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LETTER FROM THE EXECUTIVE BOARD

As the lines separating race, gender, ethnicity, and sexual orientation move closer together; and as everyone it seems has adopted their own notions concerning diversity, what it means, or the lack thereof, it is easy to be lulled into thinking that we have said and done all that we can regarding the topic. However, one can quickly discover just how premature this way of thinking is by clicking to the website of your preferred news source or picking up a newspaper – national or local. Everywhere you turn, you can see old diversity issues masquerading as new ones, previously ignored facets of diversity resurfacing, truly novel diversity problems emerging, and diversity issues finally finding solutions.

In fact, it seems that in the past year, diversity issues have particularly found themselves in the spotlight of American culture. From the Jena 6 protests in Louisiana, to the resurgence of noose incidents around the country, to the broad spectrum of presidential candidates, and the adoption of anti-immigrant ordinances across the nation, issues relating to underrepresented people have been a reoccurring theme in our country. Thus, despite what some may think, and if the past is any indication, American discourse surrounding diversity is anything but over.

Even the sometimes isolated environment of a law school reflects the nature of the larger conversation regarding diversity taking place in the nation today. One particular incident at WCL embodies this reality. Recently, the Immigration Rights Coalition (“IRC”) at the school hosted a lunch-time panel on day laborers and day labor activists. To publicize the event, the group hung signs around the school. Later, signs placed in the elevators were defaced when the words “Undocumented Day Laborers” were crossed out and replaced with “Illegal Aliens.” As the IRC and other diversity organizations have petitioned the administration for an opportunity to address the incident at a town-hall style meeting, it is important for us also realize that

incidences like these are exactly why a publication like *The Modern American* is so important. For it is by fostering meaningful dialogues in forums such as this publication that we as a legal community and society can dissect the complexities of diversity issues and find workable solutions.

This is also why, as a publication, *The Modern American* proudly continues to bring you quality articles and other writings on topics related to diversity and the law. The Special Fall/Summer 2007 Issue that you will find on the next few pages is no different. In fact, we are pleased to provide an expanded issue that discusses topics ranging from equal treatment in athletic scheduling, to the application of anti-discrimination laws to ocean vessels. This issue also contains a special insert of articles commemorating the Tenth Annual Hispanic Law Conference. This year’s conference, entitled *The Voice of the Latino/a Lawyer: Accomplishments and Challenges*, took place on March 9th, 2007. Given the conference theme, the articles in this issue commemorating the event come from some of the brightest scholarly and legal minds in the Latino community. As always, *The Modern American* is proud to do our part by providing a forum for these authors.

Finally, at *The Modern American*, we are undergoing a season of transition following the appointment of the new Executive Board. Therefore, those of us who have gone before would like to wish the newest leaders of this publication the best. We know they will preserve the vision of *The Modern American*, and will be as proud to continue the work that we have been so privileged to perform. To our readers, we thank you for the opportunity to have brought you issues in the past year that have stimulated your mind and furthered the overall discussion of diversity and the law.

We hope you enjoy reading this issue as much as we enjoyed making it!

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THE IRRATIONALITY OF A RATIONAL BASIS: DENYING BENEFITS TO THE CHILDREN OF SAME-SEX COUPLES

BY SAM CASTIC*

Three weeks after Quintin was born to Sherri Kokx and Johanna Bender, he had difficulty breathing. Alarmed, his parents took him to see his doctor, who, understanding the urgency of the situation, promptly called an ambulance. When the paramedics arrived at the doctor's office, critical time slipped away as the forms the paramedics had to fill out did not recognize that a child could have two parents of the same sex. Critical moments slipped by as the ambulance sat in the parking lot as the paramedics refused to accept that Johanna and Sherri were both Quintin's parents. The doctor's urgent declarations that both women were Quintin's parents did not hasten the paramedics' actions as the infant Quintin awaited essential medical attention. The paramedics could not understand that a child could have parents of the same sex. Quintin was eventually hospitalized for several days and fortunately survived, but the episode demonstrated to Sherri and Johanna the effect that the lack of legal protection can have on the families of same-sex couples and their children.¹

Recent high court decisions in New York and Washington have upheld the exclusion of same-sex couples from the rights and benefits of marriage. In their decisions, each court essentially found that marriage statutes were created for the benefit of children. The courts reasoned that the state interest in child welfare was furthered by restricting the benefits of marriage to opposite-sex couples, irrespective of whether the couples had children. Assuming that the benefits and protections provided in marriage statutes serve a legitimate state purpose, this article examines the effects that exclusionary provisions in those statutes visit directly upon the children of same-sex couples. That is, to the extent that marriage rights enable couples to better rear their children, the children of same-sex children are disadvantaged. Accordingly, I argues that it is wholly irrational to deny the children of same-sex couples the rights and privileges purportedly created to benefit all children.

In Section I of this article I address the exclusive nature of the rights and benefits extended by marriage. The section examines how marriage statutes operate for the intended benefit of children, and demonstrates how public and private law offer no equivalent protection to families headed by same-sex couples. Finally, the section will show how the exclusive nature of marriage disadvantages children being reared by same-sex couples. In Section II, I argue that it is irrational to use the sex of a child's parents to determine the rights and privileges that will be extended to the child. The section will examine how the exclusion of same-sex couples from marriage primarily focuses on the couples, and how this focus is irrelevant to the actual

fostering of child welfare. The section will examine the recent New York, Washington, and New Jersey marriage decisions, and will argue that decisions in the former states misapplied the relevant rational basis tests in reaching their decisions.

LEGAL RIGHTS AND PROTECTIONS ARE EXTENDED ONLY TO SOME COUPLES REARING CHILDREN

THE RATIONALE FOR MARRIAGE RIGHTS AND PROTECTIONS IS TO PROMOTE CHILD DEVELOPMENT

A key contemporary rationale for governmental extension of rights and benefits to couples that marry is that such protections promote child welfare. This is the view that best justifies the extension of rights and benefits by the state, as a solely religious institution would lack a legitimate state interest for promotion, and a purely romantic relationship would logically include same-sex couples. Importantly, proponents of state marriage laws embrace this perspective and reject describing marriage as the codification of a life-long romantic relationship.² This child development rationale is grounded in the belief that by adding to the stability of the family unit, the children of married couples are better provided for, and have increased chances of developmental success. Under the rationale, the government extends rights and benefits to married couples acting on the notion that couples are better able to rear children than single individuals. The belief is that the presence of two parents is most likely to result in a financially stable family unit equipped with the resources necessary to fulfill the obligations of child rearing. Rights and benefits provided with marriage are tailored to support the family unit, correspondingly maximizing child welfare by providing children with the best family and household in which to be reared. The rights and benefits created in marriage laws can thus be seen as a set of inducements for couples with children to marry and stay together, which arguably ensures the optimal circumstances for the child's development.³

In addition to benefiting from an intuitively logical appeal, the two-parent model finds support in social science. Social science data are uniformly in agreement that family structure affects child development and that the rights conditioned upon marital status help to benefit children.⁴ Both proponents and opponents of extending the rights of marriage the status of marriage benefits the children that the couple rears. However, there is no consensus on the degree to which it is the status of marriage as opposed to the presence of two parents that contributes to a child's development.⁵ Maggie Gallagher's survey of the social science data helpfully groups the benefits

The paramedics could not understand that a child could have parents of the same sex.

**EXISTING LAW DOES NOT UNIFORMLY EXTEND
RIGHTS AND PROTECTIONS TO SAME-SEX
COUPLES REARING CHILDREN**

that a marital family structure offers to children into six categories: psychological adjustment, physical health and longevity, crime and delinquency, child abuse, education and socioeconomic attainment, and family formation.⁶ According to Gallagher, studies show that the psychological well-being of children reared by married parents is stronger, that divorce disrupts children's mental development, and that youth suicide is correlated to divorce and being reared by single parents.⁷ As to physical health and longevity, infant mortality rates are significantly higher when the mother is unmarried, health problems increase for children reared by single parents, and the child's life expectancy is reduced by divorce.⁸ With respect to crime and delinquency, boys reared by divorced or single parents are significantly more likely to become delinquent or engage in criminal behavior. Teens in single parent households are generally more attached to their peer groups and subsequently are more inclined to be delinquent.⁹ Child abuse is more prevalent in households with single mothers, and the presence of a mother's boyfriend or a stepfather increases the likelihood that a child will be abused.¹⁰ Children in divorced or unmarried households do not perform as well in school, are more likely to be held back, and are less likely to go to college.¹¹ Subsequent family formation by children reared by a divorced or unmarried parent are more likely to be characterized by divorce and unwanted pregnancy.¹²

*studies show that the
psychological well-being of
children reared by married
parents is stronger*

Gallagher's survey of the data was employed to demonstrate that family structure is important to child development, and that extending the state rights and benefits of marriage to opposite-sex couples is the best way of promoting the formation and continuation of a family structure conducive to optimal child development.¹³ As Gallagher admits though, there is no social science consensus about the extent to which the data show that households with married parents are better settings for rearing children than are those with unmarried parents.¹⁴ While there is much consensus among social scientists that having two parents is generally better than having one, the consensus about the advantage that married parents offer seems to be limited to the benefits of the legal and social rights extended in marriage, and not the fact of having opposite-sex parents.¹⁵

*the advantage that married parents
offer seems to be limited to the benefits of
the legal and social rights extended in
marriage, and not the fact of having
opposite-sex parents*

The government extends a wide array of legal rights and privileges to married couples rearing children. The rights and privileges given at the federal, state, and local levels benefit both the couple and the children they rear. These rights and privileges are extended regardless of whether the child is biologically related to either spouse. The same rights and privileges are extended whether the child was naturally conceived or whether their life began with the assistance of artificial reproductive methods. Thus, the goal is the fostering of a family unit irrespective of biology.

Both federal and state governments guarantee rights that directly and indirectly benefit the children of opposite-sex married couples. At the federal level, over 1,000 benefits, rights, and privileges are available to married couples.¹⁶ At the state level, the rights can be categorized into those that protect the spousal relationship, enforce spouses' obligations to one another, treat spouses as a single financial unit, and extend protections to the children of married couples.¹⁷ These rights are meant both to bind the couple together and to benefit the children they rear, and as marital rights, they are unavailable to the children of unmarried couples. Lewis A. Silverman enumerates the benefits extended legally and socially to married couples and their children, organizing them into the following categories: government benefits, tax benefits, immigration privileges, employer benefits, and other benefits.¹⁸ While a complete examination of these benefits is beyond the scope of this article, a brief summary reveals the extent and importance of the rights of marriage to couples rearing children.

Tax benefits are extended to families at the federal and state levels. The right to file federal taxes jointly often results in lower marginal tax rates for a married couple in addition to lower overall tax liability.¹⁹ Married couples are not taxed on benefits, such as health care, that are extended by their spouse's employer, though any comparable benefits extended to employees in same-sex unions are.²⁰ With regard to tax on a decedent's estate, partners in a same-sex union do not qualify for the deduction extended to surviving spouses, which "in turn takes away financial resources the surviving parent would be able to spend on their child."²¹

Immigration law also affords special status to married couples, permitting the couple to reside permanently in the country as long as spouse is a United States citizen. This privilege is not extended to parties to a same-sex union, which may result in the separation of a family unit when both parents are not United States citizens. Importantly children have no independent status or means to preserve their family unit, which can lead to the child being separated from one of the legal parents who is not permitted to enter or remain in the country.²²

Employer benefits are another realm in which the lack of

recognition of the same-sex union disadvantages the children of same-sex couples. Employer-provided surviving family benefits are not generally extended to a surviving party of a same-sex relationship or any non-biological child that the couple reared.²³ The practice of exclusion is found both in federal and state

Custody and visitation are not guaranteed, even for a well-qualified parent, if she or he is not the biological parent.

employment.²⁴ Employer-provided health care commonly extended to spouses and children of the employee is not required to be given to the non-biological child of, or partner to, a same-sex union. Employer grants of leave to care for one's family member do not have to cover time away from work to care for a non-biological child or a same-sex partner.²⁵ In addition, there are no national non-discrimination laws in employment, housing, or public accommodations that protect people in same-sex relationships from discrimination on the basis of the sexual orientation or gender identity which characterizes their family. Parties to such relationships who serve in the military cannot cover their partner or non-biological child with cost of living allowances or death benefits should they die.²⁶ The examples above show some of the ways in which employer benefits that are not extended on an equal basis to same and opposite-sex couples, thus resulting in less protection for children in families with same-sex unions. In the absence of state and federal law mandating the contrary, the list could be broadened to include any employee benefit that adds to the security of their family.

The final category of rights and benefits from which same-sex couples are excluded are tangible and intangible privileges. Not being recognized as a family under the law, a same-sex couple that decides to dissolve its relationship faces custody, visitation, and child support questions that are clearly answered for married couples. Custody and visitation are not guaranteed, even for a well-qualified parent, if she or he is not the biological parent. By not recognizing the relationship as a marriage, the law poses greater challenges for courts that seek to impose child support obligations on the parent who does not retain custody, especially if she or he is a non-biological parent. Non-recognition also poses problems for families if one of the parties to a same-sex union dies wrongfully for the surviving adult, and child if not biological, will not have standing to bring a wrongful death action.²⁷ Intangible benefits include permitting the family to be recognized as a family unit within the cultural understanding of a family, which conceivably helps to reduce the stigma that has historically burdened the children of unmarried parents.²⁸

The rights and privileges that are extended in marriage are only extended to couples that are legally married, a status that is reserved for a socially-sanctioned sexual union.²⁹ Most of the

rights emphasize the couple's mutual obligations to each other and operate to bring social and legal recognition to the couple and children as a family unit. In delineating which family units are recognized under the law, married hetero-sexual unions are the model, and non-marital arrangements, including families headed by same-sex couples, are deliberately excluded from recognition. Opposite-sex couples are the only relationship uniformly entitled to the status of marriage under the law, and consequently, are the only relationship entitled to the rights and privileges extended in marriage.³⁰ Though marriage is generally understood to be a sexual union, the opposite-sex marital relationship is entitled to privacy, and the sexual nature of the couple is free from inquiry from the government.³¹ Laws against consanguinity and polygamy implicitly recognize marriage as a sexual union, and restricting marriage to a sexual union model largely forecloses non-traditional or caretaking models of family from being legally recognized.³²

Supporters of the current delineation of legal recognition and exclusion among relationships claim that there are inherent differences in the nature of marital and non-marital relationships, and that the former is generally a stronger relationship than the latter.³³ Some claim that marriage may also be viewed as a social good in and of itself, a perspective used to justify opposition to extending quasi-legal statuses to cohabitating couples who do not marry.³⁴ Obviously, opposite-sex couples are free to partake in the legal benefits and obligations of marriage by choosing to get married, a choice that can be freely made irrespective of the circumstances of their relationship. In spite of the availability of marriage for opposite-sex couples, some state courts have permitted equitable theories and private contracts to

Same-sex couples are prohibited from marrying in every state except for Massachusetts.

approximate some of the obligations between unmarried parties to a relationship, but the number of such states is small.³⁵ Recognition of equitable theories and private contracts generally involve only obligations between the parties and not specific rights from the state to benefit their children.³ Within non-marital co-habiting relationships with children, biological parents may have rights under the law with respect to their biological child, but the law's recognition of such rights is by virtue of their biological tie to the child rather than the couple's continued relationship. For cohabitating people with non-biological children, most states permit second parent adoptions, but fewer states permit same-sex couples to secure their family through the process.³⁷

Same-sex couples are prohibited from marrying in every state except for Massachusetts. Massachusetts only permits marriage where one of the parties is a resident of Massachusetts, or where the couple resides in a state without a well-founded public policy opposed to same-sex marriage.³⁸ Accordingly, few

of the nation's same-sex couples are able to marry in Massachusetts. If a couple does marry in Massachusetts, or any other jurisdiction where same-sex marriage becomes legal, the Defense of Marriage Act permits states and jurisdictions to refuse to recognize same-sex marriages or unions, and for federal purposes, same-sex unions are never legally recognized regardless of where they were preformed.³⁹ As a result of the Defense of Marriage Act and the lack of state laws sanctioning same-sex unions, the rights and privileges of marriage are effectively denied to same-sex couples and their children throughout most of the country.

Some states grant a range of the rights of marriage to same-sex couples who enter into domestic partnerships or civil unions. Vermont, Connecticut, New Jersey, and, beginning in 2008, New Hampshire, offer civil unions that extend nearly all of the state recognized rights and benefits of marriage to same-sex couples.⁴⁰ California, Hawaii, Maine, Washington, the District of Columbia, and, beginning in 2008, Oregon, permit domestic partnerships for same-sex couples, and extend differing numbers of the rights and benefits of marriage to same-sex couples.⁴¹ Ultimately, civil unions and domestic partnerships lack interstate recognition pursuant to the Defense of Marriage Act⁴², and their effectiveness in offering the same degree of protection to family units headed by same-sex couples as state and federally recognized marriages are clearly inferior.⁴³

A child born to or adopted by a married couple is generally presumed to be the child of the couple, and both parties to the couple are legally presumed to be the parents of the child.⁴⁴ When both parties to a couple have parental rights with respect to their child, then they are considered to have a legal relationship with the child. As same-sex couples cannot marry, they have no legal presumption supporting their parental rights and can only obtain such status if they reside in a jurisdiction where joint or second-parent adoption proceedings are available to same-sex couples. Joint adoption by the couple, or second-parent adoption by the partner without parental rights are means of assuring that parties to a same-sex couple both have their parental rights preserved.⁴⁵ Joint or second-parent adoption by a same-sex couple has been judicially permitted in many jurisdictions when it comports with the best interests of the child; however, it is not uniformly available.⁴⁶ Parental status involves a number of legal rights and responsibilities, and benefits the child by bringing security to the parent-child relationship.⁴⁷ The security of the parent-child relationship often becomes critical if the same-sex partner separates; in the absence of parental status, a same-sex partner who has jointly reared a child can see their relationship with the child eliminated without any legal recourse.⁴⁸ Even where parental status is available to preserve the parent-child relationship, it cannot confer the legal benefits of marriage that are designed to benefit the child of the couple.⁴⁹

Subsequently, the ability of a same-sex couple to obtain parental rights with respect to a child does not eliminate the disadvantage faced by the child.

PRIVATE LAW IS NOT AN EQUIVALENT MEANS FOR SAME-SEX COUPLES TO SECURE RIGHTS

Some of the legal rights and benefits that opposite-sex couples enjoy can be secured for same-sex couples through private contract. The private right to contract is, however, not an equivalent substitute for positive legal rights, such as marital and parental rights, which offer clear legal protection to families. Private contract can only address the obligations between the parties to the contract, and it has no authority to bind non-parties, such as the government. Accordingly, rights of inheritance, power of attorney, and medical decision-making authority, which pertain solely to the rights between the parties, can be granted through private contract. However, rights such as tax-filing status and liability, parental custody, health care coverage, or standing for wrongful death claims cannot be extended through private contract between the parties to a same-sex relationship. Without the benefit of legal status, families headed by same-sex couples cannot obtain the positive rights that extend automatically with marriage.

Without the benefit of legal status, families headed by same-sex couples cannot obtain the positive rights that extend automatically with marriage.

Where a couple does seek to secure rights through contract, they will typically have no expertise in the legal requirements to do effectively and often need to hire an attorney. The time and expense of hiring an attorney is considerable for many couples,⁵⁰ and it almost certainly means that many same-sex couples do not avail themselves to the protections of private law. Even where couples believe that they have taken the precautions necessary to protect their family unit, their efforts can be challenged by disapproving relatives in ways that marriages cannot.⁵¹ Unfortunately, such challenges often come at times of family emergency or death, when the family is most likely to need the protections, and when the lack of legal recognition for the family is most devastating.⁵²

SAME-SEX COUPLES ARE REARING, AND WILL CONTINUE TO REAR, CHILDREN

Irrespective of the merits of same-sex couples rearing children, same-sex couples *are* rearing children, and have been for years. The 2000 Census reported that there were more than 160,000 families with children headed by same-sex couples in the United States.⁵³ This is a conservative figure, given the likely of underreporting of same-sex couples in the Census.⁵⁴ Underreporting aside, the figure is almost certainly higher today as the estimated number of same-sex headed households has increased, and a significant portion of gay and lesbian people already are biological or adoptive parents.⁵⁵ Moreover, nearly half of all gay or lesbian people desire to have children.⁵⁶ In spite of the lack of legal recognition for their families, it is

unlikely that there will be any decrease in the number of same-sex couples rearing children.

In spite of the lack of legal recognition for their families, it is unlikely that there will be any decrease in the number of same-sex couples rearing children.

While state law can, and often does, disadvantage same-sex couples that seek to become parents, once a child is a legal or biological child of one of the parents, the couple can generally rear the child as long as the legal parent is present.⁵⁷ A ban on a legal parents' cohabitating with someone of the same sex, and choosing to jointly assume parental roles, would likely violate the federal Constitution as parenting is likened to a fundamental right.⁵⁸ Though the Supreme Court's constitutional protection of the parent-child relationship deals largely with biological relationships, but its rationale is applicable to all parent-child relationships once established, regardless of whether or not they are biological.⁵⁹ Accordingly, the state would need a compelling interest to disrupt the parent-child relationship, which they would not be likely to demonstrate. In spite of historical efforts preventing gay or lesbian parents from gaining or retaining custody of their child, courts are increasingly finding sexual orientation not to be determinative or even relevant to the determination of a child's best interests.⁶⁰ As same-sex couples continue to rear children, and as the parent-child relationship is constitutionally protected, the families they comprise exist without the rights and benefits of marriage.

IT IS IRRATIONAL TO USE PARENTAL STATUS TO DETERMINE THE LEGAL RIGHTS FROM WHICH CHILDREN BENEFIT

The preceding sections of this article has demonstrated the ways in which the law extends legal rights and benefits to families headed by opposite-sex couples that choose to get married. The sections have also explored the ways in which similarly situated families headed by same-sex couples are largely excluded from the statutory schemes, as well as why private law offers no equivalent substitute for the comprehensive statutory scheme. As the exclusion of same-sex couples from marriage directly impacts the children they rear, the rationality of the system merits a closer evaluation to determine whether the rights purportedly created for the benefit of children are so tailored.

THE JUSTIFICATION FOR EXCLUSION FOCUSES ON THE STATUS OF THE COUPLES REARING THE CHILDREN

The justification for denying the families headed by same-sex couples the protections offered to families headed by opposite-sex couples focuses on the nature of the relationship of the couple heading the family, overlooking the needs of the children they rear.⁶¹ Both proponents and opponents of extending rights to families headed by same-sex couples adhere to the focus on the couple, thus reinforcing the issue as being one of what is owed to the couple and not of what best serves the children reared by the couple.

The proponents of extending rights and protections to same-sex couples often frame the issue as one of discrimination, which ultimately focuses on the couple. Specifically, the denial of recognition is viewed in terms of discrimination against the same-sex couple, the parties to the same-sex couple, and homosexual people in general, as evidenced by recent court decisions and public argument offered by proponents.⁶² To the extent that the plight of the children of same-sex couples is addressed, it is done as a secondary matter. The framing of the issue as one of discrimination tends to overlook the effects on the children⁶³ and reinforces the tactics of the opponents of recognizing same-sex families.

Opponents of granting rights to families headed by same-sex couples can be motivated by a number of different reasons. Often rooted in the belief that sexual orientation is a choice, they

the exclusion of same-sex couples from marriage directly impacts the children they rear

may seek to deny legal incentives that promote people acting on homosexual desires, to codify homophobic sentiments into law, or to protect child development by preventing children from being reared by same-sex couples.⁶⁴ All of the aforementioned motivations directly reject the

framing of the denial of rights to same-sex couples as discriminatory, but nevertheless focus on the nature of the relationship of the same-sex couple.⁶⁵

Most major psychological and medical organizations reject the notion that sexual orientation is mutable,⁶⁶ and advocates of equal rights for gay and lesbian people vigorously oppose the notion. Nonetheless, the lack of definitive scientific proof that sexual orientation is caused exclusively by biological or genetic factors keeps this debate alive.⁶⁷ The support for the mutability perspective still holds influence for more than those dedicated to the cause of opposing recognition of rights for same-sex couples. For example, in the recent marriage decision by the Washington State Supreme Court, the plurality noted that there was not a sufficient showing to conclude that homosexuality is immutable, and that the "question is being researched and debated across the country."⁶⁸ Those who believe that sexual orientation is a choice may not want to permit children to be reared in families headed by same-sex couples, primarily out of concern with the influence that the parents' homosexuality will have on the children.⁶⁹

Opposition to rights for gays and lesbians can also be

grounded in a policy theory of non-promotion. Professor William Eskridge refers to such an approach as the “no promo homo” approach to legislating.⁷⁰ Related to the idea that homosexuality is a choice, opponents of granting rights to same-sex couples’ families claim that their reasons are rooted in a desire not to promote behavior that they view as undesirable. If the rights granted to couples are meant as incentives for the couples to stay together and rear their children, proponents of the “no promo homo” theory would argue that the same incentives should not be used to promote homosexuality. Advocates of the “no promo homo” theory would not frame the matter as one of discrimination, but rather, would view it as a matter of not extending “special rights” or refusing to create incentives for behavior with which they disagree.

Some who oppose recognizing families headed by same-sex couples express concern with the best interest of the children that same-sex couples rear and claim that inherent differences between

same and opposite-sex relationships lead to the latter being the ideal setting in which to rear children.⁷¹ George A. Rekers has argued that children fare less well when reared by same-sex couples because such relationships are less stable, social stigma of homosexuality negatively affects them, and they do not have proper male and female role models.⁷² Maggie Gallagher and Joshua K. Baker take a different approach, restating the social science consensus surrounding the benefit offered to children of married couples and claiming that most all of the social science conclusions supporting the fitness of same-sex parents are premised on studies which have methodological errors, or which do not provide direct evidence that married same-sex couples would be as competent as married opposite-sex couples at rearing children.⁷³ The reasoning continues that since there is not sufficient evidence that same-sex couples would perform as well in marriage, same-sex couples should continue to be denied marriage rights.⁷⁴

At first glance, these reasons for opposing rights for families headed by same-sex couples appears to legitimately consider the interests of the children without letting the status of the couple rearing the children unduly bias its judgment. Unfortunately, a deeper examination shows that the perspective is cut from the same cloth.⁷⁵ Such positions interpret social science data in a way contrary to the mainstream scientific and professional consensus in order to draw the conclusion that children will suffer if reared by a same-sex couple.⁷⁶ George Rekers’ argument is typical of this perspective. Rekers’ assertion that same-sex couples are less stable than opposite-sex couples is premised on comparing couples that don’t have the right to marry with legally married opposite-sex couples, a setup which predetermines the result.⁷⁷ While Rekers’ second assertion that children of same-sex couples may be prone to teasing on account

of their parents’ relationship, social science data does not support finding any worse psychological consequences.⁷⁸ Rekers’ third assertion is essentially what Maggie Gallagher’s work is concerned with — the belief that children need mothers and fathers. This too is unsupported in the social science findings as it depends on a conflation of the well supported belief that two married parents matter, with the unfounded notion that were same-sex couples able to marry, they would be less competent than opposite-sex couples at rearing children.⁷⁹ In the end, social science offers strong support for the belief that having married parents benefits child development, and a notably

uncontradicted, yet not long-studied degree of support for the belief that same-sex couples are as good as opposite-sex couples at rearing children. Nonetheless, so long as same-sex couples parent, the proper question should focus not on whether the couples are as competent as opposite-sex couples, but whether continued denial of

legal recognition of the family serves the child’s best interests.

THE NATURE OF THE COUPLE REARING THE CHILDREN IS IRRELEVANT TO RATIONALITY

One of the key contemporary justifications for marital laws is that marriage directly and indirectly benefits the children reared by the couple. That the children of same-sex couples are excluded from these benefits makes it unquestionable that the marriage statutes are underinclusive, and that opposite-sex couples that are unable or unwilling to have children are able to marry makes the statutes overinclusive. This underinclusivity and overinclusivity casts serious doubt on whether child welfare is the real legislative purpose of marriage laws, or merely a contemporary justification for maintaining an exclusive set of statutory benefits for opposite-sex couples. If the goal were truly child welfare, the most direct way of accomplishing the goal would be permitting all couples that have children to marry. Such a policy would be easy to administer, and would acknowledge that all children are equally entitled to the rights and benefits purportedly created for child welfare. Unfortunately, such policy changes have not been forthcoming, and the reality is that there is a large class of children that are not able to have their development assisted by rights purportedly created for their benefit. More than the promotion of child welfare, which necessarily would involve promoting the welfare of the children of same-sex couples, an overriding interest in preserving the exclusively opposite-sex nature of marriage is embedded in our laws.

In failing to fully promote child welfare for all children, the law distinguishes between the children that will and will not benefit from the rights and privileges it creates on the basis of the child’s parents. In doing so, it visits a punishment on the

so long as same-sex couples parent, the proper question should focus not on whether the couples are as competent as opposite-sex couples, but whether continued denial of legal recognition of the family serves the child’s best interests.

children of same-sex couples by denying them the full scope of opportunity offered to the children of opposite-sex couples. Though irrelevant to the stated goal of child development, the classification rests on the sexual orientation of the child's parents, and discriminates against them for something that they have no control over.

The Supreme Court's treatment of illegitimacy offers an instructive parallel to the broader question of whether it is just to punish a child for the status or actions of their parents. The Court has recognized that the Constitution's Equal Protection and Due Process Clauses are a barrier to statutes created to deter actions or behavior among adults while placing a significant part of the burden on children who bear no responsibility for the adults' actions or behavior. In *Weber v. Aetna Casualty & Surety Co.*, the Court struck down a ban on compensation recovery rights for unacknowledged illegitimate children.⁸⁰ The majority reasoned that "imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing."⁸¹ Noting that laws dissuading non-marital sex were common, the Court concluded that "penalizing the illegitimate child is an ineffectual - as well as an unjust - way of deterring the parent."⁸² The development of the jurisprudence following *Weber* has found that classifications based on legitimacy are to be subjected to heightened scrutiny, and the Court has maintained the view that it is unjust to penalize children in order to deter the behavior of their parents.⁸³

As with statutes that punished children for being born to and reared by families that did not benefit from socially constructed norms of legitimacy, statutes denying children of same-sex couples the benefits of legal rights created to promote child welfare similarly disadvantage children for the conduct of their parents. The disadvantages created through the denial are equally unjust because the children burdened possess no choice in the structure of the family that rears them. However, as long as the debate over extending rights to families headed by same-sex couples focuses on the couples, and not on the children they rear, this injustice will continue, and children will endure the consequences. Lewis A. Silverman argues that the focus on the adult relationship, and not on the independent claim that the children have to these rights, distorts the analysis that should be undertaken when considering whether families with children should be protected by the full scope of the law.⁸⁴ By positing children as people protected by the Constitution and viewing their right to benefits as deriving from their dependent status, Silverman reasons that many of the arguments against recognizing families with same-sex parents are eliminated.⁸⁵ The fact that courts are finding marriage rights to have been created for the benefit of children provides even more powerful support

for viewing the question of extending such rights from the perspective of the child. By not focusing on the needs of the children and the ways in which the lack of rights and protections for the family affects the children, children are being disadvantaged and will continue to be so long as they are denied the child welfare benefits for which marriage statutes were purportedly created.⁸⁶

EXISTING LAW IS THOUGHT TO BE RATIONAL THROUGH A MISAPPLICATION OF RATIONAL BASIS SCRUTINY

The denial of the rights and benefits of marriage to the children of same-sex couples has been upheld as rational in two recent decisions of state high courts and it has been found to be irrational in one. Though the decisions suffer from a misguided framing by focusing less on the logic of denying rights and responsibilities to families rearing children, and more on the claim same-sex couples have to the rights and responsibilities of marriage, the courts upholding rationality consistently found the legitimate state interest in marriage to be about having and rearing children. With children as the legislative purpose of marriage law, courts find a classification based on the couple rearing the children to be rational only by ignoring the actual presence and needs of the children intentionally excluded by the classification drawn. Recent high court decisions in Washington and New York embody this emerging trend, as both courts, after employing variations of the traditional equal protection analysis, found that it is rational for states to extend benefits to families

headed by opposite-sex couples while excluding families headed by same-sex couples. By contrast, the New Jersey Supreme Court found that it is irrational to exclude families headed by opposite-sex couples from the rights and benefits of marriage. The New Jersey decision demonstrates the central flaw of the Washington and New

York applications of rational basis scrutiny; by failing to examine the rationality of how the classification, which focuses on the parents, furthers the state's interest in children, the New York and Washington courts did not meaningfully apply rational basis analysis.

In *Hernandez v. Robles*, the New York Court of Appeals held that the exclusion of same-sex couples from the state marriage laws was constitutional under both the New York Constitution and the Constitution of the United States.⁸⁷ The court found that neither state nor federal Due Process or Equal Protection clauses were violated by the exclusion of same-sex couples, as there was a legitimate state interest in promoting child welfare,⁸⁸ and there were at least two rational bases upon which the legislature could limit marriage to opposite sex couples in order to protect child welfare: promoting familial stability and ensuring children are reared by a mother and father.⁸⁹ The court noted that both bases were derived from the

Though irrelevant to the stated goal of child development, the classification rests on the sexual orientation of the child's parents, and discriminates against them for something that they have no control over.

“undisputed assumption that marriage is important to the welfare of children.”⁹⁰

The court reasoned that extending marriage to opposite-sex couples could rationally promote familial stability if the legislature believed that heterosexual couples, whose sexual union may result in unexpected child birth, require more incentives than same-sex couples to stay together and rear the children they bring into the world.⁹¹ Though admitting that same-sex couples often have children, the court reasoned that the planned nature of having children in same-sex relationships could inform the legislature’s belief that opposite-sex couples need the inducements provided by marriage more than same-sex couples.⁹² This rational basis thus implicitly recognizes some objective societal benefit in having couples that reproduce enter into a marriage. If this basis is unique from the goal of having a mother and father rear a child, which is the second rational basis identified by the court, the societal good must be a recognition that two parents are better able to rear a child than one parent, and that the state is justified in creating incentives for parents to stay together.

Additionally, the court found that it would have been rational for the legislature to believe that it is optimal for children to be reared by a mother and father, a notion which if unsupported by social science, could still be supported by “the common-sense premise that children will do best with a mother and father in the home.”⁹³ The court essentially said that majoritarian societal preferences, as manifested in culture and tradition, are sufficient to merit the state effort at promoting child welfare by extending safeguards and legal protections to opposite-sex couples rearing children while denying the same protections to children reared by same-sex couples. Based on the assumption that opposite-sex couples provide a better upbringing to children, the court concluded that the legislature is rational “to offer a special inducement, the legal recognition of marriage, to encourage the formation of opposite-sex households.”⁹⁴

In *Hernandez*, Chief Judge Kaye challenged the majority’s application of rational basis review. Kaye noted that equal protection’s “rational-basis review requires *both* the existence of a legitimate interest *and* that the classification rationally advance that interest.”⁹⁵ To this end, the proper framing of the question was “whether there exists a rational basis for *excluding* same-sex couples from marriage, and, in fact, whether the State’s interests in recognizing or supporting opposite-sex marriages are rationally *furthered* by the exclusion.”⁹⁶ Kaye found that while child welfare was potentially promoted through the inducement of marriage for couples that have children, none of the state’s interests were furthered by excluding same-sex couples from marriage.⁹⁷

The first rational basis pertains to promoting familial stability for couples that procreate. As discussed previously, to the extent that child welfare is the goal, this amounts to little more than a state interest in promoting marriage for couples that have children, which is rooted in the belief that two parents are

better equipped to rear a child than one parent. What the majority opinion overlooks is that the children of same-sex couples also benefit from having two parents,⁹⁸ and thus are equally included in any state interest that aims to promote children having two legal parents. Having two parents rearing a child, in general, increases the ability to provide for the child’s financial, emotional, and developmental needs. This common sense belief is supported by the social science data on the issue, and is a key justification for why most all of the major professional organizations concerned with child development and welfare support extending comparable rights and benefits to families headed by same-sex couple that rear children.⁹⁹

The second rational basis found in *Hernandez* for advancing the state interest in child welfare was the interest in having a mother and father to rear the child. The court found this rational basis to be rooted in intuition and common sense. Like the first rational basis, the second justification is irrational to the extent that child welfare is the ultimate goal. Indeed in contradiction to the data accumulated thus far which find no adverse consequences for children reared in families headed by same-sex couples¹⁰⁰, the courts find it rational to allow tradition and societal preference to trump the needs of the children being reared by same-sex couples. As same-sex couples already are rearing children, and will continue to do so, all the while being denied rights and protections for their families, the question is no longer one of whether such children ought to have an upbringing in accord with majoritarian notions of the ideal; rather, the question is whether such majoritarian ideals are a rational justification for punishing the children of same-sex couples by denying them rights and benefits aimed at ensuring child welfare. The answer with respect to the same-sex headed families that have formed is clearly no, unless we are to believe that the inducement lures homosexual people into opposite-sex marriages for the purposes of reproducing - hardly a healthy or stable relationship to rear children in. Since the inducement does not operate with respect to homosexual people, and since children are being reared in homes headed by same-sex couples, the classification cannot be seen to further the state’s interest, but rather, can only be seen as a classification drawn to disadvantage homosexuals and families headed by same-sex couples.¹⁰¹

In *Andersen v. King County*, the Washington State Supreme Court held that the state’s Defense of Marriage Act (“DOMA”), which was passed to deny the ability of same-sex couples to marry, was constitutional under the Washington State Constitution.¹⁰² Applying a form of equal protection analysis¹⁰³, the court essentially found procreation, familial stability, and traditional nuclear families to be the three legitimate state interests promoted by the DOMA.¹⁰⁴ The court reasoned that encouraging procreation was a legitimate governmental interest, and that couples that marry may be more likely to procreate.¹⁰⁵ The limitation of marriage to opposite-sex couples is related to that interest because “no other relationship has the potential to create, without third party involvement, a child biologically related to both parents.”¹⁰⁶ Relatedly, the court found that it was

rational to believe that encouraging marriage for couples that can naturally procreate would be preferable to having children reared by unmarried parents, an interest which conceivably seeks to protect the best interests of children.¹⁰⁷ The court also found that it was a legitimate state interest to promote having children reared in a home headed by their opposite-sex parents,¹⁰⁸ to the extent that the legislature believed that children thrive in households composed of a father, mother, and their biological children.¹⁰⁹ Thus, the court believed that the legislature was rational to conclude that child welfare was fostered by the encouragement of rearing children in traditional nuclear families, and that the exclusion of same-sex couples from marriage furthered that interest.

In *Andersen*, Justice Fairhurst's dissent challenged the plurality's application of the rational basis inquiry, noting that under Washington law, the "requirement that a classification have a rational basis dictates that the issue in [the] case be framed as whether the *exclusion* of same-sex couples from civil marriage is rationally related to a legitimate [state] interest."¹¹⁰ As the state's DOMA was the only statute being challenged, the dissent argued that the focus on the rationality of extending rights and benefits to opposite-sex couples was immaterial to the inquiry, for "DOMA in *no way* affects the right of opposite-sex couples to marry – the *only* intent and effect of DOMA was to explicitly deny same-sex couples the right to marry."¹¹¹

Applying the dissent's equal protection standard to the first state interest, that of promoting procreation, the exclusion of same-sex couples from marriage would have to be deemed to be rationally related to the interest. On this relationship the dissent noted that "there is no logical way that *denying* the right to marry to same-sex couples will *encourage* heterosexual couples to procreate with greater frequency."¹¹² Similarly, there seems to be no logical way of concluding that denying the right to marry to same-sex couples would discourage heterosexual couples from procreating. Indeed, it is difficult to see how the ability of same-sex couple headed families accessing the institution of marriage at all relates to the willingness or ability of opposite-sex couples to procreate.

On the second state interest, that of ensuring that children born to opposite-sex couples are reared in the marital context, it is clear that the exclusion of same-sex couples in no way is related to this goal, and in fact, operates in direct contradiction to the goal. The dissent noted that "denying same-sex couples the right to marry also will not encourage couples who have children to marry or to stay married for the benefit of their children."¹¹³ More importantly, it defies logic to conclude that only the children of opposite-sex couples are the ones that deserve the benefits that marriage provides. Children are being reared in families headed by same-sex couples, and there is no just basis upon which to conclude that the nature of their parents' relationship, or the circumstances of their birth should rule them ineligible for these state benefits.

The exclusion of same-sex couples from marriage also fails to bear a rational relationship to the third purported state interest

in promoting traditional nuclear families. The dissent concludes that "even if such a goal is valid, which seems unlikely, denying same-sex couples the right to marry has no hope of increasing such child rearing."¹¹⁴ Again, excluding families headed by same-sex couples from marriage does not seem to provide any meaningful incentives for a homosexual person to choose to bring a child into an opposite-sex relationship – the incentive operates only with respect to heterosexuals who seek to reproduce, offering more benefits to them if they choose to marry and fewer if they do not.

In *Lewis v. Harris*, the New Jersey Supreme Court unanimously found the state's exclusion of same-sex couples from the rights and benefits of marriage to violate the New Jersey state constitution's equal protection clause although the majority rejected the plaintiffs' claim that there was a fundamental right for same-sex couples to marry under the New Jersey constitution's liberty clause.¹¹⁵ The court's equal protection standard differs in one important respect from New York and Washington's standard — the New Jersey standard requires a heightened finding of a "substantial relationship to a legitimate governmental purpose."¹¹⁶ Additionally, the majority did not engage with the possibility that procreation and child rearing were justifications for the disparate treatment of same and opposite-sex couples. The Attorney General intentionally disavowed reliance on those arguments, and the State refused to advance it.¹¹⁷ The minority opinion addressed the procreation and child-rearing argument and noted that its credibility was undermined both by the increasing prevalence of same-sex couples rearing children and the fact that social science data did not support the notion that opposite-sex couples are better at rearing children.¹¹⁸ Seemingly, the only argument advanced by the State was uniformity with the laws of other states. But the court found this to be wholly inadequate in light of the severity of the deprivation of the rights involved and in light of the fact that same-sex couples were rearing children.¹¹⁹

In spite of the different standard of constitutional analysis, the *Lewis* court's approach appropriately recognizes that any classification drawn must bear a rational relation to the purported state interest. In both *Hernandez* and *Andersen* the courts misapplied the rational basis standards by focusing on the rationality of extending rights to opposite-sex couples rearing children and conflating the appropriateness of providing rights and benefits to such families with the question of whether a classification drawn to deny those rights and benefits to same-sex couples was related to the interest in child welfare. As the court noted in *Lewis*, "children have the same universal needs and wants, whether they are raised in a same-sex or opposite-sex family, yet under the current system they are treated differently."¹²⁰ Unfortunately, this is precisely what the courts in *Hernandez* and *Andersen* found to be rational.

Even if it were rational to believe that same-sex couples are less capable than opposite-sex couples at rearing children, there would still be no rational furtherance of the goal of promoting child welfare by excluding families headed by same-sex couples

from the rights and benefits of marriage, because there always will be families headed by same-sex couples. The exclusion would have to find its rationality in the belief that children see their welfare enhanced when their same-sex parents do not have the rights and benefits of marriage to secure their relationship and benefit their family. Of course, this does nothing to enhance the child's welfare, and accordingly, defies rationality.

It is not mere under-inclusiveness which makes the justifications made by *Hernandez* and *Andersen* wrong, it is the belief that the denial of rights and benefits to families headed by same-sex couples is related, at all, to the goal of promoting child welfare. Same-sex couples have children, rear children, and will continue to rear children irrespective of the additional rights and benefits the state creates for the couple and the children they rear. With this being the reality of the society we live in, and with children bearing no responsibility for the actions or sexual orientation of their parents, "there is no rational basis for visiting

on those children a flawed and unfair scheme directed at their parents."¹²¹

CONCLUSION

With courts declaring that marriage statutes were enacted to benefit children, any meaningful evaluation of the exclusive nature of marriage statutes must account for the exclusion of the children of same-sex couples from the benefits of marriage. Such exclusion directly disadvantages children who are and who will continue to be reared by same-sex couples, and it does so solely on account of the status of the couples rearing the children. Drawing a classification based on the status of the couple parenting the child in no way furthers the state interest in child welfare, and accordingly, such exclusions cannot withstand an intellectually honest rational basis review.

ENDNOTES

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¹ The story of Johanna, Sherri, and Quintin is told in the declarations filed in marriage suit that Kokx and Bender were parties to in Washington State. Kokx Decl., *Andersen v. Sims*, No. 04-2-04964 (Super. Ct. King County Aug. 4, 2004), available at http://www.lambdalegal.org/binary-data/LAMBDA_PDF/pdf/336.pdf; Bender Decl., *Andersen v. Sims*, No. 04-2-04964 (Super. Ct. King County Aug. 4, 2004), available at http://www.lambdalegal.org/binary-data/LAMBDA_PDF/pdf/332.pdf. Kokx and Bender ultimately lost their suit before the Washington State Supreme Court. *Andersen v. King County*, 138 P.3d 963 (Wash. 2006).

² See Maggie Gallagher, *What is Marriage For? The Public Purposes of Marriage Law*, 62 LA. L. REV. 773, 783-88 (2002) (comparing the conflicting models of marriage, and arguing that it should be viewed as a social institution for rearing children, not as a romantic commitment a couple shares); *Andersen*, 138 P.3d at 979 n.12 (noting that Washington's marriage statute was not written to advance a state interest in loving and committed relationships).

³ See John F. Coverdale, *Missing Persons: Children in the Tax Treatment of Marriage*, 48 CASE W. RES. L. REV. 475, 504-06 (1998) (illustrating how the tax code can promote stable marriage, thus benefiting children reared in the marriage).

⁴ See *id.*; *Missing Persons: Children in the Tax Treatment of Marriage*, 48 CASE W. RES. L. REV. 475, 480-98 (1998) (summarizing the social science consensus on how marriage benefits the children of married couples).

⁵ Compare Judith Stacey, *Legal Recognition of Same-Sex Couples: The Impact on Children and Families*, 23 QUINNIPIAC L. REV. 529, 534-38 (2004) (noting that while there is consensus that two parents are generally better than one, there is less consensus about the extent to which marital status affects child development, though it does extend numerous benefits to children) with Maggie Gallagher & Joshua K. Baker, *Do Moms and Dads Matter? Evidence from the Social Sciences on Family Structure and the Best Interests of the Child*, 4 MARGINS 161, 171-73 (2004) (concluding that marriage alone is the optimal setting in which to rear children).

⁶ Gallagher, *supra* note 2, at 783-88.

⁷ Gallagher, *supra* note 2, at 783-84 (Data indicate that children of married couples have better emotional health than those of cohabiting couples, and that serious social, emotional, and psychological problems occur in one out of four children whose parents divorce, as opposed to one out of ten children whose parents stay married. Regarding suicide, data indicate that two thirds of the increase in youth suicide over time are largely attributable to children living with divorced parents).

⁸ Gallagher, *supra* note 2, at 785-86 (Data indicate that unmarried women have an average of a 50% higher infant mortality rate, that children with divorced

parents are up to 50% more likely to have health problems, and that a child's life expectancy, on average, is reduced by four years when their parents divorce).

⁹ Gallagher, *supra* note 2, at 786 (Data indicate that boys reared in single parent families are twice as likely to commit a crime by their early thirties).

¹⁰ Gallagher, *supra* note 2, at 786-87 (Data indicate that preschoolers living with stepfathers are 40 times more likely to be sexually abused, and that mothers' boyfriends commit half of all non-parent child abuse).

¹¹ See Maggie Gallagher, *What is Marriage For? The Public Purposes of Marriage Law*, 62 LA. L. REV. 773, 783-88 (2002).

¹² Gallagher, *supra* note 2, at 788 (Data indicate that daughters reared in unmarried households are about three times more likely than the daughters of married couples to become young unwed mothers, and that parental divorce doubles the chances that a child's marriage will end in divorce.).

¹³ Gallagher, *supra* note 2, 782 (2002).

¹⁴ See Gallagher & Baker, *supra* note 5, at 174 (noting that there is disagreement about the extent to which married parents benefit children, though there is consensus that family structure is important).

¹⁵ Stacey, *supra* note 5, at 534-36.

¹⁶ Stacey, *supra* note 5, at 442 (citing a General Accounting Office report, reprinted in 1997 WL 67783). But see Joshua K. Baker, *1,000 Federal Benefits of Marriage? An Analysis of the 1997 GAO Report*, Institute for Marriage and Public Policy (2004), available at <http://www.marriedebate.com/pdf/iMAPP.GAO.pdf> (last visited Oct. 7, 2007) (arguing that many of the rights are duplicative).

¹⁷ Liz Seaton, *The Debate over the Denial of Marriage Rights and Benefits to Same-Sex Couples and Their Children*, 4 MARGINS 127, 138-40 (2004).

¹⁸ Lewis A. Silverman, *Suffer the Little Children: Justifying Same-Sex Marriage from the Perspective of a Child of the Union*, 102 W. VA. L. REV. 411, 446-50 (1999).

¹⁹ Silverman, *supra* note 18, at 436-38 (Silverman notes that by requiring same-sex couples to file separately, they are denied lower marginal tax rates that joint filers enjoy. He provides an example of a married couple with a combined taxable income of \$60,000, who would have had \$11,204 tax due in the 1999 tax year, in contrast to a same-sex couple with one working adult and one who stayed at home to care for their child who, by being denied the ability to jointly file, would have had \$13,453 in taxes for the year).

²⁰ Silverman, *supra* note 18, at 437.

²¹ Silverman, *supra* note 18, at 439.

²² Silverman, *supra* note 18, at 441 (citing 8 U.S.C. § 1153(a)(2) (2007)).

²³ Silverman, *supra* note 18, at 443.

²⁴ Silverman, *supra* note 18, at 443.

²⁵ Lewis A. Silverman, *Suffer the Little Children: Justifying Same-Sex Marriage from the Perspective of a Child of the Union*, 102 W. VA. L. REV. 411, 444-45 (1999).

²⁶ *Id.* at 445-46.

²⁷ *Id.* at 442.

