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A LEGISLATIVE FRAMEWORK FOR COMBATING DOMESTIC MINOR SEX TRAFFICKING

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I. BACKGROUND

Domestic minor sex trafficking is the commercial sexual exploitation of America's children through prostitution, pornography, and sexual performance within U.S. borders.[1] "It is the 'recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act' whe[n] the person is . . . under the age

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1 LINDA A. SMITH ET AL., SHARED HOPE INT'L, THE NATIONAL REPORT ON DOMESTIC MINOR SEX TRAFFICKING: AMERICA'S PROSTITUTED CHILDREN iv (2009) [hereinafter NATIONAL REPORT], *available at* http://www.sharedhope.org/Portals/0/Documents/SHI_National_Report_on_DMST_2009.pdf.

of [eighteen] years."[2] When considering the crime of domestic minor sex trafficking, the age of the victim is the critical issue; there is no requirement to prove that force, fraud, or coercion was used to secure the victim's actions.[3] In fact, the law recognizes the effect of psychological manipulation by the trafficker, as well as the effect of the threat of harm that traffickers (pimps) use to maintain control over their young victims.[4] Experts estimate that at least one hundred thousand American juveniles each year are victimized through prostitution in America.[5]

A. The Business of Sex Trafficking

In the market of sex trafficking, there are sellers (traffickers), buyers (johns), and products (victims).[6] Demand presented by the buyers drives the criminal business of sex trafficking.[7] Demand is predominantly created by men who seek to purchase sex or sexual entertainment, with knowledge that—or without regard to whether—the sexual acts are being performed by persons who have been subject to force, fraud, or coercion, or by those who are underage.[8] Demand causes sex trafficking to occur in countries around the world.[9]

Sex trafficking is driven by demand for the array of commercial sex acts that are performed[10] and how they are advertised.[11] Traffickers

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[2] *Id.* (quoting 22 U.S.C. § 7102(9) (2006)); *see also* § 7102(8)(A) (defining the sex trafficking of a minor as a "[s]evere form[] of trafficking in persons").

[3] *See* § 7102(8)(A) (setting forth a strict liability standard for children under eighteen).

[4] *See* 18 U.S.C. § 1591(c)(2) (2006).

[5] NATIONAL REPORT, *supra* note 1, at 4 (quoting DVD: Prostituted Children in the United States: Identifying and Responding to America's Trafficked Youth (Shared Hope International and Onanon Productions 2008) (statement by Ernie Allen, National Center for Missing and Exploited Children) (on file with author)).

[6] SHARED HOPE INT'L, DEMAND: A COMPARATIVE EXAMINATION OF SEX TOURISM AND TRAFFICKING IN JAMAICA, JAPAN, THE NETHERLANDS, AND THE UNITED STATES 7 [hereinafter DEMAND], *available at* http://www.sharedhope.org/Portals/0/Documents/DEMAND.pdf.

[7] *Id.* at 3.

[8] Janice G. Raymond, *Prostitution on Demand: Legalizing the Buyers as Sexual Consumers*, 10 VIOLENCE AGAINST WOMEN 1156, 1157–58 (2004); *see also* 18 U.S.C. § 1591(b)(1)–(2) (prescribing punishment for sex traffickers using "force, fraud, or coercion" or sex traffickers of children).

[9] *See* SUSAN SONG, YOUTH ADVOCATE PROGRAM INT'L, GLOBAL CHILD SEX TOURISM: CHILDREN AS TOURIST ATTRACTIONS 2 (2003), *available at* http://www.yapi.org/rp childsextourism.pdf; CAPTIVE DAUGHTERS & THE INT'L HUMAN RIGHTS LAW INST. OF DEPAUL UNIV. COLL. OF LAW, CONFERENCE REPORT, DEMAND DYNAMICS: THE FORCES OF DEMAND IN GLOBAL SEX TRAFFICKING 66–67 (2003) [hereinafter CAPTIVE DAUGHTERS]; DEMAND, *supra* note 6, at 2.

[10] Raymond, *supra* note 8, at 1171–72 (2004).

move victim-products to the markets, assisted and facilitated by other actors in a myriad of ways.[12] As the demand increases, traffickers must increase the supply of victims. The buyer in this marketplace views the victim as a dehumanized product for immediate consumption and disposal. If buyers were not seeking commercial sexual services, then sex trafficking would cease to be a profitable venture.

Thus much like in a legitimate market, supply and demand for commercial sexual services are correlated. The supply of women and children in the sex industry serves as the fuel for this criminal slave trade and must increase to meet growing demand for sexual services throughout the world. Demand affects the market structure and the type of "product" made available. Evidence suggests that an increasingly younger product is sought due to buyers' perceptions that younger victims are both healthier and more vulnerable.[13] This desire for sex with younger girls has led to large numbers of juveniles exploited through prostitution around the globe—indeed, these juveniles are sex trafficking victims as identified in the U.N. Protocol and the U.S. Trafficking Victims Protection Act of 2000.[14]

Research in the United States has pointed to juvenile girls as the primary victims of sex trafficking.[15] These are domestic minor sex trafficking victims—a subset of human trafficking victimization that requires a unique legislative response touching on a range of legal issues from criminal statutes to social services to civil remedies. Testimony by survivors of domestic minor sex trafficking consistently relate quotas imposed by their traffickers of ten to fifteen buyers daily.[16] These numbers add up to a staggering number of buyers of commercial sex acts from prostituted children. A response to this demand that recognizes the societal impact, together with a legislative framework that includes the

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[11] CAPTIVE DAUGHTERS, *supra* note 9, at 51–53 (explaining the effect of the Internet, commercial advertising, and word-of-mouth advertising on connecting the supply with the demand).

[12] *E.g.*, Janice G. Raymond & Donna M. Hughes, Sex Trafficking of Women in the United States: International and Domestic Trends 19–20 (Apr. 17, 2001) (unpublished report).

[13] DEMAND, *supra* note 6, at 15.

[14] *See generally* Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, § 102(b)(2), 114 Stat. 1464, 1466 (codified as amended in 22 U.S.C. § 7101(b)(2) (2006)); Protocol To Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, G.A. Res. 55/25, U.N. Doc. A/RES/55/25 (Nov. 15, 2000) [hereinafter U.N. Protocol], *available at* http://treaties.un.org/doc/Treaties/2000/11/20001115%2011-38%20AM/Ch_XVIII_12_ap.pdf.

[15] NATIONAL REPORT, *supra* note 1, at 8–9.

[16] *Id.* at 20.

criminalization of demand as its cornerstone, is critical to combating this social crisis.[17]

B. Culture of Tolerance

> A culture of tolerance surrounds the marketplace of commercial sexual exploitation. The culture of tolerance is derived from a country's history, ethnicity, religious practice, language, political and economic system, and other influences. Cultures of tolerance differ from country to country, and sometimes vary within countries or even cities, but the essence is the same: societal acceptance backed by political tolerance.[18]

One example of a culture of tolerance can be found in the truck stops across the United States.[19] Trucking routes are frequent markets for minor victims of sexual trafficking.[20] Where major highways intersect throughout the country, underage girls are made available for commercial sex with passing truckers.[21] These girls are derisively referred to as "lot lizards"—a label that allows the truckers and truck stop personnel to avoid confronting the reality of the commercial sexual exploitation of women and children.[22] The label also benefits the buyers who, in response to the lack of alarm within the trucking community, do not seem to be concerned about the possibility of being reported.[23] A December 2005 law enforcement operation at a Harrisburg, Pennsylvania, truck stop on Highway I-81 rescued over two dozen prostituted minors, the youngest just twelve years old from Toledo, Ohio.[24] Many truck drivers used the stop for easy sex, with the traffickers receiving $40 from the buyers of sex with the girls.[25] Sixteen

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[17] *See, e.g.*, CAPTIVE DAUGHTERS, *supra* note 9, at 105 (statement by Dr. Mohamed Mattar, Executive Director of the Protection Project of Johns Hopkins University School of Advanced International Studies) ("It is not enough that the law considers illegal the behavior of the customer of sexual services. . . . [T]he functional equivalent of the law must also recognize such behavior as unacceptable. By 'functional equivalent of the law,' I mean the traditions, the customs, the acceptable behavior of the people. The legal systems that 'tolerate' or 'accommodate' or 'normalize' the behavior of the customer must reconsider its policies, change the law, and enforce the law accordingly.").

[18] DEMAND, *supra* note 6, at 17.

[19] *See id.* at 91.

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.* at 91–92.

[25] *Id.* at 92.

pimps were arrested and indicted by the U.S. Department of Justice as conspirators for trafficking of women and children, among other crimes.[26]

C. Violent Crime

The focus of efforts to combat sex trafficking through law enforcement action has traditionally been on the trafficker.[27] The trafficker is revealed as a violent psychopath.[28] However, the survivors of sex trafficking often speak of the violence they suffered at the hands of the buyer as well. In her research with adult women in prostitution, Melissa Farley described the violence that is so often part of the buyer's fantasy fulfillment.[29] Of 854 women interviewed in 9 countries, 71% were physically assaulted and 63% were raped during prostitution.[30] Another study of prostitution based in Oregon found that 84% of prostituted women were victims of aggravated assault, 78% were victims of rape, 53% were victims of sexual torture, and 49% were kidnapped.[31] A study of prostituted women in San Francisco found that 82% had been physically assaulted, 83% had been threatened with a weapon, and 68% had been raped while working as prostitutes.[32] Women in prostitution are subjected to violence by both buyer and seller on a regular basis.[33]

It is clear that sex trafficking must be combated through legislation in several key areas of law, each of which has many components necessary for the protection of children from commercial sexual exploitation, as well as the effective criminal enforcement to deter and punish the crimes.

Part II of this Article addresses the legislative gaps in the country, including problems involving the prosecution of sex trafficking cases. Part III of this Article addresses the necessary legislative framework to combat domestic sex trafficking, which include: (1) criminalization of domestic minor sex trafficking; (2) criminal provisions for demand (buyers); (3) criminal provisions for traffickers; (4) criminal provisions

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[26] *See* Press Release, U.S. Dep't of Justice, Justice Department, FBI, Announce Arrests Targeting Child Prostitution Rings in Pennsylvania, New Jersey, and Michigan, (Dec. 16, 2005), *available at* http://www.usdoj.gov/opa/pr/2005/December/05_crm_677.html.

[27] *See infra* Chart accompanying notes 37–80 (outlining punishment for various trafficking-related offenses, all directed at the trafficker himself).

[28] NATIONAL REPORT, *supra* note 1, at 25.

[29] Melissa Farley, *Prostitution and Trafficking in Nine Countries: An Update on Violence and Posttraumatic Stress Disorder*, 2(3/4) J. OF TRAUMA PRAC. 33, 33–34 (2003).

[30] *Id.*

[31] Susan Kay Hunter, *Prostitution Is Cruelty and Abuse to Women and Children*, 1 MICH. J. GENDER & L. 91, 92–94 (1993).

[32] JESSICA ASHLEY, ILL. CRIMINAL JUSTICE INFO. AUTH., THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN AND YOUTH IN ILLINOIS 10 (2008), *available at* http://www.icjia.state.il.us/public/pdf/ResearchReports/CSEC%202008%20ICJIA%20REPORT.pdf.

[33] *Id.*

for facilitators (hotels, transports, websites etc.); (5) protective provisions for the child victims; and (6) law enforcement and criminal justice tools for investigation and prosecutions. A legislative framework in each state that contains the elements to accomplish these aims is needed.

II. LEGISLATIVE GAPS

The average age a minor is first prostituted is about thirteen years old.[34] In one study of routes into prostitution, 41% of the women interviewed reported entering prostitution as minors.[35] The nexus between domestic minor sex trafficking and adult sex trafficking and prostitution is clear and points to the need to protect children, both to prevent their being trafficked for sexual exploitation and to provide the access to justice they require after a trafficking crime has been committed against them. Furthermore, the FBI Criminal Investigative Division admits

> [w]e do not currently have a definitive number for the serious problem of child prostitution itself, although judges, police, and outreach workers report both the increase in the numbers and a decrease in the ages of the children involved. . . . Accurately quantifying the existing problem of victimized children (as opposed to 'at risk') is difficult for a variety of reasons. For example, in the case of children exploited through prostitution, many of the prostituted youth[s] are charged with some other offenses such as substance abuse; thus data that relies on crime reports masks the true prevalence of the problem.[36]

Establishing the legislative framework at the state level is critical to form the foundation for reform. It will assist in the application of consistent laws for the protection of children and the creation of a safe environment.

Prosecution as Deterrent

The federal government has an array of laws to prosecute those who commercially sexually exploit children through prostitution and pornography. These laws provide strong sentences for maximum deterrence. (See the following table.)

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[34] NATIONAL REPORT, *supra* note 1, at 30.

[35] M. Alexis Kennedy et al., *Routes of Recruitment: Pimps' Techniques and Other Circumstances That Lead to Street Prostitution*, 15(2) J. OF AGGRESSION, MALTREATMENT & TRAUMA 1, 5 (2007), *available at* http://alexiskennedy0.tripod.com/lab/id21.html.

[36] Chris Swecker, Assistant Dir., Criminal Investigative Div., Address to the Commission on Security and Cooperation in Europe (U.S. Helsinki Commission): Exploiting Americans on American Soil: Domestic Trafficking Exposed (June 7, 2005), http://www.fbi.gov/news/testimony/exploiting-americans-on-american-soil-domestic-trafficking-exposed.

Federal law	Minimum Sentence	Maximum Sentence
18 U.S.C. § 2423(a): Transportation of a minor with intent for minor to engage in criminal sexual activity[37]	Ten years[38]	Life[39]
18 U.S.C. § 2422: Coercion and enticement (using the mail or means of interstate or foreign commerce)[40]	Ten years[41]	Life[42]
18 U.S.C. § 1591: Sex trafficking of children or by force, fraud, or coercion[43]	Fifteen years (child is under fourteen or under eighteen with force, fraud, or coercion)[44]	Life (child is under fourteen or under eighteen with force, fraud, or coercion)[45]
	Ten years (child between fourteen and seventeen and no force, fraud, or coercion used)[46]	Life (child between fourteen and seventeen and no force, fraud, or coercion used)[47]

37 18 U.S.C. § 2423(a) (2006).
38 *Id.*
39 *Id.*
40 18 U.S.C. § 2422(b) (2006).
41 *Id.*
42 *Id.*
43 18 U.S.C. § 1591 (2006).
44 *Id.* §1591(b)(1).
45 *Id.*
46 *Id.* §1591(b)(2).
47 *Id.*

18 U.S.C. § 2251: Sexual exploitation of children[48]	Fifteen years (first sexual offense involving minors)[49]	Thirty years (first sexual offense involving minors)[50]
	Twenty-five years (one prior conviction)[51]	Fifty years (one prior conviction)[52]
	Thirty-five years (two or more prior convictions)[53]	Life (two or more prior convictions)[54]
	Thirty years (if caused the death of the victim in the course of the crime)[55]	Life or death penalty (if caused the death of the victim in the course of the crime)[56]
18 U.S.C. § 2251A: Selling or buying of children[57]	Thirty years[58]	Life[59]

[48] 18 U.S.C. § 2251 (2006) (defining exploitation to include interstate or foreign transportation of minors for producing sexually explicit depictions; parental consent to producing sexually explicit depictions; receiving, buying, exchanging, displaying, distributing, producing, or reproducing sexually explicit materials; participation in sexually explicit conduct for the purpose of making visual depictions; or transporting advertisements for visual depictions of sexually explicit conduct with or by a minor).

[49] *Id.* § 2251(e).

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] 18 U.S.C. § 2251A (2006).

[58] *Id.*

[59] *Id.*

18 U.S.C. § 2252: Certain activities related to material involving the sexual exploitation of minors[60]	Five years (trafficking in explicit material involving children, if first sexual offense involving minors)[61]	Twenty years (trafficking inexplicit material involving children, if first sexual offense involving minors)[62]
	Fifteen years (trafficking in explicit material involving children, if prior conviction)[63]	Forty years (trafficking in explicit material involving children, if prior conviction)[64]
	None (possession of explicit material involving children, if first sexual offense involving minors)[65]	Ten years (possession of explicit material involving children, if first sexual offense involving minors)[66]
	Ten years (possession of explicit material involving children, if prior conviction)[67]	Twenty years (possession of explicit material involving children, if prior conviction)[68]

[60] 18 U.S.C. § 2252 (2006).

[61] *Id.* § 2252(b)(1).

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.* § 2252(b)(2) (providing, however, that the offender would be fined as a minimum penalty).

[66] *Id.* (providing that this sentence may also be combined with a fine).

[67] *Id.*

[68] *Id.*

18 U.S.C. § 2252A: Certain activities related to material constituting or containing child pornography[69]	Five years (trafficking in child pornography, if first sexual offense involving minors)[70]	Twenty years (trafficking in child pornography, if first sexual offense involving minors)[71]
	Fifteen years (trafficking in child pornography, if prior conviction)[72]	Forty years (trafficking in child pornography, if prior conviction)[73]
	None (possession of child pornography, if first sexual offense involving minors)[74]	Ten years (possession of child pornography, if first sexual offense involving minors)[75]
	Ten years (possession of child pornography, if prior conviction)[76]	Twenty years (possession of child pornography, if prior conviction)[77]
18 U.S.C. § 1466A: Obscene visual representations of sexual abuse of children[78]	Incorporates penalty structure of 18 U.S.C. § 2252A[79]	Incorporates penalty structure of 18 U.S.C. § 2252A[80]

The capacity of federal law enforcement to investigate and prosecute cases of domestic minor sex trafficking, however, is limited. A study of federal prosecutions of commercial sexual exploitation of children ("CSEC") cases—a category that includes several different types of crimes—across the country from 1998 to 2005 revealed that 52% of

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69 18 U.S.C. § 2252A (2006).

70 *Id.* § 2252A(b)(1).

71 *Id.*

72 *Id.*

73 *Id.*

74 *Id.* § 2252A(b)(2) (providing, however, that the offender would be fined as a minimum penalty).

75 *Id.* (providing that this sentence may also be combined with a fine).

76 *Id.*

77 *Id.*

78 18 U.S.C. § 1466A (2006).

79 *Id.*

80 *Id.*, *invalidated by United States v. Handley*, 564 F. Supp. 2d 996, 1007 (S.D. Iowa 2008), although other federal courts have upheld the statute. *E.g.*, United States v. Whorley, 550 F.3d 326, 337 (4th Cir. 2008) (as-applied challenge).

cases involving prostitution of a minor presented to the U.S. Attorney's Offices were declined for prosecution.[81] Even considering that the overall caseload of federal prosecutors more than doubled during the eight-year timeframe of the study,[82] the 52% declination rate for cases involving prostitution of minors is still high when compared to other federal offenses, such as drug trafficking (15% declination rate), weapons charges (26% declination rate), or violent offenses (32% declination rate).[83] Although the number of prosecutions in cases involving child prostitution has steadily increased throughout the period studied, practitioners on the local, national, and international levels expressed concern that the number of prosecutions for buyers and traffickers was so much lower than for child pornographers.[84]

The problem is only partly due to the federal law enforcement capacity. Local law enforcement generally lacks the training and experience necessary to gather the evidence required to win a domestic minor sex trafficking prosecution,[85] leading to the declination of these insufficient cases.

One effective response is found in Kansas City, Missouri. A pioneering federal prosecutor in the Western District of Missouri, with the support of her office, has pursued buyers of commercial sex with children by working with the local human trafficking task force to plan and implement an operation designed to satisfy the evidentiary requirements of the Trafficking and Violence Protection Act (TVPA) —specifically Sections 1591(a) and 2422(b)—using the words "obtain" and "entice."[86] This method has enabled them to charge, indict, and secure a number of convictions with mandatory minimum sentences of ten years' imprisonment for attempted domestic minor sex trafficking.[87]

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[81] KEVONNE SMALL ET AL., JUSTICE POLICY CTR, URBAN INST., AN ANALYSIS OF FEDERALLY PROSECUTED COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN (CSEC) CASES SINCE THE PASSAGE OF THE VICTIMS OF TRAFFICKING AND VIOLENCE PROTECTION ACT OF 2000, at 22 (2008).

[82] *Id.*

[83] *Id.* at 22 n.19 (citing BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS 2004, at 29 (2006)).

[84] *Id.* at 18, 20, 61.

[85] *See id.* at 15–16; *see also* Heather J. Clawson et al., ICF Int'l, Prosecuting Human Trafficking Cases: Lessons Learned and Promising Practices vii–viii (June 30, 2008) (unpublished report) (confirming that better training and resources would aid sex trafficking prosecutions on both the state and federal levels).

[86] 18 U.S.C. §§ 1591(a), 2422(b) (2006); *see* Press Release, Matt J. Whitworth, Office of the United States Attorney, W. Dist. of Mo., Final Defendant Pleads Guilty to Sex Trafficking of a Child (Dec. 18, 2009), *available at* http://www.justice.gov/usao/mow/news2009/mikoloyck.ple.htm.

[87] 18 U.S.C. §§ 1591(b), 1594, 2422(b) (2006); Whitworth, *supra* note 86; *see also, e.g.*, Indictment at 2, United States v. Oflyng, No. 09-00084-01-CR-W-SOW (W.D. Mo. Mar. 10, 2009).

Recognizing this success, other U.S. Attorneys' Offices have shown interest in initiating similar task force operations in their districts.[88]

The federal laws and penalties are preferred avenues for prosecuting offenders of child sex trafficking—both buyers and sellers—but are not utilized as often as necessary to make prosecution a serious deterrent.[89] State laws need to serve as a deterrent to the crime by aligning with federal laws and making the penalties a serious threat. However, many states lack the legislative framework necessary to prosecute buyers and sellers of sex with minors.[90] Those with applicable laws often lack the stiff sentences of the federal system and thereby lose the deterrent value of the prosecutions.[91]

III. LEGISLATIVE FRAMEWORK REQUIREMENTS

Recognizing that most of the gaps in responding to domestic minor sex trafficking must be addressed at the state level, a legislative framework must establish the basic policy principles required to create a safe environment for children. The steps necessary to create this safe environment include prevention of domestic minor sex trafficking through reducing demand, rescue and restoration of victims through improved training on identification, establishment of protocols and facilities for placements, mandating appropriate services and shelter, and incorporating trauma-reducing mechanisms into the justice system. Broken systems of response to victims must also be fixed to ensure that sexually exploited children are properly treated as victims and provided with remedies through the law to recapture their lives and their futures. Legislation designed to combat domestic minor sex trafficking must satisfy four primary policy concerns: "1) eliminating demand; 2) prosecuting traffickers; 3) identifying victims; and 4) providing protection, access to services, and shelter for victims."[92]

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[88] *See, e.g.*, Press Release, Office of the Att'y Gen. (Tex.), Attorney General Convenes Human Trafficking Prevention Task Force (Jan. 21, 2010), *available at* https://www.oag.state.tx.us/oagnews/release.php?print=1&id=3202; Press Release, United States Attorney's Office, Dist. of Columbia, New York Man Sentenced to 210 Months (17 ½ years) in Prison for Transportation of Minors To Engage in Prostitution and Simple Assault (Oct. 30, 2009), *available at* http://www.justice.gov/usao/dc/human_trafficking/pdf/MooreJermaine.pdf.

[89] NATIONAL REPORT, *supra* note 1, at 13; *see also* RICHARD J. ESTES & NEIL ALAN WEINER, UNIV. OF PA., THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN IN THE U.S., CANADA AND MEXICO 168–69 (rev. 2002).

[90] *See* SHARED HOPE INT'L & AM. CTR FOR LAW & JUSTICE, PROTECTED INNOCENCE LEGISLATIVE FRAMEWORK: METHODOLOGY 5–6 (2010) [hereinafter PROTECTED INNOCENCE].

[91] NATIONAL REPORT, *supra* note 1, at 12–13.

[92] PROTECTED INNOCENCE, *supra* note 90, at 3–4. This analysis explains that research and policy reports are consistent in echoing the importance of addressing "the three P's of prevention, protection[,] and prosecution." Raymond & Hughes, *supra* note 12, at 91; *accord* THE TEXAS HUMAN TRAFFICKING PREVENTION TASK FORCE REPORT 2011 TO

A. Criminalization of Domestic Minor Sex Trafficking

The federal trafficking-in-person statute provides an excellent model for state trafficking-in-person laws. In fact, most states have statutes against sex trafficking.[93] Within these statutes, however, there are variations in coverage; some do not cover the sex trafficking of minors.[94]

A critical aspect for an effective trafficking law for the prosecution of domestic minor sex trafficking is a separate provision specifying that minors under eighteen years of age exploited through commercial sex acts are *per se* victims of trafficking in persons. That is, even without proof that the defendant knew the minor's age and/or used force, fraud, or coercion to cause the minor victim's action, she is a victim of trafficking in person. Absent this provision, the unique dynamics of most domestic minor sex trafficking situations will make it difficult for prosecutors to produce evidence that the perpetrator knew the minor's age or used force, fraud, or coercion in securing the minor's actions.[95] Vagueness in definitions and narrow application will stymie application of the trafficking-in-persons law to situations of domestic minor sex trafficking.[96]

As long as some jurisdictions have human trafficking laws that are narrower or less harsh than other state or federal laws, traffickers will simply move to those more lenient jurisdictions.[97] Such havens for

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THE TEXAS LEGISLATURE 6, 11, 20 (2011) [hereinafter TEXAS REPORT]. Although prevention must address both the supply and demand of sex trafficking, most reports agree that the demand component receives unduly minimal attention. Raymond & Hughes, *supra* note 12, at 88, 94; TEXAS REPORT, *supra*, at 6; *see also* U.N. Protocol, *supra* note 14, at 5; DONNA M. HUGHES, BEST PRACTICES TO ADDRESS THE DEMAND SIDE OF SEX TRAFFICKING 1–2 (2004). Protection requires correct identification of trafficked girls as victims rather than delinquents, TEXAS REPORT, *supra*, at 12, as well as provision of adequate shelter and services to facilitate victims' transition into stable lives. Raymond & Hughes, *supra* note 12, at 96–97. Finally, laws that criminalize child sex trafficking are toothless if traffickers are not rigorously and consistently prosecuted. Prosecution must be a law-enforcement priority. *Id.* at 94.

93 US POLICY ADVOCACY TO COMBAT TRAFFICKING, CTR. FOR WOMEN POLICY STUDIES, FACT SHEET ON STATE ANTI-TRAFFICKING LAWS 1–3 (2010).

94 *See, e.g.*, ALASKA STAT. §§ 11.41.360, .365 (2011) (missing any provision regarding the sex trafficking of minors); CONN. GEN. STAT. § 53a-192a (2010) (same); N.J. STAT. ANN. § 2C:13-8 (West 2011) (same).

95 *See* MELISSA SNOW, SHARED HOPE INT'L, DOMESTIC MINOR SEX TRAFFICKING: SALT LAKE CITY, UTAH 12 (2008); Mark J. Kappelhoff, *Federal Prosecutions of Human Trafficking Cases: Striking a Blow Against Modern Slavery*, 6 U. ST. THOMAS L.J. 9, 14 (2008); Jane Kim, Note, *Trafficked: Domestic Violence, Exploitation in Marriage, and the Foreign-Bride Industry*, 51 VA. J. INT'L L. 443, 445–46 (2011).

96 AMY FARRELL ET AL., INST. ON RACE & JUSTICE, NE. UNIV., UNDERSTANDING AND IMPROVING LAW ENFORCEMENT RESPONSES TO HUMAN TRAFFICKING 9–10, 22 (2008).

97 PROTECTED INNOCENCE, *supra* note 90, at 5.

traffickers can include both lenient states and tribal lands, many of which are close to cities and already contain facilities such as casinos that may attract potential buyers.[98] Consistency and comprehensiveness will also ensure that prosecutors utilize the trafficking-in-persons statutes, rather than continuing to rely on sex offense or kidnapping laws to convict the traffickers and solicitation laws to convict the buyers.[99]

A comprehensive trafficking-in-persons law in each state can also solve the problem of identifying the victims of this crime. Misidentification of victims of domestic minor sex trafficking is a frequent and disturbing problem.[100] There are two primary ways this occurs. First, prostituted juveniles are often arrested with offenses related to their exploitation, such as theft or drug possession.[101] These are called masking charges and result in a skewed picture of the scope of the problem and lead to inappropriate responses to the victimization.[102] If a minor sex trafficking victim is mislabeled as a child prostitute, the trafficker will often be prosecuted under traditional state prostitution-related offenses, which tend to be more lenient for traffickers.[103]

Second, the perpetrators of commercially sexually exploited children may be prosecuted under statutes addressing sexual offenses, kidnapping, or abduction due to the lack of familiarity with a trafficking statute or the unwieldy character of the law. Prosecutors seeking justice for these children will utilize laws that may be easier to apply or are more frequently used in order to increase their chance of securing a conviction.[104] Unfortunately, this leaves the child victim without the proper label of trafficking victim with the rights and services that come with it. One example of a trafficking-in-persons law that gives special protection for victims of trafficking is Oregon's ORS § 30.867, which provides the right to civil action for damages against a victim of human trafficking and indentured servitude irrespective of the initiation or outcome of any criminal action.[105] Victims of these crimes can recover

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[98] *Id.*

[99] *See* JENNIFER BAYHI-GENNARO, SHARED HOPE INT'L, DOMESTIC MINOR SEX TRAFFICKING: BATON ROUGE/NEW ORLEANS, LOUISIANA 2–3, 14 (2008); Adam Rhew, *Human Trafficking in Virginia Part II*, NBC29 (Nov. 24, 2010, 7:38 PM), http://www.nbc29.com/story/13481974/human-trafficking-in-virginia-part-ii.

[100] *See* NATIONAL REPORT, *supra* note 1, at 6; TEXAS REPORT, *supra* note 92, at 8.

[101] SNOW, *supra* note 95, at 27, 57; LINDA STRUBLE, SHARED HOPE INT'L, DOMESTIC MINOR SEX TRAFFICKING: SAN ANTONIO, TEXAS 2–3 (2008).

[102] NATIONAL REPORT, *supra* note 1, at 50–51; Natalie M. McClain & Stacy E. Garrity, *Sex Trafficking and the Exploitation of Adolescents*, J. OBSTETRIC, GYNECOLOGIC, & NEONATAL NURSING, May 2010, at 4.

[103] NATIONAL REPORT, *supra* note 1, at 13.

[104] *See* BAYHI-GENNARO, *supra* note 99, at 2–3.

[105] OR. REV. STAT. §§ 30.867(1), 163.263, 163.264, 163.266 (2009).

damages for emotional distress, punitive damages, and attorney's fees.[106] The statute also gives victims six years to file a civil claim for damages.[107] These provisions are unique to trafficking victims; therefore, a child who has suffered a commercial sexual exploitation offense that is prosecuted under a law other than those listed in ORS § 30.867 will not enjoy these rights.[108] Furthermore, that child victim may be closed out of federally funded services for trafficking victims insofar as they exist due to the absence of the victims' record or status as such.[109]

A comprehensive, utilized state trafficking-in-persons statute will ultimately assist in the identification and proper treatment of the victims of trafficking and assist in the collection of data on the prevalence of the crime. In the absence of such a law, however, there is value in the existence of specific CSEC laws.[110] These laws should ideally reference the federal trafficking-in-persons law or the state trafficking law to bring the victims of these crimes the protections of the federal victim assistance services. Such laws should include criminalization of all forms of commercial sexual exploitation of children, including prostitution, pornography, and sexual performance.[111] The laws should also be written to reach both buyers of sex and the traffickers selling the child for such sex acts.[112]

B. Criminal Provisions for Demand

> Buyers of sexual services can be placed in three categories: situational, preferential[,] and opportunistic. The definitions of buyers commonly employed by those working in the area of commercial sexual exploitation of children (CSEC) include "situational" and "preferential" buyers. Situational buyers are defined as those who engage minors in commercial sex because they are available, vulnerable[,] and the practice is tolerated. Preferential buyers, such as pedophiles, have a sexual preference and shop specifically in the markets providing the preferred victim or service.
>
> In the larger commercial sex market involving adults and minors[,] there is a third group of buyers [that] can be described as "opportunistic buyers." Opportunistic buyers are those who purchase

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106 *Id.* § 30.867(2), (3).

107 *Id.* § 30.867(4).

108 *See id.* § 30.867(1); *cf.* TEXAS REPORT, *supra* note 92, at 8 (expressing concern that trafficking victims in Texas are not receiving the full rights and protections available to them under the law); Whitney Shinkle, *Protecting Trafficking Victims: Inadequate Measures?*, TRANSATLANTIC PERSPECTIVES ON MIGRATION, Aug. 2007, at Policy Brief #2, 4 (discussing inconsistencies in states' eligibility requirements).

109 *See* ALISON SISKIN & LIANA SUN WYLER, CONG. RESEARCH SERV., RL 34317, TRAFFICKING IN PERSONS: U.S. POLICY AND ISSUES FOR CONGRESS 31–33 (2010).

110 *See, e.g.*, IDAHO CODE ANN. § 18-1507 (2010).

111 *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-705 (2011).

112 *See infra* Sections III.B, III.C.

> sex indiscriminately because they do not care, are willfully blind to the age or willingness of the [girl], or are unable to differentiate between adults and minors.[113]

From childhood, buyers are encouraged by the increased normalization of commercial sex in society to glamorize such activities and to dehumanize the women and children exploited, even to the point of expressing aggression toward the victims, as depicted in violent video games and pornography.[114]

Research in several countries revealed the following characteristics of buyers. In the Netherlands, a sex addiction counselor described most buyers as "situational buyers."[115] These buyers

> are usually married ([nine] out of [ten]), in their late [thirties] to early [forties], have children, hold a good job, and have an average to high I.Q. They have difficulty in maintaining relationships and focus heavily on their work. Many times they do not intend to endanger their current relationship with a wife or girlfriend, but are unable to stop the relationship with prostitution.[116]

Perhaps because prostitution is legal and readily available in the Netherlands, such buyers seem to have little difficulty compartmentalizing their solicitation of prostitutes from their everyday lives.[117] In the United States, buyers of commercial sex and perpetrators of sexual exploitation include all three types.[118] With the exception of ethnic brothels, which reportedly only cater to particular ethnicities, buyers are usually white, middle-aged males, using a variety of methods to locate commercial sex, including Internet searches, escort services, and information from close friends.[119]

Researchers in London interviewed 103 men who buy sex to determine what they know about the women they are using in prostitution.[120] Twelve percent of the men had used more than 130 women in prostitution.[121] At least a plurality reported purchasing sex 15

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[113] DEMAND, *supra* note 6, at 2; *accord* NATIONAL REPORT, *supra* note 1, at vi, 17.

[114] DEMAND, *supra* note 6, at 3; Laura J. Lederer, Remarks at the United States Capitol Visitors Center: Sex Trafficking and Illegal Pornography: Is There a Link? (June 15, 2010).

[115] DEMAND, *supra* note 6, at 67.

[116] *Id.* at 67–68.

[117] *Id.* at 68.

[118] NICOLE IVES, BACKGROUND PAPER FOR THE NORTH AMERICAN REGIONAL CONSULTATION ON THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN (2001), *available at* http://www.unicef.org/events/yokohama/regional-philadelphia.html.

[119] DEMAND, *supra* note 6, at 91.

[120] MELISSA FARLEY ET AL., EAVES, MEN WHO BUY SEX: WHO THEY BUY AND WHAT THEY KNOW 7 (2009).

[121] *Id.* at 10.

times, although the numbers ranged from 1 to 2000.[122] A similar study of 113 men in Chicago revealed that the men interviewed had bought sex between 1 (4%) and 1000 times (3%).[123]

Data on the number of men engaging in commercial sex with trafficking victims (adults subject to force, fraud, or coercion, as well as minors) are lacking. A study from Georgia illustrates the demand presented in that state, providing some indication of the demand nationwide.[124] The study included a covert scientific survey of 218 men responding to advertisements for paid sex with girls.[125] Three escalated warnings were given to the callers seeking to buy sex with a "young" girl, each warning providing further information that the female was in fact under eighteen years of age.[126] Forty-seven percent of the men were undeterred by this information and were prepared to follow through with commercial sex with a minor.[127]

The research revealed that 7200 men commit 8700 commercial sex acts with juvenile girls each month in Georgia.[128] The study explains that 6% of these men are actively and explicitly seeking a girl under the age of eighteen.[129] In fact, a companion study, designed to quantify buyers' demand for young girls advertised on the Internet, revealed that buyers preferred girls who were described as "young," "just turned 18," and "barely legal" at a rate of about 150% more than girls whose age were not specified.[130] The numbers from the Georgia study indicate that 28,000 men pay for sex with minor girls each year in Georgia, and nearly 10,000 of them are repeat buyers.[131] Thirty-four percent of the men seeking to purchase sex with a minor were under the age of 30, 44%

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[122] *Id.*

[123] RACHEL DURCHSLAG & SAMIR GOSWAMI, CHI. ALLIANCE AGAINST SEXUAL EXPLOITATION, DECONSTRUCTING THE DEMAND FOR PROSTITUTION: PRELIMINARY INSIGHTS FROM INTERVIEWS WITH CHICAGO MEN WHO PURCHASE SEX 7, 9 (2008).

[124] THE SCHAPIRO GRP., MEN WHO BUY SEX WITH ADOLESCENT GIRLS: A SCIENTIFIC RESEARCH STUDY 1 (2009) [hereinafter GEORGIA STUDY].

[125] *Id.* at 4. According to the study, "young" is the term used by the men who participated in the study, and refers to "very young adult females," as well as some girls under eighteen years old. THE SCHAPIRO GRP., CSEC DEMAND STUDY RESULTS: RESEARCH HIGHLIGHTS 2 (2009) [hereinafter CSEC DEMAND STUDY RESULTS].

[126] GEORGIA STUDY, *supra* note 124, at 11.

[127] *Id.* at 12.

[128] *Id.* at 9.

[129] *Id.* at 10.

[130] JUVENILE JUSTICE FUND, ADOLESCENT GIRLS IN GEORGIA'S SEX TRADE: AN IN-DEPTH TRACKING STUDY 8 (2008).

[131] CSEC DEMAND STUDY RESULTS, *supra* note 125, at 1.

were 30 to 39, and 22% were 40 or over.[132] The plurality (42%) of buyers of commercial sex was located in the northern suburbs.[133]

Prosecution of buyers of commercial sex is a strong deterrent that is under-utilized. In 2002, a reported 34% of prostitution arrests in the United States were of male purchasers—the rest were of women and children.[134] In 2005, Congress stated in its findings that eleven women used in commercial sex acts were arrested in Boston, nine in Chicago, and six in new York City for each arrest of a male customer in each respective city.[135] The legal fight against sex trafficking has not historically targeted the purchaser of sex. Even today, the purchase of sex is largely considered a "vice-crime," rising only to the level of a misdemeanor, and is generally handled at the local level of law enforcement; this is often true regardless of the age of the victim.[136] Though some states have enacted laws that more harshly criminalize the purchase of sex with a minor,[137] many unfortunately have not.

The problem of demand has been recognized internationally as a danger to children. The Preamble of the Rio de Janeiro Declaration and Call for Action to Prevent and Stop Sexual Exploitation of Children and Adolescents finds that "[t]here is an insufficient focus on measures to reduce and eliminate the demand for sex with children and adolescents, and in some States inadequate sanctions against sexual abusers of children."[138] The document calls on all members to "[a]ddress the demand that leads to children being prostituted by making the purchase of sex or any form of transaction to obtain sexual services from a child a criminal transaction under criminal law, even when the adult is unaware of the child's age."[139]

The demand for sex with children and adolescents is staggeringly high. Shared Hope International has found that

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[132] *Id.*

[133] *Id.*

[134] SHARED HOPE INT'L ET AL., REPORT FROM THE U.S. MID-TERM REVIEW ON THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN IN AMERICA 27 (2006).

[135] End Demand for Sex Trafficking Act of 2005, H.R. 2012, 109th Cong. § 2(a)(6) (2005).

[136] *See, e.g.*, OR. REV. STAT. § 167.007 (2009) (making the act of soliciting a prostitute a Class A misdemeanor, without an enhanced penalty if the person solicited is a minor); *see also* ALASKA STAT. § 11.66.100 (2011); ARK. CODE ANN. § 5-70-102 (2010); DEL. CODE ANN. tit. 11, § 1342 (2011); HAW. REV. STAT. § 712-1200 (2011).

[137] *See, e.g.*, WASH. REV. CODE § 9.68A.100 (2011) (making the act of soliciting a minor for prostitution a Class B felony).

[138] World Congress Against Sexual Exploitation of Children and Adolescents III, The Rio de Janeiro Declaration and Call for Action To Prevent and Stop Sexual Exploitation of Children and Adolescents 3 (2008).

[139] *Id.* at 7.

> [c]hildren exploited through prostitution report they typically are given a quota by their trafficker/pimp of [ten] to [fifteen] buyers per night, though some service providers report girls having been sold to as many as [forty-five] buyers in a night at peak demand times, such as during a sports event or convention. Utilizing a conservative estimate, a domestic minor sex trafficking victim who is rented for sex acts with five different men per night, for five nights per week, for an average of five years, would be raped by [six thousand] buyers during the course of her victimization through prostitution.[140]

The crime statistics show that most of these buyers are likely to avoid punishment.[141] If faced with legal consequences, however, many men will choose not to buy commercial sex and the communities will understand that this crime will not be tolerated.

Men interviewed for a study on demand in London stated that the consequences that would deter them from using women in prostitution included the threat of being added to a sex offender registry; imprisonment; public exposure such as a billboard announcement, a newspaper notice, or an Internet webpage; or a letter to their family or employer.[142] The interviewees also cited increased fines, increased criminal penalties, suspension of driver's license, or car impoundment as deterrents if laws and penalties were actually enforced.[143] Men interviewed in Chicago identified similar deterrents to buying sex.[144]

In fact, of the 113 interviewees who purchased sex in Chicago, only 7% had ever been arrested for soliciting a woman in prostitution.[145] Although one man claimed to have been arrested twenty-five times, most of those who had been arrested had only been arrested once.[146] In London, only 6% of men surveyed had ever been arrested for soliciting prostitution.[147] The overwhelming majority of men who buy sex stated that more severe penalties for soliciting prostitution would deter them[148]—but this will only work if such laws are enforced.

One of the greatest challenges to apprehending and arresting buyers is the anonymity with which they are cloaked by the sex industry.[149] Traffickers intentionally limit the interactions between buyers and exploited girls so that the girls often know little to nothing

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[140] NATIONAL REPORT, *supra* note 1, at 20.

[141] *See, e.g.*, End Demand for Sex Trafficking Act of 2005, H.R. 2012, 109th Cong. § 2(a)(6) (2005).

[142] FARLEY ET AL., *supra* note 120, at 22.

[143] *Id.*

[144] DURCHSLAG & GOSWAMI, *supra* note 123, at 24.

[145] *Id.*

[146] *Id.*

[147] FARLEY ET AL., *supra* note 120, at 26.

[148] *Id.*

[149] NATIONAL REPORT, *supra* note 1, at 22.

about the true identities of their clients.[150] What little information the victims may acquire during their controlled encounters with the buyers is often lost from their memory due to the traumatic nature of sexual exploitation.[151] A standard check on the call records of cell phones found in the possession of arrested victims and traffickers may sometimes lead to positive identification of buyers.[152] But the effectiveness of this investigative technique is subject to the extent that the trafficker restricted interactions between himself, the victim, and the buyer.[153] Moreover, whereas pornography tends to leave a financial trail traceable to the buyer, prostitution is primarily conducted on a cash basis, leaving no trace of the commercial transaction between buyer and victim.[154] Coupled with the fact that buyers often employ aliases to conceal their true identities, investigators are left with negligible evidence of the men who purchase prostituted juveniles.[155]

A common gap in state laws is the right of a defendant to assert a defense of mistake of age.[156] This defense prevents prosecutors from bringing many cases of child sex trafficking to trial.[157] In Washington State, a 2010 legislation closed this loophole by adding the crime of commercial sex abuse of a minor to the list of crimes that do not permit a defense of mistake of age.[158] A much stricter affirmative defense of a bona fide attempt to ascertain the true age through checking government-issued identification can be asserted, however.[159] This type of legislation mitigates the risk a prosecutor takes in pursuing a case against a buyer and encourages more prosecutions of demand. Shifting the burden of proof from the child to the buyer is currently being debated in varying forms in other states.[160]

Ending demand will reduce the exploitation of vulnerable women and children. This will not be easy, as the commercial sex industry is a billion-dollar business. It was estimated that in Las Vegas alone in 2006, the sex industry and related activities, both legal and illegal (including

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150 *Id.*

151 *Id.*

152 *Id.*

153 *Id.*

154 *Id.* (citing SNOW, *supra* note 95, at 45).

155 *Id.* (citing SNOW, *supra* note 95, at 45).

156 *Id.* at 54.

157 *Id.*

158 S.B. 6476, 61st Leg., Reg. Sess. (Wash. 2010).

159 *Id.*

160 *See, e.g.*, D.C. CODE § 22-1834 (2010) (requiring only "reckless disregard of the fact that the person has not attained the age of 18 years"); *Fighting Juvenile Sex Trafficking*, PORTLANDONLINE.COM, http://www.portlandonline.com/saltzman/index.cfm?c=54076 (last visited Apr. 7, 2011) (advocating changing Oregon laws to eliminate mistake of age as a defense for buyers of prostituted children).

lap-dancing, prostitution in strip clubs, commissions to taxi drivers, and tips to valets and bartenders for procuring women, etc.), "generate between $1 billion and $6 billion per year."[161] Furthermore, juveniles are often mixed with adults in the commercial sex markets, according to a 2005 study in Atlanta.[162] The study, which researched the incidence of prostitution of juveniles in the city, found a high concentration of commercial sexual activity around adult entertainment venues, including strip clubs and sex shops.[163]

A Note on Legalization

The trend to tie morality to legal norms means that in countries where commercial sex is legal, sex for purchase loses its stigma. Legalization undoubtedly has freed many men from the stigma of buying commercial sexual services,[164] thereby increasing the demand for commercial sex; the number of women voluntarily entering the commercial sex market, however, has not increased.[165] In addition, a perception of legality or official tolerance of prostitution can result in increasing demand. A study done in London interviewing 103 men who buy sex demonstrated that in addition to buying sex in the United Kingdom, nearly one-half had bought sex outside the country as well.[166] In fact, they had traveled to a combined forty-two countries on six continents.[167] Not surprisingly, the most frequent destination was Amsterdam because, as they noted, prostitution is legal.[168]

In the United States, the perception that prostitution is legal in Las Vegas is widespread across the country and, despite the actual illegality,[169] leads to a demand for commercial sexual services. Sexually oriented entertainment pervades Las Vegas and results in the

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[161] MELISSA FARLEY, PROSTITUTION AND TRAFFICKING IN NEVADA: MAKING THE CONNECTIONS 112–13 (2007).

[162] ALEXANDRA PRIEBE & CRISTEN SUHR, ATLANTA WOMEN'S AGENDA, HIDDEN IN PLAIN VIEW: THE COMMERCIAL SEXUAL EXPLOITATION OF GIRLS IN ATLANTA 22, 24 (2005).

[163] *Id.*

[164] FARLEY ET AL., *supra* note 120, at 11.

[165] DEMAND, *supra* note 6, at 62; Janice G. Raymond, *10 Reasons for Not Legalizing Prostitution*, PROSTITUTION RESEARCH & EDUC. (Mar. 25, 2003), http://prostitution research.com/ten-reasons.html [hereinafter *10 Reasons*]; *see also* FARLEY ET AL., *supra* note 120, at 11 (noting that in Amsterdam, where prostitution is legal, women have to "service" more buyers each day than in London, where it is illegal).

[166] *See* FARLEY ET AL., *supra* note 120, at 11.

[167] *Id.*

[168] *Id.*

[169] DEMAND, *supra* note 6, at 95.

trafficking of women and, increasingly, children to the city to be used in the commercial sex industry to satisfy the sizeable demand.[170]

The trafficking of children into Las Vegas to satisfy the demand for commercial sex can be measured in the arrests of these same children. In Clark County, Nevada (which includes Las Vegas), prostitution charges against juveniles fill a judge's entire daily docket once a week.[171] In the span of just 20 months, 226 minors, who had come from all over the county, were brought before the court.[172] In early 2007, 12.8% of the girls committed to the Caliente Youth Center had been adjudicated for the misdemeanor offense of solicitation for prostitution.[173]

These numbers reflect the consequence of inflated demand for commercial sex. Traffickers inevitably include Las Vegas on any prostitution circuit through which they move their victim-products.[174] Legalization of prostitution is not the solution to the crime of sex trafficking as there simply are not enough adult women willing to make this a profession.[175] It is noteworthy that Amsterdam itself has recognized this to be a failed experiment and has been reducing the number of prostitution venues in the official Red Light District over the last three years.[176]

C. Criminal Provisions for Traffickers

Trafficking-in-persons laws are critical to prosecuting sex traffickers. Many state laws continue to require proof of knowledge that force, fraud, or coercion was used in sexual services, even as applied to the trafficker to result in a trafficking conviction.[177] This requirement is difficult to meet in cases of domestic minor sex trafficking in which it is very common for traffickers to enslave girls through psychological bonding and perceived love.[178] As a result, girl victims of sex trafficking rarely believe they are victims—rather, many are typically convinced that the trafficker is their boyfriend.[179] Eliminating proof of force, fraud,

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[170] *See* M. ALEXIS KENNEDY & NICOLE JOEY PUCCI, SHARED HOPE INT'L, DOMESTIC MINOR SEX TRAFFICKING: LAS VEGAS, NEVADA 8–9 (2007).

[171] NATIONAL REPORT, *supra* note 1, at 6.

[172] *Id.*

[173] KENNEDY & PUCCI, *supra* note 170, at 3. The Caliente Youth Center is the state detention facility that serves Las Vegas. *See id.*

[174] *See* Rachael Marcus, *Confessions of a Teenage Prostitute*, PORTLAND MERCURY, Sept. 3, 2009, http://www.portlandmercury.com/portland/confessions-of-a-former-teen-prostitute/Content?oid=1623030.

[175] DEMAND, *supra* note 6, at 62; *10 Reasons*, *supra* note 165.

[176] *Mayor Unveils Plan To Clean Up Amsterdam's Red-Light District*, CBC NEWS, Dec. 18, 2007, http://www.cbc.ca/world/story/2007/12/17/amsterdam-district.html.

[177] *E.g.*, LA. REV. STAT. ANN. § 14:46.2 (2010); N.M. STAT. ANN. § 30-52-1 (2010).

[178] NATIONAL REPORT, *supra* note 1, at 38.

[179] *Id.* at 38, 41.

or coercion in trafficking statutes is critical to reflect the reality of domestic minor sex trafficking.

In the absence of or inability to use a trafficking-in-persons statute, state prosecutors might look to other laws. The above-mentioned concerns with regard to using non-commercial sex offense laws to prosecute buyers[180] apply here as well. As discussed previously, laws related to prostitution of minors, while useful for prosecutions of traffickers without the heavy evidentiary burdens of the trafficking-in-persons law, often result in the victim being left without the designation of trafficking victim and therefore without access to the array of services and rights accorded to a trafficking victim.[181]

Traffickers often use control tactics beyond force or love to keep their young victims enslaved. One common method is to impregnate the girl, and then use her child as leverage to control the girl.[182] In the worst cases, these children are also prostituted by the trafficker-parent.[183] Laws that ensure a convicted trafficker-parent's parental rights be terminated are important to protect the victim and any children created through that exploitative relationship. State laws have rarely contemplated the importance of adding this crime to those that are grounds for termination of parental rights.[184] In addition, people who have been convicted of sex trafficking and commercial sex offenses

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[180] *See supra* Section III.B.

[181] *See supra* text accompanying notes 105–109.

[182] PROTECTED INNOCENCE, *supra* note 90, at 9.

[183] *Id.*

[184] Trafficking in persons is not specifically a ground for termination of parental rights in any state. *See* CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., GROUNDS FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS (2010). Several states have established promoting prostitution as grounds for termination of parental rights, but only if the offender's own child was the victim of that crime. *Id.* at 27, 43, 49. Similarly, most states allow for the termination of parental rights when the parent has committed certain offenses against children, but most of these provisions would require that the law recognize trafficked girls as child victims. *Id.* at 7, 10, 14–15, 17, 19–29, 32–37, 41–44, 46, 49, 52–54, 56, 58, 60. Other states have potentially applicable categories of offenses that would allow for the termination of parental rights. *Id.* at 8 (felony indicating unfitness), 16 (parent is a violent repeat offender or sexual predator), 19 (child was conceived through rape, or sexual abuse of a minor under sixteen), 23 (any felony resulting in imprisonment), 35 (unfitness due to lewd conduct), 39 (parent harmed the other parent), 45 (child conceived through rape), 48 (same), 53 (same), 49 (conviction for various sexual offenses), 51 (child conceived from a sexual offense resulting in conviction, unless the offense stemmed from a consensual encounter where both parties were between fourteen and eighteen years of age), 54–55 (conviction for various sex crimes against children or a sexual offense resulting in pregnancy), 56 (conviction of a crime indicating unfitness), 57 (conviction of a violent crime indicating unfitness), 59 (parent is a violent sexual predator, or child was conceived from a sex offense), 61 (parent has a pattern of sexual abuse that threatens the child or child was conceived in a sexual assault).

should be required to register as a sex offender to provide further protection of children in the community.[185]

D. Criminal Provisions for Facilitators

Facilitators are key components of child trafficking operations that are ignored by state trafficking laws.[186] Though not directly responsible for the sexual exploitation of the trafficking children, facilitators make such crimes possible by, for instance, funneling potential buyers to the trafficked children or by turning a blind eye to such activities.[187] Taxi services, hotels, and owners of adult entertainment venues are just a few common facilitators who participate in and benefit from child trafficking enterprises.[188]

Technology, most notably the Internet, is the most prevalent medium used to facilitate sex trafficking.[189] Prostitution is steadily moving off the streets, making it increasingly difficult to find the perpetrators and creating opportunities for technology-based facilitators of sex trafficking.[190] With the increase in demand and usage of the Internet, increasingly younger children can be sold on the Internet.[191] In addition to using the Internet to sell sex, images of sexual abuse, and sexual performance with minors,[192] traffickers recruit new victims through their MySpace accounts, Facebook accounts, and websites like online modeling employment agencies.[193] Over a two-year period, an 800% increase was seen in the number of children reporting that technology was used in some way to facilitate prostitution.[194]

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[185] *See* International Megan's Law of 2009, H.R. 1623, 111th Cong. (1st Sess. 2009); VT. CRIMINAL INFO. CTR., DEP'T OF PUB. SAFETY, VERMONT SEX OFFENDER REGISTRY RULES AND REGULATIONS 28 050 002-4 to -6 (2005).

[186] *See* Human Rights Council Res. 8/12, Special Rapporteur on Trafficking in Persons, Especially Women and Children (expressing concern that trafficking facilitators enjoy a "high level of impunity" and urging governments to penalize facilitators), *available at ap.ohchr.org/Documents/E/HRC/resolutions/A_HRC_RES_8_12.pdf.*

[187] NATIONAL REPORT, *supra* note 1, at 27.

[188] DEMAND, *supra* note 6, at 4, 98; NATIONAL REPORT, *supra* note 1, at 27.

[189] DEMAND, *supra* note 6, at 5.

[190] Natalie Pompilio & Jennifer Lin, *Shining Light on Seamy World of Escorts*, PHILA. INQUIRER, Aug. 14, 2005, at A01.

[191] *See* DEMAND, *supra* note 6, at 5, 17.

[192] *See id.* at 10, 19–20.

[193] ATHANASSIA P. SYKIOTOU, COUNCIL OF EUROPE, TRAFFICKING IN HUMAN BEINGS: INTERNET RECRUITMENT 21 (2007); Morgan Cook, *VISTA: Residents Walk To Raise Awareness of Human Trafficking*, N. COUNTY TIMES, Jan. 8, 2011, http://www.nctimes.com/news/local/vista/article_8ac79ea2-caaa-5753-8d94-5d6b1edee890.html.

[194] Andrea Hesse, Alberta Children & Youth Servs., Remarks at the Shared Hope International National Training Conference on the Sex Trafficking of America's Youth (Sept. 15–16, 2008) (transcript on file with authors).

Online classified advertising websites have come under heavy criticism for their roles in facilitating prostitution of minors and adults. Craigslist was sued by Sheriff Thomas Dart of Cook County, Illinois, under a public nuisance theory, alleging that its maintenance of an adult services webpage was tantamount to facilitating prostitution.[195] Though dismissed,[196] the suit, along with strong pressure from state attorneys general across the country, led to the closure of the Craigslist adult services page in October 2010.[197] Subsequently, Backpage.com has reportedly picked up the advertisers of commercial sex with minors and adults, which has been reflected in its increased revenue since the closure of Craigslist's adult services page.[198]

Though little criminal action has been taken against the technology facilitators (or more traditional facilitators), law enforcement have quickly tried to employ the Internet tool in their search for traffickers and buyers. Before removing the adult services page on the website, Craigslist received regular requests from investigators for information on postings depicting suspiciously young females.[199] Facebook and MySpace are routinely monitored in law enforcement attempts to rescue child sex trafficking victims and arrest traffickers.[200] Law enforcement agencies study the Internet for evidence of child pornography and prostitution of children through chat rooms and other online media.[201] Laws are needed that specifically allow this type of investigation. Laws are also essential to encourage these investigations by providing protection for the investigators from prosecution for the very crime they are investigating.[202] They are also needed to prevent offenders from

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[195] Dart v. Craigslist, Inc., 665 F. Supp. 2d 961, 961, 963 (N.D. Ill. 2009).

[196] *Id.* at 970.

[197] Christopher Leonard, *Craigslist Shuts Down Adult Services Section*, THE TIMES OF TRENTON, Sept. 5, 2010, at A14; Stephanie Reitz, *Craigslist Removes Adult Services Listings from Global Sites*, SAN JOSE MERCURY NEWS, Dec. 21, 2010, at 2C.

[198] *Sex Ads: Where the Money Is*, CLASSIFIED INTELLIGENCE REPORT (Advanced Interactive Media Grp., LLC), Sept. 14, 2010, at 2–3; *Backpage Replaces Craigslist as Prostitution-Ad Leader*, AIM GRP. (Oct. 19, 2010), http://aimgroup.com/blog/2010/10/19/backpage-replaces-craigslist-as-prostitution-ad-leader/.

[199] *See* Scott Gutierrez, *Craigslist Sex Ads Reined In: 'Erotic Services' Posters Must Provide Phone Number, Credit Card*, SEATTLE POST-INTELLIGENCER, Nov. 7, 2008, at A1.

[200] *Cf.* Sharon Nelson et al., *The Legal Implications of Social Networking*, 22 REGENT U. L. REV. 1, 13 (2009) (stating that law enforcement "often use social networking sites in their investigations"); Karen Bune, *Smart Initiatives Tackle Sex Trade*, LAWOFFICER.COM (Jan. 3, 2011), http://www.lawofficer.com/article/investigation/smart-initiatives-tackle-sex-t.

[201] GRAEME R. NEWMAN, OFFICE OF CMTY. ORIENTED POLICING SERVS., U.S. DEP'T OF JUSTICE, *Sting Operations*, at 8, 22 (Response Guides Ser. No. 6, 2007), *available at* www.cops.usdoj.gov/files/ric/Publications/e10079110.pdf.

