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## LETTER FROM THE EDITOR-IN-CHIEF

If Dr. Cornel West is correct that “justice is what love looks like in public,” then, perhaps, legal scholarship that is critical of the justice system can be viewed as a cry for more love. Implicit in this call for more love are the assumptions that legal systems can and will adapt to provide more love, and the hope that the love and justice we seek, can be found. Quite unexpectedly, but nevertheless telling, this issue of the *Howard Law Journal* has the recurring theme of love throughout the articles and comments contained within. Whether it be the romantic love that compels a binational same-sex couple to seek U.S. citizenship, the familial love that motivates parents to seek a second opinion from a medical doctor about their child’s illness, or the universal love for man-kind that is at the core of the International Human Rights movement, love, the single most powerful human emotion is constantly at work and forms the backdrop for the legal systems that are critiqued by our authors. It is our honor to present to you the second issue of Volume 59 of the *Howard Law Journal*.

We begin with Professor Darlene C. Goring’s article, *Premature Celebration: Obergefell Offers Little Immigration Relief to Binational Same-sex Couples*. In the wake of the landmark cases, *United States v. Windsor* and *Obergefell v. Hodges*, there was a wave of changes implemented by President Barack Obama to the way the executive branch implements immigration policies. As Professor Goring discusses, these changes left alien spouses in binational same-sex marriages without protections afforded to others. President Obama’s actions, moreover, are in tension with the Supreme Court’s long-standing recognition of the near plenary power of Congress to regulate immigration. Professor Goring analyzes these tensions through the lens of the efforts to give bi-nations same-sex couples immigration benefits.

Our second article is Joshua Kaiser’s *We Know It When We See It: The Tenuous Line Between “Direct Punishment” and “Collateral Consequences,”* which provides a deep dive into the Supreme Court’s jurisprudence on collateral consequences. Building on his previous scholarship on the tens of thousands of “collateral consequences,” those legal penalties imposed after a criminal conviction, Kaiser now examines the jurisprudence that defines “punishment” to the exclusion of collateral consequences and circuit court opinions holding that judges and attorneys only have to inform a defendant of the “direct consequences” of their conviction. Kaiser argues

that these distinctions are based on flawed understandings and that more recent jurisprudence may signal the winds of change.

Professor Thalia González pushes Human Rights scholarship forward in, *From Global to Local: Domestic Human Rights Norms in Theory and Practice*. Professor González argues that the scholarship would improve from progressing from discussions on how international human rights are expressed to an examination of how human rights ideas are implemented on national and subnational levels. She suggests using the innovative approach of using Ryan Goodman's and Derek Jinks's theory of acculturation to further this understanding.

In *Negligent Credentialing: A Cause of Action for Hospital Peer Review Decisions*, Sean Ryan advocates for the creation of a cause of action which would allow patients injured by their doctors to bring suit against the hospital that provided the doctor credentials to practice within the facility. Ryan begins with an exploration of the unique relationships between doctors, hospitals, and patients. He highlights the current lack of protection in certain states for patients when the credentialing process goes awry and a patient is injured as a result. Ryan's proposed solution seeks a balance between providing protections for patients and protecting hospitals from costly, unmeritorious suits.

Fifty years after its passage, the landmark employment discrimination statute, "Title VII has proven to be largely ineffective," according to Heather S. Dixon. In *Revisiting Title VII After 50 Years: The Need for Increased Regulatory Oversight of Employers' Personnel Decisions*, Dixon begins with a review of the many failures of Title VII in providing equal employment opportunities for minorities and women. She analyzes the problems associated with the current enforcement model. Dixon then suggests a new enforcement model for the Equal Employment Opportunity Commission (EEOC) that would require the EEOC to take a more proactive approach to employment discrimination that no longer relies on self-reporting by those who have been discriminated against. This enforcement model is grounded in Supreme Court jurisprudence on the means that may be employed to achieve the remedial purposes of a statute.

Continuing the critique of current criminal justice practices is *Article 32 Hearings: A Road Map for Grand Jury Reform*, by Claire P. Donohue. After the release of the transcripts from the grand jury proceedings for Darren Wilson and Daniel Pantaleo, the police officers responsible for the deaths of Michael Brown and Eric Garner respectively, it became clear that the proceedings were not conducted in the usual manner by the prosecutors. Professor Donohue argues that civilian grand jury proceedings would bene-

*Letter from the Editor-in-Chief*

fit from reforms based in part on Article 32 Hearings, the military counterpart to a grand jury. These reforms would make grand juries more transparent to the general public and including the defense as a participant.

This issue closes with two student works from Senior Editors of the *Howard Law Journal*. In *The Criminal “DNA” Footprint: Viewing the Mark of Criminal Records through the Legal Lens of the Genetic Information Non-discrimination Act*, Nairuby Beckles highlights the parallels between a criminal record and DNA. More specifically, she analyzes how, in the employment process, the use of a criminal record as an indicator of propensity to commit a crime is discriminatory and disproportionately impacts men of color. She discusses the inability of Title VII to protect against this sort of discrimination. But, the protections of the Genetic Information Non-discrimination Act offer some hope and guidance.

Brittany Davis examines the legal issues that arise when parents seek second medical opinions and healthcare providers view such actions as grounds for a claim of medical child abuse or medical kidnapping in *Hospitalized by Law: The Abrogation of Parental Rights by Hospitals and Child Welfare Courts*. Davis argues that there should be greater protections of parental rights and a parent should have the recognized right to seek a second medical opinion. Davis argues for presumptions in favor of the parents in medical child abuse statutes and a higher burden for the state when they seek to remove a child from their parents.

On behalf of the members, faculty advisors, and staff of the *Howard Law Journal*, I thank you for your readership and support.

With Love,

Stanton M.B. Lawyer  
Editor-in-Chief  
Volume 59



# Premature Celebration: *Obergefell* Offers Little Immigration Relief to Binational Same-sex Couples

DARLENE C. GORING\*

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“[B]elief that this Executive Action is within his executive authority is not dispositive because the separation of powers does not depend on the views of individual Presidents, nor on whether the encroached-upon branch approves the encroachment.”<sup>1</sup>

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\* Sam D’Amico Endowed Professor of Law and Nolan J. Edwards Professor of Law, Louisiana State University Paul M. Hebert Law Center. This article is dedicated to my late aunt, Geraldine Wallace, and my late mother, Gloria Wallace Goring. The author wishes to thank her colleagues, Joseph Bockrath and John Devlin, for their editorial comments, and Mary Allen for her wonderful research assistance.

1. *United States v. Juarez-Escobar*, 25 F. Supp. 3d 774, 786 (W.D. Pa. 2014).

## INTRODUCTION

The time span between the United States Supreme Court's approval of the racially divisive separate but equal doctrine in *Plessy v. Ferguson*<sup>2</sup> and the invalidation of laws prohibiting interracial marriage in *Loving v. Virginia*<sup>3</sup> seems insurmountably long when compared to swift judicial and legislative efforts to grant marriage equality to members of the Lesbian, Gay, Bi-Sexual and Transgendered ("LGBT") community. However, in its haste to provide judicial recognition to same-sex couples, the Supreme Court has created a paradigm in which Congress' constitutionally delegated power to regulate immigration is at odds with these rapid jurisprudential developments.

The provisions of the Immigration and Nationality Act ("INA")<sup>4</sup> encourage unification between United States citizens and their alien<sup>5</sup> spouses, and grant favorable immigration benefits to those alien spouses.<sup>6</sup> The opportunity is especially important to aliens who, upon marriage to a United States citizen, become eligible to "fast track" their immigration to the United States, and start their path toward United States citizenship.<sup>7</sup> The value of an opportunity to immigrate to the United States cannot be overstated. The Supreme Court noted in *Schneiderman v. United States*,<sup>8</sup> "it is safe to assert that nowhere in the world today is the right to citizenship of greater worth to an individual than it is in this country. It would be difficult to exaggerate its

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2. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

3. *Loving v. Virginia*, 388 U.S. 1 (1967).

4. Immigration and Nationality Act, 8 U.S.C. §§ 1101, *et seq.* (2014).

5. The term "alien" is defined in the Immigration and Nationality Act ("INA") Section 101(a)(3) as "any person not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3).

6. *Kerry v. Din*, 135 S. Ct. 2128, 2136 (2015) (plurality opinion) ("Although Congress has tended to show 'a continuing and kindly concern . . . for the unity and happiness of the immigrant family,' . . . this has been a matter of legislative grace rather than fundamental right.")

7. *Id.* at 2131. This action was brought by the United States citizen spouse because that alien spouse lacked standing to challenge the DHS's refusal to issue an immigration visa. ("Naturally, one would expect him—not Din—to bring this suit. But because Berashk is an unadmitted and nonresident alien, he has no right of entry into the United States, and no cause of action to press in furtherance of his claim for admission."). *Id.* The Court in *Din* outlined the immigration procedures for an alien seeking an immigration visa. ("Under the Immigration and Nationality Act . . . an alien may not enter and permanently reside in the United State without a visa. § 1181(a). The INA creates a special visa-application process for aliens sponsored by 'immediate relatives' in the United State. §§ 1151(b), 1153(a). Under this process, the citizen-relative first files a petition on behalf of the alien living abroad, asking to have the alien classified as an immediate relative. *See* §§ 1153(f), 1154(a)(1). If and when a petition is approved, the alien may apply for a visa by submitting the required documents and appearing at a United States Embassy or consulate for an interview with a consular officer. *See* §§ 1201(a)(1), 1202. Before issuing a visa, the consular officer must ensure the alien is not inadmissible under any provision of the INA. § 1361.") *Id.*

8. *Schneiderman v. United States*, 320 U.S. 118 (1943).

value and importance. By many it is regarded as the highest hope of civilized man.”<sup>9</sup>

Congress has never extended this favorable immigration benefit to alien spouses in binational same-sex marriages.<sup>10</sup> Notwithstanding the lack of legislative action, recent Supreme Court decisions that afford constitutional rights to same-sex couples spurred the executive branch to implement these decisions for the benefit of binational same-sex couples seeking to live together in the United States.

On June 26, 2013, the Supreme Court in *United States v. Windsor*<sup>11</sup> invalidated Section 3 of the Defense of Marriage Act (“DOMA”).<sup>12</sup> DOMA was enacted by Congress in 1996 to define marriage under Federal law as a “legal union between one man and one woman, and the term ‘spouse’ refers only to a person of the opposite sex who is a husband or wife.”<sup>13</sup> *Windsor* held that § 3 of DOMA is an unconstitutional denial of equal protection under the Due Process Clause<sup>14</sup> of the Fifth Amendment.<sup>15</sup> *Windsor*’s invalidation of § 3 of DOMA removed the federal statutory barrier that prevented binational same-sex couples from becoming eligible for immigration benefits. However, Congress has not amended the INA following *Windsor* to address whether binational same-sex marriages would be recognized for immigration purposes, or defined the terms “marriage” or “spouse” to include same-sex relationships.

President Barack Obama attempted to fill the gap regarding the federal definitions of the terms “marriage” and “spouse” by an exer-

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9. *Id.* at 122.

10. *Vy Nhu Hoang Dinh v. United States*, 2014 WL 3513379, at \*5 (D. Nev. July 14, 2014) (“A U.S. citizen may petition for his spouse (the beneficiary) to be classified as an ‘immediate relative’ by filing a Form I-130 Petition for Alien Relative . . . . If granted, this classification allows the spouse to ‘jump the line’ and immediately apply for temporary lawful permanent resident (“LPR”) status by filing a Form I-485 Application to Register Permanent Resident or Adjust Status.”).

11. *United States v. Windsor*, 133 S. Ct. 2675 (2013).

12. Defense of Marriage Act, 1 U.S.C. § 7, 110 Stat. 2419, Pub. L. 104–199, enacted Sept. 21, 1996.

13. *Id.*

14. The Fifth Amendment to the United States Constitution provides that: “No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .” U.S. CONST. amend. V.

15. *Windsor*, 133 S. Ct. at 2696 (“The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment.”).

cise of Executive Action.<sup>16</sup> Following *Windsor*, President Obama directed then Attorney General Eric Holder, through the Department of Justice, to implement “the *Windsor* decision across the entire federal government.”<sup>17</sup> Efforts to implement *Windsor* included a directive from former Secretary of the Department of Homeland Security (“DHS”) Janet Napolitano directing the United States Citizenship and Immigration Service (“USCIS”)<sup>18</sup> to “review immigration visa petitions filed on behalf of a same-sex spouse in the same manner as those filed on behalf of an opposite-sex spouse.”<sup>19</sup> The invalidation of § 3 of DOMA by the Supreme Court in *Windsor* was welcomed by thousands of binational same-sex couples who wanted to live together in the United States.<sup>20</sup>

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16. See e.g., Memorandum from the Office of the Attorney General to the President of the United States (June 20, 2014).

17. *Id.*; see also *id.* at 3 (“At your direction, the Department of Justice immediately began working with other deferral agencies to make the promise of the *Windsor* decision a reality—to identify every federal law, rule, policy, and practice in which marital status is a relevant consideration, expunge Section 3’s discriminatory effect, and ensure that committed and loving married couples throughout the country would receive equal treatment by their federal government regardless of their sexual orientation.”).

18. U.S. CITIZENSHIP AND IMMIGRATION SERVS., <http://www.uscis.gov/about-us/our-history> (last updated Sept. 8, 2015) (“On March 1, 2003, the U.S. Citizenship and Immigration Services (USCIS) assumed responsibility for the immigration service functions of the federal government. The Homeland Security Act of 2002 (Pub. L. No. 107-296, 116 Stat. 2135) dismantled the Immigration and Naturalization Service (INS) and separated the former agency into three components within the Department of Homeland Security (DHS). The Homeland Security Act created USCIS to enhance the security and improve the efficiency of national immigration services by focusing exclusively on the administration of benefit applications. The law also formed Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP) to oversee immigration enforcement and border security.”).

19. Janet Napolitano, *Implementation of the Supreme Court Ruling on the Defense of Marriage Act*, U.S. DEP’T OF HOMELAND SEC., <http://www.dhs.gov/topic/implementation-supreme-court-ruling-defense-marriage-act> (last updated July 21, 2015) (“After last week’s decision by the Supreme Court holding that Section 3 of the Defense of Marriage Act (DOMA) is unconstitutional, President Obama directed federal departments to ensure the decision and its implication for federal benefits for same-sex legally married couples are implemented swiftly and smoothly. To that end, effective immediately, I have directed U.S. Citizenship and Immigration Services (USCIS) to review immigration visa petitions filed on behalf of a same-sex spouse in the same manner as those filed on behalf of an opposite-sex spouse.”); see also Kate Woodsome, *US Immigration Service Ordered to Consider Same-Sex Visa Petitions*, VOICE OF AMERICA (July 1, 2013, 7:43 PM), <http://www.voanews.com/content/us-immigration-ordered-to-consider-petitions-of-gay-spouses/1693182.html>; Chris Good, *Kerry Announces Visas for Same-Sex Couples*, ABC NEWS (Aug. 2, 2013), [www.abcnews.go.com/blogs/politics/2013/08/kerry-announces-visas-for-same-sex-couples](http://www.abcnews.go.com/blogs/politics/2013/08/kerry-announces-visas-for-same-sex-couples); Michael R. Gordon, *New U.S. Policy Gives Equal Treatment to Same-Sex Spouses’ Visa Applications*, N.Y. TIMES (Aug. 2, 2013), <http://www.nytimes.com/2013/08/03/world/us-to-give-equal-treatment-to-same-sex-spouses-visa-applications.html>.

20. Moni Basu, *Love Wins in Gay Couple’s 40-year Immigration Fight*, CNN (June 28, 2014), [www.cnn.com/2014/06/26/US/gay-rights-immigration-struggle/](http://www.cnn.com/2014/06/26/US/gay-rights-immigration-struggle/); Mike Spradley, *Breaking Down Immigration Rules for Same-Sex Binational Couples*, HUFFINGTON POST GAY VOICES (July, 1, 2013), [www.huffingtonpost.com/mike-spradley/breaking-down-immigration-rules-for-same-sex-binational-couples\\_b\\_3523015.html](http://www.huffingtonpost.com/mike-spradley/breaking-down-immigration-rules-for-same-sex-binational-couples_b_3523015.html).

President Obama's bold decision to extend federal benefits to United States citizens and binational same-sex married couples was bolstered by the Supreme Court's landmark decision, on June 26, 2015, to legalize same-sex marriage. In *Obergefell v. Hodges*,<sup>21</sup> the Court held that same-sex couples have a fundamental right to marry that is protected by the Fourteenth Amendment's<sup>22</sup> guarantees of Due Process and Equal Protection.<sup>23</sup> This decision does not, however, require Congress to recognize binational same-sex married couples eligible for immigration benefits.<sup>24</sup>

An alien spouse in a binational marriage certainly has the right under *Obergefell* to have this marriage legally recognized for all purposes in the United States except within the field of immigration. This decision did not, however, grant alien spouses the right to immigrate to the United States. In fact, alien immigrants have "no constitutionally protected right to an immigrant visa," regardless of the constitutional rights granted to the United States citizens and lawful permanent residents.<sup>25</sup> The Constitution has no extraterritorial effect, and immigration is only a "privilege granted by the sovereign United States government."<sup>26</sup> Although the *Obergefell* decision is a tremendous victory for the LGBT community, marriage equality has not been fully realized for binational same-sex spouses seeking to unite with their citizen spouses in the United States.

The unintended consequence of this radical shift in immigration policies is representative of a pattern<sup>27</sup> of immigration reform under-

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21. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

22. U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

23. *Obergefell*, 135 S. Ct. at 2602–03.

24. Following the *Obergefell* decision, Attorney General Loretta Lynch announced that "[f]ederal marriage benefits [would] be made available to same-sex couples. Attorney General Lynch stated "I have directed Justice Department staff to work with the agencies to ensure that the ruling be given full effect across the federal government." *Same-sex Couples to get Federal Marriage Benefits*, *US Attorney General*, MSN (July 9, 2015), <http://www.msn.com/en-us/news/us/same-sex-couples-to-get-federal-marriage-benefits-us-attorney-general/ar-AAcL5kc>.

25. *Ringgold v. Johnson*, 40 F. Supp. 3d 1331, 1342 (D. Haw. 2014).

26. *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950).

27. *See Texas v. United States*, 787 F.3d 733, 743 (5th Cir. 2015) (Twenty-six states challenged President Obama's "Deferred Action for Parents of Americans and Lawful Permanent Resident Program ("DAPA") as violative of the Administrative Procedure Act ("APA") and the Take Care Clause of the Constitution."); *United States v. Juarez-Escobar*, 25 F. Supp. 3d 774, 780 (W.D. Pa. 2014) (discussing President Obama's Executive Action, dated November 20, 2014, which "announced two different 'enforcement' policies: (1) a policy that expanded the granting of deferred action status to certain categories of undocumented immigrants; and, (2) a policy that updated the removal/deportation priorities for certain categories of undocumented immi-

taken by the Obama administration that ignores the powers granted to Congress to establish a “uniform Rule of Naturalization.”<sup>28</sup> Notwithstanding President Obama’s noble objectives, the exercise of executive action to implement *Windsor* within the field of immigration is inconsistent with the constitutional delegation of legislative authority granted to Congress to regulate the field of immigration, and with Congressional plenary power to determine the categories of persons who are eligible to immigrate to the United States. It calls into question the Supreme Court’s longstanding affirmation of Congress’ plenary power<sup>29</sup> to regulate the field of immigration exemplified by Justice Powell’s statement in *Fiallo v. Bell*,<sup>30</sup> that “‘over no conceivable subject is the legislative power of Congress more complete than it is over’ the admission of aliens.”<sup>31</sup>

It is important to note that the legislative and executive branches of the federal government share power to regulate the country’s immigration policies.<sup>32</sup> However, only Congress can determine the eligibility categories for aliens seeking immigration visas.<sup>33</sup> The role of the

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grants”); see also ROBERTO G. GONZALES & ANGIE M. BAUTISTA-CHAVEZ, AMERICAN IMMIGRATION COUNCIL, TWO YEARS AND COUNTING: ASSESSING THE GROWING POWER OF DACA (2014), [http://www.immigrationpolicy.org/sites/default/files/docs/two\\_years\\_and\\_counting\\_assessing\\_the\\_growing\\_power\\_of\\_daca\\_final.pdf](http://www.immigrationpolicy.org/sites/default/files/docs/two_years_and_counting_assessing_the_growing_power_of_daca_final.pdf); Julia Hirschfeld Davis, *Obama’s Immigration Action Has Precedents, But May Set a New One*, N.Y. TIMES (Nov. 20, 2014), <http://www.nytimes.com/2014/11/21/us/politics/obamas-immigration-decision-has-precedents-but-may-set-a-new-one.html>.

28. Congress is authorized “[t]o establish an uniform Rule of Naturalization.” U.S. CONST. art. I, § 8, cl. 4.

29. See *Fong Yue Ting v. United States*, 149 U.S. 698, 705 (1893) (“In the recent case of *Nishimura Ekiu v. U.S.*, 142 U.S. 651, 12 Sup. Ct. Rep. 336, the court, in sustaining the action of the executive department, putting in force an act of congress for the exclusion of aliens, said: ‘It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. In the United States this power is vested in the national government, to which the constitution has committed the entire control of international relations, in peace as well as in war. It belongs to the political department of the government, and may be exercised either through treaties made by the president and senate or through statutes enacted by congress.’”); see also *Boutilier v. INS*, 387 U.S. 118, 123 (1967) (recognizing Congress’s “plenary power to make rules for admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.”).

30. *Fiallo v. Bell*, 430 U.S. 787, 792 (1977).

31. *Galvan v. Press*, 347 U.S. 522, 531 (1954) (“[T]hat the formulation of these policies is entrusted to Congress has become about as firmly imbedded in the legislative and judicial tissue of our body politic as any aspect of our government.”).

32. *Jean v. Nelson*, 711 F.2d 1455, 1465 (11th Cir. 1983) (“Congress and the Executive branch share the immigration power.”) (citing *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892)).

33. *Id.* at 1466 (“Congress traditionally exercises authority over matters of immigration and exclusion through passage of immigration legislation.”); see also *United States ex rel. Knauff v.*

executive branch is to enforce the immigration legislation enacted by Congress.<sup>34</sup> The executive branch has broad, but not unlimited, prosecutorial discretion to enforce immigration policies, specifically regarding deportation and removal of aliens from the country.<sup>35</sup> President Obama's executive action to expand the category of aliens who may be eligible for an immigration visa based upon binational same-sex marriages falls outside of the scope of his executive authority to regulate immigration.

This research project will attempt to reconcile the immigration landscape following *Obergefell* and *Windsor* with the plenary powers granted to Congress to regulate the field of immigration. This Article will argue that President Obama's efforts to provide immigration benefits to alien spouses in binational same-sex marriages infringes upon Congress' power to determine the categories of aliens permitted to immigrate to the United States. This Article will also explore whether the implementation of *Obergefell* and *Windsor* on behalf of binational same-sex couples contravenes the separation of powers between the two branches of the federal government charged with administration of the country's immigration policies. This project will argue that in the absence of Congressional legislation that incorporates same-sex marriages and spouses into the immigration paradigm, neither the repeal of DOMA or judicial recognition of same sex marriage will insure that immigration benefits will remain available to binational same-sex families.

## I. JURISPRUDENTIAL RECOGNITION OF SAME-SEX PERSONS

Members of the LGBT community aggressively fought to achieve legislative and common law recognition of their rights. Recognition of LGBT rights changed the social fabric of this country, and paved the way for Congress to relax restrictions on barriers that limited the ability of LGBT aliens to visit and immigrate to the United States.

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Shaughnessy, 338 U.S. 537, 543 (1950) ("Normally Congress supplies the conditions of the privilege of entry into the United States.").

34. *Knauff*, 338 U.S. at 543.

35. *See generally* *Arizona v. United States*, 132 S. Ct. 2492 (2012).

A. Legal Recognition of LGBT Aliens

Aliens, regardless of their sexual orientation, do not have a constitutional right to enter the United States.<sup>36</sup> Admission of aliens into the United States falls within the Congressional authority to establish regulations defining the categories of aliens permitted to enter our borders.<sup>37</sup> There is a long history of legislative barriers that prevented LGBT aliens from coming to the United States.<sup>38</sup> The provisions of the INA expressly excluded LGBT aliens from coming to the United States.<sup>39</sup> Prior versions of the INA classified LGBT aliens as undesirable<sup>40</sup> because they were “afflicted with a psychopathic personality, or sexual deviation.”<sup>41</sup> As such, homosexuals were “ineligible to receive visas and shall be excluded from admission into the United States.”<sup>42</sup>

In *Boutilier v. INS*,<sup>43</sup> the Supreme Court upheld the deportation<sup>44</sup> of a gay man on the ground that he was a homosexual at the time of his entry into the United States. Pursuant to the provisions of the INA, which were later repealed in 1990, the alien was “a homosexual and therefore ‘afflicted with psychopathic personality, and excludable.’”<sup>45</sup> Similarly in 1982, the District Court in *Lesbian/Gay Freedom Day Committee v. INS*<sup>46</sup> upheld an INS determination that an alien seeking to come to the United States as a “nonimmigrant visitor for

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36. *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972).

37. *Harisiades v. Shaughnessy*, 342 U.S. 580, 596–97 (1952) (Frankfurter, J., concurring).

38. See *Lesbian/Gay Freedom Day Comm. v. INS*, 541 F. Supp. 569, 571–73 (N.D. Cal. 1982) (discussing the “History of the Exclusion of Homosexual Aliens from Entry Into the United States”).

39. *Id.*; see also KEVIN JOHNSON, *THE HUDDLED MASSES MYTH: IMMIGRATION AND CIVIL RIGHTS* 140–45 (2004).

40. JOHNSON, *supra* note 39, at 140.

41. *Boutilier v. INS*, 387 U.S. 118, 121–22 (1967).

42. *Lesbian/Gay Freedom Day Comm.*, 541 F. Supp. at 572 (citing Act of October 3, 1965 amending INA § 212(a)(4), Pub.L.No. 89-236, § 15(b), 79 Stat. 911 (codified at 8 U.S.C. § 1182(a)(4))).

43. *Boutilier*, 387 U.S. 118.

44. *United States v. Lopez-Vasquez*, 227 F.3d 476, 479 n.2 (5th Cir. 2000) (“Before IIRIRA’s enactment in 1996, individuals such as Lopez-Vasquez who were ineligible for admission into the United States and were never admitted into the United States were referred to as ‘excludable,’ while aliens who had gained admission, but later became subject to expulsion from the United States, were referred to as ‘deportable.’ . . . In addition, the IIRIRA [Illegal Immigration and Reform and Immigrant Responsibility Act of 1996] has ‘done away with the previous legal distinction among deportation, removal, and exclusion proceedings . . . . Now, the term ‘removal proceedings,’ refers to proceedings applicable to both inadmissible and deportable aliens.”).

45. *Boutilier*, 387 U.S. at 119.

46. See *Lesbian/Gay Freedom Day Comm.*, 541 F. Supp. at 576.

pleasure”<sup>47</sup> was “per se excludable” because he was a homosexual.<sup>48</sup> Citing the statutory exclusion of LGBT aliens dating back to 1917, the District Court concluded that the alien would “be continually barred from entry into the United States as long as a policy of excluding homosexuals per se from entry is in effect.”<sup>49</sup>

As legal recognition and acceptance of the LGBT community increased, Congress removed the statutory barriers that excluded LGBT aliens from coming to the United States. The Immigration Act of 1990<sup>50</sup> eliminated references to “psychopathic personality” or “sexual deviation” as grounds for visa ineligibility.<sup>51</sup> Although Congress eliminated the exclusion barriers, the INA was not subsequently revised to make favorable immigration benefits readily available to LGBT aliens. For example, Congress enacted legislation that encouraged family unification between United States citizens and their alien spouses, but Congress has never extended this immigration benefit to binational same-sex spouses.

Notwithstanding the elimination of admission barriers, Congress sustained its generally hostile outlook to the growing acceptance of the LGBT community, and enacted legislation that defined marriage as a union between opposite sex couples.<sup>52</sup> This served as an impenetrable barrier for all members of the LGBT community, including citizens and aliens alike, to gain access to any federal benefits, including marital immigration benefits.<sup>53</sup> The burden then fell on the LGBT community to raise intra-territorial judicial challenges to domestic policies and that discriminated against them and deprived them of constitutional rights.

## B. Legal Recognition of LGBT Citizens

The fight to achieve equality for the LGBT community within the United States started in earnest with the Hawaiian Supreme Court’s decision in *Baehr v. Lewin*,<sup>54</sup> which held that Hawaii’s marriage law that denied marriage licenses to same-sex couples solely on the basis

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47. See 8 U.S.C. § 1101(a)(15)(B) (2012). This temporary, non-immigrant visa is commonly referred to as a “B-2” Visitor for Pleasure.

48. *Lesbian/Gay Freedom Day Comm.*, 541 F. Supp. at 588.

49. *Id.* at 576.

50. Immigration Act of 1990, Pub. L. No. 101–649, 104 Stat. 4978.

51. See § 601, 104 Stat. 5067 (codified as INA § 212(a)(1), 8 U.S.C. § 1182(a)(1) (2014)).

52. See discussion of DOMA *infra* Part III.

53. *Id.*

54. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (holding that the denial of marriage licenses to same-sex couples constitutes discrimination on the basis of sex).

of their sexual orientation was an unconstitutional denial of equal protection.<sup>55</sup> Notwithstanding the holding of *Baehr*, marriage equality was never realized in Hawaii following this decision. DOMA was enacted in direct response to *Baehr*,<sup>56</sup> and soon thereafter, Hawaii amended its constitution in 1998 to prohibit same-sex marriage.<sup>57</sup>

At the same time that the Hawaiian Supreme Court was considering marriage equality, the United States Supreme Court in *Romer v. Evans*,<sup>58</sup> was considering the constitutionality of an amendment to Colorado's constitution which "prohibit[ed] all legislative, executive or judicial action at any level of state or local government designed to protect the named class, a class we shall refer to as homosexual persons, or gays and lesbians."<sup>59</sup> Justice Kennedy authored the opinion for the Court in which he concluded that Amendment 2 violated the Equal Protection Clause of the 14th Amendment by classifying LGBT persons in a manner that was "unequal to everyone else,"<sup>60</sup> noting that "[a] State cannot so deem a class of persons a stranger to its laws."<sup>61</sup> Such a classification "impos[ed] a broad and undifferentiated disability on a single named group."<sup>62</sup>

Following *Romer*, the LGBT community focused its efforts on the eradication of laws that treat members of the LGBT community as "second class citizens."<sup>63</sup> The fight for legal equality can be divided into two phases. The first phase focused on judicial challenges to legislative efforts to regulate personal relationships between same-sex

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55. The Court subjected the Hawaiian statute to an evaluation under the strict scrutiny standard in order to "overcome the presumption that HRS § 572-1 is unconstitutional by demonstrating that it furthers compelling state interests and is narrowly drawn to avoid unnecessary abridgments of constitutional rights." *Id.* at 68. In so doing the Court held that "on its face and as applied, HRS § 572-1 denies same-sex couples access to the marital status and its concomitant rights and benefits, thus implicating the equal protection clause of Article I, section 5." *Id.* at 67.

56. See H.R. Rep. No. 104-664, at 18 ("H.R. 3936 [DOMA] is inspired, again, not by the effect of *Baehr v. Lewin* inside Hawaii, but rather by the implications that lawsuit threatens to have on the other States and on Federal law.").

57. See HAW. CONST. art. I, § 23. Subsequently, Hawaii legally recognized same-sex marriage in 2013 with the passage of the Hawaii Marriage Equality Act, Act 1, 2nd Special Session, Session Laws of Hawaii 2013.

58. *Romer v. Evans*, 517 U.S. 620 (1996).

59. *Id.* at 624.

60. *Id.* at 631-35.

61. *Id.* at 635.

62. *Id.* at 632.

63. See generally *Elton John Feels Like 'Second-Class Citizen'*, CBS L.A. (Jan. 23, 2011, 8:59 AM), <http://losangeles.cbslocal.com/2011/01/23/elton-john-feels-like-second-class-citizen/>; *'Second Class Citizens,' Planned Gay Rights Movement Documentary*, HUFFINGTON POST GAY VOICES (Jan. 17, 2012), [http://www.huffingtonpost.com/2012/01/17/second-class-citizens-planned-gay-rights-documentary\\_n\\_1210779.html](http://www.huffingtonpost.com/2012/01/17/second-class-citizens-planned-gay-rights-documentary_n_1210779.html).

persons. For example, in *Bowers v. Hardwick*<sup>64</sup> the plaintiffs argued that Georgia's sodomy statute violated their fundamental rights to engage in private, consensual sexual behavior.<sup>65</sup> The Supreme Court ruled to the contrary, noting that the court was not predisposed to "extend a fundamental right to homosexuals to engage in acts of consensual sodomy."<sup>66</sup>

The Supreme Court's landmark decision in *Lawrence v. Texas*<sup>67</sup> shifted the focus from examining the constitutionality of the right of "two persons of the same sex to engage in certain intimate sexual conduct,"<sup>68</sup> and redirected the discussion to what became the second phase of the judicial fight for legal equality; the judicial recognition of liberty and privacy rights for the LGBT community that are protected by the Due Process Clause of the Fifth and Fourteenth Amendments.<sup>69</sup>

In *Lawrence*, the Supreme Court acknowledged that same-sex couples have a constitutionally protected liberty interest that "gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."<sup>70</sup> Justice Kennedy noted that the constitutional framers could not have foreseen that the boundaries of the Due Process Clause would expand to protect private, consensual sexual conduct between same sex couples.<sup>71</sup> However, the Court did recognize that "[a]s the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."<sup>72</sup> Recognition of this constitutionally protected right led the Court to overturn its decision in *Bowers*, holding that "[t]he rationale of *Bowers* does not withstand careful analysis."<sup>73</sup>

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64. *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

65. *Id.* at 189.

66. *Id.* at 192.

67. *Lawrence v. Texas*, 539 U.S. 558 (2003).

68. *Id.* at 562.

69. *Id.* at 564, 567 ("When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.").

70. *Id.* at 572.

71. *Id.* at 578 ("Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew time can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress."); *Id.* at 578-79.

72. *Id.* at 579.

73. *Id.* at 577.

Justice Scalia's dissent in *Lawrence* foreshadowed the growing "culture war"<sup>74</sup> over constitutional recognition of same-sex marriage noting disbelief in the majority's statement that the decision in *Lawrence* "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter."<sup>75</sup> Justice Scalia noted that the holding in *Lawrence* is symptomatic of "a Court that is impatient of democratic change,"<sup>76</sup> and that sweeping changes "are to be made by the people, and not imposed by a governing caste that knows best."<sup>77</sup> Scalia's unease that "judicial imposition of homosexual marriage" could be a consequence of the expansion of the liberty interest protected by the Due Process Clause proved to be a legitimate concern.

Twelve years later, Justice Scalia's prognostication was realized when the Court announced its much anticipated decision in *Obergefell*. Relying upon Fourteenth Amendment guarantees of liberty and equal protection of the laws, the Court held that "the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty."<sup>78</sup>

*Obergefell* was an action consolidated from four cases filed in "Michigan, Kentucky, Ohio and Tennessee."<sup>79</sup> Each state followed the traditional definition of marriage "as a union between one man

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74. *See id.* at 558, 602–03 (Scalia, J., dissenting) ("One of the most revealing statements in today's opinion is the Court's grim warning that the criminalization of homosexual conduct is 'an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.' It is clear from this that the Court has taken sides in the culture war, departing from its role assuring, as neutral observer, that the democratic rules of engagement are observed. Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their homes. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive. The Court views it as 'discrimination', which it is the function of our judgments to deter. So imbued is the Court with the law professor's anti-anti-homosexual culture, that it is seemingly unaware that the attitudes of that culture are not obviously 'mainstream'; that in most States what the Court calls 'discrimination' against those who engage in homosexual acts is perfectly legal . . .").

75. *See id.* at 604 (Scalia, J., dissenting) ("At the end of its opinion—after having laid waste the foundations our rational-basis jurisprudence—the Court says that the present case 'does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.' Do not believe it.").

76. *See id.* at 603.

77. *Id.* at 603–04.

78. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015).

79. *Id.* at 2593.

and one woman.”<sup>80</sup> The plaintiffs raised two issues before the Court. First, the Court considered whether the defendant States were in violation of “the Fourteenth Amendment by denying them the right to marry.”<sup>81</sup> The *Obergefell* majority considered four principles that “demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples.”<sup>82</sup> First, that “the right to personal choice regarding marriage is inherent in the concept of individual autonomy.”<sup>83</sup> Second, the right to marry “supports a two-person union unlike any other in its importance to the committed individuals.”<sup>84</sup> Third, is “that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education.”<sup>85</sup> Finally, the fourth principle is that “[m]arriage is a keystone of our social order.”<sup>86</sup>

Justice Kennedy authored the majority opinion. He rejected calls to “adopt a cautious approach to recognizing and protecting fundamental rights” of same-sex couples to marry.<sup>87</sup> Instead, the Court reached a groundbreaking and highly controversial decision. Justice Kennedy analogized the discrimination<sup>88</sup> faced by same-sex couples with the burdens imposed on the interracial couple in *Loving*, and the financially delinquent father in *Zablocki v. Redhail*.<sup>89</sup> The majority found a “connection between marriage and liberty” that is grounded in the “fundamental right inherent in the liberty of the person,” under the Due Process and Equal Protection of the Fourteenth Amendment.<sup>90</sup>

The second issue that the Court considered in *Obergefell* was whether full faith and credit considerations require states to give full

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80. *Id.*

81. *Id.*

82. *Id.* at 2599.

83. *Id.*

84. *Id.*

85. *Id.* at 2600.

86. *Id.* at 2601.

87. *Id.* at 2606.

88. *Id.* at 2602 (“*Loving* did not ask about a ‘right to interracial marriage’; *Turner* did not ask about a ‘right to inmates to marry’; and *Zablocki* did not ask about a ‘right of fathers with unpaid child support duties to marry.’ Rather, each case inquired about the right to marry in its comprehensive sense, asking if there was a sufficient justification for excluding the relevant class from the right.”).

89. *Zablocki v. Redhail*, 434 U.S. 374, 394 (1978).

90. *Obergefell*, 135 S. Ct. at 2599, 2604 (“Like *Loving* and *Zablocki*, these precedents show the Equal Protection Clause can help to identify and correct inequalities in the institution of marriage, vindicating precepts of liberty and equality under the Constitution.”). *Id.* at 2604.

recognition “to marriages, lawfully performed in another state.”<sup>91</sup> Justice Kennedy expressed concern for “instability and uncertainty” arising from “recognition bans” on same-sex marriages that were lawfully performed in other states.<sup>92</sup> The *Obergefell* decision held that “recognition bans inflict substantial and continuing harm on same-sex couples.” As a result, the Court effectively abrogated § 2 of DOMA by holding that “there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.”<sup>93</sup>

Although this decision illustrates a radical and controversial shift in the fabric of American society, its impact on American immigration policies remains unsettled. The Constitution clearly vests Congress, not the Supreme Court, with the principle responsibility of regulating our nation’s immigration policies. Reliance upon the intra-territorial legalization of same-sex marriage does not provide the immigration benefits that bi-national same-sex couples seek.<sup>94</sup>

## II. INVALIDATION OF THE FEDERAL DEFINITION OF MARRIAGE

The federal definition of marriage as a relationship between opposite-sex partners was codified in the Defense of Marriage Act, DOMA, which was signed by then President William Clinton in 1996.<sup>95</sup> This landmark legislation was enacted in response to a perceived “legal assault against traditional heterosexual marriage laws,”<sup>96</sup> following Hawaii’s Supreme Court’s ruling in *Baehr*. DOMA had two relevant provisions. Section 2 permitted states to “decline to give effect to marriage licenses from another state if they relate to ‘marriage’ between persons of the same sex.”<sup>97</sup> Section 3 of DOMA amended the definitional section of Title 1 of the United States Code by adding

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91. *Id.* at 2593.

92. *Id.* at 2607.

93. *Id.*

94. A long-standing maxim of immigration law is that bi-national couples have no constitutionally protected right to live in the United States with an alien spouse. *See Udugampola v. Jacobs*, 70 F. Supp. 3d 33, 41 (D.D.C. 2014) (“[T]he Constitution protects an individual’s right to marry, and the marital relationship . . . ‘these constitutional rights are not implicated when one spouse is removed, or denied entry into the United States.’”) (citing *Udugampola v. Jacobs*, 795 F. Supp. 2d 96, 105 (2011)).

95. Defense of Marriage Act, 1 U.S.C. § 7 (1996).

96. H.R. Rep. No. 104-664, at 4 (1996).

97. 28 U.S.C. § 1738C (“No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex

Section 7 to create a federal definition of ‘marriage’ and ‘spouse’ that was limited to “only a legal union between one man and one woman as husband and wife . . . .”<sup>98</sup>

The definitions of the terms marriage and spouse set forth in Section 3 only applied to the interpretation and application of federal laws and regulations. As a result, one consequence of DOMA was the denial of immigration benefits to bi-national same-sex couples that were lawfully married in states or countries that recognized same-sex marriages.<sup>99</sup> Although judicial efforts were initiated on behalf of bi-national same-sex couples, DOMA’s clear prohibition stood as a barrier to any forms of immigration relief.<sup>100</sup>

Following the election of President Obama, negative sentiment against DOMA began to grow. The discriminatory, “Don’t Ask, Don’t Tell” policy banning gays from military service was repealed.<sup>101</sup> Thereafter, President Obama announced that, although his administration would continue to enforce DOMA, he believed that the legislation was unconstitutional, and as a result, the Attorney General and the Justice Department would not defend DOMA on behalf of the United States.

Almost twenty years after its enactment, the constitutionality of DOMA was examined by the United States Supreme Court in *Windsor*.<sup>102</sup> The plaintiff in *Windsor*, Edie Windsor, challenged Section 3 of DOMA, which defined marriage for the purposes of controlling federal statutes and regulations as “a legal union between one man and one woman as husband and wife.”<sup>103</sup> Under DOMA, the plaintiff could not qualify for a spousal inheritance tax exemption because her same-sex marriage was not recognized.<sup>104</sup> As a result, the Internal Revenue Service assessed a \$363,053 tax bill against Windsor because

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that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.”)

98. 1 U.S.C. § 7 (“In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.”).

99. See generally U.S. GEN. ACCOUNTING OFF., DEFENSE OF MARRIAGE ACT: UPDATE TO PRIOR REPORT, GAO-04-353R (2004), <http://www.gao.gov/assets/100/92441.pdf>.

100. See generally James R. Edwards, Jr., *Homosexuals and Immigration: Developments in the United States and Abroad*, CTR. FOR IMMIGR. STUD. (May 1999), <http://cis.org/Immigration%202526Homosexuals-PolicyTowardHomosexuals>.

101. Don’t Ask, Don’t Tell Repeal Act of 2010, Pub. L. 111-321, 124 Stat. 3515 (2010).

102. *United States v. Windsor*, 133 S. Ct. 2675, 2683 (2013).

103. *Id.*

104. *Id.*

she did not qualify as a “surviving spouse” notwithstanding her marriage in Canada to her long-term companion and domestic partner.<sup>105</sup>

The Court in *Windsor* considered the role played by the federal government in regulating marital relationships. The Court acknowledged the long-standing precept that the regulation of marriage is an area traditionally relegated to state governments.<sup>106</sup> The Court noted that “by history and tradition the definition and regulation of marriage . . . has been treated as being within the authority and realm of the separate states.”<sup>107</sup> The regulation of marriage by State government was not a grant of absolute authority. The Court recognized that in appropriate circumstances, the federal government “in enacting discrete statutes, can make determinations that bear on marital rights and privileges.”<sup>108</sup> Examples where the federal government enacted regulations pertaining to marriage include federal life insurance beneficiary designations, immigration eligibility based upon marriage to United States citizens and Social Security benefit determinations.<sup>109</sup>

The Court recognized that the federal government can regulate the definition of marriage “in order to further federal policy,” however, the provisions of DOMA reached impermissibly into areas that were historically regulated by the states.<sup>110</sup> DOMA “because of its reach and extent, departs from this history and tradition of reliance on state law to define marriage.”<sup>111</sup> As Justice Scalia predicted in his dissenting opinion in *Lawrence v. Texas*,<sup>112</sup> the *Windsor* decision noted that states, have a legitimate interest in protecting and recognizing the dignity of marital relationships that are consistent with the formation of consensus respecting the “way the members of a discrete commu-

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105. *Id.*

106. State regulation of marriage is also tempered by the constitutional guarantees afforded to persons. See *Goodridge v. Dep’t of Pub. Health*, 798 N.E. 2d 941, 957 (2003) (“It is undoubtedly for these concrete reasons, as well as for its intimately personal significance, that civil marriage has long been termed a ‘civil right.’ The United States Supreme Court has described the right to marry as ‘of fundamental importance for all individuals’ and as ‘part of the fundamental ‘right of privacy’ implicit in the Fourteenth Amendment’s Due Process Clause.”) (internal citations omitted).

107. *Windsor*, 133 S. Ct. at 2689–90 (“The responsibility of the States for the regulation of domestic relations is an important indicator of the substantial societal impact the State’s classifications have in the daily lives and customs of its people. DOMA’s unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage here operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriage.”); *Id.* at 2693.

108. *Id.* at 2690.

109. *Id.*

110. *Id.*

111. *Id.* at 2692

112. *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J. dissenting).

nity treat each other in their daily contact and constant interaction with each other”<sup>113</sup> or the enduring personal bonds created by members of the community.

The Supreme Court concluded that the consequence of DOMA was to “injure the very class NY seeks to protect.”<sup>114</sup> In so doing, DOMA violated “basic due process and equal protection principles applicable to the federal government.”<sup>115</sup> As a result, the Court held that “DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution.”<sup>116</sup> The outcome of *Windsor* was that it invalidated Section 3 of DOMA, thus eliminating the federal definition of marriage. *Windsor*, however, left Section 2’s full faith and credit provisions untouched.<sup>117</sup> The *Windsor* decision to invalidate Section 3 of DOMA, left no federal statutory definition of marriage to govern the interpretation of federal codes and regulations. Also, in the absence of a federal definition of marriage, the question remained as to how to define marriage and spouse for the purposes for immigration laws.

*Windsor*’s invalidation of DOMA removed the statutory bar that prevented bi-national same-sex couples from seeking immigration benefits. President Obama attempted to fill the gap regarding the federal definitions of marriage and spouse by an exercise of his executive authority. Following *Windsor*, President Obama directed then Secretary of Homeland Security Janet Napolitano to issue a letter directing the USCIS to “review immigration visa petitions filed on behalf of a same-sex spouse in the same manner as those filed on behalf of an opposite-sex spouse.”<sup>118</sup>

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113. *Windsor*, 133 S. Ct. at 2692.

114. *Id.* at 2693.

115. *Id.*

116. *Id.* at 2695.

117. Lisa Guillien, *Recognition of Existing Same-Sex Marriages*, NOLO: LAW FOR ALL, <http://www.nolo.com/legal-encyclopedia/recognition-same-sex-gay-marriage-32294.html> (“However, the Court did not address Section 2 of DOMA, which allows states to ignore valid same-sex marriages entered into in other states, or whether Section 2 would impact federal recognition. For example, the Court did not address whether the IRS (or other federal agencies) would recognize the marriages of same-sex married couples living in non-recognition states.”).

118. Napolitano, *supra* note 19.

### III. RECOGNITION OF BI-NATIONAL SAME-SEX SPOUSE FOR IMMIGRATION PURPOSES

#### A. *Adams v. Howerton*

The provisions of the INA offer a significant number of immigration benefits that are dependent upon marital status.<sup>119</sup> For example, the most favored immigrant visa categories is for immediate relatives of United States citizens, INA § 201(b)(2)(A)(i)<sup>120</sup> defines immediate relative as “the children, spouses, and parents of a citizen of the United States.”<sup>121</sup> This immigration category requires consideration of two additional categories. The term “spouse” is not defined in the INA. INA § 101(a)(35) only prohibits proxy marriages where the parties “are not physically present in the presence of each other, unless the marriage shall have been consummated.”<sup>122</sup>

The INA does not set forth a federal definition of marriage.<sup>123</sup> The word “spouse” as defined in § 101(a)(35) of the INA is of limited assistance in this regard. The INA specifically excludes recognition of proxy marriages, which are marriages “where the contracting parties thereto are not physically present in the presence of each other, unless the marriage shall have been consummated.” The statutory language in § 101(a)(35) does not, however, address whether same-sex marriages will be recognized for immigration purposes. In the absence of a statutory definition for marriage, or guidance regarding whether same sex marriages warrant eligibility for immigration benefits, immigration officials sought guidance from common law jurisprudence.

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119. *See* *In re Zeleniak*, 26 I. & N. Dec. 158, 159 (B.I.A. 2013) (noting that the repeal of Section 3 of DOMA afforded same-sex persons the opportunity to apply for a variety of immigration benefits “including, but not limited to, sections 101(a)(15)(K)(fiancé and fiancée visas), 203 and 204 (immigrant visa petitions), 207 and 208) (refugee and asylee derivative status), 212 (inadmissibility and waivers of inadmissibility), 237 (removability and waivers of removability), 240A (cancellation of removal), and 245 (adjustment of status) . . . .”); *see also* U.S. Citizenship and Immigration Servs., *Same Sex Marriage Frequently Asked Questions* (“Under the U.S. immigration laws, eligibility for a wide range of benefits depends on the meanings of the terms ‘marriage’ or ‘spouse.’ Examples include (but are not limited to) an alien who seeks to qualify as a spouse accompanying or following to join a family-sponsored immigrant, an employment-based immigrant, certain subcategories of nonimmigrants, or alien who has been granted refugee status or asylum. In all of these cases, a same-sex marriage will be treated exactly as an opposite sex marriage.”).

120. Immigration and Nationality Act, 8 U.S.C. § 1151(b)(2)(A)(i) (2012).

121. *Id.*

122. *Id.* § 1101 (a)(35).

123. The INA does offer guidance regarding the definition of marriage. INA § 216(d)(1), 8 U.S.C. § 1186a (2012), defines the term “qualifying marriage” for the purpose of receiving a conditional PRA status as a result of a marriage to a United States citizen or LPR if the marriage is less than 24 months before the petitioning alien obtains the status.

Until portions of this decision were abrogated by *Obergefell*, the case of *Adams v. Howerton*,<sup>124</sup> was the controlling precedent on this issue. In *Adams*, a bi-national same-sex couple that was purportedly married in Colorado, sought an immigrant visa for the putative alien as an immediate relative spouse of a United States citizen.<sup>125</sup> The Ninth Circuit proffered a two-prong test to determine whether their marriage was eligible for recognition in accordance with the provisions of the INA.<sup>126</sup> The first prong of the test required the Court to consider “whether the marriage is valid under State law.”<sup>127</sup> Questions regarding the validity of marriages for immigration purposes are determined by examining “the law of the place of celebration.”<sup>128</sup> The Court did not reach the issue of whether “Colorado law permit[ted] homosexual marriages,” because the Ninth Circuit decided the cases solely on the basis of the second prong of the test which required the Court to consider “whether state-approved marriage qualifies under the Act.”<sup>129</sup>

The second prong of the analysis required the Ninth Circuit to examine Congressional intent underlying the enactment of section 201(b).<sup>130</sup> The Court noted that “the intent of Congress governs the conferral of spouse status under Section 201(b), and a valid marriage is determinative only if Congress so intends.”<sup>131</sup> Upon finding no Congressional consideration of same-sex marriages in the legislative history of section 201, the Ninth Circuit held that “Congress intended

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124. *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982), *abrogated by* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

125. *Adams* asserted that the INS’s application of Section 201(b) only to heterosexual couples violated the Equal Protection Clause. Citing Congress’ undisputed plenary power to govern immigration, the Court noted that Congressional decisions are subject only to “limited judicial review.” *Adams*, 673 F.2d at 1042. The Ninth Circuit resolved the Equal Protection challenge by holding that “Congress’s decision to confer spouse status under section 201(b) only upon the parties to heterosexual marriages has a rational basis and therefore comports with the due process clause and its equal protection requirement.” *Id.*

126. *See also* *In re Lovo-Lara*, 23 I. & N. Dec. 746 (B.I.A. 2005).

127. *Adams*, 673 F.2d at 1038.

128. *Id.* at 1038–39.

129. *Id.* at 1038.

130. *Id.* at 1039.

131. *Id.* The evaluation of Congressional intent required the Court to examine several factors, including the ordinary meaning of the terms ‘spouse’ and ‘marriage.’ The Court also considered the Legislative history of the term ‘spouse.’ Noting that there is “nothing in the [INA], the 1965 amendments or the Legislative history suggests that the reference to ‘spouse’ in section 201(b) was intended to include a person of the same sex as the citizen in question.” The Ninth Circuit also examined the INS’s interpretation of the term ‘spouse.’ Recognizing that “substantial deference” is ordinarily accorded to the interpretations of the enforcing agency, the Ninth Circuit held that the INS had also interpreted the term “spouse” to “exclude a person entering a homosexual marriage.” *Id.* at 1040.

that only partners in heterosexual marriages be considered spouses under section 201(b).”<sup>132</sup> The Ninth Circuit in *Adams*, refused to expand the definition of spouse to include the same-sex member of a bi-national couple, relying in part, on the commonly understood definition of spouse.<sup>133</sup> The Ninth Circuit noted that:

Congress has not indicated an intent to enlarge the ordinary meaning of those words. In the absence of such a congressional directive, it would be inappropriate for us to expand the meaning of the term ‘spouse’ for immigration purposes. [citation omitted] Our role is only to ascertain and apply the intent of Congress.<sup>134</sup>

The Ninth Circuit specifically relied upon the Plenary Powers doctrine and looked to Congress to determine whether the alien spouse was eligible for an immigration visa. The Court in *Adams* noted that the legality of the bi-national same-sex marriage was “insufficient to confer spouse status for the purpose of federal immigration law.”<sup>135</sup> It is Congress “that determine[s] the conditions under which immigration visas are issued.”<sup>136</sup>

*Adams* was accepted as controlling precedent for over 30 years until three pivotal developments: the *Windsor* decision;<sup>137</sup> President Obama’s directive to the DHS to “review immigration visa petitions filed on behalf of a same-sex spouse in the same manner as those filed on behalf of an opposite-sex spouse;”<sup>138</sup> and the *Obergefell* decision that same-sex couples have a fundamental right to marry that is protected by the “Due Process and Equal Protection Clauses of the Fourteenth Amendment.”<sup>139</sup> Notwithstanding this dynamic change in the definition of marriage, the statutory framework of the INA, which does not expressly recognize bi-national same-sex marriages remains unchanged.

An unsettled question remains regarding whether the decisions in *Obergefell* and *Windsor* have any controlling impact on federal immi-

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132. *Id.* at 1041.

133. Following *Adams*, under § 3 of DOMA, the United States Citizenship and Immigration Service (“USCIS”), formerly the INS, was prevented from recognizing marriages between same-sex bi-national couples.

134. *Id.* at 1049.

135. *Id.* at 1039.

136. *Id.*

137. *United States v. Windsor*, 133 S. Ct. 2675, 2688–90 (2013). *Windsor* held that § 3 of DOMA is an unconstitutional denial of equal protection under the due process clause of the Fifth Amendment.

138. Napolitano, *supra* note 19.

139. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015).

gration policies that determine whether bi-national same-sex marriages will be eligible for immigration benefits. First, the holding in *Adams* that bi-national same-sex couples are not eligible for immigration benefits was not overruled by either *Obergefell* or *Windsor*. The Supreme Court in *Windsor* specifically mentions that “Congress, in enacting discrete statutes, can make determinations that bear on marital rights and privileges.”<sup>140</sup> Justice Kennedy further added “Congress has the power both to ensure efficiency in the administration of its programs and to choose what larger goals and policies to pursue.”<sup>141</sup> Second, President Obama’s Executive Action to implement *Windsor* was not codified in any Congressional legislation or Executive Order, thus calling into question whether this executive action is constitutionally permissible.<sup>142</sup> Finally, the *Obergefell* decision legalizing same-sex marriages, including bi-national marriages, addressed the first prong of the *Adams* test, but the Court did not and more importantly, is not authorized by Article I of the Constitution<sup>143</sup> to expand the scope of immigration policies to determine that bi-national same-sex spouses are eligible for immigrant visas.

B. *Matter of Oleg. B. Zeleniak*

During the brief period between the United States Supreme Court’s decision in *Windsor* invalidating Section 3 of DOMA, and the Court’s legalization of same-sex marriages in *Obergefell*, President Obama issued an Executive Action to implement *Windsor* to make bi-national same-sex marriages eligible for immigration benefits.<sup>144</sup> The DHS was then instructed to interpret the term “spouse” to include bi-

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140. *Windsor*, 133 S. Ct. at 2690.

141. *Id.* at 2690 (“Other precedents involving congressional statutes which affect marriages and family status further illustrate this point. In addressing the interaction of state domestic relations and federal immigration law Congress determined that marriages ‘entered into for the purpose of procuring an alien’s admission [to the United States] as an immigrant’ will not qualify the noncitizen for that status, even if the noncitizen’s marriage is valid and proper for state-law purposes.”).

142. For a critical review of President Obama’s exercise of executive power, see generally Daniel Fisher, *The President Has as Much Immigration Authority as Congress Gives Him*, FORBES (Nov. 21, 2014), <http://www.forbes.com/sites/danielfisher/2014/11/21/the-president-has-as-much-immigration-authority-as-congress-gives-him/>.

143. U.S. CONST. art. I, § 8, cl. 4.

144. An explanation of an ‘executive action’ is set forth in *United States v. Juarez-Escobar*, 25 F. Supp. 3d 774, 783 (W.D. Pa. 2014) (“Executive Actions do not have a legal definition. Executive actions have been used by Presidents to call on Congress or this Administration to take action or refrain from taking action . . . Executive Actions are not published in the Federal Register.”).

national same-sex marriages, and that bi-national same-sex spouses and their children were also eligible to apply for immigration benefits.

The instructions issued by the DHS followed the reasoning of *Adams* that “the validity of a particular marriage is determined by the law of the State where the marriage was celebrated.” The instructions provided that:

As a general matter, the law of the place where the marriage was celebrated determines whether the marriage is legally valid for immigration purposes. Just as USCIS applies all relevant laws to determine the validity of an opposite-sex marriage, we will apply all relevant laws to determine the validity of a same-sex marriage. The domicile state’s laws and policies on same-sex marriages will not bear on whether USCIS will recognize a marriage as valid.<sup>145</sup>

The Board of Immigration Appeals (“BIA”) had an opportunity to apply the DHS’s interpretation of *Windsor* in *The Matter of Oleg B. Zeleniak*.<sup>146</sup> In *Zeleniak*, a bi-national same sex couple sought an immigrant visa for the alien spouse of a United States citizen.<sup>147</sup> The United States citizen filed a petition for Alien Relative (Form I-130)<sup>148</sup> on behalf of his alien same-sex spouse, but the petition was denied.<sup>149</sup> The parties appealed the ruling and during the pendency of the appeal, the Supreme Court issued its ruling in *Windsor* and overturned Section 3 of DOMA.

Utilizing a modified version of the two-prong test that was first established in *Adams*, the BIA noted that “the Director has already determined that the Petitioner’s February 24, 2010, marriage is valid under the laws of Vermont, where the marriage was celebrated.”<sup>150</sup>

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145. Napolitano, *supra* note 19.

146. In re *Zeleniak*, 26 I. & N. Dec. 158, 158 (B.I.A. 2013).

147. *Id.* See generally *Kerry v. Din*, 135 S. Ct. 2128, 2131 (2015) (“Under the Immigration and Nationality Act (INA), (citation omitted), an alien may not enter and permanently reside in the United States without a visa. § 1181(a). The INA creates a special visa-application process for aliens sponsored by ‘immediate relatives’ in the United States. §§ 1151(b), 1153(a). Under this process, the citizen-relative first files a petition on behalf of the alien living abroad, asking to have the alien classified as an immediate relative; see §§ 1153(f), 1154(a)(1). If and when a petition is approved, the alien may apply for a visa by submitting the required documents and appearing at a United States Embassy or consulate for an interview with a consular officer; see §§ 1201(a)(1), 1202. Before issuing a visa, the consular officer must ensure the alien is not inadmissible under any provision of the INA § 1361.”).

148. Form I-130, Petition for Alien Relative, OMB No. 1615-0012, expires Dec. 31, 2015, DHS U.S. Citizenship and Immigration Services. “The purpose of I-130 is for alien relatives of U.S. citizens and permanent relatives who want to “immigrate to the United States.” <http://www.uscis.gov/sites/default/files/files/form/i-130.pdf>.

149. *Zeleniak*, 26 I. & N. Dec., at 158.

150. *Id.* at 160.

However, the BIA did not follow the holding in *Adams*. In *Zeleniak*, the BIA concluded that the *Windsor* decision “removed Section 3 of the DOMA as an impediment to the recognition” of binational same-sex marriage for immigration purposes. In *Zeleniak*, the BIA remanded the visa petition back to the Director for an “inquiry [regarding] whether the petitioner has established that his marriage to the beneficiary is bona fide.”<sup>151</sup>

There are several problems with this analysis. There is no reference made by the BIA in *Zeleniak* to *Adams* or more specifically, to the second prong of the *Adams* test which focuses the inquiry not on the validity of the marriage, but on whether Congress intended to recognize such marriages for immigration purposes. This analysis ignored the plenary powers of Congress to determine the immigrant visa eligibility criteria for aliens, and presumed, without any Congressional guidance, that binational same-sex marriages and alien spouses are eligible for immigration benefits.

The *Obergefell* decision abrogated the portion of the Ninth Circuit’s decision in *Adams* that questioned the legality of same-sex marriages, but the precedential value of *Adams* as it pertains to determining whether binational same-sex marriages are eligible for immigration benefits remains unanswered. Although there is no question that *Windsor* invalidated the federal definition of marriage, the *Windsor* decision did not invalidate the long-standing plenary powers doctrine which specifically authorizes Congress, not the Executive or judiciary to determine whether aliens qualify for immigration benefits. To date, Congress has not spoken on this issue. As noted by the Ninth Circuit in *Adams*, Congress has not indicated an intent to enlarge the

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151. *Id.* The BIA remanded the matter for a determination of whether the alien “would qualify[y] as a spouse under the Act, which includes the requirement that the marriage must be bona fide.” *Id.* at 158. See 8 C.F.R. § 204.2(a) (2007). See generally *Bark v. Immigration & Naturalization Serv.*, 511 F.2d 1200 (9th Cir. 1975) (noting that to determine the validity of a marriage for immigration purposes, immigration courts have looked to the holding in *Bark*) (holding that petitioner must establish a life together at the time of the marriage. Marriages that failed to meet this standard are commonly referred to as sham or fraudulent marriages). Immigration courts have longstanding jurisprudence to guide the analysis regarding the validity of a marriage. See generally *Phillis*, 15 I. & N. Dec. 385, 386 (B.I.A. 1975) (citing *Zeleniak*, 26 I. & N. Dec., at 158) (“Although a marriage may be given legal effect in the United States or abroad, we are not required to recognize it for the purpose of conferring immigration benefits where the marriage was entered into for the purpose of evading the immigration laws”); *In re Laureano*, 19 I. & N. Dec. 1, 2 (B.I.A. 1983) (holding that marriages entered into the purpose of evading or “circumventing immigration laws” have not been recognized as enabling an alien spouse to obtain immigration benefits) (citing *Zeleniak*, 26 I. & N. Dec., at 158); *In re McKee*, 17 I. & N. Dec. 332, 334–35 (B.I.A. 1980) (adopting the same legal analysis regarding the test to determine the validity of a marriage for immigration purposes).

ordinary meaning of those words. In the absence of such a congressional directive, it would be inappropriate for us to expand the meaning of the term ‘spouse’ for immigration purposes.”<sup>152</sup> Certainly the executive and judiciary can make educated guesses about whether Congress will amend the INA to extend marital benefits to binational same-sex spouses, but Article I, section 8, clause 4 of the Constitution<sup>153</sup> expressly entrusts Congress with the power to regulate immigration. The Ninth Circuit in *Adams* acknowledged that Congress’ plenary power over immigration constrained the Court from conducting a more exacting evaluation of the parties’ claims. Noting that, “Congress has almost plenary power to admit or exclude aliens . . . and the decisions of Congress are subject only to limited judicial review.”<sup>154</sup> The Ninth Circuit recognized that the Supreme Court had previously upheld “the broad power of Congress to determine immigration policy” even when constitutional challenges are raised regarding immigration policies.<sup>155</sup> Citing *Mathews v. Diaz*,<sup>156</sup> the Ninth Circuit in *Adams* relied upon the longstanding principle that “Congress regularly makes rules that would be unacceptable if applied to citizens.”<sup>157</sup> As evidenced by the significance of the *Obergefell* decision, the impact of regulations that discriminate against same-sex couples is certainly relevant when deciding intra-territorial disputes. But within the field of immigration, judicial decisions that resolve constitutional challenges raised by United States citizens and lawful permanent residents are not dispositive.

The judiciary does give substantial deference “where a statute has been interpreted by the agency charged with its enforcement . . . .”<sup>158</sup> That judicial deference, is not however, absolute. A Court will withhold deference where “there are compelling indications” the agencies interpretation is wrong.<sup>159</sup> In this matter, the DHS’s decision to afford immigration benefits to binational same-sex couples may not be

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152. *Adams v. Howerton*, 673 F.2d 1036, 1040 (9th Cir. 1982), *abrogated by* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

153. U.S. CONST. art. I, § 8, cl. 4.

154. *Adams*, 673 F.2d at 1041.

155. *Id.* at 1041–42. (“Faced with numerous challenges to laws governing the exclusion of aliens and the expulsion of resident and non-resident aliens, the Court has consistently reaffirmed the power of Congress to legislate in this area.”).

156. *Mathews v. Diaz*, 426 U.S. 67 (1976).

157. *Id.* at 80.

158. *Adams*, 673 F.2d at 1040.

159. *New York Dep’t of Social Servs. v. Dublino*, 413 U.S. 405, 421 (1973); *see also* *Silway-Rodriguez v. Immigration & Naturalization Serv.*, 975 F.2d 1157, 1160 (5th Cir. 1992).

wrong or even inconsistent with Congressional intent. However, since Congress has not spoken to this issue, there is no way to determine what the Congressional intent would be. As Justice Scalia observed in *Lawrence v. Texas*, sweeping societal changes “are to be made by the people, and not imposed by a governing caste that knows best.”<sup>160</sup>

#### IV. PLENARY POWER DOCTRINE

Although the Supreme Court in *Obergefell* determined that same-sex couples have a constitutionally protected right to marry, the Court has not abrogated the plenary power doctrine in that decision. The invalidation of section 3 of DOMA by the Court in *Windsor* paved the way for President Obama to direct the DHS to issue a directive to recognize binational same-sex marriages in the same manner that heterosexual marriages are treated. However, the *Windsor* decision had no impact on the continued viability of the plenary power doctrine. The implementation of these decisions was accepted as an exercise of executive authority but the practical effect of the change was to broaden the definition of the statutory definitions of the terms ‘spouse’ and ‘marriage’ found in the INA, and ignore long-standing jurisprudence that recognizes Congress’ plenary power to regulate the field of immigration.

The field of Immigration law differs significantly from other areas of law regulated by the federal government.<sup>161</sup> First, the constitutional underpinnings of federal immigration law are founded in the inherent sovereign powers of the nation.<sup>162</sup> As early as 1888, the Supreme Court in *Chae Chan Ping v. United States (Chinese Exclusion Case)*,<sup>163</sup> held that “[t]he power of exclusion [admission] of foreigners being an incident of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the constitution, the right to its exercise at any time when, in the judgment

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160. See *Lawrence v. Texas*, 539 U.S. 558, 603–04 (Scalia, J., dissenting).

161. See generally *Jean v. Nelson*, 711 F.2d 1455, 1465 (8th Cir. 1983) (“Although the Constitution fails to delegate specifically the power over immigration, the Supreme Court recognized almost a century ago that the political branches have plenary authority over immigration matters as an inherent concomitant of national security.”).

162. *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892) (“It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty and essential to preservation, to forbid the entrance of foreigners within its dominions, or to admit term only in such cases and upon such conditions as it may see fit to prescribe. In the United States, this power is vested in the national government, to which the Constitution has committed the entire control of international relations, in peace as well as in war.”).

163. *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) (“The Chinese Exclusion Case”).

of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one.”<sup>164</sup> This broad grant of power is shared between the legislative and executive branches of the federal government.<sup>165</sup> As the Eleventh Circuit noted in *Jean v. Nelson*,<sup>166</sup> “Congress and the Executive branch share the immigration power . . . . It may be exercised by the Executive and the Senate through the execution of treaties, *id.*, through the legislative powers of Congress . . . and in part by the Executive branch acting alone, as a function of its plenary authority over foreign relations.”<sup>167</sup> Second, Congress is the branch of government that “traditionally exercises authority over matters of immigration and exclusion through passage of immigration legislation.”<sup>168</sup> Article I, Section 8, Clause 4 of the Constitution grants to Congress the authority to “establish an uniform Rule of Naturalization.”<sup>169</sup> The Supreme Court has interpreted this constitutional provision as a broad, unqualified grant of plenary power to Congress to regulate the admission and removal of aliens from the United States.<sup>170</sup> In *Fiallo v. Bell*,<sup>171</sup> the Supreme Court reasserted the principle that “‘over no conceivable subject is the legislative power of Congress more complete than it is over’ the admission of aliens.”<sup>172</sup> The exercise of Congress’ plenary power authorizes Congress to enact legislation that could “exclude aliens altogether, or prescribe the terms and conditions upon which they may enter and stay in this country.”<sup>173</sup> The authority of Congress to enact immigra-

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164. *Id.* at 603, 609 (“That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy.”); see also *Fong Yue Ting v. United States*, 149 U.S. 698, 707 (1893) (“The right of a nation to expel or deport foreigners, who have not been naturalized, or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified, as the right to prohibit and prevent their entrance into the country.”).

165. See *Kleindienst v. Mandel*, 408 U.S. 753, 769–70 (1972) (“In summary, plenary Congressional power to make policies, and rules for exclusion of aliens has long been firmly established . . . Congress has delegated conditional exercise of this power of the Executive.”).

166. *Jean v. Nelson*, 711 F.2d 1455 (11th Cir. 1983).

167. *Id.* at 1465–66.

168. *Id.* at 1466; see also *United States v. Wong Kim Ark*, 169 U.S. 649, 701 (1898) (“The power, granted to Congress by the Constitution, ‘to establish an uniform rule of naturalization,’ was long ago adjudged by this court to be vested exclusively in congress.”).

169. U.S. CONST. art. I, § 8, cl. 4.

170. For a thorough analysis of the plenary power doctrine see Janel Thankul, *The Plenary Power-Shaped Hole in the Core Constitutional Law Curriculum: Exclusion, Unequal Protection, and American National Identity*, 96 CALIF. L. REV. 553 (2008); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 Sup. Ct. Rev. 255.

171. *Fiallo v. Bell*, 430 U.S. 787 (1977).

172. *Id.* at 792.

173. *Lapina v. Williams*, 232 U.S. 78, 88 (1914).

tion legislation is consistent with Article I, § 1 which clearly authorizes Congress to enact federal laws.<sup>174</sup>

The allocation of authority to Congress to enact legislation regulating immigration of alien spouses is unquestioned. The Supreme Court in *Kerry v. Din*<sup>175</sup> noted “as soon as Congress began legislating in this area it enacted a complicated web of regulations that erected serious impediments to a person’s ability to bring a spouse into the United States.”<sup>176</sup> Noting specifically that familial immigration is “a matter of legislative grace rather than fundamental right,” the Supreme Court has consistently upheld Congressional legislation governing the immigration of alien spouses.

The fact that Congress enacts legislation that governs marital relationships, an area traditionally governed by State law, does not serve an impediment to its constitutional validity. The Supreme Court has recognized Congress’ plenary power to “enact discrete statutes . . . that bear on marital rights and privileges.”<sup>177</sup> Citing INA section 216(b)(1),<sup>178</sup> which makes sham marriages ineligible for immigration benefits, the Court noted that Congressional regulations intersect “state domestic relations and federal immigration law” illustrate “discrete examples [that] establish the constitutionality of limited federal laws that regulate the meaning of marriage in order to further federal policy.”<sup>179</sup>

Historic administration of immigration laws and policies offer only a minimal opportunity for judicial review.<sup>180</sup> When called to evaluate questionable immigration policies, federal courts defer to Congress’ plenary immigration powers.<sup>181</sup> The Supreme has consistently recognized limited judicial review of Congress’ exercise of its

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174. U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States . . .”).

175. *Kerry v. Din*, 135 S. Ct. 2128 (2015).

176. *Id.* at 2135–36 (“Even where Congress has provided special privileges to promote family immigration, it has also ‘written in careful checks and qualifications.’”).

177. *United States v. Windsor*, 133 S. Ct. 2675, 2690 (2013).

178. 8 U.S.C. § 1186a(b)(1) (2014).

179. *Windsor*, 133 S. Ct. at 2690.

180. *Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889) (“The Chinese Exclusion Case”) (“If . . . [the] legislative department, considers the presence of foreigners of a different race . . . to be dangerous to its peace and security . . . its determination is conclusive upon the judiciary.”).

181. *Nevada Lifestyles, Inc.*, 3 O.C.A.H.O. 463 (U.S. Dep’t of Just. Oct. 16, 1992) (“At the heart of that sentiment lies the ‘plenary power’ doctrine, under which the court has declined to review federal immigration statutes for compliance with substantive constitutional restraints. In an undeviating line of cases spanning almost one hundred years, the Court has declared itself powerless to review . . . immigration provisions.”).

plenary power to regulate immigration.<sup>182</sup> As the Court held in *Fiallo v. Bell*, the immigration categories enacted by Congress are “policy questions entrusted exclusively to the political branches of our Government, and we have no judicial authority to substitute our political judgment for that of the Congress.”<sup>183</sup>

#### V. CANON OF CONSTITUTIONAL AVOIDANCE – EXCEPTION TO *CHEVRON* DEFERENCE

Generally, the agency charged with enforcing a statute, such as the INA, has the authority to interpret terms that are not statutorily defined.<sup>184</sup> The DHS is the agency charged with enforcing the INA.<sup>185</sup> As the Supreme Court in *New York Dep. of Social Services v. Dublino*,<sup>186</sup> held substantial deference is accorded to agency determinations “unless there are compelling indications that it is wrong . . . .”<sup>187</sup> It is questionable whether the DHS’s decision<sup>188</sup> to broadly interpret the term ‘spouse’ as defined in INA § 101(a)(35) to include aliens in binational same-sex couples would warrant judicial deference. Federal courts use the two-part test established by the Supreme Court in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*<sup>189</sup> to

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182. See *Fiallo v. Bell*, 430 U.S. 787, 796 (1997); see also *Harisiades v. Shaughnessy*, 342 U.S. 580, 596–97 (1952) (Frankfurter, J., concurring) (“The conditions of entry for every alien, the particular classes of aliens that shall be denied entry altogether, the basis for determining such classification, the right to terminate hospitality to aliens, the grounds on which such determination shall be based, have been recognized as matters solely for the responsibility of the Congress and wholly outside of the power of this Court to control.”).

183. *Fiallo*, 430 U.S. at 798; see *Nguyen v. Immigration & Naturalization Serv.*, 533 U.S. 53, 72–73 (2001) (noting that “wide deference [is] afforded to Congress in the exercise of its immigration and naturalization power.” The Court upheld § 309(a) of the INA which permitted unwed mothers to confer citizenship status on their illegitimate children under conditions that were substantially more favorable than those imposed upon fathers of illegitimate children. The Supreme Court upheld the clearly gender-based discriminatory statute, holding that the gender distinction did not violate the equal protection clause).

184. *Adams v. Howerton*, 673 F.2d 1036, 1040 (9th Cir. 1982), *abrogated by Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

185. See 8 U.S.C. § 1103 (2012).

186. *N.Y. State Dep’t of Soc. Servs. v. Dublino*, 413 U.S. 405 (1973).

187. *Id.* at 421.

188. See *In re Zeleniak*, 26 I. & N. Dec. 158, 159 (B.I.A. 2013) (concluding that following *Windsor*, section 3 of DOMA is no longer “an impediment to the recognition of lawful same-sex marriages”).

189. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). In reaching the decision by a 6-0 vote, Justice John Paul Stevens, writing the opinion for the court, established a two-part test commonly referred to as the “*Chevron Test*” to determine whether judicial deference is warranted when reviewing the interpretation of a statute by an administrative agency.

The *Chevron Test* provides that:

When a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has di-

determine whether judicial deference is appropriate to an interpretation of an ambiguous statute by an administrative agency.<sup>190</sup> Deference will be afforded to an agency's interpretation where such interpretation is "permissible" or "reasonable".<sup>191</sup>

However, judicial deference is not applicable for "an agency's interpretation of a statute if it 'presents serious constitutional difficulties.'"<sup>192</sup> The canon of constitutional avoidance as set forth by the Ninth Circuit in *Kim Ho Ma v. Ashcroft*,<sup>193</sup> provides that, "[a]lthough we recognize that, in general, the Attorney General interpretation of the immigration laws is entitled to substantial deference . . . *Chevron* principles are not applicable where a substantial constitutional question is raised by an agency's interpretation of a statute it is authorized to construe."<sup>194</sup>

The DHS's broad interpretation of the INA's definition of "spouse" to include recognition same-sex binational marriages falls squarely within this exception. In *Diouf v. Napolitano*,<sup>195</sup> the Ninth Circuit, citing *Kim Ho Ma*,<sup>196</sup> weighed granting *Chevron* deference to a DHS's interpretation of regulations that permitted prolonged detention of aliens in removal proceedings.<sup>197</sup> The Ninth Circuit analyzed this issue by applying the canon of constitutional avoidance to deter-

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rectly spoken to the precise question at issue. If 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. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

*Id.* at 842–43.

190. See Ann Graham, *Chevron Lite: How Much Deference Should Courts Give to State Agency Interpretation?*, 68 LA. L. REV. 1105 (2008); Shruti Rana, *Chevron Without the Courts?: The Supreme Court's Recent Chevron Jurisprudence Through an Immigration Lens*, 26 GEO. IMMIGR. L.J. 313 (2012); Daniel T. Shedd & Todd Garvey, *Chevron Deference: Court Treatment of Agency Interpretations of Ambiguous Statutes*, CONG. RESEARCH SERV., (2013).

191. *Chevron, U.S.A., Inc.*, 467 U.S. at 842–44 (stating that an agency's regulation contains a reasonable interpretation of an ambiguous statute).

192. *Nat'l Mining Ass'n v. Kempthorne*, 512 F.3d 702, 711 (D.C. Cir. 2008) ("But we do not abandon *Chevron* deference at the mere mention of a possible constitutional problem; the argument must be serious.").

193. *Kim Ho Ma v. Ashcroft*, 257 F.3d 1095 (9th Cir. 2001).

194. *Id.* at 1105, n.15; see also *Diouf v. Napolitano*, 634 F.3d 1081, 1090 (9th Cir. 2011).

195. *Diouf v. Napolitano*, 634 F.3d 1081, 1089 (9th Cir. 2011).

196. *Kim Ho Ma*, 257 F.3d at 1105 n.15.

197. *Diouf*, 634 F.3d at 1089 ("The government argues that we should accord *Chevron* deference to these regulations, which address the issue of prolonged detention under § 1231(a)(6) by providing for one or more 'post-order custody reviews' by DHS employees, but not for an independent determination of the need for continued detention by a neutral decision-maker such as an immigration judge.").

mine whether deference to the DHS's detention policies raised "constitutional problems."<sup>198</sup>

In *Diouf*, the Court determined that the government's interpretation of the regulation raised "serious constitutional concerns"<sup>199</sup> because the regulation infringed upon the alien's procedural due process rights and could lead to "an erroneous deprivation of liberty."<sup>200</sup>

Applying the canon of constitutional avoidance to evaluate the DHS's decision to implement *Windsor* by expanding the definitions of "marriage" and "spouse" to include binational same sex couples, leads to the conclusion that the DHS extrapolated this analysis beyond the point where judicial deference would be warranted.<sup>201</sup> Constitutional concerns are certainly raised regarding the infringement on Congress' plenary power to determine the categories of aliens eligible for immigration visas. Additionally, federalism questions are raised when the federal government attempts to define the definition of marriage, an area that has been traditionally defined by state laws.<sup>202</sup>

The INA section 1103(a)(1) provides in pertinent part that a "determination and ruling by the Attorney General with respect to all questions of law shall be controlling."<sup>203</sup> The federal judiciary has concluded that this grant of authority means "Congress left the interpretation of [the INA] to the BIA and interpretation of its application to state and federal laws to federal courts."<sup>204</sup> However, there is a

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198. *Id.* at 1088–89 ("[W]hen deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the court."). See generally Brian G. Slocum, *Canons, The Plenary Power Doctrine, and Immigration Law*, 34 FLA. ST. U. L. REV. 363, 411 (2007).

199. *Diouf*, 634 F.3d at 1091.

200. *Id.* at 1091–92.

