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WRONGS AGAINST IMMIGRANTS’ RIGHTS:
WHY TERMINATING THE PARENTAL RIGHTS OF DEPORTED IMMIGRANTS RAISES CONSTITUTIONAL AND HUMAN RIGHTS CONCERNS

By Rachel Zoghlin*

Introduction

Felipe Montes is a good father. Neither abusive nor neglectful, and but for his undocumented immigration status, he would be living happily with his wife and three children in North Carolina. In late 2010, Immigration and Customs Enforcement (ICE) officials detained and deported Felipe. Felipe did not even have the chance to say goodbye to his pregnant wife and two young sons. After he was deported, Felipe’s wife gave birth to their third son, who Felipe had yet to meet. Because Felipe’s wife suffers from mental illness, she could not care for their children alone, the three children were put into foster care. Throughout 2012, the state of North Carolina tried to terminate Felipe’s parental rights—his legal relationship with his children—so his three boys can be “freed” for adoption by another family. Because Felipe crossed the U.S.-Mexico border without inspection nearly ten years ago, his three children were in jeopardy of being taken away from him – forever.¹

Carlitos was only seven months old when ICE caught his mother, Encarnación Bail Romero, during a raid at the plant where Encarnación worked. Encarnación was convicted and imprisoned for identity fraud; after she completed her sentence, ICE transferred Encarnación to immigration detention, incarcerating and initiating removal proceedings against her. First, Carlitos stayed in the custody of Encarnación’s sister, and then with a child-less American family who attended her sister’s church. After two years of caring for Carlitos – whom the American

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couple renamed Jamison – the couple sought to adopt him. Before they could start the adoption process, however, a court needed to terminate Encarnación’s right to her child. The judge determined that during Encarnación’s involuntary incarceration (first in prison and subsequently in immigration detention), she had abandoned her child and made insufficient efforts to reunite with him. Meanwhile, ICE officials provided Encarnación no way to get in touch with her son. If she were forced to return to Guatemala, she wanted to bring her son with her. Encarnación was deported in 2010, and her son stayed with his “adoptive parents” in Missouri. Encarnación has not seen her son since he was seven months old – since the morning that ICE raided her employer’s plant in 2007.2

The dilemmas of Felipe and Encarnación are not unique and have become a growing problem. Since President Barack Obama first took office in January 2009, his administration has made immigration enforcement a top priority. In 2012, the U.S. government spent more money to deport immigrants – $18 billion – than on the FBI, Secret Service, DEA, U.S. Marshal Service and the Bureau of Alcohol, Tobacco, and Firearms combined.3 Since January 2009, the Obama administration has removed over 2.2 million immigrants.4 Of the over 211,000 individuals deported between January and June of 2011, nearly 22% (over 46,000) are parents of U.S.-citizen children.5 One collateral consequence of these deportations is that over 5,100 children have been placed into

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The deported parents of these 5,100 children in foster care are at high risk of losing their parental rights through termination of parental rights proceedings, thereby losing their legal relationship with their children forever.

The termination of parental rights of fit, deported immigrant parents occurs largely due to two different flaws in the family law system: first, the Adoption and Safe Families Act requires that a state bring termination proceedings against a parent whose child has been “out of custody” for fifteen of the proceeding twenty-two months; second, instead of discerning a parent’s fitness to deciding whether to terminate parental rights, family courts are employing a “best interest of the child” test—an extremely subjective determination, vulnerable to abuse and bias. The United States has a sinister history of discriminating against non-whites and immigrants, which is deeply embedded into both immigration and family law. This history has set the stage for the problematic practice of terminating the parental rights of fit but deported immigrant parents, raising very serious constitutional and human rights concerns.

Remedying past injustices and present discrimination against immigrant parents requires consideration of Critical Race Theory, LatCrit, and other critiques of traditional and liberal jurisprudence. It requires consideration of the various competing interests at play in termination of parental rights proceedings and the various constitutional provisions affected. Only by considering the unique legal situation of immigrants and people of color, the various competing interests at play, and the constitutional and human rights held by immigrant parents, will we be able to craft fair family laws and discern the best way to prevent undue terminations of parental rights of fit but deported immigrant parents.

I. Background and Analytical Basis

Given that the termination of parental rights of fit, deported immigrant parents disproportionately affects a distinct ethnic and racial minority, a legal analysis of the issue would be remiss if it did not consider Critical Race Theory (CRT), LatCrit, and a general critique of traditional liberal jurisprudence. The goal of Critical Race Theory is to “recognize the voices of outsiders by employing the narrative form and by

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6 Id. at 6.
7 A deported parent, regardless of fitness or desire to reunite with his/her child, most often cannot re-enter the country to fulfill this requirement due to immigration laws which: (1) criminalize the re-entry of deported individuals, or (2) refuse admission to individuals who have accrued “unlawful presence” in the United States, by being present for an extended period of time without a valid visa. 8 U.S.C. § 1326 (2006); 8 U.S.C. § 1182(a)(9)(B)(ii) (2006).
focusing on interrelationships of race, gender, and other identity characteristics.” Professor Richard Delgado summarizes various themes of critical race scholarship:

(1) an insistence on “naming our own reality”; (2) the belief that knowledge and ideas are powerful; (3) a readiness to question basic premises of moderate/incremental civil rights law; (4) the borrowing of insights from social science on race and racism; (5) critical examination of the myths and stories powerful groups use to justify racial subordination; (6) a more contextualized treatment of doctrine; (7) criticism of liberal legalisms; and (8) an interest in structural determinism.

Examining the termination of parental rights of fit immigrant parents solely through the lens of traditional jurisprudence fails to acknowledge the deep inequities embedded in our society and our legal system. As Stephen Shie-Wei Fan explains, “Critical race theorists . . . seek to clarify that . . . conventional jurisprudence may be based upon a flawed premise that racism (as well as other forms of discrimination . . . ) exists solely as discrete occurrences of anomalous, sociopathic behavior that can be confronted by, and ameliorated through, the accepted tenets of the law.” Professor Angela Harris observes that Critical Race Theory exists between, and draws from, Critical Legal Studies (CLS) and traditional civil rights scholarship. Harris explains:

CRT inherits from CLS a commitment to being ‘critical,’ . . . to locate problems not at the surface of doctrine but in the deep structure of American law and culture. . . . CRT inherits from traditional civil rights scholarship a commitment to a vision of liberation from racism through right reason. . . . CRT’s ultimate vision is redemptive, not deconstructive. . . . [C]rafting the correct theory of race and racism can help lead to enlightenment, empowerment, and finally to emancipation: that, indeed, the truth shall set you free.”

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10 Fan, supra note 8, at 1208.
11 Angela P. Harris, The Jurisprudence of Reconstruction, 82 CAL. L. REV. 741, 743
By employing critical race theory methodology, I hope to help debunk the notion that discrimination against immigrants in termination of parental rights proceedings exists not as a unique, exceptional occurrence, but rather as part of deeply embedded discrimination in the United States legal system.\textsuperscript{12}

I begin by addressing the history and context of discrimination within the realms of immigration law and family law. Discrimination inherent in the U.S. legal system, including discrimination in termination of parental rights proceedings, is not simply discrimination against immigrants as immigrants. It carries embedded racial discrimination, sexism, and ethnocentrism, among many other forms of discrimination. This multi-layered discrimination is relevant because an individual who identifies with multiple fronts of potential discrimination experiences a compounded discrimination, a distinct discrimination from this “multiple consciousness,” rather than experience each basis for discrimination divisibly.\textsuperscript{13} It is relevant, therefore, to examine many types of discrimination inherent in the immigrant experience.\textsuperscript{14} Acknowledging this nation’s history and context shows that discriminating against undocumented immigrant parents is neither unusual, nor an exceptional circumstance, but rather it is consistent with the evolution and structure of the United States legal system.

Additionally, I include two narratives, excerpts from two fit undocumented parents’ stories, which help illustrate the diversity of experience for individuals who face unjust termination of their parental rights. Using narratives here also humanizes the issue, and puts a face and a life to an otherwise faceless and lifeless legal issue. Professor Delgado explains the importance of narratives and utilizing the “voice” of oppressed peoples:

\begin{quote}
(1994).

\textsuperscript{12} See generally Fan, supra note 8, at 1210.

\textsuperscript{13} See Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 STAN. L. REV. 581, 584 (1990). Professor Harris calls “multiple consciousness” the notion that “we are not born with a ‘self,’ but rather are composed of a welter of partial, sometimes contradictory, or even antithetical ‘selves.’ . . . [C]onsciousness is ‘never fixed’ . . . but a process, a constant contradictory state of becoming, in which both social institutions and individual wills are deeply implicated.”

\textsuperscript{14} Discussing the legal construction of Mexican-American identity, Professor Haney-Lopez stresses the importance of considering both the impact of one’s ethnicity, as well as one’s race. See Ian Haney-Lopez, Retaining Race: LatCrit Theory and Mexican American Identity in Hernandez v. Texas, 2 HARY. LATINO L. REV. 279, 283 (1997) (“Utilizing ethnicity focuses our attention on the experience of being constructed as culturally removed from the norm; using race forces us to assess the imposition of an inferior identity constructed in immutable terms.”) (emphasis added).
“voice” scholarship can bring to our attention breaches of both types of equality. It can sharpen our concern, enrich our experience, and provide access to stories beyond the stock tale. Heeding new voices can stir our imaginations, and let us begin to see life through the eyes of the outsider. Not only can it broaden our point of view; bringing to light the abuses and petty and major tyrannies that minority communities suffer can enable us to see and correct systemic injustices that might otherwise remain invisible.\(^\text{15}\)

As a white American woman\(^\text{16}\) writing this paper, I am conscious of my privileged position and hope to avoid what Professor Delgado refers to as “Imperial Scholarship[:]” “[i]t does not matter where one enters this universe; one comes to the same result: an inner circle of about a dozen white, male writers who comment on, take polite issue with, extol, criticize, and expand on each other's ideas. It is something like an elaborate minuet.”\(^\text{17}\) Particularly for issues which predominately affect communities of color, conversations within the academy must include diverse perspectives. As such, I include in this work scholarship from academics of color, and, generally, scholarship that refuses to “ignore[] the position of its ostensible subjects.”\(^\text{18}\)

A. Historical context

1. Discrimination in Immigration Law: Plenary Power and Prosecutorial Discretion

The United States has a long and committed history of sewing discrimination into immigration law. The most heralded legal defense to a questionable immigration law is that Congress enjoys plenary power over immigration matters. As Professor Gabriel Chin notes, the plenary power doctrine is itself a discriminatory doctrine, having evolved from two

\(^{15}\) Delgado, supra note 9, at 109 (internal citations omitted).

\(^{16}\) In light of Professor Shie-Wei Fan’s discussion, I think it is relevant for me to disclose, and for readers to know, that I come to this issue, and come to analyze this issue, from a position of racial, socio-economic, and immigration-status privilege. See also Derrick A. Bell, Who’s Afraid of Critical Race Theory, 1995 U. ILL. L. REV. 893, 898 (1995) (“Those critical race theorists who are white are usually cognizant of and committed to the overthrow of their own racial privilege.”).


\(^{18}\) See Fan, supra note 8, at 1211.
Supreme Court decisions that uphold racist immigration rules by giving deference to Congress’s power.\textsuperscript{19}

Following the California gold rush in the mid-1800s, massive numbers of Chinese immigrants flocked to the United States. With discriminatory bias and anti-immigrant fervor, angry Americans urged both national and state legislators to react.\textsuperscript{20} In 1882, Congress passed the Chinese Exclusion Act, suspending the immigration of not solely Chinese nationals, but anyone of Chinese ancestry. The Supreme Court examined the Constitutionality of Congress’s blatantly racist and xenophobic law only a few years later, upholding the Act.\textsuperscript{21} The Court’s decision laid the foundation for the evolution of the plenary power doctrine.\textsuperscript{22}

Though race-neutral on its face, the plenary power doctrine introduced a rule of broad deference to congressional lawmaking; it remains solid law, and courts have applied it in a wide range of scenarios over the course of American history to justify discrimination.\textsuperscript{23} Rather than permitting isolated incidents of discrimination, Professor Chin notes that the plenary power doctrine has enabled, and continues to enable the United States government and federal courts to implement systematic

\textsuperscript{19} See Gabriel J. Chin, Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration, 46 UCLA L. REV. 1, 5 (1998) (citing Chan Chae Ping v. United States, 130 U.S. 581 (1889); Fong Yue Ting v. United States, 149 U.S. 698 (1893)).

\textsuperscript{20} See Erika Lee, The Chinese Exclusion Example: Race, Immigration, and American Gatekeeping, 1882-1924, 21 J. AM. ETHNIC HIST. 36 (Spring 2002) (quoting a San Francisco lawyer “sounding the alarm” before the California Senate: “The Chinese are upon us. How can we get rid of them? The Chinese are coming. How can we stop them?”); id. at 50 (quoting a keynote speaker at a lobby for the permanent exclusion of Chinese immigrants: “We want the Englishman, who brings [] capital, industry and enterprise; the Irish who build and populate our cities; the Frenchmen, with his vivacity and love of liberty; the industrious and thrifty Italians; . . . the Swedes, Slavs, and Belgians; we want all good people from all parts of Europe.”) (emphasis in original).

\textsuperscript{21} See Chae Chan Ping, 130 U.S. at 609 (“Whatever license . . . Chinese laborers may have obtained, previous to the act of October 1, 1888, to return to the United States after their departure, is held at the will of the government, revocable at any time, at its pleasure. [sic]”).

\textsuperscript{22} See id. at 603 (“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, 149 U.S. at 707 (“The right of a nation to expel or deport foreigners who have not been naturalized . . . is as absolute and unqualified, as the right to prohibit and prevent their entrance into the country.”).

\textsuperscript{23} See Chin, supra note 19, at 6-7 (noting that the plenary power doctrine has enabled Congress and federal courts to exclude hopeful immigrants grounds based on characteristics they considered “undesirable,” including: “homosexuals, Mormons, the mentally retarded, Southern and Eastern Europeans, persons of African descent . . . Mexicans[,]” political dissidents, non-English speaking persons, and illegitimate children).
discrimination against any unpopular group. Given that the doctrine was “motivated by racism,” Professor Chin justifiably urges for a departure from this precedent and encourages courts to exercise their discretion to ensure fundamental principles of justice.\textsuperscript{24}

The Supreme Court addressed allegations that the Immigration and Naturalization Service (INS) specifically targeted eight immigrants for deportation because they were affiliated with an unpopular group in \textit{Reno v. American-Arab Anti-Discrimination Commission}.

\textsuperscript{25} INS initiated deportation proceedings against a group of immigrants who belonged to the Popular Front for the Liberation of Palestine (PFLP). INS charged the eight petitioners under the McCarran-Walter Act, which, although repealed at the time the Supreme Court addressed the issue, “provided . . . for the deportation of aliens who ‘advocate . . . world communism.’”

\textsuperscript{26} The immigrants filed suit in federal district court, arguing that the INS was selectively using its discretionary power to “prosecute” individuals for immigration violations, in a way that infringed upon these individuals’ First and Fifth Amendment rights.

\textsuperscript{27} Again, the Court upheld the law which gave the Attorney General discretionary power to initiate deportation proceedings, or \textit{not} initiate, removal proceedings, as she, and INS—the agency under her control—saw fit.

\textsuperscript{28} Evaluating how the \textit{American-Arab} decision applies to the racialized U.S. immigration system, and the dearth of relief available to forcibly exiled immigrants, Professor Daniel Kanstroom proffers, “It is one thing to favor nationals of selected foreign countries. It is more problematic to explicitly disfavor or bar others. And it is most problematic of all to disfavor one group through selective enforcement of punitive deportation laws.”

\textsuperscript{30} Because of the tremendous amount of bias inherent in discretionary authority, the selective enforcement of immigration enforcement and the exercise of ICE

\textsuperscript{24} \textit{Id.}


\textsuperscript{26} \textit{Id.} at 473 (citing 8 U.S.C. §§ 1251(a)(6)(D), (G)(v) & (H) (1982)).

\textsuperscript{27} \textit{Id.} at 474.


\textsuperscript{29} \textit{Reno}, 525 U.S. at 492.

prosecutorial discretion remains a hotly contested issue in the immigration community today.\footnote{See, e.g., Seth Fried Wessler, ICE Vows More ‘Discretion’ in Deportations. Don’t Hold Your Breath, COLORLINES (June 24, 2011, 10:50 AM), http://colorlines.com/archives/2011/06/the_department_of_homeland_security.html (calling “toothless” an ICE memo advising agency attorneys on properly exercising prosecutorial discretion); Abby Sullivan, Note, On Thin Ice: Cracking Down on the Racial Profiling of Immigrants and Implementing A Compassionate Enforcement Policy, 6 HASTINGS RACE & POVERTY L. J. 101 (2009) (urging ICE to “prudently exercise its prosecutorial discretion when families are concerned”). See also Gerald L. Neuman, Discretionary Deportation, 20 GEO. IMMIGR. L.J. 611, 630-31 (2006) (“Immigration officials may choose deportees . . . that would otherwise be constitutionally suspect, and they may choose based on standards of conduct that are never revealed and cannot be challenged. The [American-Arab] decision leaves ambiguous whether the enforcement officials violate an unenforced constitutional duty when they engage in selective enforcement on such grounds, or whether they can do so without even self-reproach.”).}

2. Discrimination in Family Law: From Coverture and Slavery to Loving and Sidoti

Like the realm of immigration, family law in the United States is plagued by an unsavory history of discrimination and racism. The legal and political recognition of the family unit is characterized by male dominance and female submission.\footnote{See Reva B. Siegel, She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family, 115 HARV. L. REV. 947, 981 (2002) (quoting a Congressman in 1915: “Faithful to the doctrine of the old Bible and true to the teachings of the new, our fathers founded this Government upon the family as the unit of political power, with the husband as the recognized and responsible head.”).} The common law rule of coverture—that a woman’s identity was subsumed in the identity of her husband upon marriage—was based on the notion that women were the chattel of their husbands.\footnote{See id. at 983 (quoting Robert Steinfeld: “[T]he law of marriage gave men control over women and the ability to represent and speak for their wives in dealings with other men.”).}

\footnote{id. (“Even the briefest look at antisuffrage discourse reveals that core concepts of coverture were a vibrant part of American legal culture well into the twentieth century and shaped public as well as private law.”).}

\footnote{See PEGGY COOPER DAVIS, NEGLECTED STORIES 39 (1997) (“The slave could sustain none of those relations which give life all its charms. He could not say my wife, my child, my body. . . . The law pronounced him as chattel, and these are not the rights}
on the notion of coverture: how could a slave woman’s rights be subsumed by her husband, when neither had rights to begin with? How could a slave woman become the property of her husband, when she was already the property of someone else, when he was the property of someone else, and when everything he owned became the property of his owner? Slave children were not legally the “family” of their parents. It is the legal duty of a parent to guard and protect one’s child. How could a slave-parent protect his child when he had no right to control his child, and certainly no way to intervene with the actions of his owner, or meddle with the property of his owner. Harriet Beecher Stowe wrote, “[T]he worst abuse of the system of slavery is its outrage upon the family . . . it is one which is more notorious and undeniable than any other.”

After the abolition of slavery and the passage of the Fourteenth Amendment, the government could no longer wholly deny the legal protections of family based on race. Still, racial considerations in family-law matters persevered. It was not until 1967 that the ubiquitous state-imposed bans on interracial marriages were invalidated as unconstitutional in Loving v. Virginia. In examining a challenge by an interracial couple to Virginia’s criminal anti-miscegenation law, the Court concluded “[t]here can be no question but that Virginia's miscegenation statutes rest solely upon distinctions drawn according to race. . . . [T]his Court has consistently repudiated ‘[d]istinctions between citizens solely because of their ancestry’ as being ‘odious to a free people whose institutions are founded upon the doctrine of equality.’”

In 1984, the Supreme Court considered a vicious custody dispute between two white parents based on the mother’s decision to cohabitate with, and marry, a Black man. The Florida court exercising jurisdiction over the case originally granted custody to the child’s father, reasoning that, while “strides that have been made in bettering relations between the races in this country, it is inevitable that [the child] will . . . be exposed to the alien environment of a child of color.”

36 See id. at 35; see also id. (quoting an 1867 essay on family in The Liberator: “[T]he most appalling feature of our slave system is, the annihilation of the family institution.”).

37 To be clear, anti-miscegenation laws were largely aimed at preventing non-whites from marrying whites. Marrying outside of one’s race was not a criminal act if both parties were non-white. See Loving v. Virginia, 388 U.S. 1, 7 (1967) (criticizing Virginia’s reliance on Virginia Supreme Court case which upheld miscegenation laws, concluding that its purposes, “‘to preserve the racial integrity of its citizens,’ and to prevent ‘the corruption of blood,’ ‘a mongrel breed of citizens,’ and ‘the obliteration of racial pride,’” were not legitimate, and “obviously an endorsement of the doctrine of White Supremacy.”).

38 Id. at 11 (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943)).

remain in [the custody of her mother and Black step-father] and attains school age and thus more vulnerable to peer pressures, suffer from the social stigmatization that is sure to come.\textsuperscript{40} The Supreme Court decried the consideration of the mother’s new spouse’s race in their amendment to the parents’ custody agreement, famously stating: “Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”\textsuperscript{41} The Court concluded,

\begin{quote}
Whatever problems racially mixed households may pose for children in 1984 can no more support a denial of constitutional rights than could the stresses that residential integration was thought to entail in 1917. The effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody.\textsuperscript{42}
\end{quote}

Although such Supreme Court developments should suggest that racism and discrimination embedded in family law is subsiding, such discrimination remains alive and seriously compromises the integrity of our legal system. Even though laws overtly discriminating on the basis of race and gender have largely disappeared,\textsuperscript{43} the prevalence of discretionary decision-making authority (for prosecutors, judges, and government service-providing employees), leave vast potential for private biases to keep in place the discriminatory foundation of family law in the United States.

B. Narratives

The following stories illustrate only two situations of a reported 5,100\textsuperscript{44} across 22 states where the legal relationship between a parent and child may be or has been terminated due to the parent’s undocumented status, detention in an immigration facility, or deportation from the United States.\textsuperscript{45} Neither story is meant to essentialize either parent’s

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\textsuperscript{40} Id. at 431.
\textsuperscript{41} Id. at 433.
\textsuperscript{42} Id at 434.
\textsuperscript{43} It is worth noting, however, that state laws which deny marriage to same-sex couples constitute overt discrimination against certain families.
\textsuperscript{44} It is also worth noting that these statistics are from November 2011, and the numbers have indubitably risen significantly since that time. See Shattered Families, supra note 5.
\textsuperscript{45} Stolen Babies? Controversy in Missouri, ABCNEWS (Feb. 1, 2012),
\end{flushleft}
Taken together, they illustrate the gravity of this problem that affects undocumented immigrant parents regardless of their gender, marital status, or nationality.

1. Encarnación Bail Romero

I need him to feel my love, as the mother of Carlitos. I am the mother of Carlitos and I need him to be with me soon. . . . I never gave my consent for the boy to be adopted. I couldn’t give the adoption. Even though I was going to be deported back to my country, I wanted to go back with my son to Guatemala. . . . I start crying and get sad because he’s not with me. I need him with me. . . . I started to ask for help and ask what could I do to find out where my son Carlitos was. Nobody could help me because I don’t speak English. . . . I’m thankful he’s in good hands, but as Carlitos’s mother, I need him to be with me, because I’m his real mother.

Carlitos Bail Romero was only 7-months old when his mother—Encarnación Bail Romero, a single mother and undocumented immigrant from Guatemala—was swept up in an ICE raid at her place of employment, and incarcerated. Initially, Encarnación’s brother took care of Carlitos. Then, her sister took care of him. A few days a week, a couple at Encarnación’s sister’s church, the Velazcos, would babysit. A few days a week turned into five days a week, and Carlitos only stayed with his aunt and uncle on the weekends. The Velazcos knew of a childless couple, the Mosers, who were interested in adopting a baby; after a few visits, Carlitos went to live with the Mosers on a more permanent basis.

[hereinafter Stolen Babies?]; see also Shattered Families, supra note 5.

46 See generally Harris, supra note 13, at 585 (defining gender essentialism as “the notion that a unitary, ‘essential’ women's experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience.”). Although Harris explicitly addresses gender essentialism, the analogy fits here as well: essentializing the immigrant experience would not only silence some voices “in order to privilege others[,]” but worse, it may silence “the same voices silenced by the mainstream legal voice of ‘We the People’ . . . .” Id.

47 Stolen Babies?, supra note 45.

48 Brane, supra note 2.

At this time, the Velazcos unilaterally granted the Mosers custody of Carlitos, without consideration or a formal order by a judge. The Velazcos even informed Encarnación’s sister that there was nothing she could do to stop them from giving Carlitos to the Mosers. In December 2007, even though Encarnación had been given no notice of the family court guardianship hearing or the motion to terminate her parental rights to her son, the Court granted the Mosers’ petition for temporary custody.

Less than a year later, the Court considered the Mosers’ adoption petition, which included a motion to terminate Encarnación’s parental rights. The hearing lasted approximately an hour and a half, and consisted mostly of the Mosers’ own testimony, showing their fitness as parents. ICE refused to let Encarnación attend the hearing, so the Court only considered two letters Encarnación wrote, which indicated that she did not want her child to be adopted. The court also considered statement presented on Encarnación’s behalf:

I have suffered too much by knowing nothing about my little one, asking God to take care of him for me and let me be reunited with him soon. Please, Mr. Dominguez, look for the means to send my son [Carlitos] with my family in Guatemala. This is the telephone number of my sister in Guatemala, I spoke to her and she will welcome him in my country.

Encarnación’s attorney—the only person advocating for her rights—was provided by and paid by the Mosers. The judge did not request evidence regarding, or consider Encarnación’s fitness as a parent. In
terminating Encarnación’s parental right to Carlitos, the judge criticized her “lifestyle” rather than her ability to parent her son: “smuggling herself into a country illegally and committing crimes in this country is not a lifestyle that can provide any stability for a child. A child cannot be educated in this way, always in hiding or on the run.”

On appeal, the Missouri Court of Appeals determined that: (1) the Velazcos had no authority to grant the Mosers custody of Carlitos; (2) Encarnación was substantially prejudiced by proceedings for which she was provided little to no notice; and (3) that by conducting the proceeding without adequately notifying Encarnación, the court violated her “fundamental liberty interest” in raising her son. The Court of Appeals also condemned the lower court’s clear consideration of Encarnación’s immigration status in determining her fitness as a parent:

There is no Missouri case expressly addressing how to handle immigration status of the parents. The closest we come to an answer is through a case in the Nebraska Supreme Court [In re Angelica L. 767 N.W.2d 74, 94 (Neb. 2009)], which stated: “whether living in Guatemala or the United States is more comfortable for the children is not determinative of the children's best interests ... the ‘best interests' of the child standard does not require simply that a determination be made that one environment or set of circumstances is superior to another.

The Missouri Court of Appeals vacated the lower court’s decision and remanded so that the trial court could dismiss the motion.

The Mosers appealed the Court of Appeals’ decision to the Missouri Supreme Court, which agreed with the appellate court—that the trial court failed to adhere to notice requirements when it ordered the termination of Encarnación’s parental rights to Carlitos. In January 2011, the court determined that it could not fully consider many of Encarnación’s claims regarding her constitutional rights because such evidence had not been presented at the trial court level and therefore was not part of the record on appeal. The Missouri Supreme Court remanded the case back to the trial court for a new and fair trial.

In July 2012, Missouri Circuit Court Judge Jones ruled that Encarnación had “abandoned” her son, and therefore had no parental right to challenge her son’s adoption by the Mosers. The Judge permitted the

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56 Id. at *7.
57 Id. at *7-8.
58 See In re Adoption of C.M.B.R., 332 S.W.3d 793, 824 n.26 (Mo. 2011).
Mosers’ adoption petition to proceed. Although her lawyer discussed the possibility of appealing the decision, Encarnación may never be reunited with her son.

2. Felipe Montes

_Fui a dejar a mis hijos a la guarderia a las ocho en la mañana. Levante a mis hijos, como de custumbre. Les cambio. Los arregle para la guarderia. . . . Tenia una cita porque tuve unas multas por trafico, por no licencia y por no aseguranza. Me encontre con dos oficiales del ICE de inmigracion. Alli se me hizo la detencion, y me llevaron al otro estado. Sin decir nada a mi esposa, sin ver a mis hijos uno vez mas. Como, como iba recojer a mis hijos? Mi esposa se quedo completamenta sola y embarasada. . . . Y este es algo que a mi me duele ahora que mis hijos estan en la custodia de social services. En este mundo hay muchos injusticias. Y ahora, por lo menos, quisiera que enviaran mis hijos a Mexico. Aqui los ofreceria lo mas que podiera._

“I love my kids to death. . . . When they were born, it’s something so wonderful you can’t explain.”

Felipe Montes is a 31-year old Mexican national who was deported from the United States—separated from his wife and three children—in 2010. He came to the United States in 2001 and worked in landscaping.

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61 Wessler, _supra_ note 1.

Translation: I took my kids to daycare at 8:00 in the morning. I woke them up, as usual. I changed them. I fixed some things for them to take to daycare. . . . I had an appointment because I had some traffic tickets, for having no license and for having no insurance. There were two ICE officials from immigration there. They detained me and they took me to another state. Without being able to say anything to my wife, without seeing my children even one more time. How, how were my children going to get picked up? My wife was left completely alone, and pregnant. . . . That’s something that hurts me right now, that my children are in the custody of social services. In this world there are a lot of injustices. For now, at the very least, I would like them to send my kids to Mexico. I would provide them with all that I can.

62 _Id._
He worked 9-hour days before coming home to cook dinner for his family. His family and his wife’s family agree: Felipe would do anything for his children. He is the model of a devoted father.

Felipe went to the local traffic court to deal with a few tickets. North Carolina is one of the many states that do not issue driver’s licenses to undocumented immigrants, thus Felipe had no way of obtaining legal permission to drive. Still, he did whatever he could to support his family, which included driving to work without a proper license. He had no idea that when he dropped his kids off at daycare that morning that it would be the last time he’d see them in at least two years. ICE arrested Felipe at traffic court, detained him far away from his family, and quickly deported him to Mexico.

Felipe’s wife Marie (a U.S. citizen) suffers from mental illness, and could not care for their children on her own. Soon after Felipe was deported, Marie’s rights to the children were terminated. Felipe’s older sons were placed together in one foster home, and his infant son, as soon as he was born, was placed in a different home.

In February of 2012, the Allegany County Department of Social Services brought a petition to involuntarily terminate Felipe’s parental rights to his three boys. The department conducted a home study to discern whether Felipe’s home in Mexico would be an appropriate home for his children. A court document states, “[the county] did not approve the father’s home for placement because water is hauled in, there is a concrete roof and cement floor.”\(^63\) The home study generally approved the conditions of the home, noting that the conditions are “good,” and stated clearly that Montes’ “uncles would help care for [the children] and they would lend him a room inside the house to live in.”\(^64\) Still, the Department expressed hesitation in placing U.S. citizen children in Mexico; they say that the living situation would be problematic because the house has no running water. Felipe explained that, even though they don’t have running water, “there is clean water that we bring in to clean, drink, cook. We drink it every day.”\(^65\)

Felipe does whatever he can to stay in touch with his kids, even though he is thousands of miles away. He calls the daycare every day, and the women at the daycare help him connect with his kids. Felipe says: “I talk to the 4 year old and he says ‘Hola papa. Miss you. I love you. I’m playing.’ The middle one doesn’t talk much yet.”\(^66\) These calls are insufficient evidence for the Department, however. The Department

\(^{63}\) Id.
\(^{64}\) Id.
\(^{65}\) Id.
\(^{66}\) Id.
persists in its suit to terminate Felipe’s parental rights. The Department believes Felipe is not fit to take care of his kids because “[he] has not made an [sic] progress toward trying to obtain a temporary VISA or become legal to come back to the United States to visit or get his children.” The Department officials clearly have failed to consult with immigration attorneys; after deportation. It takes a rare and extraordinary measure for a deported person to re-enter the United States on any visa, whether to visit or “get” his/her children.

On August 1, 2012, DHS granted that rare and extraordinary measure to Felipe. He was granted temporary parole, permission to enter the United States and stay for three months, so he could attend his children’s custody hearing. Illustrating the rarity of this measure, Mexican Consul Carlos Flores stated, “This is the first time in my 11 years here that we’ve been successful in bringing someone [who was deported] back on humanitarian parole. . . . We’ve gotten people here for short periods who just need to come into the country, but never someone who’s been deported.” After weeks of numerous postponements, Felipe was permitted visitation with his sons:

> When Montes walked into the [Department of Social Services] room where the older two of his three children sat, he says his 4-year-old son, the oldest of his three, asked, “You’re my daddy, right? You come from Mexico right?” “Yeah, I came from Mexico,” Montes said. “I talk to you every Monday, every week on the phone.” The boy started to smile. . . .

> As Felipe left the visitation room where he saw his two children, his four-year-old asked his father, “Will you take us with you, daddy, will you adopt us?” “No,” he replied, holding back tears, “I don’t have to adopt you, you’re my babies, you’ll go with me as soon as I fix everything.”

After months of waiting and nearly two years of fighting, Felipe was provisionally reunited with his sons on November 27, 2012. The North

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67 Id.
69 Id.
71 Seth Freed Wessler, Felipe Montes Reunited With His Children, On Trial Basis,
Carolina County Court Judge granted Felipe a “trial placement,” whereby Felipe’s children could live with him in a local hotel from December 7th until February 19th.\textsuperscript{72} If the trial placement goes well, the Judge will close the case, reinstating Felipe’s full parental rights over his children.

C. Termination of Parental Rights: The “Family’s Civil Death Penalty”\textsuperscript{73}

1. Race Neutral Standards?

A parent’s right to a relationship with his/her child is fundamental.\textsuperscript{74} This relationship can be terminated only by a court order, to protect the child, after a showing by clear and convincing evidence that the parent is unfit.\textsuperscript{75} Parental unfitness is evaluated by a variety of factors, including: neglect; deprivation; a parent’s substance abuse; a parent’s emotional, mental illness, or mental deficiency; abandonment; or abuse.\textsuperscript{76}

States have diverse standards for determining parental unfitness and different calculi to decide whether the termination of parental rights is appropriate. In Missouri, for example, where Encarnación’s parental rights were terminated, the court considered: (1) if the child has been abandoned;\textsuperscript{77} (2) if the child has been neglected; (3) if the child has been under the jurisdiction of the juvenile court for over one year; (4) if the parent was convicted of a crime involving domestic abuse or rape; and (5) if the parent suffers from substance abuse problems that “render[] the parent unable, for the reasonably foreseeable future, to care appropriately
for the ongoing physical, mental or emotional needs of the child.”\textsuperscript{78} The Missouri statute specifies that the court should also consider the following circumstances in determining whether to terminate a parent’s rights:

(1) The emotional ties to the birth parent; (2) The extent to which the parent has maintained regular visitation or other contact with the child; (3) The extent of payment by the parent for the cost of care and maintenance of the child when financially able to do so including the time that the child is in the custody of the division or other child-placing agency; (4) Whether additional services would be likely to bring about lasting parental adjustment enabling a return of the child to the parent within an ascertainable period of time; (5) The parent's disinterest in or lack of commitment to the child; (6) The conviction of the parent of a felony offense that the court finds is of such a nature that the child will be deprived of a stable home for a period of years; provided, however, that incarceration in and of itself shall not be grounds for termination of parental rights; (7) Deliberate acts of the parent or acts of another of which the parent knew or should have known that subjects the child to a substantial risk of physical or mental harm.\textsuperscript{79}

Only if “clear, cogent and convincing evidence” exists to terminate parental rights will the court consider whether such termination is in the best interest of a child whom prospective parents wish to adopt.\textsuperscript{80}

In North Carolina, where Felipe Montes’s parental rights were in question, the court considered whether some of the following factors were met by clear and convincing evidence: (1) whether “[t]he parent has abused or neglected the [child]”; (2) whether the parent “willfully left the [child] in foster care” or in an out-of-home placement “for more than 12 months without” an attempt to correct the conditions which led to the child’s removal from the home; (3) whether “the parent is incapable of providing [ ] the proper care and supervision of the [child]”; (4) whether “[t]he parent has willfully abandoned the [child] for at least six consecutive months”; (5) whether the parent has committed domestic abuse or violence against the child, other children, or the child’s other parent; and (6) whether the parent’s rights to another child have already

\textsuperscript{78} \textit{MO. ANN. STAT.} § 211.447(5) (West 2011).
\textsuperscript{79} \textit{Id.} at (7).
\textsuperscript{80} \textit{Id.} at (6).
“been terminated involuntarily” “and the parent lacks [ ] ability or willingness to establish a safe home.”