ENDNOTES CONTINUED

- ²⁸ See Vincent C. Green, Note, *Same-Sex Adoption: An Alternative Approach to Gay Marriage in New York*, 62 BROOK. L. REV. 399, 426-27 (1996) (outlining the societal benefit that marriage would offer to the children of same-sex couples). Cf. Steven L. Nock, *A Comparison of Marriages and Cohabiting Relationships*, 16 J. Fam. Issues 53 (1995) (examining, in part, the different social and familial treatment of family units headed by unmarried couples).
- ²⁹ See Martha Albertson Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies*, 145-76 (1995) (providing an overview of how society has defined family as dependent on a heterosexual sexual union, and has privileged such unions with the ability to obtain the legal benefits of marriage).
- ³⁰ *Id.*
- ³¹ See *id.* at 145 (noting that the social and cultural understanding of a marriage is of a sexual union); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (marriage is constitutionally protected by the right of privacy, and married couples have the right to use contraceptives). See also Michael H. v. Gerald D., 491 U.S. 110 (1989) (likely biological father has no constitutional right to assert parental rights when doing so would challenge the presumption that a child reared in a marriage is the child of both parties to the marriage).
- ³² Fineman, *supra* note 29, at 145-47 (mentioning historical punishment of extramarital sexual relationships, and addressing lack of comprehensive extension of legal status to non-marital caregiving relationships).
- ³³ See generally William C. Duncan, *The Social Good of Marriage and Legal Responses to Non-Marital Cohabitation*, 82 OR. L. REV. 1001 (2003) (arguing that non-marital cohabitating couples are less stable, and demonstrate less commitment to their relationship than marital couples).
- ³⁴ *Id.* at 1026-30 (rejecting the arguments for granting legal status to cohabitating couples, and arguing that marriage itself is an objective social good worth protecting).
- ³⁵ *Id.* at 1019 (noting that seventeen states recognize private contract or equitable theories to enforce obligations between unmarried parties to an opposite-sex relationship); see, e.g., *Watts v. Watts*, 405 N.W.2d 303 (Wis. 1987) (equity requires recognition of obligations between unmarried parties to an opposite-sex relationship); *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976) (finding that contract obligations between parties of an unmarried opposite-sex relationship could be enforceable).
- ³⁶ Duncan, *supra* note 33, at 1019-20.
- ³⁷ Duncan, *supra* note 33, at 1021-22 (noting that courts in nine states have permitted joint adoption for same-sex couples).
- ³⁸ See *Cote-Whitacre v. Dep't of Pub. Health*, 844 N.E.2d 623 (2006) (upholding constitutionality of state law preventing marriages for residents of states where the marriage would otherwise be prohibited); Katie Zezima, *Rhode Island Couple Win Same-Sex Marriage Case*, N.Y. Times, Sept. 30, 2006, at A9 (indicating that Rhode Island same-sex couples are the first non-Massachusetts residents permitted to marry in Massachusetts).
- ³⁹ 28 U.S.C. § 1738C (2007).
- ⁴⁰ VT. STAT. ANN. tit. 15, § 1204 (2006); CONN. GEN. STAT. § 46b-38nn (2007); N.J. ANN. STAT. § 37:1-31 (2007); H.R. 437, 2007 Sess. (N.H. 2007) (to take effect on Jan. 1, 2008).
- ⁴¹ See CAL. FAM. CODE § 297.5 (2006); HAW. REV. STAT. § 572C-6 (2006) (referred to as reciprocal beneficiaries); ME. REV. STAT. ANN. Tit. 22, § 2710 (2005); S. 5336, 60th Leg., Reg. Sess. (Wa. 2007); Gay and Lesbian Activists Alliance, *Rights and Responsibilities of Domestic Partners in the District of Columbia*, (April 3, 2006), available at <http://www.glaa.org/resources/dprightsandresponsibilitiesindc.shtml> (last visited Oct. 7, 2007); H.R. 2007, 74th Leg. Assem., Reg. Sess. (Or. 2007).
- ⁴² 28 U.S.C. § 1738C.
- ⁴³ See *Opinions of the Justices to the Senate*, 802 N.E.2d 565 (Mass. 2004) (Rejecting civil unions as equivalent to marriage); Deborah L. Forman, *Interstate Recognition of Same-Sex Parents in the Wake of Gay Marriage, Civil Unions, and Domestic Partnerships*, 46 B.C. L. REV. 1 (2004) (analyzing the difficulty faced by same-sex parents without uniform recognition of their family rights).
- ⁴⁴ See, e.g., Michael H. v. Gerald D., 491 U.S. 110 (1989).
- ⁴⁵ See Melanie B. Jacobs, *Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Nonbiological Lesbian Coparents*, 50 BUFF. L. REV. 341, 344-45 (2002).
- ⁴⁶ See Human Rights Campaign Foundation, *Second Parent/Stepparent Adoption Laws in the U.S.*, available at http://www.hrc.org/Template.cfm?Section=Your_Community (follow "Parenting Laws in the U.S." link) (April 2006) (noting that nine states and the District of Columbia permit second parent adoption, jurisdictions in fifteen other states have permitted second parent adoption for same-sex couples, and four states ban second parent adoption for same-sex couples); Eleanor Michael, Note: *Approaching Same-Sex Marriage: How Second Parent Adoption Cases can Help Courts Achieve the "Best Interests of the Same-Sex Family"*, 36 CONN. L. REV. 1439, 1445-46 (2004).
- ⁴⁷ Jacobs, *supra* note 45, at 346-47; Silverman, *supra* note 18, at 427-28 (enumerating the ways in which having two legally recognized parents benefits the child).
- ⁴⁸ Jacobs, *supra* note 45, at 348-50.
- ⁴⁹ Michael, *supra* note 46, at 1459-60.
- ⁵⁰ Gregory M. Herek, *Legal Recognition of Same-Sex Relationships in the United States: A Social Science Perspective*, 61 Am. Psychol. 607, 615 (Sept. 2006).
- ⁵¹ *Id.*; Michael S. Wald, *Same-Sex Couple Marriage: A Family Policy Perspective*, 9 VA. J. SOC. POL'Y & L. 291, 335-37 (2001) (noting that private contracts to secure same-sex relationships often result in case by case judicial determinations, and that some states are unwilling to recognize rights for cohabitating couples).
- ⁵² See Herek, *supra* note 50, at 615-16; Nancy J. Knauer, *The September 11 Attacks and Surviving Same-Sex Partners: Defining Family Through Tragedy*, 75 TEMP. L. REV. 31, 39-53 (2002) (providing an overview of the challenges that face surviving same-sex partners following the death of the other partner).
- ⁵³ Jim Finkle, *U.S. Gay Couples Struggle To Adopt*, Reuters, Sept. 12, 2006 <http://www.alertnet.org/thenews/newsdesk/N10331415.htm>.
- ⁵⁴ See Grace Ganz Blumberg, *Legal Recognition of Same-Sex Conjugal Relationships: The 2003 California Domestic Partner Rights and Responsibilities Act in Comparative Civil Rights and Family Law Perspective*, 51 UCLA L. REV. 1555, 1570 n.72 (2004) (examining the likely underreporting of same-sex couples in the 2000 census).
- ⁵⁵ Gary J. Gates, *Same-Sex Couples and the Gay, Lesbian, Bisexual Population: New Estimates from the American Community Survey*, (Williams Inst., UCLA School of Law), Oct. 2006, at 1-2, available at <http://www.law.ucla.edu/williamsinstitute/publications/SameSexCouplesandGLBpACS.pdf> (last visited Oct. 7, 2007) (noting that the number of same-sex headed households has increased more than 30% since the 2000 census); Gary J. Gates et al., *Adoption and Foster Care by Gay and Lesbian Parents in the United States*, (Williams Inst., UCLA School of Law & Urban Inst., Wash. D.C.), Mar. 2007, at 5-6, available at http://urbaninstitute.org/UploadedPDF/411437_Adoption_Foster_Care.pdf (last visited Oct. 7, 2007) (indicating that 16% of gay men and 35% of lesbian women currently have a biological or adoptive child).
- ⁵⁶ Gates et al., *supra* note 55, at 5 (indicating that over 41% of lesbian women and 51% of gay men desire to have children).
- ⁵⁷ See John A. Robertson, *Gay and Lesbian Access to Assisted Reproductive Technology*, 55 CASE W. RES. L. REV. 323, 333-35 (2004) (discussing right of gay and lesbian parents to rear their biological children).
- ⁵⁸ See *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (noting that the Fourteenth Amendment protects parental right to rear children); *Stanley v. Illinois*, 405 U.S. 645 (1972) (recognizing substantial interest of biological father in custody determination of child and finding that unmarried status could not bar father's claims); *Santosky v. Kramer*, 455 U.S. 745, 747 (1982) (holding that due process requires the state to establish with clear and convincing evidence its legitimate reasons prior to severing parental status) see also Strasser, *supra* note 53 at 842-47 (providing an overview of the development of the Supreme Court's recognition of the fundamental right to parent).
- ⁵⁹ See *Finstuen v. Edmondson*, 497 F. Supp. 2d 1295 (Okla. 2006) (finding that state ban on recognizing adoptions by same-sex couples, as distinguished from ban on same-sex couples adopting, violated the Full Faith and Credit Clause, equal protection, and due process).
- ⁶⁰ See, e.g., *In re Marriage of Wicklund*, 932 P.2d 652 (Wash. Ct. App. 1996) (overturning court order in custody determination that barred homosexual father from displaying affection with his same-sex partner while in presence of his child); *Pryor v. Pryor*, 709 N.E.2d 374 (Ind. Ct. App. 1999) (homosexuality not determinative in child custody determination); *A.C. v. C.B.*, 829 P.2d 660, (N.M. Ct. App. 1992) (same-sex partner has standing to bring claim for custody and visitation, sexual orientation not determinative); *Packard v. Packard*, 697 So. 2d 1292 (Fla. Dist. Ct. App. 1997) (reversing and remanding custody order premised on non-traditional nature of mother's same-sex relationship, and requiring an actual harm to the child's best interests for sexual orientation to be a valid consideration); see also Mark Strasser, *Fit To Be Tied: On Custody, Discretion, and Sexual Orientation*, 46 AM. U. L. REV. 841, 863-90 (1997) (discussing various justifications used to terminate parental rights of lesbian and gay parents).
- ⁶¹ Fineman, *supra* note 29, at 148.
- ⁶² See e.g. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (concluding that the denial of marriage licenses to same-sex couples discriminates on the basis of sex); *Hernandez v. Robles*, 855 N.E.2d. 1, 10 (N.Y. 2006) (noting that plaintiffs claimed that the exclusion of same-sex couples from marriage discriminated on

ENDNOTES CONTINUED

the basis of sex, and sexual orientation); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 958, 967 (2003); *Baker v. State*, 744 A.2d 864, 890 (1999) (J. Dooley concurring) (stating that the exclusion of same-sex couples from marriage has a discriminatory effect); *Andersen*, 138 P.3d at 973, 980-81 (noting that exclusion of same-sex couples from the marriage statute is an issue of discrimination, and that the plaintiffs so pleaded the case); Sarah Wildman, *Facing Up: Wedding-Bell Blues; It's Possible that Democrats Could Have Fought This One to a Draw if They Had Emphasized Discrimination*, *AM. PROSPECT*, Dec. 2004 at 39 (arguing that framing the issue as one of discrimination increases support for same-sex relationship rights); Vincent Price, *Lilach Nir & Joseph N. Cappella, Framing Public Discussion of Gay Civil Unions*, 69 *PUB. OP. Q.* 179 (2005) (studying the effect that the framing of marriage or civil unions for same sex couples has on their debate and support).

⁶³ Silverman, *supra* note 18, at 411-13.

⁶⁴ See, e.g. Nancy J. Knauer, *Science, Identity, and the Construction of the Gay Political Narrative*, 12 *LAW & SEX.* 1, 46-50 (2003) (describing how opposition to gay rights is rooted in a belief that homosexuality is a choice, and can be changed); Timothy J. Dailey, Family Research Council, *The Slippery Slope of Same-Sex Marriage*, at 13-15 (2004), available at <http://www.frc.org/get.cfm?i=BC04C02> (last visited Oct. 8, 2007) (arguing that upholding traditional marriage is not about discrimination) (arguing that homosexuality is unnatural, and opposition to equal rights for same-sex couples is rooted in "the subconscious realization of what is normal and what is not").

⁶⁵ See, e.g. Timothy J. Dailey, Family Research Council, *The Slippery Slope of Same-Sex Marriage*, at 9-10 (2004), available at <http://www.frc.org/get.cfm?i=BC04C02> (last visited Oct. 7, 2007) (arguing that upholding traditional marriage is not about discrimination).

⁶⁶ See, e.g. Policy Statement, Am. Psychological Ass'n, *Appropriate Therapeutic Responses to Sexual Orientation*, (Aug. 14, 1997), available at <http://www.apa.org/pi/lgbcpolicy/appropriate.html> (last visited Oct. 8, 2007); Policy Statement, Am. Medical Ass'n, *AMA Policy Regarding Sexual Orientation*, available at <http://www.ama-assn.org/ama/pub/category/14754.html> (last visited Oct. 8, 2007).

⁶⁷ Knauer, *supra* note 64, at 10-12.

⁶⁸ *Andersen*, 138 P.3d at 974 & n.6.

⁶⁹ See, e.g. Dailey, *supra* note 65, at 7 (indicating that same-sex couples are inappropriate role models for children, and that the homes they provide are "dangerous and unstable environment[s] for children").

⁷⁰ See William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 *N.Y.U. L. REV.* 1327, 1328-30 (2000).

⁷¹ See George A. Rekers, *An Empirically-Supported Rational Basis For Prohibiting Adoption, Foster Parenting, and Contested Child Custody by Any Person Residing in a Household that Includes a Homosexually-Behaving Member*, 18 *ST. THOMAS L. REV.* 325 (2005); Gallagher and Baker, *supra* note 5.

⁷² Rekers, *supra* note 71, at 326-29.

⁷³ Gallagher and Baker, *supra* note 5, at 176-90.

⁷⁴ See, e.g. Brief of Amicus Curiae Families Northwest, at *4, *Andersen v. King County*, No. 75934-1, 2005 WL 901983 (Wash. Feb. 14, 2005) (arguing that the relative recency of same-sex marriage means that there has not been enough study of the children of same-sex couples to justify a change in marriage law).

⁷⁵ See Stacey, *supra* note 5 (reviewing the social science literature, and pointing out the methodological flaws of commentators such as Gallagher who conclude that same-sex couple headed households are less ideal settings to rear children).

⁷⁶ *Id.*; see also Charlotte J. Patterson, *Adoption of Minor Children by Lesbian and Gay Adults: A Social Science Perspective*, 2 *DUKE J. GENDER L. & POL'Y* 191 (1995) (reviewing social science data and concluding that there is no basis upon which to believe that children do less well when reared by same-sex couples).

⁷⁷ Rekers, *supra* note 71, at 342; Herek, *supra* note 50, at 609-10 (noting that since same-sex couples cannot marry, comparisons of the relative stability between married and same-sex couples must control for the variable).

⁷⁸ Judith Stacey and Timothy J. Biblarz, *(How) Does Sexual Orientation of Parents Matter?*, 66 *AM. SOC. REV.* 159, 171-72 (2001).

⁷⁹ Stacey, *supra* note 5, at 533-34.

⁸⁰ 406 U.S. 164 (1972).

⁸¹ *Id.* at 175.

⁸² *Id.*

⁸³ See *Clark v. Jeter*, 486 U.S. 456, 467 (1988) (finding statute of limitations on paternity suits to fail the heightened scrutiny required in illegitimacy cases); see also Laurence C. Nolan, "Unwed Children" and Their Parents Before The United States Supreme Court From Levy to Michael H.: Unlikely Participants in Constitutional Jurisprudence, 28 *CAP. U. L. REV.* 1 (1999) (providing an overview of the constitutional jurisprudence surrounding illegitimate children); Rebra Carrasquillo Hedges, Note, *The Forgotten Children: Same-Sex Partners,*

Their Children and Unequal Treatment, 41 *B.C. L. REV.* 833 (2000) (arguing that a comparison to the Court's jurisprudence on illegitimate children supports finding an equal protection violation in disadvantaging the children of same-sex couples).

⁸⁴ Silverman, *supra* note 18, at 432-36.

⁸⁵ Silverman, *supra* note 18, at 434-35.

⁸⁶ See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 964 (2003) (noting that the exclusion of same-sex couples from marriage directly disadvantages the children they rear by depriving the families of legal rights and benefits).

⁸⁷ 855 N.E.2d 1 (N.Y. 2006).

⁸⁸ *Id.* at 9-12.

⁸⁹ *Id.* at 7-8.

⁹⁰ *Id.* at 7.

⁹¹ *Id.*

⁹² *Id.* at 7-8.

⁹³ 855 N.E.2d 1, 8 (N.Y. 2006).

⁹⁴ *Id.*

⁹⁵ *Id.* at 30 (Kaye, C.J. dissenting) (emphasis in original).

⁹⁶ *Id.*

⁹⁷ *Id.* at 30-32.

⁹⁸ See *id.* at 22 (Grafeno, J. concurring) (Noting that "It is also true that children being raised in same-sex households would derive economic and social benefits if their parents could marry.")

⁹⁹ See Seaton, *supra* note 17, at 156-58 (indicating that the American Academy of Pediatrics, American Academy of Family Physicians, Child Welfare League of America, National Association of Social Workers, National Council on Adoptable Children, American Psychiatric Association, and American Psychoanalytic Association all support parenting rights for lesbian and gay parenting); Policy Statement, Am. Psychological Ass'n, *Sexual Orientation, Parents, and Children*, (Jul. 30, 2004), available at <http://www.apa.org/pi/lgbcpolicy/parents.html> (last visited Oct. 8, 2007); cf. Policy Statement, Am. Med.Ass'n, *AMA Policy Regarding Sexual Orientation*, available at <http://www.ama-assn.org/ama/pub/category/14754.html> (last visited Oct. 8, 2007) (supporting co-parenting rights and basic domestic partnership rights for same-sex couples).

¹⁰⁰ See Patterson, *supra* note 76 (reviewing social science data and concluding that there is no basis upon which to believe that children do less well when reared by same-sex couples); Stacey, *supra* note 32 (reviewing the social science literature and showing why it does not demonstrate that families headed by same-sex couples are less ideal settings to rear children).

¹⁰¹ *Hernandez*, at 30-32 (Kaye, C.J. dissenting).

¹⁰² *Andersen*, 138 P.3d at 968.

¹⁰³ *Id.* at 980 (noting that the state constitutional analysis is "coextensive with that under the equal protection clause").

¹⁰⁴ *Id.* at 982-85.

¹⁰⁵ *Id.* at 982.

¹⁰⁶ *Id.*

¹⁰⁷ *Andersen*, 138 P.3d at 982 (citing *Morrison v. Stadler*, 821 N.E.2d 15, 25 (Ind. Ct. App. 2005) for the proposition that opposite-sex marriage promotes stable relationships, and the preservation of such relationships after children are born).

¹⁰⁸ *Id.* at 983.

¹⁰⁹ *Id.*

¹¹⁰ *Andersen*, 138 P.3d at 1016 n.15 (Fairhurst, J. dissenting) (emphasis in original).

¹¹¹ *Id.* at 1018 (emphasis in original).

¹¹² *Id.* (emphasis in original).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ 908 A.2d 196, 211, 220 (2006).

¹¹⁶ *Id.* at 212 & n.13.

¹¹⁷ *Id.* at 204 n.6, 217.

¹¹⁸ *Id.* at 230 (Poritz, C.J. concurring and dissenting).

¹¹⁹ See *id.* at 218.

¹²⁰ *Id.* at 216-17.

¹²¹ 908 A.2d 196, 211, 218 (2006); see also *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972) (noting that it is irrational to punish illegitimate children for the actions of their parents).

PENCIL ME IN: THE USE OF TITLE IX AND § 1983 TO OBTAIN EQUAL TREATMENT IN HIGH SCHOOL ATHLETICS SCHEDULING

By Leigh E. Ferrin*

In 1998, Communities for Equity, a non-profit organization comprised of female high school student-athletes in Michigan and their parents, sued the Michigan High School Athletic Association (hereafter “MHSAA”).¹ Communities for Equity alleged that the MHSAA discriminated against female high school athletes by scheduling girls’ sports in different seasons than boys’ sports.²

After eight years of litigation, the Sixth Circuit, on remand from the United States Supreme Court, affirmed the district court’s holding that the MHSAA was (and still is) in violation of Title IX, the Equal Protection Clause, and the Michigan civil rights act known as the Elliott-Larsen Civil Rights Act.³ The Sixth Circuit also held that the federal statutory claim (the Title IX claim) did not preclude Communities for Equity’s equal protection claim under § 1983.⁴ The implication of this decision is that Communities for Equity will now have the full array of remedies, including injunctive relief, declaratory relief, and monetary damages, from the organization in violation and the individuals responsible for the discriminatory treatment. The MHSAA appealed the Sixth Circuit’s decision to the United States Supreme Court, arguing that Title IX precluded Communities for Equity from also bringing constitutional claims under § 1983.⁵ The Supreme Court denied certiorari,⁶ so the MHSAA will now be required to implement a previously approved compliance plan. Different remedies are available under each of the two causes of action, so if Title IX were to preclude a plaintiff from bringing an equal protection claim under § 1983, that plaintiff may be denied access to certain remedies.

This case note analyzes whether a Title IX claim should preclude a constitutional claim brought under § 1983, an issue on which the circuits are split. After the Sixth Circuit’s holding in *Communities for Equity*, three circuits agree that a Title IX claim does not preclude an equal protection claim under § 1983, while three circuits have reached the opposite conclusion.⁷ Part II sets out the facts and disposition of *Communities for Equity v. Michigan High School Athletic Association*. Part III analyzes Title IX, § 1983, and the Equal Protection Clause, and the interaction between the three. This section also contains an explanation of the cases and the legislative intent behind the preclusion of a § 1983 claim by a Title IX claim. Part IV discusses the Sixth Circuit’s analysis and the reasons for the circuit split. Finally, Part V concludes that the Sixth Circuit’s reasoning better comports with congressional intent, and furthers the important social goals embodied in Title IX and our federal

constitution. This case note asserts that future plaintiffs, defendants, and judges would benefit from a Supreme Court decision resolving the circuit split.

COMMUNITIES FOR EQUITY V. MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION

A. PARTIES

Communities for Equity was formed due to a concern that discrimination by the MHSAA would impact the female athletes’ psychological well-being, as well as their ability to continue their athletic education in college.⁸ The case was filed as a class action, with the class defined as all current and future female high school student-athletes in Michigan and their parents.⁹

The MHSAA is a non-profit organization in charge of high school sports in Michigan. The MHSAA decides which sports to sanction; when to schedule games; how, when and where to organize statewide championship tournaments; and what rules the high schools must abide by.¹⁰ While not officially a state organization, the state of Michigan has essentially ceded control of its high school athletics to the MHSAA, and the majority of the tournaments are held in state-owned facilities or properties.¹¹ In addition, public school administrators make up the majority of the MHSAA advisory committee.¹² Therefore, the district court found that the MHSAA was a state actor for purposes of the Fourteenth Amendment and a recipient of federal funds for the purposes of Title IX.¹³

B. ASSERTED CLAIMS

Communities for Equity sought to establish an equal protection claim under § 1983, as well as claims under Title IX and the Michigan state Civil Rights Act. The allegations were based on the fact that the MHSAA treats Michigan high school female athletes differently than their male counterparts. Six of the fourteen sports offered for females in Michigan are played in their non-traditional seasons; whereas, all fourteen of the sports offered for males are played in their traditional seasons. A “traditional” season is considered to be the season in which the sport is usually played and generally corresponds to when the sport is sponsored by the National Collegiate Athletic Association (hereafter “NCAA”).¹⁴ For example, girls’ basketball in Michigan is played in the fall instead of the winter, girls’ volleyball is played in the winter instead of the fall, and girls’ soccer is played in the spring instead of the fall.¹⁵ This

Non-traditional season scheduling subjects the female athletes to heightened risk of injury and reduces their chances of being recruited by college coaches.

schedule was originally adopted when Michigan introduced girls' high school sports in the 1970s.¹⁶ The purpose was to ensure that the girls' sports were not interfering with the boys' sports.¹⁷

Non-traditional season scheduling subjects the female athletes to heightened risk of injury¹⁸ and reduces their chances of being recruited by college coaches.¹⁹ Gender-based discrimination can also influence females' future career options and earning power, as well as their mental health.²⁰

C. CASE DISPOSITION

While *Communities for Equity* originally alleged seven violations of Title IX, the Equal Protection Clause, and the Elliott-Larsen Civil Rights Act,²¹ all claims except for the non-traditional season claim were settled prior to trial.²² In 2001, the Federal District Court in the Western District of Michigan held that the MHSAA's current scheduling of high school girls' sports in Michigan was in violation of Title IX, the Equal Protection Clause, and the Elliott-Larsen Civil Rights Act.²³ The court ordered the MHSAA to submit a compliance plan within six months, outlining how the violations would be remedied.²⁴ The first plan that the MHSAA submitted left "girls throughout the state in disadvantageous seasons in basketball, volleyball and soccer."²⁵ Having rejected the MHSAA's plan, the court created three plans for the MHSAA and allowed them to choose which version they would rather implement.²⁶ The MHSAA chose to switch girls' basketball and girls' volleyball to their traditional seasons; to switch two of the remaining four girls' sports to their traditional season; and to switch two boys' teams to their non-traditional seasons.²⁷ In the fall of 2007, the MHSAA is beginning to implement the compliance plan and, after nine years of litigation, Michigan female athletes are finally seeing relief.²⁸

The district court stayed its decision pending appeal.²⁹ The MHSAA appealed the district court's decision to the Sixth Circuit Court of Appeals and lost.³⁰ The MHSAA then appealed to the Supreme Court of the United States, arguing that *Communities for Equity*'s equal protection claim under § 1983 was subsumed by their Title IX claim.³¹ The Supreme Court declined to decide the case and remanded it to the Sixth Circuit to reconsider their holding in light of the Court's recent holding in *Rancho Palos Verdes v. Abrams*.³² The MHSAA conceded that they were subject to Title IX for the purposes of the appeal and claimed that Title IX precluded the plaintiffs from bringing the equal protection claim, even though the MHSAA adamantly argued that Title IX did not apply to them in the court below.³³

In August 2006, the Sixth Circuit held that Title IX contained no comprehensive enforcement scheme indicating that Congress intended to preclude recovery under § 1983 for an equal protection claim.³⁴

Most recently, in January 2007, the MHSAA appealed to the United States Supreme Court to resolve two issues, one of which was whether Title IX should have precluded the plaintiffs from bringing their equal protection claim under § 1983.³⁵ The Court has denied certiorari³⁶ and the MHSAA has run out of appeals. All that is left now in *Communities for Equity* is the discussion surrounding the compliance plan accepted by the district court in 2002.³⁷

LEGAL BACKGROUND

A. TITLE IX

Social scientists have established that the physical and emotional benefits of education and athletics are many: girls who participate in athletics have fewer instances of depression; they are less likely to become teen mothers; they are less likely to become obese; and they are more likely to graduate from high school and go to college.³⁸

Despite these positive results, women are still discouraged from participating in athletics.³⁹ Nationwide, male high school athletes receive 1.2 million more participation opportunities than female high school athletes.⁴⁰ In some states, the difference between opportunities is only a few thousand; in other states, the high schools offer close to twice as many opportunities for male high school athletes as they offer for female high school athletes.⁴¹

Those women's teams that are established often receive less funding, less attention, and less support than their male counterparts.⁴² Additionally, studies have found that 85% of females between the eighth and eleventh grades experience some form of sexual harassment.⁴³

Congress' recognition of the significant problems in education and athletics led them to enact Title IX of the Education Amendments of 1972.⁴⁴ The legislative history indicates that the principle purpose of Title IX was to prevent federal funds from being used for discriminatory practices, which is why the only express remedy written into the statute is the removal of federal funding.⁴⁵ A secondary purpose was to provide a remedy for individuals affected by discriminatory practices.⁴⁶ The Supreme Court reinforced this secondary purpose in 1979 when it decided *Cannon v. University of Chicago*, holding that there was a private right of action implicit in Title IX.⁴⁷ Congress intended Title IX to apply to educational institutions, including high schools, as long as they received federal funding.⁴⁸ At these institutions, discrimination in

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employment,⁴⁹ admission programs,⁵⁰ athletic programs,⁵¹ scholarship awards,⁵² sexual harassment,⁵³ and retaliation are all covered by Title IX.⁵⁴ If a policy or circumstance discriminates on the basis of sex or acts as a barrier to a female participating in educational or extracurricular activities, it would be a violation of Title IX.

There are two procedural mechanisms for asserting a Title IX claim. Written into the statute is an administrative procedure, whereby a Title IX complaint could be filed with the U.S. Department of Education's Office of Civil Rights (hereafter "OCR").⁵⁵ Pursuant to the statute, OCR then conducts an investigation to determine if federal funding should be removed from the institution.⁵⁶ The *Cannon* Court held that there is an implied private right of action in Title IX, meaning that an individual plaintiff can bring a lawsuit against the institution alleged to be in violation.⁵⁷ Using the *Cort v. Ash*⁵⁸ factors, the Court in *Cannon* found that: (1) the plaintiff was a member of the class that Title IX was intended to protect; (2) the legislative history indicated Congress' intent to create a private right of action for the person discriminated against on the basis of her sex; (3) the implication of a private right of action was consistent with the enforcement of Title IX; and (4) this was not an area of particular concern to the states.⁵⁹

The question then is: what relief can a plaintiff bringing a Title IX claim receive? The primary remedy for Title IX plaintiffs is the removal of federal funding from the institution found in violation.⁶⁰ Removing federal funding, however, does not necessarily eliminate the discrimination. As an alternative and preferred remedy, courts can order the institution to eliminate the discrimination through a court-sanctioned compliance plan.⁶¹ The content of compliance plans can vary greatly - from equalizing funding, to establishing a new team, or moving a girls' sport to its traditional season.⁶² The second problem with the defunding remedy is that it does not redress the harm that the discrimination has already done to the plaintiff. Damages are not available for unintentional violations of the statute.⁶³

However, attorneys' fees are available under 42 U.S.C. § 1988, which allows recovery of attorneys' fees in suits involving violations of plaintiffs' civil rights.⁶⁴

There are two significant limitations to the Title IX relief. The first is that relief, whether or not it is defunding, elimination of the discrimination through a compliance plan, or monetary damages can be obtained only from an institution receiving federal funding.⁶⁵ A particular individual who engaged in a discriminatory act cannot be sued under the statute.⁶⁶ The second limitation is that, in order to pursue relief under Title IX, the plaintiff must show that "an appropriate person" at the

institution had notice and an opportunity to remedy the situation.⁶⁷ An institution cannot be held liable for monetary damages for the actions of a rogue employee.⁶⁸

B. SECTION 1983 AND THE EQUAL PROTECTION CLAUSE

Section 1983⁶⁹ is the primary means by which an individual can obtain damages from state officials for violations of federal statutory and constitutional law.⁷⁰ Section 1983 was enacted by Congress in 1871, under section five of the Fourteenth Amendment, in order to enforce the provisions of the Fourteenth Amendment.⁷¹ The purpose was to protect individual U.S. residents from discriminatory actions by state actors abusing their authority.⁷² Section 1983 can be used to enforce all federal constitutional and statutory provisions.⁷³

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides in relevant part, "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."⁷⁴ The Fourteenth Amendment was enacted in 1868 to provide protection to African Americans but has since been expanded to cover discrimination against other impacted groups, such as women.⁷⁵ Under section five, the prohibition on discrimination is applicable to the states.⁷⁶

Under a § 1983 claim for a violation of the Equal Protection Clause, the plaintiff must show that the defendant is a state actor or is acting under color of state law.⁷⁷ Included are private organizations using state funds or public facilities or engaging in activities of the state that the state has entrusted to the private organization.⁷⁸ To establish an equal protection claim of sex discrimination, the plaintiff must show that the state actor has treated one sex differently from the other sex.⁷⁹ The burden then shifts to the defendant to show that there is an important governmental objective behind the differential treatment, and that the means chosen are substantially related to the achievement of those objectives.⁸⁰ A plaintiff using § 1983 to bring a claim under the Fourteenth Amendment can receive injunctive, declaratory,

and/or pecuniary relief. Injunctive relief is allowed only when a plaintiff can show that there is a possibility that they will again be deprived of their constitutional or statutory rights in the future. As with Title IX, successful plaintiffs are entitled to attorneys' fees under § 1988 because there has been a violation of the plaintiff's civil rights.⁸¹

C. TITLE IX AND § 1983 INTERACTION

Because Title IX was enacted with the purpose of eliminating discrimination⁸² and § 1983 was enacted to provide an enforcement mechanism for federal statutory and constitutional rights,⁸³ a plaintiff bringing a claim under Title IX often has a concurrent constitutional or statutory claim under

The primary remedy for Title IX plaintiffs is the removal of federal funding from the institution found in violation.

§ 1983. However, not every federal statute can be enforced through § 1983 because certain federal statutes have been written so as to preclude a § 1983 action for violation of the statute.⁸⁴ This is the case when Congress has intended the statutory remedy to be exclusive, or when the enforcement scheme in the statute is so comprehensive that enforcement under § 1983 would be incompatible.⁸⁵

1. § 1983 INTERACTION USED TO ENFORCE A STATUTORY RIGHT

In 1981, the Supreme Court decided *Middlesex County Sewerage Authority v. National Sea Clammers Association*,⁸⁶ holding that plaintiffs' claims under the Federal Water Pollution Control Act (hereafter "FWPCA") and the Marine Protection, Research and Sanctuaries Act of 1972 (hereafter "MPRSA") precluded plaintiffs' use of § 1983 to obtain damages under those same statutes.⁸⁷ Notably, the plaintiffs first asked that the Court recognize an implied private right of action under both the FWPCA and the MPRSA.⁸⁸ The Court declined to do so, reasoning that the "Acts contain[ed] unusually elaborate enforcement provisions," which indicated that Congress did not intend "to authorize...additional judicial remedies for private citizens."⁸⁹

The Court then turned to the question of whether the plaintiffs could use § 1983 to collect damages for violations of the FWPCA and the MPRSA, because neither of the statutes provided a remedy authorizing monetary damages.⁹⁰ Both of the statutes contained comprehensive remedial schemes, such as: provisions for civil suits brought by the government, civil or criminal penalties for violations, judicial review of the government's enforcement attempts and express citizen-suits which allow an individual to sue for injunctive relief.⁹¹ In analyzing "whether Congress had foreclosed private enforcement of that statute in the enactment itself,"⁹² the Court focused on the numerous specific statutory remedies in the FWPCA and the MPRSA. It particularly focused on the citizen-suit provisions, as an indication that Congress "intended to supplant any remedy that otherwise would be available under § 1983."⁹³

More recently, in *Rancho Palos Verdes v. Abrams*,⁹⁴ the Court followed *National Sea Clammers* and held that a plaintiff bringing a claim under the Telecommunications Act of 1996 (hereafter "TCA") could not use § 1983 to obtain monetary damages.⁹⁵ Using a similar analysis, the Court asked "whether Congress meant the judicial remedy expressly authorized by [the TCA] to coexist with an alternative remedy available in a § 1983 action."⁹⁶ The TCA provided for an individual to obtain judicial

review of an unfavorable zoning decision.⁹⁷ The Court recognized that in only two other instances had the "existence of more restrictive remedies...in the violated statute itself" led to the conclusion that § 1983 was unavailable to remedy violations of a statute.⁹⁸ In his concurrence, Justice Stevens pointed out that "only an exceptional case — such as one involving an unusually comprehensive and exclusive statutory scheme — will lead us to conclude that a given statute impliedly forecloses a § 1983 remedy."⁹⁹ Stevens recognized that the Court normally presumes Congress intended to provide, not preclude, a remedy under § 1983 to enforce federal statutory rights.¹⁰⁰

2. § 1983 INTERACTION USED TO ENFORCE A CONSTITUTIONAL RIGHT

In slightly different circumstances, the Court in *Smith v. Robinson*¹⁰¹ held that where the constitutional claims pursuant to § 1983 were "virtually identical" to the statutory claims, the § 1983 claims were precluded.¹⁰² In *Smith*, the plaintiff was alleging violations of the Education of the Handicapped Act (hereafter "EHA"), as well as violations of the Equal Protection and Due Process Clauses under § 1983.¹⁰³ As opposed to *National Sea Clammers* and *Abrams*, in

Smith, § 1983 was being used to enforce a constitutional right, rather than to obtain monetary damages under the federal statute in question.

The Court again looked to the provisions of the statute itself and to Congressional intent to determine whether Congress intended EHA plaintiffs with constitutional rights to be able to pursue those claims outside of the remedies set out in the EHA.¹⁰⁴ The EHA provides for an elaborate remedial process, beginning on the local level, with the parents making numerous appeals before the School Committee and the Associate Commissioner of Education.¹⁰⁵ The procedural safeguards in place were designed to provide due process to the parents of a handicapped child when the State planned to make changes to their child's education.¹⁰⁶ EHA plaintiffs also have a right to judicial review of the State agency's decisions.¹⁰⁷ The Court felt strongly that Congress intended for remedies available under the EHA to be exclusive, because Congress indicated the importance of the "the parents and the local education agency work[ing] together to formulate an individualized plan for each handicapped child's education."¹⁰⁸ In the end, the Court relied most heavily on its perception of Congress' intent that the EHA be the exclusive remedy for a handicapped child being denied a free and appropriate public education.¹⁰⁹ The Court determined that allowing a right of action under § 1983 to enforce the EHA would be "inconsistent with Congress' carefully tailored scheme."¹¹⁰

Because Title IX was enacted with the purpose of eliminating discrimination and § 1983 was enacted to provide an enforcement mechanism for federal statutory and constitutional rights, a plaintiff bringing a claim under Title IX often has a concurrent constitutional or statutory claim under § 1983.

THE SIXTH CIRCUIT'S REASONING IN COMMUNITIES FOR EQUITY AND THE CIRCUIT SPLIT

A. TITLE IX'S REMEDY IS NOT COMPREHENSIVE

The issue of whether Title IX precludes a plaintiff from also bringing a constitutional claim under § 1983 is important for several reasons. One of the primary reasons is that § 1983 and Title IX apply to different defendants. Both individual defendants and institutions or organizations may be held liable for violations of a person's constitutional and federal statutory rights under § 1983, as long as the defendant acted under color of state law.¹¹¹ Title IX is a federal statute with a more limited scope and assigns liability only to "educational program[s]" or "activities receiving Federal financial assistance."¹¹² This is particularly important when the discrimination is a result of a particular individual's actions, such as in a sexual harassment case. Discrimination resulting from an athletic or educational program usually involves an institutional problem, though occasionally there are particular individuals that have the power to remedy discriminatory treatment.

On remand from the Supreme Court, the primary question for the Sixth Circuit in *Communities for Equity* was whether or not Title IX precluded the plaintiffs from bringing an equal protection claim under § 1983.¹¹³ First, the Sixth Circuit recognized that in both *National Sea Clammers* and *Abrams*, the plaintiffs brought a federal statutory claim and then used § 1983 to assert those same federal statutory rights.¹¹⁴ The statutes in those cases did not authorize monetary damages, so the plaintiffs attempted to use § 1983 to obtain damages. The *Communities for Equity* court said that allowing a § 1983 claim for damages would clearly "create an end-run around the substantive statutory remedies and contravene Congress' intent."¹¹⁵ The Sixth Circuit distinguished *National Sea Clammers* and *Abrams* from the instant case because *Communities for Equity* was asserting a constitutional claim under § 1983, not using § 1983 to obtain damages under Title IX.¹¹⁶

The court looked to *Smith* to provide the framework for its analysis.¹¹⁷ The first question was: "whether Congress intended to abandon the rights and remedies set forth in Fourteenth Amendment equal protection jurisprudence when it enacted Title IX in 1972."¹¹⁸ The second question was: whether Title IX provided a remedy comprehensive enough to be exclusive?¹¹⁹ The Sixth Circuit noted that these two questions were to be independently evaluated, and that if both were not met, then the statute would not preclude a constitutional claim under § 1983.¹²⁰ In other words, if one factor is clearly unsatisfied, then the other prong does not need to be discussed.¹²¹

The court chose to address the second prong first, and examined Congress' intent when they were enacting Title IX in 1972.¹²² In 1996, the Sixth Circuit in *Lillard v. Shelby County Board of Education*,¹²³ held that Title IX does not preclude a plaintiff from using § 1983 to bring a substantive due process claim.¹²⁴ Following *Lillard*, the court in *Communities for Equity*

distinguished the express remedies in Title IX from the comprehensive administrative and judicial remedies set out in the EHA.¹²⁵ The only express remedy written into Title IX is a "procedure for the termination of federal financial support for institutions" in violation of Title IX.¹²⁶ The court further recognized that if Title IX did not exist, *Communities for Equity* would still have a cause of action under the Equal Protection Clause.¹²⁷ This reasoning indicates that the two claims are separate, despite the fact that the claims arise from the same set of underlying facts.

As with most other defendants who have challenged a plaintiff's right to recover under both Title IX and § 1983, the MHSAA relies on the implied private right of action in its argument.¹²⁸ The MHSAA argued that because a Title IX plaintiff has available to it the full range of remedies, Title IX is comprehensive enough to preclude recovery under § 1983.¹²⁹ The Sixth Circuit did not agree with this position.¹³⁰ Instead, the court used the implied private right of action as evidence of Congress' intent not to limit a Title IX plaintiff's claims to the express remedy in the statute itself.¹³¹

B. CIRCUITS THAT DISAGREE WITH THE SIXTH CIRCUIT

The Second, Third, and Seventh Circuits, over the last seventeen years, have all held that a plaintiff bringing a claim under Title IX cannot also bring a claim under § 1983.¹³² The three courts have reached the same conclusion in four diverse cases but have all relied on the reasoning expressed by the Supreme Court in *National Sea Clammers*.¹³³ The most discussed issue was whether or not Title IX provided a comprehensive remedy for plaintiffs.

In 1990, the Third Circuit held that Pfeiffer, a student who was dismissed from the local chapter of the National Honor Society due to her pregnancy, could not bring both a Title IX and an equal protection claim under § 1983.¹³⁴ The court relied on the district court's reasoning on this issue and said, "[t]he *Sea Clammers* doctrine has been applied consistently in analogous cases."¹³⁵ Three years later, the Third Circuit again faced the question of whether a Title IX claim precluded a § 1983 claim.¹³⁶ This time, the district court had previously decided the constitutional claim, and the Third Circuit was analyzing the issue on appeal.¹³⁷ The court relied on the previous decision in *Pfeiffer*, and "the Supreme Court's admonition that courts should exercise restraint before reaching federal constitutional claims."¹³⁸ The court explained that the "Supreme Court has made clear that where a federal statute provides its own comprehensive enforcement scheme, Congress intended to foreclose a right of action under § 1983."¹³⁹ The court stated that it considered Title IX's enforcement scheme to be comprehensive; thus, it precluded recovery under § 1983.¹⁴⁰

In 1996, the Seventh Circuit faced the issue in a case involving employment discrimination.¹⁴¹ Ultimately, the court held that the plaintiff was required to exhaust her administrative remedies under Title VII before resorting to sex discrimination claims under Title IX.¹⁴² On its way to that conclusion,

however, the court discussed whether the remedies provided by Title IX precluded the plaintiff from bringing an equal protection claim under § 1983, arising from the same set of facts.¹⁴³ The Seventh Circuit read *National Sea Clammers* to indicate that when a statute and a constitutional provision “prohibit the same kind of conduct and provide compensatory and punitive damages as remedies for that conduct,” that type of

a plaintiff specifically claiming intentional discrimination cannot allege that she has causes of action under both Title IX and the Equal Protection Clause through § 1983.

overlap is “intolerable.”¹⁴⁴ Based on the Third Circuit’s decisions in *Pfeiffer* and *Williams*, the court said a plaintiff specifically claiming intentional discrimination cannot allege that she has causes of action under both Title IX and the Equal Protection Clause through § 1983.¹⁴⁵ The court decided that Congress did not intend for individual officials to remedy alleged instances of discrimination, but rather placed the burden squarely on the institution itself.¹⁴⁶ To that end, the Seventh Circuit held that Congress did intend for the remedial scheme in Title IX to be exclusive.¹⁴⁷ Thus, the Title IX claim, if it were allowed in this case, would subsume the § 1983 claim.¹⁴⁸

Finally, the Second Circuit had an opportunity to decide this issue in 1998.¹⁴⁹ The plaintiff brought a hostile environment sexual harassment claim against the school district, under both Title IX and § 1983.¹⁵⁰ The court rejected the use of § 1983 to enforce the plaintiff’s Title IX rights and also rejected a constitutional rights exception to the *National Sea Clammers* doctrine.¹⁵¹ The Second Circuit stated that there was an intricate administrative enforcement scheme in Title IX, whereby an individual could file a complaint with OCR, which would then conduct an investigation.¹⁵² The court also explained that the fact that the Supreme Court had found an implied private right of action for Title IX convinced the court that “the Title IX plaintiff has access to a full panoply of remedies.”¹⁵³ The Second Circuit felt that the circuits that had found the private right of action to be outside the statutory enforcement scheme had read the remedies available too narrowly.¹⁵⁴ In rejecting a constitutional rights exception, the court relied on their previous reasoning and the analysis in *Smith*.¹⁵⁵ When a statute contains a “sufficiently comprehensive enforcement scheme,” as the court believed Title IX did, the indication is that Congress intended to replace § 1983 as an available remedy.¹⁵⁶ This means that if a plaintiff were asserting a violation of a constitutional right under § 1983, which did not

The most popular reasoning was that because Title IX is considered to have an implied private right of action plaintiffs have access to all possible remedies

overlap with her Title IX claim, she would not be allowed to bring both causes of action.

The Second, Third, and Seventh Circuits have spent little time discussing the issue. The most popular reasoning was that because Title IX is considered to have an implied private right of action plaintiffs have access to all possible remedies.¹⁵⁷ Therefore, Congress did not intend for plaintiffs to have access to a remedy under § 1983 as well.¹⁵⁸ The Sixth, Eighth, and Tenth Circuits have recognized that because the private right of action in Title IX is implied, Congress likely did not intend for the explicit remedies in Title IX to be exclusive.

C. CIRCUITS THAT SIDE WITH THE SIXTH CIRCUIT

The Eighth and Tenth Circuits have held that a Title IX claim does not preclude a plaintiff from bringing a concurrent constitutional claim under § 1983.¹⁵⁹ These circuits have agreed with the Sixth Circuit that the Title IX remedial scheme is not comprehensive. The Sixth, Eighth, and Tenth Circuits have read the Supreme Court’s decision in *National Sea Clammers* as a way of distinguishing federal statutes from each other. The three circuits examined not only the explicit remedies provided in Title IX, but also the legislative history of Title IX. The courts concluded that Congress did not intend for the remedies provided in Title IX to be the exclusive remedies available to a plaintiff.

In *Crawford v. Davis*,¹⁶⁰ the plaintiff, suing under Title IX and the Equal Protection Clause, made an allegation of sexual harassment.¹⁶¹ The Eighth Circuit stated that “*Sea Clammers* in no way restricts a plaintiff’s ability to seek redress via § 1983 for the violation of independently existing constitutional rights.”¹⁶² The court said this is true even if the constitutional right arises from the same set of facts as the Title IX rights.¹⁶³ Although the Supreme Court found an implied private right of action in Title IX, the court saw the removal of federal funding as the only express remedy.¹⁶⁴ The court compared Title

IX’s express remedy to the enforcement scheme in the statutes in *National Sea Clammers*, which contained elaborate procedures including citizen suits and enforcement by government agencies.¹⁶⁵ The Eighth Circuit felt that if Congress intended for Title IX to preclude a claim under § 1983, the enforcement scheme in Title IX would have been more elaborate, similar to the schemes in the statutes in

National Sea Clammers.¹⁶⁶

The Tenth Circuit was also dealing with a sexual harassment lawsuit when this issue arose.¹⁶⁷ Similar to the Eighth Circuit, the Tenth Circuit held that § 1983 claims are not supplanted by the private right of action implicit in Title IX.¹⁶⁸ Title IX plaintiffs who bring a constitutional claim under § 1983 “do not circumvent Title IX procedures or gain access to remedies not available under Title IX.”¹⁶⁹ It reasoned that Title IX plaintiffs have the whole panoply of remedies available to

them,¹⁷⁰ so bringing a concurrent constitutional claim through § 1983 does not allow plaintiffs to get damages they otherwise would not be entitled to under Title IX.

D. OTHER COURTS RULINGS THAT SIDE WITH THE SIXTH CIRCUIT

The Fifth Circuit has implied that, if squarely presented with the issue, it would likely hold that Title IX's remedial scheme was not "sufficiently comprehensive to indicate... that Congress intended to foreclose § 1983 suits based upon rights created by Title IX."¹⁷¹ The plaintiff's claims in *Lakoski v. James* were employment discrimination claims, so the Fifth Circuit held that Title VII precluded all other claims, including the Title IX and constitutional claims brought under § 1983.¹⁷² Although the Fifth Circuit's discussion of Title IX and § 1983 in this case was dicta, it gives us an idea of what to expect from that court.

Lower federal courts in other circuits have also come to the similar conclusion that a plaintiff is allowed to bring both a Title IX claim and a constitutional claim under § 1983.¹⁷³ *Alston v. Virginia High School League*¹⁷⁴ involved an issue similar to the one presented in *Communities for Equity*.¹⁷⁵ Plaintiffs contended that the Virginia High School League (hereafter "VHSL") discriminated on the basis of sex because boys' sports were uniformly scheduled across school classifications, but girls' sports were not.¹⁷⁶ The result was that if the size of the school required it to switch from one classification to another, some girls might be prevented from playing sports they previously played if two of their sports were in the same season.¹⁷⁷ Just like the MHSAA, the VHSL challenged the plaintiff's ability to bring both a Title IX claim and an equal protection claim.¹⁷⁸ However, the court rejected the challenge.¹⁷⁹ Instead, it recognized that "the *National Sea Clammers* doctrine 'speaks only to whether federal statutory rights can be enforced both through the statute itself and through section 1983'; it does not 'stand for the proposition that a federal statutory scheme can preempt independently existing constitutional rights, which have contours distinct from the statutory claim.'"¹⁸⁰

Finally, a district court in the First Circuit analogized Title IX to Title VI of the Civil Rights Act of 1964.¹⁸¹ The court noted that in *Cannon*, the Supreme Court found that "the only difference between the two statutes is the 'substitution of the word 'sex' in Title IX to replace the words 'race, color or

national origin' in 'Title VI.'"¹⁸² The judge in *Doe v. Old Rochester Regional School District* spent a significant amount of his opinion discussing the possibility of Title IX prohibiting a concurrent § 1983 claim.¹⁸³ The judge noted that the Supreme Court has held that § 1983 remedies are considered to be "an alternative and express cause of action under Title VI."¹⁸⁴ Thus, he reasoned that § 1983 remedies would also be permissible under Title IX.

The result of the preceding analysis is that, of the courts that have faced this issue, only three Circuit Courts of Appeals have held that Title IX does preclude a constitutional claim under § 1983. Three circuits have expressly held that Title IX does not preclude a § 1983 claim, and lower courts in three other circuits have reached the same conclusion. As the judge in *Old Rochester* mentioned, "[u]nfortunately... [no] subsequent Supreme Court decisions give a clear lead."¹⁸⁵ At the same time that the *Old Rochester* judge was issuing his opinion, his colleague in the same district was issuing the opposite holding in a companion case.¹⁸⁶ The fact that two judges within the same district are coming to different conclusions speaks to the need of a decision from the First Circuit. A decision from the Supreme Court would give the First Circuit, and all of the other circuits, guidance for future decisions. A Supreme Court decision on this important issue would also prevent delays and provide guidance to plaintiffs and defendants who are alleging and defending Title IX claims.

TITLE IX SHOULD NOT PRECLUDE A CONSTITUTIONAL CLAIM UNDER §1983

All of the federal circuit courts have recognized that the only enforcement mechanism expressly authorized by Title IX is the withdrawal of federal funds, and that the private right of action under Title IX is implied. Where the courts disagree is whether those two remedies, taken together, are sufficiently comprehensive to bar the pursuit of a constitutional claim under § 1983.¹⁸⁷ Previously, when the Supreme Court has held that a federal statute precludes a plaintiff from also bringing a federal constitutional claim, it has reasoned that allowing both claims would allow the plaintiff to recover twice for the same right.¹⁸⁸ The interaction between Title IX and the Equal Protection Clause does not present that problem. While the claims under Title IX and § 1983 may generally arise from the same set of facts, a plaintiff asserting a constitutional right in addition to a federal statutory claim is asserting a different right.

A. POSSIBLE SUPREME COURT RULING

Future plaintiffs will certainly bring Title IX suits that include equal protection claims, and the defendants will try to argue that the Title IX claim precludes an equal protection claim brought under § 1983. This argument should fail for several reasons. First, Title IX applies only to federally-funded institutions, so individuals cannot be held liable for discrimination under Title IX. Depending on the type of claim,

A Supreme Court decision on this important issue would also prevent delays and provide guidance to plaintiffs and defendants who are alleging and defending Title IX claims.

this could hamper a plaintiff's ability to remedy the alleged discrimination. Second, although a defendant is considered to be a state actor under the Equal Protection Clause of the Fourteenth Amendment, that does not necessarily mean that they are a recipient of federal funds. Thus, allowing both avenues of recovery for a plaintiff could increase the likelihood that a defendant would be subject to liability for discriminatory treatment.

If the Supreme Court adheres to the path set out in *National Sea Clammers, Abrams, and Smith*, it seems likely that the Court would hold that Title IX does not preclude a constitutional claim under § 1983. The Court has previously looked at the explicit language of the statute and the congressional intent at the time of enactment. As discussed above, the express language of Title IX provides for a very limited administrative remedy and no private right of action. The fact that the Court has found an implied private right of action in Title IX should not affect its decision. What is significant is that Congress took no action after the Court's decision in *Cannon* to amend Title IX. This failure to act indicated Congress' intent to allow for additional remedies, outside of those explicitly stated in the statute. Based on precedent, and the holdings of the previous cases involving federal statutory claims and separate constitutional claims under § 1983, if the Supreme Court decides the issue in a future case, it should find that a plaintiff is allowed to bring both a Title IX claim and a federal constitutional claim under § 1983.

VI. CONCLUSION

While much of the discussion in this note has involved the legal issues surrounding Title IX and the Equal Protection Clause, what is equally important is that the purposes of anti-

discrimination laws are recognized. Both Title IX and the Equal Protection Clause prohibit females from being subjected to discriminatory treatment. Because *Communities for Equity* involves teenage females, the issue is more urgent. It is hard to fully understand or know the damage that could be done to a female who is repeatedly discriminated against. Additionally, females who are discriminated against in high school athletics are denied opportunities to participate in athletics in college.

While the individual female certainly suffers from discrimination, so too does her community, because that particular female is less likely to be an active participant in politics, in the economy, and in life in general. These consequences may sound drastic, but that does not make

them less likely. More importantly, less extreme consequences would be no more acceptable.

Resolving the circuit split surrounding whether or not Title IX precludes a constitutional claim under § 1983, in accordance with the Sixth Circuit's holding, will discourage future discrimination. It will provide Title IX plaintiffs with an additional remedy when faced with discrimination. It will also encourage educational institutions to be more careful in their treatment of females. If the Supreme Court agrees with the Sixth Circuit, the institution as a whole and the individuals in charge of enforcing discriminatory policies will be liable for discriminatory treatment. Finally, a resolution of this issue will also promote judicial economy. Since the parties will not have to argue whether or not Title IX precludes a constitutional claim under § 1983 in future cases, plaintiffs and defendants will know which claims are allowed and will focus their efforts on proving or defending those claims.

Resolving the circuit split surrounding whether or not Title IX precludes a constitutional claim under § 1983, in accordance with the Sixth Circuit's holding, will discourage future discrimination.

ENDNOTES

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¹ *Communities for Equity, About CFE, available at* <http://www.communitiesforequity.com/about.html> (last visited Oct. 4, 2007).

² *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, 80 F. Supp. 2d 729, 731 (W.D. Mich. 2000).

³ *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, 459 F.3d 676 (6th Cir. 2006).

⁴ *Id.* at 691.

⁵ Brief of Petitioner at 14, *Mich. High Sch. Athletic Ass'n v. Cmtys. for Equity*, 2007 WL 244971 (2007) (No. 06-1038).

⁶ *Mich. High Sch. Athletic Ass'n v. Cmtys. for Equity*, 127 S.Ct. 1912 (2007).

⁷ Brief of Petitioner, *supra* note 5, at 14.

⁸ *Id.*

⁹ *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, 178 F. Supp. 2d 805, 809 (W.D. Mich. 2001).

¹⁰ *Id.* at 810-15.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 856-58.

¹⁴ Kristen Boike, Note, *Rethinking Gender Opportunities: Nontraditional Sports Seasons and Local Preferences*, 39 U. MICH. J. L. REFORM 597, 599 (Spring 2006).

¹⁵ *Communities for Equity, CFE v. MHSAA Lawsuit, available at* <http://www.communitiesforequity.com/mhsaa.html> (last visited Oct. 13, 2007).

¹⁶ *Cmtys. for Equity*, 178 F. Supp. 2d at 815.

¹⁷ *Id.*

¹⁸ *See id.* at 828-830 (noting that the scheduling causes female soccer players to

ENDNOTES CONTINUED

play more games per week than male soccer players, causing more injuries and allowing for less recovery time from injuries).

¹⁹ See *Communities for Equity*, CFE v. MHSAA, available at <http://www.communitiesforequity.com/mhsaa.html> (last visited Oct. 13, 2007) (asserting that there are fewer recruitment opportunities and fewer scholarship opportunities due to NCAA recruiting restrictions that conflict with the Michigan female athletes' schedules).

