

# CUNY LAW REVIEW

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

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Scholarship for Social Justice

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# A SUFFICIENCY-OF-THE-EVIDENCE EXCEPTION TO THE NEW YORK APPELLATE PRESERVATION RULE

*Matthew Bova*†

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Appellate procedure gets little attention. Politicians have never heard of it, law school barely mentions it, and lawyers prefer search-and-seizure doctrine to the dry intricacies of appellate rules. This is unfortunate. Since 1970, over two million people have been convicted of a crime in New York.<sup>1</sup> This number continues to climb. In this massive system of convictions, an appeal is often the last chance to correct an error that will have a life-changing impact on the accused. But while the New York State Constitution and Criminal Procedure Law establish a right to appeal,<sup>2</sup> that right is burdened with procedural hurdles. “Preservation” is perhaps the biggest one.

New York preservation rules generally require that parties cannot argue a point on appeal that they did not raise at trial.<sup>3</sup> This doctrine creates a “speak now or forever hold your peace” mandate—if defense counsel does not speak up, his client loses the claim forever. As the Appellate Divisions annually reject thousands of criminal appeals on preservation grounds, preservation often means the difference between liberty and prison. Given these stakes, preservation rules must be fair. When it comes to “sufficiency of the evidence” appeals, they are not.

Under the state and federal due process clauses, the government cannot incarcerate someone without proof of guilt beyond a reasonable doubt.<sup>4</sup> A violation of this “sufficiency of the evidence” rule (“sufficiency”) is “the most fundamental of all possible defects in a criminal proceeding.”<sup>5</sup> Recognizing as much, the New York legislature has expressly guaranteed appellants the right to argue that the “evidence adduced at a trial . . . was not legally sufficient to establish the defendant’s guilt of an offense of which he was convicted[.]”<sup>6</sup>

Sufficiency arguments come in many different forms, ranging from categorical arguments about the Penal Law’s scope (e.g., a

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<sup>1</sup> ASS’N OF THE BAR OF THE CITY OF N.Y., THE CRIMINAL JUSTICE OPERATIONS COMM., THE CORR. & CMTY. REENTRY COMM., & THE CRIMINAL ADVOCACY COMM., REPORT ON LEGISLATION BY THE CRIMINAL COURTS COMMITTEE 2 (2015), <http://www2.nycbar.org/pdf/report/uploads/20072824-ReportonA.7030S.5169reSealingMisdemeanorFelonyRecords.pdf> [<http://perma.cc/42K3-8SVQ>].

<sup>2</sup> N.Y. CONST., art. XI, § 4, art. VI, § 4(k); N.Y. CRIM. PROC. LAW § 450.10 (McKinney 2015); *People v. Ventura*, 17 N.Y.3d 675, 681 (2011); *People v. Callahan*, 80 N.Y.2d 273, 284 (1992); *People v. Pollenz*, 67 N.Y.2d 264 (1986).

<sup>3</sup> *See* CRIM. PROC. § 470.05(2); *see also* *People v. Gray*, 86 N.Y.2d 10 (1995).

<sup>4</sup> *See* U.S. CONST. amends. V, XIV; *see also* N.Y. CONST. art. I, § 6; *Jackson v. Virginia*, 443 U.S. 307, 309 (1979) (citing *In re Winship*, 397 U.S. 358 (1970)); CRIM. PROC. § 70.20.

<sup>5</sup> *People v. Udzenski*, 146 A.D.2d 245, 250 (2d Dep’t 1989).

<sup>6</sup> CRIM. PROC. § 470.15(4)(b).

disorderly-conduct defendant concedes that he yelled in a subway but argues that the disorderly conduct statute does not cover a mere rant),<sup>7</sup> to fact-specific arguments (e.g., the government failed to prove physical injury in an assault case).<sup>8</sup> In some cases, the sufficiency argument will amount to a claim of actual innocence—that is, the evidence affirmatively proves that the defendant did not commit the charged offense.<sup>9</sup> The United States Supreme Court has referred to these actual-innocence errors as a manifest injustice, and has ordered federal habeas courts to review those errors despite counsel’s failure to object at trial.<sup>10</sup>

To win a sufficiency argument, the defendant must establish that, even when the facts are viewed in a “light most favorable” to the government, no rational juror could find guilt beyond a reasonable doubt.<sup>11</sup> If the court finds insufficient evidence, the accused is pronounced “not guilty” and the case is dismissed.

But under *People v. Gray*, the government *can* incarcerate an innocent defendant *regardless* of the weakness of the government’s proof. *Gray* held that if the defendant fails to “preserve” a sufficiency argument, the claim is not reviewable on appeal.<sup>12</sup>

*People v. Finch* recently challenged *Gray*’s logic.<sup>13</sup> *Finch* suggested that where the record conclusively establishes a sufficiency defect—that is, the government could not possibly have “cured” the error—preservation should not apply.<sup>14</sup> In those cases, *Finch* explained, counsel’s omission did not “prejudice” the government, and applying preservation would “raise the *disturbing possibility* that factually innocent defendants will suffer criminal punishment for no good reason.”<sup>15</sup>

This article argues that the Court of Appeals should expressly overrule *Gray* and hold, as *Finch* strongly suggests, that preservation does not apply to sufficiency appeals when the record affirmatively establishes an incurable sufficiency defect.<sup>16</sup> To justify that theory, this article explains *Gray*’s rationales and then attempts to dismantle them.

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<sup>7</sup> *People v. Gonzalez*, 25 N.Y.3d 1100, 1101 (2015).

<sup>8</sup> *See In re Phillip A.*, 49 N.Y.2d 198 (1980).

<sup>9</sup> *See People v. Hamilton*, 115 A.D.3d 12, 28 (2d Dep’t 2014).

<sup>10</sup> *Dretke v. Haley*, 541 U.S. 386, 388 (2004) (citing *Murray v. Carrier*, 477 U.S. 478 (1986)).

<sup>11</sup> *See People v. Williams*, 84 N.Y.2d 925, 926 (1994).

<sup>12</sup> *People v. Gray*, 86 N.Y.2d 10, 19 (1995).

<sup>13</sup> *People v. Finch*, 23 N.Y.3d 408 (2014).

<sup>14</sup> *See id.*

<sup>15</sup> *Id.* at 413-15 (emphasis added).

<sup>16</sup> *See id.*

Part I explains *Gray*'s analysis and *Finch*'s counter-arguments. Part II attacks *Gray*'s theory that preservation is a state constitutional rule. Part III argues that preservation is not a jurisdictional rule, and is thus subject to exceptions when the interests underlying the doctrine do not apply. From that premise, Part IV proposes a sufficiency exception to the preservation rule because affirming a baseless conviction on preservation grounds offends basic justice and advances no state interests. Finally, Part V contends that the state and federal due process clauses require a sufficiency exception to the preservation rule.

#### I. THE PRESERVATION DOCTRINE: FROM GRAY TO FINCH

Under *Gray*, preservation compliance typically involves the utterance of a few short sentences at the end of the government's case-in-chief.<sup>17</sup> For instance, a defense attorney might object that, (1) "the government failed to prove serious injury (an element of some assault prosecutions) because the injuries were too minor;" (2) "the government failed to prove that the defendant was the person who committed the robbery;" or (3) "the government failed to disprove self-defense beyond a reasonable doubt where video evidence shows that the defendant was attacked with a knife." In turn, the trial judge usually denies the motion without explanation, or utters a few sentences about the motion's problems.

*Gray* offered several justifications for this sufficiency preservation rule:

- **Constitutional Argument:** "Under article VI, § 3 of the New York State Constitution, the Court of Appeals, with limited exceptions, is empowered to consider only 'questions of law.'"<sup>18</sup>
- **Curing:** A sufficiency objection might provide the government the opportunity to cure the sufficiency defect "before a verdict is reached and a cure is no longer possible."<sup>19</sup>
- **Efficiency and Finality:** Sufficiency objections allow the court to dismiss the case at the earliest possible point, thus saving resources and bringing the case to a swift resolution.<sup>20</sup>

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<sup>17</sup> See *People v. Gray*, 86 N.Y.2d 10, 19 (1995).

<sup>18</sup> *Id.* at 20 (quoting N.Y. CONST. art. VI, § 3).

<sup>19</sup> *Id.* at 20-21.

<sup>20</sup> See *People v. Hawkins*, 11 N.Y.3d 484, 492 (2008) ("A defendant's motion for a trial order of dismissal that specifies the alleged infirmity helps to assure that legally insufficient charges will not be submitted for the jury's consideration, and serves the overall interest in an efficient, effective justice system."); see also *Gray*, 86 N.Y.2d at 21.

- **Guidance:** Sufficiency motions trigger lower-court rulings, which in turn provide guidance to the appellate courts.<sup>21</sup>
- **Alternative Remedies:** Even if preservation is required, defendants can still argue sufficiency-of-the-evidence claims before the Appellate Division (not the Court of Appeals, though) by requesting “interest-of-justice” review.<sup>22</sup> Under interest-of-justice review, an appellate court has unfettered and unreviewable discretion to review sufficiency claims that were not raised below.<sup>23</sup>

The Court of Appeals has extended *Gray* to attacks on the facial constitutionality of a statute.<sup>24</sup> So, if New York decides to ban birth control, a New Yorker can serve time for violating that unconstitutional ban if he or she is unfortunate enough to be saddled with a lawyer who slept through a first-year constitutional law class.

*People v. Finch* has called *Gray* into question.<sup>25</sup> In *Finch*, the police arrested Mr. Finch for an alleged trespass into a public-housing complex.<sup>26</sup> The defendant physically challenged the arrest and was charged with resisting arrest.<sup>27</sup> On appeal, Mr. Finch argued that the arresting officer lacked probable cause of trespass (a necessary element of the resisting arrest charge) because the officer knew that a tenant had invited Mr. Finch to the complex.<sup>28</sup> Further, while housing management had told the officer that Mr. Finch was no longer welcome, Mr. Finch contended that there was no evidence that management had the contractual authority to override a tenant’s invitation.<sup>29</sup> During arraignment, the lower court ruled that management had the authority to override a tenant’s invitation, thus defeating Mr. Finch’s probable cause theory.<sup>30</sup> In turn, Mr. Finch did not advance that same argument during his trial, and a jury convicted him.<sup>31</sup>

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<sup>21</sup> *Hawkins*, 11 N.Y.3d at 493 (“[The Court of Appeals’] second level of [appellate] review—‘to authoritatively declare and settle the law uniformly throughout the state’—is best accomplished when the Court determines legal issues of statewide significance that have first been considered by both the trial and the intermediate appellate court.” (quoting *Reed v. McCord*, 160 N.Y. 330, 335 (1899))).

<sup>22</sup> *Gray*, 86 N.Y.2d at 22 (citing N.Y. CRIM. PROC. LAW § 470.15(3)).

<sup>23</sup> See CRIM. PROC. § 470.15(6)(a); see also *People v. Belge*, 41 N.Y.2d 60, 61-62 (1976).

<sup>24</sup> See *People v. Baumann & Sons Buses, Inc.*, 6 N.Y.3d 404 (2006).

<sup>25</sup> See *People v. Finch*, 23 N.Y.3d 408 (2014).

<sup>26</sup> *Id.* at 410-11.

<sup>27</sup> *Id.* at 412.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 417.

<sup>30</sup> *Id.* at 412.

<sup>31</sup> *Id.*

In attacking preservation, the *Finch* dissent advanced a “timing” point, arguing that a defendant cannot “preserve” a sufficiency claim by challenging the validity of the government’s theory before trial.<sup>32</sup> Instead, a mid-trial sufficiency motion is required—even if the pre-trial court already rejected the argument.<sup>33</sup>

The *Finch* majority rejected this repetition rule, relying heavily on a “futility” theory:

Having received an adverse ruling [before trial], defendant did not specifically urge the same theory again in support of his motion to dismiss for insufficiency of the evidence at trial. But he did not have to: once is enough[.] . . . As a general matter, a lawyer is not required, in order to preserve a point, to repeat an argument that the court has definitively rejected. When a court rules, a litigant is entitled to take the court at its word. Contrary to what the dissent appears to suggest, a defendant is not required to repeat an argument whenever there is a new proceeding or a new judge.<sup>34</sup>

Thus, *Finch* did not reject *Gray*’s preservation command. Instead, *Finch* held that *Gray*’s preservation command was satisfied because the defendant raised the sufficiency theory “at the earliest possible moment—at arraignment.”<sup>35</sup> But while the majority reaffirmed *Gray*, it also advanced arguments that threaten to overrule *Gray*, at least when the record affirmatively establishes an “incurable” sufficiency defect:

[Our reaffirmation of *Gray*] does not imply, however, that a specific objection in a trial motion to dismiss *is always* necessary where, as is true in this case, such a requirement will not significantly advance the purposes for which the preservation rule was designed. There will be cases, of which this is one, where the lack of a specific motion has *caused no prejudice* to the People and no interference with the swift and orderly course of justice. Insistence on specificity in a dismissal motion is amply justified where the People *might have cured* the problem if their attention had been called to it. . . . [W]hile the rule of *Gray* is generally a sound one, an overbroad application of it would raise the *disturbing possibility* that factually innocent defendants will suffer criminal punishment for no good reason. . . . The dissent responds by saying, essentially, that procedural rules do sometimes require us to uphold convictions of people who may be innocent[.] . . . True enough; but procedural rules should be so de-

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<sup>32</sup> *Id.* at 422-27 (Abdus-Salaam, J., dissenting).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 412-13 (citing *People v. Mahboubian*, 74 N.Y.2d 174, 188 (1989)).

<sup>35</sup> *Id.* at 412.

signed as to keep unjust results to a minimum. We think our interpretation of *Gray* serves that end better than the dissent's.<sup>36</sup>

*Finch* explained that *Gray* could have been rooted in a “curing” rationale because if the *Gray* defendants had raised a sufficiency argument (the *Gray* defendants claimed that the government failed to prove knowledge of the weight of the narcotics), “the People might have reopened their case to supply the missing proof.”<sup>37</sup> On the other hand, if the record affirmatively indicates an incurable defect in the government’s case, applying preservation would require an appellate court to “uphold[ ] the conviction of an innocent man, without significantly advancing any valid purpose.”<sup>38</sup>

In applying the “curing” principle, *Finch* held that the record affirmatively established an incurable sufficiency defect: the absence of probable cause.<sup>39</sup> Accordingly, the objection omission did not “prejudice” the government and the claim was reviewable.<sup>40</sup>

To get a better sense of *Finch*’s “curing” rationale, consider an endangerment-of-the-welfare-of-a-child prosecution: the government’s theory is that the defendant served liquor to a “child less than seventeen years old.”<sup>41</sup> The defendant argues, for the first time on appeal, that the government failed to prove that the child was under seventeen. Under these circumstances, trial counsel’s objection omission may have prejudiced the government. The government could have, if placed on notice of the age problem, cured that problem by presenting a birth certificate or calling a witness. On the other hand, if the complainant testified that she was twenty-one at the time of the offense, and there was no indication that the government could have somehow rehabilitated that testimony, the defect is incurable—the government simply has no case.

*Finch* relied heavily on a “futility” approach and expressly reaffirmed *Gray*. So, while *Finch* referred to the affirmance of convictions of factually innocent defendants as a “disturbing

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<sup>36</sup> *Id.* at 414-16 (emphasis added).

<sup>37</sup> *Id.* at 415.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 417-18 (“But in light of the undisputed fact, reflected in a video recording, that [the tenant] enthusiastically espoused defendant’s cause in [the arresting officer’s] presence, we do not see how a jury could find, beyond a reasonable doubt, that [the arresting officer] did not know . . . that defendant was present with [the tenant’s] consent.”); *id.* at 414-15.

<sup>40</sup> *Id.* at 414-16; *see also* *People v. McLean*, 15 N.Y.3d 117, 121 (2010) (applying a curing approach to right-to-counsel suppression claims and holding that a defendant may only argue, for the first time on appeal, that his statements were secured in violation of his right to counsel if the record “irrefutably” proves the violation).

<sup>41</sup> N.Y. PENAL LAW § 260.10(1) (McKinney 2015).

possibility,”<sup>42</sup> and advanced arguments that justify overruling *Gray* when the objection omission worked no prejudice, *Finch* left *Gray* intact.

About a year after *Finch*, the Court of Appeals had the opportunity to adopt a curing approach to sufficiency appeals but passed it up. In *People v. Jorgensen*, the defendant was “convicted of manslaughter for reckless conduct that she engaged in while pregnant that caused injury to the fetus *in utero* where the child was born alive but died as a result of that injury days later . . . .”<sup>43</sup> The defendant then argued, for the first time on appeal, that the reckless manslaughter statute does not apply to a pregnant woman who injures an unborn fetus *in utero*, thus rendering the manslaughter evidence insufficient.<sup>44</sup>

*Jorgensen* is a classic example of an “incurable” sufficiency defect. The defendant’s argument hinged on an interpretation of the Penal Law and rested on uncontested facts. Thus, the failure to object did not prejudice the government because the defect was incurable.<sup>45</sup> As Ms. Jorgensen’s appellate counsel explained during oral argument: “If you believed all of everything that the prosecutor offered in this case, no question about it, everything that’s to be believed, the argument remains the same. There’s nothing that . . . an objection can cure at this point.”<sup>46</sup> Chief Judge Lippman later asked the prosecution during oral argument if preservation applies when “it’s impossible to commit the crime [under the statute.]”<sup>47</sup> The Court, however, reached the merits without discussing preservation, thus leaving this preservation question open.

The Court of Appeals should overrule *Gray* and hold, as *Finch* strongly suggests, that preservation does not apply to sufficiency appeals when the record affirmatively indicates an incurable sufficiency defect.<sup>48</sup>

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<sup>42</sup> *Finch*, 23 N.Y.3d.at 415.

<sup>43</sup> *People v. Jorgensen*, No. 179, 2015 WL 6180890 (N.Y. Oct. 22, 2015).

<sup>44</sup> See Brief for Defendant-Appellant at 70-84, *People v. Jorgensen*, No. 179, 2015 WL 6180890 (N.Y. Oct. 22, 2015) (“Defendant-Appellant Was Convicted of a Crime That Was Not Legally Possible for Her to Commit under New York Law”).

<sup>45</sup> *Id.* at 70-72; see also Transcript of Oral Argument at 7-9, *People v. Jorgensen*, No. 179, 2015 WL 6180890 (N.Y. Oct. 22, 2015).

<sup>46</sup> Transcript of Oral Argument at 9, *People v. Jorgensen*, No. 179, 2015 WL 6180890 (N.Y. Oct. 22, 2015).

<sup>47</sup> *Id.*

<sup>48</sup> See *People v. Finch*, 23 N.Y.3d 408, 413-14 (2014).

## II. THE PRESERVATION RULE IS A STATUTORY RULE, NOT A CONSTITUTIONAL RULE

*Gray* argues that the preservation rule is a state constitutional rule: “The preservation rule is necessary for several reasons. Under article VI, § 3 of the New York Constitution, the Court of Appeals, with limited exceptions, is empowered to consider only ‘questions of law.’”<sup>49</sup>

It is unclear why *Gray* considered the preservation rule’s “nature” to be relevant. After all, courts must enforce the rule regardless of its constitutional character. *Gray* also did not even suggest that the preservation rule is a constitutional rule in the *Appellate Divisions*, so *Gray*’s constitutional theory is irrelevant to sufficiency review in those intermediate appellate courts. Ultimately, it seems like the Court was suggesting that constitutional rules are more “important” than statutory ones, and thus preservation is “very important”—so important that there is not even an exception for defendants convicted on insufficient evidence.

*Gray*’s constitutional analysis is wrong; preservation is a statutory rule and nothing more. The Court’s constitutional theory goes something like this: article VI, § 3(a) says that the “jurisdiction of the court of appeals shall be limited to the review of *questions of law*” and “question of law” is statutorily defined as a “preserved” claim.<sup>50</sup> Thus, the theory goes, article VI, § 3(a)’s “question of law” provision means “*preserved* question of law.”<sup>51</sup> This argument misreads the Constitution.

Article VI, § 3’s “question of law” provision says nothing about preservation, objections, or anything of the kind; the provision only says “questions of law.” If the “question of law” requirement

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<sup>49</sup> *People v. Gray*, 86 N.Y.2d 10, 20 (1995) (quoting N.Y. CONST. art. XI, § 3(a); citing *People v. Belge*, 41 N.Y.2d 60 (1976)).

<sup>50</sup> *See Misicki v. Caradonna*, 12 N.Y.3d 511, 524 (2009) (Graffeo, J., dissenting) (“I view the preservation requirement as a constitutional limitation on this Court’s jurisdiction.” (citing N.Y. CONST. art. VI, § 3(a))); *see also* *People v. Payne*, 3 N.Y.3d 266, 274 (2004) (Read, J., dissenting) (“Preservation is not simply a ‘formality’ . . . . Under the State Constitution, this Court, with limited exceptions not applicable here, can consider only ‘questions of law.’ . . . Generally, a question of law is an issue that was preserved by a sufficiently specific and timely objection at trial . . . .” (first quoting N.Y. CONST. art. XI, § 3(a); second quoting N.Y. CRIM. PROC. LAW § 470.35 (McKinney 2015))); and then citing *Gray*, 86 N.Y.2d at 20)); *see also* *People v. Knowles*, 88 N.Y.2d 763, 768 n.1 (1996).

<sup>51</sup> *See* *Hecker v. State*, 20 N.Y.3d 1087, 1088 (2013) (Smith, J., concurring) (“The underlying assumption seems to be that unpreserved questions of law are not questions of law at all . . . .”).

had something to do with preservation, the constitutional framers would have said so.

Indeed, nothing about the phrase “question of law” suggests a preservation rule. A question being a “question of law” hinges on the *substance* of the question, not the *procedural history* of that question’s litigation. Consider the following question: Does the Fourth Amendment permit warrantless searches of homes? This is a “question of law” since it goes to the boundaries of a constitutional right. If suppression counsel fails to argue that the Fourth Amendment prohibits warrantless home searches, this question is *still* a “question of law,” albeit an unpreserved one.<sup>52</sup>

New York Criminal Procedure Law (“C.P.L.”) § 470.05(2), which the Court seems to have relied upon to interpret article VI, § 3(a) as establishing a constitutional preservation rule, is irrelevant. That statute says:

For purposes of appeal, a *question of law* with respect to a ruling or instruction of a criminal court during a trial or proceeding is presented when a *protest* thereto was registered, by the party claiming error, at the time of such ruling or instruction or at any subsequent time when the court had an opportunity of effectively changing the same.<sup>53</sup>

Even if that statute defined “question of law” to mean “preserved question of law” (it does not), a statute cannot define the meaning of a constitutional provision.<sup>54</sup> Congress cannot, for instance, say that the Second Amendment’s right “to keep and bear arms” means “the right to keep a handgun but not bullets.” That rule could only come from a constitutional amendment.

Nothing in article VI, § 3’s purpose suggests that “question of law” has anything to do with “preservation.”<sup>55</sup> The 1894 framers created article VI, § 3 to establish the Court of Appeals as the State’s High Court for the same reason that legislatures have always created high courts: to authoritatively resolve questions of statewide significance (in contrast to everyday factual questions such as, “Was the light green?”).<sup>56</sup> The Constitutional Convention floor debates hammer this message home:

1894 CONSTITUTIONAL CONVENTION MEMBER CHOATE:

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<sup>52</sup> See *People v. Riley*, 19 N.Y.3d 944, 947-49 (2012) (Pigott, J., dissenting).

<sup>53</sup> CRIM. PROC. § 470.05(2) (emphasis added).

<sup>54</sup> See *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997).

<sup>55</sup> N.Y. CONST. art. VI, § 3(a).

<sup>56</sup> See *Reed v. McCord*, 160 N.Y. 330, 335 (1899) (explaining that the Court of Appeals was established to “authoritatively declare and settle the law uniformly throughout the state.”).

[New York Law] should be the same for the whole State; [ ] should be a consistent and harmonious system; [and] should be declared clearly and authoritatively by some supreme power, in order not merely that litigants may have their right, but that the whole people may know what is the *law*, by which their contracts and conduct shall be regulated, and by the observance of which they may, if possible, keep out of litigation. *It is this necessity alone which justifies the existence of a Court of Appeals . . .*<sup>57</sup>

This history indicates that the “question of law” provision distinguishes between “legal” questions and “factual” questions. Thus, Constitutional Convention Member Choate could, without contradiction from any convention members, explain that the “cardinal virtue” of article VI of the State Constitution was its “making the Court of Appeals strictly a court of law and not of fact.”<sup>58</sup>

Instead of being a constitutional rule, preservation is a statutory rule, stemming from C.P.L. § 470.05(2).<sup>59</sup> That statute establishes two distinct standards. First, the question must be a “question of law” and not a “question of fact.”<sup>60</sup> Second, the appellant must have “protested” “below.”<sup>61</sup> Thus, when analyzing preservation, the *only* relevant legislative authority is C.P.L. § 470.05. Article VI, § 3(a)’s “question of law” mandate is irrelevant.<sup>62</sup>

The preservation rule’s statutory versus constitutional character may be academic since courts must enforce the rule regardless of its constitutional character. Still, the Court of Appeals seems to think character matters, so it is important to get this right.

### III. PRESERVATION IS NOT “JURISDICTIONAL”

The Court of Appeals has also suggested, without offering any analysis, that the preservation rule is “jurisdictional.”<sup>63</sup> Judge Read

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<sup>57</sup> 2 REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK 464 (Hon. William H. Steele reviser, The Albany Co. Printers, 1900) (1894) (emphasis added).

<sup>58</sup> *Id.*

<sup>59</sup> See CRIM. PROC. § 470.05(2).

<sup>60</sup> *Id.*

<sup>61</sup> See *id.*

<sup>62</sup> See *id.*

<sup>63</sup> *E.g.*, *Bezio v. Dorsey*, 21 N.Y.3d 93, 98 (2013) (“The threshold issue here is a jurisdictional question—whether the inmate’s claim that the force-feeding order violated his constitutional right to refuse medical treatment was preserved for review.”); *People v. Umali*, 10 N.Y.3d 417, 423 n.2 (2008) (“To the extent defendant relies on a theory of judicial estoppel because the People did not raise preservation in the courts below, we note that estoppel does not vest jurisdiction in this Court where it does not otherwise exist.”); *People v. Turriago*, 90 N.Y.2d 77, 80 (1997) (“We conclude that the first argument, having not been preserved, is beyond the jurisdiction of this Court.

and Judge Graffeo have more forcefully expressed this view in concurring and dissenting opinions.<sup>64</sup> By definition, jurisdictional rules are categorical barriers to appellate review that permit no exceptions.<sup>65</sup> Thus, if the preservation rule is “jurisdictional,” a sufficiency exception is dead on arrival.

Contrary to the Court of Appeals’ conclusory analysis, preservation is not jurisdictional. Instead, it is a “prudential” rule that, like mootness,<sup>66</sup> statute of limitations defenses,<sup>67</sup> and pleading rules,<sup>68</sup> is subject to policy and fairness exceptions.

Courts “loosely use[ ]” the “jurisdictional” label, thus prompting high courts to demand discipline in its use.<sup>69</sup> Parsing the distinction between jurisdictional and non-jurisdictional rules is difficult. It is perhaps most useful to consider what jurisdictional does *not* mean. Jurisdictional does not mean “threshold,” nor does it refer to a mere element of a cause of action or appeal.<sup>70</sup> Instead, the label “refers to objections that are ‘fundamental to the power of adjudication of a court’ . . . . ‘Lack of jurisdiction’ . . . [means] that the matter before the court was not the kind of matter on which the court had power to rule.”<sup>71</sup> Put another way, a jurisdictional rule goes to “a court’s *competence* to entertain an action.”<sup>72</sup>

The “jurisdictional” label has drastic practical significance.<sup>73</sup> A

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Unlike the trial courts and the Appellate Division, this Court’s jurisdiction is limited to issues of law and, with extremely limited exceptions (none of which is applicable here), issues that have not been preserved in the trial court are beyond our power of review.”).

<sup>64</sup> *Misicki v. Caradonna*, 12 N.Y.3d 511, 524 (2009) (Graffeo, J., dissenting) (“I view the preservation requirement as a constitutional limitation on this Court’s jurisdiction.” (citing N.Y. CONST. art VI, § 3(a)); *see also* *People v. Payne*, 3 N.Y.3d 266, 274-75 (2004) (Read, J., dissenting)).

<sup>65</sup> *See, e.g.*, *Bowles v. Russell*, 551 U.S. 205, 214 (2007); *Adams v. Robertson*, 520 U.S. 83, 89-91 (1997); *Schacht v. United States*, 398 U.S. 58, 64 (1970); *Fleishman v. Cont’l Cas. Co.*, 698 F.3d 598, 608-09 (7th Cir. 2012); *Misicki*, 12 N.Y.3d at 525 (Smith, J., dissenting); *see also* Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 490, 490 n.472 (1996).

<sup>66</sup> *U.S. Parole Comm’n v. Geraghty*, 445 U.S. 388, 400 (1980) (noting the “flexible” character of the mootness doctrine).

<sup>67</sup> *See* *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1934 (2013).

<sup>68</sup> *See* *Manhattan Telecomms. Corp. v. H & A Locksmith, Inc.*, 21 N.Y.3d 200, 203-04 (2013).

<sup>69</sup> *See id.* at 203 (“[T]he word ‘jurisdiction’ is often loosely used.”) (citing *Lacks v. Lacks*, 41 N.Y.2d 71, 74-75 (1976)).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* (internal citations omitted).

<sup>72</sup> *Lacks*, 41 N.Y.2d at 75 (citing *Thrasher v. U.S. Liab. Ins. Co.*, 19 N.Y.2d 159, 166 (1967)) (emphasis added).

<sup>73</sup> *Gonzalez v. Thaler*, 132 S. Ct. 641, 648 (2012) (citing *Henderson v. Shinseki*, 562 U.S. 428, 435) (2011)).

party cannot waive a jurisdictional objection and courts *must* consider jurisdictional problems *sua sponte*.<sup>74</sup> “Many months of work on the part of the attorneys and the court may be wasted,” as parties may brief and argue an issue only to later find out that the appellate court lacks jurisdiction.<sup>75</sup>

On the other hand, if a rule is non-jurisdictional, courts have discretion to ignore it for good reasons, e.g., fairness and sound judicial administration.<sup>76</sup> For instance, the statute of limitations defense is non-jurisdictional, so courts can create exceptions to the statute of limitations bar when fairness supports doing so (e.g., the doctrine of equitable tolling).<sup>77</sup> On the other hand, the mandate that a defendant must file a notice of appeal within a prescribed period is jurisdictional and is thus not subject to fairness exceptions.<sup>78</sup>

It is simple for the Legislature to expressly say that a rule is jurisdictional. Thus, the Court of Appeals has looked for an “express statutory limitation on the courts’ subject matter jurisdiction.”<sup>79</sup> The United States Supreme Court has similarly adopted a “readily administrable bright line” inquiry: is there a “clear indication” that the legislature intended the rule to be jurisdictional?<sup>80</sup> This simple approach, which requires the Legislature to expressly declare a rule jurisdictional, prevents needless judicial guesswork.<sup>81</sup>

The United States Supreme Court and the federal circuit courts have found preservation to be non-jurisdictional.<sup>82</sup> Textual

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<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> See, e.g., *Misicki v. Caradonna*, 12 N.Y.3d 511, 525 (2009) (Smith, J., dissenting); see also *Bogle-Assegai v. Connecticut*, 470 F.3d 498, 504 (2d Cir. 2006); *Simcusi v. Saeli*, 44 N.Y.2d 442, 448-49 (1978).

<sup>77</sup> *Saeli*, 44 N.Y.2d at 448-49.

<sup>78</sup> See *People v. Thomas*, 47 N.Y.2d 37, 43 (1979).

<sup>79</sup> *Fry v. Vill. of Tarrytown*, 89 N.Y.2d 714, 719, 721 (1997), *superseded by statute*, N.Y. C.P.L.R. 2001 (McKinney 2007), *as recognized in* *Ruffin v. Lion Corp.*, 15 N.Y.3d 578, 581 (2010).

<sup>80</sup> *Henderson v. Shinseki*, 562 U.S. 428, 429 (2011) (internal quotations omitted) (citing *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515-16 (2006)).

<sup>81</sup> *Id.*

<sup>82</sup> See *Yee v. City of Escondido*, 503 U.S. 519, 533 (1992) (explaining that the rule against not considering “claims that were not raised or addressed below” is prudential in federal courts (citing *Carlson v. Greene*, 446 U.S. 14, 17 n.2 (1980) (“This question [raised on appeal] was presented in the petition for certiorari, but *not* in either the District Court or the Court of Appeals. However, respondent does not object to its decision by this Court. Though we do not normally decide issues not presented below, we are not precluded from doing so . . . . Here, the issue is squarely presented and fully briefed. It is an important, recurring issue and is properly raised in another petition for certiorari being held pending disposition of this case . . . . We conclude that the interests of judicial administration will be served by addressing the issue on its

analysis, legislative history, precedent, and common sense establish that the New York Court of Appeals should join this unanimous federal view.

A. *Textual Analysis*

The statutory text establishes that preservation is not jurisdictional. C.P.L. § 470.05(2) (the criminal-appellate preservation statute) and the criminal-appellate jurisdictional statutes contain no “express statutory limitation on the courts’ subject matter jurisdiction.”<sup>83</sup> If the Legislature had wanted to render preservation jurisdictional, it could easily have said so by declaring that, (1) the appellate courts *shall not* review unpreserved claims; (2) the appellate court may not consider an unpreserved claim;<sup>84</sup> or, more bluntly, (3) that preservation is jurisdictional.<sup>85</sup> The Legislature said none of these things. Under *Fry* and Supreme Court precedent, the absence of such an “express statutory limitation on the courts’ subject matter jurisdiction” essentially ends the inquiry; the rule is non-jurisdictional.<sup>86</sup> But there is more.

B. *Legislative History of the Preservation Doctrine*

The legislative history hammers home the point. When the Legislature drafted C.P.L. § 470.05(2), the appellate courts had already developed a non-jurisdictional practice—that is, the courts

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merits.” (emphasis added) (internal citations omitted)); *see also* *Vento v. Dir. of Virgin Is. Bureau of Internal Revenue*, 715 F.3d 455, 470 (3d Cir. 2013); *Starship Enter. of Atlanta, Inc. v. Coweta Cty.*, 708 F.3d 1243, 1254 (11th Cir. 2013); *United States v. Wimbley*, 553 F.3d 455, 460 (6th Cir. 2009); *United States v. Covarrubia-Mendiola*, 241 F. App’x 569, 575 (10th Cir. 2007); *Bogle-Assegai v. Connecticut*, 470 F.3d 498, 504 (2d Cir. 2006); *In re Sheridan*, 362 F.3d 96, 105 (1st Cir. 2004); *Freudensprung v. Offshore Tech. Servs., Inc.*, 379 F.3d 327, 338 n.5 (5th Cir. 2004); *Kingman Park Civic Ass’n v. Williams*, 348 F.3d 1033, 1039 (D.C. Cir. 2003); *Amos v. Md. Dep’t of Pub. Safety and Corr. Servs.*, 178 F.3d 212, 215 n.2 (4th Cir. 1999); *Scott v. Ross*, 140 F.3d 1275, 1283-84 (9th Cir. 1998). *But see* *Fleishman v. Cont’l Cas. Co.*, 698 F.3d 598, 608 (7th Cir. 2012).

<sup>83</sup> *See* *Fry v. Vill. of Tarrytown*, 89 N.Y.2d 714, 719 (1997); *see also* N.Y. CRIM. PROC. LAW §§ 450.10-90, 470.05-60 (McKinney 2015).

<sup>84</sup> *Cf.* *United States v. Robinson*, 361 U.S. 220, 224 (1960).

<sup>85</sup> *See id.* (demonstrating that the express wording and plain meaning of a statute can specify its jurisdictional nature); *see also* *DaimlerChrysler Corp. v. Spitzer*, 7 N.Y.3d 653, 660 (2006).

<sup>86</sup> *See Fry*, 89 N.Y.2d at 719, 721; *see also* *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011); *Lacks v. Lacks*, 41 N.Y.2d 71, 75-76 (1976) (“Not even the catchall word ‘jurisdiction’ appears in the statute, much less an explicit limitation on the court’s competence to entertain the action. In no way do these limitations on the cause of action circumscribe the power of the court in the sense of competence to adjudicate causes in the matrimonial categories. That a court has no ‘right’ to adjudicate erroneously is no circumscription of its power to decide, rightly or wrongly.”).

had reviewed unpreserved claims when the error was incurable and dispositive. As far back as 1870, *Levin v. Russell* explained that it was well-settled law that unpreserved claims could be raised on appeal if they would have been “decisive of the case, and could not have been obviated [if brought to the victor’s attention below].”<sup>87</sup> In 1919, *Wright v. Wright* again repeated that rule, holding that the Court properly considered respondent’s unpreserved argument because the argument “appeared upon the face of the record and . . . could not have been avoided if brought to the attention of the appellant in the courts below.”<sup>88</sup> Fifty years later, and two years before the enactment of C.P.L. § 470.05(2), *Telaro v. Telaro* discussed the “liberalizing” preservation rule:

[T]he general rule concerning questions raised neither at the trial nor at previous stages of appeal is far less restrictive than some case language would indicate. Thus, it has been said: ‘*if a conclusive question is presented on appeal, it does not matter that the question is a new one not previously suggested. No party should prevail on appeal, given an unimpeachable showing that he had no case in the trial court.*’ Of course, where new contentions could have been obviated or cured by factual showings or legal countersteps, they may not be raised on appeal. But contentions which could not have been so obviated or cured below may be raised on appeal for the first time. There are some exceptions to this *liberalizing rule*, none relevant to this case: they include concessions made by counsel, new questions on motions for reargument, and most constitutional questions.<sup>89</sup>

When the Legislature adopted the first preservation statute in 1946,<sup>90</sup> and the modern C.P.L. in 1970, it acted against the backdrop of *Levin*, *Wright*, and *Telaro*, which all treated preservation as non-jurisdictional.<sup>91</sup> Nothing in the text or legislative history of the 1946 and 1970 statutes demonstrates an intent to nullify the Court of Appeals’ non-jurisdictional approach.<sup>92</sup> Accordingly, the Legisla-

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<sup>87</sup> *Levin v. Russell*, 42 N.Y. 251, 255-56 (1870); *see also* *People v. Bradner*, 107 N.Y. 1, 4-5 (1887) (“The principal questions presented on this appeal . . . are questions raised on the record alone, and which were not, in any way, called to the attention of the trial court. If the record discloses upon its face . . . some other defect in the proceedings, *which could not be waived or cured and is fundamental*, it would, as we conceive, be the duty of an appellate tribunal to reverse the proceedings and conviction, although the question had not been formally raised in the court below, and was not presented by any ruling or exception on the trial.”) (emphasis added).

<sup>88</sup> *Wright v. Wright*, 226 N.Y. 578, 578-79 (1919) (per curiam).

<sup>89</sup> *Telaro v. Telaro*, 25 N.Y.2d 433, 439 (1969) (emphasis added).

<sup>90</sup> N.Y. CODE CRIM. PROC. § 420-a (McKinney 1946) (former code).

<sup>91</sup> *See Levin*, 42 N.Y. 251; *see also Wright*, 226 N.Y. 578; *Telaro*, 25 N.Y.2d 433.

<sup>92</sup> STATE OF N. Y., TWELFTH ANNUAL REPORT OF THE JUDICIAL COUNCIL OF NEW

ture should be “regarded as having legislated in the light of and as having accepted”<sup>93</sup> *Levin, Wright, and Telaro’s* non-jurisdictional interpretation of the preservation requirement.<sup>94</sup>

C. *The Preservation Rule is a Prudential Claim-Processing Rule*

“Among the types of rules that should not be described as jurisdictional are . . . ‘claim-processing rules.’ These are rules that seek to promote the *orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times.*”<sup>95</sup> This claim-processing label perfectly describes preservation. Preservation rules require litigants to say “X” to access an appellate court—that is, “take certain procedural steps at certain specified times.”<sup>96</sup> In this sense, the rule is similar to non-jurisdictional statute of limitations rules, which require litigants to assert a claim in a timely fashion.<sup>97</sup>

Indeed, claim-processing rules, like preservation, do not go to a court’s “competence” to entertain an appeal. The Appellate Division’s duty is to ensure the accuracy of convictions; the Court of Appeals’ duty is to resolve questions of statewide importance.<sup>98</sup> It is unclear why—and no New York Court has ever attempted to explain why—an appellate court is incompetent to consider an argument because counsel failed to utter a few words below.

D. *Erecting a Jurisdictional Bar to Appellate Review Is Bad Policy*

Treating preservation as a categorical bar to appellate review, even when “common sense and practical necessity” support review,<sup>99</sup> is bad policy. As Judge Smith’s *Misicki* dissent observed, a jurisdictional label would require the Court of Appeals to overrule

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YORK 51-52 (1946); STATE OF N.Y. TEMP. COMM’N. ON REVISION OF THE PENAL LAW & CRIMINAL CODE, PROPOSED N.Y. CRIMINAL PROCEDURE LAW 322-23 (1967).

<sup>93</sup> *Orinoco Realty Co. v. Bandler*, 233 N.Y. 24, 30 (1922).

<sup>94</sup> *See, e.g., Fry v. Vill. of Tarrytown*, 89 N.Y.2d 714, 720-21 (1997) (“Since defects in commencement [of a civil action] were waivable in the past, the same result should obtain under the new system, especially given the complete absence of any legislative design, much less an unequivocal legislative expression, to transform commencement from a procedural step in the prosecution of an action into an unwaivable limitation on the court’s subject matter jurisdiction.”).

<sup>95</sup> *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011) (emphasis added).

<sup>96</sup> *Id.*

<sup>97</sup> *See People v. Mills*, 1 N.Y.3d 269, 274 (2003) (“New York courts have long recognized that the statute of limitations defense is *not* jurisdictional and can be forfeited or waived by a defendant.”) (emphasis added).

<sup>98</sup> *See* N.Y. CONST. art. VI.

<sup>99</sup> *See, e.g., Misicki v. Caradonna*, 12 N.Y.3d 511, 525 (2009) (Smith, J., dissenting).

numerous cases reviewing unpreserved claims:<sup>100</sup>

- Claims alleging that the court failed to inform defense counsel of the contents of a jury note;<sup>101</sup>
- Defects in accusatory instruments;<sup>102</sup>
- Questions of statutory interpretation;<sup>103</sup>
- Ineffective assistance of counsel claims;<sup>104</sup>
- Illegal sentence claims;<sup>105</sup>
- Right-to-counsel violations during interrogation.<sup>106</sup>

If preservation rules were “truly jurisdictional,”<sup>107</sup> these well-established exceptions would be “incomprehensible.”<sup>108</sup>

A jurisdictional theory also forces appellate courts to accept ridiculous legal premises. Suppose, for instance, that the government argued at trial that a warrantless search performed by a civilian satisfied the Fourth Amendment because there were exigent circumstances. The government did not, however, press the more basic (and correct) argument: the Fourth Amendment does not apply to searches performed by non-state actors. Under a jurisdictional approach, an appellate court would lack the power to consider the threshold state-action question. In turn, the appellate court would have to consider what ultimately amounts to a fictional constitutional question (exigency). Appellate courts should not be

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<sup>100</sup> *Id.*

<sup>101</sup> *See* *People v. Silva*, 24 N.Y.3d 294, 299 (2014).

<sup>102</sup> *See generally* *People v. Dumay*, 23 N.Y.3d 518 (2014).

<sup>103</sup> *See, e.g.,* *Richardson v. Fiedler*, 67 N.Y.2d 246, 250 (1986) (“The argument raises solely a question of statutory interpretation, however, which we may address even though it was not presented below.”); *Am. Sugar Ref. Co. of N.Y. v. Waterfront Comm’n of N.Y. Harbor*, 55 N.Y.2d 11, 25 (1982) (“Threshold questions concerning the interpretation of [statutory] provisions . . . may be made to us not having been advanced below . . . . Were the [appellate argument] a new one, it would nonetheless be proper for us to consider it because it is not a contention that could have been ‘obviated or cured by factual showings or legal countersteps,’ turning as it does on legislative intent.” (quoting *Telaro v. Telaro*, 25 N.Y.2d 433, 439 (1969))).

<sup>104</sup> *People v. Lewis*, 2 N.Y.3d 224, 232 (2004).

<sup>105</sup> *People v. Santiago*, 22 N.Y.3d 900, 903 (2013) (“[There is a] narrow exception to [the] preservation rule permitting appellate review when a sentence’s illegality is readily discernible from the trial record.”) (citations omitted).

<sup>106</sup> *See generally* *People v. McLean*, 15 N.Y.3d 117 (2010).

<sup>107</sup> *Misicki v. Caradonna*, 12 N.Y.3d 511, 525 (2009) (Smith, J., dissenting).

<sup>108</sup> *See id.* at 525-26 (Smith, J., dissenting); Pushaw, Jr., *supra* note 65, at 490 n.472 (“Until 1964, however, the [Supreme] Court treated mootness not as an Article III requirement but as an equitable determination. Indeed, it has long decided several types of moot cases—for example, those ‘capable of repetition, yet evading review.’ These exceptions are incomprehensible if federal courts lack Article III jurisdiction to resolve moot cases at all. Thus, mootness is, and always has been, a matter of discretion.”).

forced to get the law wrong because the parties are inept.<sup>109</sup> The fundamental goal of our appellate system, like that of any judicial body, is to dole out accurate justice—not to host a moot court.<sup>110</sup>

#### IV. THE INSUFFICIENCY EXCEPTION

As preservation is not jurisdictional, it is subject to exceptions when the policy interests underlying the rule do not apply. Affirming baseless convictions on preservation grounds undermines simple justice and advances no meaningful state interests. Accordingly, the Court of Appeals should adopt a sufficiency exception.

##### A. *Precedent Supports a Sufficiency Exception*

When *Finch* announced a curing approach to preservation of sufficiency claims, it did not articulate a novel theory.<sup>111</sup> Instead, it affirmed an approach dating back as far as 1870.<sup>112</sup> As explained above, *Levin v. Russell* referred to the “curing” rule as “well settled law.”<sup>113</sup> Almost a century later, *Telaro* explained that this long-acknowledged, liberalizing rule is simple justice because baseless judgments should never stand.<sup>114</sup> And while *Telaro* noted that the curing rule does not apply to “most constitutional questions,”<sup>115</sup> *People v. Rodriguez y Paz* implicitly rejected that bizarre limitation as it reviewed a constitutional “question of law which could not have been obviated by an evidentiary showing at [the] hearing [be-

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<sup>109</sup> *Misicki*, 12 N.Y.3d at 525 (Smith, J., dissenting) (“[Appellate] judges [do not] sit as automatons, merely to register their reactions to the arguments which counsel had made below. The fortunes of litigation might then turn, not on the merits of a case, but on the skill or prescience of counsel in the court of first instance.” (quoting ARTHUR KARGER, *THE POWERS OF THE NEW YORK COURT OF APPEALS* § 17:1, at 591-92 (3d ed., rev. 2005))).

<sup>110</sup> *See Dretke v. Haley*, 541 U.S. 386, 396 (2004) (Stevens, J., dissenting) (stating that Texas “conceded” that the defendant’s sentence was illegal but argued procedural default in the Supreme Court; the majority’s refusal to review a conceded sentencing error indicated that the “unending search for symmetry in the law can cause judges to forget about justice” and that “[t]his should be a simple case”).

<sup>111</sup> *See generally* *People v. Finch*, 23 N.Y.3d 408 (2014).

<sup>112</sup> *See generally id.*

<sup>113</sup> *See Levin v. Russel*, 42 N.Y. 251, 255-56 (1870) (“It is the well settled law that objections to testimony without assigning any ground therefor will be disregarded, unless it clearly appears that the objection, if properly made, would have been decisive of the case, and could not have been obviated.”); *see also* *Wright v. Wright*, 226 N.Y. 578, 578, 579 (1919).

<sup>114</sup> *See Silverman v. Benmor Coats, Inc.*, 61 N.Y.2d 299, 314 (1984) (Kaye, J., dissenting) (noting that the “curing” test “has long been acknowledged by this Court.” (citing *Telaro v. Telaro*, 25 N.Y.2d 433, 439 (1969))).

<sup>115</sup> *Telaro*, 25 N.Y.2d at 439.

low.]”<sup>116</sup> The Court continues to apply this curing approach to right-to-counsel violations and illegal-sentence violations, holding that even if counsel did not raise those claims below, the defendant can raise them on appeal if the record conclusively reveals an incurable violation.<sup>117</sup>

The Court of Appeals has never overruled this longstanding “curing” approach. When, for example, Judge Smith advanced this curing approach in his *Misicki* dissent (five years before *Finch*), the majority and concurrences did not challenge the dissent on precedential grounds.<sup>118</sup>

Nor should *Gray* be read as overruling, *sub silentio*, the longstanding curing rule. *Gray* held preservation applicable to sufficiency claims, but in doing so, it relied on a curing rationale: “A timely objection alerts all parties to alleged deficiencies in the evidence and advances the truth-seeking purpose of the trial.”<sup>119</sup> Indeed, as *Finch* explained, *Gray*’s holding is consistent with a curing approach because *Gray* held that “the defendant’s knowledge of the weight of drugs” argument was unpreserved.<sup>120</sup> If counsel had placed the government on notice of the knowledge defect, the government could have potentially cured the defect at trial.<sup>121</sup>

The federal circuit courts agree with this curing approach as they have held that unpreserved arguments are reviewable if the parties had a full opportunity to debate the relevant facts below.<sup>122</sup> The Florida Supreme Court has also expressly applied the curing

<sup>116</sup> *People v. Rodriguez y Paz*, 58 N.Y.2d 327, 336-37 (1983).

<sup>117</sup> *See generally* *People v. McLean*, 15 N.Y.3d 117 (2010); *People v. Santiago*, 22 N.Y.3d 900, 903 (2013).

<sup>118</sup> *Misicki v. Caradonna*, 12 N.Y.3d 511, 519-20 (2009); *id.* at 524 (Graffeo, J., dissenting).

<sup>119</sup> *People v. Gray*, 86 N.Y.2d 10, 21 (1995).

<sup>120</sup> *People v. Finch*, 23 N.Y.3d 408, 414-15 (2014) (“Insistence on specificity in a dismissal motion is amply justified where the People might have cured the problem if their attention had been called to it. This may well have been true in *Gray* itself; if the defendant there had flagged the knowledge-of-narcotic-weight issue, the People might have reopened their case to supply the missing proof.”).

<sup>121</sup> *Id.*

<sup>122</sup> *See* *Vento v. Dir. of Virgin Is. Bureau of Internal Revenue*, 715 F.3d 455, 470 (3d Cir. 2013); *Starship Enters. of Atlanta, Inc. v. Coweta Cty.*, 708 F.3d 1243, 1254 (11th Cir. 2013); *United States v. Wimbley*, 553 F.3d 455, 460 (6th Cir. 2009); *United States v. Covarrubia-Mendiola*, 241 F. App’x 569, 575 (10th Cir. 2007); *Bogle-Assegai v. Connecticut*, 470 F.3d 498, 504 (2d Cir. 2006); *In re Sheridan*, 362 F.3d 96, 105 (1st Cir. 2004); *Freudensprung v. Offshore Tech. Servs., Inc.*, 379 F.3d 327, 338 n.5 (5th Cir. 2004); *Kingman Park Civic Ass’n v. Williams*, 348 F.3d 1033, 1039 (D.C. Cir. 2003); *Amos v. Md. Dep’t of Public Safety and Corr. Servs.*, 178 F.3d 212, 215 n.2 (4th Cir. 1999); *Scott v. Ross*, 140 F.3d 1275, 1283-84 (9th Cir. 1998). *But see* *Fleishman v. Cont’l Cas. Co.*, 698 F.3d 598, 608 (7th Cir. 2012).

approach to insufficiency appeals, holding that unpreserved sufficiency claims are reviewable if the appellant argues that no “crime was committed at all.”<sup>123</sup> Under this approach, preservation applies to technical deficiencies—i.e., the “usual failure-of-evidence case,”<sup>124</sup> but does not apply when, as in *Finch*, “the facts affirmatively proven by the State simply do not constitute the charged offense as a matter of law.”<sup>125</sup> In such cases, Florida requires appellate review because “[there is] no error more fundamental than the conviction of a defendant in the absence of a prima facie showing of the essential elements of the crime charged.”<sup>126</sup> Under Florida’s approach, for example, a defendant must raise a challenge to the value of stolen items in a larceny case (a defect that is potentially curable),<sup>127</sup> but need not argue that undisputed evidence failed to prove that a kidnapping occurred (a defect that is not curable).<sup>128</sup>

A sufficiency exception for incurable errors also flows *a fortiori* from the Court of Appeals’ “preservation-exceptions” jurisprudence. It is a cruel joke to hold that far less-substantial errors (e.g., the court’s failure to respond to a jury note,<sup>129</sup> and the prosecutor’s failure to allege the essential elements in a misdemeanor complaint<sup>130</sup>) are immune from preservation, while insufficiency errors—i.e., “the most fundamental of all possible defects in a criminal proceeding”—require preservation.<sup>131</sup> Further, if an attack on the *length* of a sentence need not be preserved (e.g., an argument that the sentence exceeded the maximum),<sup>132</sup> an attack on the government’s constitutional authority to impose *any sentence at all* should not have to be preserved either. A curing approach nullifies these current anomalies in our appellate jurisprudence.

### B. *Affirming a Baseless Conviction Clashes with Simple Justice*

The State has no interest in affirming a baseless conviction.<sup>133</sup>

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<sup>123</sup> *F.B. v. State*, 852 So. 2d 226, 230 (Fla. 2003).

<sup>124</sup> *E.g., id.* at 230; *Nelson v. State*, 543 So. 2d 1308, 1309 (Fla. 2d DCA 1989).

<sup>125</sup> *Griffin v. State*, 705 So. 2d 572, 574 (Fla. 4th DCA 1998); *Stanton v. State*, 746 So. 2d 1229, 1230 (Fla. 3d DCA 1999).

<sup>126</sup> *Dydek v. State*, 400 So. 2d 1255, 1258 (Fla. 2d DCA 1981).

<sup>127</sup> *F.B.*, 852 So.2d at 227.

<sup>128</sup> *See Griffin*, 705 So. 2d at 574-75 (citing *Harris v. State*, 647 So. 2d 206 (Fla. 1st DCA 1994)).

<sup>129</sup> *See People v. Silva*, 24 N.Y.3d 294, 299 (2014).

<sup>130</sup> *See People v. Dumay*, 23 N.Y.3d 518, 521 (2014).

<sup>131</sup> *People v. Udzenski*, 146 A.D.2d 245, 250 (2d Dep’t 1989).

<sup>132</sup> *People v. Santiago*, 22 N.Y.3d 900, 903 (2013).