While these statutes are race-neutral as written, because the calculation is so fact-specific and so much discretion is left to the trial court judge, bias is inevitably intertwined in the assessment. Professor Dorothy Roberts expounds on the problematic consequences of broad discretion in child welfare and child custody determinations. Even though abuse and neglect is statistically no more prevalent in families of color than in white families, children of color—specifically black children—are more likely to end up involved in the foster care system. Roberts challenges the dubious: “Spend a day at dependency court in any major city and you will see the unmistakable color of the child welfare system.”

Deeply ingrained stereotypes and biases embedded in the child welfare system and held by the actors involved in the child welfare system work to destroy families of color, largely because they do not conform with “acceptable” white notions of family.

Although race-neutral statutes do not explicitly require consideration of a parent’s immigration status, unsurprisingly, the same biases that torment the child welfare system manifest here, too. The trial court judge who terminated Encarnación’s parental rights to Carlitos condemned her for bringing a child into the world while she lacked proper immigration


82 DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 47-56 (2003) (“In San Diego . . . African American children were overrepresented in foster care at a rate six times their census proportion”). See also Charlton C. Copeland, Book Note, Private Pathologies and Public Policies: Race, Class, and the Failure of Child Welfare, 20 YALE L. & POL’Y REV. 513, 515-16 (2002) (summarizing various studies included in Roberts’ work Shattered Bonds) (“In Illinois, black children are 19% of the child population, but comprise over 75% of all children in foster care. In Chicago, black children constitute over 95% of the foster care population. While black children represent only 10% of the child population in San Francisco, they make up over 70% of the city’s foster care population. In New York City, white children are 30% of the child population, but comprise less than 3% of the city’s foster care population.”).

83 ROBERTS, supra note 82, at 6.

84 See Christina White, Federally Mandated Destruction of the Black Family: The Adoption and Safe Families Act, 1 NW. J.L. & SOC. POL’Y 303 (2006) (“Deeply rooted stereotypes about black family dysfunction place no value on the relationship between poor, black parents and their children.”); id. (“[These stereotypes] make it difficult to imagine poor, black parents actually caring for their children. [With legislation like the ASFA, the child welfare system] focuses on punishing what white America has deemed ‘disgraceful parenting’ instead of deciding what is actually best for the child.”).
documents for life in the United States. Because she successfully completed the extremely dangerous journey from Guatemala through Mexico into this country, and because she used false documents to secure a job at a factory—likely the only way she could obtain a job—this judge felt that she could never be an adequate parent for her baby. Given that racism, sexism, and xenophobia are so entrenched in our nation’s history and law, how do we avoid unjustly terminating the parental rights of parents of color, including undocumented immigrant parents, even where race or immigration status is neither a statutory factor, nor explicitly mentioned in a judge’s opinion?

2. Length-of-Time-Out-of-Custody Termination Ground

One of the most controversial bases for the termination of parental rights has been dubbed the “length of time out of custody” ground. Beginning in the 1970s, the child welfare system in the United States moved to a “permanency” model, emphasizing the need for children to have a stable family; if a child’s parent could not provide such stability, courts opted to “free” the child for adoption into a more permanent family. Summarizing this concept, Professor Michael Wald articulated, “[t]ermination would be the norm after a child has been in care a given period of time unless there are specific reasons why termination would be harmful to the child.”

In 1980, Congress first attempted to attack the problem of “foster care drift” by enacting the Adoption Assistance and Child Welfare Act (“CWA” or “AACWA”). The CWA “emphasized family preservation,”

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85 See, e.g., In re Adoption of C.M.B.R., No. SD 30342, 2010 WL 2841486 (Mo. Ct. App. July 21, 2010), transferred to 332 S.W.3d 793 (Mo. 2011) (“[T]he court stated that “[M]other’s] lifestyle, that of smuggling herself into a country illegally and committing crimes in this country is not a lifestyle that can provide any stability for a child. A child cannot be educated in this way, always in hiding or on the run.”).

86 See Jennifer Hand, Preventing Undue Terminations, 71 N.Y.U. L. REV. 1251, 1252, 1256 (1996) (relying on the groundbreaking work of HENRY S. MAAS & RICHARD E. ENGLE, CHILDREN IN NEED OF PARENTS (1959), which introduced the concept of “foster care drift” and underscored the importance of permanence and stability to child development).

87 See id. at 1256-57 (“Once the child is placed in foster care, however, the goal of ‘permanency planning’ shifts to getting the child out of foster care as soon as possible . . . .”).


urging states “to make reasonable efforts to keep families together”, and only to terminate parental rights “where the child's safety was so imperiled as to make reunification untenable.”

In the 1980s, growing concern about “foster care drift” motivated Congress to take further action. In 1997, President Clinton signed into law the Adoption and Safe Families Act (“ASFA”), which, among other things, required that states initiate proceedings to terminate the rights of parents whose children had been in foster care for 15 out of the preceding 22 months. Remarking on the evolution of family law from CWA to ASFA, Professor Libby Adler notes that, although “[t]he goal of permanence is common to both the CWA and ASFA, . . . the CWA embodied a preference for family preservation, ASFA favors expeditious termination of parental rights.”

The “length of time out of custody” ground is the only legal basis for a court to terminate the rights of a parent with no showing of abuse, neglect, or parental incapacitation. Swift movement to terminate parental rights, combined with discretionary authority of child welfare workers and judges, and deeply rooted social biases (against people of color, against immigrants, against single mothers and against fathers) ultimately result in permanent destruction of many families that do not fit within the socially established (read: white, middle/upper-class, U.S. citizen, heterosexual, married, two-parent) norm.

II. Conflicting Considerations in Terminating the Rights of Fit Immigrant Parents

A. State’s Interests

In 1982, the Supreme Court noted two distinct state interests relevant to “parental rights termination proceedings[:]a parens patriae interest in preserving and promoting the welfare of a child[,] and a fiscal and administrative interest in reducing the cost and burden of such proceedings.” Professor Marcia Zug additionally argues that the State

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91 See generally id. at 17-21.


93 Adler, supra note 90, at 9. See also id. at 23 (remarking that the ASFA marked a policy shift from social responsibility for poverty to individual blame or responsibility).

has an interest in ensuring that U.S. citizen children form and maintain strong bonds with the United States.\textsuperscript{95}

1. Parens Patriae

\textit{Parens patriae} was not always used as it is today—as a protective measure to intervene and protect vulnerable populations. Professor Douglas Rendleman, examining the history and evolution of the Latin phrase, explains that, in feudal England, “[\textit{parens patriae}] was an equitable concept[,]” employed to mediate disputes “between private parties . . . usually where property or guardianship was in issue.”\textsuperscript{96} In the English legal system, the Court of Chancery, “as an agent of the monarchy,” used \textit{parens patriae} to fulfill its duty to the crown: “to harmonize testamentary and guardianship problems in the interest of order and hierarchy.”\textsuperscript{97} Chancery relied on \textit{parens patriae}, “to prevent the victimization of vulnerable parties by prohibiting litigation by anyone outside the formal feudal hierarchy.”\textsuperscript{98} This foundation of \textit{parens patriae}—verifying, establishing, and reinforcing lineages and feudal hierarchies—is especially relevant because the context of feudal English law is drastically divergent from modern American law; by transplanting legal concepts across extremely different legal systems and times, much may be lost, misinterpreted, or mistaken.\textsuperscript{99}

In 1839, in \textit{Ex parte Crouse}, a U.S. court employed \textit{parens patriae} and “transplanted [the concept] into a branch of the poor law where it was used to justify the state statutory schemes to part poor or incompetent parents from their children.”\textsuperscript{100} \textit{Parens patriae} evolved from \textit{Crouse} as a


\textsuperscript{97}Id. at 208.

\textsuperscript{98}Id. at 208.

\textsuperscript{99}See generally Daniel Berkowitz et al., \textit{The Transplant Effect}, 51 AM. J. COMP. L. 163 (2003). \textit{See also} Michele Graziadei, \textit{Legal Transplants and the Frontiers of Legal Knowledge}, 10 THEORETICAL INQUIRIES L. 723, 728 (2009) (“[T]he finding that law is mobile has also been criticized . . . on the basis of the assumption that law as a social construct cannot remain the same, once it is dislocated. On this account, the ‘transplant’ cannot survive the change of context. In the new context, the original meaning of what is transplanted is, of necessity, lost.”); Rendleman, supra note 96, at 233 (“The phrase \textit{parens patriae} and the idea that children were being rescued from a downward course combined to detract the attention of the upper classes from inequalities in income and the need for adequate cash assistance for those in need.”).

\textsuperscript{100}Id. at 219. \textit{See Ex parte Crouse}, 4 Whart. 9 (Pa. 1839).
judicially approved guise to continue an “Elizabethan policy of severing poor parents from their children.”101

This use of *parens patriae* has been widely condemned in the realm of family law.102 Specifically with respect to removing children from their family home and terminating the parental rights of poor parents, scholars, and legislators alike have reinforced that poverty cannot serve as the basis for terminating the legal relationship between a parent and a child.103 The Supreme Court has explained that the State’s *parens patriae* interest in proceedings involving children is ensuring that every child has a permanent home.104 However, the Court noted that, where there is “reason to believe that positive, nurturing parent-child relationships exist, the *parens patriae* interest favors preservation, not severance, of natural familial bonds.”105

2. Fiscal and Administrative Interest in Termination of Parental Rights Proceedings

Although many courts recognize that states have a fiscal interest in making judicial proceedings efficient and brief, few courts venture to explain in detail the state’s fiscal and administrative interests in termination on parental rights proceedings and the significance of those interests. The Court has suggested that constitutionally required

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101 Rendleman, *supra* note 96, at 239.
102 See, e.g., *id.* at 205 (“[B]ecause of ethnocentrism and an unwillingness to admit that poor people were entitled to full citizenship, [society] continued to derogate children’s right to liberty and parent’s right to custody. . . . [C]alling the statutes ‘protective’ and by borrowing the idea of *parens patriae*, [] reformers . . . prevented . . . true protection and *parens patriae*.”).
103 See, e.g., ROBERTS, *supra* note 82, at 26-29; N.C. GEN. STAT. ANN. § 7B-1111 (West 2011) (“[N]o parental rights shall be terminated for the sole reason that the parents are unable to care for the juvenile on account of their poverty.”); KY. REV. STAT. ANN. § 625.090 (West) (ordering that termination of parental rights not be ordered unless at least one of certain enumerated factors are met, including “[t]hat the parent, for reasons other than poverty alone, has continuously or repeatedly failed to provide or is incapable of providing . . . for the child's well-being and that there is no reasonable expectation of significant improvement in the parent's conduct in the immediately foreseeable future . . . ”) (emphasis added).
105 *Id.* at 766-67 (emphasis added); “The State's interest in finding the child an alternative permanent home arises only ‘when it is clear that the natural parent cannot or will not provide a normal family home for the child.’” *Id.* at 767 (emphasis added).
106 See *id.* at 766 (acknowledging that one of two state interests at stake in parental rights termination proceedings is “a fiscal and administrative interest in reducing the cost and burden of such proceedings.”).
hearings, court-appointed counsel,\(^{107}\) and complex procedures\(^{108}\) might impose financial burdens on the State. Where the individual’s interest at risk in the proceedings is particularly high, however, a state’s interest in judicial and administrative efficiency is an insufficient basis alone to infringe upon the individual interest.\(^{109}\) While the State’s administrative interests may be important—and are certainly relevant to a due process calculation—at the very minimum, courts faced with the potential deprivation of a parent’s parental rights should be clear regarding what administrative or fiscal interests are at stake and how significantly those interests should be weighed.

3. Keeping American Children Connected to America

In addition to the notion that the State maintains a *parens patriae* right to protect vulnerable populations (in this case, children), by terminating the parental rights of fit immigrant parents, Professor Zug argues that the State maintains an interest in ensuring that U.S. citizen children are instilled with “the [f]undamental [v]alues of a [d]emocratic [s]ociety.”\(^{110}\) According to Zug, instilling these “fundamental values” requires U.S. citizen children be educated in U.S. schools; she asserts that the “mere presence [of children] in the United States ensures” that they “are exposed to the ideas necessary for their effective participation as future citizens.”\(^{111}\) Zug’s argument here devalues the quality and result of a foreign education. “[T]he problem of citizen children living outside the United States [is that] exposure to such fundamental values through either formal or informal training is much less likely.”\(^{112}\) Her argument also fails to recognize that many people, both citizens by birthright and by naturalization, have been educated outside the United States, have still developed important values of our society, and have become active citizens.

Professor Zug also uses *Tuan Ahn Nguyen v. INS*\(^{113}\) to argue that the State has an interest in ensuring that children born in the United States to immigrant parents maintain substantial and significant ties to this

\(^{107}\) *Id.* at 767.


\(^{109}\) *See Reed v. Reed*, 404 U.S. 71, 76 (1971) (holding that a statute that aimed to improve administrative efficiency by eliminating hearings was “the very kind of arbitrary legislative choice forbidden by . . . the Fourteenth Amendment.”).

\(^{110}\) Zug, *supra* note 95, at 1147.

\(^{111}\) *Id.* at 1149.

\(^{112}\) *Id.* at 1150.

country. Zug misreads *Nguyen* to stand for the proposition that Congress intended for derivative citizenship law to “ensure that future American citizens have a significant connection to the United States.”

In contrast, *Nguyen* dealt with whether foreign-born children with one U.S.-citizen parent should be permitted to derive citizenship. The Court upheld a statute that treated *potential* derivative citizen children differently based on their citizen parent’s sex. The Court’s consideration of the child’s ties to the United States are an afterthought, only mentioned as it related to the Court’s concern that the child have solid ties to his citizen parent before deriving citizenship.

Rather than attempting to ensure that “future American citizens have a significant connection to the United States,” the statutory distinction in *Nguyen* merely perpetuated sexist stereotypes about the relationship between illegitimate children and their unwed fathers. In practice, foreign-born “future American citizens” may have the exact same “connection to the United States,” but will be denied the benefit of derivative citizenship solely on the basis of their parent’s gender. Professor Zug uses the dicta of *Nguyen* to say that because “[derivative] citizenship [for foreign-born children of U.S. citizens] without a connection to the United States is not desirable,” birthright citizens must be raised *in* the United States. Arguing that *Nguyen* establishes a State interest in keeping U.S.-born children of immigrant parents “connected to America,” is illogical and untenable.

Zug uses this tenuous reading of *Nguyen v. INS* and the analogy to the State’s interest in the education of children to argue that “the State is justified in keeping citizen children in the United States after their parents’

\[114\] Zug, supra note 95, at 1151.

\[115\] Id.

\[116\] *Nguyen*, 533 U.S. at 62, 64-65 (upholding “Congress’ decision to impose requirements on unmarried fathers that differ from those on unmarried mothers” and finding the gender-based distinction “justified by two important governmental objectives[:]” first, “assuring that a biological parent-child relationship exists[:];” and second, “ensur[ing] that the child and the citizen parent have some demonstrated opportunity or potential to develop . . . real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States.”) (emphasis added).

\[117\] Zug, supra note 95, at 1151.

\[118\] See also Johnson v. Whitehead, 647 F.3d 120, 135-36 (4th Cir. 2011) (Gregory, J., dissenting) (evaluating a statute analogous to that in *Nguyen*, Judge Gregory noted that “Congress appears to have relied wholly on the invidious sex stereotype that an unmarried father has less of an interest than an unmarried mother in conferring citizenship to his child. . . . Discriminatory laws should not be allowed to stand on such undoubtedly fragile foundations.”), cert. denied, 132 S. Ct. 1005 (2012).

\[119\] Zug, supra note 95, at 1151.
deportation.” Overlooking the questionable legal foundation for this argument, Zug’s conclusion is paternalistic at best and racist at worst. It assumes that a child born in the United States will hold only American citizenship, when in practice, many immigrant parents secure dual citizenship for their children born in the United States. Zug further presumes that, even where children hold dual citizenship, their relationship to the United States is more important than their relationship to their parents’ country of origin. Finally, Zug’s conclusion assumes a unified “American” experience, essentializing the United States experience for all citizens, regardless of their ethnic origin, or birth nationality. Essentializing the “American” experience ignores and devalues the experience of millions of Americans—particularly immigrants to America, and bi- or multi-racial children of immigrant parents—whose identities as Americans are complex and involve multiple co-existing identities.

B. Children’s Rights

It is important to note that, while protecting children and vindicating the rights of children are venerable goals of parents, the State, and the legal academy alike, no court has established the fundamental rights of children. Still, Professor Zug argues that children’s rights should be paramount in proceedings to terminate parental rights. Relying on the controversial scholarship of Professors Elizabeth Bartholet and James Dwyer, Zug highlights a few instances where favoring parents’ rights sometimes detrimentally affects children:

[I]n the context of foster care and termination . . . [Professor Bartholet argues that] longer periods before termination of parental rights, while arguably good for parents, can be disastrous for their children who must spend

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120 Id. at 1152. “In cases where reunification with deported parents will harm a child’s future liberty, the State has the right, and maybe even the duty, to deny others, including parents, the ability to mandate reunification.” See id.

121 Zug’s presumptions here, and her assertions that an American education is a prerequisite to attaining “fundamental values” of our society, are consistent with the ethnocentric bias of white non-Jewish Americans noted by Professor David Raden. See also David Raden, Ingroup Bias, Classic Ethnocentrism, and Non-Ethnocentrism Among American Whites, 24 POL. PSYCHOL. 803, 815 (2003) (noting that White Non-Jews viewed Hispanics as less patriotic than Blacks, Asians, Jews, and White Non-Jews).

122 See, e.g., Harris, supra note 13, at 584 (addressing the inherent flaws of an analysis which employs essentialist notions of individuals based on only one characteristic).

123 See generally Zug, supra note 95, at 1167-70.
longer periods in foster care limbo. . . . Professor Dwyer discusses [the conflict between parents’ rights and “children’s rights”] in the context of education arguing that parental control over their children's education can deprive their children of the skills and knowledge that could benefit them in adulthood.124

Professor Zug admits that “harsh immigration laws put parents in ‘impossibly difficult positions,’” but concludes, with no legal authority or reasoning that, “it is unwise to assume that parents [in removal proceedings] act in their children's best interest.”125 As such, Zug deduces that when a parent is deported or in removal proceedings, a court should instead apply a “best interest of the child” test to evaluate whether to terminate the parent’s rights.126

The “best interest” test is malleable, reliant on innumerable considerations, and highly dependent on both the facts of the case and the biases of the welfare workers and judge(s) involved.127 While the “best interest of the child” standard is prevalent in various aspects of family law, particularly in custody and visitation determinations, it has no place in proceedings to terminate parental rights. Factors underlying custody and visitation decisions change often; the “best interest” test is well suited to address evolving situations. The termination of parental rights, in contrast, is final and cannot be undone if and when circumstances change. Moreover, although the “best interest” test may be appropriate for custody or adoption proceedings, which involve various parties including the State, parents, and third parties (such as step-parents, grandparents, or prospective adoptive parents), in contrast, parties to a proceeding to terminate a parent’s parental rights include only the State and the parents. Terminating parental rights permanently severs the relationship—legal, physical, and actual relationship—between parent and child. It cannot be undone.

The determination that it is in the “best interest” of a U.S. citizen child of an immigrant parent to remain in the United States after the parent is deported, that the child would be “better off” living in the United States without his/her parent, is a deeply racialized and paternalistic notion. This assumption fails to give credence to many other important considerations,

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124 Id. at 1168 n.134.
125 Id. at 1174.
126 Id. at 1176.
127 See Twila L. Perry, Race and Child Placement: The Best Interests Test and the Cost of Discretion, 29 J. Fam. L. 51, 57 (1991) (“Although the [best interest test] is intended to be a multi-factor balancing test, it may often allow race inappropriately to achieve a dominant position.”).
negative externalities that would bear on a child whose relationship with his immigrant parents was permanently severed. Some of these considerations include: a link to and an understanding of the child’s native culture; ability to speak the child’s native language; connection with biological relatives, including other siblings; difficulty relating to both the adoptive family and the child’s cultural group; and difficulty forming a self-identity.\textsuperscript{128}

Given that parenthood is a fundamental aspect of the human experience,\textsuperscript{129} infringement on this fundamental right should occur only in the most serious of circumstances. Deportation of an otherwise fit immigrant parent cannot rise to this level of severity to warrant such a drastic measure, even if, according to the subjective opinion of child welfare workers or judges, continuing to live in the United States would arguably be in the “best interest” of the immigrant’s child.

\section*{C. Parents’ Rights}

The Supreme Court has established and consistently reaffirms that parents have a \textit{fundamental} right to establish and keep a relationship with their children. Nearly a century ago, the Court established that the right to conceive and raise one’s children is “essential to the orderly pursuit of happiness.”\textsuperscript{130} In 1942, the Court remarked that one’s right to have children and raise a family is “one of the basic civil rights of man.”\textsuperscript{131} In addressing the right of parents to raise their children within a specific religious faith, the Court held, “[i]t is cardinal . . . 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.”\textsuperscript{132}

In 1971, the Supreme Court specifically dealt with the right of an unwed father to a judicial proceeding proving his unfitness before he was denied custody of his kids. In \textit{Stanley v. Illinois}, the Court remarked that

\begin{itemize}
\item \textsuperscript{128} See generally id; see also \textit{BARRIERS TO ADOPTION: HEARINGS BEFORE THE SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES} 214 (1985) (statement of William T. Merritt, President, National Association of Black Social Workers) (“We view the placement of Black children in white homes as a hostile act against our community. It is a blatant form of racial and cultural genocide.”); \textit{GEORGE BERNARD SHAW, ON THE ROCKS} 598 (1933) (“You can exterminate any human class not only by summary violence, but by bringing up its children to be different.”).
\item \textsuperscript{129} Congress, the Supreme Court, and the United Nations have endorsed the concept of parenthood as a fundamental aspect of the human experience, and affirmed that parental rights are both civil rights and human rights.
\item \textsuperscript{130} Meyer \textit{v.} Nebraska, 262 U.S. 390, 399 (1923).
\item \textsuperscript{131} Skinner \textit{v.} Oklahoma \textit{ex rel.} Williamson, 316 U.S. 535, 541 (1942).
\item \textsuperscript{132} Prince \textit{v.} Massachusetts, 321 U.S. 158, 166 (1944).
\end{itemize}
“[i]t is plain that the interest of a parent in the companionship, care, custody, and management of his or her children ‘come(s) to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.’”\(^{133}\) The Court concluded that the father’s interest in “retaining custody of his children is cognizable and substantial.”\(^{134}\)

Even where parents are alleged to be unfit, abusive, or neglectful, the Court has affirmed that the right to parent one’s children is \textit{fundamental}, and should be infringed upon \textit{only} in the most grave of circumstances.\(^{135}\) In proceedings to terminate one’s parental rights, the Supreme Court has repeatedly held that the state bears the burden to overcome the presumption in favor of a parent’s right to his child, and that the State’s burden in those proceedings is substantial.\(^{136}\)

\section*{III. Constitutional Implications}

\subsection*{A. Due Process}

\subsubsection*{1. Procedural Due Process}

In 1972, the Supreme Court considered for the first time whether a parent has a fundamental interest in his relationship with his children. In \textit{Stanley v. Illinois}, an unmarried father challenged the legitimacy of a state law that put children of unmarried parents into foster care upon the death of their mother.\(^{137}\) Mr. Stanley was never afforded an opportunity to defend his relationship with his children. Illinois law presumed that, because Mr. Stanley was not married to his children’s mother, he was not a parent, and therefore not entitled to notice or an opportunity to challenge custody determinations for his children.

While the specific issue before the Court dealt with unwed fathers’ constitutional right to equal protection, the Court held that “as a matter of due process of law, Stanley was entitled to a hearing on his fitness as a

\footnotesize{\(^{133}\) Stanley v. Illinois, 405 U.S. 645, 651 (1972) (citation omitted).  
\(^{134}\) Id. at 652.  
\(^{135}\) See Santosky v. Kramer, 455 U.S. 745, 753 (1982) (“The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life.”).  
\(^{136}\) See \textit{generally id.} at 764-65 (quoting Addington v. Texas, 441 U.S. 418, 427 (1979)) (“Increasing the burden of proof is one way to impress the factfinder with the importance of the decision and thereby perhaps to reduce the chances that inappropriate terminations will be ordered.”) (internal quotations omitted).  
\(^{137}\) \textit{Stanley}, 405 U.S. at 646.}
parent before his children were taken from him and that, by denying him a hearing and extending it to all other parents whose custody of their children is challenged.” By denying Stanley proper procedure, including notice and an opportunity to contest the state’s custody determination, the Supreme Court held that the Illinois statute violated Stanley’s right to due process.

Less than a decade later, in 1981, the Supreme Court answered the question of how much process is constitutionally required for a parent whose right to a legal relationship with his children is in jeopardy. Lassiter v. Dep't of Soc. Services addressed whether indigent parents are constitutionally entitled to legal representation in proceedings to terminate their parental rights. Drawing from the three-factor test in Mathews, the Court conceded:

[T]he parent's interest is an extremely important one (and may be supplemented by the dangers of criminal liability inherent in some termination proceedings); the State shares with the parent an interest in a correct decision, has a relatively weak pecuniary interest, and, in some but not all cases, has a possibly stronger interest in informal procedures; and the complexity of the proceeding and the incapacity of the uncounseled parent could be, but would not always be, great enough to make the risk of an erroneous deprivation of the parent's rights insupportably high.

One year later, the Court again dealt with the issue of the procedural due process rights of parents in termination of parental rights proceedings. In Santosky v. Kramer, two parents protested a New York state law that instructed a court to terminate a parent’s rights to his children if a preponderance of the evidence indicated that the parent neglected the child. A New York family court terminated Mr. and Mrs.

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138 Id. at 649.
140 Id.
141 Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (“First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”).
142 Lassiter, 452 U.S. at 31.
144 Id. at 748-49 (citing N.Y. FAM. CT. ACT § 622 (McKinney 1975)).
Santosky’s rights to their children, determining that a fair preponderance of the evidence tended to show that they were neglecting their children. The parents appealed this determination, arguing that it violated their constitutional rights.

The Supreme Court decried New York for engraving this low burden in statute. “[I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants.” At the very least, where the individual interests at stake in a proceeding are “particularly important,” the Court reiterated that the individual is constitutionally entitled to a hearing where the government bears the burden to establish by clear and convincing evidence.

Terminating the parental rights of fit immigrant parents simply because they have been deported cannot comport with the stringent constitutional requirements of due process. As mentioned, a parent’s interest in protecting and maintaining a legal relationship with her child is extremely high. The State has an interest in protecting children from unfit or abusive parents. According to the ASFA, the State also has a fiscal and administrative interest (related to welfare and foster care costs) in facilitating the termination of rights of parents unlikely to regain custody of their children (so that those children do not languish in foster care but rather can be adopted into new families). The risk of erroneous deprivation is extraordinarily high here given that a fundamental right is at stake. Evaluated under Mathews, the practice of terminating the parental rights of fit, deported immigrant parents violates the parents’ constitutional right to procedural due process.

2. Substantive Due Process

In addition to ensuring that individuals receive adequate procedural due process in proceedings to terminate their fundamental right to parent, the Due Process Clause “also includes a substantive component that ‘provides heightened protection against government interference with certain fundamental rights and liberty interests.’” As addressed above,

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145 Id. at 751-52.
146 Id. at 756-57.
147 Id. at 755. “In parental rights termination proceedings, the private interest affected is commanding; the risk of error from using a preponderance standard is substantial; and the countervailing governmental interest favoring that standard is comparatively slight.” See id. at 758.
148 See id. at 756 (citing Addington v. Texas, 441 U.S. 418, 424 (1979)).
the Supreme Court has established that a parent’s right to maintain a legal relationship with his or her children is fundamental. In the context of other fundamental rights, the Supreme Court has reiterated: “when a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.”

The Due Process Clause incorporates a substantive fundamental right of parents to “make decisions concerning the care, custody, and control of their children.”

Because parents have a fundamental right to a relationship with their children, terminating a fit parent’s relationship with his child, even if other potentially beneficial guardianship scenarios exist, violates the Due Process Clause of the Constitution. As the Court held in Santosky, “the fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State.”

Even where a parent has been deported and physically incapable of visiting his or her child (and, some might argue, has thus abandoned his or her child), a parent retains the constitutional protection of due process and stringent examination of laws that might infringe upon his fundamental right to his child. The Court recognized that “even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life.” Terminating the parental rights of otherwise fit, deported immigrant parents based on the nebulous, low, and incredibly subjective “best interest of the child” standard cannot possibly withstand the stringent standard required by the Constitution and consistently reaffirmed by the Supreme Court. Rather, as with other cases involving the termination of parental rights, a court must first find that a parent is unfit before it terminates the legal relationship.


Zablocki v. Redhail, 434 U.S. 374, 388 (1978) (addressing the fundamental right to marry).

Troxel, 530 U.S. at 66 (relying on Stanley v. Illinois, 405 U.S. 645, 651 (1972)). See also 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”); Quilloon v. Walcott, 434 U.S. 246, 255 (1978) (“We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected”); Parham v. J. R., 442 U.S. 584 (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”).

Santosky, 455 U.S. at 753.

Id.
B. Equal Protection

Given this country’s historic discrimination against immigrants, the growing problem of the termination of parental rights of fit immigrant parents raises serious equal protection concerns. Determining whether the practice violates equal protection involves four steps. First, is the discriminatory treatment aimed at a suspect class? Second, whether the discrimination is aimed at a suspect class determines the level of scrutiny the court applies in evaluating the alleged constitutional violation. Next, one must determine whether the discrimination is sufficiently tailored for the purported government interest. Ultimately, if the discrimination is not sufficiently tailored, the court will determine the appropriate remedy.

1. Suspect Classification

In United States v. Carolene Products, Justice Stone wrote that there are certain groups of individuals—“suspect classes”—against whom discrimination is particularly egregious. Although termination of parental rights statutes are facially nondiscriminatory, the increasing number of problematic cases involving the termination of immigrant parents’ rights raises the concern that states are treating undocumented immigrant parents differently than citizen parents in these proceedings. A judge in Southwest Florida described how an undocumented parent’s immigration status factors into a termination of parental rights proceeding:

Our child protection system has had very little, almost non-existent success at reunifying children . . . with parents who come the USA (1) undocumented, (2) poor, (3) uneducated/illiterate, (4) unable to communicate in English, (5) culturally segregated. . . . If children of these parents come into care, they are virtually doomed by these five factors and the probability of permanent loss of these children is overwhelmingly high. . . . [E]ven if a parent has some of these other factors—like lack of English language

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154 See, e.g., Chin, supra note 19, at 6-7; Lee, supra note 20; Kanstroom, supra note 30, at 195.

155 See U.S. v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) (“There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth.”).

156 See id. (noting that “prejudice against discrete and insular minorities,” including religious, national, or racial minorities, “may call for a correspondingly more searching judicial inquiry.”).
ability and cultural segregation—they still have a fighting chance of getting their kids back but if you had the factor of being an undocumented immigrant, it makes it impossible.\textsuperscript{157}

While the federal government has a legitimate basis to treat immigrants differently than citizens in many situations,\textsuperscript{158} differential treatment in a state family court based on a person’s immigration status raises serious constitutional concerns.\textsuperscript{159}

Even though many immigrants are members of racial and national minorities and are often the target of substantial prejudice, in 1982, the Supreme Court rejected the argument that undocumented immigrants are a “suspect class.”\textsuperscript{160} Arguably, however, circumstances have changed so substantially over the past 30 years that re-examining this determination is warranted. At the time, the Court noted that there were an estimated three to six million undocumented immigrants living within the United States.\textsuperscript{161} That estimation has increased exponentially. The Pew Hispanic Research Center estimated that there were approximately 11.2 million unauthorized immigrants living in the United States in 2010.\textsuperscript{162} Furthermore, while entry into this country is sometimes a voluntary action,\textsuperscript{163} because immigration law severely punishes individuals who are unlawfully present in the country for an extended period of time, one’s status as undocumented is less voluntary. Many undocumented immigrants, especially the spouses of U.S. citizens, would seek to adjust to a lawful immigrant status, but fail to do so because of severe penalties levied

\textsuperscript{157} Shattered Families, supra note 5, at 17.

\textsuperscript{158} See Adams v. Howerton, 673 F.2d 1036, 1042 (9th Cir. 1982) (“Congress has almost plenary power and may enact statutes which, if applied to citizens, would be unconstitutional.”).

\textsuperscript{159} See Plyler v. Doe, 457 U.S. 202, 213 (1982) (“The Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation. That objective is fundamentally at odds with the power the State asserts here to classify persons subject to its laws as nonetheless excepted from its protection.”).

\textsuperscript{160} Id. at 219 n.19 (1982) (“Unlike most of the classifications that we have recognized as suspect, entry into this class, by virtue of entry into this country, is the product of voluntary action. Indeed, entry into the class is itself a crime.”).

\textsuperscript{161} Id. at 218 n.17.


\textsuperscript{163} It is debatable whether, for many individuals who enter this country to escape persecution or violence, fleeing to the United States is a purely voluntary act.
against them. Furthermore, contrary to the Supreme Court’s reasoning in *Plyler*, entry into class of “undocumented immigrants” is a civil infraction, not a crime.

In addition to a bias against immigrants, the differential treatment of immigrants in termination of parental rights proceedings suggests a racial bias, which indubitably warrants a high level of scrutiny. While the United States welcomes immigrants of all races from countries around the world, the majority of immigrants in the United States are Latino. Due to uncontrolled violence and global poverty, many immigrants from Central America and Mexico flee to the United States with aspirations to make a better life. Reports estimate that approximately 11 million people in the United States are undocumented immigrants. The prevalence of undocumented immigrants and employment of unauthorized workers is a polarizing political issue, relevant not only on the national level, but for local communities and politics as well. Politicians at every level feed off racism and anti-immigrant biases and perpetuate the racism and dehumanization of immigrants through scare-tactics and propaganda.

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164 See 8 U.S.C. § 1182(a)(9)(B)(ii) (2006) (subjecting undocumented immigrants who have accrued 6 months of unlawful presence to a mandatory 3 year bar from the United States, and subjecting undocumented immigrants who have remained in the country for over one year without lawful presence to a mandatory 10 year bar from the United States).


167 Passel & Cohn, supra note 1622.

168 See, e.g., *Immigration Ruling Could Have Broad Impact*, CBSNEWS (Feb. 11, 2009, 4:28 PM), www.cbsnews.com/stories/2007/07/28/national/main3107529.shtml (A Pennsylvania mayor justified his law that fined landlords for renting to undocumented immigrants on an influx in crime: “When you start seeing serious crimes being committed, very violent crimes being committed and time and time again those involved are illegal aliens, it doesn't take a brain surgeon to figure out [what to do].” Federal courts later deemed the ordinance unconstitutional.); *Website Called ’IllegalAlienReport’ Allows People to Anonymously Report Suspected Undocumented Immigrants*, HUFFINGTON POST (May 7, 2012, 1:32 PM), http://www.huffingtonpost.com/2012/05/07/illegalalienreport-website-undocumented-immigrants_n_1496204.html (noting that the website has published “personal names and included locations on Google Maps of the whereabouts of alleged undocumented
Immigration Reform ("FAIR"), which has been designated as a hate group by the Southern Poverty Law Center.\textsuperscript{169} Despite this, Congress has called on FAIR to provide expert testimony on immigration issues. Increasingly, this xenophobia and anti-immigrant rhetoric has been recognized and criticized.\textsuperscript{170}

2. Level of Scrutiny

It is not clear which level of scrutiny applies to immigrants whose parental rights are at risk for termination. Supreme Court precedent definitively establishes that the Constitution does apply to immigrants, even undocumented immigrants. "Whatever his status under the immigration laws, an alien is surely a ‘person’ in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as ‘persons’ guaranteed due process of law by the Fifth and Fourteenth Amendments."\textsuperscript{171} If, as the Supreme Court

\textsuperscript{169} See About Fair, FAIR, http://www.fairus.org/about (last visited May 7, 2012) ("FAIR advocates a temporary moratorium on all immigration except spouses and minor children of U.S. citizens and a limited number of refugees. . . . A workable immigration policy is one that would allow us time to regain control of our borders and reduce overall levels of immigration to more traditional levels of about 300,000 a year."); see Heidi Beirich, Federation for American Immigration Reform’s Hate Filled Track Record, S. POVERTY L. CENTER: INTELLIGENCE REP. (2007) (quoting John Tanton, the founder of FAIR, on “the inevitability” of immigration resulting in whites becoming the minority racial group in the United States: “In the bacteriology lab, we have culture plates. . . . You put a bug in there and it starts growing and gets bigger and bigger. And it grows until it finally fills the whole plate. And it crashes and dies.").


suggested in 1982, undocumented immigrants do not enjoy the elevated protections of a “suspect class,” a reviewing court may analyze the constitutionality of the termination of immigrant parents’ rights under rational basis review. To pass rational basis review, a law must be rationally related to a legitimate government objective. As long ago as 1886, the Supreme Court noted that, even a law which appears to be “fair on its face, and impartial in appearance,” could constitute “unjust and illegal discrimination,” and a denial of equal protection of the law pursuant to the Constitution, if it is “applied and administered by public authority with an evil eye and an unequal hand.”