201. Former United States Attorney General Alberto R. Gonzales and Immigration attorney David N. Strange strongly criticized President Obama's executive action that "extended federal immigration benefits to the same-sex foreign spouse[s] of United States citizens." Gonzales and Strange argued that:

Under the Constitution, as the decisions in *Windsor* and *Adams* recognize, Congress has almost total power over immigration, and its decisions in this realm are subject to limited judicial review. Where there is only a rational basis for Congress's exercise of power, whether articulate or not, courts must uphold the immigration laws that Congress enacts. In our view, the DOMA decision does not appear to override the Ninth Circuit's 1982 ruling.

Alberto R. Gonzales & David N. Strange, *What The Opinion Didn't Say*, N.Y. TIMES (July 17, 2013), <http://www.nytimes.com/2013/07/18/opinion/what-the-court-didnt-say.html>.

202. *Arizona v. United States*, 132 S. Ct. 2492, 2500 (2012) ("Federalism, central to the constitutional design, adopts the principle that both the National and State Governments have elements of sovereignty the other is bound to respect.").

203. 8 U.S.C. § 1103(a)(1) (2012).

204. *Cisneros-Guerrera v. Holder*, 774 F.3d 1056, 1058 (5th Cir. 2014).

significant difference between interpreting the parameters of INA statutes and regulations, and implementing policies that expand the eligibility categories for immigrant visa applicants to include binational same-sex alien spouses without constitutional impact or directive. The former is permissible, the latter is not.

## VI. EXECUTIVE ACTION VIOLATES THE “TAKE CARE CLAUSE”

An evaluation of President Obama’s Executive Action directing the DHS to recognize bona fide marriages between binational same-sex couples under section 1101(a)(35)<sup>205</sup> raises concerns regarding whether this executive action violates the “Take Care” Clause of the Constitution.<sup>206</sup> The Take Care Clause, as it is commonly referred to, is set forth in Article II, Section 3 of the United States Constitution.<sup>207</sup> It provides, in pertinent part, that the executive “shall take Care that the Laws be faithfully executed.”<sup>208</sup> In one of its earliest immigration decisions, the Supreme Court in the *Chinese Exclusion Case*<sup>209</sup> described the scope of the executive’s authority as “[t]he president is charged with the duty and invested with the power to take care that the laws be faithfully executed.”<sup>210</sup> President Obama’s executive action expanded the categories of aliens who may become eligible for immigrant visas; an area that is exclusively within the Congress’ legislative authority.<sup>211</sup> Although it is correct that the terms ‘marriage’ and ‘spouse’ as defined in the INA do not expressly prohibit recognition of binational same-sex couples, prior to President Obama’s executive action implementing *Windsor*, the provisions of the INA pertaining to marital relationships were historically interpreted in opposite gender ways.

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205. 8 U.S.C. § 1101(a)(35).

206. U.S. CONST. art. II, § 3.

207. *Id.*; see TODD GARVEY, CONG. RESEARCH SERV., THE TAKE CARE CLAUSE AND EXECUTIVE DISCRETION IN THE ENFORCEMENT OF LAW R43708 (2014).

208. U.S. CONST. art. II, § 3.

209. See *Char Chan Ping v. United States*, 130 U.S. 581, 605 (1889) (“*The Chinese Exclusion Case*”).

210. *Id.*

211. See *Fiallo v. Bell*, 430 U.S. 787, 792–94 (1977); *Harisiades v. Shaughnessy*, 342 U.S. 580, 596–97 (1952) (“The conditions of entry for every alien, the particular classes of aliens that shall be denied entry altogether, the basis for determining such classification, the right to terminate hospitality to aliens, the grounds on which such determination shall be based, have been recognized as matters solely for the responsibility of the Congress and wholly outside the power of this Court to control.”).

In this situation, President Obama's executive action directly impacts Congress' legislative authority to define the categories of aliens who may become eligible to immigrate to the United States, and exceeds the scope of authority delegated to the executive branch of government. As expressed in *Utility Air Regulatory Group v. EPA*<sup>212</sup> by the Supreme Court, "[w]hile 'the power of executing the laws necessarily includes both authority and responsibility to resolve some questions left open by Congress that arise during the law's administration,' it does not include the power to unilaterally enact legislation."<sup>213</sup>

A similar question regarding the constitutionality of President Obama's efforts to implement immigration reform was raised in *United States v. Juarez-Escobar*.<sup>214</sup> In *Juarez-Escobar* the District Court examined the Executive Action implemented by President Obama on November 20, 2014.<sup>215</sup> The Executive action announced new border enforcement policies that "would prioritize deportation on 'actual threats to our society.'"<sup>216</sup> In *Juarez-Escobar*, the District Court questioned "whether the nature of the Executive Action is executive or legislative" because the Executive action had "an impact on any subsequent removal or deportation" decisions made by the Department of Homeland Security.<sup>217</sup>

To determine the constitutionality of President Obama's Executive Action, the District Court relied upon the Take Care Clause to consider whether the Executive action violated the separation of powers mandated by the United States Constitution.<sup>218</sup> The court noted that "[u]nder our system of government in the United States, Congress enact laws and the President, acting at time through agencies, 'faithfully execute[s]' them."<sup>219</sup> The District Court found that the Executive Action "cross[es] the line" by infringing upon the legislative authority of Congress to determine immigration policies for aliens re-

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212. *Util. Air Regulatory Grp. v. EPA*, 134 S.Ct. 2427 (2014).

213. *Id.* at 2446.

214. *United States v. Juarez-Escobar*, 25 F. Supp. 3d 774, 775-76 (W.D.Pa. 2014).

215. *Id.* at 778-80 (explaining this criticism of President Obama's governance is similar to the concerns raised about his executive action to implement immigration reform). *See generally id.* at 786 ("Further, President Obama's belief that this Executive Action is within his executive authority is not dispositive because the separation of powers does not depend on the views of individual Presidents, nor on whether the encroached-upon branch approves the encroachment.").

216. *Id.* at 787.

217. *Id.* at 780.

218. *See Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2087 (2015).

219. *Id.*

siding in the United States.<sup>220</sup> As a result, the Court held that “President Obama’s unilateral legislative action violates the separation of powers provided for in the United States Constitution as well as the Take Care Clause, and therefore, is unconstitutional.”<sup>221</sup>

A similar argument was made by 26 States that filed an action to enjoin implementation of President Obama’s November 20, 2014 Executive Action.<sup>222</sup> Republican supporters of *Texas v. United States*,<sup>223</sup> “accused Obama of improperly bypassing Congress”<sup>224</sup> to enact immigration reform. The November 20, 2014 Executive Action at issue, commonly referred to as Deferred action for Parents (“DAPA”),<sup>225</sup> sought to expand the President’s exercise of prosecutorial discretion by expanding the Deferred Action for Children (“DACA”)<sup>226</sup> program to include parents of American and lawful permanent residents who are illegally residing in the United States. The United States

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220. *Juarez-Escobar*, 25 F. Supp. 3d at 785–86 (citing *Youngstown v. Sawyer*, 343 U.S. 579, 587 (1952) (“In the framework of our Constitution, the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad.”)).

221. *Id.* at 786 (“The President must ‘take Care that the Laws be faithfully executed . . . he may not take executive action that creates laws. U.S. CONST., art. II, § 3.”).

222. Arpaio Reply Br. 4.

223. *Texas v. United States*, 787 F.3d 773, 743 (5th Cir. 2015).

224. David Nakamura, *Appeals Court Rules Against Obama on Immigration Program*, WASH. POST. (May 26, 2015), [https://www.washingtonpost.com/politics/appeals-court-rules-against-obama-on-immigration/2015/05/26/7546832a-03d9-11e5-a428-c984eb077d4e\\_story.html](https://www.washingtonpost.com/politics/appeals-court-rules-against-obama-on-immigration/2015/05/26/7546832a-03d9-11e5-a428-c984eb077d4e_story.html).

225. See U.S. CITIZENSHIP AND IMMIGRATION SERV., EXECUTIVE ACTIONS OF IMMIGRATION, [www.uscis.gov/immigrationaction](http://www.uscis.gov/immigrationaction) (last visited Dec. 1, 2015) (“On November 20, 2014, the President announced a series of executive actions . . . . These initiatives include[d]: Allowing parents of United States citizens and lawful permanent residents to request deferred action and employment authorization for three years, in a new Deferred Action for Parents of Americans and Lawful Permanent Residents program, provided they have lived in the United States continuously since January 1, 2010, and pass required background checks.”); *Texas*, 787 F.3d at 769 (issuing an order temporarily suspending implementation of DAPA).

226. See U.S. CITIZENSHIP & IMMIGRATION SERV., CONSIDERATION FOR DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA), [www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca](http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca) (last visited Dec. 1, 2015) (“On June 15, 2012, the Secretary of Homeland Security announced that certain people who came to the United States as children and meet several guidelines may request consideration of deferred action for a period of two years, subject to renewal. They are also eligible for work authorization. Deferred action is a use of prosecutorial discretion to defer removal against an individual for a certain period of time. Deferred action does not provide lawful status.”); see also AMERICAN IMMIGRATION COUNCIL, DEFERRED ACTION FOR CHILDHOOD ARRIVALS: A RESOURCE, AMERICAN IMMIGRATION COUNCIL, [www.immigrationpolicy.org/just-facts-deferred-action-childhood-arrivals-resource-page](http://www.immigrationpolicy.org/just-facts-deferred-action-childhood-arrivals-resource-page) (last visited Dec. 1, 2015) (“In June of 2012, the Obama administration announced that it would accept requests for Deferred Action for Childhood Arrivals (DACA), an initiative designed to temporarily suspend the deportation of young people residing unlawfully in the United States as children, meet certain education requirements and generally match the criteria established under legislative proposals like the DREAM ACT.”).

raised a number of challenges<sup>227</sup> to the DAPA program, including that implementation of DAPA “violated the President’s constitutional duty to ‘take care that the Laws be faithfully executed. U.S. Const. Art. II, § 3.”<sup>228</sup>

This issue becomes even more difficult when immigration policy crosscuts the traditional definition of marriage. Immigration jurisprudence draws a clear distinction between the right of heterosexual American citizens to marry the person of their choosing and the privilege of conferring an immigration benefit on an alien spouse. The former is protected by the Constitution, the latter is not. Federal courts have clearly held that “while an American citizen has the constitutional right to marry whomever she chooses, she does not have a constitutional right to have that person live in the United States.<sup>229</sup> The question of whether same-sex couples have a constitutionally protected right to marry was resolved by the Supreme Court in *Obergefell*.<sup>230</sup> That decision does not definitely resolve this issue within the field of immigration law.

Congress, not the executive, has the sole authority to enact immigration legislation that can expand the INA’s definitions of the terms ‘marriage’ and ‘spouse’ to include binational same-sex couples. Clearly, the executive branch may exercise prosecutorial discretion when enforcing immigration policies. However, the executive branch exceeds the scope of power delegated to it by the Constitution when it unilaterally expanded the immigration visa categories to include spouses in binational same-sex marriages.

## CONCLUSION

The holding in *Obergefell* that same-sex marriage is constitutionally protected does not, a fortiori, lead to the conclusion that immigration policies must change accordingly. It is certainly conceivable that a newly-elected, conservative executive could rescind President Obama’s executive action, and refuse to grant binational same-sex couples access to immigration benefits. The historic jurisprudential and legislative framework of immigration law recognizes and accepts

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227. *Texas*, 787 F.3d at 743 (noting that states raised a number of challenges to the DAPA program including that the “DAPA’s implementation violated APA”).

228. *Id.* (deciding on other grounds and the District Court did not address the States’ “constitutional claims under the Take Care Clause/Separation of Powers doctrine”).

229. *Ruiz-Herrera v. Holder*, No. 1:12-cv-0194, 2013 WL 1136849, at \*4 (N.D. Ga. Mar. 15, 2013).

230. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015).

that a clear legal distinction exists between intra-territorial and extra-territorial immigration policies.<sup>231</sup> In *Fiallo v. Bell*, the Supreme Court cites to its holding in *Mathews v. Diaz*,<sup>232</sup> for the principle that “in the exercise of its broad power over immigration and naturalization, ‘Congress regularly makes rules that would be unacceptable if applied to citizens.’”<sup>233</sup>

Notwithstanding the Supreme Court’s decision, an alien spouse in binational same-sex marriage has no standing to challenge Congress’ refusal to grant them an immigration visa based upon their marital status.<sup>234</sup> As Justice Brewer stated in his dissenting opinion in *Fong Yue Ting*, “[t]he Constitution has no extra-territorial effect, and those who have not come lawfully within our territory cannot claim any protection from its provisions.”<sup>235</sup>

Curative legislative reform is the most effective and efficient means of addressing this problem. During the 113th Congressional session, and more recently the 114th Congressional session, California Senator, Dianne Feinstein introduced a bill entitled “The Respect for Marriage Act (“RMA”)”<sup>236</sup> to address this issue. RMA creates a general neutral federal definition of marriage. RMA provides that a federal marriage is one that:

For the purposes of any Federal law in which marital status is a factor, an individual shall be considered married if that individual’s marriage is valid in the State where the marriage was entered into or, in the case of a marriage entered into outside any State, if the marriage is valid in the place where entered into and the marriage could have been entered into in a State.<sup>237</sup>

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231. *See Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (“The distinction between an alien who has affected an entry into the United States and one who has never entered runs throughout immigration law . . . It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside our geographic borders.”).

232. *Mathews v. Diaz*, 426 U.S. 67 (1976).

233. *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (citing *Mathews*, 426 U.S. at 81–82); *see also* THOMAS ALEXANDER ALEINIKOFF, ET. AL., *Immigration and Citizenship: Process and Policy* 200 (7th ed. 2012) (“Put differently, our constitutional law relating to immigration may differ from our constitutional law relating to noncitizen immigrants.”).

234. *Kerry v. Din*, 135 S. Ct. 2128, 2131 (2015) (This action was brought by the United State citizen spouse because that alien spouse lacked standing to challenge the DHS’s refusal to issue an immigration visa. “Naturally, one would expect him—not Din—to bring this suit. But because Berashk is an unadmitted and nonresident alien, he has no right of entry into the United States, and no cause of action to press in furtherance of his claim for admission.”).

235. *Fong Yue Ting v. United States*, 149 U.S. 698, 738 (1893) (Brewer, J., dissenting).

236. S. 29, 114th Cong. (2015).

237. S. 29, 114th Cong. § 7 (2015). However, the holding of *Obergefell* renders this provision unnecessary.

As long as the plenary powers doctrine remains an integral part of constitutional jurisprudence, Congress will retain its legislative authority to determine eligibility standards for an immigrant's visa. As a result, eligibility determinations for binational same-sex couples will remain unsettled, and subject to political uncertainty.<sup>238</sup> The passage of RMA will address this problem, and pave the way for binational same-sex couples to apply for immigration visas, and seek the benefits derived from family reunification in the United States; a benefit that is one of the foundational cornerstones of our nation's immigration policy.

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238. KEVIN JOHNSON, *THE HUDDLED MASSES MYTH: IMMIGRATION AND CIVIL RIGHTS* 147 (2004) ("Changing the family-based immigration provisions to permit the immigration of partners of person of the same-sex requires a reconceptualization of 'family' for the purposes of the immigration laws.").

# We Know It When We See It: The Tenuous Line Between “Direct Punishment” and “Collateral Consequences”

JOSHUA KAISER\*

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*Despite their key role in the penal system, collateral consequences have been routinely relegated in importance by courts. This paper outlines the two areas of decisional law that serve to exempt collateral consequences from constitutional protection. Firstly, courts have ruled they are not “punishment,” according to double jeopardy, ex post facto, bills of attainder, and Eighth Amendment jurisprudence. Secondly, they have created the so-called “collateral-consequences rule”: that attorneys and judges need only inform defendants of the “direct” consequences of pleas and convictions, according to due process and Sixth Amendment jurisprudence. In outlining these doctrines, this article argues that both lines of decisions rest on shaky foundations and tautological assumptions, and that recent court opinions—especially the Supreme Court opinion, *Padilla v. Kentucky*—show that change is imminent. The paper then discusses what such doctrinal change might look like and how practitioners can adapt to the new realities of this field.*

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## INTRODUCTION

For most criminal defendants, the real stake of plea bargaining and trial is not a lengthy prison sentence but rather what comes *after* release back into their communities.<sup>1</sup> Following prison or jail terms, during probation and parole, and immediately after convictions that impose only fines, ex-offenders<sup>2</sup> are subject to *tens of thousands* of additional legal penalties: the so-called “collateral consequences of criminal convictions.”<sup>3</sup> These sanctions impact every area of their lives, from restricting their political participation and judicial rights to banning them from welfare benefits and thousands of employment prospects, or requiring them to periodically register with local law enforcement and notify the public of their criminal backgrounds.<sup>4</sup> It is an “obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences,”<sup>5</sup> creating “a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed.”<sup>6</sup>

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1. Although numbers about less serious crimes are remarkably difficult to find, it is clear that most criminal convictions and arrests in the United States are not felonies, and of those that are, most do not result in serious incarceration terms. For instance, state criminal caseloads (which represent 95% of criminal cases in the U.S.) are only about 18.6% felonies, according to a study of sixteen states. R. LAFOUNTAIN ET AL., EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2009 STATE COURT CASELOADS 23, <http://www.courtstatistics.org/flashmicrosites/csp/images/csp2009.pdf> (of the 7,498,453 in the general and limited criminal caseloads of those sixteen states, about 1,395,481 of them were for felonies). Likewise, of the 12,000,000 arrests each year in the United States, less than 20% are for crimes the FBI considers most serious—and even many of those would not yield a long prison term. *E.g.*, U.S. DEP’T OF JUST., FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 2013 (Nov. 10, 2013).

2. A number of alternative terms could be used to describe a convicted criminal who has finished serving the official, court-mandated sentence ascribed to him. For the purposes of this article—and with the exception of more specific terms, such as “ex-prisoner”—the term “ex-offender” can be considered as interchangeable with any of these alternatives.

3. Currently, there are about 36,000 statutes and administrative rules across the fifty-two federal and state jurisdictions (including the District of Columbia) that include more than 42,000 collateral consequence laws. Joshua Kaiser, *Revealing the Hidden Sentence: How to Add Purpose and Transparency to “Collateral” Punishment Policy*, 10 HARV. L. & POL’Y REV. 701, 734–37 (2016). Since ex-offenders are subject to these laws according to their jurisdictions of residence and citizenship—not according to their jurisdiction of conviction—they may each be subject to almost 1,000 federal collateral consequences *in addition to* an average of about 1,800 collateral consequences from each state and the District of Columbia. *Id.*

4. *E.g.*, *Meaton v. United States*, 328 F.2d 379, 380 (5th Cir. 1964); *United States v. Okelberry*, 112 F. Supp. 2d 1246, 1248 (D. Utah 2000); *Kaiser v. State*, 621 N.W.2d 49, 52–54 (Minn. Ct. App. 2001). For current reviews of collateral consequences law, see *id.*; MARGARET COLGATE LOVE ET AL., COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE (2013 ed., 2013); Alec C. Ewald, *Collateral Consequences and the Perils of Categorical Ambiguity*, in LAW AS PUNISHMENT/LAW AS REGULATION 77 (Austin Sarat et al. eds., 2011).

5. *Sibron v. New York*, 392 U.S. 40, 55 (1968).

6. *Fiswick v. United States*, 329 U.S. 211, 222 (1946).

Despite collateral consequences' key role in the penal system, courts in the past have routinely relegated their importance in two key ways. Firstly, courts have ruled that collateral consequences are not "punishment" for the purposes of numerous constitutional protections. Most recently, in *Smith v. Doe*, the Supreme Court held that an Alaska sex offender registration and notification law was not subject to the protection of the *Ex Post Facto* Clause because it did not qualify as "punishment" under the Court's definition.<sup>7</sup> Similarly, the Court has ruled that being "non-punitive" makes collateral consequences exempt from the protections against bills of attainder, double jeopardy, cruel and unusual punishment, and excessive fines.<sup>8</sup>

Secondly, courts have created the so-called "collateral-consequences rule." Relying on a formalistic fiction that collateral consequences are separate from the criminal law process, circuit courts have ruled that attorneys and judges only have a duty to inform defendants of the "direct" consequences of plea bargains and trial convictions. Based on this distinction, the rule has been that both counsel's duty of effective assistance and a court's duty of ensuring due process can exist wholly absent notification and consideration of even crucially important penalties that are guaranteed to apply to the defendant. This rule supposedly found reinforcement from language the Supreme Court used in *Brady v. United States*.<sup>9</sup>

These two doctrines, however, have developed largely through circular logic, tautology, mis-citation of precedent, and bald assertion without any supporting facts or arguments. Many argue that the logical flaws supporting the fictional distinctions between collateral consequences and direct punishments only exist because of underlying (and unfounded) practical concerns: fears that the legislature could not protect public safety without being able to use multiple and retroactive punishments, fears of a flood of appeals if lack of notice of collateral consequences could prove ineffective assistance of counsel, and so forth.<sup>10</sup> The result in both lines of cases are formalistic definitional rules that are difficult to apply and nonsensical when compared with commonsense understandings of "direct" and "punishment."

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7. *Smith v. Doe*, 538 U.S. 84 (2003).

8. U.S. CONST. amends. V, VIII.

9. *Brady v. United States*, 397 U.S. 742, 755 (1970) ("[A] plea of guilty entered by one fully aware of the direct consequences . . . must stand unless induced by threats . . . misrepresentation . . . or perhaps by promises that are by their nature improper . . ."). See *infra* Part II.

10. See *infra* notes 156–69 and accompanying text.

Recently, the unstable foundation beneath these fictional lines has begun to break down, heralding a transformation in how courts treat collateral sanctions. In 2010, the Supreme Court analyzed the collateral-consequences rule for the first time in *Padilla v. Kentucky* where the Court ruled that deportation cannot be truly considered a collateral consequence of conviction, and that failing to inform a defendant of clear and certain deportation risks constitutes constitutionally incompetent counsel.<sup>11</sup> The opinion relies on the realization that deportation is not as divorced from the criminal law process as the collateral-consequences rule would have us believe; instead, its impact is so excessive and automatic that it must be considered an integral part of the criminal process.<sup>12</sup> As such, the Court ruled that constitutionally competent counsel must inform defendants of clear and certain deportation risks.<sup>13</sup> This article argues that *Padilla's* logic shows that the distinction between direct punishment and collateral consequences likely will—and should—collapse in the near future, and it discusses what this new doctrine may look like.

The article begins in Part I by outlining the landscape of the Supreme Court's "punishment" jurisprudence, which often draws upon cases in multiple areas on constitutional criminal law. Part II then elaborates on the collateral-consequences rule constructed largely by the circuit courts regarding effective assistance of counsel jurisprudence. In both of these sections, this article highlights the logical flaws and mis-citations at the root of today's confusing doctrinal definitions. Lastly, in Part III, this article argues that *Padilla* and related opinions show that change is in the wind, discusses what that change might look like, and contends that it actually poses very little practical threat to legislative and judicial functioning.

## I. THE DEVELOPMENT OF AN INCOHERENT DEFINITION OF "PUNISHMENT"

The Supreme Court's punishment jurisprudence originated in the wake of the Civil War with *Cummings v. Missouri* and *Ex parte Garland*.<sup>14</sup> According to these and subsequent cases, the bills of attainder, double jeopardy, *ex post facto*, cruel and unusual, and excessive fines clauses of the federal Constitution only apply to laws that consti-

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11. *Padilla v. Kentucky*, 559 U.S. 356, 374 (2010).

12. *Id.* at 366–67.

13. *Id.*

14. *Cummings v. Missouri*, 71 U.S. 277 (1866); *Ex parte Garland*, 71 U.S. 333 (1866).

tute punishment. Occasionally, the question of punishment also overlaps with the question of whether proceedings are criminal in nature—and therefore whether they must incorporate the procedural protections of the Fifth and Sixth Amendments. Although the Court’s original definition of punishment was easily applicable and consistent with commonsense and philosophical definitions, a number of doctrinal mistakes created the much more vague and unstable definition that exists today.

In both *Cummings* and *Garland*—neither of which have been overruled—the Court considered whether collateral consequences that disqualify teachers, priests, and attorneys from employment based on post-Civil War oaths of loyalty and non-hostility toward the United States were unconstitutional bills of attainder or *ex post facto* laws.<sup>15</sup> Both cases held that these constitutional proscriptions only applied to laws that inflicted punishments, which the Court defined very neatly as (a) a deprivation or suspension that was (b) in response to past conduct.<sup>16</sup> The Court explicitly stated that a “deprivation of any rights, civil or political” could be punitive if applied due to past wrongful acts.<sup>17</sup> Based on this rule, the Court found in both cases that the collateral consequences at issue were unconstitutional bills of attainder and *ex post facto* laws.<sup>18</sup>

It was irrelevant to the *Cummings* and *Garland* courts whether the collateral consequences were severe or even just; the idea of an unconstitutional *ex post facto* law or bill of attainder hinged on whether the law was punitive (and then whether it was retroactive punishment or punishment without a trial), not whether it was proportionately harsh or advisable.<sup>19</sup> Moreover, the Court held that it was irrelevant that the form of the deprivations at issue were oaths required by civil rather than criminal law statutes.<sup>20</sup> The question of whether oaths were used as a permitted part of Congress’s power to determine qualifications or as part of a state’s police power was simply immaterial; the question at hand was “whether that power has been exercised as a means for the infliction of punishment.”<sup>21</sup> All that mat-

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15. *Cummings*, 71 U.S. at 317; *Garland*, 71 U.S. at 333.

16. *Cummings*, 71 U.S. at 322–23; see also *Garland*, 71 U.S. at 377–78.

17. *Cummings*, 71 U.S. at 320 (emphasis added); see also *Garland*, 71 U.S. at 377–78.

18. *Cummings*, 71 U.S. at 324–27; *Garland*, 71 U.S. at 377–78.

19. *Cummings*, 71 U.S. at 318.

20. *Id.* at 325.

21. *Garland*, 71 U.S. at 380 (“The question . . . is not as to the power of Congress to prescribe qualifications, but whether that power has been exercised as a means for the infliction of

tered was that those collateral consequences instituted a deprivation (disqualification from employment) based solely on their past actions (as tested by the requisite oaths).<sup>22</sup>

Following *Cummings* and *Garland*, two distinct lines of punishment cases developed: those that addressed punishment as compared to remedial action and those that compared punishment to regulatory action under states' police power. The key in both lines of cases remained the deprivation of a right in response to past conduct, though the latter distinction proved to be the problematic one.

The first cases to distinguish punishment from remedial action were two *in rem* actions: *Coffey v. United States* and *Stone v. United States*. In *Coffey*, the appellant property owner challenged a collateral consequence that imposed civil forfeiture of liquor distillation property used to defraud the United States by failure to pay taxes, when the appellant had been acquitted of all criminal charges for the same acts.<sup>23</sup> The Court found such forfeiture was unconstitutional double jeopardy.<sup>24</sup> In *Stone*, however, the Court found an *in rem* action following acquittal for unlawfully cutting down trees was *not* double jeopardy when it sought to restore property and profit to its rightful owner.<sup>25</sup> The distinction between the two cases is whether the civil action was punitive or remedial; only the former activated constitutional protections: "The proceeding . . . against Coffey, although civil in form, was penal in its nature, because it sought to have an adjudication of the forfeiture of his property for acts prohibited."<sup>26</sup> Put in the language of *Cummings*'s rule, the remedial action is not a deprivation of any right, because *Stone* never had any right to the trees at issue.

The Court confronted a similar question years later in *Brady v. Daly*, when addressing whether a statute that awards a fixed amount of damages for copyright infringement was a penal statute (for jurisdictional purposes).<sup>27</sup> Again, the Court found that a purely remedial

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punishment, against the prohibition of the Constitution."). Rejecting the civil/criminal divide as a measurement tool of punishment, the Court vehemently stated, "[i]f the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law [of the U.S. Constitution] was a vain and futile proceeding." *Cummings*, 71 U.S. at 325.

22. *Cummings*, 71 U.S. at 319–21.

23. *Coffey v. United States*, 116 U.S. 436, 437–40 (1886).

24. *Id.* at 443.

25. *Stone v. United States*, 167 U.S. 178, 187–89 (1897).

26. *Id.* at 187.

27. *Brady v. Daly*, 175 U.S. 148, 153 (1899).

action for damages is not punishment, even if a fixed amount is used because actual damages are impracticably difficult to determine.<sup>28</sup>

Next, *Helvering v. Mitchell* considered whether a tax assessment of 150% of deficient taxes could constitute punishment for the purposes of the double jeopardy clause.<sup>29</sup> The Court again relied upon the distinction between remedial action and non-remedial punishment, but this time, it permitted the remedial action to exceed actual damages. The opinion explained that the extra amount was designed to compensate the government for “the heavy expense of investigation and the loss resulting from the taxpayer’s fraud,” still a civil, remedial function.<sup>30</sup> The logic is one of unjust enrichment though property not rightfully owned, not of a deprivation of the defendant’s property or other rights.

The distinction between punitive and remedial actions started unraveling in *United States ex rel. Marcus v. Hess*.<sup>31</sup> The case involved a statute that required the defendant electrical contractors of a *qui tam* action to pay double damages for defrauding the government for collusive bidding, and the Court again found that the law instituted no more than actual and consequential damages (especially since the government is only entitled to half of the damages recovered in a *qui tam* action).<sup>32</sup> The problem is that while the logic of the decision was consistent with the remedy–punishment divide, the opinion used the language of a “civil” and “criminal” divide to signify it—a distinction that even the *Hess* Court recognized that is less than clear, since civil actions can be partially punitive while criminal actions can be partially remedial.<sup>33</sup> *Cummings, Garland*, and other cases had explicitly re-

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28. *Id.* at 156–58.

29. *Helvering v. Mitchell*, 303 U.S. 391, 398–99 (1938). As the Court states, “acquittal on a criminal charge is not a bar to a civil action by the Government, *remedial in its nature*, arising out of the same facts on which the criminal proceeding was based,” but “[w]here the objective of the subsequent action likewise is *punishment*, the acquittal is a bar, because to entertain the second proceeding for punishment would subject the defendant to double jeopardy . . .” *Id.* at 397–98 (emphasis added).

30. *Id.* at 401.

31. *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943).

32. *Id.* at 549–50.

33. *Id.* at 550–51. Actually, the civil-criminal division can be traced to the language of the ruling in *Helvering*. *Helvering*, 303 U.S. at 399 (“Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense. The question for decision is thus whether [the statute in question] imposes a criminal sanction.”). *Hess*, though, quoted this language and then used the terms “civil” and “criminal” throughout the opinion—unlike the *Helvering* opinion, which moved back to the clearer terminology of remedies and punishments after stating this unfortunately worded rule.

jected the civil–criminal divide as an indicator of punishment for that reason.<sup>34</sup> In fact, in his concurrence, Justice Frankfurter presciently recognized the problems that such “dialectical subtleties” would cause later courts.<sup>35</sup>

The problematic civil-criminal version of defining punishment solidified in *One Lot Emerald Cut Stones and One Ring v. United States*, in which the Court ruled that forfeiture of undeclared imported goods was not subject to double jeopardy protections.<sup>36</sup> The only resemblance to a remedy was the idea that the forfeiture helped to pay for enforcement of tariff policies—not for *any* actual or consequential damages.<sup>37</sup> The opinion nevertheless found that the statutory label of “civil” (compared to the correspondingly labeled “criminal” sanction) determined *prima facie* that the law was exempt from constitutional protections.<sup>38</sup>

The second line of post-*Cummings* cases dealt with the distinction between punishment and regulation. *Hawker v. New York* addressed a New York collateral consequence that retroactively declared it a crime for any person convicted of a felony to practice medicine—the question being whether a conviction under this statute was in violation of the Bills of Attainder and *Ex Post Facto* clauses.<sup>39</sup> The majority opinion held that the statute was a constitutionally appropriate exercise of the state’s police power, specifically its power to regulate the professions in order to ensure public health and welfare.<sup>40</sup> In doing so, a state is permitted to require evidence of good character—and to use a past conviction as conclusive evidence of present bad character.<sup>41</sup> The logic of the decision is succinctly summarized:

Though not an ex post facto law, [this collateral consequence] is retrospective in so far as it determines from the past conduct of the party his fitness for the proposed business. Felons are also ex-

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34. See also *United States v. Lovett*, 328 U.S. 303, 316 (1946) (“The fact that the punishment is inflicted through the instrumentality of an Act specifically cutting off the pay of certain named individuals found guilty of disloyalty, makes it no less galling or effective than if it had been done by an Act which designated the conduct as criminal.”).

35. *Hess*, 317 U.S. at 554–55 (Frankfurter, J., concurring).

36. *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 235 (1972) (*per curiam*).

37. *Id.* at 236–37. This logic allowed later courts to hold that virtually any public interest goal is “plainly more remedial than punitive”—even when there is virtually nothing *remedial* about them. E.g., *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 364 (1984).

38. *One Lot Emerald Cut Stones*, 409 U.S. at 237.

39. *Hawker v. New York*, 170 U.S. 189 (1898).

40. *Id.* at 191–94.

41. *Id.* at 195; see also Gabriel J. Chin, *Are Collateral Sanctions Premised on Conduct or Conviction: The Case of Abortion Doctors*, 30 *FORDHAM URB. L.J.*, 1685, 1690–93 (2003).

cluded from obtaining such a license, not as an additional punishment, but because the conviction of a felony is evidence of the unfitness of such persons as a class.<sup>42</sup>

The remarkable feature of the *Hawker* opinion is its drastic yet unrecognized shift from *Cummings/Garland*. Both the *Hawker* Court and subsequent commentators have treated these cases as consistent, despite the change in the scope of the question.<sup>43</sup> *Cummings* had explicitly stated that the question of the scope of a state's police power was irrelevant to the question of punishment, and it had explicitly chosen *not* to rely on the argument that the collateral consequence in question merely prescribed evidence of good character to practice a profession.<sup>44</sup> Even though the statute at issue in *Hawker* said nothing about character requirements and instead created a new crime that was based solely on evidence of a past conviction, the Court decided that any such statute should be read *as though* it imposes a character requirement and uses the past conviction merely as evidence of poor character.<sup>45</sup> It then distinguished *Cummings* and *Garland* by declaring they were based entirely on the idea that oaths of loyalty had no rational connection to professional qualifications.<sup>46</sup> Through this kind of faulty logic that ignores the bulk of the prior opinions, the question of unconstitutional punishment had become a question of permissible state regulation. Worse, the Court neglected to state a clear rule that defined either punishment or regulation—a mistake that would haunt subsequent cases on this issue.

The line between regulation and punishment became more unclear in *United States v. Lovett*, which also failed to state a clear rule.<sup>47</sup> In *Lovett*, the Court addressed the collateral consequences of denial of pay and effective removal from government employment positions

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42. *Hawker*, 170 U.S. at 197 (internal quotes removed).

43. E.g., Martin R. Gardner, *Punishment and Juvenile Justice: A Conceptual Framework for Assessing Constitutional Rights for Youthful Offenders*, 35 VAND. L. REV. 791, 800–01 (1982).

44. See *Cummings*, 71 U.S. at 300 (brief for defendant).

45. *Hawker*, 170 U.S. at 196 (“All that is embraced in these propositions is condensed into the single clause of the statute, and it means that, and nothing more. The state is not seeking to further punish a criminal, but only to protect its citizens from physicians of bad character.”); see also Chin, *supra* note 41, at 1695–98 (showing that the actual language of the statute in *Hawker*, which had nothing to do with character and conduct but was only concerned with punishing conviction, made sure the resulting doctrine was nonsensical and difficult to apply).

46. *Hawker*, 170 U.S. at 198. The *Cummings* Court did mention the issue of qualifications, but it explicitly stated that prior crimes bore no relationship to fitness to practice a profession; instead, it was clear that such statutes were punishment because they deprived persons of their rights as a sole consequence of prior acts. *Cummings*, 71 U.S. at 320.

47. *Lovett*, 328 U.S. at 304.

as a result of “subversive,” “disloyal,” or “un-American” activities.<sup>48</sup> Ignoring the *Hawker* idea that past acts could be evidence of bad character and lack of qualification for a position (in fact, the majority neglected to cite *Hawker* at all), the Court instead baldly asserted the contradictory idea that “a legislative decree of perpetual exclusion from a chosen vocation . . . is punishment, and of a most severe type.”<sup>49</sup> Absent a clear rule, perhaps the only sense that can be made of the distinctions between *Cummings*, *Garland*, *Hawker*, and *Lovett* is that removal from public employment is punishment, but removal from private employment is mere regulation.<sup>50</sup>

*Trop v. Dulles* then created a new problem by ignoring the *Cummings/Garland* rule and divining a new, much more vague one.<sup>51</sup> The Nationality Act of 1940 made the loss of U.S. citizenship a collateral consequence that military tribunals could apply under court-martial for various offenses, and plaintiff *Trop* was denationalized as a result of a conviction of wartime desertion.<sup>52</sup> Firstly, without citing a single case as precedent, the Court abruptly declared: “In deciding whether or not a law is penal, this Court has generally based its determination upon the purpose of the statute.”<sup>53</sup> Prior to *Trop*, actually, the Court had *explicitly* considered the actual effects of a statute in question rather than delving into issues of legislative intent.<sup>54</sup> Then, the *Trop* opinion announced that a penal statute is one that imposes a deprivation in order to effect one of the purposes of punishment (*e.g.*, retribution or deterrence); if it has instead some other purpose, it is non-penal.<sup>55</sup> The majority cited precedent for this second part of the rule, but none of the cases cited mentioned retribution, deterrence, or any other purpose of punishment.<sup>56</sup> Ultimately, the Court found that denationalization is unconstitutional, cruel and unusual punishment,<sup>57</sup>

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48. *Id.* at 305–08.

49. *Id.* at 316 (internal quotes removed).

50. See *United States v. Brown*, 381 U.S. 437, 468–70 (1965) (White, J., dissenting).

51. *Trop v. Dulles*, 356 U.S. 86 (1958).

52. *Id.* at 88–89.

53. *Id.* at 96.

54. For instance, the only places *Cummings* or *Garland* mention legislative purpose or intent are in a hypothetical example and in the dissent. *Cummings*, 71 U.S. at 325; *Garland*, 71 U.S. at 395–96 (Miller, J., dissenting). But see Gardner, *supra* note 43, at 799–800 (arguing that the *Cummings* Court’s investigation into the functions and effects of the oaths at issue was an unstated inquiry into the legislative purpose). *Helvering* also explicitly directs the inquiry to statutory construction rather than legislative purpose. *Helvering*, 303 U.S. at 399.

55. *Trop*, 356 U.S. at 96.

56. *E.g.*, *Lovett*, 328 U.S. at 304; *Hawker*, 170 U.S. at 189; *Garland*, 71 U.S. at 333; *Cummings*, 71 U.S. at 277.

57. *Trop*, 356 U.S. at 102–03.

but it is unclear why the new rule was necessary, since the extant *Cummings/Garland* rule would have more easily achieved the same result.<sup>58</sup>

In practice, the *Trop* rule—which is still the core of the contemporary punishment inquiry—is remarkably difficult to apply, because it boils down to tautology: an act is punishment if it is intended to punish.<sup>59</sup> This kind of circular logic cannot define punishment in any way other than assumption, the “gut instinct” that we simply know punishment when we see it, and that we can explain that instinct *post hoc* by referring to the intent of the punishment. The bottom line is that, in practice, the *Trop* definition of punishment “has become something of an ‘interpretive fact’ . . . : a conclusion for which judges need no evidence.”<sup>60</sup>

Two years later, *Flemming v. Nestor* introduced new considerations and a new burden of proof into *Trop*’s legislative purpose test. Considering whether retroactive denial of Social Security benefits to aliens deported for past membership in the Communist Party violated the *Ex Post Facto* Clause, the Court focused on (1) whether the collateral consequence was focused on a person or class (rather than an activity or status), (2) whether it imposed an “affirmative disability or restraint,” and (3) how closely it resembled the traditional punishment of imprisonment.<sup>61</sup> The first factor was developed from dicta in *Cummings*<sup>62</sup> and the latter two from entirely new rules in order to differentiate *Flemming* from a prior case of imprisonment without due

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58. The new rule was likely the result of the *Perez v. Brownell* case, decided on the same day as *Trop*, in which the Court ruled denationalization as a response to voting in a foreign election a proper and constitutional exercise of legislative power. *Perez v. Brownell*, 356 U.S. 44, 62 (1958). Although *Perez* neglected to rule on the issue of punishment, it is probable that the *Trop* test was created to differentiate the two cases. See *Trop*, 356 U.S. at 105 (Brennan, J., concurring) (“It is, concededly, paradoxical to justify as constitutional the expatriation of the citizen who has committed no crime by voting in a Mexican political election, yet find unconstitutional a statute which provides for the expatriation of a soldier guilty of the very serious crime of desertion in time of war.”). The more coherent *Cummings/Garland* test would have very simply found both acts punitive, and then left open the question of whether they were both cruel and unusual.

59. See also Kaiser, *supra* note 3, at 732–34 (distinguishing *intent* to impose a deprivation, which all statutes have by definition, and the *motives* or purposes for doing so). The only alternative formulation of *Trop* is perhaps more troubling: an act is punishment if its motive is to achieve a *legitimate* purpose of punishment—thereby exempting sadism, hatred, vengeance, exclusion, and other *illegitimate* motives from constitutional protection.

60. Ewald, *supra* note 4, at 90 (discussing the ambiguity of the criminal–civil divide regarding collateral consequences).

61. *Flemming v. Nestor*, 363 U.S. 603, 614–17 (1960).

62. *Cummings*, 71 U.S. at 320.

process.<sup>63</sup> Next, the majority created a wholly novel presumption that only the “clearest proof” could determine a statute was subject to constitutional protections for punishments, by which it easily determined that deprivation of welfare benefits is permissible.<sup>64</sup> No less than three dissents (with four dissenters) warned of the dangers of departing so thoroughly from the *Cummings/Garland* rule.<sup>65</sup>

In *Kennedy v. Mendoza-Martinez*, the Court again addressed provisions of the Nationality Act, this time amendments introduced in 1944 and 1952 that denationalized persons who left the country in order to evade wartime military service.<sup>66</sup> The question was whether such a collateral consequence could be levied absent procedural due process—which also only applies to criminal proceedings.<sup>67</sup> The plurality applied the *Trop* rule that punishment requires the legislative intent to punish, and combined *Flemming*’s factors with four others to develop a seven-factor test for determining the weight of whether that intent (when it is not clearly stated) is penal or regulatory:

[1] Whether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as a punishment, [3] whether it comes into play only on a finding of scienter, [4] whether its operation will promote the traditional aims of punishment—retribution and deterrence, [5] whether the behavior to

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63. *Wong Wing v. United States*, 163 U.S. 228 (1896) (addressing whether imprisonment of illegal aliens constituted punishment for the purposes of due process).

64. *Flemming*, 363 U.S. at 617–18. As support for this contention, *Flemming* cited the ancient case of *Fletcher v. Peck* for the proposition that “it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void”—which could be considered dicta or a statement of a much more lenient standard than the one *Flemming* devised. *Fletcher v. Peck*, 10 U.S. 87, 128 (1810). Ironically, given the *Flemming* holding and many of the cases that use its standard, *Fletcher* held unanimously that forfeiture of contract and property rights was a punishment subject to the *Ex Post Facto* Clause.

65. *Flemming*, 363 U.S. at 628 (Black, J., dissenting) (“It is true that the Lovett, Cummings and Garland Court opinions were not unanimous, but they nonetheless represent positive precedents on highly important questions of individual liberty which should not be explained away with cobwebby refinements. If the Court is going to overrule these cases in whole or in part, and adopt the views of previous dissenters, I believe it should be done clearly and forthrightly.”); *Id.* at 630 (Douglas, J., dissenting) (citing the clear *Cummings* rule that “[p]unishment . . . includes the ‘deprivation or suspension of political or civil rights’”); *Id.* at 635, 640 (Brennan, J., dissenting) (“The common sense of it is that he has been punished severely for his past conduct . . . Today’s decision is to me a regretful retreat from Lovett, Cummings and Garland.”).

66. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 146–49 (1963). A slight difference between *Trop* and *Mendoza-Martinez* is that the plaintiff in the latter had dual citizenship with Mexico, so that denationalization would not make him a stateless person—which was and is customarily illegal under international law. *Id.*; *Trop*, 356 U.S. at 101–03. Moreover, a *disability* is by definition a negative concept, contrary to an affirmative restraint, so it seems quite unclear how this rule could ever clearly determine an outcome.

67. *Mendoza-Martinez*, 372 U.S. at 164.

which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned.<sup>68</sup>

Despite creating this new test, the Court neglected to use it and instead found the denationalization provisions to be *prima facie* punitive without any detailed analysis.<sup>69</sup>

The *Mendoza-Martinez* (and *Flemming*) factors were an attempt to clarify the *Trop* test of punitive intent, but they moved even further from a coherent rule and an accurate understanding of prior cases. For instance, the idea of a disability or restraint was correctly taken from *Cummings* and subsequent cases, but nowhere did those cases require the deprivation to be an *affirmative* one.<sup>70</sup> The ideas of historical consideration and excessiveness (which are also tautological) were entirely from dicta in earlier cases—and the same cases had often expressly rejected the idea that punishments *had* to be traditional or severe.<sup>71</sup> The ideas of scienter and application to criminal act came out of a line of jurisdictional and tax cases that prior courts had considered irrelevant to constitutional questions—not from the more relevant *Cummings/Garland* rule that punishment had to be in response to past acts regardless of their character.<sup>72</sup>

Finally, the ideas of punitive and non-punitive/regulatory purposes accurately came from *Trop*'s tautology, but in perhaps the worst problem of the new test, the *Mendoza-Martinez* court arbitrarily limited those purposes to only retribution and deterrence—despite *Trop*'s recognition that other legitimate purposes of punishment exist.<sup>73</sup> These two factors would prove to be the most determinative of future cases of punishment, since they help to avoid *Trop*'s tautology

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68. *Id.* at 168–69.

69. *Id.* at 169.

70. *E.g.*, *Cummings v. Missouri*, 71 U.S. 277, 320 (1866); *United States v. Lovett*, 328 U.S. 303, 316 (1946). Moreover, a *disability* is by definition a negative concept, contrary to an affirmative restraint, making the meaning of this factor perpetually unclear in every case.

71. *E.g.*, *Cummings*, 71 U.S. at 318. These ideas are also nonsensical: A gas tax of two dollars per gallon is “excessive” and non-punitive (unless applied only to wrongdoers), whereas a ten-dollar fine in response to larceny is lenient and possibly ineffective, but still punitive. Similarly, it is doubtful that legislatures could devise an entirely new form of punishment to replace imprisonment and have the courts refuse to apply constitutional protections because the act was not “historically” a kind of punishment. Even *Flemming* rejected the idea that harshness was a factor relevant to punishment. *Flemming v. Nestor*, 363 U.S. 603, 614 (1960).

72. *E.g.*, *United States v. Constantine*, 296 U.S. 287 (1935); *Helwig v. United States*, 188 U.S. 605 (1903). Again, *Cummings* explicitly decried the idea that the act had to be a criminal one. *Cummings*, 71 U.S. at 318.

73. *Trop v. Dulles*, 356 U.S. 86, 96 (1958).

by focusing on a different question. Instead of defining punishment as anything that attempts to achieve punishment, the Court henceforth defined it as any penalty that aims to deter or exact retribution.<sup>74</sup> This is, of course, another logical fallacy: confusing the *definition* of something with its *justification*.<sup>75</sup> The motive of a legislature in enacting a collateral consequence is logically irrelevant to the consequence's substantive nature as a punishment, a tax, a regulation, a program, or any other ontological characterization—and using justification as a definitional tool arbitrarily limits constitutional protections, even if it avoids the circular logic of the *Trop* rule.

As if things were not confusing enough, *United States v. Ward* merged the remedy and regulation lines of cases without any recognition that it had done so.<sup>76</sup> *Ward* considered whether a “civil penalty” for an oil-drilling facility’s illegal discharge of oil into navigable waters activated Fifth and Sixth Amendment rights applicable only in penal proceedings.<sup>77</sup> In deciding this issue, the Court created a two-step inquiry. Firstly, it relied on *Emerald Stones* to determine whether the legislature explicitly or implicitly indicated a preference for a “civil” or “criminal” label, and it held that since the statute used the phrase “civil penalty,” it was clearly intended to be civil.<sup>78</sup> This holding blatantly ignored *Cumming*’s warning that courts should never simply accept a legislative label in applying constitutional protections lest they empty those protections of all meaning.<sup>79</sup> Secondly, *Ward* applied the *Mendoza-Martinez* factors to determine if the substantive effect of the act was “so punitive either in purpose or effect” as to override the “civil” label.<sup>80</sup> This second prong also incorporated the nigh-impassible *Flemming* “clearest proof” standard.<sup>81</sup> Based on this standard, the *Ward* Court easily found that all but one of the factors (that the un-

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74. *United States v. Brown* recognized this problem and explicitly points out that incapacitation and rehabilitation were also valid purposes of punishment, and excluding them from the definitional test created an arbitrary line between punishment and regulation. *United States v. Brown*, 381 U.S. 437, 458 (1965). Subsequent cases, however, largely stuck to *Mendoza-Martinez*’s limitation.

75. See *Kaiser*, *supra* note 3, at 732–34; *Gardner*, *supra* note 43, at 805–06.

76. *United States v. Ward*, 448 U.S. 242, 247–48 (1980).

77. *Id.*

78. *Id.* at 250. The dissent, however, applied the old remedial–punitive test and found that the penalties at issue were clearly not designed to reimburse the government for any expenses, and were therefore a punishment. *Id.* at 257–58.

79. See *supra* notes 20–21.

80. *Ward*, 448 U.S. at 248–49.

81. *Id.*

derlying act was a crime) support calling the collateral consequence a civil, non-punitive regulation.<sup>82</sup>

*Ward* thus combined *Trop*'s tautology with a second one: a presumptively civil law is punishment if it is "so punitive" we must call it that. It also has apparently never struck the courts as odd that they are routinely forced to use "penalty" and "sanction," which are direct synonyms to "punishment," to describe "civil" actions that they define as exempt from constitutional protection perhaps because almost no other words ontologically describe a deprivation due to a past act.<sup>83</sup> Instead, *Ward* in practice has come to mean that no presumptively civil law will be considered punishment unless it is extraordinarily harsh or excessive in relation to its regulatory goals (a standard which no collateral consequence has ever met)<sup>84</sup>—despite *Cummings*'s and other cases' clear warning that severity and harshness bear absolutely no relationship to determining whether an action is punitive.<sup>85</sup> In other words, the *Ward/Mendoza-Martinez* test is a labyrinth of circular logic: "punishment" means intentional punishment or excessive punishment.

The strange results of this test are easily apparent. Unsurprisingly, while using it, the Court has *never* held that a collateral consequence activates constitutional protections for punishment.<sup>86</sup> "The fact is . . . the Court is no longer trying to define punishment, . . . but is instead giving the government free reign to circumvent constitutional criminal procedure altogether."<sup>87</sup> In doing so, it has manipulated or effectively abrogated all of the rules applied in earlier cases (to be expected, since most of the test came from mis-citations or utter absence of precedent). In *United States v. One Assortment of 89 Firearms*, for instance, the Court found that the location of a forfeiture provision in the civil code, its nature as an *in rem* proceeding, and the inclusion of administrative rather than criminal procedures were all indicative that the collateral consequence was civil rather than crimi-

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82. *Id.* at 249–50.

83. Interestingly, the courts use "penal" to refer to actions that are "punishment," and after the rise of the civil–criminal divide, tend to use "punitive" as though it is unrelated to "punishment" and can appear in both civil and criminal actions. Commonsense definitions be damned.

84. *See infra* note 98 and accompanying text.

85. *See supra* note 19 and accompanying text.

86. The possible exception is *Mendoza-Martinez* itself, but that opinion never actually used the *Mendoza-Martinez* factors and took place before the *Ward/Flemming* strong presumption in favor of constitutionality. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963).

87. Susan R. Klein, *Redrawing the Criminal-Civil Boundary*, 2 *BUFF. CRIM. L. REV.* 679, 698–99 (1999).

nal<sup>88</sup>—again despite earlier cases’ vehement statements that the form of a law should never outweigh its substantive effects.<sup>89</sup> Then, in a “stunning disregard not only for modern precedents but for our older ones as well,”<sup>90</sup> *United States v. Ursery* effectively held that all civil forfeitures are by definition regulatory because they serve the “non-punitive” purpose of encouraging property owners to manage their property legally or abate nuisances (despite how much these purposes suspiciously resemble the deterrence and incapacitation rationales for punishment).<sup>91</sup>

Even the Supreme Court’s subsequent use of each *Mendoza-Martinez* factor (with the *Ward* presumption of constitutionality) reveals the shakiness of this definition of punishment. Not one case has found that a collateral consequence resembles a historical punishment—including forfeiture of contraband or a residence used in the production of narcotics,<sup>92</sup> occupational debarment in response to financial fraud,<sup>93</sup> and registration and public notification for sex offenders.<sup>94</sup> Fines for white-collar criminals<sup>95</sup> and “civil” incarceration for

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88. *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 364 (1984).

89. See *supra* note 19 and accompanying text. Moreover, *Coffey, Stone, Emerald Cut Stones*, and a number of other cases considered substantive issues despite being *in rem* proceedings; none of them accepted the idea that an *in rem* proceeding was *prima facie* non-punitive. See *Stone v. United States*, 167 U.S. 178, 187–88 (1897); *Coffey v. United States*, 116 U.S. 436, 440–41 (1886).

90. *United States v. Ursery*, 518 U.S. 267, 297 (1996) (Stevens, J., concurring in the judgment in part and dissenting in part). The dissent argued that all of the precedent the majority cited would actually counsel that there are three kinds of civil forfeitures—of proceeds from illegal acts, of contraband, and of property used to commit a crime—and only the first two can be considered punishment under the extant doctrine. *Id.* at 298. The logic here was akin to the original *Cummings/Garland* rule and consistent with the civil forfeiture cases that followed: forfeiture of illegal proceeds and contraband was not punitive because no deprivation exists (there was no right to the property in the first place that could be deprived), but forfeiture of property used in commission of a crime is a penalty because it is a deprivation of a civil right in response to a past act. *Id.* at 298–99. Finally, the dissent pointed out that *none* of the cases the majority cites as support for its rule that *in rem* forfeitures cannot be punitive actually said anything of the sort. *Id.* at 302–03.

91. *Ursery*, 116 U.S. at 290–91.

92. *Id.* at 290.

93. *Hudson v. United States*, 522 U.S. 93, 96 (1997).

94. *Smith v. Doe*, 538 U.S. 84 (2003). The *Smith* opinion did consider how closely registration and public notification are to colonial-era punishments that publicly shamed the offender, but it ultimately relied upon the non-punitive purpose factor in this case (public safety through information) to determine that there was no historical resemblance. *Id.* at 97–99; see also Kevin O’Keefe, Comment, *Two Wrongs Make a Wrong: A Challenge to Plea Bargaining and Collateral Consequence Statutes through Their Integration*, 100 J. CRIM. L. CRIMINOLOGY 255, 255–57 (2010). If this can be taken as precedent, the historical inquiry itself is also focused on the punitive or non-punitive intent of the statute.

95. *Hudson*, 522 U.S. at 95 (holding that a monetary penalty and occupational debarment for violation of federal banking statutes, does not prevent a later criminal prosecution for the same act under the Double Jeopardy Clause of the Fifth Amendment).

sex offenders following their sentence<sup>96</sup> seem especially to resemble historical punishments, but the Court held otherwise. Similarly, the Court found that none of these collateral consequences, including civil commitment based on past conviction for violent sex crimes, included an element of scienter.<sup>97</sup>

The Court has also failed to find that *any* collateral consequence promotes a purpose of punishment—the fourth *Mendoza-Martinez* factor. *Ursery* simply discarded deterrence by asserting that even civil actions can deter; henceforth, the only legislative motive valid for definitional purposes has apparently been retribution.<sup>98</sup> In *Hudson v. United States*, the Court likewise held that anything that promotes public safety or stability has a non-punitive purpose—the sixth factor.<sup>99</sup> Interestingly, after it seemed like deterrence (alongside rehabilitation and incapacitation) were no longer relevant to the inquiry, *Kansas v. Hendricks* used the *lack* of a deterrent purpose in civil commitment as proof of non-punitive intent.<sup>100</sup> Then, the most recent punishment case, *Smith v. Doe*, again ruled that deterrence is irrelevant<sup>101</sup>—suggesting even more strongly that courts are free to weigh the factors in favor of their “gut instincts.” *Smith* and *Hendricks* also shifted the inquiry to whether only the “primary” purpose was non-punitive—and both easily found that it was.<sup>102</sup> Given this kind of approach, it should be no surprise that the Court has also never found a collateral consequence that appears excessive in the pursuit of its non-

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96. *Kansas v. Hendricks*, 521 U.S. 346, 369 (1997) (holding that an Act which calls for confinement after a conviction and term of incarceration does not violate the Double Jeopardy Clause of the Fifth Amendment).

97. *Id.* at 362 (explaining that the commitment decision was found to rely only upon “mental abnormality” rather than scienter—despite the relevance of a past).

98. *United States v. Ursery*, 518 U.S. 267, 312 (1996); *see also Smith*, 538 U.S. at 102; *Hudson*, 522 U.S. at 105. *But see Hendricks*, 521 U.S. at 362–63.

99. *Hudson*, 522 U.S. at 105.

100. *Hendricks*, 521 U.S. at 362–63 (arguing that the purpose of the “civil” incarceration procedure was to treat the sex offender and protect the public). *But see* Nora V. Demleitner, *Abusing State Power or Controlling Risk: Sex Offender Commitment and Sicherungsverwahrung*, 30 *FORDHAM URB. L.J.*, 1631–32 (2003) (arguing that the Court’s comparison to treatment-oriented civil commitment statutes is strained).

101. *Smith v. Doe*, 538 U.S. 84, 102 (2003).

102. *Id.* at 93; *Hendricks*, 521 U.S. at 367–68.

punitive goals—the seventh factor.<sup>103</sup> These are the factors “most significant” to the punishment inquiry.<sup>104</sup>

Finally, of the two *Mendoza-Martinez* factors most relevant to the original *Cummings/Garland* definition of punishment—whether the statute imposes an affirmative disability or restraint, and whether it is response to a past criminal act—neither has been helpful in activating constitutional protections for a collateral consequence. *Hudson* made short work of the former, strangely construing “affirmative disability or restraint” to mean “similarity to the paradigmatic example of imprisonment” (effectively merging the first and second factors).<sup>105</sup> Given this limitation, the only case that has actually found an affirmative restraint was *Hendricks* (because civil commitment does seem an awful lot like imprisonment); still, the *Hendricks* Court sidestepped the problem by citing a pre-trial detention case for the idea that all affirmative restraints are not punishment.<sup>106</sup> As for the factor that considers whether a past criminal act is involved, *every single punishment case* since *Ward* found this factor did weigh in favor of punishment—and every single case then found it unpersuasive in determining the holding.<sup>107</sup>

In other words, as the Court most recently reaffirmed in *Smith*, a collateral consequence will never pass the second prong of the tautological *Ward/Mendoza-Martinez* test unless it closely resembles imprisonment and does absolutely nothing to promote public safety or

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103. Actually, the Court failed to address this factor at all in any case except *Smith*. *Smith*, 538 U.S. at 105 (“The excessiveness inquiry of our *ex post facto* jurisprudence is not an exercise in determining whether the legislature has made the best choice possible to address the problem it seeks to remedy. The question is whether the regulatory means chosen are reasonable in light of the nonpunitive objective.”). In every other case, the Court simply implied that the collateral consequence was rationally related to its non-punitive purpose. *E.g.*, *Hendricks*, 521 U.S. at 365–66 (finding that a lack of treatment options does not negate a non-punitive purpose of public safety in civil commitment for sex offenders).

104. *Smith*, 538 U.S. at 102 (quoting *Ursery*, 518 U.S. at 290).

105. *Hudson v. United States*, 522 U.S. 93, 104 (1997). This formulation of the affirmative disability factor has been used as precedent multiple times in subsequent cases. *E.g.*, *Smith*, 538 U.S. at 100; *Hendricks*, 521 U.S. at 363.

106. *Hendricks*, 521 U.S. at 363.

107. The *Ward* majority, for instance, flatly discarded this *Mendoza-Martinez* factor through the circular logic that civil and criminal sanctions can often apply to the same conduct. *United States v. Ward*, 448 U.S. 242, 250 (1980). Other cases have cited *Ward* for this proposition. *E.g.*, *Hudson*, 522 U.S. at 105. Most recently, *Smith* simply discarded this factor and the scienter factor as completely irrelevant to the inquiry. *Smith*, 538 U.S. at 105 (“The regulatory scheme applies only to past conduct, which was, and is, a crime. This is [merely] a necessary beginning point, for recidivism is the statutory concern.”).

stability.<sup>108</sup> It is remarkably difficult to imagine what such a punishment could look like, since even imprisonment itself pursues countless such “non-punitive” goals. As Part III of this article argues, however, it is also this kind of divergence from common sense and inconsistency with precedent that has made the current punishment doctrine unstable and likely to change in the near future.

### III. THE FICTIONAL LINE BETWEEN “DIRECT” AND “COLLATERAL” CONSEQUENCES

Although the question of “punishment” is relevant to a number of constitutional protections concerning the nature of a legislative or administrative act, within criminal proceedings, both effective assistance of counsel and due process requirements for pleadings also involve the question of “directness” (as opposed to “collateral-ness”) of the proceedings’ consequences. The so-called “collateral-consequences rule” has held that competent counsel need only inform a criminal defendant of the *direct* consequences of a plea or conviction, with the *collateral* consequences being irrelevant to the inquiry. The rule also has held that courts have the same limited duties of notice for accepting a guilty plea. Unlike the original definition of punishment in *Cummings/Garland*, the definitional lines between direct and collateral consequences were never particularly clear, so the doctrine is even less stable today.

The collateral-consequences rule has a shorter, less complex history than the punishment doctrine does. Although many trace its origins to (mis)citations of *Brady v. United States*,<sup>109</sup> the circuit courts actually constructed it decades earlier. The earliest iteration of the collateral-consequences rule seems to be in *United States v. Parrino*, when the Second Circuit addressed the question of whether a guilty plea could be invalidated because defense counsel provided the misin-

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108. For this reason, Justice Souter vehemently objected to the *Smith* majority’s use of *Ward* and *Mendoza-Martinez*: “No matter how often the Court may repeat and manipulate multifactor tests that have been applied in wholly dissimilar cases involving only one or two of these three aspects of these statutory sanctions, it will never persuade me that the registration and reporting obligations that are imposed on convicted sex offenders and on no one else as a result of their convictions are not part of their punishment.” *Smith*, 538 U.S. at 113.

109. *Brady v. United States*, 397 U.S. 742 (1970). *E.g.*, Margaret Colgate Love, *Collateral Consequences after Padilla v. Kentucky: From Punishment to Regulation*, 31 ST. LOUIS PUB. L. REV. 87, 96–97 (2011); Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of “Sexually Violent Predators”*, 93 MINN. L. REV. 670, 684–85 (2008); Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 726–29 (2002).

formation that the plea could not lead to the defendant's deportation.<sup>110</sup> The majority recognized that "a defendant should not be holden to a plea of guilty made without an understanding of the consequences."<sup>111</sup> Then, however, it ruled that *collateral* consequences were exempt from that rule for two reasons: (a) there was no precedent that included them in it (neither was there precedent to the contrary), and (b) it seemed "palpably unsound" to hold otherwise.<sup>112</sup> No principled analysis besides this obvious assumption was presented. The majority also failed to actually define "collateral" consequences except by contrasting the "sentence directly flowing from the judgment" with the examples of civil forfeiture, loss of employment or civil rights, ineligibility for military service, and deportation.<sup>113</sup> Thus was born the fictional collateral-direct distinction.

The rule spread quite slowly in the next two decades, often through the same sort of unsound logic. The Fifth, Seventh, Ninth, and Tenth Circuits addressed the judge's—rather than counsel's—duty under the Due Process Clause to inform the defendant of potential deportation, and each simply asserted with no analysis whatsoever that no such duty exists.<sup>114</sup> The D.C. Circuit, like the Second, simply took the lack of precedent to mean collateral consequences (in this case undesirable discharge from the Air Force) were not part of understanding a plea.<sup>115</sup>

The first actual analysis of the rule was by the Third Circuit in *United States v. Cariola*: "It has been stated broadly that out of just consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences. But the pertinent question is: what consequences?"<sup>116</sup> The majority considered the practical impacts on both judges and prison populations of

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110. *United States v. Parrino*, 212 F.2d 919, 920–21 (2d Cir. 1954).

111. *Id.* at 921.

112. *Id.* at 922. The dissent found that the lack of precedent was just as good of a reason to find that the court *should* inform the defendant of collateral consequences. *Id.* at 924 ("The most my colleagues can show is that there are no precedents, on this point, adverse to defendant. I think we should not create one.").

113. *Id.* at 921–22.

114. *Meaton v. United States*, 328 F.2d 379, 380–81 (5th Cir. 1964); *United States ex rel. Durante v. Holton*, 228 F.2d 827, 830 (7th Cir. 1956); *Munich v. United States*, 337 F.2d 356, 361 (9th Cir. 1964); *Hutchison v. United States*, 450 F.2d 930, 931 (10th Cir. 1971).

115. *Redwine v. Zuckert*, 317 F.2d 336, 338 (D.C. Cir. 1963). Although the opinion did not clearly state whether the duty in question was the defense attorney's or the court's, it implied the latter by orienting the question toward due process. *Id.* at 337.

116. *United States v. Cariola*, 323 F.2d 180, 186 (3d Cir. 1963).

deciding that courts should warn defendants of collateral consequences,<sup>117</sup> and it cited *Parrino* for support that they need not be so warned.<sup>118</sup> In dissent, the Chief Judge argued sharply to the contrary, saying that the commonly understood, unquestioned principle is that a court should make a defendant fully aware of the consequences of a guilty plea.<sup>119</sup>

Only then did *Brady* come into the picture. While considering the standards for the voluntariness of a plea, the Supreme Court stated that a “plea of guilty entered by one fully aware of the direct consequences . . . must stand unless induced by threats . . ., misrepresentation . . ., or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor’s business. . . .”<sup>120</sup> The D.C. Circuit was the first to simply “presume that the Supreme Court meant what it said when it used the word ‘direct’; by doing so, it excluded *collateral* consequences.”<sup>121</sup> The other circuits followed suit.<sup>122</sup>

There are a number of problems with using *Brady* as Supreme Court endorsement of the collateral-consequences rule. Firstly, the case dealt only with the issue of the *voluntariness* of a plea, not the separate, due process requirement that the plea be knowingly.<sup>123</sup> The collateral-consequences rule addresses only the *knowledge* prong of the test.<sup>124</sup> Secondly, *Brady* had absolutely nothing to do with collateral consequences, instead presenting issues of impermissible pressure by defendant’s counsel, a statutory allowance of the death penalty only absent a plea, and certain promises regarding a reduced sentence.<sup>125</sup> Thirdly, the language of “direct” consequences was merely

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117. See *infra* notes 152–53 and accompanying text.

118. *Cariola*, 323 F.2d at 186.

119. *Id.* at 189 (Biggs, J., dissenting in part).

120. *Brady v. United States*, 397 U.S. 742, 755 (1970) (quoting *Shelton v. United States*, 246 F.2d 571, 572 n.2 (5th Cir. 1957)).

121. *United States v. Sambro*, 454 F.2d 918, 922 (D.C. Cir. 1971). Even this case included no analysis besides this simple statement of “precedent.”

122. *E.g.*, *Nunez Cordero v. United States*, 533 F.2d 723, 726 (1st Cir. 1976); *Cuthrell v. Director, Patuxent Inst.*, 475 F.2d 1364, 1365–66 (4th Cir. 1973) (“The law is clear that a valid plea of guilty requires that the defendant be made aware of all ‘the direct consequences of his plea.’ By the same token, it is equally well settled that, before pleading, the defendant need not be advised of all collateral consequences of his plea.”); *Armstrong v. Egeler*, 563 F.2d 796, 800 (6th Cir. 1977); *Fruchtman v. Kenton*, 531 F.2d 946, 948 (9th Cir. 1976); *United States v. Campbell*, 778 F.2d 764, 768 (11th Cir. 1985). Apparently, only fifteen states and two circuits (the Eighth and Twelfth) never accepted the collateral-consequences rule, but neither did they hold otherwise. *Cf. Padilla v. Kentucky*, 559 U.S. 356, 376 (2010).

123. *Brady*, 397 U.S. at 748–50.

124. See also *Roberts*, *supra* note 109, at 685–86.

125. *Brady*, 397 U.S. at 743–44.

dicta within an internal quotation of a Fifth Circuit case—and even that case had nothing to do with collateral consequences nor any indication that “direct” was meant to address them.<sup>126</sup> Fourthly, the Supreme Court had already indicated numerous times that, though it did not consider collateral consequences punishment, it did consider them highly important in and relevant to a criminal case for other questions.<sup>127</sup>

Another serious problem with the collateral-consequences rule is that the definitions of direct and collateral consequences are dangerously unclear (another signal that the rule exists only through assumption rather than careful analysis). Not one of the decisions that created the rule actually defined a “collateral” consequence.<sup>128</sup> The Fourth Circuit first presented a definition thirty years after *Parrino* created the rule: consequences are collateral if they do not have a “definite, immediate and largely automatic effect on the range of the

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126. *Shelton v. United States*, 246 F.2d 571, 571–72 (5th Cir. 1957).

127. The most prominent use of collateral consequences by the Court is in order to address the mootness of a “case or controversy.” If a defendant challenges a conviction after the full sentence has been served, the case is normally not justiciable. *St. Pierre v. United States*, 319 U.S. 41, 42 (1943). If the defendant can show, however, that even potential or minor collateral consequences are active due to the conviction, a continuing injury is at issue. *Fiswick v. United States*, 329 U.S. 211, 221–22 (1946) (potential deportation risks and other civil disabilities); *see also Rutledge v. United States*, 517 U.S. 292, 301–03 (1996) (at least a \$50 fee for concurrent life sentences); *Carafas v. LaVallee*, 391 U.S. 234, 237–38 (1968) (business licenses, union membership, voting rights, and jury service); *Ginsberg v. New York*, 390 U.S. 629, n.2 (1968) (potential occupational licensing restrictions); *United States v. Morgan*, 346 U.S. 502, 512–13 (1954) (“civil rights” generally). Later, the Court also created a presumption that collateral consequences are always possible, so that a case is rarely moot after the sentence has been served even absent a showing of actual injury. *Sibron v. New York*, 392 U.S. 40, 56–57 (1968) (“[I]t is far better to eliminate the source of a potential legal disability than to require the citizen to suffer the possibly unjustified consequences of the disability itself for an indefinite period of time before he can secure adjudication of the State’s right to impose it on the basis of some past action.”); *Pollard v. United States*, 352 U.S. 354, 358 (1957); *see also United States v. Juvenile Male*, 131 S. Ct. 2860, 2864 (2011) (clarifying that the presumption only exists for the underlying conviction, not a completed sentence itself); *Spencer v. Kemna*, 523 U.S. 1, 14 (1998) (declining to apply the presumption to parole revocation).

The Court has also used collateral consequences to justify the “authorized imprisonment” doctrine, because “the authorized penalty is . . . a better predictor of the stigma and other collateral consequences that attach to conviction of an offense.” *E.g.*, *Scott v. Illinois*, 440 U.S. 367, 382 (1979).

128. The Third Circuit gave examples: evidence of conviction in later civil actions, credibility as a witness, voting rights, public office, ‘second offender’ punishments, and deportation. *United States v. Cariola*, 323 F.2d 180, 186 (3d Cir. 1963). The Fifth Circuit simply used the blanket idea of “civil rights.” *Meaton v. United States*, 328 F.2d 379, 381 (5th Cir. 1964). However, the lines between collateral and direct consequences are quite unclear through these formulations. *See, e.g.*, *Hinds v. United States*, 429 U.S. 1322 (1970) (considering the possibility of consecutive sentences as a collateral consequence); *Munich v. United States*, 337 F.2d 356, 361 (9th Cir. 1964) (considering eligibility for probation or parole as a collateral consequence); *see also Roberts, supra* note 109, at 676–78.

defendant's punishment."<sup>129</sup> This rule, of course, turns on whether the consequence is defined as punishment or regulation,<sup>130</sup> conflating the two doctrines and making the definition of collateral consequences circular (a consequence is collateral if it is not part of the punishment, assuming *a priori* that collateral consequences are not themselves punishment). Other circuits define directness according to whether the court itself has "control and responsibility" for the consequence,<sup>131</sup> but this test is just as circular (courts need not take responsibility for or control of those consequences for which they have no control or responsibility). Because of these ambiguities, courts often have trouble finding the line between direct and collateral consequences.<sup>132</sup> A practical translation of this tortuous rule is thus that only the criminal fines and tenure of prison, jail, or probation constitute "direct" consequences of the sentence; anything else is (probably) "collateral."

A final problem with the collateral-consequences rule is that it conflates the role of the *judge* in ensuring a guilty plea is voluntary and knowing with the duties of the *defense attorney* to effectively inform the defendant.<sup>133</sup> "[J]ust as defense counsel and the court have different duties of loyalty, investigation, and legal research as a result of their distinct roles as advocate and decision maker, there is no reason to assume that their obligations of advising the accused of the risks and benefits of pleading guilty should be identical."<sup>134</sup> Thus, some courts even created the rule in respect of the judge's duty of

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129. *Cuthrell v. Director, Patuxent Inst.*, 475 F.2d 1364, 1366 (4th Cir. 1973).

130. *Id.* at 1367; *see also* *Barkley v. State*, 724 A.2d 558, 560–61 (Del. 1999); *Commonwealth v. Leidig*, 598 Pa. 211, 216 (2008); *Mitschke v. State*, 129 S.W.3d 130, 135 (Tex. Crim. App. 2004).

131. *E.g.*, *United States v. Gonzales*, 202 F.3d 20, 27 (1st Cir. 2000); *El-Nobani v. United States*, 287 F.3d 417, 419–421 (6th Cir. 2002).

132. Some courts, for instance, hold that eligibility for parole is a direct consequence. *E.g.*, *Munich*, 337 F.2d at 360–61. Others, however, find to the contrary. *E.g.*, *Trujillo v. United States*, 377 F.2d 266, 269 (5th Cir. 1967). In another example, one court held that civil commitment is *neither* direct *nor* collateral. *State v. Bellamy*, 835 A.2d 1231, 1238 (N.J. 2003). Finally, it should be noted that even though sentencing judges themselves can sometimes determine welfare restrictions, and could in the past submit decisive recommendations for or against deportation, courts have found that these consequences are not direct. *But see* *United States v. Littlejohn*, 224 F. 3d 960, 965–66 (holding that certain federal welfare deprivations were direct because they were a definite and automatic result of conviction).

133. *Strickland v. Washington* firmly differentiated between the judge's and counsel's duties in this respect. *Strickland v. Washington*, 446 U.S. 668, 690 (1984). Under *Strickland*, effectiveness of counsel is a reasonableness inquiry "considering all the circumstances" in each case. *Id.* at 688. Even if counsel is shown to be incompetent under this standard, the defendant still must prove that actual prejudice resulted from counsel's error. *Id.* at 694 (stating that the defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different").

134. *Chin & Holmes, Jr.*, *supra* note 109, at 727.

notice under due process while nevertheless assuming or even expressly stating that such a duty is incumbent upon counsel.<sup>135</sup> Nevertheless, no circuit has ruled that counsel but not the judge has the duty to inform the defendant about collateral consequences.<sup>136</sup>

Possibly because of these inconsistencies, the Supreme Court finally did take a case on the direct–collateral distinction in *Padilla v. Kentucky*, when it considered whether constitutionally competent counsel must inform a defendant of potential deportation upon conviction.<sup>137</sup> The Court declined to rule on the validity of the collateral-consequences rule itself, instead focusing on the “unique nature” of deportation in this respect.<sup>138</sup> Because deportation is so serious of a consequence, because it has historically been closely intertwined with criminal proceedings, and because modern legal changes effectively make it a definite and automatic result of conviction, the majority found it is neither a direct nor a collateral consequence of conviction.<sup>139</sup> As such, *Padilla* ruled that competent counsel is required to inform a defendant of potential deportation consequences—and counsel’s advice must be as specific as possible given the clarity of the immigration law in the case.<sup>140</sup>

As a result of the “groundbreaking” new ruling in *Padilla*, the collateral-consequences rule is in a state of flux.<sup>141</sup> *Padilla* recognized that some penalties do not fit neatly into the direct–collateral distinction, and it is unclear how far that logic extends. A few cases have already held that counsel must now inform clients when they may be subject to sex offender registration and notification statutes and civil commitment laws, because such statutes are also particularly severe,

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135. *E.g.*, *Michel v. United States*, 507 U.S. 461, 465 (1974) (“Where his client is an alien, counsel and not the court has the obligation of advising him of his particular position as a consequence of his plea.”).

136. *See* *Chin & Holmes, Jr.*, *supra* note 109, at 730–32; *Love*, *supra* note 109, at 98–99. Recent rulings in response to *Padilla* indicate that this may be changing as courts resist *Padilla*’s fullest interpretation. *E.g.*, *United States v. Delgado-Ramos*, 635 F.3d 123 (9th Cir. 2011) (distinguishing the judge’s duty of notice under *Brady* from counsel’s duty of notice under *Padilla*).

137. *Padilla v. Kentucky*, 559 U.S. 356, 359–60 (2010).

138. *Id.* at 365.

139. *Id.* at 365–66.

140. *Id.* at 369. The Court considered the alternative rule that constitutionally effective counsel need only refrain from providing misinformation (which defendant *Padilla* had received in this case) but nevertheless rejected that ruling in favor of an affirmative duty to provide notice. *Id.* at 369–70.

141. Margaret Colgate Love, *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 *How. L.J.* 753, 756 (2011); *see also* *Chaidez v. United States*, 133 S. Ct. 1103, 1107 (2013).

mandatory, and intimately linked to the criminal-law process.<sup>142</sup> Other collateral consequences are less clear, however; courts seem unsure how far *Padilla*'s "sea change" will go<sup>143</sup>—the subject of the last section of this article.

### III. RECOGNIZING "COLLATERAL CONSEQUENCES" AS DIRECT PUNISHMENT

Prior to 2010, both the definition of punishment and the collateral-consequences rule had become unstable. Both doctrines had been developing through tautology, circular logic, mis-citations of (and thus contradictions with) precedent, and above all, undefended assumptions that collateral consequences simply are not subject to judicial protection. With the advent of *Padilla v. Kentucky*, the gradual breakdown of these doctrines—or at least their radical change—is all but assured.

Because the results of the *Ward/Mendoza-Martinez* punitive versus regulatory/remedial test were so often contradictory to common sense and inconsistent with precedent, a string of Supreme Court cases in the late 1980s and early 1990s tried to redirect the punishment doctrine. In *United States v. Halper*, the Court recognized *Ward*'s unwise reliance on "civil" and "criminal" labels in assessing what constitutes punishment:

In making this assessment, the labels "criminal" and "civil" are not of paramount importance. It is commonly understood that civil proceedings may advance punitive as well as remedial goals, and, conversely, that both punitive and remedial goals may be served by criminal penalties. The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law.<sup>144</sup>

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142. *E.g.*, *Jackson v. United States*, 463 Fed. App'x 833, 835 (11th Cir. 2012); *People v. Fonville*, 804 N.W.2d 878 (Mich. Ct. App. 2011); *Taylor v. State*, 698 S.E.2d 384 (Ga. Ct. App. 2010). *But see* *People v. Gravino*, 928 N.E.2d 1048, 1055–56 (N.Y. 2010) (rejecting the idea that sex offender registration—and also conditions of probation—are direct enough to require notice under *Padilla*).

143. For instance, worker's compensation forfeiture, pension forfeiture, and parole ineligibility have all been held to still qualify as a collateral consequence of conviction. *United States v. Nicholson*, 676 F.3d 376 (4th Cir. 2012); *Webb v. State*, 334 S.W.3d 126 (Mo. 2011); *Commonwealth v. Abraham*, 619 U.S. 293, 351–53 (2012). Future civil liability, on the contrary, has been considered a direct consequence. *Wilson v. State*, 244 P.3d 535 (Alaska Ct. App. 2010).

144. *United States v. Halper*, 490 U.S. 435, 447–48 (1989). *Halper* was later abrogated by *Hudson*, but it was unanimous, except for a single concurring justice, worried that a case-by-case analysis might lead to unpredictable results. *Id.* at 453 (Kennedy, J., concurring); *see also* *Dep't of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 777–79 (1994); *Austin v. United States*, 509 U.S. 602, 610 (1993); Klein, *supra* note 87, at 695–98.

Then, *Halper* apparently overruled *Ward's* (and *Trop's*) reliance on statutory structure and intent, stating instead that the proper double jeopardy inquiry is on a case-by-case basis.<sup>145</sup> *Austin v. United States* likewise explicitly recognized that “sanctions frequently serve more than one purpose,” and that the proper inquiry is whether *any part of a statute* can be explained only as enacting punishment.<sup>146</sup>

Moreover, in *Halper*, *Austin*, and *Dep't of Revenue of Montana v. Kurth Ranch*, the Court implicitly recognized that the *Mendoza-Martinez* factors are incredibly difficult to apply in practice, and they often boil down to whether a judge “feels like” the sanction is punitive.<sup>147</sup> As such, these cases minimized *Mendoza-Martinez's* scope to only the question of process due in criminal cases rather than to the question of punishment for other constitutional protections.<sup>148</sup> Although the Court changed its collective mind, quickly overruling or minimizing these three cases, they show the unstable ground of the punishment doctrine before *Padilla*.<sup>149</sup>

Then, of course, *Padilla v. Kentucky* shattered any semblance of clarity in the direct–collateral distinction, and lower courts are still reeling. Although *Padilla* did not explicitly change the punishment doctrine, its logic does suggest the Court's thinking has shifted and provides precedent for that change. The ruling relied on the fact that “deportation is an integral part—indeed, sometimes the most impor-

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145. *Halper*, 490 U.S. at 447. In the instant case, a sanction of 220 times the government's loss simply did not further a remedial goal. *Id.* at 448–49.