<sup>133</sup> *Dretke v. Haley*, 541 U.S. 386, 388, 392 (2004); *People v. Henderson*, 60 Cal. 2d

*Telaro*, a matrimonial case, affirmed this rule of simple justice: “No party should prevail on appeal, given an unimpeachable showing that he had no case in the trial court.”<sup>134</sup> *Telaro*’s common sense applies with greater force in criminal cases, where affirming a baseless conviction means condemning an innocent person to incarceration in a violent warehouse. Ignoring *Telaro*’s message in criminal cases ultimately undermines the “integrity or public reputation” of our appellate courts and prosecutors,<sup>135</sup> and should “cause some to question whether the State has forgotten its overriding ‘obligation to serve the cause of justice.’”<sup>136</sup>

The government’s interest in reversing a baseless conviction is particularly pressing when the government has failed to prove identity (that is, the government “got the wrong guy”).<sup>137</sup> In those cases, the government has locked someone up who did nothing wrong. If an appellate court affirms the baseless conviction on procedural grounds, “the true culprit escapes punishment.”<sup>138</sup>

C. *Affirming Baseless and “Incurable” Convictions Advances No Preservation “Interests”*

The Court of Appeals has articulated several justifications for the preservation rule:

- Inducement to object, which in turn promotes “efficiency” and “finality”;<sup>139</sup>
- Guidance to the appellate courts;<sup>140</sup>
- Fairness to the trial judge;<sup>141</sup> and
- Opportunity to cure.<sup>142</sup>

As shown below, the inducement, guidance, and “fairness to trial judge” rationales are illegitimate grounds for affirming a baseless conviction. On the other hand, the curing rationale *is* valid.<sup>143</sup>

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482, 497 (1963) (“[T]he state has no interest in preserving erroneous judgments . . .”).

<sup>134</sup> *Telaro v. Telaro*, 25 N.Y.2d 433, 439 (1969) (internal citations omitted).

<sup>135</sup> *United States v. Olano*, 507 U.S. 725, 732 (1993) (internal quotation marks omitted).

<sup>136</sup> *Haley*, 541 U.S. at 398 (Stevens, J., dissenting) (quoting *United States v. Agurs*, 427 U.S. 97, 111 (1976)).

<sup>137</sup> *See, e.g.*, *Dist. Attorney’s Office v. Osborne*, 557 U.S. 52, 99 (2009) (Stevens, J., dissenting).

<sup>138</sup> *See id.*

<sup>139</sup> *See, e.g.*, *People v. Hawkins*, 11 N.Y.3d 484, 492-93 (2008); *People v. Gray*, 86 N.Y.2d 10, 20-21 (1995).

<sup>140</sup> *See Hawkins*, 11 N.Y.3d at 493.

<sup>141</sup> *See People v. Finch*, 23 N.Y.3d 408, 435 (Abdus-Salaam, J., dissenting).

<sup>142</sup> *Gray*, 86 N.Y.2d at 20-21.

<sup>143</sup> *Finch*, 23 N.Y.3d at 414.

Accordingly, the preservation exception should be pinned to that interest: if a sufficiency objection would have allowed the government to “cure” its insufficient case, preservation is required. On the other hand, when the record conclusively establishes insufficient evidence, preservation is not required.

### 1. The “Inducement” Interest

Although courts often claim that preservation doctrine promotes efficiency and finality,<sup>144</sup> that is not really true. *Timely objections* promote those interests, and the preservation rule only advances those interests if it *incentivizes* timely objections. Thus, the theory of preservation rules (in general and in the sufficiency context) is that by punishing trial lawyers with preservation affirmance, the court system scares future litigants into making arguments they otherwise would omit.<sup>145</sup> Here’s how the theory works:

1. The threat of waiver “induces” a lawyer to object on sufficiency grounds.
2. The objection gives the judge the chance to consider the sufficiency issue.
3. If the judge accepts the argument, the judge can prevent needless future proceedings (e.g., jury deliberations, sentencing, and an appeal), thus saving resources. Further, the judge can bring the case to a swift “final” end, thus promoting the State’s purported interest in finality.<sup>146</sup>

As shown below, the resources and finality interests underlying the inducement rationale are not cognizable in the insufficiency context. Even if they were, affirming convictions on preservation grounds does not advance those interests. And finally, even if the inducement theory did successfully advance valid interests, that theory requires appellate courts to ignore the right to effective assistance of counsel and unfairly punishes lay (often poor) clients instead of their hapless lawyers. On balance, the inducement theory does not justify *Gray*.

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<sup>144</sup> See *id.* 414-16; see also *Hawkins*, 11 N.Y.3d at 492; *Gray*, 86 N.Y.2d at 21.

<sup>145</sup> See, e.g., *Wainwright v. Sykes*, 433 U.S. 72, 89-90 (1977); see also *id.* at 112 (Brennan, J., dissenting).

<sup>146</sup> See *Teague v. Lane*, 489 U.S. 288, 309 (1989) (“Without finality, the criminal law is deprived of much of its deterrent effect.”); see also *Sanders v. United States*, 373 U.S. 1, 25 (1963) (Harlan, J., dissenting) (“[Finality ensures] attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community.”); Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 451 (1963).

a. *“Resources” and “Finality” Interests Are Not Cognizable in the Sufficiency Context*

The resources interest offends liberty. Under this theory, the State sacrifices an innocent individual’s liberty in order to provide future economic benefits to the whole. That view of the law—which, if uttered in other political contexts, would be dubbed “communism,” “socialism,” or some other “ism”—is misguided.

This finality theory is also bizarre as applied to insufficiency appeals. Essentially, the appellate message sent to an innocent defendant is, “we have a strong interest in quickly and finally announcing your innocence, but if you wait a few months to argue your innocence, we no longer care.” That is a strange view of justice.

The resources and finality interests also clash with the Legislature’s policies. In creating a comprehensive appellate regime, the Legislature has expressly announced an interest in spending money on appeals in order to nullify baseless convictions, including convictions based on insufficient evidence.<sup>147</sup> The Legislature has concluded that accuracy trumps money.

Similarly, the Legislature has rejected the “finality” interest. The statutory and constitutional creation of an appellate right reflects a policy decision that getting it *right* is more important than getting it *done*.<sup>148</sup> The same holds true for the Legislature’s decision to create a post-conviction remedy, which permits numerous distinct attacks on a conviction—without a statutory time limit.<sup>149</sup>

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<sup>147</sup> N.Y. CRIM PROC. LAW § 470.15(2)(a) (McKinney 2015) (authorizing appellate dismissal when the evidence is insufficient).

<sup>148</sup> See *Engle v. Isaac*, 456 U.S. 107, 147 (1982) (Brennan, J., dissenting) (“Nor are we told why society should be eager to ensure the finality of a conviction arguably tainted by unreviewed constitutional error directly affecting the truthfinding function of the trial.”); see also *Wainwright*, 433 U.S. at 115 (Brennan, J., dissenting) (“[T]he very existence of the well-established right collaterally to reopen issues previously litigated before the state courts . . . represents a congressional policy choice that is inconsistent with notions of strict finality . . .”); *Kaufman v. United States*, 394 U.S. 217, 237 (1969) (“[E]xalt[ing] the value of finality in criminal judgments at the expense of the interest of each prisoner in the vindication of his constitutional rights . . . runs contrary to the most basic precepts of our system of post-conviction relief.”); *Bass v. Estelle*, 696 F.2d 1154, 1162 (5th Cir. 1983) (Goldberg, J., specially concurring) (“Yes, there must be an end to criminal litigation. Our duty as judges, a duty we may not shirk, is to ensure that the ending is a constitutional one. Some things go beyond time.”).

<sup>149</sup> See *People v. Corso*, 40 N.Y.2d 578, 580 (1976) (“Of course, it should be noted that if a petitioner possesses an underlying claim relating to the validity of his conviction which falls within the enumerated grounds set forth in CPL 440.10, he may move *ad nisi prius* to vacate the judgment at any time.”).

Lastly, the premises of the finality theory do not apply in the sufficiency context. The finality theory posits that blocking appeals (1) enhances deterrence (because appeals render punishment uncertain); (2) promotes rehabilitation (because a final judgment will cause the defendant to face the reality of conviction); and (3) saves State resources.<sup>150</sup> These finality-based interests are only advanced if the defendant *does not appeal*. But even under a *Gray* regime, defendants convicted with insufficient evidence will *still* appeal because they will pursue “weight of the evidence” review,<sup>151</sup> “interest of justice” review,<sup>152</sup> or ineffective assistance of counsel review.<sup>153</sup> Stripped of its underlying justifications, the finality theory amounts to nothing more than an argument that convicted people should stay convicted.

b. *The Inducement Theory Does No Efficiency or Finality Work in the Sufficiency Context*

Even if resources and finality are cognizable interests in this context, the inducement theory does no meaningful “inducement” work in the sufficiency context because preservation rules don’t induce sufficiency objections. As the Supreme Court recently put it in a different preservation context, absent the threat of a “preservation punishment,” “counsel normally has other [very] good reasons for calling a trial court’s attention to potential [insufficiency] error.”<sup>154</sup> If trial counsel wins a sufficiency argument, his client is not only free to go, but double jeopardy bars a government appeal even if the sufficiency ruling rests on a fundamental misinterpretation of the penal law.<sup>155</sup> If there is a lawyer who is *not* incentivized by this windfall, but *is* somehow incentivized by the distant prospect of “preservation” affirmance, that lawyer, “like the unicorn . . . finds his home in the imagination, not the courtroom.”<sup>156</sup>

Additionally, reviewing an unpreserved sufficiency claim *advances* efficiency. If a defendant has a winning sufficiency claim, and he loses the claim on preservation grounds in the Appellate Division, he will pursue collateral relief in state and federal courts,

<sup>150</sup> See, e.g., Bator, *supra* note 146, at 452.

<sup>151</sup> CRIM. PROC. § 470.15(5); *People v. Danielson*, 9 N.Y.3d 342, 349 (2007).

<sup>152</sup> CRIM. PROC. § 470.15(6)(a).

<sup>153</sup> See *People v. Heidgen*, 22 N.Y.3d 259, 278 (2013).

<sup>154</sup> *Henderson v. United States*, 133 S. Ct. 1121, 1128 (2013).

<sup>155</sup> See generally *Evans v. Michigan*, 133 S. Ct. 1069 (2013); see also *People v. Brown*, 40 N.Y.2d 381, 391 (1976) (“Double jeopardy principles will bar appeal unless there is available a determination of guilt which without more may be reinstated in the event of a reversal and remand.”).

<sup>156</sup> *Henderson*, 133 S. Ct. at 1129.

thus consuming more government resources. If our aim is to save money, we should promote direct appellate review, instead of kicking the can down the post-conviction road.

Assuming successful inducement, preservation still fails to do any meaningful work in this context. Recall that the purpose of the inducement doctrine is to promote early objections and thus prevent needless future proceedings (e.g., an appeal). In the sufficiency context, it is unlikely that a timely sufficiency argument will prevent future proceedings.

Unlike pre-verdict dismissals, post-verdict dismissals *are* appealable and do not trigger double jeopardy.<sup>157</sup> Thus, to ensure appellate review, the Court of Appeals has *expressly* instructed trial judges to reserve judgment on sufficiency arguments, send the case to the jury, and then rule on the motion after the verdict.<sup>158</sup> So, even if defense counsel makes a timely, pre-verdict motion to dismiss, that motion will often fail to prevent needless litigation because the trial court will reserve judgment, send the case to the jury, find insufficient evidence *after* the verdict, and then the government will appeal anyway.

Even if we assume that (1) the preservation rule induces arguments and (2) prompts early dismissal, the inducement theory still fails because applying preservation to sufficiency appeals violates the constitutional right to effective assistance of counsel.

To show ineffective assistance of counsel, an appellant must show that trial counsel's performance was "unreasonable" and violated professional norms, and that the professionally unreasonable performance prejudiced the outcome of the case.<sup>159</sup> The failure to

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<sup>157</sup> See *United States v. Scott*, 437 U.S. 82, 91 n.7 (1978); see also *People v. Payne*, 3 N.Y.3d 266, 277 n.4 (2004) (Read, J., dissenting).

<sup>158</sup> *People v. Key*, 45 N.Y.2d 111, 120 (1978) ("If trial courts in cases like this one were, whenever practicable, only to reserve decision until after trial has been completed and determinations of fact made, much difficulty would be avoided. Of course, if the motion had been made and decided, as it should have been, before trial, no problem would have arisen. But, once trial has started, decision on a belated motion might well be delayed until after jury verdict or decision on the facts. If defendant were to be acquitted, that would be the end of the matter; if convicted, appeal of the ruling, and, if appropriate, retrial or reinstatement of the verdict or decision would be permissible on any view of double jeopardy doctrine. It is the premature dismissal that has caused the trouble in this case, and that should be avoidable in most other cases.") (emphasis added); *People v. Marin*, 102 A.D.2d 14, 15 (1st Dep't 1984) ("Although the Judge expressed *full agreement* with the defense's position on the deficiency of the evidence, he reserved decision on the motion and permitted the jury to consider the charges. In doing so, the Judge was seeking to preserve the prosecution's right to appellate review.") (emphasis added).

<sup>159</sup> See *Strickland v. Washington*, 466 U.S. 668, 691-92 (1984).

preserve a winning sufficiency argument invariably prejudices the defendant because it allows an illegal conviction to stand. Therefore, the only potential roadblock to an ineffective assistance claim is the “reasonable lawyering” prong. It is hard to imagine a case in which a counsel’s failure to raise a *winning* sufficiency argument would be “reasonable” lawyering. I am aware of no case holding as much,<sup>160</sup> and given that sufficiency preservation is fairly simple (counsel need only utter a few sentences to preserve the point), it is unlikely that counsel’s failure to raise a winning sufficiency argument will ever be found reasonable. Thus, applying preservation rules to sufficiency violates the right to effective assistance of trial counsel. And for that very reason, the theory is essentially useless because appellants can bypass the preservation problem by simply arguing to the appellate court that counsel was ineffective.

The Supreme Court’s federal-habeas-procedural-default jurisprudence hammers home this point.<sup>161</sup> The Court has declined to enforce state preservation rules when the default stemmed from ineffective assistance of counsel.<sup>162</sup> As *Murray v. Carrier* held, “if the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State, which may not conduct trials at which persons who face incarceration must defend themselves without adequate legal assistance.”<sup>163</sup> And as Justice Blackmun stressed several years later, “[t]o permit a procedural default caused by attorney error egregious enough to constitute ineffective assistance of counsel to preclude federal habeas review of a state prisoner’s federal claims in no way serves the State’s interest in preserving the integrity of its rules and proceedings.”<sup>164</sup> By this federal logic, the state courts should also decline to enforce procedural default when the default stems from ineffective assistance of counsel.

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<sup>160</sup> See *People v. McPherson*, 22 N.Y.3d 259, 278 (2013) (“Even if a reasonable defense lawyer might have questioned whether a motion to dismiss . . . was a ‘clear winner,’ he or she could not have reasonably determined that the argument was ‘so weak as to be not worth raising.’” (quoting *People v. Turner*, 5 N.Y.3d 476, 483 (2005))).

<sup>161</sup> See, e.g., *Murray v. Carrier*, 477 U.S. 478 (1986) (dismissing petition for habeas review of procedurally defaulted discovery claim because competent counsel’s failure to raise a substantive claim of error did not establish cause for the default).

<sup>162</sup> See *id.* at 488-89 (acknowledging that when a defendant is represented by counsel whose performance is not constitutionally deficient under the *Strickland* standard, the defendant bears the burden of any resulting procedural defaults).

<sup>163</sup> *Id.* at 488 (internal citations and alterations omitted).

<sup>164</sup> *Coleman v. Thompson*, 501 U.S. 722, 773 (1991) (Blackmun, J., dissenting).

Finally, even if the preservation doctrine did some “inducement” work in this context, putting aside the ineffective-assistance problems, the inducement theory is still fundamentally unfair because it punishes the wrong person:

Punishing a lawyer’s unintentional errors[, that is, failures to object,] by closing the . . . courthouse door to his client is both a senseless and misdirected method of deter[rence] . . . [E]ven if the penalization of incompetence or carelessness will encourage more thorough legal training and trial preparation, the [client], as opposed to his lawyer, hardly is the proper recipient of such a penalty. Especially with fundamental constitutional rights at stake, no fictional relationship of principal-agent or the like can justify holding the criminal defendant accountable for the naked errors of his attorney . . . [I]f responsibility for error must be apportioned between the parties, it is the State, through its attorney’s admissions and certification policies, that is more fairly held to blame for the fact that practicing lawyers too often are ill-prepared or ill-equipped to act carefully and knowledgeably when faced with decisions governed by state procedural requirements.<sup>165</sup>

In sum, the inducement theory advances invalid interests; does no inducement work; only applies to cases where the defendant’s representation violated the Constitution; and unfairly punishes the wrong party. The theory is hardly a solid foundation for a legal rule.

## 2. The Guidance Rationale

The Court of Appeals has stated that objections induce lower-court decisions, which in turn provide “guidance” to the appellate courts.<sup>166</sup> But sapping an appellate court’s sufficiency review power because the trial court did not “educate” the higher court is absurd and demeans the competency of the appellate courts. Granted, lower court analysis may be preferable, but it is not important enough to justify affirming a baseless conviction.

Indeed, the Legislature has implicitly rejected a guidance rationale.<sup>167</sup> Under C.P.L. § 470.35(1), a party *can* raise a claim in the Court of Appeals that it did not raise in the Appellate Division,<sup>168</sup> and can raise unpreserved claims before the Appellate Division

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<sup>165</sup> *Wainwright v. Sykes*, 433 U.S. 72, 113-14 (1977) (Brennan, J., dissenting).

<sup>166</sup> *See* *People v. Hawkins*, 11 N.Y.3d 484, 492-93 (2008).

<sup>167</sup> *See, e.g.*, N.Y. CRIM. PROC. LAW §§ 470.15(6)(a), 470.35(1) (McKinney 2015).

<sup>168</sup> *Id.* § 470.35(1) (“Upon an appeal to the court of appeals from an order of an intermediate appellate court affirming a judgment, sentence or order of a criminal court, the court of appeals may consider and determine . . . any question of law . . .

under that court's "interest of justice" power.<sup>169</sup> If the Legislature thought lower court guidance was so important, it would not have adopted such rules.

### 3. Fairness to the Trial Judge

The *Finch* dissent stated that reaching an unpreserved sufficiency claim is "manifest[ly] unfair" to the trial court.<sup>170</sup> It is unclear why correcting a sufficiency error is "unfair" to the trial court. Indeed, one would hope that the trial judge would prefer that a baseless conviction be reversed.

In any event, fairness to the trial judge is not a cognizable state interest, and it certainly cannot offset the countervailing liberty interests. The appellate system does not exist to ensure fairness to the state actor overseeing the trial. It is designed to protect the public's interest in the enforcement of the criminal law and the accused's interest in a fair, accurate proceeding.<sup>171</sup>

### 4. The "Substitute Procedures" Rationale

*Gray* held that barring *mandatory* review of unpreserved sufficiency claims is tolerable because defendants can still seek *discretionary* review under the Appellate Division's "interest of justice" review power:

[C]oncerns that defendants' rights are diminished by the holding here are misplaced. It should be emphasized that even where defendants have failed to adequately preserve claims for appellate review, they may request that the Appellate Divisions apply their "interest of justice" jurisdiction under CPL 470.15 (3). Nothing we hold here intrudes upon that jurisdiction.<sup>172</sup>

*Finch* expressly rejected this argument:

The dissent responds by saying, essentially, that procedural rules do sometimes require us to uphold convictions of people who may be innocent, and that the task of avoiding such injustices must sometimes be left to the Appellate Division, which has interest-of-justice jurisdiction. True enough; but procedural rules

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regardless of whether such question was raised, considered or determined upon the appeal to the intermediate appellate court.").

<sup>169</sup> *Id.* § 470.15(6)(a).

<sup>170</sup> *People v. Finch*, 23 N.Y.3d 408, 435 (2014) (Abdus-Salaam, J., dissenting) ("In relying so heavily on the alleged absence of prejudice to the People, the majority ignores the manifest unfairness its decision inflicts on the trial court.").

<sup>171</sup> See Boris M. Komar, *On the Reform of Appellate Procedures of the United States Supreme Court*, 44 CHICAGO-KENT L. REV. 28, 35 (1967) ("[T]he sole purpose for the existence of the courts [is] to serve and aid the people in their quest for justice.").

<sup>172</sup> *People v. Gray*, 86 N.Y.2d 10, 22 (1995).

should be so designed as to keep unjust results to a minimum. We think our interpretation of *Gray* serves that end better than the dissent's.<sup>173</sup>

*Finch* was right. Discretionary review is no substitute for mandatory review. Unless we assume that our appellate bureaucracy never makes discretionary mistakes, some baseless convictions will invariably be affirmed under a discretionary system. Since applying preservation rules to sufficiency claims accomplishes virtually nothing, there is no need to accept the risk that some cases will slip through the discretionary cracks.<sup>174</sup>

### 5. The Curing Interest

Unlike the four theories discussed above, *Finch*'s curing theory is sound. The curing theory recognizes that objections can remind the government of evidentiary problems, thus prompting the government to re-open its case to cure the deficiency.<sup>175</sup> Even Justice Brennan, an outspoken critic of procedural default, endorsed this interest.<sup>176</sup>

The government has the burden of proof, and the defendant has no obligation to help it make its case.<sup>177</sup> *People v. Whipple* therefore limits the government's power to re-open its case to "narrow circumstances" of curing a "technical" omission, such as the number of parking spots in a drunk-driving-in-a-parking-lot prosecution (there must be at least "four" spaces).<sup>178</sup> Thus, in theory, a sufficiency objection could induce the government to re-open its case to fix a "technical mistake." Preservation should be pinned to the government's ability to cure. If the government could have "cured" the sufficiency defect under *Whipple*, appellate review is barred. If the government could not have cured the sufficiency problem, appellate review is required.

#### D. Due Process Requires a Sufficiency Exception

Even if statutory analysis did not require a sufficiency excep-

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<sup>173</sup> *Finch*, 23 N.Y.3d at 415-16 (internal citation omitted).

<sup>174</sup> *See id.*

<sup>175</sup> *Id.* at 414.

<sup>176</sup> *Wainwright v. Sykes*, 433 U.S. 72, 112 n.11 (1977) (Brennan, J., dissenting) ("In my view, the strongest plausible argument for strict enforcement of a contemporaneous-objection rule is one that the Court barely relies on at all: the possibility that the failure of timely objection to the admissibility of evidence may foreclose the making of a fresh record and thereby prejudice the prosecution in later litigation involving that evidence.").

<sup>177</sup> N.Y. CRIM. PROC. LAW § 70.20 (McKinney 2015).

<sup>178</sup> *People v. Whipple*, 97 N.Y.2d 1, 7-8 (2001).

tion, constitutional analysis does. Affirming a baseless conviction on preservation grounds violates procedural due process under the state and federal constitutions. At a minimum, there is “constitutional doubt” about the issue, thus courts should resolve that doubt in favor of an exception.<sup>179</sup>

Suppose the Legislature passed the following statute: “The Appellate Division cannot consider an appeal unless trial counsel filed a memorandum of law that was, at a minimum, 100 pages and cited every single case on the appellate issue.” This hypothetical procedural rule imposes an insurmountable, arbitrary burden on the appellant. But are rules like this subject to procedural due process attack? Is the Legislature free to create whatever rules it wants in this arena? This section contends that procedural due process covers rules governing access to appellate reversals. Under that due process analysis, rules that affirm convictions on preservation grounds are unconstitutional unless the government can show that they advance a meaningful state interest. As shown above, in the sufficiency context, the government cannot make that showing.

The state and federal due process clauses guarantee that “[n]o person shall be deprived of life, liberty or property without due process of law.”<sup>180</sup> At bottom, the clause bans “arbitrary” government power.<sup>181</sup> Procedural due process requires a balancing of (1) the government’s interest in the challenged procedure; and (2) the countervailing liberty interests.<sup>182</sup>

Procedural due process analysis only applies when the challenged procedures implicate a liberty interest or a statutory “entitlement.”<sup>183</sup> Here, the right to an appellate judgment on the merits implicates two basic liberty interests: the basic right to be free from physical incarceration and the statutory right to present a sufficiency claim to the appellate court.

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<sup>179</sup> *E.g.*, *People v. Correa*, 15 N.Y.3d 213, 232 (2010) (“Where the language of a statute is susceptible of two constructions, the courts will adopt that which avoids . . . constitutional doubts . . . .” (internal quotes omitted) (citing *In re Jacob*, 86 N.Y.2d 651, 667 (1995))); *Almendarez-Torres v. United States*, 523 U.S. 224, 260 (1998) (Scalia, J. dissenting) (“[T]he answer to the constitutional question is not clear. It is the Court’s burden . . . to establish that its constitutional answer shines forth clearly from our cases.”).

<sup>180</sup> U.S. CONST. amend. 14 § 1; N.Y. CONST. art. I, § 6.

<sup>181</sup> *See* *Stuart v. Palmer*, 74 N.Y. 183, 190-91 (1878).

<sup>182</sup> *See* *Turner v. Rogers*, 131 S. Ct. 2507, 2517-18 (2011); *see also* *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *People v. Peque*, 22 N.Y.3d 168, 175 (2013); *People v. David W.*, 95 N.Y.2d 130, 136 (2000).

<sup>183</sup> *See* *Dist. Attorney’s Office v. Osborne*, 557 U.S. 52, 67 (2009) (“[The Due Process Clause of the 14th Amendment] imposes procedural limitations on a State’s power to take away protected entitlements.”).

The Supreme Court's analysis in *District Attorney's Office v. Osborne* is on point.<sup>184</sup> *Osborne* held that because an Alaska law created a statutory right to obtain vacatur of a conviction upon demonstrating "innocence with new evidence," an Alaskan had an "entitlement" to an appeal, thus triggering procedural due process analysis.<sup>185</sup>

The Texas Supreme Court agrees that appellate procedural bars are subject to due process analysis.<sup>186</sup> *In re M.S.* held that "because Texas provides the right of an appeal from a judgment on parental-rights termination, part of the process of ensuring the accuracy of judgments necessarily involves appellate review."<sup>187</sup> In so holding, the Texas Supreme Court relied on the United States Supreme Court's pronouncement that although there is no constitutional right to an appeal, the Legislature cannot arbitrarily limit the appellate right:

[I]t is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts. Thus, error preservation in the trial court, which is a threshold to appellate review, necessarily must be viewed through the due process prism. In this context, we review our rule governing preservation of a complaint of factual sufficiency under the procedural due process analysis established by *Mathews v. Eldridge*.<sup>188</sup>

The Texas Supreme Court's conclusion is sound. Preservation rules are essentially filing rules; they require the appellant to present a claim in a particular manner before a particular judicial body (the trial court).<sup>189</sup> Like filing rules, preservation rules are also subject to procedural due process analysis.<sup>190</sup>

Under a balancing analysis, affirming a baseless conviction on preservation grounds violates due process. As shown above, the government has no interest in blocking incurable sufficiency ap-

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<sup>184</sup> See *id.* at 67-70.

<sup>185</sup> See *id.* at 52-70.

<sup>186</sup> See *In re J.O.A.*, 283 S.W.3d 336, 342 (Tex. 2009); see also *In re M.S.*, 115 S.W.3d 534, 546-50 (Tex. 2003); *In re B.L.D.*, 113 S.W.3d 340, 352-55 (Tex. 2003).

<sup>187</sup> *In re M.S.*, 115 S.W.3d at 546.

<sup>188</sup> *Id.* at 547 (citing *Mathews v. Eldridge*, 424 U.S. 319 (1976)) (emphasis added).

<sup>189</sup> See *In re J.O.A.*, 283 S.W.3d at 342 ("[B]ecause error preservation in the trial court is the 'threshold to appellate review,' . . . it should be reviewed under . . . procedural due process analysis . . .").

<sup>190</sup> E.g., *In re A.M.*, 312 S.W.3d 76, 86-87 (Tex. App. 2010) (analyzing petition filing deadlines for adoption under *Mathews*); *In re C.M.*, 652 N.W.2d 204, 208-09, 212-13 (Iowa 2002) (analyzing Iowa's filing deadlines and brief format rules under *Mathews*); *Turner v. State*, 839 S.W.2d 46, 47 (Mo. Ct. App. 1992) (analyzing filing deadlines under due process clause).

peals on preservation grounds. On the other hand, the countervailing liberty interests—the basic right to be free from physical incarceration, the right to avoid harsh stigma, and the right to work—are significant.<sup>191</sup> On balance, *Gray* violates procedural due process.

But the analysis may not be that simple. Arguably, the flexible *Mathews* balancing standard does not apply to criminal procedural rules. Instead, the rigid *Patterson v. New York* standard applies.<sup>192</sup> The rigid *Patterson* standard considers whether a procedure “offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”<sup>193</sup> Because *Mathews* arose in the civil (administrative law) context,<sup>194</sup> *Medina v. California* held that, as a matter of federal due process, the flexible *Mathews* balancing applies to civil cases (e.g., social security benefits) while the stringent *Patterson* rule covers the criminal realm.<sup>195</sup> If *Patterson* covers New York’s preservation rules, *Gray* may survive because, arguably, *Gray* does not “offend[ ] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental” (whatever that means).<sup>196</sup>

The *Patterson* argument is flawed for numerous reasons:

First, even if the “conscience of our people” analysis was the federal criminal due process test,<sup>197</sup> the New York Court of Appeals has never held, let alone suggested, that the state due process clause incorporates that subjective test.<sup>198</sup>

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<sup>191</sup> See *Dist. Attorney’s Office v. Osborne*, 557 U.S. 52, 93 (2009) (“The ‘most elemental’ of the liberties protected by the Due Process Clause is ‘the interest in being free from physical detention by one’s own government.’”) (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004) (plurality)); see also *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (“Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause . . .”).

<sup>192</sup> *Patterson v. New York*, 432 U.S. 197, 201-02 (1977); *Medina v. California*, 505 U.S. 437, 453-56 (1992) (O’Connor, J., concurring); Gerald L. Neuman, *The Habeas Corpus Suspension Clause After Boumediene v. Bush*, 110 COLUM. L. REV. 537, 555 (2010) (“[The] procedural due process field . . . *Mathews v. Eldridge* competes with older judicial precedents, historical practices, and area-specific deference, and the Justices have debated its proper scope of application.”).

<sup>193</sup> *Patterson*, 432 U.S. at 202 (internal citations and quotation marks omitted).

<sup>194</sup> *Mathews v. Eldridge*, 424 U.S. 319, 323-26 (1976) (concerning what process was due to a recipient of social security disability benefits whose benefits had been terminated).

<sup>195</sup> *Medina*, 505 U.S. at 443 (1992) (“In our view, the *Mathews* balancing test does not provide the appropriate framework for assessing the validity of state procedural rules which, like the one at bar, are part of the criminal process.”).

<sup>196</sup> *Patterson*, 432 U.S. at 202 (citations omitted).

<sup>197</sup> *Id.*

<sup>198</sup> See, e.g., *People v. Davis*, 13 N.Y.3d 17, 27 (2009) (applying *Mathews*) (citations

Second, the *Patterson* test ignores that the basic purpose of due process is fairness—not compliance with tradition. Permitting the government to adopt unfair, arbitrary rules, simply because “our people” have not yet condemned the practice,<sup>199</sup> violates that basic purpose. Indeed, by worshiping tradition over fairness, *Patterson* prevents courts from “responding to new forms of injustice that lack any historical antecedent,” “consider[ing] the constitutionality of historically accepted practices that come to be regarded as unjust in light of evolving concepts of fairness,” and “reconsider[ing] the constitutionality of practices that a prior Court approved.”<sup>200</sup>

Third, as the “conscience of our people” is in the eye of the beholder, a liberal judge will have a different conception of our “people’s conscience” than a conservative judge. Thus, this subjective test produces a flimsy, result-oriented jurisprudence.

Fourth, as a textual matter, *Patterson* forgets that the Due Process Clause guarantees “due process,” not “traditional process” or “process consistent with the *conscience of our people*.”<sup>201</sup> Absent a clear directive from our constitutional framers to freeze our rights in time or to subject procedural rights to a straw poll of the American “conscience,” the courts should interpret flexible constitutional text to permit flexibility.

Fifth, *Patterson* clashes with due process as we know it. The Supreme Court has consistently held that due process requires rights that were neither traditionally guaranteed nor “ranked as fundamental.”<sup>202</sup> As Justice O’Connor’s concurrence in *Medina* explained, if we take the *Patterson* approach seriously, we end up with a legal system that does not include *Brady* (the right to exculpatory

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omitted); see also *People v. Thompson*, 90 N.Y.2d 615, 621 (1997) (applying the balancing test); *People v. Scalza*, 76 N.Y.2d 604, 610 (1990) (applying the balancing test).

<sup>199</sup> See *Patterson*, 432 U.S. at 202.

<sup>200</sup> Bruce J. Winick, *Presumptions and Burdens of Proof in Determining Competency to Stand Trial: An Analysis of Medina v. California and the Supreme Court’s New Due Process Methodology in Criminal Cases*, 47 U. MIAMI L. REV. 817, 830-32 (1993).

<sup>201</sup> See *Patterson*, 432 U.S. at 202.

<sup>202</sup> See *Medina v. California*, 505 U.S. 437, 454 (1992) (O’Connor, J., concurring) (citing *Ake v. Oklahoma*, 470 U.S. 68 (1985) (due process right to psychiatric examination when sanity is significantly in question); *Chambers v. Mississippi*, 410 U.S. 284 (1973) (due process right to introduce certain evidence); *Sheppard v. Maxwell*, 384 U.S. 333 (1966) (due process right to protection from prejudicial publicity and courtroom disruptions); *Griffin v. Illinois*, 351 U.S. 12 (1956) (due process right to trial transcript on appeal); *Brady v. Maryland*, 373 U.S. 83 (1963) (due process right to discovery of exculpatory evidence)); see also Donald A. Dripps, *Miscarriages of Justice and the Constitution*, 2 BUFF. CRIM. L. REV. 635, 652-53 (1999) (discussing *Medina v. California*); accord Winick, *supra* note 200, at 827.

evidence does not have historical grounding),<sup>203</sup> numerous due process cases invalidating arbitrary state evidentiary rules,<sup>204</sup> and a host of other well-established opinions.<sup>205</sup>

Sixth, applying *Patterson* to criminal cases but applying *Mathews* to civil cases produces absurdity. Under that analysis, a restrictive standard applies to criminal law (where life or liberty is at stake) but a flexible, expansive standard covers administrative hearings such as disability benefits hearings,<sup>206</sup> and horse-racing-license-suspension procedures.<sup>207</sup> Where the liberty stakes are higher, the State must afford more protection, not less.

Seventh, *Patterson* is grounded in the federalism concept that “preventing and dealing with crime is much more the business of the States than it is of the Federal Government.”<sup>208</sup> This argument is a non-starter. The states may be in the business of incarceration, but the Due Process Clause requires that the states conduct that business fairly.<sup>209</sup> Further, this federalism rationale has no bearing on the state constitutional analysis. Even if the federal courts must treat state criminal procedure as some kind of unregulated free market, the state courts retain the power to regulate their own state governments.<sup>210</sup>

Finally, post-*Medina* precedent supports application of the *Mathews* test.<sup>211</sup> In *Hamdi v. Rumsfeld*, the Court reviewed an American citizen’s right to challenge his detention for aiding the Taliban in Afghanistan.<sup>212</sup> A plurality applied *Mathews* in analyzing the procedural due process claim.<sup>213</sup> The dissent’s criticism of the majority’s reliance on *Mathews* balancing demonstrates that the test’s applica-

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<sup>203</sup> See *Brady v. Maryland*, 373 U.S. 83 (1963).

<sup>204</sup> See *Rock v. Arkansas*, 483 U.S. 44, 56 (1987); see also *Crane v. Kentucky*, 476 U.S. 683, 691 (1986); *Chambers v. Mississippi*, 410 U.S. 284 (1973).

<sup>205</sup> *Medina*, 505 U.S. at 454 (O’Connor, J., concurring).

<sup>206</sup> *Mathews v. Eldridge*, 424 U.S. 319 (1976).

<sup>207</sup> *Barry v. Barchi*, 443 U.S. 55 (1979).

<sup>208</sup> *Patterson v. New York*, 432 U.S. 197, 201 (1977) (citing *Irvine v. California*, 347 U.S. 128, 134 (1954) (plurality)).

<sup>209</sup> See William J. Brennan, J., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 546 (1986) (“This country has been transformed by the standards, promises, and power of the Fourteenth Amendment— . . . ‘that each of us is entitled to due process of law and equal protection of the laws from our state governments no less than from our national one.’”) (quoting William J. Brennan, J., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 490 (1977)).

<sup>210</sup> See U.S. CONST. amend. X.

<sup>211</sup> See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (plurality).

<sup>212</sup> See *id.*

<sup>213</sup> *Id.* at 528-29 (“The ordinary mechanism that we use for balancing such serious competing interests, and for determining the procedures that are necessary to ensure

tion was central to that decision.<sup>214</sup> Thus, *Hamdi* calls into question *Medina*'s holding that *Mathews* is limited to "civil procedure."

True, *Osborne* applied *Patterson* to a due process claim.<sup>215</sup> But the majority opinion neither discussed the debate over the appropriate due process standard nor grappled with *Hamdi*'s recent application of *Mathews*.<sup>216</sup> Therefore, while *Osborne* cuts in favor of a *Patterson* approach (to federal due process analysis), it should not be read as affirmatively resolving this question.<sup>217</sup>

But let's assume *Patterson* applies. Under that test, we must consider whether affirming a baseless conviction because counsel did not object below "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."<sup>218</sup> Discerning the "traditions and conscience of our people" is challenging. Whatever that nebulous phrase means, locking people up without proof beyond a reasonable doubt passes that test. While some may support affirming baseless convictions, the vast majority of "our people" would likely be shocked to learn that innocent people can languish in prison because their lawyers failed to say a few words at trial.

## V. CONCLUSION

When appellate courts affirm baseless convictions, they ignore the basic duty of our judicial system: to ensure accurate verdicts. While *Gray* ignored that simple premise, *Finch* revived it, as it strongly suggested that where the record conclusively reveals an illegal conviction, that conviction should never stand. It is now time for the Court of Appeals to fully embrace that common sense and establish an insufficiency exception to the preservation rule.<sup>219</sup> That exception promotes liberty, advances justice, and does no harm. It should be the law.

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that a citizen is not 'deprived of life, liberty, or property, without due process of law,' is the test that we articulated in *Mathews v. Eldridge*." (internal citations omitted).

<sup>214</sup> *Id.* at 575-76 (Scalia, J., dissenting) ("[The plurality] claims authority to engage in this sort of 'judicious balancing' from *Mathews v. Eldridge*, a case involving . . . the withdrawal of disability benefits! Whatever the merits of this technique when newly recognized property rights are at issue (and even there they are questionable), it has no place where the Constitution and the common law already supply an answer.").

<sup>215</sup> See *Dist. Attorney's Office v. Osborne*, 557 U.S. 52, 67 (2009).

<sup>216</sup> *Id.* at 67-68.

<sup>217</sup> *Id.*

<sup>218</sup> *Patterson v. New York*, 432 U.S. 197, 202 (1977) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

<sup>219</sup> *Telaro v. Telaro*, 25 N.Y.2d 433, 439 (1969).



# HOW WOMEN’S ORGANIZATIONS ARE CHANGING THE LEGAL LANDSCAPE OF REPRODUCTIVE RIGHTS IN LATIN AMERICA

*Fabiola Carrión*†

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## I. INTRODUCTION

As the home of five of the seven countries that completely ban abortion, most people perceive Latin America as the region in the world with the most stringent abortion laws.<sup>1</sup> Yet, most Latin American countries permit abortion under a specific set of circumstances: if the woman’s life or health are in danger, if the pregnancy is a result of sexual assault, and/or when there is a fetal

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<sup>1</sup> Cora Fernandez Anderson, *The Politics of Abortion in Latin America*, RH REALITY CHECK (July 17, 2013, 2:01 AM), <http://rhrealitycheck.org/article/2013/07/17/the-politics-of-abortion-in-latin-america/> [http://perma.cc/JJE2-9MHH].

abnormality that is incompatible with life.<sup>2</sup> While most reproductive rights advocates would prefer complete decriminalization, other possibilities exist for women to access a legal abortion in Latin America. Unfortunately, women do not know about these opportunities and political will to implement these laws is also scarce. Such enforceability means that for several decades women in Latin America sought unsafe ways to terminate their pregnancies when they had the complete right to access abortion care.<sup>3</sup> All is not lost, however. An empowered and diverse community of activists and professionals are making headway by raising awareness about these legal possibilities, slowly decriminalizing abortion, and working on regulatory norms that put these laws into practice.

The emergence of new legal possibilities for abortion access would not occur without an energetic feminist movement that is both diverse and young. Latin America holds one of the most rapidly evolving women's rights movements that is now focused in advancing reproductive rights.<sup>4</sup> This conglomerate of activists includes grassroots supporters, youth leaders, and allies in decision-making spaces, like parliaments and ministries, and advocacy institutions.<sup>5</sup> Critical to this movement has been the involvement of allied attorneys who litigate cases in favor of abortion rights in national and international tribunals.<sup>6</sup> Through innovative advocacy strategies and sound legal arguments, the Latin American women's movement inserts a human rights framework and a gender perspective in public policy that impacts abortion access.<sup>7</sup> Adding to their remarkability, Latin American reproductive rights advocates have achieved these legal successes while encountering a growing and well-funded sector of reproductive rights opponents.<sup>8</sup>

This article's objective is twofold: (1) To shift the legal discourse regarding the conceptualization of abortion in Latin

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<sup>2</sup> See GUTTMACHER INST., FACTS ON ABORTION IN LATIN AMERICA AND THE CARIBBEAN (Jan. 2012), [https://www.guttmacher.org/pubs/IB\\_AWW-Latin-America.pdf](https://www.guttmacher.org/pubs/IB_AWW-Latin-America.pdf) [<https://perma.cc/TP7Y-2ZA8>].

<sup>3</sup> See *id.*

<sup>4</sup> See Anderson, *supra* note 1.

<sup>5</sup> See JOAN CAIVANO & JANE MARCUS-DELGADO, CTR. FOR WOMEN POLICY STUDIES, Time for Change: Reproductive Rights for Latin America in the 21st Century 17 (May 2012), [http://www.academia.edu/15110689/Time\\_for\\_Change\\_Reproductive\\_Rights\\_in\\_Latin\\_America\\_in\\_the\\_21st\\_Century](http://www.academia.edu/15110689/Time_for_Change_Reproductive_Rights_in_Latin_America_in_the_21st_Century) [<http://perma.cc/PT7J-6W7J>].

<sup>6</sup> Examples of organizations where these allied attorneys work include the Center for Reproductive Rights, Promsex, GIRE, and Women's Link Worldwide.

<sup>7</sup> See, e.g., HUMAN RIGHTS WATCH, INTERNATIONAL HUMAN RIGHTS LAW AND ABORTION IN LATIN AMERICA (July 2005), <http://www.hrw.org/legacy/backgrounder/wrd/wrd0106/wrd0106.pdf> [<https://perma.cc/7PHU-TPKT>].

<sup>8</sup> See Anderson, *supra* note 1.

America in order to demand more access; and (2) To demonstrate that feminist organizations are taking steady steps to successfully increase access to legal abortion in Latin America. This analysis proceeds in three parts: the first section describes how international and regional jurisprudence is preparing the ground for recognizing a legal right to abortion. The second section demonstrates how this jurisprudence has influenced, or at the very least, coincided with more progressive national legislation on abortion in Latin America. The third section examines how regulations simplify old laws by setting out clear instructions on how to make abortion more available to women.

## II. ABORTION AS A HUMAN RIGHT IN INTERNATIONAL HUMAN RIGHTS SPACES

To speak about abortion as a human right, one must analyze how the concept of reproductive and sexual rights was developed in modern human rights law. In this sense, human rights are defined as “freedoms, immunities, and benefits . . . all human beings should be able to claim as a matter of right[.]”<sup>9</sup> According to the Office of the High Commissioner on Human Rights at the United Nations, human rights are guarantees to be enjoyed by all persons, independent of their nationality, place of residence, sex, national or ethnic origin, sexual orientation, religion, or other status.<sup>10</sup> As part of international law, human rights are expressed both in hard law, in the forms of treaties and cases, as well as in soft law through customary international law, expert commentary, general principles, or other sources that the State has a duty to respect, protect, and guarantee.<sup>11</sup>

As human rights are always interdependent and interrelated, reproductive rights encompass various guarantees that relate to and build from one another, like the rights to health, life, autonomy, privacy, information, and freedom from torturous, cruel and inhumane treatment, among others.<sup>12</sup> And while the Tehran Conference on Human Rights discussed women’s rights back in the 1960s,<sup>13</sup> it was not until the 1994 International Conference on Pop-

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<sup>9</sup> *Human Rights*, BLACK’S LAW DICTIONARY (10th ed. 2014).

<sup>10</sup> See *What are Human Rights?*, UNITED NATIONS, OFFICE OF THE HIGH COMM’R FOR HUMAN RIGHTS, <http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx> [[http://perma.cc/UCG3-9S\[JQ\]](http://perma.cc/UCG3-9S[JQ])].

<sup>11</sup> See *The Foundation of International Human Rights Law*, UNITED NATIONS, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS.

<sup>12</sup> *What are Human Rights?*, *supra* note 10.

<sup>13</sup> See generally *The Int’l Conference on Human Rights*, Teheran, April 22-May 13,

ulation and Development in Cairo and the 1995 Fourth World Conference on Women in Beijing that reproductive health was defined and unequivocally recognized as a human right, conceptualizing the term reproductive health as a “state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes.”<sup>14</sup> Furthermore, the manuscripts that were produced in these conferences included clear references to abortion as a type of care that is needed to alleviate public health concerns like maternal mortality and morbidity.<sup>15</sup> The Cairo and Beijing conferences are also significant because they gathered women leaders from all over the world, who contributed from their own experiences to the conferences’ manuscripts, which advocates currently use when seeking further access to abortion in their countries.<sup>16</sup>

Like other human rights, reproductive rights are developed through the creation and recognition of treaties. Most Latin American countries have ratified international human rights treaties, meaning that their content becomes immediately applicable in their national legal frameworks.<sup>17</sup> For this region, two human rights systems are particularly pertinent in defending reproductive rights: the universal or United Nations (“U.N.”) instruments, and the regional or the Organization of American States (“O.A.S.”) instruments.<sup>18</sup>

Several U.N. treaties advance reproductive rights, but the most applicable are the International Covenant on Civil and Political

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1968, *Final Act of the International Conference on Human Rights*, U.N. Doc. A/CONF.32/41 (1968), [http://legal.un.org/avl/pdf/ha/fachr/Final\\_Act\\_of\\_TehranConf.pdf](http://legal.un.org/avl/pdf/ha/fachr/Final_Act_of_TehranConf.pdf) [<http://perma.cc/HX44-6P78>].

<sup>14</sup> The Int’l Conference on Population and Dev., Cairo, Sep. 5-13, 1994, *Report of the International Conference on Population and Development*, ¶ 7.2, A/CONF.171/13/Rev.1 (1995), [https://www.unfpa.org/sites/default/files/event-pdf/icpd\\_eng\\_2.pdf](https://www.unfpa.org/sites/default/files/event-pdf/icpd_eng_2.pdf) [<https://perma.cc/5U2F-C8SG>] (calling upon States to address the consequences of rampant unsafe abortion rates); Fourth World Conference on Women, Beijing, Sep. 4-15, 1995, *Report of the Fourth World Conference on Women*, ¶ 94, A/CONF.177/20/Rev.1 (1996), <http://www.un.org/esa/gopher-data/conf/fwcw/off/a—20.en> [<http://perma.cc/MG48-89YK>].

<sup>15</sup> See *Report of the Fourth World Conference on Women*, *supra* note 14, ¶ 97.

<sup>16</sup> See Mona Zulficar, *From Human Rights to Program Reality: Vienna, Cairo and Beijing in Perspective*, 44 AM. U. L. REV. 1017, 1029-30 (1995), <http://www.amulrev.com/pdfs/44/444/zulficar.pdf> [<http://perma.cc/J278-CBZ9>].

<sup>17</sup> See JUAN E. MENDEZ & JAVIER MARIEZCURRENA, HUMAN RIGHTS IN LATIN AMERICA AND THE CARIBBEAN: A REGIONAL PERSPECTIVE (Nov. 1999), <http://core.ac.uk/download/pdf/6248904.pdf> [<http://perma.cc/AWB4-XJS3>].

<sup>18</sup> See *id.*

Rights (“I.C.C.P.R.”),<sup>19</sup> the International Covenant on Social, Economic, and Cultural Rights (“I.C.E.S.C.R.”),<sup>20</sup> the International Convention on the Elimination of All Forms of Discrimination Against Women (“C.E.D.A.W.”),<sup>21</sup> the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“C.A.T.”),<sup>22</sup> and the Convention on the Rights of the Child (“C.R.C.”).<sup>23</sup> At the U.N., committees monitor States’ compliance with treaties by issuing “General Comments” or recommendations that guide States’ efforts to implement a specific treaty.<sup>24</sup> U.N. Committees also publish country specific “Concluding Observations” after a State reports on its efforts to fulfill the treaty’s mandate.<sup>25</sup> Some U.N. human rights committees adopt a quasi-judicial role by receiving individual complaints of treaty violations in order to issue recommendations.<sup>26</sup> In sum these General Comments, Concluding Observations, and case decisions become jurisprudence that guide countries in their compliance with the treaties, while providing civil society with advocacy tools to continue to pressure their governments.<sup>27</sup>

Similar to the U.N. mechanisms, the Organization of American States (“O.A.S.”) has created two bodies that monitor the compliance of regional human rights treaties.<sup>28</sup> The first is the Inter-

<sup>19</sup> International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

<sup>20</sup> International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

<sup>21</sup> Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

<sup>22</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

<sup>23</sup> Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

<sup>24</sup> See, e.g., *Human Rights Treaty Bodies - General Comments*, UNITED NATIONS, OFFICE OF THE HIGH COMM’R FOR HUMAN RIGHTS, <http://www.ohchr.org/EN/HRBodies/Pages/TBGeneralComments.aspx> [<http://perma.cc/MNZ5-3BUS>].

<sup>25</sup> On average, this occurs every four-to-five years. See *What Are Concluding Observations?*, DEUTSCHES INSTITUT FÜR MENSCHENRECHTE, <http://www.institut-fuer-menschenrechte.de/en/topics/development/frequently-asked-questions/8-what-are-concluding-observations/> [<http://perma.cc/RH6V-NQQK>].

<sup>26</sup> A similar process that will not be thoroughly discussed in this note is the Universal Periodic Review, where countries offer recommendations to one another on their role to fulfill their human rights obligations.

<sup>27</sup> See, e.g., U.N. Chairpersons of the Human Rights Treaty Bodies, *Follow-up to the Recommendations of the Twenty Fifth Meeting of Chairpersons of the Human Rights Treaty Bodies, Including Harmonization of the Working Method*, June 24-28, 2013, HRI/MC/2013/3 (Apr. 22, 2013).

<sup>28</sup> American Convention on Human Rights, *opened for signature* Nov. 22, 1969, 9 I.L.M. 673 (entered into force July 18, 1978) [hereinafter American Convention].

American Commission on Human Rights (“Inter-American Commission”), which was created in 1959 to serve as the primary human rights organ of the O.A.S. and was granted the authority to examine the compliance with human rights agreements like the American Declaration of the Rights and Duties of Man (“The American Declaration”)<sup>29</sup> and the American Convention on Human Rights (“The American Convention”).<sup>30</sup> The American Convention created the Inter-American Court on Human Rights, the second O.A.S. human rights monitoring body, which took on a more judicial role than the Inter-American Commission, since its decision-makers are judges who only adjudicate over human rights violations or issue provisional measures.<sup>31</sup> There are various O.A.S. treaties that could be interpreted to support access to legal abortion, like the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (“Convention of Belém do Pará”)<sup>32</sup> and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights (“Protocol of San Salvador”).<sup>33</sup> A unique feature of the Inter-American system, in particular in its defense of women’s rights, is its recent creation of the Follow-up Mechanism to the Belém do Pará Convention (“MESECVI”), which is taking various measures to protect reproductive rights through its analysis and interpretation of the American Convention and the Convention of Belém do Pará.<sup>34</sup>

A. *Abortion Access as a Human Right in the U.N. Human Rights System*

Various U.N. Committees, principally the CEDAW Committee and the Human Rights Committee, have asked countries to guarantee access to abortion when it is legal,<sup>35</sup> coming close to recog-

<sup>29</sup> American Declaration on the Rights and Duties of Man, May 2, 1948, OAS/Ser.L/V/II.4, Rev. 9.

<sup>30</sup> American Convention, *supra* note 28.

<sup>31</sup> *Id.*

<sup>32</sup> Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, Mar. 5, 1995, 33 I.L.M. 1534 (1994) [hereinafter Convention of Belém do Pará].

<sup>33</sup> Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights, Nov. 17, 1988, O.A.S.T.S. No. 69 [hereinafter Protocol of San Salvador], <https://www.cidh.oas.org/Basicos/English/basic5.Prot.Sn%20Salv.htm> [<https://perma.cc/8Q7K-Y5KF>].

<sup>34</sup> Declaration on Violence Against Women, Children and Adolescents and their Sexual and Reproductive Rights, Sept. 19, 2014, OEA/Ser.L/II.7.10, <http://www.oas.org/en/mesecvi/docs/CEVII1-Declaration-EN.pdf> [<http://perma.cc/82D6-Z7GJ>].

<sup>35</sup> *See, e.g.*, Comm. on the Elimination of Discrimination against Women, *General*

nizing the human right to abortion as a way to eliminate discrimination against women's rights to life and health care.<sup>36</sup> U.N. human rights committees also expressed concern over adolescent girls' access to safe abortion services,<sup>37</sup> and have asked States to review legislation that makes abortion illegal.<sup>38</sup> Committees have also discouraged States from prosecuting women for committing the alleged crime of abortion.<sup>39</sup> And when countries have amended restrictive abortion laws to allow more access, some U.N. human rights committees have been congratulated for making these efforts.<sup>40</sup> The basis for this recognition has primarily fallen on the woman's or the adolescent's right to life and health.<sup>41</sup>

When it comes to case law, two emblematic cases against Peru establish that access to legal and safe abortion intrinsically involves the guarantee of the rights to life, health, autonomy, privacy, and to be free from cruel, torturous, and unusual punishment.<sup>42</sup> Start-

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*Recommendation 24: Women and Health*, ¶ 11, U.N. Doc. HRI/GEN/1/Rev.5 (2001); Human Rights Comm., *Concluding Observations of the Human Rights Committee: Chile*, ¶ 15, U.N. Doc. CCPR/C/79/Add.104 (1999).

<sup>36</sup> *Information Series on Sexual and Reproductive Health and Rights, Abortion*, UNITED NATIONS, OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, [http://www.ohchr.org/Documents/Issues/Women/WRGS/SexualHealth/INFO\\_Abortion\\_WEB.pdf](http://www.ohchr.org/Documents/Issues/Women/WRGS/SexualHealth/INFO_Abortion_WEB.pdf) [<http://perma.cc/A4LJ-G8KJ>].

