

The Modern American

Volume 5
Issue 2 Fall 2009

Article 1

2009

Volume 5, Issue 2

The Modern American

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Recommended Citation

The Modern American, Fall 2009, 1-64.

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Volume 5, Issue 2

THE MODERN AMERICAN

A Publication Dedicated to Diversity in the Law



"Justice O'Connor has often been cited as saying that a wise old man and wise old woman will reach the same conclusion in deciding cases. I am not so sure Justice O'Connor is the author of that line . . . I am also not so sure that I agree with the statement. . . I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life."

- Associate Justice Sonia María Sotomayor of the Supreme Court of the United States

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AMERICAN
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LETTER FROM THE EXECUTIVE BOARD

This year we have finally seen the appointment of a female Latina justice to the Supreme Court- Sonia Sotomayor. Her appointment was long overdue, but should be considered as a step forward in the push for diversity and equality in our judicial system. As Senator Leahy stated in Justice Sotomayor's confirmation hearing, "there's not one law for one race or another, there's not one law for one color or another, there's not one law for rich and a different one for poor. There's only one law." It is our hope that Justice Sotomayor's appointment will move us closer to this ideal.

There is still much progress to be made. The makeup of the Court is still predominantly white men particularly. The lengths we need to go can be seen in the Court's decision in *Ricci v. DeStefano*, where the Court upheld a racist hiring practice that Justice Sotomayor had ruled against as a judge on the Second Circuit Court of Appeals. In this issue, we are excited to showcase an article by Professor Girardeau A. Spann examining the Supreme Court's rationale in deciding *Ricci* and the continued and far-reaching implications of the decision.

This fall, *The Modern American*, in conjunction with the Women's Bar Association, hosted our second annual event, Preserving the Past, Celebrating the Future: A Continued Commemoration of Our Shared History, on October 29, 2009—pictures of the event can be found throughout this issue. This year's program focused on the relationship between women and the law, specifically, the intersection between immigration and violence against women. This was a timely issue, 2009 marking the 15th Anniversary of the Violence Against Women Act. To highlight that relationship, this issue features the winning essay of the joint WBA-TMA writing competition, authored by our incoming Editor-in-Chief, Richael Faithful.

We are also proud to announce that our readership base continues to expand; subscribers will now be able to access *The Modern American* through Vlex, LexisNexis, HeinOnline, and the Westlaw database. In the spirit of environmentalism, we are pleased to continue to offer a green publication. The next year promises to be an exciting one for our publication. Our Fifth Annual Symposium will bring together renowned scholars explore how the legal community can better serve marginalized communities. We will also be welcoming a new Executive Board for 2010.

As the old editorial board says goodbye, we want to thank our advisors and staff for all of their help and support throughout our tenure. It has been a pleasure working with an such amazing group of people and we are incredibly excited to see where the new leadership takes *The Modern American*. Our school is one of the most diverse in the nation and with this in mind, we believe that *The Modern American* should become one of the most important diversity publication in the United States. It is with this mentality that we leave the publication to the new leadership.

In closing, we hope our issue inspires you to continue fostering the discourse on diversity and embracing everyday change in your community.

Sincerely yours,

The Executive Board
The Modern American

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ORPHAN TRAIN MYTHS AND LEGAL REALITY

By

Rebecca S. Trammell*

INTRODUCTION

Beginning in the 19th century, as many as 200,000 children across New York City's overcrowded boroughs, often from immigrant homes, were removed from their families and relocated to settlements in the American West. Contemporary views have credited this massive relocation as the impetus for American adoption laws, improved foster care practices, child labor law reform and the child welfare movement. To the contrary, records show this forced resettlement of primarily immigrant children slowed and opposed many child welfare reforms.

Laws and social views regarding the care and treatment of dependent children have evolved, grown and changed in tandem with the development of America as a whole. American practices and treatment of children have shifted from overt oppression to eliminating oppressive laws in order to define and implement successful child welfare policies and practices. This legal and social evolution has been and continues to be accomplished through various laws, policies and programmatic changes involving adoption, child labor and child welfare programs directed at public and private institutions that care for and interact with dependent children.

Part one of this article explores the orphan train movement, emphasizing the historical and legal context of the care of dependent children in the United States beginning in the colonial era and extending through the 19th century. Part two of this article assesses the legal impact of the unique century-specific orphan train movement on child-related laws and legal institutions in the United States. This examination challenges the accepted view that orphan trains contributed to child welfare and posits that, to the contrary, orphan trains were a detriment to the children the movement sought to protect. The forced relocation of 200,000 children, primarily from vulnerable immigrant families, worked against proper recognition of the rights of a child by substituting a "quick fix" for increased immigration and broader economic troubles. This article concludes with recommendations for 21st century child welfare practices and policies that, but for the orphan train movement, might have developed naturally in the United States.

PART I—THE ORPHAN TRAIN MOVEMENT

Charles Loring Brace has been credited with initiating the orphan train movement in the United States through his Children's Aid Society of New York.¹ Brace's plan to move destitute and homeless children from the streets of New York to Western farms has been characterized as an unusual and inventive child care solution.² This is not, however, an accurate characterization. Placing large numbers of children into other homes was a common European practice.³ This English process of placing children in homes as apprentices or indentured servants, the so called "putting out" or "placing out" of children, was later adopted in

the American colonies.⁴ Records indicate that as early as 1627, Virginia-bound English ships carried between 1400 and 1500 children across the Atlantic and into child labor apprenticeship in the colonies.⁵

In England as well as the American colonies, children had no legal say in whether they were placed out. This authority rested with their parents or even local authorities, such as overseers of the poor.⁶ If a parent died and the local authorities determined the surviving parent could not support the child, that child would be placed as an indentured servant or as an apprentice with a family who, in return for service, would provide food, clothing and training for the child. Local authorities made their determinations in conformity with pre-existing perceptions of gender and so were more likely to remove a child from the care of a surviving mother than from a surviving father. Colonial governments and predecessor states enacted laws to control this process and to regulate agreements involving indentured servitude and apprenticeships.⁷

As the population in the United States increased, almshouses, or charitable facilities that provided care for the destitute were established to house both indigent adults and children.⁸ But this was not a preferred system as it imposed a financial burden on the jurisdiction that created the facility. During colonial times, the town level of government was generally responsible for the care of indigents in their jurisdiction, though the responsibility of indigent care sometimes shifted to the county.⁹ State governments began assuming support of public charitable institutions in the 19th century.¹⁰ Even with state support, local governments were expected to financially contribute to care efforts.¹¹ During this period, an early form of paid foster care also existed for infants who were placed with families.¹² Beginning as early as 1866, orphanages were established to remove children from almshouses and to care for them separately from adults. These publicly funded orphanages attempted to indenture or apprentice older children and place younger children in paid foster care.¹³

Private charities were also established to care for orphans and destitute children. The New York Orphan Asylum Society ("NY Society") was founded in 1806 as the first private U.S. children's charity.¹⁴ The NY Society required that children be placed out as soon as they received a basic education.¹⁵ Similar institutions were created in Baltimore, Maryland and Boston, Massachusetts.¹⁶ In total, at least 62 private charities were created between 1800 and 1850,¹⁷ most of which strove to place children in their care into apprenticeships or indentured servitude.¹⁸

Informal adoptions were also common where, for example, a relative would take in an orphaned child. Sometimes these adoptions were made official through private legislation or court proceedings.¹⁹ The first modern adoption statute was passed by Massachusetts in 1851.²⁰ Even with statutory authority, some courts were reluctant to apply laws that conferred a right of inheritance on children adopted under these state statutes.²¹

Beginning in the mid-19th century, these public and private institutions faced three major obstacles in their work to

provide for the children in their care. First, jobs were scarce due to an economic recession. Second, jobs in labor-intensive cottage industries were cut as development in industrialization led to mass production.²² Third, the influx of immigrant families in urban centers like Boston and New York expanded an already large labor pool while the need for apprenticeships diminished with so many immigrant adult laborers vying for work.²³ The combined effect of these conditions left many children from immigrant and some non-immigrant families destitute, neglected or orphaned. The needs of these children strained local public resources. George W. Matsell, New York City's first Chief of Police, provides a description of these conditions in his 1849 semi-annual report on "the problem of vagrant and delinquent children". He describes "the constantly increasing number of vagrants, idle and vicious children . . . who infest our public thoroughfares, hotels, docks, &c. [sic.]" He saw these children as "destined to a life of misery, shame and crime, and ultimately to a felon's doom."²⁴ Matsell points out that "a large proportion of these juvenile vagrants are in the daily practice of pilfering wherever opportunity offers, and begging when they cannot steal."²⁵

There are no reliable records as to the exact number of the affected children. The 1854 First Annual Report of the Children's Aid Society, drawing on numbers from Matsell's report, identifies 10,000 "vagrant children" in New York City.²⁶ Other contemporary accounts indicate as many as 30,000 primarily immigrant children roamed the streets in New York and Boston in the mid-19th century.²⁷

Publicly funded programs failed to adequately address these conditions. As a result, over 100 private charities were organized from the 1850's to the 1860's to meet child care needs.²⁸ Following practices established by previous organizations, most of these charities provided assistance to children through indentured servitude, generally indenturing boys by the age of 12 and girls by the age of 14.²⁹ Given the depressed economic conditions and lack of employment opportunities in the East, charities began to place and indenture affected children in rural areas where child labor was needed and welcomed.³⁰ This grew into the orphan train movement.

In 1849, the board of governors of the New York Almshouse favored placing children in families and sought legislation allowing children to be indentured outside the State of New York.³¹ In 1855, New York State authorized "trustees, directors or managers of any incorporated orphan asylum, or institute or home for indigent children" to "bind out" any male orphan or indigent child under 21 and any female orphan or indigent child under 18.³² Under this authority, the Boston Children's Mission sent a total of 150 children to out-of-state placements in 1850.³³

The phrase "orphan train" was first used in 1854 to describe the transportation of children outside of their home localities on the railways.³⁴ There were no geographic restrictions for these indentures — the children could be placed anywhere. Other states enacted similar provisions giving charities the authority to indenture children in their custody without geographic restrictions.³⁵ While the first charities to use orphan trains were in the East, charities farther West also placed children

out in this manner.³⁶ Organizations in Missouri, Iowa, Texas and Nebraska also placed children across their states and in neighboring states.³⁷ Expansion of railway systems into the American frontier had a two-fold effect: children were placed on trains in transit to faraway cities while railroad companies made efforts to draw immigrants to the United States. For example, railroads advertised the United States throughout Europe as "the land of opportunity" and the "land of a second chance."³⁸ These same railroad companies offered reduced or free fares to charities seeking to transport children westward. Orphan train trips were also sponsored and financed by charitable contributions and wealthy philanthropists such as Mrs. John Jacob Astor III who, by 1884, had sent 1,113 children west on the trains.³⁹ Implicitly, various levels of government sponsored these trips as well, the government underwriting railroad companies using public funds.⁴⁰

Reports provide various estimates of the number of children riding these trains. One conservative report estimated that 106,246 children were placed.⁴¹ The most consistent estimates suggest that between 150,000 to 200,000 children were placed in 48 states, the District of Columbia and Indian Territory locations.⁴² Various factors give rise to the differences in estimation: institutional records were not always well maintained; some children were counted multiple times; and records have been lost or destroyed.⁴³

For purposes of placing the children, the charities could be granted guardianship in a variety of ways. In many cases, destitute parents would temporarily surrender child care responsibilities to a charity until the parents could sufficiently improve their financial circumstances to reassume child care responsibilities. A document transferring guardianship to the charity would be signed by at least one parent, typically transferring guardianship for a specified number of years. Guardianship would vest in the charity only upon expiration of the term when the child would

be considered abandoned due to the parent's failure to claim the child.⁴⁴ A charity could also be given guardianship over a child by order of a magistrate, an officer of the court or an overseer of the poor. This was the general practice when police or public officials found a vagrant or abandoned child on the streets.⁴⁵ A public institution could also transfer guardianship to a private charity if the public charity was overcrowded or if the private charity was determined to be better able to place out children for indenture or adoption.⁴⁶ In some instances, state laws granted charities guardianship over charges committed to their care.⁴⁷ In rare instances charities could petition for guardianship where the charity or its agent found an abandoned child.⁴⁸ Children with no surviving parent had the authority to agree to a charity guardianship.⁴⁹

Charities generally asked the receiving family to sign an agreement accepting the child into that family to be cared for as a member of the family.⁵⁰ These agreements contained different provisions depending on the child's age.⁵¹ Some organizations required formal indenture agreements for placed children and transferred guardianship as part of the indenture process, sometimes designating a trial period before transferring guardianship to the receiving family.⁵² A successful trial period would conclude

In many cases, destitute parents would temporarily surrender child care responsibilities to a charity until the parents could sufficiently improve their financial circumstances to reassume child care responsibilities.

with a transfer of guardianship while a failed trial period would terminate the agreement.⁵³

Children not already preplaced with a family or business were placed on trains traveling on a predetermined route. Placement committees composed of prominent members of towns along the orphan train route were formed to help place transported children. Advertising space, for instance in newspapers, was purchased to advertise the children's arrival, urging prospective adopters to contact committee members or to simply be present in town when the orphan train was scheduled to arrive.⁵⁴ Committees arranged for the children's lodging and meals while overseeing placement applications. The committee frequently requested community applications in advance of the train's arrival and were responsible for investigating those seeking a child. Agents either accompanied children on the train or met them upon arrival, and were to investigate placements before releasing the child. Agents were also expected to work with local committees in making periodic follow-up visits, typically a year or half-a-year after the initial placement.

Children were constructively split into two groups at every stop of the train along its route: children who were selected for adoption and children that were not. Selected children whose placement was approved by the local committee would go home with their new family. Children who were not selected would re-board the train and go to the next stop, where the process would be repeated. In this manner, siblings who were already taken from their parents would frequently be separated for placement in different geographic locations. Sometimes these children were reunited, but in many cases they never saw each other again.⁵⁵

Children pre-placed for adoption were also placed on orphan trains and delivered to the adopters who sent requests to the charities. These requests usually included detailed requirements specifying the child's age and physical characteristics. If a child matching the description was found, a "receipt" for the child would be sent to the requesting family stating where and when the child would arrive by train. The family would present the notice of arrival receipt to the agent accompanying the child and if the numbers matched, they would take the child home.⁵⁶

During its 75 year existence, the orphan train movement generated both supporters and critics. Criticisms of the orphan train movement focused on concerns that initial placements were made hastily, without proper investigation, and that there was insufficient follow-up on placements.⁵⁷ Charities were also criticized for not keeping track of children placed while under their care. Some placement locations charged that orphan trains were dumping undesirable children from the East on Western communities.⁵⁸ In 1874, the National Prison Reform Congress charged that these practices resulted in increased correctional expenses in the West.⁵⁹ Catholic clergy maintained that some charities were deliberately placing Catholic children

in Protestant homes to change their religious practices. Similar charges were made concerning the placement of Jewish children.⁶⁰ Another concern of critics was that not all orphan train children were true orphans, but were made into orphans by forced removal from their biological families to be placed out in other states.⁶¹ Some claimed this was a deliberate pattern intended to break up immigrant Catholic families.⁶² Some abolitionists opposed placements of children with Western families, viewing indentureship as a form of slavery.⁶³

Orphan trains were the target of law suits, generally filed by parents seeking to reclaim their children.⁶⁴ Suits were occasionally filed by a receiving parent or family member claiming to have lost money or been harmed as the result of the placement. A more complicated lawsuit arose from a 1904 Arizona Territory orphan train placement in which the New York Foundling Hospital sent 40 Caucasian children between the ages of 18 months and 5 years to be indentured to Catholic families in an Arizona Territory parish. The families approved by the local priest for placement were identified in the subsequent litigation as "Mexican Indian."⁶⁵

Nuns escorting these children were unaware of the racial tension between local Anglo and Mexican groups, and placed Caucasian children with Mexican Indian families. A group of white men, described as "just short of a lynch mob," forcibly took the children from the Mexican Indian homes and placed most of them with Anglo families. Some of the children were returned to the Foundling Hospital, but 19 remained with the Anglo Arizona Territory families. The Foundling Hospital filed a writ of habeas corpus seeking the return of these children. The Arizona Supreme Court held that the best interests of the children required that they remain in their new Arizona homes.⁶⁶ On appeal, the U.S. Supreme Court found that a writ of habeas corpus seeking the return of a child constituted an improper use of the writ. Habeas corpus writs should be used "solely in cases of arrest and forcible imprisonment under color or claim of warrant of law," and should

not be used to obtain or transfer custody of children.⁶⁷ These events were well publicized at the time with newspaper stories titled "Babies Sold Like Sheep," telling readers that the New York Foundling Hospital "has for years been shipping children in car-loads all over the country, and they are given away and sold like cattle."⁶⁸

Charities attempted to guarantee successful orphan train placements by agreeing to remove children from failed placements and, where necessary, trans-

port the child back to the charity's Eastern office at the charity's expense.⁶⁹ Many children placed out west had survived on the streets of New York, Boston or other large eastern cities and generally were not the passive, obedient, respectful children that some families expected; this prompted placement changes and returns to the East.⁷⁰ Older boys wanted to be paid for their labor, sometimes asking for additional pay or leaving a placement to find a higher paying placement. It is estimated that young men

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THE END OF THE ORPHAN TRAINS

initiated 80% of the placement changes that occurred as part of the movement.⁷¹ As one young man wrote, “[a] boy could easily find work and set his own wages as a farm hand around here.”⁷² These issues added to the perception that New York juvenile delinquents were being imported into Western communities.⁷³

Efforts to refute or substantiate these criticisms led to several reviews of orphan train procedures and placement practices. Reviews were conducted by the criticized charities internally and also by independent organizations. Internal charity reviews defined failed placements as those where children were subsequently placed in prisons or almshouses. One charity maintained that a review of its 1858 placements of children under 15 indicated a 2% failure rate with a 4% failure rate for placements of children under 18.⁷⁴ An 1874 charity self-review found that only five children (four boys, one girl) out of 6,000 Indiana placements were in state reformatories.⁷⁵ Another charity found that of 45 children who were placed and identified in their records, 11 children (24.4%) were not found, while one of the remaining 34 children had committed a crime and fled the state.⁷⁶

The Minnesota State Board of Corrections and Charities reviewed Minnesota orphan train placements between 1880 and 1883. The Board found that while children were placed hastily and without proper investigation into their placements, only a few children were “depraved”⁷⁷ or abused. The review criticized local committee members who were swayed by pressure from wealthy and important individuals in their community. The Board also pointed out that older children were frequently placed with farmers who expected to profit from their labor. The Board recommended that paid agents replace or supplement local committees in investigating and reviewing all applications and placements.⁷⁸

An independent study from 1900 comparing orphan train placements with placements made by a public state charity within the same state revealed additional insight into the orphan train system. The study found that between 1888 and 1897 the state charity made fewer placements than the orphan train movement, but used similar strategies and procedures. Both placement groups relied on local advisory boards composed of prominent community members and Protestant clergy. Both placement groups required regular reports from foster parents, local advisory board members and local agents. In all cases, these reports were frequently late or missing entirely. State charities, the study concluded, were no more successful than orphan train charities in placing children.

There were no real differences between the placement practices and placement results of orphan train charities and an in-state charity. This highlights the frequently overlooked reality of the orphan train movement. Trains allowed large numbers of children to be transported farther than would other means available at the time. Using trains as a placement tool has been characterized and perhaps romanticized as the “orphan train movement.” This overlooks the fact that orphan train transport was just one child placement strategy among many used in the period. A comparison between state charity and orphan train placement illustrates the common shortcoming of both systems: the placement of older children was more difficult and generally for shorter duration than the placement of younger children. Child placement success, then, did not vary according to the vehicle used to accomplish the placement.⁷⁹

Numerous factors came together to end the orphan train movement in 1929.⁸⁰ One factor was that railroad expansion in the United States was complete and most railroads ended subsidized fares provided to charities moving children.⁸¹ Another critical and underlying factor was that the need for labor which drove the initial success of orphan train placements in the West was no longer as great. The trains had relocated children to rural areas where their labor was needed on the frontier. Movement of children to the Midwest and West paralleled settlement patterns. Laws like the Homestead Act of 1862 encouraged the migration of settlers, offering 160 acres to any settler who would farm and build a shelter upon received land. Thousands of settlers subsequently moved west to claim their land.⁸² Railroads received government land, which was sold to finance further construction of railroads needed to connect the country. These settlers needed laborers to work their homesteads, build houses and farm their land purchases.⁸³ Orphan train children provided this labor. As the West was settled, the labor demand declined. In 1893, Frederick Jackson Turner presented his thesis that the American frontier had ended and the West had become civilized.⁸⁴ The orphan train children were no longer needed to settle the West.

Another factor that contributed to the end of the orphan train movement was the backlash from the Western states. They reacted to their role as “a dumping ground for dependents from other states”⁸⁵ by passing legislation limiting or prohibiting placement of out-of-state children. Many of these states had become urbanized and were facing their own child care and child placement issues. Cities such as Chicago and St. Louis began to experience the same problems in caring for neglected and destitute children that New York, Boston and Philadelphia had experienced in the mid-1800s.⁸⁶ These cities began to seek ways to care for their own orphan populations. In 1895, Michigan passed a statute prohibiting out-of-state children from local placement without payment of a bond guaranteeing that children placed in Michigan would not become a public charge in the State.⁸⁷ Similar laws were passed by Indiana, Illinois, Kansas, Minnesota, Missouri and Nebraska. Negotiated agreements between one or more New York charities and several western states allowed the continued placement of children in these states. Such agreements included large bonds as security for placed children. In 1929, however, these agreements expired and were not renewed as charities changed their child care support strategies.⁸⁸

Lastly, the need for the orphan train movement decreased as legislation was passed providing in-home family support. Charities began developing programs to support destitute and needy families limiting the need for intervention to place out children.⁸⁹ State and local governments funded foster care for orphans while compulsory education and anti-child labor statutes were also being passed.⁹⁰ Social work had become a profession and social workers began to focus on keeping families together.⁹¹ Hull House and other similar programs were established in urban areas to provide in-home assistance for families and children.⁹² In 1909, Theodore Roosevelt called the first White House Conference on Children, which directed state and federal bodies to implement programs designed to aid destitute children and their families.⁹³ The Federal Children’s Bureau was established in 1912 with Julia Lathrop of Hull House as its first chief.⁹⁴ These 20th century laws and initiatives focused on keeping families

together first and paths such as foster care second. While a few states were continuing to allow indentured servitude, the national trend was moving away from child labor.⁹⁵ Orphanages and even almshouses were still used to provide care when needed, but family care and foster care were becoming the accepted preference.⁹⁶ Urbanization of the western states together with the growth of other programs, and strategies to support these needy children eliminated the need to use railroads to move children to the west. In 1929 the orphan trains stopped running.

PART II—THE LEGAL IMPACT OF THE ORPHAN TRAIN MOVEMENT

The orphan train movement has been described as the driving force for changes to American adoption law, the creation of child labor laws, and reforming child welfare and foster care practices.⁹⁷ Beginning in 1854 and ending in 1929, the orphan train movement was but one aspect of these evolving legal and societal changes. A careful review of legal history indicates that it was not the driving force for these changes.

ADOPTION LAW

The orphan train movement has been credited with establishing American adoption laws.⁹⁸ One author maintains that the increasing number of farmers who wanted to legalize the placement of orphan train children in their families resulted in states enacting adoption laws.⁹⁹ This proposition is not supported by the timeline of enacted state adoption laws. In 1846, Mississippi passed a law that authenticated and made a public record of private adoption agreements.¹⁰⁰ Texas passed a similar statute in 1850.¹⁰¹ Massachusetts enacted the first general adoption law in 1851.¹⁰² The Massachusetts statute mirrors modern adoption statutes in having a number of requirements such as written consent from the natural parents or guardian and the child's consent where the child was 14 years of age or older. In 1853, Pennsylvania followed suit.¹⁰³ All of these statutes were enacted before 1854, the date credited as the beginning of the orphan train movement. Given the dates of these adoption laws, the orphan train movement cannot be wholly credited with the establishment of American adoption law. A more likely cause was an effort to reduce requests for private legislation to formalize adoptions. Other states, recognizing adoption statutes as a way to reduce their own private legislative burdens, began to pass adoption statutes similar to those of Mississippi, Texas, Massachusetts and Pennsylvania.

No legislative history has been located indicating the role of orphan trains in the passage of state adoption laws. In fact, one author maintains that adoption laws were passed for the purpose of "securing to adopted children a proper share in the estate of adopting parents who should die intestate."¹⁰⁴ Even without orphan trains, it is reasonable to conclude that the pre-1854 trend in enactment of adoption laws would have led most states to promulgate similar laws by the early 20th century. There is no substantiation for the proposition that the influx of orphan train children resulted in greater urgency for some states to pass

adoption laws. It does not follow that the orphan train movement was central to the creation of adoption laws across the United States.

By 1925, every state and U.S. territory had some form of adoption law.¹⁰⁵ A guide to American adoption laws prepared in 1925 by the Department of Labor Children's Bureau identified a trend away from adoption by deed to a "procedure in which human values are carefully considered and the supervisory duty of the State is recognized."¹⁰⁶ This study identified Minnesota, North Dakota, Ohio, Oregon and Virginia as having the most modern adoption laws, with provisions focusing on the best interests of the child, and providing for notification and termination of the rights of natural parents.¹⁰⁷ Recognizing the need for clarification in adoption practices, states such as New York and Oregon enacted statutes that specifically addressed complex issues in adoption law like consent from the natural parent or from an institution regarding the adoption. For instance, under a 1923 New York statute, a parent who was unable to care for a child could place that child with an institution or children's aid society, and the institution or society could then place the child for adoption without any further consent from the natural parent.¹⁰⁸ In contrast, the 1920 Oregon statute allowed natural parents to place children with institutions or organizations, but required additional specific consent before a child could be placed for adoption. Courts addressed adoption practices by determining that adoption statutes required strict construction.¹⁰⁹ Courts also struggled with the question of whether adoption laws provided a right of inheritance for adopted children.¹¹⁰

Despite the wave of newly enacted adoption statutes, not all children were formally adopted. Authors tracing adoption law history and the orphan train movement generally overlook the doctrine of equitable adoption. Equitable adoption, a judicial remedy which existed in colonial times and continues to be used today, is a remedy to establish inheritance or other rights for someone who has not been formally adopted. The court in *Johnson v. Johnson*¹¹¹ discussed the doctrine as arising from the "'placing out' of homeless and indigent children from urban areas in the East to the western United States."¹¹² The court recognized that "[m]ost of these placements were memorialized only with an oral agreement made at the train platform and few children were ever formally adopted leaving them in" legal limbo."¹¹³ Drawing on a chain of equitable adoption cases, the court identified the equitable remedy as one grounded in a valid contract to adopt. Such a contract establishes the same rights for a child that would exist if the child is legally adopted, and these rights include both child support and a right to inherit.¹¹⁴

During the 75 years of the orphan train movement, adoption laws grew and evolved as part of society's growing recognition of a need to protect and nurture children. The orphan trains served as a placement vehicle for thousands of children who found homes in at least 45 states.¹¹⁵ Studies indicate that only a small percentage of these children were formally adopted, despite enacted statutes and equitable adoption, and "the great majority of placements seemed to be characterized by a desire for a teenager's labor, even if warm feelings subsequently developed between the parties."¹¹⁶ The greater percentage of non-adopted children were often placed in a "legal limbo" that was

not recognized until one or both “adopting” parents died, and the child, who was not legally adopted by the deceased, was barred from administering or inheriting the estate.¹¹⁷ The relatively low percentage of orphan train adoptions together with the greater emphasis on placements to provide farm labor, might indicate that far from fostering American adoption law, the orphan train movement was actually a negative force in the process.

CHILD WELFARE REFORM

Conflicting views exist regarding the orphan train movement’s role in child welfare reform. Some authors see improvements in child welfare as a reaction to poor orphan train placement practices,¹¹⁸ while others see child welfare reforms resulting from positive and progressive orphan train practices.¹¹⁹ Nineteenth and early 20th century child welfare organizations engaged in a variety of activities and programs they believed would promote the welfare of children; the orphan train movement was just one of these programs. When considered in the context of other child welfare programs at the time, it becomes clear that the orphan train movement was only a single part of a broad legal and social movement focusing on child welfare and child welfare reform.¹²⁰ In this light, it appears that other child welfare programs and laws may have had a more central role than the orphan train movement.

Many other strategies have been used to provide for the welfare of children and these strategies have varied to reflect changing ideas about childhood and what is best for children. In the 18th century, almshouses were constructed to care for destitute, ill or mentally deficient children and adults. As early as 1800, child welfare reformers recognized that children should be housed separately from adults and provided with different types of care. One almshouse recommended that children “should be kept as much as possible from the other paupers, habituated to decency, cleanliness, and order, and carefully instructed in reading, writing, and arithmetic. The girls should also be taught to sew and knit.”¹²¹ Private charities were developed to care for children by supplementing the child welfare efforts of almshouses. Gradually, in the 19th century, facilities were established to house only children.¹²² These residential institutions focused on providing children with discipline, work and education.

Contrary to the proposition that the orphan train movement drove child welfare reforms, various states’ legislative imperatives to address child welfare concerns may have driven the orphan train movement. Even from before the use of orphan trains, the preferred and most common publicly funded child welfare practices involved indentureship, apprenticeship, or placing out.¹²³ Growing awareness of child welfare issues in these unregulated practices led to legislative action to examine and change their child welfare strategies.

An 1869 Michigan commission examined the state’s child welfare practices and based on their recommendations, the Michigan legislature created a state public school for dependent children and mandated that all public charges be transferred there. All children in this institution were to be placed out with private families as soon as possible.¹²⁴ Other states adopted similar laws, requiring the removal of children from almshouses or limiting the time that children could remain in state institutions before being placed with families.¹²⁵ These institutions and laws

developed contemporaneously with the orphan train movement and the legislative imperatives to place out institutionalized children may have played a driving role in the use of orphan trains. Increased awareness and concern for child welfare reform led to increased state and federal involvement in child welfare and family placement programs, independent of any implications of the orphan train movement. Governments created state charity boards charged with overseeing all public and private charitable institutions within the state.¹²⁶ These state charity boards represented a significant departure from earlier practices in which private charities were incorporated within a state and then left to their own devices with limited or no state oversight. Such state oversight was met with resistance. The New York Society for the Prevention of Cruelty to Children [Society] refused to allow the New York State Board of Charities to inspect their facilities, maintaining that they were not a charity as defined by under New York law. By 1899, state charity boards were established in 30 states.¹²⁷

On the national level, the National Child Labor Committee was created and, together with other child welfare organizations, lobbied for a federal children’s bureau to collect and disseminate information affecting the welfare of children. Legislation introduced in 1905-06 was endorsed by President Theodore Roosevelt, members of the Cabinet and members of both the House and Senate, but failed to reach the floor for a vote.¹²⁸ The bill was introduced again in 1908-09 and 1909-10.¹²⁹ During this period, the first White House Conference on Children and Youth was held in Washington, D.C. With almost 200 people in attendance, this conference emphasized the harm children incurred from institutionalization.¹³⁰ The conference reinforced the importance of family and home life, stating that “[h]ome life is the highest and finest product of civilization. It is the great molding force of mind and Children should not be deprived of it except for urgent and compelling reasons.”¹³¹

Creation of a federal children’s bureau was a central focus of the conference and President Roosevelt together with conference attendees endorsed the pending legislation. President Roosevelt sent a message to Congress urging favorable action on the Children’s Bureau bill, stating:

There are few things more vital to the welfare of the nation than accurate and dependable knowledge of the best methods of dealing with children, especially with those who are in one way or another handicapped by misfortune; and in the absence of such knowledge each community is left to work out its own problem without being able to learn of and profit by the success or failure of other communities along the same lines of endeavor.¹³²

Legislation establishing the Children’s Bureau was passed and signed in 1910-11 and became effective in 1912 under President Taft.¹³³ The bill emphasized that the Children’s Bureau would investigate and report on issues and furnish information regarding children’s issues from all parts of the country. The Bureau was not to encroach on the rights of the states and would not eliminate the duty of the states to deal with child welfare issues within their jurisdictions. The Bureau would effectuate the federal government’s duty to make information available

to the various states, supporting them as they cared for children within their boundaries.¹³⁴

The national child welfare movement continued as President Wilson hosted a second White House Conference in 1919, declaring the same year as “Children’s Year”. The Conference focused on child welfare standards, beginning as a series of meetings in Washington, D.C. and continuing across eight cities throughout America. Small committees determined minimum standards in the areas of child labor, health care for children and mothers, aid for special needs children, and general child welfare minimum standards. These standards were published by the Children’s Bureau and concluded with a charge to the individual states to review and evaluate state legislation in light of the standards.¹³⁵

As a result of the 1919 White House Conference and the efforts of various child welfare organizations, state regulation of public and private child placement practices gained importance. In his 1919 work, *Child-Placing in Families*, Slingerland observed “[t]here seems to be a strong conviction among experts in social work that the public authorities, representing all the people should not only supervise and standardize all private agencies, but should enter directly into many phases of child-helping work.”¹³⁶ Slingerland proposed that this process be accomplished “a step at a time,” beginning with a general child welfare law. Using this approach, “reasonably advanced child welfare laws” could be passed in a number of states suffering from obsolete, inadequate and sometimes contradictory laws regarding child welfare and family placement.¹³⁷

By the early 20th century, it was widely accepted that child welfare was best accomplished through family placement of dependent children. Despite contrary views, the concept of family placement for children did not originate with the orphan train movement. Family placement for children was practiced before and during colonial times. Between 1854 and 1929, large scale in-family placement of neglected and dependent children happened to be facilitated by the railroads. As child welfare became a more prominent subject of concern nationwide, state governments assumed responsibility for child welfare within their boundaries, creating and regulating the structures necessary to meet this responsibility, thus ending the orphan train movement.

FOSTER CARE

While some claim the Children’s Aid Society was the first to offer foster care and that the modern concept of foster care evolved directly from the orphan train program, this view is not supported in the legal and social history.¹³⁸ It is important to first recognize the relationship between placing out and foster care. Legally, the term “‘place out’ shall mean to provide for the care of a child in a free home, in a family other than that of a relative within the second degree.”¹³⁹ A legal definition for foster care can be found in the *Code of Federal Regulations*, which defines foster care as “. . . 24-hour substitute care for children placed away from their parents or guardians and for whom the State agency has placement and care responsibility. This includes, but is not limited to, placements in foster family homes, foster homes of relatives, group homes, emergency shelters, residential facilities, child care institutions, and pre-adoptive homes.”¹⁴⁰

Though placing out and foster care both allow for the placement of a child in another family, the differences are found in payment for the care provided. Placing out usually involved a formal or informal indentureship whereby a child would work for a family in return for care.¹⁴¹ Foster care generally involves payments to the foster family to provide for the child’s care, eliminating the need for the child’s labor as a form of payment.¹⁴² Orphan train placements were almost always grounded in the assumption that the child would work in return for care, with or without an actual indenture agreement and the institutions did not pay the receiving families for the child care.

Not only were placing out and paid foster care fundamentally different in practice but paid foster care existed in the colonies and so cannot be uniquely attributed to the orphan train movement. Historically, paid foster care was described as “boarding out” and was essentially the equivalent of modern foster care. Infants were boarded out in colonial days at the cost of \$1.50 per week.¹⁴³ Boarding out became a more frequent practice in the late 19th century as states mandated the removal of children from institutions and their placement in families. Both public and private charities expanded their boarding out practices. One example, the Boston Temporary Home for the Destitute, which for a number of years had used the promise of “light service” to induce families to accept children, began, in the 1880s to make board payments in lieu of labor-service. By the 1890s, payment for board replaced all “light service” placements.¹⁴⁴

While paid foster care existed independent of the orphan train movement, it also had a great impact on the movement itself. This growing practice of paying families to care for dependent children became a factor in reducing unpaid, labor-based orphan train placements. The system of payment for boarding out or foster care also increased emphasis on both pre-placement and post-placement investigation and supervision. Organizations making on-going placements for the care of children adopted improved policies and procedures for placement supervision.¹⁴⁵ As state governments became more involved in the placement of children within their jurisdictions, state regulations were promulgated to ensure adequate child placement supervision.

CHILD LABOR

The orphan train movement has been described as a primary factor in child labor reform, but in light of history the orphan train movement seemed to contribute more to the problem of child labor rather than the push for child labor reform. As states adopted stricter regulations regarding child placement, child welfare and foster care, the casual placement and supervision practices of orphan train charities failed to meet regulatory standards thereby impacting the use of child labor which was the driving force of the orphan train movement. In the early 19th century with the expansion of the frontier, children were employed in mining, fishing, lumber, agriculture and almost every other industry.¹⁴⁶ Though society’s view of children changed in the mid to late 19th century, the driving force for these changes in child labor reform came from factory workers and educators. In 1832, the New England Association of Farmers, Mechanics and Other Workingmen adopted a resolution that “children should not be allowed to labor in the factories from morning till night, without any time for healthy recreation and mental culture” because such

work “endangers their . . . well-being and health.”¹⁴⁷ Massachusetts adopted the first state child labor law in 1836, linking mandatory education to a requirement that children under 15 working in factories must attend at least three months of school a year.¹⁴⁸ In 1876, the Working Men’s Party proposed banning employment of children under the age of 14,¹⁴⁹ and in 1881, the first national convention of the American Federation of Labor (AFL) passed a similar resolution.¹⁵⁰ The National Child Labor Committee was formed in 1904 to address the need for child labor legislation, and by 1909, primarily through their lobbying efforts, 43 states passed some sort of legislation prohibiting employment of children under a certain age.¹⁵¹ However, state exemptions were numerous and varied significantly between states. Some of the most common exemptions from the prohibition on child labor were made for orphans, children of widowed mothers or disabled parents and for farm and domestic labor.¹⁵² Special permits exempting children from the application of child labor laws were also available.¹⁵³ Parents and farmers complained that child labor was essential to their survival and opposed child labor restrictions.¹⁵⁴ Enforcement of these child labor laws became a significant problem.¹⁵⁵ Individual states complained that variations between state child labor laws created unfair competition resulting from the allowed or disallowed employment of children in various state industries.¹⁵⁶

These concerns resulted in federal legislation passed in 1916, establishing national labor standards.¹⁵⁷ Declared unconstitutional,¹⁵⁸ legislation was again passed in 1918 and was also declared unconstitutional.¹⁵⁹ This resulted in an organized movement for a constitutional amendment giving the federal government authority to regulate child labor. While the constitutional amendment passed, it failed to be ratified by the necessary number of states.¹⁶⁰ Federal legislation regulating child labor was finally enacted in 1938 when the Fair Labor Standards Act was expanded to include a prohibition on the employment of children under 16 in industries whose products were shipped in interstate commerce.¹⁶¹

The orphan train movement found its utility in providing child labor and successful placement of children hinged on the need for the child labor in the Midwest and West. The founder of the Children’s Aid Society of New York commented on the success of orphan train placement: “[it] helps to solve, in the only feasible mode, the great economic problem of poverty in our cities, for it sends future laborers where they are in demand, and relieves the over-crowded market in the city.”¹⁶² Orphan train placements, especially for children 12 and older, were made in response to the western need for farm labor. It is important to note that opposition to child labor laws came from the agricultural community dependent on child labor as was supplied by the orphan trains. Children were employed on their own family farms and hired out as extra hands on neighboring farms. In 1910, when major efforts were underway to limit child labor, 72% of children ages 10 to 15 were employed in agriculture.¹⁶³

This agricultural opposition to child labor legislation is reflected in existing labor laws. American labor law includes significant exemptions allowing the employment of children in agriculture. The Fair Labor Standards Act’s minimum age requirements do not apply to minors employed by their parents or guardian, or to children working on a farm owned or operated by a parent or guardian. Children ages 10 and 11 may harvest short season crops outside of school hours, and children under 12 may work in nonhazardous farm jobs with parental consent or if their parents are also employed on that farm.¹⁶⁴ The Human Rights Watch charges that agricultural work is the “most hazardous and grueling area of employment open to children in the United States.”¹⁶⁵ The 19th and 20th century child labor movement focused on protecting child workers, but was unable to secure protections for children working on farms and in agriculture, the very locations where orphan train children were being placed. Far from being a factor in securing protections against child labor, the orphan train movement reinforced the use of children as farm laborers, a practice that 21st century laws protecting children has failed to prevent.

