CUNY LAw REVIEW
Edited by the Students of the City University of New York School of Law

Scholarship for Social Justice

2014–2015
EDITORIAL BOARD

Editor-in-Chief
ELIZABETH KOO
Managing Editors
NABILA TAJ
PATRICK TYRELL

Public Interest Practitioners Section Editors
EMILY FARRELL
TANA FORRESTER

Digital Articles Editors
VIOLETA ARGINIEGA
CHELSEA BREAKSTONE

Notes & Comments Editors
REBECCA ARIAN
LI LITOMBE

Special Events Editors
RACHEL NAGER
SYEDA TASNIM

Senior Staff Members
SHARANA SHAHABUDDIN
CHASE VINE
KARA WALLIS

Managing Articles Editor
JULIE PENNINGTON

Executive Articles Editor
CATALINA DE LA HOZ

JAMES KING

Staff Members
DIANA ARAGUNDI
PAULA BONDAD
SARA BOVILL
SAMUEL BRUCE
JONATHAN CANTARERO
VINCE CHAN
AUBREE D’ALFONSO
AJAI J. DAVIS
RADHA DESAI
MAGGI FARMER
JEAN FISCHMAN
CAROLINA GARCIA
MARISSA GOLDFADEN BLEIER
JOHN GUYETTE
KELLY HERRMANN
ROBERT HUFF
SANA KHASHEHANG
LEONARD LEVERILLE
MIA LUKASHOVA
MARCELLA B. MARUCCI
JACQUELINE MESEE
ANGEL MELENDEZ

Volume Eighteen Winter 2014 Number One
CUNY LAW REVIEW
Edited by the Students of the City University of New York School of Law

Scholarship for Social Justice

CONTENTS

Introduction
Introduction: To Economic Justice
Themed Issue vii

Public Interest Practitioner Section
MFY Legal Services, Inc.’s Medical Legal Partnership with Bellevue Hospital Center: Providing Legal Care to Children with Psychiatric Disabilities
Aleah Gathings 1

Articles
Elevating Substance over Procedure: The Retroactivity of Miller v. Alabama under Teague v. Lane
Brandon Buskey & Daniel Korobkin 21

A Founding Failure of Enforcement: Freedmen, Day Laborers, and the Perils of an Ineffectual State
Raja Raghunath 47

Notes
One Condo, One Vote: The New York BID Act as a Threat to Equal Protection and Democratic Control
Brett Dolin 93

No Access, No Choice: Foster Care Youth, Abortion, and State Removal of Children
Kara Sheli Wallis 119

Event
The Long Crisis: Economic Inequality in New York City
A Conversation between Fahd Ahmed, Tom Angotti, Jennifer Jones Austin, Shaton Blumberg, & Robin Steinberg
Moderated by Professor Stephen Loffredo 153

Direct communication about advertising, sponsorships, reprints, or back orders can be sent via email. Manuscripts should be double-spaced and use footnotes, not endnotes. We prefer electronic submissions, which can be sent to us either through the Berkeley Electronic Press’s expresso service <http://law.bepress.com/expresso> or our email address, CUNYLR@mail.law.cuny.edu.

Volume Eighteen Winter 2014 Number One
INTRODUCTION

New York is in the midst of a long crisis of economic inequality. Over the past forty years, the gap between the rich and the poor has widened, and the working class and working poor people of New York are suffering and struggling to survive. Many aspects of working poor life present extreme challenges and barriers. People have been suffering from wage stagnation and diminished public benefits. The educational system prepares poor and working class children for a life of rote labor. The City’s paltry public services are under constant threat. These services have undergone years of assaults, and there is a steady ideological drum beat that those who enter into these systems are somehow at fault. The narrative is that if you need help, there is something wrong with you. Everything is more difficult when you are living from paycheck to paycheck, and paycheck to paycheck living is the reality for the overwhelming majority of New Yorkers. When working class people are over-policed and forced to interact with the criminal justice or immigration detention system, their precarious situation is often plunged into crisis. Money greases the wheels of the criminal justice system, allowing those arrested who have greater financial resources to be let out on bail, enabling them to amerolate any disruption in their daily lives.

While poverty itself is not the only cause of social injustice, it is the mechanism by which other forces are able to be perpetuated. But what does “economic inequality” really mean? Does referring to the idea in this simple and passive way merely touch the surface of its “societal discomforts”? Does it obscure the reality that an economic system of capitalism can only function if there is an unequal concentration of wealth and opportunity? In order to dig deeper and strive to understand economic inequality in a more nuanced way, we must realistically discuss the existing systems of oppression at play, how they impact individuals and communities, and how advocates, lawyers, organizers, and activists can begin to work together to challenge injustice and inequality in a meaningful way.

In the tradition of CUNY Law Review’s mission of promoting “Law in the Service of Human Needs,” we decided to focus this volume of work on this struggle. As a journal that has always strived to create a forum for social justice scholars and innovative public interest practitioners, we chose to use our unique position to push the conversation beyond what is typically presented in the media, which often focuses on symptoms of the problems, toward discussion of solutions. We are proud to present this volume of work, which we believe showcases writing by scholars and practitioners, to effectively inform and enhance this conversation.
Our Notes and Comments Section features the work of two CUNY School of Law students. Kara Wallis’s (Class of 2015) Note *No Access, No Choice: Foster Care Youth, Abortion, and State Removal of Children* exposes the ways our nation’s foster care system reinforces the cycle of poverty using the example of pregnant foster care youth. Under the current legal schema, these minors are unable to obtain parental consent for an abortion from parents with whom they have no legal relationship. They are forced to rely on judicial bypass to access abortion, and should their judicial bypass application be denied, these youth must carry their pregnancies to term. As wards of the system, foster care youth often lack the support and resources to achieve economic stability. Consequently, these women become vulnerable to state removal of their children through a child welfare system that disproportionately impacts the indigent. The cycle of poverty and economic disenfranchisement is perpetually reinforced as youth in the foster care system give birth to children who end up in the foster care system. Wallis calls for a number of reforms. She advocates, “Our system must recognize that poverty is the greatest risk to youth’s health, that youth are sexually active, and that youth can be trusted to make autonomous decisions when provided with sufficient support and education.”

Brett Dolin (Class of 2015), in his Note *One Condo, One Vote: The New York BID Act as a Threat to Equal Protection and Democratic Control*, examines the role of the Business Improvement District (BID) in the privatization of city services and restriction of district voting power to property owners by detailing what transpired with the proposed Hudson River Park Neighborhood Improvement District (HRP NID). Dolin articulates how the misuse of the BID form results in property owners retaining control of the allocation of BID funds, while non-owning residents and tenants have limited influence as to how funds are used. As BIDs proliferate across the United States, *One Condo, One Vote* stands as a warning of the potential for both increased and unchecked privatization of municipal government and a threat to democratic control of municipal services embedded in New York’s Business Improvement District (BID) Act.

Raja Raghunath’s *A Founding Failure of Enforcement: Freedmen, Day Laborers, and the Perils of an Ineffectual State*, argues for stricter enforcement of labor standards to protect undocumented workers, specifically day laborers, who are vulnerable to abuse and exploitation by their employers. The article provides a historical perspective on the issue by comparing the lack of enforcement of current labor laws to the federal government’s failure to enforce the working rights of recently freed slaves during the Reconstruction era, and posits that we should learn from the failed goals of the past to ensure protection now. In *A Founding Failure of Enforcement,*
Raghunath points out that undocumented workers are forced to work for long hours, with little to no pay and no redress. To combat this, Raghunath argues that labor law enforcement must be targeted toward the most vulnerable workers, as they are most likely to work in fear of threats and retaliation for asserting their rights. We are compelled to stand with Raghunath in exposing this reality and these horrific conditions and to push our readers to combat the systemic exploitation of undocumented workers.

In *Elevating Substance Over Procedure: The Retroactivity of Miller v. Alabama Under Teague v. Lane*, authors Brandon Buskey and Daniel Korobkin of the American Civil Liberties Union tackle the issue of mandatory life-without-parole sentences for juvenile criminal defendants. Although the United States Supreme Court declared such sentences unconstitutional violations of the Eighth Amendment in *Miller v. Alabama*, lower courts have split on whether the ruling must be applied retroactively to the over 2,000 inmates currently serving mandatory life-without-parole sentences that were imposed on them when they were juveniles. The devastating effect that these sentences have on communities most impacted by the criminal justice system—poor communities of color—illuminates one pathway to correcting some of the devastation wrought by the justice system.

Our Public Interest Practitioner Section (PIPS) features the article *MFY Legal Services, Inc.’s Medical Legal Partnership with Bellevue Hospital Center: Providing Legal Care to Children with Psychiatric Disabilities* by Aleah Gathings. Gathings, a staff attorney with MFY Legal Services, presents the medical legal partnership as a useful model for addressing the legal needs of a particularly vulnerable group: low-income families of children living with psychiatric disabilities. Continuing the tradition of the section, which has always served to provide a platform for practitioners engaging in innovative legal strategies, Gathings provides a grounded overview of the struggle that these families face as a result of poverty and illness, and the legal complexities that result. She describes how legal services practitioners can successfully partner with public hospitals to meet potential clients where they are, and how, through the combined efforts of medical and legal professionals, patient-clients experience both improved health and economic circumstances.

In November of 2014, CUNY Law Review hosted a panel titled *The Long Crisis: Economic Inequality in New York*, bringing together scholars and practitioners to reflect on the how the system that we live in and reproduce generates immiseration. The result, transcribed here, was a spirited dialogue touching on the ways in which this immiseration is compounded by the surveillance and incarceration of black, brown and immigrant people, the policies that promote the displacement of people from their homes in once-
affordable neighborhoods, and the stratification and hierarchy of public schools in New York City.

The CUNYL’s mission is to publish work authored by cutting-edge social justice scholars and public interest practitioners. We strive to provide a forum for community advocates, organizers, and allies to influence and radicalize legal practice. Our social justice mission is deeply integrated into the Law Review, with a rigorous article selection process that emphasizes innovative legal scholarship with a practical impact in support of low-income communities, communities of color, and other historically marginalized and disenfranchised groups of people. Looking ahead, the Law Review remains dedicated to effecting its roles as a platform not only for critical legal scholarship, but also for critical legal practice.
MFY LEGAL SERVICES, INC.'S MEDICAL LEGAL PARTNERSHIP WITH BELLEVUE HOSPITAL CENTER: PROVIDING LEGAL CARE TO CHILDREN WITH PSYCHIATRIC DISABILITIES

Aleah Gathings†

CONTENTS

I. INTRODUCTION ........................................ 1

II. MLPs ................................................. 4
    Defining Key Terms .................................. 4
    Understanding the MLP Model of Care: Treating Patients with Medical and Legal Care .......... 4
    Benefits of the MLP Model .......................... 6

III. A RIPE LEGAL LANDSCAPE FOR MLPs IN NEW YORK STATE ................................................ 8

IV. MFY LEGAL SERVICES, INC. ............................ 12
    History and Background ................................ 12
    MFY Legal Services’ Track Record of Providing Legal Services to People with Mental Illness...... 14

V. THE INCEPTION OF BELLEVUE HOSPITAL CENTER’S CHILD AND ADOLESCENT CLINIC ....................... 14
    MFY Recognizes the Unmet Need of Children in New York City ........................................ 14
    MFY Legal Services Launches a New MLP with Bellevue Hospital Center’s Department of Child & Adolescent Psychiatry ............................ 15
    Significance of Pro Bono Engagement .............. 17

V. CONCLUSION .......................................... 19

I. INTRODUCTION

“The lawyers are on top of it.” This is the new refrain during clinical rounds at Bellevue Hospital, when medical providers ask whether a patient and their family received a referral to MFY Legal Services, Inc. Clinical rounds at Bellevue’s Department of Child

† Aleah Gathings is a Staff Attorney at MFY Legal Services, Inc. and is the attorney on site at Bellevue Hospital’s Child and Adolescent Clinic. Aleah would like to thank the CUNY School of Law students for their efforts and all of those who contributed to the completion of this article.
and Adolescent Psychiatry generally incorporate a discussion of each patient’s diagnosis, prognosis, medical and family history, and medications. Members of the health care team, which include doctors, social workers, nurses, caseworkers, finance personnel, family advocates, a discharge planner, and now lawyers, discuss the patient’s individual care management and his or her pathway to stability. Lawyers add a new dimension to clinical rounds, particularly because they can spot legal needs that may implicate a patient’s health and well-being. Other members of the health care team are also being trained to identify unmet legal needs during clinical rounds. Accordingly, patients are identified for legal referral concurrent with discussions about changes to their medications, strategies to achieve health stability, or ways to augment their care management and discharge plans. This is the medical-legal partnership (MLP) in action.

Bellevue Hospital’s clinical rounds reflect a team-based approach to care—an approach that continues to receive increased recognition in health care reform efforts. In the era of the Affordable Care Act (ACA), with many states and the federal government focusing on how to improve the quality of health care, better coordinate care, and reduce care costs, recognition of the medical-legal partnership model is mounting. In addition to building a multi-disciplinary care team, the MLP model calls for care coordination across disciplines, a construct that is especially critical when providing care to patients with mental health conditions.

The MLP model is particularly well-suited to address the needs of children who live with mental illness and come from low-income families. These children present their own unique set of challenges, such as education-related issues or the dissipation of ade-

---

1 Jeanette Zelhof & Sara J. Fulton, MFY Legal Services’ Mental Health–Legal Partnership, 44 CLEARINGHOUSE REV. J. POVERTY L. AND POL’Y 535, 535 (2011) (describing an older MFY program and explaining generally that MFY’s mental health-legal partnership model continues to be the vanguard of the medical-legal partnership movement).


3 See Tina Rosenberg, When Poverty Makes You Sick, a Lawyer Can Be the Cure, N.Y. TIMES (July 17, 2014), http://opinionator.blogs.nytimes.com/2014/07/17/when-poverty-makes-you-sick-a-lawyer-can-be-the-cure/ (finding that the growth in medical legal partnerships is due in large part to the increasing attention to the social determinants that affect health and wellbeing).

quate, age-appropriate mental health services once a child nears the age of majority and available services begin to diminish. Families often endure ongoing health and financial crises due to the cyclic consequences of their child having a mental illness and need immediate help. MLPs help make an array of vital services available to patients at a single point of access. MLPs help children and their families by providing legal help within the clinical setting, where a patient has an existing familiarity and ideally, a medical home. Additionally, MLPs may delay or prevent future crises through the increased collaboration of medical, social work, and legal providers. When lawyers join a health care team, they help to stabilize the lives of patients through the provision of legal services. When a child’s legal advocates work together with that child’s doctors and social workers, they can better provide advocacy that prevents imminent or future peril or destabilization.

The next section of this article defines and discusses the MLP model. Section III describes the legal landscape for MLPs in New York State. Section IV provides an overview of the history of MFY Legal Services, Inc. and its track record for providing services to

---


6 See Laura Lee Hall et al., *Shattered Lives: Results of a National Survey of NAMI Members Living with Mental Illnesses and Their Families*, RECOVERY INFORMATION AND ADVOCACY DATABASE, 1, 3 (2003), available at http://www.nami.org/Content/NavigationMenu/Inform_Yourself/About_Public_Policy/P Policy_Research_Institute/TRIAD/TRIAD_Summary_Sheet.pdf (finding that national survey depicted that 67% of National Alliance on Mental Illness’ members are unemployed and 71% live on less than $20,000 a year, mainly as a result of the lack of quality of services, stigma, discrimination, costs, lack of supports, and inane disincentives in public programs that create daunting barriers to recovery. Many of the individuals represented in the survey depend on their families for mental care, money, and housing.).

7 A medical home is a cultivated partnership between a patient, his family, a primary care provider, and a specialist that provides comprehensive and continuous medical care to the patient and integrates patient care across all institutions. See Ashley Craig, *You Can’t Go Home Again—Difficulties of Medical Home Implementation Within Health Reform*, 21 ANNALS OF HEALTH L. ADVANCE DIRECTIVE 60, 61 (2011).

8 See Paul, et. al., supra note 4 at 304 (explaining that MLPs seek to address the needs of patients before they become crises).

9 Id. at 308 (explaining that MLP lawyers can help resolve complicated legal issues and help teach physicians that legal assistance is integral to patient health).
individuals living with mental illness. Section V highlights the need for the Child and Adolescent Clinic at Bellevue Hospital Center, and Section VI outlines future considerations for expanding services to children with psychiatric disabilities under an MLP model.

II. MLPs

Defining Key Terms

An MLP is a type of health care delivery model that integrates the expertise of health and legal professionals to identify, address, and avert a health-harming legal need.10 A health-harming legal need is a social dilemma that negatively affects a patient’s health or their access to health care services and is better addressed through joint medical and legal care, rather than solely through medical treatment.11 Examples include: food insecurity, housing instability, unhealthy housing, insufficient income, and lack of access to health insurance.12 “Legal care” is a full spectrum of affirmative interventions that address legal needs for individuals and the community and is demonstrated by legal professionals actively:

- Training health care team members to identify health-harming legal needs in patients;
- Providing patients with triage, consultations, and legal representation;
- Working with health care team to augment health care institution policy; and
- Advocating for changes to local, state, and federal policies and regulations to improve population health.13

Understanding the MLP Model of Care: Treating Patients with Medical and Legal Care

MLPs have existed for decades.14 The earliest MLP was established in Boston in 1993, and “the model of medical-legal partnership was established in the Department of Pediatrics at Boston

11 Id. at 2.
12 Id. at 12.
13 Id.
Medical Center and the Boston University School of Medicine.”  
Medical-Legal Partnership Boston is the inception site of the National MLP system and now serves 1,500 patients each year through a health care network that includes Boston Medical Center and six community health centers. The health system in Boston spans numerous medical practice areas including internal medicine, family medicine, oncology, and pediatrics. Today, there are over 230 MLPs nationwide, and this number is expected to continue to grow.

The overarching goal of an MLP is to triage legal care for patients and advocate for policies and laws that promote and protect the health of the most vulnerable residents in a community. Oftentimes, it is low-income patients that stand to derive the most benefit from MLP programs. Low-income patients often face a greater or an ongoing number of legal issues and are also more susceptible to health-harming legal needs. Low-income patients are also disproportionately affected by chronic disease conditions. Given these factors, MLPs may typically function to address the needs of patients who are at a high risk for enduring the cyclical nature of certain health problems. Depending on the populations and communities they serve, MLPs may designate specific practice areas and focus on the provision of a select few, or an array of legal services. Notably, likely social impediments to achieving and sustaining optimal health include: food and income insecurity, lack of health insurance, inappropriate education, poor housing condi-

15 Megan Sandel et al., Medical-Legal Partnerships: Transforming Primary Care by Addressing the Legal Needs of Vulnerable Populations, 29 HEALTH AFF. 1697, 1698 (2010) (explaining that the concept of medical-legal partnership was formally developed at the Department of Pediatrics at Boston Medical Center and the Boston University School of Medicine).
20 Id.
21 Id.
22 Rosenberg, supra note 3.
23 Id.
24 Id.
25 Paul et al., supra note 4, at 305.
tions, employment issues, and lack of personal/familial stability and safety.\textsuperscript{26} Ultimately, MLPs strive to identify and address these health-harming legal needs early on, before those needs become a crisis that may require litigation or have an adverse effect on health.\textsuperscript{27}

MLPs have great potential to reduce health care disparities and improve healthcare outcomes.\textsuperscript{28} Some advocates of MLPs argue that “the addition of lawyers to the medical team can promote health and address barriers to effective health care . . . These social, non-medical needs have legal solutions that, if addressed, can diminish health disparities.”\textsuperscript{29} Similarly, the National Center for Medical-Legal Partnership (NCMLP) uses the phrase “the medical-legal partnership response” to describe legal and health care systems’ consideration of and affirmative steps toward addressing the effect of social determinants of a patient’s health.\textsuperscript{30} In their words, an MLP “bridges the divide” left by uncoordinated efforts to address the correlation between health and legal needs.\textsuperscript{31} More specifically, by allowing for the provision of legal care\textsuperscript{32} in a clinical setting, the MLP model provides more comprehensive care for those individuals and communities who have the greatest need and live with the greatest disparities in health.\textsuperscript{33}

Benefits of the MLP Model

In addition to providing both medical and legal care, MLPs impart an array of benefits to the patients and communities they

\textsuperscript{26} See Cohen et al., supra note 18, at 136 (describing social causes of health disparities).
\textsuperscript{27} Id.
\textsuperscript{29} Id. at 136.
\textsuperscript{30} Nat’l Ctr. for Medical-Legal P’ship, supra, note 10.
\textsuperscript{31} Id. at 7.
\textsuperscript{32} Id. at 2.
serve. The benefit to patients is firmly rooted in a well-established evidence base. Beyond identifying and addressing health-harming legal needs, MLPs have been shown to reduce stress, increase compliance with health care, augment the treatment of chronic disease, and spur public benefits recovery. Patients may experience personal monetary gains as a result of reinstatement or increase of public benefits. There is also evidence that MLPs contribute positively to improved population health. Although there are vital advantages for all MLP patients, having ready access to a full spectrum of legal care under an MLP model is critically important for children who live with mental illness, along with their families and the community at large.

Moreover, members of the health care team may also derive a benefit due to their participation in an MLP model of care. Evidence supports the fact that members of a health care team experience increased efficacy in spotting legal issues. In addition, health care team members experience increased job satisfaction through their contribution to the work of an effective health care delivery model that improves health outcomes and combats health disparities.

34 Id. at 5-6 (citing several studies that reference patients’ benefits from MLPs).
36 See James A. Teufel et al., Rural Medical-Legal Partnership and Advocacy: A Three-Year Follow-up Study, Vol. 23, No. 2, J. of Health Care for the Poor & Underserved, 705, 711 (2012) (reporting that Medical Legal Partnerships increase patients’ access to Medicaid, thereby decreasing financial obligations and increasing patients’ financial resources).
37 See, e.g., Robert Pettignano et al., Can Access to a Medical-Legal Partnership Benefit Patients with Asthma who Live in an Urban Community?, 24 J. Health Care for the Poor & Underserved 706, 715 (2013) (finding that health outcomes for children living with asthma were improved after their families received legal assistance from an MLP).
39 Paul et al., supra note 4, at 306.
40 See, e.g., Jennifer K. O’Toole et al., Resident Confidence Addressing Social History: Is It Influenced by Availability of Social and Legal Resources? 51 Clinical Pediatrics 625, 629-31 (2012) (discussing how residents who worked in clinics with more social and legal sources expressed more confidence in their knowledge and screened for health determinants more frequently).
III. A Ripe Legal Landscape for MLPs in New York State

As the first state to adopt legislation to advance MLPs, New York provides a ripe legal environment for the creation and sustainability of MLPs statewide. In 2011, Governor Andrew Cuomo signed Public Health Law § 22 into law after a years-long lobbying effort by a coalition of advocates led by New York Legal Assistance Group’s LegalHealth division. The overriding purpose of the legislation is to “promote collaborations between health care service providers and legal aid programs to resolve practical needs that have an impact on patient health.” By specially designating health-related legal services programs that comply with Department of Health standards, the state endorsed existing MLP programs while encouraging the formation of new collaborations between legal and medical services providers. Although the bill does not provide state funding for MLPs, advocates hope that by lending its endorsement, programs will find other funding sources more easily. Public Health Law § 22 provides for a

“health-related legal services program” . . . that is a collaboration between health care service providers and legal services programs to provide [onsite] legal services without charge to assist, on a voluntary basis, income eligible patients and their families to resolve legal matters or needs that have an impact on patient health or are created or aggravated by a patient’s health.

The law recognizes social determinants of health and the adverse effects they may have on patient health and access to medical treatment, particularly as they impact low-income people. Public Health Law § 22 provides the opportunity for income-eligible patients to have their legal needs more easily resolved by promoting the multi-disciplinary approach of an MLP. Low-income patients may derive immense benefit from an MLP model because they often struggle with comprehensive and compounded legal needs.

42 N.Y. PUB. HEALTH LAW § 22(1) (McKinney 2011).
43 Retkin & Campigotto, *supra* note 42.
44 *Id.*
45 N.Y. PUB. HEALTH LAW § 22(1) (McKinney 2011).
46 *Id.*
47 N.Y. Bill Jacket, N.Y. Assemb., 234th Leg., Reg. Sess., 2011 A.B. 3304, Ch. 509, at 7 (N.Y. 2011) (stating the purpose of the bill is “to promote collaborations between health care service providers and legal aid programs to resolve practical needs that have an impact on patient health”).
48 See Carmean, *supra* note 14 (explaining the connection between poverty-related
that have significant negative implications for a patient’s mental
stability and recovery,49 along with the stability of an entire house-
hold.50 With the sanction of MLPs under Public Health Law § 22,
the provision of legal services to low-income patients may include,
but is not limited to, the following areas:

- Housing,
- Income maintenance (e.g., Supplemental Security Income
  (SSI) and Social Security Disability (SSD)),
- Employment,
- Government entitlements (e.g., Medicaid and SNAP51
  benefits),
- Family law,
- Advance planning (e.g., health care proxies, powers of
  attorney),
- Special education, and
- Consumer debt issues.52

Even independent of the recently passed law, New York State
provides an ideal environment for the advancement of MLPs be-
because the state established its own health exchange in 2012.53 On
April 12, 2012, Governor Cuomo issued Executive Order #42 to
establish a statewide Health Exchange in New York.54 Today, New
York’s health insurance marketplace, New York State of Health, has
enrolled just under one million New Yorkers for health insurance

49 See Randye Retkin et al., Medical Legal Partnerships: A Key Strategy for Mitigating the
Negative Health Impacts of the Recession, 22 No. 1 HEALTH LAW. 29, 32 (2009) (citing two
studies on positive effects of legal interventions on clients with chronic and serious
illnesses, including “significant improvements in the severity of their condition” and
“reduced stress and worry”).

50 See Carmean, supra note 14 (citing examples of largely unrecognized legal chal-
lenges faced by a high proportion of low and moderate income families that adversely
affect managing chronic illnesses as well as the quality of life of patient’s children).

51 SNAP stands for Supplemental Nutrition Assistance Program and is also known
www.fns.usda.gov/snap/supplemental-nutrition-assistance-program-snap (last modi-

52 Retkin & Camprigotto, supra note 41.

53 See Thomas Kaplan, Cuomo Acts to Advance Health Law in New York, N.Y. TIMES
(Apr. 12, 2012), http://www.nytimes.com/2012/04/13/nyregion/cuomo-orders-
health-insurance-exchange-in-new-york.html (explaining generally that as of April
2012 New York State was one of eleven states to have created a health care insurance
exchange).

54 N.Y. Exec. Order No. 42 (Apr. 12, 2012), http://www.governor.ny.gov/execu-
tiveorder/42.
coverage.55 With a substantially larger number of New Yorkers insured, hospitals, clinics, and other health care treatment facilities will see more patients coming through their doors to seek health care.56 These newly-insured patients will likely still contend with other health-adverse legal needs that can be effectively addressed under an MLP model.

In addition, the New York State Department of Health has adopted a Delivery System Reform Incentive Payment (DSRIP) Program to reduce the number of hospital admissions and readmissions statewide through increased collaboration and care coordination.57 Every affirmative step towards the successful implementation of the DSRIP Program in New York in turn expands the opportunity for the growth of MLPs statewide.58 MLPs that focus on treating patients with mental health conditions are especially good fits for the DSRIP Program because the MLP model of care is effective in achieving increased stability and health care compliance for MLP patients.59 Oftentimes, mental health stability, recovery, and promotion, similar to treatment and recovery from


56 See Dan Goldberg, Why New York Worked, CAPITAL (Apr. 29, 2014), http://www.capitalnewyork.com/article/magazine/2014/04/8544390/why-new-york-worked (explaining that seventy percent of New Yorkers who signed up for health insurance through the state’s exchange were previously uninsured and are now part of New York’s insured population). See also, Reed Abelson, More Insured, but the Choices Are Narrowing, N.Y. TIMES (May 12, 2014), http://www.nytimes.com/2014/05/13/business/more-insured-but-the-choices-are-narrowing.html (finding that while there may be fewer and fewer doctors and hospitals in consumer’s networks, national and state regulators are monitoring plans to ensure that consumers have sufficient access to hospitals and doctors).

57 See Delivery System Reform Incentive Payment (DSRIP) Program, N.Y. ST. DEP’T HEALTH, https://www.health.ny.gov/health_care/medicaid/redesign/delivery_system_reform_incentive_payment_program.htm (last visited Sept. 22, 2014) (explaining that the goal of the DSRIP program is to reduce “avoidable hospital use” by twenty-five percent over five years).

58 See Deborah Bachrach et al., Addressing Patients’ Social Needs: An Emerging Business Case for Provider Investment 17 (2014), available at http://www.health.ny.gov/health_care/medicaid/redesign/docs/addressing_patients_social_needs.pdf (explaining that the DSRIP program has made $6 billion available to fund collaborations between “medical, mental health, and social service organizations” to support patients’ transition from hospital to community).

59 See id. at 17 (explaining that the DSRIP program makes funds available to revamp the state’s delivery system and to support programs that bring together medical, mental health, and social service organizations to support a patients’ transition from a hospital to the community). See also Zelhoff & Fulton, supra note 1 at 544 (explaining that MLP’s focused on addressing the needs of individuals suffering from mental
physical illness, require affordable access to effective legal information and representation.\(^{60}\) If mental health stability and patient compliance improve, then hospital admissions and readmissions will likely decrease.\(^{61}\) Consequently, if organizations that use the MLP model can demonstrate its effectiveness in the reduction of hospital admissions and readmissions within the mental health community, the promotion and application of the model would likely flourish statewide. Because “the cost of re-hospitalization or re-institutionalization is too high in both finance and human terms for the state of New York to ignore,”\(^{62}\) the DSRIP program lays a foundation, which may ensure the future of MLPs in New York State for the long-term.

Finally, New York City provides a ripe legal environment for MLPs because the city constitutes both a major legal and medical hub. It is home to numerous law firms, legal agencies, and law schools, as well as hospitals, community-based clinics, and medical schools.\(^{63}\) MLPs in New York City are sustainable, as it is likely that MLP programs serving patient-clients in need of comprehensive legal care will remain fully staffed.\(^{64}\)

Moreover, the need for MLP programs in New York remains high. For example, there are approximately eight million people
residing in New York City’s five boroughs and roughly 1.6 million residents are impoverished\(^{65}\) and live with the imminent or existing peril of an ongoing affordable housing shortage.\(^{66}\) Accordingly, poverty and housing instability make impoverished New Yorkers more susceptible to legal issues that can be more effectively addressed through an MLP model of care. The need is even more profound for children living with disabilities. Nationwide, children with disabilities are more likely to live in poverty than other children in public schools, as twenty-five percent of children who receive services under the Individuals with Disabilities Education Act (IDEA)\(^{67}\) live in households that are below the federal poverty line. Almost twenty percent live in homes with an annual income of $15,000 or less.\(^{68}\) Further, twenty-five percent of students with disabilities receive government entitlements (e.g., Food Stamps or Supplemental Nutrition Assistance Program (SNAP), Temporary Assistance for Needy Families (TANF), and Supplemental Security Income (SSI)).\(^{69}\) With poverty comes an increased susceptibility to an array of legal issues, from lack of access to health insurance and services, to housing, food, and income insecurity.

IV. MFY LEGAL SERVICES, INC.

History and Background

MFY Legal Services, Inc. (MFY Legal Services or MFY) was


\(^{67}\) IDEA is a federal law that directs how states provide early intervention, special education, and related services to children living with disabilities. See U.S. Dep’t of Education, 35th Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act 228 (2013), available at http://www2.ed.gov/about/reports/annual/osep/2013/parts-b-c/35th-idea-arc.pdf. IDEA is a federal law that directs how states provide early intervention, special education, and related services to children living with disabilities.


2014]  

MFY LEGAL SERVICES, INC.  

born out of a grant from the Kennedy Administration in 1963.\textsuperscript{70} Led by its first director, Edward Sparer, MFY Legal Services was the legal arm of Mobilization for Youth, a social service organization whose goal was to combat juvenile delinquency and further juvenile justice.\textsuperscript{71} Driven by his revolutionary vision, Edward Sparer paved the way for change by identifying specific legal issues that were ripe for contest and using community-based organizing to affirmatively further litigation strategies.\textsuperscript{72} He sought to advance test cases that would “create new legal rights for the poor.”\textsuperscript{73} This philosophy pioneered a litany of seminal cases, most notably, \textit{Goldberg v. Kelly},\textsuperscript{74} that comprise MFY Legal Services’ noteworthy litigation history.\textsuperscript{75} Sparer’s concept of advancing novel test cases to create new legal rights for the underprivileged is still utilized today.\textsuperscript{76} Last year, MFY Legal Services celebrated its fiftieth anniversary.\textsuperscript{77} Led by its Executive Director, Jeanette Zelhof, the organization continues to serve the most vulnerable residents in New York City through its staff of attorneys, paralegals, social workers, support staff, and volunteers. MFY envisions a society in which no one is denied justice because he or she cannot afford an attorney. To make this vision a reality, for fifty years MFY has provided free legal assistance to residents of New York City on a wide range of civil legal issues, prioritizing services to vulnerable and under-served populations, while simultaneously working to end the root causes of inequities through impact litigation, law reform, and policy advocacy.\textsuperscript{78} MFY assists more than 15,000 New Yorkers each year.\textsuperscript{79} In addition, with a focus on mobilizing for justice, MFY works closely with community partners by regularly conducting legal clinics to identify legal issues and educate local residents about their legal

\begin{itemize}
\item \textsuperscript{71} Id. at 1.
\item \textsuperscript{72} See id. at 3.
\item \textsuperscript{73} Id.
\item \textsuperscript{74} 397 U.S. 254 (1970) (holding that the Due Process Clause of the Fourteenth Amendment requires an evidentiary hearing before a welfare recipient can be deprived of benefits).
\item \textsuperscript{75} MFY LEGAL SERV, INC., supra note 70.
\item \textsuperscript{76} See generally \textit{id.}, (describing a number of MFY Legal Services projects that became independent organizations as well as MFY’s own path to staying true to the original mission despite significant political and fiscal challenges).
\item \textsuperscript{77} Id. at 3.
\item \textsuperscript{78} See generally \textit{About MFY: Our Mission}, MFY LEGAL SERV. INC., http://www.mfy.org/about/about-mfy/ (last visited Nov. 3, 2014).
\end{itemize}
MFY Legal Services’ Track Record of Providing Legal Services to People with Mental Illness

MFY Legal Services has long recognized the unmet legal need for individuals living with mental illness. MFY’s Mental Health Law Project\(^81\) (MHLP) provides legal representation to individuals with mental illness who reside in the community in apartments, supportive housing, single-room occupancy hotels, and adult homes.\(^82\) MHLP’s primary aims are to prevent homelessness and unnecessary hospitalization, and to maintain income sources.\(^83\) Additionally, for twenty years, MHLP has had an ongoing partnership with Health and Hospitals Corporation (HHC) hospitals citywide. MFY lawyers work with discharge planners to overcome legal obstacles to discharging patients by educating them on legal matters as well as by providing legal services and advice to patients.\(^84\) MFY Legal Services’ partnership with Bellevue Hospital Center spans over twenty years.\(^85\)

V. THE INCEPTION OF BELLEVUE HOSPITAL CENTER’S CHILD AND ADOLESCENT CLINIC

MFY Recognizes the Unmet Need of Children in New York City

MFY recognizes that the stakes are high for children, families, and communities when a child’s mental health needs go unmet. Unmet mental health needs in children may lead to degenerative mental health, poor academic performance, disruptive behavioral problems, ongoing suicidal ideology, and a cycle of poverty.\(^86\) In 2012, it was estimated that:

- Of the 571,167 children in New York City, ages 0-4, 47,407 have a behavioral problem and
- Of the 1,343,715 children in New York City, ages 5-17,
268,743 are estimated to have any mental health disorder; with a subset of those children—134,372—having a serious emotional disturbance.\footnote{Id.}

Further, there was a significant gap between the estimated prevalence of mental health diagnoses among children in New York City and the capacity to treat them.\footnote{Id. at 14.} Yet, it is not just in the realm of medicine that a treatment gap exists. Families of children with mental health disorders also have unmet legal needs that can perpetuate adverse health status, legal crises, and long-term adverse economic consequences.\footnote{Klein et al., supra note 38, at 1064 (noting “approximately 50% of all low to moderate-income households are estimated to have at least one unmet legal need (e.g., public benefit denial or unsafe housing)” and that “[families referred to an MLP showed increased access to health care, food, and income resources; two-thirds reported improved child health and well-being”).} For example, a family with a child living with a mental disability will likely have a special education-related legal need (i.e., their child is not getting appropriate educational services at school) in addition to other health-harming legal needs.\footnote{Id. at 1067 (noting that several families in the study unmet legal needs including education-related needs such as school discipline issues or special education services).} Given that the existing mental health care system lacks the capacity to meet the comprehensive needs of individuals who must rely on its services, there is no doubt that children living with psychiatric disabilities need legal care to address their particular needs.\footnote{CITIZEN’S COMM. FOR CHILDREN OF N.Y. supra note 86, at 15 (concluding that New York City and State have “insufficient mental health treatment slot capacity to serve children in need of mental health treatment”). See also generally Maia Szalavitz, America’s Failing Mental Health System: Families Struggle to Find Quality Care, TIME (Dec. 20, 2012), http://healthland.time.com/2012/12/20/americas-failing-mental-health-system-families-struggle-to-find-quality-care/ (describing the hardships faced by mentally-ill individuals while seeking care, noting that families who do not face an mental health emergency have to wait three to six months to get an appointment and often have to travel far from home to do so); Shaili Jain, Understanding Lack of Access to Mental Healthcare in the US: 3 Lessons from the Gus Deeds Story, PLOS BLOGS (Feb. 6, 2014), http://blogs.plos.org/mindthebrain/2014/02/06/understanding-lack-access-mental-healthcare-3-lessons-gus-deeds-story/ (describing the inadequate access to mental health care due to shortage of mental health professionals, funding for community resources, discrimination, and barriers created by insurance policies).}

MFY Legal Services Launches a New MLP with Bellevue Hospital Center’s Department of Child & Adolescent Psychiatry

The Board of Directors of MFY Legal Services dedicated funding for a two-year fellowship to commemorate its fiftieth anniversary. MFY’s Executive Director, Jeanette Zelhof, wanted to use the
fellowship to expand MFY’s work to an area of unmet legal need consistent with its longstanding expertise in serving people with mental illness, its longstanding partnerships with HHC, and a harkening back to its original focus on serving children and their families to ensure they can access opportunities for long-term economic stability.\footnote{Press Release, \textit{supra} note 85.} Launched in June 2014 in response to an ever-growing need, this MLP with the Department of Children and Adolescent Psychiatry expands the scope of MFY’s legal services in the areas of special education and government benefits to include children and their families who receive services at Bellevue Hospital Center.\footnote{id.}

MFY Legal Services provides civil legal services to the patients at Bellevue Hospital Center. MFY provides an attorney on-site two full days a week at Bellevue’s Department of Child and Adolescent Psychiatry in support of the Department’s five programmatic levels:

- Child Comprehensive Psychiatry Emergency Program (C-PEP),
- In-patient wards (Child, “Tween”, Older Adolescent),
- Child and Adolescent Partial Hospital,
- Out-patient Clinic, and
- Home-Based Crisis Intervention (HBCI) Program.

Founded on the premise that “any effective strategy for educating children living with mental disabilities must take into account the limited financial resources of their families,”\footnote{Alex J. Hurder, \textit{Left Behind with No “IDEA”: Children with Disabilities Without Means}, 34 B.C.J.L. \\& Soc. Just. 283, 285 (2014).} MFY decided to focus on legal advice and representation in the areas of special education and government benefits.\footnote{Press Release, \textit{supra} note 85.} Additional issues are handled by other attorneys at MFY, including housing, family law, bankruptcy, and consumer debt.\footnote{\textit{Mental Health Law Project, supra} note 81.}

Under this MLP model at Bellevue, doctors and social workers issue-spot and refer patients, with social workers handling the majority of patient referrals. Social workers drive the new MLP at Bellevue and are central to the partnership. They support the doctors to stabilize patients upon admission, support patients during their in-patient stay, facilitate their discharge, and connect them with out-patient and wrap-around services in the community, such as mobile crisis services. Additionally, social workers provide in-
sight into patients’ family dynamics and provide support for legal representation after discharge by writing letters to request placement or other support services, providing access to psychiatric discharge summaries and other medical records that may be used as evidence in subsequent legal proceedings, and by coordinating wrap-around, out-patient services that help promote a child’s stability in the community.

Significance of Pro Bono Engagement

There is an unmet need for special education services among children residing in New York City. Only half of students receiving special education services are assigned to special education classes, and the graduation rate for children in those classes was a mere 4.4 percent.97 Also, children in ethnic minority groups, particularly African-American children, are overrepresented in special education and are also often misclassified due to incorrect evaluations and diagnoses.98

In order to serve as many families as possible and to address the overwhelming need, MFY will look to pro bono attorneys to help support the work of the MLP at Bellevue Hospital Center’s Child and Adolescent Clinic. The majority of cases referred to MFY under the MLP at Bellevue are special education cases. These cases make up about seventy-five percent of the case referrals, with government benefits cases making up the balance. Given that the bulk of the cases at the Child and Adolescent Clinic at Bellevue fall under special education law, MFY will create a pro bono project with attorneys from major New York City law firms that focuses on three critical points of advocacy within the special education remedial process: 1) individual education program (IEP) meetings, 2) resolution sessions, and 3) impartial due process hearings and appeals.

The IEP meeting is a first opportunity for parents to redress improper IEPs or the absence or deficiency of educational programs, services, or support in the IEP.99 A parent may request an IEP meeting for a number of reasons, including: amending an IEP to reflect their child’s current needs, prompting the review of their

97 Hurder, supra note 94, at 295. See also Hyman et al., supra note 68, at 136 n.155.
child’s IEP, to request a change in educational program or services, or ensuring their child is showing adequate academic progress in the classroom.\footnote{Id. at 6-7.} If a parent wishes to reject or contest a proposed/existing IEP derived from an IEP meeting, they may request an impartial due process hearing.\footnote{Id. at 32.} Before the impartial hearing, there is a mandatory thirty-day resolution period that includes a resolution session, unless waived by both parties.\footnote{Id. at 34.} If an agreement is not reached during the resolution session, the matter will go before an Impartial Hearing Officer (IHO) at an impartial due process hearing.\footnote{Advocates for Children of New York, supra note 99, at 34.} Appeals to a State Review Office (SRO) can be taken from the IHO’s decision.\footnote{See Debra Chopp, School Districts and Families under the IDEA: Collaborative in Theory, Adversarial in Fact, 32 J. Nat’l. Ass’n. Admin. L. Judiciary 423, 432-460 (2012) (explaining that decisions regarding services and accommodations a child needs for appropriate education are made by a team where parents are outnumbered by school personnel who frequently assert themselves as the experts on the child’s needs, that parents often are not aware of mechanisms for asserting their rights, and are typically unable to acquire representation at hearings even when they do assert those rights). See also See Patricia A. Massey & Stephen A. Rosenbaum, Disability Matters: Toward a Law School Clinical Model for Serving Youth with Special Education Needs, 11 Clinical L. Rev. 271, 276-84 (2005) (demonstrating that even highly educated, English-speaking parents typically do not have the medical, educational, legal, and administrative expertise required to successfully advocate for their children, yet Congress has placed the burden of enforcing the Individuals with Disabilities Act on parents without providing sufficient navigational support).} Lawyers are critical to special education advocacy, and many parents find themselves in a dire predicament when they do not have the means to secure legal representation for their children. Parents who attempt to advocate for their child \textit{pro se} may find themselves participating in due process hearings without advocates, unaware of their rights, facing intimidation while negotiating with the Department of Education or school personnel, and representing their child’s interests on their own.\footnote{Id.} Parents often have difficulty navigating the educational system (i.e., submitting written requests for IEP meetings or evaluations) and the City agencies that play a role in the lives of children who live with psychiatric disabilities, including the Department of Education, Administration for Children’s Services (ACS), New York Police Department (NYPD), and Office of People With Developmental Disabilities (OPWDD).\footnote{See Michael R. Mastrangelo, Fighting for Educational Stability in the Face of Family Disagreement: The Role of Advocacy in Special Education, 47 Stan. L. Rev. 597, 607-608 (1995).}
Due to the challenges *pro se* parents face, MFY Legal Services will connect them to pro bono attorneys to help ensure they get the legal help they need. For instance, a pro bono attorney might help ensure a child's IEP is revised to direct appropriate educational settings, supports, and services that meet his/her current needs. Additionally, pro bono attorneys will assist at resolution sessions, impartial due process hearings, and on appeals, as necessary. Identifying patient-clients through the MLP model means access to legal care is provided to children and families who are in great need of receiving legal services in a way that is collaborative with their health care team and that stabilizes their lives while promoting their overall health.

**Conclusion**

As the country's leaders and health policy makers focus on making the delivery of health care more efficient by providing better care and better quality at lower cost, great consideration should be given to the innovative and long-standing MLP model, which incorporates legal care into health care delivery. In the future, MFY Legal Services hopes to replicate the Bellevue MLP model for children with mental illness in other psychiatric hospitals across New York City. Expansion of legal services to children and their families who seek treatment at other psychiatric hospitals will affirmatively further MFY's commitment to the provision of legal services to those living with mental health conditions. Additionally, families' expressed appreciation of MFY's onsite legal services at Bellevue confirms the importance of the model citywide. In the end, for families who are no strangers to mental health-related crises, having a child's doctor, social worker, and lawyer all working together is invaluable and in the best interest of the children they serve.

---

ELEVATING SUBSTANCE OVER PROCEDURE:  
THE RETROACTIVITY OF MILLER V. ALABAMA 
UNDER TEAGUE V. LANE

Brandon Buskey†
Daniel Korobkin††

This Article proposes a unique framework establishing that the United States Supreme Court’s decision in Miller v. Alabama, which forbids states from automatically sentencing juveniles to life imprisonment without any meaningful opportunity for release, must apply retroactively to hundreds of juveniles whose convictions and life sentences were already final at the time of the decision. Such a framework is timely and critical. The lower state and federal courts are divided on the question, and the Supreme Court is likely to settle the issue within the next year.

The Article reviews how, absent guidance from the Supreme Court, a host of states, led most recently by Michigan, have invoked the Miller majority’s statement that it was merely requiring states to follow a “certain process” before sentencing a juvenile to life imprisonment without parole. By this reasoning, Miller is not retroactive under the Supreme Court’s federal retroactivity doctrine established by Teague v. Lane. The Court has always applied new substantive rules retroactively under Teague, while it has never done so for a new procedural rule.

The Article rejects this “process” language as a basis for resolving whether Miller is retroactive. It concludes that Miller in fact has little to do with process and is instead primarily concerned with sentencing outcomes for youth. In striking down mandatory life without parole for juveniles, Miller adapted the individualized sentencing requirement from Woodson v. North Carolina, which invalidated the mandatory death penalty. This individualized sentencing requirement obligates states to always offer juveniles a sentencing outcome carrying the possibility of release and to consider the essential, mitigating fact of youth before imposing an irrevocable life sentence. These obligations are inherently substantive. By contrast, Miller’s alleged procedural component is undefined and collateral to its substantive altering of juvenile sentencing. Miller therefore announces a substantive rule that must apply retroactively.

† Staff attorney, American Civil Liberties Union, Criminal Law Reform Project.
†† Deputy Legal Director, American Civil Liberties Union of Michigan.
INTRODUCTION

“Our decision does not categorically bar a penalty for a class of offenders or type of crime—as, for example, we did in Roper or Graham. Instead, it mandates only that a sentencer follow a certain process—considering an offender’s youth and attendant characteristics—before imposing a particular penalty.”

This excerpt comes from Justice Kagan’s majority opinion in the United States Supreme Court’s decision in the companion cases Miller v. Alabama and Jackson v. Hobbs, which announced for the first time that imposing mandatory life imprisonment without the possibility of release on a juvenile offender constitutes cruel and unusual punishment in violation of the Eighth Amendment. Miller voided the authority of twenty-eight states and the federal government that required this sentence for juveniles convicted of murder. By the Court’s conservative estimate, over 2,000 juveniles

2 Id.
3 Id. at 2469.
2014] ELEVATING SUBSTANCE OVER PROCEDURE

had been condemned to die in prison under such regimes.4

Miller dismantled these sentencing schemes in three specific
ways. States must now provide more lenient sentencing alternatives
to life imprisonment without parole for all juveniles.5 They must
also engage in meaningful, individualized consideration of the es-
sential, mitigating fact of youth before imposing a sentence, and
they must do so in a manner that ensures that juveniles will rarely
be imprisoned for life without any meaningful hope for release.6
Miller adapted these functional components for juveniles from the
Court’s prior decision in Woodson v. North Carolina,7 which struck
down the mandatory death penalty and ushered in the modern era
of individualized sentencing in capital cases.8 The Miller Court in-
voked Woodson on the grounds that, for the purposes of Eighth
Amendment analysis, imprisoning juveniles for life without the
possibility of parole is analogous to the death penalty.9

Given Miller’s radical reorientation of juvenile sentencing, Jus-
tice Kagan’s framing of the decision as requiring only a “certain
process” seems curiously timid. Read in context, the majority in-
tended the statement to deflect the dissent’s critique that the
Court had never before invalidated as cruel and unusual a sentenc-
ing practice imposed on so many individuals in so many states.10
However, the majority’s couching of its decision in “process” terms
has catalyzed significant controversy over which of the 2,000 juve-
nile offenders identified in Miller are entitled to relief from the
mandatory life without parole sentences they are currently serving.