<sup>37</sup> See, e.g., CRC, *supra*, note 23, at 328, ¶ 27.

<sup>38</sup> See, e.g., Comm. on the Elimination of Discrimination Against Women, *Report of the Committee on the Elimination of Discrimination Against Women*, 53rd Sess., ¶¶ 340, 394, U.N. Doc. A/53/38/Rev.1 (1998); Comm. on the Elimination of Discrimination Against Women, *Concluding Comments of the Committee on the Elimination of Discrimination Against Women: Chile*, 36th Sess., Aug. 7-25, 2006, ¶¶ 19-20, U.N. Doc. CEDAW/C/CHI/CO/4 (2006); U.N. Human Rights Comm., *Concluding Observation of the Human Rights Committee: Nicaragua*, 94th Sess., Oct. 13-31, 2008, ¶ 13, CCPR/C/NIC/CO/3 (2008).

<sup>39</sup> Comm. on the Elimination of Discrimination Against Women, *Concluding Observations on the Combined Seventh and Eighth Period Reports of Peru*, July 1, 2014, ¶ 36, U.N. Doc. CEDAW/C/PER/CO/7-8 (2014); Comm. on the Elimination of Discrimination Against Women, *Statement of the Committee on the Elimination of Discrimination Against Women on Sexual and Reproductive Health and Rights: Beyond 2014 ICPD Review*, 57th Sess., Feb. 10-28, 2014.

<sup>40</sup> E.g., Comm. on the Elimination of Discrimination Against Women, *Report of the Committee on the Elimination of Discrimination Against Women*, May 9, 1996, ¶ 181, U.N. Doc. A/51/38 (1996).

<sup>41</sup> E.g., U.N. Human Rights Comm., *Concluding Observations of the Human Rights Committee, Chile*, ¶ 15, U.N. Doc. CCPR/C/79/Add.104 (Mar. 30, 1999).

<sup>42</sup> U.N. Human Rights Committee, *Huaman v. Peru (K.L. v. Peru)* (Communication no. 1153/2003), U.N. Doc. CCPR/C/85/D/1153/2003, <https://www1.umn.edu/humanrts/undocs/1153-2003.html> [<https://perma.cc/WP7G-XBBU>]; U.N. Comm. on the Elimination of All Forms of Discrimination Against Women, *L.C. v. Peru*, (Communication no. 22/2009), U.N. Doc. CEDAW/C/50/D/22/2009, [http://www.ohchr.org/Documents/HRBodies/CEDAW/Jurisprudence/CEDAW.C.50.D.22.2009\\_en.pdf](http://www.ohchr.org/Documents/HRBodies/CEDAW/Jurisprudence/CEDAW.C.50.D.22.2009_en.pdf) [<http://perma.cc/K7V8-NFRZ>].

ing in 2005, the Human Rights Committee decided the landmark case *K.L. v. Peru*, concluding that the Peruvian State had violated various articles of the International Covenant on Civil and Political Rights when it denied a young woman access to legal abortion.<sup>43</sup> K.L. was 17 years old when she became pregnant with an anencephalic fetus, which is a fetus without a complete brain that is incapable of surviving outside of the womb.<sup>44</sup> Her doctors concluded that continuing to carry this fetus to term put K.L.'s life and health at risk.<sup>45</sup> Although Peruvian law allows abortion when the pregnant woman's life or health is in danger, the hospital director denied such medical treatment.<sup>46</sup> K.L. was therefore forced to give birth to a baby that had no chance of surviving and was also forced to breastfeed during the four days it was alive.<sup>47</sup> The CEDAW Committee observed that K.L. was subject to severe trauma by having to endure such an unhealthy pregnancy, knowing about the fetus's condition, and then the baby's death.<sup>48</sup> It was no surprise that she became severely depressed and required psychiatric help. In ruling in favor of K.L., the Human Rights Committee pointed out that:

The fact that [K.L.] was obliged to continue with the pregnancy amounts to cruel and inhuman treatment, in her view, since she had to endure the distress of seeing her daughter's marked deformities and knowing that her life expectancy was short. She states that . . . she was subjected to an "extended funeral" for her daughter, and sank into a deep depression after her death.<sup>49</sup>

The Committee found Peru to be in breach of K.L.'s right to be free from torture and cruel, inhumane, and degrading treatment, her right to privacy, and her right to be protected in her special condition as a minor.<sup>50</sup> K.L.'s inability to access therapeutic abortion, the Human Rights Committee argued, constituted a de facto ban on her right to her physical and mental health.<sup>51</sup> Similarly, the Committee Against Torture in its 2006 *Conclusions and Recommendations* for Peru commented that States should consider revising laws severely restricting abortion and must "take steps to

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<sup>43</sup> U.N. Human Rights Committee, *Huaman v. Peru (K.L. v. Peru)* (Communication no. 1153/2003), U.N. Doc. CCPR/C/85/D/1153/2003, <https://www1.umn.edu/humanrts/undocs/1153-2003.html> [<https://perma.cc/WP7G-XBBU>].

<sup>44</sup> *Id.* ¶ 2.7.

<sup>45</sup> *See id.*

<sup>46</sup> *Id.* ¶ 2.3.

<sup>47</sup> *Id.* ¶ 2.6.

<sup>48</sup> *Id.* ¶ 3.3.

<sup>49</sup> *Id.* ¶ 3.4.

<sup>50</sup> *Id.* ¶ 3.4.

<sup>51</sup> *See id.* ¶ 6.3.

prevent acts that put women's physical and mental health at grave risk and that constitute cruel and inhuman treatment."<sup>52</sup>

In 2011, the CEDAW Committee adjudicated another case relating to access to legal abortion.<sup>53</sup> L.C. was a teenager who became pregnant as a result of sexual assault, and then attempted to commit suicide by jumping from a building.<sup>54</sup> She needed emergency surgery to address the injury to her spine, but the public hospital refused to perform this procedure because it allegedly posed a risk to the fetus.<sup>55</sup> L.C. endured a miscarriage months later and only then underwent surgery.<sup>56</sup> The delay damaged her spine to the point that she became permanently paraplegic.<sup>57</sup> Similar to the Human Rights Committee's K.L. case six years earlier, the CEDAW Committee concluded that Peru's failure to provide L.C. with a legal abortion violated her right to her health, integrity, bodily autonomy, and equal treatment under the law.<sup>58</sup> As such, the CEDAW Committee urged the Peruvian State to adopt measures that guarantee access to therapeutic abortion for women like L.C.<sup>59</sup> Among these various measures, the State was asked to publish a therapeutic abortion protocol to provide Peruvian medical professionals with clear instructions on how to facilitate this care for women.<sup>60</sup> Three years later, largely due to the persistence of various advocacy organizations, the Peruvian Ministry of Health and the Ministry of Women and Vulnerable Populations published the first national protocol on therapeutic abortion.<sup>61</sup>

### *B. Abortion Access as a Human Right in the Inter-American Human Rights System*

The Inter-American Commission was an international institutional pioneer in examining whether the human right to life began

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<sup>52</sup> U.N. Comm. Against Torture, *Conclusions and Recommendations of the Committee Against Torture, Peru*, 36th Sess., May 1-19, 2006, ¶ 23, U.N. Doc. CAT/C/PER/CP/4 (2006).

<sup>53</sup> U.N. Comm. on the Elimination of All Forms of Discrimination Against Women, *L.C. v. Peru*, (Communication no. 22/2009), U.N. Doc. CEDAW/C/50/D/22/2009.

<sup>54</sup> *Id.* ¶ 2.1.

<sup>55</sup> *Id.* ¶ 2.5.

<sup>56</sup> *Id.* ¶¶ 2.9-2.10.

<sup>57</sup> *Id.* ¶ 8.12.

<sup>58</sup> *Id.* ¶¶ 8.15-8.16.

<sup>59</sup> *Id.* ¶ 9.2(a).

<sup>60</sup> *Id.* ¶ 9(b).

<sup>61</sup> Jessie Clyde, *After 90-Year Delay, Peru Releases Protocols for Legal Abortion Services*, INT'L WOMEN'S HEALTH COAL. (July 1, 2014), <http://iwhc.org/2014/07/90-year-delay-peru-releases-protocols-legal-abortion-services/> [<http://perma.cc/C54F-GMG7>].

from the moment of conception, a point of contention among supporters and opponents of abortion access.<sup>62</sup> In the 1970s, the petitioners in *White v. United States*, also known as the “Baby Boy case,” argued before the Inter-American Commission that the acquittal of a doctor who performed an abortion meant that the State had violated that fetus’s right to life.<sup>63</sup> The petitioning organization, Catholics for Christian Political Action, claimed that the American Declaration on the Rights of Duties of Man, which was signed by the United States, protected the right to life and could be interpreted in conjunction with Article 4 of the American Convention on Human Rights.<sup>64</sup> Article 4 establishes that the right to life “shall be protected by law and, in general, from the moment of conception,” which according to the petitioners meant that protection for life begins during conception.<sup>65</sup>

The Inter-American Commission, by first examining the text and history of the American Declaration, clarified that the drafters of the American Declaration intentionally rejected the language that included the right to the unborn and instead opted to include the *right to life* in order to link it afterwards with the liberty and security of the *person*.<sup>66</sup> Thus, the Commission held that the petitioners were incorrect in interpreting the American Declaration’s right to life from the moment of conception.<sup>67</sup>

In analyzing the American Declaration’s Working Papers, the Inter-American Commission also clarified that its drafters decided to leave open the possibility for States to adopt “the most diverse cases of abortion” by possibly allowing in a later convention the right to abortion.<sup>68</sup> The Commission thus held that the petitioners had an overly narrow interpretation of the American Convention and that the right to life was never intended to begin from the moment of conception. This became clear when the drafters of the American Convention added the clause “in general,” when referring to the right to life from the moment of conception, evidencing that the right to life was not meant to be absolute.<sup>69</sup>

Around the same time that U.N. human rights bodies were

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<sup>62</sup> *White v. United States*, Case 2141, Inter-Am. Comm’n H.R., Report No. 23/81, OEA/Ser.L/V/II.54, doc. 19 rev.1 (1981).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* ¶ 3(b).

<sup>65</sup> American Convention, *supra* note 28.

<sup>66</sup> *White*, Case 2141, ¶ 14(a) (emphasis added).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* ¶ 14(c)

<sup>69</sup> *Id.*

paving the way to recognizing various rights that support abortion access, similarly-themed cases also emerged in the Inter-American system, like *Paulina Ramirez Jacinto v. Mexico*.<sup>70</sup> Paulina was thirteen years old when she was sexually abused by a burglar who broke into her sister's home in the Mexican state of Baja California. Paulina found out that she became pregnant as a result of this rape when she visited a doctor three weeks after the assault. Although Baja California's penal code allowed abortion in cases of rape, public officials forcefully dissuaded Paulina from getting an abortion.<sup>71</sup> For instance, they held her at the hospital for long intervals while they showed her videos of abortion procedures.<sup>72</sup> They also directed Paulina and her mother to see a priest who threatened to excommunicate them if Paulina got the abortion.<sup>73</sup> Paulina was forced to proceed with a pregnancy that placed her life and health at risk because she was only fourteen years old. During a friendly settlement at the Inter-American Commission,<sup>74</sup> the Mexican government admitted that by denying Paulina access to legal abortion, it had violated her right to her health and privacy.<sup>75</sup> It also acknowledged that Paulina had a right to special protection because she was a young teenager and thus was under a special condition of vulnerability.<sup>76</sup> Although the Mexican government has yet to fulfill all the commitments it made during the settlement, the *Paulina Ramirez Jacinto* case is important because it has come the closest to recognizing abortion access as a human right in the Inter-American system.<sup>77</sup>

The Inter-American Commission also acted in its consultative capacity when its Rapporteur on the Rights of Women sent a letter to the Nicaraguan government in 2006 expressing his concern for

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<sup>70</sup> *Paulina del Carmen Ramirez Jacinto v. Mexico*, Case 161-02, Inter-Am. Comm'n H.R., Report. No. 21/07, Friendly Settlement (2007).

<sup>71</sup> *Id.* ¶ 11.

<sup>72</sup> *Id.* ¶ 12.

<sup>73</sup> Asjlynn Loder, *Human Rights May Weigh Mexican Abortion Case*, WOMEN'S E NEWS (Mar. 8, 2002), [http://womensenews.org/story/the-world/020308/human-rights-court-may-weigh-mexican-abortion-case?\\_sm\\_au\\_=iVVsjrnn8SpFpLsR](http://womensenews.org/story/the-world/020308/human-rights-court-may-weigh-mexican-abortion-case?_sm_au_=iVVsjrnn8SpFpLsR) [<http://perma.cc/8YCW-TRH4>].

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* ¶ 16.

<sup>76</sup> See American Convention, *supra* note 28, at art. 19 (“[Every child has] the right to the measures of the protection required by his condition.”); Convention of Belém do Pará, *supra* note 32, at art. 9 (obliging the states to consider the vulnerability of women to violence, especially women subject to violence while pregnant, of minor age, who are socio-economically disadvantaged, or who have been deprived of their freedom).

<sup>77</sup> *Paulina del Carmen Ramirez Jacinto*, Case 161-02, ¶ 17.

Nicaragua's decision to get rid of the health exception to the criminalization of abortion and to impose a complete ban on abortion.<sup>78</sup> This letter indicated that therapeutic abortion—a medical procedure required to terminate a pregnancy to save the woman's life or health—has been recognized internationally as a health service for women, and that such denial endangers women's lives as well as their physical and psychological integrity.<sup>79</sup> Basing its analysis on the Human Rights Committee's *L.C. v. Peru* decision, this was one of the first times in which the Inter-American Commission acknowledged the right to therapeutic abortion.<sup>80</sup>

The *Artavia-Murillo v. Costa Rica* case, which was heard in the Inter-American Court of Human Rights in 2012, built upon the *Baby Boy* case by confirming that life does not begin from the moment of conception, and as such abortion does not interfere with the right to life.<sup>81</sup> In *Artavia-Murillo*, the Inter-American Court struck down Costa Rica's ban of in-vitro fertilization (IVF), which nine couples sought as an alternative way to have children.<sup>82</sup> The Inter-American Court reasoned that every person has a right to privacy when it comes to his or her reproductive autonomy and access to reproductive health services; hence, any ban on IVF is discriminatory.<sup>83</sup> *Artavia-Murillo* was also significant in confirming what the *Baby Boy* case had established forty years before: that an embryo cannot enjoy the same rights as a person, and the right to life per Article 4 of the American Convention is not absolute.<sup>84</sup> Another transcendental conclusion that came out of *Artavia-Murillo* is the link that the Court established between the right to private life and personal integrity with the right to health. Although the case did not primarily touch on the subject of abortion, its reasoning supports the rights to reproductive autonomy, reproductive health, equality, and non-discrimination over any alleged rights of the embryo.<sup>85</sup>

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<sup>78</sup> Letter from Victor Abramovich, Rapporteur, Org. of American States, and Canton, Executive Secretary, Org. of American States, to Norma Calderas Cardenal, Minister of Foreign Affairs, Nicaragua (Nov. 10, 2006), [http://www.radiofeminista.net/dic06/notas/index\\_nicaragua\\_spanish.pdf](http://www.radiofeminista.net/dic06/notas/index_nicaragua_spanish.pdf).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Murillo v. Costa Rica*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 257 (Nov. 28, 2012).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* ¶ 146.

<sup>84</sup> *Id.* ¶ 220.

<sup>85</sup> *See id.* ¶ 316.

### III. ADVANCING NATIONAL LAWS THAT SUPPORT THE RIGHT TO ABORTION

At the same time that legal activists were laying the groundwork for an international legal recognition of the right to abortion, various Latin American countries were using these new legal instruments to seek advances in their domestic legislation.<sup>86</sup> The first major legal victory occurred in Mexico City in 2007 when its Legislative Assembly legalized abortions under any circumstances for the first twelve weeks of a pregnancy, a law that was later upheld by the Mexican Constitutional Tribunal.<sup>87</sup> Five years later, Uruguay also legalized abortion for the first twelve weeks of gestation, expanding the allowance to fourteen weeks if the woman became pregnant as a result of rape, and anytime thereafter if the pregnancy posed a grave risk to her life or health, or if the fetus had a condition that was incompatible with life.<sup>88</sup>

While not completely legalizing abortion as in Mexico City or Uruguay, other legal reforms took place in Latin America that permitted more access to abortion. In 2006, the Colombian Constitutional Tribunal issued an opinion in the Case C-355, which reformed the country's complete ban on abortion.<sup>89</sup> This ruling legalized abortion under the three most common circumstances: when the woman's life or health is in danger, in cases of rape or incest, or if the fetus has serious malformations that would make it impossible to survive outside the uterus.<sup>90</sup> Argentina's highest court also opened the way to allow more access to abortion in 2012 through the F.A.L. case.<sup>91</sup> In this decision, the Supreme Court reviewed Argentina's Penal Code, which only allowed abortion access to women who had been raped if they also had a mental disability. The Court extended the grounds to allow all women the right to obtain an abortion in cases of rape, basing its decision on jurispru-

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<sup>86</sup> Mandy Van Deven, *Latin America Takes Action to Decriminalize Abortion*, GLOBAL POST (Jan. 20, 2013, 9:00 AM), <http://www.globalpost.com/dispatches/globalpost-blogs/commentary/latin-american-abortion-progress> [<http://perma.cc/LX2Q-ADUX>].

<sup>87</sup> *See id.*

<sup>88</sup> Simon Romero, *Uruguay Senate Approves First-Trimester Abortions*, N.Y. TIMES, Oct. 17, 2012, at A6.

<sup>89</sup> *See* Corte Constitucional [C.C.] [Constitutional Court], Mayo 10, 2006, Jaime Araujo Rentería, Sentencia C- 355/06 (Colom.).

<sup>90</sup> *Id.*

<sup>91</sup> Press Release, La Corte Suprema Preciso el Alcance del Aborto no Punible y Dijo que Estos Casos no Deben ser Judicializados, CENTRO DE INFORMACIÓN JUDICIAL (Mar. 13, 2012), <http://www.cij.gov.ar/nota-8754-La-Corte-Suprema-preciso-el-alcance-del-aborto-no-punible-y-dijo-que-estos-casos-no-deben-ser-judicializados.html> [<http://perma.cc/WU2J-SUPM>].

dence developed by the U.N. Committees on Human Rights and the Rights of Children.<sup>92</sup> At the same time that cases like F.A.L. were being considered, the Argentinian Ministry of Health enacted a therapeutic abortion protocol.<sup>93</sup>

These victories all happened under a combination of well-prepared as well as unforeseen circumstances. Activists—through marches, lobbying, popular education, research, and other tactics—worked arduously for several years to gain the support of allies in decision-making spheres and took on opportunities as they presented themselves. During this critical time, international jurisprudence became a tool and an example for how to interpret human rights as a basis to support abortion access. Case law, observations, and recommendations from international human rights bodies were cited in domestic legislation and/or set the momentum for considering a shift in the way that abortion was legally perceived. One clear example is the way in which *K.L., L.C., Paulina Ramirez Jacinto* and others discussed the rights to life and health, in addition to their right to privacy, autonomy, and reproductive liberty.<sup>94</sup> As the next section will demonstrate, these arguments were later featured in new national laws and cases.

#### IV. NEW LEGAL VEHICLES TO ENSURE ACCESS TO LEGAL ABORTION

Since abortion in most Latin American countries is allowed when the woman's life or health is in danger, the adoption of these legal conditions is needed at the regulatory level to create a demand among women who need this care. Ministerial protocols and guidelines are also necessary to provide health professionals with the technical guidance that can contribute to their understanding of these various legal requirements and consequently to secure

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<sup>92</sup> See Paola Bergallo, *The Struggle Against Informal Rules on Abortion in Argentina*, in *ABORTION LAW IN TRANSNATIONAL PERSPECTIVE: CASES AND CONTROVERSIES* 143-65 (Rebecca J. Cook et al. eds., 2014).

<sup>93</sup> MINISTERIO DE SALUD DE LA NACIÓN DE ARGENTINA, *PROTOCOLO PARA LA ATENCIÓN INTEGRAL DE LAS PERSONAS CON DERECHO A LA INTERRUPCIÓN LEGAL DEL EMBARAZO* (2015), <http://www.msal.gob.ar/images/stories/bes/graficos/0000000690cnt-Protocolo%20ILE%20Web.pdf> [<http://perma.cc/6V37-N5SJ>].

<sup>94</sup> See U.N. Human Rights Committee, *Huaman v. Peru (K.L. v. Peru)* (Communication no. 1153/2003), U.N. Doc. CCPR/C/85/D/1153/2003; U.N. Comm. on the Elimination of All Forms of Discrimination Against Women, *L.C. v. Peru*, (Communication no. 22/2009), U.N. Doc. CEDAW/C/50/D/22/2009; Paulina del Carmen Ramirez Jacinto v. Mexico, Case 161-02.

their implementation.<sup>95</sup> Rather than portraying abortion as a criminal issue, these regulatory norms are also important because they conceptualize abortion within a framework of preservation and promotion of health.<sup>96</sup> This section will study how these guidelines were issued as part of the work of Planned Parenthood's partners as legal analysts and strategists, as well as services providers.

Planned Parenthood Global ("P.P. Global"), the international division of Planned Parenthood Federation of America ("P.P.F.A."), was created more than forty years ago "to ensure that women, men, and young people in some of the world's most neglected areas have access to the health they need to control their bodies and their futures."<sup>97</sup> Drawing from almost one hundred years of experience in the United States, this P.P.F.A. department provides technical assistance to organizations from Latin America and Africa.<sup>98</sup> These include organizations comprised of advocates, lawyers, youth collectives, professional associations of medical providers, grassroots activists, researchers, communicators, law enforcers, artists, and others.<sup>99</sup>

On the advocacy side, P.P. Global aims to support strategies that contribute to a favorable social, legal, and political environment that allows for access to safe and legal abortion.<sup>100</sup> P.P. Global's staff works hand-in-hand with these partners to promote and improve laws and policies in a wide range of ways, including providing expert opinions on bills and regulations that impact sexual and reproductive health.<sup>101</sup> Working in multiple countries and over many years has allowed P.P. Global to acquire a bird's-eye view of trends, developments, and opportunities regionally and worldwide, as well as the ability to document and share models of effective and sustainable advocacy on sexual and reproductive health services and rights.

P.P. Global's partners work to enact and implement laws and

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<sup>95</sup> See, e.g., Rachel Rebouché, *A Functionalist Approach to Comparative Abortion Law*, in ABORTION LAW IN TRANSNATIONAL PERSPECTIVE, *supra* note 92, at 98.

<sup>96</sup> See, e.g., Rebecca Cook, *Stigmatized Meanings of Criminal Abortion Law*, in ABORTION LAW IN TRANSNATIONAL PERSPECTIVE, *supra* note 92, at 347, 354.

<sup>97</sup> *About Us*, PLANNED PARENTHOOD GLOBAL, <http://plannedparenthood.org/about-us/planned-parenthood-global/> [https://perma.cc/ES4L-2U38].

<sup>98</sup> *Id.*

<sup>99</sup> See HEALTH HAS NO BORDERS, PLANNED PARENTHOOD GLOBAL (2013), [https://www.plannedparenthood.org/files/2614/2360/2051/PPGlobal\\_042114\\_Brochure\\_vF\\_rev3\\_4.pdf](https://www.plannedparenthood.org/files/2614/2360/2051/PPGlobal_042114_Brochure_vF_rev3_4.pdf) [https://perma.cc/37ZZ-Z696].

<sup>100</sup> See *How we work*, PLANNED PARENTHOOD GLOBAL, <https://www.plannedparenthood.org/about-us/planned-parenthood-global/how-we-work> [https://perma.cc/85U7-DQX6].

<sup>101</sup> See *id.*

policies that support access to sexual and reproductive health, including expanding and maintaining the grounds for legal abortion.<sup>102</sup> With the support of P.P. Global's technical team, P.P. Global's partners seek to hold governments accountable for adopting guidelines that make abortion care more accessible to women.<sup>103</sup> As was done in Mexico, Uruguay, Colombia, and Argentina, P.P. Global advocates in Peru, Ecuador, and Guatemala have taken from the jurisprudence developed at the U.N. and in the Inter-American system to improve national laws and norms.<sup>104</sup> P.P. Global's partners have succeeded in inserting human rights within new regulatory norms that impact sexual and reproductive health.<sup>105</sup> When needed, P.P. Global staff trains these partners on strategic litigation to leverage these human rights instruments, particularly when they include measures that their countries are asked to adopt.<sup>106</sup>

One of P.P. Global's major successes has been working with partners and allies—lawyers, medical providers, activists, and decision-makers—in shepherding the publication and adoption of protocols that guide the provision of safe abortion.<sup>107</sup> P.P. Global staff, partners, and allies have relied on the human rights instruments as well as the publications of respectable public health agencies like the World Health Organization to ensure access to therapeutic abortion when the pregnant woman's life or health is in danger.<sup>108</sup> Such efforts materialized when P.P. Global's focus countries enacted guidelines that facilitated safe and legal abortion care.<sup>109</sup>

The instructions of human rights bodies were critical in the

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<sup>102</sup> See *About Us*, *supra* note 97.

<sup>103</sup> See HEALTH HAS NO BORDERS, *supra* note 99.

<sup>104</sup> Ministerio de Salud Pública, *Guía de Práctica Clínica "Atención del Aborto Terapéutico"*, Adoptada por la Dirección Nacional de Normatización Registro Oficial 00005195 (12 Dic. 2014) (Ecuador) [hereinafter *Clinical Practice Guide for Therapeutic Abortion*].

<sup>105</sup> *Id.*

<sup>106</sup> Planned Parenthood Global, *Strategic Plan Narrative* (2013-2017).

<sup>107</sup> See HEALTH HAS NO BORDERS, *supra* note 99.

<sup>108</sup> See, e.g., WORLD HEALTH ORG., SAFE ABORTION: TECHNICAL AND POLICY GUIDANCE FOR HEALTH SYSTEMS (2d ed. 2013), [http://apps.who.int/iris/bitstream/10665/70914/1/9789241548434\\_eng.pdf](http://apps.who.int/iris/bitstream/10665/70914/1/9789241548434_eng.pdf) [<http://perma.cc/F929-3ES2>].

<sup>109</sup> *Clinical Practice Guide for Therapeutic Abortion*, *supra* note 104; Ministerio de Salud Pública de la República de Guatemala, *Guía para la Atención Integral de la Hemorragia del Primer y Segundo Trimestre y del Post-Aborto y sus Complicaciones*, 1ra ed. (2011); Guía Técnica Nacional para la Estandarización del Procedimiento de la Atención Integral de la Gestante en la Interrupción Voluntaria por Indicación Terapéutica del Embarazo Menor de 22 Semanas con Consentimiento Informado en el Marco de lo Dispuesto en el Artículo 199 del Código Penal, *El Peruano*, Resolución Ministerial No. 486-2014/MINSA (June 28, 2014).

development of these regulatory policies. For example, a P.P. Global partner—which brought the *L.C.* case—worked with other allies for more than eight years to pressure the Peruvian Ministry of Health and the Ministry of Women and Vulnerable Populations to publish the Peruvian Therapeutic Abortion Protocol requested by the CEDAW Committee.<sup>110</sup> This collective used various approaches like developing relationships with key ministries and Congressional members, as well as launching a media campaign that called for the promulgation of the Therapeutic Abortion Protocol.<sup>111</sup> The contents of the campaign were built from the jurisprudence developed by the *L.C.* and *K.L.* cases against Peru.<sup>112</sup> Critical to this push was the role played by the medical associations who testified before Congress and sent their recommendations to the relevant ministries.<sup>113</sup> While advocating for national guidelines, the P.P. Global partner also worked with various hospitals in different regions in Peru who were working to design their own therapeutic abortion protocols. At the invitation of these hospitals, the P.P. Global partner provided the draft language of these hospital protocols and trained their staff so that they could deliver their services with a gendered perspective and a human rights framework. This example clearly demonstrates how international jurisprudence helps P.P. Global partners hold their governments accountable for adopting and implementing guidelines.

Drawing from the lessons in Peru, advocates in Ecuador scored a similar victory at the end of 2014 when the Ecuadorian government published the Basic Practice Guidelines for Therapeutic Abortion.<sup>114</sup> P.P. Global supported Ecuadorian advocates by periodically sharing information and liaising between international experts from Peru and Argentina. These medical and legal experts

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<sup>110</sup> See *Promsex, el CDR y PPFA dan la Bienvenida a las Recomendaciones de la ONU al Estado Peruano Sobre Ampliación del Acceso al Aborto Legal*, PLANNED PARENTHOOD GLOBAL (Aug. 11, 2014), <https://www.plannedparenthood.org/esp/sobre-nosotros/sala-de-prensa/noticias-nacionales/promsex-el-cdr-y-ppfa-dan-la-bienvenida-a-las-recomendaciones-de-la-onu-al-estado-peruano-sobre-ampliacion-del-acceso-al-aborto#sthash.apnVNrUb.dpuf> [<https://perma.cc/6QVZ-5CBC>].

<sup>111</sup> Promsex advocated before the Health's and Women's Ministries, as well as the Ministry of Justice, which also published its support and encouraged the publication of the Therapeutic Abortion Protocols.

<sup>112</sup> *Presidente Humala, ¡cumpla sus promesas!*, PATAS PERÚ (Oct. 22, 2015), <http://patasperu.blogspot.com> [<http://perma.cc/56SP-P4ET>].

<sup>113</sup> See Letter from Liesl Gerntholtz, Dir. Women's Rights, Division, Human Rights Watch, to Midori Musme Cristina De Habich, Minister of Health, Peru (Apr. 11, 2014), <https://www.hrw.org/es/news/2014/04/11/peru-es-necesario-adoptar-una-ley-tecnica-nacional-de-aborto-legal> [<https://perma.cc/894T-KZNF>].

<sup>114</sup> Clinical Practice Guide for Therapeutic Abortion, *supra* note 104.

delivered a workshop on reproductive rights before seventy civil society members from Ecuador, as well as presented on this subject before the Health Committee of the Ecuadorian Assembly.<sup>115</sup> During a meeting with the Ministry of Health, an Argentinian public health expert recounted how international jurisprudence contributed to her country's judicial and ministerial successes, in particular in influencing how the Argentinian Ministry of Health drafted and then published an edited version of the Non-Punitive Abortion Protocol that provides guidance on therapeutic abortion.<sup>116</sup> She also shared how the framing of the protocol in her country was founded on the fact that this was a procedure that had actually been legal for several decades, as was the case in Ecuador.<sup>117</sup> Following this series of events, the Ecuadorian government asked P.P. Global allies and partners to be part of the expert committee that validated the Guidelines.<sup>118</sup> P.P. Global staff accompanied the Latin American partners every step of the way. Such strategic yet nimble tactics demonstrate that P.P. Global goes beyond providing policy analysis, and takes on opportunities to gather and link key actors to increase the impact of their strategies.

The results of P.P. Global partners' work in drafting and publishing the Therapeutic Abortion Guidelines in Ecuador could not have been better. This norm includes the definition of health that was established by the World Health Organization and validated by human rights bodies.<sup>119</sup> This comprehensive definition of health is important because, as established in various cases like *L.C. v. Peru*, *K.L. v. Peru*, and *Paulina Ramirez Jacinto v. Mexico*, women have the right to access legal abortion when any aspect of their health is in danger. In this vein, it is also an accomplishment that the Ecuadorian Guidelines are not limited to a certain number of diseases, which could dissuade medical professionals from performing a procedure when they do not find the woman's condition among the list of pathologies.<sup>120</sup> Also following its duty to promote, respect, and guarantee human rights, Ecuador must ensure that both public and private actors perform these medical interventions when women need and request it. Hence, therapeutic abortion in

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<sup>115</sup> Information on file with the author who personally attending these meetings in June 2014.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> See Clinical Practice Guide for Therapeutic Abortion, *supra* note 104.

<sup>119</sup> See *id.*; see also Constitution of the World Health Organization, *opened for signature* July 22, 1946, 14 U.N.T.S. 185, (entered into force Apr. 7, 1948), [http://www.who.int/governance/eb/who\\_constitution\\_en.pdf](http://www.who.int/governance/eb/who_constitution_en.pdf) [<http://perma.cc/Q6S7-48V7>].

<sup>120</sup> Clinical Practice Guide for Therapeutic Abortion, *supra* note 104.

accordance with the Guidelines is mandatory for all medical personnel in Ecuador. Consistent with the holding in *LC. v. Peru*, the Ecuadorian State cannot unnecessarily delay therapeutic abortion procedures, and should therefore perform them within six calendar days from the moment the woman requests it.<sup>121</sup> Also drawing from the human rights to autonomy, integrity and privacy, the woman in Ecuador makes the ultimate decision if she wants to move forward with her wish to get a therapeutic abortion. In contrast to the events in the *Paulina Ramirez Jacinto v. Mexico case*, a health official in Ecuador may not deny a pregnant woman an abortion procedure because of his or her religious beliefs.<sup>122</sup> For those circumstances, and during the absence of a trained medical professional who can perform an abortion, a referral process must be put in place so that the woman may get an abortion no matter what.

#### V. CONCLUSION - NEXT STEPS

The reproductive rights movement in Latin America should savor these victories as more women have legal access to abortion. These laws, cases, regulations, and other norms are critical in safeguarding women's sexual and reproductive health, including abortion care. In the last decade, the movement has learned to advance different legal models of how human rights can be practiced domestically. One such mechanism is the creation of regulations and guidelines that reiterate and deconstruct old and esoteric penal laws by explaining how medical professionals have a duty to protect women's rights. This deconstruction also allows the woman to know about her rights and demand them from the moment she sees her doctor. Protocols and guidelines help create that demand.<sup>123</sup> This is not the end. Although medical guidelines unpack complicated laws and describe them in terms that are more comprehensible to women and service providers, they are only as good as the political will of the governments to enforce them. Legislative or normative action sets the foundation for promoting equality, but legitimacy dissipates without adequate enforcement.

P.P. Global and allies must continue to foster collaboration between activists, the medical community, and the legal community to ensure that enforcement of laws and norms take place. For instance, they can follow the example of the Colombian Ministry of Health's Decree 4444/2006, which mandated that all medical

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<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> See, e.g., Bergallo, *supra* note 92, at 151.

schools incorporate techniques recommended in the *World Health Organization's Technical Guidelines to Perform Abortions*.<sup>124</sup>

As we are raising awareness about the existence of these legal tools, it is critical that their interpretation be performed in accordance with an understanding of the human rights framework. These norms are not only guidelines, they are founded on the rights to autonomy, dignity, privacy, and liberty, which both the woman and the medical provider must understand. It is important that we instill in all actors the understanding that this is a health issue, and that the woman as well as the medical provider should feel empowered to access and provide this legal recourse. Equally as important as training medical professionals, women should be supported since they have historically experienced stigma when thinking about accessing this procedure. By the same token, activists can and should continue using the international human rights framework to promote the enactment of other regulations that protect sexual and reproductive rights.

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<sup>124</sup> D. 4444, Diciembre 13, 2006, MINISTERIO DE LA PROTECCION SOCIAL (Colom.).

# WHEN JUDGES DON'T FOLLOW THE LAW: RESEARCH AND RECOMMENDATIONS

*Michele Cotton*<sup>†</sup>

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## I. INTRODUCTION

The sense that our legal system enforces the rule of law and provides litigants with equal justice may be based on perceptions created by its most visible courts. The courts where high-profile, high-stakes litigation and appellate review take place are frequented by attorneys, studied by legal scholars, covered by the media, and no doubt shape our view of the legal system as a whole. But the most visible courts are the tip of the iceberg and may not be representative of what happens in the larger, more obscure part of our system, such as those civil courts that handle “small claims,” debt collection, landlord-tenant disputes, and the like. Litigants are seldom represented by attorneys in such courts, and their cases rarely make the news or are noticed by law professors. Yet whether it is actually true that our legal system enforces the rule of law and provides equal justice would seem to depend on what happens in just such courts, as they are the legal system as most people experience it.

If we care about the rule of law, we presumably do not want these so-called “lesser” courts to be places where high-minded

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precedents established by appellate courts go to die. If we care about “access to justice,” we are presumably concerned about what justice consists of and what access actually amounts to. If we think the legal system matters to the health of civil society, then we must be interested in what happens to most people in the legal system, as their commitment to civil society is affected by their experience with its institutions. Knowing what goes on in these lesser courts is not simply knowledge for its own sake, but information that makes it possible to have meaningful conversations about what we want from our legal system.

To facilitate such discussion, this Article considers the implications of the findings of a multi-case study done of a civil trial court and how it determined outcomes in a particular type of case involving unrepresented litigants. Every year, the court in question handles hundreds of thousands of cases<sup>1</sup> in which one or more of the parties are unrepresented or likely to be unrepresented. Though their claims are in some sense “small,” these litigants may raise serious issues. For example, the cases that were the subject of this research were filed by tenants claiming that their rental housing conditions were unhealthful or hazardous to them and their families and that their landlords had failed to correct the problems—actions based on the so-called “warranty of habitability.” The conditions alleged included lack of heat and hot water, infestations of rodents and insects, leaks and mold, and falling ceilings and other structural problems. An examination of what happened in these cases provides some insight into how the rule of law and equal justice are faring in the less-visible part of our legal system. Many places have similar laws, as well as similar courts, similarly unrepresented tenants, and similar economic conditions affecting the housing market.<sup>2</sup> Therefore, this research provides a glimpse that could be more generally telling.

Studies of whether the courts that hear these kinds of cases actually follow the law or provide equal justice are relatively rare. These courts and the kinds of cases that are litigated in them tend

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<sup>1</sup> *District Court of Maryland - Activity Report, July 2014 - June 2015*, MD.COURTS, <http://mdcourts.gov/district/statistics/2015/fy2015.pdf> [http://perma.cc/ZR9J-JJAG].

<sup>2</sup> See David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 CALIF. L. REV. 389, 394 (2011) (describing adoption of the warranty of habitability by “almost every state’s legislature or courts”); see also Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal about When Counsel is Most Needed*, 37 FORDHAM URB. L.J. 37, 47 (2010) (“Despite some variation in details, the core features of the courts [that handle landlord-tenant cases] seem remarkably consistent.”).

to be studied—when they are studied—through statistical evidence. Case studies, by contrast, tend to be more time-consuming and labor-intensive<sup>3</sup> and have a more complicated reputation than quantitative study.<sup>4</sup> However, such qualitative research is nonetheless crucial to answering certain questions. Scholarship in this area has consistently shown that tenants attempting to enforce the warranty of habitability experience a low rate of success in court.<sup>5</sup> Indeed, Chester Hartman and David Robinson have remarked regarding this research that “[s]tudies of the various courts have shown that the failure to apply the law is rampant.”<sup>6</sup> But, strictly speaking, such research does not provide direct evidence that these courts fail to follow the law and to provide equal justice. It is possible that the low success rate of tenants indicates that they generally lack the facts necessary to win their cases, or that the law around the warranty of habitability is not well-designed for addressing their particular problems. The statistical evidence does not directly answer the question of why certain litigants are unsuccessful. Almost no case studies have been done of how such cases are actually adjudicated,<sup>7</sup> but it is that kind of research that provides direct

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<sup>3</sup> ROBERT K. YIN, *CASE STUDY RESEARCH: DESIGN AND METHODS* 21 (5th ed. 2014).

<sup>4</sup> Case studies are staples in many fields, including psychology, sociology, political science, anthropology, social work, business, education, nursing, and community planning. *Id.* at 4. However, “[t]he case study occupies a vexed position in the discipline of political science. On the one hand, methodologists generally view the case study method with extreme circumspection . . . At the same time, the discipline continues to produce a vast number of case studies, many of which have entered the pantheon of classic works.” John Gerring, *What is a Case Study and What is it Good for?*, 98 *AM. POL. SCI. REV.* 341, 341 (2004) (citations omitted).

<sup>5</sup> See generally Marilyn Miller Mosier & Richard A. Soble, *Modern Legislation, Metropolitan Court, Miniscule Results: A Study of Detroit's Landlord-Tenant Court*, 7 *U. MICH. J.L. REFORM* 8 (1973); Julian R. Birnbaum et al., *Chicago's Eviction Court: A Tenants' Court of No Resort*, 17 *URB. L. ANN.* 93, 109 (1979); Paula Hannaford-Agor & Nicole Mott, *Research on Self-Represented Litigation: Preliminary Results and Methodological Considerations*, 24 *JUST. SYS. J.* 163 (2003); Carroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 *LAW & SOC'Y REV.* 419 (2001); Steven Gunn, *Eviction Defense for Poor Tenants: Costly Compassion or Justice Served?*, 13 *YALE L. & POL'Y REV.* 385 (1995); D. James Greiner & Cassandra W. Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 *YALE L. J.* 2118 (2012); Rebecca L. Sandefur, *The Impact of Counsel: An Analysis of Empirical Evidence*, 9 *SEATTLE J. SOC. JUST.* 51, 76 (2010).

<sup>6</sup> Chester Hartman & David Robinson, *Evictions: The Hidden Housing Problem*, 14 *HOUSING POL'Y DEBATE* 461, 479 (2003).

<sup>7</sup> LEXIS searches and other inquiries reveal no published case study research involving unrepresented litigants. The unpublished Ph.D. dissertation of David L. Eldridge examines several cases, involving mostly represented litigants, from the perspective of the discipline of social work (but also makes thoughtful points about the law governing the cases). David L. Eldridge, *The Making of a Courtroom: Land-*

evidence of what courts are doing, and thus how and why these litigants receive the results they do.

Some researchers have tried to assess the quality of justice in these courts through surveys in which tenants are quizzed about their experiences.<sup>8</sup> And surveys may even show that the majority of tenants believe they have been treated fairly.<sup>9</sup> Under some theories, that result could perhaps be considered dispositive on the question of whether these litigants received justice. However, such research is not revealing about the actual quality of judicial decision-making, given that most non-lawyers are not well-situated to evaluate whether their cases were determined in accordance with law.

Paula Hannaford-Agor and Nicole Mott suggest that the “question of just outcomes may be the most important question of all” in the research on these courts.<sup>10</sup> But they did not try to answer that question, because they concluded that “whether the litigant received a just or appropriate outcome” is “subjective” and “one of the most difficult questions for which to formulate accurate and reliable measures for empirical analysis.”<sup>11</sup> But if by “just or appropriate outcome” is meant one consistent with the law, and if the law in a given area is fairly well-defined, then the question can be answered with properly-conducted case studies as well as, if not better than, statistical studies can answer other kinds of questions. Further, to the extent that case studies are consistent with, and help explain, statistical study, they are not an alternative or inferior form of research so much as a complementary one that bears upon questions that are not readily answerable by statistical study

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lord-Tenant Trials in Philadelphia’s Municipal Court (2001) (unpublished Ph.D. dissertation, University of Pennsylvania), <http://repository.upenn.edu/edissertations/1001/> [<http://perma.cc/3DFY-MYWC>]. Some published work does discuss case studies as pedagogical tools. See, e.g., Michael Millemann, *Case Studies and the Classroom: Enriching the Study of Law through Real Client Stories*, 12 U. MD. L.J. RACE, RELIG., GENDER & CLASS 219 (2012); Frank S. Bloch, *Framing the Clinical Experience: Lessons on Turning Points and the Dynamics of Lawyering*, 64 TENN. L. REV. 989 (1997). In addition, some published work does use tantalizing snippets from actual cases to illustrate a point. See, e.g., Jonathan I. Rose & Martin A. Scott, “Street Talk” *Summonses in Detroit’s Landlord-Tenant Court: A Small Step Forward for Urban Tenants*, 52 J. URB. L. 967, 1009-11 (1975).

<sup>8</sup> See, e.g., GINA KUBITS ET AL., FOURTH JUDICIAL DIST. OF THE STATE OF MINN. RESEARCH DIV., HOUSING COURT FAIRNESS STUDY 7-8 (2004), [http://www.mncourts.gov/Documents/4/Public/Research/Housing\\_Court\\_Fairness\\_\(2004\).pdf](http://www.mncourts.gov/Documents/4/Public/Research/Housing_Court_Fairness_(2004).pdf) [<http://perma.cc/78B6-T2JF>].

<sup>9</sup> *Id.* at 30-31.

<sup>10</sup> Hannaford-Agor & Mott, *supra* note 5, at 178.

<sup>11</sup> *Id.*

alone.<sup>12</sup>

The “new legal realists” have been advocating for expansion in the scope and methods of empirical work in legal scholarship to go beyond statistical study. For example, Howard Erlanger, Bryant Garth, Jane Larson, Elizabeth Mertz, Victoria Nourse, and David Wilkins have argued that we ought to be more concerned with “the impact of law on ordinary people’s lives” and therefore should “include in our toolkit some of the social science methods best suited for this task,” including “the qualitative methods developed by fields like anthropology and history for examining everyday experience.”<sup>13</sup> Similarly, Victoria Nourse and Gregory Shaffer have called for “an empiricism that adopts anthropological and sociological approaches, in which academics leave their universities and investigate the world.”<sup>14</sup> Here, the goal is to study “the law in action”<sup>15</sup> by “tak[ing] account of people’s lived experience of the law in particular settings.”<sup>16</sup> The multi-case study considered in this Article examines the phenomenon of how courts function in just such a way. It provides information about how the courts work for ordinary people, why they do what they do, and, accordingly, what might be done to make them more effective at enforcing the rule of law and providing equal justice.

The rule of law and equal justice under law are often described as founding principles of our society. Of course, all but the most naive are aware that these are aspirations that are not fully achieved. But when such aspirations are truly more honored in the breach, the damage is not simply to those who are misled and misused by the system, but also to the reputation and viability of the system itself. Thus, attention to “people’s lived experience of the law” is no mere anthropological undertaking, or even directed at reform that primarily benefits the least well off. Rather, it is a con-

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<sup>12</sup> See YIN, *supra* note 3, at 10 (explaining that case studies answer “how” and “why” questions that are difficult to address with statistical study); see also *id.* at 40 (noting that properly-done case studies achieve analytic generalizability rather than statistical generalizability); Gerring, *supra* note 4, at 353 (explaining that the case study and other methods of research are “interdependent, and this is as it should be,” and such other forms of research “may be desperately in need of in-depth studies focused on single units”).

<sup>13</sup> Howard Erlanger et al., *New Legal Realism Symposium: Is It Time for a New Legal Realism?: Foreword: Is It Time for a New Legal Realism?*, 2005 WIS. L. REV. 335, 340 (2005) (footnote omitted).

<sup>14</sup> Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?*, 95 CORNELL L. REV. 61, 79 (2009).

<sup>15</sup> *Id.*

<sup>16</sup> Erlanger et al., *supra* note 13, at 345.

stitutive activity that focuses on what kind of system we want to have.

## II. AN ILLUSTRATIVE MULTI-CASE STUDY

The fifty-nine cases<sup>17</sup> examined for this multi-case study con-

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<sup>17</sup> The raw data used in this study are available on a Google drive administered by the CUNY Law Review at the following address: <https://drive.google.com/folderview?id=0B-UGVRZjr5NobjlOaFZaaVpUQUU&usp=sharing>. The data are accessible from any computer, and consist of the case files and audio proceedings, identified by condensed versions of court-assigned case numbers, which have been digitized. The condensed case numbers referred to throughout this Article are accompanied by full case citations and can be used to access the relevant raw data specifically referred to herein. The cases that were examined for this research are: Dixon v. Thaylor, Case No. 01010000012012 (2012 Dist. Ct. Balt. City) (on file as 1-12); Garris v. Camden Mgmt. Servs., Case No. 010100000022012 (2012 Dist. Ct. Balt. City) (on file as 2-12); Scales v. Cooke, Case No. 010100000052012 (2012 Dist. Ct. Balt. City) (on file as 5-12); Thompson v. Saffell, Case No. 010100000082012 (2012 Dist. Ct. Balt. City) (on file as 8-12); Myers v. Progressive Props., Case No. 010100000152012 (2012 Dist. Ct. Balt. City) (on file as 15-2012); Singleton v. Edgewood Apartments, Case No. 010100089662012 (2012 Dist. Ct. Balt. City) (on file as 16-12); Brown v. Hamilton, Case No. 010100005002011 (2011 Dist. Ct. Balt. City) (on file as 500-2011); Mason v. Fleming, Case No. 010100165052011 (2011 Dist. Ct. Balt. City) (on file as 16505-11); Henson-Thomas v. Young, Case No. 010100166832011 (2011 Dist. Ct. Balt. City) (on file as 16683-11); Wellington v. Williamston, Case No. 010100246432011 (2011 Dist. Ct. Balt. City) (on file as 24643-11); Williams v. Dunne Wright Prop. Mgmt., Case No. 010100247342011 (2011 Dist. Ct. Balt. City) (on file as 24742-11); Edwards v. Progressive Prop. Real Estate, Case No. 010100247982011 (2011 Dist. Ct. Balt. City) (on file as 24798-11); Jones v. Gomez, Case No. 010100000182012 (2012 Dist. Ct. Balt. City) (on file as 18-12); McCray v. Godfrey, Case No. 01010000026012 (2012 Dist. Ct. Balt. City) (on file as 26-2012); Milner v. Thompson, Case No. 010100000282012 (2012 Dist. Ct. Balt. City) (on file as 28-2012); Robsinson v. CE Reality, Case No. 010100000342012 (2012 Dist. Ct. Balt. City) (on file as 34-2012); Peoples v. Mid-Atlantic Realty Mgmt., Case No. 010100000352012 (2012 Dist. Ct. Balt. City) (on file as 35-2012); Jordan v. HABC, Case No. 010100000362012 (2012 Dist. Ct. Balt. City) (on file as 36-2012); Gilbert v. Choi, Case No. 010100000392012 (2012 Dist. Ct. Balt. City) (on file as 39-12); Perez v. May, Case No., 010100000442012 (2012 Dist. Ct. Balt. City) (on file as 44-12); Marshall v. Mid Atlantic Realty Mgmt., Case No. 010100000532102 (2012 Dist. Ct. Balt. City) (on file as 53-2012); Meade v. Md. Prop. Mgmt., Case No. 010100000562012 (2012 Dist. Ct. Balt. City) (on file as 56-2012); Sturgis v. Anomnachi, Case No. 010100000602012 (2012 Dist. Ct. Balt. City) (on file as 60-12); Smith v. Dominion Mgmt., Case No. 010100000732012 (2012 Dist. Ct. Balt. City) (on file as 73-2012); Beverly v. Balt. Preferred Prop., Case No. 010100000752012 (2012 Dist. Ct. Balt. City) (on file as 75-12); Powell v. Harris, Case No. 010100000822012 (2012 Dist. Ct. Balt. City) (on file as 82-12); Dixon v. Rice, Case No. 010100000872012 (2012 Dist. Ct. Balt. City) (on file as 87-12); Dorsey v. Keyhole Servs., Case No. 010100000902012 (2012 Dist. Ct. Balt. City) (on file as 90-2012); Patterson v. Md. Maint. & Mgmt. Co., Case No. 010100000912012 (2012 Dist. Ct. Balt. City) (on file as 91-2012); Brown v. Sage Mgmt. Inc., Case No. 010100000922012 (2012 Dist. Ct. Balt. City) (on file as 92-2012); Harmon v. Ford, Case No. 010100000972012 (2012 Dist. Ct. Balt. City) (on file as 97-12); Boyd III v. Mayberry, Case No. 010100000982012 (2012 Dist. Ct. Balt. City) (on file as 98-12); Parks v. Dickerson, Case No. 010100001102012 (2012 Dist. Ct. Balt. City) (on file as 110-12); Dukes

sisted of the court filings and audio recordings for “rent escrow actions” filed by tenants in Baltimore City District Court during a period from 2011 to 2012.<sup>18</sup> The cases for study were randomly selected, though screened to target those in which there was at least one appearance before a judge of the court that was on the record, in order to gather information about how courts handled these cases.<sup>19</sup> The results of the research have already been shared

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v. Denise, Case No. 01011172012 (2012 Dist. Ct. Balt. City) (on file as 117-2012); Cox & Wray v. Kingsley, Case No. 010100001352012 (2012 Dist. Ct. Balt. City) (on file as 135-12); Johnson v. Upton Cts. Edgewood Mgmt., Case No. 010100001362012 (2012 Dist. Ct. Balt. City) (on file as 136-12); Ames v. Willis, Case No. 010100001402012 (2012 Dist. Ct. Balt. City) (on file as 140-12); Guy v. Mei, Case No. 010100001522012 (2012 Dist. Ct. Balt. City) (on file as 152-2012); Robertson v. Roloqas, Case No. 010100001542012 (2012 Dist. Ct. Balt. City) (on file as 154-12); Barrett v. Lyle, Case No. 010100001622012 (2012 Dist. Ct. Balt. City) (on file as 162-12); Stroud v. Progressive Prop. Inc., Case No. 010100001682012 (2012 Dist. Ct. Balt. City) (on file as 168-12); Davis v. North Ave. Equities LLC, Case No. 010100001702012 (2012 Dist. Ct. Balt. City) (on file as 170-12); Davida Moses-Jones v. Nat'l Prop. Mgmt, Case No. 010100001712012 (2012 Dist. Ct. Balt. City) (on file as 171-12); Dorothy Jones v. Terry Coffman Jr., Case No. 010100001732012 (2012 Dist. Ct. Balt. City) (on file as 173-12); O'Naya Frazier v. Dunn Wright/D&W Properties, Case No. 010100001742012 (2012 Dist. Ct. Balt. City) (on file as 174-12); Jean Minor v. Albert C. Murry Jr., Case No. 010100001772012 (2012 Dist. Ct. Balt. City) (on file as 177-12); Terri Jones v. Summerfield Inv. Grp. LLC, Case No. 010100001852012 (2012 Dist. Ct. Balt. City) (on file as 185-12); Tonia Curry v. Laura L Snuggs & William T., Case No. 010100000422012 (2012 Dist. Ct. Balt. City) (on file as 42-12); Horn v. Payne, Case No. 010100001632012 (2012 Dist. Ct. Balt. City) (on file as 163-12); Maynor v. Hous. Auth. Balt. City, Case No. 010100099072012 (2012 Dist. Ct. Balt. City) (on file as 9907-12); Staton v. Dowling, DowCo Mgmt, Case No. 010100099192012 (2012 Dist. Ct. Balt. City) (on file as 9919-12); Howell v. Weingarten, Case No. 010100099202012 (2012 Dist. Ct. Balt. City) (on file as 9920-12); Brown v. Cloverdale Partners, LLC, Case No. 010100099212012 (2012 Dist. Ct. Balt. City) (on file as 9921-12); Dotson v. Pearson, Case No. 010100099222012 (2012 Dist. Ct. Balt. City) (on file as 9922-12); Terry v. Hooks, Case No. 010100099292012 (2012 Dist. Ct. Balt. City) (on file as 9929-12); Donald v. German, Case No. 010100099402012 (2012 Dist. Ct. Balt. City) (on file as 9949-12); Moore v. Encomienda, Case No. 010100099412012 (2012 Dist. Ct. Balt. City) (on file as 9941-12); Kacherovsky v. Ruby, Case No. 9943-12 (2012 Dist. Ct. Balt. City) (final order) (on file as 9943-12).