The Fair Labor Standards Act’s minimum age requirements do not apply to minors employed by their parents or guardian, or to children working on a farm owned or operated by a parent or guardian.

CONCLUSION

Orphan trains and the orphan train movement have become a romanticized legend. Children’s books have been written extolling the successes of orphan train placements. Documentaries have been filmed capturing orphan train nostalgia. Modern depictions show happy children in new clothes hanging out of train windows, a stark contrast to the image of “street rats” adorned in rags that were also taken at this time. A picture of what appears to be hundreds of children, all waiting to be adopted, standing on and around a railroad train catches the modern imagination.

The reality of the orphan train movement is very different. Orphan trains ran from 1854 through 1929, a period in American history of the greatest changes in views regarding childhood and laws affecting children. It is understandable that the orphan train movement would be linked to these changing views and laws, and that 21st century authors would see the emigration of 150,000 to 200,000 children, accompanied by dramatic photographs and other memorabilia, as the driving force in these changing views and laws. But a review of era generated records does not support this fantasy that the orphan train movement was the positive driving force in modern adoption law, child welfare laws, foster care practices and child labor laws.

Historical records, relevant legislation and case law provide an authoritative foundation in assessing the nature and extent of the orphan train movement’s role in these changes. The orphan train movement and orphan train placements were not the driving force for modern adoption laws, foster care practices and child welfare laws. Instead, many of these reforms came about to specifically oppose orphan train practices.

ENDNOTES

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¹ The Children's Aid Society, *The Orphan Trains*, available at <http://www.childrensaidsociety.org/about/history/orphantrain> [hereinafter *Orphan Trains*].

² Mark E. Courtney, *Stephen O'Connor's Orphan Trains: The Story of Charles Loring Brace and the Children He Saved and Failed*, 79 SOC. SERV. REV. 742 (2005) (book review).

³ Stephen B. Presser, *The Historical Background of the American Law of Adoption*, 11 J. FAM. L. 443, 453-54, 456 (1971-72).

⁴ HOMER FOLKS, *THE CARE OF DESTITUTE, NEGLECTED, AND DELINQUENT CHILDREN 3-4* (The MacMillan Company) (1902).

⁵ 1 ARTHUR W. CALHOUN, *A SOCIAL HISTORY OF THE AMERICAN FAMILY: FROM COLONIAL TIMES TO PRESENT 306-307* (The Arthur H. Clark Company) (1917).

⁶ FOLKS, *supra* note 4, at 3.

⁷ *Id.* at 3-4; *see also id.* at 39 (The Pennsylvania poor relief law of June 13, 1836, P.L. 539 provided that poor children whose parents were dead could be bound out as apprentices by overseers of the poor, with the approbation and consent of two magistrates. Elaborate statutory provisions existed in many states regulating the practice of indenturing poor children and orphans, and required that indentured children be taught to "read, write and cipher.").

⁸ *Id.* at 4-5 (Philadelphia, the largest American city with a population of 70,287, and New York with a population of 60,489 both constructed larger almshouses in the 18th century to deal with their growing populations of the poor and destitute).

⁹ *Id.* at 37.

¹⁰ *Id.* at 47.

¹¹ *Id.*

¹² *Id.* at 6 (showing that the 1823 city records indicate that 129 infants were placed out "at nurse" at a cost of \$1 per week paid by New York City).

¹³ *Id.* at 73.

¹⁴ *Id.* at 45.

¹⁵ *Id.* at 46 (The Board of Directors specifically stated that a requirement of this charity is that "as soon as the age and acquirements of orphans shall, in the opinion of the board of direction, render them capable of earning their living, they must be bound out to some reputable persons or families for such object and in such manner as the board shall approve.").

¹⁶ *Id.* at 49.

¹⁷ *Id.* at 52-55 (Folks includes a chart grouping the number of private charities founded into date ranges. It is interesting to note that between 1801 and 1811 3 private charities were founded, and between 1831 and 1841 26 were founded with 30 founded between 1841 and 1851).

¹⁸ *Id.* at 64.

¹⁹ Presser, *supra* note 3, at 461-464.

²⁰ 1851 Mass. Acts, ch. 324.

²¹ Presser, *supra* note 4, at 501-507.

²² Kristine E. Nelson, *The Child Welfare Response to Youth Violence and Homelessness in the Nineteenth Century*, 74 CHILD WELFARE 56, 60 (1995).

²³ *Id.*

²⁴ George W. Matsell, *Semi-Annual Report of the Chief of Police from May 1 to October 31, 1849* (1850), available at <http://historymatters.gmu.edu/d/6526/>.

²⁵ *Id.*

²⁶ CHILDREN'S AID SOCIETY, *FIRST ANNUAL REPORT 4* (C.W. Benedict) (1854).

²⁷ Timothy J. Gilfoyle, *Street-Rats and Gutter-Snipes: Child Pickpockets and Street Culture in New York City, 1850-1900*, 37 J. SOC. HIST. 853, 854 (2004); *Orphan Trains*, *supra* note 1.

²⁸ FOLKS, *supra* note 4, at 55.

²⁹ *Id.* at 64.

³⁰ Tim Hacsí, *From Indenture to Family Foster Care: A Brief History of Child Placing*, 74 CHILD WELFARE 155, 165-167, Jan. 1995.

³¹ FOLKS, *supra* note 4, at 22.

³² EDWARD WADE, *THE CODE RELATING TO THE POOR IN THE STATE OF NEW YORK 45* (Weed, Parsons, and Co.) (1870).

³³ MARILYN IRVIN HOLT, *THE ORPHAN TRAINS: PLACING OUT IN AMERICA 84* (Univ. of Nebraska Press) (1992).

³⁴ STEPHEN O'CONNOR, *ORPHAN TRAINS: THE STORY OF CHARLES LORING BRACE AND THE CHILDREN HE SAVED AND FAILED 106-107* (Univ. of Chicago Press)

(2001) (In 1854 when the Children's Aid Society of New York sent 46 children to Dowagiac, Michigan for home placement the term orphan train began to be used to describe this type of Western placement).

³⁵ FOLKS, *supra* note 5, at 64.

³⁶ HOLT, *supra* note 33, at 84.

³⁷ Susan Whitelaw Downs & Michael W. Sherraden, *The Orphan Asylum in the Nineteenth Century*, 57 SOC. SCI. REV. 272, 282 (1983).

³⁸ HOLT, *supra* note 33, at 36-37 (quoting Mary Ellen Johnson, *Orphan Train Movement A History of the Orphan Trains Era in American History*, available at <http://www.orphantrainriders.com/otm11.html>).

³⁹ NINA BERNSTEIN, *THE LOST CHILDREN OF WILDER 198* (Pantheon Books) (2001).

⁴⁰ *Id.* at 199.

⁴¹ CHILDREN'S AID SOCIETY, *ANNUAL REPORT 16* (Children's Aid Society) (1910) (listing 47 states, the District of Columbia and Indian Territory as locations receiving a total of 106,245 children).

⁴² Connie DiPasquale, *The History of the Orphan Trains*, KAN. COLLECTION ARTICLES, ¶ 1 (2007), available at http://www.kancoll.org/articles/orphans/or_hist.htm (Most estimates begin in 1854 even though orphan trains carried children west before this date. There is consensus that the last orphan train ran in 1929, and the 75 year period between 1854 and 1929 is generally considered the time frame for the movement. In 1919, 10 years prior to the end of the movement, the New York Foundling Hospital stated that it alone had indentured 24,658 children in free homes, and had placed 3,200 children in legal adoptions. At least 11 other public and private organizations placed children through the orphan trains, but reliable numbers for these placements are not available); *see generally* Jim McCarty, *They Rode the Orphan Trains*, RURAL MO., July 1997.

⁴³ *Orphan Train Genealogy*, ANCESTRY MAG., Jan. - Feb. 1995, available at <http://www.ancestry.com/learn/library/article.aspx?article=701>; *see also* Orphan Train: an IAGen Web Special Project, available at <http://iaigenweb.org/iaorphans/>.

⁴⁴ W. H. SLINGERLAND, *CHILD PLACING IN FAMILIES: A MANUAL FOR STUDENTS AND SOCIAL WORKERS* (Russell Sage Found.) (1919); *see also* H. A. Millis, *The Law Relating to the Relief and Care of Dependents*, 3 AM. J. SOC. 777-794 (1898).

⁴⁵ SLINGERLAND, *supra* note 44, at 80.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*; Millis, *supra* note 44, at 777-794.

⁴⁹ O'CONNOR, *supra* note 34, at 304; CHILDREN'S AID SOCIETY, *ANNUAL REPORT 43* (Children's Aid Society) (1864) (Children's Aid Society of New York sought children who were deserted or homeless or "in such a state of poverty as to be improved by being taken to good homes in the country." These children were identified by volunteer or paid visitors who roamed the streets of New York and other large eastern cities looking for neglected, vagrant and destitute children. Inducements were not to be used to obtain agreement to a Western placement. Instead visitors were to explain to the children and their parents the advantages of going West, and obtain a written or witnessed verbal agreement to such placement from the child's parent or parents, or from a truly orphaned child).

⁵⁰ HOLT, *supra* note 33, at 64; O'CONNOR, *supra* note 34, at 150.

⁵¹ *Asylum Children!*, Advertisement from the N.Y. Juvenile Asylum (Sept. 8, 1888) (on file with author)

⁵² ANNETTE R. FRY, *THE ORPHAN TRAINS 89-92* (Macmillan 1994).

⁵³ *Id.*

⁵⁴ *Wanted Homes for Children*, Advertisement from the Troy Free Press (Feb. 11, 1910) (on file with author) ("A company of homeless children from the East will arrive at Troy, MO., on Friday, Feb. 25th 1910. These children are of various ages of both sexes having been thrown friendless upon the world. They come under the auspices of the Children's Aid Society of New York. They are well disciplined, having come from the various orphanages. The citizens of this community are asked to assist the agent in finding good homes for them. Persons taking these children must be recommended by the local committee. They must treat the children in every way as a member of the family, sending them to school, church, Sabbath school and properly clothe them until they are 17 years old.").

⁵⁵ National Orphan Train Complex, Inc., available at <http://www.orphantrain-depot.com/index.html> (Historical and genealogy organizations are collecting information directed at helping orphan train riders and their descendant identify

ENDNOTES CONTINUED

parents, siblings and other relatives. Orphan train reunions are being held and a National Orphan Train Complex including a Museum and Research Center has been established in Kansas).

⁵⁶ Orphan Trains of Kansas, *Indenture/Adoption Forms*, available at http://www.kancoll.org/articles/orphans/or_forms.htm (“We take pleasure in notifying you that the little girl which you so kindly ordered will arrive at Anytown, Rock Island Train on Thursday January 30 on train due to arrive at 5:15 A.M. and ask that you kindly be at Railway Station to receive child, 30 minutes before train is due, and avoid any possibility of missing connection, as train will not wait should you not be there. The name of child, date of birth, and name and address of party to whom child is assigned will be found sewn in the Coat of boy and in the hem of Dress of girl. This receipt must be signed in ink by both husband and wife, and is to be given up in exchange for child who will have corresponding number. Yours very truly, SISTERS OF CHARITY.”).

⁵⁷ Hasci, *supra* note 30, at 168-169.

⁵⁸ Nelson, *supra* note 22, at 107; *Five Points Mission, New York, Arrest of Rev. W.C. Van Meter*, CLEV. MORNING LEADER, April 2, 1857, at 2 (Rev. W. C. VanMeter, an agent who sought Western placements for orphan train children was arrested in Illinois on the charge of bringing paupers from New York State to Illinois).

⁵⁹ O’CONNOR, *supra* note 34, at 239.

⁶⁰ *Id.* at 174; Hasci, *supra* note 30, at 169; Michelle Kahan, “Put Up” on *Plat-forms: A History of Twentieth Century Adoption Policy in the United States*, 23 J. SOC. WELFARE 51, 59 (2006).

⁶¹ Clay Gish, *Rescuing the “Waifs and Strays” of the City: The Western Emigration Program of the Children’s Aid Society*, J. SOC. HIST. 122, 124-125 (1999) (Statistics maintained by the various charities support this contention. One charity indicated that 65% of all children placed out between February 1857 and February 1858 had at least one living parent at that time); CHILDREN’S AID SOCIETY, SIXTH ANNUAL REPORT 11 (Children’s Aid Society) (1859) (A random sample of Children’s Aid Society placements made between 1854 and 1890 indicated that 72.6% of all children placed had at least one living parent. These records also indicate that adult relatives frequently accompanied children on the orphan trains. According to this review of records “with the exception of the Civil War years, parents accompanied by their children consistently made up over half of those in the emigration program.”).

⁶² Gish, *supra* note 62; Hasci, *supra* note 35.

⁶³ Milwaukee Public Library, *Now @ MPL...Reference Archives*, December 21, 2007, available at <http://blog.mpl.org/nowatmpl/reference/> (“Interestingly enough, the controversy came from both sides of the abolitionist movement. Many abolitionists believed that the children were ending up being slaves to their host families, while those who advocated slavery saw it as an outgrowth of the abolitionist movement. After all, who would need slaves when these children provided labor that made slaves unnecessary?”).

⁶⁴ *In Re Knowack*, 53 N.E. 676 (N.Y. 1899).

⁶⁵ *N.Y. Foundling Hosp. v. Gatti*, 203 U.S. 429, 435 (1906).

⁶⁶ *N.Y. Foundling Hosp. v. Gatti*, 79 P. 231 (Ariz. 1905).

⁶⁷ *Gatti*, 203 U.S. at 438 (citing *In Re Barry*, 42 F. 113 (C.C.S.D.N.Y. 1844)).

⁶⁸ HOLT, *supra* note 33, at 137.

⁶⁹ Amanda C. Pustilnik, *Private Ordering, Legal Ordering, and the Getting of Children: A Counter History of Adoption Law*, 20 YALE L. & POL’Y REV. 263 (2002).

⁷⁰ Gish, *supra* note 61, at 132.

⁷¹ *Id.*

⁷² *Id.* (quoting documents in the Children’s Aid Society files).

⁷³ *Id.*

⁷⁴ CHILDREN’S AID SOCIETY, SIXTH ANNUAL REPORT *supra* note 62, at 10.

⁷⁵ Kristine E. Nelson, *Child Placing in the Nineteenth Century: New York and Iowa*, 59 SOC. SERVICE REV. 107, 109 (1985).

⁷⁶ *Id.*

⁷⁷ Hastings H. Hart, *Placing Out Children in the West*, (1884); NAT’L. CONF. OF CHARITIES & CORRECTION, 143-150 (1884) (Report of Conference Proceedings).

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⁸¹ FRY, *supra* note 52, at 72.

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⁸⁶ BERNSTEIN, *supra* note 39, at 199.

⁸⁷ U.S. DEP’T. LAB., BUREAU PUB. NO. 139: LAWS RELATING TO INTERSTATE PLACEMENT OF DEPENDANT CHILDREN 1 (1924); 1895 Mich. Pub. Acts. 33, 120.

⁸⁸ O’CONNOR, *supra* note 34, at 308.

⁸⁹ Marian E. Saksena, *Out-of-Home Placements for Abused, Neglected, and Dependent Children in Minnesota: A Historical Perspective*, 32 WM. MITCHELL L. REV. 1046-1047 (2006).

⁹⁰ Donald Dale Jackson., *It Took Trains to put Street Kids on the Right Track Out of the Slums*, 17 SMITHSONIAN 94, 99-100 (Aug. 1986).

⁹¹ Saksena, *supra* note 89, at 1046.

⁹² SETTLEMENT HOUSES, *THE READER’S COMPANION TO AMERICAN HISTORY* 983-984 (Houghton Mifflin 1991); Encyclopedia of Chicago, *Settlement Houses* (2005), available at <http://www.encyclopedia.chicagohistory.org/pages/1135.html>.

⁹³ PROCEEDINGS OF THE CONFERENCE ON THE CARE OF DEPENDENT CHILDREN 6-7 (Wash. Gov’t Printing Office) (1909).

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⁹⁵ HOLT, *supra* note 33, at 178-179 (“in 1927 12 states, Wisconsin, Illinois, Michigan, Indiana, Pennsylvania, Arkansas, Maryland, Rhode Island, Virginia, West Virginia, Nebraska and Kansas still allowed indenture of institutional charges and children who had been turned over to the county poor farm authorities.”).

⁹⁶ Hasci, *supra* note 30, at 163-164 (“Between 1900 and 1930, the gradual professionalization of social work went hand in hand with increased government involvement in child welfare to cause a shift toward the boarding-out system and away from institutional care of children.”).

⁹⁷ *Orphan Train*, *supra* note 1.

⁹⁸ *Id.* (In the American colonial period through the 19th century, the term “adoption” was frequently used to describe the placement of a dependent child in a blood relative’s family. This informal arrangement might be legalized through a private law or court action, but more likely did not involve any legal proceedings); Presser, *supra* note 3, at 459.

⁹⁹ E. WAYNE CARP, *FAMILY MATTERS SECRECY AND DISCLOSURE IN THE HISTORY OF ADOPTION* 11 (Harvard Univ. Press) (1998).

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¹⁰¹ Law of January 16. 1850, ch. 39, 1850 Tex. Gen. Laws (repealed 1931).

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¹⁰⁴ WILLIAM H. WHITMORE, *THE LAW OF ADOPTION IN THE UNITED STATES* iii-iv (J. Munsell) (1876).

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¹¹³ *Id.* at 102.

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- ¹¹⁶ Catherine Ross, *Families Without Paradigms: Child Poverty and Out of the Home Placement in Historical Perspective*, 60 OHIO ST. L.J. 1249, 1274 (1999).
- ¹¹⁷ *Id.* at 1261; Presser, *supra* note 3, at 501-507.
- ¹¹⁸ Hacci, *supra* note 30, at 168.
- ¹¹⁹ SLINGERLAND, *supra* note 44, at 35.
- ¹²⁰ Presser, *supra* note 3, at 472.
- ¹²¹ FOLKS, *supra* note 4, at 5 (quoting the Committee Report).
- ¹²² Jeanne Fogle Cook, Experiences of Orphan Train Riders: Implications for Child Welfare Policy 59-61 (1994) (Ph.D. dissertation, University of South Carolina (UMI ProQuest Digital Dissertation # AAT 9517261) (on file with author)).
- ¹²³ FOLKS, *supra* note 4, at 91, 96-97.
- ¹²⁴ *Id.* at 74-75.
- ¹²⁵ *Id.* at 75-80 (New York, Wisconsin, Pennsylvania, Connecticut, Rhode Island, New Hampshire, Indiana and New Jersey passed legislation of this nature).
- ¹²⁶ E. Munsterberg, *Poor Relief in the United States: View of a German Expert*, 7 AM. J. SOC. 504, 504 (1902).
- ¹²⁷ Samuel E. Sparling, *State Boards of Control with Special Reference to the Experience of Wisconsin*, 17 ANNALS AM. ACAD. POL. & SOC. SCI. 74, 74-91 (1901).
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- ¹²⁹ *Id.*
- ¹³⁰ CHILD WELFARE LEAGUE OF AMERICA, THE HISTORY OF WHITE HOUSE CONFERENCES ON CHILDREN AND YOUTH 8 (2009), available at <http://www.cwla.org/advocacy/whitehouseconfhistory.pdf>.
- ¹³¹ *Id.* at Appendix A ("As to the children who for sufficient reasons must be removed from their own homes, or who have no homes, it is desirable that, if normal in mind and body and not requiring special training, they should be cared for in families whenever practicable. The carefully selected foster home is for the normal child the best substitute for the home.").
- ¹³² *Id.* at Appendix B.
- ¹³³ Children's Bureau Act, ch. 73, § 1 Stat. 79 (1912).
- ¹³⁴ S. Rep. No. 141,1 (1912).
- ¹³⁵ U.S. DEP'T OF LABOR CHILDREN'S BUREAU, MINIMUM STANDARDS FOR CHILD WELFARE 15 (Gov't Printing Office) (1919), available at <http://www.mchlibrary.info/history/chbu/20443.PDF> ("The child-welfare legislation of every State requires careful reconsideration at reasonable intervals, in order that necessary revision and coordination may be made and that new provisions may be incorporated in harmony with the best experience of the day. In States where children's laws have not had careful supervision as a whole within recent years, a called-welfare committee or commission should be created for this purpose. Laws enacted by the several States should be in line with national ideals and uniforms as far as desirable, in view of diverse conditions in the several States. Child welfare legislation should be framed by those who are thoroughly familiar with the conditions and needs of children and with administrative difficulties. It should be drafted by a competent lawyer in such form as to accomplish the end desired by child welfare experts and at the same time be consistent with existing laws.").
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- ¹³⁸ Gish, *supra* note 62.
- ¹³⁹ 1923 N.Y. Laws page no. 1263.
- ¹⁴⁰ 45 C.F.R. § 1355.20 (2009).
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- ¹⁴² *Id.*
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- ¹⁴⁹ JOHN R. COMMONS & JOHN B. ANDREWS, PRINCIPLES OF LABOR LEGISLATION (Harper N.Y.) (1923).
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- ¹⁵² JOSEPHUS NELSON LARNED & DONALD EUGENE SMITH, THE NEW LARNED HISTORY FOR READY REFERENCE, READING, AND RESEARCH 1614 (Nichols Publishing Company) (1922).
- ¹⁵³ *Id.*
- ¹⁵⁴ 65 Cong. Rec. 7198-7199 (1924). Opposition as articulated by Congressman Lanham during the 1924 debate restated in defeat of the Child Labor Constitutional amendment.
- ¹⁵⁵ LARNED, *supra* note 152, at 1614.
- ¹⁵⁶ Jasper Yeates Brinton, *The Constitutionality of a Federal Child Labor Law*, 62 U. PA. L. REV. & AM. L. REG. 488 (1914).
- ¹⁵⁷ Keating-Owen Act, Pub. L. No. 249, 39 Stat. 675 (1966).
- ¹⁵⁸ Hammer v. Dagenhart, 247 U.S. 251 (1918).
- ¹⁵⁹ The Child Labor Tax Law of 1918 amended by Pomerene Amendment (Feb. 24, 1919, title 12, § 1200 et seq. [Comp. St. Ann. Supp. 1919, §§ 6336 7/8 a to 6336 7/8 h]).
- ¹⁶⁰ Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922).
- ¹⁶¹ Fair Labor Standards Act, 29 U.S.C. § 201 (1938).
- ¹⁶² CHILDREN'S AID SOCIETY, SECOND ANNUAL REPORT 6 (Children's Aid Society) (1855).
- ¹⁶³ FOREST CHESTER ENSIGN, COMPULSORY SCHOOL ATTENDANCE AND CHILD LABOR: A STUDY OF THE HISTORICAL DEVELOPMENT OF REGULATIONS COMPELLING ATTENDANCE AND LIMITING THE LABOR OF CHILDREN IN A SELECTED GROUP OF STATES (Athens Press) (1921).
- ¹⁶⁴ 29 C.F.R. § 575.1 (1978).
- ¹⁶⁵ HUMAN RIGHTS WATCH, FINGERS TO THE BONE: UNITED STATES FAILURE TO PROTECT CHILD FARM WORKERS 2 (2000).

THE “NEW” WITHDRAWAL OF CONSENT STANDARD IN MARYLAND RAPE LAW: A YEAR AFTER *BABY v. STATE*

By
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I. INTRODUCTION

On April 16, 2008, the Maryland Court of Appeals, the highest court in the state, ruled that a woman may withdraw consent for vaginal intercourse after penetration has occurred. After consent has been withdrawn, the continuation of vaginal intercourse by force or threat of force may constitute rape.¹ The ruling caused a news sensation because the defendant, Maouloud Baby, was convicted of first degree rape and related charges after his female victim testified that he “continued to have sex with her for five or ten seconds after she asked him to stop.”² The over-reaching implications of what has been termed “The Five-Second Rule” are obvious, because the most difficult legal elements to prove in any rape crime case are force and non-consent.³ A victim’s ability to change his or her mind during intercourse could effectively remove the problem of consent as a barrier to rape convictions and give rise to a host of criminal prosecutions.

Black’s Law Dictionary defines rape as “unlawful sexual activity with a person without consent and by force or threat of injury.”⁴ At common law, the crime of rape consisted of unlawful sexual intercourse by a man with a woman who was not his wife through force and against her will and required at least slight penetration of the penis into the vagina.⁵ Currently, Maryland statutorily defines the crime of “rape in the first degree” as the act of “[engaging] in vaginal intercourse with another by force, or the threat of force, without the consent of the other.”⁶ The applicable punishment is “imprisonment not exceeding life.”⁷ In contrast, “post-penetration” rape⁸ describes a situation where two people initially engage in consensual sexual intercourse, but during intercourse one person “communicates to the other the revocation of consent and the other party forces the continuation of intercourse against the will of the non-consenting person.”⁹ One person decides to stop and the other person does not. Only one state has explicit legislation criminalizing post-penetration rape: Illinois.¹⁰ Until *Baby*, Maryland was one of two states that expressly held that post-penetration continuation of intercourse after withdrawal of consent did not constitute rape.¹¹

II. THE *BABY* CASE

At trial in 2004 Baby was convicted not only of rape in the first degree, but also of committing a sexual offense in the second degree and two counts of sexual offense in the third

degree, both felonies.¹² During deliberation, the jury came to the court with questions specifically concerning the effect of post-penetration withdrawal on consent. The pertinent note read, “[i]f a female consents to sex initially and, during the course of the sex act to which she consented, for whatever reason, she changes her mind and the man continues until climax, does the result constitute rape?”¹³ The defense argued that the court should respond to

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the note in the negative on the theory that the woman consented to penetration.¹⁴ The prosecution argued that any slight intrusion into the vagina is rape.¹⁵ The judge was confused by the question and avoided making a factual determination by telling the jury to re-read the initial instructions.¹⁶ The jury submitted another note which read, “[i]f at any time the woman says stop is that rape?”¹⁷ The defendant’s counsel requested that the court repeat the prior answer. The judge agreed and instructed the jury, “[t]his is a question that you as a jury must decide. I have given the legal

definition of rape which includes the definition of consent.”¹⁸ The jury returned with a guilty verdict, and on February 17, 2005, Baby was sentenced to fifteen years imprisonment with all but five years suspended and five years probation upon release.¹⁹

On appeal, Baby argued that the lower court erred in refusing his request to instruct the jury to return a verdict of “not guilty” if persuaded that the complaining witness consented to sexual intercourse but withdrew her consent after penetration. Baby also argued that the court erred in denying his motion to exclude expert testimony concerning “rape trauma syndrome.”²⁰ The Court of Special Appeals agreed, overturning Baby’s rape and sexual offense convictions and holding that the trial court erred in not answering the jury’s questions on consent. Based upon its interpretation of the English common law behind Maryland’s statutory definition of rape, and relying on *Battle v. State*,²¹ the Court of Special Appeals ruled that “if a woman consents to sexual intercourse prior to penetration and withdraws the consent following penetration, there is no rape.”²²

On certiorari, the Maryland Court of Appeals affirmed the reversal of Baby’s convictions but articulated a new standard of consent. The highest state court held that the language in *Battle* stating, “ordinarily, if [a woman] consents prior to penetration and withdraws the consent following penetration, there is no rape,” is properly characterized as *obiter dictum* and will not be afforded precedential weight.²³ After a lengthy discussion of the history of rape and its original emphasis on punishing those who de-flower virgins, the court turned to recent cases in other states on the withdrawal of consent post initial penetration. For

example, in *State v. Bunyard*,²⁴ under a rape statute similar to Maryland's, the Kansas intermediate appellate court held that "a participant in sexual intercourse may withdraw consent after penetration has occurred. The continuation of sexual intercourse after consent has been withdrawn, and in the presence of force or fear, is rape."²⁵ The Maryland Court of Appeals found the reasoning in similar cases in Kansas, Connecticut, and Maine persuasive and held that the Maryland rape statute "punishes the act of penetration, which persists after the withdrawal of consent."²⁶ The court further held that initial penetration does not complete the act of intercourse.²⁷ Therefore, a woman may withdraw consent for vaginal intercourse after penetration has occurred, and after consent has been withdrawn, the continuation of vaginal intercourse by force or the threat of force may constitute rape.²⁸

The court also agreed with the Court of Special Appeals that the trial court erred in refusing to instruct the jury on the issue of consent and by simply sending the jury back to review previous instructions.²⁹ The seven-judge panel was split over the section of the opinion addressing a victim's withdrawal of consent, with four judges signing on to the opinion and one concurring.

III. COMPARISONS WITH OTHER STATES

Although the recent *Baby* ruling created a firestorm of local media coverage in the Washington, DC metropolitan area, seven other states ascribe to similar laws on consent in rape cases: Alaska, California, Connecticut, Kansas, Maine, South Dakota, and Illinois.³⁰ The Supreme Judicial Court of Maine recognized a woman's right to withdraw consent to sexual intercourse as early as 1985. During that time, feminists and legal reformists were attacking states' statutory marital rape exemptions as well. Advocates of the right to withdraw consent approve of outcomes such as that in *Baby*, arguing that holding otherwise only serves to deny women basic civil rights³¹ and perpetuates social myths about men, women, and sex.

Failure to recognize a person's ability to withdraw consent to sexual intercourse denies that person dignity and autonomy under the law. For example, the Supreme Court of North Carolina has declared, without any citation to legal authority, that "if the actual penetration is accomplished with a woman's consent, the accused is not guilty of rape."³² Therefore, once a woman consents to penetration there can be no rape during that act of intercourse, even if the penetration continues subsequently by use of force or coercion.³³ A woman in North Carolina may have a right to say 'no' to sex, but she has no right to say 'stop'. Courts addressing the issue of post-penetration withdrawal of consent have pointed out the absurd implications of holding that post-penetration rape is something less than rape. The Maine Supreme Court reasoned that

"if rape occurs only when a male's entry of the female sexual organ is made as a result of compulsion, [rape cases] would turn on whether the prosecutrix, on revoking her consent and struggling against the defendant's forcible attempt to continue intercourse, succeeds at

least momentarily in displacing the male sex organ."³⁴

In other words, the court's reasoning was a very polite way of saying that a female victim would have to temporarily separate her partner's sexual organs from her own after asking him to stop in order to have legal recourse. Along a different line, Judge O'Connell, writing for the Appellate Court of Alaska, has also noted that if the crime of rape depended on proof of non-consent prior to *initial* penetration, there could be no rape if a male penetrated a sleeping victim.³⁵

Feminist scholars claim that judicial and legislative failure to recognize a person's right to withdraw consent to sexual intercourse at any time exposes adherence to social myths and antiquated attitudes underlying rape laws. One such myth is that of "The Unstoppable Male," or the idea that "once a man engages in sexual activity, it is physically impossible for him to stop."³⁶ The modern articulation of this reasoning is that a man should be allowed "reasonable time to withdraw" after hearing a woman's withdrawal of consent.³⁷ Feminist advocates concede that there may be a need for a reasonable time analysis and that this would be a proper question of fact for a jury.³⁸ Another social myth reflected in the debate on withdrawal of consent is that "promiscuous women suffer less harm," or that someone who has already put herself in a compromising position is not harmed.³⁹ Finally, the most prominent myth in discussions of post-penetration rape is the idea that "initial consent waives autonomy."⁴⁰ This myth is the law in North Carolina, where once a woman initially consents to sexual intercourse or penetration, she has, for the purposes of a rape prosecution, waived the right to withdraw consent.

this law is literally climbing into bed with people and seeking to micromanage the entire sexual experience.

On the other side of the debate, critics point to the danger and uncertainty the issue of post-penetration withdrawal of consent raises for men. Specifically addressing the *Baby* ruling, Pennsylvania litigator Julia Morrow argued in a televised interview with CNN Prime News that "this law is literally climbing into bed with people and seeking to micromanage the entire sexual experience. This law is incredibly dangerous and will open up the floodgates."⁴¹ Morrow continued to harp that women should take responsibility for "who they bring home" so that innocent men will not become victims of this new law.⁴² Morrow's concerns about the holding's implications for men are well-founded. Particularly because the specific facts in *Baby* refer to a five to ten second continuation of sex after protest, men may have to be educated to acknowledge that this translates into the need to stop immediately when a sexual partner does communicate a wish to stop in order to avoid criminal penalty.

Aside from this, Morrow's reaction reflects a common willingness to ignore the real harms suffered by actual rape victims by preferring hypothetical concerns for men. Additionally, the law does climb into bed with people, and always has. Out of necessity, and in order to protect people from harm, state legislatures define what constitutes a punishable offense, and courts interpret matters that come before them. Legislatures and courts thereby establish legal definitions of acceptable sexual behavior and carve out rights and boundaries. For example, in all states a

person may freely withdraw consent to sexual intercourse before penetration.⁴³ Even in North Carolina, in situations involving multiple acts of sexual intercourse, consent for a prior act, whether with the defendant or a third party, does not constitute consent for a subsequent act of intercourse.⁴⁴

In the same CNN Prime News interview, former Florida prosecutor Mark Eigarsh opined that *Baby* should only be used as precedent “in the most limited of circumstances by both prosecutors and law enforcement [officials].”⁴⁵ In Eigarsh’s opinion, “no jury in the world will convict” a man for simply not stopping for five seconds during consensual sex.⁴⁶ Eigarsh seems to have been correct, for the time being. In over a year since the final ruling, *Baby* has not been the basis for any successful prosecutions of rape defendants.⁴⁷ During this time, the case has been cited twice, but only as precedent for criminal procedure matters.⁴⁸ In *Hutchinson v. State*, *Baby* clearly applied as precedent: the complaining witness claimed forcible rape by a stranger and the defendant admitted to penetrating the witness “digitally” but claimed he stopped when she changed her mind.⁴⁹ However, the decision failed to address the issue of post-penetration withdrawal of consent entirely and only cited *Baby* for the Maryland standard of evaluating harmless error to a defendant on an evidentiary ruling.⁵⁰

IV. IMPLICATIONS

Understandably, the “five to ten seconds” timeframe upon which *Baby* was convicted is the key source of public outcry. However, the facts of the case were more complicated than the media would suggest. *Baby* testified that he placed himself between the victim’s legs while the two were in the backseat of the victim’s car and merely attempted to penetrate her with his penis, but failed.⁵¹ The complaining witness testified that *Baby* did penetrate her vagina with his penis.⁵² The victim testified that first another man forced himself upon her in the car. Then *Baby* made advances towards her and verbally made it clear that she could not leave until he was finished with her.⁵³ The victim said that *Baby*’s attempts to penetrate her with his penis hurt her, so she

The ability to withdraw consent can be viewed either as a triumph for women’s rights or as a potential floodgate for litigation that infringes upon the rights of innocent men.

yelled at him, told him to stop, and even attempted to push him off of her but *Baby* continued to push his penis for about five seconds after the witness asked him to stop.⁵⁴ Only a construction of the facts in the light most favorable to the defendant could negate a clear indication that an unwanted sexual assault occurred upon an unwilling victim.

Most cases involving the issue of post-penetration withdrawal of consent consist of a similar fact pattern. The complaining witness makes allegations of forcible rape and the criminally accused claims that there was no sexual intercourse, or if there was, that it was consensual and he stopped after she asked him to. Prosecutors almost never pursue rape charges in cases involving the purely hypothetical “we knew each other, we were both into it, now she’s claiming rape because she’s angry with me or embarrassed about what she did” scenario against which opponents of post-penetration withdrawal of consent in rape laws warn.

Most interestingly, the media did not pick up on the fact that the defendant walked away as a free man. In order for the Maryland Court of Appeals to articulate a new rule that effectuates a human being’s right to exercise free will and choose to stop engaging in intercourse, it had to release a previously convicted rapist onto the streets. Indeed, “The Five Second Rule” does raise a host of concerns such as abuse of litigation and Constitutional Due Process concerns for perpetrators who have to be put on notice of the law. However, such concerns are beyond the scope of this article. As the public record indicates, future rape convictions are unlikely in instances where the victim changed his or her mind in the throes of sex. Further, this kind of conviction will depend on the ability of the prosecution to show that the perpetrator continued with intercourse despite the victim’s clear verbal or behavioral cues to stop. As in *Baby*, a complaining witness may have to assert that the defendant caused her pain in order to aid in successful prosecution. The ability to withdraw consent can be viewed either as a triumph for women’s rights or as a potential floodgate for litigation that infringes upon the rights of innocent men. In over a year, the predicted “flood” has been less than a leaky faucet. The effects of the “new” Maryland standard of post-penetration withdrawal of consent remain to be seen.

ENDNOTES

*Mary has a B.A. from the University of North Carolina and will receive her J.D. from WCL in 2010. Thanks to all who have made this possible.

¹ *State v. Baby*, 946 A.2d 463, 486 (Md. 2008).

² *Id.* at 467.

³ See SUSAN ESTRICH, *REAL RAPE* 29 (Harvard Univ. Press) (1987) (“Female nonconsent has long been viewed as the key element in the definition of rape.”).

⁴ BLACK’S LAW DICTIONARY (8th ed. 2004) (Westlaw).

⁵ *Id.*

⁶ MD. CODE ANN., CRIM. LAW § 3-303 (a)(1) (West 2008).

⁷ *Id.* at § 3-303 (d)(1).

⁸ See Amy McLellan, Comment, *Post-penetration Rape – Increasing the Penalty*, 31 SANTA CLARA L. REV. 779, 780 (1991) (coining the term “rape”).

⁹ Meg Garvin & Megan McGill, *No Means No: The Need for Vigilance in Sexual Assault Law*, NAT’L CRIME VICTIM L. INST. NEWS at Lewis & Clark L. Sch., Spring/Summer 2007, at 6 (citing Amy McLellan, Comment, *Post-Penetration Rape – Increasing the Penalty*, 31 SANTA CLARA L. REV. 779).

¹⁰ 720 ILL. COMP. STAT. 5/12-17(c) (2004 Supp.) (“A person who initially consents to sexual penetration or sexual conduct is not deemed to have consented to any sexual penetration or conduct that occurs after he or she withdraws consent during the course of that sexual penetration or sexual conduct”).

¹¹ The other state is North Carolina. *State v. Way*, 254 S.E.2d 760, 762 (N.C. 1979).

¹² MD. CODE ANN., CRIM. LAW § 3-307 (b) (West 2008)

¹³ *State v. Baby*, 946 A.2d 463, 471 (Md. 2008).

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- ¹⁴ *Id.*
¹⁵ *Id.*
¹⁶ *Id.*
¹⁷ *Id.* at 472.
¹⁸ *Id.*
¹⁹ *Id.*
²⁰ *Id.*
²¹ 414 A.2d 1266 (Md. 1980).
²² *Baby*, 946 A.2d at 473.
²³ *Id.* at 478 (citing *Battle*, 414 A.2d at 1269).
²⁴ 75 P.3d 750 (Kan. Ct. App. 2003).
²⁵ *Id.* at 756.
²⁶ *Baby*, 946 A.2d at 486.
²⁷ *Id.*
²⁸ *Id.*
²⁹ *Id.* at 475.
³⁰ See 720 ILL. COMP. STAT. 720 5/12-17(c); *McGill v. State*, 18 P.3d 77 (Alaska Ct. App. 2001); *In re John Z.*, 60 P.3d 183 (Cal. 2003); *State v. Siering*, 644 A.2d 958 (Conn. App. Ct. 1994); *State v. Bunyard*, 75 P.3d 750 (Kan. App. 2003); *State v. Robinson*, 496 A.2d 1067 (Me. 1985); *State v. Jones*, 521 N.W.2d 662 (S.D. 1994).
³¹ Most scholarly literature assumes a female victim, because while rape is perpetrated against both sexes, the majority of rape victims continue to be females. See e.g., Garvin & McGill, *supra* note 9, at 3.
³² *State v. Way*, 254 S.E.2d 760, 762 (N.C. 1979).
³³ Erin G. Palmer, *Antiquated Notions of Womanhood and the Myth of the Unstoppable Male: Why Post-Penetration Rape Should be a Crime in North Carolina*, 82 N.C. L. REV. 1258, 1259 (2004).
³⁴ *Robinson*, 496 A.2d at 1071.
³⁵ *McGill*, 18 P.3d at 84.
³⁶ Garvin & McGill, *supra* note 9, at 7; see also Palmer, *supra* note 33, at 1276.
³⁷ *In re John Z.*, 60 P.3d 183, 187 (Cal. 2003).
³⁸ Garvin & McGill, *supra* note 9, at 7.
³⁹ See *id.* at 8; see also *People v. Vela*, 172 Cal. App. 3D 237, 243 (1985) (overruled by *In re John Z.*, 60 P.3d at 186).
⁴⁰ See Garvin & McGill, *supra* note 9, at 8.
⁴¹ Interview of Julia Morrow, CNN Prime News, <http://www.cnn.com/video/#/video/bestoftv/2008/04/22/mg.morrow.eiglarsh.int.cnn> (CNN Online Video broadcast Apr. 2008) (last visiting August 19, 2009) [hereinafter CNN].
⁴² *Id.*
⁴³ *State v. Way*, 254 S.E.2d 760, 761-62 (N.C. 1979).
⁴⁴ See *id.*
⁴⁵ CNN, *supra* note 41.
⁴⁶ *Id.*
⁴⁷ The author is unaware of whether any unsuccessful attempts have been made by prosecutors.
⁴⁸ See *Cruz v. State*, 963 A.2d 1184, 1189 (Md. 2009) (discussing ways to address central questions to the case presented to a deliberating jury); *Hutchinson v. State*, 958 A.2d 284, 288 (Md. 2008) (discussing the Maryland standard for evaluating harmless error).
⁴⁹ 958 A.2d at 285.
⁵⁰ *Id.* at 288.
⁵¹ *State v. Baby*, 946 A.2d 463, 469-470 (Md. 2008).
⁵² *Id.* at 467.
⁵³ *Id.*
⁵⁴ *Id.* at 467-68.