In *Yick Wo*, the Court determined that a law regulating commercial laundries in wooden buildings, which allowed local officials to grant or withhold operating permits, was unconstitutional because officials applied the law to overwhelmingly deny such permits to Chinese immigrants and citizens of Chinese descent. Even where a statute is rationally related to a legitimate government purpose (here, relating to fire safety), it raises constitutional concerns if applied in a discriminatory manner.

To withstand intermediate scrutiny, a law that treats individuals differently must be substantially related to an important governmental interest. If undocumented immigrants are a suspect class in today’s society, state laws to terminate parental rights that distinguish on this basis may violate the 14th Amendment. Do state laws that terminate parental rights of fit immigrant parents serve an *important* government interest?

As addressed above, the Supreme Court has identified two distinct governmental interests in the involuntary termination of parental rights: “a *parens patriae* interest in preserving and promoting the welfare of the child and a fiscal and administrative interest in reducing the cost and burden of such proceedings.” Since the Court has already established that the State gains nothing by terminating the rights of fit parents, the remaining State interest in terminating the rights of fit immigrant parents is an administrative interest. The Supreme Court addressed a similar question in *Reed v. Reed* and held that administrative judicial efficiency, while a legitimate goal, is an insufficient basis to sustain an otherwise discriminatory law.

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173 Id. at 374.
174 See, e.g., *Craig v. Boren*, 429 U.S. 190, 197 (1976) (“[S]tatutory classifications that distinguish between males and females . . . must serve important governmental objectives and must be substantially related to achievement of those objectives.”).
177 Id. at 656 n.8.
Given that the majority of immigrants to the United States come from Latin America immigrants detrimentally affected by termination of parental rights suits may be overwhelmingly Latino. If this is the case, the practice may warrant strict scrutiny. To survive a strict scrutiny analysis, a law must be narrowly tailored to fit a compelling government interest. As mentioned above, the government interest involved here—administrative efficiency—is not likely compelling enough to warrant the discriminatory treatment between Latino immigrants and non-immigrants. Even if it were a compelling interest, terminating the parental rights of fit immigrant parents, rather than coordinating with the parents the best ways to reunite the family, is absolutely not the most ideal, most narrowly tailored way of achieving that goal.

C. International Human Rights

Although the issue of termination of parental rights of fit immigrant parents has not reached international tribunals, international laws related to the topic suggest that the practice violates human rights as well as civil rights. The American Declaration of the Rights and Duties of Man, ensures that “[e]very person has the right to the protection of the law against abusive attacks upon his honor, his reputation, and his private and family life.” It also guarantees the “right to establish a family,” and to receive protections for that family. Other international legal documents and treaties, heralding the fundamental human right to family, include: UN Declaration of Human Rights; International Covenant on Civil and Political Rights; UN Declaration on the Social and Legal Principles relating to the Protection and Welfare of Children; and UN Convention on the Rights of the Child.

178 See U.S. CENSUS BUREAU, supra note 165 (noting that 20 million of 38 million foreign-born people in the United States were born in Latin America).
179 AMERICAN DECLARATION OF THE RIGHTS AND DUTIES OF MAN ch. 1, art. 5, adopted Apr. 1948, [hereinafter AMERICAN DECLARATION].
180 Id. at art. 6.
181 Universal Declaration of Human Rights, G.A. Res. 217(III)A, U.N. Doc. A/RES/217(III), at art. 12 (Dec. 10, 1948) (“No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”); id. at art. 16 (3) (“The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”).
183 G.A. Res. 41/85, art. 3, U.N. Doc. A/RES/41/85 (Dec. 1986) (“The first priority for a child is to be cared for by his or her own parents.”); id. at art. 11 (“Foster family
Even the Convention on the Rights of the Child (CRC), which heralds the best interest of the child test, recognizes the damage that forced separation and involuntary termination of parental rights can cause. Article 9 of the CRC requires that state parties ensure that children are not separated from fit parents.\(^{185}\) It further requires that parents alleged to be unfit be given an opportunity to participate in any such judicial proceedings that could result in separation.\(^{186}\) It explicitly addresses separation between children and parents caused by state-ordered deportation:

“Where such separation results from any action initiated by a State Party, such as . . . deportation . . . of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.”\(^{187}\)

Considering the wide recognition of the human right to family, and the specific international legal obligations that the United States has in upholding these fundamental human rights, the continued termination of parental rights of deported fit immigrant parents warrants immediate recognition and remediation by all state authorities. Otherwise, an adverse decision in a case like Encarnación’s or Felipe’s may result in a petition to the Inter-American Commission on Human Rights and an embarrassing affirmation that the United States is responsible for violating human rights.

care, though temporary in nature, may continue, if necessary, until adulthood but should not preclude either prior return to the child's own parents or adoption.”) (emphasis added); id. at art. 13 (“The primary aim of adoption is to provide the child who cannot be cared for by his or her own parents with a permanent family.”) (emphasis added).

\(^{184}\) Convention on the Rights of the Child, G.A. Res. 44/25, U.N. Doc. A/RES/44/25, at art. 5 (Nov. 20, 1989) (“States Parties shall respect the responsibilities, rights and duties of parents . . . ”) [hereinafter CRC]; id. at art. 8(1) (“States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.”) (emphasis added).

\(^{185}\) Id. at art. 9(1).

\(^{186}\) Id. at art. 9(2).

\(^{187}\) Id. at art. 9(4).
IV. Conclusion

As immigrants and immigration advocates have come to realize, the problem of termination of parental rights of immigrant parents is growing. In light of the arguments proffered in this paper, states must be more cautious and conscientious in considering motions to terminate the parental rights of deported immigrant parents. There are two important ways to implement this caution.

First, the ASFA’s 15-month out-of-custody ground for the termination of parental rights should not be applied to deported parents who, due to tough immigration laws, cannot re-enter the United States within 15 months to reunite with their children. The ASFA’s 15-month rule was crafted in an era where “child welfare” was focused on “saving” children who were at risk to languish in foster care. Today, the child welfare system aims to reunify families wherever possible. As such, the ASFA’s 15-month out-of-custody ground should not apply in cases where parents have been deported and are physically incapable of visiting with or reuniting with their children.

Second, to prevent unjust and constitutionally questionable terminations, courts must fervently adhere to the proper procedure for terminating parental rights. All proceedings to involuntarily terminate a parent’s rights must begin with an allegation of unfitness, and the state must bear the burden of proving the parent’s unfitness by clear and convincing evidence. Only after the state proves parental unfitness should the court consider the state’s parens patriae interests or the best interests of the child.

Deporting parents not only severs families by dividing them geographically, but increasingly, it results in the termination of parental rights—the permanent severing of the family and the legal orphaning of children. Where parents are otherwise fit, and there is no evidence of

188 See Help Separated Families Act, H.R. Res. 6128, 112th Cong. (2012) (In July 2012, Rep. Lucille Roybal-Allard (a Democrat from California’s 34th district) introduced a bill to ensure that immigration status or involvement in immigration removal proceedings does not automatically disqualify an otherwise fit and willing parent from maintaining his/her rights.) ( The bill died in committee. See GovTrack.us, http://www.govtrack.us/congress/bills/112/hr6128 (last visited Feb. 3, 2013)).


190 See U.S. Dep’t of Health & Human Servs., FAMILY REUNIFICATION, CHILD WELFARE INFO. GATEWAY, http://www.childwelfare.gov/permanency/reunification/ (last visited May 7, 2012) (“When children must be removed from their birth families for their protection, the first goal is to achieve reunification as safely as possible.”).
abuse or neglect, family courts should tread carefully on the fundamental rights of parents to raise their children. Family services and family court should avoid terminating parental rights and should focus efforts at reunification. Ultimately, courts should avoid outcomes like what happened to Encarnación Bail Romero, and protracted processes like what happened to Felipe Montes, and respect the rights of deported parents to create appropriate post-deportation plans of care for their children.
FUNDING THE HEALING: GETTING VICTIMS PROPER RESTITUTION IN CHILD PORNOPHORAY POSSESSION CASES

By Julia Jarrett*

Introduction

When Vicky¹ was ten years old, her father, a former deputy sheriff,² abused her and posted videos of the abuse on the Internet.³ During his weekend visits with Vicky, her father would dress her up as a hooker and force her to say dirty words into the video camera.⁴ He would make her take off all of her clothes, demand that she take showers with him, have her touch his penis and fondle him, and ultimately force her to have sex with him,⁵ including raping her while she was bound with ropes.⁶ At one point, she was being raped or sexually molested as much as once or twice a day.⁷ As Vicky’s father interacted with the online pedophilia community, he began to introduce viewer-requested scripted scenarios where Vicky was forced to perform a sexual role,⁸ sometimes involving adults other than her father, which were taped and posted online.⁹

Years later, Vicki learned that there were at least twenty videos of her childhood abuse on the Internet¹⁰ and they had been downloaded tens of thousands of times by viewers around the world.¹¹ The knowledge that

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¹ Vicky is a pseudonym used in court documents to protect the victim’s identity. The name comes from the name of the series of child pornography videos in which she was abused. United States v. Brannon, No. 4:09-CR-38-RLV-WEJ, 2011 WL 2912862, at *1 (N.D. Ga. May 26, 2011).

² Corrected Appendix of Appellant at 26, United States v. Crawford, No. 11–5544 (6th Cir. Aug. 13, 2011) [hereinafter Crawford Appendix].


⁴ Id.

⁵ United States v. Faxon, 689 F. Supp. 2d 1344, 1349 (S.D. Fla. 2010).

⁶ Kraemer, supra note 3.

⁷ Crawford Appendix, supra note 2, at 33.

⁸ Id. at 6.

⁹ Faxon, 689 F. Supp. 2d at 1349.

¹⁰ Kraemer, supra note 3.

¹¹ Crawford Appendix, supra note 2, at 37-38.
thousands viewed her abuse for perverted sexual pleasure spurred a very difficult emotional rollercoaster.\textsuperscript{12}

Now approximately twenty-one years old, Vicky has been stalked and contacted by “fans” of the pornography.\textsuperscript{13} She is continually “reminded of other . . . pedophiles who continue to sexualize and objectify her in her most powerless, degrading moments of her life—a ten year old child’s worst moments frozen in time and reco[r]ded forever for the prurient interests of others.”\textsuperscript{14}

Unfortunately, Vicky is not the only person dealing with the trauma that comes from abuse images being on the Internet. “Sex crimes,” which includes child pornography, is one of the fastest growing crime categories in the U.S., with the increase largely fueled by child pornography crimes.\textsuperscript{15} There are currently over 3700 identified victims of child pornography.\textsuperscript{16} For example, Amy,\textsuperscript{17} also now a young adult, was abused as a child by her uncle, and her abuse images make up the widespread “Misty” series, which has over 35,000 downloads.\textsuperscript{18}

Unlike other trauma and abuse victims, Vicky and Amy are not merely recovering from one incident or several incidences in the past. Instead, they are experiencing continued trauma with the knowledge of the growing number of pedophiles viewing their abuse images, which is re-opening wounds and making it difficult for them to move on and heal.\textsuperscript{19}

\begin{footnotes}
\item[12] See id. at 38.
\item[13] Id. at 6. This includes one “fan” who tried to send her additional pornographic content, one who hacked her MySpace account to try to convince her to make a pornographic video with him, and one who took a variety of images from Vicky’s abuse and with two recent pictures of Vicky and her family, created a video entitled, “Where is Vicky now?” Id.
\item[14] See id. at 39.
\item[17] Amy is also a pseudonym used for court documents to preserve the identity of the victim. United States v. Paroline, 672 F. Supp. 2d 781, 783 n.1 (E.D. Tex. 2009), \textit{vacated}, \textit{In re Amy Unknown}, 701 F.3d 749 (5th Cir. 2012).
\item[19] See Crawford Appendix, \textit{supra} note 2, at 52-53.
\end{footnotes}
In attempting to deal with and recover from this trauma, Vicky, Amy, and other victims\(^20\) are demanding restitution from the possessors of the pornographic abuse images.\(^21\) However, receiving restitution, in this case seeking financial compensation for the harms from the possession of the child pornography, including therapy costs, lost wages, and attorney fees,\(^22\) has been difficult, and victims have had limited success.\(^23\) Although restitution for child pornography crimes is specifically provided for by law,\(^24\) courts struggle with a variety of issues in awarding restitution to victims of child pornography possession.

Two main issues continue to plague the courts. First, courts are split on whether victims must prove proximate causation: that the specific defendant’s possession of the images caused the harm as opposed to the cumulative harm from all individuals possessing the images.\(^25\) A court ruling that the victims need to prove proximate causation is typically fatal to the restitution claim.\(^26\) Unfortunately, the current trend in the circuit courts is to require proximate causation for restitution awards.\(^27\) The second issue is that, while defendants can always appeal a restitution order, some courts have found that victims do not have a means of direct appeal on a denied restitution order and can appeal only via the much more limited and discretionary mandamus procedure.\(^28\) This severely

\(^20\) Lesser-known victims, Tara and L.S. (pseudonyms), have also started making restitution requests in limited cases across the country. Motion for Restitution Order Ex. A, United States v. Mahoney, No. 2:10-cr-075 (D. N.D. Jan. 7, 2011) [hereinafter Mahoney Restitution Chart] (chart showing all the cases, as voluntarily reported by Assistant U.S. Attorneys, where restitution had been requested for child pornography possession as of Dec. 7, 2010). Tara’s violent sexual abuse at the hands of her father involved increasingly violent videos including one where her father held a knife toward Tara’s naked body in front of the camera. See Mark Davis, International Porn Case Leads to Georgia, ATLANTA J.-CONST., June 17, 2008, at 1B. Tara is still a pre-teen and the requests are being made by her mother on Tara’s behalf. See Crawford Appendix, supra note 2, at 1.

\(^21\) United States v. Faxon, 689 F. Supp. 2d 1344, 1349 (S.D. Fla. 2010). Amy is at the helm of over 250 requests for restitution across the country. Paroline, 672 F. Supp. 2d at 784 n.4.

\(^22\) See Crawford Appendix, supra note 2, at 150.

\(^23\) See Mahoney Restitution Chart, supra note 20.


\(^26\) Paroline, 672 F. Supp. 2d at 793.


\(^28\) See e.g., United States v. Monzel, 641 F.3d 528 (D.C. Cir. 2011).
restricts victims’ ability for recourse on an unfavorable restitution award decision.\(^{29}\)

To better address restitution for these victims, this Article argues that Congress should overhaul the restitution structure by setting up a fine schedule and a victim fund to allow victims to make a single restitution claim against a national fund for all harm from all possessors collectively. This solution avoids the proximate causation battle and creates a right to appeal through a federal claims action.

Part I of this Article provides an overview of child pornography and the laws surrounding restitution for child pornography crimes. Part II recounts the history of restitution as applied to child pornography possession cases. Part III discusses the main challenges victims face in receiving restitution for harms resulting from child pornography possession. Part IV proposes a change to the system of restitution for child pornography possession crimes, arguing that Congress should overhaul the entire restitution system to create a process that is separate from the criminal prosecution of each defendant. Part IV also identifies how the proposed system would alleviate or improve the challenges victims face by putting reality more in line with Congress’s original intent for victim restitution in child pornography possession crimes.

I. Child Pornography Crimes and Restitution

When we think of child pornography, we often think about the sick individuals who abuse children and create images of the abuse. We also often think of the young children who were the victims of that abuse. We may even think about the federal prosecutions across the country to bust child pornographers. One thing we may not think of is the victim years later and all grown up, now dealing with the aftermath of the images of the abuse being viewed by thousands of individuals time and time again. Congress, however, remembered these grown-up child victims and created laws not only prohibiting the possession of child pornography but also allowing the victims to receive restitution from the possessors for the harms these victims suffer.

A. What is Child Pornography?

Child pornography is defined in 18 U.S.C. § 2256\(^{30}\) as any visual depiction\(^{31}\) of a minor\(^{32}\) engaging in sexually explicit conduct.\(^{33}\) Among

\(^{29}\) Id.


\(^{31}\) “[C]hild pornography’ means any visual depiction, including any photograph,
other things, the child pornography statute criminalizes and prohibits the production, distribution (meaning the sending of the materials to another person), sale (or promotion of sale), receipt, and possession of child pornography. 

When child pornography pictures or videos are of the same victim, the creators of these images often categorize them together as a “series,” identifiable by a fictitious name given to the victim to conceal the victim’s identity and evade law enforcement. Each series can contain both pornographic and non-pornographic images of the child victim.

The series are then traded between pedophiles via the Internet in controlled groups or rings. Access to these online groups is zealously guarded by members to protect user identities including the use of encrypted sites and timed quizzes to test users’ knowledge of child pornography to prevent unwanted access to the sites. These groups also typically ban members from chatting or phoning other members to make sure that users could not identify other members of the group in the case of

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film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct. . . .” 18 U.S.C. § 2256(8). Visual depiction also includes “undeveloped film and videotape, data stored on computer disk or by electronic means which is capable of conversion into a visual image, and data which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format.” 18 U.S.C. § 2256(5). Child pornography also includes a “digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct, or such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.” 18 U.S.C. § 2256(8).

A minor is anyone under eighteen years of age. 18 U.S.C. § 2256(1); 18 U.S.C. § 2256(8).

Sexually explicit conduct can include “actual or simulated sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; bestiality; masturbation; sadistic or masochistic abuse; or lascivious exhibition of the genitals or pubic area of any person.” 18 U.S.C. § 2256(2)(A).

18 U.S.C. § 2252A (2006). In this context, production and distribution are not professional terms of art. Production merely refers to the actual creation of the abuse images, professional or amateur, and distribution merely refers to passing along the image from one person to another for pay or not. Production and distribution should not necessarily be viewed as a professional economic enterprise in and of itself.

Paroline NCMEC Amicus Brief, supra note 18, at 5; United States v. Paroline, 672 F. Supp. 2d 781, 783 (E.D. Tex. 2009).

Paroline NCMEC Amicus Brief, supra note 18, at 5.


Id.
police intervention. Some groups are very sophisticated and organized, one even having a bank account for the group for the purposes of ordering more child pornography from producers around the world. These groups, shrouded in secrecy, contribute to the thousands of images downloaded each year that continually harm the victims in the images.

B. How Does Child Pornography Possession Harm Victims?

Courts have recognized that while the children depicted in child pornography are victims of the crime of abuse that led to the creation of the pornography in the first place, the children are also victims of the crime of possession of the pornography. Child pornography is a permanent record of the abuse of the victim as a child, and the victim’s knowledge that this record is continually being shared and viewed around the world causes psychological harm to the victim separate from the initial abuse.

The Fifth Circuit, in United States v. Norris, identified three specific ways that possessors of child pornography cause harm to the victims depicted in child pornography: by perpetuating the initial abuse, by continually invading the privacy of the victims, and by providing an economic motive for future production of pornography. First, the dissemination and widespread possession of the pornography further perpetuates the initial abuse created by the producer. The Supreme Court, in New York v. Ferber, acknowledged the harm that child pornography distribution has on the victims through the continued existence and dissemination of these abuse records. Extending the harm from the initial abuse, child victims continually “experience intense feelings of powerlessness from knowing that there is nothing they can do to prevent others from viewing their pornographic images.” This perpetual possession and distribution deprives child pornography victims of the capability to control when, how, and to whom they disclose their abuse, a significant part of the healing process.

39 Id.
40 Id.
42 Id.
43 United States v. Norris, 159 F.3d 926 (5th Cir. 1998).
44 Id. at 929.
45 Id.
46 Ferber, 458 U.S. 747.
47 Id. at 759.
48 Monzel NCMEC Amicus Brief, supra note 16, at 10.
49 Id.
Second, the widespread possession of the images continually invades the privacy of the child victim even into adulthood.\(^{50}\) In a statute to protect against child pornography crimes, Congress found that “[e]very instance of viewing images of child pornography represents a renewed violation of the privacy of the victims and a repetition of their abuse.”\(^{51}\) The Supreme Court has cited studies, which found that the possession of child pornography is a greater threat to the victim’s future well-being than the initial sexual abuse or even prostitution because of the potential for the images to continually haunt the victim in the future.\(^{52}\) This invasion of privacy complicates normal moral and sexual development, even if the child never sees the images, just because of the victim’s knowledge that the images exist and that the images are being viewed by strangers who take pleasure in the abuse.\(^{53}\)

Third, the wide possession of child pornography provides an economic motive for producing and distributing child pornography.\(^{54}\) Possession often leads to more production, which creates more abused children and more victims of child pornography—one could not live without the other.\(^{55}\) If a particular child’s abuse is ongoing, wide possession of those abuse images could mean that that child will suffer more abuse and exploitation for the abuser’s financial or reputational gain. Looking to Vicky’s situation, she was further abused in part because of viewers’ requests for specific sexual scenes and scripts for her to act out.\(^{56}\) Although some images are traded quid pro quo between pedophiles, many times pedophiles will purchase child pornography from producers or subscribe to child pornography websites.\(^{57}\)

Possession of abuse images is extraordinarily harmful to the child depicted and future children because the possession perpetuates the initial abuse, it violates the child’s privacy into adulthood, and it could instigate

\(^{50}\) Norris, 159 F.3d at 930. Although similar, this second reason about the privacy of the child is different than the first reason of extending and drawing out the harm from the initial abuse. The second reason deals with the specific right to privacy being violated perpetually into adulthood. Though the results may be the same, the rights violated are distinct. See id.


\(^{52}\) Ferber, 458 U.S. at 759 n.10.


\(^{54}\) Norris, 159 F.3d at 930.

\(^{55}\) Id.

\(^{56}\) Crawford Appendix, supra note 2, at 6. Tara also fell under this category. See Bluestein, supra note 37.

further abuse to that child or other children because possession creates an economic motive to produce child pornography. Unfortunately, the prevalence of child pornography and the corresponding harms to victims has only increased over time.

C. Increased Prevalence and Prosecution of Child Pornography Crimes

Although child pornography has existed for ages, the invention and proliferation of the Internet has exponentially increased the problem. The Internet has increased the ability to produce child pornography, the availability of child pornography, and the anonymity of the users. At any one time, there are an estimated four million websites containing images of child pornography, some containing images of very young child victims, even under the age of two. As of 2004, there were an estimated 480,000 websites devoted solely to child pornography, an increase from 261,653 in 2001. Reports to the CyberTipline, a national hotline for leads relating to child sexual exploitation, increased by 86% between 2009 and 2010, and the proportion of these tips relating to child pornography increased by 100% in that same time period.

The United Nations Human Rights Council estimates that in 2009 there were 750,000 child predators on the Internet. These offenders may possess collections of child pornography numbering over one million images, with approximately 200 images of child pornography being added to the Internet daily. Many of these images include sexual abuse of very young children—83% of perpetrators in the U.S. had images of children between six and twelve years old; 39% of perpetrators had images of children between three and five years old; and 19% of perpetrators had images of babies and infants under the age of three. The severity of the

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59 Id. at 9-12.
61 Id. at 9.
62 Monzel NCMEC Amicus Brief, supra note 16, at 1.
64 Id.
65 Id.
images has increased over time as well, with the number of images depicting “serious child exploitation,” such as violent rape and torture, quadrupling between 2003 and 2007.\footnote{Id.}

In response to the increased prevalence of online child pornography, the federal government has clamped down on child pornography crimes.\footnote{Motivans & Kyckelhahn, supra note 15, at 1.} The number of suspects arrested and booked for a sex offense increased approximately 15% annually from 1994 to 2004, making sex offenses one of the fastest growing crime categories in the United States.\footnote{Id.} Child pornography accounted for 82% of this increase.\footnote{Id. at 2.} Not only did the number of perpetrators increase, but also the rate of prosecution increased from 40% (313 cases) of child sexual exploitation arrests prosecuted in 1994 to 57% of arrests prosecuted (2039 cases) in 2006.\footnote{Id. at 5.} Additionally, the number of offenders sent to prison for these crimes also increased.\footnote{Id.} In 1996, only 77% of those convicted of child pornography crimes received a prison sentence, while in 2006, 98% of those convicted of child pornography crimes went to jail.\footnote{Id.}

In May 2006, the Department of Justice rolled out a national strategy on child exploitation, Project Safe Childhood.\footnote{About Project Safe Childhood, U.S. Dep’t Just., http://www.justice.gov/psc/about.html (last visited Apr. 7, 2011).} Since the launch, the number of cases prosecuted by United States Attorney’s Offices dealing with the sexual exploitation of minors has increased by another 40%.\footnote{Id.} The government now has multiple programs to focus on the investigation and prosecution of child pornography and exploitation.\footnote{Motivans & Kyckelhahn, supra note 15, at 2.} The FBI has an Innocent Images National Initiative to investigate crimes against children and the National Center for Missing and Exploited Children, which helps to identify child pornography victims. As mentioned, the Department of Justice instituted Project Safe Childhood, an initiative which seeks to increase attention on prosecution child sex exploitation and also has an Internet Crimes Against Children Task Force, which combines the efforts of federal and state law enforcement to crack down on Internet predators. Immigration and Customs Enforcement has Operation Predator which targets child sex tourism and international child pornography networks. See id.
D. Development of Child Pornography Law

Over time, Congress has consistently strengthened laws against child pornography, including laws prohibiting production, possession, and distribution. Congress has also created stiff penalties and sentences for breaking child pornography laws.

In 1978, Congress passed the first federal law specifically addressing child pornography. This law generally prohibited the manufacture and commercial distribution of obscene materials involving minors under the age of sixteen. However, at that time, determining whether something was “obscene” was difficult, as neither Congress nor the Supreme Court had concretely defined the term. In 1982, the Supreme Court separated child pornography from other types of obscenity laws and essentially declared that child pornography was per se obscene, rejecting arguments that child pornography could be considered protected speech under the First Amendment. Two years later, the Child Protection Act of 1984 codified this distinction between mere obscenity and child pornography and raised the age of a minor covered by the law to eighteen years old.

The courts continued to expand the definition of child pornography from just that which was “obscene” to include that which was “lascivious,” such as the exhibition of a child’s genitals or pubic area, even if clothed. This test, created in 1986 by a trial court in California,
was called the *Dost* test, and it also differentiated “lasciviousness” for minors and “lasciviousness” for adults. The test acknowledges that a non-lascivious pose for adults could be lascivious if a child posed that way.

Congress has also strengthened the sentences in child pornography cases, including mere possession. For a first-time offender charged with possession of child pornography, the sentencing guidelines recommend 108-135 months (nine years to just over eleven years) imprisonment where sentencing enhancements apply—and they do apply in the majority of cases. Congress’s efforts to pass laws banning child pornography have, over time, worked in conjunction with and built on the courts’ liberal interpretation of those laws to restrict an individual’s rights to possess and distribute child pornography. For example, the courts made the private possession of child pornography illegal where before only manufacture and commercial distribution of child pornography were illegal. Congress later made the use of a computer to depict or advertise child pornography illegal. These expanded definitions and strengthened laws vastly improved the ability of police and prosecutors to successfully convict defendants accused of child pornography crimes.

5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity;
6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

*Id.*

84 *Id.*

85 *Id.*


87 *See* Woodlee, *supra* note 86, at 1031. Sentencing enhancements include the addition of several levels (each level represents an increase in the recommended sentencing range) for the use of a computer which occurs in almost every case these days, and the addition of several levels based on the size of the collections, the size of which has increased over time because of the use of computers. *See id.*

88 Osbourne v. United States, 164 F.2d 767 (2d Cir. 1947).


90 *See* PHILIP JENKINS, BEYOND TOLERANCE: CHILD PORNOGRAPHY ON THE
Lawmakers continue to attempt to strengthen or modify child pornography laws. In the 112th Congress, lawmakers introduced two bills dealing with child pornography.91 Their passing would have further added to the behaviors that are criminalized under the child pornography and exploitation statutes and increase sentencing penalties for violation of these statutes.92

In addition to strengthening laws against the offenders, Congress has also tried to help victims recover restitution for the harms the victims sustained by creating a separate statute just for restitution in child pornography cases over and above that which is required in other crimes.93

II. Restitution and How It Applies to Pornography Possession Cases

Although as a concept, restitution, “a making good of or giving an equivalent for some injury,”94 may be familiar to many individuals from daily life, it is a relatively new concept to the American criminal justice system and even newer when applied to child pornography possession cases.95

A. What is Restitution?

Individuals who are harmed by another’s actions typically use tort law to pursue civil damages against the perpetrator. A tort claim was the only way a victim could recover financially from the perpetrator until 1982, when Congress passed the Victim and Witness Protection Act (“VWPA”),

INTERNET 38 (2001). There were, however, limits as to how far these restrictions on child pornography could go. According to the Supreme Court, Congress, taking advantage of the fact that that laws restricting or punishing child pornography garnered wide public support, may have gone too far when it attempted to expand the definition of child pornography to include virtual images of children and those images which appeared to be of a minor but did not actually contain a minor. Child Pornography Prevention Act of 1996, Pub. L. No. 104–208, § 121, 110 Stat. 3009–26 (1996), partially declared unconstitutional by Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002). The Supreme Court struck this part of the law down, finding that criminalizing sexualized images of an individual who just appeared to be a minor was too expansive. Free Speech Coal., 535 U.S. at 256.

92 See H.R. 1981; see also S. 596.
95 See infra Part II.A-B.
which created victim restitution within the criminal system.\textsuperscript{96} The VWPA allowed, but did not require, judges to order restitution for the victim.\textsuperscript{97} Since then, Congress has passed several other restitution statutes that have strengthened a victim’s position for recovery. In 1996, Congress enacted the Mandatory Victims Restitution Act (“MVRA”), which required judges to order restitution for victims of certain crimes when the victim suffered a physical injury or pecuniary loss from the commission of the crime.\textsuperscript{98} Restitution could include returning property that was taken, paying for damaged or irretrievable property, or if the victim was physically harmed, paying for medical expenses and lost wages.\textsuperscript{99}

Congress later created a separate statute, 18 U.S.C. § 2259,\textsuperscript{100} just for restitution from offenses involving the sexual exploitation and abuse of children, which includes the possession of child pornography.\textsuperscript{101} Section 2259 requires restitution for these victims for the “full amount of the victim's losses as determined by the court.”\textsuperscript{102} The full amount of the victim’s losses includes:

- medical services relating to physical, psychiatric, or psychological care;
- physical and occupational therapy or rehabilitation;
- necessary transportation, temporary housing, and child care expenses;
- lost income;
- attorneys’ fees, as well as other costs incurred; and
- any other losses suffered by the victim as a proximate result of the offense.\textsuperscript{103}

\textsuperscript{97} See 96 Stat. 1248.
\textsuperscript{101} Id.
\textsuperscript{102} See id. at (b)(1).
\textsuperscript{103} See id. at (b)(3).
Courts cannot refuse to issue a restitution order on the basis of the defendant’s economic circumstances or based on the victim’s prior compensation for these harms from any other source.\textsuperscript{104} Section 2259 was written without the same limitations as earlier restitution laws, demonstrating Congress’s intent to fully compensate child victims of these specific heinous sexual exploitation crimes; the full compensation being much more generous than restitution for other crimes only covered under the MVRA.\textsuperscript{105} Additionally, in the legislative history of § 2259, Congress focused on the intense harms that victims of child pornography suffer, showing that Congress recognized the problem and intended § 2259 to help rectify the harm.\textsuperscript{106}

Congress ensured that victims can pursue damages in civil actions too, even though civil suits still pose practical obstacles to recovery. Masha’s Law,\textsuperscript{107} enacted as part of the Adam Walsh Child Protection and Safety Act, allows minor victims of sexual exploitation, including child pornography, to file a suit in district court against the offender.\textsuperscript{108}

Masha’s Law expanded earlier civil damages statutes, in part, by providing a longer statute of limitations: six years after the action first accrues or three years after the victim reaches the age of majority, if the victim was under sixteen at the time of the abuse.\textsuperscript{109} The statute of limitations means that most child victims must bring the suit on or before turning twenty-one years old for damages from abuse that occurred before turning sixteen. For example, if a girl is abused at the age of nine and has injuries immediately, the three-year statute of limitation applies from the age of majority, and the child has until her twenty-first birthday to file suit. However, if the victim does not discover the child pornography until much later and has injuries as a result, the six-year statute of limitations would apply from the date of discovery of the harm.\textsuperscript{110} This expanded statute of limitations shows Congress’s intent to include harms that occur from the discovery of child pornography years after the abuse occurred.

\textsuperscript{104}See id. at (b)(4).
\textsuperscript{105}See United States v. Danser, 270 F.3d 451, 455 (7th Cir. 2001).
\textsuperscript{106}Id.
\textsuperscript{108}18 U.S.C. § 2255 (2006). The statute was named after Masha Allen who was adopted by a single American man at the age of five. See James R. Marsh, Masha’s Law: A Federal Civil Remedy for Child Pornography Victims, 61 SYRACUSE L. REV. 459, 459 (2011). This man then turned her into one the world’s most widely known child porn stars by producing and distributing over 200 sexually explicit images which are now found “on eighty percent of the computers of apprehended child molesters worldwide.” Id.
\textsuperscript{109}See 18 U.S.C. § 2255(b).
\textsuperscript{110}See Marsh, supra note 108, at 473.
The statute additionally provides for $150,000 minimum damages for these cases, showing Congress’s further intent to provide substantial compensation for these victims.\textsuperscript{111} Masha’s Law is drafted so that the civil remedy would apply to child pornography possession cases with multiple defendants, awarding $150,000 to the victim from each defendant.\textsuperscript{112} This shows how seriously Congress took the harms that a victim suffers from child pornography possession.

Although the civil remedy does strengthen victim rights somewhat, a civil lawsuit is often not feasible for victims with thousands of circulating images like Vicky and is burdensome on the court system. First, in a criminal restitution hearing, the restitution happens at the sentencing portion of the process, so the crime of child pornography possession has already been established, and the defendant has already been convicted.\textsuperscript{113} All the judge needs to determine is how much the defendant should pay in restitution.\textsuperscript{114} In contrast, if a separate civil case were filed under Masha’s Law, the victim must put forth a full case for each defendant.\textsuperscript{115} All of the elements of the child pornography possession would need to be proven all over again in a separate trial with a separate jury from the criminal trial, which can be difficult to do.\textsuperscript{116}

Second, the civil process is incredibly burdensome, cost-prohibitive, and extremely time consuming, especially when a child is victimized by individuals all over the country and the collection of the awards is very difficult.\textsuperscript{117} Amy, the child featured in the Misty series, and her attorney estimate that just filing the lawsuits against the over 1000 offenders who violated Amy thus far would have cost over $450,000; the costs escalate from there.\textsuperscript{118} Third, if the victim is a minor at the time that the suit is filed, the court must follow special procedures to make sure that a guardian is appointed for the child victim, which consumes time and court resources.\textsuperscript{119} Therefore, only a handful of these cases have ever been filed, most victims opting instead for restitution through the criminal system where the burden is still great but not prohibitive.\textsuperscript{120} Plaintiffs have only

\textsuperscript{111} 18 U.S.C. § 2255(a).
\textsuperscript{112} See Marsh, supra note 108, at 473.
\textsuperscript{113} See id. at 474.
\textsuperscript{114} See id. at 474-75.
\textsuperscript{115} See Elizabeth Dunbar, Challenges Lie Ahead in Child Pornography Lawsuits, MINN. PUB. RADIO (May 27, 2010), http://minnesota.publicradio.org/display/web/2010/05/27/challenges-for-porn-lawsuits/.
\textsuperscript{116} See id.
\textsuperscript{117} Id.
\textsuperscript{118} Id.
\textsuperscript{119} Id.
\textsuperscript{120} Id.
used Masha’s Law successfully twice to recover civil damages for child pornography creation, let alone distribution or possession.