<sup>18</sup> Pronouns have been regularized in all descriptions herein of these cases, so that tenants are “she,” judges “he,” and landlords “he,” to reflect the most common constellation we saw in these cases and to avoid distracting changes where variation occurred.

<sup>19</sup> The data for these cases studies were part of a larger research project in Baltimore City District Court that collected materials from several types of cases where at least one of the litigants was unrepresented and at least one appearance occurred on the record before a judge. This Article is based on the first fifty (plus) cases studies of rent escrow cases completed by graduate students for a research course using the database. The graduate students signed up for the cases on a live spreadsheet that identified the materials only by case number. The methodology for assembling the database of materials for study was as follows. After a meeting was held advising the court of the planned research, a calendar was made numbering the dates sequentially backward from that day from 1 to 180. A random number generator was obtained

with stakeholders, including judges of the court, to help verify the validity of the research.<sup>20</sup> In addition, these case studies reach a general result that is consistent with the findings of statistical research in the area, insofar as they show unrepresented tenants obtaining relatively little success in enforcing the warranty of habitability in court, which indicates that this research is reliable.<sup>21</sup>

Indeed, the failure of tenants to benefit much from the warranty of habitability is evidently long-standing and widespread. In the 1970s, after the warranty was first widely adopted, researchers in Chicago and Detroit were already warning of the “miniscule in-court impact of the new legislation”<sup>22</sup> and sounding alarms that tenants seemed little better off than when they had no enforceable rights to livable housing.<sup>23</sup> Twenty years later, Barbara Bezdek’s extensive empirical study of the enforcement of the warranty in Baltimore found that “[d]espite the enactment of tenant-protective legislation in the mid-1970s, the rent court operates in virtually the same manner as it did” before, with tenants seldom obtaining the relief available under law.<sup>24</sup> More recently, Paris Baldacci observed that “[t]he plight of pro se litigants in New York City’s Housing Court and the broad outlines of some solutions have been recognized for at least two decades,” leading him to fear that his latest article on the subject would become “just one more . . . in a series . . . with little impact on the day-to-day experience of pro se liti-

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online for numbers 1 to 180. The graduate student researchers looked at the dockets on dates according to the numbers determined by the random number generator and collected whatever cases were on the calendar on that date where at least one litigant was unrepresented and at least one appearance occurred on the record before a judge. After more than one hundred cases were collected using this method, the court lost the six months of paper docket sheets during a remodeling, and a new method had to be devised. The court agreed to allow the graduate assistant researchers to go to the records office once a week and pull twenty files at random where the filing was prior to the date the research was begun, and from these files to select for collection those cases that had at least one party unrepresented by counsel and at least one appearance on the record before the court. The remaining approximately 200 cases in the database were collected in this manner. Though random selection of cases is not considered important to case study design, it was approximated here on the theory that it would improve the chances of finding representative cases and valid replication evidence. See YIN, *supra* note 3, at 52, 61.

<sup>20</sup> See *id.* at 198-99 (explaining that review of case studies not merely by peers but also by participants increases the construct validity of the research).

<sup>21</sup> *Id.* at 47.

<sup>22</sup> Mosier & Soble, *supra* note 5, at 33.

<sup>23</sup> Birnbaum et al., *supra* note 5, at 109-11.

<sup>24</sup> Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants’ Voices in Legal Process*, 20 HOFSTRA L. REV. 533, 533-34 (1992) (footnote omitted).

gants . . . .”<sup>25</sup> The consensus, as David Super summed it up, is that the warranty of habitability has done little to aid tenants with substandard housing, in multiple jurisdictions across four decades.<sup>26</sup>

Nonetheless, it is not unusual for the courts handling these kinds of cases to say that they follow the rule of law and endeavor to dispense equal justice to all litigants. And the court that is the subject of this multi-case study describes itself in just such terms. The Mission Statement of the Maryland District Court states that it will “ensure that every case tried herein is adjudicated expeditiously, courteously, and according to law . . . .”<sup>27</sup> Further, it promises it will “provide equal and exact justice for all who are involved in litigation before the Court.”<sup>28</sup> It even claims “unwavering and unyielding” commitment to these goals.<sup>29</sup>

And, as is true with many of the laws regarding the warranty of habitability, the law that the Baltimore City District Court enforces gives the impression of being generally beneficial. The city’s rent escrow statute allows a tenant with serious housing code violations to pay her rent into a court-administered escrow account rather than to the landlord, and to obtain various other remedies including orders directing the landlord to make repairs, abating the rent paid to the landlord or into escrow to reflect the conditions, and awarding the tenant the amount paid into escrow in whole or in part.<sup>30</sup> Maryland’s highest court explained in *Neal v. Fisher* that this law is “remedial legislation” and should be interpreted “in a way that will advance [its] purpose, not frustrate it.”<sup>31</sup> Further, a tenant may seek an offset against the rent for breach of the warranty of fitness for human habitation to reflect the “reasonable rental value” of the property in its deteriorated condition, going back to the date of first notice to the landlord of the conditions, as a claim

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<sup>25</sup> Paris R. Baldacci, *Assuring Access to Justice: The Role of the Judge in Assisting Pro Se Litigants in Litigating Their Cases in New York City’s Housing Court*, 3 CARDOZO PUB. L. POL’Y & ETHICS J. 659, 660 (2006).

<sup>26</sup> Super, *supra* note 2, at 458 (“Although appealing in the abstract, the new regime of landlord-tenant law inaugurated four decades ago has failed at achieving any of its major goals.”).

<sup>27</sup> *About District Court*, DIST. COURT OF MD., <http://www.mdcourts.gov/district/about.html> [<http://perma.cc/JB3V-8AVA>].

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> BALT. CITY PUB. LOC. L. § 9-9 (2015), <http://archive.baltimorecity.gov/Portals/0/Charter%20and%20Codes/ChrtPLL/02%20-%20PLL.pdf> [<http://perma.cc/VA65-U5CG>]. Maryland has both State and local laws providing for rent escrow. *See id.*; MD. CODE ANN., REAL PROP. § 8-211 (2012). The State law defers to the local law. *See id.* § 8-211(o). Accordingly, § 9-9 governs this situation.

<sup>31</sup> *Neal v. Fisher*, 312 Md. 685, 693 (1988).

joined to the rent escrow action.<sup>32</sup> Accordingly, it might seem as if tenants have appropriate legal mechanisms for affirmatively addressing poor housing conditions in court.

However, our findings suggest that unrepresented tenants face difficulties accessing the law's benefits. Even from the beginning of the case, the form petition frustrates tenants from pleading the relevant facts or requesting the appropriate remedies. Indeed, almost no tenants were able to accurately fill out the needlessly legalistic form. The form expects, for example, that tenants state whether they want relief based on violation of the "warranty of habitability" and the "covenant of quiet enjoyment," terms which have no meaning to these tenants or even most lay people.<sup>33</sup> To compound the problem, in the cases that we saw, judges seemingly ignored what was pleaded in the rent escrow petition (even though in Maryland the petition is required to be verified by the tenant). We did not see a judge make explicit or implicit reference to the petition in any case that we examined, even when it provided detailed factual averments or requests for particular remedies.

However, the inadequacy of the form petition cannot itself be blamed for the poor results obtained by tenants in these cases. Shortcomings in the pleadings do not themselves affect entitlement to relief—Maryland's District Court rules call for all pleadings to be "construed to do substantial justice,"<sup>34</sup> and the rent escrow law itself indicates that in disposing of the case the court "shall make any order that the justice of the case may require."<sup>35</sup> Accordingly, most problems with how tenants fill out the petition could be, and are supposed to be, addressed by the court's effort to do justice.

What more greatly impeded tenants' access to the law's relief may have been the court's failure to elicit and find the relevant facts, even though the rent escrow law explicitly requires it to do so.<sup>36</sup> The form for making findings of fact that can be found in most of the court files for these cases was left blank in every case that we looked at. Occasional shorthand notations were made on

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<sup>32</sup> See PUB. LOC. L. § 9-14.2(d) ("[Damages for violation of the warranty] shall be computed retroactively to the date of the landlord's actual knowledge of the breach of warranty and shall be the amount of rent paid or owed by the tenant during the time of the breach less the reasonable rental value of the dwelling in its deteriorated condition."); *Williams v. Hous. Auth. of Balt. City*, 361 Md. 143 (2000).

<sup>33</sup> See MD. R.C.P. DIST. CT. R. 3-303(b) ("Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleadings are required.").

<sup>34</sup> See *id.*

<sup>35</sup> PUB. LOC. L. § 9-9(f).

<sup>36</sup> *Id.* ("The court shall make findings of fact on the issues before it . . .").

other forms, but they were cursory and did not amount to factual findings, nor did the judges make many remarks in the audio recordings of these proceedings that could be construed as findings of fact. Without explicit findings of facts, or the endeavor to make them, tenants' entitlement to particular legal remedies was often left inchoate and unexplored.

But the biggest problem for tenants was that the law seemingly played little role in how the judges disposed of these cases. Judges seldom made explicit reference to the law or explained their decision-making in terms of the law. Even on the rare occasion where a tenant pressed for an explanation for the court's decision, the judge generally did not invoke the law. For example, one replied, "I heard from you at length, I heard from the defense and I made a decision and that is what it is. So, if you would like to appeal it you certainly can do that . . . ."<sup>37</sup> Another simply announced, "Well, that's my decision," and told the tenant she could appeal if she paid the fee.<sup>38</sup>

Even when the court purported to apply the law, it tended to be misinterpreted in ways that harmed tenants. For example, the landlord has to be given a "reasonable" amount of time to make repairs before a tenant can maintain a case, and the law establishes a presumption of unreasonableness where the landlord fails to make repairs within thirty days of receiving notice of the conditions.<sup>39</sup> Further, "actual notice" of the conditions from the tenant to the landlord is sufficient.<sup>40</sup> However, our case studies showed that judges routinely gave landlords thirty days to make repairs *from the date of the first court appearance in the case*,<sup>41</sup> did not elicit evidence of actual notice, and even ignored evidence on the record of actual notice.<sup>42</sup> For example, in a case where the housing inspection report found twenty-eight violations, ten of which were serious

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<sup>37</sup> Rent Escrow Hearing at 9:35, *Marshall v. Mid Atlantic Realty Mgmt.*, Case No. 010100000532102 (2012 Dist. Ct. Balt. City) (on file as 53-12).

<sup>38</sup> Rent Escrow Hearing at 28:24, *Ames v. Willis*, Case No. 010100001402012 (2012 Dist. Ct. Balt. City) (on file as 140-12).

<sup>39</sup> See Pub. Loc. L. § 9-9(d)(1) ("For the purposes of this subsection, what period of time shall be deemed to be unreasonable delay is left to the discretion of the court except that there shall be a rebuttable presumption that a period in excess of thirty (30) days from receipt of the notification by the landlord is unreasonable[.]").

<sup>40</sup> See *id.* §§ 9-14.1(b)(2)(c), 9-9(d)(1).

<sup>41</sup> Rent Escrow Hearing at 1:18, *Robertson v. Roloqas*, Case No. 010100001542012 (2012 Dist. Ct. Balt. City) (on file as 154-12).

<sup>42</sup> See, e.g., Rent Escrow Hearing at 5:44, *Mason v. Fleming*, Case No. 010100165052011 (2011 Dist. Ct. Balt. City) (on file as 16505-11). In this case, nine housing code violations were found, eight of which were serious, and the landlord did not appear despite being served. The tenant testified that the landlord had been noti-

enough to result in the issuance of a ten-day notice to the landlord by the housing department, and the tenant offered to show the judge emails to the landlord about the conditions, the judge disregarded them and said to the landlord, "I'd be happy to postpone this and let you get it done without establishing escrow if you can get it done in thirty days."<sup>43</sup> In another case, where there were twenty violations, seven of which were serious, and where the tenant testified that the landlord's agent had been informed about the conditions more than five months previously, with a list and walk-through, the judge still said that the landlord had thirty (more) days to make repairs.<sup>44</sup> Such a misinterpretation of the statute takes away any incentive for a landlord to make repairs when initially told by a tenant about the conditions. And because judges seldom developed evidence of actual notice to the landlord, any setoff against the rent that was awarded to the tenant was reduced from what it should have been, given that the court calculated it from the court date rather than the date of actual notice to the landlord.

But, in any event, judges seldom awarded these tenants the full relief to which they were legally entitled, even when they managed to establish a *prima facie* case, notwithstanding the failure of the court to explicitly find the facts or develop the evidence on actual notice. For example, although the majority of cases involved court-ordered inspections demonstrating the presence of housing code violations and testimony regarding the failure of the landlord to correct them, judges never ordered landlords to correct these violations in any of the cases we saw, even though an order to correct is one of the remedies available under law.<sup>45</sup>

Although escrow accounts were much more frequently ordered by the court, they were still surprisingly sporadic for a proceeding called a "rent escrow action." Our research showed that escrows were set up less than half of the time on the first return date where a *prima facie* entitlement to escrow was established.<sup>46</sup>

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fied about the conditions three months previously. The judge stated that the violations "are going to have to be cleared up in 30 days." *Id.*

<sup>43</sup> *Thompson v. Saffell*, Case No. 01010000082012 (2012 Dist. Ct. Balt. City) (final order) (on file as 8-12); Rent Escrow Hearing at 5:00, *Thompson v. Saffell*, Case No. 01010000082012 (2012 Dist. Ct. Balt. City) (on file as 8-12).

<sup>44</sup> Rent Escrow Hearing at 21:04, *Jean Minor v. Albert C. Murry Jr.*, Case No. 010100001772012 (2012 Dist. Ct. Balt. City) (on file as 177-2012).

<sup>45</sup> See PUB. LOC. L. § 9-9(f)(8).

<sup>46</sup> Such a case was indicated where the landlord had been properly served and had notice of the conditions, did not establish that he had a viable defense, and a housing inspection report established that serious housing code violations existed. In addition to the other cases described herein, see Rent Escrow Hearing at 3:27, *Brown v. Sage*

The general attitude of the court may have been expressed by the judge who declined to set up an escrow in a case where inspections more than three months apart showed that repairs had not been made, when he remarked, "I believe we should postpone this and see how things go."<sup>47</sup> However, it did not appear to be the case that delaying escrow generally worked to the advantage of tenants, as repairs were not made or were not completed by the next court date in half of the cases where the court did not set up the escrow account on the first court date. Perhaps that is not surprising, as not setting up the escrow removes some of the leverage the law presumably intended to give the tenant.

Even heat complaints failed to inspire a sense of urgency in the court about establishing the escrow. For example, a tenant who filed a case on February 6 and was first in court on February 21 informed the judge that she had told the landlord about her lack of heat on January 23. Further, an inspection report documented that there was no heat. The judge told the tenant that any escrow would not be set up until the next court date of March 1, although no reason was given for the delay.<sup>48</sup> The law also requires heat complaints to be given an expedited hearing,<sup>49</sup> but that happened in no case involving a heat complaint that we saw.

In one case, the tenant initially went along with the delay of escrow, at the encouragement of the court.<sup>50</sup> On the second court date, when all the repairs had not been completed, though it was a month later, escrow was still not established. The judge stated, "I am not going to open an escrow account . . . I will indicate in the

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Mgmt. Inc., Case No. 010100000922012 (2012 Dist. Ct. Balt. City) (final order) (on file as 92-2012); *Dukes v. Denise*, Case No. 01011172012 (2012 Dist. Ct. Balt. City) (final order) (on file as 17-12); *McCray v. Godfrey*, Case No. 01010000026012 (2012 Dist. Ct. Balt. City) (final order) (on file as 26-12); *Williams v. Dunne Wright Prop. Mgmt.*, Case No. 010100247342011 (2011 Dist. Ct. Balt. City) (on file as 24734-11); *Howell v. Weingarten*, Case No. 010100099202012 (2012 Dist. Ct. Balt. City) (final order) (on file as 9920-12); *Marshall v. Mid Atlantic Realty Mgmt.*, Case No. 010100000532102 (2012 Dist. Ct. Balt. City) (final order) (on file as 53-12); *Rent Escrow Hearing at 1:06*, *Dorsey v. Keyhole Servs.*, Case No. 010100000902012 (2012 Dist. Ct. Balt. City) (final order) (on file as 90-2012); *Rent Escrow Hearing at 5:41*, *Patterson v. Md. Maint. & Mgmt. Co.*, Case No. 010100000912012 (2012 Dist. Ct. Balt. City) (final order) (on file as 92-2012).

<sup>47</sup> *Rent Escrow Hearing at 7:50*, *Myers v. Progressive Props.*, Case No. 010100000152012 (2012 Dist. Ct. Balt. City) (on file as 15-12).

<sup>48</sup> *Rent Escrow Hearing at 17:23*, *David Moses-Jones v. Nat'l Prop. Mgmt.*, Case No. 010100001712012 (2012 Dist. Ct. Balt. City) (on file as 17-12).

<sup>49</sup> See PUB. LOC. L. § 9-9(h).

<sup>50</sup> *Rent Escrow Hearing at 5:30*, *Thompson v. Saffell*, Case No. 010100000082012 (2012 Dist. Ct. Balt. City) (on file as 8-12).

file tenant prefers to pay rent directly to [the] landlord.”<sup>51</sup> Two months later, the case was again in court for a status review of the case. A reinspection found that nine violations were still outstanding.<sup>52</sup> The judge asked, “Why are we here, if there is no escrow account?”<sup>53</sup> and “I don’t know why we are here, literally, is what I’m trying to tell you.”<sup>54</sup> Presumably, the tenant felt much the same way.

In a case where there were thirteen violations, four serious, the judge asked the tenant, “Were you in the courtroom when I first came in and I said one of the things that has to happen before we can set up escrow is that not only do the life, health, or safety violations have to be, uh, proven, but we have to give the landlord a reasonable opportunity to correct those conditions before we can set up escrow?”<sup>55</sup> In this particular case, the tenant stated that the landlord knew about the conditions “before we moved in” over a year ago and promised he would fix them.<sup>56</sup> The representative for the landlord did not dispute this testimony but responded that the repairs could be done in “a day or two.”<sup>57</sup> Rather than set up an escrow account, the judge called for a reinspection twenty days later, and said, “You have a chance to get these conditions corrected, so, um, escrow has not been established, so that means the rent technically is owed.”<sup>58</sup> In other words, even though, according to the record, the landlord had failed to correct the conditions for over a year and had no reasonable explanation for the delay, the court still would not establish the escrow.

In a case where the tenant had particularly serious violations—namely an inoperable furnace in winter, a rat infestation, and overfusing of electrical circuits—the judge accepted the landlord’s suggestion that the escrow be delayed, remarking, “So we can do that and defer the decision on the escrow . . . I mean, it will save everybody a lot of aggravation.”<sup>59</sup> It is not clear that the tenant falls into the category of the “everybody” who considers the remedy an

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<sup>51</sup> *Id.* at 11:34.

<sup>52</sup> *Id.* at 9:03.

<sup>53</sup> *Id.* at 18:44.

<sup>54</sup> *Id.* at 20:22.

<sup>55</sup> Rent Escrow Hearing at 2:20, *Brown v. Cloverdale Partners, LLC*, Case No. 010100099212012 (2012 Dist. Ct. Balt. City) (final order) (on file as 9921-12).

<sup>56</sup> *Id.* at 2:45.

<sup>57</sup> *Id.* at 4:05.

<sup>58</sup> *Id.* at 6:20–7:45.

<sup>59</sup> Rent Escrow Hearing at 1:10, *Brown v. Hamilton*, Case No. 010100005002011 (2011 Dist. Ct. Balt. City) (final order) (on file as 500-2011).

aggravation, but when it is regarded as an aggravation by the court, it is likely in any event to be avoided.

Another form of relief to which tenants are entitled under law is an abatement of rent paid into escrow to reflect the lower value of the housing in its defective condition.<sup>60</sup> However, judges almost never (only three times that we saw) abated the amount of rent to be deposited into escrow.<sup>61</sup> That was so even though most tenants apparently established factual entitlement to abatement, and even though the rent escrow law puts the burden on the landlord to show cause why an abatement should not be granted.<sup>62</sup> We only observed one case where the judge asked the landlord why the rent should not be abated.<sup>63</sup> Judges usually ignored or refused tenants' fairly frequent explicit requests to abate the rent going into escrow.<sup>64</sup> The norm was instead for the judge to assume that the rent going into escrow would not be abated, or even to state explicitly that it could not be abated.<sup>65</sup>

Large numbers of violations and evidence of long-standing failure to make repairs didn't seem to make a difference. For example, in a case in which the inspector found eight code violations, and in which the tenant requested an abatement in court and alleged that she had given the landlord actual notice of the condi-

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<sup>60</sup> Abatement is to be in "such an amount as may be equitable to represent the existence of the condition or conditions found by the court to exist." BALT. CITY PUB. LOC. L. § 9-9(f)(4) (2015).

<sup>61</sup> Rent Escrow Hearing at 25:18, *Henson-Thomas v. Young*, Case No. 010100166832011 (2012 Dist. Ct. Balt. City) (on file as 16683-11); Rent Escrow Hearing at 8:25, *Gilbert v. Choi*, Case No. 010100000392012 (2012 Dist. Ct. Balt. City) (on file as 39-12); Rent Escrow Hearing at 13:40–14:10, *Horn v. Payne*, Case No. 010100001632012 (2012 Dist. Ct. Balt. City) (on file as 163-12).

<sup>62</sup> PUB. LOC. L. § 9-9(f)(4) ("In all such cases where the court deems that the tenant is entitled to relief under this Act, the burden shall be upon the landlord to show cause why there should not be an abatement of the rent.").

<sup>63</sup> Rent Escrow Hearing at 9:55, *Horn v. Payne*, Case No. 010100001632012 (2012 Dist. Ct. Balt. City) (final order) (on file as 163-12).

<sup>64</sup> See *Myers v. Progressive Props.*, Case No. 010100000152012 (2012 Dist. Ct. Balt. City) (final order) (on file as 15-12); *Marshall v. Mid Atlantic Realty Mgmt.*, Case No. 010100000532102 (2012 Dist. Ct. Balt. City) (final order) (on file as 53-12); *Smith v. Dominion Mgmt.*, Case No. 010100000732012 (2012 Dist. Ct. Balt. City) (on file as 73-12); Rent Escrow Hearing at 8:28, 12:54, *Beverly v. Balt. Preferred Prop.*, Case No. 010100000752012 (2012 Dist. Ct. Balt. City) (final order) (on file as 75-12); *Dukes v. Denise*, Case No. 01011172012 (2012 Dist. Ct. Balt. City) (final order) (on file as 17-12); Rent Escrow Hearing at 11:20, *Davis v. North Ave. Equities LLC*, Case No. 010100001702012 (2012 Dist. Ct. Balt. City) (on file as 170-12); *Moore v. Encomienda*, Case No. 010100099412012 (2012 Dist. Ct. Balt. City) (final order) (on file as 9941-12); *Davida Moses-Jones v. Nat'l Prop. Mgmt.*, Case No. 010100001712012 (2012 Dist. Ct. Balt. City) (final order) (on file as 171-12).

<sup>65</sup> See Rent Escrow Hearing at 2:25–11:41, *Brown v. Cloverdale Partners, LLC*, Case No. 010100099212012 (2012 Dist. Ct. Balt. City) (final order) (on file as 9921-12).

tions two months previous to the filing of the petition, the judge denied the relief without explanation.<sup>66</sup> In another case in which the housing inspection found thirty-two violations, of which seventeen were serious, the landlord did not appear on the March return date even though he was served.<sup>67</sup> The tenant testified that the landlord had known about the conditions described in the inspection report since June of the previous year.<sup>68</sup> The judge established the escrow account but did not abate any of the tenant's \$900 monthly rent; in fact, the judge added a \$45 late charge to the amount because the tenant was a week late with the rent for that month.<sup>69</sup> While it might seem as if the landlord's failure to appear despite being served would make it difficult for him to meet his burden of showing why an abatement should not be granted, that case was not the only time we saw that happen.<sup>70</sup>

At the conclusion of these cases, when it came time to disburse any escrow account or otherwise resolve claims based on the housing code violations, judges seldom gave tenants any meaningful monetary award. Thirty-three of the fifty-nine cases comprised situations where tenants managed to make out a prima facie case of entitlement to some monetary relief, whether abatement, damages, or return of some portion of the escrow.<sup>71</sup> Since the court often did not elicit the facts on actual notice and other elements of the right to relief, and some number of tenants seemed to give up on the escrow action part of the way through it, this number probably represents an undercount of the total who had a right to it, as well as an underestimation of the extent of the relief to which they may have been entitled. In any event, no monetary relief at all was awarded by the court in nineteen of the thirty-three cases. In the fourteen cases where some monetary relief was awarded to the tenant, the amount was usually small, with the landlord generally receiving 75% of the lease rental amount or more. Further, the

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<sup>66</sup> See *Moore v. Encomienda*, Case No. 010100099412012 (2012 Dist. Ct. Balt. City) (final order) (on file as 9941-12).

<sup>67</sup> Rent Escrow Hearing at 0:27, *Scales v. Cooke*, Case No. 010100000052012 (2012 Dist. Ct. Balt. City) (on file as 5-12).

<sup>68</sup> *Id.* at 2:11.

<sup>69</sup> *Id.*

<sup>70</sup> Rent Escrow Hearing at 6:00, *Davis v. North Ave. Equities LLC*, Case No. 010100001702012 (2012 Dist. Ct. Balt. City) (on file as 170-12).

<sup>71</sup> In those cases, there was evidence of serious housing code violations and either notice was on the record (even if not actually elicited by the judge) or the matter was in court long enough that the presumptively unreasonable period of more than 30 days had elapsed between the time of inspection finding the serious violations and the time of ultimate repair. See BALT. CITY PUB. LOC. L. §§ 9-9(d)(1), 14.2(c) (2015); see also Appendix for table of cases.

amounts awarded to tenants did not appear to be well-correlated with the seriousness of the conditions, and the judge seldom gave any, or any legally-cognizable, explanation of how he arrived at the amount awarded. It is difficult to reconcile these results with the rent escrow law's professed concern for housing conditions that "constitute a menace to the health, safety, welfare and reasonable comfort of its citizens," and its "declar[ation] that the interests of public policy require that meaningful sanctions be imposed upon those who would perpetrate or perpetuate such conditions."<sup>72</sup>

Some judges evidently perceived a very high bar to tenants obtaining monetary relief. For example, a judge denied a tenant any portion of the rent escrow account, even though it had taken three months for repairs, because the premises—which had been documented by a housing inspection report as having seven violations, including four for mold—had not been rendered "unusable" by the conditions.<sup>73</sup> The law does not require that the housing be unusable to justify monetary relief; it just has to have serious deficits that reduce its value.<sup>74</sup> Even where evidence actually indicated that the premises were unfit for human habitation, judges tended to think that the landlord still ought to get most of the rental amount set forth in the lease. In one case, the tenant testified about a serious rodent infestation dating back three years and had an older inspection report to prove it, and the inspector testified as well that there was "a bad rat infestation in the property, a lot of openings . . . a lot of droppings throughout the property," even opining that the dwelling was unfit for human habitation "if you have small kids" (which the tenant did).<sup>75</sup> The judge awarded the tenant a refund of only two months' rent.<sup>76</sup>

In another case, the tenant established that she was without heat from early November until mid-February and without hot water for one-and-a-half months of this same period.<sup>77</sup> Additionally,

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<sup>72</sup> PUB. LOC. L. § 9-9(a)(1), (4).

<sup>73</sup> See *Williams v. Dunne Wright Prop. Mgmt.*, Case No. 010100247342011 (2011 Dist. Ct. Balt. City) (on file as 24734-11).

<sup>74</sup> See PUB. LOC. L. § 9-9(f)(4) ("[Rent should be abated in] an amount as may be equitable to represent the existence of the condition or conditions found by the court to exist.").

<sup>75</sup> Rent Escrow Hearing at 6:50, *Garris v. Camden Mgmt. Servs.*, Case No. 01010000022012 (2012 Dist. Ct. Balt. City) (on file as 2-12).

<sup>76</sup> *Id.* at 9:36.

<sup>77</sup> Rent Escrow Hearing at 6:40–7:17, *Horn v. Payne*, Case No. 010100001632012 (2012 Dist. Ct. Balt. City) (on file as 163-12); see also *Horn v. Payne*, Case No. 010100001632012 (2012 Dist. Ct. Balt. City) (final order) (on file as 163-12). This case is covered in detail in Michele Cotton, *A Case Study on Access to Justice and How to Improve It*, 16 J. L. & Soc'y 61, 71-74 (2014).

the housing inspector found a total of seventeen violations.<sup>78</sup> The record also showed that the landlord admitted he had notice from the time of the first failure of the heat in early November.<sup>79</sup> Although the judge did indicate that he was abating \$900 going into the escrow account,<sup>80</sup> the actual abatement amount may have been only \$50 (because the judge appears to have ignored the tenant's testimony that she had already paid November's rent).<sup>81</sup> In any event, the tenant was required to pay the full rental amount for the other months, and the escrow account was then returned in its entirety to the landlord at the conclusion of the case when the repairs were finally completed.<sup>82</sup> Thus, the tenant received only a small percentage of the \$4,250 rent deposited during the five-month period covered by the proceeding—probably only \$50.<sup>83</sup> The court is seemingly not particularly receptive to heat complaints. In another case where the tenant had gone without heat for most of the winter, and where there were also other serious violations, the judge awarded the tenant relief amounting to only one month's rent.<sup>84</sup>

In a case where there were twenty-eight violations (twelve of which were very serious), the tenant indicated that she had brought emails with her, showing notice to the landlord. Although the case stretched out to four hearings, and it took the landlord four months to correct all the violations, the court awarded the tenant no financial relief.<sup>85</sup>

In another case in which the landlord did not dispute the tenant's testimony that he had known about the need for the repairs (thirteen violations, four serious) for over a year and had promised to fix them, the court not only gave nothing to the tenant but actually awarded the landlord a judgment for two months' rent that the landlord said had not been paid.<sup>86</sup>

In a case that had been going on for eight months, and where

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<sup>78</sup> Rent Escrow Hearing at 4:00–5:06, Horn v. Payne, Case No. 010100001632012 (2012 Dist. Ct. Balt. City) (on file as 163-12).

<sup>79</sup> *Id.* at 10:00–10:43; Cotton, *supra* note 77, at 75, 78.

<sup>80</sup> Rent Escrow Hearing at 13:27–14:10, Horn v. Payne, Case No. 010100001632012 (2012 Dist. Ct. Balt. City) (on file as 163-12).

<sup>81</sup> *Id.* at 5:45–6:40; 13:27–14:10; Cotton, *supra* note 77, at 81-82.

<sup>82</sup> Rent Escrow Hearing at 17:00, Horn v. Payne, Case No. 010100001632012 (2012 Dist. Ct. Balt. City) (on file as 163-12); Cotton, *supra* note 77, at 80-81.

<sup>83</sup> *Id.*

<sup>84</sup> Brown v. Hamilton, Case No. 010100005002011 (2011 Dist. Ct. Balt. City) (final order) (on file as 500-2011).

<sup>85</sup> Thompson v. Saffell, Case No. 010100000082012 (2012 Dist. Ct. Balt. City) (final order) (on file as 8-12).

<sup>86</sup> See Rent Escrow Hearing at 2:25–11:41, Brown v. Cloverdale Partners, LLC, Case No. 010100099212012 (2012 Dist. Ct. Balt. City) (final order) (on file as 9921-12).

multiple inspections showed that the repairs had still not been completed, the tenant finally restored the case to the court calendar because her lease was coming to an end. The judge remarked, “This case has gone on for eight months and has not been resolved. Usually, when a case goes on for six months, and I’m not satisfied that the landlord has made some effort or good faith effort to resolve the issues, all of the money goes to the tenant.” The judge was making an oblique reference here to the part of the rent escrow law that states:

[W]here an escrow account is established by the court and the condition or conditions are not fully remedied within six months of the establishment of such account, and the landlord has not made reasonable attempts to remedy the condition, the court shall award all monies accumulated in escrow shall be disbursed to the tenant [sic].<sup>87</sup>

The landlord made some general statements to the judge about how difficult it had been to get the repairs done, which evidently persuaded the judge to award him 70% of the amount in escrow.<sup>88</sup>

In addition to providing tenants with little of the relief available under law, judges tended to put obstacles in their paths. For example, they generally required tenants to deposit any alleged rent arrears into escrow before they would proceed with the case. As a result of the failure to meet this precondition, some tenants’ cases were summarily dismissed, regardless of the seriousness of the housing code violations established by inspection.<sup>89</sup> However, the requirement that tenants deposit alleged rent arrears prior to receiving an adjudication of whether the full amount of that alleged back rent is actually owed does not appear to be something that the rent escrow law calls for. Further, the requirement of such a deposit also appears to violate due process.

In fact, the form used by the court to order the deposit of alleged rental arrears uses language that seems to have been taken from an older, somewhat different version of the rent escrow law. It states that it is “ordered that the tenant shall pay into court the sum of \$\_\_\_ . . . found by the court to be the amount of rent due and

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<sup>87</sup> BALT. CITY PUB. LOC. L. § 9-9(g) (2015).

<sup>88</sup> Rent Escrow Hearing at 25:18, Henson-Thomas v. Young, Case No. 010100166832011 (2011 Dist. Ct. Balt. City) (on file as 16683-11).

<sup>89</sup> See Scales v. Cooke, Case No. 010100000052012 (2012 Dist. Ct. Balt. City) (final order) (on file as 5-12) (concerning a case with thirty-two violations, seventeen of which were serious); see also Rent Escrow Hearing at 14:00, Guy v. Mei, Case No. 010100001522012 (2012 Dist. Ct. Balt. City) (on file as 152-2012).

unpaid. . . .”<sup>90</sup> A previous version of the rent escrow law indeed calls for “payment by the tenant into court of the amount of rent found by the court to be due and unpaid . . . .”<sup>91</sup> However, this previous version of the law applied when rent escrow was solely a defense and not available as an affirmative action brought by the tenant.<sup>92</sup> And even that law required the deposit of an amount *found* by the court to be due and unpaid, not a deposit as a precondition to a finding by the court.<sup>93</sup> Moreover, the current version of the rent escrow law—which allows for the affirmative rent escrow action by the tenant—does not use that language; it calls for “payment . . . of the amount of rent called for under the lease . . . unless or until such amount is modified by subsequent order of the court. . . .”<sup>94</sup> That this requirement refers to *prospective* rent rather than rent arrears is demonstrated by the fact that all the rent escrow law’s remedies (including rent abatement) are entirely prospective in nature.<sup>95</sup> A different statute, the implied warranty of fitness for human habitation, deals with the retrospective remedy of damages.<sup>96</sup> In *Williams v. Housing Authority of Baltimore City*, the Maryland Court of Appeals pointed out that the rent escrow law applies to the “current situation” while previously accrued rent is involved in the “breach of warranty action looking back for some period.”<sup>97</sup> Not only is requiring the deposit of alleged rent arrears as a condition of proceeding inconsistent with the prospective-oriented relief of the rent escrow statute, but it is also inconsistent with how cases by the landlord for nonpayment of rent are handled, which do not require the tenant to deposit alleged arrears prior to adjudication.

Such a deposit requirement also appears to violate due process. Maryland’s Court of Special Appeals explained the issue in *Lucky Ned Pepper’s Limited v. Columbia Park and Recreation Association*, which dealt with a law that required the deposit of all rent allegedly due as a condition of obtaining a jury trial.<sup>98</sup> The problem with a

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<sup>90</sup> See, e.g., *Scales v. Cooke*, Case No. 010100000052012 (2012 Dist. Ct. Balt. City) (Order to Pay Rent Into Court) (on file as 5-12).

<sup>91</sup> S.B. 130, ch. 459, § 1(b)(2), 1968 Md. Laws 832, 832-34 (current version at PUB. LOC. L. § 9-9).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> PUB. LOC. L. § 9-9(d)(2).

<sup>95</sup> *Id.* § 9-9(f).

<sup>96</sup> *Id.* § 9-14.1(a)(2).

<sup>97</sup> *Williams v. Hous. Auth. of Balt. City*, 361 Md. 143, 159-60 (2000).

<sup>98</sup> *Lucky Ned Pepper’s Ltd. v. Columbia Park & Recreation Ass’n*, 64 Md. App. 222, 230 (1985).

pre-trial deposit requirement, the court explained, is that it “presupposes a determination that the money is owed. ‘The word *due* always imports a fixed and settled obligation or liability . . . .’”<sup>99</sup> Accordingly, the court concluded that the rule requiring such deposit unreasonably interfered with the right to trial by jury.<sup>100</sup> Similar logic suggests that a deposit of alleged arrears in order to gain access to the rent escrow proceeding presupposes an obligation that has yet to be determined, likewise depriving a tenant of due process.

Nonetheless, judges often required tenants to deposit any alleged rent arrears before they would allow the maintenance of the rent escrow action. In the case where the inspector had found thirty-two housing code violations, the judge told the tenant that she was lucky the landlord hadn’t shown up for that court date, because then the case would probably have been dismissed immediately because she had not brought the arrears with her to deposit.<sup>101</sup> This perspective was common among the judges of the court. For example, a judge stated to a tenant with regard to requiring the deposit of the full amount of alleged arrears, “In order to have a rent escrow case you have to pay the rent into the court,” and made no allowance for the fact that the housing inspection report listed multiple serious housing code violations that could have represented damages claims by the tenant against such arrears.<sup>102</sup> Even in a case where a tenant actually pressed the court to take the housing code violations into account, the judge said, “I am not going to address any of that now. When the case is over with and the money is distributed, you can raise those issues then.”<sup>103</sup> He further informed the tenant that she had to pay the full amount of the alleged arrears, or the rent escrow case would be dismissed.<sup>104</sup> As one judge explained to a tenant whose housing inspection report established eight violations, five of which were

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<sup>99</sup> *Id.* (quoting BLACK’S LAW DICTIONARY (5th ed. 1979)) (emphasis in original).

<sup>100</sup> *Lucky Ned Pepper’s Ltd.*, 64 Md. App. at 230.

<sup>101</sup> Rent Escrow Hearing at 3:32, *Scales v. Cooke*, Case No. 01010000052012 (2012 Dist. Ct. Balt. City) (on file as 5-12).

<sup>102</sup> See Rent Escrow Hearing at 2:05, *McCray v. Godfrey*, Case No. 01010000026012 (2012 Dist. Ct. Balt. City) (on file as 26-12). See also *Myers v. Progressive Props.*, Case No. 010100000152012 (2012 Dist. Ct. Balt. City) (final order) (on file as 15-12); Rent Escrow Hearing at 8:24, 9:50, 21:05, 24:15, *Ames v. Willis*, Case No. 010100001402012 (2012 Dist. Ct. Balt. City) (on file as 140-12); *Moore v. Encomienda*, Case No. 010100099412012 (2012 Dist. Ct. Balt. City) (final order) (on file as 9941-12).

<sup>103</sup> Rent Escrow Hearing at 13:23, *Smith v. Dominion Mgmt.*, Case No. 010100000732012 (2012 Dist. Ct. Balt. City) (on file as 73-12).

<sup>104</sup> *Id.* at 11:11.

serious, “Did you see the movie *Jerry Maguire*? . . . In that movie, they said, Cuba Gooding Jr. said, ‘Show me the money.’ So show me the money, okay? You gotta pay it into the court . . . This is not rent avoidance, this is rent escrow . . . You can’t have a case unless you have the rent.”<sup>105</sup>

As these examples illustrate, the escrow that should have protected tenants and given them leverage against the landlord was often treated as a cudgel against tenants. For example, in a case where the tenant received her social security check every month on the second Wednesday, she was repeatedly prevented from depositing the rent by the clerk’s office because, according to the judge’s order, she was late, and so she had to repeatedly request judicial intervention to permit it.<sup>106</sup> In that case, the landlord had received notice of the conditions in September of the previous year, and the tenant filed the case in February (where twenty housing code violations, seven of which were serious, were found). Repairs weren’t completed until June, after a proceeding that took six hearings in the court.<sup>107</sup> Each time the escrow payment was late over the course of the proceedings, the court admonished the tenant. When the judge permitted the late payment at the fifth hearing in May, he said, “Now, I gave you a little extra leeway, but you need to have made the payments when they were due, or the case gets dismissed. Do you understand that?” She responded, “I understand that. But can I explain something to you?” He said, “Just acknowledge that you have to do that.” The tenant could only respond, “Okay.” At the end of the case, the tenant received no monetary relief at all, according to the judge, “because everything has been corrected and because the tenant has not been paying into the account the way she was supposed to.”<sup>108</sup> The landlord didn’t make the repairs the way he was supposed to, and he had no defense for the delay, but received all the rent. The tenant suffered from multiple serious housing code violations for nearly a year, but got no offset.<sup>109</sup> When she objected to the release of the entire escrow to the landlord, the judge responded, “This is rent money. You can’t

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<sup>105</sup> Rent Escrow Hearing at 11:50, 15:15, *Boyd III v. Mayberry*, Case No. 010100000982012 (2012 Dist. Ct. Balt. City) (final order) (on file as 98-12).

<sup>106</sup> See generally Rent Escrow Hearing, *Jean Minor v. Albert C. Murry Jr.*, Case No. 010100001772012 (2012 Dist. Ct. Balt. City) (on file as 177-2012).

<sup>107</sup> See *id.*

<sup>108</sup> *Id.* at 50:10.

<sup>109</sup> See *Jean Minor v. Albert C. Murry Jr.*, Case No. 010100001772012 (2012 Dist. Ct. Balt. City) (final order) (on file as 177-2012).

stay in a place for free. It's not your money, it's rent money."<sup>110</sup> It seems as if some judges see their role as protecting landlords' claims for rent, but not as protecting the tenants' claims for damages for violations of the warranty of habitability.

It does make sense as a matter of efficiency for the court to resolve all related claims in the rent escrow proceeding. If there is in fact a claim on the part of the tenant for damages for violation of the warranty, it should be joined to the rent escrow action (and such joinder is called for by the law). And if the landlord has a defense of unpaid rent against such a warranty claim, it makes sense that that be considered as well. If the court then made an adjudication based on such competing claims, without requiring deposits by either party, then its decision-making would be both efficient and just. But, perversely, not only did judges in these cases often require tenants to deposit all alleged arrears in order to proceed, but they also generally declined to allow tenants to join their related claims for damages for violation of the warranty of habitability that were potential offsets against any alleged arrears. For example, in one case in which nine housing code violations were found, eight serious, the judge said to the tenant, in a frank misstatement of the law, "Are you aware that legally you cannot withhold rent simply because of the conditions of the property?"<sup>111</sup> The law explicitly states that tenants have a legal claim for damages against back rent,<sup>112</sup> and Maryland precedent makes clear that tenants must be allowed to join their warranty of habitability claims to these actions.<sup>113</sup> Nonetheless, judges in these cases often informed tenants that such claims for damages were not allowed, or simply refused to allow them.

In a case in which the tenant had had an infestation of bedbugs and had pictures and an associated hospital bill to document the conditions<sup>114</sup>—and in which the landlord acknowledged pro-

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<sup>110</sup> Rent Escrow Hearing at 49:30, *Jean Minor v. Albert C. Murry Jr.*, Case No. 010100001772012 (2012 Dist. Ct. Balt. City) (on file as 177-2012).

<sup>111</sup> Rent Escrow Hearing, *Garris v. Camden Mgmt. Servs.*, Case No. 010100000022012 (2012 Dist. Ct. Balt. City) (on file as 2-12).

<sup>112</sup> See BALT. CITY PUB. LOC. L. § 9-14.2(b), (d) (2015) (stating that the breach of the warranty may be maintained as a defense in a landlord's action for summary ejectment or distress for rent).

<sup>113</sup> See *Williams v. Hous. Auth. of Balt. City*, 361 Md. 143, 160 (2000). The Court of Appeals found that it would not "do substantial justice to require a tenant to split his or her claim[s]." *Id.* at 159.

<sup>114</sup> Rent Escrow Hearing at 3:00, *Singleton v. Edgewood Apartments*, Case No. 010100089662012 (2012 Dist. Ct. Balt. City) (on file as 16-12).

viding several treatments for bedbugs<sup>115</sup>—the court awarded the tenant no damages,<sup>116</sup> even after looking at the pictures and remarking, “it’s pretty bad.”<sup>117</sup> The judge raised the issue of damages,<sup>118</sup> but said “I’m going to have [to] leave that between the two of you.”<sup>119</sup> When the tenant objected to paying rent for the previous two months,<sup>120</sup> which was evidently when the infestation occurred, the judge responded, “I’m going to have to rely on you all to work that out,”<sup>121</sup> and “rent does have to be paid, and if you continue to have problems, what I’m suggesting is continue to document it, like you are, and see if you’re able to work out an exchange, such as if you decide to get a new mattress. They may pay that, but you [have to] keep receipts of all that, and you don’t —.”<sup>122</sup> The tenant said that she had gotten new mattresses and added, “I have receipts.”<sup>123</sup> The judge continued to sidestep the tenant’s claim for damages, saying, “Certainly, if you sued, the court would absolutely consider that.”<sup>124</sup> The judge then dismissed the case, awarding the tenant nothing.<sup>125</sup>

In a case in which the inspection showed twenty-five violations, twelve of them serious, the tenant requested reimbursement for the electric heater she had bought because her heat had not been working from sometime in December until January 28.<sup>126</sup> When she added that she was moving out in March, the judge said, “Well, there’s really no reason to have this case then” and added, “You’re going to owe the rent if you’re moving.”<sup>127</sup> He terminated the lease as of March 15 and dismissed the case, awarding no damages to the tenant.<sup>128</sup>

In addition, we saw cases where tenants were whipsawed and unable to assert claims based on their housing conditions at all:

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<sup>115</sup> *Id.* at 1:30.

<sup>116</sup> Singleton v. Edgewood Apartments, Case No. 010100089662012 (2012 Dist. Ct. Balt. City) (final order) (on file as 16-12).

<sup>117</sup> Rent Escrow Hearing at 4:09, Singleton v. Edgewood Apartments, Case No. 010100089662012 (2012 Dist. Ct. Balt. City) (on file as 16-12).

<sup>118</sup> *Id.* at 4:29.

<sup>119</sup> *Id.* at 4:36.

<sup>120</sup> *Id.* at 5:12.

<sup>121</sup> *Id.* at 5:40.

<sup>122</sup> *Id.* at 6:15.

<sup>123</sup> *Id.* at 6:32.

<sup>124</sup> *Id.* at 6:46.

<sup>125</sup> *Id.* at 7:16.

<sup>126</sup> Rent Escrow Hearing at 0:35, 4:10, Barrett v. Lyle, Case No. 010100001622012 (2012 Dist. Ct. Balt. City) (on file as 162-12).

<sup>127</sup> *Id.* at 5:44.

<sup>128</sup> *Id.* at 6:20.

told by a judge when sued by the landlord for nonpayment of rent that a defense based on housing code violations was not permitted because such a claim was supposedly exclusive to the rent escrow action, but then unable to make the claim affirmatively in a rent escrow action because of failure to deposit the amount of alleged arrears (or the judgment amount resulting from the faster-moving nonpayment case). For example, in a nonpayment case, a judge instructed a tenant to take her problem with the conditions to a separate rent escrow action, and then granted the landlord a judgment against the tenant in the full amount of the alleged arrears.<sup>129</sup> The judge overseeing the rent escrow case would not consider the tenant's request for damages for the violation of the warranty of habitability, despite the inspection report indicating eight housing code violations, five of which were serious, because she was unable to first deposit the amount of the judgment against her with the court.<sup>130</sup> The judge then dismissed the rent escrow case, leaving the tenant unable to have warranty claims considered by either court.<sup>131</sup> We even saw a few instances where judges gave landlords judgments against tenants in the amount of alleged unpaid rent in rent escrow cases—even in a case where the tenant defaulted and had no notice that by filing a rent escrow petition she was exposing herself to a judgment in whatever amount the landlord claimed was past due rent.<sup>132</sup>

The evidence of these case studies indicates that the reason that tenants do not have much success in enforcing the warranty of habitability in court is because the court under-enforces that law as written. It is plausible to conclude from these case studies that the problem is not with the facts of tenant cases or with the law per se but with reluctance to enforce the law.

### III. WHY SUCH COURTS DON'T DELIVER JUSTICE

One of the reasons sometimes surmised for why tenants do so poorly in enforcing the warranty of habitability is that judges' ethi-

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<sup>129</sup> Rent Escrow Hearing at 11:50, 15:15, *Boyd III v. Mayberry*, Case No. 010100000982012 (2012 Dist. Ct. Balt. City) (final order) (on file as 98-12).

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> Rent Escrow Hearing at 8:04, *Sturgis v. Anomnachi*, Case No. 010100000602012 (2012 Dist. Ct. Balt. City) (on file as 60-12) (default case); Rent Escrow Hearing at 6:00, 2:25–11:41, *Brown v. Cloverdale Partners, LLC*, Case No. 010100099212012 (2012 Dist. Ct. Balt. City) (final order) (on file as 9921-12); Rent Escrow Hearing at 6:40, *Patterson v. Md. Maint. & Mgmt. Co.*, Case No. 010100000912012 (2012 Dist. Ct. Balt. City) (final order) (on file as 91-2012).

cal concern for maintaining impartiality impedes them from assisting tenants in establishing their cases.<sup>133</sup> However, judicial concern for impartiality does not seem like a good explanation for what we saw in our research. For one thing, there is nothing in Maryland's Code of Judicial Conduct that prohibits judges from making "reasonable accommodations"<sup>134</sup> for unrepresented litigants, as long as it does not lead to an "unfair advantage" to the litigant who is accommodated.<sup>135</sup> Judges merely eliciting the facts relevant to the remedies available under the warranty of habitability would not be going beyond making reasonable accommodations—they would in fact be doing what the statute directs, so that they can "make any order that the justice of the case may require."<sup>136</sup> In addition, declining to impose the law's remedies where litigants have established a *prima facie* right to relief, as happened in most of these cases, does not comport with the usual understanding of judicial impartiality.

Nor does it seem a potential explanation that judges in rent escrow cases are reacting to routine abuse of the warranty of habitability by unrepresented tenants. As the example where the judge upbraided the tenants for "rent avoidance" suggests, suspicion of tenants' motives may be a factor in judicial behavior. The sense that tenants have bad motives would not be an acceptable explanation for failing to do justice in any particular case, but it would at least provide a psychological account of why the court is not enforcing the law. However, our case studies showed that tenants seldom bring legally unjustified rent escrow claims. In fact, in the fifty-nine cases we examined, we only saw one rent escrow case where no serious housing code violations were found by the court inspector<sup>137</sup> and only one case where the violations were evidently caused by the tenant.<sup>138</sup> In all the other cases, the tenant had hous-

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<sup>133</sup> See, e.g., Richard Zorza, *The Disconnect between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality when Parties Appear Pro Se: Causes, Solutions, Recommendations, and Implications*, 17 GEO. J. LEGAL ETHICS 423, 424 (2004); Russell Engler, *Ethics in Transition: Unrepresented Litigants and the Changing Judicial Role*, 22 NOTRE DAME J. L., ETHICS & PUB. POL'Y 367, 372 (2008); Baldacci, *supra* note 25.

<sup>134</sup> MD. CODE OF JUD. CONDUCT R. 2.2, <http://www.courts.state.md.us/rules/reports/codeofjudicialconduct2010.pdf> [<http://perma.cc/A4Q3-SQKW>].

<sup>135</sup> *Id.* at R. 2.6.

<sup>136</sup> BALT. CITY PUB. LOC. L. § 9-9(f) (2015).

<sup>137</sup> See Terri Jones v. Summerfield Inv. Grp. LLC, Case No. 010100001852012 (2012 Dist. Ct. Balt. City) (Checklist for Inspection) (on file as 185-12); Rent Escrow Hearing at 0:10, Terri Jones v. Summerfield Inv. Grp. LLC, Case No. 010100001852012 (2012 Dist. Ct. Balt. City) (on file as 185-12).

<sup>138</sup> See Kacherovsky v. Ruby, Case No. 9943-12 (2012 Dist. Ct. Balt. City) (final order) (on file as 9943-12). One other case was difficult to judge, because both parties

ing code violations of the kind meant to be covered by the law, usually several and sometimes many. And most of these cases involved record evidence of neglect on the part of the landlord in making repairs. If judicial behavior reflected a lower opinion of tenants than of landlords, it does not appear to have been based on whatever can be found on the record in these cases.

Legal scholars also point to biases on the part of the judges as a factor in low rates of tenant success in warranty of habitability cases. David Super, in part, blames “attitudes of the trial judges . . . [that] genuinely may not result from any organized, conscious decision making”<sup>139</sup> and suggests that their behavior may reflect an underlying belief that poor litigants are less morally worthy than others.<sup>140</sup> Whatever may be the acculturation of judges within the legal profession to follow the law and to provide equal justice, it is also true that judges operate within the same larger context as everyone else, in which low-income persons tend to be stigmatized. A sense that these litigants are not fully worthy of the protection of the law may lead judges to stint on its enforcement.

However, other factors may play a substantial, if not more than substantial, role. Judges are probably more likely to follow the law if they are in some sense disciplined for not following it, as by an appellate court that reverses a decision and writes an opinion explaining the shortcomings of the judge’s decision-making. Judges also have an incentive to follow the law if they are publicly embarrassed for not following it, as through adverse media coverage. And judges may follow the law because they have been otherwise persuaded by legal argument, such as by attorneys practicing before the court or relevant legal scholarship. Since this court’s decisions (and in fact those of most civil trial courts handling pro se cases) are not likely to be appealed, to get media attention, or to be frequently schooled by attorneys or legal scholars, such mechanisms are not available to affect judicial behavior. The absence of these features, generally found in more visible courts, may play a role in the results that these litigants receive.

Because having poor rental housing conditions is likely to correlate strongly with having limited resources, it is not surprising that the tenants with warranty of habitability complaints can sel-

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seemed to be abusive of the law and had involved the police on a regular basis in their interactions. *See* Rent Escrow Hearing at 1:13, *Milner v. Thompson*, Case No. 010100000282012 (2012 Dist. Ct. Balt. City) (on file as 28-12).

<sup>139</sup> Super, *supra* note 2, at 440.

<sup>140</sup> *Id.* at 395-96, 459-60.

dom obtain counsel, and that these courts are thus places where attorneys can have little impact on judicial behavior. In Baltimore, as virtually everywhere, tenants who live in substandard housing cannot usually afford to hire an attorney and are unlikely to benefit from the limited supply of free ones.<sup>141</sup> Many landlords who are small property owners may themselves be unrepresented by an attorney in such proceedings—although such landlords as “repeat players” may be more familiar with how the court works and may benefit from having greater financial and cultural capital.<sup>142</sup> The lack of counsel means that the parties are particularly dependent on the court to ensure that the rule of law is applied.