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SEEKING PROTECTION FROM THE LAW? EXPLORING CHANGING ARGUMENTS FOR U.S. DOMESTIC VIOLENCE ASYLUM CLAIMS AND GENDERED RESISTANCE BY COURTS

By
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I. INTRODUCTION

In July 2009, the Department of Homeland Security (“DHS”) argued in a supplemental Board of Immigration Appeals (“BIA”) brief that under certain circumstances, female domestic violence (“DV”) survivors may have a cognizable asylum claim in the United States.¹ The DHS brief breaks nine years of executive level silence on the issue,² as the Obama administration ignites advocates’ imaginations about the future of domestic, gender-based asylum.

The administration’s new position is significant on two levels. First, domestic violence has become the miner’s canary issue for gender-based asylum. Gender-based claims occupy an ambivalent area in United States asylum law but in recent years, female genitalia mutilation (“FGM”), also known as female circumcision,³ has been the basis under which women bring successful asylum claims.⁴ The BIA’s treatment of the DHS brief has the potential to clarify the gender question, marking its relevance and meaning in asylum law today.

Second, the BIA’s response is a potential turning point for women’s issues within international law. The United States, like many other countries, is conflicted on the gender question because it is still influenced by historical tensions between male-centered norms and modern challenges to them. Domestic violence, as a quintessential women’s issue on one hand, exposes the human rights law evolution that is beginning to fully embrace violence against women as an issue, and on the other hand, exposes its shortcomings as an area that still fails to adequately protect women from gendered persecution. Thus, a successful effort to recognize DV claims may align emerging values with ancient practices to further legitimize women’s issues within human rights law.

This essay intends to offer context to the executive branch’s new position, and to evaluate proposed ideas in order to better establish gender-based asylum claims. Part One of this essay briefly provides a background for the development of international human rights law related to women’s issues. Part Two observes the ways in which embedded male bias within United States common law creates persistent barriers for domestic violence claims. Part Three evaluates the executive’s position and alternative proposals for reform under governing law. Finally, Part Four concludes by arguing that at this stage, devising comprehensive strategies for systemic reform is the most important contribution that human rights scholars can make to strengthen future DV and other gender-based claims.

II. FREEDOM FROM GENDERED VIOLENCE AS A HUMAN RIGHT

Women’s citizenship within international human rights law is a new phenomenon. International human rights law is the culmination of evolved shared values and aspirations by the world community that “corresponds only partially to the historical reality: the rights of women and of non-white persons, in fact, arose relatively late in history.”⁵ This area of law is humanizing its treatment toward women to meet a “standard of citizenship,”⁶ as conditions surrounding women are increasingly recognized as inhumane. More recently, feminism and human rights have formed a rich dialectical relationship. This relationship relies on each field’s strengths to fill in theoretical gaps to develop more inclusive and relief-driven principles.⁷ The result is tangible improvements in legal citizenship for some poor women, women of color, and women living in the global south.

Refugee law must be viewed within this broader international human rights history and legal framework. The Universal Declaration of Human Rights, the basis of international human rights, is often criticized for excluding social and economic rights, such as the right to work, right to control one’s possessions, and the right to be free from violence. Women are disproportionately impacted by these fatal exclusions,⁸ but a multitude of conventions and agreements now expressly recognize women’s legal citizenship. The most notable international commitment is the 1979 Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”).⁹

CEDAW is generally hailed as a pivotal international law effort to enfranchise women. One Latina feminist scholar claims that CEDAW “takes a holistic approach towards women from all walks of life attaining full personhood by recognizing the importance not only of civil and political rights but also of social, economic, cultural and solidarity rights.”¹⁰ She further argues that “[t]his treaty, along with other gender specific documents and perspectives recently embraced by the global community as well as the recognition of the need for gender perspectives in general documents (such as the International Criminal Court statute), are (can be) the foundation for making women’s equality an accessible reality.”¹¹ Other feminist scholars, however, criticize what they view as CEDAW’s practical futility with the consideration that “rights only exist to the extent states recognize and enforce them.”¹² The area of asylum law uniquely feels the absence of accountability mechanisms to enforce CEDAW.

United States asylum law is based on the Immigration and Nationality Act revision after adoption of the 1951 United

Nations Convention Relating to the Status of Refugees (“Refugees Convention”) and the corresponding 1967 United Nations protocol.¹³ Gender is not an enumerated asylum ground under the Refugees Convention, which includes race, religion, nationality, political opinion or a “particular social group.”¹⁴ In 1991, the Office of the United Nations High Commissioner for Refugees (“UNHCR”) attempted to address this omission by issuing Guidelines on the Protection of Refugee Women that explained “women refugees who are persecuted on account of their opposition to social traditions need protection and therefore should qualify as members of a [particular social group].”¹⁵ Several countries, including the United States, issued their own guidelines to further clarify the role of gender in refugee cases.

The Immigration and Naturalization Service (“INS”) issued *Considerations for Asylum Officers Adjudicating Asylum Claims from Women* (“INS Guidelines”) in 1995.¹⁶ Domestic advocates heralded the INS Guidelines as a “significant step forward for women in asylum law[.]”¹⁷ In terms of DV claims, the INS Guidelines are helpful because they affirm that “private” persecution in which the government is unwilling or unable to intervene is a cognizable asylum claim.¹⁸ At the same time, however, the INS Guidelines failed to establish domestic violence itself as a form of persecution and instead regarded it merely as evidence of *past* persecution.¹⁹ Most importantly, the INS Guidelines do not assume the force of law.²⁰ This essential issue will be discussed more in the final section.

Efforts by international law-making bodies to establish violence against women as a cognizable asylum claim within its member-states clearly fall short. The United States (“U.S.”) rarely grants asylum for gender-based violence against women, even though 80% of the world’s 27 million refugees are women and children.²¹ The legal authority around domestic violence is clear, yet “its operation still depends on the political will of those who interpret it.”²² Simply put, U.S. immigration courts and executive officers lack the political will to enforce the law.

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III. READING BETWEEN THE LINES: CRITICAL GENDER PERSPECTIVE IN ASYLUM COMMON LAW AND PRECEDENT CASES

Feminist legal scholars have long-argued that DV survivors deserve asylum protection as a “particular social group”²³ (“PSG”). These analyses generate explanatory force behind arguments that violence against women is tolerated within asylum law throughout the world.²⁴ Interestingly, however, even though gendered violence remains a rare basis on which to grant asylum, two new trends have emerged. First, DV claims tied to religious or political persecution are increasingly successful. Second, “uncivilized” violence against women, specifically FGM, is gaining favor within courts as a basis for asylum. I argue that these two patterns do not reflect significant improvement in attitudes toward female survivors; rather, these patterns reveal systemic male bias within the asylum legal framework in its common law and interpretative rationale.

Scholars address male bias within asylum law in both a general and a specific context. Generally, scholarship on DV

asylum describes its legal framework as heavily reliant on male-centered experiences.²⁵ Specifically, many of these critiques appropriately point out that certain persecution-defined harms, such as domestic violence, are often regarded as “private” issues that are unworthy of foreign intervention.²⁶ Beyond this specific observation, male bias also appears within the common law tests for defining persecution. These tests premise “rational” presumptions about violence on a limited set of realities faced by a minority of applicants. For this reason DV is an exceedingly difficult claim to prove within the governing law.

It is worth noting that gender violence is not synonymous with violence against women. Historically, among feminist writers, domestic violence had been conceptualized as spousal or heterosexual partner violence.²⁷ Contemporary feminist writers and advocates prefer the term, “intimate-partner violence,” to capture abuse within non-legally recognized relationships (such as relationships between non-married people or between lesbian, gay, or transgender-identified individuals).²⁸ Others prefer “gender-based violence” to broaden this perspective even more because gender non-conformity (sometimes perceived as homosexuality) and other gender-related human rights abuses occur outside the law’s current scope.²⁹ This discussion is framed within the context of domestic violence for analytical purposes.³⁰ Generally speaking, relationship violence, regardless of form, remains on the outskirts of the law because male-centered perspectives continue to dominate asylum law.³¹

It is also important to understand DV as a social, political, and moral pandemic. The international statistics are staggering. One-quarter to one-half of all women are abused by intimate partners, and 40 to 70% of all female murder victims are killed by intimate partners.³² Sadly, U.S. statistics reflect similar trends. A 1995-1996 survey found that nearly 25% of women, and 7.6% of men, were raped or physically assaulted by an intimate partner in their lifetime.³³ Intimate partner violence constituted 20% of all non-fatal violence against women in 2001, and 3% of all non-fatal violence toward men.³⁴ Almost half of all 3.5 million crimes committed against

family members were spousal abuse between 1998 and 2002.³⁵ DV exhibits a pattern of violence and oppression that is inherent in any reasonable notion of persecution. The international community’s impression of persecution in the 1950’s, however, does not reflect our modern realities, and those seeking to expand the definition of DV have faced a decades-long legal challenge that has proven more difficult than ever imagined.

Domestic violence does not fit neatly into the current refugee legal regime. In order to be eligible for a discretionary grant of relief, a petitioner must show a well-founded fear of persecution based on a protected status and must meet three criteria: 1) the pervasiveness of the act in the individual’s home country; 2) a lack of existing refuge within the individual’s home country; and 3) the government’s unwillingness or inability to intervene. Two requirements specifically pose challenges for domestic violence claims: proving persecution (clear probability that one’s life or freedom is threatened)³⁶ and demonstrating that such persecution is attributed to a statutorily protected status, such as race, religion, nationality, political opinion, or a PSG.³⁷ Many DV petitioners argue that they will suffer persecution based on

their membership in a PSG or based on their political opinion against women and girl violence.³⁸

Ironically, without gender as an enumerated ground, PSG DV claims are not viable at all because “defining what constitutes such a group for purposes of the INA remains elusive and inconsistent.”³⁹ The PSG category is sometimes referred to as a Refugee Convention drafting “afterthought,”⁴⁰ only added on a whim by a single delegation wishing to have a miscellany category. One scholar described the Refugee Convention’s provisions, which he believes mirrors post-World War II era politics, as “frozen in time.”⁴¹ U.S. immigration judges and the United Nations have construed this category to mean selective persecution,⁴² meaning that a PSG cannot be significantly defined by its past or future persecution. For instance, the Sixth Circuit Court found that young, attractive Albanian women who fear being forced into prostitution are not a PSG because they constitute a self-defined or “impermissibly circular” (IC) group.⁴³ DV claims are arguably most vulnerable on this point because “domestic violence survivors” are interpreted as an “impermissibly circular” social group that is defined by its membership. The IC application discussed in the next section will address how the three PSG tests pose distinct barriers for DV claims.

MALE BIAS EMBEDDED WITHIN LEGAL TESTS

There are three PSG tests: immutability, visibility, and particularity. Each test contains subtle, insidious male-bias in its common law construction that leads to an unnecessarily narrow interpretation. The outcome is that legitimate DV claims are rejected almost per se because PSG tests are construed narrowly and heighten the burden of proof for petitioners.

The first test is the *Acosta* standard, which establishes that a social group must share a common, immutable “characteristic that either is beyond the power of the individual members of the group to change or is so fundamental to their identities or consciences that it ought not be required to be changed.”⁴⁴ Some courts have slightly expanded this definition to include an innate characteristic or shared past experience.⁴⁵ The *Acosta* standard is favorable to DV claims. For example, a female DV survivor who suffers persecution at the hands of a male lover who hurts her because of his belief that women are subordinate to men, and because he has the physical ability to do so, may easily meet the *Acosta* standard on account of her identity as female or her history of abuse.⁴⁶ Overall, the flexibility around the *Acosta* standard accommodates DV claims. It is the other two requirements—visibility and particularity—that are the most difficult to meet.

Social visibility is the second PSG test. This test is particularly context-dependent⁴⁷ since petitioners must provide evidence that they are at greater risk due to their membership in an identifiable PSG.⁴⁸ This test clearly excludes less visible forms of persecution like DV or rape. Other scholars have examined the exclusion of privatized violence in detail, and this will be addressed briefly later in the essay. More significant, however,

is that this test presents a pernicious epistemological dilemma when considered with the non-PSG standards. As noted before, there are three criteria for the persecution threshold, including a “pervasive” standard and “inability to escape” standard. DV survivors who may experience “private” violence that is nonetheless pervasive, normalized, or honored, face a disadvantage to prove

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that their persecution is visible when it is systemically ignored, rationalized, or ritualized. Thus, the “substantial evidence” bar⁴⁹ is heightened for DV survivors who must show that DV has a *high occurrence rate and is visible* in their home country. Such a proposition is counter-intuitive because any “rational” state government would address widely known harms against its citizens, but this presumption is inaccurate when applied to DV and other gendered violence. The internal tensions built into the visibility test and other standards starkly contrast with the realities of violence faced by a

large number of women. Further, this dilemma demonstrates a narrow common law construction that favors male-experienced persecution.

The final PSG test is “particularity” which requires a social group to be discerned “in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons.”⁵⁰ The “particularity” test is intended to create a benchmark for objectively determining group membership.⁵¹ Yet its interpretation, like the visibility test, reveals implicit male bias. An opinion from the Third Circuit, *Fatin v. Immigration & Naturalization Service*,⁵² characterizes this bias, stating:

“Limited in this way, the ‘particular social group’ identified by the petitioner may well satisfy the BIA’s definition of that concept, for if a woman’s opposition to the Iranian laws in question is so profound that she would choose to suffer the severe consequences of noncompliance, her beliefs may well be characterized as ‘so fundamental to [her] identity or conscience that [they] ought not be required to be changed’ (internal citation omitted). The petitioner’s difficulty, however, is that the administrative record does not establish that she is a member of this tightly defined group, for there is no evidence in that record showing that her opposition to the Iranian laws at issue is of the depth and importance required.”⁵³

The Circuit Court rejected Fatin’s petition despite ample evidence that she was doubly at risk as a female member of a politically targeted family in Iran.⁵⁴ Moreover, the Court relied on an admittedly sparse record to conclude that a reasonable fact-finder could not find that the petitioner would face a threat amounting to persecution “simply” because she is a woman.⁵⁵ The opinion ignored her family’s political status when relevant, and her status as a politically-vulnerable woman when important to determine that she was at risk for *neither* reason. This case demonstrates that the visibility and particularity tests interlock to

reinforce male bias by privileging male-experienced persecution over other types of meritorious persecution.

The three “particular social group” tests create numerous barriers for proving persecution outside traditional male norms. Perhaps worse than rejecting legitimate DV claims vis-à-vis PSG tests, the courts have adopted the facially-neutral rule of “impermissibly circular,” which adversely impacts gender-based claims. Worse still, courts inconsistently apply the rule based on culturally-loaded, paternalistic beliefs about “deserving exceptions.”

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THE “IMPERMISSIBLY CIRCULAR” ARGUMENT AND ITS OPPORTUNISTIC RATIONALITY

The “impermissibly circular” (“IC”) rule derives from the rationale that a PSG must exist independently of the persecution suffered by the applicant for asylum.⁵⁶ In other words, a PSG must exist before the alleged persecution to avoid defining a group within its own “contours.”⁵⁷ Past persecution, under some circumstances, may demonstrate a well-founded fear of future persecution; it cannot, however, constitute the substantive claim for protection.⁵⁸ In some cases, previously discussed PSG tests are interwoven together to form an IC analysis. For instance, at-risk youth within a certain country are unlikely to meet the persecution threshold because their membership is based on a self-defining, mutable characteristic—age.⁵⁹ IC, therefore, refers to the ways by which a PSG is narrowed in the common law to necessarily exclude claims.⁶⁰ Otherwise, supporters fear that the law would “sanction an illogical, circular ‘nexus’ construct, i.e., individuals are targeted for persecution because they belong to a group of individuals who are targeted for persecution.”⁶¹ This fear seems to contradict the fundamental purposes for asylum to provide refuge to individuals who are persecuted for particularly iniquitable reasons.

Many gender-based claims, especially DV claims, are dismissed for being “impermissibly circular.”⁶² U.S. courts consistently apply the IC rule, despite international consensus urging judges to include women as a PSG when appropriate.⁶³ Not only is it peculiar that federal courts apply a non-discrimination human rights treaty to exclude legitimate claims by women,⁶⁴ but it is even more unsettling when the U.S. is one of the four countries (out of 41) with a domestic policy that recognizes “women” as a PSG.⁶⁵ If arguably U.S. courts have become more gender-sensitive in response to the 1995 INS Guidelines, courts still embrace IC derivatives to deny DV claims, and to say that battered women are too large of a social group for the purposes of statutory construction.⁶⁶ Recent cases continue to show a reluctance to recognize freedom from gendered violence as a civil or political human right.

While there are indications that gender-based claims are receiving more serious treatment, adjudicators continue to perpetuate male bias and, in certain instances, substitute cultural bias for gender bias. It appears that the classic “worthy refugee” dilemma is only further strained with gender, race, and cultural complexities.

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Judges choose to find sympathetic exceptions among cases rather than choosing to embrace gender-based persecution into the law. This approach inevitably undermines future domestic violence claims. There are three primary areas of analysis ripe for inconsistent, biased discretion, which are appropriate to call “opportunistic rationality”: private/public persecution, state/non-governmental actors, and violent experiences. Opportunistic rationality reinforces that “reason” goes as far as the logician in gender-based asylum cases.

The first area of analysis is the distinction between “private” and “public” persecution. Domestic violence is essentially a misnomer as violence against partners takes place in both private and public view. Its description relates more to an antiquated conception of the relationship between perpetrator and survivor. Nevertheless, “[t]raditional human rights law (and virtually all other discourses except feminism) has separated out acts that occur in the public sector from those that transpire in the private sphere.”⁶⁷ As a result, courts have rejected otherwise legitimate asylum claims on the basis that there is no justification for state intervention. Over time, “private act” justifications have become less accepted, but remarkably it continues to have a menacing presence in U.S. asylum domestic violence claims, exemplified by a feminist BIA favorite: *The Matter of R-A-*.

*The Matter of R-A-*⁶⁸ is an archetypal example of the enduring belief that domestic violence is essentially a private matter. In this case, Rodi Alvarado, a native Guatemalan, sought refugee status after suffering years of violent physical, sexual, and emotional abuse from her husband, which included: her dislocated jaw for a late period, spinal injuries from a kicking attack after refusing an abortion and near physical disability when a thrown machete barely missed her fingers.⁶⁹ Alvarado demonstrated that domestic violence in Guatemala remains prevalent⁷⁰ and that few if any legal organizations could have helped her.⁷¹ She was successful in the lower immigration court in arguing that her political opinion, opposing male domination, culminated in her well-founded fear of persecution, with which the BIA partially agreed.⁷² The BIA ruled that the case turned on whether Alvarado’s husband had knowledge of her views and abused her *but for* her views.⁷³ In its determination, the BIA refused to apply the imputed political doctrine,⁷⁴ a device that allows the court to affirmatively impute a political opinion through evidentiary inferences, such as acts of resistance.⁷⁵ The imputed political doctrine is recommended by the INS Guidelines for cases such as this one. Instead, almost in defiance, the BIA dismissed INS Guidelines as “not controlling on us”⁷⁶ and found that “it is difficult to conclude on the actual record before us that there is any ‘opinion’ the respondent could have held, or convinced her husband she held, that would have prevented the abuse she experienced.”⁷⁷

The BIA’s opinion in *The Matter of R-A-* rendered the petitioner’s belief that she deserves to live free from domestic violence as an apolitical viewpoint. In other words, although governing law does not require political opinions to be articulated in a certain way or venue,⁷⁸ the court was unwilling to recognize her claim as

worthy of intervention because it was not an *effective* opinion. The de-politicization of Alvarado's views reinforces the belief that domestic violence is not a public matter—it is simply another unfortunate private situation over which the state has no power.

The second area of analysis relates to non-state persecutors. DV claims reveal the historic reluctance of judges to view non-governmental actors as potential persecutors in the “safe haven” standard (among the three persecution criteria). Opponents to broadening the standard maintain a misguided belief that “construing private acts of violence to be qualifying governmental persecution, by virtue of inadequacy of protection, would obviate, perhaps entirely, the ‘on account of’ requirement of the statute.”⁷⁹ This is a slippery-slope argument that posits that updating the standard to reflect present-day realities will somehow validate any asylum claim. On the contrary, broadening the standard does not wash away state sovereignty; instead, it more accurately captures the complex violence patterns that we see today. There is a real distinction between inadequate state protection and unwillingness from the state to protect a class. Fortunately, the current U.S. jurisprudential trend is to acknowledge negative governmental action as rising to the standard. It remains to be seen whether this trend will widely apply to gender-based cases, in which petitioners usually do not have any practical protection at home. Equally worrisome, the modern “safe haven” standard is subject to high levels of discretion without codification. One example is Canada, which treats its gender guidelines more seriously, arguing that pain and suffering may result from willful government acquiescence.⁸⁰ The future of the modern “safe haven” standard will appreciably depend on the outcomes of current DV cases.

The final “opportunistic rationality” area of analysis is seen in violent experiences for which courts have created exceptions. Over the last decade, only one area of gender-based asylum claims has seen almost universal success: FGM cases.⁸¹ These cases typify the “worthy refugee” dilemma where adjudicators choose to recognize the brutality of gender-related violence in one context while choosing to rationalize it in another. Half of the federal circuit courts and the BIA have found FGM as an act of persecution rising to the level of asylum protection during the last several years. Successful FGM cases will expose domestic violence claims to increased biased scrutiny at best.

FGM is not qualitatively distinct from DV but cultural bigotry and racism color the issues differently in some judges' eyes. Courts' treatment of domestic violence in relation to FGM exposes Western feminists' failure to incorporate strong racial and cultural analysis into its advocacy surrounding the issue. Prominent issue scholar Pamela Goldberg's three-case comparison in the Second Circuit found race to be a key distinction among the gender-based asylum claims that she studied.⁸² Notably, in one case she describes that a black petitioner's “exotic ‘otherness’” did not reflect negatively against her as much as it supported her

claim against her black persecutors.⁸³ The problem with characterizing FGM cases as exceptionally violent is that it obscures urgency around violent experiences, such as domestic violence, that are more familiar to U.S. judges. “Uncivilized” violence against women and girls “over there” does not force courts to confront gender-based violence as a widespread, complex phenomenon. In actuality, it exacerbates cultural and racial stereotypes in a way that isolates and distances them from the issue. Inconsistent application of the law creates the potential for a racialized, tiered system by which violence is evaluated in the asylum law in a way that ultimately does not serve human rights law.

Opportunistic rationality is defined by false notions about the nature of violence, and it is reinforced by legal rationalizations about distinctions among these false notions. In addition to the PSG test interpretations, male bias plays a more subtle role in decision-making through arbitrary application that is ironically justified by North American feminist paradigms.

IV. NEW FORMULATIONS, NEW PROSPECTS?

The DHS supplemental brief submitted to the BIA on behalf of a domestic violence asylum-seeker seems to be a positive outcome for gender-based asylum cases. The brief presents “alternative particular social group formulations” to the respondent's claim: “Mexican women in an abusive domestic relationship who are unable to leave.”⁸⁴ DHS concedes that the respondent's argument fails under governing legal principles because the “central common characteristic” is circular.⁸⁵ In addition to the alternative formulations, the brief proposes that if either of its formulations meets the criteria for a cognizable claim, then remand is an appropriate mechanism to consider where “significant legal developments intervene.”⁸⁶ The last caveat outlined by the brief is that some, but not all, domestic violence survivors are eligible for asylum. However, like any other asylum claim, every applicable requirement must be satisfied for asylum to be granted.⁸⁷

There are discernable signs of broader advocacy in the brief. In its general requirement discussion, the brief stated that the applicant may satisfy the safe haven standard by showing that government acquiescence is contributing to the respondent's persecution.⁸⁸ This position reinforces the authority of the INS Guidelines despite higher courts' attempts to dismiss their importance. Moreover, before laying out the formulations, the brief opined “especially given the uneven development of the standards governing cases like this one, it is important to articulate how a social group in such cases might be defined.”⁸⁹ Both of these statements are restrained, yet are striking examples that likely foreshadow the new administration's more liberal treatment of gender-based asylum cases.

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DHS articulates its formulations as “Mexican women in domestic relationships who are unable to leave” or “Mexican women who are viewed as property by virtue of their positions within a domestic relationship.”⁹⁰ DHS argues that a PSG claim is “best defined in light of the evidence about how the respondent’s abuser and her society perceive her role within the domestic relationship.”⁹¹ The brief goes on to detail the evidence on record that supports the formulation, including her testimony that her husband “used to tell her that he could do anything he wanted to her because she belonged to him,” and it suggests that further fact-finding may substantiate that “social expectations in Mexico do little to disabuse [him] of his views in this regard.”⁹² These formulations, DHS argues, satisfy the immutability, visibility, and particularity requirements, in which “complex and subtle” fact-finding may be required, and existing statutory definitions may be evoked, to reasonably interpret the claims.⁹³

Interestingly, the DHS formulations are identical to some feminist scholars’ proposals over the last decade to transform DV into a cognizable asylum. The primary, though not exclusive, project by feminists during this time has been to find ways to narrow domestic violence claims so that they better fit into the three PSG factor tests. Feminists’ proposals can be generally categorized into three groups: 1) traditional approach: reformulating arguments to fit within existing legal interpretations; 2) feminist approach: arguing that existing interpretations are inaccurate or biased against legitimate claims, thus urging new rule construction and 3) reform approach: advocating for international and domestic statutory revisions to more clearly include “gender” into refugee law. DHS adopted a traditional approach that attempts to narrow the “domestic violence survivor” class by combining several elements: geography, political opinion, and case-specific facts.

The DHS formulations will test scholars’ proposals that were argued to meet judicial scrutiny when initially proposed—all other factors remaining consistent. One proposal, written by Patricia Seith in 1997, argues that domestic violence is analogous to FGM because both practices attempt to “control [] women’s sexuality,”⁹⁴ and that “[w]omen living in a particular country who are subject to domestic violence, are unable to get government protection, and oppose the practice” meet the BIA requirements under the seminal decision in *Kasigna*.⁹⁵ Another prominent scholar on domestic violence asylum, Laura Adams, made an argument for a doctrinal re-orientation that takes two views related to government acquiescence. One view is similar to the DHS formulation suggesting that a DV claim itself may implicate a foreign government’s failure to protect its citizen from persecution.⁹⁶ Adams takes the position that shifting the focus from the individual batterer to the state’s relationship to the harm is the necessary ingredient for a successful DV claim.⁹⁷ It will be interesting to see whether the BIA embraces any of these aspects, as both scholars introduced these ideas at least five years ago.

The fundamental belief that guides the traditional approach is that the current legal PSG construction is based on an honest, intellectual disagreement about proper interpretation. The consistent denial of DV claims is not a legal issue—it is a

political one. Many immigration judges may have a good faith belief that DV survivors simply do not meet the existing statutory requirements. However, it is clear that there are systemic impediments that influence the confines within which judges are able to interpret important legal considerations like statutory intent, case-specific facts, and policy issues. There is not much optimism for the successful outcome of the DV survivor in this particular case, considering the case law trend against DV claims and the absence of any significant changes to PSG construction, but there is optimism that the DHS brief will create opportunities for institutional change on a case-advocacy level.

Ultimately, institutional change is the best assurance that DV claims will be fairly adjudicated. There are a variety of ways to affect institutional change, even through notoriously conservative institutions, such as immigration courts. Attorneys who challenge prevailing norms and assumptions in asylum advocacy play an important role. Theorists, especially feminist scholars, have fulfilled a vital need by forming the basis by which some advocates have advanced alternative frames. Policy advocates (many of whom fall into the latter categories as well) also target the underpinnings that limit future progress for DV claims. Each approach, in its persistence and originality, promises that gender-based asylum claims, in time, will be treated more seriously by courts.

V. CONCLUSION

I suggest that scholars concerned about gender-based asylum may want to shift their focus from re-thinking legitimate arguments about why gendered violence is deserving of asylum protection, to discussing systemic changes that can more directly affect decision-making. I believe in particular that strengthening the INS Guidelines can prove to be enormously beneficial. At least one persuasive feminist scholar credits the INS Guidelines with successful rape and FGM claims, in which the guidance established “a valuable legal framework for asylum claims based on domestic violence.”⁹⁸

Since this assessment was over a decade ago, there are questions yet to be re-visited about the INS Guidelines. Should they be codified or at least be required reading for judges? If they remain nonbinding, is there additional authority that can make them even more persuasive? Based on its success, can gender-based violence be considered an independent basis (within PSG) upon which future persecution will be determined? With vast opportunity in a human rights era, thinkers can move away from defending its values to implementing its force.

The political climate toward human rights is ideal for engineering fine-tuned legal and policy reform strategies. It is a matter of catching up U.S. asylum law with its international commitments which is by no means easy, but it is possible given the strong framework outlined by scholars and advocates alike. DV survivors deserve asylum protection, as do other gender-based violence survivors. Human rights advocates’ chief test is to make this area a priority.

The consistent denial of DV claims is not a legal issue—it is a political one.

ENDNOTES

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¹ Jennifer Ludden, *Battered Asylum Seekers May Find U.S. Relief*, NATIONAL PUBLIC RADIO, July 22, 2009, available at <http://www.npr.org/templates/story/story.php?storyId=106829943>.

² DEP'T OF HOMELAND SECURITY'S SUPPLEMENTAL BRIEF 3-4 (2009), <http://graphics8.nytimes.com/packages/pdf/us/20090716-asylum-brief.pdf> [hereinafter *DHS brief*].

³ Some feminists have embraced the term FGM over female circumcision for political reasons that are beyond the scope of this paper. I use FGM in this essay because it is the adopted terminology by other theorists in this field. My use of this term is not an endorsement of the political values embodied by it.

⁴ See, e.g., *Hassan v. Gonzales*, 484 F.3d 513 (8th Cir. 2007) (granting petition for a Somali woman who underwent female circumcision and feared future persecution); *Mohammed v. Gonzales*, 400 F.3d 785 (9th Cir. 2005) (ruling in favor of female Somalian woman who feared forced female circumcision, and determining that such a procedure is a permanent and continuing act of persecution); *Abay v. Ashcroft*, 368 F.3d 634 (6th Cir. 2004) (holding that an Ethiopian mother had shown a derivative claim that established a well-founded fear that her daughter would be subjected to female circumcision if they were returned to her home country); *In re A-T*, 24 I. & N. Dec. 617 (A.G. 2008) (reversing the lower board's decision rejecting a Mali woman's petition for asylum on account of her female circumcision).

⁵ Eric Engle, *Universal Human Rights: A Generational History*, 12 ANN. SURV. INT'L & COMP. L. 219, 219 (2006).

⁶ Dana Neacsu, *The Red Booklet on Feminist Equality. Instead of a Manifesto*, 30 WOMEN'S RTS. L. REP. 106, 173 (2008) [hereinafter *The Red Booklet*] (quoting Catharine MacKinnon, *Points Against Postmodernism*, 75 CHI-KENT. L. REV. 687, 692 (2000)) ("As women's actual conditions are recognized as inhuman, those conditions are being changed by requiring that they meet a standard of citizenship and humanity that previously did not apply because they were women . . .").

⁷ *Id.* at 171 ("[F]eminists have imprinted their content-based criticism of international law and helped its revitalization by forcing it to take into account women's perspectives and concerns. . . . Some feminists have tried to use international law as a way of revitalizing feminism, too").

⁸ Amanda Blanck, *Domestic Violence as a Basis for Asylum Status: A Human Rights Based Approach*, 22 WOMEN'S RTS. L. REP. 47, 58 (2000) [hereinafter *Human Rights Based Approach*].

⁹ G.A. Res. 180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193 U.N. Doc. A/RES/34/180 (1979).

¹⁰ Berta Esperanza Hernandez-Truyol, *Latinas, Culture and Human Rights: A Model for Making Change, Saving Soul*, 23 WOMEN'S RTS. L. REP. 21, 26 (2001) (internal citations omitted).

¹¹ *Id.* (internal citations omitted).

¹² *The Red Booklet*, *supra* note 6, at 175.

¹³ Jessika Johnson, *Rreshpja v. Gonzales: The Sixth Circuit's Failure to Consider Gender's Place in Asylum Claims*, 14 TUL. J. INT'L & COMP. L. 623, 625 (2006) [hereinafter *Sixth Circuit's Failure to Consider Gender*].

¹⁴ *See Convention Relating to the Status of Refugees*, July 28, 1951, 189 U.N.T.S. 150 (1951); *Protocol Relating to the Status of Refugees*, Oct 4, 1967, 606 U.N.T.S. 267, available at <http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf>.

¹⁵ *Sixth Circuit's Failure to Consider Gender*, *supra* note 13, at 627.

¹⁶ Phyllis Coven, Office of International Affairs, Department of Justice, Considerations for Asylum Officers Adjudicating Asylum Claims From Women, Memorandum for Asylum Officers (May 26, 1995), available at http://cgrs.uchastings.edu/documents/legal/guidelines_us.pdf.

¹⁷ Patricia Seith, *Escaping Domestic Violence: Asylum as a Means of Protection for Battered Women*, 97 COLUM. L. REV. 1804, 1830 (1997) [hereinafter *Escaping Domestic Violence*].

¹⁸ *Id.* at 1833.

¹⁹ *Id.* at 1806-07.

²⁰ *Id.* at 1832.

²¹ Danette Gomez, *Last in Line – The United States Trails behind in Recognizing Gender-Based Asylum Claims*, 25 WHITTIER L. REV. 959, 959 (2003-2004) (internal citations omitted).

²² *Human Rights Based Approach*, *supra* note 8, at 56.

²³ Valerie Oosterveld, *Gender, Persecution, and the International Criminal Court: Refugee Law's Relevance to the Crime against Humanity of Gender-Based Persecution*, 17 DUKE J. COMP. & INT'L L. 49, 53 (2006) ("There is a rich feminist academic literature within refugee law that has analyzed how many domestic refugee decision-makers have failed to understand the meaning of 'gender'; the link between gender, discrimination, and persecution; and how acts that may appear to some decision-makers to be 'private,' and therefore not persecutory acts, are actually acts of gender-related persecution."). See also Laura Adams, *Beyond Gender: State Failure to Protect Domestic Violence Victims as a Basis for Granting Refugee Status*, 24 THOMAS JEFFERSON L. REV. 239 (2002) [hereinafter *Beyond Gender*]; Sharon Donovan, *No Where to Run...No Where to Hide: Battered Women Seeking Asylum in the United States Find Protection Hard to Come By: Matter of R-A-*, 11 GEO. MASON U. CIV. RTS. L.J. 301 (2000-2001) [hereinafter *Nowhere to Run*]; Pamela Goldberg, *Anyplace but Home: Asylum in the United States for Women Fleeing Intimate Violence*, 26 CORNELL INT'L L.J. 565 (1993) [hereinafter *Anyplace but Home*].

²⁴ *Sixth Circuit's Failure to Consider Gender*, *supra* note 13, at 626 ("The judiciary's treatment of gender-based asylum claims has been an ongoing problem internationally. The narrow drafting of the Refugees Convention (and similarly the INA) results in many women being denied asylum because their gender-based persecution does not qualify as an enumerated ground for refugee status.") (internal citations omitted).

²⁵ See, e.g., Nancy Kelly, *Gender-Related Persecution: Assessing the Asylum Claims of Women*, 26 CORNELL INT'L L.J. 625 (1993).

²⁶ See, e.g., Allison Reimann, *Hope for the Future? The Asylum Claims of Women Fleeing Sexual Violence in Guatemala*, 157 U. PA. L. REV. 1199, 1217 (2009) ("Harms such as rape and domestic violence have often been viewed as 'private,' not 'public,' and thus are seen as categorically different than persecution of, for example, a (male) political leader.") (internal citations omitted).

²⁷ See generally, Elizabeth P. Cramer, *Errata: Unintended Consequences of Constructing Criminal Justice as a Dominant Paradigm in Understanding and Intervening in Intimate Partner Violence*, 33 WOMEN'S STUDIES QUARTERLY 272, 274-75 (2005) ("The feminist paradigm, coming from the early activists who sensitized the nation about battered women, emphasized the role of gender socialization and patriarchy (male power and privilege) in understanding IPV.") (internal citations omitted).

²⁸ Research over the last decade is revealing two important trends leading to new domestic violence terminology. First, men, who are traditionally viewed as perpetrators, are also relationship violence survivors. Joseph H. Michalski, *Explaining Intimate Partner Violence: The Sociological Limitations of Victimization Studies*, 20 SOC. F. 613, 616 (2005). Second, same-gender violence is becoming increasingly visible. See Michael P. Johnson and Kathleen J. Ferraro, *Research on Domestic Violence in the 1990s: Making Distinctions*, 62 J. OF MARRIAGE AND FAM. 948, 951 (2000). It is also worth noting that intimate partner violence or IPV is the prevailing lexicon among health researchers, as studies find that men and women experience similar physical, mental, and emotional traumas from relationship abuse. See generally Kristin Carbone-López, Candace Kruttschnitt & Ross Macmillan, *Patterns of Intimate Partner Violence and Their Associations with Physical Health, Psychological Distress, and Substance Use*, 121 PUB. HEALTH REP. 382 (2006).

²⁹ *See Queer Law 2000: Current Issues in Lesbian, Gay, Bisexual, and Transgender Law Symposium Proceedings*, 26 N.Y.U. REV. L. & SOC. CHANGE 169, 187 (2000) ("Sexual orientation and gender identity may be characteristics that are conflated in the minds of the persecutor, or they just as easily may not be. In some societies a gay man is more likely to be the victim of persecution if he is viewed as the passive participant in a homosexual relationship or as effeminate. In other places, regardless of an individual's perceived 'effeminacy' or 'masculinity,' persecution of homosexuals is applied with merciless uniformity.")

³⁰ Other articles discuss the procedural aspects of asylum seeking in more detail. See generally *Escaping Domestic Violence*, *supra* note 17.

³¹ I agree with radical feminist critiques that argue for a "substantive human rights" approach and that emphasize the obligation of the state to protect all people from exploitation. See generally *The Red Booklet*, *supra* note 6, at 175 (proposing a move away from identity-based protections to the universalized state protection system that is being developed by prominent feminist theory scholars, like Martha Fineman).