The crux of the issue is the doctrine of retroactivity, or
whether states must reopen the cases of those juveniles who have
finished their state appeals and whose convictions are final. Here,
another central character in this national drama emerges: the Su-
preme Court’s 1989 decision in Teague v. Lane.11 Teague draws a
line for retroactivity purposes between those decisions that are
“procedural” and those that are “substantive.” Under Teague, the
Supreme Court has never applied a rule only governing procedure
retroactively, while it has always applied substantive criminal rules

---

4 Id. at 2477 (Roberts, C.J., dissenting).
5 Id. at 2467, 2469.
6 Id.
8 Id. at 301.
9 Miller, 132 S. Ct. at 2463-64, 2466-67.
10 Id. at 2471.
retroactively.12 The significance of Justice Kagan’s quote therefore becomes readily apparent. If Miller is, as the quote suggests, solely about process, it is almost certainly not retroactive. If Miller is substantive, it almost certainly is.

The lower courts are irreconcilably divided on the issue. Nine states have ruled Miller retroactive;13 five have ruled it is not.14 Additionally, four of the six federal courts that have addressed the issue have denied retroactivity.15 Despite the obvious split among the lower courts in the two years since Miller, the Supreme Court has yet to resolve the dispute. The Court first denied certiorari review in two cases that squarely presented the issue.16 The Court then granted certiorari on the question, only to dismiss the case weeks later after the parties reached a plea agreement freeing the petitioner and mooting his appeal.17 Most recently, the Court agreed to hear a second case likely to be argued this fall and decided in early 2016; however a jurisdictional question the Court raised sua sponte leaves some doubt as to whether it will decide retroactivity.18

14 Ex parte Williams, __ So.3d __, 2015 WL 1388138 (Ala. Mar. 27 2015); People v. Carp, 852 N.W.2d 801 (Mich. 2014); State v. Tate, 130 So. 3d 829 (La. 2013); Chambers v. State, 851 N.W.2d 311 (Minn. 2013); Commonwealth v. Cunningham, 81 A.3d 1 (Pa. 2013), cert. denied, 134 S. Ct. 2724 (June 9, 2014).
17 Toca v. Louisiana, No. 14-6381(R46-005); 2015 WL 507612 (Feb. 3, 2015).
18 Montgomery v. Louisiana, No. 14-280, 2015 WL 1280236 (Mar. 23, 2015). Along with Miller’s retroactivity, the Court certified a second question: “Do we have jurisdiction to decide whether the Supreme Court of Louisiana correctly refused to give retroactive effect in this case to our decision in Miller v. Alabama, 567 U. S. ___ (2012)?” The question appears directed at resolving whether the Court can apply Teague to cases on appeal from the denial of state, rather than federal, collateral review. See generally Danforth v. Minnesota, 552 U.S. 264 (2008).
Perhaps nowhere is settling this dilemma more pivotal than in the State of Michigan. Michigan has approximately 350 juvenile offenders mandatorily sentenced to life without parole.19 After Miller, the legislature amended its unconstitutional sentencing scheme. Juveniles convicted of first degree murder now receive a sentencing range between a minimum term of twenty-five to forty years, and a maximum term of not less than sixty years.20 The revisions expose a juvenile to life without parole only after the prosecutor moves to seek the sentence and the court holds an individualized sentencing hearing in compliance with Miller.21 But the legislation contains a catch. Juveniles finished with their state appeals, fully 334 of the 360 juveniles condemned to die in Michigan prisons,22 cannot be resentenced unless the Michigan Supreme Court or the United States Supreme Court declares Miller retroactive.23

Subsequently, the Michigan high court denied retroactive application of Miller in People v. Carp.24 The court effectively declared that Miller provides no hope of release under the revised statutes for nearly every juvenile offender automatically sentenced to life without parole in Michigan. Resting the result squarely on the Miller majority’s procedural framing, the court “concluded that Miller established a new procedural rule that does not ‘categorically bar a penalty,’ but instead requires ‘only that a sentencer follow a certain process.’”25

Carp does not represent the end of the tale in Michigan. In 2013, a federal district court in Michigan added its own twist. The court, in a civil rights suit under 42 U.S.C. § 1983 challenging Michigan’s prior sentencing scheme as applied to juveniles, found Miller retroactive in the civil and criminal contexts.26 In the court’s view, “[t]o hold otherwise would allow the state to impose unconstitutional punishment on some persons but not others, an intolerable miscarriage of justice.”27 Rather than ordering resentencings—a remedy unavailable in § 1983 suits28—the district court mandated that Michigan reform its parole system to afford inmates

---

21 Id. § 769.25(6).
22 Carp, 852 N.W.2d at 838.
24 Carp, 852 N.W.2d 801.
25 Id. at 832 (quoting Miller v. Alabama, 132 S. Ct. 2455, 2471 (2012)).
27 Id. at *2.
whose convictions were final the meaningful opportunity for eventual release guaranteed by Miller. The case is pending before the Sixth Circuit. If successful, the suit would offer a lifeline for the 334 juvenile offenders left behind by the Michigan Legislature and Michigan Supreme Court.

This Article seeks to undo the morass in Michigan and across the country by constructing a sound framework for evaluating Miller’s mandate of individualized sentencing under Teague’s retroactivity doctrine. Reduced to essentials, the question is whether individualized sentencing is concerned principally with substantive sentencing outcomes or solely with sentencing procedures. To answer this question, the Article identifies the three basic obligations that Miller tailored from Woodson to strike down mandatory life imprisonment without parole: 1) altering the range of sentences available to juveniles charged with murder; 2) requiring consideration of the mitigating effects of youth for juveniles exposed to life imprisonment without parole; and 3) compelling appropriate procedures for the individualized sentencing of youth. From this analysis, the Article concludes that Justice Kagan’s description of Miller as requiring only a certain process is inaccurate with respect to Teague. Instead, Miller announces a substantive rule of individualized sentencing that is integrally concerned with sentencing outcomes for youth. It should therefore apply retroactively under Teague to all juveniles inflexibly sentenced to die in prison, regardless of when their appeals ended.

Part I reviews the test for retroactivity under Teague. Part II explores how the Supreme Court’s lack of guidance on substantive rules of criminal law under Teague has led directly to the current confusion over Miller’s retroactivity. Part III identifies and evaluates Miller’s three operational components and concludes that the first two —altering the range of sentences and requiring consideration of youth —are outcome-determinative rules of substance, and that the third component, while procedural, is undefined and left to the states. Thus, though subsequent Supreme Court decisions expounding on Miller-compliant procedures may not be retroactive, Miller itself is.

I. THE SUPREME COURT’S RETROACTIVITY DOCTRINE UNDER TEAGUE V. LANE

When the Supreme Court announces a new constitutional rule in a criminal case, not every defendant affected by the invalidated practice can benefit from the change. “The past,” even the
unconstitutional past, “cannot always be erased by a new judicial declaration.” The doctrine of retroactivity governs whether new constitutional pronouncements apply to past cases. *Teague v. Lane* sets forth the Supreme Court’s modern retroactivity jurisprudence. By the Court’s account, the evil of always applying new rules to old cases is that it “continually forces the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards.” The Court developed the *Teague* doctrine to protect the states’ interest in the finality of criminal judgments from being undermined by endless federal review.

Under this commitment to finality, *Teague* draws a dividing line between the stages of direct review and collateral review following criminal trials. New rules always apply retroactively to criminal cases still on direct review, a process typically encompassing the first round of appeals granted to defendants as a matter of right, as well as the additional time within which a state supreme court or the United States Supreme Court could review the criminal judgment as a matter of discretion. Once direct review ends, a defendant’s conviction and sentence are considered final. The defendant then has the option of “collaterally” challenging his conviction or sentence by seeking post-conviction relief in the state trial court and, after exhausting state-court options, filing a petition for habeas corpus in federal court. Under *Teague*, defendants are generally not entitled to the benefit of new constitutional rules on collateral review.

The general norm against retroactivity on collateral review yields if the decision announces a new “substantive” rule. The Court classifies rules as substantive if they either prohibit the state from criminalizing certain private behavior, or if they “necessarily carry a significant risk that a defendant . . . faces a punishment that the law cannot impose upon him.” Substantive rules may also categorically prohibit a punishment for a class of defendant based either on the defendant’s status or some characteristic of the offense.

---

30 *Id.* at 310.
31 *Id.* at 307-10.
33 *Teague*, 489 U.S. at 310 (plurality opinion).
35 *Summerlin*, 542 U.S. at 352 (quotations and citations omitted).
itself.\textsuperscript{36} A prototypical example of a substantive rule would be the Court’s decision in \textit{Atkins v. Virginia},\textsuperscript{37} which barred the death penalty for the intellectually disabled.\textsuperscript{38} New substantive rules of criminal law such as this have always been considered retroactive.

By contrast, new procedural rules, which “regulate only the manner of determining the defendant’s culpability,”\textsuperscript{39} do not apply retroactively on collateral review unless they are “watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.”\textsuperscript{40} To qualify, the new criminal procedure rule must remedy an intolerably high risk of convicting the innocent.\textsuperscript{41} \textit{Teague} warned that the discovery of new watershed rules was highly unlikely.\textsuperscript{42} The Court has since never expressly recognized a watershed rule, though it has suggested that the Sixth Amendment right of an indigent person to appointment of counsel expressed in \textit{Gideon v. Wainwright}\textsuperscript{43} may meet the standard.\textsuperscript{44} The Court has also not provided an analogous example of a watershed rule in the sentencing context. Judging from this precedent, to label a constitutional rule “procedural” is tantamount to declaring it non-retroactive, while the opposite is true for substantive rules.

\section*{II. THE SUPREME COURT HAS FAILED TO PROVIDE ADEQUATE GUIDANCE ON THE NATURE OF SUBSTANTIVE RULES AND INDIVIDUALIZED SENTENCING UNDER \textit{TEAGUE}}

Subsequent to \textit{Teague}, the Court’s guidance on distinguishing between substantive rules and procedural rules has been incomplete. In \textit{Schriro v. Summerlin}, the Court explained that the universe of substantive rules “includes decisions that narrow the scope of a


\textsuperscript{37} Atkins, 536 U.S. 304 (2002).

\textsuperscript{38} \textit{Compare Penry}, 492 U.S. at 330 (classifying as substantive a decision “that held, as a substantive matter, that the Eighth Amendment prohibits the execution of mentally retarded persons . . . regardless of the procedures followed”), \textit{with Atkins}, 536 U.S. at 321 (holding that the Eighth Amendment prohibits the execution of mentally disabled persons).

\textsuperscript{39} \textit{Summerlin}, 542 U.S. at 353 (emphasis omitted) (citations omitted); see also \textit{Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.}, 559 U.S. 393, 407 (2010) (plurality opinion) (finding that rule regulates procedure where it “governs only the manner and the means by which the litigants’ rights are enforced”) (quotations omitted).

\textsuperscript{40} \textit{Summerlin}, 542 U.S. at 352 (quotations and citations omitted).

\textsuperscript{41} \textit{Teague} v. \textit{Lane}, 489 U.S. 288, 312 (1989) (plurality opinion).

\textsuperscript{42} \textit{Id}. at 313 (plurality opinion).


\textsuperscript{44} \textit{Saffle v. Parks}, 494 U.S. 484, 495 (1990).
criminal statute by interpreting its terms” and “constitutional determinations that place particular conduct or persons covered by the statute beyond the State’s power to punish.”\textsuperscript{45} Taken at face value, this statement leaves open the possibility of other sorts of substantive rules, yet without offering any definitive way to identify these rules.

Complicating matters, the Supreme Court often announces new rules while failing to address explicitly whether they are substantive or procedural. This development is somewhat surprising. The Court initially announced in \textit{Teague} that retroactivity should be addressed as a threshold matter. The Court did so on the understanding that once the Court applies a new rule to a defendant on collateral review, “evenhanded justice requires that [the rule] be applied retroactively to all who are similarly situated.”\textsuperscript{46} On this analysis, \textit{Miller} should be applied retroactively because the Court also announced the rule in the companion case \textit{Jackson v. Hobbs}, whose petitioner was on state collateral review at the time of the decision.\textsuperscript{47} A number of courts have invoked this circumstance to support the conclusion that \textit{Miller} is retroactive.\textsuperscript{48}

However, the Court changed course soon after \textit{Teague} on whether to treat retroactivity as a threshold issue. Beginning with \textit{Collins v. Youngblood}, the Court has demoted retroactivity to an affirmative defense to be raised or waived by the state, rather than a jurisdictional question or one the Court must otherwise address \textit{sua sponte}.	extsuperscript{49} This retreat from addressing retroactivity as a threshold matter has arguably returned the Court to its pre-\textit{Teague} days, when it applied new rules to cases on collateral review without analyzing retroactivity.\textsuperscript{50} Today, unless the state invokes the non-retroactivity defense, or the new rule is of a type previously found to apply retroactively,\textsuperscript{51} the fact that the Court applies a novel rule to

\begin{footnotesize}
\textsuperscript{45} \textit{Summerlin}, 542 U.S. at 351-52 (emphasis added) (citations omitted).
\textsuperscript{46} \textit{Teague}, 489 U.S. at 300 (plurality opinion).
\textsuperscript{47} Miller v. Alabama, 132 S. Ct. 2455, 2461 (2012).
\textsuperscript{48} See, e.g., \textit{State v. Mantich}, 842 N.W.2d 716, 731 (Neb. 2014) ("[W]e are not inclined to refuse to apply the rule announced in \textit{Miller} to a defendant before us on collateral review when the Court has already applied the rule to a defendant before it on collateral review.").
\textsuperscript{50} See \textit{Danforth}, 552 U.S. at 272-73.
\textsuperscript{51} See \textit{Tyler v. Cain}, 533 U.S. 656, 668-69 (2001) (O’Connor, J., concurring) (observing that multiple Court holdings may “logically dictate” retroactivity where Court makes clear over a series of decisions “that a particular type of rule applies retroactively to cases on collateral review . . . ”).
a case on collateral review cannot necessarily affirm that the rule fits within one of the exceptions to non-retroactivity.

With respect to Miller, the Court’s limited post-Teague jurisprudence bears responsibility for the disarray among the lower courts. The debate has largely centered on whether the rule in Miller prohibits “a certain category of punishment for a class of defendants because of their status or offense,” as such rules are always regarded as substantive under Teague. Primarily at issue is what constitutes a class of defendants’ “category of punishment” for retroactivity purposes. Courts finding Miller retroactive tend to characterize mandatory-life-imprisonment-without-the-possibility-of-parole as a distinct category of punishment that can no longer be imposed on juveniles as a class. Courts declaring Miller non-retroactive instead insist that, irrespective of whether the sentence is mandatory or discretionary, the defendant’s real punishment is simply life-without-parole. Returning to Justice Kagan’s quote, these courts then invoke the fact that Miller does not categorically prohibit juveniles from being sentenced to life imprisonment without parole, and only requires states to follow a “certain process” to impose the sentence. Viewed this way, the defendant’s “category of punishment” is life-without-parole, and its “mandatory” nature simply reflects the state’s failure to follow “a certain process” before imposing it.

The Supreme Court has not provided a definitive basis on which to resolve this divide. On the one hand, Chief Justice Roberts in dissent stated that “[t]he sentence at issue is statutorily mandated life without parole.” This framing supports classifying mandatory sentences as distinct forms of punishment.

The Supreme Court’s treatment of mandatory sentences in

53 See, e.g., Ex parte Maxwell, 424 S.W.3d 66, 75 (Tex. Crim. App. 2014) (“We conclude that [Miller] is a new substantive rule that puts a juvenile’s mandatory life without parole sentence outside the ambit of the State’s power.”) (internal quotations omitted).
55 See, e.g., Commonwealth v. Cunningham, 81 A.3d 1, 10 (Pa. 2013), cert. denied, 134 S. Ct. 2724 (2014) (“Since, by its own terms, the Miller holding does not categorically bar a penalty for a class of offenders . . . it is procedural and not substantive for purposes of Teague.”) (citations omitted).
57 See Penry, 492 U.S. at 330 (“The Eighth Amendment categorically prohibits the infliction of cruel and unusual punishments”) (emphasis added); see also Woodson v. North Carolina, 428 U.S. 280, 288 (1976) (plurality opinion) (“The Eighth Amendment stands to assure that the State’s power to punish is exercised within the limits of civilized standards.”) (internal quotation marks omitted).
other Eighth Amendment decisions lends additional corroboration to this position. The Court has repeatedly characterized mandatory death sentences, which the Court struck down in *Woodson v. North Carolina*, as uniquely punitive.58 In *Miller*, the Court relied heavily on *Woodson* and its progeny, ruling that because juvenile life without parole is “akin to the death penalty,” mandatory life without parole for a juvenile is likewise cruel and unusual.59

The opposing view is that a mandatory sentence describes the means for arriving at the underlying sentence, rather than a unique type of sentence. The Michigan Supreme Court adopted this stance in *Carp*, though without confronting any of the Supreme Court’s pre-*Miller* Eighth Amendment caselaw on mandatory sentences.60 The court’s underlying assumption is that, while it may be true that a mandatory sentencing scheme is uniquely harsh and rigid, it does not necessarily follow that individual sentences resulting from that scheme are harsher than their discretionary counterparts, or that the difference between the schemes is a matter of substance rather than procedure.

Adding to this confusion, the Supreme Court has never struck down a mandatory sentencing scheme under the Eighth Amendment outside of *Woodson* and *Miller*. And, in part because *Woodson* itself was decided thirteen years before *Teague*, the Supreme Court has not grappled directly with the question of whether *Woodson* is substantive. The Court has, however, struck down capital sentencing practices under *Woodson*’s Eighth Amendment rule and subsequently deemed these decisions procedural and non-retroactive under *Teague*.61 That the Court has declared some of its capital sentencing decisions as procedural indirectly undercuts the assertion that Eighth Amendment limitations on sentencing invariably impose a categorical bar on a specific punishment. It does not, however, answer the question of whether a non-categorical limitation

58 See *Woodson*, 428 U.S. at 293 (plurality opinion) (citing consensus of jurisdictions rejecting mandatory death sentences as “unduly harsh and unworkably rigid”); see also *Roberts v. Louisiana*, 428 U.S. 325, 332 (1976) (plurality opinion) (finding automatic death sentences to be of “unacceptable severity”).


60 People v. Carp, 852 N.W.2d 801 (Mich. 2014).

61 See *Beard v. Banks*, 542 U.S. 406 (2004) (denying retroactive relief to post-*Woodson* holding that a capital sentencing scheme could not require the jury to disregard a mitigating element unless the jury found the element unanimously); see also *Sawyer v. Smith*, 497 U.S. 227 (1990) (denying retroactive relief to post-*Woodson* holding that a sentencer cannot be led into a false belief that the responsibility for imposing death rests elsewhere).
on a punishment can be substantive and thus retroactive under *Teague*.

This doctrinal stalemate suggests that the key to articulating a definitive basis for whether *Miller* is substantive or procedural lies not in the differences between mandatory and discretionary life imprisonment without parole. Rather, the key lies in identifying and classifying the mechanisms through which *Miller* forces states to abandon mandatory life imprisonment without parole and adopt an individualized sentencing scheme. The following Part addresses these mechanisms and their implications for *Miller*’s retroactivity.

III. The Supreme Court’s Eighth Amendment Requirement of Individualized Sentencing in *Miller* Is Substantive under *Teague*

*Miller*’s invalidation of mandatory life imprisonment without parole for juveniles and its requirement that sentencers consider the mitigating circumstances of youth stem directly from the Court’s decision in *Woodson v. North Carolina*.62 *Woodson* struck down the mandatory death penalty and required individualized consideration of a defendant’s mitigating circumstances before a state may impose the ultimate punishment.63 *Miller* and *Woodson*’s implementation of individualized sentencing share three fundamental components: 1) they force states to expand the range of sentences available to those previously eligible for only the harshest sentence; 2) they alter the criteria states may permissibly use to impose maximum sentences under the new regime; and 3) they require states seeking to retain the maximum sentence to implement new sentencing procedures to comply with the individualized sentencing mandate.

With these functional similarities it stands to reason that courts must afford the same treatment under *Teague* to the individualized sentencing rules in both *Woodson* and *Miller*. Unfortunately, as noted above, the Supreme Court has never expressly announced whether *Woodson*’s requirement of individualized sentencing should apply retroactively. Filling this void requires ascertaining if these fundamental components of individualized sentencing are substantive or procedural. As discussed below, although the third component is undeniably procedural, the first two components are

---

63 *Id.* at 304 (plurality opinion); *see also* *Sumner v. Shuman*, 483 U.S. 66, 75-76 (1987).
inherently substantive. Individualized sentencing, then, is primarily a substantive imperative, not merely a procedural requirement. 

Miller hence must apply retroactively.

A. Miller’s Requirement That States Alter the Range of Permissible Sentencing Outcomes for Juveniles Is Substantive

The first necessary requirement of striking down a mandatory penalty and implementing individualized sentencing is that states must alter the range of sentencing outcomes available to those subjected to the punishment. Prior to Woodson and Miller, states made exactly one sentence available to the class of defendants at issue: life imprisonment with no opportunity for release. Following Woodson and Miller, these states had to offer at least one more lenient sentencing option. Requiring individualized consideration before sentencing would be meaningless otherwise.

Changing the potential outcomes of a given proceeding is a classic function of substantive law. This is true whether a state alters the amount of damages available in a civil suit, or shifts the available penalties in a criminal prosecution. For Miller, verification of this principle lies in the fact that changing sentencing outcomes may occur altogether independently of any particular process: it is an end unto itself. Because Miller requires states to offer juveniles at least one sentence carrying the possibility of release, irrespective of “the fairness of the procedures used to implement them,” the decision is firmly in the “substantive sphere” as defined by the Supreme Court.

This basic observation exposes the fallacy of the argument set forth by the Michigan Supreme Court and others that eliminating the “mandatory” element of a life-without-parole sentence is procedural since defendants can still receive the same sentence, so long as states follow a different process. What this argument obscures is that prohibiting a mandatory sentence by definition requires the state to enact different sentencing outcomes, not simply different sentencing procedures. This injunction remains regardless of whether one views a mandatory sentence as a particular category of punishment or simply a means of arriving at a particular sentence.

---


65 Cty. of Sacramento v. Lewis, 523 U.S. 833, 840 (1998); see also Penry v. Lynaugh, 492 U.S. 302, 330 (1989) (“If we held, as a substantive matter, that the Eighth Amendment prohibits the execution of mentally retarded persons such as Penry regardless of the procedures followed, such a rule would [be substantive].”).
To further illustrate why altering the range of possible sentencing outcomes is substantive under *Teague*, it is useful to compare *Miller* to *Roper v. Simmons*,66 the Supreme Court’s Eighth Amendment decision that categorically bars the death penalty for juveniles. *Roper*’s categorical ban on capital punishment for juveniles is undeniably substantive under *Teague*.67 But *Roper*’s categorical bar represents only part of its function. By outlawing the death penalty for juveniles, *Roper* also altered and narrowed the range of permissible punishments for youth. *Miller*, though lacking a categorical bar on juvenile life without parole, nonetheless announced a rule requiring states to alter and expand the range of permissible punishments for juveniles to always include one sentencing option that carries the possibility of release. Logic cannot support the proposition that a constitutional rule narrowing the range of allowable punishments (*Roper*) is substantive, but a constitutional rule expanding the range of punishments (*Miller*) is not. Both species of rules require states to rewrite their substantive sentencing laws.68

The Michigan Supreme Court in *Carp* dismissed this argument on the ground that “a new rule only ‘alters the range’ of punishments available to the sentencer if it shifts the upper limits of the range of punishments downward such that the previously most severe punishment to which defendants have been sentenced is no longer a punishment that the sentencer may constitutionally impose.”69 Curiously, shifting the lower limits of the range would not “alter the range of punishments” under this formulation. The court’s aim is transparent. Shifting the upper limits of a sentencing range necessarily requires a categorical ban on the previous maximum sentence, while lowering the range can never categorically ban a particular sentence. The court’s response merely recycles the position that *Miller* is not substantive because it does not categorically prohibit life imprisonment without parole.

---

67 *Penry*, 492 U.S. at 330 (classifying as substantive “rules prohibiting a certain category of punishment for a class of defendants because of their status or offense”); see also *Little v. Dretke*, 407 F. Supp. 2d 819, 824 (W.D. Tex. 2005) (“[T]he new rule announced in *Roper* is clearly substantive in nature and, therefore, applies retroactively . . . ”).
68 For this general reason, the United States government has conceded that *Miller* is substantive in federal habeas proceedings. See Government’s Response to Petitioner’s Application for Authorization to File a Second or Successive Motion under 28 U.S.C. § 2255 at 10-17, *Johnson v. United States*, 720 F.3d 720 (8th Cir. 2013) (No. 12-3744).
2014] ELEVATING SUBSTANCE OVER PROCEDURE 35

The Michigan Supreme Court reaches this facially dubious conclusion through clumsy sleight of hand. Quoting the Supreme Court’s decision in *Summerlin*, the court asserts that a sentencing rule qualifies as substantive only if “the defendant ‘faces a punishment that the law cannot [any more] impose upon him’ in light of the new rule.”70 However, this quotation is incomplete. A categorical prohibition on the maximum sentence is sufficient for a rule to be substantive, but *Summerlin* does not say it is a necessary condition. Properly invoked, *Summerlin* makes clear that substantive sentencing rules apply retroactively because they “necessarily carry a significant risk” that the defendant “faces a punishment that the law cannot impose upon him.”71

*Miller* mandated the expansion of sentencing outcomes for juveniles to reduce this very risk. Despite allowing states to retain life without parole for juveniles, the Court unequivocally announced that imposing the sentence on a juvenile will rarely pass constitutional muster. The Court declared: “[G]iven all we have said in *Roper, Graham [v. Florida]*, and this decision about children’s diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.”72 The Court further instructed that it is “the rare juvenile offender whose crime reflects irreparable corruption.”73 Consequently, refusing to give *Miller* retroactive effect “necessarily carries a significant risk” that juveniles serving mandatory life without parole sentences are “fac[ing] a punishment that the law cannot impose upon [them].”74 Indeed, the *Miller* Court recognized precisely this point. It noted that, because mandatorily incarcerating a juvenile for life without release removes youth from the sentencing decision “such a scheme poses too great a risk of disproportionate punishment.”75

The Supreme Court’s recent decision in *Alleyne v. United States*76 also undermines *Carp*’s suggestion that a new rule alters the range of punishments only if it shifts the upper limits of a sentencing range. Prior to *Alleyne*, the Court ruled in *Apprendi v. New Jersey*

---

70 Id. (quoting Schriro v. Summerlin, 542 U.S. 348, 352 (2004)).
71 *Summerlin*, 542 U.S. at 352 (quotations and citations omitted) (emphasis added).
73 Id. (quoting Roper v. Simmons, 543 U.S. 551, 573 (2005)).
74 *Summerlin*, 542 U.S. at 352 (quoting Bousley v. United States, 523 U.S. 614, 620 (1998)).
75 Miller, 132 S. Ct. at 2469.
76 Alleyne v. United States, 133 S. Ct. 2151 (2013).
that, other than a prior conviction, facts that increase a defendant’s sentence beyond the maximum set by statute are elements of the underlying offense.\textsuperscript{77} Such “elements” must therefore be submitted to a jury and proven beyond a reasonable doubt.\textsuperscript{78} The Court reasoned that “[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.”\textsuperscript{79} However, the Court subsequently held in \textit{Harris v. United States}\textsuperscript{80} that facts which increase the mandatory minimum are merely “sentencing factors,” rather than elements of the offense, and there is no need to prove such facts to a jury.\textsuperscript{81}

In \textit{Alleyne}, the Court overruled \textit{Harris}. The Court held that facts that increase the mandatory minimum sentence are indeed elements of the offense and must be submitted to the jury.\textsuperscript{82} Under \textit{Apprendi}, identical treatment of raising mandatory minimums and statutory maximums is necessary because “[b]oth kinds of facts alter the prescribed range of sentences to which a defendant is exposed and do so in a manner that aggravates the punishment.”\textsuperscript{83} Although raising a mandatory minimum narrows the range of punishments whereas increasing a statutory maximum expands it, the Court deemed that distinction immaterial. Facts affecting either end of the sentencing range constitute offense elements.\textsuperscript{84}

\textit{Alleyne} is not a decision about retroactivity. Nonetheless, the Court’s analysis has unmistakable implications for how \textit{Miller} ought to be analyzed under \textit{Teague}. Defining the elements of a criminal offense is a substantive function, in that it determines what “primary, private individual conduct” the state may proscribe.\textsuperscript{85} As the Court recognized in \textit{Apprendi} and \textit{Alleyne}, defining the elements of an offense also determines a defendant’s sentencing range. \textit{Alleyne} thus impliedly stands for the proposition that rules that either raise the statutory maximum or lower the mandatory minimum are

\textsuperscript{78} Id. at 490.
\textsuperscript{79} Id. (quoting Jones v. United States, 526 U.S. 227, 252 (1999) (Stevens, J., concurring)).
\textsuperscript{80} Harris v. United States, 536 U.S. 545 (2002), overruled by Alleyne, 133 S. Ct. at 2155.
\textsuperscript{81} Harris, 536 U.S. at 556.
\textsuperscript{82} Alleyne, 133 S. Ct. at 2155.
\textsuperscript{83} Id. at 2158 (plurality opinion); see also Apprendi v. New Jersey, 530 U.S. 466, 484 (2000).
\textsuperscript{84} Alleyne, 133 S. Ct. at 2160.
equally substantive.86

This conclusion reveals that Carp conflicts with Alleyne. Applying Carp’s reasoning to the question of whether facts that raise the mandatory minimum are elements of the offense would yield the result Alleyne rejected from Harris, rather than the result from Alleyne. While the Carp majority acknowledges that altering the upper limit of a sentencing range is substantive, its reasoning demands that a fact altering the lower limit of a sentencing range would not constitute an element of the substantive offense. Carp thereby runs afoul of Alleyne’s determination that altering either the minimum or the maximum sentence marks a substantive change to the elements of the offense.

Together, Roper and Alleyne refute any effort to place a one-way ratchet on the functioning of substantive rules. Whether a sentencing rule affects the upper or lower limits of a sentencing range is irrelevant to classifying the rule as substantive. What is relevant is whether the rule affects permissible sentencing outcomes. Roper and Miller mitigate punishments by lowering sentencing ceilings and floors, respectively. Apprendi and Alleyne addressed state sentencing rules that aggravated punishments by requiring the finding of facts that raised sentencing ceilings and floors, respectively. Both sets of rules “alter the prescribed range of sentences to which a defendant is exposed.” Both sets of rules are therefore substantive.

B. Miller’s Requirement that States Consider Mitigation before Sentencing a Juvenile to Life without the Possibility of Release Is Substantive

Along with expanding sentencing outcomes for all juveniles exposed to life without the possibility of parole, Miller’s individualized sentencing mandate contains a second component imported from Woodson: instituting a new rule of decision for states seeking to impose the ultimate available sentence. Woodson forced states to consider a defendant’s mitigation before they could permissibly impose a death sentence.87 Miller, in turn, makes consideration of the mitigating effects of youth a necessary prerequisite for a state to irrevocably condemn a juvenile to a lifetime in prison.88 As with eliminating the mandatory nature of a sentence, the requirement

---

86 This proposition remains true even if the constitutional requirement that juries make such factual findings is procedural, as the Court held in Summerlin. Schriro v. Summerlin, 542 U.S. 348, 354 (2004).
88 Miller v. Alabama, 132 S. Ct. 2455, 2469 (holding that before a state may sentence a juvenile to life without parole “we require it to take into account how children
of mitigation may appear procedural on its surface. Both elements speak in part to how states must conduct sentencing. Yet, a review of Court precedent from the civil and criminal realms also reveals that the mitigation requirement is substantive.

i. Rules of Decision in the Civil Context

Just as *Teague* represents the Court’s attempt to demarcate the boundaries of federalism in criminal law by resort to the distinction between substantive and procedural rules, the Court has applied this same distinction in civil cases to achieve the proper balance between federal and state interests. In the civil context, as discussed below, regulations that provide the “rules of decision” for adjudicating individual rights are substantive, whereas those that merely provide “the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them” are procedural.89

The Court’s decisions evaluating the use of the Federal Rules of Civil Procedure in diversity cases demonstrate the Court’s approach to federalism in civil cases. The Rules Enabling Act prohibits the Supreme Court from issuing rules of civil procedure that “abridge, enlarge or modify any substantive right.”90 As a matter of federalism, this injunction prevents a federal rule of civil procedure from supplanting state substantive law.91 To this end, a federal rule of civil procedure is valid if it regulates only “the manner and the means” of enforcing individual rights.92 However, a rule impermissibly encroaches upon substantive law if it alters “the rules of decision” that define the scope of individual rights.93

Rules of decision are clearly substantive under this framework. While they do not alter the substantive range of outcomes, they nonetheless control which available outcomes are appropriate. For instance, the Court has deemed substantive so-called “notice-of-claim” statutes, which are rules of decision that require would-be plaintiffs to notify potential defendants of an intended suit within a specified time or face dismissal of the action.94 This classification are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.”).

---

91 *Shady Grove*, 559 U.S. at 406-07.
92 *Id.* at 407 (quoting Mississippi Publ’g Corp. v. Murphree, 326 U.S. 438, 446 (1946)).
93 *Id.* (quoting Murphree, 326 U.S. at 447).
proved crucial in *Felder v. Casey*, which resolved whether a state’s notice-of-claim rule was preempted by federal law in a civil rights action brought in state court under 42 U.S.C. § 1983. There, the Court held that a “notice-of-claim statute is more than a mere rule of procedure. . . ; the statute is a substantive condition on the right to sue governmental officials and entities.” Thus, federal law preempted the state’s notice of claim statute because applying the state rule would “predictably alter[ ] the outcome” of suits and frustrate the federal right.

Outside of the federalism context, where civil plaintiffs have asserted the need for a new rule of decision to prevent the state from arbitrarily depriving them of a fundamental liberty interest, the Court has also categorized these claims as substantive. In *Connecticut Department of Public Safety v. Doe*, the plaintiff contended that his inclusion on the state’s sex offense registry violated the procedural component of the Fourteenth Amendment’s Due Process Clause, owing to the state’s failure to conduct a hearing on “current dangerousness.” The Court rejected this contention, finding that because inclusion on the state’s registry did not already require a finding of “current dangerousness,” the plaintiff should have invoked the *substantive* component of the Due Process Clause to invalidate the law as constitutionally arbitrary. Conversely, the earlier case of *Foucha v. Louisiana* saw the Court rule as a matter of substantive due process that a finding of current mental illness or dangerousness was essential to prevent a state from arbitrarily authorizing involuntary commitment.

Taken together, these civil cases demonstrate that *Miller’s* requirement of mitigation is substantive. As in the civil federalism cases, *Miller’s* mitigation requirement constitutes an outcome-determinative rule of decision that vindicates juveniles’ rights under the federal Constitution against cruel and unusual punishments. *Miller*, by making sentencers treat youth and its attendant circumstances as mitigating factors to arrive at the ultimate sentence, imposes a substantive condition on the state’s ability to sentence juveniles to life imprisonment without any hope of release. As in *Doe* and *Foucha*, this substantive prerequisite is specifically aimed at preventing the constitutionally arbitrary sentencing of youth to this harshest of permissible penalties.

95 *Id.* at 152.
97 *Id.* at 7-8.
ii. “Rules of Decision” in the Criminal Context

Criminal cases follow a pattern analogous to civil rules of decision that further supports classifying Miller’s mitigation requirement as substantive. Supreme Court precedent establishes that new rules are substantive when they narrow the factual circumstances under which a criminal sentence may be imposed.99 Similar to rules of decision that alter the outcome of cases in the civil context, substantive criminal rules accomplish this narrowing function when they make consideration of certain facts necessary before a state may impose a particular sentence. As the Court explained in Summerlin, one of its holdings would qualify as substantive if it made certain facts essential to imposing the death penalty.100 The Summerlin Court thereby held that its prior ruling in Ring v. Arizona,101 that a jury rather than a judge must find beyond a reasonable doubt the existence of an aggravating factor necessary to the imposition of the death penalty, was procedural.102 State law already made the finding of certain aggravating facts essential to the death penalty, while Ring merely regulated “the procedural requirements the Constitution attaches to [the] trial” of those facts.103 By contrast, had the Court required the states to find new aggravating facts in order to impose a death sentence, its ruling would be substantive.104

Applying Summerlin, the Miller rule is substantive. Before Miller, Michigan’s mandatory scheme gave no consideration to juvenile status. Miller now makes juvenile status essential to the sentencing scheme. It does so by requiring states like Michigan to consider juvenile status and its attendant mitigating circumstances before a child may permissibly receive a sentence of life imprisonment without parole.105 Moreover, Miller makes plain its narrowing intent. The decision requires sentencers not simply “to take into account how children are different,” but also “how those differences counsel against irrevocably sentencing them to a lifetime in prison.”106 Miller thus makes mitigation essential to the punishment, necessarily limiting the factual circumstances under which a state may deny the possibility of release to a juvenile.

100 Id. at 354.
102 Summerlin, 542 U.S. at 354.
103 Id.
104 Id.
106 Id. (emphasis added).
Expanding on *Summerlin*, Professor Beth Colgan has offered the insightful proposal that this substantive feature of *Miller* is also reinforced by the Supreme Court’s recent decision in *Alleyne v. United States*.\(^{107}\) Recall from above *Alleyne*'s holding that if a fact increases the mandatory minimum sentence, it must be considered an element of the offense.\(^{108}\) And recall that in *Summerlin* the Court held that if a new rule made a certain fact essential to the death penalty, the holding would be substantive for retroactivity purposes.\(^{109}\) Reading *Alleyne* and *Summerlin* together, Colgan concludes that *Miller* effectively makes adulthood an essential element of any offense that carries a “mandatory minimum” sentence of life without parole.\(^{110}\) *Miller*'s conversion of age into an offense element is therefore substantive and retroactive.\(^{111}\)

Colgan’s reliance on *Alleyne*, though facially dependent on the Court making adulthood an element of an aggravated offense, actually derives from *Miller*'s requirement that states alter the range of sentencing outcomes for juveniles. By virtue of being the only available sentence, life without parole was both the mandatory minimum and maximum sentence for juveniles in states like Michigan; there was no sentencing range. *Miller* subsequently required these states to afford juveniles the possibility of at least one additional sentence with a meaningful opportunity for release. It is this alteration of potential sentencing outcomes for juveniles as a class that enables Colgan’s argument that adulthood has become an element of an aggravated offense whose “mandatory minimum” is life without parole.

Indeed, Colgan’s argument would be valid any time the Court altered a sentencing range by prohibiting a mandatory punishment for a particular class of offenders. Whatever fact defined individuals not in the protected class—i.e., those still subject to the mandatory penalty—would become an element of the aggravated offense. To illustrate, if the Court next ruled that those with intellectual disabilities may not receive mandatory life without parole, by Colgan’s thesis, that holding would transform being of ordinary intellectual ability into an element of the aggravated offense. In either scenario, the Court is simply removing a class of offenders

---

109 *Summerlin*, 542 U.S. at 354.
from the mandatory sentencing scheme and obliging states to implement additional sentencing outcomes for that class.

This clarity is necessary to answer fully the question of whether invalidating a mandatory punishment and requiring individualized sentencing is substantive under Teague. Colgan’s approach presents a persuasive and perhaps complete theory for Miller’s retroactivity. But it does not fully account for why both Miller’s and Woodson’s sentencing rules are substantive. Applying Colgan’s reasoning, Woodson prohibited states from maintaining the death penalty as a “mandatory minimum.” Yet, unlike Miller, Woodson did not carve out any particular class of defendants from receiving the mandatory minimum. Woodson therefore did not make any particular fact defining a class essential to imposing the death penalty in the way that Miller arguably makes adult status a prerequisite to applying a mandatory minimum of life without parole. Consequently, although Colgan’s theory results in Miller being substantive because it makes adulthood an element of a mandatory minimum sentence under Alleyne, the theory fails to answer whether Woodson is retroactive, despite Miller and Woodson imposing the same essential requirements of individualized sentencing.

Colgan’s thesis also cannot help classify Miller’s individualized sentencing mandate in situations where neither the mandatory maximum nor minimum is at stake, i.e., where the jurisdiction is not required to alter the range of possible sentencing outcomes. If a non-mandatory sentencing range already exists, an individualized sentencing and mitigation requirement could force states to enact a new scheme that incorporates mitigation to arrive at outcomes without altering the range. This could occur if a state allowed a judge, after considering only the aggravating factors of the offense, to impose a sentence of either life with or without parole. The Supreme Court might then issue a new decision requiring the state to consider a defendant’s mitigation before sentencing. In this scenario, there is no mandatory sentence at issue, and thus no argument that the Court made a particular fact an element of an aggravated offense. Still, from the discussion above, the threshold requirement of mitigation would be substantive under Summerlin. While Colgan’s approach may corroborate the argument that Miller is substantive under Summerlin, it does not account for the additional conclusion under Summerlin that the mitigation requirement, found in both Miller and Woodson, is itself substantive. Given these omissions, the “adulthood as element” theory is not fully satisfying
as a tool for assessing whether individualized sentencing is substantive or procedural.

From the above discussion, it is plain that Miller’s mandate of individualized sentencing for juveniles, like Woodson’s, not only forces states to expand sentencing outcomes beyond the most severe mandatory punishment, its mitigation requirement also provides a critical new rule of decision for arriving at sentencing outcomes under the new regime. Both of these functions are substantive.

C. Miller’s Procedural Component Is Undefined and Collateral to Its Substantive Changes

Having identified two substantive components of Miller’s individualized sentencing requirement as adapted from Woodson, it cannot be denied that the decision also invokes process. After all, states with mandatory sentencing schemes before Miller must develop new procedures for how they will identify “the rare juvenile offender whose crime reflects irreparable corruption.”112 However, a thorough examination of this supposed procedural dimension further confirms that Miller does not merely regulate process.

Although Miller prohibits a state from exposing juveniles to life imprisonment without parole unless there is consideration of youth, it in no way addresses “the procedural requirements the Constitution attaches” to the consideration of youth.113 States remain free to determine “the manner and the means”114 for the consideration of youth in accordance with Miller’s expansion of sentencing outcomes and new rule of decision. One therefore should not conflate the Supreme Court’s statement in dicta that its decision “requires only that a sentencer follow a certain process,”115 with the question of whether Miller should be considered a substantive or procedural rule under Teague.

More to the point, it is objectively inaccurate to state that Miller only requires states to follow a certain process. States must do far more. They are required to expand the range of juvenile sentences to always include the possibility of release. They must also consider youth and its attendant circumstances as mitigating

113 See Summerlin, 542 U.S. at 354.
115 Miller, 132 S. Ct. at 2471.
factors to ensure that the harshest possible sentence is uncommon and rare.\textsuperscript{116} Miller's limits on state authority therefore have little to do with sentencing procedure and everything to do with sentencing outcomes.

Further, basing the Teague analysis on the Court's dicta would prove too much. Every new substantive rule potentially requires states to follow "a certain process" to enforce the new right. This truism simply expresses the necessary interplay between substance and procedure.\textsuperscript{117} Blind adherence to the Court's "certain process" language would eviscerate the very idea of substantive rules.

For example, the Supreme Court's decision in Atkins v. Virginia banned the death penalty for the intellectually disabled.\textsuperscript{118} The decision's categorical prohibition on the death penalty for this class is indisputably substantive,\textsuperscript{119} yet it is equally indisputable that the Court delegated to the states the task of implementing appropriate procedures to identify members of the newly protected class.\textsuperscript{120} States seeking to preserve life without parole as a sentencing option for juveniles face a similar task following Miller, namely, legislating procedures that satisfy the individualized sentencing mandate.

This interplay between the substantive constitutional rule and the procedures constitutionally required to enforce the rule can be observed in the decisions following Woodson. In the wake of Woodson, states maintained vastly different procedures for implementing the Court's requirement of individualized sentencing in death penalty cases.\textsuperscript{121} A contrast may therefore be drawn between, on the one hand, the Court's rulings outlawing the mandatory death penalty and, on the other hand, the Court's later rulings regulating the processes by which states implemented individualized capital sen-

\textsuperscript{116} See State v. Ragland, 836 N.W.2d. 107, 115 (Iowa 2013) ("From a broad perspective, Miller does mandate a new procedure. Yet, the procedural rule for a hearing is the result of a substantive change in the law that prohibits mandatory life-without-parole sentencing.").


\textsuperscript{120} See Hill v. Humphrey, 662 F.3d 1335, 1347 (11th Cir. 2011) (en banc) ("Atkins Left Procedural Rules to States.").

\textsuperscript{121} Compare Jurek v. Texas, 428 U.S. 262 (1976) (plurality opinion) (upholding Texas capital scheme of posing to sentencing jury three questions because nature of one question allowed defendant to submit any mitigating circumstances), with Proffitt v. Florida, 428 U.S. 242 (1976) (plurality opinion) (upholding Florida capital scheme of directing judge and advisory jury to consider enumerated mitigating circumstances).
tencing schemes. The analysis advanced in this Article would demand providing *Woodson* full retroactive effect as a substantive rule. It further dictates that the Court correctly held that its latter decisions reviewing *Woodson*’s implementation through specific sentencing schemes were procedural.\footnote{122 See, e.g., Beard v. Banks, 542 U.S. 406 (2004) (denying retroactive relief to post-*Woodson* holding that a capital sentencing scheme could not require the jury to disregard a mitigating element unless the jury found the element unanimously); see also Sawyer v. Smith, 497 U.S. 227 (1990) (denying retroactive relief to post-*Woodson* holding that a sentencer cannot be led into a false belief that the responsibility for imposing death rests elsewhere).}

*Miller*, as was the case with *Woodson*, recognized the right to individualized sentencing for a class of defendants without dictating specific procedures for vindication of that right. Future debates in the states over *Miller*-compliant processes for considering mitigation are certain to follow. That states must explore these mechanisms does not alter the fact that *Miller* itself articulates a substantive rule, and that states must comply with *Miller* for all of the juveniles whose sentence that decision rendered unconstitutional.

**Conclusion**

*Miller* requires that states seeking to incarcerate juveniles without any hope of release do so rarely, and only after conducting an individualized sentencing where the circumstances of youth—immaturity paired with the capacity for change—are given mitigating effect. Prior to *Miller*, this hopeless sentence was anything but rare, having been inflicted on over 2,000 juveniles. Worse still, life imprisonment with no possibility of release was most frequently imposed by judges powerless to consider anything except the bare fact of conviction.

An honest assessment of *Miller* demands that the overwhelming majority of youth condemned to die in prison deserve a meaningful opportunity for release at some point in their lifetimes. Nonetheless, five states, including Michigan, have determined that because the *Miller* majority characterized the decision as only requiring a “certain process,” *Miller* announced a procedural rule that is not retroactive under *Teague v. Lane*. Unless the United States Supreme Court declares otherwise, the overwhelming majority of youth that these states have condemned to die in prison may never have an opportunity at redemption.

The discussion in this Article establishes that states like Michi-
gan have proceeded on a false premise. Irrespective of the language used in the *Miller* majority’s opinion, the decision does not simply require a “certain process.” *Miller*, like its doctrinal predecessor *Woodson*, is principally attuned to sentencing outcomes, not sentencing procedures. *Miller*’s individualized sentencing mandate forces the states to abandon their previously inflexible sentencing regimes in order to drastically reduce the number of juveniles discarded as “throw away” people. *Teague* demands classifying *Miller* as a substantive decision that binds the states retroactively.
A FOUNDING FAILURE OF ENFORCEMENT:
FREEDMEN, DAY LABORERS, AND THE
PERILS OF AN INEFFECTUAL STATE

Raja Raghunath†

ABSTRACT

As the descent from the heights of our most recent rights revolution continues apace, there is a cautionary lesson contained in the aftermath of the passage of the Thirteenth Amendment and the abolition of chattel slavery, 150 years ago this year. Reconstruction was the moment when the promise of universal liberty to work first became part of the American state’s covenant with its people. But this promise was quickly lost, and the rights that the federal government had extended to the freed slaves – the freedmen – were contested and eventually nullified by vehement opposition in the working fields and cities of the South. In this sense, workers’ rights were the original civil rights, and the Freedmen’s Bureau, the original federal labor rights agency, was a founding failure of enforcement. This article argues that enforcement efforts today must take from this history an increased focus on the labor standards of low-

† Assistant Professor, University of Denver Sturm College of Law; J.D. University of Michigan Law School; B.A., Duke University.
wage workers, in particular the unauthorized immigrants among them. The presence of a largely unauthorized workforce in a labor market, such as in day labor and domestic work, is a reliable sign that the most vulnerable workers may be found there. By focusing on these most vulnerable workers, government enforcement efforts can help overcome the collective action problem that is created by any system of minimum labor standards. The exploitation of vulnerable workers is the common behavior that has persisted through the centuries, and while some of its premises may have shifted, it remains the very wrong that our equal rights at work were originally designed to combat.

**INTRODUCTION**

The origins of the rights enjoyed by today’s workers lie nearly one hundred and fifty years ago, in Reconstruction, the war after the Civil War.\(^1\) The United States passed the first laws requiring the equal treatment of black Americans during Reconstruction, laying the groundwork for the universal rights guarantees of the twentieth century.\(^2\) But the federal government’s failure to enforce these laws helped to nullify the promise of equality that was made by the abolition of slavery, and usher in a long dark period for workers’ rights in the United States. Today, the descendants of these pioneering civil rights laws find their highest purpose when used to once again protect the workers most vulnerable to exploitation by modern economic actors: unauthorized immigrants, the laboring portion of the American shadow economy.\(^3\)

This article argues that an important lesson of Reconstruction

---

\(^1\) See, e.g., *Reconstruction: The Second Civil War*, (PBS television broadcast 2004).

\(^2\) See *Kate Masur, An Example for All the Land: Emancipation and the Struggle Over Equality in Washington, D.C.* 6 (2010) ("Even before the war, theories of individual rights and contract were replacing local traditions that stressed standing and collectivity. The rise of the Republican vision of free labor ideology, the Union victory, and the raft of federal legislation and constitutional amendments that followed the war all magnified this trend. Indeed, it is a commonplace that postwar legal changes at the federal level laid the groundwork for the modern state and for a new vision of individual rights.").