²⁰ See *id.* (stating that "girls who are treated inequitably . . . transfer their diminished expectations . . . into diminished expectations in their careers").

²¹ *Cmtys. for Equity*, 80 F. Supp. 2d at 729.

²² *Cmtys. for Equity*, 178 F. Supp. 2d at 805.

²³ *Id.* at 862.

²⁴ *Id.*

²⁵ *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, No. 1:98-CV-479, 2002 U.S. Dist. LEXIS 14220, at *7-8 (W.D. Mich. 2002) (leaving basketball, volleyball and soccer in their non-traditional seasons would have left 46.5% of female athletes in Michigan at a disadvantage, while only disadvantaging 12.3% of male athletes).

²⁶ *Id.* at *19-20.

²⁷ *Id.*

²⁸ Press Release, *Communities for Equity*, Long Overdue Equity for Girls: Season Changes Underway

(Aug. 13, 2007), available at <http://www.communitiesforequity.com/images/PR%20Aug.pdf> (last visited Oct. 14, 2007).

²⁹ *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, No. 1:98-CV-479, 2003 U.S. Dist. LEXIS 2872 (W.D. Mich. 2003).

³⁰ *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, 377 F.3d 504 (6th Cir. 2004).

³¹ Reply Brief of Petitioner at 8-10, *Mich. High Sch. Athletic Ass'n v. Cmtys. for Equity*, 544 U.S. 1012 (2005) (No. 04-1021).

³² *Mich. High Sch. Athletic Ass'n v. Cmtys. for Equity*, 544 U.S. 1012 (2005); *Rancho Palos Verdes v. Abrams*, 544 U.S. 113 (2005).

³³ Reply Brief of Petitioner, *supra* note 31, at 9.

³⁴ *Lillard v. Shelby County Bd. of Educ.*, 76 F.3d 716 (6th Cir. 1996).

³⁵ Brief of Petitioner, *supra* note 5, at 25-27.

³⁶ *Mich. High Sch. Athletic Ass'n v. Cmtys. for Equity*, 127 S. Ct. 1912 (2007).

³⁷ See, e.g., *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, No. 1:98-CV-479, 2007 U.S. Dist. LEXIS 50836 (W.D. Mich. 2007) (denying two motions to intervene by parents and coaches of certain boys' and girls' soccer teams who sought to modify the compliance plan).

³⁸ NATIONAL COALITION FOR WOMEN AND GIRLS IN EDUCATION, TITLE IX AT 30: REPORT CARD ON GENDER EQUITY 10 (June 2002), www.ncwge.org/PDF/title9at30-6-11.pdf (last visited Oct. 14, 2007).

³⁹ *Id.* at 2.

⁴⁰ WOMEN'S SPORTS FOUNDATION, ATHLETIC GENDER GAP (2006), http://womenssportsfoundation.org/binary-data/WSF_ARTICLE/pdf_file/1110.pdf (last visited Oct. 19, 2007).

⁴¹ *Id.* (For example, New Mexico, ranked 4th, offers 25,918 opportunities for male high school athletes and 22,586 opportunities for female high school athletes, with a disparity of only -2.5%. Michigan, ranked 25th in terms of disparities, offers 185,873 opportunities for male athletes and 135,377 opportunities for female high school athletes, with a disparity of -6.9%. Finally, South Carolina, ranked 47th, offers 52,760 opportunities for male high school athletes and 30,955 opportunities for female high school athletes, with a disparity of -13.1%. The rankings are based on a comparison of the percentage of females enrolled in the state's high schools and the percentage of females participating in athletics).

⁴² NATIONAL COALITION FOR WOMEN AND GIRLS IN EDUCATION, *supra* note 38, at 3.

⁴³ *Id.* at 36-37.

⁴⁴ Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (1972).

⁴⁵ 117 CONG. REC. 39252 (1971) (comments of Senator Mink).

⁴⁶ 118 CONG. REC. 5806-5807 (1972) (comments of Senator Bayh).

⁴⁷ *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979).

⁴⁸ Education Amendments of 1972, Pub. L. No. 92-318, § 901, 86 Stat. 235, 373-74 (1972).

⁴⁹ See *Grove City College v. Bell*, 465 U.S. 555 (1984).

⁵⁰ See *Berkelman v. San Francisco Unified Sch. Dist.*, 501 F.2d 1264 (9th Cir. 1974).

⁵¹ See *Cohen v. Brown Univ.*, 101 F.3d 155 (1st Cir. 1996).

⁵² Title IX of the Education Amendments of 1972: A Policy Interpretation: Title IX & Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,415 (Dec. 11, 1979) (codified at 45 C.F.R. § 86) [hereinafter Policy Interpretation].

⁵³ See *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999).

⁵⁴ Education Amendments of 1972, Pub. L. No. 92-318, § 901, 86 Stat. 235, 374 (1972).

⁵⁵ Education Amendments of 1972, Pub. L. No. 92-318, § 902, 86 Stat. 235, 374 (1972).

⁵⁶ *Id.*

⁵⁷ *Cannon*, 441 U.S. at 703.

⁵⁸ *Cort v. Ash*, 422 U.S. 66 (1975).

⁵⁹ *Cannon*, 441 U.S. at 689-709 (citing *Cort*, 422 U.S. 66).

⁶⁰ See Policy Interpretation, *supra* note 52.

⁶¹ *Cmtys. for Equity*, 178 F. Supp. 2d at 862.

⁶² See, e.g., *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, No. 1:98-CV-479, 2002 U.S. Dist. LEXIS 14220 (W.D. Mich. 2002); see also *Alston v. Va. High Sch. League, Inc.*, 108 F. Supp. 2d 543 (W.D. Va. 2000).

⁶³ See *Horner v. Kentucky High Sch. Athletic Ass'n*, 206 F.3d 685 (6th Cir. 2000).

⁶⁴ 42 U.S.C. § 1988 (2006).

⁶⁵ 20 U.S.C. § 1681 (2006).

⁶⁶ *Id.*

⁶⁷ *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998).

⁶⁸ *Id.*

⁶⁹ 42 U.S.C. § 1983 (2006).

⁷⁰ *Id.*

⁷¹ See *Monroe v. Pape*, 365 U.S. 167 (1961).

⁷² See *Maine v. Thiboutot*, 448 U.S. 1 (1980).

⁷³ See *id.* at 4 (1980) (Section 1983 "means what it says" and authorizes suits to enforce individual rights under federal statutes as well as the Constitution).

⁷⁴ U.S. CONST. amend. XIV.

⁷⁵ See *Shelley v. Kraemer*, 334 U.S. 1 (1948).

⁷⁶ U.S. CONST. amend. XIV, § 5.

⁷⁷ *Cmtys. for Equity*, 80 F. Supp. 2d at 739.

⁷⁸ *Id.* at 741-43; *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288 (2001) (indicating that the private organization's leadership was comprised primarily of school officials from public schools and that the State board of education recognized the organization's authority over interscholastic athletics within the state).

⁷⁹ *Cmtys. for Equity*, 178 F. Supp. 2d at 848.

⁸⁰ *Id.*

⁸¹ 42 U.S.C. § 1988 (2006).

⁸² See 118 CONG. REC. 5806-5807 (1972) (comments of Senator Bayh).

⁸³ *Bruneau v. S. Kortright Cent. Sch. Dist.*, 163 F.3d 749, 756 (2d Cir. 1998).

⁸⁴ See generally *Abrams*, 544 U.S. 113; *Smith v. Robinson*, 468 U.S. 992 (1984); See also *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981).

⁸⁵ See *Abrams*, 544 U.S. 113; *Smith*, 468 U.S. 992; *Middlesex County Sewerage Auth.*, 453 U.S. 1.

⁸⁶ *Middlesex County Sewerage Auth.*, 453 U.S. 1.

⁸⁷ *Id.* at 20-21.

⁸⁸ *Id.* at 10-11.

⁸⁹ *Id.* at 13-14.

⁹⁰ *Id.* at 19.

⁹¹ *Id.* at 13-14.

⁹² *Middlesex County Sewerage Auth.*, 453 U.S. 1, 19 (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981)).

⁹³ *Id.* at 21.

⁹⁴ See generally *Abrams*, 544 U.S. 113 (2005).

⁹⁵ *Id.* at 127.

⁹⁶ *Id.* at 120-21.

⁹⁷ *Id.* at 116.

⁹⁸ *Id.* at 121.

⁹⁹ *Id.* at 130-31 (Stevens, J., concurring).

¹⁰⁰ *Abrams*, 544 U.S. at 131 (Stevens, J., concurring).

¹⁰¹ *Smith*, 468 U.S. 992.

¹⁰² *Id.* at 1009.

¹⁰³ *Id.* at 994.

¹⁰⁴ *Id.* at 1009.

¹⁰⁵ *Id.* at 997.

¹⁰⁶ *Id.* at 997.

¹⁰⁷ *Smith*, 468 U.S. at 1011.

¹⁰⁸ *Id.* at 1012.

¹⁰⁹ *Id.* at 1012-13.

¹¹⁰ *Id.* at 1012.

¹¹¹ *Doe v. Old Rochester Reg'l Sch. Dist.*, 56 F. Supp. 2d 114, 116 (D. Mass. 1999).

¹¹² *Id.* (citing 20 U.S.C. § 1681(a)).

ENDNOTES CONTINUED

- ¹¹³ *Cmtys. for Equity*, 459 F.3d at 679-80.
¹¹⁴ *Id.* at 684.
¹¹⁵ *Id.*
¹¹⁶ *Id.* at 683-84.
¹¹⁷ *Id.* at 685.
¹¹⁸ *Id.*
¹¹⁹ *Cmtys. for Equity*, 459 F.3d at 685 (citing *Smith*, 468 U.S. 992).
¹²⁰ *Id.*
¹²¹ *Id.* (citing *Lillard*, 76 F.3d at 723).
¹²² *Id.*
¹²³ See generally *Lillard*, 76 F.3d 716.
¹²⁴ *Id.* at 723-24.
¹²⁵ *Cmtys. for Equity*, 459 F.3d at 685 (citing *Lillard*, 76 F.3d at 723).
¹²⁶ *Cannon*, 441 U.S. at 683.
¹²⁷ *Cmtys. for Equity*, 459 F.3d at 684.
¹²⁸ Reply Brief of Petitioner, *supra* note 31, at 8-9
¹²⁹ *Id.*
¹³⁰ *Cmtys. for Equity*, 459 F.3d at 691.
¹³¹ *Id.* at 686.
¹³² *Bruneau v. S. Kortright Cent. Sch. Dist.*, 163 F.3d 749, 756 (2d Cir. 1998); *Waid v. Merrill Area Pub. Schs.*, 91 F.3d 857 (7th Cir. 1996); *Williams v. Sch. Dist. of Bethlehem*, 998 F.2d 168 (3d Cir. 1993); *Pfeiffer v. Sch. Bd. for Marion Ctr. Area*, 917 F.2d 779 (3d Cir. 1990).
¹³³ *Bruneau*, 163 F.3d 749; *Waid*, 91 F.3d 857; *Williams*, 998 F.2d 168; *Pfeiffer*, 917 F.2d 779.
¹³⁴ See generally *Pfeiffer*, 917 F.2d 779.
¹³⁵ *Id.* at 789.
¹³⁶ *Williams*, 998 F.2d 168.
¹³⁷ *Id.* at 170.
¹³⁸ *Id.* at 176.
¹³⁹ *Id.*
¹⁴⁰ *Id.*
¹⁴¹ See generally *Waid*, 91 F.3d 857
¹⁴² *Id.* at 861.
¹⁴³ *Id.* at 862.
¹⁴⁴ *Id.*
¹⁴⁵ *Id.*
¹⁴⁶ *Id.*
¹⁴⁷ *Waid*, 91 F.3d at 862-63.
¹⁴⁸ *Id.*
¹⁴⁹ *Bruneau*, 163 F.3d at 749.
¹⁵⁰ *Id.* at 753-54.
¹⁵¹ *Id.* at 756-59.
¹⁵² *Id.* at 756.
¹⁵³ *Id.*
¹⁵⁴ *Id.* at 756-57.
¹⁵⁵ *Bruneau*, 163 F.3d at 758-59.
¹⁵⁶ *Id.* at 757-58.
¹⁵⁷ *Cmtys. for Equity*, 459 F.3d at 689.
¹⁵⁸ *Id.*
¹⁵⁹ *Crawford*, 109 F.3d at 1281; *Seamons v. Snow*, 84 F.3d 1226 (10th Cir. 1996).
¹⁶⁰ *Crawford*, 109 F.3d at 1282.
¹⁶¹ *Id.* at 1284.
¹⁶² *Id.*
¹⁶³ *Id.*
¹⁶⁴ *Id.*
¹⁶⁵ *Id.*
¹⁶⁶ *Crawford*, 109 F.3d at 1284.
¹⁶⁷ *Seamons*, 84 F.3d 1226 (10th Cir. 1996).
¹⁶⁸ *Id.* at 1234.
¹⁶⁹ *Id.* at 1233.
¹⁷⁰ *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992).
¹⁷¹ *Lakoski v. James*, 66 F.3d 751, 755 (5th Cir. 1995).
¹⁷² *Id.* at 754-55.
¹⁷³ See *Jennings v. Univ. of N.C.*, 240 F. Supp. 2d 492 (M.D.N.C. 2002); *Doe*, 56 F. Supp. 2d 114; *Alston*, 176 F.R.D. 220.
¹⁷⁴ *Alston*, 176 F.R.D. 220.
¹⁷⁵ *Id.*
¹⁷⁶ *Id.* at 221.
¹⁷⁷ *Id.*
¹⁷⁸ *Id.* at 223-24.
¹⁷⁹ *Id.*
¹⁸⁰ *Alston*, 176 F.R.D. at 223 (citing *Seamons*, 84 F.3d at 1233 quoting *Lillard*, 76 F.3d at 723).
¹⁸¹ *Doe*, 56 F. Supp. 2d at 119 (citing 42 U.S.C. § 2000d (2006)).
¹⁸² *Id.* (quoting *Cannon*, 441 U.S. at 694-95).
¹⁸³ *Id.* at 116-20.
¹⁸⁴ *Id.* (quoting *Cannon*, 441 U.S. at 697).
¹⁸⁵ *Id.* at 118-119.
¹⁸⁶ *Canty v. Old Rochester Reg'l Sch. Dist.*, 54 F. Supp. 2d 66 (D. Mass. 1999).
¹⁸⁷ *Cmtys. for Equity*, 459 F.3d at 686 (citing *Lillard*, 76 F.3d a 723).
¹⁸⁸ See, e.g., *Abrams*, 544 U.S. at 122-23; *Middlesex County Sewerage Auth*, 453 U.S. at 20-21.

BUILDING A NEW PARADIGM FOR THE WOMEN'S MOVEMENT: SPOTLIGHT ON KIRAN AHUJA*

By Parag Khandhar **

Only in her mid-thirties, Ms. Kiran Ahuja, Executive Director of the National Asian Pacific American Women's Forum (NAPAWF), has had a long, distinguished public interest career as an attorney, an advocate for immigrant communities, and a mentor and advisor to countless law students and young activists. I caught up with her for a little while to talk about growing up an Indian American woman in the South, the development of her personal racial and political identity, and the evolution of the Women's Movement.

Thank you for speaking with me I have a lot of questions, but I'll try to keep this short. Looking over your career so far, there are so many places I could start! I guess I'll start chronologically. Northerners often assume things about the Deep South. How was your experience growing up in Savannah, Georgia as a young immigrant woman of color, and how formative was it in your path towards social justice and civil rights?

My Northern friends are so amused – that's funny. I think it did play a role because other young immigrants feel a sense of isolation and being the "one of only." What's interesting in the South is that because you have such a predominantly African American population, you're sort of navigating this Black/White dichotomy. I have some very distinct memories of issues between friends who were black or white, and because I was brown, I moved between those groups pretty easily. One incident is so vivid: sitting on the bus in the fifth grade in Louisiana – I've lived in different southern states – some of my black friends and white friends didn't talk to each other, but they were fighting over who I should sit next to.

Also I had a sense of really not appreciating my culture because there's such pressure to assimilate and to try to be like my blond, blue-eyed friends, or change my name. I think this happens with a lot of communities where you are very much a minority, where you have to choose whether you're going to assimilate in the white community or the black community. My sense of belonging was in the black community, going to the black churches, dating African American men. Interestingly enough, I had a lot of support from my mom. She really emboldened me to be who I wanted to be.

It wasn't until I went to Spelman College that I really started to understand that I was a person of color, that I identified with the minority communities in this country, and that I cared about what happens to them. I think where most Indian Americans or other immigrants identify with their community first and then look to the larger community. I had to look at myself as a person of color first to identify with the black community because there really was no progressive Indian or Asian community to be a part of. So then I worked my way

backwards to the Asian American community and the South Asian community.

For a lot of people, they fall into working in a particular community, but your path seems like you've had to confront a lot of these questions as you've grown in the work.

I've been challenged about why I don't work in the South Asian community, and I think I'm the first South Asian Executive Director of a National pan-Asian organization. For me, it's a no-brainer because I was doing stuff that was related to the Asian American community. If I had stayed in the South, that's what I would be doing now.

My parents ran a clinic in an inner city black community, and it was something that wasn't really thought about. It was just, this is our community, where work needs to be done, and we're here. These are our friends and our colleagues.

That's really interesting. When going over the path you've taken, it was striking to me that you chose to go to Spellman College, an historically Black College. Professor Frank Wu, when he was teaching law at Howard University, used to talk about being asked "what is like being the only Asian teaching at that historically black University" to which he'd respond, "if I was the only Asian at Yale or Harvard, a historically white institution, would you ask the same question?" You've already talked about your identity consciousness, but did going to Spellman College continue that path for you or did it present additional challenges or things for you to think about?

It was definitely very influential. I had my own trepidations about going to Spellman – it was my friends who challenged me when I said, "They know I'm not African American." They said, "what's the difference?" I remember getting asked that question all the time, and I agree with Frank Wu: I could be a minority student in a predominantly white institution, particularly in the South, or I could be a minority in a predominantly black college. The experience there was so different. I realized how much of a Eurocentric education I had received and how I hadn't learned anything about the African American or the Asian American communities. I thought this is the problem in our society and why our communities are so divided. We never take that step to learn in an authentic way about other communities and all the treasures, accomplishments, and contributions that they've made. I also had some amazing professors who challenged me and mentored me.

I can't say that I was so politically conscious. I think a part of my choice to be at Spellman was about wanting to be where I felt comfortable and where I felt like I belonged. The politics came later. It was like I wanted to be in a place where I could feel comfortable and call home. Looking back, it was an

amazing experience.

Actually, I was at a Spellman Women of Color conference recently. What was really great was that I was being honored by the Legacy of Leadership award by Spellman alum, and after I gave a little speech, some of the women came up to me and said, “we thought there was a mistake. We didn’t think you’d graduated from Spellman.” I think they told me that I’m probably the only Asian American that’s graduated from that school.

A lot of people become lifetime government employees, but after doing a lot of good work at the Department of Justice, you moved on. Was there anything about the experience that you want to talk about?

I think at the time that I came into DOJ, it was still with that idea that you had to have that civil rights experience and commitment. That’s why people went to DOJ. You still bump up against the slow pace of the Justice Department, with the career attorneys that are there. In the Justice Department you have to be more methodical – making sure you have all your ducks in a row and that you have the evidence you need to make a strong case. While that’s good, I felt like with all the school desegregation cases I was working on, it was a little frustrating because there was only so much I could do. Now you look at re-segregation of the schools and in many ways you felt kind of powerless: from the hopes and dreams of *Brown*, you’re wondering, “how am I helping?”

The NAPAWF community is quite different. So you have to figure out where you want to be, whether it’s inside the system or outside. I realized, for me, that I had to be outside the system where I could be more of an agitator and have more freedom in advocacy.

Can you give me a brief history of NAPAWF?

Initially, during the UN World Conference on Women in Beijing (1995) there was a caucus of Asian American activists that came together and asked, “Why does it take us going thousands and thousands of miles away from the U.S. to realize that we’re here, and that we’re doing really great work?” They decided that we needed to have an organization in the U.S. that represented our community and was lead by us.

So there was a founding gathering in L.A. in 1996, where they had over 150 Asian and Pacific Islander activists who came together, and they started strategizing and putting together platforms and committees about what this organization would look like. And well... we just celebrated our ten-year anniversary last year.

The issue of intersectionalities of identity is a hot topic in legal academia right now. As the director of a vibrant organization that sits on the crossroads between the women’s movement, the Asian American movement, and the immigrant rights’ movement, among others, how do issues of intersectionality play out for you and NAPAWF in a real

way?

The intersectionalities piece is something that we definitely embrace. We launched our reproductive justice education campaign with an agenda that includes really taking a look at what it means to be many things: an immigrant woman dealing with reproductive health issues; an immigrant woman in a situation of abuse dealing with reproductive health issues; an immigrant woman who’s been trafficked and is dealing with reproductive health challenges – whether it’s forced abortions or not getting the proper health care.

That’s been a criticism of the women’s movement: you can’t parcel us into one aspect of who we are because all these things intersect, and that comes out in our work. For example, with immigration reform, if you look at low-wage workers, especially in the garment industry or the domestic workers, many of them are immigrant women. Many of them don’t have access to health care or child services, especially many of those who have been here beyond the five years when they can access federal benefits. They are more likely to face abuse and exploitation by their employers.

The work we do really faces that broad, holistic perspective to the lives of Asian immigrant women and what that means.

“I had to be outside the system where I could be more of an agitator and have more freedom in advocacy.”

That is why our Founding Sisters created a multi-issue organization. We’re the only national woman-of-color organization with a progressive stance and a multi-issue focus. It’s so important because you see so many

organizations out there that are only working on immigrant rights or anti-violence work or anti-trafficking. Even though those are very difficult to develop as programs on their own, we’re seeing that there are so many opportunities to bring them together. So our anti-trafficking project director talks about the reproductive health issues of trafficking victims. That’s just one example of how we try to make that real.

There’s been a long ongoing dialog about the women’s movement and whether women of color are still marginalized in the greater movement? In a recent post on Feministing.com, you wrote eloquently about leadership transition and bringing a younger generation of women into leadership of the movement – is there anything that you’d like to add here about NAPAWF and this younger generation of women who are very passionate but sometimes get shut out of leadership?

I feel that NAPAWF has been an essential stepping-stone for a lot of young API women who otherwise would have never been a part of the women’s movement. I think that we’ve given them that space to learn about the issues, to be who they are, and to be in a safe space. A few years ago, the Ford Foundation pulled together all these women’s organizations from around the country and asked, “Is there still a women’s movement?” Or are we just a bunch of organizations working on women’s issues? That’s the ultimate question because women in the movement are asked, “Where are the young people and where are the

women of color?”

One study that was done by the Center for the Advancement of Women showed that there really is more of a desire by women of color for a movement than there is by white women, which to me suggests that women of color were not a part of the movement in the first place. Also, young people see the issues much more broadly than individuals working in organizations.

I think that NAPAWF is such a good example of this. The Founding Sisters, who are more experienced leaders, have really just stepped aside and given us space. You know, for someone like me, who is in her thirties, to lead the organization and to have everyone who working for me be basically 30 and under, is amazing. I really try to be conscientious about putting them out there. It's not about me. I think we have this skewed sense of what it means to be a leader – that you're always doing the talking. Frankly there's so much more than that to leadership, and you have to make a commitment to be conscientious.

Also with our chapters, the majority of the women are under 30. They have as part of their political identity their race or ethnicity, but not gender as much. Here's a space where they can learn about the issues, develop their advocacy skills, and feel empowered. We use the term “Fierce Sisters” all the time to negate the stereotypes of Asian women. We are fierce and we are powerful.

Transition has become a really big priority for me, for our organization, and our movement related to developing leadership. We have board members who feel strongly about it as well because we've seen what has happened to the women's movement when it hasn't been a priority. We're still going to face it; there are women's organizations where they still just don't get it - where my staff tells me that they go and still feel marginalized. Now we've had more women of color in foundations who see the need for organizations like NAPAWF, for other women-of-color organizations, for other ethnic-specific organizations because they represent our communities. We can't have others doing that because we know our communities.

As a law student at the University of Georgia, you were very active with public interest student issues – and after working at DOJ for a number of years, you took a position that supported public interest students at WCL. Were there common questions that you would get from students of color interested in exploring public interest careers? Were they similar to what your classmates were confronting at that time? Were there significant differences or other observations you have from that time?

That's a good question. First, I think that WCL is a totally different breed. I used to tell people that they were in such a great position with all these clinics and opportunities for public interest work, where that wasn't the case for me at Georgia. When I was there, I and a few other students put together a

public interest career fair because career services didn't have the capacity. I think now it's more of a mainstay, but at that time it wasn't there for us. We had to create it.

But some of the questions are very similar. It's much harder to find a job – you kind of have to search and go out on your own rather than the on-campus interviews that are ready and there and waiting for you. So it really just takes a lot more effort. You have to learn about the different organizations and how they do their hiring.

The issue of debt, especially coming out of WCL versus coming out of a public university, is a huge issue. Especially when, at WCL, there's a big push around PILRAP, and trying to figure out a way that there can be more support systems in place in a University that really supports public interest. But what are the programs that they have in place to allow students to really take advantage of this opportunity?

You've been doing this work for a good amount of time and you've done some really interesting – and trailblazing – work in a lot of ways. How have you kept your head – and your heart – in this work for so long? How do you keep yourself motivated, and do you have any words for folks who are afraid of burnout or on the brink of burnout?

I've been a burnout victim in the past. A belief in balance and in the fact that you can't be the sacrificial lamb has helped me. I keep saying that to myself: I'm one person and I can only do so much. What sense does it make for me to be helping all of these people while running myself into the ground? Be realistic. Have balance. Keep yourself healthy and productive so that you can actually stand the work. Also, just don't take yourself so seriously. I feel like the stuff gets just so politically charged and people get so worked up. And it's not as if work isn't important. It's just that you have to put it in the larger context of what's going on in your life and you can't become so one-dimensional about work. You have to have an outside life; you have to have other interests because in that sense, it helps to make you a better advocate.

Also I think we should really promote policies and organizations that support that balance. Two things I brought from the government to NAPAWF were having every other Friday off and really generous vacation time. I do feel that there are various organizational cultures where you constantly have to produce, and it's “outcome, outcome, outcome.” There's always got to be something going on at this frenzied kind of pace and that's where the burnout comes. If you want to keep people in, build their skills, and keep the consistency and longevity in the organization, you really have to do certain things. It's also a way of valuing people. It's not just about valuing the pie-in-the-sky ideals of social justice, but you value the very people that are in front of your face who work with you day in and day out, and show up every day.

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* See Ms. Ahuja's biography on page 87.

¹ Available at <http://feministing.com/archives/007040.html> (last visited October 14, 2007).

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DON'T YOU BE MY NEIGHBOR: RESTRICTIVE HOUSING ORDINANCES AS THE NEW JIM CROW

By Marisa Bono *

“We can, of course, little more than hypothesize how our racial passions first began to overtake us, how humankind’s obsession to embrace the similar and despise the different got stuck in our communal psyche....”

- Jerold M. Packard¹

“They’re taking our jobs, our homes. There’s unemployment partly because of the Hispanics. The lady who took my job is Hispanic, and she’s bilingual.”

- Anonymous proponent of Ordinance 2903, a law passed in Farmers Branch Texas that prohibits undocumented immigrants from renting housing.²

“[T]he cruelty and humiliation of Jim Crow is a thing of the past.”

- President George W. Bush, in a speech delivered at the John F. Kennedy Center for the Performing Arts in Washington, D.C., on January 16, 2006.³

To the extent that the laws meant to perpetuate racial segregation in the post-Civil War South do not exist in America today, President George W. Bush was right when he delivered his Martin Luther King Jr. commemoration speech in 2006: *Jim Crow is dead*.⁴ However, many do not recognize that such laws have since been reincarnated in forms that are much less conspicuous and significantly more savvy and mature than their predecessors.⁵ Facially neutral, they operate without reference to the racial prejudice that stirred their rebirth, and for this reason they are difficult to identify.⁶ But as Supreme Court Justice Potter Stewart once said of another subject matter similarly difficult to define, we know it when we see it.⁷

One pernicious manifestation has taken the form of anti-immigrant ordinances that have swept through predominantly small and/or rural communities across the country since April 2006.⁸ By utilizing such measures as English-only provisions,⁹ fines and criminal penalties for employers, landlords, and others who do business with undocumented immigrants,¹⁰ and barring undocumented immigrants from social services,¹¹ local government officials are attempting to drive undocumented immigrants who are predominantly Latino out of their towns. In the process, these laws create hostile living and working environments for Latino residents, relegating them to second-class citizenship in their own communities, and creating a climate of fear and shame for the undocumented, the documented, and U.S. Citizens alike. To date, approximately 100 localities in 28 states have proposed some form of anti-

immigrant ordinance, all varying in language and scope.¹² Of these, 40 ordinances have passed.¹³

This article will examine one face of the modern anti-immigrant campaigns: restrictive housing ordinances that prohibit undocumented immigrants and their families from renting apartment housing within city limits. The public rationale offered by local government officials to justify these ordinances is the health, safety, and welfare of local constituents.¹⁴ Upon closer inspection, however, these ordinances are actually reminiscent of racial zoning laws passed during the Jim Crow era to maintain and reinforce racial stratification.¹⁵ Throughout the early twentieth century, cities all over the country enacted segregation ordinances to prevent the intermingling of the races.¹⁶ City officials labeled African-American neighborhoods undesirable because “the shiftless, the improvident, the ignorant and the criminal carry their moral and economic condition with them wherever they go.”¹⁷

The similarities between the racial zoning ordinances of the Jim Crow era and the restrictive housing ordinances of today are disquieting. First, this article provides an overview of racial zoning ordinances passed in the early twentieth century and the restrictive housing ordinances of today, as well as their justifications. Second, after delving into the explanations offered by local government officials in passing restrictive housing ordinances, this article concludes that such laws are a reaction to the growing Latino population in the United States. It also asserts that, like racial zoning ordinances, restrictive housing ordinances are passed to maintain racial segregation and white dominance.¹⁸ Finally, this article suggests possible motives for these policies of segregation and warns against following their treacherous path.

OVERVIEW OF RACIAL ZONING ORDINANCES AND RESTRICTIVE HOUSING ORDINANCES

Before drawing any parallels between these two forms of discriminatory housing regulation, it is important to set the historical and social contexts in which they developed. In large part, the characteristics of each are radically distinct and exist almost a century apart. Immediate differences are evident, not only in the historical context, but in form as well. For example, racial zoning was exclusive; while restrictive housing is expulsive.¹⁹ Racial zoning was an instance of de jure discrimination; whereas, restrictive housing is de facto,²⁰ or so this article will argue. Despite these differences, however, an overarching objective emerges: the segregation of races as a fearful reaction to a growing minority population.

RACIAL ZONING ORDINANCES

In the post-Civil War era, newly freed slaves enjoyed a brief period of time where they benefited from many of the rights enjoyed by the body politic: the right to vote, the right to own property, and the right to travel and associate freely.²¹ However, after Reconstruction ended in the late 1860s, and as the entrenched southern classes regained political power, any rights afforded African Americans were revoked or modified severely so as to render them ineffectual.²² A new system of federal and local laws was ushered in under Jim Crow, one in which “racism [was a] legal right and obligation.”²³

Because the most obvious way to ensure the separation of the races was to force them to live in separate places, Jim Crow laws included severe restrictions on where African Americans could reside and travel.

Racial zoning ordinances were largely a reaction to the mass migration of southern rural blacks fleeing to the North.²⁴ In fact, studies from the time indicated that racial tension in the North was growing as the proportion of blacks in the area increased.²⁵ In 1910, Baltimore, Maryland, passed an ordinance that zoned separate residential districts for blacks and whites. Over the next six years, at least a dozen racial zoning ordinances were enacted to legally restrict members of particular races to certain areas of U.S. cities and towns.²⁶ These local housing regulations took various forms: some segregated block by block, others created distinct racial districts, and “one, New Orleans [regulation] required new residents of a particular race to obtain the consent of the current residents if they were of a different race.”²⁷ The purposes of the ordinances revolved largely around police power, or the right “to preserve social peace, protect racial purity, and safeguard property values.”²⁸

RESTRICTIVE HOUSING ORDINANCES

Almost a hundred years after the first racial zoning ordinance was passed, restrictive housing ordinances have evolved amidst a heated national debate over federal immigration policy. In 2004, an estimated 10.3 million immigrants living in the United States were undocumented, with 81% of those individuals claiming Latin American countries of origin.²⁹ By December of 2005, the United States Congress was considering a major overhaul of federal immigration law.³⁰ From those deliberations came a punitive House bill, known as the Sensenbrenner Bill after its sponsor. The bill made it a felony to have undocumented status and imposed felony criminal sanctions on individuals who provided aid or humanitarian assistance to undocumented immigrants.³¹ The passage of the Sensenbrenner bill immediately incited unprecedented mass demonstrations. Across the country, millions of people, both non-citizens and citizens, protested against what they perceived as anti-immigrant, racially hateful reforms to existing U.S. immigration laws.³² A second wave of

protests followed in March when demonstrators sought an overhaul of enforcement-only measures and demanded comprehensive immigration reform that would give amnesty to undocumented immigrants, in addition to a pathway to legalized status.³³

Opponents of amnesty provisions counter-protested with demonstrations, albeit on a much smaller scale.³⁴ Indeed, in the years leading up to these events, anti-immigrant advocates who favored enforcement-only measures had already been engaged in enforcement-type activities of their own.³⁵ Most notably, but

The similarities between the racial zoning ordinances of the Jim Crow era and the restrictive housing ordinances of today are disquieting.

not exclusively, a group calling itself the Minutemen Project had been organizing armed civilian volunteers and stationing them along the U.S.-Mexico border in order to track and detain undocumented immigrants.³⁶ In June 2006, following the mass pro-immigrant demonstrations in the

spring, the Senate passed a bill that replaced the harsher measures of the Sensenbrenner Bill with relief for undocumented immigrants.³⁷ Not long after, members and supporters of groups like the Minutemen Project began to press harder than ever for local solutions to what they insisted was the federal government’s failure to enforce immigration law.³⁸ Prominent in their efforts to promote enforcement-only laws is a claim that Latinos who support comprehensive immigration reform are plotting a “Reconquista,” or that they “seek to reconquer this territory by taking the land away from the United States and returning it to Mexico. The goal of the Reconquista is to ‘reconquer’ these ‘lost’ or ‘stolen’ territories for ‘La Raza’ - the race indigenous to Mexico.”³⁹ When local government officials first began proposing restrictive housing ordinances in the summer of 2006, the Minutemen and their associates spoke publicly in their favor and also testified at city hearings.⁴⁰

Thus far, at least 40 cities have proposed restrictive housing ordinances, of which 15 have passed.⁴¹ The ordinances made most visible to the public by the legal challenges they inspired are those that were passed in Hazelton, Pennsylvania; Escondido, California; and Farmers Branch, Texas.⁴²

On September 8, 2006, Hazelton, Pennsylvania, a former coal-mining town about 45 miles northwest of Philadelphia, was the first locality to propose and pass an anti-immigrant ordinance that included housing restrictions.⁴³ Entitled the Illegal Immigration Relief Act (IIRA), Ordinance 2006-18 prohibited undocumented immigrants from renting property in the city, subjecting any property owner or tenant to fines of up to \$250 a day and criminal penalties for a violation of the ordinance.⁴⁴ In addition, each property owner was required to obtain and pay for an occupancy permit for each potential tenant that would be granted only upon a showing of “proof of legal citizenship.”⁴⁵ Landlord property owners also faced suspension of their rental licenses for violating the ordinance.⁴⁶

The restrictive housing ordinance passed by the City of Escondido, California, on October 16, 2008, was modeled

largely after the IIRA.⁴⁷ The Escondido ordinance prohibited landlord property owners from renting an apartment to any “illegal alien” and placed the burden of verifying tenant legal status on landlords.⁴⁸ Those who failed to comply with the ordinance would be subject to fines of up to \$1,000 per day, up to six months in jail, and suspension of their business licenses.⁴⁹

On November 13, 2006, Farmers Branch, Texas passed its own restrictive housing ordinance, months after it was initially proposed by city councilman Tim O’Hare.⁵⁰ Although the Farmers Branch ordinance also threatened stiff financial and criminal penalties for landlords who rented to undocumented immigrants, it differed from those passed by Escondido and Hazleton in that it applied only to “existing leases.”⁵¹ Later versions of the ordinance also attempted to define “illegal alien.”⁵² The Farmers Branch city council repealed the ordinance and replaced it with an amended version that contained many of the same restrictions on immigrants’ access to housing as the first. Farmers Branch voters approved the ballot on May 22, 2007, and it was enjoined the same year by a federal court on June 19.⁵³

JUSTIFICATIONS USED TO SUPPORT RACIAL ZONING AND RESTRICTIVE HOUSING ORDINANCES

Despite the many decades that separate them, racial zoning ordinances and restrictive housing ordinances share two key characteristics. First, both occurred in the wake of sudden influxes of minority populations in a relatively short period of time. In the case of zoning ordinances, the triggering demographic change was a mass migration of southern rural blacks to northern cities during the Jim Crow era.⁵⁴ For restrictive housing ordinances, it was the exponential growth of Latino populations in smaller, predominantly white towns.⁵⁵ In Farmers Branch, for example, the Latino population, including both native and foreign born, virtually doubled - from 20% to 37% - during the 1990s.⁵⁶ Hazleton’s population of approximately 30,000 is about 30% Latino, up from 5% in 2000.⁵⁷ The Latino population of Escondido, a city of approximately 142,000, has nearly tripled since 1990, rising from 16% to 42%.⁵⁸

The second point of comparison is the use of the police power to justify exclusionary policies. As indicated above, in addition to the blatant and public fear of racial amalgamation,⁵⁹ racial zoning ordinances were premised on the notion that they were necessary to protect the public welfare and preserve property values.⁶⁰ Modern day localities have relied on the same rationales to justify restrictive housing ordinances. For example, Mayor Louis Barletta, the main proponent of the Hazleton ordinance, has publicly stated that, though he is unaware how many undocumented immigrants currently reside in the city, he nonetheless blames them for contributing “to overcrowded classrooms and failing schools, subject[ing] our hospitals to fiscal hardship and legal residents to substandard quality of care, and destroy[ing] our neighborhoods and diminish[ing] our overall quality of life.”⁶¹ To date, the city has not provided any figures to support Barletta’s assertions.

The same pattern of baseless justification occurred in Escondido. The Escondido ordinance states that “crime committed by illegal aliens harm[sic] the health, safety, and welfare of legal residents in the city.”⁶² During the debate leading up to the passage of the ordinance, city councilmember Marie Waldron, the driving force behind the Escondido ordinance, warned without evidence that illegal immigrants exposed other town residents to a litany of potential harms ranging in severity: from loud music and graffiti, to child molestation and deadly diseases such as leprosy and tuberculosis.⁶³ Similarly, the Farmers Branch ordinance purports to “promote the public health, safety, and general welfare of the citizens of the City of Farmers Branch.”⁶⁴ More specifically, city councilmember Tim O’Hare, who first proposed the ordinance, argued that it was necessary to prevent increasing crime rates, declining local property values, and school underperformance.⁶⁵ However, he failed to show how all of these “problems” were actually linked to undocumented immigrants, or that they were even occurring in the first place.⁶⁶

Thus, support for the racial zoning ordinances of the past and restrictive ordinances of today relies on the demonization of rapidly increasing minority populations and the aggrandizing of the so-called “police power” supposedly needed to control them. This historical and geographic commonality is crucial to identifying how restrictive housing ordinances perpetuate racial segregation.

USING EFFECT AND INTENT TO RECOGNIZE RACIAL BIAS

One may be inclined to take a strong position against, and perhaps even take a stronger offense to, the argument that restrictive housing ordinances are throwbacks to the racial zoning ordinances of a post-slavery era. The most obvious argument against this comparison is that racial zoning ordinances specifically targeted African Americans; whereas, restrictive housing ordinances target undocumented immigrants, not Latinos as a racially defined class.⁶⁷ This response, however, appears as little more than a smokescreen in light of the intent and effect of restrictive housing ordinances.

THE INTENT OF RESTRICTIVE HOUSING ORDINANCES

A closer examination of the reasons set forth by public officials to justify targeting undocumented immigrants, reveals that they are not only unfounded, but do not distinguish between undocumented immigrants and Latinos in general. Furthermore, localities do not avail themselves of alternative solutions that refrain from targeting subordinated groups of people. Put simply, in light of these considerations, the only conclusion a critical observer can reach is that these justifications are pretexts for racial exclusion.

When Farmers Branch councilmember O’Hare stated publicly that it was necessary to protect property values,⁶⁸ the city failed to offer any connection between immigration status

and problems related to health, safety, welfare, or declining property values. Worse, Farmers Branch did not show that those problems even existed.⁶⁹ Neither O'Hare nor other proponents of the ordinance pointed to any studies, reports, or statistics to support a correlation between immigration status and societal ills. In fact, at the same time as the touted increase in the Farmers Branch Latino population, the total number of criminal offenses in Farmers Branch declined - from 1,413 in 2003 to 1,306 in 2005.⁷⁰ The Texas Educational Agency recently recognized schools in the Carrollton Farmers Branch School District for academic excellence in the 2004-2005 school year, an achievement those schools had not obtained in recently preceding years.⁷¹ Furthermore, O'Hare's public comments did not distinguish between undocumented immigrants and Latinos. To explain fluctuations in property values, O'Hare reasoned that "what I would call less desirable people move into the neighborhoods, people who don't value education, people who don't value taking care of their properties...."⁷² He claimed that retail operations cater to low-income and Spanish-speaking customers, leaving "no place for people with a good income to shop."⁷³ Yet, his statements again fail to discern between undocumented immigrants and Latinos in general.⁷⁴

Similarly, the City of Escondido based its ordinance on findings that "the harboring of illegal aliens in dwelling units in the City, and crime committed by illegal aliens, harm the health, safety and welfare of legal residents in the City."⁷⁵ Unlike the City of Farmers Branch, Escondido relied on a June 2006 study by the National Latino Research Center at California State University San Marcos (hereafter "NLRC study") addressing housing conditions in the Mission Park area of Escondido.⁷⁶ The NLRC study, however, found that the causes for substandard housing in Escondido were the high costs of housing and the unavailability of affordable subsidized housing in Escondido - not the presence of "illegal aliens."⁷⁷

In Hazleton, Mayor Ray Barletta insisted "that illegal immigration leads to higher crime rates, contributes to overcrowded classrooms and failing schools, subjects our hospitals to fiscal hardship and legal residents to substandard quality of care, and destroys our neighborhoods and diminishes our overall quality of life."⁷⁸ Yet, he has also publicly admitted that he does not know how many "illegal aliens" live, work, or attend school in the city, or how many Hazleton crimes have been committed by "illegal immigrants," legal residents, or citizens.⁷⁹

Furthermore, according to statistics compiled by the Pennsylvania State Police Uniform Crime Reporting System, there has been a reduction of total arrests in Hazleton over the past five years, including a reduction in serious crimes such as rapes, robberies, homicides, and assaults.⁸⁰ Under Hazleton's violent crime index (VCI), undocumented immigrants committed no violent crime until 2006, when three such cases

were reported out of 1,397.⁸¹ Barletta also claimed that Hazleton's budget was "buckling under the strain of illegal immigrants," but admitted that he was unaware how many undocumented workers contributed to the city's budget by paying taxes.⁸² In 2000, Hazleton had a \$1.2 million deficit, in stark contrast to the surplus it enjoys today.⁸³ The town also saw its largest increase in property values last year.⁸⁴ Its net assets are up 18%, and its bond rating is AAA.⁸⁵

Amidst the baseless assertions about immigrants, legal alternatives exist that would more directly address the tribulations claimed by public officials. For example, it is not clear why a city, without evidence showing the cause-and-effect between blight-like overcrowding and a certain class of residents, would not pursue remedies that did not target that group of residents. Where concerns about property values arise, a city could enforce stricter penalties for landlords who were not keeping their buildings up to code. Where the occurrence of crime is shown to be increasing, a city could fund community watch programs in appropriate areas, if not train and hire additional police officers. There are myriad alternative solutions to these alleged societal woes. Yet none are being utilized by cities that turn to restrictive housing ordinances.

Thus municipalities with restrictive housing ordinances fail to show a connection between the presence of immigrant populations and alleged societal harms. They also ignore less restrictive solutions that would more directly address those harms to the extent that they actually exist. Moreover, municipalities that pass restrictive housing ordinances simultaneously incur overwhelming legal and economic costs that they are often unable to afford. For example, after Riverside, New Jersey, passed a restrictive ordinance in the fall of 2006, thousands of Latinos fled the community, creating a forceful blow to the local economy. Local businesses floundered, and many were forced to close.⁸⁶ By the time Riverside voted to rescind the ordinance a year later, it had already spent \$82,000 in attorney's fees fending off a legal challenge to its law.⁸⁷ It is likely that Riverside would have spent many times that amount had it seen the challenge through to conclusion.

Thus, the record of these cities reveals the intent behind the legal exclusion of the undocumented. In short, local governments' willingness to engage in certain behavior - ignoring the variety of obvious legal solutions, willingly incurring staggering economic and legal costs, and simultaneously admitting to the nonexistence of evidence that links predominantly Latino undocumented immigrant populations to threatened safety or welfare - speaks for itself. The intent behind exclusionary ordinances is to use immigration status as a pretext for the racial exclusion of Latinos.

*The intent behind exclusionary ordinances
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THE EFFECT OF RESTRICTIVE HOUSING ORDINANCES

While restrictive housing ordinances do not explicitly segregate a distinct racial or ethnic class, as racial zoning ordinances once did, their practical effect demonstrates how immigration status is actually a proxy for the same type of racial targeting. For example, restrictive housing ordinances apply to Latinos who have legal status. Moreover, the proposal and debate of restrictive housing ordinances creates extraordinary racial tension and animus in the communities where they originate. Therefore, restrictive housing ordinances force documented and undocumented Latinos alike to choose between leaving their communities and families and breaking the law by continuing to work and attend school in a place where they have been categorized as outsiders.

More specifically, Latinos suffer what this article will term “constructive exclusion.” By excluding some family members and not others from renting housing, these ordinances constructively force Latinos who have legal status, and even citizenship,⁸⁸ to leave by imposing a choice between relocation and severing the familial unit. For example, under Ordinance 2892, the first ordinance passed by Farmers Branch, each potential tenant was required to show evidence of “eligible immigrations status” in order to live in a rented apartment.⁸⁹ This wording created an explicit threat to mixed-status families, or those families in which one or more parents is a non-citizen and one or more child is a U.S. citizen. Thus, hypothetically, where a family is comprised of one undocumented spouse, a spouse with legal permanent residence, and children with U.S. citizenship by birth within the U.S., household heads are forced to choose between splitting apart and relocating their family altogether. Even after the city repealed 2892 and replaced it with 2903, the city ordinance still prohibited certain categories of persons permitted by the federal government to live and work in the United States, such as student-visa holders and temporary workers, from renting housing.⁹⁰

Ordinance language also excludes Latinos from renting housing by sanctioning racial stereotyping by potential landlords. The Hazleton ordinance, which was closely modeled after the Escondido ordinance, approved the use of an individual’s “race, ethnicity, or national origin” as at least a partial basis for a complaint that they are undocumented.⁹¹ While the ordinance states that those factors may not be the sole basis for a complaint, it virtually sanctions race- and national origin-based targeting. It also makes Latinos more vulnerable to false complaints that result in automatic criminal and financial penalties. As the plaintiffs challenging the Hazleton Ordinance stated in their Memorandum of Law in Support of Preliminary Injunction, the use of race, ethnicity, and national origin as relevant considerations in enforcing the ordinance “threatens to

stigmatize individuals by reason of their membership in a racial [or ethnic] group and to incite racial [and ethnic] hostility... [and] to enforce racial and ethnic division.”⁹²

In this way, restrictive housing ordinances, like that passed in Hazleton, relieve landlords of a sense of responsibility for racist practices. Restrictive housing ordinances encourage, or at the very least allow, landlords to use racial profiling while “screening” potential tenants.⁹³ As Latinos make up significant portions of the immigrant communities in cities that have passed restrictive housing ordinances, landlords are virtually forced to consider race, national origin, and English-speaking ability when entering into a lease agreement. By making the “degradations of racism a legal duty rather than an act of individual free will,”⁹⁴ these ordinances essentially clear the consciences of racially prejudiced Americans by relieving them of responsibility for racist practices.

Furthermore, restrictive housing ordinances target Latinos, and not merely undocumented immigrants, in another more circuitous method: by creating animus-filled environments within the communities where they are proposed. In each case where restrictive ordinances were proposed and debated, the

“...There’s unemployment partly because of the Hispanics. The lady that took my job is Hispanic, and she’s bilingual.”

local communities were immediately embroiled in heated, and often hateful, controversy.⁹⁵ By painting undocumented immigrants as the cause of all their communal woes, without evidence to support the connection, and without any

distinctions between immigrants and Latinos in general,⁹⁶ city officials embolden local residents to act on misinformation, prejudice, and, worse, racial animus. As a result, Latinos are forced to refrain from living, working, and attending school comfortably in their own environments. For example, in Farmers Branch, Latino parents are apprehensive that their children will be removed from school, and students refrain from speaking Spanish with each other for fear of arrest.⁹⁷ Relatives refrain from visiting for fear of harassment.⁹⁸ As Jose Gomez of Farmers Branch, Texas, puts it: “If we’re of a certain color, they’re going to point their finger at us.”⁹⁹

The public rhetoric surrounding the ordinances, which emphasizes protecting Americans from undesirable outsiders who speak a different language, is evidence of this effect. For example, in Farmers Branch, one ordinance proponent outright blamed Latinos, not immigrants, for perceived public woes: “They’re taking our jobs, our homes.... There’s unemployment partly because of the Hispanics. The lady that took my job is Hispanic, and she’s bilingual.”¹⁰⁰ Another complaint tied the prevalence of the Spanish language to community ruination: “[F]or every two [retail shops] that went vacant, one would be filled by a Spanish-speaking business, then, you... saw what was once a really, really, really nice neighborhood start to decline.”¹⁰¹ In these ways, local residents are sending Latinos a clear message: you are welcome to work in our city and pay sales taxes here, but you can’t sleep here at night. This

sentiment not so vaguely echoes those from the thousands of all-white “sundown” towns and suburbs across the West and North during the Jim Crow era.¹⁰² At that time, not only African Americans, but Mexican Americans, and Asian Americans were warned not to let the sun set on them while within town limits.¹⁰³

Accordingly, many Latinos who have legal status are prohibited from housing under restrictive housing ordinances, and many of those who are not will be driven out by racial targeting and animus. These Latinos, in addition to undocumented immigrants who are employed and whose children are acclimated to local schools, are most likely to move to nearby towns and suburbs.¹⁰⁴ In this way, restrictive ordinances will have the palpable effect of removing a racial community from one city to a neighboring one. In some cases, such as Farmers Branch, actual racial districts could potentially be created within the same city.¹⁰⁵ Thus, restrictive housing ordinances initiate the first step towards the segregation sought by yesteryear's proponents of racial zoning laws.

IDENTIFYING A MOTIVE TO SEGREGATE

Now that we have addressed the question of how restrictive housing ordinances operate to segregate Latinos, it is important to contemplate the motive behind these laws. The “knee-jerk” explanation points to fear of racial amalgamation, the widely recognized driving force behind racial social control in the early 1900s.¹⁰⁶ Additionally, there are two more probing, possibly interlocking, explanations: race nuisance and fear of “the waking giant.”

The theory of race nuisance was raised by white plaintiffs during the Jim Crow era to support racial segregation.¹⁰⁷ Typically, white landowners or municipal government officials articulated this concept to challenge the presence of black people in white neighborhoods. “Race nuisance” encapsulated the notion that by virtue of race alone, the African-American presence created a nuisance that disrupted the quiet enjoyment of land for white property owners.¹⁰⁸ This theory was also used to protest the presence of Mexicans in Texas. In *Worm v. Wood*¹⁰⁹ and *Lancaster v. Harwood*,¹¹⁰ for example, Texas appellate courts rejected the plaintiffs’ requests for injunctions prohibiting Mexicans and African Americans from residing nearby.¹¹¹ The plaintiffs based their arguments on the premise that the presence of these racial minorities would “greatly injure and practically destroy the social conditions of [the] neighborhood.”¹¹²

The notion of race nuisance has returned in the failure by proponents of restrictive housing ordinances to delineate between undocumented immigrants and Latinos when citing immigrants as the cause of public ailments. By failing to link the presence of undocumented immigrants to nuisances such as declining property values, underperforming schools, and increasing crime rates, proponents of restrictive housing

ordinances insinuate that Latinos are a “per se nuisance.” They claim, in essence, that Latinos, as a class of people, create a nuisance by their very presence. This implication arises from the reality that restrictive housing ordinances are often coupled with the passage of English-only laws, without justification as to how Spanish is harmful or detrimental to the community.¹¹³ Although no appellate courts between the end of Reconstruction and *Brown v. Board of Education* ever enshrined the concept of Mexican residents as a race nuisance,¹¹⁴ today’s proponents of restrictive housing ordinances are now reversing that judicial outcome by turning to legislation. Indeed, some localities have already moved towards classifying immigrants as public nuisances outright.¹¹⁵

In addition to the race nuisance theory, proponents of restrictive housing ordinances may be motivated by the fear of a “waking giant.” The proverbial “giant” being a growing minority population that is culturally different from the majority, less complacent about the subordination they encounter, and increasingly resistant to assimilation than in previous years. The combination of these factors creates fear and resentment in older residents as they witness the change in their community. While some older residents may leave, others stay behind, fighting to preserve their community as they once knew it.¹¹⁶

Already alarmed by the sheer growth of Latino populations, the white majority in small communities like Farmers Branch, Hazleton, and Escondido may be especially intimidated by the changing attitude within the Latino “majority-minority.”¹¹⁷ This attitude contrasts that of the late nineteenth-century, when many Mexican Americans began insisting that they were white in

The plaintiffs based their arguments on the premise that the presence of these racial minorities would “greatly injure and practically destroy the social conditions of [the] neighborhood.”

order to avoid “legal” forms of discrimination and classification.¹¹⁸ *Mendez v. Westminster*, a landmark school desegregation case involving Mexican-American students, concretized the Latino embrace of assimilation as the plaintiffs argued explicitly that race was not at issue in the case and that the “whiteness” of Mexican Americans carried great

social value.¹¹⁹

This attitude prevailed well into the late 1960s, until the advent of the Chicano movement.¹²⁰ The emergence of a non-white identity has since been a key component in the Latino civil rights movement,¹²¹ and in fact, the assertion of a singular non-white identity may have culminated in the mass immigrants' rights marches of 2006.¹²² With the emergence of this “non-assimilationist” attitude, the Latino population is also projected to comprise a majority of the U.S. population within the next fifty years.¹²³ These changes together have inspired allegations of increased competition for resources, jobs, housing, and education.¹²⁴ Thus, the fear of the “waking giant” alludes, more than anything else, to the threatened financial and social superiority of the white majority. The perceived peril hearkens back to the post-Reconstruction mass migration of African

Americans to the North, and their ensuing call for equal rights.