In addition, there are seldom consequences for judges—in this court and in many courts—for failure to follow the law. Tenants often don’t even realize that mistakes of law have been made by the court, and in any event usually lack the capacity and wherewithal to prosecute an appeal *pro se*. We even saw instances where the judge encouraged the tenant to waive the right to appeal—as the form allowing for the release of escrowed funds actually has a line on it that releases the funds prior to the expiration of the thirty-day appeal period if appeal is waived.<sup>143</sup> Maryland law further stymies review and correction of district court mistakes by shunting tenant “appeals” into a trial *de novo* in a parallel court,<sup>144</sup> which accomplishes no actual review of the district court decision-making. And after the trial *de novo*, the only available review of legal mistakes is by certiorari to the State’s highest court, which is rarely granted. The district court thus functions as all but unreviewable

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<sup>141</sup> See LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS (2005); see also AM. BAR ASS’N FUND FOR JUSTICE AND EDUC., LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS (1996); DIST. OF COLUMBIA ACCESS TO JUSTICE COMM’N, JUSTICE FOR ALL?: AN EXAMINATION OF THE CIVIL LEGAL NEEDS OF THE DISTRICT OF COLUMBIA’S LOW-INCOME COMMUNITY, EXECUTIVE SUMMARY 7, 9 (2008) (noting that 97% of tenants in landlord-tenant cases proceeded *pro se*); Super, *supra* note 2, at 460 (referring to the small number of tenants represented in court as having won “the legal aid lottery”).

<sup>142</sup> See Super, *supra* note 2, at 416 (discussing courts’ vulnerability to “capture” by landlords as repeat players).

<sup>143</sup> See Peoples v. Mid-Atlantic Realty Mgmt., Case No. 010100000352012 (2012 Dist. Ct. Balt. City) (Order for Disbursement of Escrow Funds and Termination of Court Escrow) (on file as 35-2012) (“We hereby waive our right to appeal so disbursement can be made prior to expiration of appeal period.”); see also Rent Escrow Hearing at 2:30, Peoples v. Mid-Atlantic Realty Mgmt., Case No. 10100000352012 (2012 Dist. Ct. Balt. City) (on file as 35-2012) (“If the parties agree, you can sign where the x’s are and this will avoid the 30-day appeal period so the money will come back more quickly.”).

<sup>144</sup> See MD. R.C.P. DIST. CT. R. 7-102 (providing for a *de novo* trial on appeal for District Court cases where the amount in controversy is less than \$5000).

for mistakes of law, which could very well reduce the court's incentives for following the law. Indeed, the sheer rarity of appellate review may create the impression that following the law in these cases is not a priority.

Further, because appeals by tenants are rare, not only do trial court mistakes go uncorrected, but relatively little appellate guidance on the relevant law gets developed, leaving judges freer to interpret the law in accordance with personal views. It may also be the case that any uncertainty about the law that results in an environment of limited appellate guidance will be resolved against the less powerful party in the litigation, which in this situation is the tenant. Of course, even where there is relevant precedent from the appellate courts, this multi-case study suggests that a court that has little chance of being appealed does not have to worry about accountability for not following that precedent.

But there is also an important logistical reality working against the ability of these courts to enforce the law, and that is the very large number of cases on their dockets.<sup>145</sup> In *Williams*, the Baltimore City Housing Authority actually made the argument to the Maryland Court of Appeals that tenant claims for damages for breach of the warranty of habitability should not be joined with rent escrow actions because the court simply would not have time to hear evidence on damages.<sup>146</sup> The Court of Appeals was unpersuaded, noting that the trial court already had to develop most of the same evidence in order to rule in the escrow case itself, and so finding the facts on damages would take little additional time.<sup>147</sup> (Of course, that conclusion reflects the assumption that trial judges are actually finding the relevant facts in rent escrow cases, while our research indicates that they are not.) The Court of Appeals pointed out that because the vast majority of cases on the court's docket are uncontested, judges actually have to hold hearings in only a few of them,<sup>148</sup> which suggests that insufficient time does not affect the adjudication of cases that actually go before the

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<sup>145</sup> See, e.g., Super, *supra* note 2, at 434-35.

<sup>146</sup> *Williams v. Hous. Auth. of Balt. City*, 361 Md. 143, 159 (2000) (“[Respondent-appellee] expresse[d] concern that the trial of warranty [of habitability] claims together with rent escrow actions would hamper the court’s efficiency in handling the landlord-tenant dockets.”).

<sup>147</sup> *Id.* at 159-60 (“Except for the period of time involved—the rent escrow case focusing on the current situation and the breach of warranty action looking back for some period—the evidence necessary to establish a rent escrow claim will usually be the same evidence necessary to establish the warranty claim.”).

<sup>148</sup> The Court of Appeals pointed out that only a “few of the cases” on the docket require “an actual adjudication of disputed facts or law.” *Id.* at 159.

court. However, that does not mean that time pressure does not play a substantial role in shaping how the court operates. The large dockets burdening courts of this kind utterly depend on only a handful of cases getting significant judicial attention. If judges actually started enforcing the law, and word of that got around, it would encourage more tenants to demand the court's attention. Concern about keeping that potential flood at bay is likely to yield procedures and mores that reduce the enforcement of the law. Thus, the large dockets themselves provide a built-in disincentive for judges to provide tenants with the relief to which they would appear to be entitled.

Though lawmakers have established what in many respects seems like favorable law for tenants who are willing to sue landlords for poor conditions, they have not created a system where that law can readily serve its intended purpose. The system frustrates appellate correction and guidance, while imposing such heavy workloads on judges that the detailed work of following the law seems like an unaffordable luxury.

#### IV. WHAT CAN BE DONE

It is not difficult to imagine what the ideal legal system would look like. It would be one that enforced the rule of law effectively in all cases and provided equal justice to unrepresented as well as represented litigants. But it seems evident that neither the social commitment nor the fiscal capacity presently exist to provide that kind of legal system. And if the long failure of warranty of habitability litigation to address the unhealthy and hazardous housing conditions of our poorest citizens proves anything, it is that there are unlikely to be any substantial improvements overnight.

One heavily promoted reform is the adoption of a civil *Gideon* rule to increase representation of litigants by counsel.<sup>149</sup> It is true that the presence of more lawyers would add something that these courts are sorely lacking and that many other courts presumably do benefit from, which is the constant pressure to follow the law and the education in the law that results when lawyers are involved. But the provision of more free lawyers is an idea that is losing ground.

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<sup>149</sup> See, e.g., Andrew Scherer, *Why People Losing Their Homes in Legal Proceedings Must Have a Right to Counsel*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 699 (2006); Raymond H. Brescia, *Sheltering Counsel: Towards a Right to a Lawyer in Evictions Proceedings*, 25 TOURO L. REV. 187, 204-06 (2009); see also Michael Millemann, *Mandatory Pro Bono in Civil Cases: A Partial Answer to the Right Question*, 49 MD. L. REV. 18, 27-28 (1990) (recommending that the Maryland Court of Appeals issue a rule requiring private attorneys to represent the poor).

The ratio of free lawyers to low-income litigants has declined over time,<sup>150</sup> and the U.S. Supreme Court shot down the most recent effort to constitutionalize a right to counsel in civil cases.<sup>151</sup> State-level efforts to mandate more lawyers for low-income civil litigants have similarly faltered.<sup>152</sup> Accordingly, it does not seem to be the most promising option for improving the situation.

In any event, adding more lawyers would have complicated effects in this situation. Tenants in rent escrow cases who had lawyers would presumably be able to seize the lion's share of the court's scarce resources, reducing the access to justice of those who remained unrepresented. And if enough lawyers were added to truly have an impact on the extent to which tenants' rights are prosecuted, then there would also need to be more judges to adjudicate the increased number of heavily-litigated cases. Any effort to provide counsel for all, or even a large number of, such unrepresented litigants is unlikely to succeed, because lawmakers are aware of the considerable expense involved—not only of paying for more lawyers but also for more judges.

There is, in fact, a fundamental mismatch between the cost of justice in this situation and the benefits provided to the litigants. It is of course overly simplistic to suggest that it would be more efficient for the judges presiding over these cases to be dismissed and their salaries reallocated to the cost of fixing up some of these decrepit buildings. But it may not be accidental that we have designed a system that mostly channels public funds to expensive administrative costs that are captured primarily by relatively powerful participants in the economic system, rather than to direct benefits to the less powerful. Civil *Gideon* and other strategies to increase

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<sup>150</sup> In constant 2013 dollars, funding for the Legal Services Corporation has declined from a high of \$848 million in 1980 to \$340 million in 2013, the lowest level of funding in its history. See *2013 LSC By The Numbers*, LEGAL SERVS. CORP. (July 2014), <http://www.lsc.gov/sites/default/files/LSC/LSC2013BTN.pdf> [http://perma.cc/SUW6-GHDP]. At the same time, funding provided by interest on lawyers' trust accounts (IOLTA), which has been used to fund lawyers for the poor, has also drastically declined, from \$371 million in 2007 to \$93.2 million in 2011. See also Terry Carter, *IOLTA programs find new funding to support legal services*, AM. BAR ASS'N J. (Mar. 1, 2013, 7:29 AM), [http://www.abajournal.com/magazine/article/iolta\\_programs\\_find\\_new\\_funding\\_to\\_support\\_legal\\_services](http://www.abajournal.com/magazine/article/iolta_programs_find_new_funding_to_support_legal_services) [http://perma.cc/KHH6-EBUV]; see also I. Glenn Cohen, *Rationing Legal Services*, 5 J. OF LEGAL ANALYSIS 221, 221-22 (2013) (describing cuts to Legal Services Corporation funding as well as reductions in other sources of funding for legal services to the poor).

<sup>151</sup> *Turner v. Rogers*, 131 S. Ct. 2507, 2515-20 (2011).

<sup>152</sup> See, e.g., *King v. King*, 174 P.3d 659, 668 (Wash. 2007) (en banc); *Frase v. Barnhart*, 379 Md. 100, 125 (2003); *In re* Petition to Establish a Right to Counsel in Civil Cases, 2012 WI 14 (Feb. 24, 2012) (No. 10-08), <http://www.wicourts.gov/sc/rulhear/DisplayDocument.pdf?content=pdf&seqNo=78599> [http://perma.cc/TPQ8-UAEC].

counsel for unrepresented litigants would exacerbate the allocation of resources upward rather than downward.

The new legal realists, such as Erlanger, have suggested that reformists not give in to “a nihilist surrender to pure critique,”<sup>153</sup> which is, of course, tempting in this situation. Indeed, after Bezdek’s extensive research effort involving the Baltimore District Court, nearly twenty-five years ago now, she herself did not present any agenda for improving the situation. Rather, she implied that the problems she documented needed to be solved through poor people recognizing their role as an exploited group and working together to bring about change.<sup>154</sup> Accordingly, she denounced even the standard recommendation of more attorneys for the unrepresented as being “parentalistic and . . . let[ting] us off the hook for our parts in the charade of legal entitlement and rights vindication.”<sup>155</sup> But poor people have not in the twenty-five years since managed to develop the political clout to obtain noticeable advances in the enforcement of the warranty of habitability. Bezdek was no doubt right that having middle-class and affluent persons drive reform is likely to lead to problematic results, including, perhaps, questionable allocations of resources. But if the rule of law and of equal justice are in fact a societal and systemic concern, then it makes little sense to conceive of the problem as something we need to wait for poor people to agitate to solve.

Further, as the new legal realists suggest, it may be possible to “chart[ ] a path between idealism and skepticism, by both remaining cognizant of hierarchies of power and the paradoxes they create for law, and also asking what can be done to work toward justice within the existing structures.”<sup>156</sup> There are some more feasible, comparatively low-cost ways to improve the decision-making of the less-visible courts that could chart such a path and become the focus of reform efforts.

For example, the adoption of routinized court processes that “automatize” the application of law can improve both the speed and correctness of decision-making.<sup>157</sup> More user-friendly petition

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<sup>153</sup> Erlanger et al., *supra* note 13, at 345.

<sup>154</sup> Bezdek, *supra* note 24, at 604 (footnote omitted).

<sup>155</sup> *Id.* at 538 n.16.

<sup>156</sup> Erlanger et al., *supra* note 13, at 345.

<sup>157</sup> Super has suggested that when reforms are sought to benefit unrepresented tenants with warranty of habitability claims, “the system’s operation should be as automatic as possible. Relying on low-income people to negotiate even fairly simple procedures, or on bureaucracies to empathize with them and adjudicate in their favor, all but guarantees a high failure rate.” Super, *supra* note 2, at 462; *see also* ATUL GAWANDE,

forms for tenants and prescribed adjudication check-lists for judges could streamline the handling of cases and reduce idiosyncrasies in how the court operates. In addition, allowing for the participation of trained lay advocates and parajudicial officers, rather than relying exclusively on lawyers and judges, would stretch public dollars further and ensure that more attention is brought to bear on the cases of the unrepresented.<sup>158</sup> Such an approach could also better distribute expertise so that more expensive resources could be targeted to more complex cases and less expensive resources to less complex ones. Further, providing real and meaningful opportunities for appeal would allow for more appellate correction and guidance. For example, amending the law in Maryland to permit record appeals would at least allow for the possibility of more appellate supervision—and also signal that it actually matters whether the district court enforces the law.

In some sense it can be said that we already have the kind of legal system we want, one that, for example, displays some concern for those with substandard housing by giving them legal rights, but that lacks the social commitment that would enable those rights to be more than nominally enforced. The fundamentally superficial nature of our concern would explain why so little has changed over time and despite repeated efforts by reformers. But it is also true that the legal system, like all systems, is composed of mechanisms and procedures that may be tinkered with in ways that could produce improved outcomes, even without having to change the degree of social commitment. Case study research provides insights into where such tinkering might most advantageously occur. Further, the kind of data that case study research relies upon—data with a human face and the particulars of human experience—might even play a role in increasing the social commitment to do more.

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THE CHECKLIST MANIFESTO (2009) (discussing generally how checklists increase the efficacy and consistency of decision-making processes).

<sup>158</sup> See generally Richard Zorza & David Udell, *New Roles for Non-Lawyers to Increase Access to Justice*, 41 FORDHAM URB. L.J. 1259 (2014); see also Michele Cotton, *Experiment Interrupted: Unauthorized Practice of Law Versus Access to Justice*, 5 DEPAUL J. FOR SOC. J. 179 (2012).

## APPENDIX

## PRIMA FACIE CASES FOR MONETARY RELIEF

CASE NO.	TOTAL AT ISSUE	LANDLORD RECEIVED	TENANT RECEIVED	PERCENTAGE OF TOTAL AT ISSUE AWARDED TO TENANT
171-12	\$875	\$675	\$200	23
53-12	\$1460	\$1460	\$0	0
422-12	\$3150	\$2250	\$900	29
26-12	\$1000	\$500	\$500	50
136-12	\$260	\$260	\$0	0
75-12	\$788	\$788	\$0	0
763-12	\$4250	\$3350 / 4200	\$900 / 50	21 / 1
170-12	\$2700	\$2025	\$675	25
24734-11	\$2700	\$2700	\$0	0
110-12	\$800	\$800	\$0	0
9941-12	\$1500	\$1500	\$0	0
9920-12	\$3500	\$3500	\$0	0
98-12	\$640	\$640	\$0	0
140-12	\$2520	\$1468	\$1052	40
16505-11	\$1200	\$1200	\$0	0
8-12	\$3300	\$3300	\$0	0
24643-11	\$3000	\$2625	\$375	13
92-12	\$2700	\$2700	\$0	0
24798-11	\$1654	\$1404	\$250	15
97-12	\$10500	\$8750	\$1750	17
16683-11	\$8125	\$5680	\$2445	30
56-12	\$2958	\$2958	\$0	0
117-12	\$1600	\$1600	\$0	0
82-12	\$480	\$0?	\$480?	100
162-12	\$2225	\$2225	\$0	0
5-12	\$7200	\$7245	-\$45	0
9921-12	\$9000	\$9000	\$0	0
15-12	\$3180	\$3180	\$0	0
73-12	\$3500	\$2500	\$1000	28
39-12	\$3600	\$0	\$3600	100
177-12	\$6750	\$6750	\$0	0
35-12	\$795	\$795	\$0	0
500-11	\$5100	\$4250	\$850	17

# RADTALKS: WHAT COULD BE POSSIBLE IF THE LAW REALLY STOOD FOR BLACK LIVES?

*A Series of Talks Delivered at the Law for Black Lives Convening,  
Organized by the Bertha Justice Institute at the Center for Constitutional Rights*

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## I. INTRODUCTION: PURVI SHAH<sup>†</sup>

*“You’ve got to seriously ask yourself, what are you willing to sacrifice to change the human condition? Radical means going against the norm or changing the norm. Radical means stepping outside the box. Radical means giving up comfort. Radical means being excited by the challenges of poverty and war . . . America, as a matter of fact, as a culture does not encourage; it works tenaciously at obstructing the path to radical thought, to radical development, to radical thinking—and as a consequence, all day long we are being subliminally bombarded with mass media, technology, with press to stay away from anything that changes the norm.”*

—Harry Belafonte, 2014<sup>1</sup>

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<sup>†</sup> Purvi Shah is the Bertha Justice Institute Director at the Center for Constitutional Rights, where her work focuses on deepening the theory and practice of movement lawyering across the United States and the world. She recently co-founded the Ferguson Legal Defense Committee, a national network of lawyers working to support the Ferguson movement and the growing national Black Lives Matter movement. Prior to coming to the Center for Constitutional Rights, she spent a decade working as a litigator, law professor, and community organizer. At the Community Justice Project at Florida Legal Services—a project she co-founded and started—she litigated on behalf of taxi drivers, tenants, public housing residents, and immigrants in a variety of class actions and affirmative damages litigation. She was an adjunct clinical professor at the University of Miami School of Law, where she founded the Community Lawyering Clinic. She graduated from Northwestern University and the Berkeley School of Law at the University of California.

<sup>1</sup> Harry Belafonte, Artist/Activist, Keynote Address at the Center for Constitutional Rights Social Justice Conference 2014 (June 6, 2014), <http://www.ccrjustice.org/home/BerthaJusticeInstitute/social-justice-conference-2014> [<http://perma.cc/X58G-8WWQ>].

*“In order for us as poor and oppressed people to become part of a society that is meaningful, the system under which we now exist has to be radically changed. This means that we are going to have to learn to think in radical terms. I use the term radical in its original meaning—getting down to and understanding the root cause. It means facing a system that does not lend itself to your needs and devising means by which you change that system.”*

—Ella Baker, 1969<sup>2</sup>

Is our radical imagination dead?

For many of us, going to law school was a radical choice. We chose the law because at some point in our lives, we witnessed injustice and oppression up close—maybe in our own homes, maybe in our neighborhoods, maybe in a community far away from home. But somewhere along the way we developed a gut-sense that something was deeply wrong with the world. And as we searched for a way to be useful in the fight to improve the human condition, we imagined law would help us solve some of society’s most daunting and intractable problems—from poverty and police brutality to climate change and xenophobia.

When we arrive at law school, we spend countless hours reading hundreds of pages of legal jurisprudence for classes where there is no mention of these societal problems. We are advised that we would be best served by learning to distinguish fact from opinion and to divorce our passion from reason. While we try to make sense of this new sterile way of thinking, we are introduced to a new set of myths: about the importance of lawyers, about the neutrality of the law, about how the law protects all equally. We begin to believe that as lawyers, we have the answers.

When we join the field, we learn the cold-truth that lawyers working for the most vulnerable in our society are severely under-resourced and outnumbered. We work day and night, drowning and overwhelmed by the never-ending stream of crisis, cases, and clients. The hours we spend slouched in meetings and on conference calls talking over and past each other give rise to disillusionment and detachment from the sense of purpose that initially drove us to this work. Our imagination starts to dwindle, and our cynicism blooms. We become cogs in the wheel.

As some of us begin to run legal organizations, we experience levels of alienation, competition, ego, and oppression reminiscent

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<sup>2</sup> BARBARA RANSBY, ELLA BAKER AND THE BLACK FREEDOM MOVEMENT: A RADICAL DEMOCRATIC VISION (2003).

of the corporate world we used to impugn. We talk about our work in terms of deliverables and platitudes, sexy enough yet safe enough to satisfy the funders that keep our organizations afloat. We're too busy to evaluate our work in authentic ways. As leaders, we are fearful and fail to solicit real feedback from our staff, clients, and partners, [because] being honest about the failings of our work would mean losing what little self-worth we have. Worst of all, some days when we go home, we can't feel anything at all. The law has turned us into problem-managers instead of problem-solvers.

However, in rare moments of contemplation, we may hear a voice inside us that asks quietly: are we really making things better? Is my work truly radical? Am I fundamentally transforming power relations, or am I simply tinkering at the margins by treating the symptoms of injustice instead of the root causes? And just as soon as that voice emerges, with our bodies tired and our brains on super-drive, we push these overwhelming existential questions aside and return to the comfort of having what appears to be a noble job, and the simplicity of checking things off our to-do lists.

RadTalks intends to re-route this common trajectory. RadTalks is an intervention in the ever-pressing grind of day-to-day social justice work. It is a space where our individual and collective imaginations are free to run wild. A space where bold ideas pierce through the cynicism and routine of social justice work, re-centering us on what is possible when we find the courage to dream.

RadTalks is a curated series of short, inspiring talks given by visionary social justice thinkers on a theme relevant to the current moment. Speakers are asked to use their radical imaginations to present radical ideas that will lead the audience toward radical action.

Though the legal community is an intended audience for RadTalks, the talks are intentionally interdisciplinary, featuring visionaries in law, organizing, art, design, and entrepreneurship. By centering legal visionaries amongst other types of change-makers, RadTalks hopes to inspire the cross-pollination of radical ideas from different sectors working towards social justice. RadTalks asks speakers to subvert the traditional discourse of band-aid solutions and instead present transformative visions of how we might sever the very root of oppression and injustice in our communities.

In light of these goals, we launched the first RadTalks at the Center for Constitutional Rights' (CCR) Law for Black Lives con-

vening in the summer of 2015.<sup>3</sup> Law for Black Lives was a national gathering of lawyers, law students, legal workers, and jailhouse lawyers committed to building a world where Black Lives Matter. More than a meeting or a conference, the gathering was a call to action for legal advocates from diverse parts of the country to join together and spend a day dreaming about how we can support the growing Movement for Black Lives. Law for Black Lives unapologetically prioritized the voices and leadership of people of color—most importantly Black lawyers and legal advocates.

Birthing out of CCR's experiences building legal infrastructure for the resistance in Ferguson and Baltimore, Law for Black Lives was a groundbreaking conversation that ignited a new level of inspiration, motivation, and intention within the legal community to support the Black Lives Matter movement. The two-day convening, endorsed by seventeen organizations, was hosted at the historic Riverside Church in Harlem and at Columbia University, and consisted of a combination of thirty-three workshops, panel discussions, and plenaries conducted by more than eighty renowned organizers, lawyers, and activists. About 1,000 participants joined us in person to dream big about how we can support the growing Movement for Black Lives. Beyond those who attended in person, the convening reached 4,400 people across the world through our livestream of the event. This conference trended nationally as one of the top three hashtags on Twitter (#Law4BlackLives).

The prompt for the first set of RadTalks was "What Could Be Possible if Law Really Stood for Black Lives?" and centered the voices of those often marginalized within the law—Black lawyers, community organizers, jailhouse lawyers, transgender individuals, and lawyers from the South. The combination of viewpoints and ideas in these first RadTalks was exhilarating and electric. From Alicia Garza's vision on how Black workers must be a part of the fight to make Black Lives Matter, to Norris Henderson's recounting of his perseverance as a jailhouse lawyer working to free himself after being wrongfully incarcerated in the Louisiana State Penitentiary at Angola for twenty-seven years, to Elle Hearn's vision of what it would take to build a world where transgender victims of police violence are not misgendered after their deaths, to Colette-Pichon Battle's talk on disaster recovery and how we go from resilience to resistance—each talk expanded our hearts and minds,

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<sup>3</sup> See LAW FOR BLACK LIVES, <http://www.law4blacklives.org> [<http://perma.cc/CRJ8-WDKZ>].

each talk made us reflect on our own work, each talk challenged us to think more radically.

What the transcripts you are about to read will not communicate is the energy of the room. The audience sat rapt during the RadTalks, incredibly moved by the speakers, at times bursting into applause.<sup>4</sup> And at the end of the talks, many of us were moved to tears, having remembered how healing it is to dream about what is possible.

I created RadTalks<sup>5</sup> to answer Mr. Belafonte's call to take radical action and to heed Ms. Baker's wisdom to focus on the root of the causes of injustice, and to give us fuel and inspiration in the long haul of social transformation. I hope at the end of reading these talks, you too will feel re-centered in your radical imagination and willing to take the risk to be as radical as possible in your work.

If changing the world begins with the belief that it is possible, then this is the moment. The problems of oppression, poverty and human suffering are not intractable, but solving them requires awakening the most creative and expansive part of ourselves.

Are you willing to dream with us?

## II. COLETTE PICHON BATTLE†

Bonjour. It's so great to be here—thank you for having me.

The first question that most folks from the Gulf Coast get when we're in places like New York is, "Where were you when Katrina hit?" Well, I was in [Washington,] D.C., practicing corporate law, trying to achieve success. Anybody feeling me? Any Black lawyers out here move to D.C. to achieve success? It's a whole bunch of success out there. Beautiful Black people, beautiful suits, nice

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<sup>4</sup> You can see videos of the RadTalks at <http://www.law4blacklives.org/videos>.

<sup>5</sup> It should be noted that RadTalks has been shaped by a series of conversations I've had with visionary thinkers, artists, and creatives, most notably Bryonn Bain, Harry Belafonte, Andre Robinson, Malik Benjamin, Steven Pargett, Camilo Ramirez, and Sally Rumble.

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cars, they go to museums, they eat out. It's great, it's fantastic. Best couple of years of my life, loved every minute of it.

And then there was this really big storm in the Gulf. I checked on my family, and the next day we saw these images. And it took about two weeks before I knew everyone in my family was okay. There was one thing I understood as a lawyer: they might need some help with paperwork. [I thought,] "I'll go down and I'll volunteer. I'll go home for a little while." But what I didn't understand as a movement leader was how much injustice was located in the middle of disaster.

My community has been in Slidell, Louisiana, actually just outside, since the 1770s. Our community, so says the oldest people there, who gave us testimony after the storm, said the water had never been that high. Where people live with water all the time, it had never come up that far. There was a thirty-foot tidal surge off the Gulf of Mexico and my community was completely underwater.

I was told I was talking to some lawyers today, so I don't have an inspirational talk. What I did make was a list of damages, so I thought you'd appreciate that. I'm not one of those [lawyers], I hate trial, [and] I don't like speaking in front of folks. Interestingly enough, in disaster work, there's a lot of different roles for lawyers. And one of the roles I found over the last ten years was just keeping a list of all of the things that we should be receiving damages for.

The first thing I want to mention is [that] we're waiting for damages from the oil companies that dredged canals in the lower part of Louisiana and allowed for the salt water intrusion to destroy the marshes that protect the land.<sup>6</sup> I don't know how much money that will be, but if you could just restore the south of Louisiana, that would be okay. Whatever that equals, we'll take those damages.

The second damages on my list go to the federal government. Because it was actually the failure of levees built by our federal gov-

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<sup>6</sup> A lawsuit filed by the Southeast Louisiana Flood Protection Authority-East (a Louisiana statute-created board of experts tasked with overseeing flood protection on the Louisiana coast) against ninety-seven oil and gas companies that operate in Louisiana, seeks an injunction and unspecified damages. Various reports estimate the restoration of the coastline in a range of eighteen-billion to fifty-billion dollars. The actual figure to restore the coastline is hotly contested. *See Bd. of Comm'rs of the Se. Louisiana Flood Prot. Auth.-E. v. Tenn. Gas Pipeline Co., LLC*, 29 F. Supp. 3d 808, 808 (E.D. La. 2014).

ernment that flooded an entire city.<sup>7</sup> New Orleans was 80% underwater, not because of Katrina, but because of levees that broke. What was found out at trial was that those levees were not built to the standards they were set to, and the standards that were set were not good enough to protect that city.<sup>8</sup> There was a lawsuit; they even won.<sup>9</sup> Turns out you can't sue the federal government for damages when the Army Corps of Engineers is at fault.<sup>10</sup>

The third on my list is the New Orleans Police Department. We just want damages for all the Black people they killed.<sup>11</sup> And when they do the calculations for the civil part of the trial, we would appreciate if you would value Black lives the way white lives get valued when these kind[s] of things happen.

Next on the list is the Jefferson Parish Sheriff's Office. I don't know if you heard, but in the middle of the storm, people literally tried to leave the city [to] get away from the water that was slowly rising. There were armed sheriffs on the bridge of the Crescent City connection telling people that they could not get out, and [they] sen[t] them back into Orleans Parish.<sup>12</sup> We would like some damages for that. I'm not sure how to calculate that; I'm willing to work with you all to figure out how that's gonna break down. But something about that seems a little illegal, and I think we have some civil claims to that.<sup>13</sup> I asked my trial friends to help me with that.

Next on the list is BP [British Petroleum]. Five years after we

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<sup>7</sup> See *In re Katrina Canal Breaches Litig.*, 673 F.3d 381, 399 (5th Cir. 2012), *opinion withdrawn on reh'g*, 696 F.3d 436 (5th Cir. 2012).

<sup>8</sup> *Id.* at 386.

<sup>9</sup> *Id.*

<sup>10</sup> See *In re Katrina Canal Breaches Litig.*, 696 F.3d 436, 448 (5th Cir. 2012).

<sup>11</sup> One study claims the exact figure will never be known, but estimates that 610 Black people died during Hurricane Katrina. See POPPY MARKWELL & RAOULT RATARD, DEATHS DIRECTLY CAUSED BY HURRICANE KATRINA, <http://dhh.louisiana.gov/assets/oph/Center-PHCH/Center-CH/stepi/specialstudies/KatrinaDeath1.pdf> [<http://perma.cc/PJX9-CJZX>].

<sup>12</sup> Gardiner Harris, *Police in Suburbs Blocked Evacuees, Witnesses Report*, N.Y. TIMES (Sept. 10, 2005), [http://www.nytimes.com/2005/09/10/us/nationalspecial/police-in-suburbs-blocked-evacuees-witnesses-report.html?\\_r=0](http://www.nytimes.com/2005/09/10/us/nationalspecial/police-in-suburbs-blocked-evacuees-witnesses-report.html?_r=0).

<sup>13</sup> Four civil lawsuits stemming from the blockade have been filed in United States District Court for the Eastern District of Louisiana. Plaintiffs in those actions had alleged constitutional violations, as well as some state violations. All of those claims were dismissed by a federal judge. However, the Jefferson Parish Sheriff's Office reached a settlement with the Cantwell family of Algiers Point for \$10,000. See Richard Rainey, *Crescent City Connection blockade after Hurricane Katrina wasn't illegal*, U.S. JUSTICE DEPARTMENT SAYS, THE TIMES-PICAYUNE (Sept. 30, 2011), [http://www.nola.com/politics/index.ssf/2011/09/us\\_justice\\_department\\_says\\_pol.html](http://www.nola.com/politics/index.ssf/2011/09/us_justice_department_says_pol.html) [<http://perma.cc/9Z6K-EJM2>].

were recovering from Katrina, and the levee breaches and the floods, just when people were starting to come out of the trauma that follows a disaster like that, there was a massive disaster in the Gulf of Mexico. 3.1 million barrels—three hundred million gallons—of oil, not regular oil, [but] heavy crude oil.<sup>14</sup> And if that wasn't bad enough, BP, the federal government, [and] several other people, said, "Let's sink the oil floating on the top by spraying toxic dispersant on it."<sup>15</sup> And let's use toxic dispersants that are banned in Europe for their human impact,<sup>16</sup> for their *known human impact*—the cancer-causing properties of this stuff—let's spray it on South Louisiana.<sup>17</sup> And that's what they did. Recently there was a judgment. Some people were happy about it, [but] most people in South Louisiana were not. The judgment was \$20 billion against BP.<sup>18</sup> Some people think that's a lot of money. But \$20 billion was what was settled for the Alaska Exxon Valdez, an oil spill that was a fifth the size, one state, on rocky coast, with no population. We would like the rest of our money. We could just multiply that and count it out.

Finally, we would like damages from all of the people who came down to South Louisiana, South Mississippi, and South Alabama to exploit for their careers, interests, and volunteer desire. [They] came down to exploit my people for [their] benefit. We would like our damages.

Our disaster recovery is not a game. It's not a learning moment. There are some injustices going on, and if you're not coming to help us find justice, we don't need you there. If you came and you get a paper, or you got some kind of grant, or you wrote some[thing], [or made] a movie or such, we'll take all of the profits that you got from that. Just send it on down.

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<sup>14</sup> *In re* Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico, on Apr. 20, 2010, 808 F. Supp. 2d 943 (E.D. La. 2011).

<sup>15</sup> Lisa Katzman, *Big Oil Uses Toxic Chemicals to Clean Up Spills. Will the Feds Finally Make Them Stop?*, MOTHER JONES (Apr. 24, 2015 5:00 AM), <http://www.motherjones.com/environment/2015/04/bp-corexit-deepwater-horizon-epa-dispersant> [<http://perma.cc/D5TM-74CB>].

<sup>16</sup> Marian Wang, *In Gulf Spill, BP Using Dispersants Banned in U.K.*, PRO PUBLICA (May 18, 2010, 1:24 PM), <http://www.propublica.org/blog/item/In-Gulf-Spill-BP-Using-Dispersants-Banned-in-UK> [<http://perma.cc/4DF4-VGHJ>].

<sup>17</sup> Antonia Juhasz, *Investigation: Two Years After the BP Spill, a Hidden Health Crisis Festers*, THE NATION (Apr. 18, 2012), <http://www.thenation.com/article/investigation-two-years-after-bp-spill-hidden-health-crisis-festers/> [<http://perma.cc/43PM-LME2>].

<sup>18</sup> Rakteem Katakey et al., *BP's Record Oil Spill Settlement Rises to More than \$20 Billion*, BLOOMBERG BUS. (Oct. 5, 2015), <http://www.bloomberg.com/news/articles/2015-10-05/bp-s-record-oil-spill-settlement-rises-to-more-than-20-billion> [<http://perma.cc/MS8Q-6HM9>].

So, small list of damages. [In] a room full of lawyers, I know we can figure out a way to work this out. These are my “radical ideas” . . . damages for things that are very clearly to be paid to us.

I made another list, [be]cause I like lists. [T]here are some changes we’d like to make in South Louisiana and in the Gulf South, and they have to do with laws.

The first thing we want is to see a change in federal disaster law. Does anybody know what the federal government has to do in disasters? What does the federal government *have* to do in disasters? Not a damn thing. The next time Sandy comes through, [or] the next time something happens to your community, please note it is a discretionary movement of the federal government to act.<sup>19</sup> We don’t have any law on our books that says the federal government has to come to the aid of its citizens in a disaster. And if you lived in Louisiana at the time of George [W.] Bush, and you had a Democratic governor and a Republican president, you quickly find out what decisions people make when they have the discretion.<sup>20</sup> Somehow, when there’s discretion, Black lives don’t get valued. We’re not the ones that get saved, and we weren’t chosen, and we weren’t valued, and we weren’t saved.

Next, I just want to mention this little thing called voting rights. Thought I’d mention it, because when you displace millions of people at gunpoint with one-way tickets and you don’t help them get back home, and then you hold elections, and you say there’s just no voter turnout, and then you purge the voter rolls, because they just haven’t been home, but there are no homes to come back to—well, we’ve come to the conclusion that we might need some voting rights in disasters.<sup>21</sup> So, [for] the conversation on voting rights that’s happening right now . . . be ready for when the disaster comes, because that is the hit. That is the moment when our power really gets taken away: when we are at our weakest, most traumatic space.

The next change: we just need a law that protects public institutions. When there’s a hurricane that hits your coast, and levees

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<sup>19</sup> 42 U.S.C. § 5148 (2015); *McWaters v. Fed. Emergency Mgmt. Agency*, 436 F. Supp. 2d 802, 809 (E.D. La. 2006) (holding that the Federal Emergency Management Agency’s decision to terminate provision of assistance is a “discretionary function,” irrespective of the potential negative impact on a particular class of persons).

<sup>20</sup> Eric Lipton et al., *Political Issues Snarled Plans for Troop Aid*, N.Y. TIMES (Sept. 9, 2005), [http://www.nytimes.com/2005/09/09/us/nationalspecial/political-issues-snarled-plans-for-troop-aid.html?\\_r=0](http://www.nytimes.com/2005/09/09/us/nationalspecial/political-issues-snarled-plans-for-troop-aid.html?_r=0).

<sup>21</sup> See Damian Williams, *Reconstructing Section 5: A Post-Katrina Proposal for Voting Rights Act Reform*, 116 YALE L.J. 1116, 1130-36 (2007).

that flood your city, we need laws that protect the strongest buildings that are on the highest ground, that are meant to withstand wind, where even the rich people go because they're the strongest buildings in the city. That's our public housing; that was our public housing in New Orleans. It got torn down.<sup>22</sup> Not because it flooded. But because somebody wanted to "shift the density of poverty," is what they said.<sup>23</sup> What it actually meant is it permanently displaced thousands of people, who are still not home, because they were living in public housing, and they were never allowed to come back to their city.<sup>24</sup> We think public housing should be protected in disasters. All public institutions.

And speaking of public institutions, we might want to protect our hospitals, too. We have a big hospital called Charity. It was built at the same time that our public housing was built. It's [in] downtown New Orleans, and the only thing that flooded was its basement.<sup>25</sup> [It] turns out that [when] the whole team of medical staff . . . and the military group [that] cleaned it [and] got it surgery-ready . . . told the government, "We're ready to receive patients at Charity," the government and a few other folks put a gag order on the doctors and military, opened the windows, and re-flooded Charity Hospital.<sup>26</sup> The dollars that were supposed to go to rebuild Charity Hospital, clean it up, [and] save the people who were stuck went to a new facility right next door.<sup>27</sup> When you come down, check it out. They could've just rebuilt Charity [or] cleaned it up. But Charity Hospital is a hospital for poor Black people. And

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<sup>22</sup> ROBERT D. BULLARD & BEVERLY WRIGHT, RACE, PLACE, AND ENVIRONMENTAL JUSTICE AFTER KATRINA: STRUGGLES TO RECLAIM, REBUILD AND REVITALIZE NEW ORLEANS AND THE GULF COAST 28-30 (2009).

<sup>23</sup> Andrew Vanacore, *Report: New Orleans' shift toward rental vouchers, and away from public housing, chips away at density of poverty*, THE ADVOCATE (July 8, 2015, 12:00 AM), <http://theadvocate.com/news/neworleans/neworleansnews/12851831-123/report-new-orleans-shift-toward> [<http://perma.cc/2BUL-C2EN>].

<sup>24</sup> JANE HENRICI ET AL., INST. FOR WOMEN'S POLICY RESEARCH, GET TO THE BRICKS: THE EXPERIENCES OF BLACK WOMEN FROM NEW ORLEANS PUBLIC HOUSING AFTER HURRICANE KATRINA (2015), <http://www.iwpr.org/publications/pubs/get-to-the-bricks> [<http://perma.cc/JX46-W5CW>]; Roberta Brades Gratz, *Who Killed Public Housing in New Orleans*, THE NATION (June 2, 2015) <http://www.thenation.com/article/requiem-bricks/> [<http://perma.cc/D88N-89ND>].

<sup>25</sup> Roberta Brandes Gratz, *Why was New Orleans's Charity Hospital Allowed to Die?*, THE NATION (Apr. 27, 2011) <http://www.thenation.com/article/why-was-new-orleans-charity-hospital-allowed-die/> [<http://perma.cc/TLU2-N8YE>].

<sup>26</sup> *Id.*

<sup>27</sup> Adam Nossiter, *Dispute Over Historic Hospital for the Poor Pits Doctors Against State*, N.Y. TIMES (Dec. 17, 2005), [http://www.nytimes.com/2005/12/17/us/dispute-over-historic-hospital-for-the-poor-pits-doctors-against-the-state.html?\\_r=0](http://www.nytimes.com/2005/12/17/us/dispute-over-historic-hospital-for-the-poor-pits-doctors-against-the-state.html?_r=0).

so they just pushed it to the side, and . . . they're starting to privatize the public money put into those hospitals.

Finally, another public institution: schools. Turns out New Orleans has become the epicenter of the charter [school] movement.<sup>28</sup> But let me tell you what's really happening. We're seeing children who go to four schools in four years, because a charter school really [just] takes \$300 and a signature to start. These children can't write their names, they can't add, they can't figure anything out, and there's no connection to the crime that we see in our city. "It's just their fault for not making better choices." It ought to be our fault for not protecting our children and the public institutions that they need to grow.

So for housing, hospitals, and schools, let's just protect them as public institutions, and let's not allow your tax dollars to go to help privatize these institutions, which is what's happening now.

The next law we ought to think about: a federal law banning racial and religious profiling. After Katrina, there were thousands of immigrants brought into our city to help with the recovery and rebuilding. When those immigrants asked for their paychecks, they were fired, and they immediately lost their status.<sup>29</sup> When they lost their status and they drove from their home to their work, or to find more work, they were profiled for being brown.<sup>30</sup> Turns out Black folks in New Orleans knew all about that trick. Black men in my family [have] been profiled all my life. And right after [September] 11, our Muslim brothers and sisters started getting profiled, too.

A suggestion: we need a federal law that bans racial profiling. It's come up, [but for] some reason it can't get passed. I don't know why this isn't a priority, but when police have the right to stop you based on your skin color, that ought to be illegal.

We also need some laws that actually promote an alternative economic system. It turns out that in the middle of a disaster, capitalism [is] not the best thing. Not the best thing for Black lives. In

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<sup>28</sup> See generally CTR. FOR POPULAR DEMOCRACY & COAL. FOR CMTY. SCHS., SYSTEM FAILURE: LOUISIANA'S BROKEN CHARTER SCHOOL LAW (2015), [http://populardemocracy.org/sites/default/files/Charter-Schools-Louisiana-Report\\_web3.pdf](http://populardemocracy.org/sites/default/files/Charter-Schools-Louisiana-Report_web3.pdf) [<http://perma.cc/Q6XG-N8N8>].

<sup>29</sup> Griselda Nevarez, *Latino Workers Helped Rebuild New Orleans, But Many Weren't Paid*, NBC NEWS (Aug. 28, 2015), <http://www.nbcnews.com/storyline/hurricane-katrina-anniversary/latino-workers-helped-rebuild-new-orleans-many-werent-paid-n417571> [<http://perma.cc/B2Y2-V55Y>].

<sup>30</sup> Joseph Tanfani & Brian Bennett, *Homeland Security Email Points to Ongoing Racial Profiling by Local Police*, L.A. TIMES (Oct. 15, 2015, 4:34 PM), <http://www.latimes.com/nation/la-na-border-profiling-20151015-story.html> [<http://perma.cc/QS5E-GPM5>].

fact, what we saw in South Louisiana after Katrina was the barter system, because the ATMs weren't full and the banks were closed. We saw people actually using what they had and getting what they need[ed].

I remember one morning, I woke up to a bag of okra in my FEMA trailer as payment for some legal services that I had done. Now, I love okra, so that was a very good payment for me. But it was [from] a lady down the street who didn't have any money. She gave me some okra, I was hungry: it all worked out. I don't understand why these kinds of [systems] can't be part of our conversation.

And one last suggestion. And this one you might not connect immediately to Black lives, but trust me, it's connected. We need federal recognition for the United Houma Nation. The United Houma Nation is a Native American tribe in South Louisiana with 17,000 tribal roll members.<sup>31</sup> They are the Nation that put the red stick in the ground that we now call Baton Rouge. They've always existed where we are. But our federal government doesn't recognize them.<sup>32</sup>

The problem when the federal government doesn't recognize you when you're the largest tribe in South Louisiana is that you don't get royalties when your land sits on a lot of oil and gas.<sup>33</sup> You also don't get a say in how disasters are cleaned up in your community, with your tribe. We want federal recognition for the United Houma Nation, not only because it's the right thing to do, but because what we've figured out in South Louisiana is that none of our struggles, none of our movements, will go anywhere until we have movements and justice for our indigenous brothers and sisters.

So, I'll wrap it up. I just thought I'd give you some things to think about, because the question was, "If law worked for Black lives, what would the world be like?" Well, this is just a suggestion

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<sup>31</sup> *About UHN*, UNITED HOUMA NATION, <http://www.unitedhoumanation.org/about> [<http://perma.cc/6GN3-J4JD>].

<sup>32</sup> Alva C. Mather, *Old Promises: The Judiciary and the Future of Native American Federal Acknowledgment Litigation*, 151 U. PA. L. REV. 1827, 1847 (2003).

<sup>33</sup> NICHOLAS NG-A-FOOK, AN INDIGENOUS CURRICULUM OF PLACE: THE UNITED HOUMA NATION'S CONTENTIOUS RELATIONSHIP WITH LOUISIANA'S EDUCATIONAL INSTITUTIONS 8 (2007) ("[S]uddenly the land that the Houmas had called home for so long became even more important and of prime interest to non-Indians—oil was under it . . . . Nonetheless, the federal government refuses to increase oil and gas royalties, a demand that is continually requested each year by the Louisiana government, in order to improve its education, levee, and coastal restoration systems. The United Houma Nation has yet to see any royalties from the land they previously inhabited." (quoting J. Curry, *A History of the Houma Indians and Their Story of Federal Nonrecognition*, 5 AM. INDIAN J.L. 8, 20 (1979))).

on where we could start, and this is from ten years of disaster recovery in the Gulf South. So I'm going to leave you with one request, and I'm going to let you know what's going on down in the Gulf South.

The request is: remember us on August 29. This is ten years since Hurricane Katrina, and no matter what you hear up here in New York, or over there in Ohio, or way on the West Coast, don't believe that the recovery is finished. Don't believe that we're okay. Don't believe that justice has been served. That has not occurred. And if you don't believe it, we invite you down to come see for yourself.

There's an initiative called Gulf South Rising led by local Black people.<sup>34</sup> Local Black people saying, "This is how we want to remember Katrina ten years later." Those people are taking to the city, and they're asking you to join them for a march and for healing rooted in traditional arts and culture. The Gulf South Rising movement is going to build power: we're building our own infrastructure, leaders, [and] financial system. That's goal number one. We invite you to join us.

Goal number two is that we're coming together, not just to party . . . specifically, to heal our bodies, our minds, our relationship with one another, and our relationship to Mother Earth. We've got some healing to do, and the healing is going to go down in New Orleans on August 29.

We're also moving from this notion of resilience to resistance. Now, we do acknowledge that we are resilient people. We are [resilient], thank you very much: when you punch me, I can come back. That's right. It's good, I can take it—thanks. We figured that out. But stop hitting me.

So we're building a movement to just stop the punches. We don't need to prove anymore to the nation or anyone else that we can take a punch. We can take a punch. Stop hitting us, stop hurting us, stop killing us, [and] don't forget about us. And so this narrative from resilience to resistance is what we're going to be shouting on August 29. If you can't join us, at least remember that the legacy of resistance in this nation started in the Gulf South.

### III. VINCENT WARREN†

How do we know that Black lives really do matter? One of the

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<sup>34</sup> *Who We Are*, GULF SOUTH RISING, <http://www.gulfsoutrising.org/#whoweare> [<http://perma.cc/8ADR-P5V4>].

† Vincent Warren is the Executive Director of the Center for Constitutional

ways I think about that is to look very far into the future, not to the campaign cycle, not to the fiscal year, not to the three-year strategic plan with measurable outcomes, but really far into the future. I am thinking not about our kids, not about their kids, or even their kids, but the generation after that. When *that* generation looks back on this moment, the question will be, “What do Black people thank us for?” It is a tough question to which I do not know the answer. However, what I do see, looking back from us so many generations away, are smiling faces. I see Black people that are at ease, I see Black people that are full of wonder, I see Black people that are unencumbered, I see Black people that are unafraid, and I see Black people that are full of joy.

But we have a problem; one that was best summed up by James Baldwin in “The Fire Next Time,” where he writes:

This past, the Negro’s past, of rope, fire, torture, castration, infanticide, rape; death and humiliation; fear by day and night, fear as deep as the marrow of the bone; doubt that he was worthy of life, since everyone around him denied it; sorrow for his women, for his kinfolk, for his children, who needed his protection, and whom he could not protect; rage, hatred, and murder, hatred for white men so deep that it often turned against him and his own, and made all love, all trust, all joy impossible.<sup>35</sup>

When I look into the future; I think our call is to create joy. As lawyers, as people in the legal profession working with movements, it is an enormous task to think about how to create joy from a legal document. Perhaps you cannot. But I want to throw out a question to you all. I want you to think about our Constitution, which was ratified in 1789. Let us not think about it as a foundational document, but let us think about it as it really is—a [Microsoft] Word redlined document. For those who have worked on editing documents, you know how this works. You work on a document, you

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Rights. He oversees CCR’s groundbreaking litigation and advocacy work, which includes using international and domestic law to hold corporations and government officials accountable for human rights abuses; challenging racial, gender and LGBT injustice; and combating the illegal expansion of U.S. presidential power and policies such as illegal detention at Guantanamo, rendition, and torture. Prior to his tenure at CCR, he was a national senior staff attorney with the American Civil Liberties Union, where he litigated civil rights cases, focusing on affirmative action, racial profiling, and criminal justice reform. He was also involved in monitoring South Africa’s historic Truth and Reconciliation Commission hearings, and worked as a criminal defense attorney for the Legal Aid Society in Brooklyn. He is a graduate of Haverford College and Rutgers School of Law. This RadTalk can be viewed at <https://youtu.be/gDWUAEgvK-c>.

<sup>35</sup> JAMES BALDWIN, *THE PRICE OF THE TICKET: COLLECTED NONFICTION, 1948-1985*, at 376 (1985).

make changes to the documents, and you make comments to the documents. Yet, this is what has happened to our Constitution. Our Constitution was redlined so that it excluded Black folks, women, Native Americans, and anyone who was not the landed white gentry.<sup>36</sup> That is the basic document that we are working with in our field.

If you think about that analogy, what then did we do? We deleted the section that said “three-fifths” for a Black man;<sup>37</sup> we added the section that said “yes, woman have rights too,”<sup>38</sup> and then the Supreme Court, the legal infrastructure, clicked “save as final.” There is, however, also a comments section and the comments section is also something that the legal professional has sought to occupy. As a result, we will have comments in our documents that say, for example, that the Fourth Amendment should be read to include the following words before the actual amendments unless a police officer feels otherwise: “You have the right to be free from unreasonable searches and seizures.”<sup>39</sup> There are other parts in the comments section that we put in as well.<sup>40</sup> Therefore, when we ask Black people in Black communities what the most important thing to them is, they will tell us the same things time and time again: education, housing, healthcare, being able to protect and provide for families, and not a single one of them is a right in our Constitution. So what are we spending our time doing? We are spending time in the comments section, trying to get our courts to accept changes. I do not think that is the path to joy. I do not see the path to showing that Black lives matter in the process we are currently engaged in.

Catherine Albisa,<sup>41</sup> one of the board members for the Center

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<sup>36</sup> See, e.g., U.S. CONST. art. I, § 2, cl. 3, *amended by* U.S. CONST. amend. XIV, sec. 2 (“Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.”).

<sup>37</sup> U.S. CONST. amend. XIV, sec. 2 (“Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.”).

<sup>38</sup> U.S. CONST. amend. XIX (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.”).

<sup>39</sup> See generally *Warden Penitentiary v. Hayden*, 387 U.S. 294 (1967); *Terry v. Ohio*, 392 U.S. 1 (1968); *Tennessee v. Garner*, 471 U.S. 1 (1985).

<sup>40</sup> See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (“The First Amendment has a penumbra where privacy is protected from governmental intrusion.”).

<sup>41</sup> Catherine Albisa is the Executive Director and co-founder of National Economic and Social Rights Initiative, a non-profit dedicated to building legitimacy for

for Constitutional Rights, told me not too long ago that there are only two things worth doing in life. One is creating joy, and the other is eliminating pain. What we are doing here today, what we are trying to assemble, is a strategy to do both things simultaneously. I do not have to tell you that it is not easy because if it were easy someone in this room would have done it already. Yet it is obvious, and as Brother [Rev. Osagyefo] Sekou<sup>42</sup> said to us just yesterday, we live in a time when stating the obvious is a revolutionary act, and we have been stating the obvious for two days in this conference.

When thinking about what that revolutionary act looks like moving forward, we need to think radically about our profession, about the role of our profession with respect to movements, groups, with respect to communities, but most importantly, we have to ask ourselves, “Can we get to where we need to be by doing the things we are doing now?” The answer is “No.” But that is actually why we are here today; that is why we are at this conference, because Law for Black Lives is about creating radical innovation in the way we think about our work as lawyers, which will then get us out of the “comments” section, into actually envisioning a legal document that includes fundamental, basic rights, and recognizes the humanity of Black people.

We are planting the seed. When you think about those generations moving forward and ask them what are they thankful for, they may say that it was that our generation came together to plant the seed. Then again, they may not, and for that reason this work also requires humility. When you go to a beautiful forest, for example, you are walking about, and you are enjoying the trees. You do not know the names of the people who planted them and made it possible, but they matter to you, so that even though you do not know their names, you thank them for it. Perhaps, then, with humility, with innovation, with solidarity, with comradeship, we will be able to plant a seed so that years and years down the road, Black people will say, “We know that many years ago, there was a discussion about changing the way our society works, and our communities were involved, and our lawyers were involved. For that, we are eternally thankful.”

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human rights in general, and economic and social rights in particular, in the United States.

<sup>42</sup> Rev. Osagyefo Uhuru Sekou is an author, documentary filmmaker, public intellectual, organizer, pastor, and theologian based in St. Louis, Missouri.

## IV. ALICIA GARZA†

Black Lives Matter is a powerful network of Black people who have come together to finally eradicate anti-Black racism and state-sanctioned violence, once and for all.<sup>43</sup> For far too long, Black lives have not mattered in this country, nor have they mattered around this world.

Now, how do we know that? We know this, because, of the two-and-a-half million people who are locked in prisons and cages, one million of those people are Black.<sup>44</sup> We know this because no fewer than nine million people are under state supervision, and many of those people are Black.<sup>45</sup> We know this because, according to our comrades at the Malcolm X Grassroots Movement, every twenty-eight hours in this country, a Black person is murdered by police, security guards, or vigilantes.<sup>46</sup> We know this because Black women are the fastest growing prison population.<sup>47</sup> We know this because while the Confederate flag may have come down in South Carolina, it has not come down in Mississippi.<sup>48</sup> In fact, it is the state

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† Alicia Garza is the Special Projects Director for the National Domestic Workers Alliance (NDWA). In 2013, she co-founded #BlackLivesMatter, an international organizing network developed after the murder of Trayvon Martin, focused on combating anti-Black racism in all of its forms. Before the NDWA, she served as Executive Director of People Organized to Win Employment Rights (POWER) in San Francisco. This RadTalk can be viewed at <https://youtu.be/cniRNj6m0-A>.

<sup>43</sup> *About the Black Lives Matter Network*, BLACK LIVES MATTER, [www.blacklivesmatter.com/about/](http://www.blacklivesmatter.com/about/) [<http://perma.cc/4QD7-W9W7>].

