

CUNY LAW REVIEW

Edited by the Students of the City University of New York School of Law

Scholarship for Social Justice

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Scholarship for Social Justice

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THE CONTINUED MARGINALIZATION OF PEOPLE LIVING WITH HIV/AIDS IN U.S. IMMIGRATION LAW

Cristina Velez†

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INTRODUCTION

All of the immigrants¹ I represent are HIV-positive, but some of the greatest dangers they face are ignorance and prejudice. More than half of the clients at the HIV Law Project, where I work, are foreign-born, and many of them also identify as gay or trans-

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¹ I use the term *immigrant* in this article interchangeably with *noncitizen* and *foreign-born* to describe individuals who were not born in the United States but wish to remain in the United States.

gender. Many of them come from countries where HIV is highly prevalent and HIV testing, education, and medication are minimal. We often see immigrants who were diagnosed in the late stages of infection or while receiving prenatal care. Many have experienced conditions that result in a greater risk of HIV infection, such as domestic violence, homophobia, gender inequality, racism, and economic displacement.² Although immigrants living with HIV are no longer excluded from the United States³ solely on account of their HIV status, they continue to face barriers to immigration relief related to misconceptions surrounding HIV treatment and transmission that continue to pervade immigration law and adjudications.

The community I serve is extremely diverse—I represent lesbian, gay, bisexual, and transgender (LGBT) immigrants, women and men who have survived domestic abuse, crime victims, heterosexual families, and people with a history of addiction. Many clients fit into more than one of these categories. My clients come from the Caribbean, Central and South America, Africa, Asia, and Europe. My practice consists of asylum applications,⁴ VAWA⁵ and U visa⁶ petitions, family-based green card applications,⁷ naturaliza-

² See generally INT'L COUNCIL OF AIDS SERV. ORG., GENDER, SEXUALITY, RIGHTS AND HIV (2007), available at <http://www.hivlawandpolicy.org/resources/view/241> (discussing factors affecting HIV risk, transmission, and treatment, including gender inequity and homophobia; poverty; inaccurate or ineffective HIV prevention efforts and discriminatory laws; and stigma and lack of access to treatment).

³ See generally JAIME GUTIERREZ, GAY MEN'S HEALTH CRISIS, UNDERMINING PUBLIC HEALTH AND HUMAN RIGHTS: THE UNITED STATES HIV TRAVEL AND IMMIGRATION BAN (rev. Jan. 2010) (2009), available at [http://www.gmhc.org/files/editor/file/GMHC_undermining_phhr_2010\(1\).pdf](http://www.gmhc.org/files/editor/file/GMHC_undermining_phhr_2010(1).pdf).

⁴ Immigrants present in the United States may be granted asylum if they prove that they suffered persecution or have a well-founded fear of future persecution on account of their race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C.A. §§ 1101(a)(42), 1158 (West, WestlawNext through P.L. 113-57 (excluding P.L. 113-66 and 113-73)); see also U.S. Citizen and Immigr. Serv. (USCIS), I-589 Application for Asylum and Withholding of Removal, available at <http://www.uscis.gov/files/form/i-589.pdf>.

⁵ Under the Violence Against Women Act (VAWA), a battered spouse, child, or parent may self-petition to apply for immigration status without the abuser's knowledge. 8 U.S.C.A. § 1154(a)(1)(A); see also USCIS, I-360 Petition for Amerasian, Widow(er), or Special Immigrant, available at <http://www.uscis.gov/files/form/i-360.pdf>.

⁶ A U visa gives victims of certain crimes temporary legal status and work eligibility in the United States. The crime must have occurred in the United States or in a U.S. territory and the victim must cooperate with law enforcement to assist with the investigation and/or prosecution of the individual(s) that committed the crime. 8 U.S.C.A. § 1101(a)(15)(U); see also USCIS, I-918 Petition for U Nonimmigrant Status, available at <http://www.uscis.gov/files/form/i-918.pdf>.

⁷ U.S. citizens and lawful permanent residents may petition for immediate rela-

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tion,⁸ and relief in removal proceedings.⁹ Some of my clients were placed into removal proceedings by the asylum office because they were unable to demonstrate their eligibility for an exception to the one-year filing deadline¹⁰ or because of doubts as to their credibility. Others have been lawful permanent residents¹¹ of the United States for many years and are charged with removal because of criminal convictions that took place long in the past. In the past, many immigrants were placed into removal proceedings following the denial of their family-based applications for permanent residence. The enforcement priorities of the Department of Homeland Security (DHS)¹² are fluid and reflect both the shifting political landscape and pressures on the administrative adjudication system.¹³

tives to immigrate to the U.S. See 8 U.S.C.A. §§ 1151(a)(1), 1153(a); see also USCIS, I-130 Petition for Alien Relative, available at <http://www.uscis.gov/files/form/i-130.pdf>.

⁸ A non-citizen may become a naturalized U.S. citizen after being a lawful permanent resident for a certain length of time, serving in the military, or by being the child of a U.S. citizen. See 8 U.S.C.A. §§ 1421–58; see also USCIS, N-400 Application for Naturalization, available at <http://www.uscis.gov/files/form/n-400.pdf>.

⁹ Removal proceedings, also referred to as deportation proceedings, are administrative proceedings that determine whether an immigrant may be removed from the U.S. An immigrant who is determined removable may request discretionary relief such as cancellation of removal, asylum, adjustment of immigration status, or a stay of removal. See *Immigration Benefits in EOIR Removal Proceedings*, USCIS, <http://www.uscis.gov/portal/site/uscis> (last visited Oct. 21, 2013) (search for “Immigration Benefits in EOIR Removal Proceedings” in upper search box; then follow “Immigration Benefits in EOIR Removal Proceedings” link).

¹⁰ Generally, an applicant must apply for asylum within one year of entry to the U.S. or he or she is ineligible. There are limited exceptions to the one-year filing deadline, including changed circumstances, which create a well-founded fear of persecution that were not present when the applicant entered the U.S. See 8 U.S.C.A. § 1158(a)(2). See also Victoria Neilson & Aaron Morris, *The Gay Bar: The Effect of the One-Year Filing Deadline on Lesbian, Gay, Bisexual, Transgender, and HIV-Positive Foreign Nationals Seeking Asylum or Withholding of Removal*, 8 N.Y. CITY L. REV. 233 (2005).

¹¹ “Lawful permanent resident” refers to the status of immigrants who are residing permanently in the U.S. 8 U.S.C.A. § 1101(a)(20).

¹² DHS is the federal government agency that administers immigration laws, among other duties. Immigration and Customs Enforcement (ICE) is the principal investigative arm of DHS. See *Mission*, DEP’T OF HOMELAND SEC., <http://www.dhs.gov/mission> (last visited June 28, 2013); *Overview*, IMMIGRATION AND CUSTOMS ENFORCEMENT, <http://www.ice.gov/about/overview/> (last visited June 28, 2013).

¹³ See Memorandum from John Morton, Director, USCIS, to All ICE Employees (Mar. 2, 2011), available at <http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf> (prioritizing categories of immigrants for removal proceedings, including people convicted of crimes and participants in gang activities); Memorandum from John Morton, Director, USCIS, to all Field Office Directors, Special Agents in Charge, and All Chief Counsel (June 17, 2011), available at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf> (identifying low-priority categories of immigrants for removal proceedings, such as veterans and longtime U.S. residents); Memorandum from John Morton, Director, USCIS, to All Employees

In this article, I will attempt to describe how the continuing misinformation and negative associations with HIV affect adjudications, particularly for the most vulnerable members of that population. First, I will provide an overview of the intersection of HIV with marginalized populations under the immigration law. Second, I will review the meaning of “stigma” as applied to HIV, and describe how applicants for asylum must overcome the negative associations of people living with HIV that were embedded in the immigration statute for many years. Third, I will address the continuing association of HIV with the public charge ground of inadmissibility for immigrants seeking admission to the United States from abroad. Finally, I will describe a disturbing new trend in which the collateral consequences of HIV criminalization statutes results in the termination or denial of humanitarian relief for some of the most vulnerable immigrants living with HIV.

I. THE INTERSECTION OF HIV WITH MARGINALIZED POPULATIONS UNDER THE IMMIGRATION LAW

“My father found out that I was HIV-positive when I took the medical exam for my green card application. That’s when he also found out I was gay. There was no waiver then, and we stopped talking. All my brothers and sisters have their green cards. Is it really too late for me? Can I marry my boyfriend? What happens if I get arrested? I got pulled over recently, and I didn’t have a license.”

—Gay man living with HIV from Jamaica, who has lived in the United States for more than twenty-five years

The intersection of HIV with other marginalized identities is a central feature of any HIV advocate’s practice, particularly so in the immigration context. The immigration law has been referred to as a “magic mirror, reflecting the fears and concerns of past Congresses,”¹⁴ and a window “into the nation’s collective con-

(June 15, 2011), available at <http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf> (directing ICE not to remove qualifying immigrants who arrived in the U.S. before the age of sixteen). See also Julia Preston, *Immigration Officials Arrest More Than 3,100*, N.Y. TIMES, Apr. 2, 2011, at A11; Andrew Rosenthal, *ICE’s New Record*, N.Y. TIMES’ TAKING NOTE BLOG (Feb. 15, 2013, 1:32 PM), <http://takingnote.blogs.nytimes.com/2013/02/15/ices-new-record/>.

¹⁴ Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A “Magic Mirror” Into the Heart of Darkness*, 73 IND. L.J. 1111, 1159 (1998) (quoting *Lenon v. Immigr. and Naturaliz. Serv.*, 527 F.2d 187, 189 (1975)).

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sciousness about its perceived national identity.”¹⁵ The immigration statute has historically targeted disfavored populations for exclusions from immigration benefits—most famously in the Chinese Exclusion laws of the 19th century.¹⁶ My clients tend to fall into categories explicitly identified at one time or another as subject to exclusion from the United States. Until 1990,¹⁷ “homosexuals” were excluded from admission to the United States.¹⁸ The continued exclusion of people “likely at any time to become a public charge” has a disproportionate impact on immigrants who are poor or working class, and acts as a barrier to full economic and political integration by noncitizens too poor to become legal immigrants.¹⁹

Many of my clients are also affected by the harsh penalties for immigrants with convictions in the immigration statute. The Antiterrorism and Effective Death Penalty Act²⁰ and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996,²¹

¹⁵ Kevin R. Johnson, *The Intersection of Race and Class in U.S. Immigration Law and Enforcement*, 72 LAW & CONTEMP. PROBS. 1, 2 (2009).

¹⁶ See *id.* at 1119–28; see also *Chae Chan Ping v. United States*, 130 U.S. 581, 609–11 (1889) (upholding the exclusion of Chinese citizens from the U.S. in the interests of protecting national sovereignty).

¹⁷ In the seminal case of *Toboso-Alfonso*, 20 I. & N. Dec. 819 (B.I.A. 1990), the Board of Immigration Appeals established that homosexual individuals are members of a particular social group for purposes of asylum and withholding of removal.

¹⁸ Four years later, Attorney General Janet Reno designated the *Toboso-Alfonso* decision as binding “precedent in all proceedings involving the same issue or issues.” 1895 Op. Att’y Gen. 94 (1994). See also *Reno Designates Case as Precedent*, 71 INTERPRETER RELEASES 859 (July 1, 1994).

¹⁹ The immigration law defines a “public charge” as someone “likely to become primarily dependent on the government for subsistence” either through the receipt of cash assistance or institutionalization for long-term medical care at government expense. Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28689 (May 26, 1999), available at <http://www.gpo.gov/fdsys/pkg/FR-1999-05-26/pdf/99-13202.pdf>. The “public charge” inquiry relates to the ground of inadmissibility found at section 212(a)(4) of the Immigration and Nationality Act. This section dictates that an individual seeking admission to the U.S. or applying for permanent residence (a green card) is inadmissible if the individual “at the time of application for admission or adjustment of status . . . is likely at any time to become a public charge.” *Id.* There is no waiver of inadmissibility for immigrants denied on “public charge” grounds. Refugees, asylees, VAWA beneficiaries, and certain applicants for relief from removal are exempt from the public charge ground of inadmissibility. *Id.* See also Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. REV. 1509 (1995); Lisa Sun-Hee Park, *Perpetuation of Poverty Through “Public Charge,”* 78 DENV. U. L. REV. 1161 (2001).

²⁰ Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 8 U.S.C.).

²¹ Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified as amended in various sections of 8 and 18 U.S.C.).

significantly expanded the criminal grounds for exclusion and removal of foreign nationals, and severely restricted or eliminated discretionary forms of relief for many immigrants with convictions. In particular, these laws broadened the definition of “aggravated felony” as a ground of removal in the immigration statute,²² meaning that immigrants convicted of misdemeanor offenses for which no or very little jail time was served suddenly became deportable. Moreover, almost all controlled substance violations cause an individual to become deportable and ineligible for most forms of relief from removal.²³ Because the largest immigrant populations in New York City are black and/or Latino,²⁴ they are disproportionately affected by the collateral consequences of contacts with law enforcement.²⁵ For immigrants living with HIV, minor convictions can have deadly consequences if they are forced to return to countries of origin with substandard or discriminatory public health systems.²⁶

Between 1988 and 2010, people living with HIV were excluded from admission to the United States, a law that initially targeted

²² See 8 U.S.C.A. § 1101(a)(43) (West, WestlawNext through P.L. 113-74 (excluding P.L. 113-66 and 113-73)). For a comprehensive discussion of the difficulties faced by immigrants with criminal convictions, see Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669 (2011).

²³ A waiver is available, under limited circumstances for persons convicted of only one offense of simple possession of thirty grams or less of marijuana. 8 U.S.C.A. § 1182(h).

²⁴ Based on 2000 U.S. Census data, eight of the ten largest foreign-born populations in New York City originated from the Dominican Republic, Jamaica, Trinidad & Tobago, Haiti, Guyana, Ecuador, Mexico, and Colombia (not in order). See N.Y.C. DEP’T OF CITY PLANNING, *THE NEWEST NEW YORKERS, 2000* (2004), available at http://www.nyc.gov/html/dcp/pdf/census/newest_new_yorkers_2000.pdf.

²⁵ See, e.g., CTR. FOR CONSTITUTIONAL RIGHTS, *RACIAL DISPARITY IN NYPD STOPS-AND-FRISKS 4* (2009) (finding that “[t]he NYPD continues to disproportionately stop-and-frisk Black and Latino” people), available at <http://ccrjustice.org/files/Report-CCR-NYPD-Stop-and-Frisk.pdf>; *Floyd v. City of New York*, No. 08 Civ. 1034 (SAS), 2013 WL 4046209, at *7 (S.D.N.Y. Aug. 8, 2013) (finding that the City of New York “adopted a policy of indirect racial profiling by targeting racially defined groups”).

²⁶ See HUMAN RIGHTS WATCH, *DISCRIMINATION, DENIAL, AND DEPORTATION: HUMAN RIGHTS ABUSES AFFECTING MIGRANTS LIVING WITH HIV 1*, 16–19 (2009), available at http://www.hrw.org/sites/default/files/reports/health0609webwcover_0.pdf (discussing the human rights challenges that HIV-positive migrants face upon deportation, and the lack of continuity of treatment upon return to their country of origin); KATHERINE WILTENBURG TRODRYS, HUMAN RIGHTS WATCH, *RETURNED TO RISK: DEPORTATION OF HIV-POSITIVE MIGRANTS 1–3*, 13–21 (2009), available at <http://www.hrw.org/sites/default/files/reports/health0909web.pdf> (finding that post-deportation continuity of treatment mechanisms for HIV-positive deportees are often nonexistent or grossly inadequate to protect deportees’ health, and may lead to illness, premature death, or the development of drug resistance).

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the LGBT population but also came to bar many immigrants of color from the developing world, regardless of sexual orientation. In 1987, Congress added HIV infection to the list of excludable diseases, which at the time included conditions such as active tuberculosis, infectious syphilis, gonorrhea, and infectious leprosy.²⁷ No waiver of inadmissibility was available for people living with HIV until 1990.²⁸ The waiver required applicants seeking permanent residence to show that they were receiving adequate medical treatment, had private health insurance, had been counseled about the manner of transmission of the virus, and had a qualifying relative (typically a spouse) who would experience hardship if they were not admitted to the United States.²⁹ The terms of the waiver itself underscored the concern by Congress that people living with HIV would be undisciplined about their care and an unacceptable drain on scarce healthcare resources reserved for U.S. citizens. In 2009, Congress passed legislation to eliminate the statutory HIV ban,³⁰ which went into effect on January 4, 2010.³¹

Despite the existence of the waiver, during the period of the HIV ban, the Defense of Marriage Act (DOMA), which prohibited recognition of same-sex marriages under the immigration law, kept many gay immigrants living with HIV from applying for permanent resident status or other immigration relief requiring a qualifying relative such as a spouse. I see many potential clients that fall into this category. For them, the recent invalidation of DOMA and expansion of same-sex marriage rights throughout the United States

²⁷ See 133 Cong. Rec. S6943-01 (1987) (Amendment to Supplemental Appropriations Act introduced by Senator Helms, providing that "Section 212(a) (6) of the Immigration and Nationality Act is amended by inserting . . . the following: 'or who test positively for infection with the human immunodeficiency virus'"); Supplemental Appropriations Act of 1987, Pub. L. No. 100-71, § 518, 101 Stat. 391, 475. See also 5 Charles Gordon, Stanley Mailman & Stephen Yale-Loehr, *Immigration Law and Procedure* § 63.02[3] (rev. ed. 2011).

²⁸ See Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978.

²⁹ Asylees were exempted from this requirement. This was fortunate for gay asylees in particular, who, due to the recently invalidated Defense of Marriage Act (DOMA), (*see generally* United States v. Windsor, 133 S. Ct. 2675 (2013)), could usually not cite a qualifying relative such as a U.S. citizen or permanent resident spouse as an anchor for the waiver. Applicants for admission as temporary visitors also had to show that they had the financial resources to pay for their own medical care while they were in the U.S., and were approved only for very short visits, while HIV-negative travelers were often granted permission to remain in the U.S. for up to six months.

³⁰ GUTIERREZ, *supra* note 3, at 3.

³¹ However, an HIV-positive immigrant applying for permanent residence from abroad must still demonstrate that he or she will not rely on public funds for long-term care of their illness. See 9 U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL § 40.11 N.9.1-2 (June 5, 2012), available at <http://www.state.gov/documents/organization/86936.pdf>.

may open new avenues for immigration relief. For those who have lived in the shadows for years or even decades, however, the structural and institutional inequalities of race, class, and sexual orientation may have taken a toll. If they have convictions, entered without inspection, or are unable to demonstrate that they or their spouses have the financial means to avoid becoming a “public charge,” the new rights created by the decision in *United States v. Windsor* may not be easily attainable.³²

Since the lifting of the HIV ban, the intersection of HIV with other populations affected by present or past exclusions in the immigration statute means that immigrants living with HIV are often required to navigate barriers to immigration relief that have nothing to do with HIV. However, there remain aspects of the immigration law that treat people living with HIV as a disfavored population. Misconceptions about treatment options and effectiveness, the ease of transmission, and concern about the use of public resources by people living with HIV continue to erect barriers that do not exist for immigrants that are not HIV-positive.

II. THE CHALLENGE OF REPRESENTING ASYLUM APPLICANTS LIVING WITH HIV

“Do they really think I’m only here for medications?”

—Asylum applicant whose HIV status was unintentionally disclosed to people in her community, and consequently suffered threats and harm to her relative

Adjudicators have recognized people living with HIV as a “particular social group” eligible for asylum since 1995,³³ even as the immigration statute continued to exclude people living with HIV from admission to the United States. In 1996, the legacy INS³⁴ is-

³² See cf. Janet Calvo, *U.S. v. Windsor’s Impact on Immigration Law*, CUNY L. REV. FN. FORUM (Sept. 28, 2013), <http://www.cunylawreview.org/?p=812>. But see Zeleniak, 26 I. & N. Dec. 158 (B.I.A. July 17, 2013) (first immigration adjudication ruling that DOMA “is no longer an impediment to the recognition of lawful same-sex marriages and spouses” under the INA).

³³ The Board of Immigration Appeals has defined a social group as membership in a group of persons, all of whom share a common immutable characteristic such as sex or kinship. See *Matter of Acosta*, 19 I. & N. Dec. 211 (B.I.A. 1985), 1985 WL 56042; *Matter of [name not provided]*, File No. A71-498-940 (IJ Oct. 31, 1995) (New York, N.Y.), reported in 73 INTERPRETER RELEASES 901 (July 8, 1996) (granting asylum to a man from Togo on the basis of his membership in the particular social group of individuals infected with HIV).

³⁴ The Immigration and Naturalization Service (INS), an agency of the Department of Justice, was formally dissolved as of March 1, 2003. Its functions and authority

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sued a memorandum authorizing adjudicators to recognize HIV-based social groups for the purpose of considering asylum claims by people fleeing harm on account of their HIV status.³⁵ Asylum adjudicators have recognized that a recent HIV diagnosis may also be an aggravating circumstance justifying an exception to the one-year filing deadline for asylum.³⁶ Although these decisions recognize that HIV-based persecution exists, there has been no precedential decision opining as to what factors distinguish a successful asylum claim based on persecution motivated by animus towards people living with HIV.

For an asylum claim based in whole or in part on HIV status to be successful, we find that it is important to explain to adjudicators how animus against people living with HIV is expressed. To do so, we have to unpack the meaning of a word commonly used to describe attitudes towards people living with HIV: “stigma.” The United Nations (UN) defines stigma as a “dynamic process of devaluation that significantly discredits an individual in the eyes of others.”³⁷ Fear of death and disability contribute to the expression of stigma against marginalized groups. According to the Joint UN Programme on HIV/AIDS,

Since the beginning of the epidemic, the powerful metaphors associating HIV with death, guilt and punishment, crime, horror, and “otherness” have compounded and legitimized stigmatization. . . . Images of people living with HIV in the print and visual media may reinforce blame by using language that sug-

were allocated primarily to the new DHS. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135; *see also* Stanley Mailman & Stephen Yale-Loehr, *Immigration in a Homeland Security Regime*, N.Y.L.J., Dec. 23, 2002, at 3, *reprinted in* 8 BENDER'S IMMIGR. BULL. 1 (Jan. 1, 2003) (describing the new DHS as a “behemoth” made up of more than twenty federal agencies).

³⁵ David A. Martin, General Counsel, INS, Memorandum to All Regional Counsel, *Legal Opinion: Seropositivity for HIV and Relief from Deportation* (Feb. 16, 1996), *reproduced in* 73 INTERPRETER RELEASES 909 (July 8, 1996).

³⁶ *See* USCIS REFUGEE, ASYLUM, AND INTERNATIONAL OPERATIONS DIRECTORATE (RAIO), GUIDANCE FOR ADJUDICATING LGBTI REFUGEE AND ASYLUM CLAIMS, OFFICER TRAINING MODULE 48 (2011), *available at* http://www.immigrationequality.org/wp-content/uploads/2012/01/Microsoft-Word-RAIO-Trng_LGBTI_LP_Final-2011-12-27-2_.pdf (noting that “an individual may qualify for a one-year exception based upon serious illness, for example being diagnosed as HIV-positive”).

³⁷ UNAIDS, *HIV-Related Stigma, Discrimination and Human Rights Violations: Case Studies of Successful Programmes* 7, U.N. Doc. UNAIDS/05.05E (Apr. 2005) (internal quotation omitted), *available at* http://data.unaids.org/publications/irc-pub06/jc999-humrightsviol_en.pdf; *see also* RICHARD PARKER & PETER AGGLETON, POPULATION COUNCIL, HIV/AIDS-RELATED STIGMA AND DISCRIMINATION: A CONCEPTUAL FRAMEWORK AND AN AGENDA FOR ACTION (2002), *available at* http://pdf.usaid.gov/pdf_docs/Pnacq832.pdf (proposing a framework for understanding stigmatization with respect to HIV/AIDS).

gests that HIV is a “woman’s disease,” a “junkie’s disease,” an “African disease,” or a “gay plague.” Religious ideas of sin can also help to sustain and reinforce a perception that HIV infection is a punishment for deviant behaviour.³⁸

Stigma against people living with HIV/AIDS manifests as discrimination in both public and private spheres. Examples of stigma in family and community settings include

ostracization, such as the practice of forcing women to return to their kin upon being diagnosed HIV-positive, following the first signs of illness, or after their partners have died of AIDS; shunning and avoiding every day contact; verbal harassment; physical violence; verbal discrediting and blaming; gossip; and denial of traditional funeral rites.³⁹

In some countries, discrimination in institutional settings such as workplaces, healthcare services, prisons, and educational institutions may be sanctioned by the government. Discrimination on the basis of HIV/AIDS violates existing international human rights standards.⁴⁰ The impact of stigma and discrimination on the health of people with compromised immune systems can be severe. Unequal treatment, dismissal from employment, and/or the denial of necessary care may lead to the rapid worsening of the health of individuals living with HIV/AIDS and increase the vulnerability of people living with HIV to harm by family and community.

Despite the damage that can result from HIV-based stigma, we frequently encounter skepticism from adjudicators about the true intentions of our clients in seeking asylum, even when their claims are based on a different characteristic, such as sexual orientation. This attitude is a legacy of the HIV ban and its association of HIV with untenable public health costs. Recently, my office represented a well-educated, middle-class woman who claimed that while she was visiting the United States, her HIV status had been inadvertently revealed to a family friend who subsequently informed mu-

³⁸ UNAIDS, *supra* note 37, at 7 (quotations and punctuation altered).

³⁹ *Id.* at 9.

⁴⁰ *Id.* at 11. See also UNAIDS, *HIV and AIDS-Related Stigmatization, Discrimination and Denial: Forms, Contexts and Determinants* 7, U.N. Doc. UNAIDS/00.16E (June 2000), available at http://data.unaids.org/Publications/IRC-pub01/jc316-uganda-india_en.pdf (“Resolution 49/1999 of the UN Commission on Human Rights reaffirms that . . . [d]iscrimination on the basis of HIV or AIDS status, actual or presumed, is prohibited by existing international human rights standards, and that the term ‘or other status’ in non-discrimination provisions in international human rights texts should be interpreted to cover health status, including HIV/AIDS.” (certain internal quotations omitted)).

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tual friends and acquaintances in her country of origin.⁴¹ The friend, with whom she was staying, evicted her from the apartment following the disclosure. She was then forced to stay in a homeless shelter. During this time, she learned that people in her country were harassing her relatives and threatening her with harm if she returned. Our client made her way to New York, where she obtained housing and resumed her medical treatment. She had been receiving antiretroviral treatment in her country of origin, and had letters from her doctor attesting to her treatment plan in case she needed medical care during her stay in the United States.

Before we filed her application for asylum, our client learned that a relative had been severely beaten during an argument about her HIV status with another member of her community. We obtained evidence of the attack and submitted it along with other materials in support of her application. At the asylum interview, the adjudicator repeatedly pressed our client as to her intentions in traveling to the United States. Despite our client's evidence of medical treatment in her home country and her obvious capacity for gainful employment, the adjudicator demanded additional evidence of her prior medical treatment. Our client was ultimately granted asylum. The experience revealed, however, that even a sophisticated applicant who is fluent in English and submits corroborating evidence of her claim may face a searching inquiry into her credibility where the claim is based on a fear of persecution motivated by animus against people living with HIV as opposed to a characteristic that does not require ongoing medical treatment in the United States.

In general, asylum claims based on HIV succeed best when they contain some traditional indicia of persecution, such as intentional physical harm explicitly related to the applicant's HIV status.⁴² In claims where the applicant can credibly demonstrate that he or she was subject to past persecution in their country of origin, there is a presumption that they have a well-founded fear of perse-

⁴¹ To preserve our client's privacy, identifying details such as her country of origin are omitted.

⁴² I addressed the status of HIV-based asylum claims in a chapter co-authored with Professor Stephen Yale-Loehr of Cornell Law School last year in the American Bar Association's *HIV & AIDS Benchbook*. In it, I surveyed the current state of the adjudications as reflected in federal circuit court of appeals decisions, as well as those issued by immigration judges granting asylum based primarily or in part on the basis of the applicant's membership in the particular social group of people living with HIV/AIDS. See Cristina Velez & Stephen Yale-Loehr, *Administrative Proceedings: HIV/AIDS Issues in Immigration Proceedings*, in *HIV & AIDS BENCHMARK* 198 (Joshua Bachrach & Cynthia B. Knox eds., 2d ed. 2012).

cution upon their return.⁴³ Many asylum claims made by HIV-positive immigrants, however, do not assert past persecution. This is because so many immigrants are not diagnosed with HIV until they are already in the United States and show signs that the virus has progressed to AIDS. Some immigrants may be infected in the United States; others may have been infected in their home countries but did not consider themselves at risk for contracting HIV or would not get tested because of associations between HIV and disfavored populations, such as gays, sex workers, and injection-drug users, as well as lack of confidentiality protections. This means that many claims involving HIV are based on the “pattern and practice” of persecution against people living with HIV/AIDS.⁴⁴ Because the fear of mistreatment is prospective, it is necessary to copiously document the country conditions affecting people in the applicant’s social group.⁴⁵

The decision to grant asylum is discretionary, and some adjudicators consider HIV-positive status to be a sympathetic factor in favor of granting asylum, so long as other criteria are met. This is helpful to asylum applicants whose claims are based on other recognized grounds. Treating HIV primarily as a sympathetic factor,

⁴³ See 8 C.F.R. § 208.13(b)(1) (2013).

⁴⁴ To establish a “pattern and practice” of persecution, the applicant for asylum must show there is systemic, pervasive, or organized persecution against a particular group, sufficient to establish a fear of future persecution. See NAT’L IMMIGRANT JUSTICE CTR., WINNING ASYLUM, WITHHOLDING AND CAT CASES BASED ON SEXUAL ORIENTATION, TRANSGENDER IDENTITY AND/OR HIV-POSITIVE STATUS 25 (2006), available at <http://www.immigrantjustice.org/sites/immigrantjustice.org/files/NAPSM%20Manual%20-%20June%202006.pdf>. See also Bridget Tainer-Parkins, *Protection from A Well-Founded Fear: Applying the Disfavored Group Analysis in Asylum Cases*, 65 WASH. & LEE L. REV. 1749 (2008).

⁴⁵ In my experience, “pattern and practice” claims featuring HIV as basis of persecution fare best when we emphasize the intersectionality of our client’s identities, and the resulting higher risk of persecution they face upon return to their countries of origin. For example, many asylum applicants explain that HIV status is so closely entwined with stereotypes of homosexuality in their home countries that seeking medical treatment could make them significantly more vulnerable to adverse treatment from homophobic medical personnel or the public at large, as a result of poor or nonexistent confidentiality protections for people living with HIV. Similarly, claims citing both gender and HIV status as characteristics making applicants more vulnerable to persecution are successful when there is sufficient documentation of country conditions detailing violence against women and the denial of medical treatment for women living with HIV in their home countries. See *Boer-Sedano v. Gonzales*, 418 F.3d 1082, 1091 (9th Cir. 2005) (holding that a gay Mexican man living with AIDS could remain in the U.S. since he would suffer serious harm if forced to relocate back to Mexico, where he could not acquire necessary treatment and would face persecution). For a discussion of intersectionality and immigration, see generally Johnson, *supra* note 15 and Peter Margulies, *Asylum, Intersectionality, and AIDS: Women with HIV as a Persecuted Social Group*, 8 GEO. IMMIGR. L.J. 521 (1994).

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however, obscures the very real harm that HIV stigma wreaks on the lives of many immigrants and encourages adjudicators to resort to the perception of HIV-positive immigrants as economic migrants who do not experience persecution on account of their HIV status.

III. HIV AS A BARRIER TO ADMISSION AT U.S. CONSULATES ABROAD

“Please help me—I thought the HIV ban was lifted. Why are they asking my husband about his HIV at the consulate?”

—U.S. citizen wife whose spouse was confronted about his HIV status at his immigrant visa interview, within earshot of other visa applicants

In January 2010, the HIV ban was finally lifted for immigrants and travelers to the United States.⁴⁶ Currently, HIV-positive immigrants and travelers are not required to disclose their HIV status to immigration authorities. Nevertheless, all applicants for permanent residence in the United States must submit a medical examination from a physician certified by U.S. Citizenship and Immigration Services (USCIS)⁴⁷ to perform such examinations. As part of the examination, the applicant is asked to provide a medical history, including whether they have ever been diagnosed with a sexually transmitted disease. Many HIV-positive applicants who contracted HIV through sexual contact self-report their HIV status in answering this question. This typically does not result in any adverse consequences for applicants for permanent residence who are already in the United States and attend an adjustment of status interview at

⁴⁶ See Christopher Van Buren, *Obama Announces End of HIV Travel Ban*, PBS NEWSHOUR (Oct. 30, 2009, 2:18 PM), http://www.pbs.org/newshour/updates/politics/july-dec09/travel_10-30.html; GUTIERREZ, *supra* note 3.

⁴⁷ Cf. *supra* note 34. Within the DHS, the former INS functions relating to such immigration benefits and services as the processing of visa petitions and applications for adjustment of status and naturalization were allocated to what is now called U.S. Citizenship and Immigration Services (USCIS). Interior enforcement and detention issues were primarily allocated to ICE. Border inspections are the province of Customs and Border Protection (CBP). See 68 Fed. Reg. 9,824 (Feb. 28, 2003) (amending various parts of 8 C.F.R., triggering the transfer of functions, and allocating them within DHS agencies). In discussing current functions throughout, we usually refer to the government, the immigration agency, the agency, the DHS, ICE, CBP, or the USCIS, even though the INS initiated the underlying regulations or other action. Where it seems important to indicate the earlier source of the action as the INS, the text so states. To add more complications, the statutes and regulations often still refer to the Attorney General or Department of Justice instead of the Secretary of Homeland Security or DHS.

their local USCIS field office. For applicants outside the United States, however, disclosure of HIV status may result in additional inquiry for which few are prepared at the time of their visa interview at the local U.S. consulate.

When HIV infection becomes known during the visa application process at a U.S. consulate abroad, the consular officer is instructed to inquire about the applicant's ability to pay for medical treatment under the guise of assuring that the intending immigrant will not become a "public charge." The Department of State, which is responsible for issuing visas to applicants outside of the United States (as opposed to the Department of Homeland Security, which adjudicates immigration applications inside the United States), produces a Foreign Affairs Manual (FAM)⁴⁸ containing guidance to Consular Officers stationed at U.S. embassies abroad as to the criteria for granting immigrant and temporary visas to foreign nationals. The FAM imposes an additional burden on intending immigrants who report that they are HIV-positive to show that they are not likely to become a "public charge" once they enter the United States. In other words, they have to prove that they will not become reliant on public assistance in the United States. It is an unfair burden, not shared by intending immigrants with other chronic health disorders, and reflects the persisting stigma and misinformation surrounding HIV that the rescission of the HIV ban sought to ameliorate.

In 2011, USCIS updated its "Public Charge Fact Sheet," which clarified the standard and the benefits to be included in the public charge analysis.⁴⁹ The fact sheet specifies that immigration officers must consider the totality of the circumstances and that "[n]o single factor, other than the lack of an affidavit of support, if required, will determine whether an individual is a public charge."⁵⁰ To determine whether someone is likely to become a public charge, adjudicators are instructed to look at their age, health, family status, assets, resources, financial status, education, and skills. Perhaps most importantly for immigrants living with HIV/AIDS, Medicaid and other supplemental health insurance benefits not intended for long-term institutional care are excluded from public charge consideration. Specifically, the USCIS states that

⁴⁸ See generally *Foreign Affairs Manual*, U.S. DEP'T OF STATE, <http://www.state.gov/m/a/dir/regs/fam/> (last visited Oct. 29, 2013).

⁴⁹ *Public Charge Fact-Sheet*, USCIS (Apr. 29, 2011), <http://www.uscis.gov/> (search for "public charge fact sheet" in the "What are you looking for?" box) (last visited Oct. 29, 2013).

⁵⁰ *Id.*

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“public assistance for immunizations and for testing and treatment of symptoms of communicable diseases, use of health clinics, short-term rehabilitation services, prenatal care and emergency medical services” are not to be included in the public charge analysis.⁵¹

In contrast with the Fact Sheet used by USCIS to adjudicate applications for permanent residence in the United States, the FAM explicitly asks consular officers to consider an applicant’s HIV in the public-charge analysis, and suggests that applicants living with HIV/AIDS may not be able to overcome the barrier to admission. The relevant language states:

Under section 212(a)(4) of the INA, an immigrant visa (IV) applicant must demonstrate that he or she has a means of support in the United States and that he or she, therefore, will not need to seek public financial assistance. *It may be difficult for HIV-positive applicants to meet this requirement of the law because the cost of treating the illness can be very high and because the applicant may not be able to work or obtain medical insurance.* You must be satisfied that the applicant has access to funds sufficient for his or her support. You need to consider the family’s income and other assets, including medical insurance coverage for any and all HIV-related expenses, availability of public health services and hospitalization for which no provision for collecting fees from patients are made, and any other relevant factors in making this determination.⁵²

This language implies that an HIV-positive visa applicant is at a higher risk of becoming a public charge than persons who are not diagnosed with HIV at the time of entry. Widely recognized scientific findings conclude, however, that early treatment for HIV sharply reduces the need for long-term institutional care and reduces transmission of the virus by up to ninety-six percent.⁵³ Although inconsistent with scientific evidence, consular officers are still bound by the FAM and will conduct the heightened public charge inquiry if an immigrant visa applicant reveals that they are HIV-positive.

This section of the FAM can cause difficulties for people applying for immigrant visas at consulates abroad. Last year, a woman who sponsored her husband for an immigrant visa from another

⁵¹ *Id.*

⁵² 9 U.S. DEP’T OF STATE, FOREIGN AFFAIRS MANUAL (FAM) § 40.11 n.9.1-2 (June 5, 2012), available at <http://www.state.gov/documents/organization/86936.pdf> (emphasis added).

⁵³ Donald G. McNeil, Jr., *Early H.I.V. Therapy for HIV Sharply Curbs Transmission*, N.Y. TIMES (May 12, 2011), <http://www.nytimes.com/2011/05/13/health/research/13hiv.html>.

country contacted my office. Both of them were HIV-positive, and their relationship had grown through steady communication and visits to one another such that they were committed to spending their lives together. He was receiving HIV treatment in his country, which has a high-quality public health system, and had a low viral load and high CD4 count because of his adherence to anti-retroviral medication. Thus, he was not likely to require long-term hospitalization at government expense, provided that he could continue his treatment in the United States. His wife in the United States had arranged for him to receive treatment at the same HIV clinic as she did.

At his consular visa interview, the applicant—our client’s husband—was interviewed at a windowed station in a large waiting area. Imagine a large bank in the United States, with tellers stationed at windows throughout a large room, or a waiting area ringed by windows such as the Department of Motor Vehicles. Many consular offices are quiet. In some consular offices, the acoustics allow for those waiting to hear what is said during interviews. In our client’s husband’s interview, the officer stated loudly enough for others to hear, that he was HIV-positive and couldn’t be approved for the visa because of additional questions related to his possible inadmissibility as a public charge. He was terribly embarrassed by this disclosure of his HIV status. His wife, who had been an advocate for people living with HIV/AIDS for many years, reached out to us to complain about his treatment at the interview.

In our response to the request by the consulate, we emphasized our position that this section of the FAM violated the principles underlying the rescission of the HIV travel ban, and was inconsistent with scientific evidence of the beneficial effect of long term antiretroviral treatment on people living with HIV. In the event that the consular office denied the visa, we were ready to embark on a litigation and advocacy campaign to challenge the imposition of this additional burden on intending immigrants living with HIV/AIDS, and its attendant violation of the confidentiality rights of visa applicants living with HIV/AIDS. The visa was ultimately approved, and the clients are now living together as a married couple in the United States.

It is significant that the clients in this case were able to locate competent counsel to represent them in this visa application. Many immigrant visa applicants proceed without counsel and lack the resources or professional networks to obtain counsel familiar with the arguments necessary to overcome the inquiry mandated by this

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section of the FAM. We don't know how many people have been denied the ability to join their families in the United States because of their HIV status, even after the HIV ban was lifted. The use of any HIV-related inadmissibility criteria by the Department of State—that it suggests HIV-positive applicants will be unable to meet—functions as a de facto HIV ban and perpetuates the perception of people living with HIV as a drain on public resources.

IV. THE COLLATERAL IMMIGRATION CONSEQUENCES OF HIV CRIMINALIZATION

Of growing concern to HIV advocates are criminal laws that subject people living with HIV to penalties for transmission or potential transmission of HIV.⁵⁴ The prosecution of HIV-based crimes is referred to by advocates as “HIV criminalization” as it conflates the alleged failure to disclose HIV status or other actions by individuals living with HIV with criminality. Such offenses have not been explicitly addressed in the immigration statute, but we are starting to see the impact of HIV-based prosecutions in immigration adjudications.

In the past six months, my office has learned of two cases in which immigrants who qualified for humanitarian relief after suffering persecution in their home countries were ordered removed on the grounds that their convictions for sex work made them dangerous to the community at large. Both immigrants experienced difficulty and marginalization in the United States prior to being placed into removal proceedings, and in both cases, the risk of transmission of HIV with the use of prophylactic measures was low or nonexistent. These cases reveal the persistence of outdated attitudes about people living with HIV and HIV transmission and illustrate the collateral immigration consequences of HIV criminalization.

A study by the Center for HIV Law & Policy found 186 cases involving the prosecution and/or arrest of individuals for HIV-ex-

⁵⁴ The Center for Interdisciplinary Research on AIDS at Yale University noted that laws criminalizing HIV exposure have not kept pace with scientific advances and often reflect antiquated beliefs about the risk of HIV transmission associated with specific activities such as spitting and oral copulation. See Zita Lazzarini et al., *Criminalization of HIV Transmission and Exposure: Research and Policy Agenda*, 103 AM. J. PUB. HEALTH 1350, 1350–53 (2013). See also CTR. FOR HIV LAW & POLICY, ENDING AND DEFENDING AGAINST HIV CRIMINALIZATION: A MANUAL FOR ADVOCATES, VOL. 2 (2012), available at <http://www.aidseducation.org/documents/EndingandDefendingAgainstHIVCriminalization.pdf>.

posure related offenses nationwide.⁵⁵ Such offenses include the alleged failure to disclose one's HIV status to consensual partners or others to whom disclosure is required under the law, regardless of the precautions taken to avoid transmission or the likelihood of transmission.⁵⁶ Many states also authorize enhanced penalties for the violation of certain criminal statutes where the defendant is diagnosed with HIV. In California, sentencing enhancements for prostitution "may be applied regardless of the defendant's viral load, whether condoms or other protection were used, or whether HIV could have been transmitted during the acts in question."⁵⁷ In many states, disclosure of one's HIV status is an absolute defense to prosecution, but it is not always easy to prove that disclosure was made in the absence of third party witnesses. In the immigration context, we have recently seen HIV-based convictions be classified as "particularly serious crimes" barring receipt of asylum or withholding of removal.⁵⁸

Under the immigration statute, persons convicted of a "particularly serious crime" are considered to be dangerous to the public.⁵⁹ For the bar to apply, DHS, represented by counsel for ICE, must prove by a preponderance of the evidence that an offense is a "particularly serious crime." In determining if an offense is a "par-

⁵⁵ *Prosecutions for HIV Exposure in the United States 2008–2014 (List)*, CTR. FOR HIV LAW & POLICY, available at <http://www.hivlawandpolicy.org/sites/www.hivlawandpolicy.org/files/Chart%20of%20U.S.%20Prosecutions%20for%20HIV%20Exposure.pdf> (last visited Mar. 18, 2014).

⁵⁶ *Id.*

⁵⁷ CTR. FOR HIV LAW & POLICY, ENDING AND DEFENDING AGAINST HIV CRIMINALIZATION: A MANUAL FOR ADVOCATES, VOL. 1, at 17 (2010), available at <http://www.abdgn.org/files/vol%201.pdf>.

⁵⁸ "Withholding of removal" is a form of relief available to persons in removal proceedings who are not eligible for asylum if, for example, they failed to comply with the one-year filing deadline for asylum. *See supra* note 9. Persons granted withholding of removal are permitted to remain in the United States indefinitely, to maintain employment, and to receive certain means-tested benefits, but they are not eligible for travel authorization or permanent residence (although they may apply for permanent residence upon marriage to a U.S. citizen, or to some other immigrant visa). Individuals convicted of a "particularly serious crime" are barred from receiving asylum and presumed to be barred from receiving withholding of removal. 8 C.F.R. § 208.16(d)(2) (2013). Persons convicted of an "aggravated felony" are presumed to be ineligible for withholding of removal. 8 U.S.C.A. §§ 1253(h)(2)(B), 1253(h)(3) (West, WestlawNext through P.L. 113-74 (excluding P.L. 113-66 and 113-73)); *Q-T-M-T*, 21 I. & N. Dec. 639 (B.I.A. 1996) (holding that immigration reforms enacted in 1996 dictate that a person convicted of one or more aggravated felonies for which the aggregate sentence is at least five years is considered to have been convicted of a particularly serious crime and barred from receiving withholding of removal).

⁵⁹ 8 U.S.C.A. § 1231(b)(3)(B)(ii) (West, WestlawNext through P.L. 113-57 (excluding P.L. 113-66 and 113-73)); 8 C.F.R. § 1208.24(f) (2013).

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ticularly serious crime,” the relevant factors are “the nature of the conviction, the circumstances and underlying facts of the conviction, the type of sentence imposed, and, most importantly, whether the type and circumstances of the crime indicate that the alien will be a danger to the community.”⁶⁰ Ultimately, the question before the court is whether the circumstances and underlying facts of the conviction indicate that the person presents a “danger to the community.”⁶¹

In one recent case, an immigration judge concluded that the respondent, a gay man living with HIV from Mexico, had committed a particularly serious crime when he solicited an undercover police officer for oral sex.⁶² The immigrant, who was living in Los Angeles after previously being granted withholding of removal based on his experience of severe past persecution by law enforcement authorities in Mexico, had been struggling with unemployment, mental illness, and homelessness when the arrest occurred. He received an extended sentence under California’s HIV-enhancement statute.⁶³ Despite his problems, at the removal hearing it was undisputed that the respondent disclosed his HIV status to the undercover officer and assented to the use of condoms in the encounter. Upon his release, DHS commenced removal proceedings against him, arguing that his grant of withholding of removal should be terminated on the grounds that he had committed a “particularly serious crime.”

The immigration judge agreed with DHS, reasoning that the

⁶⁰ *Frentescu*, 18 I. & N. Dec. 244, 245–47 1982 WL 190682, *1–3 (B.I.A. 1982).

⁶¹ See 8 U.S.C.A. § 1231(b)(3)(B)(ii) (providing that an alien is ineligible for withholding of removal if “the Attorney General decides that . . . the alien, having been convicted by a final judgment of a particularly serious crime, is a danger to the community of the United States”); *Alphonsus v. Holder*, 705 F.3d 1031, 1041 (9th Cir. 2013) (citation and alteration omitted) (“[A] crime is particularly serious if the nature of the conviction, the underlying facts and circumstances and the sentence imposed justify the presumption that the convicted immigrant is a danger to the community.”).

⁶² See Brief for American Academy of HIV Medicine & Association of Nurses in AIDS Care, et al. as Amicus Curiae Supporting Respondent, Jose Luis Ramirez, Unpublished Board of Immigration Appeals Decision (B.I.A. May 31, 2013), available at http://www.lambdalegal.org/in-court/legal-docs/ramirez_ca-amicus-brief [hereinafter Lambda Legal Brief].

⁶³ See CTR. FOR HIV LAW & POLICY, *ENDING AND DEFENDING HIV CRIMINALIZATION: STATE AND FEDERAL PROSECUTIONS* 18 (updated Mar. 2013) (2010), available at <http://www.hivlawandpolicy.org/resources/view/564>. (“Under § 647F of the California Penal Code, if an individual is (1) found guilty of either soliciting or engaging in prostitution, (2) has previously been convicted of a sex offense, and (3) tested positive for HIV following a previous sex offense conviction, she/he is guilty of a felony and may be imprisoned for up to three years.”).

respondent's intentions in practicing safe sex and disclosing his status do "not mitigate the danger Respondent's behavior posed to the subsequent sexual partners of his client."⁶⁴ She further held that he posed a danger to the community because of "the highly communicable nature of AIDS, its lethality, and the continued risk of exposure to multiple individuals arising from Respondent's behavior."⁶⁵ On appeal, HIV Law Project and Lambda Legal submitted an amicus brief on behalf of several organizations representing medical providers and HIV/AIDS specialists to correct the inaccuracies pervading the immigration court's decision.⁶⁶ The brief refuted the misconceptions cited by the judge about the lethality of an HIV diagnosis in light of current treatment options and the allocation of responsibility shared by consenting adults with respect to the onward transmission of HIV, and surveyed the scientific community's conclusion that the risk of oral transmission of HIV is slim to none.⁶⁷ Instead of opposing the appeal, DHS withdrew its argument that he was convicted of a "particularly serious crime" and moved to remand the proceedings back to the immigration court so that the grant of withholding of removal could be reinstated. The Board of Immigration Appeals promptly issued an order remanding the case with instructions that the respondent's immigration relief be restored.⁶⁸ Despite the positive result, this case underscores the need for active and persistent advocacy before adjudicators and education regarding the realities of HIV transmission.

Although the client's immigration status was ultimately restored, the removal proceedings caused a worsening of his already dire circumstances. Shortly before he was transferred to the custody of ICE, the client had been accepted into a long-term residential program that provided psychotherapy and job training and placement, along with probation support. The criminal court, which was to oversee his placement and release, had not yet completed this process when he was taken into ICE custody. Because ICE declined to transport him back for his next required appearance, the criminal court deemed him a "no show" and a bench warrant was issued for his arrest. Following his release from ICE

⁶⁴ *Id.* at 2.

⁶⁵ *Id.*

⁶⁶ See generally Lambda Legal Brief, *supra* note 62.

⁶⁷ *Id.* at 5–18.

⁶⁸ See Ramirez, File No. A075986662, slip op. (B.I.A. May 31, 2013), available at http://www.lambdalegal.org/in-court/legal-docs/in-re-ramirez_us_20130531_decision.

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custody, the residential program option was resurrected. However, by this point, the client had become ineligible for Social Security benefits, which would have paid for his treatment and care. With the help of his very supportive case managers, he was able to have his benefits restored so that he could participate in the program. Over the course of the year that he remained in removal proceedings, his mental health suffered as well, as a consequence of his non-therapeutic treatment while in ICE custody.

In seeking to terminate his withholding of removal status by labeling him “dangerous” to the public for having committed a “particularly serious crime,” ICE essentially overruled the criminal court’s judgment that, with the appropriate treatment and support, the client could reintegrate into society. By seeking to deport him to Mexico, where it was acknowledged that he suffered unspeakable violence on account of his sexual orientation, ICE sought to impose a far worse penalty on him than that contemplated by the criminal statute under which he was convicted. In choosing to pursue termination of his status, ICE communicated its disregard for this gentleman’s life.⁶⁹

These cases demonstrate that the equation of HIV with “dangerousness” was not eliminated from the immigration law when the HIV ban was lifted in 2010. With the introduction of HIV-based offenses into immigration adjudications, we see a dangerous trend that could eliminate access to relief for some of the most vulnerable immigrants living with HIV.

CONCLUSION

We have come a long way since the dark days chronicled in the recent Oscar-nominated documentary *How to Survive a Plague*.⁷⁰

⁶⁹ In a second case, also proceeding in California, a different immigration judge found that a transgender woman from Mexico living with HIV was barred from receiving withholding of removal because her conviction for sex work was a “particularly serious crime” in light of her HIV status. On appeal, the Center for HIV Law and Policy submitted an amicus brief on behalf of AIDS service organizations and scientific experts. Brief for the Center for HIV Law and Policy et al. as Amici Curiae Supporting Respondent, Lopez-Roque, Unpublished Board of Immigration Appeals Decision (B.I.A. Aug. 7, 2013), *available at* <http://hivlawandpolicy.org/sites/www.hivlawandpolicy.org/files/Redacted%20Perla%20Lopez-Roque%20Amicus%20Brief%20FINAL.pdf>. On August 7, 2013, the Board of Immigration Appeals remanded the proceedings to the Immigration Court for further fact-finding as to whether the respondent’s arrest was for a “particularly serious crime.” *See* Roque-Lopez, File No. [redacted], slip op. (B.I.A. Aug. 7, 2013), *available at* <http://hivlawandpolicy.org/sites/www.hivlawandpolicy.org/files/Matter%20of%20Lopez%2008.16.13.pdf>.

⁷⁰ This film follows two coalitions, the AIDS Coalition to Unleash Power (ACT UP) and Treatment Action Group (TAG), at the start of the U.S. AIDS epidemic during

Although HIV is now treated as a chronic condition in the United States—controllable with medication—and many believe that stigma and discrimination against people living with HIV/AIDS is no longer as prominent, people living with HIV/AIDS continue to face explicit and/or institutional discrimination rooted in misconceptions about the treatment and transmission of HIV.⁷¹

As an advocate for people living with HIV, I have become immersed in the basic science of treatment and transmission. Daily conversations with clients and colleagues in my office include references to viral loads and white blood cell counts and concerns about confidentiality and discrimination. Having done this work for several years, I sometimes forget how little the general public, including immigration adjudicators, know about these realities. In the absence of knowledge often comes the misperceptions that underlie the continued stigma against people living with HIV and AIDS. Fortunately, most adjudicators in our jurisdiction have been kind and fair. Nevertheless, immigration law and policy guidance continues to discriminate against people living with HIV. The association of people living with HIV with dangerousness and high public costs remains a battle that must be fought on behalf of immigrants living with HIV, one crucial to achieving full equality and respect for people living with HIV.

the 1980s and 1990s when AIDS was a death sentence. The coalitions battled to transform AIDS into a manageable condition by infiltrating the pharmaceutical industry and identifying promising drugs. They engage in activism and innovation, which help the new drugs move faster from the trial stages and directly to patients. *See* *HOW TO SURVIVE A PLAGUE* (Public Square Films 2012).

⁷¹ Although less acute, stigma and discrimination continues to be a barrier to prevention and treatment in the United States. *See* JONATHAN ROCHKIND, SAMANTHA DUPONT & AMBER OTT, PUBLIC AGENDA, *IMPRESSIONS OF HIV /AIDS IN AMERICA: A REPORT ON CONVERSATIONS WITH PEOPLE THROUGHOUT THE COUNTRY* (2009), available at <http://www.hivlawandpolicy.org/resources/view/420> (finding that HIV stigma persists in the United States due to misinformation about transmission risks and stereotypes about people living with HIV/AIDS).

CHALLENGING THE PRACTICE OF SOLITARY CONFINEMENT IN IMMIGRATION DETENTION IN GEORGIA AND BEYOND

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“Segregation, isolation, separation, cellular, lockdown, Supermax, the hole, Secure Housing Unit . . . whatever the name, solitary confinement should be banned by States as a punishment or extortion technique.”¹

INTRODUCTION

Immigration and human rights advocates, the general public, and even federal government agencies are increasingly becoming aware of the horrors of solitary confinement in United States super maximum security (supermax) prisons.² More recently, the use of similar isolation practices in immigrant detention facilities has come into the spotlight,³ with new federal data revealing that on a

¹ *Solitary Confinement Should Be Banned in Most Cases, UN Expert Says*, UN NEWS CENTRE (Oct. 18, 2011), http://www.un.org/apps/news/story.asp?NewsID=40097#.UKK1fuOe_hU (quoting UN Special Rapporteur Juan Méndez).

² See, e.g., *NYCLU Lawsuit Secures Historic Reforms to Solitary Confinement*, N.Y. CIVIL LIBERTIES UNION (Feb. 19, 2014), <http://www.nyclu.org/news/nyclu-lawsuit-secures-historic-reforms-solitary-confinement> (describing state taking immediate steps to remove vulnerable prisoner populations from extreme isolation); *ICE Detainees on Hunger Strike Released from Solitary Confinement*, ASSOCIATED PRESS (April 4, 2014, 7:28 PM), available at <http://www.katu.com/news/local/ICE-detainees-on-hunger-strike-released-from-solitary-confinement-253988741.html> (reporting on the release of detainees in solitary confinement); Dana Liebelson, *Lawsuit Alleges Cruel and Unusual Conditions for Mentally Ill in Montana*, MOTHER JONES (April 4, 2014, 9:40 AM), <http://www.motherjones.com/politics/2014/04/montana-solitary-confinement-lawsuit-mentally-ill-prisoners> (describing lawsuit brought in Montana by disability rights group alleging unconstitutional prison conditions); Carlos Alcalnt, *Public Safety Committee to Hear Ammanioia Solitary Confinement Bill*, SAN FRANCISCO BAY VIEW (April 8, 2014), <http://sfbayview.com/2014/public-safety-committee-to-hear-ammianos-solitary-confinement-bill/> (describing public support for a state assembly bill to reform solitary confinement practices in California); Don Thompson, *Judge: Using Pepper Spray on Mentally Ill Inmates ‘Horrific,’* ASSOCIATED PRESS (April 11, 2014), available at <http://blogs.kqed.org/newsfix/2014/04/11/california-mistreating-mentally-ill-inmates/> (explaining the outcome of a federal case where the court found that California prisons’ use of isolation of mentally ill persons amounted to constitutional violations).

³ See, e.g., *US Tortures Immigrants*, HUFFPOST LIVE (Mar. 26, 2013), <http://live.huffingtonpost.com/r/segment/immigration-solitary-confinement/514fa8222b8c2a7e630002ff>; Editorial, *Solitary Isn’t the Solution*, L.A. TIMES (Mar. 28, 2013), <http://articles.latimes.com/2013/mar/28/opinion/la-ed-solitary-confinement-immigrant-detainees-20130328>; Ian Urbina & Catherine Rentz, *Immigrants Held in Solitary Cells, Often for Weeks*, N.Y. TIMES (Mar. 23, 2013), <http://www.nytimes.com/2013/03/24/us/immigrants-held-in-solitary-cells-often-for-weeks.html>; Edith Honan, *U.S. Bureau of Pris-*

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given day, about 300 immigrants are held in solitary confinement across fifty of the largest U.S. immigration facilities.⁴ Alongside the groundswell of attention and public discomfort with what was previously a largely hidden issue, this article will shed light on the widespread practice of solitary confinement of immigrants in Georgia immigration detention centers, discussing potential domestic and international law strategies to advocate against the use of isolation.

Part I provides an overview of solitary confinement in immigration detention centers and the impact on those who are confined. Part II highlights ways in which isolation practices can be challenged under federal and constitutional law. And Part III gives an overview of advocacy mechanisms under international and regional human rights treaties. We conclude with a call to expand advocacy efforts in order to pressure the United States to adhere to human rights standards against solitary confinement, in hopes that the practice will be curtailed or even eliminated altogether.

I. BACKGROUND: INDIVIDUAL ACCOUNTS—THE EXPERIENCE OF SOLITARY CONFINEMENT IN IMMIGRATION DETENTION IN GEORGIA

The ACLU of Georgia has actively engaged with the immigrant community for several years, including investigating many claims of abuse against immigrants in detention. With the aim of shining a spotlight on conditions of detention in facilities in Georgia, the ACLU of Georgia released a report in 2012 describing abuses, lack of oversight, and the immigration detention-industrial complex in Georgia.⁵

The ACLU of Georgia report uncovered—through numerous interviews with those detained—the use of solitary confinement of immigrants in detention,⁶ a practice which, as reports by various advocacy groups⁷ and mainstream media outlets indicate,⁸ occurs

ons to Review Solitary Confinement, REUTERS (Feb. 4, 2013, 9:54 PM), <http://www.reuters.com/article/2013/02/05/us-usa-prisons-solitary-idUSBRE91404L20130205>.

⁴ See Urbina & Rentz, *supra* note 3.

⁵ See generally ACLU OF GEORGIA, PRISONERS OF PROFIT: IMMIGRANTS AND DETENTION IN GEORGIA (2012) [hereinafter PRISONERS OF PROFIT], available at http://www.acluga.org/download_file/view_inline/42/244/.