[202] *Cf.* STAFF OF H. COMM. ON ENERGY AND COMMERCE, 109TH CONG., SEXUAL EXPLOITATION OF CHILDREN OVER THE INTERNET 5–6 (Staff Rep. 2007) (suggesting that

using a defense that the "minor" they are interacting with online is actually an adult law enforcement officer or person acting at the direction of law enforcement in the investigation of a sexual exploitation crime.[203]

A web surveillance crawl commissioned by Shared Hope International investigated the use of the Internet for marketing sex tours through which men (predominantly) travel to engage in sex in locations where it is tolerated and even encouraged, and found the following:

> Of the 63 erotic sex tour English[-]language websites identified through the extensive filtering process, 79% revealed U.S.-based IP addresses and offered packages in Venezuela, Costa Rica, the Dominican Republic, Jamaica, Cambodia, the Philippines, Thailand, Russia, Amsterdam and Mexico. Four of these sites offered marriage services as an additional option.[204]

Some hotels have taken an executive-level stance against child sex tourism and prostitution occurring on the premises.[205] For example, Carlson Companies, based in the United States, has signed the Code of Conduct for the Protection of Children from Sexual Exploitation in Travel and Tourism, committing its large hotel and restaurant network to be vigilant against child sex tourism.[206] It is the only U.S.-based hotel chain to commit to the Code of Conduct to date, though a June 2010 scandal involving a brothel operating in a Hilton hotel in China has led that hotel company to consider adopting an internal code of conduct.[207] Empowering these institutions by bringing them into an alliance to combat human trafficking can be an effective tool. The official stances taken by the hotels, however, do not always trickle down to the lower level or auxiliary staff, who may continue to facilitate the exploitation of

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Internet Service Providers should be encouraged to search their networks and systems for child pornography images to help combat the problem, but that such efforts should be shielded from liability).

[203] *See* Christa M. Book, Comment, *Do You* Really *Know Who Is on the Other Side of Your Computer Screen? Stopping Internet Crimes Against Children*, 14 ALB. L.J. SCI. & TECH. 749, 765–66 (2004).

[204] *See* DEMAND, *supra* note 6, at 21.

[205] *See, e.g.*, Jerilyn Klein Bier, *Hilton Working To Abolish Child Sex Trafficking*, NASDAQ.COM (Nov. 3, 2010, 2:04 PM), http://community.nasdaq.com/News/2010-11/hilton-working-to-abolish-child-sex-trafficking.aspx?storyid=43329.

[206] Code Members, *Code of Conduct for the Protection of Children from Sexual Exploitation in Travel and Tourism*, THECODE.ORG, http://www.thecode.org/index.php?page=6_3#USA (last visited Mar. 29, 2011) (listing Carlson Companies as a Code Member, showing that Carlson Companies encompass Radisson, Country Inns and Suites, Park Inn, Park Plaza, T.G.I. Friday's, and Carlson Wagonlit Travel). *See generally id.* (listing the six criteria of the Code).

[207] Bier, *supra* note 205.

women and children within the hotels and resorts.[208] Reasonable knowledge of sex trafficking occurring within a business venue or through a business activity should result in criminal liability on the part of the business.[209]

Many trafficking-in-persons statutes contain provisions that hold facilitators liable if they criminally assist or benefit from trafficking.[210] A small number of states have enacted laws specifically criminalizing sex tourism within their jurisdictions.[211] For example, in Washington State, it is a felony offense if:

> [a] person commits the offense of promoting travel for commercial sexual abuse of a minor if he or she knowingly sells or offers to sell travel services that include or facilitate travel for the purpose of engaging in what would be commercial sexual abuse of a minor or promoting commercial sexual abuse of a minor, if occurring in this state.[212]

This type of criminal law can provide a deterrent to those who would profit from the sex trafficking of minors.

E. Protective Provisions for the Child Victims

Laws to protect children after they have been exploited range from access to justice to access to services. It is important to understand the background of these children to determine how legislation must be designed or directed to assist them. Many of the youths found in commercial sexual exploitation are the runaways, homeless, and throwaways.[213] In 1999, nearly 1.7 million youths had run away from home or were forced out.[214] It has been estimated that these youths are

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[208] Fatima Khan, *Responsibility: How Human Trafficking Puts You in the Cross-Hairs*, BUS. TRAVEL EXECUTIVE, Mar. 2010, at 1, 2.

[209] *See* Camelia M. Tepelus, *Social Responsibility and Innovation on Trafficking and Child Sex Tourism: Morphing of Practice into Sustainable Tourism Policies?*, 8 TOURISM & HOSPITALITY RES. 98, 105–06 (2007) (noting that the Code lacks enforcement mechanisms and that signatories often fail to monitor the compliance of individual locations adequately).

[210] *E.g.*, GA. CODE ANN. § 16-5-46(g) (2011); MINN. STAT. § 609.322 (2010); MISS. CODE ANN. § 97-3-54.1(2) (2010); NEB. REV. STAT. § 28-831(3)(b) (2010); N.M. STAT. ANN. § 30-52-1(A)(3) (West 2010).

[211] *E.g.*, HAW. REV. STAT. § 468L-7.5(9), (10) (2010); MO. REV. STAT. § 567.087 (2011); WASH. REV. CODE. § 9A.88.085 (2011).

[212] WASH. REV. CODE. § 9.68A.102 (2011).

[213] DEMAND, *supra* note 6, at 86 (explaining that runaways have a high risk of sexual exploitation); *accord* ESTES & WEINER, *supra* note 89, at 68 (collecting sources discussing the risks faced by such children).

[214] HEATHER HAMMER ET AL., OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, RUNAWAY/THROWNAWAY CHILDREN: NATIONAL ESTIMATES AND CHARACTERISTICS 2 (2002).

lured into prostitution within 48 hours of leaving home.[215] They often end up being involved not only in prostitution, but pornography and drug dealing as well.[216] Studies show that these runaways and throwaways constitute 75% of all juvenile prostitutes.[217] Legislation designed to respond to this group of children must recognize commercial sexual exploitation to effectively channel these victims toward appropriate legal responses.

Child protective services workers are often precluded from investigating cases of domestic minor sex trafficking, unless when committed by a family member, due to restrictive legal definitions of "abuse or neglect" and "caregiver" that define the parameters of their jurisdiction.[218] This, along with the criminal justice system's habit of responding to a prostituted juvenile as a criminal, results in failure to treat such a child as one in need of protection and treatment.[219] Only a handful of states have attempted to correct these gaps through legislation, and with varying success.

The New York Safe Harbour for Exploited Children Act,[220] for example, resulted directly from the unfortunate outcome of a twelve-year-old girl who was charged with prostitution in *In re Nicolette R.*[221] This law prevents the criminalization of certain child sex trafficking victims by giving police the option of bringing the victim directly to a safe shelter specially designed for domestic minor sex trafficking victims; this option is only available for children under eighteen years old and requires the court to adjudicate them as persons in need of supervision rather than as a juvenile delinquent.[222]

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[215] Laura Crimaldi & O'Ryan Johnson, *Prostitution Lures the Desperate*, BOS. HERALD, Apr. 15, 2007, at 5.

[216] KELLY DEDEL, OFFICE OF CMTY. ORIENTED POLICING SERVS., U.S. DEP'T OF JUSTICE, *Juvenile Runaways*, at 12 (Response Guide Ser. No. 37, 2006), *available at www.cops.usdoj.gov/files/RIC/Publications/e12051223_Juvenile.pdf*.

[217] MARCIA I. COHEN, NAT'L ASS'N OF CNTYS. & THE UNIV. OF OKLA. NAT'L RES. CTR. FOR YOUTH SERVS., IDENTIFYING AND COMBATING JUVENILE PROSTITUTION: A MANUAL FOR ACTION 2 (1987).

[218] *See, e.g.*, SHARED HOPE INT'L, REPORT CARD: PROTECTED INNOCENCE LEGISLATIVE FRAMEWORK: WASHINGTON (2011) (In Washington, "[s]exual exploitation is a form of abuse or neglect allowing for child protective services involvement, though caregiver is defined as an adult in the home [that] might preclude the situation of a pimp in control of a minor").

[219] *See infra* notes 230–233 and accompanying text.

[220] N.Y. SOC. SERV. LAW §§ 447-a to -b (Consol. 2011).

[221] 779 N.Y.S.2d 487, 487–88 (App. Div. 2004) (holding that a minor could be held delinquent for prostitution); *see also* Thomas Adcock, *Nicolette's Story*, N.Y. LAW JOURNAL (Oct. 3, 2008), http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=1202424988298&slreturn=1&hbxlogin=1#.

[222] *See* § 447-a; N.Y. FAM. CT. ACT § 732(b) (McKinney 2010).

The State of Washington enacted a bill in 2010 that amends a range of laws within the state code,[223] including the definitions that now define commercially sexually exploited children as children in need of services for purposes of bringing them within the protections of child welfare laws.[224] The state also provides for a discretionary direct referral to a secure residential facility for those in crisis operated under the Department of Social and Health Services for up to fifteen days, avoiding a criminal charge to hold a child safely from a trafficking situation.[225]

Most recently, Illinois's Safe Children Act[226] transfers jurisdiction over children arrested for prostitution from the criminal system to the child protection system.[227] The law facilitates the placement of sexually exploited children in temporary protective custody if necessary, which includes custody within medical facility or a place designated by the Department of Children and Family Services (it may be a licensed foster home, group home, or other institution), subject to review by the judge.[228] The law further specifies that "temporary protective custody" must not be in a jail or juvenile detention facility.[229]

Domestic minor sex trafficking victims can also be foreclosed from compensation for the crime committed against them in a number of ways. First, many state crime victims' compensation statutes contain eligibility criteria that pose as barriers to girls who have been commercially sexually exploited.[230] There is often a short time period for reporting the crime to law enforcement and for filing the application—both of which are unrealistic for many victims who have not identified their own victimization or the sustained resulting injuries.[231] Second, the determination that an applicant for compensation was complicit or actively engaged in the crime for which she now claims damages also acts as a common ineligibility factor.[232] Many domestic minor sex

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223 S.B. 6476, 61st Leg., Reg. Sess. (Wash. 2010).

224 WASH. REV. CODE § 13.32A.030 (2011).

225 WASH. REV. CODE § 74.13.020(6) (2011); WASH. REV. CODE § 74.13.0311 (2011); WASH. REV. CODE § 74.13.034 (2011).

226 H.B. 6462, 96th Gen. Assemb., Reg. Sess. (Ill. 2009); Art Golab, *No Prostitution Charges for Kids*, CHI. SUN-TIMES, Aug. 21, 2010, at 16.

227 720 ILL. COMP. STAT. 5/11-14 (2011).

228 325 ILL. COMP. STAT. 5/3 (2011).

229 *Id.*

230 *See, e.g.*, LINDA A. SMITH ET AL., SHARED HOPE INT'L, DOMESTIC MINOR SEX TRAFFICKING: CHILD SEX SLAVERY IN ARIZONA 13 (2010) [hereinafter ARIZONA] (describing hurdles to obtaining victim funds in Arizona); PROTECTED INNOCENCE, *supra* note 90, at 12 (explaining that statutes that consider the minor's involvement in the underlying crime are not beneficial and that minors should be identified as victims per se).

231 ARIZ. ADMIN. CODE § R10-4-106(A)(4) (2008) (imposing a seventy-two-hour reporting time limit); N.C. GEN. STAT. § 15B-11(a)(3) (2010) (same).

232 *See* ARIZ. ADMIN. CODE § R10-4-106(A)(3)(a) (2008).

trafficking victims appear complicit or even self-directed in their prostitution as they are psychologically bonded to their traffickers during the time of the exploitation.[233] It is critical for the protection of these victims that the law provides exceptions for eligibility factors and specifically identifies these youths as victims for purposes of receiving crime victims' compensation.

Additionally, civil remedies and asset forfeiture can both offset the ongoing costs for treatment and rehabilitation of victims of child sex trafficking. Laws ensuring access to civil remedies against both the traffickers and the buyers convicted of trafficking or commercial sexual exploitation of children are essential. Asset forfeiture also has the advantage of preventing the offender from keeping assets and property related to the commission of the crime or obtained through proceeds of the crime. Closely related to the civil remedies is the need for the extension (or elimination) of statutes of limitation for actions by a child sex trafficking victim, as she may need a long time to recover from psychological bonding with a trafficker and to recognize the damages she suffered adequately.[234]

F. Law Enforcement and Criminal Justice Tools to Effectuate Investigation and Prosecutions

Traditional investigation methods to capture buyers of prostitution involve the use of decoys—undercover police officers placed in prostitution zones to nab prospective johns.[235] This technique, however, cannot be used as effectively against those seeking sex with a minor because a minor cannot be legally placed as a decoy.[236] This creates a problem because, without decoys, police officers have to interrupt a commercial transaction with a minor while in progress to identify the buyer of sex with a prostituted child—a rare event.[237]

Laws specifically disallowing the defense that the person solicited was not a minor permit law enforcement to proceed with undercover operations to curb exploitation of children in street prostitution.[238] For

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[233] *See* COHEN, *supra* note 217, at 2 (explaining that young runaway girls seek affection from their pimps as the parents they never had).

[234] *See* PRIEBE & SUHR, *supra* note 162, at 29–30 (describing the various long-lasting effects of commercial sexual exploitation on children, including cognitive and developmental delays, post-traumatic stress disorder, conduct disorder, and borderline personality disorder).

[235] ARIZONA, *supra* note 230, at 28 (describing Arizona's Customer Apprehension Program and how Phoenix law enforcement uses female decoys to target buyers and arrest them).

[236] NATIONAL REPORT, *supra* note 1, at 21.

[237] *Id.* at 21–22.

[238] ARIZONA, *supra* note 230, at 28.

example, Arizona's code removes this defense for buyers and sellers of sex with minors, stating that "[i]t is not a defense to a prosecution . . . that the other person is a peace officer posing as a minor or a person assisting a peace officer posing as a minor."[239] Disallowing this defense in cases of online sexual exploitation and pornography would assist law enforcement in investigating these crimes as well.

Another investigative challenge lies in identifying the prostituted girl as a minor:

> Age verification is made difficult by the widespread use of fraudulent identification provided to the girls by the traffickers/pimps to establish their age as an adult. The first arrest of a prostituted minor is critical for proper identification—if entered into the system as an adult, her identity is altered and subsequent arrests reinforce the false [adult] identity. Steps are being taken [to resolve this gap] by the FBI through the development of a database [that] is accessible more broadly to law enforcement in an attempt to improve information sharing [and prevent the misidentification of these children].[240]

One important way authorities can identify a trafficked minor is via the National Crime Information Center ("NCIC").[241] When a child goes missing, it is important that local law enforcement input information regarding the disappearance into the NCIC.[242] Given the frequency with which missing children become trafficking victims, it is critical that the disappearances of children who are in the custody of child welfare agencies be immediately reported not only to the local police, but also to the NCIC and the National Center for Missing and Exploited Children (NCMEC), and that each rescued domestic minor sex trafficking victim be checked against these reports to see if she can be confirmed as a missing child.[243]

One local initiative in Dallas is improving the identification of prostituted minors. The High Risk Victims & Trafficking Unit within the Dallas Police Department identified 189 cases of children who had run away from home four or more times in a single year, or who had repeatedly been victims of sexual abuse or exploitation, making them high-risk victims.[244] 119 of these children were prostituted youths.[245]

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[239] ARIZ. REV. STAT. ANN. § 13-3212(C) (2011).

[240] NATIONAL REPORT, *supra* note 1, at 22.

[241] PROTECTED INNOCENCE, *supra* note 90, at 15.

[242] U.S. DEP'T OF JUSTICE, AMBER ALERT FACT SHEET: EFFECTIVE USE OF NCIC 1 (2005), *available at* http://www.ncjrs.gov/html/ojjdp/amberalert/AMBERAlertNCICFact Sheet.pdf; PROTECTED INNOCENCE, *supra* note 90, at 15.

[243] PROTECTED INNOCENCE, *supra* note 90, at 15.

[244] NICOLE HAY, SHARED HOPE INT'L, DOMESTIC MINOR SEX TRAFFICKING: DALLAS, TEXAS 11 (2008).

[245] *Id.*

Programs like this set out a standard that should be included in the legislative framework of any state.

CONCLUSION

An anti-trafficking legislative framework is the foundation for all efforts to combat domestic minor sex trafficking. It is the starting point for a holistic approach to ending domestic minor sex trafficking as well as all other forms of modern-day slavery. Anti-trafficking federal laws are comprehensive and contain severe penalties.[246] Many cases of child sex trafficking, however, are never presented to the federal prosecutors or, if they are, are declined for prosecution.[247] Therefore, it is essential that state laws are as comprehensive and severe in penalties as the federal laws to advance a full criminal deterrence program.[248] It is also important that all states elevate their criminal laws to a similar level to avoid migration of the crime to the more lenient states.[249] In accomplishing these legislative goals, the interconnectedness of the various laws that affect, or are affected by, domestic minor sex trafficking must not be overlooked. The many areas of law that are effective in cases of child protection and juvenile justice must be reviewed and considered for their impact on the legislative objectives.[250] Stronger legislation in all areas is a critical foundation to combat domestic minor sex trafficking.

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246 *See supra* table accompanying notes 37–80.

247 *See supra* text accompanying notes 81–85.

248 *See supra* Part III.

249 *See supra* text accompanying notes 97–99.

250 *See supra* Part III.

ADDRESSING DEMAND: WHY AND HOW POLICYMAKERS SHOULD UTILIZE LAW AND LAW ENFORCEMENT TO TARGET CUSTOMERS OF COMMERCIAL SEXUAL EXPLOITATION

Laura J. Lederer[*]

INTRODUCTION[†]

Human trafficking affects virtually every country, including the United States.[1] Since the passage of the Trafficking Victims Protection Act of 2000[2] in the United States as well as the U.N. Protocol to Prevent, Suppress and Punish Trafficking in Persons,[3] many have worked to address this problem of modern-day slavery, from statesmen and stateswomen to world relief organizations and grassroots organizations. Even so, these crimes continue. Some estimate there are as many as twenty-seven million people trapped in some form of slavery worldwide.[4] Many of the slaves are women and children—bought, sold, and traded day after day for sexual exploitation.[5] In human trafficking, as in drug trafficking, there is a triangle of activity consisting of *supply, demand,*

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[†] Cited throughout this Article are newspaper sources that help illustrate the widespread reach of human trafficking throughout the United States and abroad.

[1] *See* U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 338–45 (10th ed. 2010). *See generally id.* at 55–359.

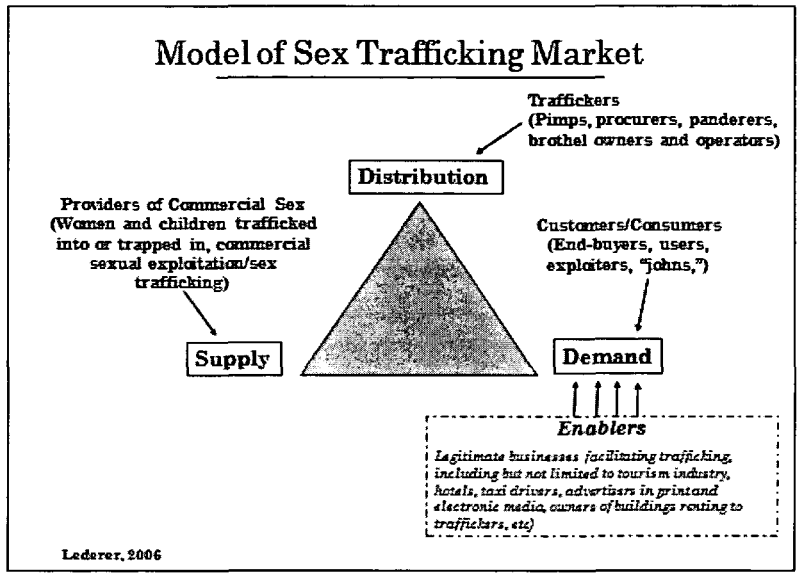
[2] Pub. L. No. 106-386, 114 Stat. 1466 (codified as amended in scattered sections of 22 U.S.C. (2000)).

[3] Protocol To Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, *opened for signature* Dec. 12, 2000, 2237 U.N.T.S. 319.

[4] *E.g.*, KEVIN BALES, DISPOSABLE PEOPLE: NEW SLAVERY IN THE GLOBAL ECONOMY 8 (rev. ed. 2004).

[5] U.S. DEP'T OF STATE, *supra* note 1, at 9, 12, 34.

and *distribution*.[6] This triangle of activity exists whether the trade is in forced labor or in commercial sexual exploitation—sex trafficking. This Article focuses on trafficking for purposes of commercial sexual exploitation.[7] The following diagram illustrates the triangle of activity in these cases:



Since the passage of the Trafficking Victims Protection Act, with its emphasis on victim rescue, rehabilitation, and restoration,[8] activity has centered on the "supply" side. Many organizations have designed comprehensive sets of services for trafficking victims, including short-term aid, such as food, clothing, shelter, medical attention, and legal services for those rescued.[9] In addition, "distribution" has also been a focal point, including the investigation, arrest, prosecution, and

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[6] *See* R.I.R. Abeyratne, *International Initiatives at Controlling the Illicit Transportation of Narcotic Drugs by Air*, 63 J. AIR L. & COM. 289, 318 (1997).

[7] Using the term "commercial sexual exploitation of women and children" is a deliberate decision by the author, as it broadly encompasses domestic and international trafficking of persons for purposes of forced prostitution and other sexual services and additionally alludes to the economic component of the crime and the victim status of the women and children who are forced to participate.

[8] Pub. L. No. 106-386, §§ 102, 105–07, 114 Stat. 1466.

[9] *E.g.*, NYC OFFICE OF THE CRIMINAL JUSTICE, HUMAN TRAFFICKING SERVS.: RES. DIRECTORY (2011), *available at* http://www.nyc.gov/html/endht/downloads/pdf/human_trafficking_services_resource_directory.pdf; *Services Available for Trafficking Victims*, KY RESCUE & RESTORE VICTIMS OF HUMAN TRAFFICKING, http://www.rescueandrestoreky.org/serving-victims/services-available/ (last visited Apr. 21, 2011).

successful conviction of traffickers.[10] Very little attention and few, if any, programs attend to the demand side of this triangle of activity.

This Article addresses some strategies for demand reduction. It suggests a four-point program for addressing demand and discusses ways that different jurisdictions can apply this program. The four points are as follows: (1) drafting laws that penalize patronizing and target customers and consumers of commercial sex; (2) creating first-offender programs, colloquially known as "John's Schools," to educate first offenders about the deleterious effects of commercial sexual exploitation; (3) creating sting and reverse-sting operations to assist law enforcement in identifying, arresting, and prosecuting buyers; and (4) developing social marketing campaigns that not only target exploiters, but also impress upon the general public the message of "no tolerance" for their actions. To put an end to commercial sexual exploitation of women and children in all of its various forms, society must recognize the larger need for continuing values-based and human rights approaches that acknowledge and affirm the dignity, integrity, and sacredness of a human life.

I. PENALIZING PATRONS OF COMMERCIAL SEX

The first step that jurisdictions may take is to draft and pass laws that target demand, and then they must enforce these laws. In 1999, Sweden became the first country to introduce a law that specifically penalized the customers.[11] While selling sex is not a crime, buying it has become punishable by up to six months in prison since the passage of the law.[12] This ban on the purchase of sexual services was the first of its kind worldwide. The rationale behind the law, now a decade old, is that prostitution is a form of male violence against women and that it is therefore a form of discriminatory behavior.[13] Accordingly, the purpose of

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[10] *See, e.g.*, U.S. DEP'T OF STATE, *supra* note 1, at 45; Michael W. Savage, *State Legislatures Move To Combat Human Trafficking*, WASH. POST, July 19, 2010, at A3 (noting, however, that the increased attention on traffickers has not yet led to increased convictions).

[11] 6 ch. 11 § LAG OM FÖRBUD MOT KÖP AV SEXUELLA TJÄNSTER (Svensk författningssamling [SFS] 1998:408) (Swed.) ("A person who . . . obtains a casual sexual relation in return for payment [] shall be sentenced for *purchase of sexual service* to a fine or imprisonment for at most six months."). A penalty is also imposed for attempt. *Id.*

[12] *See* Gunilla Ekberg, *The Swedish Law That Prohibits the Purchase of Sexual Services*, 10 VIOLENCE AGAINST WOMEN 1187, 1192 (2004).

[13] *See id.* at 1189 ("In Sweden, prostitution is officially acknowledged as a form of male sexual violence against women and children. One of the cornerstones of Swedish policies against prostitution and trafficking in human beings is the focus on the root cause, the recognition that without men's demand for and use of women and girls for sexual exploitation, the global prostitution industry would not be able [to] flourish and expand.").

this law was to take the onus off the women and children (the supply) and to transfer it to the men purchasing sex.[14]

A report by the government of Sweden evaluating the first ten years of the new approach found positive results. Street prostitution has been cut in half (and there is no evidence that the reduction in street prostitution has led to an increase in prostitution elsewhere, whether indoors or on the Internet).[15] Women have found increased services enabling them to exit prostitution, and fewer men state that they purchase sexual services.[16] Finally, the ban has had a chilling effect on traffickers who find Sweden an unattractive market in which to sell women and children for sex.[17] The law should also reduce pimping, pandering, brothels, and other activities that are already illegal, because if there is no demand, those who are involved in prostitution and related activities for profit will no longer be able to sustain their activities.

In the wake of Sweden's success, Norway recently adopted a similar law.[18] Commenting on the law's purpose, Norwegian Justice Minister Knut Storberget stated, "People are not merchandise, and criminalising the purchase of sexual services will make it less attractive for human traffickers to look to Norway."[19]

Many states in the U.S. have gender-neutral "soliciting" laws that can be utilized to arrest the men soliciting sex.[20] This approach is not as effective as the above-stated approaches, however, because even though these laws are gender-neutral on the books, they are rarely *applied* in a gender-neutral fashion.[21] Instead, the women or children forced into or trapped in prostitution are arrested for soliciting, while the customers are passed over.[22] Although this is a problem of poor and discriminatory

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[14] *Id.* at 1191–92.

[15] Statens Offentliga Utredningar [SOU] 2010:49 Förbud mot köp av sexuell tjänst En utvärdering 1999–2008, 34–36 [government report series] (Swed.).

[16] *See id.* at 33, 38.

[17] *Id.* at 37.

[18] ALMINDELIG BORGERLIG STRAFFELOV [STRAFFELOVEN] [CIVIL PENAL CODE] 2008:202a (Nor.) ("Any person who engages in or aids and abets another person to engage in sexual activity or commit a sexual act on making or agreeing payment . . . shall be liable to fines or to imprisonment for a term not exceeding six months or to both.").

[19] John Acher, *Norway Proposes Jail, Fines for Buying Sex*, REUTERS, Apr. 18, 2008, *available at* http://www.reuters.com/article/idUSL18758677 (internal quotation marks omitted).

[20] *E.g.* CAL. PENAL CODE §§ 266, 266h (West 2008); FLA. STAT. ANN. § 796.07(2)(f) (West 2007); 720 ILL. COMP. STAT. ANN. 5/11-14.1(a) (West 2002).

[21] Dana Lynn Radatz, Systematic Approach to Prostitution Laws: A Literature Review and Further Suggestions 1–2 (May 10, 2009) (unpublished M.A. dissertation, Eastern Michigan University), *available at* http://commons.emich.edu/cgi/viewcontent.cgi?article=1230&context=theses. Radatz identifies subjective beliefs of police officers as one of the explanations for the discrepancy between legislation and enforcement. *Id.*

[22] *Id.* at 20.

law enforcement rather than bad law, the problem remains. To combat this inequitable application of the law, a few states, such as New York, have introduced higher penalties for customers,[23] but, unfortunately, there are some states that have higher penalties for the *victims* of prostitution.[24]

In various states, the legislatures have been working on creative strategies to combat commercial sexual exploitation, recognizing that many of those in prostitution are victims of human trafficking. These states have approached the problem from various angles.

In the state of Washington, for instance, a bill was signed into law in April 2010 that increased penalties for those who promote commercial sexual abuse of a minor and those who commit sexual abuse of a minor.[25] The effect of the legislation is to intensify the severity of the punishment for sexual contact with a minor, thereby addressing concerns of minors trafficked into prostitution in the state.[26] The crime of promoting commercial sexual abuse of a minor is now a Class A felony, in the same class as first- degree rape and first-degree assault, and the crime of buying a minor for sex is now a Class B felony, in the same class as arson.[27] Further, it is not a defense that the defendant did not know the

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[23] N.Y. PENAL LAW § 230.04 (McKinney 2008) ("A person is guilty of patronizing a prostitute in the third degree when he or she patronizes a prostitute. Patronizing a prostitute in the third degree is a class A misdemeanor."). Enhanced penalties are provided for patronizing a child less than fourteen years old. *Id.* § 230.05 ("A person is guilty of patronizing a prostitute in the second degree when, being over eighteen years of age, he patronizes a prostitute and the person patronized is less than fourteen years of age. Patronizing a prostitute in the second degree is a class E felony.").

[24] For example, in Louisiana, regardless of the number of times a person is charged with patronizing a prostitute, the penalty shall not exceed $500 or imprisonment for six months. By contrast, a person who commits the offense of prostitution shall be fined in graduated amounts based on the number of offenses, with prison sentences increasing per offense as well. *Compare* LA. REV. STAT. ANN. § 14:82(B) (2004) (discussing the penalty and enhancements for prostitution), *with* § 14:83 (discussing the penalty for soliciting for prostitutes). *See also* KAN. STAT. ANN. §§ 21-3512(b), -3515(2) (West 2009) (classifying prostitution as a Class B misdemeanor but patronizing a prostitute as only a Class C misdemeanor); UTAH CODE ANN. §§ 76-10-1302(2), -1303(2) (LexisNexis 2011) (penalizing subsequent prostitution offenses with a heightened penalty but not penalizing subsequent patronization offenses with heightened penalties). For further state comparisons on penalties and other regulations regarding prostitution, see *US Federal and State Prostitution Laws and Related Punishments*, PROCON.ORG (Mar. 15, 2010, 1:33:55 PM), http://prostitution.procon.org/view.resource.php?resourceID=000119.

[25] Sex Crimes Involving Minors, S. 6476, 61st Leg., 2010 Reg. Sess. (Wash. 2010).

[26] While no particular section of the legislation explicitly mentions "sex trafficking," in the report for the bill, testimony regarding the bill references the importance of this enactment as a deterrent for "domestic minor trafficking." S. COMM. ON HUMAN SERVS. & CORR., AN ACT RELATING TO SEX CRIMES INVOLVING MINORS, S. 6476, 61ST LEG., at 3 (Wash. 2010).

[27] 2010 Wash. Sess. Laws 2301, 2309–11; *see also* WASH. REV. CODE §§ 9.68A.100(2), .101(2) (2011).

age of the victim.[28] Beside the heightened criminal sentences for these crimes, there are higher fines and punishments. If a car is used in the commission of the crime or the person arrested is the owner of the vehicle, the vehicle must be impounded, and the fine is $2,500 to get the car back—a $2,000 increase from the previous impounding fee.[29] As this is a new law, time is needed to determine whether its increased penalties and fines substantially deter "johns" from purchasing sex.

Some businesses, such as massage parlors and escort services, are fronts for prostitution, commercial sexual exploitation, and sex trafficking.[30] Therefore, another way to attack demand is to regulate these businesses by requiring them to obtain a license and to report their activity. This helps distinguish the legitimate businesses from those providing a façade for illegal activity. Colorado is one state that has taken this route. It requires licensing of escort agencies in the interest of the health, welfare, and safety of the people of the state.[31] The Colorado Escort Service Code, which has been in place since 1980,[32] requires a license for escort agencies to function and mandates that any violation of the licensing requirement is a misdemeanor punishable by a maximum of $5,000 or imprisonment for not more than one year, or by both.[33]

Once an application for an escort service is received by the city, a notice to the neighborhood and a public hearing are required.[34] At the public hearing, neighbors and neighboring businesses may testify regarding the needs and desires of the neighborhood, as well as the effects that the escort service could have on the health, welfare, or morals of the neighborhood.[35] The escort service licensing law also mandates that escort agencies require their patrons to sign contracts that explain that prostitution is illegal and that no act of prostitution shall be performed in relation to the services for which they contracted.[36]

Another way that states are pursuing regulation of demand for commercial sex is the approach taken by the state of Missouri. Missouri's recent law, passed in 2010, requires sexually oriented businesses to be

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[28] WASH. REV. CODE § 9.68A.110(3) (2011).

[29] *Id.* §§ 9A.88.140 (2), (4)(a).

[30] *See* U.S. DEP'T OF STATE, *supra* note 1, at 77, 127; Joanne Kimberlin, *Women for Hire*, THE VIRGINIAN-PILOT, May 18, 2008, at 1 (reporting on the prevalence of prostitution operations under the guise of escort services); Kirk Semple, *Human-Trafficking Suspect is Arrested While Gambling*, N.Y. TIMES, Jan. 11, 2011, at A23 (discussing the arrest of a woman suspected of running a prostitution scheme under the masquerades of massage parlors, health spas, etc.).

[31] COLO. REV. STAT. ANN. § 12-25.5-102 (West 2010).

[32] *Id.* §12-25.5-101.

[33] *Id.* §12-25.5-113(1).

[34] DENVER, COLO., CODE § 7-320 (2010).

[35] *Id.*

[36] COLO. REV. STAT. ANN. § 12-25.5-112(2) (West 2010).

more than one thousand feet from pre-existing schools, day-care centers, places of worship, public parks, libraries, and residences or other sexually oriented businesses.[37] The term "sexually oriented business" encompasses adult bookstores or video stores, adult cabarets, adult motion picture theaters, semi-nude model studios, and sexual encounter centers.[38] This law also restricts the activity that is permitted in sexually oriented businesses.[39] The Missouri legislature explained that the purpose of the regulation was to minimize the impact of adverse secondary effects of such businesses, including drug use, blight on surrounding property, sexual assault and exploitation, and prostitution.[40] The legislature openly hopes to prevent the "negative secondary effects" associated with sexually oriented businesses from occurring.[41]

Similarly, Nebraska attempted to curb demand by two laws introduced in 2009.[42] Unfortunately, the bills did not gain the necessary support and have been indefinitely postponed.[43] Legislative Bill 444 would have created an escort agency and escort licensing requirement, similar to Colorado's Escort Service Code,[44] and Legislative Bill 443 would have regulated sexually oriented businesses, similar to the Missouri Sexually Oriented Business Act.[45] The fact that these bills did not pass highlights the need for constituents and policy-makers to continue urging lawmakers to acknowledge the reality that many trafficking victims are bought, sold, and traded through state-allowed businesses, such as escort services, massage parlors, and karaoke bars.

The companion legitimate industry that often serves as a front for illegal prostitution, commercial sexual exploitation, and sex trafficking is the massage business. In 2004, lawmakers in San Francisco responded to community organizations that documented a serious problem of massage parlors serving as brothels. They introduced a regulation, effective as of July 2004, that required massage practitioners to obtain a permit to practice and required massage establishments to obtain

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[37] MO. REV. STAT. §573.531(1) (2010).

[38] *Id.* § 573.528(15).

[39] *Id.* § 573.531 (prohibiting full nudity, contact between semi-nude entertainers and patrons, selling or consuming alcohol on the premises, and patrons under the age of eighteen, as well as further requiring closure between the hours of midnight and 6:00 a.m.).

[40] *Id.* § 573.525(1)–(2)(1).

[41] *Id.* § 573.525(2)(3).

[42] Leg. B. 443, 444, 101st Leg., 1st Sess. (Neb. 2009).

[43] LEGIS. JOURNAL, 101st Leg., 2d Sess., at 423, 1467 (Neb. 2010).

[44] Neb. Leg. B. 444.

[45] Neb. Leg. B. 443.

permits to operate a massage parlor.[46] The city's hope was to curtail the use of massage parlors as fronts for prostitution.[47] Some of the operational requirements for a massage establishment include the prohibition of mattresses and beds in massage rooms, the prohibition of locks on any door to a room where a massage is being conducted, a clothing requirement for the massage practitioners, and a prohibition of alcohol on the premises.[48]

Another related example of local community legal action against commercial sexual exploitation occurred in the Los Angeles metropolitan area in 1992. The "concern that businesses that cater to private *karaoke* parties [were] actually . . . fronts for prostitution and video sex prompted Monterey Park officials to temporarily ban the businesses, called KTV."[49] A "twist" on the popular karaoke bars, KTV had multiplied across the western San Gabriel Valley.[50] KTV used buildings divided into small rooms to allow for private karaoke parties.[51] Law enforcement officials conducting surveillance on other crimes found that the businesses were a haven for prostitution, pornography, and gang activity.[52] The Monterey Park City Council voted to impose a forty-five-day moratorium on KTV while the city assumed measures to prevent illegal activities.[53] The ban was later extended for a year.[54]

Laws regulating various aspects of karaoke bars are now being considered in China, Thailand, Vietnam, the Philippines, and a number of other countries.[55] As one commentator said, "We call them karaoke

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[46] S.F., CAL., HEALTH CODE art. 29, §§ 1901(a), 1908(a) (2010).

[47] *See id.* § 1929 (discussing the interaction between the Department of Public Health and law enforcement necessary to deter common issues with massage parlors, such as trafficking); *cf.* Robert Selna, *An Ambiguous Attitude Toward Massage Parlors*, S.F. CHRONICLE, Jan. 5, 2009, at A1 (discussing San Francisco's struggle to deter massage parlors from fronting for prostitution through licensing legislation and sting operations).

[48] S.F. DEP'T OF PUB. HEALTH, MASSAGE PROGRAM RULES & REGULATIONS FOR MASSAGE PRACTITIONER PERMIT AND ESTABLISHMENT PERMIT TO OPERATE § XI (2009). Additionally, the municipality has since repealed the permit requirement that these establishments close at midnight in favor of a more stringent closing hour of 10:00 p.m. HEALTH art. 29, § 1918(b).

[49] *Private* Karaòke *Parties Temporarily Banned*, L.A. TIMES, Mar. 11, 1992, at B2.

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Moratorium on KTV Businesses Extended*, L.A. TIMES, Apr. 29, 1992, at B2.

[55] *See* Zhang Yan, *Vice Crackdown Moves to Bars*, CHINA DAILY, July 16, 2010, at M1 (discussing law enforcement's efforts to "crack down" on KTVs and bath houses "to create a safe, civilized and healthy cultural environment"); *Ban Lifted on New Discos, Karaoke Joints*, VIET. NEWS AGENCY, Nov. 12, 2009, *available at* http://en.baomoi.com/Home/society/en.vietnamplus.vn/Ban-lifted-on-new-discos-karaoke-joints/20578.epi (discussing the limitations placed on discos and karaoke bars); *Cebu Lawmaker Asks DOH*

bars, or KTV's, but they're not karaoke and they're not bars. . . . [T]hese places are brothels masquerading as respectable establishments."[56]

These new laws are some examples of attempts to address commercial sexual exploitation, prostitution, and sex trafficking, recognizing that many in prostitution are minors or trafficking victims. The goal of the various legislation and regulations is to make it more difficult to find sex for purchase, reducing the amount of sex for sale on the streets and in businesses and making it more difficult for men to purchase sex. As such, each approach can be considered helpful in reducing, and ultimately eradicating, demand.

II. FIRST-OFFENDER PROGRAMS

Communities are additionally experimenting with rehabilitation programs—colloquially called "John's Schools"—for men who have been arrested for soliciting for prostitution. These schools were the brainchild of the late Norma Hotaling, who, after founding her own advocacy and victim services organization called Standing Against Global Exploitation (SAGE), united with the San Francisco District Attorney's Office to co-found the first-of-its-kind class for "johns," titled the First Offender Prostitution Program ("FOPP"), in 1995.[57] This program has been replicated in roughly forty other U.S. cities.[58] These schools operate much like the weekend driver's training schools for reckless drivers who are first-time offenders. They offer first-time offenders who have been arrested for soliciting an adult for prostitution an opportunity to go to school to learn the deleterious effects of their behavior.[59] The programs

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To Step Up Info Campaign vs HIV, PHIL. NEWS AGENCY, Feb. 1, 2010, *available at* http://balita.ph/2010/02/01/cebu-lawmaker-asks-doh-to-step-up-info-campaign-vs-hiv/ (considering regulation of KTVs and bars as necessary to decrease the spread of HIV in the Philippines); *Laying Down the Law*, THE NATION, July 29, 2009, *available at* 2009 WLNR 14666931 (discussing Thailand's prohibition on drinking in karaoke bars).

[56] *Karaoke Bars or KTV's*, ENJOY CEBU! (Feb. 4, 2009, 12:18 AM), http://cebunightlifegalore.blogspot.com/2009/02/karaoke-bars-or-ktvs.html.

[57] Norma Hotaling & Leslie Levitas-Martin, *Increased Demand Resulting in the Flourishing Recruitment and Trafficking of Women and Girls: Related Child Sexual Abuse and Violence Against Women*, 13 HASTINGS WOMEN'S L.J. 117, 120–21 (2002).

[58] Michael Shively et al., Final Report on the Evaluation of the First Offender Prostitution Program: Report Summary 97, 99–100 (Mar. 7, 2008) (unpublished report), *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/222451.pdf.; *see also* Miyoko Ohtake, *A School for Johns*, NEWSWEEK, July 24, 2008, http://www.newsweek.com/2008/07/23/a-school-for-johns.html.

[59] *See* Meredith Flowe, *The International Market for Trafficking in Persons for the Purpose of Sexual Exploitation: Analyzing Current Treatment of Supply and Demand*, 35 N.C. J. INT'L L. & COM. REG. 671, 717 (2010). It is critical to reiterate that the FOPP programs are available only to first-time offenders who solicited an adult—not an offender who solicited a child. *See Eligibility Criteria for the San Francisco Pre-Trial Diversion Project, Inc.*, S.F. PRETRIAL DIVERSION PROJECT, INC., http://www.sfpretrial.com/eligibility criteria.html (last visited Mar. 22, 2011).

also offer to drop the solicitation charges if the offenders attend the class.[60] In "John's Schools," they hear from victims of trafficking, learn about the nature, scope, and harm of trafficking, and are forced to examine their own motivations for buying sex.[61]

The original FOPP in San Francisco is an eight-hour class for a fee of $1,000.[62] The program's administrative fees fund intervention services for women and girls.[63] The class is taught by sex-trafficking experts, health educators, and neighborhood activists.[64] A 2008 Department of Justice Study found that following the implementation of FOPPs, both San Francisco and San Diego experienced drops in recidivism rates, with San Diego's recidivism rate dropping to less than half of what it was prior to implementation.[65]

There are presently many variants of the FOPP initial model. Some jurisdictions are choosing not to have as substantial a program fee for the offender as the FOPP in San Francisco,[66] some have shorter or longer time commitments,[67] and many emphasize different educational components.[68] The original FOPP is now fifteen years old, but most of the programs only started operating in the last several years.[69] The time is therefore ripe to undertake a comprehensive, comparative analysis of the effectiveness of various schools, highlighting the best practices and components of a successful "John's School." In addition, it is important to examine the program's amenability to replication and the overall effectiveness of the model in different regions of the country and around the world. Presently, it is encouraging that city governments and concerned citizens are beginning to understand that one of the most important tactics in fighting commercial sexual exploitation and sex

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[60] *See* Flowe, *supra* note 59, at 716–17 (explaining some of the techniques used to reform "johns").

[61] *Id.* at 716.

[62] *Id.* at 716–17.

[63] *First Offender Prostitution Program (FOPP)*, STANDING AGAINST GLOBAL EXPLOITATION (SAGE), http://www.sagesf.org/html/about_services_fopp.htm (last visited Mar. 22, 2011); *see also* Hotaling & Levitas-Martin, *supra* note 57, at 121 (further elaborating on the uses of the funds).

[64] Shively et al., *supra* note 58, at 18–19; *see also* Justin Berton, *Repentant Johns Taught Realities of the Sex Trade*, S.F. CHRON., Apr. 14, 2008, at A1.

[65] Shively et al., *supra* note 58, at v–vi .

[66] For example, the "John's School" in Brooklyn, New York, only charges a $250 fee for participation, while the program in Norfolk County, Virginia, charges $1500. *Id.* at 106.

[67] For example, the "John's School" in Denver, Colorado, requires offenders to attend two four-hour sessions in addition to twenty to forty hours of community service, while the program in Orange County, New York, consists of a single five-hour session. *Id.*

[68] *Id.* at vii (addressing the variations in "John's Schools" across the U.S.).

[69] *See* Hotaling & Levitas-Martin, *supra* note 57, at 120; Shively et al., *supra* note 58, at 104–05 (noting the years that "John's Schools" across the United States started).

trafficking is an active attempt to deter those who purchase women and children by educating the buyers of sex about the effects of their crime.

III. STING OPERATIONS AND REVERSE-STING OPERATIONS

A critical component of any effective demand reduction effort is identification of the customer/consumer/exploiter. Law enforcement plays a key role in curbing demand. According to the Community Oriented Policing Services of the U.S. Department of Justice, police departments get substantial and highly publicized results from conducting prostitution sting operations and reverse-sting operations.[70]

In sting operations, police officers pose as prostitutes to identify and arrest customers. In reverse-sting operations, police officers pose as customers seeking to find sex for hire. Posed as clientele, once the officers are inside supposed massage parlors or other front operations, they make arrests after determining illegal activity is taking place.[71] Some researchers have concluded that such operations have had no overall effect on clients, but new studies, such as a study by Devon Brewer, highlight evidence that the threat of arrest alone serves to deter men from soliciting sex.[72]

The Internet has added a modern twist to the traditional sting operation. In online sting operations, police detectives pose as potential buyers or sellers of sex on Internet-based sites to gather evidence for cases. Law enforcement has especially targeted online personal advertisements, such as those seen on Craigslist and other similar sites.[73] Because the Internet is increasingly being utilized by traffickers,

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[70] *See* GRAEME R. NEWMAN, OFFICE OF CMTY. ORIENTED POLICING SERVS., U.S. DEP'T OF JUSTICE, *Sting Operations*, at 5–6 (Response Guides Ser. No. 6, 2007), *available at* http://www.cops.usdoj.gov/files/ric/Publications/e10079110.pdf ("When sting operations are concluded, they usually result in many arrests of high-profile people, accompanied by local and national publicity.").

[71] *See, e.g.*, Julie Pearl, Note, *The Highest Paying Customers: America's Cities and the Costs of Prostitution Control*, 38 HASTINGS L.J. 769, 775 (1987) (discussing the process of an undercover sting operation).

[72] *Compare* NEWMAN, *supra* note 70, at 20 (noting that some studies have shown sting operations to be ineffective as deterrence), *with* Devon D. Brewer et al., *A Large Specific Deterrent Effect of Arrest for Patronizing a Prostitute*, 1 PLOS ONE 1, 6 (2006), *available at* http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0000060 (noting that the arrests of prostitution customers "decrease[d] their patronizing behavior substantially").

[73] Robert Rigg, *The Not-So-Risky Business of High-End Escorts and the Internet in the 21st Century*, 17 RICH J.L. & TECH. ¶ 38 (2010) (quoting Dart v. Craigslist, Inc., 665 F. Supp. 2d 961, 962 (N.D. Ill. 2009)), http://jolt.richmond.edu/v17i1/article3.pdf.; *see also* Bruce Lambert, *As Prostitutes Turn to Craigslist, Law Enforcement Takes Notice*, N.Y. TIMES, Sept. 5, 2007, at A1.

police have successfully uncovered many cases of illegal activity, such as child sex trafficking, in these new sting operations.[74]

IV. SOCIAL MARKETING CAMPAIGNS

This fourth method is the development of incisive, targeted social marketing campaigns—aimed primarily at young men and boys, but also at young women and girls—about why it is harmful to purchase sex. The key is to reach young people in their formative years, before they become part of the sex industry.[75] Experts studying First Offender Programs have reported men saying, "Why didn't I hear any of this twenty years ago?"[76] Such campaigns can take as their starting point tailored programmatic materials from First Offender Programs. Their focus should be on everything from public health problems, like the spread of HIV/AIDS and other STDs (as well as other serious communicable diseases such as TB, hepatitis, and Epstein Barr syndrome), to the grim facts about who runs the sex industry and how customers are helping traffickers, street gangs, organized crime, and other criminal syndicates to flourish—while hurting those who have been trafficked.

Although this may seem like an overwhelming task, successful social marketing campaigns purposed to change hearts, minds, and

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[74] For example, the first human trafficking conviction in Canada involved two teenage girls who were advertised in online advertisements. *See* Benjamin Perrin, *Bill C-268: Minimum Sentences for Child Trafficking Needed*, ALTA L. REV. ONLINE SUPPLEMENT (Mar. 12, 2009, 6:40 PM), http://ualbertalaw.typepad.com/alr_supplement/2009/03/bill-c-268-minimum-sentences-for-child-trafficking-needed.html; Bob Mitchell, *Teens' Pimp Got Rich; Man Who Sold Girls, 14 and 15, for Sex is One of First To Be Convicted of Human Trafficking Since 2005 Law*, TORONTO STAR, May 14, 2008, at A06. One victim, who was eighteen years old when she finally escaped from over two years of sexual slavery, had been sold along with a fourteen-year-old girl. *Id.* This is not an isolated instance either; numerous cases of online sex trafficking, child sex trafficking, and commercial sexual exploitation of children have been documented in the U.S. *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-915, HUMAN TRAFFICKING: A STRATEGIC FRAMEWORK COULD HELP ENHANCE THE INTERAGENCY COLLABORATION NEEDED TO EFFECTIVELY COMBAT TRAFFICKING CRIMES 51–52 (2007) (noting the increasing number of child convictions).

The fact that Craigslist removed its erotic services sections from its listings in the United States and Canada last year does not mean that there is no need for continuing surveillance and sting operations online. *See, e.g.*, JR Raphael, *Craigslist's 'Erotic Services' Shutdown Could Backfire*, PC WORLD (May 13, 2009, 3:39 PM), http://www.pcworld.com/article/164860/craigslists_erotic_services_shutdown_could_backfire.html. As online industry experts have noted, these advertisements will now be dispersed in other online venues. *Id.* In addition, other similar listing and advertising services also carry such advertisements. It is therefore crucial to continue monitoring these activities.

[75] *See* Flowe, *supra* note 59, at 717–18.

[76] Laura J. Lederer, *Addressing Demand: Examining New Practices—The Five S's*, GLOBAL CENTURION, http://www.globalcenturion.org/?page_*id*=83 (last visited Mar. 4, 2011) (quoting Interview with Norma Hotaling, founder of SAGE, by Laura Lederer (Jan., 2007)).

behaviors on other social issues are instructive. Consider, for example, the campaigns to curb domestic violence or, on another health-related topic, to stop cigarette smoking. Enormous positive behavioral changes have been documented in these areas after non-profit, health, and governmental agencies designed and executed a series of campaigns, primarily targeted at youth, to reduce smoking.[77] Efforts to reduce cigarette smoking have included the following: 1) providing effective smoking-cessation interventions and guidelines tailored to youths and young adults in school, work, and community settings; 2) conducting counter-marketing campaigns designed to help young people reject messages promoting cigarette use; 3) reducing access by minors to tobacco products; 4) increasing access to school programs for preventing tobacco use; and 5) monitoring smoking trends among youths and young adults.[78] Substitute "commercial sexual exploitation" for "smoking," and we have a starting point for a social marketing campaign to counter demand for commercial sex.[79]

One U.S. city that has taken the lead on a social marketing campaign against commercial child sexual exploitation is Atlanta. Concerned parties in Atlanta became aware of the magnitude of the commercial exploitation of children in their city and became determined to raise awareness in the region. In November of 2006, the city unveiled a public service announcement campaign entitled "Dear John."[80] The

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[77] *See* DEP'T OF HEALTH & HUMAN SERVS., PREVENTING TOBACCO USE AMONG YOUNG PEOPLE: A REPORT OF THE SURGEON GENERAL (1994), *reprinted in* U.S. DEP'T OF EDUC., YOUTH & TOBACCO: PREVENTING TOBACCO USE AMONG YOUNG PEOPLE 145–51 (1994); *City's High Schools Have Fewer Smokers*, NEWSDAY, Jan. 3, 2008, at A15 (remarking on the reduction in teen smoking as a result of New York City's multi-faceted approach); *Domestic Violence Falls if Crime Taken Seriously*, PALM BEACH POST, July 10, 2005, at 2E (noting the dramatic decrease in reports of domestic violence due to the law enforcement efforts).

[78] DEP'T OF HEALTH & HUMAN SERVS., *supra* note 77, at 5, 6, 8, 9, 132, 133–34, 139–40, 145, 146 (1994).

[79] A thorough study of the prolonged campaign to reduce cigarette smoking in young people is a useful starting point. The U.S. Department of Health and Human Services, in conjunction with the Center for Disease Control and Prevention and other health agencies, funded a series of studies over many decades on effective efforts to reduce smoking. *See id.* at 5; *see also id.* at 132. The report observed that tobacco use usually begins during adolescence or young adulthood, and it agreed that preventing smoking initiation among youths and young adults is critical to reducing tobacco use in the United States. *Id.* at 5–6, 8. It noted that young people constitute a profitable market for the tobacco industry and that adolescents are the target of intensive tobacco industry marketing efforts, including sponsorship of age-specific promotions and other marketing strategies that appeal to persons in these age groups. *See id.* at 9, 145. Similar campaigns must be developed to counter demand. *Id.* at 5, 8, 132–33, 145.

[80] *Dear John Campaign*, CITY OF ATLANTA (Nov. 6, 2006), http://www.atlantaga.gov/mayor/dearjohn_111006.aspx; *see also* Kimberly Kotrla, *Domestic Minor Sex Trafficking in*

campaign consisted of a few poignant public service announcements and posters.[81] One such announcement featured the mayor, Shirley Franklin, who spoke as if she were writing a letter to a "john," demanding that he not exploit the children of Atlanta.[82] Other videos were more shocking, including a spot featuring a normal-looking middle-aged white male stating how much he enjoyed the young girls of Atlanta and how easy they were to come by.[83] The "Dear John" campaign was backed by a large coalition of law enforcement, non-profits, and public servants.[84] Unfortunately programs such as these are finding it challenging to continue to be in operation due to a lack of funding.[85]

CONCLUSION

At the heart of the problem of sex trafficking is an increasing commodification in our modern society that extends even to human beings—a belief that anything, even a life, can be bought anytime, anywhere, any place, for any purpose. This license masquerades as liberty and allows the worst kinds of exploitation to flourish. In addition to legal and educational solutions, we must continue to work as a global community to develop religious and values-based visions that promote the dignity, integrity, sacredness, and worth of all human beings. We are in the foothills of consciousness in addressing demand for sex. Considered attention to the *demand* corner of the triangle of activity of supply, demand, and distribution will help us achieve our goal of eradicating human trafficking—a modern-day form of slavery.

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the United States: Report, 55 SOC. WORK 181 (2010), *available at* 2010 WLNR 8848636 (further discussing the campaign).

[81] *See, e.g.*, CITY OF ATLANTA, *supra* note 80.

[82] *Id.* (featuring a copy of the letter that the mayor read during the public service announcement).

[83] *See Fighting Child Prostitution* (PBS television broadcast May 30, 2008), *available at* http://www.pbs.org/now/shows/422/transcript.html.

[84] CITY OF ATLANTA, *supra* note 80.

[85] *Compare* Letitia Campbell, *Selling Our Children: Atlanta Does Battle Against the Sex Trafficking of Kids*, SOJOURNERS MAG., Aug. 1, 2010, at 22 (speaking on the continued success of Atlanta's stance against commercial sexual exploitation), *with* Scott Bauer, *Budget Battles Keep States from Tackling Reforms*, ASSOCIATED PRESS, July 4, 2009, *available at* 2008 WLNR 15990391 (noting the halt of certain state reform programs due to budget constraints, such as Rhode Island's inability to resolve a legal loophole in its prostitution laws), *and* S.A. Reid, *Campaign Under Way To End Child Prostitution*, ATLANTA J.-CONST., Aug. 24, 2008, at 10D (noting some looming funding uncertainty for Atlanta's campaign against child prostitution).

"IT'S 10:00 P.M. DO YOU KNOW WHERE YOUR CHILDREN ARE?"

Kathleen A. McKee[*]

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INTRODUCTION

A 1960s public service announcement appeared on television that asked parents if they knew where their children were.[1] As might be

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[1] According to popular lore, WKBW, a Buffalo television station, started using this catchphrase as a public service announcement in the late 1960s. The announcement asks

expected, during the time the announcement ran it was grist for the mill for comedians, comic strips and television programs.[2] Ironically, the question has increased relevance today. A Department of Justice report estimates that 797,500 children were reported missing in a single year period.[3] These children are potential victims of trafficking in children for sexual exploitation.

Although we now have a decade of experience in administering the federal statutes enacted to prevent trafficking in women and children and to punish traffickers when detected, American children remain vulnerable to trafficking for sexual exploitation. This Article briefly examines the federal statutory framework for addressing trafficking, particularly domestic trafficking in children, in Part I. It discusses how state statutes are supplementing that statutory framework in Part II. It concludes with a brief discussion of unresolved service issues and legal needs in Part III. Combating trafficking of our own children within the United States requires that comprehensive legislation dealing with victim identification, perpetrator prosecution, and victim aftercare is in place and operational throughout the fifty states before someone has to ask, "Do you know where your children are?"

I. OVERVIEW OF FEDERAL ANTI-TRAFFICKING STATUTES

The initial federal anti-trafficking statute, the Victims of Trafficking and Violence Protection Act ("VTVPA") of 2000,[4] was enacted a decade ago. The initial statute is reflective of the growing awareness of trafficking in persons as a global problem. Shortly before its enactment, a federal report was published by U.S. State Department analyst Amy O'Neill Richard, which provided a context for understanding the nature of trafficking, including information about the victims, the perpetrators, the trafficking process, and the gaps in the legal system that inhibited

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"It's 10 p.m. Do you know where your children are?" *See* Stuart Elliot, *Do You Know Where Your Slogan Is?*, N.Y. TIMES, Mar. 16, 2007, at C4; IceManNYR, *WNYW NY ID and 10pm News Intro 1986*, YOUTUBE (Aug. 6, 2006), http://www.youtube.com/watch?v=O_6a_MDP2kU.

[2] *See, e.g.*, BILL WATTERSON, THE ESSENTIAL CALVIN AND HOBBES: A CALVIN AND HOBBES TREASURY 29 (1988) (Calvin: "Hello, Dad! It is now three in the morning. Do you know where I am?"); *Golden Girls: Older and Wiser*, IMDB.COM, http://www.imdb.com/title/tt0589795/ (NBC television broadcast Feb. 16, 1991) (Estelle Getty's character, Sophia, asks: "Hey everybody, it's 10 o'clock—do you *care* where your children are?") (emphasis added).

[3] ANDREA J. SEDLAK ET AL., U.S. DEP'T OF JUSTICE, NATIONAL ESTIMATES OF MISSING CHILDREN: AN OVERVIEW 5 (Oct. 2002), *available at* http://www.missingkids.com/en_US/documents/nismart2_overview.pdf.

[4] Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 [hereinafter VTVPA] (codified as amended in scattered sections of Titles 8, 18, 20, 22, 27, 28 and 42 of the U.S.C.).

addressing the issue.[5] Acknowledging the unavailability of reliable statistical information on trafficking of persons in the United States, Ms. Richard provided estimates of the magnitude of the problem. She indicated:

> Trafficking in persons, particularly women and children, is significant on nearly every continent. Gauging the level of trafficking with precision, however, is difficult since it is an underground industry. Estimates of the trafficking problem in the United States vary, given differing definitions of what constitutes trafficking and research based on limited case studies. At present, no one [U.S.] or international agency is compiling accurate statistics. Nonetheless, government and non-governmental experts in the field estimate that out of the 700,000 to two million women and children who are trafficked globally each year, 45,000 to 50,000 of those women and children are trafficked to the United States.[6]

Ms. Richard's report is noteworthy in several respects. First, it provided a baseline for understanding the nature of the issue of trafficking in persons and the limitations of the existing legal system to deal with it.[7] Second, despite her caution on the availability of statistics on trafficking, several years after her report was issued, the figures of 45,000 to 50,000 were used as the touchstone for measuring the magnitude of the problem in the United States in subsequent reports and legislative proceedings.[8] Third, while her report focused on trafficking in women and children into the United States, it was silent on the issue of domestic trafficking; that is, children who are trafficked for exploitation within the United States. This trend would carry over into future discussions of combating trafficking.