146. *Austin*, 509 U.S. at 610; *see also Halper*, 490 U.S. at 447.

147. Indeed, in the Supreme Court, they have never once been applied unanimously by the justices in a case. *See Flemming v. Nestor*, 363 U.S. 603, 615 (1960). In *Ward*, for instance, the majority found that all but one of the factors weighed in favor of a civil determination, but the concurrence applied a different analysis and the dissent found that the *Mendoza-Martinez* factors weighed in the opposite direction. *United States v. Ward*, 448 U.S. 242, 249–70 (1980). Even two justices in *Mendoza-Martinez* found that the expatriation law was primarily regulatory in purpose despite the weight of other factors to the contrary. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 208–10 (1963); *see also Demleitner, supra* note 101, at 1632 (“Despite enormous effort to [distinguish between civil regulation and criminal punishment] in a principled manner, the Court has not been able to draw a clear line.”).

148. *Kurth Ranch*, 511 U.S. at 804–05; *Austin*, 509 U.S. at 622 n.6; *Halper*, 490 U.S. at 447; *see also* Matthew Costigan, *Go Directly to Jail, Do Not Pass Go, Do Not Keep House*, 87 J. CRIM. L. CRIMINOLOGY 719, 724–29 (1997).

149. *United States v. Ursery*, 518 U.S. 267, 282–87 (1996) (narrowing *Halper* to apply only to civil fines, ruling that *Kurth Ranch* applied only to tax penalties, and limiting *Austin* to excessive fines cases, not other areas of constitutional criminal law); *Hudson v. United States*, 522 U.S. 93, 95–96 (1997) (officially disavowing *Halper*). *Hudson* even went so far as to inaccurately assert, “[o]ur opinion in *United States v. Halper* marked the first time we applied the Double Jeopardy Clause to a sanction without first determining that it was criminal in nature,” even though almost all of the earlier cases on punishment explicitly rejected the civil/criminal divide as determinative of constitutional protections. *Id.* at 100.

tant part—of the *penalty* that may be imposed on noncitizen defendants who plead guilty to specified crimes.”<sup>150</sup> In fact, the *Padilla* opinion recognized multiple times that deportation is a “severe ‘penalty.’”<sup>151</sup> That a law is notably severe and integral to penal repercussions is specifically relevant to the second prong of the *Ward/Mendoza-Martinez* test: it shows both a punitive purpose and potential excessiveness compared to any non-punitive goals. Moreover, though the opinion still does not notice that “penalty” and “punishment” are direct synonyms, this language of *Padilla* does clearly indicate how linked deportation is to criminal punishment.

If deportation has so many qualities of direct punishment, the change in collateral-consequences doctrine “has no logical stopping-point”; countless collateral consequences share the same qualities to at least some degree.<sup>152</sup> Thus, *Padilla* likely heralds both the end of the collateral-consequences rule and a return to a more sensible definition of punishment. According to both commonsense and philosophical definitions, punishment is “a deprivation or harm by an authority [*e.g.*, courts or legislatures] in response to some perceived transgression or wrongdoing.”<sup>153</sup> *Cummings v. Missouri* and *Ex parte Garland* effectively adopted this exact definition, assuming that (*a*) a deprivation or suspension that was (*b*) in response to past conduct is

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150. *Padilla v. Kentucky*, 559 U.S. 356, 364 (2010) (emphasis added).

151. *Id.* at 365. It did, however, assert that deportation was not “in a strict sense, a *criminal* sanction.” *Id.* (emphasis added).

152. *Id.* at 390 (Scalia, J., dissenting) (“[W]hat would come to be known as the ‘*Padilla* warning’ . . . cannot be limited to [particular] consequences except by judicial caprice.”). The concurring opinion likewise recognized that numerous other collateral consequences besides deportation are “serious.” *Id.* at 376 (Alito, J., concurring in the judgment); see also Kaiser, *supra* note 3, at 732 (stating that the majority of collateral consequences are automatic as a result of conviction, and many are quite severe).

There is also a clear reason why there *should* be no stopping point to *Padilla*’s logic: “if defense counsel must provide advice regarding only one of the many collateral consequences of a criminal conviction, many defendants are likely to be misled” because the advice implies other collateral consequences do not exist. *Padilla*, 559 U.S. at 381–82 (Alito, J., concurring in the judgment).

153. Kaiser, *supra* note 3, at 729–34. This definition corresponds neatly with the important factors that define punishment according to the great legal philosopher H.L.A. Hart, who considered “punishment” to involve five elements:

- (i) It must involve pain or other consequences normally considered unpleasant.
- (ii) It must be for an offense against legal rule.
- (iii) It must be of an actual or supposed offender for his offense.
- (iv) It must be intentionally administered by human beings other than the offender.
- (v) It must be imposed and administered by an authority constituted by a legal system against which the offense is committed.

H.L.A. Hart, *Prolegomenon to the Principles of Punishment*, in PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 1, 4–5 (2008).

punishment when enacted by law,<sup>154</sup> and their definition was overlooked but *never overruled* by later courts. Collateral consequences of conviction simply *are* direct punishments according to virtually every sensible definition.<sup>155</sup>

This sort of logical change in judicial doctrine, however, must come in the face of the fears that many judges and other commentators have of recognizing collateral consequences as direct punishment. *Hudson* outright admitted the Court's approach to collateral consequences is not based on true definitional logic but rather on *prima facie* apprehensions of coming to any other conclusions: "If a sanction must be 'solely' remedial . . . to avoid implicating the Double Jeopardy Clause, then no civil penalties are beyond the scope of the Clause."<sup>156</sup> In response, the Court simply assumed in circular fashion that plenty of non-remedial penalties must be exempt from constitutional protection, and then found a *post hoc* justification.

These fears and assumptions suggest that both the *Ward/Mendoza-Martinez* test and the collateral-consequence rule are based not so much on formalistic distinctions as they are on oft-unspoken practical concerns. The most prominent practical concern behind the collateral-consequence rule is involves the appropriate professional standards of knowledge for judges and lawyers. As Justice Alito stated in *Padilla*, "Criminal defense attorneys . . . are not expected to possess—and very often do not possess—expertise in other areas of the law, and it is unrealistic to expect them to provide expert advice on matters that lie outside their area of training and experience."<sup>157</sup> When first adopting the collateral-consequences rule, the Third Cir-

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154. *Cummings v. Missouri*, 71 U.S. 277, 322 (1866); *Ex parte Garland*, 71 U.S. 333, 381 (1866).

155. For this reason, a number of commentators have even rejected the term "collateral consequences of criminal convictions" because, despite its alliterative attractiveness, it is simply inaccurate. *E.g.*, Unif. Collateral Consequences of Conviction Act, 2 (National Conference of Commissioners on Uniform State Laws 2011) [hereinafter UCCCA] (preferring the terminology of collateral "sanctions" and "disqualifications" because the only distinction between collateral consequences and direct punishment is the absence of the former from the formally recognized sentence of the court); Ewald, *supra* note 4, at 97–99 (arguing that collateral consequences are typically punitive in purpose, effect, public meaning, or mode of administration, but that they simply are not the same kind of *expressive* punishment that, say, imprisonment is); Kaiser, *supra* note 3, at 722–29 (using the term "hidden sentence" because it more accurately describes collateral consequences as punishment that is overlooked and marginalized compared to the formally recognized sentence); JEREMY TRAVIS, BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY 64–65 (2005) (using "invisible punishment" for similar reasons).

156. *Hudson v. United States*, 522 U.S. 93, 102 (1997)

157. *Padilla v. Kentucky*, 559 U.S. 356, 376 (2010) (Alito, J., concurring in the judgment). The dissent shared similar concerns. *Id.* at 390 (Scalia, J., dissenting).

cuit likewise worried that the vast number of collateral consequences laws spread so unsystematically throughout legal codes (with unpredictable outcomes) means that any requirement to warn the defendant of collateral consequences “would impose upon the judge an impractical burden out of all proportion to the essentials of fair and just administration of the criminal laws.”<sup>158</sup>

Even assuming *arguendo* that concerns about the burden of understanding all collateral consequences may have once been valid, they are no longer. Many professional standards recommended before *Padilla* that attorneys and judges ensure proper information about collateral consequences be given to defendants,<sup>159</sup> and as such, a number of resources now exist for understanding collateral consequences<sup>160</sup>—at least enough to fulfill *Padilla*’s standard of at least giving notice of potential penalties when their certainty is unclear. Moreover, the National Inventory of the Collateral Consequences of Conviction (NICCC) is complete and available for free online reference.<sup>161</sup> This database was collected by the ABA Criminal Justice Section in conjunction with the National Institute of Justice, and is a complete and current reference of all collateral consequences law in every jurisdiction, sortable by penalty type, offense type, and other categories. With these extensive resources, it is now a remarkably small burden for counsel and court to understand and relay basic information on collateral consequences. Options for simple notification include pamphlets, access to a website like the NICCC, or a simple oral summary that would take no more than two minutes to communicate.

A similar fear drives the strange logic of the *Ward/Mendoza-Martinez* formulation of criminal punishment: fear that using a more logical definition would prevent the legislature from pursuing important

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158. *United States v. Cariola*, 323 F.2d 180, 186 (3d Cir. 1963); *see also* *Fruchtman v. Kenton*, 531 F.2d 946, 949 (9th Cir. 1976) (“The collateral consequences flowing from a plea of guilty are so manifold that any rule requiring a district judge to advise a defendant of such a consequence as that here involved would impose an unmanageable burden on the trial judge and ‘only sow the seeds for later collateral attack.’”).

159. ABA Standards for Criminal Justice: Collateral Sanctions and Discretionary Disqualification of Convicted Persons (American Bar Association 2011) [hereinafter ABA Standards].

160. Both the ABA Standards and the UCCCA encouraged states to collect and reference collateral consequences law in a single chapter of code. *Id.* at Standard 19-2.1; UCCCA § 4. As such, Ohio and North Carolina, at least, are already in the process of doing so. *See* *Love*, *supra* note 4, at 121 n.73. There are also now a good number of useful reviews of collateral consequences. *See* cases cited *supra* note 4.

161. *National Inventory of the Collateral Consequences of Conviction*, <http://www.abacollateralconsequences.org/> (last visited June 18, 2014).

regulatory goals that are necessary to protect the public safety. The Supreme Court's obsession with validating the "non-punitive" purpose of protecting public safety—cited in virtually every single case following *Trop* in 1958—indicates its underlying concern that applying constitutional protections will frustrate the legislatures' attempts to safeguard the public from the "dangerous" or "immoral" people. This perspective was neatly summed by *Hawker's* statement that "[i]n a certain sense such a rule is arbitrary" because past criminal acts is a poor proxy for both bad character and future dangerousness, "but it is within the power of a legislature to prescribe a rule of general application . . ." <sup>162</sup>

This fear, too, is unfounded. In fact, it has been for the punishment doctrine's entire history. *Ex post facto* punishments, for instance, have never been necessary to ensure public safety, and such an argument would have been blatantly offensive to the framers of the United States Constitution. In every case brought before the Supreme Court, a non-punitive law was not only readily available but also frequently would have been a *better* alternative. For example, the "need" to regulate the medical profession addressed in *Hawker* could have been better served with a statute that imposed a flexible, "good character" requirement—rather than using a prior conviction as a poor proxy for bad character.<sup>163</sup> Even indefinite incarceration of dangerous sex offenders was never necessary for public safety, both because the class of sex offenders is actually a terrible proxy for those likely to commit sex crimes<sup>164</sup> and because certain enforcement of the existing penal law is a ready, more effective alternative. In other words, *ex post facto* punishments are *never* necessary because a *proper, forward-looking* penal law will always be more productive. And they have the bonus of being just and constitutional.

Likewise, neither multiple punishments in violation of double jeopardy principles nor legislative punishment in violation of the bills

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162. *Hawker v. New York*, 170 U.S. 189, 197 (1898).

163. Even the *Hawker* Court recognized that past conviction is not a good approximation for bad character, much less future criminal acts. *Id.* This author agrees with the *Hawker* majority that it may not be the place of the courts to determine whether legislatures have provided the best measure of character, dangerousness, etc. *Id.* In fact, it is this precise logic that would counsel *not* worrying about fears of dangerousness and the other regulatory concerns of a law. The question is simply whether the regulatory purpose is *properly pursued within constitutional principles*. *Ex parte Garland*, 71 U.S. 333, 380 (1866).

164. Contrary to popular belief, sex offenders actually have the *lowest* re-offense rates of all categories of criminal offenders. *E.g.*, PATRICK A. LANGAN & DAVID J. LEVIN, BUREAU OF JUSTICE STATISTICS, NCJ 193427, RECIDIVISM OF PRISONERS RELEASED IN 1994 1 (2002).

of attainder prohibition were ever necessary to protect public safety. Contrary to assumption, it would be quite a simple task to meaningfully incorporate collateral consequences into judicial sentencing procedures in a meaningful way, making it clear that all of those penalties are part of the single punishment. Providing notice before pleadings and at sentencing, consistent with the death of the collateral-consequences rule, would merely be the simplest way of doing so—though other options, such as allowing courts full or limited discretion in imposing or exempting defendants from these penalties, may be even more appealing to some.<sup>165</sup>

A third fear that tends to impede logical change in both doctrines is that it is too late to reverse these doctrines without causing disaster: “To hold that no valid sentence of conviction can be entered under a plea of guilty unless the defendant is first apprised of all collateral legal consequences of the conviction would result in a mass exodus from the federal penitentiaries.”<sup>166</sup> As the Supreme Court found in *Chaidez v. United States*, this fear is patently untrue regarding the collateral-consequences rule, since a change to that law like *Padilla’s*, which announced a “new rule of criminal procedure,” is never applied retroactively to provide new grounds for appeal.<sup>167</sup> A change in the definition of punishment could also be considered a procedural change for purposes of double jeopardy if the courts began to use the sentencing procedures suggested in the prior paragraph.

On the other hand, this fear may be accurate to the extent that a number of ex-offenders may be exempt to “civil penalties” in so far as those sanctions constitute *ex post facto* or cruel and unusual punishment. As this section has already argued, however, there are myriad ways of legitimately achieving public interest aims through forward-looking punishment and truly non-punitive regulations. We must not allow legislatures to circumvent the constitutional safeguards that were foundational to American rule of law simply because it is more convenient to enact punishment under another name.<sup>168</sup> Bills of attainder and *ex post facto* laws are simply “contrary to the first principles of the social compact, and to every principle of sound legislation.”<sup>169</sup>

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165. Kaiser, *supra* note 3, at 756–62.

166. *United States v. Cariola*, 323 F.2d 180, 186 (3d Cir. 1963).

167. *Chaidez*, 133 S. Ct. at 1107. *See also* Chin & Holmes, Jr., *supra* note 111, at 736–37.

168. *See* Demleitner, *supra* note 101, at 1638 (allowing *ex post facto* civil commitment for sex offenders undermines the integrity of the criminal law).

169. THE FEDERALIST NO. 44, at 282 (James Madison) (Clinton Rossiter ed., 1961).

Absent these instinctive fears, then, the formalistic distinction between direct punishment and collateral consequences loses any real justification. The collateral-consequences rule is apparently collapsing in favor of full notice to criminal defendants of the legal consequences of guilty pleas. The courts' punishment definition has become untenable and likely to change back to the more sensible *Cummings/Garland* one.<sup>170</sup> In other words, *Padilla v. Kentucky* shows that contemporary courts are simply coming to realize what the prevailing argument in *Ex Parte Garland* blatantly recognized in the mid-nineteenth century:

Our statutes, indeed, are full of provisions showing that, in the judgment of Congress, similar consequences [to disbarment from the practice of law] are *punishments to be inflicted for crime*. Disfranchisement of the privilege of holding offices of honor, trust, or profit, is imposed as a punishment upon those who are convicted of bribery, forgery, and many other offences. And how crushing is such punishment! To be excluded from the public service makes the man virtually an exile in his native land; an alien in his own country; and whilst subjecting him to all the obligations of the Constitution, holds him to strict allegiance and denies him some of its most important advantages. Can the imagination of man conceive a punishment greater than this?<sup>171</sup>

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170. Neither *Cummings* nor *Garland* have ever been overruled, and the proper formulation of their rule has been the basis for some subsequent cases. It would thus be a more simple matter for the courts to "reinterpret" *Ward*, *Mendoza-Martinez*, and other cases so that they are merely (incorrect and tortuous) restatements of the true definition.

171. *Ex parte Garland*, 71 U.S. 333, 366-67 (1866) (reply brief for petitioner) (emphasis added).

# From Global to Local: Domestic Human Rights Norms in Theory and Practice

THALIA GONZÁLEZ\*

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*In light of the ever-growing dominance of human rights as a normative framework linking conceptions of person with social and political action, the exploration of new theoretical approaches for understanding the nuances and ambiguities of domestic human rights is increasingly important not only to speak more innovatively and effectively about human rights, but also to better understand the future of human rights compliance and implementation. This Article contends that the multidimensional nature of human rights in the United States requires new analysis of the legal, normative, and empirical accounts of norm internationalization. It contributes to the scholarly literature by arguing for a more robust exploration of the conditions under which human rights are expressed, and implemented, and through which compliance occurs within the United States. Presently, domestic human rights scholarship is fragmented into accounts of administrative powers and questions of federalism, the translation of norms from global actors, as well as descriptive ac-*

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counts of specific human rights campaigns. This leaves open many questions regarding the complex reality of human rights practice, implementation, and compliance at the local, subnational, and national levels within the United States. This also fails to address the increasingly dialogic interactions between each of these levels to influence behavior. While these accounts are incredibly important independently, they do not create an overarching framework, grounded in the local, as opposed to international, for understanding the experience of human rights norm implementation. First-generation constructivist theories have proven indispensable for understanding how global actors practice human rights, but have failed to fully capture the key roles that state and local governments, local politics, and activists play in internalizing human rights norms within the United States. In considering different theories of norm socialization, this Article posits a new approach to understanding normative change and the promotion of human rights in the United States. It is not merely a call for how scholars should study human rights, but instead presents the framework for future scholarship that seeks to illuminate both the architecture of domestic human rights and the processes of internalization of international norms. It aims to move the discourse regarding norm internalization and domestic human rights activities further, by arguing that the scholarship would greatly benefit from new studies that embrace on-the-ground specificity to better understand not just how formal international law is expressed, but how human rights ideas translate themselves into behavior, assumptions, practices, and processes at subnational and national levels. Such expansion in the study of domestic human rights is increasingly important, given the heightened scholarly attention on states as sites of experimentation and innovation. This new research will challenge general theoretical assumptions about diffusion of human rights norms, and provide a means to clarify, convert, and articulate abstract norms into concrete domestic laws and policies.

## INTRODUCTION

Human rights can be understood as a broad normative category, which at one end of the spectrum represents the body of international law emerging from the 1948 Universal Declaration of Human Rights.<sup>1</sup>

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1. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948). The universality, indivisibility, and interdependence of human rights proclaimed by the Universal Declaration have been used in the defense and advancement of human rights of people of all nations. As Crooms argued, human rights “operates as a ‘metanarrative’ that articulates ‘a system of values which provides a moral underpinning to ideas about how social mores should be exercised’ both within and between nations.” Lisa A. Crooms, *To Establish My Legitimate*

This view is grounded in a legal understanding of human rights and formal regimes. At the other end is a more expansive view of human rights that moves away from international legal instruments and texts to consider the ways in which human rights concepts are expressed by individuals, groups, and organizations. Locally and globally, this latter view has presented a new space for groundbreaking inquiry. As a rich body of scholarship has revealed, there are many complexities, contradictions, and ambiguities in how individuals, groups, and organizations mobilize human rights in a variety of local settings, often differently than imagined by human rights law itself.<sup>2</sup> Such diversity suggests an adaptability of human rights not simply as a coherent legal and ethical framework, but as an important context for the development of new ideas to challenge dominant structures of power and to reshape the experience of marginalized individuals and communities.<sup>3</sup>

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*Name Inside the Consciousness of Strangers: Critical Race Praxis, Progressive Women-of-Color Theorizing, and Human Rights*, 46 HOW. L.J. 229, 237 (2003).

2. Carol Anderson, *A "Hollow Mockery": African Americans, White Supremacy, and the Development of Human Rights in the United States*, in BRINGING HUMAN RIGHTS HOME, A HISTORY OF HUMAN RIGHTS IN THE UNITED STATES 68, 68 (Cynthia Soohoo et al. eds., 2009); Risa E. Kaufman, *States and Local Commissions as Sites for Domestic Human Rights Implementation*, in HUMAN RIGHTS IN THE UNITED STATES BEYOND EXCEPTIONALISM 89, 90 (Shareen Hertel & Kathryn Libal eds., 2011) [hereinafter *State and Local Commissions*]; Dorothy Q. Thomas, *Against American Supremacy: Rebuilding Human Rights Culture in the United States*, in BRINGING HUMAN RIGHTS HOME, A HISTORY OF HUMAN RIGHTS IN THE UNITED STATES 147, 147 (Cynthia Soohoo et al. eds., 2009); Gaylynn Burroughs, *More Than an Incidental Effect of Foreign Affairs: Implementation of Human Rights by State and Local Governments*, 30 N.Y.U. REV. L. & SOC. CHANGE 411, 416–18 (2006); Scott L. Cummings, *The Internationalization of Public Interest Law*, 57 DUKE L.J. 891, 895 (2008); Risa E. Kaufman, *Human Rights in the United States: Reclaiming the History and Ensuring the Future*, 40 COLUM. HUM. RTS. L. REV. 149, 149, 155 (2008) (book review) [hereinafter *Human Rights in the United States*]; Margaret E. McGuinness, *Medellin, Norm Portals, and the Horizontal Integration of International Human Rights*, 82 NOTRE DAME L. REV. 755, 760–67 (2006); Sally Engle Merry, *Transnational Human Rights and Local Activism: Mapping the Middle*, 108 AM. ANTHROPOLOGIST 38, 39 (2006) [hereinafter *Transnational Human Rights and Local Activism*]; Sally Engle Merry et al., *Law From Below: Women's Human Rights and Social Movements in New York City*, 44 LAW & SOC'Y REV. 101, 103–06 (2010) [hereinafter *Law From Below*]; Catherine Powell, *The Role of Transnational Norm Entrepreneurs in the U.S. "War on Terrorism"*, 5 THEORETICAL INQUIRIES L. 47, 51–53 (2004) [hereinafter *The Role of Transnational Norm Entrepreneurs in the U.S.*]; Cynthia Soohoo & Suzanne Stolz, *Bringing Theories of Human Rights Change Home*, 77 FORDHAM L. REV. 459, 461–71 (2008) [hereinafter *Bringing Theories of Human Rights Change Home*]; Cynthia Soohoo, *Close to Home: Social Justice Activism and Human Rights*, 40 COLUM. HUM. RTS. L. REV. 7, 7–8 (2008) [hereinafter *Close to Home*]; Daniel H. Wolf, *An Extraordinary Facilitator: The Voting Rights Act and U.S. Adherence to International Human Rights Treaty Obligations*, 31 U. PA. J. INT'L L. 1149, 1161–63 (2010). See generally JO BECKER, *CAMPAIGNS FOR JUSTICE: HUMAN RIGHTS ADVOCACY IN PRACTICE* (2013).

3. While human rights expressions can vary in significant ways, they emphasize catalyzing and strengthening the capacity of individuals. Thus, a broader definition of human rights that captures a rich diversity of practices becomes a communicative act of rights consciousness that recognizes the pluralism of our world and allows for a normative discourse of what should be.

Thus, to study human rights is to examine the communication channels and institutional structures that mediate global ideas and local experiences.<sup>4</sup> This is particularly true as the “idea of human rights is embedded in, shapes, and is shaped by the practice of human rights in law, politics, and policymaking.”<sup>5</sup> Moreover, in light of the ever-growing dominance of human rights as a normative framework linking conceptions of person with social and political action, the exploration of new theoretical approaches for understanding the nuances and ambiguities of human rights practice are increasingly important not only to speak more innovatively and effectively about human rights, but also to act with a true reconception of liberty and equality.

Presently, domestic human rights scholarship is fragmented into accounts of administrative powers and questions of federalism, the translation of norms from global actors, and descriptive accounts of specific campaigns. This fragmentation leaves open many questions regarding the complex reality of human rights practice, implementation, and compliance at the local, subnational, and national levels within the United States. It also fails to address the increasingly dialogic interactions between each of these levels to influence behavior. While these accounts are incredibly important independently, they do not create an overarching framework, grounded in the local, as opposed to international, for understanding the experience of human rights norm implementation.

As domestic human rights activities have increased, the literature examining localized practices and outcomes has grown. Scholars have considered state and local human rights activity as a portal for norm internalization subnationally,<sup>6</sup> and as a channel for contributing to the evolution of international norms globally by giving human rights a

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This normative position reflects human rights from a more political context which confronting structures of power and privilege.

4. This Article does not adopt a hierarchical model of human rights norm implementation either by “top down” influence of international elite actors translating rights to local communities or the implementation of human rights by a national government over a subnational government. Instead it speaks broadly regarding human rights practice, in particular a domestic identity of human rights, which centers on creating a framework of commonality grounded in the local, as opposed to, the global experiences and injustice.

5. Mark Goodale, *Human Rights After the Post-Cold War*, in HUMAN RIGHTS AT THE CROSSROADS 1, 9 (Mark Goodale ed., 2013).

6. Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564, 1626 (2006) [hereinafter *Law's Migration*] (discussing multiple ports of entry of international law domestically).

“wider voice.”<sup>7</sup> Resnik, for example, has written extensively on the diverse roles that state and local actors play in domestic integration of international human rights norms.<sup>8</sup> Adopting the term “translocal institutionalism,” she argues that organizations such as the National League of Cities, the United States Conference of Mayors, the National Conference of State Legislatures, the National Governors’ Association, the National Commissioners on Uniform State Laws, and the National Conference of Chief Justices of State Courts “are conduits for border crossings, both state-to-state and internationally.”<sup>9</sup> She notes that translocal activities extend beyond the purposeful echoing of state constitutions with international texts<sup>10</sup> or state law as the ground from which to launch a “broad embrace of transnational norms and treaty promises.”<sup>11</sup> Instead, they develop customary international law into collective actions by state and local actors challenging and influencing the characterization of international law as countermajoritarian.<sup>12</sup> Consider the numerous examples documented in Davis, Iniguez-Lopez and Thukral’s 2014 report on the use of international human rights in state court litigation.<sup>13</sup> As the authors detailed, the range of cases with arguments based on international law has increased since 2011, and now includes environmental claims, tort cases, and guardianship matters.<sup>14</sup> For example, in *Toland v. Futagi*, the Maryland Court of Appeals “quoted extensively from the trial

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7. Robert B. Ahdieh, *Foreign Affairs, International Law, and the New Federalism: Lessons from Coordination*, 73 MO. L. REV. 1185, 1209 (2008) (arguing that increased subnational engagement in human rights as a way for state and local government to “involve themselves actively in its design and evolution”).

8. *Law’s Migration*, *supra* note 6, at 1626; Judith Resnik, *Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism*, 57 EMORY L.J. 31, 35 (2007) [hereinafter *Foreign as Domestic Affairs: Rethinking Horizontal Federalism*] (analyzing two case studies of translocal organizations serve as importers and exporters of human rights ideas and as such the “and that the categories of ‘local’ and ‘national’ and ‘international’ are mutable rather than fixed”); Judith Resnik, Joshua Civin, & Joseph Frueh, *Ratifying Kyoto at the Local Level: Sovereignism, Federalism, and Translocal Organizations of Government Actors (TOGAs)*, 50 ARIZ. L. REV. 709, 709–10 (2008) [hereinafter *Ratifying Kyoto at the Local Level*] (examining how translocal organizations of government actors shape law and policy in ways that criss-cross a two-dimensional grid and undercut claims of the exclusivity of certain issues as either “national” or “local”).

9. *Foreign as Domestic Affairs: Rethinking Horizontal Federalism*, *supra* note 8, at 44.

10. *Law’s Migration*, *supra* note 6, at 1627–29.

11. *Id.*

12. *Id.* at 1647–49, 1656.

13. See generally MARTHA F. DAVIS, DIEGO INIGUEZ-LOPEZ & JUHU THUKRAL, THE OPPORTUNITY AGENDA, HUMAN RIGHTS IN STATE COURTS 2014 (2014), [https://opportunityagenda.org/files/field\\_file/2014.2.06.HumanRightsinStateCourts.pdf](https://opportunityagenda.org/files/field_file/2014.2.06.HumanRightsinStateCourts.pdf).

14. *Id.* at 3 (documenting the use of international human rights in state courts in forty-six states).

court opinion, which looked to the Universal Declaration of Human Rights' recognition of the right to 'family life' as a marker of fundamental fairness."<sup>15</sup> Such rise in state court litigation involving international law clearly exemplifies the deepening of human rights norms within the United States. Similarly, Kaufman has demonstrated how multiple state and local commissions operate as sites for domestic human rights implementation.<sup>16</sup> From a more grassroots perspective, Davis has illustrated how local human rights activities present "laboratories of foreign affairs, testing policies before initiating full-blown national programs."<sup>17</sup>

This Article seeks to move the discourse regarding norm internalization and domestic human rights activities one step further, by arguing that the scholarship would greatly benefit from new studies that embrace on-the-ground specificity in order to better understand not just how formal international law is expressed, but how human rights ideas translate themselves into behavior, assumptions, practices, and processes at subnational and national levels.<sup>18</sup> Such expansion in the study of domestic human rights is becoming increasingly important given the heightened scholarly attention on states as sites of experimentation and innovation. For example, no longer a theoretical typology, Powell's articulation of dialogical federalism<sup>19</sup> has gained renewed interest among scholars concerned with deepening the legitimacy of international human rights laws and norms within the United States.<sup>20</sup> With a few exceptions, this scholarship has taken a more pre-

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15. *Id.* at 4–5 (citing *Toland v. Futagi*, 40 A.3d 1051 (Md. 2012)).

16. *State and Local Commissions*, *supra* note 2, at 89 (noting that "human rights treaties are intended to be implemented at the local level with a great deal of democratic input").

17. Martha F. Davis, *Thinking Globally, Acting Locally: States, Municipalities, and International Human Rights* in *BRINGING HUMAN RIGHTS HOME, A HISTORY OF HUMAN RIGHTS IN THE UNITED STATES* 258, 258 (Cynthia Soohoo et al. eds., 2008).

18. Detailed analysis of this nature is currently absent from the literature studying domestic human rights, yet as Merry has argued, "[t]he impact of human rights law, as does all law, depends on changing local consciousness of rights and relationships. In order for human rights ideas to be effective, they need to be translated into local terms and situated within local contexts of power and meaning." Sally Engle Merry, *Human Rights and Transnational Culture: Regulating Gender Violence Through Global Law*, 44 *OSGOODE HALL L.J.* 53, 55 (2006) [hereinafter *Human Rights and Transnational Culture*].

19. Catherine Powell, *Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States*, 150 *U. PA. L. REV.* 245, 249–51 (2001) [hereinafter *Dialogic Federalism*].

20. Judith Resnik, *Federalism(s)' Forms and Norms: Contesting Rights De-Essentializing Jurisdictional Divides, and Temporalizing Accommodations*, in *FEDERALISMS AND SUBSIDIARITY NOMOS LV 363* (James E. Fleming & Jacob T. Levy eds., 2014) [hereinafter *Federalism(s)' Forms and Norms*]. Robert Ahdieh has argued a reconception of the dynamics of subnational, national, and international coordination. Ahdieh, *supra* note 7, at 1188. Johanna Kalb has argued for a reframing treaty implementation through a "dynamic" federalist model. Johanna Kalb, *Dy-*

scriptive approach when considering the respective roles of the federal and state governments or identifying jurisprudential gaps for state innovation. Yet, the manner in which to *study* the range of processes, norms, and modalities expressed in the domestic human rights context remains under-theorized. The absence of this discussion in the scholarship represents a missed opportunity.

By examining the multiplicity of forces at work within the United States, we can more effectively answer the following questions: Who are effective human rights change agents? What are the best institutions or actors for promoting social change? Are certain actors helpful or counterproductive to achieving results? What are the pathways for meaningful social change? Can human rights increase democratic participation through the use of local knowledge? Are connections between particular actors important? How might state and local initiatives more effectively overcome political resistance? How can a dialogic approach deepen the democratic legitimacy of international human rights? Is the openness within the practice of human rights essential to the development of different ideas of human rights, which can be expressed politically and institutionally, precisely because their legitimacy does not depend on assumptions or aspirations of universality?

In considering different theories of norm socialization, this Article posits an innovative approach to understanding normative change and the promotion of human rights in the United States through Goodman and Jinks's theory of acculturation.<sup>21</sup> As such, this Article is a unique contribution to the literature by representing a different

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*Dynamic Federalism in Human Rights Treaty Implementation*, 84 TUL. L. REV. 1025, 1055, 1064 (2010) [hereinafter *Dynamic Federalism in Human Rights Treaty Implementation*]. Risa Kaufman has offered a conceptual framework to explore the role of the federal government, specifically the executive branch in facilitating treaty implementation. She argues that this framework expands Powell's understanding of dialogic federalism. Risa E. Kaufman, "By Some Other Means": *Considering the Executive's Role in Fostering Subnational Human Rights Compliance*, 33 CARDOZO L. REV. 1971, 1978–80 (2012) [hereinafter *By Some Other Means*]. Judith Resnik has proposed a "noncategorical" approach to federalism as a way of reflecting the range of federal-state jurisdictional arrangements that are possible. Judith Resnik, *Afterword: Federalism's Options*, 14 YALE L. & POL'Y REV. 465, 474 (1996) [hereinafter *Afterword: Federalism's Options*]. Robert Schapiro has characterized an alternative concept of federalism that focuses on the interaction of state and national governments as "interactive" or "polyphonic." Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 252 (2005) [hereinafter *Toward a Theory of Interactive Federalism*]; Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 CAL. L. REV. 1409, 1416 (1999) [hereinafter *Polyphonic Federalism*].

21. RYAN GOODMAN & DEREK JINKS, *SOCIALIZING STATES: PROMOTING HUMAN RIGHTS THROUGH INTERNATIONAL LAW* 25 (2013).

response to the study of the social and conceptual complexities of human rights domestically than expressed in prior scholarship. My advancement of Goodman and Jinks's theoretical modality to examine human rights within the United States is intentional, and seeks at the very least, to present a new source of analytical guidance for those interested in the differences between human rights practices domestically and globally. Grounded in sociology and social psychology to understand state behavior, Goodman and Jinks have added a contemporary dimension to human rights and international analysis, which may more effectively "account for the pervasive effects of culture, social structure, and human cognition"<sup>22</sup> present in human rights implementation in the United States than earlier theoretical accounts.

Instead of being predicated on a narrow view of human rights, Goodman and Jinks's work seeks to promote interdisciplinary exploration of human rights practice and international law, focusing on understanding the diverse phenomenon that influence global and local institutions, governmental and non-governmental actors, and human rights advocacy strategies and campaigns. In many ways, Goodman and Jinks' contribution to the study of human rights, domestically and internationally, is to draw attention to the power of *ideas* in producing or hindering social change. In the context of the United States, this focus alleviates prior scholarly concerns over the tension of applying primarily internationalist norm theories to unique domestic conditions.<sup>23</sup> While a broad application of acculturation to human rights activities in the United States is theoretically interesting, what makes the application of Goodman and Jinks' framework more compelling is that a preliminary exploration of domestic human rights activities and expression reveals the presence of multiple examples of micro- and macro-level processes that define acculturation. This merits detailed consideration.

While there has been resistance to social science methodologies in previous scholarship, there remains little reason to exclude valuable interdisciplinary methodologies to better understand how states and localities have become increasingly important in domestic human rights expression, integration, implementation, and compliance. Given that acculturation is an integrated model of social influence with a focus on parsing out different micro- and macro-processes that

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22. *Id.* at 22.

23. *Bringing Theories of Human Rights Change Home*, *supra* note 2, at 474.

influence normative change, it balances the concerns between domestic and international theories of change.

In arguing for the need to test Goodman and Jinks' research in specific domestic contexts, this Article does not seek to reexamine the federal-state relations vis-à-vis international human rights law.<sup>24</sup> It will also leave to the side arguments based on the Supreme Court's rationale for limiting presidential authority to compel state compliance with treaties, and the various doctrinal, pragmatic, and functional concerns expressed by scholars pertaining to the appropriate roles of the federal and state governments.<sup>25</sup> This Article intentionally leaves open questions for future research of how changing domestic norms may influence the generation of larger and smaller political units in the context of treaty implementation.<sup>26</sup> It also leaves open the possibility of empirical research testing Powell's dialogic federalism under the Obama Administration.<sup>27</sup>

Instead, it focuses on rethinking the study of domestic human rights activities in order to initiate a new dialogue among academics and advocates to find commonalities, linkages, and contestations regarding the theoretical and practical dimensions that promote human rights. Such discourse can guide innovative exploration of how human

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24. See Ahdieh, *supra* note 7, at 1190 (discussing sub-national engagement in international human rights laws as characterized by concurrent federal and state activity); Curtis Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 449–50 (1998) (discussing the new treaty-making forms that addresses issues regulated by states); *Dialogic Federalism*, *supra* note 19, at 265, 270–72; Catherine Powell, *Lifting Our Veil of Ignorance: Culture, Constitutionalism, and Women's Human Rights in Post September 11 America*, 57 U.C. HASTINGS L.J. 331, 380–83 (2005) [hereinafter *Lifting Our Veil of Ignorance*]; *Law's Migration*, *supra* note 6, at 1594, 1623 (noting that interaction between international, national, and local bodies changes American law and the federal-state hierarchal relationship); *Ratifying Kyoto at the Local Level*, *supra* note 8, at 711 (stating that subnational activities involving international law undermine categorizations of subject-matter competencies of local and national government); Mark Tushnet, *Federalism and International Human Rights in the New Constitutional Order*, 47 WAYNE L. REV. 841, 863–65, 868–69 (2002).

25. See *By Some Other Means*, *supra* note 20, at 1987–98 (discussing in Part A the doctrinal landscape of international and federalism with respect to the executive authority).

26. See *Dynamic Federalism in Human Rights Treaty Implementation*, *supra* note 20, at 1061; Johanna Kalb, *Human Rights Treaties in State Courts: The International Prospects of State Constitutionalism After Medellín*, 115 PENN ST. L. REV. 1051, 1060, 1064 (2011); Johanna Kalb, *The Persistence of Dualism in Human Rights Treaty Implementation*, 30 YALE L. & POL'Y REV. 71, 75 (2011) [hereinafter *The Persistence of Dualism in Human Rights Treaty Implementation*]; *By Some Other Means*, *supra* note 20, at 1979.

27. See *By Some Other Means*, *supra* note 20, at 1983–85 (noting the increased engagement between the Obama Administration and state and local governments regarding human rights implementation); see also Jonathan Todres, *At the Crossroads: Children's Rights and the U.S. Government*, in HUMAN RIGHTS IN THE UNITED STATES BEYOND EXCEPTIONALISM 132, 138 (Shareen Hertel & Kathryn Lial, eds., 2011) (discussing new opportunities for human rights advocacy under the Obama Administration).

rights implementation and compliance are influenced by various axes, the efficacy of different forms of leverage to promote norm socialization, and greater alignment of the United States with positive international norms. The study of domestic human rights will benefit greatly from research that proves whether, and under what conditions, general theories of norm socialization apply to specific contexts. Furthermore, new research will not only challenge general theoretical assumptions about diffusion of human rights norms, but, more importantly, provide a means to clarify, convert and articulate abstract human rights norms into concrete domestic laws and policies.

Inquiry of this nature is important for several reasons. First, state and local governments are increasingly engaged in human rights activities. The interactions among various governmental and non-governmental actors “results in an iterative process by which legal rules emerge and are interpreted, internalized and enforced.”<sup>28</sup> Second, the complexity and plurality involved in states’ and localities’ human rights activities requires an understanding that these actions are the product of many conflicting political and social actors, ideals, and motivations, rather than a single actor directed at a single purpose. Consider, for example, how localized human rights treaty implementation facilitates translation of abstract international law principles into more relevant, meaningful, democratically legitimate local standards.<sup>29</sup> Third, domestic human rights activists work at multiple sites—legal, political, economic, and social—and are no longer only elite norm entrepreneurs involved in a transnational structures and network. In fact, many advocates who are firmly grounded in a domestic experience of human rights carry the contemporary discourse of human rights forward. Fourth, and perhaps most importantly, a better understanding of the localized dimensions of bringing transnational norms and insights home can help develop more participatory mechanisms through which individuals, communities, localities, states, and the federal government can promote an expansion of human rights. Such mechanisms are increasingly significant as more dialogic approaches to human rights enforcement and compliance emerge.

In connecting novel insights regarding the study of human rights within the United States, this Article (1) characterizes the proliferation of human rights in the United States as a legitimate area of study

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28. *Lifting Our Veil of Ignorance*, *supra* note 24, at 381–83.

29. *Id.* at 382 (discussing the Convention on the Elimination of All Forms of Discrimination Against Women).

distinct from international law and politics, (2) emphasizes the dynamic nature of local, subnational and national human rights activities as influential in legal, social, economic, and political processes, (3) departs from prior theoretical models and proposes the application of a new interdisciplinary modality of study to understand human rights internalization, and (4) argues that this approach will advance new theoretical and pragmatic conceptions of the channels of communication and institutional structures that mediate global ideas and local experiences. This Article proceeds in the following manner. Part I provides a descriptive account of domestic human rights activities. Part II considers various theories for understanding and promoting human rights. Part III explores why acculturation may more effectively capture the diversity of domestic human rights practices.

## I. DOMESTIC HUMAN RIGHTS ACTIVITIES

Growing state and local engagement with international law and human rights represents an important challenge to traditional accounts of norm socialization. On the one hand, subnational incorporation of international human rights is unremarkable as “lawmakers and legal decision makers have always cast a wide net when searching for new ideas and approaches, or evaluating jurisprudential directions.”<sup>30</sup> On the other hand, the significant rise in localism raises new questions about claims of power, process, structure, and the resulting changes in the dynamics of federalism.<sup>31</sup> States and localities have become key sites for human rights expression, experimentation, and implementation.<sup>32</sup> This engagement with international law and human rights norms is not limited to formal actions by local and state government actors, as domestic human rights activists have also assumed an important role in the internalization of human rights.<sup>33</sup>

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30. Martha F. Davis, *Upstairs, Downstairs: Subnational Incorporation of International Human Rights Law at the End of an Era*, 77 *FORDHAM L. REV.* 411, 420 (2008).

31. See sources cited *supra* note 20 and accompanying text.

32. See Ahdieh, *supra* note 7, at 1193–97; Davis, *supra* note 30, at 412, 418; *State and Local Commissions*, *supra* note 2, at 89; *Law’s Migration*, *supra* note 6, at 1627, 1652; *Ratifying Kyoto at the Local Level*, *supra* note 8, at 722.

33. See Davida Finger & Rachel E. Luft, *No Shelter: Disaster Politics in Louisiana and the Struggle for Human Rights*, in *HUMAN RIGHTS IN THE UNITED STATES: BEYOND EXCEPTIONALISM* 291, 302–04 (Shareen Hertel & Kathryn Libal eds., 2012); Burroughs, *supra* note 2, at 414; *Law From Below*, *supra* note 2, 104–05; Reva Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of De Facto ERA*, 94 *CAL. L. REV.* 1323, 1323; *Bringing Theories of Human Rights Change Home*, *supra* note 2, at 480–98; Cynthia Soohoo, *Close to Home: Social Justice Activism and Human Rights*, 40 *COLUM. HUM. RTS.* 7, 9 (2008) [hereinafter *Close to Home*] (arguing that “[w]hile the narrative of U.S. exceptionalism is both

All of these activities are shaped by complex interactions of social forces and human beings across a range of different domains. As Resnik, Civin and Frueh have argued, “ideas, norms, and practices do not stop at the lines people draw across land.”<sup>34</sup>

Despite the fact that the federal government retains ultimate authority over ratified treaties, such as the International Covenant on Civil and Political Rights (ICCPR), many state and local governments have taken affirmative steps towards local implementation and compliance. As detailed in the 2013 report by the Human Rights Institute at Columbia Law School,<sup>35</sup> these steps are aimed to “proactively prevent and eliminate discrimination and inequality, and to monitor and report on local human rights conditions.”<sup>36</sup> Localities and states have also engaged in pro-ratification movements<sup>37</sup> with respect to unratified treaties such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)<sup>38</sup> and the Convention on the Rights of the Child (CRC).<sup>39</sup> Given the rise in subnational engagement with human rights, increased scholarly attention has been paid to the existence of barriers for state and local officials.<sup>40</sup> Kaufman, for example, has proposed a dynamic, or cooperative, federalism

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accurate and compelling, it only tells part of the story. A narrow focus on the policies of the federal government and its record on human rights treaty ratification necessarily fails to capture the role that social justice movements play in building acceptance for new normative rights arguments that over time are reflected in changes in law, either through evolving interpretation of existing law or new legislation and policies.”). See generally BECKER, *supra* note 2.

34. *Ratifying Kyoto at the Local Level*, *supra* note 8, at 725.

35. HUMAN RIGHTS INST., COLUMBIA LAW SCH., CLOSING THE GAP: THE FEDERAL ROLE IN RESPECTING & ENSURING HUMAN RIGHTS AT THE STATE AND LOCAL LEVEL 39–60 (2013) [CLOSING THE GAP], [https://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/State%20and%20Local%20Shadow%20Report%20\(ecopy\).pdf](https://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/State%20and%20Local%20Shadow%20Report%20(ecopy).pdf) (describing in the appendices the work of state agencies, commissions, and city councils and boards).

36. *Id.* at 38; see also David Kaye, *State Execution of the International Covenant on Civil and Political Rights*, 3 U.C. IRVINE L. REV. 95, 99 (2013) (proposing implementation of ICCPR at the state level, and arguing that states should “directly incorporate human rights treaties as a matter of state law, giving litigants the opportunity to rely upon the provisions of treaty law to supply human rights causes of action or to legitimize interpretive guidance in cases arising from state or federal causes of action”).

37. See *The Persistence of Dualism in Human Rights Treaty Implementation*, *supra* note 26, at 77–79 (2011); Todres, *supra* note 27, at 140–41 (discussing the growing support for the CRC and children’s rights in the United States, in particular focusing on the pro-ratification movements in states such as: Hawaii, New York, Rhode Island, South Carolina, and Vermont, and localities including, Los Angeles, Chicago, Grand Rapids, Austin, Cambridge, Cleveland, Detroit, Kansas City, Minneapolis, New York City, San Diego and Savannah).

38. G.A. Res. 34/180, Convention on the Elimination of All Forms of Discrimination Against Women (Dec. 18, 1979) [hereinafter CEDAW].

39. G.A. Res. 44/25, Convention on the Rights of the Child (Nov. 20, 1989) [hereinafter CRC].

40. See *By Some Other Means*, *supra* note 20, at 2003, 2005.

structure that establishes a “core set of functions” with the executive branch to provide specific guidelines to state and local governments regarding their obligations to adhere to treaty standards in order to “maximize subnational human rights treaty compliance and increase United States ability to fulfill its human rights commitments.”<sup>41</sup>

The localism of human rights implementation, and thus the potential for greater diffusion of international norms, is not limited to one set of prescribed activities. In fact, if we look beyond the status of treaty ratification at the various sites of domestication of international norms, we can more fully understand the potential of human rights advocacy in the United States. For example, many states and cities have developed human rights commissions, agencies, or other administrative bodies to implement diverse human rights policies and practices.<sup>42</sup> These bodies engage a range of activities, such as human rights reporting, audits, and impact assessments to inform policies.<sup>43</sup> States have also passed outward- and inward-looking human rights legislation to strengthen norms and increase compliance. Inward-looking legislation aims to use “human rights discourse to link domestic rights-based struggles to global movements for social change.”<sup>44</sup> In contrast, outward-looking legislation seeks to support international processes and effect change outside the United States.<sup>45</sup> Separate from local resolutions and ordinances or state laws, a growing number of localities have declared themselves “human rights cities.”<sup>46</sup>

As Wexler’s work identified, cities have also passed multiple typologies of human rights ordinances and resolutions.<sup>47</sup> First, some or-

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41. *Id.* at 1971.

42. *See* CLOSING THE GAP, *supra* note 35, at 39–60.

43. *Id.*

44. The most commonly discussed example of this is the City of San Francisco’s CEDAW ordinance. In her study of outward- and inward-looking legislation, Burroughs identifies four benefits to state and local human rights implementation. *See* Burroughs, *supra* note 2, at 416.

45. *Id.* at 418. As Burroughs notes, an example of outward-looking legislation is the Massachusetts Burma Law. *See also* Ahdieh, *supra* note 7, at 1193 (discussing legislation aimed at sanctioning or condemning the Sudanese government).

46. HUMAN RIGHTS INST., COLUMBIA LAW SCH., BRINGING HUMAN RIGHTS HOME: HOW STATES AND LOCAL GOVERNMENTS CAN USE HUMAN RIGHTS TO ADVANCE POLICY 11 (2012) [hereinafter BRINGING HUMAN RIGHTS HOME], <https://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/Bringing%20Human%20Rights%20Home.pdf>. While not uniform in their approaches, human rights cities utilize norms and strategies to improve their communities. Such cities include Pittsburg, Washington D.C., Carroboro, Eugene and Chapel Hill. *See* Gillian MacNaughton & Mariah McGill, *Economic and Social Rights in the United States: Implementation Without Ratification*, 4 NE. U. L.J. 365, 399–06 (2012) (discussing the case study of Eugene, Oregon becoming a human rights city).

47. Lesley Wexler, *The Promise and Limits of Local Human Rights Internationalism*, 37 FORDHAM URB. L.J. 599, 618 (2010).

dinances are “purely expressive,” such as Berkeley’s 2002 Resolution to Oppose the Patriot Act and 2009 ordinance disavowing the United States practice of giving juveniles sentences of life without parole.<sup>48</sup> Second, other ordinances function as more than “expressive,” yet do not themselves create any enforceable rights.<sup>49</sup> In North Carolina, for example, the City Council and Board of Alderman in Chapel Hill and Carrboro have approved a resolution adopting the Universal Declaration of Human Rights (UDHR) as a set of guiding principles.<sup>50</sup> In Cincinnati, the City Council adopted a resolution grounded in the UDHR that proclaimed freedom from domestic violence as a human right.<sup>51</sup> Similarly, the Chicago City Council passed a resolution affirming the city’s commitment to human rights and in particular, focused on the principles of the CRC.<sup>52</sup> In 1989, the New York City Council adopted a resolution that called on all city agencies “to ensure that their activities and funding processes comply with the Convention on the Rights of the Child.”<sup>53</sup> Third, another category of ordinances adopt and adapt international treaty obligations to localized conditions and seek to establish new human rights norms.<sup>54</sup> The most commonly cited example of this third typology is San Francisco’s 1998 passage of a local CEDAW ordinance.<sup>55</sup> Less studied, but likewise significant, is the Los Angeles City Council’s unanimous affirmation of the CRC and vote to “advance policies and practices in line with [CRC principles] in all city agencies and organizations” that engage with children’s issues.<sup>56</sup>

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48. *Id.*

49. *Id.* (discussing ordinances prohibiting state officials from voluntarily complying with federal immigration enforcement laws).

50. Chapel Hill, N.C., Res. 2009-11-23/R-11 (Nov. 23, 2009) (adopting the UDHR as guiding principles); Carrboro, N.C., Res. No. 89/2008-09 (Apr. 21, 2009) (adopting the UDHR as guiding principles)

51. Cincinnati, Ohio, Res. 47-2011 (Oct. 5, 2011).

52. BRINGING HUMAN RIGHTS HOME, *supra* note 46, at 10. In 1993, Cook County adopted the Cook County Human Rights Ordinance, which is enforced by the Cook County Commission on Human Rights. See *Commission on Human Rights*, COOKCOUNTYIL.GOV, <http://www.cookcountyil.gov/appointments/cook-county-commission-on-human-rights/human-rights-commission-on/> (last visited July 1, 2015). The passage of pro-CRC ordinances or resolutions is not limited to cities. For example, in 1992 South Carolina passed a resolution that “calls on all agencies in South Carolina to . . . their programs aim to achieve the goals of the Convention on the Rights of the Child.” Todres, *supra* note 27, at 140.

53. Todres, *supra* note 27, at 140.

54. Wexler, *supra* note 47, at 618.

55. Burroughs, *supra* note 2, at 420–24; Davis, *supra* note 30, at 420–21; *Dialogic Federalism*, *supra* note 19, at 277–80; *Law’s Migration*, *supra* note 6, at 1641–45; Shanna Singh, Note, *Brandeis’s Happy Incident Revisited: U.S. Cities as the new Laboratories of International Law*, 37 GEO. WASH. INT’L L. REV. 537, 546–48 (2005).

56. Wexler, *supra* note 47, at 618.

Not all examples of domestic human rights activities are focused on treaty implementation or compliance, or originate with government actors. For more than two decades, human rights activists have focused on building increased recognition of the legitimacy of human rights norms by spreading human rights discourse in response to social inequalities in wealth and power. A thoughtful body of scholarship has emerged considering the widening set of actors exploring the application of international human rights within the United States. Merry, for example, has explored the dynamic process of human rights circulation, transplantation, and vernacularization as key to adapting global rights agendas to local conditions.<sup>57</sup> Her early work on translation and “mapping the middle” has proven instrumental to both normative and empirical understandings of the visibility and expansion of human rights domestically.<sup>58</sup> Followed by a case study examination of how human rights established the foundation of a social movement mobilization in New York City, Merry, Levitt, Rosen and Yoon emphasized how grassroots organizers appropriated “the moral strength and legitimacy of international human rights law” to create a “domesticated human rights ideology.”<sup>59</sup> Similarly, in their comparative analysis of local uses of global women’s rights across four countries, including the United States, Levitt and Merry found that it is the “nature of the ideas contained within global packages,” not just “values and norms,” that matter for the adoption and adaptation of human rights in localized settings.<sup>60</sup>

In the context of disaster politics and post-Katrina activism in New Orleans, Finger and Luft argue the spreading of a “human rights consciousness” or “human rights culture” is marked by “an engagement—philosophical, moral, and political, if not legal or systemic—with the notion that human beings are entitled to a broader category of rights than those promised by the U.S. constitution.”<sup>61</sup> Studying

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57. *Law From Below*, *supra* note 2, at 101, 120; see also *Human Rights and Transnational Culture*, *supra* note 18, at 55–58; *Transnational Human Rights and Local Activism*, *supra* note 2, at 38–40.

58. *Transnational Human Rights and Local Activism*, *supra* note 2, at 38–40.

59. *Law From Below*, *supra* note 2, at 125.

60. Peggy Levitt & Sally Merry, *Vernacularization on the Ground: Local Uses of Global Women’s Rights in Peru, China, India, and the United States*, 9 *GLOBAL NETWORKS* 441, 451 (2009) (noting that “adoption of new ideas, then, depends not only on understanding the cognitive categories potential recipients have in place, and vernacularizing these new concepts so they become palatable, but also on framing messages so that they can easily be inserted or connected with these categories”).

61. Finger & Luft, *supra* note 33, at 302; see also Katherine G. Young, *Redemptive and Rejectionist Frames: Framing Economic, Social, and Cultural Rights for Advocacy and Mobiliza-*

the vertical nature of human rights internalization, Finger and Luft identify two characteristics of the coexistence of a proto-human rights consciousness within traditional movement strategies and tactics “rooted in local or domestic agendas.”<sup>62</sup> They note, “in this way human rights disaster organizing becomes a tool in the broader, holistic movement for rights-based justice.”<sup>63</sup> In addition to human rights language, activists adopted formal human rights mechanisms such as the publication of shadow reports, visits by United Nations Special Rapporteurs, tribunals, and a proposed resolution to the People’s Assembly of the United States Social Forum.<sup>64</sup>

Merry and Shimmin’s examination of human rights advocacy for violence survivors in New York City revealed similar characteristics.<sup>65</sup> Human rights provided Voices of Women (VOW) a system of values that could be used to critique the court process, simultaneously with discourse and strategies of the battered women’s movement.<sup>66</sup> Das Gupta found that South Asian immigrants rights groups in New York and New Jersey have adopted a human rights framework, grounded in localized experiences, in their gender violence work.<sup>67</sup>

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*tion in the United States*, 4 NE. U. L.J. 323, 325 (2012) (citations omitted) (arguing that the “success of the rights frame lies in the way in which it presents a universalized language to claims for material protections and ensures that these claims are based on obligations rather than entreaties. First, the reliance on human dignity, freedom, or equality as the basis for economic, social, and cultural rights appeals to universal values that all people may share, even if their particular formulations differ considerably across individuals and groups. The inclusiveness of this language can unite previously diverse actors (apparently separated by religion, race, or other characteristic) under single claims, which can constitute a significant defense against the often-polarizing nature of distributive politics.”).

62. Finger & Luft, *supra* note 33, at 302–03; see also Rachel E. Luft, *Beyond Disaster Exceptionalism: Social Movement Developments in New Orleans After Hurricane Katrina*, 61 AM. Q. 499, 500 (2009) (presenting an ethnographic case study of New Orleans and identifying of a “third orientation” human rights approach to disaster response).

63. *Id.* at 308. When considering framing strategy and tactics, Finger and Luft found that the “third level used human rights tactics to operationalize a human rights strategy. At the most narrow level, human rights tactics refer to formal instruments that draw on international documents and engage international bodies. But, according to advocates they also refer to the conventional use of domestic movement methods reframed in human rights terms.” *Id.*

64. *Id.* at 301–02.

65. Sally Engle Merry & Jessica Shimmin, *The Curious Resistance to Seeing Domestic Violence as a Human Rights Violation in the United States*, in HUMAN RIGHTS IN THE UNITED STATES: *Beyond Exceptionalism* 113, 113–31 (Shareen Hertel & Kathryn Libal eds., 2012).

66. *Id.* at 126–27. In 2003, VOW designed a project in collaboration with the Urban Justice Center’s Human Rights Project to document the experiences of battered women. The data gathered was the basis for the 2008 report that “documented problems, identified the articles of human rights conventions that were being violated, and offered recommendations for change.” *Id.* at 127.

67. MONISHA DAS GUPTA, UNRULY IMMIGRANTS: RIGHTS, ACTIVISM, AND TRANSNATIONAL SOUTH ASIAN POLITICS IN THE UNITED STATES 17 (2006).

Davis has documented the rise in domestic advocacy organizations using human rights frameworks to address poverty, including the Kensington Welfare Rights Union, Survivors, Inc., United Workers, and Maryland Legal Aid Bureau.<sup>68</sup> Not only engaging with human rights as a broad normative frame, Survivors, Inc., led the campaign to establish Boston as a human rights city, “a campaign that they see as directly related to their historic efforts to implement domestically the social and economic rights provisions of the Universal Declaration of Human Rights.”<sup>69</sup>

In 2010, Vermont became the first state to use a human rights framework to design its health care system.<sup>70</sup> While Act 128<sup>71</sup> does not “recognize health care as a human right or use the term ‘human rights’” MacNaughton and McGill emphasize that it incorporates “five human rights principles promoted by the ‘Healthcare is a Human Right’ campaign.”<sup>72</sup> As their case study of the law recognized, the importance of integrating human rights principles into health care reform was an essential strategy during the statewide campaign, and influenced the development of a construction of human rights as universal.<sup>73</sup>

In his exploration of the internationalization of public interest law, Cummings notes the “modern system of public interest law that has emerged since the 1980s is distinguished by its openness: influenced by transnational economic and political relations, attentive to possibilities for extraterritorial advocacy, and concerned with a broad notion of transnational justice.”<sup>74</sup> He argues three specific linkages have influenced this internalization, including “the movement to pro-

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68. Martha Davis, *Occupy Wall Street and International Human Rights*, 39 *FORDHAM URB. L.J.* 931, 938–39 (2012).

69. *Id.* at 948–49. Davis also notes that “a large network of U.S.-focused organizations have participated in preparing human rights ‘shadow reports’ critiquing the United States government’s reports to United Nations monitoring bodies such as the Committee on the Elimination of Racial Discrimination (CERD), the Human Rights Committee that monitors country compliance with the International Covenant on Civil and Political Rights (ICCPR), and the Human Rights Council that conducts Universal Periodic Reviews of all UN-member nations.” *Id.* at 951.

70. MacNaughton & McGill, *supra* note 46, at 399–405 (describing a detailed description of Vermont as a case study); see also Bekah Mandell, *Putting Theory Into Practice: Using a Human Rights Framework and Grassroots Organizing to Build a National Revolutionary Movement*, 1 *COLUM. J. RACE & L.* 402, 412–16 (2012) (outlining the “Healthcare as a Human Right” as a campaign strategy and a grassroots movement for universal healthcare by the Vermont Workers Center’s specifically employing a human rights framework); Mariah McGill, *Using Human Rights to Move Beyond the Politically Possible*, 44 *CLEARINGHOUSE REV.* 459, 461–62 (2011).

71. 18 *VT. STAT. ANN.* tit. 18, § 9371 (2011).

72. MacNaughton & McGill, *supra* note 46, at 368.

73. *Id.* at 394.

74. Cummings, *supra* note 2, at 908.

mote international *norms* of legal accountability in the effort to “bring human rights home.”<sup>75</sup>

Rather than solely focusing on the dominant idea of human rights associated with violations of international law, domestic activists have reconstructed human rights as substantive, positive obligations of states to ensure economic and social rights. This discursive approach thus decenters human rights law and exposes normativity as the means by which knowledge shapes social actions. As such, activists’ movement towards the development of a human rights culture in the United States allows for an expression that is visionary, communicating both aspirational and normative goals. Though not always unified in their approaches or responses to social justice issues, this more fluid and dynamic expression of human rights has occurred in larger coalitions led by elite activists, as well as individual grassroots organizations.

One of the most visible coalitions is the United States Human Rights Network (Human Rights Network).<sup>76</sup> The Human Rights Network was formed in 2003 after a series of meetings by more than sixty human rights and social justice activists in the United States.<sup>77</sup> A key gathering, the U.S. Human Rights Leadership Summit “Ending Exceptionalism: Strengthening Human Rights in the United States,” brought together activists to assess human rights work in the United States and to identify ways to strengthen the domestic human rights agenda.<sup>78</sup> A consensus emerged that a new model for domestic human rights advocacy was needed in order to achieve United States compliance with universal human rights standards.<sup>79</sup> This model would be “people-centered,” informed by and responding to the needs, aspirations and perspectives of the communities and groups directly impacted by human rights violations. The model would seek to elevate awareness of human rights frameworks within the larger social justice movement, to create a sustained human rights consciousness. Since 2003, the Human Rights Network has served as a facilitator and catalyst to build and expand the base of the domestic human rights

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75. *Id.* at 969–1007.

76. U.S. HUMAN RIGHTS NETWORK, <http://www.ushrnetwork.org> (last visited July 1, 2015); see also Davis, *supra* note 68, at 949–51.

77. *About Us*, U.S. HUMAN RIGHTS NETWORK, <http://www.ushrnetwork.org/about-us/what-we-do/history-ushrn> (last visited July 1, 2015).

78. *Id.*

79. *Id.*

movement.<sup>80</sup> It is now comprised of more than 300 members and partner organizations working on domestic human rights issues.<sup>81</sup> Their work is diverse and captures a broad spectrum of advocacy, as well as engagement at the subnational, national and international levels.<sup>82</sup> For example, in 2008, the Human Rights Network played a key role in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)<sup>83</sup> review after more than six years of monitoring ICERD processes. In 2010, the Human Rights Network coordinated documentation of rights violations, and published a series of shadow reports with these findings.<sup>84</sup> In 2014, the Human Rights at Home Campaign in collaboration with the Human Rights Network Taskforces, leveraged all of the human rights reviews to organize for a new human rights agenda in the United States, including the adoption of a National Plan of Action for Racial Justice.<sup>85</sup>

At a more grassroots level, National Economic and Social Rights Initiative (NESRI) has engaged with human rights in localized contexts. Rather than taking a leadership role in the development of a human rights consciousness or the vernacularization of human rights in political or legal processes, such as the work represented by Human Rights Network or the Bringing Human Rights Home Lawyers Network,<sup>86</sup> NESRI “believes that social movements led by those directly impacted are the best route towards sustainable and progressive social change” and works to develop the capacity of “community-based organizations—particularly ones constituted and led by those most affected by human rights violations . . . to play a central role in

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80. *Id.*

81. *Id.*

82. *Id.*

83. G.A. Res. 2106 (XX), International Convention on the Elimination of All Forms of Racial Discrimination (Dec. 21, 1965).

84. Kathryn Libal & Shareen Hertel, *Paradoxes and Possibilities: Domestic Human Rights Policy in Context*, in HUMAN RIGHTS IN THE UNITED STATES: BEYOND EXCEPTIONALISM 1, 13–14 (Shareen Hertel & Kathryn Libal eds., 2012).

85. *Human Rights at Home Campaign*, U.S. HUMAN RIGHTS NETWORK, <http://www.ushrnetwork.org/hurah-campaign> (last visited July 1, 2015) (At the completion of the United States Review on compliance with ICERD, the ICERD Committee included the need for a National Plan of Action and the creation of a National Human Rights Institution in its concluding observations); Comm. on the Elimination of Racial Discrimination, Concluding Observations on the Combined Seventh to Ninth Periodic Reports of United States of America, U.N. Doc. CERD/C/USA/CO/7-9 (2014).

86. *The Bringing Human Rights Home Lawyers' Network*, HUMAN RIGHTS INST., COLUMBIA LAW SCH., <http://web.law.columbia.edu/human-rights-institute/bhrh-lawyers-network> (last visited July 1, 2015).

disseminating and applying the framework.”<sup>87</sup> For NESRI, this translates into participatory approaches using human rights and collaborating with community-based partners.<sup>88</sup> NESRI partners includes local organization such as Community Asset Development Re-defining Education (CADRE),<sup>89</sup> the Coalition of Immokalee Workers,<sup>90</sup> Los Angeles Community Action Network (LA CAN),<sup>91</sup> and Vermont Workers Center,<sup>92</sup> as well as national campaigns<sup>93</sup> that have emerged from the thought leadership of these local partners. While diverse in their approaches, each of these organizations draw on strategies of engagement that reflect a multi-layered approach to human rights practices grounded in a political stance to challenge the most egregious manifestations of inequality and injustice.

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87. *Our Approach*, NESRI, <https://www.nesri.org/about/approach> (last visited May 19, 2015).

88. *Id.*

89. *Organizing*, CADRE, <http://www.cadre-la.org/core/> (last visited May 27, 2015). Since 2001, CADRE has explicitly engaged human rights as a framework and grounding for its theory of change. CADRE has trained parents to engage in human rights documentation, conducted human rights tribunals, and developed human rights training and curricula. The work of CADRE has led not only to significant policy changes in the Los Angeles Unified School District, but also CADRE has been a recognized thought leader nationally and within California on human rights. Interview with Maisie Chin, Executive Director and Co-Founder, CADRE, in L.A., Cal. (Jan. 6, 2013); *see also* Alexandra Bonazoli, *Human Rights Frames in Grassroots Organizing: CADRE and the Effort to Stop School Pushout*, 4 NE. U. L.J. 483, 484–86 (2012).

90. *About CIW*, COAL. OF IMMOKALEE WORKERS, <http://ciw-online.org/about/> (last visited June 7, 2015); *see also* Katherine L. Caldwell, *With Great Power Comes Great Responsibility: Grassroots Corporate Campaigns for Workers' Human Rights*, 45 CLEARINGHOUSE REV. 225, 230–31 (2011).

91. *About Us*, L.A. COUNTY ACTION NETWORK, <http://cangress.org/about-us/> (last visited June 7, 2015); *see also* Brittany Scott, *Is Urban Policy Making way for the Wealthy? How a Human Rights Approach Challenges Purging of Poor Communities from U.S. Cities*, 45 COLUM. HUM. RTS. L. REV. 863, 887–88 (2014).

92. *About the Vermont Worker's Center*, VT. WORKERS' CTR., <http://www.workerscenter.org/about> (last visited May 25, 2015); *see also* Gillian MacNaughton & Diane F. Frey, *Decent Work for All: A Holistic Human Rights Approach*, 26 AM. U. INT'L L. REV. 441, 480–81 (2011); MacNaughton & McGill, *supra* note 46, at 389; Mariah McGill, *The Human Right to Health Care in the State of Vermont*, 37 VT. B.J. 28, 29 (2011); Dorothy Q. Thomas, *The 99% Solution: Human Rights and Economic Justice in the United States*, 4 NE. U. L.J. 347, 351–52 (2012).

93. For example, the Dignity in Schools Campaign (DSC) emerged from the foundational work of CADRE in South Los Angeles. Interview with Maisie Chin, *supra* note 89. DSC seeks to “challenge[ ] the systemic problem of pushout in our nation’s schools and advocates for the human right of every young person to a quality education and to be treated with dignity.” *Mission*, DIGNITY IN SCHOOLS, <http://www.dignityinschools.org/about-us/mission> (last visited May 25, 2015).

## II. THEORIES OF HUMAN RIGHTS NORM DEVELOPMENT AND INFLUENCE

Scholars have engaged in significant discourse considering how, why, and when international human rights law influences state practices. Broadly speaking this discussion has been divided into theoretical accounts and practice-based approaches to understanding the mechanisms by which global norms influence national and local actors.<sup>94</sup> When considering change and the emergence of new norms, the literature generally identifies two types of change. The first type is a “process of norm emergence and the dynamics of change from no norm to [a] norm or from one norm to another.”<sup>95</sup> The second is a change in a norms’ effectiveness, how the norm interacts and changes other features in a political landscape.<sup>96</sup> For example, Ahdieh has examined a distinct pattern of judicial interaction, which he defined as “dialectical review” among domestic courts, international tribunals, and non-state entities.<sup>97</sup> Waters has explored how transnational networks of judges influence the use of international and comparative law in legal decision-making.<sup>98</sup> Neuman has discussed the suprapositive aspect of human rights law.<sup>99</sup> Hathaway has analyzed the relationship between human rights treaties and countries’ human rights practices.<sup>100</sup> Cleveland has contended that economic sanctions can contribute to internalization of international human rights norms.<sup>101</sup> Davis has proposed that state courts can engage with international treaties as informative sources of law when interpreting state constitu-

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94. See sources cited *supra* notes 2, 6–8, 16–17, 28, 30 & 35; *infra* notes 111–115, 122; Finger & Luft, *supra* note 33; see also Ryan Goodman, Derek Jinks & Andrew K. Woods, *Introduction: Social Science and Human Rights*, in UNDERSTANDING SOCIAL ACTION, PROMOTING HUMAN RIGHTS 1, 5–6 (Ryan Goodman, Derek Jinks & Andrew K. Woods eds., 2012) (describing social science literature on normative change).

95. Michal Ben-Josef Hirsch, *Ideational Change and the Emergence of the International Norm of Truth and Reconciliation Commissions*, 20 EUR. J. INT’L REL. 810, 813 (2014).

96. See generally Sheri Berman, *Ideas, Norms, and Culture in Political Analysis*, 33 COMP. POL. 231 (2001); Dionyssi G. Dimitrakopoulos, *Norms, Interests and Institutional Change*, 53 POL. STUD. 676 (2005).

97. See generally Robert B. Ahdieh, *Between Dialogue and Decree: International Review of National Courts*, 79 N.Y.U. L. REV. 2029 (2004).

98. See generally Melissa Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487 (2005).

99. Gerald L. Neuman, *The Uses of International Law in Constitutional Interpretation*, 98 AM. J. INT’L L. 82, 87 (2004).

100. See generally Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002).

101. See generally Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 YALE J. INT’L L. 1 (2001).

tions.<sup>102</sup> Young has examined the applicability of redemptive and rejectionist frames to human rights mobilization in the United States.<sup>103</sup> Merry has explored how global human rights established the foundation for social mobilization and political activism in New York City in the context of systemic race and gender discrimination.<sup>104</sup> Resnik has considered how state and local actors, including state courts, state and local legislative bodies, administrators, and mayors, import and export human rights law.<sup>105</sup>

While it is difficult to group a diverse collection of scholars together and suggest that a single school of thought defines their work, there are two broad clusters of scholarship that have shaped the way in international law is understood as internalized, and likewise human rights influence domestic change: realists and constructivists. Realists draw on ideas from game theory and economics under the broad rubric of rational choice theory to understand and explain international cooperation and discord.<sup>106</sup> Realists believe that international politics is defined by states that are unitary actors who, at a minimum, seek their own preservation and at a maximum, drive for universal domination.<sup>107</sup> From this standpoint, if compliance with international law occurs, it is not because the law is effective, but merely because compliance is coincident with the path dictated by self-interest in a world governed by anarchy and relative state power.<sup>108</sup> While these theories can be instructive on a macro-level, they fail to provide a theoretical foundation for understanding the multiple layers of subnational incorporation of international human rights within the United States.<sup>109</sup>

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102. Martha Davis, *The Spirit of Our Times: State Constitutions and International Human Rights*, 30 N.Y.U. REV. L. & SOC. CHANGE 359, 371-72 (2006) (“[T]he similarities between international law provisions and state constitutional provisions granting affirmative rights support using transnational human rights norms to interpret state law.”).

103. Young, *supra* note 61.

104. *Law From Below*, *supra* note 2, at 101.

105. *Foreign as Domestic Affairs: Rethinking Horizontal Federalism*, *supra* note 8, at 34.

106. See generally JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005).

107. Hathaway, *supra* note 100, at 1945-46.

108. *Id.*

109. While there continues to be a ripe discussion of the relevance of realist perspectives in international law, these theories do not offer a useable framework for purposes of this Article. For example, as other scholars have noted, realist approach to international law simply cannot explain the prevalence of subnational engagement with human rights treaties. See *By Some Other Means*, *supra* note 20, at 1997-2007; *Bringing Theories of Human Rights Change Home*, *supra* note 2.

Constructivists<sup>110</sup> focus on social “meaning that is constructed from a complex and specific mix of history, ideas, norms, and beliefs” to derive explanations of state behavior.<sup>111</sup> At its foundation, “[c]onstructivism asks how norms evolve and how identities are constituted, analyzing . . . the role of identity in shaping political action and the mutually constitutive relationship between agents and structures.”<sup>112</sup> In regarding international law as a dynamic process in which agents interact with state actors and advance new norms, it suggests that states will adopt and ultimately identify with those norms.<sup>113</sup> Constructivism considers an essential question of how international actors acquire their current and future identities and interests.<sup>114</sup>

Most readily associated with the work of Finnemore and Sikkink on norm life cycle (norm internalization, cascade, and socialization),<sup>115</sup> constructivism seeks to understand human rights development through international actors working to bring about social change. For example, in the norm emergence stage, Finnemore and Sikkink argue that “[n]orms do not appear out of thin air; they are actively built by agents [with] . . . strong notions about appropriate or desirable behavior in their community . . . Norm entrepreneurs are

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110. While constructivism’s focus on norms, identity, and agency has its origins in political science, it has emerged as a dominant area of study in international law. See Jutta Brunnée & Stephen J. Toope, *International Law and Constructivism: Elements of an Interactional Theory of International Law*, 39 COLUM. J. TRANSNAT’L L. 19, 38–42 (2000); L. Lutz & Kathryn Sikkink, *International Human Rights Law and Practice in Latin America*, 54 INT’L ORG. 633, 640 (2000). See generally MARGARET KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* (1998); NICHOLAS GREENWOOD ONUF, *WORLD OF OUR MAKING: RULES AND RULE IN SOCIAL THEORY* (1989); THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE (Thomas Risse et al. eds., 1999); Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621 (2004); Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469 (2005); Cass Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996).

111. E.g., Anne-Marie Slaughter & Thomas Hale, *International Relations, Principal Theories*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 129, ¶ 20 (Rüdiger Wolfrum ed., 2013) (citing ALEXANDER WENDT, *A SOCIAL THEORY OF INTERNATIONAL POLITICS* (1999)).

112. Oona A. Hathaway & Ariel N. Lavinbuk, *Rationalism and Revisionism in International Law*, 119 HARV. L. REV. 1404, 1411 (2006).

113. Martha Finnemore & Kathryn Sikkink, *Taking Stock: The Constructivist Research Program in International Relations and Comparative Politics*, 4 ANN. REV. POL. SCI. 391, 392 (2001) (“Constructivists focus on the role of ideas, norms, knowledge, culture and argument in politics, stressing in particular the role of collectively held or ‘intersubjective’ ideas and understandings on social life.”).

114. See John Gerard Ruggie, *What Makes the World Hang Together? Neo-utilitarianism and the Social Constructivist Challenge*, in EXPLORATION AND CONTESTATION IN THE STUDY OF WORLD POLITICS 215, 223 (Peter J. Katzenstein et al. eds., 1999).

115. Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT’L ORG. 887, 902–04 (1998).

critical for norm emergence because they call attention to . . . or . . . ‘create’ issues by using language that names, interprets, and dramatizes them.”<sup>116</sup> These entrepreneurs utilize varying strategies to secure acceptance of emerging norms by state actors.<sup>117</sup> When norms move toward a “tipping point” of acceptance by states, “institutionalization contributes strongly to the possibility for a norm cascade both by clarifying what . . . the norm is . . . and by spelling out specific procedures by which norm leaders coordinate disapproval and sanctions for norm breaking.”<sup>118</sup> Building on these ideas, Risse and Sikink have further defined the theoretical framework of norm socialization processes to include three types of socialization processes, which are necessary “for enduring change in the human rights area”<sup>119</sup> as adaptation and strategic bargaining, moral-consciousness raising (shaming, argumentation, dialogue and persuasion) and institutionalization and habitualization.<sup>120</sup> More recent literature has highlighted changes that occur during the norm diffusion and focus on the process of norm localization in which local and global actors change the framing and content of an international norm in order to adapt or incorporate the norm.<sup>121</sup>

Koh’s theory of transnational legal process is also grounded in constructivism and provides greater specificity regarding the integration of international law into domestic legal systems.<sup>122</sup> Koh argues that norm-internalization among transnational actors (states, international institutions, non-governmental organizations, and individual participants in the legal system) occurs through three phases: interaction by one or more transnational actors seeking to impose the norm on another actor; translation of the norm specific to the situation; and, internalization of the norm by the target based on the interaction.<sup>123</sup>

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116. *Id.* at 896–97.

117. *Id.* at 898–900.

118. *Id.* at 900.

119. Thomas Risse & Kathryn Sikink, *The Socialization of International Human Rights Norms Into Domestic Practices: Introduction*, in *THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE* 1, 11 (Thomas Risse & Kathryn Sikink, eds., 1999).

120. *Id.*

121. See generally Amitav Acharya, *How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism*, 58 *INT’L ORG.* 239 (2004); Ann Florini, *The Evolution of International Norms*, 40 *INT’L STUD. Q.* 363 (1996).

122. Harold Hongju Koh, *Bringing International Law Home*, 35 *HOUS. L. REV.* 623, 626–27 (1998) [hereinafter *Bringing International Law Home*]; see also Harold Hongju Koh, *Transnational Legal Process*, 75 *NEB. L. REV.* 181, 184–87 (1996) [hereinafter *Transnational Legal Process*]; Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 *YALE L.J.* 2599, 2624–29 (1997) [hereinafter *Why Do Nations Obey International Law?*].

123. *Why Do Nations Obey International Law?*, *supra* note 122, at 2646.

It is through this transnational legal process, a “repeated cycle of interaction, interpretation and internalization, that international law acquires its ‘stickiness,’ that nation-states acquire their identity, and that nations come to ‘obey’ international law out of perceived self-interest.”<sup>124</sup> Koh’s theory is predictive in terms of governmental and advocacy strategies: “[i]f transnational actors obey international law as a result of repeated interaction with other actors in the transnational legal process, a first step is to empower more actors to participate.”<sup>125</sup>

All of this work has stimulated significant study aimed at clarifying the social mechanisms that influence state practices, whether focused on patterns and effects of formal human rights regimes,<sup>126</sup> issues of compliance and enforcement,<sup>127</sup> how and where the “practice” of human rights is produced,<sup>128</sup> and even asking if human rights are a good idea and what difference they make.<sup>129</sup> While critical to the overall study of human rights scope, content, and institutionalization, this Article argues that strictly internationalist approaches that seek to understand normative change from a “top down” perspective, cannot fully explain the dynamic processes occurring at the local levels that influence domestic integration of international human rights norms. Similarly, theories that only take into account domestic activities lack a broader view of the multiple portals by which human rights enter and exit the United States. The complexity of normative change within the United States requires a lens of analysis of the internalization process, which moves beyond an examination of the “first genera-

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124. *Id.* at 2655.

125. *Id.* at 2656.

126. See generally TODD LANDMAN, *PROTECTING HUMAN RIGHTS: A COMPARATIVE STUDY* (2005); BETH A. SIMMONS, *MOBILIZING HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* (2009); HENRY J. STEINER, PHILIP ALSTON & RYAN GOODMAN, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* (3d ed., 2008).