ENDNOTES CONTINUED

- ³² Stop Violence Against Women, *Prevalence of Domestic Violence*, available at http://www.stopvaw.org/Prevalence_of_Domestic_Violence.html (Feb. 1, 2006).
- ³³ PATRICIA TJADEN & NANCY THOENNES, EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE iii (2000), available at <http://www.ncjrs.gov/pdffiles1/nij/181867.pdf>.
- ³⁴ CALLIE MARIE RENNISON, INTIMATE PARTNER VIOLENCE, 1993-2001, 1 (2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ipv01.pdf>.
- ³⁵ MATTHEW R. DUROSE ET AL., BUREAU OF JUSTICE STATISTICS, FAMILY VIOLENCE STATISTICS: INCLUDING STATISTICS ON STRANGERS AND ACQUAINTANCES 8 (2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fvs.pdf>.
- ³⁶ *Kashani v. INS*, 547 F.2d 376, 379 (7th Cir. 1977).
- ³⁷ Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42).
- ³⁸ *Escaping Domestic Violence*, *supra* note 17, at 1819.
- ³⁹ *Castellano-Chacon v. INS*, 341 F.3d 533, 546 (6th Cir. 2003).
- ⁴⁰ *See Fatin v. INS*, 12 F.3d 1233, 1239 (3d Cir. 1993) (offering a descriptive history of the origins of “particular social group” in the United Nations Convention Relating to the Status of Refugees).
- ⁴¹ *Human Rights Based Approach*, *supra* note 8, at 56.
- ⁴² *DHS brief*, *supra* note 2, at 6.
- ⁴³ *See Rreshpja v. Gonzales*, 420 F.3d 551, 555-56 (6th Cir. 2005).
- ⁴⁴ *In re Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985).
- ⁴⁵ *Id.* Federal circuit courts have more recently adopted the *Acosta* standard, previously relying on the “voluntary association” standard and “close affiliation” standard. *See Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000); *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986).
- ⁴⁶ *DHS brief*, *supra* note 2, at 8 (“Social groups based on innate characteristics such as sex or family relationship are generally easily recognizable and understood by others to constitute social groups.”) (internal citations omitted).
- ⁴⁷ *See In re A-M-E & J-G-U*, 24 I. & N. Dec. 69, 74 (BIA 2007) (“Whether a proposed group has a shared characteristic with the requisite ‘social visibility’ must be considered in the context of the country of concern and the persecution feared.”).
- ⁴⁸ *See id.* (holding respondents failed to provide background evidence that they were at risk of criminal extortion because they were among a wealthy class in Guatemala).
- ⁴⁹ *See Melendez v. U.S. Dep’t of Justice*, 926 F.2d 211, 218 (2d Cir. 1991) (stating that the prevailing evidentiary standard for asylum cases is “substantial evidence” of a well-founded fear for future persecution).
- ⁵⁰ *Matter of S-E-G*, 24 I. & N. Dec. 579, 584 (BIA 2008).
- ⁵¹ *Id.*
- ⁵² *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993).
- ⁵³ *Id.* at 1241.
- ⁵⁴ *Id.* at 1235.
- ⁵⁵ *Id.* at 1241.
- ⁵⁶ *Lukwago v. Ashcroft*, 329 F.3d 157, 172 (3d Cir. 2003) (holding that “children from Northern Uganda who are abducted and enslaved by the LRA and oppose their involuntary servitude” do not constitute a “particular social group” under federal statute).
- ⁵⁷ *Id.* at 170.
- ⁵⁸ *Id.* at 172.
- ⁵⁹ Circuit courts have met youth cases with notable hostility. *See, e.g.*, *Escobar v. Gonzales*, 417 F.3d 363, 367 (3d Cir. 2005) (denying petitioner’s claim that a homeless, Honduran youth constituted a particular social group in part because age is not a sufficient permanent characteristic).
- ⁶⁰ The BIA and circuit courts have narrowly construed the term, “particular social group,” to distinguish among claimants. *See Fatin*, 12 F.3d at 1238 (“Both courts and commentators have struggled to define ‘particular social group.’ Read in its broadest literal sense, the phrase is almost completely open-ended. Virtually any set including more than one person could be described as a ‘particular social group.’ Thus, the statutory language standing alone is not very instructive.”) (internal citations omitted).
- ⁶¹ *DHS brief*, *supra* note 2, at 10 (internal citations omitted).
- ⁶² *See Ludden*, *supra* note 1 (explaining that Kris Kobach, former counsel to Attorney General John Ashcroft, believes that domestic violence survivors are inherently outside protection); *id.* (“Basically the battered woman is saying, ‘I’m being persecuted, that is to say, I’m being battered, because I’m a member of a group.’ What’s the group? People who are being battered.”).
- ⁶³ *See Human Rights Based Approach*, *supra* note 8, at 55 (“Commenting on the *Alvarado* decision, Deborah Anker, head of Harvard University’s Immigration and Refugee Clinic, indicated that the decision ran counter to ‘a growing body of international authority.’”) (internal citations omitted).
- ⁶⁴ United Nations High Commissioner for Refugees, *Gender-related persecution and refugees*, at 8 (2005), available at <http://unhcr.org.au/pdfs/webdiscussionpaperjan05.pdf>.
- ⁶⁵ *Id.* at 9.
- ⁶⁶ *Rreshpja v. Gonzales*, 420 F.3d 551, 555-56 (6th Cir. 2005) (distinguishing petitioner’s case from a female circumcision case for the reason that the latter is culturally embedded and therefore more pervasive).
- ⁶⁷ *Anyplace but Home*, *supra* note 23, at 573-74 (internal citations omitted).
- ⁶⁸ 22 I. & N. Dec. 906 (BIA 1999).
- ⁶⁹ *Nowhere to Run*, *supra* note 23, at 306.
- ⁷⁰ *Id.* at 307.
- ⁷¹ *Id.* at 309.
- ⁷² *In re R-A-*, 22 I. & N. at 914.
- ⁷³ *Id.*
- ⁷⁴ *Escaping Domestic Violence*, *supra* note 17, at 1840 (pointing to the INS Guidelines’ emphasis on the availability of the “imputed political opinion” doctrine).
- ⁷⁵ *Nowhere to Run*, *supra* note 23, at 312.
- ⁷⁶ *In re R-A*, 22 I. & N. at 913.
- ⁷⁷ *Id.* at 917.
- ⁷⁸ *Nowhere to Run*, *supra* note 23, at 313.
- ⁷⁹ Laura Adams, *Fleeing the Family: A Domestic Violence Victim’s Particular Social Group*, 49 LOY. L. REV. 287, 296 (2003) (quoting *In re R-A-*, Dec. 906, at 41-42).
- ⁸⁰ *Escaping Domestic Violence*, *supra* note 17, at 1830, n.174.
- ⁸¹ *See Hassan v. Gonzales*, 484 F.3d 513 (8th Cir. 2007); *Niang v. Gonzales*, 422 F.3d 1187 (10th Cir. 2005); *Barry v. Gonzales*, 445 F.3d 741 (4th Cir. 2006); *Abay v. Ashcroft*, 368 F.3d 634 (6th Cir. 2004); *Balogun v. Ashcroft*, 374 F.3d 492 (7th Cir. 2004); *Mohammed v. Gonzales*, 400 F.3d 785 (9th Cir. 2004); *In re A-T-*, 24 I. & N. Dec. 617 (A.G. 2008); *In re Kasinga*, 21 I. & N. Dec. 357 (BIA 1996); *In re D-V-*, 21 I. & N. Dec. 77 (BIA 1993).
- ⁸² Pamela Goldberg, *Analytical Approaches in Search of Consistent Application: A Comparative Analysis of the Second Circuit Decisions Addressing Gender in the Asylum Law*, 66 BROOK. L. REV. 309, 359 (2000).
- ⁸³ *Id.*
- ⁸⁴ *DHS brief*, *supra* note 2, at 11, 10.
- ⁸⁵ *Id.* at 11.
- ⁸⁶ *Id.*
- ⁸⁷ *Id.* at 12.
- ⁸⁸ *Id.* at 12-13.
- ⁸⁹ *Id.* at 14.
- ⁹⁰ *DHS brief*, *supra* note 2, at 14.
- ⁹¹ *Id.*
- ⁹² *Id.* at 15 (internal citations omitted).
- ⁹³ *Id.* at 19 (explaining that the fact-finding and statutory guidance mostly refer to the latter two PSG tests, visibility and particularity, pointing to the respondent’s physical injuries shown to police as evidence of visibility, and referring to U.S. immigration law for statutory definitions for “domestic violence”).
- ⁹⁴ *Escaping Domestic Violence*, *supra* note 17, at 1836.
- ⁹⁵ *Id.* at 1837.
- ⁹⁶ Adams, *supra* note 79, at 296-97.
- ⁹⁷ *Beyond Gender*, *supra* note 23, at 246 (“Recent decisions by courts in three countries suggest a way out of the dilemma posed by the search for a causal nexus between an individual batterer and victim. . . . Thus, under this approach, we should ask why the state fails to protect the domestic violence victim, not why her partner or parent beats her.”).
- ⁹⁸ *Escaping Domestic Violence*, *supra* note 17, at 1828.

POSTRACIAL DISCRIMINATION

By
Girardeau A. Spann*

INTRODUCTION

In one respect, the 2008 election of Barack Obama as the first black President of the United States may turn out to be bad for blacks, and for other racial minorities as well. Some have suggested that the Obama election indicates that we now live in a postracial society, where discrimination based on race has ceased to be a serious problem.¹ Others have strenuously contested that claim, arguing that significant racial discrimination still exists in the United States notwithstanding the election of President Obama.² But one thing does seem reasonably clear. The Obama presidency has served to embolden those who wish to deny claims of current racial injustice.

Claims of racial injustice can now be challenged simply by arguing that the culture obviously makes it possible for minorities to compete with whites on a level playing field. Under this reasoning, racial disparities that continue to inhere in the allocation of societal benefits and burdens must be caused by the attributes of individual minority group members themselves, rather than by any invidious consideration of their race. Although the argument is by no means a new one, the election of President Obama now gives that argument more apparent plausibility than it has had in the past. Indeed, if one were inclined to preserve the nation's tradition of privileging white interests over the interests of racial minorities, it would be strategically sensible to frame one's discriminatory impulses in precisely this manner. That way, the nation's evolution to its supposed new postracial maturation could ironically be utilized as an ingenious device for continued racial oppression.

The essence of this postracial form of discrimination would entail the transformation of a conventional discrimination claim asserted by racial minorities into a claim of reverse discrimination asserted by whites. That transformation could be achieved by stressing the absence of any legally cognizable basis for providing remedial resources to the original minority claimants, in order to free up those resource for allocation to worthier whites. The technique would entail more than just the time-honored practice of evading a discrimination claim by blaming the victims. It would also recast the minority victims as shameless perpetrators of discrimination, with all of the negative connotations that an indictment of unlawful discrimination conveys.

It turns out that this postracial discrimination strategy is far from merely hypothetical. Its proponents include a majority of the current Justices on the United States Supreme Court. The Roberts Court, despite its relative youth, has already issued a number of decisions that employ the technique of postracial discrimination to elevate the interests of whites over the interests of racial minorities. The most revealing is its 2009 decision in *Ricci v. DeStefano*,³ where a divided Court required the City of New Haven to utilize the results of a firefighter promotion exam that benefitted whites, even though the exam had a racially-disparate impact that adversely affected Latinos and blacks. The majority opinion depicted historically advantaged white firefighters as

the victims of unlawful discrimination, while depicting historically disadvantaged minority firefighters as the politically powerful perpetrators of invidious discrimination.⁴ The governing legal doctrines hardly compelled the Court's result, or the Court's inversion of the customary categories of perpetrator and victim. In fact, both the statutory meaning of Title VII and the Court's own precedents had to be modified so severely that the decision amounts to an exercise in conservative judicial activism.

In Title VII, Congress outlawed racially disparate employment practices unless they could be justified by a showing of job-relatedness, and by the absence of any less discriminatory, job-related alternative. In so doing, Congress struck a political balance between its pragmatic interest in protecting settled white employment expectations and its aspirational interest in dissipating the entrenched advantages that whites continue to have over racial minorities in the employment market. Although this was a quintessentially legislative judgment—made by a politically accountable Congress, operating under a constitutional form of government that assigns democratic policymaking functions to its representative branches—the Supreme Court apparently disagrees with the legislative balance that Congress struck.

The *Ricci* Court not only marginalized the effectiveness of statutory disparate-impact claims, but it also threatened to declare such claims unconstitutional. And the *Ricci* decision does not exist in isolation. When *Ricci* is considered in conjunction with other Roberts Court decisions concerning voting rights, racial profiling, English language education, and school resegregation, the Roberts Court's race cases seem to fit neatly into the pattern of Supreme Court hostility to racial minority interests that is becoming the hallmark of postracial discrimination.

Part I of this Article discusses the Roberts Court's recent *Ricci* decision, highlighting the Supreme Court voting blocs that have developed with respect to the issue of race. Part I.A describes the majority and concurring opinions of the conservative bloc Justices. Part I.B describes the dissenting opinion of the liberal bloc Justices. Part II describes the doctrinal difficulties that are entailed in trying to defend the Court's resolution of the case. Part II.A explains why the decision does not fit comfortably within the dictates of preexisting title VII doctrine. Part II.B explains why the decision does not fit comfortably within the law governing summary judgment. Part III argues that the *Ricci* decision constitutes an exercise in postracial discrimination. Part III.A describes how the Court inverts the categories of perpetrator and victim in a way that ultimately allows it to invert the categories of discrimination and equality. Part III.B argues that the *Ricci* postracial discrimination technique is simply the most recent in a long line of judicial strategies that the Supreme Court has historically used to justify the oppression of racial minorities. The article concludes that the potential effectiveness of genuine antidiscrimination remedies, such as the Title VII remedies that the Court dilutes *Ricci*, may be precisely what attracts the Supreme Court to its practice of postracial discrimination.

In *Ricci v DeStefano*,⁵ the Supreme Court held 5–4 that the City of New Haven was required by the employment discrimination prohibitions contained in Title VII of the Civil Rights Act of 1964 to utilize the results of a written firefighter promotion exam that the City administered, even though the City chose to reject those results because of the racially disparate impact that the exam produced. Whites generally performed better than blacks and Latinos on the exam, and the City feared that use of the exam would subject the City to potential liability for violating the *disparate-impact* prohibition of Title VII. However, seventeen white firefighters and one Latino firefighter—firefighters who would have been eligible for immediate promotions if the exam results had been certified—threatened to sue the City. They claimed that a decision to disregard the exam results would be racially motivated in a way that would violate the *disparate-treatment* prohibition of Title VII. The City, therefore, believed that it was on the horns of a dilemma. Whatever action it took, it would be subject to a Title VII suit filed by unhappy firefighters. The City chose not to certify the exam results, and the disappointed white and Latino firefighters sued. The United States District Court for the District of Connecticut entered summary judgment for the City, and a panel of the Second Circuit—whose members included then-Judge Sonia Sotomayor—summarily affirmed in a one-paragraph per curiam opinion. The full Second Circuit denied rehearing en banc, by a vote of 7–6. The Supreme Court then reversed the lower courts, finding that the City’s actions violated the disparate-treatment provision of Title VII. Although the disappointed firefighters also claimed that the City violated their Fourteenth Amendment Equal Protection rights, the Supreme Court saw no need to reach the constitutional issue in light of its statutory disposition of the case.⁶

The majority opinion detected an internal tension between the disparate-impact and disparate-treatment provisions of Title VII. Justice Kennedy, joined by Chief Justice Roberts, Justices Scalia, Thomas, and Alito, resolved that tension by giving primacy to the disparate-treatment provision, unless there was a “strong basis in evidence” for concluding that disparate-treatment was necessary to avoid a disparate-impact violation.⁷ Justice Scalia wrote a concurring opinion, suggesting that the disparate-impact provision of Title VII was itself invalid, because it compelled the consideration of race in a way that violated the Equal Protection principle of the Constitution.⁸ Justice Alito wrote a concurring opinion, joined by Justices Scalia and Thomas, arguing that the City’s stated desire to avoid a Title VII disparate-impact violation was a mere pretext for the City’s actual desire “to placate a politically important racial constituency.”⁹ Justice Ginsburg wrote a dissenting opinion, joined by Justices Stevens, Souter, and Breyer, arguing that Title VII permitted disparate treatment as long as there was “good cause” to believe that such treatment was necessary to avoid a disparate-impact violation, and stating that there was good cause in *Ricci* because less discriminatory job-related alternatives were available.¹⁰ It is noteworthy that the Justices in *Ricci* voted in ways that are so highly correlated with their votes in other race cases that the Supreme Court can fairly be said to consist of conservative and liberal voting blocs on the issue of race.

The five Justices who joined Justice Kennedy’s majority opinion in *Ricci* vote so consistently against the minority interests presented in race cases that they have come to constitute a conservative Supreme Court voting bloc on the issue of race.¹¹ The members of that voting bloc are Chief Justice Roberts, and Justices Scalia, Kennedy, Thomas, and Alito. None of those five Justices has ever voted in favor of the racial minority claim at issue in a constitutional affirmative action case, a majority-minority redistricting case, or a racial integration case while sitting on the Supreme Court.¹²

1. JUSTICE KENNEDY’S MAJORITY OPINION

Justice Kennedy’s majority opinion in *Ricci*, joined by the other members of the conservative bloc, held that New Haven’s decision not to certify the results of its firefighter promotion exam in order to avoid a potential Title VII *disparate-impact* violation had the effect of itself constituting a Title VII *disparate-treatment* violation.¹³ The opinion began with a detailed recitation of the facts as Justice Kennedy viewed them, because the majority’s understanding of what it held to be undisputed facts was important to the majority’s holding that the case could be resolved on summary judgment.¹⁴

According to Justice Kennedy, the New Haven City Charter required the City to fill vacancies in its classified civil service jobs through a merit-based system including the use of written examinations. The City hired an Illinois company to serve as an outside consultant, whom it asked to design job-related exams that could be used as part of the process of identifying the most qualified applicants for promotion to lieutenant and captain. The consultant designed multiple-choice exams after a lengthy process that was intended to ensure job-relatedness. That process included an oversampling of minority input in order to guard against unintentional white bias. The consultant also designed oral exams containing hypotheticals that were intended to test for qualities including firefighting, leadership, and management skills. According to the employment contract between the City and the firefighters union, the written exams were to account for 60% of an applicant’s total eligibility score, and the oral exams were to account for the remaining 40%.¹⁵

When the written and oral exams were administered to promotion candidates in December 2003, the written exams turned out to have a racially disparate impact. Although a number of whites, blacks and Latinos had taken the exams, all ten applicants who scored high enough to be eligible for “immediate promotion” to lieutenant were white. Of the nine applicants who scored high enough to be eligible for immediate promotion to captain, seven were white and two were Latino.¹⁶

The City’s legal counsel believed that the results of the written firefighter promotion exams might constitute a violation of the disparate-impact provision of Title VII, and that the need to avoid such a violation might authorize the use of race-conscious remedies for the disparate impact produced by the exams. The legal counsel communicated those views to the New Haven Civil Service Board, which was the municipal agency charged with certifying the results of promotional exams for civil service positions.¹⁷ As a result, the Civil Service Board held a series of

meetings to determine whether it should certify the exam results in light of the disparate impact produced by the exams. At these meetings, some firefighters who took the exams defended the results. They included the named plaintiff Frank Ricci—a dyslexic firefighter who spent considerable time and money preparing for his written exam. Other firefighters who took the exams spoke against certifying the results, describing the exam questions as outdated and not relevant to firefighting practices in New Haven.¹⁸

The President of the New Haven firefighters union asked the Civil Service Board to conduct a validation study to determine whether the exams were job-related. Representatives of the International Association of Black Professional Firefighters urged the Board to reject the exam results, arguing that the exam was “inherently unfair,” that a validation study for the exam was necessary, and that the exam results could be adjusted to avoid their racially disparate impact.¹⁹ The Illinois consultant who developed the exams testified that his company possessed substantial experience developing similar exams in other cities, that it had taken precautions to ensure that the exams were job-related, and that the exams minimized the possibility of any racial bias.²⁰ Another consultant, who sometimes competed with the consultant who designed the New Haven exams, testified that he was a bit surprised by the degree of disparate impact exhibited in the New Haven exams, but noted that whites generally perform better than minorities on such written exams. The competing consultant also testified that an alternative selection procedure, using “assessment centers” rather than written exams, could better gauge a candidate’s reactions to real world firefighting situations. He concluded, however, that the New Haven exam results could be certified as stemming from a “reasonably good test,” and that assessment centers might be used in the future.²¹ A retired black fire captain, who was a fire program specialist at the Department of Homeland Security, testified that the exam questions seemed relevant, and noted that whites generally perform better than minorities on written tests. A Boston College professor of race and culture also testified that whites typically outperform minorities on written tests, and further stated that the New Haven exams might have been developed in a subtly skewed way that could have favored white candidates.²²

At the Civil Service Board’s final meeting on the issue, the City’s legal counsel argued that he now believed that federal law prohibited certification of the exam results because of their disparate impact, which was greater than the disparate impact exhibited in the City’s prior exams. He also thought that the testimony compiled by the Board showed that there were less discriminatory alternatives to the New Haven exams that had produced the racially disparate impact. The City’s chief administrator, who spoke on behalf of Mayor DeStefano, also argued against certification because less discriminatory alternatives existed. In addition, the City’s human resources director argued against certification, favoring the use of a less discriminatory alternative.²³ However, other witnesses at this final meeting favored certification of the results. These included the President of the New Haven firefighters union, who emphasized the evidence showing that the exams were fair and reasonable. The witnesses favoring certification also included plaintiff Ricci, who conceded that assessment centers might be a less discriminatory alternative. However, Ricci emphasized that assessment centers were not available for the 2003 round of promotions, and that

assessment center protocols would take several years to develop. After this series of meetings, the Civil Service Board deadlocked 2–2 on the certification question, meaning that the exam results were not certified.²⁴

The disappointed firefighter promotion candidates, who were plaintiffs in the District Court and petitioners in the Supreme Court, alleged that the City’s refusal to certify the exam results constituted unlawful discrimination that violated the disparate-treatment provision of Title VII of the Civil Rights Act of 1964. Of the seventeen whites and two Latinos who were eligible for immediate promotions based on the contested exam results, all but one Latino sued New Haven officials to challenge the City’s refusal to certify the exam results. They also alleged a violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The parties filed cross motions for summary judgment, with the City arguing that it had good cause for any disparate treatment in which it had engaged, because the City was trying to avoid a Title VII disparate-impact violation. The United States District Court for the District of Connecticut entered summary judgment for the City, finding that the desire to avoid disparate-impact liability did not establish the discriminatory intent necessary for a Title VII disparate-treatment violation, and that the City’s actions did not violate the Equal Protection rights of the plaintiffs. The United States Court of Appeals for the Second Circuit affirmed in a one-paragraph per curiam opinion that adopted the reasoning of the District Court, and denied rehearing en banc by a vote of 7–6 over two written dissents. The Supreme Court then granted certiorari to consider what it viewed as a novel question presented by the interaction between the disparate-treatment and disparate-impact provisions of Title VII.²⁵ The Solicitor General of the United States participated as amicus curiae, urging affirmance of the lower court decisions.²⁶

Justice Kennedy’s legal analysis first addressed the Title VII statutory claim asserted by the petitioners, which was ultimately resolved in a way that avoided the need to address the constitutional Equal Protection claim.²⁷ Justice Kennedy noted that Title VII prohibits employment discrimination based on race, color, religion, sex, or national origin, and that the Title VII prohibition applies to both intentional “disparate-treatment” discrimination and unintentional “disparate-impact” discrimination. As originally enacted in 1964, the language of Title VII prohibited only intentional disparate-treatment discrimination, but the 1971 Supreme Court decision in *Griggs v. Duke Power*²⁸ interpreted the statute to prohibit unintentional disparate-impact discrimination as well. Under *Griggs*, an employment practice with a racially disparate impact constituted a Title VII violation unless the employer could establish that the practice was sufficiently job related to constitute a “business necessity.” In *Albemarle Paper Co. v. Moody*,²⁹ the Supreme Court further held that even a demonstration of job-related business necessity would not suffice to avoid Title VII disparate-impact liability if the plaintiff could establish that a less discriminatory alternative practice would also serve the employer’s legitimate business needs. The *Griggs* reading of Title VII was formally codified by Congress in the Civil Rights Act of 1991. Although the firefighter promotion exam results did establish a prima facie Title VII unintentional disparate-impact violation, the City’s race-based decision to remedy that prima facie violation by refusing to certify the exam results would also constitute a Title VII intentional disparate-treatment violation, unless the refusal to certify was adequately justified. The District

Court, and the United States as *amicus curiae*, believed that the motive of preventing a disparate-impact violation could not, as a matter of law, constitute a disparate-treatment violation, but Justice Kennedy concluded that this analysis was wrong because it applied the wrong legal standard. The fact that the City may have had a permissible *objective* in seeking to avoid disparate impact did not establish that race-based *means* of achieving that objective were permissible.³¹

Because Justice Kennedy found the disparate-treatment and disparate-impact provisions of Title VII to be in conflict, he considered possible ways of resolving that conflict while still advancing the ultimate purpose of Title VII, which was to provide a workplace “where race is not a barrier to opportunity.”³² He rejected the petitioners’ suggestion that unintentional disparate-impact discrimination could never justify intentional disparate-treatment discrimination, concluding that both statutory goals had to be accommodated if possible. He then rejected the petitioner’s argument that disparate treatment should only be permissible if it were first established that a disparate-impact violation actually existed. Justice Kennedy reasoned that such a holding would undermine the desire of Congress to promote voluntary compliance with Title VII, by forcing employers to address ambiguous disparate-impact claims only at their peril.³³

Justice Kennedy also rejected the suggestion made by the respondent City, and by the United States, that intentional disparate-treatment should be permissible whenever an employer had a good-faith belief that such disparate treatment was necessary to avoid a disparate-impact violation. Justice Kennedy concluded that this good-faith standard would ignore the “foundational prohibition” of Title VII, which bars employers from taking adverse employment actions “because of...race.”³⁴ It would “encourage race-based action at the slightest hint of disparate impact,” in a way that “amounted to a *de facto* quota system” that focused unduly on statistics. “Even worse,” such reliance on statistical disparities would permit an employer to pursue a desired “racial balance” in violation of Title VII’s express disclaimer of any interpretation “calling for outright racial balancing.”³⁵

Justice Kennedy borrowed what he believed to be the appropriate compromise standard from prior Supreme Court affirmative action cases that addressed the tension between the goals of advancing prospective race neutrality and providing a remedy for past discrimination. In the affirmative action context, the Court previously held that the Equal Protection clause prohibits the use of race-based affirmative action remedies unless there is a “strong basis in evidence” establishing that race-based remedies are necessary.³⁶ Even though the Title VII statutory constraints might not be parallel in all respects to the constitutional constraints, Justice Kennedy found that the constitutional principles still provided helpful guidance in the statutory context. The “strong basis in evidence” standard gave effect to both the disparate-treatment and disparate-impact provisions of Title VII. It left ample room for voluntary employer compliance efforts, while appropriately constraining employer discretion in making race-based decisions.³⁷

Justice Kennedy viewed the “strong basis in evidence” standard as consistent with the Title VII prohibition on making racial adjustments to employment-related test scores, and with the need to protect the “legitimate expectations” of those who would be burdened by the abandonment of such test scores solely because of race-based statistics. He reasoned that, if Title VII

prohibited adjusting test scores, it also prohibited “the greater step of discarding the test altogether.”³⁸ The “strong basis in evidence” standard was also consistent with Title VII’s protection of bona fide promotional examinations.³⁹ Because the Court would go on to hold that New Haven did not satisfy the “strong basis in evidence” standard, Justice Kennedy’s majority opinion expressly declined to reach the question of whether the Title VII disparate-impact provision itself would be constitutional in a case where the standard had been met.⁴⁰ He did, however, emphasize that Title VII did not prohibit an employer from intentionally designing a test or employment practice in a way that would provide a fair opportunity for all individuals to compete regardless of their race.⁴¹

Justice Kennedy’s majority opinion went on to hold that New Haven’s decision not to certify the firefighter promotion exam results violated the disparate-treatment provision of Title VII. Whatever the City’s subjective motive, the record made it clear that there was no objectively strong basis in evidence to support a disparate-impact violation.⁴² Moreover, the disappointed firefighter petitioners were entitled to summary judgment, because this lack of a strong basis in evidence was established by undisputed facts. Even though summary judgment requires the facts to be viewed in the light most favorable to the nonmoving party, here there was no “genuine” dispute about the pertinent facts, because no rational trier of fact looking at the record as a whole could conclude that there was a strong basis in evidence to fear that certification of the exam scores would amount to a disparate-impact violation.⁴³

The exam pass rate for minorities, which was approximately 50% of the pass rate for whites, did establish a prima facie racially disparate impact that was well below the 80% standard used by the Equal Employment Opportunity Commission to implement the Title VII disparate-impact provision. That was especially true since no black candidates could have been considered for any of the available promotions if the exam scores were used. However, that threshold statistical disparity was “far from a strong basis in evidence that the City would have been liable under Title VII had it certified the results.”⁴⁴ Despite the statistical discrepancy, the City would be liable for a disparate-impact violation only if its exams were not job related, or if there were a less discriminatory alternative, and neither condition could be satisfied under the “strong basis in evidence” standard.⁴⁵

There was no genuine dispute concerning whether the exams were job-related and consistent with business necessity, because the City’s contrary assertions were “blatantly contradicted by the record.”⁴⁶ The consultant who designed the exams took great pains to ensure their job-relatedness, and most of the witnesses who testified before the Civil Service Board found the exams to be adequate in this regard. Even the competitor consultant, who had some criticisms of the examination design process, recommended certification after concluding that the exams were “reasonably good.”⁴⁷ The City did not even ask the consultant for the technical report to which it was entitled, and which could have explained any of the City’s job-relation concerns.⁴⁸

There was also no strong basis in evidence for believing that an equally valid but less discriminatory alternative to the exams might exist. First, although the use of a 30/70 percent weighting of the written and oral exam scores might have reduced the racially disparate impact that was produced by the 60/40 percent weighting that was actually used, the 60/40 weighting was

the weighting specified in the firefighter union contract with the City. In addition, there was no evidence that the 60/40 weighting was arbitrary, or that a 30/70 weighting would produce an equally valid measure of the proper mix between job knowledge and situational skills.⁴⁹ Second, although “banding” exam scores could have reduced disparate impact by ranking candidates along fewer categories of scores—and thereby producing more ties among candidates—a state court held that such banding violated the City Charter. Moreover, such banding, motivated by a desire to increase minority promotions, would have violated the Title VII prohibition against adjusting test results on the basis of race.⁵⁰ Third, although the competitor consultant suggested that the use of assessment centers instead of written exams could provide a job-related selection method that would have less of a racially disparate impact, there was testimony that assessment centers could not have been used for the 2003 promotions. In any case, the competitor consultant was primarily interested in marketing his own services—a strategy that proved successful, because New Haven did subsequently hire him as a consultant.⁵¹

Justice Kennedy’s opinion concluded by stressing that fear of litigation alone cannot constitute the strong basis in evidence required to permit intentional race-based disparate treatment under Title VII. He characterized the New Haven examination process as a fair and neutral way to determine which firefighters were entitled to promotions based on their qualifications and experience. The City’s refusal to certify the results of that examination procedure imposed a burden on those who had participated in the testing process—a burden that was aggravated by the City’s reliance on “raw racial statistics.” Justice Kennedy went on to state that the Court’s decision should make it clear that, if the minority firefighters now filed a disparate-impact suit against the City for certifying the exam results, the City would be able to avoid Title VII disparate-impact liability for its actions.⁵² The majority’s disposition of the case in favor of the disappointed firefighters made it unnecessary to consider the constitutional Equal Protection claims asserted by the petitioners.⁵³

2. JUSTICE SCALIA’S CONCURRING OPINION

Justice Scalia, alone in his concurring opinion, argued that the Court would eventually have to decide whether the disparate-impact provision of Title VII was itself unconstitutional as a violation of the Equal Protection principle. Although he characterized the question as “not an easy one,” Justice Scalia seemed to embrace the argument that he outlined for finding the disparate-impact provision to be unconstitutional.⁵⁴ Because the federal government cannot discriminate on the basis of race, it cannot by statute require public or private employers to discriminate on the basis of race.⁵⁵ However, Title VII’s disparate-impact provision requires employers to “place a racial thumb on the scales” in assessing and remedying the statistical outcomes of their employment policies, and “that type of racial decisionmaking is, as the Court explains, discriminatory.”⁵⁶

Justice Scalia believed that the Title VII disparate impact provision did not mandate the use of racial quotas, but that it did

compel an employer to “intentionally design his hiring practices to achieve the same end.” As a result, Justice Scalia concluded that “[i]ntentional discrimination is still occurring, just one step up the chain.”⁵⁷ He also stated that it would not matter if Title VII required the “consideration of race on a wholesale, rather than a retail, level,” because the Government “must treat citizens as individuals not as simply components of a racial, religious, sexual or national class.”⁵⁸ He also stressed that “of course the purportedly benign motive for the disparate-impact provisions cannot save the statute.”⁵⁹

Justice Scalia thought that it might be theoretically possible to defend a disparate-impact provision as simply an evidentiary tool that could be used to “smoke out” intentional disparate treatment.⁶⁰ However, such a theory could not save the constitutionality of the Title VII disparate-impact provision, because it did not recognize an affirmative defense for good faith.⁶¹ Although the majority’s disposition precluded the need to rule upon the constitutionality of the Title VII disparate-impact provision in *Ricci*, “the war between disparate impact and equal protection will be waged sooner or later.”⁶²

3. JUSTICE ALITO’S CONCURRING OPINION

Justice Alito’s concurrence stated that it was written to address omissions in the dissent’s recitation of the facts, and to establish that, even under the dissent’s view of the facts, there were factual disputes that precluded summary judgment for the City.⁶³ Justice Alito’s opinion was joined by Justices Scalia and Thomas, but not by Chief Justice Roberts or Justice Kennedy.

Justice Alito believed that an objective and a subjective question had to be answered in order to determine whether an employer could avoid Title VII liability for a disparate-treatment claim such as that filed by the disappointed firefighters. The objective question was whether the stated reason for the disparate treatment was a legitimate reason under Title VII. The subjective question, which implicated the employer’s actual intent, was whether the stated legitimate reason was a mere pretext for discrimination.⁶⁴

The stated objective reason for New Haven’s race-based disparate-treatment in refusing to certify the firefighter promotion exam results was the legitimate reason of avoiding disparate-impact liability. But as the majority held, no reasonable jury could find that there was a “substantial basis in evidence to find the tests inadequate.”⁶⁵ That made any inquiry into actual subjective intent unnecessary.⁶⁶ However, the dissent argued that the proper standard for resolving the objective question should be whether the evidence provided “good cause” for the City to fear disparate-impact liability. Nevertheless, even the dissent would presumably concede the City’s disparate-treatment liability if the asserted disparate-impact concern were a mere pretext for intentional discrimination. As a result, the entry of summary judgment for the City by the lower courts could not be affirmed, because there was ample evidentiary basis for a reasonable jury to find that the City’s purported disparate-impact concern was

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actually a pretext for political placation of an important racial constituency.⁶⁷

Justice Alito offered several reasons, including appeasement of an important black political leader in New Haven, for believing that such political placation was the City's actual motive. The record demonstrated that City officials worked behind the scenes to avoid certification of the exam results, because certification would have antagonized the black political leader whom Mayor DeStefano did not wish to antagonize. This local black leader had strong personal and political ties with the seven-term Mayor that stretched back for more than a decade, and the Mayor had previously selected the black leader to serve as Chair of the New Haven Board of Fire Commissioners. While serving in that capacity, the black leader once created a political flap by stating that certain new recruits would not be hired because "they just have too many vowels in their name[s]."⁶⁸

The City's political motives did not stop with placation. The record suggested that members of the Mayor's staff had tried to orchestrate the city's response to the promotion exam controversy in part by silencing the City's Fire Chief and Assistant Fire Chief, both of whom favored certifying the exam results. The record further suggested that the Mayor made up his mind to oppose certification of the exam results, but wanted to conceal that fact from the public. In addition, during the Civil Service Board meetings held to resolve the certification issue, local black leaders with strong ties to the Mayor's office tried to exploit racial tensions by threatening ramifications if the exam results were certified. They also accused white firefighters of cheating on the exam, although those accusations turned out to be baseless. In addition, the City relied heavily on testimony of the competitor consultant who offered some criticism of the exams, using him as a conduit for the Mayor's political views. The city, as a reward for his assistance, ultimately hired the competitor consultant. The Mayor decided to overrule the Civil Service Board even if the Board decided to certify the exam results, and after certification failed by a 2–2 vote, the Mayor took credit for scuttling the exam results.