CONCLUSION

In 1917, in *Buchanan v. Warley*, the Supreme Court addressed the constitutionality of a Louisville, Kentucky racial zoning ordinance.¹²⁵ Although the Court invalidated the ordinance, it did so in a limited holding that trumpeted the priority of white property rights more than it rejected racial housing segregation.¹²⁶ Similarly, those courts that have enjoined restrictive housing ordinances, thus far, have done so on the basis of federal preemption, and not because of any discrimination based on suspect classification.¹²⁷

However, notwithstanding other constitutional problems posed by restrictive housing ordinances – namely the threat of piecemeal immigration policy thrown together by localities in a field already preempted by the federal government¹²⁸ – local governments should be vigilant of the racial impact of these ordinances. Across the country, the slow tide of restrictive housing ordinances threatens to create segregated towns, where

Latinos are welcomed community members in one, while uninvited guests in the next.¹²⁹ During the Jim Crow era, de facto inequality followed separateness.¹³⁰ In other words, “if Jim Crow placed a badge of inferiority on the black race, it provided license to devalue black interests as well.”¹³¹ As shown above, the controversy surrounding the proposal and passage of restrictive housing ordinances has already shown shades of a reemergence of one of the most shameful chapters of this country’s history.

In large part, it was the moral outrage over segregation and the second-class citizenship of African Americans that rang the death knell for de jure apartheid. Lest they repeat an ugly past, local governments should utilize means other than restrictive housing ordinances to alleviate social tribulations, to the extent that they actually exist. In the meantime, grounded in a social consciousness gleaned from the history of our country’s race relations before the Civil Rights Movement, we should speak out and act swiftly to prevent the actions of those who refuse to heed that unfortunate legacy.

ENDNOTES

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¹ JEROLD M. PACKARD, *AMERICAN NIGHTMARE: THE HISTORY OF JIM CROW I* (St. Martin’s Press 2002).

² Stephanie Sandoval, *FB studies tough provisions aimed at illegal immigrants: Proposals would affect landlords, employers; some say rules would draw lawsuits*, DALLAS MORNING NEWS, Aug. 21, 2006 (quoting a proponent of Prop. 2892, the restrictive housing ordinance passed in Farmers Branch, Texas) available at http://www.dallasnews.com/sharedcontent/dws/news/city/carrollton/stories/DN-fbimmigration_21met.ART.North.Edition1.3e0478e.html (last visited Oct. 7, 2007).

³ The White House, *President Honors Dr. Martin Luther King, Jr. at “Let Freedom Ring” Celebration*, available at <http://www.whitehouse.gov/news/releases/2006/01/20060116-3.html> (last visited Oct. 7, 2007).

⁴ See generally LAWRENCE M. FRIEDMAN, *AMERICAN LAW IN THE 20TH CENTURY* 111, 293 (R.R. Donnelly & Sons 2002) (noting that most segregation laws were slowly banned after *Brown v. Board of Education* and the passage of the Civil Rights Act).

⁵ See, e.g., Hazelton, Pa., Ordinance No. 2006-18; Hazelton, Pa., Ordinance No. 2006-40, 2007-6; Escondido, Cal., Ordinance No. 2006-36 R; Farmers Branch, Tex., Ordinance No. 2892; Valley Park, Mo., Ordinance No. 1715.

⁶ See generally Yifat Bitton, *The Limits of Equality and the Virtues of Discrimination*, 2006 MICH. ST. L. REV. 593 (Fall 2006) (describing the absence of instances of de facto discrimination in the anti-discrimination discourse).

⁷ *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (J. Stewart, concurring) (trying to explain “hard-core” pornography, or what is obscene, by saying, “I shall not today attempt further to define the kinds of material I understand to be embraced... [b]ut I know it when I see it....”).

⁸ Today, approximately 100 localities have proposed anti-immigrant ordinances, and at least 40 of those have passed. For a list of local ordinances introduced, passed and defeated, see Database of Local Immigration Ordinances, Fair

Immigration Reform Movement, available at <http://www.fairimmigration.org/learn/immigration-reform-and-immigrants/local-level/>; see also, e.g., Annette Fuentes, *Immigration backlash goes local*, USA TODAY, July 28, 2006, available at <http://www.mywire.com/pubs/USATODAY/2006/07/28/1719459?extID=10051> (last visited Oct. 7, 2007); Annabelle Garay, *Texas Town Okays Anti-Immigration Measure*, WASHINGTON POST, Nov. 14, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/11/13/AR2006111300155.html> (last visited Oct. 7, 2007) [hereinafter *Texas Town*]; James Sterngold, *San Bernardino seeking ‘relief,’* SAN FRANCISCO CHRON., June 11, 2006, available at <http://sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/06/11/MNGM5JCE0B1.DTL&hw=san+bernardino&sn=001&sc=1000> (last visited Oct. 7, 2007).

⁹ See, e.g., Ellen Barry, *Pennsylvania town is sued over immigrant ordinance*, SAN FRANCISCO CHRON., Aug. 16, 2006, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/08/16/MNGVJKJ7R31.DTL> (last visited Oct. 7, 2007).

¹⁰ See, e.g., *Texas Town*, *supra* note 8.

¹¹ See, e.g., Associated Press, *Nevada town enacts English-Only law, bans immigrant benefits*, Las Vegas Sun, Nov. 15, 2006, available at <http://www.lasvegassun.com/sunbin/stories/nevada/2006/nov/15/111510272.html> (last visited Oct. 7, 2007).

¹² For an overview of anti-immigrant ordinances that have been proposed and passed, see American Civil Liberties Union, Local Anti-Immigrant Ordinance Cases, available at <http://www.aclu.org/immigrants/discrim/27848res20070105.html> (last visited Oct. 7, 2007) [hereinafter ACLU]; and Fair Immigration Reform Movement, Database of Recent Local Ordinances on Immigration, available at http://64.243.188.204/CCCFTP/local/7.23_updated_firm_ordinance.doc (last visited Oct. 7, 2007).

¹³ See ACLU, *supra* note 12.

¹⁴ See, e.g., Escondido, Cal., Ordinance No. 2006-38 Sec. 1 ¶ 3; City of Escondido, California, City Council Meeting, October 18, 2006, video recorded speech available at <http://www.youtube.com/watch?v=JK-pDsdT9pE> (last visited Oct. 7, 2007); Sandoval, *supra* note 2 (quoting a proponent of Prop. 2892, the restrictive housing ordinance passed in Farmers Branch, Texas).

¹⁵ See, e.g., Rachel G. Godsil, *Race Nuisance: The Politics of Law in the Jim Crow Era*, 105 MICH. L. REV. 505, 539 (2006) (describing different methods introduced by local officials to impose racial housing segregation); Reginald Leamon Robinson, *The Racial Limits of the Fair Housing Act: The Intersection of Dominant White Images, the Violence of Neighborhood Purity, and the Master Narrative of Black Inferiority*, 37 WM & MARY L. REV. 69, 87-97 (1995).

- ¹⁶ See Charles S. Magnum, Jr., *The Legal Status of the Negro* 140 (1940), available at [http://links.jstor.org/sici?sici=0002-7162\(194011\)212%3C269%3ATLSOTN%3E2.0.CO%3B2-K](http://links.jstor.org/sici?sici=0002-7162(194011)212%3C269%3ATLSOTN%3E2.0.CO%3B2-K) (last visited Oct. 7, 2007).
- ¹⁷ A. Leon Higginbotham, Jr. et al., *De Jure Housing Segregation in the United States and South Africa: The Difficult Pursuit of Racial Justice*, 1990 U. ILL. L. REV. 763, 854 (citing Brief for Defendant in Error at 7, 12, *Buchanan v. Warley*, 245 U.S. 60 (1917) (No. 33)).
- ¹⁸ This would not be the first time that facially neutral property laws have sought to and had the de facto effect of excluding residents of color. For example, although the Supreme Court has held that race-based zoning violates the Equal Protection Clause, non-exclusionary zoning restrictions, based on economic considerations of property devaluation, still create residential segregation. See generally, Yale Rabin, *Expulsive Zoning: The Inequitable Legacy of Euclid*, in ZONING AND THE AMERICAN DREAM 101 (Charles M. Haar & Jerold S. Kayden eds., 1989); Jania S. Nelson, *Residential Zoning Regulations and the Perpetuation of Apartheid*, 43 U.C.L.A. L. REV. 1689, 1695 (1996). These "neutral" zoning ordinances undeniably exclude poor minorities. Nelson. at 1704.
- ¹⁹ The term "expulsive zoning" was coined by Professor Yale Rabin in reference to the practice of superimposing incompatible zoning on communities of color in order to force residents of color out. See Rabin, *supra* note 18; Jon C. Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 MINN. L. REV. 739, 744 (1993) (using the term "expulsive" in reference to the ordinance at issue in *In re Lee Sing*, 43 F. 359 (N.D. Cal. 1890), which required all persons of Chinese descent to move out of a San Francisco neighborhood in 1890).
- ²⁰ For the purposes of this article, "de jure" and "de facto" discrimination take on definitions as they apply to how others perceive these discriminated groups - African Americans and Latinos. "De jure" discrimination is that which is "affected by overt, explicit, and systematic laws and regulations." "De facto" discrimination "results from actions that are covert and that are less or not formalized...." See Bitton, *supra* note 6.
- ²¹ See Carlton Waterhouse, *Avoiding Another Step in a Series of Unfortunate Legal Events: A Consideration of Black Life Under America Law From 1619 to 1972 and a Challenge to Prevailing Notions of Legally Based Reparations*, 26 B. C. THIRD WORLD L. J. 207 (2006).
- ²² *Id.*
- ²³ *Id.* Between 1890 and 1907, virtually all the southern and border states amended their constitutions to disenfranchise African Americans, or adopted poll taxes to achieve the same ends. See also Godsil, *supra* note 15, at 530. Local laws were also passed to segregate education, transportation, public accommodation, prisons, and even cemeteries. Waterhouse, *supra* note 21.
- ²⁴ See Dubin, *supra* note 19, at 744-45.
- ²⁵ Supplemental and Reply Brief for Defendant in Error on Rehearing at 142-254. *Buchanan v. Warley*, 245 U.S. 60 (1917) (quoting FRANK URIAH QUILLIN, THE COLOR LINE IN OHIO: A HISTORY OF RACE PREJUDICE IN A TYPICAL NORTHERN STATE 1-2 (Negro Universities Press 1969)).
- ²⁶ See A. BICKEL & B. SCHMIDT, THE JUDICIARY AND RESPONSIBLE GOVERNMENT, 1910-1921, 791 (Macmillan 1984); Godsil, *supra* note 15, at 539 (explaining that racial zoning ordinances were passed in Baltimore, Maryland; several Virginia cities; Winston-Salem and Greenville, North Carolina; Atlanta, Georgia; Louisville, Kentucky; St. Louis, Missouri; Oklahoma City, Oklahoma; and New Orleans, Louisiana).
- ²⁷ Godsil, *supra* note 15 (citing C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 100-01 (Oxford University Press 3d ed. 1974)).
- ²⁸ Godsil, *supra* note 15.
- ²⁹ Jeffrey S. Passel, Pew Hispanic Center, Background Briefing Prepared for Task Force on Immigration and America's Future, June 14, 2005, available at <http://pewhispanic.org/files/reports/46.pdf> (citing 2000 Current Population Survey, Census Bureau and the Bureau of Labor Statistics) (last visited Oct. 7, 2007).
- ³⁰ For a summary of immigration reform proposals in Congress over the last few years, see BILL ONG HING, DEPORTING OUR SOULS: VALUES, MORALITY, AND IMMIGRATION POLICY 17-38 (Cambridge University Press 2006).
- ³¹ See generally Border Protection, Antiterrorism, and Immigrations Control Act of 2005, H.R. 4437, 109th Cong. (2005).
- ³² See Oscar Avila & Antonio Olivo, *A Show of Strength; Thousands March to Loop for Immigrants' Rights/Workers, students unite in opposition to toughening of law*, Illinois Coalition for Immigrant and Refugee Rights, Mar. 11, 2006, available at <http://www.icirr.org/stories/march10tribune.htm> (last visited Oct. 7, 2007); Teresa Watanabe & Hector Becerra, *500,000 Pack Streets to Protest Immigration Bills*, Illinois Coalition for Immigrant and Refugee Rights, Mar. 26, 2006, available at <http://www.icirr.org/stories/lahalfmil.htm> (last visited Oct. 7, 2007).
- ³³ See Kevin R. Johnson & Bill Ong Hing, *The Immigrant Rights Marches of 2006 and the Prospects for a New Civil Rights Movement*, 42 HARV. C.R.-C.L. L. REV. 99, 102-05 (2007).
- ³⁴ See, e.g., Jeffrey Zahka, *Minutemen Project Rallies Against Illegal Immigration*, May 25, 2006, available at <http://www.worldpress.org/Americas/2362.cfm> (last visited Oct. 7, 2007).
- ³⁵ *Id.*
- ³⁶ See, e.g., Amy Argetsinger, *In Ariz., 'Minutemen' Start Border Patrols*, WASH. POST, April 5, 2005, available at <http://www.washingtonpost.com/wp-dyn/articles/A26339-2005Apr4.html> (last visited Oct. 7, 2007).
- ³⁷ See Comprehensive Immigration Reform Act of 2006, S.B. 2611, 109th Cong. (2006) available at <http://thomas.loc.gov/cgi-bin/query/D?c109:2:/temp/~c109Tsk6XQ::> (last visited Oct. 7, 2007); See also Johnson & Hing, *supra* note 33, at 104.
- ³⁸ See, e.g., Miriam Jordan, *Grassroots groups boost clout in immigration fight*, THE POST-GAZETTE, Sept. 28, 2006, available at <http://www.post-gazette.com/pg/06271/725845-84.stm> (last visited Oct. 7, 2007).
- ³⁹ Jerome R Corsi & Jim Gilchrist, "Reconquista - the plan of Mexicans to regain the American Southwest," available at <http://www.usbc.org/opinion/2006/summer/reconquista.htm> (last visited Oct. 7, 2007). Jim Gilchrist is the founder of the Minuteman movement. The sentiment of racial preservation and white dominance has also been touted in the anti-immigration discourse by racial hate groups, such as the Nazi National Socialist Movement. See Action 3 News, *Nazi Group To Protest Illegal Immigration In Omaha*, available at <http://www.action3news.com/Global/story.asp?S=6991064> (last visited Oct. 7, 2007).
- ⁴⁰ See, e.g., *Minutemen press immigration ordinance*, SPOKANE SPOKESMAN REV., Dec. 6, 2006, available at <http://www.spokesmanreview.com/local/story.asp?ID=163060> (last visited Oct. 7, 2007); *Escondido gives final approval to illegal immigrant rental ban*, NORTH COUNTY TIMES, Oct. 19, 2006, available at <http://www.immigrationwatchdog.com/?p=2024> (last visited Oct. 7, 2007); CNN Open House, *Right to Housing*, aired Nov. 18, 2006, transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/061118/oh.01.html> (last visited Oct. 7, 2007).
- ⁴¹ Cities that have passed restrictive housing ordinances to date are: Escondido, California; Cherokee County, Georgia; Topeka, Kansas; Valley Park, Missouri; Riverside, New Jersey; Inola, Oklahoma; Altoona, Gilberton, Mahanoy, Hazelton and Bridgepoint, Pennsylvania; Gaston, South Carolina; and Farmers Branch, Texas. See Latino Justice Project, Database of local anti-immigrant ordinances, available at <http://prldef.org/Civil/Latino%20Justice%20Campaign.htm> (last visited Oct. 7, 2007).
- ⁴² In the interest of space and efficiency, this article limits details provided on specific ordinances to Hazleton, Pennsylvania, Escondido, California, and Farmers Branch, Texas, which are generally representative of restrictive housing ordinances passed throughout the country.
- ⁴³ *Texas Town*, *supra* note 8.
- ⁴⁴ Hazleton, Pa., Ordinance No. 2006-18.
- ⁴⁵ *Id.*
- ⁴⁶ *Id.*
- ⁴⁷ Escondido, Cal., Ordinance No. 2006-36 R.
- ⁴⁸ *Id.*
- ⁴⁹ *Id.*
- ⁵⁰ Farmers Branch, Tex., Ordinance No. 2892; *Texas Town*, *supra* note 8.
- ⁵¹ Farmers Branch, Tex., Ordinance No. 2892.
- ⁵² *Id.*
- ⁵³ *Villas at Parkside Partner, et al. v. City of Farmers Branch*, 496 F.Supp.2d 757 (2007). To date, all of the legal attempts to enjoin restrictive housing ordinances in court have been successful. See *Lozano v. City of Hazleton*, 459 F.Supp.2d 332 (2006); *Garret v. City of Escondido*, 465 F.Supp.2d 1043 (2006); *Reynolds v. City of Valley Park*, No. 06-CC-3802, Div. No. 3 (County of St. Louis, Sept. 27, 2006). More recently, a federal judge ruled the Hazleton ordinance unconstitutional after a full hearing on the merits. See *Lozano v. City of Hazleton*, 496 F. Supp.2d 477 (2007).
- ⁵⁴ See Godsil, *supra* note 15, at 539 (citing Michael J. Klarman, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 81 (2004)).
- ⁵⁵ See Immigration Policy Center, The American Immigration Law Foundation, prepared by Jill Esbenshade, Ph.D., *Division and Dislocation: Regulating Immigration through Local Housing Ordinances*, Sept. 13, 2007, available at http://www.aifl.org/ipc/special_report/sr_sept07.shtml (last visited Oct. 7, 2007) [hereinafter Esbenshade].
- ⁵⁶ American Fact Finder, United States Census Bureau, available at <http://factfinder.census.gov> (search "Farmers Branch" and "Texas" under "Fast Access to Information") (last visited Oct. 7, 2007).

⁵⁷ American Fact Finder, United States Census Bureau, *available at* <http://factfinder.census.gov/> (search “Hazleton city” and “Pennsylvania” under “Fast Access to Information”) (last visited Oct. 7, 2007).

⁵⁸ American Fact Finder, United States Census Bureau, *available at* <http://factfinder.census.gov/> (search “Escondido city” and “California” under “Fast Access to Information”) (last visited Oct. 7, 2007). Ironically, in most localities where restrictive housing ordinances have passed, a significant amount of the increase in the Latino population appears to consist not of immigrants, but of native-born citizens moving from one part of the country to another, as well as children born to Latinos already living in the locale. *See* Esbenshade, *supra* note 55.

⁵⁹ *See* Dubin, *supra* note 19, at ll.

⁶⁰ *See, e.g.,* Higginbotham et al., *supra* note 17, at 854 (citing Brief for Defendant in Error at 7, 12, *Buchanan v. Warley*, 245 U.S. 60 (1917) (No. 33)); Godsfil, *supra* note 15, at 539.

⁶¹ *See* Hazleton, Pa., Ordinance No. 2006-18, preamble *Comprehensive Immigration Reform: Field Hearing in Philadelphia Before the United States Senate Judiciary Committee*, (testimony of Barletta).

⁶² Escondido, Cal., Ordinance No. 2006-38 Sec. 1 ¶ 3 (establishing Penalties for the Harboring of Illegal Aliens in the City of Escondido).

⁶³ City of Escondido, *supra* note 14.

⁶⁴ Farmers Branch, Tex., Ordinance No. 2892.

⁶⁵ *See* Farmers Branch, Tex., Ordinance No. 2892; Sandoval, *supra* note 2 (quoting a proponent of Prop. 2892, the restrictive housing ordinance passed in Farmers Branch, Texas).

⁶⁶ Farmers Branch, Tex., Ordinance No. 2892; Sandoval, *supra* note 2 (quoting a proponent of Prop. 2892, the restrictive housing ordinance passed in Farmers Branch, Texas).

⁶⁷ Ironically, the fact that Latinos have not suffered historic de jure discrimination has often been used as a reason for excluding them from antidiscrimination discourse. *See generally* Bitton, *supra* note 6, at 596. Mexican-Americans did not explicitly fall under any of America’s de jure discriminatory regulations during the Jim Crow era, despite the fact that Mexican-Americans were a substantial minority group at the time. However, although they almost did not suffer from prominent or legally visible de jure discrimination, Mexican-Americans did suffer from chronic abuse and segregation. This discrimination was quite similar in its outcome to that suffered by de jure discriminated against groups, except that the discrimination against Mexican-Americans did not primarily occur through the use of the formal legal system. To date, despite being the largest minority group in America, Mexican-Americans remain largely invisible in the antidiscrimination discourse.

See also Ariel Gross, “*The Caucasian Cloak: Mexican Americans and the Politics of Whiteness in the Twentieth-Century Southwest*,” 95 GEO. L.J. 337, 354-60 (2007) (describing discrimination endured by Mexican Americans under Jim Crow in Texas and throughout the Southeastern United States); Delbert Roman, *The Citizenship Dialectic*, 20 GEO. IMMIX. L. J. 557, 600-02 (2006) (describing various forms of de jure and de facto discrimination suffered by Mexican-American in the mid-twentieth century); *The Subcommittee on Constitutional Rights: United States Senate Judiciary Committee* (testimony of Leonel Castillo describing de jure and de facto instances of discrimination faces by Mexican Americans in Texas in the mid-twentieth century and in favor of the 1975 Extension of the Voting Rights Act).

⁶⁸ Sandoval, *supra* note 2.

⁶⁹ *See* Farmers Branch, Tex., Ordinance No. 2892, preamble at p. 2; Farmers Branch, Tex., Ordinance No. 2903, preamble.

⁷⁰ Texas Department of Public Safety, Crime Records Service State Record Reports, *available at* http://www.txdps.state.tx.us/administration/crime_records/pages/crimestatistics.htm#2001 (last visited Oct. 7, 2007). Immigration Policy Center, *The Myth of Immigrant Criminality and the Paradox of Assimilation: Incarceration Rates among Native and Foreign-Born Men*, *available at* <http://www.ilw.com/articles/2007/0725-rumbaut.pdf> (last visited Oct. 7, 2007) [hereinafter Rumbaut & Ewing].

⁷¹ *See* Texas Educational Agency, Academic Excellence Indicator System (AEIS) for Carrollton-Farmers Branch Independent School District, *available at* <http://www.tea.state.tx.us/cgi/sas/broker>. This is consistent with a nationwide trend – as the undocumented population has doubled since 1994, the violent crime rate in the United States has decreased 34.2 percent, and the property crime rate has fallen 26.4 percent. In fact, among men ages 18 – 39, the incarceration rate for the native born in 2000 was five times higher than the incarceration of the foreign born. *See* Rumbaut & Ewing, *supra* note 70. The Farmers Branch superintendent Annette Griffen also denies O’Hare’s assertions. *See* Katherine Leal Munmuth, *FB Schools Have Different View Of Immigrants*, DALLAS MORNING NEWS, Jan. 21, 2007, *available at* <http://www.dallasnews.com/sharedcontent/dws/dn/latestnews/stories/012107dnmetfbisd.15a36fb.html> (last visited Oct. 7, 2007).

⁷² Sandoval, *supra* note 2.

⁷³ *Id.*

⁷⁴ O’Hare’s accusations about the negative externalities of a strong immigration population on the local economy also contradict recent findings by the State of Texas. *See* Darryl Fears, *Texas Official’s Report Ignites a New Border Conflict*, Washington Post, Dec. 15, 2006, *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2006/12/14/AR2006121401552.html> (discussing a report by Texas State Comptroller Carol Keeton Strayhorn which found that undocumented immigrants “put about \$420 million more into state coffers than they take out”) (last visited Oct. 7, 2007).

⁷⁵ Escondido, Cal., Ordinance No. 2006-38 (establishing Penalties for the Harboring of Illegal Aliens in the City of Escondido).

⁷⁶ *See generally* Mission Park Community Survey, National Latino Research Center at California State University San Marcos (June 2006), *available at* http://www.csusm.edu/nlrc/publications/Reports/MissionPark_Community_Survey_2006.pdf (last visited Oct. 7, 2007).

⁷⁷ *Id.*

⁷⁸ Dan Geringer, PHILADELPHIA DAILY NEWS, *Bloomberg: U.S. Can’t Stem Immigration Tide: NYC, Hazleton Mayors Disagree At Hearing Here*, July 6, 2006, *available at* <http://hecubus.wordpress.com/2006/07/07/illegal-immigration-hearings-hurt-my-ears/> (last visited Oct. 7, 2007)[hereinafter Geringer].

⁷⁹ *Id.*

⁸⁰ *See* Pennsylvania State Police Uniform Crime Reporting System, *available at* <http://ucr.psp.state.pa.us/UCR/Reporting/Annual/AnnualSumArrestUI.asp> (last visited Oct. 7, 2007).

⁸¹ *Id.*; *see also* Rubén G. Rumbaut, Ph.D., *Fed.R.Civ.P. 26(a)(2) Report on the City of Hazleton’s Premise, in the Illegal Immigration Relief Act Ordinance, that Illegal Immigrants Contribute to Higher Crime Rates*, *available at* <http://www.aclupa.org/downloads/Rumbautreportonordinance.pdf> (last visited Oct. 7, 2007). Mayor Barletta’s accusations are also contradicted by recent studies showing that immigrants do not raise the crime rate in the United States. *See, e.g.,* Eunice Moscog, *Study: Immigrants don’t raise U.S. crime rate*, ARIZONA DAILY STAR, Feb. 27, 2007, *available at* <http://www.azstarnet.com/news/171109> (last visited Oct. 7, 2007); Rumbaut & Ewing, *supra* note 70; Richard D. Alba, et al, *Open Letter on Immigration and Crime*, The American Immigration Law Foundation, July 2, 2007, *available at* http://www.aifl.org/ipc/ipc_openletter0507.shtml (last visited Oct. 7, 2007).

⁸² Geringer, *supra* note 78.

⁸³ Sara M. Philly, “*It’s not easy Fighting City Hall*”, American Civil Liberties Union of Pennsylvania, ACLU Blog: Speaking Freely, March 23, 2007, *available at* <http://aclupa.blogspot.com/2007/03/its-not-easy-fighting-city-hall.html> (last visited Oct. 7, 2007).

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *See* Ken Belson & Jill P. Caruzzo, *Towns Rethink Laws Against Illegal Immigrants*, N.Y. TIMES, Sept. 26, 2007.

⁸⁷ *Id.*

⁸⁸ Approximately 30% of the households targeted by restrictive housing ordinances include U.S. citizen children. Roughly 3.1 million U.S.-born citizen children in the United States live in households headed by undocumented immigrants. *See* Esbenshade, *supra* note 55.

⁸⁹ Farmers Branch, Tex., Ordinance No. 2892.

⁹⁰ Farmers Branch, Tex., Ordinance No. 2903; *Villas*, 496 F.Supp.757.

Ordinance 2903 defined “eligible immigrants” as those defined by 24 C.F.R. § 5.504, a federal housing regulation concerning eligibility for federal housing assistance. But 24 C.F.R. § 5.504 merely identifies which classes of immigrants are eligible for public housing programs. It does not identify which classes of immigrants are lawfully present in the country. The regulation also excludes certain classes of immigrants with legal status.

⁹¹ Hazleton, Pa., Ordinance No. 2006-18, Sec. 4.B.2 and Sec. 5.B.2.

⁹² *Villas*, 497 F.Supp.2d 757.

⁹³ *See* Herbert Hovenkamp, *Social Science and Segregation before Brown*, 1985 DUKE L.J. 624, 624-25.

⁹⁴ *Id.*

⁹⁵ “The city’s immigration debate has pitted ‘neighbor against neighbor.’” *See* Munmuth, *supra* note 71.

⁹⁶ *See* Section I, *supra*.

⁹⁷ *See* Munmuth, *supra* note 71.

⁹⁸ *See* Munmuth, *supra* note 71.

⁹⁹ Annabelle Garay, *Protesters take on immigrant proposal: Farmers Branch: Over 300 denounce plan as racist and anti-Hispanic*, DALLAS MORNING NEWS,

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Aug. 26, 2006, available at <http://www.dallasnews.com/sharedcontent/dws/dn/latestnews/stories/082706dnmetbranch.1b79f1e.html> (last visited Oct. 7, 2007) [hereinafter *Protesters*]; see also *Judge blocks Pennsylvania rental law from taking effect*, NORTH COUNTY TIMES, Oct. 31, 2006, available at http://www.nctimes.com/articles/2006/11/01/news/top_stories/0_03_0010_31_06.txt (“‘Before, it was a nice place,’ said Elvis Soto, 27, a variety store owner who came to the United States from the Dominican Republic a decade ago. ‘Now, we have a war against us. I am legal, but I feel the pressure also.’”) (last visited Oct. 7, 2007) [hereinafter *Judge*].

¹⁰⁰ *Protesters*, *supra* note 99. It is interesting to note that restrictive housing ordinances are actually not correlated with high local unemployment rates. Around two-thirds of ordinance locales had unemployment rates at or below the national average in 2000, as did 64 percent of the 25 largest localities in 2005. See Esbenshade, *supra* note 55; see also Tyche Hendricks, *Study Says Immigrants Vie With Earlier Arrivals, Newcomers Not Taking Jobs From U.S.-Born Workers*, S.F. CHRON., Feb. 28, 2007, available at [http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/02/28/BAGJ9O-](http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/02/28/BAGJ9O-C10F1.DTL&hw=study+says+immigrants+vie+with+earlier+arrivals&sn=001&sc=1000)

[C10F1.DTL&hw=study+says+immigrants+vie+with+earlier+arrivals&sn=001&sc=1000](http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/02/28/BAGJ9O-C10F1.DTL&hw=study+says+immigrants+vie+with+earlier+arrivals&sn=001&sc=1000) (last visited Oct. 7, 2007).

¹⁰¹ Annabelle Garay, *O'Hare Stirs Up Texas Immigrant Debate*, DENVER POST, July 22, 2007, available at http://www.denverpost.com/nationworld/ci_6438454 (last visited Oct. 7, 2007). The effect of local ordinances on the Latino psyche is also evident – according to a recent study by the Pew Hispanic Center, over half of Latinos believe that discrimination against them has increased since Congress began debating immigration reform. See Darryll Fears, *Hispanics Cite Rise In Discrimination: Immigration Debate Is Called a Factor*, WASH. POST, July 14, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/07/13/AR2006071301552.html> (last visited Oct. 7, 2007). Still others believe that restrictive housing ordinances are racist. See PRLDEF: Press, Julie Bykowitz, *Hazleton, Pa., All-American Town Considers Strict Rules Against Illegal Immigrants*, BALTIMORE SUN, July 9, 2006, available at <http://www.prldef.org/Press/News%20Stories/Hazleton%20-%20Hazleton,%20Pa.,%20all-American%20town%20considers%20strict%20rules%20against%20illegal%20immigrants.htm> (last visited Oct. 7, 2007).

¹⁰² For a history chronicling these practices, see JAMES W. LOEWE, *SUNDOWN TOWNS: A HIDDEN DIMENSION OF AMERICAN RACISM* (W. W. Norton 2005).

¹⁰³ *Id.*

¹⁰⁴ Indeed, this effect is already being observed in some communities. See, e.g., CBS 11-News, *Top Stories*, Dec. 28, 2006, *Farmers Branch Tenants Leaving Their Apartments* (on file with the author) (Farmers Branch); Bykowitz, *supra* note 101; See also *Judge*, *supra* note 99 (“‘Everyone was running scared and left town,’ said Lopez, 39. ‘We had customers who came in who were legal citizens and they didn’t want the harassment and hassle and told us they were leaving.’”); Press Archives – Riverside, Geoff Mulvihill, *Since strict immigration law was passed, this town has been quiet*, BURLINGTON COUNTY TIMES, Sept. 27, 2006, available at <http://njmda.org/press-archive/sincestrict.php> (Valley Park, New Jersey) (last visited Oct. 7, 2007).

¹⁰⁵ Farmers Branch is not a city, but rather a suburban municipality of north Dallas. City of Farmers Branch Annual Report, available at <http://www.ci.farmers-branch.tx.us/>.

¹⁰⁶ See, e.g., Hovenkamp, *supra* note 93, at 657; Dubin, *supra* 19, at 749. While this article proposes alternative motives for support of restrictive housing ordinances besides racial hate, it does not mean to exclude this motive altogether. In fact, some studies have documented the increase in hate groups and correlate this rise to some degree with the anti-immigrant movement. See, e.g., Brad Knickerbocker, *Anti-Immigrant Sentiments Fuel Ku Klux Klan Resurgence*, Christian Science Monitor, Feb. 9, 2007, available at <http://www.csmonitor.com/2007/0209/p02s02-ussc.html> (last visited Oct. 7, 2007); Southern Poverty Law Center Intelligence Report, *The Year In Hate: Race-based nationalism, black as well as white, is on the rise as the number of American hate groups swells*, Spring 2001, available at <http://www.splcenter.org/intel/intelreport/article.jsp?aid=233> (last visited Oct. 7, 2007).

¹⁰⁷ See Godsil, *supra* note 15, at 515.

¹⁰⁸ See, e.g., *Giles v. Rawlings*, 97 S.E. 521 (Ga. 1918); *Green v. State ex rel. Chatham*, 56 So. 2d 12 (Miss. 1952); *Thoenbe v. Mosby*, 101 A. 98 (Pa. 1917);

Morrison v. Rawlinson, 7 S.E.2d 635 (S.C. 1940); *Fox v. Corbit*, 194 S.W. 88 (Tenn. 1917).

¹⁰⁹ *Worm v. Wood*, 223 S.W. 1016 (Tex. Civ. App. 1920).

¹¹⁰ *Lancaster v. Harwood*, 245 S.W. 755 (Tex. Civ. App. 1922).

¹¹¹ *Worm* 223 S.W. at 1018; see also *Harty v. Guerra*, 269 S.W. 1064 (Tex. Civ. App. 1925).

¹¹² *Worm*, 223 S.W. at 1018 (quoting Petition for Writ of Injunction, *Worm*)

¹¹³ *Sandoval*, *supra* note 2.

¹¹⁴ See Godsil, *supra* note 15, at 519.

¹¹⁵ See *Rogers Mayor Wants To Classify Illegal Immigrants As Nuisances*, Dec. 15, 2006, available at <http://www.4029tv.com/news/10177338/detail.html> (last visited Oct. 7, 2007).

¹¹⁶ This pattern of attempted preservationism in the face of large waves of immigration is hardly novel. For analyses of similar movements, see, e.g., JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860-1925* (Rutgers University Press Atheneum ed.; 2002); DONALD L. KINZER, *AN EPISODE IN ANTI-CATHOLOICISM: THE AMERICAN PROTECTIVE ASSOCIATION* (Seattle, University of Washington Press 1964).

¹¹⁷ Numbering approximately 40 million, Latinos make up close to 15% of the nation’s demographic total and have already overtaken African Americans as the largest minority in the United States. See A.R. Williams, *Latinos Rise Nationwide: America’s New Majority Minority*, NATIONAL GEOGRAPHIC (March 23, 2003) available at http://magma.nationalgeographic.com/ngm/0311/resources_geo.html (last visited Oct. 7, 2007).

¹¹⁸ See Ian F. Haney Lopez, *Protest, Repression, and Race: Legal Violence and the Chicano Movement*, 150 U. PA. L. REV. 205 (2001).

¹¹⁹ See Toni Robinson & Greg Robinson, *Mendez v. Westminster: Asian-Latino Coalition Triumphant?*, 10 ASIAN L.J. 161, 173 (2003).

¹²⁰ *Id.*

¹²¹ See generally, Lopez, *supra* note 118.

¹²² See, Section I, *supra*.

¹²³ Brad Edmondson, *The Minority Majority In 2001 - Census Bureau Figures On Percent Of Population Composed Of Non-Hispanic Whites*, American Demographics (Oct. 1996), available at http://findarticles.com/p/articles/mi_m4021/is_n10_v18/ai_18722955 (last visited Oct. 7, 2007).

¹²⁴ See, e.g., *Blacks, Latinos and the Immigration Debate*, March 31, 2006, available at <http://www.npr.org/templates/story/story.php?storyId=5314594> (last visited Oct. 7, 2007).

¹²⁵ *Buchanan v. Warley*, 245 U.S. 60 (1917).

¹²⁶ *Id.* at 81-82. In *Buchanan*, a white seller entered into a contract to sell his home in a racially zoned district to Warley, a black buyer. *Id.* at 69-70. The contract stated that unless Warley had the right, under law, to occupy the residence, he would not have to purchase the property. *Id.* When Buchanan sued Warley for specific performance, Warley raised the Louisville racial zoning ordinance as a defense. *Id.* Buchanan countered by asserting that the ordinance violated the Fourteenth Amendment of the United States Constitution. *Id.* The Supreme Court specifically declined to invalidate racial zoning on equal protection grounds. *Id.* at 81. Rather, “the right which the ordinance annulled was the civil right of a white man to dispose of his property... to a person of color and of a colored person to make such disposition to a white person.” *Id.*

¹²⁷ See *Lozano*, 496 F. Supp. 2d 477; *Garret*, 465 F. Supp. 2d 1043; *Reynolds v. City of Valley Park*, No. 06-CC-3802, Div. No. 3 (County of St. Louis, Sept. 27, 2006); *Villas*, 496 F. Supp. 2d 757.

¹²⁸ See *Lozano*, 496 F. Supp. 2d 477.

¹²⁹ In addition to local municipalities, 41 state legislatures have passed 170 housing and other laws targeting illegal immigrants. Deborah Barfield Barry, *Civil Rights Groups: Housing Ordinances Targeting Hispanics*, DAILY RECORD, Sept. 28, 2007, available at <http://dailyrecord.com/apps/pbcs.dll/article?AID=/20070928/COMMUNITIES/709280369/1203/NEWS01> (last visited Oct. 7, 2007).

¹³⁰ See Dubin, *supra* note 15, at 758.

¹³¹ *Id.*

REFLECTIONS OF A COMMUNITY LAWYER

By Luz E. Herrera*

In May 2002, I opened a law office in one of the most underserved communities in Los Angeles County. Many questioned the sanity of such a career path when evaluating my financial stability and the personal toll that such a career path can exact. Given that I graduated from some of the best universities in the country, my friends, family, and strangers were even more perplexed at my choice. I cannot say that my decision to build a law practice in Compton, California, has been easy. However, time and time again, I found myself rejecting more secure and prestigious job offers and continued in what some of my law school friends call “the more difficult route.”

This article recounts my brief, unrefined, and continuing journey as a novice attorney. My story is not unique or new; however, the triumphs, challenges and defeats of community-based private practitioners serving individuals’ everyday legal needs are largely undocumented. By providing a personal account of my experiences as a solo practitioner, I hope to encourage others working with low-income and modest-means clients to share their experiences and demand more support from our law schools, our bar associations, and legal aid organizations to allow us to better serve our clients and sustain ourselves in the profession.

MY PERCEPTION OF LAW AND LEGAL INSTITUTIONS

Growing up in the eastside communities of Los Angeles, I remember seeing signs for lawyers and bail bondsmen in my neighborhood. My only connection to these services was overhearing conversations between my parents. Once, I heard them lamenting that their small savings would again be depleted in order to post a bond for a family member who struggled with a drug and alcohol addiction. Another time, I heard my mother warning my father to not get involved and reminding him that testifying on behalf of one of his co-workers in an employment discrimination lawsuit could cause him to lose his own job. From the tone of these conversations, even as a child, I understood the seriousness of these matters. As immigrants, my parents attempted to distance themselves from any legal problems. They would rather turn the other way or put up with mistreatment than to get involved in a legal dispute.

Until my senior year in high school, my knowledge of attorneys, judges or courtrooms was limited to television depictions and classroom role-play simulations. Those educational experiences, and my ability to function in United States’ society with greater ease than my immigrant parents, predisposed me to be less weary than they were about the legal system. During my senior year in high school, at the Chicano/Latino Youth Leadership Conference in Sacramento, I encountered an attorney for the first time. Attorneys from the Mexican American Legal Defense and Educational Fund

(MALDEF) organized a voting rights and redistricting exercise for the conference. They explained political representation, leadership, education, distribution of resources and the ability to vote. They described a legal system that created equal access to opportunity - a message that inspired me.

In college my interest was further piqued when I learned how lawyers used litigation strategies to cement civil rights victories in the 1960s and 1970s. Learning about this history helped me envision a role for myself in the legal profession. I wanted to be a lawyer who used her legal training to open doors for others. I believed that going to law school would prepare me to be an advocate for people who, like my family, my neighbors, and my friends, did not understand how to navigate government institutions. At the time I applied for law school, the only lawyer I knew well was in his first year of practice. He worked as a Los Angeles County district attorney, and he invited me to observe him in court. As he gave me a tour of the courthouse, he talked about his job with great enthusiasm. I remember walking into a holding cell adjacent to the courtroom where two working-class Latino immigrant men were on their knees praying for a merciful decision before being escorted to the courtroom. The fear and apprehension I saw in their eyes was similar to what I sensed as a child listening to the adult conversations about lawyers and courts. My friend explained that these men had been arrested for selling food without the proper permits and licenses. His job was to prosecute those who broke the law.

Because I thought I knew this district attorney’s politics, I was puzzled at why he enjoyed a job where it was his responsibility to prosecute men who I believed were honorable and hard-working. He explained that his job was to uphold the law even if its application did not always seem fair. As a district attorney, he had the power to make things very difficult for these men or give them an opportunity to rectify their mistake by paying a fine and educate them about their responsibilities when selling food to the public. I understood his explanation, but I did not understand why these men were placed in a holding cell and treated like dangerous criminals. I left the courthouse that day very disillusioned. It was my first introduction to justice in a courtroom and the first time that I questioned whether I could be an attorney.

MY LAW SCHOOL EXPERIENCE

First-year law school courses are supposed to teach students to think like lawyers. However, I often felt disengaged from the theoretical discussions of rules that seemed to take me away from the context of my experiences, my world, my self and into a world of rational behaviors presented as apolitical, asexual and void of identity. The first-year courses were teaching me to think like a lawyer, and while I acknowledged that I was

changing, I was not all that pleased by what I was becoming. My discomfort in the law school classroom was due to my identity as a first-generation, working-class Chicana. The idea that laws were neutral and that their application was fair did not ring true in my world of working-class individuals. Despite being a student leader in college, I found myself staying silent in much the same way my parents had when they were forced to deal with legal matters. When I was forced to speak in class, I spoke with a fear similar to what I saw in those street vendors' eyes - engaging in an unfamiliar process in a foreign system.

During law school, I sought training that would help me to be a voting rights expert just like those first attorneys who motivated me. Unfortunately, the only voting rights classes available were not in the university's law school, but in the school of government.¹ Very few of the discussions in my civil rights classes touched upon groups other than African Americans. It seemed every professor and career counselor I talked with about my interest in working on behalf of the Latino community was supportive, but did not know how to direct me to resources that would help me develop my career path. Some directed me to jobs at legal aid organizations or suggested I apply for government jobs - neither matched my ideas of community building. While their intentions were good, I never felt fully understood or heard by my advisors. It seemed that the only work that was valued as public interest was the work done by established non-profit organizations or government bodies. I knew that impact litigation work that organizations like MALDEF engaged in was the type of work acknowledged as "public interest." So, I secured funding from a private donor that allowed me to work for a summer in MALDEF's San Francisco office.

MY INTRODUCTION TO LAW PRACTICE

Working at MALDEF, I found some wonderful attorney-mentors who understood and supported my passion for community. While I enjoyed working on cases involving issues of voting rights, education, and immigration law, I realized that this type of work was not for me. As an intern, I spent most of my time doing legal research, and I did not have opportunities to meet clients. By the end of my internship, it was evident that impact litigation was not my calling. I wanted more client interaction. I also questioned whether the current impact litigation strategies were the best route to community empowerment with courts becoming increasingly conservative and restrictions on attorney fees provisions making it more and more difficult to finance the litigation. While I continued to respect and support the work of organizations like MALDEF, I did not see a role for myself at such institutions.

Because I ruled out impact litigation following that summer internship, I decided to interview for jobs with big law firms where I believed I would be trained while making a salary that exceeded my expectations. At the same time that I interviewed for law firm jobs, I participated in the clinical program at the Legal Services Center of Harvard Law School.² There, I had the

opportunity to engage in direct client service with low — and moderate — income individuals who were forming businesses, organizing nonprofit organizations, and negotiating real estate transactions. Most of the clients I worked with attempted to use the legal system to forge their dreams of stability and self-employment. Working with these clients reaffirmed in me the importance of developing a sound economic strategy and a political agenda for underserved or underrepresented communities. This clinical work in community economic development and its accompanying coursework helped me understand that I wanted to facilitate community building. Unfortunately, employment opportunities in community development for graduating law students were few and far between. In addition, large student loan payments and my father's recent lay-off provided more justification for accepting employment at a corporate law firm. I convinced myself that I could contribute financially to support the causes I believed in, hoping that making financial contributions and taking on pro bono matters would be enough to satisfy my desire to make a difference. I accepted a job offer in the real estate department of a corporate law firm that promised to teach me skills that I could later translate to community economic development work.

ENTERING AND EXITING CORPORATE AMERICA

At least 90% of my classmates went to work at large firms upon graduating law school or directly out of post-graduate judicial clerkships. At Harvard Law School, law firms courted us with expensive dinners, hospitality suites, activity-filled summer internships, promises of training and, of course, big salaries. Even though I did not go to law school to get a job at a large law firm, I was convinced that it would be foolish to decline a large law firm's offer when I did not see a clear path for my passions. I chose to work with a firm that took pride in their commitment to diversity and pro bono work. I believed that I had a better chance of succeeding in corporate America if I worked at an institution that shared some of my values. While I found the work interesting, I did not receive great training nor did I find mentors there. The intellectual stimulation of the work was not enough to outweigh the absence of collegiality and personally fulfilling work. The feeling that I did not belong with this firm was mutual, and I was encouraged to look for employment elsewhere. Within two years of graduating law school I found myself without a job.

FINDING MENTORS

Instead of looking for a new job, I set out to look for a mentor. I interviewed for a few small law firms, a couple of public sector jobs, and an in-house position. None of these employment opportunities felt right for me. While I struggled to carve a career path that fit my values, I began to do some contract work for friends and non-profit organizations. It was on one of my contract assignments that I unexpectedly found the mentor I sought. Salvador Alva was part of a delegation that I

helped administer on a trip to Cuba. When he learned that I was an attorney he offered me a job in his law office. He had been in solo practice for over twenty years and had started his career as an attorney for California Rural Legal Assistance. He handled mainly criminal, family, and personal injury cases, but at the time I met him his primary client was a neighboring municipality. About five weeks after our initial meeting, I began working with him on a range of legal matters. Before I knew it, I was interviewing clients, attending depositions, writing legal memoranda, and drafting city ordinances. He invited questions and, whenever possible, he took time to have lunch with me to address my concerns or confusion. Salvador interacted with his clients respectfully and professionally, expressing genuine concern for their problems.

Approximately two months after I began working with my mentor, I came upon a letter from John Ortega, an attorney in the city of Compton who was retiring and looking for someone to lease his small office space. The letter expressed a concern that there were no Spanish-speaking attorneys in an area that greatly needed bilingual services. At that time the only thing that I knew about Compton was that it had been devastated by years of drug dealing and gang warfare in the 1980s and 1990s. I did not know that more than half of its population was Latino. When I brought the letter to Salvador's attention, he explained that he had worked for this attorney in Compton at the start of his career and asked me to set up a time for us to visit.

Driving to Compton with Salvador to meet Mr. Ortega rattled my sensitivities. We passed a couple of communities before reaching Compton Boulevard, but none of them came close to being as underdeveloped and economically depressed as Compton seemed. Deteriorated, boarded-up properties on the main boulevard and in residential areas were commonplace. Most of the occupied properties had metal bars on the windows and doors. I was in disbelief that such a community existed in Los Angeles County. We had a difficult time finding Mr. Ortega's law office because it did not have signage. We finally arrived at a storefront, situated across the street from a drycleaner and adjacent to one of many dollar discount stores in the city. With the exception of a few fast food restaurants, some small family-owned business and a couple of donut shops, there was little indication that this was a city where an attorney could make a living.

The 400-square-foot wood-paneled office was crammed with outdated law books; the windows and door had bars for additional security. Mr. Ortega, a general practitioner who took just about every type of case, welcomed us and began to talk about Compton's need for a Spanish-speaking attorney. Mr.

Ortega was unaware that we were just visiting to say hello. He explained, "[s]ometimes, these people, all they need is a phone call. When you make it for them, they are very appreciative. You can make a living here." He was asking for rental payments of \$400 per month. As Mr. Ortega spoke, a woman he

introduced as Maria came to the door and asked whether we wanted to buy homemade tamales that day. For each of us - three generations of Latino attorneys - the decision to buy food from a street vendor was quite simple. We did not wonder whether our health would be adversely affected by eating them or whether Maria was violating a local ordinance by going door-to-door to sell home-prepared food in order to make a living.

We simply bought them even if we were not hungry. We did not discuss Maria or the purchase of the tamales, but I left knowing that Mr. Ortega and Salvador understood entrepreneurship and community needs the same way that I did.

Subsequently, I had several conversations with Salvador about Ortega's office space. He explained that there was a great need for service in this area but to make a living there would require a lot of hard work and time that he did not have. After giving it some thought, I asked if he would be offended if I tried to do it on my own. He responded with a surprised smile and said, "Luz, if that is what you want to do, you have my support. I know you can do it." My gut told me he was right.

TAKING MATTERS INTO MY OWN HANDS

Soon after our initial visit, I returned to Compton to explore the possibility of taking over John Ortega's office space. Ortega was stunned when I told him, "If you rent me the space for \$350 a month, I will set up my law office in Compton." He was excited that a Harvard-trained attorney would agree to practice law there and even more impressed that a female would be willing to take on such a project, given the city's reputation. He immediately agreed to lower rent and said I could keep his old books, some of his office supplies and I could even borrow his desk until I bought my own. Most importantly, he allowed me to keep the same phone number that had been associated with his law office for about 30 years. In anticipation of opening my office, I continued to work with Salvador Alva and used my earnings to buy some office equipment.

Many people have asked why I turned down more lucrative or traditional job offers to set up a solo law practice in Compton. For me it is simple. I went to law school because I wanted to represent individuals like Maria and the street vendors that district attorneys prosecute. They are the working poor. They are entrepreneurial immigrants. They are those individuals who

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struggle to make full rental and mortgage payments on time. Establishing my own practice allowed me the opportunity to fuel the fire that burned in my belly. I followed my instincts and went forward with what felt right. When I decided to venture out on my own, I did not have a business plan. I had never litigated in a courtroom. However, I knew how to read, write and advocate in ways that my neighbors, my friends, and my relatives did not. I wanted to use my education to directly contribute to the community that applauded each of my educational accomplishments as if they had been their own.

My decision to open an office in Compton was absolutely selfish in that it provided a vehicle for my idealism. I also saw this risk as an investment in myself. I recaptured the courage I had once traded for diplomas from elite institutions and rejected the notion that only the financially privileged can work on behalf of the poor. The fact that I was only three years out of law school and did not have much experience concerned me, but it did not paralyze me. When I considered that I learned much more in the six months I worked with Salvador Alva than I had after almost two years at a corporate law firm, my insecurities diminished. I learned that we become good at doing what we do through practice, study and reflection. I did not know how it was all going to work, but I knew that there were thousands of individuals in my immediate surroundings who did not possess the privilege of a law degree and bar admission. I knew that given the needs of Compton and the larger community, I would not starve. My potential clients inspired me to take a chance on myself.

John Ortega sent letters to a number of people announcing his retirement and my arrival to Compton. He organized a retirement picnic with former clients, his family and friends where he introduced me to the community. With the exception of one or two colleagues, the invitees were working-class men and women from Compton and the surrounding communities who attended to show their appreciation for Mr. Ortega's many years of service to the community.

PRACTICING LAW IN COMPTON

Media images usually depict only part of a community's reality; such is the case with Compton, California. Rap culture, the news media and a tumultuous history with drugs and violence continue to plague this particular city in Los Angeles County. The 2000 Census offers this reality of Compton: 56.8% of its population was Hispanic/Latino and 40.3% was Black/African American. The same census revealed that 31.4% of Compton's residents were foreign-born, 55.2% spoke a language other than English in their homes and 38.5% were under the age of 18. Less than six percent of Compton's population had a bachelor's degree or higher, and 28% lived below the federal poverty line. The reality for me as one of the few professionals in the city, and as the only Spanish speaking attorney in private

practice, is that I feel pulled in many directions because my advocacy skills, my contacts and my legal training are needed there. My role has positioned me to serve as a resource for local businesses, nonprofit organizations, churches, and residents.