127. Harold Hongju Koh, *How is International Human Rights Law Enforced?*, 74 *IND. L.J.* 1397, 1399–412 (1999); *Bringing International Law Home*, *supra* note 122, at 674–79. See generally Lesley Wexler, *The International Deployment of Shame, Second Best Responses, and Norm Entrepreneurship: The Campaign to Ban Landmines and the Landmine Ban Treaty*, 20 *ARIZ. J. INT’L & COMP. L.* 561 (2003).

128. Mark Goodale, *Locating Rights, Envisioning Law Between the Global and Local*, in *THE PRACTICE OF HUMAN RIGHTS: TRACKING LAW BETWEEN THE GLOBAL AND THE LOCAL* 1, 1–5 (Mark Goodale & Sally Engle Merry eds., 2007); *Transnational Human Rights and Local Activism*, *supra* note 2, at 39–40; *Law From Below*, *supra* note 2, at 103; Beth A. Simmons, *Reflections on Mobilizing for Human Rights*, 44 *J. INT’L & POL.* 729, 733–35 (2012); *Bringing Theories of Human Rights Change Home*, *supra* note 2, at 461–75.

129. Hathaway, *supra* note 100, at 1939; Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 *COLUM. L. REV.* 1832, 1835 (2002); Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 *YALE L.J.* 273, 337–66 (1997); McGuinness, *supra* note 2, at 828.

tion”<sup>130</sup> of social influence mechanisms of coercion and persuasion and incorporates a third mechanism: acculturation.<sup>131</sup>

### III. RETHINKING THE STUDY OF DOMESTIC HUMAN RIGHTS

Acculturation was first introduced into the literature by Goodman and Jinks in 2004<sup>132</sup> and more fully developed in 2013<sup>133</sup> in a comprehensive project concerned with two primary objectives: the explication of under what conditions state actors are induced to obey international law and how a richer understanding of the ways in which norms operate can improve institutions and individuals seeking to promote human rights.<sup>134</sup> As a theoretical model, acculturation seeks to explain how changes in the social environment affect the behaviors of individuals and governments.<sup>135</sup> While presented in the context of state influence at the international level, acculturation provides conceptual and practical clarity regarding subnational normative change within the federalist structure of the United States.

Explaining how international law promotes human rights, Goodman and Jinks outline three mechanisms of social influence: material inducement, persuasion, and acculturation.<sup>136</sup> Persuasion is a process whereby target actors are convinced of the “truth, validity, or appropriateness of a norm, belief, or practice.”<sup>137</sup> Persuasion occurs when actors “actively assess the content of a particular message—a norm, practice, or belief—and change their minds.”<sup>138</sup> Acculturation is the process by which “actors adopt the beliefs and behavior patterns of the surrounding culture without actively assessing either the merits of those beliefs and behaviors or the materials costs and benefits of con-

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130. GOODMAN & JINKS, *supra* note 21, at 2.

131. *Id.* at 4–6.

132. *See* Goodman & Jinks, *supra* note 110, at 638.

133. *See* GOODMAN & JINKS, *supra* note 21, at 22.

134. *Id.* at 8.

135. “‘State socialization’ is, in our view, a process grounded in the beliefs, conduct, and social relations of individuals.” *Id.* at 41 (explaining how acculturation does not rely on a claim that the state is a person or exhibits properties of personhood).

136. *Id.* at 22. The focus of this Article centers only on the latter two mechanisms of social influence. Material inducement is defined as a mechanism by which “states and institutions influence the behavior of other states by increasing the benefits of conformity or the costs of nonconformity through material rewards and punishments.” *Id.* This is less applied in the context of the United States.

137. *Id.*

138. *Id.*

forming to them.”<sup>139</sup> As such, social and cognitive pressures drive acculturation and acculturation can “lead to internalization of taken-for-granted norms in some circumstances, but it may also lead to more superficial levels of conformity.”<sup>140</sup> Goodman and Jinks acknowledge the similarities between persuasion and acculturation, but argue these theories of influence are different in several key areas. First, persuasion requires acceptance of the “validity or legitimacy of a belief, practice or norm,” whereas acculturation requires an actor to “perceive that an important reference group harbors the belief, engages in the practice, or subscribes to the norm.”<sup>141</sup> Second, acculturation occurs as a result of social structure, and not due to content of the relevant rule.<sup>142</sup> This distinction is important when considering the history of American exceptionalism and the absence of binding international law on the United States in many substantive areas.

As one might imagine, it is often difficult to assess whether persuasion or acculturation has occurred. While state and local engagement with international law and human rights has been dismissed as symbolic politics,<sup>143</sup> it is clear from the breadth of subnational activities that the domestic human rights movement has moved well beyond symbolic politics. In fact, as Ahdieh notes, subnational engagement with foreign affairs and international law is not an aberration, but the standard.<sup>144</sup> One need look no further than the enactment of CEDAW provisions into local law,<sup>145</sup> divestment measures against South Africa,<sup>146</sup> Burma,<sup>147</sup> and Sudan,<sup>148</sup> enactment of ordinances to conform with the Kyoto Protocol,<sup>149</sup> and agreements by state and local actors to transnational cap and trade provisions for greenhouse gas

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139. *Id.*

140. *Id.* It is the latter argument regarding the possibility of superficial conformity that may apply directly to the experience of human rights expression in the United States.

141. *Id.* at 28–29.

142. *Id.* at 29.

143. Robert Stumberg, *Preemption & Human Rights: Local Options After Crosby v. NFTC*, 32 L. & POL'Y INT'L BUS. 109, 157 (2000); see also KECK & SIKKINK, *supra* note 110, at 15 (discussing symbolic politics and tactics of non-governmental organizations to target the behaviors and policies of states).

144. Ahdieh, *supra* note 7, at 1196.

145. *Id.* at 1196; Burroughs, *supra* note 2, at 416–18.

146. Davis, *supra* note 30, at 421.

147. *Id.* at 422; Burroughs, *supra* note 2, at 418–19.

148. Davis, *supra* note 30, at 422.

149. Ahdieh, *supra* note 7, at 1196; *Law's Migration*, *supra* note 6, at 1645–46; *Ratifying Kyoto at the Local Level*, *supra* note 8. See generally Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 37 I.L.M. 22 [hereinafter Kyoto Protocol].

emissions.<sup>150</sup> Each of these examples represents a key indicator for the presence of acculturation: “the relationship of the actor to a reference group or wider cultural environment.”<sup>151</sup>

To explain how persuaded actors internalize norms, adopt new rules of appropriate behavior, and redefine their interests and identities, Goodman and Jinks propose two distinct micro-processes: framing and cuing.<sup>152</sup> Similar to Snow’s use of the term framing,<sup>153</sup> referring to the signifying work of social movement activists, Goodman and Jink’s framing “is that the persuasive appeal of a counterattitudinal message increases if the issue is strategically framed to resonate with already accepted norms.”<sup>154</sup> Given that frames are “products of common cognitive orientations and shared assumptions,”<sup>155</sup> framing can be understood as an act of “cultural appropriation.”<sup>156</sup> The frames are not themselves ideas, but the mechanism for packaging and presenting ideas that motivate collective action and normative change. In this context, local translators or vernacularizes<sup>157</sup> become important to understanding internalization of human rights norms and standards. As Soohoo and Stolz noted in their study of reproductive rights advocacy in the United States, after activists import international human rights standards into their local advocacy, state and local governments play a key role in translating and “thickening the human rights standards, domesticating them, and giving them concrete-

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150. Ahdieh, *supra* note 7, at 1196.

151. See GOODMAN & JINKS, *supra* note 21, at 26. Goodman and Jinks argue that a “touchstone” of acculturation is the varying degree of identification with a reference group. In the instance of CEDAW, the Kyoto Protocol, outward-looking divestment legislation, and agreements by state and local actors to transnational cap and trade provisions domestic actors identified with international norms, standards, and in some instances international actors. *Id.*

152. GOODMAN & JINKS, *supra* note 21, at 25.

153. David A. Snow & Robert D. Benford, *Ideology, Frame Resonance, and Participant Mobilization*, 1 INT’L SOC. MOVEMENT RES. 197, 198 (1988). For a discussion of framing process theories, see generally Robert D. Benford & David A. Snow, *Framing Processes and Social Movements: An Overview and Assessment*, 26 ANN. REV. SOC. 611 (2000); David A. Snow, E. Burke Rochford, Jr., Steven K. Worden & Robert D. Benford, *Frame Alignment Processes, Micromobilization, and Movement Participation*, 51 AM. SOC. REV. 464 (1986).

154. Goodman & Jinks, *supra* note 110, at 636.

155. GOODMAN & JINKS, *supra* note 21, at 169.

156. *Id.*

157. Levitt & Merry, *supra* note 60, at 446–47, 451; *Transnational Human Rights and Local Activism*, *supra* note 2, at 39, 41; *Law From Below*, *supra* note 2, at 108. See generally Gillian MacNaughton, *Human Rights Frameworks, Strategies, and Tools for the Poverty Lawyer’s Toolbox*, 44 CLEARINGHOUSE REV. 437 (2011), <https://www.northeastern.edu/law/pdfs/academics/phrge-ClearinghouseJan%202011.pdf> (examining various human rights instruments, international law obligations, and monitoring and accountability mechanisms that can prove useful to advocates in constructing a human rights frame).

ness.”<sup>158</sup> Study of translation of frames is not only relevant in the context of political action by states and localities, but also in state courts. Given the significant authority states have over their own laws, advocates can urge judges to develop positive rights, interpret treaties and reservations, evaluate customary international law, and consider the existence of an international norm “as a factor in evaluating whether a state right has been breached.”<sup>159</sup>

For Goodman and Jinks, cuing links to the procedural context in which the material is presented. Proper cuing results in a target audience “‘think[ing] harder’ about the merits of a counter-attitudinal message.”<sup>160</sup> Thus, cuing has implications that reach far beyond the passage of inward- or outward-looking legislation.<sup>161</sup> Consider Resnik, Civin and Frueh’s examination of climate control and the importation of international law by translocal organizations of government actors (TOGAs).<sup>162</sup> The translocal activities of TOGAs requires a reconsideration of “the propriety of conceiving of states in the singular rather than appreciating their role as a collective national force” in particular when considering the prescription of federalism that states act in vertical or horizontal relationships with each other.<sup>163</sup> As their research revealed, networking is a key aspect of TOGAs’ work, “enabling them to serve as clearinghouses and repositories for information and sometimes as research and educational institutions.”<sup>164</sup> Through the information TOGAs “collect, the committees they organize, the conferences they run, and the services that they provide, TOGAs can affect members’ understandings of the kinds of problems and forms of group-based responses appropriate to their office.” Thus, TOGAs shape norms, policy preferences, and statutory and regulatory schemes.<sup>165</sup> Analysis of the variant acculturation processes of TO-

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158. *Bringing Theories of Human Rights Change Home*, *supra* note 2, at 495. Human rights is an evolving context-laden phrase. As society changes and evolves, for example, more groups or individuals become increasingly engaged in social and political decision-making a thickening of human rights reflects the normative system in which the concept is rooted.

159. *Law’s Migration*, *supra* note 6, at 1627–30; *see also* MacNaughton & McGill, *supra* note 46, at 387 (discussing the use of international law in state court decisions).

160. GOODMAN & JINKS, *supra* note 21, at 25.

161. *See supra* Part I.

162. *Ratifying Kyoto at the Local Level*, *supra* note 8, at 731 (“[M]any TOGAs are not organized by an interest (such as global warming or women’s rights), but rather by the political actors they gather—the level of jurisdiction (federal, state, county, city) or the kind of office (governor, attorney general, legislator, mayor).”).

163. *Id.* at 728.

164. *Id.* at 731.

165. *Id.* at 733.

GAs, and other translocal actors, can reveal important content about the function of relationships between individual actors and a larger reference group. Further, a deeper understanding of how TOGAs problematized climate change and targeted levels of government, raises the possibility of a more predictive nature of acculturation with respect to cognitive cues and conformity with international norms outside of the climate change context.

Cuing is also important in the context of legal mobilization for domestic human rights. Returning to the example of TOGAs, Resnik, Civin and Frueh note that, “legal interventions can invigorate translocal institutions.”<sup>166</sup> For example, statutes can directly assign roles to them or, by providing revenues targeted to one or another level of government, or can shape markets in which TOGAs operate.<sup>167</sup> Similarly, decisions by courts create incentives for TOGAs to work to influence judges and legislatures in local and national settings.<sup>168</sup>

The use of legal interventions as a form of cuing to advance a particular issue is not a new phenomenon. There is a significant body of literature addressing social movements and the strategic use of litigation.<sup>169</sup> For example, advocacy to end the juvenile death penalty

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166. *Id.*

167. *Id.*

168. *Id.*

169. See, e.g., JOEL F. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE (1979); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (2d ed. 2008); STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE 131 (1974); Michael W. McCann, *How Does Law Matter for Social Movements?*, in HOW DOES LAW MATTER? 76, 83–84 (Bryant G. Garth & Austin Sarat eds., 1998); Austin Sarat & Stuart Scheingold, *What Cause Lawyers Do for, and to, Social Movements: An Introduction*, in CAUSE LAW & SOC. MOVEMENTS 1, 10–12 (Austin Sarat & Stuart A. Scheingold eds., 2006); Kathryn Abrams, *Emotions in the Mobilization of Rights*, 46 HARV. C.R.-C.L. L. REV. 551, 552–53 (2011); Catherine Albiston, *The Dark Side of Litigation as a Social Movement Strategy*, 96 IOWA L. REV. BULL. 61, 62 (2011); Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927, 929 (2006); Scott Barclay et al., *Two Spinning Wheels: Studying Law and Social Movements*, 54 STUD. L. POL. & SOC'Y 1, 2–5 (2011); Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1438–39 (2005); Paul Burstein, *Legal Mobilization as a Social Movement Tactic: The Struggle for Equal Employment Opportunity*, 96 AM. J. SOC. 1201, 1203 (1991); Scott L. Cummings, *Hemmed In: Legal Mobilization in the Los Angeles Anti-Sweatshop Movement*, 30 BERKELEY J. EMP. & LAB. L. 1 (2009); Scott L. Cummings & Deborah L. Rhode, *Public Interest Litigation: Insights from Theory and Practice*, 36 FORDHAM URB. L.J. 603, 604 (2009); William N. Eskridge Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 420–22 (2001); William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2064–65 (2002); Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 10 (1994); Gwendolyn M. Leachman, *From Protest to Perry: How Litigation Shaped the LGBT Movement's Agenda*, 47 U.C. DAVIS L. REV. 1667, 1669–70 (2014); Neal Milner, *The Denigration of Rights and the Persistence of Rights Talk: A Cultural Portrait*, 14 LAW & SOC. INQUIRY 631, 636 (1989); Laura Beth Nielsen, *Social*

was initially launched in the states and culminated in the Supreme Court's decision in *Roper v. Simmons*.<sup>170</sup> This decision established a strong cue regarding the shifting norms of children's rights. Following the decision, human rights activists began to even more vigorously question the legality of life sentences without parole for juvenile offenders.<sup>171</sup> In 2010 and 2012, respectively, the Supreme Court reached decisions in *Graham v. Florida*,<sup>172</sup> and *Miller v. Alabama*,<sup>173</sup> which brought the United States into greater alignment with international children's rights norms. One can only imagine how future scholarly inquiry into the role of cuing, vis-à-vis the courts, as a mechanism of acculturation and norm socialization can help to overcome what Powell has argued is the "democratic deficit" in human rights treaty implementation.<sup>174</sup>

As a theory of influence, acculturation groups together a set of related social processes that induce behavioral change through pressures to conform.<sup>175</sup> As such, it is a more integrated model that creates an opportunity for its application to human rights activities within the United States. This dynamic operates not as an obstacle for understanding the diverse relationships and processes for human rights expression and norm socialization, but rather as a mechanism to consider the overall shared jurisdiction between federal, state, and local authorities acting in the space of human rights. This is particularly true as it emphasizes the "role of social interaction in preference and identity formation" of state actors, and similarly states, and may serve as a predicate for persuasion.<sup>176</sup> As is the case with other social processes, the effectiveness of acculturation may depend on several variables such as "strength, immediacy, and size."<sup>177</sup> For example, conformity with group norms becomes more likely as the importance of the group to the target actor increases, the importance of the issue

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*Movements, Social Process: A Response to Gerald Rosenberg*, 42 J. MARSHALL L. REV. 671, 672 (2009).

170. *Roper v. Simmons*, 543 U.S. 551, 572 (2005) (the decision referenced an amicus brief condemning the practice on international law grounds filed by Human Rights Advocates).

171. See, e.g., HUMAN RIGHTS WATCH & AMNESTY INT'L, THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES 60, 85 (2005), <http://hrw.org/reports/2005/us1005/TheRestofTheirLives.pdf> (reporting that the United States is violating international law by sentencing juveniles to life without parole).

172. See generally *Graham v. Florida*, 130 S. Ct. 2011 (2010).

173. See generally *Miller v. Alabama*, 132 S. Ct. 2455 (2012).

174. *Dialogic Federalism*, supra note 19, at 251–53.

175. GOODMAN & JINKS, supra note 21, at 26.

176. *Id.* at 29.

177. *Id.* at 28.

to the group increases, and the target actor's exposure to the group increases.<sup>178</sup> Consider the example of the 1998 CEDAW ordinance passed by the City of San Francisco.<sup>179</sup> Following this, the Los Angeles City Council adopted a Resolution in Support of CEDAW and subsequently passed an ordinance to comply with CEDAW.<sup>180</sup> As of 2004, forty-four cities, eighteen counties, and sixteen states had passed or considered CEDAW legislation.<sup>181</sup> Since then, more cities have moved forward with implementing inward-looking CEDAW legislation,<sup>182</sup> and there is currently a national movement by Cities for CEDAW<sup>183</sup> to implement CEDAW ordinances in 100 cities by 2016.<sup>184</sup>

Whereas persuasion highlights norm content, acculturation emphasizes a relationship of the target to a specific social reference group or larger social or cultural environment.<sup>185</sup> Given an emphasis on environment, analysis of local case studies become particularly relevant and informative. For example, how can understanding the actions taken by human rights advocates in Chicago, leading to the adoption of a resolution by the city to support the CRC, help to close the gap between what is desired as a norm and an actual outcome?<sup>186</sup>

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178. *Id.*

179. Burroughs, *supra* note 2, at 420–24; Davis, *supra* note 30, at 420–21; *Dialogic Federalism*, *supra* note 19, at 277–80; *Law's Migration*, *supra* note 6, at 1641–45; Singh, *supra* note 55, 546–48.

180. In 2015, a partnership between the Los Angeles City Commission on the Status of Women and Mount St. Mary's University yielded a 5-part report on the status of women and girls. CITY OF L.A., THE REPORT ON THE STATUS OF WOMEN AND GIRLS, PART 1: DEMOGRAPHICS (2015), [https://d3n8a8pro7vhm.cloudfront.net/mayorofla/pages/17106/attachments/original/1427823295/LACity\\_Part1\\_Demographics.pdf?1427823295](https://d3n8a8pro7vhm.cloudfront.net/mayorofla/pages/17106/attachments/original/1427823295/LACity_Part1_Demographics.pdf?1427823295); CITY OF L.A., THE REPORT ON THE STATUS OF WOMEN AND GIRLS, PART 2: LEADERSHIP (2015), [https://d3n8a8pro7vhm.cloudfront.net/mayorofla/pages/17106/attachments/original/1431998073/LACity\\_Part2\\_Leadership.pdf?1431998073](https://d3n8a8pro7vhm.cloudfront.net/mayorofla/pages/17106/attachments/original/1431998073/LACity_Part2_Leadership.pdf?1431998073).

181. *Bringing Theories of Human Rights Change Home*, *supra* note 2, at 496.

182. In 2014, the United States Conferences of Mayors adopted a resolution in support of cities for CEDAW initiatives, which encouraged cities to implement principles of CEDAW and enforce CEDAW at the municipal level. U.S. CONFERENCE OF MAYORS, 82ND ANNUAL MEETING: 2014 ADOPTED RESOLUTIONS 59–60 (2014), [http://www.usmayors.org/resolutions/82nd\\_Conference/resolutions-final.pdf](http://www.usmayors.org/resolutions/82nd_Conference/resolutions-final.pdf).

183. CITIES FOR CEDAW, <http://citiesforcedaw.org> (last visited June 7, 2015). It is expected in June 2015 that New York Mayor Bill de Blasio will implement the United States Conference of Mayors' resolution. Denis Fitzgerald, *New York City Expected to Adopt CEDAW Legislation in June*, UN TRIBUNE (Feb. 17, 2015), <http://untribune.com/new-york-city-expected-adopt-cedaw-legislation-june/>.

184. *Id.*

185. GOODMAN & JINKS, *supra* note 21, at 26. Group identification may be based on local environments or a larger global environment in which human rights norm have spread. *See id.*

186. *See* HUMAN RIGHTS INST., COLUMBIA LAW SCH., STATE AND LOCAL HUMAN RIGHTS AGENCIES: RECOMMENDATIONS FOR ADVANCING OPPORTUNITY AND EQUALITY THROUGH AN INTERNATIONAL HUMAN RIGHTS FRAMEWORK 9 (2009) [hereinafter STATE AND LOCAL HUMAN RIGHTS AGENCIES], <https://web.law.columbia.edu/sites/default/files/microsites/human-rights-insti>

Or how does studying the complexities of the development and passage of inward-looking legislation provide prescriptive lessons for sub-national actors seeking to establish “more concrete human rights norms”?<sup>187</sup> Similarly, how might the linking of the local with the global<sup>188</sup> through both inward- and outward-looking legislation help local communities situate themselves in a global context? Moreover, how does knowledge of the synergistic spiral<sup>189</sup> of mobilization at sub-national levels lead to increased diffusion of norms at the national level?

Returning to the context of human rights treaty compliance and federalism, it becomes clear that an exploration of the internal and external pressures that drive processes of acculturation can help scholars and policymakers alike respond to the need to develop cooperative federalism arrangements that address and acknowledge the continuation of states and local governments to engage in human rights activities, and foster increased incorporation of treaty obligations. Similarly, acculturation could also help identify how local treaty implementation helps “translate broad abstract principles contained in human rights treaties into concrete, definable standards on the ground.”<sup>190</sup> Furthermore, as human rights activities expand at the subnational level, there is an increased incentive to replicate those state and local initiatives, especially those that are legally binding, “to increase the viscosity of human rights law in the United States.”<sup>191</sup>

To be clear, the relationship between acculturation and persuasion is multi-faceted. For example, Goodman and Jinks acknowledge that acculturation can act as a cultural predictor for acts of persuasion by setting the broad frames for actors seeking to make claims with respect to human rights.<sup>192</sup> Instead of creating tension in future studies, this dynamic relationship is essential for theorizing and studying targeted actions organized around more than one mechanism of social influence, as is the case within the United States, where there are not

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187. Burroughs, *supra* note 2, at 421.

188. *Id.* at 423.

189. GOODMAN & JINKS, *supra* note 21, at 154.

190. *Dialogic Federalism*, *supra* note 19, at 279.

191. *Id.* at 293.

192. GOODMAN & JINKS, *supra* note 21, at 25.

formal legal or governmental structures to accomplish human rights internalization.<sup>193</sup>

Acculturation can be further understood through evaluation of processes of isomorphism, the development of structural similarity.<sup>194</sup> While legal environments can promote isomorphic conformity, norm socialization is not solely defined by legal outcomes. Institutionalization also provides greater detail into the processes of acculturation. When institutionalization occurs, rules and shared meanings move from abstractions to specific expectations, and in turn, to frames that are taken for granted and scripts that have become unscripted.<sup>195</sup> As Goodman and Jinks explain, “one mechanism leading to institutional isomorphism is mimesis by organizations that purposively model themselves on other similar organizations by adopting similar or identical decisions and structures.”<sup>196</sup>

While the presence of isomorphism does not conclusively evidence acculturation or complete socialization, it does however, allow for the drawing of important inferences and suggest the need for considering empirical patterns of behavior. As the number of state and local human rights commissions incorporating human rights standards and strategies suggest, patterns of isomorphism are present in the United States. For example, in 2008, the City of Portland created a Human Rights Commission that explicitly incorporated a human rights framework.<sup>197</sup> Article II of its bylaws is specifically guided by the “principles set forth in the United Nations Declaration of Human Rights.”<sup>198</sup> Utilizing the United Nations Declaration of Human Rights (UNDHR) guidelines, the Commission created a complaint mechanism to document and report on human rights violations.<sup>199</sup> Similarly, the Washington State Commission, charged with enforcing the state’s human rights statute, has utilized human rights reporting and documentation processes to address the lack of housing for farm workers.<sup>200</sup> In its report on housing, the Commission drew on Article 25 of the UNDHR.<sup>201</sup> Likewise, the San Francisco Commission on

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193. *By Some Other Means*, *supra* note 20, at 1998–2021 (discussing the pragmatic and functional concerns of localism in international law and human rights implementation).

194. GOODMAN & JINKS, *supra* note 21, at 43.

195. *Transnational Human Rights and Local Activism*, *supra* note 2, at 49.

196. GOODMAN & JINKS, *supra* note 21, at 43.

197. STATE AND LOCAL HUMAN RIGHTS AGENCIES, *supra* note 186, at 7.

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

the Status of Women is the implementing agency for the city ordinance that requires the city to “integrate gender equity and human rights principles into all of its operations” under CEDAW.<sup>202</sup> The City of Berkeley adopted a human rights ordinance based on the United Nations Charter to promote “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.”<sup>203</sup> In 2007, the city became the first locality to report on local human rights treaty compliance.<sup>204</sup> In Salt Lake City, the Human Rights Commission and the Mayor’s Office of Diversity and Human Rights have held a series of community sponsored dialogues on discrimination and in response the city has begun to consider using CEDAW to create a framework for more equitable gender policies.<sup>205</sup>

In the legal context, isomorphic outcomes can result when, resolving a pervasive or perhaps universal problem, several legal systems independent of each other reach a similar conclusion.<sup>206</sup> Consider, for example, the similarities between the decisions in *Miller v. Alabama*<sup>207</sup> and *People v. Gutierrez*,<sup>208</sup> as well as the 2014 hearing before the Inter-American Commission on Human Rights in *Hill v. United States*<sup>209</sup> each considering the issue of life without parole for juveniles. Legal isomorphism is not limited to court decisions. In fact, in the United States, some recent examples of legal isomorphism have occurred at state legislatures suggesting the possibility of state convergence with respect to international children’s rights norms.<sup>210</sup> For example, since 2005, twenty-three states have enacted legislation to reduce the prosecution of youth in adult courts and end the placement of youth in adult facilities consistent with international standards and

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202. *Id.* at 8.

203. BRINGING HUMAN RIGHTS HOME, *supra* note 46, at 20.

204. *Id.* (In 2009, the City Council required reporting on all three treaties the United States has ratified to measure Berkeley’s compliance.).

205. *Id.*

206. *California: New Youth Parole Law Promises Hope: Landmark Law Expands Parole for Teens Serving Adult Prison Terms*, HUMAN RIGHTS WATCH (Sept. 17, 2013) [hereinafter *California: New Youth Parole Law*], <http://www.hrw.org/news/2013/09/17/california-new-youth-parole-law-promises-hope-0>.

207. *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012).

208. *People v. Gutierrez*, 58 Cal. 4th 1354, 1390 (Cal. 2014).

209. *Hill v. United States*, Case No. 12.866 (Inter-Am. Comm’n on Human Rights 2014).

210. When discussing the empirical record evidencing state acculturation and convergence, Goodman and Jinks highlight the issue of women’s rights. See GOODMAN & JINKS, *supra* note 21, at 66.

norms.<sup>211</sup> Similar to the movement for the ratification of CEDAW, activists seeking the ratification of the CRC<sup>212</sup> have relied on state level reforms to support their efforts.<sup>213</sup> As Kalb notes, “albeit less extensive, [a] pro-ratification movement” is occurring at the state-level with respect to the CRC.<sup>214</sup> Similarly, human rights activists have also begun to organize around the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>215</sup>

Future scholarship studying the legal isomorphism of human rights activism in the United States is important to resolve the “core dilemma confronting human rights project, how to square the idea of universal international standards with the tendency towards localism and particularity.”<sup>216</sup> Moreover, it will be beneficial in shedding light on how states are internally influenced by human rights practices, how states in turn influence each other, and how states might influence norm internalization nationally. It may also help to illuminate new questions regarding the growing intersection between international, regional, national, municipal, and local legal regimes. Such plurality of formal law has meant that courts and tribunals increasingly turn to international human rights law to assist in their interpretation and ap-

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211. CAMPAIGN FOR YOUTH JUSTICE, STATE TRENDS: UPDATES FROM THE 2013–2014 LEGISLATIVE SESSION (2014), [http://www.campaignforyouthjustice.org/images/nationalreports/state\\_trends\\_updates\\_from\\_the\\_2013-2014\\_legislative\\_session.pdf](http://www.campaignforyouthjustice.org/images/nationalreports/state_trends_updates_from_the_2013-2014_legislative_session.pdf) (documenting New Hampshire as the fifth state to raise the age of the juvenile court jurisdiction to 18, and Nebraska and Maryland, successfully passed legislation which allows more cases to originate in or transfer back to the juvenile court, while two states (West Virginia and Hawaii) abolished juvenile life without parole); *Florida: Hope for Children Charged as Adults*, HUMAN RIGHTS WATCH (Apr. 8, 2015), <http://www.hrw.org/news/2015/04/08/florida-hope-children-charged-adults> (discussing proposed legislation in Florida); *California: New Youth Parole Law*, *supra* note 207 (discussing legislative changes in California).

212. CRC, *supra* note 39.

213. Advocates have noted that California Senate Bill 260 was proposed after three United States Supreme Court cases recognized the centrality of developmental differences between adults and children in sentencing. *E.g.*, *Senate Bill 260—Justice for Juveniles with Adult Prison Sentences*, FAIR SENTENCING FOR YOUTH, <http://fairsentencingforyouth.org/legislation/senate-bill-260-justice-for-juveniles-sentenced-to-adult-prison-terms/> (last visited July 1, 2015).

214. *Dynamic Federalism in Human Rights Treaty Implementation*, *supra* note 26, at 81 (noting that as of 2009, nine cities and five states had passed resolutions in support of CRC); see CHILDREN & FAMILY JUSTICE CTR. ET AL., UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: TOOLKIT FOR THE ADOPTION OF THE CONVENTION ON THE RIGHTS OF THE CHILD BY CITY COUNCILS AND STATE LEGISLATURES 8 (2009), <http://www.law.northwestern.edu/legalclinic/documents/CRC-TOOLKIT-11-2009.pdf>.

215. *Resource and Documents on the Human Rights Framework*, NAT'L LAW GUILD INT'L COMM. (Nov. 29, 2010), <http://www.nlginternational.org/news/article.php?nid=360> (Activist toolkit for promoting adoption of local ICESCR ratification resolutions); see AM. BAR ASS'N., RESOLUTION 117 (Aug. 12–13, 2013), [http://www.americanbar.org/content/dam/aba/administrative/homelessness\\_poverty/resolution117.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/homelessness_poverty/resolution117.authcheckdam.pdf); NESRI, <https://www.nesri.org> (last visited May 25, 2015); ESCR-NET, <http://www.escr-net.org> (last visited May 25, 2015).

216. *Dialogic Federalism*, *supra* note 19, at 253.

plication of domestic laws.<sup>217</sup> It is clear that the law and legal institutions are, in large part, a mechanism for socialization of elite and non-elite actors in society as law represents a body of obligations, procedures, and responsibilities established within a institutional regime so that society can continue to function in an orderly manner on the basis of rules so maintained.<sup>218</sup>

From a practical standpoint, research of this nature can also enhance an understanding of the conditions of mobilizing human rights for reform by providing concrete lessons for activists and policymakers.<sup>219</sup> For example, a deeper understanding of the cross-sectoral work of juvenile justice reform can create more coordinated efforts to further the movement. Such insights will challenge scholars and activists to ask probing questions about whom, and arguably what institutions, are the most effective at promoting social change. Similarly, greater clarity regarding how the collaboration between the work of international human rights organizations, such as Amnesty International or Human Rights Watch, and domestic social justice organizations, such as the Youth Law Center and the American Civil Liberties Union, can foster the development of new opportunities for treaty ratification, implementation, and compliance. Such inquiries move beyond a theoretical exploration of norm adherence to develop an empirical lens of the complex processes of social change. As Goodman and Jinks note, an expression of the various micro-processes of

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217. See Paul Schiff Berman, *The New Legal Pluralism*, 5 ANN. REV. L. SOC. SCI. 225, 229–32 (2009) (detailing the history and rise of global legal pluralism).

218. While this Article is focused on subnational human rights practices and expression, the importance of the recent Supreme Court decisions in *Graham*, *Miller*, and *Roper* to domestic internalization of human rights norms and increased compliance with international law cannot be overstated. This is particularly true when considering the complex processes that mark acculturation.

219. The example of the juvenile death penalty and the influence of public interest lawyers pursuing transnational justice is illustrative. In the mid-1980s, advocates began a campaign to challenge the juvenile death penalty that combined human rights advocacy, organizing, and traditional litigation. Lawyers brought a series of petitions before the Inter-American Commission, challenging the juvenile death penalty practice, each of which resulted in findings that the United States violated the right to life. Human rights organizing against the juvenile death penalty, coordinated primarily by the National Coalition to Abolish the Death Penalty, worked to build political support in the United Nations by providing testimony and materials to United Nations monitoring bodies. The legal campaign culminated in the decision in *Roper v. Simmons*, which struck down the juvenile death penalty and referenced an amicus brief condemning the practice on international law grounds. See Cummings, *supra* note 2, at 993–95; Brian D. Tittemore, *The Mandatory Death Penalty in the Commonwealth Caribbean and the Inter-American Human Rights System: An Evolution in the Development and Implementation of International Human Rights Protections*, 13 WM. & MARY BILL RTS. J. 445, 450–59 (2004).

socialization, including acculturation of law, facilitates a more robust description and design of human rights practices.<sup>220</sup>

To be clear, this Article does not suggest that acculturation is a perfect mechanism for explaining or influencing normative changes. In fact, as the examples presented *supra* suggest, acculturation can often involve either complete or incomplete internalization, highlighting the complex stages in which norms are internalized. Additionally, as Goodman and Jinks note, some forms of acculturation (partially internalized, social pressures) may crowd out other forms of acculturation, (completely internalized, cognitive scripts) thereby complicating the analysis.<sup>221</sup> However, this Article argues that acculturation can be one theory of influence by which scholars and activists alike can better understand the mechanisms of normative influences, more effectively evaluate the diffusion of human rights at the subnational and national levels, and develop new strategies for social change. As Soohoo and Stolz have argued, “in the United States, the role of social movements cannot be underestimated as a force for domestic change, and the process of social internalization often forces legal and political internalization, rather than vice versa.”<sup>222</sup> New analysis of the diverse range of human rights activities and, more importantly, how these activities influence positive and negative normative change, is critical not merely to support the overall movement for greater compliance with international norms by the United States, but rather to further explore how “democratic federalism has been, repeatedly, a source of importation that has transformed the nation’s self-understanding of its own legal commitments.”<sup>223</sup>

## CONCLUSION

In proposing a new approach for studying human rights compliance and practices in the United States, this Article suggests that simply asking whether international law, through an analysis of social influence mechanisms, has affected or guided domestic human rights compliance is inadequate. In this way, it challenges a deeper exploration of the architecture of human rights in the United States by asking how social influence mechanisms, typically associated with the study of human rights regime design at the international level, can explain

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220. GOODMAN & JINKS, *supra* note 21, at 9.

221. *Id.* at 189.

222. *Bringing Theories of Human Rights Change Home*, *supra* note 2, at 500.

223. *Ratifying Kyoto at the Local Level*, *supra* note 8, at 725.

micro- and macro- level human rights activities within the United States. These inquiries are guided by an understanding that critical attention must be paid to diverse local practices, as well as increased collaboration between subnational governments and the federal government.

Such questions expand and challenge the discourse of dialogic federalism and expose new directions for future empirical and normative work. For example, can the study of human rights through acculturation offer the possibility of greater information sharing and coordination needed to disseminate information about effective state and local initiatives that seek to implement human rights treaty obligations?<sup>224</sup> Similarly, can a study of the intersection between persuasion and acculturation provide insight into when and how global issues are transformed into norm portals,<sup>225</sup> allowing the importation of international norms into state legal systems? Further, can a new analysis of frames,<sup>226</sup> applied in movements for social, economic and political rights in the United States, overcome what Young<sup>227</sup> describes as the polarizing nature of distributive politics to “change the law or the understanding of the law.”<sup>228</sup> By studying such domestic human rights advocacy through the complex process of acculturation, scholars can also broaden the theoretical and practical application of acculturation beyond the global-domestic dichotomy.

This Article intentionally leaves open many questions regarding the application of Goodman and Jinks’ theory of influence to the study of human rights in the United States and urges the development of exacting descriptions of both localized case studies and the diverse expressions of dialogic and cooperative federalism arrangements to better understand how social influence mechanisms operate to effect and shape subnational compliance. The task of further integrating human rights into political, social, and legal consciousness is a critical one. Such case studies will prove indispensable, both descriptively and prescriptively, for understanding not only how global norms influence local actors, but also the dynamic influence that subnational governments can have on each other. Moreover, these case studies can produce valuable knowledge for human rights advocacy and mobiliza-

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224. *By Some Other Means*, *supra* note 20, at 1980–88, 2005–07.

225. McGuinness, *supra* note 2, at 760.

226. *See supra* note 153 and accompanying text.

227. Young, *supra* note 61, at 325.

228. *Id.* at 330–31 (citing Robert M. Cover, *The Supreme Court, 1982 Term: Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 33–40 (1982)).

tions in the United States and encourage important discourse regarding overlapping normative landscapes critical to realizing human rights goals.

# Negligent Credentialing: A Cause of Action for Hospital Peer Review Decisions

SEAN RYAN\*

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## INTRODUCTION

In 1997, Dr. Abubakar Atiq Durrani arrived in America with nothing but \$2000 in his pocket and a dream of becoming a back surgeon.<sup>1</sup> He represented himself as an accomplished spinal surgeon with a medical degree from the Army Medical College Quaid-e-Azam University in his native country of Pakistan.<sup>2</sup> For years, he served hundreds of patients in the Greater Cincinnati area in both Ohio and

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1. James Ritchie, *Facing Fraud Charges, Cincinnati Spine Doctor Speaks: Exclusive*, CIN. BUS. COURIER (July 29, 2013, 1:25 PM), <http://www.bizjournals.com/cincinnati/blog/2013/07/facing-fraud-charges-cincinnati-spine.html?page=all>.

2. Dr. Atiq Durrani, *Achievements and Patents of Dr. Atiq Durrani*, WORDPRESS (Aug. 12, 2013), <https://dratiqduurrani.wordpress.com/2013/08/12/achievements-and-patents-of-dr-atiq-duurrani/>.

Kentucky, working in hospitals in both states.<sup>3</sup> Yet, after nearly a decade of practice and hundreds of spinal surgeries performed, people began to question the necessity and effects of his diagnoses.<sup>4</sup> Soon, he faced federal charges for insurance fraud in performing unnecessary surgeries.<sup>5</sup> Many patients began to claim that his surgeries made their conditions worse and began mounting lawsuits against him.<sup>6</sup> Some alleged that there was no record of Dr. Durrani attending Quaid-Azam Medical College or any other medical school.<sup>7</sup>

Dr. Durrani, faced not only millions of dollars in lawsuits, but state and federal criminal charges.<sup>8</sup> Though the United States government revoked his passport, Dr. Durrani fled to Pakistan in 2013.<sup>9</sup> Dr. Durrani's patients continue their lawsuits against him.<sup>10</sup> The question remains how they will be able to recover from a defendant who has fled the country.

In such a situation, the most viable party for patients to turn to for recovery is the hospital that allowed their doctors to treat them. However, in most hospitals, doctors are not hospital employees or agents who subject the hospital to vicarious liability. Fortunately for Ohio patients, an alternative claim is allowed under Ohio law, called negligent credentialing. Patients in Ohio may bring a lawsuit directly against the hospitals that arguably failed to properly monitor credentialing of doctors before allowing them to practice in their facilities.<sup>11</sup> On the other hand, across the Ohio River, the Kentucky patients have

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3. *Mason Spinal Surgeon Facing Federal Charges*, Fox 19 (Feb. 20, 2013, 4:20 PM), <http://www.fox19.com/story/21289279/dr-durrani-facing-13-suits-claiming-medical-negligence>.

4. James Leggate, *Lawsuits: Local Hospitals Hosted 'Unnecessary' Surgery by Dr. Atiq Durrani*, WCPO (June 17, 2015 3:46 PM), <http://www.wcpo.com/news/local-news/hamilton-county/cincinnati/lawsuits-local-hospitals-hosted-unnecessary-surgery-by-dr-atiq-durrani>.

5. Greg Noble, *Dr. Atiq Durrani: Kentucky Suspends License of Doctor Facing Federal Charges*, WCPO (Nov. 8, 2013), <http://www.wcpo.com/news/local-news/dr-atiq-durrani-kentucky-suspends-license-of-mason-spine-doctor-facing-federal-charges>.

6. James Leggate, *Lawsuits: Local Hospitals Hosted 'Unnecessary' Surgery by Dr. Atiq Durrani*, WCPO (June 17, 2015 3:46 PM), <http://www.wcpo.com/news/local-news/hamilton-county/cincinnati/lawsuits-local-hospitals-hosted-unnecessary-surgery-by-dr-atiq-durrani>.

7. *Couple Files Suit Against Durrani, Claiming He Isn't Licensed Doctor*, WLMT 5 (Jan. 19, 2015 8:38 PM), <http://www.wlwt.com/news/couple-files-suit-against-durrani-claiming-he-isnt-licensed-doctor/30805142>.

8. Lisa Bernard-Kuhn, *Surgeon: I'll Fight Criminal, Civil Charges*, CINCINNATI.COM (Aug. 3, 2013), <http://archive.cincinnati.com/article/20130803/NEWS01/308030030/Surgeon-ll-fight-criminal-civil-charges>.

9. Donahy L. Firm, *Where Is Dr. Durrani? Fleeing Physician Leaves 160 Lawsuits Behind*, LAW FIRMS, <http://www.lawfirms.com/resources/medical-malpractice/where-is-dr-durrani-fleeing-physician-leaves-160-lawsuits-behind> (last visited Apr. 7, 2015).

10. *Id.*

11. *Schelling v. Humphrey*, 916 N.E.2d 1029, 1033 (Ohio 2009).

no such cause of action, because the Kentucky Supreme Court has not recognized a cause of action for negligent credentialing.<sup>12</sup>

Dr. Durrani's practice, spanning multiple states, illustrates the inconsistent results of the plethora of views about negligent credentialing that exist from state to state. While one patient may have recourse against a negligent hospital in one state, that same patient may have no recourse at all just ten miles away. This type of confusion should not exist and defeats patients' expectations of legal responsibility for safe medical care.

Doctors may only treat patients in hospital facilities by virtue of medical staff privileges. These privileges are divided between admitting privileges and clinical privileges. Admitting privileges grant physicians authority to admit patients to the hospital for treatment by other physicians.<sup>13</sup> Clinical privileges grant the physician's authority to admit and treat patients and otherwise use hospital facilities, among other subsets of authority.<sup>14</sup> The hospital must specifically delineate the scope of a doctor's clinical privileges.<sup>15</sup> This process of granting medical staff privileges is called credentialing. This credentialing process is based on the decisions of a peer review committee consisting of other members of the medical staff of that hospital. Decisions of the peer review board are similar to personnel decisions, which are in large part confidential. In addition to confidentiality, some state peer review statutes provide absolute immunity for peer review boards, which completely bans any claims against committee members even when they have acted negligently. Peer review boards are granted immunity for performing credentialing at the federal level by the Health Care Quality Improvement Act (HCQIA).<sup>16</sup> This immunity is mirrored at the state level by peer review statutes, which grant varying levels of immunity and differ by state.

This Article seeks to find a balance between the strict peer review statutes, which cut off legitimate negligence claims, and lax peer review statutes, which fail to filter out frivolous claims and burden the health care system. It analyzes the gaps in the law and a cause of action of negligent credentialing against hospitals for direct liability in

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12. *Trover v. Estate of Burton*, 423 S.W.3d 165, 168 (Ky. 2014).

13. FURROW ET AL., *HEALTH LAW: CASES, MATERIALS AND PROBLEMS* 877-80 (7th ed. 2013)

14. *Id.*

15. *Id.*

16. *Id.*

negligent credentialing decisions. Part I of this Article discusses the relationship between hospitals and doctors to show how traditional tort theories of recovery are inadequate when credentialing decisions in hospitals go wrong. It explains the role of hospital peer review boards in the credentialing process. Part II explores the different approaches taken by the various jurisdictions that have considered whether to adopt negligent credentialing and the impact that statutory language can have on the breadth of peer review statutes' application. Part III attempts to strike a balance among the approaches arguing for qualified immunity for hospital peer review boards. The Article concludes that states should adopt the cause of action of negligent credentialing to give injured patients recourse but provide some limited protections to hospitals if they follow hiring procedures outlined in the state peer review statute.

## I. THE HOSPITAL-DOCTOR RELATIONSHIP

The hospital-doctor relationship is most analogous to, yet still very different from the employer-employee or employer-independent contractor relationship at common law. The traditional employer-employee relationship creates vicarious liability for any acts of the employee made in the course and scope of employment.<sup>17</sup> Vicarious liability enables a plaintiff to sue an employer for the tortious acts of its agents, even when the employer had no personal involvement in the tort.<sup>18</sup> The theory behind vicarious liability is that if an employer gains the benefit of its employees, it is equitable that the employer should also gain its employees' liabilities. Conversely, the employer-independent contractor relationship shields the employer from actions brought against its independent contractors.<sup>19</sup> The employer-independent contractor relationship effectively severs vicarious liability, unlike the employer-employee relationship.<sup>20</sup> The theory behind severing vicarious liability is that unlike an employee, an employer lacks the control necessary to be responsible for the acts of the employer's independent contractors.<sup>21</sup>

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17. See Alan O. Sykes, *The Economics of Vicarious Liability*, 93 *YALE L.J.* 1231, 1231 n.4 (1984).

18. *Id.*

19. Martin C. McWilliams, Jr. & Hamilton E. Russell, III, *Hospital Liability for Torts of Independent Contractor Physicians*, 47 *S.C. L. REV.* 431, 432 (1996).

20. JONATHAN M. PURVER, 4 *AM. JUR. 2D Proof of Facts* 483 (1983).

21. Sykes, *supra* note 17, at 1259-60.

In most employment situations, other than the hospital-doctor relationship, American courts allow liability against employers for negligent hiring decisions concerning their employees and independent contractors, regardless of their legal label. For example, negligent hiring liability is allowed in situations where the employer negligently hired an individual with a discoverable dangerous propensity and the individual later causes harm to a third party.<sup>22</sup> This prevents employers from avoiding all liability for negligent behavior by framing the employment relationship as one of an employee/independent contractor.

The theory of negligent hiring traditionally applies to independent contractors. Under this theory of liability, an employer may be held liable for injuries to a party that result from a negligent hiring process where the employer knew of a dangerous propensity or should have known about a dangerous propensity on the part of the independent contractor.<sup>23</sup> This creates incentives for the employer to utilize caution with candidates who may cause harm and encourages a thorough hiring process. This prevents the problem of employers completely bypassing liability by framing the employment relationship as one of employer-independent contractor.

At first glance, it would seem that the theory of negligent hiring would hold hospitals liable for allowing someone to treat patients in the hospital who lacks credentials. Yet, courts have refused to allow negligent hiring as a cause of action against hospitals for credentialing decisions.<sup>24</sup> The common law of negligent hiring gravitates around the traditional employer-employee/contractor relationship. Hospitals have a much more complex, bifurcated credentialing structure that

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22. Although there is some concern over employment discrimination towards ex-convicts in this area, in many cases of negligent hiring, employed ex-convicts with violent criminal pasts were placed in a situation, which encouraged recidivism. For example, in *Oakley v. Flor-Shin, Inc.*, the defendant employer hired an individual with a criminal history, which included attempted rape. 964 S.W.2d 438, 441-42 (Ky. Ct. App. 1998). The employee was then left after-hours in a K-mart store, alone with a female employee-plaintiff. *Id.* at 439. The employee then sexual assaulted the plaintiff. *Id.* The plaintiff brought an action for negligent hiring against the defendant employer under the theory that the man who assaulted her had a known propensity for sex crimes and should have never been left alone with her. *Id.* The Court of Appeals of Kentucky held that negligent hiring was a cause of action and it created an issue of fact for the jury, because the defendant knew about the man's criminal history and knowingly left him alone with a female employee. *Id.* at 442.

23. McWilliams & Russell, *supra* note 19, at 433 n.7.

24. See Richard L. Griffith & Jordan M. Parker, *With Malice Toward None: The Metamorphosis of Statutory and Common Law Protections for Physicians and Hospitals in Negligent Credentialing Litigation*, 22 TEX. TECH L. REV. 156, 161 (1991).

make this common law of negligent hiring inapplicable for several reasons.

First, doctors are privately hired by their patients. Their relationship operates separately from a grant of hospital medical staff privileges. Members of a medical staff are not employees or agents of the hospital who will subject the hospital to lawsuits for negligent hiring. Instead of “hiring” physicians, the hospital only “credentials” the physician to practice within the institution.<sup>25</sup>

Second, the institutional decision making process is bifurcated between two distinct entities: the governing health care entity and the medical staff. The medical staff, comprised of doctors, has a status of independence unlike any employment relationship and involves independent bylaws governing staff privileges and patient care.<sup>26</sup> The board of the health care entity ultimately governs the structure and operations of the hospital and ensures that the medical staff has appropriate resources it needs to provide patient care.<sup>27</sup> The medical staff governs policies and procedures for effective medical care and staffing.<sup>28</sup> While each entity has different bylaws that govern different aspects of health care, the hospital is still often deemed to be responsible for the overall quality of care in the institution.<sup>29</sup>

Finally, the credentialing process is regulated through state peer review statutes, which vary state by state. Although no employee-employer relationship exists between most doctors and hospitals, and thus there is technically no “hiring,” hospital peer review boards in thousands of hospitals perform functions similar to hiring under the process of peer review.<sup>30</sup> Peer review is the process by which doctors review the performance of their colleagues.<sup>31</sup> A doctor must earn his or her ability to visit and treat patients in hospitals through a peer review process called credentialing.<sup>32</sup> The peer review board determines whether to grant clinical or admitting privileges to the doctor,

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25. *Id.* at 162.

26. Karen S. Rieger & Eric S. Fisher, Presentation at 2006 Fundamentals of Health Law Institute: Medical Staff Bylaws and Managed Care Provider Panels: Organization and Credentialing, at 3 (Nov. 8–10, 2006), [https://www.healthlawyers.org/Archive/Program%20Papers%20/2006\\_FUNDAMENTALS/rieger.pdf](https://www.healthlawyers.org/Archive/Program%20Papers%20/2006_FUNDAMENTALS/rieger.pdf).

27. *Id.*

28. *Id.*

29. *See id.*

30. *See* Dinesh Vyas & Ahmed Hozain, *Clinical Peer Review in the United States: History, Legal Development and Subsequent Abuse*, 20 *WORLD J. GASTROENTEROLOGY* 6357, 6357–58 (2014).

31. *See id.*

32. *See id.*

which allows the doctor to perform specific procedures.<sup>33</sup> The board makes its decision based on “current licensure; education and relevant training; and experience, ability, and current competence to perform the requested privilege(s).”<sup>34</sup>

At most hospitals, a peer review board consists of physicians who review their colleagues’ competency and ability to practice within the health care institution.<sup>35</sup> The peer review board examines a doctor’s license, education, training, and past practices and performance.<sup>36</sup> Verification of credentials further minimizes “the possibility of granting privilege(s) based on the review of fraudulent documents.”<sup>37</sup> A hospital’s Joint Commission accreditation, Medicare participation and other certifications depend on completing the credentialing process.<sup>38</sup>

In theory, peer review reduces the instances of medical malpractice by shutting out unqualified doctors from practicing medicine in the review board’s hospital and preventing poor performers from continuing to treat patients. Yet, peer review statutes differ from state to state, making it difficult to develop a nationwide consensus about hospital liability for credentialing doctors. While the HCQIA and Joint Commission establish minimum standards that are reflected in hospitals nationwide, the states have varying levels of liability for credentialing decisions within their peer review statutes.<sup>39</sup>

For example, the Texas peer review statute requires a showing of malice for the hospital to be liable for credentialing decisions, whereas the Minnesota peer review statute requires no showing at all.<sup>40</sup> The statute effectively operates by granting varying levels of immunity to hospitals for the actions of its peer review boards. By including the word “malice” throughout the Texas peer review statute, the Texas legislature effectively places an extremely high evidentiary burden on plaintiffs throughout the state.<sup>41</sup> Broadly speaking, most state courts have interpreted their peer review statutes to allow a tort action for

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33. FURROW ET AL., *supra* note 13, at 877–80.

34. THE JOINT COMMISSION ACCREDITATION MANUAL, MS.06.01.03 (2009).

35. Scott M. Smith, Annotation, *Construction and Application of Health Care Quality Improvement Act of 1986*, 121 A.L.R. FED. 255, 255 (1994).

36. *Id.*

37. *Id.*

38. See Rieger & Fisher, *supra* note 26, at 3, 5.

39. FURROW ET AL., *supra* note 13, at 885–86.

40. Compare *St. Luke’s Episcopal Hosp. v. Agbor*, 952 S.W.2d 503, 509 (Tex. 1997), with *Larson v. Wasemiller*, 738 N.W.2d 300, 313 (Minn. 2007).

41. Bridget Fuselier, *St. Luke’s Episcopal Hospital v. Agbor: The End of Negligent Credentialing*, 50 BAYLOR L. REV. 251, 259, 261 (1998).

negligent credentialing against hospitals in at least some form, but the hurdles plaintiffs face in pursuing the cause of action vary, depending upon the state's peer review statute.<sup>42</sup>

Because of the variations in state laws, at the federal level, the HCQIA regulates the credentialing process by granting peer review boards immunity in peer review decisions.<sup>43</sup> The HCQIA was enacted in 1986 to establish a mechanism for interstate reporting.<sup>44</sup> Prior to the HCQIA, incompetent physicians were able to flee from state to state without hospitals reporting the reasons for the physician leaving for fear of litigation.<sup>45</sup> To encourage hospitals and their review boards to report their peers for their misconduct and malpractice, the HCQIA grants immunity to peer review boards based on the theory that an immunized board is free to rigorously vet prospective physicians.<sup>46</sup> This theory is influential in some states' peer review statutes and several courts have cited the HCQIA as support to extend immunity to both the medical staff and the hospital institution.<sup>47</sup> Statutory regulation further differentiates hospital credentialing decisions from traditional hiring. Thus, while negligent hiring provides a theoretical framework for a new cause of action, negligent hiring is inadequate

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42. See *Domingo v. Doe*, 985 F. Supp. 1241, 1244–45 (D. Haw. 1997); *Crumley v. Mem'l Hosp., Inc.*, 509 F. Supp. 531, 535 (E.D. Tenn. 1978); *Humana Med. Corp. of Ala. v. Traffanstedt*, 597 So. 2d 667, 668–69 (Ala. 1992); *Fletcher v. S. Peninsula Hosp.*, 71 P.3d 833, 842 (Alaska 2003); *Tucson Med. Ctr., Inc. v. Misevch*, 545 P.2d 958, 960 (Ariz. 1976); *Elam v. College Park Hosp.*, 183 Cal. Rptr. 156, 160 (Cal. Ct. App. 1982); *Kitto v. Gilbert*, 570 P.2d 544, 550 (Colo. App. 1977); *Insinga v. LaBella*, 543 So. 2d 209, 214 (Fla. 1989); *Mitchell Cnty. Hosp. Auth. v. Joiner*, 189 S.E.2d 412, 414 (Ga. 1972); *May v. Wood River Twp. Hosp.*, 629 N.E.2d 170, 171 (Ill. App. Ct. 1994); *Winona Mem'l Hosp., L.P. v. Kuester*, 737 N.E.2d 824, 828 (Ind. Ct. App. 2000); *Ferguson v. Gonyaw*, 236 N.W.2d 543, 550 (Mich. Ct. App. 1976); *Taylor v. Singing River Hosp. Sys.*, 704 So. 2d 75, 78 n.3 (Miss. 1997); *Corleto v. Shore Mem'l Hosp.*, 350 A.2d 534, 537–38 (N.J. Super. Ct. Law Div. 1975); *Diaz v. Feil*, 881 P.2d 745, 749 (N.M. Ct. App. 1994); *Sledziewski v. Cioffi*, 528 N.Y.S.2d 913, 915 (N.Y. App. Div. 1988); *Blanton v. Moses H. Cone Mem'l Hosp., Inc.*, 354 S.E.2d 455, 458 (N.C. 1987); *Albain v. Flower Hosp.*, 553 N.E.2d 1038, 1045 (Ohio 1990) *overruled on other grounds by Clark v. Southview Hosp. & Family Health Ctr.*, 628 N.E.2d 46, 53 (Ohio 1994); *Strubhart v. Perry Mem'l Hosp. Trust Auth.*, 903 P.2d 263, 276 (Okla. 1995); *Welsh v. Bulger*, 698 A.2d 581, 586 (Pa. 1997); *Rodrigues v. Miriam Hosp.*, 623 A.2d 456, 462–63 (R.I. 1993); *Garland Cmty. Hosp. v. Rose*, 156 S.W.3d 541, 545–46 (Tex. 2004); *Wheeler v. Cent. Vt. Med. Ctr., Inc.*, 582 A.2d 165, 166 (Vt. 1989); *Pedroza v. Bryant*, 677 P.2d 166, 168–70 (Wash. 1984); *Roberts v. Stevens Clinic Hosp., Inc.*, 345 S.E.2d 791, 798 (W. Va. 1986); *Johnson v. Misericordia Cmty. Hosp.*, 301 N.W.2d 156, 164 (Wis. 1981); *Greenwood v. Wierdsma*, 741 P.2d 1079, 1088 (Wyo. 1987).

43. See 42 U.S.C. § 11111 (2006).

44. *Health Care Quality Improvement Act of 1986*, Am. Health Law. Assoc., <https://www.healthlawyers.org/hlresources/Health%20Law%20Wiki/HCQIA.aspx> (last visited May 1, 2015).

45. See Griffith & Parker, *supra* note 24, at 180.

46. *Id.*

47. See *Svindland v. A.I. DuPont Hosp. for Children of the Nemours Found.*, No. 05-0417, 2006 WL 3209953, at \*2 (E.D. Pa. Nov. 3, 2006); *Paulino v. QHG of Springdale, Inc.*, 386 S.W.3d 462, 470 (Ark. 2012).

for the highly regulated and complex process of hospital credentialing. The HCQIA is discussed further in Parts II and III.

## II. THE LAW OF NEGLIGENT CREDENTIALING AND STATE PEER REVIEW STATUTES

Negligent credentialing, as a cause of action, allows patients to seek compensation from the hospital peer review board under the theory that the review board improperly credentialed an incompetent doctor. Negligent credentialing is “the theory in which the recipient of harmful service recovers from a gatekeeping entity for allowing the provider of that service to engage in the activities that caused the recipient harm.”<sup>48</sup> While negligent hiring is an insufficient cause of action to encourage more rigorous vetting of doctors in the peer review process because of the complex nature of the hospital-doctor relationship, courts consider it to be the logical basis for negligent credentialing.<sup>49</sup>

The logical relationship between negligent hiring and negligent credentialing is that through the credentialing process, a hospital must exercise reasonable care in the selection and retention of employees to protect its patients from incompetent or careless surgeons.<sup>50</sup> The logical similarities are further explained by the “special relationship” between a hospital and its patients being analogous to the special relationship between an employer to its customers or clients that gives rise to the duty of an employer to safeguard patrons from incompetent or dangerous employees.<sup>51</sup>

### A. States Adopting Negligent Credentialing

As of this writing, 28 states have adopted the claim of negligent credentialing.<sup>52</sup> However, there is no consensus in the drafting of peer

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48. Andrew R. DeHoll, *Vital Surgery or Unnecessary Procedure? Rethinking the Propriety of Hospital Liability for Negligent Credentialing*, 60 S.C. L. REV. 1127, 1127 (2009).

49. Benjamin J. Vernia, Annotation, *Tort Claim for Negligent Credentialing of Physician*, 98 A.L.R.5th 533 (2002).

50. See *Rabelo v. Nasif*, 30 Mass. L. Rptr. 547, \*1–\*2 (Mass. Sup. Ct. 2012).

51. *Id.*

52. See *Domingo v. Doe*, 985 F. Supp. 1241, 1244–45 (D. Haw. 1997); *Crumley v. Mem'l Hosp., Inc.*, 509 F. Supp. 531, 535 (E.D. Tenn. 1978); *Humana Med. Corp. Ala. v. Traffanstedt*, 597 So. 2d 667, 668–69 (Ala. 1992); *Fletcher v. S. Peninsula Hosp.*, 71 P.3d 833, 842 (Alaska 2003); *Tucson Med. Ctr., Inc., v. Misevch*, 545 P.2d 958, 960 (Ariz. 1976); *Elam v. Coll. Park Hosp.*, 183 Cal. Rptr. 156, 160–161 (Cal. Ct. App. 1982); *Kitto v. Gilbert*, 570 P.2d 544, 550 (Colo. App. 1977); *Insinga v. LaBella*, 543 So. 2d 209, 214 (Fla. 1989); *Mitchell County Hosp. Auth. v. Joiner*, 189 S.E.2d 412, 414 (Ga. 1972); *May v. Wood River Twp. Hosp.*, 629 N.E.2d 170, 171 (Ill. App. Ct. 1994); *Winona Mem'l Hosp., Ltd. P'ship v. Kuester*, 737 N.E.2d 824, 828 (Ind.

review statutes and therefore, judicial interpretations about the breadth of the action greatly vary. Ohio is one example where the cause of action has significantly evolved. As recently as 2011, Ohio courts granted peer review boards blanket immunity for negligent credentialing, as long as they follow statutory procedures regulating the credentialing process.<sup>53</sup> The relevant Ohio Peer Review Statute first provided “[n]o hospital . . . shall be liable in damages . . . for any acts, omissions, decisions, or other conduct within the scope of the committee.”<sup>54</sup> Under the Ohio statute, even “sloppy” credentialing was allowed, as long as statutory procedures were followed.<sup>55</sup> Later, the Ohio legislature softened the immunity afforded to Ohio peer review boards to a “qualified immunity” scheme by providing a rebuttable presumption of no negligence if the hospital proves that it was accredited and followed statutory procedures during the accrediting process.<sup>56</sup>

In applying the peer review statutes, in *Schelling v. Humphrey*, the Ohio Supreme Court stated that hospitals have “a direct duty to grant and to continue staff privileges only to competent doctors . . . [and] a duty to remove ‘a known incompetent.’”<sup>57</sup> The court found that the plaintiff could pursue a claim of negligent credentialing against the hospital but only after establishing a claim for medical malpractice.<sup>58</sup> To prove a negligent credentialing claim in Ohio, “a

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Ct. App. 2000); *Ferguson v. Gonyaw*, 236 N.W.2d 543, 550 (Mich. Ct. App. 1976); *Larson v. Wasemiller*, 738 N.W.2d 300, 313 (Minn. 2007); *Taylor v. Singing River Hosp. Sys.*, 704 So.2d 75, 78 n.3 (Miss. 1997); *Corleto v. Shore Mem’l Hosp.*, 350 A.2d 534, 538–39 (N.J. Super. Ct. Law Div. 1975); *Diaz v. Feil*, 881 P.2d 745, 749 (N.M. Ct. App. 1994); *Sledziewski v. Cioffi*, 528 N.Y.S.2d 913, 915 (N.Y. App. Div. 1988); *Blanton v. Moses H. Cone Mem’l Hosp., Inc.*, 354 S.E.2d 455, 458 (N.C. 1987); *Albain v. Flower Hosp.*, 553 N.E.2d 1038, 1045 (Ohio 1990), *overruled on other grounds by Clark v. Southview Hosp. & Family Health Ctr.*, 628 N.E.2d 46, 53 (Ohio 1994); *Strubhart v. Perry Mem’l Hosp. Tr. Auth.*, 903 P.2d 263, 275–76 (Okla. 1995); *Welsh v. Bulger*, 698 A.2d 581, 586 (Pa. 1997); *Rodrigues v. Miriam Hosp.*, 623 A.2d 456, 462–63 (R.I. 1993); *Garland Cmty. Hosp. v. Rose*, 156 S.W.3d 541, 545–46 (Tex. 2004); *Wheeler v. Cent. Vt. Med. Ctr. Inc.*, 582 A.2d 165, 166 (Vt. 1989); *Pedroza v. Bryant*, 677 P.2d 166, 168–70 (Wash. 1984); *Roberts v. Stevens Clinic Hosp., Inc.*, 345 S.E.2d 791, 798 (W. Va. 1986); *Johnson v. Misericordia Cmty. Hosp.*, 301 N.W.2d 156, 164 (Wis. 1981); *Greenwood v. Wierdsma*, 741 P.2d 1079, 1088 (Wyo. 1987).

53. Lindsey Stout, *Negligent Credentialing as a Cause of Action in Indiana Medical Malpractice Litigation*, 10 IND. HEALTH L. REV. 249, 266 (2013) (first ellipses in original, second ellipses added).

54. *See id.*

55. *Huntsman v. Aultman Hosp.*, No. 2010CA0021, 2011 WL 884107, at \*2 (Ohio Ct. App. 2011).

56. *See Stout, supra* note 53, at 267.

57. *Schelling v. Humphrey*, 916 N.E.2d 1029, 1033 (Ohio 2009) (quoting *Albain v. Flower Hosp.*, 553 N.E.2d 1038, 1046 (Ohio 1990)).

58. *Id.* at 1033.

plaintiff injured by the negligence of a staff doctor must show that but for the lack of care in the selection or retention of the doctor, the doctor would not have been granted staff privileges and the plaintiff would not have been injured.”<sup>59</sup>

Other states have adopted more patient friendly versions of peer review statutes. For example, Minnesota has adopted a more liberal version of negligent credentialing that provides for liability for the hospital’s action or recommendation when that action or recommendation is not reasonably based on the facts that were known or that could have been known by reasonable efforts.<sup>60</sup> The Minnesota Supreme Court reasoned that the Minnesota peer review statute neither affirmed or rejected the notion of negligent credentialing as a cause of action and thus allowed for a judicially crafted remedy.<sup>61</sup> Minnesota’s interpretation of negligent credentialing is often cited by plaintiffs’ attorneys seeking to convince their respective state supreme courts to adopt negligent credentialing.<sup>62</sup>

The Minnesota Supreme Court decision in *Larson v. Wasemiller* is also representative of reasoning courts apply in adopting negligent credentialing.<sup>63</sup> In deciding whether to recognize the tort of negligent credentialing, the court addressed (1) whether Minnesota’s peer review statute created a cause of action for negligent credentialing, and (2) whether a common law cause of action for negligent credentialing existed.<sup>64</sup> Minnesota’s Peer Review Statute provides that:

No review organization and no person shall be liable for damages . . . when the person acts in the reasonable belief that the action or recommendation is warranted by facts known to the person or the review organization after reasonable efforts to ascertain the facts upon which the review organization’s action or recommendation is made . . . .<sup>65</sup>

The Minnesota court held that the statutory language contemplated the existence of a common law cause of action for negligent

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59. *Id.* However, in Ohio, a negligent credentialing claim does not become ripe until such time as the defendant physician is found liable for medical negligence. *Id.*

60. MINN. STAT. ANN. § 145.63 (West 2015).

61. See J. Taylor White, *Paulino v. QHG of Springdale, Inc., and Negligent Credentialing: A Look into Peer Review-Statutes and the Health Care Quality Improvement Act*, 66 ARK. L. REV. 879 (2013).

62. *Id.*

63. *Larson v. Wasemiller*, 738 N.W.2d 300, 306–07 (Minn. 2007).

64. *Id.*

65. MINN. STAT. ANN. § 145.63 (West 2015).

credentialing and did not abrogate the common law tort.<sup>66</sup> First, the court reasoned that the hospital's liability was not vicarious.<sup>67</sup> Rather, hospitals "owe a duty of care directly to patients to protect them from harm by third persons" and that the hospital-patient relationship is analogous to the innkeeper-guest relationship.<sup>68</sup> The court noted that it had previously recognized common law negligent hiring of employees and negligent selection of independent contractors as causes of action.<sup>69</sup> The court held that recognition of the tort of negligent credentialing "is inherent in and the natural extension of well-established common law rights."<sup>70</sup> Finally, the court noted the majority of courts have adopted the tort of negligent credentialing.<sup>71</sup>

Other states have not been as patient friendly in adopting negligent credentialing. For example, Texas adopted negligent credentialing, but with extremely heavy restrictions.<sup>72</sup> The Texas statute provides little ambiguity on negligent credentialing and only allows the cause of action in cases where the plaintiff can show the grant of privileges was made with malicious intent.<sup>73</sup> The requirement of malicious intent is so stringent that there has yet to be a case with a successful outcome for a plaintiff under the Texas negligent credentialing regime. The Texas Supreme Court in *St. Luke's Episcopal Hospital v. Agbor* rejected negligent credentialing as a cause of action in the ab-

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66. *Larson*, 738 N.W.2d at 303–04.

67. *Id.* at 305.

68. *Id.*

69. *Id.* at 305–06.

70. *Id.* at 306.

71. *Id.* at 306 n.3 (citing *Domingo v. Doe*, 985 F. Supp. 1241, 1244–45 (D. Haw. 1997); *Crumley v. Mem'l Hosp., Inc.*, 509 F. Supp. 531, 535 (E.D. Tenn. 1978); *Humana Med. Corp. of Ala. v. Traffanstedt*, 597 So.2d 667, 668–69 (Ala. 1992); *Fletcher v. S. Peninsula Hosp.*, 71 P.3d 833, 842 (Alaska 2003); *Tucson1 Med. Ctr., Inc., v. Misevch*, 545 P.2d 958, 960 (Ariz. 1976); *Elam v. College Park Hosp.*, 183 Cal. Rptr. 156, 160 (Cal. Ct. App. 1982); *Kitto v. Gilbert*, 570 P.2d 544, 550 (Colo. Ct. App. 1977); *Insinga v. LaBella*, 543 So.2d 209, 214 (Fla. 1989); *Mitchell County Hosp. Auth. v. Joiner*, 189 S.E.2d 412, 414 (Ga. 1972); *May v. Wood River Twp. Hosp.*, 629 N.E.2d 170, 171 (Ill. App. Ct. 1994); *Winona Mem'l Hosp., Ltd. P'ship v. Kuester*, 737 N.E.2d 824, 828 (Ind. Ct. App. 2000); *Ferguson v. Gonyaw*, 236 N.W.2d 543, 550 (Mich. Ct. App. 1976); *Taylor v. Singing River Hosp. Sys.*, 704 So.2d 75, 78 n.3 (Miss. 1997); *Corleto*, 350 A.2d at 537–38; *Diaz v. Feil*, 881 P.2d 745, 749 (N.M. Ct. App. 1994); *Sledziewski v. Cioffi*, 528 N.Y.S.2d 913, 915 (N.Y. App. Div. 1988); *Blanton v. Moses H. Cone Mem'l Hosp., Inc.*, 354 S.E.2d 455, 458 (N.C. 1987); *Albain*, 553 N.E.2d at 1045; *Strubhart v. Perry Mem'l Hosp. Trust Auth.*, 903 P.2d 263, 276 (Okla. 1995); *Welsh v. Bulger*, 698 A.2d 581, 586 (Pa. 1997); *Rodrigues v. Miriam Hosp.*, 623 A.2d 456, 462–63 (R.I. 1993); *Garland Cmty. Hosp. v. Rose*, 156 S.W.3d 541, 545–46 (Tex. 2004); *Wheeler v. Cent. Vt. Med. Ctr. Inc.*, 582 A.2d 165, 166 (Vt. 1990); *Pedroza v. Bryant*, 677 P.2d 166, 168–70 (Wash. 1984); *Roberts v. Stevens Clinic Hosp., Inc.*, 345 S.E.2d 791, 798 (W. Va. 1986); *Johnson v. Misericordia Cmty. Hosp.*, 301 N.W.2d 156, 164 (Wis. 1981); *Greenwood v. Wierdsma*, 741 P.2d 1079, 1088 (Wyo. 1987)).

72. See TEX. HEALTH & SAFETY CODE ANN. § 161.033 (West 2015).

73. *Id.*

sence of proof that the hospital peer review committee acted with malice, as required by Texas's peer review statute.<sup>74</sup>

Additionally, the Texas Supreme Court addressed the HCQIA, which also provides immunity to healthcare peer review committees.<sup>75</sup> The HCQIA requires hospital peer review committees to make factually supported decisions to improve healthcare, and the committee "shall be presumed to have met the preceding standards . . . of this title unless the presumption is rebutted by a preponderance of the evidence."<sup>76</sup> Therefore, the plaintiff has the burden of rebutting this presumption.<sup>77</sup> The court in *Abgor* distinguished "negligent treatment or care," for which the healthcare facility is not afforded immunity, from general negligence.<sup>78</sup> Therefore, the HCQIA allowed the state statute to provide immunity to healthcare facilities for credentialing decisions.<sup>79</sup>

These three examples of approaches to negligent credentialing are only a few of many. Arizona only allows negligent credentialing in the strict confines of traditional *respondeat superior*, which is easily bypassed utilizing the independent contractor relationship.<sup>80</sup> Iowa allows the cause of action, but holds that the credentialing file to prove malpractice against the hospital and doctor is inadmissible at trial.<sup>81</sup>

What these great variations in the negligent credentialing cause of action show is that deciding whether or not to adopt negligent credentialing is only half of the inquiry. The cause of action may be adopted in the state, but it may provide no relief because either the standard of care is set so low that the action cannot be proven or all of the evidence needed to prove negligence is exempt from discovery.

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74. *St. Luke's Episcopal Hosp. v. Agbor*, 952 S.W.2d 503, 504 (Tex. 1997).

75. *Id.* at 514–15; see 42 U.S.C. § 11111 (2015). A peer review committee likely qualifies as a "professional review body" under the HCQIA: "[A] health care entity and the governing body or any committee of a health care entity which conducts professional review activity, and includes any committee of the medical staff of such an entity when assisting the governing body in a professional review activity." § 11151(11) (2015). A hospital is a covered "health care entity," defined as "a hospital that is licensed to provide health care services by the State in which it is located." § 11151(4)(a)(i).

76. § 11112(a).

77. *Id.*

78. *St. Luke's Episcopal Hosp.*, 952 S.W.2d at 507.

79. *Id.*

80. See White, *supra* note 61. It should be noted the Arizona Supreme Court has allowed an alternative for negligent supervision of an independent contractor. *Fridena v. Evans*, 622 P.2d 463, 465 (Ariz. 1980). This provides some measure of recourse outside of negligent credentialing.

81. *Cawthorn v. Catholic Health Initiatives Iowa Corp.*, 743 N.W.2d 525, 528 (Iowa 2007) (finding the credentialing file inadmissible in a malpractice lawsuit against the hospital and doctor).

Thus, while negligent credentialing is adopted by the majority of states and is generally considered a cause of action on the rise, this does not always lead to relief for many patients.

In short, the breadth of a negligent credentialing cause of action greatly depends upon a court's interpretation of a particular peer review statute. While this leads to great flexibility for some plaintiffs, other plaintiffs are prevented from bringing a cause of action at all. Indeed, courts may construe peer review statutes so narrowly that a cause of action for negligent credentialing is nonexistent. As seen in the next section, such an interpretation is present in a large number of states.

#### B. States Rejecting Negligent Credentialing

Just as with the adoption of negligent credentialing, the rejection of the cause of action is grounded on the interpretation of state peer review statutes. However, there is also a federal basis for the rejection of the cause of action in the HCQIA.<sup>82</sup>

The HCQIA encourages the medical profession to police its own. It grants confidentiality and broad immunity to peer review boards for discussions about their peers and their decisions about credentialing them. Those include decisions of whether the physician may have clinical privileges or membership; the scope or conditions of such privileges or membership; or a change or modification to such privileges or membership.<sup>83</sup>

The policy behind the HCQIA is that affording peer review board members immunity will promote frank, critical discussions about the qualifications and performance of doctors practicing in the board's hospital.<sup>84</sup> The HCQIA grants this immunity as long as the peer review board complies with four elements. First, the action must be made with the reasonable belief that the action is in furtherance of the quality of care.<sup>85</sup> Second, the action is taken after "a reasonable effort to obtain the facts of the matter."<sup>86</sup> Third, the action is taken after adequate notice and hearing.<sup>87</sup> Finally, there is a "reasonable belief that the action was warranted by the facts known after such

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82. See 42 U.S.C. § 11111 (2015).

83. § 11151(10).

84. See White, *supra* note 61, at 904–05.

85. § 11112(a)(1).

86. § 11112(a)(2).

87. § 11112(a)(3).

reasonable effort to obtain the facts and after meeting” the third requirement.<sup>88</sup>

In theory, the end result of the HCQIA is a more rigorous credentialing process that better filters incompetent physicians from medical practice that benefits patients, physicians and hospitals. However, some physicians argue that the immunities afforded peer review boards go too far, as courts are reluctant to second guess decisions made in hospital peer review processes.<sup>89</sup> These physicians’ practical result is absolute immunity for peer review boards.<sup>90</sup> For patients, that same immunity can be an insurmountable obstacle for a claim of negligent credentialing and many states have considered HCQIA grounds for rejecting the cause of action.

States that reject negligent credentialing consider the HCQIA as the basis for extending total immunity to the hospital itself under their respective peer review statutes, thus making the negligent credentialing an untenable cause of action under state law.<sup>91</sup> Arkansas and Kansas are two states, which have expressly rejected a cause of negligent credentialing based not only on the language of the state peer review statute, but also under the HCQIA.<sup>92</sup> These states find that the benefits of the critical discussion in peer review boards created by total immunity are superior to any purported benefit from possible liability for negligence in credentialing decisions.<sup>93</sup>

Courts also use the language of a state’s peer review statute to reject negligent credentialing as a cause of action. For example, the *Paulino* court in Arkansas rejected negligent credentialing for two reasons.<sup>94</sup> First, the court concluded that negligent credentialing conflicted with the state’s medical malpractice act because the hospital’s credentialing decision was not a “medical injury” as defined by the Act.<sup>95</sup> Under the Arkansas statute, a “medical injury” includes “services being rendered by a medical care provider, whether resulting

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88. § 11112 (a)(4).

89. Dr. Michael Lawrence Langan, *Physician Health Programs (PHPs) are Not Above the Law; They Just Think They are*, (Dec. 15, 2015), <http://disruptedphysician.com/tag/medical-boards/>.

90. *Id.*

91. See generally Thomas J. Hurney Jr. et al., *A Practical Analysis of HCQIA Immunity*, IN-HOUSE DEF. Q., Fall 2009, at 34, 38.

92. See *Paulino v. OHG of Springdale, Inc.*, 386 S.W.3d 462, 470 (Ark. 2012); *McVay v. Rich*, 874 P.2d 641, 645 (Kan. 1994).

93. *Svindland*, 2006 WL 3209953, at \*2.

94. *Paulino*, 386 S.W.3d at 467–69.

95. ARK. CODE ANN. § 16-114-201 (repealed 2006); *Paulino*, 386 S.W.3d at 467.

from negligence, error, or omission.”<sup>96</sup> Since the hospital was not directly involved with the doctor’s decision to perform plaintiff’s surgery, the hospital was not liable for a “medical injury” under the medical malpractice act.<sup>97</sup> Second, the *Paulino* court rejected the argument that negligent credentialing was simply an extension of common law negligent hiring or negligent supervision because Arkansas’ Peer Review Statute already provided for review of physician competency.<sup>98</sup>

The Arkansas Supreme Court distinguished cases like the Minnesota *Larson* case because of the language in the states’ peer review statutes. The Arkansas statute affords immunity to hospital peer review committees as long as they act without fraud or malice. The statute provides that “[t]here shall be no monetary liability on the part of, and no cause of action for damages shall arise against, any member of a peer review committee for any act or proceeding undertaken or performed within the scope of the functions of the committee if the committee member acts without malice or fraud.”<sup>99</sup> To the contrary, the Minnesota Peer Review Statute in *Larson* does not preclude claims for negligent credentialing.<sup>100</sup> In *Larson*, the Minnesota Supreme Court stated that the language in the Minnesota statute implied that “a review organization shall be liable for granting privileges where the grant is not reasonably based on the facts that were known or that could have been known by reasonable efforts.”<sup>101</sup>

Similar to the Arkansas Supreme Court, the Kansas Supreme Court in *McKay v. Rich* rejected negligent credentialing.<sup>102</sup> The Kansas Peer Review Statute, like the Arkansas Peer Review Statute, provides immunity to healthcare facilities for credentialing decisions.<sup>103</sup> The Kansas statute precludes “liability on the part of . . . any licensed medical care facility because of the rendering of or failure to render professional services within such medical care facility by a person licensed to practice medicine and surgery if such person is not an employee or agent of such medical care facility.”<sup>104</sup> Relying on this

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96. § 16-114-201 (repealed 2006).

97. *See id.*

98. *Paulino*, 386 S.W.3d at 468–69; *see* ARK. CODE ANN. §§ 20-9-501 to 503 (2015).