⁶ See *id.*

⁷ See, e.g., NAT'L IMMIGR. JUSTICE CTR. & PHYSICIANS FOR HUMAN RIGHTS, INVISIBLE IN ISOLATION: THE USE OF SEGREGATION AND SOLITARY CONFINEMENT IN IMMIGRATION DETENTION (2012) [hereinafter NIJC/PHR REPORT], [https://www.immigrantjustice.org/sites/immigrantjustice.org/files/Invisible in Isolation-The Use of Segregation and Solitary Confinement in Immigration Detention.September 2012_7.pdf](https://www.immigrantjustice.org/sites/immigrantjustice.org/files/Invisible%20in%20Isolation-The%20Use%20of%20Segregation%20and%20Solitary%20Confinement%20in%20Immigration%20Detention.September%202012_7.pdf). In collecting data for their report on segregation in U.S. immigration detention centers,

in immigration detention facilities nationwide. The co-authors of this article strongly advocate for the abolition of solitary confinement practices in immigration detention except in very limited circumstances and even then for strictly limited periods of time in line with international human rights norms, and for ending of contracts with corporations that profit from the suffering of detained immigrants, an increasingly widespread phenomenon to which the title of the ACLU of Georgia report alludes.⁹

1. *ACLU of Georgia Report: Prisoners of Profit*

The operation of immigration detention facilities is a multi-billion dollar industry.¹⁰ Whereas some facilities are operated by the Department of Homeland Security (DHS) with the cooperation of local and state detention facilities, DHS claims to save money by contracting with private prison corporations that provide bed space for detained immigrants.¹¹ Immigrants held in detention either have no criminal record (about half of detained immigrant individuals), or have served their sentences before landing in detention.¹² Yet, despite their official status as civil detainees, immigrants are routinely housed in facilities that “look, feel, and operate like jails.”¹³

Physicians for Human Rights (PHR) and the National Immigrant Justice Center (NIJC) sent open records requests to 250 facilities in the U.S. Results indicated poor recordkeeping, if any, on the use of isolation in these facilities, particularly in cases where immigrants are held in isolation for less than 30 days. *Id.* at 6. In related submitted testimony before the Senate Judiciary Committee, NIJC noted that “DHS has failed to track solitary policies and procedures” and that it is therefore “impossible to accurately assess the scope of the problem.” Written Testimony by Mary Meg McCarthy, Nat’l Immigr. Justice Ctr., to S. Judiciary Comm., Subcomm. on Constitution, Civil Rights, and Human Rights, 111th Cong., Hearing on Reassessing Solitary Confinement: the Human Rights, Fiscal and Public Safety Consequences 2 (June 19, 2012) [hereinafter *NIJC Solitary Confinement Testimony*], available at <http://solitarywatch.com/wp-content/uploads/2012/06/national-immigrant-justice-center.pdf>. Despite a lack of accurate official numbers, consistent reports from immigrants held in detention in Georgia and across the country indicate widespread use of solitary confinement. See PRISONERS OF PROFIT, *supra* note 5, at 47–109 (findings from detention centers across Georgia).

⁸ See generally *supra* note 2.

⁹ See PRISONERS OF PROFIT, *supra* note 5, at 1. See also *id.* at 42 (noting that “the longer a non-citizen is detained, the more profit the private prison company makes, since their contracts with ICE are on a per diem basis”); *id.* at 110 (recommending to the federal government the termination of contracts with facilities that fail to meet “strengthened” detention standards).

¹⁰ See *The History of Immigration Detention in the U.S.*, DETENTION WATCH NETWORK, <http://www.detentionwatchnetwork.org/node/2381> (last visited Oct. 8, 2013).

¹¹ *Id.*

¹² See PRISONERS OF PROFIT, *supra* note 5, at 21.

¹³ DETENTION WATCH NETWORK, *supra* note 10.

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Notably, private corporations operate three out of the four immigration detention centers in Georgia.¹⁴ Abuse of power and lack of oversight have been rampant in these facilities.¹⁵ All four facilities have used some form of administrative segregation, isolation, or 23-hour solitary confinement to “protect” or discipline immigrants in detention.¹⁶ The organization documented the following about the “segregation units,” which actually refers to the practice of solitary confinement:

All four facilities have segregation units for administrative and disciplinary segregation. . . . [T]wo detainees at Stewart . . . said they had been kept in segregation in excess of 60 days, one for five months. At the [Atlanta City Detention Center] detainees expressed concerns about the sanitation of the segregation units, calling them “portable toilets.” . . . [There were] documented instances where detainees were denied privileges such as recreation, law library access, and phone access, and were given smaller portions at mealtime as a result of being placed in segregation. Detainees in segregation are allowed access to the shower less frequently than the general population. Finally, and most problematic, detainees with mental health problems are put in segregation in lieu of receiving treatment.¹⁷

2. *Arbitrary Use of Solitary Confinement*

ICE officials cite disciplinary or protective reasons for isolating immigrants from the general population, including minor “infractions,” such as not making the bed, or other nonviolent and harmless behavior such as translating for other immigrants in detention.¹⁸ The findings of the ACLU of Georgia report indicate that immigrants are sometimes placed into, or threatened that they will be placed into, solitary confinement for retaliatory reasons including complaining about water quality, filing grievances, speaking with the ACLU of Georgia regarding conditions of detention, or organizing a worker strike against unfair labor conditions.¹⁹ Per

¹⁴ PRISONERS OF PROFIT, *supra* note 5, at 12. North Georgia Detention Center is no longer used as an immigration detention facility. See “Officials to Close North Georgia Detention Center in Gainesville.” <http://wabe.org/post/officials-close-north-georgia-detention-center-gainesville> (last visited May 5, 2014).

¹⁵ *Id.* at 19.

¹⁶ *Id.* at 16, 96; NIJC/PHR REPORT, *supra* note 7, at 9.

¹⁷ PRISONERS OF PROFIT, *supra* note 5, at 16.

¹⁸ *Id.* at 17, 96.

¹⁹ *Id.* at 19, 57, 64. See also Yana Kunichoff, “Voluntary” Work Program Run in Private Detention Centers Pays Detained Immigrants \$1 a Day, TRUTHOUT (July 27, 2012, 12:00 AM), <http://truth-out.org/news/item/10548-voluntary-work-program-run-in-private-detention-centers-pays-detained-immigrants-1-a-day/>.

accounts by immigrants in detention, retaliation against people exercising their human and religious rights²⁰ and those who speak out about conditions of detention²¹ or other abuses in detention is the true reason for placement in isolation.²² The various individual accounts relayed by immigrants held in solitary confinement in Georgia illustrate the lack of any rhyme or reason why and for how long immigrants are confined.²³

Another immigrant in detention who preferred to have his name kept private said in an interview that he was assaulted by a detention official, resulting in a damaged blood vessel in his arm.²⁴ Before he was treated for his injury, the officer who assaulted him sent him into solitary confinement for four to five hours.²⁵

Isolation is often erroneously defended as a needed disciplinary response, purportedly to reduce violence. However, contrary to this rationale, Mississippi attained national recognition for its

²⁰ See PRISONERS OF PROFIT, *supra* note 5, at 68 (“Jaime Lara was threatened with segregation [by guards at the Stewart Detention Center in Lumpkin, Georgia] if he refused to work less than eight hours per day.”). See also *NIJC Solitary Confinement Testimony*, *supra* note 7, at 5.

²¹ In 2009, Arman Garghani, a detainee who worked cleaning showers, told the ACLU of Georgia that when detainees complained that the shower water was dirty, the guards sent them to the segregation unit. *Id.* at 68. Another detainee, Mikyas Germachew, confirmed that this practice continued two years later. *Id.*

²² This detainee account is representative of some of the abuses by Corrections Corporation of America (CCA), a private corrections company:

Javan Jeffrey believes that as a result of [an] assault incident and because he filed a grievance, he has been targeted by guards. This was confirmed by another detainee who told [the ACLU of Georgia] that since Javan filed grievances, he is on the guards’ “radar” and everything he does gets him sent to the segregation unit. Javan had been in the segregation unit seven times in less than three months. Javan’s wife told us that right after the ACLU of Georgia visited with Javan, he was put back in the segregation unit for 29 days and was told that he could only make one phone call during the entire time he was in the segregation unit. That marks Javan’s eighth time in segregation. When asked to respond, CCA stated that Javan was in segregation for disciplinary reasons.

Id. at 67–68.

²³ See, e.g., *id.* at 68 (“Grzegorz Kawalec has been placed in segregation twice. Once, he had a dangerously high fever, but there was no room for him in the medical center, and so he was moved to the segregation unit. The second time he was sent to segregation, he stayed there for two weeks, and the guards would not tell him why he was there. After two weeks, he was moved back into the general population. ‘They said it was a mistake, and I hadn’t broken any rules.’ He said detainees are placed in segregation often. ‘Two, three weeks there is a short time. You go there for three weeks for talking back or being disrespectful.’” A month or two, he says, is standard for more serious violations.”).

²⁴ Interview with Anonymous Detained Immigrant, Irwin County Detention Center, Ocilla, Ga. (August 3, 2012).

²⁵ *Id.*

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manner of handling violence without placing prisoners on 23-hour lockdown.²⁶ Additionally, a 2003 study covering Arizona, Illinois, and Minnesota suggests that solitary confinement is not effective at reducing prison violence.²⁷

In the immigration detention context, far from being a tool used only as a method of controlling violence, isolation is reportedly used for minor infractions that are not fully investigated and based on false accusations.²⁸ Isolation is frequently used in an arbitrary and inconsistent manner, as a weapon to retaliate against those who speak out, to single out members of the LGBTQ community, and as a substitute for mental health treatment.²⁹ Consistently, the reasons why immigrants are confined appear to involve abuse of power and unfettered discretion as well as discriminatory attitudes toward vulnerable populations.

3. LGBTQ Individuals

LGBTQ immigrants in detention are sometimes placed in solitary with little or no explanation. In a July 6, 2012 interview at the Stewart Detention Center with a transgender immigrant named Odalis, conducted in anticipation of this article, the ACLU of Georgia learned that after she was arrested for a nonviolent offense by law enforcement in Georgia, she was detained by Immigration and Customs Enforcement (ICE) and held for seven days in solitary confinement at the Hall County Immigration Detention Center in Gainesville, Georgia.³⁰ Odalis says she was sent “directly” to isolation without any explanation or information about how long the isolation would last.³¹ For seven days, Odalis was kept alone in a cell that was about eight by twelve feet and had a small slit for a window.³² Aside from being able to yell sometimes to another cell, her only contact with other human beings was getting

²⁶ See Editorial, *The Abuse of Solitary Confinement*, N.Y. TIMES (March 15, 2012), <http://www.nytimes.com/2012/03/16/opinion/the-abuse-of-solitary-confinement.html>.

²⁷ See Helen Vera, *Keeping Prisoners in Solitary Confinement Isn't Just Cruel, It's Ineffective*, NAT'L POST (Feb. 27, 2014, 2:18 PM), <http://fullcomment.nationalpost.com/2014/02/28/helen-vera-keeping-prisoners-in-solitary-confinement-isnt-just-cruel-its-in-effective/> (reporting on the 2003 study).

²⁸ See *NIJC Solitary Confinement Testimony*, *supra* note 7, at 4; see also PRISONERS OF PROFIT, *supra* note 5, at 67–68.

²⁹ See PRISONERS OF PROFIT, *supra* note 5, at 19. See also *NIJC Solitary Confinement Testimony*, *supra* note 7, at 1.

³⁰ Interview with Odalis (last name withheld), Irwin County Detention Center, Ocilla, Ga. (July 6, 2012).

³¹ *Id.*

³² *Id.*

escorted in handcuffs by guards to the bathroom and locked inside while they waited for her.³³ As there appeared to be no other reason for her to be placed in confinement, she believes that she was singled out for her gender identity.³⁴ She knows of other LGBTQ individuals who were held for much longer, including immigrants who were detained for two to three months and even up to nine months.³⁵ She says of her experience in solitary confinement: “[The cell was] very ugly, very isolated, shut closed. I was only allowed to shower every three days. You are stuck and closed in and can’t get to anything.”³⁶ After she was released into the general population, she says she felt safer than she did in isolation.³⁷ However, she says she now suffers from “insomnia, depression, anxiety, and fear,” which she has experienced since being detained.³⁸ Her story echoes similar reports across the country.³⁹

The National Immigrant Justice Center (NIJC) filed a complaint with the Department of Homeland Security in 2011 on behalf of seventeen detained LGBTQ individuals. LGBTQ individuals were told that they were held in long-term solitary confinement for their own protection and for their feminine appearance.⁴⁰ In response, thirty members of Congress, led by Jared Polis from Colorado and Michael Quigley from Illinois, wrote to the U.S. Government Accountability Office, calling for the Obama administration to comprehensively investigate the NIJC’s allegations, citing

³³ *Id.*

³⁴ *Id.*

³⁵ Interview with Odalis (last name withheld), Irwin County Detention Center, Ocilla, Ga. (July 6, 2012).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ See, e.g., Claudia Valenzuela, *Nightmare of Solitary Confinement*, NAT’L IMMIGRANT JUSTICE CTR. (Oct. 12, 2012, 10:58 AM), <http://www.immigrantjustice.org/staff/blog/these-lives-matter-nightmare-solitary-confinement> (depicting the testimony of a solitary confinement victim); Andrew Harmon, *Eight Months in Solitary*, ADVOCATE.COM (May 7, 2012, 7:42 AM), <http://www.advocate.com/news/news-features/2012/05/07/transgender-detainees-face-challenges-broken-immigration-system>; Cora Lively, *Documentary Outlines Deplorable Treatment of Transgender ICE Detainees*, IMMIGRATION EQUALITY (July 9, 2012), <http://www.immigrationequality.org/2012/07/harvard-law-documentary-outlines-deplorable-treatment-of-transgender-ice-detainees/>.

⁴⁰ See Memorandum Accompanying Redacted Civil Rights Complaints Regarding Mistreatment and Abuse of Sexual Minorities in DHS Custody from Mary Meg McCarthy, Exec. Dir., Nat’l Immigrant Action Ctr. to Margo Schlanger, Dep’t of Homeland Sec., at 5 (Apr. 13, 2011), available at <http://www.lgbtqnation.com/wp-content/uploads/2011/04/LGBT-Immigrant-OCRCL-Complaint-April-2011-Redacted2-1.pdf>; National Immigrant Justice Center, Announcement of Four Supplemental Complaints (Oct. 25, 2011), http://www.immigrantjustice.org/press_releases/human-rights-group-reports-continued-abuse-against-detained-lgbt-immigrants.

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the complaint's reports of "long-term solitary confinement, and misuse of segregation due to sexual minority status."⁴¹

4. *Exacerbation of Underlying Mental Disabilities and "Prison Psychosis"*

Human rights experts recommend against long-term solitary confinement due to the profound negative impacts of isolation, which one expert calls "prison psychosis."⁴² This condition, seemingly unique to those placed in prolonged solitary confinement, can include "hyperresponsivity to external stimuli; perceptual distortions, illusions, and hallucinations; panic attacks; difficulties with thinking, concentration, and memory; intrusive obsessional thoughts; overt paranoia; problems with impulse control, including random violence and self-harm."⁴³

In addition to negatively impacting the psychological well-being of individuals not already experiencing mental disabilities, the practice of isolating immigrants in detention has caused some immigrants to decide not to discuss existing mental issues with health professionals in detention for fear of being separated from the general population.⁴⁴ Accounts across the country highlight the disturbing practice of using solitary confinement as a substitute for medical treatment.⁴⁵

While ICE has acknowledged that solitary confinement exacerbates mental illness, the ACLU of Georgia report discusses numerous instances of detainees being isolated as a substitute for mental health treatment.⁴⁶ Detention centers in Georgia were found to be understaffed with inadequate medical care, as well as a stark absence of meaningful mental health resources.⁴⁷ One immigrant, Ermis Calderone, who was formerly detained at Stewart and suffers from bipolar disorder, panic attacks, addiction issues, and depression, described a lack of mental health services, as well as his experience of being held in solitary confinement:

I feel like I'm going crazy. My medicine is always changing and it makes me crazy. When I get upset, they just give me more

⁴¹ Letter from Jared Polis, et al., Members of Cong., to Gene Dodaro, Comptroller General, U.S. Government Accountability Office (Jan. 4, 2011), http://polis.house.gov/uploadedfiles/010512_gao_detention_letter.pdf.

⁴² See NIJC/PHR REPORT, *supra* note 7, at 12.

⁴³ *Id.*

⁴⁴ PRISONERS OF PROFIT, *supra* note 5, at 19.

⁴⁵ *Id.* at 16, 77, 95, 100; NIJC/PHR REPORT, *supra* note 7, at 16.

⁴⁶ See, e.g., PRISONERS OF PROFIT, *supra* note 5, at 63.

⁴⁷ *Id.* at 60, 62.

medicine. I can't tell them I'm really upset or they just put me in a helmet and handcuffs for a few days. That's torture! I don't see anybody. I don't really care about anything. I just want to get out and get into a program that will help me.⁴⁸

Despite recently issuing guidelines on solitary confinement⁴⁹ which comes as a much-needed step in the right direction, the U.S. has yet to set strict time limits on this practice even for vulnerable populations.⁵⁰

⁴⁸ *Id.* at 64.

⁴⁹ U.S. IMMIGR. & CUSTOMS ENFORCEMENT, REVIEW OF THE USE OF SEGREGATION FOR ICE DETAINEES 1 (2013), available at http://www.ice.gov/doclib/detention-reform/pdf/segregation_directive.pdf.

⁵⁰ *Id.* At the second meeting of the Open-ended Intergovernmental Expert Group on the Standard Minimum Rules for the Treatment of Prisoners, human rights experts proposed changes to the Standard Minimum Rules (SMR), which have remained unchanged since 1955. See David Fathi, *UN Prisoners' Rights Meeting: US Puts the Brakes on Progress*, ACLU BLOG OF RIGHTS (Dec. 18, 2012, 1:48 PM), <http://www.aclu.org/blog/prisoners-rights/un-prisoners-rights-meeting-us-puts-brakes-progress>; see also Standard Minimum Rules for the Treatment of Prisoners, adopted Aug. 30, 1955 by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, E.S.C. Res. 663C, Annex 1, at 11, U.N. ESCOR, 24th Sess., Supp. No. 1, U.N. Doc. A/CONF/611 (July 31, 1957), available at http://www.unodc.org/pdf/criminal_justice/UN_Standard_Minimum_Rules_for_the_Treatment_of_Prisoners.pdf. At the meeting, an ACLU representative made a statement specifically highlighting the need for protections against long-term solitary confinement, noting the severe harm caused not only to especially vulnerable individuals, such as children and individuals suffering from mental disabilities, but to any person subject to solitary confinement. See David Fathi, *US at UN Prisoners' Rights Meeting: Progress, but Still Wrong on Solitary Confinement*, ACLU BLOG OF RIGHTS (Dec. 12, 2012, 5:37 PM), <https://www.aclu.org/blog/prisoners-rights/us-un-prisoners-rights-meeting-progress-still-wrong-solitary-confinement>. The ACLU based its recommendation that any period of prolonged isolation (thirty days or more) should be prohibited on a series of studies that show that even seven days of solitary confinement are sufficient to alter an individual's brain chemistry, and that "no study of the effects of solitary . . . confinement that lasted longer than [sixty] days failed to find evidence of negative psychological effects." See ACLU, ABUSE OF THE HUMAN RIGHTS OF PRISONERS IN THE UNITED STATES: SOLITARY CONFINEMENT 2 (2011), available at https://www.aclu.org/files/assets/ACLU_Submission_to_HRC_16th_Session_on_Solitary_Confinement.pdf (submission to the 16th Session of the U.N. Human Rights Council). The draft report of the meeting group states that revisions to the SMR will "limit . . . in Rule 32(1), the imposition of punishment by solitary confinement to a disposition of last resort to be authorized by the competent authority, to be applied in exceptional circumstances only and for a short a time as possible . . ." Expert Group on the Standard Minimum Rules for the Treatment of Prisoners, Draft Report on Meeting Held Dec. 11–13, 2012, at 5, U.N. Doc. CCPCJ/EG.6/2012/L.4 (Dec. 13, 2012). For progress of the Intergovernmental Expert Group meetings, see *IEG Standards*, U.N. OFFICE OF DRUGS AND CRIME, <http://www.unodc.org/unodc/en/justice-and-prison-reform/ieg-standards.html> (last visited Apr. 30, 2014).

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II. THE CONSTITUTIONAL FRAMEWORK: THE DIFFERENCES
BETWEEN PRISONS AND IMMIGRANT DETENTION CENTERS
UNDER THE FOURTH, FIFTH, AND EIGHTH AMENDMENTS

Convicted prisoners are protected against cruel and unusual punishment by the Eighth Amendment.⁵¹ Immigrant detainees, like civil detainees, are protected by the Due Process Clause, and are entitled to conditions at least as favorable as those of convicted prisoners. In *Jones v. Blanas*, the Court of Appeals for the Ninth Circuit held that “a civil detainee awaiting adjudication is entitled to conditions of confinement that are not punitive.”⁵² The court further held that under *Bell v. Wolfish*,⁵³ a restriction is “punitive” where it is intended to punish, or where it is “excessive in relation to [its non-punitive] purpose,” or is “employed to achieve objectives that could be accomplished in so many alternative and less harsh methods.”⁵⁴

Civil detention centers in theory provide for the temporary holding of immigrants. Therefore, their practices must be distinguishable from prisons and jails. Yet in reality, there are few practical differences between correctional facilities and the facilities used to detain immigrants. Even the former director of the Department of Homeland Security’s Office of Detention Policy and Planning acknowledged that immigrant detention centers rely “primarily on correctional incarceration standards . . . and on correctional principles of care, custody, and control.”⁵⁵

While civil immigrant detention centers improperly replicate practices of prisons and jails, federal law has been relatively silent regarding forms of relief available to immigrants held in detention. Nevertheless, the Supreme Court has concluded that not only should immigrants be protected by the Due Process Clause—which “applies to all persons within the United States, including aliens, whether their presence is lawful, unlawful, temporary, or permanent”⁵⁶—but also that their civil detention raises serious constitutional questions vis-à-vis violation of their liberty interests.⁵⁷

If the condition of said detention constitutes “cruel and unusual punishment under the Eighth Amendment, it is [also] a pre-

⁵¹ U.S. CONST. amend. VIII.

⁵² 393 F.3d 918, 931–32 (9th Cir. 2004).

⁵³ 441 U.S. 520.

⁵⁴ *Id.*

⁵⁵ NIJC/PHR REPORT, *supra* note 7, at 11.

⁵⁶ *Zadvydas v. Davis*, 533 U.S. 678, 679 (2001).

⁵⁷ *Id.* at 679–80.

sumptive denial of due process under the Fifth Amendment,”⁵⁸ effectively granting immigrant detainees two avenues for protection available to prisoners in correctional facilities: the Fifth and Eighth Amendments.

Over the last decade and in the face of growing detainee populations across the United States, some courts have begun to recognize the improper similarities between treatment of civil detainees versus those criminally committed, ruling that the conditions of civil confinement must be superior to the conditions in correctional facilities.⁵⁹

For the immigrant who has been confined, remedies are a complex issue due to the relatively uncharted legal territory. Nonetheless, there are separate legal standards regarding 1) prisoners seeking constitutional remedies for confinement, and 2) immigrant detainees seeking constitutional remedies for prolonged detainment. Coupled together, these areas illustrate avenues for how a detained immigrant may seek relief.

The starting point for those seeking relief for constitutional violations of any kind is *Bivens v. Six Unknown Fed. Narcotics Agents*,⁶⁰ in which the Supreme Court recognized an implied cause of action for damages against federal officers for alleged violations of the Fourth Amendment’s protection against unlawful searches and seizures. Since this seminal ruling in *Bivens*, the Court has extended the availability of such suits to violations of the Cruel and Unusual Punishment Clause and the Fifth Amendment Due Process Clause.⁶¹

In these later cases, the Eighth Amendment has been interpreted to impose duties on officers and officials administering prison facilities,⁶² requiring the provision of “humane conditions of confinement,” and specifically that “in-mates receive adequate

⁵⁸ Gwynne Skinner, *Bringing International Law to Bear on the Detention of Refugees in the United States*, 16 WILLAMETTE J. INT’L L. & DISP. RESOL. 270, 292 (2008).

⁵⁹ *Id.* at 293.

⁶⁰ 403 U.S. 388, 397 (1971).

⁶¹ *See* *Carlson v. Green*, 446 U.S. 14, 17–19 (1980); *Davis v. Passman*, 442 U.S. 228, 230 (1979).

⁶² Courts have held that *Bivens* claims against prison officials do not apply to those employed by privately run detention centers when state tort remedies are also available. Even if contracted in partnership with the federal government, private corporations and their staff cannot be liable for violating a prisoner’s constitutional rights under *Bivens*. Rather, the only remedies extend from state tort claims. *See* *Minneci v. Pollard*, 132 S. Ct. 617 (2012); *Correctional Services Corp v. Malesko*, 524 U.S. 61 (2001); *Bell v Wolfish*, 441 U.S. 520 (1979); *Peoples v. CCA Det. Ctrs.*, 422 F.3d. 1090 (10th Cir. 2005).

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food, clothing, shelter, and medical care” and are accorded “reasonable measures to guarantee [their] safety.”⁶³ Applying that interpretation to pre-trial and civil detention—which technically does not constitute “punishment” according to judicial and legislative language—denial of adequate food, clothing, shelter, and medical care qualifies as a presumptive violation of the Due Process Clause of the Fifth Amendment.⁶⁴

1. *Courts Have Granted Relief to Convicted Prisoners Housed in Solitary Confinement*

In a few cases, courts have granted relief to convicted prisoners housed in solitary confinement. In *Madrid v. Gomez*, the Court held that conditions of extreme social isolation and sensory deprivation of mentally ill prisoners in the Security Housing Unit of a Pelican Bay State Prison was in violation of the Eighth Amendment and was therefore unconstitutional.⁶⁵ In *Jones El v. Berge*, the Court granted a preliminary injunction to remove seriously mentally ill prisoners from a supermax facility after experts toured a Wisconsin correctional facility to document those prisoners’ treatment.⁶⁶

2. *Courts Have Not Yet Had Occasion to Rule on Solitary Confinement of Immigrant Detainees*

Despite this increased willingness on the part of judges to hear cases regarding constitutional violations pertaining to prison issues and beyond, courts have struggled for more than a century with the particular complexity of confinement. The U.S. Supreme Court’s view of solitary confinement has evolved – though certainly not in a linear, progressive way. Rather, the evolution of judicial thought on solitary confinement can be described as a push-pull relationship: while nearly outlawing solitary confinement as a form of torture in supermax facilities, the Court has ultimately upheld the practice under the Eighth Amendment.

In one of the first cases to grapple with the issue, the Supreme Court stated that solitary confinement “was an additional punishment of the most important and painful character” and struck it down as an ex post facto statutory change.⁶⁷ Yet one year later, in

⁶³ *Farmer v. Brennan*, 511 U.S. 825, 832–33 (1994) (citing *Hudson v. Palmer*, 468 U.S. 517, 526–527 (1984)).

⁶⁴ *See Bell v. Wolfish*, 441 U.S. 520, 536–37 (1979).

⁶⁵ 889 F. Supp. 1146 (N.D. Cal. 1995); *see also* David Fathi, *The Common Law of Supermax Litigation*, 24 PACE L. REV. 675, 676–77 (2004).

⁶⁶ 374 F.3d 541 (7th Cir. 2004)

⁶⁷ *In re Medley*, 134 U.S. 160, 171 (1890).

McElvaine v. Brush,⁶⁸ the Court rejected “a direct 8th Amendment challenge to electrocution and solitary confinement by deferring to the New York legislature’s judgment.”⁶⁹ And over the next half century, judicial opinions vacillated between granting and denying constitutional protections to prisoners under the Eighth Amendment.

By 1978, the Supreme Court finally recognized that “confinement . . . is a form of punishment subject to scrutiny under Eighth Amendment standards.”⁷⁰ Despite this victory for the prisoner seeking relief, the Court has exclusively reviewed cases regarding *criminal* solitary confinement, effectively creating a noticeable gap in judicial opinion regarding immigrant confinement in detention centers.

In one of the most recent and highly applicable cases regarding correctional confinement, the New York Civil Liberties Union filed a lawsuit on behalf of Leroy Peoples in 2012 challenging New York prison officials’ system-wide policies and practices governing confinement.⁷¹ Mr. Peoples was locked inside a cell no bigger than an elevator with another prisoner for 24 hours a day for 780 days for engaging in behavior that was neither violent nor presented a threat to others.⁷² In reaction to his term in isolation, Mr. Peoples stated, “Life in the box stripped me of my dignity, and made me feel like a chained dog.”⁷³

Confinement, often used haphazardly for “administrative” or “disciplinary” reasons, has largely failed to pay regard to the various difficulties or needs of prisoners; and Mr. Peoples was no exception, suffering from mental illness. By 2008, the New York legislature acknowledged these failures and mandated that inmates who suffer from serious mental illness be placed in treatment programs rather than solitary confinement should they violate prison rules. That revelation greatly improved the treatment of such prisoners and broadened awareness of the particular problems of confining prisoners. Nevertheless, solitary confinement is still used across the state, as the NYCLU argued in the litigation on Mr. Peoples’ case,

⁶⁸ 142 U.S. 155 (1891).

⁶⁹ *U.S. Supreme Court Cases*, SOLITARY WATCH, <http://solitarywatch.com/resources/u-s-supreme-court-cases/> (last visited Feb. 22, 2014).

⁷⁰ *Hutto v. Finney*, 437 U.S. 678, 685 (1978).

⁷¹ *NYCLU Lawsuit Challenges New York State’s Use of Solitary Confinement*, N.Y. CIV. LIBERTIES UNION (Dec. 6, 2012), <http://www.nyclu.org/news/nyclu-lawsuit-challenges-new-york-states-use-of-solitary-confinement>.

⁷² *Id.*

⁷³ *Id.*

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as a punishment “for a broad range of the system’s 55,000 inmates.”⁷⁴

While voices of advocates grow stronger for confined prisoners seeking relief from their constitutional rights’ violations, there are still voiceless immigrants confined in ways far too similar to the correctional system.

3. *Challenges to Conditions of Confinement*

a. Lack of Sufficient Internal Grievance Procedures Makes Alternative Remedies Necessary

There is very little federal regulation addressing conditions of confinement for those detained by the federal government through ICE. DHS has set forth guidelines for ICE addressing the use of segregation units in the Detention Operations Manual.⁷⁵ A new directive, cited above, issued in September 2013 by ICE Acting Director John Sandweg, seeks to reinforce and expand upon these guidelines.⁷⁶ The directive sets out an updated policy stating that segregation should be used “only as a last resort,” and in such cases, as a limited measure.⁷⁷

One main detention reform goal in 2010 was to release new standards, finally published in 2011.⁷⁸ The stated purpose of Performance Based National Detention Standards 2011 (PBNDS) was “to improve medical and mental health services, increase access to legal services and religious opportunities, improve communication with detainees with limited English proficiency, improve the process for reporting and responding to complaints, reinforce protections against sexual abuse and assault, and increase recreation and visitation.”⁷⁹ The PBNDS 2008, which were supposed to take effect in all ICE facilities by January 2010, created 41 performance-based national detention standards, all targeting oversight and well-being

⁷⁴ Editorial, *The Cost of Solitary Confinement*, N.Y. TIMES (Dec. 13, 2012), <http://www.nytimes.com/2012/12/14/opinion/the-cost-of-solitary-confinement.html>.

⁷⁵ Since ICE is a division of DHS, the Secretary of Homeland Security has the authority to regulate conditions of confinement for immigrants in detention. *See* 8 U.S.C. § 1103(a)(2) (2012).

⁷⁶ *See* U.S. IMMIGR. & CUSTOMS ENFORCEMENT, REVIEW OF THE USE OF SEGREGATION FOR ICE DETAINEES 1 (2013), *available at* http://www.ice.gov/doclib/detention-reform/pdf/segregation_directive.pdf.

⁷⁷ *Id.* at 8.

⁷⁸ *See* U.S. IMMIGR. & CUSTOMS ENFORCEMENT, PERFORMANCE-BASED NATIONAL DETENTION STANDARDS 2011, at 1 (2013), *available at* <http://www.ice.gov/doclib/detention-standards/2011/pbnds2011.pdf>.

⁷⁹ *Fact Sheet: ICE Detention Standards*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (Feb. 24, 2012), <http://www.ice.gov/news/library/factsheets/facilities-pbnds.htm>.

of immigrants in custody while they awaited a determination in their removal proceedings or removal.⁸⁰ PBNDS are organized into seven categories: Safety, Security, Order, Care, Activities, Justice, and Administration and Management.⁸¹ Subsections of these categories address most aspects of detainee life including food, housing, recreation, medical care, and discipline.⁸² The September 2013 directive expands upon the guidelines of the PBDNS focusing specifically on the use of segregation: designating specific personnel with responsibilities of notification, reporting, review, and internal oversight of segregation cases; distinguishing procedures for administrative (or “non-punitive”) and disciplinary segregation; requiring review of all segregation cases lasting over fourteen days; requiring documentation of the basis for placement in segregation; and ordering additional protections for immigrants with “special vulnerabilities.”⁸³

Notwithstanding the strides forward made by the new directive, potentially troublesome aspects include: vague requirements to review “appropriateness” of placement of immigrants with mental illness in segregation, the lack of oversight requirements for instances of segregation lasting less than fourteen days, and the absence of a time limit on solitary confinement.⁸⁴ Furthermore, as internal policy documents, there is a question as to whether the standards or the September 2013 directive are binding or subject to meaningful external review.

Few provisions of the standards or the new directive relate to actual grievance procedures for detainees. The most significant, however, falls under Section 2.12 of the 2011 PBDNS, explicitly authorizing the use of “Special Management Units” (SMU) for purposes of administrative or disciplinary confinement.⁸⁵ The procedures here include: a disciplinary hearing panel to place immigrants in isolated, solitary rooms which greatly resemble correctional confinement conditions, in the event the panel finds an

⁸⁰ See U.S. IMMIGR. & CUSTOMS ENFORCEMENT, 2008 OPERATIONS MANUAL ICE PERFORMANCE-BASED NATIONAL DETENTION STANDARDS (PBNDS) (2008), available at <http://www.ice.gov/detention-standards/2008/>.

⁸¹ See *id.*

⁸² See *id.*

⁸³ U.S. IMMIGR. & CUSTOMS ENFORCEMENT, REVIEW OF THE USE OF SEGREGATION FOR ICE DETAINEES 1–4, 6, 8 (2013), available at http://www.ice.gov/doclib/detention-reform/pdf/segregation_directive.pdf.

⁸⁴ See generally *id.*

⁸⁵ See U.S. IMMIGR. & CUSTOMS ENFORCEMENT, 2.12 SPECIAL MANAGEMENT UNITS 178 (2013), available at http://www.ice.gov/doclib/detention-standards/2011/special_management_units.pdf.

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immigrant guilty of violating a rule or engaging in prohibited conduct characterized at a “greatest,” “high,” or “high-moderate level.”⁸⁶

Even with the benefit of more structured guidelines for ICE personnel ordered by the new directive, remedies for an immigrant placed in an SMU remain narrow. If an incident occurs which detention officials believe could warrant time in an SMU, detainees are often placed there throughout investigation of the potential infractions.

The 2011 standards provide that immigrants are afforded rights such as: “the right to protection from abuse; the right to freedom from discrimination; [and] the right to pursue a grievance.”⁸⁷ Immigrants can file informal, formal, and emergency grievances as well as appeal initial decisions.⁸⁸ However, if it is believed that an immigrant has “establishe[d] a pattern of filing nuisance complaints,” an ICE administrator can find that that immigrant is “one for whom not all subsequent complaints must be fully processed.”⁸⁹

As the ACLU of Georgia report highlighted, due process for these detainees is truncated: there is no opportunity to appeal, nor an avenue to present witnesses, nor present a challenge to an assignment to solitary confinement. Thus, the lack of appropriate internal grievance procedures makes it important to seek constitutional remedies. Still, advocates would be well-advised to carefully review the September 2013 directive and hold detention facilities accountable to their own guidelines. New internal data-tracking requirements open the door to the possibility of filing Freedom of Information Act requests to review the self-reported progress of detention facilities on limiting the use of segregation.⁹⁰ One useful strategy may be to create a questionnaire for immigrants placed in segregation, investigating the facility’s step-by-step compliance with appropriate internal procedures. Data from these surveys could be used to support clients with individual grievances, as well as to cre-

⁸⁶ See *id.* at 179.

⁸⁷ U.S. IMMIGR. & CUSTOMS ENFORCEMENT, PERFORMANCE-BASED NATIONAL DETENTION STANDARDS 2011, at 226 (2013), available at <http://www.ice.gov/doclib/detention-standards/2011/pbnds2011.pdf>.

⁸⁸ See *id.* at 168, 175.

⁸⁹ *Id.* at 399.

⁹⁰ See U.S. IMMIGR. & CUSTOMS ENFORCEMENT, REVIEW OF THE USE OF SEGREGATION FOR ICE DETAINEES 10 (2013), available at http://www.ice.gov/doclib/detention-reform/pdf/segregation_directive.pdf.

ate shadow reports comparing data and highlighting any discrepancies with official reports.

b. Means of Bringing a Federal Claim

Though far from an exhaustive list, below are some legal avenues that have proven effective, in varying degrees, to challenge conditions of confinement or prolonged detention in federal courts.

Habeas Corpus Claims: The Supreme Court held in *Zadvydas v Davis*⁹¹ that under the federal habeas statute, “indefinite detention of an alien would raise a serious constitutional problem,”⁹² and that the detained immigrant should have the option of habeas corpus proceedings as a forum to challenge prolonged civil detention.⁹³

A victory for civil detainment challenges, the Court also rejected government arguments that civil detention assists the regulatory immigration and removal process by ensuring that 1) aliens indeed appear at future immigration proceedings, and 2) their detainment helps protect the broader community.⁹⁴ In rejecting both arguments, the Court has now made room for future claims by civil detainees who receive haphazard, prolonged detention for mere administrative reasons. Those subjected to administrative confinement can employ a similar rationale.

Constitutional Claims: The Supreme Court has held that immigrants have presumptively been denied their due process rights if “a condition constitutes cruel and unusual punishment under the Eighth Amendment.”⁹⁵ Yet courts have been reluctant to extend these rights too broadly and have not yet done so for an immigrant detainee who has been confined.

Currently, the exceptional case remains the Pelican Bay Prison class action suit, *Madrid v. Gomez*,⁹⁶ in which the federal district court in California recognized there is a degree of Eighth Amendment violation when prisoners with “pre-existing mental health conditions . . . [are] subjected to solitary confinement.”⁹⁷

⁹¹ 533 U.S. 678 (2001).

⁹² *Id.* at 690.

⁹³ *Id.* at 688.

⁹⁴ *Id.* at 690.

⁹⁵ Gwynne Skinner, *Bringing International Law to Bear on the Detention of Refugees in the United States*, 16 WILLAMETTE J. INT’L L. & DISP. RESOL. 270, 292 (2008).

⁹⁶ 889 F. Supp. 1146 (N.D. Cal. 1995).

⁹⁷ JENNIFER WEDEKIND, SOLITARY WATCH, FACT SHEET: SOLITARY CONFINEMENT AND THE LAW I (2011), available at <http://solitarywatch.com/wp-content/uploads/2011/06/fact-sheet-solitary-confinement-and-the-law2.pdf>; see also *Madrid*, 889 F. Supp. at 1265–66.

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Further, the Supreme Court has found that within the prison context, prisoners retain “only the most limited liberty interests and courts are exceedingly deferential to the decision of prison administrators.”⁹⁸ Should there be a liberty interest implicated, procedural due process must be provided for the confined individual so she is given notice of the factual basis for her confinement and provided an opportunity to respond.⁹⁹ Nevertheless, the relief available for immigrants confined remains narrow as the Supreme Court has stood by its holding in *Sandin v. Conner* in procedural due process terms insofar as prisoners subjected to solitary confinement are not granted liberty interests for remedy purposes: conditions in solitary “did not present a dramatic departure from the basic conditions of [the prisoner’s] sentence.”¹⁰⁰

Tort Claims: Another legal avenue may be the Federal Tort Claims Act (FTCA),¹⁰¹ which provides for the substitution of the United States for the individual federal official for most torts. Below is a brief sampling of case law showing under which circumstances a prisoner may or may not recover damages under this statute.

In *Ali v. Fed. Bureau of Prisons*,¹⁰² Abdus-Shahid M.S. Ali was being transferred across state lines to a different federal prison. Upon arrival, the inmate realized that several personal items were missing.¹⁰³ Ali alleged that BOP officers had lost his property and filed suit under the FTCA.¹⁰⁴ The Supreme Court held that the BOP officers were “law enforcement officers” within the meaning of the FTCA, and thus were excepted from waiver of federal sovereign immunity from liability for negligent or wrongful disposal of prisoner’s belongings—that is, the FTCA “forecloses lawsuits against the United States for the unlawful detention of property.”¹⁰⁵

In *Michtavi v. United States*,¹⁰⁶ Michtavi, an Israeli citizen and

⁹⁸ WEDEKIND, *supra* note 96, at 1; see *Hewitt v. Helms*, 459 U.S. 460 (1983), with respect to court deference to prison administrators regarding procedural due process. In *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985), the Court elaborated that substantive due process rights are rights that are reserved to a person, such as life, liberty, and freedom of speech, whereas procedural due process rights encompass procedures that are guaranteed to a person.

⁹⁹ See *Wilkinson v. Austin*, 545 U.S. 209, 223 (2005).

¹⁰⁰ 515 U.S. 472, 486 (1995).

¹⁰¹ 28 U.S.C. §§ 1346, 2671–2680 (2012).

¹⁰² 552 U.S. 214 (2008).

¹⁰³ See *id.* at 216.

¹⁰⁴ *Id.* at 216–17.

¹⁰⁵ *Id.* at 228.

¹⁰⁶ 345 F. App’x 727 (3d Cir. 2009).

federal inmate, alleged fellow inmates plotted against him in an attempt to steal his personal effects and that prison officials accused him of involvement in prison wrongdoing and conspiring to cover up inmate plots.¹⁰⁷ The Third Circuit Court of Appeals held that a prisoner such as Michtavi may not, under either the FTCA or the Prisoner Litigation Reform Act, recover compensatory damages for exclusively mental or emotional injuries without also showing an accompanying physical injury.¹⁰⁸

In *Ashford v. United States*,¹⁰⁹ Edward Ashford knew he was going to be transferred to a different prison where gang members who had previously attacked him were being held; so Ashford notified prison officials of the risk of being housed with those individuals.¹¹⁰ Despite this notice, Ashford was housed with those gang members and was brutally attacked on his second day at the facility.¹¹¹ The Fifth Circuit Court of Appeals held that the discretionary-function exception to the FTCA would not apply if the inmate raised the safety concerns at his prison intake interview.¹¹²

III. ADVOCACY MECHANISMS UNDER INTERNATIONAL HUMAN RIGHTS LAW

Where constitutional and federal law fail to provide a clear remedy for an immigrant in detention who is unable to successfully argue that she is being “punished” through the practice of solitary confinement, human rights standards can provide a set of principles that are broad enough to cover all circumstances, including solitary confinement of immigrants in detention.

1. *International Treaties Ratified by the United States*

Several human rights treaties ratified by the United States, including the International Covenant on Civil and Political Rights (ICCPR),¹¹³ the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),¹¹⁴ and the Conven-

¹⁰⁷ See *id.* at 728.

¹⁰⁸ *Id.* at 729–30.

¹⁰⁹ 511 F.3d 501 (5th Cir. 2007).

¹¹⁰ See *id.* at 503.

¹¹¹ See *id.* at 504.

¹¹² *Id.*

¹¹³ International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 31st Sess., Supp. No. 16, art. 7, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICCPR] (entered into force Mar. 23, 1976), available at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

¹¹⁴ International Convention on the Elimination of All Forms of Racial Discrimination art. 2, Mar. 7, 1966, 660 U.N.T.S. 195 [hereinafter ICERD], available at <http://>

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tion Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),¹¹⁵ explicitly prohibit the use of treatment that rises to the level of torture and other cruel, inhuman, or degrading treatment.¹¹⁶ However, a majority of these treaties lack meaningful enforcement mechanisms. Although ratified by the United States, these treaties are not enforceable in U.S. domestic courts as they are not “self-executing.”¹¹⁷ “Non-self-executing” means that provisions of treaties are not domestically enforceable absent further implementation by U.S. legislation.¹¹⁸ As a result, immigrants who suffer conditions of solitary confinement in U.S. immigration detention centers cannot sue the U.S. for violations of these treaties in domestic courts. They must there-

www.ohchr.org/Documents/ProfessionalInterest/cerd.pdf (prohibiting all forms of racial discrimination).

¹¹⁵ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 2, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT], *available at* <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx> (prohibiting any acts of torture); *id.* art. 1 (“[T]he term ‘torture’ means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining . . . information or a confession, punishing him for an act . . . committed or . . . suspected of . . . commit[ing], or intimidating or coercing him . . . when such pain or suffering is inflict[ed] by or at the instigation of or with the consent or acquiescence of a public official.”).

¹¹⁶ Press Release, Physicians for Human Rights, On Human Rights Day, PHR Highlights Priorities for the Administration (Dec. 20, 2013), <http://physiciansforhumanrights.org/press/press-releases/on-human-rights-day-phr-highlights-priorities-for-the-administration.html> (noting that the Universal Declaration of Human Rights “is a landmark document that guarantees fundamental rights to all people”); *cf.* Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948) [hereinafter UDHR], *available at* <http://www.un.org/en/documents/udhr/> (prohibiting any acts that interfere with any rights and freedoms set forth in the Declaration); ICCPR art. 7 (prohibiting any acts that interfere with an individual’s right to freely determine his or her political status and freely pursue his or her social, economic, and cultural development); CAT art. 1 (qualifying “torture” to not “include pain or suffering arising only from, inherent in or incidental to lawful sanctions,” which is relevant to challenging prison conditions); *id.* art. 11 (“Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.”).

¹¹⁷ Oona A. Hathaway et al., *International Law at Home: Enforcing Treaties in U.S. Courts*, 37 YALE J. INT’L L. 51, 53 (2012) (“In *Medellín v. Texas*, the Court reasoned that the treaties . . . were non-self-executing and thus not enforceable unless implemented into law by Congress.” (footnote omitted)); *id.* at 56 n.22 (“As the Court put it in *Medellín*, a treaty that is self-executing has automatic domestic effect as federal law upon ratification.”) (citation and internal quotation marks omitted).

¹¹⁸ MICHAEL J. GARCIA, CONG. RESEARCH SERV., RL32528, INTERNATIONAL LAW AND AGREEMENTS: THEIR EFFECT UPON U.S. LAW 7 (2014), *available at* <http://www.fas.org/sgp/crs/misc/RL32528.pdf>.

fore avail themselves of alternate remedies and methods of advocacy.

Growing awareness around the impact of solitary confinement on incarcerated and detained individuals will prove useful to advocates seeking to hold the U.S. government accountable to its commitments under ICCPR, CERD, or CAT. Official reports documenting adherence to treaty principles are periodically released before treaty monitoring bodies for each of these treaties.¹¹⁹ To supplement official reports that could contain omitted, incomplete, or inaccurate information, non-governmental organizations often independently gather data and document cases related to treaty requirements and submit “shadow reports” to the treaty monitoring bodies.¹²⁰ Advocates seeking a way to use the language of these treaties to the advantage of clients held in solitary confinement are therefore encouraged to apply community pressure with the support of human rights oversight bodies and to file individual or group complaints to challenge solitary confinement practices.

2. *Regional Treaties*

Advocates may also find it useful to examine precedents set by recent cases under regional instruments, such as the European Convention of Human Rights¹²¹ and the American Declaration of

¹¹⁹ For a list of monitoring bodies, see *Human Rights Bodies*, U.N. OFFICE OF THE HIGH COMM’R FOR HUMAN RIGHTS, <http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx> (last accessed April 23, 2014).

¹²⁰ See Report to the U.N. Human Rights Comm., Concluding Observations on the Fourth Periodic Report of the United States of America, U.N. Doc. CCPR/C/USA/CO/4, at 9 (Apr. 23, 2014), available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fUSA%2fCO%2f4&Lang=en (reporting on solitary confinement in the United States). See also JOHN MARSHALL L. SCH. & NAT’L IMMIGRANT JUSTICE CTR., CONCERNING THE USE OF SOLITARY CONFINEMENT IN IMMIGRANT DETENTION FACILITIES IN THE UNITED STATES OF AMERICA 4 (2013), available at <http://repository.jmls.edu/cgi/viewcontent.cgi?article=1000&context=whitepapers> (noting “the widespread use of solitary confinement in immigrant detention as it violates immigrant detainees’ rights to due process and judicial remedies, violations of minimum standards of the right to humane treatment, and the right to personal liberty”).

¹²¹ The European Court of Human Rights recently took on the question of whether solitary confinement constitutes torture under Article 3 of the European Convention on Human Rights, which provides: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.” European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR], available at http://www.echr.coe.int/Documents/Convention_ENG.pdf; cf. Vikram Dodd, *Abu Hamza Can Be Extradited to US, Human Rights Court Rules*, GUARDIAN (Apr. 10, 2012), <http://www.guardian.co.uk/uk/2012/apr/10/abu-hamza-extradited-us-court> (reporting on a European Court of Human Rights ruling

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the Rights and Duties of Man,¹²² for strategies to challenge solitary confinement.

Since the U.S. never ratified the Inter-American Convention, individuals cannot bring legal action before the Inter-American Court,¹²³ however, the Inter-American Commission on Human Rights (IACHR) can make recommendations to the member state, adding to international pressure for the U.S. to conform to human rights standards with respect to solitary confinement practices. Individuals may petition the IACHR, alleging in a complaint that the United States is violating provisions of the American Declaration of the Rights and Duties of Man.¹²⁴ Complaints may be brought on the basis that the U.S. actively holds individuals in solitary confine-

holding that no violations under ECHR would occur if certain terrorism suspects were extradited to the United States).

¹²² The American Declaration of the Rights and Duties of Man (American Declaration), signed by the United States in 1948, provides for specific protections for non-criminal detainees. *See Basic Documents Pertaining to Human Rights in the Inter-American System*, INTER-AMERICAN COMM'N ON HUMAN RIGHTS, <http://www.cidh.org/basicos/english/Basic1.%20Intro.htm> (last visited Apr. 23, 2014). The Inter-American Commission on Human Rights (IACHR) monitors the compliance of member states of the Organization of American States (OAS) with the American Declaration. *Id.* A 2011 IACHR Report examined immigration detention facilities in the United States and covered a range of problematic trends in the American immigration detention system. *Report on Immigration in the United States: Detention and Due Process*, INTER-AMERICAN COMM'N ON HUMAN RIGHTS, <http://cidh.org/countryrep/USImmigration/Chap.IV.c.htm#IV.B1> (last visited Apr. 23, 2014). The IACHR was "deeply troubled" in particular about the use of solitary confinement against immigrants held in civil detention, particularly "in the case of vulnerable immigration detainees, including members of the LGBTQ community, religious minorities and mentally challenged detainees." *Report on Immigration in the United States: Detention and Due Process*, INTER-AMERICAN COMM'N ON HUMAN RIGHTS, <http://cidh.org/countryrep/USImmigration/Chap.IV.d.htm> (last visited Apr. 23, 2014). "Using confinement to protect a threatened population amounts to a punitive measure. Equally troubling is the extent to which this measure is used as a disciplinary tool." *Id.* The IACHR's recognition of solitary confinement as torture in this report is consistent with its rulings on petitions filed against several member states alleging the use of solitary confinement. *See, e.g.,* Luis Lizardo Cabrera v. Dominican Republic, Case 10.832, Report No. 35/96, Inter-Am. Comm'n H. R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 821 (1997), available at <http://www1.umn.edu/humanrts/cases/1997/domrep35-96.html>; Suarez-Rosero v. Ecuador, Judgment and Merits, Inter-Am. Ct. H.R. (ser. C) (Nov. 12, 1997), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_35_ing.pdf; Oscar Elias Biscet *et al.* v. Cuba, Case 12.476, Report No. 67/06, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.127 Doc. 4 rev. 1 (2007), available at <http://www1.umn.edu/humanrts/cases/67-06.html>; Victor Rosario Congo v. Ecuador, Case 11.427, Report No. 63/99, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 475 (1998), at ¶ 58–59, available at <http://www1.umn.edu/humanrts/cases/1998/ecuador63-99.html>.

¹²³ *See Basic Documents Pertaining to Human Rights in the Inter-American System*, INTER-AMERICAN COMM'N ON HUMAN RIGHTS, <http://www.cidh.org/basicos/english/Basic1.%20Intro.htm> (last visited Apr. 23, 2014).

¹²⁴ *Id.*

ment, tacitly consents to the practice, or fails to act in a manner that would prevent this kind of treatment.¹²⁵

3. *Special Rapporteurs*

The most unequivocal condemnation of solitary confinement in recent memory amongst human rights experts has come from the current Special Rapporteur on Torture, Juan Mendez.¹²⁶ In his 2011 report to the U.N. Human Rights Commission (UNHRC),¹²⁷ Mendez recommends that any period of solitary confinement longer than fifteen days (“prolonged solitary confinement”) be considered torture and outlawed by all states that have signed onto CAT.¹²⁸

In support of the Special Rapporteur on Torture’s recommendations, the national ACLU issued a statement to the UNHRC in February 2012 urging the body to adopt his recommendations.¹²⁹ Specifically, the ACLU supported the chief recommendation to limit the use of solitary confinement to the most extreme cases, and even in such cases, limit the period of isolation as much as possible.¹³⁰ The ACLU also recommended that the Special Rapporteur on Torture be granted permission to visit United States facilities as soon as practicable.¹³¹

The prior Special Rapporteur on the Human Rights of Migrants noted in a report on his 2007 visit to the United States: “In some cases immigrant detainees spend days in solitary confinement, with overhead lights kept on [twenty-four] hours a day, and often in extreme heat and cold.”¹³² In his April 2012 report (not

¹²⁵ Cf. *Report on Immigration in the United States: Detention and Due Process*, INTER-AMERICAN COMM’N ON HUMAN RIGHTS, <http://cidh.org/countryrep/USImmigration/Chap.IV.d.htm> (last visited Apr. 23, 2014).

¹²⁶ See generally Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Interim Rep. on Solitary Confinement, U.N. Doc. A/66/268 (Aug. 5, 2011) (by Juan E. Méndez), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/445/70/PDF/N1144570.pdf?OpenElement>.

¹²⁷ *Id.*

¹²⁸ *Id.* ¶¶ 26, 76. See also Mike Corradini, *UN Advisor Says Solitary Confinement in the US is Torture*, PHYSICIANS FOR HUMAN RIGHTS BLOG (Oct. 16, 2012), <http://physiciansforhumanrights.org/blog/un-advisor-says-solitary-confinement-in-us-is-torture.html>.

¹²⁹ Written Statement Submitted by the Am. Civil Liberties Union to the Human Rights Council, U.N. Doc. A/HRC/19/NGO/31 (Feb. 17, 2012), available at http://www.aclu.org/files/assets/aclu.statement.solitary.confinement.unhrc_.19th.session.feb_.2012.pdf.

¹³⁰ *Id.* at 6.

¹³¹ *Id.*

¹³² Special Rapporteur on the Human Rights of Migrants, Rep. on Mission to the United States of Am. (Addendum), U.N. Doc. A/HRC/7/12/Add.2, at 2 (Mar. 5,

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covering the United States) presented to the UNHRC,¹³³ the current Special Rapporteur on the Human Rights of Migrants, François Crépeau, did not mention solitary confinement per se; however, he did express concern at the detention of immigrants in “an irregular situation”¹³⁴ and recommended limiting the use of immigration detention in general¹³⁵ and harmonizing domestic law with the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families in order to improve conditions of immigrants in detention.¹³⁶

Advocates for the abolition of solitary confinement can assist the Special Rapporteurs by supporting advocacy around ending prolonged isolation and speaking out in support of allowing inspection of U.S. detention centers (as the ACLU has done).

The offices of the Special Rapporteur on Torture also provide an accessible mechanism for advocates to directly report incidents of torture. Advocates may submit “allegation letters” on behalf of survivors of solitary confinement, reporting violations against specific groups, particular methods of isolation, and conditions of confinement.¹³⁷ In addition, advocates may report in these letters any legislation permitting the use of prolonged isolation or protecting or failing to punish its perpetrators.¹³⁸ Information on how to submit allegation letters is listed on the UN Office of the High Commissioner for Human Rights website,¹³⁹ including an address where urgent appeals may be sent, and a detailed questionnaire that may be used in interviewing an immigrant experiencing torture in the form of solitary confinement at the hands of U.S. officials. In response, the Special Rapporteur will investigate the allegation by requesting that the U.S. “clarify the substance of the allegations and to forward information on the status of any investigation,” such as “findings of any medical examination, the identity of the persons responsible for the torture, the disciplinary and

2008) (by Jorge Bustamante), *available at* <http://daccess-dds-ny.un.org/doc/UN-DOC/GEN/G08/112/81/PDF/G0811281.pdf?OpenElement>.

¹³³ Special Rapporteur on the Human Rights of Migrants, Rep. on Mission to Albania (Addendum), U.N. Doc. A/HRC/20/24/Add.1 (Apr. 10, 2012) (by François Crépeau), *available at* http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-24-Add1_en.pdf.

¹³⁴ *Id.* at 17–19.

¹³⁵ *Id.* at 23.

¹³⁶ *Id.* at 20.

¹³⁷ See *Allegation Letters*, U.N. OFFICE OF THE HIGH COMM’R FOR HUMAN RIGHTS, <http://www.ohchr.org/EN/Issues/Torture/SRTorture/Pages/Allegation.aspx> (last visited Apr. 24, 2014).

¹³⁸ *Id.*

¹³⁹ *Id.*

criminal sanctions imposed on them, and the nature and amount of compensation paid to the victims or their families[.]”¹⁴⁰

Communicating with the Special Rapporteur’s offices through letters documenting the solitary confinement of immigrants in detention and building on his recognition of the practice as torture could effectively pressure the U.S. government to abolish or severely limit its use in immigration detention centers.

CONCLUSION

Reports of the use of solitary confinement in immigration detention centers in Georgia reflect a disturbing trend of federal facilities isolating civil detainees across the United States for prolonged periods with limited oversight and accountability. The findings of the ACLU of Georgia report—the impetus for this Article—indicate that isolation is widespread, often arbitrarily practiced, and severely endangers the health of immigrants. While immigrants in detention have several means of raising federal claims—including actions through *Bivens* and FTCA—perhaps the greatest difficulty to surmount is securing meaningful representation. For while pursuing constitutional and statutory claims presents several challenges, achieving redress is only possible through effective advocacy. Broader advocacy on the human rights front may also pressure federal authorities in Georgia and elsewhere to adhere to international human rights standards that either seek to limit or abolish isolation of immigrants altogether.

¹⁴⁰ *Id.*

J. MCINTYRE AND THE GLOBAL STREAM OF COMMERCE

Frank Deale†

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INTRODUCTION

The U.S. Supreme Court’s grant of certiorari in *J. McIntyre Machinery, Ltd. v. Nicastro*¹ ended the twenty-year hiatus since the Court last visited the doctrinal area of personal jurisdiction. In its last personal jurisdiction decision, *Burnham v. Superior Court*,² the Court issued a highly fragmented ruling in a case raising the question of whether in-state service of process was sufficient to create general jurisdiction over a private defendant who was “tagged” with service of process in a divorce action while on a three-day business trip to the state of California.³ Three years before that, in its immediately previous endeavor, the Court fragmented once again in ascertaining the circumstances under which a foreign manufacturer could be subjected to state-court jurisdiction when a component part it manufactured entered the forum state through the stream of commerce and caused injury.⁴

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¹ 131 S. Ct. 2780 (2010). *See also* *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 62 (2010) (granting certiorari).

² 495 U.S. 604 (1990).

³ *Id.* at 607–10.

⁴ *Asahi Metal Indus. Co. v. Super. Ct. of Solano Cnty.*, 480 U.S. 102 (1987).

In each of these 4-4-1 decisions,⁵ the Court's ultimate result was unanimous,⁶ yet the clarity of the underlying holdings served to mask the stark ideological divisions that polarized the Justices. This was most pronounced in *Burnham*, which erupted into a debate, characteristic of the 1980s, between Justice Brennan, who had consistently maintained that the Due Process Clause and other parts of the Constitution must be read as evolving normative conceptions, and Justice Scalia, who prefers to articulate bright-line rules that are consistent with the purported intention of the Framers.⁷

⁵ By "4-4-1," I refer to decisions characterized by two four-vote plurality opinions with one Justice joining neither and writing separately. Perhaps the most well-known of such decisions was *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

⁶ In *Burnham*, the Court was unanimous in concluding that California's exercise of jurisdiction over defendant Burnham was proper because he was served process in California, even though he was only present in the state for three days. 495 U.S. at 640. Likewise the *Asahi* Court was unanimous in concluding that California's exercise of jurisdiction over a Japanese firm on a cross-complaint for indemnification was unreasonable and violated due process notions of fair play and substantial justice because neither the original plaintiff nor the state of California had any interest in securing a California forum for the litigation. 480 U.S. at 114-16. Justice Scalia refused to join Section II-B of Justice O'Connor's opinion in *Asahi*, and was thus the only Justice to suggest that the fairness factors could not be utilized to invalidate a finding of minimum contacts. 480 U.S. at 104.

⁷ Justice Scalia argued for a plurality of the Court in *Burnham* that the in-state service of process rule has been firmly in place since *Pennoyer v. Neff*, 95 U.S. 714 (1877), and none of the subsequent developments under the minimum-contacts doctrine, which involved defendants served out-of-state, altered this approach. Therefore, Scalia saw no need for a "fair play and substantial justice" analysis of whether California's exercise of jurisdiction over Burnham violated due process. As Scalia stated:

[T]he concurrence's proposed standard of "contemporary notions of due process" requires more: it measures state-court jurisdiction not only against traditional doctrines in this country, including current state-court practice, but also against each Justice's subjective assessment of what is fair and just. Authority for that seductive standard is not to be found in any of our personal jurisdiction cases. It is, indeed, an outright break with the test of "traditional notions of fair play and substantial justice," which would have to be reformulated "*our* notions of fair play and substantial justice."