As an attorney in solo practice my work is defined by my clients' legal needs; it varies from securing their parental rights, protecting their economic rights and helping them understand their responsibilities. At other times my role involves community legal education, strategic planning or participating in discussions with community members to develop a collective vision for the neighborhood where we live and work. I advocate for the rights of individuals, small businesses, and non-profits in Compton and in other communities of Los Angeles County, as well. I do not classify my practice or my work as "cause lawyering" or under any of the classifications created by academics. For me, and other attorneys working in underserved communities, our roles are so fluid and our clients' needs are so diverse that we practice in different ways depending on the client, the community and the problem. Our work and our clients' lives are complex and messy. Effective community-

I wanted to use my education to directly contribute to the community that applauded each of my educational accomplishments as if they had been their own.

based lawyers and advocates understand that legal problems are multi-faceted and often require interventions from the larger community, non-legal institutions, and non-lawyers. Most of my clients' legal needs are rooted in more systemic problems. However, when a client is about to lose their home or their parental rights, the long-term designs of a social

movement seem irrelevant.

MY CLIENTS

While some of my clients are poor and working-class retail clerks, waitresses, and janitors, some of them are also college graduates, homeowners, and teachers whose legal problems cannot be addressed by self-help remedies or legal hotlines. My clients are generally not destitute, but they live paycheck-to-paycheck. They represent the working poor and the middle class. An illness or loss of employment for a few months would cause financial havoc to most of my clients.³ The majority of them reside in the southeastern communities of Los Angeles County, but I have a handful of clients who live in neighboring counties and a couple who live several hundred miles away. The fact that someone 400 miles away would hire me is a reflection of the lack of affordable legal services that exists throughout the state of California.⁴

My first two clients were prime examples of individuals who do not have the means or connections to obtain subsidized or market-rate legal services and could not navigate the legal system without the assistance of an attorney. The first client was living in her mother's house and was mildly developmentally challenged. While her mother was in hospice care, she faced eviction by her brother. My client had only a part-time job and no other family members to provide housing. The second client

was an immigrant and father of five who lived in a two-bedroom apartment with his children, his wife, and his brother-in-law. He was the victim of a fraudulent real estate transaction that left him with the responsibility of a mortgage but without the benefit of occupancy in the home. He had limited English competency and was not knowledgeable about the legal process in the United States. Both of these cases required that I appear before several courts and learn several substantive areas of law. These cases required me to go to probate court, a family law court, bankruptcy court and to engage in general civil litigation. The complexity of these first two cases was an indication of the difficulty and complexity of problems that awaited me. Many of the clients that came to my door were clients whom others had turned away because they did not qualify for publicly funded services, because they lacked the funds or because the language barriers were too difficult to overcome.

CHALLENGES OF SOLO PRACTICE

Although there is information available on the challenges faced by solo practitioners,⁵ I was not prepared for the journey that I embarked on, as I had relatively little experience and no business plan. My decision to open my law office was not motivated by financial considerations, but by a personal thirst to create a practice that fit my belief system. Based on my clinical work in law school and my prior work experience, I knew enough to set up a client trust account and draft a basic retainer agreement. I also was prudent enough to search for affordable legal malpractice insurance. I read publications published by the American Bar Association and the California State Bar for individuals starting law firms.⁶ The advice contained in those books was relevant and helpful, but the sources were also not written with my clients' needs in mind and tended to assume that attorneys who start their practice have more financial resources and experience than I had. I was plunging into a world of unknowns; it was daunting. Shortly, financial concerns became paramount. I needed to buy books and enroll in continuing legal education courses to prepare myself. These needs along with the technology necessary to run a law office brought start-up costs and anxiety to levels I had not expected.

In the first two years on my own, I invested my profits in training myself and getting involved with several organizations to market my services. Most of my clients were referrals from other attorneys, community leaders, school friends, and former clients. Getting clients through the door did not prove too difficult for me. In the geographic areas where I practice, the number of clients with legal problems is larger than the attorneys who can address them. My language skills and flexible payment plans filled a need in the community. I adopted practices utilized by corporate law firms and honed my organizational abilities to develop systems that allowed me to manage my clients. Developing intake questionnaires and retainer agreements took much work, even though there were samples available through

bar associations, my malpractice insurance carrier and my mentor. But learning how to charge clients and developing a billing system proved most challenging.

Like other community lawyers, I continued to represent clients who I knew could not afford to pay me. Without a business plan, sufficient support staff or a mastery of the business side of law, I embarked on my own pro bono work - mostly work for which I never billed or was never paid for. The problems with billing plagued the viability of my practice for some time. While I found attorneys able to offer advice about marketing, client management, and their expertise on substantive and procedural law, it was much more difficult to get advice on the viability of a practice. It was also difficult to find bookkeepers trained to manage billing for small law practices. It took a couple of years to develop a system for billing and find individuals I could employ to meet my business needs. With a billing system in place, I found that most clients, particularly the ones with the most modest means, pay when billed.

Over four years, operating a law practice in an underserved community has had many financial and emotional drawbacks. To make ends meet, I lived with my parents, limited my social engagements, and forwent luxuries. In the first two years whatever money I earned went back into my business or my frugal living expenses. It became difficult to keep up with my friends and colleagues as the discrepancy in our financial means kept widening. Even though I believed in what I was doing, it was an emotional struggle that I finally won when I stopped comparing my financial status to that of my classmates and understood that the value of my work could not be measured by the digits behind the dollar sign.

The emotional costs of solo practice can be high. There are numerous demands on one's time, money, and skills. Clients expect and warrant excellence. Family and friends expect and warrant time. Professional circles require development. Community partners require investment. A solo practitioner cannot hide behind a large corporation, a junior associate or business partners to carry the load when she is not feeling up to par. When you are your own boss running your own business, there is constant scrutiny about your performance, your appearance, your commitments and your future. The loneliness and isolation that accompany those demands are inherent in the job.

FACILITATING OPPORTUNITIES FOR OTHERS

Since venturing out on my own, I have received calls from peers, paralegals, law students, and prospective law students who are interested in my career path and want to discuss career options. After many meetings and conversations, it has become evident to me that many lawyers are looking for alternative

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options in practicing law. Even attorneys who are happy with their salaries often feel unfulfilled or trapped in their current job environments. There are fellowships that allow attorneys to set up their own legal projects. These programs are usually granted only to recent law school graduates and are usually adhesive to existing public interest organizations. Often they limit lawyers who have an entrepreneurial spirit by placing restrictions on salaries and viewing public service through a strictly nonprofit model. At the same time, lawyers who turn to government as a way to serve the public and secure a comfortable salary with benefits often find themselves with systemic restrictions that inhibit their creativity and ability to affect community change.

It is not easy to find individuals who are willing to make a full-time commitment to providing legal services to low and moderate-income individuals. Although many have cheered my efforts, there are only a handful of people who are willing to take a chance on themselves and on such communities. For those attorneys who are looking for work that combines direct service and social impact but are unsatisfied with a low-salary job at a legal aid organization, the alternatives are not apparent.

Before meeting Salvador Alva and John Ortega, I had not planned on opening up my own practice. The career counseling that my Ivy League institution offered did not include becoming a solo practitioner in a low-income community as a viable option for its graduates. Salvador Alva exposed me to constant client contact. John Ortega's referrals forced me to step into the courtroom. Other attorneys I have met during this journey have guided me through such challenges as bankruptcy adversary proceedings and preparing my first trial. I was fortunate that I found these individuals and that I was not shy about asking for help. However, going out on your own can be overwhelming.

STRENGTHENING THE NETWORK

In April 2006, I took advantage of an invitation to return to the Legal Services Center at Harvard Law School as a clinical instructor. This opportunity was possible because I found another Spanish-speaking attorney who understood my client base and was willing to sublease my office space to start her own practice. During my time away, I had the opportunity to reflect on my work and to learn about the work of other solo practitioners in community-based practices throughout the country. By talking with other solo practitioners, reading interviews with them, and surveying the small body of literature about them, I came to understand that there is a deep need for a greater system of support for solo practitioners. Most solo practitioners whose law practices serve the daily legal needs of

their communities find their work fulfilling. However, it comes with a price as they are frequently overworked, underpaid, and unrecognized.

There is a need for greater support systems for attorneys in private practice who serve the needs of working-class clients. Monthly publications, occasional seminars, and discounts on legal software are some of the benefits that bar associations offer their members, but they do not address the everyday needs of lawyers running their businesses in working-class neighborhoods. Discounted legal software still requires a significant investment of time, money, and personnel. The occasional bar seminar is often accompanied by a significant fee and held during inconvenient time frames. The legal profession owes a greater commitment to attorneys who practice on their own and work to address the needs of individuals, families, and small businesses in communities across the United States.

Access to affordable health care for these attorneys and their employees, student loan assistance programs, technology assistance programs, tax deductions for attorneys who work in underserved areas, training arrangements with large law firms, coordinated bookkeeping services, greater integration of telephonic appearances, paying client referrals from legal services organizations - these are just some initiatives that could improve the lives and livelihood of solo practitioners. To improve access to and delivery of legal services in our country it will be necessary for the bar, courts and law schools to address and remedy the discrepancy of resources and support systems available to attorneys in private practice who represent the legal needs of the average American.

CONCLUSION

I returned to Compton in June 2007 with some apprehension but even more conviction. I had the unique opportunity to continue to re-envision my law practice or to change direction. I felt torn between (a) engaging full time in re-building my practice and (b) focusing on finding resources to develop a model infrastructure for a community law practice incubator. My own experience with legal education and the conversations I continue to have with pre-law and law students, and new attorneys, reveal that the legal profession is lacking structured experiences and opportunities that encourage idealism.

My law practice is now a small operation that is nestled between teaching law students and helping build Community Lawyers, Inc.⁷ My desire to increase access to affordable and quality legal services is coupled with my commitment to help prepare a new generation of attorneys to make a difference in their communities. I envision developing post-graduate or law school clinical programs that prepare new attorneys to make a good living without gouging consumers of legal services. Providing more hands-on training to those entering the legal profession, strengthening the network of existing community-

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based lawyers in private practice, and connecting them with the other sectors of the profession will greatly benefit clients by increasing the quality and availability of affordable legal services and by developing a pipeline of attorneys who understand and serve the needs of underserved neighborhoods. My space in

Compton will continue to be an incubator for entrepreneurial and community-minded lawyers who strive to use their degrees to make a difference for the families and individuals that inspired them to become attorneys.

ENDNOTES

* Luz E. Herrera is currently a visiting professor at Chapman University School of Law. She continues to practice part-time in Compton and is a board member and founder of Community Lawyers, Inc.

¹ Because law school policy prohibited me taking courses at the Kennedy School of Government as an elective during my first year of law school, I was only able to audit a seminar taught by Keith Reeves and Leon Higginbotham. Lani Guinier, a voting rights legal scholar, did not arrive at Harvard Law School until the 1998-99 academic year. She was the first and only woman of color to be a tenured professor at Harvard Law School until Jeannie Suk was hired in 2006-07. Only one of the three civil rights courses I took during law school was taught by a tenured law professor.

² When I met other progressive students and alumni who shared some of my ideas about lawyer advocacy in low-income communities, they pointed to Gary Bellow and the Hale and Dorr Legal Services Center so I enrolled in a year-long course with Professor Bellow and did clinical work for two semesters of my second year.

³ For further discussion on the vulnerability of working class or middle class America, see Elizabeth Warren, *Financial Collapse and Class Status: Who Goes Bankrupt?*, 41 OSGOODE HALL L.J. 115, 123 (2003); see ELIZABETH WARREN & AMELIA WARREN TYAGI, *THE TWO-INCOME TRAP* (Basic Books 2003).

⁴ See The California Commission on Access to Justice, *Action Plan for Justice* (April 2007), http://calbar.ca.gov/calbar/pdfs/reports/2007_Action-Plan-Justice.pdf.

⁵ See Leslie C. Levin, *Preliminary Reflections on the Professional Development of Solo and Small Firm Practitioners*, 79 *FORDHAM L. REV.* 847 (December 2001); Leslie C. Levin, *The Ethical World of Solo and Small Firm Practitioners*, 41 *HOUS. L. REV.* 309 (Summer 2004); CARROLL SERON, *THE BUSINESS OF PRACTICING LAW: THE WORK LIVES OF SOLO AND SMALL-FIRM ATTORNEYS* (Temple Univ. Press 1996). See also RICHARD H. ABEL, *AMERICAN LAWYERS* (Oxford Univ. Press 1991); see also JEROME E. CARLIN, *LAWYERS ON THEIR OWN* (Rutgers Univ. Press 1962).

⁶ See JAY G. FOONBERG, *HOW TO START AND BUILD A LAW PRACTICE* (American Bar Association 5th ed. 2004) (1935); K. WILLIAM GIBSON, *FLYING SOLO: A SURVIVAL GUIDE FOR THE SOLO AND SMALL FIRM LAWYER* (American Bar Association 4th ed. 2005) (1949); EDWARD POLL, *ATTORNEY AND LAW FIRM GUIDE TO THE BUSINESS OF LAW* (American Bar Association 2d ed. 2002) (1994).

⁷ See Community Lawyers, Inc., available at <http://www.community-lawyers.org/1.html> (last visited Oct. 14, 2007). Community Lawyers, Inc. is a tax-exempt, not-for-profit organization founded in 2005 to encourage education, training, and support for legal professionals committed to working in underserved communities. See *id.*

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IMMIGRATION POLICY AND IMMIGRATION FLOWS: A COMPARATIVE ANALYSIS OF IMMIGRATION LAW IN THE U.S. AND ARGENTINA

By Adela De la Torre, Ph.D.
and Julia Mendoza *

SPECIAL INSERT COMMEMORATING THE TENTH ANNUAL HISPANIC LAW CONFERENCE

Lawyers and policy experts within the Latino community need to foster cultural responsibility for immigration reform by participating in the policy dialogue. Although Latino lawyers do not represent the broad American population, they do represent American communities that have been discriminated against because of their cultural and racial heritage. It is important to uphold the diverse cultural identities of Latinos while asserting policies that will not only benefit Latino communities but also conciliate past discrimination.

One important country in the Western Hemisphere that has developed a more forward-thinking immigration strategy is Argentina. Like the United States, Argentina experienced massive European immigration at the end of the nineteenth and early twentieth centuries. Unlike the United States, however, it has developed a more open approach toward its bordering nations and natural trading partners. Argentina's strategy to develop a more balanced and race-neutral federal immigration policy has resulted in a more humane and economically sound approach to immigration reform in comparison to the United States. In order to fully compare the two countries' immigration policies, it is important to summarize the historical development of U.S. immigration policy.

HISTORICAL SUMMARY OF SIGNIFICANT IMMIGRATION POLICIES

The U.S.-Mexico immigration relationship began after the Mexican Revolution, in response to the disarray of the post-revolutionary years. In an attempt to establish stability after years of war, many Mexican migrants moved up to the North, hoping to establish themselves economically. At the same time, many American employers ran recruitment campaigns to acquire cheap, dispensable labor.¹

In addition to significant economic "pull-factors,"² Mexican migrants were also drawn to the United States by the change in American immigration policies. During this time in the U.S., public fear evolved in response to the Eastern and Southern Europeans, the Chinese, and the Japanese. This fear was not only expressed on the streets by racial violence and segregation, but also conveyed in immigration legislation. The immigration laws of this era imposed significant restrictions on the type of immigrants that were able to come to the United States.³ This racialized hatred focused on select minorities opened space in

the American economy for an alternative source of low-skilled labor: Mexican immigrants. Although the need for labor ceased during the Great Depression, recruitment was revived during World War II.⁴

In 1942 the United States negotiated a treaty with the Mexican government in an attempt to fill labor shortages created by the draft. The Bracero Program was implemented to supply the United States with temporary agricultural workers. Although the initial intent of the Bracero Program was to supply labor to the United States during the war, the program was so advantageous for American employers that it continued until 1964.⁵

Under the Bracero Program, nearly five million Mexican migrants came to the United States.⁶ Under the program, the Department of Labor would certify an American employer's estimation of labor needs and then make a request to the Mexican government, which in response transferred the migrants to the United States. Once the workers arrived, the Department of Labor placed them with private American employers.⁷

The Bracero Program established migratory patterns for both documented and undocumented immigrants. Although the Bracero Program established a legal avenue for Mexican immigrants to come to the United States, it also created many pull-factors to encourage those who did not qualify under the program requirements to come as well. The United States was aware that its recruitment activities promoted Mexicans' belief that the United States was the land of opportunity, which enticed many migrants to enter illegally or without inspection.⁸

Despite the necessity of low-wage workers during this era, Mexican immigrants lacked basic rights. They had the ability to participate economically in the United States, but were unable to participate politically.⁹ This political disenfranchisement in addition to the blatant racism created an incredibly hostile environment for these immigrants. In this environment "Operation Wetback" was spawned.¹⁰ In response to public concerns over loose border policies and the frenzy caused by the increasing employment of Mexican immigrants, Operation Wetback deported over one million Mexicans, including many documented Mexicans, under the supervision of the Immigration and Naturalization Service.¹¹ Federal strategies, such as border patrol profiling, employed in the 1950s to target Mexican immigrants, are still used today and have been protected under

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the most recent U.S. Supreme Court decisions.¹²

CURRENT U.S. IMMIGRATION LEGISLATION

Given the primacy of popular opinion in determining federal immigration policy in the United States, it is not surprising that the racialized tone and anti-immigrant rhetoric of the past has prevailed in the formulation of policies during the last two Administrations. The Bush Administration has placed the immigration problem at the forefront of its policy concerns. In response to the presence of an estimated 12 million undocumented immigrants in the United States, President Bush has attempted to create a solution that not only resolves the national political divide but also pacifies international trade partners. The solution proposed is another guest worker program.¹³

On June 7, 2007, the Senate quashed the program, and the prospects of comprehensive immigration reform, by a fifteen-vote margin.¹⁴ The outcome resulted in an overwhelming amount of criticism from core Republican voters and liberal Democrats.¹⁵ Despite support from President Bush, Democratic leaders of the Senate, and some prominent senators from both parties, the bipartisan plan never came to life.¹⁶

One of the most problematic aspects of the bill was a proposal that would shift policy preferences away from the naturalization of applicants with family ties in the United States toward the employment of immigrants with advanced skills, college degrees and English-speaking ability.¹⁷ Supporters of this proposal claim that immigrants would still be able to bring close family members into the country.¹⁸ However, opponents of the proposal argue that countless families would be split apart in exchange for a very selective admissions process based on classist and racist preferences.¹⁹

Another problematic issue with the proposed legislation was the guest-worker proposal. Despite a desperate struggle from both sides of the Senate and a cut of the initial proposal of 400,000 two-year guest worker visas into half, there wasn't enough cumulative support to satisfy the political expectations of the entire electorate.²⁰ This political crisis raises concerns for policy analysts, such as the Immigration Policy Center, which cites the Bureau of Labor's recent findings and concludes that not only would a guest worker program be desirable but also necessary to sustain current economic growth²¹:

A key component of the immigration reform bill now being debated in Congress is a new temporary worker program that, ostensibly, would replace the current stream of undocumented migration with a regulated flow of less-skilled immigrant workers. However... the temporary worker provisions of the legislation, as they now stand... would not respond to the growing demand for less-skilled workers to fill permanent jobs in high-growth industries like construction. In fact, the temporary program taking shape in the Senate would have the effect of cycling less-skilled immigrant workers in and out of the lowest rungs of the U.S. labor force without creating any longer-term

investment in the workers or the industries in which they are employed....An alternative program that allows workers to apply for permanent status would better address industry's need for a larger and more settled less-skilled workforce and would more likely discourage undocumented immigration in the future.²²

Given the current political tenor and the historical record on immigration policy, the U.S. appears inclined to continue to subordinate basic human rights issues and hamper strategies to integrate immigration with the needs of the economic sector.

Although a comprehensive immigration reform plan has yet to be approved, the Bush Administration has managed to subdue the immigration problem by increasing physical deterrents to illegal migration through an enhanced border-enforcement system. On October 26, 2006, George Bush signed the Secure Fence Act.²³ During the inauguration of this bill, the president declared, "This bill will help protect the American people. This bill will make our borders more secure. It is an important step towards immigration reform."²⁴ This measure reflected the Republican House leaders' attempt to fulfill their promise to 'crack down' on immigration.²⁵

The Secure Fence Act authorizes a 700-mile border that would stretch around the town of Tecate, California, and build an expansion between Calexico, California, and Douglas, Arizona. In addition, the bill provides funding for more sensors, satellites, radars, lighting, cameras, and other detection devices for the 2,000-mile U.S.-Mexico border.²⁶ The scope of the immigration protection and enforcement budget for the 2007 fiscal year is estimated at \$21.3 billion dollars, not including the two to nine billion-dollar estimated cost of building the fence.²⁷

Until the underlying political motivation for immigration policy changes, U.S. immigration policy will further alienate low-wage, largely Mexican immigrants from mainstream U.S. society and continue the growing racial and economic divide of Mexican immigrants vis-à-vis the majority of the U.S. population.²⁸ The proposed wall on the US-Mexico border illustrates, both symbolically and politically, the moral dilemma that U.S. policymakers face with regard to immigration policy relative to other countries in the Western Hemisphere. As stated below by one critic, the wall is a "vivid demonstration of the moral bankruptcy of American politics," and it is an offense against humanity by separating families and dividing those who wish to be joined.²⁹

AN ALTERNATIVE MODEL FOR ADDRESSING AND INCORPORATING IMMIGRANTS IN LATIN AMERICA: THE CASE OF ARGENTINA

Although the United States is often viewed as a model for incorporating diverse immigrants, it may lag behind other "less developed" countries in its strategies to address economic needs while maintaining humane and equitable treatment of immigrant populations. Historically, the United States has developed ad hoc and often overtly racist immigration policies, accompanied

by federal legislation that limits equal access to programs that would speed up immigrant assimilation into American society.³⁰ There has been no successful solution to address the competing political forces within the immigration debate, and there is growing alienation across constituent groups that could be disproportionately supported by the racist rhetorical discourse.³¹

When looking at other countries that still rely on immigrant labor, it is opportune to review Argentina in a comparative framework with the United States, as both nations share similar histories of European immigration in the latter part of the nineteenth century.³² However, there are clear divergences in immigration policy at the federal level in these two countries. For example, in Argentina, unlike the United States, popular racist rhetoric about immigrants has never overwhelmed its overall federal policy strategy of providing relatively easy mechanisms for immigration and citizenship for immigrants. This is demonstrated not only in the Argentinean Constitution, but also within the immigration laws sanctioned by Congress in 2003, the implementation of the *Patria Grande*, and the economic influences of the MERCOSUR.

ARGENTINA'S LEGAL FRAMEWORK FOR IMMIGRANTS

The Argentinean Constitution features three primary sections within the first articles that illustrate the foundational hegemony that influenced Argentinean immigration policy.³³ In Article 25, the Argentinean Constitution states its desire to promote immigration from Europe.³⁴ Many have chosen to look at this declaration as creating the foundational rhetoric to promote preferential treatment for European immigrants over the surrounding indigenous communities from other countries.³⁵ Although it is impossible to deny that the mainstream Argentinean sentiments towards immigrants have been historically pro-European, the Argentinean political and social discourse did not historically produce xenophobia in the same infringing manner as was produced within the U.S. context.³⁶ Additionally, unlike the Constitution of the United States, the Argentinean Constitution granted protection of basic rights to all the inhabitants of the country, not only to its citizens, protecting immigrants' basic rights.³⁷

In recent years, Argentina has expanded upon its legal foundation of immigrants' rights through its Civil Code.³⁸ This development of a pro-immigration policy came into full force during the Kirchner Administration. In 2003 President Nestor Kirchner introduced into legislation a law that reduced the restrictions on immigration from other South American countries and guaranteed access to public health and education for both documented and undocumented immigrants.³⁹ By introducing *La Ley de Migraciones* 25.871 and creating *El Programa Nacional de Normalización Documentaria Migratoria*, the Kirchner Administration constructed a legal and political framework to support the basic

human rights of immigrants and to complement the international framework asserted under the MERCOSUR and the pressures of globalization.⁴⁰

ECONOMIC INFLUENCES ON ARGENTINEAN IMMIGRATION POLICY

Globalization and the effects of the MERCOSUR agreement have played a significant role in establishing both push and pull factors for migrants within Latin America. Although Argentinean economy is not comparable to that of the United States, it still provides an interesting vantage point to compare immigration policies, as both economies receive immigrants from geographically neighboring countries and feature relative wage differentials as strong pull factors.

MERCOSUR is a regional integration organization in which Argentina, Brazil, Uruguay, and Paraguay are member countries and Chile and Bolivia are associate countries. It was established in the Southern Cone region in an attempt to generate intra-regional trade while encouraging the liberalization achievements needed to compete in a global market.⁴¹ MERCOSUR has contributed to the significant flow of immigrants from neighboring countries such as Bolivia, Paraguay, Uruguay and Chile.⁴² MERCOSUR has also managed to catalyze hundreds of cross-border investments within the Southern Cone region. This phenomenon was virtually unknown in the economic history of South America prior to the 1990s and was "necessary to create internationally competitive sub regional firms. Furthermore, MERCOSUR has widened the scope and deepened the level of intraregional relations through regional infrastructure initiatives, cooperative agendas in education and culture, and heightened interaction among political actors of the member states."⁴³

When Argentina signed MERCOSUR, it signed a trade agreement that acknowledged the need for residency on behalf of immigrants.⁴⁴ The agreement establishes a manner in which temporary residents have access to residence for up to two years in the country that they desire. This legal framework coincides well with the existing Argentinean immigration legal system. The agreement embraces a unified

Unlike other international trade agreements, MERCOSUR and the Argentinean legal system enforce an immigration framework that supports a humanitarian immigration doctrine.

effort to deter employment of illegal immigrants by providing sanctions for those employing illegal workers and guaranteeing that such sanctions will not have repercussions on the rights of immigrant workers.⁴⁵

Argentina's legislative history and case law enforces immigration in a manner that complements MERCOSUR's economic goals. Unlike other international trade agreements, MERCOSUR and the Argentinean legal system enforce an immigration framework that supports a humanitarian immigration doctrine. By contrast, this was not the case when the North American Free Trade Agreement (hereafter NAFTA)

was passed in the 1990s absent any easing of immigration restrictions for Mexican workers as a result of greater economic integration through trade among the three member countries.

Unlike NAFTA, the *Patria Grande* furthered the intent of Argentina to enforce laws and employ its economic policies in a humanitarian manner. The *Patria Grande* was created to address the widespread abuse of undocumented immigrants in response to a tragic fire in a Buenos Aires sweatshop that caused the deaths of several undocumented Bolivian immigrants.⁴⁶ By giving undocumented immigrants within the Southern Cone region a legal avenue to obtain residency, the plan attempted to ease the bureaucratic process of documentation and was aimed at promoting human rights for the residents within the MERCOSUR region.

As a result of the Argentinean government's efforts, 350,000 residence visas were issued to undocumented immigrants in 2006 -- eight times the 2005 total.⁴⁷ Currently, Argentina's federal government is planning to offer amnesty to approximately one million undocumented immigrants that work in the country. The *Patria Grande* also set a legal course for an estimated 700,000 to one million illegal immigrants to eventually seek citizenship.⁴⁸ Legal scholars anticipate future legal discourse on how to construct legally immigrants' citizenship after two years. Nevertheless, the *Patria Grande* should create an environment in which undocumented immigrants avoid victimization and will provide a vehicle for citizenship for undocumented workers in Argentina.

Although the historical Argentinean sentiment linked to immigration policies targeted preferred racial groups of immigrants, Argentina is currently moving forward with immigration policies that promote the political, social, and economic cohesion of the Southern Cone region. In order to fully appreciate the differences between United States and Argentinean immigration policies, it is critical to place these cultural differences within a comparative historical framework.

CONCLUDING THOUGHTS: LESSONS TO BE LEARNED

In a United Nations Press Release announced on September 15, 2006, in reference to Global Migration Policy, Vice-Minister for Latin American Policy of the Ministry of Foreign Affairs of Argentina, Leonardo Franco, commented that policies similar to *Patria Grande* need to be used as an outline for immigration policy.

Argentina had participated in this high-level session in the context of regional integration that addressed migration from a human rights perspective, he said. His country had also decided to promote the issue of migration multilaterally, and not on a vision based

exclusively on sovereignty and the State. As proof of this, he cited the important agreements of MERCOSUR and the South American Conference of Migration that had already achieved advances. The search for better conditions of life in other countries must not be reproachable, much less criminalized, he continued. Countries should address the issue by searching for mechanisms of cooperation and integration. He noted that Argentina had sealed that spirit into its migration policies in the National Law of Migration in 2004. That had affirmed Argentina's commitment to guaranteeing the human rights of migrants, while establishing mechanisms to regulate migration, thereby minimizing discrimination and xenophobia.⁴⁹

Franco eloquently echoes the Argentinean attitude towards immigration policy, which includes concern for the equitable treatment of undocumented immigrants. Franco states that immigration policy experts should recognize the basic desire that all individuals have to improve their economic well-being, which provides the underlying incentive for immigrant flows. In addition, given his analysis of the broader economic problems, immigration solutions require cooperative partnerships across neighboring countries. Multilateralism in trade and immigration is a logical policy outcome from the MERCOSUR agreement.

Beyond the more balanced immigration approach supported by the MERCOSUR agreement, Argentina has continued to support a race-neutral and humane approach to addressing new immigrants -- both legal and undocumented. Argentina has refused to allow either hostile popular opinion about immigrants or cyclical crises to affect its federal policies. Thus, there is little legislative evidence of unilateral and/or hostile immigrant policies unlike the ones documented in the United States. Finally, Argentina has maintained its core cultural values for incorporating new immigrants within its social milieu.

Although there are a handful of cases in which immigrants have struggled to receive residency, generally Argentina supports immigrants by maintaining a legal structure that theoretically guarantees their human and civil rights.⁵⁰ This general structure has been realized in the recent implementation of the *Patria Grande* Agreement and the recently enacted immigration laws that value the human rights of undocumented immigrants. As a result, on an international level, this agreement has become a model for how other countries should treat their immigration 'problem.'

The United States, by contrast, continues to maintain a unilateral and racialized policy with regard to immigration reform. Human rights issues are of secondary concern in light of recent terrorist attacks, and popular sentiment continues to view low-

Beyond the more balanced immigration approach supported by the MERCOSUR agreement, Argentina has continued to support a race-neutral and humane approach to addressing new immigrants — both legal and undocumented.

income Mexican immigrants as inferior, illegal, and therefore unworthy of any federal legal status.⁵¹ Furthermore, there are few attempts to address the challenge of a meaningful political and economic incorporation of these new immigrants into American society.

The popular dialogue regarding immigration policy in the U.S. is easily captured within the news media, which often report on smuggling, interception, or raids of undocumented workers in the key employment sectors of the U.S. economy. This manner of portraying “The Immigration Debate” not only infringes upon the everyday struggle of undocumented immigrants, but upon *all* Latinos as well. Press coverage of federal immigration raids in Georgia during September 2006 is one clear example. In these illegal raids, federal immigration agents swept through towns in southeastern Georgia, relying heavily on racial and ethnic profiling.⁵² A lawsuit brought forth by the Southern Poverty Law Center states that

It is the responsibility of lawyers and policy analysts in the Latino community to encourage a political shift toward developing meaningful immigration reform and to create immigration legislation that values the maintenance of our communities.

United States Immigration and Customs Enforcement agents illegally detained and unlawfully searched documented Latinos, violating their Fourth and Fifth Amendment rights. Illegal immigration raids reinforce the narrow, nationalistic perspective that unilateral solutions form the appropriate response to immigration reform. This manner of approaching immigration reform not only hampers the basic rights of undocumented immigrants, but also effects the entire Latino community.

CONCLUSION

Economic globalization requires states to move from ad hoc, self-interested and racist immigration policies to a balanced, multilateral and mutually beneficial policy that protects human rights and individual economic security.

Historically, the United States has lagged in developing a forward thinking, multinational immigration policy. Argentina, however, has provided an interesting template for addressing immigration that supports both economic success for employers and immigrant employees as well as a process for rapid normalization of legal and undocumented immigrants. Unlike the case of NAFTA, the MERCOSUR agreement included specific labor market policies that were mutually beneficial for participating countries.

Thus, although both countries may be motivated by self interest and a degree of popular support with regard to immigration policy, the U.S. has lagged in its ability to handle meaningful reform that addresses key economic domestic interests and is placed within the context of meeting minimum human rights needs. The United States’ immigration policy response may be seen as a protectionist strategy that undermines its position within a global and free trade environment. Within the context

of greater economic and political cooperation across the Americas, U.S. policymakers can learn some important lessons from its sister nations about humane, competitive immigration policies.

It is the responsibility of lawyers and policy analysts in the Latino community to encourage a political shift toward developing meaningful immigration reform and to create immigration legislation that values the maintenance of our communities. As the cultural makeup of the United States continues to evolve, policies and laws are still constructed within a racist rhetoric from the past. There is a huge political cleavage in this country regarding how the immigration ‘problem’ will affect our future. It is important to realize that at the core of this problem is the protection of our communities.

ENDNOTES

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¹ Leo R. Chavez, *Borders and Bridges: Undocumented Immigrants from Mexico and Central America*, in *ORIGINS AND DESTINIES: IMMIGRATION RACE AND ETHNICITY IN AMERICA* 254-255 (Eve Howard ed., Wadsworth Publishing Company 1996).

² A “pull factor” is a common term used to describe a strong factor for encouraging or attracting immigrants.

³ BILL ONG HING, *DEFINING AMERICA THROUGH IMMIGRATION POLICY* 68-70 (Temple University Press 2004).

⁴ Philip Martin, *Does the U.S. Need a New Bracero Program?* 9 U.C. DAVIS J. INT’L L. & POL’Y 127, 128-29 (2003).

⁵ Kristi L. Morgan, *Evaluating Guest Worker Programs in the U.S.: A Comparison of the Bracero Program and President Bush’s Proposed Immigration Reform Plan*, 15 BERKELEY LA RAZA L.J. 125, 127-29 (2004).

⁶ Jorge Durand et. al., *Mexican Immigration to the United States, Continuities and Changes*, 36 LAT. AM. RES. REV. 107, 109 (2001).

⁷ Shannon Leigh Vivian, *Be Our Guest: A Review of the Legal and Regulatory History of U.S. Immigration Policy Toward Mexico and Recommendations for Combating Employee Exploitation of Nonimmigrant and Undocumented Workers*, 30 SETON HALL LEGIS. J. 189, 197-98 (2005).

⁸ HING, *supra* note 3, at 129.

⁹ Christopher David Ruiz Cameron, *Borderline Decisions: Hoffman Plastic Compounds, the New Bracero Program, and the Supreme Court’s Role in Making Federal Labor Policy*, 51 UCLA L. REV. 1, 25-26 (2003).

¹⁰ *Id.* at 3.

¹¹ HING, *supra* note 3, at 130.

¹² See *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975). In this case the officers relied on a single factor to justify stopping respondent’s car: the apparent

ENDNOTES CONTINUED

Mexican ancestry of the occupants. On certiorari, the Supreme Court held that except at the border and its functional equivalents, officers on roving patrol could stop vehicles only if they were aware of specific articulated facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicle contains undocumented immigrants. Although Mexican ancestry alone could not be sufficient basis to warrant the stop, it is allowed as a significant factor and is the most significant factor in practice. In the dicta of the holding, the court acknowledges its acceptance of the 'modest' imposition on the Fourth Amendment Right guaranteed under the Constitution.

¹³ In his recent visit to Mexico, President Bush left Mexico without reaching concrete agreements with the new Mexican president on a host of issues, from greater cooperation on attacking drug traffic to extending protections for Mexican farmers who grow corn and beans. But as he sought to mend ties with Mexico, Bush vowed to step up his efforts to persuade Congress to approve a bigger guest worker program for Mexican migrants and to provide a path to citizenship for millions of immigrants living in the United States illegally, most of them from Mexico and Central America. Alfredo Corchado, *Calderón: My relatives may be in U.S. illegally On last day of Bush visit, Mexican president looks at positive aspects*, THE DALLAS MORNING NEWS, Mar. 15, 2007.

¹⁴ Carl Hulse and Robert Pear, *Immigration Bill, Lacking 15 Votes, Stalls in Senate*, N.Y. TIMES, June 8, 2007.

¹⁵ Michael Falcone, *2008: Immigration Fall Out*, The Caucus, N.Y. TIMES, June 8, 2007, available at <http://thecaucus.blogs.nytimes.com/2007/06/08/2008-immigration-fallout/> (last visited Oct. 15, 2007).

¹⁶ *Id.*

¹⁷ Teresa Watanabe, *Businesses, Families Have a Lot Riding on Immigration Change*, L.A. TIMES, May 21, 2007.

¹⁸ Editorial, *The Immigration Deal*, N.Y. TIMES, May 20, 2007.

¹⁹ Sen. Robert Menendez, D-N.J., attempted to push an amendment that would encourage the shifting U.S. immigration policy away from keeping families together in favor of attracting more foreign workers. The Mexican-American Political Association and other immigrant right advocates called this proposal "the New Anti-Family 'Point System.'" Despite a desperate push, Senator Menendez acquired seven votes short of the 60 needed. Voting against him were 44 senators. The Menendez amendment would have allowed more than 800,000 people who had applied for permanent legal status by the beginning of 2007 to obtain green cards based purely on their family connections. This would have eliminated the family preference for most relatives who have been waiting for green cards on or after May 2005. Mexican American Political Association, *The Immigration Debate Update*, June 7, 2007, http://www.mapa.org/_06_07/debate.html (last visited Aug. 15, 2007).

²⁰ Will Sullivan, *This Bargain Wouldn't Sell*, U.S. NEWS & WORLD REP., June 18, 2007.

²¹ "The Bureau of Labor Statistics (BLS) projects that nearly 6 million new jobs will be created between 2004 and 2014 that require only short-term on-the-job training. However, the available supply of native-born workers to perform this labor is shrinking. Among the native-born population, fertility rates are falling, workers are growing older and better educated, and labor force participation rates are flattening. Immigrants, in contrast, are more likely to be younger and to have only a high-school education or less. The temporary worker program currently under consideration, which is capped at 200,000 per year, is unlikely to accommodate even the current level of demand for less-skilled workers. Moreover, because none of the workers who enter the country under the new temporary program would be permitted to stay, the program cannot contribute to the long-term growth of the U.S. labor force and cannot respond to increasing demand for workers in the future. Under the temporary worker program, no more than 400,000 less-skilled immigrant workers are added to the U.S. labor force each year because all temporary workers have to return home after 2 years." Bureau of Labor Statistics, *Occupational Employment, Training, and Earnings database*, available at <http://www.bls.gov/emp/home.htm> (last visited Aug. 15, 2007).

²² Stewart Lawrence et al., *Out of Sync: New Temporary Worker Proposals Unlikely to Meet U.S. Labor Needs*, American Immigration Law Foundation, June 2007, available at http://www.aifl.org/ipc/policybrief/policybrief_060707.shtml (last visited August 15, 2007).

²³ Secure Fence Act of 2006, 42 WEEKLY COMP. PRES. DOC. 1891, 1891 (Oct. 26, 2006).

²⁴ *Id.*

²⁵ Jonathan Weisman, *With Senate Vote, Congress Passes Border Fence Bill*, WASH. POST, Sept. 30, 2006.

²⁶ Editorial Pages Desk, *Fencing over Immigration*, L.A. TIMES, Sept. 21, 2006, at B14.

²⁷ Nicole Gauouette, *Border Bill Takes a Detour; The Senate Moves to Vote on a 700-mile fence, but a Farm worker Program is Now at Issue*, L.A. TIMES, Sept. 29, 2006, at A1.

²⁸ Mexican-American Political Association, *supra* note 21.

²⁹ Jim Chen, *Yo Soy Peregrino Fronterizo*, Jurisdynamics, Nov. 1, 2006, available at <http://jurisdynamics.blogspot.com/2006/11/yo-soy-peregrino-fronterizo.html> (last visited Aug. 15, 2007).

³⁰ The treatment of Chinese immigrants by federal, state, local governments and the public in the 1800s represented society's desire for Anglo-Saxon homogeneity and constitutes an important example of "racialized" practices of U.S. immigration law (Johnson 16-18). The now infamous Chinese exclusion laws essentially barred all immigrants of Chinese ancestry, and those Chinese immigrants that violated those laws faced serious repercussions. The efforts to exclude Chinese immigrants from the United States were fueled by the negative attitude toward people of Chinese descent (Johnson 17).

Another group that suffered the racist intent of U.S. immigration laws was the Japanese. What is important to note in this case is that both legal immigrants and citizens of Japanese ancestry were denied basic civil rights during this period. The decision to intern Japanese Americans and Japanese immigrants during World War II exemplified the difficulty in drawing legal distinctions between citizens and non-citizens who share the same ancestry. Subsequently, the U.S. government placed all Japanese in a homogenous category of "enemy" regardless of citizenship (Johnson 21).

Anti-immigrant laws historically have been influenced by the political climate. An end to the exclusion of Chinese immigrants from the U.S. shores resulted during World War II when China became an important ally in the war effort. As a result, in 1943 Congress allowed a minimum quota of Chinese immigrant visas and naturalization for Chinese immigrants (Hing Table A-1). The exclusion laws were relaxed only when the U.S. saw the political advantages of the strategy.

Another important example of how race impacted treatment of immigrants is the case of the internment of the Japanese during WW II. After the Japanese were placed in internment camps (which included small farmers and agricultural workers), the farm labor shortage in the U.S. became acute, particularly with the onset of the War and the subsequent adverse impact on the labor supply for U.S. agricultural production. It is during this period that the U.S. established a significant guest worker program that would set the political tone for low-wage immigrant labor in the United States, that is, the Bracero Program. From 1942 to 1964 the Bracero Program became the primary vehicle for legal entry from Mexico for low wage immigrant labor. It provided an important magnet for Mexican migration to the US as well as an important stimulus for continued legal and undocumented migration to the US to address the shortage of low skill labor in targeted sectors of the economy. (Acuña 286). In 1964, the Bracero program ended during a period of massive and successful civil rights and labor union mobilization in the United States (United Farm Workers-AFL-CIO). Nevertheless, the legacy of this period was immigration policy that was largely influenced by popular sentiment. This occurred despite the fact that Federal law continued to provide no real mechanism to sanction employers in their use of immigrant labor, particularly undocumented labor in key low wage sectors of the economy. Sources: RODOLFO ACUÑA, OCCUPIED AMERICA: A HISTORY OF CHICANOS 285-289 (4th ed., Longman 2000); HING, *supra* note 3 at Table A-1; KEVIN JOHNSON, THE "HUDDLED MASSES" MYTH: IMMIGRATION AND CIVIL RIGHTS 16-21 (Temple University Press 2004).

³¹ In response to the recent attempt to formulate a comprehensive immigration plan, Senator Feinstein (D-Calif.) reported, "[I]n my 15 years I've never received more hate or more racist phone calls and threats." Janet Hook and Nicole Gauouette, *Immigration Bill Drew Fire from Both Sides*, L.A. TIMES, June 9, 2007.

³² Argentina experienced its most significant immigration surge from 1857 to 1913 from mostly Spain and Italy; the country still is a site of migratory flows due to migration networks and macroeconomic economic conditions within Latin America. Conformación de la Población Argentina, available at <http://www.argentina.gov.ar/argentina/portal/paginas.dhtml?pagina=1669> (last visited Oct. 16, 2007).

³³ Argentina's Constitution is the second oldest constitution in the Americas. Although it was influenced by the Constitution of the United States, it is argued that the Argentine Constitution guarantees more rights than those set forth in the U.S. Constitution's Bill of Rights. The Argentine Constitution was revised extensively in 1994 to further emphasize the allotment of economic and social rights not only to citizens, but to all inhabitants of Argentina. See Alberto F. Garay, *Federalism, the Judiciary, and Constitutional Adjudication in Argentina: A Comparison with the U.S. Constitutional Model*, 22 U. MIAMI INTER-AM. L. REV. 161, 201-02 (1991).

³⁴ “The Federal Government shall foster European immigration; and may not restrict, limit or burden with any tax whatsoever, the entry into the Argentine territory of foreigners who arrive for the purpose of tilling the soil, improving industries, and introducing and teaching arts and sciences.” CONST. ARG. Article 25 (1994).

³⁵ According to a recent empirical study by Julia Albarracín, between 1970 and the 1990s there was ample evidence in the Argentine popular press to suggest that both political actors as well as the general population preferred European immigration over non-European immigration from bordering Latin-American countries. Her study also suggested that Argentine immigration policies during the study period were developed to allow for preferential treatment and more liberal incorporation policies for European immigrants as compared to non-European immigrants, which appear to be independent of macroeconomic conditions during the study period. Julia Abarracín, *Explaining Immigration Policies in Argentina during the 1990s: European Immigration, “a Marriage in Sickness and in Health”* 4 (presented at the 2003 meeting of the Latin American Studies Association, Dallas, Texas), available at <http://lasa.international.pitt.edu/Lasa2003/albarracinjulia.pdf> (last visited Oct. 16, 2007).

³⁶ Both the *CIA World Factbook* and the *Censo Nacional de Población* (National Census conducted by the Argentine National Institute of Statistics) assert that the ethnic make-up of Argentina constitutes of 97-98% ‘white’/ ‘European.’ Although there are no studies that discuss the ‘Social Construction of Whiteness’ within Argentina, the authors suggest the theory that, considering the similar histories of immigration and the documented existence of the Argentine indigenous make-up of the country, the definition of ‘White’ and ‘European’ as identities might be different in Argentina than the United States. The authors suggest that what may be described as racism in Argentina against immigrants from bordering nations may reflect classism, which is rather pronounced in Argentine culture. It is clear that given the lower class position of most immigrants that migrate from bordering countries such as Bolivia, this influences the cultural interpretation of immigrants in Argentina. Immigrants that are perceived to move successfully up the economic ladder are largely viewed in a more favorable light than those groups that do not economically assimilate into the mainstream. Thus, although racism does exist within certain segments of Argentine society, these beliefs have less influence on current immigration policy that targets or discourages certain groups of immigrants. *Censo Nacional de Población*, available at <http://www.indec.gov.ar/webcenso/index.asp> (last visited Oct. 16, 2007); *CIA World Factbook*, Argentina, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/ar.html> (last visited Oct. 16, 2007).

³⁷ “All inhabitants of the Nation are entitled to the following rights, in accordance with the laws that regulate their exercise, namely: to work and perform any lawful industry; to navigate and trade; to petition the authorities; to enter, remain in, travel through, and leave the Argentine territory; to publish their ideas through the press without previous censorship; to make use and dispose of their property; to associate for useful purposes; to profess freely their religion; to teach and to learn.” CONST. ARG. Article 14 (1994).

³⁸ The Argentinean constitution provides a very liberal framework of rights for immigrants. In the Constitution of 1994 [Article 20], it is clearly stated that foreigners are entitled to the same civil rights as citizens. The law frames immigrants into three categories: transitory residents, temporary residents, and permanent residents. Those who are not able to fit into any particular category are able to apply under an optional category which is maintained by the Ministry of the Interior, who is able to admit a transitory resident for any given reason. Those who do not fit under these specified immigration categories are defined as “inhabitants” under Article 14. “Inhabitants” are defined within the Argentinean Constitution to include foreigners, so that immigrants that do not fit within the constraints of the specific categories are able to acquire additional constitutional

and civil rights, including the right to enter and live in Argentina.

The manner in which these categories are implemented and defined is for the most part left to the discretion of the Executive Branch and to the Department of Immigration, which is able to admit migrants who do not qualify under a particular category. The Supreme Court of Argentina also maintains discretion as to how the immigration laws are implemented. Yet despite the Supreme Court’s maintained right to monitor immigration proceedings, there are only a handful of cases in which the Supreme Court has granted for judicial review. When the Supreme Court of Argentina has chosen to grant judicial review, it has mostly been for the objective of giving definition to the elusive categories that the Constitution defines. Yet its current discretion has been in regards to whether or not immigrants are from the MERCOSUR region. Barbara Hines, *An Overview of Argentine Immigration Law*, 9 IND. INT’L & COMP. L. REV. 395 (1999).

³⁹ Editorial, *An Open Door*, THE ECONOMIST, March 8, 2007.

⁴⁰ Programa Nacional de Normalización Documentaria Migratoria, available at <http://www.patriagrande.gov.ar/> (last visited Oct. 16, 2007).

⁴¹ Laura Gomez Mera, *Explaining Mercosur’s Survival: Strategic Sources of Argentine—Brazilian Convergence*, 37.1 J. Lat. Am. Stud. 109, 109 (2005).

⁴² Andrés Solimano, *Development Cycles, Political Regimes and International Migration: Argentina in the Twentieth Century* 10, Macroeconomía del Desarrollo, Economic Development Division, Santiago Chile January 2003.

⁴³ Thomas Andrew O’Keefe, *Economic Integration as a Means for Promoting Regional Political Stability: Lessons from the European Union and Mercosur*, 80 Chi.-Kent L. Rev. 187, 205 (2005).

⁴⁴ Law No. 25903, July 13, 2004, B.O., (ratifying Agreement Regarding Residency for Nationals of MERCOSUR Party States).

⁴⁵ Maria Pabon Lopez, *The Place of the Undocumented Worker in the United States Legal System After Hoffman Plastic Compounds: An Assessment and Comparison with Argentina’s Legal System*, 15 IND. INT’L & COMP. L. REV. 301, 329-330 (2005).

⁴⁶ Brian Byrnes, *Making Room; Argentina finds a place for its local immigrants*, NEWSWEEK, Sept. 11, 2006.

⁴⁷ *An Open Door*, supra note 39.

⁴⁸ James Scott, *Argentina a magnet for working poor; New immigration policy drawing thousands with lure of jobs, security*, The Post & Courier, May 28, 2006 at AA1.

⁴⁹ United Nations, *Broad Agreement Emerges That, with ‘Right Set of Policies,’ Global Migration Can Boost Development as Historic Debate Concludes*, Sept. 15, 2006, available at <http://www.un.org/News/Press/docs/2006/ga10496.doc.htm> (last visited Oct. 16, 2007).

⁵⁰ Maria Pabon Lopez, supra note 45, at 327.

⁵¹ In a New York Times commentary, James M. Broder suggests that, “sometimes seems that it takes a catastrophe to create consensus. The Great Depression, Pearl Harbor and Sept. 11 all shattered partisan divisions and led, at least for a time, to enhanced presidential power and a rush of bipartisan lawmaking (some of which political leaders later came to regret). Today, however, the partisan chasm in Washington is deeper than it has been in 100 years, according to some academic studies, as moderate blocs in both parties have all but vanished.” John M. Broder, *Why Washington Can’t Get Much Done*, N.Y. Times, June 10, 2007.

⁵² Mary Lou Pickel, *5 Citizens Sue over Tactics Used Over Immigration Raids*, ATLANTA J. CONST., Nov. 2, 2006.

PUTTING THOUGHTS INTO ACTION: THE CREATION OF THE LATINA/O ALUMNI ASSOCIATION OF THE WASHINGTON COLLEGE OF LAW

By Carlos Quitana *

The process for establishing the Latina/o Alumni Association of the Washington College of Law (“LAAW”) began in the same way I suspect many great organizations got their start, over a few beers in a Washington, D.C. bar. Eight alumni (Maryam Ahranjani, Luis Clavijo, John Evanoff, Paul Figueroa, Juan Garcia, Manuel Garcia, Eric Garduno, and Carlos Quintana), first been introduced to each other as part of the Latina/o Law Students Association at the Washington College of Law (“WCL”) from 2000 to 2002, met in the summer of 2005 to discuss an idea first conceived by Manuel Garcia (2000). The idea was part of a larger discussion with members of WCL's Diversity Committee earlier in the year.

Specifically, the idea was to find a way for Latina/o alumni to help incoming Latina/o students at WCL avoid some of the pitfalls that awaited them as law students, and that frankly, many of us had fallen into during our years of study at WCL. We wanted to provide law students with practical advice on study and exam-taking techniques that worked well for us, as well as those that did not work so well. We also felt it was important to speak about other aspects of our law school experiences as Latina/o students, such as how we dealt with personal relationships (i.e., family, community, and partners), time management, financial hardships, and career choices. At its most basic, we wanted to share information about the things we wish someone had told us about law school before we started our law school careers.

THE MOTIVATION

The potential impact of a Latina/o alumni association was crystallized for us after reading a report prepared by the American Bar Association (“ABA”) as part of a National Conference entitled, *Collaborating to Expand the Pipeline*. The conference took place in Houston, TX on November 3-5, 2005. Statistics in the report provided clear evidence of the challenges faced by minorities along the “pipeline” into the legal profession. Focusing on Latinas/os, the report found that in the fall of 2004, Latinas/os made up only 7.9% of all applicants to ABA-accredited law schools, compared with 65% for whites, 10.6% for blacks, and 8.6% for Asians. The report also showed that despite the fact that Latinas/os make up nearly 14% of the U.S. population, only about 4% of attorneys are Latinas/os. Finally, the report indicated that Latinas/os posted lower bar passage rates and higher law school attrition rates than their white counterparts.

These numbers were not surprising when you looked at conditions further back in the pipeline. For example, a 2004 study by the Civil Rights Project at Harvard found that high school graduation rates for Latina/o students were only 53.2%, compared to 74.9% for whites. For Latinas/os that did go to college, only 6.3% received Bachelor of Science degrees conferred in Title IV degree-granting institutions, while 70% of whites received such degrees.

THE MISSION

Upon reading the ABA's report, we decided that LAAW could positively affect the pipeline at many levels. For example, LAAW could provide motivational speakers to elementary, high school, and college students and provide useful information about law school and legal careers. While recognizing the long term potential of the association, LAAW also realized that initially, our most valuable contribution would be assisting incoming students, current students, and alumni. However, we agreed that unlike typical alumni associations whose primary goal was to advance the careers and professional development of its alumni, mostly by creating networking opportunities, our primary focus was to give back to those who were following in our footsteps.