\(^3\) See *Mae M. Ngai, Impossible Subjects: Illegal Aliens and the Making of Modern America* 2 (2004) ("Employed in western and southwestern agriculture during the middle decades of the twentieth century, today illegal immigrants work in every region of the United States, and not only as farmworkers. They also work in poultry factories, in the kitchens of restaurants, on urban and suburban construction crews, and in the homes of middle-class Americans. Marginalized by their position in the lower strata of the workforce and even more so by their exclusion from the polity, illegal aliens might be understood as a caste, unambiguously situated outside the boundaries of formal membership and social legitimacy.").
should be that, if the government is going to set a lower boundary of labor standards that apply to all, it has to be prepared to police that boundary, lest it become too porous and thereby allow too many to fall through into the world of unregulated employment below. The low-wage workforce of unauthorized immigrants is hugely consequential to American household prosperity and the nation’s macroeconomic strength. As the workplace rights of today, granted to us in prior generations, continue to wane, whether these rights can be asserted by the most vulnerable workers will similarly have consequences for all.

The labor rights of unauthorized immigrants come up for discussion with some regularity in Congress, predictably as a fraught topic that precludes much compromise. The polarized nature of the debate draws moral outrage away from the vulnerability of unauthorized workers in low-wage work, although that fact is increasingly being documented. A recent landmark study by the National Employment Law Project (NELP) found that more than two-thirds of low-wage workers surveyed had experienced at least one pay-related violation in the work week prior to the survey. The study

4 See Ruben J. Garcia, Marginal Workers: How Legal Fault Lines Divide Workers and Leave Them Without Protection 4 (2012) (“Workplace law is seen as a political battlefield between labor and capital, with each successive political change leading the pendulum either more toward the laissez-faire or toward New Deal-style regulation. This political see-saw has created a class of ‘marginal workers’—workers who fall through the margins of different bodies of law that are supposed to protect them, but lack the political power to fix the holes in the legislation. These pendulum swings have produced a statutory framework that has left numerous gaps and incomplete protections for all workers.”).

5 See Mark S. Krikorian, The New Case Against Immigration: Both Legal and Illegal 133 (2008) (“While immigration certainly increases the overall size of our economy, it subverts the widely shared economic goals of a modern society: a large middle class open to all, working in high-wage, knowledge-intensive, and capital-intensive jobs exhibiting growing labor productivity and avoiding too skewed a distribution of income.”).


7 Aristide R. Zolberg, A Nation by Design: Immigration Policy in the Fashioning of America 25 (2008) (“Whereas policy regarding the ‘front gate’ is shaped by the relatively free play of competing societal interests (political science’s traditional ‘pluralism’), refugee policy is shaped by ‘realism’ (in which the state looms as a major agent pursuing interests of its own), and ‘back-door’ policy comes close to fitting classical ‘class-conflict’ theories.”).

found that the rate of wage violations for immigrant, and especially unauthorized, workers in this group was up to more than twice as high as for native-born workers. There is “widespread agreement that unauthorized immigrants are vulnerable to abuse,” but more work still to be done to measure the rate of violations. It is nevertheless clear that more should also be done to guard the rights of those workers.

In Part I of this article, I will begin by explaining how the persistence of a working underclass that has difficulty accessing the rights of the rest of the workforce has always been a feature of the nation’s economy, rather than a bug. I will then argue for the importance of labor standards enforcement in such a context, and identify the sources of resistance that would accompany such efforts. In Part II, I will describe how the regulatory failure of the Freedmen’s Bureau helped kick off a long period of low worker protection, embodied by the Supreme Court’s *Lochner* decision and the still-ascendant doctrine of employment at-will, and provides a cautionary example of why the rights of the most vulnerable workers should be paramount for regulators. Finally, in Part III, I will explain how this enforcement focus should apply to the modern low-wage and unauthorized workforce, and attempt to respond to the likely vehement opposition that advocacy for such a regulatory focus would prompt.

I.

A. The Persistent American Underclass

The enactment of the Civil Rights Act of 1964 was the pinnacle of the rights revolution of the twentieth century, and the beginning of its end. The revolution had taken decades to unfold, be-

9 *Id.* at 42–43 (also noting that “foreign-born Latinos had an especially high minimum wage violation rate of 35 percent, double the rate of U.S.-born Latinos and nearly six times the rate of U.S.-born whites. And race plays a marked role among U.S.-born respondents, where African-American workers had a violation rate three times that of white workers.”).

10 DORIS MEISSNER ET AL., IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY 89 (2013) (“While there is widespread agreement that unauthorized immigrants are vulnerable to abuse, there is surprisingly little research that systematically compares employers that violate labor standards with those that violate employer verification (i.e. immigration) requirements.”).

11 *Id.* (“However, there is strong evidence that low-wage immigrants work at high rates in particular industries and firms that substantially violate labor laws.”).

12 CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE, at V (1990) (“By the ‘rights revolution’ I mean the creation, by Congress and the President, of a set of legal rights departing in significant ways from those
beginning during the New Deal with the passage of worker-protection laws such as the Fair Labor Standards Act (FLSA), in 1938. No new employment-rights statutes of significance have been enacted in the half-century since the Civil Rights Act, apart from its amendment and broadening in 1991, and, arguably, the Americans with Disabilities Act, the Family and Medical Leave Act, and ERISA.\textsuperscript{13}

Specialized statutes governing occupational safety and unemployment insurance remain important to the well-being of American workers, but they do not primarily regulate (some would say intrude upon\textsuperscript{14}) the employment contract. In the meantime, union density under the system of labor relations established by the National Labor Relations Act (another New Deal-era statute) continues to erode, with all that entails. The inescapable conclusion is that the rights enjoyed by workers in the modern American legal system are far more likely to shrink than to expand in the future,\textsuperscript{15} and that there are no better ones on offer.

It becomes all the more crucial, then, that efforts to enforce these rights be targeted towards the most vulnerable in the American workforce, whether that vulnerability is the result of the operation of other federal laws (such as in the case of unauthorized immigrants),\textsuperscript{16} the operation of a particular economic sector (such as in agriculture and meatpacking),\textsuperscript{17} expressions of bigotry, or a

\textsuperscript{13} GARCIA, \textit{supra} note 4, at 66 ("Besides the Americans with Disabilities Act passed in 1990 to cover disability discrimination, no new categories of protection had been added to Title VII since its passage in 1964, until the Genetic Nondiscrimination Act of 2008.").

\textsuperscript{14} See, e.g., WALTER K. OLSON, THE EXCUSE FACTORY: HOW EMPLOYMENT LAW IS PARALYZING THE AMERICAN WORKPLACE 308 (1997) ("The new employment law makes scarcely a single promise that it does not break. It promises a fairer sharing of the blessings and burdens of work, but doles out its rewards capriciously, giving most to those who already are doing the best.").

\textsuperscript{15} See, e.g., Vance v. Ball State Univ., No. 11-556, slip op (U.S. Sup. Ct. Jun. 24, 2013) (narrowing the definition of "supervisor" for the purposes of employer liability under Title VII of the Civil Rights Act).

\textsuperscript{16} Maria Ontiveros, Immigrant Rights and the Thirteenth Amendment, 16(2) NEW LABOR FORUM, 26, 28 (2007) ("From a Thirteenth Amendment perspective, \textit{Hoffman [Plastic] creates a caste of workers, primarily people of color, whose status is beneath that established for free labor.").

\textsuperscript{17} See ERIC SCHLOSSER, FAST FOOD NATION: THE DARK SIDE OF THE ALL-AMERICAN MEAL 149–150 (2001) ("Migrant workers have long played an important role in the agricultural economy of other states, picking berries in Oregon, apples in Washington-
combination of multiple such factors. 18

It is widely agreed-upon that unremedied violations of universal labor standards occur more frequently at the lower, rather than the middle or higher, end of income. 19 Accordingly, any agent whose mission is the eradication of such violations should go where they most occur. For unauthorized immigrants, the real or perceived absence of impartial outside assistance when they are wronged 20 helps ensure that such workers are looked to first by employers when economic forces encourage their exploitation, as such forces have always done. 21

The low-wage workforce is also vulnerable because the incentive to commit wage violations for a given employer in any particular employment situation can rise as the amount of money at issue declines. This may seem counterintuitive—surely an employer has a higher incentive to fail to pay wages when the amount to be gained is higher. The additional variable that changes this calculation is the likelihood of dispute, and this is where employment laws play their role. In the case of wages, employers are able to routinely “nickel and dime” their low-wage workers out of amounts that readers of this article (and lawyers generally) would consider small. The employers can do this because, on average, the money will be too little to justify enforcement efforts by the employee or anyone else. 22 At the same time, these wages are meaningful portions of

18 See generally NGAI, supra note 3.
19 See BURNHART ET AL., supra note 8, at 2 (“Many employment and labor laws are regularly and systematically violated, impacting a significant part of the low-wage labor force in the nation’s largest cities.”).
20 See MEISSNER ET AL., supra note 10, at 84-87 (describing enforcement resources of Wage & Hour Division of U.S. Department of Labor and information-sharing agreements with Immigration and Customs Enforcement agency).
21 Cf. JAMES C. SCOTT, THE ART OF NOT BEING GOVERNED: AN ANARCHIST HISTORY OF UPLAND SOUTHEAST ASIA 24 (2010) (“The concentration of people and production at a single location required some form of unfree labor when population was sparse, as it was in Southeast Asia. All Southeast Asian states were slaving states, without exception, some of them until well into the twentieth century.”).
22 See BARBARA EHRENREICH, NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA 210 (2001) (“So if low-wage workers do not always behave in an economically rational
2014] A FOUNDING FAILURE OF ENFORCEMENT 53
each individual employee’s meager overall income, and meaning-
fully large enough to the employer in aggregate to justify continu-
ing the practice.23

Unauthorized workers in particular suffer this condition by rea-
son of a legal demarcation alone, ostensibly one to do with na-
tional sovereignty, and not primarily motivated by these workers’
roles in the labor market.24 Upon closer examination, it becom-

es apparent that the labor aspect of immigration controls in Amer-
ican history was arguably the aspect that mattered most in the cen-
tury that followed Emancipation and the loss of the slave
workforce,25 and that it remains so today.

B. Exploitation as Feature, Not Bug

A system of labor regulation will only imperfectly cover the
working population to which it applies. Mostly, it is a question of
scale. The informal economies at the low end of global income,
such as what exists today in much of India,26 often dwarf the formal
economies that exist alongside them. In other instances, this im-
perfect coverage is by design.27 In the United States, founded upon
the principle of equality before law, formal law has been used

way, that is, as free agents within a capitalist democracy, it is because they dwell in a
place that is neither free nor in any way democratic. When you enter the low-wage
workplace—and many of the medium-wage workplaces as well—you check your civil
liberties at the door, leave America and all it supposedly stands for behind, and learn
to zip your lips for the duration of the shift.”).

23 See BURNHART, ET AL., supra note 8, at 5 (“The average worker lost $51, out of
average weekly earnings of $339. Assuming a full-time, full-year work schedule, we
estimate that these workers lost an average of $2,634 annually due to workplace viola-
tions, out of total earnings of $17,616. That translates into wage theft of 15 percent of
earnings.”).

24 See RICHARD B. LILlich, THE HUMAN RIGHTS OF ALIENS IN CONTEMPORARY \nINTERNATIONAL LAW 69 (1984) ("During the nineteenth century the phenomenon of mi-
grant labour was perceived as a blessing rather than as a problem. In the high days of
laissez-faire, with its ethos of free enterprise and ready movement of labour and capi-
tal, even the system of requiring travelers to carry passports with them fell into disuse.
The problems of migrant labour were simply problems of labour generally. This cen-
tury, however, has witnessed dramatic change, spurred in large part by World War I,
with its welter of restrictions and controls. It was then that the phenomenon of inter-
national migration for employment began to command attention as a problem in its
own right.”).

25 See, e.g., ZOLBERG, supra note 7, at 287.

26 See KATHERINE Boo, BEHIND THE BEAUTIFUL FOREVERS 6 (2012) (ethnographic
account of lives of slum dwellers in Mumbai, India, where “only six of the slum’s three
thousand residents had permanent jobs. (The rest, like 85 percent of Indian workers,
were part of the informal, unorganized economy.”)).

employees exempt from wage and hour standards of FLSA).
throughout the nation’s history to maintain a sizable population to whom normal worker protections do not apply. In the nineteenth century, it was chattel slavery that fulfilled this function; 28 in the twentieth and twenty-first, it is the immigration system.

Before the passage of our modern workplace protections, the rights of American workers had been defined by the sweeping civil rights goals of Reconstruction 29 and their resounding defeat. 30 The era that followed that defeat is embodied in the doctrine of employment at will, which came into being in the decades after Reconstruction. 31 The turn of the twentieth century saw the Supreme Court hold in *Lochner v. New York* 32 that the individual liberty to contract that had been so central to Emancipation forbade state regulation of working conditions. *Lochner* was of course overruled to make way for the New Deal, but the doctrine of employment at will continues to predominate. Nevertheless, the modern employment relationship is generally better than what an employer might otherwise provide, given his druthers. 33

Observing that the employment relationship in this country was largely one of master-servant before Emancipation, and remained so for much of the century following, 34 does not diminish

---

28 See David R. Roediger, *The Wages of Whiteness: Race and the Making of the American Working Class* 25 (2007) (“The many gradations of unfreedom among whites made it difficult to draw fast lines between any idealized free white worker and a pitied or scorned servile Black worker. Indentured servitude [et al.] made for a continuum of oppression among whites. Of course . . . that continuum did not extend to the extreme of chattel slavery as was inflicted on people of color.”).


30 See David Blight, *The Civil War and Reconstruction Era, 1845-1877* (On file with Open Yale course HIST 119, lecture 24, at 5:45) (“80% of freedmen were sharecroppers by as early as the late 1860’s.”).

31 James J. Brudney, *Reluctance and Remorse: The Covenant of Good Faith and Fair Dealing in American Employment Law*, 32 COMP. LAB. L. & POL’Y J. 773, 798 (2010) (“As is well known, American common law departed from its English roots when it developed the at-will rule in the late nineteenth century. The presumption that indefinite-term hirings were terminable at the discretion of either party, that there was no mutuality of obligation regarding job tenure in these contracts, coincided with the rise of laissez-faire capitalism.”).

32 198 U.S. 45 (1905).

33 *Saturday Night Live: The Best Of Chris Rock* (NBC Home Video 1999) (The comedian Chris Rock joked that the message a boss sends to a person who works for minimum wage is: “If I could pay you less, I would.”).

34 See Barbara Young Welke, *Law and the Borders of Belonging in the Long Nineteenth Century United States* 116 (2010) (“Bracketing the Civil War and Reconstruction as the end point of an era ignores the ugly continuities between slavery
the gains that have been made. A focus on the poorest, most vulnerable workers in the economy today begins at a much better place than it did during Reconstruction, when subsistence farming was a state to which most freedmen aspired.\(^35\) The modern exploitation of vulnerable workers is the successor to the economic behavior that our employment laws were first written to eliminate,\(^36\) even though the overall conditions of these workers have improved alongside everyone else.

This commonality between eras is illustrated by the fact that we can find these workers in many of the same places they were found 150 years ago—in farms and fields, kitchens and bathrooms. The faces of most of the workers have changed. This does not imply that black Americans have sufficiently overcome racism such that they no longer have a need for the laws originally written to benefit them, and those laws can now focus on another disadvantaged group. To the contrary, now more than ever, those laws are still needed for that original purpose.\(^37\)

But society no longer accepts the race of the worker as an express justification for exploitation. It may, however, accept his or her immigration status.\(^38\) The common thread between the centuries for the exploitation in question is that it happens to the most and the stunted freedom enjoyed by the vast majority of African Americans in the South by the century's end.\(^\)\(^\)\(^\).

\(^{35}\) *Amy Dru Stanley, From Bondage to Contract: Wage Labor, Marriage, and the Market in the Age of Slave Emancipation* 41 (1998) ("In the eyes of many former slaves, land ownership represented the natural outcome of emancipation—a bounty of war, a recompense for unrequited toil, an entitlement due by the labor theory of property. As defined by Georgia freedmen, freedom did not mean substituting the impersonal discipline of wage contracts for slave masters' personal dominion but rather being independent and owning property other than the self: the right to 'reap the fruit of our own labor,' to 'take care of ourselves,' and to 'have land, and turn it and till it by our own labor.'").

\(^{36}\) Ontiveros, *supra* note 16, at 27-28 ("This conception of free labor protects the uniquely human rights of workers-rights which are inherently placed in danger when labor becomes a commodity. The Supreme Court found that the Thirteenth Amendment, at its core, stands for the proposition that human labor must be treated differently and given more protection and than other things which get bought and sold via contracts. The Amendment protects workers rights as human rights.").


\(^{38}\) See David Weil, *Improving Workplace Conditions Through Strategic Enforcement, A Report to the Wage and Hour Division* 20 (2010), available at http://www.dol.gov/whd/resources/strategicEnforcement.pdf (including among “sources of workforce vulnerability” the effect of “a large influx of immigrant (and in many cases undocumented) workers, who are particularly vulnerable to exploitation . . . ”).
vulnerable workers, and that there remain third parties empowered to take action under laws written for that situation, and not the reasons given.”

To their credit, the federal workplace enforcement agencies state plainly that they do not consider employee immigration status in their enforcement efforts. But the lesson of Reconstruction, as it approaches its sesquicentennial, is that this is not enough. To fully effectuate equality before the law in the workplace, enforcement agencies must explicitly commit to seeking out firms and industries employing unauthorized immigrants, as the U.S. Equal Employment Opportunity Commission (EEOC) does, because the labor standards that all US workers enjoy are best served when they are enforced for these most vulnerable members of the working population. By the same token, when these standards are inevitably narrowed, it tends to hit this subset of workers hardest.

39 See James M. McPherson, Battle Cry of Freedom: The Civil War Era 867 (The Oxford history of the United States, Vol. 6) (1988) (“Eternal vigilance against the tyrannical power of government remains the price of our negative liberties, to be sure. But it is equally true that the instruments of government power remain necessary to defend the equal justice under law of positive liberty.”).

40 See Ming H. Chen, Where You Stand Depends on Where You Sit: Bureaucratic Politics in Federal Workplace Agencies Serving Undocumented Workers, 33 BERKELEY J. EMP. & LAB. L. 227, 239–240 (2012) (“[The Hoffman Plastic decision] triggered a rapid response from all three federal workplace agencies. Within months of Hoffman, the NLRB, the DOL, and the EEOC promulgated policy statements, internal memoranda, and a variety of regulatory guidance on the interpretation and implementation of case law. While none of these promulgations took the form of notice and comment rules and not all carried the independent force of law, these documents memorialized the agencies’ interpretation of existing law and indicated how they planned to exercise their discretion. The defining characteristic of each guidance document was an agency interpretation of existing law that blunted the Supreme Court’s opinion. While the specific exercise of discretion varied across agencies, each agency read Hoffman narrowly, reaffirmed that immigration status is not relevant to the labor and employment rights they protect, and emphasized that the agency practice is not to inquire into immigration status in the course of investigations.”).

41 The second priority listed in the agency’s most recent Strategic Enforcement Plan is “Protecting immigrant, migrant and other vulnerable workers. The EEOC will target disparate pay, job segregation, harassment, trafficking and discriminatory language policies affecting these vulnerable workers who may be unaware of their rights under the equal employment laws, or reluctant or unable to exercise them.” EEOC STRATEGIC ENFORCEMENT PLAN FY 2013 - 2016, available at http://www.eeoc.gov/eeoc/plan/sep.cfm.

42 See generally Weil, supra note 38 (setting forth enforcement priorities and strategies for Department of Labor to increase focus on violations against low-wage workers).

43 See, e.g., Teresa Tritch, The Family Unfriendly Act, N.Y. TIMES BLOG (May 10, 2013, 9:00 PM) http://takingnoteblogs.nytimes.com/2013/05/10/the-family-unfriendly-act/ (criticizing U.S. Congressional bill to allow “private-sector employers to offer compensatory time off in lieu of time-and-a-half pay for overtime,” noting that “employees can use their comp time only at the employer’s convenience,” and that the
The traditional conservative perspective on the individual freedom to contract sees employment laws such as antidiscrimination statutes as overly intrusive,\(^44\) economically inefficient,\(^45\) or some damning combination of the two.\(^46\) Another point of view, informed by the history of Reconstruction and its aftermath, is that protecting a particular worker’s freedom from an unlawful contract is very much a protection of the basic right to contract for all.\(^47\) The Abolitionists were among the first to raise equality in the employment relationship to the prominence of the more traditionally popular values of efficiency and utility.\(^48\)

As discussed at greater length in Part II, the first new individual rights amendments to the Constitution since the original Bill of Rights\(^49\) were a necessary step to ensure the legal status of the
freedmen as workers.50 Emancipation brought a great mass of new workers into the light of full civil society,51 requiring the federal government to make free labor its earliest enforcement priority.52 The United States was newly dedicated to the universal individual rights for workers,53 because enslavement was formally the loss of control over their own labor, by force as well as operation of law.54 Freedom at work thus became the template for individual freedom as a whole.55 from the governments of other states. Moreover, the eminent domain clause, safeguarding private property, was a prominent part of the Bill of Rights, which has usually been thought, rightly, to find an organizing principle in the desire to prevent collective interference with private ordering. In these respects, the original constitutional rights were ‘negative’ in character—rights to be free from governmental intrusion, rather than rights to affirmative governmental assistance.”).

50 See ERIC F. ONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863-1877 at 244 (Henry Steele Commager & Richard B. Morris eds., 1988) (“In constitutional terms, the Civil Rights bill represented the first attempt to give meaning to the Thirteenth Amendment, to define in legislative terms the essence of freedom. Again and again during the debate on Trumbull’s bills, Congressmen spoke of the national government’s responsibility to protect the ‘fundamental rights’ of American citizens. But as to the precise content of these rights, uncertainty prevailed.”).

51 See DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II 235 (2009) (“Human slaves had been freed many times before—from the Israelites, to the Romans, to Africans in the vast British Empire as recently as 1834. But no society in human history had attempted to instantly transform a vast and entrenched slave class into immediate full and equal citizenship. The cost of educating freed slaves and their children came to seem unbearably enormous, even to their purported friends. Their expectations of compensation radically altered the economics of southern agriculture. And even among the most ardent abolitionists, few white Americans in any region were truly prepared to accept black men and women, with their seemingly inexplicable dialects, mannerisms, and supposedly narrow skills, as true social equals.”).

52 See ROBERT J. STEINFELD, THE INVENTION OF FREE LABOR: THE EMPLOYMENT RELATION IN ENGLISH & AMERICAN LAW AND CULTURE, 1350-1870, at 181 (1991) (“Ultimately, it was only as a result of the long ideological struggle that preceded the Civil War and the war itself that the modern way of seeing peonage (and indentured servitude) was finally consolidated and became the exclusive view of all forms of legally compelled labor.”).

53 See George Rutherglen, CONSTITUTIONALIZING EMPLOYEES’ RIGHTS: LESSONS FROM THE HISTORY OF THE THIRTEENTH AMENDMENT, 27 WIS. J. GENDER & SOC’Y 162, 165 (2012) (“[The Thirteenth Amendment has] a more immediate connection to labor and employment than [either the Fourteenth Amendment or the Commerce Clause] or, indeed, to any other provision in the Constitution. It excludes altogether certain forms of the master-servant relationship from among those allowed by American law.”).

54 STANLEY, supra note 35, at 55-56 (“Principles of contract rang through the halls of Congress during the debate over the Civil Rights Act. The act asserted the principle of equality before the law and the authority of the national government to guarantee the irrevocable rights of citizens, which it enumerated as those of contract, property, and personal liberty. But its immediate purpose was to nullify the Black Codes, and the equal right of contract was the nub of the legislation.”).

C. The Role of Labor Standards Enforcement

Today, individual equal rights at work remain vulnerable to inadequacies in the enforcement process. It is impossible for such rights to be enforced behind a “veil of ignorance” that allows for equitable decision-making in all cases, and therefore enforcement priorities must take into account existing inequities. Cass Sunstein classifies the employment market as a “prisoner’s dilemma” or “collective action problem,” which arises when a “majority of citizens might support regulation that would prevent them from engaging in the very conduct which, in an unregulated system, they are led to choose.”

Sunstein explains that policies addressing a prisoner’s dilemma often take the form of “redistributive measures [that] do not directly transfer resources to disadvantaged people or to those whom we wish to subsidize, but instead attempt to deal with coordination or collective action problems faced by large groups.” In the United States, this is the function of the private right of enforcement for earnings, which is what American workers “get” from the state in lieu of direct wealth transfers to the working poor.

Sunstein calls such a policy choice an “effort[] to overcome the difficulties of organization of many people in the employment market.” He contrasts this collective-action problem with the “analogous problem” of “coordination,” in which the government arranges private behavior in such a way as to satisfy private desires which, if left to individual decision, would produce chaos or disorder. Either a social norm or legal constraint is necessary to solve the problem. Unlike in a prisoner’s dilemma, a coordination problem presents no incentive to defect once the solution is in place. An agreement to solve a coordination problem is stable; an

that the “antislavery ideal of equality” before law “became commonplace in post-Civil War judicial opinions,” particularly “in opinions dealing with enforcement of the Civil War amendments and the federal legislation enacted pursuant thereto”).

56 SUNSTEIN, supra note 12, at 103 (“Statutes designed to reduce or eliminate the social subordination of disadvantaged groups are frequently subject to skewed redistribution and failure as a result of inadequate implementation. The very problems that make such statutes necessary in the first instance tend to undermine enforcement; market failure is matched by government failure.”).

57 See JOHN RAWLS, A THEORY OF JUSTICE 211 (2009) (“[E]ven in a well-ordered society the coercive powers of government are to some degree necessary for the stability of social cooperation,” since “[b]y enforcing a public system of penalties government removes the grounds for thinking that others are not complying with the rules.” He called this “Hobbes’s thesis.”).

58 SUNSTEIN, supra note 12, at 51.

59 Id. at 55.
agreement to solve a prisoner’s dilemma is not.\textsuperscript{60}

The prisoner’s dilemma for employers is deciding whether to exploit their employees amidst a background of declining labor standards for employees in general,\textsuperscript{61} and changing economic conditions, while employees must decide whether or not they will accept such behavior. In the language of economics, these employers are not fully internalizing their actual labor costs. When the likelihood of employees who are so treated challenging this behavior is factored into the calculation, it becomes clear that the incentive to defect for employers in any such employment transaction is high, and vastly greater than the employees’. Sunstein’s point is that such a situation is unstable and requires active intervention. That is also the point of this article.

Regulations like the prohibition on unequal treatment in employment are best understood as limitations on “positional competition” between better- and worse-situated parties in a competitive labor market. Employers who are willing to discriminate, pay below minimum wage, or leave out overtime are given an advantage over competitors who will not, and workers who will take such treatment are similarly (dis)advantaged with respect to those who won’t.\textsuperscript{62} President Roosevelt, of course, made the expansion of individual rights at work a touchstone of national policy in the New Deal, recognizing the importance of avoiding such a race to the bottom at a time of mass economic deprivation.\textsuperscript{63}

\textsuperscript{60} Id. at 51.


\textsuperscript{62} In making this point, the blogger Matthew Yglesias also described the labor market as a collective action problem. See Matthew Yglesias, Labor Market Regulation and the Freedom Red Herring, SLATE (July 4, 2012, 1:55 PM) http://www.slate.com/blogs/moneybox/2012/07/04/labor_market_regulation_freedom_and_property_rights_are_red_herrings.html (“[O]ftentimes I think we’re arguing about curbing positional competition. You can easily imagine a workplace in which every worker would prefer to work slightly shorter hours and would be willing to accept less pay, and where managers would be willing to make that bargain. But the managers (naturally) look a bit askance at whomever it is they deem to be the laziest worker, and the workers (naturally) are therefore reluctant to present themselves as the laziest in the office. Therefore nobody actually asks to make the hours/pay tradeoff. Group decision-making, whether through a collective bargaining agreement or legislation, can create a situation that most people are happier with.”).

The axiom “money paid for work done,” or some variant thereof, underlies all wage law enforcement, public or private. The existence of wage laws is universally accepted, with their parameters often disputed because those laws support the widespread expectation of impartial state enforcement of bargaining obligations freely made, which grows out of the precepts of basic fairness learned by all in childhood. In this way, the enforcement of wage laws is grounded in the exchange principle at the heart of contracts: mutuality. Arguably this principle is even more central to the operation of the employment contract than nondiscrimination.

The effective enforcement of agreed-upon individual worker protections like wage laws can also help offset the existing tilt of

---

64 See, e.g., U.S. Dep’t of Labor, Fact Sheet No. 48: Application of U.S. Labor Laws to Immigrant Workers: Effect of Hoffman Plastic Decision On Laws Enforced By The Wage and Hour Division (2002), available at http://www.dol.gov/whd/regs/compliance/whdfs48.htm (“[Enforcement of wage laws is] distinguishable from ordering back pay under the NLRA. In Hoffman Plastics (sic), the NLRB sought back pay for time an employee would have worked if he had not been illegally discharged, under a law that permitted but did not require back pay as a remedy. Under the FLSA or MSPA, the Department (or an employee) seeks back pay for hours an employee has actually worked, under laws that require payment for such work.” (emphasis in original)).


66 See Trebilcock, supra note 46, at 23 (“As Arrow has pointed out, a private property-private exchange system depends, for its stability, on the system’s being non-universal. For example, if political, bureaucratic, regulatory, judicial, or law enforcement offices were auctioned off to the highest bidder, or police officers, prosecutors, bureaucrats, regulators, or judges could be freely bribed in individual cases, or votes could be freely bought and sold, a system of private property and private exchange would be massively destabilized.” (citing Kenneth Arrow, Gifts and Exchanges, 1 Phil. and Pub. Aff. 345 (1972)).


68 See Bjorn Bartling, et al., Use and Abuse of Authority: A Behavioral Foundation of the Employment Relation 33 (2012), available at http://ssrn.com/abstract=2175701 (“We find that the principals have an almost universal preference for employment contracts regardless of whether they are used in an efficient or an inefficient way – while workers resist accepting employment contracts if a large number of principals use them to assign inefficient (abusive) tasks.”).

69 See Lindblom, supra note 47, at 4 (“This gives us a definition of the market system sufficient for our immediate purposes: it is a system of society wide coordination of human activities not by central command but by mutual interactions in the form of transactions.”).

70 Compare Tim Judson & Cristina Francisco-McGuire, Where Theft is Legal
the law of employment in the United States,\textsuperscript{71} which by default favors the better-resourced initiator of the employment contract (the employer) over the other party.\textsuperscript{72} This bias is so pervasive that the question of whether the other party to an agreement to work is an “employee,” so as to qualify for protection under most employment laws, becomes a matter of central dispute in any instance of wages going unpaid.\textsuperscript{73}

Given these inequities, and the vast differences between the stakes of individual employees and employers in a dispute,\textsuperscript{74} employees still largely require outside assistance to assert their rights against an employer with other preferences. It was precisely this type of good-faith assistance from others that was absent for so many of the freedmen during Reconstruction,\textsuperscript{75} and that is often

\textsuperscript{71} See Meissner \textit{et al.}, supra note 10, at 84 (“Low-wage immigrants, particularly the unauthorized, are highly concentrated in certain industries that have traditionally experienced substantial labor standards violations. In addition, some employers exploit the fear of deportation to discourage unauthorized immigrants from reporting violations of law and protesting substandard conditions. Exploitation of unauthorized workers by unscrupulous employers drives down wages and working conditions for all workers, and gives such employers a competitive advantage.”).

\textsuperscript{72} See George Rutherglen, \textit{The Thirteenth Amendment, the Power of Congress, and the Shifting Sources of Civil Rights Law}, 112 COLUM. L. REV. 1551, 1563 (“[Civil rights and economic rights], while never entirely coextensive, had solidified as the foundation for the regime of freedom of contract—what we would call today formal equality of opportunity. Everyone has the same legal rights to make contracts, hold property, and go to court. No guarantee is offered to individuals of the resources to develop or exercise these rights, which therefore differ drastically in value depending upon an individual’s economic and social position.”).

\textsuperscript{73} See Garcia, supra note 4, at 34 (“The misclassification of workers has become a serious problem in the economy. A broader definition of worker is necessary. Recent studies estimate that up to 30 percent of companies misclassify workers. Independent contractors cannot organize or get the protection of labor laws.”).

\textsuperscript{74} Bagenstos, supra note 48, at 116, \textit{available at} http://ssrn.com/abstract=2208883 (“Asymmetric vulnerability is a particular concern in employment markets—especially in times of high unemployment. For an individual worker, having and keeping a job is supremely important. For the employer, by contrast, individual employees are often replaceable or even fungible.”).

\textsuperscript{75} Charles L. Flynn, Jr., \textit{White Land, Black Labor: Caste and Class in Late Nineteenth-Century Georgia} 38 (1983) (relating incident in 1866 when “the head of the Freedmen’s Bureau in Georgia . . . appointed agents from among the resident white . . . to serve without salary” but instead “receive fees from employers and freed-
A FOUNDING FAILURE OF ENFORCEMENT

not available for unauthorized immigrants working today.

D. Sources of Resistance to Equal Treatment for the Unauthorized

The national immigration laws have an attenuated relationship (if any at all) to the actual levels of supply and demand for workers in this country’s labor market. Nevertheless, they have great influence on the availability and treatment of many of the workers in that market. Significant portions of the American population believe that unauthorized immigrants are both unwelcome and unneeded in the United States, and, extending this premise to the enforcement of labor standards, they conclude that the unauthorized are ineligible for the same protection from unlawful workplace practices that authorized workers enjoy.

As discussed at greater length in Part III, this view, while widespread, is ahistorical and ignores the degree to which workplace injustice in modern production and service operations is fungible. For example, low-wage Latino workers with valid work status may receive comparable treatment to the undocumented workers alongside whom they work or compete for day laboring positions.

men for the witnessing of contracts.” However, the “‘resident white appointees . . . shamefully abused’ their power and ‘occasionally inflicted cruel and unusual punishments,’ reported General Oliver O. Howard, and “the Georgia bureau returned to a system of salaried, mostly northern agents in January, 1867.”

ZOLBERG, supra note 7, at 14 (“While post-World War II policies constituted a liberalization in relation to the extremely restrictionist regime established in the first quarter of the century, the contemporary regime retains a ‘near-zero baseline’ with regard to the supply of entries in relation to the demand for them as well as in relation to the size of the resident population-current annual U.S. immigration, for example, amounts to approximately one-third of 1 percent.”).

See, e.g., Brian Bennett & Michael Memoli, Senators’ immigration talks stall, L.A. TIMES, Mar. 22, 2013, http://articles.latimes.com/2013/mar/22/nation/la-na-immigration-unfinished-20130323 (noting that one of the difficulties in negotiation was that “the two sides couldn’t agree whether foreign workers should be paid the same wages as Americans.”).

As the libertarian blogger Will Wilkinson put it, “Appealing to fairness is a strategy for bargaining over the division of the surplus, not a way of determining in advance the ‘correct’ division. Our discourse would be a lot less confused if everyone grasped this.” Market forces and appeals to fairness, The ECONOMIST (June 25, 2013, 2:26 PM), www.economist.com/blogs/democracyinamerica/2013/06/economic-inequality?src=ecn_tw_ec/market_forces_and_appeals_to_fairness.

See, e.g., BURNHART ET AL., supra note 8, at 14 (noting that “[c]onsistent with recent trends in the low-wage labor market, immigrants comprise a large part of our sample—30 percent of the sample was U.S.-born, with the remainder comprised of naturalized citizens, and authorized and unauthorized immigrants [and 63% Latino/a].”).
The same process may cause entire industries to adopt lowest-common-denominator conditions, once native-born workers—who may be perceived as more likely to dispute rights violations—no longer predominate the workforce. The effects of the immigration system admittedly interact with other social conditions today to apply a discount to the labor of the working poor. But immigrants have the dubious distinction of being the de jure underclass that persisted in America after Emancipation. The first successful tests of the application of the universal guarantees of the Fourteenth Amendment beyond black Americans were brought before the Supreme Court by Chinese immigrant plaintiffs in the nineteenth century. The enslavement of Chinese “coolies” became a topic of Congressional discussion almost immediately after the legislative efforts for abolition concluded in full, and their labor was at least as important to the

81 See, e.g., Charlotte S. Alexander, Explaining Peripheral Labor: A Poultry Industry Case Study, 33 BERKELEY J. EMP. & LAB. L. 353, 395 (2012) (“[T]hough peripheral work may now be less transnational in reality, the perception of transnationalism can be ‘sticky.’ Peripheral jobs have become branded as ‘immigrant work,’ and the associated stigma may repel local workers.”).

82 See, e.g., BURNHART ET AL., supra note 8, at 5 (“Women were significantly more likely than men to experience minimum wage violations, and foreign-born workers were nearly twice as likely as their U.S.-born counterparts to have a minimum wage violation. The higher minimum wage violation rate for foreign-born respondents was concentrated among women—especially women who are unauthorized immigrants. Foreign-born Latino workers had the highest minimum wage violation rates of any racial/ethnic group. But among U.S.-born workers, there were significant race differences: African-American workers had a violation rate triple that of their white counterparts (who had by far the lowest violation rates in the sample).”).

83 See, e.g., NGAI, supra note 3, at 135 (describing the “economic structure of migratory wage-labor,” wherein “[g]rowers wanted not only seasonal workers,” but also “a labor surplus so they could obtain workers on demand, at low wages, and in plentiful supply to pick their crops early and quickly.” This dynamic was “the ruin of Anglo small farmers and sharecroppers,” who complained that the “farmers would be better off here if we did not have so many Mexicans. Many farmers compared their plight to that of small white farmers in the South ‘injured by the Negro slavery system before the Civil War.’”).

84 National citizenship under the Fourteenth Amendment was upheld by the Supreme Court in U.S. v. Wong Kim Ark, 169 U.S. 649 (1898). Equal protection was upheld much earlier, in Yick Wo v. Hopkins, 118 U.S. 356 (1886).

85 See Moon-Ho Jung, Outlawing “Coolies”: Race, Nation, and Empire in the Age of Emancipation, 57 AM. Q. 677, 678 (2005) (“These congressional debates remind us of the extent to which slavery continued to define American culture and politics after emancipation. The language of abolition infused the proceedings on Chinese exclusion, with no legislator challenging the federal government’s legal or moral authority to forbid ‘coolies’ from entering the reunited, free nation. Indeed, by the 1880s, alongside the prostitute, there was no more potent symbol of chattel slavery’s enduring legacy than the ‘cooie,’ a racialized and racializing figure that anti-Chinese (and putatively pro-Chinese) lawmakers condemned.”).
economy of the West in the years after the Civil War as black labor was to the South.\footnote{See Zolberg, supra note 7, at 182 (“Within California, as of the early 1870s, the Chinese constituted only about 9 percent of the total population; but since nearly all of them were adult males, they amounted to one-fifth of the economically active and probably one-fourth of all wage workers.”).}

It is nevertheless outrageous to many that unauthorized workers should even be the subject of modern enforcement efforts, let alone a priority. In other words, “money paid for time worked” is no longer axiomatic when the work is done by someone who has snuck into the country, “cut in line,” or otherwise violated national immigration regulations. As one conservative columnist argued (albeit not in the context of employment), “It’s not a ‘crisis’ when people who shouldn’t be here anyway don’t have all the privileges of people who do have a right to be here. That’s how it should be.”\footnote{Kurt Schlichter, The Immigration “Crisis” Is No Crisis, TOWNHALL (June 13, 2013), http://townhall.com/columnists/kurtschlichter/2015/06/13/the-immigration-crisis-is-no-crisis-n1618034.} Under this view, such individuals simply do not deserve the attention.

The question of what courts and enforcement agencies could or should do for unauthorized-immigrant workers flared into prominence in 2002, when the Supreme Court weighed in on the debate with its decision in *Hoffman Plastic Compounds, Inc. v. NLRB*.\footnote{535 U.S. 137 (2002).} The Court in *Hoffman Plastic* foreclosed the National Labor Relations Board (NLRB) from awarding back pay to an unauthorized-immigrant worker who had been terminated for supporting union organizing, for the reason that he “was never lawfully entitled to be present or employed in the United States.”\footnote{Id. at 146.} The majority opinion, authored by then-Chief Justice Rehnquist, found that “awarding backpay to illegal aliens runs counter to policies underlying” the Immigration Reform and Control Act of 1986 (IRCA),\footnote{Id. at 149.} and “would encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations.”\footnote{Id. at 150.}

*Hoffman Plastic*’s precedential effect was limited to the remedial powers of the NLRB, but its implications seemed vast, especially at first, when it became the citation of choice for every employer seeking to make a plaintiff’s immigration status an issue
in his or her case.92 These efforts were largely rebuffed on the merits by the courts that entertained them.93 The Hoffman decision also “triggered a rapid response from all three federal workplace agencies” to reaffirm their position that immigration status was neither relevant nor inquired into for their enforcement efforts.94

Ming Chen has concluded, from her own study of the enforcement efforts made by these three agencies, the United States Equal Employment Opportunity Commission (EEOC), the National Labor Relations Board (NLRB), and the United States Department of Labor (DOL), that they appear to be putting forward their best efforts on behalf of unauthorized immigrants in the wake of the Hoffman Plastic decision, taking into account the significant legal and political constraints on their behavior.95 There is likely more variety among the states that variously regulate their respective labor markets, but only limited data exists on this question.96

Separate from the scope of the ruling, the logic of Hoffman Plastic illustrates once again that the law-breaking nature of unauthorized immigrants is central to the arguments against those immigrants’ working rights. Yet the manner in which a particular worker may have violated immigration regulations in the past does not meaningfully guide a present decision whether to prioritize such a worker’s claim for wages owed, in comparison to the claim of an authorized worker, since both types nevertheless participate in the same national economy.97 What can provide guidance in this

---

92 See, e.g., Christine N. Cimini, Ask, Don’t Tell: Ethical Issues Surrounding Undocumented Workers’ Status in Employment Litigation, 61 STAN. L. REV. 355, 360 (2008) (“In the wake of Hoffman, employers have attempted to broaden the Court’s holding by arguing that immigration status is relevant to a whole range of employment-related civil litigation.”).

93 See id. at 357 (“Since the Hoffman decision, lower courts have struggled to define the parameters of the case, and, while the jurisprudence is still evolving, many courts have limited Hoffman’s reach and found workers entitled to seek legal remedies for workplace violations under a variety of statutes.”).

94 Chen, supra note 40, at 239.

95 Chen, supra note 40, at 230-231 (describing “three case studies” of the NLRB, DOL, and EEOC that illustrated “a pattern of regulatory resistance to hostile immigrants’ rights laws. Characterizing these agency responses as reconfiguring, buffering, and mitigating respectively, the Article contends that federal workplace agencies use discretion to issue guidance that counters the contraction of immigrants’ rights in courts. Counterintuitively for immigration scholars, the Article attributes these acts of regulatory resistance to a professional ethos of protecting workers and to a commitment to enforcing labor laws independent of the policy preferences of the civil servants and political leadership.”).


97 See, e.g., Ramesh Ponnuru, New Immigration Bill Has One Terrible Flaw, BLOOM...
decision are the lessons learned from the first time the nation experienced such an influx of workers into its wage economy, in the wake of slavery’s abolition.

II.

A. Workers’ Rights as the Original Civil Rights

The common ancestor of all modern employment-rights laws in the United States is the Civil Rights Act of 1866, the first equal rights statute in American history. This original Civil Rights Act (more would follow) was Congress’s first use of its newfound power to write legislation under Section 2 of the Thirteenth Amendment, to carry out the guarantee of slavery’s abolition contained in Section 1 of the Amendment.

The principle of equality was central to abolition because American slavery rested on a belief in the inferiority of black Africans as a whole, and the enslaved among them specifically. This entrenched racism continued to drive behavior even after slavery itself was forbidden, of course, thus making the enforcement of “equality before the law” the primary mission of the federal agents charged with helping freed slaves integrate into the post-Emancipation American economy.

The Thirteenth Amendment was passed by Congress before the end of military operations in the Civil War, but not ratified by enough states to be enacted until December 1865, after Reconstruction had already begun in the smoking and ruined South.
This period of American history is understood by all today as a failure on its own terms, such that by a half-century after the Civil Rights Act of 1866, many of the ostensibly-free black American working population labored in no better conditions than their fathers and mothers had in the antebellum (pre-Civil War) era.103

Today, a half-century after our own most recent rights revolution, even if low-wage workers have made only meager material gains in the elapsed time,104 at least that compares favorably to the dismal slide that began in Reconstruction, continued through the stark inequalities of the Gilded Age, and reached full flower during “the long era of Jim Crow in the twentieth century.”105 It was only through the Great Migration to northern and western cities like New York, Chicago, and Los Angeles, which began during the First World War and did not conclude until after the civil rights movement, that the conditions of large numbers of black Americans began to improve.106

The reasons for Reconstruction’s failure are many, predominant among them the fierce pushback that came from the reactionary South to the granting of equal rights to the newly-freed slaves. The so-called Redemption of state and local governments in the 1870s, and widespread vigilantism that gave birth to organizations of military age. It also killed two-fifths of southern livestock, wrecked half of the farm machinery, ruined thousands of miles of railroad, left scores of thousands of farms and plantations in weeds and disrepair, and destroyed the principal labor system on which southern productivity had been based. Two-thirds of assessed southern wealth vanished in the war. The wreckage of the southern economy caused the 1860s to become the decade of least economic growth in American history before the 1930s.”).

103 See BLACKMON, supra note 51, at 254 (2009) (“Across the nation, the spring and summer of 1903 marked a venomous turn in relations between blacks and whites. A pall was descending on black America, like nothing experienced since the darkest hours of antebellum slavery.”).

104 But see U.S. Dep’t of Labor, Employment, Benefits, and Wages, 14, available at www.dol.gov/dol/aboutdol/history/herman/reports/futurework/report/chapter2/main.htm (“Since the end of World War II, real wages for production workers have risen by more than half. Most of this growth occurred, however, in the 1950s and 1960s. (See chart 2.1.) After reaching a peak in 1973, real hourly earnings for production workers either fell or stagnated for two decades. During 1996–1998, growth in hourly earnings resumed, accelerating to over two percent in 1998.”).

105 BLACKMON, supra note 51, at 86.

106 See ISABEL WILKerson, THE WARMTH OF OTHER SUNS: THE EPIC STORY OF AMERICA’S GREAT MIGRATION 9 (2010) (“Over the course of six decades, some six million black southerners left the land of their forefathers and fanned out across the country for an uncertain existence in nearly every other corner of America. The Great Migration would become a turning point in history. It would transform urban America and recast the social and political order of every city it touched. It would force the South to search its soul and finally to lay aside a feudal caste system. It grew out of the unmet promises made after the Civil War and, through the sheer weight of it, helped push the country toward the civil rights revolutions of the 1960s.”).
tions like the Ku Klux Klan, were the means by which the defeated South wrested back control. This counter-revolution was the beginning of the nullification of Emancipation’s guarantees in the ninety-eight years that passed between the two Civil Rights Acts.

Another prominent reason for the denial of the Thirteenth (and, eventually, the Fourteenth) Amendment’s promise of “equality before the law” was the failure of the United States government to enforce this equality on behalf of the people it was intended to protect. The Freedmen’s Bureau, the federal agency created to enforce that equality in the working fields and cities of the South during the crucial years immediately after the War, was not equal to the forces it was required to overcome to fulfill its mission.

Once the issue of labor by coercion had been formally dealt with by the Thirteenth Amendment, the focus of Republican lawmakers in Congress rightfully turned from freedom of contract, as enshrined in the Civil Rights Act, to freedom from unlawful contracts. This meant more than simply a prohibition on work without pay, a baseline requirement for a nation in which the

107 BLACKMON, supra note 51, at 157 (“Investigations of any kind by federal agencies were extraordinarily unusual in an era that predated the creation of the Federal Bureau of Investigation. Moreover, the South’s long asserted right to manage the affairs of black residents without northern interference had finally been achieved. Nearly every southern state, including Alabama, had completed the total disenfranchisement of African Americans by 1901. Virtually no blacks served on state juries. No blacks in the South were permitted to hold meaningful state or local political offices. There were virtually no black sheriffs, constables, or police officers. Blacks had been wholly shunted into their own inferior railroad cars, restrooms, restaurants, neighborhoods, and schools. All of this had been accomplished in a sudden, unfettered grab by white supremacists that was met outside the South with little more than quiet assent. During the thirty years since Reconstruction—despite its being a period of nearly continuous Republican control of the White House—federal officials raised only the faintest concerns about white abuse of black laborers.”).

108 Id. at 42 (“The role of the African American in American society would not be clear for another one hundred years.”).

109 See id. at 262 (“Just as the federal Freedmen’s Bureau agents sent into remote southern towns had learned immediately after the Civil War, the new representatives of northern justice brought more risk upon themselves than to any person still holding slaves.”).

110 See William E. Nelson, The Impact of the Antislavery Movement Upon Styles of Judicial Reasoning in Nineteenth Century America, 87 HARV. L. REV. 513, 532 (1974) (“[E]conomic rights of property and contract probably ranked next to the right of personal liberty as the most important rights of which slaves were deprived” in abolitionist rhetoric).

111 This was not an unforeseen turn. See ERIC FONER, THE FIERY TRIAL: ABRAHAM LINCOLN AND AMERICAN SLAVERY 276 (2010) (quoting Lincoln in April 1864, “We all declare for liberty; but in using the same word we do not all mean the same thing. With some the word liberty may mean for each man to do as he pleases with himself, and the product of his labor; while with others the same word may mean for some men to do as they please with other men, and the product of other men’s labor.”).
embodiment of individual freedom going forward would be wage labor.112 Individual liberty fully defined brought with it a broader set of expectations of fair treatment and non-discrimination,113 enshrined in the Fourteenth Amendment and its doomed legislative progeny. The historian Kate Masur has described this as the difference between liberty and equality, two terms used to describe freedom in the era that required quite different levels of commitment from the government to carry out.114

The national government’s newfound commitment to these individual rights was tested and found wanting in many different spheres. There were early struggles in Congress,115 and ultimately all was lost before the Supreme Court.116 Between these two events, the government’s commitment to freed slaves’ working rights found itself most sorely tested in the ruins of the defeated South, through the actions (and inaction) of the regulators created by Congress to guard these rights and enforce these new laws.117 The first of these agencies was the Freedmen’s Bureau.118

112 See Robert J. Steinfield, Coercion, Contract, and Free Labor in the Nineteenth Century 10 (2001) (“The origins of modern free wage labor are not to be found in the free contracts in free markets of the first half of the nineteenth century but in the restrictions placed on freedom of contract by the social and economic legislation adopted during the final quarter of the century.”).