<sup>44</sup> LAUREN E. GLAZE & DANIELLE KAEBLE, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2013 (Dec. 2014), [www.bjs.gov/content/pub/pdf/cpus13.pdf](http://www.bjs.gov/content/pub/pdf/cpus13.pdf) [<http://perma.cc/QBY6-P53D>] (reporting 2,220,300 people incarcerated); TODD D. MINTON & ZHEN ZHENG, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, JAIL INMATES AT MIDYEAR 2014 (June 2015), [www.bjs.gov/content/pub/pdf/jim14.pdf](http://www.bjs.gov/content/pub/pdf/jim14.pdf) [<http://perma.cc/8RV5-B9T7>] (reporting that of the 744,600 inmates in city and county jails, 263,800 are black); E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2014 (Sept. 2015), [www.bjs.gov/content/pub/pdf/p14.pdf](http://www.bjs.gov/content/pub/pdf/p14.pdf) [<http://perma.cc/6SQ9-6V5C>] (reporting that of the 1,561,500 prisoners in state and federal facilities, 516,900 are black).

<sup>45</sup> GLAZE & KAEBLE, *supra* note 44, at 1 (reporting 6,899,000 people under adult supervision).

<sup>46</sup> TONGO EISEN-MARTIN, MALCOLM X GRASSROOTS MOVEMENT, WE CHARGE GENOCIDE AGAIN! (2012), <https://mxgm.org/wp-content/uploads/2013/05/we-charge-genocide-FINAL.pdf> [<https://perma.cc/P67W-V843>].

<sup>47</sup> See generally GLAZE & KAEBLE, *supra* note 44.

<sup>48</sup> *North Carolina Takes Down Confederate Flag*, HUFFPOST LIVE (Apr. 4, 2013), <http://live.huffingtonpost.com/r/segment/north-carolina/515ab3ce78c90a5be9000033> [<http://perma.cc/9YT4-7HM8>]; *Mississippi Votes to Keep Controversial Flag*, ABC NEWS, <http://abcnews.go.com/US/story?id=93537> (last visited Dec. 7, 2015).

emblem.<sup>49</sup> It is the symbol that says to Mississippi, “Black lives do not matter here.” We know this because Black women make 64 cents to every 78 cents that a white woman makes, to every dollar that a white man makes.<sup>50</sup> We know this because the average life expectancy of a Black transgender woman is thirty-five-years-old.<sup>51</sup>

I could go on and on about how we know that Black lives do not matter in this country and around this world, but more importantly, it is critical that we understand that Black Lives Matter both as a powerful network and as an international movement that was ignited by the murders of people like Michael Brown.<sup>52</sup> Ignited by the murders of people like India Clarke.<sup>53</sup> Ignited by the murders of people like Jonathan Sanders.<sup>54</sup> Ignited by the murders of people like Jordan Davis.<sup>55</sup> Ignited by the people who are murdered like Aiyana Stanley-Jones.<sup>56</sup> Ignited by people who are murdered like Penny Proud,<sup>57</sup> like Oscar Grant,<sup>58</sup> like Sandra [Bland],<sup>59</sup> like

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<sup>49</sup> *State Flags*, MS.GOV, <https://www.ms.gov/content/Pages/flags.aspx> [<https://perma.cc/P789-JXSZ>].

<sup>50</sup> *Your Right to Equal Pay*, THE WHITE HOUSE, <https://www.whitehouse.gov/issues/equal-pay> [<https://perma.cc/85JD-WZ7T>].

<sup>51</sup> This statistic is extrapolated from a 2014 study conducted by the Inter-American Commission on Human Rights (IACHR). According to the IACHR, eighty percent of documented killings of transgender persons in the Western Hemisphere, particularly trans women, were thirty-five years of age or younger. See Press Release, Inter-Am. Comm’n on Human Rights, IACHR Expresses Concern over Pervasiveness of Violence against LGBTI Persons and Lack of Data Collection by OAS Member States (Dec. 17, 2014) [hereinafter IACHR Press Release], [http://www.oas.org/en/iachr/media\\_center/preleases/2014/153.asp](http://www.oas.org/en/iachr/media_center/preleases/2014/153.asp) [<http://perma.cc/KXY6-CAUX>].

<sup>52</sup> Michael Brown was an eighteen-year-old Black man shot and killed by Darren Wilson, a police officer, in Ferguson, Missouri on August 9, 2014. In December 2014, a grand jury in St. Louis County refused to indict Wilson on criminal charges for Brown’s murder.

<sup>53</sup> India Clarke was a twenty-five-year-old Black transgender woman murdered in Tampa, Florida on July 21, 2015.

<sup>54</sup> Jonathan Sanders was a thirty-nine-year-old Black man who was killed by a police officer in Stonewall, Mississippi, on July 8, 2015.

<sup>55</sup> Jordan Davis was a seventeen-year-old Black teenager who was killed by Michael Dunn, a forty-five-year-old white man, in a Jacksonville, Florida gas station parking lot on November 23, 2012. In October 2014, Dunn was found guilty of Davis’s murder and sentenced to life in prison.

<sup>56</sup> Aiyana Stanley-Jones was a seven-year-old Black child who was shot and killed during a police raid of her home in Detroit, Michigan on May 16, 2010. Detroit Police Officer Joseph Weekley was initially charged with involuntary manslaughter for Jones’s killing, but was eventually cleared of all charges.

<sup>57</sup> Penny Proud was a twenty-one year-old Black transgender woman murdered in New Orleans, Louisiana, on February 9, 2015.

<sup>58</sup> Oscar Grant was a twenty-two-year-old Black man killed by Bay Area Rapid Transit (BART) Police Officer Johannes Mehserle at the Fruitvale BART Station in Oakland, California on January 1, 2009. In 2010, Mehserle was found guilty on a lesser charge of involuntary manslaughter and sentenced to two years in prison; he was released on parole in 2011.

Rekia Boyd,<sup>60</sup> like so many others. We know this because as all of these people are having their lives taken unnecessarily, we know that Black Lives Matter is about much more than police terror. It is about our fundamental right to live as Black people with dignity and respect.

In my work at the National Domestic Workers Alliance, we see ourselves as an integral part of the movement for Black lives. However, you may be asking yourself, what do domestic workers have to do with Black Lives Matter? Domestic work, caregiving that is administered in other people's homes, is rooted in and shaped by the legacy of slavery. Historically, enslaved Africans were forced to work in other people's homes, on other people's land, mostly for folks who were generating profit off of our backs. That is the legacy of domestic work.

How, then, did we get there? During the New Deal, Southern lawmakers and union leaders made a compromise that excluded domestic workers and agricultural workers from federal labor protections that were afforded to all other workers.<sup>61</sup> Why did they do that? Because domestic workers and agricultural workers, at that time, were predominately Black.<sup>62</sup>

Today, that means that domestic workers often live and work in the shadows of our society and in the shadows of our economy. They are often isolated as the only employee inside a home and oftentimes not even considered to be an employee but instead a member of the family. They are subject to exploitation and abuse. One woman I know personally said that she was brought here from Brazil with the promise that she could work for a family and be able to go to school. Instead, she had her passport taken from her, and she was forced to sleep on the porch while she cleaned and nourished and fed a family that was wealthy. They were, in fact, cancer researchers.

Domestic workers are often increasingly unprotected by the very laws that ensure that this type of exploitation does not happen.<sup>63</sup> Many domestic workers are Black immigrant women from

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<sup>59</sup> Sandra Bland was a twenty-eight-year-old Black woman who was found hanged while in police custody in Waller County, Texas, on July 13, 2015.

<sup>60</sup> Rekia Boyd was a twenty-two-year-old Black woman, who was shot and killed by an off-duty police detective on March 21, 2012 in Chicago, Illinois.

<sup>61</sup> See Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J. 95 (2011).

<sup>62</sup> *Id.* at 98.

<sup>63</sup> See INT'L LAB. OFFICE-GENEVA:ILO, DOMESTIC WORKERS ACROSS THE WORLD: GLOBAL AND REGIONAL STATISTICS AND THE EXTENT OF LEGAL PROTECTION (2013),

the Caribbean and from across the continent.<sup>64</sup> More than 500,000 Black immigrants are living in the shadows of our democracy. They are both being criminalized for being undocumented and they are being criminalized for being seen as Black American.<sup>65</sup> And while the tales are horrific, the organizing, which is led by these women, who hold the tatters of our democracy and our economy together, is restoring life and humanity to our homes and to our workplaces. Domestic workers have formed a powerful national alliance driven by them to fight for basic labor protections to set a fair floor, not just for us, but for everyone.<sup>66</sup> Domestic workers are also innovating and shaping the fastest growing economy. We are building new and innovative models of full and fair employment that can finally uproot structural racism from caregiving, once and for all.

In our work, we have won five state-level bills in five states in five years, and we are just getting started. Domestic workers from across the African Diaspora have joined the powerful movement for Black lives. Because not only are we workers, but we are also mothers. We are mothers who have a hard time sleeping at night, because we are worried that our children will not return home. We are mothers who live in communities where the police join forces with federal agents, and they separate our families, and they criminalize our children. We know all too well, as my sister Heather McGhee from Demos has said, Black bodies were the first currency of this nation, and as such we are uniquely positioned to transform this nation.

Black Lives Matter is much more than a hashtag. It is much more than a moment. Black Lives Matter is a powerful assertion. It is a demand that we value humanity. It is a demand that we restore the right to breathe. It is an assertion that our children deserve to grow up to be adults. It is a movement that is designed to restore

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[http://www.ilo.org/wcmsp5/groups/public/—dgreports/—dcomm/—publ/documents/publication/wcms\\_173363.pdf](http://www.ilo.org/wcmsp5/groups/public/—dgreports/—dcomm/—publ/documents/publication/wcms_173363.pdf) [<http://perma.cc/LWU8-93QE>]; see also LINDA BURNHAM & NIK THEODORE, NAT'L DOMESTIC WORKERS ALL., HOME ECONOMICS: THE INVISIBLE AND UNREGULATED WORLD OF DOMESTIC WORK (2012), <http://www.domesticworkers.org/sites/default/files/HomeEconomicsEnglish.pdf> [<http://perma.cc/5EQH-SXMA>].

<sup>64</sup> *Id.*

<sup>65</sup> See U.S. DEP'T OF HOMELAND SECURITY, ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT (2014), <https://www.ice.gov/doclib/about/offices/ero/pdf/2014-ice-immigration-removals.pdf> [<https://perma.cc/2X8K-VAHA>].

<sup>66</sup> See, e.g., DOMESTIC WORKERS UNITED, NAT'L DOMESTIC WORKERS ALL., & THE COMM. DEV. PROJECT AT THE URBAN JUSTICE CTR., DOMESTIC WORKERS AND COLLECTIVE BARGAINING: A PROPOSAL FOR IMMEDIATE INCLUSION OF DOMESTIC WORKERS IN THE NEW YORK STATE LABOR RELATIONS ACT (Oct. 2010), <http://www.domesticworkers.org/sites/default/files/pdfs/collectivebargaining.pdf> [<http://perma.cc/J7JD-8VMT>].

dignity and respect to a nation that was built off of our backs in the very first place. And we know that we will win.

#### V. ELLE HEARNS†

Hello everyone. The law has lied to us. The law has lied to you. Your academic degrees have lied to you as well. If the law really stood for Black lives, we would not have to continue to learn to say the names of countless beautiful Black people who have been murdered. If the law really stood for Black lives, we would understand exactly what state violence is and how it manifests itself in the lives of Black people. We would know that systemic and structural violence is a form of state violence, along with the very visible forms of police brutality that we all know. If the law really stood for Black lives, the officers who murdered Sam Dubose in Cincinnati, Ohio would have been fired the first time they murdered a Black man and got away with it.<sup>67</sup>

If the law really stood for us as Black people, we would not have to defend ourselves against the very thing that is supposed to protect us. If the law really stood for Black lives, people from Paterson, New Jersey to Cleveland, Ohio would be able to live unapologetically in all of their Black glory without death being a constant in their lives.<sup>68</sup> I would not have been arrested after defending myself against a transphobic attack. The jail that I was placed in would not exist if the law really stood for Black lives.

Laws would not be the gateway to a better quality of life—investing in people would be. The ego of the law would be left at the door when coming in contact with those who are most impacted by laws. We would have a better practice in identifying and connecting to our human existence, as opposed to the circumstances that

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† Elle Hearn is the Central Region Coordinator for GetEQUAL, and she was appointed to the position in early 2015. She is also a strategic partner of #BlackLivesMatter and works collaboratively with the #BlackLivesMatter team. This RadTalk can be viewed at <https://youtu.be/lsFeI0X1jJE>.

<sup>67</sup> See John Mura & Sheryl Gay Stolberg, *Samuel DuBose's Death in Cincinnati Points to Off-Campus Power of College Police*, N.Y. TIMES (July 31, 2015), <http://www.nytimes.com/2015/08/01/us/samuel-duboses-death-in-cincinnati-points-to-off-campus-power-of-college-police.html> (“Mr. DuBose is the third black man to die after encounters with the [University of Cincinnati] police since 2010; Kelly Brinson, a 45-year-old psychiatric patient, and Everette Howard, an 18-year-old student, died in 2010 and 2011 after campus police officers fired Taser stun guns at them, according to lawsuits filed by their families.”).

<sup>68</sup> See generally Nicholas Quah & Laura E. Davis, *Here's A Timeline Of Unarmed Black People Killed By Police Over Past Year*, BUZZFEED NEWS (May 1, 2015, 5:46 PM), <http://www.buzzfeed.com/nicholasquah/heres-a-timeline-of-unarmed-black-men-killed-by-police-over#.brDXqxw12> [<http://perma.cc/ZCB8-FVBF>].

often keep us divided. If the law really stood for Black lives, white people, you would not be so confused about the privilege you carry. There would be specific language around the dismantling of white supremacy, patriarchy, and capitalism in laws, if they really were for Black lives. We would have received reparations.

If the law really stood for Black lives, Ky Peterson, a Black transgender man who murdered his rapist, would not be in prison currently serving twenty years in Georgia.<sup>69</sup> Mya Hall's murder would not have gone unnoticed if the law really stood for Black lives.<sup>70</sup> Anthony Sowell would have never made the news if the law really stood for Black lives.<sup>71</sup> The "House of Horrors" in Cleveland, Ohio would have been torn down long before Anthony Sowell had the opportunity to capture and detain Black women.<sup>72</sup>

If the law really stood for Black lives, you all would know that I fear you, just like Black people fear the police. As a Black transgender woman, when I come into a space with you, I do not know if you will kill me, misgender me, out me, or verbally attack me. If the law really stood for Black lives, we would not have to listen to Bill O'Reilly.<sup>73</sup> If the law really stood for Black lives, we would not have had to watch in horror as Black people in Ferguson were not allowed to mourn, grieve, protest, or claim the very city they domi-

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<sup>69</sup> Sunnivie Brydum & Mitch Kellaway, *This Black Trans Man Is in Prison for Killing His Rapist*, THE ADVOCATE (Apr. 08, 2015, 11:15 AM), <http://www.advocate.com/politics/transgender/2015/04/08/black-trans-man-prison-killing-his-rapist> [<http://perma.cc/N2VP-42JL>].

<sup>70</sup> Peter Hermann, *Baltimore's transgender community mourns one of their own, slain by police* (Apr. 3, 2015), [https://www.washingtonpost.com/local/crime/baltimores-transgender-community-mourns-one-of-their-own-slain-by-police/2015/04/03/2f657da4-d88f-11e4-8103-fa84725dbf9d\\_story.html](https://www.washingtonpost.com/local/crime/baltimores-transgender-community-mourns-one-of-their-own-slain-by-police/2015/04/03/2f657da4-d88f-11e4-8103-fa84725dbf9d_story.html) [<https://perma.cc/GXF9-G5J9>].

<sup>71</sup> Anthony Sowell, otherwise known as the "Cleveland Strangler," was arrested on November 1, 2009 after a SWAT team entered his house and found the bodies of eleven rape victims that had been decomposing throughout his home. Prior to his 2009 arrest, Anthony previously served a fifteen-year prison sentence for kidnapping, raping, and torturing a twenty-one-year-old pregnant woman. See generally ROBERT SBERNA, *HOUSE OF HORRORS: THE SHOCKING TRUE STORY OF ANTHONY SOWELL, THE CLEVELAND STRANGLER* (2012).

<sup>72</sup> David Lohr, *Serial Killer Anthony Sowell's 'House Of Horrors' Demolished*, THE HUFFINGTON POST (Dec. 7, 2011, 5:07 PM), [http://www.huffingtonpost.com/2011/12/06/anthony-sowell-serial-killer-house-demolished\\_n\\_1130815.html](http://www.huffingtonpost.com/2011/12/06/anthony-sowell-serial-killer-house-demolished_n_1130815.html) [<http://perma.cc/S25E-SFN7>].

<sup>73</sup> For example, days after a white man shot nine people in a Black church in Charleston, South Carolina, Bill O'Reilly, the host of FOX News Channel's *The O'Reilly Factor*, compared the Black Panthers to bigots, blamed the Black community for "Black-on-Black crime," and stated that "there is not an epidemic of racism in the United States of America." Bill O'Reilly, *Bill O'Reilly: Demonizing America as a racist nation*, FOX NEWS (June 25, 2015), <http://www.foxnews.com/transcript/2015/06/25/bill-oreilly-demonizing-america-as-racist-nation/> [<http://perma.cc/S9AP-ZKNE>].

nate.<sup>74</sup> If the law really stood for Black lives, Mike Brown's body would not have laid in the street for hours.<sup>75</sup> Detroit would be just as vibrant as it once was. We would not know the names of Black women like Sandra Bland, Raynette Turner, Kindra Chapman, Joyce Curnell, and Ralkina Jones.<sup>76</sup> We would not have to speculate whether or not they committed suicide. We would have confirmation for what we already know about their deaths.

If the law really stood for Black lives, one out of two Black transgender women would not have to live with the reality that they will sit in jail at some point in time in their life.<sup>77</sup> Black transgender women would have a life expectancy longer than thirty-five-years old.<sup>78</sup> Black transgender women would be able to anticipate making more than \$10,000 a year.<sup>79</sup> If the law really stood for Black lives, you would know I, as a Black transgender woman, am not interested in inclusion. I am not interested in marriage. I am not interested in equality. I am interested in the liberation, in the freedom, of Black people.

## VI. CARL WILLIAMS†

Law for Black lives. The law is our enemy. The law is our enemy.

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<sup>74</sup> See, e.g., Alex Altman, *Ferguson Protesters Try to Block Use of Tear Gas*, TIME (Dec. 12, 2014), <http://time.com/3631569/ferguson-protesters-try-to-block-use-of-tear-gas/> [<http://perma.cc/7U2L-AU5Y>] (explaining that a federal judge in St. Louis ordered local police to limit their use of tear gas on Ferguson protesters following news that a grand jury had declined to indict officer Darren Wilson in the death of Michael Brown).

<sup>75</sup> See Kim Bell & David Hunn, *Timeline: Four Hours After The Michael Brown Shooting*, ST. LOUIS POST-DISPATCH (Sept. 13, 2014, 3:57 PM), [http://www.stltoday.com/timeline-four-hours-after-the-michael-brown-shooting/table\\_79c7ed69-4fbe-57fb-bf77-e1888dffffd4e.html](http://www.stltoday.com/timeline-four-hours-after-the-michael-brown-shooting/table_79c7ed69-4fbe-57fb-bf77-e1888dffffd4e.html) [<http://perma.cc/RN4G-MLRY>].

<sup>76</sup> Breanna Edwards, *At Least 5 Black Women Have Died in Police Custody in July; WTF?!*, THE ROOT (July 30, 2015, 3:00 AM), [http://www.theroot.com/articles/news/2015/07/at\\_least\\_5\\_black\\_women\\_have\\_died\\_in\\_police\\_custody\\_in\\_july\\_wtf.html](http://www.theroot.com/articles/news/2015/07/at_least_5_black_women_have_died_in_police_custody_in_july_wtf.html) [<http://perma.cc/2FSE-4YXR>].

<sup>77</sup> JAIME M. GRANT ET AL., NAT'L CTR. FOR TRANSGENDER EQUALITY & NAT'L GAY & LESBIAN TASK FORCE, *INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY* 163 (2011), [http://www.thetaskforce.org/static\\_html/downloads/reports/reports/ntds\\_full.pdf](http://www.thetaskforce.org/static_html/downloads/reports/reports/ntds_full.pdf) [<http://perma.cc/4M65-758L>].

<sup>78</sup> See IACHR Press Release, *supra* note 51.

<sup>79</sup> GRANT ET AL., *supra* note 77, at 2 (finding that black transgender women were nearly four times more likely to have a household income of less than \$10,000/year as compared to the general population).

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The law as it stands today in this country and in this time is our enemy. Historically, it's what's enslaved us as Black people. It's what's Jim Crow-ed us. It's what gave us anti-miscegenation laws. Those were laws, structures that were in place in this country, and today we have even more of them. They have different names. They're parts of different systems. They're mandatory minimums. They're the school-to-prison pipelines. They're the war on drugs. They're stop-and-frisk procedures. All across the country from Portland, Maine [to] Portland, Oregon, from Miami to San Diego. Those laws that exist today are part of the core of what makes up the system of white supremacy in this country.

And those laws didn't just appear from nowhere. They appeared at the foundational points of this country. Vince was talking about the Constitution and sort of the ways to amend it and change it. The Constitution, and I always point this out, the very easy place to remember when it was first written. It's Article 1, section 2, [clause] 3 explicitly talks—it doesn't use the words "Black people"—but it explicitly talks about Black people, and many of you all know, maybe all of you know what it says right about Black people. Three-fifths of a human being. So it talked about us, at the core, *specifically* are not human beings. And I would be remiss if I left out our Native brothers and sisters—I'm arrogant myself—if we left our Native brothers and sisters. What does it say about Native brothers and sisters in that same Article 1, section 2, clause 3 . . . of the Constitution? Not even three-fifths. Don't count. Zero.

So our Constitution—or *their* Constitution, excuse me—talks about people of color. And it says we're maybe three-fifths, a little bit more than half, or zero, and that's the foundational document of this country. And the Declaration of Independence also speaks specifically about Native American people and refers to them as bloodthirsty savages.<sup>80</sup> Right? So that's from whence we come. That's where we come from. We need a wholesale change to the legal system of this country. We need that for ourselves, for Black people, for oppressed people inside the borders of this country, and we need it for the rest of the world.

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<sup>80</sup> THE DECLARATION OF INDEPENDENCE para. 29 (U.S. 1776) ("He has excited domestic insurrections amongst us, and has endeavored to bring on the inhabitants of our frontiers, the merciless Indian Savages whose known rule of warfare, is an undistinguished destruction of all ages, sexes and conditions.").

And more than that, we need to change the culture around it. I was at an activist gathering, and someone came up to me and said, "Couldn't we make it against the law so when a policeman kills somebody, that that should be murder? It should be illegal." And I said, "So what you're saying is when someone takes a gun and shoots a person, there should be a law that says that that's something and we could call that murder?" He said, "Yeah, we should have a law that says that." I said "There's probably, I don't [know], maybe fifteen [laws] in this state, and there's federal ones. We have those laws, but it isn't that law. It's the culture that surrounds it. It's the district attorneys. It's federal prosecutors. It's defense attorneys sometimes.

And it's the judges, and it's the grand juries, and it's the juries that look and say, "Doesn't look like that to me." It's that system, and it's that culture that we need to get to the root at, rip out and change.

We all know what Audre Lorde said: "The master's tools will never [dismantle] the master's house."<sup>81</sup> With some apologies to the sister, I'm going to change it a little bit and say the master's laws will never destroy the master's system: white supremacy.

We can use those laws to bail ourselves out when we're on that journey, right? To get some people out of jail, to maybe have some less harsh conditions when people are behind enemy lines when people are in prison. We can use it to bail people out. Sometimes we can use our bar card to assist that process, but that is not going to destroy this system of white supremacy that is crushing human beings in this country.

So, where does that leave us? Right? Because that's the depressing part. Someone asked me, and I'm sure everyone in this audience has been asked, "Well, what does this Black Lives Matter movement want?" And I hate that question. But I thought about it, and I said, "We need to answer [to] these white supremacist people who keep saying this stuff." Right? We have to have some response to that. And I'm a trial lawyer at heart, so you'll forgive me for answering that. When I answer that for people, I answer it in a story.

I'm going to start out by asking a question to folks. How many people here have very young Black children? Put your hands up. First of all, everybody should clap for them because they're raising young Black children right?

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<sup>81</sup> AUDRE LORDE, *The Master's Tools will Never Dismantle the Master's House*, in *SISTER OUTSIDER: ESSAYS & SPEECHES* 110-13 (1984).

Now. Wait, wait. Keep your hands up. Keep your hands up. So for all of those folks, what I want to see happen . . . and y'all can tell me if it's what you want to see, too. I want to know the time when this happens, because I know that it will happen. I want that young child, not in the very far future, to grow up and come to their parent, their mother, their father, other folks, and [ask], "Is it true that in this country"—or maybe there won't be countries anymore, because we'll all be free—but, "When you were younger, was it true that Black people weren't free?" And you're going to be absolutely eloquent, absolutely on point, and explain exactly what it was like to live in this country today. And your beautiful Black child is going to look at you and go, "I don't understand. I don't understand what you mean. That doesn't make any sense. How could people live like that? How could people let other people—for our allies and accomplices in the room—let other people, let us, let you, mom, dad, other folks live like that?" And then you're going to try to explain again and they're just going to [say], "I don't understand that. It doesn't make any sense to me." That's the day we win.

That day is coming. The only question is, how far that day is off? How far is it away? And that brings us to who we are and why we're here. So the only thing that all of this, the gathering in Cleveland, the movement for Black lives that happened, and everything that's happening around this country, everything that's happening around the world, for Black liberation, for racial justice, and for the liberation of people. The only thing that we are all doing is making that day come a little bit sooner. Right? So all we're doing is there's an X on the calendar, and we're just saying, "Let's move the date up a little bit, just a little bit closer to today," right? Let's have it so that child is a little bit more confused at this situation that was in this country today a little bit sooner. We want to invoke that. We want to speed up that confusion. And I think one of the things on a very core emotional level that we need to do to bring that day sooner, and one of the things that we can do right now in this room, is to believe.

[Imagine] if all of us were to get together, and we were a society of civil engineers, and we said, "We're going to go out and build a skyscraper." But a lot of us said, "Well, I don't believe that that's possible really. It's a nice dream, and we like to talk about it, and we write poems about it, and we sing about it, and we chant about it, and we have workshops about it, but I don't really actually believe it's a possibility. It's an impossible thing to happen."

How many of you have sometimes doubted that we actually can be free? Fully free? I'm going to put my hand up, because I believe sometimes I doubt it. We have to one hundred percent commit ourselves to the belief that human beings want to be free, that we yearn to be free, and that we can make and believe in our own power in making ourselves free. Because like the engineers who don't believe in the skyscraper, it ain't never gonna get built. If we start to believe right now, right here—we may be wrong in the end—we one hundred percent have to believe that it is possible.

And in that, I want you all to put your hand against your heart and feel a little bit of your life inside. And I don't need you to chant it, because I don't want you to say it out loud so everybody outside can hear. I want you to say it inside, but with your voice. Say it. Say the words. Say, "I believe. I believe. I believe that we will win. I believe that we will win. I believe that we will win."

*[Audience chants, "I believe that we will win."]*

I got a little bit more for you. I'm not done. Just one last piece. Put your fist in the air. And now say, "I fuckin' know that we will."

Don't laugh. Say it. I'm going to [say] that again. "I fuckin' know that we will."

#### VII. NORRIS HENDERSON†

This is supposed to be about something radical, about how we see ourselves in this moment . . . . This moment is about how we show up and how we show up for each other in this moment. One of the things about having legal skills and knowing the power of what you can do with it is how to pay it forward. What do we do with the skillset that we have acquired? So for all the lawyers, the jailhouse lawyers, and law students, the question to yourself is, how do you show up in the moment? When you look in the mirror in the morning, what do you see? Do you see this pretty person, this beautiful, handsome person, this lovely, gorgeous person, or do you see somebody who is really engaged and willing to commit themselves to helping others?

One of the things about acquiring a skill set is that you have to

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do something with it. For example, I am a CPR instructor, but I cannot perform CPR on myself. I learned that so I could do it for somebody else. So when you learn the law, it is for you to use this talent that you have acquired to the benefit of somebody else. A service to humanity is the best work in life. And so how do we show up in these different moments? We are having a critical moment right now. Things are happening, and we are responding to them. But the thing is, I need to know where you are in that critical moment. I do not need to be in battle walking with you, and then when I get to the line of conflict, look over my shoulder and you are not there. I need to know that you are going to be there with me. For that reason, my biggest ask for everybody here is how we show up. How we show up in these critical moments when things are happening all around us.

Conversely, we cannot twist people because of their position or possessions. We have to meet people as we find them. We have to find people who are willing to do what they are capable of doing. We cannot get mad with people who say, "Check this out brother, this is as far as I can go." If they tell me that is as far as they can go, I have to accept that and respect that. However, do not walk here with me, talking this talk, and then when I get there, say that I have to go. One of the things Michael [Jackson] said about talking to that man in the mirror is [that] he must check himself. If we do not check ourselves, we are going to wreck ourselves. We always talk about leaving the egos at the door, but somehow we seem to sneak them in our pocket and bring them in. This is about us being honest with each other.

I have been truly blessed. I am not supposed to be here. I had a life sentence. For years, I could not figure out how I got into the circumstance I found myself in. But I was there. I took a bad situation and turned it into something good. I learned the law by hook or crook, trying to figure out how to get myself out of prison. Before I found a way out for myself, however, I was also able to help thousands of other people.

This is about us coming together as a collective. Recently, we left our regional caucus and had a call about an incident in Mississippi. People drove eighteen hours to make a call stating that they may need help soon. Will we show up for those folks in Mississippi like we showed up in Ferguson, Baltimore, and Oakland? If we talk about winning, and about how we win, I have a very simple formula for that. We have to be willing to fight one day longer than our opposition. It is that simple—it is not a complicated thing.

Envision that. For example, I remember [Joe] Frazier and [Muhammad] Ali, the “Thrilla in Manila.” I can hear Bundini Brown say, “All night long, champ, all night long.” But the expression on Ali’s face said, “I don’t know if I can go any farther.” Truth be told, he did not want to continue to fight, but at that moment, Joe quit on the other side of the ring; he threw in the towel. Ali did not even know it, he was still contemplating whether he could go back out there. Angelo Dundee looked over his shoulder, he saw that Joe threw in the towel, and he forced Ali to get up. Why? Because if we can look up, we can get up—that is what this is all about.

I am a bit late to organizing one-on-one, but we need to use this energy. We did not organize one-on-one in prison. Organizing in prison was a “no-no.” If you find yourself organizing in prison, you find yourself moving on the fast train in the wrong direction. However, we found a way to do it, though we had to do it spontaneously. Shit happens, somebody responds to it, and that is what is starting to happen across this country. Shit is happening, people are responding to it. Now we are trying to do it in a more organized way, so that when shit happens, we have a group of lawyers already waiting so that we are passing through the jail but not spending the night. In the old days, they spent the night in jail because the lawyer was trying to figure out what to do. We know what to do now. We need to have bail money, and we need to have someone right there advising somebody of what their rights are: “Don’t say anything. This is my client,” and he goes in and passes back out so he can get right back on the front line. That is how we built this army.

If we want to build an army, that is how we are going to build it. We build it one soldier at a time. At the same time, however, we cannot afford to get mad at our soldiers. One of our experiences on the inside when we was organizing, for example, was that there were some brothers inside who could not read and write. Their contribution to our movement was that they stuffed enveloped and licked them and put stamps on them. So imagine in a prison where you have 5,000 people sending out 10,000 pieces of mail, and you got a handful of people folding and licking envelopes and licking stamps. Nobody else wanted to do it, but they took on the task of doing it. So there is a role for everybody in this fight. Everybody.

I say this to the generals. For the generals, those folks, some self-anointed generals, and some of us who have lifted people up to be generals. The greatest action of the general occurs, not during

the battle, but in the first few minutes after. You have to find something to say to get those troops back there on the battlefield and keep them fighting. So when you take on this leadership position or are anointed or whatever, think about that and think about the impact your decisions have on all of the people you are asking to follow. Sometimes we make selfish decisions, and I tell people all the time when they say that we might go to jail, "Jail don't scare me, I've been there." Jail does not scare me, but for the person standing next to me, that may be a horrific experience for that person. I have to value that person's opinion and feelings and position. So I cannot get upset with this person who says, "I cannot afford to go to jail." I have got to respect that. At the end of the day, all I am saying is that we have a moment in front of us that if we do the right thing with it—if we do the right thing with it, we can accomplish so many things. So many great things.

And so my final ask of everybody in the room is that, when we look at that mirror in the morning, we bring our whole self. I tell people all the time, "You know you better than I know you." You know what you are capable of doing. You know how much commitment you are going to give, because inside, all you have inside is loyalty and commitment. That is all you have. You do not have the cash to pay for this and pay for that. Your face takes you everywhere you need to go to inside. Your face and your reputation for packing fair with people. And if we learn to pack fair with each other, [we'll] have people in this room from all over the country.

I came here early this morning, and I started to count the chairs. I was just sitting down and I saw it: ten rows here, ten rows deep. Well, that is one hundred [people], that is six hundred people who are going to fill up this room. This is a lot, this is a critical mass of people with real skills. We got organizers, we have advocates, we have attorneys, we have law students, but what do we do with it? The test of this is going to be when we leave here, today, tomorrow, or the next day. For those who live in New York, what do we do with this moment? How do we continue to stay connected to each other so that we do not always show up when it is critical, [like] when there is a Trayvon Martin<sup>82</sup> or Mike Brown<sup>83</sup> or Freddie Gray?<sup>84</sup> We have to continue to show up for each other all the time.

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<sup>82</sup> Trayvon Martin was a seventeen-year-old Black youth shot and killed by George Zimmerman in Sanford, Florida on February 26, 2012. In July 2013, a jury found Zimmerman not guilty of second-degree murder in Martin's death.

<sup>83</sup> See *supra* note 52.

<sup>84</sup> Freddie Gray was a twenty-five-year-old Black man killed in police custody on

I get tired of going to funerals. We are in a place that leads the nation for capital incarceration. If that was really the solution, I do not think we would be leading the nation in crime, but those things are on the same parallel track. It tells me that something is wrong with this picture. However, we are in a position to make a change.

I always say “we” inclusively, because I am a part of this, whether it goes right or whether it goes wrong. We have to become owners of saying, “If it’s to be, it starts with me.” Now think about what that saying means. You have made a commitment to yourself. You have just made a covenant with yourself that if anything is supposed to change, it starts with you. So, if it is not moving, blame yourself.

#### VIII. UMI SELAH†

*One day . . . when the glory comes . . . it will be ours, it will be ours. Ohhhhhoo . . . one day . . . When the war is won . . . It will be sure . . . It will be sure . . .*<sup>85</sup> I want to introduce myself, my name is Umi Selah.

I gotta center myself. Anybody with B.O.L.D.? Black Organizer for Leadership and Dignity?<sup>86</sup> Anybody? Anyone Black Love? We learn to center ourselves, so I’m gonna center myself. I’m gonna ask that the ancestors be with me. I wanna tell you all a story about my name.

Now I’m not gonna act like I’m not the same person I was two months ago. I’m not gonna hit you with that. There are many things that are similar with Umi and Phillip Agnew. Umi is a little bit taller though. Plays basketball; he’s fantastic.

My name came to me in a dream. It was a crazy dream. It came to me on the evening of my thirtieth birthday: June 22nd, 2015. I’ve never had a dream like this—one that I remembered so vividly. I remembered every part of my dream. And I woke up and kinda laughed, because I thought I was awake. I thought I was awake in

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April 19, 2015 in Baltimore, Maryland. In May 2015, a Baltimore grand jury indicted six police officers for Gray’s death.

† Umi Selah, formerly known as Phillip Agnew, is a co-founder and Organizer/Mission Director of the Dream Defenders, an organization committed to bringing social change by training and organizing youth in students in nonviolent civil disobedience, civic engagement, and direct action. He is a graduate of Florida A&M University. This RadTalk can be viewed at <https://youtu.be/rchmWqIS0o0>.

<sup>85</sup> COMMON & JOHN LEGEND, *GLORY, ON SELMA* (Columbia Records 2014).

<sup>86</sup> BOLD is a national training program designed to help rebuild Black social justice infrastructure in order to organize Black communities more effectively and re-center Black leadership in the U.S. social justice movement. See BOLDORGANIZING.ORG, <http://boldorganizing.org/> [<http://perma.cc/4YQ5-64NC>].

the dream. In the dream we were all sitting in a circle. Aja [Monet] was there,<sup>87</sup> and there was a bunch of folks and for some reason we were in Cuba. In the dream we had taken a trip to Cuba. For some reason we were talking about The Amistad—the ship. And in the dream, there was a young woman and she was saying, “You know, Cinqué?”<sup>88</sup> Cinqué get all the love. You know, ‘give us us free.’<sup>89</sup> But there was a slave on there, a slave woman named Umi, who was really holding it down.” And I didn’t know this, and I said “Really? Really? That sounds crazy. I never heard of this Umi.” And she said “Well you know, Umi? Umi was gangster. Umi was the one. Umi? She moved to Pensacola right afterwards.” This didn’t make sense in my mind, but I remember in the dream saying, “My great-grandmother is from Pensacola.” And the woman in the dream said to me, “Your name is Umi. Your name is Umi.”

I looked up the name afterwards, and it has three meanings, for everybody that thinks I just chose a name without quality meanings. It has three different meanings in multiple languages to appeal to many folks. In Japanese, it means “beach.” In Arabic, it means “mother.” In Egyptian, it means “life.” I said, “All three of those sound cool. I would like to live on the beach with my mom.”

This is beautiful. And so a few days later, Aja [Monet] said, “Why don’t you look up the Amistad?” You all know the story of Amistad. I thought I knew it all, I’d seen the movie with Matthew McConaughey. I know *everything* about the story; obviously, they wouldn’t lie to me in the film.

So I looked it up. Honestly, I knew a fair degree of the story. I knew that the captured Africans had fought back and revolted and had killed everybody on the ship. And they had left the captain and his second-in-command alive, and they told him, “Take us back to Africa. Take us back to Africa.” But they tricked them and they wound up in the northeast of the United States, and they were taken in and there was a trial. They eventually were granted their freedom by the United States government, which does that often—grant freedoms.

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<sup>87</sup> Aja Monet is a poet, singer, and activist based in Brooklyn, New York.

<sup>88</sup> *Joseph Cinqué*, BLACKHISTORYNOW.COM, <http://blackhistorynow.com/joseph-cinque/> [<http://perma.cc/8MK7-ZHTM>] (“Joseph Cinqué (c.1814-c.1879) led an 1839 mutiny on board the Cuban schooner Amistad, initiating the first slave rebellion in history to be successfully defended in American courts. Captured off Long Island and nearly prosecuted on charges of murder, Cinqué and his fellow Amistad rebels were eventually set free following a Supreme Court decision that opposed the will of the President of the United States.”).

<sup>89</sup> AMISTAD, at 1:33:52 (HBO Films 1997).

*[Audience laughter]*

But the interesting thing I found out was that the ship—before the mutiny that happened—the ship had just left Havana, Cuba. I said to myself, “Man, there’s no way I could have known that. That’s a little bit crazy.” And so, I was on Wikipedia . . . [in] . . . the Wikipedia rabbit hole. I clicked on everything. I clicked on every name. I clicked—I clicked, I clicked. I was deep in. I was like, looking at *The Godfather*, I don’t know how. I began reading about the experience of our people on slave ships. And it was then that I began to really feel that the literal meaning of my name was trivial compared to the journey that I was supposed to be on.

I began to read about the experience of our people on slave ships. And that shit was horrible, y’all. One of the stories that I read was of an abolitionist reverend who fancied himself an abolitionist pirate. And what he would do is, after the transatlantic slave trade was abolished, he would go with a bunch of abolitionists to the high seas and look for slave ships. They would board them and they would liberate the slaves. He was a pretty gangster dude. And in one of the stories he talked about boarding this one specific slave ship. And on the slave ship he began to describe in vivid detail the conditions of the ship. He said the stench was one that would cause a man, or a woman, to collapse.

He spoke about a ship that had been at sea for seventeen days, storing over 500 Africans when it left the west coast of Africa, minus the fifty-six that it had thrown overboard. He talked about opening the hull—the grate that covered our people. And he talked about how small the area was; how they were stacked side-to-side-to-side laying down. Some of them chained two and three together. Stacked like muffins in an oven. He said the height from one floor to the next wasn’t wide enough for them to ever turn. So for sometimes months our people would lay, just like this, in their own stool, in the stool of their neighbors, in their own vomit. He said there was a part of the ship where our people were stuffed in between each other’s legs—hands in between legs—and some of them had to sit because they hadn’t found the space to lay down for seventeen days. And he said on board the ship, it was eighty-nine degrees but the temperature couldn’t read how hot it was, that smell that emanated from the bow of that ship.

There was a portion there, as he rounded out his depiction of the ship, where he was telling his abolitionist friends what he had seen on this ship, and they said, “Brother, that’s nothing. Because we boarded a ship just a little while ago where the slaves were tied

two and three together. Sometimes we would pull one and the other two men would be dead, chained to him.” They said that there was a suffocating, stifling stench, and that they could not breathe. Many of them were in various stages of suffocation and death. Some of them were foaming at the mouth. And he went on to say that, in their last gasp, in their last ability to grasp onto life-giving air, that some of the men would strangle the man next to them. And that some of the women would dig at the eyes of the women next to them, so that they could just breathe. He said some of the children had died. And that when they came up aboard the ship, they would kill each other for a drop of water. And all they could remember was the stench. All they could remember was the stench.

I want to be very, very honest with y’all right now. I’m not a movement leader. Sometimes I feel dead inside because in this movement, this movement moment, sometimes I feel suffocated by a stench of death. Sometimes I feel numb. Things that would cause my thumb to stop and pause now I can pass up without the slightest glance. Everyday I’m inundated with news of somebody dying with the grotesque details of the last seconds of some of our sisters’ and brothers’ lives. And, I have to be honest, I’m tired of it. I can only speak for myself but sometimes I feel a dark cloud over the movement. I feel that we’ve decided to show folks that black lives matter by proving that only black deaths matter.

I want to be honest with you for a second and tell y’all that I’m not a movement leader. I’m a flawed person trying every day to do at least what I think is right but sometimes I feel a numbness. Sometimes I feel an aloofness about what’s going on in the world. Sometimes I can feel a cynicism creeping up inside of me because I can feel the stench of yet another passing. Some days I feel a deep melancholy come over me and I don’t want to go to the rally. I don’t want to go to the vigil. I don’t want to share the video. I don’t want to know the story. I don’t want to say the name because it gets tiring. It gets heavy. It’s hard. Dang [it] feels good to say that.

We’re in a moment of great, critical importance to the future of all of us. We’re in a moment where we’ve got to remember that our lives truly do matter and we’ve got to prove that far before we deliver the eulogy. That our communities do matter far before blood runs in their streets. That our families matter far before their fathers, and their mothers, and their sisters, and their brothers, and their siblings are ripped from them. We’ve got to stop making celebrities out of people just doing their human duty. We’ve got to

stop making celebrities out of families that have lost theirs. And we've got to remember that no matter what you say, many of us are still on that slave ship and we'll strangle somebody just to get a little breathe of air. We will dig into the brains of our sister just to get one little piece of air while they live in abundance. We've got to remember who the enemy is. We've got to remember who's the one holding the whip. And we've also got to remember a crucial thing—and I'll end it here.

You know, the more *hotep* of our community,<sup>90</sup> they will tell you that we all came from kings and queens, and we all came from the people that built the pyramids. I've come to tell you that that is a lie. That by virtue of you being here, you probably were not a king or a queen. That you probably were just a farmer, and in the middle of the night, slavers came to take your forefather and your foremother, scared, not knowing what happened, they were placed in the bowel of a ship, arm to leg, arm to leg, arm to leg, arm to leg. I'm here to tell you that you weren't a king or a queen, but you were then a slave and you were then taken to the point of no return. And your foremother and your forefather scratched at the walls. They screamed out to *Oshun* in their language.<sup>91</sup> They begged for forgiveness. They begged for help. They wondered what they had done to wind up in Mississippi. And they cried as their father was ripped from their family, and you weren't a king or a queen, but your forefather and your foremother, they worked every day and night beneath the beating sun of Alabama. And, they cried when they saw black bodies swinging from those southern trees. They knew very well the stench of burning flesh. I came to tell you that you were not a king or a queen, but your forefathers and foremothers plowed and plowed a plot of land. After [being] freed by this great government of ours, they plowed and plowed a plot of land that they planned to be yours. And raiding cowards in white robes came and sought to take that land away. And your forefathers and your foremothers decided to run north. No, you weren't a king or queen, but they decided to settle in Cleveland and Chicago and in New York and in St. Louis. And late at night,

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<sup>90</sup> "Hotep" is a slang term that refers to Afrocentric-based cultural nationalism. See, e.g., Tunde Adeleke, *Black Americans, Africa and History: A Reassessment of the Pan-African and Identity Paradigms*, 22 *W. J. OF BLACK STUD.*, 182, 189 (1998).

<sup>91</sup> "Oshun" is an orisha (Yoruba deity) associated with water and fertility. Orishas and other aspects of traditional African religions made their way to Latin America and the Caribbean through the transatlantic slave trade. See, e.g., Sheila Walker, *Everyday and Esoteric Reality in the Afro-Brazilian Candomblé*, 30 *HIST. OF RELIGIONS* 103, 109 (1990).

they would think about you. They said, “I don’t have much to give but my life, and I will give it for you.” And every single day they withstood the insults. They withstood the “boy,” the “girl.” They withstood the sitting in the back. They withstood the fear and the fury of police because they knew that they didn’t come from kings or from queens but they came from survivors.

When you think about that slave ship and you think about that passage and you break it down to the month and the nautical miles that we traveled—that our people traveled—in the darkness, and in the stench of death, it feels familiar doesn’t it? But I’m reminded about a ship that came to me in a dream. An Amistad whose captured Africans rose up and fought for their freedom. They call out to us today.

A weird kind of footnote in my story. A classmate of mine three weeks ago added me on Instagram. And her name was “Black Pensacola.” It’s a true story. I went to her page. And the last post she had posted was a [paraphrased] quote from Cinqué, saying that, “I call out to my ancestors and they will be there with me.”<sup>92</sup>

As I stand to defend myself, my family, my community, my people, my ancestors will be there with me. And they’re here with us today. They’re here with us today, saying, “We have a beautiful history, but the one we will create in the future will astonish the world.” Saying, “You will find me in the whirlwind.” Saying, “You can find me in the whirlwind.” Saying, “Up, you mighty race.” Saying, “Up, you mighty race. Up, you mighty race. Accomplish what you will.”<sup>93</sup>

#### IX. MAURICE “MOE” MITCHELL†

Oh my God, you’re so beautiful! Could you look at one another and just acknowledge your presence, your beauty, your fierceness? Just look and say, “I see you.” And if you do have love in your heart for that person, say, “I love you.” [*Audience: “I see you. I love you.”*].

Blackbird was founded by myself, Thenjiwe McHarris, and Mervyn Marciano in this year of protest and resistance to respond rapidly and lovingly to the urgent needs of Black liberation. When

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<sup>92</sup> AMISTAD, *supra* note 89, at 2:06:58.

<sup>93</sup> This is a reference to a famous quote by Marcus Garvey, an activist who led the Black Nationalist Movement in the early 1900s, based in Harlem, New York. See HENRY HAMPTON & STEVE FAYER, VOICES OF FREEDOM: AN ORAL HISTORY OF THE CIVIL RIGHTS MOVEMENT FROM THE 1950S THROUGH THE 1980S 38 (1990).

† Maurice is a co-founder of Blackbird and an organizer in the movement for Black Lives. This RadTalk can be viewed at <https://youtu.be/6yrxu8RbK2s>.

Blackbird was called to South Carolina and in Missouri, we both witnessed and heard of extreme violations of people's legal and civil rights. We also saw, in response, the courageousness of a small but dedicated legal community, right? In South Carolina, when we talked to members of street organizations—people who face constant intimidation and surveillance by law enforcement—we saw as they joined with direct action takers, and they shared with us how they too desired freedom and their freedom was linked to their communities' freedom. What we saw on the streets of Baltimore, in Missouri, and in many other communities, was this uncommon, unflinching desire to be free that brings many of us into this room.

However, a legal community that is in full defense of Black lives needs to be engaged *before* the killings, needs to be engaged *before* the tragic headlines, needs to be engaged *before* the hashtags. It needs to be concerned with the full spectrum of violence meted against Black bodies.

Standing with Black lives means the creation of a bench of lawyers dedicated to the particular and unique needs of trans Black women. Standing with Black lives means never being the type of attorney that would allow Kalief Browder to languish in jail for years.<sup>94</sup> Standing with Black lives means eschewing the respectability politics to join young people on the streets wherever they may go, in resistance to curfews, and to embrace all of their tools—if that might be slingshots and rocks, or tweets, or direct action, being on the front line ducking rubber bullets, ammunition, and tear gas canisters with young people. Standing with Black lives means challenging false dichotomies around good protesters and bad protesters, around violent and non-violent crime, around political and apolitical prisoners.

I want to free the U.S. Two Million. I don't want just some of our people to be free; we have to go in and free all of our people.

So, let me bring into context what many of you know and some people on this stage have already lifted up. The millions and millions of us who are in some way involved in the criminal justice system, the [seven] millio[n] of us who are in some form at the behest of correctional supervision,<sup>95</sup> and the more than two million of us who are behind bars,<sup>96</sup> one million being Black bodies.<sup>97</sup>

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<sup>94</sup> See Michael Schwirtz & Michael Winerip, *Kalief Browder, Held at Rikers Island for 3 Years Without Trial, Commits Suicide*, N.Y. TIMES (Jun. 8, 2015), <http://www.nytimes.com/2015/06/09/nyregion/kalief-browder-held-at-rikers-island-for-3-years-without-trial-commits-suicide.html>.

<sup>95</sup> See GLAZE & KAEBLE, *supra* note 44, at 1.

<sup>96</sup> *Estimated number of persons under correctional supervision in the U.S., 1980-2013*, BU-

Black people are being executed on these streets.

Black parents are being sentenced to jail sentences because of their desire for a quality education for their children.<sup>98</sup> In a broken economy, Black people are finding ways in the informal economy to live out valuable and dignified lives, and are being punished because they want to feed their families and live their lives in dignity in an economy that doesn't have quality, just, and dignified labor.

So the law, currently, and primarily, functions as an instrument of the relatively privileged to maintain their privilege, to protect their property, to accumulate wealth, to disappear social problems, and to socially control Black people.

And when the law bends, and when it bends in its application, it's not towards fuzzy concepts of human rights. Unfortunately, it bends towards the often-irrational racial anxieties of a white middle class and the overwhelming momentum of globalized capitalism. So, the law in its application is an extension of racism, white supremacy, and capitalism, right? We need to have a clear analysis of what we're dealing with if we want to fix any problem, and we need to have that clarity. And we need to speak it. We need to say, capitalism—and the way that we deal with each other, the way that it turns ourselves, each other, into consumers, and laborers, and labor hours, and denies our capacity for love—is a problem. And the way that the law supports that is a fundamental problem.

What we witnessed in Ferguson, and Baltimore, and Oakland, in the streets of New York, and other places, was working-class Black people—many of them young, many of them women, many of them queer, many of them trans—channeling an uncommon courage to expose these contradictions in the most dark and uncompromising way, and we all owe all of them a debt of gratitude.

So do we have the freedom of assembly? Do we have the freedom of speech? Do we?

Not when it interrupts white comfort. Not when it interrupts irrational but deeply felt white racial anxiety. The answer consist-

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REAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE (Aug. 20, 2015), <http://www.bjs.gov/index.cfm?ty=kfdetail&iid=487> [<http://perma.cc/75T9-3MCF>].

<sup>97</sup> *Criminal Justice Fact Sheet*, NAACP, <http://www.naacp.org/pages/criminal-justice-fact-sheet> [<http://perma.cc/Y8D6-56HN>].

<sup>98</sup> See Julianne Hing, *Kelley Williams-Bolar's Long, Winding Fight to Educate her Daughters*, COLORLINES (May 16, 2012, 9:30 AM), <http://www.colorlines.com/articles/kelley-williams-bolar-long-winding-fight-educate-her-daughters> [<http://perma.cc/5V3S-32P2>]; Daniel Tepfer, *Tanya McDowell sentenced to 5 years in prison*, CONN. POST (Mar. 27, 2012), <http://www.ctpost.com/news/article/Tanya-McDowell-sentenced-to-5-years-in-prison-3437974.php#item-38492> [<http://perma.cc/3BGK-H47P>].

ently is no. Is there a right to a speedy trial? Not when those subject to arrest are objects of political or social control. The answer consistently is no.

So, when human dignity and justice is so tragically and wholly out of reach, the law's tendency to maintain order is actually a barrier to the achievement of justice, right? What is the value of order, what is the value of decorum, what is the value of law, in a caste system, in a state that essentially replicates this racial caste? What is the value of law, if not a replicator and a hardener of that racial caste system? So, a legal community that is in solidarity and stands for Black lives is committed to a *movement* of Black lives and must do a few things.

Number one: unflinchingly follow Black leadership. I'll say it again. Unflinchingly follow Black leadership.

Number two: put at the center the people who feel the brunt of the violence. Formerly incarcerated people. People who participate in informal economies, sex workers, corner boys, folks who are outside of traditional economies. Transgender women—folks who feel the brunt of state violence—must be at the center of our mission, of our cause, and are ultimately the experts in their own existence and their own experience.

Number three: take risk. Resist counsel that prioritizes order. What is the value, again, of order, when there is no justice?

And in leaning into risk, push your lawyering further. Embrace discomfort. Right? If you don't feel discomfort and fear, then you're not allowing yourself to move into the margins where the fight is. So challenge your lawyering and challenge your practice, and move it closer and closer to the theater of fear and discomfort, because that's where our people are every single day. That's our lived experience.

Match the urgency, intensity, promise, and scale of this movement. So we don't need small law. We need big, audacious, unflinching, powerful, revolutionary law. Right?

And build long term infrastructure for winning. Where are the pipelines for young Black folks to become movement lawyers? Where are the pipelines for young trans sisters, young trans brothers, young trans siblings, to become movement lawyers in order to lawyer to their community?

And the last piece: turn up. This movement is rooted in the turn up. We are all inspired by those young revolutionaries in Ferguson, and in Baltimore, who eschewed the counsel of their elders, of the pastors, of the traditional organizations, eschewed the re-

spectability politics, eschewed all of that, and channeled the courage that we haven't seen in decades. Let that be your guiding star, let that be your North Star. When you're behind your desk, when you're preparing for whatever legal battles you're in, figure out ways that you can channel that. So, in every space that you're in, deny orthodoxy, deny safety, deny white silence and white comfort, unchecked racism and gradualism. Don't allow any of those things to have safe quarter in your presence.

So, in closing, my people:

Center Black leadership. Ashe?<sup>99</sup> [*Audience: Ashe*].

Prioritize human dignity and justice over order. Ashe? [*Audience: Ashe*].