A. The Victims of Trafficking and Violence Protection Act (VTVPA) of 2000

At the time that Congress enacted the VTVPA, the United States' initiatives to address human trafficking were policy-based. During the Clinton Administration, the Department of State initiated a policy of prevention, protection, and prosecution.[9] Although the policy initiatives

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[5] *See generally* AMY O'NEILL RICHARD, CENTER FOR THE STUDY OF INTELLIGENCE, INTERNATIONAL TRAFFICKING IN WOMEN TO THE UNITED STATES: A CONTEMPORARY MANIFESTATION OF SLAVERY AND ORGANIZED CRIME (2000).

[6] *Id.* at 3 (citation omitted).

[7] *Id.* at 35–36.

[8] *See, e.g.*, VTVPA § 102(b)(1) ("As the 21st century begins, the degrading institution of slavery continues throughout the world. Trafficking in persons is a modern form of slavery, and it is the largest manifestation of slavery today. At least 700,000 persons annually, primarily women and children, are trafficked within or across international borders. Approximately 50,000 women and children are trafficked into the United States each year.").

[9] *See, e.g., International Trafficking in Women and Children: Hearings Before the Subcomm. on Near E. and S. Asian Affairs of the S. Comm. on Foreign Relations*, 106th

supplemented criminal statutes on the books that could be used to prosecute traffickers, such as the Mann Act, these statutes were not regarded as effective in addressing human trafficking.[10]

Through the initiatives of Senator Sam Brownback and Congressman Christopher Smith, legislation was introduced in both houses of Congress to address human trafficking. (Senator Brownback sponsored legislation in the Senate while Congressman Smith sponsored legislation in the House.)[11] As the legislation moved through the legislative process, it was expanded to encompass the issues of trafficking in persons and violence against women.[12] The initial trafficking legislation, as enacted, provided the current operating framework for preventing, interdicting, and prosecuting human traffickers.

The initial trafficking legislation achieved several important goals. In the section of the act addressing its purposes and findings, it acknowledged the magnitude of the problem and characterized the activity as a significant violation of "labor, public health, and human rights standards worldwide."[13] It provided a statutory framework for addressing "severe forms of trafficking in persons" in women and children which it defined as:

> (A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or
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> (B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or

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Cong. 7 (2000), (statement of Frank E. Loy, Under Sec'y of State for Global Affairs) ("Our strategy consists of what we call the three P's, prevention of trafficking, protection of and assistance to its victims, and prosecution and enforcement against the traffickers.").

[10] A far-reaching U.S. trafficking law would assist the law enforcement effort against trafficking:

> The [U.S.] currently does not have a comprehensive trafficking law. Law enforcement now relies upon a number of criminal, labor, and immigration laws to address activities involved in trafficking schemes. . . . Prosecutors feel the use of a combination of charges can create many plea and sentencing options to reward cooperation and/or reflect a defendant's role in the conspiracy as well as result in longer sentences. . . .
>
> Advocates for a specific trafficking law, however, argue that using numerous [statutes] may be more cumbersome as the prosecutor is required to prove each element of each crime whereas a trafficking [statute] would streamline the prosecutorial burden. The passage of a trafficking law provides an additional tool without losing the existing mechanisms.

RICHARD, *supra* note 5, at 35. The Mann Act addresses the interstate and foreign commerce of sex-related crimes. 18 U.S.C. §§ 2421–2428 (2006).

[11] S. 2449, 106th Cong. (2000); H.R. 3244, 106th Cong. (1999).

[12] S. 2449 §§ 6(a)(3), 10(d)(4), 106th Cong. (2000).

[13] VTVPA § 102(b)(3).

coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.[14]

The statute established an interagency task force composed of the Secretary of State, the Administrator of the United States Agency for International Development, the Attorney General, the Secretary of Labor, the Secretary of Health and Human Services, and the Director of Central Intelligence to monitor and combat trafficking.[15] The responsibilities of the task force were explicitly delineated in the Act.[16] A careful review of these responsibilities reveals that they are international, rather than intra-national, in emphasis.[17]

The VTVPA created a reporting mechanism to assess and report on the status of governmental efforts to interdict trafficking in countries of origin, transit, and destination.[18] The Department of State is charged with preparing this report annually and individual countries are assessed to determine what efforts are being made to prohibit trafficking in persons.[19] Based on this assessment, a country is ranked on one of three tiers.[20] A country that is ranked as Tier 1 is regarded as being highly effective in addressing trafficking.[21] A country that is placed on Tier 2 is regarded as having deficiencies in its anti-trafficking efforts and may be subject to closer monitoring by the Department of State.[22] A country that is placed on Tier 3 is regarded as having significant deficiencies in its efforts to address human trafficking.[23]

The Department of State review which determines a country's placement on Tier 1, 2, or 3 will consider whether the government condones or participates in trafficking, whether efficacious penalties are currently in place to deter trafficking, whether the government provides assistance to victims of trafficking, and whether the individual country cooperates with other countries to extradite traffickers.[24]

In addition to articulating standards and criteria for evaluating countries' efforts to eliminate human trafficking, the VTVPA also provides a means to enforce these standards. The President is authorized to provide assistance to countries for "programs, projects, and

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[14] *Id.* § 103(8).

[15] *Id.* § 105(b).

[16] *Id.* § 105(d).

[17] *Id.*

[18] *Id.* § 104.

[19] *Id.*

[20] U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 12 (June 2008).

[21] *Id.*

[22] *Id.*

[23] *Id.* For a more detailed description of the tier system, see U.S. DEP'T OF STATE, FACTS ABOUT HUMAN TRAFFICKING (2005).

[24] VTVPA § 104(a).

activities designed to meet the minimum standards for the elimination of trafficking."[25] For countries that fail to make progress in attaining the minimum standards, the President may determine that a sanction in the form of withholding non-humanitarian, non-trade assistance should be imposed.[26]

The VTVPA also altered existing domestic law in many respects. Prior to the enactment of this legislation as a result of the U.S. Supreme Court's holding in *United States v. Kozminski*,[27] which determined that involuntary servitude included only forced labor that was a result of legal or physical coercion, the law did not encompass psychological coercion.[28] The VTVPA superseded the Supreme Court's decision in *Kozminski* and expanded the definition of involuntary servitude to include psychological coercion.[29] It amended Title 18 of the U.S. Code to increase the jail terms for trafficking for purposes of sexual exploitation and other forms of involuntary servitude.[30] The federal sentencing guidelines were also amended to expressly address the issue of trafficking.[31]

The law explicitly mandates restitution for victims of trafficking to the full amount of their losses, and losses are defined to include "the greater of the gross income or value to the defendant of the victim's services or labor or the value of the victim's labor as guaranteed under the minimum wage and overtime guarantees of the Fair Labor Standards Act (29 U.S.C. 201 et seq.)."[32]

Since victims of trafficking are oftentimes illegal aliens, the VTVPA also has created a new visa, referred to as the "T" visa, which allows victims of a severe form of trafficking whose continued presence in the United States may be necessary to assist law enforcement authorities in investigating and prosecuting trafficking offenses to remain in the United States[33] and to petition for Permanent Resident Alien status at

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[25] *Id.* § 109.

[26] *Id.* § 110(d)(1)(A)(i); *see* U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 41, 43, 53, 116, 161 (2003) (listing Cambodia, Cuba, Myanmar (Burma), North Korea, and Venezuela as either Tier 2 or Tier 3 countries).

[27] 487 U.S. 931 (1988).

[28] *Id.* at 949–50, 952.

[29] VTVPA § 102(b)(6).

[30] *Id.* § 112. As a result of the VTVPA, the following sections of Title 18 of the U.S.C. were amended: §§ 1581(a), 1583, 1584, 1589, 1590, 1591, 1592, 1593, and 1594 (2006).

[31] U.S. SENTENCING COMM'N, 2010 FEDERAL SENTENCING GUIDELINES MANUAL 203–05 (2010), *available at* http://www.ussc.gov/Guidelines/2010_guidelines/Manual_PDF/2010_Guidelines_Manual_Full.pdf.

[32] VTVPA § 112(a).

[33] *Id.* § 107(e)(1).

the end of the three-year period.[34] Barriers to participation in government benefit programs that were enacted pursuant to Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996[35] are removed. Consequently, victims of severe forms of trafficking are eligible to apply for benefits and services funded through Health and Human Services, Department of Labor, Legal Services Corporation, and other Federal agencies.[36]

B. The Trafficking Victims Protection Reauthorization Act of 2003

In 2003, Congress reviewed and revised the provisions of the original VTVPA trafficking legislation.[37] Although the reauthorization clarified and extended coverage under the Act, the emphasis of the legislation remained on international rather than domestic trafficking in persons. According to the congressional findings, while progress had been made since enactment of the initial legislation, some problems were encountered in implementation.[38] Moreover, problem areas were identified that were not addressed in the initial legislation. Among the findings made in the 2003 reauthorization were that "[c]orruption among foreign law enforcement authorities continues to undermine the efforts by governments to investigate, prosecute, and convict traffickers."[39] The reauthorization required the President to create programs of border interdiction outside the United States[40] and to promulgate regulations to ensure that materials were developed and disseminated to alert travelers to the dangers and legal risks of international sex tourism.[41]

From its inception, the anti-trafficking legislation provided a role for nongovernmental organizations ("NGOs") to play in interdicting trafficking. In the 2003 reauthorization, there is an acknowledgment that there may be organizations that are engaging in trafficking in the guise of NGOs.[42] Consequently, the legislation provided that an executive agency may include a condition of funding that authorizes termination of a

> grant, contract, or cooperative agreement, without penalty, if the grantee or any subgrantee, or the contractor or any subcontractor (i)

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[34] *Id.* § 107(f).

[35] Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, §§ 400–51, 110 Stat. 2105, 2260–78 [hereinafter PRWORA].

[36] VTVPA § 107(b)(1)(A)–(B).

[37] Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 [hereinafter TVPRA of 2003].

[38] *Id.* § 2(2)–(3).

[39] *Id.* § 2(5).

[40] *Id.* § 3(c).

[41] *Id.* § 3(e)(1).

[42] *See id.* § 3(b).

> engages in severe forms of trafficking in persons or has procured a commercial sex act during the period of time that the grant, contract, or cooperative agreement is in effect, or (ii) uses forced labor in the performance of the grant, contract, or cooperative agreement.[43]

The initial anti-trafficking legislation was not without critics. With regard to the new visa program, victim advocates were concerned that in order to secure a "T" visa a victim was dependent upon a certification by federal law enforcement that he or she had cooperated in the investigation or prosecution of the trafficker.[44] As a practical matter, traffickers often moved victims around frequently to disorient them and to keep them from identifying their location or making contacts with persons who might be of assistance to them, causing them to have little information to share with law enforcement.[45] Fear for their personal safety or that of their families might inhibit a victim's willingness to cooperate with law enforcement.[46] Primary contact with law enforcement might be at the state or local level rather than at the federal level.[47]

The 2003 reauthorization act addressed one of these concerns by authorizing the Secretary of Health and Human Services to certify victims of a severe form of trafficking for services on the basis of

> statements from State and local law enforcement officials that the person . . . has been willing to assist in every reasonable way with respect to the investigation and prosecution of State and local crimes such as kidnapping, rape, slavery, or other forced labor offenses, where severe forms of trafficking appear to have been involved.[48]

The 2003 reauthorization also increased the remedies available to victims of trafficking. In the initial legislation, the primary focus was on strengthening efforts to apprehend and criminally prosecute traffickers. An inherent limitation of this approach is that the victim has no control over whether his or her case will be investigated and prosecuted; that determination lies with the prosecutor. According to Department of Justice statistics:

> From 2001 to 2005, a total of 377 matters where human trafficking was the lead charge were closed by U.S. Attorneys. In the closed matters, U.S. attorneys prosecuted 146 suspects (39%) in U.S. district courts . . . .

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[43] *Id.*

[44] *See, e.g.*, Ivy Lee, An Appeal of a T Visa Denial, 14 GEO. J. ON POVERTY L. & POL'Y 455, 457 (2007); Jennifer M. Wetmore, *The New T Visa: Is the Higher Extreme Hardship Standard Too High for Bona Fide Trafficking Victims?*, 9 NEW ENG. J. INT'L & COMP. L. 159, 161 (2002).

[45] *See* Lee, *supra* note 44, at 467–68.

[46] *See* U.S. DEP'T OF JUSTICE, THE NATIONAL STRATEGY FOR CHILD EXPLOITATION PREVENTION AND INTERDICTION: A REPORT TO CONGRESS 34–35 (2010).

[47] *But cf. id.* at 33 (explaining how the "transitory nature" of human trafficking makes building a case against the traffickers difficult even for local law enforcement).

[48] TVPRA of 2003 § 4(a)(3).

. . . .

U.S. attorneys declined to prosecute suspects in 222 matters or 59% of the matters closed during this period, due to—

- lack of evidence of criminal intent (29%)
- weak or insufficient admissible evidence (28%)
- prosecution by other authorities or facing other charges in federal court (14%)
- no federal offense evident (9%)
- and other (20%) reasons.[49]

As a result of an amendment to the original legislation, a civil remedy has been created for trafficking victims. A party alleging that he or she is a victim of a violation of Title 18, Section 1589, 1590, or 1591 of the U.S. Code may file a civil suit against the perpetrator in Federal District Court and in doing so may potentially receive damages and attorney fees.[50] There are still limitations, however, on the filing of a civil suit. The statute expressly provides that the civil suit will be "stayed during the pendency of any criminal action arising out of the same occurrence in which the claimant is the victim."[51] "Criminal action" is broadly defined and "includes investigation and prosecution and is pending until final adjudication in the trial court."[52] Consequently, the victim may have a degree of control of the filing of the suit but must still defer to the government with regard to the advancement of the suit if a criminal action is pending.

There are two provisions of the 2003 reauthorization that strengthen the attention given to the domestic trafficking of children. The first provision is Section 5 of the Act, "Enhancing Prosecutions of Traffickers." This section expands jurisdiction under Title 18 U.S.C. Section 1591, "Sex Trafficking of Children or by Force, Fraud, or Coercion" by "striking [the words] 'in or affecting interstate commerce' and inserting 'in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States[,]'"[53] thereby more clearly delineating between international and domestic, interstate trafficking. This expansion of emphasis is reinforced by the section of the 2003 reauthorization which directs the President to fund research initiatives on both domestic and international trafficking.[54]

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49 MARK MOTIVANS & TRACEY KYCKELHAHN, U.S. DEP'T OF JUSTICE, FEDERAL PROSECUTION OF HUMAN TRAFFICKING, 2001–2005, 1–2 (2006).

50 TVPRA of 2003 § 4(a)(4).

51 *Id.*

52 *Id.*

53 *Id.* § 5(a)(2).

54 *Id.* § 6(g)(1).

C. The Trafficking Victims Protection Reauthorization Act of 2005

The 2005 reauthorization may be characterized as benchmark legislation on the issue of domestic trafficking in persons.[55] As in prior legislation, this statute assesses the current status of the government's anti-trafficking initiatives.[56] In addition, for the first time the "Findings" section acknowledges that "[t]rafficking in persons also occurs within the borders of a country, *including the United States.*"[57] Moreover, the findings expressly identify children within the United States who are potential trafficking victims:

> No known studies exist that quantify the problem of trafficking in children for the purpose of commercial sexual exploitation in the United States. According to a report issued by researchers at the University of Pennsylvania in 2001, as many as 300,000 children in the United States are at risk for commercial sexual exploitation, including trafficking, at any given time.
>
> Runaway and homeless children in the United States are highly susceptible to being domestically trafficked for commercial sexual exploitation. According to the National Runaway Switchboard, every day in the United States, between 1,300,000 and 2,800,000 runaway and homeless youth live on the streets. One out of every seven children will run away from home before the age of 18.[58]

The evolving nature of our anti-trafficking legislation requires ongoing efforts to clarify and strengthen provisions relating to perpetrators of international trafficking in persons. There is acknowledgement that natural and human disasters are exploited by traffickers and that efforts by federal agencies need to be enhanced to protect potential victims of trafficking in "post-conflict environments and during humanitarian emergencies."[59] Similarly, persons in positions of trust, i.e., "military and civilian peacekeepers,"[60] "employees and contractors of the United States Government and members of the Armed Forces,"[61] may sometimes directly engage in—or facilitate—trafficking abroad.

To address these issues, several new initiatives are instituted in the reauthorization. The United States Agency for International Development (USAID) is authorized to conduct a pilot program to identify best practices in providing rehabilitative treatment to

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55 Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 [hereinafter TVPRA of 2005].

56 *Id.* § 2.

57 *Id.* § 2(4) (emphasis added).

58 *Id.* § 2(5)–(6).

59 *Id.* § 2(8).

60 *Id.* § 2(9).

61 *Id.* § 2(10).

trafficking victims in residential programs[62] and to establish a pilot treatment program in foreign countries for victims of trafficking based on the best practices identified in the research initiative.[63] Additional activities are also authorized to monitor and combat forced labor and child labor.[64]

Jurisdiction (and authority to prosecute criminal cases) is explicitly extended to offenses by federal government personnel who commit trafficking offenses abroad unless the perpetrator is being prosecuted for the same offense by a foreign government.[65] As a result of an amendment to Title 18 U.S.C. Section 1956(c)(7)(B), laundering profits earned from trafficking in persons and exploitation is addressed.[66] Forfeiture of property that was used in or acquired through funds traceable to trafficking activities is authorized.[67]

Furthermore, Title II of the 2005 reauthorization expressly authorizes an initiative to reduce trafficking of persons and demand for commercial sex acts in the United States. Among the activities authorized by this Title of the legislation are: (1) comprehensive research and statistical review;[68] (2) a biennial conference addressing severe forms of trafficking within the United States;[69] (3) the establishment of a program to make grants to states, localities, Indian tribes, and non-profit organizations to assist victims of trafficking that takes place in whole or in part in the United States;[70] and (4) the establishment of pilot programs to ensure protection of juvenile victims of trafficking.[71] Last but not least, this Title authorizes a grant program for state and local law enforcement authorities to strengthen activities relating to the investigation and prosecution of trafficking-in-persons offenses "that occur, in whole or in part, within the territorial jurisdiction of the United States."[72]

In short, while the focus of the 2005 reauthorization is not exclusively domestic trafficking, it does reflect an expansion of the anti-trafficking legislative focus. It expressly acknowledges the need to have better data on domestic trafficking as well as better-trained state and

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62 *Id.* § 102(b)(1)(A).

63 *Id.* § 102(b)(2).

64 *Id.* § 105(b)(1).

65 *Id.* § 103(a)(1).

66 *Id.* § 103(d)(1).

67 *Id.*

68 *Id.* § 201(a)(1).

69 *Id.* § 201(a)(2)(A).

70 *Id.* § 202(a).

71 *Id.* § 203(a). This "juvenile victim" is inclusive of, but not limited to, children trafficked within the United States. *Id.* § 203(f).

72 *Id.* § 204(a)(1)(A).

local law enforcement personnel to identify potential victims of trafficking, and to increase capacity to provide services to domestic victims of domestic trafficking through governmental grants.

D. The William Wilberforce Trafficking Victims Protection Reauthorization

The most recent extension of the federal anti-trafficking legislation is the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008.[73] This legislation builds upon the initial legislation and its subsequent reauthorizations. Once again, the primary focus is on international trafficking. This reauthorization addresses the following areas: (1) enhanced provisions for combating international trafficking in persons;[74] (2) combating trafficking in persons in the United States as a destination, not an origin country;[75] (3) ensuring assistance to all trafficking victims;[76] (4) clarification of federal penalties against traffickers and non-preemption of other federal and state statutes by the trafficking legislation;[77] (5) promotion of effective state enforcement;[78] (6) activities of the United States Government, particularly in the areas of unaccompanied alien minors;[79] and (7) prevention of conscription of child soldiers.[80]

Title II of the 2008 reauthorization, "Combating Trafficking in Persons in the United States," does not focus on domestic or intra-national trafficking in persons. It focuses on immigrant victims for whom the United States is a country of destination. In particular, this portion of the Act clarifies the "T" visa program. It grants authorities discretion in processing "T" visa applications where an applicant is unable to satisfy the requirement of certification by a law enforcement agency that she has assisted in the investigation and prosecution of her case when unable to do so "due to physical or psychological trauma."[81] It also creates waiver authority for the requirement that an applicant for a "T" visa demonstrate good moral character if the act or acts that would keep her from satisfying this requirement are incidental to her being trafficked.[82]

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[73] William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 [hereinafter Wilberforce Act of 2008].

[74] *Id.* §§ 101–111.

[75] *Id.* §§ 201–205.

[76] *Id.* § 213.

[77] *Id.* §§ 221–224.

[78] *Id.* § 225.

[79] *Id.* §§ 231–239.

[80] *Id.* §§ 401–407.

[81] *Id.* § 201(a)(1).

[82] *Id.* § 201(d)(3). For example, a victim of trafficking would not be disqualified from seeking a "T" visa and Permanent Resident Alien status if the crime for which she was

This legislation also encourages an increased state role in combating human trafficking in two ways. First, it clarifies that the federal anti-trafficking statute is not intended to preempt state prosecutions under state criminal statutes.[83] Second, it directs the Attorney General of the United States to "facilitate the promulgation of a model State statute that . . . furthers a comprehensive approach to investigation and prosecution through modernization of State and local prostitution and pandering statutes"[84] and to ensure the dissemination of the model state statute by posting it on the website of the United States Department of Justice[85] and distributing it to state attorneys general.[86]

Fortunately, the anti-trafficking legislation is not the only federal legislation that addresses the sexual exploitation of American children. For example, in 2003 Congress enacted the PROTECT Act,[87] which "requires the Department of Justice . . . to formulate and implement a National Strategy to combat child exploitation."[88] This national strategy is intended to address all the incidents which are often implicated in the trafficking of children, i.e., exploitation of children in child pornography, recruiting of children for sexual exploitation online, commercial sexual exploitation of children, and child sex tourism.[89]

The point to be made here is simply that our knowledge is limited regarding how many American children are trafficked each year. In our society, it is easy for children to go missing and be unaccounted for. Through a variety of mechanisms, children are vulnerable to exploitation

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convicted was prostitution and the prostitution was a consequence of having been trafficked.

[83] *Id.* § 225(a)(2).

[84] *Id.* § 225(b)(1).

[85] *Id.* § 225(c)(1).

[86] *Id.* § 225(c)(2).

[87] Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108-21, 117 Stat. 650. Among the provisions of the U.S. Code dealing with the exploitation of children are: 18 U.S.C. §§ 1466A ("Obscene visual representations of the sexual abuse of children"), 1470 ("Transfer of obscene material to minors"), 2251 ("Sexual exploitation of children"), 2251A ("Selling or buying of children"), 2252 ("Certain activities relating to material involving the sexual exploitation of minors"), 2252A ("Certain activities relating to material constituting or containing child pornography"), 2252B ("Misleading domain names on the Internet"), 2252C ("Misleading words or digital images on the Internet"), 2256 ("Definitions for chapter [18 U.S.C. § 2251 et seq.]"), 2258A ("Reporting requirements of electronic communication service providers and remote computing service providers"), 2260 ("Production of sexually explicit depictions of a minor for importation into the United States"), 2421 ("Transportation generally"), 2422 ("Coercion and enticement"), and 2423 (2006 & Supp. III 2010) ("Transportation of minors").

[88] U.S. DEP'T OF JUSTICE, *supra* note 46, at 1.

[89] *Id.* at 2.

for pornography and commercial sex. While existing anti-trafficking legislation acknowledges the problem of domestic trafficking in children and creates implicit authority to address it, it does not communicate the same sense of urgency or mandate priority consideration in dealing with this issue.

If protection for children is to be maximized, the trafficking legislation needs to work in tandem with other federal legislation intended to protect children from predators. If these statutes are to work effectively, they need to be scrutinized carefully to assess the actual scope of coverage, potential gaps in coverage, and potential administrative and legal barriers to their enforcement, in a way that provides effective, comprehensive services for children. Collectively, the application of these laws needs to operate in a manner that achieves the overall goals of the federal anti-trafficking campaign of prevention, protection, and prosecution.

II. AN OVERVIEW OF STATE ANTI-TRAFFICKING INITIATIVES

Current federal anti-trafficking legislation contemplates that the states have an important role to play in interdicting this crime. This is acknowledged in several different ways. For example, the legislation acknowledges that federal legislation is not intended to preempt states from prosecuting trafficking and trafficking related crimes.[90] It also authorizes providing technical assistance to states in the form of training for state and local law enforcement officials.[91] Funding is made available for victim assistance projects at the state and local level.[92] States are encouraged to draft their own legislation by referencing a model statute template as a guide.[93]

A. The Rationale for State Initiatives

There are several reasons why states need to be actively involved in efforts to combat trafficking.[94] Federal law enforcement resources are not

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[90] Wilberforce Act of 2008 § 225(a)(2).

[91] *Id.* § 212(b)(2).

[92] *Id.* § 213(a)(3)(A).

[93] *See infra* Appendix B. For a discussion of the requisite elements of comprehensive anti-trafficking legislation, see Mohamed Y. Mattar, *Incorporating the Five Basic Elements of a Model Antitrafficking in Persons Legislation in Domestic Laws: From the United Nations Protocol to the European Convention,* 14 TUL. J. INT'L & COMP. L. 357 (2006).

[94] Some concerns have been raised about whether the states should enact their own legislation. While it is beyond the scope of this Article to discuss the pros and cons of this issue, the following articles examine the topic in greater detail. Shashi Irani Kara, *Decentralizing the Fight Against Human Trafficking in the United States: The Need for Greater Involvement in Fighting Human Trafficking by State Agencies and Local Non-Governmental Organizations,* 13 CARDOZO J. L. & GENDER 657 (2007); Kathleen K. Hogan,

adequate to detect, investigate, and prosecute trafficking activities, and provide the necessary level of services and aftercare for victims of trafficking. For example, the Trafficking Victims Protection Act of 2000 authorized appropriations of approximately $95 million to implement the legislation for two years.[95] If, as the legislation assumed, an estimated 50,000 persons were trafficked into the United States each year, and all victims were served, that would break down into a per capita expenditure of approximately $950.00 per year per trafficking victim for food, shelter, medical and aftercare, and job training. Given the trauma associated with being trafficked, many of these victims will require such assistance for a number of years. These resources are not sufficient to adequately serve identified victims of trafficking.

State and local law enforcement authorities are closer to the problem and are more likely, with proper training, to pick up on indicators that women and children are being trafficked into a particular community. Because of the local nature of law enforcement, the systems that are most likely to have some level of interaction with trafficked youth are the juvenile justice system, the social service system, the health care system,[96] and the public education system. These institutions are creatures of the state legislature. If they are not functioning effectively in protecting children against trafficking, it will require state legislative action to change them and make them more responsive to the problem. Moreover, mandatory expungement of victims' criminal records of crimes incidental to being trafficked and placement of convicted child traffickers on the child abuse and/or sexual predator registry maintained by states[97] may require additional state legislation.

Comment, *Slavery in the 21st Century and in New York: What Has the State's Legislature Done?*, 71 ALB. L. REV. 647 (2008); Stephanie L. Mariconda, Note, *Breaking the Chains: Combating Human Trafficking at the State Level*, 29 B.C. THIRD WORLD L.J. 151 (2009); Stephanie Richard, Note, *State Legislation and Human Trafficking: Helpful or Harmful?*, 38 U. MICH. J. L. REFORM 447 (2005).

[95] VTVPA, Pub. L. No. 106-386, § 113, 114 Stat. 1464 (2000).

[96] *See* OHIO TRAFFICKING IN PERS. STUDY COMM'N, REPORT ON THE PREVALENCE OF HUMAN TRAFFICKING IN OHIO TO ATTORNEY GENERAL RICHARD CORDRAY 46 (2010) [hereinafter OHIO TRAFFICKING COMM'N REPORT].

[97] *See Combating Trafficking In Persons: Hearing Before the Subcomm. on Domestic and Int'l Monetary Policy, Trade, and Tech. of the H. Comm. on Fin. Servs.*, 109th Cong. 26 (2005) (statement of Tina Frundt, Street Outreach Specialist, Polaris Project), *available at* http://financialservices.house.gov/media/pdf/109-22.pdf. When asked about the most effective measures that the U.S. government could take in combating trafficking at home and abroad, Ms. Frundt testified:

> I think one of them would be that sex-offenders registry, because the pimps and johns are pedophiles. They are abusers, they are rapists. Adding them to the sex registry, because they move from state to state, and flagging them for what they truly are, as pimps [and] johns, will make everyone aware and put them in the spotlight and show[] that this is glamorized, that these are sex abusers who are preying on our children and women.

State laws are sometimes the weak link in the chain. The Ohio Trafficking in Persons Study Commission suggests in its report that traffickers are aware of the potential risk of doing business in a particular state:

> State laws do play a role in the decision making of human trafficking organizations that are sophisticated and networked. Those more sophisticated trafficking rings are aware of the laws and potential risk of doing business in a particular U.S. state. In a quote from Raymond and Hugh[e]'s (2001) report, it is apparent that traffickers look for states with more lenient laws.
>
> In the Midwest, women are trafficked around the region, as well as to the East and West Coast: from Minneapolis to Tampa, Memphis, New York, Chicago, Seattle, Denver, St. Louis and Las Vegas. Law enforcement officials in this region reported that large numbers of U.S. women are domestically trafficked to other states, because Minnesota laws are stricter than in these states, and the sex businesses move to more permissive regions.[98]

This highlights two issues that states need to address. First, there is a need for all states to have criminal anti-trafficking legislation in place to ensure that no state provides a safe harbor for trafficking activities. Second, when states enact legislation, it is important that there be consistency among state statutes. A weak or limited statute still has the potential to attract traffickers into a state to avoid another state's more stringent, comprehensive statute. As the Ohio Trafficking in Persons Study Commission suggests in its report,

> Ohio has not passed a stand-alone law, but instead passed a *specification* in the law that provides the capacity to enhance the charges against would be traffickers. After a comprehensive look at all state anti-trafficking laws to date[,] Bouche & Wittmer (2009) argue that "any and all human trafficking legislation is a step in the right direction", however[,] "it is important to recognize that there is a large variation in the comprehensiveness of anti-trafficking legislation across the states."[99]

Further progress on comprehensive trafficking legislation across all states is crucial; however, there are some encouraging signs that states are taking this problem more seriously.

Id.

[98] *See* OHIO TRAFFICKING COMM'N REPORT, *supra* note 96, at 13 (quoting JANICE G. RAYMOND & DONNA M. HUGHES, COALITION AGAINST TRAFFICKING IN WOMEN, SEX TRAFFICKING OF WOMEN IN THE UNITED STATES: INTERNATIONAL AND DOMESTIC TRENDS 56 (2001)).

[99] *Id.* (quoting VANESSA BOUCHE & DANA WITTMER, HUMAN TRAFFICKING LEGISLATION ACROSS THE STATES: THE DETERMINANTS OF COMPREHENSIVENESS 16 (2009)).

B. Summary of State Initiatives

The number of states that have enacted some form of anti-trafficking legislation increases from one year to the next. According to the Center for Women Policy Studies, as of January 1, 2010, forty-four states had enacted laws addressing trafficking in persons.[100] Legislative initiatives ranged from enacting criminalization statutes to creating statewide task forces, regulating international marriage brokers, and regulating travel service providers.[101] Among the handful of states that had not enacted some form of anti-trafficking legislation as of January 2010 were Alabama, Massachusetts, South Dakota, Vermont, West Virginia, and Wyoming.[102] During the 2010 legislative session, Alabama and Vermont enacted legislation that criminalizes trafficking under state law for the first time.[103]

III. UNRESOLVED ISSUES AND NEEDS

A. Victim Identification

One of the challenges of interdicting trafficking in children is victim identification. There is not a great deal of data available on this segment of the victim population. As in the case of trafficking in adults, it is a highly underreported crime. As a result of the authorization by federal legislation for the appropriation of funds for research projects,[104] current, more reliable data is being developed. For example, in May 2009, Shared Hope International released a study funded through the United States Department of Justice entitled *The National Report on Domestic Minor Sex Trafficking: America's Prostituted Children.*[105] Based on original research, the key findings of the report address the following issues: (1) victim misidentification; (2) criminalization of the victim through misidentification; (3) criminalization of the victim because of a lack of placement options; (4) lack of appropriate services or access to support

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[100] CTR. FOR WOMEN POLICY STUDIES, FACT SHEET ON STATE ANTI-TRAFFICKING LAWS FROM [U.S.] PACT (Policy Advocacy to Combat Trafficking) 2 (2010) [hereinafter U.S. PACT], http://www.centerwomenpolicy.org/programs/trafficking/facts/documents/FactSheetonStateAntiTraffickingLawsJanuary2010.pdf (last visited Mar. 13, 2010); *see also infra* Appendix A.

[101] U.S. PACT, *supra* note 100, at 1; *see also infra* Appendix B for a state legislative summary chart.

[102] U.S. PACT, *supra* note 100, at 2.

[103] Jennifer Kimball, *Anti-Trafficking Legislation 2010*, THE HUMAN TRAFFICKING PROJECT (May 26, 2010, 7:03 PM), http://traffickingproject.blogspot.com/2010/05/anti-trafficking-legislation-2010.html.

[104] *See* VTVPA, Pub. L. No. 106-386, § 113, 114 Stat. 1464 (2000).

[105] LINDA SMITH ET AL., SHARED HOPE INT'L, THE NATIONAL REPORT ON DOMESTIC MINOR SEX TRAFFICKING: AMERICA'S PROSTITUTED CHILDREN (2009), http://www.sharedhope.org/Portals/0/Documents/SHI_National_Report_on_DMST_2009.pdf.

services for victims; (5) undue dependence on victim assistance for investigation and prosecution; (6) lack of protective, therapeutic shelter for victims of trafficking; and (7) lack of adequate emphasis on combating demand.[106]

Victim identification is a pivotal issue. Children who come from unstable or dysfunctional homes, have parents who abuse alcohol or drugs, or experience physical and sexual abuse at home are clearly at risk of falling prey to traffickers. It would be a mistake, however, to assume that children who come from middle class homes with these problems are not also at risk. As Shared Hope points out in its report, "[d]omestic child victims of sex trafficking come from a variety of socio-economic backgrounds, geographic areas, and ethnicities."[107] Moreover, "[m]any victims are youth in the child welfare system and/or runaways, but some are recruited from middle-class homes as well."[108] One common denominator among victims, regardless of socioeconomic background, that makes them vulnerable to sex traffickers is their age.[109]

Just as there is a risk that adult victims of trafficking for sexual exploitation will be perceived as criminals rather than as victims, there is a risk that children who are trafficked within the United States will be perceived as runaways, throwaways, and delinquents rather than as victims of trafficking. As one article on sex trafficking observed:

> The charged language and unsavory imagery associated with sex trafficking can make it difficult for many to relate with the circumstances of exploited women. "We make so many assumptions about the morality of young women involved in the sex trade," Alameda County Deputy District Attorney Sharmin Bock told me this afternoon. Sometimes it takes real-life examples to drive home how normal people can get sucked into this expansive underworld.[110]

The United States Department of Education has posted a fact sheet on its website to help concerned members of the public identify children who are victims of trafficking. While the list acknowledges that it is by no means comprehensive, it suggests the following as markers for identifying a child that is being trafficked:

A victim:

- Has unexplained absences from school for a period of time, and is therefore a truant
- Demonstrates an inability to attend school on a regular basis
- Chronically runs away from home

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[106] *Id.* at v–vi.

[107] *Id.* at 9.

[108] *Id.*

[109] *Id.*

[110] Ali Winston, *Explainer: What Sex Trafficking Looks Like*, THE INFORMANT (Aug. 10, 2010), http://informant.kalwnews.org/2010/08/explainer-what-sex-trafficking-looks-like/ (last visited Mar. 31, 2011).

- Makes references to frequent travel to other cities
- Exhibits bruises or other physical trauma, withdrawn behavior, depression, or fear
- Lacks control over her or his schedule or identification documents
- Is hungry-malnourished or inappropriately dressed (based on weather conditions or surroundings)
- Shows signs of drug addiction

Additional signs that may indicate sex-related trafficking include:

- Demonstrates a sudden change in attire, behavior, or material possessions (e.g., has expensive items)
- Makes references to sexual situations that are beyond age-specific norms
- Has a "boyfriend" who is noticeably older (10+ years)
- Makes references to terminology of the commercial sex industry that are beyond age specific norms; engages in promiscuous behavior and may be labeled "fast" by peers[.][111]

In addition to establishing a means of proper victim identification, it is also important to better understand the tools that traffickers use to lure unsuspecting minors.

B. Access to Victims: The Role of the Internet

Traffickers are able to entice and snare their young victims in a variety of ways. "Traffickers have been reported targeting their minor victims through telephone chat-lines, in clubs, on the street, through friends, and at malls, as well as using girls to recruit other girls at schools and after-school programs."[112] The most powerful recruitment tool, however, is probably the Internet. It allows traffickers to communicate with a prospective victim without active adult surveillance or supervision. An adult preying on a child can conceal his true identity more effectively on the Internet. Moreover, it allows the trafficker to operate without a fixed, identifiable physical location.

As Shared Hope observes in its 2009 National Report, "[t]he Internet and other technological advancements have opened an avenue to commercial sexual exploitation previously unattainable by most people. Individuals viewing child pornography have found comfort in the cyber-community . . . . This anonymity and community aspect to the Internet makes it a powerful tool for traffickers, buyers, and facilitators."[113] This conclusion is confirmed by the Department of Justice in its August 2010 report to the Congress:

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[111] U.S. DEP'T OF EDUC., HUMAN TRAFFICKING OF CHILDREN IN THE UNITED STATES: A FACT SHEET FOR SCHOOLS 1, http://www.covenanthousepa.org/who_we_serve/studies/Human%20Trafficking%20Fact%20Sheet.pdf (last visited Apr. 8, 2011).

[112] *Id.*

[113] SMITH ET AL., *supra* note 105, at 19.

> The anonymity afforded by the Internet makes the offenders more difficult to locate, and makes them bolder in their actions. Investigations show that offenders often gather in communities over the Internet where trading of these images is just one component of a larger relationship that is premised on a shared sexual interest in children. This has the effect of eroding the shame that typically would accompany this behavior, and desensitizing those involved to the physical and psychological damage caused to the children involved. . . .
>
> . . . Child predators often use the [I]nternet to identify, and then coerce, their victims to engage in illegal sex acts. These criminals will lurk in chat rooms or on bulletin board websites that are popular with children and teenagers. They will gain the child's confidence and trust, and will then direct the conversation to sexual topics. . . . Often, the defendants plan a face-to-face [meeting] for the purpose of engaging in sex acts.[114]

The initial contact is not exclusively via the Internet. It may be face-to-face, through an acquaintance like a school classmate or a distant relative, or a contact made through a social setting like the local mall. By the time the child victim is entrapped, the Internet will play some role in advancing the trafficking enterprise.

A cursory review of information releases on recent cases prosecuted by the U.S. Department of Justice illustrates the degree to which traffickers have utilized the Internet and social media to advance their trafficking enterprise for either recruiting or marketing their victims. The following table summarizes several sex trafficking cases investigated by the Maryland Human Trafficking Task Force in the summer of 2009:

Case	Charges	Means of Contact
United States v. Corey[115]	Sex trafficking of a minor; Conspiracy related to interstate prostitution	Online classified ads; Social networking websites
United States v. Bell, a/k/a "Eboni"[116]	Conspiracy to commit sex trafficking of a minor;	Internet erotic and personal ads; Craigslist

[114] U.S. DEP'T OF JUSTICE, *supra* note 46, at 3.

[115] No. 1:09-cr-00512-JFM, Judgment at 1 (D. Md. Apr. 28, 2010); *see also* Press Release, U.S. Dep't of Justice, U.S. Army Private and Three Other Men Indicted on Sex Trafficking and Drug Charges (Sept. 29, 2009), http://www.justice.gov/usao/md/Public-Affairs/press_releases/press08/U.S.ArmyPrivateandThreeOtherMenIndictedonSexTraffickingandDrugCharges.html.

[116] No. RDB-1-09-CR-0271-2, Second Amended Judgment at 1 (D. Md. Jan. 6, 2010); *see also* Press Release, U.S. Dep't of Justice, Second Defendant Pleads Guilty in Sex Trafficking Conspiracy Involving Three Minor Girls (June 28, 2009), http://www.justice.gov/usao/md/Public-Affairs/press_releases/press08/SecondDefendantPleadsGuiltyinSexTraffickingConspiracyInvolvingThreeMinorGirls.html.

	Sex trafficking of a minor	
United States v. Thompson, a/k/a "B"[117]	Conspiracy to commit sex trafficking of a minor Sex trafficking of a minor	Erotic Internet ads; Craigslist postings
United States v. Frock[118]	Sex trafficking of a minor	Recruited by distant family member and marketed on the Internet

In a report to Congress in 2009, the Federal Trade Commission assessed children's access to sexually explicit or violent content on "virtual worlds"—computer-simulated environments that are home to online communities on the Internet.[119] It is noteworthy that in its report, the Federal Trade Commission describes current efforts by operators of teen- and adult-oriented "virtual world" websites to monitor and regulate Internet behavior as dependent upon community and industry policing.[120] The Commission does not suggest the enactment of further federal legislation to restrict the access of children to certain Internet content. Acknowledging "important First Amendment considerations," it "supports virtual world operators' self-regulatory efforts to implement these [Report] recommendations."[121] Efforts to reduce the incidence of recruiting and marketing of children for the purposes of sexual exploitation face the challenge of regulating the use of the Internet by both victims and victimizers in a way that is not defeated by constitutional challenges for overbreadth.[122]

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[117] No. RDB-1-09-CR-0271-1, Second Amended Judgment at 1 (D. Md. Jan. 6, 2010); *see also* Press Release, U.S. Dep't of Justice, Reisterstown Man Pleads Guilty in Sex Trafficking Conspiracy Involving Three Minor Girls (July 16, 2009), http://www.justice.gov/usao/md/Public-Affairs/press_releases/press08/ReisterstownManPleadsGuiltyinSexTraffickingConspiracyInvolvingThreeMinorGirls.html.

[118] No. WDQ-09-0093, Amended Judgment at 1 (D. Md. Sept. 9, 2010) *aff'd* No. 09-4618 (4th Cir. July 9, 2010) (per curiam); *see also* Press Release, U.S. Dep't of Justice, Westminster Woman Sentenced to 10 Years for Sex Trafficking of a Child (June 23, 2009), http://www.justice.gov/usao/md/Public-Affairs/press_releases/press08/WestminsterWomanSentencedto10YearsforSexTraffickingofaChild.html.

[119] FED. TRADE COMM'N, VIRTUAL WORLDS AND KIDS: MAPPING THE RISKS, A REPORT TO CONGRESS i (2009).

[120] *Id.* at ii.

[121] *Id.* at iii.

[122] This tension between regulating the Internet and protecting First Amendment rights is illustrated by a number of cases dating back to the 1990s. *See, e.g.*, Reno v. ACLU, 521 U.S. 844, 849, 879 (1997) (challenge to the Communications Decency Act of 1996 ("CDA") on grounds of overbreadth); ACLU v. Reno, 31 F. Supp. 2d 473, 476 (E.D. Pa. 1999)

C. Providing an Effective Service and Legal Infrastructure for Domestic Child Victims of Trafficking

1. Access to Victim Services

Although the federal anti-trafficking legislation contains provisions to remove barriers to access to governmental services, these provisions primarily serve to benefit adult, alien victims.[123] They allow otherwise ineligible illegal aliens to apply for federal benefits such as subsidized housing, Food Stamps, Medicaid, and legal aid, provided they are certified as victims of a severe form of trafficking for sexual exploitation or forced labor.[124] These programs, however, are all structured to serve the adult population. Unless a child trafficking victim is an emancipated minor, he or she would probably not be able to apply for these programs in his or her own right.[125]

As a result of the physical and emotional trauma of trafficking, child victims present a unique set of needs. They may not be able to return home. Foster parents may not be prepared to cope with the physical and psychological needs of a minor who has been trafficked. The residential placement system for minors may be equally maladapted to deal with their needs. It is likely that minors who have been trafficked, whether due to misidentification as delinquents or lack of appropriate facilities for juvenile victims, will be housed in jail facilities.[126] As Shared Hope points out in its Report:

> Law enforcement officers report they are often compelled to charge a victim of domestic minor sex trafficking with a delinquency offense in order to detain her in a secured facility to keep her safe from the trafficker/pimp and the trauma-driven response of flight. The frustration of first responders with this maneuver was widely expressed; however, in the absence of better options, this stop-gap measure continues. The results are detrimental for the victim who rarely receives any services in detention, much less services specific to the trauma endured through sex trafficking. Also, the entry of the

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(challenge to the Child On-Line Protection Act as violative of the First Amendment); ApolloMedia Corp. v. Reno, 19 F. Supp. 2d 1081, 1084 (N.D. Cal. 1998) (challenge to the CDA provision prohibiting the knowing transmission of indecent messages).

[123] As a result of limitations adopted pursuant to the PRWORA, Public Law No. 104-193, §§ 401, 411, 110 Stat. 2105, 2261–62, 2268–69 (1996), an adult who is convicted of a felony may be barred from participating in certain governmental benefit programs unless the state administering the program enacts legislation to remove the restriction. The associated provision of the VTVPA does not explicitly remove this program bar for domestic victims of trafficking.

[124] VTVPA, Pub. L. No. 106-386, § 107(b)(1)(a), 114 Stat. 1464 (2000).

[125] *See Emancipation of Minors*, NORTHWESTERN LEGAL SERVICES (Oct. 2008), http://www.nwls.org/emancipation_of_minors.htm (last visited Mar. 31, 2011).

[126] SMITH ET AL., *supra* note 105, at vi.

juvenile into the delinquency system can disqualify her from accessing victim-of-crime funds for services in some states.[127]

This is a predictable outcome given the "lack of protective, therapeutic shelters for domestic minor sex trafficking victims."[128] Among the findings of the Shared Hope International Report are that "[o]nly five residential facilities specific to this population exist across the country."[129]

2. Improving Handling of Child Victims of Trafficking by the Legal System

Just as the state service system needs to be reviewed and modified to more effectively address the needs of child trafficking victims, the legal system needs to be reviewed to make sure that trafficking defendants are not advantaged by the treatment of children. As noted previously, it is important that children who are being trafficked are accurately identified and are treated as victims. It is also important that diversion programs and facilities exist to serve these children once they are rescued from trafficking operations.

These are not the only issues that need to be addressed. Within the existing legislative framework, victims are expected to assist law enforcement in the investigation and prosecution of the trafficking case.[130] Child advocates, such as Christianna Lamb, have contended that this puts an undue burden on child victims of trafficking.[131] To expect a child who has been physically and emotionally abused to assist in the prosecution of traffickers is both unrealistic and harmful to the victim.[132]

If the exploitation of the child does not have a connection to interstate commerce, the case will be prosecuted in state courts. One challenge this presents is to make sure that there is uniformity among

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[127] *Id.*

[128] *Id.*

> At times, law enforcement purposely place a masking charge on a victim in order to hold the juvenile without realizing that the child qualifies as a trafficking victim. . . . This process of arresting youth on a masking charge is typically an effort to protect the child from the stigma of a criminal charge. . . . Masking charges re-victimize the child and thwart proper treatment, and in the case of a delinquency determination, these charges may have the negative long-term effect of preventing the youth from obtaining funding for education and hinder career opportunities.

Id. at 50–51.

[129] *Id.* at vi. These facilities are located in New York City, San Francisco, Los Angeles, Atlanta, and Dallas.

[130] *See id.* at 13.

[131] Christianna M. Lamb, *The Child Witness and the Law: The United States' Judicial Response to the Commercial, Sexual Exploitation of Children in Light of the UN Convention on the Rights of the Child*, 3 OR. REV. INT'L L. 63, 70–71 (2001).

[132] *Id.*

the states regarding the treatment of children who are domestic victims of trafficking. There are some mechanisms currently in place to facilitate that goal, but further steps are needed. For example, as research is conducted on domestic trafficking of children and best practices are identified, that information can be—and needs to be—shared through state attorneys general in addition to training provided by federal law enforcement authority to state and local law enforcement. Also, authority to make grants to states and NGOs to address domestic trafficking in children needs to be used to encourage grantees to address these issues. Where there is an anti-trafficking task force at the state level, these task forces need to be encouraged to assess the need for legal and policy reforms to address issues that child victims of trafficking face within the legal system.

The William Wilberforce Trafficking Victims Protection Reauthorization of 2008 includes specific protections for unaccompanied alien children.[133] Our own native children would benefit from the same protections. The 2008 reauthorization requires that an unaccompanied alien minor child "shall be promptly placed in the least restrictive setting that is in the best interest of the child."[134] Moreover,

> [a] child shall not be placed in a secure facility absent a determination that the child poses a danger to self or others or has been charged with having committed a criminal offense. The placement of a child in a secure facility shall be reviewed, at a minimum, on a monthly basis . . . .[135]

Permanent protection for certain at-risk alien children is authorized.[136] If a state provides foster care for such a child, the federal government must reimburse the state for the expense of the foster care.[137] In making suitability and placement determinations for the unaccompanied alien minor, the following services will be made available: (1) home studies;[138] (2) legal orientation presentations for custodians;[139] (3) access to counsel in legal proceedings;[140] (4) independent child advocates;[141] (5) specialized training to federal personnel, and upon request, state and local personnel, who have significant contact with unaccompanied alien children;[142] and (6) regular

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[133] Wilberforce Act of 2008, Pub. L. No. 110-457 § 235(a)(2), 122 Stat. 5044.

[134] *Id.* § 235(c)(2).

[135] *Id.*

[136] *Id.* § 235(d).

[137] *Id.* § 235(d)(4)(B).

[138] *Id.* § 235(c)(3)(B).

[139] *Id.* § 235(c)(4).

[140] *Id.* § 235 (c)(5).

[141] *Id.* § 235(c)(6).

[142] *Id.* § 235(e).

follow-up visits to determine the suitability of such facilities, placements, and other entities.[143]

While the federal government cannot force states to take these measures, it needs to encourage states and localities to do so through its training assistance and grant programs. We cannot rationalize providing these protections and services to alien children who are the victims of trafficking and not providing them for our own children.

CONCLUSION

"It's 10:00 p.m. Do you know where your children are?" The question has renewed relevance today. We are living in a time when children move about with greater freedom and less adult supervision, especially in cyberspace. People who intend harm to our children make contact with them directly through peer acquaintances and at the mall and other social gathering places. Traffickers have demonstrated a facility in using the Internet both to make a connection to recruit a prospective child victim and to market that victim once ensnared. If we are to interdict domestic trafficking in children, we must make the authority to do so explicit, not implicit. Legislation, public policy, and funding initiatives must make it clear that interdicting domestic trafficking in children is no less important a priority than interdicting trafficking in children into the United States from abroad.

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[143] *Id.* § 235(f)(1).

APPENDIX A

LIST OF STATES WITH ANTI-TRAFFICKING STATUTES THROUGH 2010[144]

State	Criminalization Statute	Creation of Statewide Task Force	Regulation of International Marriage Brokers	Regulation of Travel Service Providers
Alabama	x			
Alaska	x			
Arizona	x			
Arkansas	x			
California	x	x		
Colorado	x	x		
Connecticut	x	x		
Delaware	x			
Florida	x	x		
Georgia	x			
Hawaii		x	x	x
Idaho	x	x		
Illinois	x			
Indiana	x			
Iowa	x	x		
Kansas	x			
Kentucky	x			
Louisiana	x			
Maine	x	x		
Maryland	x			
Massachusetts				
Michigan	x			
Minnesota	x	x		
Mississippi	x			
Missouri	x		x	x
Montana	x			
Nebraska	x			
Nevada	x			

[144] The chart was adapted from information compiled by the Center for Women Policy Studies. U.S. PACT, *supra* note 100, at 2; *see also* Kimball, *supra* note 103.

State	Criminalization Statute	Creation of Statewide Task Force	Regulation of International Marriage Brokers	Regulation of Travel Service Providers
New Hampshire	x	x		
New Jersey	x			
New Mexico	x	x		
New York	x	x		x
North Carolina	x			
North Dakota	x			
Ohio	x	x		
Oklahoma	x			
Oregon	x			
Pennsylvania	x			
Rhode Island	x	x		
South Carolina	x			
South Dakota				
Tennessee	x			
Texas	x	x	x	
Utah	x			
Vermont	x			
Virginia		x		
Washington	x	x	x	x
West Virginia				
Wisconsin	x			
Wyoming				

APPENDIX B

DEPARTMENT OF JUSTICE MODEL CRIMINAL STATUTE[145]

MODEL STATE ANTI-TRAFFICKING CRIMINAL STATUTE

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AN ACT relating to criminal consequences of conduct that involves certain trafficking of persons and involuntary servitude.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF _____:

(A) TITLE ____, PENAL CODE, is amended by adding Article XXX to read as follows:

ARTICLE XXX: TRAFFICKING OF PERSONS AND INVOLUNTARY SERVITUDE

SEC. XXX.01. DEFINITIONS. In this Article:

(1) "Blackmail" is to be given its ordinary meaning as defined by [state Blackmail statute, if any] and includes but is not limited to a threat to expose any secret tending to subject any person to hatred, contempt, or ridicule.

(2) "Commercial sexual activity" means any sex act on account of which anything of value is given, promised to, or received by any person.

(3) "Financial harm" includes credit extortion as defined by [state extortion statute, if any], criminal violation of the usury laws as defined by [state statutes defining usury], or employment contracts that violate the Statute of Frauds as defined by [state statute of frauds].

(4) "Forced labor or services" means labor, as defined in paragraph (5), infra, or services, as defined in paragraph (8), infra, that are performed or provided by another person and are obtained or maintained through an actor's:

(A) causing or threatening to cause serious harm to any person;

(B) physically restraining or threatening to physically restrain another person;

(C) abusing or threatening to abuse the law or legal process;

(D) knowingly destroying, concealing, removing, confiscating or possessing any actual or purported passport or other immigration

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[145] DEP'T OF JUSTICE, MODEL STATE ANTI-TRAFFICKING CRIMINAL STATUE (2004), *available at* http://www.legislationline.org/documents/id/6805.

document, or any other actual or purported government identification document, of another person;

(E) blackmail; or

(F) causing or threatening to cause financial harm to [using financial control over] any person.

(5) "Labor" means work of economic or financial value.

(6) "Maintain" means, in relation to labor or services, to secure continued performance thereof, regardless of any initial agreement on the part of the victim to perform such type of service.

(7) "Obtain" means, in relation to labor or services, to secure performance thereof.

(8) "Services" means an ongoing relationship between a person and the actor in which the person performs activities under the supervision of or for the benefit of the actor. Commercial sexual activity and sexually-explicit performances are forms of "services" under this Section. Nothing in this provision should be construed to legitimize or legalize prostitution.

(9) "Sexually-explicit performance" means a live or public act or show intended to arouse or satisfy the sexual desires or appeal to the prurient interests of patrons.

(10) "Trafficking victim" means a person subjected to the practices set forth in Sections XXX.02(1) (involuntary servitude) or XXX.02(2) (sexual servitude of a minor), or transported in violation of Section XXX.02(3) (trafficking of persons for forced labor or services).

SEC. XXX.02. CRIMINAL PROVISIONS.

(1) INVOLUNTARY SERVITUDE. Whoever knowingly subjects, or attempts to subject, another person to forced labor or services shall be punished by imprisonment as follows, subject to Section (4), infra:

(A) by causing or threatening to cause physical harm to any person, not more than 20 years;

(B) by physically restraining or threatening to physically restrain another person, not more than 15 years;

(C) by abusing or threatening to abuse the law or legal process, not more than 10 years;

(D) by knowingly destroying, concealing, removing, confiscating or possessing any actual or purported passport or other immigration document, or any other actual or purported government identification document, of another person, not more than 5 years,

(E) by using blackmail, or using or threatening to cause financial harm to [using financial control over] any person, not more than 3 years.

(2) SEXUAL SERVITUDE OF A MINOR. Whoever knowingly recruits, entices, harbors, transports, provides, or obtains by any means, or attempts to recruit, entice, harbor, provide, or obtain by any means, another person under 18 years of age, knowing that the minor will engage in commercial sexual activity, sexually-explicit performance, or the production of pornography (see [relevant state statute] (defining pornography)), or causes or attempts to cause a minor to engage in commercial sexual activity, sexually-explicit performance, or the production of pornography, shall be punished by imprisonment as follows, subject to the provisions of Section (4), infra:

(A) in cases involving a minor between the ages of [age of consent] and 18 years, not involving overt force or threat, for not more than 15 years;

(B) in cases in which the minor had not attained the age of [age of consent] years, not involving overt force or threat, for not more than 20 years;

(C) in cases in which the violation involved overt force or threat, for not more than 25 years.

(3) TRAFFICKING OF PERSONS FOR FORCED LABOR OR SERVICES. Whoever knowingly (a) recruits, entices, harbors, transports, provides, or obtains by any means, or attempts to recruit, entice, harbor, transport, provide, or obtain by any means, another person, intending or knowing that the person will be subjected to forced labor or services; or (b) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of Sections XXX.02(1) or (2) of this Title, shall, subject to the provisions of Section (4) infra, be imprisoned for not more than 15 years.

(4) SENTENCING ENHANCEMENTS.

(A) Statutory Maximum - Rape, Extreme Violence, and Death. If the violation of this Article involves kidnapping or an attempt to kidnap, aggravated sexual abuse or the attempt to commit aggravated sexual abuse, or an attempt to kill, the defendant shall be imprisoned for any term of years or life, or if death results, may be sentenced to any term of years or life [or death].

(B) Sentencing Considerations Within Statutory Maximums.

(1) Bodily Injury. If, pursuant to a violation of this Article, a victim 3 Suffered bodily injury, the sentence may be enhanced as follows: (1) Bodily injury, an additional ____ years of imprisonment; (2) Serious Bodily Injury, an additional ____ years of imprisonment; (3) Permanent or Life-Threatening Bodily Injury, an additional ____ years of imprisonment; or (4) If death results, defendant shall be sentenced in accordance with Homicide statute for relevant level of criminal intent).

(2) Time in Servitude. In determining sentences within statutory maximums, the sentencing court should take into account the time in which the victim was held in servitude, with increased penalties for cases in which the victim was held for between 180 days and one year, and increased penalties for cases in which the victim was held for more than one year.

(3) Number of Victims. In determining sentences within statutory maximums, the sentencing court should take into account the number of victims, and may provide for substantially-increased sentences in cases involving more than 10 victims.

(5) RESTITUTION. Restitution is mandatory under this Article. In addition to any other amount of loss identified, the court shall order restitution including the greater of 1) the gross income or value to the defendant of the victim's labor or services or 2) the value of the victim's labor as guaranteed under the minimum wage and overtime provisions of the Fair Labor Standards Act (FLSA) and [corresponding state statutes if any].

(B) TRAFFICKING VICTIM PROTECTION

(1) ASSESSMENT OF VICTIM PROTECTION NEEDS

(A) The Attorney General, in consultation with the [Department of Health and Social Services] shall, no later than one year from the effective date of this statute, issue a report outlining how existing victim/witness laws and regulations respond to the needs of trafficking victims, as defined in XXX.01(8) of the Criminal Code, and suggesting areas of improvement and modification.