In addition to the hurdles, the courts’ inconsistent holdings further complicate victims’ recovery. Although Congress has shown its intent to strengthen the laws for victims of child pornography to recover for the harms, courts have struggled in applying the restitution framework to child pornography possession defendants.

**B. Restitution Applied to Child Pornography Possession Cases**

Restitution awards in child pornography possession cases have neither been consistent in courts’ applications nor easy for the victims to recover. Although Congress enacted § 2259, allowing restitution in all sexual exploitation cases, in 1994, the first court award of restitution in a child pornography possession case did not happen until 2009 in *United States v. Freeman*. Amy decided to seek compensation under § 2259, demanding that the Mandatory Restitution be applied in her case for the harms that Freeman caused by possessing her images. Mr. Freeman was involved in a sex exploitation business in addition to possessing the images of Amy’s abuse and received a life sentence for his crimes. The court in this case read the statute quite literally and awarded Amy the “full amount of the

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As the National Center for Missing and Exploited Children processed the images found on Hesketh’s computer, it notified Amy that her images were among those found. Transcript of Restitution Hearing, *Hesketh*, No. 3:08-CR00165. Amy decided to seek compensation under § 2259, demanding that the mandatory restitution statute be applied in her case for the harms that Hesketh caused her by his possession of her images. Id. Understanding that he was carving new ground, Judge Eginton was wary and cautious in the restitution proceeding and ended up encouraging the parties to instead settle the amount between the parties. Id. The settlement ended with Mr. Hesketh agreeing to pay Amy $130,000. Richey, supra.

123 Richey, supra note 122.
victim’s losses,”124 in the amount of $3,263,758.125 This figure was based on Amy’s past and future lost wages provided she would have worked until the age of sixty-five—assuming she would be unable to work due to emotional trauma—plus the future cost of Amy’s counseling and treatment.126

Since Freeman, the road to restitution has been difficult for child pornography possession victims, even though the facts in each case are essentially identical.127 District courts all over the country have dealt with restitution in child pornography possession cases, but the approaches have drastically varied.128 Whether restitution is awarded at all largely depends on the court’s interpretation of the proximate causation clause in § 2259.129 Some courts have held that victims need to show how all of the damages claimed in the restitution requested directly stemmed from the actions of this specific defendant.130

Among those courts that do award restitution, the amounts and the methodology to calculate the restitution amounts widely differ. A few courts, like the court in Freeman, award the entire amount requested by the victim as the full amount of the losses.131 Some courts, such as the Central District of California, award a standard “nominal” restitution amount in each case, $5000.132 Other courts calculate the full loss that the victim suffered, estimate the number of defendants that the victim could likely make restitution claims against, and award the victim the full

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125 Amended Judgment in a Criminal Case at 1, Freeman, No. 3:08-CR-22-002/LAC.
126 Restitution Clarification, Freeman, No. 3:08-CR-22-002/LAC. Several defendants in this case, including Mr. Freeman, appealed the sentences and Mr. Freeman appealed the restitution award. United States v. McGarity, 669 F.3d 1218, 1218 (11th Cir. 2012). The sentences were upheld but the restitution order was vacated. Id. at 1265.
127 See Monzel Petition, supra note 27, at 17.
129 See Monzel Petition, supra note 27, at 18-19.
130 See id. at 19 (partial list of courts denying restitution because of the victim’s lack of showing of proximate causation).
amount divided by the number of potential defendants.\textsuperscript{133} Still other courts base calculations on the civil statute minimum award of $150,000 and then try to apportion what percentage of the total harm the victim experienced was actually caused by the defendant in that case.\textsuperscript{134}

There are also circuit divides on whether restitution requires a showing of proximate causation and whether there is a direct right to appeal for victims who are denied a restitution award. Of the circuits to address these issues, the First, Second, Third, Fourth, Sixth, Seventh, Ninth, Eleventh, and D.C. Circuits have all concluded that proximate causation is required and made restitution decisions on this basis, although the courts still differ in how they determine if proximate cause is present.\textsuperscript{135} Only the Fifth Circuit has found that a victim can receive restitution without a proximate cause showing.\textsuperscript{136} Even in the Fifth Circuit there was disagreement until two similar cases were reheard \textit{en banc}, finally deciding that proximate causation was not required for a victim to get restitution.\textsuperscript{137}

Circuits are likewise split as to whether the victim has the right to directly appeal a restitution order through the ordinary appellate channels or merely mandamus review. The Second, Third, Ninth, and Eleventh Circuits have allowed crime victims (all crime victims, not just sexual exploitation victims) to receive ordinary appellate review of restitution orders under the Crime Victims’ Rights Act (“CVRA”).\textsuperscript{138} In contrast, the Fifth, Sixth, Tenth, and D.C. Circuits all have denied victims this right.

\textsuperscript{135} See, \textit{e.g.}, United States v. Kearney, 672 F.3d 81, 81 (1st Cir. 2012) (finding proximate cause was present and upholding restitution award, calculated by averaging victim’s recovery in other cases); United States v. Aumais, 656 F.3d 147, 153 (2d Cir. 2011); United States v. Crandon, 173 F.3d 122, 126 (3d Cir. 1999); United States v. Burgess, 684 F.3d 445, 459 (4th Cir. 2012), \textit{cert. denied}, 133 S. Ct. 490 (2012); United States v. Crawford, No. 11-5544, 2013 WL 692512 (6th Cir. Feb. 27, 2013); United States v. Laraneta, 700 F.3d 983 (7th Cir. 2012); United States v. Kennedy, 643 F.3d 1251, 1262 (9th Cir. 2011); United States v. McDaniel, 631 F.3d 1204, 1208 (11th Cir. 2011); United States v. Monzel, 641 F.3d 528, 535 (D.C. Cir. 2011), \textit{cert. denied}, 132 S. Ct. 756 (U.S. 2011).
\textsuperscript{136} See \textit{In re} Amy Unknown, 636 F.3d 90, 198-99 (5th Cir. 2011).
\textsuperscript{137} \textit{In re} Amy Unknown, 701 F.3d 749 (5th Cir. 2012).
\textsuperscript{138} See, \textit{e.g.}, \textit{In re} W.R. Huff Asset Mgmt. Co., 409 F.3d 555, 562 (2d Cir. 2005); \textit{In re} Walsh, 229 F. App’x 58, 61, 2007 WL 1156999, at *2 (3d Cir. 2007); Kenna v. U.S. Dist. Court C.D. Cal., 435 F.3d 1011, 1017 (9th Cir. 2006); \textit{In re} Stewart, 552 F.3d 1285, 1288 (11th Cir. 2008).
relegating the claim to mandamus review only.\textsuperscript{139} Both of these issues have even been brought to the Supreme Court, but cert was denied.\textsuperscript{140} Other similar cert petitions are still pending before the Court.\textsuperscript{141} Even a quick look at this jurisprudence underscores the numerous and onerous obstacles victims face in seeking restitution in child pornography possession cases.

\textit{1. Victim Identification and Notice}

Victims face obstacles from the very beginning—finding out about the child pornography in time to file a restitution claim. The National Center for Missing and Exploited Children (“NCMEC”) is a non-profit organization designated by Congress as “the official national resource center and information clearinghouse for missing and exploited children.”\textsuperscript{142} As such, NCMEC serves as the central repository for child pornography images and reports.\textsuperscript{143} NCMEC operates a CyberTipline which, since 1998, has received over 1,040,000 reports of images of child pornography, 161,000 in the first eight months of 2011 alone.\textsuperscript{144} NCMEC also operates the Child Victim Identification Program (“CVIP”), which reviews the child pornography images seized by law enforcement in an investigation to see if any of the victims in those images match the child victims previously identified by law enforcement.\textsuperscript{145} The matching is done visually as well through the use of software that codes or tags the images with a unique identifier then matches up the images to existing identified images with the use of the tag.\textsuperscript{146} CVIP has conducted more than 28,000 reviews of evidence involving more than fifty-three million images but only has information on 3700 identified victims.\textsuperscript{147} This means there are a lot of victims out there who have not yet been identified.

\textsuperscript{139} See, e.g., \textit{In re Dean}, 527 F.3d 391, 394 (5th Cir. 2008); \textit{In re Acker}, 596 F.3d 370, 372 (6th Cir. 2010); \textit{In re Antrobus}, 519 F.3d 1123, 1124 (10th Cir. 2008); \textit{Monzel}, 641 F.3d 528 at 535.
\textsuperscript{140} \textit{Amy v. Monzel}, 132 S. Ct. 756 (2011). In July of 2011, Amy filed a petition for writ of certiorari for a Fifth Circuit case, \textit{Amy v. Monzel}, which was denied cert November 2011. \textit{Monzel Petition, supra} note 27, at 1.
\textsuperscript{143} \textit{Monzel} NCMEC Amicus Brief, \textit{supra} note 16, at 1.
\textsuperscript{144} \textit{Id.} at 2.
\textsuperscript{145} \textit{Id.} at 3.
\textsuperscript{146} \textit{Id.}
\textsuperscript{147} \textit{Id.} at 4.
Since the Child Victims’ Rights Act\textsuperscript{148} passed in 2004, crime victims must be sent notice of any public court proceeding involving that specific crime.\textsuperscript{149} Therefore, every time the CVIP identifies an image as matching an identified victim from the collection of an offender who is facing charges, the government sends notice to that victim to make the victim aware of the proceeding and of the victim’s right to request restitution from that offender.\textsuperscript{150} Amy has received over 800 notices in six years.\textsuperscript{151} Vicky has received more notifications than would “overflow a 55 gallon drum.”\textsuperscript{152} An average of thirty notices arrive at her house each day.\textsuperscript{153} While this notice process can arguably cause harm by itself, proper notice from the government allows victims to understand the extent to which the victim’s images are out there and the restitution rights associated with each possession. Without notice the victim would have no opportunity for restitution requests.

Victims must request restitution at least sixty days before the sentencing portion of the defendant’s trial or request up to a ninety-day delay for a separate restitution hearing.\textsuperscript{154} If a victim is not identified until after a defendant has been prosecuted and sentenced, that victim cannot receive restitution from that defendant, even though they may have been injured by that defendant’s actions. With only 3700 victims currently identified, this systemic bar on restitution could have an enormous impact on the now-unidentified victims.

2. Definition of a Victim

Even if victims are notified and they file for restitution in a timely manner, some judges may not find that they are considered victims under the law. Under § 2259, a victim is the “individual harmed as a result of a commission of a crime.”\textsuperscript{155} Determining who constitutes a victim will typically be straightforward in pornography production cases—it will be

\textsuperscript{149} See id. § 3771(a)(2).
\textsuperscript{153} Crawford Appendix, supra note 2, at 144.
the child who was abused and depicted in the images. Possession cases pose a greater problem, however, as the collections found in possession cases often include hundreds or thousands of images and videos involving many different children.\

One reading of the statute may limit the class of victims to those who are depicted in images specifically listed in a count of the indictment. Because prosecutors find it impractical to list every image discovered in the defendant's possession, a standard indictment for child pornography possession lists only one or two images for each count. Therefore, under this reading of the statute, even in cases that involve a collection of 1000 or more images, only the child depicted in the single image (or few images) listed in the indictment could recover for harm, even though the children in the other images may be equally harmed. Limiting victims to only those listed in the indicting document potentially makes the U.S. Attorney's selection of which images to list in the indictment a very high-stakes proposition for the victims.

In a case interpreting § 2259 for child pornography production, the Ninth Circuit found that the charging documents restricted who could claim restitution. The government argued that all of the images are taken into account at the sentencing stage even when not listed in the charging document, but the court denied this argument, stating that “a court may hold a defendant responsible for a broader range of harms connected with the defendant’s crimes when it calculates a sentence than it may consider when it crafts a restitution order.” However, in interpreting a related law, the Tenth Circuit found that the Crime Victims’ Rights Act “does not limit the class of crime victims to those whose identity constitutes an element of the offense or who happen to be identified in the charging document.” Neither of these cases dealt with the possession of child pornography, and due to the relatively recent nature of restitution cases for possession, the question of who is eligible to file for restitution in possession cases remains unaddressed and open in many courts across the country.

3. Proximate Causation

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156 See Restitution Update, CEOS QUARTERLY NEWSLETTER, Sept. 2009 [hereinafter Restitution Update].
157 United States v. Laney, 189 F.3d 954, 965 (9th Cir. 1999).
158 See Restitution Update, supra note 156.
159 Id.
160 Laney, 189 F.3d at 965.
161 Id.
162 In re Stewart, 552 F.3d 1285, 1289 (11th Cir. 2008).
By far the biggest obstacle to victims receiving an award of restitution is proximate causation. As discussed supra, § 2259 requires restitution for these victims for the “full amount of the victim's losses as determined by the court.” The full amount of the victim’s losses includes:

(A) medical services relating to physical, psychiatric, or psychological care;
(B) physical and occupational therapy or rehabilitation;
(C) necessary transportation, temporary housing, and child care expenses;
(D) lost income;
(E) attorneys' fees, as well as other costs incurred; and
(F) any other losses suffered by the victim as a proximate result of the offense.

Courts are not clear whether the last clause in subsection (f), “suffered by the victim as a proximate result of the offense,” applies to the entire preceding listed or just the last clause. For example, does the lost income in subsection (e) need to be suffered as a proximate result of the offense, or do only the “any other losses” as specified in subsection (f) need to be suffered as a proximate result of the offense?

All circuits that have addressed this issue, with the exception of the Fifth Circuit, have found that some proximate cause requirement applies to all losses claimed for restitution under § 2259. The Fifth Circuit and several lower courts found that proximate causation does not apply to restitution awards in this context. Instead, these courts held that the proximate causation requirement in § 2259 applies only to the last clause, “any other losses.” The court reasoned that Congress wanted to provide for specific losses but could not anticipate for other types of losses and therefore wanted an open statement but needed to limit it in some respects. The court also pointed out that § 2259 was drafted differently than other restitution statutes, which specifically require proof of

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164 See id. § 2259(b)(3).
165 Id.
166 See supra note 135 and accompanying text.
167 In re Amy Unknown, 636 F.3d 190, 198 (5th Cir. 2009), reversing 591 F.3d 792 (2009).
168 Id.
169 Id.
proximate causation.\textsuperscript{170} For example, the MVRA defines a victim as an individual “directly and proximately harmed as a result of the commission of an offense.”\textsuperscript{171} In contrast, § 2259 defines a victim as an individual “harmed as a result of a commission of a [child pornography] crime.”\textsuperscript{172} This difference in language was enough to convince the Fifth Circuit that this was no mistake and was indicative of congressional intent.\textsuperscript{173}

The remainder of the circuits that have addressed the issue have found that proximate causation is required.\textsuperscript{174} Some circuits read this requirement as coming from the catch-all statutory language of proximate causation applying to all of the preceding types of losses.\textsuperscript{175} In addition to the catch-all statutory provision, other circuits have imposed a proximate causation requirement based on the definition of the victim, which states that a victim is a person “harmed as a result of a commission of a crime”.\textsuperscript{176} Yet other circuits applied the common law construction of proximate causation, “presum[ing] that a restitution statute incorporates the traditional requirement of proximate cause unless there is good reason to think Congress intended the requirement not to apply.”\textsuperscript{177} If proximate causation is held to apply, that determination is typically fatal to a claim of restitution in a pornography possession case because the court then requires the victim to show how the specific actions of that particular defendant directly caused the victim’s injuries.\textsuperscript{178} Even the courts that impose the burden often state that if the statute is interpreted to have the proximate causation requirement, the burden is nearly impossible to overcome.\textsuperscript{179} In 2009, one judge expressed this sense: “Although this may seem like an impossible burden for the Government, the Court is nevertheless bound by the requirements of the statute.”\textsuperscript{180} Imposition of a proximate causation requirement such as this does not coincide with

\textsuperscript{170} Id.
\textsuperscript{171} Id.
\textsuperscript{172} Id. at 199 (citing 18 U.S.C. § 2259(c) (2006)).
\textsuperscript{173} Id.
\textsuperscript{174} See Monzel Petition, supra note 27, at 10.
\textsuperscript{175} See, e.g., United States v. McDaniel, 631 F.2d 1204, 1208-09 (11th Cir. 2011).
\textsuperscript{176} See, e.g., United States v. Laney, 189 F.3d 954, 965 (9th Cir. 1999); United States v. Kennedy, 643 F.3d 1251, 1260 (9th Cir. 2011); 18 U.S.C. § 2259(c).
\textsuperscript{177} United States v. Monzel, 641 F.3d 528, 536 (D.C. Cir. 2011).
\textsuperscript{178} United States v. Paroline, 672 F. Supp. 2d 781, 793 (E.D. Tex. 2009), vacated sub nom. In re Unknown, 697 F.3d 306 (5th Cir. 2012), opinion withdrawn and superseded on reh'g en banc sub nom. In re Amy Unknown, 701 F.3d 749 (5th Cir. 2012), vacated sub nom. In re Amy Unknown, 701 F.3d 749 (5th Cir. 2012).
\textsuperscript{179} Id.
\textsuperscript{180} Id.
Congress’s intent to provide restitution for victims of child pornography possession.

4. Restitution Awards

Once the court finds that the victim in a particular case is considered a victim under the law, the victim still faces an enormous battle because of the many approaches that the courts take in deciding how restitution should be calculated.\(^{181}\)

An additional issue the courts struggle with is whether restitution awards are constitutional under the Eighth Amendment prohibiting excessive fines.\(^{182}\) There is continuing debate on whether restitution in general is a criminal punishment or a civil remedy merely contained within criminal proceedings. Some courts have held that restitution is a criminal penalty, part of a criminal sentence, and serves the same purposes as criminal punishment.\(^{183}\) If restitution is a criminal punishment, then it must be analyzed under the Eighth Amendment to determine if a restitution award is an excessive fine or could be considered cruel and unusual punishment.\(^{184}\) The test under the Eighth Amendment is whether the award is “grossly disproportional to the gravity of a defendant's offense.”\(^{185}\) Because district courts are awarding the restitution themselves, they would not likely make the award and then find that the restitution award is grossly disproportional. However, it is an appropriate question for circuit courts and provides good fodder for a defendant’s appeal.

Victims also struggle with actually receiving the restitution award. Although Vicky has been awarded upwards of $2 million,\(^ {186}\) as of May 2011, Vicky has actually received payment only in the tens of thousands of dollars.\(^ {187}\) The Financial Litigation Unit in the U.S. Attorney’s Office is tasked with enforcing restitution awards.\(^ {188}\) The Unit will monitor payment

\(^{181}\) See supra Part II.
\(^{182}\) U.S. CONST. amend. VIII.
\(^{184}\) U.S. CONST. amend. VIII.
for up to twenty years, including the time the defendant is incarcerated and on probation, if applicable.\textsuperscript{189} A victim may also attempt to file a lien against the defendant for the amount awarded in the restitution hearing.\textsuperscript{190} Although a restitution award is not dischargeable in bankruptcy, it is also not a guarantee that the victim will ever actually receive the money.\textsuperscript{191} As many of the defendants are indigent and then incarcerated for long periods of time after conviction, the opportunity for the victim to actually recover the award is not always present.

5. Right to Appeal

When a defendant is ordered to pay restitution, that defendant has the right to appeal directly to the next higher court.\textsuperscript{192} When a victim asking for restitution is denied restitution, the circuits are divided on which appellate remedies are available to that victim: direct appellate review, a non-deferential CVRA “mandamus” review, or merely a typical deferential mandamus review.

A mandamus petition asks a higher court to order a lower court to do something.\textsuperscript{193} For a typical mandamus petition the higher court has discretion whether to hear the appeal or not.\textsuperscript{194} The CVRA “mandamus” review, however, is not a true mandamus review because the plain language of the statute authorizing CVRA “mandamus” review explicitly requires the courts of appeal to “take up and decide” the crime victim’s petition.\textsuperscript{195} This language is much stronger, and less deferential, than standard mandamus review—effectively no different than a direct right of appeal.\textsuperscript{196}

Still, courts interpreting this CVRA “mandamus” process are split on what standard of review victims are entitled to receive. The Fifth, Sixth, Tenth, and D.C. Circuits have held that under the CVRA, victims only have deferential mandamus review for restitution petitions.\textsuperscript{197} The Second,\footnotesize
\begin{itemize}
  \item \textsuperscript{189} Id.
  \item Id.
  \item Id.
  \item Id.
  \item 28 U.S.C. § 1291 (2006) (stating that Courts of Appeals have “jurisdiction [over] appeals from all final decisions of the district courts”).
  \item BLACK’S LAW DICTIONARY 544 (9th ed. 2009).
  \item \textit{See Monzel Petition, supra} note 27, at 30.
  \item \textit{See 150 CONG. REC. 7295, 7304 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein) (“[W]hile mandamus is generally discretionary, this provision means that courts must review these cases.”)}.
  \item \textit{See Monzel Petition, supra} note 27, at 30.
  \item \textit{See supra} note 139 and accompanying text.
\end{itemize}
Third, Ninth, and Eleventh Circuits, however, have all granted victims ordinary appellate review under the CVRA.\textsuperscript{198}

Congress did not intend for courts to have discretion in whether to review crime victims’ appeals.\textsuperscript{199} Senator Kyl recently wrote a letter to the Justice Department, noting that the CVRA was “intended to allow crime victims to take accelerated appeals from district court decisions denying their rights and have their appeals reviewed under ordinary appellate standards.”\textsuperscript{200} The differing interpretations in the courts means that victims in different parts of the country are currently receiving different protection and have different rights to appeal restitution awards, with some courts not reviewing the cases at all.\textsuperscript{201}

Additionally, circuits are divided on whether victims can take a direct appeal to the courts of appeals under the general appeals statute, 28 U.S.C. § 1291.\textsuperscript{202} Two circuits, the Third and Sixth Circuits, have allowed victims to directly appeal restitution awards;\textsuperscript{203} while a plurality of circuits have held that victims lack sufficient standing to directly appeal a restitution award.\textsuperscript{204}

This split leaves a landscape where district courts across the country are exercising drastically different approaches to restitution awards with equally drastically different results on essentially identical facts, yet the victim often has no or extremely limited recourse in the way of appellate review.

III. Recommendation: Centralized Child Pornography Possession Victim Restitution Fund

Given the deep divide among district and circuit courts on the issues surrounding restitution for child pornography victims, congressional intervention is necessary to bring the reality of the system in line with

\textsuperscript{198} See supra note 138 and accompanying text.
\textsuperscript{200} Id.
\textsuperscript{201} See, e.g., United States v. United Sec. Sav. Bank, 394 F.3d 564, 567 (8th Cir. 2004).
\textsuperscript{202} See Monzel Petition, supra note 27, at 34.
\textsuperscript{203} See, e.g., United States v. Kones, 77 F.3d 66, 68 (3d Cir. 1996); United States v. Perry, 360 F.3d 519, 524-33 (6th Cir. 2004).
\textsuperscript{204} The Second, Ninth, Tenth, Eleventh, and D.C. Circuits deny direct appeal for victims appealing restitution awards under 28 U.S.C. § 1291, the general appeal statute. See, e.g., United States v. Grundhoefer, 916 F.2d 788, 793 (2d Cir. 1990); United States v. Mindel, 80 F.3d 394, 398 (9th Cir. 1996); United States v. Kelley, 997 F.2d 806, 807 (10th Cir. 1993); United States v. Johnson, 983 F.2d 216, 217 (11th Cir. 1993); United States v. Monzel, 641 F.3d 528, 535 (D.C. Cir. 2011), cert. denied, 132 S. Ct. 756 (U.S. 2011).
Funding the Healing

Congress’s intent and to make application of § 2259 consistent for each case.

A. A Proposed Solution – Fixing a Broken System

Congress must overhaul the current restitution system for child pornography possession. Child pornography possession is different than other types of crime in that the offender did not have direct contact with the victim but still has an immense impact on the victim and harms the victim in a very real way. This requires a different approach for restitution.

Congress should create a victim restitution fund for child pornography victims and have the U.S. Federal Claims Court administer the fund. At sentencing, district courts would order each convicted defendant to pay a specified amount into the victim restitution fund regardless of whether the children in the defendant’s pornography collection are identified and regardless of whether the victims are making legal restitution claims at the time of sentencing. The amount the defendant is required to pay into the fund could be based on the number of images the defendant possessed or alternatively, on the number of victims in the images. Once the children are identified, or if they later decide to make restitution claims for any reason, the funds are available to compensate for the full loss. This money would accrue, and each victim would make a single claim against the fund with the understanding that any additional claims will be barred even if further harms are incurred.

This type of fund is not unprecedented. In 1984, Congress established the Crime Victims Fund through the Victims of Crime Act of 1984. Each year, millions of dollars are deposited into the fund from “criminal

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205 In opinions, even courts that have denied restitution have acknowledged the need to provide assistance to child pornography victims and suggested something similar to a fund. In Paroline, the court suggested that:

[p]erhaps a statutory provision requiring that fines for child pornography be paid to a national center that would act as a trustee to disburse funds for counseling of victims of child pornography would do more to help these victims than the seemingly unworkable criminal restitution provisions in 18 U.S.C. § 2259.


206 Some conceivable reasons are that victims may not experience the full impact of the harms until later in life, or some parents of child victims may not want to pursue restitution but when the victim gets older, the victim may want to seek restitution on their own. See New York v. Ferber, 458 U.S. 747, 758 (1982) (recounting research of the effects child pornography victims experience into adulthood).


fines, forfeited bail bonds, penalties, and special assessments collected by U.S. Attorneys' Offices, federal U.S. courts, and the Federal Bureau of Prisons.\textsuperscript{209} These monies are then distributed through grants to victim services organizations.\textsuperscript{210} Although the Crime Victims Fund differs from the proposed fund in respect to whom the money is distributed (grants to organizations versus directly to the child pornography victims), the goal of helping victims is the same.

Another example of a victim compensation fund is the Vaccine Injury Compensation Trust Fund.\textsuperscript{211} The program is funded through a tax on vaccines and is administered by the U.S. Department of Health and Human Services and the U.S. Federal Court of Claims.\textsuperscript{212} Claimants file claims in the Federal Court of Claims and the court decides which claims warrant compensation for harms.\textsuperscript{213} The victims still preserve their right to sue civilly with some restrictions if they are denied compensation or reject the award.\textsuperscript{214} One of the problems with the Vaccine Injury Fund is the difficulty of proving that the injuries sustained are from a vaccine,\textsuperscript{215} just as proximate causation is currently a challenge for restitution awards for child pornography possession.

In contrast, the burden of proof for showing causation in the proposed restitution fund would be less stringent than the current proximate causation standard because the proof of causation is not focused on a single defendant. A victim would no longer have to prove that his/her injuries were proximately caused by a specific defendant: just that the harm was caused by the wide possession of the child pornography in general.

The administration of restitution awards would be centralized, consistent, and streamlined. One court would deal with all of the country’s claims, resolving the wide variance in interpretation in the current system. Judicial efficiency would be served because of the fewer number of suits—one per victim—and a centralized administration. The victim could

\textsuperscript{209} Id.
\textsuperscript{210} Id.
\textsuperscript{211} 42 U.S.C. § 300aa-10 (2006).
\textsuperscript{213} Id.
receive restitution for the full amount of the victim’s losses without filing in every district court across the country in hundreds of suits.

Some have suggested that Congress amend the statute to soften the perceived proximate causation requirement and allow more victims to recover.216 However, this would only placate one problem with the current system of restitution and still leaves each district court open to interpret the new statute. A new system is necessary to address the wide variety of current problems.

B. How the Proposed System Would Address Current Problems

Although the proposed system is not a perfect solution, it elegantly addresses or alleviates several of the recurring problems.

1. Victim Notification and Notice

Because restitution is currently tied to an individual defendant’s criminal trial, a victim has to satisfy a very rigid timetable in order to make a restitution claim.217 Under the proposed system, delayed victim identification would not impact a victim’s ability to claim restitution because the fund would be collecting money from the defendants who possessed that child’s images over time, even before the child was identified. The money would be waiting in the fund.

Also, the proposed system would help to alleviate much of the trauma that occurs when the victim gets continued victim notices each time a new defendant is found with the victim’s abuse images. Under the new system, these notices would not be necessary after the victim has received full restitution from the fund because all future restitution claims would be barred.

2. Definition of a Victim

In some courts, a victim is currently limited to only those children in the specific images listed in the indicting document.218 Under the proposed system, the issue of which images were included in an indictment would have no bearing on a victim’s right to claim restitution. When you separate

218 United States v. Laney, 189 F.3d 954, 965 (9th Cir. 1999).
an individual defendant’s trial from the victim’s restitution process, these mechanical issues are no longer an issue and a victim cannot be barred by an Assistant U.S. Attorney’s early mistake. The victim would be considered a victim if the images exist and any prosecuted defendant possessed them.

3. Proximate Causation

By far the most challenging obstacle for a victim to overcome is showing how the victim’s injuries and harm is proximately caused by that specific defendant in the case in which the victim is claiming restitution.\(^{219}\) This standard is an effective bar to claiming restitution. Under the proposed system, the victim would still have to show that the injuries were caused by possession of the victim’s abuse images, but the causation does not have to be tied to any one defendant. This alleviates the problems that the courts currently see when a victim can only prove harms caused by a cumulative effect and not by the actions of a specific possessor.

4. Restitution Awards

From the differential in the size of awards to the actual collection of the money from the defendants, the current restitution is a nightmare both for the courts and for the victims claiming restitution. This problem would be greatly improved by the proposed system. The government would collect money from the defendant and deposit that money into the fund. Because the victims would make claims directly against the fund instead of the defendant, victims would not have to wait for defendants to pay up in order to receive restitution. While the government may still have difficulty collecting from certain individuals, the victim would not have to chase down the money or file liens on a defendant’s property to receive the court-ordered full amount of the victim’s harms.

5. Right to Appeal

While a defendant has the right to directly appeal a restitution order, many courts only allow a discretionary mandamus review of a restitution award, restricting the victim’s ability to get full review of a restitution denial.\(^{220}\) The proposed system would clear all of these cases out of the

\(^{219}\) United States v. Paroline, 672 F. Supp. 2d 781, 793 (E.D. Tex. 2009), vacated sub nom. In re Unknown, 697 F.3d 306 (5th Cir. 2012), opinion withdrawn and superseded on reh’g en banc sub nom. In re Amy Unknown, 701 F.3d 749 (5th Cir. 2012), vacated sub nom. In re Amy Unknown, 701 F.3d 749 (5th Cir. 2012).

\(^{220}\) See supra note 139 and accompanying text.
district and circuit courts and centralize them in one court system, the Federal Court of Claims, and would provide a direct right of appeal for all restitution awards. With this basic right available, and a consistent approach, victims will finally have the rights and restitution that Congress intended.

**Conclusion**

Child pornography is increasingly prevalent in this Internet age. With the ability for images to travel across the world or just across the street anonymously and in an instant, the children in the abuse images are being violated over and over again. Although the initial abuse was extraordinarily difficult, now these victims have to go through life knowing that thousands of perverts are taking pleasure in the most humiliating and traumatizing moments in the victim’s life. Congress recognized these harms and created restitution to help the victims get the help they need and be compensated for the deep damages the pornography has caused.

Vicky has been filing restitution claims all over the country for nearly three years now. Courts have denied her restitution claims because she could not prove exactly how one specific defendant’s actions contributed to her harm. Even from the courts that did order restitution, actually getting the money is another battle. If the court makes a restitution determination, the defendant can appeal the result, but the victim cannot appeal directly and only has access to further review through a mandamus proceeding. These bars on receiving restitution are not what Congress intended.

As more images of child pornography are produced, and as more victims are identified by law enforcement, this problem will only get worse. Failing to reform the system will just compound the confusion, increase the inefficiency, and restrict the restitution. These victims deserve better. Congress must overhaul this system to provide these victims a simpler solution. A streamlined restitution process in the Federal Court of Claims, with victims claiming against a victim restitution fund, would go a long way to making sure that these individuals, who were abused and victimized time and time again by the pedophiles around the world, are not also victims of a broken system.
CONFLICT IN THE COURTS: THE FEDERAL NURSING HOME REFORM AMENDMENT AND § 1983 CAUSES OF ACTION

By Susan J. Kennedy*

Introduction

When I was younger, I could remember anything, whether it had happened or not; but my faculties are decaying now and soon I shall be so I cannot remember any but the things that never happened. It is sad to go to pieces like this but we all have to do it. — Mark Twain

The inevitability of old age that Mark Twain referred to, and the possibility that most of us will spend our final years in a nursing home, was a major factor in explaining why Congress chose to examine nursing-home conditions in 1987. As a result of its investigation, Congress discovered the presence of a shocking amount of substandard conditions. Congress attempted to address these conditions by incorporating the Federal Nursing Home Reform Amendment (FNHRA) into the Omnibus Budget Reconciliation Act of 1987 (OBRA). In FNHRA, Congress endeavored to provide legislation that would force nursing homes to provide quality care to nursing-home residents by coupling participation in federal Medicare and Medicaid programs with adherence to certain required standards. Unfortunately, even though FNHRA has been instrumental in increasing the quality of care provided to nursing home residents, the persistence of substandard-care issues in the face of this legislation is surprising. Substandard care can result in deadly consequences because of the fragile state of most elderly nursing-home residents. Many families of deceased residents turn to the legal system,

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3 Id.


6 See Inst. of Med. of the Nat’l Acads., Retooling for an Aging America: Rebuilding the Health Care Workforce xi (2008), available at
not only for a private remedy, but also to bring change to the system that victimized their loved ones. Many U.S. courts are asking whether a privately run nursing home can be held liable in a lawsuit under 42 U.S.C. § 1983 for violations of FNHRA requirements in an attempt to force nursing homes to raise the standard of care through legal action. This paper will explore this question in the light of a recent Third Circuit decision, Grammer v. John J. Kane Regional Centers - Glen Hazel.7

I. Background

Title XIX of the Social Security Act, codified at 42 U.S.C. §§ 1396-1396v, established a “cooperative federal-state program under which the federal government furnishes funding to [the] states for the purpose of providing medical assistance to eligible low-income persons.”8 This cooperative program allows participating states to receive federal funding in exchange for complying with the Medicaid Act and with regulations transmitted by the Secretary of Health and Human Services.9

Only two sanctions against noncomplying nursing homes existed before Congress amended the “Medicaid Act” in 1987. First, either the Health and Human Services Secretary or the states themselves could terminate a nursing home’s certification for participation in the Medicaid reimbursement program.10 Second, the Secretary or the states could deny payment for new admissions for up to eleven months if the infractions did not pose a serious threat.11 Because these penalties were rarely invoked, many nonconforming nursing homes remained open and provided substandard care. By 1987, Congress had become “deeply troubled that the Federal Government, through the Medicaid program, continued to pay nursing facilities for providing poor-quality care to vulnerable elderly and disabled beneficiaries.”12

In response to this concern, Congress passed FNHRA in 1987. As part of the Omnibus Budget Reconciliation Act of 1987, FNHRA was incorporated into one multi-purpose bill to ensure final passage of all of FNHRA’s elements. FNHRA provided for the inspection and oversight of nursing facilities that participate in Medicare and Medicaid programs. In


7 Grammer v. John J. Kane Reg’l Ctrs.-Glen Hazel, 570 F.3d 520 (3d Cir. 2009).
9 Id.
10 Grammer, 570 F.3d at 523.
11 Id.
order to receive certification in the programs, FNHRA required facilities to satisfy certain quality-care standards.\(^\text{13}\)

Unfortunately, many questions have arisen as to the interpretation and application of FNHRA. In particular, courts have struggled with the interpretation of FNHRA as it applies to both county-run and privately run facilities and lawsuits claiming FNHRA rights violations. Federal statutes can authorize private causes of action, explicitly or implicitly.\(^\text{14}\) In such lawsuits, however, the court must first determine whether Congress intended to confer individual rights upon a class of individuals.\(^\text{15}\) If the court determines the statute does confer a federally protected right, it must then decide whether Congress intended to create a remedy to enforce that right.\(^\text{16}\) In cases where the defendant is a state actor (someone acting on behalf of a governmental body) and is accused of violating an individual’s federal right, that right is presumptively enforceable under 42 U.S.C. § 1983.\(^\text{17}\) Section 1983 provides:

\begin{quote}
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.\(^\text{18}\)
\end{quote}

If the defendant is not a state actor, the court must determine whether Congress intended to provide a private remedy under the statute, because § 1983 is not available as a remedy where no state actor is involved.\(^\text{19}\)

While addressing these lawsuits, courts have wrestled with determining

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\(^{13}\) 42 U.S.C. §§ 1395i-3(g), 1396(r)(g) (2006).

\(^{14}\) Grammer, 570 F.3d at 525.


\(^{17}\) Gonzaga Univ., 536 U.S. at 284.