Therefore, as a first step in affecting the pipeline, we decided to devote our energies to creating a support network for Latina/o students that had succeeded in becoming law school applicants and/or students. Specifically, we decided that our mission would include improving the recruitment of Latina/o students and their retention and academic performance once they enrolled at WCL. We also determined that an effective support network would be made stronger by the presence of Latina/o faculty, so we decided to include recruitment of Latina/o professors into our mission.

Our guiding principle to help Latino/a law students at WCL was memorialized in the organization's mission statement:

The Latina/o Alumni Association of the Washington College of Law (WCL) seeks to improve the academic performance of Latina/o students, strengthen and enhance recruitment and retention of Latina/o law students and faculty, and advocate for policies to achieve these goals at WCL. The Alumni Association also seeks to establish and maintain a sense of community and strong network for students and alumni.

THE WORK

Having decided on our mission, we began discussing what would be the best mechanism for us to share our experiences and best practices with the incoming students. Initially, we talked about a summer program over the course of several weeks, a pre-law school boot camp, modeled on programs at UC Davis' King Hall Outreach Program, Charles Hamilton Houston Law School Preparatory Institute, the Sutherland Scholars training program administered by Sutherland, Asbill & Brennan, LLP in Atlanta, and Council on Legal Education Opportunity's College Scholars Program. Those programs were all intended to help improve the academic performance of minority students in law school, were at least six weeks long, and included intensive legal writing and exam taking preparation.

Although we liked the comprehensive nature of these programs, it soon became clear that they presented some real obstacles. For example, we would need to provide room and board for most of the students coming to Washington D.C. The program might limit students' ability to earn much needed income in preparation for law school. Having a comprehensive program also ran the risk of burning students out before they even began their law school careers. Furthermore, LAAW was concerned about possible overlap with existing WCL programs that provided incoming students with workshops on legal writing and analysis, such as the "Legal Analysis Study Group." Taking these realities into account, as well as the limited time availability of alumni, we decided in April 2006 that our best option would be to offer the students a one-day prep course that would focus strictly on providing practical advice. We titled the prep, "What I Wish I Would Have Known."

THE ORGANIZATIONAL STRUCTURE

In addition to developing our mission statement and selecting the format for our introduction to incoming students, the association wrestled with the decision of whether to establish itself as non-profit 501(c)(3) association, versus a sub-division of WCL. At first, the idea of a non-profit organization affiliated with WCL had a lot of appeal; primarily, because it seemed to provide the most autonomy in developing what we considered to be a non-traditional alumni association. Consequently, we contacted the Black Alumni Association of WCL, which we learned was established as and remains a 501(c)(3), that mainly provides scholarships to black students at WCL. Jackie Jackson, the association's treasurer, provided some useful context as to their establishment and current activities, and provided us with a copy of their bylaws.

In February 2006, LAAW met with Trishana Bowden, Associate Dean of Development and Alumni Relations at WCL, to discuss the establishment of the association and potential affiliation with WCL. At the meeting, Trishana made clear that WCL was very excited about the establishment of the association and committed to supporting our mission. WCL also made clear their preference that the association exist within

the structure of the law school. To our surprise, the law school, currently, does not have an umbrella alumni association. WCL also expressed concern that as an independent organization, there could be a lack of coordination in fundraising efforts undertaken by LAAW and WCL. As a way to better assess how a potential affiliation with WCL might work in practice, WCL offered to support LAAW's efforts to put on a prep course for incoming students in the fall. The prep course was scheduled for August 16, 2006, and WCL suggested that we view this as a trial run for a possible partnership. The idea seemed reasonable to the alumni, and we agreed to proceed according to WCL's suggestion.

In August, WCL proved to be true to their word, providing not only classroom space and other logistical support for the prep course, but also agreeing to provide lunch for the students. In addition, prior to the prep course, WCL distributed LAAW's invitation to all incoming Latina/o students. As a result of our collaboration, the prep course was a great success, with twenty-eight incoming Latina/o 1Ls attending. During the prep course, alumni provided students with information about test taking skills, speaking with professors, dealing with family responsibilities, adjusting to life in Washington, D.C., and setting priorities. In addition, Professor Tony Varona, one of three Latino professors at WCL, provided the students with invaluable information about professor's expectations and participated in a mock professor-student dialogue. After the event, students filled out a survey of the prep course in which they unanimously praised the LAAW's effort and indicated that it was extremely useful.

By January 2007, although we had avoided discussion of a governing structure, the decision could not be put off any longer. As a practical matter, we needed to have a formal decision-making body and people to identify as representatives of the association for purposes of communicating with WCL, students, and the general public. Since in practice we had operated as an executive committee, consisting mostly of a core group of six alumni, we settled on an Executive Committee model. Via email, LAAW asked for volunteers to participate in the Committee and received responses from Maryam Ahranjani (2000), Manuel Garcia (2000), Eric Garduno, Juan Henao (2005), and Carlos Quintana (2000). One of the first items on the Committee agenda was to make a final decision on whether to affiliate within the structure of WCL or establish itself as a nonprofit. On January 12, 2007, the Executive Committee voted unanimously to affiliate with WCL. Based on the support provided by WCL in preparing the prep course, the decision to affiliate within the law school now seemed to be the obvious choice. Further, the experience made clear the advantage of having built-in access to WCL's facilities, communication network, and staff, among other valuable resources.

THE INTRODUCTION

With the affiliation decision behind us, it was now time to plan a party as a means of celebrating the new partnership

between WCL and its Latina/o alumni, as well as provide a tool to recruit new alumni members. The big event was scheduled to take place on April 12, 2007, at PepsiCo, Inc., a space secured by one of our members, Omar Vargas.

In the meantime, on March 6, 2007, at WCL's 10th Annual Hispanic Law Conference, LAAW formally announced its establishment. It was an especially proud moment for the association because it had recruited Professor Margaret Montoya to be the keynote speaker at the Conference. Professor Montoya, who is currently a professor at the University of New Mexico School Of Law, and has the distinction of being the first Latina admitted to Harvard Law School, had been a supporter of the association since we began discussing its creation. During her presentation, she reminded us of why we consider her a great inspiration. She praised our efforts to establish the association. However, Professor Montoya also challenged the legal community to do more to improve diversity in the legal profession and to incorporate discussions of race, ethnicity, gender, and language into law school curriculums.

THE FUTURE

Looking ahead, LAAW is committed to becoming an integral part of WCL, including becoming an active participant in student and faculty recruitment processes and all aspects of alumni relations. LAAW will also continue to provide programmatic support for incoming and current Latina/o students by institutionalizing its prep course as an annual event in the fall, along with a spring follow-up. In addition, LAAW will collaborate with WCL in developing programs and activities for 2 and 3Ls, focusing on providing advice about the bar exam, networking, and career opportunities.

Furthermore, LAAW will soon begin fundraising efforts to provide book scholarships to incoming Latina/o 1Ls. Finally, LAAW will work with local Washington, D.C. organizations, including the Hispanic Bar of D.C., to encourage and facilitate opportunities for WCL Latina/o alumni and students to volunteer their time and skills to assisting underserved members of the Latino community. Activities like these will allow students and alumni the opportunity to give back to those that may be awaiting their turn in the pipeline to successful legal careers.

ENDNOTES

* Carlos Quitana is the Co-founder and an Executive Committee member of the LAAW. He wrote this piece with support from Paul Figueroa (2001) and Maryam Ahranjani (2001). Maryam is also a member of the Executive Committee, an Associate Director of the Program on Law and Government, and a Professorial Lecturer at WCL.

¹ American Bar Association Presidential Advisory Council on Diversity in the Profession, *The Critical Need to Further Diversity the Legal Academy & the Legal Profession* (October 2005), available at <http://www.abanet.org/op/pipelineconf/acdreport.pdf> (last Oct. 17, 2007).

² *Id.* at 1.

³ *Id.* at 3.

⁴ *Id.* at 6.

⁵ *Id.* at 2.

⁶ GARY ORFIELD ET AL., LOSING OUR FUTURE: HOW MINORITY YOUTH ARE BEING LEFT BEHIND BY THE GRADUATION RATE CRISIS (2004). A joint release by The Civil Rights Project at Harvard University, the Urban Institute, Advocates for Children of New York, and the Civil Society Institute; available at www.civilrightsproject.harvard.edu/ (last visited Oct. 17, 2007).

⁷ *Id.*

ALL IN A DAY'S WORK: ADVOCATING THE EMPLOYMENT RIGHTS OF DAY LABORERS

By Liza Zamd *

SPECIAL INSERT COMMEMORATING THE TENTH ANNUAL HISPANIC LAW CONFERENCE

In December 2005, House Bill H.R. 4437 brought the immigration debate to the forefront of national politics.¹ In homes and in public forums across the country, people debated the advisability of allowing an estimated 12 million undocumented immigrants the right to obtain legal status. Further complicating the issue, advocates highlighted human rights and homeland security problems resulting from millions of people living outside health, educational, and law enforcement systems.²

In the spring and summer of 2007, Congress came its closest in years to passing legislation to address a system that all sides agree is currently non-functional. In late June, however, the Senate could not foreclose a filibuster threat, and the immigration bill died without a vote. With focus now on the impending presidential elections, immigration reform has been put on the proverbial back burner — but the issue continues to smolder. Outside the immigration controversy, there are myriad legal and arguably moral problems surrounding immigrants that are unrelated to documentation status.

This article deviates from the common focus on how a person arrives in the United States by concentrating on what happens to these newcomers as workers who have critical roles in our daily lives.⁴ By taking jobs in construction, restaurants, and agricultural work³, immigrant Latinos make up a significant percentage of the American workforce. Yet in immigrant communities in Maryland, and across the nation, wage theft occurs with alarming frequency.⁵ Furthermore, the need for legal advocacy in this area goes largely unmet because Legal Aid and other government-funded organizations are not allowed to represent undocumented workers in most circumstances.⁶

This article focuses on a piece of the immigration issue from the perspective of a practitioner at a non-profit that assists the most controversial figures in the heart of the debate — undocumented workers. First, I will discuss the demographic realities of my clients and the nature of the cases I litigate. Then, I will explain the legal employment issues my clients face and how I deal with challenges from employers who refuse to pay their workers. Finally, I will detail some possible solutions to worker exploitation.

My experience with day laborers stems from my work as a staff attorney at CASA of Maryland (“CASA”).⁷ CASA is a non-profit organization that provides health, education, employment, community organizing, and legal services to predominantly low-income immigrants. I am the sole attorney in CASA's Baltimore office, though there are other attorneys in CASA's Silver Spring location. In Baltimore, the Latino

population has increased significantly in the last ten years, reflecting the overall growth in the state.⁸ Although I strive to provide basic legal advice to whomever walks through the door, I prioritize wage and hour cases, almost to the exclusion of any other issue. The general advice I give often pertains to the many poverty problems that confront citizens and immigrants alike: landlord-tenant disputes, low-level criminal issues, access to health care, and access to education. Depending on other commitments within my job, I have between 75 to 100 (or more) open cases at any given time. Outside of client contact, I have continuous and frequent interaction with immigrants -- speaking to between ten and fifty Latino (and sometimes African) immigrants per day.

My clients run the gamut of low-wage temporary workers, and although I sometimes encounter restaurant employees, the bulk of my cases involve construction and house rehabilitation. My clients are drywall hangers, painters, framers, carpenters, and demolitionists. Not surprisingly, they are predominately male; only about five percent of my clients are women.⁹ Most are in their twenties or thirties, though their ages range from eighteen to fifty-five. The majority of my clients are Mexican, Salvadoran, and Honduran. In addition, some are from other Latin-American countries, and even a few are native-born, non-Latino Americans.

Day laborers' wage and hour cases have a common structure. A worker usually comes into CASA after not having been paid by the employer for weeks, months, or sometimes even years,¹⁰ and our conversation usually begins after they have uttered the same six words “Mi patron no me quiere pagar.”¹¹ For whatever reason, whether it is miscommunication, resentment, or downright malicious thievery, an employer has not paid the day laborer after work was completed. During client intake, which lasts about an hour, I try to elicit the basic factual points that will help inform the case against the employer. What days did you work? What was your wage? Where did you work? These may seem rudimentary, almost banal questions, but often my clients respond with a sheepish look and tell me they don't know. It is often challenging to piece together basic facts from a worker who, for any number of reasons, waited some months before coming to see me. With few exceptions, however, each client is resolute in his idea of how much he is owed even if he does not recall how many hours of wages went into that dollar amount.

The calculation of the wages problem is complicated by the fact that employers often give their workers random sums of money at various times during the term of service. For example, one client, Pablo,¹² did intermittent construction over the course of a few months for a prominent Latino business

owner in the area. Pablo was absolutely certain he was owed \$700 and had even kept track of his hours in a notebook — a lawyer’s dream. Pablo and I met with the employer, a man I was already frustrated with because he had failed to pay an additional six people in the previous weeks. During the meeting it became clear that while Pablo had meticulously recorded his work schedule, he had neglected to note when he had received small partial payments that occurred at random times. In a rare turn of events, the employer had actually kept written receipts of the wages he paid — an often-neglected requirement under federal law.¹³ Upon review, it appeared that Pablo was probably owed about \$100, although there was some possible ambiguity concerning an \$80 payment. At most, Pablo should have received another \$180 for work he performed. The employer was annoyed with my initial position that Pablo was owed \$700, but I was frustrated with the employer because his irregular payments caused the confusion.¹⁴

Unfortunately, the great majority of day laborers do not write down their hours, nor do they gather other necessary information about their employer due to their fear that if they ask too many questions, the employer will just hire someone else. This often puts me in a position of weakness when I call an employer, because it may be obvious that I am missing crucial information.¹⁵ For this reason, it is helpful to make the initial employer phone call with my client sitting next to me, enabling me to ask my client for clarifications depending on how the employer responds to the unpaid wage allegations. Most clients have at least a cell phone number and first name of an employer, and calling is usually my best means to recover wages.¹⁶ If phone calls are not fruitful, however, I then write a demand letter to the employer detailing the laws that have been violated and my client’s potential recourses.¹⁷ If the demand letter fail to resolve the issue, I take the case to court if my client performs and provides the requisite requirements.¹⁸

II

Of the three-step process by which I interact with employers -- the phone calls, the demand letter, and litigation -- most of the amusement, frustration, and shock I experience comes from my phone interactions. Sometimes, perhaps five percent of the time, the wage non-payment arises from a true misunderstanding, and the employer wants to settle the matter as quickly as possible. Usually, however, my client is not that fortunate, and the employer proffers several reasons as to why the worker should not be paid. These excuses often make me almost laugh out loud,¹⁹ pull at my hair in frustration,²⁰ or lay down the phone, stunned.²¹

Although there are employers who give outlandish responses, some of the most popular non-payment excuses I encounter are the following:

“The worker did a bad job.”

“The worker is ‘illegal’” (i.e. is undocumented and

not permitted to work in the United States).

“I’ve never heard of this worker. How do you know he even worked for me?”

“I haven’t been paid for the job.”

“The worker did a bad job” is the most common complaint among employers, and usually they are livid that I am requesting wages for work that was allegedly poorly performed. There are, of course, instances when a day laborer has done sub-par work, and even lied about his level of skill or training for a particular job. The law is quite clear on the matter; unless there is a bona fide disagreement about wages, an employer must pay employees for work performed within two weeks.²² If an employee is doing a poor job, then the employee should be fired. All workers should be supervised, and just as it would be unfair for a receptionist who cannot handle phone calls to be fired without having been paid for the work already performed, it is similarly unfair for a painter who leaves unsightly streaks on the walls to leave a 12-hour day with no money in hand.

Recently, I had an unsatisfied subcontractor case where three of his employees came to CASA after waiting four months for their wages. Juan, Mario, and Alex were good-humored, respectful men. They felt bad for resorting to legal devices because they honestly believed the subcontractor would pay them their \$6,500 wage debt, even though he had strung them along, week after week, promising money at future dates that passed without payment. The men finally grew suspicious when the subcontractor stopped answering their calls, so they came to me almost apologetically but also desperately needing the wages they were owed.

The men showed up on a Thursday, having come from work with plaster and paint splattered on their clothing. Their stories were similar to most of my other clients. Mario is 33 and has a wife and a few young children waiting for him in Honduras. He moved to the States last year so that he could finance his children’s for his/her own books and uniforms. Alex is 34 and one of the savvier workers I have met. He demanded that his employer sign an itemization of the work that would be performed and the agreed-upon wages. Unfortunately, Alex never received or kept a copy of the contract, so his foresight did not pay off. Finally, Juan is 32 and hailed from Mexico. Juan is supporting all his siblings -- and their children — with his \$300 per week average salary. With the exception of that first day, he dressed up when he came to see me, even though it probably meant having to bring a change of clothing with him to work. He had a very developed sense of formality and took pride in doing things properly. I believe that it was also this sense of propriety that made him and the other men wait so long to try to claim their wages through legal means.

The employer, who turned out to be a very reasonable man, suggested my clients and I do a walk-through of the house so we could see how the work was performed. I was mindful of the fact that it made no difference whether the men had painted a

giant “X” on a wall and called it a day — they were to be paid for whatever work they did. I thought, however, that if I could meet the employer face-to-face, I would have better success at convincing him of the legal realities. After walking through the house with the men and hearing from them the different work that was accomplished, I could tell the employer was having a change of heart. He ended up offering a settlement of 75% of the debt. After some deliberation, the men agreed to the settlement, provided that I promise to go out to lunch with them.

While the unsatisfied employer situation is probably the most frequent, it is often coupled with the “worker is illegal” excuse. This argument is a little more complicated because it is sometimes accompanied with threats of calling immigration, but it is not all that difficult to rebut. Each employer has three days from the date of hire to check an employee’s work eligibility.²³ Absent any mitigating fraud on the employee’s behalf, an employer has violated federal law by not obtaining verification of any employee’s ability to work.²⁴ The significant fines for violating the law make it all the more remarkable that employers protest workers’ undocumented status, since they are basically admitting that they knowingly hired a person without work authorization.

Given that legal status does not pertain to wage and hour law, I inform employers that bringing it up is pointless and that I do not even collect that information from my clients. If the employer continues to argue, I phrase my rebuttal in these terms: “You violated federal law when you did not collect my client’s information regarding his ability to work, and you violated Maryland Wage Payment and Collection Law when you refused to give him his wages. There is nothing you can do about the first legal violation, but you are now in a position to ameliorate the second. You should also know that the Departments of Labor and Homeland Security have an agreement whereby Immigration and Customs Enforcement²⁵ will not involve itself in labor disputes.”²⁶ Usually, employers have no counter to that argument and, depending on the employer’s original inclination to pay, I am often able to collect the due wages or at least settle for a portion of them.

The third excuse is one of my favorites and can be disposed of rather quickly. Amazingly, each employer provides such a similar argument that I wonder if there is a common script handed out for subcontractors to read whenever they are called with unpaid wage claims. This is usually the gist of what I hear: “I don’t know [insert client’s name]. How do you know he even worked for me? Hell, why don’t I just come into your office and tell you that I worked for *him* and he owed me for [insert number of days owed]! Any guy can just walk into your office, claim that he has worked for me, and you’ll go representing him? That’s ridiculous.” In response to this argument, I

usually have ready specific details about the worksite, the employer, the type of work performed, or other factual information that would be known only by someone who had performed the labor.²⁷ The employer usually grumbles and may move on to the first or second excuses for not having paid, but sometimes the details are enough to induce a settlement agreement.

Although I have never had such a case, I have often thought about the possibility in which a worker comes in, pretends to have worked at a site where his friend or family member has been employed, and tries to get payment by giving me a completely falsified story. While it is theoretically possible for that to occur, CASA requires workers to perform 30 hours of community service for me to take their case to court -- a strong disincentive for people who would otherwise just be fishing for easy money. Further, there is a safety net of sorts in that employers often do not pay people they have *actually* employed, much less some worker they legitimately never hired. Additionally, in the 13 months that I have been at CASA, I have done intakes with hundreds of clients and can usually tell quite easily when people are lying.²⁸

The fourth employer excuse, “I haven’t been paid for the job,” is the most difficult one I deal with, even though there is no legal ambiguity. Under Maryland law, every worker must be paid within fifteen days of performing work.²⁹ It is therefore immaterial whether or not the employer received, or was denied, expected income. This excuse is the most challenging because the employer, usually a contractor or a subcontractor, literally has no money to pay workers. His revenue sources are so tenuous that if one job does not pay, the employer does not have enough capital to cover other costs, such as labor.

There are no perfect solutions for this problem, although I have found that requesting a payment plan is a good way to determine whether the employer, in good faith, wants to pay off the wage debt. With my client’s permission I often settle for a lower amount of wages contingent on the employer providing between \$100 and \$300 per week, depending on the amount of money owed, in order to make the wage repayment less onerous. This is often a successful way to avoid court, save time, and prevent us from trying to obtain a judgment against an employer who may be judgment-proof.

Ultimately, irrespective of what reasons an employer gives for not paying a worker, I am convinced that the only relevant factors in whether a day laborer will be paid are the employer’s integrity, and the employer’s aversion to being sued.³⁰ The most financially compromised employer will try hard to settle a wage claim if he or she fears the moral or legal consequences of an unpaid wage. In contrast, the most financially solvent employer will hang up on me without compunction if he or she cares little about the difficult life of a day laborer or is indifferent to landing in court.

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to being sued.*

Regardless of how many employers I call, write, or sue, there will always be some who will try different ways to take advantage of their workers. At CASA, we try to implement three strategies to prevent or mitigate the likelihood that workers will be exploited. First, we provide a brief but comprehensive “Know Your Rights” talk, or *charla*, to educate workers. Second, we have created worker centers where employers and employees meet in an organized fashion. Third, we try to employ legislative fixes to common problems that plague the day laborer community.

I believe that one of the more important elements of my job is to give “Know Your Rights” talks to the community. I have a five minute workers’ rights *charla* and an accompanying booklet simply written and illustrated so that uneducated or illiterate workers can understand the bulk of the material. The *charla* involves wage and hour, employment discrimination, and workman’s compensation laws. Although CASA takes only wage cases, workman’s compensation is a huge issue among day laborers: Latinos are hurt and killed on the job at an alarming rate.³¹ Additionally, there is a limited window in which an employee can submit a discrimination claim with the Equal Employment Opportunity Commission, so I feel it is important for workers to understand that issue as well.

The education component of my job is also critical because one way to assist exploited workers is to ensure they have sufficient level of proof to win a civil wage judgment or a criminal theft of services claim. One of the best forms of proof is business records, which for an employee are contemporaneous notes that include one or more of the following: the days and hours worked, the address of the work-site, and the type of work performed. This information is powerful evidence in court since employers often do not have any rebuttal records of their own, even though they are required by law to keep them.

I give my worker’s right *charla* to every client after intake, in the hopes that if my clients are ever owed wages again, they will have a notebook of proof the next time they walk through the door. The *charla* is an imperfect solution to a much larger problem. Workers understand why the information is important but are often too discouraged by their plight in life to bother noting the information every day. After experiencing exploitation at work for months and years at a time, many day laborers have a fatalistic viewpoint and believe that even the best records in the world will not force employers to pay and therefore do not bother keeping them.

As a practitioner interested in motivating day laborers to play a role in the advocacy of their rights, I am torn as to whether I should require information-keeping as a condition for taking a case to court. Many good claims would fall by the wayside if CASA were to initiate that policy, but I also believe that some workers know they can go to CASA with little or no written proof of their hours. Because of this, some workers may

feel no incentive to keep those records. I ultimately want workers to feel a sense of agency and power over their lives, which can be partially accomplished by keeping records. There is one reason, however, that keeps me from suggesting that CASA implement a written-record policy: lack of basic education. Many day laborers are barely able to write or are completely illiterate, so it would be a huge burden -- if not impossibility -- for them to keep track of their hours. These people already feel deep shame about their illiteracy,³² and I would hate to create yet another barrier in their already difficult lives.

The second method CASA uses to prevent exploitation of workers is to organize day laborers and create worker centers. A worker center is a place where day laborers congregate in an orderly fashion so that employers can pick up employees who are qualified in the needed areas without the chaotic clustering occurring on street corners and in Home Depot parking lots around the country. Currently, CASA has four centers around Maryland. These centers provide workers with a safe environment, restrooms, and a barrier from the elements, which is critical during the hot summer and cold winter months. Additionally, employers must give their identification to CASA staff and list their names, addresses, and telephone numbers. The employers write a description of the work to be done, the proffered wage, and a rough approximation of the length of the job. This ensures that unpaid workers are already one step ahead of their unorganized counterparts, for CASA has employer contact information in addition to proof that the employer hired the worker.

Worker centers are also useful tools to organize day laborers; CASA’s community organizers have a captive audience in the mornings when workers are waiting for employers to come. During these times workers are also given *charlas* about health and labor issues, so the centers provide an opportunity to protect workers, organize them, and educate them as well. It is also important to note that worker centers have set wage rates, so there is no race to the bottom. This also empowers workers to decide for themselves important employment priorities. Unfortunately, there is currently no worker center in Baltimore, although we are working hard to open one by the end of 2007.

Arguably, the broadest yet most difficult method for protecting workers is to create legislative fixes. Currently, CASA is determining which laws need to be strengthened or created to ensure that workers will be paid their owed wages. Two of our top legislative goals are creating laws that allow for joint employer liability and strengthening the criminal penalties for non-payment of wages.

At present, workers are often hampered in an unpaid wage claim by low-level subcontractors who, as explained above, may not have sufficient capital to cover expenses whenever a single client fails to pay for services rendered. If, however, the law were to impose joint liability to contractors for non-payment of wages, workers would be able to collect from their direct

employer, the subcontractor, or from the larger, often more solvent contractors. Currently, contractors can avoid wage payment claims if they did not directly supervise the work of the unpaid day laborer. This creates an incentive for contractors to shield themselves from being sued by keeping a distance between themselves and the work performed by sub-contractors. If there was broader joint employer liability, contractors would take a greater interest in the work performed and would have incentive to ensure that all workers are paid, even those hired by subcontractors.

Enhancing criminal penalties for wage theft would also be a useful weapon in combating the problem.³³ Currently, under Maryland's Theft of Services law, non-payment of wages is a felony, but the law is relatively weak and narrow compared to other state statutes. The Maryland Theft of Services statute reads:

- (e) A person may not obtain the services of another that are available only for compensation:
- (1) by deception; or
 - (2) with knowledge that the services are provided without the consent of the person providing them.³⁴

Given that the burden of proof is higher in criminal cases, and that Maryland's statute does not shift the burden of proof to employers, many workers are unable to overcome evidentiary hurdles.³⁵ If the burden of proof shifted to employers in the absence of federally-required record keeping, criminal prosecution of wage and hour cases would undoubtedly be more attractive to state attorneys.

Ultimately, all legislative fixes take a great deal of time, money, and effort, especially when some state legislators are hostile to the idea that all workers, regardless of legal status, should be protected by the law. CASA's legal and organizing departments are joining with other groups to help pass statutory improvements, but the road may be a long one.

IV

I am often asked why I, a seemingly white, middle-class American, have dedicated my career to low-wage worker issues. Clients also often ask where I learned my Spanish because I have a clear accent that gives away no hint of my American background. The answer is surprising for both groups, for I, despite my pale skin, am a first-generation American of immigrant Mexican parents. My older sisters were born in Mexico and my family moved to California a few weeks before I was born. There I was educated about the finer points of stereotypes and racism — not by my parents, but by my classmates and fellow citizens. Although there are many Latinos in San Diego, I witnessed significant bigotry, yet I never experienced any of it. In school, people bad-mouthed Latinos but would turn to me and say that I was exempt from their diatribe because I was “different,” but they could not explain how. I learned Spanish before I learned English, but that made me cute and exotic, while darker-skinned schoolmates were weird and regarded with contempt for speaking another language in public. These experiences convinced me of the necessity of my work, and each eyebrow raised in surprise when I disclose that I am Latina feels like a small victory. Now...if only I could convince all the day laborers to write down their hours.

ENDNOTES

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¹ Border Protection, Anti-Terrorism, & Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. (2005).

² Low-income undocumented immigrants do not have much access to preventative health care because they do not qualify for most government benefits. Also, although they are allowed to receive a primary education, in most states undocumented students are required to pay out of state tuition if they wish to attend college, and they are not eligible for financial aid. In November 2007, Congress will vote upon a bill, the Development, Relief, and Education for Alien Minors (DREAM) Act, which will allow a pathway to legalization for undocumented youngsters who were: 1) brought to the United States as children, 2) have been accepted into college or the U.S. armed forces, and 3) have no criminal record. Additionally, almost all states require proof of legal status in order to obtain driver's license (although Maryland is one of the few exceptions). This means that there is no government database that contains the contact information for millions of undocumented immigrants.

³ Craig J. Regelbrugge, Senior Director of Government Relations, American Nursery & Landscape Association, National Co-chair, Agriculture Coalition for Immigration Reform, American Agriculture and Immigration Reform: An American Perspective, Address at the USDA Agricultural Outlook Conference (Mar. 1, 2007).

⁴ According to a report issued by the President's Counsel of Economic Advisors, “Our review of economic research finds immigrants not only help fuel the Nation's economic growth, but also have an overall positive effect on the income of native-born workers...In 2006, foreign-born workers accounted for 15% of the U.S. labor force, and over the last decade they have accounted for about half of the growth in the labor force... Immigrants increase the economy's total

output, and natives share in part of that increase because of complementarities in production. Different approaches to estimating natives' total income gains from immigration yield figures over \$30 billion per year. Sharply reducing immigration would be a poorly-targeted and inefficient way to assist low-wage Americans.” Executive Office of the President, Counsel of Economic Advisors, *Immigration's Economic Impact*, 1, 4 (June 20, 2007).

⁵ A 2004 survey conducted in the suburbs of Washington, D.C. found that 58% of workers had been denied their wages at least once, while another 57% reported being paid less than the agreed upon wage. Abel Valenzuela Jr., Ana Luz Gonzalez, Nik Theodore & Edwin Melendez, *In Pursuit of the American Dream: Day Labor in the Greater Washington DC Region*, 1, 14 (UCLA Center for the Study of Urban Poverty, 2005). See Jennifer Gordon, *Campaign for the Unpaid Wages Prohibition Act: Latino Immigrants Change New York Wage Law*, 2-3 (Carnegie Endowment Working Papers No. 4, 1999) for an account detailing the passage of a strong wage and hour law in New York, the author notes that the exploitation of immigrant workers occurs not only in New York, where her campaign was launched but also in “the outskirts of Los Angeles, Dallas, Chicago, Washington, D.C., and elsewhere around the country...”

⁶ Although Legal Aid usually cannot take undocumented clients, they are able to make an exception for certain narrow issues, such as domestic violence.

⁷ CASA of Maryland was founded in 1985 as Central American Solidarity Association but has since expanded its mission to reach all immigrant communities, as well as low-wage workers.

⁸ According to the Migration Policy Institute “Between 2000 and 2005, the foreign-born population in Maryland changed from 512,040 to 641,373, representing a change of 25.3 percent [...] contrasting the national immigrant population, which...] grew from 30,760,065 to 35,689,842 (16.0 percent) between 2000 and 2005. [...] Of the total foreign-born population in Maryland in 2005, 15.0 percent were from Africa, 33.0 percent from Asia, 13.2 percent from Europe, 37.3 percent from Latin America [...]” Migration Policy Institute,

2005 American Community Survey and Census Data on the Foreign Born by State, Maryland, available at <http://www.migrationinformation.org/datahub/state.cfm?ID=MD> (last visited Oct. 15, 2007).

⁹ I will use the male pronouns when the situations I describe apply almost unambiguously to men.

¹⁰ Under Maryland law, an employee has 3 years in which to file an unpaid wage claim. MD CODE ANN., LAB. & EMPL., §3-501 *et seq.* (2007).

¹¹ Translation: *My boss does not want to pay me.*

¹² All clients' names have been changed to protect their privacy.

¹³ The record-keeping requirement is mandated by the Immigration Reform and Control Act (IRCA). Immigration and Control Act of 1986, §§ 101, 201, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in various sections of 8 U.S.C.).

¹⁴ Pablo's story has quite an unexpected ending. Despite his signature on the cash disbursement receipts, Pablo was resolute that his accounting was correct and that he had not been paid all the money. We briefly left the employer meeting and discussed the issue for a long while, with Pablo deciding that he would not settle for less than \$500. I explained to Pablo that if we could not settle, I may decide not to take his case to court, or at least not for more than \$175 since his unique signature appeared on all the cash receipts, and he did not believe they had been forged. Pablo, who had been educated up to the 3rd grade, remained firm, however, not trusting the math the employer and I had used, and believed that there was something intangible going on, and would not yet back down from his \$500 offer. I felt like I had no choice but to propose his settlement, but I knew the employer would laugh in my face or angrily leave over what seemed like a preposterous offer. What happened next shocked me, and continues to be a source of humor. I told the employer we would settle for \$500, and he quickly agreed, pulled out a wad of cash from his pocket, hurriedly signed a receipt for the payment, and went on his way. I was stunned, and turned to see a smiling Pablo who had a look of vindication on his face. As I later found out, the employer had his hands in politics and was not willing to risk a public shaming over \$500. To my great joy, I have not received any more cases against this employer, and hope that his more public persona motivates him to be a more conscientious employer.

¹⁵ In April of 2007, CASA implemented a limited retainer whereby we make phone calls and write demand letters on our clients' behalves, but only take cases to court where clients have provided us with specific information, discussed *infra* fn. 17. Additionally, we also require that a client perform 30 hours of service for CASA in exchange for litigating a case. Service can be performed by gathering evidence for a case, making phone calls to the community about upcoming CASA events, participating in mobilizations, community meetings, and other general volunteer help that comes up. The service requirement ensures that the client is committed to his or her case, and also benefits the client by educating him or her about worker rights, and possible solutions that can help the immigrant community.

¹⁶ Sometimes clients come in with other information, such as license plate numbers, however they not very helpful. I have used a license plate information database over a dozen times and have never retrieved accurate information. At first I believed my clients were providing incorrect plates, but then I submitted a license plate number I had personally noted, and it was not in the system.

¹⁷ I am almost four times more likely to recover money with a phone call than I am after a demand letter. Unfortunately, almost half of my clients do not have an employer's address, or have an incorrect address. Luckily, many employers have other legal matters against them, so apart from using rudimentary Google searches and Yellow-page listings, I look up names in the Maryland Case Search database and am often able to find current contact information, as well as a physical description. If, however, I am unsuccessful in finding an address, and the client is similarly unable to do so, I am forced to close the case since I cannot send a demand letter, nor can I sue an employer without a current address.

¹⁸ CASA requires the following information: 1. Employer's full name; 2. employer's address; 3. exact dates and hours worked; 4. agreed-upon wage; 5. amount of wages owed; 6. description of the work performed; and 7. address of one or more of the worksites (in addition to the 30 hours of volunteer service mentioned above).

¹⁹ In one case, an employer alleged that my client and her husband, who were both employees, created a fictitious third person, collected paychecks on behalf of that person, and created another bank account to cash those checks. There were, however, multiple witnesses to attest to the fact that a third person was constantly working alongside my client and her husband, and that she did, in fact, exist.

²⁰ In another case, an employer seemed willing to pay my clients their unpaid wages, however disastrous things kept occurring. First, her vacant yet almost fully rehabbed house was broken into, vandalized, and all the new appliances were stolen. Soon thereafter, the house was broken into again, and this time the

assailants turned on the water valve and by the time the house was entered into two days later, it had flooded completely and required extensive repair. The insurance company, sensing fraud, took a long time to pay out the policy. Ultimately, the employer did receive her money and gave my clients their wages.

²¹ In my first month at CASA, before I developed thick skin, an employer screamed at me during a run-of-the-mill phone call accusing me of not being a real lawyer, and when I calmly explained that I was, he asked me where I went to college and law school. I maintained my cool and disclosed where I received my education, and his reply was something similar to "your parents must be really f***** disappointed that they wasted all that money on your education just so you end up a piece of s*** non-profit. Go to hell, eat s***, and die. I'm not paying a goddamn penny." I have since developed a sense of humor about vituperative defendants, but every so often I am taken aback by their indecency.

²² LAB. & EMPL., §3-501 *et seq.*

²³ Verification of Employment Eligibility, 8 C.F.R. § 274a.2(b)(1)(ii) (2007).

²⁴ Immigration Control and Reform Act of 1986, Pub.L. 99-603, 100 Stat. 3359.

²⁵ Immigration and Customs Enforcement, formally Immigration and Naturalization Service.

²⁶ Memorandum of Understanding Between the Immigration and Naturalization Service Department of Justice and the Employment Standards Administration Department of Labor, (Nov. 25, 1998), available at <http://www.dol.gov/esa/whatsnew/whd/mou/nov98mou.htm#toesa> (last visited Oct. 15, 2007).

²⁷ Once, in response to an employer's suggestion that the client had never worked for him, the client offered as proof that the employer was short, overweight, and had bad breath such that he constantly chewed gum. I did not mention the first two descriptions to the employer, but the gum-chewing was a clincher.

²⁸ The question that is most problematic is whether or not the client was fired. Before posing the question, I always emphasize that the answer makes no difference to the claim, but that I want to know the factual situation so I can talk intelligently about it to the employer. This preface is sometimes not enough, however, and clients believe they are somehow worse off if they were fired. If a client hesitates, fidgets, looks away, or looks down while saying he or she quit, I stress how important it is for me to know the truth since the employer is certainly aware of it. That explanation usually causes a client to apologize and tell me the actual circumstances surrounding his or her departure. This type of lie does not make me upset.

If, however, there are internal inconsistencies with a story and I catch a client being untruthful in regards to the number of hours worked, or wages owed, I stop intake, politely apologize to worker, and tell him or her I will not take the case. This has only happened to me twice, but I feel very strongly about the fact that I provide a service in a community where there are more workers in need of my help than I am able to handle, so I am unwilling to tolerate any potentially untruthful workers. I also do not want to risk creating a bad reputation among employers, and perhaps more importantly, I am not willing to be known in the day laborer community as someone who will take a claim even if a client has lied.

²⁹ MD CODE ANN., LAB. & EMPL., § 3-502(a)(1)(ii) (2007).

³⁰ Some employers do not care whether they are sued, or whether they have a judgment against them. I have one particularly egregious employer who not only owed 5 of my clients, but has been sued over 150 times under various causes of action.

³¹ According to an AFL-CIO study, Latinos are at high risk for workplace injury and death. The organization notes that "workplace deaths for Latino and immigrant workers [have] sharply increased. In 2004, the fatality rate among Latino workers was 19 percent higher than the fatal injury rate for all U.S. workers. At the national level, fatal injuries to immigrant Latino workers increased 11 percent from 2003 to 2004." DEATHS ON THE JOB INCREASE FOR THE FIRST TIME IN A DECADE STATE BY STATE AND NATIONAL NUMBERS ON JOB DEATHS AND INJURIES INCLUDED IN NEW REPORT (April 26, 2006), available at <http://www.aflcio.org/mediacenter/prspmt/pr042606.cfm> (last visited Oct. 15, 2007).

³² I have some clients who have received no schooling at all, and cannot even write or sign their names.

³³ For a comprehensive discussion on the use of theft of services laws in unpaid wage claims, see, Rita J. Verga, *An Advocates Toolkit: Using Criminal "Theft of Service" Laws to Enforce Workers' Right to be Paid*, 8 N.Y. CITY L. REV. 283 (2005).

³⁴ MD CODE ANN., CRIM. LAW, § 7-104, *et seq.* (1999).

³⁵ Additionally, former Governor Robert Ehrlich defunded Maryland's office of Wage and Hour, which was charged with investigating and prosecuting unpaid wage claims. The current Governor, Martin O'Malley, is taking steps to reopen the office.

“WHITE LATINO” LEADERS: A FOREGONE CONCLUSION OR A MISCHARACTERIZATION OF LATINO SOCIETY

By Eric M. Gutierrez *

Am I white? My personal inquiry into race begins with a school picture of a six-year-old boy. My dark brown hair, parted to one side, falls impishly over half-cocked eyebrows. My eyes, more almond-shaped than oval, are a murky blue with green speckles. My nose, a thicker version of the traditional aquiline Roman contour, fades into a tiny bulbous tip. My smile, close-mouthed and askance. My skin, white, even with a faded summer tan.

If I am white, whether I have claimed it or not, has it afforded me the privileges of a racial hierarchy skewed towards the dominant white culture? Moreover, has my apparent skin color placed me in a leadership role in the Latino community based merely on society’s perception of what that race is? Will that perception imply that I will turn my back on the Latino community that raised me, opting instead for the spoils of an influential white power structure?

In this article I consider the arguments presented by Ian Haney López in his essay entitled, “White Latinos”¹ and analyze the validity of his statements on white Latino community leaders. I examine and challenge López’s assertions regarding the characterization of Latino leaders, generally; and his description of an emerging Latino culture identified as “Mexican Americans,” the “Brown Race,” and the “New Whites,” specifically.

The most crucial assertion by López is that white Latino leaders are the most prevalent and influential in Latino society and that by emphasizing their whiteness as a key component of their identity, they facilitate the mistreatment of Latinos and buttress social inequality. Although I agree with many of López’s assertions about white Latino leaders, I believe the aforementioned assertion is a mischaracterization of Latino leadership and neglects to consider the cultural values from which these leaders arise.

WHITE LATINO LEADERS

López initiates his argument by sidestepping the contentious issues of what constitutes a leader and what Latino identity entails. By way of hyperbole, he states that “most of those who see themselves as leaders of Latino communities accept or assert whiteness as a key component of their identity.”² Further, he

argues that this assertion of whiteness “facilitates the mistreatment of Latinos and buttresses social inequality.”³

Conceding that race is not easily fixed or ascertained, López contends, “Latino leaders are often white in terms of how they see themselves and how they are regarded by others within and outside of their community.”⁴ Because the concept of race is a social construct, López outlines the key criteria for determining “whiteness,” including: 1) class; 2) education; 3) physical features; 4) accent; 5) acculturation; 6) self-conception; and 7) social consensus.⁵ The amalgam of racial criteria that equates a Latino leader with “whiteness” is made more insidious because the existence of such criteria is not dispositive: many Latino leaders are considered white because they believe themselves to be or are understood

to be.⁶

Ironically, López’s analysis of race theory in America does not address the historical context of Latino identity. By omission, he denies the preexistence of the Spanish caste system, its influence on the Latino community and its leaders, and how the racially mixed learned to thrive amid social, racial and cultural ambiguity.

The Spaniards reinforced their cultural ideals by applying a “white veneer” to the ancient Aztec goddess, Tonantzin, and the legend of the Virgin of Guadalupe.⁷ The fact that the Spaniards historically were using skin color or the minutia of sanguinity analysis to keep themselves at the top of the “racial food chain” years before the advent of slavery in America does not discredit López’s theory of society’s premium on “whiteness.” It does, however, raise the question of whether current Latino leaders identify their whiteness on the majority template that López posits or whether they are merely acting on internal cultural mandates cast centuries ago.

Some scholars point to the plight of the multi-cultural Moors as the touchstone for Spain’s denigration of all non--white peoples:

The fact is, racism grew out of a system that was established in England and parts of Europe during the Middle Ages, when Africans/Black Moors began to fall out of favor from being a highly respected and accomplished people, to being reduced to slavery after Ferdinand and Isabella retook Spain from the Black Moors and Arabs.⁸

López never dissects the patchwork of racial criteria that he claims most Latino leaders emerge from, as a means of claiming

whiteness and privilege. He offers no analysis, for example, of the effects of wealth or social status in conjunction with racial identity (a key element of Spanish-American culture) or of the cultural stratification of indigenous groups that may have mirrored that of the Spanish or white Americans. In short, López arrives at a sense of “whiteness” born out of almost no connection to our past and no attempt to correlate its prominence to the evolution of our culture

MEXICAN-AMERICANS

After addressing the “white dilemma,” López pursues a deconstruction of the Mexican-American polity that historically attempted to integrate itself into the white mainstream and legitimize its place in American society. López’s argument focuses on several points: 1) Mexican immigrants, after resisting assimilation into white American society, forge a new social identity (Mexican-American), galvanizing their ranks by claiming “quintessential” American membership; 2) Mexican-Americans employ the “other white strategy,” and insist that they are racially white; 3) Mexican-Americans are polarized by their claims of whiteness into two distinct groups; “white” Mexican-Americans reap the benefits of the dominant class while “darker” Mexican-Americans are relegated to the lowest rung on the racial ladder; 4) Mexican-American community leaders tend to be white; and 5) Mexican-American leaders that claim a white identity also hold a corollary belief that non-citizens and non-whites are beyond the realm of social concern or responsibility.⁹

The real evil, according to López, is not that a few Mexican-American leaders, regardless of their loyalty to the culture, claimed a white identity and exploited themselves at the detriment of other Mexican-Americans, but that in principle, “the assertion of white identity is at root an attempt to locate oneself at or near the top of the racial hierarchy that forms an intrinsic part of U.S. society.”¹⁰ López asserts that “selling out” adds legitimacy to the doctrine of white superiority and turns Mexican-Americans on each other.¹¹

López cites the overemphasis on citizenship (tantamount to societal acceptance) and complicity with white supremacist

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ideas regarding black inferiority, as the invidious fallout of Mexican-American leaders’ continual claims of whiteness as a means of belonging to society’s dominant class.¹² López categorizes this kind of behavior as a “Faustian bargain.”¹³

A modern example of López’s observation of Mexican-American leaders claiming whiteness to exploit their social

dominance and avoid discrimination is the emergence of “white Latino” organizations, like the National Association for the Advancement of Caucasian Latinos (NAACL). NAACL identifies itself as an organization “dedicated to reversing the harmful effects of governmental and media stereotyping of Latinos.”¹⁴ According to their website, they “especially represent the interests of the at least 16,907,850 Caucasian Hispanics in America as measured by the 2000 Census.”¹⁵ NAACL’s website outlines the organization’s rationale:

Hispanics are not a racial group. The word Hispanic refers to national origin. Hispanics can be of any race. Many millions of Hispanic Americans are descended from Spain and other European countries. Like their ancestors, these Hispanics are white.

The common surnames and language of Hispanics do not make them “all the same” any more than the Anglo last names of Bill Clinton and Jesse Jackson, make them members of the same race, ethnicity, or socioeconomic class.¹⁶

The NAACL website further delineates the group’s political agenda and voices its dissatisfaction with Latino community leaders:

The NAACL fills a void left empty by other “Hispanic” organizations and leadership who, despite their pretenses, do not and never have represented our interest. Our rights have not been advanced by our journey from the white-majority to the “Hispanic-minority.” To the contrary, the polarization created by the “black, white, or Hispanic” myth has sabotaged our assimilation into mainstream socioeconomic prosperity.¹⁷

López’s point regarding the ineffectual legal strategy Mexican-Americans employed to have themselves declared legally white is well-taken, but its true effect on the Latino experience or Latino leadership is never explored.¹⁸ In fact, some scholars suggest that although Mexican-Americans were considered legally white, they were socially non-white; thus, the law made little difference because it established only empty formal categories filled in by discriminatory practice.¹⁹

THE BROWN RACE

After López’s next argument focuses on the rise and fall of the Chicano Movement and its emphasis on challenging the notion of a white Latino identity and replacing it with a new “brown identity.”²⁰ As López observes, during the Chicano movement, broad sectors of the Mexican community came to accept and assert the idea that they were proud members of a brown race. In the intervening years, this [movement] waned, [and] today members of the [Latino] community in the United States are evenly split, with roughly half claiming they are white, and the other half insisting otherwise.²¹

The downfall of the Chicano Movement, according to López, was the tendency to define brown identity in terms of nineteenth-century ideas that tied race to ancestry, culture, group destiny, and patriarchal gender roles.²² In addition, Chicano Movement leaders struggled with how to reconcile its Marxist ideological undercurrents at a time when socialism was seen as an aberration.

Some scholars even argue that characterizing the Chicano Movement as problematic, as López implies, does nothing but denigrate its cultural and social importance to the Latino struggle:

By misrepresenting the multiple ideologies that informed the Chicano movement as a single current of reactionary cultural nationalism or “identity politics” riddled by sexism, internal dissension, “anti-Americanism,” and even “reverse racism,” revisionist historians (some of Mexican-American descent) have deprived future generations of a complete portrayal of Chicano/a activism in one of the more revolutionary periods in American history. The reality of the *movimiento* between the crucial years of 1965 and 1975 was one of great intellectual ferment in which competing political agendas vied for the attention of ethnic Mexican youth.²³

Contrary to López’s characterization of the Chicano Movement’s defining brown identity in terms of anachronistic “patriarchal gender roles,” some scholars have viewed the ideology as carving the way for a new form of women’s liberation: Chicana feminism.²⁴ Faced with the difficult task of negotiating these various ideological currents and challenging traditional patriarchal structures, an emergent Chicana feminism incorporated analysis of political economy, imperialism, and class relations as they related to issues of gender and race.²⁵ Throughout the late 1960s and early 1970s, Chicana feminists developed sophisticated critiques of sexism and patriarchy, often linking their agendas to those of women in other countries.²⁶

One criticism of López’s “brown race” analysis is that it relies too heavily on his reading of assimilationist strategies used by middle-class associations from the 1940s and 1950s. López’s analysis also ignores the impact of labor history from the 1880s through the 1950s, fueled by Mexico’s national imagery of the indigenous/mestizo identity, and not the white Spaniard.²⁷ López assumes that Latino claims to whiteness were some sort of cruel Hobson’s choice or worse, a form of cultural ennui; when in fact they may have been a sign of the group’s coming to terms with the American legal landscape:

The League of United Latin American Citizens (LULAC) has been the primary organization employed by historians, Mario García (1989) in particular, to portray the acceptance of assimilationist and integrationist agendas within the Mexican-American community. However, as a middle-class organization, LULAC has represented the political and economic interests of a

very thin slice of the Mexican-American population.... [f]aced with two racial choices (and all the legal, political, and economic consequences attached to each), to interpret the claim of being “white” rather than “black” in a courtroom is not evidence that a local community of Mexican-Americans thought of themselves as white but rather that they understood how the system worked.²⁸

THE NEW WHITES

In López’s final section, “The New Whites,” he echoes the sentiments of popular, African-American comedian Chris Rock’s musing on the premium society places on being white:

There ain’t no white man in this room that will change places with me --- and I’m rich. That’s how good it is to be white. There’s a one-legged busboy in here right now that’s going: “I don’t want to change. I’m gonna ride this white thing out and see where it takes me.”²⁹

López paints an idyllic picture for the “growing numbers of minority individuals — those with fair skin, wealth, political connections, or high athletic, artistic, or professional accomplishments — [that] can virtually achieve a white identity”; while whole populations of people categorized as non-white “remain beyond the care of the rest, impoverished and incarcerated, disdained and despised, feared and forsaken.”³⁰ According to López, “the closer one comes to being white, the less susceptible one is to the gross mistreatment and disregard accorded minorities, and the more access one has to the material rewards and positive presumptions reserved for our nation’s racial elite.”³¹ “As a result,” he writes, “two-thirds of all recent immigrants — the vast majority of them from Asia and Latin America — identify themselves as white.”³² Half of the Latino population does the same.³³ Claiming to be white achieves measurable advantages for some individuals and communities, but these advantages come at a steep price for others.³⁴

López’s answer to this cultural polemic is for Latinos to claim a “non--white identity as a means of fostering political opposition to racial status inequality.... [and] not pine for the privileges of whiteness, but [] embrace a political commitment to end racial hierarchy.”³⁵

The difficulty with López’s normative statement is not that it lacks vision, but that it lacks concrete instructions on how to achieve it. For example, how can a Latino, light or dark skinned, subvert the majority’s premium placed on white identity? How feasible is it to assume that by eschewing a white identity, Latinos will necessarily embrace a political commitment to end racial hierarchy? Finally, how reasonable is it to think that by simply cutting out race considerations altogether, Latinos will be able to forge a new identity as “non-whites” in a racially polarized society?

The difficulty with López’s normative statement is not that it lacks vision, but that it lacks concrete instructions on how to achieve it.

CONCLUSION

It is no secret that the Latino culture, like most cultures born out of a mixture of races, ethnicities, classes, and social identities, has struggled with the predominance of a “white” hierarchy and the degradation of an oppressed indigenous heritage. This scenario has played itself multiple times in nearly every Latin-American country and still resonates in the modern struggles of indigenous peoples around the world.

The attempt by certain Latino leaders to use this cultural paradigm to their advantage is not a new phenomenon nor is it particularly American. Many of the ruling families of Mexico are descendants from white Spaniards, and their lineage is not happenstance; it is the result of strict adherence to intermarriage with other whites, and the promulgation of a “white superiority” complex etched out centuries ago when the Spaniards conquered the Aztecs.

López’s assertion, that the preeminence of white Latino leaders facilitates the mistreatment of Latinos and buttresses

social inequality, may be the consequence of social rigging, but it overlooks a key cultural mandate handed down from generation to generation: the primary importance of family loyalty and the welfare of the collective community. I maintain

that it is this value, the foundation of Latino society in the United States, which takes precedence over any individual gain that might be had at the expense of the community. Whether future Latino leaders can make that cultural connection or assert their leadership without necessarily oppressing other community members as “white Latinos” is yet to be seen.

We are a product of our past — but our future is still at hand. As the Latino community increases in numbers and political power, its leaders will continue to face difficult struggles such as the temptation to use that power for self-aggrandizement. Perhaps the demise of the white Latino leader can come only at the restructuring of a social power base that makes room for all Latinos, white or otherwise.

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ENDNOTES

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¹ Ian Haney López, *White Latinos*, 6 HARV. LATINO L. REV. 1 (2003).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ López, *supra* note 1, at 5.

⁷ See generally Terry Rey, *The Virgin’s Slip Is Full of Fireflies: The Multiform Struggle over the Virgin Mary’s Legitimierende Macht in Latin America and Its U.S. Diasporic Communities*, 33 U.C. DAVIS L. REV. 955 (2000).