Burnham, 495 U.S. at 623 (plurality opinion). Justice Brennan argued for a different plurality in *Burnham* that a minimum-contacts analysis had to be performed for *all* assertions of state court jurisdiction as the Court had previously held in *Shaffer v. Heitner*, 433 U.S. 186 (1977), and this included an assessment of whether the exercise of jurisdiction was consistent with a "fair play and substantial justice analysis." *Burnham*, 495 U.S. at 629 (Brennan, J., concurring in judgment). As Brennan stated: "The critical insight of *Shaffer* is that all rules of jurisdiction, even ancient ones, must satisfy contemporary notions of due process." *Id.* For academic commentary on this debate, see generally, Earl M. Maltz, *Personal Jurisdiction and Constitutional Theory—A Comment on Burnham v. Superior Court*, 22 RUTGERS L.J. 689 (1991); Travis Knobbe, Note, *Brennan v. Scalia: Justice or Jurisprudence? A Moderate Proposal*, 110 W. VA. L. REV. 1265 (2008).

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During this twenty-year interregnum, the composition of the Court changed, almost in its entirety. Justice Brennan was replaced by Justice Souter (1990); Justice Marshall by Justice Thomas (1991); Justice White by Justice Ginsburg (1993); Justice Blackmun by Justice Breyer (1994); Justice Rehnquist by Justice Roberts (2005); Justice O'Connor by Justice Alito (2006); and Justice Stevens by Justice Kagan (2010). Justice Souter sat a full twenty years on the Court without hearing a single personal jurisdiction case, before being replaced by Justice Sotomayor (2009).⁸ Having neglected this area for an entire generation, almost any new decision of the Court would be worthy of close attention. But the case the Court agreed to hear was also clearly a compelling one, addressing the ability of a United States plaintiff to sue the foreign manufacturer of a product in the state where the injury caused by the product occurred. Because of increased globalization, more and more products that have been manufactured abroad are ending up in the United States marketplace,⁹ suggesting that these cases will proliferate in the future. However, in its response to these developments, the Court issued yet another fragmented decision. In a plurality opinion, bolstered into a majority by two votes from Justices who agreed with the result of the plurality but not its reasoning, the Court ruled that a foreign manufacturer who consciously targeted the entire United States market and sold products through an independent American distributor, could not be subject to jurisdiction in a New Jersey state court under the stream of commerce theory, absent a showing that it had sold "sizeable quantities" of its product in the state of New Jersey.¹⁰ As a consequence

⁸ The dearth of Supreme Court personal jurisdiction cases during this twenty-year period cannot be attributed to consensus regarding the doctrine in the lower courts. For a summation of the lower court splits on the stream of commerce theory after *Asahi*, see *Nicastro v. McIntyre Machinery America, Ltd.*, 201 N.J. 48, 70–73 (2010). Cf. Rodger D. Citron, *The Last Common Law Justice: The Personal Jurisdiction Jurisprudence of John Paul Stevens*, 88 U. DET. MERCY L. REV. 433, 468–69 (2011) (suggesting that the Court stayed out of the personal jurisdiction area until Justice Stevens retired).

⁹ According to Justice Ginsburg's dissenting opinion, in 2010 the United States imported nearly 2 trillion dollars in foreign goods. See *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2799 n.6 (2011) (Ginsburg, J., dissenting) (citing U.S. Census Bureau data).

¹⁰ *J. McIntyre Mach.*, 131 S. Ct. at 2786–91 (plurality opinion); *id.* at 2795 (Ginsburg, J., dissenting). The Court issued a second personal jurisdiction decision the same day in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2010), a case arising in North Carolina where the North Carolina appellate court allowed an assertion of jurisdiction over the Belgian subsidiary of an American corporation in a suit by plaintiffs in North Carolina regarding a bus accident that took place in France. In *Goodyear*, the Supreme Court unanimously reversed a lower court decision that, in its reach to assert jurisdiction, collapsed the distinction between specific jurisdiction,

of this ruling, a worker-plaintiff who suffered a severe and disabling injury while using the manufacturer's product at his place of employment, and in his state of residence, was forced to abandon his litigation in New Jersey and travel to England to adjudicate his claim before a foreign legal system. The holding was a big win for the business community over plaintiffs,¹¹ and is feared to have established a blueprint for multinational corporations to follow in order to avoid products liability suits in the United States.¹²

As Justice Kennedy stated in his plurality opinion for the Court, *J. McIntyre* presented an opportunity to clarify the circumstances in which a state court can exercise specific jurisdiction over the foreign manufacturer of a product that has entered the state and caused an injury, an issue left unresolved after the *Asahi* decision of 1987.¹³ This Article argues that the Court woefully failed to accomplish that goal. After a summation of the New Jersey litigation, the Article postulates a set of goals that Justice Kennedy sought to attain in his opinion for the Court and the extent to which he satisfied them, in light of the fact that he was only able to get three additional members of the Court, Justices Scalia, Thomas and Roberts, to go along with his reasoning. These goals included: establishing that the far reaching opinion of the New Jersey Supreme Court could not be sustained consistently with the plurality's reading of Supreme Court precedent; reining in the "stream of commerce theory" as a means of establishing state court jurisdiction; minimizing the "fairness factors" as an independent wing of

where the plaintiff's cause of action arises out of or relates to the defendant's contacts with the forum state, and general jurisdiction, where there is no such relationship. Although the Supreme Court has decided a series of general jurisdiction cases, the discussion of these differences first appeared only in brief footnotes, providing some insight into the confusion of the North Carolina courts and others. See *Helicopteros Nacionales De Colombia, S.A. v. Hall*, 466 U.S. 408, 414 nn.8 & 9; *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n.15 (1985).

¹¹ Cf. Adam Liptak, *Justices Offer Receptive Ear to Business Interests*, N.Y. TIMES, Dec. 19, 2010, at A1 (reporting on a study by the Constitutional Accountability Center concluding that the Roberts Court has sided with the Chamber of Commerce 68% of the time compared with 56% of the time during the last eleven years of the Rehnquist Court). The United States Chamber of Commerce is a pro-business advocacy group that files "friend of the court" briefs in Supreme Court cases. The Chamber and its "Chamber Litigation Center" claim to be the "voice of business in the courts on issues of national concern to the business community." *Id.*

¹² Cf. *J. McIntyre Mach.*, 131 S. Ct. at 2795 (Ginsburg, J., dissenting) ("Inconceivable as it may . . . appear[] . . . the splintered majority today turn[s] the clock back to the days before modern long arm statutes when a manufacturer, to avoid being haled into a court where a user was injured, need only Pilate-like wash its hands of a product by having independent distributors market it." (citation and internal quotations omitted)).

¹³ *Id.* at 2786 (plurality opinion).

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the personal jurisdiction analysis that can be used by a plaintiff to establish jurisdiction; and setting Internet-conscious rules for future personal jurisdiction cases. Justice Kennedy's plurality opinion also sought to destabilize Justice Brennan's personal jurisdiction legacy, a jurisprudence that sought to assure that plaintiffs have fair and reasonable access to the courts to adjudicate their claims.¹⁴

While *J. McIntyre* makes it extremely difficult for United States plaintiffs to seek remedies against foreign corporations in the United States, and plaintiff Nicastro now has no alternative to litigating in Britain if he intends to pursue his case, the Article shows that the absence of a clear rationale for the Supreme Court's decision has left room for lower courts to exercise personal jurisdiction in cases presenting facts remarkably similar to those presented in *J. McIntyre*. Ironically, the analysis followed by many lower courts after *J. McIntyre* bears a closer resemblance to the New Jersey Supreme Court decision that *J. McIntyre* reversed, than to Justice Kennedy's plurality opinion. For this reason, this Article gives close attention to the New Jersey Supreme Court's reasoning, and suggests that there is great reluctance amongst lower-court judges to impose the harsh defendant-friendly rules contained in Justice Kennedy's plurality opinion, and that courts have adopted narrow readings of *J. McIntyre* that do not impose such impacts on plaintiffs.

I. FACTS

Robert Nicastro lost four fingers on October 11, 2001, when his right hand was caught in the blade of Model 640 Shearing machine while employed at a scrap recycling facility in Saddle River, New Jersey.¹⁵ The machine was manufactured by J. McIntyre Machinery Ltd., a British company, and sold to Nicastro's American employer, Curcio Scrap Metal. The actual sale was transacted by McIntyre America Ltd., J. McIntyre's exclusive, and now bankrupt, American distributor, which was based in Ohio. Frank Curcio purchased the machine at a trade fair booth in Nevada where he met

¹⁴ Cf. Herman Schwartz, *Opening the Courthouse Door*, in JOSHUA ROSENKRANZ & BERNARD SCHWARTZ, REASON & PASSION: JUSTICE BRENNAN'S ENDURING INFLUENCE 275 (1997) ("Justice Brennan devoted much of his effort during his thirty-four years on the Court to making the federal courts more accessible to ordinary people seeking justice for their grievances." *Id.*); Richard D. Freer, *Personal Jurisdiction in the Twenty-First Century: The Ironic Legacy of Justice Brennan*, 63 S.C. L. REV. 551, 554 (2012) (describing Brennan's approach as a "flexible fairness-based assessment of personal jurisdiction").

¹⁵ New Jersey is the largest processor of scrap metal in the United States, far exceeding Kentucky, its next rival in amount of tons recycled. See *J. McIntyre Mach.*, 131 S. Ct. at 2795 (Ginsburg, J., dissenting).

with representatives of J. McIntyre and McIntyre America. The machine was shipped from McIntyre America's headquarters in Ohio to New Jersey, and paid for with a check made out to McIntyre America.¹⁶

Although McIntyre America was a legally distinct and separate corporation from J. McIntyre Ltd., the two companies shared the same name and worked together to establish a marketing strategy for selling the machines in the United States. At the heart of this strategy was the attendance by the president of J. McIntyre at trade conventions, exhibitions, and conferences throughout the United States with representatives from McIntyre America.¹⁷ The case record is not entirely clear on how individual sales were handled. J. McIntyre claimed that the machines were ordered by McIntyre America, built by J. McIntyre, and then sold back to McIntyre America. Other evidence in the case, however, suggests that some of the machines were sold on consignment basis, with McIntyre America maintaining a stock of machines for which it only received payment of a commission after their sale.¹⁸

Nicastro instituted suit on September 22, 2003, in the Superior Court, Law Division, in Bergen County, New Jersey, against J. McIntyre and McIntyre America, alleging that the shear machine was not reasonably fit, suitable, or safe for its intended purposes, that it failed to contain adequate warnings or instructions, and was so defectively designed as to allow the plaintiff to get injured while oper-

¹⁶ *Nicastro v. McIntyre Mach. Am., Ltd.*, 201 N.J. 48, 54 (2010). Also included with the machine was an instruction sheet indicating the Nottingham, England address of J. McIntyre Ltd., including its phone and fax numbers and an instruction manual that referenced safety regulations of the United States and the United Kingdom. *Id.* at 55. This recitation of facts is based on the opinion of the New Jersey Supreme Court, which are more complete than those provided by Justice Kennedy's plurality opinion for the Supreme Court. Commentators have noted the different ways the three Supreme Court opinions utilized the facts. See Adam N. Steinman, *The Lay of the Land: Examining the Three Opinions in J. McIntyre Machinery, Ltd. v. Nicastro*, 63 S.C. L. REV. 481, 488-91 (2012); Johnjerica Hodge, *Minimum Contacts in the Global Economy: A Critical Guide to J. McIntyre Machinery v. Nicastro*, 64 ALA. L. REV. 417, 438-39 (2012).

¹⁷ These conventions are sponsored by the Institute of Scrap Recycling Industries, Inc., a membership organization that has over 100 members in New Jersey. See *J. McIntyre Mach.*, 131 S. Ct. at 2796 n.1 (Ginsburg, J., dissenting). J. McIntyre attended as many as twenty-six of these events in cities such as Chicago, Las Vegas, New Orleans, Orlando, San Diego, and San Francisco, but none were in New Jersey. See Oral Argument Transcript, *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (No. 09-1343), at 52, available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/09-1343.pdf.

¹⁸ See *Nicastro*, 201 N.J. at 56. At oral argument, counsel for J. McIntyre stated that there was no consignment on the machine that caused the injury to plaintiff Nicastro. See Oral Argument Transcript, *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (No. 09-1343), at 60.

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ating the machine in the normal course of employment.¹⁹ The trial court dismissed Nicaastro's suit not once, but twice, due to lack of personal jurisdiction. After the first dismissal, Nicaastro appealed to the New Jersey Appellate Division, which reversed the trial court. In an unreported opinion, the Appellate Division ordered discovery to ascertain whether the trial court could exercise jurisdiction under: 1) a traditional minimum contacts analysis; 2) under Justice O'Connor's plurality opinion in *Asahi*; or 3) under an independent "stream of commerce" theory, identified in the 1986 New Jersey Supreme Court decision, *Charles Gendler Co. v. Telecom Equipment Company*.²⁰ After discovery, the trial court again dismissed the case for lack of personal jurisdiction, concluding that J. McIntyre had no contacts with the state of New Jersey, as it did not solicit business in the state or have any physical presence in the state. While J. McIntyre had contact with the *United States*, the trial court reasoned, such contact was not sufficient to allow jurisdiction to be exercised in New Jersey, absent some indication that J. McIntyre engaged in a nationwide distribution scheme that purposefully brought products into New Jersey and allowed it to benefit from the protection of New Jersey's laws.²¹

The Appellate Division reversed the trial court a second time, stating that it had "no hesitancy" in finding that New Jersey could exercise jurisdiction over J. McIntyre. That court determined that jurisdiction was proper because it would not violate "traditional notions of fair play and substantial justice," and was justified under Justice O'Connor's "stream of commerce" rationale in *Asahi*.²² The court found that J. McIntyre had placed the shearer in the stream of commerce by shipping it to McIntyre America, and had know-

¹⁹ *Nicaastro*, 201 N.J. at 53. This claim was based on the absence of a safety guard that plaintiff asserted would have prevented the accident.

²⁰ *Id.* at 53–54. In *Charles Gendler & Co., Inc. v. Telecom Equipment Corp.*, 102 N.J. 460 (1986), the New Jersey Supreme Court held that the stream of commerce theory supports jurisdiction if a manufacturer knew or reasonably should have known that a distribution system has brought the product it manufactured into the forum state, even though the manufacturer did not control the distribution system. In *Gendler*, the court reasoned that the manufacturer's awareness of the distribution system by which it receives economic and legal benefits "justifies subjecting the manufacturer to the jurisdiction of every forum in every jurisdiction within its distributor's market area." *Id.* at 481. Thus, a manufacturer that is aware that its product is being distributed nationwide should be subject to jurisdiction in every state. To avoid this result the manufacturer must "attempt to preclude the distribution and sale of its product in that state." *Id.*

²¹ *Nicaastro*, 201 N.J. at 56.

²² *Nicaastro v. McIntyre Mach. Am., Ltd.*, 399 N.J. Super. 539, 565–66 (App. Div. 2008).

ingly participated in a distribution scheme calculated to bring the product into the U.S. market, which included the state of New Jersey. The purchase of the machine and its use in New Jersey served the explicit and intended purposes of the distribution scheme that J. McIntyre had put into effect.²³

The New Jersey Supreme Court affirmed the Appellate Division. It began its analysis with a bold and highly unusual proposition in a case sustaining personal jurisdiction, stating:

We do not find that J. McIntyre had a presence or minimum contacts in this state—in any jurisprudential sense—that would justify a New Jersey court to exercise jurisdiction in this case. Plaintiff's claim that J. McIntyre may be sued in this state must sink or swim with the stream-of-commerce theory of jurisdiction.²⁴

Whereas the Appellate Division had found that J. McIntyre had purposefully availed itself of the U.S. market which includes the state of New Jersey, thus remaining within the parameters of Justice O'Connor's plurality opinion in *Asahi*,²⁵ the language of the New Jersey Supreme Court suggests that it was dispensing with the minimum contacts test altogether, and at least for purposes of the *J. McIntyre* case, substituting in its stead a stream of commerce rationale for the assertion of personal jurisdiction decoupled from a finding of minimum contacts.²⁶

As will be analyzed in greater detail in the following section, the New Jersey Supreme Court, relying on its previous decision in *Charles Gendler & Co., Inc. v. Telecom Equipment Corp.*,²⁷ held that J. McIntyre could be held accountable in the New Jersey courts because it was aware of, and engaged in, a distribution scheme conducted in co-partnership with McIntyre America that was carrying its product into each of the fifty states, including New Jersey, thus rendering it immaterial that J. McIntyre had neither advertised, marketed, or sent products into New Jersey.

However, not to be missed by the dissenters in the New Jersey

²³ See *id.* at 559.

²⁴ *Nicastro v. McIntyre Mach. Am., Ltd.*, 201 N.J. 48, 61 (2010). The Appellate Division had similarly concluded that it was stream of commerce or nothing. See 399 N.J. Super. at 557.

²⁵ *Id.* at 557–58.

²⁶ The court did suggest later on in its opinion, as something of an afterthought, that “arguably” jurisdiction could be asserted under Justice O'Connor's approach. See 201 N.J. at 74.

²⁷ 102 N.J. 460 (1986). Although *Gendler* was the first New Jersey Supreme Court case to adopt the stream of commerce theory, it had been utilized by the New Jersey Appellate Division. See *id.* at 476–77 (citing cases).

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Supreme Court, or by six Justices of the U.S. Supreme Court, this pioneering analysis allowed the New Jersey Supreme Court to conduct an end run around the “traditional” understanding of minimum contacts, substituting in its place the analysis from *Gendler*. Once this had been accomplished, the case was a sure shot for jurisdiction, as the fairness factors all pointed toward New Jersey as a forum for the plaintiff consistent with notions of fair play and substantial justice.

II. ANALYSIS—NEW JERSEY SUPREME COURT

The New Jersey Supreme Court ruling in *Nicastro*²⁸ is one of the most far-reaching decisions ever written in the law of personal jurisdiction. Bold and historical, Justice Albin’s opinion, in its emphasis on providing plaintiff access to the New Jersey courts, bears an uncanny resemblance to the numerous Warren Court-era decisions in which the Supreme Court confidently established ever-broader parameters in its efforts to expand the promises of American democracy through enhanced access to the courts and the political process.²⁹ As the following discussion suggests, *Nicastro* was hardly flawless, but it nonetheless came to a conclusion more consistent with Supreme Court precedent than the Supreme Court’s fragmented ruling in *J. McIntyre*.

The *Nicastro* decision begins with a sweeping historical overview, taking up almost half its length, providing a recap of the law of personal jurisdiction beginning with the rule of *Pennoyer v. Neff*³⁰ and continuing through *Asahi* and lower court decisions construing it. The thrust and underlying premises of the historical analysis was clear: by documenting the Supreme Court’s adjustment of the rules governing personal jurisdiction to remain current with the shifting demands of a dynamic society, particularly changes regarding transportation technology and the organization of the business corporation, the New Jersey Supreme Court suggested that in the thirty years since *Asahi* was decided, further transformations in the American economy mandated additional tweaks in the jurisdictional rules and that, as in the past, the courts should lead the

²⁸ To avoid confusion, I refer to the New Jersey Supreme Court decision as *Nicastro* and the U.S. Supreme Court decision as *J. McIntyre*.

²⁹ See, e.g., James B. O’Hara, *Introduction*, in *THE WARREN COURT: A RETROSPECTIVE* 3 (1996) (noting “the almost revolutionary significance of the Supreme Court’s role in extending the jurisprudence of civil rights, equal protection, and freedom of speech during Warren’s leadership”).

³⁰ 95 U.S. 714 (1877).

way.³¹ Thus, the shift from the rigid defendant-friendly rule of *Pennoyer* to the flexibility of *International Shoe* was necessitated by the “technological progress in communications and transportation” which “increased the flow of commerce between states” and consequently the “need for state courts to exercise jurisdiction over non-residents,”³² especially foreign corporations.³³ While noting that the Court in *World-Wide Volkswagen* refused to sustain jurisdiction for the plaintiff, the New Jersey Supreme Court nonetheless heralded that decision for establishing a “new theory of state court jurisdiction to respond to the contemporary realities of modern commerce,”³⁴ namely the “stream of commerce theory.” In *World-Wide Volkswagen*, Justice White wrote:

Hence if the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others. The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.³⁵

The Supreme Court’s opinion in *World-Wide Volkswagen* served as a direct precedent for the New Jersey Supreme Court’s first stream of commerce decision, *Gendler & Co., Inc. v. Telecom Equipment Corp.*,³⁶ which was decided a year after *World-Wide Volkswagen* and heavily relied upon by the New Jersey Supreme Court in *Nicastro*.

Gendler upheld New Jersey state court jurisdiction over a Japanese manufacturer who, through its New York subsidiary, sold an

³¹ The opinion begins:

Today, all the world is a market. In our contemporary international economy, trade knows few boundaries, and it is now commonplace that dangerous products will find their way through purposeful marketing, to our nation’s shores and to our state. The question before us is whether the jurisdictional law of this State will reflect this new reality.

Nicastro v. McIntyre Mach. Am., Ltd., 201 N.J. 48, 52 (2010).

³² *Id.* at 62, (citing *Hanson v. Denkla*, 357 U.S. 235, 250–51 (1958)).

³³ *Id.* (citing *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 222–23 (1957)).

³⁴ *Id.* at 64 (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297–98 (1980)).

³⁵ 444 U.S. at 297–98.

³⁶ *Charles Gendler & Co., Inc. v. Telecom Equip. Corp.*, 102 N.J. 460 (1986). Although *Gendler* was the first New Jersey Supreme Court case to adopt the stream of commerce theory, it had been utilized by the New Jersey Appellate Division. *Id.* at 476–77 (citing cases).

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allegedly defective telephone system to an independent New Jersey corporation, which then sold it to the New Jersey office of the Gendler company. Recognizing the expansion of state court jurisdiction authorized by numerous decisions of the Supreme Court, the *Gendler* court explained that the enlargement of state court jurisdiction “has special relevance for foreign corporations engaged in commercial activities in the United States” because of the “metamorphosis” of the United States from a domestic to an international economy.³⁷ The *Gendler* court based its holding on the basis that the Japanese manufacturer and distributor placed at the start of a distribution chain served a large market and “purposefully conducted their activities to make their product available for purchase in as many forums as possible. For such a manufacturer, the sale of a product in a distant state is not simply an isolated event but a result of the corporation’s efforts to cultivate the largest possible market for its products.”³⁸

According to the *Gendler* court:

[F]oreign manufacturers derive benefits from the indirect sales of products throughout the United States. By increasing the distribution of its products, the manufacturer not only benefits economically from indirect sales to foreign residents, but also benefits from protection provided by the laws of the forum state. Thus, a manufacturer that distributes its products into the stream of commerce for widespread distribution derives both legal and economic benefits from the states in which its products are sold. In sum, the system through which the manufacturer distributes its products evidences the manufacturer’s purposeful penetration of the market.

A foreign manufacturer that purposefully avails itself of those benefits should be subject to personal jurisdiction, even though its products are distributed by independent companies, or by an independent, but wholly owned subsidiary.³⁹

The *Gendler* court noted the widespread use of middlemen to act as distributors for a manufacturer’s products and asserted that to allow a manufacturer to “shield itself from liability for damages caused by its products distributed by those middlemen would permit a legal technicality to subvert justice and economic reality in the worst sense.”⁴⁰ *Gendler* concluded that if a manufacturer benefits from the sales of its products through a distributor and is aware

³⁷ *Id.* at 474.

³⁸ *Id.* at 477–79.

³⁹ *Id.* at 478–79 (citations omitted).

⁴⁰ *Id.* at 479 (citations omitted).

that a distribution network is carrying its products through a nationwide distribution system, the manufacturer should expect that its products will be sold in each state and furthermore that it will be subject to jurisdiction in each state.⁴¹ *Gendler* was therefore the key guidepost for the New Jersey Supreme Court in deciding *Nicastro*.

Following its extensive discussion of *Gendler*, the New Jersey Supreme Court in *Nicastro* next looked to *Asahi*, to see whether it undermined the *Gendler* analysis. Parsing the three *Asahi* opinions, the court noted that a majority opinion could not be mustered in answer to the question posed by Justice O'Connor at the outset of her plurality opinion.⁴² While four Justices agreed with Justice O'Connor's stream of commerce "plus" theory, requiring some additional intentional conduct by the manufacturer to demonstrate purposeful availment such as advertising, marketing, or use of a distributor to serve the forum state, three different Justices agreed with the theory articulated by Justice Brennan, which did not require any additional conduct but only awareness on the part of the manufacturer that the product it manufactured had entered the forum state causing injury.⁴³

The *Nicastro* court noted the many lower court cases decided after *Asahi*, recognizing that some adopted the O'Connor view, some the Brennan view, while others either refused to choose between the two approaches or somehow combined them.⁴⁴ Even more noteworthy than the continuing conflict amongst the federal circuit and state courts after *Asahi* was the Supreme Court's refusal to grant certiorari in these cases, irrespective of whether they adopted the O'Connor or Brennan view.⁴⁵ With *Gendler* and other

⁴¹ *Gendler & Co. Inc. v. Telecom Equip. Corp.*, 102 N.J. 460, 478 (1986). No petition for certiorari was filed in *Gendler*.

⁴² O'Connor framed the question as:

This case presents the question whether the mere awareness on the part of a foreign defendant that the components it manufactured, sold, and delivered outside the United States would reach the forum State in the stream of commerce constitutes "minimum contacts" between the defendant and the forum State such that the exercise of jurisdiction "does not offend 'traditional notions of fair play and substantial justice.'"

Asahi Metal Industry Co. v. Superior Ct. of Solano Cnty, 480 U.S. 102, 105 (1987).

⁴³ The New Jersey Supreme Court erroneously concluded that a "unanimous" majority agreed that the exercise of jurisdiction would violate notions of fair play and substantial justice, *Nicastro v. McInyre Mach. Am., Ltd.*, 201 N.J. 48, 67 (2010), by including Justice Scalia, who did not join Section II-B of Justice O'Connor's opinion. See *Asahi*, 480 U.S. at 104.

⁴⁴ *Nicastro*, 201 N.J. at 70–71 nn.10–12.

⁴⁵ For example, in 1995 the Supreme Court denied certiorari in *A. Uberti and C. v.*

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appellate courts upholding the Brennan perspective on stream of commerce cases,⁴⁶ there indeed were few reasons why the New Jersey Supreme Court should not allow for the assertion of jurisdiction in *Nicastro* under the stream of commerce theory articulated in *Gendler*.

Once the stream of commerce requirements under *Gendler* were satisfied, establishing the reasonableness of jurisdiction was straightforward. The fairness factors all pointed toward New Jersey as a forum consistent with notions of fair play and substantial justice. The defendant would not be burdened by coming to New Jersey since it had made over twenty-six visits to the United States to market its product at ISRI scrap metal conventions—indeed attending every ISRI convention held between 1990 and 2005.⁴⁷ Moreover, the plaintiff had an extremely strong interest in litigating the case in New Jersey, where he lived and worked and which

Leonardo, 892 P.2d 1354 (Ariz. 1995), *cert. denied*, 516 U.S. 906 (1995), a case sustaining jurisdiction on facts almost identical to those of *Nicastro*. In that case the Arizona parents of a two-year-old child who was killed in an accident involving a firearm sued the Italian manufacturer of the weapon in a products liability action in an Arizona court. The manufacturer utilized at least eight American distributors who targeted the entire United States market for distribution of the firearm but had not specifically targeted Arizona and had no control over the actions of the U.S. distributors. The Arizona Supreme Court ruled that to reject jurisdiction because Arizona was not specifically targeted “turns common sense on its head” and “defies economic logic” because

[d]ue process does not give foreign companies a safe harbor to manufacture goods designed for and shipped to America and at the same time immunize them from the penalties of noncompliance with American safety standards. Such a rule would drive American manufacturers out of business while allowing foreign businesses to produce, with absolute immunity, unreasonably dangerous and defective products for the American market.

Id. at 1363. This was especially true because the defendant “could have avoided the risk of products liability in Arizona by making some affirmative effort to preclude distribution of its products in [the] state.” *Id.* at 1363 n.8.

The Supreme Court also denied certiorari in *Tobin v. Astra Pharmaceutical Products, Inc.*, 993 F.2d 528 (6th Cir. 1993), *cert. denied*, 510 U.S. 914 (1993). In that case, a Kentucky plaintiff sued a Netherlands-based drug company in a Kentucky court for the ill effects of a drug she had taken during her pregnancy. After removal to the federal court, the defendant moved to dismiss for lack of jurisdiction, claiming that “it has done nothing in particular to purposefully avail itself of the Kentucky market as distinguished from any other state in the union.” *Tobin*, 993 F.2d at 544. The Sixth Circuit rejected the argument concluding that “[i]f we were to accept defendant’s argument on this point, a foreign manufacturer could insulate itself from liability in each of the fifty states simply by using an independent national distributor to market its products . . .” *Id.*

⁴⁶ See, e.g., *McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2804–06 (2011) (Ginsburg, J., dissenting) (listing “illustrative cases” upholding jurisdiction under similar facts to those presented in Justice Ginsburg’s dissenting opinion).

⁴⁷ *Id.* at 2796.

was also the location of the accident and thus where the cause of action arose. The plaintiff's interest is especially noteworthy, when considering that the only alternative forum was the foreign legal system of the United Kingdom, a long and expensive trek for a severely disabled worker from New Jersey. These reasons also support the interest of the state of New Jersey in adjudicating the action, as it certainly wished to protect its consumers, even if only to the extent of assuring them a fair day in court.⁴⁸

III. IN THE SUPREME COURT

A. *Kennedy's Goals*

Confronted with this extraordinary decision from the New Jersey Supreme Court, Justice Kennedy's plurality opinion was written with a number of purposes in mind, which emanate from the decision itself.

1) A central purpose was to correct the New Jersey Supreme Court's view that the stream of commerce theory provided an *alternative* way of asserting jurisdiction over a nonresident defendant that would obviate the need for a direct finding of minimum contacts. As we have seen, the New Jersey Supreme Court proclaimed the existence of jurisdiction while simultaneously denying the existence of minimum contacts,⁴⁹ an approach that, whether viewed as a remarkable exercise of judicial candor—or the hoisting of the red flag of rebellion—certainly served as a provocation, catching the Court's attention in a way that similar cases had not. If understood as a provocation, the extent of it could only have been exacerbated by the New Jersey Supreme Court's additional suggestion that its decisional preference was to find jurisdiction on the facts of the case.⁵⁰ Although noting that the New Jersey Supreme Court

⁴⁸ *Nicastro*, 201 N.J. at 79–80.

⁴⁹ *Id.* at 61.

⁵⁰ “We cannot evade consideration of the stream of commerce theory for it is the only basis on which the English manufacturer could be subject to the jurisdiction of a New Jersey court.” *Id.* at 72. Similar concerns appeared to motivate the Appellate Division:

To allow a foreign manufacturer to shield itself from liability in damages caused by its products distributed by those middlemen would be to permit a legal technicality to subvert justice and economic reality in the worse sense. Foreign manufacturers should not be allowed to insulate themselves by using intermediaries in a chain of distribution or by professing ignorance of the ultimate destination of their products.

Nicastro v. McIntyre Mach. Am., Ltd., 399 N.J. Super. 539, 554 (App. Div. 2008) (quoting *Charles Gendler & Co., Inc. v. Telecom Equip. Corp.*, 102 N.J. 460, 479 (1986)). Since the Supreme Court has over the years let stand a number of cases

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issued an “extensive opinion with careful attention to this Court’s cases and to its own precedent,”⁵¹ from Justice Kennedy’s perspective, however, the New Jersey decision was driven by a “metaphor” that “cannot be sustained.”⁵²

2) Recognizing, however, that the stream of commerce remains a valid way of establishing minimum contacts, Justice Kennedy had the additional goal of clarifying the confusion surrounding the circumstances in which the stream of commerce theory can provide a basis for minimum contacts.⁵³ As the plurality explained, since the *Asahi* decision, lower courts have been divided on whether to follow Justice Brennan’s approach, which allowed for the assertion of jurisdiction over a defendant if its product caused injury in the forum state and the defendant was aware of a regular and anticipated flow of its commerce into the forum state, or Justice O’Connor’s view that mere awareness isn’t sufficient, and that advertising, marketing, and targeted acts of a distributor are also necessary.⁵⁴ Justice Kennedy’s plurality opinion asserts the view that the correct approach was reflected in the *Asahi* plurality opinion of Justice O’Connor.⁵⁵

3) Justice Kennedy also sought greatly to reduce the role that the fairness factors⁵⁶ play in the “traditional” minimum contacts

authorizing jurisdiction under the Brennan stream of commerce theory, the daring and peculiar formulation used by the New Jersey Supreme Court may very well have triggered the grant of certiorari.

⁵¹ *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2785 (2011) (plurality opinion).

⁵² *Id.*

⁵³ Kennedy stated,

Both the New Jersey Supreme Court’s holding and its account of what it called “[t]he stream-of-commerce doctrine of jurisdiction,” were incorrect, however. This Court’s *Asahi* decision may be responsible in part for that court’s error regarding the stream of commerce, and this case presents an opportunity to provide greater clarity.

Id. at 2786.

⁵⁴ See *Asahi Metal Industry Co. v. Superior Ct. of Solano Cnty.*, 480 U.S. 102, 112 (1987) (plurality opinion). The appellate court splits are summarized in *Nicastro v. McIntyre Mach. Am., Ltd.*, 201 N.J. 48, 70–71 nn.10–12 (2010).

⁵⁵ See *J. McIntyre*, 131 S. Ct. at 2788–89 (plurality opinion).

⁵⁶ In *World-Wide Volkswagen Corp. v. Woodson*, Justice White described the fairness factors as follows:

The relationship between the defendant and the forum must be such that it is reasonable . . . to require the corporation to defend the particular suit which is brought there. Implicit in this emphasis on reasonableness is the understanding that the burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors, including the forum State’s interest in adjudicating the dispute; the plaintiff’s interest in obtaining convenient and effective relief, at least when that interest is not adequately pro-

analysis. In *International Shoe*, Justice Black took strong issue with the suggestion that federal judges should be able to determine the constitutional validity of a state court exercise of jurisdiction by reference to a jurisprudential notion as elastic as “fairness.”⁵⁷ Justice Scalia has strongly echoed Black’s concerns on the contemporary court,⁵⁸ and Justice Kennedy, as indicated by his joining Justice Scalia’s plurality opinion in *Burnham v. Superior Court*, evidently shares that view.⁵⁹ Any lingering questions regarding Kennedy’s views on the fairness factors were resolved in his *J. McIntyre* plurality decision, where he sought to bring the rest of the Court into line with his minimalist role for the fairness factors.⁶⁰ His strategy for accomplishing this, however, was to revive the discredited sovereignty prong of minimum contacts doctrine and reinsert it back

tected by the plaintiff’s power to choose the forum; the interstate judicial system’s interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies.

444 U.S. 286, 292 (1980) (citations and internal quotations marks omitted).

⁵⁷ See *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 325 (1945) (opinion of Black, J.) (“There is a strong emotional appeal in the words ‘fair play’, ‘justice’, and ‘reasonableness.’ But they were not chosen by those who wrote the original Constitution or the Fourteenth Amendment as a measuring rod for this Court to use in invalidating State or Federal laws passed by elected legislative representatives. No one, not even those who most feared a democratic government, ever formally proposed that courts should be given power to invalidate legislation under any such elastic standards.”). Professor Freer has noted that after his opinion in *International Shoe*, Justice Black authored majority opinions in the first two specific jurisdiction cases to apply the minimum contacts analysis. See *Travelers Health Ass’n v. Virginia*, 339 U.S. 643, 648–49 (1950); *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 222–24 (1957). In both cases, Justice Black used the fairness factors as part of a “ménage” of concerns to be balanced by the courts to determine whether an exercise of jurisdiction was “reasonable,” and found jurisdiction in both instances. Freer, *supra* note 14, at 554–62.

⁵⁸ See *supra* p. 2 and note 7. Justice Scalia’s resemblance to Justice Black is very different from that of Justice Brennan’s. Whereas Black and Scalia *oppose* the use of elastic fairness factors to allow a defendant to *avoid* jurisdiction once minimum contacts have been established, Black and Brennan have both sought *affirmatively to utilize* the fairness factors as a way of gauging whether individual, fact-specific aspects of a case could be juggled to establish jurisdiction for the plaintiff.

⁵⁹ Justice Scalia began his *Burnham* opinion with only three Justices on board, with Justices Rehnquist, Kennedy, and White joining sections I, II-A, II-B, and II-C. See 495 U.S. 604, 607 (plurality opinion). By the time he got to Sections II-D and III, which included his attack on Justice Brennan, he had only two, one of whom was Justice Kennedy. *Id.* at 619–28.

⁶⁰ “Freeform notions of fundamental fairness divorced from traditional practice cannot transform a judgment rendered in the absence of authority into law.” *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2787 (2011) (plurality opinion). “Furthermore, were general fairness considerations the touchstone of jurisdiction, a lack of purposeful availment might be excused where carefully crafted judicial procedures could otherwise protect the defendant’s interests, or where the plaintiff would suffer substantial hardship if forced to litigate in a foreign forum.” *Id.* at 2789.

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into the analysis, creating additional confusion in an area of law already in great disarray.

4) A final goal for Justice Kennedy was to establish a set of personal jurisdiction rules that are Internet-conscious, that is, rules that are developed with awareness of the role the Internet plays in our contemporary society. None of the current doctrinal understandings of personal jurisdiction can claim such consciousness, as they were developed before today's Internet proliferation. While *J. McIntyre* did not present questions of Internet jurisdiction, one can assume that the Court was aware of its lurking presence because at least one amicus curiae brief argued that it was essential for the Court to clarify the circumstances in which Internet presence in the forum state can be deemed advertising in the forum state.⁶¹ There was also considerable attention directed to Internet jurisdiction at oral argument.⁶² Having been absent from the personal jurisdiction area for twenty years, during which time a tremendous amount of Internet commercial and technical innovation occurred, it would be perplexingly remiss for the Court to ignore the need for present day jurisdictional rules that are attentive to the extraordinary commercial and non-commercial role the Internet has assumed in American life. Moreover, the Court must proceed on the assumption that future cases that do present Internet issues would rely on the personal jurisdiction rules articulated in *J. McIntyre*, even though Internet issues were not present in the case.⁶³ Indeed, the significant concurring opinion of Justice Breyer, joined by Justice Alito, specifically stated that those Justices were *not* joining Kennedy's opinion because it appeared to apply to the Internet "strict rules that limit jurisdiction where a defendant 'does not intend to submit to the power of the sovereign' and 'cannot be said

⁶¹ See Brief for the U.S. Chamber of Commerce as Amici Curiae Supporting Petitioner, *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011) (No. 09-1343), 2010 WL 4803147, at *26 ("Nonetheless, assuming that this Court adopts some form of the 'additional conduct' test, the case does provide an appropriate vehicle to gloss the meaning of 'advertising in the forum state' in light of the rapid technological changes that have occurred over the last decades. Specifically, in order to provide a 'degree of predictability' to companies, the Court should make clear that, at a minimum, the mere presence on the Internet does not constitute 'advertising in the forum state.'")

⁶² See Transcript of Oral Argument, *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011) (No. 09-1343), 2011 WL 87745, at *37, *51-57.

⁶³ One early commentator has predicted that after *McIntyre* "geographical borders will become relevant in the Internet context, and thus courts will be more hesitant to look to broader Internet conduct to justify jurisdiction. Instead courts will be forced to determine whether the website operator or seller targeted a particular forum." *Leading Cases*, 125 HARV. L. REV. 311, 319-20 (2011).

to have targeted the forum.”⁶⁴

B. The Supreme Court Decision

The Kennedy plurality held that jurisdiction over Nicaastro’s suit was not authorized under current law.⁶⁵ Justice Kennedy concluded, first, that the stream of commerce is not a substitutive way of establishing personal jurisdiction that allows a plaintiff to sidestep a finding of purposeful availment.⁶⁶ Second, even in a case where the stream of commerce theory is being used to ascertain purposeful availment, the correct reading of the *Asahi* precedent is the approach adopted by Justice O’Connor’s plurality opinion, which was not followed by the New Jersey Supreme Court.⁶⁷ Third, no matter how strong the fairness factors may point to the exercise of jurisdiction, they can only be utilized to protect a *defendant* from jurisdiction in circumstances where minimum contacts, through a purposeful availment analysis, have been found—they may *not* be used to justify an exercise of jurisdiction for the plaintiff.⁶⁸

The plurality decision was bolstered into a majority by a two-Justice concurrence that explicitly rejected the reasoning of the plurality but agreed with its result.⁶⁹ Borrowing from the *Asahi* opinions of Justice Brennan, and Justice O’Connor, the concurrence voted to reverse the New Jersey Supreme Court on the extremely narrow ground that not enough of the shearing machines were sold in New Jersey to justify a finding of purposeful availment.⁷⁰ But the concurrence also chastised the plurality for its

⁶⁴ *J. McIntyre*, 131 S. Ct. at 2793 (Breyer, J., concurring). Justice Breyer goes on to inquire:

But what do these standards mean when a company targets the world by selling products from its website? And does it matter if, instead of shipping the products directly, a company consigns a product through an intermediary (say, Amazon.com), who then receives and fulfills the orders? And what if a company markets its products through pop up advertisements that it knows will be viewed in the forum? . . . I do not agree with the plurality’s strict no-jurisdiction rule.

Id.

⁶⁵ 131 S. Ct. at 2785 (plurality opinion).

⁶⁶ *Id.* at 2788.

⁶⁷ *Id.* at 2789.

⁶⁸ *Id.* at 2787. *See id.* at 2789 (“Furthermore, were general fairness considerations the touchstone of jurisdiction, a lack of purposeful availment might be excused where carefully crafted judicial procedures could otherwise protect the defendant’s interests, or where the plaintiff would suffer substantial hardship if forced to litigate in a foreign forum.”).

⁶⁹ *Id.* at 2793 (Breyer, J., concurring).

⁷⁰ *Id.* at 2792 (“None of our precedents finds that a single isolated sale, even if accompanied by the kind of sales effort indicated here, is sufficient. Rather, this

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strict no-jurisdiction rule that requires evidence showing that the defendant “inten[d] to submit to the power of a sovereign” and can “be said to have targeted the forum.”⁷¹ The concurring opinion can thus be read to suggest that if some threshold number of machines had been sold in New Jersey above and beyond the one machine suggested by the *Nicastro* record, the concurring Justices may have allowed a finding of jurisdiction even though J. McIntyre had not engaged in any of the “plus” factors demonstrating purposeful availment demanded by Justice O’Connor’s concurring opinion in *Asahi*.⁷²

The concurring Justices were clearly on to something. While there was ample precedent justifying the New Jersey Supreme Court’s expansion upon current doctrine to accommodate new economies and corporate business practices, and thus allow jurisdiction in New Jersey, there were also reasons that should have led the court to pause. The seeds of the difficulty were planted in *Gendler*, the central New Jersey precedent for *Nicastro*, where they germinated until their eruption in the *J. McIntyre* Supreme Court opinion. The problem identified by the *Gendler* court itself on the facts before it was the puzzling and disturbing lack of clarity as to the exact number of phone systems that were sold to plaintiff Gendler in New Jersey, an important issue for addressing the extent to which Nippon, the Japanese defendant, purposefully availed itself of the benefits of selling its telephones in the state.⁷³ In the con-

Court’s previous holdings suggest the contrary.”). A number of scholars have criticized Justice Breyer for the breadth of this statement and its facial inconsistency with the holding in *McGee v. Int’l Life Insurance Co.*, 355 U.S. 220, 223 (1957), which upheld an exercise of jurisdiction in California over a Texas insurance company based on the sale of a single insurance contract solicited in California from a California resident. See, e.g., Freer, *supra* note 14, at 581–82; Steinman, *supra* note 16, at 508. However, the fact that the dissenting opinion by Justice Ginsburg neglected to criticize Justice Breyer on this point, even while citing *McGee*, see *J. McIntyre*, 131 S. Ct. at 2800 n.9 (Ginsburg, J., dissenting), suggests that the Court understood Breyer to be speaking solely of the stream of commerce precedents—*World-Wide Volkswagen* and *Asahi*—which he specifically references in his surrounding discussion. See *id.* at 2792 (Breyer, J., concurring).

⁷¹ *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2793 (Breyer, J. concurring) (internal quotation marks omitted).

⁷² Cf. Steinman, *supra* note 16, at 511 (noting that “Justice Breyer’s logic would merely require a showing that potential customers were likely to exist in the forum state”).

⁷³ *Charles Gendler & Co., Inc. v. Telecom Equip. Corp.*, 102 N.J. 460, 468 (1986). The *Gendler* court noted that “Gendler purchased one of Nippon’s telephone systems, and Telecom installed it in Gendler’s place of business in New Jersey.” *Id.* at 482 (emphasis added). Later, however, the court stated:

Although the sale of a Nippon telephone to Gendler in New Jersey probably was not an isolated transaction, the better practice is for plain-

cluding pages of its decision, the *Gendler* court noted that it was “reluctant to conclude that Nippon is subject to the personal jurisdiction of the New Jersey courts under the stream of commerce theory,”⁷⁴ and left the extremely important and determinative matter of purposeful availment, as determined by the number of phone systems sold in New Jersey, to discovery. In light of this disposition, it is odd that the *Gendler* court nonetheless went on to carve out its expansive and novel jurisdictional rule,⁷⁵ which provided the basis for the New Jersey Supreme Court analysis in *Nicastro*. The way the *Gendler* court brushed aside the purposeful availment problem might have suggested to the New Jersey Supreme Court in *Nicastro* that the number of products flowing into New Jersey via the stream of commerce was not an issue meriting close attention. Even after the discovery ordered by the Appellate Division in *Nicastro*, it was never established, not even in the U.S. Supreme Court, just how many shearing machines actually made their way into New Jersey.⁷⁶ For Justices Breyer and Alito, the number was too small to pass muster even under Justice Brennan’s analysis in *Asahi*.⁷⁷ This was central to their holding that jurisdiction could not be exercised, and was thus crucial to the Court’s ultimate

tiff to submit proof that its purchase of Nippon telephones was not a fortuitous event, but the result of an established distribution system for Nippon’s telephone systems.

Id. at 483–84.

⁷⁴ *Id.* at 482.

⁷⁵ *See id.* at 484 (“It is not necessary that a manufacturing corporation wholly own the distributing subsidiaries. . . . Similarly it is unnecessary that [the manufacturer] control the subsidiaries although any such control would also support the exercise of jurisdiction The crucial question is whether [the manufacturer] was aware or should have been aware of a system of distribution that is purposefully directed at New Jersey residents.”)

⁷⁶ Justice Kennedy stated: “[N]o more than four machines (the record suggest only one) . . . including the machine that caused the injuries that are the basis for this suit, ended up in New Jersey.” *See J. McIntyre*, 131 S. Ct. at 2786 (plurality opinion). He later described the number as being “up to four.” *Id.* at 2790. Justice Breyer noted “one” machine shipped to Nicastro’s employer from the American distributor. *Id.* at 2791 (Breyer, J., concurring). Justice Ginsburg, in dissent, does not address the number of McIntyre machines found in New Jersey but does note that J. McIntyre “resisted Nicastro’s efforts to determine whether other McIntyre machines had been sold to New Jersey customers.” *Id.* at 2797 n.3 (Ginsburg, J., dissenting).

⁷⁷ 131 S. Ct. at 2792 (Breyer, J., concurring) (citing Justice Brennan in *Asahi* to the effect that “jurisdiction should lie where a sale in the state is part of ‘the regular and anticipated flow’ of commerce into the State, but not where that sale is only an ‘edd[y],’ i.e., an isolated occurrence.”). Justice Ginsburg argued in dissent that each of the machines was valued at \$24,900, which would represent a “significant sale” if, dollar for dollar, the product sold were flannel shirts, cigarette lighters, or wire-rope splices, each of which were enough to trigger jurisdiction in cases decided by the U.S. Courts of Appeals. *See id.* at 2803 n.15 (Ginsburg, J., dissenting).

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disposition of the case.⁷⁸

Of course, from another perspective, the absence of direct evidence of J. McIntyre's purposeful availment in New Jersey is precisely where the *Nicastro* court demonstrated its greatest creativity. Although the New Jersey Supreme Court did not specifically explain *why* J. McIntyre did not have minimum contacts with the state of New Jersey, the opinion can be read to have concluded that although the number of shearing machines that entered the state was minimal,⁷⁹ the stream of commerce analysis *can* serve as a *substitute* for the purposeful availment requirement, provided that the conditions established in *Gendler* are satisfied, *and* are coupled with a strong showing of the fairness factors.

However, even considering the small number of machines that entered New Jersey, the case can be distinguished from *Asahi* because the shearing machine that caused Nicastro's injury, priced at \$24,000, was of significant value, and was independently hazardous in its own right if defective, thus subject to a different analysis than the valve stem components that allegedly caused injury in *Asahi*.⁸⁰ Moreover, unlike *Asahi*, plaintiff Nicastro and the State of New Jersey had compelling interests in adjudicating the case in New Jersey.⁸¹ In addition, *J. McIntyre* could be distinguished from *World-Wide Volkswagen* because the shearing machine was knowingly delivered into New Jersey through the J. McIntyre's distribution system, not by the unilateral act of the plaintiff taking the regionally dis-

⁷⁸ Cf. *Marks v. United States*, 430 U.S. 188, 193 (1977) (noting that in a case decided by a plurality, the Court must construe the holding as "that position taken by those Members who concurred in the judgments on the narrowest grounds") (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)).

⁷⁹ Professor Peterson has dismissed as "spurious" the suggestion that there has to be more than one product sold in the forum state to establish purposeful availment. See Todd David Peterson, *The Timing of Minimum Contacts After Goodyear and McIntyre*, 80 GEO. WASH. L. REV. 202, 226–28 (2011).

⁸⁰ Compare this with Justice Stevens' opinion in *Asahi*: "Whether or not this conduct rises to the level of purposeful availment requires a constitutional determination that is affected by the volume, the value, and the hazardous character of the components." *Asahi Metal Industry Co. v. Sup. Ct. Solano Cnty.*, 480 U.S. 102, 122 (1987) (Stevens, J., concurring in part). At least one *amici* alluded to a distinction between stream of commerce cases where component parts are involved and those where they are not. See, e.g., Brief for the U.S. Chamber of Commerce, *supra* note 61, at 15–16. The point was also discussed in oral argument at the Supreme Court. See *supra* note 62, at *45–50.

⁸¹ Because *Asahi* plaintiff Zurcher settled his claims with defendant Cheng Shin, the Supreme Court held that neither the state of California nor cross-complainant Cheng Shin had an interest in litigating the remaining indemnification claim in the California courts. *Asahi*, 480 U.S. at 114–15.

tributed product into the forum state as in *World-Wide*.⁸²

In 2010, the United States imported nearly 2 trillion dollars in foreign goods and foreign trade with the United States,⁸³ a business process that is largely characterized by U.S. middlemen operating at the behest of foreign corporations who are seeking to penetrate the national United States marketplace. If a foreign corporation has knowledge of this marketing, with sufficient control over it so as to be able to refrain from shipping its products to certain areas, but hasn't done so in order to earn a greater profit, it should be held accountable in jurisdictions where the product causes injury, even if only one product has entered the forum state, provided that the product is a not a component part and is hazardous on its own terms.⁸⁴

The plurality's determination to curtail the power of state courts to exercise jurisdiction over non-resident corporations under the compelling circumstances present in *J. McIntyre* suggests hostility to a minimum contacts doctrine that would uphold an assertion of jurisdiction in circumstances where there is a strong, but not definitive, showing of minimum contacts, coupled with fairness factors that point overwhelmingly in favor of jurisdiction in the forum chosen by the plaintiff. A close reading of Justice Kennedy's opinion suggests that he was aware that an alternative, more plaintiff-friendly approach to the law of personal jurisdiction was possible. Not only had such an alternative been argued by at least one *amici*,⁸⁵ but also Justice Brennan had long been a proponent of a relaxed, pro-access approach to the courts that he articulated in a

⁸² *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 298 (1980). J. McIntyre's situation is closely analogous to the manufacturer (Audi) and importer (Volkswagen of America), also defendants in *World-Wide Volkswagen* who never challenged the personal jurisdiction of the Oklahoma court because they marketed and directed their product throughout the United States and the world, although with no specific focus on Oklahoma.

⁸³ See *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2799 n. 6 (Ginsburg, J., dissenting) (citing U.S. CENSUS BUREAU, U.S. INTERNATIONAL TRADE IN GOODS AND SERVICES 1 (2011), available at http://www.census.gov/foreign-trade/Press-Release/current_press_release/ft900.pdf). Justice Ginsburg also noted: "Capital goods, such as the metal shear machine that injured Nicastro, accounted for almost 450 billion dollars in imports for 2010. . . . New Jersey is the fourth-largest destination for manufactured commodities imported into the United States, after California, Texas, and New York." *Id.* (citations omitted).

⁸⁴ *Cf. id.* at 2797.

⁸⁵ See Brief for Public Citizen, Inc. as Amicus Curiae Supporting Respondents, *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011) (No. 09-1343), 2010 WL 5192282, at *3 ("[M]inimum contacts analysis is not purely defendant-centric: its focus is on fairness to the defendant in relation to the forum state's interests, including its interests in protecting its residents.").

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number of decisions, including a stream-of-commerce analysis that would make it easier for plaintiffs to hold non-resident defendant corporations accountable in plaintiff's home state for defective products that have made their way into the forum state's borders. Kennedy's plurality decision was forced to grapple with these decisions but garbled and discussed them with barely veiled contempt. However, in his attempt to refute Justice Brennan's views, Kennedy may have gone so far as to alienate the two Justices necessary to convert his plurality opinion into a majority. To fully grasp this point, it will be necessary to underscore certain aspects of the personal jurisdiction doctrine that are clearly manifest in the Court's analysis even though the Court has yet to explicitly spell them out.

1) Minimum Contacts

Since *International Shoe*,⁸⁶ minimum contacts doctrine has been harnessed by two prongs, carved out from Justice Stone's allowance of personal jurisdiction in cases where (1) the existence of minimum contacts is (2) combined with circumstances where the exercise of jurisdiction does not violate traditional notions of fair play and substantial justice.⁸⁷ Writing in *World-Wide Volkswagen*, Justice White sought to give meaningful content to each of these prongs. In his initial view, minimum contacts was articulated as securing the goals of federalism and state sovereignty by preventing courts from extending their jurisdictional reach beyond their borders to exercise jurisdiction over persons of a different sovereign.⁸⁸ However, in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*,⁸⁹ decided shortly thereafter, Justice White retreated from this earlier understanding, and identified the minimum contacts doctrine as necessary to protect the "liberty interest" of an out of state defendant in not being subjected to the courts of a foreign sovereign, absent some indication that the defendant had sought to benefit from the laws of that sovereign.⁹⁰

While acknowledging the Court's repudiation of the so-called "sovereignty" prong analysis in *Ireland*, Justice Kennedy nonetheless pivoted his analysis around notions of sovereignty in *J. McIntyre*, at

⁸⁶ 326 U.S. 310 (1945).

⁸⁷ *Id.* at 316.

⁸⁸ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293-94 (1980).

⁸⁹ 456 U.S. 694 (1982).

⁹⁰ *Id.* at 702 ("The requirement that a court have personal jurisdiction flows not from Art. III, but from the Due Process Clause. The personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty.").

times employing terminology strongly reminiscent of *Pennoyer v. Neff*,⁹¹ the foundational case that many scholars condemn as the disastrous wrong turn early in the formulation of personal jurisdiction jurisprudence.⁹² Justice Kennedy's reinsertion of sovereignty notions into the minimum contacts analysis was combined with a deliberate downplay of the role of fundamental fairness, a co-equal part of the minimum contacts doctrine that has traditionally been associated with the Due Process Clause, and further operated to discredit Justice Brennan's approach to minimum contacts.⁹³ Kennedy's challenge proceeded in a unified manner across both dimensions of the minimum contacts analysis: one argument targeted Justice Brennan's approach to the fair play and substantial justice prong of the minimum contacts test,⁹⁴ while another targeted his stream-of-commerce theory enunciated in *Asahi*.⁹⁵

2) Fair Play

Unlike the minimum contacts prong of the analysis, which has evolved through numerous adjudicatory permutations, the mean-

⁹¹ 95 U.S. 714 (1877). For example, Justice Kennedy says: "[I]f another State were to assert jurisdiction in an inappropriate case, it would upset the federal balance, which posits that each State has a sovereignty that is not subject to unlawful intrusion by other States." *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2789 (2011) (plurality opinion).

⁹² *Cf.* Wendy Collins Perdue, *What's "Sovereignty" Got to Do With It? Due Process, Personal Jurisdiction, and the Supreme Court*, 63 S.C. L. REV. 729, 730 (2012) ("[A]lthough at one time the concept of sovereignty provided an important analytic component of personal jurisdiction analysis, this is largely no longer true.").

⁹³ *Cf.* Freer, *supra* note 14, at 579 ("Clearly, Brennan would find nothing to like about the Kennedy opinion."). Although best known for his role in establishing and furthering individual liberties, Justice Brennan was also notable as a proponent of wide ranging access to the federal courts. *Cf.* sources cited *supra* note 14. In the personal jurisdiction field, he wrote more opinions than any other Justice on the Court, including the majority opinion in *Burger King*, significant concurrences in *Asahi*, *Burnham*, and *Shaffer v. Heitner*, and dissents in *World-Wide Volkswagen* and *Helicopteros*. See Freer, *supra* note 14, at 551. In each of these opinions, Justice Brennan argued for an approach that would expand state-court personal jurisdiction in a way that provided plaintiffs greater access to the judiciary. The only exception is his four-Justice concurring opinion in *Burnham*, where he argues that involuntary transient defendants "tagged" by in-state service of process are entitled to the benefit of a "fairness" analysis, which could result in a denial of jurisdiction. However, Brennan would presumably also require that such a fairness analysis be utilized by plaintiffs in cases where those factors weighed heavily toward the exercise of jurisdiction. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985). *J. McIntyre* and its companion case, *Goodyear Dunlop Tires*, were in fact the first personal jurisdiction cases decided without Justice Brennan since the Eisenhower Administration. Freer, *supra* note 14, at 551.

⁹⁴ *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2787, 2789, 2791 (2010) (plurality opinion).

⁹⁵ *Id.* at 2788-90.

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ing of “fair play and substantial justice” has remained stable since its first articulation in *World-Wide Volkswagen*,⁹⁶ in part because of the small role the prong has played in the Supreme Court cases.⁹⁷ On its face, the phrase can mean any number of things—however, Justice White suggested a weighing of five factors to determine whether, even after a finding of minimum contacts, an exercise of jurisdiction over a defendant should be deemed consistent with the Due Process Clause. White’s articulation of these factors was a long delayed response to the 1945 opinion from Justice Black in *International Shoe* chastising the Court for allocating to itself the power to upset a state-court exercise of jurisdiction based on an “elastic” idea of fairness,⁹⁸ even after minimum contacts had been determined.

Although identifying the fairness factors in *World-Wide Volkswagen*, the majority opinion by Justice White did not apply them in that case, on the evident assumption that the Court should only address them if the plaintiff had first shown minimum contacts, which were never established.⁹⁹ Thus, although never explicitly articulated by the Court, this *sub silentio* understanding identified the fairness factors as, in essence, a second-level defense for the defendant once the plaintiff had established some purposeful connection to the forum.¹⁰⁰ Dissenting in *World-Wide*, Justice Brennan instead saw the two prongs operating *together* to determine the “reasonableness” of jurisdiction.¹⁰¹ Under his view, the fairness factors could be utilized not solely to provide an additional level of protection for the defendant, but could also be utilized, when coupled

⁹⁶ See *supra* note 56.

⁹⁷ The only case in which they played a dispositive role was *Asahi*.

⁹⁸ *Int’l Shoe Co. v. State of Washington*, 326 U.S. 310, 325 (1945) (opinion of Black, J.).

⁹⁹ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980). The Court held that Oklahoma could not assert jurisdiction over the New York-based regional distributor and retail seller of a car that exploded on impact in a collision that took place in Oklahoma, finding that those defendants did not benefit from the protection of Oklahoma law, and that the only contact they had with Oklahoma was the fortuitous circumstance that the plaintiff car owner had made the unilateral determination to bring the car into the Oklahoma. *Id.*

¹⁰⁰ Freer, *supra* note 14, at 565–66. This was precisely the objection made by Justice Black—that once the sovereignty aspect of the due process clause was satisfied, the Court was without constitutional power to check the exercise of state court jurisdiction. *International Shoe*, 326 U.S. at 325–26. Professor Freer has referred to this as a “two-step” analysis, first demanding a finding of minimum contacts, and if found, then an assessment of whether exercise of jurisdiction is fair or reasonable. Freer, *supra* note 14, at 567.