\(^{19}\) Sabree v. Richman, 367 F.3d 180, 188 (3d Cir. 2004).
whether the provisions and language contained in FNHRA create rights protected by federal law or the Constitution. Similarly, they have arrived at conflicting decisions and have not been able to come to any agreement on whether FNHRA contains an implied, private § 1983 cause of action. Courts also have struggled as to whether a privately owned nursing home is a state actor operating under the color of law as required for a § 1983 lawsuit.

II. For purposes of pursuing a § 1983 lawsuit for violations of FNHRA requirements, can a privately held nursing home be considered a state actor operating under the color of law?

A. Rights Conferred by Statutes and FNHRA

One question courts have struggled to answer is whether the language in FNHRA successfully confers enforceable federal rights. Answering that question is the first step in exploring whether a privately held nursing home can be held liable for FNHRA rights violations under § 1983. The Supreme Court requires that a plaintiff seeking a remedy through § 1983 prove the violation of a federal right, not merely violation of a federal law.20

In the 1997 U.S. Supreme Court case, Blessing v. Freestone, the Supreme Court addressed necessary conditions in order for a statute to confer federal individual rights.21 In Blessing, a group of mothers whose children were eligible under Title IV-D of the Social Security Act to receive state child-support services filed a § 1983 action against the state of Arizona,22 suing the director of Arizona’s child support agency. In their lawsuit, the custodial parents claimed they had an enforceable right to have the State’s program achieve “substantial compliance” with the requirements of Title IV-D.23

In determining whether Title IV-D gave individuals enforceable federal rights, the Court outlined three mandatory factors a plaintiff must demonstrate. First, the plaintiff must be an intended beneficiary of the statute.24 Second, the right asserted in the language of the statute cannot be so “vague and amorphous” that its enforcement would burden judicial competence.25 Finally, the provision giving rise to the asserted right must

21 Id. at 340.
22 Id. at 329.
23 Id. at 332.
24 Id. at 340-41.
be stated in mandatory terms. After applying these three factors to the facts in the Blessing case, the Court ruled against the petitioning parents and reversed the Arizona federal district court’s decision.

The Supreme Court found it necessary to clarify the first factor in a 2002 case, Gonzaga University v. Doe. In Gonzaga, a former university student sued Gonzaga University under § 1983, alleging violations of the Family Educational Rights and Privacy Act (FERPA). The Court, denying the student’s claim, noted that it is a right, not a vague “benefit,” that may be enforced under § 1983. In applying the Blessing factors, and the Gonzaga clarification to FNHRA, courts have arrived at vastly different conclusions.

While most courts agree that FNHRA meets the second and third Blessing factors, determining congressional “intent” for the first Blessing factor has created a split among the courts. This split is illustrated by two recent federal district court cases, Grammer v. John J. Kane Reg’l Centers-Glen Hazel and Duncan v. Johnson-Mathers Health Care, Inc.

In Grammer v. Kane, the daughter of a deceased nursing-home resident brought a § 1983 action against a county-run nursing home for wrongful death, alleging the nursing home violated her mother’s rights by breaching a duty to provide quality care. The Grammer court found that, in order to rule on allegations of a federal right violation as the basis for a § 1983 action, it first had to determine if the statute in question conferred an individual right. Citing Gonzaga, the court reasoned that whether a federal statute creates a federal right enforceable under a § 1983 depends upon “whether or not Congress intended to confer individual rights upon a class of beneficiaries.” The court noted that, because of suggestions by other Supreme Court cases, fine distinctions in the application of the

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25 Id. at 341.
26 Noting that the lower court did not separate and clearly define what rights it believed arose from Title IV-D, the Court left open the possibility that Title IV-D may give rise to enforceable rights. Id. at 346. Therefore, because the Court was unable to rule on whether Title IV-D conferred an enforceable right, the Court did not address the other factors. Id.
28 Id. at 283.
29 Grammer v. John J. Kane Reg’l Ctrs.-Glen Hazel, 570 F.3d 520 (3d Cir. 2008).
31 Grammer, 570 F.3d at 522.
32 Id. at 525 (citing Blessing v. Freestone, 520 U.S. 329, 349 (1997)).
33 Id. at 525 (emphasis added) (citing Gonzaga Univ. v. Doe, 536 U.S. 273, 285 (2002)).
Blessing factors required examining not only the statutory language but also congressional intent.\textsuperscript{34}

In analyzing FNHRA’s statutory language, the Grammer court determined the statutory requirement that a plan for care “must provide” services was the same as the “no person shall” language in the Gonzaga University case that the Supreme Court cited as an example of rights-creating language.\textsuperscript{35} In addition, the court found the statutory language mandatory rather than precatory.\textsuperscript{36} Finally, because the relevant provisions of FNHRA mandated that such privileges be made available to “all eligible individuals,” the statute did not focus on the “entity regulated rather than the individuals protected.”\textsuperscript{37} In light of these determinations, and noting the congressional purpose for FNHRA was to improve conditions in nursing homes, the Grammer court concluded the language of the statute clearly conferred unambiguous and personal rights.\textsuperscript{38}

In Duncan v. Johnson-Mathers Health Care, Inc., the court rejected the logic of the Grammer case and found that FNHRA does not create enforceable rights.\textsuperscript{39} In Duncan, the brother of a deceased nursing-home resident sought relief on four counts of FNHRA violations.\textsuperscript{40} The court reasoned that, in cases that turn on whether a plaintiff has a statutory right of action, the language of the statute should be examined first.\textsuperscript{41}

In evaluating the language of the statute, the Duncan court reasoned that because the statute is entitled “Requirements for nursing facilities” and sets forth requirements for nursing homes related to providing services, it does not have an “unmistakable” focus on the rights of individuals.\textsuperscript{42} Instead, the court found the statute sets forth requirements for nursing homes to meet in order to receive funding.\textsuperscript{43} Therefore, the court declined to adopt the Grammer court’s ruling that the language in FNHRA has “an unmistakable focus on the benefitted class” as required by the Supreme Court in Gonzaga.\textsuperscript{44} In addition, the court noted that it was mindful of the Supreme Court’s reluctance to associate Spending

\textsuperscript{34} Id. at 526.
\textsuperscript{35} Id. at 527.
\textsuperscript{36} Id.
\textsuperscript{37} Id. (citing Sabree v. Richman, 367 F.3d 180, 190 (3d Cir. 2004).
\textsuperscript{38} Id.
\textsuperscript{40} Id. at *2.
\textsuperscript{41} Id. at *5.
\textsuperscript{42} Id. at *8.
\textsuperscript{43} Id.
\textsuperscript{44} Id. at *8 (citing Gonzaga Univ. v. Doe, 536 U.S. 273, 283 (2002)).
Clause legislation with individual rights.\textsuperscript{45} Noting that Congress did not speak in a clear, unambiguous voice and confer individual rights on nursing-home residents, the Duncan court refused to adopt the Grammer court’s ruling, and it ruled there was “no basis for private enforcement directly under the statute or under \([\S]\) 1983.”\textsuperscript{46}

Unfortunately, the U.S. Supreme Court denied the petition for certiorari in the Grammer case, so the courts remain divided on whether FNHRA created federally enforceable rights.

\textbf{B. Implied Cause of Action and FNHRA}

If a court determines the FNHRA created federally enforceable rights, the second step in exploring whether a privately held nursing home can be held liable for FNHRA rights violations is to determine if the FNHRA implies a private cause of action. Since the FNHRA does not contain an explicit cause of action, courts have turned to case precedent to determine whether the statute implies such a cause of action.

\textit{Cort v. Ash}, a 1975 Supreme Court case,\textsuperscript{47} addressed this issue under a different statute. In \textit{Cort}, stockholders sought an injunction and asserted a derivative claim for damages based on violations of a statute prohibiting the funding of campaigns for federal offices with corporate funds.\textsuperscript{48} The Court concluded four factors must be present to determine whether a private remedy is implicit in a statute that does not expressly provide one. First, the plaintiff must be a member of the class that the statute was expressly created to benefit.\textsuperscript{49} Second, there must be an indication of legislative intent to create a remedy.\textsuperscript{50} Third, implying such a remedy must be consistent with the underlying purposes of the legislative order.\textsuperscript{51} And finally, the cause of action should not be one that is traditionally relegated to state law, in an area that is the concern of the States, so that inferring a cause of action based solely on federal law would be inappropriate.\textsuperscript{52}

\textsuperscript{45} Id. at *10.
\textsuperscript{46} Id. at *10.
\textsuperscript{47} Cort v. Ash, 422 U.S. 66 (1975).
\textsuperscript{48} Id. at 66.
\textsuperscript{49} Id. at 78 (citing Texas & Pac. Ry. Co. v. Rigsby, 241 U.S. 33, 39 (1916)).
\textsuperscript{50} Id. (citing Nat’l R.R. Passenger Corp. v. Nat’l Ass’n of R.R. Passengers, 414 U.S. 453, 458, 460 (1974)).
\textsuperscript{51} Id. (citing Sec. Investor Prot. Corp. v. Barbour, 421 U.S. 412, 423 (1975); Calhoon v. Harvey, 379 U.S. 134 (1964)).
In *Grammer*, the Third Circuit considered only the presence of rights in the FNHRA and not the presence of a remedy. Thus, examining how other courts have treated this issue is necessary. *Sparr v. Berks County* and *Brogdon v. National Healthcare* discuss this issue.

In *Brogdon*, residents of a long-term health-care facility brought an action against the owners of the facility, alleging the facility failed to provide the minimally required levels of care as mandated in the FNHRA. In applying the first *Cort* factor, the court found the Medicare and Medicaid Acts were enacted to benefit nursing-home residents. The court even went so far as to concede that the FNHRA clearly conferred federal rights. However, the court stated that just because individuals enjoy certain federal rights, it does not mean they are necessarily entitled to a private cause of action to enforce those rights. In considering the third *Cort* factor, the court determined that Congress did not intend to create a remedy. The court found nothing in the written statute or its history to persuade it that Congress intended to create a private cause of action. In considering congressional intent, the court viewed the FNHRA through the context of contract, explaining that legislation addressing the spending power is really a contract: in return for federal funds, the recipients agree to comply with federally imposed conditions. In conclusion, the *Brogdon* court ruled there was insufficient evidence to support the position that Congress intended to create a private cause of action in the FNHRA.

Similarly, in *Sparr v. Berks County*, the court held no private cause of action existed under the Act to enforce the Bill of Resident Rights. Determining that the FNHRA did contain rights-creating language, the court reasoned that the lynchpin issue in the case was whether Congress intended to create a judicially enforceable cause of action. In examining the legislative history, the court found the statute’s purpose was to distribute funds and to place conditions on the recipients of the funds.

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55 Id. at 1325.
56 Id. at 1330.
57 Id.
58 Id.
59 Id.
60 Id.
61 Id. at 1331.
62 Id.
64 Id.
Sparr court disagreed with the plaintiff’s interpretation of the FNHRA’s legislative history used to support the plaintiff’s assertion that Congress intended for the FNHRA to contain an implied cause of action. The Sparr court determined the section of legislative history quoted by the plaintiff, when read in context, not only emphasized no authorization of a private cause of action, it also specified that the statute did not limit private remedies available under common law. Therefore, the court concluded that the FNHRA did not satisfy the second Cort factor.

Although the Cort factors were not discussed in Grammer, it is interesting to note that on the one pivotal issue, congressional intent of FNHRA, the Grammer court arrived at a very different conclusion. In Grammer, the court emphasized that it was “not concerned” that the provisions of the FNHRA were phrased in terms of responsibilities imposed upon the nursing home. To the Grammer court, it was clear that the purpose of the statute was to protect the rights afforded to individuals. In distinguishing between intent and purpose, the court looked to the House of Representatives Report regarding the circumstances that the statute was intended to remedy. All of the mitigating conditions in the Report revolved around the prevalence of substandard care in nursing homes. The focus was on the resident, not the nursing home.

In summary, while most courts have ruled that the FNHRA does not contain an implied private cause of action, the ruling in Grammer creates some uncertainty. Citing the Supreme Court’s reluctance to rule that Spending Clause legislation creates enforceable federal rights, most courts have chosen not to look beyond the FNHRA’s enforcement scheme to determine intent. However, Grammer examined the legislative history of the FNHRA in an effort to determine the congressional purpose in drafting the statute. While examining the purpose of the statute instead of its intent, the Grammer court scrutinized the specific social problems Congress was addressing and how the statute was written to cure those problems. In taking this approach, the Grammer court may have arrived at a more accurate interpretation of the FNHRA legislation. The words of a statute are meaningful only when they fit some intelligible purpose.

65 Id. at *1.
66 Id. at *2.
67 Grammer v. John J. Kane Reg’l Ctrs.-Glen Hazel, 570 F.3d 520, 530 (3d Cir. 2008).
68 Id.
69 Id.
70 Id.
determining the purpose of a statute, a judge should always look to the problem it addresses for direction on discovering intent. In adopting this approach, contrary to other court rulings, Grammer established that the FNHRA does imply a private cause of action. Because Grammer involved a county-run facility, the court concluded that the plaintiff could pursue a remedy through a §1983 action because all violations of federal rights by state entities are presumptively enforceable under §1983.

C. § 1983 Cause of Action and a Privately Owned Nursing Home

The Supreme Court in Flagg Bros. Inc. v. Brooks and Blum v. Yaretsky addressed the issue and the “under color of any statute” requirement.

In Flagg Bros., a class-action civil-rights suit was brought against the State of New York for the selling of private goods by a warehouse storage facility. The original plaintiff in Flagg Bros. had been evicted and her belongings had been placed in a storage unit. The storage warehouse threatened to sell Brooks’ belongings pursuant to Section 7-210 of the New York Uniform Commercial Code unless she made a payment on her unpaid balance. Brooks then brought a class action under 42 U.S.C. § 1983 seeking damages, an injunction, and a declaration that the sale under Section 7-210, which provided a way for a warehouseman to convert his lien into good title, was a violation of Due Process and Equal Protection Clauses of the Fourteenth Amendment. The District Court dismissed the claim, noting that the complaint failed to evoke relief under § 1983 because it did not meet the necessary “acting under the color of law” requirement for a § 1983 cause of action. The Court of Appeals reversed the lower court’s decision, reasoning that Section 7-210 delegated some sovereign state power over binding conflict resolution. However, the Supreme Court reversed the Court of Appeals decision, affirming the decision of the District Court. In making its decision, the Supreme Court explored and clarified the necessary components for the creation of a state actor working under the color of law.

72 Id.
75 Flagg Bros., 436 U.S. at 151.
76 Id. at 152.
77 Id.
78 Id.
79 Id.
80 Id.
Specifically, the Supreme Court noted that any claim for relief under § 1983 must contain two elements. First, the plaintiff must show he has been deprived of a right “secured by the Constitution and the laws” of the United States. Second, he must show whoever deprived him of the right was acting “under [the] color of any statute”. The Court noted that some rights created by government are protected from both governmental and private violation. However, even though a private person may cause a deprivation of a federal right, he cannot be held liable under § 1983 if he was not acting under the color of law. The Supreme Court further found that most rights secured by statute are protected only against governmental infringement. The Court pointed out that, although any person with sufficient physical power may deprive a person of his property, only a State or a private person whose actions “may be fairly treated as that of the State itself” may deprive a person of “an interest encompassed within the Fourteenth Amendment’s protection.” Although the discussion in Flagg Bros. solidified the “state actor” requirement for a § 1983 cause of action, it did not define exactly what makes a private party a state actor. Another Supreme Court case, Blum v. Yaretsky, addresses this question.

In Blum, a group of nursing-home residents brought a class action lawsuit against a privately run nursing home in New York. The lawsuit alleged violation of the residents’ federal rights when they were not afforded adequate notice of decisions to transfer the residents to a lower level of care. In addition, the residents asserted they were not given notice of an administrative hearing where they could challenge those decisions. Federal regulations required that the services provided by the facility be medically necessary in order for the resident to receive Medicaid assistance. The regulations required that a proprietary review committee (“URC”) composed of doctors associated with the facility review the residents’ care plan periodically to determine whether each resident was receiving appropriate care, or whether a transfer to a different level care facility was appropriate. This review satisfied the “medically necessary” requirement for the resident to receive Medicaid assistance. The URC

81 Id. at 155.
82 Id.
83 Id.
84 Id.
85 Id. at 157.
87 Id. at 995.
88 Id. at 994-95.
89 Id.
notified the state agency responsible for reimbursement of services when it determined the level of care for a resident needed to be reduced.\textsuperscript{90}

When the state agency refused to reimburse the nursing home for future treatment of the residents at the same level of care, the residents filed the lawsuit. On appeal, the residents argued that the State “affirmatively command[ed] the summary discharge or transfer of Medicaid patients” by nursing-home doctors through the operation of several federal and state regulations.\textsuperscript{91}

In a seven-to-two decision, the Court ruled against the residents. In reaching its decision, the Court focused mainly on the private decision-making of the nursing-home doctors.\textsuperscript{92} The Court noted the federal regulations mandated and controlled much of how nursing homes managed resident care. For example, homes providing excessive care faced potential expulsion from the Medicaid reimbursement program. In addition, regulations required state officials to review forms outlining each decision and to fine facilities that violated applicable regulations. In spite of these seemingly intertwining conditions, the Court determined that the full power to decide on discharge or transfer to a lower level of care facility ultimately rested with the doctors in charge of the residents’ care plan.\textsuperscript{93} Because discharge and transfer decisions were medical decisions determined by facility doctors and uninfluenced by the action of the State, to which the State merely responded by affecting Medicaid reimbursements according to assessment of the doctors, the \textit{Blum} Court ruled there was not a close-enough nexus between the State and the decision to transfer or discharge.\textsuperscript{94} A majority of the Court agreed that the State did not apply enough “coercive power” or “significant encouragement” toward the privately run nursing home to warrant labeling the home as a State actor.\textsuperscript{95}

In conclusion, the \textit{Blum} Court specified three principles that a court should examine when attempting to determine state-actor classification. First, the fact that a “business is subject to state regulation does not . . . convert its action[s] into that of the State for purposes of the Fourteenth Amendment.”\textsuperscript{96} Second, a State normally can be held liable for a private decision only when it has exercised enough coercive power or significant persuasion so that the private actor’s decisions are deemed decisions of the

\begin{itemize}
  \item \textsuperscript{90} Id. at 995.
  \item \textsuperscript{91} Id. at 995-96, 1005.
  \item \textsuperscript{92} Id. at 1010.
  \item \textsuperscript{93} Id. at 1009-10.
  \item \textsuperscript{94} Id. at 1010.
  \item \textsuperscript{95} Id. at 1004.
  \item \textsuperscript{96} Id. at 992.
\end{itemize}
Third, the required nexus may be present only if the private entity has exerted powers that are “traditionally the exclusive prerogative of the State.”

In 2011, the three Blum principles were applied in two § 1983 lawsuits brought against private nursing homes: Taormina v. Suburban Woods and Baum v. Northern Dutchess Hospital.

In Taormina, the estate of a deceased nursing-home resident sought remedy for FNHRA rights violations through a § 1983 cause of action. The plaintiff (“Taormina”) was the daughter of a resident of Suburban Woods Health and Rehabilitation Center (“Suburban Woods”). Taormina’s mother had been admitted to the facility for a variety of rehabilitation and medical treatments. Suburban Woods was a privately run facility that operated without active direction from any government entity. However, Suburban Woods also was a participant in the federal Medicaid reimbursement program and, as such, was subject to both state and federal regulations regarding patient care. While under the supervision of a speech and language pathologist contracted by Suburban Woods, the deceased choked on food and died. Taormina drew exclusively on the decision in Grammer to prove the existence of federal rights via FNHRA. The court did not address this issue, but instead focused on the fact that one of the requirements of a § 1983 lawsuit was that “the defendant acted under the color of state law, in other words, that there was a state action.” Taormina argued that Suburban Woods satisfied this requirement because it received funding from the state government, it was subject to regular inspections and a state-mandated licensing regime, and it was required to comply with various state laws governing patient care. In addition, Taormina contended a close nexus between the state’s licensing, regulations, and funding of the nursing-home facility established state action. Taormina further argued that the state exercised coercive power, or overtly encouraged Suburban Woods to

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97 Id.
98 Id. at 1005 (citing Jackson v. Metro. Edison Co., 419 U.S. 345, 353 (1974)).
101 Taormina, 765 F. Supp. 2d at 668.
102 Id.
103 Id.
104 Id.
105 Id.
106 Id.
107 Id. at 669.
108 Id.
109 Id.
provide substandard care, because the state’s incentive program encouraged facilities to manage and reduce costs.\textsuperscript{110} The \textit{Taormina} court referenced the ruling in \textit{Blum}, however, and held the allegations were insufficient to plead a close nexus between the state and the nursing home. Noting that a mere incentive is not sufficient to justify holding the state responsible for a private party’s actions, the court refused to rule that Suburban Woods was operating as a state actor.\textsuperscript{111} Taormina attempted to use the ruling in \textit{Grammer} to support changing the state-actor inquiry and thereby convert the actions of a private nursing home into action by the state.\textsuperscript{112} However, the court countered with the fact that \textit{Grammer} did not consider whether the plaintiff was a state actor because the nursing home involved in \textit{Grammer} was a county-run facility.\textsuperscript{113} The court concluded that FNHRA does not transform a traditionally private act into a public one, unless government itself becomes directly involved.\textsuperscript{114}

In \textit{Baum v. Northern Dutchess Hospital},\textsuperscript{115} the administrator of a nursing-home resident’s estate filed a § 1983 action against a privately run nursing home and hospital. The \textit{Baum} court held that FNHRA did not authorize a private cause of action, and the nursing home was not a state actor.\textsuperscript{116} The decedent in this lawsuit (“Baum”) was admitted to Northern Duchess Hospital (“Northern Duchess”) for hip surgery and then went to Wingate Nursing Home for rehabilitation. While at Wingate, Baum developed bedsores and died. Baum’s lawyers asserted that FNHRA was rights-creating and because Wingate and New York State were “inextricably intertwined” in providing medical services, Wingate acted under the color of law in treating the decedent.\textsuperscript{117} Baum relied predominately on the ruling in \textit{Grammer} to support his position.\textsuperscript{118} The \textit{Baum} court countered by detailing various cases that had not adopted \textit{Grammer}’s line of reasoning in holding a nursing home subject to a § 1983 lawsuit. Citing these cases, the court disagreed with the ruling in \textit{Grammer} and ruled that FNHRA did not confer a federal right. The court also addressed the state-actor requirement for a § 1983 lawsuit and relied heavily on the \textit{Blum} ruling. As in \textit{Blum}, the court determined the state did not exclusively coerce or influence patient care through its regulatory authority. Therefore, it could not be considered a co-actor in the delivery

\textsuperscript{110} \textit{Id.}

\textsuperscript{111} \textit{Id.}

\textsuperscript{112} \textit{Id.} at 672.

\textsuperscript{113} \textit{Id.}

\textsuperscript{114} \textit{Id.}

\textsuperscript{115} \textit{Baum v. N. Dutchess Hosp.}, 764 F. Supp. 2d 410 (N.D. N.Y. 2011).

\textsuperscript{116} \textit{Id.} at 428.

\textsuperscript{117} \textit{Id.} at 417.

\textsuperscript{118} \textit{Id.} at 421.
of medical services. Finally, the court reasoned, “government does not treat bed sores,” medical doctors do. Law cannot transform that private action into a public one.119

Conclusion

Even though conditions in nursing homes have improved since the passing of the Federal Nursing Home Reform Amendment in 1987, the existence of substandard care in nursing homes, which Congress attempted to correct with the statute, still exists today. As various state agencies, advocacy groups, and victims’ families attempt to educate the public on the failure of nursing homes to ensure that the elderly receive the best quality medical care in the waning years of their lives, the courts are struggling with how to make substandard nursing homes responsible for unacceptable care and conditions. As evidenced by the ruling in Grammer, some players in the legal world are still trying to achieve what Congress desired in drafting FNHRA: protecting nursing-home residents.

Although privately run nursing homes probably cannot be considered state actors and thereby making a private cause of action under § 1396r difficult to demonstrate, Grammer does open the door for state-run nursing homes to be held accountable for abuse and substandard care. In light of several courts’ conflicting interpretations of FNHRA’s provisions, Congress should amend the law and clearly establish a cause of action. Such an amendment would accomplish the original purpose of FNHRA: improving nursing-home conditions. Considering that most of us at some point in our future will live the nursing-home experience first-hand, we should keep this topic on our radar.

119 Id. at 433.
THE LIMITS OF GUILT AND SHAME
AND THE FUTURE OF AFFIRMATIVE ACTION

By Donald L. Beschle*

Introduction

Five decades after the concept of “affirmative action” was first employed by the government,1 and nearly four decades since the Supreme Court made its first attempt to define the constitutional status of affirmative action programs,2 the political and legal debate surrounding this policy continues. The Court’s most recent pronouncements3 do little more than reject the argument that race may never be taken into account in government programs, without providing firm guidance with respect to the limitation or the use of race as a factor.4

The continuing uncertainty over the proper scope of affirmative action is relevant, not only to legislators and government administrators, but also to private businesses seeking workplace diversity. While the precise relationship between the constitutional limitations on government affirmative action programs and the statutory limitations on similar programs established by private entities has never been articulated,5 court

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4 An acceptable university admissions program must avoid rigid quotas and be “flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.” Grutter, 539 U.S. at 309 (quoting Bakke, 438 U.S. at 317).

decisions suggest a great deal of overlap in the standards applied in each situation.⁶

The articulated standard for constitutional analysis of affirmative action is strict scrutiny,⁷ but ever since the first articulation of that standard, its application has been more challenging than in cases where racial classifications are used to the detriment of minority groups. In these latter cases, strict scrutiny has resulted in something quite like a rule of per se invalidity.⁸ In other constitutional contexts, however, strict scrutiny has become something less than an absolute barrier to governmental action.⁹ In these contexts, the requirement that government narrowly tailor its responses to pursue a compelling government interest has been enforced in a way that sometimes permits government to satisfy its burden. Affirmative action is one of these contexts.

The question of whether a particular government action is sufficiently narrowly tailored is often hard to answer, especially since its fact-specific nature may make prior cases questionable precedents. The question of narrow tailoring, however, will only come into play where a sufficiently powerful government interest exists. In recent years, perhaps the most significant issue in the jurisprudence surrounding affirmative action has been whether the only interest sufficient to justify racial classifications designed to benefit minority groups is the need to remedy specific past acts of discrimination by the entity proposing the remedial program.¹⁰ Both as a political and legal strategy, a focus on past guilt by affirmative action advocates may seem attractive, in light of the unanimous support for the proposition that such guilt can serve as a sufficient interest to justify affirmative action; yet, as the era of overt and

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⁶ Thus, it is not unusual to see the Court make reference to Title VII cases in cases turning on the Equal Protection Clause. See, e.g., City of Richmond v. J.A. Croson Co., 488 U.S. 469, 501 (1989). And in Coal. for Econ. Equity v. Wilson, the Court held that the constitutional standard enunciated in Croson governed judicial remedies proposed under Title VII. 110 F.3d 1431, 1445-46 (9th Cir. 1997).

⁷ Bakke, 438 U.S. at 290-91; Gratz, 539 U.S. at 270.

⁸ The only case in which the Supreme Court has found that a racial categorization that disadvantaged a racial minority satisfied strict scrutiny was, ironically, the first case to enunciate a strict scrutiny test for cases involving race discrimination. See Korematsu v. United States, 323 U.S. 214 (1944) (upholding the World War II military order excluding persons of Japanese ancestry from portions of the Pacific Coast).

⁹ See, e.g., Planned Parenthood of S. Pa. v. Casey, 505 U.S. 833 (1992) (introducing the “undue burden” test into analysis of abortion regulation); see also id. at 876 (limiting the use of strict scrutiny in such cases); Emp’t Div. v. Smith, 494 U.S. 872 (1990) (rejecting strict scrutiny in free exercise cases challenging laws of general applications).

¹⁰ See infra text accompanying notes 29-60.
government-condoned racial discrimination recedes into the past, convincing showings of guilt become harder to establish. In light of this, two responses are possible.

One response is to broaden the definition of past discrimination and of guilt. In doing so, however, the concept of guilt itself is significantly transformed into what social psychologists more commonly denote as shame. Whereas guilt properly defined focuses on remorse for specific acts, shame is a more global feeling of embarrassment with respect to what one is, rather than specifically what one has done. Where a sense of guilt is absent, how effective is shame in inducing socially positive action?

If neither guilt nor shame is available as effective motivating agents for those making decisions regarding diversity programs, what alternatives remain? Recent court decisions do leave open some room for justifying affirmative action on the basis of forward-looking grounds, that is, grounds that look to the future benefits of diversity, rather than past guilt for acts of discrimination. The extent to which forward-looking justifications will be accepted by courts remain unclear, however.

As the Supreme Court prepares to consider the affirmative action program at the University of Texas, the possibility that affirmative action might be strictly limited to remediation of past guilt is quite alive. Will this lead, in effect, to the end of affirmative action?

Whatever the extent of permissible grounds for affirmative action may be, legislators and other policymakers must be persuaded of the desirability of such programs. This leads to the core question explored in this article: how effective is guilt in motivating pro-social actions? Where a sense of guilt is absent, is shame an equally effective or more effective substitute? And if guilt and shame are likely to fail, what is left? To what extent are guilt and shame required by current constitutional doctrine as justifications to affirmative action?

This article begins with a brief history of affirmative action, focusing on the way in which the Supreme Court has come to see it primarily, if not exclusively, as a remedial device upon a showing of guilt for past discriminatory acts. Part II will explore the use of guilt and shame, two often overlapping but distinct emotions, in serving as factors motivating pro-social actions. Finally, after discussing the limits of guilt and shame, this article will suggest some ways to approach affirmative action in the future that might be both politically effective and constitutionally permissible.

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11 Fisher v. Univ. of Tex., 631 F.3d 213 (5th Cir. 2011), cert. granted, 132 S. Ct. 1536 (Feb. 21, 2012) (No. 11-345).
I. Affirmative Action: A History

The modern history of the concept and the terminology of affirmative action are regarded as beginning with the executive orders issued by the Johnson and Nixon administrations in the years following the enactment of the landmark civil rights legislation of the 1960s. These orders required federal agencies and government contractors to go beyond mere nondiscrimination and take affirmative steps to increase minority representation in job categories where racial minorities were severely underrepresented. Legislators and administrators at the federal, state, and local levels, as well as a number of private entities, began experimenting with various types of affirmative action programs either to remedy the effects of past discrimination (and avoid potential liability) or to achieve perceived benefits resulting from more diverse education or work-related environments.

Despite this history, our understanding of the affirmative action debate will benefit from a preliminary look at what might be called the pre-history of affirmative action. In the years immediately following the Civil War, Congress took steps to secure something more than mere formal legal equality for the former slaves. As significant as the Thirteenth, Fourteenth, and Fifteenth Amendments were, they hardly erased the social and economic consequences of the slavery era. Although Congress rejected calls to redistribute plantation land owned by former rebels in order to provide newly freed slaves with “forty acres and a mule”, it did establish the Freedman’s Bureau, a federal agency charged with providing education and other forms of assistance.

During its short life and with limited resources, the Bureau had some degree of success, particularly in providing educational opportunities.

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12 See supra note 1.
13 Id.
16 See Oubre, supra note 15.
17 Freedmen’s Bureau Act of 1865, ch. 90, 13 Stat. 507 (enacted March 3, 1865) (giving the Bureau “control of all subjects relating to refugees and freed men”). On its face, the Bureau was authorized to assist all those displaced by the War, black or white. In practice, services were overwhelmingly provided to blacks. Schnapper, supra note 15, at 760-61.
18 “In each of the years immediately prior and subsequent to the adoption of the
From its inception, though, it was controversial. Even in the immediate aftermath of slavery, opponents characterized the Bureau as providing the former slaves not with equal opportunity but with unwarranted advantages. 19 While much of this opposition no doubt had its origins in racism, it is perhaps not entirely surprising since it was at a time where federal involvement in education and the provision of social welfare benefits were nearly nonexistent. 20

The Reconstruction-era Congress also enacted the Civil Rights Act of 1875, 21 which prohibited racial discrimination by private parties engaged in providing public accommodations. 22 In 1883, however, the Supreme Court invalidated that Act, holding that the Fourteenth Amendment did not empower Congress to legislate against private acts of discrimination but only the acts of the states themselves. 23 Beyond the obvious significance of this entrenchment of what would become known as the “state action” doctrine, 24 the Court further echoed the voices of the opponents of the Freedman’s Bureau and their concern with “special favor” for racial minorities:

When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws ... 25

This comment, largely unnecessary for the resolution of the federalism issues on which the case was decided, shows that even at a time when the Civil War and slavery were “almost too recent to be called history”, 26 questions that would, a century later, dominate the debate over

19 For specific objections by the Bureau’s opponents to its allegedly unfair aid to blacks, Id. at 763-65.

20 The constitutional legitimacy of federal social welfare programs was disputed into the twentieth century. See Massachusetts v. Mellon, 262 U.S. 447 (1923).

21 Civil Rights Act of 1875, ch. 114, 18 Stat. 335 (enacted March 1, 1875).

22 Id.

23 Civil Rights Cases, 109 U.S. 3, 23 (1883).


26 Slaughter-House Cases, 83 U.S. 36, 71 (1873).
affirmative action were already sharply defined. What is the difference between protecting equality and providing unwarranted special favoritism? If special treatment is sometimes justified, under what conditions? Is special treatment a temporary aberration, available only for a limited time to those who have been personally deprived of equal opportunity in the past, or might it extend beyond a single generation of victims of discrimination?

In the decades following the demise of the Freedman’s Bureau and the Civil Rights Act of 1875, the question of the constitutional legitimacy of targeted government aid to racial minorities was hardly an active issue. In the post-Reconstruction world of government-sponsored segregation, endorsed by the Supreme Court’s 1896 decision in *Plessy v. Ferguson*,

27 citizens rights advocates had their hands full advocating enforcement of formal legal equality. After the civil rights revolution marked by *Brown v. Board of Education* 28 and the landmark federal legislation of the 1960s, 29 however, the question of “special treatment” was bound to reappear. Decades of public and private acts of racial discrimination had taken their toll. Was it a sufficient response to merely demand that these acts cease?

The first context in which the Supreme Court considered race-based decisions by the government intended to benefit racial minorities arose, not in the context of what we would label “affirmative action,” but rather in cases involving court-ordered school bus plans. After a decade or more of minimal, reluctant compliance by many school boards with the Court’s command that public schools be desegregated “with all deliberate speed,” 30 courts began to require busing students out of their neighborhoods as a remedy following a finding of illegal segregation. 31 Opponents of busing as a remedy argued that *Brown* and subsequent developments required that government acts be entirely colorblind, and

27 163 U.S. 537 (1896).


racially sensitive school assignments were, therefore, directly contrary to that principle.\(^\text{32}\)

In the 1971 case of *Swann v. Charlotte-Mecklenburg Board of Education*, the Supreme Court upheld the use of race-conscious remedies to enforce school desegregation.\(^\text{33}\) The Court emphasized that these race-conscious steps were responses to a history of unconstitutional state-sponsored segregation.\(^\text{34}\) Once that history was established, local government had “the affirmative duty to take whatever steps might be necessary” to end segregation.\(^\text{35}\) And in such a case, “the scope of a district court’s equitable powers to remedy past wrongs is broad.”\(^\text{36}\) While *Brown* established a standard of strict scrutiny for government-imposed racial classifications, it did not make all such classifications per se illegal. Since federal courts have a compelling interest in remedying the effects of a constitutional violation, a race-conscious remedy might well be seen as sufficiently tailored to achieving that interest to satisfy a strict scrutiny analysis.\(^\text{37}\)

*Swann*, then, emphasized the link between race-conscious acts intended to favor minority groups and the past-guilt of those who bore the brunt of those acts. In the 1974 case of *Milliken v. Bradley*,\(^\text{38}\) the Court indicated that this link was not merely sufficient but also necessary to justify court-ordered race-conscious relief. In a decision widely seen as dealing a nearly fatal blow to the practical possibility of genuine racial integration in many urban school systems, the Court invalidated a district court plan that would have required busing students across district lines in Detroit and the surrounding suburbs.\(^\text{39}\) Although those suburban districts were home to a significant number of former Detroit residents who had left the city during a period of “white flight,” the Court held that since the suburban districts had never engaged in de jure segregation, they could not be required to participate in a busing plan designed to remedy the sins of Detroit.\(^\text{40}\)

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\(^{32}\) For a summary of desegregation decisions nationwide during the 1960s and early 1970s, see GARY ORFIELD, MUST WE BUS?: SEGREGATED SCHOOLS AND NATIONAL POLICY 11-39 (1978).