⁸ Paul Barton, *A Response: PBS’s Race: A History Of Racism* (May 4, 2003), available at <http://www.raceandhistory.com/historicalviews/2003/race.html> (last visited Oct. 12, 2007).

⁹ López, *supra* note 1, at 2-3.

¹⁰ López, *supra* note 1, at 3.

¹¹ López, *supra* note 1, at 3.

¹² López, *supra* note 1, at 3.

¹³ López, *supra* note 1, at 3.

¹⁴ The National Association for the Advancement of Caucasian Latinos, available at <http://whitehispanics.com> (last visited Aug. 14, 2007).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ See, e.g., *In re Rodriguez*, 81 F. 337 (D.C. Tex. 1897); *Hernandez v. Texas*, 347 U.S. 475 (1954).

¹⁹ See generally Ariela Gross, *Texas Mexicans and the Politics of Whiteness*, 21 LAW & HIST. REV. 195 (2003).

²⁰ López, *supra* note 1, at 4.

²¹ López, *supra* note 1, at 4.

²² López, *supra* note 1, at 4.

²³ *Id.*

²⁴ See Jorge Mariscal, *Left Turns in the Chicano Movement, 1965-1975*, MONTHLY REV., July-August 2002, available at http://findarticles.com/p/articles/mi_m1132/is_3_54/ai_89830891 (last visited Oct. 15, 2007).

²⁵ *Id.*

²⁶ *Id.*

²⁷ Mary Romero, *Brown is Beautiful*, 39 LAW & SOC’Y REV. 211, 228 (2005).

²⁸ *Id.* at 228-229.

²⁹ MICHAEL K. BROWN, ET. AL., *WHITEWASHING RACE: THE MYTH OF A COLOR BLIND SOCIETY* 34 (Univ. of Cal. Press 2003).

³⁰ López, *supra* note 1, at 5.

³¹ López, *supra* note 1, at 5.

³² López, *supra* note 1, at 5.

³³ López, *supra* note 1, at 5.

³⁴ López, *supra* note 1, at 5.

³⁵ Ian Haney López, *White Latinos*, 6 HARV. LATINO L. REV. 1 (2003).

EQUAL MARRIAGE RIGHTS FOR TRANSGENDERED INDIVIDUALS

By Parker Theoni*

The prevailing view on marriage is premised on a binary conceptualization of the sexual characteristics of the two adults involved. This approach is typified by the Defense of Marriage Act, passed by the U.S. Congress in 1996, which limits marriage to the legal union of one man and one woman for the purposes of federal law.¹ Considering the medical facts about this topic, however, it becomes apparent that there are a plethora of scenarios where two consenting adults who wish to be married do not fit into the categorically binary definition of marriage between a man and a woman.² Just as in the 2004 case *Deane v. Conway*, where nine same-sex couples and a man whose partner had recently passed away unsuccessfully challenged a Maryland law which denied same-sex couples the right to marry,³ transsexual or transgendered individuals could take issue with being precluded from marriage on the basis of sex. The scarcity of these challenges most likely stems from the unfortunate consequences of a history of social and official discrimination and isolation severe enough to keep citizens from coming out of the woodwork.⁴ This article analyzes the Maryland Family Law's restriction on the marriage rights to transgendered individuals.

SEX AND GENDER

For the purposes of this article, the term "transgender" means having personal characteristics that transcend traditional gender boundaries and corresponding sexual norms.⁵ The traditional binary model of sex and gender, emerging from the Middle Ages, shoe-horns individuals into the categorical role of "male" or "female." During those early times, intersex individuals were forced to choose one of the two established gender roles, with the penalties for transgression being as serious as death.⁶

Medical experts today recognize that many factors contribute to the determination of an individual's sex, including the presence of sexual organs, facial and chest hair or breasts, "sexual identity (one's own sense of one's sexual identity), gender identity (the gender society would attribute to an individual), and gender role (the extent to which one chooses to live in one's self-identified sex)."⁷ While most individuals do not find any inconsistencies between these factors in their identification as a male or female, there is some ambiguity

between these factors for transgendered individuals and others.⁸ The relationship between sex and gender is thus not always a binary concept limited to all male or all female.⁹ Neither are the terms "sex" and "gender" always synonymous; "sex" refers to one's anatomy and biological function in reproduction whereas "gender" refers to psychosexual individuality or identity.¹⁰

NON-CONGRUENT SEX CHARACTERISTICS

The initial development of a fetus is asexual, followed by the formation of rudimentary sexual organs based on the presence or absence of a Y chromosome.¹¹ When the sexual development of the fetus is changed or interrupted, people are born with sexual features that are either ambiguous (inconsistent with either "male" or "female" characteristics) or incongruent (inconsistent with their assigned sex).¹² Doctors in the past commonly believed that a person was psychosexually neutral at birth and that the development after birth was dependent on the appearance of the person's genitals.¹³ The medical community no longer accepts this view, and many researchers believe that a person's brain differentiates in utero to one gender or the other.¹⁴ This offers a "biological explanation for transsexualism - the brain has differentiated to one sex while the body has differentiated to another."¹⁵

At ages as young as three or four years old, many transsexual individuals may begin to believe they have grown up with the wrong genitalia and proceed to rebel against the social order imposed upon them, refusing to wear "appropriate" clothes or participate in activities associated with their gender.¹⁶ Even so, "the official designation of a person as male or female usually occurs at or immediately after birth, and is often based on the appearance of the external genitalia."¹⁷

Transgendered individuals who wish to bring their sex characteristics into alignment with either the male or female categories have limited options. These include psychotherapy, living as a person of the assigned sex, hormonal treatment, and sex reassignment surgery.¹⁸ "Estimates of the number of intersexed individuals vary considerably, from 1 per 37,000 people to as high as 1 per 2,000 people."¹⁹

Regardless of the nature of an individual's inconsistent or ambiguous sex characteristics, and regardless of the treatment they may undergo, a transgendered individual may one day wish

Regardless of the nature of an individual's inconsistent or ambiguous sex characteristics, and regardless of the treatment they may undergo, a transgendered individual may one day wish to make a lifelong commitment to another consenting adult and enter into the union of marriage with that adult.

to make a lifelong commitment to another consenting adult and enter into the union of marriage with that adult. Although the Maryland Family Law currently burdens, arguably to the point of preclusion, transgendered individuals' marriage rights, legal discrimination based on sex is forbidden by Maryland's state constitution.²⁰

FAMILY LAW AND EQUAL RIGHTS IN MARYLAND

While states have approached marriage issues in a variety of ways, from banning same-sex marriages by constitutional amendment to finding prohibitions on same-sex marriage to violate a number of constitutional provisions, the best analysis of transgender marriage rights in Maryland rests on the application of the state's Equal Rights Amendment (hereinafter "ERA"). By avoiding the issue of fundamental due process rights to marriage and privacy,²¹ and by avoiding application of the rational basis standard of review, courts in Maryland leave the decision to usurp the ERA to the people through a constitutional amendment. Such actions have failed to pass through the legislative branch.²²

The ERA, passed by the legislature and ratified by voters in 1972, became Article 46 of the Maryland Declaration of Rights and states that "[e]quality of rights under the law shall not be abridged or denied because of sex."²³ The historical denial of equal rights for women preceding the ERA reveals the basic principle of the ERA; sex is not a permissible factor in determining legal rights.²⁴ The ERA recognized that preserving the status quo could mean stigmatizing a class of people based on mistaken reliance on internalized stereotypes rather than on medical facts.²⁵ Maryland's ERA may have mistakenly internalized the binary notion that sex is limited to "male" and "female."²⁶ But without a doubt, the concept of sex incorporates, if not turns on, gender identity.²⁷

Under the ERA, sex- and gender-based classifications are considered suspect, subject to strict scrutiny.²⁸ The Maryland Court of Appeals initially interpreted the language of Article 46 as clear and unambiguous.²⁹ Since that point, the court has stated, "because of [Article 46], classifications based on gender are suspect and subject to strict scrutiny."³⁰ While this standard "flatly prohibits gender-based classifications, absent substantial justification,"³¹ the court has clarified that the ERA forbids the determination of rights *solely* on the basis of one's sex.³²

Maryland Family Law § 2-201, however, states that "[o]nly a marriage between a man and a woman is valid in this State."³³ To the extent that § 2-201 is intended to benefit men and women, and in effect primarily benefits only men and women, it imposes some additional burden, inconvenience and expense to transgendered individuals by forcing them to "pass" as a man or a woman in order to reap the benefits of marriage. The ERA,

however, mandates that transgendered individuals be granted the right to marry a consenting individual of their choice because classifications based on sex are considered suspect and thus subject to strict scrutiny, and because § 2-201 is a sex-based classification on its face. Section 2-201 is a sex-based classification on its face because it grants different rights to men and women, and it burdens the marriage rights of transgendered individuals. In addition, laws precluding transgendered individuals from marrying a consenting adult are not narrowly tailored to serve a compelling government interest. Just as a statute that benefits males at the expense of everyone else violates the ERA, a statute that benefits males and females at the expense of everyone else violates the ERA.

The government may make a gender-based classification only when it can show that the classification is narrowly tailored to achieve compelling state goals.³⁴ Whenever a law refers to an individual's gender on its face, the state must have a compelling reason for doing so; the theory of "equal application" has been rejected in Maryland.³⁵ Application of the strict scrutiny standard of review inevitably leads to the conclusion that transgendered individuals are eligible to enjoy the same benefits of marriage as all other individuals in Maryland.

REJECTION OF THE "EQUAL APPLICATION" THEORY

Even though both men and women have the right to marry someone of the opposite sex, § 2-201 is a sex-based classification because Maryland has rejected the "equal application" theory as unpersuasive. Article 24, the due process clause of the Maryland Declaration of Rights,³⁶ does not contain an express equal protection clause, but Maryland courts have

long recognized that the due process clause implicitly guarantees equal protection similar to the equal protection clause of the Fourteenth Amendment of the federal constitution in both manner and extent.³⁷

Because it could not realistically be contended that the people, in adding the ERA, intended to repeat what was already contained in Article 24, Maryland courts have interpreted Article 46 of the Maryland Declaration of Rights as developing one of those differences: "segregation based upon sex, absent substantial justification, violates the [ERA], just as segregation based upon race violates the Fourteenth Amendment."³⁸ The divergence here from the federal notion of equal protection is the treatment of sex as a suspect class, not the manner in which equal protection is applied to a suspect class.³⁹ Thus, Maryland's strict scrutiny standard likely incorporates federal standards that rejected the "equal application" and "separate but equal" theories with respect to suspect classes.⁴⁰ Indeed, the rejection of the "separate but equal" theory, limiting the term "marriage" to a relationship between a man and a woman, would be a sex-based classification.

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Even if Maryland accepted the theories of “equal application” and “separate but equal,” limiting the definition of sex to the binary categories of “all male” and “all female,” the resulting scheme would inherently exclude people from marriage on the basis of sex. As race is more than just black or white, so is sex more than just male or female. The “equal application” argument that all individuals are free to marry someone of the “opposite sex,”⁴¹ is just as faulty and non-sensical as an argument that all individuals are free to marry someone of the “opposite race.” To avoid a discriminatory classification, the word “opposite” must be replaced with the word “any.”

By assuming that all people are either purely male or purely female, proponents of the equal application theory attempt to force a square peg into a round hole. Just as a law defining marriage as only between two white people would burden some white people (those wishing to marry someone non-white) and all non-white people, a law defining marriage as only between a man and a woman burdens some men and women, and all trans-gendered individuals who do not fit those categories. Thus, even if the equal application theory were accepted, it does not apply.

A SUSPECT CLASS OF TRANSGENDERED INDIVIDUALS

Those who fall outside the male/female dichotomy and are therefore left without marriage rights should be considered a suspect class.⁴² Under Maryland equal protection, a “suspect class is a category of people who have experienced a history of purposeful unequal treatment or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities.”⁴³ The long history of purposeful unequal treatment of transgendered people is unquestionable.⁴⁴ Transgendered individuals are thus a suspect class, and the Maryland Family Law should be reviewed under strict scrutiny instead of rational basis review.⁴⁵ Because § 2-201 makes a gender-based classification on its face, it must be narrowly tailored to achieve compelling state interests.⁴⁶

There are no compelling government interests furthered by narrowly tailored means when marriage is limited as between a man and a woman. Thus, the best way to define marriage is between two individuals, rather than conditioning marriage

Maryland’s marriage statute does not pass muster in limiting marriage rights to men and women because the means by which people are identified as men or women are not made clear enough to be considered narrowly tailored.

rights on any sexual characteristics.

Though the government in *Deane* failed to assert a compelling interest in restricting marriage rights on the basis of sex, the true legislative intent of § 2-201 of prohibiting same-sex marriages can easily be derived from the face of the statute.⁴⁷ Any attempt to justify this government interest as compelling should fail, and a marriage statute that defines marriage on the basis of sex is not narrowly tailored to meet any government interest that is valid under the ERA. In *Deane*, the government asserted an interest in promoting traditional family units and preserving traditional societal values.⁴⁸

Promoting a traditional family unit that encourages procreation is neither compelling nor narrowly tailored because it is based on the presumption that people who do not fit into the traditional binary sex system, even to the extent that only their sexual orientation differs, are not similarly situated to those who do so with respect to raising a child.

However, the ERA does not allow the presumption that a man or a woman is better suited to raise a child of a certain sex, so it likewise bars the presumption that a man or a woman is better suited to raise any child.⁴⁹ Therefore, ERA also bars the presumption that a male-female couple is better suited to raise a child than any other couple, without respect to sex.

To the extent that procreation is argued to be natural, such an argument is based on internalized stereotypes that fail to recognize that individuals are born with sex characteristics that do not fit the binary mold.⁵⁰ Regardless, §2-201 is not narrowly tailored to meet that goal because it does not claim to invalidate marriages because the couple cannot or has not chosen to procreate.

Any argument that these conclusions are counter to societal values and tradition is misplaced. The traditional notion of marriage is a thorn in the foot of Maryland’s overarching traditions of tolerance and protection of minorities. One instance in which the state may permissibly grant benefits on the basis of sex arises where women seek remedies to past wrongs. Such remedies are similar to those allowed under the Fourteenth Amendment in instances of racial classifications.⁵¹ The long denial of equal rights to women that prompted the ERA has indeed applied to women’s marriage rights, and those inequities have since been equalized.⁵² For example, there may very well be compelling government interests in providing women with a remedy for past discrimination from male sports.⁵³ Of course, if the classification included anyone other than women, and lasted longer than necessary to remedy the past wrongs, it would not be narrowly tailored to the class of individuals discriminated. Even if the exclusion of homosexuals from marriage were a compelling interest, marriage, as defined between a man and a woman, is not narrowly tailored because it is under-inclusive and over-inclusive. Maryland’s marriage statute does not pass muster in limiting marriage rights to men and women because

the means by which people are identified as men or women are not made clear enough to be considered narrowly tailored. While § 2-201 uses the words “man” and “woman,” it fails to offer a definition of either. Section 2-201 does not require any showing of sex. Section 2-402 of the Maryland Family Law requires details such as name, address, prior relationship, social security number, and age, leaving it to the clerk to withhold licenses if he or she feels that there may be legal reasons why applicants for a marriage license should not be married under the Maryland Family Law.⁵⁴ By granting marriage rights to “men” and to “women” without offering a sufficient mechanism with which to define a “man” or a “woman,” § 2-201 at least burdens, and potentially precludes, transgendered individuals from getting married because of their gender identity differences, and more specifically, *because* of sex.⁵⁵

The Maryland Court of Appeals recently held that individuals must be allowed to change their birth certificates to reflect their sex identity; however, it first required evidence of a “permanent and irreversible change” from male to female.⁵⁶ The court in *In re Heilig* required a showing based on medical facts, but carefully avoided concluding that surgery would be the only permissible medical fact.⁵⁷ Requiring any showing of sex, sex change or congruency between sex and gender characteristics as a condition to marriage, shows that any mechanism by which an individual’s sex is defined for the purposes of marriage, is overbroad.

The court in *In re Heilig* found that a change in sex denoted on an individual’s birth certificate was permissible, but it left open the question of what would need to be shown to establish such a change and whether this change on the birth certificate would mean a change in sex for the purposes of marriage. The methods used to determine some-

one’s sex for the purposes of marriage are presently unclear, but presumably either the sex on a person’s birth certificate at birth, or as amended, or in a driver’s license, would be determinative.

Therefore, the first question regarding the determination of an individual’s sex for the purposes of marriage is whether individuals are defined as a man or a woman based on the sex denoted on their original birth certificates, or whether individuals may change their sex for the purpose of marriage. The second question then is what criteria should be used if an individual’s sex may be changed for the purposes of marriage. If the determination of sex does not hinge on sex as recorded at birth, the method of determination of sex cannot simply lead to the categories of male and female.

Marriage defined as between a man and a woman does not pass muster under the ERA because the relevant characteristic - gender identity - may be male, female, or neither, without respect to the physical characteristics of an individual. Reliance

on the original birth certificate, or the genitals an individual has at birth, is not narrowly tailored because it focuses on mutable characteristics.⁵⁸ Requiring a medical showing of sex change is not narrowly tailored because it burdens transgendered individuals more than others on the basis of sex by requiring a showing based on genitals at birth; an individual’s gender does not change with medical procedures.⁵⁹

If the government does not recognize a change in sex, then it relies on the sex assigned at birth, which is most commonly based solely on the appearance of the external genitalia. By failing to recognize a change in gender, the government implicitly allows an individual who, for example, was born with male sex characteristics that have since been changed to female sex characteristics, to marry a woman. However, it does not allow an individual who was born with female sex characteristics, which have since been changed to male sex characteristics, to marry a woman. Therefore, physical sex characteristics are not relevant to marriage between a man and a woman to the extent that the genitals with which an individual is born define sex.

If the government does recognize a change in sex, then it allows a person born with male sex characteristics that have since been changed to female sex characteristics to marry a woman upon a showing that such a change has in fact occurred. However, that change must occur prior to the marriage. A person born with male sex characteristics could marry a woman,

and after the marriage, transition to female sex characteristics. Because the individual’s sex is not changed except upon a showing to a court, the marriage remains valid. If a showing is not required after marriage, it cannot be required prior to marriage. Therefore, whether a change in sex is allowed or not, two individuals

with the same sex characteristics may end up together in marriage if the government considers sex characteristics to be mutable and not locked at birth.

For the purposes of limiting marriage as between a man and a woman, an individual’s sex must be defined by gender identity. However, the government does not require a showing that two individuals getting married have one partner who identifies as a male and one who identifies as a female.⁶⁰

Requiring congruency between a person’s sex and gender characteristics lacks narrow tailoring as well. The presence or absence of surgery or hormonal treatment cannot be the basis upon which the decision is made, because not only is gender an immutable characteristic, but furthermore the cost-prohibitive nature of surgery conditions marriage rights on the ability to pay for a medical procedure. Indeed, requiring congruency is not a narrowly tailored test because it is easily evaded by delaying any medical procedures.⁶¹ If consistency is to be required, then

The Maryland Court of Appeals recently held that individuals must be allowed to change their birth certificates to reflect their sex identity; however, it first required evidence of a “permanent and irreversible change” from male to female.

everyone must bear the same burden of proof, and the government must require from everyone a showing that their gender identity is consistent with their physical sex characteristics. This places the focus on the irreversible gender identity rather than the changeable physical sex characteristics. Requiring a showing of sex prior to marriage based on genitals at birth is not narrowly tailored.

The government lacks a narrowly tailored definition of marriage by defining it as between a man and a woman, even as defined by gender identity alone, because it is inherently either under-inclusive or over-inclusive. Because defining a person's sex focuses on gender identity, and because individuals can have ambiguous gender identities,⁶² the scope of marriage rights must be expanded to include those people. However, when marriage is recognized as between a man and a woman, it becomes clear that accommodation of those individuals provides them with a pool of suitable spouses that grants them a choice of whether to marry a man or a woman. Because this choice may not be limited to those individuals on the basis of sex, it must also be granted to individuals who identify themselves as men and women. Thus, marriage rights must be blind as to a person's sex characteristics at birth as well as an individual's gender identity, and should be defined as between two individuals, not between a man and a woman, in order to comply with the equal protection mandates of the ERA.

Physical sex characteristics are not immutable, but gender identity is. A focus on physical sex characteristics is therefore more easily evaded than a focus on gender identity and cannot be considered narrowly tailored. Once the focus has shifted to the relevant characteristic, it becomes apparent that individuals whose identity does not fit within the binary sex categories do not have marriage rights at all, and individuals who were born with inconsistent sex characteristics are more burdened than those who were not, solely because they are a minority sex class. Requiring any showing of sex produces nonsensical results, and reliance on physical sex characteristics is not narrowly tailored either. Because the asserted interests inherently cannot be furthered by narrowly tailored means, they are revealed as falling short of being compelling. If a showing has not been required of course, Maryland has not concerned itself with two people of the same gender marrying one another. The benefits of marriage may not fall solely on men and women, no matter how they are defined, because sex is more complex than simply "male" and "female."

PHYSICAL DIFFERENCE AS A LEGITIMATE BASIS ON WHICH TO MAKE SEX CLASSIFICATIONS

Maryland has recognized physical differences as legitimate bases on which to make sex classifications.⁶³ During isolated

personal interactions, physical sex characteristics are most noticeable in the context of one-time contacts. Since marriage involves every day contact with a person, not just a one-time run in with the body of a person, and because the marriage contact is consensual, gender identification - not physical sex characteristics - are relevant. Physical sex characteristics may be relevant to

the extent that those characteristics are usually not revealed to the public (e.g., e.g. external genitals revealed to or forced upon an unconsenting individual). Thus, for the purpose of sexual assault or bathroom designations, physical sex characteristics may be the most appropriate criteria on which to base different treatment.⁶⁴

The court in *In re Heilig* noted that many courts find, for purposes of marriage, that an individual's biological sexual constitution is fixed at birth and cannot be changed unless a mistake has been made at birth and later revealed by medical investigation.⁶⁵ As the facts make clear, and because the law in this field should depend upon medical facts,⁶⁶ when an individual is born, that individual's gender identity has been decided.⁶⁷ Thus, while basing a classification system on an individual's genitals at birth may often lead to the appropriate classification, sometimes it will lead to a mistake, misidentifying an individual as a male or female based on that individual's genitalia.⁶⁸

Because they are "universally recognized as inherent, rather than chosen," attempts to change a person's gender identity to conform to physical sex characteristics have consistently failed.⁶⁹ In addition, although they are noticeable, physical sex characteristics are reversible because they can be altered by way of hormone treatment or sex reassignment surgery, but are likely to be altered only to conform to gender identity, which is immutable.⁷⁰ Indeed, sexual reassignment surgery "merely harmonizes a person's physical characteristics with that identity."⁷¹ Therefore, a person whose sex characteristics fit the binary categories and who feels that physical sex characteristics are immutable is correct with respect to himself or herself because it would counter the dictates of his or her gender identity to alter their already congruent sex characteristics. However, this is not the case for transgendered individuals.

If the government is interested in defining sex for the

If the government is interested in defining sex for the purpose of marriage on a basis other than gender identity, it should do so by stating precisely what sex characteristics it feels are relevant to marriage.

purpose of marriage on a basis other than gender identity, it should do so by stating precisely what sex characteristics it feels are relevant to marriage. It would not be unreasonable to expect the legislature to do this. Indeed, Maryland reconstructed its rape statute to define the crime based on the physical sex characteristics it found, to be most naturally vulnerable.⁷² However, if sex can be said to be relevant to marriage, then the relevant characteristic is gender identity, not physical sex characteristics. To the extent that a person's sex is defined by physical sex characteristics, for the purposes of marriage, the definition does not fit under a "unique characteristics" exception. .

CONCLUSION

Marriage may not be limited as between a man and a woman, and there is no narrowly tailored definition of man and woman that does not exclude a class of people based on sex. Because requiring any showing of sex prior to marriage, or limiting marriage based on genitals at birth, is not narrowly tailored to further a compelling government interest, defining marriage as between a man and a woman violates the ERA. To comply with the ERA, marriage should be defined as between two individuals, rather than as between a man and a woman.

ENDNOTES

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¹ 1 U.S.C. §7 (1996).

² See Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision between Law and Biology*, 41 ARIZ. L. REV. 265, 278, 328 (1999) (describing sixteen different "intersex conditions").

³ Deane v. Conaway, No. 24-C-04-005390, 2006 WL 148145 (Md. Cir. Ct. Jan. 20, 2006), *rev'd*, Conaway v. Deane, No. 44, Sept. Term 2006, September 18, 2007, <http://mdcourts.gov/cgi-bin/indexlist.pl?court=coa&year=2007&order=bydate&submit=Submit> (last visited October 15, 2007).

⁴ Greenberg, *supra* note 2, at 275 n.47 (describing death as the penalty in the middle ages); *In re Heilig*, 372 Md. 692, 705 (2003) (pointing out that gender identity differences were "once regarded as a form of sexual or psychological deviance and, in some [places, are] still considered so today").

⁵ Merriam-Webster Online Dictionary, *Definition of Transgender*, available at <http://merriam-webster.com/dictionary/transgender> (last visited Oct. 7, 2007); *cf. In re Heilig*, 372 Md. at 697 n.3 (using the term "transsexual" to describe individuals with sexual characteristics of one sex, and psychosocial configuration of another sex or someone who has achieved "consistent gender" only after a medical procedure, and distinguishing the term from "transvestism" and "homosexuality"); see also Greenberg, *supra* note 2, at 278 (describing interested people as those having non-congruent sexual attributes).

⁶ See Greenberg, *supra* note 2, at 275 n.47 (citing Richard A. Epstein, *Gender is for Nouns*, 41 DEPAUL L. REV. 981, 983 (1992)).

⁷ Greenberg, *supra* note 2, at 278 n.74.

⁸ See Greenberg, *supra* note 2, at 278.

⁹ See *In re Heilig*, 372 Md. at 698 (citing Leslie Pearlman, *Transsexualism as Metaphor: The Collision of Sex and Gender*, 43 BUFF. L. REV. 835, 842-43 (1995); Greenberg, *supra* note 2, at 275-76.

¹⁰ See *In re Heilig*, 372 Md. at 698 n.4 (2003) (citing Jerold Taitz, *Judicial Determination of the Sexual Identity of Post-Operative Transsexuals: A New Form of Sex Discrimination*, 13 AM. J.L. & MED. 53, 53-54 (1987)); Laura Hermer, *Paradigms Revised: Intersex Children, Bioethics & the Law*, 11 ANN. HEALTH L. 195, 200-01 (2002); Pearlman, *supra* note 9, at 835; Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CALIF. L. REV. 3, 12-14 (1995).

¹¹ See *In re Heilig*, 372 Md. at 700 (citing Susan Tucker Blackburn, MATERNAL, FETAL, & NEONATAL PHYSIOLOGY: A CLINICAL PERSPECTIVE 19-24 (2d ed. 2002)).

¹² *Id.* (citing Alice Do Murat Dreger, HERMAPHRODITES AND THE MEDICAL INVENTION OF SEX 35-40 (1998); Blackburn, *supra* note 11, at 24-28; Greenberg, *supra* note 2, at 279-90; Claude J. Migeon & Amy B. Wisniewski, *Sexual Differentiation: From Genes to Gender*, 50 HORMONE RESEARCH 245, 249 (1998); Selma Feldman Witchel & Peter A. Lee, *Ambiguous Genitalia*, in PEDIATRIC ENDOCRINOLOGY 111 (Mark A. Sperling ed., 2d ed. 2002); Alan J. Schafer & Peter N. Goodfellow, *Sex Determination in Humans*, 18 BIOESSAYS 955 (1996); John Money & Anke A. Ehrhardt, MAN & WOMAN, BOY & GIRL: GENDER IDENTITY FROM CONCEPTION TO MATURITY 1-21 (1996)).

¹³ See *In re Heilig*, 372 Md. at 703-704 (noting that doctors used to remove ambiguous external organs from infants, suggesting the child be raised as a girl).

¹⁴ See *Id.* at 704

¹⁵ *Id.* (citing Frank P.M. Kruijver et al., *Male-to-Female Transsexuals Have Female Neuron Numbers in a Limbic Nucleus*, 85 J. CLIN. ENDOCRINOLOGY AND METABOLISM 2034 (2000)).

¹⁶ See *Id.* at 707.

¹⁷ *Id.* at 702-703 (noting that sometimes, an individual's sexual ambiguity may be the result of a mistaken "sex assignment" at birth, if genitalia where abnormal -mistaking an enlarged clitoris for a small penis or vice versa).

¹⁸ See *Id.* at 707-709.

¹⁹ *In re Heilig*, 372 Md. at 709.

²⁰ Md. Const. Decl. of Rights, Art. 46.

²¹ See Hornbeck v. Somerset County Bd. of Educ., 295 Md. 597, 640-41 (1983).

²² See Md. Leg. Wrap Up, No. 04-14 (bill proposing a constitutional amendment to define marriage as being between a man and a woman failed (SB 673/HB 16), as well as a bill which proposed that a same-sex marriage validly entered into in another state or country, is valid in Maryland, and declaring that same-sex marriages are against the public policy of Maryland (SB 746/HB 728)); *c.f.* Deane, 2006 WL 148145 at *2 (noting that only six months following the Attorney General's declaration that Maryland common law limited marriage to male-female relationships, Maryland passed its ERA, and the following year, the legislature attempted to preserve the common law with a marriage statute); see also Dan Friedman, *Marriage Equity: The Counter-majoritarian Nature of the Maryland Constitution*, The Daily Record, Mar. 3, 2006, available at <http://www.equalitymaryland.org/dailyrecord.htm> (describing gubernatorial disapproval of attempts to remove the judge's finding that Maryland allows same-sex marriage, and the preference of a constitutional amendment when minority rights are at stake) (last visited Oct. 7, 2007).

²³ Md. Const. Decl. of Rights, Art. 46.

²⁴ See *Burning Tree Club, Inc. v. Bainum*, 305 Md. 53, 63-64 (1985) [hereinafter *Bainum*].

²⁵ See, e.g. *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (recalling rhetoric from 100 years prior, that women are naturally timid and delicate, put women "not on a pedestal, but in a cage").

²⁶ See Greenberg, *supra* note 2, at 275 (explaining that binary views of sex and gender implicit in some legislation ignore millions of people who are transgendered).

²⁷ See generally *In re Heilig*, 372 Md. at 710.

²⁸ *Murphy v. Edmunds*, 325 Md. 342, 357 n.7 (1992).

²⁹ E.g., *Rand v. Rand*, 280 Md. 508, 511-512 (1977).

³⁰ *Murphy*, 325 Md. at 357 n.7.

³¹ *Giffin v. Crane*, 351 Md. 133, 149 (1998).

³² *Tyler v. State*, 330 Md. 261, 265-66 (1993) (emphasis added).

³³ MD. CODE ANN., FAM. LAW § 2-201 (1984).

³⁴ See *State v. Burning Tree Club*, 315 Md. 254, 295-96 (1989) [hereinafter *Burning Tree Club*].

³⁵ See *Bainum*, 305 Md. at 86; *Burning Tree Club*, 315 Md. at 293-295; *Giffin*, 351 Md. at 149 (noting that treatment by the law may not be based on sex, and that the law may not burden or benefit one sex but not the other).

³⁶ Md. Const. Decl. of Rights, Art. 24

³⁷ See, e.g., *Kirsch v. Prince George's County*, 331 Md. 89, 97 (1993); *Manikhi v. Mass Transit Admin.*, 127 Md.App. 497, 524 (Md. Ct. Spec. App. 1999) (observing that "with respect to the development of equal protection jurisprudence, the Court of Appeals has virtually adopted Supreme Court precedent as controlling authority in the interpretation of corresponding State constitutional law").

ENDNOTES CONTINUED

- ³⁸ Tyler v. State, 330 Md. 261, 265 (1993) (citing *Burning Tree Club*, 315 Md. at 269).
- ³⁹ See also *Detroit Automotive Purchasing Services, Inc. v. Lee*, 463 F. Supp. 954, 970 (1978) (finding that with respect to Maryland, “relevant federal and state provisions regarding equal protection are afforded the same judicial construction”).
- ⁴⁰ See *Bainum*, 305 Md. at 72 n.14 (noting that a statute couched in gender-neutral terms may have an unconstitutionally discriminatory purpose and effect and rejecting the “equal application” theory, citing *Loving v. Virginia*, 388 U.S. 1, 8-9 (1967); *id.* at 79 (suggesting that “separate but equal” theory rejected in *Brown v. Board of Education*, 347 U.S. 483 (1954) would be rejected under Article 46); but see *Singer v. Hara*, 11 Wash. Ct. App. 247 (1974) (accepting an effectively separate but equal argument that marriage is descriptive of a relationship between a man and a woman so the label should be limited as such).
- ⁴¹ See e.g. Paul Benjamin Linton, *Same-Sex “Marriage” Under State Equal Rights Amendments*, 46 ST. LOUIS U. L.J. 909, 928 (2002).
- ⁴² Cf. *Bainum*, 305 Md. at 72.
- ⁴³ *Hornbeck*, 295 Md. at 640-41.
- ⁴⁴ See Greenberg, *supra* note 2, at 275 n.47; see also, e.g., *Hartin v. Bureau of Records*, 347 N.Y.S.2d 515, 518 (N.Y. Sup. Ct.1973) (where the New York Board of Health described sex reassignment surgery as “an experimental form of psychotherapy by which mutilating surgery is conducted on a person with the intent of setting his mind at ease, and that nonetheless, does not change the body cells governing sexuality.”); *Corbett v. Corbett*, 2 All E.R. 33, 2 W.L.R. 1306 (Probate, Divorce, and Admiralty Div. 1970) (finding litigant’s transsexualism to be a “psychological sexual abnormality”); *Maggert v. Hanks*, 131 F.3d 670, 671 (7th Cir.1997) (in describing a transsexual wishing to undergo sex reassignment surgery, court observed that “[s]omeone eager to undergo this mutilation is plainly suffering from a profound psychiatric disorder”); see generally Marybeth Herald, *Transgender Theory: Reprogramming Our Automated Settings*, 28 T. JEFFERSON L. REV. 167 (Fall, 2005); see also MD. CODE ANN., CRIM. PROC. §10-301 (2005) (recognizing gender-related identity as a target characteristic for hate crimes).
- ⁴⁵ See *Massage Parlors, Inc. v. Mayor & City Council of Baltimore*, 284 Md. 490, 496-497 (1979) (noting that rational basis analysis applies only when there is no suspect class or fundamental right restricted); *Kirsch*, 331 Md. at 108-109 (Chasanow, dissenting, explaining that “a statutory classification reviewed under the rational basis standard enjoys a strong presumption of constitutionality and will be invalidated only if the classification is clearly arbitrary”); but cf. *Massachusetts v. Goodridge*, 440 Mass. 309, 334 (2003) (applying rational basis standard under a variety of state constitutional provisions, stating only in dicta that strict scrutiny is the appropriate standard).
- ⁴⁶ Cf. *Burning Tree Club*, 315 Md. at 295-96 (1989); *Condore v. Prince George’s Co.*, 289 Md. 516, 530 (1981); *Turner*, 299 Md. at 574 (1984).
- ⁴⁷ See *Deane*, 2006 WL 148145 at *1 (describing the legislative history in a way that reveals its intent to preserve the common law marriage rule of banning same sex marriages in response to the ERA).
- ⁴⁸ See *id.* at *8-9.
- ⁴⁹ See *Giffin*, 351 Md. at 133.
- ⁵⁰ See *In re Heilig*, 372 Md. at 698.
- ⁵¹ Cf. *Kirsch*, 331 Md. at 89-108.
- ⁵² See e.g. *Coleman v. State*, 37 Md. App. 322 (1977); *McClellan v. McClellan*, 52 Md. App. 525 (1982); *Bell v. Bell*, 38 Md. App. 10 (1977), cert. denied 282 Md. 729 (holding that presumption that husband is the dominant figure in the marriage cannot stand under the ERA).
- ⁵³ See *Bainum*, 305 Md. at 79 (1985) (citing *Darrin v. Gould*, 540 P.2d 882 (1975) and *Petrie v. Illinois High Sch. Ass’n*, 75 Ill. App. 3d 980 (1979)).
- ⁵⁴ MD. CODE ANN., FAM. LAW § 2-402; MD. CODE ANN., FAM. LAW § 2-405.
- ⁵⁵ See *In re Heilig*, 372 Md. at 701 (naming three categories of people whose sex clearly does not fit in the binary sex classifications).
- ⁵⁶ *Id.* at 692 (referring to “MD. CODE ANN., § 4- 214(b)(5) of the Health-General Article, which directs the Secretary of Health and Mental Hygiene, upon receipt of a court order indicating that the sex of an individual born in Maryland has been changed by surgical procedure”).
- ⁵⁷ *Id.* at 721-22 (noting that many other contexts require surgery for a gender change, but that medical facts form the basis of a reasoned legal conclusion respecting an asserted change in one’s gender).
- ⁵⁸ See *id.* at 702.
- ⁵⁹ See *id.* at 721-22.
- ⁶⁰ See Mark F. Scurti, *Same Sex Marriage: Is Maryland Ready?*, 35 U. BALT. L.F. 128, 134 (Spring 2005) (stating that “[i]f one person transitions to an opposite gender through various medical processes and has not divorced their spouse... Maryland has not... not void[ed] such marriages simply because the gender of one party has changed. Many such couples exist in Maryland....”).
- ⁶¹ See *In re Heilig*, 372 Md. at 702.
- ⁶² See Greenberg, *supra* note 2, at 378; see also William Reiner, *To be male or female - that is the question*, 151 ARCHIVES PED. & ADOLESCENT MED. 224 (1997) (noting that in the end, individuals must define who and what they are).
- ⁶³ See, e.g., *In re Heilig*, 372 Md. at 710, 719-720 n.9, 721 n.11 (finding that gender identity plays a powerful role as a determinate of gender, and recognizing that the effect and requirements for gender changes differ with context); cf. *Brooks v. State*, 24 Md. App. 334, 337-338 (1975), cert. denied 275 Md. 746 (for the purpose of rape, because the vagina and the possibility of unwanted pregnancy were found to be particularly vulnerable characteristics, the class of individuals with male external genitalia were categorized as men, and treated differently from those who did not have these characteristics).
- ⁶⁴ See, e.g., *Brooks*, 24 Md. App. at 337-338, cert. denied 275 Md. 746 (determining male or female based on external genitals for the purpose of rape).
- ⁶⁵ See *In re Heilig*, 372 Md. at 710.
- ⁶⁶ See *id.* at 722.
- ⁶⁷ *Id.* at 708 (stating that “transsexualism is universally recognized as inherent, rather than chosen”).
- ⁶⁸ See *id.* at 710 (finding that “external genitalia are not the sole medically recognized determinant of gender”).
- ⁶⁹ See *id.* at 708.
- ⁷⁰ See *id.* at 707-09.
- ⁷¹ *In re Heilig*, 372 Md. at 698 (citing *M.T. v. J.T.*, 355 A.2d 204, 211 (N.J. Super. Ct. App. Div. 1976)).
- ⁷² See MD. CODE ANN., CRIM. PROC. § 3-301; *Brooks*, 24 Md. App. at 337-338 (noting that the old rape statute defined rape as by a “person,” but that courts considered physical sex characteristics because a primary concern was to avoid female rape victims being left with unwanted pregnancies).

BOOK REVIEW

LESBIAN AND TRANSGENDER ISSUES IN EDUCATION: PROGRAMS, POLICIES AND PRACTICES

Edited By James T. Sears, PhD . Publisher (Year). ISBN #
*Reviewed by Justin K. Teres **

“*Queer* and *faggot* were common taunts back in the 1960s – just as they often are today. If one wore green to school on Thursdays, then one was surely queer and everyone mercilessly harassed the person. I avoided green on Thursdays,”¹ recounts Rani Sonno, Director of the University of California at Los Angeles LGBT Campus Resource Center.

For members of the lesbian, gay, bisexual, transgender, and intersexed (LGBTI) community, who grew up as sexual and gender minorities, memories like this are an unfortunately common experience. In *Gay, Lesbian and Transgender Issues in Education: Programs, Policies and Practices*, an anthology of scholarly articles edited by James T. Sears, PhD, authors examine policies affecting LGBTI youths within academic communities. They reflect upon their own experiences as youths in the LGBTI community and address areas of law and society that impacted whether or not they had comfortable environment in which to learn. Authors also contend that children should be exposed to controversial topics, such as a societal construct of gender and the normality of homosexuality, as early as elementary school.

The anthology makes clear that many members of the LGBTI community confront similar experiences involving negative sentiment from classmates in insensitive and homophobic environments. However, the articles also convey that segments of the LGBTI community encounter differing struggles. For instance, some articles explain that transgendered students have shown a higher level of attempted and actual suicide at the high school level than other LGBTI students.² Another piece recognizes the distinct challenges faced by transgendered college students and offers suggestions for promoting inclusion, such as training of university administrators on transgender topics, the use of trans-inclusive language in university documents, and the addition of “gender identity” to university non-discrimination policies.³

Sears makes clear that LGBTI students run into similar educational problems on a global scale, without a regard to cultural or political boundaries. This is demonstrated through a series of letters from Japanese LGBTI high school students, who

felt a sense of isolation, expressed embarrassment in their sexuality and/or gender identity, and found solace only in Japanese LGBTI magazines such as *Buddy* and *Fabulous*, which indicate to them that there are others out there who feel the same. Sears also includes the memoirs of three lesbians from, New Zealand, Australia, and the United States, who reflect on their common educational experiences, which included hiding their true identities but feeling a strong independence from feminist stereotypes.

Gay, Lesbian and Transgender Issues in Education also addresses legal aspects of problems in LGBTI education. Examining efforts made to curtail homophobic and anti-transgendered behavior within schools, Sears investigates the issue of bullying when manifested as homophobia. Through the lens of a Canadian experience, Gerald Walton states that some school districts have modified mission statements to be inclusive of all students’ safety by criminalizing bullying against those under the age of eighteen.⁴ However, bullying that targets LGBTI students in particular remains largely un-addressed by the law and school officials, as does the societal question of why homophobia becomes a source of bullying in the first place.

The book also covers the area of school-sponsored programs addressing issues such as gay-straight alliance groups and LGBTI-inclusive educational materials. Articles identified school-sanctioned gay-straight alliances as influential in creating LGBTI awareness and in developing supportive ‘safe spaces’ for LGBTI students, but to be successful, such groups require a significant level of support from school administrators, which is harmfully lacking. Discussing other roadblocks, Patti Capel Schwartz describes her experience with an educational program entitled *It’s Elementary*, which advocates the teaching of same-

bullying that targets LGBTI students in particular remains largely unaddressed by the law and school officials, as does the societal question of why homophobia becomes a source of bullying in the first place.

sex relationships, the normality of LGBTI individuals, and other relevant issues within classroom educational aids.⁵ Unfortunately, when integrating these controversial standpoints into lesson plans, schools encounter difficulties such as hesitancy of teachers and the necessity of permission slips from parents, both of which signify a sense that the material is objectionable.

Overall, *Gay, Lesbian and Transgender Issues in Education* provides a broad picture of the state of LGBTI education policy, not only in the United States, but around the world. Sears' article selection also attempts to encompass these issues from every education level, from elementary school through the completion of graduate programs.

every segment of the community, whether gay men, lesbians, or a transgendered individuals, who faces a world that refuses to acknowledge their most basic identity, faces unique problems in their own right.

The compilation of articles unfies a vast array of issues, but the broad scope of articles can be overwhelming at times. However, the content demonstrates an important LGBTI theme: every segment of the community, whether gay men, lesbians, or a transgendered individuals, who faces a world that refuses to acknowledge their most basic identity, faces unique problems in their own right. These differences

add to the complexity of LGBTI education policy. This complexity, intertwined with a heterosexist majority in most schools, leaves LGBTI students with many challenges left to face.

ENDNOTES

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¹ James T. Sears, PhD., ed. *Gay, Lesbian and Transgender Issues in Education: Programs, Policies and Practices*, New York: Harrington Park Press, 2005, p. 21.

² P. Jayne Bopp, *A School-Based Program to Improve Life Skills and to Prevent HIV Infection in Multicultural Transgendered Youth in Hawaii*, in *Gay, Lesbian and Transgender Issues in Education: Programs, Policies and Practices* 147, 155 (James T. Sears, PhD ed., 2005)

³ Brett Beemyn, *Serving the Needs of Transgender College Students*, in *Gay, Lesbian and Transgender Issues in Education: Programs, Policies and Practices* 105, 115-119 (James T. Sears, PhD ed., 2005).

⁴ Gerald Walton, *Bullying and Homophobia in Canadian Schools: The Politics of Policies, Programs, and Educational Leadership*, in *Gay, Lesbian and Transgender Issues in Education: Programs, Policies and Practices* 89, 90 (James T. Sears, PhD ed., 2005).

⁵ Patti Capel Swartz, *It's Elementary in Appalachia: Helping Prospective Teachers and Their Students Understand Sexuality and Gender*, in *Gay, Lesbian and Transgender Issues in Education: Programs, Policies and Practices* 125, 126 (James T. Sears, PhD ed., 2005).

RAISING THE SPECTOR OF DISCRIMINATION: THE CASE FOR DISREGARDING “FLAGS OF CONVENIENCE” IN THE APPLICATION OF U.S. ANTI-DISCRIMINATION LAWS TO CRUISE SHIPS

By Paul T. Hinckley *

In June 2005, the United States Supreme Court resolved a conflict between two lower courts and ruled that Title III of the Americans with Disabilities Act applies to foreign-flagged cruise ship, in the case of *Spector v. Norwegian Cruise Lines*.¹ Though enlightening and constructive, many issues regarding the application of U.S. laws to entities located outside U.S. territorial boundaries were unresolved by the Supreme Court decision, especially with regard to cruise vessels operating in the United States.² Many of these problematic legal questions arise from the pervasive practice in the maritime industry of flying “flags of convenience” (“FOC”s).³ Flags of convenience can be defined as “the flag of any country allowing the registration of foreign-owned and foreign-controlled vessels under conditions which, for whatever the reasons, are convenient and opportune for the persons who are registering the vessels.”⁴

A cruise vessel’s internal operations and management are presumed to be under the jurisdiction of the host state whose flag the vessel flies. Therefore it is out of the jurisdiction of U.S. courts (absent expressed congressional intent to the contrary). As a result, courts have found that many U.S. regulations, most notably labor and employment protections, do not apply to cruise ships and other maritime vessels flying foreign flags. This article explores the current situation and argues for extra-territorial availability of additional protections to workers aboard ships ultimately owned and controlled by U.S. interests.

FLAGS OF CONVENIENCE AND OPEN REGISTRIES - HISTORY AND PRACTICE

A ship flying under the flag of a sovereign state, under most circumstances, is operating under the laws and jurisdiction of that host state.⁵ That state is also responsible for the enforcement of both domestic and international laws against the ships that sail its flag.⁶ However, when there is little to no actual relationship between the ship (its crew and its owner) and the host state, the ship is often referred to as flying a “flag of convenience.”⁷ Among the reasons for “flagging out” are: fewer to no taxes imposed on earnings, lower safety standards, and reduced operating costs.⁸ In response to the adverse effects on the American maritime workforce caused by U.S. ships’ “flagging

out” and hiring cheap foreign labor, U.S. maritime trade unions have long sought international support against open-registry countries. They hope to further restrict the registration of ships by requiring a “genuine link” between the vessel and the country registering the vessel.⁹

Since the 1920s, the percentage of the world’s maritime vessels FOCs increased.¹⁰ A recent United Nations Conference on Trade and Development (UNCTAD), entitled *Review of Maritime Transport*, declared that over half of the gross ship tonnage owned by the three biggest shipping nations (Greece, Japan, and the United States) were flying FOCs.¹¹ Similarly, in 2001, a study by the International Transport Workers’ Federation concluded that FOC ships accounted

for 53% of the world’s gross tonnage.¹²

The United States has played an integral part in both the development of the open-registry concept and in the increasing popularity of FOCs.¹³ Indeed, “the creation of open-registries was largely masterminded by the entrepreneurs of developed countries.”¹⁴ However, union pressure on the legislature in the United States in the early and middle twentieth century resulted in strict crew mandates and registry requirements for ships seeking to fly the U.S. flag, in addition to increased safety requirements and wage protections for U.S. laborers.¹⁵ Because the costs of maintaining a crew can account for half of operating expenses,¹⁶ economic concerns drove the maritime industry in the United States to seek alternatives to the high-priced U.S. labor force.

In the 1920s, the United States became involved in the creation of the Panamanian registry.¹⁷ During that period, U.S. Consulars actually represented Panamanian interests abroad in countries without a Panamanian Consulate.¹⁸ Panama currently has approximately 1700 registered vessels and is considered the oldest open-registry.¹⁹ Further illustrating U.S. involvement, Panama’s registry is administered from an office in New York.²⁰ The registry fees it receives account for five percent of Panama’s annual budget.²¹ The country advertises that “any person or company, irrespective of nationality and corporation,” with any sized ship, can register in a ‘straightforward’ and ‘expedient’ manner.²² The Panamanian Registry also claims to be “one of the most responsible in the world in reference to the concern of the Administration for the safety of life at sea of its vessels and the people embarked and for the economic well-being of the

owners/operators of these vessels [sic].²³ However, the Panamanian Registry's simplified requirement system has proven to encourage substandard practice. In fact, in 1999, the affluent British owners of a Panamanian registered vessel kept twenty percent of the wages meant for the crew.²⁴ Furthermore, in 2001, the average vessel flying the Panamanian flag was built in 1985. In that year alone, 15 Panama-registered vessels were lost, a number far greater than any other nation.²⁵

Not satisfied with just the open registry of Panama, former Secretary of State Edward Stettinius and a group of leading U.S. entrepreneurs and multinationals spearheaded the creation of the Liberian registry.²⁶ Liberia now has the world's largest ship registry with approximately 1800 registered vessels.²⁷ The Liberian registry is administered through International Registries, Inc., of Reston, Virginia, and is headquartered in New York.²⁸ The biggest obstacle to registering a vessel in Liberia is a requirement that vessels over 1600 tons may be registered only by Liberian nationals.²⁹ Under Liberian law, however, a corporation or partnership qualifies as a Liberian national.³⁰

In 1993, the U.S. Coast Guard caught the Royal Caribbean ship Nordic Empress dumping oil in waters off the coast of the Bahamas as it made its way to Miami.³¹ The ship was flagged out of Liberia.³² During the course of the Coast Guard's investigation, Royal Caribbean Cruise Lines ("RCCL") denied charges that it had illegally dumped pollutants.³³ The cruise line also claimed that it was immune from criminal prosecution in the United States because its ships fly foreign flags.³⁴ RCCL argued that under international law, only Liberia had jurisdiction to prosecute because Nordic Empress flew the Liberian flag.³⁵ The United States was forced to amend the charges to making false statements to the Coast Guard.³⁶ The ship had omitted the discharge from its record books before submitting them to the Coast Guard, and it was this act which brought the cruise ship under U.S. jurisdiction.³⁷

The business of maintaining ship registries is lucrative and provides substantial income for host states that are able to attract vessels to that country.³⁸ Many countries, in order to lure and keep registry business in their states, fail either to adopt or to enforce laws against ships that may cause them financial difficulty. The fear of losing the registry income provided by a fleet of fee-paying ships to another country with less rigorous regulations (or enforcement regulations) creates a virtual race to the bottom where states fail to enforce, among other things, labor and employment regulations and anti-discrimination laws.

DISCRIMINATION IN THE CRUISE INDUSTRY

Cruise ship operations are the fastest growing segment of the global maritime industry.³⁹ Since 1980, cabin occupancy has increased almost 600 percent, from 1.5 million to more than 10

million passengers worldwide.⁴⁰ The number of North Americans taking cruises has doubled in the past ten years. Employment in the cruise industry has increased to meet the demands. Royal Caribbean International, one of the largest cruise operators, estimated that it would need 12,000 new "hotel" employees for housekeeping and the dining room each year for the next five years to keep pace with expansion.⁴¹

The majority of these workers are recruited from countries in Eastern Europe, Asia, the Caribbean, and Central America.⁴² Workers must often pay recruiters and placement companies hundreds of dollars for their positions, gradually paying these fees from their paychecks.⁴³ This arrangement creates a situation where the worker is an indentured servant by the time she or he steps onto the ship, greatly increasing the consequences of job loss.⁴⁴ Ship operators exploit this situation by using the threat of termination (and often abandonment at foreign ports) to quell complaints and disputes.⁴⁵

Cruise ship crew-members generally work ten to twelve hours a day, seven days a week, for ten-month contracts.⁴⁶ A shipboard waiter may work as many as 16 hours a day and often gets less than six hours of uninterrupted rest per night.⁴⁷ Collective agreements on cruise ships frequently require shipboard employees to work 80 hours per week. "In a survey of shipboard employees conducted by the ITF in 2001, 95% of those surveyed reported working seven days a week."⁴⁸ They are not paid overtime and often work their entire contract without any break.⁴⁹ Even working under an

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ITF collective bargaining agreement, the lowest compensated employee may earn as low as \$730 a month.⁵⁰ Poor or unsafe living conditions, unpaid wages, long working hours, abusive employers, the fear of crew-members being abandoned in foreign ports, little or no job security, and the suppression of union activities frequently occur on FOC ships.⁵¹ This has resulted in an ever-increasing staff turnover rate in which the average term of hotel crew employment decreased from three years in 1970, to a year and a half in 1990, to nine months in 2000.⁵²

Despite the fact that they maintain internal operations outside the jurisdiction of the United States, the cruising industry frequently lobbies Congress to pass favorable laws.⁵³ By total spending, it is the fourth-largest lobbying industry in Florida.⁵⁴ In fact, as an organization created to advance the interests of the cruising industry, the International Council of Cruise Lines spends about a million dollars annually on its lobbying efforts.⁵⁵

In addition to the aforementioned employment difficulties, gender and race-based discrimination aboard cruise vessels continues to be a serious problem.⁵⁶ "The operation of the cruise ship is segregated by gender. All the captains are men and few if

any women are found in the deck and engine departments. Women concentrate in hotel, catering, and other 'non-technical' sectors of the vessel."⁵⁷

National origin discrimination also occurs.⁵⁸ Women from industrial countries are far more likely to be found in a small number of management or administrative positions, and are also more likely to be employed as receptionists, nurses, entertainers, and beauticians; while, Asians and women from less developed countries are almost entirely employed in the "hotel" functions of the ship, which include catering, waiting, and cabin staff positions.⁵⁹ Reports also suggest that women from industrial countries are paid more than those from less developed countries employed in the same job.⁶⁰

THE INADEQUACY OF THE *SPECTOR DECISION* AND OTHER CASELAW

The decision in *Spector v. Norwegian Cruise Lines* dealt a blow to the longstanding practice of deferring to a host country in matters concerning the functioning of a ship.⁶¹ That decision declared that foreign-flagged cruise ships, which pick up American citizens at U.S. ports, must comply with Title III of the ADA because the cruise ships qualify as "public accommodations" under the Act.⁶² The Court was unclear, however, about the extent to which the ADA would apply or what modifications would need to be made to accommodate handicapped individuals.⁶³ In situations where compliance would not be "readily achievable" or would be a violation of an inter-national obligation, the Court declared the Act would not apply.⁶⁴ Relying on precedent,⁶⁵ the Court held that if compliance affected the "internal order of the ship" the Act would not apply, since the internal operation of the ship is subject to the jurisdiction of the host state.⁶⁶ However, the Court's decision in *Spector* did nothing to change the status quo as it relates to the jurisdictional situation which allows U.S. owned and operated cruise lines to discriminate on the basis of gender and nationality without fear of discrimination lawsuits, to blacklist employees for union activity, and to escape liability for dumping waste in inter-national waters.