Match the urgency, scale, intensity, and promise of this moment. Ashe? [*Audience: Ashe*].

Lean into risk, and channel the courage of the young people on the streets. Ashe? [*Audience: Ashe*].

And turn up.

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<sup>99</sup> "Ashe" is a Yoruba word, referring to the power to make change. *Ase (Yoruba)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Ase\\_\(Yoruba\)](https://en.wikipedia.org/wiki/Ase_(Yoruba)) [<https://perma.cc/U7XS-E5R7>].

**EXPECTATIONS OF THE EXEMPLAR:  
AN EXPLORATION OF THE BURDENS  
ON PUBLIC SCHOOL TEACHERS IN  
THE ABSENCE OF TENURE**

*Jacqueline A. Meese*<sup>†</sup>

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### I. INTRODUCTION

Consider this hypothetical: You have an accountant who has prepared your taxes for the past three years, and you meet with this accountant several times leading up to April 15. Over the course of this professional relationship, you have determined that this accountant is proficient—the accountant finds you a refund when possible and makes sense of your year’s worth of receipts. Perhaps there are better accountants in the larger profession, but this one creates no cause for complaint.

Then, one day, you discover that your accountant routinely posts ads on Craigslist seeking casual sex. These ads are not meretricious, but they do include explicit language describing the desired sex and nude photos of the accountant. The ads neither mention the accountant’s profession nor the accounting firm for which he works.

Would this revelation cause you to fire your accountant? This behavior appears to have no impact on the accountant’s professional performance, and the ads appear to be solely confined to the accountant’s private life.

Now consider a second hypothetical: You have a daughter in eighth grade. She has little interaction with her school’s dean of students but, as far as you know, the dean is proficient—the students are generally well behaved and other parents seem to like him. Perhaps there are better disciplinarians in the school district, but this one performs well enough.

Then, one day, another parent forwards you an ad from Craigslist, in which the dean is soliciting casual sex. These ads are not meretricious, but they do include explicit language describing the sex and nude photos of the dean. They include no information about his position or the school, and the ads in no way mention children.

Would this revelation cause you to ask for the dean’s termination?<sup>1</sup> This behavior appears to have no impact on his performance as the dean, the students are unaware of the ads, and the ads appear to be solely confined to the dean’s private life.

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<sup>1</sup> This hypothetical was adapted from Frank Lampedusa’s court case, in which he was fired for this exact behavior. *See San Diego Unified Sch. Dist. v. Comm’n on Prof’l Competence*, 194 Cal. App. 4th 1454, 1458 (Cal. App. Ct. 4th Dist. 2011).

If your answer was different for the dean than it was for the accountant, you're likely not alone. Even though both accountants and teachers are professions licensed by the state, these professions clearly carry different expectations. Teachers are often set apart from other occupations because teachers are required to be exemplars<sup>2</sup> for good and moral conduct. "With great sincerity, parents and the community believe[ ] a teacher should serve the community through an upright exemplary life and whose influence will give their children the characters they themselves aspired to and failed to attain."<sup>3</sup> To put it simply, teachers are expected to act differently than other people.

Thus, teaching is a curious profession. Communities feel very comfortable with telling teachers how to do their jobs and live their lives, and likely no other job occupies the minds of the American public as does teaching. For instance, in April 2015, eleven teachers were convicted on racketeering charges for their involvement in changing students' answers on standardized tests so as to increase their scores.<sup>4</sup> When the teachers attempted to appeal the sentence, the judge responded, "They have made their bed and they're going to have to lie in it, and it starts today."<sup>5</sup> The need to discipline the cheating teachers is likely undisputed—even within the most stringent tenure system, this misconduct is grounds for dismissal and revocation of their teaching licenses. Yet, the fact that this misconduct made its way into a criminal court is simultaneously exceedingly troublesome and unsurprising. By imposing an eleven-year sentence, the presiding judge determined that cheating on an exam was quantifiably worse than involuntary manslaughter, which carries a maximum ten-year prison sentence in Georgia.<sup>6</sup> Such a sentence appears to be rooted in both the heightened expectations of teachers and the comfort with which the community exercises control over teachers.

As extreme as the Atlanta teachers' sentences may be, this exercise of control is not novel. Perhaps nothing crystallizes this point more than the manner in which the American public is fascinated

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<sup>2</sup> Black's Law Dictionary secondarily defines exemplar as "[a]n ideal example; the epitome of some characteristic." *Exemplar*, BLACK'S LAW DICTIONARY (10th ed. 2014).

<sup>3</sup> Todd A. DeMitchell, *Sexual Orientation and the Public School Teacher*, 19 B.U. PUB. INT. L.J. 65, 69 (2009) (internal quotation marks omitted).

<sup>4</sup> See Alia Wong & Terrance F. Ross, *When Teachers Cheat*, THE ATLANTIC (Apr. 2, 2015), <http://www.theatlantic.com/education/archive/2015/04/when-teachers-cheat/389384/> [<http://perma.cc/J324-GBAL>].

<sup>5</sup> *Id.*

<sup>6</sup> GA. CODE ANN. § 16-5-3 (2015).

with the sex lives of teachers. From kindergarten teachers through college professors, stories about teachers' sexual relationships, sexual choices, and gender identity regularly populate the news cycle.<sup>7</sup> The rise of social media has made it immensely easier to peer into teachers' private lives, and communities are quick to pass judgment on teachers' sexual "misconduct." Overall, teachers' privacy is minimized in a way that others do not experience.

Simultaneously, however, there is a movement that is aimed at treating teachers the same as other professionals. The Educational Policy Reform movement<sup>8</sup> has lofty and admirable goals, which are targeted at overhauling our entire "failing" education system. For Ed Reformers, our country's educational ills will be cured by removing "ineffective" teachers from classrooms, but there is a complication: "ineffective" teachers are protected by teacher tenure and cannot be easily removed.<sup>9</sup> As such, this movement has long been focused on dismantling teacher tenure for elementary and secondary public school teachers<sup>10</sup> to fix our education system.<sup>11</sup> The ultimate goal is to make teachers at-will employees,<sup>12</sup> just like other professions.<sup>13</sup>

Yet, teachers' limited privacy rights and heightened expectations make the newest Ed Reform strategy worrisome. Although there are admitted problems with the current teacher tenure system in many states, this paper will argue that eliminating or rolling back teacher tenure is an inappropriate mechanism for solving the country's educational difficulties because of the public's attempt to control the lives of teachers. Throughout, this paper will use teachers' sex lives as the lens by which to understand the implications of eliminating tenure. Section II will examine the current teacher tenure cases in New York and California and explore the legal arguments posited by the parties. Next, Section III will conduct a

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<sup>7</sup> *Why are Our Teachers Obsessed with Sex?*, CBS TAMPA BAY, Feb. 7, 2012, <http://tampa.cbslocal.com/2012/02/07/why-are-our-teachers-obsessed-with-sex-debra-la-fave/> [<http://perma.cc/E8VF-GDV7>].

<sup>8</sup> Henceforth, referred to as "Ed Reform."

<sup>9</sup> Rebecca Klein, *This Is What It Takes To Get A Teacher Fired Around The Country*, HUFFINGTON POST (Sept. 8, 2015), [http://www.huffingtonpost.com/2015/06/03/teacher-tenure-map\\_n\\_7502770.html](http://www.huffingtonpost.com/2015/06/03/teacher-tenure-map_n_7502770.html) [<http://perma.cc/TXB3-4S4P>].

<sup>10</sup> Henceforth, referred to as "K-12 teachers" or "teachers."

<sup>11</sup> Jennifer Medina, *Fight Over Effective Teachers Shifts to Courtroom*, N.Y. TIMES (Jan. 31, 2014), [http://www.nytimes.com/2014/02/01/education/fight-over-effective-teachers-shifts-to-courtroom.html?\\_r=0](http://www.nytimes.com/2014/02/01/education/fight-over-effective-teachers-shifts-to-courtroom.html?_r=0).

<sup>12</sup> "At-will employees" are those who can be terminated at any time without cause. *Employment At Will*, BLACK'S LAW DICTIONARY (10th ed. 2014).

<sup>13</sup> *E.g.*, *Can You Be Fired?*, N.Y. STATE OFFICE OF THE ATT'Y GEN., <http://www.ag.ny.gov/labor/can-you-be-fired> [<http://perma.cc/Z57K-U3WC>].

comprehensive discussion of tenure. The section will start by explaining what teacher tenure actually is today, before moving into the history of teacher tenure. This section will also explore the weakness in the tenure system. Section IV will turn to how the American public treats teacher sex and how this impacts the limited constitutional protections given to teachers. Section V will inventory the ways in which this preoccupation has influenced termination decisions at non-unionized schools and will discuss how employment law treats teachers in the absence of tenure. Section VI will discuss the critiques of teacher tenure and respond to those critiques. Section VII will conclude by making recommendations for how to improve education without compromising the protections given by the tenure system.

## II. CURRENT CASES

Attempts to eliminate teacher tenure have historically been focused on policy changes and statutory revisions, but such efforts have been largely unsuccessful in most states.<sup>14</sup> Thus, the Ed Reform movement has recently shifted its strategy and is seeking judicial intervention.

As of August 2015, two consolidated teacher tenure cases are pending in New York state. The first is *Dauids v. State*, in which the plaintiffs allege that New York's teacher tenure statute prevents school administrators from firing ineffective teachers in violation of students' right to a sound basic education under the New York State Constitution.<sup>15</sup> According to the complaint, K-12 teachers are afforded job protection beyond what other public employees are given, and this "super due process" stops school administrators from terminating ineffective teachers.<sup>16</sup>

The second and more widely known case is *Wright v. New York*, which also alleges the New York education law granting tenure to public school teachers violates students' right to a sound basic education under the New York Constitution.<sup>17</sup> The complaint goes on

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<sup>14</sup> See, e.g., Tom Moroney & Jeffrey Young, *Michelle Rhee Resigns as D.C. Schools Chancellor*, BLOOMBERG NEWS (Oct. 13, 2010), <http://www.bloomberg.com/news/2010-10-13/michelle-rhee-is-said-to-step-down-as-washington-d-c-schools-chancellor.html> [<http://perma.cc/28J4-6BCA>].

<sup>15</sup> Verified Amended Complaint ¶ 3, *Dauids v. State*, No. 101105/14 (N.Y. Sup. Ct. Richmond Cty. 2014), <http://www.nycparentsunion.org/archives/1383> [<http://perma.cc/AW6E-VYS9>].

<sup>16</sup> *Id.* ¶ 37.

<sup>17</sup> Complaint for Declaratory and Injunctive Relief ¶ 4, *Wright v. New York*, A00641/2014 (N.Y. Sup. Ct. Albany Cty. 2014), <http://nylawyer.nylj.com/adgifs/decisions14/072914summons.pdf> [<http://perma.cc/FZ4T-QNZC>].

to describe how “effective teachers” are a key part of a sound basic education by citing a host of social science studies.<sup>18</sup>

New York Attorney General Eric Schneiderman moved to consolidate the two cases, and Judge Minardo of the Richmond County Supreme Court ruled in favor of the motion on September 11, 2014.<sup>19</sup> Both the United Federation of Teachers (“UFT”) and the New York State United Teachers (“NYSUT”) have intervened in the suit,<sup>20</sup> claiming that they have an interest in the outcome of the suit since they represent hundreds of thousands of teachers in New York State. NYSUT has moved to dismiss the case, claiming that the plaintiffs failed to state a claim, lacked standing, and presented a non-justiciable claim.<sup>21</sup>

On March 12, 2015, Judge Minardo denied the defendants’ motion to dismiss.<sup>22</sup> On the failure to state a claim grounds, the judge explained that, accepting all of the alleged facts as true, the plaintiffs have asserted a cause of action by alleging that the dismissal policy caused the injury.<sup>23</sup> The statistical evidence presented by the plaintiffs also supported this point.<sup>24</sup>

The judge went on to refuse the motion to dismiss for non-justiciability and standing.<sup>25</sup> The judge determined that the issue is justiciable because the court’s appropriate role is to “interpret and safeguard” the students’ constitutional rights.<sup>26</sup> The court rejected the claim that the outcome in this case would amount to judicial policy-making.<sup>27</sup> Additionally, the judge acknowledged that the plaintiffs have standing because they have suffered an injury—the deprivation of a sound basic education.<sup>28</sup> Thus, the court concluded that they are within the “zone of protected interests” cre-

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<sup>18</sup> *Id.* ¶¶ 27-33.

<sup>19</sup> Diane C. Lore, *Now it's 'Davids v. Goliath' in New York teacher tenure lawsuit*, S.I. LIVE (Sept. 11, 2014), [http://www.silive.com/news/index.ssf/2014/09/now\\_its\\_davids\\_v\\_goliath\\_in\\_ne.html](http://www.silive.com/news/index.ssf/2014/09/now_its_davids_v_goliath_in_ne.html) [<http://perma.cc/TFS6-4K8P>].

<sup>20</sup> Linda Ocasio, *UFT becomes defendant in tenure lawsuit*, UNITED FED’N OF TEACHERS (Oct. 2, 2014), <http://www.uft.org/news-stories/uft-becomes-defendant-tenure-law-suit> [<http://perma.cc/MW57-TF8Z>].

<sup>21</sup> *NYSUT files motion to dismiss lawsuit challenging tenure law*, NYUST (Oct. 29, 2014), <http://www.nysut.org/news/2014/october/nysut-files-motion-to-dismiss-lawsuit-challenging-tenure-law>.

<sup>22</sup> *See Davids v. New York*, Index No. 10115/14, at 13 (N.Y. Sup. Ct. Richmond Cty. Mar. 12, 2015), <http://www.scribd.com/doc/258542104/Judge-Minardo-Decision-on-Denied-Motions-to-Dismiss> [<http://perma.cc/UZ5V-XRLX>].

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 13-15.

<sup>25</sup> *Id.* at 15.

<sup>26</sup> *Id.* at 15-16.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

ated by the statute.<sup>29</sup>

Moving into discovery, the defendants have good reason to be worried. These cases were filed on the heels of the decision in *Vergara v. California*, a California case that made national headlines when the judge ruled in favor of the plaintiffs who posited that teacher tenure violated students' equal protection rights under the California State Constitution.<sup>30</sup> The judge relied heavily on *Brown v. Board of Education* and other California cases to reach his decision, criticizing the "uber due process" guaranteed to K-12 teachers by statute.<sup>31</sup> An important difference between the California and New York cases is that *Vergara* focused on the impact on low-income and minority students,<sup>32</sup> whereas the *Wright* and *Davids* complaints focus on all students, regardless of household income or wealth. Perhaps this is due in part to the landmark New York case that guaranteed sound basic education to all children,<sup>33</sup> despite the unfavorable federal law determination that education is not a fundamental right.<sup>34</sup>

All three cases were filed by Ed Reform activist groups<sup>35</sup>—Students Matter in *Vergara*, New York City Parents Union in *Davids*, and Partnership for Educational Justice in *Wright*. Though these cases are touted as parental activism in the Ed Reform world,<sup>36</sup> there are others,<sup>37</sup> such as the United Federation of Teachers, who consider these cases to be anti-teacher. Their response to the litigation is that vilifying teachers for the problems with the education system is unfair, as well as purely political. "This action is not brought by aggrieved Plaintiffs who have been denied a 'sound basic education;' it is brought by political advocacy groups attempting to drive policy that is in closer alignment with their own political

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<sup>29</sup> *Id.*

<sup>30</sup> *Vergara v. California*, No. BC484642, slip op. at 2 (Sup. Ct. Cal. L.A. Cty. Aug. 27, 2014).

<sup>31</sup> *Id.* at 6.

<sup>32</sup> *Id.* at 2.

<sup>33</sup> See generally Campaign for Fiscal Equity v. New York, 100 N.Y.2d 893 (2003).

<sup>34</sup> See generally San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

<sup>35</sup> Generally, the Ed Reform world is multi-tiered, with many activist groups both working together and against each other. See generally Billy Easton, *Changing Course on School Reform: Strategic Organizing around the New York City Mayoral Election*, 39 VOICES IN URBAN EDUC., 2014, at 6, <http://vue.annenberginstitute.org/sites/default/files/issues/VUE39.pdf> [<http://perma.cc/HSU8-5TH2>].

<sup>36</sup> See Angela Dickens, *Vergara's Effects Ripple Out to New York State*, STUDENTS FIRST (July 31, 2014), <https://www.studentsfirst.org/blogs/entry/vergaras-effects-ripple-out-to-new-york-state> [<https://perma.cc/92D9-B3AZ>].

<sup>37</sup> *UFT urges dismissal of anti-tenure lawsuits*, UNITED FED'N OF TEACHERS (Oct. 28, 2014), <http://www.uft.org/press-releases/uft-urges-dismissal-anti-tenure-lawsuits> [<http://perma.cc/BLU3-NKP4>].

preferences for the way they believe New York State School Districts ought to be run.”<sup>38</sup>

Overall, these cases are troublesome for the teaching workforce. Of course, predicting a future consequence of a case that has yet to be decided is far from foolproof. Still, the historical and contemporaneous treatment of teachers provides an instructional basis for forecasting the ways in which the “exemplar” label can be an impossible burden to carry, even with tenure.

### III. UNTANGLING TENURE – SAFEGUARDS & SHORTFALLS

Against this political and legal backdrop, a general discussion about teacher tenure becomes crucial to understanding the risks posed by *Vergara*, *Dauids*, and *Wright*. Teachers are already provided with limited legal protection, and an outcome like that in *Vergara* will chip away the little protection that is provided. As such, this section reviews the purpose and history of tenure, the history of the exemplar label, and the gaps left by the exemplar label that tenure is intended to fill.

#### A. *What is Teacher Tenure?*

Teacher tenure is an often-misunderstood term, as it is often thought to confer permanent employment<sup>39</sup> on public school-teachers.<sup>40</sup> However, tenure is a statutorily-created interest in a teacher’s employment that guarantees certain due process rights before termination.<sup>41</sup> This guarantee of employment is one of the benefits for almost all government jobs, and the general protection of public service positions was created in part to stimulate productivity by insulating the employees from political changes.<sup>42</sup> Thus, permanent employment was implemented to stop newly-elected

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<sup>38</sup> *Id.*

<sup>39</sup> This confusion likely stems from the term “permanent employee” being used interchangeably with “tenured employee.” However, this is a misnomer as the employment is not permanent, but is rather a statutory benefit.

<sup>40</sup> M.J. Stephey, *A Brief History of Tenure*, TIME (Nov. 17, 2008), <http://www.time.com/time/nation/article/0,8599,1859505,00.html>.

<sup>41</sup> See *Goldberg v. Kelly*, 397 U.S. 254 (1970); see also *Civil Serv. Emps. Ass’n Inc. v. Venugopalan*, 228 A.D. 767 (3d Dep’t 1996).

<sup>42</sup> Jonathan Fineman, *Cronyism, Corruption, and Political Intrigue: A New Approach for Old Problems in Public Sector Employment Law*, 8 CHARLESTON L. REV. 51, 61 (2013) (“The belief was that employees who had some job stability and who did not have to worry about retribution could focus on performing their jobs to the best of their ability. The public would be better served if employees were rewarded based on their competence and expertise rather than their adherence to the dictates of a particular political party or as a reward for political favors.”).

politicians from firing existing public employees and hiring friends into the open positions, as was the practice under the “spoils system.”<sup>43</sup> This anti-corruption, anti-cronyism policy is still in effect today,<sup>44</sup> and this is partially why teachers have tenure.

Consequently, in New York, most non-political civil servant jobs are given permanent employee status, including public school teachers.<sup>45</sup> The statute granting teacher tenure requires an eligible teacher to go through a three-year probationary period and obtain a recommendation from the superintendent of schools before getting tenure.<sup>46</sup>

Yet, even after obtaining tenure, a New York teacher can be dismissed for: (a) insubordination, immoral character, or conduct unbecoming a teacher; (b) inefficiency, incompetency, physical or mental disability, or neglect of duty; or (c) failure to maintain certification as required by this chapter<sup>47</sup> and by the regulations of the commissioner.<sup>48</sup> However, under the federal Due Process Clause, a state-created statutory-interest in employment can only be revoked after the employee has been given notice and some opportunity to be heard.<sup>49</sup> For New York teachers, the process due to the teachers amounts to a notice of the termination charges, a hearing before an impartial hearing officer at which the teacher may mount a defense, a record of the hearing, and the right to appeal the decision.<sup>50</sup>

These are the statutes the plaintiffs in *Wright* and *Dauids* seek to challenge.<sup>51</sup> Specifically, the *Dauids* complaint regards this as “super due process,”<sup>52</sup> a term which is likely referring to the portion of the *Vergara* opinion in which the judge referred to Califor-

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<sup>43</sup> *Id.* at 59, 61.

<sup>44</sup> *Id.* at 91.

<sup>45</sup> *See, e.g.*, N.Y. CIV. SERV. LAW § 63(1) (McKinney 2015).

<sup>46</sup> N.Y. EDUC. LAW § 3012(1) (McKinney 2015).

<sup>47</sup> EDUC. Art. 61 (McKinney 2015).

<sup>48</sup> EDUC. § 3012(2).

<sup>49</sup> *See generally* Mathews v. Eldridge, 424 U.S. 319 (1976).

<sup>50</sup> EDUC. § 3020-a.

<sup>51</sup> Complaint for Declaratory and Injunctive Relief ¶ 6, *Wright v. New York*, A00641/2014 (N.Y. Sup. Ct. Richmond Cty. 2014), <http://nylawyer.nylj.com/adgifs/decisions14/072914summons.pdf> [<http://perma.cc/F67W-MVNY>]; Verified Amended Complaint ¶ 37, *Dauids v. State*, No. 101105/14 (N.Y. Sup. Ct. Richmond Cty. 2014), <http://www.nycparentsunion.org/archives/1383> [<http://perma.cc/AW6E-VYS9>]. These plaintiffs are also challenging New York’s seniority system (“Last In, First Out” or “LIFO”), but these statutes are outside the scope of this paper.

<sup>52</sup> Verified Amended Complaint ¶ 37, *Dauids*, No. 101105/14.

nia's statutory steps as "uber due process."<sup>53</sup> Yet, the process due in both states is the same as it is for other public employees.

While permanent employment laws have critics no matter the position,<sup>54</sup> the current plaintiffs are specifically only targeting teacher tenure. This distinction is interesting since the road to permanent employment for teachers was unique.

### B. *History of Teacher Tenure*

The existence of teacher tenure can only be properly understood within the context of the history of the teaching profession itself. Public schools were built on the backs of a female workforce—taxpayers in the mid-1800's were initially reluctant to finance a public school system, and the system only survived because the governments could pay female teachers little to no money.<sup>55</sup> Still, because of cultural attitudes of the time, many were wary of allowing women into the workforce and permitting them to have public lives at all.<sup>56</sup> Thus, the discussion of the public school system often framed education as a "private" space, akin to the home.<sup>57</sup>

By positioning the school as a private space, the greater public could exercise control over the lives of the female teachers, since they were acting *in loco parentis*. Professor Kristin Shotwell posits this is where the obsession with teachers' sex lives was born.<sup>58</sup> Not only were female teachers generally required to be unmarried due to coverture laws, but these teachers were also expected to be chaste so as to set a moral example for their students.<sup>59</sup> Because teachers were operating in a "private" sphere that was an extension of the home, parents and the community felt comfortable intruding into teachers' lives and requiring them to live up to a higher standard of moral conduct than the parents themselves abided by.<sup>60</sup> This hybridization of the teachers' public/private life to exercise control illustrates the feminist legal critique of privacy as a legal structure used to advance progressive objectives in lieu of

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<sup>53</sup> Vergara v. California, No. BC484642, slip op. at 10 (Sup. Ct. Cal. L.A. Cty. Aug. 27, 2014).

<sup>54</sup> See, e.g., Johan P. Olsen, *Citizens, Public Administration and the Search for Theoretical Foundations*, 37 POL. SCI. & POL. 69, 70-71 (2004).

<sup>55</sup> Kristin D. Shotwell, *Secretly Falling in Love: America's Love Affair with Controlling the Hearts and Minds of Public School Teachers*, 39 J.L. & EDUC. 37, 44 (2010).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 47-48.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

equality, which minimizes women as belonging to a primarily private sphere.<sup>61</sup>

Ultimately, the current teacher tenure system emerged early in the twentieth century, at a time when this mostly-female workforce was both obtaining the right to vote and seeking the similar workplace protections as male manufacturing workers.<sup>62</sup> Tenure was initially offered at colleges and universities to protect professors' academic integrity and freedom of speech; the system was eventually extended to K-12 teachers as well.<sup>63</sup>

The K-12 teacher tenure system had unique aims, since this teaching corps was mostly female and the school administrators tended to be mostly white males.<sup>64</sup> Even well into the mid-twentieth century, public school teachers were subjected to unusually strict employment rules—such as those forbidding them from dating or wearing pants—and were dismissed for peculiarly frivolous reasons—such as getting married, becoming pregnant, or wearing pants—that the male workforce did not have to endure.<sup>65</sup>

Through organized labor efforts, female teachers were able to secure employment protection that otherwise eluded them simply because they were female.<sup>66</sup> The development of this system was intended to be a guarantee of due process for teachers before they could be removed from their jobs and was not intended to guarantee “permanent employment.”<sup>67</sup>

### C. *Teacher as Exemplar*

Despite moving away from considering schools to be an exten-

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<sup>61</sup> Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1, 43 (1992) (“Women feel that too long we have been ignored, because we have been seen as private and unimportant. Furthermore, we feel that for too long our lives and our complaints have been ignored because they lacked visibility.”).

<sup>62</sup> Stephey, *supra* note 40.

<sup>63</sup> Laura McNeal, *Total Recall: The Rise and Fall of Teacher Tenure*, 30 HOFSTRA LAB. & EMPL. L.J. 489, 492 (2013).

<sup>64</sup> Sigrid Bathen, *Tracing the Roots of Teacher Tenure*, CAL. J., May 1999, at 11, <http://www.cde.ca.gov/nr/re/hd/documents/yr1999hd05.pdf> [<http://perma.cc/ZLL7-U9DM>].

<sup>65</sup> Stephey, *supra* note 40.

<sup>66</sup> Teacher tenure also protected all teachers' abilities to engage in free speech and political discourse, as well as provided protection for the teaching of radical or progressive ideas. See Ralph E. Shaffer, Opinion, *History shows why teachers need tenure*, L.A. DAILY NEWS (June 11, 2014), <http://www.dailynews.com/opinion/20140611/history-shows-why-teachers-need-tenure-ralph-shaffer> [<http://perma.cc/DK4J-KVSU>]. However, this article focuses primarily on using teachers' positions as public servants as a method to punish their sexual choices by revoking their employment.

<sup>67</sup> McNeal, *supra* note 63, at 492.

sion of the private home in the twentieth century, teachers are still required to be “exemplars” for their students. Thus, teachers must model perfect behavior since students are expected to follow all instructions and guidance provided by their teachers.<sup>68</sup> Parents, administrators, and politicians require more prudent and moral behavior from teachers because, “[e]xcept for sex, education is the most intimate of human contacts. Other than marriage, it is the most loving and momentous of personal relations.”<sup>69</sup>

Because public schools have their roots in a puritanical conception of Christianity,<sup>70</sup> schools are intended to “inculcate[e] fundamental values necessary to the maintenance of the democratic political system” and “a teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values,”<sup>71</sup> which increases the importance of the role model function of teaching. “Parents who smoked, drank, gambled, lied, and committed adultery demanded that a teacher’s conduct be above their own.”<sup>72</sup>

Thus, teachers’ personal lives are frequently inspected by the greater public, which results in teachers regularly being denied the protections that are given to other citizens.<sup>73</sup> More often than not, this entails scrutiny of the teacher’s sexual life. For the greater public, sexual activity is a constitutionally protected aspect of privacy.<sup>74</sup> Although sex is usually considered a means to some end under the law (such as intimacy or procreation), the privacy of the act and communication about it are still typically protected.<sup>75</sup> This is less true for teachers because, for them, “[i]f suspicion of vice or immorality be once entertained against a teacher, his[/her] influence for good is gone. The parents become distrustful, the pupils contemptuous and the school discipline essential to success is at an end.”<sup>76</sup>

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<sup>68</sup> Jason R. Fulmer, *Dismissing the “Immoral” Teacher for Conduct Outside the Workplace—Do Current Laws Protect the Interests of Both School Authorities and Teachers?*, 31 J.L. & EDUC. 271, 276 (2002).

<sup>69</sup> Lauren E. Fisher, *A Miscarriage of Justice: Pregnancy Discrimination in Sectarian Schools*, 16 WASH. & LEE J. C.R. & SOC. JUST. 529, 557 n.171 (2010).

<sup>70</sup> Shotwell, *supra* note 55, at 48.

<sup>71</sup> *Ambach v. Norwick*, 441 U.S. 68, 77-78 (1979).

<sup>72</sup> DeMitchell, *supra* note 3, at 69 (internal quotation marks omitted).

<sup>73</sup> *Id.* at 72-74.

<sup>74</sup> See Margo Kaplan, *Sex-Positive Law*, 89 N.Y.U. L. REV. 89, 141-42 (2014) (citing *Lawrence v. Texas*, 539 U.S. 558 (2003); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

<sup>75</sup> *Id.* at 141.

<sup>76</sup> *Tingley v. Vaughn*, 17 Ill. App. 347, 351 (Ill. App. Ct. 1885).

D. *Shortcomings of Teacher Tenure*

Because of the heightened expectations for teachers' private behavior, teacher tenure has not been a panacea for all employment discrimination.<sup>77</sup> Under most tenure statutes, teachers can still be fired on the following grounds: incompetence, inadequate performance, immoral conduct, insubordination, willful neglect of duties, unfitness, or any other sufficient cause.<sup>78</sup>

Perhaps unsurprisingly, "immoral conduct" and "unfitness" became the loopholes for continuing sex discrimination under the tenure system. Until the mid-1980s, a female teacher who became pregnant out of wedlock could be considered to have engaged in "immoral conduct" and could still be fired for her "indiscretion."<sup>79</sup> For instance, in 1976, a federal district court in Nebraska held that a teacher who became pregnant out of wedlock could be terminated for being "unfit" since her continued employment could condone out-of-wedlock pregnancies.<sup>80</sup>

Furthermore, teachers' choices about their romantic lives have also come under scrutiny as "immoral." For example, in 1975, a female teacher who lived with her boyfriend in a trailer park was determined to have engaged in "immoral conduct."<sup>81</sup> Because her supervisor warned her that this living arrangement was "grossly immoral" under her contract, the court upheld the teacher's dismissal on the grounds that her behavior was both immoral and insubordinate.<sup>82</sup>

Thus, the protection afforded by teacher tenure is only as strong as the community standards in which the tenure system exists. Though these examples come from a generation ago, this history illuminates how external standards of morality influenced teachers' employment. The next section will examine the shortcomings of other protections given to the rest of the citizenry.

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<sup>77</sup> For a robust discussion of why teacher tenure is necessary to protect against age discrimination and to prevent firing teachers who are paid more, see Mark A. Paige & Perry Zirkel, *Teacher Termination Based on Performance Evaluations: Age and Disability Discrimination?*, 300 EDUC. L. REP. 1 (2014).

<sup>78</sup> McNeal, *supra* note 63, at 491.

<sup>79</sup> Floyd G. Delon, *Is a Teacher's Pregnancy Out of Wedlock Constitutionally Protected Conduct?*, 7 EDUC. L. REP. 9, 11 (1987).

<sup>80</sup> *Brown v. Bathke*, 416 F. Supp. 1194, 1198 (D. Neb. 1976).

<sup>81</sup> *Sullivan v. Meade Cty. Indep. Sch. Dist. No. 101*, 387 F. Supp. 1237, 1247 (D.S.D. 1975).

<sup>82</sup> *Id.* at 1248.

## IV. TEACHING WITH TENURE: LIMITATIONS ON LIBERTIES

Even with tenure, teachers and other public employees have limitations on their civil liberties as a result of their employment. Understanding the ways in which cultural attitudes about sex intersect with our vision of the teaching profession is a useful lens for understanding how these limitations impact teachers' private lives.

Despite developing more permissive attitudes towards sex in recent years, our society is still remarkably preoccupied with the sex lives of teachers, arguably more so than any other profession. When conducting a general internet search with the keywords "teacher sex," an uncountable number of news articles surface.<sup>83</sup> In fact, an entire section of the *Huffington Post* is dedicated to describing "Teacher Sex Scandals," which has four pages worth of teacher sex stories.<sup>84</sup> A Wikipedia page called "Sexual harassment in education in the United States" provides a comprehensive overview of sexual relationships between teachers and students.<sup>85</sup>

The rise of social media has fueled this obsession with teacher sex. Some school districts encourage parents to google their children's teachers and see what they can discover about the teachers' private conduct.<sup>86</sup> Stories about teachers' racy photos on social media have also become popular for online news readership.<sup>87</sup>

Furthermore, this phenomenon is not limited to the twenty-four hour news cycle and sensational journalism techniques. There is robust legal scholarship about the grounds on which a tenured teacher can be fired, and the first and most extensive category of "misconduct" is almost always about sex.<sup>88</sup>

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<sup>83</sup> In a review of 50 news articles about teacher sex conducted by the author, roughly 60% of the articles were about teachers having sex with students and about 20% were about teachers posting some sort of sexual material on social media.

<sup>84</sup> *Teacher Sex Scandals*, HUFFINGTON POST, <http://www.huffingtonpost.com/news/teacher-sex/> [http://perma.cc/8QUS-G2QQ].

<sup>85</sup> *Sexual Harassment in Education in the United States*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Sexual\\_harassment\\_in\\_education\\_in\\_the\\_United\\_States](http://en.wikipedia.org/wiki/Sexual_harassment_in_education_in_the_United_States) [http://perma.cc/F5PL-8VBD].

<sup>86</sup> Shotwell, *supra* note 55, at 38.

<sup>87</sup> See, e.g., *Tiffani Webb, New York High School Counselor, Fired For Modeling Past, Racy Photos Taken 17 Years Ago*, HUFFINGTON POST (Oct. 8, 2012, 2:54 AM), [http://www.huffingtonpost.com/2012/10/08/tiffani-webb-new-york-hig\\_n\\_1947277.html](http://www.huffingtonpost.com/2012/10/08/tiffani-webb-new-york-hig_n_1947277.html) [http://perma.cc/U3NB-AHUT].

<sup>88</sup> See generally John Trebilcock, *Off Campus: School Board Control Over Teacher Misconduct*, 35 TULSA L.J. 445, 455-57 (2000) (discussing first the sexual activity cases that led to teacher dismissals before noting that sexual activity is "not the only area" for which teachers are dismissed); see also Clifford P. Hooker, *Terminating Teachers and Revoking Their Licensure for Conduct Beyond the Schoolhouse Gate*, 96 EDUC. L. REP. 1, 5-9 (1995) (dedicating all of Section III of the article to sexual misconduct before moving on to other grounds of dismissal); Ruth L. Davison, *The Personal Lives and Professional Respon-*

Consequently, this section will discuss how simply being a teacher can lead to intrusions into one's sexual choices because the teacher is an exemplar. This is further complicated by the limitations placed on teachers' right to privacy and freedom of speech.

#### A. *Privacy*

Aside from the lives of teachers, privacy generally occupies a peculiar space in American jurisprudence. Although not written into the Constitution, the right to privacy has been elevated to constitutional status as part of substantive due process doctrine.<sup>89</sup>

Because teachers are expected to be exemplars, they are afforded markedly less privacy than the general public.<sup>90</sup> Courts have recognized that unlimited intrusion into a teacher's personal life would raise constitutional concerns because of the fundamental right to privacy.<sup>91</sup> However, these same courts recognize that a teacher's right to privacy is limited by the possibility of a public injury.<sup>92</sup> The scope of "public injury" has been broadened by the internet. Teachers who post material intended for a limited audience may find themselves facing allegations of public injury.

For example, Frank Lampedusa was fired after he posted an ad on Craigslist soliciting casual sex.<sup>93</sup> He had been a middle school teacher and dean of students for nine years when he was

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*sibilities of P-12 Educators: Off Duty Conduct as Grounds for Adverse Employment Actions*, 171 EDUC. L. REP. 691, 698-706 (2003) (first discussing "sexual misconduct," "pregnancy out of wedlock," and "sexual orientation" before discussing "drug use," "alcohol abuse," or "criminal misconduct.").

<sup>89</sup> See *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision to bear or beget a child.").

<sup>90</sup> Shotwell, *supra* note 55, at 68-70.

<sup>91</sup> See, e.g., *Morrison v. St. Bd. of Educ.*, 461 P.2d 375, 392 (Cal. 1969) ("Conscientious school officials concerned with enforcing such a broad provision might be inclined to probe into the private life of each and every teacher, no matter how exemplary his classroom conduct. Such prying might all too readily lead school officials to search for 'telltale signs' of immorality in violation of the teacher's constitutional rights.").

<sup>92</sup> See *id.* at 391.

<sup>93</sup> *San Diego Unified Sch. Dist. v. Comm'n on Prof. Competence*, 194 Cal. App. 4th 1454, 1458 (Cal. App. Ct. 4th Dist. 2011). The court decision included the whole text of the Craigslist ad, which read:

In shape guy, mac, attractive, 32 waist, swimmer's build, horny as fuck. Looking to suck and swallow masc guys, also looking to get fucked. Uncut and huge shooters jump to head of line. Give my [sic] your loads so I can shoot mine. White, black, Hispanic, European, all good. No fats, fems, queens, Asians. NO BELLIES. Have pics when you email.

*Id.* at 1498.

fired from his position because the posting included graphic photos of Lampedusa's body, including his genitalia and his anus.<sup>94</sup> Though the Commission on Professional Competence<sup>95</sup> found Lampedusa to be a qualified teacher, a California appellate court reversed the decision and upheld his dismissal because of his "moral indifference" and the "unique position of public school teachers."<sup>96</sup>

Lampedusa's case demonstrates the fine line between private electronic conduct, intended for a limited audience, and the public nature of the internet. Despite making a public listing, Lampedusa claimed he did not think anyone from the school or his students would see the ad because it was on the adults-only section of Craigslist, and because he did not list his name or his place of employment; the ad was intended to help him meet someone in his personal life for a sexual relationship.<sup>97</sup> The Commission accepted Lampedusa's version of the story, noting that the ad was "neither praiseworthy nor blameworthy, although [Lampedusa] is now more mindful of how his actions in his private life can inadvertently affect his public life as a teacher."<sup>98</sup>

The California appellate court was not persuaded and upheld his initial termination because of his "unfitness to serve" and his "moral conduct."<sup>99</sup> The court relied heavily on the idea that a teacher should be an exemplar. According to the court, "there are certain professions which impose upon persons attracted to them, responsibilities and limitations on freedom of action which do not exist in regard to other callings. Public officials such as judges, policemen and schoolteachers fall into such a category."<sup>100</sup> The court noted that a parent in the community did actually see the ad, and its pornographic nature "interfered with his ability to serve as role model at the school."<sup>101</sup>

Although Lampedusa believed that he was making private sexual decisions using a public forum, the Court ultimately found that

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<sup>94</sup> *Id.*

<sup>95</sup> In California, a terminated teacher may request review of his termination before the impartial Commission on Professional Competence. The Commission's decision can be appealed to state court for arbitrary and capricious review. *See* CAL. CODE OF CIV. PROC. ANN. § 1094.5 (1945).

<sup>96</sup> *San Diego Unified Sch. Dist.*, 194 Cal. App. 4th at 1466 (internal quotation omitted).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 1466-67.

<sup>100</sup> *Id.* at 1463.

<sup>101</sup> *Id.*

his position as a schoolteacher stripped him of the privacy rights that would be afforded to a person in a different position.<sup>102</sup>

*B. Freedom of Speech*

The Supreme Court has held that the First Amendment protects teachers' private speech, but that the protection is limited by the state's interest in advancing employment goals.<sup>103</sup> Such an inquiry into whether a teacher's private speech is protected ultimately results in "balanc[ing] between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."<sup>104</sup> Accordingly, the Court developed a two-step analysis for conducting this balancing test:

First, does the speech in question touch on a legitimate matter of public concern? If the teacher is speaking on a matter of public concern, then the second question is whether the state's interest in its educational goals or maintaining order and discipline in the schools outweighs the teacher's interest in free expression.<sup>105</sup>

The Court went on to define "public concern" as speech "relating to any matter of political, social, or other concern to the community."<sup>106</sup>

Thus, teachers are given limited protection on speech concerning their sexual expression, since it may not be determined to be a matter of "public concern." Law Professor Eva DuBuisson has written at length about teacher's "out-speech" and how schools have attempted to censor such speech or fire teachers for engaging

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<sup>102</sup> *Id.* at 1466 ("Moreover, the definition of immoral or unprofessional conduct must be considered in conjunction with the unique position of public school teachers, upon whom are imposed responsibilities and limitations of freedom of action which do not exist in regard to other callings.") (internal quotations omitted).

<sup>103</sup> *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) ("The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."). Since the *Pickering* decision, the Court has further rolled back speech protections for public employees by requiring that the speech be made by a citizen in order to be protected, in addition to touching on matter of public concern. *See Garcetti v. Ceballos*, 547 U.S. 410, 422 (2006). However, the ramifications of this decision are outside the scope of this paper.

<sup>104</sup> *Pickering*, 391 U.S. at 568.

<sup>105</sup> Eva DuBuisson, *Teaching from the Closet: Freedom of Expression and Out-Speech by Public School Teachers*, 85 N.C. L. REV. 301, 313 (2006) (citing *Cox v. Dardanelle Pub. Sch. Dist.*, 790 F.2d 668, 672 (8th Cir. 1986)).

<sup>106</sup> *Connick v. Myers*, 461 U.S. 138, 144-46 (1983).

in such speech.<sup>107</sup> Yet, the greater American community has grown more accepting of the LGBTQ community in the new millennium and teachers are less likely to be fired for engaging in such private “out-speech.”<sup>108</sup>

However, teachers are still not immune from being fired for their sexual speech. Although the *Pickering/Connick* analysis is used for teachers’ private speech, teachers’ speech inside the school—whether in the classroom or in an extracurricular setting—is treated differently. The Supreme Court has held that schools are permitted to regulate the content of any speech, so long as the regulation serves a legitimate pedagogical interest.<sup>109</sup> These legitimate pedagogical interests can include “assur[ing] that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school.”<sup>110</sup> Although *Hazelwood* was decided on a student speech issue, courts have subsequently applied this analysis to teachers as well.<sup>111</sup>

For example, Julia Frost was a veteran English teacher when she took a position at Sultana High School in California.<sup>112</sup> Once hired at the new school, Frost informed her colleagues that she is a lesbian, and her co-workers invited her to be a faculty advisor for the school’s Gay/Straight Alliance, which is a student-run organization that aims to end anti-gay sentiment.<sup>113</sup> Some months later during the same school year, the Vice Principal of Discipline informed Frost that she was being investigated for “teaching homosexuality” and determined that she was “teaching gay things.”<sup>114</sup> Despite this investigation, Frost received an exemplary review at the end of the

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<sup>107</sup> DuBuisson, *supra* note 105, at 304 (“[S]chool administrators in some communities still face strong incentives to keep gay teachers in the closet for fear of community reaction.”).

<sup>108</sup> Davison, *supra* note 88, at 703.

<sup>109</sup> See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (“A school need not tolerate student speech that is inconsistent with its “basic educational mission . . . even though the government could not censor similar speech outside the school.”) (internal quotation marks omitted).

<sup>110</sup> *Id.* at 271.

<sup>111</sup> DuBuisson, *supra* note 105, at 336 (citing *Ward v. Hickey*, 996 F.2d 448 (1st Cir. 2005)).

<sup>112</sup> Complaint for Damages, Injunctive and Declaratory Relief ¶ 1, *Frost v. Hesperia Unified Sch. Dist.*, No. CIVDS 1313980 (Super. Ct. Cal. Cty. of San Bernadino Nov. 19, 2013), [http://www.lambdalegal.org/in-court/legal-docs/frost\\_ca\\_20131119\\_complaint](http://www.lambdalegal.org/in-court/legal-docs/frost_ca_20131119_complaint) [<http://perma.cc/D3D3-22CF>].

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* ¶ 4.

school year.<sup>115</sup>

Ultimately, Frost was terminated at the end of her probationary period and was not granted tenure.<sup>116</sup> She claims that she was dismissed because of her sexual orientation.<sup>117</sup> However, the school contends that she was just “not a good fit” with the school and that is why her contract was not “reelected.”<sup>118</sup>

Thus, the school district could terminate a teacher for classroom speech related to being a lesbian. Because schools are permitted to advance the pedagogical interest in not exposing students to “material that may be inappropriate for their level of maturity,”<sup>119</sup> these schools can stop teachers from having conversations with students about sexual orientation because the topic is “too mature.” Claiming that discussing sexual orientation is too mature for children under the age of eighteen is clearly reflective of the attitude that homosexuality is “outside the norm,” “taboo,” or “wrong.” Thus, the current law permits schools to advance their own moral attitudes towards homosexuality.

### C. *Freedom of Association*

Additionally, the freedom of association is an ancillary right to the freedom of speech.<sup>120</sup> Essentially, a portion of this right allows association for the exercise of free speech as a group, when the First Amendment protects the underlying speech.<sup>121</sup> This gets murky because the First Amendment does not protect all speech, and gets even murkier when the speaker is a teacher.

For example, Peter Melzer was fired from his teaching position at Bronx High School of Science in 2000 for being a member of the North American Man/Boy Love Association (“NAMBLA”) after over thirty years of employment with the school.<sup>122</sup> NAMBLA’s mission is to change sexual attitudes towards sexual activity between men and boys, and Melzer had been a member of the organization since 1979.<sup>123</sup> Parents found out about Melzer’s mem-

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<sup>115</sup> *Id.* ¶ 5.

<sup>116</sup> *Id.* ¶ 1.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* ¶ 11.

<sup>119</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988).

<sup>120</sup> *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 617-23 (1984) (describing the right to intimate association and the right to expressive association).

<sup>121</sup> Mark Strauss, *Public Employees’ Freedom of Association: Should Connick v. Myers Speech-Based Public-Concern Rule Apply?*, 61 *FORDHAM L. REV.* 473, 478 (1992) (citing *N.Y. State Club Ass’n v. City of N.Y.*, 487 U.S. 1, 13 (1988)).

<sup>122</sup> *Melzer v. Bd. of Educ.*, 336 F.3d 185, 188-89 (2d Cir. 2003).

<sup>123</sup> *Id.* at 189.

bership in the group, and parents and students alike called for his termination.<sup>124</sup> As his defense, Melzer argued that his termination violated his freedom of speech and freedom of association rights.<sup>125</sup>

The case went up to the Second Circuit and the court applied the *Pickering* test.<sup>126</sup> Although the court determined that Melzer's speech was a matter of public concern, the court ultimately determined that the school board met its burden by showing that the disruption caused by the speech outweighed Melzer's speech and association rights.<sup>127</sup> Melzer's position as a teacher was central to the outcome, and the court stated:

Melzer's position as a school teacher is central to our review. He acts *in loco parentis* for a group of students that includes adolescent boys . . . . At the same time, he advocates changes in the law that would accommodate his professed desire to have sexual relationships with such children. We think it is perfectly reasonable to predict that parents will fear his influence and predilections. Parents so concerned may remove their children from the school, thereby interrupting the children's education, impairing the school's reputation, and impairing educationally desirable interdependency and cooperation among parents, teachers, and administrators.<sup>128</sup>

Despite poetically quoting Alexis de Tocqueville at the outset of the opinion,<sup>129</sup> the court ultimately determined that the parents' outrage could override Melzer's constitutional rights. This illustrates both how Melzer failed to be an exemplar and how his sexual identity ultimately led to his termination.

Considered together, teachers' limited privacy and speech rights expose how demanding the role of exemplar actually is. The law specifically separates out teachers and treats them differently than the rest of the public. Even compared to other public employees, the burden of being an exemplar influences how teachers' privacy and speech are analyzed by the courts. For this reason, tenure becomes exceedingly important and explains why teachers are given heightened job security.

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<sup>124</sup> *Id.* at 191.

<sup>125</sup> *Id.* at 189.

<sup>126</sup> *Id.* at 192-95.

<sup>127</sup> *Id.* at 198.

<sup>128</sup> *Id.* at 199 (internal citations omitted).

<sup>129</sup> *Id.* at 188 ("Among the liberties an American citizen enjoys is the right to associate with whomever he or she chooses for whatever purpose. That right, Alexis de Tocqueville observed in discussing it 168 years ago in his classic book is 'almost as inalienable in its nature as [the right of] individual freedom.'").

## V. TEACHING WITHOUT TENURE: INVENTORY OF INTRUSIONS

Importantly, not all teachers are protected by tenure. Though these teachers are still required to be exemplars, their only legal protections come from federal and state employment statutes. Those who advocate for ending K-12 tenure claim that tenure's protections are now provided by federal civil rights legislation. Specifically, if schools move to an "at-will" system<sup>130</sup> of employment, Title VII of the Civil Rights Act of 1964, the Pregnancy Discrimination Act, or the Family Medical Leave Act are supposed to protect teachers from unwarranted intrusions into their personal lives which form the basis for termination.

As such, this section will provide an inventory of examples in which teachers were fired for their sexual conduct. Schools that operate without teacher tenure or teacher unions—namely private schools, parochial schools, and charter schools—illustrate the ways in which teachers' sex lives are implicated in termination decisions.<sup>131</sup> The section will then address the legality of these termination decisions under federal employment statutes.

### A. *Sexual Orientation*

As described below, teachers can be terminated for their sexual identity, rather than any specific sexual act. However, sometimes behavior can bleed into the notion of identity. For each example below, however, the teacher's private sexual orientation became public grounds for termination.

#### 1. Sexual Identity

Nichole Williams claims she was fired from Life School Waxahachie, a charter high school in Texas where she was a varsity basketball coach and ninth-grade geography teacher, for being a lesbian.<sup>132</sup> The school, however, denies that she was fired because of her sexual orientation, and instead claims that the termination decision was made after an incident that occurred on October 13,

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<sup>130</sup> At-will employment is practiced by most employers and allows either the employer or employee to terminate the employment relationship at any time. See Fineman, *supra* note 42, at 57-58.

<sup>131</sup> Although some of the examples come from Catholic schools that have particular exemptions because of the religious affiliation, the sexual undercurrent of the termination decision still illustrates the problem of being obsessed with teacher sex.

<sup>132</sup> John Wright, *Charter school won't reconsider coach's firing*, DALLAS VOICE (Nov. 11, 2011), <http://www.dallasvoice.com/charter-school-won%E2%80%99t-reconsider-coach%E2%80%99s-firing-1094828.html> [<http://perma.cc/9KYH-7LVT>].

2011.<sup>133</sup>

The “incident” occurred when Williams let some of her students stay in her office during a conference period.<sup>134</sup> Because these students were supposed to be in a scheduled class at that time, Williams expected to get into trouble for the minor incident but did not expect to be fired because of it. Thus, she believes that her termination for that incident was a pretext for sexual orientation discrimination.<sup>135</sup>

As often occurs in employment discrimination cases,<sup>136</sup> Williams and Life School Waxahachie settled before the case went to trial.<sup>137</sup> Still, this case illustrates both how intolerance for a teacher’s sexual orientation can cast a shadow over a termination decision and how a possible pretext for that discrimination can be formed.

## 2. Same-Sex Marriage

Michael Griffin was fired from Holy Ghost Preparatory School in Philadelphia, Pennsylvania, when he and his male partner decided to get married.<sup>138</sup> Griffin taught at the school for twelve years, and the school community was aware that he identified as a gay man for the entirety of his employment.<sup>139</sup> He frequently attended school events with his partner and did not attempt to hide his sexuality, despite being employed at a Catholic school.<sup>140</sup>

On December 6, 2013, the school principal terminated Griffin’s contract and explicitly stated that Griffin and his partner’s marriage license application was the grounds for the termination.<sup>141</sup> The Archdiocese issued a public statement that the school

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<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> Christine Caulfield, *To Settle Or Not To Settle: Lawyer’s Share Their Tips*, LAW 360 (July 10, 2009), [https://www.hunton.com/files/News/236c18dd-fcb6-4486-a348-e96597a7062a/Presentation/NewsAttachment/4ef14289-8ad8-4aa1-b2e6-9af18a76a3a8/To\\_Settle\\_Or\\_Not\\_To\\_Settle\\_Law360.pdf](https://www.hunton.com/files/News/236c18dd-fcb6-4486-a348-e96597a7062a/Presentation/NewsAttachment/4ef14289-8ad8-4aa1-b2e6-9af18a76a3a8/To_Settle_Or_Not_To_Settle_Law360.pdf) [<https://perma.cc/U2LW-ABD8>].

<sup>137</sup> John Wright, *Coach settles with Waxahachie school that allegedly fired her for being gay*, DALLAS VOICE (Jan. 12, 2012), <http://www.dallasvoice.com/breaking-coach-settles-waxahachie-charter-school-allegedly-fired-gay-1098798.html> [<http://perma.cc/G6JY-LTHV>].

<sup>138</sup> David Gibson, *Students, alumni rally around fired gay teacher at Catholic school*, WASH. POST (Dec. 13, 2013), [http://www.washingtonpost.com/national/religion/students-alumni-rally-around-fired-gay-teacher-at-catholic-school/2013/12/13/69f31258-643f-11e3-af0d-4bb80d704888\\_story.html](http://www.washingtonpost.com/national/religion/students-alumni-rally-around-fired-gay-teacher-at-catholic-school/2013/12/13/69f31258-643f-11e3-af0d-4bb80d704888_story.html) [<http://perma.cc/95QK-9R49>].

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

had “no choice” but to terminate Griffin because the school’s teaching contract “requires all faculty and staff to follow the teachings of the Church as a condition of their employment . . . .”<sup>142</sup> The Archdiocese did not explain why the license to engage in a same-sex marriage was the tipping point for terminating Griffin’s contract, rather than Griffin’s identity as gay man, which also goes against the church’s teachings.

The community response to Griffin’s termination amounted to outrage.<sup>143</sup> Students, alumni, and allies started a change.org petition, which gathered more than 4,000 signatures in one week.<sup>144</sup> However, despite the public outcry, the school refused to reinstate Griffin.<sup>145</sup> Hence, this case demonstrates the ways in which the exercise of a fundamental right<sup>146</sup> can undercut otherwise secure employment because a marriage will publicly broadcast a teacher’s sexual identity.

### 3. Imputed Sexual Identity

Tim Torkildson was an education blogger when he was fired from his position as a teacher at Nomen Global Language Center in Provo, Utah, in July 2014 for a personal blog post that he wrote.<sup>147</sup> In this blog, Torkildson correctly defined “homophone” as “two words that sound alike but are spelled differently.”<sup>148</sup> The owner of the Nomen school subsequently fired Torkildson because he believed readers would associate the word “homophone” with “homosexuality,” and feared that the readers would associate the school with a “gay agenda.”<sup>149</sup>

Thus, Torkildson need not even identify as gay or engage in any sexual conduct to be terminated on the basis of sexual orientation. The Nomen school’s intolerance for homosexuality was sufficient reason for the school to fire Torkildson.