¹⁰¹ *World-Wide Volkswagen*, 444 U.S. at 300 (Brennan, J., dissenting). See also Freer, *supra* note 14, at 570.

with some showing of minimum contacts, to support state court jurisdiction at the behest of the plaintiff.¹⁰²

In *Burger King Corp. v. Rudzewicz*,¹⁰³ Justice Brennan convinced a majority of the Court that the fairness factors “sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required,”¹⁰⁴ while simultaneously rejecting fairness arguments asserted by Justices Stevens and White,¹⁰⁵ as well as by an Eleventh Circuit panel,¹⁰⁶ that the exercise of jurisdiction by a Florida federal court on behalf of a multinational corporation over two Michigan-based small franchise owners in a breach of contract case violated the Due Process Clause. Instead, Brennan’s majority directed defendant’s argument that he would be inconvenienced by litigation in the Florida forum to the statutory and common law remedies of transfer and forum *non-conveniens*.¹⁰⁷

Asahi re-affirmed the *World-Wide Volkswagen* formula for assessing the interplay of minimum contacts and fair play in a complex decision that had the agreement of the entire Court, with the silent exception of Justice Scalia. Although the Court again did not explicitly articulate a two-step analysis, such an analysis proved to be dispositive of the case. First, the Court addressed whether there were sufficient minimum contacts (purposeful availment) to justify

¹⁰² *World-Wide Volkswagen*, 444 U.S. at 300 (Brennan, J., dissenting). Brennan argued that jurisdiction was proper in Oklahoma because the accident took place in Oklahoma, the plaintiffs were hospitalized in Oklahoma, and crucial witnesses were in Oklahoma. There was thus a sufficient relationship, connection, and nexus between the forum and the defendants to justify jurisdiction in Oklahoma. *Id.* at 305–07. This analysis was based on Brennan’s understanding of *International Shoe*, which, Brennan argued, “specifically declined to establish a mechanical test based on the quantum of contacts between a State and the defendant. . . . The existence of contacts, so long as there were some, was merely one way of giving content to the determination of fairness and reasonableness.” *Id.* at 300. Brennan read *International Shoe* to mean that the Due Process Clause prevents an exercise of jurisdiction only where there were “no contacts, ties, or relations.” *Id.* (citing *International Shoe*, 326 U.S. at 319) (emphasis in original).

¹⁰³ 471 U.S. 462 (1985).

¹⁰⁴ *Id.* at 477 (citing *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 780 (1984); *Calder v. Jones*, 465 U.S. 783, 788–89 (1984); *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 223–24 (1957)).

¹⁰⁵ See *Burger King*, 471 U.S. at 487–91 (Steven, J., dissenting).

¹⁰⁶ See *Burger King Corp. v. MacShara*, 724 F.2d 1505, 1511 (11th Cir. 1984).

¹⁰⁷ *Burger King*, 471 U.S. at 477, 477 n.20. Justice Brennan’s opinion placed not inconsiderable burdens upon defendants seeking to upend plaintiff’s choice of forum, suggesting that they would have to “become so substantial as to achieve constitutional magnitude.” *Id.* at 484 (emphasis in original).

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an exercise of state court jurisdiction.¹⁰⁸ Were the answer to that question clearly “no,” as Justice O’Connor’s plurality opinion asserted, jurisdiction would have failed in *Asahi* without analysis of the fairness factors.¹⁰⁹ However, there was not a majority for this resolution.¹¹⁰

Rather, a majority of the Court found that there was sufficient contact to exercise jurisdiction because *Asahi* was aware that its valve stems were entering California in large quantities.¹¹¹ The Court was thus forced to address whether the exercise of jurisdiction was consistent with the fairness factors outlined in *World-Wide Volkswagen*. In so doing, and concluding that the exercise of jurisdiction was “unfair,” *Asahi* became the first case where the fairness factors were utilized to *defeat* an exercise of jurisdiction.¹¹² Still left to be determined, however, was whether the fairness factors could be used as a basis to *create* jurisdiction, or at least compensate for a dearth of minimum contacts, as suggested by Justice Brennan in *Burger King*.¹¹³

The *J. McIntyre* case provided a pristine opportunity to address this question. The plaintiff was working in his state of residence when the defendant purposefully sent its arguably defective product into the state of New Jersey through a pre-planned, nationwide distribution scheme, where it caused injury to the plaintiff. Because the distributor, McIntyre America, had declared bankruptcy, there was only one alternative forum where the litigation could have been brought, yet it was at a distant location and embedded in a foreign legal system. The facts suggest that plaintiff Nicastro was neither wealthy, nor highly educated, and that the cost of travel and other expenses necessary to litigate in a foreign jurisdiction would have been prohibitive. Moreover, New Jersey had a strong interest in the litigation because of these same facts, in addition to having a stake in enforcing a cause of action rooted in its state law

¹⁰⁸ *Asahi Metal Indus. Co. v. Super. Ct. of Solano Cnty.*, 480 U.S. 102, 108–13 (1987) (plurality opinion).

¹⁰⁹ *See id.* at 112–13. Justice Scalia joined only Part II-A of Justice O’Connor’s opinion that reached this conclusion, suggesting that, in his view, this was sufficient to resolve the case.

¹¹⁰ Part II-A of Justice O’Connor’s opinion adopting this position only gathered four votes, those of Chief Justice Rehnquist and Justices Powell and Scalia. *See id.* at 108–13.

¹¹¹ *See id.* at 116–22 (Brennan, J., concurring in part and in the judgment) (joined by White, Marshall, and Blackmun, JJ.). Justice Stevens provided the fifth vote, suggesting a finding of purposeful availment on the facts of the case. *Id.* at 122 (Stevens, J., concurring in part and in the judgment).

¹¹² *See id.* at 113–16 (majority opinion).

¹¹³ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476–78 (1985).

products liability provision.¹¹⁴ Indeed, the case for the plaintiff could only have been stronger if the alternative forum had been one that did not share such historic common law roots with the United States, such as China.¹¹⁵

Although neither the plaintiff nor the New Jersey courts specifically addressed the fairness factors buttressing jurisdiction,¹¹⁶ the explicit conclusion of the New Jersey Supreme Court that there were *no* minimum contacts¹¹⁷ suggests that, in its view, it was suffi-

¹¹⁴ See N.J. STAT. ANN. § 2A:58C-2 (“A manufacturer or seller of a product shall be liable in a product liability action only if the claimant proves by a preponderance of the evidence that the product causing the harm was not reasonably fit, suitable or safe for its intended purpose because it: a. deviated from the design specifications, formulae, or performance standards of the manufacturer or from otherwise identical units manufactured to the same manufacturing specifications or formulae, or b. failed to contain adequate warnings or instructions, or c. was designed in a defective manner.”).

¹¹⁵ Justice Ginsburg was particularly concerned at oral argument as to whether, in the absence of personal jurisdiction in New Jersey, plaintiff could be relegated to something other than a “trusted legal system,” particularly mentioning China, Mexico, and Russia. Transcript of Oral Argument, *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011) (No. 09-1343), 2011 WL 87745, at *24–25. Counsel for the defendant responded that these were matters that would have to be addressed in a forum *non-conveniens* motion, which the defendants were never under any obligation to file. *Id.* at *9–12. Neither the plurality nor the concurring opinion of Justice Breyer suggests that the disposition of the personal jurisdiction motion was in way affected by whether an alternative forum would be a “trusted legal system.”

¹¹⁶ The Appellate Division clearly sought to place the case within mainstream minimum contacts jurisprudence, stating: “We conclude that sufficient minimum contacts exist under the ‘stream-of-commerce plus’ rationale espoused by Justice O’Connor in *Asahi* We further conclude that entertainment of jurisdiction in New Jersey would not offend traditional notions of fair play and substantial justice.” *Nicastro v. McIntyre Mach. Am., Ltd.*, 399 N.J. Super. 539, 545 (App. Div. 2008) (citations omitted). The quotes below from the decision of the New Jersey Supreme Court suggest a bit more innovation:

Due process permits this State to provide a judicial forum for its citizens who are injured by dangerous and defective products placed in the stream of commerce by a foreign manufacturer that has targeted a geographical market that includes New Jersey. The exercise of jurisdiction in this case comports with traditional notions of fair play and substantial justice.

Nicastro v. McIntyre Mach. Am., Ltd., 201 N.J. 48, 52–53 (2010). “Thus, even under Justice O’Connor’s approach, arguably, a manufacturer would be amenable to jurisdiction in every state that is part of its national distribution scheme.” *Id.* at 73–74. “Because J. McIntyre knew or reasonably should have known that its distribution scheme would make its products available to New Jersey consumers, it now must present a compelling case that defending a product-liability action in New Jersey would offend ‘traditional notions of fair play and substantial justice.’” *Id.* at 79 (citations omitted).

¹¹⁷ *Nicastro*, 201 N.J. at 61. As the language of the New Jersey Supreme Court cited in note 116 suggests, to say that there were no minimum contacts is an overstatement, or at least a problematic slip of the tongue. Other than the fact that so few machines could be found in New Jersey, the case was a prototypical stream of commerce case.

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cient to base jurisdiction on a finding that J. McIntyre had established a distribution system, that brought its product into the New Jersey causing injury, and fairness factors pointed toward New Jersey as the appropriate forum. Viewed this way, the decision begins to look very much like Justice Brennan's assertion in *Burger King* that a strong showing of the fairness factors could justify an exercise of jurisdiction with a lesser showing of minimum contacts.¹¹⁸

Even without argument from the named parties, Justice Kennedy explicitly rejected the possibility of asserting jurisdiction under these circumstances, concluding that an exercise of general jurisdiction must be based on submission by the defendant to state authority either by explicit consent, presence within the state, citizenship, or domicile, while specific jurisdiction must be predicated on defendant's connections or purposeful availment from the state—a desire to benefit from the protection of the state's laws.¹¹⁹ This otherwise standard formulation of the law, however, was buttressed by additional prerequisites for specific jurisdiction—a requirement that the defendant's activities “manifest an intention to submit to the power of a sovereign” or “target[] the forum.”¹²⁰

Stating that “freeform notions of fundamental fairness divorced from traditional practice cannot transform a judgment rendered in the absence of authority into law,”¹²¹ the Kennedy plurality suggested that a judgment for Nicastro by a New Jersey state court, entered absent a finding of minimum contacts, even though consistent with the fairness factors, would be a judgment made without legal authority.¹²² The plurality reached this conclusion despite the indisputable evidence of a significant contact that J. McIntyre had with the state of New Jersey: a hazardous machine entered New Jersey through the actions of the defendant and caused serious injury to a New Jersey resident who was using it

The suggestion that a stream of commerce case is something other than a minimum contacts case may have been no more than a terminological misunderstanding. In any event, the decision to include the infamous paragraph was a mistake with undeterminable consequences for the plaintiff.

¹¹⁸ *Burger King*, 471 U.S. at 477.

¹¹⁹ See *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2787–89 (2011) (plurality opinion) (“Furthermore, were general fairness considerations the touchstone of jurisdiction, a lack of purposeful availment might be excused where carefully crafted judicial procedures could otherwise protect the defendant's interests, or where the plaintiff would suffer substantial hardship if forced to litigate in a foreign forum.” *Id.* at 2789.)

¹²⁰ *Id.* at 2788.

¹²¹ *Id.* at 2787.

¹²² *Id.* at 2790–91.

while at work in New Jersey. As Justice Brennan had argued, the Due Process Clause bars “binding a judgment *in personam* against an individual or corporate defendant with which the state has *no* contacts, ties, or relations.”¹²³ *J. McIntyre* was thus not a case where a worker comes to New Jersey from Montana, is injured in New Jersey, but then goes home to Montana and brings suit against J. McIntyre in Montana, as hypothesized by Justice Roberts at oral argument.¹²⁴ Nicastro’s counsel was clear when presented with Roberts’ hypothetical that Montana would not have jurisdiction over J. McIntyre under such circumstances even though J. McIntyre had targeted the entire United States as a market for its product.¹²⁵ The plaintiff’s theory, similar to Justice Brennan’s argument, was that a strong showing of the fairness factors can allow for jurisdiction with a *lesser* showing of minimum contacts—a showing that was established by the facts of the *J. McIntyre* case.

Rather than trace Brennan’s argument to his dissent in *World-Wide Volkswagen*, and its acceptance by a majority of the Court in *Burger King*, Justice Kennedy attaches Justice Brennan’s use of fairness as a means to secure plaintiff jurisdiction to Brennan’s concurrence in *Asahi*, which Kennedy went so far as to denigrate as “inconsistent with the premises of lawful judicial power[.]”¹²⁶ However, Justice Brennan did not discuss the fairness factors in *Asahi*, as he agreed fully with Justice O’Connor’s analysis of them.¹²⁷

Justice Brennan’s *Asahi* concurrence was directed entirely at the minimum contacts analysis contained in Part II-A of Justice O’Connor’s opinion, yet Justice Kennedy also mischaracterized this part of the concurrence, describing it as follows: the “defendant’s ability to anticipate suit renders the assertion of jurisdiction fair. In this way, the opinion made foreseeability the touchstone of jurisdiction.”¹²⁸ What Brennan actually said is that the defendant’s knowledge that the product was being marketed in the forum state

¹²³ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 300 (1980) (Brennan, J., dissenting) (emphasis in original) (quoting *Int’l Shoe Corp. v. Washington*, 326 U.S. 310, 319 (1945)) (“Surely *International Shoe* contemplated that the significance of the contacts necessary to support jurisdiction would diminish if some other consideration helped establish that jurisdiction would be fair and reasonable. The interests of the State and other parties in proceeding with the case in a particular forum are such considerations.” *Id.*).

¹²⁴ See Transcript of Oral Argument, *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011) (No. 09-1343), 2011 WL 87745, at *40–43.

¹²⁵ *Id.*

¹²⁶ *J. McIntyre Mach.*, 131 S. Ct. at 2789 (plurality opinion).

¹²⁷ See *Asahi Metal Indus. Co. v. Super. Ct. of Solano Cnty.*, 480 U.S. 102, 116 (1987) (Brennan, J., concurring in part and in the judgment).

¹²⁸ *J. McIntyre Mach.*, 131 S. Ct. at 2784 (plurality opinion).

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was indicative of purposeful availment,¹²⁹ a statement fully consistent with the only Supreme Court stream-of-commerce precedent then existent, *World-Wide Volkswagen*.¹³⁰

Justice Kennedy's plurality also disregards the fact that Justice Brennan's *Asahi* concurrence was joined by four Justices (the same number as joined Justice O'Connor's plurality), including Justice White, the author of the majority opinion in *World-Wide Volkswagen*, which first recognized the stream-of-commerce theory. What we know of Justice White¹³¹ suggests that it is extremely unlikely that he would join a concurring opinion in a close case that was based on a theory "inconsistent with the premises of lawful power."¹³²

¹²⁹ Brennan noted:

As long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise. Nor will the litigation present a burden for which there is no corresponding benefit. A defendant who has placed goods in the stream of commerce benefits economically from the retail sale of the final product in the forum State, and indirectly benefits from the State's laws that regulate and facilitate commercial activity. These benefits accrue regardless of whether that participant directly conducts business in the forum State, or engages in additional conduct directed toward that State.

Asahi, 480 U.S. at 117 (Brennan, J., concurring in part and in the judgment).

¹³⁰ See 444 U.S. 286, 297–98 (1980).

¹³¹ Justice White's biographer Dennis Hutchinson has observed: "Byron White believed more than most justices during his tenure that the proper focus of adjudication was on the individual case as much as on its location in larger doctrine: the lower-court record always came first, the issue second. He was an incrementalist first and foremost, perhaps to a fault." DENNIS J. HUTCHINSON, *THE MAN WHO ONCE WAS WHIZZER WHITE: A PORTRAIT OF JUSTICE BYRON R. WHITE* 7 (1998).

¹³² Justice Kennedy states that *World-Wide Volkswagen*

merely observes that a defendant may in an appropriate case be subject to jurisdiction without entering the forum—itsself an unexceptional proposition—as where manufacturers or distributors 'seek to serve' a given State's market. . . .

. . . .
 . . . This Court's precedents make clear that it is the defendant's actions, not his expectations, that empower a State's courts to subject him to judgment.

J. McIntyre Mach., 131 S. Ct. at 2788–89 (plurality opinion). *World-Wide Volkswagen*, however, authorizes courts to look at a defendant's expectations as well as allow suits in states where the defendant had only targeted the market "indirectly." Again quoting Justice White:

Hence if the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve directly *or indirectly*, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others. The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that de-

The plurality's assertion that jurisdiction is a question of "authority" rather than "fairness"¹³³ is another troubling denigration of Justice Brennan's jurisprudence and the fairness prong of the minimum contacts analysis. In support of this assertion, Justice Kennedy relies on what he describes as the "principal opinion" in *Burnham*, which, in Kennedy's assessment, "'conducted no independent inquiry into the desirability or fairness' of the rule that service of process within a State suffices to establish jurisdiction over an otherwise foreign defendant."¹³⁴ Yet, sections II-D and III of Justice Scalia's opinion in *Burnham*, to which Justice Kennedy refers, were joined only by two members of the Court, Chief Justice Rehnquist and Justice Kennedy,¹³⁵ thus substantially eroding Kennedy's substantive claim regarding the role of "fairness" as well as his identification of Justice Scalia's opinion as the "principal" opinion of the Court. Moreover, four members of the Court, Justices Brennan, Marshall, Blackmun, and O'Connor indeed conducted a fairness analysis to determine whether jurisdiction over *Burnham* could be exercised,¹³⁶ while a fifth, Justice White, suggested that such an analysis would be necessary in a case where the defendant was in the forum state unintentionally¹³⁷ or, as phrased by Justice Brennan, "involuntarily."¹³⁸ It is simply not credible to read the *Burnham* opinion in support of the proposition Justice Kennedy assigns to it.

Overall the scholarly commentary regarding *J. McIntyre* has been almost entirely critical, with one noted scholar going so far as to describe it as "quite possibly the most poorly reasoned and obtuse decision of the entire minimum contacts era."¹³⁹ What counts, however, is how the decision is being interpreted in the lower courts. But here too, the early decisions suggest that the Supreme Court will have to review stream-of-commerce jurisdiction again, and the sooner it does so, the better.

livers its products into the stream of commerce *with the expectation* that they will be purchased by consumers in the forum State.

World-Wide Volkswagen, 444 U.S. at 297-98 (emphasis added).

¹³³ *J. McIntyre Mach.*, 131 S. Ct. at 2787 (plurality opinion).

¹³⁴ *Id.* at 2789 (quoting *Burnham v. Sup. Ct. of Calif.*, 495 U.S. 604, 622 (1990)).

¹³⁵ *See Burnham*, 495 U.S. at 619-28 (plurality opinion).

¹³⁶ *See id.* at 637-41 (Brennan, J., concurring in the judgment).

¹³⁷ *Id.* at 628 (White, J., concurring in part and in the judgment).

¹³⁸ *Id.* at 640 (Brennan, J., concurring in the judgment).

¹³⁹ Patrick J. Borchers, *J. McIntyre Machinery, Goodyear, and the Incoherence of the Minimum Contacts Test*, 44 CREIGHTON L. REV. 1245, 1263 (2011).

IV. POST-*J. MCINTYRE*

Predictably, the cases decided since *J. McIntyre* reflect the confusions and tensions of that opinion. Just as the stream-of-commerce cases after *Asahi* could be categorized into those that followed the O'Connor plurality, those that followed the Brennan plurality, and those following neither or both, the stream-of-commerce cases after *J. McIntyre* follow Justice Kennedy's plurality, Justice Breyer's concurrence, or conclude that the case made no new law and thus one should either ignore it or distinguish it.¹⁴⁰ Cases that follow the Kennedy plurality see *J. McIntyre* as a repudiation of the Brennan view in *Asahi* and a vindication of the "stream of commerce plus" analysis carved out by Justice O'Connor. Those that follow Justice Breyer do not read *J. McIntyre* as repudiating the Brennan view in *Asahi*, but insist that there must be a continuous stream of products entering the forum as Brennan suggested in *Asahi*, and as Breyer required in *J. McIntyre*.¹⁴¹ Unfortunately, Breyer-based decisions do not address the applicability of Brennan's analysis when the product shipped into the forum state is not a component part as in *Asahi*, or an item that sells in bulk, but is rather an independent, self-standing product.¹⁴² Courts that ignore *J. McIntyre* follow circuit precedent as it existed before *J. McIntyre* was decided, which can mean following Justice O'Connor's or Justice Brennan's view. A sampling of the decided cases in the lower courts¹⁴³ since *J. McIntyre* underscores this analysis,¹⁴⁴ but

¹⁴⁰ The cases that follow neither decision see *J. McIntyre* as not establishing a minimum contacts precedent, and reason from either local precedent or earlier Supreme Court cases; those that follow both decisions reason that if Justice O'Connor's minimum contacts standard is satisfied, those facts will also satisfy the more lenient standard of Justice Brennan.

¹⁴¹ *But see* Steinman, *supra* note 16, at 511 n.208 (emphasis added) (internal citations omitted) ("Justice Breyer's concurrence, therefore, should not be read as endorsing a strict rule that jurisdiction is never proper when only a single sale is made to an in-forum purchaser. If an expectation of in-forum purchases is shown by *other* evidence, then jurisdiction might be proper even if only a single sale is ultimately made.").

¹⁴² *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2803 n.15 (2011) (Ginsburg, J., dissenting).

¹⁴³ The few federal appellate decisions decided since *J. McIntyre* have not necessitated deep exploration of the tension between the Kennedy and Breyer opinions, presumably because none of the cases decided as of this writing involved international stream-of-commerce jurisdiction.

¹⁴⁴ While this Article focuses on international stream-of-commerce jurisdiction after *J. McIntyre*, there are other emanations from that decision that extend beyond the purview of this Article but remain worthy of further exploration. One example is *Océ Fin. Services, Inc. v. Fox Blueprinting Co.*, No. 11 C 4696, 2011 U.S. Dist. LEXIS 77024 (N.D. Ill. July 15, 2011), where a district judge *sua sponte* questioned a forum selection

what is especially noteworthy is the infrequency with which courts follow the Kennedy plurality in circumstances where doing so will require a plaintiff injured in the United States to institute litigation in a foreign jurisdiction.

A. *Cases Following the J. McIntyre Plurality*

In *Gardner v. SPX Corp.*,¹⁴⁵ the plaintiff's husband was killed at work in Utah when a vertical dock leveler collapsed on him. Suit was filed in Utah alleging that a malfunctioning control box, a component part of the dock leveler, caused the accident. The control box was manufactured in Canada by defendant Schneider Canada, which sold "hundreds, if not thousands" of its control boxes in Canada to its various Canadian distributors, who put them in Canadian manufactured dock levelers, then sold them in the United States.¹⁴⁶ Schneider Canada knew that some of its control boxes were placed in dock levelers in the United States but did not know the states in which they would be installed. Schneider Canada was also unaware that the plaintiff's employer in Utah purchased forty-four of the dock levelers.¹⁴⁷ The court denied Utah jurisdiction over Schneider Canada, holding that the Canadian corporation did not purposefully avail itself of the Utah market. The company did not take any active steps to sell its products in Utah, and although it was aware of sales in the United States, and

clause in a lease agreement between the parties that gave exclusive jurisdiction over disputes to state or federal courts in Chicago, Illinois. Borrowing language from Justice Kennedy's plurality opinion in *J. McIntyre*, the district court stated that the Due Process Clause protects a defendant's right to be subject only to lawful authority and noted that "a contractual forum-selection clause or choice-of-law-selection clause will not trigger unquestioning judicial acceptance" unless there is a "material rational connection . . . between any such designation and the underlying transaction." *Id.* at *6-7. While acknowledging that "consent" has traditionally been a basis for asserting personal jurisdiction, the court stated that nothing in the language of the forum-selection clause addressed the question as to the "propriety of instituting this action in this District Court" and directed the *plaintiff* to address the court's concerns. *Id.* at *4. Another outlandish reading of *J. McIntyre* in a non-stream-of-commerce case arose in *Kidston v. Res. Planning Corp.*, 11-cv-2036-PMD, 2011 U.S. Dist. LEXIS 141156 (D.S.C. Dec. 8, 2011), where the court noted that "after *McIntyre*, the relevance of fairness as part of the jurisdictional inquiry is unclear." *Id.* at *10 n.2. Although this may have been a goal of the plurality decision, there is nothing in the concurrence or dissent that supports such a reading. *Cf.* Howard B. Stravitz, *Sayonara to Fair Play and Substantial Justice?*, 63 S.C. L. REV. 745, 746 (2012) ("Justice Ginsburg invoked several second-branch factors to support her conclusion that jurisdiction over J. McIntyre Machinery, Ltd. in New Jersey was 'fair and reasonable' and comported with 'notions of fair play and substantial justice.'").

¹⁴⁵ 272 P.3d 175 (Utah Ct. App. 2012).

¹⁴⁶ *Id.* at 177.

¹⁴⁷ *Id.*

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that more than one product had entered Utah, “the record here does not show ‘special state-related design, advertising, advice, marketing, or . . . specific effort by the [Canadian] Manufacturer to sell in [Utah].’”¹⁴⁸

Following *J. McIntyre*, the court reached the correct result in this case, which presented a weaker case for jurisdiction than *J. McIntyre*. Canada Schneider sold all of its products in Canada and there was no evidence that it had anything to do with the distribution of its components parts after they had been sold to Canadian distributors. The only connection to Utah was that one of its component products arrived in Utah and caused injury there. Not as many were sold as was the case in *Asahi*, nor was the product potentially hazardous. And unlike *J. McIntyre*, the manufacturer was not intricately involved in distribution of the product in the United States.¹⁴⁹ Moreover, the case came up on appeal after a jury verdict in favor of the designer of the control box, finding that the product was neither negligently designed nor unreasonably dangerous, suggesting that perhaps the appellate court could have avoided the personal jurisdiction claim altogether, and there were few, if any, fairness factors pointing toward jurisdiction.¹⁵⁰

*May v. Osako & Co.*¹⁵¹ is practically on all fours with *J. McIntyre* and the court analyzed the case through a reading of the Kennedy and Breyer opinions. While working in Virginia as a stitching machine operator, plaintiff May was injured by an allegedly negligently designed conveyor belt manufactured by Osako, a Japanese manufacturer. Plaintiff filed suit against Osako in a Virginia state court. Osako had no physical sub-entities in the United States and its products were distributed exclusively by an American-based

¹⁴⁸ *Gardner*, 272 P.3d at 182 (alterations in original) (quoting *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2792 (2011)). Although the court cites Justice Breyer’s concurrence in support of this requirement, the court earlier cited a Utah precedent, *Parry v. Ernst Home Center Corp.*, 779 P.2d 659, 666 (Utah 1989). Of course, the origin of this requirement is in Justice O’Connor’s concurring opinion in *Asahi*.

¹⁴⁹ Justice Kennedy’s plurality noted that the U.S. distributor “structured [its] advertising and sales efforts in accordance with” *J. McIntyre*’s “direction and guidance whenever possible,” and that “at least some of the machines were sold on consignment to” the distributor. *Nicastro v. McIntyre Mach. Am., Ltd.*, 201 N.J. 48, 55–56 (2010).

¹⁵⁰ Although the trial court ruled that there was no jurisdiction over Schneider Canada, the case proceeded to trial against SPX, one of the designers of the control box. The jury found that the control box was not negligently designed nor did its design make the product unreasonably dangerous. *Gardner*, 272 P.3d at 178. Schneider Canada argued that this jury determination mooted the appeal against it; the Court of Appeals held that its lack of jurisdiction determination mooted that argument. *Id.* at 182.

¹⁵¹ 83 Va. Cir. 355 (2011).

company. Osako did not specifically target the Virginia market for its products, but knew that its product would be sold generally in the United States. Osako made changes to its product in order to better appeal to an American market, but did not attend any trade shows in Virginia. At least one of the defective machines was sent to Virginia. The court dismissed the complaint with no analysis of either the *J. McIntyre* plurality or concurring opinion, evidently of the view that none of the six Justices forming the majority opinion would view the case any differently from *J. McIntyre*. The court saw *J. McIntyre* as “strongly affirm[ing] Justice O’Connor’s substantial connection analysis set forth in *Asahi Metal Industry Co. v. Superior Court of California* over Justice Brennan’s foreseeability test.”¹⁵² The court was certainly correct in its prediction that the result should be controlled by *J. McIntyre*, as neither the plurality nor Justice Breyer would allow jurisdiction to be exercised where only one machine entered the forum state market and where there was no showing of any further purposeful availment on the part of the Japanese manufacturer.¹⁵³

A more complex case following Justice Kennedy’s plurality opinion is *Windsor v. Spinner Industry Co.*,¹⁵⁴ a products liability and breach of contract case brought by Maryland plaintiffs against a Taiwanese company that manufactures a “quick release skewer,” a bicycle component part that failed, causing injuries to the plaintiff and a minor child when riding the bicycle. The defendant sold its skewers to distributors, manufacturers, and trading companies who marketed them in every state in the U.S., but had no direct contacts with the State of Maryland.¹⁵⁵ To fully understand *J. McIntyre*, the district court reasoned that it must ascertain “that position

¹⁵² *Id.* at 356.

¹⁵³ *See cf.* *Powell v. Profile Design, LLC*, 838 F. Supp. 2d 535, 546 (S.D. Tex. 2012) (dismissing third-party complaint against American distributor of bicycle aerobar stem manufactured in China because distributor did not send *any* product into the forum state of Texas; *Bluestone Innovations Texas, LLC v. Formosa Epitaxy Inc.*, 822 F.Supp. 2d 657, 663 (E.D. Tex. 2011) (dismissing Texas patent action against Taiwanese chip manufacturer because there was no direct evidence that accused products were ever actually sold in the State of Texas); *Baker v. Patterson Medical Supply*, No. 4:11CV37, 2012 WL 380109, at *3 (E.D. Va. Feb. 6, 2012) (dismissing claim against third-party defendant, a British manufacturer of allegedly defective shower chair, because product was “never sold . . . in the United States”); *Eskridge v. Pac. Cycle, Inc.*, No. 2:11-cv-00615, 2012 U.S. Dist. LEXIS 41819, at *21 (S.D. W. Va. Mar. 27, 2012) (dismissing suit against Taiwanese bicycle parts manufacturer because it is insufficient for plaintiff to prove that defendant sold its bicycle parts to companies, and that these parts were incorporated into bikes that were eventually sold in West Virginia, even if in large quantities).

¹⁵⁴ 825 F. Supp. 2d 632 (D. Md. 2011).

¹⁵⁵ *Id.* at 634.

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taken by those members who concurred in the judgment on the narrowest grounds, but recognizing that even the narrowest grounds of the decision should only be given precedential weight if there is substantial overlap between the plurality and concurring opinions, such that the narrowest opinion represents a common denominator of the Court's reasoning and embod[ies] a position implicitly approved by at least five Justices who support the judgment."¹⁵⁶ Under this formulation, the court saw *J. McIntyre* as "rejecting the foreseeability standard of personal jurisdiction, but otherwise left the legal landscape untouched."¹⁵⁷ Applying this reasoning to the facts of the case, the court rejected the plaintiffs' arguments for jurisdiction in Maryland. Noting that the plaintiffs demonstrated that the defendant marketed the skewer throughout the United States, the court was concerned that the plaintiffs had failed to show "additional conduct" that would evince an intent by the defendant to serve the Maryland bicycle market in particular.¹⁵⁸ Rather than dismiss the case, however, the court allowed plaintiff additional discovery, suggesting that the plaintiff might be able to secure jurisdiction if discovery showed that the defendant used distributors who maintained channels of distribution in the state of Maryland.¹⁵⁹ In an unusual aside, the court noted its personal view that "indeed the reasoning of the dissenters in *J. McIntyre*, represents the most sensible approach to personal jurisdiction in the context of global commerce."¹⁶⁰

Justice Kennedy's plurality opinion was also followed in *Lindsey v. Cargotec USA, Inc.*,¹⁶¹ a case involving an Irish corporation (Moffett Engineering Ltd.) sued in Kentucky. The plaintiff employee was injured when a defective forklift manufactured in Ireland and sold in the U.S. by a distributor (Cargotec) ran over his leg. The plaintiff's federal suit alleged that a design flaw of the forklift blocked the visual field of the driver. After summarizing *Asahi* and *J. McIntyre*, the court concluded that the decision in *J. McIntyre* did not change preexisting law and that the court was therefore bound by prior Sixth Circuit precedent, which had previously adopted Jus-

¹⁵⁶ *Id.* at 636–38. The court's understanding was based on a reading of Supreme Court and Fourth Circuit precedents. See *Marks v. United States*, 430 U.S. 188 (1977); *Gregg v. Georgia*, 428 U.S. 153 (1976); *A.T. Massey Coal Co. v. Massanari*, 305 F.3d 226 (4th Cir. 2002).

¹⁵⁷ *Windsor*, 825 F. Supp. 2d at 638.

¹⁵⁸ *Id.* at 639.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 640.

¹⁶¹ No. 4:09CV-00071-JHM, 2011 U.S. Dist. LEXIS 112781 (W.D. Ky. Sept. 29, 2011).

tice O'Connor's "stream of commerce plus" analysis in *Asahi*.¹⁶² The court found that the defendant corporation designed and manufactured the forklifts exclusively in Ireland, had never maintained a physical presence in Kentucky, and did not own, possess, or use any property in Kentucky. The company had no officers, employees, or agents stationed in Kentucky, and it had never sent any of its employees to Kentucky for business purposes, nor had it ever sought authority from the Kentucky Secretary of State to conduct business in Kentucky. It never directly shipped or sold any of its products to customers in Kentucky, never directly solicited business from any company located in Kentucky, and never had any contacts with plaintiff's employer. The employer's only contact was with a sales representative from the distributor, Cargotec, who delivered the forklifts to Kentucky. The court was of the view that the corporate relationship between the Irish manufacturer and the distributor could not serve as a basis for securing jurisdiction over the Irish manufacturer in Kentucky.¹⁶³

While this result is consistent with the plurality determination in *J. McIntyre*, it is inconsistent with the opinion of Justice Breyer. The court failed to attach any significance to the fact that the Irish Company sold 97 forklifts in the state of Kentucky over a ten-year period (2000-2010).¹⁶⁴ Such a continuing flow of heavy duty, hazardous products into the forum state conceivably could have been sufficient to pass muster under Justice Breyer's concurrence since many more machines entered Kentucky than entered New Jersey in *J. McIntyre*. A closer reading of *J. McIntyre* should have relaxed the district court's insistence that it follow Sixth Circuit precedent, because there was an arguable change in the law under a reading of the Breyer concurrence.

B. Cases Not Following *J. McIntyre* Plurality

The above-proposed analysis of *Lindsey v. Cargotec USA* is buttressed by the decision in *Ainsworth v. Cargotec USA*¹⁶⁵ where a Mississippi decedent was killed by a similarly flawed forklift manufactured by the same defendant. *Ainsworth*, however, is one of a growing number of cases that either distinguish *J. McIntyre* or outright refuse to follow it. Plaintiffs in this wrongful death and prod-

¹⁶² See *id.* at *19.

¹⁶³ *Id.* at *20-21.

¹⁶⁴ *Id.* at *23-24.

¹⁶⁵ No. 2:10-CV-236-KS-MTP, 2011 U.S. Dist. LEXIS 109255 (S.D. Miss. Sept. 23, 2011).

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ucts liability case were the survivors of a Mississippi decedent who sued the Irish Company (Moffett) in Mississippi after the decedent was struck and killed by a forklift designed and manufactured by Moffett. Here, as in the Kentucky case, the defendant never maintained a physical presence in Mississippi; did not own, possess, or use any property in Mississippi; had no officers, employees, or agents stationed in Mississippi; and did not send any of its employees to Mississippi for business purposes. It never sought authority from the Mississippi Secretary of State to conduct business in Mississippi, nor had it ever directly shipped or sold any of its forklifts to customers there or directly solicited business from any company located in Mississippi.¹⁶⁶

As in *Lindsay*, the defendant Irish corporation sold all of its forklifts to its co-defendant Cargotec USA, Inc, an American company that, by contract, had the exclusive right to market and sell Moffett's product throughout the United States. Cargotec sold and marketed Moffett forklifts in all fifty states, with no territorial limitations, and handled all the communications with end purchasers, so Moffett was not aware of their identities or locations. Moffett personnel traveled to the United States two or three times a year to discuss products and sales forecasts with Cargotec personnel, and additionally, traveled to the United States periodically for trade shows.¹⁶⁷

Emphasizing Justice Breyer's concurrence, the district court noted that Breyer "declined to choose between the *Asahi* plurality opinions."¹⁶⁸ Because of this, *J. McIntyre* was "limited in its applicability"¹⁶⁹ and "[does] not provide the Court with grounds to depart from the Fifth Circuit precedents establishing Justice Brennan's *Asahi* opinion as the controlling analysis" in stream of commerce cases.¹⁷⁰ Distinguishing *J. McIntyre* on the ground that it involved only a single machine shipped into the New Jersey, the court pointed out that, since 2000, Moffett had shipped over 13,073 forklifts to Cargotec, which then sold 203 of those forklifts to customers in Mississippi, amounting to sales of approximately \$5,350,000. In the court's view, this removed the case from *J. McIntyre*'s scope.¹⁷¹ Although the number of products entering Mississippi was substantially greater than in *J. McIntyre*, a strict adherence to Justice Ken-

¹⁶⁶ *Id.* at *2.

¹⁶⁷ *Id.* at *1-5.

¹⁶⁸ *Id.* at *19.

¹⁶⁹ *Id.*

¹⁷⁰ *Ainsworth*, 2011 U.S. Dist. LEXIS 109255, at *19.

¹⁷¹ *Id.* at *19-20.

nedey's plurality opinion in the case would have defeated jurisdiction because there was no evidence that the Irish defendant, Moffett, as opposed to the distributor American distributor, Cargotec, specifically "targeted" Mississippi or evidenced any intention to submit to the law of Mississippi or any other individual state.¹⁷²

Another narrow reading of *J. McIntyre* can be found in *Merced v. Gemstar Group*,¹⁷³ where jurisdiction was allowed in Pennsylvania over an Italian marble slab producer who, through its distributor, sold heavy, negligently packaged marble slabs to a Philadelphia company. The slabs weighed thousands of pounds and the plaintiff suffered severe leg injuries when the slabs of a container dislodged because they were improperly loaded. The Italian defendant, Margraf S.P.A., produced, packaged, and loaded the containers and distributed them to Gemstar—an Ontario, Canada company—which then sold the slabs to the plaintiff's Philadelphia employer, Belfi Brothers. The marble slabs were shipped to at least seventy United States locations since 2007, with at least three going to Pennsylvania, including one in 2010 valued at over \$19,000, and dozens to other states in the Northeast.¹⁷⁴ The court asserted jurisdiction on the basis that Margraf knowingly shipped its products into Pennsylvania on at least three occasions for pecuniary gain, thus purposefully availing itself of the privilege of conducting activities within the forum state, and invoking the benefits and protections of its laws. The court noted the additional shipments to New Jersey, New York, Maryland, and other neighboring states and concluded that "[b]y disseminating their monopoly product throughout Pennsylvania and many neighboring states, the Defendants obtained an economic benefit in Pennsylvania and could thus have reasonably anticipate[d] being haled into court [] here."¹⁷⁵

In its decision, the court makes only one reference to *J. McIntyre*, distinguishing it on the ground that "[i]n *J. McIntyre Machinery*, the defendant never made a single shipment to the forum state. In the present case, the Margraf Defendants have made at least three—including the one giving rise to this litigation."¹⁷⁶ The

¹⁷² The U.S. Court of Appeals for the Fifth Circuit affirmed the district court following an interlocutory appeal. In affirming, the Court of Appeals adopted fully the reasoning of the district court. *See Ainsworth v. Cargotec USA, Inc.*, No. 12-60155, 2013 U.S. App. LEXIS 9424 (5th Cir. May 9, 2013).

¹⁷³ NO. 10-CV-3054, 2011 U.S. Dist. LEXIS 134781 (E.D. Pa. Nov. 22, 2011).

¹⁷⁴ *Id.* at *4.

¹⁷⁵ *Id.* at *12 (alterations in original) (internal quotation marks omitted).

¹⁷⁶ *Id.* at *13–14 n.1.

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problem with this analysis, however, is that the court specifically notes that the sales to Pennsylvania resulting in plaintiff's injuries were made not by Margraf, but rather by Gemstar, the Canadian distributor.¹⁷⁷ The court also does not specify whether the sales to states outside of Pennsylvania were made by the Italian defendants, Margraf, or by Gemstar. Under this contrary reading of the facts, neither Margraf nor J. McIntyre shipped anything into the forum state. In both cases, the shipment and sale was by the distributor. The decision thus runs afoul of the *J. McIntyre* plurality decision, which looks for evidence that the *defendant* "targeted" or intended to submit to the jurisdiction of the forum state.¹⁷⁸ Jurisdiction, however, perhaps could be asserted pursuant to Justice Breyer's analysis, under the assumption that the three shipments into Pennsylvania by the distributor would satisfy Breyer's threshold.

Another federal district court refusal to follow the Kennedy plurality is *DRAM Technologies v. America II Group, Inc.*,¹⁷⁹ a patent infringement action filed in Texas federal court against Elite Semiconductor, a Taiwanese manufacturer of semiconductor chips. These chips were sold to manufacturers of consumer electronics products outside the United States, who incorporated the allegedly infringing chips into their products, before shipping them to markets worldwide, including the United States, one of the largest consumer electronics markets in the world. Elite Semiconductor was aware that its chips were being used in these devices and that its products were entering the United States via electronics companies. Between 2005 and 2010, Elite Semiconductor shipped approximately 1.02 million packaged memory chips directly to electronics customers in the United States, though none of them was shipped directly into Texas. Some of the chips were contained in electronics products that were on sale in Texas retail stores and available on Internet sites that shipped the products directly into Texas. In addition, Elite Semiconductor's employees regularly visited several of its United States-based customers and, at one time, had a United States affiliate, until it was closed in 2007.¹⁸⁰

¹⁷⁷ "The Marble Slabs were produced, packaged, and loaded into a shipping container by Margraf, S.P.A., an Italian Corporation, who then distributed the container to Gemstar, a tile distributor in Ontario, Canada . . . Gemstar then sold and distributed the marble slabs to Belfi Brothers in Philadelphia, where Plaintiff was injured." *Id.* at *3.

¹⁷⁸ *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2788 (2011) (plurality opinion).

¹⁷⁹ No. 2:10-CV-45-TJW, 2011 U.S. Dist. LEXIS 112532 (E.D. Tex., Sept. 30, 2011).

¹⁸⁰ *Id.* at *8–10. The decision does not indicate whether the visits were to Texas or whether the affiliate was located in Texas.

After summarizing the plurality and concurring and opinions in *J. McIntyre*, the court concluded that the exercise of jurisdiction was proper under the plurality opinion as well as under the concurring opinion because a substantial number of the infringing semiconductor chips had entered into Texas as incorporated into electronic devices, notwithstanding the defendants' objections that there was no evidence that any of semiconductor chips themselves had been sold by the defendant in Texas.¹⁸¹ The Court noted that even if *J. McIntyre* imposed some kind of "heightened scrutiny" requirement, the Court would allow plaintiff to conduct additional discovery, rather than dismiss the action.¹⁸²

On its facts, *DRAM Technologies* is very similar to *Asahi*, but it is unclear that jurisdiction would have been upheld under Justice O'Connor's plurality opinion. The defendant manufactured its semiconductor chips and knowingly sold them to electronics companies that sent them all over the world, including the United States and Texas. But there was no evidence of any of the additional conduct demanded by O'Connor's *Asahi* plurality,¹⁸³ or any indications that DRAM Technologies specifically targeted the Texas market or manifested an intention to submit to the sovereignty of Texas as demanded by the Kennedy plurality in *J. McIntyre*.¹⁸⁴ The facts, however, would have been sufficient for jurisdiction under the Brennan view in *Asahi* because the defendant was responsible for a steady product stream consisting of large numbers of its components that entered the state of Texas as well as other places throughout the United States. The number was large enough to also satisfy Justice Breyer's concurrence in *J. McIntyre* because there was a steady stream of products entering the forum state.¹⁸⁵

C. State Court Resistance

There are also signs in the state courts of resistance to the plurality opinion in *J. McIntyre*. In *Soria v. Chrysler Can., Inc.*,¹⁸⁶ an Illinois plaintiff bought suit in an Illinois state court against Chrysler Canada, a Canadian automobile manufacturer, after losing her

¹⁸¹ *Id.* at *10.

¹⁸² *Id.* at *11–12.

¹⁸³ *Asahi Metal Industry Co. v. Super. Ct. of Solano Cnty.*, 480 U.S. 102, 112–13 (1987) (plurality opinion).

¹⁸⁴ *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2780 (2011) (plurality opinion).

¹⁸⁵ *Id.* at 2792.

¹⁸⁶ 958 N.E.2d 285 (Ill. App. Ct. 2011).

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sight in an automobile accident that she alleged was caused by a defective minivan airbag module. Chrysler Canada was incorporated in Canada, had its principal place of business in Canada, and had never transacted business, entered into contracts, owned real estate, maintained a corporate presence, or had a telephone number, tax identification number, or employees or agents in Illinois. Further, it contended that it did not ship, deliver, distribute, or sell the minivan in Illinois, and that its website was not directed to or interactive with Illinois residents.¹⁸⁷ Chrysler Canada assembled the minivan based on Chrysler United States' specifications and, once it assembled and tested the vehicle, sold it to Chrysler United States. Chrysler United States imported the vehicle to the United States and made the decision to ship the vehicle to Illinois. In this respect, Chrysler Canada argued, it did not control or determine where the vehicle was to be marketed, sold, or distributed in the United States. Further, it did not decide upon warnings for the minivan or conduct compliance testing.¹⁸⁸

After summarizing the relevant opinions, including some under state law, the court upheld the trial court's conclusion that Illinois could exercise jurisdiction. Purporting to use "either version of the stream-of-commerce theory" the court concluded that *J. McIntyre* did not control the case because Chrysler Canada "was specifically aware of the final destination of every product (i.e., vehicle) that it assembles,"¹⁸⁹ and "that it 'expected' that some of its vehicles would be sold in Illinois."¹⁹⁰ The court's use of this particular terminology is especially noteworthy in light of the *J. McIntyre* plurality's noted displeasure with those exact terms.¹⁹¹ So this decision also does not fit within the language of the plurality in *J. McIntyre*. There is nothing in the Court opinion that suggests that Chrysler Canada "targeted" or "intended to submit to the jurisdiction of Illinois." The court held that Chrysler Canada targeted the United States market that included Illinois and noted that Chrysler Canada shipped over 28,000 vehicles to Illinois dealerships. But there was nothing, other than this huge volume of shipments, suggesting that Chrysler Canada specifically targeted Illinois. Again, it seems

¹⁸⁷ *Id.* at 290.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 297–98.

¹⁹⁰ *Id.*

¹⁹¹ See *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2789 (2011) (plurality opinion) ("This Court's precedents make clear that it is the defendant's actions, not his expectations, that empower a State's courts to subject him to judgment."). See also *id.* at 2780.

clear that jurisdiction would be sustainable under Justice Breyer's approach because of the large number of vehicles that had been sold into Illinois by Chrysler Canada.

Similar reluctance by a state court to follow the *J. McIntyre* plurality opinion is evident in *State ex rel. Cooper v. NV Sumatra Tobacco Trading Co.*,¹⁹² a suit brought by the State of Tennessee to recover deposits for a state-mandated Tobacco Escrow Fund. Sumatra Tobacco, an Indonesian cigarette manufacturer, produced United Brand cigarettes that were marketed throughout the United States. Over 74,600 cartons (11.5 million cigarettes) were sold in Tennessee from 2000 through 2002.¹⁹³ No Sumatra employee ever traveled to Tennessee for the purpose of conducting business, or initiated contact with any individual or entity in Tennessee, nor did the company sell cigarettes directly in Tennessee or through any agent in Tennessee. It did not use a distributor to sell cigarettes in Tennessee, did not advertise in Tennessee, had no agents in Tennessee, and produced no promotional materials to be used in Tennessee.¹⁹⁴ After the trial court dismissed for lack of jurisdiction, the appellate court reversed in a decision remarkably similar in its reasoning to the *Nicastro* New Jersey Supreme Court decision.¹⁹⁵ The court noted that Sumatra not only placed its product into the stream of commerce—it intentionally decided to market its product nationwide with the goal of mass distribution to all fifty states by having its distributors market its product in each and every state. Moreover, Sumatra was aware of the fact that its chosen distribution system was very likely to result in Sumatra's products being sold in every state, and, in fact, this was Sumatra's goal. Furthermore, Sumatra took no steps to exclude Tennessee from selling its products so as to evidence an intent to limit its distribution market in any way. In fact, Sumatra did just the opposite in seeking to distribute its product into all fifty states.¹⁹⁶ It was undisputed that,

¹⁹² No. M2010-01955-COA-R3-CV, 2011 WL 2571851 (Tenn. Ct. App. Jun 28, 2011).

¹⁹³ *Id.* at *3.

¹⁹⁴ *Id.* at *6-7.

¹⁹⁵ The court stated:

[A] manufacturer that intentionally seeks out a distribution system, with the goal of national distribution, should reasonably expect that its products could be sold throughout the fifty states and that it could be subject to the jurisdiction of every state. . . . If the foreign manufacturer attempts to preclude the distribution and sale of its products in the forum state, it may avoid the jurisdiction of the courts of that state (depending, of course, upon the specific facts of the case).

Id. at *18.

¹⁹⁶ *Id.* at *25.

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through intermediaries, Sumatra sold over 11.5 million cigarettes in Tennessee over a three-year period.¹⁹⁷

This decision to allow Tennessee jurisdiction was rendered the same day *J. McIntyre* was decided. Subsequently, the defendant sought a rehearing based on *J. McIntyre* that the court denied, reaffirming its previous decision and distinguishing *J. McIntyre*. According to the court,

[t]he metal-shearing machine in *McIntyre* was an isolated defective product that found its way into the forum state through the stream of commerce. In the instant appeal, the number of Sumatra's United brand cigarettes sold in Tennessee constitutes something more than an isolated event. . . . Here, over 11.5 million of Sumatra's cigarettes were sold in Tennessee over a three-year period. . . . Sumatra's contacts with Tennessee were, therefore, neither isolated, nor incidental.¹⁹⁸

While consistent with the Breyer concurrence, the decision appears to be out of line with the plurality since again there is no indication that the defendant specifically targeted Tennessee or intended to submit to the sovereignty of Tennessee.

The Tennessee Supreme Court, in turn, reversed this decision.¹⁹⁹ However, in doing so, the court also refused to follow the Kennedy plurality opinion, holding that the controlling opinion was that authored by Justice Breyer,²⁰⁰ which in the view of the court "leaves existing law undisturbed."²⁰¹ The court, therefore, undertook an analysis that relied upon an amalgam of Tennessee law and the Supreme Court decisions in *Burger King*, *World-Wide Volkswagen*, and *International Shoe*,²⁰² and concluded that, as a factual matter,

[t]he fundamental issue with the sales of United brand cigarettes in Tennessee is that NV Sumatra had nothing to do with them. . . . The record reveals that the arrival of NV Sumatra's cigarettes in Tennessee was almost wholly attributable to the initiative of Mr. Battah and FTS, his tobacco distribution company.²⁰³

Thus, although there was a substantial flow of cigarettes manufactured by the company that made their way into Tennessee with the

¹⁹⁷ *Id.* at *23.

¹⁹⁸ *Sumatra*, 2011 WL 2571851, at *33 (internal citations omitted).

¹⁹⁹ *State v. NV Sumatra Trading Co.*, No. M2010-01955-SC-R11-CV, 2013 Tenn. LEXIS 335 (Mar. 28, 2013).

²⁰⁰ *Id.* at *80.

²⁰¹ *Id.* at *83.

²⁰² *Id.* at *89.

²⁰³ *Id.* at *101-02.

knowledge of the manufacturer, the manufacturer had “remained mostly aloof from the international marketing and distribution of its cigarettes,”²⁰⁴ and there was thus no purposeful availment.²⁰⁵ Although the court could have reached this conclusion by following the O’Connor view in *Asahi* and the Kennedy view in *J. McIntyre*, it explicitly refused to do so, basing its decision entirely on pre-*Asahi* precedent.²⁰⁶

In one of the most thorough discussions rejecting the plurality reasoning in *J. McIntyre*, the Oregon Supreme Court in *Willemssen v. Invacare Corp.*²⁰⁷ allowed for the exercise of Oregon state jurisdiction over a Taiwanese manufacturer (CTE) of battery chargers that were placed in battery powered wheelchairs sold throughout the United States by Invacare. One of the batteries placed in a wheelchair purchased in Oregon caused a fire that killed the plaintiff’s mother. The defective charger caused the fire. CTE had no contacts with Oregon, did not maintain offices in Oregon, and did not directly transact business there. It did not sell its products directly in Oregon, nor did it direct advertising material to customers in Oregon or directly solicit business there.²⁰⁸ However, in one year (2006–2007), Invacare sold 1,166 motorized wheelchairs in Oregon that Invacare made in Ohio, and of these 1,166 wheelchairs, 1,102 wheelchairs came with battery chargers that CTE had manufactured and sold to Invacare.²⁰⁹ Relying on Justice Breyer’s plurality opinion, the Supreme Court of Oregon found that even though there was no specific targeting of Oregon, as opposed to the rest of the United States, jurisdiction was proper in Oregon. The court stated:

To be sure, nationwide distribution of a foreign manufacturer’s products is not sufficient to establish jurisdiction over the manufacturer when that effort results in only a single sale in the forum state. . . . In this case, however, the record shows that, over a two-year period, Invacare sold 1,102 motorized wheelchairs with CTE battery chargers in Oregon. In our view, the sale of over 1,100 CTE battery chargers within Oregon over a two-year period shows a “‘regular . . . flow’ or ‘regular course’ of sales” in Oregon. The sale of the CTE battery charger in Oregon that led to the death of plaintiffs’ mother was not an isolated or fortui-

²⁰⁴ *Id.* at *103.

²⁰⁵ *NV Sumatra Trading Co.*, 2013 Tenn. LEXIS 335, at *108.

²⁰⁶ *See id.* at *103–06.

²⁰⁷ 282 P.3d 867 (Or. 2012).

²⁰⁸ *Id.* at 871.

²⁰⁹ *Id.* at 870–71.

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tous occurrence.²¹⁰

And most recently, in *Sproul v. Rob & Charlies, Inc.*²¹¹ the New Mexico Court of Appeals held, in a case almost identical on its facts to *J. McIntyre*, that jurisdiction was proper in New Mexico over the Chinese manufacturer of a front wheel bicycle quick release mechanism which failed, causing a serious bicycling accident in New Mexico. Bypassing *J. McIntyre* completely, the court went back to *World-Wide Volkswagen* to justify jurisdiction:

In any event, neither *World-Wide Volkswagen* nor our cases require that a manufacturer direct activities specifically at the forum state. Rather, *World-Wide Volkswagen* requires that the defendant place the product into the stream of commerce with the *expectation* that it will be purchased by users in the forum state. . . . It is in the very nature of the stream of commerce theory of minimum contacts that a product will reach the forum state after a manufacturer has sold it in such a way that it has passed from distributor to distributor to arrive there. . . . To insulate a foreign manufacturer of an allegedly defective component part that has caused injury in our state, unless it specifically targeted New Mexico or knew that its product will ultimately be resold here, defies logic. . . . Accordingly, we conclude that a manufacturer of an allegedly defective component part that has otherwise placed it into a distribution channel with the expectation it will be sold in our national market cannot be insulated from liability simply because it does not specifically target or know its products are being marketed in New Mexico.²¹²

The court was able to follow such an analysis because it viewed *J. McIntyre* as accomplishing no more than requiring lower courts to “adhere to our precedents.”²¹³

These numerous cases sustaining jurisdiction in the face of *J. McIntyre* focus on the quantity of the injurious product that entered the forum state. They manifest little concern with how the product entered the forum, whether through the foreign manufacturer or a distributor, and they also pay little attention to the corporate relationship between the manufacturer and the distributor. They say nothing about sovereignty, the defendants’ intentions, or indicia that the forum has been “targeted” by the defendant. And even in an exemplary post-*J. McIntyre* case denying jurisdiction, rather than follow the rigid guidelines of Justice Kennedy’s plurality, a state

²¹⁰ *Id.* at 874 (internal citations omitted).

²¹¹ No. 31,167, 2012 WL 6662638 (N.M. Ct. App. Aug. 15, 2012).

²¹² *Id.* at *10.

²¹³ *Id.* at *15.

supreme court preferred to go back to pre-*Asahi* opinions by Justice Brennan in *Burger King* and Justice White in *World-Wide Volkswagen*—neither of whom, for illumination, was part of the O'Connor plurality in *Asahi*.²¹⁴

In essence, the decisions upholding jurisdiction are reaching conclusions consistent with a majority in *J. McIntyre* consisting of Justices Breyer, Alito, Ginsburg, Sotomayor, and Kagan.²¹⁵ Of the cases discussed, only one directly followed the plurality opinion, and that case was virtually indistinguishable from the facts of *J. McIntyre*.²¹⁶ A second case with distinguishable facts followed the *J. McIntyre* plurality, but rather than dismiss, ordered more discovery, meanwhile noting its dissatisfaction with the plurality rule.²¹⁷ Another case followed the plurality opinion in *J. McIntyre* because that opinion was consistent with preexisting Sixth Circuit precedent that followed the O'Connor test in *Asahi*.²¹⁸ Yet in a case in an adjacent circuit, a district court, dealing with the same defendant in a case of similar injuries, did not follow the *J. McIntyre* plurality, reasoning that the plurality opinion provided no basis to depart from Fifth Circuit precedent that followed the Brennan opinion in *Asahi*.²¹⁹ Other state and federal courts that have been presented with international stream-of-commerce issues have come up with reasons for declining to follow the *J. McIntyre* plurality.²²⁰ Indeed, if

²¹⁴ State v. NV Sumatra Tobacco Trading Co., 2013 Tenn. LEXIS 335.

²¹⁵ Cf. Johnjerica Hodge, *Minimum Contacts in the Global Economy: A Critical Guide To J. McIntyre Machinery v. Nicasastro*, 64 ALA. L. REV. 417, 437 (2012) (“Because the concurrence and dissent express many of the same views, foreign based manufacturers should expect a drastic increase in their potential liability.”).

²¹⁶ See *May v. Osako & Co. Ltd.*, 83 Va. Cir. 355 (2011).

²¹⁷ See *Windsor v. Spinner Indus. Co.*, 825 F. Supp. 2d 632 (D. Md. 2011).

²¹⁸ See *Lindsay v. Cargotec USA, Inc.*, No. 4:09CV-00071-JHM, 2011 U.S. Dist. LEXIS 112781 (W.D. Ky. Sept. 29, 2011).

²¹⁹ See *Ainsworth v. Cargotec USA, Inc.*, NO. 2:10-CV-236-KS-MTP, 2011 U.S. Dist. LEXIS 109255 (S.D. Miss. Sept. 23, 2011).

²²⁰ See, e.g., *UTC Fire and Sec. Americas Corp. v. NCS Power Inc.*, 844 F. Supp. 2d 366, 375–76 (S.D.N.Y. 2012) (upholding jurisdiction over third-party defendant Hong Kong battery manufacturer in New York under Justice Breyer’s concurrence in *J. McIntyre* because the volume of sales, the presumptive knowledge thereof, and the fact that the batteries were sold to a national company, combined, create a strong inference of an expectation of true national distribution of the batteries); *Russell v. SNFA*, No. 1-09-3012, 2011 WL 6965795, at *7–11 (Ill. App. Ct. Dec. 16, 2011) (upholding Illinois jurisdiction over a French helicopter component parts manufacturer (SFNA) whose bearings allegedly caused a helicopter crash in Illinois); *Simmons v. Big #1 Motor Sports Inc.*, No.: 2:12-CV-01115-RDP, 2012 U.S. Dist. LEXIS 159022, at *3, *10–12 (N.D. Ala. Nov. 5, 2012) (upholding jurisdiction in Alabama over Canadian global vehicle products under Justice Breyer’s concurrence for a defective motorcycle power steering system that was shipped worldwide, including fifteen shipments into Alabama); *Monje v. Spin Master Inc.*, No. CV-09-1713-PHX-GMS, 2013 U.S. Dist.

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we look at these cases along with those cited in the appendix to Justice Ginsburg's dissenting opinion, the true outlier in this area of law is the plurality opinion in *J. McIntyre* itself. What seems to be driving these decisions is a demonstrable reluctance to direct plaintiffs who have been injured by products imported into their state of residence to foreign tribunals for adjudications of their claims. The rationale that best explains them is some kind of amalgamation of the New Jersey Supreme Court decision in *Nicastro*, along with Brennan's and Stevens' opinions in *Asahi*.