113 See George Rutherglen, The Thirteenth Amendment, the Power of Congress, and the Shifting Sources of Civil Rights Law, 112 COLUM. L. REV. 1551, 1552 (2012) (“Although its full effect was not achieved for nearly a century, [the Thirteenth Amendment] began the process of dismantling involuntary servitude as a widespread form of labor relations. It was the first constitutional amendment to restrict state power and the first to establish equality as an ideal in American life.”).

114 Masur, supra note 2, at 4 (“Whereas the concept of freedom almost always implied liberty—or people’s ability to act as they chose, unconstrained by government or by other private persons—the concept of equality had everything to do with policy. When people demanded equal rights, they were in essence asking for government measures that would ensure that individuals who were in some ways unequal would be treated equally or offered equal opportunities.”).

115 See Foner, Reconstruction, supra note 50, at 247-251 (describing how Congress was required in April 1866, “for the first time in American history,” to “enact[ ] a major piece of legislation over a President’s veto”—the Civil Rights Bill. Congress had earlier in the year been forced to do the same when Andrew Johnson vetoed the Freedmen’s Bureau Bill.).


117 Welke, supra note 34, at 145 (“The Fugitive Slave Act of 1850 offered one of the first examples of administrative courts focused on an exclusive subject matter. The Civil War; Congressional Reconstruction; and the Bureau of Refugees, Freedmen, and Abandoned Lands were the first large-scale federal experiments in administrative governance, more generally.”).

118 Stanley, supra note 35, at 36 (“After the war the newly created Freedmen’s Bureau enforced the regime of contract. Enjoining former slaves to obey the ‘solemn obligation of contracts,’ the bureau taught that freedom was inimical not just to coer-
B. A Founding Failure of Enforcement

The Freedmen’s Bureau was an agency of the War Department, staffed by veterans of the Union army. Its mandate was no less than the establishment of a universal free labor and education system for former slaves, a population for whom government action had never been a source of much comfort. "The Bureau’s role in supervising labor relations reached its peak in 1866 and 1867," after which time its mission fell to two other agencies, the military provost courts and the Southern Claims Commission. Its presence was sorely needed in a South that sought black labor desperately but could not conceive of having to bargain for it.

Unfortunately, these three government agencies were much too short-lived and never had enough funding or staff to meet the needs of black southerners during Reconstruction . . . The Freedmen’s Bureau, for example, never had more than 900

119 DYLAN C. PENNINGROTH, THE CLAIMS OF KINFOLK: AFRICAN AMERICAN PROPERTY AND COMMUNITY IN THE NINETEENTH-CENTURY SOUTH 112 (2003) ("In the 1860’s the U.S. government extended legal rights and protections to four million black southerners through three major institutions: the provost courts, the Freedmen’s Bureau, and the Southern Claims Commission. Each of these forums had a different mission and structure, but they all seemed to promise that ex-slaves might soon leave behind the uncertainties of plantation ‘custom’ for the evenhanded formalism of law . . . In many regions of the South, the army provost courts continued to act as a substitute legal system after the war ended. The Freedmen’s Bureau, also a branch of the army and staffed by army officers, extended and institutionalized the provost marshal’s legal protection of freedpeople.").

120 W.E.B. Du Bois described a Bureau circular in The Freedmen’s Bureau as follows: “The Bureau invited continued cooperation with benevolent societies, and declared, ‘It will be the object of all commissioners to introduce practicable systems of compensated labor,’ and to establish schools.” W. E. Burghardt Du Bois, supra note 29, Part One.

121 See Laura F. Edwards, Status Without Rights: African Americans and the Tangled History of Law and Governance in the Nineteenth-Century U.S. South, THE AMERICAN HISTORICAL REVIEW 390 (2007) ("Slaves did not so much use law as survive legal proceedings they had no choice but to endure. Their acceptance of the system might better be termed resignation. Although they knew that the legal system was capricious, they nonetheless lived with its processes and understood it as a means to regulate the communities in which they lived. They had to, because legal practice was so thoroughly integrated into the rhythms of daily life.").

122 FONER, RECONSTRUCTION, supra note 50, at 166.

123 PENNINGROTH, supra note 119, at 112.

124 BLACKMON, supra note 51, at 39 ("Without former slaves—and their steady expertise and cooperation in the fields—the white South was crippled. But this new manifestation of dark-skinned men expected to choose when, where, and how long they would work.").
agents in the South at one time.\textsuperscript{125}

Though beloved by many of the newly free,\textsuperscript{126} the Bureau had few other friends,\textsuperscript{127} and where the agency’s efforts led to successes, they often came in no small part due to the contributions of freedmen themselves.\textsuperscript{128} Indeed, encouraging such self-help was one of the priorities of the Freedmen’s Bureau and its backers.\textsuperscript{129}

The Bureau and its agents had nothing comparable to the resources and reach of modern federal agencies like the EEOC or the DOL, but its mandate was vast with paternalistic enthusiasm, sweeping over not just paid employment\textsuperscript{130} for freedmen and freedwomen,\textsuperscript{131} but also their marriages and households.\textsuperscript{132}

\textsuperscript{125} Penningroth, supra note 119, at 116.

\textsuperscript{126} Foner, Reconstruction, supra note 50, at 169 (“In Wilmington, North Carolina, 800 blacks crowded into the Brick Church to voice support. ‘If the Freedman Bureau was removed,’ one speaker insisted, ‘a colored man would have better sense than to speak a word in behalf of the colored man’s rights, for fear of his life.’ Somewhat taken aback, General [John] Steedman asked the assemblage if the army or the Freedmen’s Bureau had to be withdrawn, which they would prefer to have remain in the South. From all parts of the church came the reply, ‘The Bureau.’”).

\textsuperscript{127} Id. at 168 (“Of course everyone abuses the Freedmen’s Bureau,” the British ambassador reported after a visit to Virginia in early 1866, precisely when agents were exerting their greatest effort to induce blacks to sign labor contracts. Indeed, whatever the policies of individual agents, most Southern whites resented the Bureau as a symbol of Confederate defeat and a barrier to the authority reminiscent of slavery that planters hoped to impose upon the freedmen. Even if, in individual cases, the Bureau’s intervention enhanced the power of the employer, the very act of calling upon a third and ostensibly disinterested party served to undermine his standing, by making evident to the freedmen that the planter’s authority was not absolute.”).

\textsuperscript{128} See Evelyn Nakano Glenn, Unequal Freedom: How Race and Gender Shaped American Citizenship and Labor 138 (2002) (“In all localities blacks paid taxes or contributed in kind. Freedmen’s Bureau records showed that in early 1867 at least half of the schools in ten southern states received financial assistance from black parents, and that except in Alabama and Florida, black parents put in at least $25 for every $100 expended by the Freedmen’s Bureau. In Louisiana and Kentucky blacks paid more toward expenses than the Freedmen’s Bureau.”).

\textsuperscript{129} Stanley, supra note 35, at 123 (“Throughout the proclamations of the Freedmen’s Bureau ran a double message: an affirmation of former slaves’ right to liberty and a warning that freedom barred dependence. The bureau sought to dispel the notion that its mission was charitable, aiming its words both at former slaves and at northerners who shunned the prospect of permanently supporting a free black population.”).

\textsuperscript{130} See Blackmon, supra note 51, at 27 (“Some white plantation owners attempted to coerce their former slaves into signing ‘lifetime contracts’ to work on the farms.”).

\textsuperscript{131} See Masur, supra note 2, at 64 (describing the creation of “several ‘industrial schools’ to promote freedwomen’s financial independence,” that either taught “hand and machine sewing” or “were basically large-scale laundries where women washed and ironed,” and which “offered ‘employment and instruction to some 369 women’” in 1866).

\textsuperscript{132} See Stanley, supra note 35, at 56 (“[I]t was generally acknowledged that emancipation had made freedmen into proprietors of their own persons and labor, giving them the legal capacity to participate in voluntary exchange relations . . . Slavery’s
The District of Columbia was not a site of battle during the Civil War, but had been no stranger to slavery in the antebellum era, and was host to a large black population that had swelled as the war ground on, partly as a result of the early abolition of slavery there. The Bureau’s extensive efforts in DC were the agency’s apotheosis, consisting of a range of services for the rapidly-arriving freedmen population that included low-income housing and a legal defense program.

Reconstruction was unprecedented in its scope and ambition, and this assured that the resistance it provoked was broad and persistent. Congress became engaged in a series of antithesis, agreed legislators from both sides of the Mason-Dixon line, was free contract—the right of self-owning freedmen to sell their labor for wages and to marry and maintain a household.

---

\footnotesize{133 See \textit{Masur}, \textit{supra} note 2, at 19 (“During the antebellum years, Washington’s black population grew steadily, while the proportion of slaves to free blacks diminished. In 1860, 78 percent of the local black population was free, up from 73 percent ten years earlier.”); and 28 (“From 1860 to 1870, Washington’s black population grew more than any other \[city\], in both relative and absolute terms. During that decade, about 29,000 new black residents moved to the capital.”).}

\footnotesize{134 See \textit{Foner}, \textit{The Fiery Trial}, \textit{supra} note 111, at 201 (“The first federal statute to grant immediate freedom to any group of slaves, the [April 1862] law ending slavery in Washington, D.C., fulfilled a long-standing abolitionist dream and marked a significant change in federal policy . . . It offered one example of how the war was inexorably expanding federal power.”).}

\footnotesize{135 \textit{Masur}, \textit{supra} note 2, at 69 (“[B]ureau agents opened their first rental apartments to freedpeople in October 1865, in a former military hospital at the north end of Seventh Street. By the winter of 1866, the bureau was renting apartments in three different barracks . . . as well as at the hospital,” an operation that “would continue into 1868, when the bureau embarked on plans to build new tenements and tear down the old ones, even as it gradually shut down its other operations.”).}

\footnotesize{136 \textit{Id.} at 116 (“[T]he Freedmen’s Bureau began a legal defense program in the summer of 1866 . . . lawyers working for the Freedmen’s Bureau made themselves available to people who walked into their office on Pennsylvania Avenue, and they visited the jail and police stations in search of people who needed legal representation. The bulk of their work related to enforcement of labor contracts and rental agreements, but they also sought justice for freedpeople involved in criminal cases,” making “685 visits to the jail” and working on “291 criminal cases, as well as almost 600 civil ones.”).}

\footnotesize{137 \textit{Id.} at 2 (“It was relatively straightforward to decree that human beings could no longer be considered property and that no one could enjoy the benefits of others’ uncompensated labor. Much more complicated was the question of postemancipation equality. In the Northeast, slavery’s abolition in the early nineteenth century had led not to a regime of racial equality, but rather to a society in which both customary and legal discrimination were commonplace. As southern slavery ended, Americans asked crucial questions about whether and how to eliminate the features of slavery that might remain in law and public life even after abolition.”).}

\footnotesize{138 \textit{Foner}, \textit{Reconstruction}, \textit{supra} note 50, at 244 (“As the first statutory definition of the rights of American citizenship, the Civil Rights bill embodied a profound change in federal-state relations and reflected how ideas once considered Radical had been adopted by the party’s mainstream.”).}
rearguard actions to defend prior guarantees of rights. The Fourteenth Amendment was passed to preserve the constitutionality of the measures taken in the Civil Rights Act of 1866, the Reconstruction Acts followed to help ensure ratification of the Fourteenth Amendment, and so on. Ultimately, federal involvement in the South was ended as part of the agreement resolving the disputed election of 1876.

The Bureau, for its part, could not last that long, failing to persist to the end of the 1860s. W.E.B. Du Bois’ conclusion, looking back at the turn of the twentieth century, was wistful but unflinching:

It came to regard its work as merely temporary, and Negro suffrage as a final answer to all present perplexities. The political ambition of many of its agents and protégés led it far afield into questionable activities, until the South, nurturing its own deep prejudices, came easily to ignore all the good deeds of the Bureau, and hate its very name with perfect hatred. So the Freedmen’s Bureau died and its child was the Fifteenth Amendment.

139 FLYNN, JR., supra note 75, at 37–38 (“And so, one step led to the next: the Civil Rights Act of 1866, which, despite its questionable constitutionality, invalidated discriminatory black codes; the proposal of the Fourteenth Amendment, which would bar Confederate leaders from holding any office and make the Civil Rights Act constitutional and immutable; the Reconstruction Acts of 1867, which disfranchised former Confederate leaders and enfranchised the freedmen in a further effort to get what Republicans defined as ‘true unionist sentiment’ dominant in the politics of the South and to get the Fourteenth Amendment ratified; the Fifteenth Amendment to try to protect the new political system; and the Ku Klux Klan Act to try to counter anti-Republican and antiblack violence. These congressional actions went much further than all but the most radical Republicans had anticipated at the end of the war. Each step was meant to protect the step before, but the cumulative effect was as great as a second civil war.”).

140 BLACKMON, supra note 51, at 87–88 (“A terrible depression in the 1870s had finally eased as the South began to emerge from economic ruin. In the disputed presidential election of 1876, white southern political leaders leveraged the electoral college system to rob the winner of a huge majority of the popular vote, Samuel J. Tilden, of the White House. In return, the Congress and the administration of the fraudulent new Republican president, Rutherford B. Hayes, finally removed the last Union troops from the South and ended a decade of federal occupation of the region.”).


142 Id.
C. The Long Winter of the Lochner Era

As with the two other great rights-producing events in United States history—the American Revolution and the twentieth century’s New Deal and civil rights campaigns—the campaign for human equality that reached its peak during Congressional Reconstruction was followed by long decades of regression to a less egalitarian mean. There was some advancement in the enforcement of individual rights during this dark period, at both the federal and state levels, and during wartime. President Franklin Roosevelt famously brought the issue of workers’ rights to the fore of federal policy-making at the close of this period, setting the stage for the gains of the second half of the twentieth century.

143 See Glenn, supra note 128, at 24 (“Liberalizing changes occurred rarely and usually only in the context of major social crises. Three periods in which major upheavals occurred were the years of the American Revolution and Confederation, the Civil War and Reconstruction, and the post-World War II civil rights era of the 1950s and 1960s. These times of expanding egalitarianism typically were followed by periods of regression during which hard-won gains were rolled back and new exclusions put in place—the current post-civil rights period being an obvious instance.”).

144 See Risa L. Goluboff, The Thirteenth Amendment and the Lost Origins of Civil Rights, 50 DUKE L. J. 1609 (2001) (describing efforts of the first civil rights section of the U.S. Department of Justice to enforce the Thirteenth Amendment in the 1930s and 40s, before the major civil rights campaigns began).

145 See David Freeman Engstrom, The Lost Origins of American Fair Employment Law: Regulatory Choice and the Making of Modern Civil Rights, 1943-1972, 63 STAN. L. REV. 1071, 1079 (2011) (“By the time Congress enacted Title VII of the Civil Rights Act of 1964, nearly two dozen nonsouthern states that were home to more than ninety percent of African Americans outside the South had already enacted legislation mandating equal treatment in employment.”).

146 See Jeffrey A. Jenkins & Justin Peck, Building Toward Major Policy Change: Congressional Action on Civil Rights, 1941-1950, 31 LAW & HIST. REV. 139, 174 (2013) (describing how Franklin D. Roosevelt in 1941 “issued Executive Order 8802 to formally prohibit ‘discriminatory employment practices because of race, color, creed or national origin in government service, defense industries, and by trade unions,’” declaring it “‘the duty of employers and of labor organizations . . . to provide for the full and equitable participation of all workers in defense industries, without discrimination because of race, creed color, or national origins,’” and creating “the non-salaried, five-man FEPC,” to administer the regime).

147 In his famous “Commonwealth Club” speech in 1932, Franklin D. Roosevelt said: “We know that individual liberty and individual happiness mean nothing unless both are ordered in the sense that one man’s meat is not another man’s poison. We know that the old ‘rights of personal competency’—the right to read, to think, to speak, to choose and live a mode of life, must be respected at all hazards. We know that liberty to do anything which deprives others of those elemental rights is outside the protection of any compact; and that government in this regard is the maintenance of a balance, within which every individual may have a place if he will take it; in which every individual may find safety if he wishes it; in which every individual may attain such power as his ability permits, consistent with his assuming the accompanying responsibility.” See supra note 63.

148 See William E. Forbath, Civil Rights and Economic Citizenship: Notes on the Past and
For the most part, however, the guardians of individual liberty in the *Lochner* era turned the equalizing guarantees of Reconstruction on their head to maintain the retrograde employment conditions of the antebellum era,149 aided by sympathetic Southern state governments and a disinterested federal government.150 The result for many of the descendants of the freedmen was a life little different than what their parents and grandparents had experienced before Emancipation.151 There were advances as well, including some that were the result of more active agency enforcement of existing labor laws,152 and others that were the result of legislative efforts.153

The passage of another Civil Rights Act would not come for nearly a century.154 It was only after this milestone that the modern notion of formal, universal equality under law finally began to be

---

149 LAURA F. EDWARDS, THE PEOPLE AND THEIR PEACE: LEGAL CULTURE AND THE TRANSFORMATION OF INEQUALITY IN THE POST-REVOLUTIONARY SOUTH 297 (2009) ("Workers also resorted to legal appeals, trying to use Fourteenth Amendment rights to alter the balance of power at the workplace. But the courts consistently used the Fourteenth Amendment against them, maintaining that the ability to contract was a protected right.").

150 BLACKMON, supra note 51, at 157 ("Nearly every southern state, including Alabama, had completed the total disenfranchisement of African Americans by 1901. Virtually no blacks served on state juries. No blacks in the South were permitted to hold meaningful state or local political offices. There were virtually no black sheriffs, constables, or police officers. Blacks had been wholly shunted into their own inferior railroad cars, restrooms, restaurants, neighborhoods, and schools. All of this had been accomplished in a sudden, unfettered grab by white supremacists that was met outside the South with little more than quiet assent. During the thirty years since Reconstruction—despite its being a period of nearly continuous Republican control of the White House—federal officials raised only the faintest concerns about white abuse of black laborers.").

151 Id. at 300 ("That was the work available to an independent black man like Green: free labor camps that functioned like prisons, cotton tenancy that equated to serfdom, or prison mines filled with slaves. The alternatives, reserved for African Americans who crossed a white man or the law, were even more grim.").

152 See generally Goluboff, supra note 144.

153 See Jenkins & Peck, supra note 146, at 193–94 (describing how Representative Adam Clayton Powell considered his National School Lunch Act of 1946 to be “the first civil rights amendment’ to pass Congress in the post-Reconstruction era”).

154 See William E. Nelson, THE CHANGING MEANING OF EQUALITY IN TWENTIETH-CENTURY CONSTITUTIONAL LAW, 52 WASH. & LEE L. REV. 3, 100 (1995) ("An obvious question that some might want to ask is when the shift to rights-centered constitutionalism occurred. Three dates suggest themselves. The first is 1938 — the year of United States v. Caroene Products Co. and of New York’s Constitutional Convention. The second is 1954—the year of Brown v. Board of Education. The third is the mid-1960s—the years of African-American and antiwar protest and of a solid liberal majority on the Warren Court.").
enforced, and started to gain wider purchase in American society.\textsuperscript{155} In the decade following, black Americans saw for the first time a measurable improvement in their economic conditions relative to whites; an effect that has either leveled off or reversed as the private right of action has become the primary means of enforcement.\textsuperscript{156}

The system of laws regulating labor in the United States today imposes a broader set of conditions on the at-will employment contract than just the non-discrimination at the heart of the twentieth century’s two Civil Rights Acts. These conditions include a right to overtime, paid break periods,\textsuperscript{157} generally safe working conditions,\textsuperscript{158} qualified rights to religious and disability accommodation,\textsuperscript{159} as well as unpaid medical leave,\textsuperscript{160} and protection from retaliation or other extra-contractual wrongs.\textsuperscript{161} The Civil Rights Act of 1866 was revived by the Supreme Court a few years after the passage of its modern successor,\textsuperscript{162} and it lives on today as Section 1981, a private anti-discrimination cause of action.\textsuperscript{163}

However, employees still require reliable third parties to enforce these rights. For the most part, those third parties are government regulatory agencies,\textsuperscript{164} but they may also be private counsel, where fee-shifting statutes make such representation possible, and

\textsuperscript{155} John J. Donohue III & James J. Heckman, Symposium: The Law and Economics of Racial Discrimination in Employment: Re-Evaluating Federal Civil Rights Policy, 79 GEO. L. J. 1713, 1715 (1991) (“Between 1920 and 1990 there were only two periods in which black incomes rose relative to white incomes: during the economic rebound from the Great Depression induced by World War II, and in the decade following the launching of an intensive federal effort to guarantee the civil rights of blacks.”).
\textsuperscript{156} Id. at 1729–30 (“[F]ederal antidiscrimination law is a powerful tool in attacking egregious forms of discrimination, such as that existing most conspicuously in the pre-1965 South,” but that the “process of breaking down these blatant barriers to black advancement in employment, schooling, voting, and housing was complete by roughly 1975.” Furthermore, “once the egregious forms of exclusion have been eliminated, a law enforced by the complaints of alleged victims of discrimination is not likely to produce further significant black improvement,” and in fact “there has been little improvement in the relative earnings of non-Southern blacks since the passage of Title VII and for Southern blacks after the egregious segregation was dismantled.”).
\textsuperscript{163} 42 U.S.C. § 1981.
\textsuperscript{164} See Kutz & Meyer, supra note 70, at “GAO Highlights” (“GAO’s overall assessment of the [Wage and Hour Division] complaint intake, conciliation, and investigation processes found an ineffective system that discourages wage theft complaints.”).
unions, where they still exist.165 For-profit employment discrimination litigators are hardly guaranteed to secure compensation for the injuries suffered by their clients,166 but nevertheless they must look at the likelihood of such an outcome above all other factors in choosing which claims to pursue. Although there are some non-profit organizations that are immune to this revenue-generating concern and are able to have a limited impact,167 the elimination of prevalent and longstanding violations of labor standards in the American economy continues to be the heritage and mandate of the government agencies charged with enforcing these laws.

III.

A. The Value of a Disposable Workforce

The pervasive and deep-seated racism that motivated the enslavement of black Americans168 continues to contribute to their oppression in the workplace and practically everywhere else. Michelle Alexander has convincingly argued that the predominant uses of force of law against black Americans have shifted, particularly since the beginning of the War on Drugs in the 1980s, from the civil and contractual to the criminal and penal.169 This large-scale removal from the workforce has allowed particular oppres-

165 Union Membership (Annual) News Release, BUREAU OF LABOR STATISTICS (Jan. 24, 2014), www.bls.gov/news.release/union2.htm (reporting that the rate of private-sector unionization in 2012 was “11.3 percent, down from 11.8 percent in 2011”).
166 See Laura Beth Nielsen et al., Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States, 7 J. OF EMPIRICAL LEGAL STUD. 175, 178 (2010) (“In discrimination cases, what begins as a moral contest over whether discrimination occurred progressively becomes redefined as a shifting set of cost/benefit analyses about how to dispose of a dispute before proceeding to the next, more costly stage. EDL cases are treated more harshly by the courts, with lower levels of settlement rates, higher rates of summary judgment motions against plaintiffs, higher plaintiff loss rates, and higher appellate reversal rates of plaintiff awards than is the case for other kinds of civil litigation.”).
167 This author’s clinical program, which represents individuals bringing a variety of employment-related claims on a pro bono basis, is an example of one such organization. See http://www.law.du.edu/index.php/profile/raja-raghunath (last visited Jan. 11, 2015).
168 Alexander Stephens, Confederate Vice President, Corner Stone Speech (Mar. 21, 1861), http://teachingamericanhistory.org/library/index.asp?documentprint=76 (infamously declared in 1861 that the Confederacy’s “foundations are laid, its cornerstone rests, upon the great truth that the negro is not equal to the white man; that slavery subordination to the superior race is his natural and normal condition”).
169 See Michelle Alexander, The New Jim Crow: Mass Incarceration Is The Age Of Colorblindness 21 (2010) (“Since the nation’s founding, African Americans repeatedly have been controlled through institutions such as slavery and Jim Crow, which appear to die, but then are reborn in new form, tailored to the needs and constraints of the time.”).
sions that were pioneered on working black Americans to spread to new generations of workers,\textsuperscript{170} in particular workers who are estranged from formal law and its enforcement mechanisms.\textsuperscript{171}

An example of the nadir of American employment practices today can be found in the immigrant-heavy domestic meatpacking industry,\textsuperscript{172} which in the first decade of the twenty-first century famously experienced large-scale federal enforcement actions of both the immigration laws and labor laws, in some instances at the same facilities.\textsuperscript{173} As catalogued in the journalist Eric Schlosser’s best-selling book \textit{Fast Food Nation}, the role of immigrant labor in domestic food production is concededly part of a larger story that yields many other examples of injustices resonant of Reconstruction; for example, tenant farming becoming as widespread as sharecropping,\textsuperscript{174} or the inevitable emergence of the rural South as a site of the worst practices.\textsuperscript{175}

\textsuperscript{170} \textit{Id.} at 18 (“[M]ass incarceration is designed to warehouse a population deemed disposable—unnecessary to the functioning of the new global economy—while earlier systems of control were designed to exploit and control black labor.”).

\textsuperscript{171} See \textsc{Abel Valenzuela Jr. et al.}, \textit{On the Corner: Day Labor in the United States} (2006), http://www.sscnet.ucla.edu/issr/csrip/uploaded_files/Natl_Day_Labor-On_the_Corner1.pdf. See also \textsc{Linda Burgham & Nik Theodore}, \textit{Home Economics: The Invisible and Unregulated World of Domestic Work} xi–xii (2012) (“Eighty-five percent of undocumented immigrants who encountered working conditions in the prior 12 months did not complain because they feared their immigration status would be used against them.”).

\textsuperscript{172} See \textsc{Alexander}, \textit{supra} note 81, at 373–75 (citing estimates of 25%-60% of “peripheral poultry jobs” being held by immigrant workers, with “large numbers” undocumented, and noting that poultry industry’s “high-turnover labor regime can only function if (1) there is an unending supply of new workers ready to take the vacant jobs and (2) transaction costs are low enough such that turnover is relatively costless. The transnational labor market meets both criteria.”).


\textsuperscript{174} \textsc{Schlosser}, \textit{supra} note 17, at 118 (“Over the past twenty-five years, Idaho has lost about half of its potato farmers. During the same period, the amount of land devoted to potatoes has increased. Family farms are giving way to corporate farms that stretch for thousands of acres. These immense corporate farms are divided into smaller holdings for administrative purposes, and farmers who’ve been driven off the land are often hired to manage them. The patterns of land ownership in the American West more and more resemble those of rural England.”).

\textsuperscript{175} \textit{Id.} at 139 (“The poultry industry was also transformed by a wave of mergers in the 1980s. Eight chicken processors now control about two-thirds of the American market. These processors have shifted almost all of their production to the rural South, where the weather tends to be mild, the workforce is poor, unions are weak, and farmers are desperate to find some way of staying on their land. Alabama, Arkan-
The astonishing brutality and inhumanity of meatpacking work, performed under modern just-in-time production conditions, affects all workers in the industry, native-born or immigrant, authorized or not. But the meatpacking industry could not use up and discard workers at the pace that it does without some assurance that the vast majority so used will not press their case very far with the authorities, if at all. This is an assurance that a largely undocumented workforce can provide.

The meatpacking industry is not the only employment sector crying out for the enforcement of labor standards at the low end of worker income. Many so-called marginal or peripheral employments, Georgia, and Mississippi now produce more than half the chicken raised in the United States.

176 Id. at 175 (“One of the leading determinants of the injury rate at a slaughterhouse today is the speed of the disassembly line. The faster it runs, the more likely that workers will get hurt. The old meatpacking plants in Chicago slaughtered about 50 cattle an hour. Twenty years ago, new plants in the High Plains slaughtered about 175 cattle an hour. Today some plants slaughter up to 400 cattle an hour—about half a dozen animals every minute, sent down a single production line, carved by workers desperate not to fall behind.”).

177 Id. at 172 (“Meatpacking is now the most dangerous job in the United States. The injury rate in a slaughterhouse is about three times higher than the rate in a typical American factory. Every year about one out of three meatpacking workers in this country—roughly forty-three thousand men and women—suffer an injury or a work-related illness that requires medical attention beyond first aid. There is strong evidence that these numbers, compiled by the Bureau of Labor Statistics, understate the number of meatpacking injuries that occur. Thousands of additional injuries and illnesses most likely go unrecorded.”).

178 Id. at 160 (“Having broken the union at the Greeley slaughterhouse, Monfort began to employ a different sort of worker there: recent immigrants, many of them illegals. In the 1980s large numbers of young men and women from Mexico, Central America, and Southeast Asia started traveling to rural Colorado. Meatpacking jobs that had once provided a middle-class American life now offered little more than poverty wages. Instead of a waiting list, the slaughterhouse seemed to acquire a revolving door, as Monfort plowed through new hires to fill the roughly nine hundred jobs. During one eighteen-month period, more than five thousand different people were employed at the Greeley beef plant—an annual turnover rate of about 400 percent. The average worker quit or was fired every three months.”).

179 See Ted Conover, The Way of All Flesh: Undercover in an Industrial Slaughterhouse, HARPER’S MAGAZINE, May 2013, at 46 (“Local 293, meanwhile, has not staged a major labor action in years. Some 1,300 people at the Schuyler plant are still unionized. And Greenwood says the union sticks up for its members: ‘Somebody gets screwed, we’ll take them all the way to court.’ But strikes, as he explains, are another thing: why walk off the job to ensure some oldtimer’s vacation pay if you may lose your job the next week in a Homeland Security raid? Still, says Greenwood, the passage of time has strengthened the union’s hand, as the first wave of Latino immigrants becomes more established in Schuyler: ‘A lot of them are staying put. They’ve become citizens, they’re second-generation, and so tomorrow means something for them now.’”).

180 See Alexander, supra note 81, at 398 (“For example, in its current Strategic Plan, the Department of Labor’s Wage and Hour Division has already named ‘meat and poultry processing’ as an industry with prevalent overtime misclassification.”).
ers also routinely violate labor standards. Under labor market segmentation theory, “peripheral” employers “tend to be smaller, less stable, and less profitable.” These employers draw their workforce from the secondary labor market, require little worker skill, and provide little training. Peripheral firms do not invest in their workforce, and workers become fungible and easily replaceable, with low bargaining power. The results are low wages, job insecurity, and lack of promotion opportunities—the hallmarks of secondary jobs.

This describes the employment situation of most day laborers, the bottom rung of wage earners in the American economy and a category of workers overwhelmingly composed of the unauthorized.

On the one hand, the continued enforcement of wage and antidiscrimination laws seems widely accepted, so that critics of such laws who advocate for alternative regimes will readily concede that their positions are outside the mainstream. Yet the political valences completely reverse when the question becomes whether unauthorized workers should be protected alongside the authorized workforce. It is hard to picture any national politician today making a full-throated endorsement of the rights of unauthorized workers to sue under employment laws. Over a decade later, the central question that was raised by Hoffman Plastic—does the work done by the unauthorized properly fall within coverage of our workplace protections, and if so, which ones?—remains unsettled for good reason.

181 See Garcia, supra note 4, at 9 (“In labor economics, the term has a specific meaning: marginal workers are those in irregular employment, because they are part-time, contractors, or disabled. In a broader sense, many workers are marginalized by the lines of demarcation in statutes themselves. The National Labor Relations Act, for example, excludes agricultural workers and those in domestic service. All statutes exclude independent contractors, and cover only those who are considered ‘employees’ who work under the control of an employer.”).

182 Alexander, supra note 81, at 356–57.

183 See Valenzuela Jr. et al., supra note 171, at iii (National Day Labor Study 2006) (“The day-labor workforce in the United States is predominantly immigrant and Latino. Most day laborers were born in Mexico (59 percent) and Central America (28 percent), but the third-largest group (7 percent) was born in the United States. Two-fifths (40 percent) of day laborers have lived in the United States for more than 6 years. Three-quarters (75 percent) of the day-labor workforce are undocumented migrants. About 11 percent of the undocumented day-labor workforce has a pending application for an adjustment of their immigration status.”).

184 See Epstein, supra note 44, at 499 (“This position leaves me securely outside the mainstream.”).

185 See Garcia, supra note 4, at 60 (“[T]here is no political will to restore employee rights to undocumented immigrants.”).

186 See NCI, supra note 3, at 229 (“The civil rights movement was uncontroversibly about winning full and equal citizenship for African Americans, but citizenship occu-
B. Otherness as Externality

The immigration debate in modern America is a manifestation of age-old human territoriality, and so it is deeply felt and fiercely fought. Like the debate over fiscal policy, it is also hampered by a seemingly common-sense, but deeply misinformed, analogy between household and nation. Just as the merits and drawbacks of sovereign borrowing are fundamentally different from private borrowing, so is the violation of immigration entry regulations fundamentally different from private trespass.

The issue of whether a particular worker "should" be working in this country in the first place is not relevant to whether that worker should be paid for time already worked, or that would have been worked absent his unlawful discharge. This is particularly true where effectively exempting such a worker from existing laws requiring payment would create an incentive to hire him over an authorized worker, presumably the opposite of what is sought by immigration opponents. An entire class of workers who are already participating in the national economy cannot be excluded from coverage of the law without negatively affecting the other participants in that economy, whatever else is thought of those excluded workers.

187 See, e.g., JARED DIAMOND, THE WORLD UNTIL YESTERDAY: WHAT CAN WE LEARN FROM TRADITIONAL SOCIETIES? 947-950 (2012) ("Traditional peoples, living in societies of a few hundred individuals, obtain access to others’ lands by being known individually, by having individual relationships there, and by asking permission individually. In our societies of hundreds of millions, our definition of ‘relationship’ is extended to any citizen of our state or of a friendly state, and the asking of permission is formalized and granted en masse by means of passports and visas.").

188 See Kurt Schlichter, The Immigration “Crisis” is No Crisis, THE TOWNHALL (June 1, 2013, 12:01 AM), http://townhall.com/columnists/kurtschlichter/2013/06/13/the-immigration-crisis-no-crisis-n1618034 (“[W]hy [should we] just give citizenship away to people who have already disrespected us by coming here uninvited?”).


190 See Chen, supra note 40, at 252 (“The combined effect of Hoffman and IRCA was to create perverse economic incentives for employers to exploit immigrant workers suspected of lacking status and to dim the prospects for immigrant workers to challenge those abuses. The Department of Homeland Security’s (DHS) aggressive use of workplace raids as a strategy for immigration control—first under President Bush and continuing under President Obama, albeit to a lesser extent—has exacerbated the situation, making credible employer threats to expose the status of their immigrant workers lacking documentation in retaliation for those workers’ complaints.”).

191 But see ZOLBERG, supra note 7, at 12 (“As the complexity of contemporary debates on immigration policy in the affluent liberal democracies indicates, ‘utility’ en-
The argument is more difficult for antidiscrimination laws. Some immigration opponents use the fact that the bulk of modern immigrants would fall under one or more protected classes as a reason to oppose further legal or illegal immigration. This seems to be a larger complaint about the modern antidiscrimination regime, but nevertheless the temptation is to conclude that the way to resolve the second-class status of unauthorized workers is to resolve the second-class status of unauthorized immigrants generally.

The freedmen were considered deserving of the lesser treatment they received, for their labor among many other things, because most whites considered inferiority to be in their essential nature. The reasons today for considering unauthorized workers unprotected by the labor standards that apply to other workers are ostensibly different than racial inferiority—not essentialist on their face, but conduct-based—yet the effect is the same: to create a class of workers on whose labor individuals and businesses are reliably able to make a greater profit margin than a worker to whom all compasses not only a population’s economic value, but also its putative value in relation to cultural and political objectives.”

See, e.g., Karla Mari McKanders, Immigration Enforcement and the Fugitive Slave Acts: Exploring Their Similarities, 61 CATH. U. L. REV. 921, 951–52 (2012) (“There is a striking similarity in the regulation of both slaves and migrant workers to low paying and low status jobs. Slaves performed jobs such as agricultural and household work. Today, both documented and undocumented migratory workers are pigeonholed into low paying agriculture, household, and construction jobs. In both positions, the law facilitates the exploitation of the most vulnerable population. The Reconstruction Amendments were intended to ‘abolish[ ] all class legislation in the States and [do] away with the injustices of subjecting one caste of persons to a code not applicable to another.’ Similarly, when immigration law and policy begin to recognize the humanity of the subjects of the laws, there will be more equitable policies towards immigrants who come to the United States as economic migrants. Most acknowledge that ‘[s]lavery was a system of racial adjustment and social order.’ So, too, is an immigration regime that has the indirect effect of targeting the poorest immigrants of color.”).
wages owed are paid as a matter of course (presumably the norm).195

In this light, the conservative protest that the protected-class rights framework should only ever have applied to racism against black Americans,196 and lightly there,197 misses the point. The common thread between the centuries has always been the particular exploitative conduct that required regulation to make workers’ rights meaningful, rather than the various subjective reasons given to justify that conduct.198

Reactionary Southerners during Reconstruction considered it “illegitimate” for freedmen to work for their own benefit, rather than for the benefit of the whites.199 The unauthorized immigrant, a figure both unwelcome and ubiquitous in modern society,200 occupies a similar role in domestic production processes.201 His labor is provided at a discount so that consumers may purchase goods and services at the lower prices to which they have grown accustomed.202 But this particular discount comes almost entirely from a unique and contradictory legal status that makes his actual pres-

195 See, e.g., id. at 101 (“It took fourteen hundred pounds to make a bale, and George needed to make a bale every two or three days in the picking season. Mr. Edd took half.”).
196 See OLSON, supra note 14, at 87 (“The history of identity politics, like the history of discrimination law, has been built on a continuing series of analogies to the condition of blacks, each less convincing than the last.”).
197 See BERNSTEIN, supra note 45, at 110 (arguing that, although the “classical liberal vision of civil rights admittedly holds little utopian promise,” in its favor, “unlike the modern regime, the classical liberal vision does not depend on granting the government massive regulatory powers . . .”).
199 FLYNN, Jr., supra note 75, at 58.
200 NGAI, supra note 3, at 4-5 (“But restriction meant much more than fewer people entering the country; it also invariably generated illegal immigration and introduced that problem into the internal spaces of the nation. Immigration restriction produced the illegal alien as a new legal and political subject, whose inclusion within the nation was simultaneously a social reality and a legal impossibility - a subject barred from citizenship and without rights. Moreover, the need of state authorities to identify and distinguish between citizens, lawfully resident immigrants, and illegal aliens posed enforcement, political, and constitutional problems for the modern state.”).
201 See Wilkerson, supra note 106, at 31 (“The hand had determined that white people were in charge and colored people were under them and had to obey them like a child in those days had to obey a parent, except there was no love between the two parties as there is between a parent and child. Instead there was mostly fear and dependence—and hatred of that dependence—on both sides.”).
202 NGAI, supra note 3, at 2 (“Undocumented immigrants are at once welcome and
ence anathema for many of those same consumers.\footnote{Sunstein described the difference between coordination problems, which have stable solutions, and collective action problems that are unstable, and therefore require active management. Traffic lights are an example of a solution to a coordination problem: we would all like a system to regulate who gets to go when, and once in place, we are all happy to adhere to it (for the most part). The labor market is, in contrast, a collective action problem: we would act in our immediate best interest without regard to the welfare of others or optimal efficiency overall.\footnote{Except that the labor market that readers of this article enjoy is likely constrained in part by the same sorts of social expectations that permit traffic engineers to assume that traffic lights will mainly be observed by drivers – that is, we remain capable of being outraged by egregious violations of these rules.}

What allows many to systematically depart from this behavior is the absence of effective social sanction—those affected are “others,” not people we care about or identify with.\footnote{The Reverend Martin Luther King Jr., among many others, has made this observation.\footnote{This dynamic is what drove exploitation of the unwelcome; they are woven into the economic fabric of the nation, but as labor that is cheap and disposable.”).}\footnote{See, e.g., id., at 36 (“Sociologist John Torpey points out that nationality is a legal fact that, to be implemented in practice, must be codified and not merely imagined. While ‘citizen’ is defined as an abstract, universal subject, the citizenry is not an abstraction but, in fact, a collection of identifiable corporeal bodies.”).\footnote{See Bagenstos, supra note 48, at 14–15 (“One particular threat to social equality is the phenomenon of asymmetric vulnerability. Where one individual is especially vulnerable to the exercise of another’s economic power, and the vulnerability is not reciprocated, it will be easier for the less vulnerable person to establish a relationship of domination over the more vulnerable one. Asymmetric vulnerability is a particular concern in employment markets—especially in times of high unemployment. For an individual worker, having and keeping a job is supremely important. For the employer, by contrast, individual employees are often replaceable or even fungible. For the worker, the loss of a job can lead to the loss of the means of making a living and of obtaining respect from self and community. Where jobs are scarce, a worker might be willing to subordinate herself in all sorts of ways to ensure that she doesn’t lose hers.”).\footnote{See Zolberg, supra note 7, at 339 (“Dominated by undocumented border-crossing Mexicans, with the remainder consisting mostly of visa ‘overstayers’ from widely ranging sources, including Caribbean Islanders as well as some Asians and Africans, in the eyes of many the unauthorized flow reinforced immigration’s disquieting otherness.”).\footnote{Alexander, supra note 169, at 242 (“King recognized that it was this indifference to the plight of other races that supported the institutions of slavery and Jim Crow. In his words, ‘One of the great tragedies of man’s long trek along the highway of history has been the limiting of neighborly concern to tribe, race, class or nation.’ The consequence of this narrow, insular attitude ‘is that one does not really mind}}}
freedmen, and it is what drives exploitation of the day laborer. As one social scientist described it in the context of public benefits policies, "diversity decreases the demand for redistribution by limiting solidarity and trust, the bases for a strong welfare state."207

In economic terms, the harms suffered by workers “who shouldn’t be here anyway” are externalities, while identical harms to “hardworking Americans” with whom an employer identifies are able to be revisited back upon a wrongdoer through social sanction.208 This causes some of that harm to be factored into a potential wrongdoer’s calculus of the costs and benefits of discriminating, or failing to pay wages or overtime. Another way to make this process occur is through the increased enforcement of employment laws, targeted to situations where other enablers of social sanction are absent.

This would represent a significant shift in federal enforcement priorities. For unauthorized immigrants, the role of the United States government in their lives is defined by its ever-present threat to detain and exile them, likely following a chance encounter or unexpected event.209 Immigration enforcement presently consumes more of the executive branch’s primary enforcement budget than the rest of federal law enforcement combined.210 The way the historian Laura Edwards described the situation of the freedmen during Reconstruction is apt to today’s unauthorized workers: they sit outside of full membership of society and many

what happens to the people outside his group."”) (quoting Martin Luther King Jr., Strength to Love (1963)).


208 See Zolberg, supra note 7, at 95 (“Considered together, these measures amount to deliberate efforts to erect an internal boundary, not simply between natives and aliens, as suggested by historians of nativism, but somewhat more ambiguously between ‘Americans’ and ‘Un-Americans.’ All natives were not equally American, nor all aliens equally un-American: the boundary builders placed on the one side well-behaved native-born and immigrants, and on the other disturbing aliens and Americans who adopt alien ways.”).

209 The journalist Jose Antonio Vargas, who has publicly revealed his own unauthorized work status, attempts to provide a more complete picture of unauthorized immigrants’ day-to-day lives than just this, however. He tweets under the handle @joseiswriting. Jose Antonio Vargas, TWITTER.COM, https://twitter.com/joseiswriting (last visited Jan. 11, 2015).

210 See Meissner ET AL., supra note 10, at 9 (finding that “the U.S. government spends more on its immigration enforcement agencies than on all its other principal criminal federal law enforcement agencies combined. In FY 2012, spending for CBP, ICE, and US-VISIT reached nearly $18 billion. This amount exceeds by approximately 24 percent total spending for the FBI, Drug Enforcement Administration (DEA), Secret Service, U.S. Marshals Service, and Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), which stood at $14.4 billion in FY 2012.”).
are not used to summoning law to their aid, only to being summoned.211

The danger is that such an outreach effort would be viewed with hostility by native-born Americans who “perceived [equal rights] as a zero-sum game,” such that “the extension of rights to new members might be considered a dilution just as much as an expansion.”212 Indeed, this was the tenor of much of the reaction to the Executive Action announced in late 2014 to normalize the status of up to five million undocumented immigrants.213 It was the late twentieth-century shift from cultural assimilation to multiculturalism that fueled a now-popular view of individual rights as a limited resource over which to compete, rather than an expanding pie.214 The state of Colorado made this argument, among others, to the Supreme Court in Romer v. Evans,215 complaining that requiring it to recognize same-sex equality would detract from the rights of existing protected classes.216 Kenji Yoshino has concluded from the prevalence of what he calls this “pluralism anxiety” that a “new equal protection” will be needed to move forward.217

It would not be productive to respond to this anxiety by attempting to return to the low immigration levels of the middle part of the last century.218 Any such effort would create difficult (never

211 Edwards, supra note 121, at 374.
214 Nelson, supra note 154, at 75 (“Whereas early egalitarians had pursued the goal of enabling the urban, immigrant underclass to adopt elite, WASP cultural norms and thereby assimilate and integrate into the mainstream of society, newer rights egalitarians ceased to show respect for traditional norms and instead demanded that subordinated groups receive the right to develop their own culture and to live by their own lights on a level playing field with others.”).
216 Id. at 635 (“Colorado also cites its interest in conserving resources to fight discrimination against other groups.”).
217 Kenji Yoshino, The New Equal Protection, 124 HARV. L. REV. 747, 796-97 (2011) (“Equality claims inevitably involve the Court in picking favorites among groups, a practice attended by pluralism anxiety. Liberty claims, in contrast, emphasize what all Americans (or, more precisely, all persons within the jurisdiction of the United States) have in common. The claim that we all have a right to sexual intimacy, or that we all have a right to access the courts, will hold no matter how many new groups appear in this country. As such, liberty-based dignity claims may be one way in which we fashion a new, more inclusive sense of ‘we.’”).
218 See ZOLBERG, supra note 7, at 254 (“Thanks to the new law and postwar business
mind inadvisable) tensions in the modern world. The already-massive immigration enforcement apparatus would need to grow even larger, operate extensively within the country’s interior—separating and culling individuals from workplaces, families, and neighborhoods—and cause vast amounts of human suffering. Opponents of immigration gloss over the level of suffering that individuals living in the United States would need to endure to choose to “self-deport.”219 Much like letting the poor and old die on emergency room steps rather than expend public resources to treat them, it is something that, if made reality, would provoke strong opposition in our society, as it should.220

Increased government enforcement dollars should instead be directed towards what can be more directly improved with comparable effort. The systematic violation of labor standards, such as the wage and antidiscrimination laws, by employers of low-wage and vulnerable workers, in particular the unauthorized, causes harm to competing employers who refrain from that behavior, as well as all other workers in that industry. The empirical consensus is that increased immigration is positively correlated to national economic growth,221 with many accompanying benefits to all.222 In response, doldrums, European immigration dipped by two-thirds from 652,364 in 1921 to a mere 216,385 the following year. The restrictionist scholar Roy Garis contended that ‘according to a careful estimate [the measure] kept from our shores 1,750,000 to 2,000,000 immigrants, few of whom we would have been prepared to receive and care for in a year of unemployment and readjustment.’ However, arrivals then climbed back to 364,339 in 1924, approximately the maximum level attainable under the new law.”). See also id. at 269 (“Documented Mexican immigration was brought down further to 3,333 in 1931, lowered to 2,171 the following year, and kept at roughly that level for the remainder of the decade. Moreover, according to the Census, the Mexican-born population in the four southwestern states (Arizona, California, New Mexico, and Texas), which numbered 616,998 in 1930, dropped to 377,435 in 1940, a net loss of about 240,000.”).

219 See KRIKORIAN, supra note 5, at 219 (“It’s true that raids at workplaces and elsewhere will always be needed as an enforcement tool (like speed traps or random tax audits in other contexts), because every illegal alien must understand that he or she may be deported at any time.”).

220 See id. at 184 (“Immigrants don’t just cross a physical border when entering the United States; they also cross a moral border, entering a nation that will not tolerate the kind of premodern squalor and inhumanity that is the norm in much of the rest of the world.”).

221 See, e.g., Shaun Raviv, If People Could Immigrate Anywhere, Would Poverty Be Eliminated? THE ATLANTIC (Apr. 26, 2013), www.theatlantic.com/international/archive/2013/04/if-people-could-immigrate-anywhere-would-poverty-be-eliminated/275332 (“[Although] the research on migration’s effects is far from complete, what [one researcher] has found ‘suggests that the gains from reducing emigration restrictions are likely to be enormous, measured in tens of trillions of dollars.’”).

immigration opponents emphasize the short-term economic downside from illegal immigration for native-born low-wage and vulnerable workers. These effects could be directly ameliorated through increased enforcement of the employment rights of the most vulnerable members of our workforce.

At the same time, increased enforcement of existing labor standards would not “incentivize” illegal entry into the country, the bugaboo of all proposed extensions of rights to the unauthorized. As long-term trends have shown, macroeconomic factors overwhelmingly determine year-by-year inflows. Indeed, one of the benefits to employers of hiring the unauthorized is that such workers may only dimly understand that the rights they enjoy in the United States as workers are formally greater than what the laws of

the economy’s productive capacity by stimulating investment and promoting specialization,” which “produces efficiency gains and boosts income per worker,” while “evidence is scant that immigrants diminish the employment opportunities of U.S.-born workers.”

See David Frum, Immigration Amnesty: The Path to Poverty, THE DAILY BEAST, (Mar. 22, 2013) (“The United States is already evolving into a society much harsher and less hospitable for the less-skilled. Yet American elites seem determined to enlarge and perpetuate a problem they already don’t know how to solve: how to create economic opportunities for the least economically competitive half of the population.”), available at www.thedailybeast.com/articles/2013/03/22/immigration-amnesty-the-path-to-poverty.html.