\(^{33}\) 402 U.S. 1, 22-31 (1971).

\(^{34}\) *Id.* at 6-11.

\(^{35}\) *Id.* at 15 (quoting Green v. Cnty. Sch. Bd., 391 U.S. 430, 437-38 (1968)).

\(^{36}\) *Id.*

\(^{37}\) *Id.*


\(^{39}\) *Id.* at 745-47.

\(^{40}\) *Id.*
Thus, before the Supreme Court had considered what are generally regarded as “affirmative action” cases, it had established, in the busing cases, a link between race-conscious action taken to benefit racial minorities and a prior finding of guilt for past discrimination on the part of those taking the action. In this context, race-conscious action taken to benefit racial minorities was held justified as a remedy necessary to restore a presumed pre-guilt state of racial equality.

The necessity of a connection between judicial imposition of a remedy and a finding of some degree of guilt in the school desegregation lawsuits hardly seems surprising or unusual. It merely reflects the normal role of courts and the normal limitations on their rule. Courts operate within a context that require a finding of guilt or fault in order to justify a remedy, the purpose of which is merely to set things right. The role of courts is not generally understood to include wading into a social problem and presenting a way of making things better, apart from a finding that someone has acted wrongfully.

Legislatures, on the other hand, do not work under such restraints. Legislators may identify a social problem without the need to attribute its existence to guilt or fault on the part of any specific person or entity, and prescribe methods of alleviating the problem that go beyond merely restoring some perceived status quo ante. The future of affirmative action would largely turn on whether courts saw the government acts, or acts by private employers in cases involving Title VII violations, as legitimate acts to alleviate a social problem limited to minority underrepresentation or an illegitimate effect to impose a remedy where there was no initial finding of guilt or fault.

In *Regents of the University of California v. Bakke*, the Supreme Court for the first time assessed the legitimacy of a race-conscious government plan aimed at benefitting racial minorities, which was neither imposed by a district court nor adopted to remedy specific past acts of discrimination. The medical school at the University of California at Davis, which had only been established in 1968, and thus had no history of racial discrimination, established an affirmative action admissions program in 1970. Under the plan, 16 of the 100 seats in the school’s entering class were reserved for “economically and/or educationally disadvantaged” applicants. While these formal eligibility requirements for the reserved seats did not exclude white applicants, in practice only

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42 *Id.* at 272 (explaining that the school, established in 1968, clearly had no history of racial discrimination on which to base an affirmative action program).
43 *Id.*
44 *Id.* at 274.
African-Americans, Asian-Americans, and Mexican-Americans were actually chosen.\textsuperscript{45}

The Supreme Court invalidated the program, but in a fractious way that left many questions unanswered. Four justices, finding that the program violated federal statutes prohibiting racial discrimination in higher education saw no need to address the question of whether benign racial classifications not prohibited by statute would nevertheless violate the Constitution.\textsuperscript{46} Four justices, in contrast, would have upheld the program.\textsuperscript{47} In their opinion, the statute prohibited only racial classifications that would violate the Constitution.\textsuperscript{48} Further, these justices felt that the Constitution did not prohibit “benign” racial classifications if they “serve[d] important government objectives and . . . [were] substantially related to . . . [these] objectives,”\textsuperscript{49} a test somewhat more permissive than the classic formulation of “strict scrutiny.”\textsuperscript{50} Eliminating “serious and persistent underrepresentation of minorities in medicine”, these four justices contended, could serve as such an objective, regardless of whether the medical school itself had any responsibility for creating that underrepresentation.\textsuperscript{51}

Justice Powell cast the deciding vote. While holding against the school’s program, he rejected the position that either the federal statute or the Constitution categorically prohibited race-consciousness in higher education admissions.\textsuperscript{52} At the same time, he rejected the dissenter’s view that a form of intermediate scrutiny was sufficient in analyzing benign racial classifications.\textsuperscript{53} Justice Powell would apply strict scrutiny, but insist that such a test was not necessarily fatal. He accepted the university’s position that providing the educational benefits of a diverse student body could qualify as a compelling state interest.\textsuperscript{54} That interest, however, must be satisfied by sufficiently narrow means, and Justice Powell concluded that setting aside a fixed number of admission slots for minority candidates went too far.\textsuperscript{55} With Justice Powell’s opinion

\textsuperscript{45} Id. at 275-76. (“Indeed, in 1974, at least, the special [admissions] committee explicitly considered only ‘disadvantaged’ special applicants who were members of one of the designated minority groups.”). Id. at 276.

\textsuperscript{46} Id. at 408-21 (Stevens, J., concurring in part and dissenting in part).

\textsuperscript{47} Id. at 324-79 (Brennan, J., concurring in part and dissenting in part).

\textsuperscript{48} Id. at 325 (Brennan, J., concurring in part and dissenting in part).

\textsuperscript{49} Id. at 359 (Brennan, J., concurring in part and dissenting in part).

\textsuperscript{50} See id. at 311-14 (Powell, J., applying strict scrutiny).

\textsuperscript{51} Id. at 370-71 (Brennan, J., concurring in part and dissenting in part).

\textsuperscript{52} Id. at 311-14.

\textsuperscript{53} Id.

\textsuperscript{54} Id. at 312.

\textsuperscript{55} Id. at 314-19.
providing the decisive fifth vote, \textit{Bakke} would be read as endorsing the position that while affirmative action programs, at least where they were not justified by the need to remedy specific prior acts of discrimination, could not employ fixed quotas or separate tracks for consideration of minority candidates, in certain circumstances race could be one of a number of factors taken into account in admission or employment decisions.

\textit{Bakke} seemed to suggest that affirmative action might be an acceptable response to a perceived social problem arising from minority underrepresentation in some circumstances without the need to attribute that underrepresentation to any specific guilty party. While never explicitly repudiating this idea, subsequent Supreme Court cases, primarily focusing on employment matters rather than the admission policies of universities, were skeptical of affirmative action rationales not based on past guilt.

A prominent example, and one that might suggest that \textit{Bakke} was \textit{sui generis}, is the 1986 case \textit{Wygant v. Jackson Board of Education} \textsuperscript{56}. The Court invalidated a school district’s layoff policy that took race into account as well as seniority.\textsuperscript{57} The board’s contention that maintaining a racially diverse public school faculty would enhance the educational environment was rejected as a sufficient justification for the policy,\textsuperscript{58} and the Court went on to find insufficient evidence of any past discrimination in the board’s hiring policies.\textsuperscript{59} Three of the four dissenters based their disagreement on their conclusion that the record did in fact support a finding of past discrimination.\textsuperscript{60} Only Justice Stevens preferred shifting the focus away from the question of past guilt to the question of whether the policy could be justified as promoting an educationally superior school environment:

\begin{quote}
In my opinion, it is not necessary to find that the Board of Education has been guilty of racial discrimination in the past to support the conclusion that it has a legitimate interest in employing more black teachers in the future. Rather than analyzing a case of this kind by asking whether the minority teachers have some sort of special entitlement to jobs as a remedy for sins that were committed in the past, I believe that we should first ask whether the Board’s
\end{quote}

\textsuperscript{56} 476 U.S. 267 (1986).
\textsuperscript{57} Id. at 270-71.
\textsuperscript{58} Id. at 274-76 (explaining the benefits of providing “role models” for minority students was found to be too amorphous).
\textsuperscript{59} Id. at 278.
\textsuperscript{60} Id. at 297-99 (Marshall, J., dissenting).
action advances the public interest in educating children for the future.\(^{61}\)

Justice Stevens’ advocacy of analyzing affirmative action for its potential to create future social benefits in addition to its potential to serve as a remedy for the guilt of past discrimination found little support in subsequent cases. Whether looking at the actions of government entities subject to constitutional provisions, or private employers subject to Title VII, the pattern was relatively clear. In cases where past discrimination could be proven, the Court approved affirmative action, even programs going beyond the confines of Bakke to employ numerical goals.\(^{62}\) In the absence of past discrimination, however, outcomes were quite different.

In City of Richmond v. J.A. Croson Co.,\(^{63}\) the Court held that all state or local government affirmative action programs must be subjected to strict scrutiny.\(^{64}\) This was the first time that an unambiguous majority of the Court had explicitly endorsed that position.\(^{65}\) While the Court fell short of explicitly ruling out any non-remedial use of affirmative action,\(^{66}\) apart from Justice Stevens,\(^{67}\) the majority strongly suggested that “rectify[ing] the effects of identified discrimination” might well be the only acceptable justification for race-conscious action.\(^{68}\) The Court’s language suggested that even as a remedy, affirmative action would be rarely appropriate: “in the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion.”\(^{69}\)

Once again, in Croson, even the dissenter focused primarily on the past rather than the future. Unlike the majority, the dissenter would allow past discrimination within a particular field of employment, or even in society at large, to serve as the requisite past discrimination justifying government action to remedy its effects.\(^{70}\) This approach obviously

\(^{61}\) Id. at 313 (Stevens, J., dissenting).


\(^{63}\) 488 U.S. 469 (1989).

\(^{64}\) Id. at 493-98.

\(^{65}\) Id. at 551 (Marshall, J., dissenting).

\(^{66}\) Id. at 509 (“In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion.”).

\(^{67}\) Id. at 511 (“I . . . do not agree with the premise that seems to underlie today’s decision . . . that a governmental decision that rests on a racial classification is never permissible except as a remedy for a past wrong.”) (Stevens, J., concurring in part).

\(^{68}\) Id. at 509.

\(^{69}\) Id.

\(^{70}\) Id. at 530-35, 544-46 (Dissenters contending that Richmond had made a sufficient
expands the list of entities permitted to engage in affirmative action well beyond those that were demonstrably guilty of past discrimination. Even in this view, though, the justification for affirmative action is grounded in some type of guilt for past acts.

In *Adarand Constructors, Inc. v. Pena*, the Court held that federal as well as state and local affirmative action programs must be subjected to strict scrutiny analysis. In so doing, the Court overruled its earlier decision in *Metro Broadcasting, Inc. v. FCC*. *Metro Broadcasting* held that greater judicial deference was due when an affirmative action program was authorized by Congress than when it originated at the state or local level. This conclusion was based on the Fourteenth Amendment’s section five, authorizing Congress to implement the Amendment’s substantive provisions, including the assurance of equal protection, by appropriate legislation. *Metro Broadcasting* was a rare decision that relied not on particular past discrimination by the FCC in its past licensing, but rather on the forward-looking justification for the agency’s affirmative action program, specifically the goal of promoting diverse program content, to serve as the requisite government interest.

The extent to which *Adarand* rejected the use of any justification for affirmative action other than specific acts of past discrimination is not entirely clear. On one hand, the Court cited *Wygant* for the proposition that evidence of “societal discrimination” is insufficient as a basis for affirmative action. In addition, the Court’s citation of *Metro Broadcasting* stressed that “the FCC policies at issue did not serve as a remedy for past discrimination.” On the other hand, the Court cited with approval Justice Powell’s *Bakke* opinion, which maintained that the forward-looking interest of a school in having a diverse student body could support a limited form of affirmative action. Although it has not

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showing of past discrimination in the local contracting industry. Also, dissenters citing the general pervasive history of racial discrimination in Richmond.):

72 *Id.* at 225-26.
74 *Id.* at 564-65.
75 *Id.* at 563.
76 *Id.* at 564-65 (“We hold that benign race-conscious measures mandated by Congress – even if those measures are not ‘remedial’ in the sense of being designed to compensate victims of past governmental or societal discrimination – are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives.”).
78 *Id.* at 225 (citing *Metro Broad., Inc. v. F.C.C.*, 497 U.S. 547 (1990)).
79 *Id.* at 218-20 (discussing *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978)).
been unheard of for lower courts in recent years to find affirmative action justified on forward-looking grounds, without a showing of specific past discrimination, post-Adarand courts might well assume that even mild forms of affirmative action were subject to invalidation in the absence of such a showing.

The Supreme Court’s most recent attempt to clarify the affirmative action question as applied to higher education provides less than either the strong supporters or the strong opponents of the practice might have hoped. A pair of companion cases involving the University of Michigan caused the Court to revisit Bakke. The two opinions each drew from Justice Powell’s decisive Bakke opinion, putting to rest questions that had persisted concerning the force of that opinion as precedent, given that, despite providing the necessary fifth vote, it was the opinion of a single justice.81

In Gratz v. Bollinger, the Court invalidated the affirmative action program employed by the university’s undergraduate division.82 While the program did not establish a system of fixed quotas for minority admission, unlike the program at issue in Bakke, the Court held that it went too far in giving preferential weight to minority status and failed to provide a system that “assess[ed] all of the qualities [an] individual possesses.”83 Race, in other words, was too determinate a factor in itself.

In Grutter v. Bollinger, however, the University of Michigan Law School prevailed, with the Court finding its affirmative action admissions program sufficiently tailored to satisfy the standard set forth in Bakke.84 While much might be said about the question of how narrowly tailored an affirmative action program must be, the issue relevant to this article concerns the first part of the “strict scrutiny” analysis. In Grutter, and even implicitly in Gratz, most of the justices accepted the contention of the university that providing students with the educational benefit of a racially and ethnically diverse environment can constitute a sufficiently

80 See, e.g., Wittmer v. Peters, 87 F.3d 916 (7th Cir. 1996), cert. denied, 519 U.S. 1111 (1997) (upholding a hiring criterion for prison boot camp personnel that sought racial balance, in light of evidence that a critical mass of black lieutenants was essential to the operation of the camp).
81 With Justice Powell writing only for himself, but casting the deciding vote in Bakke, there was considerable debate over the question of whether his opinion was binding precedent. See Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996), cert. denied, 518 U.S. 1033 (1996) (rejecting the contention that Justice Powell’s opinion was binding precedent).
83 Id. at 271.
strong interest for some form of affirmative action.\textsuperscript{85} This rejects the contention that only a remedial justification, based upon specific findings of guilt for past discrimination, can serve to justify affirmative action.

Whether this aspect of \textit{Grutter} is strong or secure, however, remains open to debate. It is clear that not all of the current justices will accept any but the most extreme non-remedial, forward-looking justification for affirmative action. Justice Thomas, joined by Justice Scalia, rejects “marginal improvements” in legal education as a sufficiently compelling state interest.\textsuperscript{86} He notes that “the Court has accepted only national security, and rejected even the best interests of the child, as a justification for racial discrimination”,\textsuperscript{87} outside of the context of affirmative action. This leads Justice Thomas to conclude, “only those measures the State must take to provide a bulwark against anarchy, or to prevent violence, will constitute a ‘pressing public necessity’, justifying race-conscious activity.”\textsuperscript{88} As a practical matter, then, Justices Thomas and Scalia are committed to limiting affirmative action to situations where it remedies specific past acts of discrimination.

While \textit{Grutter} clearly endorses the use of some limited forms of affirmative action regardless of the existence of specific acts of past discrimination, it is unclear whether this will have much impact outside of the context of higher education. The \textit{Bakke} precedent may have caused the Court to maintain a narrow exception to an otherwise hostile response to non-remedial uses of affirmative action.\textsuperscript{89} Commentators on \textit{Grutter} have, unsurprisingly, taken different positions. Some see the opinion as a significant shift away from exclusive concern with past guilt and toward the use of affirmative action “as [an] instrument[ ] for the achievement of extrinsic social goods.”\textsuperscript{90} Others see its impact extending no further than the context of higher education admissions programs.\textsuperscript{91} Interestingly,

\begin{itemize}
  \item \textsuperscript{85} “[T]he Law School has a compelling interest in attaining a diverse student body” \textit{Id.} at 308. The undergraduate admissions program “is not narrowly tailored to achieve the interest in educational diversity that respondents claim justifies their program” \textit{Gratz}, 539 U.S. at 270.
  \item \textsuperscript{86} \textit{Grutter}, 539 U.S. at 357 (Thomas, J., concurring in part and dissenting in part).
  \item \textsuperscript{87} \textit{Id.} at 353 (Thomas, J., concurring in part and dissenting in part).
  \item \textsuperscript{88} \textit{Id.}
  \item \textsuperscript{89} See, e.g., Johnson v. California, 543 U.S. 499 (2005) (where the Court invalidated a California prison program that segregated prisoners by race for the first sixty days of confinement, an attempt to prevent racial violence while determining where to permanently place prisoners); Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (invalidating school district plans that included race as a factor in determining which students would be assigned to their choice of public schools).
  \item \textsuperscript{90} Robert C. Post, \textit{Fashioning the Legal Constitution: Culture, Courts, and Law}, 117 Harv. L. Rev. 4, 60 (2003).
  \item \textsuperscript{91} See generally Vikram David Amar & Evan Caminker, \textit{Constitutional Sunsetting}?:
some supporters of affirmative action have criticized Grutter’s focus on the potential future benefits of diversity, preferring the supposedly “more radical arguments [that] focus on the need to remedy past discrimination, address present discriminatory practices, and reexamine traditional notions of merit and the role of universities in the reproduction of elites.”

In 2007, the Court invalidated student assignment plans adopted by Seattle and Louisville that used race as a “tiebreaking” factor in assigning students to elementary schools or high schools. Seattle public schools had never been segregated by intentional legal discrimination; Louisville schools, once segregated by law, were freed from court-ordered integration orders in 2000, upon a finding that “the vestiges” of past discrimination had been eliminated. Thus, neither school district could rely on remedy for past guilt as justification for their plans.

For our purposes, this significant part of the Court’s analysis focuses on the first part of the strict scrutiny test, the existence of a compelling state interest. A four-justice plurality opinion rejects the achievement of racial balance or the remedying of general societal discrimination as a compelling state interest. The four dissenters, in contrast, accept the “interest in promoting or preserving greater racial ‘integration’ of public schools” as compelling. Justice Breyer supports this conclusion by referring both to the past (“setting right the consequences of prior conditions of segregation”) and to the future (“to create school environments that provide better educational opportunities”).

Justice Kennedy, while providing the fifth vote to invalidate each program, does so on the basis of the necessity of the means chosen by the school districts, rather than the absence of sufficient compelling state interests. In contrast to the plurality opinion, Justice Kennedy finds that “reduc[ing] . . . racial isolation” and achieving “diverse school

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Justice O’Connor’s Closing Comments in Grutter, 30 Hastings Const. L.Q. 541 (2003) (discussing Justice O’Connor’s comment that she would expect that in 25 years, affirmative action programs will no longer be necessary to further compelling government interests).


93 Parents Involved in Cmty. Schs., 551 U.S. at 733-34.

94 Id. at 712, 716.

95 Id. at 720-33.

96 Id. at 729-31.

97 Id. at 838 (Breyer, J., dissenting).

98 Id.

99 Id. at 843.

100 Id. at 787-89 (Kennedy, J., concurring in part and concurring in the judgment).
enrollments” may serve as compelling interests for local school districts.\textsuperscript{101}

As a matter of constitutional law, the question of whether affirmative action can be justified only as a remedy for past guilt remains alive, in the wake of \textit{Grutter}. To the extent that courts will allow non-remedial uses of such programs, however, legislators and administrators will have to decide whether to adopt them. Several states have proposed or adopted prohibitions on the use of race-based affirmative action, and the political opposition to such programs remains strong elsewhere.

To what extent has the Court’s focus on affirmative action as a remedy affected the affirmative action debate, not merely in courtrooms, but in legislative halls and voting booths? Is keeping the focus on past guilt more or less likely to generate support for continued use of affirmative action? To answer the questions, it may be much more useful to focus less on case law, and more on the work of social psychology.

\section*{II. Guilt, Shame, and Affirmative Action}

\textit{Grutter} stands for the proposition that specific past guilt for acts of discrimination is not always required to justify at least limited forms of affirmative action. Still, whether as a consequence of the fact that the first cases involving race-conscious activities designed to benefit racial minorities involved court ordered remedies for past discrimination, or simply flowing from a judicial mindset more comfortable with fault and remediation, guilt remains central to the affirmative action debate. While questions persist concerning which non-guilt based justifications will satisfy the Supreme Court’s strict scrutiny test, past discrimination remains the sole justification clearly accepted by all the justices.\textsuperscript{102}

With guilt for past discrimination being the most secure basis for the maintenance of affirmative action programs, it is unsurprising that disputes would arise over just what we mean by the concept of guilt. From the outset of the legal and political debate over affirmative action, supporters have argued that the guilt of past discrimination need not be confined to a particular party, but could be seen as tainting an entire profession or field, or even society at large.\textsuperscript{103} As we have seen, courts

\begin{flushright}
\textsuperscript{101} \textit{Id.} at 786. \\
\textsuperscript{102} See \textit{supra} text accompanying notes 55-86. \\
\textsuperscript{103} “[A] state government may adopt race-conscious programs if the purpose of such programs is to remove the disparate racial impact its actions might otherwise have and if there is reason to believe that the disparate impact is itself the product of past discrimination, whether its own or that of society at large.” Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 369 (1978) (Brennan, J., concurring in the judgment in part and dissenting in part).
\end{flushright}
have been reluctant to accept these broadly defined concepts of guilt as justifying affirmative action, and political opponents of these programs similarly reject extending the scope of guilt for past discrimination. Regardless of the effect that extending the concept of guilt might have on the willingness of courts to accept affirmative action,\textsuperscript{104} will it make it more or less likely that public and private decision makers will adopt such programs?

At the outset, it will be necessary to define some terms. Specifically, we need to distinguish guilt from shame, a related concept, but not one synonymous with guilt. It is common for people, in everyday conversation, to use the terms interchangeably or simultaneously with little or no thought to whether those might be separate emotions, albeit ones that might co-exist at the same time. In recent years, though, both law and social science have paid attention to the difference between the two.\textsuperscript{105}

In law, guilt is, of course, a well-understood term. Along with its correlate of fault, it focuses on the responsibility of a particular party for a particular act or course of action. Criminal punishment cannot be based merely on status; some wrongful act is required.\textsuperscript{106} Shame, on the other hand, while it might accompany guilt, does not necessarily require a connection to a particular guilty act.\textsuperscript{107} Instead, social science sees shame as a more global feeling of embarrassment about the self. Still, in recent years, interest has grown in the use of “shaming punishments” in criminal law.\textsuperscript{108} These consist of various activities ordered by a court after a finding of guilt that are designed not merely to exact retribution or remediation for the wrong committed, but to generate community scorn directed at the offender.\textsuperscript{109} The intended result, in addition to any general

\textsuperscript{104} “[A]n amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota.” City of Richmond v. J.A. Croson Co., 488 U.S. 469, 499 (1989).


\textsuperscript{106} Compare Robinson v. California, 370 U.S. 660 (1962) (a state cannot criminalize the status of being an addict), with Powell v. Texas, 392 U.S. 514 (1968) (a state may criminalize the act of being drunk in public on a particular occasion).

\textsuperscript{107} “[S]hame includes a negative evaluation of the global self, whereas guilt involves a negative evaluation of a specific behavior”. Tangney & Stuewig, supra note 105, at 328 (citing HELEN B. LEWIS, SHAME AND GUILT IN NEUROSIS (1971)).


\textsuperscript{109} Kahan sees public resistance to alternative sentencing as a consequence of public perception that such punishments “fail to express condemnation as dramatically and
deterrent effects, is to shame the offender into at least a change in behavior, if not a change of heart.\textsuperscript{110} Anyone familiar with legal history will recognize this as a revival of thinking behind such antiquated punishments as the stocks, or Hawthorne’s scarlet letter.\textsuperscript{111}

To the lawyer, then, guilt is a finding of responsibility determined by a judge or jury with respect to a particular act or acts of an individual. The individual may or may not feel a sense of guilt. Shame, on the other hand, is the internal sense of remorse sought to be induced by a particular form of punishment. In a normal legal proceeding, no action will be taken without some sort of finding of guilt, which in this sense is external to the guilty individual’s own self-regard. Shame may or may not be consciously sought to be induced through the means of punishment employed.\textsuperscript{112}

Social science, in contrast, has looked at both guilt and shame as states internal to the individual, states that can exist with or without any external social or legal condemnation. Although both are internal, emotional states and both frequently co-exist,\textsuperscript{113} recent research has drawn a significant distinction between the two emotions, and that distinction has significant consequences for the individual’s response.

The key distinction between the emotions can be summarized as follows: guilt is a feeling of regret or remorse over some specific bad act; shame is a more global feeling that the self is flawed in some significant way, making the subject less worthy of respect or affection.\textsuperscript{114} Having made the distinction, we can see that one might feel guilt over a specific act without feeling an overall sense of shame. Conversely, one might feel shame in the absence of any specific feeling of guilt, and while guilt and shame might co-exist, one might also feel neither guilt nor shame, even

\textsuperscript{110} See the discussion of the related goals of shaming penalties as furthering alternative goals as well as inducing a sense of shame in the offender. \textit{Id.} at 635-49.


\textsuperscript{112} Kahan, \textit{supra} note 108, at 594-605. Kahan stresses the importance of expressions of condemnation to the general community, whether or not the message gets through to the convicted criminal.


\textsuperscript{114} Tangney & Steuwig, \textit{supra} note 105, at 328.
where a finding of guilt has been pronounced by a source outside of the self.

Specific culpable behavior is generally required for a court to make a finding of guilt; likewise, without a specific act to feel remorse over, an individual will not feel a sense of guilt. Of course, the law may expand the concept of guilt so that it encompasses some people not directly responsible for the culpable act. Business partners may bear responsibility for their partners’ acts, parents may be held responsible for the acts of their children, corporate bodies may be responsible for the acts of their agents.

Therefore, when affirmative action cases began to focus on past guilt as a justification, it is unsurprising that advocates would seek to expand the scope of such guilt from specific acts of discrimination by the party involved in past practices in the relevant profession or trade, or even past discrimination in society in general. As we have seen, the Supreme Court has refused to extend the concept of guilt for past discrimination that far.

If guilt seems inappropriate, either as a judicial finding or an internal emotional state, in the absence of particularized bad acts, shame may be put forward as an alternative, and commentators have suggested that shame might well suffice as an appropriate and effective force in justifying affirmative action and in motivating support for it. The notion that one should feel a sense of embarrassment because the acts of others who share one’s racial or ethnic background has provided one with advantages denied unfairly to others does not seem unreasonable. Also, it seems more accurate than the contention that one who has done nothing concrete to further discrimination is nevertheless guilty in the sense of being personally responsible, for its existence, but does the substitution of shame for guilt, along with efforts to induce a sense of shame in decision


Homer H. Clark, Jr., The Law of Domestic Relations in the United States 628 (2nd ed. 1988). Most states have enacted statutes that, to some extent, make a parent responsible for a child’s torts.

See generally James D. Cox & Thomas Lee Hazen, Corporations ch. 8 (2nd ed. 2002).

See supra text accompanying notes 50-54.

In Milliken v. Bradley, the Court held that a desegregation remedy could not be extended to include suburban communities that did not have a history of official racial discrimination. 418 U.S. 717, 744-45 (1974).

makers and voters, increase the likelihood of support for affirmative action?

Recent social science research has shown that the typical reaction to guilt and the typical reaction to shame are quite distinct. These different reactions can have seriously different consequences for the individual and his or her relation to society. These differences have clear relevance to the use of shame as an effective correctional policy in criminal law, and commentators have noted this.121 These differences, however, would seem to also have relevance to the utility of these emotions in engendering support for affirmative action.

Because guilt and shame so frequently co-exist, it is not always easy to determine which emotion is primarily responsible for a person’s behavior. In recent years, however, social psychologists have developed methods of clarifying subjects as either “guilt-prone” or ‘shame-prone” by presenting them with certain situations, and asking whether their responses tend toward focusing on feelings of blame-worthiness or more global feelings of humiliation or disgrace.122 On a simpler level, subjects have been interviewed as to their own experiences of guilt and shame.123 Results of these studies have proven fairly consistent.

Guilt feelings are associated with the urge to “change[ ] the objectionable behavior . . . to repair the negative consequences or . . . extend a heartfelt apology . . . [also], the person can resolve to do better in the future.”124 Since guilt focuses remorse on a particular act, it can motivate confession and atonement without threatening the overall self-image of the individual.125 Atonement cannot only benefit the victim of the wrong, then, it can also serve to help repair the wrongdoer’s self-image.126

In contrast, shame, implicating the whole person rather than merely a particular act, leads to defensive reactions. “[S]hame is an acutely painful emotion that is typically accompanied by a sense of ‘shrinking’ or ‘smallness’ . . . and powerlessness.”127 Instead of an urge to confess, the shamed person is more likely to deny.128 Instead of attempting to repair

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121 Tangney & Steuwig, supra note 105, at 343-47.
122 Id. at 331-32 and the authorities cited therein.
123 Id.
124 Id. at 334.
125 Id. at 328-29.
126 Id. at 334-35. “Guilt-prone” people, as opposed to the “shame-prone,” are not at higher risk for depression, anxiety, or low self-esteem.
127 Id. at 328.
128 Id. at 329.
social relationships, the shamed person is likely to retreat in an attempt to escape the shame-provoking situation.129

Perhaps more striking than the findings with respect to denial and the urge to escape, studies show that shame is more likely than guilt to lead to anger, and the desire to punish those seen as responsible for inducing the shame.130 As opposed to guilt, shame is more strongly related to “physical, verbal, and symbolic aggression”, as well as indirect harmful activity, such as malicious gossip, and even displaced aggression, that is, taking out anger on someone other than the true target.131

The “common-sense” assumption that making someone feel shame will motivate that person to reform and become more moral and pro-social, then, seems incorrect, and largely a consequence of conflating shame with guilt. While proneness to guilt has been negatively related or inconsistently related to drug and alcohol abuse and delinquency,132 positive correlations have been found between shame-proneness and these behaviors.133 It would seem that the shamed person, rather than conforming, is likely to embrace his identity as an outsider and be more likely to reject community values.

The implications of the guilt-shame dichotomy seem clear in the context of criminal punishment. A sense of guilt can lead to pro-social behavior; a sense of shame can lead an individual in the opposite direction. Punishments designed to induce shame, then, may well have counterproductive consequences, but all of this is clouded by the likelihood that where a specific criminal act has occurred, guilt and shame, or at least the potential for each emotion, will co-exist. Focusing attention on the specific act in question can emphasize the guilt-producing, rather than shame-producing, aspects of the community response. What does this mean where there is no concrete act for which one can be induced to feel guilt? While the inability to feel guilt for one’s own actions has been identified as the mark of the sociopath,134 the absence of a sense of guilt where one has committed no act that would trigger guilt is hardly uncommon or unexpected.

This leads us back to the issue of affirmative action. The most widely accepted justification for the use of affirmative action is the need to remedy past guilt for discrimination,135 yet particular acts of past

129 Id. “[S]hame has been associated with attempts to deny, hide, or escape . . . .”
130 Id. at 331.
131 Id. at 332.
132 Id. at 335-36.
133 Id.
134 Id. at 340-42.
135 See supra text accompanying notes 55-70.
discrimination are often absent from an institution’s history. The common response of affirmative action supporters is to broaden the concept of discrimination to include not only specific acts of the people now at issue, but those of a wider group including an entire profession, trade, or even more broadly, society.\textsuperscript{136} In advocating the adoption of affirmative action on such grounds, however, the emotion that is likely to be triggered is shame rather than guilt. In other words, persons and institutions are being urged to feel remorse not for what they have done, but for what they are, that is, participants in a profession, trade, activity, or society that is blameworthy. Regardless of the ethical validity of this contention, the practical consequences seem clear. An attempt to induce shame is much more likely to trigger defensiveness, avoidance, and anger than an urge to make amends.\textsuperscript{137}

If the absence of specific blameworthy acts makes guilt unavailable as a motivating force, and if shame is more likely to reduce rather than increase one’s receptiveness to change behavior, what is the supporter of affirmative action to do? The answer, it would seem, is to shift focus away from guilt and shame and toward the recognition of a problem to be solved. Grutter provides support for the proposition that minority underrepresentation can be seen as a problem, at least in certain contexts justifying efforts to solve it, without the need to place blame for creation of the problem either on an individual, an institution, society as a whole, or some subset of society.\textsuperscript{138}

The mere identification of a problem, though, may be insufficient to motivate legislators, voters, or those in control of corporate bodies or academic institutions to act to solve it. In the absence of a sense of guilt, one or both of two additional motivating factors would seem essential. The first, of course, is self-interest. If a public or private institution can see a concrete benefit from promoting diversity, it will hardly be necessary to apply further pressure to move in that direction.\textsuperscript{139} There will be instances, however, particularly where affirmative action is the subject of legislative or voter-initiated debate,\textsuperscript{140} where self-interest will be weak or

\textsuperscript{136} See supra note 70.
\textsuperscript{137} Tangney & Steuwig, supra note 105, at 329-33.
\textsuperscript{138} See supra text accompanying notes 84-85.
\textsuperscript{139} “American businesses have made clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.” Grutter v. Bollinger, 539 U.S. 306, 308 (2003). “What is more, high-ranking retired officers and civilian leaders of the United States military assert that, ‘[b]ased on [their] decades of experience,’ a ‘highly qualified, racially diverse officer corps . . . is essential to the military’s ability to fulfill its principle mission to provide national security.’” Id. at 331 (internal citations omitted).
\textsuperscript{140} States including California and Texas acted to constitutionally prohibit race-based
absent. In these contexts, a majority of citizens, or their representatives, must act in a way that primarily benefits others. If not a consequence of guilt or self-interest, such acts might well find their basis in empathy.

The ability to empathize with others has long been recognized as a potentially significant motivating force in a wide range of pro-social activity. This is hardly surprising. We see evidence of a willingness to help others with whom we empathize on a personal, as well as a political level, on a regular basis. Just as we must differentiate between guilt and shame, though, despite the tendency to treat them as the same thing, social science has found that we must separate two types of empathy in assessing their effect on individual motivation.

When confronting the plight of another, an individual can respond with two different types of distress. The first is sympathetic empathy, which actually does focus on the other’s situation. The second type of empathy is one in which the individual focuses on his or her own discomfort in observing the other’s situation. The first type of empathy is significantly correlated with a strong motivation to help; the second will often motivate merely a desire to withdraw to end one’s own discomfort.

Sympathetic empathy, of course, will not automatically exist when one is confronted by another’s troubles. Consistent social scientific findings strongly indicate that this helpful empathy is more likely to exist when the troubled person is seen by the observer as similar to him or her. Early studies, for example, show that people are less likely to assist foreigners, or those who do not speak the native language well, than they are to assist native speakers, even where the assistance exacts minimal inconvenience. Laboratory studies that lead subjects to believe that others have more or less similar personality profiles have demonstrated affirmative action in state universities, leading public institutions to experiment in class-based, rather than race-based, affirmative action. See generally Richard H. Sander, Experimenting with Class-Based Affirmative Action, 47 J. LEGAL EDUC. 472 (1997).


Id. at 361-69.


Id.

Id.


Id.
that more cooperative behavior will occur among those who believe that they share values. Researchers have concluded that:

[T]he mere perception of belonging to two different groups – that is, social characterization per se – is sufficient to trigger intergroup discrimination favoring the in group. In other words, the mere awareness of the presence of an out group is sufficient to provoke intergroup competitive or discriminatory responses on the part of the in-group.

Given the significance of race and ethnicity in defining groups that Americans self-identify with, this suggests that there may be significant barriers to majority group sympathetic empathy with disadvantaged minorities. Further, these responses are found in real-world studies, as well as under laboratory conditions. Studies have shown, for instance, that while loan applicants whose creditworthiness is clear receive loan approval in roughly equal rates regardless of race, where credit scores are at the margin, neither obviously strong or weak, white applicants are far more likely to receive loans than are black or Hispanic applicants. The loan officer is unlikely to be consciously acting on the basis of race. Instead, this is likely the consequence of the tendency to more readily empathize with the plight of those with whom we feel more like ourselves.

This suggests the importance of providing social support to mitigate this tendency. A study by David Frey and Samuel Gaertner illustrates both the tendency to more readily empathize with those we see as similar to ourselves and the potential of social cues to combat this tendency. A study was constructed in which the subjects, white female undergraduates, observed workers performing tasks that required them to form words from Scrabble letters. Conditions were manipulated to cause the subjects to

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151 Hunter & Walker refer to this tendency as “cultural affinity.” *Id.* at 16.


153 *Id.*
believe that the workers were having problems either because of the difficulty of the task or their own poor work habits. Subjects were then asked to help, with the requests coming either from the workers or from a third party. Half of the workers were white and half were black.