Under the *Spector* decision, the Americans with Disabilities Act may now apply to cruise ships, ending the practice of discriminating against U.S. passengers who are disabled. However, because crews are considered part of the "internal order of the ship" and thus subject to the laws of the host state, crews remain unprotected by U.S. employment laws. Thus, a cruise ship company may be required to make reasonable accommodations for a handicapped passenger, such as braille in an elevator or a handrail in a bathroom, but may not be required to make the same modification to an employee service elevator or to a crew member's bathroom. Furthermore, under *Spector*, the cruise

company may not be able to charge more when selling a boarding ticket to a disabled person, yet may pay a disabled employee less.

LIMITATIONS ON EXTRATERRITORIAL APPLICATION OF U.S. LAW

Historically, U.S. laws did not apply extraterritorially. This was due to the principle set forth by the Supreme Court in *Foley Brothers Inc. v. Filardo*,⁶⁷ which states that federal laws are presumed not to apply extra-territorially absent specific congressional intent. The Supreme Court affirmed its approval of this rule in two consolidated cases, *Equal Employment Opportunity Commission v. Arabian American Oil Co.*,⁶⁸ and *Bourlesan v. Arabian American Oil Co. (Aramco)*.⁶⁹ In those cases, the Court held that Title VII of the Civil Rights Act of 1964 did not apply to employment outside the U.S. despite the fact that Aramco was an American corporation and its employees (the plaintiffs) were American citizens. In its holding, the Court declared that the rule against extraterritorial application "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord."⁷⁰

Subsequently, in 1991, Congress declared its intent to apply the ADA and Title VII of the Civil Rights Act to U.S. citizens working abroad for U.S. companies.⁷¹ As a result, claims of discriminatory employment practices abroad against U.S. companies brought by American citizens no longer run the risk of dismissal on those grounds. These changes are limited, however. For example, Title VII of the Civil Rights Act applies only when the employee is a United States citizen, and the employee's company is controlled by an American employer.⁷²

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The language of the statute specifies that overseas citizens are to be covered under the revised legislation, but neglects to mention whether or not foreign nationals working for U.S. corporations overseas fall are included.⁷³ This exclusion of foreign nationals by the congressional revision has been the subject of at least two cases, *Shekoyan v. Sibley Int'l Corp.*, and *Torrico v. IBM*.⁷⁴

In *Shekoyan* (2002), a foreign national sued his former employer claiming Title VII violations.⁷⁵ Though born in Armenia, the plaintiff was a permanent resident of the United States.⁷⁶ He was hired in the District of Columbia, but his job required him to work in the Republic of Georgia.⁷⁷ Shekoyan claimed that his immediate supervisor, Jack Reynolds, discriminated against Shekoyan's on the basis of his national origin.⁷⁸ Shekoyan claimed that his boss made statements that he was not a "real American," mocked his accented English, and made racist comments about people from former Soviet states.⁷⁹ The District Court for the District of Columbia held that, because Shekoyan was not a U.S. citizen and because of his employment was in the Republic of Georgia, he was outside of the protections

afforded by Title VII. The court further found that it lacked subject-matter jurisdiction over his claim.⁸⁰ Title VII did not apply to permanent U.S. residents or to U.S. “nationals” – only to citizens of the United States who may be working abroad.⁸¹

In *Torrigo v. International Business Machines*,⁸² the United States District Court for the Southern District of New York took a different approach. *Torrigo* dealt with an employee who, though not a U.S. citizen, was a U.S. resident prior to agreeing to take a three-year temporary rotational assignment in Chile.⁸³ He was discharged while on medical leave⁸⁴ and sued pursuant to the Title I of the Americans with Disabilities Act (ADA).⁸⁵ In deciding whether or not ADA protections should apply in *Torrigo*, the court borrowed a “center of gravity test” which New York courts normally used for employment contract disputes when choice of law was at issue.⁸⁶ Here, however, they looked to see whether or not it could reasonably be argued that *Torrigo*’s employment occurred in the United States, and whether the ADA should therefore apply.⁸⁷ After a bench trial, the court found in favor of the defendants, but the case set a precedent for allowing claims to survive summary judgment despite the plaintiff not being a U.S. citizen and being out of the country at the time the discrimination occurred. “A non-resident employed in the United States who travels abroad on a business trip is not stripped of the protections of the ADA the moment he or she leaves U.S. territory.”⁸⁸

In *EEOC v. Bermuda Star Line, Inc.*,⁸⁹ the United States District Court for the Middle District of Florida was presented with the opportunity to consider application of Title VII⁹⁰ to a cruise ship flying a foreign flag. In that case, Susan Harman inquired into an entry-level position as a wiper or ordinary seaman in the deck or engine department of Bermuda Cruise line vessel *S.S. Veracruz*.⁹¹ The employment inquiry was made over the telephone to Captain Glidden, Bermuda Star’s port captain, whose office was in Miami.⁹² Harmon was told that, because she was a female, her application for employment would be denied.⁹³ She was told that the ordinary seaman position required that the applicant be male.⁹⁴ Despite the fact that the *S.S. Veracruz* was registered in Panama and flew the Panamanian flag, and that the corporation itself was organized under the laws of the Cayman Islands, the court held that the Title VII violations occurred within U.S. territorial boundaries and accordingly denied the defendant’s motion for summary judgment.

U.S. courts were presented with a second opportunity to visit the issue of Title VII application to cruise ships when the District Court for the Southern District of Florida considered *EEOC v. Kloster Cruise Ltd.* (d/b/a Norwegian Cruise Lines).⁹⁵ That case began when two charges of employment discrimination against Kloster were filed with the Equal Employment Opportunity Commission (“EEOC”).⁹⁶ Judy Corbeille, an assistant cruise director, alleged that she was fired as a result of her pregnancy.⁹⁷ Fernando Watson, a bar manager, claimed that he had been forced to resign because he was discriminated against on the basis of his race and national origin.⁹⁸ Pursuant to its statutory duty, the EEOC began its

investigation by issuing two administrative subpoenas.⁹⁹ It sought to discover evidence relating to Kloster’s corporate structure and employment practices.¹⁰⁰ Kloster refused to comply with the subpoenas. The EEOC requested judicial enforcement.¹⁰¹

The District Court denied the EEOC’s request. It held that “the application of Title VII to foreign flagged vessels owned by a foreign corporation, without clear congressional authorization, would “undermine the sovereignty of another country” and “violate principles of international law.”¹⁰² The Court of Appeals for the Eleventh Circuit reversed the decision.¹⁰³ In its decision, the court stated, “[a]lthough we do not decide the jurisdictional reach of Title VII with respect to owners of foreign flagged cruise ships, we reverse the district court’s ruling because it was prematurely made in this subpoena enforcement action.”¹⁰⁴ The Eleventh Circuit’s reasoning is worth noting:

In the instant case, many of the EEOC’s requests for documents are attempts to discover information that would be relevant to jurisdiction. For example, although Kloster argues that the discharged employees were actually employed by Ivanhoe Catering International, Ltd. (“Ivanhoe”), a wholly owned Bahamian subsidiary of Kloster, the EEOC makes a colorable assertion that Ivanhoe is really a mere alter ego of Kloster. The EEOC subpoenae request information on the relationship between Kloster and Ivanhoe. The EEOC also seeks information relating to the nature and extent of Kloster’s business operations in Miami, the extent to which the employment activities occurred in Miami, and whether the acts of alleged discrimination occurred in Miami. These and other facts may lead to information that will allow the EEOC to make an informed decision regarding its jurisdiction. The EEOC cannot be expected to ask only questions to which it already knows the answers.¹⁰⁵

Because Title VII only applies extraterritorially to American citizens employed by U.S. companies, the EEOC sought information regarding not only whether or not the employees filing the complaint were American citizens, but whether or not a case could be made that Kloster (Norwegian Cruise Lines) was a U.S. company.¹⁰⁶ Such a determination would not have been the end of the inquiry since NCL had attempted to protect itself from liability by hiring its crew through a third-party employment company, a common strategy among cruise operators.¹⁰⁷

The Eleventh Circuit, in its decision, also alluded to the conclusion that was reached in *Lauritzen v. Larsen*,¹⁰⁸ which dealt with the application of the Jones Act to a foreign owned ship. In that case, the Court considered seven factors,¹⁰⁹ only one of which was the “law of the flag,” to guide its resolution of the issue regarding whether the Jones Act applied to a maritime tort action brought by a Danish seaman against a Danish owner of a Danish vessel.¹¹⁰ The *Kloster* court held that it could not “conclude at this early stage that the EEOC clearly lacks jurisdiction.”¹¹¹

The result of the decision in *Kloster* remains nonetheless unclear when combined with the Court's ruling in *Spector*.¹¹² The courts appear to be more willing to look past the supposed sovereignty of ships flying FOCs to analyze other factors which may affect choice-of-law issue.

CONCLUSION

Most cruise lines operating in the United States have significant ties to the United States.¹¹³ While most are incorporated abroad, and register their ships under foreign flags, they are often headquartered in the United States. Additionally, most passengers are U.S. citizens, and often the cruise lines are owned and largely controlled by U.S. interests.¹¹⁴ A rule which accounts for the beneficial ownership of the vessel and the owner's nationality, as well as the relative protections to be expected from the host state, should guide courts toward determining whether extension of anti-employment discrimination laws should be available, to both U.S. citizens and to aliens working aboard U.S. cruise ships.¹¹⁵

Thus far, legislative efforts by Congress have failed to bring

about real change in the industry.¹¹⁶ To date, international efforts have also had limited success.¹¹⁷ Meanwhile, the current situation allows for the absurd result of protecting passengers from discrimination, but not workers. Unlike the National Labor Relations Act and the Fair Labor Standards Act, both ruled to be inapplicable to foreign crews aboard foreign flagged ships due to their potential for conflict with other legal obligations, U.S. anti-discrimination statutes are unlikely to provoke international discord of the kind discussed in *Benz* and *McCulloch*, the respective cases deciding those matters.¹¹⁸

American corporations should not be permitted to shirk the laws of the United States by transferring non-citizen employees to foreign offices or by simply hiring foreign workers. Title VII must be re-written in order to conform to its original purpose - the deterrence of discriminatory behavior by employers.¹¹⁹ If a protected U.S. trademark were being used improperly aboard a cruise ship and compensation denied, the U.S. would undoubtedly assert jurisdiction. Therefore, courts should consider showing the same courtesy to the people employed aboard the same ships.

ENDNOTES

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¹ *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119 (2005).

² Anne Gray Miller, 10-VI BENEDICT ON ADMIRALTY § 6.04 (2007) (noting the uncertainty regarding the application of Title VII of the Civil Rights Act to cruise vessels).

³ Rochdale Report, COMMITTEE OF INQUIRY INTO SHIPPING, REPORT 51 CMND 4337 (London: HMSO, 1970). According to the Rochdale Report, there are six criteria for determining the status of a "flag of convenience":

[1] The country of registry allows ownership and/or control of its merchant vessels by non-citizens;

[2] Access to the registry is easy; ship may usually be registered at a consulate abroad. Equally important, transfer from the registry at the owner's option is not restricted;

[3] Taxes on the income from the ships are not levied locally, or are very low. A registry fee and an annual fee, based on tonnage, are normally the only charges made. A guarantee of acceptable understanding regarding future freedom from taxation may also be given;

[4] The country of registry is a small power with no national requirement under any foreseeable circumstances for all the shipping registered, but receipts from very small charges on a large tonnage may produce a substantial effect on its national income and balance of payments;

[5] Manning of ships by non-nationals is freely permitted; and

[6] The country of registry has neither the power nor the administrative machinery effectively impose any governmental or international regulations; nor has the country even the wish or the power to control the companies themselves.

⁴ R. Tali Epstein, Comment, *Should the Fair Labor Standards Act Enjoy Extraterritorial Application?: A Look at the Unique Case of Flags of Convenience*, 13 U. PA. J. INT'L BUS. L. 653, 665 (1993) (quoting BOLESŁAW A. BOCZEK *FLAGS OF CONVENIENCE* 6-12 (1962))(describing the widespread practice of registering merchant vessels under flags of convenience).

⁵ See H. Edwin Anderson, III, *The Nationality of Ships and Flags of Convenience: Economics, Politics, and Alternatives*, 21 TUL. MAR. L.J. 139, 140 (1996).

⁶ *Id.*

⁷ For a good discussion of the history of the "genuine link" requirement, see *Id.* at 148-152.

⁸ Epstein, *supra* note 4, at 666

⁹ International Transport Workers' Federation, *Flags of Convenience Campaign*, ITF Handbook, available at <http://www.itfglobal.org/flags-convenience/index.cfm> (last visited Oct. 6, 2007).

For example, the ITF declares its two main objectives in its flags of convenience campaign to be:

"(1) to establish by international governmental agreement a genuine link between the flag a ship flies and the nationality or residence of its owners, managers and seafarers, and so eliminate the flag of convenience system entirely, [and] 2) to ensure that seafarers who serve on flag of convenience ships, whatever their nationality, are protected from exploitation by shipowners."

¹⁰ Anderson, *supra* note 5, at 156.

¹¹ Anderson, *supra* note 5, at 156-157.

ENDNOTES CONTINUED

- ¹² Shayna Frawley, *The Great Compromise: Labor Unions, Flags of Convenience, and the Rights of Seafarers*, 19 W.R.L.S.I. 85, 89 (2005).
- ¹³ Anderson, *supra* note 5, at 158-161 (discussing the mutual dependency that arises between open registry states and the industrially developed nations whose ships fly FOCs).
- ¹⁴ Anderson, *supra* note 5, at 158-161.
- ¹⁵ Anderson, *supra* note 5, at 158-161.
- ¹⁶ Anderson, *supra* note 5, at 159.
- ¹⁷ Rodney Carlisle, *Sovereignty for Sale: The Origins and Evolution of the Panamanian and Liberian Flags of Convenience*, (Naval Institute Press, 1981) (1981) (a thorough discussion of the development of the Liberian and Panamanian registries).
- ¹⁸ Anderson, *supra* note 5, at 159.
- ¹⁹ Anderson, *supra* note 5, at 155.
- ²⁰ Anderson, *supra* note 5, at 155.
- ²¹ Ross A. Klein, *High Seas, Low Pay: Working Conditions on Cruise Ships*, Our Times: Canada's Independent Labour Magazine (Dec. 2001/Jan. 2002), available at <http://www.cruisejunkie.com/ot.html>. (last visited Oct. 16, 2007).
- ²² Frawley, *supra* note 12, at 91 (quoting "The Advantages of the Panamanian Registry" Consulates of Panama, available at <http://www.embassy-avenue.jp/panama/adva.htm> (last visited Oct. 16, 2007)).
- ²³ Frawley, *supra* note 12, at 91.
- ²⁴ Frawley, *supra* note 12, at 91 (quoting the International Transport Workers Federation *Flags of Convenience Campaign Report 1998 & 1999*).
- ²⁵ Frawley, *supra* note 12, at 91 (citing *Flags of Convenience Campaign Report 2001/02*, "Casualties for 2001" *Lloyds Register, World Casualty Statistics 2001*, International Transport Workers Federation, available at <http://www.itf.org.uk/iftweb/seafarers/foc/report2001/pages/s15-07.html> (last visited Oct. 16, 2007)); see also Anderson, *supra* note 5, at 167-68 (pointing out that when, in accordance with the Paris Memorandum of Understanding (MOU) signed by seventeen European countries and Canada, port states were to inspect for safety infractions every fourth vessel porting, by 1991 those countries had detained 6.15% of Panamanian flagged vessels, 4.59% of Liberian flagged vessels, and 16.67% of vessels flagged in the Marshall Islands. By contrast, only 1.8% of U.K. vessels were detained).
- ²⁶ Anderson, *supra* note 5, at 155.
- ²⁷ Anderson, *supra* note 5, at 155.
- ²⁸ Anderson, *supra* note 5, at 155.
- ²⁹ Anderson, *supra* note 5, at 155.
- ³⁰ Anderson, *supra* note 5, at 155.
- ³¹ William A. Goldberg, *Cruise Ships, Pollution, and International Law: The United States Takes on Royal Caribbean Cruise Lines*, 19 WIS. INT'L L.J. 71, 71 (2000).
- ³² Goldberg, *supra* note 34, at 71.
- ³³ Goldberg, *supra* note 34, at 71.
- ³⁴ Goldberg, *supra* note 34, at 71.
- ³⁵ Goldberg, *supra* note 34, at 71.
- ³⁶ Goldberg, *supra* note 34, at 71.
- ³⁷ William A. Goldberg, *Cruise Ships, Pollution, and International Law: The United States Takes on Royal Caribbean Cruise Lines*, 19 WIS. INT'L L.J. 71, 73 (2000).
- ³⁸ Klein, *supra* note 21 (noting that in 1995, Panama earned \$47.5 million in ship-registration fees and annual taxes (five per cent of its federal budget)).
- ³⁹ Transport International Online, *Cruise Shipping: Behind the Fantasy*, Issue 1 (June 2000) available at <http://www.itfglobal.org/transport-international/cruiseshipping.cfm> (last visited Oct. 16, 2007) (noting that since the mid- 1980s, cruise shipping has outstripped all other maritime sectors with an average growth rate of 9.6 per cent a year, compared with the average of all types of vessels of 2.76 per cent)[hereafter "Transport International Online"]
- ⁴⁰ Klein, *supra* note 21.
- ⁴¹ Klein, *supra* note 21.
- ⁴² Klein, *supra* note 21.
- ⁴³ Klein, *supra* note 21.
- ⁴⁴ Klein, *supra* note 21.
- ⁴⁵ Ross A. Klein, *High Seas, Low Pay: Working Conditions on Cruise Ships*, Our Times: Canada's Independent Labour Magazine (Dec. 2001/Jan. 2002), available at <http://www.cruisejunkie.com/ot.html>. (last visited Oct. 16, 2007).
- ⁴⁶ Klein, *supra* note 21.
- ⁴⁷ Klein, *supra* note 21.
- ⁴⁸ Klein, *supra* note 21.
- ⁴⁹ Ross A. Klein, *High Seas, Low Pay: Working Conditions on Cruise Ships*, Our Times: Canada's Independent Labour Magazine (Dec. 2001/Jan. 2002), available at <http://www.cruisejunkie.com/ot.html>.
- ⁵⁰ International Transport Workers' Federation, Sample "Standard Collective Bargaining Agreement 2006," available at <http://www.itfglobal.org/files/seealsodocs/1467/ITF%20Standard%20CBA%202006.pdf>. (last visited Oct. 16, 2007).
- ⁵¹ Frawley, *supra* note 14, at 95 (summarizing information from the International Transport Workers' Federation, available at <http://www.itfglobal.org/flags-convenience/flags-convenience-184.cfm> (last visited Oct. 16, 2007)).
- ⁵² Transport International Online, *supra* note 39.
- ⁵³ Center for Public Integrity, *International Council of Cruise Lines*, (1998 – 2004), available at <http://www.publicintegrity.org/lobby/profile.aspx?act=clients&year=2003&cl=L001929&sub=3> (last visited Oct. 16, 2007). The Center for Public Integrity lists the number of lobby filings by the International Council of Cruise Lines, an organization comprised of cruise companies and other special interest groups, as 87 between 1998-2004. Among the listed issues which the organization lobbies for (or against) are the Environment, Immigration, Civil Rights & Civil Liberties, and Taxation & Internal Revenue Code. The Center pegs the spending on lobbying efforts by the Council at \$6,134,702 between 1998-2004. Norwegian Cruise Lines, also heavily involved in lobbying, spent \$2,760,000 on its efforts during the same time period.
- ⁵⁴ *Id.* "Sea Transportation" ranks fourth, behind "State, Local, Tribal Governments and related organizations", "Railroads & Related Organizations", and "Electric Utilities". The Sea Transportation industry spent more on lobbying between 1998-2004 than the Automotive Industry, the Defense Aerospace Industry, the Food & Beverage Industry, and Health Services & HMOs combined.
- ⁵⁵ Klein, *supra* note 21.

ENDNOTES CONTINUED

⁵⁶ See generally Transport International Online, *For Women, More Jobs – But a Culture of Discrimination*, Issue 1 (June 2000), available at <http://www.itfglobal.org/transport-international/discrimination.cfm> (last visited Oct. 16, 2007).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Duncan B. Hollis, *International Decision: Spector v. Norwegian Cruise Line Ltd. United States Supreme Court, June 6, 2005*, 99 A.J.I.L. 881, 881 (2005) (noting that the decision in *Spector* may presage the further erosion of primacy of flag state jurisdiction).

⁶² *Id.* at 882.

⁶³ See *supra* note 50.

⁶⁴ *Spector*, 545 U.S. at 136

⁶⁵ *Id.* at 130 (2005) (noting that the first of the modern cases to address the application of a domestic statute to a foreign-flag ship in U.S. waters was *Benz v. Compania Naviera Hildalgo, S.A.*, 353 U.S. 138 (1957)) (holding that the Labor Management Relations Act did not reach relations between “a foreign crew operating under an agreement made abroad under the laws of another nation”). The Court did not stray from the rule laid down in this case that laws apply only within the territorial boundaries of the United States absent specific congressional intent to the contrary.

⁶⁶ *Id.* at 136-141.

⁶⁷ *Foley Brothers Inc. v. Filardo*, 336 U.S. 281, 285 (1949) (holding that the federal Eight Hour Law did not apply to U.S. citizen working abroad in Iran).

⁶⁸ *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Civil Rights Act of 1991, Pub. L. No. 102-166, §109, 105 Stat. 1071 (1991) (“PROTECTION OF EXTRATERRITORIAL EMPLOYMENT”).

⁷² See *infra* Note 66.

⁷³ See *infra* Note 66.

⁷⁴ *Shekoyan v. Sibley Int'l Corp.*, 217 F. Supp. 2d 59 (2002);

⁷⁵ *Shekoyan.*, 217 F. Supp. 2d at 62; *claim dismissed by* 2004 U.S. Dist. LEXIS 4845 (D.D.C., Mar. 19, 2004); *affirmed by* 366 U.S. App. D.C. 144, 409 F.3d 414; *US Supreme Court certiorari denied by* *Shekoyan v. Sibley Int'l, Inc.*, 2006 U.S. LEXIS 1187 (U.S. Feb. 21, 2006).

⁷⁶ *Shekoyan.*, 217 F. Supp. 2d at 62.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 61.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Torrico v. IBM*, 213 F. Supp.2d 390, 393 (S.D.N.Y. 2002).

⁸³ *Id.*

⁸⁴ *Id.* at 397 (“Torrico became very ill in January 1999 as a result of an autoimmune disease that caused, among other symptoms, severe chronic fatigue, reactive arthritis and peripheral neuropathy, and severe muscular pain throughout his body. At one point on January 23, 1999, Torrico collapsed and required medical attention. Torrico's physician advised him that on account of this condition, he would require rest and would not be

able to work for approximately six months. Accordingly, Torrico informed his employer of his illness and went on a medical leave of absence on January 24, 1999.” IBM stated that Torrico's employment contract ended while he was on leave).

⁸⁵ See 42 U.S.C. §12101 (1990).

⁸⁶ *Torrico*, 213 F. Supp. 2d at 403.

⁸⁷ *Id.*

⁸⁸ *Id.* at 402-03.

⁸⁹ *EEOC v. Bermuda Star Line, Inc.*, 744 F. Supp. 1109 (1990).

⁹⁰ See 42 U.S.C. § 2000e-2 (1991), Unlawful Employment Practices.

⁹¹ *Bermuda Star Line, Inc.*, 744 F. Supp. at 1110.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *EEOC v. Kloster Cruise Ltd.*, 743 F. Supp. 856 (S.D.Fla. 1990).

⁹⁶ *Id.* at 856.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*, 857 (S.D.Fla. 1990).

¹⁰⁰ See 42 U.S.C. §2009e-9 (1964). Section 2000e-9 gives the EEOC the same authority to enforce subpoena as the National Labor Relations Board has under 29 U.S.C. § 161.

¹⁰¹ *EEOC v. Kloster Cruise Ltd.*, 743 F. Supp. at 857.

¹⁰² *EEOC v. Kloster Cruise, Ltd.*, 939 F.2d 920, 922 (11th Cir. 1991).

¹⁰³ *Id.* at 924.

¹⁰⁴ *Id.* at 923.

¹⁰⁵ *Id.* at 922-23.

¹⁰⁶ *Id.*

¹⁰⁷ This may have been due to an increasing realization that a court may find any one of the cruise lines operating out of the U.S. to be U.S. companies. In that situation, a court would likely find a U.S. citizen to be protected by U.S. anti-discrimination laws. However, even if the cruise line in question is found to be an American enterprise, aliens working aboard the ship would still have the burden of proving that the situs of the discriminatory action occurred within the territorial boundaries of the United States. This would create another strange situation where the ship operator could pay a foreign national less just because he is from Nigeria, while a U.S. citizen on the same ship would be protected from that action. Also, because U.S. citizens would have more protections, they may be undesirable employees. This would also then raise the question of whether or not a U.S. citizen could sue for Title VII (Civil Rights Act) violations discrimination based on U.S. citizenship. Title VII prohibits discrimination based on nationality, but does not protect against discrimination based on citizenship.

¹⁰⁸ *Lauritzen v. Larsen*, 345 U.S. 571 (1953).

¹⁰⁹ *Lauritzen*, 345 U.S. at 583-91 (noting the seven *Lauritzen* factors are: (1) the place of the wrongful act; (2) the “law of the flag;” (3) the allegiance or domicile of the injured party; (4) the allegiance of the defendant shipowner; (5) the place of the contract; (6) the accessibility of the foreign forum; and (7) the law of the forum.)

¹¹⁰ *Id.*

¹¹¹ *EEOC v. Kloster Cruise, Ltd.*, 939 F.2d at 924.

ENDNOTES CONTINUED

¹¹² *Spector v. Norwegian Cruise Lines, Ltd.*, 2005 WL 578842 (U.S.) Oral Argument noting the issue of whether or not Title VII applies to cruise ships came up in oral argument during the Spector case. Below is an excerpt of the exchange between Mr. Frederick (counsel for Norwegian Cruise Lines) and two Justices:

JUSTICE O'CONNOR: Well, but this is a good question, and what is your position? That the ship could engage in racial discrimination while in U.S. port and within the 3--

MR. FREDERICK: Justice O'Connor, our position is that Congress has not spoken to the question, and so there is no congressional statute that is on point.

JUSTICE SOUTER: Then your answer, I take it, is yes, it can discriminate and it can discriminate because Congress has not told it not to. Is that it?

MR. FREDERICK: No. No. Our position is that it can't discriminate because a different law proscribes that—

JUSTICE SOUTER: So far as United States law is concerned, it could.

MR. FREDERICK: Yes.

¹¹³ See *infra* Note 110.

¹¹⁴ John Pain, *For Carnival CEO, It's Full Speed Ahead*, SEATTLE TIMES, May 7, 2004, available at http://seattletimes.nwsourc.com/html/travel/2001920579_carnivalchief09.html (last visited Oct. 16, 2007).

Carnival Corporation is a widely held public company, a member of the S&P 500, traded on the NYSE, but incorporated in Panama. Carnival Corp.'s chairman and chief executive, Micky Arison, is Florida's second-richest person and the 33rd wealthiest in America, with an estimated net worth of \$5.9 billion, according to Forbes magazine. Royal Caribbean Cruises, which operates both the Royal Caribbean Lines and Celebrity Lines, is based in Miami, FL and incorporated in Liberia. While almost 40% of the company is owned by insiders and much of it controlled by Norwegian founder Arne Wilhelmsen, over 60% is owned by U.S. institutional investors and mutual funds, available at <http://finance.yahoo.com/q/mh?s=RCL> (last visited Oct. 16, 2007).

¹¹⁵ See generally Olivia P. Dirig and Mahra Sarofsky *The Argument for Making American Judicial Remedies Under Title VII Available to Foreign Nationals Employed by U.S. Companies on Foreign Soil*, 22 HOFSTRA LAB. & EMP. L.J. 709 (2005); Epstein, *supra* note 4.

¹¹⁶ See generally Key U.S. Lawmakers Seek Reform of Open Registries, Am. Mar. Officer (Oct. 2000), available at <http://www.amo-union.org/newspaper/morgue/10-2000/Sections/>

News/itf-lawmakers.htm (last visited Oct. 16, 2007). Excerpt as follows:

Rep. Bonior characterized FOC cargo and cruise vessels as "floating plantations." Pointing to documented abuses aboard such vessels, the Congressman said FOC ship owners and operators "thumb their noses" at U.S. laws and standards, even while thriving on U.S. trade. "No more of this," he said. "No more of these seagoing plantations coming into our ports."

Rep. Bonior had a particularly pointed message for the U.S.-based flag-of-convenience luxury cruise fleets: "Change your act," he cautioned, "or your cruising for a bruising." Rep. Clay, a 32-year House veteran who will retire at the close of the current Congressional session, recalled his multiple, frustrating attempts to apply U.S. labor laws to foreign-flag cargo and cruise ships making frequent port calls in the U.S. His bills to accomplish that were heard in House testimony, but there never was a Senate version of the legislation.

FOC labor and living conditions remain "intolerable," said Rep. Clay, who characterized the FOC regime as "a not-too-sophisticated scheme to deny workers their rights."

Countries that provide "open" vessel registries often "don't even pretend to have laws to protect mariners," Rep. Clay said. As a result, FOC ships are "snake pits of human suffering," with long hours at little pay, substandard quarters, rancid food, and payoffs to manning agents in crew recruitment countries in exchange for desperately needed jobs.

"This nation not only has the right, but the moral duty to end these abuses," Rep. Clay said. "Now is the time to strike back, to bring justice to these workers at sea." Rep. Engel said FOC shipping represents an "assault against working men and women" and "something we should not stand for."

It is, he added, an issue of "basic fairness."

¹¹⁷ Olivia P. Dirig and Mahra Sarofsky, *supra* note 115 (outlining that The International Labor Organization Convention No. 111 addresses international discrimination in employment and calls for all ratifying nations to pursue policies that will work toward eliminating discrimination in employment).

¹¹⁸ *Benz v. Compania Naviera Hildalgo, S.A.*, 353 U.S. 138 (1957); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963).

¹¹⁹ Olivia P. Dirig and Mahra Sarofsky, *supra* note 115, at 710.

The First Cuban-born President of the Florida Bar Association: Spotlight on Francisco Angones*

By Juan Fernandez-Barquin **

CUBA AND YOUR FAMILY

I read that you arrived from Cuba in 1961. How old were you? Did your whole family come with you? How was their voyage to the United States? I was a month short of being 11. I arrived in the United States on Tuesday, June 13, 1961, by myself, through a program called Pedro Pan.¹ As it just so happens, there were two other unaccompanied children on the flight whom I befriended. The son of one of the two other unaccompanied children has since become an attorney.

My family flew over here 4 ½ months after I arrived. It was a very difficult 4 ½ months because I had no idea when they were arriving. If anything, I was very lucky. Some children did not reunite with their parents until years after they arrived in the United States. And some other children never saw their parents again.

Do you have any vivid memories of Cuba? If so, what is your most vivid memory? Why do you think you remember that the most?

I have some wonderful memories with my father, and with friends from the neighborhood riding horses and going to school. But I also have some very sad, heart-wrenching memories, for instance the day I left my father, mother, and sister behind in Cuba to come to the United States. I was just eleven years old, and to this day, I still remember how much I was hoping and how hard I was praying that I would one day be reunited with them.

As for the rest of my family, my grandparents joined us much later. My grandmother on my mother's side came about five years after I arrived. My grandmother and aunt on my father's side arrived almost exactly 10 years after I arrived.

Fidel financially crippled the vast majority of the upper and middle class Cubans after his arrival to power. Many families had to leave everything they owned and only take what they could each fit into one suitcase. What did your parents do for a living in Cuba? What did they do to make ends after your arrival in the United States? What sort of impression did this change in lifestyle leave upon you?

In Cuba, my father was a lawyer and my mother, a school teacher. In the United States, my parents had several jobs. I remember that they once cleaned the floors in the bathrooms of Miami International Airport. My father also worked selling merchandise and other products in Hialeah. Ultimately, my parents were able to find employment with the Catholic Welfare Bureau in Florida City. Later, my mother was able to get a job teaching there. This was largely because she spoke English. My father, on the other hand, did not speak English. He also had to work odd jobs to make ends meet.

The change in lifestyle was drastic. Upon arriving in 1961, I lived in Hialeah. After my parents arrived, we moved to Florida City, a small city in South Miami-Dade County, next to

Homestead. At Florida City my parents and I lived at a camp, where my parents were placed in charge of some seven or eight other children who had arrived from Cuba via Pedro Pan and had no guardians here in the United States. While at Florida City, I felt like I was leading a double life. At school there were only two Cuban kids and four Puerto Rican kids, the rest were white. We were the only children who spoke Spanish there. While at the camp all the children were Cuban and spoke Spanish. Aside from school and basketball, I only socialized and played with other children from the camp. We were at this camp for about four years.

I noticed several differences between Cuba and the United States – for instance, the difference in the abundance of food between the local grocery store in Hialeah and the one we used to frequent in Cuba. The grocery store in Hialeah, was full of food and nicely presented. The store in Cuba was almost completely bare. Another difference was with the channels on the television sets. In the U.S. we could watch several channels, and in Cuba there were just a handful. The newspapers and the media were tightly controlled in Cuba. The Revolutionary Defense Committee had a tight grip over all things that were published and televised. Here one could pick up the newspaper and read the real news.

Was there a sense of disadvantage amongst you in the camp?

Among us, not really. I did not feel a sense of disadvantage

since all my friends and I were in the same situation. Overall, all of us were on the same boat. None of us had any money, and we were all trying to get ahead. Our parents got the jobs they could just to make a living, and hoped for their kids to do better. Even when it came to sports, we would take

advantage of what we had. Whether it was just a baseball, some gloves, and a bat, or simply a basketball, we would use them, have fun, and enjoy it. We kept originally to our group. But then through high school and then the university we became more integrated. Looking back it probably wasn't as hard as we probably thought it was. Yes, we worked hard and had tunnel vision composed of: we had to work hard and get ahead, and work hard and get ahead. But that was the example our parents gave us. They sometimes held two jobs. Even working after school wasn't that bad.

Tell me about your present family? How did you meet your wife?

I met my wife, because I danced in her fifteenth birthday party. I did not know her very well at the time, but we became friends, and I became part of her social circle. The year before I met her I had moved with my family to Miami from Florida City, and did not know anyone in Miami. We also attended high school very close to one another. She attended the sister school of my high school. Three years after meeting her, during my senior year, I asked her out, and that was the beginning of our

relationship. On September 16, 1967 we started dating, and then we got married on August 25, 1972. We had our only child about ten years later, Francisco Angones, Jr. who recently completed his Bachelors at Columbia University, and has begun his Masters degree in Fine Arts at Columbia University.

THE PROFESSION

Why the law? Did you always know you wanted to be an attorney? Did anything trigger your decision to become a lawyer?

I was always fascinated with the law. At 12 years old I remember I wanted to be a lawyer. I told my father this, and he told me that I was too introverted, not out-going enough, and not tough enough. I was greatly impacted when I started my undergraduate degree at the University of Miami. I studied Philosophy of Political Systems and History. In History I concentrated on Revolutions, in particular the American, French, Mexican, Soviet, and Cuban Revolutions. From there I learned to appreciate and admire our system of government and the Constitution.

What I admire about our Constitution the most is how it is able to evolve and how we can still resolve our problems using it. You must keep in mind that when our government was started, women, blacks, and even some white males who didn't own real property couldn't vote or serve in juries. You cannot deny the fact that our system has been able to evolve over time. The only great misfortune we've had as a country was our Civil War, which pitted brother against brother, and father against son. And I am certain nothing like that will ever happen again because of the great suffering it caused.

Women received their right to vote in 1920. Blacks in some parts of the country weren't allowed to vote until the 1960's. The Civil Rights Act, and *Brown v. Board* provided avenues of great change. Most recently, in 2000 with the voting dispute between Bush and Gore, in some other countries a General would have declared war, martial law, and decided the victor. In the United States the parties did go to war, but in the courtroom. They each filed suits all over the State of Florida, and in some other parts of the United States. Then, a final arbiter, the courts, an independent branch of government, determined the victor. And even though many thought it wasn't right, the court's decision was ultimately accepted and democracy continued.

After I earned my undergraduate degree I attended University of Miami School of Law, and graduated from there in 1976.

I understand you served as President of the Cuban-American Bar Association in 1982. How do you feel the minority bar associations contribute to meet the needs of minorities?

All minority bar associations are great training grounds for leadership and future involvement in state bar associations. Minority bar associations, such as the Cuban American Bar Association, are particularly suited for groups such as Cuban Americans to learn to work together and learn how the Florida Bar and American Bar Association function. Overall, through minority bar associations members are able to achieve greater leadership roles in their respective state bars and the American

Bar Association.

The Brothers to the Rescue is an organization composed of volunteers who organize fly-bys over the Straits of Florida to look out for rafters. On February 24, 1996, three U.S. citizens and a resident of Florida were shot down over international waters by Cuban MiGs while flying a humanitarian mission for the Brothers to the Rescue. You sued the Cuban government on behalf of the families and collected on the judgment. It is very difficult and some would claim almost impossible to collect from the Cuban government. Can you speak of the difficulties you encountered in attaining the judgment and in collecting?

We were lucky that shortly after the unfortunate tragedy and murder of four human beings, Congress passed the Anti-Terrorism and Effective Death penalty Act, which essentially removed immunity from the sovereign nations who were listed on the Justice Department's list of terrorist government. Cuba was on this list. This Act allowed us to file suit against the Cuban Government and provided a method of service process. However, there was no method of collection. Even though the Cuban government failed to appear in court, we were still

required to present our case. When you sue a foreign country, even though they fail to appear in court and you file a default judgment, you still have to show some proof of their guilt. This requirement to show proof of their guilt is for the protection of their sovereignty. So we presented our case, with several witnesses in front of the Honorable Lawrence King in the United States District Court for the Southern District of Florida. Judge King came out with an excellent human rights opinion awarding our party \$187 Million in compensatory

damages. From there to collection was a difficult task.

Although the Cuban government did not appear at trial, they did hire lawyers when we tried to collect from their frozen assets. They hired a New York law firm to oppose us. The U.S. Justice Department also opposed the collection since they had an interest in preserving the assets of sovereign nations, including frozen assets.

Judge King's opinion came out in late 1996, and it took us until late 2001 to collect. Congress had to pass legislation to enable us to collect from the frozen assets. Passage of this act required lobbying. At about the same time we were lobbying a young woman was murdered in the Middle East by a terrorist group financially supported by Iran. This incident assisted in the passage of the act. Through a bipartisan effort led by Senator Frank R. Lautenberg (D-NJ), and Senator Connie Mack (R-FL), the act passed in early 2001 and we were able to partially collect on the judgment.

FLORIDA BAR ASSOCIATION

How does it feel to be the first Cuban born President of the Florida Bar?

It's a wonderful honor and humbling experience. It is difficult to describe the joy I have in representing the lawyers of Florida and the citizens of Florida as the Pres of the Fl Bar.

What goals do you have as President?

I have a couple of things I hope to accomplish. For one thing, I would like to seek the participation of all lawyers in the

bar association, particularly minority lawyers- blacks, Hispanics, and women. I plan to accomplish this by asking them to get more involved in the bar associations events, and asking for their participation within the organization, such as participating in committees. Besides greater minority involvement, I also plan to reach out to lawyers who feel disenfranchised by the Florida Bar.

Another initiative is to increase funding to the state judiciary. To keep an independent judiciary there must be adequate funding so the justice system can perform properly. The justices of the Supreme Court of Florida have not received a standard of living raise in the last four years. We are also seeking funds to make a support staff for the judiciary from the Supreme Court to the lowest courts. Other arms of government are luring away competent members of the judiciary staff with higher pay for essentially the same type of work. Even though the members of the judiciary staff may be of the same category as the other state employees, the other state employees get paid more than those on the judiciary staff. Lastly, another initiative of mine is to create a task force to assist in the preservation of attorney client privilege. This is in response to the Justice Department recent attacks on the privilege.

You discussed minority attorneys. Do you feel there is there a strong representation of minorities within the Florida Bar?

If we were to take the totality of all the lawyers in Florida with an accurate statistic of the blacks, Hispanics, and women represented in the bar, and I can only say this anecdotally, I believe we are beginning to be represented in adequate numbers. Believe it or not, the problem is that the questionnaires asking your race, gender, ethnicity, are voluntary. Consequently, we only have partial numbers because reporting is not required.

This year we have the greatest amount of minorities in our 52-member Board of Governors than we have ever had in the past. For the first time ever we have five black members of the Board of Governors, the highest ever, three Hispanic members – this figure has remained consistent over the last couple of years – and 11 women, another highest ever. Representation of women and minorities in the committees is also higher than it has ever been in the past. Perhaps we are not completely there yet, but we are surely making the in roads to getting there.

How do you plan to bolster minority attorney participation in the Florida Bar?

The Florida Bar, with the assistance of a law firm has set up a program to study the effect of lawyers and minorities. The law firm will fund a member of the Florida Bar with a two-year fellowship to conduct these studies. And, we may also revamp our annual diversity symposium. For the last four years we have had an annual diversity symposium. We have set up a committee to study the symposium from top to bottom to see whether it needs improvement to accomplish its goal of attracting more minority attorneys.

Does the Florida Bar have some sort of a big brother-big sister organization to assist minorities becoming attorneys?

There are a couple of projects that involve mentoring currently taking place, and some being considered. There is a cooperation between student branches of the bar association in different universities throughout Florida, and particular sections of the bar. For instance, the real property and probate division of the Florida Bar has set up a minority outreach program for future and new members of the bar. Through this program, the attorneys of this division will introduce students and new graduates to the real property and probate sections of the Florida Bar.

The Young Lawyers Division of the Florida Bar also reaches out to the student associations to bolster interest for the students' participation after graduation. We have been doing this for some time. The present President of the Young Lawyers Division has followed through on this, and I know the incoming President plans to continue with this same plan.

The professionalism committee of the Florida Supreme Court along with the Florida Bar will be considering the possibility of a mentoring program for young lawyers who have just graduated from law school. This program would be intended for graduates who are neither in big firms nor working for a big government agency, and in general need of some necessary training to become better attorneys. Learning to be an attorney does not end with law school. This program would get these individuals more involved in the profession and further instruct them on their professional responsibilities, including quite possibly the most important one of all, ethics.

ENDNOTES

* See Mr. Angones' s biography on page 87.

** Juan Fernandez-Barquin is a third-year law student at the American University Washington College of Law. Mr. Fernandez-Barquin is also the Managing Editor of *The Modern American*.

¹ Pedro Pan was a program created by the Catholic Welfare Bureau of Miami in December 1960 at the request of parents in Cuba to provide an opportunity for them to send their children to Miami to avoid Marxist-Leninist indoctrination. From December 1960 to October 1962, more than 14,000 Cuban youths arrived alone in the United States. What is now known

as Operation Pedro Pan was the largest recorded exodus of unaccompanied minors in the Western Hemisphere. While the majority was Catholic, several hundred were Protestant, Jewish or non-believers. Very few were from wealthy backgrounds. Most were of the middle class or lower middle class and included children of different racial background, Black and Chinese. Family reunions began shortly after the first arrivals of the children. About 50% were united with family members at the airport. <http://www.pedropan.org/history.html>.

LEGISLATIVE UPDATES

H.RES. 526 “WHEREAS HOME OWNERSHIP IS AN IMPORTANT PART OF THE AMERICAN DREAM”

This resolution finds that home ownership levels were at a near record high in 2006, although still lower among minorities. The House recognizes that the sub-prime market created home ownership opportunities for lower income families and that sub-prime mortgages are most prevalent in neighborhoods with high concentrations of minorities. In recent months the sub-prime mortgage crisis has caused a sharp increase in home foreclosures and has had a disparate impact on minority communities. The resolution was proposed by Representative Elijah E. Cummings (MD) and was passed in the House on July 11, 2007.

The House recognizes a need to protect borrowers from unscrupulous practices by lenders and mortgage brokers. This resolution calls for rules to eliminate unfair practices, to encourage lenders to evaluate a borrower's ability to repay a mortgage, to require lenders to clearly communicate information about mortgage loans, to reduce or eliminate prepayment penalties, and to increase opportunities for loan counseling, among other things.

The House and the Senate have proposed many bills in response to the current crisis. The Foreclosure Protection and Home Ownership Protection Act (H. R. 3666) was introduced in the House on September 25, 2007 by Representative Betty Sutton (OH). The bill recognizes the great effect this crisis has had on the world economy and that the number of foreclosures will likely increase. The purpose of this bill is to establish a commission to examine the crisis, its causes, and legislative changes that could prevent such a problem in the future.

The Fair Mortgage Practices Act of 2007 (H.R. 3012) would require loan originators to obtain a mortgage license or registration in order to engage in the business of loan origination. This bill was introduced by Representative Spencer Bachus (AL) and was referred to house committee on July 12, 2007.

The Fairness for Homeowners Act of 2007 (H.R. 3081) would require lenders to verify borrowers' ability to repay loans secured by a principal dwelling. This bill was introduced by Representative Keith Ellison (MN) and was referred to a House committee on July 18, 2007.

Other bills call for transparency in lending (H.R. 3296), leniency in bankruptcy proceedings (S 2136), and a requirement of mitigation activities as an alternative to foreclosure (S. AMDT. 2832 to H.R. 3074).

H.R. 3685 “EMPLOYMENT NON-DISCRIMINATION ACT OF 2007”

This bill would prohibit employment discrimination based on sexual orientation and create meaningful remedies for victims of such discrimination. The bill is sponsored by Representative Barney Frank (MA) and has nine co-sponsors. It was referred to House committee and to the Committee on Education and Labor on September 27, 2007.

The bill resembles the Title VII protections that currently prohibit employment discrimination on the basis of race and gender. The bill would prohibit failing or refusing to hire,

discharging, and discriminating in wages, terms, conditions, or privileges of employment based on sexual orientation or perceived sexual orientation. It would also prohibit segregating or classifying applicants or employees in a way that would deprive, tend to deprive, or otherwise adversely affect an individual based on sexual orientation or perceived sexual orientation. The bill would not apply to members of the military or religious organizations.

Representative Barney Frank introduced another bill, H.R. 2015, in April 2007. That bill would have prohibited employment discrimination based on sexual orientation and gender identification. H.R. 2015 had 171 co-sponsors. The current bill has been criticized for failing to extend protection against employment discrimination to transsexuals.

H.R. 2965 “GROWTH ACT OF 2007”

This bill would direct the Secretary of State to establish the Global Resources and Opportunities for Women to Thrive (GROWTH) Fund by amending the Foreign Assistance Act of 1961. First introduced in 2006, the amendments target underprivileged women in developing nations and focus on “(1) increasing women-owned enterprise development; (2) increasing property rights for women; (3) increasing women's access to financial services; (4) increasing women in leadership in implementing organizations, such as indigenous non-governmental organizations, community-based organizations, and regulated financial intermediaries; (5) improving women's employment benefits and conditions; and (6) increasing women's ability to benefit from global trade.”

The bill recognizes that women are more vulnerable to economic instability than men in developing nations. The bill also finds that because women often invest extra income in their families, supporting underprivileged women in enterprises would have a positive impact on child nutrition, health, and education.

The bill was introduced in the House in July by Representative Nita M. Lowley (NY) and has fourteen co-sponsors. The bill was also introduced in the Senate in September by Senator Richard Durbin (IL) and currently has one co-sponsor.

H.RES. 535 “COMMENDING DAVID RAY RITCHESON, A SURVIVOR OF ONE OF THE MOST HORRIFIC HATE CRIMES IN THE HISTORY OF TEXAS, AND RECOGNIZING HIS EFFORTS IN PROMOTING FEDERAL LEGISLATION TO COMBAT HATE CRIMES”

With this resolution Congress mourns the passing of David Ray Ritcheson and commends his activism against hate crimes. Ritcheson was a Mexican-American high school student in Spring, Texas. On April 23, 2006 he was brutally assaulted because of his race. The former high school running back and Homecoming Prince spent several months in the hospital, where he underwent 30 surgeries. Ritcheson became an advocate against hate crimes because of his personal experience.

Ritcheson testified in front of a committee of the House of Representatives and urged the Federal Government to take

action to prevent hate crimes. The David Ray Hate Crimes Prevention Act of 2007 – “David’s Law” – was incorporated into the Local Law Enforcement Hate Crimes Prevention Act of 2007. The legislation provides Federal grants to state and local programs to combat hate crimes committed by juveniles.

David Ray Ritcheson died on July 1, 2007. He was eighteen years old.

H.R. 3014 “HEALTH EQUITY AND ACCOUNTABILITY ACT OF 2007”

This bill would amend the Public Health Services Act to provide “culturally and linguistically appropriate health care.” The amendments include provisions that would improve access to federally funded medical care for patients with limited English proficiency. The bill would also require non-discrimination in healthcare, create national standards in health care, and establish the Robert T. Matsui Center for Cultural and Linguistic Competence in Health Care.

Representative Hilda L. Solis (CA) introduced this bill on July 12, 2007. It is co-sponsored by eighty-three Representatives. On September 11, 2007 it was referred to a House subcommittee.

H.R. 2221 “UNITING AMERICAN FAMILIES ACT OF 2007”

The purpose of this bill is to amend the Immigration and Nationality Act (INA) to permit 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 obtain that status. This bill would eliminate discrimination based on sexual orientation in the INA by extending privileges to permanent partners. The limitations imposed by the INA on married couples would also apply to permanent partners. Children of citizens or lawful permanent residents that have permanent partners would not be eligible for lawful permanent resident status.

The bill was introduced in May 2007 by Representative Jerrold Nadler (NY) and is co-sponsored by eighty-seven Representatives. The bill was referred to the Sub-Committee on Immigration, Citizenship, Refugees, Border Security, and International Law on June 25, 2007. Senator Patrick J. Leahy (VT), with nine co-sponsors, introduced a companion bill (S.1328) in the Senate in May.

SPOTLIGHT



Ms. Kiran Ahuja is the Executive Director of the National Asian Pacific American Women's Forum (NAPAWF). NAPAWF is a national grassroots organization with a mission to forge a progressive movement for the social and economic justice and political empowerment of APA women and girls. Kiran has been involved in NAPAWF since 1999, as a local and national board member and was involved in starting the DC chapter of

NAPAWF. She has practiced as a civil rights lawyer with the U.S. Department of Justice, Civil Rights Division where she worked on desegregation, bilingual, race and national origin discrimination issues in education-related civil rights cases.

Kiran immigrated to the United States with her parents when she was two and grew up in Savannah, Georgia. She attended Spelman College (HBCU) and graduated summa cum laude. Following graduation, she worked in the district office of the first African-American Congresswoman in Georgia since Reconstruction and lived in India for a year. Kiran graduated from the University of Georgia School of Law where she was President of the student-led public interest law organization, organized the first public interest law career fair for 300 students and received the first Equal Justice Foundation, Shelley D. Knox Equal Justice Award for Outstanding Public Interest Student.

*See Ms. Ahuja’s interview on page 25



Mr. Francisco Angones is partner of Angones, McClure, & Garcia. He graduated from University of Miami with a Bachelors in 1972, and from the University of Miami School of Law in 1976. He was the youngest attorney ever to assume the presidency of the Cuban-American Bar Association and the first Hispanic to be elected President of the Dade County Bar Association. He has been, and now is again, a member of the House of

Delegates of the American Bar Association. He has served as Chairman of the Board of Victoria Hospital, and on the Metro-Dade Community Relations Board. Mr. Angones is a member of the Dade and Broward County Bar Associations, the American Bar Association, the Cuban-American Bar Association, the Defense Research Institute, the Spellman-Hoeveler American Inn of Court, the American Board of Trial Advocates and the International Association of Defense Counsel. He is also on the Board of Directors of U.S. Century Bank. <http://www.angonesmcluregarcia.com> (follow “Attorney Profiles” hyperlink; then follow “Francisco ‘Frank’ R. Angones” hyperlink).

*See Mr. Angones’s interview on page 83

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