CONCLUSION

One should not underestimate the significance of the decision in *J. McIntyre*. As Justice Ginsburg stated, the extremely harsh rule implemented by Justice Kennedy's plurality opinion is not the rule of the Court, but it will be if Justices Breyer or Alito later adopt its reasoning.²²¹ As this Article has shown, most lower-court judges deciding personal jurisdiction motions in the aftermath of *J. McIntyre* have resisted Justice Kennedy's plurality view—these decisions should be affirmed and encouraged because they reflect an analysis which is more consistent with the views adopted by a majority of the Court. The number of international stream-of-commerce cases raising personal jurisdiction issues currently in litigation strongly suggests that international companies seeking to target the United States market, yet avoid U.S. law, will structure their operations to conform to the rules established in the Kennedy plurality. Trial judges presiding over those cases have doctrinal and procedural arguments available that will enable them to prevent future plaintiffs from sharing the unfortunate experience of Robert Nicastro, and should utilize them.

LEXIS 75330, at *13–32 (D. Ariz. May 29, 2013) (upholding jurisdiction in Arizona over Australian manufacturer who distributed millions of toy Aqua Dot beads containing a harmful toxin, throughout the United States, though not targeting Arizona).

²²¹ In non-unanimous cases decided during the October 2010 term, Justice Alito voted with Justice Ginsburg in 28.1% of the cases, with Justice Breyer in 36.8% of the cases, and with Justice Kennedy 70.2% of the cases. His decision to join with Breyer in *J. McIntyre* thus provides much room for speculation. *The Statistics*, 125 HARV. L. REV. 362, 365 (2011).

**NOT GUILTY BY REASON OF GENDER
TRANSGRESSION: THE ETHICS OF GENDER
IDENTITY DISORDER AS CRIMINAL
DEFENSE AND THE CASE OF
PFC. CHELSEA MANNING**

Madeline Porta†

A young person sits in a dark room, face lit by the glow of a computer screen. The person types for long stretches, then pauses while waiting for an instant message response from a new “friend.” The message thread is bursting with the types of confessions familiar in a world of cyber anonymity: job frustration, anxiety, interspersed with flirtatious chatter and inquiries. The scene could describe the activities of hundreds of thousands of young people in America on any given night. When we learn the young person is gay and cannot tell anyone about it, or that the online pseudonym used differed from the gender assigned to the person at birth, we can still picture the scene. We know plenty of young people this could be, maybe even ourselves.

Except this young person, Chelsea Manning,¹ formerly and fa-

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¹ A day after being sentenced for various military offenses, Manning announced in a written statement that he would like to be known as Chelsea Manning, requested the use of feminine pronouns, and expressed a desire to undergo hormone therapy “as soon as possible.” See *TODAY: Bradley Manning: I Want to Live as a Woman* (NBC television broadcast Aug. 22, 2013), available at <http://www.today.com/news/bradley-manning-i-want-live-woman-6C10974915>. Various media outlets quickly honored Manning’s request and began using the correct pronoun. See Andrew Beaujon, *AP, New York Times, NPR Update Style on Chelsea Manning*, POYNTER (Aug. 29, 2013), <http://www.poynter.org/latest-news/mediawire/222260/ap-new-york-times-update-style-on-chelsea-manning/>. Except for direct quotations or attributions where a different pronoun would make reading cumbersome, this Note will also use the correct pronouns throughout, even when referencing events and circumstances occurring before Manning’s announcement. See cf. Adam Klasfeld, *Transgenderism More Likely in the Military, Study Finds*, COURTHOUSE NEWS SERVICE (July 24, 2012, 5:11 AM), <http://www.courthousenews.com/2012/07/24/48664.htm> (“Manning reportedly told his lawyers and the public to refer to him as a male.”); Evan Hansen, *Manning-Lamo Chat Logs*

mously known as Pfc. Bradley Manning, was instant-messaging from a tiny office in Iraq where she was deployed as an Army private. And the anxieties expressed had to do not only with being gay in a “Don’t Ask Don’t Tell”² (DADT) environment of forced secrecy, but also (and more importantly) about being a whistleblower against the U.S. government. The job complaints were about the hours spent as an intelligence analyst viewing computer files which exposed atrocities the government was hiding from the media (and the public), including the indiscriminate murder of Iraqi civilians and journalists by U.S. troops shooting from an Apache helicopter. Manning did not want to keep these secrets. And she didn’t. Manning was distraught about her complicity in covering up evidence of war crimes, and also about what would happen to her if she refused to continue to hide that evidence. And if caught, the fear loomed that her image would go out to the world: “[I] wouldn’t mind going to prison for the rest of my life, or being executed so much, if it wasn’t for the possibility of having pictures of me . . . plastered all over the world press . . . as [a] boy”³

Revealed, WIRED (July 13, 2011, 3:40 PM), <http://www.wired.com/threatlevel/2011/07/manning-lamo-logs/> (noting that Manning chose to use the name “Breanna Manning” when setting up Twitter and YouTube accounts). For commentary on pronoun usage specific to Manning, see Rainey Reitman, *Feminist, Transgender Advocates Should Support Bradley Manning*, WASHINGTON BLADE (Feb. 23, 2012), <http://www.washingtonblade.com/2012/02/23/feminist-trans-advocates-should-support-bradley-manning/>; Emily Manuel, *Why Does the Media Still Refer to “Bradley” Manning? The Curious Silence Around a Transgender Hero*, GLOBAL COMMENT (Dec. 22, 2011, 2:57 AM), <http://globalcomment.com/2011/why-does-the-media-still-refer-to-%E2%80%9CBradley%E2%80%9D-manning-the-curious-silence-around-a-transgender-hero/>; Julie Swoope, *Private Manning and Being Outed as Transgender*, THE TRANS LIFE (Dec. 27, 2011), <http://thetranslife.com/?p=498>; *Archive of Tumblr Posts Tagged with “Breanna Manning.”* TUMBLR, <http://www.tumblr.com/tagged/breanna%20manning> (last visited Sept. 25, 2013); Jos, *Why Do the Media and Her Supposed Supporters Continue to Misgender Breanna Manning?*, FEMINISTING (Dec. 22, 2011), <http://feministing.com/2011/12/22/why-does-the-media-and-her-supposed-supporters-continue-to-misgender-breanna-manning/>. For commentary on the problems of English-language pronouns for transgender communities, see *The Need for a Gender-Neutral Pronoun*, GENDER NEUTRAL PRONOUN BLOG (Jan. 24, 2010), <http://genderneutralpronoun.wordpress.com/>.

² “Don’t Ask, Don’t Tell,” codified at 10 U.S.C. § 654, prevented lesbian, gay, and bisexual people from disclosing their sexual orientation in the military. President Barack Obama implemented the repeal of the law on September 20, 2011. See FREEDOM TO SERVE: THE DEFINITIVE GUIDE TO LGBT MILITARY SERVICE, SERVICEMEMBERS LEGAL DEFENSE NETWORK 2 (2011), http://sldn.3cdn.net/5d4dd958a62981cff8_v5m6bw1gx.pdf.

³ Hansen, *supra* note 1 (quoting Manning in the chat logs with Adrian Lamo as saying, “i just. . . dont wish to be a part of it. . . at least not now. . . im not ready. . . i’ve totally lost my mind. . . i make no sense. . . the CPU is not made for this motherboard. . .”).

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INTRODUCTION

Manning was arrested soon after her chat “friend” Adrian Lamo⁴ told the federal government about the chats—namely, that

⁴ Lamo is a computer hacker who was arrested in 2003 for breaking into the computer networks of the New York Times, Yahoo!, Microsoft, and MCI WorldCom. He took a plea from federal prosecutors and received six months of house arrest and two years of probation. See Kevin Poulsen, *Feds Say Lamo Inspired Other Hackers*, SECURITY FOCUS (Sept. 15, 2004), <http://www.securityfocus.com/news/9520>.

Manning was in contact with Julian Assange and was considering turning over the evidence of war crimes and other select files to WikiLeaks.⁵ Manning's subsequent detention and court-martial⁶ have been watched and criticized for many reasons. This Note will concentrate on one specific aspect of the case: the earliest defense strategy of eliciting Manning's gender identity, including the use of the diagnosis of Gender Identity Disorder (GID) and negative stereotypes associated with it, as a factor mitigating Manning's culpability.⁷ It will examine disparities between what is good for social justice movements versus what is good for individual people accused of crimes, applying criminal defense ethical theories and comparing Manning's case to criminal cases in which negative stereotypes about marginalized groups have been used to benefit individual persons accused of crimes. While the issues raised by Manning's defense are applicable in the context of the criminal system, Manning is not being tried within that system, nor is her case indicative of trends within it.⁸

⁵ See GREG MITCHELL & KEVIN GOSZTOLA, TRUTH AND CONSEQUENCES: THE U.S. vs. BRADLEY MANNING 130–31 (2012) (noting that Manning contacted Lamo for the first time on May 20, 2010; that they began instant-messaging each other on AOL that day; and that on May 21, Lamo informed his friend and former Army counterintelligence agent about the chats but he continued chatting with Manning until May 26). See also Hansen, *supra* note 1.

⁶ Courts-martial are trials for military offenses, governed by the Uniform Code of Military Justice (UCMJ). The rules governing courts-martial are contained in the Manual for Courts-Martial. See JOINT SERVICE COMMITTEE ON MILITARY JUSTICE, MANUAL FOR COURTS-MARTIAL (2012), available at <http://armypubs.army.mil/epubs/pdf/mcm.pdf>. Military courts are administrative bodies governed by Article I of the U.S. Constitution and are thus not subject to the same procedural requirements as Article III courts. See ESTELA I. VELEZ POLLACK ET AL., CONG. RESEARCH SERV., RS21850, MILITARY COURTS-MARTIAL: AN OVERVIEW 1–3 (2004), available at <http://www.fas.org/man/crs/RS21850.pdf>.

⁷ The tactic is controversial and objectionable on many levels that I will discuss in this Note, which in turn is my attempt—as a white, queer, cisgender (person who is not transgender and whose gender identity conforms generically to the biological sex assigned at birth) activist, trans ally, and aspiring criminal defense attorney—to grapple with the tensions between criminal defense lawyering and social justice movements.

⁸ As a low-income, white, apparently gender-conforming gay person in the Army, Manning is not entirely representative of those whom the criminal system systematically seeks out and punishes. It is important to note that there is a crisis of mass incarceration in the U.S., and this crisis drives many criminal defense attorneys in the work they do, including the author. One in every 137 Americans was in prison or jail in 2010. Two-thirds of those incarcerated are people of color. See generally THE SENTENCING PROJECT, FACTS ABOUT PRISONS AND PRISONERS (2012), http://sentencing-project.org/doc/publications/publications/inc_factsAboutPrisons_Jan2013.pdf; MARC MAUER, THE SENTENCING PROJECT, COMPARATIVE INTERNATIONAL RATES OF INCARCERATION: AN EXAMINATION OF CAUSES AND TRENDS (2003), http://www.sentencing-project.org/doc/publications/inc_comparative_intl.pdf. Although no data is

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Gender Identity Disorder (GID), discussed in greater detail in Section II, was an extremely controversial diagnosis in the Diagnostic and Statistical Manual of Mental Disorders (DSM);⁹ community action and criticism led the American Psychiatric Association (APA) to announce in December 2012 that it would remove GID from the most recent revised edition, DSM-5, which was published in May 2013.¹⁰ GID's very existence is considered by some to be an affront to transgender,¹¹ genderqueer, and gender non-conforming people because it normalizes the gender binary by pathologizing people who don't fit the narrow idea of the DSM authors (and others) about what a "man" or "woman" is. However, the GID diagnosis in the U.S. has been necessary for trans people to receive certain essential gender-affirming medical care, or have it paid for by insurance. This creates something of a "necessary evil" relationship between the GID diagnosis and trans people who need medical services.

This Note is written from a perspective that does not accept either that trans identity/gender-nonconformity is a pathology or that the criminal system is a place of justice. Through this lens, it will analyze Manning's defense attorney's early choice to exploit the GID diagnosis, in the face of a movement that challenges its

available on transgender rates of incarceration, one San Francisco study found that 67% of transgender women and 30% of transgender men surveyed had a history of incarceration. See Emily Alpert, *Gender Outlaws: Transgender Prisoners Face Discrimination, Harassment, and Abuse Above and Beyond That of the Traditional Male and Female Prison Population*, IN THE FRAY (Nov. 20, 2005), <http://inthefray.org/content/view/1381/39/>.

⁹ DSM, Am. Psychiatric Ass'n, <http://www.psychiatry.org/practice/dsm> (explaining that the DSM was created by the American Psychiatric Association, which considers it to be the "standard classification of mental disorders") (last visited Nov. 5, 2013); *DSM: History of the Manual*, AM. PSYCHIATRIC ASS'N, <http://www.psychiatry.org/practice/dsm/dsm-history-of-the-manual> (last visited Nov. 5, 2013) (explaining that the first edition was published in 1952 and it has been revised several times since then).

¹⁰ Zack Ford, *APA Revises Manual: Being Transgender Is No Longer a Mental Disorder*, THINK PROGRESS (Dec. 3, 2012), <http://thinkprogress.org/lgbt/2012/12/03/1271431/apa-revises-manual-being-transgender-is-no-longer-a-mental-disorder/>.

¹¹ The terms "transgender," "trans," "genderqueer," and "gender-nonconforming" are used throughout this Note as umbrella terms to refer to people who "transcend gendered social roles assigned at birth based on their anatomical sex." See *Transgender 101: A Quick Guide on Being an Ally to People Who Are Transgender and Gender Non-Conforming*, TRANSGENDER LAW PROJECT OF ILL., <http://tjlp.org/TRANSGENDER101QuickGuide.pdf> (last visited Mar. 11, 2013). These terms are meant to be used analogously to the term "trans*" and to be inclusive of non-cisgender identities, rather than referring to an exclusive form of gender identity or presentation. See *Outward, What Does Trans* Mean, and Where Did It Come From?*, SLATE (Jan. 10, 2014, 12:37 PM), http://www.state.com/blogs/outward/2014/01/10/trans_What_does_it_mean_and_where_did_it_come_from.html.

validity and existence and where another defense theory, particularly a whistleblower defense, was viable. It also recognizes that a defense attorney has an obligation to act as a zealous advocate and use any and all arguments at her disposal to fight for a favorable outcome for her client; it arguably should not affect her strategy if the negative stereotypes involve an already-marginalized community, so long as they help her client avoid jail time. The question remains whether the defense attorney's opinions or political or personal motivations matter when defending someone who faces incarceration, or whether it is paternalistic to impose her beliefs, no matter how morally fundamental they are to her worldview, on the people she represents. This Note will focus on this issue in the context of both queer¹² and criminal justice theories and practice—at the center of which sits Chelsea Manning.

Part I of this Note is an overview of Manning's case and Part II is a brief introduction to concepts of gender identity and trans activism. Part III reviews the theories of punishment, concepts of culpability, the complex role of the criminal defense attorney, and the use of narrative storytelling in defense practice. Part IV analyzes other defenses used to either mitigate culpability or reduce sentences based on characteristics of the accused, from mental health to race to gender to cultural background. Part V focuses on past use of gender and sexuality in criminal courts. The Note concludes with the author's opinion that the wisdom of the defense strategy in Manning's case was questionable, although its use was arguably ethical if Manning agreed to it.

I. THE UNITED STATES V. PFC. MANNING¹³

Chelsea Manning was accused of leaking over 500,000 military

¹² The term *queer* has been reclaimed as a positive word that embraces nonconformance with gender and sexuality norms and celebrates a culture outside the mainstream. It will be used in this way to describe individuals and communities throughout the paper.

¹³ The military judge in Manning's court-martial, Colonel Denise Lind, refused to turn over transcripts, court orders, or prosecution documents filed during pre-trial hearings for nearly three years. The Center for Constitutional Rights (CCR), of counsel in the U.S. to Julian Assange, filed briefs with the military trial court and the U.S. Court of Appeals for the Armed Forces on behalf of itself and several independent journalists and media organizations, demanding public access to all pretrial filings, conferences, rulings, and orders. See *Summary of Center for Constitutional Rights et al. v. United States & Lind, Chief Judge*, CTR. FOR CONSTITUTIONAL RIGHTS, <http://ccrjustice.org/ourcases/current-cases/ccr-et-al-v-usa-and-lind-chief-judge> (last visited June 2, 2013). On February 27, 2013, the trial court released 86 redacted orders and rulings. See *Freedom of Information Act Electronic Reading Room, RECORDS MGMT. AND DECLASSIFICATION AGENCY*, https://www.rmda.army.mil/foia/FOIA_ReadingRoom/

cables and documents—including the infamous “Collateral Murder” video¹⁴—to WikiLeaks, a whistleblower website notorious for publishing sensitive and classified information from governments and other large organizations. She was arrested on May 26, 2010, and locked up in a detention facility in Kuwait before being transferred to the military prison in Quantico, Virginia, known as the Brig.¹⁵ Manning chose to hire a civilian defense attorney, David Coombs,¹⁶ in addition to the Army Judge Advocate General (JAG) attorney assigned to her by the military.¹⁷ The conditions of her incarceration at the Brig prompted an investigation by the UN Special Rapporteur on Torture and accusations of cruel and unusual treatment.¹⁸

index.aspx (last visited Nov. 6, 2013). Twenty-one of the orders are “court orders for records from mental health professionals.” Kevin Gosztola, *US Army Makes Bradley Manning Court Martial Bit Less Secretive to Avert First Amendment Ruling*, THE DISSENTER (Feb. 27, 2013, 6:42 PM), <http://dissenter.firedoglake.com/2013/02/27/us-army-makes-bradley-manning-court-martial-bit-less-secretive-to-avert-first-amendment-ruling/>. See also Press Release, Ctr. for Constitutional Rights, DOD Release of Docs in Manning Case Falls Short of Legal Requirement (Feb. 27, 2013), <http://ccrjustice.org/newsroom/press-releases/dod-release-of-docs-manning-case-falls-short-of-legal-requirement>. Importantly, media were not allowed to enter the court pressroom on several occasions (including hearings attended by the author in July 2012), and the public therefore has had to rely on reports by journalists who were forced to sit in the audience and take notes by hand, without computers.

¹⁴ *Collateral Murder Video*, PVT. MANNING SUPPORT NETWORK, <http://www.bradleymanning.org/learn-more/collateral-murder-video> (last visited Nov. 5, 2013); MITCHELL & GOSZTOLA, *supra* note 5, at 18–19.

¹⁵ Kevin Poulsen & Kim Zetter, *U.S. Intelligence Analyst Arrested in Wikileaks Video Probe*, WIRED (June 6, 2010, 9:31 PM), <http://www.wired.com/threatlevel/2010/06/leak/>.

¹⁶ Coombs is a lieutenant colonel in the Army Reserve but is representing Manning in a civilian capacity. His attorney fees were paid by the nonprofit Pvt. Manning Support Network and its parent organization Courage to Resist. See generally THE LAW OFFICES OF DAVID E. COOMBS, <http://www.armycourt martialdefense.info> (last visited Mar. 11, 2013); PVT. MANNING SUPPORT NETWORK, <http://www.bradleymanning.org/> (last visited Nov. 5, 2013).

¹⁷ A person accused of a crime in military court has a right to JAG counsel, but may also hire civilian defense counsel. 10 U.S.C.A. § 838 (West, current through P.L. 113-57 (excluding P.L. 113-54 and 113-56)). See also JENNIFER K. ELSEA, CONG. RESEARCH SERV., RL31262, SELECTED PROCEDURAL SAFEGUARDS IN FEDERAL, MILITARY, AND INTERNATIONAL COURTS (2006), available at <http://www.fas.org/sgp/crs/natsec/RL31262.pdf>.

¹⁸ David E. Coombs, *PFC Manning’s Unlawful Pretrial Punishment at Quantico*, THE LAW OFFICES OF DAVID E. COOMBS (Aug. 10, 2012), http://www.armycourt martialdefense.info/2012/08/unlawful-pretrial-punishment-motion_10.html; David E. Coombs, *The Truth Behind Quantico Brig’s Decision to Strip PFC Manning*, THE LAW OFFICES OF DAVID E. COOMBS (Mar. 5, 2011), <http://www.armycourt martialdefense.info/2011/03/truth-behind-quantico-brigs-decision-to.html>. See also Editors, *Inhumane Treatment of WikiLeaks Soldier Bradley Manning*, HUMAN RIGHTS NOW AMNESTY INTERNATIONAL BLOG (Jan. 24, 2011, 9:24 AM), <http://blog.amnestyusa.org/waronterror/inhumane-treatment-of-wikileaks-soldier-bradley-manning/>; Glenn Greenwald, *The In-*

Manning originally faced twenty-two charges,¹⁹ the most serious being “Aiding the Enemy,”²⁰ a charge which reeks of treason and carries a sentence of death, although the government prosecutors have said they will “only” seek life imprisonment, not death.²¹ On February 28, 2013, Manning offered a guilty plea to ten lesser included offenses that carried a maximum total sentence of twenty years behind bars.²² The government continued to prosecute Man-

humane Conditions of Bradley Manning’s Detention, SALON (Dec. 15, 2010, 2:15 AM), http://www.salon.com/news/opinion/glenn_greenwald/2010/12/14/manning/index.html. Despite the fact that Brig forensic psychiatrists maintained she was not a suicide threat, Manning was forced to sleep in only her underwear for approximately eight months under Prevention of Injury watch. David E. Coombs, *PFC Bradley Manning Is Not Being Treated Like Every Other Detainee*, THE LAW OFFICES OF DAVID E. COOMBS (Jan. 26, 2011), <http://www.armycourt martialdefense.info/2011/01/pfc-bradley-manning-is-not-being.html>. After making a sarcastic comment that she could injure herself with the band of her underwear, she was forced to be nude each night for seven hours, from March 2 to April 20, 2011. Between March 3 and March 7, Manning was forced to stand at attention (“parade rest”), still naked, for about three minutes in the mornings in front of the guards, until the Duty Brig Supervisor completed his inspection rounds. See Brief for Defendant at 36, Motion to Dismiss for Unlawful Pretrial Punishment, United States v. Manning (filed July 27, 2012) (No docket number available), available at https://docs.google.com/file/d/0B_zC44SBaZPoQ2hLa21jNlM0WmM/edit?pli=1. In a letter to Coombs, Manning described the experience of this abuse: “The guard told me to stand at parade rest, with my hands behind my back and my legs spaced shoulder-width apart. I stood at parade rest for about three minutes . . . The [brig supervisor] and the other guards walked past my cell. He looked at me, paused for a moment, then continued to the next cell. I was incredibly embarrassed at having all these people stare at me naked.” Ed Pilkington, *Stripped Naked Every Night, Bradley Manning Tells of Prison Ordeal*, GUARDIAN (Mar. 10, 2011), <http://www.guardian.co.uk/world/2011/mar/11/stripped-naked-bradley-manning-prison>. On January 8, 2013, Military Judge Denise Lind ordered that Manning be given 112 days of sentencing credit for her time in the Brig; Coombs had requested that the charges be dismissed on that ground. Kevin Gosztola, *Judge: Bradley Manning Punished Unlawfully But Not Enough to Warrant More Than Weak Relief*, THE DISSENTER (Jan. 8, 2013, 5:18 PM), <http://dissenter.firedoglake.com/2013/01/08/judge-bradley-manning-punished-unlawfully-but-not-enough-to-warrant-more-than-weak-relief/>.

¹⁹ MITCHELL & GOSZTOLA, *supra* note 5, at 171–79. See also *Manning Charge Sheet*, N.Y. TIMES, <http://graphics8.nytimes.com/packages/pdf/politics/20110302-manning.pdf> (last visited Mar. 4, 2013).

²⁰ 10 U.S.C.A. § 904 (West, current through P.L. 113-57 (excluding P.L. 113-54 and 113-56)) (“Any person who . . . aids, or attempts to aid, the enemy with arms, ammunition, supplies, money, or other things; or . . . without proper authority, knowingly harbors or protects or gives intelligence to, or communicates or corresponds with or holds any intercourse with the enemy, either directly or indirectly . . . shall suffer death or such other punishment as a court-martial or military commission may direct.” *Id.* (emphasis added)).

²¹ See *About Pvt. Manning*, PVT. MANNING SUPPORT NETWORK, <http://www.bradley-manning.org/learn-more/bradley-manning> (last visited Nov. 5, 2013).

²² David E. Coombs, *PFC Manning’s Written Statement in Support of His Guilty Plea*, THE LAW OFFICES OF DAVID E. COOMBS (Mar. 4, 2013), <http://www.armycourt martialdefense.info/2013/03/pfc-mannings-written-statement-in.html> (“Through his plea

ning on the remaining charges, including the Aiding the Enemy charge; Manning chose to be tried by a military judge alone, not a jury.²³ On June 3, 2013, after more than three years in military detention, Manning's court-martial began, and on July 30, 2013, she was cleared of the Aiding the Enemy charge but found guilty of five espionage charges, for which she was sentenced to thirty-five years in prison.²⁴

A. *Article 32 Hearing—Manning's First Appearance in Court*

This Note is primarily concerned with the earliest defense strategies presented by Coombs during the Article 32 hearing between December 16 and December 22, 2011. A pretrial investigatory hearing, called an Article 32 hearing, is required to ensure there are sufficient facts to support a prosecution for the offense(s) charged.²⁵ The hearing differs most significantly from a state or federal criminal court grand jury indictment in that the person accused has access to the proceeding and may see the evidence against her, cross-examine witnesses, and present arguments, and is thus an opportunity for the defense to both glean discovery and to present testimony and evidence.²⁶ In this case, the hearing provided the first glimpse of Manning's defense strategy.

Coombs focused heavily on Manning's sexual orientation and gender identity, coupled with narratives about her mental and emotional health, as factors mitigating her culpability.²⁷ The goal

of guilty, PFC Manning has accepted responsibility for his actions of releasing information to Wikileaks. PFC Manning did not plead guilty pursuant to a 'plea bargain' or 'plea deal' with the Government.”).

²³ David E. Coombs, *Pfc. Manning's Offered Plea and Forum Selection*, THE LAW OFFICES OF DAVID E. COOMBS (Nov. 7, 2012), <http://www.armycourt martialdefense.info/2012/11/pfc-mannings-offered-plea-and-forum.html>.

²⁴ See Bill Chappell, *Bradley Manning Court-Martial Begins in WikiLeaks Case*, NPR (June 3, 2013, 5:24 PM), <http://www.npr.org/blogs/thetwo-way/2013/06/03/188404967/bradley-manning-court-martial-begins-in-wikileaks-case>; Ed Pilkington, *Bradley Manning Verdict: Cleared of 'Aiding the Enemy' but Guilty of Other Charges*, GUARDIAN (July 30, 2013), <http://www.theguardian.com/world/2013/jul/30/bradley-manning-wikileaks-judge-verdict>; Paul Courson & Matt Smith, *WikiLeaks Source Manning Gets 35 Years, Will Seek Pardon*, CNN (Aug. 22, 2013, 6:38 AM), <http://www.cnn.com/2013/08/21/us/bradley-manning-sentencing/>.

²⁵ See 10 U.S.C.A § 832 (West, current through P.L. 113-57 (excluding P.L. 113-54 and 113-56)); MANUAL FOR COURTS-MARTIAL, *supra* note 6, at R.C.M. § 405. See also R. CHUCK MASON, CONG. RESEARCH SERV., R41739, MILITARY JUSTICE: COURTS-MARTIAL, AN OVERVIEW 2 (2012), available at <http://www.fas.org/sgp/crs/natsec/R41739.pdf>.

²⁶ MANUAL FOR COURTS-MARTIAL, *supra* note 6, at R.C.M. § 405.

²⁷ Coombs spent the first day of the hearing making an oral motion for the recusal of the investigating officer, Lt. Col. Paul Almanza, on the ground that his position as a senior prosecutor with the Department of Justice—which was engaged in an ongoing investigation of Manning and WikiLeaks—caused a conflict of interest. See Phil

was both to shift the responsibility to Manning's supervisors for not revoking her security clearance or discharging her because of her emotional distress (which was attributed to her gender identity),²⁸ and also to support a diminished capacity defense by showing Manning did not have the intent to aid the "enemy," which the 10 U.S.C. § 904 statute requires.

At the hearing, Coombs questioned Army investigators about whether they were aware of Manning's cyber "alter ego" (Breanna Manning), or that Manning had sent an email to her supervisor SFC Paul Adkins in April 2010 stating that she suffered from GID, including a photograph of herself in traditionally feminine clothing.²⁹ One investigator who searched Manning's home after the arrest testified, upon questioning by Coombs, that she discovered a pamphlet about facial feminization and gender reassignment surgeries and a study entitled "Transsexuals in the Military: Flight into Hypermasculinity."³⁰ When the prosecutor challenged the relevance of this line of questioning, Coombs replied that the questions "were relevant to whether Pfc. Manning had diminished capacity at the time of the alleged offenses," and therefore lacked the intent necessary to establish the charges.³¹

Coombs also questioned witnesses about Manning's emotional health while in the service.³² Manning's team supervisor, Specialist Jihrleah Showman, testified about an incident in March 2009, where Manning became upset after being told she needed to receive counseling before being deployed in October 2009.³³ After that incident, Showman and Adkins met with Manning to check in;

Fornaci & Jane Zara, *Inside a Military Court Hearing: How the Government Is Railroaded Bradley Manning*, TRUTHOUT (Apr. 3, 2012, 1:11 PM), <http://truth-out.org/news/item/8297-inside-a-military-court-hearing-how-the-government-is-railroading-bradley-manning>.

²⁸ Josh Gerstein, *Defense Cites Bradley Manning's Emotional, Gender Issues at Wikileaks Hearing*, POLITICO (Dec. 17, 2011, 9:13 PM), <http://www.politico.com/news/stories/1211/70597.html>.

²⁹ Adkins never reported this email. *Id.* See also Kevin Gosztola, *More Evidence at Manning Hearing on Sgt. Adkins' Dereliction of Duty*, THE DISSENTER (Dec. 20, 2011, 1:32 PM), <http://dissenter.firedoglake.com/2011/12/20/more-evidence-at-manning-hearing-on-sgt-adkins%E2%80%99-dereliction-of-duty/>.

³⁰ MITCHELL & GOSZTOLA, *supra* note 5, at 99–100.

³¹ Gerstein, *supra* note 28 (internal quotes omitted). See also Serena Marshall, *Bradley Manning: Judge Denies Dismissal, Sets Trial Date*, ABC NEWS' THE NOTE (Apr. 25, 2012, 11:56 AM), <http://abcnews.go.com/blogs/politics/2012/04/bradley-manning-judge-denies-dismissal-sets-trial-date/>.

³² See MITCHELL & GOSZTOLA, *supra* note 5, at 105.

³³ Gosztola, *supra* note 29. Showman informed Adkins of this incident, recommending nonjudicial action, but Adkins did not follow the recommendation; Showman also recommended that Manning not be deployed. See *cf.* Kim Zetter, *Army Was*

Showman testified that Manning said she “really felt paranoid because [she] felt people were listening and watching [her] every move.”³⁴ In December 2009, after being deployed, Manning flipped over a table and broke a computer; she was restrained by a fellow soldier based on a fear that she would use a weapon that was in the room.³⁵ After this event, Showman informed Adkins that she felt Manning’s security clearance should be revoked, and Adkins did not take action.³⁶ In May 2010, Showman saw Manning in the fetal position after a therapy session; a few hours later, Manning allegedly hit her after Showman confronted her, and Showman then pinned Manning to the ground.³⁷ While on the ground, Manning told her “[she] was tired of everyone trying to fix [her] and tired of everyone watching [her]. And, if [she] told behavioral health the truth, that would mean [she] would be removed from the army.”³⁸ This statement was assumed to relate either to Manning’s sexuality or gender identity.³⁹

During closing arguments, Coombs declared that GID “is an unfortunate term. It is not a disorder. When a person looks in the mirror and they do not feel that the person they are looking at is the gender they are, that’s not a disorder. That’s reality.”⁴⁰ He then read Manning’s letter to her supervisor, Adkins (who refused to testify, invoking the right against self-incrimination), which described Manning’s struggles with gender identity, her initial wish that the military would help her, and the subsequent realization that she could not get help from family or supervisors while in the military.⁴¹ Coombs emphasized that Manning was not adequately supported by her supervisors, who did next to nothing to help Manning after learning of her emotional distress.⁴² Coombs then recounted other incidents which he claimed indicated that Manning was not emotionally stable, including carving “I want” into a chair with a knife.⁴³ The prosecution, by contrast, did not mention

Warned Not to Deploy Bradley Manning to Iraq, WIRED (Jan. 27, 2011, 6:48 PM), <http://www.wired.com/threatlevel/2011/01/army-warned-about-manning/>.

³⁴ Gosztola, *supra* note 29.

³⁵ *Id.* See also MITCHELL & GOSZTOLA, *supra* note 5, at 106.

³⁶ Gosztola, *supra* note 29.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ MITCHELL & GOSZTOLA, *supra* note 5, at 142.

⁴¹ *Id.*

⁴² *Id.* at 142–43.

⁴³ *Id.* at 143–44. Coombs concluded by offering a completely different argument, which was that the leaks had not caused any actual harm. *Id.*

Manning's emotional or behavioral concerns at all in its closing; it focused solely on the classified information that was leaked and how it intended to prove that Manning was the one who leaked it.⁴⁴ One month after the Article 32 hearing, on February 3, 2012, the convening officer referred all twenty-two charges to a general court-martial.⁴⁵

B. *Subsequent Hearings and Strategies*

After the Article 32 hearing, Coombs did not rely heavily on Manning's gender identity and emotional health, and instead shifted tactics entirely. After steadily chipping away at the prosecutors' case for months,⁴⁶ Coombs and Manning unveiled a proper whistleblower defense on February 27, 2013, when Manning read a statement admitting she leaked the cables and voluntarily pleading guilty to lesser included offenses related to her actions.⁴⁷ By taking "full responsibility" for providing the materials to WikiLeaks, Manning confirmed that she knew what she was doing when she leaked

⁴⁴ *Id.* at 144–47.

⁴⁵ *Bradley Manning: US General Orders Court Martial for WikiLeaks Suspect*, GUARDIAN (Feb. 3, 2012), <http://www.guardian.co.uk/world/2012/feb/04/bradley-manning-court-martial-wikileaks>. The general court-martial is reserved for the most serious offenses and is the only type at which charges carrying death may be heard. See *Pollack*, *supra* note 6, at 5.

⁴⁶ For more information about other defense strategies employed since the Article 32 hearing, many of which do not rely on speculations or assumptions about Manning's gender identity, see generally THE LAW OFFICES OF DAVID E. COOMBS (Mar. 1, 2013), <http://www.armycourt martialdefense.info>. Other major and independent media outlets have been closely following the case. See, e.g., *Chelsea Manning (Formerly Bradley Manning) Article Archive*, GUARDIAN, <http://www.guardian.co.uk/world/chelsea-manning> (last visited Nov. 29, 2013); *Pfc. Manning Archive*, ALEXAOBRIEN.COM, http://www.alexaobrien.com/secondsight/wikileaks/bradley_manning/ (last visited Nov. 29, 2013) (compiling links to documents, articles, and other files connected to the case); Kevin Gosztola, *Pvt. Manning Coverage*, THE DISSENTER, <http://dissenter.firedoglake.com/tag/bradley-manning/> (last visited Nov. 29, 2013); *Pvt. Manning Coverage*, NATION, http://www.thenation.com/search/apachesolr_search/bradley%20manning and http://www.thenation.com/search/apachesolr_search/chelsea%20manning (last visited Nov. 29, 2013); *Bradley Manning Archive*, DEMOCRACY NOW!, http://www.democracynow.org/topics/bradley_manning (last visited Nov. 29, 2013); *Bradley Manning Archive*, WIRED, <http://www.wired.com/threatlevel/category/bradley-manning/> (last visited Nov. 29, 2013). Mainstream media coverage has been much more sporadic, with *The New York Times* being marginally more consistent than others. See, e.g., *Articles About Bradley Manning*, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/people/m/bradley_e_manning/index.html (last visited Apr. 8, 2013).

⁴⁷ Alexa O'Brien, *Pfc. Bradley E. Manning's Statement for the Providence Inquiry*, ALEXAOBRIEN.COM (Feb. 28, 2013, 11:59 AM), http://www.alexaobrien.com/secondsight/wikileaks/bradley_manning/pfc_bradley_e_manning_providence_hearing_statement.html (audio and transcript of Manning statement).

the materials and that she did so for moral and political purposes, as a whistleblower.⁴⁸

Although the whistleblower defense became the official strategy, the early use of Manning's gender identity as a defense strategy to mitigate Manning's culpability raised eyebrows and prompted much criticism and this criticism remains relevant in an ethical analysis of the strategy. What was said and done cannot be unsaid or undone, and the public (and potentially judicial) response to the early strategy serves as a lesson to those of us committed to both social justice and individual defense.

Upon examination, the strategy appears to have been employed in the context of a hearing in which nearly all the defense requests for discovery were denied, including those for exculpatory evidence.⁴⁹ Additionally, the defense had requested forty-seven witnesses⁵⁰ but was allowed only two, while the prosecution was allowed to call twenty-one witnesses.⁵¹ Through this lens, the tactic may have been born more of desperation than intentional strategy. Coombs made an early choice between two defense theories, neither of which was ideal. First, there was a story about an isolated, emotionally unstable, young trans person who attempted to go through the chain of command and get help from supervisors but was ignored. In this story, the prosecutor could not establish the "intent" required by the Aiding the Enemy statute because Manning suffered from a psychiatric disorder and thus had diminished capacity and was not responsible for her actions. The second story is that of a freedom-fighting whistleblower who saw war crimes being committed by the military in the midst of an unjust war and was compelled to expose them. Here, Manning was cognizant of her actions, but was justified in so acting because of the immorality of the war in Iraq and the military industrial complex. As it turns out, Manning's experience was an amalgamation of the

⁴⁸ See Kevin Gosztola, *Bradley Manning Pleads Guilty to Some Offenses (Updates)*, THE DISSENTER (Feb. 28, 2013, 11:00 PM); Spencer Ackerman, *Bradley Manning Takes "Full Responsibility" for Giving WikiLeaks Huge Government Data Trove*, WIRED (Feb. 28, 2013, 4:08 PM), <http://www.wired.com/threatlevel/2013/02/bradley-manning/>; Scott Shane, *Soldier to Face More Serious Charges in Leak*, N.Y. TIMES (Mar. 1, 2013), <http://www.nytimes.com/2013/03/02/us/manning-to-face-more-serious-charges-in-leak.html>; Floyd Abrams & Yochai Benkler, *Death to Whistle-Blowers?*, N.Y. TIMES (Mar. 13, 2013), <http://www.nytimes.com/2013/03/14/opinion/the-impact-of-the-bradley-manning-case.html>.

⁴⁹ MITCHELL & GOSZTOLA, *supra* note 5, at 104.

⁵⁰ David E. Coombs, *Defense Witness List*, THE LAW OFFICES OF DAVID E. COOMBS, <http://www.armycourt martialdefense.info/2011/12/defense-witness-list.html> (follow "witness list" hyperlink) (last visited Mar. 1, 2013).

⁵¹ MITCHELL & GOSZTOLA, *supra* note 5, at 148.

two stories. To determine if Coombs was justified in his decision to rely on GID, it is crucial to analyze the diagnosis and its stigma, implications, and impacts on trans people.

II. CAN GENDER IDENTITY “MAKE” A PERSON AID THE ENEMY?

Before Manning’s gender and sexuality were raised by Coombs, they were raised in the court of public opinion—the media. *The New York Times* ran an article soon after Manning’s arrest which traced her childhood from rural Oklahoma, to rural Wales, where classmates made fun of her “for being gay,” to the Army, where she was forced to conceal her sexuality.⁵² The article boldly postulated that “some of [Manning’s] friends say they wonder whether [her] desperation for acceptance—or delusions of grandeur—may have led [her] to disclose the largest trove of government secrets since the Pentagon Papers.”⁵³

The media’s focus on Manning’s gender identity led some to question—what exactly did her gender identity, even if coupled with severe emotional distress about it, have to do with a capital charge of aiding enemy terrorists?⁵⁴ The fact that Coombs did not immediately use a whistleblower defense, in light of Manning’s clear statements in the chat logs that her actions were motivated by political conscience,⁵⁵ was publicly criticized:

The emotional problems of loneliness and alienation Manning confronted are hardly atypical for a perceptive 20-year-old, particularly one with a long-estranged father dealing with issues of sexual orientation and gender identity who, after being raised in a tiny evangelical community in Oklahoma, finds himself deployed to Baghdad as part of the U.S. Army’s brutal war in Iraq The notion that these reactions to wholly unjustified, massive blood-spilling is psychologically warped is itself warped. The reactions described there are psychologically healthy; it’s

⁵² Ginger Thompson, *Early Struggles of Soldier Charged in Leak Case*, N.Y. TIMES (Aug. 8, 2010), <http://www.nytimes.com/2010/08/09/us/09manning.html>. See also Steve Fishman, *Bradley Manning’s Army of One*, N.Y. MAGAZINE, July 3, 2011, available at <http://nymag.com/news/features/bradley-manning-2011-7/>.

⁵³ Thompson, *supra* note 52.

⁵⁴ Mike Bruner, *Manning Defense’s Focus on Gender Identity Disorder Alarms Some*, NBCNEWS.COM (Dec. 21, 2011, 6:28 AM), http://openchannel.msnbc.msn.com/_news/2011/12/21/9590399-manning-defenses-focus-on-gender-identity-disorder-alarms-some. See also MITCHELL & GOSZTOLA, *supra* note 5, at 138; Manuel, *supra* note 7.

⁵⁵ Hansen, *supra* note 7 (“[I]nformation should be free / it belongs in the public domain / because another state would just take advantage of the information . . . try and get some edge / if its [sic] out in the open . . . it should be a public good” . . .).

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far more psychologically disturbed NOT to have the reactions Manning had.⁵⁶

A. *The Whistleblower Defense*

Several commentators called attention to the logical links between a whistleblower and being queer and/or trans. Lieutenant Daniel Choi, an opponent of DADT, said about Manning, “I’m proud of him, as a gay soldier, because he stood for integrity . . . the gay community is [the] only one that bases its membership . . . on integrity and telling the truth.”⁵⁷ Choi also said: “That Bradley voiced his concerns proves he was the least unstable and most moral of all the members of his team. That he happens to be gay or transgender gives our community a new hero who brings great credit to the moral force of our people in this world.”⁵⁸ Other commentators noted that “queer activists have long known, there is power and transcendence in choosing truth, even when that truth makes others uncomfortable”;⁵⁹ that queer people should support Manning because “many of us have firsthand experience with being abused by the state”; and that her actions were in line with the “anti-war, anti-establishment values the gay movement used to champion before becoming more narrowly focused on marriage equality and the repeal of Don’t Ask Don’t Tell.”⁶⁰

However, some within the LGBT community did not consider Manning’s actions heroic. For military assimilationists, “Manning doesn’t fit into the affluent, we-are-just-like-you vision of gay normalcy He’s not the poster boy for the campaign they’ve been running for gays in the military.”⁶¹ A spokesperson for the Trans-

⁵⁶ Glenn Greenwald, *The Motives of Bradley Manning*, SALON (July 4, 2011, 8:05 AM), http://www.salon.com/2011/07/04/manning_11/.

⁵⁷ Eliza Gray, *How Bradley Manning Became a Gay Martyr*, NEW REPUBLIC (Aug. 21 2012), <http://www.tnr.com/blog/plank/106382/how-bradley-manning-became-gay-martyr>.

⁵⁸ Dan Choi, *We Must Stand with Bradley Manning*, MYFDL (July 14, 2011, 2:49 PM), <http://my.firedoglake.com/danchoi/2011/07/14/dan-choi-we-must-stand-with-bradley-manning/>.

⁵⁹ Reitman, *supra* note 1.

⁶⁰ Gray, *supra* note 57.

⁶¹ *Id.* See also Larry Goldsmith, *Bradley Manning: Rich Man’s War, Poor (Gay) Man’s Fight*, COMMON DREAMS (June 7, 2011), <https://www.commondreams.org/view/2011/06/07-6> (“Bradley Manning is not that butch patriotic homosexual, so central to the gays-in-the-military campaign, who Defends Democracy and Fights Terrorism with a virility indistinguishable from that of his straight buddies Having grown up in a dysfunctional family in a small town in the South, he is that lonely, maladjusted outsider many gay people have been, or are, or recognize, whether we wish to admit it or not. He broke the law, the President says. And he did so . . . because he wasn’t man enough to deal with the pressure. . . . This is, of course, the classic argument about

gender American Veteran's Association (TAVA) stated that "[d]espite all of our discrimination, I don't think that it occurred to any of us once to sell out our country because of that. . . . We're not supporting him . . . or her."⁶² The Executive Director of the Log Cabin Republicans (LCR) said:

This shameful defense is an offense to the tens of thousands of gay servicemembers who served honorably under [DADT]. We all served under the same law, with the same challenges and struggles. We did not commit treason because of it. . . .

. . . For [Coombs] to suggest that [Manning's] orientation and/or gender identity be part of a defense or excuse for misbehavior is as unacceptable as the use of a "gay panic" defense by a murderer.⁶³

While TAVA and LCR clearly felt Manning's actions were morally wrong and that Coombs's strategic use of Manning's gender and sexuality tarnished the image of LGBT people seeking acceptance in the military, others opposed the defense because it relied on GID as a psychiatric disorder, linking it to the seemingly insulting concept of "diminished capacity."

B. *Gender Identity—Disorder?*

Before analyzing the DSM diagnosis of GID, it is important to define key terminology and distinguish concepts.⁶⁴ "Gender identity" refers to each person's subjective understanding of themselves as being men, women, a combination of those, or neither, and can change and evolve over time. Gender identity is distinct from a person's *biological sex*, which also exists on a continuum from male to female.⁶⁵ "Transgender" is an umbrella term that can be used to describe a person "whose gender identity and/or expression . . . does not or is perceived to not match stereotypical gender norms

gays and national security—they'll get beat up or blackmailed and reveal our secrets.").

⁶² Adam Klasfeld, *Gender Politics in Manning-Wikileaks Case*, Courthouse News Service (Mar. 13, 2012, 12:09 PM), <http://www.courthousenews.com/2012/03/13/44632.htm>.

⁶³ R. Clarke Cooper, *Manning's Defense Dishonors Gay GI's*, STARS AND STRIPES (Dec. 21, 2011), <http://www.stripes.com/manning-s-defense-dishonors-gay-gis-1.164136>.

⁶⁴ See *Transgender 101*, *supra* note 11; *Trans 101*, SYLVIA RIVERA LAW PROJECT, available at <http://srp.org/resources/trans-101/> (last visited Mar. 11, 2013).

⁶⁵ The terms "intersex" and "disorders of sex development" are both used to describe several circumstances under which people's bodies do not fall squarely within the male/female binary rubric. See *Glossary of Terms*, ACCORD ALLIANCE, <http://www.accordalliance.org/learn-about-dsd/glossary.html> (last visited Mar. 11, 2013). See also INTERSEX SOCIETY OF NORTH AMERICA, www.isna.org (last visited Mar. 11, 2013).

associated with [their] assigned gender at birth.”⁶⁶ “Sexual orientation” is entirely distinct, referring to whom a person is attracted. A deviation from the “norm” within each of these categories may result in a person being diagnosed with a mental disorder listed in the DSM.⁶⁷ “Homosexuality” as a psychiatric diagnosis was not removed from the DSM until 1973.⁶⁸ However, the first edition that did not include homosexuality (DSM-III) introduced GID in children as a diagnosis, making it clear that gender conformity was of more concern than a person’s sexual activity.⁶⁹

The GID diagnosis has been contested by medical professionals⁷⁰ and rejected by some trans and queer advocates because it enforces an artificial norm of gender appropriateness and heteronormativity.⁷¹ Scholar and activist Dean Spade has criticized the “gatekeeping role that medical providers occupy in the lives of trans people . . . [where] medical evidence is required for various

⁶⁶ SYLVIA RIVERA LAW PROJECT, *supra* note 64 (“Transgender people have an enormous and beautiful gender diversity. Among transgender as among non-transgender people, there are feminine women, masculine women, androgynous women, feminine men, androgynous men, masculine men, to name just a few. There are infinitely different ways to be male and infinitely different ways to be female. And there are infinite ways to be neither.”).

⁶⁷ Arlene Istar Lev, *Disordering Gender Identity: Gender identity disorder in the DSM-IV-TR*, 17 J. OF PSYCHOL. & HUM. SEXUALITY 35, 38 (2005), available at http://choicesconsulting.com/assets/Disordering_Gender_Identity_JOURNAL.pdf.

⁶⁸ *Facts About Homosexuality and Mental Health*, U.C. DAVIS, http://psychology.ucdavis.edu/rainbow/html/facts_mental_health.html (last visited Nov. 5, 2013).

⁶⁹ Ellen K. Feder, *Power/Knowledge*, in MICHEL FOUCAULT: KEY CONCEPTS 55, 64 (Diana Taylor ed., 2011). In the previous iteration of the DSM, GID was diagnosed if a person met four criteria: 1) “A strong and persistent cross-gender identification (not merely a desire for any perceived cultural advantages of being the other sex); 2) “[p]ersistent discomfort with his or her sex or sense of inappropriateness in the gender role of that sex”; 3) “[t]he disturbance is not concurrent with a physical intersex condition”; and 4) “[t]he disturbance causes clinically significant distress or impairment in social, occupational, or other important areas of functioning.” DIAGNOSTIC AND STATISTICAL MANUAL IV-TR, available at http://www.aclu.org/files/images/asset_upload_file155_30369.pdf. Section 302.6 Gender Identity Disorder in Children. Section 302.85 Gender Identity Disorder in Adolescents or Adults. GID was removed from the DSM-5 in 2013.

⁷⁰ Lev, *supra* note 67, at 36–37.

⁷¹ Dean Spade, *Law as Tactics*, 21 COLUM. J. GENDER & L. 40, 48 (2012) (“The diagnostic criteria of Gender Identity Disorder produces a fiction of a naturalized, untroubled binary gender identity for non-trans people, including a gender-appropriate childhood filled with gender-appropriate toys, role plays and friends. The existence of the criteria, we have also asserted, establishes a mechanism of surveillance by creating a category of deviance that gender non-normative behavior can trigger, which has often particularly led to involuntary psychiatric treatment in young people.”). See also Judith Butler, *Undiagnosing Gender*, in TRANSGENDER RIGHTS 275 (Paisley Currah et al., eds. 2006) (noting that GID serves to “pathologize as a mental disorder what ought to be understood instead as one among many human possibilities of determining one’s gender for oneself”).

forms of recognition of a trans person's gender identity or eligibility for treatment . . . determining which of us are true"⁷² Michel Foucault also recognized the role that medical normalization plays in controlling the lives of those deemed "other" by the medical establishment.⁷³ Others criticize the diagnosis because of how it may be perceived: "[f]or conservatives, [the GID diagnosis] provided rhetorical carte blanche to describe the entire trans [community] as disordered, delusional, and mentally ill."⁷⁴ Some claim the existence of the disorder itself inflicts emotional and psychological harm on children and adults who are gender nonconforming, where they otherwise may not experience such internal distress about their gender.⁷⁵

Such critiques⁷⁶ and direct advocacy eventually led to the APA publishing two position statements, one titled "Access to Care for Transgender and Gender Variant Individuals" and the other "Discrimination Against Transgender and Gender Variant Individuals."⁷⁷ Then, in December 2012, the APA Board of Trustees approved major changes to the DSM, which included the removal of the diagnosis "Gender Identity Disorder" from DSM-5, which was published in May 2013.⁷⁸ A new diagnosis has been put in its

⁷² Spade, *supra* note 71, at 48. Spade makes clear that the fallacy that medical providers are greater experts on people's gender than those people themselves results "in the enforcement of rigid gender norms on trans bodies with doctors often requiring performances of hyper masculinity and femininity read through straight, white, upper class norms. Those who fail to meet the arbitrary, subjective criteria of their medical providers are frequently denied access to care. . . . [T]hese criteria and relationships of authority [are] technologies of the production of gender normativity in which trans bodies experience intensified surveillance and correction."

Id. at 49.

⁷³ See Feder, *supra* note 69, at 62 ("Normalization, the institutionalization of the norm, of what counts as normal, indicates the pervasive standards that structure and define social meaning." There has been a shift from "a focus on health understood as qualities specific to an individual, to normality, a standard imposed from without.").

⁷⁴ Ford, *supra* note 10.

⁷⁵ Butler, *supra* note 71, at 280 ("[W]e have to ask whether submitting to the diagnosis does not involve, more or less consciously, a certain subjection to the diagnosis such that one does end up internalizing some aspect of the diagnosis, conceiving of oneself as mentally ill or 'failing' in normality, or both.").

⁷⁶ There are others. See, e.g., *Gender Identity Disorder and the DSM*, NATIONAL ASSOCIATION OF SOCIAL WORKERS, <http://www.socialworkers.org/diversity/new/lgbtq/51810.asp> (last visited Nov. 5, 2013); GENDER IDENTITY REFORM ADVOCATES, <http://gidreform.org/> (last visited Nov. 5, 2013).

⁷⁷ See Kelley Winters, *The American Psychiatric Association Issues Historic Position Statements on Trans Issues*, GID REFORM BLOG (Aug. 20, 2012), <http://gidreform.wordpress.com/2012/08/20/the-american-psychiatric-association-issues-historic-position-statements-on-trans-issues/>.

⁷⁸ See J. Bryan Lowder, *Being Transgender Is No Longer a Disorder: The American Psychi-*

place, however: “Gender Dysphoria” refers to a temporary state of acute emotional distress people may experience about their gender identity, resulting in “a marked incongruence between one’s experienced/expressed gender and assigned gender,”⁷⁹ as opposed to GID’s overarching pathological disordering.⁸⁰

While many called this a step forward for the trans community, others call attention to the crucial other side of the debate, which is that a diagnosis of GID provides needed medical legitimacy for trans individuals who seek necessary gender-affirming medical treatment such as hormone therapy and surgery, as well as individuals who find themselves caught up in institutional settings which categorize people based on sex and gender, such as prisons, treatment facilities, and shelters.⁸¹ A diagnosis of GID is necessary to receive any hormone therapy or surgical procedures under the Harry Benjamin Standards of Care,⁸² and is the strongest line of defense for trans people who are incarcerated—most often transgender women of color—to demand access to necessary medical treatment in the face of a prison system that so often denies necessary care to those who are locked up.⁸³ Queer theorist Judith Butler argues that, unless an alternative means of accessing necessary health care for low-income trans people is put in place, GID must be used strategically to pursue such treatment.⁸⁴

atric Association Salutes the T in LGBT, SLATE (Dec. 3, 2012, 6:21 PM), http://www.slate.com/articles/health_and_science/medical_examiner/2012/12/dsm_revision_and_sexual_identity_gender_identity_disorder_replaced_by_gender.html.

⁷⁹ See Camille Beredjick, *DSM-V to Rename Gender Identity Disorder ‘Gender Dysphoria,’* ADVOCATE (July 23, 2012, 8:00 PM), <http://www.advocate.com/politics/transgender/2012/07/23/dsm-replaces-gender-identity-disorder-gender-dysphoria>.

⁸⁰ *Id.*

⁸¹ See Chase Strangio, *Debating ‘Gender Identity Disorder’ and Justice for Trans People*, HUFFINGTON POST (Dec. 5, 2012, 5:59 PM), http://www.huffingtonpost.com/chase-strangio/gender-identity-disorder-dsm_b_2247081.html; see also Lev, *supra* note 67, at 37; Butler, *supra* note 71, at 281; JOEY L. MOGUL, ANDREA J. RITCHIE & KAY WHITLOCK, *QUEER (IN) JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES* 107–10 (Michael Bronski ed. 2011).

⁸² See HARRY BENJAMIN INTERNATIONAL GENDER DYSPHORIA ASSOCIATION, *THE STANDARDS OF CARE FOR GENDER IDENTITY DISORDERS* (5th ed. 1998), available at <http://www.tc.umn.edu/~colem001/hbigda/hstndrd>.

⁸³ Strangio, *supra* note 81 (“[M]edical control over trans bodies and lives will always be most dangerous and violent for our community members in prison, jail, detention, homeless shelters and psychiatric hospitals and institutions. The removal of GID or its changing construction might help to further distance some (most likely white, wealthy, male-identified) trans people from external control over their access to affirming care, while simultaneously subjecting other trans people (low-income, incarcerated, people of color, female-identified) to enhanced control.”).

⁸⁴ See Butler, *supra* note 71, at 288. See also Strangio, *supra* note 81 (“[I]t is helpful to think about what we want from the law and discrete benefits systems and advocate

C. Trans in the Military

Coombs' decision to rely on Manning's transgender identity, in a military setting infamous for being one of the most trans- and homophobic institutions in the U.S.,⁸⁵ was troubling. The repeal of DADT had no effect on trans people in the military, who must remain officially in the closet to either enlist or avoid discharge,⁸⁶ and who suffer abuse and harassment from others enlisted regardless of whether they have expressly come out or not. Discrimination has been described as disparate, with "masculinity in women [being] more acceptable than expressed femininity in men."⁸⁷ Discharge for "sexual gender and identity disorders" is considered administrative, not medical, and therefore people who are discharged on these grounds may not access gender-affirming medical treatment through the Department of Veterans Affairs (VA).⁸⁸ The military, even more than the psychiatric establishment, strictly enforces gender norms through dress and grooming policies.⁸⁹ A deviation from what the military considers "gender appropriate" clothing can result in a person being charged with "cross-dressing" and being subjected to discipline or criminal prosecution.⁹⁰

from that standpoint centering the most vulnerable in our communities rather than looking to those systems to reflect our identities back to us in ways that is most affirming."); Spade, *supra* note 71, at 51 n.32 (suggesting treatment of "gender confirming health care for trans people" more like pregnancy, "something that happens to some bodies and requires care but is not an illness or pathology. . . . [T]rans identity need not be considered 'disordered' in order for health services to be considered necessary.").

⁸⁵ The military has openly discriminated based on sex, gender, and sexual orientation through limits on who can join the military and the Don't Ask Don't Tell policy. See Klasfeld, *supra* note 62; Klasfeld, *supra* note 1.

⁸⁶ See FREEDOM TO SERVE, *supra* note 2, at 29. Enlisting in the military requires undergoing a physical examination, and a person can be disqualified for any surgeries deemed to create "major abnormalities and defects of the genitalia." DEP'T OF DEFENSE, INSTRUCTION 6130.03, MEDICAL STANDARDS FOR APPOINTMENT, ENLISTMENT, OR INDUCTION IN THE MILITARY SERVICES ¶¶ E4.14(e) & E4.15(l) (2010), available at <http://www.dtic.mil/whs/directives/corres/pdf/613003p.pdf>. Further, "transsexualism" and "transvestism" are considered "psychosexual conditions" which disqualify a person seeking to enlist. *Id.* ¶ E4.28(r).

⁸⁷ Katie Miller, *The New DADT: The Military's Ban on Transgender Service*, OUTSERVE (Jan. 31, 2012) <http://outservemag.com/2012/01/the-new-dadt-the-militarys-ban-on-transgender-service/>.

⁸⁸ FREEDOM TO SERVE, *supra* note 2, at 30. But see DEP'T OF VET. AFF., VHA DIRECTIVE 2013-2003, PROVIDING HEALTH CARE FOR TRANSGENDER AND INTERSEX VETERANS (2013), available at http://www.va.gov/vhapublications/ViewPublication.asp?pub_ID=2863 (establishing policy guidelines for the "respectful delivery of healthcare" to transgender and intersex veterans enrolled in or eligible to receive VA care).

⁸⁹ See FREEDOM TO SERVE, *supra* note 2, at 29.

⁹⁰ *Id.* at 29-30.

Viewing Manning's case through the lens of trans advocacy and the critiques of GID, it is important to consider next the system of punishment Manning faces and the role Coombs plays as defense counsel. While Manning is not being tried in the Article III criminal system, the military criminal system is analogous in important ways.⁹¹ The next section will explore the complex role of defense counsel, the rights of people accused of crimes vis-à-vis their attorneys, and how the two coalesce in the development of defense strategies.

III. THE CRIMINAL SYSTEM AND THE COMPLICATED ROLE OF THE DEFENSE ATTORNEY

The conundrum of how to serve both the individual client and the larger community is one that has troubled social justice lawyers and led to movements in radical and community lawyering in the civil context.⁹² The challenge comes to an ethical head in the realm of criminal defense work. Different schools of thought have emerged to grapple with the question of what a criminal defense attorney should do when the interests of her client conflict with or cause harm to the interests of others, particularly marginalized and oppressed communities. As one leading theorist has phrased the issue, must a defense attorney "refrain from zealous advocacy, or even subvert their clients' cases, whenever the social good of doing so outweighs the moral costs"?⁹³

This section will first examine justifications for punishment, which are helpful to frame an analysis about effective defense tactics. Next, it will review the role of the defense attorney and the rights of people accused of crimes vis-à-vis their attorneys, highlighting conflicts that can emerge when developing a defense strategy, and the rules that govern—to an extent—when counsel and client disagree. Finally, this section will examine two schools of thought that grapple with such conflicts: those who believe in zeal-

⁹¹ Procedural safeguards shared by Article III courts and general courts-martial include, among others, the presumption of innocence, the right to remain silent, and—most relevantly for this note—the right to effective assistance of counsel (discussed in more detail below in Section III.B). MASON, *supra* note 25, at 9–10. *See also* ELSEA, *supra* note 17.