(B) The [Department of Health and Social Services], in consultation with the Attorney General, shall, no later than one year from the effective date of this statute, issue a report outlining how existing social service programs respond or fail to respond to the needs of trafficking victims, as defined in XXX.01(8) of the Criminal Code, and the interplay of such existing programs with federally-funded victim service programs, and suggesting areas of improvement and modification.[146]

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[146] For a model state statute that builds upon and amplifies the Department of Justice's model statute, see Global Rights, *State Model Law on Protection for Victims of Human Trafficking* (2005), *available at* http://www.legislationline.org/download/action/download/id/1264/file/5b6fb5af473eb70407d29b957330.pdf.

[Such inquiry shall include, but not be limited to, the ability of state programs and licensing bodies to recognize federal T non-immigrant status for the purposes of benefits, programs, and licenses.]

AN INTRODUCTION TO THE DEBATE ON THE ARIZONA IMMIGRATION LAW†

*James C. Ho**

I do not have to tell anyone that the debate on the condition of immigration law in this country is a topic that provokes strong passion, as we saw on television screens and on cable networks across the country last summer.[1] The topic is such an emotional issue, yet I find myself oddly ambivalent about it. On the one hand, as a lawyer, I obviously feel very strongly about the rule of law and law enforcement. On the other hand, since I am an immigrant myself, I also feel strongly about the value of immigration as a bedrock component of what makes America great. But thankfully, today we have an all-star panel to help us wade through these emotional and thorny legal issues, focusing particularly on the Arizona law. Unless you were on the planet Mars, you have heard that the state of Arizona has passed a law[2] in the area of immigration enforcement that has triggered quite a bit of response from liberals, conservatives, and moderates.[3]

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† This speech is adapted for publication and was originally presented at a panel discussion as part of the Federalist Society's National Lawyers Convention on Civil Rights: Immigration, the Arizona Statute, and *E Pluribus Unum* in Washington, D.C. on November 18, 2010.

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1 *See* Fox News Channel, *Fox News and the Arizona Immigration Law*, YOUTUBE (Apr. 26, 2010), http://www.youtube.com/watch?v=axawILbGhLA (collecting several clips of the debates on Fox News regarding the Arizona immigration debate); CBS, *Uproar over Ariz. Immigration Law*, YOUTUBE (May 2, 2010), http://www.youtube.com/watch?v=PGSvk6-n7X8&feature=channel (discussing the purpose of the Arizona law, the right method of correcting the immigration problem, and the effect of the law on Arizona on CBS's "Face the Nation" with Harry Smith featuring former representative J.D. Hayworth and Illinois Representative Luis Gutierrez).

2 ARIZ. REV. STAT. ANN. § 11-1051 (LEXIS through 2010 legislation) (effective 2011).

3 *See* Randal C. Archibold, *Arizona's New Immigration Law Widens the Chasm Between Sides*, N.Y. TIMES, Apr. 26, 2010, at A13; *see also* Kasie Hunt, *Democrat: Arizona Law Like 'Nazi Germany,'* POLITICO (Apr. 26, 2010, 4:04 PM), http://www.politico.com/news/stories/0410/36365.html (quoting Colorado Democrat Representative Jared Polis) ("[The Arizona law] is absolutely reminiscent of second class status of Jews in Germany prior to World War II when they had to have their papers with them at all times and were subject to routine inspections at the suspicion of being Jewish."); Liz Goodwin, *Arizona Immigration Law Divides Republicans and Conservatives*, YAHOO! NEWS (Apr. 28, 2010,

We have three excellent speakers today. Roger Clegg, the President and General Counsel of the Center for Equal Opportunity, will begin our discussion. The Center for Equal Opportunity is a conservative research and educational organization that specializes in civil rights, immigration, and bilingual educational issues. Mr. Clegg has held several senior positions at the U.S. Department of Justice, ranging from Assistant to the Solicitor General to the number two official in both the Civil Rights Division and the Environmental Division. He is a graduate of Yale Law School.[4]

We are also honored to have Kris Kobach here. He is the recently elected Secretary of State from the state of Kansas, Senior Counsel at the Immigration Reform Law Institute, and, most recently, a professor of law and Daniel L. Brenner Scholar at the University of Missouri, Kansas City School of Law.[5] He has litigated a number of truly high-profile lawsuits across the country in the field of immigration. Perhaps his most important role is with regard to the statute we are discussing. He also graduated from Yale Law School.[6]

Finally, finishing the discussion is Margaret Stock, who is an adjunct faculty member in the Department of Political Science at the University of Alaska, Anchorage. She is an expert in immigration, citizenship, national security, military affairs, and constitutional law. She previously taught at the U.S. Military Academy at West Point, New York, and is a member of the American Bar Association Commission on Immigration. Unlike our other panelists, she graduated from Harvard Law School, which is our nod to diversity on the panel.[7]

7:17 PM), http://news.yahoo.com/s/ynews/20100428/ts_ynews/ynews_ts1840 (showing a split between Republicans in their views about the Arizona law).

[4] *Roger Clegg*, CTR. FOR EQUAL OPPORTUNITY (Sept. 13, 2007), http://www.ceousa.org/content/view/507/123/; *Mission Statement*, CTR. FOR EQUAL OPPORTUNITY (Oct. 12, 2007), http://www.ceousa.org/content/view/533/127/.

[5] KANSAS SECRETARY OF ST., http://www.kssos.org/ (last visited Feb. 11, 2011); *Attorneys and Staff*, IMMIGR. REFORM L. INST., http://www.irli.org/about/attorneys (last visited Mar. 30, 2011).

[6] *About Kris Kobach*, KRIS KOBACH FOR SECRETARY OF ST., http:www.kris kobach.org/site/Html/expanded.html (last visited Mar. 30, 2011); *see also* Julia Preston, *Political Battle on Immigration Shifts to States*, N.Y. TIMES, Jan. 1, 2011, at A1 (noting that Secretary Kobach was instrumental in helping many states devise their immigration laws).

[7] *Margaret Stock*, DEP'T OF POL. SCI., U. OF ALASKA ANCHORAGE, http://polsci.uaa. alaska.edu/resources/faculty/Stock.html (last visited Mar. 30, 2011).

E PLURIBUS UNUM FORGOTTEN: FIVE IMMIGRATION POLICY MISTAKES SOME CONSERVATIVES MAKE†

*Roger Clegg**

This Article discusses five mistakes that some conservatives are currently making with respect to immigration policy. The following are the five mistakes:

1. Neglecting the importance of assimilation in the public debate about immigration,
2. Opposing birthright citizenship,
3. Supporting racial profiling,
4. Supporting state and local (versus federal) law-enforcement policymaking, and
5. Failing to strike a pro-immigrant tone in discussing immigration.

These are not errors that all conservatives make—neither are they *conservative* mistakes. Conservatism, rightly understood, actually ensures that these mistakes are avoided. This Article addresses each of these five issues in order but focuses primarily on the first and last.

I. NEGLECTING ASSIMILATION

Assimilation is the neglected part of the immigration debate, and it deserves attention. Conservatives differ on what the appropriate level of immigration should be; I believe that America benefits from a fairly high level of immigration and that our nation can successfully assimilate these immigrants.[1] In any event, while conservatives can disagree over what is the right level for future immigration, conservatives can find common ground in promoting the assimilation of immigrants that are

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1 *Compare* Linda Chavez, *The Realities of Immigration*, COMMENT., July–Aug. 2006, at 34, 40 (explaining that there are no special circumstances today that would prohibit the assimilation that immigrants to the U.S. have achieved in the past), *with* PETER BRIMELOW, ALIEN NATION: COMMON SENSE ABOUT AMERICA'S IMMIGRATION DISASTER 18–19 (1995) (arguing that assimilation techniques fail today because of changed circumstances).

arriving, however many there are. A rather obvious effect of the conservatives' silence on assimilation is the lack of thoughtful and critical perspectives on this issue, since we will have the most insights.

The consensus on the importance of assimilation[2] is illustrated in the debate regarding the merits of bilingual education. Conservatives generally recognize that bilingual education is a bad idea[3]—believing instead that we should teach immigrants to speak English as quickly as possible. I believe that teaching immigrants to speak English is the most important goal for our public schools, and bilingual education simply does not do this.[4] Another troubling example of failure to promote

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[2] The importance of assimilation is nothing new. Speaking in 1915, former President Theodore Roosevelt stated the following:

> The one absolutely certain way of bringing this nation to ruin, of preventing all possibility of it continuing to be a nation at all, would be to permit it to become a tangle of squabbling nationalities, an intricate knot of German-Americans, Irish-Americans, English-Americans, French-Americans, Scandinavian-Americans, or Italian-Americans, each preserving its [separate] nationality, each at heart feeling more sympathy with Europeans of that nationality than with the other citizens of the American Republic.

Roosevelt Bars the Hyphenated, N.Y. TIMES, Oct. 13, 1915, at 1 (newspaper quote of Theodore Roosevelt's speech at Knights of Columbus's Columbus Day Celebration on Oct. 12, 1915); *see also* ARTHUR M. SCHLESINGER, JR., THE DISUNITING OF AMERICA 118 (1992) ("The republic embodies ideals that transcend ethnic, religious, and political lines. It is an experiment, reasonably successful for a while, in creating a common identity for people of diverse races, religions, languages, cultures. But the experiment can continue to succeed only so long as Americans continue to believe in the goal."). For an excellent recent history and analysis, see MICHAEL BARONE, THE NEW AMERICANS (2001).

[3] For example, Newt Gingrich states that "[b]ilingual education has been stunningly destructive." Eric Pfeiffer, *Gingrich Backs English Push as Official Language*, WASH. TIMES, Jan. 25, 2007, at A6, *available at* http://www.washingtontimes.com/news/2007/jan/24/20070124-110503-4028r/. *See also* Charles Ashby, *Illegal Immigration Focus for Tancredo*, DAILY SENTINEL (Oct. 9, 2010), http://www.gjsentinel.com/breaking/articles/illegal_immigration_focus_for (explaining that a Colorado State House Representative's first proposed bill in 1977 was to abolish bilingual education in Colorado); John J. Miller, *Going Native*, NAT'L REV. ONLINE (July 9, 2008, 11:39 AM), http://www.nationalreview.com/blogs/print/165620 (noting that "[o]ne of the sad results of bilingual education is that [it] often leaves kids semi-literate in two languages and fluent in none").

[4] In *Horne v. Flores*, where Arizona law required schools to adopt a Sheltered English Immersion (SEI) program in which almost all classroom instruction is in English instead of bilingual education instruction, the Court noted that "[research] indicates there is documented, academic support for the view that SEI is significantly more effective than bilingual education." 129 S. Ct. 2579, 2601 (2009). *See also* Rosalie Pedalino Porter, *The Case Against Bilingual Education: Why Even Latino Parents Are Rejecting a Program Designed for Their Children's Benefit*, ATLANTIC MONTHLY, May 1998, at 28, 30 (finding that the "accumulated research of the past thirty years reveals almost no justification for teaching children in their native languages to help them learn either English or other subjects").

assimilation is the fact that ballots are printed in foreign languages,[5] an undesirable disincentive to assimilation that is required by federal law in many jurisdictions.[6] Here again most conservatives are in agreement.

There are a variety of things government and non-government organizations can do to promote assimilation better. To be effective, both should consider the principles that make America work. Below is my list of the ten characteristics that, for all Americans (including those who have been here for generations), are of critical importance for assimilation and crucial to a successful multiracial, multiethnic society:

1. Don't disparage anyone else's race or ethnicity.
2. Respect women.
3. Learn to speak English.
4. Don't be rude.
5. Don't break the law.
6. Don't have children out of wedlock.
7. Don't demand anything because of your race or ethnicity.
8. Don't believe that working hard, in school and on the job, and saving money are "acting white."
9. Don't hold historical grudges.
10. Be proud of being an American.[7]

Ask yourself, what are the things that we should demand of both immigrants and long-time residents of the United States? Obviously, we cannot demand that all vote Republican, listen to the same music, eat the same foods, or dance the same dances. Instead, we welcome pluralism in these and many other areas. I propose, however, that we can and should encourage all Americans to adopt these ten characteristics. This will ensure the necessary assimilation without destroying pluralism.

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[5] *E.g.*, *Continuing Need for Section 203's Provisions for Limited English Proficient Voters: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 162 (2006) (testimony of Linda Chavez, Chairman, Center for Equal Opportunity) (arguing that bilingual ballots are a waste of taxpayer money, unconstitutional, and "devalue[] citizenship for those who have mastered English as part of the naturalization process"); JOHN J. MILLER, THE UNMAKING OF AMERICANS: HOW MULTICULTURALISM HAS UNDERMINED THE ASSIMILATION ETHIC 133 (1998) ("Not everyone need speak English all of the time in America, but it must be the [common language] of civic life. Because the voting booth is one of the vital places in which citizens directly participate in democracy, it ought to be the official language of the election process."); *see also* LINDA CHAVEZ, OUT OF THE BARRIO (1991).

[6] 42 U.S.C. § 1973aa-1a (2006).

[7] Roger Clegg, *E Pluribus Unum*, NAT'L REV. ONLINE (Sept. 12, 2000, 1:00 PM), http://old.nationalreview.com/comment/comment091200d.shtml; *see also Comprehensive Immigration Reform: Becoming Americans—U.S. Immigrant Integration Before the Subcomm. on Immigration, Citizenship, Refugees, Border Sec., and Int'l Law of the H. Comm. on the Judiciary*, 110th Cong. (2007) (testimony of Roger Clegg, President and General Counsel, Center for Equal Opportunity), *available at* http://www.ceousa.org/index.php?option=com_docman&task=doc_view&gid=155&itemid=54.

II. THE THREE MISTAKES THAT PRESENT POTENTIAL CONSTITUTIONAL ISSUES

A. *Opposing Birthright Citizenship*

Some conservatives also err in opposing "birthright citizenship," i.e., the automatic citizenship of any person born on U.S. soil notwithstanding the fact that the parents were in America as illegal immigrants. For example, John Eastman[8] argues that the Constitution does not require birthright citizenship.[9] I disagree. I think that the Fourteenth Amendment does support birthright citizenship,[10] and I have never heard a persuasive argument otherwise.[11] Given the text of the Fourteenth Amendment, the unlikelihood that it will be amended, and the lack of any significant harm from birthright citizenship, I believe that conservatives should forget about opposing it.

B. *Supporting Racial Profiling*

As conservatives, we argue all the time that the government should not treat people differently because of skin color and their ancestors' country of origin.[12] Conservatives argue against discriminatory treatment in government contracting,[13] in college admissions,[14] and in

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8 Dr. John C. Eastman is the Donald P. Kennedy Chair in Law at Chapman University School of Law.

9 *See, e.g.*, John C. Eastman, *Politics and the Court: Did the Supreme Court Really Move Left Because of Embarrassment Over* Bush v. Gore*?*, 94 GEO. L.J. 1475, 1484 (2006) (arguing that mere birth on U.S. soil is insufficient to confer U.S. citizenship unless the person is also "subject to the . . . jurisdiction of the United States").

10 Linda Chavez, *Eastman Is Wrong: The Constitution Does Guarantee Birthright Citizenship*, DAILY CALLER (Aug. 24, 2010, 1:12 PM), http://dailycaller.com/2010/08/24/eastman-is-wrong-the-constitution-guarantees-birthright-citizenship/#ixzz1Bnm8eie1 (arguing that "subject to the jurisdiction" of the United States required something more than mere birth on U.S. soil only for Indians and diplomats—not illegal immigrants).

11 *See, e.g.*, Roger Clegg, *Rethinking the Birthright Battle*, WASH. TIMES, Feb. 10, 2011, http://www.washingtontimes.com/news/2011/feb/10/rethinking-the-birthright-battle/print/#; James C. Ho, *Ban on Birthright Citizenship Unconstitutional*, WASH. TIMES, Apr. 11, 2011, at B1, *available at* http://www.washingtontimes.com/news/2011/apr/8/ban-on-birthright-citizenship-unconstitutional/.

12 *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007) (Roberts, C.J., plurality opinion) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.").

13 *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 224, 238–39 (1995) (holding that when the government hires contractors, the government must justify any racial classification under strict scrutiny, i.e., requiring a compelling interest in the regulation and that the regulation is narrowly tailored).

14 *See* Gratz v. Bollinger, 539 U.S. 244, 270 (2003) (holding that the university's point-based undergraduate admissions policy was unconstitutional because its use of race was not narrowly tailored to achieve the state's compelling state interest in diversity).

the hiring and promoting of firefighters.[15] But we lose all credibility if we say that there is an exception and that it is okay for state and local government officials to take ethnicity into account in deciding whom to stop during an immigration sweep (when they are looking not for terrorists, not even for drug smugglers, but for people here—yes, illegally—looking for work).[16] Such support for racial profiling is inconsistent and unprincipled.

Let me hasten to add that the controversial Arizona statute is drafted in a way that laudably attempts to avoid the problem of racial profiling by directly addressing that issue in the text.[17] Of course, any statute can be implemented in a racially discriminatory way, but I am hopeful that will not happen in Arizona. As finally passed, the Arizona statute does not include racial profiling, and specifically prohibits law enforcement from unlawfully considering race, color, or national origin in carrying out the law.[18]

C. Supporting State versus Federal Immigration Law-Enforcement Policymaking

As a conservative, I generally prefer giving authority to private actors over public actors, and local over state, and state over federal. Immigration policy, however, is an element of foreign policy.[19] And as such, it is an area where the federal government necessarily calls the shots.[20] Of course, as a constitutional matter, the Supreme Court has developed preemption tests to determine whether federal law actually

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15 *See* Ricci v. DeStefano, 129 S. Ct. 2658, 2664–65, 2681 (2009) (holding that a city may not disregard test results—and thus withhold promotions—solely based on the racial disparity of the scores).

16 *See, e.g.*, Roger Clegg, *Perfect Profile*, NAT'L REV. ONLINE (June 19, 2003, 8:45 AM), http://www.nationalreview.com/articles/207259/perfect-profile/roger-clegg.

17 ARIZ. REV. STAT. ANN. § 11-1051 (LEXIS through 2010 legislation) (effective 2011) ("A law enforcement official or agency of this state or a county, city, town or other political subdivision of this state may not consider race, color or national origin in implementing the requirements of this subsection except to the extent permitted by the United States or Arizona Constitution."); *see also* HANS A. VON SPAKOVSKY, THE HERITAGE FOUNDATION, THE ARIZONA IMMIGRATION LAW: RACIAL DISCRIMINATION PROHIBITED, 58 LEGAL MEMORANDUM 4 (Oct. 1, 2010), *available at* http://thf_media.s3.amazonaws.com/2010/pdf/lm0058.pdf (noting that the language of the Arizona law is "in fact stricter than[] the Department of Justice's own guidance on racial profiling for federal law enforcement officers").

18 SPAKOVSKY, *supra* note 17, at 1, 3, 6–7.

19 The Supreme Court held in *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889), that the federal government has the power to exclude foreigners as an essential attribute of sovereignty.

20 Hines v. Davidowitz, 312 U.S. 52, 66 (1941) (stating that where the federal government has already acted to regulate immigration and where a state also acts, "'the act of Congress . . . is supreme; and the law of the State . . . must yield to it'" (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 211 (1824))).

invalidates subordinate government legislation.[21] But whether or not states and municipalities are technically preempted in a given instance from involvement in regulating immigration, naturalization, and deportation, conservatives should be reluctant to encourage such involvement—even if the federal government is doing a lousy job.[22]

Some conservatives argue that all the Arizona law and similar proposals do is enforce existing federal immigration laws.[23] In other words, Congress has enacted immigration statutes,[24] and the state is merely taking steps to ensure that they are enforced.[25] But the enforcement of statutes is never automatic and always involves discretionary decisions and prioritizing. Because of this, and because of the need for uniformity in the enforcement of immigration, the federal government, and not the states, ultimately has to call the shots in making basic policy decisions about the enforcement of immigration

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21 *See, e.g.*, DeCanas v. Bica, 424 U.S. 351, 356–57, 362–63 (1976).

22 *But see* Anthony W. Hager, *Federal Failure and Arizona*, AMERICAN THINKER (July 24, 2010), http://www.americanthinker.com/2010/07/federal_failure_and_arizona.html ("For a national government to refuse to exercise an authority—in this case, enforcing the borders—amounts to abandonment. . . . Enter Arizona's immigration enforcement law. In fact, Arizona's action is in keeping with our nation's founding principles. Thomas Jefferson wrote in the Declaration of Independence that when a government no longer meets the needs of the governed, it is open to alteration. Arizona's reaction is therefore mild. Instead of abolishing federal authority, or supplanting federal statutes, the state has upheld both in enforcing the existing national law.").

23 Thus, it is argued that Arizona's immigration statutes support federal laws, requiring, for example, that state law enforcement verify a person's immigration status with the federal government, ARIZ. REV. STAT. ANN. § 11-1051 (LEXIS through 2010 legislation) (effective 2011), uphold federal registration requirements, *id.* § 13-1509, and prohibit employers from intentionally employing an unauthorized alien, *id.* § 23-212.01; *see also* Kris W. Kobach, *Reinforcing the Rule of Law: What States Can and Should Do to Reduce Illegal Immigration*, 22 GEO. IMMIGR. L.J. 459, 465 (2008) (arguing that federal action does not displace all state immigration laws, but rather there are eight areas in which states can act without being preempted by federal immigration law, citing Arizona, Oklahoma, and Missouri as examples).

24 *E.g.*, 8 U.S.C. § 1304(c) (2006) ("Every alien, eighteen years of age and over, shall at all times carry with him and have in his personal possession any certificate of alien registration . . . . Any alien who fails to comply with the provisions of this subsection shall be guilty of a misdemeanor . . . ."); *id.* §1373(c) ("The Immigration and Naturalization Service shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information.").

25 *E.g.*, ARIZ. REV. STAT. ANN. § 11-1051 (2010) (effective 2011) ("For any lawful stop, detention or arrest made by a law enforcement official or a law enforcement agency of this state . . . where reasonable suspicion exists that the person is an alien and is unlawfully present in the United States, a reasonable attempt shall be made, when practicable, to determine the immigration status of the person, except if the determination may hinder or obstruct an investigation. . . . The person's immigration status shall be verified with the federal government pursuant to 8 United States Code section 1373(c).").

statutes.[26] If the shoe were on the other foot, and state and local governments were second-guessing federal policy in a way that conservatives disliked (for example, by declaring "sanctuary cities"), we would be quick to make this point, and rightly so.

III. FAILING TO STRIKE A PRO-IMMIGRANT TONE

Finally, many conservatives err in failing to strike a pro-immigrant tone. Again, this is a failure of some but not all conservatives. There is nothing wrong with people wanting to come to the United States. There is nothing wrong with people wanting to immigrate, look for jobs, and thus gain better lives for themselves and their families. That is the primary reason why we have immigrants and why we have illegal immigrants.

The appropriate analogy is not people trying to break into a candy store, where we must drive them from our stores to protect our candy.[27] That is not the way to look at it. A better analogy is that America is a lifeboat, and a lot of people want to get into the lifeboat. Of course, not everybody should get into the lifeboat at once because then the lifeboat sinks and everyone drowns. You have to wait your turn. We may have to direct people and explain that, because we are almost full, you have to wait or go to another lifeboat. Although it is an imperfect analogy, the basic point is that there is nothing dishonorable or wrong with people wanting to come here and wanting to become Americans. We should *want* people to become Americans.

To use another analogy, it is similar to a sixteen-year-old who wants to join the Marines. Of course, sixteen-year-olds cannot join the Marines.[28] They have to wait a year or two. But our attitude when we catch a sixteen-year-old trying to join the Marines is not to vilify him. Rather, the attitude is to say—more in sorrow than in anger—"Kid, I admire your pluck; it's great that you want to be a Marine; we hope that someday you are a Marine; come back. But we have rules, and you can't be a Marine now; that's just not the way the system works." It is not evil to want to be a Marine. It is not evil to want to come to America looking for better job for yourself and have better opportunities for yourself and your family.

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[26] *See* Margaret Stock, *S.B. 1070: The Unconstitutional and Inefficient Law that May Just Fix Immigration*, 23 REGENT U. L. REV. 367, 372–73 (2011).

[27] *E.g.*, Patrick J. Buchanan, *Real Message of the Bush Amnesty*, WORLD NET DAILY (Jan. 12, 2004, 1:00 AM), http://www.wnd.com/news/article.asp?ARTICLE_ID=36555 (criticizing the 2004 plan for immigration reform: "[Bush's] amnesty will send this message to the world: The candy store is open, and the Americans cannot protect it. Now is the time to bust in.").

[28] *See* U. S. MARINE CORPS, TALKING TO YOUR SON OR DAUGHTER'S MARINE CORPS RECRUITER (2010), *available at* http://www.lifeasamarine.com.

CONCLUSION

While America faces legitimate concerns related to immigration—whether it is protecting the integrity of its borders or determining the economic and social limits of mass immigration—conservatives should not forget that immigration is, overall, a good thing. Instead of asserting dubious interpretations of the Constitution, conservatives should focus more on the assimilation of lawful immigrants. Conservatives best understand the principles that make America thrive, and they can foster these principles by welcoming immigrants who come to the United States to work for a better life. We must keep this in mind as we address illegal immigration and discuss future immigration policies.

FACT OR FICTION?: SETTING THE RECORD STRAIGHT ON S.B. 1070†

*Kris W. Kobach**

This Essay addresses three common assumptions made about Arizona's newest immigration law, Senate Bill ("S.B.") 1070,[1] and shows that they are based on pure fiction, not fact. I will then explain why S.B. 1070 is on legally sound footing in the face of the preemptive challenge brought by the Obama Justice Department.[2] Before addressing the three fictions of S.B. 1070, however, I would like to begin by respectfully disagreeing with the contention that conservatives should not support state and local efforts to discourage illegal immigration.[3] I have two points of disagreement.

I. EFFICIENCY AND ECONOMIC COST REQUIRE THE COLLABORATION OF FEDERAL, STATE, AND LOCAL EFFORTS TO ENFORCE IMMIGRATION LAWS

First, efficiency requires that law enforcement problems of national proportions be addressed by collaborative efforts of all levels of law enforcement. When there is a serious and pervasive law enforcement problem of national dimension, I doubt anyone would seriously argue that the problem should be addressed only with one level of government, to the exclusion of all others.

For example, take the war on drugs. No reasonable person would contend that if we are going to stop drug abuse and drug crimes that we should tell the federal government, "DEA, stay out of it; this will be

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1 S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010) (as amended by H.R. 2162, 49th Leg., 2d Reg. Sess. (Ariz. 2010)).

2 *See generally* Complaint, United States v. Arizona, 703 F. Supp. 2d 980 (D. Ariz. 2010) (No. CV 10–1413–PHX–SRB).

3 *See, e.g.*, Clegg, *supra* pp. 349–51.

taken care of at the state and local level." Nor would anyone seriously claim that the DEA should tell the states and local governments, "No, we don't want you making the arrests; we'll do everything." When a pervasive law enforcement problem exists, it is necessary to have a coordinated effort in which all levels of government work together.[4]

Second, the cost incurred by state and local governments as a result of illegal immigration justifies state and local action. Illegal immigration's net fiscal cost to United States taxpayers is approximately $99.2 billion a year.[5] I emphasize that this figure represents the *net* cost, so it includes any taxes or revenues received by federal, state, and local governments from illegal aliens.[6] Nearly $79.9 billion of the $99.2 billion is borne by state and local governments,[7] and $19.3 billion is borne by the federal government.[8] Thus, state and local governments have a significant financial interest in the vigorous enforcement of immigration law, even if the federal government reduces its enforcement efforts for political reasons.

In Arizona, the net annual fiscal cost of illegal immigration to the state is over $2.4 billion a year.[9] The biggest ticket items are K–12 education for children in illegal alien-headed households, uncompensated health care costs, and criminal incarceration costs.[10] Almost fifteen percent of the inmates in Arizona's detention facilities are illegal aliens.[11]

There are also incredible criminal costs. Arizona rancher Robert Krentz was killed on his own land in April 2010, shortly before the law was passed.[12] In 2008, there were over 370 kidnappings in Phoenix alone.[13] The vast majority of those kidnappings were associated with

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[4] KRIS W. KOBACH, CTR. FOR IMMIGRATION STUDIES, STATE AND LOCAL AUTHORITY TO ENFORCE IMMIGRATION LAW: A UNIFIED APPROACH FOR STOPPING TERRORISTS 5–6 (2004), *available at* http://www.cis.org/articles/2004/back604.pdf.

[5] JACK MARTIN & ERIC A. RUARK, FED'N FOR AM. IMMIGRATION REFORM, THE FISCAL BURDEN OF ILLEGAL IMMIGRATION ON UNITED STATES TAXPAYERS 79 (2010), *available at* http://www.fairus.org/site/DocServer/USCostStudy_2010.pdf?docID=4921.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.* at 78.

[10] *See* FED'N FOR AM. IMMIGRATION REFORM, THE COSTS OF ILLEGAL IMMIGRATION TO ARIZONANS (2004), *available at* http://www.fairus.org/site/DocServer/azcosts2.pdf?docID=101.

[11] CHARLES L. RYAN, ARIZ. DEP'T OF CORRS., CORRECTIONS AT A GLANCE (2010), *available at* http://www.azcorrections.gov/adc/reports/CAG/CAGJun10.pdf.

[12] *Murder of Arizona Rancher Roils Immigration Debate*, FOX NEWS (Apr. 10, 2010), http://www.foxnews.com/politics/2010/04/10/murder-arizona-rancher-roils-immigration-debate/.

[13] Brian Ross, *Kidnapping Capital of the U.S.A.*, ABC NEWS (Feb. 11, 2009), http://abcnews.go.com/Blotter/story?id=6848672&page=1.

alien smuggling or with cartels involved in alien smuggling.[14] There is simply no way to refute the fact that the fiscal and criminal impacts of illegal immigration are monumental, and to say that a state should ignore it or simply not be permitted to deal with it is a difficult position to support.

II. WHY THREE COMMON ASSUMPTIONS ABOUT S.B. 1070 ARE BASED ON FICTION, NOT FACT

Arizona's S.B. 1070 was designed as a common-sense way of facilitating cooperation among local, state, and federal law enforcement as well as slightly ratcheting up the level of enforcement of federal immigration statutes in Arizona.[15] Few statutes, however, have been so grossly mischaracterized by members of the press, members of Congress, and the Administration.

Before discussing these mischaracterizations, it is important to set this law in context. S.B. 1070 is not Arizona's first step in the area of increasing state-level efforts to stop illegal immigration; it is the fourth of four steps. First, in 2004, Arizona passed Proposition 200,[16] which restricted public benefits to illegal aliens.[17] Second, in 2005, Arizona passed a law prohibiting human smuggling,[18] which has been vigorously and successfully enforced by Sheriff Joe Arpaio in Maricopa County.[19] Third, in 2007, Arizona passed the Legal Arizona Workers Act,[20] which was upheld by the Ninth Circuit Court of Appeals in a 3-0 decision in 2009.[21] The case is currently before the United States Supreme Court.[22] S.B. 1070, enacted in April 2010, is the fourth step.

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[14] *Id.*

[15] *See generally* S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010) (as amended by H.R. 2162, 49th Leg., 2d Reg. Sess. (Ariz. 2010)).

[16] *Arizona Law Requiring Voters To Prove Citizenship Is Struck Down*, FOX NEWS (Oct. 27, 2010), http://www.foxnews.com/politics/2010/10/26/court-strikes-ariz-law-requiring-voters-prove-citizens/ (citing Arizona 2004 Ballot Propositions, Proposition 200 (Nov. 2, 2004)). In October 2010, the Ninth Circuit Court of Appeals in a 2-1 decision struck down the part of Proposition 200 that required voters to prove citizenship to register to vote. Gonzalez v. Arizona, 624 F.3d 1162, 1168, 1198 (9th Cir. 2010).

[17] ARIZ. REV. STAT. ANN. § 46-140.01(A)(3) (2011).

[18] ARIZ. REV. STAT. ANN. § 13-2319 (2011).

[19] *See* JJ Hensley & Jolie McCullough, *Arpaio's New Sweep Targets Human Smuggling, Drugs*, ARIZ. REPUBLIC, Mar. 19, 2010, at B3.

[20] ARIZ. REV. STAT. ANN. §§ 23-211 to -214 (2011).

[21] Chicanos Por La Causa, Inc. v. Napolitano, 558 F.3d 856, 860–61 (9th Cir. 2009), *cert. granted sub nom.*, Chamber of Commerce v. Candelaria, 130 S. Ct. 3498 (2010).

[22] Chamber of Commerce v. Candelaria, 130 S. Ct. 3498 (2010), *sub nom.* Chamber of Commerce v. Whiting, 131 S. Ct. 624 (2010) (granting the motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument). The Obama Administration urged the Supreme Court to grant certiorari. Brief for the United

With each step, Arizona has incrementally ratcheted up the level of enforcement, and the strategy is working. People are self-deporting out of Arizona.[23] I would argue that this is ultimately the objective of all law enforcement: deter people from breaking the law. In the context of illegal immigration, that means inducing illegal aliens to return to their countries of origin.

In the case of Arizona, many illegal aliens are actually returning to their country of origin and not just relocating to California. After the Legal Arizona Workers Act went into effect in January 2008, the legislature of the Mexican state of Sonora sent a delegation to Arizona.[24] The Sonoran legislators complained to the Arizona legislators that Arizona's new law was sending too many Mexican nationals home too quickly, and that the Sonoran infrastructure of housing and other facilities was insufficient to handle the incoming load.[25] In their view, Arizona should bear the fiscal cost. This is the context in which S.B. 1070 was introduced in 2010 and the context in which it must be analyzed now.

I will now focus on the three commonly-made assumptions about S.B. 1070. The first false assumption is illustrated by U.S. Attorney General Eric Holder's interview on *Meet the Press*, in which he famously gave a stern warning that the law has the possibility of leading to racial profiling.[26] Holder had a somewhat embarrassing moment a few days later when, in a congressional committee, he was asked if he had read the law.[27] He admitted that he had not.[28]

If he had, he would have noticed that S.B. 1070 expressly prohibits an officer from enforcing the terms of the Act based on a person's skin color, race, or national origin in four different places.[29] Therefore, if an officer does engage in racial profiling, in almost all circumstances

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States as Amicus Curiae, Chamber of Commerce v. Candelaria, 130 S. Ct. 3498 (2010) (No. 09-115); Robert Barnes, *Administration Opposes Arizona Law That Penalizes Hiring of Illegal Immigrants*, WASH. POST, May 29, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/05/28/AR2010052804319.html.

[23] *See* Press Release, Dep't of Homeland Sec., Remarks by Homeland Security Secretary Michael Chertoff and Attorney General Mukasey at a Briefing on Immigration Enforcement and Border Security Efforts (Feb. 22, 2008), *available at* http://www.dhs.gov/xnews/releases/pr_1203722713615.shtm; *see also* E. J. Montini, *A 'Bonus' Consequence: Self-Deportation*, ARIZ. REPUBLIC, Apr. 27, 2010, at B1.

[24] Sheryl Kornman, *Sonoran Officials Slam Sanctions Law in Tucson Visit*, TUCSON CITIZEN, Jan. 16, 2008, at 4A.

[25] *Id.*

[26] Stephen Dinan, *Holder Balks at Blaming 'Radical Islam'; Attorney General Critical of Arizona Law He Admits He Hasn't Read*, WASH. TIMES, May 14, 2010, at A1.

[27] *Id.*

[28] *Id.*

[29] *See* S.B. 1070, 49th Leg., 2d Reg. Sess. §§ 2.B, 3.C, 5.13-2928.D, 5.13-2929.C (Ariz. 2010) (as amended by H.R. 2162, 49th Leg., 2d Reg. Sess. (Ariz. 2010)).

imaginable any prosecution would not stand because the law would have been violated in the process of making the arrest.[30] Furthermore, the protections under the Fourth and Fourteenth Amendments against racial profiling are still available.[31] By specifically prohibiting racial profiling, this law goes well beyond what normal statutes do in protecting minority rights. Thus, the mischaracterization that S.B. 1070 will lead to racial profiling more than what already takes place is a fiction on its face. This mischaracterization is also revealed by the fact that the Justice Department's legal complaint against S.B. 1070, which was filed a few months later, did not contain any claim related to racial profiling.

The second false assumption made about S.B. 1070 is that the law would require aliens to carry documentation that they otherwise did not have to carry.[32] Our President was perhaps the greatest purveyor of this misconception. You may remember the analogy he made: "[N]ow suddenly if you don't have your papers, and you took your kid out to get ice cream, you're gonna be harassed."[33] The curious word in President Obama's phrasing is "suddenly." Evidently, he was not briefed before he went to the microphone on the fact that for more than fifty years, federal law has required all aliens in the United States to carry on their person at all times certain federal documents.[34] There is nothing sudden about this requirement. S.B. 1070 simply states that if someone violates these provisions of federal law (provisions found in 8 U.S.C. §§ 1304(e)[35] and 1306(a)[36]) he also commits a misdemeanor under Arizona law.[37] Arizona is simply taking seriously the documentation provisions of federal law. It is thus a serious mischaracterization to paint S.B. 1070 as containing a new and oppressive documentation requirement.

The third false assumption is that the law requires police officers to accost people on the street and demand documents from them. This

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30 *See* Ariz. S.B. 1070 § 8.B.

31 U.S. CONST. amends. IV, XIV; *see also* United States v. Brignoni-Ponce, 422 U.S. 873, 886–87 (1975) (holding that ethnicity alone is not sufficient to establish reasonable suspicion to justify a "seizure" under the Fourth Amendment).

32 *See Palin to Obama: 'Do Your Job, Secure Our Border'*, CNN (May 16, 2010), http://articles.cnn.com/2010-05-16/politics/arizona.palin.brewer_1_brewer-sarah-palin-new-law?_s=PM:POLITICS [hereinafter *Do Your Job*].

33 *Id.*

34 Immigration and Nationality Act, Pub. L. No. 82-414, § 264(e), 66 Stat. 163, 225 (1952) (codified at 8 U.S.C. § 1304(c) (2006)).

35 § 1304(e) (imposing penalties on non-resident aliens for failure to have in one's possession any certificate of alien registration).

36 8 U.S.C. § 1306(a) (2006) (imposing penalties on any alien who fails to register and be fingerprinted).

37 S.B. 1070, 49th Leg., 2d Reg. Sess. §§ 3.A, 3.H (Ariz. 2010) (as amended by H.R. 2162, 49th Leg., 2d Reg. Sess. (Ariz. 2010)).

misconception was also fueled by President Obama's example.[38] Section 2 of the law requires very specifically that for S.B. 1070's requirements to be triggered, an officer must first make a "lawful stop, detention or arrest . . . in the enforcement of any other law or ordinance of a county, city or town or this state . . . ."[39] Individuals will not be stopped at an ice cream parlor, as President Obama claimed, because of their skin color. Individuals will be stopped, however, if they run out of the ice cream parlor with an ice cream cone in one hand and a bag of money in the other, and someone is shouting, "Stop that thief!" It is that simple.

The most common instance in which S.B. 1070 will come into play is during a traffic stop. Thousands of traffic stops happen across this country every day, hundreds in the state of Arizona. Suppose a police officer pulls over a minivan on Highway 17 northeast of Phoenix for some traffic violation one night. Inside the minivan are sixteen people, crammed in, head to toe. The second and third row seats have been removed (this is very common; I have been with Sheriff Joe's deputies[40] when such scenarios have occurred) and underneath the human cargo are trash bags filled with drug cargo—a common way of moving aliens and drug cargo out of Phoenix—now the primary hub for illegal immigration in the United States—and on to other parts of the country.[41]

In this situation, S.B. 1070 requires that if an officer develops "reasonable suspicion" that the person to whom he is talking is an alien unlawfully present in the country, he should act on that reasonable suspicion and not turn a blind eye.[42] Reasonable suspicion generally requires the presence of multiple factors.[43] In the context of illegal immigration, such factors include, but are not limited to, traveling on a known human smuggling corridor,[44] the fact that the passengers in the vehicle have no identification documents whatsoever,[45] and the driver's evasive response when questioned about where he has been or where he

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[38] *Do Your Job*, *supra* note 32.

[39] Ariz. S.B. 1070 § 2.B.

[40] *See supra* note 19 and accompanying text.

[41] Ted Robbins, *A Backlash in Phoenix over Immigration from Mexico*, NPR (Mar. 14, 2006), http://www.npr.org/templates/story/story.php?storyId=5260526.

[42] Ariz. S.B. 1070 § 2.B.

[43] The U.S. Supreme Court has held that a determination of reasonable suspicion is based on the "'totality of the circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing." United States v. Arvizu, 534 U.S. 266, 273 (2002) (quoting United States v. Cortez, 449 U.S. 411, 417 (1981)).

[44] *Id.* at 277.

[45] United States v. Fuentes, No. C-09-860, 2010 WL 707424, at *4 (S.D. Tex. Feb. 23, 2010).

is going.[46] S.B. 1070 requires that if some of these factors are present, the officer must follow up on them.[47]

Following up means that the officer calls the Law Enforcement Support Center, a 24/7 hotline that has been in operation since the mid-1990s and that exists exactly for this purpose.[48] Every day, on average, more than 2200 calls are made by law enforcement officials all over the country to this hotline to find out whether the persons to whom they are talking in a traffic stop or other law enforcement situation is indeed an illegal alien.[49] S.B. 1070 simply states that it is Arizona's policy that every officer should do this[50]—if an officer develops reasonable suspicion, he should make the call immediately from his squad car. S.B. 1070 merely takes something that was, and is, done regularly all over the country and makes it Arizona's uniform policy.

Now that it is clear what S.B. 1070 actually does, it is appropriate to turn to the legal arguments made against it.

III. S.B. 1070 IS NOT PREEMPTED BY CONGRESS AND MUST NOT BE PERMITTED TO BE PREEMPTED BY EXECUTIVE POLICY DECISIONS

The principal assertion made by the Justice Department's lawsuit against Arizona is that Arizona is prohibited from enforcing S.B. 1070 under the doctrine of pre-emption.[51] The basic principle of pre-emption is that Congress has the power to proscribe state action in certain areas where Congress has authority. In order to preempt the states, however, Congress must act in a way that demonstrates unmistakable intent to preempt.[52] The problem with the Justice Department's lawsuit is that

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[46] *See* United States v. Nichols, 142 F.3d 857, 865 (5th Cir. 1998); *Fuentes*, 2010 WL 707424, at *4.

[47] Ariz. S.B. 1070 § 2.B.

[48] U.S. GEN. ACCOUNTING OFFICE, GAO/AIMD-95-147, LAW ENFORCEMENT SUPPORT CENTER: NAME-BASED SYSTEMS LIMIT ABILITY TO IDENTIFY ARRESTED ALIENS 1 (1995).

[49] *See* U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, FISCAL YEAR 2008 ANNUAL REPORT iv (2008).

[50] Ariz. S.B. 1070 § 2.B.

[51] Complaint at 14–15, United States v. Arizona, 703 F. Supp. 2d 980 (D. Ariz. 2010) (No. CV 10-1413-PHX-SRB).

[52] *See* De Canas v. Bica, 424 U.S. 351, 356 (1976) (stating that pre-emption only occurs where it is clear "'either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained.'") (quoting Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 142 (1963); Geier v. Am. Honda Motor Co., 529 U.S. 861, 884–85 (2000) (citing English v. Gen. Elec. Co., 496 U.S. 72, 78–79, 90 (1990) (explaining that "[p]re-emption fundamentally is a question of congressional intent" (alteration in original), and that "[t]he Court has observed repeatedly that pre-emption is ordinarily not to be implied absent an 'actual conflict.'").

there is no federal statute that expressly prohibits the state action in question. Congress has simply never passed a law declaring that states may not make arrests on the basis of unlawful immigration status in order to assist the federal government. Indeed, Congress has done just the opposite and passed laws encouraging states to pass laws like S.B. 1070.[53]

Because no federal statutes expressly preempt S.B. 1070, the Justice Department was forced to bring an implied pre-emption challenge.[54] Its implied pre-emption argument was that the law conflicts with congressional objectives in regulating immigration.[55] The problem with this theory is not only has Congress specifically encouraged states to assist in immigration law enforcement,[56] but the U.S. Supreme Court has also long recognized that states may take actions to discourage illegal immigration.[57] The last time that the Supreme Court spoke on this subject was in 1976 in the case of *De Canas v. Bica*.[58] In that case, the Court upheld a California law that prohibited the employment of unauthorized alien workers.[59] The Court held that the law was not preempted and that states may permissibly pass laws that touch on immigration and discourage illegal immigration as long as they are harmonious state regulations that do not conflict with federal law.[60]

Justice Kennedy, in his concurrence in *Gade v. National Solid Wastes Management Association*, wisely cautioned the Court that it must be careful in inviting judicial inquiries to find conflict pre-emption in the nooks and crannies of federal laws: "A freewheeling judicial inquiry into whether a state statute is in tension with federal objectives would undercut the principle that it is Congress rather than the courts that pre-empts state law."[61] Furthermore, in 2005, a unanimous Supreme Court in *Muehler v. Mena* held that local law enforcement officers have the authority to inquire into the immigration status of individuals who

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[53] *E.g.*, 8 U.S.C. § 1357(g)(1) (2006) (providing for state and local law enforcement officers to be immigration agents); § 1357(g)(10) (expressly reserving to states authority to enforce immigration law); 8 U.S.C. § 1373(c) (2006) (requiring federal officials to respond to state and local law enforcement inquiries related to immigration enforcement).

[54] *See* Complaint at 14–18, United States v. Arizona, 703 F. Supp. 2d 980 (D. Ariz. 2010) (No. CV 10-1413-PHX-SRB).

[55] *Id.*

[56] *See supra* note 53.

[57] *See, e.g.*, De Canas v. Bica, 424 U.S. 351, 355 (1976).

[58] *Id.* The Supreme Court will soon speak again, in the case of *Chamber of Commerce v. Whiting*, 131 S. Ct. 624 (2010), concerning the Legal Arizona Workers Act of 2007.

[59] *Id.* at 352, 365.

[60] *See id.* at 355–58.

[61] 505 U.S. 88, 111 (1992) (Kennedy, J., concurring).

have been lawfully detained even without first developing a reasonable suspicion that the person is an illegal alien.[62]

In addition to these judicial precedents, Congress has taken steps to encourage states to assist the federal government in immigration enforcement.[63] The Tenth Circuit in *United States v. Vasquez-Alvarez* correctly held that federal law "evinces a clear invitation from Congress for state and local agencies to participate in the process of enforcing federal immigration laws."[64] If there is no act of Congress that says, even implicitly, that states cannot regulate in a particular manner, then the pre-emption argument must fail.

The Justice Department attorneys addressed this flaw in their case by advancing a novel theory. They claimed that even if Congress did not preempt the states, the Executive Branch did by choosing not to enforce certain federal immigration laws when setting its own priorities in immigration enforcement.[65] Therefore, the argument runs, because the Executive Branch has chosen not to enforce certain laws, the states are preempted from enforcing the same laws.[66]

This argument is absurd and dangerous for two reasons. First, it makes a mockery of Article II of the Constitution, which states that the President "shall take care that the Laws be faithfully executed,"[67] which, notably, is the President's "most important constitutional duty."[68] According to the Justice Department's logic, by abrogating his constitutional duty, the President has thereby preempted the states. Second, it is absurd because the Supremacy Clause of Article VI, which is the source of pre-emption, only comes into operation when *Congress* acts.[69] Only laws of Congress or treaties ratified by Congress have preemptive effect under the Supremacy Clause.[70] Unilateral executive

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[62] 544 U.S. 93, 100–01 (2005) (holding that police questioning, even on the subject of immigration status, does not constitute a seizure, and thus "officers did not need reasonable suspicion to ask Mena for her name, date and place of birth, or immigration status").

[63] *E.g.*, 8 U.S.C § 1357(g) (2006) (encouraging the states to cooperate with the federal government in immigration enforcement).

[64] 176 F.3d 1294, 1300 (10th Cir. 1999).

[65] *See* Complaint at 17–18, United States v. Arizona, 703 F. Supp. 2d 980 (D. Ariz. 2010) (No. CV 10–1413–PHX–SRB).

[66] *See id.*

[67] U.S. CONST. art. II, § 3.

[68] Lujan v. Defenders of Wildlife, 504 U.S. 555, 577 (1992).

[69] U.S. CONST. art. VI, cl. 2.

[70] "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made . . . shall be the supreme Law of the Land . . . ." *Id.* Thus by implication, only the Constitution, laws properly passed by Congress under the Constitution, or treaties ratified by the Senate may preempt state law through the Supremacy Clause power. *See id.*; KRIS W. KOBACH, THE HERITAGE FOUND., HERITAGE

actions that are contrary to Congress' manifest intent that federal laws should be enforced, do not, and should not, have any preemptive effect under the Supremacy Clause.

The implications of the Justice Department's argument are truly significant. We are now in a situation where the Executive Branch is asserting that it can unilaterally preempt by choosing not to enforce a federal law, and that its choice not to enforce that law will have the constitutionally significant effect of pushing the states off the field. If an executive whim or an executive order can preempt, then the states will be pushed off the field at the will of the executive, without any congressional action whatsoever. Regardless of one's personal views about the Arizona law, presumably all would agree that the notion of executive pre-emption is truly dangerous to our constitutional republic.

LECTURES NO. 1173, THE ARIZONA IMMIGRATION LAW: WHAT IT ACTUALLY DOES, AND WHY IT IS CONSTITUTIONAL 5–6 (2010).

A RESPONSE TO MARGARET STOCK†

*Kris W. Kobach**

I would like to offer several points in response to Margaret Stock's presentation. First, she described how the Declaration of Independence criticized King George for limiting immigration.[1] On one hand, that is correct, but on the other hand, the Founders were not open-borders advocates.[2] Their chief objection to King George was that he was not allowing immigration to proceed in accordance with the Laws for Naturalization of Foreigners, not that he refused to embrace unlimited immigration.[3] The Founders may not have yet agreed on a detailed immigration policy, but they at least agreed that immigration to the United States should be limited according to the laws adopted by the newly-formed republic.[4]

Second, Ms. Stock states that the current system is broken and dysfunctional and that the real solution to this problem is for Congress to reform the current laws. She posits that the only good that will result from the Arizona statute is the possibility of comprehensive immigration reform, presumably including an amnesty for illegal aliens. This is unfortunately a familiar Washington tune: if a problem exists, what we need is for Congress to pass a law, and the problem will be solved. Unfortunately, that is not reality. In so many areas, Congress passes a law, and that law only compounds the problem.

Federal immigration laws are not at all dysfunctional, and even if there were problems in the structure of the laws, we would have no way of knowing the scope of the problems because federal immigration laws

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1 THE DECLARATION OF INDEPENDENCE para. 9 (U.S. 1776).

2 THOMAS G. WEST, VINDICATING THE FOUNDERS: RACE, SEX, CLASS, AND JUSTICE IN THE ORIGINS OF AMERICA 149 (2001).

3 THE DECLARATION OF INDEPENDENCE para. 9 (U.S. 1776).

4 WEST, *supra* note 2, at 159.

have never been fully executed as intended.[5] Before embarking on widespread legal reforms, the government should simply enforce the current laws thoroughly and systematically across the country.[6] If the laws were actually enforced as intended, the system would likely work, and work well. Any dysfunction in the system stems chiefly from a failure to enforce the law as written, rather than an inherent failure in the law itself. Having Congress weigh in with a so-called comprehensive reform act (including an amnesty) will not improve the situation; indeed, depending on the content of such an act, it may make things much worse.

Third, Ms. Stock argues that some areas of the country do not have enough Immigration and Customs Enforcement ("ICE") agents to pick up the illegal aliens that may be arrested by Arizona police officers. Again, while this may be correct,[7] the Arizona law does not demand or require that the ICE agents come running to take custody of every illegal alien arrested.[8] It merely provides the federal government the opportunity to do so—if the phone call is made and the federal government is unable to respond, then so be it. S.B. 1070 simply requires Arizona law enforcement officers not to turn a blind eye when they encounter illegal aliens in the course of enforcing other laws.[9]

Fourth, Ms. Stock asserts that Arizona's law conflicts with Congress' strategy. She does not, however, cite any statute that embodies—or even hints at—a strategy of not enforcing certain laws or tempering enforcement in certain parts of the country. Her argument boils down to this: because Congress has not allocated enough resources to federal enforcement agents to enforce all of our laws vigorously, Congress has therefore implied that the states should enforce only some laws, or only enforce immigration laws against illegal aliens who have committed certain crimes. While no statute supports this assumption, we are asked to discover it in the penumbras and emanations of other congressional actions. Such attenuated arguments do not amount to a valid preemption claim.

Finally, Ms. Stock argues that the federal government would prefer that Arizona use the existing statutory procedure of Section 287(g)[10]

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[5] *See* Mark Krikorian, *Obama Won't Enforce Existing Immigration Laws*, HUMANEVENTS.COM (May 6, 2010), http://www.humanevents.com/article.php?print=yes&id=36853.

[6] *See id.*

[7] *See* Alia Beard Rau & JJ Hensley, *Police Weighing Bill's Impact*, ARIZ. REPUBLIC, Apr. 22, 2010, at A1.

[8] *See generally*, S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010) (as amended by H.R. 2162, 49th Leg., 2d Reg. Sess. (Ariz. 2010)).

[9] *See* Ariz. S.B. 1070 § 2.B.

[10] Immigration and Nationality Act § 287(g), 8 U.S.C. § 1357(g) (2006).

rather than implement its own system. Section 287(g) defines a process by which a state can enter into a formal agreement with the federal government to deputize state law enforcement officers as ICE agents with federal law enforcement powers.[11] Seventy-one law enforcement agencies around the country participated in this program as of October 2010.[12] The problem with this argument is that the Obama administration is actually scaling back the 287(g) program.[13] States will not be able to utilize 287(g) if the executive branch does not permit them to do so. Notably, Sheriff Joe Arpaio's Maricopa County is the jurisdiction that has most aggressively and effectively used its 287(g) authority, making more than three times the number of 287(g) arrests in 2008 than any other jurisdiction.[14] The Obama administration has been taking steps to prevent this from continuing.[15]

Ms. Stock also neglected to mention sub-section 10 of 287(g).[16] Sub-section 10 affirms that the 287(g) mechanism is not an exclusive method for cooperating with the federal government on immigration enforcement.[17] Thus, Congress contemplated immigration arrests by state and local jurisdictions, outside of 287(g) agreements. Furthermore, at the same time that Congress enacted 287(g), it enacted 8 U.S.C. § 1373,[18] which requires the federal government to respond to any inquiry coming from any state or local law enforcement officer about a person's immigration status.[19] Through these statutes, Congress unambiguously evinced intent for state and local officers to assist in illegal immigration detection and enforcement.

I will conclude with one final point. Contrary to what some people may think, ICE does not regularly patrol for illegal aliens. In many

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[11] *Id.*

[12] *Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, http://www.ice.gov/news/library/factsheets/287g.htm#signed-moa (last visited May 21, 2011).

[13] *See* Jon Feere, *DHS Task Force Seeks Weaker 287(g)*, CTR. FOR IMMIGRATION STUDIES (Oct. 2, 2009), http://www.cis.org/feere/weaker287g; *Krikorian*, *supra* note 5; Memorandum of Recommendations from the Homeland Sec. Advisory Council Sw. Border Task Force to Sec'y of the Dep't of Homeland Sec. Janet Napolitano 6 (Sept. 30, 2009), *available at* http://www.dhs.gov/xlibrary/assets/hsac_southwest_border_task_force_recommendations_september_2009.pdf.

[14] JESSICA M. VAUGHAN & JAMES R. EDWARDS, JR., CTR. FOR IMMIGRATION STUDIES, THE 287(G) PROGRAM: PROTECTING HOME TOWNS AND HOMELAND 7 (2009), *available at* http://www.cis.org/articles/2009/287g.pdf; Dan Nowicki, *Feds' New Tone Puts Arpaio in Hot Seat*, ARIZ. REPUBLIC, Mar. 15, 2009, at 1.

[15] *See* Nowicki, *supra* note 14.

[16] 8 U.S.C. § 1357(g)(10) (2006).

[17] *See id.*

[18] Act of Sept. 30, 1996, Pub. L. No. 104-208, § 133, 642, 110 Stat. 3009-563, -564, -707.

[19] 8 U.S.C. § 1373 (2006).

instances, ICE is dependent on other agencies for initial detection and detention of illegal aliens. ICE officers spend a lot of their time preparing for specific raids and developing cases for alien removal. In many parts of the country, state and local law enforcement officers are ICE's primary eyes and ears on the field who initially detect and detain illegal immigrants. This requires a cooperative relationship between ICE and local law enforcement.[20] For example, in Maricopa County, which covers sixty percent of the population of Arizona,[21] ICE gets a large percentage of its leads from the Maricopa County Sheriff's Office. Because the Sheriff's Office detects so many illegal aliens and alien smugglers, they can give leads to ICE, which can then concentrate its efforts on big raids—safe houses, drop houses, and the smuggling operations themselves.[22] Again, this results in a very efficient and mutually beneficial relationship, but its foundation rests upon state and local law enforcement utilizing their authority to make arrests and assist ICE. By attacking states that are using this authority, the Obama administration is shooting itself in the foot.

It is really quite simple: state and local officers, who are on the ground permanently and know the area, focus their efforts on small-scale, local matters, such as particular illegal aliens who may be involved in committing additional crimes beyond their immigration violations; and the federal government, using the states as a force multiplier, can focus on larger-scale operations such as alien smuggling networks, alien street gangs, and large employers of illegal aliens. In addition, the federal government can take custody of the individual illegal aliens arrested by state and local officers and initiate removal proceedings against such aliens. Federalism, the system upon which this republic was built, works when it is permitted to function as constitutionally intended.

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[20] *See Combating Border Violence: The Role of Interagency Coordination in Investigations: Hearing Before the Subcomm. on Border, Mar., & Global Counterterrorism of the H. Comm. on Homeland Sec.*, 111th Cong. 12 (2009) (statement of Kumar C. Kibble, Deputy Director, Office of Investigations, U.S. Immigration and Customs Enforcement, Department of Homeland Security).

[21] *State and County QuickFacts: Maricopa Country, Arizona*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/04/04013.html (last visited May 21, 2011).

[22] *See* Press Release, U.S. Immigration & Customs Enforcement, ICE Teams up with County Sheriff, Adult Probation To Target Deportable Criminals in Phoenix Area (Feb. 14, 2008), *available at* http://www.ice.gov/news/releases/0802/080214phoenix.htm.

S.B. 1070: THE UNCONSTITUTIONAL AND INEFFICIENT LAW THAT MAY JUST FIX IMMIGRATION†

*Margaret D. Stock**

The immigration issue is as old as America itself. One of the Founders' primary complaints against King George was that he restricted immigration.[1] This complaint carried such weight that it was one of the grievances listed in the Declaration of Independence.[2] Because of the Founders' apparent open-border mentality, the Constitution only mentions two immigration powers, and delegates them both to Congress. First, Congress was given the power to restrict human trafficking, better known to history as "slavery," after 1808.[3] Congress was also given exclusive power to provide "an uniform Rule of Naturalization."[4] James Madison explained in Federalist Paper Number 42 that Congress was given this power to establish uniform "rights of citizenship" and "privileges of residence,"[5] and therefore prevent the states from setting different standards for citizenship.

Although the Constitution is relatively silent on the question of immigration, it does not follow that the federal government is not primarily responsible for regulating immigration. Indeed, the federal government has possessed virtually exclusive power to regulate

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1 DAVID SKILLEN BOGEN, PRIVILEGES AND IMMUNITIES: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 6 (2003).