99. § 20-9-502(a).

100. MINN. STAT. § 145.63 (2015) (addressing the standard of care applicable to a cause of action for negligent credentialing).

101. *Larson v. Wasemiller*, 738 N.W.2d 300, 304 (Minn. 2007); *see also id.*

102. *McKay v. Rich*, 874 P.2d 641, 645 (Kan. 1994).

103. KAN. STAT. ANN. § 65-442(b) (2015).

104. *Id.*

statute, the *McKay* court barred a patient's claim of negligent credentialing, holding that a claim could not exist against the hospital for a non-employee doctor to render professional services.<sup>105</sup>

The importance of these cases and the various approaches taken is that they make very clear that the decision whether to allow negligent credentialing as a cause of action will turn on the peer review statute's precise language. Some states may choose to use the HCQIA immunities to strengthen their positions. The result is inconsistent recourse for plaintiffs and some states remaining in limbo about adopting negligent credentialing.

### C. The State of Confusion—Negligent Credentialing in Limbo

Some states' lower courts have adopted negligent credentialing, but they are still in a state of limbo. Indiana and Kentucky are two states that have adopted negligent credentialing, but not at the Supreme Court level.<sup>106</sup> Indiana's Court of Appeals adopted negligent credentialing in medical malpractice cases in *Winona Mem'l Hosp. v. Kuester*.<sup>107</sup> In *Kuester*, the Indiana Supreme Court analyzed the plaintiff's negligent credentialing claim in the context of the Indiana Medical Malpractice Act.<sup>108</sup> The court viewed the plaintiff's claim as two acts of negligence. The first was the medical malpractice itself and the second was the failure of the hospital and its medical review board to enact policies to prevent the malpractice.<sup>109</sup> The court found that the Indiana Medical Malpractice Act's definition of "health care provider" was broad enough to encompass medical review panels and hospitals.<sup>110</sup> The court found that since credentialing was "directly related to the provision of health care" that it was covered under the Medical Malpractice Act and that a negligent credentialing action was valid.<sup>111</sup>

However, the Indiana Supreme Court has never ruled on negligent credentialing as a cause of action.<sup>112</sup> Subsequent cases in Indiana

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105. *McKay*, 874 P.2d at 645.

106. See *Estate of Burton v. The Trover Clinic Found.*, No. 2009-CA-001595, 2011 Ky. App. Unpub. LEXIS 1001, at \*7 n.5 (Ky. Ct. App. June 10, 2011); *Winona Mem'l Hosp., v. Kuester*, 737 N.E.2d 824, 828-29 (Ind. Ct. App. 2000).

107. 737 N.E.2d at 825.

108. *Id.*

109. *Id.* at 828.

110. *Id.*

111. *Id.*

112. *Beswick v. Bell*, 940 N.E.2d 338, 343 (Ind. Ct. App. 2010).

have also cast doubt on the *Kuester* decision.<sup>113</sup> One court expressly granted privileges to all medical board members in their individual capacities in negligent credentialing actions.<sup>114</sup> Another court questioned the depth of *Kuester* court's interpretation of the Medical Malpractice Act and stated negligent credentialing was to be applied narrowly by plaintiffs.<sup>115</sup> Without an Indiana Supreme Court ruling on the issue, Indiana remains in the dark on the future of negligent credentialing in the state and legal scholars continue to debate which scheme the state should adopt.<sup>116</sup>

Some scholars have looked towards another state struggling with the adoption of negligent credentialing.<sup>117</sup> Kentucky is a prime example of a state that is still wrangling with whether to adopt negligent credentialing. The Kentucky Court of Appeals in *Burton v. Trover Clinic Foundation* adopted the tort of negligent credentialing and outlined the elements that a plaintiff must prove for a cause of action.<sup>118</sup> However, the issue of negligent credentialing in the bifurcated trial court proceedings was not presented to the jury and was not necessary to the Supreme Court's discretionary review on appeal, and so the strength of the authority is questionable.

In *Burton*, the scans of the plaintiff's chest revealed lung cancer.<sup>119</sup> However, the defendant "misread" three charts and did not give a diagnosis.<sup>120</sup> Treatment was delayed and the cancer became untreatable due to Dr. Trover's "misread" of the plaintiff's chart.<sup>121</sup> At trial, Plaintiff brought a medical negligence claim against the doctor and a negligent credentialing claim against the Foundation and hospital.<sup>122</sup> The trial court bifurcated the case against the doctor, foundation, and hospital.<sup>123</sup> The jury heard the medical negligence claim against the doctor in phase one of the trial.<sup>124</sup> The jury returned

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113. *Longa v. Vicory*, 829 N.E.2d 546, 548-49 (Ind. Ct. App. 2005); *Roberts v. Sankey*, 813 N.E.2d 1195, 1199 (Ind. Ct. App. 2004).

114. *Longa*, 829 N.E.2d at 549 (noting that the *Kuester* court had not ruled on liability regarding individual capacity).

115. *Sankey*, 813 N.E.2d at 1199.

116. See Stout, *supra* note 53, at 250.

117. *Id.* at 262.

118. Estate of *Burton v. The Trover Clinic Found.*, No. 2009-CA-001595, 2011 Ky. App. Unpub. LEXIS 1001, at \*6 n. 5 (Ky. Ct. App. June 10, 2011).

119. *Id.* at \*2.

120. *Id.*

121. *Id.*

122. *Id.* at \*3.

123. *Id.* at \*4.

124. *Id.*

a verdict against Plaintiff.<sup>125</sup> However, the jury never heard the negligent credentialing claim which alleged that the hospital knew of the doctor's unsafe practices and approved his credentialing.<sup>126</sup>

On appeal, the Kentucky Court of Appeals reversed judgment against Plaintiff on the medical negligence issue on the basis of evidentiary errors and in the process, adopted the tort of negligent credentialing in Kentucky.<sup>127</sup> The court reasoned that Kentucky adopted the similar tort of negligent hiring outlined in *Oakley v. Flor-Shin, Inc.*<sup>128</sup> The court concluded that negligent credentialing was an extension of the doctrine of negligent hiring.<sup>129</sup> The court also reasoned that at least 28 other states have adopted the tort of negligent credentialing.<sup>130</sup>

The Court of Appeals then outlined the elements of negligent credentialing.<sup>131</sup> The underlying medical malpractice claim is a pivotal issue in negligent credentialing cases.<sup>132</sup> If the plaintiff fails to prove that the physician is negligent, a hospital's failure to exercise reasonable care in the selection and credentialing of medical staff cannot be the proximate cause of the patient's injuries.<sup>133</sup> The remaining elements that the plaintiff must prove are "(1) [t]he defendant hospital owed the patient a duty to ensure a competent medical staff, (2) [t]he hospital breached that duty by granting privileges to an incompetent or unqualified physician, and (3) [t]he physician caused harm to the patient."<sup>134</sup>

In its decision to adopt negligent credentialing, the Kentucky Court of Appeals relied upon the doctrine of negligent hiring discussed in *Oakley v. Flor-Shin, Inc.*<sup>135</sup> Negligent hiring is defined as follows: "an employer can be held liable when its failure to exercise ordinary care in hiring or retaining an employee creates a foreseeable

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125. *Id.*

126. *See id.*

127. *Id.* at \*2.

128. *Id.* at \*6 (citing *Oakley v. Flor-Shin, Inc.*, 964 S.W.2d 438, 442 (Ky. Ct. App. 1998) ("Commonwealth recognizes that an employer can be held liable when its failure to exercise ordinary care in hiring or retaining an employee creates a foreseeable risk of harm to a third person.")).

129. *Id.* at \*6 n.5.

130. *Id.* at \*6.

131. *Id.* at \*6-7

132. *Id.* ("The underlying medical malpractice claim must be proved.").

133. *Burton* does not support this contention.

134. *Id.* at 6.

135. *See Oakley v. Flor-Shin, Inc.*, 964 S.W.2d 438, 441-42 (Ky. Ct. App. 1998).

risk of harm to a third person.”<sup>136</sup> In negligent hiring cases, courts evaluate whether the employer knew, or reasonably should have known, that (1) the employee was unfit for the job and (2) the employee’s “placement or retention in that job created an unreasonable risk of harm.”<sup>137</sup>

The Kentucky Supreme Court granted discretionary review in the *Burton* case, largely to “consider the Court of Appeals’ recognition of a new cause of action against a hospital for ‘negligent credentialing.’”<sup>138</sup> However, because the trial court bifurcated the negligent credentialing issue, reserving that issue for phase two of the trial, the issue before the Supreme Court only turned on whether the trial court’s evidentiary rulings were an abuse of discretion. The Supreme Court concluded that the trial court did not abuse its discretion, and the Supreme Court was “constrained simply to reinstate the trial court’s judgment and to leave for another day consideration of a negligent credentialing cause of action.”<sup>139</sup> The Kentucky Supreme Court’s saving the issue of negligent credentialing for another day has left the issue in a state of confusion in Kentucky. While the Kentucky Court of Appeals has shown willingness to adopt negligent credentialing, the cause of action is in a state of limbo until the Kentucky Supreme Court rules on the issue. The Court has yet to wrangle with the Kentucky Peer Review Statute.

#### D. Analysis Based on the Indiana and Kentucky Peer Review Statutes

The language of state peer review statutes can be the basis for arguments that a state should adopt or reject negligent credentialing

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136. *Id.* at 442.

137. *Id.* Kentucky courts distinguish between negligent hiring and negligent retention.

A claim for negligent hiring arises when an employer negligently places a person with known propensities, or propensities which should have been discovered by reasonable investigation, in an employment position in which it should have been foreseeable that the individual posed a threat of injury to others. Negligent retention requires that the employer be aware, or should have been aware, that an employee poses a threat and fails to take remedial measures to ensure the safety of others.

*Airdrie Stud, Inc. v. Reed*, No. 2001-CA-001397-MR, 2003 WL 22796469, at \*4 (Ky. Ct. App. Nov. 26, 2003). Kentucky also recognizes a claim for “negligent supervision.” Plaintiff must show that (1) “the employer knew or should have known that the employees were unfit for the job, and” (2) “the employer’s alleged failure to properly supervise the employees created an unreasonable risk of harm to the claimant.” *Jones v. Lexington H-L Servs.*, No. 2003-CA-002072-MR, 2004 WL 2914880, at \*11 (Ky. Ct. App. Dec. 17, 2004).

138. *Trover v. Estate of Burton*, 423 S.W.3d 165, 167 (Ky. 2014).

139. *Id.* at 167–68.

as a cause of action.<sup>140</sup> If a peer review statute requires a showing of malice or bad faith on the part of a peer review board, proving negligent credentialing may be difficult. Peer review statutes in Indiana and Kentucky show how negligent credentialing claims will turn on statutory language.

The Indiana peer review statute establishes a very strict standard of liability for negligent credentialing, very similar to Texas.<sup>141</sup> Indiana's peer review statute provides "[i]n all actions to which this chapter applies, good faith shall be presumed, and malice shall be required to be proven by the person aggrieved."<sup>142</sup> This provides little room for interpretation at common law if the Indiana Supreme Court chooses to adopt negligent credentialing as a cause of action.

While the Indiana Peer Review Statute provides clarity on the highly restricted future of negligent credentialing in the state, Kentucky's peer review statute leaves more room for interpretation. Although the Kentucky Peer Review Statute does not explicitly require "malice" as a requirement for an action against a peer review committee, it does require bad faith.<sup>143</sup> Defendants in a negligent credentialing case could argue that the immunities afforded by Kentucky's Peer Review Statute are the basis for rejecting the adoption of negligent credentialing in Kentucky.<sup>144</sup>

The Kentucky Peer Review Statute provides statutory immunity from civil liability for activities related to the peer review procedure, stating that a person engaged in such functions "shall not be required to respond in damages for any action taken by him in good faith as a member of such committee, board, commission or other entity."<sup>145</sup> The purpose of Kentucky's Peer Review Statute is to protect "licensed health organizations from being sued for good faith actions made in the performance of a peer review function."<sup>146</sup> Defendants could argue that this shows the legislature's intent to immunize peer review committees in all lawsuits, as long as they act in good faith within the scope of their duties.<sup>147</sup>

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140. See White, *supra* note 61, at 879.

141. Compare Fuselier, *supra* note 41 (based on a common law understanding) with IND. CODE § 34-30-15-23 (2015).

142. IND. CODE § 34-30-15-23 (2015).

143. KY. REV. STAT. ANN. § 311.377(1) (LexisNexis 2015).

144. See *id.*

145. § 313.035(5) (LexisNexis 2015); see § 311.377(1).

146. Sisters of Charity Health Sys. v. Raikes, 984 S.W. 2d 464, 469 (Ky. 1998).

147. Defendants arguing against the adoption of negligent credentialing in Kentucky may also rely on a Sixth Circuit antitrust case, *Manion v. Evans*, which determined that the HCQIA's

However, while defense attorneys may assert the good faith language, plaintiffs' attorneys may take solace in the statute. The Kentucky Peer Review Statute's immunity appears to be limited to actions brought by those seeking staff privileges. It provides that "[a]ny person who applies for, or is granted staff privileges . . . shall be deemed to have waived as a condition of such application or grant, any claim for damages for any good faith action taken by any person who is a member" of a peer review committee.<sup>148</sup>

Moreover, the Kentucky Supreme Court in *Raikes* found that the immunity in Ky. Rev. Stat. 311.377(2) is limited, as it does not prohibit discovery of peer review records and material in medical malpractice suits.<sup>149</sup> Also, the Court held that the peer review privilege on discovery matters does not extend to medical malpractice suits.<sup>150</sup> The immunity afforded by the Kentucky Peer Review Statute is quite limited.<sup>151</sup> Thus, while Indiana's negligent credentialing future looks to be highly restricted, Kentucky's peer review statute allows room for the cause of action to grow. States must look to these states as examples of how to consider their own causes of action and treatment of negligent credentialing. States must consider the policy benefits and burdens of adopting the cause of action and how strictly a peer review privilege should be construed.

### III. FINDING BALANCE IN CREDENTIALING CASES— A CASE FOR QUALIFIED IMMUNITY

In scrutinizing state peer review statutes and considering whether to extend traditional notions of common law negligent hiring to the hospital-doctor relationship in a new negligent credentialing cause of

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immunity provisions provide peer review participants with immunity from damages liability. See *Manion v. Evans*, 986 F.2d 1036, 1039 (6th Cir. 1993). In *Manion*, a doctor relied on a theory of "bad faith peer review" in an antitrust case, and the issue before the court was whether the Act limited a hospital's liability and prevented the doctor's allegations of antitrust. *Id.* at 1037, 1039–40. The Sixth Circuit determined that the legislature intended to immunize hospitals from damages to doctors who lost their credentials and to "protect[s] [peer review committees] from having to defend private damage claims at all," to encourage meaningful peer reviews. *Id.* at 1041–42. However, it is unclear whether such immunity would apply between a patient and his or her health care facility. Given the strong trend of courts adopting negligent credentialing, the Kentucky Court of Appeal's *Burton* decision, and construction of the Kentucky Peer Review Statute, it is doubtful. Courts that consider adopting negligent credentialing will need to closely scrutinize their state's peer review statutes.

148. KY. REV. STAT. ANN. § 311.377(1) (LexisNexis 2015).

149. *Sisters of Charity Health Sys.*, 984 S.W.2d at 470–71.

150. *Id.* at 471; see also *Saleba v. Schrand*, 300 S.W.3d 177, 182 (Ky. 2009); *Appalachian Reg'l Health Care v. Johnson*, 862 S.W.2d 868, 869 (Ky. 1993).

151. See *Sisters of Charity Health Sys.*, 984 S.W.2d at 470–71.

action, courts must grapple with the modern landscape of health care. Physicians face upwards of 85,000 medical malpractice claims a year, so vicarious liability of hospitals may be highly undesirable for both hospitals and the public.<sup>152</sup> Litigating thousands of vicarious liability claims would create excess costs to an already costly United States health care system and may not deter doctors' malpractice when hospitals are held vicariously liable for the acts of others. Thus, the employer-independent contractor relationship is not only beneficial to the institution, but also to the public.

At the same time, plaintiffs increasingly face damage caps on recovery for medical malpractice while doctors often carry decreasing insurance coverage.<sup>153</sup> As a result, the public may be left sharing the costs for patients' injuries through increased insurance costs of their own or increased costs for public assistance.

No doubt, a health care organization provides a plaintiff with an attractive corporate deep pocket to sue and should not be shielded if it is directly at fault in its decision to grant hospital privileges to incompetent or unqualified doctors.<sup>154</sup> In extreme cases, it is abundantly clear that hospitals must have some level of accountability for the actions of the people to whom they afford privileges to treat and visit patients. While hospitals cannot be expected to guarantee perfection in invasive procedures fraught with imperfection,<sup>155</sup> hospi-

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152. *Medical Malpractice Statistics*, GOLFAND BERGER LLP, <http://www.golfandberger.com/resources/medical-malpractice-statistics/> (last visited Apr. 14, 2015).

153. Carly Kelly & Michelle M. Mello, *Are Medical Malpractice Damage Caps Constitutional? An Overview of State Litigation*, 33 J. L. MED. & ETHICS 515,516 (2005).

154. A direct cause of action for negligent credentialing against a hospital is attractive to plaintiffs for additional reasons. Shorter statute of limitations for medical negligence actions may not apply to a negligent credentialing claim. *See generally* *Browning v. Burt*, 613 N.E.2d 993, 1004, 1010 (Ohio 1993). In addition, plaintiffs find a direct cause of action against a hospital attractive, as it may broaden the evidence admissible at trial. If a patient is able to sue a hospital on the basis of negligent credentialing, evidence of prior law suits and malpractice claims against the doctor that otherwise would be inadmissible in a medical malpractice actions may be allowed. In *Larson*, the Supreme Court of Minnesota recognized that evidence of unrelated claims brought by other patients against the doctor would be prejudicial. *Larson v. Wasemiller*, 738 N.W.2d 300, 313 (Minn. 2007). For that reason, a plaintiff must prove an underlying case of medical malpractice against a doctor independent of evidence that supports a claim of against a hospital for negligent credentialing. *Id.* at 310–11. Other courts have held that a plaintiff must first prove malpractice against the doctor or the claims against the doctor and hospital must be bifurcated. *Id.*

155. The court noted:

[A] hospital has a direct duty to grant and to continue such privileges only to competent physicians. A hospital is not an insurer of the skills of private physicians to whom staff privileges have been granted. In order to recover for a breach of this duty, a plaintiff injured by the negligence of a staff physician must demonstrate that but for the lack of care in the selection or the retention of the physician, the physician would not have been granted staff privileges and the plaintiff would not have been injured.

tals should, at a bare minimum, be able to guarantee patients that the individual performing surgery on them is properly certified. If hospitals assure patients that they are competent and diligent enough to entrust them with their health and lives, they should ensure patients that the doctors who treat them in the hospital are just as competent and diligent.<sup>156</sup> Patients are not privy to the contracts between the hospital and doctors who treat them there. To patients, they are one and the same when it comes to responsibility for their care.

Thus, some cause of action should be available to injured patients to encourage cautious and diligent behavior in hospital privileging decisions. Complete immunity for liability only stands to give rise to “rubber-stamping” type credentialing.

Adopting negligent credentialing as a cause of action will incentivize hospitals to encourage a more rigorous review of doctor qualifications before allowing the privilege to practice within the institution. With the prospect of liability for negligent doctors, hospitals will be encouraged to carefully review physician’s education and experience before allowing them to practice. A phone call to a doctor’s *alma mater* or hospital where he previously practiced could save hundreds from being maimed. This is the benefit of negligent credentialing.

Advocates who oppose the adoption of negligent credentialing argue that such a cause of action will reduce the effectiveness of peer review boards. They argue that negligent credentialing, if adopted, will reduce the critical atmosphere encouraged by granting immunity to peer review boards, which defeats the purpose of the HCQIA.<sup>157</sup> However, this argument ignores the fact that the hospital is the focus of a negligent credentialing cause of action and not the peer review board itself. The HCQIA itself does not expressly immunize hospitals, but only the peer review board members in their individual capacities.<sup>158</sup> There is little disagreement that allowing negligent credentialing actions against peer review board members individually would generate negative results. The open discussion and criticism

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Albain v. Flower Hospital, 553 N.E.2d 1038, 1045 (Ohio 1990) *overruled on other grounds by* Clark v. Southview Hosp. & Family Health Ctr., 628 N.E.2d 46, 53 (Ohio 1994); *see also* Johnson v. Misericordia Community Hosp., 301 N.W.2d 156, 164 (Wis. 1981); Ferguson v. Gonyaw, 236 N.W.2d 543, 550 (Mich. Ct. App. 1975).

156. *See About University of Cincinnati Hospital*, U. CIN. HOSP., <http://uchealth.com/university-of-cincinnati-medical-center/about/> (last visited Apr. 14, 2015) (asserting that University of Cincinnati Health “physicians have access to the latest technological procedures and clinical trial medications, ensuring the best quality of care for our patients”).

157. *See* 42 U.S.C. § 11111 (2015).

158. *See id.*

encouraged by immunity is the entire purpose of the board. Allowing liability for these discussions could ultimately allow liability for every subjective decision made in the privileging process.

Applying a “reasonable person” standard would hardly encourage frank discussion in credentialing decisions. Yet, this is not what is suggested here. Instead, negligent credentialing should apply only to the hospitals, while peer review board members remain immunized individually. This approach could incentivize hospitals to enact procedures that encourage rigorous vetting in the peer review process without harming the open discussion that results from immunity.

As noted, the cause of action can be liberally applied as to be similar to a traditional negligence action in Minnesota, or can be heavily restricted to the point that the cause of action is nullified, as in Texas.<sup>159</sup> Minnesota’s negligent credentialing scheme is often cited by plaintiff’s attorneys when urging state supreme courts to adopt the cause of action.<sup>160</sup> This is because the Minnesota cause of action is the most plaintiff friendly negligent credentialing scheme. However, it does so with a societal cost to hospitals. In Minnesota, there is little direction as to what procedures to enact to avoid liability under a negligent credentialing cause of action. Instead, no matter what actions the hospital may pursue, the hospital may still be held liable under the “reasonable person” standard. There is little social utility of forcing hospitals to continually guess at what is “reasonable” procedure in the peer review context.

Ultimately, common law may develop well enough to answer questions of reasonableness, but only through litigation. Increasing the costs of litigation in an already costly process is not a cost efficient solution. In addition, plaintiffs’ attorneys championing the cause of action may well be harming their clients. With the complexity of hospital procedure comes the need for expert testimony. While both sides bear the heavy cost of expert testimony, plaintiffs are harmed the most by increased costs.<sup>161</sup>

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159. *Compare Larson*, 738 N.W.2d at 302, 311 with *St. Luke’s Episcopal Hosp. v. Agbor*, 952 S.W.2d 503, 508–08 (Tex. 1997).

160. *See Paulino v. Springdale QHC, Inc.*, 386 S.W.3d 462, 470 (Ark. 2012); *LeBlanc v. Res. Belton Hosp.*, 278 S.W.3d 201, 205, 207 (Mo. App. W.D. 2008); *Brookins v. Mote*, 292 P.3d 347, 361 (Mont. 2012).

161. In *Agbor*, the court noted that malice, while not requiring intent, required “extreme degree of risk, considering the probability and magnitude of the potential harm to others.” *Agbor*, 952 S.W.2d at 506.

The flaw in the Minnesota scheme places regulation of peer review boards completely in the hands of the judicial branch, despite the traditionally legislative nature of the regulation of peer review boards.<sup>162</sup> The HCQIA and state peer review statutes indicate legislative intent for involvement in the regulation of peer review boards at both the state and federal levels. If the legislature wanted no part in the process, it is unlikely states would have peer review statutes at all. Thus, the Minnesota scheme is inefficient and ignores legislative intent.

Texas's negligent credentialing scheme would not provide patients with any recourse in most cases. By limiting the cause of action to situations of "malice", recourse for "negligent" credentialing is non-existent.<sup>163</sup> The Texas peer review statute provides such a strict standard that the state judiciary is completely excluded from the process except to decide a very small number of cases that may fit into the incredibly high standard of malice. The HCQIA creates a statutory presumption of reasonableness for the peer review board, but the statute does not completely cut off the court from ruling on the cause of action.<sup>164</sup> The Texas peer review statute excludes the judiciary from the process with its malice requirement.

A middle ground exists in Ohio, which allows the cause of action, but with clear procedures that if the hospital follows, will reduce the institution's likelihood of liability.<sup>165</sup>

Under the Ohio statute, a hospital is "presumed to not be negligent in the credentialing of an individual who has . . . applied for, staff membership or professional privileges at the hospital. . . . [I]f the hospital . . . proves by a preponderance of the evidence that, at the time of the alleged negligent credentialing of the individual, the hospital . . . was accredited . . . ."<sup>166</sup> However, a plaintiff may rebut the presumption by proof that the hospital "failed to comply with all material credentialing and review requirements of the accrediting organization."<sup>167</sup> A plaintiff may also rebut with evidence that the hospital "knew that a previously competent individual had developed a pattern of incompetence or otherwise inappropriate behavior."<sup>168</sup> The pre-

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162. See 42 U.S.C. § 11111 (2015).

163. See generally *Agbor*, 952 S.W.2d at 503.

164. See 42 U.S.C. § 11111 (2015).

165. OHIO REV. CODE ANN. § 2305.251 (West 2015).

166. § 2305.251 (B)(1).

167. § 2305.251 (B)(2)(b).

168. § 2305.251 (B)(2)(c).

sumption may also be rebutted by proof that the hospital “knew that a previously competent individual would provide fraudulent medical treatment but failed to limit or terminate the individual’s staff membership, professional privileges, or participation . . . .”<sup>169</sup>

The Ohio negligent credentialing scheme provides hospitals clear guidance beyond the mercurial “reasonableness” standard found at common law.<sup>170</sup> If the hospital follows the standard, the institution is rewarded with a presumption of reasonableness, similar to the automatic presumption found under the HCQIA.<sup>171</sup> This encourages reasonable conduct on the part of the hospital without forcing the hospital to guess the meaning of “reasonableness”. State courts have the ability to review the action even in cases where the hospital followed statutory procedures. This allows the legislature to set expectations by creating a broad presumption of reasonableness and allows the state courts to fill in the gaps. Hospitals are further protected by frivolous claims because plaintiffs must first establish a case of medical malpractice before an action for negligent credentialing.<sup>172</sup>

One argument against the Ohio system is that hospitals should receive total immunity when the hospital follows statutory procedure. This is arguably a more cost effective system. Hospitals would still have a clear standard of conduct to follow and litigation costs would be even lower as claims would end once the court decides whether statutory procedures were followed. Yet a total immunity scheme would deprive individuals of a right of action, possibly even in cases of extreme incompetence. As the Ohio courts noted, under the previous scheme of total immunity, even “sloppy” credentialing would be acceptable.<sup>173</sup> This would allow hospitals to become complacent under blanket immunity based on statutory procedures. There would be no incentive for hospitals to go beyond statutory procedures in a total immunity scheme. In addition, state courts would be powerless to provide justice in situations where a bad actor nonetheless followed statutory procedures. Even ignoring justice for the individual, at the very least the common law could fill in the gaps for weaknesses in the statutory procedures. Thus, Ohio’s system of negligent credentialing is the proper path. The Ohio system provides a balance of both legis-

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169. § 2305.251 (B)(2)(d).

170. *See e.g.* Schelling v. Humphrey, 916 N.E.2d 1029, 1033 (Ohio 2009).

171. 42 U.S.C. § 11112 (a)(4).

172. *Schelling*, 916 N.E.2d at 1033.

173. *Huntsman v. Aultman Hosp.*, No. 2010CA00211, 2011 WL 884107, at \*6 (Ohio Ct. App. Mar. 14, 2011).

lative and judicial involvement. The Ohio scheme also encourages hospitals' good conduct and provides recourse for plaintiffs injured by incompetent doctors.

States adopting negligent credentialing as a cause of action must also make peer review materials admissible at trial, as these materials are necessary for the plaintiff to show negligent credentialing. For example, a plaintiff cannot show negligent credentialing without records showing the steps taken to check a doctor's educational background. Allowing evidence of peer review board discussions will not stymie the board's critical review. Individuals are still immune under the HCQIA and all negligent credentialing causes of action. Thus there is no reason to prevent discovery of documents because peer review members are immune anyway.

Thus, states should legislate peer review statutes that allow flexibility for the courts to establish a common law negligent credentialing claim for patients and courts should liberally construe them to adopt negligent credentialing as a cause of action. The Ohio scheme provides the best balance between protecting hospitals based on qualified immunity and providing patients with recourse for meritorious claims.

#### CONCLUSION

States still on the fence about negligent credentialing must join the majority of states and adopt a negligent credentialing cause of action to give recourse to patients injured by incompetent or unqualified doctors. The best scheme exists in states like Ohio due to the balance of legislative and judicial involvement and the balance of patient rights, clear policy, and rewarding careful hospital conduct. However, until some semblance of a national consensus is established, patients may be without recourse in one state, yet be able to bring an action over the border in another. For example, Doctor Durrani's Ohio patients have an action for negligent credentialing, but they have none in Kentucky. The states without negligent credentialing and those still considering its adoption are not incentivizing an effective or just health care system by granting near absolute immunity to peer review boards. Instead, this promotes negligence and a lack of incentive to improve. States must move toward an Ohio system of qualified immunity to provide justice to patients.

# Revisiting Title VII After 50 Years: The Need for Increased Regulatory Oversight of Employers’ Personnel Decisions

HEATHER S. DIXON\*

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## INTRODUCTION

Title VII<sup>1</sup> has proven to be largely ineffective.<sup>2</sup> Although it has been in effect for fifty years, statistics reveal that it has failed to serve

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1. 42 U.S.C. § 2000e-2 (2012).

2. MARY C. STILL, LITIGATING THE MATERNAL WALL: U.S. LAWSUITS CHARGING DISCRIMINATION AGAINST WORKERS WITH FAMILY RESPONSIBILITIES 5 (2006); BUREAU OF NAT’L AFFAIRS, SEX DISCRIMINATION 4 (June 20, 2000); Thomas H. Barnard & Adrienne L. Rapp, *Are We There Yet? Forty Years After the Passage of the Civil Rights Act: Revolution in the Workforce and the Unfulfilled Promises that Remain*, 22 HOFSTRA LAB. & EMP. L.J. 627, 643 (2005); Theresa M. Beiner, *Not All Lawyers Are Equal: Difficulties That Plague Women and Women of Color*, 58 SYRACUSE L. REV. 317, 331 (2008) [hereinafter *Not All Lawyers Are Equal*]; Susan Bisom-Rapp, *Scripting Reality in the Legal Workplace: Women Lawyers, Litigation Prevention Measures, and the Limits of Anti-Discrimination Law*, 6 COLUM. J. GENDER & L. 323, 333

its goal of ensuring that women and minorities have opportunities in the workforce<sup>3</sup> equal to those of their non-minority and male counter-

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(1996); Shelley J. Correll et al., *Getting a Job: Is there a Motherhood Penalty?*, 112 AM. J. SOC. 1297, 1327, 1330 (2007); Tiffani N. Darden, *The Law Firm Caste System: Constructing A Bridge Between Workplace Equity Theory & The Institutional Analyses of Bias in Corporate Law Firms*, 30 BERKELEY J. EMP. & LAB. L. 85, 90 (2009) (“Law firm culture today resembles in important ways the law firm culture in place when Congress passed antidiscrimination laws”); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1164 (1995) [hereinafter *Content of Our Categories*]; Justin D. Levinson & Danielle Young, *Implicit Gender Bias in the Legal Profession: An Empirical Study*, 18 DUKE J. GENDER L. & POL’Y 1, 1–2 (2010) [hereinafter *Implicit Gender Bias*]; Laura Beth Nielsen & Robert L. Nelson, *Rights Realized? An Empirical Analysis of Employment Discrimination Litigation as a Claiming System*, 2005 WIS. L. REV. 663, 708 (2005) (concluding that our antidiscrimination law is “a system whose symbolic presence is more powerful and pervasive than its practical effect”); Deborah L. Rhode, *From Platitudes to Priorities: Diversity and Gender Equity in Law Firms*, 24 GEO. J. LEGAL ETHICS 1041, 1042 (2011) (citing, *inter alia*, Fiona Kay & Elizabeth Gorman, *Women in the Legal Profession*, 4 ANN. REV. LAW & SOC. SCI. 299, 309–12 (2008); Fiona M. Kay, *Professional Monopolies and Divisive Practices in Law: ‘Les Femmes Juridiques’ in Civil Law, Canada*, 4 INT’L J.L. CONTEXT 187, 205 (2009); Anthony V. Alfieri, *Big Law and Risk Management: Case Studies of Litigation, Deals, and Diversity*, 24 GEO. J. LEGAL ETHICS 991 (2011)); Naomi Schoenbaum, *It’s Time That You Know: The Shortcomings of Ignorance as Fairness in Employment Law and the Need for an “Information-Shifting” Model*, 30 HARV. J.L. & GENDER 99, 99–100 (2007); Eli Wald, *Glass Ceilings and Dead Ends: Professional Ideologies, Gender Stereotypes, and the Future of Women Lawyers at Large Law Firms*, 78 FORDHAM L. REV. 2245, 2256 (2010); Hillary Jo Baker, Comment, *No Good Deed Goes Unpunished: Protecting Gender Discrimination Named Plaintiffs From Employer Attacks*, 20 HASTINGS WOMEN’S L.J. 83, 86–90 (2009); Lea E. Delossantos, Comment, *A Tangled Situation of Gender Discrimination: In the Face of an Ineffective Antidiscrimination Rule and Challenges for Women in Law Firms - What is the Next Step to Promote Gender Diversity in the Legal Profession*, 44 CAL. W. L. REV. 295, 317–18 (2007); Michelle Landever, Note, *Tester Standing in Employment Discrimination Cases Under 42 U.S.C. § 1981*, 41 CLEV. ST. L. REV. 381, 382 (1993); Anthony F. Spalvieri, Note, *Employment Testers: Obstacles Standing in the Way of Standing Under § 1981 and Title VII*, 52 CASE WESTERN RES. L. REV. 753, 756 (2002). See generally Theresa M. Beiner, *Some Thoughts on the State of Women Lawyers and Why Title VII Has Not Worked For Them*, 44 IND. L. REV. 685 (2011) [hereinafter *Some Thoughts*].

3. Although the proposal set forth by this article would apply to all types of employers in the workforce, the data and discussion herein focuses disproportionately on law firms for a few reasons. First, law-related research sources pertinent to the proposal herein are usually authored by lawyers, who are likely to be more interested in (or more familiar with) happenings of the legal profession. Second, perhaps because they are comprised of savvy lawyers familiar with the loopholes and ways around compliance with the law, law firms are frequently considered to be among the worst violators of employment laws (if not always in actuality, then at least in violation of the spirit of those laws) Third, the legal industry is among a handful of sectors notorious for disproportionately few numbers of women and minorities. See, e.g., Douglas R. Richmond, *The Contemporary Legal Environment and Employment Claims Against Law Firms*, 43 TEX. TECH. L. REV. 471, 471 (2011) (“It is tempting to characterize law firms as a low risk setting for employment discrimination and harassment claims because the alleged offenders are likely lawyers, and thus their education, legal knowledge, and experience should deter their alleged misconduct. Unfortunately, that is not the case.”). Importantly, however, it is well-documented that other industries suffer from discrimination as well, including the finance industry which, like the legal profession, is notorious for such discrimination. See, e.g., U.S. EQUAL EMP’T OPPORTUNITY COMM’N, DIVERSITY IN THE FINANCIAL INDUSTRY 1–2 (2006) (setting forth statistics on race and gender discrimination in the finance industry). For example, in 2014, only 22.5% of the class of first year bankers (known on Wall Street as analysts) are women. William Alden, *Wall Street’s Young Bankers Are Still Mostly White and Male, Report Says*, N.Y. TIMES (Sept. 30, 2014), <http://>

parts.<sup>4</sup> Legal scholars have frequently referenced a need for change in enforcement of the statute and the monitoring of its efficacy.<sup>5</sup> This article proposes a change to the model by which the Equal Employment Opportunity Commission (EEOC) ensures enforcement of Title VII, explains the need for such a model, and identifies its legal justification.

## I. BACKGROUND AND DATA

Title VII was enacted in 1964. Its objective was to prevent discrimination in employment on the basis of race, color, religion, sex, or national origin.<sup>6</sup> Upon its enactment, Congress expected that a large

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dealbook.nytimes.com/2014/09/30/wall-streets-young-bankers-are-still-mostly-white-and-male/?\_r=0.

4. See DEEPALI BAGATI, *WOMEN OF COLOR IN U.S. LAW FIRMS* 2 (2009); U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *DIVERSITY IN LAW FIRMS* 9 (2003); Jill L. Cruz & Melinda S. Molina, *Hispanic National Bar Association National Study on the Status of Latinas in the Legal Profession: Few and Far Between: The Reality of Latina Lawyers*, 37 PEPP. L. REV. 971, 975 n.7 (2010); Elizabeth H. Gorman & Fiona M. Kay, *Racial and Ethnic Minority Representation in Large U.S. Law Firms*, 52 STUD. L., POL., & SOC'Y 211, 211 (2010); Elizabeth H. Gorman, *Gender Stereotypes, Same-Gender Preferences, and Organizational Variation in the Hiring of Women: Evidence From Law Firms*, 70 AM. SOC. REV. 702, 705–06 (2005); *Implicit Gender Bias*, *supra* note 2, at 1–2; Monique R. Payne-Pikus et al., *Experiencing Discrimination: Race and Retention in America's Largest Law Firms*, 44 LAW & SOC'Y REV. 553, 576–77 (2010);

5. See, e.g., Kenneth A. Bamberger, *Regulation as Delegation: Private Firms, Decisionmaking, and Accountability in the Administrative State*, 56 DUKE L.J. 377, 383 (2006); Darden, *supra* note 2, at 101 (proposing alternative dispute resolution as an approach for maximizing the relationship between firms and associates); Tristin K. Green, *Race and Sex in Organizing Work: "Diversity," Discrimination, and Integration*, 59 EMORY L.J. 585, 640–42, 647 (2010) (suggesting that research related to Title VII goals "may show, for example, that courts or other monitoring actors are not adequately monitoring organizational efforts" and that caselaw addressing Title VII may be "taking antidiscrimination law or norms astray"); Katherine A. Macfarlane, *The Improper Dismissal of Title VII Claims on "Jurisdictional" Exhaustion Grounds: How Federal Courts Require That Allegations Be Presented to an Agency Without the Resources to Consider Them*, 21 GEO. MASON U. C.R. L.J. 213, 232 (2011) (asserting that "the EEOC's investigatory and conciliatory powers have been rendered meaningless"); Nielsen & Nelson, *supra* note 2, at 709 (addressing "the need to increase resources for the enforcement of antidiscrimination law" and suggesting "enhanced regulation of employment decisions, such as additional reporting requirements concerning pay and promotion" and also "increasing the regulatory resources of the EEOC to screen cases and employers for potential violations"); Joanne Scot & Susan Sturm, *Courts as Catalysts: Re-thinking the Judicial Role in New Governance*, 13 COLUM. J. EUR. L. 565, 572 (2007); Susan Sturm, *The Architecture of Inclusion: Advancing Workplace Equity in Higher Education*, 29 HARV. J.L. & GENDER 247, 248 (2006); Eli Wald, *A Primer on Diversity, Discrimination, and Equality in the Legal Profession Or Who Is Responsible for Pursuing Diversity and Why*, 24 GEO. J. LEGAL ETHICS 1079, 1134 (2011) ("large law firms should be held accountable for the under-representation of women at their partnership ranks").

6. See, e.g., Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. L. REV. 431, 431 (1966). The Supreme Court has summarized the goals of Title VII as "break[ing] down old patterns of racial segregation and hierarchy," *United Steelworkers of America v. Weber*, 443 U.S. 193, 208 (1979), and "assur[ing] equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974).

period of time—perhaps decades—would be necessary for the benefits of such a broad and transformative statute to become fully manifested in the workforce.<sup>7</sup> However, as the fiftieth anniversary of the statute's enactment has just passed, it is time to assess the efficacy of the statute and its enforcement mechanisms. Because the objective of equal employment opportunity remains paramount in our society, it makes sense to adjust Title VII's enforcement mechanism over time to best serve its objective.

Fifty years after the enactment of Title VII, women are still paid far less than men for the same work.<sup>8</sup> As recently as 2006, the wage gap between men and women remained very large, with women earning an average of 76.9% of what men earn,<sup>9</sup> and twenty-first century mothers working full-time earning only 60% of what fathers working full-time earn.<sup>10</sup>

Although women represent approximately 46% of the workforce in the United States, they still hold only five percent of the top-level jobs.<sup>11</sup> In the legal profession, despite women comprising approximately 51% of law students, there is still a gap between men and women in academia,<sup>12</sup> the judiciary,<sup>13</sup> corporations,<sup>14</sup> and in law firms—

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7. See, e.g., Vaas, *supra* note 6, at 457–58.

8. See, e.g., Ronit Dinovitzer et al., *The Differential Valuation of Women's Work: A New Look at the Gender Gap in Lawyers Incomes*, 88 SOC. FORCES 819 (2009).

9. NAT'L COMM. ON PAY EQUITY, THE WAGE GAP OVER TIME, <http://www.pay-equity.org/info-time.html> (last visited Nov. 12, 2015) (wage gap data for 1960–2014).

10. See JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 2 (2000) [hereinafter UNBENDING GENDER]. Other data indicates that mothers earn approximately 5% less per child than other workers, beyond the penalty that women already experience by virtue of their gender. Stephen Benard et al., *Cognitive Bias and the Motherhood Penalty*, 59 HASTINGS L.J. 1359, 1359 (2008) (citing Michelle Budig & Paula England, *The Wage Penalty for Motherhood*, 66 AM. SOC. REV. 204, 204 (2001)).

11. See UNBENDING GENDER, *supra* note 10, at 67.

12. Only one out of five law school deans are women, and only 29% of tenure track and tenured faculty positions are held by women. *Implicit Gender Bias*, *supra* note 2, at 2 (citing Patti Abdullina, *Statistical Report on Law School Faculty and Candidates for Law Faculty Positions*, ASS'N AM. LAW SCH., <http://www.aals.org/statistics/2009dlt/titles.html> (last visited Oct. 25, 2010)).

13. Women comprise only 25% of federal district court judges, 29% of federal appeals court judges, and 26% of state court judges. *Implicit Gender Bias*, *supra* note 2, at 5 (citing NAT'L WOMEN'S LAW CTR., WOMEN IN THE JUDICIARY (2010), <http://lawprofessors.typepad.com/files/numberofwomeninjudiciary09.pdf>; Nat'l Ass'n Women Judges, REPRESENTATIONS OF UNITED STATES STATE COURT WOMEN JUDGES, [http://www.nawj.org/us\\_state\\_court\\_statistics\\_2009.asp](http://www.nawj.org/us_state_court_statistics_2009.asp) (2010) (citing MARIE T. FINN, THE AMERICAN BENCH: JUDGES OF THE NATION (2010))). See generally Laura Gatland, *A Clerkship for White Males Only?*, 28 STUDENT LAW 34 (1999) (discussing discrimination against and underrepresentation of women and minorities in clerkships).

14. Women serve as general counsel for only 13.7% of Fortune 500 companies. Sari Bashi & Maryana Iskander, *Why Legal Education Is Failing Women*, 18 YALE J.L. & FEMINISM 389, 394 n.8 (2006) (citing CATALYST, WOMEN IN LAW: MAKING THE CASE 7 (2001)).

with women making up only 18% of partners at the 200 largest law firms.<sup>15</sup> Over time, studies have consistently found that there is a significant gender gap in promotion to partnership in private law firms,<sup>16</sup> even after controlling for factors such as work experience, law school performance, and family status.<sup>17</sup> Contrary to popular theory, data confirm that this discrepancy is created by the phenomenon of women being pushed out of law firms, rather than leaving voluntarily.<sup>18</sup> The discrepancy is most drastic for minority women,<sup>19</sup> who still account for only 1.48 percent of partners working in major law firms.<sup>20</sup>

Discrimination during the early years of lawyers' careers helps both to create—and “justify”—discrimination against them as they rise in seniority, as female and minority associates are still given primarily administrative tasks and “mindless” legal work that does not

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15. *Some Thoughts*, *supra* note 2, at 686 (citing INST. OF MGMT. & ADMIN. INC., NEW DATA ON MAJOR LAW FIRMS FIND WOMEN LAWYERS EARN LESS THAN THEIR MALE PEERS 1 (2008); Vivia Chen, *Looking Into the Equity Box*, AM. LAW., Sept. 1, 2010, at 13); *Implicit Gender Bias*, *supra* note 2, at 2.

16. In 1997, the class of associates promoted to partner at New York's twenty-five largest firms was 81% male and 94% white. Anna Snider, *Associates Promoted to Partner at New York's 25 Largest Firms*, N.Y. L.J., Mar. 2, 1998, <http://www.nylj.com/links/partners98.html> (cited in Steve French, *Of Problems, Pitfalls and Possibilities: A Comprehensive Look at Female Attorneys and Law Firm Partnership*, 21 WOMEN'S RTS. L. REP. 189, 190 n.16 (2000)).

17. Kenneth G. Dau-Schmidt et al., *Men and Women of the Bar: The Impact of Gender on Legal Careers*, 16 MICH. J. GENDER & L. 49, 94–95, 108–09 (2009) (discussing various studies examining data across the time period of 1969 to 2005). Interestingly, this remained true even in places like New York City, where one might expect to see a comparatively decreased level of gender discrimination, and even in government jobs, where one might also expect to see a greater level of parity in pay across genders. See also Jo Dixon & Carroll Seron, *Stratification in the Legal Profession: Sex, Sector, and Salary*, 29 LAW & SOC'Y REV. 381 (1995) (cited and summarized in Dau-Schmidt et al., *supra* at 108).

18. Joan C. Williams et al., “OPT OUT” OR PUSHED OUT?: HOW THE PRESS COVERS WORK/FAMILY CONFLICT: THE UNTOLD STORY OF WHY WOMEN LEAVE THE WORKFORCE (2006), <http://www.worklifelaw.org/pubs/OptOutPushedOut.pdf> (last visited Nov. 13, 2015) [hereinafter “OPT OUT” OR PUSHED OUT?]; cf. *Some Thoughts*, *supra* note 2, at 687 (citing “OPT OUT” OR PUSHED OUT?, *supra* note 18, at 3); JOAN C. WILLIAMS & CONSUELA A. PINTO, AM. BAR ASS'N COMM'N ON WOMEN IN THE PROFESSION, FAIR MEASURE: TOWARD EFFECTIVE ATTORNEY EVALUATIONS (2008)); Steve French, *Of Problems, Pitfalls and Possibilities: A Comprehensive Look at Female Attorneys and Law Firm Partnership*, 21 WOMEN'S RTS. L. REP. 189, 190 (2000) (summarizing statistics and discussing “the traditional male partnership paradigm” as one of the reasons for the “under-representation” of women in law firm partnerships); Rhode, *supra* note 2, at 1058; PAMELA STONE, OPTING OUT?: WHY WOMEN REALLY QUIT CAREERS AND HEAD HOME 62 (2007). It is likely that racial minorities (not just women) are forced out of firms, too, rather than leaving voluntarily. As one author commented, “informed opting out simply seems implausible given the consistent under-representation of all minority groups all the time.” Wald, *supra* note 5, at 1096.

19. *Some Thoughts*, *supra* note 2, at 688 (citing AM. BAR ASS'N COMM'N ON WOMEN IN THE PROFESSION, VISIBLE INVISIBILITY: WOMEN OF COLOR IN LAW FIRMS 1 (2006)).

20. Darden, *supra* note 2, at 92 (citing NAT'L ASS'N FOR LAW PLACEMENT, PARTNERSHIP AT LAW FIRMS ELUSIVE FOR MINORITY WOMEN (2006), <http://www.nalp.org/2006partnershipelusiveforminoritywomen> (last visited Nov. 11, 2015)).

permit them to learn and develop skills as their seniority advances, while (particularly white male) associates are given both mentoring<sup>21</sup> and substantive work that enables them to develop professionally.<sup>22</sup> Data from a recent study suggests that the pay gap is exacerbated by the fact that “[w]omen have significantly less opportunity to be promoted from associate to equity partner in the subsample of firms that pays significantly higher average compensation to their equity partners.”<sup>23</sup> Even among those women who have managed to become partners, a significantly smaller percentage of them have equity status as compared to their male peers.<sup>24</sup> However, data from the period 2002 to 2007 shows that “[th]e disparity in compensation between women and men partners exists even after controlling for the lower compensation of non-equity partners and the greater likelihood for women to remain non-equity partners.”<sup>25</sup>

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21. See, e.g., Irene Segal Ayers, *The Undertraining of Lawyers and Its Effect on the Advancement of Women and Minorities in the Legal Profession*, DUKE F. L. & SOC. CHANGE 71,74–75 (2009) (citing studies and noting that “[w]hat these studies of women and minority attorneys all have in common is an exclusive or predominant focus on problems with how law firms treat women and minority attorneys, such as lack of mentoring, exclusion from social networks, limited access to clients, inferior work assignments, subjective performance evaluations, and preconceptions of incompetence”); Fiona M. Kay & Jean E. Wallace, *Mentors as Social Capital: Gender, Mentors, and Career Rewards in Legal Practice*, 79 SOC. INQUIRY 418 (2009); Maria Pabon Lopez, *The Future of Women in the Legal Profession: Recognizing the Challenges Ahead By Reviewing Current Trends*, 19 HASTINGS WOMEN’S L.J. 53, 91 (2008) (citing Lauren Stiller Rikleen, *Ending the Gauntlet: Removing Barriers to Women’s Success in the Law* 12 (2006); SUZANNE NOSSEL & ELIZABETH WESTFALL, PRESUMED EQUAL: WHAT AMERICA’S TOP WOMEN LAWYERS REALLY THINK ABOUT THEIR FIRMS xviii (1998)); Payne-Pikus et al., *supra* note 4, at 561.

22. *Not All Lawyers Are Equal*, *supra* note 2, at 319–20; Payne-Pikus et al., *supra* note 4, at 561 (explanatory phrase); Wald, *supra* note 5, at 1121 (decrying the fact that “large law firms permit gender stereotypes to affect staffing, allocation of quality assignments, mentoring opportunities, business development skills, and compensation decisions”); Joan C. Williams & Veta Richardson, *New Millennium, Same Glass Ceiling? The Impact of Law Firm Compensation Systems on Women*, 62 HASTINGS L.J. 597, 601 (2011) [hereinafter *New Millennium, Same Glass Ceiling?*] (observing that “there may be something unique in the early professional work of lawyers” that causes the gender pay gap to be larger in the legal profession than in most other lines of work); David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CALIF. L. REV. 493, 585 (1996) (discussing the lack of mentoring, training, and worthwhile assignments experienced by black lawyers). Similarly, it is documented that there is a “significant cumulative disadvantage for mothers” in the workforce. See Benard et al., *supra* note 10, at 1360 (citing U.S. BUREAU OF LABOR STATISTICS, CHARTING THE U.S. LABOR MARKET IN 2006, at §§5–6 (2007), <http://www.bls.gov/cps/labor2006/chartbook.pdf>; Wendy Single-Rushton & Jane Waldfogel, *Motherhood and Women’s Earnings in Anglo-American, Continental European, and Nordic Countries*, *Feminist Econ.*, Apr. 2007, at 55, 76).

23. Marina Angel et al., *Statistical Evidence on the Gender Gap in Law Firm Partner Compensation* 24 (Temp. Univ. Beasley School of L., Legal Studies Research Paper No. 2010–24, Sept. 9, 2010), <http://ssrn.com/abstract=1674630>.

24. *Some Thoughts*, *supra* note 2, at 686.

25. Angel et al., *supra* note 23 at 3, (explanatory parenthetical phrase for table 4 at 16–18).

Within the legal profession as a whole, only 30.2% of members were women in 2006 and, in 2000, only 11.2% of members were not white.<sup>26</sup> It has been reported that “[a]ll studies that have examined the question have found that, on average, female lawyers [of all levels] have significantly lower incomes than male lawyers.”<sup>27</sup> Interestingly, one study found that the amount by which these women are paid less has remained fairly steady for decades, with female lawyers consistently being paid approximately 60–70% of what their male peers are paid.<sup>28</sup> Even within the partnership level of law firms, as of 2007, female partners are still paid less than male partners despite the fact that they are not less productive than male partners in generating revenue for their firms.<sup>29</sup>

A study of data from 2000 found that, even when examining only lawyers without children (and, thus, no childcare responsibilities), men were still paid significantly more than women (an annual average of \$190,324 for men without children and \$163,959 for women without children)—even though the women were working *more hours*<sup>30</sup> (2,328

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26. AM. BAR ASS'N, COMM'N ON WOMEN IN THE PROFESSION, *A Current Glance at Women in the Law* (2006), <http://www.americanbar.org/content/dam/aba/migrated/women/reports/CurrentGlanceStatistics2006.authcheckdam.pdf> (data on gender); A.B.A., *Lawyer Demographics 1* (2006), [http://abanet.org/marketresearch/lawyer\\_demographics\\_2006.pdf](http://abanet.org/marketresearch/lawyer_demographics_2006.pdf) (data on race) (both cited in Beiner, *Not All Lawyers Are Equal*, *supra* note 2, at 317 n.1–2)); *see also* Floyd Weather- spoon, *The Status of African American Males in the Legal Profession: A Pipeline of Institutional Roadblocks and Barriers*, 80 MISS. L.J. 259 (2010) (discussing the discrimination against and underrepresentation of African American men in the legal profession); ELIZABETH CHAMBLISS, AM. BAR ASS'N, COMM'N ON RACIAL & ETHNIC DIVERSITY IN THE PROFESSION, *Miles to Go: Progress of Minorities in the Legal Profession* (2004).

27. Dau-Schmidt et al., *supra* note 17, at 102.

28. Mary C. Noonan et al., *Pay Differences Among the Highly Trained: Cohort Differences in the Sex Gap in Lawyers' Earnings*, 84 SOC. FORCES 853, 860 tbl. 1 (2005) (cited and summarized in Dau-Schmidt et al., *supra* note 17, at 102–03).

29. Angel et al., *supra* note 23 at 3–5; *Some Thoughts*, *supra*, note 2, at 688 (citing Angel et al., *supra* note 23 at 3); *see also* Rosalie Berger Levinson, *Gender-Based Affirmative Action and Reverse Gender Bias: Beyond Gratz, Parents Involved, and Ricci*, 34 HARV. J. L. & GENDER 1, 21 (2011) [hereinafter *Gender-Based Affirmative Action*] (discussing the “pink-collar ghetto” and setting forth evidence that, “even where women enter male-dominated spheres, the ‘glass ceiling’ has proven to be impervious”); *Productivity and Gender*, 10–11 Partner’s Report 6 (Nov. 2010) (reporting information from Karen Sloan writing for the *National Law Journal*, Sept. 15, 2010, and Debra Cassens Weiss writing for the *ABA Journal’s Law News Now*, Sept. 14, 2010, discussing results of a study by law and business professor researchers from Temple University and the University of Texas-Pan American confirming that female lawyers are just as productive and effective at generating revenue as male lawyers, although they are consistently paid less than the men).

30. Interestingly, a study from around the same time found that over a quarter of male lawyers had the belief that female lawyers do not work as many hours as their male counterparts. *See Lopez*, *supra* note 21, at 60 (citing The Survey Research Center at IUPUI, *Gender Issues within the Indiana Judicial System* (prepared for the Indiana Supreme Court Commission on Race and Gender Fairness), at 21 (2005)).

on average for men and 2,363 on average for women).<sup>31</sup> In fact, the study found that “women equity partners in the median and lowest groups are compensated less despite being *more* productive than men equity partners,” and in spite of the fact that “women partners, both non-equity and equity, match and outperform their men colleagues who are not burdened by pregnancy, childbirth, and caretaking.”<sup>32</sup> In 2009, it was reported that female equity partners typically earn about \$66,000 less than their male counterparts, while female income partners earned about \$25,000 less than male income partners.<sup>33</sup>

In short, within the legal profession, it is generally accepted that women are still treated very differently from their male counterparts<sup>34</sup> in terms of both pay and the assignments and opportunities they are afforded,<sup>35</sup> frequently because of misperceptions about their competency,<sup>36</sup> and assumptions about their commitment to the practice of

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31. Dau-Schmidt et al., *supra* note 17, at 142–45, Tables D12.1(15)P2 and D17(15); *see also* Jane Waldfogel, *Understanding the “Family Gap” in Pay for Women with Children*, 12 J. OF ECON. PERSPECTIVES 137, 143 (1998) (cited for the proposition that “married men, most with children, earn more than unmarried men, with estimates of a marriage premium for men between 10% and 15%” in Angel et al., *supra* note 23, at 32 nn. 50–51).

32. Angel et al., *supra* note 23, at 23, 35.

33. STEPHANIE SCHARF ET AL., NAT’L ASS’N OF WOMEN LAWYERS & NAWL FOUND., REPORT OF THE FOURTH ANNUAL NATIONAL SURVEY ON RETENTION AND PROMOTION OF WOMEN IN LAW FIRMS 3, 11 (2009).

34. Data has shown that female lawyers received less respect than their male peers and more condescending treatment. *See* Lopez, *supra* note 21, at 88 (citing New York State Bar Association Committee on Women in the Law, *Gender Equity in the Legal Profession: A Survey, Observations, and Recommendations*, at 31 (2001), <http://www.nysba.org/Content/ContentGroups/News1/Reports3/womeninlawreport-recs.pdf>; The Survey Research Center at IUPUI, *Gender Issues within the Indiana Judicial System* (prepared for the Indiana Supreme Court Commission on Race and Gender Fairness), at 26 (2005)).

35. This inequality has been found even in terms of the committees on which men and women are placed, with men at law firms serving on committees that make decisions about the firm and women serving on committees aimed at diversity or dealing with associates. Lopez, *supra* note 21, at 71 (citing N.Y. STATE BAR ASS’N COMM. ON WOMEN IN THE LAW, REPORT TO THE HOUSE OF DELEGATES: GENDER EQUITY IN THE LEGAL PROFESSION - A SURVEY, OBSERVATIONS AND RECOMMENDATIONS 21, 23 (2002), [http://www.nysba.org/Content/ContentGroups/committee\\_on\\_Women\\_in\\_the\\_Law1/May2002COMMONWOMENINTHELAWGENDEREQUITY.p](http://www.nysba.org/Content/ContentGroups/committee_on_Women_in_the_Law1/May2002COMMONWOMENINTHELAWGENDEREQUITY.p)); *see also* Ayers, *supra* note 21, at 104–05 (noting “inferior work assignments” for female and minority associates); Cynthia Fuchs Epstein et al., *Glass Ceilings and Open Doors: Women’s Advancement in the Legal Profession*, 64 FORDHAM L. REV. 291, 322 (1995).

36. One study found that only 55% of men believe that female lawyers are as capable as male lawyers. Lopez, *supra* note 21, at 75 (citing Indiana Judicial System, *supra* note 30, at 23); *see also* Ayers, *supra* note 21, at 104–05 (noting law firms’ “preconceptions of incompetence” regarding female and minority associates); Darden, *supra* note 2, at 93 (discussing study finding that 31% of minority women, 25% of women overall, and 21% of minority men reported having received an unfair evaluation, while less than 1% of white men believed they had been evaluated unfairly (citing AM. BAR ASS’N, COMM’N ON WOMEN IN THE PROFESSION, *supra* note 19, at 26; Aravinda N. Reeves, *Gender Matters, Race Matters: A Qualitative Analysis of Gender & Race Dynamics in Law Firms* 226–29 (June 2001) (unpublished Ph.D. dissertation, Northwestern University)); French, *supra* note 18, at 202 (discussing the facts that women are given less challeng-

law.<sup>37</sup> Recent research from the Temple University Beasley School of Law examining statistical evidence on the gender gap in law firm partnership compensation has concluded that the pay discrepancy at law firms is due to gender discrimination that manifests itself in the form of both disparate treatment and disparate impact discrimination.<sup>38</sup>

Our persistent societal discrimination and the persistent inequality between men and women<sup>39</sup> is reflected even in our elected officials: As of 2009, women held only 16.8% of Congressional seats and comprised only 24.3% of state legislatures.<sup>40</sup> It manifests itself in the most basic operations of our government.<sup>41</sup> In a 2004 report regarding the status of women in the private sector, the EEOC declared that, despite the passage of the Civil Rights Act of 1964, “there are still concerns about the relative absence of women in higher management ranks, which some have described as the ‘glass ceiling,’” which results in “the inability of the most qualified employees to move into the most important positions due to irrelevant criteria such as race or gen-

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ing assignments than men and have to “labor under a presumption of incompetence”); Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741 (2005); Madeline E. Heilman, *Description and Prescription: How Gender Stereotypes Prevent Women’s Ascent Up the Organizational Ladder*, 57 J. SOC. ISSUES 657 (2001); Audrey J. Lee, *Unconscious Bias Theory in Employment Discrimination Litigation*, 40 HARV. C.R.-C.L. L. REV. 481 (2005); *New Millennium, Same Glass Ceiling?*, *supra* note 22, at 650 (noting that, in male-dominated environments, such as law firms, “[m]en enjoy an assumption of competence” while female lawyers are “treated with a presumption of incompetence”).

37. See, e.g., French, *supra* note 18, at 190, 199; Lopez, *supra* note 21, at 60; Nancy J. Reichman & Joyce S. Sterling, *Sticky Floors, Broken Steps, and Concrete Ceilings in Legal Careers*, 14 TEX. J. WOMEN & L. 27 (2004); Hope Viner Samborn, *Higher Hurdles for Women*, 86 A.B.A. J. 30, 31 (2000).

38. Angel et al., *supra* note 23, at 22. One recently noted example of disparate impact discrimination at law firms involved discrimination against those taking time off for childcare. David Leonhardt, *A Labor Market Punishing to Mothers*, N.Y. TIMES, Aug. 3, 2010 at B1.

39. CECILIA L. RIDGEWAY, *FRAMED BY GENDER: HOW GENDER INEQUALITY PERSISTS IN THE MODERN WORLD* 115 (2011).

40. *Gender-Based Affirmative Action*, *supra* note 29, at 30 (citing data from CENTER FOR AMERICAN WOMEN AND POLITICS, FACT SHEET: WOMEN IN STATE LEGISLATURES 2009 (Aug. 2010), <http://www.cawp.rutgers.edu/sites/default/files/resources/stleg2009.pdf>; CENTER FOR AMERICAN WOMEN AND POLITICS, FACT SHEET: WOMEN IN STATE LEGISLATIVE LEADERSHIP POSITIONS 2009 (Dec. 2009), <http://www.cawp.rutgers.edu/sites/default/files/resources/leglead09.pdf>).

41. See, e.g., Kristin Maschka, *Counting Fathers as Babysitters: Why It Matters*, HUFFINGTON POST (Feb. 13, 2012 3:04 PM), [http://www.huffingtonpost.com/kristin-maschka/childcare-census\\_b\\_1272219.html](http://www.huffingtonpost.com/kristin-maschka/childcare-census_b_1272219.html). (describing Census Bureau practice of designating fathers (but not mothers) as “babysitters” or “childcare”); K.J. Dell’Antonia, *The Census Bureau Counts Fathers as ‘Child Care’*, N.Y. TIMES (Feb. 8, 2012 12:36 PM), <http://parenting.blogs.nytimes.com/2012/02/08/the-census-bureau-counts-fathers-as-child-care/> (describing Census Bureau practice of designating fathers (but not mothers) as “babysitters” or “childcare”).

der.”<sup>42</sup> Inequality for women in the workplace is a significant issue for society<sup>43</sup> with far-reaching effects—especially in light of the fact that 19% of households are headed by single mothers<sup>44</sup> who are frequently trying to support their families with no assistance from a spouse or their children’s fathers.

## II. PROBLEMS WITH THE CURRENT EEOC MODEL

The role of the EEOC is to enforce the federal anti-discrimination laws prohibiting employment discrimination.<sup>45</sup> As it operates today, the EEOC carries out this task by investigating charges filed by individual employees (or former or prospective employees). Although the EEOC requires private employers with 100 or more employees to report information annually regarding the make-up and distribution of their employees, the information is used only for analysis for general reports or in connection with investigation of individual complaints.<sup>46</sup> Under this model, the EEOC only takes action regarding discrimination when a variety of circumstances exist: there must be a plaintiff with enough knowledge, resources, and willingness to initiate a complaint (or “charge” as it is referred to by the EEOC) against an employer, and, ideally, to follow through with the complaint until its resolution.<sup>47</sup> As a result, an untold number of discriminatory (or retal-

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42. U.S. EQUAL EMP’T OPPORTUNITY COMM’N, GLASS CEILINGS: THE STATUS OF WOMEN AS OFFICIALS AND MANAGERS IN THE PRIVATE SECTOR 1 (2004), <http://permanent.access.gpo.gov/lps47621/index.pdf>.

43. See Diane L. Bridge, *The Glass Ceiling and Sexual Stereotyping: Historical and Legal Perspectives of Women in the Workplace*, 4 VA. J. SOC. POL’Y & L. 581, 604 (1997).

44. U.S. DEP’T OF LABOR, BUREAU OF LABOR STATISTICS, CHARTING THE U.S. LABOR MARKET IN 2006, §6, chart 6-1 (2007), <http://www.bls.gov/cps/labor2006/chartbook.pdf> (noting, 31% of poor households are headed by single women); Dell’Antonia, *supra* note 41.

45. U.S. EQUAL EMP’T OPPORTUNITY COMM’N, *About the EEOC: Overview*, <http://www1.eeoc.gov/eeoc/index.cfm?renderforprint=1> (last visited Nov. 13, 2015). These laws include Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967 (ADEA), the Equal Pay Act of 1963, Title I of the Americans with Disabilities Act of 1990 (ADA), and Section 501 of the Rehabilitation Act of 1973. U.S. EQUAL EMP’T OPPORTUNITY COMM’N, *Laws Enforced by EEOC*, <http://www.eeoc.gov/laws/statutes/index.cfm> (last visited Nov. 13, 2015).

46. The number is lower for federal contractors. U.S. EQUAL EMP’T OPPORTUNITY COMM’N, *Reporting Requirements*, <http://www.eeoc.gov/employers/reporting.cfm> (last visited Nov. 13, 2015); see also U.S. EQUAL EMP’T OPPORTUNITY COMM’N, *supra* note 42, at 3 n.4 (2004).

47. Moreover, evidence of discriminatory intent—which is usually not readily available even where discrimination is occurring—is essential in order for a plaintiff to obtain legal representation and/or prevail in an action against an employer. See Miriam A. Cherry, *How To Succeed in Business Without Really Trying (Cases): Gender Stereotypes and Sexual Harassment Since the Passage of Title VII*, 22 HOFSTRA LAB. & EMP. L.J. 533, 539 (2005) (discussing the lack of “smoking gun” evidence in discrimination cases and the difficulty of proving discrimination, even in the face of discriminatory comments); Kerri Lynn Stone, *Clarifying Stereotyping*, 59

iatory) employment actions go unreported and therefore uninvestigated.<sup>48</sup> It is quite likely that the vast majority of such actions remain entirely unaddressed. As such, employers exist in an environment in which they are aware that discriminatory conduct is unlikely to be challenged or penalized in any way. This drastically reduces (if not eliminates) the incentive for employers to comply with Title VII. A further examination of the problems of the current EEOC model is worthwhile and can be separated into four (4) main weaknesses, each of which is addressed further below. The current model (1) does not adequately control for plaintiffs' legitimate fear of retaliation; (2) depends upon plaintiff resources (which, to a large extent, are controlled by employers); (3) is limited by individual employees' knowledge (also controlled to a large extent by employers); and (4) creates a large window of time prior to court involvement in which the plaintiff must withstand employer intimidation, retaliation, and depletion of resources.

#### A. Retaliation

Very few individuals are willing to initiate a complaint against an employer—particularly when the individual is still employed by that employer.<sup>49</sup> This may occur for numerous reasons,<sup>50</sup> including a fear of retaliation—either by the employer against whom the charge is brought or prospective employers with whom the individual may seek other employment.<sup>51</sup> It is well accepted that such a fear is well

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KAN. L. REV. 591, 592–93 (2011) (discussing the lack of “smoking gun” evidence in discrimination cases and the difficulty of proving discrimination, even in the face of discriminatory comments).

48. See also Michael Selmi, *The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law*, 57 OHIO ST. L.J. 1, 64 (1996).

49. Nielsen & Nelson, *supra* note 2, at 664–65 (discussing the fact that “empirical data indicate that antidiscrimination law is seldom used by people who perceive themselves to be the target of workplace discrimination”); cf. J. Maria Glover, *The Structural Role of Private Enforcement Mechanism in Public Law*, 53 WM. & MARY L. REV. 1137, 1137–38 (2012) (citing Title VII and the EEOC as an example in a broader discussion of how “[t]he American regulatory system is unique in that it expressly relies on a diffuse set of regulators, including private parties . . . for the effectuation of its substantive aims,” and proposing ways to make this system more effective in achieving regulatory objectives).

50. See, e.g., Cheryl R. Kaiser & Carol T. Miller, *Derogating the Victim: The Interpersonal Consequences of Blaming Events on Discrimination*, 6 GROUP PROCESSES & INTERGROUP REL. 227 (2003); Cheryl R. Kaiser & Carol T. Miller, *Stop Complaining! The Social Costs of Making Attributions to Discrimination*, 27 PERS. & SOC. PSYCHOL. BULL. 254, 263 (2001); Phoebe A. Morgan, *Risking Relationships: Understanding the Litigation Choices of Sexually Harassed Women*, 33 LAW & SOC'Y REV. 67 (1999).

51. *Some Thoughts*, *supra* note 2, at 690–91 (citing French, *supra* note 18, at 212; Eyana J. Smith, Comment, *Employment Discrimination in the Firm: Does the Legal System Provide Remedy*).

grounded, as evidenced by the anticipatory inclusion in Title VII of an anti-retaliation provision<sup>52</sup> and reports at the hearings surrounding the statute's 1991 amendments.<sup>53</sup>

It stands to reason that the deterrent effect of the fear of retaliation increases with the power and influence of the employer.<sup>54</sup> An employer with more power (in terms of money, connections, influence, and other resources) is better able to inflict harm on an employee who has complained about Title VII violations by way of “blacklisting” or negative employment references.<sup>55</sup> This is particularly true in small or exclusive industries where the opportunity for an employee to find new employment “out of the reach” of the former employer is unlikely and perhaps even unrealistic. Professions such as the legal profession are notoriously small, exclusive, and powerful in blacklisting members who do not comply with and conform to the expectations of the profession’s “leaders.”<sup>56</sup> Still in 2016, these leaders are almost al-

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*dies for Women and Minority Members of the Bar?*, 6 U. PA. J. LAB. & EMP. L. 789 (2004)); French, *supra* note 18, at 212 (noting the perception among female attorneys that “bringing a suit will result in being blackballed in the profession”); Rhode, *supra* note 2, at 1059 nn. 118–21 (citation omitted); *New Millennium, Same Glass Ceiling?*, *supra* note 22, at 638 (2011) (quoting one female attorney interviewed about gender discrimination in pay in law firms, who stated, “I know I will be punished for raising my concerns. . .”).

52. In fact, a retaliatory response by an employer accused of discrimination is so predictable that Congress included an anti-retaliation provision in Title VII upon its *initial* enactment.

53. In testifying before the Committee during the 1990 Hearings, Dr. Freada Klein testified: “Most employees believe that the policies their employers have put in place are fair, are adequate, and that both formal and informal complaint structures are adequate until they try to use them. They then find the experience of being ostracized, of having their careers hit a dead end, and being labeled a troublemaker by their employers. Numerous victims appearing before the Committee confirmed that filing a charge of discrimination often makes the victim’s employment situation worse rather than better. Workers filing claims often encounter retaliatory discharges, demotions, ostracism by co-workers, and even “black-listing” by [an] employer in a particular field or industry.” H.R. REP. NO. 102-40(I), *as reprinted in* 1991 U.S.C.C.A.N. 549, 609, at 71 (1991).

54. See Nielsen & Nelson, *supra* note 2, at 668 (citing sociological and statistical research data regarding “significant barriers confront[ing] plaintiffs,” such as the facts that “potential plaintiffs are often reluctant to complain,” and “[t]hose who do complain seldom succeed within their own organization, before the EEOC, or in the courts”).

55. It is worth noting that even a “neutral” employment reference or a refusal to provide information about an employee beyond mere confirmation of dates of employment has the same result as a negative employment reference — particularly in small fields or small professional communities where it would be expected that employers (who frequently know each other on a personal and/or professional level) would speak openly to volunteer information about an employee who was not deemed “problematic.” As such, employers who seek to retaliate against a former employee are well aware that by remaining silent or providing a “neutral” reference, they will effectively blacklist that employee from future work in the field or community.

56. See, e.g., Darden, *supra* note 2, at 89 (discussing “Title VII’s deficiencies in addressing the systemic problems present in law firms and how cultural norms specific to the law firm context deter associates from relying on Title VII as a remedy”); Eyana J. Smith, Comment, *Employment Discrimination in the Firm: Does the Legal System Provide Remedies for Women and Minority Members of the Bar?*, 6 U. PA. J. LAB. & EMP. L. 789, 789–90, 808 (2004) (“[A]ttorneys

ways older white males with outdated or “traditional” ideas about race and gender roles.<sup>57</sup> Ironically, the problem of retaliation may be heightened for those in the legal profession, as law firms (particularly large and powerful firms) are known for their belief that they are “above the law” and, due to their legal experience and wealth, can either “out-litigate” a plaintiff on any Title VII claim brought against them<sup>58</sup> or simply dispose of it in a relatively inexpensive manner without facing any actual liability or negative publicity.<sup>59</sup>

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are likely to suffer a large amount of backlash for reporting discrimination claims. Often an attorney who files a charge is considered a complainer, and since many legal communities are small, the reputation of a trouble-making attorney will travel fast. This may result in an attorney being blackballed from the legal community (particularly law firms), even if the discriminatory allegations are found to be true.”); *Id.* at 808 (discussing the situation “where the plaintiff-attorney is a young associate just starting out in the Bar and the defendant-employer is a prestigious law firm whose decision-makers are powerful attorneys with long-standing reputations” and explaining that “[i]t is not hard to believe that many members of the Bar will side with the employer when an attorney brings discrimination/harassment allegations.”).

57. *Not All Lawyers Are Equal*, *supra* note 2, at 321 (“Law firms work perfectly for those who designed them: elite white males with a spouse at home who can take care of their personal lives. The hierarchy in law firms reflects patriarchy, traditional gender roles and heterosexism.”); Judith S. Kaye & Anne C. Reddy, *The Progress of Women Lawyers at Big Firms: Steadied or Simply Studied*, 76 *FORDHAM L. REV.* 1941, 1954 (2008) (identifying gender stereotypes as a persisting cause of gender disparities in the legal profession).

58. French, *supra* note 18, at 212 (discussing the phenomenon by which lawyers and “law firms are best able to structure evaluations in a manner that protects them from exposure to discrimination claims” and “insulate them from liability”); *cf.* Smith, *supra* note 56, at 803 (observing that plaintiffs are able to prevail in Title VII suits against legal employers far less often than in similar claims against non-legal employers).

59. For example, the cap on punitive damages in a Title VII claim is anywhere from \$50,000 for smaller employers (15 to 100 employees) to a maximum of \$300,000 for large employers (more than 500 employees). *See* U.S. EQUAL EMP’T OPPORTUNITY COMM’N, ENFORCEMENT GUIDANCE: COMPENSATORY AND PUNITIVE DAMAGES AVAILABLE UNDER § 102 OF THE CIVIL RIGHTS ACT OF 1991 (1992), <http://www.eeoc.gov/policy/docs/damages.html>.

Because the annual salary for an associate at a large firm generally falls within the range of \$135,000 for first year associates and \$265,000 for senior associates, an award of punitive damages against a law firm who has successfully blacklisted an attorney from ever working in the profession amounts to only 1–2 years worth of the associate’s salary. This amount is negligible to—and therefore not an effective deterrent to—these firms, whose gross revenues frequently exceed a billion dollars per year, and whose average annual partner compensation often exceeds one million dollars. *See, e.g.*, Elizabeth Olson, *Revenues at the Top 100 Law Firms Rose 5.4% Last Year*, *N.Y. TIMES* (Apr. 28, 2014, 8:21 AM), [http://dealbook.nytimes.com/2014/04/28/revenues-at-the-top-100-law-firms-rose-5-4-last-year/?\\_php=true&\\_type=blogs&\\_r=0](http://dealbook.nytimes.com/2014/04/28/revenues-at-the-top-100-law-firms-rose-5-4-last-year/?_php=true&_type=blogs&_r=0) (firm revenue); Jennifer Smith, *Partner Pay is Way Up in Atlanta, Seattle (But New Yorkers Still Make More)*, *LAW BLOG, WALL ST. J.* (Sept. 19, 2012, 2:09 PM), <http://blogs.wsj.com/law/2012/09/19/partner-pay-is-way-up-in-atlanta-seattle-but-new-yorkers-still-make-more/> (partner compensation); *see also* French, *supra* note 18, at 212 (discussing law firm wealth and resources that enable firms to easily protect and defend themselves against claims); Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and Its Effects*, 81 *TEX. L. REV.* 1249, 1249–50 (2003) (arguing that, even where damages in employment discrimination cases are substantial, they are insufficient to deter discrimination in large corporations).

B. Resources

For those individuals who are not dissuaded from filing a grievance by fear of retaliation, but then experience such retaliation in actuality (such as loss of a job or inability to obtain employment with a new employer due to his or her filing of the grievance), the effect may be that the person no longer has the resources to meaningfully pursue his or her Title VII claim.<sup>60</sup> In that situation, the result, of course, is that Title VII has not served its purpose and the individual has not only missed out on the protection the statute intended to offer, but has been left in a much worse position than he or she experienced prior to filing the grievance required by the statute. It has been noted recently by scholars that Title VII was intended “to ‘make it easier for a plaintiff of limited means to bring a meritorious suit,’” and was meant to “open, not shut, courthouse doors.”<sup>61</sup>

C. Information

Additionally, an individual plaintiff has only limited information based on his or her observations and interactions with the employer and is usually not privy to evidence of patterns of discriminatory or retaliatory conduct against other employees.<sup>62</sup> Cases involving “smoking gun” type of evidence are very rare—and become increasingly rare as the public becomes more aware that open, explicit statements of bias against women or minorities are both illegal and likely to create discord or some form of backlash from others<sup>63</sup> (although data confirms that this bias still exists and informs workplace deci-

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60. See, e.g., Smith, *supra* note 56, at 808 (discussing the “handicapping” of an attorney’s livelihood that can result from making a claim of discrimination).

61. Macfarlane, *supra* note 5, at 215 (quoting *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 63 (1980)).

62. See U.S. EQUAL EMP’T OPPORTUNITY COMM’N, WRITTEN TESTIMONY OF KATHARINE KORES DISTRICT DIRECTOR, MEMPHIS DISTRICT (June 22, 2011), <http://www.eeoc.gov/eeoc/meetings/6-22-11/kores.cfm> [hereinafter EEOC TESTIMONY OF KORES] (commenting on difficulty in identifying discrimination in hiring because “[a]pplicants for positions often do not have the type of inside information necessary to infer discrimination, much less to establish that discrimination occurred”). This is particularly unfortunate in light of research indicating that the hiring process (as opposed to other employment processes susceptible to discrimination, such as the promotion and termination processes) is “particularly vulnerable to employers’ tendencies to make biased decisions.” U.S. EQUAL EMP’T OPPORTUNITY COMM’N, WRITTEN TESTIMONY OF MARC BENDICK, JR., PH.D. ECONOMIST, BENDICK AND EGAN ECONOMIC CONSULTANTS INC. (June 22, 2011), <http://www.eeoc.gov/eeoc/meetings/6-22-11/bendick.cfm>.

63. See, e.g., Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 460–61 (2001) (comparing intentional and open discrimination of previous eras with the invidious and structural discrimination that has come to exist in more recent years).

sions<sup>64</sup>). In fact, academic research has confirmed the lingering existence of subtle and even “unconscious”—but nonetheless pernicious—bias that continues to exist in our society (including in employment decisions) despite the drastic decrease in overt discrimination that existed at the time Title VII was enacted.<sup>65</sup> As such, it is difficult (and, some would say, often impossible) to effectively combat Title VII violations by way of individual lawsuits.<sup>66</sup>

#### D. Detrimental Delay

Moreover, the requirement for filing an EEOC charge prior to initiation of a lawsuit provides a substantial period of time in which the plaintiff is forced to “survive” while awaiting investigation by the EEOC.<sup>67</sup> During this window, an employer has the opportunity and leverage to intimidate or retaliate against an employee to dissuade the employee from ever publicly filing a complaint in court. In many situations, an unfair settlement can be somewhat “strong-armed” from the plaintiff due to this delay, as the employee must have enough resources to sustain himself or herself through the process, and the employer has the ability to impede the plaintiff’s obtainment of other

64. See, e.g., JENNIFER PIERCE, *GENDER TRIALS: EMOTIONAL LIVES IN CONTEMPORARY LAW FIRMS* (1995) (discussing bias faced by female litigators); Monica Biernat, *Toward a Broader View of Social Stereotyping*, 58 AM. PSYCHOLOGIST 1019, 1023 (2003); Correll et al., *supra* note 2, at 1333–34 (discussing pregnancy discrimination, motherhood discrimination, and race discrimination in workplace decisions, as well as unwarranted bias and preference in favor of fathers); Jennifer DeNicholis Bragger et al., *The Effects of the Structured Interview on Reducing Biases Against Pregnant Job Applicants*, 46 SEX ROLES 215, 220, 223 (2002); Martha Foschi, *Double Standards in the Evaluation of Men and Women*, 59 SOC. PSYCHOL. Q. 237, 238 (1996); Kathleen Fuegen et al., *Mothers and Fathers in the Workplace: How Gender and Parental Status Influence Judgments of Job-Related Competence*, 60 J. SOC. ISSUES 737, 738 (2004); Jane A. Halpert et al., *Pregnancy as a Source of Bias in Performance Appraisals*, 14 J. ORGANIZATIONAL BEHAV. 649, 655 (1993); Christine Jolls & Cass Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969 (2006); Amy Wax & Philip E. Tetlock, *We’re All Racists At Heart*, WALL ST. J. Dec. 1, 2005, at A16.