⁹² *See, e.g.*, Gabriel Arkles, Pooja Gehi & Elana Redfield, *The Role of Lawyers in Trans Liberation: Building A Transformative Movement for Social Change*, 8 SEATTLE J. FOR SOC. JUST. 579 (2010); Rose Cuison Villazor, *Community Lawyering: An Approach to Addressing Inequalities in Access to Health Care for Poor, of Color and Immigrant Communities*, 8 N.Y.U.J. LEGIS. & PUB. POL'Y. 35, 48–51 (2004).

⁹³ David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1758 (1993).

ous advocacy at all costs on behalf of individual clients, and those who believe that dignity-based, anti-humiliation, anti-subordination principles should guide individual representation in a way that is ultimately and primarily accountable to the larger community. Each perspective will be discussed in turn.

A. *Why Do We Punish?*

Two recognized theoretical justifications for punishment in American criminal law are utilitarianism and retributivism. Utilitarian theory views punishment as a harm to be avoided, focusing on deterrence, incapacitation, and rehabilitation⁹⁴ to maximize social good and minimize future crime. Retributivism, by contrast, is a backwards-looking theory focused on morality-based punishment: wrongdoers should be punished because they deserve it—they get their “just deserts”—not because it will result in fewer crimes.⁹⁵ In both contexts, the question remains: should a person be punished for involuntary acts? For retributivists, punishment is only deserved if the wrongdoer chose to violate a rule of society—involuntary actions are not subject to the same eagerness to punish. On the other hand, utilitarianism “can [be used to] justify the punishment of a person known to be innocent of wrongdoing.”⁹⁶

Michel Foucault theorized that a main justification for punishment and imprisonment was to create “docile bodies . . . bodies that were both efficient in performance and obedient to author-

⁹⁴ Proponents of utilitarianism view punishment as the means to achieve the goal of general deterrence (punishing one person deters others from committing similar acts) as well as specific deterrence by incapacitation (being locked up and prevented from misconduct), intimidation (people are afraid of incarceration and conform their behavior to the law to avoid punishment), and rehabilitating the defendant to help him to reform his actions. JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 14–15 (5th ed. 2009).

⁹⁵ Three main subsets of retributivism are theoretically prominent. The first is revenge-based, whereby the victim uses the state to take out his anger and hatred of the wrongdoer. The second subset views punishment as a way of achieving “social balance” in a society where one of its members has breached the social contract by choosing not to be burdened with rules that otherwise benefit everyone. The third subset sees punishment as a means to right a wrong—getting even by making the victim whole through the punishment of the perpetrator. See DRESSLER, *supra* note 94, at 14–19. See also Jeffrey L. Kirchmeier, *A Tear in the Eye of the Law: Mitigating Factors and the Progression Toward a Disease Theory of Criminal Justice*, 83 OR. L. REV. 631, 638–43 (2004) (providing an overview of utilitarian and retributive theories of punishment); CYNTHIA LEE & ANGELA HARRIS, *CRIMINAL LAW CASES AND MATERIALS* 6–7 (2d ed. 2009) (same).

⁹⁶ DRESSLER, *supra* note 94, at 20.

ity.”⁹⁷ Prisons discipline the bodies of those locked up within them by manipulating, classifying, examining, and constantly surveilling them; this discipline “make[s] them more useful for mass production and at the same time easier to control.”⁹⁸ According to Foucault, normalization is also a goal of punishment, as prisons were ostensibly designed to “inscribe the norms of the society in the bodies of criminals by subjecting them to reconstructed patterns of behaviour.”⁹⁹ The military’s punishment system recognizes discipline explicitly as a *modus operandi*: “it might be said that discipline is as important as liberty interests.”¹⁰⁰

B. *The Rights of People Accused of Crimes and the Role of Defense Counsel*

Once involved in the criminal or military punishment system, a person facing jail or prison time arguably needs the assistance of counsel to navigate those intentionally complex legal systems; in this light, the role of the defense attorney is to keep her clients from being locked inside a cage in jail or prison for any amount of time.¹⁰¹ How forcefully a defense attorney should counsel her client with regards to a particular defense strategy to that end is debatable. Crucially, the role of defense counsel is to advocate for her client regardless of whether the person is guilty or innocent.

People accused of crimes have a right to *effective* assistance of counsel, both in military and state criminal courts.¹⁰² Effective assistance is often referred to in terms of how the defense attorney per-

⁹⁷ Todd May, *Foucault’s Conception of Freedom*, in MICHEL FOUCAULT: KEY CONCEPTS 71, 75–76 (Dianna Taylor ed., 2011).

⁹⁸ Johanna Oksala, *Freedom and Bodies*, in MICHEL FOUCAULT: KEY CONCEPTS 85, 87 (Dianna Taylor ed., 2011).

⁹⁹ *Id.* at 89.

¹⁰⁰ MASON, *supra* note 25, at 2.

¹⁰¹ With regards to representing transgender people who face incarceration, it must be noted that “verbal harassment, physical abuse, and sexual assault and coercion create an exceptionally dangerous climate for transgender, gender non-conforming, and intersex people in prison,” particularly for transgender people of color who are most likely to be locked up. THE SYLVIA RIVERA LAW PROJECT, IT’S WAR IN HERE 26 (2007), available at <http://srlp.org/files/warinhere.pdf>.

¹⁰² *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984) (finding that to establish that their attorney was ineffective, the person represented must show that 1) the attorney’s performance “fell below an objective standard of reasonableness,” and 2) that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different”). See also *McMann v. Richardson*, 397 U.S. 759 (1970); ELSEA, *supra* note 17 (noting that in the military court context, a defendant’s appointed counsel must be “certified as qualified and may not be someone who has taken any part in the investigation or prosecution, unless explicitly requested by the defendant” (citing 10 U.S.C. § 827)).

forms during trial, but one area that has been studied, debated, and affected by recent Supreme Court decisions, is the extension of the duty of effective assistance to pre-trial counseling with respect to whether to go to trial or take a plea.¹⁰³ When counseling a client about whether or not to take a plea, defense counsel may utilize varying degrees of persuasion—from remaining neutral and making suggestions to advising and even urging.¹⁰⁴ Neutrality comports with a client-centered model of defense lawyering, but the Second Circuit found that such a “hands-off” approach did not rise to the level of *effective* assistance.¹⁰⁵ Another key concern with regards to deciding the appropriate level of persuasion is “[t]he danger[] of paternalism, and the attorney’s subordination of her client,” to the attorney’s own ideas of what is best for her client.¹⁰⁶

The ethical rules themselves are mere guideposts—the answer to the debate comes down to personal ethics.¹⁰⁷ While the person accused has the “ultimate authority” to make all fundamental decisions such as whether or not to plead guilty, testify, or waive a jury trial,¹⁰⁸ the Comments to Model Rule 1.2 suggest that defense counsel is charged with making tactical or strategic decisions. Crucially, however, “concern for third persons who might be adversely affected” is assigned to the client.¹⁰⁹ Model Rule of Professional Conduct 2.1 provides: “In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic,

¹⁰³ See Josh Bowers, *Lafler, Frye, and the Subtle Art of Winning by Losing*, 25 FED. SENT’G REP. 126, 126 (2012) (“[I]f a prosecutor makes an offer that is too good to refuse, the defense attorney must not only inform the defendant of the offer but perhaps also take steps to persuade the defendant to accept.”). See also Steven Zeidman, *To Plead or Not to Plead: Effective Assistance and Client-Centered Counseling*, 39 B.C. L. REV. 841, 852–53 (1998), available at <http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=2103&context=bclr>.

¹⁰⁴ See generally Zeidman, *supra* note 103 (giving an overview of what defense counsel must and may do with regards to informing clients of plea offers and the consequences of taking them).

¹⁰⁵ See *id.* at 847–48; see also *id.* at 908 (“Although posited as a response to lawyers’ paternalistically telling their clients what to do, neutrality, premised on notions that clients will be unable to make independent judgments once their lawyer advises a particular choice, treats clients as inherently incapable of listening to advice, weighing it and reaching an autonomous decision. In order to free clients from attorney influence, counsel withholds information—her opinion—which might be important for the client to evaluate in order to make a fully informed decision.”).

¹⁰⁶ *Id.* at 900.

¹⁰⁷ ANTHONY G. AMSTERDAM, TRIAL MANUAL 5 FOR THE DEFENSE OF CRIMINAL CASES § 201, at 339 (5th ed. 1988) (“The limits of allowable persuasion are fixed by the lawyer’s conscience.”).

¹⁰⁸ Zeidman, *supra* note 103, at 853 (quoting *Jones v. Barnes*, 463 U.S. 745, 751 (1983)).

¹⁰⁹ MODEL RULES OF PROF’L CONDUCT R. 1.2 cmt. 2 (2011).

social and political factors, that may be relevant to the client's situation." Model Code EC 7-9 provides that, while a lawyer should always act consistent with the best interests of her client, "when an action in the best interest of his client seems to him to be unjust, he may ask his client for permission to forego such action." However, Model Code EC 7-8 provides that "the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for the lawyer." And Model Rule 1.16(b)(4) states that a lawyer has discretion to withdraw from representation if "the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement."

A new ethical rule was considered by the ABA as a revision to Model Rule 8.4, the rule defining attorney misconduct, in the 1990s; the rule would have prohibited the use of bias-based defenses, but it was not adopted.¹¹⁰ Massachusetts did enact ethical rules that comported with the proposed revision to the Model Rule, but they were limited by qualifying language that specified the rules do not "preclude legitimate advocacy when race, sex, national origin, disability, age, or sexual orientation, or another similar factor is an issue in the proceeding."¹¹¹

The following debate illustrates two views about what defense counsel should do when she disagrees with her client about a particular defense tactic or strategy based on the potential harm or benefit to the individual or the community.

C. Zealous Advocacy v. Anti-subordination

Defense strategies may be extremely controversial, potentially invoking negative stereotypes about a marginalized community for the good of the individual person accused. For example, the "gay panic" defense draws on provocation and "heat of passion" defenses to mitigate the culpability of an individual who reacts ("understandably") violently to the sexual advances of a person of the same sex; it does this by legitimizing straight male fear and abhorrence of gay male sexuality, with the end goal being a reduced

¹¹⁰ See, e.g., Eva S. Nilsen, *The Criminal Defense Lawyer's Reliance on Bias and Prejudice*, 8 GEO J. LEGAL ETHICS 1, 24 (1994). The rejected rule provided that "[i]t is professional misconduct for a lawyer to . . . manifest by words or conduct, in the course of representing a client, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socio-economic status. *This paragraph does not preclude legitimate advocacy with respect to the foregoing factors.*" *Id.* (emphasis added).

¹¹¹ *Id.* at 24 n.98.

charge (usually from murder to manslaughter).¹¹² Based on the same reasoning, “transgender panic” has been used in cases of assault or murder of trans individuals, most notably in the case of Gwen Araujo.¹¹³ This genre of defense has been successful with juries, in that defendants’ convictions have been reduced from murder to manslaughter; however, the defense was disallowed in the famous Matthew Shepard case and has been roundly criticized for legitimizing homophobia and pandering to jury bias.¹¹⁴ Note as well that the controversial and movement-damaging defense was disallowed in the case of a white, gay, cisgender man, while it was allowed in the case of a transgender Latina woman—racism and classism are clearly at play in all parts of the criminal system, including defense strategies. To frame the debates that follow, the question of the ultimate effect on society of such defenses is key. Those who oppose their use ultimately argue that defenses like “gay and trans panic” signal to people that violent attacks on trans and queer people are excusable.¹¹⁵

The two schools of thought discussed below differ in how they approach the use of race, culture, gender, and sexuality by defense attorneys. Prof. Muneer Ahmad tackles the debate by posing the question whether “the ethical rules permit, or even require, lawyers to strategically deploy racist, sexist or homophobic narratives that will advance their clients’ interests?”¹¹⁶ These approaches contextualize the “tension that arises between the progressive [defense] lawyer’s political commitment to anti-subordination on the one hand,

¹¹² See Teresa Marie Garmon, *The Panic Defense and Model Rules Common Sense: A Practical Solution for A Twenty-First Century Ethical Dilemma*, 45 GA. L. REV. 621, 633 (2011); Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471, 489 (2008).

¹¹³ Victoria L. Steinberg, *A Heat of Passion Offense: Emotions and Bias in “Transgender Panic” Mitigation Claims*, 25 B.C. THIRD WORLD L.J. 499, 501 (2005). See also Jillian T. Weiss, *Banning the “Trans Panic Defense,”* BILERICO PROJECT (Sept. 23, 2008, 7:00 PM), http://www.bilerico.com/2008/09/banning_the_trans_panic_defense.php.

¹¹⁴ Garmon, *supra* note 112, at 635.

¹¹⁵ Though beyond the scope of this Note, a related concept is the current debate on hate crimes legislation, which was created to signal moral indignation for bias-based violence by imposing harsher penalties (i.e., more time locked up in prison) for those alleged to have committed hate crimes. Several queer and trans organizations, however, have come out against hate crimes legislation, arguing that increasing punitive responses to homophobia only serves to structurally reinforce violence by promoting incarceration and the violence of the prison industrial complex. For a broad overview of this topic, see Che Gossett, Reina Gossett & AJ Lewis, *Reclaiming Our Lineage: Organized Queer, Gender-Nonconforming, and Transgender Resistance to Police Violence*, THE SCHOLAR & FEMINIST ONLINE (2011), <http://sfonline.barnard.edu/a-new-queer-agenda/reclaiming-our-lineage-organized-queer-gender-nonconforming-and-transgender-resistance-to-police-violence/0/>.

¹¹⁶ Muneer I. Ahmad, *The Ethics of Narrative*, 11 AM. U. J. GENDER SOC. POL’Y & L. 117, 117 (2002).

and the particular demands of an individual client's case on the other," including the client's constitutional right to effective assistance of counsel.¹¹⁷

i. Zealous Advocacy and Public Defenders

The philosophy of zealous representation was famously articulated by Lord Brougham in 1821:

[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others.¹¹⁸

Abbe Smith, a prominent legal scholar and former public defender who has written extensively on the topic, agrees that zealous advocacy is an imperative, especially for public defenders.¹¹⁹ Smith explicitly defends the use of stereotypes to paint a certain picture of the defendant or complaining witness or to poke holes in the government's theory, if this will advance her clients' interests: "[d]efense lawyers cannot afford to be color-blind, gender-blind, or even slightly near-sighted when it comes to race, gender, sexual orientation, and ethnicity, because jurors will be paying close attention and they have come to the trial with their own feelings about these issues."¹²⁰ Smith defended the use of male pronouns when

¹¹⁷ See *id.*

¹¹⁸ 2 Trial of Queen Caroline 8 (London, J. Robins & Co. Albion Press 1820–21).

¹¹⁹ See Abbe Smith, *The Difference in Criminal Defense and the Difference It Makes*, 11 WASH. U. J.L. & POL'Y 83, 135–36 (2003) ("[A]dversarial zeal is most important when the stakes are high, the adversary powerful, and the level of trust between the lawyer and client low. The only way to compensate for the disadvantage in resources and power is to allow a more fiercely adversarial ethic on behalf of intimidated and isolated clients who lack the means to hire their own attorneys. Only through zealous advocacy can there be meaningful access to justice."). Importantly, while Smith premises her ethics on the fact that zealous advocacy is imperative in an adversarial system, many dispute that the criminal system is in fact adversarial. See Jed S. Rakoff, *Frye and Lafler: Bearers of Mixed Messages*, 122 YALE L.J. ONLINE 25 (2012), <http://yalelawjournal.org/2012/06/18/rakoff.html> (noting that 97% of federal criminal convictions and 94% of state criminal convictions are the result of guilty pleas, a cooperation between defense and prosecuting attorneys that do not force the prosecution to its burden of proof beyond a reasonable doubt, which in turn leads many innocent people to plead guilty).

¹²⁰ Abbe Smith, *Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things*, 28 HOFSTRA L. REV. 925, 954–55 (2000). See also Abbe Smith, *Criminal Responsibility, Social Responsibility, and Angry Young Men: Reflections of a Feminist Criminal Defense Lawyer*, 21 N.Y.U. REV. L. & SOC. CHANGE 433, 480 (1995) [hereinafter Smith, *Criminal Responsibility*] ("Like many criminal defense lawyers . . . I often raise a

cross-examining a transgender woman complaining witness, and endorsed pointing out her birth-assigned sex (male) despite the fact that she explicitly identified as a woman, where defense counsel represented a cisgender male accused of assaulting her.¹²¹ Persuasion, she claims, is the defender's main tool, and persuasion often involves "playing on the sympathies and prejudices of an audience . . . you get them to identify with the position you're advancing, or at least identify less with your opponent's position."¹²² Another supporter of this view states that zealous advocacy is a moral responsibility, making it necessary for the defense attorney to "separate her individual beliefs and morals from those of her client. . . . The means used and the end attained are not reflective of the lawyer's principles."¹²³

In an interesting career twist, however, Smith was contacted to represent crime victim Claudia Brenner, after she and her partner were shot at in the woods—Brenner was wounded and her partner was killed.¹²⁴ The defendant used the gay panic defense, claiming that after watching the women have sex in the woods he was provoked into shooting them because he had suffered abuse as a child, had been sexually assaulted by men in prison, experienced frequent rejection by women, and because his mother was a lesbian.¹²⁵ While maintaining that she did not find fault with the defense attorney's ethical choices, Smith admitted to feeling good about being on the "right side" in that case.¹²⁶ She cites another case in which she represented a person who was abused by police and falsely accused of assault once it was discovered the person was trans: "Representing this client was entirely consistent with much of what motivates me to be a criminal defender: I was defending a

kind of cultural defense, if the facts allow. I'm likely to suggest that my client's intent was seduction, not rape, and that his ungentlemanly method was the product of machismo and bravado, not a criminal state of mind. . . . Perhaps I am exploiting cultural stereotypes, as opposed to raising a formal cultural defense, but I'm not sure the two are so different. The cultural defenses raised on behalf of newly arrived immigrants and accused rapists sound alike: my client did not intend to commit a crime; he thought he was doing what was expected of him in his cultural milieu; my client didn't do it, the male culture did.")

¹²¹ Abbe Smith, *The Complex Uses of Sexual Orientation in Criminal Court*, 11 AM. U. J. GENDER SOC. POL'Y & L. 101, 110 (2002) ("Though this may have been unseemly, it was an entirely appropriate defense strategy.")

¹²² *Id.* at 115.

¹²³ Shauna I. Marshall, *Mission Impossible?: Ethical Community Lawyering*, 7 CLINICAL L. REV. 147, 210 (2000).

¹²⁴ Smith, *supra* note 121, at 111.

¹²⁵ *Id.*

¹²⁶ *Id.* at 112–13.

marginalized member of a social minority (who also happened to be poor and black) who was a victim of ill treatment at the hands of the police.”¹²⁷ She then claims that criminal defense attorneys should follow trends of social justice, not set them, exploiting stereotypes as long as they exist:

[A]s our society becomes more enlightened and accepting, so will criminal practice. There are some who believe that lawyers—and especially criminal trial lawyers, who are sometimes in the public light—ought to lead the way to this new day. I do not think so. I think we ask enough already of those who defend the least popular and least powerful among us.¹²⁸

David Luban, a critic of the absolute imperative of zealous representation, has theorized about a model of legal advocacy which centralizes human dignity and the interactions between attorneys and those they serve, not merely a series of judicial adjudications.¹²⁹ He claims that the professional ideal of “moral activism . . . imposes on lawyers the moral responsibility to ‘break role’ in compelling moral circumstances to respond to the human pathos of those on whom harm would be visited as a result of adhering to professional role obligations.”¹³⁰ He has admitted, however, that his theory applies most strongly to civil legal advocacy, where the parties to the dispute are arguably more equal in terms of power and control; criminal defenders are different—those accused of crimes, particularly low-income people assigned public defenders, face the power of the state with their liberty at stake.¹³¹ Another scholar finds that, while considerations of negative stereotypes and detrimental community effect should be talked about between the attorney and client, the ultimate decision of whether or not to utilize such stereotypes as part of an advantageous criminal defense are ultimately up to the client; the lawyer’s feelings about it should not preclude such a defense.¹³²

The zealous advocacy approach has been criticized for its disregard for the “truth” and its willingness to rely on potentially neg-

¹²⁷ *Id.* at 113.

¹²⁸ *Id.* at 114 (“The criminal lawyer routinely stands between his or her client and the purgatory we call criminal punishment. This is an honorable vocation and one that is essential to our adversarial system of justice.”).

¹²⁹ See Katherine R. Kruse, *The Human Dignity of Clients*, 93 CORNELL L. REV. 1343, 1343–48 (2008).

¹³⁰ *Id.* at 1348.

¹³¹ See David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1756–58 (1993).

¹³² Gerald F. Uelman, *Lord Brougham’s Bromide: Good Lawyers As Bad Citizens*, 30 LOY. L.A. L. REV. 119, 122 (1996).

ative stereotypical narratives—often about race, culture, gender, and sexuality—so long as those stereotypes advance their clients’ interests.¹³³ It is true that defense attorneys put forth to the judge or jury their *client’s* side of a story—in gay and trans panic cases, defense attorneys are merely relating the very real prejudice their client experienced, and which they claim led to their actions. It is certainly not the attorney’s fault if the person accused suffered from bias. However, as Smith alluded, a savvy defender will not rely on a prejudicial stereotype which is not commonly held. The issue is whether the defense attorney must wait for negative stereotypes to fall out of favor before ceasing to exploit them in the courtroom.

ii. Dignitary and Anti-humiliation Postures—Ivory Tower Luxury?

Scholar Anthony Alfieri takes issue with the use of narratives, constructed either by defense attorney or client, that uphold dominant beliefs and assumptions which perpetuate racist stereotypes in cases involving crimes of violence committed by people of color against whites.¹³⁴ The fact that such narratives, which play on the prejudices of the audience and damaging stereotypes, are very persuasive (and thus effective for the defendants who use them) is the main reason not to employ them. Critical race theorist Richard Delgado stated that Alfieri’s critical “attention to the narrative side of lawyering can enable lawyers representing the poor and disenfranchised to achieve a better brand of justice.”¹³⁵ Alfieri agrees with Luban’s model as applied to preserving the human dignity of criminal defendants of color and their communities, but rejects the idea that criminal defense is different.¹³⁶

Smith openly criticized Alfieri for suggesting that defense attorneys should sacrifice their clients’ liberty for the good of the broader community.¹³⁷ To follow Alfieri’s reasoning would be to “completely transform criminal defense lawyers from defenders of

¹³³ See Anthony V. Alfieri, *Race Trials*, 76 TEX. L. REV. 1293, 1345–49 (1998) (“For defense lawyers, truth is undiscoverable and, moreover, immaterial. Crudely postmodern, they claim a situated truth linked only to standpoint—the standpoint of judge and jury.” *Id.* at 1345.).

¹³⁴ See *id.* at 1345–50.

¹³⁵ RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 51 (2d ed. 2012).

¹³⁶ See Anthony V. Alfieri, *Jim Crow Ethics and the Defense of the Jena Six*, 94 IOWA L. REV. 1651, 1656–59 (2009).

¹³⁷ See Abbe Smith, *Burdening the Least of Us: “Race-Conscious” Ethics in Criminal Defense*, 77 TEX. L. REV. 1585, 1589–90 (1999).

individuals accused of crime, a difficult enough enterprise, to protectors of the community.”¹³⁸ She ultimately boils it down to this stark prediction: “In practice, Alfieri’s communitarianism would serve to expedite the prosecution and incarceration of the most marginalized.”¹³⁹ Another scholar finds that Alfieri’s thesis “openly restricts defense lawyers [in interracial violence cases] to certain legal arguments, regardless of their value or proximity to ‘objective’ truth.”¹⁴⁰

Alfieri writes primarily about high-profile interracial violence cases in which African-American men are charged with some form of violent assault against a white person. Smith recognized that high-profile cases involving media coverage may indeed mean the defense attorney should abandon strategies she might otherwise employ if such strategies would hurt the defendant’s community.¹⁴¹ Ahmad, by contrast, does not distinguish between high-profile and “smaller” cases in his assertion that negative stereotypes should not be used in defense tactics:

[A]s individual, as particularized, and as client-centered as a representation may be, it does not occur in a vacuum . . . just as the [defenders’] efforts in an individual representation will not eradicate racism, sexism, or homophobia, nor will a client’s individual case, by itself, resolve the systemic oppression of poor people by the criminal justice system. Both efforts depend upon our aggregate efforts, and rely upon the notion that our individual actions, no matter how small, are of consequence. They matter. They are subject to moral scrutiny. Even in the smallest of cases, we are as lawyers creatures in an ecosystem that shifts and responds as we do.¹⁴²

¹³⁸ *Id.* at 1590.

¹³⁹ *Id.* at 1590 n.34.

¹⁴⁰ Robin D. Barnes, *Interracial Violence and Racialized Narratives: Discovering the Road Less Traveled*, 96 COLUM. L. REV. 788, 792 (1996).

¹⁴¹ Smith, *supra* note 137, at 1596.

¹⁴² Ahmad, *supra* note 116, at 126. Ahmad continues:

Assume that use of the term “Muslim fundamentalist” will find favor with the judge and that it will be to the client’s advantage. . . . It is, in my mind, not a stretch at all to think that an immigration judge’s subscription to the broad application of the term “Muslim fundamentalist” might affect her judgment on whether to permit [another Arab or Muslim] immigrant’s detention. We must be honest in our recognition of the lawyer’s role and responsibility in shaping this judge’s judgment, and how it might affect others in the future.

The lawyer-client relationship may be a confidential one, but it is not wholly a private one. We can learn from queer theory the value of transparency, of understanding that the acts of individuals are of consequence to the collective. Is there a tension between zeal to the

Ahmad (then a criminal defense clinic professor) ultimately concluded that lawyers should “engage their clients in a meaningful discussion of the potential negative consequences to others of their specific narrative choices.”¹⁴³ Another defense clinic professor agreed with this approach, and wrote about her experience supervising student-attorneys who spoke with their clients about the negative biases that would likely be fueled by defenses they had contemplated, which led the clients to ultimately choose “a fair fight with family members [complaining witnesses] for whom they held complex feelings.”¹⁴⁴

The next section will compare controversial defense strategies that rely on characteristics of the accused and appeal to bias in an attempt to mitigate culpability or obtain a reduced sentence. It will analyze both the justifications and the criticism of these strategies in an attempt to decipher the wisdom of Coombs’ GID defense.

IV. DON’T CRIMINALIZE—PATHOLOGIZE!

The following controversial storytelling tactics—insanity, battered women’s syndrome, rotten social background, and cultural defenses—are used by defenders to present mitigating evidence of personal or cultural characteristics of people accused to show they did not have the mental culpability required by the offense charged.¹⁴⁵ These theories have been criticized as exploitative and reductionist, as racist, anti-feminist, and homophobic. Alternately, they are criticized for letting people off the hook who don’t truly “deserve” it—the genre has been referred to disparagingly as “abuse excuse.”¹⁴⁶ Those who defend these strategies argue that they can humanize defendants and educate judges and juries about the tragedies that occur at the intersections of crime, culture, race, poverty, gender, and mental illness. More importantly, they can produce positive results for people accused of crimes by keeping

individual client and commitment to anti-subordination? Of course there is. But our fidelity to ourselves as lawyers depends upon the honest embrace of such tension as a threshold step to its resolution.

Id. at 126–27.

¹⁴³ *Id.* at 125. See also Nilsen, *supra* note 110, at 23 n.92.

¹⁴⁴ Nilsen, *supra* note 110, at 23 n.92.

¹⁴⁵ These tactics are not directly related to Manning’s case because they deal with racism and communities of color; however, they analogously address the use of negative stereotypes as a criminal defense.

¹⁴⁶ See J. Thomas Parker, *The Abuse Excuse and Other Cop-Outs, Sob Stories, and Evasions of Responsibility*, 150 MIL. L. REV. 410 (1995) (book review) (quoting from book by Alan M. Dershowitz defining “abuse excuses” as “legal tactic[s] by which criminal defendants claim a history of abuse as an excuse for violent retaliation”).

them from being locked up, overturning convictions, or reducing time spent incarcerated. Crucially, they are employed in the face of much more abusive tactics by judges and prosecutors, whose discriminatory attitudes fuel the majority of the racist, classist, and homophobic discourse and behavior in criminal courtrooms. It is important to note that the defenses are not frequently used, and when used they are not often successful—they are often a gamble taken as a last resort.

A. *Insanity Defense—Psychological Evidence*

The longest-standing, and perhaps most infamous, of the narrative defense strategies is the insanity defense. Insanity is a legal term of art, and is not synonymous with mental illness as defined by the APA or the DSM.¹⁴⁷ The test for insanity is notoriously difficult to conform to¹⁴⁸ and is also highly politicized, having undergone scathing criticism.¹⁴⁹ When used successfully, the defense may result in acquittal by reason of insanity, a reduced sentence in capital cases, or the accused being declared incompetent to stand trial altogether.¹⁵⁰

The analogous defense in the military context is lack of mental responsibility.¹⁵¹ Coombs leaned heavily towards this defense at the Article 32 hearing by focusing on the mental instability he associated with Manning's gender identity. GID symptoms could never approach the level of psychological incapacity required for an insanity defense, but Coombs did not attempt to take the strategy that far. Instead he presented a series of inferences: Manning had GID; therefore, she suffered from emotional distress which is severe enough to be listed as a psychiatric disorder in the DSM; it followed that she had a diminished capacity to either rec-

¹⁴⁷ DRESSLER, *supra* note 94, at 348–49.

¹⁴⁸ *Id.* at 365.

¹⁴⁹ *Id.* at 339 (explaining that the defense was highly criticized when used in John Hinckley's defense after his attempt to shoot President Reagan). See also Christopher Slobogin, *A Defense of the Integrationist Test as a Replacement for the Special Defense of Insanity*, 42 TEX. TECH L. REV. 523 (2009); Jennifer S. Bard, *Re-Arranging Deck Chairs on the Titanic: Why the Incarceration of Individuals with Serious Mental Illness Violates Public Health, Ethical, and Constitutional Principles and Therefore Cannot Be Made Right by Piecemeal Change*, 5 HOUS. J. HEALTH L. & POL'Y 1, 72 (2005).

¹⁵⁰ LEE & HARRIS, *supra* note 95, at 697–98.

¹⁵¹ MASON, *supra* note 25, at Summary Page. Before the Article 32 hearing, a Rule for Court-Martial (RCM) 706 board examination, comprised of military medical personnel, was held to determine whether Manning was fit to stand trial; Manning was found fit in April 2011. See Michelle Lindo McCluer, *RCM 706 Board Finds Manning Fit to Stand Trial*, NAT'L INST. OF MILITARY JUST. BLOG (Apr. 29, 2011, 4:42 PM), <http://www.nimjblog.org/2011/04/rcm-706-board-finds-manning-fit-to.html>.

ognize the nature of wrong and right or conform her behavior to fit the law; and thus, she should not be punished because she did not intend to act as she did, and the Aiding the Enemy statute requires intent.

B. Rotten Social Background—Sociological Evidence

Rotten Social Background (RSB) is a defense strategy that seeks to introduce evidence of severe environmental and economic deprivation to show the accused lacked mental and moral culpability and therefore should not be punished.¹⁵² Critical race theorist Richard Delgado posited that “[a]n environment of extreme poverty and deprivation creates in individuals a propensity to commit crimes.”¹⁵³ Ultimately, Delgado argued that an RSB defendant should not be punished for transgressing the rules of a culture that actively marginalizes and abuses him.¹⁵⁴ This defense has not been successfully used to mitigate culpability on the merits; however, RSB evidence is often considered in sentencing, especially in capital cases.¹⁵⁵

The sociological RSB factors are analogous to those on which Coombs based the GID defense. As opposed to arguing that the accused lacks all mental capacity, RSB allows defense attorneys to focus on the environmental aspects of crime and mental disorder. Poverty, homelessness, health issues, and environmental deprivation are realities for many transgender folks, especially trans people of color. Manning, like other trans people, had a history of

¹⁵² This evidence includes, but is not limited to, lack of emotional support within the family, squalid living conditions, alcoholism, abuse, and marginalization from middle-class society. This concept was first articulated by Judge David Bazelon in his dissent in *United States v. Alexander*, 471 F.2d 923 (D.C. Cir. 1973). In *Alexander*, a divided circuit court affirmed, *inter alia*, a jury instruction to disregard a psychiatrist’s testimony that the defendant’s impoverished upbringing—replete with traumatic incidents of racism and minimal emotional support from his family—caused him to experience an “irresistible impulse to shoot” when he was verbally assaulted by a racist marine. *Id.* at 957–59 (Bazelon, C.J., dissenting). Bazelon later explored how people from economically disadvantaged backgrounds could utilize a defense predicated on “disease” models like insanity to mitigate their culpability. See David Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385 (1976); David Bazelon, *The Crime Controversy: Avoiding Realities*, 35 VAND. L. REV. 487, 489–92 (1982).

¹⁵³ Richard Delgado, “Rotten Social Background”: *Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 LAW & INEQ. 9, 54 (1985).

¹⁵⁴ See *id.* at 68–75.

¹⁵⁵ See *Williams v. Taylor*, 529 U.S. 362, 395–96 (2000) (stating that a capital defendant had a constitutional right at sentencing to present evidence of “nightmarish childhood” and borderline mental retardation); see also Mythri A. Jayaraman, Note, *Rotten Social Background Revisited*, 14 CAP. DEF. J. 327 (2002), available at <http://scholarlycommons.law.wlu.edu/wlucdj/vol14/iss2/6/>.

social isolation and ostracization at school and home, so she arguably is not bound by the social contract in the same way as are others in our society who are better cared for. However, RSB, as Delgado envisioned it, applies more to people of color growing up in low-income urban environments.

C. *Battered Woman Syndrome—Relational Evidence*

Battered Woman Syndrome (BWS), a subcategory of Posttraumatic Stress Disorder in the DSM, refers to “psychological changes that occur after exposure to repeated abuse”¹⁵⁶ and is used to support a justification defense for women who kill or attempt to kill their abusive partners. BWS has been successfully used to support claims of self-defense in situations such as where the abusive partner was asleep.¹⁵⁷ By utilizing trauma theory, BWS focuses on evidence such as “oppression, powerlessness . . . [and] learned helplessness” to explain the psychological impact of abuse and argue that some women are justified in killing their abusers.¹⁵⁸

BWS has been criticized by many,¹⁵⁹ including critical race feminists who argue that it creates a caricature of women as helpless victims with no personal agency,¹⁶⁰ a dangerous oversimplification that has had a damaging effect on all women, particularly women of color who have historically had vastly different experiences of patriarchy than the white women on whom the definitions of oppression embedded in BWS are based.¹⁶¹ This applies with force to Manning’s GID defense. Fitting oneself into oppressive or unattainable categories can be imperative for a BWS defendant, whereas GID pathologizes individuals who don’t fit coercive and stifling gender norms. Many see this as victim-blaming, and as a cop-out instead of fighting to change the dominant culture. This was briefly acknowledged by Coombs in his Article 32 closing argu-

¹⁵⁶ Lenore E.A. Walker, *Battered Women Syndrome and Self-Defense*, 6 NOTRE DAME J.L. ETHICS & PUB. POL’Y 321, 326 (1992).

¹⁵⁷ *Id.* at 321. See also DRESSLER, *supra* note 94, at 223–25.

¹⁵⁸ Walker, *supra* note 156, at 326–37.

¹⁵⁹ See, e.g., Angela P. Harris, *Heteropatriarchy Kills: Challenging Gender Violence in a Prison Nation*, 37 WASH. U. J.L. & POL’Y 13, 33–36 (2011); Kimberly D. Bailey, *Lost in Translation: Domestic Violence, “The Personal is Political,” and the Criminal Justice System*, 100 J. CRIM. L. & CRIMINOLOGY 1255, 1255 (2010); Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379, 458 (1991).

¹⁶⁰ Smith, *Criminal Responsibility*, *supra* note 120, at 468–69.

¹⁶¹ See Elaine Chiu, *Confronting the Agency in Battered Mothers*, 74 S. CAL. L. REV. 1223, 1249 (2001); Sharon Angella Allard, *Rethinking Battered Woman Syndrome: A Black Feminist Perspective*, 1 UCLA WOMEN’S L.J. 191, 191–92 (1991).

ment, where he lamented the “disorder” label while proceeding to use it anyway.

D. Cultural Defense—Anthropological Evidence

Other defenses use “cultural evidence by immigrant and/or racial minority defendants seeking to refute or mitigate criminal charges.”¹⁶² The evidence is used to show that the person accused should not be punished (or should be punished less severely) for conforming to his or her own cultural norms.¹⁶³ While a distinct defense does not exist, cultural evidence has successfully been admitted as mitigating evidence in a very few cases, resulting in convictions for lower charges and even some being overturned.¹⁶⁴

The use of cultural evidence is controversial; Professor Leti Volpp has pointed out that “[c]ulture is not some monolithic, fixed, and static essence.”¹⁶⁵ Problems of essentializing cultures and “othering” occur, and Volpp noted that there is a “general failure to look at the behavior of white persons as cultural, while always ascribing the label of culture to the behavior of minority groups.”¹⁶⁶ Some feminists oppose the use of culture evidence to mitigate culpability in cases involving violence against women, arguing that the defense condones such violence.¹⁶⁷ Those who support the use of this tactic claim that culturally “othered” defendants are already disadvantaged in court, and cultural evidence can create much-needed context for the accused’s actions, thereby humanizing her in a vital way for the judge and jury.¹⁶⁸

¹⁶² Cynthia Lee, *Cultural Convergence: Interest Convergence Theory Meets the Cultural Defense*, 49 ARIZ. L. REV. 911, 915 (2007).

¹⁶³ *Id.* at 915–16. See also Nancy S. Kim, *The Cultural Defense and the Problem of Cultural Preemption: A Framework for Analysis*, 27 N.M. L. REV. 101, 102–03, 115 (1997).

¹⁶⁴ See generally Kim, *supra* note 163. See also Holly Maguigan, *Cultural Evidence and Male Violence: Are Feminist and Multiculturalist Reformers on a Collision Course in Criminal Courts?*, 70 N.Y.U. L. REV. 36, 37 (1995); Lee, *supra* note 162, at 920.

¹⁶⁵ Leti Volpp, *Talking “Culture”: Gender, Race, Nation, and the Politics of Multiculturalism*, 96 COLUM. L. REV. 1573, 1589 (1996); *id.* at 1592.

¹⁶⁶ Leti Volpp, *Feminism Versus Multiculturalism*, 101 COLUM. L. REV. 1181, 1189 (2001).

¹⁶⁷ See Kim, *supra* note 163, at 110–11; Maguigan, *supra* note 164, at 44.

¹⁶⁸ Maguigan, *supra* note 164, at 58–59. *But cf.* Lee, *supra* note 162, at 940–41. (“Judges, jurors, and prosecutors attempting to be culturally sensitive often end up reinforcing negative stereotypes about the racial or ethnic group of the defendant.” *Id.* at 941.).

V. DISCRIMINATION AGAINST TRANSGENDER DEFENDANTS
IN COURT—CAN A GID-TYPE DEFENSE
EVER BE USED SAFELY?

The courtroom is no exception to the discrimination transgender people face daily—trans defendants are usually not called by their correct names and incorrect pronouns are used,¹⁶⁹ and they have been portrayed as deceitful,¹⁷⁰ diseased,¹⁷¹ or degraded and debauched.¹⁷² So-called deviant sexuality and gender expression are presumptively criminal, as evidenced by lewd conduct statutes (enforced disproportionately against queer and transgender individuals) and frequent arrests for “walking while trans” where police target transgender women walking, especially at night, and profile them as performing sex work.¹⁷³ Once in the courtroom, trans defendants are often treated terribly by court staff, judges, prosecutors, and their own attorneys.¹⁷⁴

Is it possible, then, for a defense attorney to use GID safely, in a way that helps her client, when the courtroom is teeming with institutional and particularized homo- and transphobia? Using GID in a criminal case is a gamble: it could potentially garner sympathy or vitriol. One capital case that reached the Supreme Court¹⁷⁵ illustrates an example of the defense going well, while many others demonstrate the defense going very badly.¹⁷⁶

¹⁶⁹ See NAT'L CTR. FOR LESBIAN RIGHTS & TRANSGENDER LAW CTR., SOME COURTROOM CONCERNS OF THE TRANSGENDER COMMUNITY, <http://www.transgenderlaw.org/resources/courtroomconcerns.pdf>.

¹⁷⁰ See MOGUL ET AL., *supra* note 81, at 30, 35–36, 73, 76–77 (referring to transgendered individuals as “tricking” those around them, and the jurors, into thinking they are normatively gendered).

¹⁷¹ See *id.* at 30, 43 (giving examples and noting portrayals of transgender people as psychologically and emotionally unstable, neurotic, and compulsive).

¹⁷² See *id.* at 31–34 (noting archetypal characterizations of transgender people as pedophiles, sexually depraved, and incapable of controlling their perverse sexual impulses).

¹⁷³ See *id.* at 59–61. See also Smith, *supra* note 121, at 103 (“[T]he vast majority of openly gay or transgendered people who wind up in criminal court are charged with solicitation or prostitution.”).

¹⁷⁴ *Id.* at 72–75.

¹⁷⁵ See, e.g., *Lockett v. Ohio*, 438 U.S. 586 (1978). In *Lockett*, a plurality of the Supreme Court concluded that the Eighth and Fourteenth Amendments require consideration of mitigating evidence to justify the death penalty. *Id.* at 604. Therefore, in death penalty cases, a court could decide to consider evidence relating to sexuality or gender identity if it was found to have mitigated culpability in some way (i.e. caused emotional distress, required therapy, caused the accused to be disowned). See *id.*

¹⁷⁶ The cases below examine defendants who identified (or were identified) as transgender, gender-nonconforming, and/or gay. These distinct categories are lumped together for two reasons: first, people are often identified by others as gay based on their gender expression, regardless of these individuals’ actual sexual orien-

A. *The “Good”—Leslie Ann Nelson*

A complicated, tragic, and ultimately somewhat successful example of the use of GID as a mitigating factor in the death penalty context was the case of Leslie Ann Nelson, who pleaded guilty to killing two police officers and to second-degree aggravated assault of a third officer and was sentenced to death.¹⁷⁷ During the penalty trial, the defense relied heavily on GID and (allegedly) attendant mental illness as mitigating evidence to avoid the death penalty, to no avail.¹⁷⁸ Nelson was sentenced to death, but the New Jersey Supreme Court vacated the death sentence based on a *Brady* violation.¹⁷⁹ A new penalty trial was held but a majority of jurors found that the aggravating factors outweighed Nelson’s long history of psychological issues.¹⁸⁰ However, the New Jersey Supreme Court once again overturned the death penalty, finding that the instructions to the jury regarding balancing aggravating and mitigating factors were misleading.¹⁸¹ In this opinion, the court reviewed the extensive psychological and social history put forth by mental health experts at trial, including detailed stories about Ms. Nelson’s ostracization based on her gender, the violence she experienced, as well as depression, anxiety, and transition.¹⁸²

The court found that the jury did not properly consider Ms. Nelson’s psychological and emotional history, and reversed the death penalty and ordered a third penalty trial.¹⁸³ Ms. Nelson was transported off death row, where she had been the only woman inmate, and was transferred to a women’s correctional facility where she received an “Inmate of the Month” award for helping other women in the law library.¹⁸⁴ The New Jersey Supreme Court re-abolished the death penalty in 2007 before Ms. Nelson’s third

tation (i.e. “feminine” men are presumed gay and “masculine” women presumed lesbians); second, gay people who are also gender-nonconforming face additional stigma and are often treated worse than more gender-conforming folks.

¹⁷⁷ See *State v. Nelson*, 173 N.J. 417, 429–32 (2002).

¹⁷⁸ See *State v. Nelson*, 155 N.J. 487, 511 (1998).

¹⁷⁹ *Nelson*, 173 N.J. at 432–33.

¹⁸⁰ *Id.* at 433–34.

¹⁸¹ *Id.* at 446, 459–60.

¹⁸² See *id.* at 434–40.

¹⁸³ See Laura Mansnerus, *Briefing: The Courts; Death Sentence Reprieve*, N.Y. TIMES (Aug. 4, 2002), <http://www.nytimes.com/2002/08/04/nyregion/briefing-the-courts-death-sentence-reprieve.html>; Laura Mansnerus, *Top Court Again Rejects Sentence of Death*, N.Y. TIMES (July 31, 2002), <http://www.nytimes.com/2002/07/31/nyregion/top-court-again-rejects-sentence-of-death.html>.

¹⁸⁴ See *Double Cop Killer Honored as ‘Inmate of the Month,’* NJLAWMAN.COM (Oct. 30, 2005, 11:56 PM), <http://www.njlawman.com/Editorials/Inmate-of-the-Month.htm>.

trial took place.¹⁸⁵ While evidence about Ms. Nelson's gender identity was cited as contributing to commuting her sentence, it can easily be argued that the New Jersey Supreme Court's reluctance to kill Leslie Ann Nelson had less to do with its concern for a transgender woman with a history of abuse, trauma, and depression, and more with its growing inclination to abolish the death penalty entirely.

B. The "Bad"—The "Deviant" Archetype

A much more significant number of cases suggest that being openly or visibly gay, queer, or transgender in criminal court makes it *more* likely that a person will receive a harsher sentence. One example is the case of Calvin Burdine, a white gay man convicted of capital murder in a trial that lasted less than thirteen hours.¹⁸⁶ The most notorious aspect of the case was the homophobia Burdine suffered at the hands of every institutional actor in the courtroom, including his defense attorney who failed to object to multiple homophobic comments by the prosecutor, the most of egregious of which was in his closing statement to the jury: "[s]ending a homosexual to the penitentiary certainly isn't a very bad punishment for a homosexual, and that's what he's asking you to do."¹⁸⁷

Another example involved an African-American lesbian, Wanda Jean Allen, who was convicted of murdering her partner and sentenced to death.¹⁸⁸ At trial, the prosecutor informed the jury that Allen "wore the pants" and was "the man" in the family; he called the deceased's mother in to testify that Allen spelled her

¹⁸⁵ See Keith B. Richburg, *N.J. Approves Abolition of Death Penalty; Corzine to Sign*, WASH. POST (Dec. 14, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/12/13/AR2007121301302.html>.

¹⁸⁶ See *Burdine v. State*, 719 S.W.2d 309, 313 (Tex. Crim. App. 1986) (Burdine was convicted of killing his ex-lover after attempting to get money from him and stealing his ATM card); Michael B. Shortnacy, *Guilty and Gay, a Recipe for Execution in American Courtrooms: Sexual Orientation as a Tool for Prosecutorial Misconduct in Death Penalty Cases*, 51 AM. U. L. REV. 309, 347 (2001); Richard Goldstein, *Queer on Death Row*, VILLAGE VOICE (Mar. 13, 2001), <http://www.villagevoice.com/2001-03-13/news/queer-on-death-row/>.

¹⁸⁷ Shortnacy, *supra* note 186, at 347. Burdine applied for habeas corpus relief and listed ten issues in his application, including the prosecutor's homophobic remarks; but the district court never reached that point—it granted habeas relief on the ground that Burdine's attorney had slept through "substantial portions" of the trial. *Id.* at 348–49.

¹⁸⁸ See LaDonna Childress, *To Fulfill a Promise: Using Canons 3B(5) and 3B(6) of the Judicial Code of Conduct to Combat Sexual Orientation Bias Against Gay and Lesbian Criminal Defendants*, 34 SW. U. L. REV. 607, 609 (2005).

middle “G-E-N-E,” not the feminine version “J-E-A-N.”¹⁸⁹ The appeals court approved the use of this evidence, saying it helped the jury to understand the relationship of the parties, and was evidence of Allen’s aggressive nature.¹⁹⁰ The district court, in considering her habeas petition, found that even if the statements by the prosecutor were improper, they did not unduly influence the jury’s decision or lead to an unfair trial. Allen was executed by the state of Oklahoma in 2001.¹⁹¹

In another case, a Latina lesbian, Bernina Mata, was charged with and convicted of murdering a man she had met that night at a bar.¹⁹² Mata claimed she acted in self-defense, but the prosecutor proffered evidence that “she was a ‘hard core’ lesbian, and that a lesbian was more likely to kill a man who made an unwanted pass at her than a heterosexual woman.”¹⁹³ He further stated that “[a] normal heterosexual woman would not be so offended by such conduct as to murder.”¹⁹⁴ The state brought ten witnesses to testify that Mata was a lesbian to support its theory.¹⁹⁵ Mata was convicted and sentenced to death, but her sentence was commuted to life imprisonment in 2003.

Finally, in a case where New York police officers were accused of physically and sexually assaulting a Haitian immigrant, the defense counsel for one officer claimed in his opening that the internal injuries the victim suffered were actually the result of consensual same-sex anal sex, not police brutality.¹⁹⁶ Critics of the defense spanned from LGBT activists who claimed the defense perpetuated a stereotype about rough or violent gay sex, to critics such as the Rev. Al Sharpton who considered calling the accused gay to be slander and character assassination.¹⁹⁷

C. *The “Different”*

Criminal defendants are undoubtedly discriminated against based on their sexual orientation or gender identity, and also based on their race and class. It is recognized by many that death

¹⁸⁹ *Id.*

¹⁹⁰ Shortnacy, *supra* note 186, at 343–44 (noting that the altercation occurred after a dispute between the two over the deceased’s welfare check).

¹⁹¹ *Id.* at 344.

¹⁹² Joey L. Mogul, *The Dykier, the Butcher, the Better: The State’s Use of Homophobia and Sexism to Execute Women in the United States*, 8 N.Y. CITY L. REV. 473, 484 (2005).

¹⁹³ *Id.* at 485.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ Smith, *supra* note 121, at 107.

¹⁹⁷ *Id.* at 107–08.

penalty sentencing depends on the dehumanization of the defendant; therefore, it is easier for jurors to execute a person of a different race, class, sexual orientation, or gender identity/expression as themselves.¹⁹⁸ The mainstream, white LGBT community, too, tends to distance itself from its members when they are accused of crimes, while rallying publicly around victims of crimes (especially gay white victims). As noted above, Manning has not been hailed as a trans hero. As Abbe Smith puts it, “[b]eing a convicted murderer seems to eclipse one’s membership in the gay community.”¹⁹⁹

In some ways, then, Manning was in a better position for Coombs to have used a controversial defense that, if Manning were a person of color or visibly gender-nonconforming, would likely not have been effective. As a young, white, apparently gender-conforming person in a military uniform, the prosecution (a team of white JAG attorneys, with the lead prosecutor being a white man) and the judge (a white woman) could look at her and relate in some ways. However, Coombs’ use of a GID-diminished capacity defense in a military environment, known for enforcing homogeneity through regulations and violence, and for being institutionally transphobic, made the strategy look less than wise.

CONCLUSION

The ethical issues surrounding the use of negative stereotypical narratives as strategic mitigating factors in criminal defense cases remain complex and disputed. In Pfc. Chelsea Manning’s case, Coombs called attention to Manning’s emotional distress and attributed it to her gender identity, even though that was likely only one aspect of the distress. As there is no whistleblower disorder, GID was a diagnosable cause for Manning’s emotional disturbance. And Coombs used that argument despite perhaps having never talked to another transgender person in his life. However, a savvy defense attorney will always consider the mental health of those she represents. If a person is mentally ill, a defense attorney will likely call attention to that mental illness to show that the person accused was not acting voluntarily, or lacked the requisite intent. Here, the “mental illness” at issue was a highly contested diagnosis that pathologized an oppressed group of people.

The crux of Coombs’s early argument for using GID as a mitigating factor appears to be a commitment to zealous representa-

¹⁹⁸ Mogul, *supra* note 192, at 478.

¹⁹⁹ Smith, *supra* note 121, at 106.

tion.²⁰⁰ However, Coombs made no effort to reach out to trans activists or organizations about his strategies. Further, he has not fully acknowledged how controversial the tactic was, nor has he issued any statements about homophobia and transphobia in the military and how this could affect judgment against Manning.²⁰¹ Despite this, Coombs was not ethically obliged to forgo the defense, or to consult with community groups before doing so. However, the maelstrom around the defense could have been tempered by a public statement similar to the one made during the closing arguments at the Article 32 hearing, acknowledging that GID is not a disorder but that Manning nonetheless experienced emotional distress about her gender identity in the oppressive environment of the military. Such a statement would not likely have quelled all criticism, but it would have at least informed the public that Coombs had done some basic research on trans-related issues, without giving away any crucial information about his defense theory.²⁰²

Coombs *was* ethically obliged to argue zealously for Manning, and to use any defense he believed would help Manning avoid spending the rest of her life locked up in a cage. My endorsement of the defense strategy as ethically sound is contingent, however,

²⁰⁰ Coombs said as much in his first public comments, delivered in December 2012:

[I]t was and still is my belief that Bradley Manning deserves an attorney that is focused on what is happening in the courtroom and only what is happening in the courtroom . . . [The record of trial] will reflect one thing—that we fought at every turn, at every opportunity, and we fought to ensure that Brad received a fair trial. . . . When I'm in the courtroom, I stand up and I look to my right and I see the United States government, with all of its resources, all of its personnel. I see them standing against me and Brad, and I have to admit to you that [that] can be rather intimidating and I was intimidated, especially when the President of the United States says, "Your client broke the law." Especially, when Congress members say, "Your client deserves the death penalty."

Presentation by Bradley's Attorney David Coombs, Transcript and Video, PVT. MANNING SUPPORT NETWORK, <http://www.bradleymanning.org/activism/exclusive-presentation> (last visited Sept. 8, 2013).

²⁰¹ Coombs further distanced himself from the full implications of the early strategy in his interview with the *TODAY Show*: "The stress that he was under was mostly to give context to what was going on at the time . . . It was never an excuse because that's not what drove his actions. What drove his actions was a strong moral compass." See *TODAY: Bradley Manning: I Want to Live as a Woman*, *supra* note 1.

²⁰² This could also have been accomplished, however, by the publication of the transcripts of the hearing. Additionally, it should be noted that Coombs was the one to break the news about Pfc. Manning's preferred gender, name, and pronoun, and he has stated he is committed to ensuring that she will have access to gender-affirming treatment (medical and otherwise) while she is incarcerated awaiting appeal. See *id.* ("Coombs said he is 'hoping' that Fort Leavenworth 'would do the right thing' and provide hormone therapy for Manning. 'If Fort Leavenworth does not, then I'm going to do everything in my power to make sure they are forced to do so.'").

upon the assumption that Manning was not only on-board with this strategy, but that she had an active voice in its creation and implementation. If a person accused does not want to be outed as trans or gay, the defense attorney *must* respect that decision regardless of the outcome on the case.

In addition to ensuring that the person accused approves of the strategy, it is crucial that the potentially negative stereotypes in defense narratives are helpful to the person's case. This may be a nearly impossible determination to make in advance. It is clear from the foregoing that calling attention to a person's sexual orientation or gender identity in the toxic context of a criminal or military courtroom can be extremely damaging. One commentator cites a survey conducted by a Chicago newspaper that found that potential jurors were "more than three times as likely to think they could not be fair or impartial toward a gay or lesbian defendant as toward a defendant from other minority groups, such as blacks, Hispanics, or Asian-Americans."²⁰³ Other commentators are adamantly against the *prosecution* admitting evidence of sexual orientation or gender identity in criminal trials, and specifically in capital trials,²⁰⁴ although this evidence remains fair game for the defense attorney.

As a person not yet practicing as a criminal defense attorney, I am engaging in this debate from a somewhat academic standpoint—however, I have experience working with the queer community and strategizing for transformative social justice, which led me to law school. Grappling with the ethical issues inherent in the work of criminal defense is a crucial process for those of us who remain convinced, through the haze of legal indoctrination, that radical lawyering is possible as a public defender, and that our old notions of social justice don't have to be discarded in this new profession.

²⁰³ Mogul, *supra* note 192, at 479–80.

²⁰⁴ Shortnacy, *supra* note 186, at 356–57.

BECAUSE PARENTS OWE IT TO THEM: UNACCOMPANIED LGBTQ YOUTH ENFORCING THE PARENTAL DUTY OF SUPPORT

Maria Roumiantseva[†]

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*The streets steal stories. Crush the bodies of boys and girls with molars of jagged concrete; tear at tender hearts with incisors of glass shards. I tried to remember who we wanted to be. Where we came from before our names shriveled under the labels of “at risk,” “street involved,” “runaways,” “throwaways,” “trash.” The streets ingest lives. Bodies decompose in the acidic reality of survival. We were swallowed by systems incapable of digesting us.*¹

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¹ Sassafra Lowrey, *KICKED OUT* (2010), <http://www.kickedoutanthology.com/anthology/> (last visited Dec. 3, 2013).

INTRODUCTION

Colloquially, it is termed the “kicked out for coming out epidemic.” Youth are coming out to their parents as lesbian, gay, bisexual, transgender, or questioning (LGBTQ)² at younger ages than ever before.³ Some parents not only support their child but are excited by this discovery of self. Others are uncomfortable at first but grow tolerant and, eventually, affirming of their child’s identity. But “the epidemic” is not referring to these scenarios. There are parents that outright reject their child’s sexual orientation or gender non-conformity. Frightened, threatened, angered, or disgusted by their child’s disclosure, some try to *repair* the child through therapy.⁴ Others badger, belittle, or beat the youth.⁵ Finally, there are the vectors of “the epidemic.” There are parents that turn the home into such an unbearably cruel place that the child runs away; these parents present the choice: follow my rules or go. Other parents simply demand the child to leave.

LGBTQ youth are disproportionately represented among unaccompanied homeless youth.⁶ Homelessness can also be dispro-

² I use the acronym LGBTQ throughout this paper to refer to lesbian, gay, bisexual, transgender, and questioning youth. When a source has used an alternative acronym or specific term, I have noted it. “Lesbian” refers to a woman or girl who has enduring romantic, physical, and/or sexual attraction for other females. “Gay” refers to a person who is romantically, physically, and sexually attracted to other people of the same gender; it may be used to refer to men and boys specifically. “Bisexual” refers to a person who is romantically, physically, and sexually attracted to people who are male or female. “Transgender” is an umbrella term encompassing people whose gender identity does not match their sex assigned at birth. The term includes people who self-identify as transgender or are perceived to be transgender. “Questioning” refers to a person who is exploring their sexual orientation and/or gender identity.

³ LGBT youth who worked with The Family Acceptance Project reported coming out, on average, at age 13 and four months. See CAITLIN RYAN, NAT’L CTR. FOR CULTURAL COMPETENCE, HELPING FAMILIES SUPPORT LGBT CHILDREN 1–2 (2009), available at http://nccc.georgetown.edu/documents/LGBT_Brief.pdf. See also NICO SIFERA QUINTANA ET AL., CTR. FOR AMERICAN PROGRESS, ON THE STREETS: THE FEDERAL RESPONSE TO GAY AND TRANSGENDER HOMELESS YOUTH 8–9 (2010), available at http://www.americanprogress.org/wp-content/uploads/issues/2010/06/pdf/lgbtyouth_homelessness.pdf.

⁴ See generally Karolyn Ann Hicks, “Reparative” Therapy: Whether Parental Attempts to Change A Child’s Sexual Orientation Can Legally Constitute Child Abuse, 49 AM. U. L. REV. 505, 513–19 (1999). For more personalized accounts of reparative therapy, see Tyler Talbot, Comment, *Reparative Therapy for Homosexual Teens: The Choice of the Teen Should Be the Only Choice Discussed*, 27 J. JUV. L. 33 (2006).

⁵ See generally Lowrey, *supra* note 1.

⁶ See NICHOLAS RAY, NAT’L GAY & LESBIAN TASK FORCE POL’Y INST. & NAT’L COAL. FOR THE HOMELESS, LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH: AN EPIDEMIC OF HOMELESSNESS 162–66 (2006), available at <http://www.thetaskforce.org/downloads/HomelessYouth.pdf> (providing a detailed list of estimates about the proportion of LGBTQ youth within the homeless youth population, and noting that, although spe-

portionately brutal for these youth. Not only do LGBTQ youth face barriers to assistance that other youth encounter, such as a lack of services and general distrust of adult service providers, but they are also plagued with the risk of continuing rejection. Parents are not the only entities that reject, and LGBTQ youth can resist services when they perceive them as unsafe or discriminatory toward their sexual orientation and/or gender expression.⁷ Hindered access to services increases the difficulty of securing basic survival needs.

LGBTQ homeless youth advocates have advanced recommendations to increase services and support for these youth.⁸ The recommendations include raising awareness among service providers about the unique struggles LGBTQ youth face, transforming the culture of homeless youth services to be safer for LGBTQ youth, expanding LGBTQ specific services, and working with parents to prevent rejection.⁹ These recommendations must be implemented. Yet advocates must also take guidance from the creative youth they serve and consider alternative options.