2 THE DECLARATION OF INDEPENDENCE para. 9 (U.S. 1776) ("He has endeavoured to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migrations hither, and raising the conditions of new Appropriations of Lands.").

3 U.S. CONST. art. I, § 9, cl. 1 ("The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.").

4 U.S. CONST. art. I, § 8, cl. 4.

5 THE FEDERALIST NO. 42, at 236–37 (James Madison) (E. H. Scott ed., 1898).

immigration for more than one hundred years.[6] The Supreme Court has held that the federal government has a plenary power to regulate immigration that derives from Congress' power to regulate interstate commerce,[7] the President's power over foreign affairs,[8] and the inherent sovereignty of the federal government.[9]

Congress has exercised this plenary power by creating a complex and dysfunctional web of laws that lies beyond the power of most people to comprehend—even lawyers. Immigration law is so complicated that an Immigration and Naturalization Service spokesperson stated on the record that "[i]mmigration law is a mystery and a mastery of obfuscation."[10] Federal judges have been even less complimentary of the statutory mess that Congress has created. For example, one federal judge stated,

> We have had occasion to note the striking resemblance between some of the laws we are called upon to interpret and King Minos's labyrinth in ancient Crete. The Tax Laws and the Immigration and Nationality Acts are examples we have cited of Congress's ingenuity in passing statutes certain to accelerate the aging process of judges.[11]

President George W. Bush was also troubled by the condition of our immigration system. In his book *Decision Points*, President Bush noted that one of his greatest regrets was that he did not attempt to fix the immigration system before trying to fix Social Security.[12] He believes that had he reordered his priorities, he would have been able to fix the broken immigration system.[13] President Bush achieved no such victory, however, and the problem now looms larger than ever.

Indeed, this complex web of laws has created an utterly broken and dysfunctional immigration system that has harmed our national economy, our national cohesiveness, and our national security in general. We have a continuing crisis on our hands, one that successive

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[6] In the nation's early days, states regulated immigration. *See* E. P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 1798–1965, at 396 (1981).

[7] *E.g.*, Head Money Cases, 112 U.S. 580, 600 (1884) ("Congress [has] the power to pass a law regulating immigration as a part of commerce of this country with foreign nations . . . .").

[8] *See, e.g.*, United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950) (citing United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 318 (1936); Fong Yue Ting v. United States, 149 U.S. 698, 713 (1893)).

[9] *See, e.g.*, *Fong Yue Ting*, 149 U.S. at 711.

[10] Nurith C. Aizenman, *Maryland Family Ensnared in Immigration Maze; After Changes in the Law, Couple Faces Deportation*, WASH. POST, Apr. 24, 2001, at B1. The Immigration and Naturalization Service ("INS") was subsequently restructured into the Department of Homeland Security. *See* Department of Homeland Security Act of 2002, 6 U.S.C. § 271(a)(5)(b) (2006).

[11] Lok v. INS, 548 F.2d 37, 38 (2d Cir. 1977).

[12] GEORGE W. BUSH, DECISION POINTS 305–06 (2010).

[13] *Id.*

presidencies and congresses have been unable to resolve. With rising violence on our southern border, millions of undocumented immigrants located throughout the United States, massive lawbreaking, and Congress' inability—or unwillingness—to provide the legal fixes and resources necessary to solve the problem, the states suffering the most have naturally decided to exercise their role as laboratories of democracy and attempted to step in where Congress has failed.

Traditionally, the states have played a strong role in regulating non-citizens who reside within their borders. For example, they often enact statutes that regulate employment or benefits for non-citizens.[14] The pre-emption doctrine[15] and Supremacy Clause jurisprudence[16] teach us, however, that when the states do regulate on matters relating to immigration, they cannot do so in a manner that conflicts with or undermines federal law and policy.[17] While states are free to complement federal government laws and policies, and in some cases are required to provide support to federal efforts, they can never undermine them.[18]

So what, then, is a state like Arizona to do? Many contend that Arizona is merely trying to help the federal government do its job. This is not the case. A prime example of this was illustrated by an interesting segment on the *Larry King Live* television show. One night, talk show host Larry King had two Arizona sheriffs on the show.[19] Both sheriffs completely agreed on the facts of the situation in Arizona, yet one sheriff opposed Senate Bill ("S.B.") 1070,[20] and the other sheriff was in favor of it.[21] How could this be? The sheriffs' answers revealed that the sheriffs did not think that Arizona's law would complement federal efforts to enforce immigration laws, but rather would force the federal government

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[14] *See, e.g.*, ARIZ. REV. STAT. ANN. § 23-212 (2011) (making it illegal for employers to hire illegal aliens); CAL. HEALTH & SAFETY CODE § 130 (Supp. West 2010) (prohibiting illegal aliens from receiving publicly funded health care); GA. CODE ANN. § 50-36-1 (2011) (making it illegal for illegal aliens to receive government benefits).

[15] *See, e.g.*, Felder v. Casey, 487 U.S. 131, 138 (1988) ("Under the Supremacy Clause of the Federal Constitution, '[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law,' for 'any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.'" (quoting Free v. Bland, 369 U.S. 663, 666 (1962)) (alteration in original)).

[16] *See* U.S. CONST. art. VI, cl. 2.

[17] *See* De Canas v. Bica, 424 U.S. 351, 358 n.6 (1976) (quoting Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 419 (1948)).

[18] *See id.* at 357.

[19] *Larry King Live* (CNN television broadcast July 28, 2010).

[20] S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010) (as amended by H.R. 2162, 49th Leg., 2d Reg. Sess. (Ariz. 2010)).

[21] *Larry King Live*, *supra* note 19.

to behave differently.[22] Their assessments of the law turned on their perception that federal authorities were meeting each sheriff's needs for federal cooperation.[23]

The first sheriff did not approve of the bill because it would "overwhelm the system" by requiring Arizona to subject all illegal immigrants to its criminal justice system.[24] He argued that under Arizona law prior to the passage of S.B. 1070, an arresting officer would hand over illegal immigration suspects to Immigration and Customs Enforcement ("ICE").[25] S.B. 1070, he argued, would require Arizona to deal with the suspect in the state system first, and thereby clog up the state criminal justice system.[26] Because the suspect ultimately would still be turned over to ICE, S.B. 1070 would needlessly drain Arizona's scarce resources.[27] In this sheriff's jurisdiction, there was no shortage of ICE agents.[28]

The second sheriff argued that he needed the law in his jurisdiction, and agreed with the other sheriff's assessment of how it would work.[29] He approved of the law because it would now require the federal government to deal with all apprehended illegal immigrants, whereas before, the federal government seemingly had the option of declining to take certain unauthorized immigrants into custody.[30] In his jurisdiction, ICE was not likely to respond to him when he called for them to pick up unauthorized immigrants, and he perceived that the law would force them to do so.[31]

The debate between the sheriffs illustrates precisely what S.B. 1070 is going to do: It will force the federal government to expend its resources in Arizona and to remove Arizona's four hundred thousand illegal immigrants—at the expense of its enforcement efforts in other states.[32]

While many would claim that result as a victory, it is exactly what makes S.B. 1070 unconstitutional. Arizona's law explicitly contradicts the federal priorities in immigration enforcement laid out by Congress and the executive branch. S.B. 1070 states that its purpose is to create

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22 *Id.*

23 *Id.*

24 *Id.*

25 *Id.*

26 *Id.*

27 *See id.*

28 *See id.*

29 *Id.*

30 *See id.*

31 *See id.*

32 *See* Krissah Thompson, *Case Spotlights Tension on Mexican Border*, WASH. POST, Feb. 6, 2011, at A3.

"attrition through enforcement," meaning *enforcement of every single immigration law*.[33] The strategy of the federal government, however, is *enforcement prioritization*.[34] The federal government's priority is to use ICE's limited resources to deport the "worst of the worst"[35]—not every illegal immigrant in Arizona.

Examining the numbers makes this point even clearer. Congress has given the Executive Branch the resources to detain and deport only about four hundred thousand immigrants per year,[36] which is approximately the entire unauthorized population of Arizona.[37] With such a limited budget, ICE cannot send every immigration agent to Arizona simply because Arizona demands it. Those limited detentions and deportations are supposed to be reserved for the most serious criminals, regardless of whether some contend that the executive branch has failed in the area of immigration enforcement.[38]

Moreover, Congress has never given the Department of Homeland Security the resources to deport all the unauthorized aliens in the country. By conservative estimates, it would cost about $80 billion to deport every unauthorized alien in the United States.[39] That is more

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[33] *See* S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010) (as amended by H.B. 2162, 49th Leg., 2d Reg. Sess. (Ariz. 2010)).

[34] Memorandum from John Morton, Assistant Sec'y of U.S. Immigration & Customs Enforcement, to All ICE Employees (June 30, 2010) (noting that because of ICE's limited resources, "ICE must prioritize the use of its enforcement personnel, detention space, and removal resources" and reserve its "highest immigration enforcement priority" for those aliens "who pose a danger to national security or a risk to public safety"); *see also* Press Release, Dep't of Homeland Sec., Secretary Napolitano Announces New Agreement for State and Local Immigration Enforcement Partnerships & Adds 11 New Agreements (July 10, 2009), *available at* http://www.dhs.gov/ynews/releases/pr_1247246453625.shtm (designating that immigration enforcement should focus on "improving public safety by removing criminal aliens who are a threat to local communities").

[35] Anna Griffin, *Just Whose Job Is It To Enforce Immigration?*, OREGONIAN, Oct. 2, 2010, *available at* 2010 WLNR 19604909.

[36] Jerry Markon, *Calls for His Resignation Just 'Part of the Territory'; John Morton Leads U.S. Immigration and Customs Enforcement*, WASH. POST, July 19, 2010, at A13. ICE has a deportation budget of approximately $2.55 billion. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, FACT SHEET: ICE FISCAL YEAR 2010 ENACTED BUDGET (2009) [hereinafter FACT SHEET]. It costs approximately $6000 to deport an illegal immigrant. Stephanie Czekalinski, *Deported Illegal Immigrants Return Repeatedly*, COLUMBUS DISPATCH, Dec. 27, 2010, at A1.

[37] PEW HISPANIC CTR., UNAUTHORIZED IMMIGRANT POPULATION: NATIONAL AND STATE TRENDS, 2010, at 14 (2011).

[38] *See, e.g.*, Susan Carroll, *Secure Communities: Southeast Texas Leads U.S. in Ousting 'Criminal Aliens[.]' Obama Officials Say Figures Show Their Border Efforts Are Paying off[.] Immigrant: Critics Say Program Too Broad*, HOUS. CHRON., Oct. 7, 2010, at B1.

[39] Brian Bennett, *GOP Senators Inquire into Cost of Mass Deportations[;] Letter to DHS Alleges Patchy Immigration Law Enforcement*, CHI. TRIB., Oct. 31, 2010, at C29.

than thirty times the current budget for immigration enforcement.[40] By enacting S.B. 1070, Arizona has claimed a right to all of these resources—ahead of states like California, New York, and Texas.

Furthermore, immigration law enforcement is one area in which Congress has already created a mechanism for states to cooperate and work with the federal government. Other criminal law issues are often addressed separately by the states and the federal government. For example, drunk driving is a serious and pervasive problem nationwide, but enforcement of drunk driving laws is nonetheless generally left to the states[41] (with the exception of mandating a drinking age through the use of federal highway funds[42]), as is speeding.[43] Enforcement of federal tax laws is an example of an area that is left solely to the federal government.[44]

Immigration, however, is one issue in which there is cooperation between states and the federal government—despite the federal government's plenary immigration power. In fact, cooperation is abundant. "Cooperation" as Arizona desires in S.B. 1070 is undesirable, however, because Congress has *already* created a statutory scheme for such cooperation. Congress enacted Section 287(g) of the Immigration and Nationality Act, which lays out an explicit procedure by which states can enforce immigration laws—subject to the priorities and control of the federal government.[45] What Arizona has done, however, is extend itself far beyond Congress' authorization in Section 287(g). Rather than having Arizona enact its own legislation and attempt to "help" through mechanisms such as S.B. 1070, the federal government would prefer that the state of Arizona use the existing 287(g) procedures and assist the federal government using the mechanism prescribed by Congress.

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[40] ICE has a deportation budget of approximately $2.55 billion. FACT SHEET, *supra* note 36.

[41] *See* ALASKA STAT. § 28.35.030 (2011); ARIZ. REV. STAT. ANN. § 28-1381 (2011); CONN. GEN. STAT. § 14-227a (2011).

[42] 23 U.S.C. § 158 (2006).

[43] *See* ALASKA STAT. §§ 19.10.070, 28.35.410 (2011); ARIZ. REV. STAT. ANN. § 28-701 (2011); CONN. GEN. STAT. § 14-219 (2011).

[44] *See generally* 26 U.S.C. § 6155 (2006)

[45] Immigration and Nationality Act § 287(g), 8 U.S.C. § 1357(g) (2006).

Not all offers of "help" from states are welcomed by the federal government. Consider an example: No one would seriously contend that Arizona could pass a state law criminalizing federal income tax evasion and mandate that Arizona state police check every suspect they stop to see if he or she has filed a federal tax return or owes back taxes and subsequently demand that every IRS agent in the country be sent to Arizona to enforce this law. Although Arizona presumably would benefit from enhanced enforcement of the federal tax code, such a law would clearly be pre-empted. The IRS has limited resources and different priorities than the state of Arizona and must use those resources to respond to tax issues throughout the nation, not just in Arizona. By the same token, Arizona cannot enforce federal immigration law in a manner that dictates how the federal government uses its limited resources to accomplish its goals.

A practical reason also exists for why Arizona should not be permitted to enforce federal immigration law. As previously mentioned, immigration law is extremely complex.[46] Arizona's law was not written by immigration law experts. In fact, Arizona's law criminalizes behavior that Congress has not. For instance, it penalizes persons who do not have certain paperwork when such persons are not even given the specified papers by the federal government.[47] Arizona's law also fails to recognize that it is not an easy matter to determine whether an individual is removable. Every year, the Department of Homeland Security, supposed experts on immigration law, accidentally deports American citizens and removes individuals who have legitimate legal status in the United States.[48] Such mistakes are not rare. As an immigration lawyer, I handled several cases in which American citizens believed they were illegal immigrants and several cases where illegal immigrants falsely believed they were United States citizens. This common confusion is a direct result of the extraordinarily complex and technical code that Congress created. If Arizona officials, who have not

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[46] *See supra* notes 10–11 and accompanying text.

[47] Under Section 2.B of S.B. 1070, a person is presumed to be an unlawful alien if they cannot provide the necessary papers. *See* S.B. 1070, 49th Leg., 2d Reg. Sess. § 2.B (Ariz. 2010) (as amended by H.R. 2162, 49th Leg., 2d Reg. Sess. (Ariz. 2010)). Under federal law, however, certain groups of aliens, like those remaining in the United States for less than thirty days, are not required to register, and therefore would not even have papers. 8 U.S.C. § 1302 (2006); *see also* 8 U.S.C. §§ 1303, 1304 (2006); Renee C. Redman, *National Identification Cards: Powerful Tools for Defining and Identifying Who Belongs in the United States*, 71 ALB. L. REV. 907, 917 (2008) (noting that many citizens do not even have the required papers).

[48] Jacqueline Stevens, *Deporting American Citizens: ICE's Mexican-izing of Mark Lyttle*, HUFFINGTON POST (Aug. 21, 2009, 12:15 PM), http://www.huffingtonpost.com/jacqueline-stevens-phd/deporting-american-citize_b_265187.html.

been trained thoroughly in immigration law begin enforcing the Arizona statute, the results could be disastrous.

As mentioned, states are permitted to help federal officials with immigration enforcement under the direction and control of the Executive Branch through Section 287(g) and through mechanisms like the Secure Communities Program.[49] Through these avenues, states can cooperate with immigration enforcement, but they cannot dictate the federal government's efforts by demanding absolute enforcement and criminalize immigration acts that are not criminal under federal law. S.B. 1070, however, attempts to do just that.

With this in mind, let us turn to the district court's opinion in the federal government's suit against Arizona. The opinion is a conservative and careful decision. The judge applied straightforward principles of pre-emption[50] and carefully found significant conflicts between the federal government's scheme as laid out by Congress and the statutory scheme set forth in S.B. 1070.[51] Furthermore, the Ninth Circuit Court of Appeals is highly likely to rule against Arizona,[52] despite the panel's less-than-liberal make-up; it consists of two conservative judges and one liberal judge.[53] The Ninth Circuit is familiar with the technical complexities of immigration law because it handles the most immigration cases in the country.[54] A reversal is not likely.

In addition to being unconstitutional, S.B. 1070 is also highly inefficient as it does not withstand a basic cost-benefit analysis. Arizonans should be grateful that the federal government has obtained

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[49] The Secure Communities Program "enhances fingerprint-based biometric technology used by local law enforcement agencies during their booking process. This enhanced technology enables fingerprints submitted during the booking process to be checked against FBI criminal history records *and* DHS records, including immigration status, providing valuable information to accurately identify those in custody." But the Secure Communities Program "does not authorize local law enforcement to enforce immigrations laws." U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, SECURE COMMUNITIES: A MODERNIZED APPROACH TO IDENTIFYING AND REMOVING CRIMINAL ALIENS (2010).

[50] United States v. Arizona, 703 F. Supp. 2d 980, 991, 994–96, 998–1002, 1006–08 (D. Ariz. 2010).

[51] *Id.* at 998–99, 1002, 1006.

[52] As this Author predicted, the three-judge panel of the Ninth Circuit Court of Appeals ruled against Arizona on April 11, 2001, in a 3-0 decision in which one judge partially dissented from the majority's reasoning, but concurred in the result. *See* United States v. Arizona, No. 10-16645, 2011 U.S. App. LEXIS 7413, (9th Cir. Apr. 11, 2011) (affirming the district court's preliminary injunction enjoining certain provisions of S.B. 1070).

[53] The panel consists of conservative-bent Judges Carlos Bea and John Noonan and liberal-bent Judge Richard Paez. *See* Maura Dolan, *Immigration Law's Review Panel Named*, L.A. TIMES, Oct. 31, 2010, at A43.

[54] *See* JAMES C. DUFF, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2009 ANNUAL REPORT OF THE DIRECTOR 5–6 (2009).

an injunction to stop its implementation, because the cost to Arizona of enforcing S.B. 1070 may bankrupt the state and result in the use of state resources to go after minor immigration offenders, while native-born violent felons go unpunished. Arizona's S.B. 1070 mandates that state law enforcement officials focus on even minor immigration violations, while no such mandate exists for major crimes committed by U.S. citizens.[55] Ironically, many studies contend that undocumented immigrants commit fewer violent crimes than native-born citizens.[56] Indeed, most of the crimes committed in Arizona are carried out by people who can never be deported because they are United States citizens.

Charging four hundred thousand undocumented immigrants in Arizona with crimes, locking them up in Arizona prisons, providing them with food and medical care while they are in jail, and paying for all the lawsuits that will inevitably result is not cost efficient. Immigrant plaintiffs complaining of similar laws have already won lawsuits against local governments recently, and the attorneys' fee awards against these local governments have been substantial. In *Lozano v. City of Hazleton*, for example, the Third Circuit Court of Appeals held that ordinances regulating the employment and housing of unauthorized aliens were pre-empted by federal law.[57] Because the plaintiffs prevailed, the City faced a potential legal bill of $2.4 million, and the City's insurance carrier had contested payment, arguing that the City must pay these attorneys' fees, not the insurance company.[58]

Furthermore, it is inevitable that Arizona officials will make mistakes and commit unconstitutional racial profiling, which will subject Arizona to a large number of lawsuits. The federal government

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[55] *See* IMMIGRATION POLICY CTR., THE IMPACT OF SB 1070: USURPING THE FEDERAL GOVERNMENT'S ABILITY TO SET ENFORCEMENT PRIORITIES (2010), *available at* http://www.immigrationpolicy.org/just-facts/impact-sb-1070-usurping-federal-government%E2%80%99s-ability-set-enforcement-priorities.

[56] *See, e.g.*, IMMIGRATION POLICY CTR., IMMIGRANTS AND CRIME: ARE THEY CONNECTED? 1–2 (2007), *available at* http://www.immigrationpolicy.org/sites/default/files/docs/Crime%20Fact%20Check%2012-12-07.pdf; Kristin F. Butcher & Anne Morrison Piehl, Why Are Immigrants' Incarceration Rates So Low? Evidence on Selective Immigration, Deterrence, and Deportation 2 (Nov. 2005), *available at* http://www.chicagofed.org/digital_assets/publications/working_papers/2005/wp2005_19.pdf.

[57] 620 F.3d 170, 211 (3d Cir. 2010) (holding that the Illegal Immigration Relief Act Ordinance ("IIRAO") passed by the City of Hazleton, Pennsylvania, HAZLETON, PA., ORDINANCE 2006-18 (2006), which regulated the employment and provision of rental housing to unauthorized aliens, was pre-empted by the federal Immigration Reform and Control Act ("IRCA"), 8 U.S.C. § 1324 (2006), because the IIRAO furthered one of the objectives of IRCA "at the expense of the others").

[58] *See* Terrie Morgan-Besecker, *Legal Bills May Sock Hazleton*, THE TIMES LEADER (May 8, 2009), http://www.timesleader.com/news/Legal_bills_may_sock_Hazleton_05-08-2009.html.

itself has had great difficulty avoiding charges of racial profiling in its own immigration enforcement efforts; a state is not likely to have better success. For instance, several Spanish-speaking American citizens from Denver, Colorado, were arrested by federal authorities on their way to an Amway convention in Omaha, Nebraska, when they stopped at a fast-food restaurant for breakfast.[59] A Spanish-speaking ICE officer heard them speaking in Spanish at the restaurant and concluded that they were engaged in a smuggling operation.[60] The government arrested everyone on the bus and is now being sued for false arrest and false imprisonment.[61] This case provides an example of the difficulty the federal government has had with interior enforcement of immigration laws—and immigration law enforcement will prove to be no easier for Arizona.

Thus the unintended consequences of S.B. 1070—a clogged criminal justice system and various expensive civil lawsuits—could cost Arizona millions of dollars. An additional cost that Arizona may not have considered, however, is the cost of legal counsel, which must be provided to persons prosecuted under S.B. 1070. Under the recent U.S. Supreme Court decision *Padilla v. Kentucky*, every non-citizen arrested under S.B. 1070 will be entitled to receive expert advice as to the immigration consequences of his or her arrest.[62] This requirement will provide employment to hundreds of immigration lawyers—at the expense of the Arizona state government.

Congress has not criminalized the act of being present in the United States unlawfully,[63] because if it did, the federal government would be forced to fund numerous additional Article III judges, prosecutors, and defense lawyers. Turning the ten to twenty million unlawful immigrants in the country[64] into criminals overnight would be extraordinarily

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[59] Press Release, Am. Civil Liberties Union, ACLU Files Legal Claim Against ICE on Behalf of U.S. Citizens Arrested in Unwarranted Immigration Roundup (Nov. 15, 2010), *available at* http://www.aclu.org/immigrants-rights/aclu-files-legal-claim-against-ice-behalf-united-states-citizens-arrested-unwarran.

[60] *Id.*

[61] *Id.* The suit also includes battery as one of its claims. *Id.* Thirty-six of the forty-two passengers on the bus were in the United States illegally. Felisa Cardona, *Two Americans File Claim over Questioning by ICE Agent*, DENVER POST, Nov. 16, 2010, http://www.denverpost.com/news/ci_16623614.

[62] *See* 130 S. Ct. 1473, 1486 (2010) (quoting McMann v. Richardson, 397 U.S. 759, 771 (1970)).

[63] *See, e.g.*, Harisiades v. Shaughnessy, 342 U.S. 580, 594 (1952) ("Deportation, however severe its consequences, has been consistently classified as a civil rather than a criminal procedure.") (citing United States *ex rel.* Bilokumsky v. Tod, 263 U.S. 149, 154 (1923); Bugajewitz v. Adams, 228 U.S. 585, 591 (1913); Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893)).

[64] Michael Matza, *Philadelphia Rally Decries Arizona Immigrant Crackdown*, PHILA. INQUIRER, May 27, 2010, at B7.

expensive. Currently, most immigration cases are handled administratively with limited due process[65]—including the absence of a right to a defense lawyer at government expense in deportation proceedings.[66] This is a far more cost-effective system that allows for a maximum number of deportations. Indeed, the Obama administration is about to set the record for the most deportations in a single year.[67]

S.B. 1070 proponents argue that the bill helps the federal government. It is a more accurate statement to say that it would serve as a ball and chain on the federal government. Under straightforward principles of pre-emption, S.B. 1070 is unlawful. I predict that the Supreme Court will ultimately uphold the injunction against it. This may lead to the only salutary effect of S.B. 1070—forcing Congress to do its job. If one thing is clear from this immigration mess, blame should be laid at the feet of Congress. It has enacted a complex scheme that is unclear (at best) to most people who read it—including lawyers and federal judges. Congress has failed to provide the resources necessary to enforce this complex scheme, which has forced states like Arizona to seek to provide unconstitutional and inefficient "help."

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65 *See* AUSTIN T. FRAGOMEN, JR. & STEVEN C. BELL, IMMIGRATION FUNDAMENTALS: A GUIDE TO LAW AND PRACTICE §§ 1:5.2, 8:1 (4th ed. 2010).

66 Trench v. INS, 783 F.2d 181, 183 (10th Cir. 1986). *But see* 8 U.S.C. § 1362 (2006) ("In any removal proceedings before an immigration judge . . . the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel . . . as he shall choose.").

67 Shankar Vedantam, *DREAM Act Defeat Reveals Failed Strategy*, WASH. POST, Dec. 19, 2010, at A3.

PANEL DISCUSSION AND COMMENTARY†

Mr. Ho: We are going to open up the discussion for questions from the floor.

Audience Question 1: What I want to know from Ms. Stock and Professor Kobach is what other types of state laws would be constitutional, in either of your views, in this area either to encourage entrepreneurs or highly skilled immigrants to jumpstart the economy? Are there other types of enforcement measures available? What can states do, setting aside SB 1070?

Ms. Stock: Well, states do many things already. States do in fact cooperate with federal immigration law enforcement under the provisions of Section 287(g)[1] and under the Secure Communities Program, in which the federal government obtains fingerprints from the state jails of participating states.[2] Some localities have tried to opt out of that program,[3] but the federal government says that the program is not optional: a locality must participate if its state is participating.[4]

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† This commentary session was presented as part of the panel discussion of the Federalist Society's National Lawyers Convention on Civil Rights: Immigration, the Arizona Statute, and *E Pluribus Unum* in Washington, D.C. on November 18, 2010. The panelists discussed issues involving Arizona's controversial immigration law. Panelists included the following: Roger Clegg, President and General Counsel, Center for Equal Opportunity; Kris W. Kobach, Kansas Secretary of State, and Daniel L. Brenner/UMKC Scholar and Professor of Law, University of Missouri-Kansas City School of Law; and Margaret D. Stock, Adjunct Instructor of the Department of Political Science, University of Alaska Anchorage. The panel was moderated by former Solicitor General of Texas James C. Ho, who is partner in the Dallas office of Gibson, Dunn & Crutcher LLP.

1 8 U.S.C. § 1357(g)(1) (2006). Under this section, the states may enter into a written agreement with the Attorney General in which state officers function as a federal immigration officer regarding the "investigation, apprehension, or detention of aliens in the United States" consistent with that state's law. *Id.*

2 *See Secure Communities*, U.S. IMMIGR. AND CUSTOMS ENFORCEMENT, http://www.ice.gov/secure_communities/ (last visited May 21, 2011). The Secure Communities program is a partnership between the Department of Homeland Security ("DHS") and the Department of Justice ("DOJ"). In this program, state localities submit fingerprints of their criminals to the DOJ and checked against the criminal history records of the Federal Bureau Investigation ("FBI"). The DOJ would turn the fingerprints over to be checked against the DHS immigration records. If the DHS finds a match between their records and the fingerprints, Immigration and Customs Enforcement ("ICE") evaluates whether any action is required based on the immigration status of the alien, the severity of the crime, and the criminal history of the alien. *Id.*

3 *E.g.*, Arlington Cnty. Bd., Arlington, Va., *Resolution Promoting Community Safety in Accordance with Constitutional Principles* (Sept. 28, 2010), http://www.arlingtonva.us/departments/CountyBoard/proclamations/page78364.aspx; S.F. Bd. of Supervisors, S.F., Cal., *Resolution Urging the San Francisco Sheriff's Department, the Juvenile Probation Department and the San Francisco Police Department To Opt-Out of*

There is also cooperation between the federal government and the states on a wide variety of issues. Mr. Kobach accuses me of not citing a statute. I would have to cite the whole Immigration and Nationality Act ("INA").[5] In the INA, Congress has laid out a complicated scheme. It has provided different visa categories for unauthorized immigrants to get status if they're crime victims.[6] It has provided for a temporary protected status which the President may grant to whole countries of unauthorized immigrants, along with work permits, allowing them to stay in the United States lawfully because of foreign-policy considerations in their home countries.[7] There are battered spouse provisions where undocumented men and women, who cannot get their U.S. citizen spouses to file paperwork for them, are permitted to get immigrant status here in the United States.[8] Arizona's law would disrupt those provisions.

States are permitted to cooperate heavily with the federal government in the prosecution of cases involving alien smuggling,[9] in certifying people for various crime-victim visas like the S ("Snitch") Visa,[10] the T ("Trafficking") Visa,[11] the U ("Abuse") Visa.[12] The states also

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Participating in the Police Immigration and Customs Enforcement Collaboration Program Known as "Secure Communities," 294 (May 20, 2010) *available at* http://www.sfbos.org/ftp/uploadedfiles/bdsupvrs/bosagendas/materials/bag060810_100650.pdf; Cnty. of Santa Clara Bd. of Supervisors, Santa Clara Cnty., Cal., *Public Safety & Justice Committee-September 1, 2010*, 1–2 (Sept. 28, 2010), *available at* http://uncoverthetruth.org/wp-content/uploads/Santa-Clara-S-Comm.pdf.

[4] *E.g.*, Shankar Vedantam, *No Opt-out for Immigration Enforcement*, WASH. TIMES, Oct. 1, 2010, at B1 ("Participation in the program, called Secure Communities, was widely believed to be voluntary . . . . [b]ut the Immigration and Customs Enforcement agency now says that opting out of the program is not a realistic possibility—and never was."). The National Day Laborer Organizing Network (NDLON), as well as several other organizations, filed suit in New York to compel several government organizations to release documents regarding whether localities may opt-out of participating in the Secure Communities Program, after which a judge ordered the government to release the documents. *Judge Demands Release of Secure Communities Documents, Government Faces Possible Sanctions*, NAT'L DAY LABORER ORGANIZING NETWORK (Dec. 10, 2010), http://www.pitchengine.com/nationaldaylabororganizingnetwork/judge-demands-release-of-secure-communities-documents-government-faces-possible-sanctions/108635/.

[5] *See* Immigration and Nationality Act, 8 U.S.C. §§ 1101–1527 (2006).

[6] *Id.* § 1101(a)(15)(T)(i)(I), (U)(i)(I). Criminal activity includes violent crimes, inchoate offenses, and crimes that interfere with a fair trial. *See id.* § 1101(a)(15)(U)(iii).

[7] *Id.* § 1254a(a)(1), (b)(1).

[8] *Id.* § 1154(a)(1)(A)(iii).

[9] *See id.* § 1357(g)(5).

[10] *Id.* § 1101(a)(15)(S). The S-Visa is available to aliens who provide critical and reliable information to aid in a law enforcement investigation. *Id.*

[11] *Id.* § 1101(a)(15)(T)(i)(I). The T-Visa provides a means for victims of human trafficking to obtain nonimmigrant status. *Id.*

play a role in regulating noncitizens present within their borders.[13] Some states have successfully barred certain noncitizens from becoming members of the bar of their state.[14] Alaska has successfully barred undocumented immigrants from receiving the Alaska Permanent Fund Dividend, the money that is paid out to lawful residents of the state of Alaska every year because of our oil largesse.[15]

So there are a wide variety of roles,[16] and I could probably best refer you to some law review articles that recite them.[17] The main point is, when the states regulate immigration their efforts must complement and not conflict with the federal government.

Secretary Kobach: I would like to refer you to a law review article too. It is my own on that exact question.[18] Basically, I divide the article into eight areas of permissible state activity and give examples of how

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[12] *Id.* § 1101(a)(15)(U)(i)(I). The U-Visa provides a means for victims of other crimes including violent crimes to obtain nonimmigrant status if the victim had resulting substantial physical and mental abuse.

[13] *See id.* § 1357(g)(1).

[14] The Supreme Court has held unconstitutional a Connecticut rule requiring United States citizenship to apply to the state bar. *In re* Griffiths, 413 U.S. 717, 718 (1973). The Fifth Circuit, however, declined to apply the holding in *Griffiths* to nonimmigrant aliens, refusing to overturn a statute that only allowed citizens and permanent residents to sit for the Louisiana bar examination. LeClerc v. Webb, 419 F.3d 405, 410, 419 (5th Cir. 2005). The Supreme Court denied certiorari to the consolidated cases in *LeClerc v. Webb*. LeClerc v. Webb, 419 F.3d 405 (5th Cir. 2005), *cert. denied* 551 U.S. 1158 (2007).

[15] ALASKA STAT. § 43.23.005 (2011); ALASKA ADMIN. CODE tit. 15 § 23.154 (2011); Dept. of Revenue v. Andrade, 23 P.3d 58, 61–62 (Alaska 2001) (upholding the constitutionality of Alaska Statutes 43.23.005).

[16] States also play various roles with regard to many employment-based immigrant and non-immigrant visas. *See, e.g.*, IRA J. KURZBAN, IMMIGRATION LAW SOURCEBOOK 731–32 (12th ed. 2010) (discussing the role that states play in the Conrad 20 International Medical Graduate Program); *see also id.* at 1021–23 (discussing the role that the State Workforce Agencies (SWAs) play in the recruitment process for obtaining a labor certification for a foreign worker).

[17] *E.g.*, Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723, 1730, 1738 (2010) (noting that states are permitted to pass laws that disadvantage illegal immigrants in order to force them out of the state, but those laws must not deny access to public education or involve racial or ethnic discrimination); Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2055–56 (2008) (pointing out that some states pass illegal immigration laws regarding enforcement, employment, housing, and documentation as well as education, welfare, and healthcare, while other states pass laws seeking to protect illegal immigrants against federal law enforcement and to integrate them into society); Kathryne J. Couch, *This Land Is Our Land, a Local Solution to a Local Problem: State Regulation of Immigration Through Business Licensing*, 21 GEO. IMMIGR. L.J. 641, 642 (2007) (describing the actions of a city in Pennsylvania that enacted an ordinance that would revoke business licenses of businesses that hired illegal immigrants).

[18] Kris W. Kobach, *Reinforcing the Rule of Law: What States Can and Should Do To Reduce Illegal Immigration*, 22 GEO. IMMIGR. L.J. 459 (2008).

different states have implemented policies to reduce illegal immigration. I also discuss court decisions that have supported these efforts. The eight areas I identify where states can act constitutionally are as follows:

A. Denying public benefits to illegal aliens;
B. Denying resident tuition rates to illegal aliens;
C. Prohibiting the employment of unauthorized aliens;
D. Enacting state-level crimes that mirror federal immigration crimes [Arizona's law being one that is obviously in contention now];
E. Enacting state-level crimes against identity theft;
F. Providing state and local law enforcement assistance to ICE [Immigration and Customs Enforcement];
G. Presuming illegal aliens to be flight risks for bail purposes;
H. Denying driver licenses to illegal aliens.[19]

States have many options in dealing with illegal immigration in conjunction with the federal government.

Ms. Stock: It is important to know that the states can also provide benefits to immigrants. California just had its provision providing tuition to undocumented immigrants and other residents of the state upheld by its own court.[20]

Secretary Kobach: Certiorari to the Supreme Court is pending.[21]

Ms. Stock: That statute is probably going to withstand review on appeal—states are allowed to do things that benefit immigrants also.[22]

Audience Question 2: I have a question for the panel that has been bothering me ever since this Arizona suit has been filed. The Constitution specifically states that an action filed against the state is within the original jurisdiction of the Supreme Court.[23] How can this case have been litigated in Phoenix in a district court?

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[19] *Id.* at 465.

[20] Martinez v. Regents of the Univ. of Cal., 241 P.3d 855, 860 (Cal. 2010); *see* CAL. EDUC. CODE § 68130.5 (West 2003).

[21] *Martinez*, 241 P.3d 855, *petition for cert. filed*, (Feb. 14, 2011) (No. 10-1029).

[22] *See* 8 U.S.C. § 1621(d) (2006).

[23] U.S. CONST. art. III. § 2, cl. 2 ("In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction.").

Secretary Kobach: I can answer that question; many people are asking that question. The Supreme Court has interpreted that provision in Article III giving the Supreme Court original jurisdiction in cases where a state is a party as non-exclusive, meaning lower federal courts could also have jurisdiction over such cases.[24] Some people were urging the state of Arizona to contest that point and try to reopen that issue,[25] but Arizona decided not to do so.[26]

Ms. Stock: I do not know if Mr. Ho wants to comment on that question. What do you think would happen if they actually had a trial on it before the Supreme Court?

Mr. Ho: A trial? I am not going to comment on what would happen in that case, but thank you.

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[24] In *Ames v. Kansas*, the Supreme Court described its jurisdiction in suits against states as follows:

> With respect to States, it was provided that the jurisdiction of the Supreme Court should be exclusive in all controversies of a civil nature where a State was a party, except between a State and its citizens, and ... between a State and citizens of other States or aliens, in which latter case its jurisdiction should be original but not exclusive. Thus the original jurisdiction of the Supreme Court was made concurrent with any other court to which jurisdiction might be given in suits between a State and citizens of other States or aliens. . . . [T]he practical effect . . . was, therefore, to give the Supreme Court exclusive original jurisdiction in suits against a State begun without its consent, and to allow the State to sue for itself in any tribunal that could entertain its case. In this way States . . . were protected from the compulsory process of any court other than one suited to their high positions, but were left free to seek redress for their own grievances in any court that had the requisite jurisdiction. . . . This, of course, did not prevent a State from allowing itself to be sued in its own courts or elsewhere in any way or to any extent it chose.

Ames v. Kansas, 111 U.S. 449, 465 (1884). The Supreme Court clarified the meaning of its original jurisdiction for cases in which a state is a party as allowing lower courts to have concurrent jurisdiction of these cases. In fact, this idea was codified in the United States Code. 28 U.S.C. § 1251 (2006) ("The Supreme Court shall have original but not exclusive jurisdiction of: . . . All controversies between the United States and a State . . . ."). From the passage in *Ames*, it appears as though the Supreme Court would retain exclusive original jurisdiction if a state is sued without its consent; however, later court decisions have ruled that consent is not required. *E.g.*, United States v. Texas, 143 U.S. 621, 646 (1892) (states gave their consent to be sued by the United States by accepting the Constitution and being admitted as a state); United States v. Louisiana, 339 U.S. 699, 701–02 (1950) (rejecting Louisiana's argument that *United States v. Texas* should be overruled).

[25] *See* Joe Wolverton, II, *Does the District Court Have Jurisdiction in Case Against Arizona?*, NEW AM. (Aug. 2, 2010 3:00 PM), http://www.thenewamerican.com/index.php/usnews/constitution/4199-does-the-district-court-have-jurisdiction-in-case-against-arizona (arguing that the district court does not have jurisdiction to hear the case).

[26] The State of Arizona and Governor Janice K. Brewer's Answer and Counterclaims at 2–3, United States v. Arizona, 703 F. Supp. 2d 980 (D. Ariz. 2010) (No. 2:10-cv-01413-SRB).

Audience Question 3: I have a question primarily for Ms. Stock. With Congress' stated policy under Section 212, it states that the Department of Labor must consider the wages and working conditions of Americans and lawful permanent residents[27] and the regulations that prohibit the hiring of undocumented aliens.[28] Specifically, the Arizona provision and SB 1070 make it a crime to apply for a job while being undocumented.[29] I think it makes the crime a misdemeanor.[30] How does that conflict with the federal law as opposed to complementing it, and also how does that conflict with the current Administration's approach in terms of bypassing a lot of these smaller deportation cases?

I know that in Houston, for instance, ICE attorneys have been going into immigration court and asking aliens, "Do you have any convictions?" If the response is "No," they ask, "How long have you been here?" Depending on the answer, ICE attorneys may not proceed with the removal of the aliens and may turn them loose.[31] How does it conflict with Congress' intent?

Ms. Stock: That particular provision is probably going to be the one that is the most interesting for people to watch. It appears that the argument is a field preemption argument based on the design of the statute,[32] because Congress has passed such an extensive set of rules and regulations regarding who gets to work and who does not.[33] Although it is illegal for most undocumented immigrants to be employed in the United States, there are still some immigrants who are "grandfathered" from prior to 1986.[34] Once undocumented immigrants are employed, they also have some rights to certain protections under federal law, such as against unpaid wages.[35] The federal judge ruled in this case that what

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27 8 U.S.C. §1182(a)(5)(A)(i) (2006).

28 *Id.* § 1324a(a)(1).

29 ARIZ. REV. STAT. ANN. § 13-2928(C) (2011).

30 *Id.* § 13-2928(F).

31 Susan Carroll, *Feds Moving To Dismiss Some Deportation Cases*, HOUS. CHRON., Aug. 25, 2010, at A1; *see also* Julia Preston, *Immigration Agency Ends Some Deportations*, N.Y. TIMES, Aug. 27, 2010, at A14.

32 For an explanation of the different types of preemption, see Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 226–28 (2000).

33 For an example of the complexity of determining visas for employment, see 8 U.S.C. § 1151(d) in conjunction with 8 U.S.C. § 1153(b).

34 8 U.S.C. § 1324a(a)(4) (2006) (also known as the "grandfather provision"); *see also* Maka v. U.S. Immigration & Naturalization Serv., 904 F.2d 1351, 1360 (9th Cir. 1990).

35 Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 891–92 (1984) (concluding that undocumented immigrants come under the definition of "employee" under the National Labor Relations Act); Patel v. Quality Inn S., 846 F.2d 700, 706 (11th Cir. 1988) (holding

Arizona is trying to do goes beyond what is allowed and conflicts with the complex scheme that was enacted by Congress.[36]

I am not quite sure how the 9th Circuit will rule on that issue,[37] but I do think the reasoning under *DeCanas v. Bica*, in terms of the philosophy laid out in the decision, is probably still applicable;[38] however, the actual court decision, since it predates the Immigration Reform and Control Act of 1986 ("IRCA"),[39] is probably suspect.

Secretary Kobach: With this particular preemption argument, the federal government is once again testing a rather novel theory. The Justice Department is arguing that Arizona's lawmaking, in making it a misdemeanor to seek employment unlawfully when one is an unauthorized alien, goes beyond the scheme envisioned by Congress; however, there is no federal law that says this, or anything close to it. In this instance, the Justice Department argument is not that preemption occurs through an executive decision not to enforce the law.[40] Rather, it is saying that preemption occurs through congressional silence.[41] In other words, the Justice Department is claiming that if Congress does not speak in an area, then Congress has preempted state legislation by declining to speak.[42] Now that is a very dangerous notion if you think about it. Preemption requires an unmistakable statement by Congress. If preemption occurs through congressional silence, it becomes an invitation for courts to divine preemption where none exists.

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that "undocumented workers are 'employees' within the meaning of the FLSA and that such workers can bring an action under the act for unpaid wages and liquidated damages").

[36] United States v. Arizona, 703 F. Supp. 2d 980, 992, 994–96 (D. Ariz. 2010).

[37] Following the panel discussion, a three-judge panel of the Ninth Circuit ruled against Arizona on this issue. United States v. Arizona, No. 10-16645, 2011 U.S. App. LEXIS 7413, at *1–4, *71–72 (9th Cir. Apr. 11, 2011). Writing for the majority, Judge Richard Paez wrote that Arizona could not criminalize the act of seeking employment because Congress had made a choice "to exert the vast majority of pressure on the employer side" through its "affirmative protections to unauthorized workers" and a complex scheme of employer sanctions. *Id.* at *47–48.

[38] The Supreme Court began its discussion by stating that "[p]ower to regulate immigration is unquestionably exclusively a federal power." DeCanas v. Bica, 424 U.S. 351, 354 (1976). However, the Court noted that it had never ruled a state statute preempted merely because it dealt with immigrants. *Id.* at 355. The Court determined that in the absence of federal legislation, California's statute forbidding state employers from hiring illegal aliens would not be preempted. *Id.* at 355–56.

[39] The Immigration Reform and Control Act was passed on November 6, 1986, ten years after the Supreme Court decided *DeCanas v. Bica*. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986).

[40] Plaintiff's Motion for a Preliminary Injunction and Memorandum of Law in Support Thereof at 42–43, United States v. Arizona, 703 F. Supp. 2d 980 (D. Ariz. 2010) (No. 2:10-cv-1413-NVW).

[41] *Id.*

[42] *See id.* at 44.

It is a bizarre dormant preemption concept whereby Congress somehow preempts the states without acting. What Congress did in 1986 through the enactment of IRCA was to make it a crime under certain circumstances to knowingly hire or employ unauthorized aliens.[43] Congress did not go into the subject of whether the alien has committed a criminal offense by knowingly seeking unlawful employment.[44] Congressional silence, however, in no way constitutes preemption.

I also do not think that field preemption[45] applies here because IRCA expressly stated that there are certain places on the field where states are still allowed to operate. The most notable example is the one that was at issue in the Legal Arizona Workers Act case that is now before the Supreme Court.[46] The question is whether a state may take away business licenses from companies that are knowingly employing unauthorized aliens.[47]

The Legal Arizona Workers Act,[48] which I also assisted in the drafting of, is based on the exception that was carved out by Congress in 8 U.S.C. 1324a(h)(2). That subsection of federal law says that states can take away business licenses from employers that hire illegal aliens.[49] Since Congress has allowed for the states to be on the field, it is quite difficult for a field preemption argument to work because you are saying that they are simultaneously allowed on the field but pushed off the field too.

Ms. Stock: No, it is because Congress put the exception in the statute for that, and it did not put an exception in for the other issues.

Audience Question 4: My question is for Kris Kobach. What can we do to educate the public to the effect that there is a war going on in the southwestern part of our country and that we are being invaded?

The second part of the question is, what can we do to counteract the fact that the President of the United States and his predecessor, in spite of their window-dressing in deporting a few people, really are not

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[43] 8 U.S.C. § 1324a(a)(1) (2006).

[44] Working without employment authorization can, however, be a violation of an alien's immigration status, rendering the alien removable.

[45] *See* Nelson *supra* note 32.

[46] Chicanos Por La Causa, Inc. v. Napolitano, 558 F.3d 856 (9th Cir. 2009), *cert. granted sub nom.* Chamber of Commerce of the United States v. Candelaria, 130 S. Ct. 3498 (2010).

[47] *Napolitano*, 558 F.3d at 860–61.

[48] ARIZ. REV. STAT. ANN. §§ 23-211 to -216.

[49] 8 U.S.C. § 1324a(h)(2) (2006).

interested in enforcing the law and in effect are actually aiding and abetting the criminals who are invading our country?[50]

Secretary Kobach: It is an interesting point. There literally is a war going on in Mexico. The Mexican federal government is having real difficulty asserting authority over portions of its own territory; the drug cartels have successfully prevented the Mexican Army from asserting control in these areas.[51] I do not need to go into the statistics concerning the number of fatalities because I am sure you have heard them. I think most Americans who regularly follow the news have heard what is going on. It is extraordinary, though. And the mayhem and death that is happening south of the border frequently spills across the border into the border cities and border counties of the United States.[52]

So, I think the public is certainly aware of it. The question is, will the Executive Branch, and to a lesser extent Congress, become sufficiently concerned about it that they will try to do something meaningful? And will they recognize the importance of state and local law enforcement in dealing with this violence near the border?

As I explained earlier, ICE agents do not normally go on patrols looking for illegal aliens. They do not drive around looking for violations in the way that a police officer on the beat cruises through a violent neighborhood looking for lawbreakers. Consequently, if you are a smuggler and you are bringing in your human cargo, once you get past the 100-mile zone where the Border Patrol operates, you are likely to be free and clear.[53] You will likely never run into a federal law enforcement officer. The only law enforcement officer that you are likely to come into contact with is a state or local law enforcement officer. In most regions of the country, the federal government is like a baseball team that has pulled the outfield and is just playing with an infield. All the alien

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[50] *See Sen. Graham Says President Obama's Proclaimed 'Unwavering' Commitment to Immigration Reform 'Doesn't Pass the Smell Test,'* ABC NEWS (Mar. 15, 2010 10:32 AM), http://blogs.abcnews.com/politicalpunch/2010/03/sen-graham-says-president-obamas-proclaimed-unwavering-commitment-to-immigration-reform-doesnt-pass-.html (reporting Senator Graham's views that President Obama is not doing enough in immigration reform).

[51] Marc Lacey, *With Deadly Persistence, Mexican Drug Cartels Get Their Way*, N.Y. TIMES, Mar. 1, 2009, at A1.

[52] For example, a Mexican drug cartel threatened to kill local police officers in an Arizona border city if the officers interfered with drug trafficking while off duty. Joshua Rhett Miller, *Mexican Drug Cartel Warns Police Officers in Arizona Border Town To 'Look the Other Way,'* FOXNEWS.COM (June 22, 2010) http://www.foxnews.com/us/2010/06/22/mexican-cartel-threatens-target-officers-arizona-border-town/.

[53] *See* Colin Woodard, *Far from Border, U.S. Detains Foreign Students*, THE CHRON. OF HIGHER EDUC. (Jan. 9, 2011), http://chronicle.com/article/Far-From-Canada-Aggressive/125880/; *see also* Nina Bernstein, *Border Sweeps in North Reach Miles into U.S.*, N.Y. TIMES, Aug. 30, 2010, at A1.

smugglers have to do is hit the ball beyond the infield to score a homerun. They are unlikely to get caught by federal authorities in the interior of the country, unless they become the target of a particular investigation. That is why it is so crucial for state and local police to fill the gap.

Ms. Stock: That simply is not true, Mr. Kobach, and I give the Amway example. That incident was in the middle of Nebraska, and it was an ICE agent who was at McDonald's and called in the troops. They came in, right in the middle of Nebraska, and grabbed everybody on the bus.[54]

Secretary Kobach: It was a very unusual case, because it involved a chance intersection of the ICE agent and the bus at a McDonalds. It illustrates my point; the ICE agent was not out there patrolling for illegal aliens.

Ms. Stock: I have been in southern Vermont and passed through checkpoints in southern Vermont on the interstate highway.[55]

Secretary Kobach: If you get more than a hundred miles from border, you will not find many Border Patrol agents.

Ms. Stock: Well, a hundred miles is pretty far inside the country.

Secretary Kobach: As to the question of how we inform the public, I believe in some respects the public is already well informed on this issue generally. There has been so much media coverage of it in recent years. You saw this during the 2007 and 2008 debates on the DREAM Act[56] and on the other amnesty proposals.

Because of the Internet, certain cable news programs, and talk radio, there is a great amount of information out there. I was amazed at how informed the public was during those recent debates; in many instances members of the public were better informed than their

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[54] *ACLU Files Legal Claim Against ICE on Behalf of United States Citizens Arrested in Unwarranted Immigration Roundup*, ACLU (Nov. 15 2010), http://www.aclu.org/immigrants-rights/aclu-files-legal-claim-against-ice-behalf-united-states-citizens-arrested-unwarran.

[55] *See Border Patrol Stops*, ACLUVT.ORG, http://www.acluvt.org/issues/border_patrol_stops.php (last visited Mar. 31, 2011).

[56] WHITE HOUSE, THE DREAM ACT: GOOD FOR OUR ECONOMY, GOOD FOR OUR SECURITY, GOOD FOR OUR NATION, *available at* http://www.whitehouse.gov/sites/default/files/DREAM-Act-WhiteHouse-FactSheet.pdf; *see* Ernest Istook, *States in Rebellion*, WASH. TIMES, Oct. 21, 2007, at B1.

respective members of Congress. One would hear members of Congress talking about the issue in media interviews, and it was clear that they were unaware of exactly what certain provisions of the bill contained. So, I think public information is actually unusually high on the subject of illegal immigration, compared to congressional information.

Ms. Stock: I think we put out some misinformation tonight, which is that there is no enforcement going on. In fact, the Obama administration is breaking records on the number of deportations.[57] They have deported more people this past year than ever in United States history.

Secretary Kobach: Although these were cases which were initiated before the Obama administration came into office.[58]

Ms. Stock: They are deporting more. Even as we speak, they're going to break 400,000 this year in terms of deportations.

Secretary Kobach: You said that they're breaking records. In the Houston sector and, as the one questioner just mentioned, North Dakota, the administration is now having ICE attorneys drop removal cases by the thousands.

Ms. Stock: Cases are being dropped against minor violators, so they can put their resources on more serious violators.

Secretary Kobach: You just told us they were breaking numerical records for deportations.

Ms. Stock: Yes, they are.

Secretary Kobach: In certain districts, the political leadership of ICE has ordered ICE attorneys to drop thousands of cases midway through the removal proceeding.

Ms. Stock: Right, because Congress has only given them the resources to detain and deport 400,000 people throughout the whole country.[59]

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[57] Shankar Vedantam, *U.S. Deportations Reach Record High*, WASH. POST, Oct. 7, 2010, at A10.

[58] *Statement from FAIR in Response to Sec. Napolitano's 'State of America's Homeland Security'*, PR NEWSWIRE (Jan. 27, 2011), http://www.prnewswire.com/news-releases/statement-from-fair-in-response-to-sec-napolitanos-state-of-americas-homeland-security-114751474.html.

Secretary Kobach: So how are we to believe that the Obama Administration truly wishes to deport a record number of aliens, when the Administration is simultaneously dropping thousands of cases that were already pending?

Ms. Stock: And they're trying to deport the murderers, the rapists, the drug dealers, the bank robbers.[60]

Mr. Ho: Unfortunately, we are out of time, and unlike in a game of football, we don't have overtime today. This clearly is an emotional issue. Please join me again in thanking the panel. This was a wonderful debate, a real testament to the Federalist Society. Thank you.

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59 Peter Slevin, *Record Numbers Being Deported*, WASH. POST, July 26, 2010, at A1.

60 *Id.*

REED V. UAW: AN ADVERSE RULING ON ADVERSE ACTION

Nathan J. McGrath[*]

INTRODUCTION

The United States of America is a country that is famously known for, among other laudable virtues, its commitment to the religious freedom of its citizens.[1] It is the dedication to this commitment that was partly the inspiration for Sections 701(j) and 703 of Title VII of the Civil Rights Act of 1964.[2] These provisions, which are at the center of this Article, contain language that protects an individual's ability to practice his religion without fear of discrimination by an employer[3] or labor union.[4] The law also ensures that an individual will not face reduction in pay, firing, or other discriminatory actions simply because he is dedicated to following the dictates of his religion.[5] The United States Court of Appeals for the Sixth Circuit's decision in *Reed v. International Union, UAW*[6] sets dangerous precedent, which—if not abandoned by the Sixth Circuit and other circuits that similarly interpret Section 703—will allow labor unions to target employees of faith, without fidelity to Title VII.

Part I of this Article describes the background and facts of *Reed*. Part II explains that the Sixth Circuit applied the incorrect standard for determining whether Reed had established a prima facie case of discrimination due to lack of religious accommodation. Section II.A describes the split among the U.S. Courts of Appeals and explains why the standard for a prima facie case used by half of the circuit courts is incorrect. Section II.B defines two canons of statutory interpretation that the Sixth Circuit should have applied when it decided the standard for the third element of the prima facie case. Finally, Part III concludes the Article with a recommendation that the Supreme Court resolve the

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[1] The Founders of the United States ensured that religious freedom would be a key characteristic of the American government by adopting the First Amendment to the U.S. Constitution: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.

[2] 42 U.S.C. §§ 2000e(j), 2000e-2 (2006).

[3] *See id.* § 2000e-2(a).

[4] *See id.* § 2000e-2(c).

[5] *See id.* §§ 2000e-2(a), (c).

[6] 569 F.3d 576 (6th Cir. 2009).

circuit split over the proper interpretation of Title VII Section 703(c) to include all discriminatory actions by a union against an employee that are not narrowly limited to situations in which an employee has been "discharged" and "disciplined."

I. BACKGROUND OF *REED V. UAW*

Jeffrey Reed, the appellant in *Reed v. UAW*, was hired by AM General and became a member of the United Auto Workers Union ("UAW") shortly thereafter.[7] The collective bargaining agreement between the UAW and AM General required non-management employees to become members of the labor union or, in the alternative, they were required to pay an agency fee to the union, equal to union membership dues.[8] The UAW Constitution granted both UAW members and non-members the right to object to paying the UAW the portion of dues used by the UAW for political purposes.[9]

After reading UAW materials, Reed determined that financially supporting the UAW would conflict with his religious beliefs, and as a result, he terminated his membership.[10] Upon receiving notification of Reed's membership termination, the UAW informed Reed that he was an "objecting member" and was only required to pay an agency fee equal to the amount used for representation purposes, and not UAW's political activities.[11] In effect, Reed's objection was treated as a political objection.[12]

UAW and AM General had entered into an agreement to allow bona fide religious objectors to pay an amount equal to the payment of *full union dues* to one of three charities chosen by UAW and AM General."[13] When Reed learned of his opportunity to request a religious accommodation, he filed the necessary form with the UAW.[14] The UAW granted Reed's request to be treated as a religious objector once it received from Reed's pastor confirmation of his sincere religious beliefs.[15]

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7 *Id.* at 578.

8 *Id.* at 577–78.

9 *Id.* at 578.

10 *Id.*

11 *Id.*

12 In *Communications Workers of America v. Beck*, the Supreme Court held that objecting employees (like Reed) would be obligated to pay union fees only for collective bargaining costs and not for union politics. *See* 487 U.S. 735, 762–63 (1988). This reduced fee paid by *Beck* objectors is sometimes referred to as the *Beck* amount. *See* 48 AM. JUR. 2D *Labor and Labor Relations* § 831 (2005); *see also Reed*, 569 F.3d at 587 (McKeague, J., dissenting). This Article uses the terms "*Beck* objector" and "political objector" interchangeably.

13 *Reed*, 569 F.3d at 578.

14 *See id.*

15 *Id.*

After the UAW received confirmation of said beliefs, the union directed Reed to pay $439.44 to one of the three charities chosen by UAW and AM General.[16] This resulted in Reed being required to pay approximately $100 more in fees as a religious objector than he had previously paid as a political objector.[17] Thus each month thereafter, Reed was required to pay a premium greater than the amount that he had been paying as a political objector.[18] Meanwhile, the *Beck* amount[19] Reed was previously paying as a political objector was available to any other employee in the bargaining unit.[20] Because the UAW allowed its voluntary members to object to paying the portion of its dues devoted to politics, all employees in the bargaining unit, union members and non-members alike, were allowed to pay compulsory union fees in an amount substantially less than that required of Reed (or other religious objectors).[21]

Reed initially filed his complaint against the UAW with the Equal Employment Opportunity Commission ("EEOC"), alleging that the union had "refused to make a non-discriminatory reasonable accommodation to his sincerely held religious beliefs."[22] After an investigation, the EEOC concluded in its Determination Letter that "there [was] reasonable cause to believe that a violation of Title VII [had] occurred."[23]

Reed then filed suit against the UAW, alleging that the labor union had "failed reasonably to accommodate his religious objections to supporting the union."[24] Reed's claim alleged that the UAW had unreasonably failed to accommodate him because non-religious objectors paid an amount equivalent to seventy-eight percent of union dues,[25] while Reed as a religious objector was forced to pay an amount to charity that was equal to full union dues, including the percentage equivalent to the labor union's political expenses—an amount Reed would not have paid if he had been a non-religious objector or an objecting union member.[26]

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16 *Id.*

17 *Id.*

18 *Id.*

19 *See supra* note 12.