See ZOLBERG, supra note 7, at 372 (“Although legalization and admission [in 1986] to permanent residence hardly transformed the immigrants’ social and economic situation, the changes did afford them some tangible benefits. As of 1992, while the jobs they held were still among the poorest paying, ‘the picture was not uniformly bleak;’ overall, ‘The advent of work authorization acted as a ‘union card,’ fostering widespread occupational mobility. Legalization also fostered widespread investments in education, training, and language skills, which—at least for Mexican men—reaped substantial wage gains.’”).

See id. at 374, 375 (“Although employer sanctions had been touted ever since the 1950s as a decisive deterrent to illegal immigration, most analysts concurred from the outset that their effect was likely to be extremely limited, as the flow across the border was largely shaped by economic conditions on both sides, and these powerful ‘push’ and ‘pull’ factors outweighed the costs that sanctions imposed on either employers or workers . . . . entries in fact increased slightly after IRCA, and that those ineligible for legalization had no intention of returning home to Mexico or Central America but planned to increase the length of their stay in the United States so as to minimize the frequency of risky crossings. It concluded that the effect of employer sanctions was mainly to stimulate an expansion of the market in fake documents.”). The Economist, The US-Mexico Border, Secure Enough, THE ECONOMIST (June 22, 2013), available at www.economist.com/news/united-states/21579828-spending-billions-more-fences-and-drones-will-do-more-harm-good-secure-enough (“Economics probably matters more than enforcement [as cause of decline in illegal entries to U.S.]. America’s downturn cost many illegal migrants their jobs, just as opportunities were blossoming back home in Mexico. In the past two years Mexico’s economy has grown at a healthy 3.9% annually, creating jobs (albeit at much lower pay than in America).“).
their home countries provided, or have strong reasons not to care. Increased domestic enforcement of the working poor’s labor rights may not do much to improve this level of knowledge among people not already arrived in the nation, but it could greatly help educate American employers and workers on the unitary labor standards that will be applied to all who work here, even those they consider outsiders.

CONCLUSION

As others have pointed out, arguments over whether a particular modern form of exploitation in the employment relationship is an equivalent of slavery are largely insufficient to justify action. In contrast, an understanding of the reasons why the laws governing employment in this nation first arose in the wake of slavery’s abolition helps lead to the conclusion that, if all who work are equally worthy of a common minimum level of working conditions, the government and third parties must undertake great effort to maintain this level, against those who would seek to violate it. Such effort is best directed towards the workers most likely to experience

226 See Alexander, supra note 81, at 382 (“Peripheral poultry workers may carry over legal knowledge from their home countries, which may have less robust, or even less robustly enforced, labor and employment rights regimes. They may have experience with corruption in the justice systems of their home countries. Undocumented workers in particular may have a deep mistrust of the U.S. government, believing that interaction even with ‘friendly’ or ‘status-neutral’ agencies puts the worker at risk of deportation. Even if workers are fully informed about their rights at work, they may not know how to find a lawyer who speaks their language, will accept what they can pay, and is willing to challenge the biggest, most powerful employer in town.”).

227 Id. at 387-88 (“Gleeson proposes that undocumented workers view themselves as temporary, hard workers who do not complain. By tolerating substandard conditions, peripheral workers strike a sort of bargain with society at large: their work ethic ‘sets them apart from their native-born and documented counterparts, and ultimately justifies their undocumented presence’ in the United States. Filing a lawsuit, complaining to a government agency, or organizing into a union would upset the implicit exchange of labor for presence. In this way, immigration law writ large, and the state of ‘legally constructed subservience’ that it creates for undocumented workers, serves as a powerful silencing force.”).

228 See Richard Delgado, Four Reservations on Civil Rights Reasoning by Analogy: The Case of Latinos and Other Nonblack Groups, 112 COLUM. L. REV. 1885, 1895 (2012) (“Nonblack groups sometimes have been able to analogize their predicaments to ones that Blacks suffer, just as the latter have sometimes been able to win relief for new injuries by comparing them to ones that their slave ancestors suffered, but often the effort has failed. Thus wartime internment, language discrimination, suppression of Native American religions, and profiling based on presumed foreign appearance—afflictions that do not stem from the enslavement of Blacks—have largely gone without redress under American law, even though these injuries might appear comparable to ones that lie at the heart of our system of racial remedies.”).
such violations, at the bottom of income and in the shadows.\textsuperscript{229} The exploitation of these vulnerable workers is the very behavior that our employment laws were first written to eliminate,\textsuperscript{230} and it is accordingly the wrong to which the enforcers of those laws should direct the most attention, as demanded by the heritage and mandate of equal rights in our system of law.

\textsuperscript{229} See, e.g., Plyler v. Doe, 457 U.S. 202, 218–19 (1982) (“This situation raises the specter of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents. The existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law.”).

\textsuperscript{230} See Wilkerson, supra note 106, at 317 (“[W]hat was becoming clear was that, north or south, wherever colored labor was introduced, a rivalrous sense of unease and insecurity washed over the working-class people who were already there, an unease that was economically not without merit but rose to near hysteria when race and xenophobia were added to preexisting fears. The reality was that Jim Crow filtered through the economy, north and south, and pressed down on poor and working-class people of all races. The southern caste system that held down the wages of colored people also undercut the earning power of the whites around them, who could not command higher pay as long as colored people were forced to accept subsistence wages.”).
ONE CONDO, ONE VOTE: THE NEW YORK BID ACT AS A THREAT TO EQUAL PROTECTION AND DEMOCRATIC CONTROL

Brett Dolin†

CONTENTS

INTRODUCTION ............................................... 93  R
I. BUSINESS IMPROVEMENT DISTRICTS: AN OVERVIEW ...... 98  R
II. THE NEW YORK BID ACT .............................. 99  R
   A. BID Establishment ..................................... 100  R
      i. The District Plan ...................................... 100  R
      ii. Establishment Procedure ......................... 101  R
   B. Judicial Review ................................... 102  R
   C. BID Powers ....................................... 102  R
   D. BID Dissolution ............................... 104  R
   E. BID Governance ................................. 105  R
III. THE HUDSON RIVER PARK NEIGHBORHOOD IMPROVEMENT DISTRICT ............................................. 106  R
   A. The HRP NID Proposal ............................ 107  R
   B. Toward a Residential Improvement District? .... 109  R
IV. EQUAL PROTECTION CHALLENGES TO BID GOVERNANCE 110  R
   A. One-Person, One-Vote ........................... 110  R
   B. The Special-Purpose-District Exception ........... 114  R
   C. The One-Person, One-Vote Challenge to the Expanded BID ................................... 117  R
CONCLUSION ................................................. 118  R

INTRODUCTION

The Hudson River Park Neighborhood Improvement District (HRP NID) was to be a solution to a failure of state and municipal government. The Hudson River Park, created along the west side of Manhattan in 1998 by an act of the New York State Legislature,1

† J.D. Candidate '15, City University of New York (CUNY) School of Law; B.A. '05, Oberlin College. I thank Professor Andrea McArdle, for her constant support, feedback, and enthusiasm for this topic, Thomas Honan, for spotting this issue and our early collaboration that made this paper possible, and Emily Farrell, for her talent with titles. I also thank the board and staff of CUNY Law Review, especially Li Litombe.

1 Hudson River Park Act, N.Y. UNCONSOL. LAW § 1641-56 (McKinney 2014).
has faced serious funding problems. Hurricanes Sandy and Irene exacerbated the problems, causing damage to the park and increasing the urgency of a funding solution. Proponents of the park found an answer in New York’s Business Improvement District (BID) Act: a BID would provide a dependable source of funds in the form of tax-like assessments from district property owners. The funds could provide for park maintenance, district improvements, and additional services that the municipality might typically provide: street and sidewalk cleaning, sanitation services, and additional security. The district residents could elect a governing board, with a guaranteed majority of property owners burdened by the assessment, to control dispensation of the funds. Non-owning residents, including rental tenants, as well as the larger public, however, would have limited say under the BID structure. As in other New York BIDs, property owners, through their power to elect a majority of the BID board, would effectively control the HRP NID, managing millions of dollars in assessment revenue.

But the proposed HRP NID would not have been an ordinary BID. It was a potentially disturbing misuse of the New York BID Act, including a fundamental change and significant expansion of its purpose of “restoring and promoting business activity.” The story behind the HRP NID’s formation and a description of its pro-

---

4 Business Improvement District Act, N.Y. GEN. MUN. LAW. § 980 et seq. (McKinney 2013); Hudson River Park Neighborhood Improvement District Draft District Plan 34-35 (Mar. 15, 2013) [hereinafter HRP NID Draft District Plan] (on file with the author) (describing sources of funding as assessments on various classes of property within the HRP NID).
5 GEN. MUN. § 980-c; HRP NID Draft District Plan, supra note 4, at 29-33 (describing the proposed services of the HRP NID, including safety, beautification, and business and resource promotion).
6 GEN. MUN. § 980-m(b).
7 Tenants are allocated at least one seat on the board under the New York BID Act and four seats are reserved for political appointees. However, property owners must always constitute a majority with a statutory minimum of six members. Id. § 980-m.
8 HRP NID Draft District Plan, supra note 4, at 36 (proposing a first-year budget of $8,000,000).
posed powers serve to illustrate the potential for expansion and misuse of the BID form, where a group of powerful economic interests could wrench the BID concept out of its intended context and create a risk of privatized municipal governance in districts where only property owners have control over privatized municipal services. Moreover, these developments raise the prospect of equal protection violations under the United States Supreme Court’s one-person, one-vote doctrine. While the proposal sparked community resistance and supporters ultimately withdrew after the New York State Legislature acted to address the Hudson River Park funding problem,10 the potential for misuse of the BID process remains.

BIDs are proliferating across the United States and in other countries.11 Since 1984, seventy BIDs have been established throughout New York City alone.12 BIDs allow for the privatization of the financing and the services of municipal governance. Property-owner control of a BID’s broad array of services is a potentially serious cause for concern, especially in residential neighborhoods with many residential tenants. The HRP NID illustrates the concern: the circumstances behind its proposal, its purpose, and its planned size distinguish it from a typical BID. Although in the form of a BID, the HRP NID would be much larger in geographic area, incorporate several neighborhoods along the west side of Manhattan divided among multiple City Council and state legislative districts, and include a much larger percentage of residential property owners than other New York City BIDs.13

Although the HRP NID was presented as a solution to the funding problem of the Hudson River Park, the focus on residential properties suggests the possibility of an unintended expansion of the BID Act. Where the BID Act envisions a district of private businesses pooling resources to make the area attractive to shoppers, the HRP NID suggests a district of private property owners,


13 See infra Part III-A.
including a large percentage of residential property owners, pooling resources to fund a municipal park, as well as to increase their municipal services and, potentially, their property values. A rental tenant in the district would be left out of decision making almost entirely, but perhaps pay higher rent as a result of assessments or the gentrifying effect of increased property values. The fact that this is a “Neighborhood” and not a “Business” Improvement District hints at the creation of another form of public-private governance: the Residential Improvement District (RID).

A RID is similar to a BID, but situated in a residential neighborhood rather than a commercial area. Residential property owners would organize, create a plan, and fund improvements to their residential district with property owner assessments.14 The RID could be governed by a non-profit corporation board of directors, elected by residential property owners.15 RIDs, however, raise the specter of municipal governance by residential property owners. Particularly in a city like New York, with a very large renting population, the establishment of RID-like districts could lead to property-owner-controlled boards managing millions of dollars in assessment revenue and providing a variety of traditional municipal services or service enhancements. What effect might this have on the quality of municipal services across the city? In addition to the district itself, where rental tenants might lack an effective vote, one can also imagine a wealthy district and a low-income district with a vastly different set of services dependent solely on the economic resources available to local property owners. If wealthy property owners can band together to offer a higher scale of municipal services from private providers, what will happen to those living in districts that cannot organize, or do not have enough money to keep up? And in what sense would the municipality fulfill its general government functions?

Given its expansion of the BID Act’s intended function,16 the HRP NID is not within the spirit of the BID Act even though its supporters attempted to use that process for its creation.17 This suggests a need for the New York Legislature to address the provisions and availability of the BID formation procedures. Moreover,

15 Id.
17 See HRP NID Draft District Plan, supra note 4.
in light of the potential expansion of BIDs into residential neighborhoods and into the private provision of more typically municipal services, this paper will consider the possibility of equal protection challenges by non-property-owning BID residents to BID elections and governance under the doctrine of one-person, one-vote. If BIDs continue to expand, from business to residential, and involve a larger array of municipal services, the principles of democratic governance underlying the one-person, one-vote doctrine may provide a limit to this threat of increasing privatization of government.

The existing case law is not promising, but does provide would-be BID challengers with some guidance. Although the Second Circuit held in Kessler v. Grand Central District Management Association that BIDs fall within the special-purpose district exception to one-person, one-vote,\(^{18}\) the Supreme Court’s precedent in City of Phoenix v. Kolodziejski and Avery v. Midland County present another way to approach the issue.\(^{19}\) As BIDs expand into larger districts, appear in primarily residential neighborhoods, and take on more municipal functions, they may begin to look less like special-purpose districts and more like municipal subdivisions. A municipal subdivision with general government powers would require stricter scrutiny under the one-person, one-vote principle required by the Equal Protection Clause. At what point, then, does a BID transition from a special-purpose district to a general-government district?

This Note begins in Part I with a discussion of the concept and design of BIDs in the United States. Part II will discuss the New York BID Act, including the procedures for establishing a BID in New York City. Part III will consider the potential expansion of BID-like districts in New York City with a discussion of the proposed HRP NID, and compare that proposed district with the purposes of the BID Act and the RID concept. Part IV will examine the one-person, one-vote principle of the 14th Amendment Equal Protection Clause, particularly the contours of the special-purpose-district exception as applied in Kessler v. Grand Central District Management Association, Inc., and consider the application of the Kessler rule to potential districts with expanding size and purpose as a way to combat the increasing privatization of municipal services.

\(^{18}\) 158 F.3d 92, 108 (2nd Cir. 1998).

I. BUSINESS IMPROVEMENT DISTRICTS: AN OVERVIEW

Like the HRP NID, BIDs are thought to be solutions to failures of municipal governance. BIDs can be viewed in light of the “urban renewal” projects of the 1970s. Rather than government-led approaches like “slum clearance” or public housing, BIDs are, at least in theory, a grassroots community response to the problems of urban decay, focused on the needs of local small-business owners.

In this conception, BIDs are formed by groups of business owners in a limited, specific area who seek both a source of funding and power that might otherwise belong to the municipality. The area business owners would then use those funds to “improve” the district by providing services and physical improvements beyond or in addition to those provided by the municipal government.

State and local government scholar Richard Briffault describes the BID as a hybrid of two, earlier types of “special” government district: the special assessment and the special-purpose district. BIDs borrow the concept of an independent source of revenue from the special assessment district. An assessment is a tax-like levy imposed on private property owners, often burdening those owners in proportion to the value or size of their property. Special assessment districts, typically located in newly developing areas, are funded by assessments collected from district property owners to pay for specific local improvements, such as constructing streetlights or connecting that area to the municipal sewer system. Once the improvements are built, the assessment ends; this temporal limitation is a feature of the special assessment district. The municipality or other local government can, in turn, avoid using general tax monies to pay for the improvements. The private benefit accrued to the property owners through their new connection to municipal services is thought to justify the special assessment in only that area.

Like special assessment districts, BIDs take an assessment,

---

21 Id. at 422-23
22 Id. at 369.
23 Id. at 424.
24 Id. at 414.
25 Id. at 415-16.
26 Briffault, supra note 21, at 415.
27 Id. at 414-15.
28 Id. at 416.
29 Id.
30 Id. at 415.
their independent revenue source, from property owners within the district and use that money for district-level improvements. BIDs, however, are already fully developed urban areas, and the services they provide are not limited to a specific, permanent improvement (e.g., once the streetlights are built, the assessment will end). To manage the funds, BIDs borrow a second concept from the special-purpose district.

Special-purpose districts lend to BIDs the concept of independent governance. Governments create these districts to “perform a single or a very small number of closely related functions.” The justification for a special-purpose district is to allow “the state to create a government whose territory and powers are tailored to the scope of the problem to be addressed.” Special-purpose districts are managed by a board that exists as a separate legal entity from the state or local government that created it, an idea that is of key significance in the development and governance of BIDs. BIDs borrow from the special-purpose district this concept of a separate legal entity tailored to a specific problem to be addressed; however, the problem to be addressed with a BID is not necessarily “a single or very small number of closely related functions.” BIDs address, within a limited district, many improvements designed to “improve business” and combat “urban decay.”

Combined with an independent and permanent revenue source from property assessments, the independent governing structure of a BID could potentially provide a wide array of traditional municipal services. Under the New York BID Act, a BID can also obtain the typically corporate attribute of perpetual life, particularly when it takes on a second revenue source, debt financing. The establishment procedures, powers, and voting procedures created by the New York BID Act are discussed below.

II. THE NEW YORK BID ACT

In 1989, the New York State Legislature instituted a formal process for the creation of business improvement districts, declar-
ing the then-existing process to be “unduly cumbersome and complicated.” The findings of the legislature in enacting the statute shed light on its purpose. First, the legislature found and declared “that the business districts within many municipalities in the state are in a deteriorated condition” and that “[t]his condition adversely affects the economic and general well-being of the people of the state.” Second, the legislature declared that “the establishment of business improvement districts is an effective means for restoring and promoting business activity.” The legislature further declared the intent of the state to provide a “more streamlined process of establishing and operating” the districts. The BID Act prescribes procedures for BID establishment, judicial review, powers, dissolution, and governance. This section will discuss each of those statutory procedures, focusing on areas where the law specifically sets procedure for New York City.

A. **BID Establishment**

   i. **The District Plan**

   Before a BID can be established, the group proposing the BID must present a district plan to the relevant city authorities. The district plan is the initial governing document of the district. It is required to contain, among other things: a district map, the “present and proposed uses” of the land within the proposed district, and the “improvements proposed and the maximum cost thereof.” It must describe “the total annual amount proposed to be expended for improvements, maintenance and operation” and the “proposed source or sources of financing.” The plan must also include “any proposed rules and regulations to be applicable to the district” and identify the district management associ-
ation that will govern the district.52

The district plan must also provide a list of all district properties that will benefit from the district and a "statement of the method or methods by which the expenses of a district will be imposed upon benefited real property, in proportion to the benefit received by such property . . . "53 This provision appears to place a BID within the special-purpose district exception to the one-person, one-vote principle of the Equal Protection Clause, requiring the district plan to identify those property owners charged and the benefit they receive in relation to that charge. This relationship between a burdened property owner and the benefit received in accordance with that burden is a hallmark of the special-purpose district exception.54

ii. Establishment Procedure

Establishing a BID in New York City requires adherence to an extensive schedule of deadlines and hearings, culminating in a vote by the City Council and approval by the Mayor.55 The BID Act requires the participation of the City Planning Commission, the relevant community boards and borough presidents, and the mayor.56 The authorization process further requires that property owners within a district (presumably under the assumption that these are the people primarily affected) receive notification of the district.57

The BID Act further provides that a BID will not be established if the owners of at least 51% of the assessed valuation of district property or the owners of at least 51% of the individual district properties file their objections with the office of the municipal clerk within thirty days of the City Council’s finance committee hearing.58 The 51% hurdle can be difficult to achieve, particularly in a BID of large size or where property owners may not pay attention, receive adequate notice, or be able to object in an organized fashion. Further, the owners of a few properties of particularly high

52 Id. § 980-a(b)(9).
53 Id. § 980-a(b)(8).
56 Gen. Mun. § 980-d(c).
57 Id.
58 Id. § 980-c(b) (for required percentages); N.Y.C. Dep’t of Small Bus. Serv., supra note 56, at 23 (for thirty-day requirement).
value could potentially control the process because of the statute’s “assessed valuation” prong. Unless the objections of the 51% are filed with the municipal clerk, the City Council can vote to establish the BID, which then becomes very difficult to dissolve, as discussed below. The Act provides for judicial review in the event of improper establishment procedure, although this option also presents substantial limitations.

B. Judicial Review

Section 980-H of the BID Act provides that “[any] person aggrieved by any local law adopted pursuant to this article may seek judicial review of the local law in the manner provided by article seventy-eight of the civil practice law and rules.” Section 980-Q, however, provides for severance in the event a court finds invalid “any provision or any section” of the act or its application to “any person or circumstance.” Here, severance restricts the judgment of invalidity to “the controversy in which it was rendered” and the provision further declares that a judgment “shall not affect or invalidate the remainder of any provisions of any section” or apply to the application of “any other person or circumstance.” The potential for challenging BID governance under the one-person, one-vote principle of the Equal Protection Clause is described in Part V, below.

C. BID Powers

BIDs focus on small-scale improvements and services. The statute specifically provides that a district may use its power in four broad areas: to provide “district improvements . . . which will restore or promote business activity in the district;” to provide for “the operation and maintenance of any district improvement;” to provide “additional maintenance or other additional services required for the enjoyment and protection of the public and the promotion and enhancement of the district whether or not in conjunction with improvements authorized by this section;” and to “enter into contracts to provide for the construction of accessibility improvements . . . ”

59 Gen. Mun. § 980-c(b).
60 Id. § 980-h(c). (Proceedings must commence within thirty days “from the date of the publication of the copy or summary of the local law . . . “).
61 Gen. Mun. § 980-q.
62 Id.
63 Gen. Mun. § 980-c(a)-(d).
More specifically, with respect to district improvements, a BID may engage in:

(1) construction and installation of landscaping, planting, and park areas; (2) construction of lighting and heating facilities; (3) construction of physically aesthetic and decorative safety fixtures, equipment and facilities; (4) construction of improvements to enhance security of persons and property within the district; (5) construction of pedestrian overpasses and underpasses and connections between buildings; (6) closing, opening, widening or narrowing of existing streets; (7) construction of ramps, sidewalks, plazas, and pedestrian malls; (8) rehabilitation or removal of existing structures as required; (9) removal and relocation of utilities and vaults as required; (10) construction of parking lot and parking garage facilities; and (11) construction of fixtures, equipment, facilities, and appurtenances as may enhance the movement, convenience and enjoyment of the public and be of economic benefit to the surrounding properties such as: bus stop shelters; benches and street furniture; booths, kiosks, display cases, and exhibits; signs; receptacles; canopies; pedestrian shelters and fountains.64

And with respect to providing “additional maintenance or other additional services” under subsection (c), the district may provide:

(1) enhanced sanitation services; (2) services promoting and advertising activities within the district; (3) marketing education for businesses within the district; (4) decorations and lighting for seasonal and holiday purposes; and (5) services to enhance the security of persons and property within the district.65

BIDs can provide a wide range of services and remain within this statutory grant. The services suggested for a proposed Corona-Jackson Heights BID in Queens are representative. In the area of “district improvements” and maintenance, the BID proposes to add improved streetlights, custom trash receptacles and newsboxes, directional street signage, flower boxes, tree and flower plantings, tree pit maintenance, street and sidewalk cleaning, graffiti removal, and “pigeon poop mitigation.” As “additional services,” the BID would provide an array of business and marketing services, including commercial vacancy reduction, business mix improvement, assistance to small businesses and city agencies, special events, district public relations, promotional materials, and holiday decorations. Perhaps more controversially, the BID also proposes public and pedestrian safety services and coordination with law en-

64 Id. § 980-c(a)(1)-(11).
65 Id. § 980-c(c)(1)-(5).
forcement. Other BIDs, such as the Grand Central District Management Association (GCDMA) challenged in *Kessler*, employ their own security guards, raising the troubling issue of private security enforcing business district norms (whatever those may be) on “undesirable” residents in apparently public streets and spaces.

D. BID Dissolution

New York allows its BIDs to achieve perpetual life, and BIDs are difficult for district residents to dissolve, unless the City Council can be moved to act. Dissolution, rather than being automatic or requiring reevaluation after some number of years, requires affirmative steps from either the City Council or a large number of the BID property owners. Further, a BID that has acquired debt cannot be dissolved: “[a]ny district . . . where there is no indebtedness, outstanding and unpaid, incurred to accomplish any of the purposes of the district, may be dissolved by local law by the legislative body . . . ” (emphasis added).

There are two methods for dissolution: the City Council may dissolve a BID on its own or the Council may act on a written petition of “(1) the owners of at least fifty-one percent or more of the total assessed valuation of all benefited real property . . . and (2) at least fifty-one percent of the owners of benefited real property . . . ” within the district (emphasis added). This is an even higher burden than that required for opposition to the BID at formation, because both individual owners and those who own the most valuable properties must act together. Further, the district management association may make recommendations concerning the dissolution, which the City Council must consider if submitted within sixty days of the dissolution proposal. As a further disincentive for district property owners, the City receives all of the district’s assets when it dissolves rather than the property owners. Given the difficulty of both stopping BID establishment and dissolving an existing BID,

---

67 *See, e.g.*, Briffault, *supra* note 21, at 402 - 03 (discussing accusations that Grand Central Partnership security acted as a “goon squad” to chase homeless people out of the district).
68 *Id.* at 389 (discussing BID termination procedures in nationwide statutes, including time limits for the district, renewal, reauthorization, and time limits for assessments).
69 *Gen. Mun.* § 980-o(a).
70 *Id.*
71 *Id.*
72 *Id.*
the BID governance procedures and democratic control of the board gains greater importance.

E. BID Governance

After the City Council passes and the mayor approves a new BID establishment law creating the district management association (DMA), the DMA, a non-profit corporation, controls the provision of BID services and the expenditure of the BID’s assessment revenue as described in the district plan.\textsuperscript{73} An elected board of directors governs the DMA; property owners within the district elect a majority of the directors, as required by the BID Act.\textsuperscript{74} The Second Circuit Court of Appeals determined that this provision of the BID Act passed constitutional muster under the Equal Protection Clause in \textit{Kessler v. Grand Central District Management Association, Inc.}, discussed in Part IV, below.

In addition to the required majority representing property owners, the remainder of the board must consist of one appointee of the mayor, one appointee of the city comptroller, one appointee of the relevant borough president, one appointee of the relevant city council member,\textsuperscript{75} and at least one representative of “tenants of commercial space and dwelling units within the district.”\textsuperscript{76} A board meeting the statutory minimum would include six property owners, four political appointees, and one tenant representative. However, as with corporate boards, the BID’s district plan may establish other board members and voting classes, so long as district property owners always constitute a majority. The proposed Jackson Heights-Corona BID, for example, plans to include residents, commercial tenants, and “civic non-profit groups.”\textsuperscript{77} The Grand Central BID at the time of \textit{Kessler} included thirty-one property owners, sixteen commercial tenants, and one residential tenant.\textsuperscript{78}

Voting in board elections is to be set forth in the DMA’s certificate of incorporation or bylaws, and may include representation for both property owners and tenants.\textsuperscript{79} Voting for property own-

\begin{footnotesize}
\begin{tabular}{ll}
\textsuperscript{73} & \textit{Id.} \textsuperscript{\textcopyright} \textsuperscript{980-m(a).} \\
\textsuperscript{74} & \textit{Gen. Mun.} \textsuperscript{\textcopyright} \textsuperscript{980-m(b).} \\
\textsuperscript{75} & If a BID, such as the HRP NID, consists of more than one City Council district, the City Council Speaker will appoint the member representing the City Council after consulting with all of the City Council members in the district. \textit{Id.} \\
\textsuperscript{76} & \textit{Id.} \\
\textsuperscript{77} & \textit{Steering Committee, Jackson Heights-Corona Business Improvement District}, http://jhcoronabid.org/steering-committee/ (last visited May 19, 2014). \\
\textsuperscript{78} & \textit{Kessler}, 158 F.3d at 97. \\
\textsuperscript{79} & \textit{Gen. Mun.} \textsuperscript{\textcopyright} \textsuperscript{980-m(a).} \\
\end{tabular}
\footnotendisplay}

ers may also be weighted according to the planned assessment against their property, potentially giving more voting power to larger property owners. Further, the district can use class voting, as did the GDCMA: residential tenants were eligible to vote for the Class C director, the one representative of residential tenants on the board.

The majority voting power of propertied residents is among the most disturbing aspects of BIDs, especially in the context of ever larger and more numerous districts. While the DMA can provide for tenant voting and representation, it cannot provide for equal voting power for district tenants because property owners must always constitute a majority. The board, therefore, is controlled by a majority of property owners who govern the expenditure of assessed revenues in the exercise of BID powers. Further, if property owners fail to vote, small numbers of interested parties who do vote could easily capture a board controlling millions of dollars in assessments. A similar scenario forms part of the background of the Kessler litigation, to be discussed in Parts IV and V, below: one powerful person managed to capture the board of the Grand Central District Management Association and, through the board, controlled millions of dollars in district revenue.

As BIDs grow larger, provide more extensive (or more exclusive) services, or deviate from their intended purpose, do they risk a broader privatization of municipal services controlled only by property-owning interests? To surface this potential problem, Part III will discuss the ways in which the HRP NID differs from the BID concept envisioned by the state legislature as indicated by the BID Act’s legislative history.

III. THE HUDSON RIVER PARK NEIGHBORHOOD IMPROVEMENT DISTRICT

The HRP NID is, despite its name, a proposed BID that would take an assessment from property within the proposed district, spend that money for improvements of the Hudson River Park and the district, and potentially take on debt for those projects. Although it seeks to make use of the BID process as outlined above, it differs from a traditional BID in three ways: it was not proposed by local business interests for the improvement of the district for busi-

---

80 Id.
81 Kessler, 158 F.3d at 97.
ness purposes; its district map is much more extensive; and it incorporates a larger percentage of residential property than other BIDs. The district plan offers some insight into what services the NID would have offered, how it would have been financed, and how it would have been governed. Although ultimately withdrawn, the HRP NID proposal remains a compelling example of potential future abuse of the BID concept and the purpose of the New York BID Act.

A. The HRP NID Proposal

The HRP NID was not proposed by a group of local business owners, nor even a group of local interests: of the twenty-three members of the steering committee that proposed the NID, ten members are representatives of “major real estate developers,” three are residential homeowners within the district, and the other ten are community board representatives and representatives of other organizations, including the Hudson River Park Trust and the Whitney Museum of American Art. Further, and as previously mentioned, the BID is of extensive size, spanning multiple neighborhoods and city council districts. The HRP NID would include 87 million square feet of built floor space, compared to approximately 417 million square feet in all BIDs in New York City formed prior to 2003. The HRP NID would be approximately 38% residential floor space, compared to an average of 14.4% residential floor space in all other New York City BIDs formed prior to 2003. The percentage of residential floor space is likely to increase: as the district plan acknowledges, new residential development is under construction throughout the district, for example, along the High Line in Chelsea and in the new Hudson Yards development. In its description of the Hell’s Kitchen/Clinton section of the district, the plan notes that “a number of high-profile residen-

84 See HRP NID Draft District Plan, supra note 4, at 4-5.
85 Id. at 6.
87 See HRP NID Draft District Plan, supra note 4, at 6.
88 Ingrid Gould Ellen et al., supra note 89, table 2.
89 HRP NID Draft District Plan, supra note 4, at 15.
tial projects have been designed with an emphasis on access to and views of the waterfront and the [Hudson River] Park.\footnote{Id. at 9}

The draft district plan proposes several specific services in the categories of safety, beautification, and business and resource promotion.\footnote{Id. at 29-33.} However, the plan authorizes a very broad potential array of activities: “any services required for the enjoyment, protection, and general welfare of the public, the promotion, and enhancement of the District, and [services] to meet needs identified by members of the District.”\footnote{Id. at 29.} The plan has a particular focus on park access, providing statistics for traffic safety and proposing various pedestrian bridges and other access improvements.\footnote{Id. at 12 (describing and mapping “High Volume Crash Sites” in Hell’s Kitchen/Clinton); id. at 29 (describing safety improvements for park access).}

To finance its services, the district plan proposes a variety of sources of funding.\footnote{HRP NID Draft District Plan, supra note 4, at 34-35.} Assessments would be divided into six classes, with lots containing 51% or more commercial space having the largest assessment and lots having 51% or less commercial space and which also contain residential space assessed at half the commercial rate.\footnote{Id. at 34.} Non-profit and “public purpose” lots are excluded, unless they agree to pay, and vacant lot owners pay a flat $100 per tax lot.\footnote{Id.} The final assessment class, concerning areas within an undefined number of blocks from “undeveloped areas of the Park” (also undefined), is assessed at half the rate of commercial and residential properties.\footnote{Id. at 35.} The plan authorizes borrowing as a source of funding for both operations and improvements, including from private lending institutions, New York City, public entities, not-for-profit organizations, and individuals.\footnote{Id.}

The NID proposal sparked community resistance, including by Neighbors Against the NID, the members of which attempted to rally community opposition and attended community board meetings and hearings.\footnote{Interview with Members of Neighbors Against the NID, in N.Y.C., N.Y. (Oct. 27, 2013) (the members prefer to be identified by their group name).} The NID proposal was ultimately withdrawn, however, when the New York State Legislature passed, and Governor Andrew Cuomo signed, legislation allowing the Hudson River Park Trust to sell its air rights and thus secure the funding the NID
was designed to provide. The story behind its formation and a description of its proposed powers serve to illustrate the potential for expansion and even misuse of the BID form.

B. Toward a Residential Improvement District?

While the HRP NID is presently withdrawn, its proposal suggests an expansion of the BID Act which the legislature did not intend: the creation of Residential Improvement Districts (RIDs). Because of its residential quality, the NID suggests an attempt to use the BID Act to create a RID, a theoretical cousin to the BID. In a RID, residential property owners would organize, create a plan, and fund improvements to their residential district with property owner assessments. The RID would be governed by a non-profit corporation board, composed of residential property owners. RIDs, however, raise the specter of municipal governance by residential property owners. Particularly in a city like New York, with a very large renting population, the establishment of RID-like districts, especially given the extent of BID creation, could lead to property-owning boards controlling the dispensation of municipal services.

Although the RID proposal envisions a semi-privatized governance structure to “improve” urban neighborhoods (similar to the legislative findings behind the New York BID Act), it also suggests a way for real estate developers (along the lines of the HRP NID) or even local residents to use semi-municipal powers to gentrify neighborhoods. The effect on non-district areas is also of concern: if wealthy property owners can band together to offer a higher scale of municipal services from private providers, what will happen to those living in districts that cannot organize, or do not have enough money?

If RID-like proposals, such as the HRP NID, continue to appear, New York may have to reassess its BID Act and make clear that it is not to be used for this purpose, and only for its intended purpose: “restoring and promoting business activity.” In addition, the establishment of RIDs that do raise serious concerns may still be challenged under the Equal Protection Clause, if plaintiffs can successfully avoid the special-purpose-district exception to the

100 Rubinstein, supra note 11; Foderaro, supra note 11.  
102 Id. at 6.  
103 Id. at 1.  
one-person, one-vote principle as applied in Kessler. This paper has so far presented the HRP NID as a potential abuse of the New York BID Act. Because of its differences from a typical BID, it (or perhaps a further expanded version of it) also suggests a potential new analysis under the Equal Protection Clause.

IV. EQUAL PROTECTION CHALLENGES TO BID GOVERNANCE

In Kessler v. Grand Central District Management Association, Inc., the Second Circuit addressed the troubling issue of the New York BID Act’s provision mandating a permanent board majority for district property owners. Two residential tenants of the Grand Central BID, located around Grand Central Station, challenged the board majority provision under the one-person, one-vote principle of the Equal Protection Clause of the Fourteenth Amendment. The mandate did not trouble the court, however, which held that the Grand Central BID was a special limited purpose district with a disproportionate effect on property owners and no general government powers. This, according to the rule, means there must only be a “reasonable relationship” between the voting system chosen and the purposes of the special district. The court held that the New York legislature “could reasonably have concluded that property owners, unless given principal control over how the money is spent, would not have consented to having their property subject to the assessment.”

Yet, as BIDs increase in number and size, and potentially expand into other contexts, the district management association boards may wield increasing power over the allocation of services that have been, or should be, provided by the municipality. That power, in turn, is concentrated in the hands of the property-owning majority of the board, which is democratically accountable only to the property-owning voters of the district. The following is a brief explanation of one-person, one-vote and the special-purpose-district exception, intended to highlight the policy concerns animating these doctrines as they might apply to BIDs growing in size, power, and influence.

A. One-Person, One-Vote

The one-person, one-vote principle requires that voting power be apportioned equally on the basis of the population across elec-
toral districts: one person’s vote is equal to every other person’s vote, and each districts’ representatives represent approximately equal numbers of people.108 In other words, “[t]he fact that an individual lives here or there is not a legitimate reason for overweighting or diluting the efficacy of his vote.”109 The Supreme Court’s description of the right at issue alludes to a possible application in the BID context: the fact that an individual lives “here”—in this BID or this rental apartment—as opposed to “there”—outside a BID or in that condominium unit—may result in a change to the power of that individual’s vote.110 The Supreme Court expanded the application of the doctrine from the federal government to state governments and to state subdivisions in the 1960s and early 1970s, and began to restrict it in the later 1970s in cases applying the special-purpose-district exception.

The Supreme Court applied the one-person, one-vote principle to state legislative districts in Reynolds v. Sims and to state political subdivisions, including county and city governments, in Avery v. Midland County. The Court in Reynolds held that “the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis.”111 In discussing the demands of the Equal Protection Clause in relation to the right to vote for state legislatures, the Court made the following observations: “Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests”112 and “[o]verweighting and overvaluing of the votes of those living here has the certain effect of dilution and undervaluation of the votes of those living there.”113

The plaintiff in Avery challenged the electoral districts of the Midland County Commissioners Court, a five-member board with one County Judge elected at-large by all county voters and four Commissioners elected from four districts.114 The central issue of

109 Id. at 567.
110 See id. at 557-8 (quoting favorably Gray v. Sanders, 372 U.S. 368 (1963): “Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment. The concept of ‘we the people’ under the Constitution visualizes no preferred class of voters but equality among those who meet basic qualifications.”). 
111 Id. at 568.
112 Id. at 562.
113 Reynolds, 377 U.S. at 563.
114 Avery, 390 U.S. at 476.
the case concerned the apportionment of the four Commissioner’s districts: at the time of the suit, one district contained 95% of the county’s population, and the other three districts contained the remaining 5%. The Supreme Court held that Avery had a right to vote for the Commissioners Court that was of “substantially equal weight” to the votes of all residents of the County and that the Equal Protection Clause “forbids the election of local government officials from districts of disparate population.” The Court further held that the Equal Protection Clause requires the state, in delegating power to its subdivisions, to provide equal voting rights to the residents of those subdivisions.

Of particular relevance here is the Court’s discussion of the various powers of the Commissioners Court. Midland County, arguing against the application of one-person, one-vote, contended that the Commissioners Court was not “sufficiently ‘legislative’” but was rather an “administrative” body. The Supreme Court describes the duties of the Commissioners Court as follows:

“the court is: the general governing body of the county. It establishes a courthouse and jail, appoints numerous minor officials such as the county health officer, fills vacancies in the county offices, lets contracts in the name of the county, builds roads and bridges, administers the county’s public welfare services, performs numerous duties in regard to elections, sets the county tax rate, issues bonds, adopts the county budget, and serves as a board of equalization for tax assessments. The court is also authorized, among other responsibilities, to build and run a hospital, an airport, and libraries. It fixes boundaries of school districts within the county, may establish a regional housing authority, and determines the districts for election of its own members.”

In Avery, these government functions were enough to trigger heightened equal protection scrutiny. Whether a BID resident can successfully challenge its voting scheme will depend on that plaintiff’s description of the breadth of the services rendered.

Despite what could be viewed as more expansive language in its analysis of the functions of the Avery Commissioners Court (at least as related to the equal protection issues of a BID), the Su-

\[\text{\textsuperscript{115}} \text{Id.}\]
\[\text{\textsuperscript{116}} \text{Id.}\]
\[\text{\textsuperscript{117}} \text{Id. at 478.}\]
\[\text{\textsuperscript{118}} \text{Id. at 480.}\]
\[\text{\textsuperscript{119}} \text{Avery, 390 U.S. at 476-7 (quoting the Texas constitution and various Texas statutes) (internal quotation marks and citations omitted).}\]
Supreme Court qualified its holding after mentioning the possibility of a “special-purpose unit.” A different analysis might apply “[w]ere the Commissioners Court a special-purpose unit of government assigned the performance of functions affecting definable groups of constituents more than other constituents.”\(^\text{120}\) The holding provides a constitutional “ground rule” for local government, requiring that “units with general governmental powers over an entire geographic area not be apportioned among single-member districts of substantially unequal population.”\(^\text{121}\)

The Court also addressed one-person, one-vote in a situation relevant to the BID governance scheme in *City of Phoenix v. Kolodziejski*. In that case, the city of Phoenix, Arizona, allowed only voters who also paid property taxes to vote on general obligation bonds that were primarily serviced by those taxes.\(^\text{122}\) The general obligation bonds provided funds for municipal improvements, with most of the money directed to “the city sewer system, parks and playgrounds, police and public safety buildings, and libraries.”\(^\text{123}\) Plaintiff Kolodziejski, a Phoenix resident and voter, filed suit because, as a non-property owner, she was denied the right to vote on the general obligation bond.\(^\text{124}\) The Court found an equal protection violation, holding that one-person, one-vote required an equal vote between property owners and non-property owners, even where the owners “have interests somewhat different from the interests of non-property owners” where the bonds, while primarily paid from property taxes, could be paid from other general taxes (especially in the event of economic collapse).\(^\text{125}\) The result here is noteworthy, too, considering that New York BIDs may take on debt and that property owners may pass their assessment costs on to their tenants (or charge higher rents if a BID causes increased property values).

*City of Phoenix*, however, was among the last cases in the Court’s expansion of one-person, one-vote before President Nixon began to appoint more conservative justices in the 1970s. The *Avery* Court had mentioned the possibility of a “special-purpose unit of government assigned the performance of functions affecting definable groups of constituents more than other constituents.”\(^\text{126}\)

\(^{120}\) *Id.* at 483-04.

\(^{121}\) *Id.* at 485-06.

\(^{122}\) *City of Phoenix*, 399 U.S. at 206.

\(^{123}\) *Id.*

\(^{124}\) *Id.* at 206-07.

\(^{125}\) *Id.* at 212.

\(^{126}\) *Avery*, 390 U.S. at 483-4.
planted the seed of the special-purpose-district exception, which would take root and grow in two water district cases: *Salyer Land Co. v. Tulare Lake Basin Water Storage District* and *Ball v. James*.

**B. The Special-Purpose-District Exception**

The Court revisited the special-purpose district in *Salyer Land*. The case signals a change in the Court’s previously expansive application of the one-person, one-vote principle after *Reynolds*. The challenge in this case involved a water storage district created under the California Water Storage District Act. To distinguish the “special” nature of this district, Justice Rehnquist, writing for the majority, provides an extensive quotation from Justice Sutherland on the toils of pioneers in the West as they brought water to previously desert lands, noting the “necessary” involvement of federal and state governments in major water projects. The water storage district was authorized to “plan projects and execute approved projects for the acquisition, appropriation, diversion, storage, conservation, and distribution of water,” with a primary purpose of “[providing] for the acquisition, storage, and distribution of water for farming . . . ” The Court found that the district provided “no other general public services . . . ” As in a BID, property assessments funded the water storage district and a board of directors governed the district. Landowners elected the board, with votes “apportioned according to the assessed valuation of the land.”

The Court applied a rational basis standard to hold that the water district voting qualification did not violate the Equal Protection Clause, declining to extend one-person, one-vote and an-

---

127 *See Salyer Land*, 410 U.S. at 720.
128 *Id.* at 721.
129 *See id.* at 721-2. It is fitting that Justice Rehnquist, so instrumental in turning the Court back toward Lochner Era jurisprudence, begins this decision with a quote from Justice Sutherland, one of the conservative “four horsemen” of the pre-New Deal Era Court.
130 *Id.* at 723 (quoting Calif. Water Code § 42200 et seq.) (internal quotation marks omitted).
131 *Id.* at 728.
132 *Salyer Land*, 410 U.S. at 728-29 (“It provides no other general public services such as schools, housing, transportation, utilities, roads, or anything else of the type ordinarily financed by a municipal body. There are no towns, shops, hospitals, or other facilities designed to improve the quality of life within the district boundaries, and it does not have a fire department, police, buses, or trains”) (internal citations omitted).
133 *Id.* at 725.
134 *Id.* at 734-35.
swering the question posed in *Avery* regarding districts that give “greater influence to the citizens most affected by the organization’s functions.” The Court held that the landowner-only voting qualification did not violate equal protection because the California Legislature could have rationally determined that landowners would “bear the entire burden of the district’s costs” and therefore should be dominant in its control.

The Court applied and expanded the special-purpose-district exception in *Ball v. James*. Here, plaintiffs challenged the voting system of a larger, more comprehensive “water reclamation district” in Arizona, the Salt River Project Agricultural Improvement and Power District. The statute at issue in the case gave the district power to allow only district property owners to vote, and to apportion their voting power according to the amount of land they owned. As in *Salyer*, the Court took a historical approach, perhaps indicating that the Court will look first at the “primary and originating purpose” of a special-purpose district. In reversing the Ninth Circuit’s application of *Salyer*, the Court deemphasized the lower court’s broad reading of the Salt River Project’s powers, instead focusing on the “relatively narrow” original powers.

The Ninth Circuit had found, and the Court agreed (but found constitutionally irrelevant), that, although originally a water storage district similar to that in *Salyer*, the Salt River Project, “at least in its modern form,” had grown into a major supplier of hydroelectric power that included almost half the population of Arizona. The Supreme Court, however, focused narrowly on the “constitutionally relevant” fact that the Salt River Project distributed all of its water according to land ownership. The Court also made clear that the Project did not have “the sort of governmental powers that invoke the strict demands of *Reynolds*,” These powers include, as the Court notes: “ad valorem property and sales taxes . . . laws governing the conduct of citizens . . . [and] such normal functions of government as the maintenance of streets, the opera-

---

135 *Avery*, 390 U.S. at 483-84.
136 *Salyer Land*, 410 U.S. at 731.
137 *Ball*, 451 U.S. at 357.
138 *id.* at 359.
139 *id.* at 367.
140 *id.*
141 *id.* at 361.
142 *See Ball*, 451 U.S. at 365.
143 *id.* at 367.
144 *id.* at 366.
tion of schools, or sanitation, health, or welfare services.” As the Court would have it, the Salt River Project, which the Ninth Circuit found to be a major supplier of hydroelectric power and water used in urban areas, was, for equal protection purposes, a mere water storage and delivery service that, while nominally public in character, was more like a “business enterprise[ ], created by and chiefly benefiting a specific group of landowners.” Thus, rational basis scrutiny as applied to the special-purpose-district exception was well established when plaintiffs challenged the New York BID Act in the Second Circuit in the 1990s.

In Kessler v. Grand Central District Management Association, the Second Circuit dealt squarely with the issue of the New York BID Act’s property-owning majority requirement for every BID board. Plaintiffs, both residents of the Grand Central Business Improvement District (GCBID), alleged that the BID’s governing non-profit, the Grand Central District Management Association (GCDMA), exercised “general governmental power” and thus should be subject to one-person, one-vote, requiring strict scrutiny under the Equal Protection Clause. The Second Circuit disagreed, holding that the special-purpose-district exception applied, and that the BID “[has] a disproportionate effect on property owners[ ] and . . . has no primary responsibilities or general powers typical of a governmental entity.”

The Second Circuit considered the BID’s powers in the areas of security, sanitation, and social services. The Court reached this conclusion because GCDMA’s “responsibility . . . is at most secondary to that of the City,” GCDMA provided quantitatively fewer services than the City, and GCDMA’s services were “qualitatively different.” Considering the services provided by the City in the district in light of § 980-J(a), the Court determined that GCDMA’s services were cosmetic or operated by referral to the City, and its responsibilities were “at most secondary to that of the City” (e.g., GCDMA guards patrolled, but called the City police for

145 Id.
146 Id. at 361.
147 Ball, 451 U.S. at 357.
148 Id. at 368.
149 See Kessler, 158 F.3d at 92.
150 Id. at 93-94.
151 Id. at 108.
152 Id. at 105.
153 Gen. Mun. § 980-J(a) (“the [district] plan must be in addition to or an enhancement of those provided by the municipality prior to the establishment of the district”).
law enforcement).  

C. The One-Person, One-Vote Challenge to the Expanded BID

Should BIDs continue to expand, and NID/RIDs become commonplace, future plaintiffs may still be able to bring an equal protection challenge in the Second Circuit. The Kessler Court focused on the purposes and limited powers of the GCDMA relative to the City. If a district were of extensive size and providing more comprehensive services, a court might be willing to distinguish Kessler and apply one-person, one vote. Avery, after all, speaks not of “secondary” responsibilities, as noted in Kessler, but of powers delegated by states to their subdivisions. Further, Salyer and Ball are easily distinguishable from BIDs on one point: both deal with management of a scarce natural resource, within a historical context of government experimentation with different forms of storage and distribution. If BIDs continue to grow and expand, a court may be willing to view them as a delegation of state power to private interests based on property ownership. Such a prospect implicates the democratic principles underlying one-person, one-vote, although members of the current Supreme Court may disagree.

Kessler found that the voting provision of the BID Act had a reasonable relationship with the purposes of the GCDMA, namely “to pool [property owners’] resources to accomplish mutually beneficial projects to increase the attractiveness of district property for commercial purposes.” As described above, the HRP NID, on the other hand, pools property owners’ resources to accomplish other purposes, primarily as a funding source for the Hudson River Park, but also, one might speculate, as a way to increase residential property values in the rapidly developing district as a whole. It pools the resources of more residential property owners than any other BID in New York City; does this meet the commercial purpose? At present, this reasonable relationship between the purpose of the NID and the BID Act’s mandated governance structure appears to be the doctrinal weak point, particularly compared to the legislative intent of the BID Act. With a change from BID to NID, the analysis under Kessler might change, particularly if NID-

154 Kessler, 158 F.3d at 105.
155 Id.
156 Avery, 390 U.S. at 480.
157 Kessler, 158 F.3d at 108.
158 See Stukane, supra note 84.
like structures continue to grow and to privatize more municipal services.