One unexplored option is the parental duty of financial support. In New York, parents must provide their children with shelter, food, clothing, and other necessities until the child reaches 21 years of age or the parent-child relationship is legally terminated.¹⁰ Unaccompanied youth who have been rejected by their families because of their actual or perceived sexual orientation or gender

cific research is minimal, estimates about transgender homeless youth are included in general estimates). For a similar, more recent study that does not include transgender identity, see Heather L. Corliss et al., *High Burden of Homelessness Among Sexual-Minority Adolescents: Findings From a Representative Massachusetts High School Sample*, 101 AM. J. OF PUB. HEALTH 1683 (2011), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3154237/pdf/1683.pdf> ("Approximately 25% of lesbian and gay adolescents and 15% of bisexuals reported homelessness compared with just 3% of the exclusively heterosexual adolescents." *Id.* at 1686.).

⁷ See Laura A. Hughes, *Homeless LGBT Youth: Living on the Streets at the Dangerous Intersection of Sexual Orientation, Gender Identity, Race, and Class*, HUFFINGTON POST (Mar. 12, 2012, 3:41 PM), http://www.huffingtonpost.com/laura-a-hughes/homeless-lgbt-youth_b_1338509.html; RAY, *supra* note 6, at 5.

⁸ See N.Y.C. COMM'N ON LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUESTIONING RUNAWAY AND HOMELESS YOUTH, ALL OUR CHILDREN: STRATEGIES TO PREVENT HOMELESSNESS, STRENGTHEN SERVICES, AND BUILD SUPPORT FOR LGBTQ YOUTH 31-42 (2010) [hereinafter N.Y.C. LGBTQ HOMELESS YOUTH REPORT], available at http://www.nyc.gov/html/om/pdf/2010/pr267_10_report.pdf. This commission consists of LGBTQ homeless youth service providers and government officials who make broad policy recommendations and specific strategies to address LGBTQ youth homelessness in New York City. See also LAMBDA LEGAL ET AL., NATIONAL RECOMMENDED BEST PRACTICES FOR SERVING LGBT HOMELESS YOUTH (2009), available at <http://www.f2f.ca.gov/res/pdf/NationalRecommended.pdf>.

⁹ See LAMBDA LEGAL ET AL., *supra* note 8.

¹⁰ N.Y. FAM. CT. ACT § 413 (McKinney 2013).

identity, could enforce this duty against their parents. Court enforcement can provide youth with the financial resources to obtain their basic needs. Additionally, enforcement could incentivize a transformation in the parent-child relationship.

Section II of this paper discusses the unique challenges LGBTQ youth face during episodes of homelessness.¹¹ This section emphasizes the difficulty youth face in securing their basic needs because of hindered access to homeless and social services, as well as a general lack of financial resources.¹² Section III explains the legal duty parents have to financially support their child, which persists despite a breakdown in the parent-child relationship. This section focuses specifically on New York law and analyzes the defense of constructive emancipation which parents could raise to avoid liability. Section IV explores what enforcement by LGBTQ unaccompanied youth would look like and exposes the inapplicability of constructive emancipation to these cases. Section V rebuts the expected critiques, and maintains that this proposal is a supplement to, rather than a replacement of, the already-existing recommendations to improve services and supports for LGBTQ unaccompanied youth.

I. KICKED OUT FOR COMING OUT

*“No matter what estimates are used, it is accepted that homelessness among youth is substantial and widespread throughout the nation.”*¹³

New York State defines a homeless youth as a person younger than 21 years of age who is in need of services and without shelter where supervision and care are available.¹⁴ Unaccompanied youth are those who are homeless on their own. Federal law defines homeless youth as youth who are not in the physical custody of a

¹¹ See *cf.* JAN MOORE, NAT’L CTR. FOR HOMELESS EDUC., UNACCOMPANIED AND HOMELESS YOUTH: REVIEW OF LITERATURE 1995–2005, at 8 (2005), available at http://center.serve.org/nche/downloads/uy_lit_review.pdf (stating that more than 22% of youth with foster care experience are homeless for one or more days after turning 18). This article focuses on the initial adoptive or biological relationship, while recognizing that a major subset of youth is leaving foster care and juvenile justice systems.

¹² See NAT’L COAL. FOR THE HOMELESS, HOMELESS YOUTH: NCH FACT SHEET #13, at 1–2 (2007), available at <http://www.nationalhomeless.org/publications/facts/youth.pdf> (summarizing that the causes of homelessness include three interrelated categories of family problems, economic problems, and residential instability).

¹³ MOORE, *supra* note 11, at 5.

¹⁴ Runaway and Homeless Youth Act of 1978, N.Y. EXEC. LAW §532-a(2) (McKinney 2013).

parent or guardian.¹⁵ This population encompasses runaway¹⁶ and throwaway youth.¹⁷ In data collected from major cities, unaccompanied youth comprise approximately 1% of the sheltered homeless population.¹⁸ However, this number only considers young people ages 5 to 17.¹⁹ Youth ages 18 to 21 fall into the next age range, 18 to 34, which constitutes approximately 25% of the homeless population in major cities.²⁰

Generating accurate statistics about youth homelessness is difficult. Federal, state, and local governments differ in their definitions of *homeless youth*.²¹ Additionally, unaccompanied youth are difficult to research. One surveyor of homeless youth research and literature conducted between 1995 and 2005 found that accurate estimates about this population are particularly difficult to make because these youth are highly transient, distrust adults, and may not be able to consent to a research study.²² Furthermore, researchers often look at sheltered populations to quantify homelessness, though youth do not utilize homeless services universally.²³ Determining the precise numbers of unaccompanied LGBTQ

¹⁵ McKinney-Vento Homeless Assistance Act of 1987, 42 U.S.C. § 11434a(2), (6) (2012).

¹⁶ See Ira Colby, *Runaway and Throwaway Youth: Time for Policy Changes and Public Responsibility*, J. OF APPLIED RES. ON CHILD.: *Informing Pol'y for Child. at Risk* 3 (2011), available at <http://digitalcommons.library.tmc.edu/cgi/viewcontent.cgi?article=1025&context=childrenatrisk>. The U.S. Department of Education defines “runaway youth” as young people who have left the home without parental permission and stay away overnight. See *id.* Traditional definitions of *runaway* problematically imply that youth had a choice to stay or leave. See *id.*

¹⁷ *Id.* at 3 (citing the 1001 NISMART report’s definition of *throwaway youth* as young people who are either told to leave home by a parent or other household adult, or are away from home and prevented from returning, with no adequate alternative care arranged for them and they stayed outside the household overnight). See also Moore, *supra* note 11, at 3 (positing that a broader definition of *throwaway youths* includes those who have been abandoned or deserted by their parents).

¹⁸ U.S. CONF. OF MAYORS-SODEXHO, HUNGER AND HOMELESSNESS SURVEY: A STATUS REPORT ON HUNGER AND HOMELESSNESS IN AMERICA’S CITIES: A 23-CITY SURVEY 13–14 (2007), available at <http://usmayors.org/hhsurvey2007/hhsurvey07.pdf>.

¹⁹ *Id.* at 15.

²⁰ *Id.*

²¹ PATRICIA JULIANELLE ET AL., NAT’L LAW CTR. ON HOMELESSNESS & POVERTY, ALONE WITHOUT A HOME: A STATE-BY-STATE REVIEW OF LAWS AFFECTING UNACCOMPANIED YOUTH 3–16 (2003), available at http://www.maine.gov/education/homeless_ed/documents/alonewithouthome.pdf (listing state definitions, if they exist, for *homeless* and *runaway youth*). See also RAY, *supra* note 6, at 9 (“A number of different definitions of ‘youth’ and ‘homeless’ are used by government agencies and . . . this type of inconsistency makes it difficult to optimize service delivery or determine the level of funds really needed to serve the population.”).

²² MOORE, *supra* note 11, at 6.

²³ *Id.* (stating that there is over reliance on information from shelters and agencies in research on homeless and unaccompanied youth).

youth is an even more muddled task. Sexual orientation and gender identity are inherently fluid, especially for adolescents.²⁴ Not all youth who practice same-sex sexual relations identify as lesbian, gay, or bisexual, just as gender non-conformity is not indicative of a transgender identity. These fluid aspects of identity make quantifying “LGBTQ homeless youth” difficult to study.

The last federal count of runaway and throwaway youth was done in 1999.²⁵ The Office of Juvenile Justice and Delinquency Prevention found that approximately 1.7 million youth under the age of 18 had had a runaway or throwaway experience in 1999.²⁶ A 2007 study found approximately 3,800 unaccompanied youth in New York City.²⁷ Though they comprise only an estimated 2% to 7% of the general youth population, between 20% and 40% of homeless youth identify as lesbian, gay, bisexual, or transgender.²⁸ These extraordinary numbers are on the rise.²⁹

The causes of youth homelessness are as varied as the youth themselves. Though some youth leave their homes by choice, many do not.³⁰ Economic problems, residential instability, and family conflict—including physical and psychological abuse—account for most episodes of homelessness among youth.³¹ These long-stand-

²⁴ J. Lauren Turner, *From the Inside Out: Calling on States to Provide Medically Necessary Care to Transgender Youth in Foster Care*, 47 FAM. CT. REV. 552, 553–54 (2009).

²⁵ See HEATHER HAMMER ET AL., U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, NATIONAL INCIDENCE STUDIES OF MISSING, ABDUCTED, RUNAWAY, AND THROWN AWAY CHILDREN (NISMART) 1–2 (2002), available at <https://www.ncjrs.gov/pdffiles1/ojjdp/196469.pdf>.

²⁶ *Id.* at 5. This is a dated statistic. In 2010, the Office of Juvenile Justice and Delinquency Prevention initiated the NISMART-3 process to gather more recent statistics. See Request for Proposals, U.S. DEP’T OF JUSTICE, OJJDP FY 2010 National Incidence Studies of Missing, Abducted, Runaway, and Thrownaway Children 3, OMB No. 1121-0329 (2010), available at <http://www.ojjdp.gov/grants/solicitations/FY2010/NISMART3.pdf>. But cf. NAT’L RUNAWAY SWITCHBOARD, <http://www.1800runaway.org/> (last visited Jan. 19, 2013) (estimating that between 1.6 and 2.8 million youth run away annually in the United States).

²⁷ LANCE FREEMAN & DARRICK HAMILTON, EMPIRE STATE COAL. FOR YOUTH & FAMILY SERVS., A COUNT OF HOMELESS YOUTH IN NEW YORK CITY 7 (2008), available at http://www.citylimits.org/images_pdfs/pdfs/HomelessYouth.pdf.

²⁸ RAY, *supra* note 6, at 1. See also LAMBDA LEGAL ET AL., *supra* note 8, at 1 (estimating percentage of LGBT youth in the general population ranges between 4% and 10%).

²⁹ RAY, *supra* note 6, at 12.

³⁰ See *Three Rules for Working with Unaccompanied Youth*, NAT’L CLEARINGHOUSE ON FAMILIES & YOUTH, <http://ncfy.acf.hhs.gov/features/serving-youth-economic-down-turn/three-rules-working-unaccompanied-youth> (last visited Dec. 1, 2013). See also RAY, *supra* note 6, at 16; Rosemarie Buchanan, *Young, Homeless, and Gay*, 22 HUM. RTS. 42, 49 (1995) (arguing that in connection with family rejection, LGBT youth may be pulled to the streets as “the road toward the realization of self”).

³¹ MOORE, *supra* note 11, at 6–7.

ing issues are often interwoven into the lives of young people who eventually experience homelessness.³² LGBTQ youth are not spared these catalysts. However, lesbian and gay youth are more likely than their heterosexual counterparts to *actually* leave when confronted with these issues.³³ Additionally, LGBTQ youth are disproportionately represented among homeless youth because of family rejection of their actual or perceived sexual orientation or gender identity.

Though perhaps antithetical to the social understanding of the parent-child relationship, “parental love is not necessarily enduring.”³⁴ Parents can and do reject their children.³⁵ Family rejection denotes the negative, adverse, punitive, and traumatic reactions families have toward their child’s actual or perceived LGBTQ status.³⁶ Family rejection can include name-calling, blaming the child for being LGBTQ, forcing the child to keep their orientation or identity a secret, physical violence, isolation from friends and family, denying LGBTQ-related care and services, and controlling dress and behavior for gender appropriateness.³⁷ Family rejection elevates mental and physical health risks for LGBTQ children.³⁸ The U.S. Department of Health and Human Services estimates that approximately 26% of LGBTQ homeless youth were forced to leave

³² See Ilse Nehring, “Throwaway Rights”: Empowering a Forgotten Minority, 18 *WITTIER L. REV.* 767, 770 (1997).

³³ See Bryan N. Cochran et al., *Challenges Faced by Homeless Sexual Minorities: Comparison of Gay, Lesbian, Bisexual, and Transgender Homeless Adolescents with Their Heterosexual Counterparts*, 92 *AM. J. OF PUB. HEALTH* 773, 774 (2002), available at <http://ajph.apublications.org/doi/pdf/10.2105/AJPH.92.5.773>. This study was designed to “identify the risks faced by GLBT youth and to determine whether these risks transcend those of their heterosexual counterparts,” *id.* at 773, but did not differentiate between gender non-conforming and gender-conforming or cis-gendered homeless youth, indicating that the authors may have conflated the risks faced by gender non-conforming youth with risks faced by youth with a non-heterosexual sexual orientation. Most data was based on “self-reporting” and most youth identified as bisexual. *Id.* at 776. Thus, the results may not necessarily extend to youth who exclusively identify as gay, lesbian, or transgender.

³⁴ Nehring, *supra* note 32, at 769.

³⁵ MOORE, *supra* note 11, at 7; see also N.Y.C. LGBTQ HOMELESS YOUTH REPORT, *supra* note 8, at 17–18 (stating that parents with religious attitudes that condemn homosexuality and gender non-conformity may be likely to reject their child).

³⁶ Caitlin Ryan, et al., *Family Rejection as a Predictor of Negative Health Outcomes in White and Latino Lesbian, Gay, and Bisexual Young Adults*, *PEDIATRICS* 2009 at 346, 350, available at <http://pediatrics.aappublications.org/content/123/1/346.full.pdf+html>.

³⁷ RYAN, *supra* note 3, at 5.

³⁸ See *id.*; see also Carl Siciliano, *A Call to Cardinal Dolan to Stop Endangering LGBT Youth: An Open Letter*, *HUFFINGTON POST*, Mar. 20, 2012, available at http://www.huffingtonpost.com/carl-siciliano/cardinal-dolan-lgbt-youth_b_1363153.html (reporting that youth who are rejected by their families are “eight and a half times more likely to be suicidal than those whose families accept them”).

their families as a result of revealing their sexual orientation or gender identity.³⁹

Once homeless, a person is not simply without stable shelter. Homelessness is accompanied by a loss of “community, routines, possessions, privacy, and security.”⁴⁰ There are social, mental, emotional, and physical consequences of homelessness. LGB youth experience “greater vulnerability to physical and sexual victimization . . . in comparison with homeless heterosexual adolescents.”⁴¹ Most significant is the impact homelessness has on an individual’s ability to survive. Generally, youth have not had the experience of living independently before homelessness.⁴² Once homeless, youth have to secure their basic needs and plan for the future when “their capacity for rational thought and decision making is inconsistent and still developing.”⁴³ The ability to obtain even a minimum wage or short-term job can be hindered by age, lack of housing, and lack of identification, as well as minimal education and work experience.⁴⁴ Unaccompanied youth face a high risk of living in absolute poverty with no guaranteed route to financial stability. Between 120,000 and 240,000 LGBTQ youth are forced into “abject destitution.”⁴⁵

The financial consequences of homelessness can be somewhat mitigated when youth have access to homeless services. In New York City, homeless youth service providers help youth with housing, as well as assistance with services.⁴⁶ Though informal arrangements are generally set up between youth, unaccompanied youth generally have few other options to obtain food, shelter, and cloth-

³⁹ Turner, *supra* note 24, at 554 (citing PAUL GIBSON, U.S. DEP’T OF HEALTH AND HUMAN SERV., REPORT OF THE SECRETARY’S TASK FORCE ON YOUTH SUICIDE 110, 112 (1989)).

⁴⁰ ELLEN L. BASSUK & STEVEN M. FRIEDMAN, NAT’L CHILD TRAUMATIC STRESS NETWORK HOMELESSNESS AND EXTREME POVERTY WORKING GROUP, FACTS ON TRAUMA AND HOMELESS CHILDREN 1 (2005), *available at* http://www.nctsnet.org/sites/default/files/assets/pdfs/Facts_on_Trauma_and_Homeless_Children.pdf.

⁴¹ See Cochran, *supra* note 33, at 775 (LGB is used here because of the limited scope of the study—only one person identified as transgender, while 84% identified as bisexual).

⁴² NAT’L ALLIANCE TO END HOMELESSNESS, FUNDAMENTAL ISSUES TO PREVENT AND END YOUTH HOMELESSNESS: BRIEF NO. 1 2 (2006), *available at* http://www.endhomelessness.org/files/1058_file_youth_brief_one.pdf. *But see* RAY, *supra* note 6, at 20–21 (discussing how dysfunctional family relationships led many homeless youth to become highly independent before eventually leaving the home).

⁴³ NAT’L ALLIANCE TO END HOMELESSNESS, *supra* note 42, at 3.

⁴⁴ *Id.* at 2.

⁴⁵ Siciliano, *supra* note 38.

⁴⁶ N.Y.C. LGBTQ HOMELESS YOUTH REPORT, *supra* note 8, at 23.

ing, among other necessities.⁴⁷ Unfortunately, unaccompanied youth do not have equal access opportunities to these services.

LGBTQ youths' ability to access homeless services depends on whether the service provider is providing *safe* services. Access can be impeded by the issues homeless youth generally face in accessing services,⁴⁸ compounded by problems unique to LGBTQ youth, such as a service provider's blatant or subtle demonstrations of homophobia, transphobia,⁴⁹ racism, or discrimination based on age, mental health and ability, and physical ability. For example, transgender youth, particularly those of color, are prevented from accessing services when their identification documents do not match their gender presentation or expression, just as much as they are by the well-documented harassment and physical assaults they risk in shelters.⁵⁰ If LGBTQ youth are prevented from accessing safe services to obtain their basic needs, then these services are not viable options for all youth.

When financial instability and hindered access to services prevent youth from obtaining their basic needs, alternative, and dangerous, survival strategies are the last option.⁵¹ Youth may begin participating in the "street economy," which includes sex work, selling drugs, panhandling, shoplifting, mugging, and selling stolen goods.⁵² As one homeless youth reported: "[Y]ou have to make a living somehow. And if you really truly believe that you can't do it in a legal fashion, then you'll do anything you have to do in order to make money."⁵³ Providers working with LGBTQ youth substantiate findings that LGBTQ youth face an increased risk of engaging in survival sex.⁵⁴

⁴⁷ NAT'L COAL. FOR THE HOMELESS, *supra* note 12, at 2.

⁴⁸ *Id.* ("Few homeless youth are housed in emergency shelters as a result of lack of shelter beds for youth, shelter admission policies, and a preference for greater autonomy.").

⁴⁹ RAY, *supra* note 6, at 5; LAMBDA LEGAL ET AL., *supra* note 8, at 2.

⁵⁰ N.Y.C. LGBTQ HOMELESS YOUTH REPORT, *supra* note 8, at 16; *see also* RAY, *supra* note 6, at 59.

⁵¹ Marya Viorst Gwadz et al., *The Initiation of Homeless Youth into the Street Economy*, 32 J. OF ADOLESCENCE 357, 358–59 (2009) (examining the survival strategies of homeless youth and their initiation into the street economy).

⁵² *Id.* at 358. Homeless youth begin participating in the street economy for several reasons, including obstacles to legal employment, the perceived benefits of the street economic activities, immediate economic need, as well as feeling rejected or excluded by society at large. Youth who were studied identified the street economy as normative and the formal economy as foreign, which the researchers believe to be another inhibitor to stable and formal employment.

⁵³ *Id.* at 367.

⁵⁴ *Petition from The Ali Forney Center et al. to Governor Cuomo, the New York State Legislature, and Mayor Bloomberg*, THE ALEY FORNEY CTR., available at <http://www.aliforney>

II. THE PARENTAL DUTY TO SUPPORT THE CHILD

*“Wherever I look, I see signs of the commandment to honor one’s parents and nowhere of a commandment that calls for the respect of a child.”*⁵⁵

At English common law, the duty to support the child was a “principle of natural law.”⁵⁶ Children were entitled only to that which they received by their parents’ grace, and could not enforce this moral duty.⁵⁷ Seventeen-year-old Frieda Huke’s unsuccessful action against her father, William, for maintenance and support, exemplifies the use of this common law principle by American courts.⁵⁸ In 1890, William, a wealthy business owner in St. Louis, forced Frieda out of his home without money or any provision for her care. She was left impoverished, with no means of survival. Due to her “youth, sex and lack of education and experience,” she was unable to secure food and shelter, except that which she received through charity.⁵⁹ Frieda tried to enforce her “right to a just, adequate and suitable provision for her wants in the premises” against her father.⁶⁰ The St. Louis Court of Appeals, Missouri, held that such an action could not be sustained because, at common law, the duty to provide for the maintenance of a child was left “to the natural feelings of the parents,” and was therefore unenforceable in an action by a child.⁶¹ Courts rarely diverted from this common law

center.org/?fuseaction=cms.page&id=1014 (last visited Nov. 15, 2013); see also Siciliano, *supra* note 38; Laura A. Hughes, *Youth Homelessness Moves Forward as a Major LGBTQ Issue*, HUFFINGTON POST (Jan. 21, 2013), available at http://www.huffingtonpost.com/laura-a-hughes/homeless-lgbyouth_b_1333732; JAIME M. GRANT, ET AL., INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 3, 7 (table) (2011), available at http://www.thetaskforce.org/reports_and_research/ntds. Of the transgender and gender non-conforming respondents to the National Transgender Discrimination Survey, 16% reported that they had been compelled to work in the underground economy for income (which includes sex work), and of those who had been rejected by their families, 19% were engaged in sex work.

⁵⁵ ALICE MILLER, FOR YOUR OWN GOOD: HIDDEN CRUELTY IN CHILD-REARING AND THE ROOTS OF VIOLENCE 263 (Hildegard Hannum trans., Sunkhamp Verlag 1st ed. 1980) (2003).

⁵⁶ Drew D. Hansen, *The American Invention of Child Support: Dependency and Punishment in Early American Child Support Law*, 108 YALE L.J. 1123, 1133 (1999) (citing WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 435 (1898)); JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA 287 (2011) (discussing how the financial obligation to support *illegitimate* children has been enforced in America through “bastardy laws” since the early 17th century).

⁵⁷ Nehring, *supra* note 32, at 778 (citing BLACKSTONE, *supra* note 56, at 447).

⁵⁸ Huke v. Huke, 44 Mo. App. 308 (Mo. Ct. App. 1891).

⁵⁹ *Id.* at 311.

⁶⁰ *Id.*

⁶¹ *Id.* at 315.

principle and then only if there was a specific law mandating such enforcement⁶² or a contract with the parent authorizing such enforcement.⁶³

Today, in New York, parents have a legal duty to financially support their child.⁶⁴ This duty is considered “one of the oldest and firmest pillars of New York family law.”⁶⁵ Pursuant to a court order or valid agreement between the parties, parents with sufficient means must pay a reasonable and fair sum for the care, maintenance, and education of any un-emancipated child under 21 years of age.⁶⁶ The amount to be paid is determined by the court.⁶⁷ Support payments provide for the child’s necessary “shelter, food, clothing, care, medical attention, expenses of confinement, the expense of education, payment of funeral expenses, and other proper and reasonable expenses.”⁶⁸ Although child support is typically understood in the context of a divorce,⁶⁹ the obligation is not from non-custodial parent to the custodial parent, but from the parent to the child.⁷⁰ This is important because child support obligations can be enforced whether the parents’ relationship is intact, or if the parents are separated, or even if the parents never maintained a relationship.⁷¹

There are important nuances associated with this duty. First, unless an agreement expressly stating otherwise is made, the parent is only liable until the child turns 21.⁷² Second, parents are only liable for a reasonable and fair sum.⁷³ To determine the sum, courts will consider the child’s reasonable needs, the parent’s ability to pay, and how the standardized child support guidelines ap-

⁶² *Id.* at 313 (“[I]f any popish parent should refuse to allow his Protestant child a fitting maintenance, with a view to compel him to change his religion, the lord chancellor should, by order of the court, constrain him to do what is just and reasonable [I]f Jewish parents should refuse to allow their Protestant children a fitting maintenance, suitable to the fortune of the parents, the lord chancellor, on complaint, might make such order as he should see proper.”).

⁶³ Nehring, *supra* note 32, at 778 (citing BLACKSTONE, *supra* note 56, at 420 nn.7–9).

⁶⁴ N.Y. FAM. CT. ACT § 413 (McKinney 2013).

⁶⁵ 11 ALAN D. SCHEINKMAN, WEST’S NEW YORK PRACTICE SERIES, NEW YORK LAW OF DOMESTIC RELATIONS § 16:1 (2d ed. 2011).

⁶⁶ N.Y. FAM. CT. ACT § 413(1)(a)-(2).

⁶⁷ *Id.* § 413(1)(a).

⁶⁸ *Id.* § 416.

⁶⁹ Nehring, *supra* note 32, at 780.

⁷⁰ *Id.*

⁷¹ 11 SCHEINKMAN, *supra* note 65, § 16:1.

⁷² N.Y. FAM. CT. ACT § 413; *see also* Hirsch v. Hirsch, 142 A.D.2d 138, 140 (2d Dep’t 1988).

⁷³ N.Y. FAM. CT. ACT § 413(1)(a).

ply.⁷⁴ Third, numerous entities can enforce the duty. These include the custodial parent,⁷⁵ a third party,⁷⁶ or a social services agency.⁷⁷ New York allows youth to bring independent action against a parent for support.⁷⁸ When a custodial parent or third party cannot or will not bring an action to enforce the parental duty of support, a child can bring an independent enforcement action.⁷⁹

To bring an action against their parent for support, the youth must be un-emancipated.⁸⁰ Emancipation denotes the legal adulthood of a young person, where there is a “surrender and renunciation of the correlative rights and duties concerning the care, custody, and earnings of a child.”⁸¹ Generally, emancipation results when the child reaches the age of majority, marries, or joins the armed forces.⁸² Additionally, a court can emancipate a minor that is of a minimum age, lives apart from her parents, handles her own affairs, and can support herself financially.⁸³

When the court deems a child emancipated, the parental duty to support the child terminates.⁸⁴ The child’s previous dependency on a parent is not a determinative factor in finding that there is a continuing obligation of support.⁸⁵ This is in stark contrast to a divorce action, where courts may look at the dependency of one spouse on the other during the marriage to justify continued support.⁸⁶ Importantly, the duty of support extends in special situa-

⁷⁴ N.Y. DOM. REL. LAW § 240(1)(f) (McKinney 2012); N.Y. FAM. CT. ACT § 413(1)(f); Comm’r of Soc. Servs. *ex rel.* *Wandel v. Segarra*, 78 N.Y.2d 220, 226 (1991). The Guidelines provide the courts with a method for calculating payment for the basic needs of the child, such as shelter, food, and clothing, and the resulting payment can be modified to include “add-ons” such as health care, child-care, and educational expenses. 11 SCHEINKMAN, *supra* note 65, § 16:12.

⁷⁵ 11 SCHEINKMAN, *supra* note 65, § 16:51. Though traditionally the father was only chargeable for support, in 1979 the Supreme Court of the United States held that support laws could no longer discriminate on the basis of the gender of the parent. *See generally* *OTT v. OTT*, 440 U.S. 268, 281–82 (1979).

⁷⁶ 46 N.Y. JUR. 2D *Domestic Relations* § 1013 (2012).

⁷⁷ N.Y. FAM. CT. ACT § 235.

⁷⁸ *Wakefield v. Wakefield*, 84 A.D.3d 1256 (2d Dep’t. 2011) (ruling that 18-year-old could maintain independent action against mother for child support).

⁷⁹ *Id.*

⁸⁰ N.Y. FAM. CT. ACT § 413(1)(b)(2).

⁸¹ BLACK’S LAW DICTIONARY 468 (9th ed. 2010) (definition for “emancipation”).

⁸² 45 N.Y. JUR. 2D *Domestic Relations* § 576 (2012); 46 N.Y. JUR. 2D *Domestic Relations* § 907 (2012).

⁸³ 46 N.Y. JUR. 2D *Domestic Relations* § 907; JULIANELLE, *supra* note 21, at 63–73 (discussing state law on emancipation).

⁸⁴ 11 SCHEINKMAN, *supra* note 65, § 16:50. Emancipation may be reversible.

⁸⁵ Nehring, *supra* note 32, at 800.

⁸⁶ *Id.*

tions, such as where the young person receives public assistance.⁸⁷ The duty is prolonged to protect society's resources.⁸⁸

In 1979, the New York Court of Appeals established "constructive emancipation," as a parental defense to a child support enforcement action.⁸⁹ The Court held that when a "minor of employable age and in full possession of her faculties, voluntarily and without cause, abandons the parent's home against the will of the parent and for the purpose of avoiding parental control, she forfeits her right to demand support."⁹⁰ Constructive emancipation is a limited defense.⁹¹ The party asserting emancipation bears the burden of proof.⁹² The court will only relieve parents of their duty to support "under extreme circumstances," where the actions and behavior of the child toward the parent have been egregious.⁹³ This is in part because courts are cognizant of the child's emotional instability and immaturity, and are very hesitant to penalize a youth by withholding necessary support.⁹⁴ Additionally, courts are cautious in burdening taxpayers with child support.⁹⁵ However, courts are also hesitant to unfairly burden the parent with underwriting the lifestyle the child has chosen against the parent's reasonable wishes.⁹⁶

Whether the child has been constructively emancipated de-

⁸⁷ 46 N.Y. JUR. 2d *Domestic Relations* § 912.

⁸⁸ *Id.* § 907.

⁸⁹ *Id.* Constructive emancipation is also called "emancipation by conduct," Wisselman & Talassazan, *infra* note 93, at 1, or the "abandoned parent doctrine." 11 SCHEINKMAN, *supra* note 65, § 16:51. Cases on constructive emancipation are generally set in the context of a post-divorce family, where one parent is using constructive emancipation as a defense to terminate their duty of support.

⁹⁰ *Roe v. Doe*, 29 N.Y.2d 188, 192 (1971).

⁹¹ Jerome A. Wisselman, & Eyal Talassazan, *Constructive Emancipation: Conduct of the Child Can Lead to a Termination of Support—But Only Rarely*, N.Y. FAM. L. MONTHLY 1 (Aug. 2008), available at <http://www.lawjaw.com/documents/Aug08NYFam.pdf>. Courts have also made constructive emancipation procedurally difficult to establish. *Id.* at 8. For instance, if the non-custodial parent is seeking to terminate their duty of support to the child, they will have to follow a process that includes several petitions. *Id.* These petitions include an order for visitation so as to establish evidence that the child refuses to see the parent or maintain contact with the parent. *Id.*

⁹² 46 N.Y. JUR. 2d *Domestic Relations* § 907.

⁹³ Wisselman & Talassazan, *supra* note 91, at 8; 11 SCHEINKMAN, *supra* note 65, § 16:51. Egregious behavior toward the parent may be found in a case like *Donnelly v. Donnelly*, 14 A.D.3d 811 (3d Dep't 2005) (holding that a mother no longer had a duty to support her son because he violently abused her, stole from her, refused to attend school, abused alcohol and drugs, was arrested, barricaded his room, and sequestered his girlfriend in his room for days).

⁹⁴ 11 SCHEINKMAN, *supra* note 65, § 16:51.

⁹⁵ *Id.*

⁹⁶ See, e.g., *Parker v. Stage*, 43 N.Y.2d 128, 134 (1977).

pends on the particular circumstances of each case.⁹⁷ The court will only undertake the constructive emancipation analysis after an initial inquiry into the age and capacity of the child.⁹⁸ One legal scholar has provided a three-part test for constructive emancipation in New York.⁹⁹ First, the court will look at the circumstances surrounding the child's alleged abandonment. Constructive emancipation will only apply when the child has left the home voluntarily for the purpose of avoiding parental authority.¹⁰⁰ Voluntary abandonment can be established where the child had a choice and the abandonment was "against the will of the parent."¹⁰¹ A child running away from home can be highly probative of voluntary abandonment, while a parent instructing the child to leave the home or preventing them from returning home is not.¹⁰² The child must also abandon the home for the purpose of escaping parental control, custody, and care. The duty of support does not generally terminate simply because the child was "at odds with her parents or had disobeyed their instructions."¹⁰³ Findings of voluntariness or an intent to escape parental control are probative of constructive emancipation, but not conclusive.¹⁰⁴

Second, the court will look at the parental actions related to the abandonment. The court may find constructive emancipation when the child lacked good cause for leaving the home because the parent was reasonably exercising their right to "control, custody, and care."¹⁰⁵ The duty of support has been cast as reciprocal.¹⁰⁶ In return for support, the parent could "establish and im-

⁹⁷ See Wisselman & Talassazan, *supra* note 91, at 8.

⁹⁸ *Id.* at 1. See also *Hiross v. Hiross*, 224 A.D.2d 662, 662–63 (2d Dep't 1996) (determining that son could not have abandoned his father as a matter of law because the son was only 14 years old); 11 SCHEINKMAN, *supra* note 65, § 16:51 (constructive emancipation cases generally deal with youth close to or over the age of 18).

⁹⁹ Nehring, *supra* note 32, at 795–96.

¹⁰⁰ *Id.*

¹⁰¹ Wisselman & Talassazan, *supra* note 91, at 1.

¹⁰² See *Ontario Cnty. Dep't of Soc. Serv. v. Gail K.*, 269 A.D.2d 847 (4th Dep't 2000) (relieving mother of child support liability where child refused to obey her lawful directives, ran away from home, assaulted police officer, called mother vile names, and was "totally out of control"). *But see Drago v. Drago*, 138 A.D.2d 704, 706 (2d Dep't 1988) (finding father liable for support when he refused to take in his daughter, insisting instead that she attend boarding school or join the military); *Alice C. v. Bernard G.C.*, 193 A.D.2d 97, 108 (2d Dep't 1993) (finding father liable for child support because the son was not found to have "abandoned" the home against his father's will when his father told him during an argument that if he left the house then, he should not return home).

¹⁰³ Wisselman & Talassazan, *supra* note 91.

¹⁰⁴ Nehring, *supra* note 32, at 795–96.

¹⁰⁵ *Id.*

¹⁰⁶ *Roe v. Doe*, 29 N.Y.2d 188, 193 (1971).

pose reasonable regulations for his child.”¹⁰⁷ The parent could use “the child unjustifiably withdraw[ing] from parental control and supervision” to establish emancipation.¹⁰⁸ If emancipated, the child forfeits their right to support while the parent loses the right to “custody, control, services, and earnings of such child.”¹⁰⁹ The court is considering whether, from the objective perspective of a reasonably prudent parent, the parent made reasonable regulations for the child.¹¹⁰ Reasonable regulations include a father requiring his daughter, from the age of 14 to 17, to leave the bedroom door open when she had boys over.¹¹¹ The child’s right to support is severed if the parent neither abused nor made unreasonable demands but the child wanted to live somewhere else against the wishes of her parents.¹¹²

If the youth had good cause to leave or had the approval of the parent, constructive emancipation is not applicable.¹¹³ There is no abandonment when the child is reluctant to see the parent for good cause.¹¹⁴ Alternatively, the parent may be responsible for the child’s alleged abandonment by causing a breakdown in the relationship with the child.¹¹⁵ For instance, a father was still liable for support when he made very little effort to fix the relationship with his child after a violent fight.¹¹⁶ Courts have suggested that if the child were abandoned or abused by the parent, the parent would continue to be liable for support.¹¹⁷ The New York Court of Appeals has suggested that a father “actively drove [his daughter] from her home or encouraged her to leave in order to

¹⁰⁷ *Id.*

¹⁰⁸ Wisselman & Talassazan, *supra* note 91, at 1.

¹⁰⁹ Boley v. Knowles, 905 S.W.2d 86, 88 (Mo. 1995) (citing *Mennemeyer v. Hart*, 221 S.W.2d 960, 962 (1949)). *See also* 59 AM. JUR. 2D *Parent and Child* § 37 (2013).

¹¹⁰ Nehring, *supra* note 32, at 794–95.

¹¹¹ *Chambers v. Chambers*, 742 N.Y.S.2d 725, 726–27 (3d Dep’t 2002).

¹¹² 46 N.Y. JUR. 2D *Domestic Relations* § 912 (2013).

¹¹³ *Monroe Cnty. Dep’t of Soc’y. Serv. ex rel San Filippo v. San Filippo*, 178 A.D.2d 1011, 1012 (4th Dep’t 1991); 45 N.Y. JUR. 2D *Domestic Relations* § 524 (2012). *See also* G. Stephen Neeley, *The Psychological and Emotional Abuse of Children: Suing Parents in Tort for the Infliction of Emotional Distress*, 27 N. KY. L. REV. 689, 711 (2000) (stating that a child may also be able to bring a tort action against the parent for intentional infliction of emotional distress and receive compensation or damages).

¹¹⁴ 11 SCHEINKMAN, *supra* note 65, § 16:51; *Radin v. Radin*, 209 A.D.2d at 396 (2d Dep’t 1994) (no abandonment when father claimed daughter didn’t return phone calls).

¹¹⁵ 11 SCHEINKMAN, *supra* note 65, § 16:51.

¹¹⁶ *Kordes v. Kordes*, 70 A.D.3d 782, 783 (2d Dep’t 2010) (finding that daughter was not constructively emancipated where father was most likely the cause of the alienation).

¹¹⁷ *See, e.g., Parker v. Stage*, 43 N.Y.2d 128, 134 (1977).

have the public assume his obligation of support” would render a different ruling.¹¹⁸

Finally, the court will look to see whether the child has tried to return home. If the child has made a request to return home and the parents have refused, the court is less likely to find that the child is emancipated.¹¹⁹ This factor rests on the idea that the right to support is reciprocal with the right to custody and control. Courts ask this question in cases where it may be possible for the child to return home as a condition of the support.¹²⁰ However, courts recognize that returning home to the parent is not possible in every situation. Where the court determines that the family ties have been irreparably severed, they will not give much weight to this inquiry.¹²¹

III. A NEW LEGAL STRATEGY FOR UNACCOMPANIED LGBTQ YOUTH

“Sometimes like when you don’t have nowhere to go. I’m about to cry right now. You need the money to eat you know. You might want to make money to stay in a hotel in the night because you haven’t slept in so long. You know little things like that. You need to buy a new pair of underwear, a new pair of socks, or something because you don’t want to be stinking, you know. It’s really hard.”¹²²

Youth who have been forced out of their homes due to their sexual orientation or gender identity could enforce the duty to pay child support against their parents. Though the court would have to look at the particular circumstances in each case, generally LGBTQ unaccompanied youth could survive the constructive emancipation defense if it is put forth by the parent. When it is established that the youth is owed support, the court can determine the fair and reasonable sum that parents should pay for their child’s basic needs, including food, shelter, and clothing. If utilized, this recommendation would most likely be limited to specific situations.

A. *Unaccompanied LGBTQ Youth Enforcing the Parental Duty of Support*

When an unaccompanied youth brings an action to enforce

¹¹⁸ *Id.*

¹¹⁹ Nehring, *supra* note 32, at 795–96.

¹²⁰ Drago v. Drago, 138 A.D.2d 704, 706 (2d Dep’t, 1988).

¹²¹ *Id.*

¹²² Gwadz et al., *supra* note 51, at 371 (quoting Jonella, age 19).

the parental duty of support, the parent may claim constructive emancipation to escape liability. LGBTQ youth may be experiencing homelessness for a variety of reasons. This section will focus on applying the duty of support and the constructive emancipation defense to situations where LGBTQ youth have been forced out of the home and where they have run away from the home.

In cases where a youth, younger than 21, has been rejected by their family for coming out as LGBTQ and is subsequently forced out of the home, the parental duty to financially support the child remains intact and enforceable. The constructive emancipation defense is not applicable in these cases. In dicta, it has been said that if the parent instructed the child to leave the home or refused to take them back as they were currently identifying, courts cannot find voluntary abandonment for the purpose of escaping parental control.¹²³ For example, the New York Court of Appeals has suggested that where there is evidence that the parent drove the child from the home or encouraged the child to get public assistance to avoid supporting the child, the constructive emancipation defense could not be met.¹²⁴

For LGBTQ youth who have run away from home, the constructive emancipation defense may prove more difficult to overcome. Running away has been found to be probative of voluntariness.¹²⁵ However, courts will balance the child's act of running away with whether or not it was *against the wishes of the parent*.¹²⁶ For instance, a father could prove that the child voluntarily abandoned the home when she ran away *and* that this was against his wishes because he went to look for her each night.¹²⁷ For LGBTQ youth, an act of running away will be probative of voluntary abandon-

¹²³ See *Roe v. Doe*, 29 N.Y.2d 188, 193–94 (1971) (“We do not have before us the case of a father who casts his helpless daughter upon the world, forcing her to fend for herself.”)

¹²⁴ See *Parker v. Stage*, 43 N.Y.2d 128, 134 (1977). It should be noted that the court did not specifically rule on the hypothetical of these facts.

¹²⁵ See *Ontario Cnty. Dep’t of Soc. Serv. v. Gail K.*, 269 A.D.2d, 847, 847–48 (4th Dep’t 2000) (relieving a mother of her obligation to support her 16-year-old son when she established, among other infractions, that he repeatedly ran away from home); *Parker*, 43 N.Y.2d at 134–35 (terminating a father’s duty to support his child after he submitted evidence that the daughter ran away from his home and, upon return, continued to disappear for long periods of time).

¹²⁶ *Wisselman & Talassazan*, *supra* note 91, at 1; *Roe*, 29 N.Y.2d at 189 (point made by counsel rather than the court).

¹²⁷ *Parker*, 43 N.Y.2d at 131 (indicating that father wanted his daughter to return home and utilized the police to get her safely home); see also *Orange Cnty. Dep’t of Soc. Serv. ex rel Clavijo v. Clavijo*, 172 Misc. 2d 87, 89 (N.Y. Fam. Ct. 1997) (indicating that the parents set a curfew time for their son, and when the son did not come home on time, the father would go search for him).

ment. In order to negate the value of this act, they will have to argue either that their act was aligned with the wishes of their parent or that their act was not actually voluntary. They could establish that their abandonment of the home was not against the wishes of the parent if the parent had previously told them to leave. This could also be established if there was evidence that the parents did not look for the child after he ran away. If, alternatively, the child were to argue that their act was not actually voluntary, the court's analysis would bleed the inquiry into the purpose of the child's abandonment.

The court will inquire into the child's reason for abandoning the family home to determine whether it was for the purpose of avoiding parental "control."¹²⁸ As a generalization, LGBTQ youth who run away from home after experiencing family rejection of their sexual orientation or gender identity, leave to avoid the authority of their parents. For example, a transgender youth may leave because the parent forces them to dress and behave in ways that do not conform to their gender identity. In these cases, where the young person leaves to escape an intolerable living environment, courts will have to consider whether the parent's rules were reasonable. The youth could argue that rules arising out of the parent's rejection of the youth's sexual orientation or gender identity are unreasonable because they amount to abuse, neglect, or maltreatment.

Regulations that amount to abuse, neglect, maltreatment, and abandonment of the child are unreasonable.¹²⁹ The New York City Administration for Children's Services has issued a policy recognizing the connection between family rejection and parental behaviors that impact a child's safety or puts them at risk.¹³⁰ The policy states that a child's sexual orientation and/or gender identity does not excuse a parent's abuse or neglect.¹³¹ It permits child protective services to investigate the beliefs and values of the parents when it is suspected that family rejection of the child's sexual ori-

¹²⁸ See Nehring, *supra* note 32, at 808.

¹²⁹ *Roe*, 29 N.Y.2d at 193 ("It is the natural right, as well as the legal duty, of a parent to care for, control and protect his child from potential harm, whatever the source and absent a clear showing of misfeasance, abuse or neglect, courts should not interfere with that delicate responsibility.").

¹³⁰ See N.Y.C. ADMIN. FOR CHILDREN'S SERVS., PROMOTING A SAFE AND RESPECTFUL ENVIRONMENT FOR LESBIAN, GAY, BISEXUAL, TRANSGENDER AND QUESTIONING (LGBTQ) YOUTH AND THEIR FAMILIES INVOLVED IN THE CHILD WELFARE, DETENTION, AND JUVENILE JUSTICE SYSTEM, POLICY # 2012/01, at 17-18, 19 (2012), available at http://www.nyc.gov/html/acs/downloads/pdf/lgbtq/LGBTQ_Policy.pdf.

¹³¹ *Id.* at 7.

entation and/or gender identity is directly related to the allegations of abuse or neglect.¹³² Family rejection is related to child abuse or neglect when parents behave adversely or punitively toward the child for disclosing their LGBTQ identity.¹³³ Behaviors indicating rejection of the child's sexual orientation or gender identity are related to allegations of abuse or neglect when parents behave adversely or punitively toward their child for disclosing their LGBTQ identity.¹³⁴ The parental duty to support a child is not severed when the child is no longer living at the home because of abuse and neglect. This is particularly clear where a social services agency removes the child from the home for abuse or neglect, provides the child with necessary services, and then sues the parent for reimbursement.¹³⁵

A determination about whether the parental regulations were reasonable will depend on the specific circumstances of the case. For instance, a court would likely find that physical abuse of the child would constitute an unreasonable exercise of parental authority. The analysis becomes more complicated if a child abandoned the home because the parent regulated their association with other LGBTQ youth. New York courts have held that controlling a child's association with friends under certain circumstances is reasonable. A father's prohibition against his teenage daughter from having boys in her room with the door closed was reasonable.¹³⁶ The Second Department has implied that a mother's rule against her daughter hanging out with her friends during all hours of the night was considered reasonable.¹³⁷ If a child can establish that the parent controlled her association with other LGBTQ friends at all times or isolated her from her friends under all circumstances, this could amount to an unreasonable exercise of authority over the child. If unreasonable demands were placed on the child, the court is likely to find good cause for abandoning the home.

The child retains their right to support if they have left for good cause or the parent was the cause of the breakdown of the

¹³² *Id.* at 6.

¹³³ *Id.* at 6–7 (explaining that among the factors a child protective specialist is directed to consider are the following applicable safety factors: verbal violence; ostracizing or belittling the child for their status; and/ or controlling the child's association with friends, clothing choices, and grooming practices).

¹³⁴ *Id.*

¹³⁵ N.Y. FAM. CT. ACT §§ 235, 415 (McKinney 2012).

¹³⁶ *Chambers v. Chambers*, 295 A.D.2d 654, 655 (3d Dep't 2002).

¹³⁷ *Comm'r of Soc. Servs. v. Jones-Gamble*, 227 A.D.2d 618 (2d Dep't 1996).

relationship.¹³⁸ The court will also consider whether the child has requested to return to the parental home.¹³⁹ For LGBTQ youth who have been forced out of the home because of sexual orientation and/or gender identity, an inquiry into whether they requested to return home is unlikely to become determinative. New York courts have accepted that if the parental home is not open for return, there is no injustice to the parent in continuing to support the child elsewhere.¹⁴⁰

If the court finds that the parent of an LGBTQ unaccompanied youth continues to be responsible for the child's support, then the court will determine the amount of child support owed to the child. Though the ideal would be to have the parents maintain the child at the lifestyle to which they were accustomed, the child should be awarded enough for basic necessities.¹⁴¹ Child support, in this context, should be capped at a percentage that adequately provides for the child's basic needs in the particular jurisdiction. For instance, a specific amount could be determined as the reasonable and fair sum that could provide the child with food, shelter, and clothing. Courts would then adjust the payments as per the parents' financial situation, the child's financial situation, as well as any add-on expenses such as healthcare and educational expenses. Additionally, although the continued duty of support rests on the precept that a parent will have some continued custody and control over their child, this is not upheld in all cases. Courts do not have to include a reciprocal right to care, custody, and control in the order for continuation of support.¹⁴² This is especially important for LGBTQ youth who may not be willing to go to court to enforce their right to support by the parent if they have to reconcile or move back in with the parent.

B. *Public Policy Reasons for Enforcing the Duty of Support*

The reason for hesitancy with allowing the child to enforce the parental duty of support in court is that it limits parental authority and requires parents to "share power with the children."¹⁴³ How-

¹³⁸ Monroe Cnty Dep't of Soc. Servs. *ex rel.* San Filippo v. San Filippo, 178 A.D.2d 1011, 1012 (4th Dep't 1991) (citing Henry v. Boyd, 99 A.D.2d 382 (4th Dep't 1984)).

¹³⁹ See Nehring, *supra* note 32, at 795–96.

¹⁴⁰ See Drago v. Drago, 138 A.D.2d 704, 707 (2d Dep't 1988).

¹⁴¹ See N.Y. FAM. CT. ACT §§ 413, 416 (McKinney 2012); Dutchess Cnty. Dep't of Soc. Servs. *ex rel.* Day v. Day, 96 N.Y.2d 149, 151 (2001).

¹⁴² See, e.g., Drago v. Drago, 138 A.D.2d 704, 707 (2d Dep't 1988).

¹⁴³ Nehring, *supra* note 32, at 809 (quoting Leslie J. Harris et al., *Making and Breaking Connections Between Parents' Duty to Support and Right to Control Their Children*, 69 OR. L. REV. 689 (1990)).

ever, the state has determined that there are legitimate reasons for intervening in the parent-child relationship. The proposal explored in this article is in line with two important goals of state intervention in the family relationship: 1) protecting youth by providing support to allow them to grow into “good” citizens, and 2) to the extent possible, making reasonable efforts to reunify the family.

First, allowing a child who has been forced out of the home by the parent to seek enforcement of the parental duty to support is in line with the state’s goal of protecting youth so that they become good citizens. When the state intervenes in child abuse-and-neglect cases, the underlying understanding is that “well-cared-for children can grow into autonomous adults.”¹⁴⁴ There is a similar understanding when the state provides services for homeless and runaway youth.¹⁴⁵ New York’s Department of Youth and Community Development offers a number of services for homeless and runaway youth under the federal Runaway and Homeless Youth Act,¹⁴⁶ including street outreach, emergency shelter services, crisis intervention, and transitional living programs. These services supply youth with their basic necessities and help them develop skills to transition into adulthood, such as job skill development and independent living skills.

In the event that some or all of the homeless services options are not available, or their accessibility changes with time, youth should not be left without financial support. Enforcing the duty of support against parents responsible for homeless unaccompanied youth broadens the options for youth’s economic independence. This legal strategy helps youth secure a financial cushion to assist them with their basic needs as they become self-sufficient, “good” citizens for society.

Second, state intervention into family relationships includes a commitment to make all reasonable efforts to help reunify the family. Asking parents to financially support the youth they have forced out of their home could incentivize parents to rethink their relationship to their child. Families can be taught the impact that their words and actions have on their child’s well-being and ultimate survival.¹⁴⁷ If they learn the effects of family rejection, fami-

¹⁴⁴ Anne L. Alstott, *What Does a Fair Society Owe Children—and Their Parents?*, 72 *FORDHAM L. REV.* 1941, 1942 (2004).

¹⁴⁵ See The Runaway and Homeless Youth Act, 42 U.S.C. § 5701(3), (5) (2012).

¹⁴⁶ See generally *Runaway Homeless Youth*, N.Y.C DEP’T OF YOUTH & CMTY. DEV., <http://www.nyc.gov/html/dycd/html/runaway/runaway.shtml> (last visited Nov. 15, 2013).

¹⁴⁷ For information on an organization working with these issues, see THE FAMILY

lies may begin to support their children.¹⁴⁸ By pulling parents into court, child support enforcement may force families to consider the deleterious effects of rejection on the well-being of their child, develop awareness about sexual orientation and/or gender identity issues, and change the parents' behavior toward their child. The argument that intra-family litigation causes further breakdown in the family does not apply when the matter at hand is enforcing child support for basic necessities. The potential for reunification is evinced by the arguments parents must put forth as they predictably assert the right to terminate support. In putting forth the constructive emancipation defense, the parent is arguing that they *want* to have care, custody, and control of the child—or, at a minimum, visitation or contact if they are made to pay child support. The parent will further have to establish that the child left *against their wishes*. Bringing parties into the courtroom to discuss the continuation of the parental duty to support can shift perspectives. The parent will be exposed to how their rejection has affected their child's survival, and they will also reflect on their relationship with the child.

IV. CRITIQUES

*"Issues of family rights, obligations, responsibilities, and accountability should be dealt with, but only after the young person is in a safe, secure environment."*¹⁴⁹

Addressing the essential critiques of this proposal is necessary to negate the hesitancy courts feel in allowing youth to enforce the duty of support.¹⁵⁰ This section provides counterarguments to four major critiques expected to arise against this proposal. First, youth may be unwilling to enforce the duty of support against their parents. Second, youth should not be able to enforce the duty to support. Third, parents will not be able to pay the support payments. Finally, by allowing the child to enforce the duty of support against the parent, the state is violating the parent's fundamental liberty interest in the care, custody, and management of their child.

ACCEPTANCE PROJECT, <http://familyproject.sfsu.edu> (last visited Jan. 19, 2013). The Family Acceptance Project is a multiyear research, intervention, and training initiative on LGBT youth and their families and caregivers carried out at the César E. Chávez Institute at San Francisco State University.

¹⁴⁸ See *id.*

¹⁴⁹ Colby, *supra* note 16, at 8.

¹⁵⁰ See Nehring, *supra* note 32, at 809.

A. *Youth Will Be Unwilling to Enforce the Parental Duty to Support*

Young people may be unwilling to enforce the duty of support against their parents, particularly when they have left the home because of family rejection of their sexual orientation and/or gender identity. This argument stems from the understanding that if youth have been thrown out of the home or abused, they tend to be “less than enthusiastic about bringing their families back into the process.”¹⁵¹ For this reason, advocates that work on issues of LGBTQ youth homelessness focus more on serving the immediate needs of youth without involving the family.¹⁵² Additionally, this critique involves the valid uncertainty of forcing youth to interact with a legal system that has often been hostile to LGBTQ people.

This proposal, however, is part of an effort to expand the options for economic stability in the lives of unaccompanied LGBTQ youth. As such, it recognizes the varied experiences of youth. Though it may not be an option for every child, it can open doors for youth who *are willing* to utilize it to receive financial support in this way. The parental duty to support the child is a mandatory one, but it will require the willingness of the child to seek enforcement. Furthermore, though some youth will rightfully be hesitant to interact with the court system, others may prefer it to interaction with state assistance programs. Advocating for both options of economic stability allows youth to seek out the method of financial support that is most suited to them. Finally, this option is not designed to encompass all LGBTQ unaccompanied youth. Some youth have actually emancipated and others want to be considered emancipated. In these cases, continued financial support would not be an option because their right to it has been severed.

B. *Youth Should Not Be Able to Enforce the Duty to Support*

The second critique is that youth should not be able to enforce the duty to support. This argument comes in three different versions. It may be argued simply that young people should not be

¹⁵¹ Theresa Nolan & Jennifer Gunnell, *Bringing Families into the Fold When Serving Homeless LGBT Youth*, HUFFINGTON POST (Jan. 20, 2012, 5:42 PM), http://www.huffingtonpost.com/theresa-nolan/homeless-gay-youth_b_1218151.html.

¹⁵² *Id.* (“Family rejection and its tragic consequences are hardly new problems. But for many years, providers and advocates for these youth have, for many reasons, focused on the youth themselves, giving little attention to their families. Those who work with LGBT youth must confront some basic realities: short-term stays, limited resources, and reluctant clients make it difficult to make much headway in involving families when the focus on basic needs and reducing the risks these youth are exposed to on the streets is paramount.”).

rewarded for “delinquent” behavior. Alternatively, it may be argued that parents shouldn’t have to support the runaway child because there are viable state sponsored mechanisms to provide the child with financial assistance. Another version of this critique is that youth are not mature enough to be awarded money.

The argument that young people should not be rewarded for delinquent behavior is a viable one. This view focuses on runaway youth who have undermined parental authority by running away. This viewpoint demonstrates why some courts have accepted the constructive emancipation defense and ordered the termination of the duty of support. This argument, however, does not account for the fact that youth, even if they have made the decision to run away, may have nonetheless been forced out of the home. Furthermore, the act of running away can be done for the youth’s own protection and safety.¹⁵³ Allowing youth to enforce the parental duty of support against a parent who has forced them out of the home is not a reward for delinquent conduct, but a reward for surviving and wanting to survive. There is a deeper argument that allowing youth to receive financial support may entice youth to leave for invalid reasons and try to enforce the parental duty of support. However, this is addressed by court involvement in ordering and enforcing the support. The court will determine whether the child has been forced out of the home by the parent, and if so, will order and enforce support.

It may also be argued that the youth should not pursue payment from the parents, but access the state assistance that is available for them. Yet, as emphasized throughout this paper, not all youth are eligible for state services or assistance.¹⁵⁴ Young people who have been forced out of the home or have run away rarely have the documentation necessary for accessing state services.¹⁵⁵ The ability of the state to prevent youth from accessing services based on lack of documentation is evident in federal legislation pertaining to homeless and unaccompanied youth. For instance, the McKinney-Vento Homeless Assistance Act has incorporated specific provisions mandating that states review and change their policies concerning necessary documentation youth need for accessing public education.¹⁵⁶ These provisions were incorporated because homeless and unaccompanied youth were prevented from

¹⁵³ See RAY, *supra* note 6, at 20–21.

¹⁵⁴ See Nehring, *supra* note 32, at 804–05.

¹⁵⁵ Gwadz et al., *supra* note 51, at 368–69.

¹⁵⁶ See McKinney-Vento Homeless Assistance Act of 1987, 42 U.S.C. § 11432(g)(1)(H) (2012).

accessing public education for lack of necessary records. Transgender youth have also had well-documented problems accessing state assistance when the sex on their identification documents fails to match their gender expression or presentation.¹⁵⁷

Furthermore, in New York, a parent of sufficient means is obligated to provide support for a child on public assistance.¹⁵⁸ The state will generally provide the assistance to the child and seek reimbursement from the parents. However, having the state act as an intermediary instead of allowing the child to enforce the duty of support directly against the parent places more obstacles in front of the child. The child may or may not want to seek public assistance, and may or may not be able to receive it.¹⁵⁹ Additionally, the burden should not fall on the state if there are people of means, namely the parents, to provide for the child.

The view that unaccompanied youth are able to obtain employment stems from a societal misconception about employment accessibility for homeless people in general. Obtaining employment is difficult for a housed person with access to hot water, food, a bed, and clean clothing, and so it is much more difficult for someone who does not even have those basic needs met. There are significant barriers to homeless youth obtaining jobs in the formal economy, including: the effects of homelessness itself (such as hunger, fatigue, and an inability to stay clean), the lack of an address to give to employers, educational limitations or lack of previous job experience, mental health issues, race and ethnicity, sexual orientation and transgender identity, and age.¹⁶⁰ Even if youth could become employed, these barriers could cause them to lose their job.¹⁶¹ There are also barriers specific to actual or perceived LGBTQ identity. For instance, male-to-female transgender youth reported the highest levels of discrimination when attempting to access employment.¹⁶² Still, youth should not be forced into employment, especially when they can attend school. In New York, youth must attend school until they are 16 years old and can attend until they are 21.¹⁶³ Youth should be allowed to attend school with-

¹⁵⁷ The Sylvia Rivera Law Project is an example of a transgender-specific service provider that helps clients change their documentation because of the high demand for such services. *See generally* THE SYLVIA RIVERA LAW PROJECT, <http://srlp.org/> (last visited Apr. 17, 2013).

¹⁵⁸ *See* N.Y. FAM. CT. ACT § 415 (McKinney 2012).

¹⁵⁹ Nehring, *supra* note 32, at 804–05.

¹⁶⁰ Gwadz, *supra* note 51, at 368.

¹⁶¹ *Id.*

¹⁶² *Id.* at 369.

¹⁶³ N.Y. EDUC. LAW §§ 3202, 3205(1)(a) (McKinney 2012).

out the interference of having to obtain full-time work in order to attain their basic survival needs. Without permitting youth to enforce the parental duty of support, “when the parent-child relationship deteriorates, often the child shoulders the burden of financial loss and economic deprivation.”¹⁶⁴

Finally, this second critique encompasses the question of whether young people could be paid directly. Generally, the custodial parent or third party enforces the child support obligations and is the one paid, though the money is owed to the child.¹⁶⁵ Unaccompanied youth over the age of 18 are legally adults and could be paid directly; as for unaccompanied youth under the age of 18, the court could make an inquiry into the child’s age and capacity to determine if the child could be paid directly.¹⁶⁶ In addition, children are awarded money after court intervention in other contexts. For instance, in jurisdictions where the parental immunity doctrine has been fully or partially abrogated, youth are permitted to bring tort claims for emotional, physical, and sexual abuse against their parents.¹⁶⁷ Here, the money from the parental duty of support could only be directed for necessities—namely shelter, clothing, and food—and would be available in small amounts paid regularly until the child reaches the age of 21. A third-party payor could be enlisted to receive, pay, and track the payments. For unaccompanied youth who are younger than 16, attempting to enforce the parental duty of support directly may result in child welfare placement, as the state is responsible for these youth.¹⁶⁸ If the state could not reunify the child with the parents, then they would be placed in care and the social services agency would seek reimbursement from the parent.