20 *Reed*, 569 F.3d at 578.

21 *Id.* ("Reed's ongoing union security obligation requires him to make a monthly charity payment approximately *22% greater than what he would pay UAW as an objecting member or non-member.*") (emphasis added).

22 Reed v. Int'l Union, UAW, 523 F. Supp. 2d 592, 595 (E.D. Mich. 2007).

23 *Id.* (quoting Brief for Plaintiff at 5, *Reed*, 523 F. Supp. 2d 592 (No. 06–14233)).

24 *Reed*, 569 F.3d at 578.

25 *Id.* at 578, 580; *see also* Brief of Appellant at 5–6, *Reed*, 569 F.3d 576 (No. 07-2505).

26 Brief of Appellant, *supra* note 25, at 6.

The district court held that "(1) Reed had failed to establish his prima facie case because he had not shown that he had been discharged or disciplined; and (2) even if Reed had established a prima facie case, UAW's accommodation of Reed's religious objection was reasonable."[27]

Reed appealed the district court's decision to grant summary judgment in favor of the UAW to the United States Court of Appeals for the Sixth Circuit.[28] In a split decision, the Sixth Circuit affirmed the ruling of the lower court on the ground that Reed failed to establish a prima facie case of religious discrimination.[29]

II. THE SIXTH CIRCUIT INCORRECTLY DECIDED THAT NO PRIMA FACIE CASE WAS ESTABLISHED AGAINST THE UAW

The Sixth Circuit applied the incorrect standard when determining whether Reed had established a prima facie case of discrimination due to lack of religious accommodation against the UAW. First, the court incorrectly applied the elements for a prima facie case in a discrimination action between an *employer* and an employee based on Section 703(a), instead of the correct elements as articulated by Section 703(c) in a dispute between a *union* and an employee; the majority erred by treating dissimilar language in the two provisions as having similar legal effect. Second, the majority failed to apply sound theories of statutory interpretation and failed to give weight to Congress' specific language in treating employer and union cases differently.

A. Misapplied Prima Facie Elements Led to a Split in the Circuits and an Incorrect Application of Law

1. The Opposing Standards That Split the Circuits in Their Determination of Whether an Employee Has Established a Prima Facie Case

The United States Courts of Appeals have acquired a nearly equal split among themselves as to the required standard for an employee to establish a prima facie case for unreasonable accommodation of the employee's religious beliefs under Title VII.[30] As a result, there is an inconsistency among the circuits that the Supreme Court has yet to resolve. The specific question, treated differently by the circuits, is how an employee may establish a prima facie case and thus acquire standing to pursue a religious accommodation claim.[31]

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[27] *Reed*, 569 F.3d at 578.

[28] *Id.*

[29] *Id.* at 577, 582.

[30] *See infra* notes 32–34 and accompanying text.

[31] *Reed*, 569 F.3d at 585 (McKeague, J., dissenting) ("This case is the first in our circuit to squarely present the question of whether a plaintiff can satisfy the prima facie

Half of the circuit courts, in one form or another, have held that a prima facie case is proven only when an employee shows that (1) he has a bona fide religious belief that conflicts with an employment requirement, (2) he has given notice to the labor union or employer of the belief so that it can attempt to accommodate it, and (3) the employee, due to his religious belief, was either "disciplined" or "discharged."[32] For the purpose of this Article, this standard is referred to as "Standard One." The significance of this standard will become clear later in this Article, but it is important to note at the outset that the third element of the above-articulated prima facie case is derived from the language of Section 703(a), which is the section specifically addressed to employer obligations—not union obligations.[33]

The second standard, or "Standard Two," from rulings of the circuits, articulates a lower and arguably more accurate standard for an employee establishing a prima facie case of religious discrimination: (1) a bona fide religious belief, (2) notice to the union or employer of that belief so that it can attempt to accommodate the employee, and (3) an adverse employment action suffered by the employee based upon the employee's religious belief.[34] This standard differs from the previously

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case for a religious accommodation claim by showing an adverse employment action without showing discharge or discipline.").

[32] *Id.* at 580 (majority opinion) (requiring an employee be either "discharged" or "disciplined" in the Sixth Circuit). In both the Third and Fourth Circuits, the term "disciplined" was referred to as the adverse action element when the employees were fired. *See* EEOC v. Firestone Fibers & Textiles Co., 515 F.3d 307, 311–12 (4th Cir. 2008); Shelton v. Univ. of Med. & Dentistry of N.J., 223 F.3d 220, 224 (3d Cir. 2000).

The Fifth Circuit has used both "discharged" and "disciplined" to describe the adverse action element in the prima facie standard. *See* Weber v. Roadway Express, Inc., 199 F.3d 270, 273 (5th Cir. 2000) (requiring an employee be "discharged"); *see also* Turpen v. Mo.-Kan.-Tex. R.R., 736 F.2d 1022, 1026 (5th Cir. 1984) (requiring an employee be "disciplined" as part of establishing a prima facie case).

The Tenth Circuit has used the terminology of "fired" and "not hired" to describe the adverse action standard. *See* Thomas v. Nat'l Ass'n of Letter Carriers, 225 F.3d 1149, 1155 (10th Cir. 2000); Toledo v. Nobel-Sysco, Inc., 892 F.2d 1481, 1486 (10th Cir. 1989).

Finally, the Eleventh Circuit has used the term "discharged" as the standard by which adverse action was shown. *See* Morrissette-Brown v. Mobile Infirmary Med. Ctr., 506 F.3d 1317, 1321 (11th Cir. 2007); Beadle v. Hillsborough Cnty Sherriff's Dep't., 29 F.3d 589, 592 n.5 (11th Cir. 1994). Despite these rulings, it is yet to be seen in the Eleventh Circuit if anything less than being "discharged" would qualify as meeting the standard for adverse action.

[33] See 42 U.S.C. § 2000e-2(a), which is entitled "*Employer* practices" (emphasis added).

[34] *See* Berry v. Dep't of Soc. Servs., 447 F.3d 642, 655 (9th Cir. 2006); Peterson v. Hewlett-Packard, Co., 358 F.3d 599, 606 (9th Cir. 2004); Cruzan v. Special Sch. Dist., No. 1, 294 F.3d 981, 983 (8th Cir. 2002) (the third element of the prima facie standard only requires an "adverse employment action"); EEOC v. Unión Independiente de la Autoridad de Acueductos y Alcantarillados de Puerto Rico, 279 F.3d 49, 55 (1st Cir. 2002); Knight v. Conn. Dep't. of Pub. Health, 275 F.3d 156, 167–68 (2d Cir. 2001) (holding that even though

described Standard One because the third element of Standard Two is more inclusive, not specifically requiring discharge or discipline.

2. It Is Improper to Require Discharge or Discipline as the Third Element of a Prima Facie Case Against a Labor Union

When the courts force an employee to show that a labor union discharged or disciplined the employee to establish a prima facie case of religious discrimination, the result is a narrowing effect that limits the scope of protection afforded by Title VII. A closer review of the statutory language, particularly that of Section 703(c), reveals that "discharge" and "discipline," the actions that an employee must show to satisfy the third element of Standard One (at least according to the courts that subscribe to this standard),[35] are not exclusive grounds for an employee to sue a labor union for an adverse employment action.[36] Unlike in Section 703(a), where the term "discharge" appears in the list of unlawful employment practices for *employers*,[37] in Section 703(c), the term "discipline" does not appear in the list of unlawful employment practices for *unions*.[38]

Contrary to the Sixth Circuit's misguided standard, Section 703(c) simply provides that labor unions may not "otherwise . . . discriminate against" an employee based upon the employee's religious beliefs.[39] By applying a Standard One analysis, courts like the Sixth Circuit in *Reed* have injected requirements that simply do not exist into the language of Title VII's union provision, forcing employees to undertake an added litigation burden beyond that legislated by Congress. The Sixth Circuit's application of Standard One to a union discrimination case only allows the showing of a prima facie case when the employee shows evidence of "discharge" or "discipline,"[40] thus narrowing the protection afforded to the employee by the broad language Congress penned when it authored Section 703(c).

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the employee had only been issued a letter of reprimand and told to stop promoting her religious beliefs, the defect was the employee's failure to notify the employer of said beliefs, not the lack of the third prima facie element); EEOC v. Ilona of Hungary, Inc., 108 F.3d 1569, 1575 (7th Cir. 1997) (stating the standard as "discharge or other discriminatory treatment"); EEOC v. United Parcel Serv., 94 F.3d 314, 318 n.3 (7th Cir. 1996); Philbrook v. Ansonia Bd. of Educ., 757 F.2d 476, 481–82 (2d Cir. 1985), *aff'd & remanded on other grounds*, 479 U.S. 60, 66 (1986) (the employee's being forced to choose between giving up portions of pay and his religious beliefs was adequate to meet the third prima facie element); Brown v. F.L. Roberts & Co., 419 F. Supp. 2d 7, 12 (D. Mass. 2006).

35 *See* discussion *supra* Section II.A.1.

36 *See* 42 U.S.C. § 2000e-2(c) (2006) (lacking the terms "discharge" and "discipline").

37 *Id.* § 2000e-2(a).

38 *Id.* § 2000e-2(c).

39 *Id.* § 2000e-2(c)(1).

40 Reed v. Int'l Union, UAW, 569 F.3d 576, 582 (6th Cir. 2009).

Judge McKeague, who dissented from the majority and concurring opinions in *Reed*, made the keen observation that the phrase "otherwise discriminate against" included in Title VII's union provision "is similar to that in Title VII's retaliation provision, which the Supreme Court held [in *Burlington Northern & Santa Fe Railway Company v. White*] is more expansive than the language in the provision [under Section 703(a)] giving rise to disparate treatment claims."[41] By ignoring the *Burlington* approach, the Sixth Circuit majority failed to apply Title VII's language to labor unions properly.

In *Burlington*, the Supreme Court examined and compared the statutory language of the Title VII anti-retaliation and anti-discrimination provisions for employers.[42] First, the Supreme Court defined the term "discriminate against" as "refer[ring] to distinctions or differences in treatment that injure protected individuals."[43] That definition alone supports the argument that the Sixth Circuit was incorrect in specifically requiring proof of "discharge" or "discipline" when Section 703(c) provides that an unlawful employment practice happens whenever an employee is "discriminate[d] against."[44] If the Sixth Circuit had adhered to the plain meaning of the statute and applied the Supreme Court's established definition of "discriminate[d] against," the court would have found that Reed was in fact discriminated against because as a religious objector, he was required to pay twenty-two percent more in monthly dues than a non-religious objector.[45]

Secondly, the Supreme Court decided in *Burlington* that the employer provision in that case unlawfully confined discrimination to an enumerated list of actions by way of the limiting language found in the provision.[46] The Court determined that the language "discriminate against" in Title VII's anti-retaliation provision was broad language without words of limitation.[47] Section 703(c), Title VII's union provision, states it is an unlawful employment practice for a union to "exclude or . . . expel from its membership, or *otherwise to discriminate against*, any individual because of his . . . religion,"[48] and is similar in both language and scope to the anti-retaliation language that the Supreme Court has deemed to be without limiting language.[49]

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41 *Id.* at 586 (McKeague, J., dissenting) (citing *Burlington*, 548 U.S. 53, 63–64 (2006)).

42 *Burlington*, 548 U.S. at 56–57.

43 *Id.* at 59.

44 42 U.S.C. § 2000e-2(c) (2006).

45 *See Reed*, 569 F.3d at 578.

46 *Burlington*, 548 U.S. at 61–62, 67.

47 *Id.* at 67.

48 § 2000e-2(c)(1) (emphasis added).

49 *Burlington*, 548 U.S. at 57.

Proper construction of Section 703(c) would take into account the Supreme Court's analysis of Title VII's anti-retaliation language in *Burlington* and apply its interpretation to the language of Section 703(c) in an effort to find consistency in similarly constructed statutory language. As such, the language of the union provision, which defines an unlawful employment practice, should be interpreted by the courts not as requiring discharge or discipline, but as protecting against a wide array of discriminatory actions by unions.

The Sixth Circuit should have applied Standard Two, the broader standard, for determining whether the facts of Reed's case rose to the level of meeting all three elements of the standard to establish a prima facie case for religious discrimination. The Sixth Circuit should not have limited its determination of Reed's prima facie case to whether Reed had been discharged or disciplined; other discriminatory actions by the UAW should have been considered.

As a final consideration, to maintain consistency in the law and to align with the Supreme Court's interpretation of similar statutory language, the Sixth Circuit and all other circuits that similarly interpret Section 703(c) should refrain from applying the prima facie elements meant for cases arising from alleged employer discrimination under Section 703(a)(1), and apply Section 703(c)(1) as it was intended—a purposefully broad mechanism to protect employees against discriminating labor unions.

B. Canons of Statutory Interpretation Indicate That the Language of the Employer and Union Provisions Should Not Have the Same Legal Effect

The Sixth Circuit used Standard One when it determined that Reed had not proven a prima facie case of unlawful employment practice against the UAW.[50] This standard is tolerable when applied in suits against employers, but as previously discussed, it is the incorrect standard to apply when establishing a prima facie case against a labor union.[51]

The *Reed* majority admitted that "the prima facie elements of a religious accommodation case do not always fit nicely into a case against a labor union."[52] In light of the court's admission, it is curious that the court would require Reed to show discrimination in the form of discharge or discipline when labor unions do not have the power to take those actions against an employee. Discharge and discipline are in fact employment actions reserved for an employer—not a labor union.[53]

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50 *See* discussion *supra* Part II.

51 *See* discussion *supra* Part II.

52 Reed v. Int'l Union, UAW, 569 F.3d 576, 580 (6th Cir. 2009).

53 *Id.*

The disturbing consequence of this simple fact is likely obvious, but the extreme importance of its understanding requires its mention, even if it is obvious. Logically, if a union can neither "discharge" nor "discipline" an employee in relation to his employment, then unions can flat out discriminate either by not offering accommodation, or by offering an unreasonable religious accommodation. Labor unions need not fear the consequences of their actions or inaction because an employee would not be able to establish a prima facie case against the union due to the labor union's inherent inability to discharge or discipline employees—which are indeed the only actions that can satisfy the third element of Standard One and bring about adequate proof of a prima facie case for an employee such as Reed, according to the Sixth Circuit.[54]

With that understanding, the position that there must be either an employment-related "discipline" or "discharge" can mean only one of two things: (1) the Sixth Circuit is correct, and an employee only establishes a prima facie case when a union "disciplines" or "discharges" the employee, and therefore, Congress *accidentally* drafted the union provision of Title VII to read more broadly than Section 703(a), the employer provision; or (2) the Sixth Circuit incorrectly interpreted the union provision by interpreting it too narrowly and the intent of the language was to offer greater breadth than that of Section 703(a).

The first scenario appears unlikely. The assumption of Congressional accident flies in the face of a fundamental canon of statutory interpretation: "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[55]

Applying this canon of statutory interpretation would have been of great help to the Sixth Circuit in *Reed*. The court's willingness to apply prima facie elements based upon the employer-employee statutory language of Section 703(a) is a mistake. The language used by Congress in the union provision of Section 703(c) clearly diverges from the language in the Section 703(a) employer provision.[56] Such divergence in statutory language is significant and should have signaled to the court that Congress intended a different legal meaning by the use of unique language.

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[54] *Id.* ("To establish a prima facie case, [a plaintiff] must show that . . . 'he was discharged or disciplined for failing to comply with the conflicting employment requirement.'" (alteration in original) (quoting Tepper v, Potter, 505 F.3d 508, 514 (6th Cir. 2007))).

[55] Russello v. United States, 464 U.S. 16, 23 (1983) (alteration in original) (quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972)).

[56] *Compare* 42 U.S.C. § 2000e-2(a) (2006), *with id.* § 2000e-2(c).

It is therefore odd that the *Reed* majority was so quick to apply the prima facie elements used in employer-employee situations to a union-employee situation. Given the aforementioned canon of statutory construction, it is reasonable to assume that Congress chose not to use duplicate language in the separate, yet related, union provisions because Congress did not intend the employee to overcome the same threshold of proof for a prima facie case in an employer-employee controversy as in a union-employee controversy. Thus, the employer provision, which has narrowing language, is in fact just that: a narrower provision than the union provision, which affords greater protection to an employee confronted by a discriminating labor union.[57] Put another way, the phrase in the union provision that a union is not to "otherwise . . . discriminate against" an employee based upon religion, among other things, is devoid of any limiting language,[58] unlike the employer provision.[59]

Another canon of statutory interpretation holds that one is to assume that Congress' intention was to say exactly what was written in the legislation it passed.[60] In other words, it is presumed that Congress drafts statutory language competently; Congress knows what terms of art to use and how to articulate its intended meaning.[61] While this is not always foolproof reliance, generally speaking, one should expect that Congress intends a statute to mean what it states.[62]

Furthermore, the Supreme Court has reasoned that it is the Court's "duty to refrain from reading a phrase into the statute when Congress has left it out."[63] Based upon that understanding, the plain language of Section 703(c), the union provision is broad and encompasses any discriminatory action taken by the union against an employee on the basis of the employee's religion.[64] Section 703(c), unlike Section 703(a), does not articulate that "discipline" or "discharge" need be present,[65] and per the Supreme Court's acknowledgement of controlled interpretation,[66]

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57 *Id.* § 2000e-2(a), (c).

58 *Id.* § 2000e-2(c).

59 *Id.* § 2000e-2(a).

60 *See* YULE KIM, CONG. RESEARCH SERV., NO. 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES & RECENT TRENDS 15 (2008), *available at* http://www.fas.org/sgp/crs/misc/97-589.pdf.

61 *Id.*

62 *Id.*

63 Keene Corp. v. United States, 508 U.S. 200, 208 (1993).

64 *See* § 2000e-2(c).

65 *Compare* § 2000e-2(c), *with id.* § 2000e-2(a).

66 *See Keene Corp.*, 508 U.S. at 208; KIM, *supra* note 60, at 13 ("[C]ourts should not add language that Congress has not included.").

the Sixth Circuit should not have read into the statutory language requirements that did not, and do not, exist.

In conclusion, under the first canon of statutory interpretation described above, it is logical to assume that when Sections 703(a) and 703(c) are examined side by side, the lack of parallel language is indicative of Congress' intent to provide practical and relevant protection to employees from unions, which matches the limited scope of a union's authority over an employee—which in turn is different from the protection needed from an employer, who would hold a comparatively broader authority over an employee. The difference in language could be explained by the fact that Congress recognized the different needs that are unique to each situation.

Additionally, when Section 703(c) is examined independently per the second canon, the conclusion that one must reach is that Congress intended to provide broader protection for an employee against the actions of labor unions, and that the Sixth Circuit went against the Supreme Court's instruction not to "read[] a phrase into the statute when Congress has left it out."[67]

Thus, the Sixth Circuit in *Reed* wrongly required the employee to show that the union discharged or disciplined him to satisfy the third element of a prima facie case of discrimination due to lack of religious accommodation because the Sixth Circuit's demand for such "discharge" or "discipline" is in direct conflict with sound principles of statutory interpretation.

CONCLUSION

In sum, the argument in opposition to the Sixth Circuit's use of a judicially narrowed standard for a prima facie case of discrimination due to lack of religious accommodation that requires an employee to show adverse action through being "discharged" or "disciplined" is quite simple. In *Reed*, the Sixth Circuit applied an incorrect standard for establishing a prima facie case by applying Section 703(a), the standard for employers, instead of Section 703(c), the standard for unions.[68] Further, by failing to guide its interpretation of the statute with the correct canons of statutory interpretation, the court failed to recognize the interplay and fundamental distinctions between Sections 703(a) and 703(c).[69] As a result, the Sixth Circuit incorrectly granted summary judgment in favor of the UAW.

The Supreme Court should rule in this area of law to bring stability and uniformity to the circuits. If the issue comes up before the Court, it

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[67] *Keene Corp.*, 508 U.S. at 208.

[68] *See* discussion *supra* Section II.A.

[69] *See* discussion *supra* Section II.B.

should read the statutory language of Title VII Section 703(c)'s union provision concerning unlawful employment practices to include all actions by a union against an employee that are discriminatory and not narrowly limited to situations in which an employee has been "discharged" and "disciplined."

THE TWISTED SISTERS OF PROBATE: HOW THE UNIFORM PROBATE CODE AND SUPREME COURT PRECEDENT CREATE INCENTIVES FOR ABORTION

INTRODUCTION

The ramifications of *Roe v. Wade* extend far beyond women's privacy issues.[1] In *Roe*, the Supreme Court held that a woman had the constitutional right to an abortion.[2] Anything less would have infringed on her privacy.[3]

But today the holding does more than merely allow a right of privacy. When the holding is combined with the Uniform Probate Code ("UPC"), the two can actually provide financial *incentives* for women to abort. These financial incentives can be substantial.

Consider the following hypothetical example. Mark and Carol were married for seven happy years. Carol had two children from a previous marriage; however, Mark had none of his own. They were expecting their first child when Mark was tragically killed in a car accident. His death radically altered Carol's life. In one tragic moment, Carol went from planning the color of their baby's room to planning for Mark's burial arrangements. Meanwhile, her financial adviser delivered devastating news of his own. She had a $1.3 million choice she needed to make: whether to abort her baby—the couple's first child together. Carol already had children of her own and was pregnant with Mark's first child; because Mark died intestate, if she chose to bear the baby, she would inherit $1.3 million fewer dollars. Unfortunately for her, the state in which she lived based its intestate succession code upon the 1990 Article II revision to the UPC. While the UPC does not promote abortion on its face, there are exceptional circumstances where it does in application. Most notably, where a husband dies intestate with an estate worth more than $150,000, the UPC provides a financial incentive for his wife to abort where she is pregnant with their first mutual child and she has other living children who are not also the decedent's.[4]

Previously, these matters have not been publicly discussed, but now that the cat is out of the bag, perhaps states will finally stop forcing women to choose between their babies and their pocket books.

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1 410 U.S. 113 (1973).

2 *Id.* at 153.

3 *Id.* ("This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty . . . or . . . in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.").

4 For a detailed explanation of the incentive, see *infra* Part I.A.4.

This Note provides answers for states that question how they can stop forcing women like Carol to make such difficult decisions. Part I explains how the combination of Supreme Court jurisprudence and the UPC can force women to choose between their babies and their pocketbooks. Part II provides a suggestion for a constitutionally viable solution to what no longer needs to be a dilemma. This suggested solution is a simple modification of the UPC to see to it that women are not forced to make this choice.

This Note is different from other abortion articles for several reasons. First, it is not about babies' equal protection.[5] Not one of the premises in this Note is dependent upon equal protection. This Note is also not about a state's interest in promoting life.[6] This Note is about the way states that have adopted the UPC create an incentive for abortion in specific circumstances.[7] Therefore, this Note is about an interest much

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[5] Scholars have suggested that babies should be afforded equal protection. *See, e.g.*, Charles I. Lugosi, *Conforming to the Rule of Law: When Person and Human Being Finally Mean the Same Thing in Fourteenth Amendment Jurisprudence*, 4 GEO. J.L. & PUB.POL'Y 361, 364 (2006) ("In the following discussion, I will show that common law, history and tradition establish that the unborn from the time of conception, are both persons and human beings, thus strongly supporting an interpretation that the unborn meet the definition of 'person' under the Fourteenth Amendment."). But even Justice Scalia has stated he does not believe a person has a right to equal protection until he is outside the womb. Interview by Lesley Stahl with Supreme Court Justice Antonin Scalia, *60 Minutes* (CBS television broadcast Apr. 27, 2008), *available at* http://www.cbsnews.com/stories/2008/04/24/60minutes/main4040290.shtml. That is not to say, however, that the Court could never recognize those rights. History provides at least one example where jurisprudence on personhood was clearly wrong and was subsequently remediated. *Compare* Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1856) (refusing to recognize slaves as persons, holding they were mere chattels) *with* U.S. CONST. amend. XIII (abolishing slavery).

[6] A state may have a legitimate interest in promoting life. *See, e.g.*, Gonzales v. Carhart, 550 U.S. 124, 145 (2007) (holding that, even though all of the Justices in the opinion did not agree with *Planned Parenthood of Southeastern Pennsylvania v.Casey*, the *Casey* opinion held that the state had a "legitimate and substantial interest in preserving and promoting fetal life"). This Note, however, is about a greater state interest in not promoting death.

[7] There are also instances where valid wills create incentives for abortion. Consider the following hypothetical. Bonnie is pregnant with a baby whom she plans to name Clyde. Clyde is not yet viable. Bonnie's grandmother, Flo, dies, leaving $2 million to Bonnie unless she has any great-grandchildren. If she does have great-grandchildren, she leaves $1 million to Bonnie and $1 million to be divided equally among the great-grandchildren. Flo has no great-grandchildren, but Clyde is on the way. This would provide a $1 million incentive for Bonnie to abort, since the common law rule is that infants in the womb at the time of a father's death can take an estate. *See, e.g.*, Harper v. Archer, 12 Miss. (4 S. & M.) 99, 109 (1845) ("[I]t is now settled . . . that from the time of conception the infant is in esse, for the purpose of taking any estate which is for his benefit, whether by descent, devise, or under the statute of distributions, provided, however, that the infant be born alive, and [is expected to keep living]."). But because this is provided for through a will rather than a state intestacy clause, the state is less involved; thus, these situations will not be the focus of this Note.

greater than promoting life—a state's interest in refraining from promoting death.

I. *ROE* AND THE PROBATE CODE: THE TWISTED SISTERS

Buried deep within *Roe* is a reference to a baby having inheritance rights if it is born alive.[8] That right is also present within the UPC.[9] In fact, it is a common law right dating all the way back to England.[10] The UPC also provides specific instances where a surviving spouse can inherit more or less of the decedent's estate depending partially upon whether she has children.[11] When this right of a subsequently born baby to inherit is combined with the "Share of Spouse" section of the UPC[12] and the Supreme Court's abortion jurisprudence, there can be instances where a woman must choose between an abortion and a substantial amount of money.[13] The laws are outlined below.

A. Instances Where the UPC Encourages Abortion

These incentives were created by revisions to Article II of the UPC in 1990.[14] The portion of the UPC that can create a windfall for women who abort after the death of an intestate spouse is Section 2-102,[15] which explains the percentages of a decedent's estate that a surviving spouse

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[8] *Roe*, 410 U.S. at 162 ("Similarly, unborn children have been recognized as acquiring rights or interests by way of inheritance or other devolution of property, and have been represented by guardians *ad litem*. . . . Perfection of the interests involved, again, has generally been contingent upon live birth.") (citations omitted).

[9] UNIF. PROBATE CODE § 2-104(a)(2) (amended 2008), 8 U.L.A. 43 (Supp. 2010) (providing that "[a]n individual in gestation at a decedent's death is deemed to be living at the decedent's death if the individual lives 120 hours after birth"). [Editor's note: The Uniform Probate Code was amended in 2008, but no substantive changes were made. The amendments relating to the sections that are the focus of this Article mostly concerned dollar amount adjustments to account for inflation. This Note will cite the 2008 amendment and 2010 Supplement, but the author's text will refer to the 1990 revised version of Article II.].

[10] ROBERT LUDLOW FOWLER, THE REAL PROPERTY LAW OF THE STATE OF NEW YORK § 56, at 360 (3d ed. 1909) (citing Reeve v. Long, (1694) 87 Eng. Rep. 395 (K.B.) 395; 4 Mod. 282, 282) (other citations omitted).

[11] PROBATE §§ 2-102, 2-102A.

[12] *Id.* § 2-102.

[13] *See infra* Part I.A.4.

[14] *See infra* notes 18, 30–34 and accompanying text (explaining the incentive created by the 1990 revision of Article II).

[15] Section 2-102A provides the same incentives for community property states. *See* PROBATE § 2-102A. There is only one difference between the two codes: subsection (b), which provides that "[t]he one-half of community property belonging to the decedent passes to the [surviving spouse] as the intestate share." (brackets in original). *Id.* For the purpose of this Note, there is little difference in the incentive provided; thus, § 2-102A will not be analyzed separately from § 2-102.

will inherit.[16] It provides for four different amounts a spouse stands to inherit after the death of his or her spouse.[17] Those scenarios, along with a hypothetical for each, are explained below, along with comparisons between the different formulas that explain how the formulas can induce abortion. Of the four different scenarios provided for in the "Share of Spouse" section of the UPC, only one encourages abortion. That scenario occurs where a woman has children of her own and is pregnant with her and her husband's first mutual child at the time of his death.[18]

To avoid confusion in the following hypotheticals, no names are used, just nouns. To serve the purposes of this Note, the husband will be the one dying, but there could also be situations where a husband could try and persuade a woman to abort after his wife dies.[19] The couple in the hypothetical will not have more than one generation underneath them (that is, they will not yet be grandparents). Finally, so that the hypotheticals are easy to compare with one another, the husband will be leaving behind a $3 million estate in each of them; and none of the $3 million will be community property (so that the hypotheticals apply equally to Section 2-102A on intestate succession in community property states).

The four different types of spousal succession and their implications are outlined below. While the first three spousal succession scenarios do not provide state created incentives to abort, the fourth does.[20]

1. The $3 Million Scenario: Survivor Gets the Whole Caboodle

Section 2-102(1) provides that the "entire estate" goes to the decedent's surviving spouse where (1) "no descendant or parent of the decedent survives the decedent[,]"[21] or (2) "all of the decedent's surviving descendants are also descendants of the surviving spouse and there is no other descendant of the surviving spouse who survives the decedent[.]"[22]

Two scenarios illustrate this provision. First, Husband dies after both of his parents or, if he had any children, after his parents and all of his children. And second, Husband dies and all remaining children of Husband and Wife are their mutual children. In these situations, Wife would inherit all $3 million.

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16 *Id.* § 2-102.

17 *See infra* Parts I.A.1–4.

18 *See infra* Part I.A.4.

19 *See infra* note 29.

20 The order of the third and fourth spousal succession clauses have been switched for the purposes of this Note. Part I.A.4 actually precedes Part I.A.3 in the UPC.

21 PROBATE § 2-102(1)(i).

22 *Id.* § 2-102(1)(ii).

A wife who inherits the entire $3 million is in the best intestate inheritance position. There is no economic incentive for a spouse to try to leave this position.

One might argue that, in a situation where the decedent's parents have already passed and neither spouse yet has children, a pregnant wife could have an incentive to abort since the surviving spouse gets everything where "no descendent or parent of the decedent survives the decedent."[23] But if Wife was having the couple's only baby, she would still inherit all $3 million because the only child of both spouses would be a mutual child.[24]

Therefore, this scenario provides no economic incentive for a woman to have an abortion to leave this category.

2. The $2.3 Million Scenario: The Survivor Gets $200,000 Plus 3/4 of the Remainder

Section 2-102(2) provides that "the first [$200,000], plus three-fourths of any balance of the intestate estate," will go to the surviving spouse "if no descendant of the decedent survives the decedent, but a parent of the decedent survives the decedent."[25]

That situation looks like this: Husband dies with no children, but Husband's mother or father is still alive.

In this case, Wife inherits $2,300,000. ($3,000,000 – 200,000 = $2,800,000. $2,800,000 x .75 = $2,100,000. $2,100,000 + 200,000 = $2,300,000.)

This is the second-best intestate inheritance position in which a surviving spouse could be left. There is no incentive to abort to avoid this position. In fact, if neither Husband nor Wife yet has any children, the UPC encourages Wife to have her deceased husband's child because she would then move from this $2.3 million category to the $3 million category, avoiding losing money to his parents. She would move to that category by having a child because "all of the decedent's surviving descendants" would also be "descendants of the surviving spouse" and she would have no other descendants.[26]

3. The $1,550,000 Scenario: The Survivor Gets $100,000 Plus 1/2 of the Remainder

The UPC section 2-102(4) provides that "the first [$100,000], plus one-half of any balance of the intestate estate[]" goes to the surviving

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[23] *Id.* § 2-102(1)(i).

[24] *See id.* § 2-102(1)(ii).

[25] *Id.* § 2-102(2) (brackets in original).

[26] *Id.*

spouse "if one or more of the decedent's surviving descendants are not descendants of the surviving spouse."[27]

That situation looks like this: Husband dies and is survived by at least one child not belonging to Wife.

In this case, Wife inherits $1,550,000. ($3,000,000 – 100,000 = $2,900,000. $2,900,000 x .5 = $1,450,000. $1,450,000 + 100,000 = $1,550,000.)

While Wife actually winds up with $25,000 less in this situation than in one other situation addressed by the UPC,[28] there will be no incentive for her to have an abortion because this provision only concerns situations where the surviving spouse must share the inheritance with the decedent's children by another.[29]

4. The $1,575,000 Scenario/An Incentive to Abort: The Survivor Gets $150,000 Plus 1/2 of the Remainder

The UPC section 2-102(3) provides that "the first [$150,000], plus one-half of any balance of the intestate estate" goes to the surviving spouse "if all of the decedent's surviving descendants are also descendants of the surviving spouse and the surviving spouse has one or more surviving descendants who are not descendants of the decedent."[30]

That situation looks like this: Husband dies and all of his children are also Wife's; however, Wife has other children not from Husband.

In this case, Wife inherits $1,575,000. ($3,000,000 – 150,000 = $2,850,000. $2,850,000 x .5 = $1,425,000. $1,425,000 + $150,000 = $1,575,000.)

Financially, this scenario is one of the two worst, and seems to be the most likely to create an incentive to abort, particularly where the surviving spouse is the wife. Consider the following hypotheticals.

Wife has three children from a previous marriage when she marries Husband, who has no children. Husband dies two months after Wife

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[27] *Id.* § 2-102(4) (brackets in original).

[28] *See infra* Part I.A.4.

[29] PROBATE § 2-102. There is a scenario where someone could be encouraged to abort, but it would not be directly due to the state's laws. This is a crucial point to distinguish. For example, assume Husband and Wife have mutual children. Husband cheats on Wife and sends her a letter confessing and asking for her forgiveness. Wife reads the note and, tragically, commits suicide. Wife's estate is worth $3 million. The next day, Girlfriend, who is unwed, notifies Husband that she is pregnant. Although Husband might try to induce Girlfriend to abort, the law does not encourage her to do so. The UPC, combined with the Supreme Court's jurisprudence, would actually encourage Girlfriend to have the baby. Baby would inherit his portion of the $1,450,000 not going to Husband ($3,000,000 – $1,550,000 = $1,450,000); thus, even though the money would not belong directly to Girlfriend, she could have the baby and know that he or she would be well provided for in the future.

[30] *Id.* § 2-102(3) (brackets in original).

becomes pregnant with their first mutual child and husband's first descendant, Girl. Wife has a dubious decision to make: abort Girl, her only child with husband, or lose a lot of money.

Consider these two possible scenarios: (1) if either of Husband's parents are still alive, Wife gains $725,000 by aborting Girl ($2,300,000 – 1,575,000 = $725,000) since she would bump up into the $2,300,000 category—where Husband has a living parent, but no descendant;[31] or, even more tempting, (2) if Husband has no living parent and Wife aborts Girl, Wife gains $1,425,000 ($3,000,000 – 1,575,000 = $1,425,000) since she would bump up into the $3 million category—where Husband has no living parent or descendant.[32]

Indeed, Girl's inheritance rights effectively put Wife on notice that if she chooses to deliver Girl from her pre-viability purgatory, she bears to lose a lot of money.

Finally, there is another way this part of the UPC encourages abortion: where Husband and Wife have children together and neither has any other children, the law encourages Wife to abort where she becomes pregnant with another man's child. If the mutual children are able to somehow overcome the presumption that their father was the father of the new baby,[33] they would be able to inherit the $1,425,000; thus, their mother would lose that amount.[34] Wife might rather not take such a large risk and rely upon the presumption of fatherhood. Therefore, the law would encourage her to abort here.

B. Supreme Court Abortion Jurisprudence

In light of the fact that the UPC clearly offers incentives for mothers to abort in certain circumstances,[35] UPC authors and state lawmakers should take steps to remove the incentives in those instances. Those steps should be consistent with Supreme Court abortion jurisprudence. This Part explores holdings of three of the most important Supreme Court abortion cases: *Roe v. Wade*,[36] *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[37] and *Gonzales v. Carhart*.[38]

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31 *Id.* § 2-102(2).

32 *Id.* § 2-102(1)(i).

33 *See* Michael H. v. Gerald D., 491 U.S. 110, 129–30 (1989) (upholding California's presumption that a husband is the father of a child when the husband was living with the mother at the time of the child's birth).

34 *See* PROBATE § 2-102.

35 *See supra* Part I.A.4.

36 410 U.S. 113 (1973).

37 505 U.S. 833 (1992).

38 550 U.S. 124 (2007).

1. *Roe v. Wade*

The Supreme Court first held there is a constitutional right to an abortion in *Roe* in 1973.[39] It made that decision in response to a challenge to Texas's ban on most abortions.[40] The Court noted that there had historically been three reasons for statutes proscribing abortions,[41] none of which the Court fully upheld.

The first was to "discourage illicit sexual conduct."[42] But according to the Court, that was not taken seriously and was overbroad because it failed to distinguish between wed and unwed mothers.[43]

The second reason was because the procedure was hazardous to the woman's health.[44] The Court found that reason to be outdated, though, due to modern medicine.[45] "Consequently, any interest of the State in protecting the woman from an inherently hazardous procedure, except when it would be equally dangerous for her to forgo it, has largely disappeared."[46]

The third reason was because the state had an interest in protecting "prenatal life."[47] Although the Court noted that protecting prenatal life could be a valid interest,[48] it held that this interest was not strong enough to infringe upon a woman's privacy in the first two trimesters.[49] Under *Roe*, protecting life did not become a compelling interest until the third trimester.[50]

An issue that the Court did not decide, however, was whether a woman's right to privacy outweighs a state's interest in not incentivizing death. The Court explicitly rejected the notion that the privacy right was absolute:

> [A] State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential

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39 *Roe*, 410 U.S. at 153.

40 *Id.* at 117–18.

41 *Id.* at 147–49.

42 *Id.* at 148.

43 *Id.*

44 *Id.*

45 *Id.* at 149.

46 *Id.*

47 *Id.* at 150.

48 *Id.* ("In assessing the State's interest, recognition may be given to the less rigid claim that as long as at least *potential* life is involved, the State may assert interests beyond the protection of the pregnant woman alone.").

49 *See id.* at 153 ("This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.").

50 *See id.* at 163.

> life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision. The privacy right involved, therefore, cannot be said to be absolute. In fact, it is not clear to us that the claim asserted by some *amici* that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past . . . .
>
> We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation.[51]

Although this passage clearly shows the right to privacy is not absolute, the obstacles in overcoming it are great. Under *Roe*, in order for a state to overcome a woman's right to privacy, it must show "'a compelling state interest'" that is "narrowly drawn to express only the legitimate state interests at stake."[52]

The Court laid out a rigid trimester-based framework to govern the parameters of the state's interest in limiting a woman's abortion right.[53] It summarized the framework as follows:

> (a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.
>
> (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.
>
> (c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.[54]

The Court's jurisprudence after *Roe*, then, established that (1) abortion could only be proscribed when the government had a narrowly drawn compelling interest in the third trimester; and (2) in order to regulate

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[51] *Id.* at 154 (citing Buck v. Bell, 274 U.S. 200, 207 (1927); Jacobson v. Massachusetts, 197 U.S. 11, 25–26, 39 (1905)).

[52] *Id.* at 155 (citations omitted).

[53] *Id.* at 162–65.

[54] *Id.* at 164–65. The Court explained that the state did not have an interest in regulating abortions in order to promote the mother's health in the first trimester because, "until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth." *Id.* at 163. It then listed specific examples that would be permissible ways to protect the mother's health in the second trimester, including regulating "qualifications of the [abortionist]; . . . the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; . . . the licensing of the facility; and the like." *Id.*

abortion procedures in the second trimester, the regulations had to be based on promoting the woman's health.

2. *Planned Parenthood of Southeastern Pennsylvania v. Casey*

In *Casey*, the Court simultaneously reaffirmed its "essential holding" in *Roe* and promulgated a new standard for state restrictions on abortions.[55] It held that (1) the state could not unduly burden a woman's right to choose a pre-viability abortion; (2) a state could proscribe abortions as soon as the baby attained viability as long as the health of the mother was not jeopardized; and (3) the state's interest "in protecting the health of the woman and the life of the . . . child" was "legitimate . . . from the outset."[56]

Justices O'Connor, Kennedy, and Souter, in a joint opinion, defined an undue burden as "a state regulation [that] has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a *nonviable* fetus."[57] Accordingly, "the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it."[58] Other than those guidelines, however, the Court promulgated no clear rules defining either a substantial obstacle or an undue burden.

The new standard promulgated in *Casey* was partially due to the Justices' belief that *Roe* "undervalue[d] the State's interest in the potential life within the woman."[59] *Casey* was also an explicit rejection of *Roe's* trimester framework.[60] Rather than holding there could be no regulations before the third trimester, the court held that a state could "create a structural mechanism by which" it "express[es] profound respect for the life of the unborn," even pre-viability, as long as it did not place an undue burden on a woman's right to choose.[61]

The trimester framework was not the only aspect of *Roe* that was rejected in *Casey*. The joint opinion also rejected the need for a state to

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[55] Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 846 (1992).

[56] *Id.*

[57] *Id.* at 877 (O'Connor, Kennedy, & Souter, JJ., joint opinion) (emphasis added).

[58] *Id.*

[59] *Id.* at 875.

[60] *Id.* at 878.

[61] *Id.* at 877; *see also id.* at 871 ("Those cases decided that any regulation touching upon the abortion decision must survive strict scrutiny, to be sustained only if drawn in narrow terms to further a compelling state interest. . . . Not all of the cases decided under that formulation can be reconciled with the holding in *Roe* itself that the State has legitimate interests in the health of the woman and in protecting the potential life within her. In resolving this tension, we choose to rely upon *Roe*, as against the later cases." (citation omitted)).

overcome strict scrutiny.[62] The need for any new laws to overcome strict scrutiny was swallowed by the "amorphous" abyss that is the undue burden standard.[63]

While the Court did not perfectly explain the undue burden standard, it did give examples of what were and were not undue burdens. The state of Pennsylvania attempted to regulate abortion in the several ways: (1) it required a woman to "give her informed consent" twenty-four hours before the abortion; (2) for a minor, it required her parent's informed consent—unless she was granted a "judicial bypass"; (3) it required a married woman to notify her husband of her intent; (4) it provided an exception to (1)–(3) in "medical emergenc[ies]"; and (5) it imposed "certain reporting requirements on facilities that provide[d] abortion services."[64]

The Court concluded that the only requirement that was an undue burden was the requirement that a married woman notify her husband.[65] The Court believed the husband's interest in the life of the child was not great enough to justify an infringement upon the woman's privacy right.[66] This gives an example of the sort of restriction that creates an undue burden.

In finding an undue burden, the Court relied mostly upon the following district court findings: (1) most women already tell their husbands anyhow, so this provision would not accomplish much;[67] (2) this requirement could harm women because their husbands might keep them from aborting;[68] and (3) spousal abuse is high in the United States, and telling husbands about pregnancies is likely to create more abuse.[69] Accordingly, these are the types of substantial obstacles that create an undue burden. By contrast, the other restrictions were all compelling state interests because they promoted life while protecting the health of the mother.[70] Protecting the health of the mother was an integral aspect

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62 *Id.* at 871.

63 Clarke D. Forsythe & Stephen B. Presser, *The Tragic Failure of* Roe v. Wade*: Why Abortion Should Be Returned to the States*, 10 TEX. REV. L. & POL. 85, 139 (2005).

64 *Casey*, 505 U.S. at 844 (majority opinion) (internal quotation marks and citations omitted).

65 *Id.* at 879, 895.

66 *See id.* at 898 ("The husband's interest in the life of the child his wife is carrying does not permit the State to empower him with this troubling degree of authority over his wife.").

67 *Id.* at 888.

68 *See id.*

69 *Id.* at 888–89.

70 *See id.* at 879–80 (holding that the medical emergency exception was not too narrow because it adequately provided that the regulations would *"not . . . pose a significant threat to the life or health of a woman"* (emphasis added) (internal quotation marks omitted)); *id.* at 881–83 (O'Connor, Kennedy, & Souter, JJ., joint opinion) (holding

of those restrictions because, as the Court noted, "a State's interest in the protection of life [alone] falls short of justifying any plenary override of individual liberty claims."[71]

Finally, one of the reasons the Court refused to overturn *Roe* was because people relied on it in making life decisions.[72]

3. *Gonzales v. Carhart*

The Court gave another example of what was not an undue burden when it upheld the congressional Partial-Birth Abortion Ban Act of 2003 ("the Act")[73] in *Carhart*.[74] In *Carhart*, abortionists sought an injunction

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that the informed consent requirement was a legitimate state interest since—in helping to dispel ignorance about the procedure—(1) it could prevent negative psychological consequences in the future, and (2) it could help in "its legitimate goal of protecting the life of the unborn"); *id.* at 885–87 (holding (1) that the 24-hour waiting period was reasonable for the state to implement and (2) that it was not a "substantial obstacle" to a woman's right to choose because a state could "enact persuasive measures which favor child-birth over abortion," even if the measures burden the woman more than she otherwise would have been); *id.* at 900–01 (O'Connor, Kennedy, Souter, & Stevens, JJ., joint opinion) (holding that the reporting and recordkeeping requirements were constitutional—except for the one requiring that notice be given to husbands—since "recordkeeping and reporting provisions 'that [were] reasonably directed to the preservation of maternal health and that properly respect[ed] a patient's confidentiality and privacy [were] permissible'" (quoting Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 80 (1976))).

[71] *Id.* at 857 (majority opinion) (citation omitted). This point is also important to remember because states are not only trying to protect life in this instance. Far from it—in this instance, states are trying to stop incentivizing death, while maintaining the integrity of their property laws. This difference may seem minute, but it is not. *See infra* Part II.B.

[72] *See id.* at 856 ("The Constitution serves human values, and while the effect of reliance on *Roe* cannot be exactly measured, neither can the certain cost of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed."); *id.* at 860 ("An entire generation has come of age free to assume *Roe's* concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions . . . ."). This is an important point to remember when addressing possible ways that states can neutralize the abortion incentive to inheritance law because it is highly unlikely that a woman ordered her life around state intestacy clauses. In fact, logically speaking, the opposite would be true most of the time. Intestacy clauses are needed precisely because people do not make plans for their futures.

[73] Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 (2006). The relevant part of the act was as follows:

> (a) Any physician who . . . knowingly performs a partial-birth abortion and thereby kills a human fetus shall be fined under this title or imprisoned not more than 2 years, or both. This subsection does not apply to a partial-birth abortion that is necessary to save the life of a mother whose life is endangered . . . .
>
> (b) As used in this section—
>
> (1) the term 'partial-birth abortion' means an abortion in which the person performing the abortion—
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> (A) deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing

against a ban which imposed criminal penalties on doctors who deliberately, intentionally, and knowingly performed partial-birth abortions.[75] Congress originally implemented the ban because "among other things, . . . a moral, medical, and ethical consensus exist[ed] that the practice" was "gruesome," "inhumane," and "never medically necessary[.]"[76] In upholding the ban, the Court noted that it followed *Casey* based on principles of stare decisis rather than reaffirmation of *Casey's* rationale.[77]

Applying *Casey*, the Court found the act was legal because, on its face, it did not impose an undue burden.[78] The Court's holding was directly contrary to the findings of the district court, which found that the Act could ban other abortions along with the partial-birth abortion,[79]

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an overt act that the person knows will kill the partially delivered living fetus; and

(B) performs the overt act, other than completion of delivery, that kills the partially delivered living fetus; and

(2) the term 'physician' means a doctor of medicine or osteopathy legally authorized to practice medicine and surgery by the State in which the doctor performs such activity, or any other individual legally authorized by the State to perform abortions: *Provided, however*, That any individual who is not a physician or not otherwise legally authorized by the State to perform abortions, but who nevertheless directly performs a partial-birth abortion, shall be subject to the provisions of this section.

. . . .

(d)(1) A defendant accused of an offense under this section may seek a hearing before the State Medical Board on whether the physician's conduct was necessary to save the life of the mother whose life was endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.

(2) The findings on that issue are admissible on that issue at the trial of the defendant. Upon a motion of the defendant, the court shall delay the beginning of the trial for not more than 30 days to permit such a hearing to take place.

(e) A woman upon whom a partial-birth abortion is performed may not be prosecuted under this section, for a conspiracy to violate this section, or for an offense under section 2, 3, or 4 of this title based on a violation of this section.

See also Gonzales v. Carhart, 550 U.S. 124, 141–43 (2007) (quoting 18 U.S.C. § 1531 (2000 ed., Supp. IV)) (internal quotation marks omitted).

[74] *Carhart*, 550 U.S. at 168.

[75] *See* 18 U.S.C. § 1531. For a description of the procedure that the Act banned, see *Carhart*, 550 U.S. at 134–38.

[76] *Carhart*, 550 U.S. at 141 (internal quotations and citation omitted).

[77] *See id.* at 146 ("We assume the following principles *for the purposes of this opinion.*") (emphasis added); *see also id.* at 168–69 (Thomas & Scalia, JJ., concurring) ("I join the Court's opinion because it accurately applies current jurisprudence, including [*Casey*]. I write separately to reiterate my view that the Court's abortion jurisprudence, including *Casey* and [*Roe*], has no basis in the Constitution.").

[78] *Id.* at 168 (majority opinion).

[79] *Id.* at 143.

and the appellate court, which found that the Act needed a health exception for the mother.[80]

Carhart dealt primarily with whether the Act promoted the legitimate state interest of protecting the life of the child and the health of the mother.[81] Notably, the Act did not hinder women from choosing any abortion. It only effectively proscribed women from choosing a partial-birth abortion.

Partial-birth abortions were performed much less often than the two most popular abortions, which the Act did *not* regulate. The most common method of abortion occurs in the first trimester and is called "vacuum aspiration."[82] An abortionist using the vacuum aspiration method uses a tool to suck the embryonic tissue out of the womb.[83] The second most common method of abortion occurs in the second trimester and is known as the standard "dilation and evacuation, or D&E."[84] When an abortionist performs a standard D&E, he inserts forceps through the cervix and removes the fetus "piece by piece."[85] Meanwhile, in a partial-birth abortion—also known as an "intact D&E"[86]—the abortionist partially delivers the baby from his mother, leaving only the head inside the cervix.[87] He then inserts scissors into "the base of the skull," spreads the scissors, removes the brain, and then removes the rest of the baby from the cervix.[88]

After the second-trimester abortionists argued unsuccessfully that the restriction banning partial-birth abortions was unconstitutionally vague,[89] they claimed that the restrictions were too broad, creating an undue burden.[90]

That argument, too, was unsuccessful.[91] The Court held that the Act did not create an undue burden because the abortionists did not show "that requiring doctors to intend dismemberment before delivery to an anatomical landmark will prohibit the *vast majority* of D&E abortions."[92]

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80 *Id.*

81 *Id.* at 145–46.

82 *Id.* at 134.

83 *Id.*

84 *Id.* at 135 (internal quotations and citations omitted).

85 *Id.* at 135–36.

86 *Id.* at 136.

87 *Id.* at 137–38.

88 *Id.* at 138 (internal quotations and citations omitted).

89 *Id.* at 148–49.

90 *Id.* at 150.

91 *Id.* at 156.

92 *Id.* at 156 (emphasis added). According to the opinion, partial-birth abortions occur much less frequently than "standard D&E" abortions, which are the "usual method" in the second trimester. *Id.* at 135 (citing Planned Parenthood Fed'n of America v. Ashcroft, 320 F. Supp. 2d 957, 960–61 (N.D. Cal. 2004)). Furthermore, an abortionist could

The Court noted that, according to the Act, doctors would have to *intentionally* perform the procedure to be liable—thus, it would be unlikely that an abortionist would accidentally violate the law.[93] The Court also applied the canon of constitutional avoidance under which "'every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'"[94] Applying the canon kept the Court from extending the ban beyond its "reasonable reading," which was that the Act prohibited more than intact D&Es.[95] That the canon of constitutional avoidance was applied is important because there were abortion cases in the past where the Court declined to apply the canon.[96]

The Court next held that the ban did not "'place a substantial obstacle in the path of a woman seeking an abortion[,]'" regardless of whether the ban proscribed a pre-viability abortion.[97] Congress's reasons for passing the act were not "substantial obstacles" to abortion, but valid reasons for limiting it for at least three reasons. First, "'[t]he fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it.'"[98] Second, a decision to abort can be a difficult moral decision, sometimes leading to depression.[99] And third, the procedure might very well tarnish doctors' reputations.[100]

4. Summary of Abortion Jurisprudence

Roe, *Casey*, and *Carhart* show that it is difficult for a state to put limitations on abortions. Furthermore, the standards the Court adopted in those cases can be ambiguous. For example, while it is clear that a state cannot impose a substantial obstacle to a woman's right to choose a

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still choose to do a standard D&E, ripping the baby apart piece by piece. *Id.* at 150. For more detail pertaining to how abortionists perform these killings, see *id.* at 135–36.

[93] *Id.* at 150–51.

[94] *Id.* at 153 (quoting Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988)). The Court later made the canon even clearer, holding the following: "[T]he canon of constitutional avoidance does not apply if a statute is not 'genuinely susceptible to two constructions.'" *Id.* at 154 (quoting Almendarez-Torres v. United States, 523 U.S. 224, 238 (1998)).

[95] *Id.* at 154.

[96] *Id.* at 153–54 (quoting Stenberg v. Carhart, 530 U.S. 914, 977 (2000) (Kennedy, J., dissenting)).

[97] *Id.* at 160 (quoting Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 878 (1992) (O'Connor, Kennedy, & Souter, JJ., joint opinion)).

[98] *Id.* at 157–58 (brackets in original) (quoting *Casey*, 505 U.S. at 874).

[99] *Id.* at 159 (citing *Casey*, 505 U.S. at 852–53).

[100] *Id.* at 160.

pre-viability abortion, thus creating an undue burden, it is not clear what constitutes a substantial obstacle.[101]

Restrictions fall into two categories: those prior to viability and those subsequent to the child reaching viability. The Court has identified several appropriate reasons for abortion restrictions prior to viability, including promoting the health of the mother and promoting respect for the life of the child.[102] States can pass such pre-viability regulations as long as they do not constitute undue burdens.[103] As for restrictions subsequent to viability, states can freely restrict those as long as the mother's health is not jeopardized.[104]

The Court has been clear that while the spirit of *Roe* is still alive,[105] the standard by which pre-viability abortion restrictions will be judged is the undue burden.[106] There are several key aspects to the undue burden framework. First, a state cannot impose a substantial obstacle blocking a woman seeking a pre-viability abortion from obtaining one.[107] That apparently means that "the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it."[108] Second, as long as the state has not imposed an undue burden, restrictions will no longer need to overcome strict scrutiny.[109] Third, restrictions with valid purposes such as informing the woman or promoting the state's interest in life can be valid—even if they make the abortion process more difficult—so long as they are "not designed to strike at the right itself."[110] Finally, the Court now applies the canon of constitutional avoidance to these cases, reading the restrictions as reasonably understood so long as their meanings are not

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[101] *See supra* notes 57–58 and accompanying text.

[102] *See supra* note 56 and accompanying text.

[103] *See supra* notes 56–57 and accompanying text.

[104] *See supra* note 56 and accompanying text.

[105] *See supra* note 55 and accompanying text.

[106] *See supra* notes 55–58, 78 and accompanying text.

[107] *See supra* note 57 and accompanying text.

[108] *See supra* note 58 and accompanying text. This explanation of an undue burden is best understood by studying examples of what have and have not constituted undue burdens. For example, the regulations upheld in *Casey* were all focused around educating or protecting women. *See supra* note 64 and accompanying text. The regulation that was found to be an undue burden, however, was not focused on educating or protecting women; rather, its purpose was to notify women's husbands. *See supra* notes 65–66 and accompanying text. Furthermore, the restriction in *Carhart* was not an undue burden because, in seeking the legitimate interest of respecting life, it did not prohibit women from choosing abortions; it only prohibited a less-used, particularly egregious form of abortion. *See* Gonzales v. Carhart, 550 U.S. 124, 168 (2007).

[109] *See supra* notes 62–63 and accompanying text.

[110] *See supra* note 98 and accompanying text.

ambiguous.[111] Thus, the Court will avoid construing restrictions as overbroad so long as they are clearly intended for limited circumstances.

II. HOW STATES AND AUTHORS OF THE UPC CAN LEGALLY NEGATE THE UPC'S INCENTIVE TO ABORT

This Part addresses states and UPC authors who want to stand up, say "We're not gonna take it/No, we ain't gonna take it/We're not gonna take it anymore[,]" and change their cultures of death.[112] Currently, nine states have adopted the 1990 Article II revision to the UPC.[113] While the UPC and the Supreme Court's privacy-based abortion jurisprudence encourage women to abort, there are ways states and UPC authors can stop encouraging abortions while complying with the Court's decisions. States that have adopted the UPC could either amend their codes to stop creating incentives to abort or adopt a revision that the UPC authors draft to solve this problem.

A. The Easy Way To Change the UPC Without Encroaching upon Women's Rights

Where a woman fits one of the factual scenarios of Part I.A.4 of this Note—where, for instance, a wife will gain $1,425,000 for aborting her first mutual child with husband because she has other children of her own—states and UPC authors should modify the UPC to eliminate the incentive.[114]

The state can neutralize this incentive without encroaching upon the woman's right to abort by designating another heir to receive the interest the child would have received had he or she not been aborted. Because the UPC already provides for successors in interest, it would only be a matter of finding the relative or relatives who are next in line to inherit after the wife.[115] That could be accomplished by allowing the woman to inherit what she would have otherwise inherited had she not aborted, and then giving the next heir in line—under UPC §§ 2-103 and 2-105—the right to the money she would have gained by aborting.[116]

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[111] *See supra* notes 94–96 and accompanying text.

[112] TWISTED SISTER, WE'RE NOT GONNA TAKE IT (Atlantic Records 1984).

[113] Cornell University Law School's Legal Information Institute, *Uniform Probate Code Locator*, LAW BY SOURCE: UNIFORM LAWS, http://www.law.cornell.edu/uniform/probate.html (last visited Jan. 24, 2011). Those states include Alaska, Arizona, Colorado, Hawaii, Minnesota, Montana, New Mexico, North Dakota, and South Dakota. *Id.*

[114] There should also be a health exception since that is required. *See* Gonzales v. Carhart, 550 U.S. 124, 145 (2007) (confirming "'the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health[]'" (quoting Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 846 (1992)).

[115] *See* UNIF. PROBATE CODE § 2-103 (amended 2008), 8 U.L.A. 83 (Supp. 2010).

[116] *See id.* §§ 2-103, 2-105.

Furthermore, the state would not have to waste its resources enforcing this measure because it would be enforced by private action (unless it were to escheat to the state under UPC § 2-105).[117]

There are two different groups of people who would stand to inherit. First, where a husband dies and the couple's first mutual child is aborted,[118] the right to the portion of the estate that would have gone to the child would be as follows: to the decedent's parents, or, if they are not alive, to the descendants of decedent's parents; if there are no such living descendants, to the decedent's grandparents; if decedent's grandparents are not alive, to the descendants of decedent's grandparents; if there are no such descendants alive, to the state.[119] The other way this would come about is where the husband and wife already have children of their own, the wife becomes pregnant with her first child from another man while her husband still lives, and he subsequently dies with the child in the womb.[120] This scenario is more complicated because of the presumption of legitimacy.[121] The mutual children between the husband and wife would be the people who would stand to inherit that which the mother would gain from aborting.[122] But it is unlikely that they could ever overcome any presumption that the new baby was their father's because DNA would be the best way to try to prove the new baby had a different father; however, because aborted babies are often completely disposed of,[123] there would often be no way to prove its DNA. Nevertheless, enacting this change would at least negate the incentive for the wife to abort their first mutual child.