Conclusion

The proposed HRP NID was a potentially disturbing misuse of the New York BID Act, including a fundamental change and significant expansion of its purpose of “restoring and promoting business activity.” The HRP NID proposal is currently withdrawn, but the potential for abuse of the BID concept remains, particularly where public budgets are tight and moneyed private interests seek power over services that ought to be public and run by democratically accountable officials. Before another such proposal surfaces, the New York Legislature should reevaluate the intent and scope of its BID Act to address BID overreach before it is entrenched in debt-financed districts that are nearly impossible to dissolve. Should these districts consume more of our cities, plaintiffs should again attempt equal protection challenges, and the courts should apply the one-person, one-vote principle to ensure that all residents of a district have an equal voice in its actions.

160 Id.
NO ACCESS, NO CHOICE: FOSTER CARE YOUTH, ABORTION, AND STATE REMOVAL OF CHILDREN

Kara Sheli Wallis†

CONTENTS

INTRODUCTION ............................................... 119

I. ENTERING THE SYSTEM: THE CHILD WELFARE LEGAL SCHEME ............ 122

II. PREVENTING PREGNANCY: THE SYSTEM’S FAILURE TO PROVIDE SUPPORT AND ACCESS TO RESOURCES .......... 130

III. TERMINATING A PREGNANCY: FOSTER YOUTH’S RIGHTS AND RESTRICTIONS ............................................ 136
  A. Background of the Legal Landscape of Abortion. 136
  B. Judicial Bypass: Preventing Minors from Access to Abortion ......................... 138
  C. Judicial Bypass and Foster Youth: Exceptions, Legal Quandaries, and Risk of Harm ............. 142

IV. MINOR PARENTS IN FOSTER CARE: THE RISK OF LOSING A CHILD .............. 146

V. A BETTER SYSTEM: CONCEPTUAL CHANGE AND NEW PREMISES ...................... 149

CONCLUSION ................................................. 152

INTRODUCTION

In 2013, an anti-abortion judge garnered national attention when the Nebraska Supreme Court upheld his decision to deny a pregnant foster youth access to an abortion.¹ Known as Anonymous 5, the sixteen-year-old petitioner sought a judicial bypass of

† J.D. Candidate ‘15, City University of New York (CUNY) School of Law; M.A. Ethics & Society ‘12, Fordham University; B.A. ‘09, Seattle University. Ms. Wallis thanks Professor Ruthann Robson, Professor Andrea McArdle, Professor Ann Cammett for their invaluable feedback and support; the Board and staff of CUNY Law Review for their tireless efforts to support social justice scholarship; and special thanks to National Advocates for Pregnant Women and associates, including Professor Jeanne Flavin, Lynn Paltrow, Farah Diaz-Tello, Laura Huss, Kylee Sunderlin, Emma Ketteringham, and Katherine McCabe for their unlimited compassion and resilience in the face of struggle.

¹ In re Petition of Anonymous 5, 838 N.W.2d 226, 229 (Neb. 2013); George Chidi, Nebraska Supreme Court rules 16-year-old ‘not mature enough’ for abortion, The Raw Story (October 5, 2013), http://www.rawstory.com/rs/2013/10/05/nebraska/ (“The district court judge, Peter C. Batallion, appears to have served in the 1980s on the com-
the Nebraska law that requires a minor to obtain parental consent before accessing abortion services. At a confidential hearing, she told the judge that she was not in a position to financially support a child and that she could not “be the right mom that [she] would like to be right now.” She also testified that her foster parents might resent her and her child because of their strong religious beliefs about sexuality and abortion. She worried they would tell her young siblings, her only biological family left, that she was a “bad person.” She indicated she and her child might become homeless if she were required to tell her conservative foster parents about her pregnancy.

In response to these concerns, the judge asked Anonymous if she would rather “kill the child inside [her]” than “risk problems with the foster care people,” and ultimately denied her request, ruling she was “not sufficiently mature and well-informed” to choose on her own to end her pregnancy. On appeal, the Nebraska Supreme Court upheld the ruling, a decision that incurred a plethora of public comment. Many critics poignantly emphasized that finding a minor too immature for an abortion simultaneously

---

2 Anonymous 5, 838 N.W.2d at 231.
3 Id.
4 Id.
5 Id.
6 Id.
7 Anonymous 5, 838 N.W.2d at 231.
8 Id.
9 See, e.g., Hilary Hanson, Nebraska Court Rules Teen Too Immature for Abortion, HUFFINGTON POST (Oct. 9, 2013), http://www.huffingtonpost.com/2013/10/09/teen-too-immature-abortion_n_4072921.html; Nina Liss-Schultz, Nebraska Court Decides 16-Year-Old Is Too Immature for an Abortion, But Motherhood’s Okay, MOTHER JONES (Oct. 8, 2013), http://www.motherjones.com/mojo/2013/10/parental-consent-laws-nebraska-abortion-courts (describing the Anonymous 5 court as “essentially finding [the minor] mature enough to carry a baby she doesn’t want but too immature to consent to her own abortion”); Katy Waldman, Nebraska Court Rules Teen Too Immature for an Abortion, Fine to Raise a Kid, SLATE (Oct. 7, 2013), http://www.slate.com/blogs/xx_factor/2013/10/07/nebraska_supreme_court_rules_that_a_16_year_old_in_foster_care_is_not_mature.html (“The Nebraska Supreme Court denied a 16-year-old foster child’s request for an abortion on Friday because she was ‘not sufficiently mature’ to make the decision herself. So instead, this immature young woman who does not want a baby will become a mother. Everyone wins.”); Dan Arel, Nebraska Court Rules 16-year-old Girl not Mature Enough for Abortion, EXAMINER (Oct. 8, 2013), http://www.examiner.com/article/nebraska-court-rules-16-year-old-girl-not-mature-enough-for-abortion (“A 16-year-old Nebraskan girl who had to petition the Nebraska Supreme Court for her federally protected right to an abortion was denied when the judge ruled she was not mature enough to have an abortion. Oddly enough, they believe she is mature enough to be a mother.”).
2014] NO ACCESS, NO CHOICE 121

ously deems her mature enough to parent.10 Across news sites, reporters began stories with quips highlighting this paradox, including Slate’s article Nebraska Court Rules Teen Too Immature for an Abortion, Fine to Raise a Kid.11

Although clever, the headline seriously understates the extraordinary barriers to reproductive justice that pregnant and parenting foster youth face. When a foster minor like Anonymous 5 is denied access to abortion, she may also be unable to parent her child because of the significant rate of state removal of children from mothers in foster care.12 As a result, for many pregnant and parenting youth in foster care, the quip horrifyingly becomes “too immature for an abortion and too immature for motherhood.”13

Across the reproductive spectrum, the state fails to provide foster youth with the resources, rights, and support necessary to choose whether to get pregnant, give birth, or parent a child.14 At the start, without access to adequate sex education and reproductive health services, a foster minor may lack real autonomy in choosing to become pregnant and carry her pregnancy to term. Upon giving birth, she may be coerced into adoption by a caseworker or foster parents who do not wish to accommodate the newborn. If she retains custody, the new parent may likely also face accusations of abuse or neglect in a defective child welfare system inundated with systemic prejudice against the poor that consistently fails to provide for its wards.15 As a result of system failure, a disadvantaged mother in foster care, who very likely did not have much choice in becoming a parent, might also face such lack of

10 See sources cited supra note 9.
11 Waldman, supra note 9.
12 WASH. STATE DEP’T OF SOC. & HEALTH SERVS., PREGNANT AND PARENTING YOUTH IN FOSTER CARE IN WASH. STATE: COMPARISON TO OTHER TEENS AND YOUNG WOMEN WHO GAVE BIRTH 10 (2014), available at http://www.dshs.wa.gov/pdf/ms/rda/re search/11/202.pdf (finding that the “rate of out of home placement for children born to Foster Youth (7%) was more than 10 times higher than the rates for Medicaid Teens (0.5%) and Medicaid Young Adults (0.6%) and nearly 25 times higher than the rate for Non-Medicaid Teens (0.3%)”); Amy Dworsky & Jan DeCourcey, Pregnant and Parenting Foster Youth: Their Needs, Their Experiences, CHAPIN HALL AT THE UNIVERSITY OF CHICAGO 34 (2009), available at http://www.chapinhall.org/sites/default/files/Pregnant_Foster_Youth_final_081109.pdf (finding that of the population of foster youth mothers they surveyed, “11 percent had a child placed in foster care”).
choice in remaining one.\textsuperscript{16}

This comment tracks the reproductive life course of a foster youth and the various legal and policy-based obstacles she may face, beginning with pre-pregnancy and entry into foster care, and ending with state removal of children.\textsuperscript{17} Part I provides an overview of the child welfare system and its failure to achieve the goals upon which it is premised. Part II generally discusses the regulatory scheme and the role of increasing privatization in denying foster youth adequate sex education and reproductive health services. Part III focuses on judicial bypass as applied to foster youth, which creates legal absurdities and significant risks to minors’ health and safety. Part IV discusses risks that a pregnant or parenting foster youth faces: lack of prenatal care, unwarranted scrutiny and judgment, and a high risk of state removal of her child—not because of conventional understandings of abuse or neglect, but because the state fails to provide her the resources to parent. Finally, Part V recommends various practical interventions to improve outcomes for foster youth, including major shifts in the way the system approaches child welfare, teen sexuality, and reproductive health.\textsuperscript{18}

I. ENTERING THE SYSTEM: THE CHILD WELFARE LEGAL SCHEME

To begin, this section analyzes the legal scheme of the child welfare system, focusing on how youth end up in state care. Family law is typically decided by each state.\textsuperscript{19} But when it comes to child welfare, each state conforms to federal requirements in order to receive funding for its child welfare system. In 1996, these federal requirements underwent an extreme revision, changing the focus from keeping youth in their communities to a more “child protective” stance, purportedly designed to protect minors from harm and promoting adoption as a means of securing stable placements

\textsuperscript{16} See id. at 2.

\textsuperscript{17} This comment assumes the following definition of reproductive justice: “Reproductive justice will exist when all people can exercise the rights and access the resources they need to thrive and to decide whether, when, and how to have and parent children with dignity, free from discrimination, coercion, or violence.” LAW STUDENTS FOR REPRODUCTIVE JUSTICE, Motivation (2013), available at http://lsrj.org/motivation/.

\textsuperscript{18} Recognizing the importance of language, this comment uses “children” when discussing the private familial context, “minors” when referring to the legal system, and “youth” when referencing greater social concerns regarding the population in foster care.

\textsuperscript{19} “[R]egulation of domestic relations’ is ‘an area that has long been regarded as a virtually exclusive province of the States.’” United States v. Windsor, 133 S.Ct. 2675, 2680 (2013) (quoting Sosna v. Iowa, 419 U.S. 393, 404 (1975)).
in families.\textsuperscript{20}

Known as the Adoption and Safe Families Act (\textquotedblleft ASFA\textquotedblright), the law was designed to secure \textquotedblleft permanency\textquotedblright for a foster minor by promoting adoption rather than reunification with the family of origin.\textsuperscript{21} Signed into law by then-President Clinton, the legislation was a response to high-profile child abuse cases making national news because of their horrific facts and child deaths.\textsuperscript{22} Sadly, these news stories produced an erroneous concern that agencies were reuniting families at the expense of child safety,\textsuperscript{23} when in fact, most of those tragedies were a result of administrative failure, not because an agency prioritized family unity over removal of a child.\textsuperscript{24}

For instance, J.W. was a child who died in his mother\textquotesingle s care while an agency was investigating her for abuse.\textsuperscript{25} The tragedy made national news with legislators framing it as a \textquotedblleft casualty of the federal law.\textquotedblright\textsuperscript{26} Backers of ASFA used the death to say the old law required the agency to make too many efforts to keep families together at the expense of children\textquotesingle s safety.\textsuperscript{27} In reality, however, J.W. remained in the home because the agency lost his records, not because the law required the agency to keep him with his mother.\textsuperscript{28} Regardless, politicians used such high-profile tragedies to pass ASFA—an agency now only needs to make reasonable efforts (as opposed to the previous \textquotedblleft diligent efforts\textquotedblright) to keep families together.\textsuperscript{29}

Consequently, more children are unnecessarily removed from their families and placed into stranger foster care because of poverty-related issues rather than intentional maltreatment that is typically associated with abuse and neglect.\textsuperscript{30} With legal neglect

\begin{flushright}
\begin{itemize}
\item \textsuperscript{21} Id. § 305(b)(2) (limiting family reunification to a "15-month period" beginning "on the date that the child, pursuant to section 475(5)(F), is considered to have entered foster care").
\item \textsuperscript{23} Id.
\item \textsuperscript{24} Id. at 274.
\item \textsuperscript{25} Id.
\item \textsuperscript{26} See id.
\item \textsuperscript{27} Crossley, \textit{supra} note 22, at 274.
\item \textsuperscript{28} Id.
\item \textsuperscript{29} Id. at 271-74; In order for an agency to show substantial conformity with federal law to determine eligibility for federal funding, it must achieve the outcome that "children are, first and foremost, protected from abuse and neglect [and] children are safely maintained in their own homes whenever possible and appropriate." 45 C.F.R. § 1355.34(b)(1)(i).
\item \textsuperscript{30} Ann Cammett, \textit{Introduction to The Rights of Parents with Children in Foster Care:}
\end{itemize}
\end{flushright}
making up more than seventy-five percent of child welfare investigations, a state’s safety concern that justifies removal of a child is often more closely linked to poverty than to someone being a “bad parent.”

For example, an agency may include in the basis for removing a child that the mother has too much take-out and fast food in the refrigerator despite lack of local access to affordable healthy groceries; or for her not visiting the child enough in the hospital despite her inability to pay for transportation; or for her son’s truancy from school while she balances two full-time jobs. Relying on high-profile abuse cases for its passage, ASFA made it easier for an agency to take away a parent’s custody of her child, rather than address the underlying socioeconomic causes of the problem, because of the reduced efforts required by the agency to keep the family intact.

Similarly, horror stories about minors languishing in the foster care system resulted in a push for adoption over traditional family unity. Federal law now requires states to file a petition to terminate a parent’s rights when her child has been in state custody for fifteen of the most recent twenty-two months, or if the parent commits a certain crime against the minor. ASFA also includes that for every successful termination of parental rights and adoption of

---

Removals Arising from Economic Hardship and the Predicative Power of Race Association of the Bar of the City of New York, 6 N.Y. CITY L. REV. 61, 62 (2003) (“The policy directive, absorbed and implemented by agency officials and caseworkers alike, is crudely referred to as ‘when in doubt, yank them out.’ As a practical matter, the agency failed to make a distinction between cases of child abuse and severe parental neglect—which constitute a small percentage of indicated cases—and child neglect arising from poverty.”).


33 Examples based on cases the author witnessed while observing abuse and neglect proceedings in Bronx County Family Court during Summer of 2013, and Brooklyn County Family Court in Fall of 2014. See also Dorothy Roberts, Shattered Bonds: The Color of Child Welfare 26-29 (2002); Kamala D. Harris, In School On Track: Attorney General’s 2013 Report on California’s Elementary School Truancy & Absenteeism Crisis, CALIFORNIA ATTORNEY GENERAL (2013), available at https://oag.ca.gov/tractancy/2013/ch5.

34 Grossley, supra note 22, at 271-273.

35 42 U.S.C.A. § 675(5)(E) (West, Westlaw through P.L. 113-163 (excluding P.L. 113-128)).
a minor, foster care agencies receive a substantial financial reward.\textsuperscript{36} So, while an agency is responsible for making reasonable efforts to reunify a child with her parent, that same agency also has major financial incentive to see the minor remain in care so that the parent’s rights are terminated and the minor is successfully adopted.\textsuperscript{37} The financial incentives have been touted as successes, with the prerogative given to adoption rather than a minor’s return to her parents or community, regardless of the context in which she entered or remained in state care.\textsuperscript{38}

When a state has jurisdiction over a minor, because she is in care or otherwise, a court must hold a yearly hearing.\textsuperscript{39} During this hearing, a court decides her permanent living arrangement, determining a range of issues such as: (1) whether the child should return to her parents; (2) whether parents’ rights should be terminated and the minor placed for adoption; (3) whether another person should obtain legal guardianship; or (4) whether the child should be placed with a family member or in another arrangement that is in the minor’s best interests.\textsuperscript{40}

After the court determines the minor’s permanency plan, the agency must make reasonable efforts towards this end.\textsuperscript{41} States determine whether to prioritize children being placed with family members because no priority is given in ASFA. However, even when kinship care is prioritized by statute, a low-income or non-traditional family member will likely not meet the arduous requirements of a “fit and willing relative,” and the minor will be placed in stranger foster care.\textsuperscript{42}

For example, New York City denies family member requests to foster their kin because of arbitrary rules regarding the family’s

\textsuperscript{36} Adoption and Safe Families Act of 1997, \textit{supra} note 20; \textit{How the Adoption Incentives Program can Incentivize Adoptions}, CONG. COAL. ON ADOPTION INST. (Feb. 27, 2013), http://ccainstituteblog.org/2013/02/27/how-the-adoption-incentive-program-can-incentivise-adoptions/ (“Originally created in 1997 as part of the Adoption and Safe Families Act, the Adoption Incentives Program has delivered a total of $375 million in bonuses to states that were successful in increasing the number of children adopted out of foster care.”).

\textsuperscript{37} See Crossley, \textit{supra} note 22, at 271-73; Schorr, \textit{supra} note 32, at 120 (“Now, foster parents and foster care administrators have an economic incentive to perpetuate the institutionalized practice of child removal and placement.”).

\textsuperscript{38} CONG. COAL. ON ADOPTION INST., \textit{supra} note 36.

\textsuperscript{39} Adoption and Safe Families Act of 1997, \textit{supra} note 20.

\textsuperscript{40} Id.

\textsuperscript{41} Id.

\textsuperscript{42} 42 U.S.C.A. § 675(1)(E) (West 2011); Cammett, \textit{supra} note 30; \textit{See also} Katherine Moore, \textit{Pregnant In Foster Care: Prenatal Care, Abortion, And The Consequences For Foster Families}, 23 COLUMN. J. GENDER & L. 29, 33-36 (2012).
home. Low-income families might only have one- or two-bedroom apartments, but to foster their nieces, nephews, or grandchildren, families must have separate bedrooms for opposite sex children over seven years old.\footnote{18 N.Y.C.R.R. § 443.3(a).} No more than three people can occupy a bedroom where children sleep.\footnote{Id.} An adult may not sleep in the same room with a child of the opposite sex who is over the age of three.\footnote{Id.} No child may sleep in the same bed as an adult, even if that adult is her grandmother.\footnote{Id.} Additional rules require all members in the household to undergo intensive background checks.\footnote{Id.} The home will be denied foster care status because of someone’s stale criminal conviction or an abuse or neglect registry report, even if a court has found the report unsubstantiated or that such a history would not pose any risk to the child.\footnote{18 N.Y.C.R.R. § 443.3(a).} For families living in poverty, these requirements can be impossible to meet.

When in stranger foster care, minors may still enjoy visits with their parents, who often maintain significant legal rights to parent their children.\footnote{Santosky v. Kramer, 455 U.S. 745, 753 (1982) (“The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State”); see also Smith v. Org. of Foster Families for Equality & Reform, 431 U.S. 816, 821 (1977); see, e.g., In re Lyle A., 14 Misc. 3d 842, 850 (Fam. Ct. 2006) (“A parent whose child is in foster care has the right to make the decision regarding whether or not his or her child will be given psychotropic drugs.”).} But for low-income parents, visitation is often difficult to maintain because of agencies’ inflexible visitation hours and low standard of accommodation for work conflicts, transportation, or other special needs. A parent might also struggle to complete the time-consuming regime of services mandated by the court. These unwanted and unhelpful programs are typically not tailored to meet the parent’s individual needs and can instead be overly burdensome and negatively impact the family unit as a whole.\footnote{See Schorr, supra note 32. A court may not exercise jurisdictional control over a parent until after a trial and finding of abuse or neglect. However, even without a finding of abuse or neglect, a parent often must participate in court-mandated services to enjoy visits with her child, and to show a willingness to cooperate with the court.}

Indeed, the current system “substitutes costly, poorly tailored interventions—few of which have been shown to improve the care of children—for systemic and lasting investment in our poor com-
For example, the court typically assigns all parents accused of abuse and neglect to parenting classes. But the support a fifteen-year-old parenting foster minor needs is much different from what a forty-five-year-old mother of four needs—yet the two are assigned to the same two-hour mandatory parenting skills lecture. For allegations involving drug or alcohol use, burdensome programs may be mandatory, even when such programs are ineffective and non-responsive to the individual’s needs or supposed risk to the minor.

Additionally, overworked and undertrained caseworkers determine what “good” parenting is through subjective value judgments, often colored by prejudice and cultural assumptions. Take, for example, a mother’s plight recently profiled by The New Yorker—a caseworker took an Egyptian mother’s shyness for shiftiness and mysteriousness, ultimately forbidding her from speaking in Arabic to her son. A caseworker’s prejudice and bias often shape the standard for what is deemed acceptable parenting and who is ultimately accused of abuse and neglect. Such room for personal and

51 Leaving your children? Go to a parental skills class. No need to consider that what you really need is some day-care assistance, or someone to watch the little ones while you take the older children to the store or the doctor or simply for a walk. You’ve sexually abused your child? Go to a sex-offenders clinic, where you will get behavioral modification therapy. No need to explore the physical or emotional violence you experienced as a child or your own lack of self-esteem and sense of alienation. Abusing drugs or alcohol? Have your urine tested regularly and exercise greater self-discipline. No need to say that you feel narcotics may be the best thing going, given the conditions under which you’re living. This does not mean that these behaviors should not be controlled; indeed, they must be. But in the absence of a real commitment to addressing the isolation and degradation from which abuse and neglect follow, they will only continue.

Schorr, supra note 32, at 121; see also Ketteringham supra note 32.

52 Example from Judge Maria Arias, New York City Family Court, Kings County, Panel Speaker at the City University of New York (CUNY) Law Students for Reproductive Justice Spring Panel: Youth, Gender, and Social Justice Lawyering in Family Court (April 3, 2014).

53 Id.


55 Roberts, supra note 33, at 17 (“A national study of child protective services by the U.S. Department of Health and Human Services reported that ‘minority children, and in particular African American children, are more likely to be in foster care placement than receive in-home services, even when they have the same problems and characteristics as white children.’ . . . Government authorities appear to believe that maltreatment of Black children results from pathologies intrinsic to their homes and that helping them requires dislocating them from their families. Child welfare for Black children usually means shattering the bonds with their parents.”).
systemic biases partly accounts for the gross racial disproportionality of children of color in the child welfare system and the disparate treatment they receive while in care.\footnote{Id. at 16-25 (“Not only do Black children enter the system in disproportionate numbers and for longer periods of time, but they also receive lower-quality services once they get there.” “Black children are less likely than white children to either be returned home or adopted.”).}

Federal law also sets the goals of the foster care programs.\footnote{45 C.F.R. §§ 1355, 1356, 1357 (2014).} In order to receive funding, an agency is evaluated on its ability to meet various outcomes, including that the minors in its care receive appropriate educational, physical, and mental health services.\footnote{The federal government tracks and measures state outcomes in relation to the requirements set out in this highly complex and opaque funding scheme. 45 C.F.R. § 1355.34(b)(iii) (2012); Gail Chang Bolur, For the Well-Being of Minnesota’s Foster Children: What Federal Legislation Requires, 31 WM. MITCHELL L. REV. 897, 899 (2005) (discussing 42 U.S.C. § 677 (2002)).} States, however, rarely actualize these goals, adversely impacting for life the almost half a million youth in foster care; yet states and the private independent agencies they contract with still receive funding.\footnote{Ramesh Kasarabada, Fostering the Human Rights of Youth in Foster Care: Defining Reasonable Efforts To Improve Consequences of Aging Out, 17 CUNY L. REV. 145, 151-157 (2013); U.S. DEP’T OF HEALTH & HUMAN SERVICES, ADMIN. FOR CHILDREN & FAMILIES, THE AFCRS REPORT (July 2012), available at http://www.acf.hhs.gov/sites/default/files/cb/afcarsreport19.pdf.}

Indeed, the growing trend of privatizing foster care agencies has worsened the outcomes for foster youth—indeed non-governmental organizations are left alone to interpret and fulfill the already-vague federal requirements for achieving the health and well being of minors. This includes religious agencies that may have other priorities or sectarian beliefs regarding what is best for the minor. Of additional worry are agencies that function on a for-profit model when they receive federal monies for every termination of parental rights and private monies for successful adoption of a child—a model that commodifies children, rather than encourages entities to act in children’s best interests.\footnote{See Crossley, supra note 22, at 271-73; For a background on problems associated with privatizing traditional government functions and the for-profit functioning of non-profits, see James J. Fishman, The Nonprofit Sector: Myths and Realities, 9 N.Y. CITY L. REV. 303, 306 (2006) (“Nonprofits are far from independent of private enterprise or government. There is an extraordinary degree of interface between government and nonprofits today. Nonprofits mimic for-profit firms, and the private sector plays an enormous role in the nonprofit sector. Many nonprofits engage substantially, if not excessively, in regular business activity.”).}

Foster youth often find themselves separated from their communities for the first time, heightening the high risks that minors
in foster care already face. For example, as compared to their peers, foster care youth are more likely to drop out of high school,\textsuperscript{61} face homelessness,\textsuperscript{62} get inconsistent health care (if any),\textsuperscript{63} and experience trauma, including the trauma of being separated from their parents.\textsuperscript{64} Foster youth also have increased rates of incarceration and interaction with the juvenile criminal system,\textsuperscript{65} repeated pregnancy,\textsuperscript{66} teen parenting,\textsuperscript{67} joblessness,\textsuperscript{68} and extreme poverty.\textsuperscript{69}

Already disadvantaged by the system, foster care youth then face complete abandonment when they “age out” of the system.\textsuperscript{70} Federal law requires an agency to plan for supporting youth as they transition out of care.\textsuperscript{71} However, the plan requirement is vague

\begin{flushright}
\textsuperscript{61} Dworsky & Decoursey, \textit{supra} note 12, at 34 (“Foster youth were more likely to drop out (or, in the case of males, become incarcerated) than to graduate.”).  \\
\textsuperscript{62} Mark E. Courtney, et. al., \textit{Midwest Evaluation of the Adult Functioning of Former Foster Youth: Outcomes at age 23 and 24}, CHAPIN HILL AT THE UNIVERSITY OF CHICAGO, 10 2010, available at http://www.chapinhall.org/sites/default/files/Midwest_Study_Age_23_24.pdf.  \\
\textsuperscript{63} Id.  \\
\textsuperscript{64} COMMITTEE ON EARLY CHILDHOOD, ADOPTION, AND DEPENDENT CARE, \textit{Health Care of Young Children in Foster Care}, 109 PEDIATRICS 536, 539 (2002), available at http://pediatrics.aappublications.org/content/109/3/536.full.pdf (“Certainly, even brief separation from parental care is an unfortunate and usually traumatic event for children.”); Karen Baynes-Dunning & Karen Worthington, Responding to the Needs of Adolescent Girls in Foster Care, 20 GEO. J. ON POVERTY L. & POL’Y 321, 343 (2013) (describing “the emotional trauma that is caused simply by a family’s involvement with the child welfare system.”).  \\
\textsuperscript{65} Children in child welfare systems are at a higher risk of involvement with the juvenile criminal justice system as compared to their peers. The reasons for this vary, but include the fact that children in the child welfare system are often low-income and of color, making them a target for the criminal justice system. Additionally, child welfare agencies will often report the youth in their custody for various crimes. The rate of interaction between these two systems is incredibly apparent such that one advocate recommends that agencies, in addition to making the legally required reasonable efforts to reunite families, should make reasonable efforts to keep children in their care from becoming targets of the juvenile criminal justice system, which would include not reporting on their wards to law enforcement. Baynes-Dunning & Worthington, \textit{supra} note 64 at 325; Claudette Brown, \textit{Crossing over: From Child Welfare to Juvenile Justice}, Md. Bar J. 22, 18 (2003).  \\
\textsuperscript{66} Dworsky & Decoursey, \textit{supra} note 12 at 33.  \\
\textsuperscript{67} Id.  \\
\textsuperscript{68} Kasarabada, \textit{supra} note 59.  \\
\textsuperscript{69} Id.  \\
\textsuperscript{70} Id. Each state varies on how long a youth can remain in foster care, typically ranging between eighteen and twenty-one years old, with some states allowing longer periods when the youth is employed or enrolled in school.  \\
\textsuperscript{71} 42 U.S.C.A. § 675(5)(H) (During the ninety-days before the child ends care, “a caseworker on the staff of the State agency, and, as appropriate, other representatives of the child provide the child with assistance and support in developing a transition plan that is personalized at the direction of the child, includes specific options on
and the agency is not required to take steps to actually implement the plan or provide the minor with support.\(^2\) This leaves the minor virtually alone and without any resources, exacerbating the disadvantages she may already face.\(^3\) The state’s failure to provide for foster youth as they age out is so egregious that it may likely violate the basic tenets of human rights and various international laws.\(^4\)

II. Preventing Pregnancy: The System’s Failure to Provide Support and Access to Resources

The systemic failure of the state to provide for foster youth is exemplified by a lack of pre-pregnancy education and access to resources available to foster youth. Generally, American teens are uninformed about sex, pregnancy, and pregnancy prevention because of a national failure to educate our youth, partially resulting from state policies that place political and religious ideology above the health, safety, and future of youth.\(^5\) Foster youth are

housing, health insurance, education, local opportunities for mentors and continuing support services, and work force supports and employment services, includes information about the importance of designating another individual to make health care treatment decisions on behalf of the child if the child becomes unable to participate in such decisions and the child does not have, or does not want, a relative who would otherwise be authorized under State law to make such decisions, and provides the child with the option to execute a health care power of attorney, health care proxy, or other similar document recognized under State law, and is as detailed as the child may elect.\(^6\).

\(^2\) Id.; Kasarabada, supra note 59.

\(^3\) Id.


\(^5\) American youth are undereducated and misinformed about sex, pregnancy, and pregnancy prevention. Only twenty-two states plus the District of Columbia mandate sex education. Of those states, only twelve of them require that information be medically accurate. Additionally, the majority of states require that if sex education is given, then abstinence from sex must be stressed or covered. The majority of states have this policy, despite many studies proving that these models be ineffective, dangerous for youth, and result in higher rates of unwanted teen pregnancy and Sexually Transmitted Infections (STIs). The increase of the influence of religious ideologies in state policies is partially responsible for the prevalence of these harmful policies. The National Campaign to Prevent Teen and Unplanned Pregnancy, Magical Thinking: Young Adults’ Attitudes and Beliefs about Sex, Conception, and Unplanned Pregnancy, Results from a Public Opinion Survey (2008), available at http://www.thenationalcampaign.org/resources/pdf/pubs/MagicalThinking.pdf; Sex and HIV Education, State Policies in Brief as of November 1, 2013, GUTMACHER INSTITUTE, 3-4 (2013) available at http://www.gutmacher.org/statecenter/spibs/spib_SE.pdf; Policy Brief: Abstinence-Only-Until-Marriage Programs: Ineffective, Unethical, and Poor Public Health, ADVOCATES FOR YOUTH (July 2007), available at http://www.advocatesforyouth.org/storage/adfy/documents/pba
especially susceptible to under-education and misinformation about sex and reproductive health and are more likely to get pregnant than their peers.76 Advocates attribute this to inconsistent education,77 frequent moving between placements, overloaded and mismanaged agencies, and a lack of agency policies to adequately educate foster youth.78

Indeed, despite federal goals to educate foster youth, many child welfare workers and foster parents feel inadequately trained to provide general sex education for foster youth.79 One study of seventeen- and eighteen-year-olds in foster care found that only forty-five percent were given information about pregnancy prevention and only fifteen percent received information about family planning services.80 Worsening the matter, foster youth also often do not have access to traditional forms of sex education via family and community sources, often assumed to be a primary source of information about sex, reproduction, and pregnancy.81 Experts conclude that lack of sex education is responsible for the high


77 Inconsistent education is compounded by a drastic increase of public schools using suspension and expulsion as an institutional response to disciplinary and behavioral problems; such policies often disproportionately impact foster youth. Brown, supra note 65, at 22 ("Disciplinary problems in school resulting in suspension or expulsion have increased dramatically in the U.S., from 1.7 million in 1974 to 3.1 million in 1997.").

78 Taylor Dudley, Bearing Injustice: Foster Care, Pregnancy Prevention, and the Law, 28 BERKELEY J. GENDER L. & JUST. 77, 110–112 (2013); Amy Sullivan, Teen Pregnancy: An Epidemic in Foster Care, TIME MAG., (July 22, 2009) ("You’re so busy being transferred from home to home," says Alixes Rosado, who has been in foster care in Connecticut since he was 6 years old. ‘You don’t have a lot of stable connections.’ The 20-year-old estimates that he has worked with a different social worker every year for the past 10. ‘And not a single one talked about sex.’").


81 Sullivan, supra note 78 ("Perhaps the most important asset teenagers need to avoid early parenthood is a strong relationship with parents or other adults in their lives."); see also Baynes-Dunning & Worthington, supra note 64, at 341.
rates of teen pregnancy and sexually transmitted infections (STIs) among foster youth. 82

Even when foster care youth do receive education about sex and pregnancy prevention, it is often “too little, too late.” 83 Youth misunderstand how to effectively protect themselves, 84 because of prevalent misinformation and stigma surrounding sex and reproductive health. 85 Such misinformation and stigma are often a result of the widespread use of ineffective and unethical abstinence-only models of sex education. 86 Indeed, there are no standard guidelines for what constitutes adequate sex and reproductive health education, and private agencies, often sectarian in nature, are left to their own judgment and expertise, or lack thereof. 87

Equally problematic is that youth in foster care often do not feel safe or even know whom to turn to for help if help were available. Trepidation to approach a caseworker or foster parent may be compounded by the agency’s or foster parent’s particular religious orientation, whether or not that concern is founded. Alarmingly, one study found that queer youth in foster care feel more comfortable being homeless than in foster care because of the agency’s or foster parents’ private religious beliefs. 88 Youth may have similar fears of approaching the agency or foster parents with politically charged problems like abortion or sexual health.

For example, in In re petition of Anonymous 5, the minor sought a judicial bypass of the parental consent law out of fear that if her foster parents found out about her pregnancy, then they would no longer let her live there and would tell her siblings she was a “bad person.” 89 She feared that, if she carried her pregnancy to term, her foster parents would “harbor resentment toward her” and that “it would also be taken out on [her] child.” 90 These concerns

82 Dworsky, supra note 80, at 2.
83 Id. at 3.
84 Id.
85 See The National Campaign to Prevent Teen Pregnancy, supra note 75.
86 Advocates for Youth, Abstinence-Only-Until-Marriage Programs, supra note 75.
87 For example, one researcher found that foster care youth were not receiving any education about sexually transmitted infections, despite receiving education about birth control. Kym R. Ahrens, Laboratory Diagnosed Sexually Transmitted Infections In Former Foster Youth Compared With Peers, 126 Pediatrics 97, 101 (2010).
90 Id.
stemmed from her foster parents’ “strong religious beliefs about abortion” and the obvious failure to create an environment of support in the placement.91

Unfortunately, Anonymous 5’s fears might be very common given compounding factors, including the high rate of unplanned pregnancies of foster care youth,92 a trend of privatizing foster care without adequate government oversight,93 and no standard training for agency workers and foster parents.94 Many foster youth do not feel comfortable approaching adults in their lives with questions or requests for help,95 and agencies and foster parents are often ill-equipped and untrained to support a pregnant minor in their care.96 Indeed, “child welfare workers feel unprepared to talk with foster youth about sex and contraception,”97 and the lack of policies leads to confusion on how to best help the minor.98

An additional risk to a minor’s health is that most agencies suffer from poor care management because of frequent turnover, extremely high caseloads,99 and a lack of adequate training for staff.100 For example, in Pennsylvania in 2003, a foster care minor was initially denied an abortion because agency staff were confused about “whether the department would pay for the procedure.”101 Delays like this could put a minor at risk for missing crucial steps to

---

91 Id.
92 Sullivan, supra note 78 (labeling the rate of teen pregnancy in foster care as an “epidemic” and citing a University of Chicago study that “found that nearly half of girls who had spent time in the foster-care system had been pregnant at least once by the time they were 19 years old”).
94 Baynes-Dunning & Worthington, supra note 64, at 343-344.
95 Dworsky, supra note 80, at 2-3.
96 Moore, supra note 42, at 52-55 (surveying several policies that either do not address or minimally address pregnant youth).
97 Other adults in a minor’s life also do not get the training necessary to speak with youth about pregnancy prevention, including how to create an atmosphere where the minor feels comfortable approaching them with questions or requests for help. Dworsky, supra note 80, at 2-3.
98 Moore, supra note 42, at 52-55 (surveying several policies that either do not address or minimally address pregnant youth).
99 Dudley, supra note 78, at 92 (the recommended number of cases is twelve to fifteen, while many places expect caseworkers “to handle upwards of fifty cases”); Nat’l Ass’n of Soc. Workers, Case Mgmt. Standards Work Grp., NASW Standards for Social Work Case Management (June 1992), www.nasw.org/practice/standards/sw_case_mgmt.asp.
100 Dudley, supra note 78, at 92.
securing a legal abortion.\textsuperscript{102} Lack of policies and case mismanagement such as this often cause foster youth to be overlooked and to not receive access to needed health services.\textsuperscript{103}

As privatization of foster care increases, an agency also may have its own agenda as to what constitutes appropriate reproductive health care, regardless of objective medical standards. Caseworkers and foster parents may conscientiously object to providing a minor with information and resources about abortion and pregnancy prevention, even if there are policies in place,\textsuperscript{104} because these private agencies likely receive little oversight from the government departments with whom they contract.\textsuperscript{105} As one scholar notes, an agency may “provid[e] as much as or as little help as they see fit”\textsuperscript{106} to a pregnant minor, which may include a referral to deceptive crisis pregnancy centers.

In New York City, for example, foster care is predominantly privatized—rather than the City providing foster care services directly, it contracts with over thirty non-profit agencies, many of which are religiously affiliated.\textsuperscript{107} In the 1980s, a lawsuit over this structure resulted in a settlement requiring an agency to give the City access to the minors in foster care so that it could provide them with reproductive health services and education.\textsuperscript{108} Thus, the agency itself need not educate or directly give minors in care access to reproductive health services.\textsuperscript{109} But in 1998, the settlement was vacated, and until 2014, “no policy [was] in place to ensure that children placed with Catholic agencies—or any other agency for that matter—have meaningful access to contraceptive and abortion services.”\textsuperscript{110} In 2014, New York City’s Administration for Children Services introduced a policy to address this issue, explicitly stating that “provider agency staff must not impose their personal, organizational, and/or religious beliefs regarding sexual and reproductive health care services on youth in foster care.”\textsuperscript{111}

\textsuperscript{102} See \textit{id.}
\textsuperscript{103} See Dudley, \textit{supra} note 78, at 92.
\textsuperscript{104} \textit{Id.} at 94.
\textsuperscript{105} Moore, \textit{supra} note 42, at 53.
\textsuperscript{106} \textit{Id.}
\textsuperscript{107} Stotland & Godsoe, \textit{supra} note 15, at 53.
\textsuperscript{108} \textit{Id.}
\textsuperscript{109} \textit{Id.}
\textsuperscript{110} Id.
\textsuperscript{111} City of N.Y. Admin. for Children Servs., \textit{Sexual and Reproductive Health Care for Youth in Foster Care}, Policy and Procedure #2014/9, 13 (on file with CUNY Law Review).
however, the implementation, enforcement, and formal legal challenges to the policy have yet to be seen.

But even when adequate policies are in place, the onus is often on the pregnant minor to find resources and navigate barriers without help.\(^{112}\) Formal rights to abortion and adequate education are essentially meaningless if a minor does not have a way to effectuate those rights and put her knowledge into action. Indeed, all minors must navigate various barriers to receive services, and they often are unsuccessful.\(^{113}\) In addition to parental-involvement laws discussed at length below, a minor may face various laws and regulations designed to restrict access to abortion, including waiting periods, traveling long distances, or undergoing unwarranted and excessive medical examinations and procedures, to name a few.\(^{114}\) For foster care youth, these impediments may be more pronounced given agencies’ failure to provide adequate sex and reproductive health education, and lack of guidance and resources.\(^{115}\)

Moreover, despite having significantly higher rates of pregnancy than their peers,\(^{116}\) foster care youth have lower rates of abortion because barriers to abortion services are “compounded by poverty and Medicaid provisions.”\(^{117}\) The average cost for a first-trimester procedure in 2009 was $470.00,\(^{118}\) and for foster care youth, who rely on the state for health care services, funds for abortion are often non-existent.\(^{119}\) Though ninety-nine percent of foster children are eligible for Medicaid, foster care youth do not get needed care in general.\(^{120}\) Making matters worse, the Hyde Amendment prevents federal funds from being used for abortion services, except in cases of rape, incest, or to save the person’s

\(^{112}\) Moore, supra note 42, at 53–54.

\(^{113}\) See id. at 41.


\(^{115}\) As compared to their peers, minors in foster care might not have access to transportation or may have trouble finding services on their own because of a lack of access to information streams like the internet or school. Moore, supra note 42, at 41 (also noting that foster youth are particularly susceptible to deceptive anti-choice medical office fronts).

\(^{116}\) Dudley, supra note 78, at 80 (noting that foster care youth are 2.5 times more likely to get pregnant than their peers).

\(^{117}\) Moore, supra note 42, at 41.


\(^{119}\) See Moore, supra note 42, at 47–50 (discussing the lack of funding for abortion available to low-income persons who rely on state programs).

\(^{120}\) Moore, supra note 42, at 37–38.
Thus, to receive adequate reproductive health care, foster youth must rely on state funding, which varies by state. Disturbingly, only seventeen states currently fund all abortions or those deemed medically necessary. Such limited funding for abortion has wide-reaching adverse effects on a young person’s life, maternal and fetal health, and families in general. Without such funds, a minor in foster care has no realistic ability to terminate her pregnancy, regardless of right, need, or desire.

### III. Terminating a Pregnancy: Foster Youth’s Rights and Restrictions

#### A. Background of the Legal Landscape of Abortion

Moving from pre-pregnancy sex education and lack of access to resources for foster youth, this section will discuss the legal possibilities a pregnant foster might face when she seeks to terminate her pregnancy. In the 1973 landmark case of *Roe v. Wade*, the Supreme Court ruled that the U.S. Constitution protects a woman’s right to privacy when she seeks to terminate her pregnancy. The Court found that the Due Process Clause of the 14th Amendment forbids a state from completely denying a person an abortion. However, the Court also held that the state has a legitimate interest in protecting the health of pregnant persons and their pregnancies, an interest that increases along the trimester framework. Thus, a person has a qualified right to abortion—one that
can be curtailed by the state to further maternal and fetal health as the state determines it.

The political reaction to Roe was enormous, creating a progeny of state laws and cases that scaled back the breadth and force of the right originally announced in Roe.129 Decided in 1992, one such case, Planned Parenthood v. Casey, reaffirms the major holding of Roe but redefines how a state can curb a person’s right to abortion.130 Casey bars a state from placing an undue interference on “a woman’s right to choose to have an abortion before fetal viability,” because the state’s interest in the previability pregnancy is not sufficient to prohibit or impose “substantial obstacles” on a person’s choice to terminate her pregnancy.131 Yet Casey notes the state’s interest in maternal and fetal health from the outset of the pregnancy and gives the state power to restrict abortions after viability, as long as there are exceptions for circumstances where prohibiting an abortion would endanger the life or health of the pregnant person.132 Ultimately, the Casey plurality opines that a law is invalid if it creates an undue burden that creates a “substantial obstacle to the woman’s effective right to elect the [abortion] procedure.”133

Applying this “undue burden” test in Gonzales v. Carhart, the Court upheld a federal law that criminalizes doctors who perform late term abortions through a procedure known as intact dilation and extraction.134 Though Gonzales recognizes there is uncertainty on whether banning the procedure creates health risks to women, the Court held that “medical uncertainty does not foreclose the exercise of legislative power in the abortion context,” especially when alternatives to the procedure are available.135 The state has “wide discretion to pass legislation in areas where there is medical and scientific uncertainty” and should be left to its own devices to balance risks without judicial interference.136 In Gonzales’s wake, it

131 Casey, 505 U.S. at 834.
132 Id. (adding “[T]he State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child,” and confirming the “State’s power to restrict abortions after viability, if the law contains exceptions for pregnancies endangering a woman’s life or health . . .”).
133 Id. at 846.
135 Id. at 164.
136 Id. at 163.
is unclear what constitutes an “undue burden” on a person’s legal ability to choose an abortion. Indeed, many laws that significantly foreclose access to and criminalize abortion have been found constitutional.  

B. Judicial Bypass: Preventing Minors from Access to Abortion

For better or worse, politics has placed the Court at the center of the debate about pregnant teens. Legislatures have proven themselves incapable of separating public health concerns from more ideological battles over the issue of abortion.  

In the aftermath of Roe, there “was a rush by opponents of abortion to the legislatures to enact laws placing as many roadblocks to abortion as possible.” This resulted in a plethora of laws across the states that inject parents into a minor’s decision to obtain reproductive health services. Despite the prevalence of these laws, the Supreme Court has only addressed the rights of pregnant minors, or lack thereof, ten times since Roe, which is silent on the issue of minors and abortion.  

In the cases that follow Roe, the Court has held that a state cannot “give a third party an absolute, and possibly arbitrary, veto” over a minor’s decision to terminate her pregnancy. However, the Court did not leave state legislatures empty-handed in their ability to interject parents into youth decision-making. Bellotti v. Baird provides a solution for a state to make parental notification and consent laws constitutional: a state must give certain categories of minors a judicial bypass from the parental notification and consent requirements. Under Bellotti, a law is constitutional if the minor can petition a judge to determine whether she is sufficiently mature and informed about the abortion procedure or that it is in her best interest to bypass the parental notification or consent requirements of the law. Additionally, the bypass procedure must

137 See, e.g., Planned Parenthood of Greater Texas Surgical Health Servs. v. Gregory Abbott, Attorney Gen. of Texas, 134 S. Ct. 506, 508 (2013) (failing to vacate a stay on a lower federal court’s decision to uphold a Texas law, requiring a physician performing an abortion to have admitting privileges at a hospital within thirty miles which forced “women who were planning to receive abortions . . . to go elsewhere—in some cases 100 or more—to obtain a safe abortion, or else not to obtain one at all.”) (Breyer, J., dissenting).
138 GUGGENHEIM, supra note 129, at 235.
139 Id. at 218.
140 Id. at 213-216.
143 Id. at 643-44 (“A pregnant minor is entitled in such a proceeding to show either:
“be completed with anonymity” and give sufficient time for the minor to obtain a legal abortion. 144

In accordance with Bellotti’s guidance, states adapted their bypass schemes, with most failing to define ‘sufficiently mature’ or ‘best interest of the minor’—this is left to the judge, ideally functioning as an independent decision-maker. 145 Throughout the process, the burden is on the pregnant minor to seek the bypass and then prove she is sufficiently mature or that it is in her best interests to receive the bypass. 146 Despite Bellotti’s promise that the process be expedited, the Supreme Court later held that a bypass procedure that takes almost three weeks to complete is constitutional. 147 Indeed, legal challenges to the Bellotti framework have been generally unsuccessful, except under some state constitutions that afford greater protections for a minor’s right to privacy and medical decision-making than the Supreme Court has found in the federal constitution. 148

Of course, it is up to each state to determine the confines of their parental involvement and bypass laws, 149 which can often en-

144 Id. at 644.
145 Id. at 651.
147 The three-week time frame is particularly alarming given that many persons may not realize they are pregnant until later in their pregnancy, compounded with the shortening time periods during which a person may obtain a legal abortion. Ohio v. Akron Center for Reproductive Health, 497 U.S. 502 (1990).
148 Arguments that the bypass procedure violates the Equal Protection Clause of the 14th Amendment have been unsuccessful. Courts have consistently rejected the argument that judicial bypass procedures to the parental consent law place an undue burden on minors seeking abortion services in violation of the U.S. Constitution. Some state constitutions do provide relief, affording greater protections for the minor’s right to privacy. See, e.g., In re T.W., 551 So. 2d 1186 (Fla. 1989); Am. Acad. of Pediatrics v. Lungren, 940 P.2d 797 (Cal. 1997); cf. Pro-Choice Mississippi v. Fordice, 716 So. 2d 645 (Miss. 1998). But even at the state level, challenges regarding the vagueness of statutes concerning who is emancipated and not subject to the law, as well as who constitutes a parent for the purposes of the statute, have been met with varying success. 77 A.L.R.5th 1 (originally published in 2000).
compass access to other reproductive health services such as contraception.\textsuperscript{150} To date, only two states and the District of Columbia explicitly give a minor the affirmative right to consent to an abortion,\textsuperscript{151} while thirty-nine states require parental involvement in the decision-making process,\textsuperscript{152} eight of which go so far as to require the parental consent to be notarized before allowing a minor access to reproductive health services.\textsuperscript{153}

Additionally, some states have adopted a heightened standard of “clear and convincing” evidence for judicial bypass proceedings, making it all the more difficult for a minor to prove her maturity with arbitrarily-related evidence, such as high school grades, work experience, or anything else an individual judge might find, or not find, sufficient.\textsuperscript{154} Indeed, the judicial bypass procedure can be a difficult experience for a minor, placing the burden on her to prove her maturity and that she is well-informed about the procedure in a court of law, all with the knowledge that if she fails, she may have to carry an unwanted pregnancy to term.\textsuperscript{155} In addition to this stress, the wide discretion left to an individual judge can create space for bias and exposes the minor to humiliation.\textsuperscript{156}

For example, in Anonymous 5, the presiding judge had previously served on a committee of a very active Nebraska anti-abortion group.\textsuperscript{157} Such political affiliations and hostility towards abortion beamed bright when he questioned the minor in open court, asking whether she would “kill the child inside [her rather] than risk problems with the foster care people,”\textsuperscript{158} an inquiry that the Nebraska Supreme Court found permissible on appeal.\textsuperscript{159}

Judges’ wide discretion not only allows questionable inquiries riddled with bias and pre-judgment, but can also make the whole process futile.\textsuperscript{160} Indeed, for some judges, “all minors who would

\textsuperscript{150} Guttmacher Institute, Minors’ Consent Law, supra note 149 (discussing consent laws for various other reproductive health services, including for minors to access contraceptive services, STI services, prenatal care, and adoption).
\textsuperscript{151} Id.
\textsuperscript{152} Guttmacher Institute, Parental Involvement in Minors’ Abortions, supra note 149.
\textsuperscript{153} Id.
\textsuperscript{154} Id.
\textsuperscript{155} Moore, supra note 40, at 46.
\textsuperscript{156} Id.; Guggenheim, supra note 129, at 242–243; Sanger, supra note 146, at 492-493.
\textsuperscript{157} Chidi, supra note 1.
\textsuperscript{158} In re Petition of Anonymous 5, 838 N.W.2d 226, 230 (Neb. 2013).
\textsuperscript{159} Id.
\textsuperscript{160} Sanger, supra note 146, at 492-493 ("Judicial opposition to abortion has also colored how these hearings are conducted. Judges have questioned petitioners as though abortion’s legality was unresolved, as though the only measure of a petitioner’s maturity was the decision not to abort, and as though the hearing offered a
use the bypass procedure are by definition immature,”161 and there have been multiple reports of “anti-abortion judges using the bypass process to harass the girls who come before them.”162 Advocates report judges “torment[ing] pregnant minors in their courtroom” by requiring minors to undergo unscientific anti-abortion education, “assign[ing] anti-abortion lawyers to represent them in court,” or even appointing a lawyer for the fetus.163 When a judge’s private feelings on abortion inundate the courtroom and the proceedings, he is far from the neutral decision-maker imagined in Bellotti,164 but unfortunately this is all too common among bypass proceedings.165

But even with an impartial judge on the bench, the process can produce humiliation, confusion, and harm a person’s dignity.166 Testifying for a challenge to Minnesota’s parental consent law, one judge said that a minor’s level of apprehension during the bypass proceeding is twice what he saw during other proceedings—

“You see all the typical things that you would see with somebody under incredible amounts of stress, answering monosyllabically, tone of voice, tenor of voice, shaky, wringing of hands, you know, one young lady had her—her hands were turning blue and it was warm in my office.”167

Another family court judge testified that going to court alone “was ‘absolutely’ traumatic for minors. ‘You know, it was just—it was just another thing at a very, very difficult time in their lives.’”168

Yet, as noted, the framework in Bellotti puts the burden entirely on the minor and gives her no support, leaving her to rebut the presumption that she is too immature and it is not in her best interest to receive the bypass. But how is she to prove she is mature? Most likely she will offer evidence of her high school grades, chance to remonstrate against it. They have asked petitioning minors whether they understand that abortion is murder, whether they would kill their own three-year-old child, whether they change their mind about abortion if they knew their baby would go to a loving adoptive family or if they were given $2000. Bypass denials have been sprinkled with pro-life sentiment: ‘This is a capital case. It involves the question whether [the minor’s] unborn child should live or die.’ And some judges refuse to hear bypass cases at all.”