Unsurprisingly, subjects were significantly more likely to help when the source of the worker’s difficulty was not seen to be poor work habits, but instead seemed to be something beyond the worker’s control. The more interesting finding concerned racial differences. When the source of the worker’s difficulty appeared to be the inherent difficulty of the task, and the worker directly asked the subject for help, the white workers received assistance only slightly more frequently than the black workers. When the subjects were led to believe that the source of the problem was the worker’s own work habits, however, and the worker asked for help, white workers were assisted 73% of the time, while black workers received help only 33% of the time.

When the request for help came not from the troubled worker, but from a third party, results were dramatically different. The entire difference in the frequency of aid given to white and black workers disappeared; in fact, the black workers now received help at a slightly higher rate than the white workers. Apparently, the social cue that empathy was appropriate countered the tendency to reserve empathy for those with whom the subjects could most easily identify.

This suggests the significance of education and other formal and informal social forces in helping to promote empathy across racial and ethnic lines, and in turn the potential significance of the presence or absence of such empathy in generating support for affirmative action programs. At the same time, we can turn once again to social scientific research on guilt and shame to see their connection with empathy. In light of what we have already seen, it should not be surprising that guilt correlates with the ability to take the perspective of the other and with empathetic concern.

Shame, on the other hand, interferes with such other-directed empathy. By turning the shame-prone person’s concern inward toward his or her “bad self”, shame will cause a distancing from the other.

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154 Id. at 1084.
155 Id.
156 Id.
157 Id. at 1086.
158 Id.
159 Id.
160 Id.
161 Tangney and Steuwig, supra note 105, at 330-31.
162 Id.
If past guilt becomes the sole justification accepted by the Supreme Court for all, or almost all, types of racial preferences, attempts to assign “guilt” beyond the specific actors involved are unlikely to succeed. This is so, we can see, not merely because of the refusal of the Court to accept discrimination in society as a whole or in a profession generally as the type of guilt sufficient to justify remediation, but also due to the distinction between guilt and shame. Demands that one atone for what that person has not done, but rather for the action of a group that one is a part of, are more likely to provoke the defensive, hostile reactions associated with shame than the pro-social reactions that can result from a sincere sense of guilt. Even if courts could be persuaded to broaden the definition of guilt for discrimination, therefore, the political response of voters and legislators could be expected to be hostile to proposals to use affirmative action as a remedy.

Empathy may well be the key to the marshaling of support for social programs benefitting disadvantaged groups. As we have seen, however, empathy is more easily generated where people can see similarity, rather than difference, with the other. This would suggest what is perhaps already clear in the political arena, that when affirmative action is broadened to include efforts that assist beyond racial or ethnic categories, it encounters far less opposition. In addition, of course, an affirmative action program based on poverty, educational deprivation, or other factors that cut across racial and ethnic lines presents few constitutional problems. These types of classifications are not subject to strict scrutiny.

Efforts to promote empathy, combined with an attempt to rework the categories of beneficiaries of affirmative action to include some beyond race or gender, will likely be opposed by some affirmative action supporters. Arguments, which cannot be lightly dismissed, can be made that these classic forms of discrimination have been more socially pervasive, and thus call for unique consideration. At the same time, abandoning the guilt/shame model may fall short of satisfying those who

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163 Id. at 331.
164 See supra text accompanying notes 55-80.
165 See supra text accompanying notes 62-80.
166 See supra text accompanying notes 132-39.
167 Thus, California, Florida, and Texas, responding to state law prohibiting race-based affirmative action, have adopted plans that guarantee college admission to a fixed percentage of students from each high school. While opponents of race-based affirmative action see this as an acceptable alternative, Justice Souter, dissenting in Gratz, saw this as merely “deliberate obfuscation”. Gratz v. Bollinger, 539 U.S. 244, 298 (2003) (Souter, J., dissenting). To Souter, open race-consciousness is no more objectionable than its disguised, and concededly constitutional, alternative.
168 Id.
need explicit symbolic recognition of past wrongs in order to feel a sense of justice.

As we move further away from the days of overt racial discrimination tolerated or even approved by law, particularized guilt will become increasingly difficult to show as a justification for affirmative action. The attempt to expand the concept of guilt to include what has been defined here, as shame, is likely to be ineffective, even counterproductive, in rallying support for affirmative action, even if the Supreme Court accepts it as a sufficient basis. To the extent that recent cases leave the door open to the use of forward-looking justifications for affirmative action, the problems caused by underrepresentation of disadvantaged groups will require political support for those programs to be implemented. Shame is unlikely to be effective in increasing that support; the alternative is to create a sense of empathy in the majority of citizens and voters. The most effective way to do that will be to seek to reduce the salience of the difference between those benefited by affirmative action programs and the majority. This suggests that reconfiguring the programs to focus not merely on race or gender is the most effective option available.

Conclusion

As the law of affirmative action built on earlier cases involving race-conscious remedies imposed after a finding of illegal past discrimination, it is unsurprising that such a finding would provide a compelling purpose for voluntary affirmative action programs; however, would providing a remedy for past guilt be the sole acceptable justification for race-conscious state action?

Recent cases show a tenuous Supreme Court majority in support of the proposition that future-oriented goals, such as preventing racial isolation, may serve to justify affirmative action, but whether that majority holds is open to question. If expiation of past guilt becomes the sole justification for affirmative action, can supporters of such programs succeed in broadening the concept of past guilt? The Court’s refusal to accept attempts to remedy broad societal discrimination as acceptable purposes of affirmative action suggests that efforts to expand the concept will fail. The reason may well lie in the distinction between guilt and shame. When we invoke broad concepts of societal discrimination, rather than pointing to particular acts of particular actors, we are asking for acknowledgment of shame rather than guilt by those who feel no personal sense of guilt, and the likely response, as we have seen, is strongly negative.

A continued focus on the past, whether confined to specific instances of state-supported discrimination, or general societal attitudes supporting
racism, is extremely unlikely to permit the survival of race-conscious affirmative action. A focus on the future, emphasizing the benefits of avoiding racial isolation, a focus supported by a fragile majority of the current Supreme Court, provides perhaps the only viable basis for the future of affirmative action.
LOSING THE LOOPOHOLE ON THE ‘EQUAL OPPORTUNITY/ BISEXUAL’ HARASSER DEFENSE

By Jose Carrillo*

Editor’s note: This note contains offensive language for the sole purpose of reflecting alleged statements made by the parties in the cases noted.

Introduction

Harry, a supervisor at ABC Corporation, makes sexual advances toward and sexually harasses his male subordinate employee, Paul. The harassment includes physical touching of Paul’s buttocks and inner thighs, comments about his appearance, and propositions for sexual favors. Paul, offended by Harry’s actions, follows ABC Corporation’s anti-harassment company policy and informs the human resources department director and several other management officials of Harry’s inappropriate and offensive conduct. Despite Paul’s efforts to stop Harry’s harassment, the harassment increases in frequency and severity. Paul ultimately files a claim of sexual harassment against ABC Corporation. No evidence is presented to suggest that Harry made any sexual advances or sexually harassed any other employee. ABC Corporation is found liable for Harry’s behavior because it failed to take appropriate corrective action to stop the harassment. Paul is awarded compensatory damages for the harassment he endured.

Two months later, Harry is still in the same supervisory capacity at ABC Corporation. Harry engages in identical sexual advances and behavior towards Patty, a female subordinate employee. Patty follows the appropriate protocol of reporting the harassment, but management ignores her complaints. Patty files a claim of sexual harassment against ABC Corporation. ABC Corporation raises the “equal opportunity/bisexual” harasser defense based on Harry’s equal harassment of both a man (Paul)

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1 An “equal opportunity” harasser typically refers to a supervisor who creates a hostile work environment by: “engaging in offensive sexual conduct, irrespective of his or her sexual preference, for both sexes. A “bisexual” harasser is a supervisor who sexually harasses both sexes. The “equal opportunity/bisexual” harassers have puzzled courts because of their disregard for the sex of the victim.”

and now a woman (Patty) in the workplace. Unfortunately, Patty has a problem and is out of luck.2

Similar versions of this scenario primarily existed in the imagination of early sex discrimination jurists and law school professors; however, the “classroom” hypothetical has become a reality in employment discrimination law. The current state of employment discrimination law would likely ensure that Patty’s claim against ABC’s Corporation fails. Patty, despite having suffered the same egregious and sexually harassing conduct that Paul endured at the hands of Harry, is unable to prevail under the current analytic legal framework. ABC Corporation escapes liability for otherwise unlawful conduct because both sexes are being treated equally, albeit badly. Courts effectively use the protections provided for employees under Title VII of the Civil Rights Act of 1964 (“Title VII”)3 against itself.4

This article first presents the legal background and evolution of sexual harassment protection under Title VII.5 Next, this article describes the manifestation of the “equal opportunity/bisexual” harasser defense loophole.6 Finally, this article analyzes the conceptual issues created by the “equal opportunity/bisexual” harasser and proposes an approach to closing the loophole on the defense.7

I. The Evolution of Sexual Harassment Protection Under Title VII

Title VII of the Civil Rights Act provides that employers shall not discriminate against any individual “because of . . . sex.”8 Title VII states in part:

It shall be an unlawful employment practice for an employer--to fail or refuse to hire or to discharge any

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2 This is a common hypothetical in employment law.
4 Professor Kenji Yoshino states: The embarrassment that bisexuality causes sexual harassment jurisprudence is clear. An individual who would be liable for engaging in certain conduct can evade liability for that conduct by engaging in more of the conduct directed at the opposite sex. I call this the “double for nothing” problem--by doubling the proscribed conduct, the harasser lowers his liability to nothing. This result is so counterintuitive that commentators who usually seem far apart on the political spectrum--such as Robert Bork and Catharine MacKinnon--can agree that this result is anomalous. Kenji Yoshino, The Epistemic Contract of Bisexual Erasure, 52 STAN. L. REV. 353, 441 (2000).
5 See infra Part II.
6 See infra Part III.
7 See infra Part IV.
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 [. . .].

When Title VII of the Civil Rights Act of 1964 was up for passage in Congress, Representative Howard Smith, a staunch adversary of the civil rights legislation, proposed a last minute amendment of “sex” to Title VII in an effort to derail the legislation. Representative Smith’s effort to thwart the enactment of Title VII, fortunately, was unsuccessful. As silly as this historical fact sounds, the same can be said of the “because of sex” standard that courts have struggled to grasp. One of the major difficulties with the causation standard is that it asks a court to decide what the discriminator’s intent is when they are engaging in inappropriate conduct. In early employment discrimination cases, the intent was often clear and direct. Today, the discriminator’s intent is not so obvious.

Notably, Title VII’s language fails to define sex or discrimination, and does not make any mention of sexual harassment. However, the U.S. Equal Employment Commission,11 the preeminent federal agency charged with enforcing the nation’s employment discrimination laws, promulgated guidelines describing conduct constituting “sexual harassment” under the hostile work environment framework.12 The Commission’s guidelines state that “[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment.”13

In Meritor Savings Bank, FSB v. Vinson14, the Supreme Court held that sexual harassment is a form of sex discrimination actionable under Title VII of the Civil Rights Act of 1964.15 The Court agreed with the Court of Appeals for the Eleventh Circuit that a “plaintiff may establish a violation of Title VII by proving that discrimination based on sex . . . created a hostile . . . work environment” and that sexual harassment is “every bit the arbitrary barrier to sexual equality at the workplace that

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9 Id.
12 29 C.F.R. § 1604.11(a) (2011).
13 Id.
15 “Without question, when a supervisor sexually harasses a subordinate because of the subordinate’s sex, that supervisor ‘discriminate[s]’ on the basis of sex.” Id. at 64.
racial harassment is to racial equality. [A] requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.  

In order to establish a claim under Title VII against an employer for hostile work environment caused by sexual harassment, the employee must allege and prove the following elements: (1) the employee belongs to a protected group; (2) the employee was subjected to unwelcome sexual harassment; (3) the harassment complained of was because of sex; (4) that the harassment complained of affected a term, condition or privilege of employment; and (5) that the employer knew or should have known of the harassment in question and failed to take prompt, corrective action.

The typical sexual harassment case involves a heterosexual male supervisor making unwelcome sexual advances to a female employee. The supervisor’s conduct clearly discriminates against the female employee because of her sex in that the heterosexual male supervisor is not sexually attracted to members of his own gender, and thus directs his harassing conduct only to women. Conversely, in the case of an “equal opportunity/bisexual” harasser, where both male and female employees are harassed, the “because of sex” element is not so clear.

In traditional employment discrimination cases, courts require plaintiffs to prove the “because of sex” element with evidence of disparate treatment of similarly situated individuals. The courts borrowed the “because of sex” element when they extended Title VII’s reach to sexual harassment to determine whether the harasser’s conduct was motivated by the victim’s sex. Courts consistently analyze this element by posing the question: Would the plaintiff have been treated differently if she were a man? This question poses a significant obstacle in “equal opportunity/bisexual” harassment cases as well as in a single-sex work environment.

The Supreme Court, in Oncale v. Sundowner Offshore Services Inc., was presented with the question of whether workplace harassment violates Title VII’s prohibition against discrimination “because of sex” when the

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16 See id. at 66-67 (quoting Henson v. City of Dundee, 682 F.2d 897, 902 (11th Cir. 1982)).
17 Henson, 682 F.2d at 902.
18 Calleros, supra note 10, at 61.
20 Locke, supra note 1, at 392.
21 Id.
harasser and the harassed employee are of the same sex. Mr. Oncale alleged that, on several occasions, he was subjected to sexually charged, humiliating actions against him, he was physically assaulted, and he was threatened with rape by his supervisors. Specifically, the supervisors raped Mr. Oncale with a bar of soap, pinned Mr. Oncale to the ground, and put their penises on different parts of his body.

The Oncale Court held that sex discrimination consisting of same-sex sexual harassment is actionable under Title VII. The Court stated that, to support an inference of discrimination on the basis of sex, a plaintiff may show (1) sexual desire, (2) sex-specific and derogatory terms to make it clear that the harasser is motivated by general hostility of the sex in the workplace, or (3) direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace. The Court added that whatever the evidentiary route the plaintiff chooses, he or she must always prove the sexually harassing conduct occurred “because of sex.” Since Oncale, the circuit courts are still divided on the scope of the “because of sex” standard and have consistently applied the comparative evidence (disparate treatment) analysis, despite the fact that Oncale did not say that comparative evidence, showing one sex was treated differently from the other, was required.

II. The ‘Equal Opportunity/Bisexual’ Harasser Defense Loophole

The loophole of the “equal opportunity/bisexual” harasser was first hypothesized by a judge for the District of Columbia Court of Appeals in a footnote of Barnes v. Costle, which states, “[i]n the case of the bisexual superior, the insistence upon sexual favors would not constitute gender discrimination because it would apply to male and female employees alike.” Courts have subsequently found that sexually harassing individuals of both sexes was a valid defense under Title VII because the

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23 Id. at 76.
24 Id. at 77.
26 Oncale, 523 U.S. at 79-82.
27 Id. at 80-81.
28 Id. at 81.
31 Id. at 990 n.55.
harassing conduct cannot be “because of sex” when men and women are being treated equally.\(^{32}\)

The key case recognizing the “equal opportunity/bisexual” harasser defense is the Seventh Circuit case of Holman v. Indiana.\(^{33}\) Karen Holman and Steven Holman, a married couple working in the maintenance department at the Indiana Department of Transportation (IDOT), alleged that their shop supervisor sexually harassed them in violation of Title VII.\(^{34}\) Karen Holman alleged that her shop foreman sexually harassed her by touching her body, standing close to her, sexually propositioning her, and making sexist comments.\(^{35}\) In the same complaint, Steven Holman alleged that the same shop foreman who sexually harassed Karen also sexually harassed him by grabbing his (Steven’s) head while asking for sexual favors.\(^{36}\)

IDOT moved to dismiss the Holmans’ claims of sexual harassment.\(^{37}\) The district court granted IDOT’s motion “because both plaintiffs were alleging sexual harassment by the same supervisor, they both, as a matter of law, could not prove that the harassment occurred ‘because of sex.’”\(^{38}\) The Holmans moved the district court to reconsider its order in light of the Oncale decision, but the district court ultimately denied the Holmans’ motion after supplement briefings and dismissed their claims.\(^{39}\) The Holmans appealed the dismissal to the Court of Appeals for the Seventh Circuit.\(^{40}\)

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32 Zalesne, supra note 29, at 544. See Bundy v. Jackson, 641 F.2d 934, 942 n.7 (D.C. Cir. 1981) (noting that only in the rare case of a bisexual supervisor who harasses both men and women could sexual harassment not amount to sex discrimination); Henson v. City of Dundee, 682 F.2d 897, 904-05 (11th Cir. 1982) (holding that in “cases in which a supervisor makes sexual overtures to workers of both sexes or where the conduct complained of is equally offensive to male and female workers... the sexual harassment would not be based upon sex because men and women alike are accorded like treatment... [and] the plaintiff would have no remedy under Title VII”); Holman v. Indiana, 211 F.3d 399, 404 (7th Cir. 2000) (holding that equal opportunity harassment of employees of both sexes cannot support Title VII sex discrimination claim, as conduct is not “because of sex”); Lack v. Wal-Mart Stores, Inc., 240 F.3d 255, 262 (4th Cir. 2001) (finding no actionable harassment claim where a male supervisor was equally abusive to both men and women).

33 Holman, 211 F.3d 399.

34 Id. at 401.

35 Id.

36 Id.

37 Id.

38 Id. (citing Holman v. Indiana, 24 F. Supp. 2d 909, 910 (N.D. Ind. 1998)).

39 Id. at 401-02.

40 Id.
The Seventh Circuit affirmed the district court’s dismissal, reasoning that prior to and since Oncale, Title VII has been “premised on eliminating discrimination,” and therefore, inappropriate conduct inflicted on both sexes falls outside the purview of Title VII.\(^{41}\) The Circuit Court went on to declare, “Title VII does not cover the ‘equal opportunity’ or ‘bisexual’ harasser … because such a person is not discriminating on the basis of sex.”\(^{42}\) The Seventh Circuit read Oncale to mean that discrimination in sexual harassment cases is “to be determined on a gender-comparative basis: ‘The critical issue, Title VII’s text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.’”\(^{43}\) The Circuit Court pronounced that it would be “anomalous not to require proof of disparate treatment for claims of sex discrimination,” and to hold otherwise would change Title VII into a “code of workplace civility.”\(^{44}\)

The Seventh Circuit also rejected the Holmans’ contention that sexual harassers will attempt to escape liability by purposefully harassing both sexes as unrealistic.\(^{45}\) The Court added that it is unlikely that harassers would be familiar with the intricacies of sexual harassment law and may run the risk of being ostracized, fired, or sued under state law.\(^{46}\) However, the Seventh Circuit’s reading of Oncale to require proof of gender-comparative treatment in all sexual harassment cases is misguided.\(^{47}\) In its discussion of Oncale, the Seventh Circuit overlooks the two other evidentiary routes that the Supreme Court established in that case to support an inference of sex discrimination.\(^{48}\) Additionally, some federal courts have allowed claims against “equal opportunity/bisexual” harassers while still satisfying the disparate treatment requirement through an in-depth analysis of the “because of sex” element.\(^{49}\) In Kopp v. Samaritan,\(^{50}\) the plaintiff alleged that her male

\(^{41}\) Id. at 403.

\(^{42}\) Id. (emphasis omitted).

\(^{43}\) Id. (quoting Oncale v. v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998)).

\(^{44}\) Id. at 404.

\(^{45}\) Id.

\(^{46}\) Id.


\(^{48}\) Id. at 629; see supra Part II.

\(^{49}\) Miles, supra note 47, at 617.

\(^{50}\) Kopp v. Samaritan, 13 F.3d 264 (8th Cir. 1993).
supervisor subjected her to sexual harassment.\textsuperscript{51} The Eighth Circuit, despite noting that female employees and male employees were subjected to harassment by the same supervisor, concluded that the incidents alleged by the female plaintiff primarily involved more women than men, and were of a more serious nature than those involving the male employees.\textsuperscript{52} The Eighth Circuit held that a fact finder could conclude that the supervisor’s treatment of women was worse than that of man and therefore prove that the harassment was “because of sex.”\textsuperscript{53}

The Ninth Circuit clearly rejected the “equal opportunity/bisexual” harasser defense in \textit{Steiner v. Showboat Operating Co.}\textsuperscript{54} A female plaintiff alleged that her supervisor sexually harassed her by referring to her as “dumb fucking broad,” “fucking cunt,” and yelled at her to “suck [her customers’] dicks.”\textsuperscript{55} Showboat claimed that the plaintiff’s supervisor harassed men and women alike and therefore his harassment was not based on her sex.\textsuperscript{56}

The Ninth Circuit held that the district court erred in accepting Showboat’s contention that the conduct was not sexual harassment because of the equal harassment of the sexes.\textsuperscript{57} The Ninth Circuit reasoned that the harasser was abusive to both men and women, but his abuse of women was more egregious and was laden with references to their sex.\textsuperscript{58} The Court noted, “[i]t is one thing to call a woman ‘worthless,’ and another to call her a ‘worthless broad.’”\textsuperscript{59} The Ninth Circuit further stated that even if the supervisor had subjected both men and women in an equally degrading manner, he would not ‘cure’ his conduct and that both the men and women of Showboat have viable sexual harassment claims.\textsuperscript{60}

\section*{III. Closing the ‘Equal Opportunity/Bisexual’ Harasser Defense Loophole}

While the federal courts are inconsistent in their treatment of the “equal opportunity/bisexual” harasser defense, this defense remains good law and employers will, in good legal practice, continue to raise the

\begin{itemize}
\item \textsuperscript{51} \textit{Id.} at 269.
\item \textsuperscript{52} \textit{Id.}
\item \textsuperscript{53} \textit{Id.} at 270.
\item \textsuperscript{54} \textit{Steiner v. Showboat Operating Co.}, 25 F.3d 1459 (9th Cir. 1994).
\item \textsuperscript{55} \textit{Id.} at 1461.
\item \textsuperscript{56} \textit{Id.} at 1463.
\item \textsuperscript{57} \textit{Id.}
\item \textsuperscript{58} \textit{Id.} at 1464.
\item \textsuperscript{59} \textit{Id.}
\item \textsuperscript{60} \textit{Id.}
\end{itemize}
defense as a means of escaping liability for sexual harassment of both sexes. Although the courts have overwhelmingly accepted the defense, other courts have realized that American jurisprudence should close the loophole because it fails to protect individuals from sexually offensive conduct in the workplace.

The cause of the problem posed by the “equal opportunity/bisexual” harasser defense is the prevailing conception of discrimination. Under the current approach, in order to be protected by Title VII and entitled to a remedy, one must prove that he or she is being treated differently than a similarly situated employee. This prevailing approach to Title VII is an equality principle, whereby the employer must treat their similarly situated employees equally, and by doing so they are free to treat their employees badly as long as everyone is being treated that way. This problem created by this defense could be easily eliminated, since the comparator analysis is a purely judicial construct and not required by Title VII.

There have been several proposals set forth by commentators and the courts in an attempt to put an end to this “bizarre” result when faced with an “equal opportunity/bisexual” harasser. Commentators have argued for various approaches to close the “equal opportunity/bisexual” harasser defense loophole. Some commentators posit that Congress should enact federal legislation specifically including sexual orientation as a protected class and include sexual harassment as an alternate theory for individuals whose claims fit under both the new legislation and the original language of Title VII. These approaches, although commendable in the case of sexual orientation protection, simply sidestep the issue of a deeper conceptual problem. The likelihood that the federal government will enact sexual orientation protection, although long overdue, is very slim due to its unpopularity in political discourse. Likewise, the likelihood that an alternate theory of sexual harassment legislation would be enacted is nonexistent because of the fear that federal courts, already burdened with sex discrimination litigation, will be even more overwhelmed with the additional claims of sex discrimination that such legislation may create.

Another commentator suggests that courts should adopt an individual analysis of each claim and consequently reject evidence of disparate treatment in sexual harassment claims. This approach fails to recognize

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62 Miles, supra note 47, at 621.
the importance of the similarly situated comparator. A comparator can provide a fact finder with a wealth of information particularly in the traditional sexual harassment and hostile work environment claims. Besides, discrimination inherently invokes the need to engage in a comparative analysis. We subconsciously apply a comparative analysis in innocuous situations on a daily basis when we decide what to wear in the morning, which route to take to work, and what to eat for lunch.

The correct proposal should be an analytical framework that utilizes the existing evidentiary structure under Oncale for proving the “because of sex” element, closes the loophole, and does not open the proverbial floodgates. The framework should have all the aforementioned characteristics, and yet allow individuals with meritorious claims of sexual harassment, like Patty and the Holmans, to recover for the demeaning and sexually offensive acts perpetrated by “equal opportunity/bisexual” harassers that employers fail to remedy.

I propose an approach with a judicially expanded definition of the term “sex” and use it similarly to how the Ninth Circuit used it in Steiner v. Showboat. In Steiner, the supervisor harassed both men and women. The court analyzed the conduct against both sexes using a comparative analysis, and found that the difference in treatment was along the line of sex because the offensive conduct towards the female employees was coupled with words related to their sex, such as being called “dumb fucking broad.” To truly close the loophole, courts should expand the definition of the term “sex” beyond male and female. Instead of asking whether the victim was harassed because of his or her sex, the courts should analyze whether the harassment was based on sex, sexuality, sex role or sex stereotypes.

Looking beyond Oncale, once the conduct is tinged with sex-based terms or physical sexual conduct, assuming it is sufficiently severe or pervasive, it fulfills the “because of sex” element irrespective of the way the other sex was treated. Oncale was a step in the right direction, but it did not go far enough. In Oncale, the Supreme Court asked that an inquiry be made into the sexual desire of the harasser, the harasser’s animus towards the sex, and comparison of the manner in which the harasser treats both sexes. The expanded definition of sex approach, however,

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63 See supra Part III.
64 Locke, supra note 1, at 414.
65 “We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations.” Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998).
focuses on the harm suffered by the victim instead of the conduct engaged by the perpetrator.

Applying this proposed approach with an expanded definition of sex discrimination to the case solidifying the “equal opportunity/bisexual” harasser defense yields, in my opinion, the correct result for both Karen and Steven Holman. Recall that in Holman v. Indiana, the Court of Appeals for the Seventh Circuit held that neither Karen nor Steven could prove that the harassment they endured by their supervisor was “because of sex.”

Under this approach, we analyze whether the Holmans’ harassment was based on sex, sexuality, sex role, or sex stereotypes, to determine if both Karen and Steven were subjected to harassment that was sexually charged. First, we look at the harassment endured by Karen, which included the supervisor touching her body, standing close to her, sexually propositioning her, and making sexist comments. Then, we review Steven’s allegations that the same shop foreman grabbed his head while asking him for sexual favors. Clearly Karen’s harassment was based on sex, sexuality, sex role, or sex stereotype because she was sexually propositioned, touched in a sexual manner, and was the recipient of sexist comments. Steven’s harassment was also sex-based because he was asked to engage in a sexual act by the supervisor.

By going through this sex-based analysis of the conduct suffered by each of the claimants, a court would likely find that Karen and Steven Holman both have actionable claims of sexual harassment under Title VII. Due to the fact that the conduct was sex-based, each plaintiff could find recourse under Title VII even when an employer raises an “equal opportunity/bisexual” harasser defense.

Critics might argue that such an approach will burden the courts with even more discrimination claims. However, I contend that the number of claims will not increase because a plaintiff still has to prove all the elements outlined in a sexual harassment claim, and in particular, they still have to prove that it was sex-based or “because of sex.” This approach

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66 Holman v. Indiana, 211 F.3d 399 (7th Cir. 2000).
67 Id.
68 Id.
69 This sex-based approach would also allow a plaintiff to recover in a single sex environment.
70 (1) the employee belongs to a protected group; (2) the employee was subjected to unwelcome sexual harassment; (3) the harassment complained of was because of sex; (4) that the harassment complained of affected a term, condition or privilege of employment; and (5) that the employer knew or should have known of the harassment in question and failed to take prompt, corrective action. Henson v. City of Dundee, 682 F.2d 897, 902
also prevents a plaintiff from prevailing in a claim against a supervisor who is just a “jerk to everybody.” However, once the “jerk” crosses the line and uses sexually charged comments or behavior against both his male and female subordinate employees, then his conduct violates Title VII of the Civil Rights Act, and the employer should be liable if it failed to meet its legal and moral obligations to stop the harassment. I also posit that this approach towards “equal opportunity/bisexual” harassment would better coalesce with our understanding of race-based harassment. One would not expect a supervisor to make racially charged and offensive epithets towards members of different racial groups without consequence simply because he degrades everyone on the basis of their race. The same should be true in cases where a supervisor harasses men and women with sexually charged commentary and behavior.

IV. Conclusion

Sexual harassment is prevalent in today’s workplace. No one should have to endure sexual abuse in return for having the privilege to work and earn an honest living. Employers and employees should welcome a sensible approach to “equal opportunity/bisexual” harassment cases that will encourage a safe working environment, promote productivity in the workplace, improve the lives of hardworking individuals and protect people like Patty and the Holmans from embarrassment and ridicule.

Using Title VII against itself so that it does not protect anyone is unjust. Sexual harassment undoubtedly leaves lasting effects on its victims and they should be compensated accordingly. Unfortunately, federal courts have made it cumbersome for a truly harmed plaintiff to prevail by keeping the “equal opportunity/bisexual” harasser defense alive. Rather than creating exceptions like the “equal opportunity/bisexual” harasser defense to offensive behavior by bad actors, courts and lawmakers should aim to ferret out discriminatory conduct and eliminate it from the modern workplace.

(11th Cir. 1982).
WHY THE ALI SHOULD REDRAFT THE ANIMAL-CRUELTY PROVISION OF THE MODEL PENAL CODE

By Nicole Pakiz†

Introduction

After six years of ownership, Douglas Juras decided that he no longer wanted his cat Momma. Instead of taking Momma to a shelter or trying to find her another home, thirty-six-year-old Juras sliced Momma’s throat with a box cutter. Because he missed the jugular artery and a neighbor heard her cries, Momma was able to wriggle free from his grasp and escape to the hands of law enforcement who responded to the neighbor’s call. However, after suffering shock from the blood loss, she was later euthanized at the humane hands of the police.

Juras pleaded guilty to animal cruelty, a Class A misdemeanor under North Dakota law. For this intentional act of cruelty, he was sentenced to 400 hours of community service, one year of unsupervised probation, and ordered to pay $300 in court costs. This slap on the wrist is consistent with North Dakota’s disregard for the welfare of companion animals, where the criminal laws have not kept up with societal values. Further,

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‡ Thank you to Professor Pamela Vesilind for her inspiration and support in the writing of this Comment.


² Id.

³ Id.

⁴ Id.


⁶ Cat’s Throat Sliced with Boxcutter Fargo, ND, supra note 1.


North Dakota is not the only state employing outdated criminal code regarding animal abuse.

Had Juras committed the same acts in Illinois, for example, his crime would have been classified as a felony, and the sentence would have been more commensurate.\(^9\) Unfortunately, the punishment for animal cruelty varies drastically from one state to the next. One reason for this is that the Model Penal Code (MPC), which state legislatures have traditionally looked to for guidance in modifying state penal codes,\(^10\) has not kept up with society’s values either. Under the MPC, Juras’s horrific acts would have likely been treated the same.\(^11\) This Note argues that the MPC’s animal-cruelty section desperately needs revision.

The MPC has been the most successful attempt to codify American criminal law.\(^12\) Even before the MPC was first finalized, tentative versions were used by states to reform their penal codes.\(^13\) In 1962, at the completion of the MPC, “Cruelty to Animals” was listed under “Part II. Definition of Specific Crimes, Offenses Against Public Order and Decency, Article 250. Riot, Disorderly Conduct and Related Offenses.”\(^14\) At that time, animal abuse was associated with other morally reprehensible behaviors such as public intoxication, desecration of venerated objects, gambling, prostitution, and abuse of corpses.\(^15\)

Today, despite mounting evidence linking animal cruelty with domestic violence, child abuse, and murder among juveniles and adults alike,\(^16\) crimes of “Cruelty to Animals” remains buried under “Riot, Disorderly Conduct and Related Offenses.”\(^17\) Therefore, the statutory model reflects a fifty-year-old view on animal cruelty that calls for minimal punishment, uses inadequate terminology, and fails to recognize the broad range of acts that now constitutes animal abuse.\(^18\) In this way, the MPC fails to act as a guide for state penal-code reform, resulting in animal-cruelty laws that vary drastically across the country.

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\(^9\) See infra Part IV.A.
\(^12\) Robinson & Dubber, *supra* note 10, at 320.
\(^13\) Id. at 326.
\(^14\) *MODEL PENAL CODE* § 250.11 (1962).
\(^16\) Id. at 503–04; see infra Part III.
\(^17\) *MODEL PENAL CODE* § 250.11 (1962).
\(^18\) See infra Part IV.
This Note proceeds in five parts. Part I discusses a brief history of the Model Penal Code and its pervasive influence on states drafting and revising their penal codes. Part II explores the evolution of state animal-cruelty laws. Part III discusses the connection between animal cruelty and other serious criminal offenses. Part IV then explains the lack of continuity among state animal-cruelty statutes, both good and bad, and how the MPC is adding to this disparity. Finally, Part V discusses how the MPC might model its revision of “Cruelty to Animals” and explains why a redraft of this provision is absolutely necessary.

I. History and Influence of the Model Penal Code

The MPC is the closest thing to a comprehensive American criminal code. The United States is comprised of jurisdictions that have a total of fifty-two different criminal codes in addition to a federal penal code. The U.S. Constitution grants states the primary authority to impose criminal liability on its citizens pursuant to state interests or “street crimes.”

Claiming that state criminal codes were “chaotic and irrational,” the American Law Institute (ALI) published the first version of the Code in 1962. Whereas restatements of law act as “general statements of principle digesting the state of the common law,” the purpose behind the MPC was to act as a comprehensive body of criminal law to be adopted by state legislatures across the country.

After publication of the MPC in 1962, thirty-four states redrafted their criminal codes in a way that was influenced in whole or in part by the MPC. The influence of the MPC has not been limited to state codes; thousands of court opinions have cited the MPC as persuasive authority for interpreting statutes and formulating criminal-law doctrine. As

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19 Robinson & Dubber, supra note 10, at 320.
20 Id.
21 Id. (describing “street crimes” as “homicide, rape, robbery, assault, and theft”).
22 Id. at 323.
23 The ALI is a nongovernmental organization comprised of lawyers, judges, and law professors in the U.S. who typically draft “restatements” of an area of the law. Id. ALI’s mission was “to promote the clarification and simplification of the law and its better adaption to social needs . . . .” ALI Overview, A.L.I., http://www.ali.org/index.cfm?fuseaction=about.creation (last visited Feb. 19, 2012).
25 Robinson & Dubber, supra note 10, at 324 (listing the states in order of recodification from 1962 to 1983).
26 See, e.g., Hawai‘i v. Aiwohi, 123 P.3d 1210, 1221 (Haw. 2010) (looking to the Model Penal Code to fill in gaps in the state law in distinguishing the three material elements of any criminal offense); Pennsylvania v. Henley, 459 A.2d 365, 369 (Pa.
influential as the MPC has proven to be, however, legal scholars have recognized that it has become notably dated in many areas of the law including rape, drug offenses, domestic violence, and bias crimes.\textsuperscript{27} Likewise, the MPC’s “Cruelty to Animals” section has become terribly outdated. In the 1950s, animal cruelty was treated as a social misbehavior.\textsuperscript{28} Consequently, the objective in drafting § 250.11 of the MPC in 1962 was to “prevent outrage to the sensibilities of the community.”\textsuperscript{29}

Following that objective, the animal-cruelty provision was categorized under “Offenses Against Public Order and Decency”\textsuperscript{30} and viewed as petty mischief that affected the morals of society as a whole. Similar indecency offenses include behavior related to rioting, disorderly conduct, making false public alarms, harassment, public drunkenness, loitering, obstructing highways, disrupting meetings and processions, desecrating venerated objects, abusing corpses, and violating privacy.\textsuperscript{31} The offenses in Article 250 are described as those that “affect a large number of defendants, involve a great proportion of public activity, and powerfully influence the view of public justice.”\textsuperscript{32} While in 1962 the public might have viewed animal cruelty as similar to these offenses, this Note will explore how this consensus has drastically evolved, while the MPC has not.