Finally, in order to guarantee that this restriction will be a valid restriction, drafters should allow a physical-health exception.[124] That is,

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[117] *See id.* § 2-105.

[118] *See supra* Part I.A.4.

[119] PROBATE §§ 2-103, 2-105.

[120] *See supra* Part I.A.4.

[121] *See* Michael H. v. Gerald D., 491 U.S. 110 (1991) (upholding California's presumption that a husband is the father of a child when the husband was living with the mother at the time of the child's birth).

[122] PROBATE § 2-103(1).

[123] *See, e.g.*, Mary Meehan, *The Ex-Abortionists: Why They Quit*, HUM. LIFE REV., Spring/Summer 2000, at 7, 8–9 (explaining that aborted babies are often disposed of by, among other methods, cremation, contaminated waste container, or garbage disposal).

[124] Allowing the health exception to take mental-health into account would mean the rule could be circumvented too easily. *See* Brian D. Wassom, Comment, *The Exception that Swallowed the Rule?* Women's Medical Professional Corporation v. Voinovich *and the Mental Health Exception to Post-Viability Abortion Bans*, 49 CASE W. RES. L. REV. 799, 863 (1999) (noting that "in many, if not most situations, a mental health exception translates into abortion on demand").

they should allow the woman to inherit the larger amount if the abortion was not due solely to a mental-health-based need to abort.[125]

B. Avoiding Death Incentives Is a Legitimate Interest That Is a Greater Interest Than Promoting Life

A key tenet to states enacting this change is their realization that a larger interest is at stake than showing a preference for life.[126] This interest is about keeping state law from letting people, other than abortionists,[127] profit from abortions. The states' interests in *Roe*, *Casey*, and *Carhart* were all justifications for banning or limiting abortion or a type of abortion. However, in this instance, states would not be attempting to limit abortions but would be trying to stop compelling women to choose abortions for purely financial gain.

In *Roe*, Texas's justification for its law against abortion was an interest in protecting babies' lives.[128] Texas was trying to stop abortions—which, presumably, were already going to happen.

In *Casey*, Pennsylvania's interest in requiring women to notify their husbands before aborting was based upon the husband's interest in the life of the child. Pennsylvania was trying to require women—who, presumably, were already going to have abortions—to perform an extra task that the Court considered an undue burden.[129]

Finally, the controversial ban in *Carhart* only stopped one form of abortion that was not performed as often as the most popular methods.[130] Thus, the banned method did not reach the level of morbidity the UPC

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[125] *See supra* note 56 and accompanying text.

[126] This is not to say that a state's interest in life is not a noble and important interest.

[127] Doctors have an incentive to fight to keep all abortions legal because the abortion industry is extremely lucrative. According to Planned Parenthood, "Nationwide, the cost at health centers ranges from about *$350 to $950* for abortion in the first trimester. *The cost is usually more for a second-trimester abortion.* Costs vary depending on how long you've been pregnant and where you go. Hospitals generally cost more." *In-Clinic Abortion Procedures*, PLANNED PARENTHOOD, http://www.plannedparenthood.org/health-topics/abortion/in-clinic-abortion-procedures-4359.htm#center (follow "Where Can I Get an In-Clinic Abortion? How Much Does It Cost?" hyperlink) (last visited Feb. 19, 2011) (emphasis added). In fact, Planned Parenthood has been criticized for targeting more affluent suburban areas in its effort to generate larger volumes of cash. Stephanie Simon, *Extending the Brand: Planned Parenthood Hits Suburbia*, WALL ST. J., June 23, 2008, at A1. The large cash flows—along with taxpayer dollars—have, in turn, allowed Planned Parenthood to create clinics that are even more attractive to teens. *Id.*

[128] Roe v. Wade, 410 U.S. 113, 148, 150 (1973). The other reason was to protect the mother's health from the dangers of the abortion procedure, but the Court held that was no longer a valid interest since it found that modern medicine extinguished the dangers. *Id.* at 148–49.

[129] *See supra* note 66 and accompanying text.

[130] *See supra* note 92 and accompanying text.

does because, even though the type of abortion being outlawed was particularly egregious,[131] nothing about the method compelled a woman who would not have otherwise aborted to seek an abortion.

Therefore, in each case, the Court was deciding whether a particular state had an interest in limiting a constitutional right that a woman was already going to exercise. Modifying the UPC is more compelling than trying to stop abortions that are already going to take place. The interest here is to avoid giving women who have no other legitimate reason to abort a purely financial reason to abort. This is the precise scenario that can be regulated without creating an undue burden: where "the means chosen by the State to further the interest in potential life [would] be calculated to inform the woman's free choice, not hinder it."[132]

When one applies past case law, and the logic behind the case law, it seems that a state has a legitimate interest in changing its code to stop itself from promoting abortions.

C. Eliminating the Abortion Incentive Does Not Create an Undue Burden

Because a state can already restrict abortions subsequent to viability as long as there is a health exception for the mother,[133] there is no need to analyze whether an undue burden is created subsequent to viability. Any restrictions that happen to affect a woman wanting to abort subsequent to viability will be upheld as long as they have the health exception.

As for pre-viability abortions, changing the UPC to take away the incentive to abort is too narrow a restriction to reach the level of an undue burden. Unlike *Roe*, where Texas sought to keep most abortions illegal,[134] in this instance the state would only be restricting abortions under very specific factual scenarios, as it did in *Carhart*.[135] And, because the Court will apply the canon of constitutional avoidance, the Court will not extend an unambiguous restriction past its logical reading, which does not unduly burden the woman.[136]

The interest would not be an undue burden, as the husband-notification statute was in *Casey*.[137] Unlike husband notification statutes, which would have applied in many circumstances and the

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[131] *See supra* note 76 and accompanying text.

[132] *See supra* note 58 and accompanying text.

[133] *See supra* note 56 and accompanying text.

[134] *See supra* note 40 and accompanying text.

[135] *See supra* note 92.

[136] *See supra* note 94–96 and accompanying text.

[137] *See supra* note 65.

Court held could lead to *widespread* abuse[138]—restricting inheritance rights for women who abort will only limit very specific circumstances and will do more to protect women than harm them. It will keep them from making a choice wrought with potential negative psychological repercussions motivated solely by financial gain.[139]

Most importantly, this restriction will clearly not be an undue burden. First, a state's interest in avoiding abortion incentives is a legitimate interest.[140] Second, a state which negates its abortion incentive by allowing other heirs to inherit is not imposing a substantial obstacle on a woman's right to choose a pre-viability abortion; it is merely discouraging with one hand that which it encourages with the other. This is logically consistent with the Court's statement that "the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it."[141] Changing the UPC to allow someone else to inherit after a woman aborts gives her the chance to look objectively at her situation and decide whether to abort based on the sweet mystery of her own life[142] rather than a chance for financial gain. This restriction is also not designed "'to strike at the right itself'"[143] but merely shows appropriate respect for life and the well being of the mother. Therefore, based upon the Supreme Court's definitions of "undue burden," negating the abortion incentive by allowing another heir to inherit would not constitute an undue burden.

CONCLUSION

The explosion of privacy rights detonated by *Roe* has left women's rights to abort largely unchecked. So deep are the ramifications of the decision that it has combined with the UPC to birth a twisted state-sponsored death incentive. It is time for states and the UPC to stop providing an incentive for women to make this choice. It is time for a change.

As this Note has explained, there is a viable solution to the identified problem. States have a legitimate interest in negating death

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138 *See supra* notes 67–69 and accompanying text.

139 *See Cause for Concern (Abortion)*, Found on *Social Issues*, FOCUS ON THE FAMILY, http://www.focusonthefamily.com/socialissues/sanctity-of-life/abortion/cause-for-concern.aspx (2008) ("Psychological risks after an abortion include depression, substance abuse and suicide."). For more information on the profound psychological effects of abortion, including scholarly works and first-hand testimonials, see Elliot Institute, AFTERABORTION.ORG, http://afterabortion.org/ (last visited Feb. 19, 2011).

140 *See supra* Part II.B.

141 Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 877 (1992).

142 *See id.* at 851.

143 Gonzales v. Carhart, 550 U.S. 124, 157–58 (2007) (quoting *Casey*, 505 U.S. at 874 (O'Connor, Kennedy, & Souter, JJ., joint opinion)).

incentives, and doing so as recommended above would not constitute an undue burden. Therefore, states and the authors of the UPC should take action, allowing women to make this immensely consequential choice based upon legitimate needs rather than financial considerations thrust upon them by the state.

Aaron Mullen

THE "SEARCH-INCIDENT-TO-ARREST [BUT PRIOR-TO-SECUREMENT]" DOCTRINE: AN OUTLINE OF THE PAST, PRESENT, AND FUTURE

PRELUDE

You're a 2L, maybe a 3L. It's late April or early May 2009—in other words, exam period. You've just spent the last four days cramming for your Criminal Procedure exam. For most exams, you spend only a day or two preparing, but your Criminal Procedure professor is known to be a real stickler for perfection. This semester, she even had the nerve to tell the class that, to get an "A," one "must know and be able to apply" any relevant cases that the Supreme Court may decide between now and the exam. You snickered.

That was ten days ago. It's now the afternoon of the exam—game-time. You're ready to get yourself that "A."[1]

"Gimme dat!" you say in excitement as a proctor hands you a copy of the exam.

You're about to put in your earplugs when a friend stumbles into the room, grabs the empty seat next to you, and asks if you've heard about the "very important" Fourth Amendment case that the Supreme Court just decided—*Arizona v. Gant*.[2] You turn red.

"Are you kidding?" you ask.

"No, it's a big time search-and-seizure case," he replies.

With just minutes to spare, you ask him to give you a quick rundown of the case. To start, he tells you that *Gant* effectively abrogates *New York v. Belton*[3] and that it may also affect the way courts interpret *Chimel v. California*.[4]

"*Belton* and *Chimel*?" you exclaim. "But both those cases are long-standing Supreme Court precedent."

"I know," replies your friend. "It's dirty."

Fortunately, you know both cases inside and out. Both deal with the "search-incident-to-arrest" exception to the warrant requirement—*Chimel* in the broad context, *Belton* in the automobile context.

"*Chimel* established that cops, after making an arrest, can search the arrestee and, uh, anything within their immediate control," you

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1 "At the beginning the people in your class seem[ed] like nice enough folks. But gradually [you began] to realize that [your] only hope of getting a job is to blast the chromosomes out of [your] classmates in the giant zero-sum thermonuclear war game called 'class standing.'" James D. Gordon III, *How Not To Succeed in Law School*, 100 YALE L.J. 1679, 1685 (1991).

2 129 S. Ct. 1710 (2009).

3 *Id.* at 1719; *New York v. Belton*, 453 U.S. 454 (1981).

4 *Gant*, 129 S. Ct. at 1719; *Chimel v. California*, 395 U.S. 752 (1969).

quickly tell your friend, "while *Belton* established that the entire inside of a car is within the arrestee's immediate control, and can thus be searched, when the arrestee is the car's recent occupant. Where does *Gant* come into play?"

Just as your friend is about to hit you with some knowledge, the professor walks into the classroom and proclaims, "The exam will begin now. Please stop talking."

The classroom falls silent. In a last-ditch effort to educate you, your friend whispers, "Just remember that it's over for the cops—definitely when they arrest car occupants, and maybe across the board, too." You nod in appreciation. Then you open your exam. Game-time!

Question One:

> Suppose police officers obtain a warrant to arrest Dan for, say, an assault that occurred during a fistfight at a neighborhood bar. They go to Dan's home. His wife lets them in, and they find Dan in his bedroom, in bed. They arrest him, handcuff him behind his back, take him out of the room, and lock him in a police car. Then one of the officers searches the nightstand next to the bed, finding narcotics in the drawer. Dan is charged with possession of illegal narcotics. His lawyer moves to suppress the narcotics. She concedes that the arrest was valid but argues that the narcotics were obtained by an illegal search. The prosecutor makes no claim that the police had a warrant to search the premises, that the police had probable cause to believe that evidence of a crime would be found in the bedroom, that the police searched in order to protect themselves from weapons, or that Dan or his wife consented to the search.
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> . . . .
>
> According to many appellate decisions, [the] motion[] should be denied, on the ground that the search[] [was] "incident" to the arrest, because the nightstand . . . [was] within Dan's reach when he was arrested—though not when the search[] took place.[5]

Who wins in the United States Supreme Court in light of its recent *Arizona v. Gant* decision?

INTRODUCTION

The following is a brief overview of Fourth Amendment law as it pertains to this Note. The Fourth Amendment prohibits "unreasonable searches."[6] Searches are "per se unreasonable" when they are conducted without a warrant, that is, "without prior approval by [a] judge."[7] The Supreme Court was quick to recognize, however, that it is sometimes

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[5] This hypothetical was taken from Myron Moskovitz, *A Rule in Search of a Reason: An Empirical Reexamination of* Chimel *and* Belton, 2002 WIS. L. REV. 657, 657 (2002).

[6] U.S. CONST. amend. IV.

[7] Katz v. United States, 389 U.S. 347, 357 (1967).

impractical to require law enforcement authorities to obtain a warrant.[8] In turn, it created several exceptions to the warrant requirement, one of them being the "search-incident-to-arrest" doctrine.[9]

The Court delineated the doctrine's current version in the 1969 case *Chimel v. California*.[10] There, the Court held that a government official making a lawful custodial arrest, may, as a contemporaneous incident of that arrest, conduct a warrantless search of the arrestee's person and anything within the arrestee's immediate control, regardless of the crime for which the arrest was made.[11] Put more concisely, a police officer who makes a formal arrest has free rein to search the arrestee's body and anything within his immediate surrounding area.

The Court defined an arrestee's immediate surrounding area as "the area . . . within which [the arrestee] might gain possession of a weapon or destructible evidence."[12] Specifically, if the arrestee is in his house or apartment at the time of the arrest, the officer(s) can search a table or drawer in front of the arrestee, but not neighboring rooms or "[even] all the desk drawers or other closed or concealed areas in that room [where the arrest occurred]."[13] If the arrestee happens to be a car occupant or recent occupant, the officer(s) can search the car's passenger compartment and any containers found therein (this is what the aforementioned *New York v. Belton* stands for).[14]

As one may have already inferred from above, the Court in *Chimel* gave (and, to this day, continues to give) two justifications for allowing a search incident to arrest: (1) officer safety, that is, to "remove any weapons that the [arrestee] might seek to use in order to resist arrest or effect his escape," and (2) evidence preservation, that is, to prevent the arrestee from concealing or destroying evidence.[15] The Court in *Chimel* then reiterated its oft-stated maxim that "[a] search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible."[16] In short, no justifications, no search.[17]

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8 McDonald v. United States, 335 U.S. 451, 455–56 (1948).

9 Chimel v. California, 395 U.S. 752, 762–63 (1969).

10 *Id.*

11 *See id.* As mentioned, the doctrine only applies to custodial arrests. A custodial arrest is one that involves "the taking of a suspect into custody and transporting him to the police station." United States v. Robinson, 414 U.S. 218, 235 (1973). Conversely, the doctrine does not apply when an officer stops a motorist for a traffic infraction and issues him a citation rather than arresting him. Knowles v. Iowa, 525 U.S. 113, 118–19 (1998).

12 *Chimel*, 395 U.S. at 763.

13 *Id.*

14 New York v. Belton, 453 U.S. 454, 462–63 (1981); *accord* Arizona v. Gant, 129 S. Ct. 1710, 1714 (2009).

15 *Chimel*, 395 U.S. at 763.

16 *Id.* at 762 (citing Terry v. Ohio, 392 U.S. 1, 19 (1968)).

Notwithstanding the limited justifications enumerated above, however, many courts have interpreted *Chimel* to allow a search incident to arrest *after* the officer has handcuffed the arrestee and placed him in the back of his squad car.[18] In other words, courts (and law enforcement authorities alike) have widely understood *Chimel* to allow a search incident to arrest even if the justifications underlying the doctrine cease to exist, that is, in instances in which "there [was] no possibility the arrestee could gain access" to weapons or evidence.[19] In fact, in 2004, the Supreme Court even implicitly approved of such a search.[20]

In their defense, the courts had reason to construe *Chimel* in this manner. In general, police officers are taught to handcuff the arrestee and secure him in the backseat of a squad car before searching the immediate surrounding area[21] because "[c]ustodial arrests are dangerous in themselves, and [handcuffing and securing the arrestee] is one step . . . that officers can take to secure their [own] safety."[22] Therefore, for those courts that have instead construed *Chimel* to prohibit searches of the arrestee's immediate surrounding area after the arrestee was secured, "the *Chimel* rule . . . [is] a specialty rule, applicable to only a few unusual cases."[23] Astoundingly, the Court never addressed this practical ambiguity of *Chimel* (at least not in a majority opinion)—that is, until this past April, in *Arizona v. Gant*.[24]

In *Gant*, the Court did more than address the ambiguity—some might even say it threw *Belton* out the window. The Court ruled:

> If there is no possibility that an arrestee could reach into the [passenger compartment of the car], both justifications for the search-incident-to-arrest exception are absent and the rule does not apply.

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[17] Even if an officer cannot justify a search incident to arrest, he may be able to justify a search pursuant to other established exceptions to the warrant requirement.

[18] *See Gant*, 129 S. Ct. at 1718 (observing that the "'lower court decisions seem now to treat the ability to search a vehicle incident to the arrest of a recent occupant as a police entitlement rather than as an exception justified by the twin rationales of *Chimel*'" (quoting Thornton v. United States, 541 U.S. 615, 624 (2004) (O'Connor, J., concurring in part)), and "although it is improbable that an arrestee could gain access to weapons stored in his vehicle after he has been handcuffed and secured in the backseat of a patrol car, cases allowing a search in this 'precise factual scenario . . . are legion'" (quoting *Thornton*, 541 U.S. at 628 (Scalia, J., concurring))).

[19] *Id.*

[20] *Thornton*, 541 U.S. at 617.

[21] Moskovitz, *supra* note 5, at 663, 665–66; *see also Gant*, 129 S. Ct. at 1719 n.4 ("[I]t will be a rare case in which an officer is unable to fully effectuate an arrest so that a real possibility of access to the arrestee's vehicle remains."); *id.* at 1730 (Alito, J., dissenting) ("[B]ecause it is safer for an arresting officer to secure an arrestee before searching, it is likely that this is what arresting officers do in the great majority of cases.").

[22] Transcript of Oral Argument at 30, *Gant*, 129 S. Ct. 1710 (No. 07-542).

[23] *Gant*, 129 S. Ct. at 1730 (Alito, J., dissenting).

[24] *Id.* at 1719 (majority opinion).

> . . . .
> Accordingly, we reject [the broad] reading of *Belton* and hold that the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.[25]

The Court, however, avoided making *Chimel* a "specialty rule" (at least in its application to the automobile context) by giving police another means to conduct a vehicular search incident to arrest: "Although it does not follow from *Chimel*, we also conclude that circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'"[26]

In other words, the Court created a two-part rule: Police may search a vehicle incident to arrest when it is reasonable to believe that either (1) there is a realistic possibility the arrestee could access the vehicle, or (2) the vehicle contains evidence of the crime of arrest.

The Court, however, seemingly left many questions unanswered (an example of which follows the hypothetical posed in this Note's Prelude). As to the first part of the Court's new rule, does it apply to contexts other than that of "vehicle occupants and recent occupants"?[27] Put differently, in light of *Gant*, are police officers allowed to search a secured arrestee's former immediate surrounding area incident to his arrest if that area is, say, a room in the arrestee's house or apartment rather than his car?

As to the second part of the Court's new rule, how is "reason to believe" defined?[28] Is it a lower standard than probable cause? Also, why did the Court restrict this type of search to evidence of the crime of arrest, rather than also includes evidence of a crime other than the crime of arrest?[29] And finally, why is this type of search "unique to the automobile context"?[30]

While all of these questions are worth exploring, this Note is devoted to only the first one: whether the Supreme Court should apply *Gant* to all contexts, and not just vehicular contexts.[31] The answer is "no."

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[25] *Id.* at 1716, 1719.

[26] *Id.* at 1719 (quoting Thornton v. United States, 541 U.S. 615, 632 (Scalia, J., concurring)).

[27] *Id.* at 1731 (Alito, J., dissenting).

[28] *Id.*

[29] *Id.*

[30] *Id.* at 1714 (majority opinion).

[31] This question was presented in the hypothetical posed in the Prelude.

Before giving the reasons for the answer in Part II, however, Part I outlines the doctrine's checkered past. Part II also analyzes the future impact of the first part of *Gant*'s new rule.

I. *WEEKS* TO *GANT*: THE NINETY-FIVE-YEAR PENDULUM

A. 1914–1930: Creation and Expansion

The Court first acknowledged the government's right to conduct a warrantless search incident to a lawful arrest some ninety-five years ago, in *Weeks v. United States*.[32] There, the Court noted in *dictum* that the government's right "to search the *person* of the accused when legally arrested to discover and seize the fruits or evidences of crime. . . . ha[d] been uniformly maintained in many cases."[33]

Conspicuously absent from *Weeks*, however, was a reference to the right to search the *place* where an arrest occurs. Eleven years later, in *Carroll v. United States*, the Court subtly referenced such a right: "When a man is legally arrested for an offense, whatever is found upon his person or *in his control* which it is unlawful for him to have and which may be used to prove the offense may be seized and held as evidence in the prosecution."[34]

Later that year, in *Agnello v. United* States, the Court directly acknowledged the right, albeit again in *dictum*.[35] The Court wrote that the government may conduct a warrantless search of "the place where the arrest is made in order to find and seize things connected with the crime . . . as well as weapons and other things to effect an escape from custody."[36]

Two years later, in *Marron v. United States*, the Court seemingly precedentialized the right.[37] In that case, government officials obtained a search warrant for premises where alcohol was supposedly being unlawfully sold; the warrant authorized the seizure of liquor and materials used for its manufacturing.[38] When the officials arrived on the scene, they executed the warrant and arrested the person in charge.[39] While conducting their search, the officials found and seized an

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[32] 232 U.S. 383, 392 (1914). For support, however, the Court cited to just *one* case—*Dillon v. O'Brien*, [1887] 20 L.R. 300, 317–18 (Ir.).

[33] *Weeks*, 232 U.S. at 392 (emphasis added).

[34] 267 U.S. 132, 158 (1925) (emphasis added).

[35] 269 U.S. 20, 30 (1925).

[36] *Id.* (citing *Carroll*, 267 U.S. at 158).

[37] 275 U.S. 192, 199 (1927).

[38] *Id.* at 193–94.

[39] *Id.*

incriminating ledger that was not covered by the warrant.[40] The Court, in upholding the ledger's seizure, wrote that the officials "had a right without a warrant . . . to search the place in order to find and seize the things used to carry on the criminal enterprise. . . . as an incident of the arrest."[41]

Up to this point, the government's right to conduct a warrantless search incident to a lawful arrest had only expanded. As a search incident to an arrest, government officials presumably had the right to conduct a warrantless search of an arrestee's person and the place where the arrest occurred and, in conjunction therewith, seize both "things connected with the crime" and "weapons and other things [that could be used] to effect an escape from custody."[42] On its face, the right was pretty broad. That would soon change.

B. 1931–1968: Constriction, Expansion, Ditto

In 1931, the Court decided *Go-Bart Importing Co. v. United States*,[43] in which it evidently made "the *Marron* opinion . . . not [to] mean all that it seemed to say."[44]

In *Go-Bart*, government agents went to the company's office and lawfully arrested its president and treasurer for conspiring to order, sell, and transport liquor illegally.[45] The agents, by threat of force, compelled the president to open a locked desk and safe; the agents then searched them, seizing account books, among other things.[46] The Court held the search and seizure to be unreasonable.[47] In doing so, the Court first noted that the agent in charge had sufficient "information and time to swear out a valid [search] warrant, [but] failed to do so."[48] The Court then distinguished the case from *Marron* and wrote as follows: "[In *Marron*, the] things [seized] were visible and accessible and in the offender's immediate custody. There was no threat of force or general search or rummaging of the place."[49]

A year later, the Court further qualified its holding in *Marron*. The case was *United States v. Lefkowitz*,[50] and its facts were very similar to

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40 *Id.* at 194.

41 *Id.* at 199.

42 Agnello v. United States, 269 U.S. 20, 30 (1925).

43 282 U.S. 344 (1931).

44 Chimel v. California, 395 U.S. 752, 757 (1969).

45 282 U.S. at 349.

46 *Id.* at 349–50.

47 *Id.* at 358.

48 *Id.*

49 *Id.*

50 285 U.S. 452, 465 (1932).

those in *Go-Bart*: Government agents lawfully arrested defendants for conspiring to order, sell, and transport liquor illegally, and incident to that arrest, they searched defendants' desks, seizing various incriminating papers.[51] Yet there was one possibly meaningful difference between the searches in the two cases. Unlike *Go-Bart*, the desks and cabinets in *Lefkowitz* were unlocked, so the agents did not have to threaten the defendants to gain access to them.[52]

The Court, however, still held the search and seizure unreasonable, but again refused to overrule *Marron*.[53] It distinguished the case from *Marron* on two grounds.[54] First, the ledger seized in *Marron* was in plain view and was found without an additional search; conversely, the search in *Lefkowitz* was "exploratory and general."[55] Second, the ledger in *Marron* was actually used to "carry on the criminal enterprise," while the papers in *Lefkowitz*, "[t]hough intended to be used to solicit orders for liquor in violation of the Act . . . were in themselves unoffending."[56]

Note that before the Court decided *Go-Bart* and *Lefkowitz*, government officials had an incident-to-arrest right to search a place without a warrant and seize "things used to carry on the criminal enterprise."[57] After *Go-Bart* and *Lefkowitz*, it was no longer clear what the government's right was. If a government official wanted to be sure that a search-and-seizure incident to an arrest was lawful, the search would have had to be particularized rather than exploratory and general,[58] yet done without time and information sufficient to swear out a valid search warrant.[59] Moreover, the thing seized would have needed to be "visible and accessible and in the offender's immediate custody,"[60] and the offender would have had to have already used the thing in commission of the crime rather than merely have intended to use it.[61] What are the chances of meeting those criteria? The Court (particularly Justice Butler, who authored both opinions) really did a number on the doctrine in the early 1930s.

Some fifteen years later, in *Harris v. United States*, the pendulum swung to the other side.[62] There, FBI agents arrested Harris at his four-

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51 *Id.* at 458–59.

52 *Id.* at 460.

53 *Id.* at 465.

54 *See id.* at 465.

55 *Id.*

56 *Id.*

57 Marron v. United States, 275 U.S. 192, 199 (1927).

58 *See Lefkowitz*, 285 U.S. at 465.

59 *See* Go-Bart Importing Co. v. United States, 282 U.S. 344, 358 (1931).

60 *Id.*

61 *See Lefkowitz*, 285 U.S. at 465.

62 331 U.S. 145, 152–53 (1947).

room apartment pursuant to two valid arrest warrants that charged him with intent to defraud certain banks.[63] After handcuffing Harris, the agents searched the entire apartment for approximately five hours (the agents claimed that they carried out the search to find two canceled checks that were used in the fraud).[64] Near the end of the search, one of the agents found and opened a sealed envelope marked "George Harris, personal papers."[65] The envelope contained documents that were "in no way related to the crimes for which [Harris] was initially arrested," but were nonetheless used to secure his conviction in the lower court for other criminal acts.[66]

Harris claimed that the search and seizure were unconstitutional, but the Court rejected his argument.[67] Instead of overruling *Go-Bart* and *Lefkowitz*, however, the Court attempted to distinguish the searches in those cases on the grounds that they were "exploratory," while the search here in *Harris* was "specifically directed to the means and instrumentalities by which the crimes charged had been committed, particularly the two canceled checks."[68]

Just over a year later, however, the *Harris* holding took a hit. In *Trupiano v. United States*,[69] federal agents raided the site of an illegal distillery that they had been monitoring for over two months without a warrant.[70] During the raid, the agents noticed one of the offenders operating the distillery and arrested him.[71] Contemporaneously, the agents seized the still, alcohol, and other equipment.[72] This time, the Court found the seizure unreasonable, and again without overruling any of its previous decisions.[73] It stated that "[i]t is a cardinal rule that . . . law enforcement agents must secure and use search warrants whe[n]ever reasonably practicable."[74] The Court then noted how the agents had "an abundance of time during which such a warrant could have been secured," because they had been monitoring the distillery for over two months.[75] The *Harris* case, on the other hand, "dealt with the

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63 *Id.* at 148. The warrants also listed other charges. *Id.*

64 *Id.* at 148–49.

65 *Id.* at 149.

66 *Id.*

67 *Id.* at 152–53.

68 *Id.* at 153.

69 334 U.S. 699 (1948).

70 *Id.* at 701–03.

71 *Id.* at 702.

72 *Id.* at 703–04.

73 *Id.* at 705.

74 *Id.* (citing Johnson v. United States, 333 U.S. 10, 14–15 (1948); Taylor v. United States, 286 U.S. 1, 6 (1932); Go-Bart Importing Co. v. United States, 282 U.S. 344, 358 (1931); Carroll v. United States, 267 U.S. 132, 156 (1925)).

75 *Id.* at 706.

seizure of Government property which could not have been the subject of a prior search warrant, it having been found unexpectedly during the course of a search."[76]

Two short years later, the Court had yet another opportunity to clarify its precedents in *United States v. Rabinowitz*.[77] And for the first time in its warrantless search jurisprudence, it seized that opportunity and overruled *Trupiano*.[78]

In *Rabinowitz*, federal officers obtained an arrest warrant for Rabinowitz after being informed that he was selling canceled stamps that bore forged overprints.[79] The officers then arrested Rabinowitz at his one-room business office, and incident thereto, conducted an hour-and-a-half search of the desk, safe, and filing cabinets.[80] They found and seized 573 incriminating stamps that were later admitted at trial in which Rabinowitz was convicted.[81] The Court affirmed Rabinowitz's conviction[82]—and it would have affirmed the conviction even if the officers had had enough time to obtain a search warrant but failed to do so.[83] In doing so, the Court rejected *Trupiano*'s holding and instead held that "[t]he relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable."[84] It then reiterated *Agnello*'s *dictum*: It is reasonable for officials to search a place in which a lawful arrest is made to seize evidence that has to do with the crime.[85]

With *Rabinowitz*, the doctrine came to a culmination. Officers were legally able to conduct warrantless searches of all areas under the arrestee's "control," not just the place where the arrest occurred, incident to a lawful arrest.[86] Moreover, officials were able to seize things merely "connected with the crime"—including evidence of other crimes for which the officers may not have had probable cause to arrest.[87]

Nineteen years later, however, Rabinowitz was overruled in part and substantially restricted by Chimel v. California.

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[76] *Id.* at 709.

[77] 339 U.S. 56 (1950).

[78] *Id.* at 66.

[79] *Id.* at 57–58.

[80] *Id.* at 58–59.

[81] *Id.* at 59.

[82] *Id.* at 63–64.

[83] *See id.* at 64.

[84] *Id.* at 66.

[85] *Id.* at 61 (quoting Agnello v. United States, 269 U.S. 20, 30 (1925)).

[86] *Id.* at 60–61; *see also* Chimel v. California, 395 U.S. 752, 760 (1969) ("*Rabinowitz* has come to stand for the proposition, *inter alia*, that a warrantless search 'incident to a lawful arrest' may generally extend to the area . . . under the 'control' of the person arrested.").

[87] *See Rabinowitz*, 339 U.S. at 61 (quoting *Agnello*, 269 U.S. at 30).

C. 1969–2009

1. *Chimel v. California*—A Firm Circumscription of *Harris* and *Rabinowitz*

As mentioned above, forty years ago in *Chimel*, the Court announced the doctrine's current version.[88] There, police officers arrested Chimel at his house pursuant to a valid arrest warrant.[89] Without first obtaining a search warrant and over Chimel's objection, the officers searched Chimel's entire three-bedroom house.[90] They found and seized numerous items that were later admitted into evidence at trial.[91] Chimel was convicted, and his conviction was subsequently upheld by both the California Court of Appeal and the California Supreme Court.[92]

The U.S. Supreme Court, however, reversed the state courts' decisions.[93] It held that when a policeman makes a lawful custodial arrest, he may, as a contemporaneous incident of that arrest, search the arrestee's person and the immediate surrounding area.[94] The Court defined immediate surrounding area as the area "within which [the arrestee] might have obtained either a weapon or something that could have been used as evidence against him."[95] In similar fashion, the Court provided two justifications for the exception: (1) the officer's safety, and (2) evidence preservation.[96]

By the same token, the Court also held that "[t]here is no comparable justification . . . for routinely searching any room other than that in which an arrest occurs—or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself."[97] It continued that "[s]uch searches . . . may be made only under the authority of a search warrant."[98]

In short, *Chimel* circumscribed the power of the police to conduct a warrantless search incident to arrest and fortified Fourth Amendment

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88 395 U.S. at 763.

89 *Id.* at 753.

90 *Id.* at 753–54.

91 *Id.* at 754.

92 *Id.*

93 *Id.* at 768.

94 *Id.* at 763.

95 *Id.* at 768.

96 *Id.* at 763. These have come to be known as *Chimel*'s "twin rationales." *See* Arizona v. Gant, 129 S. Ct. 1710, 1718 (2009); Thornton v. United States, 541 U.S. 615, 624 (2004) (O'Connor, J., concurring).

97 *Chimel*, 395 U.S. at 763; *see also id.* at 773 (White, J., dissenting) (asserting that the justifications "do not apply to the search of areas to which the accused does not have ready physical access").

98 *Id.* at 763 (majority opinion).

principles. Police no longer had the power "'to rummage at will . . . in search of whatever will convict [the arrestee].'"[99]

2. *New York v. Belton*—An Extension of *Chimel* to Automobiles

In the years following *Chimel*, courts had difficulty applying the doctrine in specific cases. For one, many courts were unsure of the proper scope of a search of the arrestee's person incident to a custodial arrest.[100] The Court addressed this uncertainty in the 1974 case of *United States v. Robinson*; therein, it authorized a "full search" of the arrestee's person.[101]

Seven years later, in *New York v. Belton*, the Court answered another question: Is an automobile's passenger compartment within the arrestee's immediate surrounding area when the arrestee is the automobile's occupant or recent occupant?[102]

In that case, Belton was in a car with three other men when a policeman pulled over the driver for speeding.[103] When the officer approached the car, he smelled burnt marijuana and noticed an envelope on the car floor marked "Supergold," which the officer associated with marijuana.[104] The officer then ordered the four men out of the car and arrested them for possession of marijuana, but the men were not handcuffed.[105] The officer then began to search the car's interior.[106] First, he opened the envelope and found marijuana.[107] Then he searched the car's passenger compartment and found a jacket belonging to Belton.[108] He unzipped one of the jacket pockets and found cocaine.[109] At trial, Belton moved to suppress the cocaine; the court denied the motion and Belton was convicted.[110]

The Supreme Court upheld Belton's conviction and wrote that a car's passenger compartment is "in fact generally, even if not inevitably, within 'the area into which an arrestee might reach in order to grab a

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[99] *Id.* at 767 (quoting United States v. Kirschenblatt, 16 F.2d 202, 203 (1926)).

[100] *See, e.g.*, New York v. Belton, 453 U.S. 454, 460 (1981).

[101] 414 U.S. 218, 235 (1973).

[102] 453 U.S. at 455.

[103] *Id.*

[104] *Id.* at 455–56.

[105] *Id.* at 456.

[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] *Id.*

weapon or evidentiary ite[m].'"[111] As such, the Court ruled that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile."[112]

The Court rationalized its ruling in part on the need for a "workable rule,"[113] or, in other words, a "single familiar standard . . . to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront."[114] From here on, courts would be able to avoid the issue of whether a weapon or evidence was in the arrestee's "immediate control."

The majority's bright-line rule, however, caused Justice Brennan to dissent.[115] Justice Brennan presumed that the majority would have ruled the same way even if the officer had handcuffed Belton and the other men and placed them in the patrol car before conducting the search.[116] He then argued that "[w]hen [an] arrest has been consummated and the arrestee safely taken into custody, the justifications underlying *Chimel*'s limited exception to the warrant requirement cease to apply: at that point there is no possibility that the arrestee could reach weapons or contraband," and so a search incident to arrest would be unreasonable.[117] In turn, Justice Brennan concluded that "the crucial question under *Chimel* is not whether the arrestee could *ever* have reached the area that was searched, but whether he could have reached it *at the time of arrest and search*."[118]

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[111] *Id.* at 460–63 (alteration in original) (quoting Chimel v. California, 395 U.S. 752, 763 (1969)).

[112] *Id.* The Court further provided the contents of any containers in the passenger compartment may also be investigated regardless of whether they were open or closed. *Id.* at 460–61.

[113] *Id.* at 460.

[114] *Id.* at 458 (quoting Dunaway v. New York, 442 U.S. 200, 213–14 (1979)).

[115] *See id.* at 463 (Brennan, J., dissenting) ("The Court today turns its back on the product of [its *Chimel*] analysis, formulating an arbitrary 'bright-line' rule applicable to 'recent' occupants of automobiles that fails to reflect *Chimel*'s underlying policy justifications.").

[116] *Id.* at 468. Remember, the officer in *Belton* did not handcuff Belton or any of his companions before searching the vehicle. *See id.* at 455–56 (majority opinion).

[117] *Id.* at 465–66 (Brennan, J., dissenting).

[118] *Id.* at 469 (emphasis added).

3. *Thornton v. United States*—A Subtle Expansion of *Belton*[119]

Because *Belton* applies to both car occupants and recent occupants[120] but did not define those terms, in the years following *Belton*, courts differed on how to define recent occupant. Some courts allowed officers to search an automobile incident to arrest only when the officer first initiated contact while the person still occupied the vehicle.[121] Conversely, other courts examined the arrestee's proximity to the vehicle and how much time had passed between the arrestee's exit from the car and his contact with the officers.[122]

In *Thornton*, the Court addressed the split of authority; specifically, it decided whether *Belton* applied to situations "when the officer first makes contact with the arrestee after the latter has stepped out of his vehicle."[123] It answered with an emphatic yes.[124]

The officer in this case was tailing Thornton because the license tags did not match the vehicle he was driving.[125] Before the officer could pull Thornton over, however, Thornton pulled into a parking lot and exited the vehicle.[126] In response, the officer parked his patrol car, accosted Thornton, patted him down, and found narcotics in one of his pockets.[127] The officer then handcuffed Thornton and secured him in the back of the squad car.[128] Immediately thereafter, the officer searched Thornton's car and found a handgun under the driver's seat.[129]

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[119] In the twenty-three years between *Belton* (1981) and *Thornton* (2004), the Court decided few cases that significantly affected the "search-incident-to-arrest" doctrine. For those cases that did make a noteworthy impact on the doctrine, see Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001) (holding that officers, as long as they have probable cause, can make *custodial* arrests for "even a very minor criminal offense," and can thus carry out a search incident to such an arrest); Knowles v. Iowa, 525 U.S. 113, 117 (1998) (holding that *non-custodial* arrests (that is, those in which the officer does not take the person into custody, but merely stops him or issues him a traffic citation) do not trigger the power to conduct any automatic search of the arrestee or his surrounding area); Maryland v. Buie, 494 U.S. 325, 330, 334 (1990) (holding that as an incident to arrest, officers may (without a warrant, probable cause, or even reasonable suspicion) conduct a "protective sweep" of a home for dangerous persons following a lawful-in home arrest, and that in doing so, officers may "look in closets and other spaces immediately adjoining the place of arrest"). In short, the Court modestly, but consistently, increased the scope of the "search-incident-to-arrest" doctrine between 1981 and 2004.

[120] 453 U.S. at 460; *see also* discussion Section I.C.2.

[121] *See, e.g.*, United States v. Strahan, 984 F.2d 155, 159 (6th Cir. 1993).

[122] *See, e.g.*, United States v. Thornton, 325 F.3d 189, 196 (4th Cir. 2003).

[123] 541 U.S. 615, 617 (2004).

[124] *Id.*

[125] *Id.* at 618.

[126] *Id.*

[127] *Id.*

[128] *Id.*

[129] *Id.*

The prosecution submitted the handgun into evidence at Thornton's trial in which he was convicted for possession of a firearm, inter alia.[130] Thornton appealed on one ground—that the search of his car violated his Fourth Amendment rights.[131]

The Court upheld Thornton's conviction notwithstanding the fact that it was "unlikely . . . that [Thornton] could have reached under the driver's seat for his gun once he was outside of his automobile."[132] It provided that:

> There is simply no basis to conclude that the span of the area generally within the arrestee's immediate control is determined by whether the arrestee exited the vehicle at the officer's direction, or whether the officer initiated contact with him while he remained in the car. . . .
>
> . . . [T]he arrest of a suspect who is next to a vehicle presents identical concerns regarding officer safety and the destruction of evidence as the arrest of one who is inside the vehicle. . . . [A]n arrestee [is not less] likely to attempt to lunge for a weapon or to destroy evidence if he is outside of, but still in control of, the vehicle. In either case, the officer faces a highly volatile situation. It would make little sense to apply two different rules to what is, at bottom, the same situation.[133]

In sum, *Thornton* reaffirmed *Belton*'s holding that officers have the authority to search an automobile's entire passenger compartment incident to the lawful arrest of the automobile's occupant or recent occupant. In addition, it made clear that officers hold such authority irrespective of whether the arrestee is in the vehicle when the officer first makes contact.

On a final note, the Court declined to address whether *Belton* was limited to cases of "'recent occupant[s]' who are within 'reaching distance' of the car."[134] Instead, it simply noted that "arrestee's status as a 'recent occupant' may turn on his temporal or spatial relationship to the car at the time of the arrest and search."[135]

4. *Arizona v. Gant*—An Unexpected "Clarification" of *Belton*

Between 1969 and April 2009, the Court steadily expanded the "search-incident-to-arrest" doctrine. The question remained, however, whether an officer could carry out a search incident to an arrest

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[130] *Id.* at 618–19.

[131] *Id.* at 619.

[132] *Id.* at 622, 624.

[133] *Id.* at 620–21.

[134] *Id.* at 622 n.2. The Court refused to address the issue because it was outside the question on which it granted certiorari. *Id.*

[135] *Id.* at 622.

regardless of the arrestee's ability to access weapons and evidence *at the time of the search*. *Gant* presented the Court with an opportunity to answer that question, at least insofar as it pertained to the automobile context.

In *Gant*, shortly after parking and exiting his vehicle, the defendant was arrested for driving with a suspended license.[136] The police handcuffed and secured him in a squad car.[137] They then searched his car and found a firearm and cocaine therein.[138] Gant argued that the search violated his Fourth Amendment rights because it was not possible for him to access his vehicle at the time of the search.[139]

The majority agreed with Gant and, for the first time, espoused the view previously posited by Justice Brennan[140] and Justice Scalia.[141] First, the Court stressed the importance of the justifications underlying *Chimel* (officer safety and evidence preservation).[142] It then held that "[i]f there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply."[143] Put differently, "the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant's arrest *only* when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search."[144]

The Court then noted how "it will be [a] rare case in which an officer is unable to fully effectuate an arrest so that a real possibility of access to the arrestee's vehicle remains."[145] And so to avoid rendering the exception in the automobile context obsolete, the Court provided another ground on which officers may search a vehicle incident to arrest: "when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'"[146]

In short, it created a two-part rule: Police may search a vehicle incident to arrest when it is reasonable to believe that either (1) there is

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[136] Arizona v. Gant, 129 S. Ct. 1710, 1715 (2009).

[137] *Id.*

[138] *Id.*

[139] *Id.*

[140] *See supra* Section I.C.2.

[141] *See* Thornton v. United States, 541 U.S. 615, 628–29 (2004) (Scalia, J., concurring) (arguing that "[i]f *Belton* searches are justifiable [when an arrestee is handcuffed and secured in the back of a squad car], it is not because the arrestee might grab a weapon or evidentiary item from his car, but simply because the car might contain evidence relevant to the crime for which he was arrested").

[142] *Gant*, 129 S. Ct. at 1716.

[143] *Id.* at 1716 (citing Preston v. United States, 376 U.S. 364, 367–68 (1964)).

[144] *Id.* at 1719 (emphasis added).

[145] *Id.* n.4.

[146] *Id.* at 1719 (quoting *Thornton*, 541 U.S. at 632 (Scalia, J., concurring)).

a realistic possibility the arrestee could access the vehicle, or (2) the vehicle contains evidence of the crime of arrest.

II. BEYOND *GANT*: THE PENDULUM SHOULD STOP

Gant has had a major impact on the daily operations of law enforcement authorities around the country. At the very least, police must now often refrain from conducting searches following vehicular arrests when such arrests are for traffic violations or outstanding arrest warrants, even when the arrestee appears to be engaged in criminal activity, because there often will not be sufficient reason to believe that the vehicle contains evidence relevant to the crime.[147]

Some jurisdictions, however, may construe *Gant* as far more limiting. Regardless, *Gant* clearly left some unanswered questions. Justice Alito's dissent was quick to point this out:

> The Court . . . leaves the law relating to searches incident to arrest in a confused and unstable state. The first part of the Court's new two-part rule—which permits an arresting officer to search the area within an arrestee's reach at the time of the search—applies, at least for now, only to vehicle occupants and recent occupants . . . .
>
> The second part of the Court's new rule . . . raises doctrinal and practical problems that the Court makes no effort to address. Why, for example, is the standard for this type of evidence-gathering search "reason to believe" rather than probable cause? And why is this type of search restricted to evidence of the offense of arrest? . . .
>
> . . . [And, finally,] why [is] an evidence-gathering search incident to arrest . . . restricted to the passenger compartment[?][148]

This Part of the Note analyzes the future impact of the first part of the Court's new rule. Specifically, it purports to answer whether the Court should apply *Gant* to "virtually all situations where an arrestee is handcuffed, in effect creating another bright-line rule—that no search incident to arrest may proceed once the arrestee is [fully secured.]"[149]

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[147] *See supra* Section I.C.4; *see also* JENNIFER G. SOLARI, FEDERAL LAW ENFORCEMENT TRAINING CENTER, THE UNITED STATES SUPREME COURT'S RULING IN *ARIZONA V. GANT*: IMPLICATIONS FOR LAW ENFORCEMENT OFFICERS, *available at* http://www.fletc.gov/training/programs/legal-division/the-informer/research-by-subject/4thamendment/ArizonaVsGant.pdf.

[148] *Gant*, 129 S. Ct. at 1731 (Alito, J., dissenting).

[149] Dale Anderson & Dave Cole, *Search and Seizure After* Arizona v. Gant, 46 ARIZ. ATT'Y 14, 16 (2009).

A. Lower Court Reactions to Searches Following a Non-Vehicular Arrest

1. The "Time-of-Arrest" Approach

Prior to *Gant*, many jurisdictions permitted officers to search the place of arrest even after the arrestee had been handcuffed and removed from the area, so long as the area was within the arrestee's control at the time of the arrest.[150] This is known as the "time-of-arrest" approach.[151]

In *United States v. Tejada*, for example, the United States Court of Appeals for the Seventh Circuit noted how many circuit courts hold that "if the search is limited to the area under the defendant's control at the time of his arrest, the fact that it is no longer under his control at the time of the search does not invalidate the search."[152]

In *Tejada*, more than a dozen undercover agents came into the defendant's apartment to arrest him for intent to distribute narcotics.[153] The agents pushed the defendant onto the floor and handcuffed his hands behind his back.[154] Some of the agents then searched the defendant's apartment, including an entertainment center in the living room.[155] Therein, the agents discovered a blue travel bag that they unzipped only to find another bag containing cocaine.[156] The Seventh Circuit found it "inconceivable" that the defendant would have had time to unzip the travel bag after being arrested without being immobilized yet again by dozen or more agents.[157] Nevertheless, it found the search constitutional.[158]

There are two basic rationales behind the "time-of-arrest" approach. First, "if the police could lawfully have searched the [arrestee's] grabbing radius at the moment of arrest, he has no legitimate complaint if, the better to protect themselves from him, they first put him outside that radius."[159] Second, to hold otherwise creates "a perverse incentive for an

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[150] *See, e.g.*, United States v. Tejada, 524 F.3d 809, 812 (7th Cir. 2008); United States v. Currence, 446 F.3d 554, 557 (4th Cir. 2006); United States v. Hudson, 100 F.3d 1409, 1419 (9th Cir. 1996); United States v. Abdul-Saboor, 85 F.3d 664, 668 (D.C. Cir. 1996).

[151] *See* Moskovitz, *supra* note 5, at 682 (citing United States v. Turner, 926 F.2d 883, 887 (9th Cir. 1991)).

[152] *Tejada*, 524 F.3d at 812.

[153] *Id.* at 811.

[154] *Id.*

[155] *Id.*

[156] *Id.*

[157] *Id.* at 812.

[158] *Id.* at 814.

[159] *Id.* at 812 (citing United States v. Abdul-Saboor, 85 F.3d 664, 669 (D.C. Cir. 1996)); *see also* People v. Summers, 86 Cal. Rptr. 2d 388, 393 (Ct. App. 1999) (Bedsworth, J., concurring) (asserting that "[t]he right to search attaches at the moment of arrest" and

arresting officer to prolong the period during which the arrestee is kept [unsecured] in an area where he could pose a danger to the officer."[160]

2. The "Time-of-Search" Approach

On the other hand, some other jurisdictions have required the state to show that the area searched was accessible to the arrestee at the time of the search.[161] This is known as the "realistic" or "time-of-search" approach.[162] These jurisdictions are quick to point out that a secured arrestee has neither "the skill of Houdini [nor] the strength of Hercules."[163] Thus because the arrestee is rarely able to reach into the area in question at the time of the search, the two justifications underlying *Chimel* do not exist, and thus a search incident to an arrest is per se unreasonable.

B. The "Right" Approach: How the United States Supreme Court Should React to Searches Following a Non-Vehicular Arrest in Light of Its Ruling in Gant

In *Gant*, the Court expressly adopted a "time-of-search" approach for searches incident to *vehicular* arrests.[164] As to non-vehicular arrests, the dissent in *Gant* asserted that the majority opinion did not apply;[165] however, that might not have been the majority's intent. The majority stated that "[i]f there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications

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that "the Constitution is not offended by allowing police to delay exercise of that right until they can do so safely").

[160] *Abdul-Saboor*, 85 F.3d at 669; *see also* United States v. Griffith, 537 F.2d 900, 904 (7th Cir. 1976) ("*Chimel* does not permit the arresting officers' . . . to create a situation which [gives] them a pretext for searching beyond the area of defendant's immediate control.").

For those jurisdictions that do hold otherwise, the search in connection to the search–incident-to-arrest doctrine is "almost *never* [upheld] . . . . This is to be expected, of course, because police officers are not fools. As the answers to my inquiries revealed, they will normally restrain and remove the arrestee from the scene of arrest as soon as possible in order to protect themselves." Moskovitz, *supra* note 5, at 687.

[161] *See, e.g.*, United States v. Myers, 308 F.3d 251, 267 (3d Cir. 2002) (noting that an arrestee who was handcuffed behind his back while lying face down on the floor and "covered" by two armed policemen while a third policeman searched his bag would have to possess supernatural abilities to reach the bag at the time of the search).

[162] Moskovitz, *supra* note 5, at 685–87.

[163] Thornton v. United States, 541 U.S. 615, 625–26 (2004) (Scalia, J., concurring) (quoting United States v. Frick, 490 F.2d 666, 673 (5th Cir. 1973) (Goldberg, J., concurring in part and dissenting in part)).

[164] *See supra* Section I.C.4.

[165] Arizona v. Gant, 129 S. Ct. 1710, 1731 (2009) (Alito, J., dissenting).

for the search-incident-to-arrest exception are absent and the rule does not apply."[166]

"Notably, the Court did not limit its elaboration of *Chimel* to the vehicular context,"[167] and, "[t]hus, one can make a persuasive argument that all searches incident to arrest under *Chimel*—whether of persons, places, or things—are reasonable *only* when circumstances give rise to a possibility that the arrestee might gain access to a weapon [or] evidence."[168] Unquestionably, defense counsel will do just this, arguing that *Gant* applies to non-vehicular contexts.[169]

Therefore, a time will inevitably come when the Court will expressly espouse one of the two approaches with respect to the non-vehicular context: the "time of arrest" approach or the "time of search" approach. Which will it be? At first glance, "there is no logical reason why the ["time-of-search"] rule should not apply to all arrestees."[170] In addition to what was mentioned above, most non-vehicular searches would be conducted at the arrestee's home, and one has a greater privacy interest in his home than he does in his vehicle.[171]

But if the Court were to adopt the "time-of-search" rule for non-vehicular arrests, the Court would effectively eviscerate the "search-incident-to-arrest" rule as it pertains to such. Why? Because first, the arrestee is nearly always handcuffed and secured before the officers conduct the search and thus there is no realistic possibility that he might reach into nearby areas.[172] In turn, the justifications underlying *Chimel* would cease to exist. Second, unlike in the vehicular context, the non-vehicular context provides no alternative ground on which to conduct the search.[173] For these two reasons, the "search-incident-to-arrest" exception would rarely apply in non-vehicular contexts. And arguably, the Supreme Court did not intend its ruling in *Chimel* to be eviscerated.[174]

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[166] *Id.* at 1716 (citing Preston v. United States, 376 U.S. 364, 367–68 (1964)).

[167] Angad Singh, Comment, *Stepping Out of the Vehicle: The Potential of* Arizona v. Gant *To End Automatic Searches Incident to Arrest Beyond the Vehicular Context*, 59 AM. U. L. REV. 1759, 1778 (2010).

[168] SOLARI, *supra* note 147.

[169] Anderson & Cole, *supra* note 149, at 16.

[170] *Gant*, 129 S. Ct. at 1731 (Alito, J., dissenting).

[171] *See* New York v. Class, 475 U.S. 106, 112–13 (1986).

[172] Moskovitz, *supra* note 5, at 665 (describing what police generally do upon making an arrest).

[173] *See Gant*, 129 S. Ct. at 1719 (holding that "[a]lthough it does not follow from *Chimel*, we also conclude that circumstances *unique to the vehicle context* justify a search incident to a lawful arrest when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle'") (emphasis added) (quoting Thornton v. United States, 541 U.S. 615, 632 (2004) (Scalia, J., concurring)).

[174] Moskovitz, *supra* note 5, at 689–90.

In short, barring the extension of the second part of *Gant*'s rule (that police may search a vehicle incident to arrest when it is reasonable to believe that the vehicle contains evidence of the crime of arrest) to non-vehicular arrests, a "time-of-search" rule would eviscerate the "search-incident-to-arrest" doctrine as it applies to non-vehicular contexts.

This alone may prompt some courts to adopt or maintain the "time-of-arrest" approach for non-vehicular searches incident to arrests. But there is a concrete justification as well. It is true that if the arrestee is handcuffed and secured, the two *Chimel* justifications—to prevent the arrestee from lunging for a weapon or destroying evidence—cease to exist, but one justification for conducting a non-vehicular search incident to arrest *does* exist: to prevent a *third party* (say, the arrestee's spouse or friend) from concealing or destroying evidence. Although this justification is a lot less substantial in the vehicular context because the vehicle is most often impounded and searched in conjunction therewith (an "inventory search"),[175] when the arrest occurs in a home, the home remains unattended and unguarded, and thus "other people can go in and maybe find weapons and contraband."[176]

CONCLUSION

For two significant reasons, the Supreme Court should not apply *Gant*'s "time-of-search" rule in non-vehicular contexts; rather, it should expressly adopt a "time-of-arrest" rule for such. First, although the two *Chimel* justifications may not exist after an arrestee is fully secured, a search incident to a non-vehicular arrest is still justified by the need to prevent third parties (for example, the arrestee's spouse) from concealing or destroying evidence.[177] This justification is less glaring in the vehicular context because a vehicle is often impounded after its driver is arrested.[178] Second, to apply the "time-of-search" rule to non-vehicular contexts would either (1) create "a perverse incentive for an arresting officer to prolong the period during which the arrestee is kept [unsecured] in an area where he could pose a danger to the officer,"[179] or (2) eviscerate the "search-incident-to-arrest" doctrine as it pertains to non-vehicular contexts.[180] As Justice Alito intuitively put it:

> I do not think that . . . the *Chimel* Court intended [a "time-of-search" rule]. Handcuffs were in use in 1969. The ability of arresting officers to secure arrestees before conducting a search—and their

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175 Transcript of Oral Argument, *supra* note 22, at 24.

176 *Id.* at 12.

177 *See supra* Section II.B.

178 *See supra* Section II.B.

179 United States v. Abdul-Saboor, 85 F.3d 664, 669 (D.C. Cir. 1996).

180 *See supra* Section II.B.

incentive to do so—are facts that can hardly have escaped the Court's attention. I therefore believe that the *Chimel* Court intended that its new rule apply in cases in which the arrestee is handcuffed before the search is conducted.[181]

Robert G. Rose[182]

[181] Arizona v. Gant, 129 S. Ct. 1710, 1730 (2009) (Alito, J., dissenting).

[182] I thank Professor David Velloney for his suggestions and feedback, the members of the Regent University Law Review for their hard work, and especially my parents, Joseph and Helen Rose, for their love, encouragement, and prayers over the years.

LEARNING FROM THE PAST: HOW THE EVENTS THAT SHAPED THE CONSTITUTIONS OF THE UNITED STATES AND GERMANY PLAY OUT IN THE ABORTION CONTROVERSY

Political pundits balked, Facebook and blogs flared with renewed vim and vigor, and the vice president of the National Organization of Women seethed that it was "hate masquerading as love."[1] The cause of all this ruckus? The Super Bowl—and not because of a bad coin toss, unwinding scandal, or "wardrobe malfunction" either.[2] This time the uproar was over NFL quarterback and former Heisman Trophy winner Tim Tebow.[3] Tebow was featured in a privately created and funded advertisement alongside his mother, who, thanks to the controversy surrounding the ad, is now commonly known to have chosen to undertake the health and financial risks of forgoing an abortion to carry him to term and give him the opportunity of life.[4]

It almost goes without saying that abortion is a hotly disputed subject in the United States. More than thirty-five years after the Supreme Court definitively entered the debate,[5] the controversy remains just as strong, the opposing parties equally resolute, and the arguments equally vehement.

One indication of the substantiality of the debate is the growing controversy accompanying each new judicial appointment. Since the infamous *Roe v. Wade*,[6] Supreme Court judicial appointments have increasingly come to be dominated by candidates' positions and

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[1] Frances Kissling & Kate Michelman, *How to Be Pro-Choice on Super Bowl Sunday*, WASH. POST, Jan. 31, 2010, at B1.

[2] In 2004, Janet Jackson and Justin Timberlake performed at halftime for Super Bowl XXXVIII. In a performance that is now infamous, Timberlake removed a portion of Jackson's costume, exposing a bare breast to a national audience of more than 140 million people. Keith Olbermann, *Janet Jackson's Wardrobe Malfunction*, MSNBC.COM (Feb. 3, 2004, 1:32 PM), http://www.msnbc.msn.com/id/4147857/ns/msnbc_tv-countdown_with_keith_olbermann/. Jackson later claimed that it was a wardrobe malfunction for which she was responsible. *Id.*

[3] Sally Jenkins, *Super Bowl Ad Isn't Intolerant; Its Critics Are*, WASH. POST, Feb. 2, 2010, at D1.