161 GUGGENHEIM, supra note 129, at 242.
162 Id.
163 Id. at 242–243.
165 GUGGENHEIM, supra note 129, at 242–243; Sanger, supra note 146, at 492-493.
166 See Sanger, supra note 146, at 484-486; Moore, supra note 42, at 46.
168 Id. (testimony of Mr. Paul Garrity, former Massachusetts judge).
work experience, how she articulates herself, or her knowledge about the procedure, but the judge is ultimately left to find connections between these questionably relevant facts and what he deems mature or immature. Although proving maturity in court may be empowering for some young people, the arbitrary process creates yet another barrier that hampers a young person from exercising autonomy over her body, from having control over her own medical decision-making and reproductive freedom.

C. Judicial Bypass and Foster Youth: Exceptions, Legal Quandaries, and Risk of Harm

In *Bellotti*, the Court recognized the risk of leaving the abortion decision outside the hands of the pregnant minor, but this concern was ultimately outweighed by conveniently placed parental rights rhetoric, pitting a minor’s right against that of her parents.\(^{169}\) This resulted in a process that removes the private medical decision from the minor and her physician, and places it in the hands of a judge or the minor’s parent.\(^{170}\) In doing so, the judicial bypass procedure created by *Bellotti* does little to avoid risks for the minor’s well being, but instead often engenders serious problems for a minor’s health and safety.\(^{171}\)

This is especially true for a minor in foster care, whose relationship with her parents might be broken because of unnecessary state intervention or otherwise. In deriving a constitutional framework from an imagined world of the ideal parent-child relationship, the Court created quandaries for minors whose family structures do not meet the contours of the law, yet are still bound by them (e.g., minors in foster care who do not have parents to seek consent from).\(^{172}\) The framework also creates real risks of harm for minors whose parental relationships do not meet the ide-

---

169 See *Bellotti*, 443 U.S. at 639-645; see also GUGGENHEIM, supra note 129.
171 *Id.* at 46.
172 *Id.* at 57 (“There are many categories of girls for whom parental notification or consent laws simply do not fit. Foster girls . . . are one such group. Other groups of girls include, but are by no means limited to, those who have never met one of their parents, girls whose parent(s) are incarcerated in prison or held in a mental health facility or rehabilitation center, girls who do not wish to be in contact with a parent because of sexual or physical abuse, and girls who do not know where one or both parents live. It is not uncommon for girls in such situations to still live under the legal guardianship of such parents, even when they are unavailable, cannot be found, or pose a physical or psychological risk to their daughter. Such girls are stuck when courts refuse to be flexible in interpreting parental notification and consent statutes.”).
als imagined in *Bellotti* (e.g., when the minor’s father might also be the putative father of her pregnancy). The minor is then left with the onus to prove her maturity in an infantilizing and arbitrary process, which presumes her to be immature and non-autonomous from the start.

Mindful that the *Bellotti* structure can be dangerous to youth, sixteen states have exceptions to parental consent laws for minors who are abused or neglected. Yet the exception is often unhelpful to protect minors put at risk by the bypass procedure because it is narrowly applied and courts often require a nexus between the person who must consent and the finding of abuse.

For example, the Nebraska law at issue in *Anonymous 5* provides an exception from parental consent if the minor is adjudicated abused or neglected within the meaning of Nebraska’s child protection law. The minor was in state custody pursuant to the state’s abuse and neglect law and her biological parents’ formal legal rights had been terminated two years earlier. However, the court found that she did not meet the exception because in order to meet the abuse or neglect exception, “the pregnant woman must establish that a parent or guardian, who fills that role at the time she files her petition, has abused or neglected her.”

Under these narrow nexus requirements, a minor who suffers trauma will often not meet the exception. A minor’s abuse or neglect will not be sufficient for the exception if someone other than her parents abused her, including when a pregnancy is a result of the abuse, or if the abuse is ongoing. Additionally, the burden is on the minor to prove that she is or has been a victim of abuse in court, an experience that can re-victimize the minor and prevent her from exercising her legal rights to terminate her pregnancy.

In the remaining thirty-four states without the exception, a de-

---

173 *Id.*

174 GUTTMACHER INSTITUTE, *Parental Involvement in Minors’ Abortions*, supra note 149.

175 Ohio v. Akron, 497 U.S. 507, 519-520 (1990) (finding no undue burden for a minor in judicial bypass proceedings when the minor could prove maturity, that she was a victim of abuse, or that it was in her best interests to have the bypass); *see also In re Petition of Anonymous 5*, 838 N.W.2d 226, 232 (Neb. 2013). The exception does not apply in circumstances where a minor is in state custody, but a court finding of abuse or neglect has not yet been made, which can often take years to decide because of over-burdened courts and the failings of ASFA.

176 *See Anonymous 5*, 838 N.W.2d at 232.

177 *Id.* at 231.

178 *Id.* at 233.

179 *See, e.g., id.* (“Petitioner did not meet her burden to show that she is a victim of such abuse or neglect.”).
nial of the bypass requires the foster youth to receive her parents’ consent or notify them if their rights have not been formally terminated.\textsuperscript{180} When parental rights have been legally terminated or significantly hampered, however, it is ambiguous whether the agencies’ or foster parents’ consent is required,\textsuperscript{181} because of the “diffusion of authority and responsibility among parents,” agencies, and the state.\textsuperscript{182}

In the 1970s, the Supreme Court decided that foster parents do not have the same rights as natural birth parents and cannot consent to most medical procedures for youth without agency approval—yet in the abortion context with parental consent laws, it seems a foster parent’s consent is required for foster youth.\textsuperscript{183} In Anonymous 5, the dissenting justices recognize this problem,

“The petitioner has no legal parents; the juvenile court terminated their parental rights. Her legal guardian, the Department—by regulation—will not give her consent. And although the district court has required her to get her foster parents’ consent to obtain an abortion, their consent would be meaningless under the law because they are neither parents nor guardians. She is in a legal limbo—a quandary of the Legislature’s making.”\textsuperscript{184}

Equally problematic is requiring an agency’s consent because political pressures may dictate action, or in some cases, inaction—effec-

\textsuperscript{180} See, e.g., In re P.R., 497 N.E.2d 1070 (Ind. 1986) (finding that a child being remanded to state care did not obviate the natural mother’s consent as required by state statute).

\textsuperscript{181} See, e.g., In re T.H., 484 N.E.2d 568, 569 (Ind. 1985) (finding a minor required the Director of the Department of Public Welfare’s consent to receive an abortion, rather than the foster parents with whom the minor was placed. The Director refused consent; instead, “they would handle all arrangements for her, including placement for adoption.”).

\textsuperscript{182} See Moore, supra note 42, at 44, 57; See generally Addressing Barriers, American Academy of Pediatrics, Health Foster Care America (2013), http://www.aap.org/en-us/advocacy-and-policy/aap-health-initiatives/healthy-foster-care-america/Pages/Addressing-Barriers.aspx#sthash.QMQtEN1h.dpuf.

\textsuperscript{183} Foster parents also often need agency permission to immunize a youth and only may obtain routine medical care for foster youth. See, Smith v. Org. of Foster Families for Equality and Reform, 431 U.S. 816, 828 n.20 (1977) (“[A]lthough the agency usually obtains legal custody in foster family care, the child still legally ‘belongs’ to the parent and the parent retains guardianship. This means that, for some crucial aspects of the child’s life, the agency has no authority to act. Only the parent can consent to surgery for the child, or consent to his marriage, or permit his enlistment in the armed forces, or represent him at law”); see, e.g., In re Petition of Anonymous 5, 838 N.W.2d 226, 239-240 (Neb. 2013) (“The Department authorizes foster parents to obtain only routine immunizations and medical care for a foster child, under a caseworker’s supervision and direction.”). See also

\textsuperscript{184} Anonymous 5, 838 N.W.2d at 238.
tively denying a minor an abortion by withholding consent as in Anonymous 5. Moreover, when a child is placed with a private agency, whose religious ideology opposes abortion, refusing consent becomes significantly poignant for religious freedom considerations. Of final note, and perhaps highlighting the legal absurdity of parental consent laws, a legal conundrum arises when a parenting foster minor is able to consent to her child’s medical procedures, but not to her own abortion.\textsuperscript{185}

Regardless of the legal quandaries, practical safety concerns for youth also trouble the wisdom of parental consent laws: forcing a minor to tell adults whom she otherwise feels uncomfortable telling about her pregnancy, or her desires to terminate it, exposes her to risks of verbal assault, physical violence, and homelessness.\textsuperscript{186} For a foster minor, an agency or foster placement’s disapproval of her sexuality, sexual activity, pregnancy, or desire for an abortion may heighten risks of homelessness and instability.\textsuperscript{187}

Privacy around pregnancy is vital for youth; yet judicial bypass hearings place a minor at risk of public exposure, which can have severe consequences for a foster youth’s well being and the stability of her placement.\textsuperscript{188} Anonymity may be easily compromised in areas where the community is insular and foster placements are in greater shortage, but for all minors, anonymity is difficult to achieve when she enters a public courtroom known for bypass hearings. Unfortunately, “foster youth frequently run away from their placement once it is discovered that they are pregnant, and finding them is often difficult.”\textsuperscript{189} By placing their pregnancies in public view, bypass laws increase a risk of homelessness and lack of resources for pregnant minors in foster care.

\begin{itemize}
\item \textsuperscript{185} Stotland & Godsoe, supra note 15.
\item \textsuperscript{186} Moore, supra note 42, at 45 (“There can be significant problems for minors who desire to obtain an abortion in states that require parental consent or notification. Girls may face verbal or physical abuse if they tell a parent about their pregnancy or their desire for an abortion, and many girls risk being kicked out of their homes if they come home pregnant”); HELENA SILVERSTEIN, GIRLS ON THE STAND: HOW COURTS FAIL PREGNANT MINORS 13 (2007) (“[T]he AMA has concluded that some minors would experience serious physical and emotional injury under a blanket parental involvement provision”); Miriam Gerace, Should Doctors Have to Notify Parents Before a Minor Receives an Abortion?, L.A. TIMES (October 22, 2008), http://www.latimes.com/news/opinion/la-oew-gerace-short22-2008oct22,0,7048163.story (“There is a significant risk of violence, abuse and rejection in families when parents are informed of a pregnancy.”).
\item \textsuperscript{187} The risk of homelessness is increased for older minors or minors wishing to carry the pregnancy to term, because of lack of alternative or accommodating placements. Moore, supra note 42, at 47.
\item \textsuperscript{188} Id.
\item \textsuperscript{189} Dworsky & DeCoursey, supra note 12, at 38.
\end{itemize}
IV. MINOR PARENTS IN FOSTER CARE: THE RISK OF LOSING A CHILD

With such large barriers to autonomous decision-making in becoming pregnant or terminating a pregnancy, foster youth also face serious injustice when they remain pregnant and give birth in state care. Though there is currently no national tracking of pregnancy and parenting rates of youth in foster care, it is undisputed that pregnant and parenting minors make up a significant portion of the foster youth population. This is not surprising considering foster youth’s higher pregnancy rate, lower rate of abortion, and increased chances of repeat pregnancy than their non-foster peers. A report from the New York City Public Advocate estimates that one in six girls in foster care are either pregnant or parenting. Yet despite these high, and perhaps more importantly, known numbers, child welfare systems continue to fail to provide support and health services to minors who wish to carry pregnancies to term and parent their children.

Though special placements sometimes exist for some foster care youth who want to carry their pregnancies to term, the space is severely limited and often requires youth to be moved from their current placement, increasing instability for the minor. Pregnant foster youth are also at risk for running away or being expelled from their placements, especially because placements typically do not receive additional funds for housing pregnant or parenting minors.

Of significant concern is that across the board, pregnant foster youth do not receive adequate prenatal care or health screen-
nings. One study in Washington State found that pregnant foster youth’s birth outcomes are far worse than those of their peers—foster youth have the highest rate of premature births, low birth weights, and infant mortality because of various factors, including poverty and lack of resources for medical and mental health care.

Most disturbing, when a foster youth does successfully carry a pregnancy to term, she faces a significant risk that her child will be immediately removed from care due to increased scrutiny from child protective services and lack of resources provided to her to parent her child. Compared to their peers, parents in foster care are much more likely to become subjects of state investigation and have their children removed from them. In the Washington State study, not only were the rates of referrals to child welfare specialists ten times higher for foster youth, but horrifyingly children of parenting foster youth were placed in stranger foster care at a rate nearly twenty-five times higher than parenting youth not relying on government resources.

The circumstances of the removal of foster youth’s children are often caused by a failure of the state to provide resources for newly parenting wards in their care. Additionally, higher rates of removal from foster youth are the result of a foster youth being subject to intense scrutiny by child welfare agencies by virtue of being their wards. Suspicious caseworkers and foster parents may view a new mother as damaged, disturbed, or unable to parent because of her own placement in care, rather than because of actual concerns of neglect or abuse—

195 Id. at 38; Wash. State Dep’t of Soc. & Health Servs., supra note 12, at 10 (“Foster Youth had the lowest rates of first trimester entry into prenatal care; the rates of first trimester prenatal care were similar for those whose stay in foster care include the prenatal period and for those who entered foster care at the end of pregnancy or later.”).

196 Wash. State Dep’t of Soc. & Health Servs., supra note 12 at 7-8 (“Foster Youth had the highest rate of premature births, with sixteen percent of their babies born before 37 weeks gestational age.” “Foster Youth had the highest rate of low birth weight, with eight percent of their babies born at less than 5.5 pounds.” “16.6 per 1000 of [foster youth’s] liveborn infants died before their first birthday.”).

197 See, e.g., Stotland & Godsoe, supra note 15, at 24; Dworsky & DeCoursey, supra note 12, at 34.

198 Dworsky & DeCoursey, supra note 12, at 34. (“Twenty-two percent of the TPSN mothers were investigated for child abuse or neglect and 11 percent had a child placed in foster care. Most of their children were very young when they were placed, and while some of their placements were very short-term, many had not achieved permanency even after 2 years.”).

199 Wash. St. Dep’t of Soc. and Health Servs, supra note 12, at 9-10.

200 Stotland & Godsoe, supra note 15, at 61.
“Advocates across the country report that states and counties frequently violate parenting wards’ due process rights by coercing teens into ‘voluntarily’ placing their child in government custody, separating wards from their children absent proper judicial findings, and threatening to remove infants from the ward’s care based on infractions which do not pose an imminent risk of harm to the baby.”

Indeed, parenting youth are penalized with the removal of their children because of a lack of resources and access to necessary services that the state has failed to provide, despite being responsible for the health and well-being of youth entrusted to its care.

For example, New York State law mandates that child welfare departments provide “financial support to minor parents in foster care, personal counseling and support services to ensure stability, and assistance in achieving the highest possible degree of economic independence.” But a study done by the City’s Public Advocate found that in every area, there were alarming insufficiencies in needed services to support pregnant and parenting foster youth. These insufficiencies were primarily responsible for increased rates of neglect and abuse findings against parenting foster youth and the removal of their children.

Additionally, when a minor is charged with abuse or neglect, the state acts both as prosecutor and caretaker of its wards—a ludicrous contradiction. The parenting minor’s attorney may also face a conflict of interest. Indeed, “many organizations representing children see the representation of parents—even minor parents—as conflicting with the fundamental mission of their agency.”

This is an absurd and destructive result of the unnecessary adversarial process of current child welfare law—the state prosecutes the parent with the goal of finding abuse or neglect, rather than acting in the family’s best interest. Children’s rights are unnecessarily pitted against parents’ rights, a mechanism that harms all

---

201 Id.
202 Id.
204 Id. at 7-8.
205 See id.
206 Stotland & Godsoe, supra note 15, at 42–43.
207 Id. at 32.
208 Id. at 42–46; see generally, GUGGENHEIM, supra note 129.
members of the family unit because children’s and parents’ interests are typically aligned, and the majority of children are better off when they remain with their parents.209

V. A Better System: Conceptual Change and New Premises

States entrusted with the health of foster youth fail, repeatedly and on all counts. First, necessary sex and reproductive health education and resources to prevent pregnancy are not provided. After pregnancy occurs, the state erects barriers to deny a minor the legal right and resources she needs to terminate her pregnancy. After not receiving adequate health care and support while pregnant, she likely will then give birth without access to needed resources and support to parent her child, which often results in the unwarranted and destructive state removal of her child.

Given the evidence that the state severely fails to meet the health and educational needs of foster youth, a plethora of changes must be implemented to significantly improve outcomes for foster care youth. Better data collection to assess the needs of pregnant and parenting foster youth,210 adequate training for caseworkers and foster parents,211 privileging and supporting kinship care,212 treating foster youth as emancipated for the purpose of bypass procedures,213 reducing crossover with the juvenile justice system,214 and other various concrete suggestions exist to address the myriad of problems facing foster youth.215 Yet, despite a laundry list of concrete suggestions from advocates, researchers, and policy makers, these fixable problems remain persistent and

209 Emma Ketteringham, Test and Report: Bad for Children and Families, HUFFINGTON POST (April 25, 2014), http://www.huffingtonpost.com/emma-s-ketteringham/test-and-report-bad-for-children-and-families_b_5175106.html (“Former foster children are far more likely to drop out of school, be imprisoned, enter the homeless population, join welfare or have substance abuse problems of their own when compared to children similarly neglected, but who remained with their families”); Joseph Doyle, Child Protection and Child Outcomes: Measuring the Effects of Foster Care, 97(5) AM. ECON. REV. 1583 (2007) (finding that similarly situated youth who remain with their parents have better outcomes than those who are placed in stranger foster care); Schorr, supra note 32, at 21 (“A compassionate response to children must include an equally compassionate response to their parents.”).

210 Dudley, supra note 78, at 80.

211 Baynes-Dunning & Worthington, supra note 64, at 337.

212 Roberts, supra note 33, at 24-25 (discussing generally the problems with and improvements needed to be made to kinship care policies).

213 Moore, supra note 42, at 61.

214 Baynes-Dunning & Worthington, supra note 64, at 346.

215 Id.; Dudley, supra note 78; Moore, supra note 42.
prevalent because of the system’s flawed approach to the health of families and youth.

To engender change, child welfare law must be fundamentally rethought and goals reframed to acknowledge current realities. Although these recommendations are not an exhaustive list of the necessary conceptual changes, our system must recognize that poverty is the greatest risk to youth’s health, that youth are sexually active, and that youth can be trusted to make autonomous decisions when provided with sufficient support and education. These are starting points to ensure that the health of youth and families are privileged above ideology and politics.

First, the current system ignores poverty as the number one threat to child safety, including a lack of safe housing and necessary resources, such as food, education, and health care. Unnecessary and prolonged removal of children from their parents is damaging to the continuity that children need, while “restraint in intervention advances the child’s best interests.” State interventions should be “to the degree necessary to ensure the child’s safety,” yet removal is almost the first resort in many cases. Rather than parent-blaming, a system premised on the realities of poverty would reduce the number of harmful and unnecessary state interventions that are almost automatic in the current system. Moving away from a complex system of caseworkers, lawyers, and questionable privately-run court-mandated services would allow states to focus efforts on improving access to housing, health care, and necessities. In doing so, states could truly protect children and families, providing them with the support necessary for them to maintain agency and control over their bodies and their lives.

---

216 National Center for Children in Poverty, Child Poverty (last visited May 2, 2014), http://www.nccp.org/topics/childpoverty.html; see also Ketteringham, supra note 32; Roberts, supra note 33, at 26-29.
217 See Crossley, supra note 22, at 266.
218 Id.
219 Ketteringham, supra note 32 (“Blaming poor parents for what are the predictable consequences of poverty is not just unfair. It allows the rest of us to ignore that economic inequality led to the tragedy. It permits state officials to appear to be helping to keep children safe, while ignoring the well-understood threats to our children’s well-being, such as unsafe housing, dangerous neighborhoods, and the other deficits in poor communities which poor children routinely are forced to endure—such as having to light candles to avoid living in a dark apartment.”).
220 It is not practically possible to charge the state bureaucracies, and private agencies, to take on the responsibility of raising whole communities of children. Guggenheim, supra note 129, at 248;
221 Ketteringham, supra note 32 (“Instead of paying tens of thousands of dollars to
Second, legislatures, judges, and other adults who are in minors’ lives as workers or family need to accept that minors have sex. Avoidance of sex education and reliance on abstinence-only models neither delays sexual activity nor reduces the number of sex partners one has nor lowers sexually transmitted infections and pregnancy rates.\textsuperscript{222} In addition to denying the reality that youth have sex, such policies frame sex as shameful and wrong, exacerbating the difficulties that youth already have when approaching resources to ask questions or ask for help.\textsuperscript{223} Indeed, minors have sex whether they receive sex education or not. Deplorably many policies fail to recognize the fact that teens are sexually active regardless of their level of sex education. Such inadequate policies remain in place at the expense of health, and affected youth are left without the tools needed to protect their health and make informed decisions about their bodies.\textsuperscript{224}

The state must protect the health and safety of youth by requiring and implementing effective comprehensive sex education. Comprehensive sex education does not encourage or sanction teen sex, and research shows that youth who receive such education do not have more sex than those who receive ineffective abstinence-only education.\textsuperscript{225} Youth who receive sex education are also healthier and safer when they do engage in sexual behaviors.\textsuperscript{226} Importantly, adequate education requires not only teaching youth their rights but also how to access resources to effectuate those rights. With a system premised on the fact that youth are sexually active, policies can be implemented to give youth the education needed to support their autonomy and protect their short-term and long-term health.

Third, youth need a system that trusts them rather than infantilizes them. From parental consent laws to intensified scrutiny of parenting foster youth, the current legal system is predicated on involve dozens of caseworkers and lawyers in the family’s lives, New York City could be footing the bills that might really help: access to safe housing and assistance with the utility bill.”.

\textsuperscript{222} ADVOCATES FOR YOUTH, Comprehensive Sex Education: Research and Results (2009), available at http://www.advocatesforyouth.org/storage/advfy/documents/fsces.pdf (“no abstinence-only program has yet been proven through rigorous evaluation to help youth delay sex for a significant period of time, help youth decrease their number of sex partners, or reduce STI or pregnancy rates among teens.”); ADVOCATES FOR YOUTH, Effective Sex Education (2006), available at http://www.advocatesforyouth.org/storage/advfy/documents/fssexcur.pdf.

\textsuperscript{223} Id.
\textsuperscript{224} Id.
\textsuperscript{225} Id.
\textsuperscript{226} Id.
youth having a lack of autonomy. However, if youth are given education and adequate support, youth can be and should be entrusted with the decisions that will determine their lives and reproductive health.

Putting policies in place that require an agency to provide resources and promote access will free minors like Anonymous 5 from the legal limbo that leaves them parentless, pregnant, and in poverty, lacking needed resources and support to make meaningful choices about the future. Unfortunately, as advocates and commentators have documented, agencies and policy makers often allow political pressures, or desire to avoid divisive topics, to trump giving youth education and resources to make autonomous decisions about their lives.227

In doing so, the health and well-being of foster youth suffer at the hands of those who are charged with providing for youth, reinforcing systems of poverty and violence that plague and punish impoverished communities. With a system whose goal is to secure autonomy for youth, through education, support, and access to resources, youth can be empowered to make informed decisions about their own bodies and secure reproductive justice.

CONCLUSION

The United States is in a crisis when it comes to child welfare—it has created a system that punishes impoverished communities and sets up youth in foster care to fail. In particular, foster youth are given inadequate access to services, education, and support to exercise reproductive decision-making. They are then robbed of the chance to actually parent their own children. With fundamental changes in the premises of the child welfare system—1) recognizing poverty as the major risk to health, 2) accepting that youth are sexually active, and 3) empowering youth through education and access to resources—the system can better achieve its goals: providing for and promoting the health and wellbeing of families and their children.

227 Dudley, supra 78, at 94–95; Bronwyn Mayden, Sexuality Education for Youths in Care 19–20 (1996) (showing that child welfare agencies make “conscious decisions not to develop written policies” and ignore sex education out of concern over the political ramifications).
THE LONG CRISIS: ECONOMIC INEQUALITY IN NEW YORK CITY

A Conversation between Fahd Ahmed, Tom Angotti, Jennifer Jones Austin, Shawn Blumberg, & Robin Steinberg

Moderated by Professor Stephen Loffredo†

I. INTRODUCTIONS

The Long Crisis: Economic Inequality in New York was a panel discussion hosted by the City University of New York (CUNY) Law Review on November 12, 2014. CUNY Law Review planned this panel as a symposium in conjunction with our “Economic Justice” themed issue for volume 18.1. The symposium brought together lawyers and activists from New York City to reflect on how conditions of poverty are created and reproduced both in New York City and in the United States at large.

Working class people in New York City struggle to survive. They suffer from wage stagnation, long hours, and diminished public benefits. The educational system prepares poor and working class children for a life of rote labor. The city’s paltry public services have undergone years of assault and continue to face the constant threat of budget cuts. Furthermore, in the current political climate, there is a steady ideological drumbeat proclaiming that those who enter into these systems are the ones at fault: if you need help, then there is something wrong with you.

It is difficult living from paycheck to paycheck but this is the

† Stephen Loffredo is Professor of Law at CUNY School of Law. He has litigated many path-breaking law reform cases, including actions that secured the right of homeless families in New York to safe and adequate shelter, established the right of single homeless shelter residents to public assistance and Medicaid, and vindicated the statutory entitlement of disabled New Yorkers to federal benefits worth over $100 million annually. He has continued to represent poor people through the Law School’s clinical program and as pro bono counsel to the Urban Justice Center. He has written and spoken widely on the constitutional dimensions of economic rights and the role of wealth in a constitutional democracy.

1 City University of New York Law Review hosted this public panel discussion on November 12, 2014 at CUNY School of Law. CUNY Law Review would like to thank the co-sponsors of this event: Law Students for Reproductive Justice (LSRJ); Latin American Law Students Association (LALSA); Labor Coalition for Workers’ Rights and Economic Justice; National Lawyers Guild CUNY Law Chapter (NLG); Iraqi Refugee Assistance Project (IRAP); Student for Justice in Palestine (SJP) and CUNY Law Association of Students for Housing (CLASH).
reality for the overwhelming majority of New Yorkers. Moreover, given that “quality of life” and “broken windows” policing policies disproportionately impact low-income communities, working class people who interact with the criminal justice or immigration detention systems experience a unique, multi-faceted vulnerability that can propel them deeper into crisis. This panel sought to discuss the problems generated by this system, and to reflect on the work that these panelists are undertaking to combat and overcome the barriers that stand in the way of social change.

The following is a transcript of the comments of our panelists, Jennifer Jones Austin, Tom Angotti, Fahd Ahmed, Shawn Blumberg, and Robin Steinberg. Stephen Loffredo moderated the discussion. CUNY Law Review Special Events Editors, Syeda Tasmin and Rachel Nager organized the panel.

STEPHEN LOFFREDO

Thank you to the student organizers. Thank you to our panelists. Welcome, audience. Before turning to the panel, and just to set the stage a bit, I’d like to share a couple of graphics that I found useful in understanding some of the dynamics and some of the dimensions of economic inequality in the United States.
Top income shares. United States. 1913-2012


This first graph is based on data gathered and analyzed by two economists: Emmanuel Saez and Thomas Picketty, the fellow who just published Capital in the Twenty-First Century. The graph shows the share of income captured by the top 1% in the United States for each of the years between 1913 and 2012. One thing you notice right away is that starting in the late ‘70s, there’s a sharp increase in the share taken by the very top. In fact, by 2012, almost a quarter of all income is going to the top 1%. The last time we had that level of inequality was all the way back on the eve of the Great Depression in 1928.

Picketty and Saez also calculated the income share that has gone to the top 10%, and it turns out we have just broken new ground on that metric. The top 10% in the U.S. now receive more income than the other 90% of the population combined – the first time this has happened in the last hundred years. Wealth is distrib-


uted even more unequally than income: the top 10% control three-quarters of all wealth in the United States. One last observation about this chart before I move on: you’ll notice there’s an era in the center of the graph — between the Second World War and the 1970s — marked by far less income inequality; this is an era that some economists refer to as “The Great Compression.” During these years, the United States managed to keep economic inequality at more reasonable levels. Many believe that the more egalitarian economy of this era resulted from conscious policy choices. So perhaps there are lessons to be drawn from that experience, and perhaps we’ll discuss those a little further on in the evening when we talk about solutions.

This second chart was created by Robert Reich, and you’ll notice that it reflects the same trends as the first graphic. What it shows is that, from the ‘40s through the ‘70s, as worker productivity grew, as the economy grew, the resulting prosperity was shared up and down the income ladder. Wages increased, pretty much in sync with increases in GDP, increases in the economy. But starting in the late ‘70s something happens. The economy continues to grow, productivity continues to increase, the stock market contin-

---

ues to climb—I’m happy to report it hit a new high today—but what happens to the ordinary worker and the average family? They are uncoupled from these upward trends and excluded from the economic gains. Their wages stagnate as the elites appropriate greater and greater shares of the nation’s economic growth.

I saw a startling statistic in the *New York Times* last week: fully 95% of all income growth since the end of the Great Recession has gone to the wealthiest 1%. At the same time, social mobility and upward economic mobility—the phenomena that are said to make vast disparities of income and wealth tolerable in a democracy—are on the decline. Now, you may ask, is the U.S. any different from any other advanced industrial nation in these respects? It may be a matter of degree, but the answer is yes. We lead the advanced industrial world on virtually any measure of economic inequality you care to choose. We’re also near the top with respect to such measures as poverty rate, child poverty, and infant mortality. We trail in social spending as percent of GDP. We trail in economic mobility. So that is at least part of the troubling picture on the macro-level. Now we will turn to our panel and ask them for their thoughts about economic inequality, its causes, and its consequences, from a more local and granular perspective.

**JENNIFER JONES AUSTIN**

Good evening, everyone. Let me begin by celebrating CUNY
Law School for having this forum, for having this discussion. Many years ago, I too found myself in law school. And as I looked at the slides you shared, I kept thinking to myself, if I had stayed on the track that I went to law school intending to be on, where might I fall? I went to law school thinking that I was going to be a corporate lawyer. And it was in my second year of law school, while searching for a law review note topic, that I happened upon a case of child abuse and neglect—severe child abuse and neglect—and it forever changed my thinking about the world and my role and my responsibility in it. And I dedicated my career ever since to working on behalf of the most vulnerable here in New York City, here in New York State, and beyond. And so I am hopeful tonight that this discussion, for those of you who are just here to hear what's going on, those of you who have not committed yourself to one particular area of law, might get something out of this and you'll join up with many of us who have dedicated our careers to working on behalf of the most vulnerable.

About three years ago, I found myself in a roundtable discussion with several influential people on the D.C. scene, one of them Donna Brazile, the noted political strategist, analyst, and Vice Chairwoman of the Democratic National Committee. We were talking about the election of President Obama and the upcoming 2012 election, and she said something that I have not been able to shake ever since that day. She said, “Can a child growing up poor in America today become president of the United States?”

Economic inequality is often overly simplified. It’s talked about as the unequal distribution of income and wealth, or the gap between the rich and the poor with respect to income and wealth. And that’s a good beginning definition. But I believe that to truly understand economic inequality, you have to move beyond the simplified definition, and you have to appreciate its impact. Here in New York City, examples of economic inequality and its impact can be found through communities that just pervade this city. Mayor de Blasio, you may recall when he campaigned, talked a lot about “a tale of two cities,” and essentially what he was speaking to was economic inequality.

So I want to give you a few data points that will help to make
economic inequality here in New York City live, make it more obvious, make it more clear to you. Looking at one of the richest communities in the city, in the country, the Upper East Side, and one of the poorest, the South Bronx, which are separated by just a short subway ride—ten, fifteen minutes—you can get a very clear picture of economic inequality. On the Upper East Side, the median household income is $100,000, and the unemployment rate is less than 7%. But in the South Bronx, the median income is $20,000 and the unemployment rate is 16%. Home ownership, one of the most effective means of building assets and wealth, looks vastly different in these communities. The median sales price for homes on the Upper East Side last year: $1 million. The South Bronx: $280,000.

And with higher incomes and higher home values come better health and education systems. On the Upper East Side, where only 6% of residents self-identify as being in poor health, you’ll find four of the top twenty hospitals in New York City. But in the South Bronx, where 43% of residents identify themselves as in poor or at best fair health and where the HIV-related death rate is the third-highest in the city, access to hospitals is much more limited, and they are home to one of the worst hospitals in the nation. Sixty years since the Brown v. Board of Education decision, a public school on the Upper East Side, where less than one-third of the students are black or Hispanic, earned a performance grade of A in the last [Department of Education] rating, and 72% of the 8th graders are taking accelerated courses. But in the South Bronx, a public school that has a student body that is 99% black and Hispanic earned a C, grade and 18%—just 18%—of its eighth graders are enrolled in accelerated courses. Economic inequality is inextricably linked with income, health, and education. In short, income, health, and education inequality results in opportunity inequality, which then results in less social mobility, which then reinforces economic inequality.

We were asked to think about and share with you why there has been such a dramatic rise in economic inequality here in New York City and the nation, and there are many contributing factors. A few that I just want to highlight [are] the trend of making taxes less progressive since the 1970s [and] a changing job market that has forced many blue-collar workers to compete with cheaper labor abroad. We can look at the garment industry as an example of how we lost a lot of jobs overseas as trade rules were eased here in the United States. Job growth since the Great Recession is not where it
once was, and the biggest job recovery to date has been in low-wage jobs. That’s coupled with stagnant wage growth for lower- and middle-income earners, which in turn means that they have less money to save.

There’s been a high premium placed on education, and higher education in particular. The more educated you are—you well know, many of you, that’s why you’re in law school—the greater income you will likely earn. But with the high rise in tuition cost for college and graduate school, that makes higher education less of a reality for low-income people. Financial deregulation and expanded borrowing opportunities helped some people to build equity, and it caused other persons, particularly lower-income black and Latino families, to lose out. They lost a lot of money.

And finally, during the Great Recession, we saw significant cuts in funding for human service programs. Here in New York alone, $800 million were cut in human services programs. I’m talking about childcare, housing supports, homeless shelters, public assistance, [and] food supports. That resulted in people who were accessing these supports having less money in their pockets that came from those supports, which then caused them to stretch their dollars even more, and inhibited them from doing some of the things that would have allowed them to keep moving upward. Nationally, we have more than ten million people who are living in neighborhoods that are concentrated in inequality and in poverty, and the consequences are high unemployment rates, rampant crime, health disparities, inadequate early childhood education, and struggling schools.

So I said that I couldn’t help but continuously reflect on that question that Donna Brazile posed: can a poor child in America today become President one day? Can a child growing up poor today, in poverty today, become President of the United States? If a child in a lower-income community does not have the same access to quality public schools, then his chances of moving up, improving his education, and his educational journey are iffy at best. If a child growing up in a household that is low-income doesn’t have access to quality health care, her chances of thriving and being prosperous are iffy at best. Growing inequality decreases the likelihood of individuals, children, and families moving up the income ladder and building wealth. Economic inequality, we have to remember, is bigger than income inequality, and it’s more than an individual or family problem. Economic inequality is ripping through America, and it’s eroding the good old American dream.
Thank you, Jennifer, for that really excellent introduction and background. Since you started off with a personal anecdote, I will add my story. When I graduated from college, I went to Alabama and was working in the civil rights movement, where I discovered deep inequality, racial inequality, which has been fundamental, systemic, and institutionalized in the United States and continues to be. Then I joined the Peace Corps, which kept me out of Vietnam, thank goodness, but exposed me to another set of inequalities: the gross difference in the standard of living and access to resources between the United States and most of Latin America.

I was working in Peru for three years in rural community development. I discovered another systemic problem that persists: call it imperialism. It is based on a gross economic and political divide and the United States stands at the top. This is one of the many contradictions that we face in the United States. While it is one of the wealthiest nations in the world by some measures, it is also a major proponent of poverty in other parts of the world through its investments and disinvestments in industries that do not provide sustainable or decent living conditions for the people in those nations.

Those experiences led me on a track to work in different ways against inequality in community development. I got a Ph.D. in urban planning, which was interesting, and it didn’t stop me from doing community development work despite the dominant trends in the profession. I’ve done a lot of work recently in New York City. I think [Jennifer Jones-Austin’s] comparison between the South Bronx and Manhattan is excellent, and I would add another piece of information that came from a recent New York Times article. Manhattan, according to the U.S. Census, is the most unequal county in the United States. People who come from outside say Manhattan is all rich people, but Manhattan is not just the Upper East Side. We still have tens of thousands of people living in public housing and a lot of working people living in neighborhoods that are just holding on.

---

8 Tom Angotti is professor of Urban Affairs and Planning, and Director of the Hunter College Center for Community Planning and Development. His recent books include: The New Century of the Metropolis, New York For Sale: Community Planning Confronts Global Real Estate, which won the Davidoff Book Award, and Accidental Warriors and Battlefield Myths. He is co-editor of Progressive Planning Magazine, and Participating Editor for Latin American Perspectives and Local Environment. He is actively engaged in community and environmental justice issues in New York City.

9 No copy.
I want to talk a little bit more about the latest face of inequality. Part of our long history in this country has been a history of displacement people from their homes. This has been an urban issue, but it is also a social, racial, and economic issue that has been a profound divider. African people were displaced from their homes to come to work on plantations, and when slavery ended, they were displaced into the cities of the North. When they got to the cities of the North, they settled in neighborhoods and found that the Federal Urban Renewal Program wanted the land they were sitting on and they were displaced even further into overcrowded conditions and into public housing. It has been a story of constant displacement.

The story of New York City today is displacement on steroids. We call it gentrification. Some people take issue with that term and they say gentrification is a good thing because it means neighborhoods are improving. But no, it is not a good thing, if it means neighborhoods are improving while people are forced to move out. People who have lived in neighborhoods for years, decades, and generations suddenly find that they are being evicted from their apartments or that their landlords are converting to condominiums they can’t afford to buy.

If it is neighborhood improvement, I am all for it and everybody is all for it. Neighborhoods always change. There is nothing wrong with neighborhood change. But there is something extremely American about displacement. It is based on a great faith in the American dream, that owning property is the key to gaining wealth. People buy land and we have a private property market that plans our cities.

The market leads me to my last comment about inequality. I get a little nervous when I hear the economists talking about inequality all the time. I am afraid that what a lot of them are really talking about is dealing with the problem of low levels of consumption. Wages are low and fewer people are buying because they don’t have as much money to spend. They need a trigger for consumption, to expand consumption. I’m afraid that this is only restoring the structural inequalities that existed previously and not dealing with the fundamental problems of a divided society. It does not deal with the question of race. It does not deal with the historical questions of displacement.

I think [the discussion of] inequality has to go deeper. The search for solutions has to go deeper . . . . It has to go to the basis
of an economy, that fundamentally defines progress as growth. If capital is not expanding, then it’s a weak economy.

Since the crash of 2007-2008, we have been told that the economy is recovering because the stock market is growing. People are still suffering, incomes are flat, unemployment is slightly better, but people may be working two and three jobs in order to survive. So the economists are always defining everything as fueling the growth machine. Government needs to spend more to trigger new jobs. The private sector needs to be freed from taxes so that we can get new jobs. But it is not working. It has not worked. It does not address the question of inequality.

When you come to the spatial dimension, the urban questions, the urban issues, the issues and questions that we face here in New York City, that is exactly the solution the economists are proposing: fuel the market to spur growth. What government has to do is encourage new housing construction and that is going to solve the housing problem.

Mayor Bloomberg had his proposal to build 165,000 units of affordable housing. Mayor de Blasio has a proposal to build 200,000 units of housing. Most of the projected growth is through private investment, stimulated by government incentives and so forth. But the problem is not the lack of growth. That’s the fundamental economic lie, because if I live in West Harlem growth is what’s displacing me. It’s the construction of the new apartments. Even if 20-30% are low-cost housing that I can afford, the vast majority of my neighbors are going to have to move to the suburbs. And then the next level of inequality is experienced, because if you happen to have black or brown skin, your move to the suburbs is restricted. You don’t have the options the white middle class had when it was displaced from New York City after the Second World War, when the federal government was financing new suburban development through Federal Housing Administration mortgage guarantees and the federal Interstate Highway program.

Today, thanks to neoliberal capital, there is no substantial expenditure in the public sector. There is no thought of another major public works project like the Interstate Highway System, which benefited suburban developers and the new, mostly white, middle class. And there is no talk of reinvesting so people can stay in large cities, in the central cities, and not have to move out to the suburbs.

I will end with this skeptical note. We have to talk a little more in depth about inequality as historic and systemic and not some-
thing that can be jiggled by the Federal Reserve issuing more bonds. Thank you.

Fahd Ahmed10

Good evening. Thank you, Tom, for starting the conversation with displacement. I think it’s always important to recognize that we live in a country that was fundamentally founded on not just displacement but the genocide of people who are the original people of this land. And we see that repeated throughout history. The genocide and the displacement of indigenous peoples; the bringing in of African peoples; the flows of people, and particularly more marginalized communities, all to the advantage and the needs of economic development in the interest of profit. So displacement is a fundamental and central theme.

I think that one of the ways that we make the conversation more difficult is by using very nice terms like: “economic inequality.” It’s sort of like it is magically happening and we all kind of feel bad about it. As many people have said, it’s not by accident. It is intentional. It is inherently part of the economic system of capitalism that we live in. We can debate to what extremes economic inequality would be under different forms of capitalism, whether neoliberalism makes it worse—indeed it does—but it is inherent to the system.

10 Fahd Ahmed is Acting Executive Director of DRUM: South Asian Organizing Center. Fahd Ahmed came to the United States as an undocumented immigrant from Pakistan in 1991. He has been a grassroots organizer on the issues of racial profiling, immigrant justice, police accountability, and national security over the last thirteen years. Fahd attended Vanderbilt University as an undergraduate, and went to the CUNY School of Law. Fahd has been involved with DRUM in various capacities since 2000, when he had family members facing deportation, and entrapment as part of the War on Drugs. Within DRUM, Fahd co-led the work with Muslim, Arab, and South Asian immigrant detainees before, and immediately after 9/11, by coordinating the detainee visitation program. Over the last three years, as the Legal and Policy Director at DRUM, Fahd ran the End Racial Profiling Campaign and brought together the coalitions working on Muslim surveillance, and stop-and-frisk, to work together to pass the landmark Community Safety Act. He is also a member of the Steering Committee for the National Campaign on Surveillance and Use of Informants, which is housed out of DRUM. Fahd was a recipient of the Haywood Burns Fellowship from the National Lawyers Guild, and served as an Ella Baker intern at the Center for Constitutional Rights. In addition to DRUM, Fahd worked as a legal consultant with the Juvenile Justice Project of Louisiana on documenting and reforming policies of juvenile detention center in Louisiana. Fahd also worked as a lecturer and researcher on Islamophobia, national security, and social movements at the Arab and Muslim Ethnicities and Diasporas Initiative at the College of Ethnic Studies at San Francisco State University. He was also a Human Rights and National Security Reform Fellow with the Rockwood Leadership Institute, and a Fellow with the American Muslim Civil Leadership Institute.
One way to talk about it, rather than just say economic inequality, which is a very passive term, is to say the concentration of wealth into the hands of the few. The second chart that Professor Loffredo had shown, which showed the difference between productivity and wages. Productivity... turns into profits. And [then Professor Loffredo] used the term “appropriation.” That’s somebody doing the work, but somebody else capitalizing, or benefiting, on what’s being produced out of that work. That is very, very intentional. And we have to always be cognizant of that anytime we are trying to understand our current economic system.

I just want to briefly talk about sort of how economic inequality, the concentration of wealth, and capitalism impacts the communities that I work with. I work with an organization called DRUM—South Asian Organizing Center. We are a membership-based organization. The shortest way to describe it is like a community-based union of low-income South Asian immigrants, workers, and youth.

The issues that our members face: the first is the fact that they’re immigrants, which is an initial displacement, again, from their home countries. Nobody wants to leave their home. People are forced to leave their homes because of wars, because of economic policies, because of environmental disasters... mostly caused by the global economic system. So they’re displaced in the first place and they’re forced to migrate here.

Jackson Heights is two train stops on the E train east. It is a nice South Asian neighborhood. Some of you, I’m sure, have been there. The average wage in that neighborhood, for South Asian workers is $5.25 an hour. Anybody know the minimum wage in New York City? [It’s] $8.00 an hour. These are undocumented workers, and they are working from $5.00 to $5.25, sometimes $5.50, an hour. And they are essentially being threatened: “If you complain, we’ll call the police, we’ll call immigration,” even though that’s not legal. The law students here that work on these issues can attest to that.

The children of these workers go to New York City public schools. ... Go two more stops on the E train to Hillcrest High School. In New York City, we spend $227 million dollars a year to put police, school safety agents, and metal detectors inside our public schools. $227 million dollars a year. We have 5,500 school safety agents.

Does anybody want to take a guess on how many guidance counselors New York City public schools have? 2,400. What message
does it send to young students, mostly poor, mostly of color, when there are 5,500 safety officers for them and 2,400 guidance counselors? What message does it send to them that the public school policing budget is $227 million dollars a year, but in Hillcrest High School a teacher will give you extra credit if you bring in a ream of paper because she doesn’t have paper to print handouts for the students?

Over the last couple of years, policing in our communities has been a major issue in New York City. Stop-and-frisk has been one of the most visible components of it. Stop-and-frisk is just the tip of the iceberg, and only the tip of the iceberg that was visible. There is a lot more that remains to be uncovered. But even if you map out stop-and-frisk, you’ll find an interesting trend. You compare those maps to the maps of neighborhoods that are being gentrified, or being displaced, or are soon slated to be displaced, and you’ll see a lot of parallels. The neighborhoods that are slated to be displaced are the ones that are facing some of the harshest policing currently. And when people are picked up, given the prison industry, and the prison industrial complex, somebody stands to gain. Somebody stands to benefit from those levels of policing on the local level and on the national level.

Jennifer talked about the impact of economic inequality. One of the ways that we ought to frame it is that a lot of these things—policing, the deterioration of the education system, the exploitation of immigrant labor, the deterioration of life conditions—are actually intentional. It is part of the social and economic control. Policing keeps communities in check. It keeps them from speaking out. It keeps them from organizing. The policing of immigrant workers and laborers keeps them from organizing, prevents them from joining unions, from joining worker centers, from speaking out for better conditions. When we talk about policing, education, and budgets, there is an increasing recognition of a school-to-prison pipeline, particularly among black and Latino youth, who are essentially being prepared for prison. And then, for our membership, who are not quite at that extreme yet, we are seeing the school-to-low-wage pipeline.