II. The Evolution of State Animal-Cruelty Laws

States began enacting animal-cruelty statutes in the first half of the nineteenth century.\textsuperscript{33} The first animal-cruelty statutes were not to promote animal welfare, but rather to “(1) protect the property rights of those who owned commercially valuable animals . . . and (2) prevent harm to human beings.”\textsuperscript{34} The owner of an animal had an interest in the animal only as

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\textsuperscript{27} See Lynch, supra note 24, at 230–35 (explaining that these areas are in need of statutory reform because they did not exist in the 1950s to the extent they do today); Robinson & Dubber, supra note 10, at 329 (explaining the change in society’s views on the treatment of sex and drug offenses since the 1950s).

\textsuperscript{28} AM. LAW INST., MODEL PENAL CODE & COMMENTARIES, PT. II, VOL. 3, at 309 (1980) [hereinafter MPC COMMENTARIES].

\textsuperscript{29} Id. at 425.

\textsuperscript{30} MODEL PENAL CODE § 250.11 (1962).

\textsuperscript{31} Id. at §§ 250.1–250.10, 250.12.

\textsuperscript{32} MPC COMMENTARIES, supra note 28, at 309.

\textsuperscript{33} Challener, supra note 15, at 500–01.

\textsuperscript{34} Id. at 501.
chattel. However, a change in this view was evident as early as post-
Civil War, when the emancipation of slaves moved society toward “a
more profound recognition of the dignity of all beings.” In 1866, New
York amended its animal-cruelty statute to expand the scope of animals
protected and abusive acts covered. The amended statute read: “Every
person who shall, by his act or neglect, maliciously kill, maim, wound,
injure, torture, or cruelly beat any horse, mule, ox, cattle, sheep, or other
animal, belonging to himself or another, shall, upon conviction, be
adjudged guilty of a misdemeanor.” This animal-cruelty law then
became the model for reformed animal-cruelty statutes throughout the
country.

Although animals continued (and continue) to be regarded, legally, as
personal property, courts began adopting the view that cruelty to animals
was also degrading to the human perpetrator, human witnesses, and
society as a whole. Animal cruelty was regarded as a problem that
“diminished the human condition.” Not only were animal-cruelty laws
meant to prevent and punish the destruction of property, but also to
discourage and protect people from barbarous and uncivilized behavior
that negatively impacted the general public. The type of behavior that
aligned with humans committing animal cruelty was thought to be
indicative of a character that also participated in excessive gambling,
dissemination of pornography, public intoxication, loitering, and similar
actions. As a result, the animal-cruelty provisions of many state codes
were found in chapters entitled, for example, “Of Offenses Against
Chastity, Decency and Morality,” reflected in the drafting of the MPC.

35 Margit Livingston, Desecrating the Ark: Animal Abuse and the Law’s Role in
Prevention, 87 IOWA L. REV. 1, 21 (2001). “Chattel” is thought to be derived from the
word “cattle,” which was one of the most valuable animals and thus personal property.

Id. at 24 (emphasis added).

Id. at 25.

38 N.Y. AGRIC. & MKTS. § 26 (McKinney 1881).

39 Livingston, supra note 35, at 25.

40 See, e.g., Waters v. People, 46 P. 112, 113 (Colo. 1896) (“[The animal-cruelty
law’s] aim is not only to protect these animals, but to conserve public morals . . . .”);
Johnson v. Dist. of Columbia, 30 App. D.C. 520, 522 (D.C. 1908) (explaining that the
prevention of animal cruelty “is in the interest of peace and order and conduces to the
morals and general welfare of the community”); see also Livingston, supra note 35, at 26.

41 Livingston, supra note 35, at 26.

42 Id. at 27–28.

43 Id. at 28.

44 David Favre & Vivien Tsang, The Development of Anti-Cruelty Laws During the
1800’s, 1993 DETROIT C. L. REV. 1, 9 (1993) (citing specific examples of early codes in
New Hampshire, Minnesota, Michigan, and Pennsylvania).
While most animal-cruelty statutes still resembled their earlier counterparts by 2002, some state provisions have started to reflect society’s increasing concern about animal welfare. Currently, all fifty states and the District of Columbia have some type of statute to protect animals from cruelty and neglect. Further, some states’ anti-cruelty statutes reflect the purpose of preventing cruelty to animals for the benefit of the animals as opposed to society. For example, Oregon catalogues its animal cruelty statute under “Offenses Against Public Health, Decency, and Animals.” By assigning a separate section for offenses against animals, the Oregon legislature recognizes that the primary purpose of the animal-cruelty provision is to protect animal welfare, not public health and property. Still, a number of modern animal-cruelty statutes have retained their purpose as “promot[ing] moral behavior and thereby ‘improv[ing] human character’” rather than promoting animal welfare.

Not only has society’s conception about animal cruelty greatly evolved in the last 200 years, discussion about animal rights has “moved from the periphery and towards the center of political and legal debate.” Professor David Favre suggests that vertebrate animals should be considered under a new category of “living property” with at least some legal rights because animals have “individual interests worthy of our consideration.” Another legal scholar, Steven Wise, suggests that some animals, particularly large primates, are entitled to basic legal rights based on the sophisticated nature of animal minds. While many people continue to view the idea of animal legal rights as implausible, the growing animal-rights movement serves as another example of how attenuated the original concepts of animal cruelty are from today’s vision of protecting our companion animals.

46 Livingston, supra note 35, at 29.
47 Id.
49 OR. REV. STAT. § 167.310–167.390 (2011); see also Moore, supra note 48, at 95.
50 Moore, supra note 48, at 95.
54 Wise, supra note 45, at 101.
55 Sunstein, supra note 52, at 387.
III. The Connection Between Animal Cruelty and Other Serious Offenses

The animal-cruelty provision of the MPC was drafted in part to promote “moral behavior,” and in part to “prevent those who harm animals from engaging in other antisocial conduct that is harmful to humans.”\textsuperscript{56} Unfortunately, decades of research have demonstrated that the antisocial conduct perpetuated by animal abuse is much more severe than riot, disorderly conduct, or public intoxication. As mentioned, the link between animal abuse and other serious crimes has become well established.\textsuperscript{57} The gambit of crimes ranges from domestic abuse within the home, to drug-related offenses, to serial killings and mass murder.\textsuperscript{58}

Several studies demonstrate that where there is domestic violence in the home, you will also likely find an abused animal.\textsuperscript{59} Killing or abusing an animal demonstrates an offender’s control and domination over the subject, similar to the mindset behind an offender’s violent action toward an abused partner or child.\textsuperscript{60} 68% of women who reported domestic violence also reported animal abuse.\textsuperscript{61} Furthermore, 75% of these incidences occurred in the presence of children.\textsuperscript{62} Where there is a child being abused or witnessing abuse, there is a strong probability that the child will adopt this behavior and continue both animal and human abuse in a generational cycle.\textsuperscript{63}

Additionally, children in homes where animal abuse is occurring are often subject to the abuse themselves.\textsuperscript{64} For example, in a Kentucky case, the county animal shelter was alerted that animals were being kept in the

\textsuperscript{56} Challener, \textit{supra} note 15, at 503.
\textsuperscript{57} Randall Lockwood, \textit{Animal Cruelty and Violence Against Humans: Making the Connection}, 5 ANIMAL L. 81, 81 (1999) (describing a compilation of fifty classic references to the connection in various fields of study over the last 200 years).
\textsuperscript{60} Sauder, \textit{supra} note 58, at 11–12.
\textsuperscript{62} \textit{Id.}
\textsuperscript{63} Sauder, \textit{supra} note 58, at 11–12; see also Challener, \textit{supra} note 15, at 503–04 (describing studies showing that juveniles and adults who abuse animals are more likely to continue the abuse against humans).
\textsuperscript{64} Sauder, \textit{supra} note 58, at 13.
defendants’ garage without food, water, or ventilation.65 The county game warden responded to the complaint, finding seventeen to twenty-three dogs in three to five inches of feces, without water, and in a temperature exceeding 90 degrees.66 After seizing the animals, investigators later discovered that the defendants’ four children, ages five to thirteen, were being forced to perform anal and oral sex on both the defendants and other men and women while tied to a tree.67

While animal abusers are four times more likely to commit property-related crimes, and three times more likely to commit drug-related offenses, they are also five times more likely to commit violent crimes such as assault, rape, and murder.68 Outside the home, some of the most notable violent offenders started out as animal abusers. For example, the “Son of Sam” serial murderer killed both his grandmother’s parrot and a neighbor’s dog before going on his infamous killing spree.69 Additionally, the gunmen in the Columbine High School shooting, which resulted in the death of twelve students and one teacher, had a history of mutilating animals prior to their mass murder, double suicide.70 Further, “[Seventy-five] percent of violent offenders in prison have earlier records of animal cruelty.”71 Psychologists conjecture that only the object of a serial killer’s violent actions change, and the violent behavior does not.72 In the same

65 Schambon v. Kentucky, 821 S.W.2d 804, 806 (Ky. 1991).
66 Id.
67 Id. at 807–08.
68 Sauder, supra note 58, at 13–14; see also Slitting the Throat of Girlfriend’s Rottweiler, PET-ABUSE.COM, http://www.pet-abuse.com/cases/1678/AL/US/ (last visited Dec. 6, 2011) (describing how defendant slit the throat of his girlfriend’s Rottweiler resulting in conviction of misdemeanor animal cruelty and then broke his probation buying crack cocaine from an undercover agent).
69 Iannacone, supra note 58, at 753; Lockwood, supra note 57, at 83 (also describing infamous serial killer Jeffrey’ Dahmer’s fascination with animal corpses and incident of killing an entire tank of tadpoles in the third grade); see also Weslander, supra note 8 (explaining that serial killer BTK admitted that before he started strangling people to death, he killed numerous dogs and cats).
72 Sauder, supra note 58, at 14.
way that acts of cruelty towards humans causes a great deal of harm to the humans involved, acts of animal cruelty cause a great deal of harm to both the animals and humans involved. As it turns out, acts of animal cruelty are indicative of a character that participates in much more severe actions than rioting or disorderly conduct.

IV. The Current “State” of Animal-Cruelty Laws

Animal-cruelty laws differ drastically from state to state. While some states recognize the large scope of criminal activity that animal abuse encompasses, others have failed to move beyond what is covered under the MPC. Further, how the act of animal cruelty is defined differs depending on what jurisdiction the crime was committed. One of the biggest issues is the disparity in maximum punishments. While forty-six states and the District of Columbia have felony animal-cruelty provisions, each state varies drastically on what type(s) of crime(s) and animal(s) are covered. Location of the animal-cruelty provision within a state’s criminal code is also a good indicator of how progressive the anti-cruelty law is within the state. The following gives a brief insight into how state animal-cruelty statutes differ across the country and why some are more effective than others.

A. The Good, the Bad, and the Ugly

The animal-cruelty laws in Illinois, Maine, and Michigan are three of the most progressive animal-cruelty statutes in the country. These three states are the only ones that have felony penalties available for cruelty,
neglect, fighting, abandonment, and sexual assault. Further, all three statutes also treat animal cruelty violations separate from offenses against public order and decency in their criminal codes, providing coverage of animal abuse in its own chapter.

Illinois is deemed to have one of the most effective animal-cruelty statutes because of its wide array of protections. For example, Illinois is one of only two states that specifically defines animal hoarding. Besides recognizing a relatively new phenomenon, the Illinois animal-hoarding provision is progressive for two more reasons. First, it goes beyond traditional punishment by including a mental health component, which requires judges to order offenders to undergo psychological evaluation if convicted. Second, it includes specific definitions of an owner’s duties to their companion animal, leaving little room for misinterpreting, for example, “an open toilet bowl [as] an adequate source of water.”

Further, Illinois provides for mandatory forfeiture of animals upon conviction and also allows courts to restrict ownership when necessary. Veterinarians and animal-related professionals are required to report suspected acts of animal-cruelty. Additionally, there are broad measures listed to mitigate the costs of care for abused pets seized by animal-welfare agencies. The Illinois statute also recognizes the effect of animal abuse on human victims, requiring mental health evaluations and counseling beyond animal hoarding convictions, and allowing pets to be included in domestic protective orders. Lastly, anyone convicted of animal torture, “infliction of or subjection to extreme physical pain,

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80 Id. at 4 (While other states provide felony penalties for cruelty or fighting, these are the only three states that provide felony penalties for all five offenses comprehensively).
81 See 510 ILL. COMP. STAT. 70/3.01 (2011) (placing cruel treatment of companion animals under Chapter 510. Animals); ME. REV. STAT. tit. 17, § 1031 (2011) (placing cruelty to animals under Chapter 42. Animal Welfare); MICH. COMP. LAWS. ANN. § 750.50(b) (2011) (placing the animal cruelty provision under Chapter IX. Animals).
82 RANKINGS, supra note 79, at 2.
84 510 ILL. COMP. STAT. 70/3 (2011); Renwick, supra note 83, at 599; see also 30 Dogs Seized, Odin, IL, PET-ABUSE.COM, http://www.pet-abuse.com/cases/18780/IL/US/ (last visited Feb. 29, 2012) (describing an Illinois man who plead guilty to animal cruelty for hoarding thirty dogs and was ordered to undergo mental evaluation in October 2011).
85 510 ILL. COMP. STAT. 7/3 (2011); Renwick, supra note 83, at 600.
86 510 ILL. COMP. STAT. 70/3.04 (2011); RANKINGS, supra note 79, at 4.
87 510 ILL. COMP. STAT. 70/3.07 (2011); RANKINGS, supra note 79, at 4.
88 510 ILL. COMP. STAT. 70/16.2–16.17 (2011); RANKINGS, supra note 79, at 4.
89 510 ILL. COMP. STAT. 70/3.03 (2011); RANKINGS, supra note 79, at 4.
90 510 ILL. COMP. STAT. 70/16.3 (2011); RANKINGS, supra note 79, at 4.
motivated by an intent to increase or prolong the pain, suffering, or agony of the animal,” can face up to five years in prison.91

The Maine and Michigan statutes also include notable sections that distinguish them as leaders in the anti-cruelty law arena. A major strength of the Maine statute is it provides police officers with an affirmative duty to enforce animal-protection laws.92 The police’s role in enforcing animal-cruelty laws is a vital first step in successful prosecution.93 While Michigan has some of the same strengths as the Illinois and Maine statutes, it also provides a few other positive distinctions.94 For example, Michigan treats malicious animal cruelty as a felony punishable by up to four years imprisonment on the first conviction.95 Additionally, Michigan gives humane officers broad law enforcement authority.96 When a state has an integrated plan in place to respond to animal-cruelty complaints, allowing other agencies enforcement authority can provide extra resources necessary for successful reporting and investigation.97

On the other end of the spectrum, Idaho, Kentucky, and North Dakota have been named three of the worst states for companion animals due to some of the weakest protection laws in the country.98 There are a few characteristics that separate the bad laws from the downright ugly. None of these three consider cruelty, neglect, or abandonment a felony.99 As demonstrated in the Introduction, the maximum penalty for cruelty to animals in North Dakota is seemingly minimal regardless of how horrific the act may be; cruelty to animals is a Class A misdemeanor with a

91 510 ILL COMP. STAT. 70/3.03 (2011); see Kitten’s Head Ripped Off During Domestic Dispute Bethalto, IL, PET-ABUSE.COM, http://www.pet-abuse.com/cases/9663/IL/US/ (last visited Feb. 29, 2012) (sentencing defendant to two years imprisonment for ripping off a kitten’s head during a domestic dispute in exchange for a guilty plea).
92 ME. REV. STAT. tit. 17, § 1023 (2011); RANKINGS, supra note 79, at 4; see also Brief for the State Appellee at 9, State v. Clark, No. LIN-08-193 (Me. filed Aug. 5, 2008), 2008 WL 5974812 (urging the Supreme Court of Maine to uphold the seizure of animals from the appellant’s puppy mill under ME. REV. STAT. tit. 17, § 1023).
93 See Sherry Ramsey, Enforcing State Animal Cruelty Laws: Interpreting the Laws to Obtain Successful Prosecutions, 2 LEX CANIS 2, 2 (2010) (explaining that when police do not have a direct incentive to respond to animal-cruelty cases they often get shuffled to other agencies, disallowing prompt and consistent investigation).
94 See generally RANKINGS, supra note 79, at 4 (comparing the select provisions used by ALDF in determining the rank between the top five state animal cruelty statutes).
95 MICH. COMP. LAWS ANN. § 750.50(b) (West 2011).
96 Id. at § 750.52; see also MASS. GEN. LAWS ANN. ch. 147, § 10 (West 2011) (allowing nonprofits to enforce anti-cruelty statutes when they have been appointed as special police officers).
97 Ramsey, supra note 93.
98 Thornton, supra note 7.
99 Id.
maximum jail sentence of one year.\textsuperscript{100} While Kentucky boasts the same tough punishment,\textsuperscript{101} Idaho only allows a maximum jail sentence of one year upon the third conviction within fifteen years, unless found guilty of poisoning an animal.\textsuperscript{102} The maximum sentence in an animal cruelty-provision is critical.

It signals to a judge how opposed legislators think a society actually is to a particular wrong . . . [and] because a judge usually will not impose a penalty near the maximum for a first ‘run-of-the-mill’ offense, the typical penalty for cruelty will remain low so long as the maximum penalty remains low.\textsuperscript{103}

Moreover, while states like Michigan require veterinarians to report animal-abuse, veterinarians in Kentucky are prohibited from reporting either cruelty or animal fighting.\textsuperscript{104} Moreover, Kentucky’s and Idaho’s felony penalties only apply to dog fighting, leaving out other types of animals.\textsuperscript{105} Despite the shortcomings of the entire Idaho animal-cruelty statute, the legislature succeeded in correctly placing the provision under a chapter entitled “Animal Care.”\textsuperscript{106} North Dakota’s provision is hidden under “Livestock,”\textsuperscript{107} and Kentucky follows the MPC, listing it under “Riot, Disorderly Conduct, and Related Offenses.”\textsuperscript{108}

While these two ends of the spectrum draw attention to the greatest disparity among animal-cruelty laws across the country, it is important to note that state legislatures are beginning to recognize the need for progressive change.\textsuperscript{109} Likewise, in the past fifteen years, legal academics

\textsuperscript{104} Thornton, supra note 7.
have been calling for more modern animal-cruelty laws on a state-by-state basis.不幸地，由于美国动物残忍法律之间的广泛差异持续存在，它会继续决定一个动物虐待者是，例如，肯塔基州居民或缅因州居民，在确定是否伴侣动物如Momma（在介绍中讨论）将看到正义。

B. The MPC’s Role in Retarding the Evolution of State Animal-Cruelty Laws

states have received no new guidance for structuring an animal-cruelty section in their criminal codes since the MPC was published in 1962. As a result, most states have struck out on their own to mirror modern society’s view on animal cruelty (whether they have met success or not is another question), while others have more or less retained the MPC or a similar version of § 250.11. As just discussed, this has resulted in a wide disparity in animal-cruelty statutes across the country, or worse—a failure to recognize the drastic difference between animal cruelty from other petty misbehaviors and the similarity of animal abuse to more serious violent crimes.112 It is first important to analyze why § 250.11 is ineffective in order to understand how the MPC should be revised.

The animal-cruelty provision in the MPC prevents meaningful enforcement and prosecution. The placement of the provision serves to underscore the misapprehension that these crimes are insignificant and of lesser importance.113 Substantively, the MPC is flawed as well. Section 250.11 “Cruelty to Animals” reads:

A person commits a misdemeanor if he purposely or recklessly:

1. subjects any animal to cruel mistreatment; or


112 See supra Part III.

113 Ramsey, supra note 93, at 2–3 (explaining the importance of the location of state animal-cruelty provision(s) within the state criminal code).
(2) subjects any animal in his custody to cruel neglect; or

(3) kills or injures any animal belonging to another without legal privilege or consent of the owner.

Subsections (1) and (2) shall not be deemed applicable to accepted veterinary practices and activities carried on for scientific research.114

The MPC fails to provide adequate definitions or guidance on the meaning of the words used in the offense, such as “animal” and “cruel” used in sections (1), (2), and (3) of § 250.11.115 The commentators felt that failure to define these terms would not “cause much trouble” in the section’s interpretation.116

1. What is an “animal?”

Contrary to the commentators’ speculation, the ALI could have contributed much in deliberating on what types of animals should enjoy protection from statutes drafted similar to the MPC.117 Further guidance on this term might have minimized the disparity in state statutes, subsequently creating a patchwork of law. For example, some states have provided relatively broad definitions of “animals,” such as “every living, sentient creature not a human being,”118 while some have limited animal-cruelty statutes to pets, which includes dogs and cats.119 Other states have limited their animal-cruelty provision to “companion animals.”120 Yet, other states have failed to define “animal,” leaving it up to the courts to decide.121 This lack of guidance leaves open the question as to what categories of animals the MPC provision was intended to protect and whether the appropriate group is covered.

115 MPC Commentaries, supra note 28, at 426.
116 Id.
117 Id.
120 N.Y. AGRIC. & MKTS. LAW § 353-a (McKinney 2012) (limiting the felony animal-cruelty statute to companion animals); see also Iannacone, supra note 58, at 760.
2. What is “cruel?”

Similar problems have arisen in light of the MPC’s failure to provide any kind of intended meaning of the word “cruel.” Some states have attempted to overcompensate for this failure by simply using more words to supplant it, often using antiquated language such as “overdriving and overworking” that is only relevant to working animals. Other states have attempted to define “cruelty” more generally. Either way, the lack of guidance on what is intended by the word “cruel” in § 250.11 begs the question of what types of cruelty practices are actually included within each section of the provision. For example, in New York, aggravated cruelty is defined as conduct that “(i) is intended to cause extreme physical pain; or (ii) is done or carried out in an especially depraved or sadistic manner.” Because this definition fails to take into account that not all cruel acts that cause extreme pain are apparent, New York courts have inconsistently provided a felony penalty for cases of extreme neglect. Recent cases in New York have interpreted this statute to mean that prosecutors must show that a defendant exhibited a pattern of neglect by the defendant. Leaving important words such as “cruel” and “animal” undefined in a statute makes it challenging for prosecutors and courts to correctly interpret the law.

122 Iannacone, supra note 58, at 760.
123 Animal Cruelty: Opportunities for Early Response to Crime and Interpersonal Violence, SPECIAL TOPIC SERIES (Am. Prosecutors Research Inst., Alexandria, Va.), July 2006, at 15 [hereinafter Opportunities for Early Response]; see also CAL. PENAL CODE § 597(b) (West 2011) (describing animal cruelty as “every person who overdrives, overloads, drives when overloaded, overworks, tortures, torments, deprives of necessary sustenance, drink, or shelter, cruelly beats, mutilates, or cruelly kills any animal . . . or fails to provide the animal with proper food, drink, or shelter or protection from the weather, or who drives, rides, or otherwise uses the animal when unfit for labor”); N.Y. AGRIC. & MKTS. LAW § 353 (McKinney 2012) (reading similar to the California provision).
124 Wis. Stat. § 951.02 (2011) (“No person may treat any animal . . . in a cruel manner.”); see also Iannacone, supra note 58, at 761.
126 Iannacone, supra note 58, at 758.
127 Id.
128 Id. at 758–59; Compare People v. Arroyo, 777 N.Y.S.2d 836, 846 (N.Y. Crim. Ct. 2004) (finding no aggravated cruelty under N.Y. AGRIC. & MKTS. LAW § 353 when defendant failed to provide veterinary care for a dog who had a grapefruit size tumor in his stomach), with People v. O’Rourke, 369 N.Y.S.2d 335, 342 (N.Y. Crim. Ct. 1975) (finding aggravated cruelty under N.Y. AGRIC. & MKTS. LAW § 353 for failing to provide medical attention to a working horse who was limping).
129 Ramsey, supra note 93, at 3.
3. Penalties under the MPC

Under the MPC animal-cruelty provision, the maximum punishment for this offense is a misdemeanor, undermining the importance of prosecuting animal-cruelty cases as discussed previously. Even in states that provide a felony penalty under their animal-cruelty statute, it often applies only to specific types of cruelty or provides minimal incarceration time. In New York, the maximum sentence for a felony animal-cruelty violation “may not exceed two years.” Kentucky’s felony violation only applies to four-legged animal fighting. North Carolina’s maximum jail time for a conviction of cruelty is six months, even after the third subsequent offense. Not only does the MPC not provide adequate potential jail-time for offenders, it also fails to recognize the root of the problem by failing to provide measures to seize abused animals or require psychological treatment. Some scholars even advise that states should develop an animal-abuse registry or tracking system to protect animals from further abuse.

V. The Future of the MPC: A Revised Animal-Cruelty Section

The ALI expresses that “[t]he purpose of the Model Penal Code was to stimulate and assist legislatures in making a major effort to appraise the content of the penal law by a contemporary reasoned judgment.” In other words, the MPC intended “to promote the reform of the nation’s actual criminal codes, as adopted by state legislatures and Congress.” However, as early as 1980, the ALI recognized that the “constitutional background of the[] offenses [listed in Article 250] ha[d] changed significantly since the promulgation of the [MPC] in 1962.” While state

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130 MODEL PENAL CODE § 250.11 (1962).
131 Iannacone, supra note 58, at 768.
132 N.Y. AGRIC. & MKTS. LAW § 353–a(3) (McKinney 2012).
133 KY. REV. STAT. ANN. § 525.125 (2012).
135 Iannacone, supra note 58, at 769.
137 In recent years, many academics have begun discussing the possibility of a Model Penal Code Second or smaller more manageable projects revising specific sections of the current MPC. Joshua Dressler, The Model Penal Code: Is it Like a Classic Movie in Need of a Remake?, 1 OHIO ST. J. CRIM. L. 157, 158–59 (2003).
138 Lynch, supra 24, at 219.
139 MPC COMMENTARIES, supra note 28, at 312; see also Kent Greenawalt, A Few Reflections on The Model Penal Code Commentaries, 1 OHIO ST. J. CRIM. L. 241, 243
legislatures have attempted reform on their own, this has led animal-cruelty laws to the same place most state penal codes were before the publication of the MPC—chaos and disarray.\textsuperscript{140} A revised MPC provision in line with today’s views on animal-abuse could narrow the disparity in animal-cruelty provisions across the country.

\textbf{A. What the Revision Should Look Like}

The starting point for revision is the location of the animal-cruelty section. The most logical placement of the animal-cruelty provisions under the MPC would be to place these offenses in their own section. For example, prosecutors, law enforcement, humane officers, and laypeople can easily identify where the animal-cruelty provisions are located in the Oregon Penal Code, as the legislature clearly placed it in its own chapter under “Offenses Against Animals.”\textsuperscript{141} The MPC should follow the Oregon legislature and move its animal-cruelty provision to a newly created section entitled “Offenses Against Animals” under Part II: “Definitions of Specifics Crimes.”\textsuperscript{142} Removing the animal-cruelty provision from “Offenses Against Public Order and Decency” would demonstrate that the ALI no longer views animal abuse parallel with minor social misbehaviors but rather recognizes its position in a multi-dimensional legal spectrum. Further, this type of revision “avoid[s] the temptation to rethink the [MPC’s] basic organization and approach.”\textsuperscript{143} Rather, this revised placement perpetuates the drafters attempt to organize offenses conceptually, making it easy for a code user to find the relevant offense, while ensuring that related offenses are nearby and “not hidden in a dark corner elsewhere in the code.”\textsuperscript{144}

Second, the substance of the animal-cruelty provision also needs revision. The current anti-cruelty section under the MPC fails to recognize the many facets that animal abuse encompasses. Fortunately, the ALI drafters have a handful of progressive, well-written state statutes to use as a guide in redrafting a new comprehensive model law.\textsuperscript{145} A successful redraft of the MPC’s “Cruelty to Animals” section should provide a basic

\textsuperscript{140} Robinson & Dubber, \textit{supra} note 10, at 323.
\textsuperscript{142} See generally \textit{MODEL PENAL CODE} (1962) (looking at the layout of the different parts); see also \textit{MICH. COMP. LAWS ANN.} § 750 (West 2012) (listing animal-cruelty under “Animals”); \textit{infra} Appendix.
\textsuperscript{143} Lynch, \textit{supra} note 24, at 237 (emphasis added).
\textsuperscript{144} Robinson & Dubber, \textit{supra} note 10, at 333.
\textsuperscript{145} See \textit{supra} Part IV.A.
guide, which covers all recognized types of animal abuse and includes adequate definitions, enforcement techniques, and penalties that are easily accessible to law enforcement, prosecutors, and advocates. State legislatures could then adopt or amend this revised MPC section to their respective animal-cruelty statutes across the country.

B. Why the Revision is Important Now

The desperate need for penal code reform in some areas of state law is no different than it was before the MPC was published in 1962. However, it is no longer expected that states will radically change their state penal codes today based on the 1962 MPC.146 Many states that have attempted penal code reform on their own since 1962 had little success in both the legislature and public arena.147 This lack of success can be attributed to the “dynamics of local criminal law politics [which] make it very difficult, if not impossible, to achieve general criminal law recodification without the kind of outside help provided by the Model Penal Code in the 1960s and 70s.”148 State legislatures have attempted to respond to public pressure by addressing new and previously “unimportant” criminal offenses with non-MPC terminology “undermin[ing] the coherence and clarity of many MPC-inspired codes.”149 “A new MPC, if it focused on the areas in which [there is] a real need and demand for reform . . . could be of great value to those seeking to reform [their] criminal codes”150 in the same way the original MPC was in 1962.

As a revised draft of the MPC’s sentencing provisions was discussed at the Annual Meeting in 2012,151 many scholars have begun to discuss whether a second coming of the MPC is or should be on the horizon.152 Judge Lynch153 suggests that the biggest weaknesses of the MPC are those

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146 Lynch, supra note 24, at 224.
147 Id.
149 Dressler, supra note 137, at 159.
150 Lynch, supra note 24, at 225.
152 E.g., Debra W. Denno, Why the Model Penal Code’s Sexual Offense Provisions Should Be Pulled and Replaced, 1 OHIO ST. J. CRIM. L. 207 (2003); Dressler, supra note 137; Lynch, supra note 24; Robinson & Cahill, supra note 148, at 176.
153 Gerard E. Lynch is a U.S. Federal judge for the United States Court of Appeals for the Second Circuit appointed by the Obama administration in 2009. Previous to this position, he was appointed by the Clinton administration and served as a Federal judge
where the criminal-law theorists have been the least active, and the need for reform is the greatest. Some of the weak areas of the MPC include definitions of particular crimes, areas of criminal law that were neglected by the original drafters, and those areas which did not exist when the MPC was created in 1962. Three of these areas are rape, narcotics, and domestic violence and bias crimes.

Similar to animal abuse, the social change of the last fifty years has drastically changed the principles and practices of defining the crime of rape. The MPC arrived just before the feminist movement, which changed the way society viewed family, reproduction, and sexual relations. The MPC treats the crime of rape as gender-specific and adheres to an old notion that a husband cannot sexually assault his wife. Although a number of legislative and judicial reforms have essentially rendered the rape provisions of the MPC irrelevant today, the variety of different statutes adopted across the state-penal system have inconsistently addressed this, “causing a host of interpretive questions, penal problems, and social consequences.” Only twenty-four states have completely abolished the marital-immunity rule despite drastic changes in the way society views rape. Similarly, although society once viewed animal abuse as a social misbehavior equivalent to acts of vagrancy, 67% of Americans today believe that protecting animals from cruelty and abuse is “very important.”

The modern “war on drugs” had also yet to be declared at the time the ALI drafted the MPC, therefore failing to include drug offenses in the

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94 Lynch, supra note 24, at 228.
95 Id.
96 Id. at 230-35. Judge Lynch also suggests reform for sentencing, conspiracy, money laundering, and terrorism. Id. at 229, 235; see also Dressler, supra note 137, at 158-59 (agreeing with Judge Lynch on the need for MPC reform in rape law, new statutory crimes, and the “war on drugs”).
97 Lynch, supra note 24, at 230.
98 Id.
99 JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 605 (5th ed. 2009).
100 Lynch, supra note 24, at 231.
101 DRESSLER, supra note 159, at 599.
102 See id. (discussing how the marital immunity rule still exists in some states for intercourse with a physically or mentally helpless spouse, and lesser forms of nonconsensual sexual conduct, while some states have abolished the immunity for the specific offense of forcible rape).
103 Opportunities for Early Response, supra note 123, at 9.
original publication.164 This can be attributed to the fact that the possession and sale of narcotics was much less prevalent in the 1950s—165 or was just regarded as a less serious problem. Judge Lynch recognizes that ignoring the dangerous consumption of drugs cannot be part of a modern model criminal code, when law officials and prosecutors devote a large portion of their resources on narcotics enforcement.166 He also points out that deliberate omission by the 1962 drafters cannot mean that some form of criminal regulation is not now necessary to attack the modern narcotics problem.167 He suggests that some type of “Model Controlled Substances Act” could stand a significant chance of adoption in many state jurisdictions because of the current diverse system of state penal codes relating to narcotics offenses.168 While animal abuse was regarded as a much less serious and insignificant problem in the 1950s—equated to minor social deviances—the link between animal cruelty and drug abuse169 suggests that a modern MPC could not continue to regard animal cruelty through a 1962 lens.

Judge Lynch suggests a third reform in the area of domestic violence and bias crimes, which the feminist movement has also been spearheading since the promulgation of the MPC in 1962.170 Similar to how animal welfare was not on the “criminal agenda” of the MPC drafters in the 1950s, neither was the concern of “minorities [and] disempowered groups.”171 Judge Lynch suggests that these topics should concern MPC reformers not only because the MPC treated them either with silence or inadequacy in 1962, but also because they represent a “broader criminal law trend that requires [re]consideration” in today’s society.172 Cruelty to animals must fit within this broad trend, as domestic abuse and animal abuse are “commonly intertwined.”173

The aforementioned areas, among others, are in the same “chaotic and irrational” disarray among state-penal codes as the originally targeted areas of reform were prior to 1962.175 These are the areas that legal

164 Lynch, supra note 24, at 231.
165 Id. at 232.
166 Id.
167 Id.
168 Id. at 233.
169 Brief for Law Professors, supra note 109, at 31; Sauder, supra note 58, at 13.
170 Lynch, supra note 24, at 223.
171 Id. at 233.
172 Id.
173 Sauder, supra note 58, at 12.
174 Robinson & Dubber, supra note 10, at 323.
175 Lynch, supra note 24, at 223–24; see also Dressler, supra note 137, at 158 (discussing the dramatic improvement in culpability requirements in state penal codes after the MPC).
scholars have focused on when discussing the possibility of a revised MPC. However, animal-cruelty statutes among state-penal systems are in the same “archaic, inconsistent, unfair, and unprincipled”\textsuperscript{176} state as the popularly analyzed areas for reform. It only seems logical that because animal abuse acts as a precursor to all of the above areas proffered for reform by Judge Lynch, a revision of § 250.11 of the MPC is not only relevant but also necessary. Further, if the ALI is going to remain true to the MPC’s mission of “assist[ing] legislatures in making a major effort to appraise the content of the penal law by a contemporary reasoned judgment,”\textsuperscript{177} then the ALI needs to update the animal-cruelty section of the MPC. This revision could “stimulate state criminal code reform [to] help states crawl out from under the decades of ad hoc amendments”\textsuperscript{178} that are continuing to widen the gap of animal-cruelty laws that vary from state to state.

**Conclusion**

A modern revision of the MPC’s “Cruelty to Animals” section would provide a progressive guide for statewide legislative change. As the saying goes, history repeats itself. In the 1960s and 1970s, the drafting of the MPC sparked “a wave of state code reform[]” across the country.\textsuperscript{179} Just recently, the ALI embarked on a wholesale revision of the sentencing guidelines in the MPC “in light of the many changes in sentencing philosophy and practice that have taken place in the more than 40 years since the Code was first developed.”\textsuperscript{180} Given the MPC’s purpose, this undertaking suggests that the ALI intends for states to reform their sentencing guidelines in light of the new model once published.\textsuperscript{181} Today, although society’s views on animal cruelty have drastically evolved, the only guide for state legislatures is tainted with a 1950’s view on animal abuse that is far attenuated from reality. A revision of the MPC’s treatment of animal cruelty can potentially provide courts, legislators, and prosecutors with a progressive model to fill in statutory, legislative, and judicial gaps that can act as good precedent for the rising trend in promoting the welfare of our companion animals. The ALI has an obligation to undertake this challenge.

\textsuperscript{176} Dressler, \textit{supra} note 137, at 157.
\textsuperscript{177} \textit{Publications Catalog}, \textit{supra} note 136 (emphasis added).
\textsuperscript{178} Dressler, \textit{supra} note 137, at 159.
\textsuperscript{179} Robinson & Dubber, \textit{supra} note 10, at 320.
\textsuperscript{180} \textit{Current Projects}, \textit{supra} note 151.
\textsuperscript{181} Lynch, \textit{supra} note 24, at 219.