[4] The commercial, despite all of the controversy it generated, was relatively benign. It featured Ms. Tebow, holding a baby picture of her son, a football phenomenon, and reminiscing: "He almost didn't make it into this world." PolitiClips1, *Focus on the Family Super Bowl Commercial with Tim Tebow*, YOUTUBE (Feb. 7, 2010), http://www.youtube.com/watch?v=xqReTDJSdhE. She called him her "miracle baby" and claimed that her pregnancy was difficult, that she remembered "so many times when [she] almost lost him. It was so hard." *Id.*

[5] *See* Roe v. Wade, 410 U.S. 113 (1973).

[6] *Id.*

jurisprudence on abortion.[7] Most recently, pro-choice activists tried to forestall Senate confirmation of current Justice Sonia Sotomayor, who was generally a favorite among liberals, because her adjudication record did not provide solid indication of how she might vote in an anticipated case to overturn *Roe v. Wade*.[8]

But why, after the nation's highest court unambiguously held in 1973 that a fetus was not a "person" within the meaning of the Constitution,[9] and with its preceding declaration that the State's obligation is to uphold a woman's right to privacy,[10] would the debate not have begun to subside? Despite the Court's initial adjudication clearly favoring women's reproductive autonomy,[11] the debate has raged on, with the Court itself even coming to vacillate both in its legal reasoning and conclusions on the extent to which its commitment is to a woman's right to abortion or to a (viable) fetus's right to life.[12]

Halfway around the world, Germany has found itself in a similar predicament, this also after its highest court[13] issued an unambiguous statement on the issue of abortion. Unlike the United States' Supreme Court, however, both the legal analysis and conclusion in the German Constitutional Court (the "*Bundesverfassungsgericht*") opinion on the matter tilted clearly in favor of the unborn, holding that the woman's right to abortion, though derived from an important constitutional right, was not absolute and, moreover, limited by the State's obligation to protect the life of the unborn.[14]

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[7] *See, e.g.*, JAN CRAWFORD GREENBURG, SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT 221–27 (2007) (discussing the central role of judicial nominees' abortion records in the nominees' confirmation processes, highlighting those of Justice O'Connor and Chief Justice Roberts).

[8] Charlie Savage, *Tight Lid Defined Process in Selecting a New Justice: On Abortion, No Set Path Is Seen*, N.Y. TIMES, May 28, 2009, at A1 ("[P]resident of Naral Pro-Choice America[] urged supporters to press senators to demand that Judge Sotomayor reveal her views on privacy rights before any confirmation vote," contending that "[d]iscussion about Roe v. Wade will—and must—be part of this nomination process . . . . [C]hoice hangs in the balance on the Supreme Court as the last two major choice-related cases were decided by a 5-to-4 margin." (internal quotation marks omitted)).

[9] *Roe*, 410 U.S. at 162.

[10] *See* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

[11] Richard E. Levy & Alexander Somek, *Paradoxical Parallels in the American and German Abortion Decisions*, 9 TUL. J. INT'L & COMP. L. 109, 117–18 (2001).

[12] *See, e.g.*, Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 860 (1992).

[13] *See* CONSTITUTIONAL COURTS IN COMPARISON: THE U.S. SUPREME COURT AND THE GERMAN FEDERAL CONSTITUTIONAL COURT 1–2 (Ralf Rogowski & Thomas Gawron eds., 2002) (providing more information on Germany's Constitutional Court, called the *Bundesverfassungsgericht* (or "BVerfG")).

[14] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 25, 1975, 39 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 1, 1975 (Ger.), *translated in* Robert E. Jonas & John D. Gorby, *West German Abortion Decision: A*

For many Americans who adhere to a strong sense of American autonomy and subsequently do not welcome international influence, what Germany's constitution says about a woman's right to abortion and the nation's obligation to protect unborn life seems irrelevant to our own debate, except insofar as there is a recognition of commonness of plight (suffered by either unduly burdened women or unsafeguarded unborn life, depending on where one aligns herself in the abortion debate). Regardless of Americans' reticence to assess their own constitutional values in light of those of another country, the benefits of such comparison, especially with regard to fundamental human rights, cannot be denied. Donald Kommers, comparative constitutional scholar, expressed the same:

> For Americans, foreign constitutional cases are particularly important because they belong to the literature of responsible freedom and limited government, a literature that is both challenging and enlightening: challenging because it forces Americans to confront cherished assumptions about themselves as a people and the deeper meaning of their public values; enlightening because the opinions and insights of foreign case law uncover truths about our own constitutional tradition that we may have only dimly perceived in the past.[15]

Accordingly, this Note seeks both to "challeng[e] and enlighten[]"[16] Americans by comparing and contrasting both U.S. and German approaches to abortion in light of their respective constitutions and proposing that *Roe*—on account of its historical incorrectness, weak legal reasoning, and disregard for human life—and its progeny ought to be overturned.

To those ends, in Section I, this Note provides histories, albeit vastly abbreviated ones, of the constitutional drafting processes in each nation, because it is the historical backdrop against which each Constitution was drafted that sheds much-needed light on the values that are represented therein. Further, analysis of the historical settings of the respective constitutions' drafting reveals the intent behind, and indeed the very values embraced by, the Framers of each Constitution, and that analysis has consequently served to guide Justices in both Courts in matters of constitutional jurisprudence.

In Section II, this Note addresses the portions of the text of each Constitution that are relevant to the constitutional question of abortion. It further discusses how the U.S. and German Courts initially weighed

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Contrast to Roe v. Wade, 9 J. MARSHALL J. PRAC. & PROC. 605, 647 (1976) [hereinafter *Abortion I Case*].

[15] Donald P. Kommers, *The Constitutional Law of Abortion in Germany: Should Americans Pay Attention?*, 10 J. CONTEMP. HEALTH L. & POL'Y 1, 2–3 (1994).

[16] *Id.* at 3.

in on the abortion debate in light of constitutional text, if any, relevant to it. Accordingly, this Note discusses the constitutional interpretations the Supreme Court proffered in *Roe v. Wade* and in the Constitutional Court's decision of February 25, 1975, and examines briefly how the Courts have subsequently begun to alter their legal positions to accommodate public opinion on the divisive subject.

Beyond providing a mere historical comparison of abortion in the two nations, Section III of this Note proposes that, regardless of public opinion on an issue, the United States Supreme Court is compelled to interpret the Constitution not with an eye on what it anticipates public response will be, but with firm commitment to elucidate the rights that the Constitution protects and to uphold, unwaveringly, the values it embodies. For the Court to do anything less would be to betray its sworn oath to uphold the Constitution[17] and would venture well beyond its constitutional limitation to "[s]ay what the law is"[18] by taking upon itself the role of legislature in matters of popular opinion.[19]

I. CONSTITUTIONAL CONTEXTS: WHAT CONSTITUTES A CONSTITUTION?

In some ways, the Constitution of the United States and the German equivalent, called the "Basic Law,"[20] share a similar history. Both were drafted in response to government systems that lacked sufficient constitutional safeguards to prevent tyranny.[21] In conjunction, both were forged in post-war years, as the abuses of the former governments of each ultimately led to complete upheaval and fresh beginnings. Additionally, both bear the influences of Christian ideology.[22] Despite such likenesses, there is at least one immeasurably

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[17] 28 U.S.C. § 453 (2006). The oath of Justices and judges is as follows:

> I, [Name], do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as [Title] under the Constitution and laws of the United States. So help me God.

[18] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[19] Recognizing the limited role of the judiciary under the constitutional separation of powers, the Supreme Court, for almost the entire first century of its existence, generally showed deference to laws passed by Congress, "only once declin[ing] to carry out a provision of federal law." AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 211 (2005).

[20] John D. Gorby, *Introduction to the Translation of the Abortion Decision of the Federal Constitutional Court of the Federal Republic of Germany*, 9 J. MARSHALL J. PRAC. & PROC. 557, 563 & n.18 (1976).

[21] *See id.* at 564 ("[B]oth constitutions were in part reactions to a system of oppression and injustice.").

[22] In Germany, the already existing Christian Democratic Party played a significant role in the drafting of the Basic Law, and in the United States, the Congressional record demonstrates the influence of Christianity on the document's

significant point of deviation between the two. The U.S. Constitution responded to numerous repeat violations of civil and political liberties,[23] whereas the German Basic Law responded to the greatest violation of human rights in the history of the civilized world.[24] The rights declared in and protected by each have subsequently been directly affected.

Hannes Rösler, Senior Research Fellow at the Max Planck Institute for Comparative and International Private Law in Germany, put it this way:

> There are "classical" moments whe[n] a constitution can be established. On the one hand it can result from a revolutionary striving for civil liberties . . . . On the other hand the failure of a political system can serve as an incentive to establish constitutional individual rights and new democratic institutions, and to guarantee them by means of fixed procedures. Examples of the latter are the 1945 collapse of the "Third Reich" . . . . Whereas the historical setting of the American Constitution more closely resembles the first model, the Basic Law for the Western part of Germany was an attempt of moral cleansing through law.[25]

Accordingly, the constitution of each served a very distinct purpose, each proclaiming substantially divergent orderings of values. In Germany, human dignity is considered the most fundamental, and valuable, right.[26] It therefore "occupies the position that liberty may be said to play in the American constitutional order."[27]

A. The History of the U.S. Constitution

The history of the birth of the United States is a rather familiar one. The colonists, who were weary of "taxation without representation," remote and overly intrusive monarchical rule, and often complete disregard of their rights as colonists in furtherance of Mother England's objectives, made numerous unsuccessful efforts to safeguard their freedoms from infringement by the monarchy before they ever developed the intention to assert independence. They expressed the same in what many felt had become their last resort. Having found the Crown's

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drafting. DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 31–32 (2d ed. 1997) [hereinafter CONSTITUTIONAL JURISPRUDENCE OF GERMANY].

[23] *See* discussion *infra* Part I.A.

[24] *See* discussion *infra* Part I.B.

[25] Hannes Rösler, *Harmonizing the German Civil Code of the Nineteenth Century with a Modern Constitution—The Lüth Revolution 50 Years Ago in Comparative Perspective*, 23 TUL. EUR. & CIV. L.F. 1, 3–4 (2008).

[26] S.E. Finer et al., *Comparing Constitutions*, *in* COMPARATIVE LEGAL TRADITIONS: TEXT, MATERIALS AND CASES ON WESTERN LAW 79, 83 (Mary Ann Glendon et al. eds., 3d ed. 2007) ("The German constitution is imbued with a ranked set of values of which the most basic is the principle of human dignity . . . .").

[27] CONSTITUTIONAL JURISPRUDENCE OF GERMANY, *supra* note 22, at 359.

responses to their previous efforts to be more than unsatisfactory, they were eventually moved to declare their independence.[28] They did so in 1776, providing a litany of grievances ranging from the Crown's failure to provide representative government for (and, as a result of that, enforcement of unfair legislation against) the colonists[29] to its creation and expansion of a military-enforced bureaucracy that tested the patience of even the most even-tempered men.[30]

Nearly all of the specifically enumerated grievances were assertions of the colonists' civil and political rights: a call for representative government, a condemnation of unfair taxation, a protestation against economic sanctions, a demand for judicial due process, an outcry against unlawful use of military force, inter alia.[31] They were, collectively, a public demand for liberty[32] and—if their demand for liberty was not honored—an expression of their right to self-determination.[33]

As the Revolutionary War makes clear, the Crown and the colonies did not reach an amicable solution, and the colonies subsequently entered into a sort of league of nations among themselves via the Articles of Confederation.[34] Drafted and ratified in the midst of the

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[28] The introductory paragraphs of the Declaration declare:

> Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations . . . evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security. —Such has been the patient sufferance of these Colonies; and such is now the necessity which constrains them to alter their former Systems of Government. The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these states.

THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[29] *Id.* at paras. 3–8.

[30] *Id.* at para. 12 (contending that the King had "erected a multitude of New Offices, and sent hither swarms of Officers to harass our people, and eat out their substance").

[31] *Id.* at para. 13.

[32] *See* Marc Chase McAllister, *Human Dignity and Individual Liberty in Germany and the United States as Examined Through Each Country's Leading Abortion Cases*, 11 TULSA J. COMP. & INT'L L. 491, 492 (2004) (discussing the role of liberty in the United States and comparing it to the role of human rights, specifically human dignity, in Germany).

[33] "Self-determination" is a more modern term but is nonetheless applicable to the colonists who were, in effect, asserting their right to "freely determine their political status and freely pursue their economic, social and cultural development." International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI) A, U.N. GAOR, 21st Sess. Supp. No. 16, U.N. Doc. A/6316, at 53 (Dec. 16, 1966).

[34] *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 187 (1824) ("[R]eference has been made to the political situation of these States, anterior to [the Constitution's] formation. It

Revolutionary War,[35] the emphasis of the Articles was not on fundamental rights but on other broader governmental themes: a confederate alliance with France, a uniform currency to finance the war,[36] "the nature of the association of states, limits on the respective powers of the states and confederation government, the structure of the confederation government, and methods of changing, or amending, the agreement."[37]

A shaky experience with the Articles of Confederation led to an intense four-month long Constitutional Convention, where delegates from the various sovereign states gathered to reach resolution on a number of highly divisive issues.[38] James Madison considered priorities of the Convention's attempts at solution to include the Articles' lack of an enforcement mechanism (namely sanctions), state encroachment on the authority of the confederation, state violations of treaties, inconsistencies among the states regarding currency, and the "perverseness of particular States" that deliberately thwarted necessary uniformity among the several states.[39] All were political issues. Out of necessity, the delegates to the Convention met to revise the Articles.[40] As it is now commonly known (although deliberations were kept secret at the time[41]), instead of revising the preexisting Articles, the delegates ultimately ended up scrapping them and starting anew. The result was the Constitution of the United States of America. In the forthcoming Constitution, emphasis on rights that would today qualify as

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has been said, that they were sovereign, were completely independent, and were connected with each other only by a league. This is true.").

35 BARBARA SILBERDICK FEINBERG, THE ARTICLES OF CONFEDERATION: THE FIRST CONSTITUTION OF THE UNITED STATES 24 (2002) ("Decisions about the Articles had to be postponed while military matters demanded the delegates' attention. [The British had] captured Philadelphia, where Congress had been meeting. The delegates fled to Lancaster and then to York.").

36 *Id.* at 24.

37 *Id.* at 26.

38 *Id.* at 68–70.

39 JAMES MADISON, VICES OF THE POLITICAL SYSTEM OF THE UNITED STATES (Apr., 1787), *reprinted in* COLONIES TO NATION, 1763–1789: A DOCUMENTARY HISTORY OF THE AMERICAN REVOLUTION, 514–16 (Jack P. Greene ed., 1975).

40 The recommendatory congressional act emanating from the Annapolis Convention stated that "a Convention of Delegates . . . [should meet] for the sole and express purpose of *revising the Articles of Confederation*[,] and reporting to Congress and the several Legislatures, such *alterations and provisions therein,* as shall . . . render the Federal Constitution *adequate to the exigencies of Government, and the preservation of the Union.*" THE FEDERALIST NO. 40, at 216 (James Madison) (E.H. Scott ed., 1898).

41 *See id.*; *see also* WALTER BERNS, THE WRITING OF THE CONSTITUTION OF THE UNITED STATES 16 (Am. Enter. Inst. 1985) (reflecting that the idea to keep the proceedings private was largely motivated by efforts to encourage candid discourse and debate among the delegates).

fundamental human rights[42] is noticeably absent. Additionally absent is a proclamation of a right of privacy.[43]

In fact, so little was the emphasis the Framers placed on human rights that the draft of the Constitution originally submitted to the States for ratification in September of 1787 was initially without any sort of declaration of fundamental individual rights.[44] It instead emphasized government structure and outlined limitations on the exercise of governmental power, both of which were more implicit of individual liberties than explicit enumerations of rights.[45] Fearing that a too-powerful federal government would eventually come to usurp the power of the States and disregard individual liberties as the Monarch had, a number of States refused to ratify the Constitution.[46] After months of intense political debate vis-à-vis such ideological conduits as *The Federalist Papers*, the Constitutional Convention produced a Bill of Rights in the fall of 1789. Two years later, the Bill of Rights had finally

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[42] "Human rights" as we understand them today did not emerge until after the Second World War, as the world searched for charges that could be made against Nazi officers who had masterminded or carried out the previously not coined "crimes against humanity." *See* MICHELINE R. ISHAY, THE HISTORY OF HUMAN RIGHTS: FROM ANCIENT TIMES TO THE GLOBALIZATION ERA 217–18 (2004).

[43] Indeed, Justice Brandeis opined that one of the greatest American rights is the "right to be let alone" when he said the following:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. . . . They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

[44] JOSEPH F. MENEZ & JOHN R. VILE, SUMMARIES OF LEADING CASES ON THE CONSTITUTION 229 (14th ed. 2004).

[45] Alexander Hamilton contended that a bill of rights is unnecessary when a government has specifically enumerated and limited powers:

> Bills of Rights, in the sense and to the extent they are contended for, are not only unnecessary, in the proposed Constitution, but would even be dangerous.—They would contain various exceptions to powers not granted; and on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done, which there is no power to do?

THE FEDERALIST No. 84, at 469–70 (Alexander Hamilton) (E.H. Scott ed., 1898).

[46] Randy E. Barnett, *A Ninth Amendment for Today's Constitution*, *in* THE BILL OF RIGHTS IN MODERN AMERICA: AFTER 200 YEARS 178 (David J. Bodenhamer & John W. Ely, Jr., eds., 1993) (recounting that a number of states made it clear that their ratification of the Constitution was contingent upon a forthcoming declaration of individual rights).

secured ratification from three-fourths of the States and was attached collectively as the first ten amendments to the Constitution.[47]

For these and additional more obvious reasons, it is not at all surprising that there was no mention, either explicit or implicit, of unborn life anywhere in either the Constitution itself[48] or the Bill of Rights[49]—no passage that would intimate what the public at large felt about the State's role in abortion restrictions, and no precursory inquiry into when life began. For one, such a specific issue is much too detailed to have been included in the broadly framed Constitution.[50] Further, the decriminalization of abortion as a consequence of some later discovered right to privacy was surely beyond the Framers' contemplation.

The same was true when Congress passed the Fourteenth Amendment in 1868. The Amendment was primarily a response to the egregiousness of slavery and the affronts to the dignity of an entire race of people.[51] The provision consequently specifically states, "[n]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[52] To be sure, the direct connotation of "person" in the Amendment referred to emancipated slaves.[53] Political debate over abortion at the time was not substantial enough to have led to any sort of serious debate in the drafting of the Amendment over whether "any person" should encompass the unborn.

B. The German Constitution

The "Grundgesetz" ("Basic Law") was drafted in 1949,[54] a full century and a half after the Constitution of the United States. The

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47 MENEZ & VILE, *supra* note 44, 228–29.

48 *See* Raymond B. Marcin, *God's Littlest Children and the Right to Live: The Case for a Positivist Pro-Life Overturning of* Roe, 25 J. CONTEMP. HEALTH L. & POL'Y 38, 49–51 (2008) (arguing that the reference to "Posterity" in the Preamble to the Constitution can be interpreted to include life that is not yet born).

49 U.S. CONST. amends. I–X.

50 The Bill of Rights does contain specific provisions, but unlike freedom from unreasonable search and seizures and freedom of speech, abortion was neither at that time, nor at any time previously, a political issue. It had not been a source of tension between the monarchy and the colonists or among the several States.

51 HORACE EDGAR FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 20 (1908) ("[I]t was to secure the provisions of [the first section of the Civil Rights Bill] that the first section of the Fourteenth Amendment was incorporated into our Constitution. The first section was in fact the basis of the whole bill, the other sections merely providing the machinery for its enforcement.").

52 U.S. CONST. amend. XIV.

53 McAllister, *supra* note 32, at 502 (citing GERALD GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 676 (10th ed. 1980)).

54 Brun-Otto Bryde, *Fundamental Rights as Guidelines and Inspiration: German Constitutionalism in International Perspective*, 25 WIS. INT'L L.J. 189, 194 (2007).

political and moral climate of Germany was much different in 1949 than it had been in the newly established United States in 1787.[55] The United States Constitution followed the Revolutionary War, and the German Basic Law followed the Second World War. The U.S. Framers of the Constitution had in their recent memory such things as unfair taxes, trade sanctions, overly meddlesome bureaucratic officers, and suspension of due process rights.[56] The drafters of the German Basic Law remembered very intimately death camps, human experimentation, recent attempts at genocide, infanticide, and forced abortions and euthanasia.[57] The impact of World War II was vast, engendering firm declarations and vindications of human rights the world over[58] and, more immediately, in Germany itself.

The harrowing effects of World War II are evident even in the international response to them. Nazi Germany and its allies had subjected the European continent to egregious affronts to human dignity previously unmatched in the modern civilized world. As the war came to an end, the world demanded retribution; the Nuremberg Trials ensued.[59] Throughout the trials, the world became increasingly aware of the fullness and extent of the Nazis' contempt for human rights—contempt that was so egregious that a new criminal charge for the commission of "crimes against humanity"[60] was created both to cope with the disregard of human rights and to punish Nazi officers for their offenses fully.

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[55] For one, the Basic Law was drafted under the watchful eye of the Allied powers, which placed stipulations on the content of the German-drafted constitution in order for it to receive the Allies' approval. These requirements were the establishment of "democracy, federalism, and fundamental rights," and each was given equal weight. DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 9 (1994).

[56] *See supra* notes 28–31 and accompanying text.

[57] McAllister, *supra* note 32, at 496.

[58] The drafting committee within the Commission on Human Rights of the Universal Declaration of Human Rights included representatives from the United States, France, Lebanon, China, Chile, *inter alia*, and over 50 Member States participated in the final drafting. Mary Ann Glendon, *Foundations of Human Rights: The Unfinished Business*, 44 AM. J. JURIS. 1, 4 (1999); John P. Humphrey, *The Universal Declaration of Human Rights: Its History, Impact and Juridical Character*, *in* HUMAN RIGHTS: THIRTY YEARS AFTER THE UNIVERSAL DECLARATION 23 (B.G. Ramcharan ed., 1979).

[59] For more on the Nuremberg Trials, see DREXEL A. SPRECHER, INSIDE THE NUREMBERG TRIAL: A PROSECUTOR'S COMPREHENSIVE ACCOUNT (1999) and TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR (1992).

[60] OLIVIA SWAAK-GOLDMAN, *Crimes Against Humanity*, *in* 1 SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW: THE EXPERIENCE OF INTERNATIONAL AND NATIONAL COURTS 145 (Gabrielle Kirk McDonald & Olivia Swaak-Goldman eds., 2000) ("The origin of 'crimes against humanity' as an independent juridical norm can be found in Article 6(c) of the Nuremberg Charter, promulgated at the conclusion of the Second World War, that included this crime within the jurisdiction of the International Military Tribunal for the Trial of the Major War Criminals." (citations omitted)).

Further evidence of the far-reaching impact of Nazi Germany's human rights violations was the subsequent gathering of leaders and representatives from around the globe for the United Nations Commission on Human Rights,[61] which ultimately produced the Universal Declaration of Human Rights.[62] Ernest Davies, a representative from the United Kingdom and one of the Declaration's drafters, went so far as to declare "that the war by its total disregard of the most fundamental rights was *responsible* for the Declaration . . . ."[63] Fellow drafter Lakshimi Menon, a representative from India, similarly stated that the Declaration was "born from the need to reaffirm [human] rights after their violation during the war."[64] To publicize and immortalize their recognition of this, the drafters of the Universal Declaration of Human Rights opened the Preamble with numerous affirmations of the worth of all human beings.[65] Therein they directly attributed the "barbarous acts which have outraged the conscience of mankind" to the utter "disregard and contempt for human rights,"[66] which had been unveiled in the aftermath of the Second World War. They subsequently declared that "[the] recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,"[67] and that "the dignity and worth of the human person" is the very foundation of "social progress and better standards of life in larger freedom."[68]

If the wounds inflicted by Nazi-led Germany had such tremendous impact on global civilized society—which, in comparison to Germany,

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61 *See supra* note 58 and accompanying text.

62 *See, e.g.*, Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287, 313 (1995–1996) ("[M]any constitutions have been directly inspired by the Universal Declaration. One author has estimated that 'no fewer than 90 national constitutions drawn up since 1948 contain statements of fundamental rights which, where they do not faithfully reproduce the provisions of the Universal Declaration, are at least inspired by it.'") (quoting Nihal Jayawickrama, *Hong Kong and the International Protection of Human Rights, in* HUMAN RIGHTS IN HONG KONG 160 (Raymond Wacks ed., 1992)); *see also* Evadné Grant, *Dignity and Equality*, 7 HUM. RTS. L. REV. 299, 306 (2007) ("The [Basic Law] is historically linked with the UDHR, drafted at about the same time, against the backdrop of the events of the war and in the context of similar philosophical influences."); Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

63 JOHANNES MORSINK, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, AND INTENT 37 (1999) (emphasis added).

64 *Id.* at 36.

65 Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), at 71 (Dec. 10, 1948).

66 *Id.*

67 *Id.*

68 *Id.* at 72.

had only been affected tangentially—it follows that in Germany, where the violations were directly experienced, their effects would be at least as great.[69]

When the Allied Powers first commissioned the West Germans to draft a constitution in July of 1948,[70] the wounds were still very fresh. Records of the Parliamentary Council provide some indication of to what extent the freshness of World War II had influenced the Basic Law's Framers. Framers often alluded to what they "ha[d] experienced in the Nazi-years"[71] with clear effort to avoid any sort of repeat of those events. Further, in interpreting the Basic Law, the Court acknowledges that it can "be understood *only* in light of the historical experience and the spiritual-moral confrontation with the previous system of National Socialism."[72]

Even the structure of the Basic Law evidences this. The preamble opens with a bold acknowledgement: "Conscious of its responsibility before God and mankind, filled with the resolve . . . to serve world peace as an equal partner in a united Europe, the German people . . . has . . . enacted this Basic Law of the Federal Republic of Germany . . . ."[73] It is somewhat counterintuitive to encounter a Constitution that begins with an explicit acknowledgement of a people's "responsibility before God and mankind,"[74] and an even greater anomaly for a Constitution to acknowledge in its Preamble a responsibility to persons beyond the borders of the country that is adopting the Constitution.

Additionally, the very placement of the German Bill of Rights in the Basic Law evinces the Basic Law's emphasis on human rights.[75] The order is notably inverted with that of the U.S. Constitution. While the U.S. Constitution attaches the Bill of Rights to the end of the Constitution as amendments to it, the German Basic Law leads off with its Bill of Rights, fully integrating them into, and in fact forming the basis of, the Basic Law.[76] Further, the very first article declares, "The

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[69] *See,* Bryde, *supra* note 54, at 190 ("German fundamental rights theory can only be understood against the background of history."); *see also id.* at 194 ("In reaction to the horrors of Nazi Germany, [the drafters] based the new constitution on the principle of human dignity and the recognition of human rights, recognized in Article 1.").

[70] Inga Markovits, *Constitution Making After National Catastrophes: Germany in 1949 and 1990,* 49 WM. & MARY L. REV. 1307, 1308 (2008).

[71] *Id.* at 1312 (citing *Dritte Sitzung des Ausschusses für Grundsatzfragen, in* 5/I DER PARLAMENTARISCHE RAT 1948–1949 28, 52 (1993)).

[72] *Abortion I Case, supra* note 14, at 662 (emphasis added).

[73] GRUNDGESETZ FÜR DIE BUNDESREPUBLICK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBL. I at pmbl. (Ger.).

[74] *Id.*

[75] CURRIE, *supra* note 55, at 10–11.

[76] *Id.*

dignity of man shall be inviolable."[77] Compare that to the first article of the United States Constitution which begins by outlining the specific—limited—powers accorded the legislative branch.[78] In sum, the Basic Law's drafters would have been hard-pressed to demonstrate more clearly just how committed to individual, and specifically human rights, the German people were.[79]

Even the makeup of the Framers of the Basic Law was different from the makeup of those who framed the Constitution of the United States. For one, in Germany, the political parties already existed, and members of the Parliamentary Council were already allied with their respective parties.[80] Each of the two largest parties, the Social Democrats and the Christian Democrats, had twenty-seven seats.[81] Of those, nearly three-quarters had been personally affected by Nazi policy that had "professionally disadvantaged" them,[82] and nearly all presumably were affected by the Nazi-era atrocities in some significant way. Regardless of political and ideological differences, however, the drafters of the Basic Law were in general alignment when it came to the importance, indeed "inviolab[ility]," of human dignity.[83]

To be sure, the historical backdrop for the drafting of the current German equivalent is not completely dissimilar to that of the United States. It does bear some resemblance, particularly with regard to its structural safeguards against totalitarian government.[84] Politically, the Federal Republic of Germany had been overrun by the Nazi Party, and the drafters consequently wanted to set up "new democratic institutions, and to guarantee them by means of fixed procedures."[85] But the Nazi takeover influenced more than the structure and procedure of the

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[77] GRUNDGESETZ FÜR DIE BUNDESREPUBLICK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBL. I at art. 1 (Ger.).

[78] U.S. CONST. art. I, §§ 1, 8.

[79] For a description of what the German "people" meant with regard to the drafting and ratification of the Basic Law, see Markovits, *supra* note 70, at 1309 ("[The] 'Parliamentary Council' elected by the legislative bodies of the *Länder* . . . succeeded in convincing the Occupation Powers that the new Basic Law should not be approved by popular referendum but by the parliaments of the West German *Länder*.").

[80] *See id.*

[81] *Id.*

[82] *Id.* at 1309–10 (internal quotation marks omitted) (quoting Wolfram Werner, *Introduction* to 9 DER PARLAMENTARISHE RAT 1948–1949: AKTEN AND PROTOKOLLE viii (Rupert Schick & Frederich P. Kahlenberg eds. 1996)).

[83] CONSTITUTIONAL JURISPRUDENCE OF GERMANY, *supra* note 22, at 301 (internal quotation marks omitted).

[84] *See* Bryde, *supra* note 54, at 194 ("In reaction to the abuse of state power, [the Basic Law's drafters] were careful in drafting judicial safeguards against the abuse of state power, most notably creating an elaborate multi-tiered system of judicial review with a powerful Constitutional Court at the apex.").

[85] Rösler, *supra* note 25, at 3.

democratic German government that followed in its wake.[86] It ultimately led the drafters to integrate a fiercely protective declaration of individual rights, perhaps more so than any Constitution before it. Therefore, even though the design of the Basic Law does bear some likeness to that of the U.S. Constitution, on the whole, the above elements demonstrate that it is quite different, and where it is different is significant.

The unique circumstances under which the German Basic Law was drafted amounted to a constitution that was not only cognizant of the concept of human rights, but was purposeful, unambiguous, and unmoving in its protection of them.

II. THE CONSTITUTION *IN RE* ABORTION: THE COURT WEIGHS IN ON THE ABORTION DEBATE

A. The United States

1. Constitutional Personhood

The *Roe* majority held that "[i]f this suggestion of [fetal] personhood is established, the [argument that women have a right to abortion], of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment."[87] To this end, the Court considered the text of the Constitution for references that might illuminate whether constitutional personhood extended to unborn life.[88] As this Note demonstrated previously, however, no specific Constitutional text is directly applicable to the abortion question.[89] The *Roe* Court accordingly proceeded by citing each time the word "person" appeared in the Constitution.[90] This included Section 1 of the Fourteenth Amendment, the Due Process Clause, the Equal Protection Clause, the Qualifications Clauses for both Congressmen and Presidents, the Migration and Importation provision, the Electors provisions, and the Fifth, Twelfth, and Twenty-second Amendments.[91] Viewing the term exclusively within the context of the particular reference, the Court held that the fetus was not ascribed "person" status within the meaning of the Constitution.[92]

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[86] Bryde, *supra* notes 54, 69, 84 and accompanying text.

[87] Roe v. Wade, 410 U.S. 113, 156–57 (1973).

[88] *Id.* at 157.

[89] *See* discussion *supra* Part I.A.

[90] *Roe*, 410 U.S. at 157.

[91] *Id.*

[92] *Id.* (holding that "[n]one indicates, with any assurance, that it has any possible pre-natal application"). *But see* Marcin, *supra* note 48, at 49–50 (arguing that Justice Blackmun had gotten it wrong because he neglected to consider the word "people," the plural of the word "person," or "posterity" in the Preamble to the Constitution in his textual analysis).

Professor Gerard Bradley disagrees.[93] He notes that in Justice Blackmun's determination of the constitutional personhood of the fetus, he "cleaved closely to constitutional text, history contemporaneous with its enactment, and decided cases."[94] While this is an originalist interpretation of which even Justice Scalia could be proud, Professor Bradley makes a crucial point that the interpretation was selectively applied to the Court's analysis of whether the fetus is a constitutional person.[95] In short, Bradley contends that

> had [Blackmun] applied these same criteria to the woman's assertion of right under the Fourteenth Amendment, *Roe* would have come out differently. Were constitutional text, precedent, and nineteenth century legislative practice, as well as anomalies forced into contemporary legislative practice, the measure of *her* claim, an attorney who claimed that the Constitution required abortion-on-demand would face Rule 11 sanctions.[96]

Regardless, the fact of the matter is that, to the chagrin of millions, the *Roe* Court's skewed constitutional analysis created an abortion-legitimizing right to privacy; and because the unborn life was determined not to have constitutional personhood,[97] it was therefore not guaranteed the right to life.[98]

2. The Right to Privacy

In *Roe v. Wade*, the Court necessarily engaged in some evaluative analysis of which rights were implicated in a woman's choice to terminate her pregnancy. In what is now an infamous exercise in

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93 *See* Gerard V. Bradley, *Life's Dominion: A Review Essay*, 69 NOTRE DAME L. REV. 329, 346 (1993) (arguing that "unjust discrimination against the unborn permeated our laws up to and including *Roe*. Even the blanket exception for the mother is an arbitrary preference which, precisely as such, cannot be rationally defended if the unborn are persons with an equal right not to be killed. A fully just regime would . . . have no special law for abortion at all. Our legal tradition has had special laws for abortion. This fact demands some explanation, if only as a dialectical defense of my legal argument for the personhood of the unborn.").

94 *Id.* at 340.

95 *Id.*

96 *Id.*

97 For the significance of the denial of constitutional personhood, see Marcin, *supra* note 48, at 47, drawing a parallel between *Roe* and the *Dred Scott* decision:

> It is in the context of the denial of personhood to the developing prenatal child that a telling analogy has been drawn between Justice Blackmun's denial of constitutional personhood to fetuses in his *Roe v. Wade* opinion in 1973 and Chief Justice Taney's denial of constitutional personhood to blacks, slave *or free*, in his well-known *Dred Scott v. Sandford* opinion in 1856. There have only been two times in the entire history of the Supreme Court when the Court has denied personhood to any classes of individuals. The first time was the *Dred Scott* decision in 1856 and the second was the *Roe v. Wade* decision in 1973.

98 Roe v. Wade, 410 U.S. 113, 158 (1973).

constitutional jurisprudence to both advocates and opponents of abortion,[99] the Court unveiled a constitutional right to privacy and declared that a woman's decision to terminate a pregnancy fell within that right, or, more specifically, her emanating right to reproductive autonomy.[100]

Therefore, at its very first shot at determining the constitutionality of statutes criminalizing abortion, the Court denied the unborn a right to life and ruled definitively in favor of a woman's right to choose. Justice Blackmun, writing the majority opinion for seven of nine justices, essentially "discovered" a right to privacy in *Roe v. Wade*.[101] Finding that the alleged right was "embodied in the Fourteenth Amendment's Due Process Clause," the Court held ultimately that the right was broad enough to encompass a woman's decision to terminate her pregnancy and that, beyond that, it was "fundamental."[102]

Justice Rehnquist, one of two dissenting justices in *Roe*, disagreed with this finding,[103] as have numerous Supreme Court justices and countless constitutional scholars since. Numerous *amici* briefs for the appellee in *Roe* argued that life begins at conception and that the unborn life is therefore a constitutional person whose right to life must undeniably trump a woman's right to privacy.[104] They further contended that the right of the unborn to life is guaranteed by the Fourteenth Amendment because it is a "fundamental, enumerated right necessary for ordered liberty [and therefore] takes precedence over the woman's right to privacy, which however genuine, is not enumerated in the Constitution, was probably not within the contemplation of the Founding Fathers and, as it developed historically, was thought to be subordinate to the right to life."[105] Nevertheless, Justice Blackmun's view prevailed, the woman's right to privacy was codified, and the right to life of the unborn was denied.

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[99] *See, e.g.*, John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 922 (1973) (criticizing the legal rationale of the *Roe* majority); Bradley, *supra* note 93 at 335–36 (arguing that, among others, the pro-life Robert Bork and the pro-choice John Hart Ely both disagree with the legal analysis of Justice Blackmun in *Roe*).

[100] Levy & Somek, *supra* note 11, at 117.

[101] *Roe*, 410 U.S. at 152 (acknowledging that "[t]he Constitution does not explicitly mention any right of privacy" but that such a right may be pieced together from judicial interpretations of various constitutional amendments).

[102] Ely, *supra* note 99, at 920, 928 n.58.

[103] *Roe*, 410 U.S. at 172 (Rehnquist, J., dissenting).

[104] Robert E. Jonas, *Dissenting Remarks*, 9 J. MARSHALL J. PRAC. & PROC. 595, 602 (1976).

[105] *Id.* (citing Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 253 (1891)).

3. The Limited & Legally Enigmatic State Interest in Protecting Unborn Life

Because the *Roe* court determined that "the fetus is not a 'person' within the meaning of the Fourteenth Amendment's guarantees of due process and equal protection,"[106] the amount of protection the State could afford unborn life was greatly limited. The simultaneous holding that the woman had a fundamental right to privacy broad enough to encompass abortion placed the Court in a conundrum. The decision "that a mother has the absolute right, up to the day before delivery, to terminate [her] pregnancy would offend virtually [every]one's moral sensibility, [and thus] the recognition of some limit to the mother's right of reproductive autonomy is hardly surprising."[107]

The Court accordingly set up the trimester framework, by which it gave States the ability to limit abortion—essentially restricting the woman's right to privacy—in graduating degrees corresponding to the interest the State had in protecting potential life at various stages throughout pregnancy.[108] The Court determined the State did not have a "compelling interest" until the fetus reached viability,[109] a conclusion that has garnered abundant criticism.

With the little legal justification offered for the trimester framework, the controversy over the constitutionality of the right to privacy, and the arbitrariness of asserting that the state has a "compelling interest" in protecting fetal life at viability,[110] in addition to a host of other legal inconsistencies in *Roe*,[111] abortion proponents have been compelled to seek alternative legal justifications for abortion. Increasingly, they are seeking that justification in the Equal Protection Clause.[112]

B. Germany

The events leading up to the *Bundesverfassungsgericht*'s first abortion decision were markedly different from those in the United States. In addition to Germany's intimate experience with the human

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[106] Levy & Somek, *supra* note 11, at 115.

[107] *Id.* at 119.

[108] *Roe*, 410 U.S. at 164–65.

[109] *Id.* at 163.

[110] *See, e.g.*, Ely, *supra* note 99, at 935 (discussing that the right to privacy "discovered" in *Roe* is resilient, being given "protection[] so stringent that a desire to preserve the fetus's *existence* is unable to overcome it—a protection more stringent . . . than that the present Court accords the freedom of the press *explicitly* guaranteed by the First Amendment" (emphasis added)).

[111] *See id.* at 924–26.

[112] Anita L. Allen, *The Proposed Equal Protection Fix for Abortion Law: Reflections on Citizenship, Gender, and the Constitution*, 18 HARV. J. L. & PUB. POL'Y 419, 438 (1995).

rights violations of Nazi Germany in World War II,[113] Germany had more recently experienced heightened focus in medical and scientific debate on the subject.[114] In response to the debate and the corresponding gravitation of public opinion toward more permissive abortion legislation, the more liberal Social Democratic Party majority mustered enough votes to pass, by a narrow majority,[115] the Abortion Reform Act of 1974 ("ARA").[116] The ARA decriminalized abortion in certain cases and allowed abortion on demand within the first twelve days of conception.[117] It further imposed mandatory counseling requirements, which required the woman seeking abortion to receive counseling that would serve primarily to "prevent premature [abortion]" and "effectuate a long-term reduction in the abortion rate."[118] Five German States and ninety-three members of the federal Parliament challenged the constitutionality of the Act, however, and before the legislation went into effect, it was enjoined so that the Constitutional Court could determine its constitutionality.[119]

On February 25, 1975, the *Bundesverfassungsgericht* rendered an opinion in which it held that the ARA was unconstitutional and that the German parliament had an affirmative duty to protect life, even against the rights of the mother.[120]

1. The State's Obligation to Protect Unborn Life

The constitutional text of the Basic Law that the abortion question implicates most directly is Article 2, paragraph 2, sentence 1, which proclaims that "[e]veryone shall have the right to life."[121] From this and

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[113] *See* Bryde *supra* notes 54, 69, 84 and accompanying text.

[114] *See* Albin Eser, *Reform of German Abortion Law: First Experiences*, 34 AM. J. COMP. L. 369, 372–73 (1986).

[115] John J. Hunt, *A Tale of Two Countries: German and American Attitudes to Abortion Since World War II, in* LIFE AND LEARNING IV: PROCEEDINGS OF THE FOURTH UNIVERSITY FACULTY FOR LIFE CONFERENCE HELD AT FORDHAM UNIVERSITY JUNE 1994 122, 125 (Joseph W. Koterski ed., 1995) ("The vote of 247 to 233 with 10 abstentions (Social Democrats), did not constitute an absolute majority in the Bundestag [Parliament] and was passed without a clear popular mandate.").

[116] Donald P. Kommers, *Abortion and Constitution: United States and West Germany*, 25 AM. J. COMP. L. 255, 259–60 (1977).

[117] Criminalization generally applied to all abortions not performed to save the life or health of the mother. *See Abortion I Case*, *supra* note 14, at 610.

[118] Eser, *supra* note 114, at 378.

[119] *Abortion I Case*, *supra* note 14, at 622.

[120] *See* discussion *infra* Part II.B.1–2.

[121] Gorby, *supra* note 20, at 570; GRUNDGESETZ FÜR DIE BUNDESREPUBLICK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I at art. 2 (Ger.).

the general structure of the Basic Law, the Court has declared a hierarchy of values, beginning with human dignity.[122]

Additional text, which is of secondary significance to the inviolability of the right to human dignity, is the section dealing with the development of one's personality, found in the first paragraph of Article 2, which states: "Everyone shall have the right to the free development of his personality, *insofar as he does not infringe the rights of others* or offend against the constitutional order or the moral code."[123] It is readily apparent that the latter is not unqualified.

While the drafting history of the U.S. Constitution does not have specific reference to abortion and therefore cannot shed much light on the constitutional personhood of a fetus, the legislative history of the German Basic Law *does* include some specific references to abortion and therefore does provide some insight to the constitutional personhood of a fetus.[124] Consequently, the Basic Law is decidedly less ambivalent with regard to the personhood of unborn life than is the U.S. Constitution.

In expounding upon the Basic Law provisions relevant to abortion in light of the legislative debate concerning the constitutional personhood of the unborn, the Constitutional Court declared:

> The duty of the state to protect every human life may . . . be directly deduced from Article 2, Paragraph 2, Sentence 1, of the Basic Law. In addition to that, the duty also results from the explicit provision of Article 1, Paragraph 1, Sentence 2, of the Basic Law since developing life participates in the protection which Article 1, Paragraph 1, of the Basic Law guarantees to human dignity. Where human life exists, human dignity is present to it; it is not decisive that the bearer of this dignity himself be conscious of it and know personally how to preserve it. The potential faculties present in the human being from the beginning suffice to establish human dignity.[125]

In addition to finding an affirmative State duty to protect potential life, the Constitutional Court also implied a right of the unborn to life, essentially "maintain[ing] that the right to life extended even to the foetus, since the Constitution guaranteed it to 'everyone.'"[126] While

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[122] *See* Levy & Somek, *supra* note 11, at 116.

[123] GRUNDGESETZ FÜR DIE BUNDESREPUBLICK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBL. I at art. 2 (Ger.) (emphasis added).

[124] The legislative history for the ratification of Article 2, para. 2, recounts Parliamentary discussion over whether "germinating life" was to be included in the right to life. *Abortion I Case*, *supra* note 14, at 639–40. A motion was presented regarding explicit mention of the same. *See id.* While the motion was ultimately rejected, the written report of the session claims that "[t]he motions introduced by the German Party in the Main Committee . . . did not attain a majority only because, according to the view prevailing in the Committee, the value to be protected was already secured through the present version." *Id.* at 640 (internal quotation marks omitted).

[125] *Id.* at 641 (emphasis added).

[126] Eser, *supra* note 114, at 373.

proponents of the legislation argued that "everyone" was limited to "completed person[s]," they were unsuccessful in convincing the Court.[127]

As for the scientific, theological, and legal question as to when life begins (hence when this right to life would mature), the Court refrained from entering the debate,[128] holding that it was not necessary to reach a conclusion because it had already established that the Basic Law imposed an affirmative duty on the state to protect life—all life—and that such a duty would "provide[] direction and impetus for legislation, administration, and judicial opinions" regarding abortion.[129]

One manifestation of the impact the State's affirmative duty to protect life has had on legislation is the counseling requirement. "For the Constitutional Court . . . , the constitutional priority given to the life of the unborn child implied that the state has a constitutional duty to protect the life of each unborn child by *preventing* abortions."[130] To this end, the Court upheld the legislatively imposed waiting periods on women seeking abortion in order that women may first receive counseling—counseling that has the express purpose of dissuading women from obtaining an abortion.[131] Compare this to the optional counseling that women may receive in the United States, where it is highly controversial even to entertain the idea of discouraging women through counseling.[132]

Most importantly, the German Constitutional Court placed estimation of the right to the free development of the woman's personhood at a level lower to that of the State's commitment to protect life, and it consequently refused to legalize abortion. To the contrary, it seemed to embrace the argument that "[t]he allowance of abortion by the penal law cannot be interpreted in any other way than in the sense of legal approval."[133] It went on to declare specifically that, "[i]f one were to deny that there was any duty to employ the means of the penal law, the protection of life which is to be guaranteed would be essentially

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[127] Levy & Somek, *supra* note 11, at 115 (internal quotation marks omitted).

[128] *Abortion I Case*, *supra* note 14, at 641–42.

[129] *Id.* at 642.

[130] Levy & Somek, *supra* note 11, at 117 (emphasis added).

[131] *Abortion I Case*, *supra* note 14, at 651.

[132] *See* Rachel Benson Gold, *All That's Old Is New Again: The Long Campaign to Persuade Women to Forego Abortion*, 12 GUTTMACHER POL'Y REV. 19, 21 (2009) ("Providing women information specifically geared to dissuading them from having an abortion is a *perversion* of medical ethics in general and the informed consent process in particular.") (emphasis added).

[133] *Abortion I Case*, *supra* note 14, at 625; *see also* Hunt, *supra* note 115, at 128 (contending that the German Constitutional Court's keeping abortion in a criminal context has led to a lower per capita abortion rate in Germany than in the United States).

restricted. . . . The elementary value of human life [thus] requires criminal law punishment for its destruction."[134]

2. The Balancing Act—the Duty to Protect Life Balanced with the Right to Full Development of Personhood

Even in spite of the hierarchy of values establishing the right to life as superior to other constitutional rights, the Court acknowledged that "[i]n balancing all of the considerations, Article 2, Paragraph 2, Sentence 1, of the Basic Law, which as a fundamental norm also protects unborn life, could not be construed to mean that it requires a universal penalization of [abortion] from the beginning of life forward."[135]

This is because the right of the unborn to life is in tension with the corresponding right of the mother to the free development of her personality and, as an extension of that, reproductive autonomy.[136] Such a right, however, is not absolute and is necessarily subservient to the more fundamental right to life.[137] For this reason the Court rejected a "terms solution" to abortion and instead maintained criminalization of abortion with indications as exceptions.

Ultimately, the Court came to a much more restrictive view of the legality of abortion—and a much more esteemed view of the fetus—than the U.S. Supreme Court had in *Roe*. First, it recognized a comprehensive duty of the state both to protect *and* promote unborn life, basing this obligation on the status of human life as an "ultimate value, . . . the living foundation of human dignity and the prerequisite for all other fundamental rights."[138] Second, it declared that this state obligation existed even if it curtailed the rights of the mother because the fetus "is an independent human being who stands under the protection of the

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[134] *Abortion I Case*, *supra* note 14, at 646–47.

[135] *Id.* at 634.

[136] *See* Kommers, *supra* note 15, at 7 (stating that "Article 2 (1) of the Basic Law . . . embodies the principle of personal self-determination—the closest German equivalent to our right of privacy found in the due process liberty clause of the fourteenth amendment . . . ," and it is from our right of privacy that the right to abortion is discerned).

[137] The Court held that:

> [t]he right of the woman to the free development of her personality, which has as its content the freedom of behavior in a comprehensive sense and accordingly embraces the personal responsibility of the woman to decide against parenthood and the responsibilities flowing from it, can also . . . likewise demand recognition and protection. This right, however, is not guaranteed without limits—the rights of others, the constitutional order, and the moral law limit it. . . . [T]his right can never include the authorization to intrude upon the protected sphere of right of another without justifying reason or much less to destroy that sphere along with the life itself . . . .

Abortion I Case, *supra* note 14, at 643.

[138] *Id.* at 642.

constitution . . . ."[139] Third, and finally, it held that, as a consequence, abortion must be clearly condemned in the legal order.[140] To balance the right to life of the unborn with the woman's right to the free development of her person, the Court instated an "indications solution" by which abortions that are justified as one of the enumerated indications, certified following counseling, and performed by a licensed physician "need not be punished under the German Basic Law."[141]

3. The Effect of Reunification

By the early 1990s, the composition of the Court had changed,[142] but its bipartisanship and commitment to responsible constitutional exegesis remained the same. Additionally, the constitutional hierarchy of values had remained unchanged.[143]

This time around, however, the legislature essentially balanced its obligation to protect fetal life against the people's desire to reunify with East Germany.[144] In the legislature, the fetus lost. The Pregnancy and Family Medical Assistance Act of 1992 virtually gutted the Court's holding in 1975, paradoxically ascribing equal weight to the state's interest in protecting potential life and the woman's right to terminate that life in the event of "deprived social conditions."[145] This is not the final state of abortion law in Germany, however, for once again members of the German Parliament requested a court-ordered injunction so that the Constitutional Court could review the constitutionality of the legislation.[146]

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[139] *Id.*

[140] *Id.* at 644.

[141] Kommers, *supra* note 15, at 7–8.

[142] *See* Markovits, *supra* note 70.

> [T]he Court now has two Senates, with eight judges each, sitting for a nonrenewable term of twelve years. The term limits ensure a regular turnover at the Court, and so prevent the entrenchment of particular political approaches; the even number of justices forces them to compromise in close cases. The men and women chosen in this way have been remarkable for their moral commitment and their open minds. It helped that the constitution did not settle all appointment choices and thus left room for a flexibility more easily achievable by ordinary law.

Id. at 1346.

[143] *See* Kommers, *supra* note 15, at 19.

[144] East Germany had developed abortion law of its own and arrived at a much more permissive policy, allowing abortion on demand during the first trimester. *See* John A. Robertson, *Reproductive Technology in Germany and the United States: An Essay in Comparative Law and Bioethics*, 43 COLUM. J. OF TRANSNAT'L L. 189, 198 (2004).

[145] Levy & Somek, *supra* note 11, at 121–22, 131–32.

[146] Kommers, *supra* note 15, at 15.

In the second major abortion case,[147] the Court reaffirmed its affirmative duty to protect potential life and further held that "constitutional provisions protecting human dignity and the right to life *required* the legislature in most instances to make abortion a crime."[148] It held unambiguously that abortion was an "act of killing," and was therefore the subject of criminal law, but that it may be "justified," and therefore exempt from criminal penalty, in specifically enumerated cases.[149] While the exceptions to the general rule criminalizing abortion tended to make abortion more legally permissive than it had been previously, the Court still mandated that the legislature balance the right to life of the unborn against the rights held by the mother.[150] Further, the Constitutional Court mandated that counseling of women seeking abortion was still required and that the design of the counseling was "preventive protection" for the unborn life,[151] which required nothing short of "advisors who [could] be trusted to convey a strong prolife message, to treat women in distress respectfully, and provide them with comprehensive information about available care, facilities and financial support."[152]

In sum, the decision laid the groundwork for legislation that would represent the state's unrelenting commitment to recognize the value of unborn life, even though the court also recognized the increasingly demanded, yet legally inferior, right of the woman to the full development of her personhood.

CONCLUSION—WHERE DO WE GO FROM HERE?

The purpose of this Note is to "challeng[e] and enlighten[]"[153] American constitutional jurisprudence on abortion. Considering the moral and legal insufficiencies of current American jurisprudence, there is much the United States can learn from the German Constitutional Court with regard to our hierarchical understanding of fundamental

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[147] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 28, 1993, 88 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 203, 1993 (Ger.) *as reprinted in* DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 349 (2d ed. 1997) [hereinafter *Abortion II Case*].

[148] CURRIE, *supra* note 55, at 13–14.

[149] Kommers, *supra* note 15, at 18 ("[A]pplying [criminal law] reasoning to abortion, while any deliberate destruction of the fetus after the fourteenth day of conception is an 'act of killing,' thus satisfying the elements of a criminal act (*Tatbestand*), this act may be 'justified' and thus declared 'not illegal' (*nicht rechtswidrig*) in some circumstances.").

[150] *See* Levy & Somek, *supra* note 11, at 116 ("[T]he Constitutional Court, unlike the Supreme Court in *Roe*, engaged in an explicit constitutional balancing of the competing rights at issue.").

[151] Kommers, *supra* note 15, at 20.

[152] *Id.*; *cf.* Gold, *supra* note 132 and accompanying text.

[153] Kommers, *supra* note 15, at 3.

rights and the Court's commitment to protect them, regardless of past precedent and the ebb and flow of popular opinion.

In 1949, the Federal Republic of Germany ratified the Basic Law, which was in many ways a direct response to the unspeakably heinous Nazi-era human rights violations.[154] In essence, it was an expression that the German people had learned from the commission and experience of gruesome acts against humankind and the gravity of disregard and, ultimately, contempt for human dignity. Deserted death camps and mass graves served as chilling reminders of the results of stripping from humans their intrinsic value as persons.

They subsequently incorporated a fiercely protective bill of rights into their constitution, and in its very first article they proclaimed the inviolability of human dignity.[155] When the *Bundesverfassungsgericht* was called upon to render its first decision on abortion in light of its Basic Law in 1975, despite mounting public pressure to legalize abortion, the Court declared that abortion was then—and would remain—the subject of criminal law, no matter how compelling arguments to the contrary may have been.[156] In its rationale, the *Bundesverfassungsgericht* emphasized the supremacy of its duty to protect life over its commitment to promote the free development of personhood.[157] Even following a tenuous reunification process, it reaffirmed its utmost obligation to protect human dignity and held its commitment to other rights—namely the right to the free development of personhood—to be necessarily inferior. The *Bundesverfassungsgericht*'s interpretation of its Basic Law therefore remained cognizant of the human rights violations committed at the hands of the Nazis and consequently remained steadfast in the Basic Law's design to prevent repetition of them.

The United States Constitution has a decidedly less informative history than that of the Germans with regard to human dignity. Specifically, the Constitution was not preceded by egregious human rights violations that prompted widespread public contemplation and fervent political response. Accordingly, abortion proponents are seemingly correct in their assertion that there is no explicit constitutional right of the unborn to life. Even so, it is important to note that the Constitution's history is equally, if not less, uninformative with regard to a right to abortion.[158] Without our own history to inform us of

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[154] *See supra* Part I.B.

[155] *See id.*

[156] *Abortion I Case*, *supra* note 14, at 625; *see also Abortion II Case*, *supra* note 147, at 349.

[157] *See Abortion I Case*, *supra* note 14, at 625; *see also Abortion II Case*, *supra* note 147, at 349–50.

[158] Bradley, *supra* note 93, at 340.

the consequences of massive violations of human dignity, can the United States not learn from the Germans that, out of respect to *life*, the fetus must be attributed personhood that merits significant State protection, at any term of a pregnancy?[159]

This is not to say that there is no case in which the termination of a pregnancy could be legally justified. In Germany, even after the *Bundesverfassungsgericht*'s intractable refusal to decriminalize abortion in 1975, women were still able to obtain legal justification for abortion if specific "indications" were met, some of which being rape, incest, or the life and health of the mother.[160] In essence, then, German abortion law requires a balancing of interests at any stage of the pregnancy between the fetus's right to life and the woman's right to the full development of her personhood.[161]

Ideally, the United States should pass a constitutional amendment defining personhood and advocating greater respect for human life than that which can be inferred from the Constitution as it stands. Such an approach would certainly not be novel; Americans did something similar in 1868 with passage of the Fourteenth Amendment. After more than a century of embracing slavery, the American people were finally moved to create a constitutional amendment declaring the rights of "life, liberty, [and] property" to be rights fundamental for "all persons."[162] Essentially, the American people had learned from odious consequences the gravity of their contemptuous disregard of human dignity.[163] Taking a lesson from wiser, post-war Germany, the American people should do likewise and vindicate human dignity by protecting the right of the unborn to life.

Many, perhaps most, legal scholars and historical and philosophical commentators disagree with this proposition. Some even go so far as to analogize the state interest in protecting unborn life to society's general interest in preserving non-sentient species from extinction.[164] The fact of

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[159] Therefore, evaluation of abortion legislation should always involve a balancing of interests between the right to life and the right to terminate it.

[160] Eser, *supra* note 114, at 373–76 (discussing the "indications" model of abortion regulation).

[161] *See supra* text accompanying note 150.

[162] U.S. CONST. amend. XIV.

[163] Caitlin E. Borgmann, *The Meaning of "Life": Belief and Reason in the Abortion Debate*, 18 COLUM. J. GENDER & L. 551, 556 (2009) ("If, as a moral matter, an embryo or fetus is a person, then ultimately this must be reflected in the interpretation of our Constitution just as, for example, the moral recognition that slaves were persons led ineluctably to their recognition as full persons under the Constitution.").

[164] *See* Lawrence J. Nelson, *Of Persons and Prenatal Humans: Why the Constitution Is Not Silent on Abortion*, 13 LEWIS & CLARK L. REV. 155, 156 (2009) (arguing that "the only way to avoid [a Constitutional] anomaly is not to regard prenatal humans as constitutional persons. Nevertheless, the State has a morally legitimate interest in valuing and protecting prenatal humans . . . and it may enforce that interest, provided that it does

the matter is that the State has more interest in protecting prenatal life than that which arises from a commitment to valuing life as it is incidental to biodiversity[165]—this is *human* life we are talking about after all. To avoid such a dismissive view of human dignity, the Court must evaluate abortion restrictions in a new light, and, if Americans can glean anything from the experiences of the Germans, they can learn that the right to life must necessarily rank higher within a constitutional hierarchy of rights than does the right to reproductive autonomy.[166]

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not violate the fundamental rights and interests of persons."); *see also id.* at 200–01 (contending that "[t]he federal Endangered Species Act protects certain groups of living, nonhuman entities (both sentient and nonsentient) from extinction. Congress' findings note that 'these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people.'").

[165] *See id.* at 200–01.

[166] Critics of this approach will point out that abortion in Germany today is more legally permissive than it was when the *Bundesverfassungsgericht* issued its initial opinion on the issue. Regardless of some of the convergence of abortion legislation in the two countries in recent years, the *Bundesverfassungsgericht* has remained steadfast in its constitutional hierarchy of rights, which places the right to life ahead of the right to the woman's free development of her personhood and refuses to decriminalize abortion except in specifically enumerated circumstances. For a summary of current German abortion restrictions, see Christian Ehret, *Germany Parliament Approves Late-term Abortion Restrictions*, JURIST: LEGAL NEWS & RES. (May 14, 2009, 12:10 PM), http://jurist.law.pitt.edu/paperchase/2009/05/germany-parliament-approves-late-term.php.