I’ll end with an anecdote. We have a youth program. We do workshops on a lot of these same issues around what they facing, around racism, around economic injustice, and around immigration. You bring New York City public school youth into a workshop to have a discussion about their own lives. We ask: “Tell us about the time you were stopped by police on the street,” and they re-
spond: “This happened to me, and that happened to me.” The participation is kind of meek. However, last year we did the donor mailing, and you put these same students on a mailing factory line—fold up paper, put it in an envelope—and they get excited about it. That, to me, raises a lot of alarms.

These are students who are being trained. You are not intended to have critical learning skills. You are not being trained to be somebody who is going to be thoughtful, who is going to lead anything. You are going to be a worker. So, we are going to train you to be a worker. And we see this consistently across New York City public schools. There is a hierarchy in New York City public schools. You can clearly see the difference based on what school the students are coming from in terms of what they feel that they are qualified and designated to do. I’ll stop there and I will talk more about challenges and solutions later in the program.

SHAWN BLUMBERG

I work at Housing Conservation Coordinators. We are a legal services agency that defends tenants in housing court who are being actively evicted by landlords and we occasionally sue landlords. I wanted to talk more specifically about displacement and to piggyback on what Professor Angotti was saying. I particularly like Fahd’s point that displacement is intentional.

I’d like to talk about the consequences of the system that is the product of the disproportionate political power wielded by the real estate lobby in New York. I have a lot of statistics that I found really shocking. The real estate industry gave Senate Republicans in the last election cycle roughly the same amount as the next fourteen industries combined. So, that was about $4.5 million.

Talking about ultimate consequences, probably everyone living in the city is familiar with the incredible dearth of affordable housing. This is a repeated political talking point for every mayor, for every elected official in the city. It is probably fairly well known that hundreds of thousands of affordable units have been lost in

---

11 Shawn Blumberg is Legal Director of Housing Conservation Coordinators. Housing Conservation Coordinators is a community-based, not-for-profit organization anchored in the Hell’s Kitchen/Clinton neighborhood of Manhattan’s West Side. Housing Conservation Coordinators is dedicated to advancing social and economic justice and fighting for the rights of poor, low-income and working individuals and families. With a primary focus on strengthening and preserving affordable housing, they seek to promote a vibrant and diverse community with the power to shape its own future.
the last decade. I think an accurate number would be 400,000 units in approximately the last decade.

In approximately the last decade as well there was a 39% drop in the total number of available affordable apartments. “Affordable apartments” is sort of a blanket term and I don’t want to get too in the weeds, but they are scarce commodities.

Affordable housing is apparently every local politician’s goal, but it is something the system is really set up to get rid of and has effectively eliminated at spectacularly quick rates.

I work in Manhattan, so I am more familiar with Manhattan property owners than any other, but I think that what I am about to say applies to the rest of the city. Some of the most shocking aspects of the system are all clearly a result of the enormous disparity in the resources that landlords have versus the amount of resources tenants have: especially long-term rent regulated tenants and their advocates.

Rent stabilization is the biggest and most important affordable housing program in the city. It affects more units than any other. It provides more affordable housing than any other program. It’s not something that is affordable in the sense that one’s rent is tied to one’s income. Rent stabilization means that the amount of rent that a landlord can charge is limited.

Because rent stabilization is such an important part of the affordable housing landscape in the city, some of the gimmicks, traps, and incentives that landlords have to evict tenants are worth discussing.

Other obvious, terrible consequences that are a result of this system are the evictions, homelessness, and all of the attendant devastation not just to low-income folks but to middle-income folks, to working class folks in the city, and people who have made up the fabric of this city, who have lived in this city, whose parents have lived in the city for generations, and who, as Professor Angotti pointed out, are continually displaced.

I think that the real point is that these laws are awful. They make no sense and are not just a trap, but also a system that is set up intentionally to get tenants out. I think it’s an example of an application of Fahd’s earlier point.

The rent stabilization law is dictated by the state, and since 1971 the city has not been able to enact more stringent laws by-and-large than the state. This is by design, intentionally so, thanks to Governor Rockefeller.

Once a landlord gets a tenant out of rent-stabilized apartment,
that landlord automatically gets a 20% vacancy bonus. So, the landlord gets that prize for getting a tenant out, but not only do they get that prize for getting a rent-regulated tenant out, they have the opportunity to make improvements to the apartment. Tenants typically have to consent to these improvements, but if a tenant [has recently been evicted from] the apartment, no consent is required.

The great gimmick here is that not only is no consent required but there is an absolute and ridiculous identity of interest between the landlords and the contractors because there is absolutely no requirement whatsoever that the improvements be necessary or that they be useful in any way.

If a landlord is lucky enough and effective enough at churning apartments, then a landlord can make bi-annual gut renovations of the apartments, which are utterly pointless. And not only that, they can get away with incorporating the cost of these improvements into the rent and having the cost of these improvements be basically whatever the landlord and the contractors decide the cost should be.

The ultimate goal here in raising these rents is that the landlord gets a permanent rent increase. So, not only do they get to pay whatever they want in order to make these improvements to the apartment, and not only doesn’t it make the least bit of difference that they made the same improvements a couple of years earlier, but they get to take a proportion of these increases and incorporate it into the rent as permanent rent increases.

Now, the reason that this is terrible, other than that they’re clearly profiteering and it’s completely greed-driven and it lessens the supply of affordable housing in the city, is that another law in the state allows a landlord to deregulate an apartment when the landlord manages, through this fraud, sometimes perfectly legal ridiculousness, to get the rent up to $2,500.

Landlords have really an elaborate set of incentives to kick tenants out. And these tenants are among the most vulnerable . . . people of New York. The consequences are not just the devastation to these families on the individual level, but also the fact that once these apartments are de-regulated, this is one less apartment that is affordable in New York City.

A lot of times it’s just so easy for politicians, investors, or affordable housing developers—people who are invested in these issues and who seem to have all the right intentions—to just pay meaningless lip service to the problems they have with the system. A system that in so many more ways than I just described is abso-
lutely set up to hemorrhage affordable housing and to render homeless the most vulnerable people in New York City.

**Tom Angotti**

Quickly, I just want to add a couple points that slipped my mind before. New York City has always been called the real estate capital of the world. Since its founding, it has always been a place for investors to dump their excess capital and to store it in skyscrapers.

But, something had happened in the ‘90s and up through the last decade. There was what economists call the financialization of capital. More and more excess capital was being generated and put into banks and investment vehicles, and they didn’t know what the hell to do with it. So, big cities, like New York City—particularly Manhattan—were good places to park excess capital. Not because there was anything unique about New York City, but because of the land market.

They were investing excess capital in centrally located land where it would be expected to grow over a long period of time—grow even more than putting it in a bank, because bank interest rates are so low. So, that fed this frenzy, and it wasn’t just New York City. Go to London, go to all major cities in the world and you’ll see the same thing: skyscrapers sometimes . . . half empty. [But it] doesn’t matter because they are investment vehicles; they are not for housing.

Add to that the political dimension: Michael Bloomberg, the twenty-ninth wealthiest man in the world, is the mayor and explicitly says that New York City is the “luxury city” and that it is our goal to attract more wealth. [T]hat’s what development is, and it’s classical and neoclassical economics, which is trickle down economics. The more capital we have, the better off everyone is going to be. That explains what has happened. The gross loss of affordable housing over the past two decades has been inspiring a renaissance of movements against displacement.

Of course it’s this vast displacement that’s triggering investment. That has been the history of the real estate capital. [When] more capital gets dumped into the city, it has a displacement effect. It raises land values, and with increased land values you get increased rent and people get pushed out.

The economists are trying to say the housing problem has to do with the housing market, that there is the law of supply-and-demand: if you increase the supply [by] build[ing] more housing
and make[ing] more housing units available, they will trickle down
to the people who need [housing] the most. That has never
worked. It’s never worked, and the last twenty years are an example
of it. We have had a building boom, yet [New York City] has be-
come more unequal, more people have been displaced, and there
has been a bleeding of existing affordable housing. There is a push
to privatize public housing. Mitchell-Lama, the middle-income
housing program, is in crisis and we’ve lost 25% of those units. So,
that theory doesn’t work. You have to look at land, and that is why
land is the essential element that we have to attack. When we talk
about reform and change, and government programs, it has to be
with the way land is dealt with. This is why rent control is so dan-
gerous, not because it limits the rents. A lot of landlords don’t
make their big profits on rents; they make their profits from their
ability to resell over time.

ROBIN STEINBERG

I knew that I was going to feel this way by the time the panel
got to me. Because I looked at the bios of everyone who is speak-
ing, and I knew that they would use terms like “real estate lobby”
and “historic trends.” Each and every one of [these panelists] is
more brilliant than the next. I have to be honest: I felt a little out-
classed. I feel as if I haven’t actually dealt with things at the macro-
level for so many years that I have to harken back to my days at
Berkeley as an undergrad. So I did what every person does in this

12 Robin Steinberg is Founder and Executive Director of The Bronx Defenders
and a leader and a pioneer in the field of indigent defense. Since graduating from
the New York University School of Law in 1982, Robin has spent her entire career as a
public defender. In 1997, Robin founded The Bronx Defenders, where she developed
holistic defense: a client-centered model of public defense that uses interdisciplinary
teams of advocates to address both the underlying causes and collateral consequences
of criminal justice involvement. Robin has been honored by the National Legal Aid
& Defender Association for her, “exceptional vision, devotion, and service in the quest
for equal justice,” and by the New York Bar Association for her, “outstanding
contributions to the delivery of defense services.” She has taught trial skills at various
law schools and is currently a Lecturer in Law at Columbia Law School, where she
teaches a seminar on holistic defense. Robin is the author of four articles: “Heeding
Paradigm” (Washington and Lee Law Review, Summer 2013), “Beyond Lawyering:
How Holistic Lawyering Makes for Good Public Policy, Better Lawyers, and More
Prison Policy and the Deadly Politics of Denial” (Harvard Journal of African-American
Public Policy, 2005), and “Cultural Revolution: Transforming the Public Defender
day and age, and I went to TED Talks last night.\textsuperscript{13} I sat in my kitchen and I was downloading TED Talks frantically.

Income inequality: I know what it is when I see it. It’s like pornography: you know it when you see it. But I can’t really define it. And I can’t really define it in the way that I know that my colleagues here have because I am not an economist and I am not a sociologist or a professor. But here’s what I took away from the TED Talk. I took away that economic inequality, no matter what country you are in, the worse that it is, the worse you fare on every metric that can ever be measured in a society. Everything from happiness to trust, all the way on through mental illness and incarceration. Every bad thing that could happen in a country, happens more the more economic inequality there is. So I learned that. The other thing that I really took away was the final point that the TED Talk advised: that if you want to live the American dream, move to Denmark.

So, I decided instead what I would do is focus on what I know best. I have been a public defender for thirty-two years and at the Bronx Defenders for the past seventeen years, which is located in the South Bronx in one of the poorest urban congressional districts in the nation.

I want to talk about how being poor affects what happens to you in the criminal justice system. I want to talk about what we see and how it continues to push and worsen economic inequality. That is the alley that I am going to go up tonight.

The obvious thing that we can look at is: if you are poor, how does that affect you being in the criminal justice system? The first, obvious thing is that you cannot hire your own lawyer. That is the just the easy, fundamental thing. That is not to say that there are not amazing public defenders who can provide amazing public defense, but you can’t buy your own legal team. You can’t buy every resource, or every expert, or everything that you need to defend yourself the way that you want to be defended. And if you were rich, you would be able to. This is the first place you see it, but it is the obvious trope about the criminal justice system. Of course that’s where you see economic inequality really playing out and how being poor really affects what happens to you. But, I think that it is important to look beyond the obvious.

The answer to “how does being poor affect what happens to you in the criminal justice system?” is a simple one. It affects you in

\footnote{\textsuperscript{13} For more information on TED Talks, see \textit{Our Organization}, TED, http://www.ted.com/about/our-organization (last visited Mar. 17, 2015).}
every conceivable, imaginable way, from the minute you enter the
criminal justice system until the minute you are out, and way be-
yond. Make no mistake about that. And it starts before the cuffs go
on. If you are looking at how being poor affects what happens to
you in the criminal justice system, you have to start by looking at
how we define crime. When I think about this, I like to think about
tax fraud—not tax fraud like in a big scale, but rather like tax
cheating. You all know your parents do it. You write off a little
room in your apartment you call it your home office, and you take
deduction.

Then consider what happens when there is “welfare fraud.”
You don’t mention the extra person who is living in your apart-
ment from whom you are getting a tiny bit of extra income to feed
your children, and you get prosecuted in the criminal justice sys-
tem immediately. We see those cases day in and day out. The tax
cheater: not so much. You get an audit, and it’s horrible, and you
curse the IRS, but basically what is happening to affluent and mid-
dle-class families is that that kind of economic cheating gets dealt
with in an administrative hearing by an audit, which makes you
really uncomfortable.

So you can see right away how we are defining crime. How we
are policing crime and who we are policing are obvious. There’s
stop-and-frisk, which has already been covered. There’s broken
windows policing, where conduct that is going on in every commu-
nity in New York City is being policed only in poor communities,
and disproportionately those communities are communities of
color. This type of conduct is not being policed in affluent commu-
nities. You see that most strikingly all over The New York Times
these last couple of days. Marijuana. Everybody knows that everybody
smokes marijuana. And everyone knows that the more affluent you
are, the more you are smoking marijuana. And there is no eco-
nomic difference in the consumption of marijuana. There’s no
gender distinction in the consumption of marijuana. There’s no
other distinction. Everybody is smoking weed in New York City.
And you know we can debate that another time. That is for another
night.

At the end of the day, the people who are getting arrested for
it and policed for it are people in poor communities and commu-
nities of color. So you see how that plays out in policing. If you
were to overlay a map across this country, not just New York City,
with the per capita income per block against a map of marijuana
arrests, you would see a perfect and inverse correlation. You would
see that policing is going on in communities for conduct that is not being policed in other communities. You can see how being poor is really going to affect what happens to you, not just in the criminal justice system once you are there, but before you ever get there, before the cuffs go on.

Bail. Bail is one of the most flagrant examples of where being poor is going to have a horrible impact on what happens to you, your family, and ultimately your case disposition in the criminal justice system. If you don’t have enough money in the bank and your family can’t scrape together the money to put cash bail on you while you are waiting for your case to get to trial, you will sit in prison. Here in New York City, 12,000 of you will sit at Rikers Island. You will sit in prison, and you will wait, and you will wait: while your health deteriorates, while your mental condition deteriorates, while you lose your job and your kids are traumatized. While everything is falling apart outside, you are sitting there because you can’t post a thousand dollars bail. Bail is one of the things where you can really see economic inequality. A rich person is going to get out of jail and fight their case from the outside, continue with their job, continue to nurture their families and feed their families, and continue to build their defense case with the fancy defense team that they hired with their money.

Sentencing. Sentencing is partly related to bail, because in the criminal justice system, if you are in jail your case disposition will almost always involve a jail sentence. If you are out of jail it is much less likely that your sentence will ultimately wind up with you stepping back in. That’s the reality of the system.

Imprisonment rates have risen with income inequality in this country as well. So, you have seen a dramatic increase in the past fifty years. Fifty years ago we had 200,000 people in prison; now we have 2.1 million. As economic inequality has grown in this county, so have the rates of imprisonment.

Of course if you look at sentencing, even beyond imprisonment, you have fines that are being levied against poor people in the system. So they have fines being levied against them—court costs being charged to them. And then of course you have to pay for your own treatment in the “alternative-to-incarceration industrial complex,” as I’ve come to call it. And so that all does what? It works a terrible disadvantage on you if you are from a poor community and it makes your family even poorer because the system is now extracting more money from you that you can’t pay. And
when you can’t pay, you get a warrant, you go back to jail, and it becomes a terrible cycle, which disadvantages the poor.

And the place where I think that we see it—and in some ways for us at the Bronx Defenders, we see it clearly because of the model of public defense that we use—is if you look at collateral consequences and the enmeshed penalties of criminal justice involvement.

Let’s say that something miraculous happens, and affluent Mr. Jones gets brought into the criminal justice system. And, not so surprisingly, poor Mr. Jones gets brought into the criminal justice system. And let’s say they are charged with the same thing. What you will see is that the enmeshed penalties and collateral consequences that occur for somebody who is from a low-income community or is poor will be far more dramatic and have far longer life-altering consequences than they will for rich Mr. Jones.

What do I mean? The collateral consequences and enmeshed penalties are things that are connected to your criminal case outside the criminal justice system. If you get a conviction in criminal court, you may lose your public housing. If you get a conviction in criminal court, you may lose public benefits. If you get a conviction in criminal court, you may see that you can’t apply for student financial aid to go to college, you may be deported, [and] you may lose your children. There are lots of collateral consequences, but they only happen to you if your life is tied up in those systems. If I own my condominium on Park Avenue and I get convicted, guess what? The board probably doesn’t actually throw me out, but Section 8 housing and the New York City Housing Authority (NYCHA) may very well evict you and your family.

So those collateral consequences that we have built into what happens to you when you get a criminal conviction really touch, almost exclusively, people coming from low-income communities, and particularly men of color. So that is where you see collateral consequences as this incredibly blatant example of all the ways in which, if you are poor and coming into the criminal justice system, you will suffer far more. Not just in the immediate, not just in going to Rikers and sitting there because you can’t post bail, not just in the fact that you got arrested to begin with, [and] not just in the fact that you are going to be sentenced more harshly than someone who is coming from a more affluent community, particularly if you are black or brown. At the end of the day, even when you are done with your criminal case, [enmeshed penalties] will spread out in your life when you are engaged in administrative and govern-
ment agencies because of your low-income status. Whether it’s public housing or public benefits or public school or any other place, you will see those effects trickle for years and years and perhaps your lifetime. And that is one of the ways that you really see through the criminal justice system a kind of disparity about how affluent communities and poor communities are treated differently.

In closing, the criminal justice system, in my mind, is being used as a means of social control to be thrown over poor communities and communities of color in this country. This is undeniably true. We can argue it. People can talk about it, saying, “No, police are there because there are higher crime rates.” But that is not really what is at play there. The criminal justice system is being used as a mechanism to control poor communities. And we talk about what the fear is under that, but there is no doubt that it’s true that the criminal justice system is more involved in poor communities and that it reacts more aggressively in low-income communities through policing and other strategies. Its impact is going to be worse in poor communities through collateral consequences and sentencing. In other words you are going to get more time, more often.

I have a client who we have been representing for many years who would seem to be a success story in the public defender world. What do I mean by that? We all like to think that the client comes into the criminal justice system, you connect them to the services that they need, you support them, you defend them, you work your way through all the systems—at least in our model of public defense at the Bronx Defenders—you manage to get their kids back, get them into stable housing, and get them out of jail, and they kick their heroin problem and they get their kids reunified with them from the family court. Then it is all good and there is your client standing in their home. And then my client said to me, “You know what, I’m still poor and my life is still really, really, hard.” And so, at the end of the day, even when we are toiling away in the criminal justice system in low-income communities, even when we can protect and defend clients against all of those consequences, we are still left with the reality of what it means to be from a low-income community and to be poor in this country in 2014.

DISCUSSION

JENNIFER JONES AUSTIN

It is encouraging to hear my co-panelists speak to many of the
structural and institutional policies and practices that have served to perpetuate racism and inequity over centuries.

I must also say, though, that as an individual who has worked both inside and outside of government, and deliberately so, when I graduated from law school I determined to go work in government wanting to be an advocate. Talking with many people, I was told that if you are going challenge government the best learning that you can have is going first to work in government, because then you gain an insider’s knowledge and you gain an appreciation for how government does what it does and why it does what it does. So as I have sat here and listened to discussion about displacement, displacement is very, very real and much of it is intentional, but we also have to appreciate that the game can only be played when you have willing participants in it.

So I look at communities like the Bedford Stuyvesant community, to take that as an example. I did not grow up in Bed-Stuy, but my father was a civil rights activist and a Baptist minister, a very prominent Baptist minister and civil rights activist, known internationally for his work. When I go into Bed-Stuy on Sunday mornings now to go to church, it looks very different than it did when I was growing up. I see more Caucasians walking along the streets of Bed-Stuy on a Sunday morning than I do African-Americans. But some of those African-Americans who lived in the community before determined and decided to sell their homes and not just African-Americans. Some determined to and maybe we can say that they did so for a variety of reasons. Maybe they did so for their nest egg, maybe they wanted to return south. But we can appreciate that some took advantage of gentrification, and they got on up and out.

Take my organization, the Federation of Protestant Welfare Agencies. It is an anti-poverty advocacy organization that, for better than ninety years, has been working with community-based organizations to address the needs of vulnerable populations, communities, and individuals. Just today I closed on a condo down in the Wall Street area, moving my organization’s headquarters downtown. Why are we moving? Because I took advantage of the real estate market and sold a building that the Federation bought about thirty years ago for about five million dollars, and I sold it for fifty million dollars so that the Federation could take that money and reinvest it in the community and its mission. People will say that I sold out, that I sold out to the big real estate developers. But I saw an opportunity to take the money and to put it back into the community rather than to have it sit in a building.
So as we’ve talked about the concentration of wealth, we’ve talked about real estate and conspiracies around real estate. I worked for Attorney General Elliot Spitzer, and he brought the biggest predatory lending suits against agencies back in the ’90s, and he’s the son of a real estate mogul. I worked for Mayor Bloomberg, and people said he wasn’t for the poor people. He did a lot that wasn’t very good for poor people, I admit that, but he also campaigned to bring about greater food policies that would serve to bring about a reduction in health disparities in low-income communities where people are dying from diet-related diseases in greater numbers than people in the Caucasian community.

The point that I am making with all of this is that we are making a very valid point up here, but it is important that we appreciate that these issues are complicated and you have to look at all the faces to understand them. They are nuanced in many respects. And sometimes people in positions of authority at the highest levels know exactly what they are doing, but sometimes people are just doing business as usual and they are not questioning and challenging. So a lot of the work comes in the policy work and I am going to turn it into some of this strategy conversation.

One of the things that I have come to appreciate working at the Federation of Protestant Welfare Agencies (FPWA) and working with on-the-ground community-based organizations that are doing the work of helping people make ends meet, ensuring that people have food supports, that they have housing support, that they have cash assistance, that they receive child care supports that enable them to go to work, on and on and on, one of the things that I’ve come to appreciate is that we are not really playing the capitalist game by making sure that people have, what is that old Chinese proverb, “give a man a fish and you feed him for a day, but teach a man to fish and you feed him for a lifetime.”

Many of our support organizations are doing the critical and necessary work of helping people get by from day to day, and they are not really doing the work of helping to change the conversation and not helping people to become upwardly mobile. So what my organization, FPWA, has determined to do is to figure out how to begin to change the game and how to get people more engaged in the game, and how to start changing the conversation around the living wage.

Why do we believe that we should just give people income supports? Why can’t they get ahead with just a few more dollars in their pockets? Why are we not pushing for fair and living wages?
Why are we pushing for minimum wages that just take the wages up by seventy-five cents a year between now and 2015? Why are we not saying that to live in New York City at a minimum everybody should be making $15.15 per hour? But we can’t get many people to join that discussion.

We have, in social service agencies, people who are working to serve the most vulnerable, and who are making less than $9.00 an hour. The people who are serving the people who are vulnerable are themselves vulnerable, but we are in fights with budget decision makers about whether or not that’s right.

Should non-profits be able to decide for themselves how they want to spend the money that comes through their contracts? In my opinion: no, not when it means that some people are going to go hungry at night while putting in a full day’s work.

The point that I am making is that we are functioning in a system that was based in structural racism and then over time it has been layered with policies that, on their face, suggest we are trying to improve upon all of the mistakes that were being made along the way, that we are trying to rectify, and that we are trying to give people equal opportunity and equal access. But then you have within the last administration an education reform plan that says we are not going to create a system replete with great schools, but we are going to create great schools within a system. What that means is that we know that we are not giving everybody opportunity. We are in a system where your early childhood foundation determines your success in elementary school, and that success in elementary school determines where you are going to go for middle school. And where you go for middle school then determines where you go for high school. We can’t play on the fringes.

We’ve got to get involved in real policy-making and that comes about by supporting policy and advocacy organizations. That comes about by getting involved in voting. That comes about in some instances by becoming a part of government so that you can be on the inside and challenge government.

FAHD AHMED

While I do think that the problems that exist are very intentional, I think it’s a little bit distinct than sort of personalizing it, as if it’s about some bad people that are doing it. I think that it’s inherent to the system. It doesn’t matter really who the people are that are in charge. The system is inherently set up so that, for it to
survive, it has to further and deepen exploitation and division and inequality, or whatever terms we want to use.

I think, at least from our perspective, because there are problems inherent to the system, we have to challenge the system. I’m sure later on, I’ll get the questions like, “Do you think some form of capitalism could work?” The answer to that is no. “Are you a socialist?” “Are you a communist?” No, I’m not saying that. I think as humans we still have a long way to go to figure it out, but I know that this system does not work.

And the lives of billions of people across the world show that it does not work. And so, what is the way to change it? I think we should use all of the tools that are available, whether that is voting, whether that is advocacy, whether that is lawyering. But fundamentally, I think the most potent tool is building the power of people that are directly impacted by these policies themselves. To build the power of workers as part of unions and as part of workers’ centers, to build the power of immigrants, to build the power of women, build the power of students from low-income schools, and really believing in mass movements.

We can elect politicians and they can say one thing, and then they can appoint Bill Bratton to be the police commissioner. Right? Talk about the “tale of two cities” and bring in the police commissioner who, more than any other police commissioner, implements policies that reinforce the “tale of two cities”.

And so how do we build a mass base of people so that they are able to raise up their own experiences, raise up their own voices, and really start to create a system of self-determination? The way that we do this is people and movements, and it may be a surprise to some people but social movements are pretty low in the United States. And really, the way that we start to build the power is by engaging [and] is by practice. We’re not going to come up with this grand theory and figure out, “Here is what we do.” But it’s by engaging in small struggles, policy-change struggles. Passing the Community Safety Act around the NYPD, increasing the minimum wage, working towards a living wage, working towards fifteen-dollars an hour. These are campaigns— these are struggles— that provide the praxis and practice for people to learn how to fight back. And how to raise our voices and to start to build power in a way that the people in power are accountable to them rather than just every four years we press a button and then hope that they do the right thing.
I have a really quick response to something that Ms. Austin said about voluntary participation and gentrification and all that. And it is maybe an obvious point, but it leads into a solution... even if a far-fetched one. The thirty-thousand families, not individuals but families, that were evicted last year, the tenants who live in affordable apartments in New York, and are routinely harassed out of their apartments, are not, categorically not, participating in gentrification. They’re not, you know, selling out in any respect and they are vulnerable.

Let me say, I appreciate that, and I’ve actually worked on housing evictions.

Shawn Blumberg

No, I got it. I think a point worth making, however, is that, in housing court, where people get evicted, which is set up in fact to evict people, over ninety percent of landlords have attorneys, and even in Manhattan, where we work, south of ten percent of tenants have attorneys. This is part of the point I was trying to make earlier. This is a system that is set up just to leave the most vulnerable people as exposed as they can be to be evicted. And as a result, to not only have them suffer the devastation that is inevitable when they lose their homes, but also for affordable housing in the city to continue diminishing.

I would say one solution is funding legal services. There is a difference that might not be obvious to everybody here. In criminal court there is a right to counsel. In family court, where the state is bringing Article 10 proceedings to try to remove peoples’ children, there is a right to counsel. In housing court, where tenants are being sued to be evicted there is no right to counsel as things stand. And given the incredible resource disparity that is obviously going to continue to be inevitable when we are talking about property owners in New York City versus tenants, I think that increased funding and maybe even eventually a right to counsel in housing court is one big solution, in our world.

You know I think we need to make a decision about how we’re going to police and what we’re going to police and that, if we are
going to police we should police everyone the same. So if we’re
going to police drug crime, which I don’t suggest that we do, then
let’s go to college campuses and shake down every dorm room and
arrest every kid who has illegal Adderall. Because you all know it’s
there. And Ritalin and all the other sort of recreational drugs that
are being used. And let’s stop focusing on poor communities, and
men of color particularly, in the drug war.

So, I think we have to arrive at some understanding that we
are either not going to police or we’re going to police equally and
fairly and we’re not going to police because of the color of your
skin or the neighborhood you live in or the size of your bank ac-
count. I think that is a big decision on the macro-level. I agree that
there should be a right to counsel in a civil Gideon.\textsuperscript{14} I think with-
out that people will be struggling always and always out-
maneuvered and always out-powered by people who are affluent.

I think there needs to be bail reform. Cash bail needs to be re-
thought, and alternative forms of bail need to be used that don’t
require cash. And at the end of the day, I think I agree with what
has been said: the lawyers aren’t going to solve it all. And I am a
lawyer and I love to think that we can solve lots of things. Lawyers
can do really well at what lawyers do and what we do really well is
litigate and defend and engage and I think that is important. But
lawyers need to also work in partnership with clients and with the
people that they are serving and organize with them as partners in
the struggles that our clients prioritize.

That partnership of lawyers and community members organiz-
ing in the context of the criminal justice system, not just people
going through the criminal justice system but people’s families and
communities partnering with lawyers and organizers is an incredi-
bly powerful way to address systemic issues. Stop-and-frisk was the
great example of that, the perfect merging. I frankly never thought
I would see it in my lifetime, but it was sort of the perfect merging
of all those things coming together at a wonderful moment. Seeing
something actually change, gives me hope, even though I know I
sound pretty angry and not hopeful most of the time. That was
something that gave me a little hope that you can actually bring
about change.

I would also like to think [about moving away from the] silo-

\textsuperscript{14} The term “civil Gideon” refers to the 1963 Supreme Court decision Gideon v.
Wainwright (372 U.S. 335), which held that the Sixth Amendment grants indigent
defendants the right to state-appointed and state-paid counsel in criminal cases. A
“civil Gideon” would extend the right to counsel to indigent people in civil cases.
ing of policy organizations and direct services organizations. Policy should be dictated by the organizations that are working in the communities with the people. And to the extent that you can make that process seamless, in a perfect world, it would be housed in one place. In a perfect world, you would have the direct service work being done, in every form for clients, informing the policy and organizing activities that the organization takes on. I would like to think that is one of the things we do at the Bronx Defenders. But if you can’t do that, then there should be seamless access and relationships and collaboration that is very deep and very wide between direct service providers, particularly in low-income communities, and policy and organizing advocates because I think when that disconnect happens, we all go a little bit haywire.

JENNIFER JONES AUSTIN

That’s exactly what FPWA does and what we are trying to do more of is to provide advocacy building opportunities and training for on the ground community-based organizations so that it’s not just the policy people carrying their messages, and they are carrying them themselves.

STEVE LOFFREDO

Last words?

TOM ANGOTTI

I really go for this integration between policy and practice. I’m sort of one of the “go-to;” I think I’m the only “go-to” urban planning professional when there is a case and somebody needs an affidavit. I’ve written as many affidavits as I have articles for scholarly journals. And, most of our cases are lost, but I’m waiting for you guys to start challenging the City’s land use policies.

Land use and zoning policies are essentially based on whatever the real-estate market dictates. The City Planning Department should be renamed as the “Department of Real Estate.” And Mayor Bloomberg sponsored 140 re-zonings, 40% of the land in the city was re-zoned, which included creating multiple new opportunities for new development and oodles of profits for landholders. So, there is a case to be made.

The Furman Center for Real Estate and Urban Policy at NYU did a fantastic study in 2006, looking at the first generation of Bloomberg’s re-zonings and all of the up-zonings to create new op-
opportunities for development were disproportionately concentrated in low-income communities of color. And the re-zonings that were protecting blocks and neighborhoods were disproportionately in middle-income and white neighborhoods. Is there something to litigate there?

My greatest inspiration over the last several years has been seeing a renewed sophistication in the fight against displacement. I look at, not so much at Bed-Stuy, but next door at Crown Heights. The Crown Heights Tenant Union, and there are several other similar organizations, that for the first time are bringing together the gentrifiers and the gentrified, black and white, middle-income and working people. And, they’re all saying, “This is crazy, we don’t want to move.” I went to a meeting a couple of weeks ago where home owners are getting up and saying, “I could sell my house for ten times what I bought it for, but my family has lived in this neighborhood for generations, my friends are here, I don’t want to move, you can’t pay me enough; but, the pressures are such that everyday I’m getting a mailing that they want to buy my house. They are harassing us to get us out.” And so, people are starting to really organize in a sophisticated way, eliminating some of the big divisions because our housing movement and our community movements have been historically divided as the rest of society by race and class.

I think this is what needs to be supported and that where we as professionals need to work. I was a professional who worked ten years in government at the state and city levels. And I urge all professionals to get that background and experience because there is an unfortunate view around there in our movements that says “All government is corrupt and don’t even bother.” Because there is not single community struggle that has been won in New York City without allies in government, friends, maybe not in positions of great power, but people who know where information is, people who can dialogue and work with you, collaborate with you, perhaps silently. But you have to know how government thinks and operates, and they are not all just evil masters.

There are a lot of bureaucrats, and there are a lot of people who sincerely believe in government. The problem is that we have people financing governments, and the real estate industry is the

single largest campaign financer in New York City for both parties. The view is that government can’t do it, and that is the great neoliberal lie that we also have to undo. We need government. We need better government. We need more honesty and straightforward government and that includes the professionals who go in, and don’t lose your moral compass and your political vision and your social vision if you go into government; but hang onto it and work with it.

QUESTIONS FROM THE AUDIENCE

LAW STUDENTS FOR REPRODUCTIVE JUSTICE (LSRJ)

Hello, this question is for the whole panel. When we talk about government, what role does the increasing privatization play and how does this increasing privatization affect low-income communities? In particular, how does this privatization affect prisons and policing as well as municipal functions and foster care?

ROBIN STEINBERG

I can make it simple. I think no good can come of privatization of prisons anywhere. Prisons should be uniquely a government function that should be thought about carefully, compassionately, [and] with an eye towards re-entry into people’s communities. Privatization: no good will come of that, at least not in my arena of the criminal justice system.

JENNIFER JONES AUSTIN

So, I’ll speak with respect to foster care. Are you aware that in the last year or so the Bloomberg administration engaged in some experimentation with social impact bonds? Are you familiar with social impact bonds? The Bloomberg administration partnered with Goldman Sachs to try to provide a set of services working with a nonprofit agency to achieve specific outcomes in a shorter period of time the theory being that you would spend less money over a time to achieve the outcomes that you desire.

This partnership did something on Rikers Island with the juveniles and they did something with foster care and with early childhood. The jury is out in foster care. I don’t know about the Rikers Island initiative on whether or not it actually proved successful.

One of the challenges that you have with privatization is that you find people taking shortcuts sometimes to try to maximize the
return on investment. But the flip slide of that you can learn from some of the principles that sometimes attend privatization or business when working with nonprofits. When you run a nonprofit, many people look at nonprofits as not being “businesses” and so therefore they don’t apply some of the soundest practices that you will see in solid functioning for-profit entities. I think lessons can be learned, but I don’t think that they should be privatized.

Tom Angotti

I think the privatization of public services, schools, libraries and parks through conservancies are major contributors to the gentrification and displacement of neighborhoods and they need to be stopped.

Fahd Ahmed

A couple quick points: Earlier, the term “neoliberalism” was thrown out. A fundamental function of neoliberalism is to undercut social services while continuing existing amounts of support resources for police services and the military as a means of exerting social control. I think that is one of the areas where that privatization is playing a role.

I do want to pick up on something around profit and nonprofit models. As somebody that is extremely critical of anything around privatization, I do think that there is a serious problem with folks engaged in nonprofit work resting on the fact that they are engaging in social work or justice work and not really committed to doing that work in the best and most efficient way possible. I think that that is a problem.

A lot of folks in the social justice movement, from the services aspect to advocacy to organizing just feel good about the fact that they are doing good work. That can’t be enough. As people who are working toward public interest work, I would highly recommend that whatever you choose to do you have to do it in the best way possible.

Jennifer Jones Austin

That is interesting. I recently spoke to a number of non-profits—a significant number of non-profits, CEO’s, and COO’s and CFO’s—about nonprofits establishing their business models, and I was fascinated. I noticed that the looks on the faces of these people were like, “business model? Why do I need a business model when
I’m running a non-profit?” When I spoke of the whole notion of: “Who’s your customer? Who are your customer segments? What’s your revenue? What’s your value proposition? Who are your stakeholders? Who is your strategic partner?” They were looking at me like I had two heads. If you are going to drive an effective and efficient business you have got to operate with those concepts and principles.

**LABOR COALITION**

To give context to my question, CUNY Law School is an institution that was built to address the problem of economic inequality in New York City by having a mission and structure of recruiting students who wouldn’t traditionally have access to this type of education.

The mission of the school is to train students to be part of the legal profession and train them to give back to disadvantaged communities in New York City.

We are facing extreme budget cuts, low enrollment and, with that, higher tuition. This situation is affecting both students and staff. Job security is a big issue, not just for the staff, but for us when we graduate.

My question is: how do we build that social movement here on our campus within the University as a whole? How do we identify how economic inequality is affecting a public university here in New York City that is supposed to serve New York City?

**TOM ANGOTTI**

Well, since I’m the chair of the Hunter Chapter of the Professional Staff Congress, which is the union representing faculty and staff at CUNY, we haven’t had a contract in four years, which means wages are flat. Now, the big social justice issue is the huge gap between full-time and part-time faculty. Part-time faculty on a per-hour basis, are making a fraction of what the full-time faculty make, and they don’t always have access to benefits.

I think more students and faculty across the campuses in CUNY can get together and push in Albany, where the big resistance is. The resistance is in the legislature and the Governor’s office. We need to push so that we get a decent contract with livable wages for everybody working at CUNY. That means fighting for funding because somebody has got to pay for the increased wages. The legislature has to come up with the money.

The feud is that we shouldn’t spend any more money on pub-
lic education, it needs to come from the private sector. The fight around the contract is really a fight to save CUNY. Every year, tuition goes up. Every year, wages are flat. And what Albany wants now is a contract with zeros every year going forward. Zero wage increases going forward. That is unacceptable. Part of the struggle is that the majority of faculty members at CUNY are part-timers. Thirty years ago the majority were full-timers. Because of the privatization of the university, the corporatization of the university, the hiring of administrators over teachers, we now have more administrators than we have full-time faculty in some cases.

I think that’s a task right before us, right now, that we really are working on now. We are testifying at the next Board of Trustees meeting, again, to try to get them to push. We’ve been supported by the City government, but the city portion of the budget is only the minority of the budget. The majority comes from Albany, and that is where the pressure needs to be.

CUNY LAW ASSOCIATION OF STUDENTS FOR HOUSING (CLASH)

In May of this year De Blasio announced his proposal for creating a number of affordable housing units, which is basically inclusionary zoning and creating a bunch of 80-20’s across our city. I think there are a lot of problems with this. I want to hear from Tom Angotti and Shawn Blumberg Maybe you explain a little bit about what 80-20’s and tax incentives and then also how this effects gentrification and how its really a back-door way to gentrify neighborhoods. And Shawn, you spoke about incentives for landlords to evict tenants. There are a ton of them, and I am wondering if you see this new proposal for inclusionary zoning and 80-20’s as a way to undermine rent stabilization and give almost another huge incentive to landlords to de-stabilize their buildings and possibly sell them to large real estate developers to create these 80-20’s.

SHAWN BLUMBERG

I think the inclusionary zoning really is probably something that Professor Angotti can speak more intelligently about. First of all, concerning tax incentives, 80-20’s, inclusionary zoning, there is a distinction between them. Also, within inclusionary zoning itself, there is an existing program from the Bloomberg administration, which has been optional, although I think there are proposals to make it mandatory. The idea with inclusionary zoning is that land-

\footnote{No copy.}
lords are given incentives to develop affordable housing in return for the ability to develop more space. I think mandatory inclusionary zoning has some very positive aspects, although I realize it’s debatable.

The 80-20 program is a bunch of existing tax incentives that landlords have. 421A tax abatements, low-income tax credits, are a big part of that: there are huge problems with this program both from a policy standpoint and certainly from the way we see landlords administering it. Landlords get to participate in all these different programs, often three different programs where they get multiple tax benefits for the same affordable housing. That is unfair and silly.

These incentive programs are really complex, and really opaque. We have seen in our neighborhood, where there happens to be a particularly high density of these 80-20’s, where it is to a certain extent an open question whether these landlords are knowingly screwing tenants or they incompetent because the program is so complex. We have an organizing campaign to educate people around these issues and we are trying to gather data, about what programs these builders are participating in; the duration of the tax abatements and the duration of the corresponding affordability of certain apartments. I won’t go too far into the weeds on that. We reached out to some property developers and were told several times, “We don’t have this information and to get you this information we would have to spend thousands of dollars in attorney’s fees.” It is debatable from our end, if it is scarier if that’s true, or if it’s scarier if they’re making this up? There are huge problems and the system in a very real way is set up intentionally to hemorrhage affordable housing. I don’t think every variation of the tax incentive policy necessarily needs to be a bad thing, but I certainly think the way that the policy has exists up to now has a lot of problems, both in the way that it is supposed to work and in the way that it actually works.

TOM ANGOTTI

When Bloomberg and later de Blasio announced their affordable housing programs, the Real Estate Board of New York unanimously stood up and applauded. Why? Because these programs are moneymakers. They make money on affordable housing. It’s public subsidies that go into it. Real estate doesn’t pay for that 20% that’s affordable. The other problem with these programs is, if you look at the definitions of affordable they are invariably unafford-
able to the people in the neighborhoods where the inclusionary housing is being built.

If you look at the history under the Bloomberg administration, and it’s not going to change much, more people have been displaced by inclusionary housing and more affordable units have been displaced than have been created. That is the problem. Check out my article “A Tale of Two Housing Plans.”17

When de Blasio came out with his housing plan I was looking for a different approach. At the beginning, de Blasio’s plan starts to sound like a different approach. There is talk about helping neighborhoods preserve the quality of life and a lot of good rhetoric and narrative, but then you look at the teeth in the plan and it’s all about building market rate housing with 20% affordable housing. Originally the promise was we were going to get 30 or 40 or even 50% affordable housing, but City Hall just announced it’s going to be 20%. The real estate industry said, “more than 20% and we can’t make any money. If we can’t make any money, it ain’t going to work.” So, now you know who does the planning.

I think the inclusionary housing program could work better but New York is late at the game and is doing it the wrong way. San Francisco has an inclusionary program that has some problems, but they started a lot earlier and it’s much better thought out. At least they try to integrate it with neighborhood preservation. That’s not happening here.

JENNIFER JONES AUSTIN

I shared earlier that I was the co-chair of the de Blasio transition team and I had a hand in helping to appoint probably 95% of the people that are holding their positions. When I did so, I did so with a mandate to look for the most progressive, competent, and diverse people to fill these positions: people that were as concerned and sincere about economic inequity and creating a more equal opportunity city as any one of the persons sitting up here on this panel, including myself. What I will tell you is that it is hard to run a government. I will tell you that ideas have consequences, some you intend and some you do not intend. That it is not as simple to say that somebody just went south and elected to do something that went contrary to what they campaigned on.

When you are running a government the size of the New York

City government and you have competing concerns, priorities and challenges, sometimes you can not do everything just the way you intended to. Sometimes you hope that you do a little better. It’s not always going to be perfect and sometimes perfect is the enemy of the good. Sometimes what you put in place is more disastrous than what was there before. It’s all about taking risks and you try to make smart, calculated and educated risks. But there is not one person that sits in that City Hall right now or any of those city agencies that is not as concerned about economic inequity and overcoming it as any one person on this panel and I can say that personally.

AUDIENCE MEMBER

Thank you for a very insightful and informative panel. My question is about the role of women in this conversation about economic inequality. Something that isn’t unique to this panel is that the word “women” was mentioned once. The conversation around economic inequality doesn’t center on the needs of women and the role that they can play in combating economic inequality. From what you’ve seen in your work respectively, how do we make sure that women stay in the center of this conversation?

JENNIFER JONES AUSTIN

For many of the persons who are challenged here in this city and across this nation, low-income earners, a great many of them, probably the greater majority of them are low-income women, and in particular women of color with children. So, maybe we haven’t singled them out because in some instances it goes without saying. When I talked about social service workers being among the lowest paid, we’re talking about women, primarily women, and women of color.

ROBIN STEINBERG

The reality is that policing and the criminal justice system pretty much target men and men of color in New York City. So of the stop and frisk campaign, 10% of the people who were ever stopped and frisked in that campaign over all those years during the Bloomberg administration and the Ray Kelly administration were women. While it is true that there are women in the criminal justice system, there is a more prevalent conversation about how men are coming through the system. Not to say that there aren’t women in the system and that it is not impacting women who
aren’t going through the system, who are members of that family. This is obviously a very important conversation to have.

I think if you wanted to look at the analogy of where systems are at play for women who are in low-income communities, you will have to look at the child welfare system. That system is really where you see women being hauled in on abuse and neglect petitions, 80% of which are directly related to “neglect,” which is almost always directly related to poverty. Who you see in the family court system, whose kids are at risk of removal, are poor women and almost exclusively women of color. That is something that we really need to be talking about in the broader narrative of poverty and income inequality and women in particular.

**FAHD AHMED**

To undo existing hierarchies in society, we can’t recreate smaller hierarchies. If we see rich above poor, men above women, adults above youth, fairness around housing status. We have to be sure that our movements are reflective of those hierarchies and actually flip those hierarchies in total. An example is when the housing plan came out one of the things that it completely excludes are the lowest income folks and homeless people. Completely excluded. How do we expect that plan to fix anything if the people who are the most marginalized in the city are not accounted for in that plan? I appreciate that this is an ongoing struggle, but even in our movements we have to figure out how to not recreate existing hierarchies.

**AUDIENCE MEMBER**

I’m not a lawyer. I am actually a social worker who works in the alternative-sentencing industrial complex, which I think is a wonderful name for that. It is important that when we talk about inequality at any level we engage people who are actually being affected by it. There are these wonderful policy discussions that you can have and there are these broad macro discussions about housing, but for me, since I primarily work in substance abuse and mental health the issues that come up are: “I have a criminal record and I can’t get a job” and “I can’t get student loans.” “I can’t vote.” “Why should I stay abstinent (or whatever the treatment modality is that we want these people to do so that they do not go back into the judicial system)?”

It becomes so that we have begun to use the judicial system as a treatment modality. Which is ineffective. It’s immoral too, but
that is a different issue. How do we go from looking at large marco issues and then begin to engage the people on the ground and ask them, what is it that they want? How is it that we can help them as opposed to doing the exact same thing that has been going on, which is: “we know what is best for you, we’ll tell you what we should do on a policy level.”

JENNIFER JONES AUSTIN

I can give you one example where we can see what you are talking about making a difference. Are you familiar with worker cooperatives? They are an alternative form of entrepreneurship, where a group of individuals will come together and decide to create a business from the ground up.

New York City year after year was engaging in all of these workforce development opportunities and supports that really weren’t getting people anywhere. People engaging in entry level positions with no opportunity for growth and development. No increased incomes or career ladder opportunities.

We went to the government and said that you really should be investing in worker cooperatives as a small business like service. We went to the New York City Economic Development Corporation and said support worker cooperatives where people on the ground are empowering themselves, deciding what they want to do, how they want to make an income, how they want to support their families.

Just recently the City Council invested $1.2 million in helping to seed worker cooperatives. Growing about 920 worker cooperatives with this seed money and more promised over the next several years to come and building out about 235 new jobs in the first year. By listening to the community and having the community say, “This is what we need, this is what will strengthen our community and strengthen us as individuals.” What that requires often is having that go between, having that broker who is going to help bring forward the voice, helping to organize individuals and communities on the ground to help bring the conversation back. That is just one example, I am sure that there are others.

FAHD AHMED

For me the emphasis is always organize, organize, organize mass bases of people. So, I’ll mention three organizations. There’s
VOCAL New York,\textsuperscript{18} which organizes people both in public housing and people dealing with substance abuse issues. Picture the Homeless,\textsuperscript{19} which organizes homeless people and also a lot of folks dealing with substance abuse problems. NHRE: New York Harm Reduction Educations.\textsuperscript{20} If you go to these organizations, their members are the folks that are dealing with substance abuse issues, they are the ones coming together, they are talking about their problems, they are coming up with the solutions and they are leading and organizing their own struggles. Nobody is telling them, “Here’s what you should do, let me advise you.” They are amazing at it. Support those organizations financially, volunteer wise, whatever it is. I am sure that there might be other organizations like that as well.

ROBIN STEINBERG

I just wanted to make a final point. I feel the need to say this. Maybe it is just the defender odd moment in me and maybe it is a bit of a kumbaya moment as well, but I feel like it is important to say that there is no question that the current administration and Jennifer [Jones Austin], in particular in her leadership role, took enormous care to try to find people who run parts of this government in ways that we haven’t seen in a very long time. In compassionate ways. In smart ways. In progressive ways and in inclusive ways and in ways that we haven’t seen before. I watched in awe as I saw people being appointed, people that I knew, being appointed to positions of authority. Positions where they could actually make a difference. People who were actually going to make change and we have seen some of that change.

Maybe because it is the defender in me and maybe it is because I am talking to a lot of law students here, but I also think that it is equally important to say that the voices from the outside, on the ground are critical. The voices that are nay saying and pushing the envelope all the time are critical. It is critical that you do that no matter what the government looks like and who the leaders are and how progressive they appear. I think that there is room for both and I don’t think that either needs to be defensive, but I think that you need to find where your comfort level is and if you

\textsuperscript{19} See Picture the Homeless, \url{http://www.picturethehomeless.org} (last visited Mar. 22, 2015).
are comfortable on the inside and you are willing to deal with the complex issues that I am sure keep Jennifer up at night and I am sure wakes her up in an existential crisis at night about how you navigate complex issues. If you can do that and that is where your comfort level is, that is where you should find yourself. If you are comfortable on the outside, agitating and pushing and being that person to question even people as thoughtful as the leaders in this administration, then that’s where you should land. There isn’t a good and evil necessarily, but it is about finding where you need to be.

Stephen Loffredo

I would like to thank our panelists for an insightful and engaging discussion and I would like to thank all of you for coming. I would also like to thank CUNY Law Review for organizing this panel tonight.