65. See Susan T. Fiske, *Intent and Ordinary Bias: Unintended Thought and Social Motivation Create Casual Prejudice*, 17 SOC. JUST. RES. 117, 122 (2004); Lee, *supra* note 36, at 482–88 (summarizing social science research on “unconscious bias” and the evolution of the workplace structure). See generally Cynthia L. Estlund, *Putting Grutter to Work: Diversity, Integration, and Affirmative Action in the Workplace*, 26 BERKELEY J. EMP. & LAB. L. 1, 5 (2005) (citing *Content of Our Categories*, *supra* note 2); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997 (2006) [hereinafter *Behavioral Realism*].

66. See generally French, *supra* note 18, at 190, 204–13; Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203 (1993).

67. See also Macfarlane, *supra* note 5, at 216 (describing the EEOC as an “administrative waiting room”).

employment.<sup>68</sup> Data from 2008 indicates that the amount of time for the EEOC to process a case (from the filing of the charge to the issuance of a right-to-sue letter) was 229 days (or approximately seven and a half months).<sup>69</sup> Even in a best-case scenario where the employer agrees to a reasonable and quick settlement with the plaintiff during this delay period, the circumstances created by the waiting period enable the employer to make the settlement confidential, to avoid further investigation by the EEOC, and to avoid the public filing of a lawsuit. This aspect of the EEOC process serves further to prevent the goals of Title VII from being fulfilled, as the employer has suffered no harm (not even a general social reprimand of shame or embarrassment for having been accused of discrimination) as a result of a mere EEOC charge being filed but not carried all the way through litigation.

In short, Title VII is not able to serve its purpose in a meaningful way when use of its mechanisms is either unreasonably risky or requires an abundance of resources on the part of the aggrieved employee. In order for its protections to be more than an illusory and lofty goal on the books, it needs to be enforced in a manner that is reasonably affordable, in terms of both risk to and resources of the employees it seeks to protect.<sup>70</sup>

### III. THE IMPORTANCE OF CHANGE

Equal employment opportunity remains as important a goal and ideal today in the United States as it was fifty years ago.<sup>71</sup> However, as

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68. This is because virtually all employers require a positive reference from a prospective employee's prior employer—and, in many industries, employers tend to have networks where even informal “gossip” can impede an employee's efforts to find new employment.

69. MacFarlane, *supra* note 5, at 229–31 (citing Statements of Members of Congress and Other Interested Individuals and Organizations: Hearing on Commerce, Justice, Science, and Related Agencies Appropriations for 2010 Before the Subcomm. of the Comm. on Appropriations, 111th Cong. 41 (2009) (statement of Gabrielle Martin, President, National Council of EEOC Locals)).

70. The lack of reasonable and affordable means by which a complainant can avail herself or himself of Title VII's intended protections is not the only barrier to effective implementation of the statute. The issue of judicial erosion of—and refusal to reasonably apply—the statute is another glaring problem hindering the EEOC's efforts to enforce the statute. *See, e.g.*, Vicki Schultz, *Telling Stories about Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1750, 1834 n.330 (1990); Smith, *supra* note 56, at 789–90 (discussing the “tremendous failure rates” of employment discrimination cases resulting from courts' interpretations of what Title VII requires a plaintiff to prove). Because this issue exceeds the scope of the present article, it will not be further addressed herein.

71. It also remains an important goal worldwide. *See* Nicholas D. Kristof & Sheryl WuDunn, *The Women's Crusade*, N.Y. TIMES MAG., Aug. 2009, at 28. The United States should

already discussed, the data shows that progress has been slow and continues to slow in recent years, even regressing with respect to certain measures of parity.<sup>72</sup> In fact, there is evidence to suggest that the recent recession has caused a step backward in equal employment opportunity gains.<sup>73</sup> The fact that employment is so fundamental to even basic survival in our society renders the enforcement of equal opportunity employment laws of the utmost importance. This is especially true given the increase since 1964 in single parent households. For these reasons, it is crucial to examine the enforcement system currently in place and seek ways to enhance its effectiveness.

Unless employers are consistently and systematically held accountable for unlawful discrimination in their employment decisions, women and minorities will continue to experience discrimination.<sup>74</sup> The obstacles to women's success in the legal profession<sup>75</sup> are unlikely to dissipate on their own.<sup>76</sup> For one thing, their existence today is, at least in large part, a tool by which those in power maintain their power—and which there is no real incentive for those in power to change.<sup>77</sup> Moreover, many of these obstacles work in hidden and insidious ways, making them difficult to root out even for those who

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continue to be a leader, serving as a role model for the world in promoting gender equality in employment (thus leading to, *inter alia*, economic gender equality).

72. For example, between 2006 and 2007, the income disparity between male and female partners in law firms actually increased. Kaye & Reddy, *supra* note 57, at 1946 n.16 (noting that in 2007, the average median compensation of a male equity partner was \$81,000 higher than that of a female equity partner, and that of a male of counsel was \$18,000 higher than that of a female of counsel).

73. See, e.g., Richmond, *supra* note 3, at 476–87; Anna Scott, *Diversity Has Been a Casualty of Law Firm Cutbacks*, S.F. DAILY J., Mar. 17, 2010, at 4; Susan Hansen, *African-American Midlevels Jittery About Economy; Survey Shows Recession's Impact on Minority Associates*, 31 MINORITY L.J. S4 (2008).

74. This is particularly true in periods of economic difficulty in the larger financial structure, such as that experienced in the United States since the economic downturn that occurred in 2008.

75. These include: gender stereotypes, gender bias, sexual harassment, lack of formal and informal mentoring support networks, inflexible work structures that are designed (arguably arbitrarily) around the “normal” male prototype, “old boys’ clubs” work environments, and gender-centric social and networking activities among colleagues. See Ayers, *supra* note 21, at 104–05 (noting “exclusion from social networks” and “limited access to clients” experienced by female and minority law firm associates); *Some Thoughts*, *supra* note 2, at 690; Reichman & Sterling, *supra* note 37, at 35; Rhode, *supra* note 2, at 1053 (citing, *inter alia*, Payne-Pikus et al., *supra* note 4, at 57677 (2010); Kathleen Wu, *What's Changed for Women Lawyers in the Last Decade? Not a Whole Lot Frankly*, 49 ADVOC. 21, 21–22 (2009).

76. Many of the efforts made to date to eliminate gender disparities in the work place have been aimed at changing or “fixing” women rather than tailoring the system to equally satisfy the needs and preferences of both women and men. See Rhode, *supra* note 2, at 1048–49; see also Wu, *supra* note 76, at 21.

77. Rhode, *supra* note 2, at 1046 (discussing gender and racial inequity in law firms and noting that “those in charge of hiring, promotion, and compensation decisions are those who

would desire to do so.<sup>78</sup> Often, such obstacles arise from subconscious stereotypes that lead people to categorize others in unfairly discriminatory ways without even recognizing their conduct.<sup>79</sup> “In-group” preferential treatment (or bias) is another well-documented social phenomenon that is difficult to control or eliminate.<sup>80</sup>

Moreover, even when women and minorities choose to pursue Title VII claims, the legal system is so stacked against them that it does not create incentives for employers to comply with Title VII. Not only does the structure of Title VII make it difficult to challenge more subtle and subconscious forms of bias, but the burden of proof is extremely difficult to satisfy (even when common sense dictates that discrimination or retaliation has occurred),<sup>81</sup> and courts (whose judges are still—even today—largely elderly, white males,<sup>82</sup> who one would reasonably expect to have outdated views on gender and racial equality) are generally very deferential to defendant-employers.<sup>83</sup> In more

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have benefitted from the current structure, and who have the greatest stake in believing in its fairness”).

Even assuming that those in power want to help lessen gender inequality, they may not be the ones best equipped or best situated to effect such change. See Martha Neil, *Planned All-Male Bar Panel on Women Lawyers’ Skills Draws Female Fire*, ABA JOURNAL (Jan. 15, 2010, 8:40 PM), [http://www.abajournal.com/news/article/planned\\_all-male\\_bar\\_panel\\_on\\_women\\_lawyers\\_skills\\_draws\\_female\\_fire](http://www.abajournal.com/news/article/planned_all-male_bar_panel_on_women_lawyers_skills_draws_female_fire) (discussing a program at the New York State Bar Association’s annual meeting which was advertised as follows: “A distinguished panel of gentlemen from the legal field will discuss the strengths and weaknesses of women in the areas of communication, negotiation, mediation, arbitration, organization, and women’s overall management of their legal work.”).

78. See *Gender-Based Affirmative Action*, *supra* note 29, at 26 (“The exponential growth in the number of female attorneys . . . has dispelled the myth canonized by the Supreme Court in 1873, that ‘the natural and proper timidity and delicacy which belongs to the female sex unfits it’ for the occupation of an attorney. However, the disproportionately low number of women who make partnership in law firms demonstrates that implicit, if not explicit, bias still exists.”); *Implicit Gender Bias*, *supra* note 2 (empirical study finding that implicit gender biases were pervasive among law students).

79. See *Behavioral Realism*, *supra* note 65, at 1031; *Implicit Gender Bias*, *supra* note 13, 8–13; Ramona L. Paetzold, *Using Law and Psychology to Inform Our Knowledge of Discrimination*, in *DISCRIMINATION AT WORK: THE PSYCHOLOGICAL AND ORGANIZATIONAL BASES*, 329, 336 (Robert L. Dipboye & Adrienne Colella eds., 2005)); Stone, *supra* note 47, at 592–93 (citing Hart, *supra* note 36, at 745–49).

80. See, e.g., Marilyn B. Brewer, *In-Group Favoritism: The Subtle Side of Intergroup Discrimination*, in *CODES OF CONDUCT: BEHAVIORAL RESEARCH INTO BUSINESS ETHICS* 164–67 (David M. Messick & Ann E. Tenbrunsel eds., 1996); *Implicit Gender Bias*, *supra* note 13, at 14–15; *New Millennium, Same Glass Ceiling?*, *supra* note 22.

81. See, e.g., *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S.Ct. 2517 (2013) (establishing a “but for” test for Title VII retaliation claims—a standard virtually impossible for a plaintiff-employee to satisfy—especially against a defendant with sophisticated counsel and self-protective employment practices).

82. Kaye & Reddy, *supra* note 57, at 1954 n.59 (noting that, as of 2006, 23.3% of sitting federal district court judges and 23.6% of federal court of appeals judges were women).

83. *Some Thoughts*, *supra* note 2, at 692–96; see also Stone, *supra* note 47, at 630 (“There is widespread agreement among scholars that . . . this construction [of Title VII] no longer keeps

recent years, the federal judiciary has taken extreme views in interpreting Title VII, rendering it, some would argue, largely meaningless.<sup>84</sup> As a result, the vast inequalities and disparities that Title VII was designed to eliminate persist largely unchanged.

Without a major change in the way in which Title VII is enforced, the goals of the statute will remain far from realization. Rather than accept an enforcement model that has proven to be largely unsuccessful and, indeed, illusory, changes should be made to ensure continued progress in the important initiative that has been long underway. Others who have considered the ineffectiveness of Title VII in eliminating discrimination have proposed changes to systems beyond the statute itself.<sup>85</sup> This article suggests that we not abandon Title VII as the primary means for obtaining employment opportunity, but proposes that the EEOC instead be permitted to implement a more aggressive means of enforcing the statute.

#### IV. THE PROPOSED REGULATORY OVERSIGHT

To ensure consistent compliance with the goals of Title VII, it is imperative that the employment decisions of employers subject to the

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pace with the current form or status of discrimination in the workplace because the mechanics and manifestations of discrimination have evolved since the passage of Title VII. The paradigm of discrimination contoured and prohibited by Title VII is simply not seen by those who study the realities of discrimination in the workplace and elsewhere as ample to engage with the increasingly nuanced and repressed, albeit present discrimination that manifests itself in contemporary society.”) (citing Ann C. McGinley, *!Viva La Evolución!: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J. L. & PUB. POL’Y 415, 416 (2000); *Content of Our Categories*, *supra* note 2, at 1211; Rebecca Hanner White & Linda Hamilton Krieger, *Whose Motive Matters?: Discrimination in Multi-Actor Employment Decision Making*, 61 LA. L. REV. 495, 584 (2001)).

84. See, e.g., Suzanne B. Goldberg, *Discrimination By Comparison*, 120 YALE L. J. 728 (2011) (discussing how the formal requirement for a similarly situated comparator leaves victims of discrimination with no recourse); Kenneth L. Karst, *Why Equality Matters*, 17 GA. L. REV. 245 (1983) (decrying approaches to ending discrimination that depend on formal or procedural equality rather than substantive equality); MacFarlane, *supra* note 5, at 214 (discussing, *inter alia*, *Ledbetter v. The Goodyear Tire & Rubber Co.*, 550 U.S. 618, 628 (2007)); Martha S. West, *Gender Bias in Academic Robes: The Law’s Failure To Protect Women Faculty*, 67 TEMP. L. REV. 68 (1994); Tricia M. Beckles, Comment, *Class of One: Are Employment Discrimination Plaintiffs at an Insurmountable Disadvantage if They Have No “Similarly Situated” Comparators?*, 10 U. PA. J. BUS. & EMP. L. 459, 470–72 (2008). See generally Christine Nicolaidis Kearns, *Title VII Update: Including Developments in the Area of Sexual, Religious and Racial Harassment*, ALI-ABA Course of Study, Mar. 22–24, 2012 (detailing district courts’ handling of Title VII cases and, in some cases, federal appellate courts’ determinations that district courts applied Title VII in a way that makes a plaintiff’s burden insurmountable).

85. *Some Thoughts*, *supra* note 2, at 696–701 (arguing that Title VII itself is ineffective in obtaining equal employment opportunity for female lawyers and proposing that society rely upon law firms, law schools, and the courts to bring about the equal employment opportunity that remains so elusive for them).

statute are actively and continually monitored and investigated<sup>86</sup> by an objective outside entity<sup>87</sup>—and that significant penalties are imposed upon employers who are deemed to have violated the statute.<sup>88</sup> Because reliance upon the self-reporting of aggrieved employees can only reasonably be expected to bring to light a very small percentage of the unlawful decisions of employers, the EEOC should be charged with the task of proactively monitoring and investigating employers' hiring, firing, and promotion decisions.<sup>89</sup> This mode of enforcement would provide a much greater assurance than the current model that unlawful discrimination would be identified, and that the incidence of retaliation against employees would be greatly reduced. In part, this is because the model would go a long way toward eliminating the largely unchecked power employers currently experience in being able to discriminate unlawfully with virtually no concern of being reported or held accountable for their misconduct. In addition, it could be used in a manner that ferrets out the hidden barriers to equal employment opportunity crafted by employers in response to Title VII.<sup>90</sup> The model would also create a system in which employers have no (or much less) incentive to retaliate against employees, since it would frequently be the EEOC (rather than the employee) who initiated the investigation and the complaint against the employer.

There are many ways in which the EEOC could take a more proactive role in ensuring that employers comply with Title VII. For example, one way to monitor equality of assignments at law firms is by comparing billing records of male and female associates—and minority and non-minority associates. This is a fairly quick and relatively

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86. See MacFarlane, *supra* note 5, at 217 (attributing failures in EEOC process to inability of EEOC to appropriately investigate discrimination).

87. To their credit, many firms have made efforts to identify and remedy discrimination in the firm by, for example, employing diversity consultants. Darden, *supra* note 2, at 116–18. The unavoidable problem with this method, however, is that objectivity is hard to ensure when the individual or entity assessing the firm's unlawful conduct is also being paid by the firm. Moreover, it has been noted that mere diversity training implemented by law firms cannot alone fix the problem of inadequate retention of minorities. *Id.* at 131.

88. “In order to accomplish systemic change, the law must be viewed as merely delineating the contours of a comprehensive framework designed to facilitate an equitable workplace.” *Id.* at 132.

89. The Commission has the authority to investigate suspected discrimination without need for the filing of a charge by a member of the public. EEOC TESTIMONY OF KORES, *supra* note 62, at 4; see also *Gender-Based Affirmative Action*, *supra* note 29, at 21 (setting forth evidence to support the argument that “affirmative action may be necessary to remedy women's continued exclusion from many male-dominated spheres”).

90. See, e.g., Matthew J. Lindsay, *How Antidiscrimination Law Learned to Live with Racial Inequality*, 75 U. CIN. L. REV. 87, 94 (2006).

objective way of assessing what type, quantity, and level of work is being given to men versus women. The EEOC could also proactively review the gender and racial make-up of firm committees, which are frequently publicly available on firm websites. A mere review of statistical evidence of underrepresentation can be very revealing, as was the case in the recent class action brought against Wal-Mart, which revealed a significant underrepresentation of women in management.<sup>91</sup> Certain industries or types of jobs can be easily identified as a good starting point for investigations: one example recently identified by the EEOC was a casino, in which beverage servers were exclusively women.<sup>92</sup> Filmmaking is another example of an industry so widely known to experience the type of discrimination that individuals are afraid to address that the ACLU proactively sought agency help in investigating gender discrimination.<sup>93</sup> In addition, the process could allow for anonymous complaints to be filed with the EEOC, which the EEOC could have the authority to investigate. The EEOC could also conduct confidential interviews with associates and former associates to learn of associates' reasons for leaving and perceptions of discrimination.<sup>94</sup> For example, the EEOC could investigate whether women truly leave firms because they "choose" to pursue motherhood or less demanding jobs (as firms often claim) or whether they are forced out explicitly or implicitly by lack of prospects for advancement, outright hostility, or other signs of discrimination.

While evidence of discriminatory intent would certainly be important information for the EEOC to seek, a more meaningful means of enforcement than prosecution of cases in which there is clear evi-

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91. See *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137 (N.D. Cal. 2004). Similarly, looking outside of actual litigation, mere statistics pertaining to Hollywood have also revealed what appears to be egregious discrimination: a University of Southern California study found that, of the top-grossing 100 films from 2013 and 2014, only 1.9 percent were directed by women; a Directors Guild of America analysis of 220 television shows consisting of 3,500 episodes broadcast in 2013 and 2014 found that only 14 percent were directed by women, while a third of all shows had no female director at all. Cara Buckley, *A.C.L.U., Citing Bias Against Women, Wants Inquiry Into Hollywood's Hiring Practices*, N.Y. TIMES (May 12, 2015), [http://www.nytimes.com/2015/05/13/movies/aclu-citing-bias-against-women-wants-inquiry-into-hollywoods-hiring-practices.html?\\_r=0](http://www.nytimes.com/2015/05/13/movies/aclu-citing-bias-against-women-wants-inquiry-into-hollywoods-hiring-practices.html?_r=0).

92. EEOC TESTIMONY OF KORES, *supra* note 90, at 3.

93. Buckley, *supra* note 92 (quoting female directors who requested anonymity for fear of "career repercussions").

94. For example, the A.C.L.U. recently solicited information from 50 female directors in Hollywood, who reported being told by executives that a show was not "woman friendly," being told by agents that producers had repeatedly instructed them to "not send women" for prospective jobs, being informed at meetings for television jobs that "we already hired a woman this season," and receiving dismissive rejections with a pretext of concern, such as, "This isn't a good show for a woman director," or, "Our actors are hard on women." Buckley, *supra* note 92.

dence of intentional discrimination would be to simply impose penalties on firms whose statistics for men versus women (or minorities versus non-minorities) were sufficiently disparate to suggest that only unlawful discrimination could explain the difference (i.e., pursuing disparate impact cases more aggressively, rather than focusing on disparate treatment cases).<sup>95</sup> Although it is beyond the scope of the current article, it would be necessary to have parameters as to what amount of discrepancy suffices to establish discrimination without specific evidence of discriminatory intent. This author suggests that the current guidelines for such discrepancy (as set forth in *Yick Wo v. Hopkins*<sup>96</sup> and *Griggs v. Duke Power Co.*<sup>97</sup>) are too lenient and render Title VII largely meaningless. This is particularly true in light of the evolution of society over time, making it more acceptable and desirable for women to be breadwinners (in addition to or instead of being “homemakers”). While it is hard to define with specificity how much disparity is necessary in order to be obviously a result of discrimination, there is precedent, as discussed further in Part V *infra*, for a more common sense assessment of a discrepancy revealing discrimination.<sup>98</sup>

A meaningful review of employers’ decisions should not just examine the distribution of jobs to women and minorities relative to the application pool. Rather, a review should examine the ways in which an employer may have come to receive a pool of applicants that is disproportionately male or non-minority. For example, the EEOC should carefully review the ways in which an employer advertises job openings and recruits potential candidates to identify discriminatory means of recruitment. If, for instance, candidates are solicited only via

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95. See, e.g., Michael J. Yelnosky, *Title VII, Mediation, and Collective Action*, 1999 U. ILL. L. REV. 583 (arguing that the current focus of Title VII on finding evidence of discriminatory intent diverts attention from larger problems such as the structures and practices of the workforce that result in disparate opportunities for women and minorities).

Such an approach would also be desirable in that it would root out the most egregious offenses and offenders (i.e., “extreme discrimination”) and would often avoid the need for and costs of a trial.

96. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (finding disparate impact race discrimination where 200 Chinese-owned laundries were prohibited from operating in situations similar to those in which 80 non-Chinese-owned laundries were permitted to operate).

97. *Griggs v. Duke Power Co.*, 401 U.S. 424, 429–30 (1971) (implicitly finding disparate impact race discrimination in violation of the Civil Rights Act where employer implemented education and intelligence tests not apparently related to job function, which had a substantially larger effect on minorities).

98. *Johnson v. Transp. Agency*, 480 U.S. 616 (1987), upheld an employer’s affirmative action plan under Title VII, requiring only that there be a “manifest” or “conspicuous” underrepresentation of the favored group.

internal channels, or through publications known to target disproportionately male or non-minority audiences, the employer should be penalized, as common sense dictates that employers can be equally effective at promoting discrimination through recruitment methods as it can through hiring decisions. In an enforcement regime such as this, employers would no longer be able to explain away their disproportionately male and non-minority workforce by pointing to lower numbers of female and minority applicants (i.e., blaming the “victim”). Clearly, one cannot apply for a position that one does not know is available.

Finally, in order for the model to be effective, a firm found to be engaging in discrimination should be both fined and named publicly by way of, for example, an annual report by the EEOC.<sup>99</sup> Scholars have suggested—and common sense would seem to support the idea—that the potential for damage to its public reputation would deter law firms (and other employers) from engaging in unlawful discrimination.<sup>100</sup> It has even been argued that the mere threat of investigation would serve as a deterrent.<sup>101</sup>

This article would be remiss if it failed to note that the proposed oversight would be a costly endeavor, requiring expansion of EEOC resources (in terms of personnel and otherwise), which would require funding with tax dollars.<sup>102</sup> However, given the importance of this landmark legislation, and the resources already devoted to fulfilling its goals over the past fifty (50) years, it makes good sense to increase resources as needed in order to work toward more quickly and aggressively fulfilling its purpose. This is particularly true in light of the fact that the goal of the statute is, ultimately, to reach a state of equality where non-discriminatory employment actions are a self-sustaining norm of our society that do not require enforcement by way of statute.

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99. The fine and public naming could be in addition to a lawsuit brought by the EEOC (and need not replace a lawsuit).

100. See Darden, *supra* note 2, at 129 (citing Robert H. Frank, *Winner-Take-All Markets and Wage Discrimination*, in *THE NEW INSTITUTIONALISM IN SOCIOLOGY* 208, 215 (Mary C. Britton & Victor Nee eds., 1998)).

101. Buckley, *supra* note 92 (quoting law professor Charles Sullivan that, “Even an investigation might be a black eye” to Hollywood studios).

102. One recent academic article provided data from 2008 indicating that the EEOC only has 600 investigators nationwide (and only 2,174 employees total), although there were 95,402 new charges filed that year—the largest number ever. MacFarlane, *supra* note 5, at 229–30 (citing Statements of Members of Congress and Other Interested Individuals and Organizations: Hearing on Commerce, Justice, Science, and Related Agencies Appropriations for 2010 Before the Subcomm. of the Comm. on Appropriations, 111th Cong. 38 (2009) (statement of Gabrielle Martin, President, National Council of EEOC Locals)).

## V. JUSTIFICATION AND AUTHORITY

One of the key purposes of Title VII is to remedy historical discrimination—not just discrimination by private employers, but also discrimination by state governments.<sup>103</sup> The Supreme Court has held that, where a statute with a remedial purpose has not served its purpose as implemented, more aggressive means of seeking remediation are warranted.<sup>104</sup> The proposed change in regulatory enforcement is a more aggressive means of achieving the remedial purposes of Title VII. As such, it finds support in *Nevada Department of Human Resources v. Hibbs*.<sup>105</sup>

To the extent that the proposed model not only proactively investigates employers but enforces compliance by way of fines and public naming, it resembles affirmative action based on gender (and race): this is because it creates financial and social pressure that, in essence, would force employers to hire and promote more women and minorities. Despite the fact that affirmative action requirements are typically permissible only in the context of government programs, the proposal herein is justified (under *Hibbs*) for application to both public and private employers.<sup>106</sup> Moreover, there is an argument that mere societal discrimination (as opposed to governmental discrimination) is a sufficient reason for gender-based (or race-based) affirmative action programs.<sup>107</sup> While the proposed program stops short of constituting

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103. As set forth in footnote 7, *supra*, the Supreme Court has summarized the goals of Title VII as “break[ing] down old patterns of racial segregation and hierarchy,” *United Steelworkers of America v. Weber*, 443 U.S. 193, 195, 208 (1979), and “assur[ing] equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin,” *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974).

104. *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 730–37 (2003) (upholding as applicable to *both public and private employers* the Family and Medical Leave Act, which was designed to remedy workplace discrimination stemming at least in part from state governments’ improper reliance on gender role stereotypes concerning women’s caretaking responsibilities, and was deemed “congruent and proportional” to the harm to be remedied, especially in light of the failure of Title VII to achieve gender equality in the workplace).

105. *Id.*

106. *See id.*

107. *See Estlund, supra* note 65, at 35–36 (arguing that “Grutter’s recognition of the civil and societal value of integrated institutions” provides a basis for construing Title VII to allow an employer to take measures to eliminate a “manifest imbalance in a predominantly white workplace or job,” for any reason it deems appropriate); *Gender-Based Affirmative Action, supra* note 29, at 23 (arguing that reliance on “societal discrimination” to justify gender based affirmative action programs “makes sense because it has been so difficult to identify and prove subconscious gender stereotyping).

affirmative action,<sup>108</sup> the authority for it is found in caselaw approving gender-based (and race-based) affirmative action programs—including cases in which strict scrutiny has been applied.<sup>109</sup>

The Supreme Court has recognized only two justifications for upholding race-based affirmative action: the remedial purpose rationale and the diversity-in-education rationale.<sup>110</sup> This author suggests that the EEOC compliance-monitoring program proposed herein would be warranted by the remedial purpose rationale: the historical discrimination against women (and minorities) in employment justifies this proactive approach.<sup>111</sup> Currently, there is a split in the Circuits as to whether and when gender-based affirmative action is legally justifiable.<sup>112</sup> Some circuits apply strict scrutiny in determining the validity of such programs,<sup>113</sup> while others apply intermediate scrutiny,<sup>114</sup> and a few have either declined to make a determination<sup>115</sup> or have not yet

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108. The proposed program is different from an affirmative action program insofar as it does not implement any particular process or requirements for actively increasing the rate of employment of women (or minorities) and, instead, focuses on ferreting out existing illegal discrimination (i.e., seeks out violations of already-existing law).

In other countries and other contexts, there has been support for and legal approval of affirmative action programs designed to increase equality for women in the workplace. For example, in 2004, Norway enacted an affirmative action program for corporate governance, and the European Community's Amsterdam Treaty (adopted in 1997), endorsed gender-based affirmative action in employment. *Gender-Based Affirmative Action*, *supra* note 29, at 29.

109. *See Weber*, 443 U.S. at 195, 208; *Johnson*, 480 U.S. at 620–21.

110. *Gender-Based Affirmative Action*, *supra* note 29, at 19 (discussing *Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989) (remedial), *Califano v. Weber*, 430 U.S. 313 (1977) (same), *Grutter v. Bollinger*, 539 U.S. 306, 330, 334 (2003) (diversity); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990) (same)).

111. *See id.* at 3–13, 21–22 (discussing historical discrimination against women by the government, such as statutes that remained on the books for generations, caselaw upholding these statutes and setting forth discriminatory rationales, and policies at state colleges and universities, that discriminated against women and kept them from advancing).

112. *Id.* at 13–18.

113. The Sixth Circuit and the Federal Circuit have adopted the strict scrutiny test. *Id.* at 14–15 (discussing *Mich Rd. Builders Ass'n v. Milliken*, 834 F.2d 583 (6th Cir. 1987), *summarily aff'd*, 489 U.S. 1061 (1989); *Berkley v. United States*, 287 F.3d 1076, 1085 (Fed. Cir. 2002)); *see also Brunet v. City of Columbus*, 1 F.3d 390, 403 (6th Cir. 1993).

114. The Third, Fifth, Ninth, Tenth, Eleventh, and D.C. Circuits have rejected strict scrutiny review for gender-based affirmative action programs. *Id.* at 15–17 (discussing *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 1001 (3d Cir. 1993); *Dallas Fire Fighters Ass'n v. City of Dallas*, 150 F.3d 438, 441–42 (5th Cir. 1998), *cert. denied*, 526 U.S. 1038 (1999); *W. States Paving Co. v. Wash. Dep't of Transp.*, 407 F.3d 983, 990 n.6 (9th Cir. 2005); *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 712–13 (9th Cir. 1997); *Concrete Works of Colo., Inc. v. City & Cnty. of Denver*, 321 F.3d 950, 957–60 (10th Cir. 2003); *Eng'g Contractors Ass'n v. Metro Dade Cnty.*, 122 F.3d 895, 907–09 (11th Cir. 1997)); *MD/DC/DE Broadcasters Ass'n v. F.C.C.*, 236 F.3d 13, 23 (D.C. Cir. 2001).

115. The Second and Seventh Circuits have avoided making a determination as to what level of review is appropriate for a gender-based affirmative action program. *Id.* at 17–18 (discussing *Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 981 F.2d 50 (2d Cir. 1992); *Milwau-*

been faced with the issue.<sup>116</sup> Given that the past 50 years of implementation of Title VII have been unsuccessful (particularly in certain industries, such as the legal industry, where disparities in employment statistics between men and women and minorities and non-minorities are still so vast), while the importance of women's employment and accompanying earnings in sustaining our population has grown greatly (and steadily) throughout that time period, the proposed increase in regulation should survive even strict scrutiny review.<sup>117</sup>

Additional persuasive support for the proposal herein is found in the Supreme Court's opinion in *Johnson v. Transportation Agency*.<sup>118</sup> Johnson upheld an employer's affirmative action plan under Title VII, requiring only that there be a "manifest" or "conspicuous" underrepresentation of the favored group. At least one scholar has argued that, "*Johnson* could be read to permit preferences for non-white (or female) employees in jobs heretofore occupied exclusively or overwhelmingly by white (or male) employees, *without regard to either the cause of underrepresentation or the employer's reason for redressing it.*"<sup>119</sup> As such, *Johnson* supports the proposed change to the current EEOC enforcement model—particularly to the extent that implemen-

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kee Cnty. Pavers Ass'n v. Fiedler, 992 F.2d 419, 422 (7th Cir. 1991), *cert. denied*, 500 U.S. 954 (1991)).

116. The First, Fourth, and Eighth Circuits have not been faced with the question of what level of review is appropriate for a gender-based affirmative action program.

117. This is because the proposed enforcement model is narrowly tailored to achieve the government's interest in remedying historical discrimination against women in order to further gender equality (an interest that should now be deemed compelling, given the changing role of women as single parents and breadwinners) — and is the least restrictive means that will be effective in serving that goal. See, e.g., *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938) (setting forth requirements of strict scrutiny); *Korematsu v. United States*, 323 U.S. 214 (1944) (applying strict scrutiny).

To be clear, the history and data surrounding Title VII after 50 years of its implementation show that less restrictive enforcement of Title VII has not been successful in achieving its goal, despite having allowed a sufficient time for its goal to have been attained—thus satisfying the "least restrictive means" requirement of strict scrutiny. The model is a narrowly tailored method of furthering the statute already in place because it would solely impact the rate of women's employment opportunities (without causing unnecessary disruption)—thus satisfying the "narrowly tailored" requirement of strict scrutiny. Finally, gender equality today is an even more compelling interest than it has been in the past: this is because, as a result of natural societal progression in which more than half of marriages end in divorce and the number of single mother households has become so substantial, women's income (and social impact, in frequently serving as a child's sole or primary role model) now plays a much greater role in preserving and protecting the lives of the individuals in our society—in particular, the children in our society.

To the extent that it is questionable whether the proposal would survive strict scrutiny review, it is worth noting that, in the absence of any authority from the Supreme Court on the matter, it is not clear that it would be subjected to such a high level of review. Rather, it may very well be subject to intermediate level review.

118. *Johnson v. Transp. Agency*, 480 U.S. 616 (1987).

119. Estlund, *supra* note 65, at 12.

tation of the model focuses on rooting out the most extreme and egregious offenses and offenders.

## CONCLUSION

The marked lack of progress in equal employment opportunity for women and minorities since the passage of Title VII a full half-century ago makes revisiting its enforcement mechanisms an important and sensible task. The importance of employment to both basic survival and to status and power in our society makes enforcement of our employment laws crucial to the recognition of equality that is central to our nation's core ideals. Achievement of this objective is worth the cost of enforcement of the statute and justifies the burden it would impose on employers and taxpayers. A more proactive approach is warranted and necessary to help achieve the goal of equal employment opportunity as prescribed by Title VII. Over time, as women and minorities become more present in more desirable and powerful positions in the workplace, discrimination against them—and the stereotypes and biases (both conscious and subconscious) that give rise to this discrimination—will continue to diminish.<sup>120</sup>

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120. See *Gender-Based Affirmative Action*, *supra* note 29, at 26 (arguing that, “[o]nce more women are seen in male-dominated occupations and assume leadership positions, notion of lack of ability and incompetence tend to evaporate”).

Data on the continuing gender disparity among lawyers perhaps reflects not only employers' biases and discrimination but also that of society in general. For example, the number of women arguing before the United States Supreme Court likely reflects both law firms' provision of opportunities to women and clients' selection of counsel (male counsel versus female counsel). It was reported by SCOTUSblog that, in October of 2015, only 1 of 28 lawyers arguing before the United States Supreme Court was a woman. See SCOTUSblog (@scotusblog), TWITTER (Oct. 7, 2015, 5:27 PM), <https://twitter.com/scotusblog>. It was reported that, during the 2013–2014 term, only 16% of the lawyers arguing before the United States Supreme Court were women. Ian Millhiser, *Only 16 Percent Of Attorneys Arguing Before The Supreme Court This Term Were Women*, THINK PROGRESS (Mar. 19, 2014, 11:50 AM), <http://thinkprogress.org/justice/2014/03/19/3416246/only-16-percent-of-attorneys-arguing-before-the-supreme-court-this-term-were-women>.



## ESSAY

# Article 32 Hearings: A Road Map for Grand Jury Reform

CLAIRE P. DONOHUE\*

### INTRODUCTION

In late 2014, two grand juries, one in New York and one in Missouri, declined to return indictments against white police officers, Daniel Pantaleo and Darren Wilson, for killing unarmed black men, Eric Garner and Michael Brown. Since that time, seemingly countless accounts of police violence against black civilians have come to light.<sup>1</sup> The racial overtones and implications for race relations between the public and the police are obvious. What is equally obvious for many in the legal community and beyond, is the need to renew calls for grand jury reform.<sup>2</sup> With the public on high alert, with people's confidence in criminal justice system so low, with the accused being members of the same executive branch that is obligated to examine the case, surely the need for transparency of process is clear.<sup>3</sup> California recently addressed the quagmire by outlawing the use of grand juries in

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1. See, e.g., *In Depth: Protest over Police Violence*, CBS NEWS, <http://www.cbsnews.com/feature/protests-over-police-violence> (last updated Nov. 29, 2015) (referencing allegations in Cleveland and Cincinnati, OH; Baltimore, MD; Waller County and Arlington, TX).

2. See, e.g., Andrew E. Taslitz & Stephen E. Henderson, *Reforming the Grand Jury to Protect Privacy in Third Party Records*, 64 AM. U. L. REV. 195, 197 (2014); The Editorial Board, *A Judge's Idea for Grand Jury Reform*, N.Y. TIMES (Feb. 19, 2015), <http://www.nytimes.com/2015/02/19/opinion/a-judges-idea-for-grand-jury-reform.html>.

3. See Tracy Kaplan, *California Bans Grand Juries in Fatal Shootings by Police*, SAN JOSE MERCURY NEWS (Aug. 15, 2015), [http://www.mercurynews.com/crime-courts/ci\\_28621966/gov-brown-oks-nations-1st-ban-grand-juries](http://www.mercurynews.com/crime-courts/ci_28621966/gov-brown-oks-nations-1st-ban-grand-juries) (stating that beyond the Ferguson and Staten Island cases, “[c]alls for transparency also have come amid national concerns about disparate treatment of blacks and other racial minorities when encounters with cops turned deadly in Baltimore, Cincinnati and South Carolina”).

cases involving fatal shootings by police,<sup>4</sup> but for those states that had or have grand juries, the calls for transparency focus, by default, on the ex post release of grand jury transcripts. And indeed, in Ferguson Missouri, the grand jury transcripts were eventually released in the name of transparency.<sup>5</sup> Meanwhile the legal battle over the release of records in the Daniel Pantaleo proceedings in New York waged on for some time and resulted in only preliminary release of limited information.<sup>6</sup>

Release of records in the Ferguson case revealed a process startling to those with an insider's knowledge of the grand jury proceedings. The breadth and detail of the evidence before the grand jury was in stark contrast to the typical 'less is more' approach of prosecutors.<sup>7</sup> Similarly, the preliminary release of limited information in New York revealed a grand jury proceeding that far and away exceeded the practiced norms.<sup>8</sup> Many were left to conclude that the prosecutors invested themselves in achieving no-bill decisions and that the grand juries returned the decision that was expected of them, just as grand juries typically return indictment after indictment, because prosecutors request the indictments (never mind that the requests are often based on nothing more than a second or third hand report by a government agent).<sup>9</sup>

The stubborn insistence that grand jury secrecy protects civil liberties seems amiss in the light of widespread public distrust of policing and the criminal justice system.<sup>10</sup> And yet, even the release of records in Missouri only provided an imperfect, incomplete solution: it is diffi-

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4. *Id.*

5. *But see* Benjamin Weiser, *Mixed Motives Seen in Prosecutor's Decision to Release Ferguson Grand Jury Materials*, N.Y. TIMES (Nov. 25, 2014), [http://www.nytimes.com/2014/11/26/us/mixed-motives-seen-in-prosecutors-decision-to-release-ferguson-grand-jury-materials.html?\\_r=0](http://www.nytimes.com/2014/11/26/us/mixed-motives-seen-in-prosecutors-decision-to-release-ferguson-grand-jury-materials.html?_r=0) (addressing "mixed motives" for the release of the grand jury transcripts).

6. Then, in March 2015, a judge decided that the grand jury transcripts would not be released. Associated Press, *Judge Won't Release Grand Jury Testimony in Eric Garner's Chokehold Death*, PIX 11 (Mar. 20, 2015), <http://pix11.com/2015/03/19/judge-wont-release-nyc-chokehold-death-grand-jury-testimony/>.

7. *See* Niki Kuckes, *The Useful, Dangerous Fiction of Grand Jury Independence*, 41 AM. CRIM. L. REV. 1, 13 (2004); *see also* *Ferguson Grand Jury Transcripts Show Widely Varying Witness Testimony*, WALL ST. J. (Nov. 25, 2014), <http://www.wsj.com/articles/ferguson-grand-jury-transcripts-show-widely-varying-witness-testimony-1416948406>.

8. Kuckes, *supra* note 7, at 13.

9. *Id.* at 21.

10. *See, e.g.,* Sara Levy, *The Patriot Act Grand Jury Disclosure Exception: A Proposal for Reconciling Civil Liberty and Law Enforcement Concerns*, 5 CHI.-KENT J. INT'L & COMP. L. 2, section D (2005) (offering an overview of the policies underlying grand jury secrecy); *see also* Mark Kadish, *Behind the Locked Door of American Grand Jury: Its History, Its Secrecy, and Its Process*, 24 FLA. ST. U. L. REV. 1, 12 (1996) (discussing the history behind grand jury secrecy).

cult to fully contextualize or understand what was done when one looks at one proceeding in a vacuum without access to other grand jury transcripts. Moreover, ex-post access and transparency is just a first step in inspiring the systemic reforms that would serve as a prophylactic against inconsistent or biased grand jury procedures.

As scholars and practitioners continue to debate the shape and form that grand jury reform might take, and specifically tackle the question of whether or how grand juries might be more transparent, they would be advised to consider the military counterpart to the grand jury, namely Article 32 Investigations. Part I of this paper gives a brief overview of the grand jury system as an “accusatory” body. Part II describes Article 32 Investigations and Part III suggests grand jury reforms for open hearings and defense participation that are in line with aspects of Article 32 proceedings.

## I. GRAND JURIES

As is the case with much of our jurisprudence, the United States took its lead from English Common law in defining grand juries. In 18th century-England the grand jury sat “only to hear evidence on behalf of the prosecution[,] for the finding of an indictment is only in the nature of an enquiry or accusation, which is afterwards to be tried and determined.”<sup>11</sup> Accordingly, in early American courts the grand jury was charged to examine “upon what foundation [the charge] is made.”<sup>12</sup> “As a consequence, neither in this country nor in England has the suspect under investigation by the grand jury ever been thought to have a right to testify or to have exculpatory evidence presented.”<sup>13</sup>

In steadfastly holding that only a bare minimum is required for grand jury examination of a charge, the court has not only declined to extend technical evidentiary protections (e.g. protection against hearsay evidence) to an accused, but has gone beyond this to afford grand juries the same deference it offers prosecutors under their charging

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11. See 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 300 (1769); 2 M. HALE, HISTORY OF THE PLEAS OF THE CROWN 157 (1st Am. ed. 1847); see also *United States v. Williams*, 504 U.S. 36, 51 (1992).

12. *Republica v. Shaffer*, 1 U.S. 236 (1788); see also *Williams*, 504 U.S. at 51 (discussing history of grand juries); F. WHARTON, CRIMINAL PLEADING AND PRACTICE § 360, pp. 248–249 (8th ed. 1880).

13. *Williams*, 504 U.S. at 51.

powers.<sup>14</sup> In *United States v. Costello*, for example, the court did not just rule that hearsay rules were inapplicable to grand juries, it held more broadly that “[a]n indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more.”<sup>15</sup>

So while the Supreme Court tells us that the grand jury has an historic role “as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor,”<sup>16</sup> it also seems inclined to conflate the roles of the grand jury with the role of the prosecutor. Historically, for example, because the grand jury was essentially signing off on an allegation or certain set of allegations, the prosecution was then required to try the exact charge returned by the grand jury.<sup>17</sup> But modern rules and procedures have drifted even from this constraint.<sup>18</sup> In *United States v. Miller*, for example, the Court held that Miller could be convicted of a different offense, one based on evidence that was less than that put before the grand jury. The court argued that the evidence before the grand jury was “surplusage.”<sup>19</sup> Indeed, “[l]eaving aside, for a moment, the Court’s rhetoric suggesting that the grand jury is a ‘neutral’ decisionmaker like a magistrate judge, the vision of grand jury indictment that emerges from the Court’s decisions does not resemble a judicial process, but rather prosecutorial decisionmaking.”<sup>20</sup> In a very real sense the grand jury has always been an “accusatory not adjudicatory” body.<sup>21</sup>

Increasingly, modern grand juries are convened and operated not as an independent entity meant to test prosecutors, but rather as an extension of that office.<sup>22</sup> The courts continue to insist on the legal fiction<sup>23</sup> of independence between grand juries and prosecutors even as their opinions (essentially) reason that the grand jury has

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14. Niki Kuckes, *The Democratic Prosecutor: Explaining the Constitutional Function of the Federal Grand Jury*, 94 GEO L. J. 1265, 1305 (2006).

15. See *Costello v. United States*, 350 U.S. 359, 409 (1956).

16. See *United States v. Dionisio*, 410 U.S. 1, 17 (1973). Yet in that same case the court acknowledges that the grand jury may not always serve that role.

17. ROBERT O. DAWSON, DEORGE E. DIX, FRANK W. MILLER, & RAYMOND I. PARANAS, *PROSECUTION AND ADJUDICATION* 695 (5th ed. 2000).

18. See *id.*

19. See *id.* at 696; see, e.g., *United States v. Miller*, 471 U.S. 130, 136 (1985).

20. See Kuckes, *supra* note 14, at 1305.

21. See *United States v. Williams*, 504 U.S. 36, 51 (1992).

22. See Taslitz, *supra* note 2, at 207 (stating that nobody informs grand jurors of their full power or independence).

23. See Kuckes, *supra* note 7.

prosecutorial charging power, and they eradicate any difference of institutional perspective between the grand jury and the prosecutor. Add to all of this, that the dance between prosecutors and grand juries is almost entirely out of the public purview.<sup>24</sup> Yet public outcry over the Daniel Pantaleo and Darren Wilson grand juries show one very real consequence of the lack of transparency and clear objectivity: public distrust. Military Article 32 Investigations provide for procedures that would remedy this public distrust, most notably: 1) the public nature of the proceedings; and 2) the ability of the defense to be present and participate meaningfully.

## II. ARTICLE 32 INVESTIGATIONS

The right to grand juries as secured by the Fifth Amendment of the constitution is inapplicable to the Armed Forces: “[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, *except* in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger. . .” (emphasis added).<sup>25</sup> Instead the Uniform Code of Military Justice outlines a distinct process known as Article 32 Investigations, often called an Article 32 Hearing.<sup>26</sup> An accused is entitled to an Article 32 Hearing, but may waive the requirement.<sup>27</sup> Article 32 Hearings are meant to be “thorough and impartial” reviews of charges, before those charges are presented to a general court martial.<sup>28</sup> The purpose of the investigation is to provide “inquiry as to the truth of the matter set forth in the charges, consideration of the form of the charges, and a recommendation as to the disposition which should be made of the case in the interest of justice and discipline.”<sup>29</sup>

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24. See, e.g., MO REV. STAT. §§ 540.130.1; 540.310.1(2014) (provisions against disclosure).

25. U.S. CONST. AMEND. 5.

26. 10 U.S.C. § 832 (2012).

27. *Id.*

28. *Id.*; see also, e.g., Michelle Tan, *Bergdahl Charged With Desertion, Faces Article 32*, ARMY TIMES (Mar. 25, 2015), <http://www.armytimes.com/story/military/2015/03/25/bowe-bergdahl-army-decision-next-steps/70436058/>; Andrew Tilgham, *Army, Bergdahl Could Face Court Martial*, MILITARY TIMES (Jan. 27, 2015), <http://www.militarytimes.com/story/military/pentagon/2014/12/22/army-sgt-bowe-bergdahl-could-face-court-martial/20771723/>.

29. 10 U.S.C. § 832 (2012).

The requirement for formalized, thorough pretrial investigations was first codified in the Articles of War in 1920.<sup>30</sup> The statutory requirement for Article 32 Hearings specifically followed two “substantive legislative changes and was formalized in The Uniform Code for Military Justice in 1958.<sup>31</sup> From its earliest inception and until its ratification, the proponents of Article 32 Hearings maintained that “the armed services can point to [Article 32 Hearings] with pride as exceeding any comparable protection in civilian life.”<sup>32</sup>

Article 32 Hearings are often compared to preliminary hearings and grand juries proceedings, because it, like they, has a screening function. The additional functions, of Article 32 Hearings, however, highlight stark differences from grand jury proceedings, and differences from preliminary hearings as well.<sup>33</sup> Article 32 Hearings serve four purposes: 1) protect the accused from baseless charges; 2) provide the adjudicating body with evidence to determine whether to refer the charges to trial by court martial; 3) provide the convening authority with information to determine a range of dispositions for a case being referred to trial by court martial; and 4) to provide the defense with discovery.<sup>34</sup> Notably, only the first three are statutory purposes, and the latter, defense discovery, is a collateral, yet recognized and protected interest.<sup>35</sup>

As shall be discussed in more detail below, Article 32 Hearings allow the defense to be present and participate meaningfully, including by presenting evidence.<sup>36</sup> Moreover, the proceedings supply the convening authority with information concerning possible dispositions and serve as a means of discovery for the defense.<sup>37</sup> As such “it is far

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30. Article of War 70, § 1, ch. 2, 41 Stat. 759, 802 (1920), as amended. *See also* 62 Stat. 604, 633, 639, 642 (1948); Lieutenant Colonel William Murphy, *The Formal Pretrial Investigation*, 12 MIL. L. REV. 1, 1 (1961).

31. 10 U.S.C. §§ 801–934 (1958); *see also* Murphy, *supra* note 30, at 1.

32. *See* Murphy, *supra* note 30, at 2.

33. “Insofar as the Article 32 investigation is an inquiry into the facts surrounding the charges against the accused, and thus an important pretrial screening device, it is functionally similar to both the preliminary hearing and grand jury. It is, however, a unique hybrid, and dissimilar in large part to both civilian proceedings.” *Chapter 9 The Article 32 Investigation*, 3, Report of the Washington Headquarters Services, [http://responsesystemspanel.whs.mil/Public/docs/meetings/Sub\\_Committee/20140107\\_CSS/Materials/MRE/CH9\\_Art32Investigations\\_20120418.pdf](http://responsesystemspanel.whs.mil/Public/docs/meetings/Sub_Committee/20140107_CSS/Materials/MRE/CH9_Art32Investigations_20120418.pdf) (2014) (hereinafter *Chapter 9*).

34. *Chapter 9, supra* note 33, at 1.

35. Major Larry A. Gaydos, *Comprehensive Guide to Military Pretrial Investigation*, 111 MIL. L. REV. 49 (1986).

36. *Id.*

37. *Chapter 9, supra* note 33, at 3.

broader in scope than is the normal preliminary hearing.”<sup>38</sup> As compared to the grand jury system: “the grand jury is a secret proceeding that deprives a testifying accused [of various rights of confrontation]. Consequently, the Article 32 investigation is far more protective of the accused than is any analogous civilian proceeding.”<sup>39</sup>

There are important procedural safeguards for an accused in an Article 32 Hearing. First, a prosecutor is not permitted to advise or assist the judicial officer. In *United State v. Payne*, the court held that ex parte conversations between the Article 32 Hearing investigating officer and the prosecutor violated the investigator’s role as a judicial officer.<sup>40</sup> The reasoning in *Payne* provides an important perspective on Article 32 Hearings: the investigator, the juror if you will, is considered a judicial officer on the preceding who is adjudicating the “truth of the matter set forth in the charges.”<sup>41</sup> It follows then that conversations with the investigator would be inappropriate ex parte communications.<sup>42</sup> Contrast grand jury proceedings, where the prosecutor is not only permitted, but often statutorily tasked,<sup>43</sup> to work with jurors as an “accusatory body.”<sup>44</sup> Secondly, the defendant is present at the Article 32 Hearing with a lawyer.<sup>45</sup> While this is not unique to Article 32 Hearings alone and is, in fact, allowed by some states in grand jury proceedings; the Article 32 Hearings take the presence of a represented defendant one step further by allowing the defense to cross examine witnesses,<sup>46</sup> call their own witnesses, and present their own evidence.<sup>47</sup> Also, the defense is permitted to present argument to the judicial officer about what charges may be appropriate or what potential dispositions, short of court martial,<sup>48</sup> may be appropriate.<sup>49</sup>

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38. *Id.*

39. *Id.* at 3–4.

40. *United States v. Payne*, 3 M.J. 354, 356 (C.M.A. 1977) (holding, however, that the impropriety did not prejudice the appellant).

41. 10 U.S.C. § 832 (2012).

42. *See Payne*, 3 M.J. at 356.

43. MO. REV. STAT. § 540.130 (2014) (stating “[w]henver required by any grand jury, it shall be the duty of the prosecuting or circuit attorney in the county, or in a city not within a county, to attend them for the purpose of examining witnesses in their presence, or giving them advice upon any legal matter”) (emphasis added).

44. *United States v. Williams*, 504 U.S. 36, 37 (1992).

45. *United States v. Mickel*, 26 C.M.R. 104, 106 (C.M.A. 1958) (holding that failure to provide qualified counsel at an Article 32 Hearing constituted reversible error).

46. 10 U.S.C. § 832 (2012). The amendment.

47. 10 U.S.C. § 832 (2012). *See generally* *United States v. Ledbetter*, 2 M.J. 37 (C.M.A. 1976) (discussing defendant’s right to order appearance of a witness).

48. The equivalent of a bill or indictment.

49. 10 U.S.C. § 832 (2012) (amended section effective one year after December 26, 2013).

There are also several important provisions to secure the integrity and solemnity of the hearings. The hearings will follow an investigation by military law enforcement, a commander, or a regulatory investigation.<sup>50</sup> Secondly, the hearings are before a designated investigating officer. This individual is selected and may serve on a temporary basis or as a permanent installation.<sup>51</sup> As of the most recent amendment, the investigation officer must, barring exigencies, be a Judge Advocate.<sup>52</sup> Again, as with *Payne*, one can see the perspective that if an Article 32 Hearing is to serve as a shield to false accusations or overcharges, then the investigator (the grand juror) must be fit to adjudicate the matter before her. Moreover, the Article 32 Hearings are open hearings, so public in fact, that when the press was denied access to a hearing, ABC sued.<sup>53</sup> ABC won the case, resulting in a proclamation that: “[t]oday we make it clear that, absent ‘cause shown that outweighs the value of openness,’ the military accused is likewise entitled to a public Article 32 investigative hearing.”<sup>54</sup>

### III. ROADMAP FOR GRAND JURY REFORM

Many question whether the grand jury legitimately investigates and screens pretrial matters or whether they serve as a rubber stamp for a prosecutor’s office.<sup>55</sup> Indeed, the concerns are so fixed and longstanding that even law school texts apprise aspiring attorneys of the long list of “concerns that can be raised as to the ability of the grand jury to function effectively [including] its dependence upon the prosecution for information, investigatory assistance, and legal advice, and the potential difficulty which lay jurors may experience in resolving the sometimes complex legal issues that even probable cause determinations raise.”<sup>56</sup> Many of the attributes of the Article 32 Hearing correct for these concerns. This is particularly true for cases such as *Brown and Garner*, where there is an obvious critique that the needs

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50. See, e.g. Tan, *supra* note, 28 (indicating that the “extensive” Army investigation into Bergdahl’s conduct lasted six months and was then “reviewed thoroughly” by a commanding general before the matter was advanced to an Article 32 Hearing).

51. 10 U.S.C. § 832 (2012) (amended section effective one year after December 26, 2013).

52. *Id.*

53. *ABC, Inc. v. Powell*, 47 M.J. 363 (C.A.A.F. 1997).

54. *Id.* at 365. The *ABC* case was not extended to allow public access to documents filed in a court martial. See *Center for Constitutional Rights v. United States*, 72 M.J. 126 (C.A.A.F. 2013).

55. See, e.g., Levy, *supra* note 10, at n.27 (offering scholarly accounts from as early as the 30s, 60s, and 70s, that characterize the grand jury system as a rubber stamp).

56. *DAWSON ET AL.*, *supra* note 17, at 695.

of certain types or classes of victims are undermined by an opaque, prosecutor-driven, grand jury system.

It is also particularly logical to import aspects of the Article 32 Hearing into the grand jury system when one considers the potential conflict of interest that a prosecutor's office faces in proceeding against an officer who has been accused of a crime.<sup>57</sup> When a prosecutor is faced with a law enforcement officer having been accused of a crime, they are faced with 'one of their own' having been accused of a crime. This, no doubt, inspires any number of reactions ranging from "no it can't be; not Officer so-and-so" to "we cannot have bad people doing our good and important work." It is likely that this range of reactions mirrors the reactions of military members faced with the realization that 'one of *their* own' has been accused of a crime. Accusations are personal if they are made against someone that the prosecutor or commander knows well, something that is incredibly common at the county level or where a military outfit is working and/or living closely with one another.<sup>58</sup> Some accusations are vile, worrisome, public relations nightmare.<sup>59</sup> Some accusations are maddening if they are for conduct that has been insidious and yet know within the institutional walls.<sup>60</sup> Whatever the reaction, accusations often hit close to home and create a conflict of interest, one best managed with care and transparency.

Article 32 Hearings provide a good example of a system that is more even handed, and certainly more transparent, than the grand jury system. The grand jury system as it operates in most states amounts to one long ex parte conversation between the prosecutor and the grand jury members; this fact is most acute where the defense is not permitted in the proceedings.<sup>61</sup> And even where the defense is permitted to be present, they are not permitted to present evidence or

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57. *Local Criminal Prosecution*, HUMAN RIGHTS WATCH (June 1998), <http://www.hrw.org/legacy/reports98/police/uspo31.htm>.

58. *See id.*

59. Sarah Hagen, *Cop Accused of Sexually Assaulting a 2-year Old*, USA TODAY (Mar. 20, 2015), <http://www.usatoday.com/story/news/nation/2015/03/19/police-child-sex-assault/25041091/>; Kellan Howell, *13 Cops Indicted After Participating in Undercover Drug Trafficking Scheme*, WASH. TIMES (Apr. 30, 2015), <http://www.washingtontimes.com/news/2015/apr/30/13-police-officers-indicted-after-participating-in/>.

60. Helene Cooper, *Pentagon Study Finds 50% Increase in Reports of Military Sexual Assaults*, N.Y. TIMES (May 1, 2014), <http://www.nytimes.com/2014/05/02/us/military-sex-assault-report.html>.

61. Taslitz & Henderson, *supra* note 2, at 207 (stating "social science research demonstrates that an awareness that one will need to justify her actions to a third party reduces the chance of error").

cross examine witnesses. The portrayal of evidence in grand juries is entirely one sided and therefore skewed. Prosecutors, for example, can chose not to present exculpatory evidence, or they can choose to present illegally obtained evidence.<sup>62</sup> Prosecutors' decision to control presentation of evidence in this way has an obvious result: in federal cases, grand juries indict 99% of the cases before them.<sup>63</sup>

That is, unless of course, the prosecution feels independently motivated to present evidence in favor of the defense as they notably did in the Wilson (Ferguson) and Pantaleo (New York City) cases.<sup>64</sup> The trouble, of course, is that barring any prosecutorial misconduct, the prosecution is not required to rebut itself and indeed, rarely does so.<sup>65</sup> This notion that the prosecution will pick and choose which cases require meritorious fleshing out and which cases only require a cursory presentation of evidence is deeply offensive to notions of equal protection and due process. Several Article 32 Hearing-style reforms would correct for these shortcomings in the grand jury system.

#### A. Open Hearings

The notion of open proceedings is logical given the myriad of studies that affirm that decision making is improved when it is undertaken in public view.<sup>66</sup> In grand jury proceedings examining police misconduct, one can easily see why scrutiny in public view makes good sense. Under current laws and norms, the grand jury rubber stamps the whims of the prosecution and, if forced to review the matter, the court rubber stamps the decisions of grand juries.<sup>67</sup> The robotic nature of grand jury indictments, coupled with secret proceedings, has damaging social costs.<sup>68</sup> This is dramatically evident when

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62. See *United States v. Williams*, 504 U.S. 36, 52 (1992) (allowing that prosecution need not present exculpatory evidence and that illegally obtained evidence can come before the grand jury); see also *United States v. Calandra*, 414 U.S. 338, 355 (1974) (declining to extend the protection of the exclusionary rule).

63. See Thaddeus Hoffmeister, *The Grand Jury Legal Advisor: Resurrecting the Grand Jury's Shield*, 98 J. CRIM. L. & CRIMINOLOGY 1171, 1776 (2008).

64. See Darren Lenard Hutchinson, 'Continually Reminded of their Inferior Position': *Social Dominance, Implicit Bias, Criminality, and Race*, 46 WASH. U. J. L. & POL'Y 23, 113 (2014).

65. The prosecution could indict a ham sandwich. See Hoffmeister, *supra* note 53, at 1776 (2008); see also *Costello v. United States*, 350 U.S. 359, 409 (1956); *Williams*, 504 U.S. at 52.

66. See Taslitz & Henderson, *supra* note 2, at 204.

67. No judge is present during grand jury proceedings, disclosure of the proceedings is limited, and the grounds for challenging the outcome of grand juries are very narrow. See *Costello*, 350 U.S. at 409, FED. R. CRIM. PRO. 6(e); see also Taslitz & Henderson, *supra* note 2, at 208.

68. *Id.* at 219; *Police Nationwide Brace for Protests After Ferguson*, CBS News (Nov. 14, 2014, 12:43 PM), <http://www.cbsnews.com/news/ferguson-missouri-police-nationwide-brace-for-protests-after-grand-jury-decision/>.

there is an allegation of police misconduct. In such cases, the public view can all too easily see that the system of rubber stamping seems to rubber stamp police misconduct.<sup>69</sup> Transparency seems particularly important and obvious when it comes to scrutinizing police, because as with any governmental agency that is allowed (indeed *invited*) to exercise its will against citizens, public accountability is an important restraint on that agency.<sup>70</sup>

Beyond the desire for public accountability for police, is the sense that public hearings would elevate public accountability for prosecutors. Codified grand jury transparency, like the transparency required in Article 32 Hearings, would produce a better result than the ad hoc, reactionary transparency that follows public outcry. As stated earlier, release of the transcripts in Ferguson and the limited release of documents in New York revealed a disconcerting approach: the prosecutor had operated outside of institutional and legal norms and offered an abundance of exculpatory evidence before the grand jury.<sup>71</sup> A grand jury decision not to indict after such a robust presentation of evidence might not have been so troubling if it were not for the fact that a similarly measured presentation of evidence rarely seems available to most defendants, notably men of color. Yet the ability of advocates to make the equal protection arguments and due process objections in the face of inconsistent practices is stymied by the fact that most grand jury proceedings are in secret and seemingly judgment proof.<sup>72</sup> How then can there be any public accountability for the prosecution?

Lastly, the same studies that show public decision making reduces the chance of poor decision making, would support the notion that

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69. Grand jury secrecy is seen as part of the web of police secrecy. Al Baker & J. David Goodman, *New Challenges to Secrecy That Protects Police Files*, N.Y. TIMES (Feb. 4, 2015), <http://www.nytimes.com/2015/02/05/nyregion/new-challenges-to-secrecy-that-protects-police-files.html>.

70. See, e.g., Marianne F. Kies, Note, *Policing the Police: Freedom of the Press, The Right to Privacy, and Civilian Recordings of Police Activity*, 80 GEO. WASH. L. REV. 274, 301–02 (2011) (discussing civilian recordings of police misconduct); see Charlotte Dennett, *The Freedom of Information Versus Government Secrecy: A Vermont Lawyer Sues the CIA*, 31 VT. B.J. 20, 22 (2005) (discussing government secrecy and the Freedom of Information Act and stating the view that “secrecy removes accountability”); Taslitz & Henderson, *supra* note 2, at 204.

71. See Hoffmeister, *supra* note 63, at 1209 (discussing “trial stage” protections regarding exculpatory evidence and noting that “the prosecutor is not required to provide exculpatory information to the grand jury and can obtain an indictment simply by relying on hearsay statements”).

72. See *id.* at 1196–97 (noting that “starting with *Costello v. United States*, [the courts] have become increasingly reluctant to apply their supervisory power to activities occurring within the grand jury room.” And in recent years courts have “continued to limit the instances in which the supervisory power could be employed in the context of grand juries”).

grand jurors should hear evidence and report their decision in public view.<sup>73</sup> Of course one wants to keep a grand jury free from public opinion and pressures just as it wants to keep a petite jury free from such pressures; and secret deliberations may make sense for grand juries just as it makes sense for petite juries.<sup>74</sup> Requiring, however, that the hearings themselves be secret seems inapposite to the suggestion that grand juries should be free from control and manipulation, because the very secrecy of their proceedings makes them vulnerable to pressure and control from the prosecution.<sup>75</sup> The prosecutor is, after all, the puppet master of the grand jury proceedings; she: directs the order and manner of evidence; requests subpoenas and drafts charges; convenes the grand jury and excuses them; and advises them throughout.<sup>76</sup> Open hearings would insure that the prosecutor tempers her role with deliberation; and a sense that their proceedings are in public view would encourage grand juries to be engaged, thoughtful recipients of evidence.

#### B. Defense Present & Participates

The fair and effective participation of a criminal defendant, as permissible in Article 32 Hearings, would also address many aspects of the public's frustration with the grand jury system. Procedural justice theory and the associated research makes the clear link between participation and a sense of justice. Procedural justice is not a jurisprudence that advocates from a procedural due process perspective, rather it advocates a way of thinking about justice that "resolve[s] conflicts in such a way as to bind up the social fabric and encourage continuation of a productive exchange between individuals."<sup>77</sup>

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73. See Taslitz & Henderson, *supra* note 2, at 204.

74. See Kadish, *supra* note 10, at 2; Levy, *supra* note 10.

75. See Hoffmeister, *supra* note 63 at 1198–99 (discussing how the court claims to be protecting grand jury independence "by both limiting and obfuscating the application of the supervisory authority," but arguing that the court's decisions that "indirectly decreased grand juror independence," because "there is little to prevent the executive branch from completely controlling the grand jury and usurping its powers").

76. See *id.* at 1183–84 (noting the role of the prosecutor as the director of the grand jury proceeding, but also as the gatekeeper of information to the grand jury." "The prosecutor determines the order of the evidence, requests that the court issue subpoenas, questions the witnesses, and drafts the charges. In addition, during their eighteen months of service, grand jurors meet at the discretion of the prosecutor. Most importantly, at least for the purposes of this Article, the prosecutor provides legal advice to the grand juror").

77. See E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 27 (1988).

Procedural justice research indicates that people have a greater sense that a given authority is “moral and legitimate” if the procedures employed by that authority appear fair; for example: “allowing a person to state their views, ensuring that their perspective is taken seriously, and demonstrating that officials maintain an open mind about this person and their case.”<sup>78</sup> This sense of participation and fairness inspires a person’s “sense of self-worth and, in turn, his degree of compliance, even when [compliance] conflicts with immediate self-interest.”<sup>79</sup> As executed, grand juries are clearly not procedurally fair from the defense perspective; but one wonders if, moreover, they appear unfair from the public perspective. Consider the aftermath of the Michael Brown and Eric Garner cases and the public call for justice via a public vetting of the incidents in question.<sup>80</sup> Arguably the public’s concerns could have been eliminated or at least assuaged if the roles and procedures of those participating in the grand jury process appeared clearly defined and logically fair.

Under current formations the prosecutor alone is allowed in the room with grand juries to control the presentation of evidence and moreover, to advise grand juries.<sup>81</sup> When a prosecutor provides exculpatory evidence, despite practice norms not to,<sup>82</sup> a given defendant’s defense attorney might stand up and cheer, but the very inconsistency of the practice is troubling to the legal community and the public generally. Now imagine if Darren Wilson and Daniel Pantaleo’s defense attorneys had been participating in the grand jury proceedings, as they would have been in an Article 32 Hearing. Surely *they* would have provided the rigorous defense of Wilson and Pantaleo that (instead) the prosecutors did in these cases. Had the defense attorneys presented evidence, cross examined witnesses, and otherwise presented a defense, one could credit those efforts as being consistent with the duty and role of a defense attorney. The public did not—could not—credit the prosecutors for acting in a manner consistent with their

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78. See Deborah Epstein, *Procedural Justice: Tempering the State’s Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843, 1846 (2002).

79. See *id.*

80. See, e.g., Greg Botelho, *Michael Brown Shooting: What to Expect, What to Know as Grand Jury Takes Place*, CNN (Aug. 20, 2014), <http://www.cnn.com/2014/08/20/justice/missouri-shooting-grand-jury/index.html>.

81. See, e.g., MO REV. STAT. §540.130.1 (August 2014) (stating “[w]henever required by any grand jury, it shall be the duty of the prosecuting or circuit attorney in the county, or in a city not within a county, to attend them for the purpose of examining witnesses in their presence, or giving them advice upon any legal matter”).

82. See *United States v. Williams*, 504 U.S. 36, 52 (1992); *Calandra*, 414 U.S. at 355.

roles when they acted as they did in the Wilson and Pantaleo grand juries. Relatedly, having defense participation eliminates conflicts of interest where the prosecutor is asked to present evidence against one of “its own.”

Allowing meaningful participation of defendants and defense counsel in grand juries would visually and literally provide for the presentation of two sides of a given event; thus it would affirm a sense that a grand jury will and should have an open mind about a case before them. Moreover, it would allow an individual defendant to feel some sense of control and participation.<sup>83</sup> A lack of control, in contrast, has been shown to cause emotional numbness; this numbness can foreclose the possibility of meaningful healing or make an ultimate victory seem hollow, because the passion for justice and closure has been replaced by detachment.<sup>84</sup> The fatigue and strain of emotion laden litigation—particularly for the litigant, but for the public as well—provides a breeding ground for self-doubt, and self-loathing.<sup>85</sup> Control and participation go a long way to ward off these emotional reactions to the stress and conflict inherent in litigation, which, in turn, would increase the likelihood of parties’ acceptance of the outcome.<sup>86</sup> To the extent that members of the public identify with a given defendant or victim, they might be vicariously affirmed by a grand jury process that has a measured approach and clear roles. It would follow then that the public’s reactions would be less fraught and more compliant if they could understand and credit the system.<sup>87</sup>

## CONCLUSION

In the current climate, grand jury reform seems more appropriate than ever to calm the rising tide of public distrust and the creeping sense of the injustice of the status quo. Ham-sandwich indictments appear to be the norm for non-police offenders, with prosecutors suc-

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83. See Epstein, *supra* note 78, 1877–78.

84. See Thomas Gutheil et al., *Preventing “Critogenic” Harms: Minimizing Emotional Injury From Civil Litigation*, 28 J. PSYCHIATRY & L. 5, 11 (2000).

85. See *id.* The article cited here discusses the realities of this emotional fall out in the context of civil litigation, yet one can imagine that the manifestations are only more extreme in criminal context where the situation is so much more fraught. See, e.g., Abbe Smith, *The Difference In Criminal Defense and the Difference it Makes*, 11 WASH. U. J.L. & POL’Y 83 (2003) (discussing the difficulty of establishing a trusting attorney client relationship in the context of the charged criminal litigation atmosphere).

86. See Epstein, *supra* note 78, at 1878, 1892.

87. See *id.*

cessfully indicting the vast majority of the time.<sup>88</sup> This is particularly troubling for the African American community who suffer higher incidents of arrests.<sup>89</sup> In juxtaposition, there are the recent non-indictments of police offenders, which have led some to conclude that excessive police force has been “effectively decriminalized.”<sup>90</sup> The data suggests there is a problem. Public outcry suggests there is a problem. The difficulty is in exploring or investigating the problem when the grand jury process is shrouded in secrecy.

In contrast, several years ago in the course of its open and participatory Article 32 Hearings, the press and some members of the military began to notice that victims of sexual assault fared poorly during the pretrial investigative system.<sup>91</sup> Soon there was a rising concern that victims of sexual assault, were marginalized or ignored by the military justice system, possibly due to a conscious or subconscious desire to turn a blind eye to the reality of sexual violence in the ranks.<sup>92</sup> The military began to investigate the problem and, thereafter, undertook dramatic reform of its Article 32 Hearings. In answer, the statute governing Article 32 Hearings was overhauled to speak to the interest of the victims. Whereas at one time a commissioned officer could have acted as the investigating officer for an Article 32 Hearing, now the individual must be a lawyer.<sup>93</sup> A sexual assault victim his or

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88. See, e.g., MARK MOTIVANS, U.S. DEP'T OF JUST., BUREAU OF JUST. STATS., *Federal Justice Statistics Table* (2013), <http://www.bjs.gov/content/pub/pdf/fjs10st.pdf> (citing the statistic that in 162,000 federal case grand juries only declined to indict 11 times).

89. See, e.g., BRIAN A. REAVES, U.S. DEP'T OF JUST., BUREAU OF JUST. STATS., *Felony Defendant in Large Urban Counties, 2009 - Statistics Tables* (2013), <http://www.bjs.gov/content/pub/pdf/fdluc09.pdf> (2015) (stating “[b]lack males accounted for more than half (55%) of defendants age 17 or younger. Among defendants age 40 or older, 37% were black males, 28% were white males, and 16% were Hispanic males”).

90. See Nicole Smith Furtell, *The Cost of Silence: Rethinking Grand Jury Secrecy in cases of Lethal Police Force*, 2 WORKING PAPER (2015) (on file with the Author).

91. See, e.g., Ruth Marcus, *In Navy Rape Case Defense Goes Wild*, WASH. POST (Sept. 5, 2013), [https://www.washingtonpost.com/opinions/ruth-marcus-in-navy-rape-case-defense-lawyers-go-wild/2013/09/05/2c729520-1647-11e3-a2ec-b47e45e6f8ef\\_story.html](https://www.washingtonpost.com/opinions/ruth-marcus-in-navy-rape-case-defense-lawyers-go-wild/2013/09/05/2c729520-1647-11e3-a2ec-b47e45e6f8ef_story.html); *Twice Betrayed*, SAN ANTONIO EXPRESS NEWS, <http://www.mysanantonio.com/twice-betrayed> (last visited Nov. 29, 2015); see also David Vergun, *Legislation Changes UCMJ for Victims of Sexual Assault*, U.S. ARMY (Jan. 7, 2015) [http://www.army.mil/article/140807/Legislation\\_changes\\_UCMJ\\_for\\_victims\\_of\\_sexual\\_assault/](http://www.army.mil/article/140807/Legislation_changes_UCMJ_for_victims_of_sexual_assault/).

92. LINDSAY ROSENTHAL & LAWRENCE KORB, CENTER FOR AMERICAN PROGRESS, *Twice Betrayed Bringing Justice to the U.S. Military's Sexual Assault Problem* (Nov. 2013), <https://www.americanprogress.org/wp-content/uploads/2013/11/MilitarySexualAssaultsReport.pdf>; STEPHEN PRESTON, DEP'T OF DEF., *The Military Justice System's Response to Unrestricted Reports of Sexual Assault* (Oct. 30, 2014) [http://sapr.mil/public/docs/reports/FY14\\_POTUS/FY14\\_DoD\\_Report\\_to\\_POTUS\\_Annex\\_4\\_OGC.pdf](http://sapr.mil/public/docs/reports/FY14_POTUS/FY14_DoD_Report_to_POTUS_Annex_4_OGC.pdf).

93. 10 U.S.C. § 832 (2012) (amended section effective one year after December 26, 2013).

herself is represented by a lawyer.<sup>94</sup> Also, a victim cannot be compelled to testify and is now free to submit a sworn statement instead.<sup>95</sup> The investigating officer must prepare a report concerning jurisdiction and probable cause for charges as well as the “effect of evidence of [an] uncharged offense.”<sup>96</sup>

Just as the military undertook change to protect a class of victims previously not served well by its charging mechanisms, so too should the civilian system consider reform. Leaving aside whether grand juries could or should ever be reformed to provide police-victims special proceedings as sexual assault victims enjoy special proceedings in Article 32 Hearings, the civilian system should at least consider reform that would increase transparency and clear division of roles. These aspects of the Article 32 Hearings are important procedural safeguards for an accused and for victims. Moreover, the degree of equality and transparency with Article 32 Hearings elevates the procedural justice the proceeding provides.

The civilian system should be reformed to require open hearings. It should also allow defense participation in order to delineate clear roles that align with public expectations and address potential conflicts of interest. Such change seems long overdue. To ignore the need for such changes seems not only unfair, but (nowadays) dangerous.

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94. *Id.*

95. *Id.*

96. *Id.*

## COMMENT

# The Criminal “DNA” Footprint: Viewing the Mark of Criminal Records through the Legal Lens of the Genetic Information Non-discrimination Act

NAIRUBY L. BECKLES\*

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“Contrary to what we may have been taught to think, unnecessary and unchosen suffering wounds us but need not scar us for life. It does mark us. What we allow the mark of our suffering to become is in our own hands.” –bell hooks<sup>1</sup>

## INTRODUCTION

In 2010, Precious Daniels applied for a position as a temporary local Census worker with the United States Census Bureau.<sup>2</sup> At the time, Precious was an ideal candidate for the position.<sup>3</sup> She was a lifelong resident of Detroit, Michigan and a veteran health-care worker who knew the people in her community.<sup>4</sup> Within days of applying for the position, she received a letter from the Bureau notifying her that a routine criminal records check uncovered information about a 2009 arrest for disorderly conduct.<sup>5</sup> The Bureau informed Precious that, to get the job, she would need to submit fingerprints and court documents in order to prove that her case had been resolved without conviction.<sup>6</sup> The Bureau gave her thirty days to provide this proof.<sup>7</sup> Providing the proof should have been easy, except that her local courthouse maintained no records of her arrest.<sup>8</sup> Precious missed the thirty-day window and never became a 2010 Census worker.<sup>9</sup> She is now part of, potentially, the largest employment discrimination class-action suit in history. The estimated class of approximately 250,000 African-Americans and 200,000 Latinos allege

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1. bell hooks, *ALL ABOUT LOVE: NEW VISIONS* 209 (2000).

2. Gary Fields & John R. Emshwiller, *As Arrest Records Rise, Americans Find Consequences Can Last a Lifetime*, *WALL ST. J.* (Aug. 18, 2014, 10:30 PM), <http://www.wsj.com/articles/as-arrest-records-rise-americans-find-consequences-can-last-a-lifetime-1408415402>. Every ten years the U.S. Census Bureau conducts a Population and Housing Census, commonly known as the Decennial Census. See *Decennial Census of Population and Housing*, U.S. CENSUS BUREAU, <http://www.census.gov/programs-surveys/decennial-census/about.html> (last visited Dec. 18, 2015) [hereinafter *Population and Housing Census*].

3. Fields & Emshwiller, *supra* note 2.

4. *Id.* The U.S. Census Bureau hires local temporary workers to increase the likelihood that community members will participate in the Census survey. Census workers go door-to-door and solicit non-participants to answer survey questions. Temporary workers with an intimate knowledge of the community members are more likely to succeed at getting their neighbors to participate.

5. *Id.* Ms. Daniels was participating in a protest of Blue Cross Blue Shield of Michigan when she was arrested in 2009. *Id.* She was released on fifty dollars bail and the misdemeanor charge against her was later dropped. *Id.*

6. *Id.*

7. *Id.*

8. *Id.* See *supra* note 4 and explanatory comments.

9. Fields & Emshwiller, *supra* note 2.

discrimination by the Census Bureau's use of arrest records in its hiring process.<sup>10</sup>

The immense class-size makes complete sense given the national statistics. Excluding traffic violations, in 2014, there were over 11.2 million arrests made in the United States.<sup>11</sup> Nearly three-and-a-half decades after “tough on crime” measures were implemented during the 1980s “War on Drugs”<sup>12</sup> it was estimated in 2011 that “one in three individuals in the [United States] can expect to be arrested by twenty-three years of age.”<sup>13</sup> Moreover, in the United States, the number of adults with a criminal record is estimated to be as high as 80 million.<sup>14</sup> The numbers are even higher for African-Americans and Latinos who are arrested at rates disproportionately higher than their representation in the U.S. population and the actual criminal activity associated with each group.<sup>15</sup> Compared to non-Hispanic Whites, “African-Americans are up to fifteen times more likely” to be arrested or cited for low-level crimes while “Latinos are three times more likely to be arrested.”<sup>16</sup> In 2014, African-Americans, who represent an estimated 13.2% of the U.S. population,<sup>17</sup> made up 27.8% of all arrests.<sup>18</sup> In the same year, Hispanics or Latinos made up 18.9% of arrests<sup>19</sup> yet 17.4% of the U.S. population.<sup>20</sup>

For African-Americans, like Precious, who were “merely charged with criminal offenses that did not result in conviction, the charge itself often leads to legal and non-legal consequences that [stay with the

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10. *Id.* See also *Houser v. Pritzker*, 28 F. Supp. 3d 222 (S.D.N.Y. 2014) (class certification granted).

11. FED. BUREAU OF INVESTIGATION; U.S. DEP'T OF JUSTICE, FBI Releases 2014 Crime Statistics (Sept. 28, 2015), <http://www.fbi.gov/news/pressrel/press-releases/fbi-releases-2014-crime-statistics>.