Justice Alito concluded that these facts provided ample basis for a reasonable juror to conclude that the City's stated disparate-impact justification was simply pretextual. He noted that even the United States Solicitor General conceded that the lower courts did not give adequate consideration to the pretext possibility.⁶⁹ Justice Alito emphasized that he was not simply equating political considerations with unlawful discrimination. However, he did believe that unlawful discrimination was not a permissible way to win over a political constituency.⁷⁰

Even if the Mayor's decision to overrule any adverse ruling by the Civil Service Board were overlooked, and even if the Civil Service Board were viewed as having made the final certification decision, the Mayor's improperly motivated influence could still taint the Civil Service Board's decision. Although the Supreme Court under Title VII never resolved the question of improper influence on a decisionmaker, the courts of appeals applied a variety of standards to the question. In *Ricci*, a reasonable jury could find that those lower court standards were met in a way that impermissibly tainted the Civil Service Board decision not to certify the exam results. In any event, it was the politically predisposed Mayor, and not the Civil Service Board, who had final decisionmaking authority.⁷¹ The petitioners—such as dyslexic Frank Ricci who had to hire someone at his own expense

to prepare for the exam, and Latino Benjamin Vargas who had to give up his part time job to prepare for the exam—deserved more than sympathy. They had a right to evenhanded enforcement of Title VII's prohibition against racial discrimination—a right that the City's refusal to certify denied them.⁷²

A. THE LIBERAL BLOC—Justice Ginsburg's Dissenting Opinion

The four Justices who joined Justice Ginsburg's dissenting opinion in *Ricci* vote so consistently in favor of the minority interests presented in race cases that they have come to constitute a liberal Supreme Court voting bloc on the issue of race.⁷³ The members of that voting bloc are Justices Stevens, Souter, Ginsburg and Breyer. With only minor deviations, those four Justices have almost always voted to uphold the racial minority claims at issue in constitutional affirmative action cases, majority-minority redistricting cases, and racial integration cases while sitting on the Supreme Court.⁷⁴

Justice Ginsburg's dissenting opinion argued that New Haven did not violate Title VII by seeking to avoid the racially disparate impact of its firefighter promotion exam. Justice Ginsburg emphasized that New Haven had a long history of racial discrimination in its fire department, and although blacks and Latinos made up almost 60 percent of the City's population, minorities were still rare in fire department command positions. She conceded that the white firefighters who scored well on the promotion exams "understandably attract this Court's sympathy," but "they had no vested right to promotion." In holding that the City lacked a "strong basis in evidence" for its decision not to certify the exam results, the majority pretended that the City was motivated only by race. However, Justice Ginsburg concluded that there were multiple flaws in the exams that the City used, and that other cities used better selection procedures that yielded less racially skewed outcomes. One could not help but wonder why the City did not use one of the alternatives that would have produced less disparate results. Justice Ginsburg stated that the majority "barely acknowledges the pathmarking decision in *Griggs*," and the centrality that the disparate-impact concept plays in Title VII enforcement. As a result, she believed that the majority's decision in *Ricci* would not have staying power.⁷⁵

Justice Ginsburg believed that the majority's recitation of the facts omitted important details. Firefighting in general was associated with a long legacy of racial discrimination, which Congress recognized in 1972 when it extended Title VII coverage to state and municipal employment—where racial discrimination was even more prevalent than in the private sector. Employment decisions often abandoned merit in favor of nepotism or political patronage, thereby entrenching preexisting racial hierarchies. New Haven illustrated the problem. In the early 1970s, minorities comprised 30% of the population, but only 3.6% of the City's five hundred and two firefighters. Moreover, only one of the Department's one hundred and seven officers was a minority firefighter. It took a lawsuit and subsequent settlement before conditions in the New Haven fire department improved. However, by the time of the 2003 promotions at issue in *Ricci*, minorities still remained badly underrepresented in the senior officer ranks—where only one of the City's twenty one fire captains was black.⁷⁶

The City's promotion exams produced the stark racial disparities that were at issue in *Ricci*, where minority candidates

passed at about half the rate of blacks. In making its 2003 round of promotions, New Haven adhered to the testing regime outlined in the firefighters union contract that it had used for two decades, without closely considering what sort of practical examination would best measure fitness for promotion. Accordingly, when the City asked its consultant to design promotion exams, the consultant was told to adhere to a 60% written component and a 40% oral component, without ever considering other alternative selection regimes. Because those 50% racial disparities fell well below the 80% standard that the Equal Employment Opportunity Commission used for Title VII enforcement, City officials were concerned about the danger of incurring Title VII disparate-impact liability. As a result, the New Haven Civil Service Board held a series of public meetings designed to assess job-relatedness and the availability of less-discriminatory alternatives.⁷⁷

At those meetings, some participants favored certifying the exam results, and some objected to certification. The evidence presented in favor of certification stressed the close relationship between the exams and the assigned study materials, as well as the considerable time and expense that many applicants invested in preparing for the exams. The evidence against certification included questions about the germaneness of the exam to New Haven practices and procedures, as well as racially-correlated unequal access to study materials that was traceable to the fact that white applicants had relatives in the fire service from whom they could obtain materials and assistance.⁷⁸

Other evidence showed that the nearby City of Bridgeport previously used selection procedures similar to the procedures used by New Haven, but reduced the racially-disparate impact of its selection process when it changed the relative weighting of its written and oral exams. The new weighting gave primary weight to the oral exam, which could better test responses to real-life scenarios. A competitor consultant stated that behavioral responses to hypothetical situations presented in “assessment centers” could test for pertinent skills—with less of a disparate impact—in a way that was more valid than mere written multiple choice exams. A Boston College professor of counseling psychology also noted that testing procedures such as those used by New Haven could have certain built-in biases that gave an advantage to white applicants. When the Civil Service Board’s 2–2 vote ultimately precluded certification of the exam results, the two Board members who voted against certification stated that they did so because the evidence presented at the public meetings convinced them that the exams were flawed, and that there were better alternatives.⁷⁹

Justice Ginsburg noted that the disappointed firefighters who sued the City for failing to certify the exam results alleged that the City’s defense of trying to avoid a Title VII disparate-impact violation was a mere pretext. However, when the District Court entered summary judgment for the City, it merely followed Second Circuit precedent in holding that the intent to remedy disparate impact did not constitute intent to discriminate against nonminority applicants. The District Court also rejected the pretext argument, finding that the exam results were sufficiently skewed to make out a prima facie case of disparate-impact discrimination, and that the City should not be forced to use racially skewed exam results that were presumptively invalid. Although the City was conscious of race, the District Court held that such race consciousness did not amount to racially disparate treatment. The City’s actions were race neutral in the sense that the exam

results were discarded for all races, and the City’s actions were not analogous to a racial quota because everyone was treated uniformly without any individual preference.⁸⁰

Justice Ginsburg observed that when Title VII took effect in 1965, it did not create genuine equal opportunity, because subtle and sometimes unconscious forms of discrimination simply replaced formerly undisguised discrimination. Accordingly, the Supreme Court’s 1971 unanimous decision in *Griggs* responded by holding that Title VII embodied a congressional intent to prohibit discrimination through unintentional disparate impact—as well as through intentional disparate treatment—by focusing on the consequences rather than the form of an employer’s actions. The Court’s 1975 unanimous decision in *Albemarle Paper* then held that even a showing of job-related business necessity could not defeat a disparate-impact claim if the plaintiff could show the existence of an alternative job-related employment practice that had less of a racially disparate impact. Lower courts then began to enforce the Title VII disparate-impact provision in ways that invalidated employment practices, such as the firefighter promotion exams at issue in *Ricci*, by carefully scrutinizing employer claims of business necessity. However, in its 1989 *Wards Cove* decision, the Supreme Court began moving in a different direction. A bare majority of the Court adopted a new standard of proof for business necessity in Title VII disparate-impact cases that was more deferential to employers and less protective of employees seeking to avoid discrimination. Congress responded to *Wards Cove*, and other Supreme Court decisions that cut back on civil rights enforcement, by enacting the Civil Rights Act of 1991, which formally codified the disparate-impact reading of Title VII that was adopted in *Griggs*.⁸¹

Justice Ginsburg accused the majority of manufacturing a tension between the disparate-treatment and disparate-impact provisions of Title VII that simply did not exist. No previous Supreme Court decisions—including the now-discredited decision in *Wards Cove*—ever detected such a tension, and both provisions sought to promote the same objective of ending workplace discrimination by promoting genuine equal opportunity. Although the task of the Court should be to harmonize statutory provisions, the majority set the two provisions at odds with each other by characterizing actions taken to avoid disparate-impact liability as actions taken “because of race.” By codifying *Griggs* and *Albemarle Paper*, Congress adopted a statutory design under which efforts to comply with the law by giving employees an equal opportunity to compete could not constitute a disparate-treatment violation—subject to one condition. The employer taking a race-conscious remedial action must have “good cause” to believe that the racially disparate employment practice being remedied would not withstand scrutiny as a business necessity. Under the facts of *Ricci*, Justice Ginsburg thought that it was hard to see the “business necessity” for the particular exams and 60/40 percent exam weightings that the majority required the City to use.⁸²

Justice Ginsburg also noted that the Equal Employment Opportunity Commission interpretive guidelines, which were entitled to judicial deference, would not turn efforts to avoid disparate-impact liability into violations of the very statute with which those efforts were designed to comply. She emphasized that the Supreme Court’s own gender discrimination precedent in *Johnson v. Transportation Agency* held that voluntary affirmative action programs for women did not violate the Title VII

disparate-treatment provision. Although *Ricci* was not an affirmative action case, the New Haven effort to avoid actual discrimination would certainly be likewise immune from Title VII disparate-treatment liability.⁸³

Justice Ginsburg thought that the “strong basis in evidence” standard that the majority invoked to resolve the statutory tension it invented was too enigmatic. The standard was drawn from “inapposite equal protection precedents,” and was not elaborated upon. Equal Protection precedents were inapposite because—unlike Title VII—the Equal Protection Clause was interpreted by *Personnel Administrator v. Feeney* and *Washington v. Davis* as not having a disparate-impact component.⁸⁴ Prior to *Ricci*, the Supreme Court never questioned the constitutionality of Title VII’s disparate-impact provision, because that provision “calls for a ‘race-neutral means to increase minority... participation’—something this Court’s equal protection precedents also encourage.”⁸⁵ “[O]nly a very uncompromising court would issue such a decision.”⁸⁶ Justice Ginsburg also thought that the cases on which the majority relied most heavily were particularly inapt, because they involved absolute racial preferences. In contrast, an employer’s effort to avoid Title VII disparate-impact liability involved no racial preference at all, but rather, involved an effort to rely on job-related qualifications that do not screen out candidates of any race. Even Title VII race- and gender-conscious affirmative action cases used a reasonableness standard, rather than the majority’s new “strong basis in evidence” standard.⁸⁷

Although a dominant theme of Title VII has been to encourage voluntary employer compliance, Justice Ginsburg believed that the majority’s “strong basis in evidence” standard made voluntary compliance hazardous. *Ricci* illustrated that discarding a dubious selection process would subject an employer to costly disparate-treatment litigation, in which the outcome would be very uncertain. Moreover, under the majority’s standard, the showing that an employer would have to make in order to avoid disparate-treatment liability was virtually the same as the showing that would be required to establish an actual disparate-impact violation—thereby undermining an employer’s incentive to engage in voluntary Title VII compliance efforts. Even those Equal Protection affirmative action cases from which the majority borrowed its “strong basis in evidence” standard did not apply that standard as harshly as the majority did in *Ricci*. Those cases never suggested that anything more than a prima facie case of prior discrimination would be required to permit the use of race-conscious affirmative action remedies.⁸⁸

Justice Ginsburg found that the majority’s desire to protect the “legitimate expectations” of the disappointed firefighters who scored well on the promotion exams was circular, and she proposed her own “good cause” standard. If, as the City feared, the exam failed to constitute the least discriminatory means of testing for pertinent promotion qualities, the disappointed firefighters could have no legitimate expectation of profiting from the results of the exams. That was especially true in *Ricci*, because the prime objective of Title VII was to prevent exclusionary practices from freezing the status quo. In addition, Justice Ginsburg viewed as unfounded the majority’s suggestion that the “strong basis in evidence” standard was necessary to avoid de facto quotas that were intended to promote an employer’s desired racial balance. Justice Ginsburg believed that her proposed “good cause” standard would guard against racial balance quotas by ensuring the presence of a credible disparate impact

claim. Justice Ginsburg also failed to understand why the majority departed from customary practice by refusing to remand the *Ricci* case for District Court application of the new standard that the majority announced. The failure to remand also deprived the City of an opportunity to invoke the statutorily recognized defense of good faith compliance with the interpretive guidelines adopted by the Equal Employment Opportunity Commission.⁸⁹

Justice Ginsburg outlined several factors showing that the City satisfied her “good cause” standard for assessing voluntary efforts to avoid disparate-impact liability. All agree that the New Haven promotion exams had a sufficiently striking disparate impact to establish a prima facie case of Title VII liability. Moreover, the nature of the exams that established this disparate impact was suspect, because the City gave no consideration to anything other than its customary 60/40 percent weighting—even though that weighting produced racially disparate results in the past. Reliance on written exams to assess practical skills is a questionable practice, because such exams do not necessarily identify leadership abilities. In fact, skepticism about the utility of such written exams has been expressed not only by experts who testified at the New Haven Civil Service Board meetings, but by other published experts, by courts, and by the Title VII administrative guidelines as well. Mere pencil-and-paper knowledge of the history and vocabulary of baseball would not qualify one to play for the Boston Red Sox.⁹⁰

Accordingly, it is not surprising that most municipal employers do not evaluate their promotion candidates through written tests or by giving tests the same weight as New Haven did. Two-thirds of the municipalities included in a 1996 study used assessment center simulations rather than written exams to evaluate candidates, and the popularity of assessment centers seems to be increasing over time. Among the municipalities that continue to use written exams, the median weight assigned to those exams is 30%—half the weight that New Haven assigned to its written exams. Therefore, Justice Ginsburg concluded that the prevalence of the assessment-center and modified-weighting alternatives would have made it difficult for New Haven to argue that its selection process was a business necessity. The majority rejected these alternatives, asserting that assessment centers were unavailable in 2003, and that Title VII prohibited the racial adjustment of test scores. However, the only evidence in the record that supported the unavailability of assessment centers in 2003 was an offhand remark made by Frank Ricci—one of the disappointed firefighters—which was belied by the widespread use of assessment centers at the time in other municipalities. And changing the weight of the written and oral exams would not constitute a prohibited racial alteration of test scores, but would rather constitute the substitution of a new selection procedure. Justice Ginsburg thought that the majority’s dismissal of any substantial risk of disparate impact liability was reminiscent of the deferential standard accorded employers under *Wards Cove*, but *Wards Cove* was overruled by Congress in the Civil Rights Act of 1991—precisely because it was too protective of employers.⁹¹

Justice Ginsburg also found the New Haven exams questionable because the City precluded its consultant from getting expert feedback on potential questions from anyone in the New Haven fire department. The restriction was intended to protect the security of the exam questions, but this “very critical” defect resulted in exam questions that were sometimes confusing, irrelevant, spotty in their coverage, and potentially biased

in favor of nonminority firefighters. In addition, the exams had technical defects that undermined the validity of the exam score cutoffs, and the ensuing candidate rankings. Although the majority criticized the City for not requesting a technical report to allay its concerns about job relatedness, the technical report would merely have summarized evidence that was produced at the Civil Service Board meetings, and would not have established the reliability of the exam as an assessment tool. The many defects contained in the exams created at least a triable issue of fact that precluded summary judgment against the City, even under the majority's "strong basis in evidence" standard.⁹²

In response to Justice Alito's concurring opinion, Justice Ginsburg stated that she would not have opposed a remand to resolve the factual disputes revealed in the record, but the majority insisted on disposing of the case by summary judgment. Justice Alito's concurring opinion argued that the City's asserted fear of disparate-impact liability was merely a pretext for the desire of certain officials in the mayor's office to placate a politically powerful racial constituency, and that there was a sufficient factual dispute about this to vacate the lower court rulings of summary judgment for the City. Justice Ginsburg also noted that the facts on which Justice Alito drew to support his pretext claim were drawn from the self-serving statement of facts submitted by the petitioners. Moreover, many of those allegations were either misleading or entirely devoid of support in the record. The important point, however, was that the Civil Service Board—not the Mayor's office—made the ultimate decision not to certify the exam results, and there was no evidence of political partisanship on the part of Civil Service Board members. In addition, the New Haven political forces favoring certification of the exam results attempted to exert just as much pressure on the Civil Service Board as did the political forces opposing certification.⁹³

Justice Ginsburg went on to question the relevance of Justice Alito's pretext argument, because political considerations alone could not be equated with unlawful discrimination. Politicians commonly respond to racial considerations without engaging in racial discrimination. There is no reason to believe that the Mayor's office wished to exclude white firefighters from promotions, since white firefighters would also be promoted under a nondiscriminatory selection procedure. The District Court found that the presence of political considerations did not negate the City's genuine desire to avoid disparate-impact liability, and it found a total absence of discriminatory animus toward the petitioners. Those findings were "entirely consistent with the record." Moreover, as established by the Court's recent post-9/11 racial profiling decision in *Ashcroft v. Iqbal*, a desire to please political constituents is not inconsistent with a desire to avoid unlawful discrimination.⁹⁴

Justice Ginsburg concluded that the majority forced the City of New Haven to use a flawed promotion exam that would produce racially disparate results without identifying the best-qualified candidates for promotion. The majority decision broke the promise of *Griggs* by denying equal opportunity through use of a test that was "fair in form, but discriminatory in operation."⁹⁵

DOCTRINAL STRAIN

The outcome in *Ricci* did not flow naturally from pre-existing Title VII doctrine. Rather, Justice Kennedy's majority

opinion constructed a previously undetected tension between the disparate-treatment and disparate-impact provisions of Title VII, and then resolved that tension in a way that strained against the overall antidiscrimination objective that Title VII was enacted to advance. In addition, Justice Kennedy announced the Court's modification of pre-existing Title VII doctrine in the process of granting summary judgment for the disappointed firefighter petitioners, even though significant factual disputes almost certainly made summary judgment for the petitioners improper. It appears that Justice Kennedy did both of these things knowingly, in order to convey the strength of the Court's commitment to a new post-racial conception of employment discrimination law.

Title VIJustice Kennedy's majority opinion in *Ricci* adopted a novel reading of Title VII that rebalanced the competing interests between whites and racial minorities that are at stake in the allocation of limited societal resources. Moreover, it rebalanced those interests in a way that undermined the initial balance struck by Congress in enacting and amending Title VII. The opinion also failed to apply the standing limitations that the Supreme Court has in the past used to defeat minority claims of racial discrimination. In so doing, the Court yet again illustrated a willingness to relax standing requirements for reverse discrimination claims asserted by whites that are strenuously enforced in cases asserting traditional discrimination against racial minorities.

1. ZERO SUM BALANCE

Justice Kennedy's majority opinion asserted that *Ricci* was a case of first impression concerning the divergence between the disparate-treatment and disparate-impact provisions of Title VII.⁹⁶ But Justice Ginsburg's dissent pointed out that no such conflict existed, because both provisions of Title VII were designed to advance the same goal—the elimination of employment practices that had commonly produced workplace discrimination in the past.⁹⁷

In one sense, Justice Ginsburg was certainly correct. There was no conflict under pre-existing law, because pre-existing law held that the consideration of race for the sincere purpose of avoiding disparate impact discrimination did not constitute the type of racial consideration that could amount to a Title VII disparate-treatment violation. That is what the District Court held when it followed Second Circuit precedent; that is what the Second Circuit panel held when it summarily affirmed the District Court in its brief per curiam opinion; that is what the full Second Circuit held when it denied rehearing en banc; that is what the Equal Employment Opportunity Commission established when it adopted its Title VII interpretive guidelines; and that is what the Supreme Court itself established in an analogous gender discrimination case holding that the consideration of gender to prevent disparate impact did not amount to a Title VII disparate-treatment violation.⁹⁸

But Justice Kennedy also had a point. Even though Title VII law was settled at the time of the *Ricci* decision, there had long been undercurrents of discontent with that settlement. Individual conservative-bloc Justices in prior Title VII cases expressed the view that racial affirmative action could not be used to benefit minorities who were not themselves actual victims of particularized discrimination, because such affirmative action imposed too great a burden on adversely affected whites.⁹⁹ As Justice Kennedy stressed in his *Ricci* opinion, several Supreme

Court constitutional decisions struggled with the issue of when the Equal Protection Clause permitted affirmative action programs to benefit minorities at the expense of so-called innocent whites.¹⁰⁰ Accordingly, what Justice Kennedy was really doing in *Ricci* when he detected and resolved a novel tension between the disparate-treatment and disparate-impact provisions of Title VII was changing the balance that the Supreme Court previously struck between the zero-sum interests of whites and racial minorities in discrimination cases.¹⁰¹

In any alleged race discrimination or affirmative action case, a contested societal resource—such as the right to a firefighter promotion—has to be allocated to either a white person or to a racial minority. In order to make that allocation, some way has to be found to balance the competing interests underlying the white and minority claims of entitlement to that resource. Previously, the balance was struck so that close cases would be resolved in favor of racial minorities, in order to compensate for past discrimination or to promote prospective diversity. *Ricci*, however, re-struck the balance so that close cases would now be resolved in favor of whites. It did this by increasing, to a “strong basis in evidence,” the standard of proof that had to be met before a resource could be given to a racial minority.¹⁰²

In other words, the five-Justice *Ricci* majority re-struck the balance between white and minority interests in Title VII cases, so that the new balance would mirror the balance that the Supreme Court previously struck in its constitutional affirmative action cases. That might initially appear to create a desirable doctrinal symmetry, but there is an important asymmetry that exists between Title VII and constitutional cases. In Title VII cases the appropriate balance is supposed to be struck by Congress—not by the Supreme Court. It is true that statutes are often ambiguous, and the exercise of loosely constrained judicial discretion is often required for the Supreme Court to announce statutory meaning. But that is not the case with the disparate-impact provision of Title VII.

As Justice Ginsburg pointed out, Justice Kennedy was not writing on a clean slate when he chose to strike a new Title VII balance in favor of whites. The Supreme Court previously tried to strike a similar balance in *Wards Cove* and other decisions that cut back on civil rights enforcement. However, Congress responded by overruling those cases in the Civil Rights Act of 1991.¹⁰³ Therefore, when Justice Kennedy rewrote Title VII in *Ricci* to correspond to the Supreme Court’s Equal Protection jurisprudence, he was usurping legislative policymaking power from Congress. Congress wanted the close cases to be resolved in favor of racial minorities, believing that to be the best way of reducing employment discrimination. But Justice Kennedy wanted the close cases to be resolved in favor of whites, even if it meant allowing fire department officers to remain overwhelmingly white.

The Supreme Court’s usurpation of legislative racial policymaking power in *Ricci* may be difficult to justify in separation-of-powers terms, but it is hardly unprecedented. As a matter of relative institutional competence, it is difficult to see why a politically insulated Supreme Court would view itself as better able than a politically accountable national legislature to balance the subtle and complex competing interests that are necessarily entailed in trying to formulate a coherent national race relations policy. Nevertheless, the Supreme Court seems always to have thought that it could do a better job than Congress in mediating

the nation’s racial tensions. When the Court invalidated congressional efforts to limit the spread of slavery in *Dred Scott v. Sandford*,¹⁰⁴ Congress overruled that decision by securing the adoption of the Fourteenth Amendment.¹⁰⁵ The Fourteenth Amendment was designed to shift the pre-Civil War federalism balance in matters involving race from the states to the federal government, by giving Congress the power to enforce the equality and antidiscrimination provisions of the Amendment.¹⁰⁶ Nevertheless, the Supreme Court decision in the *Civil Rights Cases*¹⁰⁷ re-struck that balance in favor of state sovereignty by reading a “state action” component into the Fourteenth Amendment, even though Section Five expressly gave Congress the power to enforce the Amendment.¹⁰⁸ If judicial activism is defined as the disregard of clearly expressed legislative policy judgments, then *Ricci* entails an exercise in conservative judicial activism.

Justice Kennedy used the new “strong basis in evidence” standard as the doctrinal device that would accord his desired additional weight to the interests of whites in the Title VII balance. Like the lower courts and the Solicitor General, Justice Ginsburg thought that that any genuine desire to avoid a disparate-impact violation would suffice to prevent a disparate-treatment violation. She insisted only on the presence of “good cause” to fear a disparate-impact violation, as a safeguard against frivolous or pretextual disparate-impact claims.¹⁰⁹ Justice Ginsburg also emphasized that the heightened “strong basis in evidence” standard would frustrate the Title VII preference for voluntary compliance, by making it hazardous for employers to implement voluntary remedies for disparate impact. Only a disparate-impact showing that was strong enough to establish an actual Title VII violation would be sufficient to immunize employers from potential disparate-treatment violations.¹¹⁰

The law governing contract modifications, as well as the law of accord and satisfaction governing the settlement of legal disputes, supports Justice Ginsburg’s view. Reminiscent of Justice Kennedy’s approach, classical contract law would not recognize the presence of consideration supporting a modification or accord and satisfaction unless the underlying relinquished claim was in fact a meritorious one.¹¹¹ However, such a rule made voluntary modifications and settlements largely worthless, because the underlying legal claim would still have to be adjudicated in order to establish the validity of the modification or settlement. After realizing this, modern contract doctrine dispensed with the need to establish the validity of the underlying claim. It insisted only on “good faith” motivation, and it did so precisely so that voluntary modifications and settlements could become legally enforceable.¹¹²

Utilization of the “strong basis in evidence” standard, therefore, constitutes another important way in which the *Ricci* majority undermined the thrust of Title VII—by frustrating the congressional desire to rely heavily on voluntary rather than coerced compliance. Justice Kennedy’s adoption of a “strong basis in evidence” standard thrusts Title VII voluntary compliance back to the days of classical contract law, and in so doing, undermines the Title VII preference for voluntary compliance. Moreover, the “strong basis in evidence” standard seems to apply in a way that benefits whites more than it benefits racial minorities. Although there is ample reason to find a “strong basis in evidence” supporting the City’s fear of disparate-impact liability,¹¹³ there is *not* a “strong basis in evidence” for the Court to have rejected the assessment-center and modified-weighting

alternatives that the city wished to use in lieu of its racially skewed written exams.¹¹⁴ It seems unlikely that the effect of Justice Kennedy's "strong basis in evidence" standard on voluntary settlements went unnoticed—or was unintended. Without voluntary compliance to supplement formal enforcement of Title VII, there will simply be fewer occasions in which contested resources are given to racial minorities rather than to whites.

The unequal application of discrimination law to whites and racial minorities is illustrated even more clearly by Justice Scalia's concurring opinion. Although Justice Kennedy's majority opinion expressly left open the question of whether the Title VII disparate-impact provision was constitutional,¹¹⁵ Justice Scalia apparently believed that the provision *did* violate the Equal Protection principle of the Constitution by forcing employers to engage in race-based decisionmaking in order to avoid disparate impact.¹¹⁶ Justice Scalia then suggested that the disparate-impact provision of Title VII might be saved if it were viewed as an evidentiary tool to "smoke out" intentional discrimination, but that such a saving construction would require recognition of a good faith defense to any disparate-impact claim.¹¹⁷ This is striking because Justice Scalia also emphasized that a benign motive on the part of Congress in enacting the disparate-impact provision could not save the constitutionality of the provision.¹¹⁸ This reasoning creates a curious form of discrimination. When Congress acts to *remedy* disparate-impact discrimination, a benign motive will not save the constitutional validity of its actions. But when an employer acts to *create* disparate-impact discrimination, a benign motive will save the validity of the employer's actions. For Justice Scalia, therefore, a good faith, benign motive can be used to permit racial discrimination, but not to prevent it. A legal regime that would permit such an outcome is indeed a noteworthy regime.

Justice Alito too wrote a curious concurrence. By arguing that New Haven's asserted concern with disparate impact was really a politically motivated desire to placate a minority constituency,¹¹⁹ Justice Alito appears to believe that racial politics is somehow illegitimate. Although he concedes that racial considerations can sometimes play a permissible role in political bargaining, he says that racial discrimination never can.¹²⁰ However, the issue to be decided was *whether* the City's decision to forego certification of the firefighter promotion exam results constituted permissible racial *consideration* or impermissible racial *discrimination*. Justice Alito apparently believed that the City's actions constituted a mere pretext for impermissible discrimination,¹²¹ but his reasoning was circular. The only evidence that Justice Alito offered to support his *discrimination* conclusion was that the City *considered* race.¹²²

Justice Alito could not have been pleased by his perception of racial politics in New Haven. One of the black leaders, whom Justice Alito viewed as having been placated by the Mayor's administration, once objected to hiring firefighters who "just have too many vowels in their name[s],"¹²³ an apparent reference to New Haven's long history of hiring white Italian firefighters instead of blacks.¹²⁴ This suggests that "racial placation" had long been the norm rather than the exception in New Haven politics. If such ubiquitous racial politics were now to be reconceptualized as unlawful racial discrimination, it is noteworthy that Justice Alito wished to effect that reconceptualization when the long history of New Haven racial politics began to benefit racial minorities rather than whites. It also makes one wonder

whether Justice Alito believes that he can realistically exclude his own racial considerations from the adjudicatory process in the way that he apparently believes they should be excluded from the political process.¹²⁵

2. STANDING

Although no Justice mentioned it, the disappointed New Haven firefighter petitioners may have lacked standing to challenge the City's failure to certify the promotion exam results. They may have lacked standing because none of the petitioners could be sure of receiving the promotions they sought, even if the exam results had been certified. Under the City's "rule of three," the City Charter required that civil service positions be filled from among the top three exam performers for each position.¹²⁶ However, we cannot tell *which* of the top three candidates would have been chosen for any position. There were eight lieutenant vacancies, so only eight of the top ten candidates who qualified for "immediate promotion" to lieutenant under the rule of three would actually be promoted. Furthermore, there were seven captain vacancies, so only seven of the top nine candidates who qualified for "immediate promotion" to captain would be promoted.¹²⁷ Collectively, we cannot know which of the eighteen petitioners would have received the fifteen available promotions, but we do know that three of the petitioners would not have received any of the promotions at all.¹²⁸

It may seem silly, but under the Supreme Court's standing jurisprudence, such uncertainty about whether a favorable ruling will actually redress a plaintiff's alleged injury can deprive that plaintiff of standing. Moreover, a plaintiff's failure to establish a redressable injury is not merely a prudential impediment to standing, but rather can amount to a constitutional defect that deprives the Court of jurisdiction under the case-or-controversy provision of Article III.¹²⁹ On occasion the Supreme Court has applied this particularized redressability requirement with remarkable stringency. For example, it denied environmental plaintiffs standing to enforce certain financial incentive provisions of the Endangered Species Act, because those incentives might not ultimately result in protection of the endangered species at issue.¹³⁰ It also denied other environmentalists standing to challenge mining, oil, and natural gas exploitation of federal lands, because the plaintiffs did not show with sufficient particularity that they would use the precise tracts of land that were being opened up for exploitation.¹³¹ It even denied indigents standing to challenge preferential "charity" tax status for hospitals that refused to provide certain charitable medical care to indigents, because the hospitals might continue to deny such care even if they were denied preferential tax status.¹³² In *Ricci*, no petitioner could be certain that a favorable ruling would redress his or her injury, because no petitioner could be certain of getting a promotion. Indeed, three petitioners could be certain that they would *not* get a promotion, although we do not know which three petitioners they would be.

Admittedly, the Supreme Court does not always enforce its standing redressability requirement with such stringency. Sometimes the Court grants standing despite serious redressability problems, as it did when it granted the State of Massachusetts standing to challenge the Environmental Protection Agency's refusal to regulate certain greenhouse gas emissions even though such regulation was not guaranteed to reduce the global warming

injuries that the State alleged.¹³³ Because the law of standing is in notorious disarray, it is not surprising that Supreme Court standing decisions are often difficult to reconcile.¹³⁴ The problem is that there is one overriding principle that *does* seem to reconcile many of the Court's standing cases. The law of standing often protects the interests of whites more than it protects the interests of racial minorities.¹³⁵

In the 1984 case of *Allen v. Wright*,¹³⁶ the Supreme Court denied standing to black parents who challenged the allegedly unlawful grant of tax-exempt status to segregated private schools, because those schools might continue to deny admission to blacks even if the tax exempt status of the schools were revoked. In the 1975 case of *Warth v. Seldin*,¹³⁷ the Supreme Court denied standing to black and Latino plaintiffs who challenged exclusionary zoning practices alleged to be intentionally discriminatory, because the low and moderate income housing developments that had sought zoning variances still might not ultimately be constructed even if the exclusionary zoning practices were invalidated. In four police and prosecutorial misconduct cases decided between 1974 and 1983, the Supreme Court found that a lack of standing and other justiciability defects barred suits by black victims of allegedly discriminatory police brutality and other official abuses, because prior official misconduct was moot and the threat of future recurrences was too speculative for injunctive relief to redress any current injury.¹³⁸

The Supreme Court has been fairly frequent in its denial of standing to minority plaintiffs who wished to challenge allegedly discriminatory practices that harm racial minorities. However, the Court often grants standing in analogous cases to white plaintiffs who wish to challenge affirmative action or antidiscrimination practices that benefit minorities. In *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*,¹³⁹ the Court granted standing to a white construction contractor who challenged an affirmative action program designed to benefit minority contractors, even though the white contractor was unlikely to be awarded one of the contracts at issue if the affirmative action program were invalidated. Other Supreme Court cases have similarly granted standing to whites seeking to challenge affirmative action programs,¹⁴⁰ or voter-redistricting programs designed to benefit racial minorities,¹⁴¹ without requiring the strong redressable injury showings that the Court has demanded of minority plaintiffs. *Ricci* is a case that falls on the permissive white-plaintiff side of the line. It tacitly recognizes the standing of at least three white plaintiffs to challenge an antidiscrimination law that benefits racial minorities, even though they cannot possibly prove redressability. The one final irony that should be noted in the Supreme Court's tacit grant of standing to the *Ricci* plaintiffs is its effective issuance of an advisory opinion. The purpose of the Article III standing requirement is to help ensure that the federal courts do not issue advisory opinions—opinions that make abstract pronouncements of law that are unnecessary to the resolution of a concrete “case” or “controversy” presented in an adversary context.¹⁴² Because the Supreme Court disposed of the *Ricci* case by granting the motion for summary judgment filed by the petitioners, the Court ended up making abstract pronouncements that were dependent on the resolution of factual issues that seem clearly to have been in dispute. The Court even announced that minority firefighters could not win a hypothetical Title VII disparate-impact suit if they were subsequently to file one.¹⁴³ Moreover, the Court did all of this

without the vigorous adversary presentation that would have been available if the Court had followed the customary practice of remanding a case with contested facts for trial. The Court's decision to grant the petitioners summary judgment is therefore also quite curious.

SUMMARY JUDGMENT

As Justice Kennedy noted, summary judgment is appropriate only where there is “no genuine issue as to any material fact,” and one party is “entitled to judgment as a matter of law.”¹⁴⁴ His opinion went on to hold that “there is no evidence—let alone the required strong basis in evidence—that the tests were flawed because they were not job-related or because other, equally valid and less discriminatory tests were available to the City.”¹⁴⁵ The assertion that there is “no evidence” questioning job-relatedness or supporting the existence of less discriminatory alternatives is simply incorrect. The assertion that there is no “strong basis in evidence” is the very legal issue that is under dispute.

1. NO EVIDENCE

Justice Kennedy's assertion that there was “no evidence” supporting the City's disparate impact fears does not withstand scrutiny. His opinion itself described evidence in the Civil Service Board hearing record that both questioned the job-relatedness of the City's promotion exams and suggested the presence of less discriminatory alternatives. Some witnesses testified that the exams were outdated and not relevant to firefighting practices in New Haven.¹⁴⁶ Others called for a validation study to determine job-relatedness, because the exams were “inherently unfair.”¹⁴⁷ The competitor consultant testified that “assessment centers” were not only better at assessing job-relatedness, but that they would also constitute a less-discriminatory alternative selection device.¹⁴⁸ A college professor with relevant expertise testified that the New Haven exams may have contained subtle racial biases that favored whites.¹⁴⁹ The City's legal counsel and officials in the Mayor's administration also testified that there were less discriminatory alternatives to the exams.¹⁵⁰

Justice Kennedy's opinion ignored the additional pertinent evidence highlighted in Ginsburg's dissent. She pointed to testimony establishing that most municipalities do not use pencil-and-paper exams to evaluate promotion candidates because of questions about the sufficiency of those exams in assessing practical job-related skills. She also cited evidence in the record establishing that other municipalities use alternate weighting percentages that place more emphasis on practical skills than on written exam results.¹⁵¹ Far from containing “no evidence,” the record was replete with evidence of less discriminatory alternatives that posed fewer job-relatedness problems. Not only were alternate weightings of exam and practical skills a seemingly better alternative, but the conclusion that assessment centers would have been a better alternative actually seems to have been uncontested. Nevertheless, Justice Kennedy rejected these evidentiary showings out of hand.

Justice Kennedy rejected the alternate weighting option because he viewed it as prohibited by the New Haven firefighter union contract, the New Haven City Charter, and the Title VII prohibition against adjusting test scores “on the basis of race.” He also saw no evidence that the original New Haven exam weighting

was arbitrary.¹⁵² The union contract and City Charter were largely irrelevant, because they would simply be unlawful if they compelled a degree of disparate impact that was prohibited by Title VII. Also, the fact that the original exam weighting may not have been arbitrary was simply nonresponsive to the claim that better alternatives existed. However, the question of whether alternate weightings would constitute prohibited race-based adjustment of test scores, as Justice Kennedy argued, or the mere substitution of an alternate selection procedure, as Justice Ginsburg argued,¹⁵³ is more serious. Ultimately, however, it simply begs the central question presented in the case. Proper legal characterization of a decision by the City to use an alternate weighting process would turn on whether the City was motivated by genuine disparate-impact concerns when it declined to certify the exam results, or whether that decision was a mere pretext for racial bias. But the question of motive certainly seems like a disputed issue of fact that could have been better resolved by a trial on remand than by Justice Kennedy's ex cathedra determination.¹⁵⁴

Justice Kennedy rejected the assessment center alternative, even though no one seems to dispute the claim that assessment centers would have been more job-related and less discriminatory than written promotion exams. Justice Kennedy gave only one reason for rejecting the assessment center alternative. He stated that assessment centers would not have been available for the 2003 firefighter promotions.¹⁵⁵ However, that conclusion was based on a single offhand comment made by Frank Ricci—one of the very petitioners challenging the City's failure to certify the exam results.¹⁵⁶ Although Frank Ricci was a firefighter who worked hard to score well on his promotion exam, the record does not suggest that he had any expertise whatsoever in designing, implementing, or evaluating promotion procedures. As Justice Ginsburg pointed out, there was no particular reason to believe that assessment centers—which were in widespread use in other municipalities at the time—were unavailable to the City of New Haven.¹⁵⁷ Moreover, the record does not disclose any reason it was important for promotions to be made in 2003, rather than waiting until assessment center procedures could be established. That is especially noteworthy since the Supreme Court did not finally order the promotion exam results to be certified until 2009. Although Justice Kennedy was unwilling to accord any deference to New Haven's fear of potential disparate-impact liability, he was willing to accord total deference to Frank Ricci's stated basis for opposition to assessment centers.

The racial politics of which Justice Alito apparently disapproved may well have been viewed by minorities as the only alternative available to counteract the more entrenched politics that had caused the City to use its de facto discriminatory promotion procedures for the previous twenty years.¹⁵⁸ In a political climate where a fire department would forego promotion assessment alternatives that were more job-related and less discriminatory than written multiple-choice exams, it is easy to understand how racial politics could become as salient as Justice Alito found them to be.¹⁵⁹ Whether the City's effort to deviate from its previous practices was genuine or pretextual seems at least to be a genuine issue of material fact. Justice Ginsburg notes that it is common practice for the Supreme Court to remand a case in which it has announced a new rule of law, so that the trial court can apply the new rule to the facts.¹⁶⁰ That customary practice certainly seems compelling when factual disputes abound, as

they did in *Ricci*, but it was not compelling enough to serve the purposes of the *Ricci* majority.

2. NO STRONG BASIS IN EVIDENCE

Although it is difficult to defend Justice Kennedy's assertion that there was "no evidence" of less discriminatory, job-related alternatives, Justice Kennedy also asserted that any evidence that might exist was not sufficient to satisfy the "strong basis in evidence" standard that the Court was announcing as its new disparate-impact rule.¹⁶¹ It seems clear that there was significant evidence of less discriminatory, job-related alternatives contained in the Civil Service Board hearing record. It also seems clear that any suggestion that such alternatives were lacking was far from undisputed for summary judgment purposes. But Justice Kennedy knew all of this. My suspicion is that Justice Kennedy was not simply making an evidentiary or civil procedure mistake when he decided to enter summary judgment for the petitioners despite the existence of striking factual disputes. I suspect that Justice Kennedy was making a statement about the stringency of the new disparate-impact rule that the Court was adopting.

By deeming a very strong factual showing of better alternatives to be insufficient even to defeat a motion for summary judgment, Justice Kennedy communicated that it would henceforth be very difficult to establish a disparate-impact discrimination claim under Title VII, even when a prima facie case of disparate impact was statistically demonstrated. The Court was reinstating an era of strong deference to employer discretion, in order to immunize employers from disparate-impact claims. As Justice Ginsburg viewed it, the Court was reverting to the interpretation of Title VII that it had adopted in *Wards Cove*, even though Congress had overruled *Wards Cove* by statutory amendment in the Civil Rights Act of 1991.¹⁶² I believe that Justice Kennedy was conveying the idea that disparate impact claims would now be as difficult to uphold under the Title VII "strong basis in evidence" standard as affirmative action programs have been to uphold under the "strong basis in evidence" Equal Protection standard that Justice Kennedy borrowed.¹⁶³

Since the conservative voting bloc took firm control of the Court in race cases after 1990, the Supreme Court has upheld the constitutionality of a racial affirmative action program in only one case—and even that case seems doctrinally indistinguishable from another case in which the Court invalidated a similar program on the same day.¹⁶⁴ Justice Kennedy's decision to grant the petitioners summary judgment in *Ricci*, despite the existence of important factual disputes suggests that we can expect outcomes in future Title VII disparate-impact cases that are similar to the outcomes we have seen in affirmative action cases. Justice Kennedy himself illustrates this with the "advisory opinion" that he issued to reject the hypothetical claim asserted by minority firefighters in the hypothetical New Haven disparate-impact case that was never even filed.¹⁶⁵ Even though such a hypothetical suit would be filed by different plaintiffs, using legal theories and evidentiary presentations that had not yet been developed—let alone presented to a court—Justice Kennedy was still confident that the minority firefighters would lose their case. He could not have known this unless he had already determined that the "strong basis in evidence" standard was so heavily tilted toward the interest of white firefighters that no hypothetical disparate impact would be sufficient to outweigh the harm to whites.¹⁶⁶ This also suggests

that Justice Ginsburg was correct when she feared that Justice Kennedy's "strong basis in evidence" standard would undermine the congressional preference for voluntary compliance with Title VII.¹⁶⁷ For Justice Kennedy, there appears to be very little gap left to fill between potential liability (under the "strong basis in evidence" standard) and actual liability (under the statutory Title VII standard) for voluntary compliance to fill. He appears to be equally solicitous of white interests under both standards.

The stringency of Justice Kennedy's "strong basis in evidence" standard means that the scales are tipped in Title VII cases before the Court even begins its analysis. Because the Court has now detected a conflict between the statute's disparate-treatment and disparate-impact provisions, the Court must balance competing interests to resolve that conflict. The "strong basis in evidence" standard means that when unclear or disputed evidence is in equipoise, the balance will be struck in favor of protecting the white interest in avoiding disparate-treatment discrimination, rather than in favor of the racial minority interest in avoiding disparate-impact discrimination. It is unclear why a tie should go to the white interests under a statute that was enacted to prevent discrimination against racial minorities—unless the Court believes that times have changed so much that whites are now the primary victims of racial discrimination.