¹⁶⁴ Nehring, *supra* note 32, at 804–05.

¹⁶⁵ *Id.* at 780.

¹⁶⁶ Courts already inquire into the age and capacity of a young person when determining whether to allow the constructive emancipation defense. *See* Wisselman & Talassazan, *supra* note 91, at 8. *Cf.* *Hiross v. Hiross*, 224 A.D.2d 662, 662–63 (2d Dep’t 1996); 11 SCHEINKMAN, *supra* note 65, § 16:51.

¹⁶⁷ *See* G. Stephen Neeley, *The Psychological and Emotional Abuse of Children: Suing Parents in Tort for the Infliction of Emotional Distress*, 27 N. KY. L. REV. 689, 711 (2000). *See also* Benjamin Shmueli, *Love and the Law, Children Against Mothers and Fathers: Or, What’s Love Got to Do With It?*, 17 DUKE J. GENDER L. & POL’Y 131, 147–54 (2010).

¹⁶⁸ Under New York law, being under 18 triggers the responsibility of the state. *Cf.* N.Y. SOC. SERV. LAW § 371(1) (McKinney 2012). There are major problems with this possibility, as LGBTQ youth have extensively suffered in state child welfare and juvenile justice systems. *See generally* ROB WORONOFF ET AL., CHILD WELFARE LEAGUE OF AM. & LAMBDA LEGAL DEF. AND EDUC. FUND, OUT OF THE MARGINS: A REPORT ON REGIONAL LISTENING FORUMS HIGHLIGHTING THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL, TRANSGENDER AND QUESTIONING YOUTH IN CARE (2006), available at <http://www.cwla.org/programs/culture/outofthemargins.pdf>.

C. Parents Without Sufficient Means to Pay

Third, there is a general concern about child support enforcement. As enforcement has become stricter, parents without the sufficient means to provide support payments have been criminalized. This may be more likely in situations where the child has been thrown out or forced to run away from their home. Youth who are experiencing homelessness are typically leaving a dysfunctional and poverty-stricken family environment. Some youth have reported being forced to leave the home because their parents were not able to provide for their basic needs.

However, the parental duty to support the child, as statutorily codified in New York, already requires the court to inquire into whether the parents are of sufficient means or are able to earn the sufficient means to provide for the child. Allowing youth to directly enforce the parental duty of support would not change this requirement. A court would still have to make a determination about whether the parents are able to provide support for the child and if so, what the reasonable and fair sum would be. If the parents are of sufficient means, but refuse to pay, the court can withhold their wages or ensure compliance with a contempt order.¹⁶⁹

D. Allowing the Child to Enforce the Duty to Support Violates the Federal Constitution

The United States Supreme Court has long recognized that parents have a fundamental liberty interest, protected by the Fourteenth Amendment of the United States Constitution, to the “care, custody, and management of their child.”¹⁷⁰ This interest does not evaporate when the parent temporarily loses custody of the child to the state.¹⁷¹ In New York, courts have held that this interest in care, custody, and control is reciprocal to the duty to support the child. This parental authority over the child has been upheld because there are “pages of human experience that teach that parents generally do act in the child’s best interests,” even though some parents may abuse or neglect children.¹⁷²

However, this fundamental liberty interest is not without limit. Parents cannot force their child from the home and argue that this is an extension of their fundamental right to care, custody and con-

¹⁶⁹ See *Turner v. Rogers*, 131 S. Ct. 2507, 2517 (2011).

¹⁷⁰ *Santosky v. Kramer*, 102 S. Ct. 1388, 1394 (1982) (characterizing the right as “freedom of personal choice in matters of family life”).

¹⁷¹ *Id.*

¹⁷² *Parham v. J.R.*, 99 S. Ct. 2493, 2504 (1979).

trol. The state is not “without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized.”¹⁷³ The state regularly uses *parens patriae* power to protect children in cases of abuse and neglect. Furthermore, as discussed above, the state has the power to order and enforce child support orders against a non-custodial parent. Therefore, states can impose child support orders against parents who have forced their children from the family home without violating the parent’s right to care, custody, and control of the child.

CONCLUSION

*“And while so many [LGBTQ homeless] youth have displayed great resilience, wisdom, and independence in overcoming the obstacles they face, basic survival—let alone sustained independence—is a day-to-day challenge.”*¹⁷⁴

Options of support for unaccompanied youth have transformed partly in recognition that specific subsets of this population receive services. LGBTQ youth are one such subset. In response to research studies and reports, and most importantly the voiced and written experiences of LGBTQ youth experiencing homelessness, practitioners and advocates have put forth numerous recommendations to improve homeless youth services. This work continues under the well-founded belief that bettering the services of an extremely vulnerable population will in turn make more services available to all youth. As a supplement to these recommendations, I suggest that LGBTQ unaccompanied youth advocates seriously consider whether some of the young people they are serving could benefit from enforcing the parental duty of support. This proposal is part of an effort to expand the options for economic stability for unaccompanied LGBTQ youth. At the very least, this option should be further explored by service providers and practitioners.

Exploring the ability of LGBTQ youth to enforce the parental duty of support recognizes the extremely varied experiences that unaccompanied youth have. Though it may not be an option for every child, it can open doors for youth who are willing to utilize it as a means of securing their basic needs. These youth deserve as many avenues and resources to achieve economic stability and, in turn, transition out of homelessness, as can be identified. They deserve *more* from their peers, service providers, policy-makers, and advocates. But their parents legally owe it to them.

¹⁷³ *Id.*

¹⁷⁴ Hughes, *supra* note 7.

WORK, WORK, AND MORE WORK: WHOSE ECONOMIC RIGHTS?

A Conversation Between Professors Stanley Aronowitz†
& Shirley Lung††
Moderated by Professor Ruthann Robson†††

PROFESSOR RUTHANN ROBSON: Today we have a special treat. This talk is the fourth annual conversation that we've done in LEDP,¹ in which we match one of CUNY's Distinguished Professors with one of our own distinguished professors to talk interdisciplinarily about things that we thought about in terms of constitutional rights. The first one that we did featured Frances Fox Piven with Stephen Loffredo,² and they talked about class and thinking about poor people and poor people's rights. The second one that we did was about healthcare and healthcare as a right—and obviously we were doing that one as healthcare reform was happening—and that was be-

† Distinguished Professor of Sociology in the Ph.D. Program in Sociology at the CUNY Graduate Center and Director of the Center for the Study of Culture, Technology, and Work. Professor Aronowitz does research on the sociology of education, the sociology of labor, social theory, and science and technology. He is the author of *The Knowledge Factory* (2000), *From the Ashes of the Old: American Labor and America's Future* (1998), *Postmodern Education* (1991) and *Education Under Siege* (1985), both written with Henry Giroux, and the classic *False Promises: The Shaping of American Working Class Consciousness* (1973), as well as the author, co-author, or editor of several other volumes and over one hundred published articles for scholars and the general public. His latest book is *Taking It Big: C. Wright Mills and the Making of Political Intellectuals*. His current research interests include the role of new information technologies in schools and other workplaces and the development of critical curriculum.

†† Shirley Lung, Professor of Law, CUNY School of Law. Before coming to CUNY, Professor Lung was Executive Director of the Center for Immigrants' Rights. She has a long history of working on labor issues affecting Chinese garment, restaurant, service, and construction workers in New York City through participation in several independent workers' centers. Professor Lung has helped to develop position papers on the employer sanctions provisions of the Immigration Reform and Control Act of 1986 and its role in dividing working class workers against one another. Her scholarship includes the articles *Overwork and Overtime* and *Exploiting the Joint Employer Doctrine: Providing a Break for Sweatshop Garment Workers*, as well as articles on academic support and law school pedagogy. Professor Lung has been frequently recognized by graduating classes of CUNY for excellence in teaching and community service.

††† Professor of Law and University Distinguished Professor, CUNY School of Law. She teaches in the areas of constitutional law and sexuality and the law.

¹ Liberty, Equality, and Due Process is a required first-year course at CUNY Law examining issues of race, gender equality, and sexual orientation in the context of constitutional and historical analysis.

² See Stephen Loffredo & Frances Fox Piven, *A Discussion of Poverty, Class, and Economic Justice Between Frances Fox Piven and Stephen Loffredo*, 11 N.Y. CITY L. REV. 1 (2007).

tween Nicholas Freudenberg of the School of Public Health at Hunter College and our Law School's Janet Calvo.³ The third one we did focused on language and language rights, for which we had a poet, Kimiko Hahn, who is a Distinguished Professor at Queens College and the Graduate Center, and Judge Jenny Rivera.⁴ Today we are going to talk about employment, work, jobs, jobs, jobs, work, work, work—I feel like I'm on the campaign trail. And we have two terrific professors who have been longtime activists, who have thought about work, and worked on work, and who give us their thoughts.

Stanley Aronowitz is the Distinguished Professor of Sociology at the Graduate Center and Director of the Center for the Study of Culture, Technology, and Work at CUNY. He's the author of more than twenty-five books, so I'm not going to say all of them, but his most recent is available online and in your favorite independent bookstore. Some of my favorites are *The Last Good Job in America* and *How Class Works*.⁵ Again, he's well-known not only for his scholarship but also for his activism on a broad range of economic justice and employment and labor issues, including rights, workers' rights, and also the link between jobs and education, which we'll talk a little about.

Shirley Lung, who many of you know, is a Professor of Law here at the Law School, where she teaches classes such as The Rights of Low-Wage Workers, and is also a professor in the Academic Support program. She talks about the relationship between work and education, including one of my favorite articles by her, which is about overwork—how you tell when you're working too hard, too much, too long; and also looking at immigrants' rights and undocumented workers and how to hold employers, especially in sweatshops, responsible. She also has a long history of organizing low-wage workers with the Asian-American Legal Defense Fund and the Chinese Staff and Workers' Association. So let's welcome our speakers.

I thought we'd start off by thinking about some of the things we've talked about in Liberty, Equality, and Due Process. We've also been considering the constitutional status of a right to work, and interestingly, but perhaps not surprisingly, often that right to

³ See Janet Calvo & Nicholas Freudenberg, *A Conversation on Health and Law with Janet Calvo and Dr. Nicholas Freudenberg*, 12 N.Y. CITY L. REV. 63 (2008).

⁴ See Kimiko Hahn & Jenny Rivera, *Translating Equality: Language, Law, and Poetry—A Conversation with Kimiko Kahn and Jenny Rivera*, 13 N.Y. CITY L. REV. 233 (2010).

⁵ STANLEY ARONOWITZ, *THE LAST GOOD JOB IN AMERICA* (1997); STANLEY ARONOWITZ, *HOW CLASS WORKS: POWER AND SOCIAL MOVEMENT* (2005).

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work really has been used by employers to force people to work for as long of hours as possible, and usually for as low a wage as possible. So the first thing I wanted to open up with is, is that really the way it has to be? Or can we conceptualize and maybe even actualize a right to work that is about worker autonomy? So we'll start with you, Stanley. Yes or no?

PROFESSOR STANLEY ARONOWITZ: In the United States the only way in which workers have been able to gather any kind of right—the right to work for a limited number of hours, to have some control over their working conditions, and be able to limit the hours they have to work—has been through two institutions. The most important, historically, was the labor movement. I say that was the most important because even before we had a National Labor Relations Act,⁶ which was enacted in 1935, but really didn't come into effect until 1938 as the result of a Supreme Court decision sometimes called the *Chicken Pluckers' Decision*, where a chicken plucker company challenged the constitutionality of the National Industrial Recovery Act.⁷ But it was really before that that the unions, through one major activity that they conducted, were able to gather some rights, and that activity is the strike. The right to strike—the right, therefore, to withhold one's labor—was in some sense the only guarantee that workers had through which they were able to control their own conditions, or what is called, technically, the *terms and conditions* of work.⁸ The National Labor Relations Act was established—in my opinion, and I'm writing about this even as we speak—in order to control what in 1933 and '34 had become the strike wave. The control of the strike wave was in the form of a law that provided a series of procedures as well as the rights to organize unions; workers could organize unions of their own choosing. That had not been the case in advance, because the companies, companies like DuPont, famously, and some others, actually established company unions, which in many ways were not unions at all, they were really very loose grievance mills which the company said replaced independent unions.

⁶ National Labor Relations Act (NLRA), Pub. L. No. 74-198, 49 Stat. 449 (1935) (*codified as amended at* 29 U.S.C. §§ 151–169 (2012)).

⁷ *A.L.A. Schechter Poultry Corporation v. U.S.*, 295 U.S. 495, 537 (1935) (holding that Section 3 of the National Industry Recovery Act was an unconstitutional exercise of legislative power by Congress. Section 3 authorized the President to approve “codes of fair competition,” such as the “Live Poultry Code,” which regulated hours and other labor conditions in the poultry industry.).

⁸ NLRA §§ 7–8, 29 U.S.C. §§ 157–158.

To this day, November 16, 2012, companies still argue as they did in the 1920s and 1930s that you don't want a union because what you're doing is bringing in an outside force to the relationship which employers and workers have between them. There is, therefore, even to this day no constitutional right to work, or no constitutional right to withhold one's own labor. A friend of mine who is a Professor of Law at Rutgers Law School, whose name is Jim Pope, has argued that the right to withhold one's labor should be a constitutional right.⁹ He says the most important problem is a First Amendment right, it's a right to free speech, to say "I don't want to work here until I get terms and conditions that meet my needs." He says that, unfortunately, the courts don't agree.

PROFESSOR SHIRLEY LUNG: What I also think is interesting is that the period that you're talking about, with the National Labor Relations Act, the Wagner Act of 1935, that the right to strike, or the right to engage in concerted activity through mutual aid and support, is grounded in protecting, some people argue, commerce. Based on the idea that the right to strike, the wave of strikes you were referring to in the 1933–1934 period—wildcat strikes, intermittent strikes, spontaneous strikes—that those had the great threat of basically stopping commerce. And so part of the idea behind the National Labor Relations Act was the need to ensure the right to engage in collective bargaining, to basically protect commerce from being disrupted.¹⁰ And so it's very contradictory in terms of the history and what animated the National Labor Relations Act, because on the one hand it did enshrine the right to engage in collective bargaining, the right to organize, to join unions. And at the same time that right is subordinated to protect commerce. So all of the line of cases we see interpreting the National Labor Rela-

⁹ See Jim Pope, *Next Wave Organizing and the Shift to a New Paradigm of Labor Law*, 50 N.Y.L. SCH. L. REV. 515, 554 (2006); James Gray Pope, *The First Amendment, the Thirteenth Amendment, and the Right to Organize in the Twenty-First Century*, 51 RUTGERS L. REV. 941, 949 (1999).

¹⁰ See 29 U.S.C. § 151 ("The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.").

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tions Act and the agency interpretations and board interpretations of the National Labor Relations Act have really, to this point in time, begun to constrain the right to strike, to regulate that right to strike. And now what we see more of, we see greater incidences because of the intrusions on the right to strike. I think that has played out both culturally—popularly—but also legally. Basically it is thus less possible to strike. And that we see now—more lockouts by employers . . .

PROFESSOR ARONOWITZ: Especially in the sports industry.

PROFESSOR LUNG: In the sports industry. And we see it in instances in local communities. In Chinatown we've seen lockouts being used by restaurant owners to say, "We're just going to lock you out." [It becomes] a very protracted struggle. It's very interesting to me that the right to strike is so fundamental, but it's grounded in commerce.

It's interesting to me when you talked about the Thirteenth Amendment. Some people have said at one point the Thirteenth Amendment wasn't only about ending chattel slavery—that there were strands of the debate on the Thirteenth Amendment that really talked about freedom of labor, the autonomy of laborers to control, to not be subjugated, to be free from starvation wages, to be free from oppressive, brutal working conditions. So there is this whole history of the Thirteenth Amendment that's unrealized. And is it merely an academic exercise to think about if there is a way that we use the Thirteenth Amendment to reform or change the way we think about employment relations, relations between workers and employers? Or is there real value towards doing that in terms of promoting, advancing workers' rights today? Wherever those struggles take place—whether it is the rhetorical struggle, where it's the struggle in terms of the fight for what the narrative is when we have workers' struggles at stake, or whether it's in the legal arena in the cases—is there some interest to see . . . how we could use the Thirteenth Amendment to ground a fundamental right to strike. Because we need a fundamental right to be free, to be, to have autonomy, labor autonomy. Is that something that's useful to do?

PROFESSOR ARONOWITZ: Sure it's useful to do it. And one of the things that we ought to make clear is that we are in the State of New York, which has a public employee union movement of about half a million people at the city, state, and federal level. In the

State of New York and at the federal level generally, public employees do not have the right to strike. The Taylor Law¹¹ and federal law,¹² which is a separate law, prohibits public employees from striking. And that was a deal between the unions that were organizing among the public employees and the government. The government said, “We will recognize the unions for the purposes of collective bargaining in return for which you have to give up the right to strike,” and the unions agreed to that. I will say “agreed to that” egregiously, and now the unions are suffering because policy both at the State and New York City level is zero salary increases for public employees, and collective bargaining has been reduced to public begging. If you don’t have the right to strike you’re always in some situation of collective begging, because you can demonstrate in front of the state office building or the city hall or wherever, but basically you don’t have the right.

Now, that brings up the question that you raised: *Would it be important to interpret the Thirteenth Amendment to include the right of workers to strike and the right of workers to control the conditions of their own employment?* And the answer is obviously yes. I don’t think that it would be a bad thing at all. However, I have a prejudice, because I was in the labor movement for a long time. *Labor movement* meaning I was a steelworker for about eight years; I was a union organizer for another seven years; I spent fifteen years active in the labor movement, and I still am; I was on the Collective Bargaining Committee and the Executive Council of our own union, the Professional Staff Congress. My observation, both in my scholarship and in my own experience, is the only way you actually change the law is by acting. But if you act, then the question becomes, *What will you take as a settlement of your striking, or a settlement of your engaging in concerted activity?* And the answer for the unions could be, “Well, we need a constitutional amendment.” That takes a lot of states to say that’s the case, if it’s going to be an amendment, or an amendment to the amendment, and I’m not sure that we’re in a political situation where that’s possible.

However, the problem both of the unions and of advocates for workers is that we have a problem of a lack of intellectual curiosity and intellectual aggressiveness. If we look at the history of labor relations, the rights of workers as a legal proposition, as well as an actual proposition, predated the strength of the unions by a cen-

¹¹ See Public Employees’ Fair Employment Act of 1967, *codified at* N.Y. CIV. SERV. LAW §§ 200–14 (McKinney, Westlaw through L. 2014, chs. 1 to 19, 50 to 58, 60).

¹² See Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111.

tury at least. In the 1830s and 1840s, there were people who were talking about labor rights when there was no possibility for labor rights to be effective. We don't have that conversation now, and I'm glad that you brought it up, because it seems to me that we have to start the conversation. Maybe not in our lifetime, but if we start creating a culture, an environment in which conversations about the constitutional rights of workers to control their own labor are raised—Pope thinks it's a First Amendment right—then we might find that at some point it's going to happen. If we don't even raise the question, it never will happen.

PROFESSOR LUNG: I agree with that, though I wasn't even thinking necessarily of the Thirteenth Amendment as a legal strategy—although it could be, and I could see it playing out. I also think, in terms of how we are acculturated, how we're socialized to think about workers' rights, that it's important for us to begin to think about these rights as constitutional rights, that they're fundamental rights, as opposed to just statutory or legal rights. In terms of what we want as workers, what we fight for, they're not just legal rights, so in terms of thinking about what led to the kinds of regulations that we have that protect the right to organize, like the National Labor Relations Act¹³ or even the Fair Labor Standards Act,¹⁴ we tend to think about it as a result of the New Deal. For a lot of people that's the extent of it. It was legislative reform that was part of the New Deal. But there was also this whole vibrant, radical, militant labor movement that created the pressure for government to respond.

I was just reading and thinking about the Auto-Lite strike in Toledo, Ohio of 1934, and at the time, there was the National Industrial Recovery Act.¹⁵ Section 7 basically protected the right to engage in collective bargaining, but it wasn't being enforced. When the workers were going out to strike, there was an anti-strike injunction levied against them. However, the workers still went on strike, and they were held in contempt of court, they went to jail, and the movement grew and became very bloodied and violent. The workers weren't going to let the use of law take away their right to strike, and they didn't see that their right was granted to

¹³ NLRA § 7, 29 U.S.C. § 157 (2012).

¹⁴ Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060 (1938) (codified at 29 U.S.C. § 201 (2014)).

¹⁵ National Industrial Recovery Act of June 16, 1933, Pub. L. No. 67, ch. 90, 48 Stat. 195 (1933) (codified at 15 U.S.C.A. § 703). This Act was held unconstitutional in *A.L.A. Schechter Poultry Corporation v. U.S.*, 295 U.S. 495, 537 (1935).

them by section 7-a of the NIRA, it was a right that was fundamental to them—being able to fight against what was happening at the Auto-Lite plant.

PROFESSOR ARONOWITZ: In 1934, the Toledo strike was only one of four major strikes that year. There was a general strike in San Francisco, and a general strike in Minneapolis, but they were connected to the transportation industry: Longshoremen in San Francisco and Teamsters in Minneapolis. The fourth strike, which is not as well known, was a national textile strike of 400,000 workers; primarily women in the South of the United States went on strike. They were sold down the river by their union leadership who made a deal with Franklin Delano Roosevelt to say, “If you will stop the strike, I will help you negotiate a contract with textile employers.” And then Roosevelt walked the other direction and sold them down the river again. Now the problem obviously is that there was, as you say, radical activity, there was striking—there had also been a miners strike and a garment workers strike in 1933—and Roosevelt felt the political pressure. If he had not signed the National Labor Relations Act—and it wasn’t even him that did it, it was Senator Wagner of New York—the ‘36 election might have looked different. There was a possibility unions would form a new party if something serious wasn’t done about labor rights. Roosevelt did not want the new party to be formed; he wanted them to stay behind the Democratic Party, which of course is, I think, a tragedy. But nevertheless, for the next thirty, thirty-five years, there were real benefits that were gained by unionized workers, as well as non-union workers, from the New Deal and its aftereffects.

That stopped after the Medicare Act of 1966 and the Civil Rights and Voting Rights Acts of 1964¹⁶ and 1965.¹⁷ We haven’t had anything new in forty-five years in terms of reform. So there’s a certain issue as to why the union movement put \$400 million behind the reelection of Democratic President Obama. That’s an interesting question we can discuss in due time, but I do think that you have a social movement, and then you have change. It doesn’t come about because a bunch of smart politicians and sympathetic politicians decide to make change. It doesn’t happen that way.

PROFESSOR ROBSON: We’ve talked some about the right to quit as a

¹⁶ Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

¹⁷ Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437.

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Thirteenth Amendment right, so what's the difference, really, between the right to quit and the right to strike?

PROFESSOR LUNG: I think the right to quit comes up when we think about compulsory labor. So the right to quit, the right to mobility, to me is also about freedom. Why was the right to quit historically an important right? Because after the end of slavery there were all of these Black Codes that were enacted that were trying to recapture an enslaved labor force.¹⁸ They had anti-enticement statutes directed at employers that said you basically couldn't poach the employees of another employer, because they were trying to create a captive workforce after the abolition of slavery. You could also be prosecuted and criminalized for being a vagrant if you didn't have a job and you refused to work at a certain wage when someone came up to you and asked if you would work for them for a certain amount. So the idea that there was a whole system that was criminalizing non-work as a way to capture and retain a captive labor force becomes important when the issue of a right to quit comes up. To me the idea of a right to strike is a different right because we're not talking about quitting or leaving, we're talking about striking to affect the terms and conditions by which we work and live. But I don't belittle the right to quit, because when we talk about compulsory labor, the right to quit is an important, meaningful right, because it has to do with the idea that you're not free.

PROFESSOR ARONOWITZ: One of the problems about the right to quit is that under certain circumstances people do have the right, but under conditions such as we have now, where there are millions of people looking for jobs, although the formal right to quit may exist, if you don't have jobs outside of the job you have, the right to quit becomes kind of empty. While he was President, Richard Nixon made a proposal for a guaranteed income, and we need the security of a guaranteed income for people to substantively have the right to quit. We have a case where in the year of our Lord 1996, the President of the United States, William Jefferson Clinton, signed a so-called Welfare Reform Act,¹⁹ which eliminated the only guaranteed income program we had. We don't have a guaranteed

¹⁸ See, e.g., *Slaughter-House Cases*, 83 U.S. 36, 70 (1872) (describing state laws enacted after the abolition of slavery and finding that the laws saddled African Americans with "onerous disabilities and burdens and curtailed their rights in the pursuit of life, liberty and property to such an extent that their freedom was of little value.").

¹⁹ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105.

income program anymore, or what exists is very threadbare, so to decide to quit and condemn yourself to the existence of welfare is a very risky business. The other problem that we still have, even though it used to be much more widespread, is that we still have many towns, many cities in the United States, which have one industry in the town. The whole textile industry is organized in that respect. Even in Upstate New York, in the city of Schenectady, there was one major employer, General Electric. Lynn, Massachusetts, also, General Electric. If you quit General Electric, you better leave town, if you want to make the kind of decent income that General Electric under union conditions offered. So this is a big problem. The right to quit, the coercion that exists because of the economic situation, brings the question of rights into direct relationship to the economic situation that people face when they exercise that right.

PROFESSOR LUNG: I also think about the right to quit in terms of the issue of immigration and undocumented workers. There are employer sanction provisions of the Immigration Reform and Control Act of 1986,²⁰ which basically say it's unlawful for an employer to knowingly hire someone who is without authorization to work in the United States. It doesn't make it criminal for the worker to work, but it does make it a violation for the employer to knowingly hire someone. In some ways, when you talk to people about this provision, it goes against your intuition because you're saying, "well it sanctions employers who are basically using undocumented workers to depress wages and to exploit workers; so it's a good thing because it sanctions the employer." However, the last twenty years have shown that that's not true, that very few employers are prosecuted or fined, and most of the enforcement is really on the backs of undocumented immigrant workers. The impact of it is basically, again, to create a captive workforce, because if someone thinks it's a really hard job, they might not quit this job because it might be difficult to get another job, because they don't have work authorization, and the employers know that. So there is a lot of exploitation that goes on, because you're not as free to move, to find a job, because of the whole issue of authorization to work.

And so then the question is, "Well, that's just an immigration problem, isn't it? That's just something that affects undocumented immigrant workers, isn't it?" But the relationship between immi-

²⁰ See 8 U.S.C. § 1324a (2012) (providing a range of civil and criminal penalties for employers who employ undocumented immigrants).

grant workers, undocumented immigrant workers and workers who are native-born is very integrally tied. If someone is undocumented, it is very difficult for them to refuse longer hours, lower wages. And if you're working alongside someone who's a citizen worker or has papers to work, it's very hard for that person to say to the employer, "Well, I'm not going to work those long hours unless you pay me overtime, or I'm not going to work under these conditions." It's very hard to do that because the employer will say, "Fine, leave, because there are many more undocumented workers I could hire." So this question of right to quit is being played out because of the lack of jobs and structural lack of rights that workers have. And instead of being played against each other, actually there is a common unity here, because the interests are very tied together. However, it's very easy to divide these workers against each other, if you talk about immigration only as a matter of rights for immigrants, but not about the issue of labor as a right that affects not just immigrants. Immigration isn't just affecting immigrants; it's affecting workers as a whole class. I think that's one of the challenges that we have in terms of the direction of the labor movement—how we really begin to overcome those built-in divisions between immigrant workers, undocumented workers, and citizen native workers. And also particularly between groups pitted against each other: immigrant workers, African-American workers, and white working-class workers.

PROFESSOR ARONOWITZ: It's very interesting that you should mention that, because in the '60s and the '70s, there was a movement that was very successful over the '70s and the early '80s called the United Farm Workers. Agricultural workers have been notoriously exploited as well as unorganized into unions, and the National Farm Workers Union successfully organized both through boycotts and strikes. There was a big grape boycott, and there were major strikes, mainly out of California, but not exclusively out of California. Many of those immigrant workers were undocumented, and many of them were documented, and they got organized. One of the things that the strike did was that it began to raise the awareness by the organized unions of the importance of organizing among the working poor on the one hand, and among immigrants on the other. That effort has met a tragic end. However, the labor movement is always full of ebbs and flows, and I believe that in New York City right now, the labor movement is becoming much more aware of the plight of immigrant workers. And largely not because they have had an epiphany, but because there were at least two

organizations, the Taxi Workers Alliance and the organization of domestic workers, who have brought their problems and their militancy to the table of the labor movement. And they are being incorporated into the Central Labor Council. That's happening in California as well.

So it was really from the bottom that the unions became much more aware, because otherwise they were happy to live in the shadow of this split labor movement, this split labor force. But when confronted, they had a very difficult time avoiding, recognizing, the Taxi Workers Alliance—now, for example, as a member of the Central Labor Council, 8,000 people.

I wanted to just mention one more thing, and I think it's rather important. It was a couple weeks ago. I don't know whether everybody knew this, but Walmart is the largest employer in the United States. In the city of Chicago, a couple of weeks ago at one of the distribution centers, there was an unauthorized strike of Walmart distribution workers. One of the major characteristics of that strike is that, unlike most strikes and most organizing efforts, they were not looking for a contract. They were looking to settle some of their grievances. It was what I call an IWW (Industrial Workers of the World) strike, which was a strike of industrial workers who were not seeking a contract with employers; they were seeking remediation for their grievances. When they went back to work and threatened to strike again, they didn't get the remediation of their grievances, but they were all hired back by the employer, who was a little bit afraid to let them go. So we are at a new period in the history of the labor movement; it's going to be a very interesting period. I think contracts are basically of the past. I think a lot of the activity by unions and a lot of activity by workers will not be to gain collective bargaining in the traditional sense. They are going to be to gain justice. And if they gain justice, they may or may not have a contract. I think that's a new direction, and I think it's an important one.

PROFESSOR LUNG: And I think it's important for us, who are lawyers and lawyers in training, to think about this development, because some of the organizing—or at least the organizing of the United Farm Workers—took place totally outside of the National Labor Relations Act. So the question of whether you have a legal right or not is in some ways irrelevant, if you claim that right. If you're claiming power and you fight for it, then you create rights outside the whole apparatus of law. The United Farm Workers—they were

an inspiration in terms of what they were able to achieve. And it was a tactical protracted struggle, and it was totally outside of any legal framework because the legal framework excluded them.

We have a lot of categories of workers—still the domestic workers are excluded from protection of the National Labor Relations Act.²¹ We can go on; there are many. So the idea that if people rest their idea of rights and what they can do in their lives based on what the law gives to them, that's very limited. And what you've already seen in the cases that you've read is that access to courts has narrowed, and that even when you get into court, the interpretation of what rights we have has been narrowed by the courts, by the National Labor Relations Board. And if workers were to stop organizing, their rights would continue to narrow.

That's what I see happening in terms of when we talk about undocumented workers, and I think it's really important because there is a challenge to labor, there's a challenge to organized labor because organized labor supported the employer sanctions provisions on the idea that immigrants steal jobs from native-born workers and so we need to provide disincentives for hiring immigrant workers.

It [organized labor] since has reformed and reversed its position in 1999. But no organized labor union has taken—made it an important political stance—to basically repeal the employer sanction provisions of the Immigration Reform and Control Act.²² And I don't only fault the labor unions; I fault the immigrants' rights activists as well because what we're looking for in comprehensive immigration reform is basically a path to legalization, which is important because that will affect people's lives. But if we keep intact the structure of employer sanctions, we're always going to have a two-tiered system of workers: those who are perceived as criminals and whom society wants to criminalize, and everybody else. Whenever you have that structure in place, it doesn't matter how many undocumented immigrants are given a path to legalization; the structure of the workforce dividing immigrant versus non-immigrant, citizen versus non-citizen, is there. And that is a huge divide. That is a huge, structural power that employers have at the workplace.

²¹ NLRA § 2, 29 U.S.C. § 152(3) (providing that an “employee” covered by the Act “shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home”).

²² See 8 U.S.C. § 1324a (providing civil and criminal penalties for employing undocumented immigrants).

PROFESSOR ARONOWITZ: I would just add one more thing because I think it crosscuts the immigrant rights issue. The organized labor movement, with some exceptions, but only very few, has consistently refused, or failed—I would not use the word *refused* necessarily, but at least failed—to organize the working poor, to organize contingent labor, which is a growing part of our workforce.

PROFESSOR LUNG: To organize unemployed workers.

PROFESSOR ARONOWITZ: Well, to organize the unemployed. With all due respect to the labor movement, we have not seen the organization of the unemployed, and let's put our cards on the table: the major march of the unemployed in the 1930s took place in the Year of our Lord 1930. And the 1930 march involved a million unemployed workers and was led by the Communist Party. We should understand that. Then the Socialist Party got involved and they formed a workers' alliance in the mid-1930s. We haven't had anything since the mid-'30s in the way of an organized unemployed movement.

But the labor movement regards only—and this is the narrowing—the labor movement sees itself these days—and I hate to use the word labor movement because they're not a movement, they're a bunch of unions—the unions have not been willing to consider the rights and the fate of workers who are not their members, especially not their dues-paying members. So the working poor and the part-time people and the contingent people are de facto excluded from organized labor, by and large.

Secondly, they [the unions] have not been willing to organize the unemployed and do not see that as part of their mission. We now have a situation in which unions are being run by accountants. With all due respect to accountants, they are saying, "We can't afford to organize people who can't pay decent dues." That's not a good argument. It's a self-defeating argument.

So I suspect that what's going to happen, and what is already beginning to happen, is that—as you said correctly, I think—the organization of the working poor, the part-timers, and the contingent labor is going to take place to a large extent outside of the framework of the existing organized unions. It's going to take place because community organizations and workers' organizations begin to take the initiative and begin to take on the issues that are involved, including the immigration issue.

You're right. If the immigrant rights movement does not take

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on the organization of immigrants, it's not going to happen as part of the labor movement because the labor union is very narrowly facing.

PROFESSOR LUNG: I want to go back to *Lochner*.²³ I know that recently you read *Lochner*. And it's important for a lot of reasons, right? So how do you look at *Lochner*? There's so many ways to think about *Lochner* and its impact on us. Is it an instance of assertion of federal judicial activism over state legislation? Do we look at it that way because it could be, right? That's one thing that it looks like. Do we look at it as a workers' rights case? Because, after all, the case struck down a New York statute that was basically limiting long hours for people who worked in bakeries. So do we just look at it as a workers' rights case by being an anti-workers' rights case, or do we look at it as an employers' rights case? That's one way to look at it, right? Or do we look at it as something bigger? Many of the cases that were based on the *Lochner* ideology were subsequently overruled by U.S. Supreme Court cases.²⁴ But that *Lochner* anthology lives, right? We saw it play out; we see it play out every day when we pick up the newspaper; we see it play out in the politics of this country; we saw it play out in the election.

So what was in *Lochner* that I say still lives so much—not just in law, but in culture, in our legal system, in our social system, in our political system . . . what's so infuriating, dangerous, and vicious about *Lochner* was not just that they struck down the statute, but that basically they're saying that the health and the interest of bakers was not in the interest of the public good, right? The interest of bakers and the interests of workers is a special interest group. That's special interest legislation, that's a partisan interest, and the interest of workers is no different than any other constituent group. To me the part about *Lochner* that is most dangerous and that lives is the idea that workers' interests are spliced off from what's considered to be the public good.

Then it's very easy, as we are seeing, to blame public employees for the ill of the economy because of their pension plans. Workers who are striking are hurting commerce and are hurting the community. We basically see workers' interests as antithetical to the public good, workers' interests as antithetical to the commu-

²³ *Lochner v. New York*, 198 U.S. 45 (1905).

²⁴ See, e.g., *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937) (overruling *Adkins v. Children's Hospital*, 261 U.S. 525, 43 (1923), which had invalidated minimum wage legislation for women and children in the District of Columbia).

nity. But employers' interests are synonymous with the public good. What's good for commerce, what's good for business, a better business climate, is going to be good for workers. It seems to me that is at the heart of the struggle; that is why people are mad at public employees. You have pensions, right? Or people are mad at striking workers. "Why are you striking for that? You're striking for an increase in wages? Well, I haven't had an increase in wages in a long time and I don't have a pension."

And so it's this idea that whenever a group of workers is standing up to fight for what they are due and to fight for the right to dignity—because it goes beyond the issue of wages; it's about dignity at the workplace—that's seen as being against the community; it's seen as being selfish; it's seen as being a threat to commerce. It seems to me that is what we need to battle, and that battle is a difficult battle to undertake. That battle requires . . . changing how we think of each other, how we think of different classes of workers, including undocumented workers. But how do professional workers think of blue-collar workers? How do blue-collar workers think of "skilled workers"? All these divisions are so stitched into the fabric of law, of culture, of policy, of society, of how we are socialized, that we don't even really think about it critically. So that's why this is so wonderful that Professor Robson brought us together to talk about this because the question you ask is, what is work? Who do we consider as workers? Who do we consider as employees? What's work? What's non-work? What do we value as work? But all of that, it seems to me, is what we—progressives, lawyers, whoever we are—should engage in to be able to see what common interests we have. Because if we don't do that, why should I support immigrants' rights if I'm not undocumented and if I'm not an immigrant? Why should I? Then it's just an immigrants' rights issue. Or if it's an issue about wages, about that strike going on at Hostess Cupcake or whatever, why should I be interested in that in any sustained way?

PROFESSOR ARONOWITZ: One of the problems, ideological and cultural, is that if you want to have a class stand for it, but you take the position that anybody who has a job—who makes up to \$20,000 a year, which is the poverty rate—is middle class, and when you hear politicians over and over and over again, and the unions, saying "middle class this and middle class that," then you lose a certain kind of linguistic advantage.

PROFESSOR LUNG: \$7.25, the minimum wage, increased in 2007

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from \$6.50 or \$6.75 over the course of two years. And in 2009 the federal minimum wage became \$7.25.²⁵ You multiply that by forty hours a week and that comes out to \$15,080. That's below the federal poverty line. And so, you're talking about single parents, single women with kids living on \$7.25—if they are paid \$7.25. But if we just talk about the minimum wage and what that would do to business it seems that there is a reality that is obscured by the language of talk.

PROFESSOR ARONOWITZ: Well, what we don't have here in the United States, and we haven't had it for a very long time, is a theoretical and political analysis of the class structure in American society. The belief, for example, which is patently absurd, that employers create jobs—which was continually repeated during the presidential campaign of 2012—is really widespread in the sense that we have to help business and help commerce because that's where the jobs come from. The truth of the matter is that jobs come when workers produce goods and services. They are the ones who are the producers, not the employers. The employers invest capital. It's a very different kind of relationship. But nobody's talking about that relationship.

In Europe at least—although they are deteriorating as well, I submit—for example, in France, the worker in an enterprise of over fifty workers has a right to collective bargaining, regardless of whether they're in a union or not. So that committees—*Ar det pleas*²⁶—are established by law to negotiate the terms of the conditions of employment. Now it doesn't mean that the union is completely passive; the union vies for the positions—there are three or four unions—they vie for the positions on those committees, the enterprise committees, and they negotiate. The government is required by law to train people on those committees to learn the labor law and to know how to negotiate.

We don't have that situation. We have continually defined—and I think your point is very well taken—we've defined workers' interests as private interest, not public interest. We have defined workers essentially as individuals, not as collectives. We have defined collective bargaining as a voluntary activity that is a result of an election, which can be intervened by the employer at will, and there are very, very, very few people who would ever understand, at the moment, that workers are public goods, that workers' activity,

²⁵ 29 U.S.C. § 206 (2014).

²⁶ French for “committees.”

not workers personally, but workers' activity really benefit the entire economy. And they benefit the entire society. That conception is foreign to American law, foreign to American ideology. We have to work to correct that.

PROFESSOR LUNG: The reason why I brought it back to *Lochner* in the law school classroom is because we also have another tradition of cases. We have *West Coast Hotel Co. v. Parrish*,²⁷ where there the Supreme Court is talking about the liberty of contract relationship, but it's talking about that there's a relationship of power inequality—that it's a class conflict, that employers can be greedy, that if we allow the employers to pay sub-minimum wages that we're giving a subsidy to employers. We're subsidizing employers, right?

Whereas the *Lochner* idea is that if we require intervention to protect workers, then we're going to require employers to basically subsidize undeserving workers. So we have some cases that basically represent a different paradigm for looking at workers' rights, but it doesn't seem to me that that set of cases is the norm. Lawyers need to make that set of cases the norm. We need to call upon those cases.

That's why I also think that what we're involved in here at CUNY Law, as far as its mission to diversify the bar and the bench, is really important in terms of who you are because the class-based assumptions and biases of judges—given who they are and the composition of the bench—those are the people who are deciding these cases that have to do with workers' rights, who are deciding the cases like *Citizens United*.²⁸ We're looking at who the judges are and the idea that we populate the law profession with people who are not just from a certain privileged class, but maybe we could come up with case law that is not fragmenting interests of workers, not redefining divisions between workers, whether it's based on citizenship status or whether it's based on class identity. Basically, maybe we would be able to have case law that tried to look at workers as being defined as part of the public good.

But I also want to go back to a point that you made earlier, Stanley, that the law is not what's propelling the social movements, right? Social movements push forward the law. It's only because of people who are organizing, pushing, using the law, organizing, pushing, using the law, that in some ways the law responds. Anything that I've seen in workers' rights that has to do with represent-

²⁷ *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 406 (1937).

²⁸ *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

ing some new legal inroad has been because it's been preceded by organizing by workers, working with lawyers—coming up with ideas, legal tools, and strategies to figure out how to articulate, express, and push to advance what the organizing struggle is about. The law, then, is forced sometimes to catch up.

PROFESSOR ARONOWITZ: It's an anonymous history. The problem is that our historians—I mean the most prominent historians, for example, of the New Deal, or for that matter of slavery—will focus on individuals, [such as] the *Lincoln*²⁹ movie that just came out. Arthur Schlesinger, Jr., who is our colleague at the Graduate Center out of CUNY for a very long time, writes a history of the New Deal—more than one—on Franklin Delano Roosevelt.³⁰ It's as if Franklin Delano Roosevelt was responsible for everything. I mean, it is unbelievable.

But the social historians, and I know some of them, they are trying to create what might be described as an anonymous history—that is, a history of people's actual struggles in which there are no single leaders who are the representatives of good and so on. And that's part of the ideological struggle: you have to begin—we have to begin to say, “Look, it's not Brandeis, it's not Oliver Wendell Holmes, it's not William O. Douglas or Hugo Black who have created all the good things in the world. It's the people.

I saw *The Grapes of Wrath*³¹ on the tube the other night. It's not a great movie, in my opinion. I liked the novel a whole lot better. But at the end, the actor Jane Darwell, who plays the mother, says, “We just keep coming. We're the people.” The people keep coming. And what historians have forgotten—the Doris Kearns and the Schlesingers and so on—is that it's the people, not the figures who are professional politicians, who are making the difference.

One of the things that happened in New York State, which I'm very happy about, is . . . I know lawyers who are now judges. I mean, when Stanley Aronowitz personally has a friendship with a lawyer who is a judge, you know that something happened in the legal profession. Part of it was because of feminism. Feminists became lawyers, became judges, and some people who are active in labor

²⁹ LINCOLN (Walt Disney Studios Motion Pictures 2012).

³⁰ See ARTHUR M. SCHLESINGER, JR., *THE CRISIS OF THE OLD ORDER: 1919–1933 (THE AGE OF ROOSEVELT, VOL. 1)* (1957); ARTHUR M. SCHLESINGER, JR., *THE COMING OF THE NEW DEAL: 1933–1935 (THE AGE OF ROOSEVELT, VOL. 2)* (1958); ARTHUR M. SCHLESINGER, JR., *THE POLITICS OF UPHEAVAL: 1935–1936 (THE AGE OF ROOSEVELT, VOL. 3)*.

³¹ *THE GRAPES OF WRATH* (Twentieth Century Fox Film Corporation 1940).

rights activity became judges. That's a very important thing to say because those are the people who, to a large extent, came out of the movement, not out of the profession alone, but out of the movement. We haven't gotten too many other parts of the country; that's half the problem.

So, in my view, the law—and I think it can be shown—comes after the movement. The law is in some sense very contradictory in its relationship to the movement. On the one hand, it responds to the movement by having to push in certain directions. On the other hand, it's the famous phrase that we heard just before. It tries to regulate. It tries to control. It tries to suppress the movement. I think that is a characteristic of the National Labor Relations Act; I think that is a characteristic of the Civil Rights Act and the Voting Rights Act.

The idea, for the sake of argument, which may be a little controversial, I don't know—maybe it isn't—that if you have the right to vote for this politician or that politician, you have the pinnacle of human rights. Now, that's true for people who didn't have the right before. The franchise is, in fact, the important right. But that's not the pinnacle of all rights. The pinnacle of all rights is self-organization and autonomy. That's the pinnacle of rights.

PROFESSOR ROBSON: I am going to talk a little bit also about the relationship between the right to education and the right to work because you've both written about that. Interestingly, one of the things we saw when we were doing the affirmative action cases is that the court really gave great credit to the amicus briefs from GM, 3M, and the military, talking about the importance of diversity.³² So now we're thinking about diversity of education and diversity in the workforce. Maybe you could talk a little bit about that in terms of both pitting people against each other.

PROFESSOR ARONOWITZ: All right. I have to say this because it's what's on my mind a lot and I've written about this. My latest book on education is called *Against Schooling*.³³ The reason I call it *Against Schooling* is because I think there is a distinction between education and schooling. My observation, as well as my study, has convinced me that for most kids, especially working class kids, black kids, Latino kids—not all, but most—they don't learn any-

³² See *Grutter v. Bollinger*, 539 U.S. 306, 330–31 (2003).

³³ STANLEY ARONOWITZ, *AGAINST SCHOOLING: FOR AN EDUCATION THAT MATTERS* (2008).

thing in school, except discipline. Schooling is not an educational experience for many young people, even people who are in so-called middle-class schools.

That's a long conversation, but the basis of it is that I think that affirmative action is an example of an exception to that rule—that is to say, the promotion of people on the basis of a history of discrimination, on the basis of race and gender, was enacted originally by Richard Nixon. And the reason it was enacted by Richard Nixon—and this may sound cynical to you, but I don't mean it to be cynical—is because they would not spend enough money to have equal education in schools. This was going to be a cherry-picking operation by federal, state, and local authorities, as well as by the private corporations, to say, "Look, we have to have diversity, wherefore are we making sure that people have some opportunity."

But the hierarchy of our workforce and the hierarchy of our educational system should not obscure and not blind us to the fact that many people do not make it into the educational system beyond the sixth or the tenth grade; that in fact lots of kids drop out of school at the age of sixteen; and increasingly those who go to college do not graduate. The graduation rates are appalling in the United States. We should understand that.

So by the time you get to go to CUNY Law School or the graduate school of SUNY University or Harvard or anyplace else, you have been in a process which is called in France "selection"—*selectionne*. The selection of certain people to make it, which demonstrates that, if you put your nose to the grindstone and you work hard enough, regardless of your social background, you can be successful. Well, that's not the way the pyramidal structure of the American society operates. The pyramid, whether you know it, is a triangle. It has very few spaces at the top, a little bit more in the middle and at the bottom is the base of people who really never make it into the system.

Now, I have one more thing to say and then I'll stop. And that is to say that historically, the labor movement—when it was a movement, as well as community groups that were allied to working people—did not believe that the public schools, aside from the fifth grade or the tenth grade, were places for education. So they established their own educational programs. You did not read the great classics of literature and you did not read the great classics of social science as well through the schools; you learned it through the movement. You learned it from the trade unions. My grandfather—he was a worker, a cutter. When he became a citizen of the

United States, he went to citizenship school in the union local that he was a member of. And they taught him how to read English because his native language was Russian and Yiddish. And when they taught him how to read, they taught him on the basis of reading Dostoevsky and they taught him by reading *Communist Manifesto* by Karl Marx. That was an old labor movement, but that's how he learned how to read.

You could not learn how to read in schools; you learned how to read in the movement, and you learned how to write in the movement. My great uncle on my mother's side became a journalist, having been a sewing machine operator in the Yiddish press, even though he was a worker who never went to school to speak of in the old country or in this country. He just went to the union. We don't have that kind of understanding anymore.

I'm not saying we shouldn't try to fight for better schools; that's not my point. My point is, don't rely on them; that's not where it's going to happen. It's going to happen, if it happens at all, in public schools, because the rubric demands it and also has an alternative educational program, which offers to students, who are workers, a certain kind of education, which is not available in most schools.

PROFESSOR LUNG: I also want to say that we can talk about racial diversity and multiculturalism in higher education, but just how is that going to happen if we disinvest in our public schools? I mean, if we disinvest in our public schools, the way we are, where is that diversity going to come from? And so one statistic that I wanted to share was from Michelle Alexander's book, *The New Jim Crow*.³⁴ She said that nearly one-third of young black male workers are out of work. The jobless rate for black male high school dropouts, including the incarcerated, is sixty-five percent. So that educational system, who is it serving? And so if the educational system when you're in grade school, junior high school, and high school is not serving all of the population, then who's going to make it to get into college, law school, or any other graduate school?

We don't talk much about incarcerated labor [or] mass incarceration, even though we know it's a fact. It's a huge fact that many corporations that are basically extolling diversity also are some of the corporations who are using incarcerated labor to produce products.

³⁴ MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

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If we disinvest in public education where does that diversity or that multiculturalism come from? You see the whole movement towards charter schools, but I just don't see where that diversity is coming from. So we're going to fight at the university level and at the law school level for a very small group of people to create that diversity, when, basically, we're abandoning our education system. As a society, our money is not being put into public education. It's being put into different kinds of schools that are basically very class-based and race-based.

PROFESSOR ROBSON: How do you see student debt playing into that? Because we have a great interest in that: student debt.

PROFESSOR ARONOWITZ: Oh, student debt—I could imagine.

PROFESSOR ROBSON: And maybe a Thirteenth Amendment.

PROFESSOR ARONOWITZ: The United States is a great innovator in this direction. We have introduced into public higher education the notion of tuition. Now, for those of you who don't know, until 1977 the City University of New York did not have tuition; it was free. And, of course, you paid student fees. Then, in the fiscal crisis of 1976 and 1977, they introduced tuition. The way they got away with it was by assuring students and their parents that various federal programs would pick up the cost—that is to say, pick up the tuition. Within several generations of students, that had begun to erode significantly, and to a large extent, had begun to disappear so that the students themselves became increasingly responsible for their tuition.

On the other side of that, which is not insignificant, the thirty percent of students in higher education who go to private schools—private schools generally speaking are non-profits; I mean the private schools like the Ivies and the private colleges—those tuitions have skyrocketed so that you can spend \$50,000 a year in an institution like Harvard, Yale, or Dartmouth. Or Wesleyan, where my daughter went—we didn't pay \$50,000 at that time—you could spend \$50,000 a year and come out after four years with a debt of \$200,000 to \$250,000.

Now, obviously, student debt is not in the interest of students—or is it? Student debt is in the interest of the banks that loan the money. Student debt is one of the largest industries. Just to quote another statistic: We now know that student debt has now outpaced credit cards as the largest personal debt in the United

States.³⁵ There is a small movement, one of whose inspiration is a very close friend of mine, Andrew Ross, to address the problem of student debt, to begin to ask for forgiveness, cancellation, and so on. And Andrew knows, as well as many of the people who are now involved in the student debt movement, the students themselves—he's a professor at NYU but there are students involved, as well—that the only way that we're going to have any progress in the reduction of student debt, either in the form of forgiveness or in challenging the whole concept of student debt, is if we undertake what amounts to the right to strike, the right to take quote-unquote *concerted action* in other ways as well.

Luckily, unlike in the case of workers, students can still occupy administrative offices and the banks. Workers cannot occupy a factory; it is against the law. In the Supreme Court decision, I believe in 1938, where you had factory occupations in 1936 and '37 in the automobile industry—particularly and the rubber industry in 1936—the employers took care of that. They went to the Supreme Court, and the Supreme Court said you cannot violate the right of private property.³⁶

Now we haven't got that yet at the universities—you can still occupy administrative offices. You can still occupy—the students can still occupy the banks. Now of course they don't have a right to do that, but it's not the same kind of penalty that you have in the case of workers.

But there will have to be forms of concerted action to address the problem. And then what we might have is some law that would provide some protection against excessive tuition—and maybe I guess the continual situation in which the universities that charge tuition money are now exceeding the rate of inflation. That's one small matter. If the rate of inflation is going up approximately two to three percent a year, officially, and the rate of tuition has gone up six to seven to eight percent a year, you have a problem.

If you limited increases to the rate of inflation, which I think would be inadequate but at least it would be a step, you would begin to get some kind of amelioration of the situation. But so far, the movement of students and the movement against debt by their parents are much too small. It's not becoming an object of conver-

³⁵ See Tamar Lewin, *Burden of College Loans on Graduates Grows*, N.Y. TIMES (April 11, 2011), <http://www.nytimes.com/2011/04/12/education/12college.html>.

³⁶ See *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 256 (1939) (holding that employees' sit-down strike constituted an "illegal seizure" of employer's property, and thus the employer did not violate the National Labor Relations Act when it discharged the striking employees).

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sation, and I think conversation, as I said before, is the beginning, and education is the beginning of the possibility of remediation.

PROFESSOR LUNG: Also the whole notion of student debt and why this increasing cost of education in public schools and public universities like our own is a public disinvestment from it. And when you talk about private schools, it's all about seeing education as a commodity and students as consumers.

So one college president—I forget which college—was asked, “Should it cost \$50,000 to go to your school?” And he said, “Well, we have to provide really good services for our students because they're consumers. So we have to have small class student-to-teacher ratios, we have to have nice dormitories, we have to have nice gymnasiums.” So it's the idea, the idea of this corporatization of education, seeing education as a commodity, seeing students as consumers that in part lends to this.

Then the idea about student debt. Some people say that student debt is the next housing bubble. It's the next bubble because of what happened to those subprime mortgages that were being traded in derivatives. That's also what's happened with student debt. And so the fear that's instilled is that once that bursts, that could contribute to the next economic collapse. So this issue is—and I don't think it's just the issues of loan forgiveness—I think it has to be the issue of how you contain costs. It's the same thing with medical care: it's how do you have universal health care and how do you contain the costs? I think the same thing can be applied to education.

Also, the other thing that I wanted to say that we haven't touched on is this corporatization that's going on. It's occurring on every single level. In grade schools it's talking about merit increases for teachers, linking outcomes assessments and standardized test-taking results. At the university level that's what we're also seeing—outcomes and assessments, what are the outcomes and assessments to evaluate what we're doing here, the whole notion of merit-increases versus seniority. All of that is going on.

But there are places of resistance. I think what you're asking is, when will students become very upset about student debt? When will their parents become so upset about student debt that it forms some kind of movement? We're talking about increasing the use of adjuncts to teach classes and treating them as a second tier of workers. That movement, the PSC is addressing that, but are we vigorous in it?

We talk about TAs who are being used to teach classes, but TAs are teaching assistants. Do they have the right to organize? Do they have a right to a minimum wage? So there are points of resistance that are really possible and that there are seeds of.

PROFESSOR ARONOWITZ: And we should mention that in 1980 the Supreme Court issued a decision called the *Yeshiva* decision.³⁷ And the *Yeshiva* decision said that teachers and professors in private colleges and universities are part of management. One of the great concessions that the unions made in the 1930s in the National Labor Relations Act was to exempt management from union organization—what a terrible mistake that was. Be that as it may, teachers in private colleges cannot organize into unions unless they are voluntarily recognized by the administration; there's no protection under the law.

But the other significant problem is about colleges and universities. We have a hierarchy: the associate professor, the assistant professor, the adjunct, the lecturer and the part-timer, the full-timer. We have all the same provisions they used to describe in terms of immigration. So that is a big problem. My full professor colleagues, almost all of them at the Sociology Program at the Graduate Center are full-time professors, and many of them . . . couldn't care less for the fate of the adjuncts. Students are adjuncts. One of the things we have discovered is that enrollment in higher education, especially in graduate education at some universities, including our own, has expanded for Ph.D candidates. And one of the reasons it's expanded is because they're a cheap labor force—and there may not be jobs available for them at the end of the process. So now they're beginning to restrict the admission of many to the programs at the graduate level—those that cannot be fully funded will not be admitted. That's a very bad thing in some ways; on the other hand, that's the way of restricting the labor supply.

The second thing I wanted to say beyond that is that the hierarchy of institutes foments an attitude by many parents and many students that they're willing to pay the freight—not now, because it's getting much more difficult, the bubble is beginning to burst. But historically, they've been willing to say, "Well, this is Harvard. This is Yale. This is Vassar. This is Barnard. Etcetera. We're willing to put up the money because the outcomes from being a college graduate from Barnard or Yale and so on are much better than it

³⁷ NLRB v. *Yeshiva Univ.*, 444 U.S. 672 (1980).

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would be from a public university.” That is not necessarily true anymore.

PROFESSOR ROBSON: Okay, I’m going to go to my last question. Ready? It’s a big, open-ended question. So finally: what are your reflections on the outcome of the election? I think I told you it was huge.

PROFESSOR ARONOWITZ: You’re being very narrow.

PROFESSOR ROBSON: Is it about jobs, work, taxes, other central issues? One thing I saw last week—it was in *New York Magazine* and not the *New Yorker*—that said, “We just had a class war, and one side won.” Go for it. I’ve stumped you both.

PROFESSOR LUNG: I wouldn’t go that far. Maybe because I’m not a pessimistic person at all. I’m a very hopeful person. But I vacillate between thinking that this was important to thinking, “Wow, we barely won and that, basically, if we had two more weeks right before the election, maybe things would have changed completely.” Maybe the voter suppression and the infusion of all the money would have worked, and maybe if the circumstances were slightly different and we had two more weeks for those things to play out, it’s possible that the election wouldn’t have turned out the way it did. So I vacillate between both of those.

And then I guess what I do think the election showed was that it rejected basically a certain vision that there’s no role for the government. Because I think basically that was what was at issue, that the whole Romney-Ryan idea of government not having a role, I think that that was rejected. And the idea that there needs to be someone there to fight, including government, to fight for working people and the poor, even though the words “poor people” were rarely mentioned. It was about the middle class—nothing against the middle class—but the poor people were never mentioned.

And what I also think, which is what I’m really hopeful about, is that the demographics of the country really came into play. So with that—that we are becoming much more multiracial, multicultural, the Latino vote, Asians, African Americans, and the coming of age of those populations in terms of their size—that has the potential to alter the politics of this country, if we engage in the kind of organizing and the building of alliances towards movement. It has the possibility, I think, to alter the politics. I don’t think the

numbers by themselves mean that, but I think that there's a potential for that.

PROFESSOR ARONOWITZ: I am glad that Obama won the election, and I'll tell you why. Because I think if Romney had won the election and that right wing cabal that he was obliged to cater to had won the election, we would be asking for another Obama. But with Obama winning the election and the Democratic Party being mostly in power we're in a situation in which the demands that can be raised politically from the base of the Democratic Party—which, as you correctly say now, includes large numbers of blacks, large numbers of Latinos, Asians, young people, women, workers—those demands are going to have to be met because the expectations are still that they will be raised.

However, I want to just point out a few things that are not very pleasant. The past four years of the Obama administration illustrate, I think, a major point—namely, that we've reached the end of an era. This is not to say that we're at the beginning of a new era yet, but we've reached an end of an era. And that end definitively may have ended a long time ago, but it's very clear—it seems to me—that when Obama took office that his real base was Wall Street. I don't mean his electoral base but his ideological base was Wall Street. U.S. foreign policy, for example, is still sending U.S. soldiers to their death, and they will not withdraw from Afghanistan, will not withdraw from Iraq, will not necessarily stop the war that will potentially be against Iran, or at least bombing. The foreign policy of the United States has been continuous since the Cold War.

Secondly, about work and about jobs: Can you imagine—Romney made one very important point—23 million people who are out of jobs who want jobs or income? This administration—forget about whether they can enact anything, given the Republicans' control of the House. That's a serious question and we can't go into it greatly, but he [Romney] did not even use his bully pulpit to raise the question of where jobs and income might come from. He played a game, and the administration—I'm not blaming [Obama] individually, but the administration—played a game essentially of what we call neo-liberal economics, which is an economic policy that essentially believes that the market is going to solve all the problems and that government must be subordinate, ultimately, to the market. That is Obama's philosophy. And I think it's important that he be elected because I think that philosophy has to be repu-

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diated. I think it is immoral. Until and as long as people begin to address that kind of question, nothing much is going to happen in these next four years.

One of the problems, obviously, is that the needs of the American people—given what I started to say before this last question—are growing. There are no automatic cyclical solutions to the unemployment crisis. We have ended that whole period of Keynesianism—that is to say, of effective demand from below; that's not where the Obama administration is going. It means that there will be increased unemployment. There will be more and more part-time and contingent labor. There will be more and more discontent in society. You know, there are people who think this discontent is a bad thing and that what we need is to make lovey to each other. Excuse me—without discontent, we're not going forward. I think we're into a period of the next four years of increasing discontent, and I welcome it.

PROFESSOR ROBSON: And that's a lot of work for us as social justice attorneys. Thank you both so much.