12. Michael Pinard, *Reflections and Perspectives on Reentry and Collateral Consequences*, 100 J. CRIM. L. & CRIMINOLOGY 1213, 1214 (2010) [hereinafter Pinard, *Reflections and Perspectives*].

13. Michael Pinard, *Criminal Records, Race, and Redemption*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 963, 964 (2013) [hereinafter Pinard, *Criminal Records*].

14. *Id.*

15. Kimani Paul-Emile, *Beyond Title VII: Rethinking Race, Ex-Offender Status, and Employment Discrimination in the Information Age*, 100 VA. L. REV. 893, 896, 911 (2014).

16. *Id.* at 896–97.

17. *QuickFacts*, U.S. CENSUS BUREAU, <http://www.census.gov/quickfacts/> (last visited Dec. 29, 2015) [hereinafter Census Bureau QuickFacts].

18. FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, *Crime in the United States 2014*, at tbl.43a, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/table-43> (last visited Dec. 29, 2015) [hereinafter FBI Crime in the U.S. Table].

19. *Id.*

20. Census Bureau QuickFacts, *supra* note 17.

individual way beyond] their encounter with the criminal justice system.”<sup>21</sup> These “collateral consequences” range depending on the severity of the crime and whether there was a mere charge, arrest, or conviction, but can include voting rights restrictions, restrictions on an individual’s ability to secure public housing, ineligibility for student loans and federal welfare assistance, and employment discrimination.<sup>22</sup> These consequences make it difficult and sometimes impossible for individuals to move past their criminal records.<sup>23</sup> This is particularly true in the employment context.

Well over ten years ago, Harvard Professor of Sociology Devah Pager conducted a study that confirmed the “mark” of the criminal record in the employment context.<sup>24</sup> In her study, Dr. Pager found that “[l]ike a high school diploma or an occupational license, the credential of a criminal record provides an official marker of status and suitability for employment that can be used as an easy screening mechanism by employers. . . . [and an] official marker [of graduation from the criminal justice system that] carries significant weight.”<sup>25</sup> With each interaction with the criminal justice system, an individual’s criminal record grows longer and the individual is more likely to be informally branded, or formally defined, as a career criminal.<sup>26</sup> The study also found that African-Americans, in particular, are “more

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21. Pinard, *Criminal Records*, *supra* note 13, at 969.

22. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 143–61 (rev. ed. 2011); see also DEVAH PAGER, *MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION* 154 (2007) (e-book) (“Individuals who come into contact with the criminal justice system are from that moment forward branded by the experience, with this official certification of criminal status triggering restricted access to a wide range of social goods.”) [hereinafter PAGER, *MASS INCARCERATION*]; Pinard, *Reflections and Perspectives*, *supra* note 12, at 1214–15 (“At no point in United States history have collateral consequences been as expansive and entrenched as they are today.”).

23. Pinard, *Criminal Records*, *supra* note 13, at 969.

24. In 2003, Professor Devah Pager published the first research study offering: direct evidence of the causal relationship between a criminal record and employment outcomes; a direct measure of a criminal record as a mechanism producing employment disparities; conclusive evidence that mere contact with criminal justice system severely limits subsequent employment opportunities; and, confirmation that criminal records present a major barrier to employment. See generally Devah Pager, *The Mark of the Criminal Record*, 108 AM. J. OF SOC. 5 (2003) [hereinafter Pager, *The Mark of the Criminal Record*]; see also PAGER, *MASS INCARCERATION*, *supra* note 22, at 58–85.

25. PAGER, *MASS INCARCERATION*, *supra* note 22, at 71, 153. Michelle Alexander, famed author of *The New Jim Crow*, expounded that “[t]he ‘official status’ of [the] negative credential . . . offer[s] legitimacy to its use as a basis for discrimination” based on its functioning as an official certification of an individual’s character and competence. ALEXANDER, *supra* note 22, at 151.

26. JAMES B. JACOBS, *THE ETERNAL CRIMINAL RECORD* 2 (2015).

strongly affected by the stigma of a criminal record.”<sup>27</sup> Compared to a White job applicant with a criminal record, an employer is 60% less likely to call an African-American job applicant with a criminal record back for an interview.<sup>28</sup> The criminal records problem is further exacerbated in today’s internet era because employers have instant, ready, and low-cost access to an applicant’s criminal records via a rapidly expanding for-profit industry of commercial background checking companies that collect and compile criminal records into electronic, searchable databases of millions<sup>29</sup> of computerized criminal history records—regardless of their accuracy.<sup>30</sup>

Given this reality, the disproportionate impact of the use of criminal records by employers on African-Americans and Latinos persists. Arguably, there is an even greater need today, than existed when Dr. Pager conducted her study, for a federal response to counter the potentially injurious impact of criminal records on an individual’s employment opportunities. Moreover, legislative history and case law reveal that the goal of preventing employment discrimination based on non-job-related information led to the passage of the federal Genetic Information Non-discrimination Act (“GINA”). At the time GINA was passed, Congress was responding to the increased availability of genetic information in the workplace and the risks of disproportionate discrimination against individuals whose genetic conditions and disorders were associated with particular racial and ethnic groups.<sup>31</sup>

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27. PAGER, MASS INCARCERATION, *supra* note 22, at 69, 71 (explaining that, in her experimental study, the chances of a callback to a black applicant with a criminal record was 60% less than a white applicant with a criminal record).

28. *Id.* at 69.

29. There are “over 100 million computerized records representing sixty-five million different individuals—over 29% of the entire adult population of the United States.” Paul-Emile, *supra* note 15, at 896; *see also* PAGER, MASS INCARCERATION, *supra* note 22, at 154 (“Trends in the dissemination of criminal records have been characterized by a uniform move toward greater access and wider distribution.”); Pinard, *Criminal Records*, *supra* note 13, at 970 (explaining, “as a result, employers, landlords, government agencies and anyone else can access [an individual’s] criminal records with rapidly increasing ease.”).

30. Paul-Emile, *supra* note 15, at 907 (explaining that these records have been shown to be “riddled with errors” and “frequently contain[ing] significant inaccuracies, including false positive identifications, sealed or expunged information, misleading information, and missing case disposition or resolution information.”); *see also* Roberto Concepción, Jr., *Need Not Apply: The Racial Disparate Impact of Pre-Employment Criminal Background Checks*, 19 GEO. J. ON POVERTY L. & POL’Y 231, 246–48 (2012) (“Typical errors include[:] overreporting (i.e., when a record about a different person with the same name as the applicant is reported as being a potential match for the applicant)[:] records based on criminal identity theft (i.e., where an actual arrestee gives a false name or claims to be another actual person[:]) reports containing expunged records[:] and mundane clerical errors.”) (internal quotations omitted)).

31. *See* discussion *infra* Sections I-B, IV-B.

Given the current socio-political climate concerning mass incarceration and criminal justice reform,<sup>32</sup> this Comment serves to further the dialogue and legal scholarship on the criminal records problem, and to promote an alternative legal framework to overcome the obstacles faced by plaintiffs bringing Title VII criminal records discrimination claims. This Comment argues that GINA provides a legal framework through which individuals who submit to criminal background checks may be treated as a protected class, thereby prohibiting the prevalent risks of employment discrimination based on an individual’s criminal record, and reducing the disproportionate impact of criminal background screening on traditionally marginalized communities.

Part I of this Comment discusses the criminal records problem—the disproportionate exclusion of African-Americans and Latinos from employment opportunities that is created by the overreliance on criminal records as a tool to identify an individual’s criminal past and propensity to commit future crime. Like DNA, criminal records are used in the employment context to mitigate perceived risk, including the costs of medical care, lost labor, or tort liability. These similarities support a comparative inquiry into the protections of Title VII and the Genetic Information Non-discrimination Act. In Part II, I discuss the application of Title VII’s anti-discrimination doctrine in the criminal records context and the use of other legal doctrines to address the criminal records problem. Given the strong, analogous risks of employment discrimination presented by the overly broad use and consumption of criminal records, Part III discusses GINA’s anti-discrimination roots and how GINA addressed the problem of employment discrimination based on racially linked information. This Comment concludes by proposing an enhanced federal response to the criminal records problem in employment discrimination that adopts the legal approach of the Genetic Information Non-discrimination Act.

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32. Carrie Johnson, *What You Should Know about the Federal Inmate Release*, NPR (Nov. 4, 2015, 3:26 PM), <http://www.npr.org/sections/thetwo-way/2015/11/01/453564956/what-you-should-know-about-the-federal-inmate-release>.

## I. LAYING THE FOUNDATION FOR A COMPARATIVE INQUIRY ON CRIMINAL RECORDS

### A. The Criminal Record and the Criminal Records Problem

For every interaction an individual has with the criminal justice system, a criminal record is created—and, no matter the ultimate disposition, the most serious consequence of an interaction with the criminal justice system is the resulting criminal record because “[a] criminal record is for life. . . .”<sup>33</sup> An estimated 25% of the United States’ adult population has a criminal record in either, or both, federal and state criminal record repositories.<sup>34</sup> Although, a rap sheet is the best-known criminal record, a criminal record is not comprised of a single document.<sup>35</sup> “Information about arrestees, [suspects,] defendants, pre-trial detainees, probationers, inmates, and parolees is recorded in numerous and overlapping files, records, and databases”<sup>36</sup> that include: rap sheets created by police<sup>37</sup> and nationally integrated rap sheet systems;<sup>38</sup> court records;<sup>39</sup> police investigative and intelligence information shared at the local, state, and federal levels;<sup>40</sup> and

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33. JACOBS, *supra* note 26, at 1, 3–4 (“[T]here is no statute of limitations [on criminal records.]”). Although, under limited circumstances, criminal records may be expunged through a burdensome and costly process.

34. *Id.* at 1.

35. *Id.* at 2.

36. *Id.*

37. The Record of Arrest and Prosecution (“rap”) sheet is a lifetime record of an individual’s arrests, charges, dispositions, and sentences resulting from those arrests. *Id.* at 33.

A rap sheet includes some or all of the following information: names and addresses provided by arrestee; location of crimes; date of crimes; arrest charges; docket numbers . . . ; courts where the record-subject has been arraigned; formal [prosecution or grand jury] charges; sentences (incarceration, probation, fine, etc.); whether the arrestee has been adjudicated as a sex offender and dates of paroles.

*Id.* at 36–37.

38. The FBI’s National Crime Information Center (“NCIC”) links together thousands of decentralized police agencies and the Interstate Identification Index (“Triple I”) “allows police officers anywhere in the [U.S.] to rapidly find out whether a suspect or arrestee is wanted[,] or has been arrested or convicted at any times anywhere in the United States.” *Id.* at 10, 18, 41.

39. *Id.* at 59 (“Much more information about the charges against defendants can be gleaned from court records than from rap sheets.”). Court records (i.e., dockets, cases indexes, case files, presentence reports, and unsealed cooperation agreements, dismissals, and acquittals) constitute the most available and most widely used source of information about the charges against criminals—including who has been charged with what crime and that an individual has a criminal record—because the information is made publicly available on First Amendment and other state-specific policy grounds. *See generally id.* at 54–69.

40. Police intelligence records and databases (e.g., gang databases), effectively label, without any due process, individuals as possible perpetrators of future crimes. *Id.* at 21. Likewise, police investigative records and files (i.e., files used to solve serious crimes and build cases for conviction), effectively label, without any due process, individuals as possible perpetrators of past crimes. *Id.* at 9, 14.

other private databases hosted by advocacy groups,<sup>41</sup> employer associations,<sup>42</sup> and “blackmailers.”<sup>43</sup>

Criminal records become a problem when, as scholars have pointed out for years, employers overly rely on criminal records and “compound[ ] existing social and economic problems for the poorest and most marginalized populations” like African-Americans and Latinos.<sup>44</sup> In 2015 alone, political and social advocacy to end “mass incarceration” included a call to action by President Barack Obama<sup>45</sup> and his recognition of the collateral consequences of criminal records in employment.<sup>46</sup> Because African-Americans and Latinos are arrested and convicted at disproportionately higher rates, they are, as a result, more likely to have a criminal record and are more likely to be disproportionately excluded from the workforce.<sup>47</sup> Thus, being African-American or Latino with a criminal record creates a “pronounced . . . socially stigmatic effect” and a “powerful . . . form of social marginalization” that makes it “all but impossible for [African-Americans and Latinos] with criminal records to find gainful employment.”<sup>48</sup> The inability to find gainful employment “essentially dooms” African-Amer-

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41. For example, the National Domestic Violence Registry—acting in the public’s interest—posts the names of individuals convicted of domestic violence offenses and subject to domestic violence protection orders. *Id.* at 79, 89.

42. For example, the National Retail Mutual Association hosts a Retail Theft Database populated with names of retail employees and shoplifters who have been either convicted of, or admitted to, committing retail theft. *Id.* at 80.

43. “Blackmailers” are companies that “collect and post to their websites the names, mugshots, and other identifying information on arrestees and ex-offenders, then solicit from the people depicted a fee [ ] to remove the information.” *Id.* at 81.

44. Paul-Emile, *supra* note 15, at 896.

45. President Barack Obama, *Remarks by the President at the NAACP Conference* (July 14, 2015), <https://www.whitehouse.gov/the-press-office/2015/07/14/remarks-president-naacp-conference>

African Americans and Latinos make up 30 percent of our population; they make up 60 percent of our inmates. About one in every 35 African American men, one in every 88 Latino men is serving time right now. . . . The bottom line is that in too many places, black boys and black men, Latino boys and Latino men experience being treated differently under the law. . . . And I want to be clear — this is not just anecdote. This is not just barbershop talk. A growing body of research shows that people of color are more likely to be stopped, frisked, questioned, charged, detained. African Americans are more likely to be arrested. They are more likely to be sentenced to more time for the same crime. . . . So our criminal justice system isn’t as smart as it should be. It’s not keeping us as safe as it should be. It is not as fair as it should be. Mass incarceration makes our country worse off, and we need to do something about it.

46. *Id.* (“Let’s invest in innovative new approaches to link former prisoners with employers and help them stay on track. Let’s follow the growing number of our states and cities and private companies who have decided to ‘Ban the Box’ on job applications . . . so that former prisoners who have done their time and are now trying to get straight with society have a decent shot in a job interview.”).

47. Paul-Emile, *supra* note 15, at 896.

48. *Id.* at 914–15.

icans and Latinos with criminal records to “a life of social dislocation, economic instability, and civic disengagement.”<sup>49</sup>

The fact that the Federal Bureau of Investigation’s criminal records database is no longer the sole source of identifying an individual’s criminal records further exacerbates the criminal records problem. Today, a rapidly expanding for-profit industry of commercial background checking companies collects and compiles these records into electronic “ready access” databases of millions<sup>50</sup> of computerized criminal history records that are available on the internet to the general public and private actors.<sup>51</sup> Employers are the largest consumers,<sup>52</sup> and their access to readily assembled, commercially available criminal records effects their hiring decisions.<sup>53</sup> When deciding whether to hire an otherwise qualified individual for a position, employers purchase access to the online databases as “inexpensive[, convenient,] and efficient means of screening potential employees.”<sup>54</sup> “In but a matter of minutes,” an employer conducts online searches “of government or commercial criminal records databases, and, for free or a modest fee,” instantly gains access to an applicant’s criminal

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49. *Id.* at 915.

50. There are “over 100 million computerized records representing sixty-five million different individuals—over 29% of the entire adult population of the United States.” *Id.* at 896; see also JACOBS, *supra* note 26, at 68 (“An[y] examination of criminal records policy options must recognize that there is now an entrenched private sector infrastructure of commercial information vendors that meets and stokes demand for criminal background checks.”); PAGER, MASS INCARCERATION, *supra* note 22, at 154 (“Trends in the dissemination of criminal records have been characterized by a uniform move toward greater access and wider distribution.”).

51. Paul-Emile, *supra* note 15, at 907 (“[Background Checking Companies] are increasingly purchasing criminal history information in bulk from courts and criminal justice agencies throughout the country as a means of creating proprietary national databases that can enable instantaneous searches of millions of files from every state.”); see also JACOBS, *supra* note 26, at 68 (“Whether as a way of furthering judicial transparency or raising revenue, court administrators are increasingly required or authorized to sell their criminal cases databases to commercial vendors.”); Pinard, *Criminal Records*, *supra* note 13, at 963, 970 (explaining “as a result, employers, landlords, government agencies and anyone else can access [an individual’s] criminal records with rapidly increasing ease.”).

52. Approximately 92% of employers now check an applicant’s criminal background. Paul-Emile, *supra* note 15, at 913 (“Nine out of ten employers now inquire into the criminal history of job candidates.”); see also JACOBS, *supra* note 26, at 73 (“Private employers are the majority of criminal background check customers.”).

53. Paul-Emile, *supra* note 15, at 913–14 (“[T]he existence of a criminal record can play a decisive role in the hiring process, reducing [the] chance of receiving a . . . job offer by almost 50%.”).

54. See Paul-Emile, *supra* note 15, at 895; JACOBS, *supra* note 26, at 72–73 (“Commercial information vendors solicit business by warning employers about the risks of failing to screen job applicants and incumbent employees properly [and that] criminal background screening protects companies from civil liability resulting from injuries and damages caused by dishonest, unreliable, and dangerous employees.”). For one example of experimental evidence of the use of criminal records to deny employment, see generally PAGER, MASS INCARCERATION, *supra* note 22.

records.<sup>55</sup> Consequently, an individual’s criminal record becomes their criminal “DNA” footprint in the sense that it is a permanent record that negatively affects their life and is always used by employers to identify an individual’s criminal past.

B. “Why DNA?” [and the Significance of this Comparative Inquiry]

Many readers’ first reaction to this Comment may be: “*Why compare criminal records to DNA? It seems a far stretch.*” Not quite. The hereditary material of all multi-cellular organisms is the deoxyribonucleic acid (“DNA”).<sup>56</sup> DNA is the chemical compound that contains all of our genes.<sup>57</sup> “Virtually every human ailment has some basis in our genes.”<sup>58</sup> Through the Human Genome Project, a public database of the exact sequence of the human genetic code,<sup>59</sup> researchers have deciphered the human genome<sup>60</sup> such that inherited traits (such as those for genetic disease) can be tracked over generations.<sup>61</sup> In today’s post-Human Genome Project era, an individual’s DNA footprint is, amongst other things, a unique and permanent record of that individual’s genetic *predisposition* to illness and disease in the future.

Upon its inception, the database’s most immediate use was to increase understanding of the links between genes and diseases.<sup>62</sup> However, such recognition came with the inherent risk<sup>63</sup> that “the knowledge that a person carries a mutation in a disease-related gene . . . could also be used for harmful purposes.”<sup>64</sup> In the employment context, the risks include an employer using information “about an employee’s genetic profile to deny employment to an individual

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55. Paul-Emile, *supra* note 15, at 895. These criminal records include arrests for non-violent crimes, minor infractions, and non-criminal offenses like loitering, curfew violations, drunkenness, vagrancy, disorderly conduct, and even the results of “stop and frisk” encounters with police. The records may also be inaccurate including false positive identifications and the mistaken release of sealed and expunged information. *Id.* at 897.

56. *A Brief Guide to Genomics*, NAT’L HUMAN GENOME RES. INST., <http://www.genome.gov/18016863> (updated Aug. 27, 2015) [hereinafter *A Brief Guide to Genomics*].

57. *An Overview of the Human Genome Project*, NAT’L HUMAN GENOME RES. INST., <http://www.genome.gov/12011238> (last updated June 29, 2015).

58. *A Brief Guide to Genomics*, *supra* note 56. DNA also contains the instructions needed to develop and direct the activities of nearly all living organisms.

59. *Id.*

60. *Id.* An organism’s complete set of DNA is its genome.

61. *Id.*

62. S. REP. NO. 110–48, at 5 (2007).

63. *Id.*

64. *Id.*

who is healthy and able to do the job[.]”<sup>65</sup> or an employer “rely[ing] on genetic testing to ‘weed out’ employees who carry genes associated with diseases.”<sup>66</sup> These risks are especially true when it comes to genetic conditions and disorders associated with particular racial and ethnic groups whose members may be stigmatized and face discriminatory treatment because of genetic information.<sup>67</sup> This potential misuse and discriminatory treatment by employers prompted congressional action and the enactment of the Genetic Information Nondiscrimination Act of 2008.<sup>68</sup>

It is a lesser-known fact that a criminal rap sheet<sup>69</sup> acts in the same way as DNA for those individuals affected by the collateral consequences of interactions with the criminal justice system. Consequently, today—like DNA—an individual’s criminal record has become a permanent record of that individual’s suspected *predisposition* to criminal behavior in the future.<sup>70</sup> Moreover, “like a medical record, . . . [DNA, a criminal record] is increasingly a part of every American’s information footprint.”<sup>71</sup>

Hence, it is worth exploring how our legal principles respond to an individual’s criminal record when it functions, like DNA, (i) as a tool to identify an individual’s criminal past and propensity to commit future crime and, where in the case of criminal records, (ii) the information—through its widespread availability—permanently and negatively, affects an individual’s life and future potential. Moreover, the application of Title VII of the Civil Rights Act of 1964, to protect genetic information is quite possibly the key to understanding how we best vindicate individual rights against employment discrimination based on criminal records.

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65. *Id.* at 5–6.

66. *Id.* at 6.

67. *Id.* at 7–8.

68. *See generally* S. REP. NO. 110–48.

69. JACOBS, *supra* note 26, at 2 (“The police-created rap sheet, based on arrest and booking, is the best-known criminal record.”).

70. PAGER, MASS INCARCERATION, *supra* note 22, at 153 (“With no mechanism for removal, the information remains prominently displayed in background checks.”); PINARD, *Criminal Records*, *supra* note 13, at 969 (“[T]he effects of a criminal record are long-lasting and often permanent.”).

71. JACOBS, *supra* note 26, at 1.

C. An Overview of Title VII & An Individual’s Right to Bring Claim

An understanding of Title VII’s protections against employment discrimination is an important starting point for this comparative analysis. Section 703(a) of Title VII of the Civil Rights Act of 1964, as amended, provides:

It shall be an unlawful employer practice for an employer—  
(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or  
(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.<sup>72</sup>

Sections 703(a)(1) and 703(a)(2) target two different theories of discrimination: disparate treatment and disparate impact.<sup>73</sup> Under section 703(a)(1), Title VII prohibits disparate treatment—“employment decisions that are motivated in whole or in part by prohibited considerations such as race and sex.”<sup>74</sup> The disparate treatment theory “requires a showing that a plaintiff, or plaintiff class, is being intentionally treated unfavorably because of their race, color, sex, religion, or national origin.”<sup>75</sup> Under section 703(a)(2), Title VII prohibits disparate impact—“neutral employment decisions that disproportionately harm members of a protected class.”<sup>76</sup> The disparate impact theory “requires no showing of intent.”<sup>77</sup> Instead, under the disparate impact theory, a plaintiff, or class of plaintiffs, must prove that a facially neutral policy has a discriminatory effect.<sup>78</sup>

The Supreme Court’s recent decision in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, provides the most recent, historical account of the origins of Title VII’s disparate impact theory and the Court’s cur-

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72. 42 U.S.C. § 2000e-2(a) (2012).

73. Tammy R. Pettinato, *Defying “Common Sense?”: The Legitimacy of Applying Title VII to Employer Criminal Records Policies*, 14 NEV. L.J. 770, 773 (2014).

74. Alexandra Harwin, *Title VII Challenges to Employment Discrimination Against Minority Men with Criminal Records*, 14 BERKELEY J. AFR.-AM. L. & POL’Y 2, 5 (2015).

75. Pettinato, *supra* note 73, at 773.

76. Harwin, *supra* note 74, at 5.

77. Pettinato, *supra* note 73, at 773.

78. *Id.*

rent interpretation of the legal theory behind disparate impact claims.<sup>79</sup> In *Inclusive Communities*, a challenge to disparate impact theory under the federal Fair Housing Act, the Court explained that:

[I]n § 703(a)(2), Congress proscribed not only overt discrimination but also practices that are fair in form, but discriminatory in operation. For that reason, . . . Congress directed the thrust of § 703(a)(2) to the consequences of employment practices, not simply the motivation. In light of the statute’s goal of achieving equality of employment opportunities and removing barriers that have operated in the past to favor some races over others, . . . § 703(a)(2) of Title VII must be interpreted to allow disparate-impact claims.<sup>80</sup>

The Court further explained that “not all employment practices causing a disparate impact impose liability under § 703(a)(2)” and that this “important limit” in a disparate impact case meant that: (i) “‘business necessity’ constitutes a defense to disparate-impact claims”; and, (ii) “§ 703(a)(2) does not prohibit hiring criteria with a ‘manifest relationship’ to job performance.”<sup>81</sup> Moreover, the Court reasoned that:

[D]isparate-impact liability must be limited so employers and other regulated entities are able to make the practical business choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system. And before rejecting a business justification—or, in the case of a governmental entity, an analogous public interest—a court must determine that a plaintiff has shown that there is an available alternative practice that has less disparate impact and serves the entity’s legitimate needs.<sup>82</sup>

Consequently, disparate impact suits brought under Title VII generally proceed in three stages.<sup>83</sup> First, the plaintiff or plaintiff class has the burden of proof to establish a *prima facie* case of disparate impact by showing that an employment practice has an adverse impact on members of a protected class.<sup>84</sup> Second, once a plaintiff has proven discriminatory effect, the burden of proof shifts to the employer to rebut the *prima facie* case by showing that the challenged

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79. See generally *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2516 (2015) (discussing, at-length, “the concept of disparate impact under [Title VII, as decided by the Court] in *Griggs v. Duke Power Co.*, 401 U.S. 424 [(1971)]”).

80. *Id.* at 2517 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 429–32 (1971)) (internal quotations omitted).

81. *Id.*

82. *Id.* at 2518.

83. Harwin, *supra* note 74, at 6; Pettinato, *supra* note 73, at 773.

84. 42 U.S.C. § 2000e–2(k)(1)(A)(i) (2012); Harwin, *supra* note 74, at 6; Pettinato, *supra* note 73, at 773.

policy or practice is job-related to the position in question and consistent with business necessity.<sup>85</sup> Third, the plaintiff or plaintiff class may rebut the employer’s defense by showing that an alternative employment policy or practice, which was available to the employer and the employer refused to adopt, would fulfill the business necessity without the alleged discriminatory effect.<sup>86</sup>

## II. CRIMINAL RECORDS & TITLE VII

In practice, it would be extremely difficult for an ex-offender of color to succeed with a Title VII disparate treatment claim for criminal records discrimination because he or she would have to show that minority ex-offenders were being treated differently than non-minority ex-offenders.<sup>87</sup> Thus, Title VII suits involving an employer’s consideration of arrest and conviction records have alleged disparate impact under Title VII. In these suits, “unsuccessful job candidates have argued that facially neutral inquiries about criminal records disproportionately disadvantage [African-American and Latino] job applicants.”<sup>88</sup> Employers have, in turn, defended their actions as job-related and justified by business necessity.<sup>89</sup> However, the ease with which plaintiffs prevail in criminal records disparate impact cases has slowly eroded over time, and the Supreme Court has never directly addressed the issue of criminal records discrimination. This Part argues that, in the absence of federal legislation targeting this form of discrimination, a piecemeal of federal court rulings along with Title VII of the Civil Rights Act of 1964 and U.S. Equal Employment Op-

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85. Harwin, *supra* note 74, at 6; Pettinato, *supra* note 73, at 773.

86. § 2000e-2(k)(1)(A)(ii); Harwin, *supra* note 74, at 6; Pettinato, *supra* note 73, at 773.

87. Harwin, *supra* note 74, at 17–18 (“So long as disparate treatment litigation for minorities with criminal records remains focused on comparators, it seems doomed to fail. Given that whites are arrested and convicted at much lower rates—and often for different types of crimes—the likelihood of finding a white comparator who works in the same company, for the same supervisor, and was arrested for or convicted of the same or a substantially similar crime is, at best, slim.”); Pettinato, *supra* note 73, at 773; *see also* Foxworth v. Pa. State Police, 228 F. App’x 151, 156–57 (3d Cir. 2007) (finding a comparison valid but insufficient evidence of pretext where a police department hired one white cadet with a conviction, but not a single black one); Silvera v. Orange Cty. Sch. Bd., 244 F.3d 1253, 1258–59 (11th Cir. 2001) (rejecting a comparison between black and white men convicted of similar crimes because the black man also had several arrests); Taylor v. Procter & Gamble Dover Wipes, 184 F. Supp. 2d 402, 410–11 (D. Del. 2002) (rejecting a black man’s comparison to various white employees because their conduct was deemed not of “comparable seriousness”).

88. Harwin, *supra* note 74, at 5.

89. JACOBS, *supra* note 26, at 7 (“Although criminal record-based employment discrimination is proscribed by the Civil Rights Act of 1964 if its disproportionately excludes protected minorities from the hiring pool, it can be justified by proving business necessity.”); Harwin, *supra* note 74, at 5.

portunity Commission (“EEOC”) Guidelines continue to provide the basis for an employee’s cause of action against an employer for discriminatory criminal background screening.

A. In the Absence of a Criminal Records Non-Discrimination Act of Congress, Title VII Provides Some Shelter

Where criminal records are concerned, “Title VII does not prohibit discrimination based on criminal records *per se*[.]”<sup>90</sup> but Title VII is where today’s “federal protection against [criminal records] discrimination [chiefly lies.]”<sup>91</sup> That is to say, no federal law prohibits employers from asking about an individual’s criminal history, and the category of *individuals who submit to criminal background checks* is not a Title VII-protected class.<sup>92</sup> An employer violates Title VII and may be held liable if he or she: (1) summarily excludes applicants with arrest or conviction records because blanket exclusions “may have a disparate impact on racial or ethnic minorities”—the disparate impact theory; or, (2) “treats criminal history information differently for different applicants based on their race[, color,] or national origin”—the disparate treatment theory.<sup>93</sup> Under the disparate impact theory, should an employer’s *facially neutral policies regarding criminal records have a discriminatory effect* because of a plaintiff’s Title VII-protected characteristic, the employer may be held liable.<sup>94</sup> Under the disparate treatment theory, should an employer *treat individuals with similar criminal records differently* because of a Title VII-protected characteristic, the employer may be held liable.<sup>95</sup> According to the EEOC, “Title VII prohibits employers from using policies or practices that screen individuals based on criminal records if they significantly disadvantage Title VII-protected individuals and do not help the employer accurately decide if the person is likely to be a responsible, reliable, or safe employee.”<sup>96</sup> Title VII also gives victims of dis-

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90. Harwin, *supra* note 74, at 5 (emphasis added).

91. Pettinato, *supra* note 73, at 773.

92. *Pre-Employment Inquiries and Arrest & Conviction*, EEOC, [http://www.eeoc.gov/laws/practices/inquiries\\_arrest\\_conviction.cfm](http://www.eeoc.gov/laws/practices/inquiries_arrest_conviction.cfm) (last visited Dec. 20, 2015).

93. Paul-Emile, *supra* note 15, at 921.

94. *Pre-Employment Inquiries and Arrest & Conviction*, *supra* note 92.

95. *Id.*

96. *Id.*; see also Johnathan J. Smith, *Banning the Box but Keeping the Discrimination: Disparate Impact and Employers’ Overreliance on Criminal Background Checks*, 49 HARV. C.R.-C.L. L. REV. 197, 201–02 (2014) (“Title VII’s disparate impact provision does not preclude employers from conducting background checks; it simply requires that such checks not be used in a way that has an adverse impact on protected classes and is not necessary for the positions at issue.”).

crimination standing to bring claims of employment discrimination in federal courts.<sup>97</sup>

To prevail at establishing a *prima facie* case of criminal records discrimination under Title VII’s disparate impact theory, the plaintiff must first identify the offending policy or practice. The EEOC will conduct an investigation to determine “whether the policy or practice denies employment opportunities to a disproportionate number of Title VII-protected individuals.”<sup>98</sup> During the investigation, an employer is “permitted to produce [regional data, local data,] or its own applicant data” to rebut the claim and demonstrate that “African-American and/or [Latino] men [or women] are not arrested or convicted at disproportionately higher rates in the employer’s particular geographical area.”<sup>99</sup> Where the plaintiff successfully demonstrates disparate impact, “the Title VII burden of production and persuasion shifts to the employer to show that the challenged practice or policy is ‘job[-]related’ for the position in question and ‘consistent with business necessity.’”<sup>100</sup> To prove business necessity, “the employer needs to show that the policy operates to effectively link specific criminal conduct, and its dangers, with the risks inherent in the duties of a particular position.”<sup>101</sup> To show job-relatedness, an employer’s policies must be “narrowly tailored to identify criminal conduct with a demonstrably tight nexus to the position in question.”<sup>102</sup> The plaintiff may prevail when an employer’s criminal records policies “have a disparate impact on [Title VII-]protected classes and are not job-related for the position in question and consistent with business necessity.”<sup>103</sup> Even if an employer establishes that the exclusion is job-related and consistent with business necessity, a Title VII plaintiff may still prevail by showing there is a “less discriminatory ‘alternative employment practice’ that serves the employer’s legitimate goals as effectively as the challenged practice.”<sup>104</sup>

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97. The EEOC has the authority to bring Title VII claims on behalf of plaintiffs or plaintiffs may, on their own or as representatives of a class, bring a private action. *See* 42 U.S.C. § 2000e-5(f)(1) (2012).

98. Paul-Emile, *supra* note 15, at 921–22.

99. *Id.* at 922.

100. *Id.*; *see also* Pettinato, *supra* note 73, at 777.

101. Pettinato, *supra* note 73, at 777 (internal quotations omitted).

102. *Id.*

103. *Id.* at 771.

104. Paul-Emile, *supra* note 15, at 924; *see also* Pettinato, *supra* note 73, at 773.

B. The “Bellwether” Title VII Criminal Records Discrimination Cases Were Successful

Criminal records disparate impact claims brought in the 1970s and early 1980s were “among the most successful Title VII suits brought by [job applicants]” because the evidence of discrimination was overt and federal courts allowed less robust statistical evidence while remaining skeptical of employer defenses.<sup>105</sup> One of the first landmark cases on criminal records and Title VII addressed past convictions. In *Green v. Missouri Pacific Railroad Company*, 523 F.2d 1290 (8th Cir. 1975), the issue before the appeals court was whether a railroad’s twenty-two year old policy of refusing consideration for employment to any person convicted of a crime other than a minor traffic offense violated Title VII.<sup>106</sup> Mr. Buck Green, a twenty-nine year old African-American job applicant, indicated on his application that, three years prior, he was convicted for refusing military induction and had served twenty-one months in prison.<sup>107</sup> After the railroad informed Mr. Green that he was not qualified for employment because of his conviction and prison record, Mr. Green brought a Title VII action arguing on appeal from the lower court that:

(i) [the railroad’s policy] of not hiring any person convicted of a criminal offense [had] a racially discriminatory effect and violate[d] Title VII; (ii) the policy [was] not justified by any business necessity; and [that] (iii) the district court erred in restricting the class only to black persons denied employment consideration because of a conviction record.<sup>108</sup>

The issue before the court was whether the policy violated Title VII because the practice allegedly operated “to disqualify blacks from employment with the railroad at a substantially higher rate than whites and was not job[-]related.”<sup>109</sup> In its analysis, the court looked to “national data on black and white conviction rates, in addition to looking at the company’s applicant flow data [showing] differences in the selection rates of candidates who actually applied for jobs with the employer.”<sup>110</sup> The court concluded that Green had established his *prima facie* case of discrimination because the aforementioned general statistics established that the railroad’s employment practice disquali-

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105. Harwin, *supra* note 74, at 6.

106. *Green v. Mo. Pac. R.R. Co.*, 523 F.2d 1290, 1292 (8th Cir. 1975).

107. *Id.* at 1292–93.

108. *Id.* at 1293.

109. *Id.* at 1292.

110. *Id.* at 1294–95; Harwin, *supra* note 74, at 7.

fied black applicants or potential black applicants for employment at a substantially higher rate than whites.<sup>111</sup> The railroad attempted to rebut Green’s *prima facie* case by arguing that its policy was a business necessity because, among other things, former convicts would be: “handling company funds,” unable to meet bond qualifications—a “possible liability [because of their] known violent tendencies,” and “lacking moral character.”<sup>112</sup> However, skeptical of the railroad’s claims, the court held that to establish business necessity for a policy disqualifying all job applicants with criminal records, the company would have to go beyond the generic justifications it had provided and present empirical validation to substantiate its claims.<sup>113</sup> Finding for the plaintiff, the court further explained:

We cannot conceive of any business necessity that would automatically place every individual convicted of any offense, except a minor traffic offense, in the permanent ranks of the unemployed. *This is particularly true for blacks who have suffered and still suffer from the burdens of discrimination in our society.* To deny job opportunities to these individuals because of some conduct which may be remote in time or does not significantly bear upon the particular job requirements is an unnecessarily harsh and unjust burden.<sup>114</sup>

Further, “many of the best rulings for plaintiffs in the 1970s and early 1980s explicitly limited their holdings to situations in which employers based their decisions on arrests that had not resulted in convictions”—thus, courts distinguished between convictions and arrests.<sup>115</sup> In fact, the first landmark case on criminal records and Title VII addressed past arrests.<sup>116</sup> In *Gregory v. Litton Systems, Inc.*, 316 F. Supp. 401 (C.D. Cal. 1970), *aff’d*, 472 F.2d 631 (9th Cir. 1972), the issue before the court was whether an employer’s policy of “not hiring applicants who have been arrested on a number of occasions for things other than minor traffic offenses” violated Title VII.<sup>117</sup> Mr. Earl H. Gregory, an African-American man, applied, accepted an offer, and, before the job started, disclosed that he had previously been ar-

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111. *Green*, 523 F.2d at 1295.

112. *Id.* at 1298.

113. *Id.*; see also Harwin, *supra* note 74, at 8.

114. *Green*, 523 F.2d at 1298 (emphasis added).

115. Harwin, *supra* note 74, at 9.

116. Michael Carlin & Ellen Frick, *Criminal Records, Collateral Consequences, and Employment: The FCRA and Title VII in Discrimination Against Persons with Criminal Records*, 12 SEATTLE J. FOR SOC. JUST. 109, 146 (2013).

117. *Gregory v. Litton Sys., Inc.*, 316 F. Supp. 401, 402 (C.D. Cal. 1970), *aff’d*, 472 F.2d 631 (9th Cir. 1972) (internal quotations omitted).

rested fourteen times in non-minor traffic incidents but had “never been convicted of any criminal offense.”<sup>118</sup> The employer withdrew its employment offer based on the arrest record and Mr. Gregory brought a Title VII action based on the withdrawn offer.<sup>119</sup> The court found that the racially neutral employment questionnaire—absent a showing of business necessity—discriminated against African-American job seekers by requiring each applicant to reveal his non-public arrest records.<sup>120</sup> The court also found that the policy operated to bar the employment of African-American applicants in far greater proportion than white applicants based on statistical evidence showing that African-Americans were “arrested substantially more frequently than whites in proportion to their numbers.”<sup>121</sup> The district court held, and the appeals court affirmed, that the “policy of excluding from employment persons who have suffered a number of arrests without any convictions, is unlawful under Title VII.”<sup>122</sup> In its published opinion, the court pointed out that its decision in *Gregory* was solely limited to employer policies concerning arrest records.<sup>123</sup>

As early successes, *Green* and *Gregory* established the standards for the statistical evidence required to establish plaintiff’s *prima facie* case, defendant’s rebuttals in criminal records disparate impact cases, and the treatment of arrest records. To be sure, *Green* set the foundation for the three statistical methods accepted by courts to establish plaintiff’s *prima facie* case of disparate impact.<sup>124</sup> *Green* also articulated three factors that should be considered in order to determine whether an employer’s criminal conviction record policy is job-related and consistent with business necessity.<sup>125</sup> *Gregory* built upon the

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118. *Id.*

119. *Id.*

120. *Id.* at 403.

121. *Id.*

122. *Id.*

123. Harwin, *supra* note 74, at 9; see *Gregory*, 316 F. Supp. at 403 (“Nothing contained in the injunction shall prohibit the Defendant from seeking, ascertaining, considering, or using information concerning criminal convictions of applicants or existing employees.”).

124. The three statistical methods include: (i) the labor market or statistics showing “whether blacks as a class (or at least blacks in a specified geographical area) are excluded by the employment practice in question at a substantially higher rate than whites;” (ii) minority representation in an employer’s applicant flow or evidence of “a comparison of the percentage of black and white job applicants actually excluded by the employment practice or tests of the particular company or governmental agency in question;” (iii) the general population or data comparing “the level of employment of blacks by the company or governmental agency in comparison to the percentage of blacks in the relevant geographical area.” See *Green*, 523 F.2d at 1293–94; Carlin & Frick, *supra* note 116, at 145–49; Concepción, *supra* note 30, at 240.

125. See *Green*, 523 F.2d at 1297; Carlin & Frick, *supra* note 116, at 155 (“The first factor is the nature and [seriousness] of the offense. The second factor is length of time since the arrest or

court’s prior analysis of criminal records policies to distinguish between policies that consider arrests—where a person is merely accused of committing a crime, and policies that consider convictions—where a jury finds beyond a reasonable doubt that a person actually committed a crime.<sup>126</sup>

C. Since the 1980s, Business Necessity has Proven itself a Death Knell for Plaintiff’s Title VII Criminal Records Claims

The ease with which plaintiffs prevail in criminal records disparate impact cases has slowly eroded over time<sup>127</sup> and the Supreme Court has never directly addressed the issue of criminal records discrimination.<sup>128</sup> The outcome of claims filed in federal courts since the late 1980s has been described as “uniformly grim” with “near-zero win rates” for plaintiffs.<sup>129</sup> Federal courts now hold “employers who disqualify job applicants with criminal records to *radically relaxed* standards for business necessity and job-relatedness.”<sup>130</sup> For example, federal courts are especially deferential to employers claiming some risk to public safety, however minimal or undefined, and are taking employers “at their word regarding their ‘potential’ or ‘perceived’ needs.”<sup>131</sup> In addition, federal courts have “ceased to accept general population statistics on arrests or convictions as evidence of disparate impact”<sup>132</sup> and have begun elevating plaintiffs’ burden of proof to es-

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conviction [, and the degree of the felon’s rehabilitation.] The third factor is the nature of the job the employee wants or has.”).

126. Concepción, *supra* note 30, at 241 (“Unlike conviction records, which constitute reliable evidence that a person engaged in the conduct alleged since the criminal justice system required the highest degree of proof (‘beyond a reasonable doubt’) for a conviction[,] arrests alone are not reliable evidence that a person has actually committed a crime.”) (internal quotations omitted).

127. Carlin & Frick, *supra* note 116, at 147 (“[F]rom the early 1980s to the early 2000s, the success of disparate impact litigation has declined from 48 to 12 percent.”).

128. *El v. Se. Pa. Transp. Auth.*, 479 F.3d 232, 242 (3d Cir. 2007) (“The Supreme Court has never dealt directly with criminal record policies. . . . [Nor has the Court] squarely address[ed] the issue of prior convictions.”).

129. Harwin, *supra* note 74, at 12–13.

130. *Id.* at 14 (emphasis added) (citing, e.g., *EEOC v. Carolina Freight Carriers Corp.*, 723 F. Supp. 734, 753 (S.D. Fla. 1989) (holding that “[i]t is not required that Carolina Freight’s conviction policy be ‘essential’ or ‘indispensable’ to its business needs”)).

131. *Id.* at 14–15 (citing, e.g., *Tye v. City of Cincinnati*, 794 F. Supp. 824, 833 (S.D. Ohio 1992) (explaining that “a public employer hiring a firefighter is held to a lighter burden in demonstrating that its employment criteria is job-related, because of the potential risk to public safety of hiring incompetent firefighters”)).

132. *Id.* at 16 (citing, e.g., *McCraven v. City of Chicago*, 109 F. Supp. 2d 935 (N.D. Ill. 2000) (holding that statistical evidence that more African-Americans were arrested than Caucasians was insufficient to show racial discrimination)).

tablish disparate impact.<sup>133</sup> In effect, the culmination of this wave of change “[bars] plaintiffs who are unable to afford expert statisticians from pursuing disparate impact claims.”<sup>134</sup>

In 2007, *El v. Southeastern Pennsylvania Transit Authority*, 479 F.3d 232 (3d Cir. 2007), became the case which notoriously cemented this change and “offered the most in-depth court analysis” prompting the promulgation of EEOC’s revised 2012 Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964.<sup>135</sup> In *El*, Douglas El—a paratransit bus driver who was hired to transport people with mental and physical disabilities—was terminated solely because of a forty-year old conviction for second-degree murder that was uncovered during a criminal background check.<sup>136</sup> The employer was required, by contract with SEPTA, to ensure that anyone driving for SEPTA had “no record of any felony or misdemeanor conviction of any crime of moral turpitude or of violence against any person.”<sup>137</sup> Mr. El subsequently filed a Title VII suit against SEPTA under a disparate impact theory, alleging that “[SEPTA] unnecessarily disqualified applicants because of prior criminal convictions—[causing] a disparate impact on [African-American and Latino] applicants because they are more likely than white applicants to have convictions on their records.”<sup>138</sup> The lower court granted summary judgment in favor of SEPTA on grounds that (i) SEPTA had “submitted sufficient evidence to prove that its policy was justified by business necessity”, and that (ii) Mr. El “had not submitted sufficient evidence of an alternative policy that would accomplish SEPTA’s legitimate goal of public safety.”<sup>139</sup> On appeal, the issue before the court was whether a rea-

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133. *Id.*

134. *Id.*

135. Concepción, *supra* note 30, at 242; see Carlin & Frick, *supra* note 116, at 160 (“[T]he decision in *El* seemed to cut against the spirit of the EEOC guidelines [and] correctly pointed out serious problems in the [EEOC Guidelines; however, these] problems have been mostly addressed by the EEOC’s 2012 guidelines.”); see also EEOC, ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 3 (2012), [http://www.eeoc.gov/laws/guidance/upload/arrest\\_conviction.pdf](http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf) (“In light of . . . case law analyzing Title VII requirements for criminal record exclusions . . . the Commission has decided to update and consolidate in this document all of its prior policy statements about Title VII and the use of criminal records in employment decisions.”).

136. *El v. Se. Pa. Transp. Auth.*, 479 F.3d 232, 235 (3d Cir. 2007).

137. *Id.* at 236.

138. *Id.* at 235–37.

139. *Id.* at 237.

sonable juror could find that SEPTA’s policy was inconsistent with business necessity.<sup>140</sup>

To make this determination, the court analyzed the disparate impact doctrine and made some strikingly nuanced conclusions that dismantled doctrine-setting precedent in the criminal records context and the, then existing, EEOC Guidance. For example, the Third Circuit first noted that the standards set out in “*Griggs* and its progeny”<sup>141</sup> were inapplicable because, as the court explained, they “did not provide a precise definition of business necessity”<sup>142</sup> and “[did] not parallel the facts of [*El*].”<sup>143</sup> Thus, the court concluded, “our standards of ‘minimum qualifications necessary for successful performance of the job in question’ is appropriate in test-score cases, but awkward here because ‘successful performance of the job’ in the usual sense is not at issue. . . . [T]he standard is worded to address ability, not risk.”<sup>144</sup> The Third Circuit then distinguished *Green* on its material facts. The court explained that (i) the position at issue in *Green* “did not require the employee to be alone with and in close proximity to vulnerable members of society,” and (ii) “the hiring policy in *Green* prevented hiring a person with any criminal conviction . . . while SEPTA’s policy only prevents consideration of people with certain types of convictions.”<sup>145</sup> The Third Circuit then proceeded to reject relevant EEOC guidelines. Specifically, the court rejected the EEOC’s adoption of the *Green* factors explaining that the guidelines “[did] not speak to whether an employer can take [the *Green*] factors into account when crafting a bright-line policy, nor [did] they speak to whether an employer justifiably can decide that certain offenses are serious enough to warrant a lifetime ban.”<sup>146</sup> The court also made the determination that the EEOC Guidelines: (i) were no longer entitled to “great deference,” but instead should be afforded “deference in accordance with the thoroughness of its research and the persuasiveness

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140. *Id.* at 245.

141. For discussion of the disparate impact doctrine described by the court as “*Griggs* and its progeny”, see *supra* Part I.C.

142. *El*, 479 F.3d at 241.

143. *Id.* at 242–43 (explaining that “the hiring policies at issue [in *Griggs* and its progeny] were tests designed or used—at least allegedly—to measure an employee’s ability to perform the relevant jobs. Here, however, the hiring policy has nothing to do with the applicant’s ability to drive a paratransit bus; rather, it seeks to exclude applicants who, while able to drive a bus, pose too much of a risk of potential harm to the passengers to be trusted with the job”).

144. *Id.* at 243.

145. *Id.*

146. *Id.*

of its reasoning,”<sup>147</sup> and, (ii) did not “substantively analyze the statute” and, therefore, it did not apply the *Green* factors to the case.<sup>148</sup>

After rejecting *Griggs*, *Green*, and the EEOC guidelines, the court proceeded to adopt a broader definition of business necessity by reasoning that all “hiring policies . . . ultimately concern the management of risk.”<sup>149</sup> The court further explained that: “an employer who seeks to avoid violating Title VII must draft its criminal records exclusion policies carefully based on empirical evidence that ‘accurately distinguish[es] between applicants that pose an unacceptable level of risk and those that do not’.”<sup>150</sup> The court reasoned that the employer must meet this requirement because the intent of the policies is to “deal with the risk that an applicant will endanger the employer’s patrons,”<sup>151</sup> and “former violent criminals who have been crime free for many years are *at least somewhat more likely* than members of the general population to commit a future violent act.”<sup>152</sup> The court affirmed the lower court’s grant of summary judgment for the defendant-employer while cementing a new standard of “risk” for future criminal records discrimination cases brought under Title VII’s disparate impact theory.<sup>153</sup>

#### D. Today, the Success of Title VII Criminal Records Discrimination Suits Continues to Decline

In the aftermath of *El*, the EEOC promulgated its revised 2012 Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964.<sup>154</sup> The revised and updated guidance “discourage[s] bright-line criminal records policies and instead call[s for employers who use criminal records to conduct] ‘individualized assessment[s]’ of applicants and employees” that consider the *Green* factors.<sup>155</sup> As comprehensive as the “individualized assessment” guidelines appear to be, they have resulted in a quagmire of confusion, fear, and litigation because—even under EEOC’s implementa-

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147. *Id.* at 244.

148. *Id.*

149. *Id.*

150. Paul-Emile, *supra* note 15, at 923.

151. *El*, 479 F.3d at 244.

152. *Id.* at 246 (emphasis added).

153. *Id.* at 249.

154. EEOC, *supra* note 135, at 20.

155. Pettinato, *supra* note 73, at 772; *see* EEOC, *supra* note 135, at 18.

tion—there is wide room for interpretation because EEOC’s guidance is not binding.<sup>156</sup> Moreover, when the EEOC has sued employers under the revised guidance, the agency “has sometimes met substantial judicial resistance”<sup>157</sup> and challenges from both private and public actors.<sup>158</sup>

A few recent cases involving private actors that were decided at the federal appellate level are illustrative of the challenges brought by employers and the subsequent judicial resistance to EEOC enforcement actions. In *EEOC v. Peplemark, Inc.*, 732 F.3d 584 (6th Cir. 2013), the Sixth Circuit affirmed the award of \$751,942 in fees and costs to an employer that the EEOC alleged had a blanket policy of denying jobs to applicants with felony records resulting in a disparate impact on African-Americans.<sup>159</sup> The issue before the court was whether the EEOC’s “claim was frivolous, unreasonable, or groundless or whether the [EEOC] continued to litigate after it clearly became so.”<sup>160</sup> The court found that the EEOC’s case was groundless because, as discovery continued, the EEOC knew or should have known that the company did not actually have a blanket company-wide policy of rejecting felon applicants.<sup>161</sup> The court was particularly disturbed because the EEOC proceeded on a theory that *merely* considering felony convictions created an unlawful disparate impact without producing new expert reports in a timely manner, and because the EEOC voluntarily dismissed its case only *after* the employer moved for summary judgment.<sup>162</sup> In *EEOC v. Freeman*, 778 F.3d 463 (4th Cir. 2015), the EEOC alleged that an employer’s criminal background checks had a “disparate impact on [African-American] and male job

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156. Carlin & Frick, *supra* note 116, at 159 (“The EEOC guidelines are not binding law.”).

157. JACOBS, *supra* note 26, at 290.

158. In November 2013, Texas sued the EEOC seeking to enjoin the enforcement of the 2012 EEOC guidelines on grounds that the EEOC violated the APA. The case was dismissed for lack of standing and argued, on appeal, before the Fifth Circuit in July 2015. See *Texas v. EEOC*, No. 5:13-cv-00255-C (N.D. Tex. dismissed Aug. 20, 2014), *appeal docketed*, No. 14-10949 (5th Cir. argued July 7, 2015).

159. *EEOC v. Peplemark, Inc.*, 732 F.3d 584, 587 (6th Cir. 2013).

160. *Id.* at 592.

161. During its initial investigation, a senior Peplemark executive informed the EEOC that the company had a blanket policy in place. However, discovery in this case included the production of over 176,000 documents by the employer that did not support EEOC’s investigatory findings that a companywide policy existed. *Id.* at 591–92 (“When discovery clearly indicated [the] statements belied the facts, the [EEOC] should have reassessed its claim [despite its intent to prove disparate impact with statistical evidence]. . . . [The company-wide policy of denying employment opportunities to felons] did not exist, and the claim the [EEOC] pleaded could not be proved. [Therefore, the] Commission could not prove a *prima facie* case of its claim because the claim was groundless. . . .”).

162. *Id.* at 587–91.

applicants,” and sought relief for a class of applicants affected by criminal checks over a five-year period.<sup>163</sup> Because the district court found that the EEOC proffered expert testimony to establish the alleged disparate impact that was “fatally flawed[,] . . . contained a plethora of analytical fallacies, reflected cherry-picked data, produced a meaningless, skewed statistic, and included a mind-boggling number of errors,” the lower court granted summary judgment for the defendant.<sup>164</sup> On appeal, the Sixth Circuit affirmed “in light of [the expert’s] pervasive errors and utterly unreliable analysis.”<sup>165</sup> Circuit Judge G. Steven Agee, writing separately to address his “concern with the EEOC’s disappointing litigation conduct”<sup>166</sup> explained that he found it troubling that “the Commission continue[d] to proffer expert testimony from a witness whose work ha[d] been roundly rejected in our sister circuits for similar deficiencies”<sup>167</sup> and that despite the expert’s “record of slipshod work, faulty analysis, and statistical sleight of hand, the EEOC continue[d] on appeal to defend his testimony.”<sup>168</sup> Judge Agee, then forewarned that the EEOC’s “significant power [and] broad discretion to investigate, conciliate, and enforce [unlawful employment actions under Title VII invokes] duties to employers as well: a duty reasonably to investigate charges, a duty to conciliate in good faith, and a duty to cease enforcement attempts after learning that an action lacks merit.”<sup>169</sup> Thus, he concluded:

The EEOC must be constantly vigilant that it does not abuse the power conferred upon it by Congress, as its significant resources, authority, and discretion will affect all those outside parties they investigate or sue. . . . [I]t is thus incumbent upon [the Commission] to maintain some appreciation for the extent of the burden that its actions may impose. . . . [And,] it would serve the agency well in the future to reconsider how it might better discharge the responsibilities delegated to it or face the consequences for failing to do so.<sup>170</sup>

These cases illustrate the significant hurdles facing plaintiffs seeking to challenge the use of criminal records under Title VII today. According to some legal scholars, these hurdles have included plaintiff’s burden to establish the *prima facie* case that the employer has a

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163. EEOC v. Freeman, 778 F.3d 463, 465 (4th Cir. 2015).

164. *Id.* at 468 (J. Agee, concurring).

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* at 471.

169. *Id.* at 472.

170. *Id.* at 472–73.

facially neutral employment policy or practice that has a significant adverse impact on a protected group.<sup>171</sup> In addition, an increasingly conservative and anti-disparate impact judiciary serves as a hurdle in determining whether the plaintiff has reached the *prima facie* burden.<sup>172</sup> Likewise, the court’s requirement that plaintiff’s claims be accompanied with statistical evidence that is sufficient to establish their *prima facie* case of adverse impact serves as yet another hurdle,<sup>173</sup> and especially so when it is coupled with the difficulty a plaintiff has acquiring empirical data because criminal records discrimination occurs “almost exclusively during the hiring stage.”<sup>174</sup> Finally, an employers’ ability to meet the business necessity defense under a lesser degree of scrutiny than what plaintiff’s face “serves as a death knell” even if plaintiff were successful at proving a *prima facie* case.<sup>175</sup> Ultimately, many scholars agree, “Title VII is not an appropriate tool for ensuring fairness for people with criminal records”<sup>176</sup> because “[plaintiffs and civil rights advocates alike] have found it extremely difficult to establish, to the satisfaction of a federal court, that the policies violate Title VII’s disparate impact provision.”<sup>177</sup>

At the federal level, there is no law prohibiting employment discrimination based on past criminal acts.<sup>178</sup> Some scholars have concluded that in the absence of such a statute, a criminal record can lead to discrimination in employment<sup>179</sup> because “[n]early every state allows private employers to discriminate based on past criminal convictions.”<sup>180</sup> Though critics of federal inaction prohibiting or limiting an employer’s misuse and abuse of criminal records focus solely on the fact that there has been no unique, comprehensive legislative enactment to address the problem specifically, this perspective does not tell a complete story. Past and current attempts at a national legislative response exist. The most notable of these attempts were the 1998 expansion of the regulatory reach of the federal Fair Credit Reporting Act (“FCRA”) to cover commercial background checking companies

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171. Smith, *supra* note 96, at 201.

172. *Id.* at 205.

173. *Id.* at 210.

174. Paul-Emile, *supra* note 15, at 926.

175. Smith, *supra* note 96, at 207.

176. Paul-Emile, *supra* note 15, at 927.

177. Smith, *supra* note 96, at 203.

178. *Pre-Employment Inquiries and Arrest & Conviction*, *supra* note 92.

179. ALEXANDER, *supra* note 22, at 141.

180. *Id.* at 149–50.

that sell criminal records information for employment purposes,<sup>181</sup> and state and federal Ban the Box initiatives to prevent employment discrimination against former offenders by eliminating an employer's ability to inquire about criminal backgrounds on job applications.<sup>182</sup>

E. The Federal Fair Credit Reporting Act Created National Standards with Limited Protections

Before the FCRA and the rise of internet-based commercial background checking companies, an individual with a criminal history could rehabilitate their life and move beyond their criminal past by getting a fresh start in a new geographical area.<sup>183</sup> Today, such a fresh start is “virtually impossible” because of the criminal records problem.<sup>184</sup> As an attempt to address the criminal records problem,<sup>185</sup> the FCRA “establishes national standards for employment screening” that include “requiring employers to notify and obtain consent from job applicants prior to obtaining a criminal history report, and to inform job applicants if an adverse action is taken on the basis of the contents of a report.”<sup>186</sup> However, because the FCRA was originally enacted to regulate “consumer reporting agencies” that collect and distribute credit and other consumer information for employment,<sup>187</sup> one of the statute's shortcomings is that it only regulates commercial entities engaged in providing “consumer reports” —that the Act defines as:

any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for . . . employment purposes. . . .<sup>188</sup>

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181. See Paul-Emile, *supra* note 15, at 916–17.

182. See Smith, *supra* note 96, at 211–19.

183. Paul-Emile, *supra* note 15, at 916.

184. *Id.*

185. For a general understanding of the criminal records problem in creditor lending practices, see Taja-Nia Henderson, *New Frontiers in Fair Lending: Confronting Lending Discrimination Against Ex-Offenders*, 80 N.Y.U. L. REV. 1237 (2005).

186. Paul-Emile, *supra* note 15, at 917.

187. *Id.* at 916–17.

188. 15 U.S.C. § 1681a(d) (2012).

Among its other shortcomings,<sup>189</sup> scholars have pointed out that: (i) the FCRA only governs third-party screening companies and does not address employers who conduct their own background checks by accessing criminal records via government sources;<sup>190</sup> (ii) a third-party screening company may evade compliance under the FCRA by simply claiming that the FCRA does not apply to them because they do not engage in “consumer reporting” as defined by the statute;<sup>191</sup> (iii) “the FCRA provides qualified immunity to covered [background checking companies and employers] from claims [arising from] invasion of privacy, defamation or negligence based on the information contained in an FCRA-covered report;”<sup>192</sup> and, (iv) the Act allows for the indefinite reporting of convictions<sup>193</sup> and defines no standard of accuracy in the consumer reports that are provided to employers other than that they must “follow reasonable procedures to assure maximum possible accuracy.”<sup>194</sup> Consequently, because of the rise in employers’ use of internet-based criminal records databases and the scant protection that the FCRA provides to individuals with criminal records, many scholars agree that the FCRA does not offer adequate protection against criminal records discrimination for African-American and Latino job applicants.<sup>195</sup>

#### F. State & Federal Ban the Box Initiatives Lack Uniformity & “Universal” Application

State and federal<sup>196</sup> Ban the Box initiatives attempt to prevent employment discrimination against former offenders by eliminating

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189. Paul-Emile, *supra* note 15, at 918–19 (explaining that: (i) under the FCRA, a background checking company may report an individual’s records of arrests that did not lead to conviction for arrests that occurred during the prior seven years; (ii) the Act allows for the disclosure and circulation of arrest information and expunged conviction records; and, (iii) the FCRA does not compel consumer guidance on how to properly interpret criminal history reports or how to apply them in the hiring process).

190. *Id.* at 918.

191. *Id.* at 917.

192. *Id.* at 917–18.

193. *Id.* at 918.

194. *Id.*

195. *Id.* at 921.

196. Peter Baker, *Obama Takes Steps to Help Former Inmates Find Jobs and Homes*, N.Y. TIMES (Nov. 2, 2015), [http://www.nytimes.com/2015/11/03/us/obama-prisoners-jobs-housing.html?\\_r=0](http://www.nytimes.com/2015/11/03/us/obama-prisoners-jobs-housing.html?_r=0) (“President Obama ordered federal agencies . . . to stop asking most prospective employees about their criminal histories at the beginning of the application process.”); see also Troutman Sanders, *Federal “Ban the Box” Legislation Announced by Bipartisan Group*, LEXISNEXIS LEGAL NEWSROOM (Oct. 13, 2015, 4:10 PM), <http://www.lexisnexis.com/legalnewsroom/labor-employment/b/labor-employment-top-blogs/archive/2015/10/13/federal-ban-the-box-legislation-announced-by-bipartisan-group.aspx#sthash.k4q6q9ev.dpuf> (“The Fair Chance Act [S. 2021/

an employer's ability to inquire about criminal backgrounds on job applications. The "box" refers to "the part of an employment application that requires an applicant to disclose the existence of a criminal record."<sup>197</sup> The Ban the Box movement began as a coordinated state-level legislative movement that aimed to "remove structural barriers that prevent people with criminal records from gaining employment" by, "at a minimum, . . . remov[ing an employer's] request for applicants to check [the "box"] if they have a criminal history."<sup>198</sup> Today, the movement consists of policies and regulations that utilize three strategies. First, the movement prevents an employer "from making stereotypical judgments" by providing the employer with the opportunity to evaluate the skills and employability of individuals with criminal records.<sup>199</sup> Second, because individuals with criminal records do not apply for employment opportunities because they "believe they would be automatically disqualified," the movement "counter[s] the deterrent effect" that criminal history questions have.<sup>200</sup> Third, the movement gives both the employer and the applicant the opportunity to "interview with the employer, sell themselves, and tell their own story" by delaying an employer's consideration of criminal history information "to later stages in the screening process."<sup>201</sup> The Ban the Box movement is built on the simple proposition that policy changes that "remove questions about criminal history from job applications" will "eas[e] hiring barriers and creat[e] a fair chance to compete for jobs" for individuals with criminal records.<sup>202</sup> As of February 2016, twenty states, Washington, DC, and over 100 cities and counties have adopted Ban the Box policies.<sup>203</sup>

While Ban the Box efforts are significant, they are not uniform across states and allow for the varying treatment of individuals with criminal records by geographical location.<sup>204</sup> The policies differ with respect to several elements. For example, some policies focus on the

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H.R. 347] if enacted, would prohibit federal agencies or contractors from asking job applicants about criminal histories until a formal job offer has been presented to the candidate, contingent upon the results of a background check and criminal history review by the employer.").

197. Pinard, *Criminal Records*, *supra* note 13, at 985.

198. Smith, *supra* note 96, at 211.

199. *Id.*

200. *Id.*

201. *Id.* at 211–12.

202. *Fact Sheet: "Ban the Box" is a Fair Chance For Workers With Records*, NAT'L EMP. L. PROJECT (Feb. 2016), <http://www.nelp.org/content/uploads/Ban-the-Box-Fair-Chance-Fact-Sheet.pdf>.

203. *Id.*

204. Smith, *supra* note 96, at 213.

regulation of government employers because it is “easier to convince municipal leaders to implement reforms in their own hiring chain”<sup>205</sup> while others include “[private] companies contracting with government agencies” or doing business within the municipality.<sup>206</sup> Another area where the policies diverge is with respect to the positions that are covered by the policy.<sup>207</sup> For example, the policies may exempt positions in law enforcement, those with access to sensitive information and financial resources, senior positions in municipal government, and positions in social services and child welfare that involve working with children.<sup>208</sup>

Two additional areas where Ban the Box policies differ amongst localities include: (1) the stage in an employer’s application process at which criminal history information may be considered; and, (2) to what extent the policies provide guidance on how to evaluate criminal record information.<sup>209</sup> For example, limitations on when an employer may consider an applicant’s criminal history information range from “during the initial application and/or interview” to “when the applicant is a finalist or has been extended a conditional job offer.”<sup>210</sup> With respect to providing guidance, the policies may range from remaining “silent about the way in which employers should consider criminal history” to Ban the Box policies that “list [specific criteria or] factors employers must consider before rejecting an applicant because of her criminal [record.]”<sup>211</sup>

At their core, Ban the Box policies do not preclude an employer’s consideration of criminal history information; the efforts only prevent discrimination at the earliest stage of an application process. While they allow an individual with a criminal record to get his or her foot in the door, an employer may still screen an applicant’s criminal background before hiring and violate Title VII by denying employment solely on the grounds of a non-job-related criminal records finding.<sup>212</sup> Many scholars agree that, because Ban the Box is not an outright ban of employers’ inquiries into an individual’s criminal records, the

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205. *Id.*

206. *Id.*

207. *Id.* at 214.

208. *Id.*

209. *Id.*

210. *Id.* at 214–15.

211. *Id.* at 215.

212. *Id.* at 214 (“[I]n the vast majority of ban the box policies, employers may consider applicants’ criminal history at some point in the screening process. The question is when.”).

movement is “unlikely to serve as a panacea to those individuals with criminal records seeking gainful employment” for a number of reasons.<sup>213</sup> First, a majority of the American workforce lives outside of jurisdictions with Ban the Box policies in place.<sup>214</sup> As of 2014, “nearly half the states have neither passed any ban-the-box legislation nor do they have any cities where [Ban the Box] policies are in effect.”<sup>215</sup> Second, in Ban the Box jurisdictions, the policies often only cover a subset of employees.<sup>216</sup> Third, it cannot be understated how significant it is that, “[e]ven in [Ban the Box] jurisdictions, employers retain substantial discretion in determining the weight they attach to an applicant’s criminal record.”<sup>217</sup>

### III. ADOPTING GINA’S LEGAL FRAMEWORK TO THE PROBLEM OF CRIMINAL RECORDS

Conceptualizing the interplay of discrimination and genetic information might have been a challenge were it not for the well-known atrocities of racist medical experiments like the infamous Tuskegee Experiments—where, for over 40 years, the U.S. government unethically conducted a clinical study of syphilis in African-American men leading to a \$10 million settlement in the subjects favor and, more importantly, a legacy of discrimination in genetic screening.<sup>218</sup> This Part argues that the nation’s long, storied history of “medical information” motives and racist outcomes serves as backdrop to the legal framework that, if adopted, may provide an effective response to the criminal records problem today. The lessons begin with the case of Mrs. Marya Norman-Bloodsaw.

#### A. Norman-Bloodsaw v. Lawrence Berkeley Lab, 135 F.3d 1260 (9th Cir. 1998)

In 1986, Marya Norman-Bloodsaw, a thirty-three year old African-American woman discovered that she and at least seven other African-Americans were secretly subjected to repeat genetic testing by

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213. *Id.* at 216.

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *The Tuskegee Timeline*, CDC, <http://www.cdc.gov/tuskegee/timeline.htm> (last visited Dec. 20, 2015).

their employer for the sickle cell gene.<sup>219</sup> Each of the employees participated in medical examinations, both before and after they accepted their offers of employment, by the Lawrence Berkeley Laboratory (the “Lab”), a research facility operated by the University of California under contract with the United States Department of Energy.<sup>220</sup> Prior to the examinations, Marya and other new hires filled out a medical history form, which included questions regarding a number of medical conditions, including “venereal disease,” “sickle cell anemia,” and “menstrual disorders.”<sup>221</sup> During the examination, blood and urine samples were taken.<sup>222</sup> Neither Mrs. Norman-Bloodsaw nor any of her co-workers who completed the medical examinations were provided with the results of the examination or testing.<sup>223</sup> “Eight years after that first examination, Mrs. Norman-Bloodsaw requested her [Lab] medical records as part of a workers’ compensation case” and discovered that they included the medical code for a syphilis exam.<sup>224</sup>

Thereafter, Mrs. Norman-Bloodsaw and the other employees became members of the first ever class action suit raising privacy and discrimination claims related to medical and genetic testing in the workplace—*Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260 (9th Cir. 1998). Amongst the claims asserted in the class action suit was the claim that the Lab’s genetic screening violated Title VII of the Civil Rights Act of 1964 by targeting African-American employees for sickle cell trait testing.<sup>225</sup> While defendant’s motion for

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219. In total, plaintiffs underwent fourteen examinations on dates between 1968 and 1999. Elizabeth Pendo, *Race, Sex, and Genes at Work: Uncovering the Lessons of Norman-Bloodsaw*, 10 HOUS. J. HEALTH L. & POL’Y 227, 232 (2010); see also *Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1264, 1265 n.2 (9th Cir. 1998).

220. When Mrs. Norman-Bloodsaw worked at the lab, the DOE required federal contractors to establish an occupational medical program that required “‘preplacement examinations’ in order to determine ‘the health status and the physical fitness of the individual’ to aid in a suitable job placement which would not present a ‘health hazard of accident risk’ to the individual, other employees, plant facilities, or the public. . . . Until 1995, it also required contractors to offer optional subsequent ‘periodic health examinations.’” Pendo, *supra* note 219, at 232; see also *Norman-Bloodsaw*, 135 F.3d at 1264, 1267.

221. *Norman-Bloodsaw*, 135 F.3d at 1265, 1267.

222. *Id.*

223. *Id.* at 1265 (the testing “occurred without their knowledge or consent, and without any subsequent notification that the tests had been conducted”); Pendo, *supra* note 219, at 233 (“Marya was not provided with the results of the examination or testing.”).

224. Pendo, *supra* note 219, at 234.

225. In 1995, after receiving a right-to-sue letter from the EEOC, Mrs. Norman-Bloodsaw and six others filed a class action suit on behalf of themselves and other similarly situated employees asserting three claims: (i) violation of the ADA by requiring or assisting in medical testing that was not job-related; (ii) violation of the right to privacy under the federal and California constitutions by conducting the testing, maintaining the results of the testing, and failing to provide adequate safeguards against disclosure; and (iii) violation of Title VII by targeting

judgment on the pleadings was pending and prior to full discovery, the district court granted defendant's motion for summary judgment<sup>226</sup> on grounds that plaintiffs' claims were time-barred, and, "in the alternative, the court found the privacy and Title VII claims were without merit."<sup>227</sup> Plaintiffs were granted leave to amend the complaint; however, ultimately, the court held that the Title VII claims were time-barred and concluded that plaintiffs had failed to state a cognizable Title VII claim because they had failed to show harm—plaintiffs had "neither alleged nor shown any connection between [the] discontinued confidential tests and [their] employment terms of conditions, either in the past or in the future."<sup>228</sup>

On appeal, the Ninth Circuit found that factual questions precluded the grant of summary judgment for the Lab as to the Title VII claims, and remanded the case for proceedings consistent with its ruling.<sup>229</sup> The Ninth Circuit also reversed the dismissal of plaintiffs' claims under Title VII, finding that the claims fell "neatly into a Title VII framework [where] plaintiffs [alleged that] the black . . . employees were singled out for additional nonconsensual testing and that defendants, thus, selectively invaded the privacy of certain employees on the basis of race. . . ."<sup>230</sup> Thus, the Ninth Circuit held that plaintiffs had stated a claim under Title VII reasoning that:

the employment of women and blacks at [the Lab] was conditioned in part on allegedly unconstitutional invasions of privacy to which white and/or male employees were not subjected. An additional 'term or condition' requiring an unconstitutional invasion of privacy is, without doubt, actionable under Title VII. Furthermore, even if the intrusions did not rise to the level of unconstitutionality, they would still be a 'term' or 'condition' based on an illicit category as decreed by the statute and this a proper basis for a Title VII action.<sup>231</sup>

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Black employees for sickle cell trait testing, women for pregnancy testing, and that Black employees were subjected to race-targeted retesting for syphilis. *Norman-Bloodsaw*, 135 F.3d at 1265–67, 1265 n.5; Brief of Plaintiffs-Appellants at 2–3, 39, *Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260 (9th Cir. 1998).

226. Brief of Plaintiffs-Appellants, *supra* note 225, at 4.

227. *Norman-Bloodsaw*, 135 F.3d at 1266; Pendo, *supra* note 219, at 236–37.

228. *Norman-Bloodsaw*, 135 F.3d at 1266.

229. *Id.* at 1275–76.

230. *Id.* at 1272.

231. *Id.*

Ultimately, the parties reached a settlement agreement for \$2.2 million and several corrective actions by the employer.<sup>232</sup> The class of employees and job applicants affected by the settlement, reportedly, reached back “27 years to 1972 and involved as many as 8,000 people.”<sup>233</sup>

“Although Title VII does not generally prohibit an employer from conducting or requiring medical examinations of employees,” *Norman-Bloodsaw* stands for the proposition that “Title VII does prohibit the imposition of medical examinations (or any other terms or conditions) upon an employee or group of employees based on membership in a protected class.”<sup>234</sup> The Lab singled out African-Americans for sickle cell testing, and African-Americans and Latinos for repeated syphilis testing. In *Norman-Bloodsaw*:

the testing of all African-American employees for sickle cell trait and disease, and the disproportionate testing of African-American and Latino employees for syphilis label[ed] these employees as more likely to be carriers of sexually transmitted disease as well as genetic traits deemed undesirable, on the basis of race and national origin, and thus adversely affect[ed] the status of the plaintiffs.<sup>235</sup>

Hence, *Norman-Bloodsaw* became the first Title VII class action that claimed discrimination “related to genetic and medical testing in the workplace.”<sup>236</sup> Moreover, legal scholars, like Professor Elizabeth Pendo of Saint Louis University School of Law, recognize that the story behind *Norman-Bloodsaw* illustrates that “the acquisition and use of genetic information in the workplace is not neutral, and often reflects and reinforces long-standing patterns of stratification by race and sex.”<sup>237</sup> Consequently, Professor Pendo explains: “The story of *Norman-Bloodsaw* also connects to the well-known history of medical professionals exploiting communities of color, and the resulting distrust of medicine and medical testing within those communities.”<sup>238</sup> Most significantly, Congress identified the facts of the *Norman-Bloodsaw* case as a key example of genetic discrimination in the workplace

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232. Pendo, *supra* note 219, at 246 (“[The employer] agreed to implement new procedures prohibiting testing without informed consent of the employees, giving current and former employees the right to review their medical files, and the right to expunge any testing information related to any tests for the sickle cell trait.”).

233. *Id.* at 247.

234. *Id.* at 243.

235. Brief of Plaintiffs-Appellants, *supra* note 225, at 44.

236. Pendo, *supra* note 219, at 230.

237. *Id.* at 250.

238. *Id.* at 251–52 (“The only genetic test conducted by [the Lab] was for sickle cell trait.”).

in its legislative findings when it enacted the Genetic Information Nondiscrimination Act of 2008.<sup>239</sup>

B. GINA's Adoption of Title VII Protections for Discriminatory Genetic Screening

GINA is “the first federal, uniform protection against the use of genetic information” in the workplace and health insurance.<sup>240</sup> When enacting GINA, Congress made three major findings that were prompted in part by the facts and findings of *Norman-Bloodsaw*. First, Congress found that advances in genetic screening give rise to the potential misuse of genetic information<sup>241</sup> to discriminate in health insurance and employment.<sup>242</sup> Second, Congress noted that, “although genes are facially neutral markers, many genetic conditions and disorders are associated with particular racial and ethnic groups.”<sup>243</sup> Third, Congress found that because some genetic traits are most prevalent in particular groups, members of a particular group might be “stigmatized or discriminated against because of that genetic information.”<sup>244</sup> Congress also noted that:

While [Title VII] provides robust guarantees against discrimination on the basis of these characteristics, its applicability to genetic discrimination is limited. The plain language of the statute provides no explicit protection against genetic discrimination. Title VII may indirectly offer some protections against discrimination on the basis of a person's genetic makeup when that discrimination disproportionately affects individuals on the basis of one of the characteristics named in the Act. For acts of genetic discrimination that do not have a discriminatory effect on members of class of individuals named in the Civil Rights Act, Title VII would provide no apparent protection against genetic discrimination.<sup>245</sup>

Prior to the enactment of GINA, a piecemeal of federal court rulings in combination with Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, and EEOC Guidelines provided

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239. Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, 122 Stat. 881 (codified as amended in scattered sections of 42 U.S.C. & 26 U.S.C.).

240. Pendo, *supra* note 219, at 227.

241. The Act defines genetic information as information about an “individual's genetic tests, the genetic tests of family members of such individual, and the manifestation of a disease or disorder in family members of such individual.” 42 U.S.C. § 2000ff (2012).

242. S. REP. NO. 110-48, at 6–7.

243. *Id.* at 8.

244. *Id.*; 154 CONG. REC. H2961 (daily ed. May 1, 2008) (statement of Rep. Dingell).

245. H. R. REP. NO. 110-28, pt. 3, at 30 (2007).

the bases for an employee’s cause of action against an employer for discriminatory genetic testing.<sup>246</sup> In addition, “34 states and the District of Columbia had promulgated their own genetic discrimination laws” that did not uniformly protect against discrimination from inherited characteristics and family histories or restrict all employer access to genetic information.<sup>247</sup> To address these gaps, Title II of GINA—entitled “Prohibiting Employment Discrimination on the Basis of Genetic Information”—provides:

It shall be an unlawful employment practice for an employer—

- (1) to fail or refuse to hire, or to discharge, any employee, or otherwise to discriminate against any employee with respect to the compensation, terms, conditions, or privileges of employment of the employee, because of genetic information with respect to the employee; or
- (2) to limit, segregate, or classify the employees of the employer in any way that would deprive or tend to deprive any employee of employment opportunities or otherwise adversely affect the status of the employee as an employee, because of genetic information with respect to the employee.<sup>248</sup>

Title II took effect on November 21, 2009.<sup>249</sup> With few exceptions,<sup>250</sup> the Act prohibits employers with more than 15 employees,

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246. See generally COALITION FOR GENETIC FAIRNESS, *FACES OF GENETIC DISCRIMINATION: HOW GENETIC DISCRIMINATION AFFECTS REAL PEOPLE* 16–17 (2004), <http://go.nationalpartnership.org/site/DocServer/FacesofGeneticDiscrimination.pdf?docID=971>. For a more detailed listing of specific state statutes, see *Genome Statute and Legislation Database*, NAT’L HUM. GENOME RES. INST., <https://www.genome.gov/PolicyEthics/LegDatabase/pubsearch.cfm> (last visited Dec. 31, 2015).

247. Stephen E. Trimboli & Marissa Becker Ruggiero, *Navigating the Genetic Information Nondiscrimination Act of 2008*, 58 *FED. LAW.* 24, 26 (2011).

248. 42 U.S.C.A. § 2000ff-1 (2012).

249. See generally U.S. DEP’T OF HEALTH & HUM. SERVS., “GINA” THE GENETIC INFORMATION NONDISCRIMINATION ACT OF 2008 INFORMATION FOR RESEARCHERS AND HEALTH CARE PROFESSIONALS (Apr. 6, 2009), <https://www.genome.gov/Pages/PolicyEthics/GeneticDiscrimination/GINAInfoDoc.pdf>.