POSTRACIAL DISCRIMINATION

Postracial discrimination is discrimination against racial minorities that purports to be merely a ban on discrimination against whites. It is premised on the belief that active discrimination against racial minorities has largely ceased to exist, and that the lingering effects of past discrimination have now largely dissipated. As a result, a prospective commitment to colorblind race neutrality is now sufficient to promote racial equality, and any deviation from such neutrality will itself constitute unlawful discrimination. Although versions of this view have been around since the era of official segregation,¹⁶⁸ the claim that we now live in a postracial society has acquired enhanced plausibility from the success of prominent racial minorities in roles that were traditionally reserved for whites. Those successes have ranged from the golfing achievements of mixed-race Tiger Woods in a traditionally white game,¹⁶⁹ to the selection of black politician Michael Steele as head of the Republican Party,¹⁷⁰ to the election of mixed-race Barack Obama as President of the United States.¹⁷¹

As recent events have indicated, however, the claim that we now live in a postracial society is quite premature. Black Harvard Professor Henry Louis Gates still believed that he was being racially profiled in 2009 when he was arrested by a white police officer after allegedly breaking into his own house.¹⁷² The suburban Philadelphia Valley Swim Club still thought it was appropriate to exclude black children from its swimming pool in 2009.¹⁷³ And the 2009 death of singer Michael Jackson reminded us that the "King of Pop" lived in a culture that caused him to think that he could increase his popular appeal by lightening the color of his skin.¹⁷⁴ Because the culture that we live in is actually far from postracial in nature, supposed efforts to prevent whites from being victimized by racial minorities end up entailing nothing more than a new form of old fashioned discrimination.

The Supreme Court has played its part in this form of postracial discrimination by inverting the traditional concepts of

perpetrators and victims in a way that allows the Court ultimately to invert the concepts of discrimination and equality themselves. *Ricci* serves as an example of such postracial discrimination, and other postracial discrimination decisions handed down by the Roberts Court belie any suggestion that *Ricci* was merely an aberration. Moreover, the Roberts Court's postracial discrimination decisions are reminiscent of historical Supreme Court decisions that were issued when the Court was openly hostile to racial minority rights, thereby further calling the legitimacy of those Roberts Court decisions into question.

A. CONCEPTUAL INVERSION

As Justice Ginsburg pointed out in her *Ricci* dissent,¹⁷⁵ when the City of New Haven decided to forego reliance on the racially disparate results of its firefighter promotion exams, it was not acting in a vacuum. Rather, the decision was part of the City's effort to counteract a long history of racial employment discrimination practiced by the New Haven fire department. Historically, whites were the perpetrators of discriminatory hiring and promotion decisions, and racial minorities were the victims.¹⁷⁶ Justice Kennedy's majority opinion in *Ricci* inverted the concepts of perpetrator and victim in a way that treated minorities as if they were the perpetrators and whites as if they were the victims.¹⁷⁷ Justice Alito's concurring opinion was even more emphatic in its depiction of whites as the victims of partisan racial politics in New Haven.¹⁷⁸ The Court's inversion of the distinction between perpetrators and victims has, in turn, prompted a more fundamental inversion in the core concepts of discrimination and equality themselves, so that contemporary racial discrimination has now come to be viewed as equal, while remedial equality has come to be viewed as discriminatory.¹⁷⁹

1. PERPETRATORS AND VICTIMS

In a zero-sum resource allocation context, the roles of perpetrator and victim can be initially assigned and subsequently inverted simply by shifting the analytical baseline that is used to conduct a discrimination analysis. A baseline is the thing that separates the propositions that are actively addressed in formulating an analytical argument from the propositions that are simply assumed to be true without any effort to justify their validity. When analytical attention is focused on the issues that lie above the baseline, tacit assumptions that lie beneath the baseline often slip through unnoticed, and are passively accepted without any analytical justification. Indeed, baseline shifting works best as a persuasive technique when its baseline assumptions are able to do their work in a way that is largely undetected.¹⁸⁰

Justice Kennedy's majority opinion in *Ricci* held that it was unfair to deny the disappointed petitioners the promotions to which they were entitled as a result of their superior performance on the written firefighter exams.¹⁸¹ That holding rested on the tacit baseline assumption that those who perform well on promotion exams are entitled to merit-based promotions. Therefore, the issue presented in Justice Kennedy's opinion was whether a deviation from the merit-based promotions to which the petitioners were entitled was justified in order to advance the independent goal of reducing the racially disparate impact produced by the promotion exams. Stated in this way, the claims of the disappointed petitioners seem both strong and sympathetic, because it

is common to use promotion exams for the purpose of assessing merit. As a result, the baseline assumption—the assumption that those who scored well on their exams were entitled to promotions—went largely unscrutinized. However, if the analytical baseline is shifted down, so that the baseline assumption is highlighted and actively scrutinized, the claim of the disappointed petitioners loses much of its force.

The assumption that the petitioners were entitled to promotions because they had performed well on their written exams is not a valid assumption under Title VII. Title VII does not even require the use of written exams in awarding promotions. What Title VII *does* require is that promotions be awarded in a way that is not racially discriminatory, and disparate impact is an expressly prohibited form of discrimination under Title VII. Accordingly, even if the petitioners did perform well on their written exams, they still had no right to be promoted when their promotions would produce a racially disparate impact. A non-validated promotion exam that produces a racially disparate impact is simply an unlawful employment practice—especially in a case such as *Ricci*, where less-discriminatory, job-related alternatives exist.

The adoption of an analytical baseline necessarily entails a normative judgment. There is no “natural” baseline that can serve as the foundation for legal analysis, because the instrumental nature of baselines means that they can always be contested by specifying some different instrumental objective.¹⁸² Justice Kennedy’s instrumental objective, reflected in the baseline assumption underlying his majority opinion, was to enforce the Title VII requirement of race-neutral fairness to firefighters who performed well on their promotion exams.¹⁸³ Justice Ginsburg’s instrumental objective, reflected in the baseline assumption underlying her dissent, was that Title VII requires an end to the historic practice of disparate-impact discrimination.¹⁸⁴ There is no way to decide between these competing instrumental objectives without asserting a normative preference for one objective over the other. But the normative preference asserted by Justice Kennedy is clear that the enactment of Title VII’s prohibitions on employment discrimination rested on the belief that racial and other minorities were the victims of widespread discriminatory practices being perpetrated against them by white employers and labor unions.¹⁸⁵ The United States has had a long history of pervasive—and often violent—white discrimination against racial minorities, but racial discrimination against the white majority has never been a particular problem—at least not until now. Despite the racial history of the United States, Justice Kennedy chose to invert the Title VII concepts of perpetrators and victims, so that whites would be viewed as the victims in *Ricci*, and racial minorities would be viewed as the perpetrators.¹⁸⁶ There is nothing analytically impermissible about this doctrinal maneuver—the

Legal Realists have taught us that the job of lawyers and judges is to manipulate legal doctrine for instrumental purposes. However, one cannot help but wonder *why* Justice Kennedy and a majority of the Justices on the Supreme Court would view this inversion of the conventional Title VII understanding as normatively desirable. It is likely that their actions in *Ricci* reflect a more fundamental inversion of the concepts of discrimination and equality themselves.

2. DISCRIMINATION AND EQUALITY

The view that minorities have become the perpetrators and whites have become the victims of racial discrimination in the United States also inverts the conventional concepts of discrimination and equality by substituting for each the behavior and attitudes that we previously used to define the other. It used to be that the history of racial discrimination in the United States caused us to view existing distributional inequalities as the products of past and present discrimination, and to view racially redistributive efforts as remedial measures that were necessary to move us toward the goal of nondiscriminatory equality. Now, however, we appear to view the existing racially-correlated distribution of resources as something that actually *defines* equality by honoring the individual differences that exist between us, and we view racially-redistributive efforts as discriminatory rather than remedial. If there is no longer any appreciable level of discrimination against racial minorities, race-conscious efforts to benefit racial minorities cannot be justified as remedial. Instead, they are simply a form of “reverse discrimination,” that is inconsistent with the constitutional and statutory principles of equality to which we claim an enduring commitment. Inverting the concepts of discrimination and equality in this way might make sense if the United States is now a postracial culture, in which current racial equality has finally triumphed over our long history of prior inequality. If the United States has not yet achieved this postracial status, however, the conceptual inversion simply becomes a new form of racial discrimination—one that insists on the preservation of existing inequalities in order to benefit whites.

It is hard to believe that someone could seriously contend that the problem of discrimination against racial minorities is a problem that is now behind us.¹⁸⁷ Whites still have a significant advantage over racial minorities in the allocation of societal resources,¹⁸⁸ and race obviously remains a salient social category that is often used to disadvantage minorities.¹⁸⁹ However, the election of Barack Obama as President of the United States has nevertheless fueled characterization of the contemporary period as a postracial era in which minorities are able to compete successfully against whites on a level playing field.¹⁹⁰ Under this

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view, the real racial problem in the United States is the problem of minorities discriminating against whites.

A pertinent *Comment* appeared in *The New Yorker*, shortly after the 2009 Cambridge police arrest of Harvard Professor Henry Louis Gates in his own home.¹⁹¹ Staff writer Kelefa Sanneh highlighted a number of ways in which minorities have been blamed for racist attitudes toward whites: Obama's former pastor, Reverend Jeremiah Wright, was called racist and anti-white for his sermons; Obama himself was accused of insulting white people when he referred to his grandmother as a "typical white person;" then-Judge Sonia Sotomayor's "wise Latina" remark was referred to as "racist;" and Obama's claim that the Cambridge Police had "acted stupidly" in arresting Professor Gates was characterized as "racial self-aggrandizement," which revealed a "deep-seated hatred for white people" that made Obama himself "a racist."¹⁹² Even discounting for the hyperbole that is often used to score rhetorical points, those accusations do seem to show that many whites have come to feel genuinely aggrieved by current racial politics.

Sanneh then went on to make an important point. He said that the accusations of "reverse racism" that are often used to combat affirmative action in the post-Civil Rights era have been so successful that reverse racism against whites has now come to be viewed as systemic rather than personal. Whites like Frank Ricci do not simply feel that they are occasionally victimized by the isolated deeds of bad actors. They feel as if the whole system is skewed in favor of racial minorities, and is therefore stacked against them.¹⁹³ The irony here is striking. Title VII was rooted in the belief that racial equality could be achieved only by neutralizing the systemic discrimination that existed against racial minorities, but the postracial *Ricci* view is that equality can be attained only by reinstating the institutional practices that used to constitute discrimination. Stated more concretely, under Title VII, a non-validated, multiple-choice exam that had a racially disparate impact used to be viewed as the very definition of systemic discrimination. Now reinstating the results of that exam is necessary to prevent systemic discrimination against whites. Sanneh concluded that aggrieved whites have now commandeered the term "racism". Racial minorities can still talk about isolated issues that affect racial minority interests, but the term "racism" has now acquired a cultural meaning that equates it with mistreatment of the white majority by racial minorities.¹⁹⁴

The view that contemporary culture now entails this new form of systemic minority discrimination against whites, rather than the more traditional forms of white discrimination against minorities, would seem to be legally irrelevant even if true. The Supreme Court has insisted in its constitutional affirmative action decisions that the Equal Protection principle does not prohibit general "societal discrimination." Particularized acts of identifiable discrimination are illegal, but the subtler forms of cultural behavior and attitudes that have systemically caused whites to do better than racial minorities in most social, political and economic categories are not prohibited by the Court's conception of Equal Protection.¹⁹⁵ That Supreme Court holding has always been problematic,¹⁹⁶ but it nevertheless remained the established law for as long as racial minorities were the ones viewed as the victims of such societal discrimination. If the Supreme Court were to retreat from its refusal to recognize the legal legitimacy of societal discrimination because it now viewed whites as the victims, the Supreme Court would be changing the

rules in a racially motivated way. That would, of course, lend credence to the view that we continue to live in a culture that discriminates against racial minorities.

The fact that Justice Kennedy's majority opinion in *Ricci* could be viewed as offering even a credible construction of Title VII shows that the Court's inversion of the traditional discrimination and equality concepts has a receptive audience. However, it is still difficult to take the postracial hypothesis on which that inversion rests seriously. White discrimination against racial minorities remains a serious cultural problem, while minority discrimination against whites seems at best to be merely marginal. The continuing maldistribution of societal resources along racial lines strongly rebuts the validity of any postracial-society claim that one might be inclined to assert. Minorities are disproportionately burdened by high unemployment rates, high levels of poverty and low access to health care. Minority schools remain segregated and they offer educational opportunities that are significantly worse than the opportunities offered in white schools. Minorities are still discriminated against in the job market, in real estate markets, and in consumer transactions. Moreover, when minorities do get jobs they are paid less than whites with equivalent levels of education. The biases that lead to these inequalities are both conscious and unconscious, and they show no signs of abating in the near future.¹⁹⁷ Harvard sociologist William Julius Wilson has stated that we cannot be considered a postracial society as long as so many minorities are disproportionately concentrated at the low end of the socio-economic scale. When economic conditions deteriorate, minorities are always the ones who suffer as the targets of white frustrations.¹⁹⁸

It is true that the President of the United States is now black, but that does not mean that the society that elected him has become postracial. One could choose to characterize Obama's election in different ways. One could characterize it as demonstrating that minorities can now compete on a level playing field, without the need for affirmative action or serious antidiscrimination measures. Alternatively, one could characterize Obama's election as demonstrating only that a mixed-race, multiple Ivy League graduate, with the intellectual and political skills to become President of the Harvard Law Review can successfully navigate contemporary racial culture—thereby providing little evidence of how less-exceptional racial minority group members are likely to fare on a playing field that is far from level. As Professor Darren Hutchinson has noted, the "postracial" claim may simply illustrate the phenomenon of "racial exhaustion." Whites have simply grown tired of having to deal with the discrimination claims asserted by racial minorities.¹⁹⁹ As a result of this fatigue, whites may now have decided to assert retaliatory discrimination claims of their own.

For me, the claim that our culture is now postracial is seriously undermined by the now-famous Henry Louis Gates arrest in 2009. Black Harvard Professor Henry Louis Gates was arrested by white Cambridge Police Sergeant James Crowley after Professor Gates broke into his own home because the front door was stuck. A neighbor who feared that a criminal might be breaking into the house called the police. The events that followed are disputed, but Professor Gates ended up accusing Sergeant Crowley of racial profiling, and Sergeant Crowley ended up arresting Professor Gates. Because Sergeant Crowley knew that Professor Gates lived in the house at the time that the arrest was made, President Obama stated in response to a news conference

question that the police had “acted stupidly”—a comment that he later “recalibrated.” These events attracted an enormous amount of media attention, and things ultimately calmed down after Sergeant Crowley, Professor Gates and President Obama all met for a beer together at the White House.²⁰⁰ I do not know what actually happened. I suspect that all parties probably “overreacted” in some sense, but that is my point. Racial tensions are still so high in even a northeastern university community that what might have been an innocuous non-event became a hot-button racial issue. Sergeant Crowley may well have thought that he was being verbally abused simply for doing his job, and Professor Gates may well have thought that he was being arrested for acting like an uppity nigger. An environment in which racial nerves are still that raw can hardly be viewed as an environment that is postracial.

Perhaps the strongest argument against the claim that we now live in a postracial society—a society where our most pressing discrimination problem is the problem of racial discrimination against the white majority—comes from the Supreme Court itself. The current Supreme Court commonly rules in favor of whites and against racial minorities in contemporary race cases. Moreover, it rules this way even though it has had to strain prior antidiscrimination doctrine to do so. When the Supreme Court goes out of its way to favor white interests over the interests of racial minorities, the culture in which that Court operates can hardly be said to be postracial in any meaningful sense of the term. The Supreme Court favored the interests of whites over the interests of racial minorities in *Ricci*, and it has done so in a host of other race cases as well. When viewed in the context of these collective racial decisions, the Supreme Court emerges as an institution that facilitates discrimination against racial minorities rather than an institution that promotes equality.

B. CONTEXT

The *Ricci* decision did not occur in isolation. It was a 5–4 decision handed down by the conservative voting bloc of the Roberts Court, which in its brief history has already issued a number of decisions that favored the interests of whites over the interests of racial minorities. Some of those decisions were issued the same Term as *Ricci*, and some were issued in prior Terms. But the racial tenor of all those decisions suggests a general hostility to the enforcement of antidiscrimination laws and precedents that were initially adopted to protect the interests of racial minorities from continued oppression by whites. Unfortunately, the racial tenor of those Roberts Court decisions is also reminiscent of decisions issued by the Supreme Court in earlier eras, when the Court was openly antagonistic to the rights of racial minorities. Consistent with the theory of postracial discrimination, what emerges from the Roberts Court decisions is a Supreme Court that views its function to be that of protecting the white majority from discrimination claims asserted by racial minorities.

1. ROBERTS COURT DISCRIMINATION

John Roberts was confirmed as Chief Justice of the United States in 2005.²⁰¹ Since his confirmation, the Roberts Supreme Court has issued decisions that favored the interests of whites over the interests of racial minorities in a number of

cases. In addition to *Ricci*, those cases include decisions that have rejected minority allegations of racial discrimination in the areas of voting rights, racial profiling, English language education, and school resegregation.

a. Voting Rights.

Ricci was probably the most significant race case that the Roberts Court decided during its 2008 Term, but another closely watched case was *Northwest Austin Municipal Utility District Number One v. Holder*.²⁰² In *Northwest Austin*, the Supreme Court addressed the issue of whether Section 5 of the Voting Rights Act of 1965 remained constitutional in light of the increased minority voting participation that has occurred since 1965. Section 5 seeks to prevent future voting discrimination against racial minorities by requiring jurisdictions with a history of prior voting discrimination to obtain federal preclearance from the Department of Justice or from a three-judge Federal District Court in the District of Columbia for any changes that they wish to make in their voting practices or procedures. In 2006, Congress voted overwhelmingly to reauthorize Section 5 for another twenty five years. This was the fourth time the Act had been reauthorized by Congress since 1965. However, the plaintiff utility district argued that Section 5 could not constitutionally be applied to it because there was no evidence that the utility district had ever engaged in voting discrimination. A three-judge district court rejected the claim, but the Supreme Court avoided the constitutional question by holding that the utility district could apply for a Section 5 waiver under the statute’s “bailout” provision.²⁰³

It might at first seem as if *Northwest Austin* was decided in a way that was favorable to the interest of racial minority voters, because the Court declined to hold Section 5 unconstitutional.²⁰⁴ However, the majority opinion of Chief Justice Roberts left little doubt that he believed Section 5 to be unconstitutional in light of the increased minority participation in voting that occurred since the original adoption of the Voting Rights Act in 1965. Discussing two potentially applicable constitutional standards, he concluded that “[t]he Act’s preclearance requirements and its coverage formula raise serious constitutional questions under either test.”²⁰⁵

Northwest Austin and *Ricci* are alike in at least two important respects. First, in both cases the Court practiced postracial discrimination by supplanting an unambiguous statutory effort to protect racial minorities with a dubious judicial effort to protect whites.²⁰⁶ In *Northwest Austin*, Congress decided as recently as 2006 that minority voters still needed the voting rights protections of Section 5. It did so by a vote of 390–33 in the House and 98–0 in the Senate, after extensive legislative hearings, and a voluminous legislative record.²⁰⁷ In *Ricci*, Congress not only adopted Title VII in 1964 to protect racial minorities from employment discrimination at the hands of whites, but it amended Title VII in the Civil Rights Act of 1991 in order to overrule prior Supreme Court decisions that proved excessively protective of white employer interests, and insufficiently protective of racial minority rights.²⁰⁸ Both cases, therefore, illustrate the Court’s propensity to undermine congressional antidiscrimination initiatives when the Court disagrees with the racial policies that they embody.

Second, both *Northwest Austin* and *Ricci* sought to engage in racial policymaking through the technique of regulatory “chill,” rather than through the process of direct adjudication.

Because the race relations issues that underlie the Voting Rights Act and Title VII are pure legislative policy issues, the Supreme Court was understandably reluctant to invalidate the two statutes directly. To have done so would have subjected the Court to a potential political backlash, and to questions about the Court's usurpation of legislative policymaking powers in a way that was inconsistent with separation of powers principles. In both cases, what the Court did instead was to issue *in terrorem* dicta that was designed to advance the Court's postracial policy agenda without forcing the Court to internalize the attendant political costs. Therefore, in *Northwest Austin*, the Court threatened to hold Section 5 unconstitutional in the future, so that Congress might be chilled into adopting "saving" modifications of the statute that better protected the interests of the Court's white constituents.²⁰⁹ Similarly, in *Ricci*, the Court tacitly threatened to hold Title VII unconstitutional in the future, so that Congress might be chilled from once again overruling by statute the Court's postracial administration of Title VII.²¹⁰

It is not clear how successful these dictum threats will prove to be, but they will almost certainly contribute to a political climate in which the representative branches will have to consider rejuvenated reverse discrimination claims that are asserted by whites. The problem is likely to be particularly acute in the voting rights context. If the *Northwest Austin* decision causes the upcoming 2010 census to be followed by a plethora of Voting Rights Act redistricting challenges such as those that arose after the 1990 census,²¹¹ racial minorities are likely to end up suffering new forms of vote dilution. After the 1990 census, the Justice Department was able to negotiate redistricting plans that did not unduly dilute minority voting strength by threatening to withhold Section 5 preclearance under the Voting Rights Act.²¹² Now, however, the Supreme Court decision in *Northwest Austin* may not only encourage whites to file redistricting challenges to efforts aimed at protecting minority voting strength, but it may also reduce the Justice Department's negotiating leverage to resist such challenges. If a covered jurisdiction wishes to engage in redistricting that will increase relative white voting strength, by diluting minority voting strength, that jurisdiction can simply thumb its nose at Justice Department threats to deny preclearance. Defiant jurisdictions will now have every incentive to risk litigation, gambling that the Supreme Court will simply declare Section 5 to be unconstitutional the next time a Section 5 challenge is presented to the Court.

The Roberts Court also decided a second voting rights case during its 2008 Term. *Bartlett v. Strickland*,²¹³ was itself a redistricting case, in which the conservative bloc held 5–4 that the Voting Rights Act prohibitions on minority vote dilution did not apply to so-called "crossover districts." A crossover district is a district in which minorities do not comprise a majority of the voting population, but comprise a large enough percentage to elect a candidate of their choice by forming political coalitions with whites. The issue presented was whether splitting a crossover district in a way that deprived its minority voters of a realistic chance to elect the candidate of their choice constituted vote dilution of minority voting strength that was prohibited by the Voting Rights Act.²¹⁴ In announcing the judgment of the Court, Justice Kennedy's plurality opinion held that splitting the district did not violate the Voting Rights Act, because minorities had to comprise at least 50% of the voting population in a district in order to qualify for vote dilution protection under the Act.²¹⁵

Justice Souter's dissent not only disagreed with the 50% requirement, but argued that reading such a requirement into the Act perversely encouraged racial bloc voting rather than interracial voting coalitions. Justice Souter believed that the majority provided an incentive for states to pack minority voters into fewer majority-minority voting districts. It also punished minorities who were able to form voting coalitions with whites, by denying them statutory protections from vote dilution.²¹⁶ Justice Souter stressed that minority vote dilution could be accomplished not merely by minority vote dispersion, but also by the very minority vote packing that the Court's holding encouraged.²¹⁷

Although the *Bartlett* decision is in many respects technical, the ultimate effect of the decision is to increase white voting strength by decreasing minority voting strength. By denying statutory vote dilution protections to crossover districts, minorities will have less influence in the electoral process than they would have had if crossover districts were protected, because minorities will be able to control the electoral outcome in fewer voting districts. Once again, Justice Kennedy's opinion argued that granting vote dilution protections to racial minorities that white voters did not have would discriminate against whites.²¹⁸ As in *Ricci*, he indicated that reading the statute to compel such racial considerations might make the statute unconstitutional.²¹⁹ Also reminiscent of *Ricci*, he viewed the society as postracial, because the existence of crossover districts now showed that the Voting Rights Act had "by definition" been successful in reducing racial discrimination in voting.²²⁰ But as in *Ricci* as well, Justice Kennedy's postracial opinion seems to ignore the fact that it is racial minorities rather than whites who suffer the types of historical discrimination that the pertinent statutes were intended to remedy.²²¹

b. Racial Profiling.

The Roberts Court conservative bloc issued another 5–4 decision during its 2008 Term in the racial profiling case of *Ashcroft v. Iqbal*.²²² In *Iqbal*, Justice Kennedy's majority opinion held that a Pakistani Muslim immigrant who was detained after the September 11, 2001 terrorist attacks did not adequately state a cause of action when he claimed that high level Justice Department officials, including the Attorney General and the Director of the FBI, singled him out for "harsh confinement" because of his religion and ethnicity.²²³ *Iqbal*'s complaint alleged that the defendants "each knew of, condoned, and willfully and maliciously agreed to subject" *Iqbal* to harsh treatment, and that they did so "as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest." The complaint further alleged that the Attorney General was the "principal architect" of the policy, and the FBI Director was "instrumental in [its] adoption, promulgation, and implementation."²²⁴ Although the lower courts upheld the adequacy of the complaint,²²⁵ Justice Kennedy's opinion stated that the allegations in the complaint were too conclusory and insufficiently plausible. They were too conclusory because they did not contain specific factual allegations, but rather were nothing more than "a 'formulaic recitation of the elements' of a constitutional discrimination claim."²²⁶ They were insufficiently plausible because there were legitimate, nondiscriminatory reasons why law enforcement officials would have focused on Arab Muslims following a terrorist attack by Arab Muslim hijackers.²²⁷ Moreover, because the high level Justice Department officials were not subject to vicarious

liability, any plausible misconduct by lower level officials would not prevent dismissal of Iqbal's complaint against the high level officials.²²⁸

The *Iqbal* Court's dissatisfaction with "conclusory" pleadings, and its insistence on a stringent "plausibility" standard, seem inconsistent with the idea of notice pleading that was incorporated into the Federal Rules of Civil Procedure.²²⁹ The Court, however, also held "implausible" an Arab Muslim's allegation that discriminatory racial profiling caused him to be targeted for post-9-11 harsh confinement. To me, it is the Court's holding that seems "implausible." Given the nation's current anxieties and fears about Arab and Muslim terrorism, and the alleged involvement of high level federal officials in formulating United States torture policy,²³⁰ racial profiling seems more likely than not. As in *Ricci*, however, Justice Kennedy once again gave the benefit of the doubt to white claims of legitimacy rather than to racial minority claims of discrimination. As in *Ricci*, Justice Kennedy seemed intent on precluding any opportunity for an inquiry into the actual facts—entering summary judgment in *Ricci* and dismissing the complaint in *Iqbal*. And as in *Ricci*, Justice Kennedy had to strain the meaning of existing law in order to effectuate his inversion of the perpetrators and the victims.

c. English Language Education.

Yet another Roberts Court 2008 Term decision that disadvantaged racial minorities was *Horne v. Flores*.²³¹ In an opinion by Justice Alito, the conservative bloc voted 5–4 to reverse the District Court and Court of Appeals holdings that Arizona was violating the Equal Educational Opportunities Act of 1974 by failing to provide adequate educational opportunities for students with limited English language proficiency. The Equal Educational Opportunities Act is an antidiscrimination statute that prohibits the denial of "equal educational opportunity on account of race, color, sex or national origin." It further prohibits "the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs."²³² In 1992, the plaintiffs filed a class action challenging the State's alleged failure to provide adequate educational opportunities for minority at-risk and limited English proficient children. Beginning in 2000, the lower courts began issuing a series of orders that required the adoption of minimal educational standards and increased funding to comply with the Act. The State's repeated failures to comply ultimately led to contempt citations. The lower courts also denied the State's Rule 60(b)(5) motion for relief from the compliance order, which the State argued had become inequitable in light of changed circumstances.²³³

Justice Alito's opinion reversed, stating that the lower courts should have been more flexible in ruling on the Rule 60(b)(5) motion, because such motions perform a particularly important function in "institutional reform litigation" where "sensitive federalism concerns" are involved.²³⁴ Here the lower courts had been insufficiently flexible, because they focused too much attention on whether the prior funding orders had been complied with, and not enough attention on the question of whether changed circumstances brought the State into compliance with the Act in a way that made enforcement of the original order inequitable.²³⁵ Justice Alito therefore stated that a remand was necessary to determine if changed circumstances were provided by factors including new educational strategies adopted

by the State, and congressional enactment of the No Child Left Behind statute.²³⁶ Justice Breyer's dissent argued that the lower courts adequately considered the factors relevant to a changed-circumstances inquiry, and that adequate funding was essential to compliance with the Act.²³⁷ Justice Breyer concluded that the Court's decision would hinder congressional efforts to ensure that Spanish-speaking students will learn the English skills necessary to participate in a society where English is the predominant language.²³⁸

Commentators have viewed *Horne* as establishing a new Rule 60(B)(5) standard for relief from court orders in institutional litigation that will undermine finality by permitting litigants to reopen remedial injunctions that have been issued to control their conduct.²³⁹ For present purposes, however, Justice Breyer's concern that the decision will frustrate congressional efforts to provide equal educational opportunities to Spanish-speaking minorities is particularly pertinent. Among the allegations made by the plaintiffs was the claim that Arizona's school finance scheme "is just sufficient to let less distressed, predominantly Anglo districts impart State-mandated essential skills to their mainstream student bodies" without providing sufficient funds for minority students to acquire the same skills.²⁴⁰ Although this claim was first asserted in 1992, by 2009 the plaintiffs had still not received the relief they requested. Despite lower court decisions and contempt citations ordering such relief, the Roberts Court simply remanded for yet another round of proceeding. Moreover, it did so in an opinion whose tone suggested that the Court disfavored granting any relief. Consistent with its postracial orientation, the Roberts Court again appears to believe that there is no longer any real discrimination problem to remedy, and that racial minorities are simply asking for more than they are entitled to receive. And again, it adopted this position despite the existence of a federal statute that seems designed to remedy the precise problem of which the plaintiffs complained.

d. Resegregation.

In its 2006 Term, the conservative bloc of the Roberts Court issued a 5–4 decision in the school *Resegregation Cases*.²⁴¹ The majority opinion written by Chief Justice Roberts invalidated voluntary race-conscious efforts by the Seattle and Louisville school boards to prevent the resegregation of public schools that was occurring as a result of residential resegregation.²⁴² In previous years, both school districts eventually achieved integration after making strenuous efforts to comply with the Supreme Court decisions in *Brown*.²⁴³ When population shifts began to produce resegregation, the school boards became convinced that only race conscious student assignment could preserve the integrated nature of the schools. Accordingly both school boards adopted narrow integration plans, affecting a small number of students, that considered race when a student's desired school assignment would force a school's racial makeup to fall outside of a predetermined integration range.²⁴⁴ White parents who did not receive their desired school assignments challenged the plans.²⁴⁵ The Court then reversed the lower courts and held the plans to be unconstitutional because they were not narrowly tailored to advance the interest of the schools in promoting student diversity.²⁴⁶

Although *Brown* was issued to desegregate public schools, Chief Justice Roberts read the *Brown* decision itself as invalidating the integration plans that were adopted to prevent

resegregation.²⁴⁷ He justified this conclusion by asserting that a school board was prohibited from considering race regardless of its benign motive.²⁴⁸ He concluded his opinion by stating that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”²⁴⁹ Justice Breyer’s dissent argued that the Court’s decision was inconsistent with *Brown*, and with a range of other Supreme Court precedents. He stressed that because other race neutral ways of addressing the problem proved inadequate, the Court’s decision left school districts with no effective way to prevent resegregation.²⁵⁰

The Court’s decision in the *Resegregation Cases* seems to epitomize the conceptual inversion of discrimination and equality that animates the Court’s postracial view of contemporary culture.²⁵¹ When the decision in the *Resegregation Cases* is juxtaposed to the 5–4 conservative bloc decision in 2009, denying a black defendant post-conviction access to evidence for DNA testing,²⁵² it appears that white parents have a stronger constitutional right to send their children to segregated schools than post-conviction criminal defendants have to test the evidence offered against them in a way that could establish their innocence. It takes quite a stretch of the legal imagination to conclude that *Brown v. Board of Education* requires the resegregation of public schools. Yet the aphorism with which Chief Justice Roberts ends his *Resegregation* opinion attests to his possession of such an imagination. The Chief Justice, and the other members of the Supreme Court conservative voting bloc on race, appear to believe that the nation’s racial problems can be solved by a mere commitment to prospective race neutrality. The Roberts Court’s recent race decisions turn a blind eye to the continuing effects of prior discrimination, and to the structural forces that continue to perpetuate subtle forms of institutional discrimination. In cases ranging from firefighter promotions to school resegregation, the Court seems to care very little about the interests of racial minorities—and very much about the interests of the white majority. Inequalities suffered by racial minorities simply do not seem to count when the Court submits to the lure of postracial discrimination. Unfortunately, this aligns the Roberts Court with prior Supreme Courts that were more transparently committed to the practice of racial minority oppression.

2. HISTORICAL DISCRIMINATION

The postracial discriminatory decisions of the Roberts Court are reminiscent of the overt discriminatory decisions issued by prior Supreme Courts. There is now a fairly standard litany of infamous decisions in which historical Supreme Courts have openly sacrificed the interests of racial minorities to advance the interests of white slave holders, segregationists, and other white supremacists. Traces of those historical decisions can also be found in more recent contemporary cases, including those that have imposed constitutional limits on school desegregation, racial redistricting, and racial affirmative action. The Roberts Court’s postracial discrimination cases can be easily aligned with those prior decisions, in terms of both tone and outcome. Accordingly, one cannot help but wonder why the Roberts Court has not

felt a need to distance itself from those historical and contemporary decisions, rather than risk being aligned with them. I fear that the reason may be that the conservative bloc Justices on the Roberts Court actually favor such an alignment.

The historical Supreme Court was no friend to racial minorities. In the 1823 case of *Johnson v. McIntosh*,²⁵³ the Supreme Court upheld the seizure of indigenous Indian lands by the United States. In the 1857 case of *Dred Scott v. Sanford*,²⁵⁴ the Supreme Court held unconstitutional the Missouri Compromise Act of 1820, which Congress enacted in an effort to limit the spread of slavery in new United States territories. The Court not only held that the statute interfered with the property rights of white slave owners, but it also held that blacks could not be citizens within the meaning of the United States Constitution.²⁵⁵ The Fourteenth Amendment overruled *Dred Scott*²⁵⁶ after the Civil War, when other Reconstruction constitutional amendments and implementing legislation were also enacted to promote equal rights for former black slaves. Nevertheless, the Supreme Court began limiting the remedial scope of the amendments, and even invalidated some of their implementing legislation.²⁵⁷ In the 1896

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case of *Plessy v. Ferguson*,²⁵⁸ the Supreme Court upheld the constitutionality of Jim Crow official segregation in public facilities. Despite some formal minority victories, the Court commonly capitulated to Southern white supremacist attitudes. It acquiesced to Southern evasion efforts to deny blacks the right to vote, to replace slavery with peonage, to preserve segregated transportation, and to preserve housing segregation.²⁵⁹ The Court also often capitulated to Southern racism in the criminal justice system by permitting racial segregation in the jury box and on the witness stand. It sometimes allowed

apparently innocent black defendants to be imprisoned or even executed, rather than interfere with the procedural sovereignty of Southern state courts.²⁶⁰

In the mid-Twentieth Century, the Supreme Court’s racial performance was little better. In the 1944 case of *Korematsu v. United States*,²⁶¹ the Court upheld the constitutionality of a World War II order excluding Japanese-American citizens from their own homes on the West Coast, which led to the internment of Japanese-Americans in detention centers. After the official segregation doctrine of *Plessy* was invalidated by the 1954 *Brown* school desegregation case,²⁶² the Court still refused to order immediate desegregation. Instead, *Brown II* required desegregation “with all deliberate speed,” which permitted *Brown* to be evaded by massive Southern resistance for nearly a decade.²⁶³ Then, when the school desegregation effort moved out of the South, the Court articulated a distinction between de facto and de jure discrimination—a distinction that has permitted most schools in the United States to remain de facto segregated even today.²⁶⁴ The year after *Brown* was decided, the Supreme Court also declined to invalidate a Virginia miscegenation statute in *Naim v. Naim*,²⁶⁵ even though *Brown* almost certainly rendered the statute unconstitutional. More recently, *Brown* has been read as establishing a colorblind race-neutrality requirement that the Court now uses to invalidate race-conscious affirmative action and redistricting programs.²⁶⁶

The tone and outcomes of the historical Court's decisions sometimes made the Court's hostility to racial minority interests unmistakable. In frequently quoted language from his opinion in *Dred Scott*, Chief Justice Taney described the framers' view of black slaves. Not only could blacks not be citizens, but

they were at the time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.²⁶⁷

Chief Justice Taney went on to say that blacks "had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect."²⁶⁸ Hopefully, that is no longer a widely shared view of racial minorities, and it is certainly not a view that is often expressed in polite company. Nevertheless, the tone of Roberts Court race cases sometimes reflects a disregard of racial minority interests that strikes me as similarly callous.

Justice Kennedy's opinion in *Ricci* displays an understandably sincere concern for the interests of white firefighters who scored well on their promotion exams. However, it displays a near total lack of concern for the interests of racial minorities, who daily suffer the relentless disparate-impact harms that Title VII was adopted and amended to prevent.²⁶⁹ Moreover, by adopting an unrealistically high standard for the avoidance of disparate-impact injuries, Justice Kennedy's opinion seems to place any meaningful remedy for such harms beyond the practical reach of Title VII, and perhaps beyond the reach of the Constitution as well.²⁷⁰ The position of the disappointed New Haven firefighters seems to be that abandoning a resource allocation criterion that favors whites constitutes racial discrimination against the white majority, and that seems to be the way the Roberts Court views thin Justice Alito's refusal to uphold equal educational funding in the *Horne* English Language Education case also seems unnecessarily to disregard the interests of racial minority students. The seventeen years that elapsed between the time the plaintiffs filed their class action and the time the Supreme Court remanded without a remedy for yet additional proceedings, has a disquieting similarity to the long period of time that elapsed after *Brown*, when the Supreme Court first acquiesced in Southern evasion of the *Brown* desegregation mandate but ultimately refused to desegregate Northern and Western schools.²⁷¹ *Horne* has a disquieting similarity to the Roberts Court's more recent refusal to permit voluntary efforts to maintain hard-won integration in the *Resegregation Cases*.²⁷²

The dictum suggestion of Chief Justice Roberts in *Northwest Austin*, that Section 5 of the Voting Rights Act might be unconstitutional despite its recent overwhelming reauthorization by Congress, suggests a similar callousness to the interests of racial minorities.²⁷³ By its terms, the Voting Rights Act applies only to jurisdictions that have a history of minority voter disenfranchisement. And by its terms the Act permits those jurisdictions to make any changes they desire to their voting practices and procedures, provided they can first demonstrate that they are

not perpetuating the sorts of past discrimination that caused them to become covered jurisdictions.²⁷⁴ Rather than acquiesce in the need for suspect jurisdictions to make that showing, however, Chief Justice Roberts preferred to subject racial minorities to the danger of continued voter discrimination. Moreover, he did so in a political climate involving recent presidential elections that were rife with allegations of politically-partisan, minority voter disenfranchisement.²⁷⁵

The aphorism with which Chief Justice Roberts chose to end his opinion in the *Resegregation Cases*—"[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race"²⁷⁶—conveys what is perhaps the most disturbing tone of all of the Roberts Court's post racial discrimination cases. Chief Justice Roberts appears to suggest that the problem of racial discrimination in the United States—a problem that has plagued the nation for hundreds of years, since before the nation's inception—is really not such a difficult problem after all. All we have to do to solve the pesky problem of racial discrimination is ignore the continuing legacy of past discrimination, and prospectively behave in a colorblind, race neutral manner. Imagine how insulting it must be for racial minorities to be told that their problem can be solved in such a simple-minded manner.

There remains an enduring sense of white entitlement, highlighted by Cheryl Harris in *Whiteness As Property*,²⁷⁷ pursuant to which whites have traditionally thought it *natural* to exploit racial minorities in order to advance white interests. Hillary Jordan's novel *Mudbound*²⁷⁸ illustrates this nicely. In the novel, post-slavery Southern white planters—who commonly cheated and abused their black workers—sat around vilifying the "niggers" for moving North and leaving the planters with no one to harvest their crops, other than workers who would demand market rates for their labor. The novel was set in the post-World War II era, but I fear that the attitude of entitlement that it captures is both less fictitious and less dated than one would hope.

I doubt that the conservative bloc members of the Roberts Court share the racial sentiments expressed by Chief Justice Taney in *Dred Scott*.²⁷⁹ Still, there is an aspect of Roberts Court postracial discrimination that *Dred Scott* renders hauntingly familiar. *Dred Scott* entailed the Supreme Court's invalidation of a congressional effort to solve a serious racial problem. As the subsequent Civil War indicates, the Court's invalidation of that congressional effort did not work out well. During Reconstruction, the Supreme Court also engaged in efforts to limit or invalidate congressional efforts to solve our continuing racial problems. Again, the Supreme Court often chose to limit or invalidate those efforts.²⁸⁰ Unfortunately, Roberts Court efforts to treat racial minorities as if they are no longer victims of discrimination, in order to protect the interests of whites instead, share the historical Court's propensity to marginalize or overrule congressional policies that have been adopted to help remedy racial discrimination. The Roberts Court Justices certainly understand this facet of Supreme Court history, but the conservative bloc Justices have chosen to align themselves with those historical practices nevertheless. Separation of powers considerations aside, it is simply not clear to me why the Roberts Court thinks it can do a better job of formulating race relations policy than the politically accountable, representative branches of government, or why the Roberts Court would want to align itself with the darker strands of Supreme Court racial history. I fear that the conservative bloc Justices on the Roberts Supreme Court

may actually consider themselves to be proud heirs of the racial attitudes that they seem to have inherited from their predecessors.

CONCLUSION

The view that the Roberts Court seems to have of racial minorities is disheartening. The *Ricci* firefighters decision suggests that the Court's conservative bloc majority favors the interests of whites over the interests of racial minorities. Moreover, the intensity of that favoritism is strong enough to prompt the Court to circumvent statutory protections that Congress enacted precisely to prevent such racial favoritism. Because other Roberts Court race decisions exhibit a similar favoritism, the Court's preference for whites seems intentional and persistent, rather

than incidental or sporadic. The tone and outcome of the Court's decisions are reminiscent of earlier Supreme Court decisions that were openly hostile to racial minority rights. This suggests that contemporary racial attitudes may be more firmly rooted in the past than we would like to admit. The Roberts Court's race decisions seem premised on the view that we now live in a post-racial culture, where discrimination against racial minorities has largely ceased to exist, and our most serious racial problem is the problem of minorities discriminating against whites. The election of Barack Obama notwithstanding, the systemic disadvantages that minorities continue to suffer relative to whites makes the assertion of that view seem disingenuous. It is as if the Supreme Court were simply looking for a novel justification to continue its time-honored practice of sacrificing racial minority rights for the benefit of whites.

ENDNOTES

* Professor of Law, Georgetown University Law Center. I would like to thank James Forman, Jody Franklin, Steven Goldberg, Patricia King, Mike Seidman, and David Vladeck for their help in developing the ideas expressed in this article. Research for this article was supported by a grant from the Georgetown University Law Center.

¹ See, e.g., Peter Baker, *Court Choice Pushes Issue of "Identity Politics" Back to Forefront*, N.Y. TIMES, May 31, 2009, at A20 (discussing claim that Obama election "was supposed to usher in a new post-racial age"); Krissah Thompson, *100 Years Old, NAACP Debates Its Current Role*, WASH. POST, July 12, 2009, at A3 (quoting historian David Garrow's suggestion that the election of President Obama marked the end of the traditional civil rights era by signifying "the complete inclusion of black people at all levels of politics."); *id.* (reporting Professor Darren Hutchinson's suggestion that we are now in a period of "racial exhaustion," when "[a] lot of people are tired of talking about race," and "[t]hey have to find a new language for dealing with these issues."); Jeffrey Toobin, *Comment: Answers To Questions*, NEW YORKER, July 27, 2009, at 19 (noting that Obama's election has been invoked to argue that we have now achieved a level playing field that precludes the need for remedial racial measures).

² See Baker, *supra* note 1 (suggesting that nomination of then-Judge Sotomayor for the Supreme Court shows that we have not yet reached a post-racial age). See, e.g., Sheryl Gay Stolberg, *Obama Tells Fellow Blacks: 'No Excuses' for Any Failure*, N.Y. TIMES, July 16, 2009, at A14 (President Obama addressing NAACP 100 anniversary convention, stating that racial discrimination continues to exist despite civil rights gains); Krissah Thompson & Cheryl W. Thompson, *Obama Speaks of Blacks' Struggle: Disparities Remain, He Says to NAACP*, WASH. POST, July 17, 2009, at A1. See also Krissah Thompson, *Obama Addresses Race and Louis Gates Incident*, WASH. POST, July 23, 2009, at A4 (President Obama stating that racially charged arrest of Henry Louis Gates illustrates that racial profiling still exists); Krissah Thompson & Cheryl W. Thompson, *After Arrest, Cambridge Reflects on Racial Rift: Forum To Explore Deep-Seated Issues*, WASH. POST, July 26, 2009, at A1 (Gates arrest illustrates continued existence of deep-seated racial tensions); Toobin, *supra* note 1 (rejecting claim that Obama's election has leveled the playing field in a way that now precludes need for remedial racial measures); Henry Louis Gates, *A Conversation with William Julius Wilson on the Election of Barack Obama*, 6 DU BOIS REVIEW 15, 15-23 (2009) (disputing post-racial claim).

³ 129 S. Ct. 2658 (2009).

⁴ See *id.* at 2673-77, 2681 (depicting white firefighters as victims and minority firefighters as perpetrators of discrimination).

⁵ See *id.* at 2658.

⁶ See *id.* at 2664-72 (describing the facts and procedural history of case).

⁷ See *id.* at 2664-65, 2672, 2673-77 (finding conflict between disparate-treatment and disparate-impact provisions of Title VII, and giving primacy to disparate-treatment provision).

⁸ See *id.* at 2681 (Scalia, J., concurring).

⁹ See *id.* at 2683-84 (Alito, J., concurring).

¹⁰ See *id.* at 2689, 2699, 2703-07 (Ginsburg, J., dissenting).

¹¹ See Girardeau A. Spann, *The Conscience of a Court*, 63 MIAMI L. REV. 431, 437-38 (2009) (discussing the conservative Supreme Court voting bloc on the issue of race).

¹² See *id.*

¹³ See *Ricci*, 129 S. Ct. at 2664-65.

¹⁴ See *id.* at 2665-73.

¹⁵ See *id.* at 2665-66.

¹⁶ See *id.* at 2666.

¹⁷ See *id.*

¹⁸ See *id.* at 2667.

¹⁹ See *id.* at 2667-68.

²⁰ See *id.* at 2668.

²¹ See *id.* at 2668-69.

²² See *id.* at 2669.

²³ See *id.* at 2670.

²⁴ See *id.* at 2669-71.

²⁵ See *id.* at 2671-72.

²⁶ See *id.* at 2673-74.

²⁷ See *id.* at 2672, 2681.

²⁸ 401 U.S. 424, 431-32 (1971).

²⁹ 422 U.S. 405, 425 (1975).

³⁰ See *Ricci*, 129 S. Ct. at 2672-73.

³¹ See *id.* at 2673-74.

³² See *id.* at 2674.

³³ See *id.*

³⁴ See *id.* at 2674-75.

³⁵ See *id.* at 2675.

³⁶ See *id.* (citing *Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 500 (1989) (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (plurality opinion of Powell, J.)).

³⁷ See *id.* at 2675-76.

³⁸ See *id.* at 2676.

³⁹ See *id.*

⁴⁰ See *id.*

⁴¹ See *id.* at 2677.

⁴² See *id.*

⁴³ See *id.*

⁴⁴ See *id.* at 2677-78.

⁴⁵ See *id.*

⁴⁶ See *id.* at 2678 (quoting *Scott v. Harris*, 550 U.S. 372, 380 (2007)).

⁴⁷ See *id.* at 2678-79.

⁴⁸ See *id.*

⁴⁹ See *id.* at 2679.

⁵⁰ See *id.* at 2679-80.

⁵¹ See *id.* at 2680-81.

⁵² See *id.* at 2681.

⁵³ See *id.*

⁵⁴ See *id.* at 2681-82 (Scalia, J., concurring).

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⁵⁵ See *id.* at 2682 (citing *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954), and *Buchanan v. Warley*, 245 U.S. 60, 78-82 (1917)).

⁵⁶ See *id.* (citing *Ricci*, 129 S. Ct. at 2673, and *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)).

⁵⁷ See *id.*

⁵⁸ See *id.* (quoting *Miller v. Johnson*, 515 U.S. 900, 911 (1995)).

⁵⁹ See *id.* (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)).

⁶⁰ See *id.* (citing *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 992 (1998) (plurality opinion), and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973)).

⁶¹ See *id.* at 2682-83 (Alito, J., concurring).

⁶² See *id.* at 2683.

⁶³ See *id.*

⁶⁴ See *id.*

⁶⁵ See *id.* (quoting *Ricci*, 129 S. Ct. at 2677).

⁶⁶ See *id.*

⁶⁷ See *id.* at 2683-84.

⁶⁸ See *id.* at 2684.

⁶⁹ See *id.* at 2685-87.

⁷⁰ See *id.* at 2688.

⁷¹ See *id.* at 2688-89.

⁷² See *id.* at 2689.

⁷³ See Spann, *supra* note 11, at 441-42 (discussing the liberal Supreme Court voting bloc on the issue of race).

⁷⁴ See *id.*

⁷⁵ See *Ricci*, 129 S. Ct. at 2689-90 (Ginsburg, J., dissenting).

⁷⁶ See *id.* at 2690-91.

⁷⁷ See *id.* at 2691-92.

⁷⁸ See *id.* at 2692-93.

⁷⁹ See *id.* at 2693-95.

⁸⁰ See *id.* at 2695-96.

⁸¹ See *id.* at 2696-99 (citing, inter alia, *Griggs v. Duke Power*, 401 U.S. 424, 428-32 (1971); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975); and *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659-60 (1989)).

⁸² See *id.* at 2699.

⁸³ See *id.* at 2699-2700 (citing *Johnson v. Transp. Agency of Santa Clara County*, 480 U.S. 616, 638, 642 (1987)).

⁸⁴ See *id.* at 2700 (citing *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979) and *Washington v. Davis*, 426 U.S. 229, 239 (1976)).

⁸⁵ See *id.* at 2700 (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 238 (1995) (quoting *City of Richmond v. J.A. Croson Co.*, 448 U.S. 469, 507 (1989))).

⁸⁶ See *id.* at 2700-01 (quoting Richard Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 585 (2003)).

⁸⁷ See *id.* at 2701 (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *Croson*, 448 U.S. at 499-500; *Johnson*, 480 U.S. at 637; and *Firefighters v. Cleveland*, 478 U.S. 501, 516 (1986)).

⁸⁸ See *id.* at 2701-02. This argument is strengthened by Justice Kennedy’s issuance of an “advisory opinion” that shows the stringency of his “strong basis in evidence” standard; see also *infra* text accompanying notes 165-167.

⁸⁹ See *Ricci*, 129 S. Ct. at 2702-03.

⁹⁰ See *id.* at 2703-04.

⁹¹ See *id.* at 2704-06.

⁹² See *id.* at 2706-07.

⁹³ See *id.* at 2707-09.

⁹⁴ See *id.* at 2709-10 (citing *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009)).

⁹⁵ See *id.* (citing *Griggs v. Duke Power*, 401 U.S. 424, 431 (1971)).

⁹⁶ See *id.* at 2672, 2673-74.

⁹⁷ See *id.* at 2699 (Ginsburg, J., dissenting).

⁹⁸ See *id.* at 2695-96, 2699-2700 (discussing pre-existing Title VII law). The issue attracted national attention during the July 2009 Senate confirmation hearings for Justice Sotomayor, when opponents attempted to paint then-Judge Sotomayor as an unsympathetic judicial activist because of her membership on the three-judge Second Circuit panel that summarily affirmed the District Court decision in *Ricci*. See, e.g., Neil A. Lewis, *Senate Likely to Vote on Sotomayor in August*, N.Y. TIMES, July 16, 2009, at A11 (discussing opposition to panel ruling in firefighter case); Amy Goldstein & Paul Kane, *Democrats Rally for*

Sotomayor; Backers Dismiss GOP Resistance, WASH. POST, Aug. 6, 2009, at A0; Joseph Williams, *Committee Endorses Sotomayor Bid; Latino Groups Angry at GOP for Opposition*, BOSTON GLOBE, July 29, 2009, at 6. The panel’s actions can easily be viewed as the routine application of existing law—albeit existing law that the *Ricci* Supreme Court subsequently decided to change in Justice Kennedy’s majority opinion.

⁹⁹ See GIRARDEAU A. SPANN, *THE LAW OF AFFIRMATIVE ACTION: TWENTY-FIVE YEARS OF SUPREME COURT DECISIONS ON RACE AND REMEDIES* 31-43 (2000) (discussing Title VII cases in which the Supreme Court sought to find the proper balance between helping women and minorities, and burdening white males).

¹⁰⁰ See *Ricci*, 129 S. Ct. at 2675-76.

¹⁰¹ Cf. *id.* at 2681 (framing his opinion as resolving “competing expectations under the disparate-treatment and disparate-impact provisions” of Title VII).

¹⁰² See *id.* at 2675-76.

¹⁰³ See *id.* at 2696-99 (Ginsburg, J., dissenting); see also GIRARDEAU A. SPANN, *RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA*, 173-75 (1993) (discussing the Civil Rights Act of 1991 and some of the Supreme Court cases that lead to its enactment).

¹⁰⁴ 60 U.S. (19 How.) 393, 451-52 (1857).

¹⁰⁵ U.S. CONST. amend XIV.

¹⁰⁶ See GEOFFREY STONE ET AL., *CONSTITUTIONAL LAW* 451-52 (6th ed. 2009) (discussing post-Civil War shift in federalism balance).

¹⁰⁷ 190 U.S. 3, 8-19 (1883).

¹⁰⁸ See U.S. CONST. amend XIV, § 5; see also STONE ET AL., *supra* note 106, at 453-56 (discussing Supreme Court dilution and invalidation of Reconstruction Amendments and legislation).

¹⁰⁹ See *Ricci v. DeStefano*, 129 S. Ct. 2658, 2699 (2009) (Ginsburg, J., dissenting).

¹¹⁰ See *id.* at 2701-02. This argument is strengthened by Justice Kennedy’s issuance of an “advisory opinion” that shows the stringency of his “strong basis in evidence” standard; see *infra* text accompanying notes 165-167.

¹¹¹ See *Ricci*, 129 S. Ct. at 2703-04, 2706-07 (Ginsburg, J., dissenting).

¹¹² See *id.* at 2704-06.

¹¹³ See *id.* at 2703-07.

¹¹⁴ See *id.* at 2705.

¹¹⁵ See *id.* at 2676.

¹¹⁶ See *id.* at 2682 (Scalia, J., concurring).

¹¹⁷ See *id.*

¹¹⁸ See *id.*

¹¹⁹ See *id.* at 2687-88 (Alito, J., concurring).

¹²⁰ See *id.* at 2688.

¹²¹ See *id.* at 2687-88.

¹²² See *id.* at 2684-88.

¹²³ See *id.* at 2684.

¹²⁴ Cf. *id.* at 2690-91 (Ginsburg, J., dissenting).

¹²⁵ See *supra* text accompanying notes 11-12 (discussing Justice Alito’s membership in the Supreme Court conservative voting bloc on race).

¹²⁶ See *Ricci*, 129 S. Ct. at 2665 (discussing “rule of three”); see also *Ricci v. DeStefano*, 554 F. Supp.2d 142, 145 (2006) (discussing “rule of three”). See *id.* at 160-61 (considering the issue of standing and ruling that the petitioners possessed standing to challenge the City’s failure to certify the exam results).

¹²⁷ See *Ricci*, 129 S. Ct. at 2666 (discussing the number of promotion vacancies); see also *id.* at 2664 (noting that the suit was filed by “[c]ertain white and Hispanic firefighters who likely would have been promoted based on their good test performance”) (emphasis added).

¹²⁸ Although nineteen candidates would have been considered for the fifteen available promotions under the rule of three, only eighteen of those nineteen candidates chose to sue. One of the disappointed Latino candidates was therefore not a petitioner in the case. See *Ricci*, 129 S. Ct. at 2666, 2671 (discussing the number of candidates and number of petitioners).

¹²⁹ See *Massachusetts v. EPA*, 549 U.S. 497, 517-18 (2007); see also *id.* at 536 (Roberts, C.J., dissenting); *Ne. Fla. Chapter of the Associated Gen. Contractors of America v. City of Jacksonville*, 508 U.S. 656, 663-64 (1993); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-62 (1992); *Allen v. Wright*, 468 U.S. 737, 752-53 (1984); *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 37-39 (1976).

¹³⁰ See *Defenders of Wildlife*, 504 U.S. at 568-71.

¹³¹ See *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 882-89 (1990).

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¹³² See *Simon*, 426 U.S. at 40-46.

¹³³ See *EPA*, 549 U.S. at 517-18, 525-26 (finding standing despite redressability problems); cf. *id.* at 536; 540-49 (Roberts, C.J., dissenting) (arguing that Massachusetts lacked standing because of redressability problems).

¹³⁴ See Girardeau A Spann, *Color-Coded Standing*, 80 CORNELL L. REV. 1422, 1426 n.1 (1995) (quoting comments concerning disarray of standing doctrine).

¹³⁵ This argument is developed more fully in *id.*

¹³⁶ 468 U.S. 737, 756-61 (1984); see also Spann, *supra* note 134, at 1456 (discussing *Allen v. Wright*).

¹³⁷ 422 U.S. 490, 502-08 (1975); see also Spann, *supra* note 134, at 1455-56 (discussing *Warth v. Seldin*).

¹³⁸ See Spann, *supra* note 134, at 1457-58 (discussing *Los Angeles v. Lyons*, 431 U.S. 95, 97-104 (1983); *Rizzo v. Goode*, 423 U.S. 362, 366-73 (1976); *O'Shea v. Littleton*, 414 U.S. 488, 490-93 (1974); *Spomer v. Littleton*, 414 U.S. 514, 519-23 (1974)).

¹³⁹ 508 U.S. 656, 663-64 (1993); see also Spann, *supra* note 134, at 1426-27; 1446-52 (discussing *Northeastern Florida*).

¹⁴⁰ See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 210-12 (1995) (granting standing to white plaintiff).

¹⁴¹ See, e.g., *Miller v. Johnson*, 515 U.S. 900, 909 (1995) (granting standing to whites who challenged redistricting of voter district in which they resided, where challenged redistricting increased minority voting strength); cf. *Shaw v. Reno*, 509 U.S. 630 (1993) (permitting white challenge to redistricting plan that increased minority voting strength without discussing issue of standing); but see *United States v. Hays*, 515 U.S. 737, 744-47 (1995) (denying standing to whites who challenged redistricting of voting district in which they did not reside).

¹⁴² See e.g., *Flast v. Cohen*, 392 U.S. 83, 95-97 (1968) (discussing Article III restriction on advisory opinions); *Massachusetts v. E.P.A.*, 549 U.S. 497, 516 (2007).

¹⁴³ See *Ricci v. DeStefano* 129 S. Ct. 2658, 2681 (2009) (noting that no complaint was filed in such a hypothetical suit, no discovery was conducted concerning job-relatedness or the existence of less discriminatory alternatives, no subsidiary legal issues were identified or briefed, and of course, no trial was conducted).

¹⁴⁴ See *id.* at 2677 (quoting FED. R. CIV. P. 56(c)).

¹⁴⁵ See *id.* at 2681.

¹⁴⁶ See *id.* at 2667.

¹⁴⁷ See *id.* at 2667-68.

¹⁴⁸ See *id.* at 2668-69.

¹⁴⁹ See *id.* at 2669.

¹⁵⁰ See *id.* at 2670.

¹⁵¹ See *id.* at 2702-07 (Ginsburg, J., dissenting).

¹⁵² See *id.* at 2679-81.

¹⁵³ See *id.* at 2705 n.15 (Ginsburg, J., dissenting).

¹⁵⁴ Cf. *id.* at 2683-88 (Alito, J., concurring) (highlighting the factual disputes concerning the City's motive that should have precluded summary judgment for the City).

¹⁵⁵ See *id.* at 2680.

¹⁵⁶ See *id.* at 2670-71.

¹⁵⁷ See *id.* at 2705 (Ginsburg, J., dissenting).

¹⁵⁸ See *id.* at 2691 (Ginsburg, J., dissenting) (noting that the procedures specified in the union contract had been used for two decades).

¹⁵⁹ See *id.* at 2683-88 (Alito, J., concurring) (discussing racial politics).

¹⁶⁰ See *id.* at 2702-03 (Ginsburg, J., dissenting); see also *id.* at 2703 n.9 (noting that the majority's failure to remand deprived the City of the opportunity to raise a statutory defense that was available for good faith compliance with a written interpretation of the Equal Employment Opportunity Commission).

¹⁶¹ See *id.* at 2681.

¹⁶² See *id.* at 2698-99 (Ginsburg, J., dissenting) (citing *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659-60).

¹⁶³ See *id.* at 2675-76 (borrowing the "strong basis in evidence" standard from the Supreme Court's Equal Protection jurisprudence).

¹⁶⁴ After the Supreme Court upheld the constitutionality of a congressionally enacted broadcast affirmative action plan in *Metro Broad., Inc. v. F.C.C.*, 497 U.S. 547 (1990), the Court did not uphold the constitutionality of another racial affirmative action plan until its 2003 decision upholding the University of Michigan Law School plan in *Grutter v. Bollinger*, 539 U.S. 306 (2003). However, that same day, the Court invalidated the University of Michigan's

undergraduate affirmative plan in *Gratz v. Bollinger*, 539 U.S. 244 (2003), even though the two plans are difficult to distinguish. See, e.g., Girardeau A. Spann, *The Dark Side of Grutter*, 21 CONST. COMMENT. 221, 227-29, 242-49 (2004) (discussing Supreme Court voting blocs, and the difficulty distinguishing between *Grutter* and *Gratz*); SPANN, *supra* note 99, at 159-63 (discussing Supreme Court outcomes and voting blocs in racial affirmative action cases).

¹⁶⁵ See *Ricci*, 129 S. Ct. at 2681.

¹⁶⁶ See *id.*; see also *id.* at 2681 (noting that Justice Kennedy's "advisory opinion" was explicitly articulated in terms of interest balancing. Justice Kennedy states: "Our holding today clarifies how Title VII applies to resolve competing expectations under the disparate-treatment and disparate-impact provisions. If, after it certifies the test results, the City faces a disparate-impact suit, then in light of our holding today it should be clear that the City would avoid disparate-impact liability based on the strong basis in evidence that, had it not certified the results, it would have been subject to disparate-treatment liability.")

¹⁶⁷ See *id.* at 2701-02 (Ginsburg, J., dissenting); see also *supra* text accompanying note 88 (discussing Justice Ginsburg's fear of impeding voluntary compliance).

¹⁶⁸ See, e.g., *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896) (asserting that official segregation did not stamp blacks with a badge of inferiority unless blacks chose to interpret segregation in that manner).

¹⁶⁹ See, e.g., ROBERT GOLDMAN & STEPHEN PAPSON, *NIKE CULTURE: THE SIGN OF THE SWOOSH* 113-17 (Sage Publications) (1998) (discussing Nike's use of Tiger Woods as a post-racial, multicultural icon).

¹⁷⁰ See Leonard Pitts, *It's Not the End of Race—Just a Big Step Forward*, ORLANDO SENTINEL, Jan. 18, 2009, at A19 (discussing whether black politicians, including Michael Steele, are "post-racial").

¹⁷¹ See sources cited *supra* note 1 (suggesting that Obama's election as president indicates shift to postracial culture).

¹⁷² See Cheryl W. Thompson, et al., *Gates, Police Officer Share Beers and Histories with President*, WASH. POST, July 31, 2009, at A3 (discussing Gates arrest by Cambridge police officer).

¹⁷³ Ann Gerhart, *Alleged Prejudice Starts Probe at Club: Pa. Organization Revoked Swim Contract for Day Camp that Included Minorities*, WASH. POST, July 11, 2009, at A2 (discussing exclusion of minority children from swim club).

¹⁷⁴ See DeNeed L. Brown, *Through the Past, Darkly: The Legacy of Colorism Reflects Wounds of Racism that Are More than Skin-Deep*, WASH. POST, July 12, 2009, at E1 (discussing Michael Jackson's transformed skin color).

¹⁷⁵ See *Ricci v. DeStefano*, 129 S. Ct. 2658, 2689-91 (2009) (Ginsburg, J., dissenting).

¹⁷⁶ See *id.*

¹⁷⁷ See *id.* at 2673-77, 2681.

¹⁷⁸ See *id.* at 2683-87 (Alito, J., concurring).

¹⁷⁹ See Girardeau A. Spann, *Affirmative Inaction*, 50 HOW. L.J. 611, 645-52 (2007) [hereinafter *Affirmative Inaction*] (noting the author's inversion arguments in the context of criticizing the Supreme Court's hostility to affirmative action, and the author's efforts to deconstruct the very distinction between affirmative action and discrimination); see also Girardeau A. Spann, *Affirmative Action and Discrimination*, 39 HOW. L.J. 1, 63-76 (1995).

¹⁸⁰ See Girardeau A. Spann, *Constitutionalization*, 49 ST. LOUIS U. L.J. 709, 722-29 (2005) [hereinafter *Constitutionalization*] (describing baseline shifting as a strategic analytical technique).

¹⁸¹ See *Ricci*, 129 S. Ct. at 2673-77, 2681 (depicting white firefighters as victims, and minority firefighters as perpetrators of discrimination).

¹⁸² See *Constitutionalization*, *supra* note 180, at 721-23 (discussing Realist insight that there is no natural baseline).

¹⁸³ See *Ricci*, 129 S. Ct. at 2673-77, 2681 (discussing the need to avoid disparate-treatment discrimination, and to avoid burden on high scoring firefighters).

¹⁸⁴ See *id.* at 2689-90, 2696-700 (Ginsburg, J., dissenting) (discussing the need to avoid disparate-impact discrimination).

¹⁸⁵ See *id.* at 2696-99 (discussing Title VII's goal of preventing disparate-impact discrimination).

¹⁸⁶ See *id.* at 2673-77, 2681.

¹⁸⁷ See sources cited *supra* note 2 (citing commentators who are skeptical of the postracial claim).

ENDNOTES CONTINUED

- ¹⁸⁸ See, e.g., *Gratz v. Bollinger*, 539 U.S. 244, 299-301 (2003) (Ginsburg, J., dissenting) (discussing the striking racial disparities that continue to exist in distribution of societal resources).
- ¹⁸⁹ See *supra* text accompanying notes 172-174 (discussing the contemporary significance of race).
- ¹⁹⁰ See sources cited *supra* note 1 (citing commentators who suggest that contemporary culture is now postracial).
- ¹⁹¹ See Kelefa Sanneh, *Comment: Discriminating Tastes*, *THE NEW YORKER*, Aug 10 & 17, 2009, at 21.
- ¹⁹² See *id.*
- ¹⁹³ See *id.*
- ¹⁹⁴ See *id.*
- ¹⁹⁵ This prohibition on the use of legal remedies to redress general societal discrimination, as opposed to identifiable acts of particularized discrimination, was articulated by Justice Lewis Powell in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307-10 (1978), and reasserted by Justice Powell in *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274-78 (1986) (Powell, J., plurality). Led by Justice Sandra Day O'Connor, this view has now been adopted by a majority of the full Supreme Court. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 323-25 (2003) (citing *Bakke* as rejecting interest in remedying societal discrimination); *Shaw v. Hunt*, 517 U.S. 899, 909-10 (1996) (rejecting societal discrimination); *Metro Broad., Inc. v. F.C.C.*, 497 U.S. 547, 610-14 (1990) (O'Connor, J., dissenting); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 496-98 (1989) (plurality opinion of O'Connor, J.); *Johnson v. Transp. Agency*, 480 U.S. 616, 647-53 (1987) (O'Connor, J., concurring); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 288 (O'Connor, J., concurring). See generally SPANN, *supra* note 99, at 168-69 (discussing general societal discrimination).
- ¹⁹⁶ See Spann, *Affirmative Inaction*, *supra* note 179, at 636-39 (criticizing the societal discrimination rule).
- ¹⁹⁷ See *Gratz v. Bollinger*, 539 U.S. at 299-304 (Ginsburg, J., dissenting) (discussing the striking racial disparities that continue to exist in distribution of societal resources).
- ¹⁹⁸ See Gates, *supra* note 2, at 15-23 (2009) (discussing Wilson's rejection of the postracial claim).
- ¹⁹⁹ See Thompson, *supra* note 1, at A3 (discussing Darren Hutchinson's concept of "racial exhaustion").
- ²⁰⁰ See Thompson et al., *supra* note 172, at A3 (citing discussions of Gates' arrest).
- ²⁰¹ See STONE ET AL., *supra* note 106, at lxxi (discussing the confirmation of Chief Justice Roberts).
- ²⁰² 129 S. Ct. 2504 (2009).
- ²⁰³ See *id.* at 2508-11, 2513-17.
- ²⁰⁴ See *id.* at 2513 (declining to address the constitutional question).
- ²⁰⁵ See *id.* at 2511-13 (suggesting that Section 5 would now be unconstitutional). Justice Thomas expressed similar sentiments, stating that "[t]he Court quite properly alerts Congress that § 5 tests the outer boundaries of its Fifteenth Amendment enforcement authority and may not be constitutional." See *id.* at 2519 (Thomas, J., concurring in the judgment in part and dissenting in part).
- ²⁰⁶ See David S. Broder, *For Obama, Court Cases That Matter*, *WASH. POST*, July 2, 2009, at A19 (arguing that *Northwest Austin* and *Ricci* reflect the Supreme Court view "that racial discrimination is no longer as big a problem as we thought").
- ²⁰⁷ See Adam Cohen, *The Supreme Court's Hostility to the Voting Rights Act*, *N.Y. TIMES*, May 13, 2009, at A30 (discussing congressional vote, hearings and legislative record).
- ²⁰⁸ See *Ricci v. DeStefano*, 129 S. Ct. 2658, 2696-99 (2009) (Ginsburg, J., dissenting).
- ²⁰⁹ See *Northwest Austin*, 129 S. Ct. at 2511-13 (suggesting that Section 5 would now be unconstitutional); see also *id.* at 2519, 2526-27 (Thomas, J., concurring in the judgment in part and dissenting in part) (noting that Justice Thomas expressed similar sentiments and would have declared Section 5 to be unconstitutional in *Northwest Austin* itself, stating that "[t]he Court quite properly alerts Congress that § 5 tests the outer boundaries of its Fifteenth Amendment enforcement authority and may not be constitutional."); see also E.J. Dionne, Jr., *Courtly Politics: A Compromise Sustains the Voting Rights Act*, *WASH. POST*, June 25, 2009, at A19 (commenting on threatened future invalidation of Voting Rights Act).
- ²¹⁰ See *Ricci*, 129 S. Ct. at 2676, 2681 (expressly raising and reserving the question of Title VII constitutionality).
- ²¹¹ See SPANN, *supra* note 99, at 180-89 (discussing the redistricting cases that the Supreme Court decided after 1990 census); see also *Bush v. Vera*, 517 U.S. 952, 956-57 (1996) (plurality opinion of Justice O'Connor, J.) (citing a series of Supreme Court redistricting cases decided "in the wake of 1990 census").
- ²¹² See, e.g., *Lawyer v. Dep't. of Justice*, 521 U.S. 567, 569-75 (1997) (discussing a redistricting plan that was modified after preclearance denial and subsequent negotiations with Justice Department); *Miller v. Johnson*, 515 U.S. 900, 905-10 (1995); *Shaw v. Reno*, 509 U.S. 630, 633-39 (1993).
- ²¹³ 129 S. Ct. 1231 (2009).
- ²¹⁴ See *id.* at 1238-40 (plurality opinion of Kennedy, J.).
- ²¹⁵ See *id.* at 1241-1246 (rejecting the vote dilution protections for crossover districts).
- ²¹⁶ See *id.* at 1250 (Souter, J., dissenting) (discussing perverse incentives).
- ²¹⁷ See *id.* at 1251 (Souter, J., dissenting).
- ²¹⁸ See *id.* at 1243.
- ²¹⁹ See *id.* at 1245, 1247-49.
- ²²⁰ See *id.* at 1249 (suggesting that racism in voting was waning); but see *id.* (suggesting that much still remains to be done).
- ²²¹ Cf. *id.* at 1255 (Souter, J., dissenting).
- ²²² 129 S. Ct. 1937 (2009).
- ²²³ See *id.* at 1942-43 (holding that the allegations in the complaint were insufficient to survive a motion to dismiss).
- ²²⁴ See *id.* at 1943-44.
- ²²⁵ See *id.* at 1944-45.
- ²²⁶ See *id.* at 1951 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (1950)).
- ²²⁷ See *id.* at 1951.
- ²²⁸ See *id.* at 1948-49, 1952.
- ²²⁹ See Melinda Hanson, *Term in Review: Civil Cases*, 78 U.S.L.W. 3025, 3025-27 (July 21, 2009) (discussing the tension between *Iqbal* and notice pleadings).
- ²³⁰ See, e.g., Editorial, *Illegal, and Pointless*, *N.Y. TIMES*, July 17, 2009, at 22 (discussing possible involvement of high level government officials in torture of terrorist suspects); Doyle McManus, *Tortuous Road to the Truth*, *L.A. TIMES*, July 19, 2009, at A31; Michael Muskal, *What and Why Behind CIA Counterterrorism Issue*, *CHI. TRIB.*, July 26, 2009, at 30.
- ²³¹ 129 S. Ct. 2579 (2009).
- ²³² See *id.* at 2588-89.
- ²³³ See *id.* at 2590-92.
- ²³⁴ See *id.* at 2593-95 (discussing FED. R. CIV. P. 60(b)(5) standards).
- ²³⁵ See *id.* at 2595-2600 (discussing the need for flexibility, and deemphasizing the importance of complying with lower court funding orders).
- ²³⁶ See *id.* at 2600-2606.
- ²³⁷ See *id.* at 2607-08, 2613-15, 2621-28 (Breyer, J., dissenting).
- ²³⁸ See *id.* at 2631 (expressing concern for Spanish-speaking students).
- ²³⁹ See, e.g., Thomas D. Edmondson & Melinda Hanson, *High Court Gives Arizona Another Crack At Doffing Language Program Injunction*, 77 U.S.L.W. 1825 (June 30, 2009) (discussing the finality problem).
- ²⁴⁰ See *State English Language Learners' Program Triggers Debate on Funding, Remedial Orders*, 77 U.S.L.W. (April, 28, 2009).
- ²⁴¹ See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).
- ²⁴² See *id.* at 709-10.
- ²⁴³ See *Brown v. Bd. of Educ.*, 347 U.S. 483, 493-95 (1954) (rejecting the separate-but-equal doctrine and declaring official school segregation to be unconstitutional); see also *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 301 (1955) (tempering the effect of *Brown* by declining to order immediate school desegregation and instead requiring desegregation "with all deliberate speed").
- ²⁴⁴ See *Parents Involved*, 551 U.S. at 709-18.
- ²⁴⁵ See *id.* at 710-11, 715-18.
- ²⁴⁶ See *id.* at 711, 722-25.
- ²⁴⁷ See *id.* at 745-48 (plurality opinion of Roberts, C.J.) (invoking *Brown*).
- ²⁴⁸ See *id.* at 741-48 (plurality opinion of Roberts, C.J.) (ignoring motive).
- ²⁴⁹ *Id.* at 748.
- ²⁵⁰ See *id.* at 803-04, 823-30, 858-63 (Breyer, J., dissenting) (arguing that *Brown* and other precedents permitted plans).

ENDNOTES CONTINUED

- ²⁵¹ See, e.g., Girardeau A. Spann, *The Conscience of a Court*, 63 U. MIAMI L. REV. 431 (2009) (noting the author's vigorous criticisms of the *Resegregation Cases* arguing that the Supreme Court is serving as the judicial arm of the "movement conservative" effort to dismantle the New Deal welfare state); Girardeau A. Spann, *Disintegration*, 46 U. LOUISVILLE L. REV. 565 (2009) (arguing that the Supreme Court is constitutionalizing school segregation).
- ²⁵² See District Attorney's Office for Third Judicial Dist. v. Osborne, 129 S. Ct. 2308, 2319-23 (2009) (denying post-conviction access to DNA testing).
- ²⁵³ Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823) (discussing the European discovery of the land now constituting the United States, the conquest of indigenous Indian inhabitants, and divesting Indians of title to that land).
- ²⁵⁴ 60 U.S. (19 How.) 393 (1857).
- ²⁵⁵ See *id.* at 407 (holding that blacks could not be citizens within the meaning of the United States Constitution for purposes of establishing diversity jurisdiction and invalidating congressional statute enacted to limit spread of slavery as interfering with property rights of slave owners).
- ²⁵⁶ U.S. CONST. amend. XIV, § 1 (granting citizenship to blacks); *cf. id.* amend. XIII (abolishing slavery).
- ²⁵⁷ See, e.g., Civil Rights Cases, 109 U.S. 3, 8-19 (1883) (invalidating public accommodations provisions of Civil Rights Act of 1875 and imposing "state action" restriction on congressional antidiscrimination legislation); United States v. Cruikshank, 92 U.S. 542, 551-59 (1876) (refusing to apply criminal provisions of Enforcement Act of 1870 to Ku Klux Klan lynching of black freedmen); see also STONE ET AL., *supra* note 106, at 453-56 (describing the Supreme Court's restrictions on Reconstruction legislation).
- ²⁵⁸ 163 U.S. 537, 548, 551-52 (1896) (upholding the constitutionality of separate-but-equal regime of racial discrimination in public facilities by finding that segregation did not constitute unconstitutional discrimination under the Equal Protection Clause).
- ²⁵⁹ See MICHAEL KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 61-97, 135-70 (2004) (discussing formal minority victories in the Supreme Court that made little practical difference in preventing actual discrimination).
- ²⁶⁰ See *id.* at 117-35 (discussing formal minority victories in the criminal justice system that had little practical consequence in preventing discrimination).
- ²⁶¹ 323 U.S. 214, 215-19 (1944) (upholding the World War II exclusion order that led to Japanese American internment).
- ²⁶² See *Brown v. Bd. of Educ.*, 347 U.S. 483, 493-95 (1954) (rejecting the separate-but-equal doctrine and declaring official school segregation to be unconstitutional).
- ²⁶³ See *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 301 (1955) (tempering the effect of *Brown* by declining to order immediate school desegregation and instead requiring desegregation "with all deliberate speed"); see also STONE ET AL., *supra* note 106, at 473-79 (discussing delay in implementation of *Brown*).
- ²⁶⁴ See, e.g., *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 208-09 (1973) (adopting expansive interpretation of de jure segregation, but reaffirming the prohibition of race-conscious remedies to eliminate de facto segregation); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 17-18 (1971); *cf.*, *Washington v. Davis*, 426 U.S. 229, 238-48 (1976) (reading the Equal Protection Clause to permit racially disparate impact that is not directly caused by intentional discrimination); *Milliken v. Bradley*, 418 U.S. 717, 732-36, 744-47 (1974) (refusing to allow inter-district judicial remedies for de facto school segregation, thereby permitting suburban schools to remain predominantly white and inner-city schools to remain overwhelmingly minority); see also STONE ET AL., *supra* note 106, at 479-88 (discussing the current de facto school segregation).
- ²⁶⁵ 350 U.S. 891, 891 (1955) (per curiam) (considering the constitutionality of a Virginia miscegenation statute that was upheld by the Virginia Supreme Court of Appeals, vacating the Virginia decision, and remanding for clarification of the record); *Naim v. Naim*, 90 S.E.2d 849, 850 (Va. 1956) (per curiam) (reaffirming its earlier decision and refusing to clarify the record); *Naim v. Naim*, 350 U.S. 985, 985 (1956) (per curiam) (declining to recall or amend the mandate, finding that the constitutional question had not been "properly presented," which allowed the Virginia Court's decision to remain in effect). Because the neutrality principle announced in *Brown* seemed to make the Virginia miscegenation statute unconstitutional, and because the Supreme Court's failure to resolve *Naim* on the merits also seemed to violate a federal statute giving the Supreme Court mandatory jurisdiction over the case, the Supreme Court's actions in *Naim* have been vigorously criticized. See, e.g., Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 12 (1964) ("[T]here are very few dismissals similarly indefensible in law."); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959) (noting that dismissal of the miscegenation case was "wholly without basis in the law"). The Supreme Court ultimately invalidated the Virginia miscegenation statute as a manifestation of white supremacy eleven years later in *Loving v. Virginia*, 388 U.S. 1, 6, 11-12 (1967), when only sixteen states still had miscegenation statutes on the books.
- ²⁶⁶ See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 293-95, 307 (1978) (controlling opinion of Powell, J.) (reading *Brown* to prohibit affirmative action that benefits racial minorities at the expense of whites); see also Spann, *supra* note 99, at 156-89 (discussing affirmative action and redistricting cases).
- ²⁶⁷ See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 404-05 (1857).
- ²⁶⁸ See *id.* at 407.
- ²⁶⁹ See *Ricci v. DeStefano*, 129 S. Ct. 2658, 2673-77, 2681 (2009) (depicting white firefighters as victims, and minority firefighters as perpetrators of discrimination).
- ²⁷⁰ See *id.* at 2664-65, 2672, 2673-77 (finding conflict between the disparate-treatment and disparate-impact provisions of Title VII, and adopting a "strong basis in evidence standard" to give primacy to the disparate-treatment provision).
- ²⁷¹ See *supra* text accompanying notes 262-264 (discussing the Supreme Court's failure to enforce *Brown*).
- ²⁷² See *supra* text accompanying notes 241-251 (discussing the *Resegregation Cases*).
- ²⁷³ See *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2511-13 (2009) (suggesting that Section 5 would now be unconstitutional); *id.* at 2519 (Thomas, J., concurring in the judgment in part and dissenting in part) ("[t]he Court quite properly alerts Congress that § 5 tests the outer boundaries of its Fifteenth Amendment enforcement authority and may not be constitutional."):
- ²⁷⁴ See *id.* at 2508-10.
- ²⁷⁵ See, e.g., RONALD W. WALTERS, FREEDOM IS NOT ENOUGH: BLACK VOTERS, BLACK CANDIDATES, AND AMERICAN PRESIDENTIAL POLITICS 96-105, 180-81 (2007) (discussing black disenfranchisement in recent presidential elections).
- ²⁷⁶ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (plurality opinion of Roberts, C.J.).
- ²⁷⁷ See Cheryl I. Harris, *Whiteness As Property*, 106 HARV. L. REV. 1709, 1710-15 (1993) (discussing white entitlement).
- ²⁷⁸ See HILLARY JORDAN, MUDBOUND 61-62 (2008) (conveying white entitlement).
- ²⁷⁹ See *supra* text accompanying notes 267-268 (quoting from *Dred Scott*).
- ²⁸⁰ See, e.g., *United States v. Cruikshank*, 92 U.S. 542, 551-59 (1876) (refusing to apply the criminal provisions of the Enforcement Act of 1870 to Ku Klux Klan lynching of black freedmen); *Civil Rights Cases*, 109 U.S. 3, 8-19 (1883) (invalidating public accommodations provisions of Civil Rights Act of 1875 and imposing "state action" restriction on congressional antidiscrimination legislation); see also STONE ET AL., *supra* note 106, at 453-56 (describing the Supreme Court's restrictions on Reconstruction legislation).