250. Pendo, *supra* note 219, at 230 (“There are important exceptions to the prohibition on employer acquisition of genetic information. GINA is not violated where: (1) the information is inadvertently provided as part of the individual’s medical history or the medical history of a family member; (2) the information is provided to the employer as part of a service, such as a wellness program that contains certain protections in terms of voluntariness and confidentiality; (3) the information is provided to the employer as part of a request for leave under federal or state law; (4) the information is publicly available, as defined by the statute; (5) the information is gathered as part of a genetic monitoring program of the biological effects of toxic substances in the workplace, with certain safeguards; and (6) the employer operates as a law enforcement entity and requires the individual’s DNA for quality control purposes in a forensic lab or human remains identification.”).

excluding the military, from using genetic information<sup>251</sup> for hiring, firing, or promotion decisions and for any decisions regarding terms of employment.<sup>252</sup> The EEOC enforces Title II of GINA via the publication of guidelines and the enforcement of corrective actions and monetary penalties for violations by employers.<sup>253</sup> The EEOC's final rule implementing Title II of GINA became effective January 10, 2011.<sup>254</sup> "Under Title II of GINA, individuals may also have the right to pursue private litigation."<sup>255</sup> As with Title VII, claimants under Title II of GINA "must file a charge with the EEOC and exhaust their administrative remedies before [suing] in court."<sup>256</sup> To be sure, Title II provides all of "[t]he powers, procedures, and remedies provided in sections 705, 706, 707, 709, 710, and 711 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-4 *et seq.*) to the Commission, the Attorney General, or any person, respectively, alleging an unlawful employment practice in violation of" Title II of the Genetic Information Non-Discrimination Act.<sup>257</sup>

The second most significant aspect of GINA's legal framework is that, once enacted, GINA authorized a disparate treatment cause of action for employment discrimination based on genetic information and expressly barred suits based on disparate impact theory.<sup>258</sup> Thus, to state a claim for genetic discrimination under GINA, a plaintiff must allege: (1) that he or she was an employee, (2) who was discharged or deprived of employment opportunities, (3) because of information from his or her genetic tests.<sup>259</sup> However, GINA has rarely been litigated in federal courts since its enactment in 2008.<sup>260</sup> To date, EEOC has received more than 1,300 charges under GINA and has resolved nearly 1,200 of those charges by settlement, conciliation, and

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251. Under GINA, genetic information includes but is not limited to: (1) an individual's genetic tests; (2) the manifestation of a disease or disorder in family members (family history); and (3) any request for, or receipt of, genetic services or participation in clinical research that includes genetic services (genetic testing, counseling, or education) by an individual or family member. See U.S. DEP'T OF HEALTH AND HUMAN SERVS., *supra* note 249, at 2.

252. *Id.*

253. *Id.*

254. 42 U.S.C. §2000ff-1(a) (2012).

255. U.S. DEP'T OF HEALTH AND HUM. SERVS., *supra* note 249, at 2.

256. Trimboli & Ruggiero, *supra* note 247, at 25.

257. 42 U.S.C. §2000ff-6 (2012).

258. Trimboli & Ruggiero, *supra* note 247, at 25.

259. Deborah F. Buckman, Annotation, *Construction and Application of Statutes Prohibiting Genetic Discrimination in Workplace*, 6 A.L.R. 7th Art. 2, 4 (2015).

260. Trimboli & Ruggiero, *supra* note 247, at 27.

administrative closures.<sup>261</sup> Of the four cases decided since GINA’s passage where genetic discrimination in the workplace was established or supported, two of the cases held that a violation of GINA was established or supported by an employee’s claim that an employer had requested information as to the employee’s family medical history.<sup>262</sup> The other held that a violation of a statute prohibiting genetic discrimination in the workplace was established or supported by an employee’s claim that an employer had requested information as to the employee’s DNA.<sup>263</sup>

### C. Applying GINA’s Legal Framework to Criminal Records Discrimination

There is very little legal scholarship considering the adoption of GINA’s legal framework in the criminal records context. Professor Kimani Paul-Emile of Fordham University, for example, recommended adopting GINA as an unconventional legal model *preemptively regulating information flow* in order to address race discrimination in employment.<sup>264</sup> According to Professor Paul-Emile, adopting GINA would modify and strengthen existing Title VII and FCRA protections against criminal records discrimination because viewing “criminal records discrimination through the lens of social stigma” may help foster greater understanding and deterrence against the criminal records discrimination that is disproportionately impacting African-Americans and Latinos.<sup>265</sup> To support this recom-

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261. *Genetic Information Non-Discrimination Act Charges FY 2010–2014*, EEOC, <http://www.eeoc.gov/eeoc/statistics/enforcement/genetic.cfm> (last visited Dec. 20, 2015); *What You Should Know: Questions and Answers about the Genetic Information Nondiscrimination Act (GINA) and Employment*, EEOC, [http://www.eeoc.gov/eeoc/newsroom/wysk/gina\\_nondiscrimination\\_act.cfm](http://www.eeoc.gov/eeoc/newsroom/wysk/gina_nondiscrimination_act.cfm) (last visited Dec. 20, 2015).

262. *See Lee v. City of Moraine Fire Dept.*, No. 3:13-cv-222, 2015 WL 914440, at \*11–12 (S.D. Ohio 2015) (holding defendant liable where the city’s agent implemented an OSHA questionnaire requesting information about family history of heart disease in order to save costs associated with physical examinations for firefighters); *Maxwell v. Verde Valley Ambulance Co.*, No. CV-13-08044-PCT-BSB, 2014 WL 4470512, at \*19 (D. Ariz. 2014) (denying both parties motions for summary judgment and distinguishing between a GINA claim of strict liability for an employer’s receipt of an employee’s family medical history from an occupational health questionnaire where the employee did not argue that any information from his family medical history was considered or used for any employment decision).

263. *Lowe v. Atlas Logistics Grp. Retail Servs. (Atlanta), LLC*, 102 F. Supp. 3d, 1360, 1365 (N.D. Ga. 2015) (finding that the employer violated GINA when the employer requested information about a lab’s comparison of employee DNA to a fecal sample).

264. Professor Paul-Emile includes both the ADA and GINA in her Health Law Framework, however, ADA protections are beyond the scope of this Comment. *See* Paul-Emile, *supra* note 15, at 935.

265. *Id.*

mendation, Professor Paul-Emile provides three justifications. First, she argues that in contrast to Title VII, GINA was “designed to target discrimination based on a trait or condition that, like the existence of a criminal record, may not be readily apparent to the casual observer, but which carries a powerful social stigma that may form the basis of an adverse employment decision.”<sup>266</sup> Second, she posits, “the existence of a criminal record, is relevant to employment decision making and, unlike race, can be a licit ground upon which to exclude an individual from employment.”<sup>267</sup> Third, she asserts that GINA’s “doctrinal [scheme of] regulating the *flow of information*” prior to an adverse employment decision in the health law context is relevant in the criminal records setting because “preemp[ting] discrimination by controlling employers’ use of technology to access” what she refers to as, “stigmatizing information,” may curtail “employers’ reliance on criminal records to screen [racial minorities] out of the employment pool.”<sup>268</sup>

Further, Professor Paul-Emile argues that, because “GINA’s implementation regulations explicitly apply to the internet,”<sup>269</sup> under a GINA-based legal framework, “employers should be precluded from requesting, requiring, or purchasing a job applicant’s criminal records, including information obtained via the Internet, from sources such as criminal records databases and online court records.”<sup>270</sup> Consequently, Professor Paul-Emile explains that adopting GINA to the criminal records setting would allow for:

more robust enforcement of the FCRA’s existing provisions . . . [by] requiring employers to obtain a job candidate’s consent prior to conducting a background investigation through a [background checking company]; [requiring the employer to] notify the applicant if the report is used to make an adverse decision; . . . alert[ing] job candidates when an employer has unlawfully based an employment exclusion on the existence of an arrest record in violation of the EEOC enforcement guidance[; and] let[ting] job seekers know when a [background check company] has violated the FCRA by disseminating a record of an arrest that occurred more than seven

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266. *Id.*

267. *Id.*

268. *Id.* at 935–36 (emphasis added).

269. *Id.* at 937–38 (“For example, [under GINA], the term ‘request’ is interpreted broadly to cover Internet searches on individuals that are likely to result in a covered entity obtaining genetic information [from] court records [or] medical databases.”).

270. *Id.* at 939.

years prior and that did not lead to the entry of a judgment of conviction.<sup>271</sup>

Thus, helping applicants with criminal records avoid Title VII’s obstacles by lessening a plaintiff’s burden of identifying a specific practice in a disparate impact claim, and compelling employers to articulate their consideration of the *Green* factors for determining job-relatedness and business necessity, and their justification for denying an individual with a criminal record the employment opportunity.<sup>272</sup>

Professor Paul-Emile’s work presents a comprehensive legal framework that applies *all* employment-related health information law to the criminal records problem and approaches the criminal records problem from an *information flow management* perspective. In contrast, this Comment advances the idea that, by framing the problem in the *historical context* of genetic information discrimination by employers that affected African-Americans in the 1970s, it is possible to see “the problem” of criminal records discrimination the same as society once viewed, and continues to view, the problem of genetic information discrimination. By taking two steps back to establish the “law of the land,” this Comment also advances an understanding that the existing legal protections are insufficient to deter the criminal records discrimination that disproportionately impacts African-Americans and Latinos because of the obstacles plaintiffs must overcome to bring a Title VII disparate impact claim. GINA, however, was enacted to solve that problem in the genetic information context. To that end, with GINA applied in the criminal records context, a plaintiff’s *prima facie* case for criminal records discrimination should require four elements under a disparate treatment theory. A plaintiff should be required to show: (1) that he or she was an employee—post-offer and pre- or post-placement; (2) who was discharged or deprived of employment opportunities; (3) because of information the employer obtained—with consent—from his or her criminal background screening.<sup>273</sup>

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271. *Id.* at 941.

272. *Id.* at 940–41.

273. This solution presumes that, with the parallel implementation of ban-the-box legislation, most plaintiffs will interview and have at least a conditional offer of employment before criminal records get introduced into the evaluation of their job candidacy.

## CONCLUSION

What we allow the mark of a criminal record to become is in our own hands. While there is ample legal research on the disparate impact of criminal background screening on African-Americans and Latinos, there appears to be a trailing willingness of congressional actors to protect African-Americans and Latinos from employment discrimination based on their criminal background information. When Congress passed GINA, its members' concerns for an employer's potential misuse of genetic information to deny employment opportunities was paramount. Arguably, it was the treatment of genetic information as *protectable* information subject to exploitation that forced GINA's disparate treatment legal framework into the open.

Today, there are at least three pending class action lawsuits against public and private entities in federal district courts alleging that the employers' criminal background screening policies and practices are racially discriminatory and violate Title VII of the Civil Rights Act of 1964.<sup>274</sup> One of these cases—*Houser v. Blank*<sup>275</sup>—prompted this comparative inquiry and, though settlement negotiations have concluded,<sup>276</sup> plaintiffs' prevailing at the class action certification stage is, one could argue, demonstrative of a growing discontent with the collateral consequences of over incarceration. By treating criminal records with the same protections as genetic information, we create an objective lens with which to view an individual's criminal background history—it is a record subject to exploitation. An alternative legal doctrine is warranted, and the framework is GINA.

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274. See, e.g., *Little v. Wash. Metro. Area Transit Auth.*, 100 F. Supp. 3d 1 (D.D.C. 2015) (class-action lawsuit alleging that WMATA's criminal background screening policy violates Title VII).

275. *Houser v. Blank*, No. 10-civ-3105 (S.D.N.Y. filed Apr. 13, 2010) (formerly *Houser v. Pritzker*).

276. Joint Letter to Magistrate Judge, *Houser v. Blank*, No. 10-civ-3105 (S.D.N.Y. filed Apr. 13, 2010), ECF No. 342 (settlement pending Dep't. of Justice approval).

## COMMENT

# Hospitalized by Law: The Abrogation of Parental Rights by Hospitals and Child Welfare Courts

BRITTANY S. DAVIS\*

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## INTRODUCTION

Several years ago, Justina Pelletier was a happy teenager living at home with her nurturing parents and siblings, even though she suffered from a persistent and weakening sickness.<sup>1</sup> After her parents brought her to Tufts Medical Center, trained physicians associated with the Tufts University School of Medicine treated Justina for a rare disease called Mitochondrial Disorder.<sup>2</sup> The diagnosis came after numerous consultations and physical tests on Justina, a long-term patient of Tufts Medical Center.<sup>3</sup> Justina’s parents were confident in the abilities of the Tufts physicians and decided to follow the treatment plan recommended to them.<sup>4</sup>

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1. See Christy Balcells, *First, Do No Harm: How We Failed Justina Pelletier and Her Family*, HUFF. POST (Feb. 23, 2014, 6:38 PM), [http://www.huffingtonpost.com/cristy-balcells/first-do-no-harm-how-we-f\\_b\\_4843997.html](http://www.huffingtonpost.com/cristy-balcells/first-do-no-harm-how-we-f_b_4843997.html).

2. See Neil Swidey & Patricia Wen, *Justina Pelletier Heads Home After Judge Ends State Custody*, BOSTON GLOBE (June 17, 2014), <http://www.bostonglobe.com/metro/2014/06/17/judge-orders-custody-justina-pelletier-returned-parents/mdWtuGURNawSuObO0pDX4J/story.html> [hereinafter Swidey & Wen, *Justina*].

3. *Id.*

4. *Id.*

On referral from Justina's Tufts-based physician, Justina's parents took her to Boston Children's Hospital for gastroenterology treatment.<sup>5</sup> Unexpectedly, physicians at Boston Children's Hospital denied Justina access to a gastroenterologist and asserted that Justina's problems were psychiatric in nature.<sup>6</sup> This diagnosis was determined after only a few hours of consultation.<sup>7</sup> Boston Children's Hospital doctors declared that Justina suffered from a psychiatric disorder that caused her to feel pain without a physical cause.<sup>8</sup>

Skeptical of this particularly different diagnosis, Justina's parents sought to return to Tufts Medical Center for a subsequent opinion on the matter.<sup>9</sup> Boston Children's Hospital then prohibited Justina's parents from seeking another medical opinion, whether from Tufts Medical Center or any other hospital by refusing to discharge Justina to the care of another hospital.<sup>10</sup> Moreover, Boston Children's Hospital prohibited Justina's parents from removing Justina from the hospital at all, essentially trapping Justina within their walls.<sup>11</sup> Justina's parents were left without the option of transferring care and treatment of their child to another physician, leaving them at the mercy of Boston Children's Hospital.<sup>12</sup>

Unwilling to relinquish custody and care of Justina when her parents sought to discharge her, Boston Children's Hospital contacted the Massachusetts Department for Children and Families ("DCF") with allegations that Justina's parents committed medical child abuse.<sup>13</sup> The hospital alleged that Justina's parents medically abused their child, asserting that by following the recommended treatment plan from Tufts, Justina's parents were over-medicating Justina and causing her to take medication not necessary for her psychiatric condi-

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5. *Id.*

6. Maxine Eichner, *The New Child Abuse Panic*, N.Y. TIMES (July 11, 2015), [http://www.nytimes.com/2015/07/12/opinion/sunday/the-new-child-abuse-panic.html?\\_r=0](http://www.nytimes.com/2015/07/12/opinion/sunday/the-new-child-abuse-panic.html?_r=0).

7. See Balcells, *supra* note 1.

8. Swidey & Wen, *Justina*, *supra* note 2.

9. Swidey & Wen, *Justina*, *supra* note 2. Justina was a patient of Tufts Medical Center for years, and the doctors and nurses knew her patient history very well. *Id.*

10. Keith Ablow, *Justina Pelletier's Legal Nightmare Should Frighten All Parents*, FOXNEWS.COM (June 17, 2014), <http://www.foxnews.com/opinion/2014/06/17/justina-pelletier-legal-nightmare-should-frighten-all-parents/>.

11. *Id.*

12. Swidey & Wen, *Justina*, *supra* note 2.

13. *Id.* Medical child abuse is discussed in Part II.

tion.<sup>14</sup> Upon initiation of the child abuse allegations, Justina never returned to Tufts Medical Center for a subsequent medical opinion.<sup>15</sup>

Boston Children's Hospital brought the medical abuse allegations to the attention of Children's Protective Services ("CPS").<sup>16</sup> Soon, CPS and a county prosecutor filed charges of medical child abuse in the local family court.<sup>17</sup> Within four days, the family court found that the state's allegations sufficiently alleged that Justina's parents medically abused their daughter by following the recommended treatment and providing unnecessary medical treatment.<sup>18</sup> The court awarded legal and physical custody of Justina to the Commonwealth of Massachusetts, ignoring her parents' request for another medical opinion for clarification of Justina's particular illness.<sup>19</sup> Justina spent the next year locked in the psychiatric ward of Boston Children's Hospital undergoing intensive psychiatric treatment, with her parents zealously fighting to visit her as well as bring her home.<sup>20</sup> Ultimately, Justina's parents were successful in June of 2014, when the family court finally returned Justina home to her parents.<sup>21</sup>

The circumstances surrounding Justina's removal from the care of her parents challenged the legal rights of parents to make important medical decisions for their children. Justina's case is an example of a recent phenomenon whereby family courts defer to children's services and hospitals over the objections of a child's parents.<sup>22</sup> Justina's parents are not alone in their frustration with the legal system's deference

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14. *Id.*

15. *Id.* Justina began her journey at Tufts Medical Center, and the doctors at Tufts were quick to disagree with Boston Children's Hospital's planned course of treatment.

16. Neil Swidey & Patricia Wen, *Frustration on all Fronts in Struggle Over Child's Future*, BOSTON GLOBE (Dec. 3, 2013), <http://www.bostonglobe.com/metro/2013/12/16/month-medical-ordeal-conclusion-still-uncertain/Y7qvYTGsq8QklkxUZvuUgP/story.html> [hereinafter Swidey & Wen, *Frustration*].

17. *Id.* This decision shocked many, including Justina's former doctors. Boston Children's Hospital ignored requests from Tufts Medical to be included in consultations about Justina's care. *Id.*

18. Swidey & Wen, *Justina*, *supra* note 2.

19. Ablow, *supra* note 10.

20. Swidey & Wen, *Justina*, *supra* note 2; see also *Justina Pelletier Says No One Should Go Through Her Ordeal*, FOXNEWS.COM (June 28, 2014), <http://www.foxnews.com/us/2014/06/28/justina-pelletier-says-no-one-should-go-through-her-ordeal/> (noting that Justina later spoke out against the psychiatric treatment she received).

21. Neil Swidey & Patricia Wen, *A Difficult Return to Hospital for Justina Pelletier*, BOSTON GLOBE (Dec. 7, 2014), <https://www.bostonglobe.com/metro/2014/12/07/difficult-return-hospital-for-justina-pelletier/u4JXzmt5YsmWhYk95za2aK/story.html>.

22. See Megan Lynch, *Missouri Lawmaker says Medical Kidnapping is Real*, CBS ST. LOUIS (Feb. 15, 2015), <http://stlouis.cbslocal.com/2015/02/16/missouri-lawmaker-says-medical-kidnapping-is-real/> (explaining a lawmaker's measure to prevent authorities from removing children when parents seek a second medical opinion).

to hospitals and state branches of Children's Protective Services.<sup>23</sup> Across the country, hospitals are taking actions against parents who challenge their child's physician's diagnosis, even when the parents are questioning a diagnosis by requesting a subsequent opinion.<sup>24</sup> In the past several decades, courts have protected parents' rights in a variety of situations.<sup>25</sup> Protecting children from abuse and neglect is unarguably important; however, this protection must be adequately balanced to also protect parents' constitutional rights to the medical care and custody of their children.<sup>26</sup>

There is a persistent struggle between balancing the significant government interest of children's safety and care<sup>27</sup> with the right of parents to rear their children. Justina's battle with Boston Children's Hospital addresses the essential issue: a state or commonwealth should not assume jurisdiction of a child due to conflicting views of non-essential medical treatment over the objection of fit and suitable parents. Indeed, there is a saying that parents know what is best for their child. Through their care, parents are generally the most aware of their child's health issues, as well as their medical history. This Comment argues that, absent exceptional circumstances, parents should have a wide range of discretion and ultimately have the final choice in deciding the treatment path for their child. When a court is faced with a hospital's medical abuse allegation on the sole basis that the parent wishes to seek a subsequent medical opinion, there should be a presumption that a fit parent is best suited to make a medical determination for the child. The prosecutor, in neglect cases, should

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23. See *infra* Part II.B.

24. See Terri Lapoint, *Hospital Seizes Custody When Eight-Year-Old Jaxon's Parents Ask For A Second Opinion*, INQUISITR (Oct. 24, 2014), <http://www.inquisitr.com/1565015/hospital-seizes-custody-when-eight-year-old-jaxons-parents-ask-for-a-second-opinion/>; Megan Lynch, *Missouri Family Maintains They're Victims of "Medical Kidnapping"*, CBS ST. LOUIS (Jan. 12, 2015), <http://stlouis.cbslocal.com/2015/01/12/missouri-family-maintains-theyre-victims-of-medical-kidnapping/>; Gabriel Roxas, *CPS Case Against Nikolayev Family Dismissed*, ABC NEWS10 (June 25, 2013), <http://archive.news10.net/news/article/248770/2/CPS-case-against-Nikolayev-family-dismissed>.

25. See generally *Troxel v. Granville*, 530 U.S. 57 (2000) (finding that parents have a fundamental right to parent their children); *Stanley v. Illinois*, 405 U.S. 645 (1972) (finding that fathers of children born out of wedlock have a fundamental right to their children).

26. See *Parham v. J.R.*, 442 U.S. 584, 602 (1979). In this case, the Supreme Court found that parents have the right to commit their children when necessary. *Id.* at 604. If a third party disagrees with medical decision a parent makes, the state is not automatically entitled to make decisions on behalf of the child. *Id.* at 603.

27. See 42 U.S.C. § 5101 (1996). The Federal Child Abuse Prevention and Treatment Act provides assistance to states to prevent child abuse. *Id.* at 42 U.S.C. § 5101.106.

only overcome this presumption by clear and convincing evidence that the parent is unfit to make a medical determination.

Part I of this Comment examines the history of medical child abuse and how medical child abuse has evolved into an increasingly complex matter due to a lack of uniformity in state law and federal guidance. Part II outlines the fundamental constitutional rights that parents have to rear their child and describes the parental presumption that is inherent in family law. This parental presumption contends that parents' interest in the "care, custody and control of their children" is one of the "oldest of the fundamental liberty interests."<sup>28</sup> Part II also discusses a similar instance of so-called "medical kidnapping" in the United States and highlight a failure of the law to protect parents. Part III presents a critical analysis of the current standards for medical child abuse and compares multiple state statutes to show the disparity between standards for removal. Part III also emphasizes the importance of medical abuse reform to prevent significant deference to a hospital's opinion, an opinion that carries great weight due to ambiguous medical abuse standards and guidance. Finally, Part IV recommends a two-pronged approach to ensure children and parents are protected in the event parents come under suspicion by state actors for choosing to seek a subsequent medical opinion.

The two-pronged approach appeals to parental rights in the legislative and judiciary branches. First, there should be a presumption in state medical child abuse statutes that parents are the most fit to make decisions when it comes to seeking a subsequent opinion or second form of treatment. Second, officials seeking to remove a child solely for medical child abuse should be required to prove that the course of treatment provided by the parents is "unacceptable" in the face of immediate danger. This standard is described below as the New York statutory scheme for medical child abuse or neglect and reflects respect for parental medical decisions. The New York scheme requires proof that the medical treatment sought by a child's parent is unacceptable.<sup>29</sup> This scheme protects the best interest of the child while also taking into consideration the legal argument of the state and hospital; most importantly, it recognizes a parent's presumption that they are fit to make medical decisions. This requires courts to hold state prosecutors and hospitals to a higher standard in removal cases. This

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28. *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

29. *See infra*, note 53.

Comment contends that the removal of a child is a deprivation of a parent's liberty and thus requires proof that removal is the last option, an only after a parent's recommended course of treatment is found to be unacceptable.

## I. MEDICAL CHILD ABUSE IN THE LAW

### A. Medical Child Abuse Defined By State Statutes

Medical child abuse is a relatively new term.<sup>30</sup> Formerly, medical and legal professionals interpreted medical child abuse as synonymous with Munchausen's Syndrome By Proxy ("MSBP").<sup>31</sup> Parents suffering from MSBP fake illnesses for their children in order to gain sympathy.<sup>32</sup> Recently, medical and legal professionals moved away from defining medical child abuse as synonymous with MSBP; rather, medical child abuse is now determined by medical professionals, statutes, and courts to be a form of child abuse that encompasses the general abuse or neglect of a child's health in a medical setting.<sup>33</sup>

Statutory definitions surrounding medical child abuse vary in the United States. Depending on the state, the law can define allegations as medical child abuse, medical child neglect, or a combination of both abuse and neglect.<sup>34</sup> While medical neglect is mentioned in all state statutes,<sup>35</sup> most states (including Justina's jurisdiction, Massachusetts) do not define medical abuse or medical neglect specifically in their statutes.<sup>36</sup> Seven states define medical neglect as the failure to "provide any special medical treatment or mental health care needed by

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30. See Tiffany Allison, *Proving Medical Child Abuse: The Time is Now for Ohio to Focus on the Victim and Not the Abuser*, 25 J.L. & HEALTH 191, 192 (2012).

31. *Id.* MSBP is a mental illness in which a caregiver of a child creates fake symptoms of an illness or actually causes real symptoms of an illness in the child to fool people into believing the child is sick. *Id.* The parent takes this action to generate sympathy for the child or themselves. *Id.*

32. *Id.*

33. THOMAS A. ROESLER & CAROLE JENNY, *MEDICAL CHILD ABUSE: BEYOND MUNCHAUSEN'S SYNDROME BY PROXY* 43 (2009).

34. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., ADMIN. FOR CHILDREN & FAMILIES, *DEFINITIONS OF CHILD ABUSE AND NEGLECT 2* (2014), <https://www.childwelfare.gov/pubPDFs/define.pdf> [hereinafter CHILDREN'S BUREAU, DEFINITIONS].

35. *Id.* Neglect, as mentioned in state statutes, is codified as the "failure of a parent or other person with responsibility for the child to provide needed food, clothing, shelter, medical care, or supervision to the degree that the child's health, safety, and well-being are threatened with harm." *Id.*

36. *Id.* Only four states and territories actually define medical neglect in their child welfare statutes. *Id.* Massachusetts includes "medical care" as a category of neglect. 110 MASS. CODE REGS. § 2.00 (2008).

the child.”<sup>37</sup> Four states (not including Massachusetts), define medical neglect as the “withholding of medical treatment or nutrition from disabled infants with life-threatening conditions.”<sup>38</sup> Generally, the remaining states agree that medical child abuse occurs “when a child receives unnecessary and harmful or potentially harmful medical care at the instigation of a caretaker, wherein the caregiver is most likely the mother of the child.”<sup>39</sup> These different interpretations cause courts to apply different standards of proof in determining that a parent is such a threat to their child that removal of the child from the parent is necessary. Due to these numerous, varied definitions of “medical abuse” by state statutes, courts around the United States apply different standards and justifications when reviewing cases of medical child abuse. This lack of a uniform system on how to determine when a parent medically abuses their child leads to different reasons for the removal of a child from their parent’s home based on the jurisdiction.<sup>40</sup>

#### B. Family Courts’ Interpretation of Medical Child Abuse

There are two major categories of circumstances that lead to the removal of children for medical abuse or neglect.<sup>41</sup> The first category is medical neglect and encompasses the following circumstances, among others: when a child’s life is endangered and parents have taken no medical action; when a parent fails to provide routine medical care or physical examinations; when the parent has refused to consent to medical care recommended for an injury; or a parent who provides nonconventional or radical medical treatment to an ill child.<sup>42</sup> Nonconventional or radical treatment can vary from parents opting to use natural remedies to cure their children to parents seeking schedule 1 drugs to alleviate a child’s condition.<sup>43</sup> Schedule 1

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37. CHILDREN’S BUREAU, DEFINITIONS, *supra* note 34. These states are Arkansas, Mississippi, Iowa, North Dakota, Ohio, Oklahoma, Tennessee, Texas, and West Virginia. *Id.* at n.8.

38. *Id.* at 2. These states are Indiana, Kansas, Minnesota, and Montana. *Id.* at n.9.

39. See Allison, *supra* note 30, at 192. By using the phrase “generally,” this is to say that these states agree that harm to the child occurred via medical services at the instigation of the parent. *Id.*

40. See CHILDREN’S BUREAU, DEFINITIONS, *supra* note 34.

41. See, e.g., DONALD T. KRAMER, LEGAL RIGHTS OF CHILDREN (Rev. 2d. ed. 2005); CHILD WELFARE INFORMATION GATEWAY, WHAT IS CHILD ABUSE AND NEGLECT, RECOGNIZING THE SIGNS AND SYMPTOMS 3 (July 2013), <https://www.childwelfare.gov/pubpdfs/whatiscan.pdf> [hereinafter GATEWAY Report].

42. *Id.*

43. See Mary Pols, *Maine Parents Fight to Treat Sick Children with Medical Marijuana*, PORTLAND PRESS HERALD (Dec. 13, 2014), [http://www.pressherald.com/2013/12/14/maine\\_par](http://www.pressherald.com/2013/12/14/maine_par)

drugs are drugs with no acceptable medical use, and that carries a high probability of abuse.<sup>44</sup> Thus, a parent's use of these drugs is not only unacceptable, but also is criminal.

The second category leading to intervention is considered medical abuse.<sup>45</sup> This involves parents who subject their child to unnecessary medical treatment, including "doctor shopping"<sup>46</sup> and various medical procedures.<sup>47</sup> This sometimes may be a result of MSBP.<sup>48</sup>

Regardless of the cause for a removal petition, the state and children's services will base their complaint almost exclusively on the testimony and beliefs of medical doctors and professionals treating the child or medical professionals who wish to treat the child.<sup>49</sup> In general, all hospital workers (doctors, nurses, social workers) are mandated reporters of child abuse and neglect, meaning they are required to report suspected abuse or neglect to the appropriate child welfare agency.<sup>50</sup> Due to this mandate, hospital personnel will play a large role in a petition for a child's removal for medical abuse because they often initiate proceedings and provide opinions for removal.<sup>51</sup>

A court's interpretation of medical child abuse or neglect is important because it determines how the state must prove that a parent abused or neglected a child. Different standards of medical abuse or neglect create varying thresholds states have to meet to prove medical neglect or abuse to remove the child from the parents. What may

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ents\_fight\_to\_treat\_sick\_children\_with\_medical\_marijuana/. Schedule 1 drugs are considered the most dangerous with no currently accepted medical use. U.S. DRUG ENFORCEMENT ADMIN., DRUG SCHEDULING, <http://www.dea.gov/druginfo/ds.shtml> [hereinafter DEA, DRUG SCHEDULING].

44. DEA, DRUG SCHEDULING, *supra* note 43.

45. See GATEWAY report, *supra* note 41.

46. Doctor shopping happens when parents engage in "visiting numerous doctors to fraudulently get prescription drugs." Madison Park, *How Physicians Try to Prevent 'Doctor Shopping'*, CNN (Apr. 7, 2010), <http://www.cnn.com/2010/HEALTH/04/07/doctor.shopping.haim/>. In fact, Justina's previous pediatrician accused Justina's parents of doctor shopping for treatment that suited what they wanted. Neil Swidey & Patricia Wen, *A Medical Collision With a Child in the Middle*, BOSTON GLOBE (Dec 15, 2013), <http://www.bostonglobe.com/metro/2013/12/15/justina/vnwzbbNdiodSD7WDT6xZI/story.html>.

47. *In re Andrew B.*, 49 A.D.3d 638 (N.Y.2d 2008) (noting that mother continually sought unnecessary treatment for her child from different health professionals, resulting treatment harmed the child).

48. See, e.g., *In re Suffolk County Dep't of Soc. Servs.*, 215 A.D.2d 395, 396 (N.Y.S.2d 1995) (finding that a mother continuously subjecting her child to unnecessary treatment was due to her MSBP).

49. See, e.g., MASS. GEN. LAWS ch. 119, § 51A (2015) (listing hospital personnel as mandated reporters); KRAMER, *supra* note 41.

50. MASS. GEN. LAWS ch. 119, § 51A (2015).

51. *Id.*; see also MASS. DEP'T OF CHILD. & FAMILIES, *Who Are Mandated Reporters?*, <http://www.mass.gov/dppc/abuse-report/who-are-mandated-reporters.html>.

qualify as medical abuse or neglect in one jurisdiction is not defined as medical abuse or neglect in another.

For example, in New York, the supplementary commentary to the child neglect statute requires that the state prove that a parent's actions resulted in "the child's physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired."<sup>52</sup> New York has two requirements that the state must prove to determine a correct finding of medical abuse or neglect.<sup>53</sup> The state must first determine whether the parents have provided an "acceptable course of medical treatment" with the child's specific circumstance.<sup>54</sup> Second, the state must show that the parent's failure to seek medical treatment will result in impairment or put the child in immediate danger.<sup>55</sup> In contrast, Ohio's procedure for determining whether the court should grant the state's motion for removal provides deference to the state.<sup>56</sup> The threshold for removal is if the state can show by clear and convincing evidence "that it is in the best interest of the child to grant permanent custody of the child to the agency that filed the motion for permanent custody."<sup>57</sup>

Likely, if an Ohio court heard Justina's case, the lack of a specific standard for removal would allow Justina's removal from her parents' care. However, if Justina's case was heard in a New York court, it is likely that a New York court would not have removed Justina because, according to New York statute, it is probable that following a hospital's medical treatment plan could be considered an acceptable course of treatment. If the state of Massachusetts did not present evidence proving that following the medical treatment plan of Tufts Medical Center placed Justina in immediate danger, Justina's parents likely would have retained custody. The differences in the medical child abuse statutes in just these two states illustrate why a more stringent burden must be placed on all states to prove unacceptable medical treatment and immediacy of danger.

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52. N.Y. FAM CT. ACT § 1012, 4(a) (Mckinney 2009).

53. *Id.*

54. *In re Hofbauer*, 393 N.E.2d 1009, 1014 (N.Y. 1979).

55. FAM CT. § 1012.

56. *See* OHIO REV. CODE ANN. § 2151.414 (West 2014). Ohio defines neglect to include The parent has repeatedly withheld medical treatment or food from the child when the parent has the means to provide the treatment or food, and, in the case of withheld medical treatment, the parent withheld it for a purpose other than to treat the physical or mental illness or defect of the child by spiritual means through prayer alone in accordance with the tenets of a recognized religious body.

*Id.*

57. *Id.*

Medical neglect, therefore, can be easier for some states to prove when the law provides for a lower evidentiary standard that favors the hospital, leaving parents to fight against a liberal standard. Ohio's law is subjective in that the judge has the discretion to determine what is in the best interest of the child. This may not include determinations of what can be considered acceptable treatment or if the present treatment presents an immediate danger.<sup>58</sup> Ohio's law, in essence, allows a judge to choose the "better" treatment of two acceptable treatments.<sup>59</sup> Thus, the inconsistency in statutes allows for a variation in the way judges make determinations of medical child abuse. This discrepancy also makes a difference in how the medical abuse or neglect is viewed in its entirety by parents, hospitals, and the judicial system.

C. From the Hospital Room to the Courtroom: Transition from Parental Custody to State Custody

In Justina's case, the lack of a Massachusetts law similar to the New York statutory scheme made Justina's parents face an uphill battle, and little likelihood that Justina's parents would prevail. In addition to child abuse laws, the procedure to remove children sometimes stifles the voice of the parent and child by disallowing parents. To illustrate, this section uses the Massachusetts' child removal procedure as a case study to examine how state child welfare workers and courts interpret medical abuse and neglect statutes. The Massachusetts agency responsible for protecting children from abuse and neglect and for initiating court proceedings is the Department of Children and Families ("DCF").<sup>60</sup> Within the DCF, Children's Protective Services ("CPS") is tasked with the screening and investigation of allegations of child abuse/neglect.<sup>61</sup>

When a hospital doctor or nurse suspects an incident of abuse or neglect, the doctor contacts the hospital social worker, who then reports it to CPS.<sup>62</sup> Usually, the hospital social worker will report the type of abuse the doctor or nurse potentially identified, such as physi-

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58. *Id.*

59. *Id.*

60. "The Department of Children and Families (DCF) is the Massachusetts state agency charged with the responsibility of protecting children from child abuse and neglect." *About the Dep't of Child. & Families*, EXEC. OFF. HEALTH AND HUM. SERVS., <http://www.mass.gov/eohhs/gov/departments/DCF/>.

61. *Screening, Investigation and Initial Assessment*, EXEC. OFF. HEALTH AND HUM. SERVS., <http://www.mass.gov/eohhs/gov/departments/DCF/child-abuse-neglect/screening.html>.

62. MASS. GEN. LAWS ch. 119, § 51A (2015) (hospital personnel may report suspected abuse or neglect to children's services, or report it to a designated person within the hospital).

cal, sexual or medical abuse.<sup>63</sup> After a referral is received and it passes the initial screening, CPS then assigns the referral to a worker for investigation or assessment.<sup>64</sup>

Ultimately, the CPS worker then has several options: reject the hospital's referral, transfer the referral to another agency that provides support services, or accept the referral for investigation.<sup>65</sup> There are two requirements a referral must fulfill for investigation.<sup>66</sup> The referral must pertain to a child less than 18 years of age, and the child must be under the care or control of a person responsible for that child's health and welfare.<sup>67</sup> If those criteria are met, CPS will determine whether the allegation requires investigation (emergency or non-emergency) or assessment.<sup>68</sup> Serious cases involving severe physical abuse, sexual abuse, or severe neglect will likely fall under the emergency investigation category, which requires that an investigation begin within two hours of the report, and be completed within five business days of the report.<sup>69</sup> Non-emergency investigations must begin within two business days of the report and conclude within fifteen business days of the report.<sup>70</sup> CPS commences the field investigation by interviewing the parents or guardian, interviewing the child in the home or school, assessing the risk of the home, and assessing the child's physical being.<sup>71</sup> At any point in the investigation, CPS workers may remove a child from the home without a court order if "reasonable cause" exists to believe that the child is in imminent danger of abuse or neglect.<sup>72</sup>

If CPS believes that a child is threatened to the extent that removal is required, absent extraordinary circumstances that would place the child's life in imminent danger requiring emergency removal, the court must hold a hearing.<sup>73</sup> In Massachusetts, there must

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63. See David M. Pressel, *Evaluation of Physical Abuse in Child.*, AM. FAMILY PHYSICIAN, <http://www.aafp.org/afp/2000/0515/p3057.html> (providing guidelines for doctors in identifying certain types of abuse).

64. *Screening*, *supra* note 61.

65. MASS. DEP'T OF CHILD. & FAMILIES, CHILD ABUSE AND NEGLECT REPORTING: A GUIDE FOR MANDATED REPORTERS, <http://www.mass.gov/eohhs/docs/dcf/can-mandated-reporters-guide.pdf>.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. MASS. GEN. LAWS ch. 119, § 51B (2015).

72. *Id.*

73. *Id.*

be judicial certification of need in order for the state to remove a child from their home.<sup>74</sup> Massachusetts is one of the few states<sup>75</sup> that grants all parents, regardless of financial status, a right to counsel in child protection cases where the Massachusetts Department of Social Services is a party.<sup>76</sup> Comparatively, many states do not require an attorney in CPS proceedings, and some states allow the court to appoint a parent's attorney for a fee paid by the parents.<sup>77</sup> In cases like Justina's, where the state or agent of the state takes immediate custody due to the emergency circumstances, Massachusetts's statute requires this hearing to take place within seventy-two hours of the removal to comply with due process.<sup>78</sup> At this hearing, the DCF must establish by a preponderance of the evidence that the "child is suffering from or is in immediate danger of serious abuse or neglect, and that immediate removal is necessary to protect the child from serious abuse or neglect."<sup>79</sup> The Supreme Judicial Court of Massachusetts established that an intermediate standard of fair preponderance of the evidence provides "sufficient consideration for the interests of all those involved . . . and protects those interests from erroneous deprivation."<sup>80</sup> If this burden is met, the state has adequate grounds to obtain custody of the child.<sup>81</sup>

Thus, the court grants the state a custody order for the child that is either temporary or permanent depending on the circumstances.<sup>82</sup> But before the court decides to grant temporary custody to the De-

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74. *Id.* at § 29C. Need occurs when court certifies "continuation of the child in his home is contrary to his best interests." *Id.* The court must determine whether the state agency "has made reasonable efforts prior to the placement of a child with the department to prevent or eliminate the need for removal from the home." *Id.*

75. *In re V.V.*, 24 N.E.3d 1022, 1025 (Mass. 2015) (finding that the Supreme Judicial Court of Massachusetts held that parents have a constitutional right to counsel in private proceedings to establish guardianships of their children. The Supreme Judicial Court's holding was pursuant to due process and equal protection clauses of the Massachusetts Constitution).

76. MASS. GEN. LAWS ch. 119, § 29 (2015); AMY M. KARP, *Statutory and Procedural Overview in CHILD WELFARE PRACTICE IN MASSACHUSETTS* (2012).

77. See *A Parent's Guide to a Child Protective Servs. (CPS) Investigation*, TEX. DEP'T OF FAM. AND PROTECTIVE SERVS., [http://www.dfps.state.tx.us/Child\\_Protection/About\\_Child\\_Protective\\_Services/parentguide.asp](http://www.dfps.state.tx.us/Child_Protection/About_Child_Protective_Services/parentguide.asp) (noting that for example, parents in Texas may request a court-appointed lawyer; however, the court may be unable to appoint a lawyer depending on the financial circumstances of the parents).

78. See *In re Robert*, 556 N.E.2d 993, 1001 (Mass. 1990).

79. KARP, *supra* note 76.

80. *Robert*, 556 N.E. at 1001.

81. See MASS. GEN. LAWS ch. 119, § 24 (noting the only reasonable cause is needed for emergency 72-hour removal). The preponderance of the evidence and reasonable cause standard is vastly different from the standard to terminate parental rights, which must be higher than preponderance of the evidence. *Santosky v. Kramer*, 455 U.S. 745, 749 (1982).

82. KARP, *supra* note 76.

partment of Social Services, the child's removal from the parent requires court certification.<sup>83</sup> Court certification occurs when the court finds that "continuation of the child in his [parents'] home is contrary to his best interests and shall determine whether the department or its agent, as appropriate, has made reasonable efforts prior to the placement of a child with the department to prevent or eliminate the need for removal from the home."<sup>84</sup> In Massachusetts, the state proffers that the goal of child removal is to protect children from abusive or neglectful parents, as well as to maximize involvement from attorneys representing the state, parent, and child.<sup>85</sup> This involvement is intended to create an effective and fair court process by allowing representation and presentation of all sides of a dispute.<sup>86</sup> However, after a child is removed, parents are likely to face a more difficult challenge: convincing the court that the child can be returned home safely.

When the Department of Social Services assumes custody over a child, the state has legal and physical custody of the child.<sup>87</sup> The state is then able to determine medical care and to control whom the child visits.<sup>88</sup> Currently, in the United States, over fifty percent of children in the custody of the state remain wards of the state for over one year.<sup>89</sup> A child may remain in the care and protection of the state much longer than the several days it took for the child to become a temporary ward of the state. Therefore, returning a child to a parent is likely to take much longer than the procedure in which the state removed the child.

#### D. The Current System of Removal for Medical Child Abuse or Neglect Must Be Changed

A change is needed in the removal procedure when the allegation of abuse is solely for medical purposes—specifically, when the removal is due to the state's challenge of medical care for a child. As evidenced in Justina's case, the procedure to remove a child can happen in as little as a few days and the return of a child to a parent may

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83. MASS. GEN. LAWS ch. 119, § 29C (2015).

84. *Id.*

85. See KARP, *supra* note 76.

86. *Id.*

87. MASS. GEN. LAWS ch. 119, § 23 (2015).

88. *Id.*

89. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., ADMIN. FOR CHILDREN & FAMILIES, HOW LONG DO CHILD. STAY IN FOSTER CARE? WHAT ARE THEIR PLANS AFTER FOSTER CARE?, <http://www.acf.hhs.gov/programs/cb/faq/foster-care3>.

take many months or years. In cases of medical child abuse or neglect, change is needed to prevent a disruption in parental custody when a child's parents are providing an acceptable course of treatment.

Recently, media has brought to light cases in which removal laws has allowed the state to remove children from their parents solely for a disagreement in medical treatment. This phenomenon has been coined "medical kidnapping" by parental advocates.<sup>90</sup> In the past several decades, court cases around the country have recognized parental rights on a variety of fronts: the right to parent a child, the right of a father to have custody of a child, and the right of birth parents to nullify an adoption.<sup>91</sup> This Comment argues that removal procedures for parents facing allegations of medical abuse or neglect should parallel New York's statutory scheme to reflect the increasing importance of parents' autonomy in the medical treatment and decisions for a child, if appropriate.

## II. PARENTAL RIGHTS AND THE PHENOMENON OF MEDICAL KIDNAPPING

### A. Parental Rights in the Care of Children

The twentieth century brought much litigation from parents asserting certain rights pertaining to a child, coming from the federal level and state level.<sup>92</sup> Moreover, state statutes provide guidelines for determining the scope of parental rights in certain situations.<sup>93</sup> When analyzing these protections, it is clear that parents have certain fundamental rights. These rights should extend to the medical context, within the framework of the New York statutory scheme.

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90. See *CPS Takes Custody of 4-month-old at UMC, Parents Call it 'Medical Kidnapping'*, KCBd (Oct. 31, 2014, 2:43 PM), <http://www.kcbd.com/story/27177058/cps-takes-custody-of-4-month-old-at-umc-parents-call-it-medical-kidnapping>; see also MEDICALKIDNAP.COM <http://medicalkidnap.com/> (last visited Feb. 4, 2015) (noting that parents' rights website that details instances of parents allegedly losing their children due to disagreement with authorities about medical care).

91. See *supra* note 21; see also *In re Clausen*, 502 N.W.2d 649 (Mich. 1993) (holding that adopted baby ordered to be returned to her birth parents).

92. See discussion *infra* Part II.A.1.

93. See discussion *infra* Part II.A.2.

1. Constitutional Protection and States Case Guidance

Parents have a fundamental right to rear their child.<sup>94</sup> The Supreme Court cemented this right in the landmark case of *Troxel v. Granville*, directing that the Due Process Clause of the Fourteenth Amendment protects the right of parents to make important decisions concerning the “care, custody and control of their children.”<sup>95</sup> The Supreme Court elaborated that if parents adequately care for, and are fit<sup>96</sup> to parent their child, the state has no right to insert itself into the private lives of family.<sup>97</sup> Moreover, the state should not question the parents’ ability to make a decision seen as fit concerning the upbringing of the child.<sup>98</sup> The Fourteenth Amendment “does not permit a State to infringe on the fundamental right of parents to make child-rearing decisions simply because a state judge believes a “better” decision could be made.”<sup>99</sup> The Supreme Court recognized the inherent bond between parent and child and that this bond leads a parent to “act in the best interest of their children.”<sup>100</sup> Thus, *Troxel* stands for the proposition that parents have a constitutional right to raise their child in the manner they see reasonable, so long as the parents are fit to make the appropriate decisions.<sup>101</sup>

While clearly enunciated in *Troxel*, the liberty interest parents have in rearing their children is also deeply rooted in the nation’s history and traditions.<sup>102</sup> The Supreme Court first recognized in *Meyer v. Nebraska* the liberty interest of parents in the care, custody, and control of their children over nine decades ago.<sup>103</sup> In *Meyer v. Nebraska*, the Court found that the liberty of parents as protected by the Due Process Clause includes the right of parents to “establish a home and

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94. *Troxel v. Granville*, 530 U.S. 57, 65–66 (2000).

95. *Id.* at 57, 65–66.

96. *Id.* at 68–69. Parental fitness is determined at the trial court, and measured by the state’s controlling statute. Parental unfitness is proven by the parent’s inability “. . . by reason of conduct or condition which renders the parent unable to care properly for a child and the conduct or condition is unlikely to change in the foreseeable future.” *In re L.D.B.*, 891 P.2d 468, 470–71 (Kan. Ct. App. 1995). When the parent’s conduct is inconsistent with the child’s protected interest, it is in the child’s best interest for “all legal relations to be ended.” *See, e.g., In re Zoltan*, 881 N.E.2d 155, 163 (Mass. App. Ct. 2008); Daniel R. Victor & Keri L. Middleditch, *When Should Third Parties Get Custody or Visitation*, 27 GPSOLO 14, 14 (2010).

97. *Granville*, 539 U.S. at 68–69.

98. *Id.* at 68.

99. *Id.* at 72–73.

100. *Id.* at 69.

101. *See id.*

102. *Id.* at 66.

103. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

bring up children” and “to control the education of their own.”<sup>104</sup> Two years after the *Meyer* decision, the Supreme Court expanded upon the notion of liberty regarding parental rights by stating that “[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”<sup>105</sup> The Court continued to cement the constitutional right of parents in the upbringing of their children in *Prince v. Massachusetts*.<sup>106</sup> This case highlighted the primary role parents should have in the care of their child over the state: “[it] is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.”<sup>107</sup> The post World War II era recognized the fundamental right of parents to make decisions about the way their child is raised, how they are raised, and who raises the child.<sup>108</sup> Later cases upheld the rights of natural fathers, if fit, to have a fundamental right to parent their child,<sup>109</sup> and upheld the right of parents to choose the educational path for their child.<sup>110</sup> Leading up to the *Troxel* decision, many cases recognized the tradition of the parent-child relationship that must be protected by the Constitution.<sup>111</sup> In light of these landmark cases providing pro-parent precedent, parents have a fundamental right to the care, custody and control of their child.

In the medical choice context, although there is no supreme court precedent, case law in several states identifies a parent’s duty to make

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104. *Id.* at 399, 401.

105. *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925).

106. *Prince v. Massachusetts*, 321 U.S. 158, 164 (1944).

107. *Id.* at 165–66.

108. *See Granville*, 530 U.S. at 66.

109. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

110. *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (“The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.”).

111. *See, e.g., Granville*, 530 U.S. at 66; *Washington v. Glucksberg*, 520 U.S. 702 (1997) (“In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the ‘liberty’ specially protected by the Due Process Clause includes the right . . . to direct the education and upbringing of one’s children.”); *Santosky v. Kramer*, 455 U.S. 745 (1982) (discussing “[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child”); *Parham v. J. R.*, 442 U.S. 584, 602 (1979) (“Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course.”); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (“We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected.”).

medical choices relating to the care and control of their child.<sup>112</sup> These states identify parental rights in determining a course of treatment for a child.<sup>113</sup> These rights assume that parents will make medical determinations that are in the best interest of their child.<sup>114</sup> This assumption should apply when fit parents seek medical care alternate to what a hospital recommends. If the court determines that the parents are fit, fit parents are presumed to act in the best interests of their child.<sup>115</sup> In an era of increasing medical concerns and diagnoses, second medical opinions are becoming routine and encouraged by doctors.<sup>116</sup> Second, additional medical opinions prevent misdiagnosis, allow patients to find more affordable treatment, and prevent unnecessary treatments.<sup>117</sup> Furthermore, some insurance companies actually require patients to seek a second opinion for expensive treatments.<sup>118</sup> Thus, seeking a second medical opinion can be considered a wise choice for a parent to make. Therefore, a parent deemed fit by the family court should have the ability to seek the best option available for the health and welfare of the child, which should include seeking other medical opinions.

## 2. Statutory Custodial Rights

In addition to a fundamental constitutional right, parents are also protected at the state level<sup>119</sup> by legislation that outlines parental rights to the custody of their children.<sup>120</sup> These statutes provide that

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112. See *State v. Neumann*, 832 N.W.2d 560, 590 (Wis. 2013) (holding that parents have a fundamental right in Wisconsin to make decisions about religion and medical care); *J.W.J., Jr. v. P.K.R.*, 999 So. 2d 943, 951 (Ala. Civ. App. 2008) (“Alabama law recognizes that it is the legal custodian’s right and duty to provide medical attention for the child.”); *In re Karwath*, 199 N.W.2d 147, 149–50 (Iowa 1972) (holding that it is the legal custodian’s duty and parental right to provide necessary medical care).

113. See *Mitchell v. Davis*, 205 S.W.2d 812, 814 (Ct. Civ. App. Tex. 1947) (“It is the right and duty of parents under the law of nature as well as the common law and the statutes of many states to protect their children, to care for them in sickness and in health, and to do whatever may be necessary for their care, maintenance, and preservation, including medical attendance, if necessary.”).

114. *Id.*

115. *Victor & Middleditch*, *supra* note 96.

116. Robert Klitzman, *Second Opinions, Through a Patient’s Eyes*, N.Y. TIMES (Feb. 12, 2008), [http://www.nytimes.com/2008/02/12/health/views/12essa.html?\\_r=0](http://www.nytimes.com/2008/02/12/health/views/12essa.html?_r=0).

117. See *Why You Should Consider a Second Medical Opinion*, CLEVELAND CLINIC (Nov. 18, 2014), <http://health.clevelandclinic.org/2014/11/why-you-should-consider-a-second-medical-opinion/>.

118. *Id.*

119. Suzette M. Haynie, *Biological Parents v. Third Parties: Whose Right to Child Custody is Constitutionally Protected*, 20 GA. L. REV. 705, 711 (1986).

120. *Id.*

there is a presumption that parents are the preferred custodians for their children.<sup>121</sup> For example, in certain family proceedings, there is a common law presumption that favors keeping children with their biological parents:

Between the parental rights jurisdictions and the best interests jurisdictions are the majority of states, which apply a presumption favoring the biological parent. These state courts reason that custody in the natural parent usually serves the best interests of the child. These courts realize, however, that in certain circumstances it is better for the child to live with the nonparent. The nonparent, therefore, can rebut the presumption favoring the natural parent. The strength of the presumption varies from jurisdiction to jurisdiction.<sup>122</sup>

Thus, within the parent-child relationship in the custodial setting, parental custody is generally in the best interest of the child.<sup>123</sup>

After the presumption in support of natural parents is established, the next critical question is whether a parent is “currently fit to further the welfare and best interests of the child.”<sup>124</sup> When denying parents custody of a child, the judge must find that the parent is unfit.<sup>125</sup> Factors a court may take into consideration when determining the best interests of the child include: emotional stability, financial stability, and the parent’s physical stability.<sup>126</sup> This is a high standard, in that a challenger for custody of a child over a natural parent must prove by clear and convincing evidence that the natural parent is unfit, and that the best interests of the child dictate non-parental custody.<sup>127</sup> The authority for the state to intervene in custody is intended protect its children from harm, particularly if a child’s safety is threatened at the hand of an unfit parent.

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121. *Id.*

122. Haynie, *supra* note 119.

123. In disputed custody cases, the law begins with the presumption that parents have a natural right to the custody of their child. *In re Yushiko*, 735 N.E.2d 1260, 1262 (Mass. App. Ct. 2000).

124. *In re Lyle*, 932 N.E.2d 869, 869 (Mass. App. Ct. 2010) (quoting *Bezio v. Patenaude*, 381 Mass. 563, 576 (1980)).

125. *Id.*

126. *Yushiko*, 735 N.E. 2d at 1262.

127. *Id.*

### 3. State Challenge to Unfit Parents

A state, as *parens patriae*,<sup>128</sup> or parent of the nation, has the power to intervene with the custody of a child when the state believes it needs to protect the well being of a child.<sup>129</sup> With the fundamental liberty interest a parent has in the care, custody, and control of their child, a parent retains this interest even if they become a “less than ideal” caretaker of the child.<sup>130</sup> The state must find that the child is in need of the state’s care and protection.<sup>131</sup> To find this, the state must affirmatively show that the natural parent is unfit, and this finding requires more than “ineptitude, handicap, character flaw, conviction of a crime, unusual lifestyle, or inability to do as good a job.”<sup>132</sup>

Parental unfitness means that a natural parent has dangerous flaws that put the child’s welfare at a high level of hazard.<sup>133</sup> This hazard must place the child at a “serious risk of peril from abuse, neglect, or other activity harmful to the child, “ and the state must prove this hazard by clear and convincing evidence.<sup>134</sup> This requires the evidence the state submits to be sufficient to convey a “high degree of probability” that the proposition is true.<sup>135</sup> When these standards are met, only then does the state has the authority to assume the care and protection of the child.<sup>136</sup> However, recent news suggests that the state does not have to prove a parent unfit to remove a child in allegations of medical child abuse or neglect.

#### B. State’s Use of Authority to “Medically Kidnap” Children

Legislatures and courts have conclusively established that parents have a fundamental right to raise their child in a reasonable manner as they see fit.<sup>137</sup> Parents reasonably believe that they enjoy a wide range of autonomy over the important decisions in the lives of their

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128. *Parens patriae* means “parent of the nation.” *In re McCauley*, 565 N.E.2d 411, 413 (Mass. 1991). This term references a state actor when it intervenes to protect the well being of children. *Id.*

129. *Id.*

130. *See, e.g., In re Laurent*, 22 N.E.3d 974, 978 (Mass. App. Ct. 2015) (noting that unfitness in Massachusetts requires a showing that the parent’s parenting is so bad that is child is placed in “serious risk of peril from abuse, neglect, or other activity harmful”).

131. *In re Yetta*, 2 N.E.3d 910, 914 (Mass. App. Ct. 2014).

132. *Id.*

133. *Id.*

134. *Id.* at 915.

135. *Id.*

136. *Id.* at 914.

137. *See* discussion *supra* Part II.A. discussing the court cases that establish the parent’s right to make important decisions for a child.

children. Likely, parents would believe they enjoy this autonomy when making important medical decisions for their child.

Justina's story is contrary to the notion of parental autonomy in medical decisions because her case highlights the power and control of the state over medical decisions. This includes the state's enormous control over a parent's choice to seek a subsequent medical opinion.<sup>138</sup> The court proceedings are sealed, so the state's arguments and reasons are unknown.<sup>139</sup> Her case made national news, and brought attention to a phenomenon some have coined "medical kidnap."<sup>140</sup> Frustrated parents created this term because of the ability of hospitals to detain their children under unfair and improper pretenses.<sup>141</sup> A similar case in California highlights the deference given to the state and children's protection officials, as well as the increasing power of children services to control and regulate parent's medical decisions for their child.<sup>142</sup> In the case described below, the court, under extreme public pressure, released the court documents to the public.<sup>143</sup> These public court records highlight the involvement of the state when parents attempt to receive a second medical opinion, and how child welfare laws fails to protect parental autonomy.<sup>144</sup>

Anna Nikolayev's baby, Sammy Nikolayev, was ripped away from her after California children's services and police officers came to her home on reports from social workers at Sutter Memorial Hospital in Sacramento.<sup>145</sup> Sutter Memorial Hospital doctors wanted to perform immediate open-heart surgery on the child.<sup>146</sup> However, the baby's parents left the hospital against medical advice to receive a sec-

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138. In the realm of medical child abuse, parents are also faced with the presumption that hospitals report instances of medical child abuse or neglect in good faith, regardless of the intent. See *Heinrich v. Conemaugh Valley Mem'l Hosp.*, 648 A.2d 53, 58 (Pa. Super. 1994).

139. There is no doubt that the prosecutor and hospital alleged medical child abuse against Justina's parents. However, there are no released records that indicate why the court agreed with the prosecutor over the Pelletier's strong parental rights argument. See Swidey & Wen, *Justina*, *supra* note 2.

140. Bridget Bennett, *Sioux Falls Couple Says their Children are Victims of "Medical Kidnapping"*, KSFY (Dec. 22, 2014, 7:09 PM), <http://www.ksfy.com/home/headlines/Sioux-Falls-couple-says-their-children-are-victims-of-medical-kidnapping-286624191.html> (explaining another case of the so-called medical kidnapping).

141. See MEDICALKIDNAP, <http://medicalkidnap.com/> (website raising awareness for children removed from their parents in circumstances that contributors to the website consider unjust).

142. Zach Weismueller, *Court Documents Reveal Conflicting Accounts in Baby Sammy CPS Case*, REASON.COM (Nov. 6, 2013, 12:40PM), <http://reason.com/blog/2013/11/06/baby-sammy-court-documents-reveal-confli>.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

ond medical opinion at another local hospital.<sup>147</sup> At the second hospital, police and children's services agents observed Sammy's parents pursuing medical care for their son and eventually concluded Sammy was not in danger.<sup>148</sup> Sammy was released to his parents' care with instructions to follow up with a pediatrician.<sup>149</sup>

Sutter Memorial Hospital protested Sammy's follow up care and, with the aggressive belief that Sammy needed immediate follow up with pediatric cardiologists, petitioned for CPS to remove Sammy from his parents without a court order.<sup>150</sup> Following removal, the court ordered Sammy returned home with parental authority to make medical decisions, but continued the child medical abuse case.<sup>151</sup> While Sammy later had surgery at another hospital, the doctor noted that the surgery was necessary, but "not an emergency."<sup>152</sup>

Sammy's story is important for two reasons: first, by bringing national attention to the widespread phenomenon of "medical kidnapping," Sammy's parents were eventually successful in bringing him home and raising awareness about the conflict between parents' rights for subsequent medical opinions and a state interest that seems unsupported by evidence.<sup>153</sup> Second, Sammy's story led to a Sacramento CPS internal audit of risk assessments of children.<sup>154</sup> Baby Sammy is now rightfully home.<sup>155</sup> However, a lingering question remains as to why CPS was so quickly able to remove a child without a court order simply because the parents wanted a second medical opinion before consenting to major surgery.<sup>156</sup>

Justina and Sammy represent an amalgamation of two major concerns in removing children over disputes in medical opinions. First, Justina's case illustrates a cooperative effort between the state prosecutor and children's services that may lead to parents losing their constitutional right to make decisions to rear their child. Second, Sammy's case illustrates a need for all states to specifically define

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147. *Id.*

148. *Id.*

149. *Id.*

150. Lisa Flam, *Parents: Police Removed Our Child After We Sought Second Medical Opinion*, TODAY (May 1, 2013, 9:38 AM), <http://www.today.com/health/parents-police-removed-our-child-after-we-sought-second-medical-6C9708419>.

151. *Id.*; Weissmueller, *supra* note 142.

152. Weissmueller, *supra* note 142.

153. *Id.*

154. *Id.*

155. *Id.*

156. In non-emergency cases, a court order is required to remove a child from the home. *Id.*

medical abuse or neglect and purposefully exclude from this definition a parent's choice to seek a subsequent medical opinion.<sup>157</sup>

### III. COURTS SHOULD VIEW SUBSEQUENT MEDICAL OPINIONS AS A PROTECTED PARENTAL RIGHT

In the landmark Supreme Court case of *Troxel v. Granville*, the court recognized that natural parents have a fundamental interest in the “care, custody, and control of their child,” leaving parents responsible for rearing their children in any reasonable manner they see fit.<sup>158</sup> Nonetheless, the ability of the state to control certain medical decisions contradicts established parental rights. This moves further away from the *Troxel v. Granville* precedent protecting parent's rights. With CPS becoming increasingly involved with medical decisions that should remain the sole decision of fit parents, CPS is limiting parental interest in the care, custody, and control of a child. The joined power of CPS, hospitals, and prosecutors are slowly creating a state that polices parent's medical decisions for their children. If the state disagrees, the powers then rush to court to assume jurisdiction over children to make medical decisions that, fundamentally, should be left to the parents to determine.

With cases like Justina and Sammy appearing across the country,<sup>159</sup> parents may now fear the repercussions, ranging from mild and severe, that can arise from their medical decisions. Other than legal repercussions and the fear of losing custody of their child, parents may even fear hospitals and doctors to the extent that the parents prevent taking their child to hospitals and doctors. With CPS weighing in on medical decisions for children, parental rights are becoming severely limited when it comes to successfully obtaining subsequent medical opinions.

#### A. State Laws Protect Some Medical Decisions of Parents, But Does Not Protect Others: When The State Has A Legitimate Reason To Intervene

Parents are currently entitled to make certain medical decisions without legal intervention. However, seeking subsequent medical

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157. California does not define medical neglect. See CAL. WELF. & INST. CODE § 300 (2015); see also MASS. GEN. LAWS. ch. 119 § 29C (2015).

158. *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

159. Lapoint, *supra* note 24; Lynch, *supra* note 24.

opinions does not appear to be as protected as these other medical decisions. Current family medical decisions that are protected by statute or case law include, but are not limited to, birthing plans, vaccinations, and, occasionally, blood transfusions. These choices grant parents the freedom they are entitled to, allowing them to exercise a right to parental autonomy. For example, parents are allowed to choose the method of delivery of a child and parents decide whether a child receives vaccinations. These two medical situations describe medical procedures pertaining to children and the rights parents have, sometimes over the objection of hospital personnel and other individuals. Importantly, in these two situations the parents generally retain the freedom to decide.

While most births in the United States occur in hospitals,<sup>160</sup> women are free to choose a birthing plan.<sup>161</sup> In hospitals, women have the choice of delivering vaginally, having a cesarean section, or having a vaginal birth after cesarean.<sup>162</sup> While there are no laws regulating the exact procedure a woman must choose, hospitals and midwives follow standard procedures in recommending an appropriate plan for an expectant mother.<sup>163</sup> Yet, “physicians are neither compelled nor required to seek judiciary intervention requiring their pregnant patients to undergo treatment or change behavior for the best interest of the fetus.”<sup>164</sup> In other words, a mother does not have to fear the repercussions of her informed refusal, because she has a right to choose how she proceeds with delivery.<sup>165</sup> However, doctors also have the right to refuse to go along with a mother’s planned delivery if it goes against medical advice.<sup>166</sup> In extreme circumstances, the state

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160. Of the nearly 4 million births per year, 98% of women give birth in hospitals. See Phil Galewitz, *Not a Hospital, Not a Home Birth: The Rise of the Birth Center*, CNN (Oct. 12, 2015), <http://www.cnn.com/2015/10/12/health/us-birth-centers-increase/>.

161. Caitlin McCartney, Comment, “Childbirth Rights”?: *Legal Uncertainties Under the European Convention After Ternovszky v. Hungary*, 40 N.C. J. INT’L L. & COM. REG. 543, 551–52 (2015).

162. Alexis Chmell, *Home Sweet Home*, 33 J. LEGAL MED. 137, 141, 144 (2012).

163. See *id.* at 147; see also Elizabeth Kukura, *Choice in Birth: Preserving Access to VBAC*, 114 PENN ST. L. REV. 955, 995–96 (2010) (explaining doctor’s increasing role in recommending birth plans for expectant mothers).

164. Neha Deshpande & Corinna Oxford, *Management of Pregnant Patients Who Refuse Medically Indicated Cesarean Delivery*, 5 REV. OBSTET. GYNECOL. e144, e145 (2013). Some legal scholars relate this to *Roe v. Wade*’s grant of privacy in decision making. *Id.* at e146–47.

165. *Id.* This Comment does not discuss the differences in choosing delivery of a fetus versus choosing medical decisions for a child. Rather, the importance of this analogy is to highlight a parent’s choice in choosing medical care that may or may not have an adverse effect on the child.

166. *Id.*

can intervene if the parent does not follow recommended advice to see a doctor.<sup>167</sup>

Similarly, parents are free to choose whether their child is vaccinated.<sup>168</sup> Every state statute allows medical exemptions from vaccinations for legitimate reasons.<sup>169</sup> Legitimate reasons include a potential life-threatening allergic reaction and a medical inability to handle a vaccination if the child is sick.<sup>170</sup> Moreover, twenty states allow parents to opt their children out of life-saving vaccinations for “philosophical reasons,” and many states allow for a religious exemption.<sup>171</sup> Most physicians recommend vaccinations, and schools can refuse to enroll children who are not vaccinated.<sup>172</sup> Thus, while authorities may mandate vaccinations for children in certain cases (like for school), parents have the autonomy in choosing whether or not they want their child to be exposed to vaccines.<sup>173</sup>

Contrary to birthing plans and vaccinations, states have a legitimate interest in interfering with a parent’s medical decision for their child when it is argued that the state must intervene to protect the immediate health or life of a child.<sup>174</sup> For example, states will have a winning argument when it comes to life-saving blood transfusions.<sup>175</sup>

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167. See Alison Morrow, *Couple Fights for Custody of Children After Home Birth*, USA NEWS (Dec. 4, 2014, 12:06 PM), <http://www.usatoday.com/story/news/nation/2014/12/04/washington-home-birth-children-removed/19877193/>.

168. Mary Holland, *Compulsory Vaccination, the Constitution, and the Hepatitis B Mandate For Infants and Young Children*, 12 YALE J. HEALTH POL’Y, L. & ETHICS 39, 82–83 (2012).

169. Lindsey Bever, *7-year-old Cancer Patient Gives ‘A Damn’ About the Measles Vaccine*, WASH. POST (Feb. 13, 2015), <http://www.washingtonpost.com/news/morning-mix/wp/2015/02/13/7-year-old-cancer-patient-gives-a-damn-about-the-measles-vaccine/> (noting that California law requires children to receive vaccinations before attending public state schools, with certain exemptions).

170. *Id.*

171. *Id.*; see also Christine Parkins, Note, *Protecting the Herd: A Public Health, Economics, and Legal Argument for Taxing Parents Who Opt-Out of Mandatory Childhood Vaccinations*, 21 S. CAL. INTERDISC. L.J. 437, 440 (2012).

172. *Id.* at 444.

173. See *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905) (affirming guilty judgment in prosecution under state compulsory vaccination law, noting that “[r]eal liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own . . . regardless of the injury that may be done to others”).

174. See *In re Jamaica Hosp.*, 491 N.Y.S.2d 898, 900 (N.Y. Sup. Ct. 1985) (ordering blood transfusion to save the life of an infant over the objection of the mother). But see *In re Fetus Brown*, 689 N.E.2d 397, 406 (Ill. App. Ct. 1997) (reversing lower court ordering of a pregnant mother to receive a blood transfusion to save the life of the mother and her unborn child).

175. Karen L. Diaz, *Refusal of Medical Treatment Based on Religious Beliefs: Jehovah’s Witness Parents*, 16 J. CONTEMP. LEGAL ISSUES 85, 87 (2007) (explaining the Jehovah’s Witness stance against the ingestion of blood into the body, including blood transfusions. The author argues that the state needs to aggressively pursue transfusions for children when their lives are in danger).

When children are involved, courts will order that the protection of children's lives supersedes any potential religious justification.<sup>176</sup> Courts around the country are unanimous in "authorizing state intervention, over the religion-based objections of parents, to give blood transfusions to children who require them."<sup>177</sup> Reasoning "the right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death,"<sup>178</sup> courts acknowledge the state's interest in protecting the life of a child.

Thus, when assessing the state's intervention in certain family medical decisions, the state generally intervenes, and has an important government interest in intervening, in situations where the child's life is at risk. These determinations of risk, as in blood transfusion cases, are processed when physicians declare that the only option available to maintain the child's life is to engage in the treatment plan that the parents oppose.<sup>179</sup> If the child's life is not in imminent danger, parents have the ability to choose alternative remedies.<sup>180</sup>

Parent's ability to seek subsequent medical opinions for their children should have the same protection because the decision to seek opinions and treatment for a child is within a parent's medical autonomy. Parents should retain the freedom to decide the correct medical choice for their child without intervention from the state, particularly if the decision does not put the child's life in imminent danger. To be clear, importance of family autonomy and the protection of parental authority must not lead to circumstances that maltreat a child.<sup>181</sup> This treatment must be more than an "uncertain harm or mere risk," rather; courts have held that the state may intervene if a parent's decision will jeopardize the health or safety of a child.<sup>182</sup> As in birth plans, the state has no interest in intervention when the child's life is not at risk, and should not have the authority to determine a better course of action when hospitals have differing opinions because this completely interrupts parental medical autonomy. Yet, as Justina and Sammy's cases<sup>183</sup> show, states are now claiming an interest in non-essential

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176. *Id.*

177. *Id.* at 86.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* at 87.

182. *Commonwealth v. Robinson*, 910 N.E.2d 911, 918 (Mass. App. Ct. 2009).

183. *See* discussion Parts A and B.

medical decisions. The state is criticizing and intervening in medical matters where the child's life is not at risk, and parents have no recourse because most state statutes do not protect parental medical autonomy.

Similar to the struggle between medical care and religious beliefs, statutes should protect parental autonomy in medical decisions. Parents seek subsequent medical opinions to make an informed decision before consenting to major treatment.<sup>184</sup> Parents are particularly likely to seek subsequent opinions when the alleged major treatment needed is not immediately needed or medically necessary to protect a child's life. Without legal protection, parents may be relegated to following a single hospital or physician's course of action to maintain custody over a child or fear intervention by the state. Therefore, lack of protection from the legislature leave parents vulnerable and exposed to the state's challenge for custody.

**B. Lack of Uniform Guidance on Medical Child Abuse Laws is Damaging to Parental Autonomy**

Parental autonomy in medical decisions is most certainly a family law issue and belongs in the state courts. However, due to the flexible nature of the definition, standard, and application of medical abuse throughout the states, allegations of medical abuse or neglect results in different outcomes. In the United States, there is no model code or guidelines for child abuse and child neglect.<sup>185</sup> A parent's ability to opt for subsequent medical opinions should be considered a fundamental right that must be protected to preserve the familial privacy and autonomy.<sup>186</sup> Bolstering familial privacy and autonomy is impor-

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184. Other laws provide patients with the right to seek a second medical opinion for matters involving the Family and Medical Leave Act (FMLA), as well as other assorted public laws. See Pub. L. 103-3. The relevant portion of the FMLA grants employers the positive right to require an employee on leave to certify the leave by obtaining a second medical opinion. 29 U.S.C.A. § 2613(c)(1). Some states require a second medical opinion for elective surgeries when financed through the state public welfare system. MINN. STAT. ANN. § 256B.0625. Other states require a second medical opinion before physicians will prescribe, or pharmacists will fill, certain medication. Allison M. Busby, Comment, *Seeking a Second Opinion: How to Cure Maryland's Medical Marijuana Law*, 40 U. BALT. L. REV. 139, 178 (2010). With these standards in mind, it is quite surprising that the courts sometimes charge parents with medical child abuse.

185. There is no federal guideline or stands for child abuse or neglect. Rather, standards for child abuse are found in state statutes. Due to the differences in the guidelines for child abuse in various states, the justification for removal can fluctuate between jurisdictions leading to difference responses from the court for similar parental actions. See also discussion *supra*, Part I.A.

186. See Judith G. McMullen, *Privacy Family Autonomy and the Maltreated Child*, 75 MARQ. L. REV. 569, 581 (1992).

tant because of the assumption that it strengthens families by fostering positive child development, instilling good values, and respect for parents.<sup>187</sup>

Parents who are deemed fit and invested into the life and care of their child should have the option to prevent potentially unnecessary and invasive treatment. By seeking a subsequent medical opinion in non-emergency situations, parents are not endangering the life of their child. Rather, they are considering all options, similar to the determination and consideration parents make when parents choose a primary case physician, choose a school, and choose a daycare facility. They should not be punished so severely when there are drastic conflicts between physicians. Courts should not have the authority to determine the best medical course for a child when the circumstance is not life threatening. The court should not deter fit parents from determining the medical treatment path of their child.

### C. Subsequent Medical Opinions are a Legitimate Exercise of Parental Rights

The essential problem in Justina's case is the allegation of medical child abuse because of the Pelletier's request for a second opinion.<sup>188</sup> Generally, most physicians recommend their patients seek a second opinion, particularly when the diagnosis is confusing and/or the physician is considering experimental treatment. Concerned parents who face long-term, inpatient care for their child would likely seek a second opinion. A subsequent opinion leads to a better understanding of medical conditions and the ability for the parents to weigh the options before making an informed decision.<sup>189</sup> Parents will want to better understand their child's condition and make a decision that is best for the child. Indeed, one parental guide actually encourage parents to seek second medical opinions:

Once upon a time, parents got a second opinion only when their child was facing major surgery or when the doctor gave an unusual or extremely threatening diagnosis. Things have changed. Today, even if you have complete confidence in your child's pediatrician,

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187. *See id.* at 569. Family autonomy is "the state of separateness from societal intervention that occurs when adult family members are allowed to freely exercise their own rights of privacy in family decision-making." *Id.* at 570.

188. *See* Ablow, *supra* note 10.

189. Family Health Team, *Why You Should Consider a Second Medical Opinion*, CLEVELAND CLINIC (Nov. 18, 2014), <http://health.clevelandclinic.org/2014/11/why-you-should-consider-a-second-medical-opinion/>.

you may want a second opinion—whether to confirm that surgery is really the best option, ascertain that there are no new medical advances your current doctor may not be aware of, or because your insurance company requires one before treatment can proceed.<sup>190</sup>

Considering the relevant constitutional standards surrounding parent’s fundamental rights in the care and control of their children, courts should not consider informed decisions as medical child abuse.<sup>191</sup>

#### D. States Intervention and the Interaction With Patients Rights Law

According to Massachusetts’s public health law, a patient in a hospital or health institution has the freedom to choose what facility the patient prefers to utilize and the freedom to choose an attending physician.<sup>192</sup> Massachusetts’ statute appears to give parties, in this case the parents of a child in a hospital, the freedom to choose who treats their child and where their child is treated. From this statute, the freedom to choose a physician to treat their child is essentially equal to refusing certain physicians with an outrageous treatment plan to treat their child. If parents have the ability to refuse certain treatments or physicians for their children, they should have the ability to refuse certain treatment for their children without legal consequences. In most circumstances, parents are also required to consent to their children’s treatment. Parents have certain rights in regards to other medical decisions.<sup>193</sup> Regardless of the risk of opting out of treatment, parents constitutionally have a right to because it is their right as the decision maker of their children’s medical care, so long as it does not threaten the safety of a child.<sup>194</sup> Therefore, CPS and courts should not threaten parents with medical child abuse for deciding to

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190. Pamela F. Gallin, *When to Get a Second Medical Opinion*, PARENTS, <http://www.parents.com/health/doctors/when-to-get-a-second-opinion/>.

191. *Troxel v. Granville*, 530 U.S. 57 (2000).

192. MASS. GEN. LAWS. ch. 111 § 70E (2016). “Every such patient or resident of said facility shall have, in addition to any other rights provided by law, the right to freedom of choice in his selection of a facility, or a physician or health service mode. . . .” *Id.*

193. MASS. GEN. LAWS. ch. 111 § 70E (2016). Parents have the right to refuse vaccinations on the basis on religion or belief. The vaccines parents have the right to refuse are vaccinations that can prevent serious injury or death. Elizabeth Hatch, Comment, *To Vaccinate or Not to Vaccinate?: The Challenges and Benefits of the Jamie Schanbaum Act*, 15 TEX. TECH. ADMIN. L.J. 187, 191–92 (2013).

194. Hatch, *supra* note 193, at 195. Public policy focuses on the safety of the children; in circumstances with abuse or neglect, the government has an important interest in protecting children when their lives are at risk. *Id.*

seek a second medical opinion or alternate treatment that comes from the second medical opinion.

#### IV. ADOPT NEW YORK'S STATUTORY SCHEME

If a hospital chooses to report parents to CPS with an allegation of medical child abuse or neglect in a case where parents seek a subsequent medical opinion, the state and the hospital should face an uphill battle. First, courts should keep in mind that there is a presumption that parents are fit to make the best medical decision for their child. When a medical abuse or neglect case comes in front of the court, keeping in mind the important fundamental right a parent has to make decisions for a child, the court should presume that parents have the right to choose a reasonable physician or treatment path. Courts should also be able to consider the evidence a hospital presents, and if there is a unique circumstance, use its discretion to determine what is best for the child's medical care rather than immediately removing a child.

Second, all states should follow the New York two-step analysis for child removal based on medical abuse.<sup>195</sup> That is, the state must have the burden in: first proving that the parents recommended treatment course is unacceptable; and second have the burden of proving that the parent's recommend treatment will put the child in immediate danger.<sup>196</sup> New York's statute protects parents and children by highlighting that a parent has the ability to choose an acceptable course of treatment. This prevents a court from removing a child simply due to a disagreement with medical case, forcing the state to prove that a child is in danger because of an unacceptable course of medical treatment chosen by the parents. If, like in Justina's case, the court is presented with conflicting diagnoses between two reputable hospitals, parents should be presumed to continue with the care, custody and control of their child as they see fit unless the child is in imminent danger of unacceptable treatment.

This approach works best to protect parental autonomy and the state's interest in protecting children. The standard presumes that parents will act in the best interests of their children, and highlights that parents have a fundamental right to make decisions relating to their

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195. N.Y. FAM CT. ACT § 1012, 4(a) (Mckinney 2009).

196. *Id.*

children's care, control and custody.<sup>197</sup> Unless the court deems a parent unfit, children should remain with their parents. Moreover, parents should benefit from the presumption that they are best able to decide medical care. To overcome this presumption, the state, utilizing evidence from a hospital involved, must prove that it is not in the best interest of the child to remain with the parents.

This approach is in the best interest of the child because it ensures that parents have the utmost authority for medical decisions. When the state or commonwealth relies on the presumption that a hospital has a right to determine the most appropriate medical care, the rights of parents everywhere are at risk.

### CONCLUSION

Courts in the child welfare system need more guidance on to how to address the sensitive issue of medical child abuse or neglect. America is an ever-changing place of people with different ideas, beliefs and needs. Not all hospitals are created equal, and not all parents believe in the same treatment strategy. As such, parents should have the fundamental right to choose how their child is treated, within reason.

Amending state statutes would begin to solve the legal pitfalls that parents face when hospitals and the state appeal to courts to make decisions – decisions parents have the right to make. The *Pelleitiers* were a victim of a system that provided deference to the state, and placed the burden on the parents.<sup>198</sup> Instead, the burden should be on the state to prove that the parent is unfit to make medical decisions and to prove that the medical treatment sought threatens the well being of the child. Parents deserve protection from the law to preserve the right to make medical decisions — the New York scheme is ultimately the only way to ensure this important right is safeguarded.

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197. See, e.g., *Sharon v. City of Newton*, 769 N.E.2d 738, 746 (Mass. 2002); *Sayre v. Aisner*, 748 N.E.2d 1013, 1018 (Mass. App. Ct. 2001); *Petition of the Dep't of Pub. Welfare to Dispense with Consent to Adoption*, 421 N.E.2d 28, 36 (Mass. 1981).

198. *Swidey & Wen, Justina*, *supra* note 2.