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(from left to right) Jamie R. Abrams—WCL Legal Rhetoric Instructor and Women’s Bar Association Secretary; Consuela Pinto—President, Women’s Bar Association; and The Hon. Judge Ruiz—Associate Judge, District of Columbia Court of Appeals

UPDATE ON ASYLUM LAW: NEW HOPE FOR VICTIMS OF DOMESTIC VIOLENCE

By

Sandra A. Grossman and María Mañón*

I. MEETING “ANA”

One afternoon not so long ago, we met “Ana,” a young woman from El Salvador. At the age of 14, Ana met and formed a “relationship” with a 43-year-old man who would later become the father of her two daughters. “He was nice in the beginning,” Ana recounted, but then one day he got jealous and beat her. In fact, he beat her several times that night. The beatings grew more vicious, continuing for more than a decade, and often occurring in the presence of their two young daughters. “You can never leave me,” he would tell her, “you belong to me.”

Ana sought the help of local police and the courts, but to no avail. Her family and friends knew of the abuse, but no one did anything to stop it. Ana knew she must leave or risk losing her life and the lives of her children. Ana decided to make the long and treacherous journey to the United States, and with our help, recently applied for asylum before the U.S. Executive Office of Immigration Review (EOIR) based on fear of continued persecution and abuse if returned to El Salvador. Thanks to a recent change in policy by the Obama administration, Ana, and others like her, have a chance at obtaining asylum and rescuing themselves and their families from further abuse.

II. DOMESTIC VIOLENCE-BASED ASYLUM CLAIMS: ONCE HOPELESS, NOW HOPEFUL?

Asylum is available to an alien physically present in the U.S. who can establish himself/herself to be a refugee according to section 101(a)(42) of the Immigration and Nationality Act (INA).¹ To qualify as a refugee, an applicant for asylum must show that he or she has suffered persecution in the past or has a well-founded fear of persecution in the future on account of at least one of five protected grounds: race, religion, nationality, membership in a particular social group, or political opinion.² A request for asylum may be based on past persecution, as well as a well-founded fear of future persecution.³

The term “well-founded fear” was defined by the Supreme Court as containing an objective and a subjective component referring to, respectively, the known country conditions and the applicant’s own beliefs.⁴ A foreign national “possesses a well-founded fear of persecution if a reasonable person in her circumstances would fear persecution if she were to be returned to her native country.”⁵ Quantitatively stated, an applicant’s fear is well-founded if there is as little as a 10 percent chance of the feared event happening.⁶ Yet, practically speaking, at least once before an immigration judge, applicants are often forced prove their cases beyond a shadow of a doubt.⁷ Asylum applicants must show that relocation within their own country is either not an option or would not protect them from persecution.⁸ Finally, the persecution must be by the government or by a persecutor which the government is unwilling or unable to control.⁹

Domestic violence victims seeking asylum in the U.S. often assert their fear of persecution on account of membership in a social group. The Board of Immigration Appeals (BIA) defined this ground as persecution “that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic...that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.”¹⁰ Subsequent BIA decisions further qualified the definition of social group, requiring that “the group have particular and well-defined boundaries, and that it possess a recognized level of social visibility.”¹¹ The “social visibility”¹² and “particularity” requirements further support the idea that to qualify for asylum, victims must show they are persecuted because of an immutable characteristic known to their persecutor.

Whether a battered woman may be a member of a cognizable social group has been a subject of much contention, as reflected in the Department of Homeland Security’s nine year delay in producing regulations or an authoritative precedent on the issue.¹³ In *Matter of R-A-*, first heard in 1996, the BIA analyzed an asylum claim involving a young woman from Guatemala, Rody Alvarado, who suffered horrific domestic abuse at the hands of her husband.¹⁴ Ms. Alvarado applied for asylum on account of her membership in a particular social group and political opinion, specifically, “Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination.”¹⁵ In 1999, the BIA denied Ms. Alvarado asylum, finding she was not a part of a cognizable social group and that her persecution was not on account of her political opinion.¹⁶ The BIA’s decision was subsequently reviewed by several attorney generals, and recently came before the BIA for entry of a new decision. This time, lawyers for the Department of Homeland Security have recommended asylum for this horribly abused woman, virtually guaranteeing the entry of a grant of asylum.¹⁷

III. DEFINING ANA’S SOCIAL GROUP: THE KEY TO A SUCCESSFUL ASYLUM CLAIM

The decision to recommend asylum in Ms. Alvarado’s case came after the Department laid out its new stance on domestic violence based claims in a related case involving an abused woman from Mexico, respondent in *Matter of L-R-*. In April of 2009, DHS, now under Secretary Janet Napolitano, acknowledged the difficult issues and challenges presented by the application of asylum in the domestic violence context¹⁸ and recommended remand in *Matter of L-R-*.¹⁹ More importantly for immigration law practitioners and advocates, the brief provides a set of important guidelines on what a successful domestic violence-based claim might look like.²⁰ For the first time, the DHS’s brief opens

the door to the possibility that foreign domestic violence victims can qualify for asylum in the United States.²¹

According to DHS, a particular social group based on domestic violence “is best defined in light of the evidence about how the respondent’s abuser and her society perceive her role within the domestic relationship.”²² The key is identifying what characteristics the persecutor targeted in choosing his victim.²³ In Ana’s case, for example, it may have been her youth,²⁴ her gender, her economic disadvantage, and the fact that she was unprotected and vulnerable. Ana was 14 years old when she met her abuser, who was both older and wealthier than she was, and even though family and friends knew of the abuse, nobody did anything to stop it.

According to DHS, an applicant’s status within a domestic relationship is immutable where the applicant is economically, socially, or physically unable to leave the abusive relationship, or where “the abuser would not recognize a divorce or separation as ending the abuser’s right to abuse the victim.”²⁵ Ana, for example, because of her age, her financial dependence, and her fear of retaliation, was unable to leave the abusive relationship. Every time she tried to escape, her family would encourage her to return to her abuser because he was her only means of financial support and security. Even when she tried to end the relationship or relocate to a different city, her abuser would find her and force her to resume the relationship.

“Visibility,” another requirement for establishing asylum based on social group, may be demonstrated by submitting evidence of country conditions related to the social perception of domestic violence.²⁶ It is not surprising that Ana’s family and

friends knew of the abuse, but did nothing to stop it, since 9 out of 10 women in El Salvador have suffered from domestic violence.²⁷ The fact that Salvadoran society is accepting of relationships between older men and younger women, even in cases of abuse, made Ana an easy target. Finally, according to DHS, the “particularity” requirement in social group assessments can be met with the use of the term “domestic relationship,” since the term itself suggests a certain level of specificity.²⁸

We are tasked with showing that Ana and other victims of domestic violence were viewed and treated as property by their abusers, and that this behavior was deemed socially acceptable. Importantly, DHS warns against “circularity,” or defining the social group by the persecution suffered or feared.²⁹ In other words, practitioners should avoid defining the particular social group as “targeted for persecution because they belong to a group of individuals who are targeted for persecution.”³⁰

IV. CONCLUSION: YES WE CAN!

Victims of abuse, like all other asylum applicants, must meet their heavy burden of persuasion by providing testimony and evidence documenting their statutory eligibility for asylum. For Ana and others similarly situated there is no denying that the road ahead remains difficult and long, and that the United States has not traditionally accepted domestic violence based asylum claims, but careful and creative lawyering combined with a keen understanding of the law relating to social group-based asylum claims, may yet change the landscape of what is possible.

ENDNOTES

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¹ 8 C.F.R. § 208(a) (2009).

² 8 C.F.R. § 208.13 (b)(1) (2009); *see also*, *INS v. Elias Zacarias*, 502 U.S. 478, 481 (1992); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 428 (1987).

³ *See* *Matter of Chen*, 20 I. & N. Dec. 16, 18 (1989) (“If an alien establish that he has been persecuted in the past for one of the five reasons listed in the statute, he is eligible for a grant of asylum. The likelihood of present or future persecution then becomes relevant as to the exercise of discretion, and asylum may be denied as a matter of discretion if there is little likelihood of present persecution.”).

⁴ *Cardozo-Fonseca*, 480 U.S. at 430.

⁵ *Guevara Flores v. INS*, 786 F.2d 1242, 1249 (5th Cir. 1986), *cert. denied*, 480 U.S. 930 (1987).

⁶ *Cardozo-Fonseca*, 480 U.S. at 431.

⁷ *See also* *Matter of Dass*, 20 I. & N. Dec. 120, (BIA 1989).

⁸ 8 C.F.R. § 208.13(b)(1)(i)(B) (2009).

⁹ *See, e.g.*, *Matter of Acosta*, 19 I. & N. Dec. 211, 222 (BIA 1985).

¹⁰ *Id.* at 233.

¹¹ *Matter of S-E-G-*, 24 I. & N. Dec. 579, 582 (BIA 2008) (citing *Matter of A-M-E- & J-G-U-*, 24 I. & N. Dec. 69 (BIA 2007)).

¹² *Matter In Re C-A-*, 23 I. & N. Dec. 951 (BIA 2006) (“former noncriminal informants working against the Cali drug cartel’ did not have the requisite social visibility to constitute a particular social.”); *see also*, *Matter of S-E-G-*, 24 I. & N. Dec. 579 at 584 (“the proposed group, which consists of young Salvadorans who have been subject to recruitment efforts by criminal gangs, but who have refused to join for personal, religious, or moral reasons, fails the ‘social visibility’ test and does not qualify as a particular social group.”).

¹³ *See* Brief of Dep’t of Homeland Security at 4 (B.I.A. April 13, 2009), *available at* <http://cgrrs.uchastings.edu/pdfs/Redacted%20DHS%20brief%20on%20PSG.pdf> [hereinafter DHS Brief].

¹⁴ *See* *Matter of R-A-*, 22 I. & N. Dec. 906 (BIA 1999).

¹⁵ *Id.*

¹⁶ *Id.* at 946.

¹⁷ *See* Response of Dep’t of Homeland Security to the Respondent’s Supplemental filing of August 18, 2009, *Matter of Rodi Alvarado-Pena*, No. A073-753-922 (Dep’t of Justice Oct. 28, 2009)..

¹⁸ DHS Brief, *supra* note 13, at 4.

¹⁹ *Id.* at 29.

²⁰ *Id.* at 4-5.

²¹ *Id.* at 11.

²² *Id.* at 14.

²³ *Id.* at 15.

²⁴ *Matter of S-E-G-*, 24 I. & N. Dec. 579, 583-84 (BIA 2008) (questioning whether “youth” is an immutable characteristic, but acknowledging that “the mutability of age is not within one’s control, and that if an individual has been persecuted in the past on account of age-described particular social group, or faces such persecution at a time when that individual’s age places him within the group, a claim for asylum may still be cognizable.”).

ENDNOTES CONTINUED

²⁵ DHS Brief, *supra* note 13, at 16.

²⁶ *Id.* at 17.

²⁷ U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, Integration of the Human Rights of Women and a Gender Perspective: Violence Against Women, *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, U.N. Doc. E/CN.4/2005/72/Add.2 (December 20, 2004) (prepared by Yakin Ertürk) at 10; *see also*, United States Department

of State, 2008 Human Rights Report: El Salvador (Feb. 25 2009), *available at* <http://www.state.gov/g/drl/rls/hrrpt/2008/wha/119159.htm> (last visited October 5, 2009) (“Violence against women, including domestic violence, [is] a widespread and serious problem.”).

²⁸ DHS Brief, *supra* note 13, at 19.

²⁹ *Id.* at 6.

³⁰ *Id.* at 10.



(from left to right) Sandra A. Grossman—founder and owner of Grossman Law, LLC and contributing author to *The Modern American's* Fall 2009 Issue; Tatiana Miranda—Editor-in-Chief, *The Modern American*; María Mañón—associate at Grossman Law, LLC and contributing author to *The Modern American's* Fall 2009 Issue; Claudio Grossman—Dean, American University Washington College of Law; and Leslye E. Orloff—Vice President and Director, Immigrant Women Program, Legal Momentum

***The Modern American* Annual Symposium: Exploring the Marginalized Community: How Can Lawyers Work With and in Marginalized Communities?**

APRIL 14, 2010

4:00 pm - 6:00 pm

How do common misconceptions of marginalized groups affect their legal representation? How, as attorneys, can we make the legal process less intimidating and more accessible for these groups? Do attorneys have a duty to reach out to marginalized peoples? How can this be accomplished? *The Modern American*, the American University Washington College of Law's (WCL) student-run diversity legal publication, hopes to provide answers to these questions while provoking new ones at the annual symposium.

Presented by The Modern American

ANNOTATED BIBLIOGRAPHY: WHO CAN HELP? A HISTORY LESSON ON URBAN RELATIONS

By
Daniel A. Broughton

Detroit has inspired dozens of books and hundreds of articles exploring what happened after World War II and why the Motor City has fallen victim to drastic spatial inequalities and continuing racial segregation. From Joe T. Darden to Thomas Sugrue, numerous authors have taken their shot at explaining the declining of Detroit and what factors have had similar repercussions in other parts of the United States. New literature is published every year, and each new research design comes out with the latest findings and statistics, trying to top its slightly older counterparts. As urban policy expert Angela Glover Blackwell has noted, “Fortunately, if America really wants to solve the problem of racial and ethnic inequality, it has a history of programs, strategies, and policies to build upon”(116). I argue that before we dive into the latest hardcovers on our bookstores’ shelves, we must first look to the findings of past urban researchers to discover which policy schema have been tested, which have been successful, and what is still left uncovered.

The study of Detroit’s urban and race relations may be my particular field of interest, but the cornucopia of urban research designs that flourished throughout the second half of the twentieth century are applicable to sociologists, lawyers, and advocates in major cities throughout the United States. Again, before diving deeper into current theoretical analyses of and policy proposals for American cities, it is important to review what older research designs suggest for the varying perceptions of today’s urban crises. Through reevaluating the related literature of the past 20 years, case studies of different cities’ struggles over time may provide insight on effective solutions in light of the current economic recession:

Blackwell, Angela Glover, Stewart Kwoh, and Manuel Pastor.
Searching for the Uncommon Common Ground: New Dimensions on Race in America. New York: The American Assembly, 2002.

Sifting through virtually all corners of urban America, Angela Glover Blackwell analyzes the constantly changing demographic of African Americans. With various maps and histograms complementing the text, Blackwell tackles racial tension/race relations as a challenge to the development of the United States at all levels. Her data suggest that “racial justice” is becoming increasingly ambiguous and that multiculturalism must be viewed as a competitor with traditional black-white typologies. Blackwell’s examination helps to assess the national versus local responsibilities regarding urban race relations.

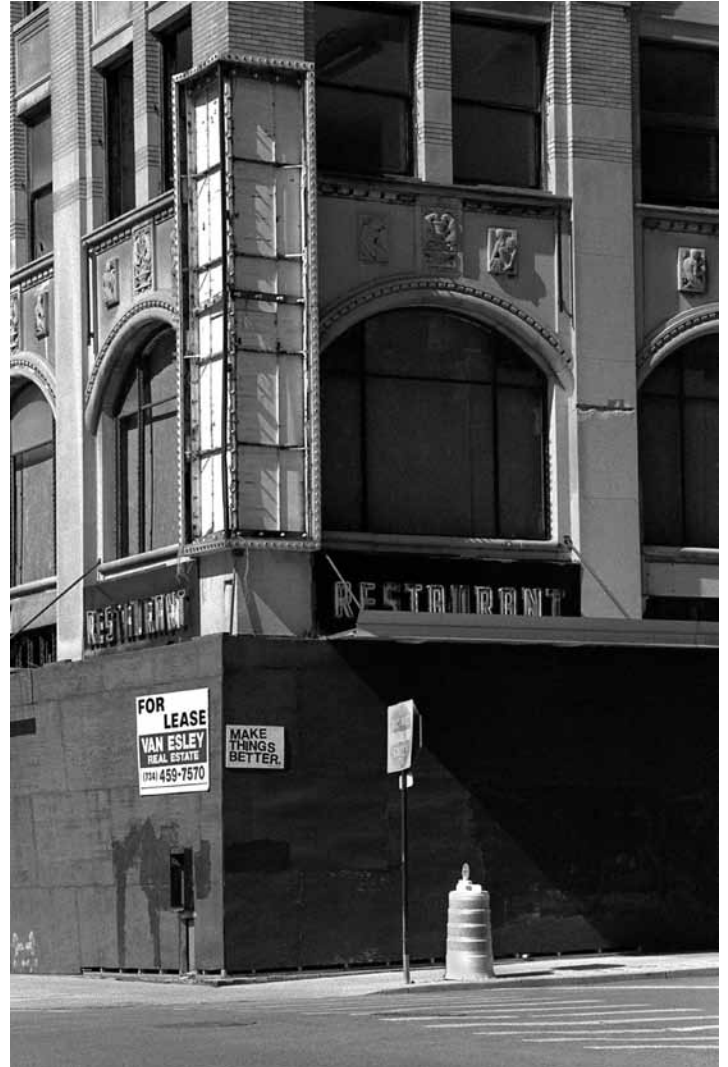


Photo by: Christa Broughton

DeParle, Jason. *American Dream: Three Women, Ten Kids, and a Nation’s Drive to End Welfare.* New York: Penguin Group, 2004.

Jason DeParle’s *American Dream* uses a narrative style, yet is lined with accurate depictions of the welfare state as they intersect with specific events in his story. The book reads as an oral history, capturing the conversation and tension of those dealing with welfare while maintaining households in present-day Milwaukee. This micro-level chronicle allows readers to learn of personal disparities that may lead to poverty and how welfare policies contain clauses that often discriminate against the impoverished who are the most dependent on them

Fortune. The Negro and the City. New York: Time, 1968.

This book presents a contextual perspective of American business in the fight against racism in cities. Set in the late 1960s, *The Negro and the City* was published by Fortune magazine and was devoted to corporate America's search for a solution to the urban crisis. The project surveys African Americans as its central methodology, asking them to comment on inner-city conditions and their ability to find stable employment. In its conclusion, the book suggests that a constructive future lies not in new laws but in better attitudes supporting "colorblind" practices.

Gans, Herbert, et al. "Viewing the 'Underclass' and Ghetto from the Top Down." *Journal of Urban History*. 25.4, 1999: 583-593.

This review essay draws parallels and similarities among five contemporary pieces on the urban poor of America. As the title suggests, the articles in this journal approach the American city from the top down, looking the intellectual and social contexts within minority factions that have been stigmatized by outside perspectives. Gans' article, in particular, attacks the current modes of urban planning, arguing that the working-class subculture cannot be neglected in today's social policy considerations.

Gilbert, Dennis. *The American Class Structure: In an Age of Growing Inequality*. 6th ed. Belmont, California: Wadsworth, 2003.

Dennis Gilbert's textbook is a good reference for the application of social theory to datasets and case studies. In particular, Gilbert introduces Karl Marx's "class consciousness" and Maximilian Carl Weber's "status considerations" and integrates these principles into various American models and typologies of social hierarchy. Most importantly, Gilbert explains the implicit costs of class consciousness, such as prestige and association, and how these outside pressures can be used to further define status boundaries.

Jennings, James, ed. *Blacks, Latinos, and Asians in Urban America*. Westport, Connecticut: Praeger, 1994.

Blacks, Latinos, and Asians in Urban America examines the formation of ghettos in American cities, questioning how enclaves of ethnic minorities relate to one another politically. In considering social and fiscal monopolies in urban centers, Jennings describes how different power struggles can encourage ethnocentrism in minority communities, provoking rivalries among racial groups. The book appeals to an achievable "social justice," yet it recognizes the functional steps of ethnic identity and acceptance.

Massey, Douglas S. and Nancy A. Denton. *American Apartheid: Segregation and the making of the Underclass*. Harvard University Press, 1994.

American Apartheid takes a public policy approach to examining the dynamics of private ghettoization of urban United States and the public regulation that legally advocated

the segregation of cities. The Fair Housing Act presents a number of problems with law enforcement, including poor funding and narrow objectives. The book also takes a sociological stance, researching the isolating effects of the ghetto and how, as an urban microcosm, it is contained by both inside and outside pressures.

Mohl, Raymond A. "The Second Ghetto Thesis and the Power of History." *Journal of Urban History*, 29.3, 2003: 243-256.

The Second Ghetto Thesis looks at the roles of government and public policy in housing projects and other forms of urban renewal. As new resources and public housing communities are constructed, they take on the demographics of previous residential options. Efforts to renovate the American city are hollowed out by the incapability to mobilize the urban racial composition. Mohl concludes that the model of a "second ghetto" movement should have a strong influence on today's civil rights legislation.

Omi, Michael and Howard Winant. *Racial Formation in the United States*. 2nd ed. New York: Routledge, 1994.

In *Racial Formation in the United States*, Michael Omi and Howard Winant explore the aspects of nation and hegemony that encourage the collection of a common lifestyle and, consequently, a definition of deviance. Hegemony promotes group mentalities, such as morality-based conservatism, that must maintain a system of ideas and practices; it advocates a "common sense." The authors present five paradigms to answer how racism in America has changed and survived, stressing the fluid influences of class and gender interactions during different time periods.

Reed, Adolph. ed. *Without Justice for All: The New Liberalism and Our Retreat from Racial Equality*. Boulder, Colorado: Westview, 1999.

With a unique and crucial study, Adolph Reed challenges the abilities and integrities of America's progressive politics. Specifically critiquing the Democratic Party, this book explains the successes of Reaganism and social hegemony in the midst of a crumbling liberal movement. As progressivism opens its doors to a wide spectrum of issues, its strength is dispersed, and it loses power against a strong Republican coalition. African-American advancement is especially vulnerable as it juggles the included obstacles of political and gender relations.

Stokes, Curtis and Theresa Meléndez. eds. *Racial Liberalism and the Politics of Urban America*. East Lansing, Michigan: Michigan State University, 2003.

In this collaboration, Stokes and Meléndez offer a set of scholarly essays to explore contemporary systems of privilege and oppression in America's urban centers through socio-economic and political typologies. The essays concentrate on the entrapment of multicultural identity in the city, posing that factors of a "universal" social citizenship often conflict with "group

differentiated” citizenship, resulting, historically, in an American caste system. The essays also look at specific case studies, Detroit among them, to express the polarizing effects of metropolitan politics.

Street, Paul. “Urban Race Relations: ‘Everything Changed?’” Hidden Continuities of Urban Racial Inequality Before and After 9/11.” *Dissident Voice*. September 18, 2003.

Sociologist Paul Street views the domestic racializing effects of 9/11 and how the downturns of the nation’s economy and the semi-permanent war on terror have shifted America’s policy focus to a hegemonic agenda. The article provides statistics of incarceration rates and annual incomes by race in light of the 2001 terrorist attacks. Street aims to expose the magnitude of contemporary urban race relations, exemplified by the economic recession felt after 9/11 that left many African Americans locked out of the workforce.

Sugrue, Thomas J. *The Origins of the Urban Crisis: Race and Inequality in Postwar Detroit*. New Jersey: Princeton, 1996.

Thomas Sugrue questions the conventional theories of twentieth-century urban racism by looking at the racial violence that flourished at the end of World War II, instead of attacking the welfare reform and social programs of the 1960s. Like Detroit, other major cities of the “rust belt” have also experienced post-war conflict, and Sugrue concentrates on spatial and social structures to explain the economic and racial disparities that limit the freedom and mobility of urban minorities.

Taylor, Henry Louis and Walter Hill. eds. *Historical Roots of the Urban Crisis: African Americans in the Industrial City, 1900-1950*. New York: Garland, 2000.

Historical Roots of the Urban Crisis very specifically exposes the history of the industrial city to explain modern urban dilemmas. As American cities enter a more information-based economy, African Americans need to play “catch up” in order to compete with the new market. The authors assembled a team of junior and senior colleagues to research different facets of African Americans’ dependence on the industrial city and how internal conflicts add to more widespread racism in preventing class mobility.

Wright, Nathan. *Black Power and Urban Unrest: Creative Possibilities*. New York: Hawthorn Books, 1967.

In *Black Power and Urban Unrest*, Nathan Wright analyzes the Civil Rights movement shortly after its “completion.” He gives specific anecdotes and presents group dynamics of only a few years earlier, describing the Black Power struggle that chose to form in the cities. Black Power, Wright argues, was perceived as a new effort to “regain” a liberal democracy in the United States. The conclusions in this 1967 book take a more liberal stance than many of today’s platform: Black Power needs to support African American self-development and social citizenship.

The Modern American
is now available on the
Westlaw, LexisNexis, HeinOnline,
and V.lex databases.



Claudio Grossman—Dean, American University Washington College of Law



Consuela Pinto—President, Women's Bar Association



(from left to right) Leslye E. Orloff—Vice President and Director, Immigrant Women Program, Legal Momentum and Shiwali Patel—Senior Staff Editor, *The Modern American*



(from left to right) Elizabeth Keyes—WCL Practitioner-in-Residence with the International Human Rights Law Clinic and Amy Myers—Director of the WCL Domestic Violence Clinic

LEGISLATIVE UPDATES

By Rene Carballo

S. 21 “Prevention First Act of 2009” Introduced by Senator Harry Reid (D, NV)

The Prevention First Act seeks to improve women’s access to health care, specifically by increasing access to reproductive health care services.¹ Congress introduced this legislation to expand women’s access to these services by providing funds to states and other entities to invest in research, education, and preventative programs regarding teen pregnancy and sexually transmitted diseases.² The Act would require hospitals receiving federal funding to provide, upon request, emergency contraception to victims of sexual assault.³ In regard to health plans and their coverage, this Act would prohibit the exclusion or restriction of benefits related to prescription contraceptive drugs, devices, and outpatient services.⁴

Senator Harry Reid from Nevada introduced this Act on January 6, 2009 with 27 co-sponsors. After its introduction in the Senate, the Act was referred to the Committee on Health, Education, Labor, and Pensions. The companion bill in the House of Representatives, the Unintended Pregnancy Reduction Act of 2009, was referred to the committees on Energy and Commerce, Ways and Means, and Education and Labor.

S. 424 “Uniting American Families Act of 2009” Introduced by Senator Patrick Leahy (D, VT)

The Uniting American Families Act (UAFAs) was introduced to amend the Immigration and Nationality Act⁵ to eliminate discrimination by the following: 1) permitting permanent partners of United States citizens and lawful permanent residents to obtain lawful permanent resident status in the same manner as spouses of citizens and lawful permanent residents and 2) penalizing immigration fraud in connection with permanent partnerships.⁶

The Act defines the scope of a “permanent partner” as an individual 18 or older in a committed intimate relationship with another individual 18 or older in which both parties intend a lifelong commitment. The individual must be financially interdependent with the other party and not married to, or in a permanent partnership with, any other person. The individual must be unable to contract with the other individual a marriage cognizable under this Act and finally, the partners cannot be in first, second, or third degree blood relation to one another.⁷

Family reunification has been essential to U.S. immigration policy for decades, but lesbian and gay families have been entirely excluded from discussion.⁸ By introducing this legislation, Congress intended to extend the U.S. Immigration and Nationality Act to same-sex partners of U.S. citizens and permanent residents. Under the current law, same-sex partners are not considered “spouses.” Consequently, the current law tears apart bi-national couples and their families. According to the most recent U.S. Census, there are nearly 36,000 gay and lesbian bi-national couples.⁹ As with opposite-sex couples, there

are requirements such as providing proof of the relationship. Furthermore, this Act would impose harsh penalties for fraud, including up to five years in prison and as much as \$250,000 in fines.

Senator Patrick Leahy from Vermont introduced this Act on February 12, 2009 with 20 co-sponsors. After its introduction, it was referred to the Committee on the Judiciary. Representative Jerrold Nadler from New York introduced its companion legislation, H.R. 1024, in the House with 115 co-sponsors. After its introduction, it was referred on February 12, 2009 to the Committee on the Judiciary and on March 16, 2009 to the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law.

S. 697 “Community Living Assistance Services and Supports (CLASS) Act of 2009” Introduced by Senator Edward M. Kennedy (D, MA)

This Act was introduced to amend the Public Health Service Act¹⁰ to help individuals with functional impairments and their families pay for the services and supports that they need to maximize their functionality and independence. The Act increases families’ options for community participation, education, and employment. This legislation creates a new financing strategy for community living assistance services to allow these individuals to live in the community. It also supports the establishment of an infrastructure that will help address America’s community living assistance services and support need and alleviate burdens on family caregivers.¹¹

Senator Ted Kennedy from Massachusetts introduced the CLASS Act on March 25, 2009 with five co-sponsors. It was referred to the Committee on Finance. Its companion legislation, H.R. 1721, was referred to the Committee on Energy and Commerce. It was referred to the House Committees on Ways and Means, Rules, and the Budget.

S. 909 “Matthew Shepard Hate Crimes Prevention Act of 2009”

Introduced by Senator Edward M. Kennedy (D, MA)

This Act was introduced to provide federal assistance to states, local jurisdictions, and Native American tribes to aid in the prosecution of hate crimes.¹² The legislative intent is to expand the scope of the 1969 U.S. federal hate-crimes law¹³ to include bodily crimes motivated by a victim’s actual or perceived gender, sexual orientation, gender identity, or disability. Furthermore, it codifies and expands the funding and investigative capabilities of federal officials for aiding their local counterparts, particularly at the behest of the Attorney General.¹⁴

The legislation was named after Matthew Wayne Shepard, a student at the University of Wyoming who died after being tortured because of his sexual orientation. Due to the circumstances surrounding Shepard’s murder, the legislation also amends the Hate Crimes Statistics Act. Data collection and

reporting requirements would now include crimes manifesting prejudice based on gender and gender identity, as well as hate crimes committed by and against juveniles.

Senator Edward M. Kennedy from Massachusetts introduced this Act in April 28, 2009 with 45 co-sponsors. After dying in committee when brought for a vote by Senator Kennedy in the 110th Congress, the Act was approved as an amendment to the Senate Defense Reauthorization bill. Due to staunch opposition, it was ultimately dropped from the Reauthorization, but President Obama indicated his goals to see the bill passed in its original language was signed into law on October 28, 2009. Its companion legislation, H.R. 1913, passed the House on April 29, 2009.¹⁵

S. 931 “Arbitration Fairness Act of 2009” Introduced by Representative Henry Johnson (D, GA)

The Arbitration Fairness Act would amend Title 9 of the United States Code to prevent the enforcement of pre-dispute arbitration agreements that require arbitration of employment, consumer, franchise, or civil rights disputes.¹⁶ The purpose of the amendment is to alter mandatory arbitration because it lacks any meaningful judicial review of the arbitrators’ decisions, undermining the development of public law for civil rights and consumer rights.¹⁷

Senator Russell Feingold from Wisconsin introduced this Act on April 29, 2009. It was referred to the Committee on the Judiciary. Representative Henry Johnson from Georgia introduced its companion legislation, H.R. 1020, on February 12, 2009 with 85 co-sponsors. It was referred to the House Committee on the Judiciary and on March 16, 2009 to the Subcommittee on Commercial and Administrative Law.

H.R. 3017 “Employment Non-Discrimination Act of 2009” Introduced by Representative Barney Frank (D, MA)

This Act was introduced to prohibit employment discrimination based on actual or perceived sexual orientation or gender identity.¹⁸ Specifically, the intent of the legislature is to

address the history and widespread pattern of discrimination on the basis of sexual orientation or gender identity by private sector employers and local, state, and federal government employers.¹⁹ It also seeks to provide comprehensive federal prohibition of employment discrimination on the basis of sexual orientation or gender identity and include meaningful and effective remedies for any such discrimination.

Because there is no federal law that consistently protects lesbian, gay, bisexual, and transgender individuals from employment discrimination, Congress invokes the 14th Amendment of the Constitution,²⁰ and Article I, Section 8 of the Constitution,²¹ granting it power to propose this legislation. However, this Act shall not apply to a corporation, association, educational institution, or society that is exempt from the discrimination provisions of Title VII of the Civil Rights Act of 1964. Under Title VII, all employers excluding the four aforementioned exceptions are not only prohibited from being motivated by discriminatory intent, but must also not use a facially neutral employment practice that has an unjustified adverse impact on members of a protected class.²² By enacting the Employment Non-Discrimination Act, Congress would extend the protected class under this disparate impact theory to include lesbian, gay, bisexual, and transgender people.

Representative Barney Frank from Massachusetts introduced this Act on June 24, 2009 with 152 co-sponsors. After being introduced it was referred to the Committee of Education and Labor, which held the first of its hearings on the bill on September 23, 2009.

Healthcare Reform

The Affordable Health Care for Americans Act of 2009 was introduced Representative John Dingell (D, MI) on October 29, 2009. The Obama Administration pushed for the introduction of the Affordable Health Care for Americans Act of 2009 in response to the growing demand for healthcare reform.²³ Earlier in the year, the House introduced H.R. 676, the United States National Health Care Act or the Expanded and Improved Medicare for All Act,²⁴ to provide for comprehensive health insurance coverage for all United States residents, improved healthcare delivery, and for other purposes. This in turn led to the Affordable Health Care for Americans Act, seeking to expand health care coverage to the approximately 40 million Americans who

THE SECOND ANNUAL LAMBDA LAW SOCIETY SYMPOSIUM: LGBTQ POVERTY AND BARRIERS TO ACCESS

FEBRUARY 12, 2010
2:00 pm – 5:00 pm

This Freedom to Marry Day, we step back to examine widespread poverty among lesbian, gay, bisexual, transgender, and queer (LGBTQ) communities. How do barriers to the basic needs of employment, health care, and housing affect LGBTQ survival? How do these access barriers create and exacerbate LGBTQ poverty? What roles do racism, homophobia, and disability phobia play? And where do we go from here?

Presented by the Lambda Law Society

are currently uninsured by lowering the cost of health care and making the system more efficient.

To successfully revamp the current health care system, the Act includes a new government-run insurance plan to compete with companies in the private sector. It would require that all Americans have health insurance, and prohibit denying coverage of those Americans with pre-existing conditions. In order to fund the project, there will be a surtax on households with an income above \$500,000. The legislative intent behind the Act is to help low- and middle-income individuals and families

purchase insurance. Despite mandating universal coverage and disallowing discriminatory practices for health status or gender, the premiums would still vary based on factors such as age, geography, and family size.

Representative John Dingell from Michigan introduced this Act on October 29, 2009 with six co-sponsors. The bill passed on November 7, 2009. Due to the pressing nature of the issue, amendments and potentially new legislation is bound to arise in the Senate during Congress' next session.

ENDNOTES

¹ Prevention First Act of 2009, S. 21, 111th Cong. (2009).

² *Id.* (putting into practice the goals of the At-Risk Communities Teen Pregnancy Prevention Act of 2009 and the Responsible Education About Life Act of 2009).

³ *Id.* (paralleling the Compassionate Assistance for Rape Emergencies Act of 2009).

⁴ *Id.* (exemplifying the application of the Equity in Prescription Insurance and Contraceptive Coverage Act of 2007).

⁵ Immigration and Nationality Act of 1952 Pub. L. No. 82-414, 66 Stat. 163 (1952) (Allowing U.S. citizens and legal permanent residents to sponsor their spouses and other immediate family members for immigration purposes).

⁶ Uniting American Families Act of 2009, S. 424, 111th Cong. (2009).

⁷ *Id.*

⁸ Human Rights Campaign, Talking Points: The Uniting America Families Act, http://www.hrc.org/issues/int_rights_immigration/13114.htm (last visited Nov. 18, 2009).

⁹ *Id.* (referring to the U.S. Census Bureau, Census 2000 stating the median age of these bi-national couples is 38 and 47% of them are raising children).

¹⁰ 42 U.S.C. § 201 (2008).

¹¹ Community Living Assistance Services and Supports Act of 2009, S. 697, 111th Cong. (2009).

¹² Matthew Shepard Hate Crimes Prevention Act of 2009, S. 909, 111th Cong. (2009).

¹³ Distinguished from the definition of "hate crime" as set forth in the Violent Crime Control and Law Enforcement Act of 1994, which included gender and sexual orientation, in addition to race, color, religion, ethnicity, and national origin.

¹⁴ S. 909.

¹⁵ Local Law Enforcement Hate Crimes Prevention Act of 2009, H.R. 1913, 111th Cong. (2009).

¹⁶ Arbitration Fairness Act of 2009, S. 931, 111th Cong. (2009).

¹⁷ *Id.* (providing arbitrators near complete freedom to ignore the law or even their own rules in making decisions).

¹⁸ Employment Non-Discrimination Act of 2009, H.R. 3017, 111th Cong. (2009).

¹⁹ See 42 U.S.C. §2000 (referring to the Civil Rights Act of 1964 to define employees and employers for purposes of this legislation).

²⁰ U.S. CONST. amend. XIV ("no state shall . . . deny to any person within its jurisdiction the equal protection of the law").

²¹ U.S. CONST. Art. 1, § 8 (ensuring a Congressional right to regulate interstate commerce to provide for the general welfare).

²² Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §2000).

²³ Affordable Health Care for American Act, H.R. 3962, 111th Cong. (2009).

²⁴ National Health Care Act or the Expanded and Improved Medicare for All Act, H.R. 676, 111th Cong. (2009).

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Corrections: Volume 5 – Issue 1, Much Ado About Nothing or A Wake Up Call to Do Something By Lydia Edwards, Esq.

Corrections to this piece will be available online January 2010.

THE MODERN AMERICAN

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To join our listserve, please contact

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