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<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> Reinstatement Michael Griffin, CHANGE.ORG, <https://www.change.org/p/jeffery-danilak-reinstate-michael-griffin> [<https://perma.cc/LG4J-ZVY8>].

<sup>145</sup> *Id.*

<sup>146</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015) (“The Court, in this decision, holds same-sex couples may exercise the fundamental right to marry in all States.”).

<sup>147</sup> Zach Schonfeld, *Education Blogger Fired for Writing About Homophones and Confusing Homophobes*, NEWSWEEK (Jul. 31, 2014), <http://www.newsweek.com/education-blogger-fired-writing-about-homophones-and-confusing-homophobes-262404>.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

#### 4. Title VII & Sexual Orientation

Title VII of the Civil Rights Act of 1964 makes it illegal for an employer to discriminate against employees based on their sex in hiring, promotion, or termination decisions.<sup>150</sup> Sexual orientation is not its own protected class, although it may be covered by the term “sex” in the statute in certain instances.<sup>151</sup> The Court has recognized that an employer may not discriminate against employees based on “‘stereotyped’ impressions about the characteristics of males or females.”<sup>152</sup> Yet, within the concept, legal scholars are divided over how to advance an equality agenda. Some advocate for a similarity approach, in which men and women must be treated equally only with respect to the areas where the sexes are similar.<sup>153</sup> Others argue that sex-based discrimination exists not only when the sexes are equal but treated differently, but rather any time that a rule or practice “disproportionately burdens one sex because of sex.”<sup>154</sup>

However, to make a claim for disparate treatment under Title VII for sexual orientation, the claim must be shown to be about “sex stereotypes” about how a “real” man or woman would behave.<sup>155</sup> Thus, a person who is experiencing discrimination based on sexual orientation must first determine what the cultural sex stereotype is and the ways in which his or her behavior is at odds with the stereotype.

To make out a claim of disparate treatment<sup>156</sup> for any type of sex-based discrimination, the initial burden rests on the plaintiff to show that there was intentional discrimination based on sex under the *McDonnell Douglas* burden-shifting framework.<sup>157</sup> From there, the burden shifts to the defendant-employer to show that there was a legitimate, non-discriminatory purpose for the plaintiff being treated differently.<sup>158</sup> If successful, the burden shifts back to the

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<sup>150</sup> 42 U.S.C. § 2000e-2 (2015).

<sup>151</sup> See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Cf. *Baldwin v. Dep’t of Transportation*, EEOC Appeal No. 0120133080, 2015 WL 4397641 (July 16, 2015).

<sup>152</sup> *L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707 (1978).

<sup>153</sup> See, e.g., Deborah M. Weiss, *All Work Cultures Discriminate*, 24 HASTINGS WOMEN’S L.J. 247, 248 (2013) (citing Carol Gilligan, *Getting Civilized*, 63 FORDHAM L. REV. 17, 20-21 (1994)).

<sup>154</sup> CATHERINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 225 (1979).

<sup>155</sup> *Id.* at 251.

<sup>156</sup> Sex-discrimination cases can also be brought under a “disparate impact” theory but such suits are outside the scope of this paper.

<sup>157</sup> See generally *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

<sup>158</sup> *Id.*

plaintiff to show that the employer's stated reasons were pretext for the discrimination.<sup>159</sup>

Thus, without tenure protection, a school may fire an at-will teacher for a discriminatory purpose and claim that the non-discriminatory purpose was the teacher's ineffectiveness. Then, the burden will be on the employee to show that the "ineffective" label was pretext for some other form of discrimination. For instance, Nichole Williams believed the charter school's reason for her termination was pretext for sex-discrimination based on sexual orientation, meaning Williams would have to present evidence of the intentional discrimination to win her case. Finding such evidence is typically very difficult, and public school teachers would be exposed to these difficulties without due process and with limited privacy and free speech protections.

Similarly, even if the teacher-plaintiff can assert direct evidence of discrimination, the failure of federal courts to recognize sexual orientation discrimination as protected under Title VII means that the teacher will need to tie the discrimination to the statutorily-protected class of sex on a gender stereotype theory. Title VII protections are limited by the gender-stereotyping theory for sexual orientation.<sup>160</sup> As such, Michael Griffith and Tim Torkildson would likely be unable to invoke Title VII protections for their terminations because they might not be able to show how their terminations were caused by their failure to conform to gender stereotypes. Perhaps Griffith could argue that marrying a man is a failure to comply with the gender-stereotype of a different-sex marriage, but courts have been reluctant to find such a cause of action for fear of opening up the flood gates to sexual orientation as a protected class in and of itself.<sup>161</sup>

### B. Gender Identity

As attitudes about sex have become more relaxed, cultural understanding of gender identity has increased. However, transgender teachers still face difficulties because of the worries about how students will respond to a teacher's gender expression.

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<sup>159</sup> *Id.*

<sup>160</sup> Zachary A. Kramer, Note, *The Ultimate Gender Stereotype: Equalizing Gender-Conforming and Gender-Nonconforming Homosexuals under Title VII*, 2004 U. ILL. L. REV. 465 (2004).

<sup>161</sup> See, e.g., *Dawson v. Bumble & Bumble*, 398 F.3d 211, 219 (2d Cir. 2005).

## 1. Gender Identity Termination

Mark Krolikowski taught at St. Francis Preparatory School in Queens, New York for over thirty-two years before he was fired for his<sup>162</sup> gender identity.<sup>163</sup> Some years before his termination in January 2013, Krolikowski began to grow his hair out, wear nail polish, and dress in more feminine clothing.<sup>164</sup> Although the students noticed Krolikowski's change in appearance, they claimed to not feel affected by it.<sup>165</sup>

The school, however, did not react positively. During the 2011-2012 school year evaluations, Krolikowski was instructed to "tone down his appearance."<sup>166</sup> Bishop Leonard Conway told Krolikowski that he would not be able to attend school functions if he dressed in women's clothing.<sup>167</sup> Bishop Conway went on to say that Krolikowski's gender identity was "worse than [being] gay."<sup>168</sup>

Krolikowski was ultimately terminated for insubordination for failing to dress appropriately.<sup>169</sup> Much like Michael Griffin's termination for entering into a same-sex marriage, Krolikowski's students, alumni, and allies were outraged by his termination and started a change.org petition.<sup>170</sup> However, the school refused to re-hire Krolikowski, and he took the case to court.<sup>171</sup>

Krolikowski's case demonstrates how teachers who are gender non-conforming can be subject to discriminatory employment

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<sup>162</sup> Krolikowski has confirmed in media stories that he prefers the continued use of male pronouns, and asks that his students call him "Mr. K." Michelle Garcia, *Transgender Teacher Fired From Catholic School*, ADVOCATE (Jan. 8, 2013, 7:19 PM), <http://www.advocate.com/politics/religion/2013/01/08/transgender-teacher-fired-catholic-school> [<http://perma.cc/6ELD-R49C>].

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> Miriam Lazewatsky, *Queens Teacher Fired for Being Transgender*, GLAAD.ORG BLOG (Jan. 31, 2013), <http://www.glaad.org/blog/queens-teacher-fired-being-transgender> [<http://perma.cc/D7AX-74PQ>].

<sup>167</sup> *Id.*

<sup>168</sup> Russell Goldman, *Transgender Teacher Sues Catholic School Over Firing*, ABC NEWS (Jan. 7, 2013), <http://abcnews.go.com/US/transgender-teacher-sues-catholic-school-firing/story?id=18153937>.

<sup>169</sup> *Id.*

<sup>170</sup> *St. Francis Preparatory High School: Formally Apologize to Mark (Marla) Krolikowski for Sexual Discrimination*, CHANGE.ORG, <https://www.change.org/p/st-francis-preparatory-high-school-formally-apologize-to-mark-marla-krolikowski-for-sexual-discrimination> [<https://perma.cc/FWJ4-ZLBB>].

<sup>171</sup> Sarah Wallace, *Victory for Transgender Former Teacher*, EYEWITNESS NEWS (Sep. 9, 2013, 6:18 PM), <http://abc7ny.com/archive/9241977/> [<http://perma.cc/49ZW-KTQR>].

practices because of the sometimes-public nature of their gender expression.

## 2. Gender Identity & Title VII

Like sexual orientation, Title VII does not address gender identity as its own protected class, but it, too, is covered by the term “sex” in the statute.<sup>172</sup> “Title VII’s prohibition on sex discrimination proscribes gender discrimination, and not just discrimination on the basis of biological sex,” such that “[w]hen an employer discriminates against someone because the person is transgender, the employer has engaged in disparate treatment ‘related to the sex of the victim’ in violation of Title VII.”<sup>173</sup> Attorney General Eric Holder announced on December 18, 2014 that the Department of Justice will officially extend Title VII protection to those discriminated against because of their gender identity.<sup>174</sup>

Still, Mark Krolkowski would likely not be successful in bringing his suit to the Equal Employment Opportunity Commission (“EEOC”) because of the ministerial exception to Title VII. The Supreme Court has recognized a ministerial exception to Title VII that allows religious institutions to discriminate against ministerial employees who do not follow the institution’s religious requirements, as a means to protect the institution’s First Amendment freedoms.<sup>175</sup> For example, while a religious school is not permitted to fire a teacher for being pregnant, that school is permitted to fire a teacher for having a child out of wedlock or for using assistive reproductive technologies when that teacher is a ministerial employee.<sup>176</sup>

[C]ourts have made clear that if the school’s purported ‘discrimination’ is based on a policy of preventing non-marital sexual activity which emanates from the religious and moral precepts of the school, and if that policy is applied equally to its male and female employees, then the school has not discrimi-

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<sup>172</sup> See, e.g., *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004).

<sup>173</sup> *Macy v. Holder*, EEOC Appeal No. 0120120821 (Apr. 20, 2012), <http://www.hivlawandpolicy.org/sites/www.hivlawandpolicy.org/files/Macy%20v.%20Holder.pdf> [<http://perma.cc/P93K-J289>].

<sup>174</sup> *Attorney General Holder Directs Department to Include Gender Identity Under Sex Discrimination Employment Claims*, DEP’T OF JUSTICE (Dec. 18, 2014), <http://www.justice.gov/opa/pr/attorney-general-holder-directs-department-include-gender-identity-under-sex-discrimination> [<http://perma.cc/93WH-Y37H>].

<sup>175</sup> *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S. Ct. 694, 709 (2012) (“The exception instead ensures that the authority to select and control who will minister to the faithful—a matter ‘strictly ecclesiastical’—is the church’s alone.”) (quoting *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 119 (1952)).

<sup>176</sup> *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651, 658 (6th Cir. 2000).

nated based on pregnancy in violation of Title VII.<sup>177</sup>

Although this exception would not apply to public schools, the ministerial exception does demonstrate that Title VII is not impermeable when another legal right is at stake. Thus, it seems possible that a similar exception could be carved out for teachers. Since teachers are expected to adhere to a morally irreprehensible level of conduct as exemplars, they could also have their permissible sexual conduct further limited for the sake of the school's pedagogical interests.

### C. *Pregnancy*

Pregnancy and teaching have a long and complicated history. Pregnancy by its very nature is not private, even if a pregnant woman has every intention to keep her sex life private.<sup>178</sup> Although pregnancy-related rules often purport to be gender-neutral, the underlying nature of pregnancy typically means only women's bodies will betray their privacy.<sup>179</sup> Female teachers will ultimately bear the brunt of any policies against premarital sex, and these cases demonstrate how pregnancy can be treated today.

#### 1. General Attitudes Towards Pregnancy

Loyda Suero and Leslie Cruz claimed that they were fired from South Bronx Charter School for International Cultures in July 2012 because they were pregnant.<sup>180</sup> Though they never filed a lawsuit, the two teachers told the media that their principal stated that they must either plan to get pregnant in the summer or take a month of maternity leave.<sup>181</sup> Richard Riley, a United Federation of Teachers representative, stated that because the teachers worked at a charter school without a union or tenure, Suero and Cruz could be terminated without cause.<sup>182</sup>

This case illustrates the broader attitude towards pregnancy at schools. Teachers are often told to time their pregnancies so that

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<sup>177</sup> *Id.*

<sup>178</sup> Fisher, *supra* note 69, at 557 n.173.

<sup>179</sup> *Id.*

<sup>180</sup> Candida Portuguese, *Maestras Alegan Que Fueron Despedidas por Embarazo*, EL DIARIO (July 5, 2012), <http://www.eldiariony.com/2012/07/05/maestras-alegan-que-fueron-despedidas-por-embarazo/> [<http://perma.cc/WDW9-Z2C5>], translated in *Charter School Teachers Say They Were Fired for Getting Pregnant*, VOICES OF NY (July 9, 2012), <http://www.voicesofny.org/2012/07/charter-school-teachers-say-they-were-fired-for-getting-pregnant/> [<http://perma.cc/R93-CQ77>].

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* However, given the UFT's relationship with charter schools, this statement may be biased.

they will give birth over the summer.<sup>183</sup> Schools are typically reluctant to get long-term substitute teachers and will push their teachers to plan their sexual lives around the school calendar.

## 2. Out-of-Wedlock Pregnancy & Assistive Reproductive Technology

In January 2014, Shaela Evenson was fired from her position as a middle school teacher at a Catholic school in Montana for becoming pregnant out of wedlock.<sup>184</sup> Despite not being Catholic herself, the school terminated her because her pregnancy by artificial insemination went against “the moral and religious teachings of the Roman Catholic Church” and violated her employment contract.<sup>185</sup> Although Evenson’s principal initially expressed happiness for Evenson’s pregnancy, the Diocese stepped in to fire Evenson after receiving an anonymous letter about her out-of-wedlock pregnancy.<sup>186</sup> The EEOC issued Evenson a right to sue letter in July 2014, and she has since filed a lawsuit in federal court.<sup>187</sup> However, Evenson’s lawsuit is currently on hold, as the Diocese is now in bankruptcy proceedings.<sup>188</sup>

Thus, this case reflects how pregnancy can betray a woman’s desire to keep her sexual life private. Although the school may not have intended to intrude into her sexual life, the school was still able to form a judgment about Evenson’s life because of the public nature of pregnancy.

## 3. Pregnancy Discrimination Act & Family Medical Leave Act

Pregnancy discrimination is illegal under Title VII of the Civil Rights Act of 1964 as amended by the Pregnancy Discrimination Act.<sup>189</sup> Additionally, the Family Medical Leave Act guarantees em-

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<sup>183</sup> June Kronholz, *No Substitute for a Teacher*, 13 EDUC. NEXT 2, 17 (2013), [http://educationnext.org/files/ednext\\_XIII\\_2\\_kronholz.pdf](http://educationnext.org/files/ednext_XIII_2_kronholz.pdf) [<http://perma.cc/VY7R-WPQE>].

<sup>184</sup> Complaint and Demand for Jury Trial ¶ 22, *Evenson v. Butte Central Catholic Schs.*, No.14-cv-00055-DWM-JCL (D. Mont. Aug. 21, 2014).

<sup>185</sup> *Id.* ¶ 22.

<sup>186</sup> *Id.* ¶¶ 17, 19.

<sup>187</sup> *Id.* ¶ 6.

<sup>188</sup> Angela Brandt, *Former Butte Central teacher’s lawsuit on hold pending diocese bankruptcy hearings*, MONT. STANDARD (Nov. 8, 2014, 3:30 AM), [http://mtstandard.com/news/local/former-butte-central-teacher-s-lsuit-on-hold-pending-diocese/article\\_898c03c1-62d0-50f8-9dbc-304f15cf9c3b.html](http://mtstandard.com/news/local/former-butte-central-teacher-s-lsuit-on-hold-pending-diocese/article_898c03c1-62d0-50f8-9dbc-304f15cf9c3b.html) [<http://perma.cc/C8T5-8A5L>].

<sup>189</sup> 42 U.S.C. § 2000e(k) (2015) (“The terms ‘because of sex’ or ‘on the basis of sex’ include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related

ployees “a total of 12 workweeks of leave during any 12-month period for one or more of the following: (A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.”<sup>190</sup>

Importantly, though, even if an employer may not be permitted to terminate an employee on the basis of pregnancy, this does not mean that the employers won’t still attempt to do so, as was the case for Loyda Suero and Leslie Cruz. Pregnancy discrimination suits have nearly doubled from 1997 through 2011.<sup>191</sup>

Given that there are approximately 3.3 million public school teachers in the United States and roughly 1 million of those teachers are women of childbearing age,<sup>192</sup> eliminating teacher tenure altogether could expose nearly .3% of the American population<sup>193</sup> to erroneous termination claims from which they would otherwise be protected.

Furthermore, the relationship between assistive reproductive technology (“ART”) and pregnancy discrimination is still tenuous. The Pregnancy Discrimination Act does not explicitly prevent employers from discriminating against an employee for using ARTs because the Act was intended to protect the status of being pregnant.<sup>194</sup> Thus, Shelia Evenson will likely have to argue that her termination was gender discrimination, rather than pregnancy discrimination, because the termination was not about the status of being pregnant. Courts may not be persuaded by such an argument since people in both different- and same-sex couples rely on ARTs to create families.

Title VII, the Pregnancy Discrimination Act, and the Family Medical Leave Act protect the general public from a large swath of discriminatory conduct. However, given teachers’ limited constitu-

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medical conditions shall be treated the same for all employment-related purposes . . .”).

<sup>190</sup> 29 U.S.C. § 2612 (2015).

<sup>191</sup> *Pregnancy Discrimination Charges EEOC & FEPAs Combined: FY 1997 - FY 2011*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <http://www.eeoc.gov/eeoc/statistics/enforcement/pregnancy.cfm> [<http://perma.cc/YLR4-E7UF>].

<sup>192</sup> *Fast Facts: Teacher Trends*, NAT’L CTR. FOR EDUC. STATS., U.S. DEP’T OF EDUC., <http://nces.ed.gov/fastfacts/display.asp?id=28> [<http://perma.cc/CN9S-3BK9>].

<sup>193</sup> *Annual Estimates of the Resident Population by Single Year of Age and Sex for the United States: April 1, 2010 to July 1, 2014*, U.S. CENSUS BUREAU (June 2015), <http://factfinder.census.gov/bkmk/table/1.0/en/PEP/2014/PEPSYASEX> [<http://perma.cc/62GR-2FLK>].

<sup>194</sup> JESSICA ARONS & ELIZABETH CHEN, CTR. FOR AM. PROGRESS, *FUTURE CHOICES II: AN UPDATE ON THE LEGAL, STATUTORY, AND POLICY LANDSCAPE OF ASSISTED REPRODUCTIVE TECHNOLOGIES* (Mar. 2013), <https://www.americanprogress.org/wp-content/uploads/2013/03/ChenAssistedReproduction.pdf> [<https://perma.cc/M4XS-KRX9>].

tional protections, this federal civil rights legislation will likely be insufficient to cover the gaps in privacy and speech rights. Taken together, these examples of firing teachers for their sexual orientation, their pregnancy status, or their gender identity provide an important context for understanding teacher tenure. While all of the American workforce can be subjected to such discriminatory terminations, teachers are precariously more vulnerable to such systemic failings because of the bizarre nature of their position in society. Thus, the next section will describe the current battle against tenure.

#### VI. RESPONSE TO THE FIGHT AGAINST INEFFECTIVE TEACHERS & TENURE

Undoubtedly, teacher tenure is not without problems, and this paper recognizes that any potential resolution will require balancing two social justice goals—improving educational access and protecting teachers. On the one hand, the  *Davids*  and  *Wright*  complaints correctly assert that there are students who are assigned to ineffective teachers. Specifically, the  *Wright*  plaintiffs are Kaylah and Kyler Wright. They are twin sisters, both of whom entered kindergarten at a Brooklyn public school in the fall of 2013.<sup>195</sup> According to the complaint, Kyler was assigned to an “ineffective” kindergarten teacher, which has resulted in her falling several reading levels behind her sister.<sup>196</sup> Kyler’s story is upsetting, as every child should be provided meaningful opportunities to reach their full potential.

Critics of teacher tenure are quick to point out stories like Kyler’s as a means to prove that tenure should be abolished. They claim that, under the tenure system, removal proceedings are so costly and so often unsuccessful, that schools rarely pursue them to remove ineffective teachers.<sup>197</sup> Thus, school administrators instead transfer ineffective teachers to different districts or accept that the ineffective teachers will remain on the payroll.<sup>198</sup>

However, stories like Kyler’s raise more question than can be resolved with the patent “end teacher tenure” response. Such an answer fails to account for how difficult it is to determine which teachers are “ineffective.” Currently, no objective system exists for

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<sup>195</sup> *Wright* complaint, *supra* note 17, ¶ 4.

<sup>196</sup> *Id.* ¶ 3.

<sup>197</sup> Nicholas Dagostino, *Giving the School Bully a Timeout: Protecting Urban Schools Students from Teacher Unions*, 63 ALA. L. REV. 177, 194-95 (2011).

<sup>198</sup> *Id.*

determining which teachers are “ineffective”—evaluative systems typically involve measuring student outcomes and some type of observation by an administrator.<sup>199</sup> However, the manner in which student outcomes should be measured is a highly contested topic,<sup>200</sup> and the observational model allows for school administrators to use subjective beliefs when evaluating teachers.

Typically, Ed Reform proponents claim that student test scores should be the primary determinant in whether a teacher receives tenure, thus increasing the evaluation’s objectivity.<sup>201</sup> However, educational testing experts consistently agree that testing is an unreliable tool for predicting teacher effectiveness.<sup>202</sup> “[Testing results] will not simply reward or penalize teachers according to how well or how poorly they teach. They will also reward or penalize teachers according to which students they teach and which schools they teach in.”<sup>203</sup> For instance, a story like Kyler’s is upsetting, but it indicates nothing about the outcomes of the other students in the classroom. By using one student’s reading level to determine that a teacher is “ineffective,” the complaint provides only limited insight into what type of teacher she had. As such, even the complaint is unable to objectively set forth a way to determine that a teacher is “ineffective.”

Such a discussion raises the causation and redressability issues presented by *Dauids*, *Wright*, and *Vergara*. While the plaintiffs pleaded statistical evidence that a student’s teacher has the most impact on that student’s educational outcomes, the complaint only described “ineffective” teachers in a broad sense.<sup>204</sup> There were no facts pleaded that the plaintiffs’ actual teachers were “ineffective.” The complaints themselves were focused on the broad problems with education,<sup>205</sup> rather than the harm caused to the actual litigants. Furthermore, the complaint did not address how eliminating teacher tenure would redress these students’ problems—even if “ineffective” teachers can be terminated more easily, they will not necessarily be replaced by “effective” teachers.

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<sup>199</sup> Jim Hull, *Trends in Teacher Evaluation: At a Glance*, CTR. FOR PUB. EDUC. (Oct. 2013), <http://www.centerforpubliceducation.org/teacherevalreview> [<http://perma.cc/GSX2-7TWA>].

<sup>200</sup> *Id.*

<sup>201</sup> Dagostino, *supra* note 197, at 194.

<sup>202</sup> See EDWARD H. HAERTEL, RELIABILITY AND VALIDITY OF INFERENCES ABOUT TEACHERS BASED ON STUDENT TEST SCORES (Sept. 2013), [http://www.ets.org/s/pdf/23497\\_Angoff%20Report-web.pdf](http://www.ets.org/s/pdf/23497_Angoff%20Report-web.pdf) [<http://perma.cc/Z43U-JCHZ>].

<sup>203</sup> *Id.* at 13.

<sup>204</sup> *Wright* complaint, *supra* note 17, ¶ 4.

<sup>205</sup> *Id.*

Furthermore, blaming the teacher for being “ineffective” is only part of the problem. The majority of public schools fail to provide their teachers with any meaningful professional development.<sup>206</sup> Most teachers receive infrequent professional development training, and the trainings that are provided are generally presented in an ineffective workshop style.<sup>207</sup> Thus, teachers are blamed for being ineffective, but their schools are failing to support them.

Thus, on the other side of the social justice agenda, teachers also need protection. Of course, attracting and maintaining highly effective teachers is an important goal. Yet, unilaterally eliminating or scaling back teacher tenure is not guaranteed to advance this goal. Much more robust evaluative systems and teacher support programs need to be developed before eliminating teacher tenure will actually result in “ineffective” teachers being dismissed.

In the absence of such systems, teachers may be labeled as “ineffective” when an administrator, parent, or community member is unhappy with the teacher’s private sexual choices, the same way teachers were labeled as “unfit” just a generation ago.<sup>208</sup> Because of the American public’s obsession with teachers’ sex lives, judicially reforming teacher tenure could flood the legal system with employment discrimination cases that otherwise could have been prevented by the tenure system. As described throughout, teachers occupy a peculiar legal space. In the absence of tenure, teachers will continue to be exemplars but will be afforded limited privacy, freedom of association, and freedom of speech rights. Removing teacher tenure may expose teachers to additional discrimination that the rest of the public does not experience.

## VII. CONCLUSION & RECOMMENDATIONS

Eliminating tenure may expose our teachers to the whims and morals of the loudest opponents. Instead of weeding out truly ineffective teachers, ending tenure may allow employing school districts to use the “ineffective” label as a pretext for terminating teachers whose sexual choices are questioned by their administration.

Ensuring that the nation’s public school teachers are effective

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<sup>206</sup> Allison Gulamhussein, *Teaching the Teachers: At a Glance*, CTR. FOR PUB. EDUC. (Sept. 2013), <http://www.centerforpubliceducation.org/teachingtheteachers> [<http://perma.cc/G4QF-TSRJ>].

<sup>207</sup> *Id.*

<sup>208</sup> *See supra* Part III, Section D.

is an important goal. However, true effectiveness will not be achieved through ending tenure and wrapping the education reform efforts around an abundance of anti-teacher rhetoric. Instead, supporting and developing our teaching workforce must be the means to achieve true reform. As such, here are this paper's recommendations for reform:

**1) Recognize Teacher Tenure as a Political Question.** Given the many competing policy goals of education reform and teacher tenure, this issue is better left addressed by the political process. Tenure needs to be refined by the public at large, not obliterated by a judge.

**2) Keep Tenure in Place Until "Ineffectiveness" Can Be Objectively Observed.** The cases outlined above illustrate how reactions to teachers' private sexual lives overestimate whether the teachers are actually unfit to teach. Similarly, "ineffective" ratings can be swayed or influenced by teachers' private sexual conduct. Thus, until a purely objective rating system exists, teachers should continue to have tenure protections.

**3) Invest in Professional Development.** Every school district has money earmarked for professional development programs, but, in many school districts, this money is never spent and is recycled back into the district at the end of the school year. School districts need to commit to spending this money and offering robust training programs to their teachers. Not only is it inefficient to not offer such programs, it is also unfair to label teachers as ineffective when the school districts fail to offer them support.

**4) Create a Culture for Professional Development.** Spending money on professional development is only part of the problem. Schoolteachers are faced with demanding schedules, but are often told their jobs are easy or minimally challenging. Thus, changing the effectiveness of teachers is not about firing practices, but rather creating school cultures in which teachers are expected to grow professionally and given the support they need to become excellent educators. This is easier said than done, but there are many bright spot schools throughout the nation that are doing just this.

**IS IT WORTHLESS TO BE “WORTH LESS”?  
ENDING THE EXEMPTION OF PEOPLE WITH A  
DISABILITY FROM THE FEDERAL MINIMUM  
WAGE UNDER THE FAIR LABOR  
STANDARDS ACT**

*Alanna Sakovits*†

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“I am opposing a social order in which it is possible for one man who does absolutely nothing that is useful to amass a fortune of hundreds of millions of dollars, while millions of men and women who work all the days of their lives secure barely enough for a wretched existence.”

—Eugene V. Debs<sup>1</sup>

## I. INTRODUCTION

Even the wealthiest among us would be staunchly opposed to the idea that their income be commensurate with their productivity. Warren Buffet, who is estimated to earn \$1.54 million per hour,<sup>2</sup> would certainly lose out if his income were determined by his literal physical output, without regard for any additional factors. It would be antithetical to common sense to, in the name of social welfare, subject *only* some of the most vulnerable members of society to such a requirement. Yet, in allowing people with a disability to be paid below the federal minimum wage, section 14(c) of the Fair Labor Standards Act (“FLSA”) does just this.<sup>3</sup>

Enacted in 1938 by President Franklin Delano Roosevelt, the FLSA created fundamental and critical workers’ rights as basic as the guarantee of a minimum wage,<sup>4</sup> overtime pay,<sup>5</sup> and child labor protections.<sup>6</sup> Section 14(c) of the FLSA, a seemingly innocuous provision, purports to “prevent curtailment of opportunities for employment” for individuals with disabilities.<sup>7</sup> In setting out to do so, this provision permits employees with a physical or mental disability to be paid at rates below the otherwise applicable federal minimum wage, commensurate with their productivity, as determined by their employer.<sup>8</sup>

This New Deal-era legislation, though progressive for its time,<sup>9</sup> has since lost pace with modern conceptions of disability rights and

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<sup>1</sup> JYOTSNA SREENIVASAN, 1 POVERTY AND THE GOVERNMENT IN AMERICA: A HISTORICAL ENCYCLOPEDIA 199 (vol. 1 2009). Eugene Victor Debs, an American union leader, made this statement to the trial court upon his conviction for violating the Sedition Act on September 18, 1918. *Id.*

<sup>2</sup> Julia La Roche, *Here’s How Much 10 of the Richest People in the World Made Per Minute in 2013*, BUS. INSIDER (Dec. 19, 2013), <http://www.businessinsider.com/what-warren-buffett-makes-per-hour-2013-12> [<http://perma.cc/W78T-EMV4>].

<sup>3</sup> See 29 U.S.C. § 214(c) (2015).

<sup>4</sup> *Id.* § 206.

<sup>5</sup> *Id.* § 207.

<sup>6</sup> *Id.* § 212.

<sup>7</sup> *Id.* § 214(c)(1).

<sup>8</sup> See *id.*

<sup>9</sup> See WILLIAM G. WHITTAKER, CONG. RESEARCH SERV., RL 30674, TREATMENT OF WORKERS WITH DISABILITIES UNDER SECTION 14(C) OF THE FAIR LABOR STANDARDS ACT

values.<sup>10</sup> Dating back to the 1930s, section 14(c) was a mechanism used to protect employment opportunities in a time when there were virtually no employment prospects in the mainstream workforce for workers with a disability.<sup>11</sup> The once-grim realities of a bygone era continue to cast a shadow on workers’ and disability rights, retrospectively and more than likely prospectively, placing us on the wrong side of history.

The 14(c) program is antiquated with respect to disability rights as well as in its construction of the employee-employer relationship. Proponents of section 14(c) often attribute the loss of wages to the “therapeutic” benefits that the individual derives from working.<sup>12</sup> This conception perpetuates the notion that employment is strictly an economic arrangement that is not intended to be therapeutic or fulfilling, and moreover, that deriving such psychological benefits should result in decreased compensation. However, employed people are generally more satisfied with their lives than unemployed people,<sup>13</sup> as all workers reap the therapeutic benefits of work—such as income, sense of purpose, social relationships, structured time, skill development, and creativity.<sup>14</sup> Sigmund Freud identified the two most fundamental components of mental health as “the ability to love and to work.”<sup>15</sup> Nonetheless, section 14(c) supports the notion that people with a disability should be financially accountable for acquiring the therapeutic benefits of work, and in doing so, it reinforces the fallacy that work should not be therapeutic. Repealing section 14(c) must begin with a reevalu-

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7-8 (2005), [http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1211&context=key\\_workplace](http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1211&context=key_workplace) [<http://perma.cc/64DB-UJG5>].

<sup>10</sup> See Transition to Integrated and Meaningful Employment Act, H.R. 188, 114th Cong. § 2 (2015) (“Today, advancements in vocational rehabilitation, technology, and training provide disabled workers with greater opportunities than in the past, and the number of such workers in the national workforce has dramatically increased.”).

<sup>11</sup> See *id.*; Fair Wages for Workers with Disabilities Act, H.R. 831, 113th Cong. (2013).

<sup>12</sup> See Anna Schechter, *Disabled workers paid just pennies an hour—and it’s legal*, NBC NEWS (June 25, 2013), [http://investigations.nbcnews.com/\\_news/2013/06/25/19062348-disabled-workers-paid-just-pennies-an-hour-and-its-legal](http://investigations.nbcnews.com/_news/2013/06/25/19062348-disabled-workers-paid-just-pennies-an-hour-and-its-legal) [<http://perma.cc/R5JJ-78BM>].

<sup>13</sup> Stefan Priebe et al., *Employment Attitudes Toward Work, and Quality of Life Among People with Schizophrenia in Three Countries*, 24 SCHIZOPHRENIA BULL. 469 (1998).

<sup>14</sup> *Id.*

<sup>15</sup> *Frequently Asked Questions*, FREUD MUSEUM LONDON, <http://www.freud.org.uk/about/faq/> [<http://perma.cc/QW77-NNF4>] (“This formula was cited by Erik Erikson but it is not to be found in Freud’s works, although . . . [i]n ‘Civilization and Its Discontents’ (1930) he wrote: ‘The communal life of human beings had, therefore, a two-fold foundation: the compulsion to work, which was created by external necessity, and the power of love . . .’”).

ation of societal conceptions about the meaning of work, as well as our assumptions about why people work.<sup>16</sup>

Section 14(c) has splintered the disability rights community. Some believe that the program discriminates against, isolates, and underpays workers, while others maintain that section 14(c) is a necessary apparatus for creating sustainable employment opportunities for workers with a disability.<sup>17</sup> Although the latter remains a viable concern, its dogmatic prominence has permitted the tail to wag the dog such that concerns surrounding lack of employment opportunities for people with a disability has come at the expense of exploiting that same workforce.<sup>18</sup>

This exploitation has become increasingly salient—so much so that in 2001, the Government Accountability Office (“GAO”) reported that more than half of all section 14(c) workers were paid \$2.50 per hour or less.<sup>19</sup> While remaining cognizant of the real threats posed to the livelihood of workers with a disability in the absence of section 14(c), it cannot go unacknowledged that a law that is devoid of any discernable protections and that facially discriminates against an entire group of people based on characteristics particular to them, was defective from its inception. Nonetheless, this sub-minimum wage program has largely been ignored by legal and academic scholarship.

This Note argues for the repeal of section 14(c) of the FLSA. Part II recounts the historical and modern political development of the “special minimum wage program.”<sup>20</sup> Part III outlines the 14(c) program, including eligible participants, the administration and implementation of the program as well as its oversight, or lack thereof. Part IV identifies the pitfalls of the program, which have resulted in exploitation of workers with a disability. Part V argues that the program, which distinguishes between workers whose productivity may be lower due to disability and workers whose productivity may be low due to other reasons, violates the Fourteenth

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<sup>16</sup> See John Cicero, *TNS, Inc.—The National Labor Relations Board’s Failed Vision of Worker Self-Help to Escape Longterm Health Threats from Workplace Carcinogens and Toxins*, 24 STETSON L. REV. 20, 79 (1994) (describing the transformation of the status of workers).

<sup>17</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-01-886, SPECIAL MINIMUM WAGE PROGRAM: CENTERS OFFER EMPLOYMENT AND SUPPORT SERVICES TO WORKERS WITH DISABILITIES, BUT LABOR SHOULD IMPROVE OVERSIGHT 1 (2001) [hereinafter GAO], [www.gao.gov/new.items/d01886.pdf](http://www.gao.gov/new.items/d01886.pdf) [<http://perma.cc/NCE4-MJFL>].

<sup>18</sup> *Id.* at 3-5 (reporting the lack of federal oversight of the 14(c) program that leads to systematic exploitation of workers with a disability employed under the program).

<sup>19</sup> *Id.* at 6.

<sup>20</sup> See GAO, *supra* note 17.

Amendment’s guarantee of equal protection of the laws. Part VI explains why productivity, as a sole criterion, is an inaccurate measurement of the value of one’s work and creates a problematic construction of the employer-employee relationship. Finally, Part VII seeks to correct the assumption that work is a purely economic arrangement by noting the intrinsically therapeutic value work has for all individuals and for society. Part VIII concludes by suggesting a potential remedy for the problems created by section 14(c).

## II. POLITICAL AND HISTORICAL DEVELOPMENT OF SECTION 14(C) OF THE FAIR LABOR STANDARDS ACT

An old proverb, “a rolling stone gathers no moss,”<sup>21</sup> can be read to reflect the idea that laws should not remain stagnant, but are intended to keep pace with the ever-evolving values and views of society. However, the recent political advancement of the sub-minimum wage program, much like its history, can be categorized as largely stagnant.<sup>22</sup> One can speculate that this absence of inertia is not due to lack of need or cause for change. Although society’s understanding of disability and the opportunities available to people with a disability has progressed immensely since the 1930s, section 14(c) has not.<sup>23</sup> This incongruity requires change.

### A. *History of the Sub-minimum Wage Certificate Program*

Section 14(c) has its roots in the National Industrial Recovery Act (“NIRA”) of 1933-1935, which arranged a productivity-based sub-minimum wage system for persons with a disability.<sup>24</sup> Under this system, minimum wages for workers with a disability were set at 75% of the industry minimum in competitive industries.<sup>25</sup> However, there was no floor wage set for facility work centers, where the pay rate remained tied to productivity.<sup>26</sup> After the NIRA was declared unconstitutional in 1935,<sup>27</sup> this productivity-aligned system of calculating wages was reestablished in 1938 with the passage of

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<sup>21</sup> See NABIL M. MUSTAPHA, *ECONOMICS: THE HISTORICAL, RELIGIOUS & CONTEMPORARY PERSPECTIVES: A TREATISE* 316 (2009) (“A ‘rolling stone gathers no moss’ can be contrasted with a stagnant one covered with moss.”).

<sup>22</sup> See *The Issue of Fair Wages for Workers with Disabilities*, NAT’L FED’N OF THE BLIND, <https://nfb.org/fair-wages> [<https://perma.cc/G98Y-X2XD>].

<sup>23</sup> See Transition to Integrated and Meaningful Employment Act, H.R. 188, 114th Cong. (2015).

<sup>24</sup> See WHITTAKER, *supra* note 9, at 6.

<sup>25</sup> *Id.* at 7.

<sup>26</sup> *Id.*

<sup>27</sup> See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

section 14(c) of the FLSA.<sup>28</sup>

The concept of a sub-minimum wage was raised by then-Labor Secretary Frances Perkins during the hearings preceding the passage of the FLSA.<sup>29</sup> Perkins suggested that a sub-minimum wage should be enforced for “substandard workers” whom she described as “persons who by reasons of illness or age or something else are not up to normal production.”<sup>30</sup> Under the FLSA, the Department of Labor (“DOL”) was designated as the “Wage and Hour Administrator” and was charged with determining the wage floor for persons with a disability.<sup>31</sup> It was in 1938 that the DOL ruled that wages should be set “on the basis of earning capacity,” or the literal physical output of a worker.<sup>32</sup>

Although a counsel was established to administer the 14(c) program, this group was composed solely of representatives from charitable institutions and employers.<sup>33</sup> It is notable that no spokesperson for workers with a disability took part in formulating the program that was set in place to help them.<sup>34</sup> Upon Congressional adoption of the FLSA, while Americans were struggling to break from the grips of the Great Depression, President Roosevelt characterized the Act as “the most far-reaching, far-sighted program for the benefit of workers ever adopted in this or any country.”<sup>35</sup>

After nearly three decades of dormancy, the sub-minimum wage provision was modified in 1965 to include a minimum wage floor,<sup>36</sup> ensuring that employees with a disability would be paid no less than 50% of the statutory minimum wage.<sup>37</sup> In 1978, legislation was proposed to exclude persons with vision impairment from the 14(c) program.<sup>38</sup> Although that proposal was denied, it catalyzed a conversation about the 14(c) program that brought to light some of its deficiencies, including the lack of federal oversight which allowed the program to be administered by ill-trained management.<sup>39</sup>

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<sup>28</sup> WHITTAKER, *supra* note 9, at 8.

<sup>29</sup> *Id.* at 7.

<sup>30</sup> *Id.* (emphasis omitted).

<sup>31</sup> *Id.* at 8.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> Franklin D. Roosevelt, Broadcast from the White House (May 24, 1938), <http://teachingamericanhistory.org/library/document/radio-address-of-the-president> [<http://perma.cc/6MD3-KTL2>].

<sup>36</sup> See WHITTAKER, *supra* note 9, at 9.

<sup>37</sup> Pub. L. No. 89-601, § 501(d), 80 Stat. 830, 842-45 (1966).

<sup>38</sup> See WHITTAKER, *supra* note 9, at 11.

<sup>39</sup> See *id.* at 11-13.

In 1980, following the publication of two investigative articles by *The Wall Street Journal* about the employment of the blind in New York City, the House Subcommittee on Labor Standards conducted two days of hearings regarding oversight of the 14(c) program.<sup>40</sup> While the hearings yielded no legislative action, a GAO report released in 1981 concluded that the goal of providing a guaranteed 50% of the prevailing minimum wage had not been realized due to exemptions that permitted payment at a lower rate.<sup>41</sup> Rather than increasing oversight or drafting legislation that would achieve the goal of paying workers with a disability at least half of what workers without a disability are paid, the GAO report recommended that the FLSA be modified to eliminate the wage floor for workers with a disability altogether.<sup>42</sup> Congress adhered to the recommendation and removed the wage floor requirement from section 14(c) in 1986.<sup>43</sup> As it currently stands, the statute authorizing the 14(c) program likewise contains no wage floor and permits workers with a disability to be paid below the minimum wage at a rate “commensurate with those paid to nonhandicapped workers”<sup>44</sup> and “related to the individual’s productivity.”<sup>45</sup>

*B. Current Political Disposition of the Sub-minimum Wage Certificate Program*

Recent Congressional efforts to ameliorate or repeal this provision have been unsuccessful.<sup>46</sup> The Fair Wages for Workers Act, House Bill 3086, was proposed in 2011 and died on the House floor.<sup>47</sup> House Bill 3086 was intended to guarantee a fair wage to workers with a disability by prohibiting the Secretary of Labor from issuing any new “special wage certificates,” which permit individuals with disabilities to be paid below the minimum wage, and prescribed a three-year phase-out of all existing sub-minimum wage

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<sup>40</sup> *Id.* at 14.

<sup>41</sup> *Id.* at 21 (explaining that exemptions for training, evaluation, etc. had led to the lower pay rate).

<sup>42</sup> *Id.* at 23-24.

<sup>43</sup> Pub. L. No. 99-486, 100 Stat. 1229 (Oct. 16, 1986).

<sup>44</sup> 29 U.S.C. § 214(c)(1)(B) (2015).

<sup>45</sup> *Id.* § 214(c)(1)(C).

<sup>46</sup> See Fair Wages for Workers with Disabilities Act of 2011, H.R. 3086, 112th Cong. (2011), <https://www.congress.gov/bill/112th-congress/house-bill/3086> [<https://perma.cc/7YQL-7UGK>]; Fair Wages for Workers with Disabilities Act of 2013, H.R. 831, 113th Cong. (2013), <https://www.congress.gov/bill/113th-congress/house-bill/831> [<https://perma.cc/4CVG-QHP8>].

<sup>47</sup> H.R. 3086, <https://www.congress.gov/bill/112th-congress/house-bill/3086/actions> [<https://perma.cc/LH6F-UY4H>].

certificates.<sup>48</sup> Similar legislation, the Fair Wages for Workers with Disabilities Act of 2013, House Bill 831, was subsequently proposed and then referred to the Subcommittee on Workforce Protections in April of 2013.<sup>49</sup> No action is currently scheduled on the bill.<sup>50</sup>

Although there has been some activism surrounding section 14(c), Ari Ne'eman, co-founder of the Autistic Self Advocacy Network, believes we are unlikely to see any action on this issue in Congress in the near future, stating, “[t]here doesn’t seem to be any appetite on the part of the traditional supporters [of rights of people with a disability] to go after FLSA at this time.”<sup>51</sup> The most recent legislative action surrounding this issue is the Transition to Integrated and Meaningful Employment Act, or “TIME Act,” introduced in Congress on January 7, 2015.<sup>52</sup> Like House Bills 3086 and 831, the TIME Act also seeks to halt the issuing of “special wage certificates” and prescribes a three-year phase-out of all existing sub-minimum wage certificates as well as the ultimate repeal of the law.<sup>53</sup> However, in line with Ne’eman’s prediction,<sup>54</sup> *GovTrack* estimates just a two percent chance of the bill’s enactment.<sup>55</sup>

### III. THE FAIR LABOR STANDARD ACT’S SECTION 14(C) SUB-MINIMUM WAGE CERTIFICATE PROGRAM

For nearly eighty years, section 14(c) of the FLSA has affected, and continues to affect, hundreds of thousands of workers with a disability annually.<sup>56</sup> Nonetheless, the program has largely been left out of the conversation among workers rights’ and disability advocates alike.<sup>57</sup> The lack of federal oversight of the program has left it to be administered almost entirely by employers, many of

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<sup>48</sup> *Id.*

<sup>49</sup> H.R. 831, <https://www.congress.gov/bill/113th-congress/house-bill/831/all-actions> [<https://perma.cc/25YP-JHGV>].

<sup>50</sup> *Id.*

<sup>51</sup> Bruce Vail, *For Goodwill’s Disabled Workers, Spotlight is on Subminimum Wage*, MOYERS & CO. (Nov. 12, 2013), <http://billmoyers.com/2013/11/12/for-goodwill%E2%80%99s-disabled-workers-spotlight-is-on-subminimum-wage/> [<http://perma.cc/BW29-XXPX>].

<sup>52</sup> Transition to Integrated and Meaningful Employment Act, H.R. 188, 114th Cong. (2015), <https://www.congress.gov/bill/114th-congress/house-bill/188> [<https://perma.cc/TL73-3M7N>].

<sup>53</sup> *Id.*

<sup>54</sup> See Vail, *supra* note 51.

<sup>55</sup> See H.R. 188: TIME Act, GOVTRACK.US, <https://www.govtrack.us/congress/bills/114/hr188> [<https://perma.cc/PU26-CVL7>].

<sup>56</sup> GAO, *supra* note 17, at 18 (estimating that, when they conducted their 2001 survey, 424,000 workers with a disability were being paid the “special minimum wage”).

<sup>57</sup> See Vail, *supra* note 51.

whom profit from paying the workers a lesser wage.<sup>58</sup> Section 14(c) has remained frozen in time and become somewhat of an anomaly.

A. *Eligible Participants of the 14(c) Program*

Currently, more than 5,600 employers pay sub-minimum wage rates to approximately 424,000 workers nationwide.<sup>59</sup> In order for an employer to be authorized to pay a sub-minimum wage, the employer must receive a certificate from the Wage and Hour Division of the DOL.<sup>60</sup> These certificates are issued to four types of employers: work centers, hospital or residential care facilities, and business and school-work exploration programs.<sup>61</sup> The FLSA grants the Secretary of Labor the authority to issue “special certificates,” or sub-minimum wage certificates, that permit employers to set the wages of persons with a disability at a level reflective of their productivity.<sup>62</sup> All persons with a disability are eligible to be paid the sub-minimum wage under the 14(c) program.<sup>63</sup> For purposes of section 14(c), qualifying disabilities include both physical and mental disabilities, and may be related to age or injury, including blindness, mental illness, intellectual disabilities, alcoholism, and drug addiction.<sup>64</sup> The largest demographic that is employed under the 14(c) program—approximately 74%—are those who have been diagnosed with an intellectual disability.<sup>65</sup>

B. *How Wages are Set and Determined by Employers*

Pursuant to fact sheets that serve as guidance documents for regulations promulgated by the DOL, employers in the 14(c) program determine an hourly wage by measuring the productivity of a worker.<sup>66</sup> Employers measure productivity by conducting time studies, in which the measured productivity of the worker with a disability is compared against the quality and quantity of work performed

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<sup>58</sup> See GAO, *supra* note 17, at 27-34.

<sup>59</sup> GAO, *supra* note 17, at 1.

<sup>60</sup> 29 U.S.C. § 214(c)(1) (2015).

<sup>61</sup> GERALD MAYER ET AL., CONG. RESEARCH SERV., THE FAIR LABOR STANDARDS ACT (FLSA): AN OVERVIEW 5 (2013), <https://www.fas.org/sgp/crs/misc/R42713.pdf> [<https://perma.cc/X9UU-QZCP>].

<sup>62</sup> 29 U.S.C. § 214(c)(1)(A)-(C).

<sup>63</sup> *Id.*

<sup>64</sup> MAYER ET AL., *supra* note 61, at 5.

<sup>65</sup> GAO, *supra* note 17, at 3.

<sup>66</sup> See U.S. DEP’T OF LABOR, WAGE & HOUR DIV., FACT SHEET #39 E: DETERMINING HOURLY COMMENSURATE WAGES TO BE PAID WORKERS WITH DISABILITIES UNDER SECTION 14(C) OF THE FAIR LABOR STANDARDS ACT (FLSA) [hereinafter DOL FACT SHEET #39E], <http://www.dol.gov/whd/regs/compliance/whdfs39e.pdf> [<http://perma.cc/Q37T-29TF>].

by an “experienced worker who does not have a disability.”<sup>67</sup>

An employer conducting a time study first determines the length of time that it takes an experienced worker who does not have a disability to perform a given task, usually by using a stopwatch to time the experienced worker.<sup>68</sup> The wage that a worker with a disability will be paid is then determined by comparing the performance of the experienced worker without a disability against the time it takes a worker with a disability to perform the same task.<sup>69</sup> The employers are required to conduct these time studies in conditions that emulate the work environment by taking into account the tasks to be performed and a variety of factors that may influence the work, including the method, materials, and equipment to be used as well as the location, the time of day, or the need to work in extreme heat.<sup>70</sup>

The DOL provides the example that, if a worker with a disability was 60% as productive as an experienced worker who does not have a disability performing the same job, the wage for the worker with a disability would be 60% of the wage of the worker who does not have a disability.<sup>71</sup> If the experienced worker without a disability earned \$8.00 per hour, the 14(c) worker in the aforementioned scenario would earn \$4.80 per hour (\$8.00 multiplied by 60%) for performing essentially the same type of work.<sup>72</sup> Given the enormous potential for exploitation that arises when the employer who profits from paying employees a lesser wage is the same one conducting the time studies, one would certainly assume that such a program would merit a substantial amount of federal oversight. However, available data suggests that such an assumption is dubious at best.<sup>73</sup>

### C. Oversight of the 14(c) Program

Although the DOL is responsible for oversight of 14(c),<sup>74</sup> a report by the GAO found that the DOL does not compile data on which employers are complying with the provisions of section

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<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> GAO, *supra* note 17, at 27-34 (reporting that the program greatly lacks federal oversight).

<sup>74</sup> *Id.* at 1.

14(c), including whether section 14(c) workers are underpaid.<sup>75</sup> Employers are required to review the wages of all employees annually to reflect changes in productivity and in the prevailing wage rate paid to experienced workers without a disability.<sup>76</sup> Employers are also required to evaluate the productivity of each section 14(c) worker at least every six months, or whenever there is a change in the methods or materials used.<sup>77</sup> However, the DOL “does not systematically conduct self-initiated investigations of employers” to verify that their assessments of section 14(c) workers’ productivity levels and wage rates are in compliance with the program.<sup>78</sup> This is so even though the GAO reports that the DOL provides minimal training to employers on how to correctly compute “special minimum wages.”<sup>79</sup>

This enormous deficit of oversight leaves the group of people it was intended to protect—individuals “whose earning or productive capacity is impaired by age, physical or mental deficiency, or injury”<sup>80</sup>—vulnerable to exploitation at the hands of employers. According to employers’ unchecked<sup>81</sup> assessments, approximately 70% of their section 14(c) workers are less than half as productive as the workers without disabilities performing the same jobs.<sup>82</sup> These reportedly low productivity levels are intended to explain why more than half of all section 14(c) workers were paid \$2.50 per hour or less in 2001.<sup>83</sup>

#### IV. “PEOPLE ARE PROFITING FROM EXPLOITING DISABLED WORKERS”

As recognized in the recently proposed TIME bill, the fact that employers can pay their workers less than the federal minimum wage creates an incentive for them to exploit cheap labor.<sup>84</sup> In seeking to prevent the curtailment of opportunities for employment for people with a disability,<sup>85</sup> Congress of more than seventy

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<sup>75</sup> *Id.* at 4-5.

<sup>76</sup> 29 C.F.R. § 525.1 (2015).

<sup>77</sup> DOL FACT SHEET #39E, *supra* note 66, at 2.

<sup>78</sup> GAO, *supra* note 17, at 5.

<sup>79</sup> *Id.*

<sup>80</sup> 29 U.S.C. § 214(c)(1).

<sup>81</sup> GAO, *supra* note 17 (noting that there is no systematic oversight of employers’ assessments).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> Transition to Integrated and Meaningful Employment Act, H.R. 188, 114th Cong. (2015).

<sup>85</sup> *See* 29 U.S.C. § 214(c)(1).

years ago presumably never envisioned the creation of a two-tiered system where employers could profit from openly discriminating against an entire class of workers with the backing and sanction of the law. Regardless of the statute's stated purpose, the resulting exploitation has become increasingly newsworthy.<sup>86</sup>

"People are profiting from exploiting disabled workers," stated Ari Ne'eman, president of the Autistic Self Advocacy Network.<sup>87</sup> "We are certainly in favor of paying our handicapped clients the minimum wage . . .," said Dean Phillips of Goodwill Industries at a Congressional hearing on section 14(c), "when and where they can earn it."<sup>88</sup> Goodwill Industries is among the nonprofit groups that partake in the sub-minimum wage certificate program.<sup>89</sup> Although Goodwill is a multibillion-dollar company whose executives make six-figure salaries,<sup>90</sup> DOL records have documented cases where Goodwill has paid workers under the 14(c) program as low as 41, 38 and 22 cents per hour.<sup>91</sup> Unfortunately, such abhorrent conditions are not uncommon and have increasingly become the topic of recent news stories.<sup>92</sup>

The Department of Justice found that Rhode Island and the city of Providence had paid workers with a disability under the 14(c) program in publicly funded job programs an hourly wage of \$1.57, with one individual earning just fourteen cents per hour.<sup>93</sup> Public outcry against the 14(c) program has intensified since the news story broke in 2009 documenting the horrifying conditions found at a meat processing plant, Henry's Turkey Service.<sup>94</sup> There, under the 14(c) program, twenty-one men with intellectual disabilities were boarded at a century-old schoolhouse in Iowa in what *The New York Times* referred to as conditions of "servitude."<sup>95</sup> The men, ranging in age from forty to sixty-years old spent most of their adult lives working for "next to nothing" and lived in "dangerously

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<sup>86</sup> See, e.g., Dan Barry, *The 'Boys' in the Bunkhouse*, N.Y. TIMES (Mar. 9, 2014), <http://www.nytimes.com/interactive/2014/03/09/us/the-boys-in-the-bunkhouse.html>; Vail, *supra* note 51; Schechter, *supra* note 12.

<sup>87</sup> Schechter, *supra* note 12.

<sup>88</sup> See WHITTAKER, *supra* note 9, at 17.

<sup>89</sup> *Id.*

<sup>90</sup> Schechter, *supra* note 12.

<sup>91</sup> *Id.*

<sup>92</sup> See, e.g., Barry, *supra* note 86; Vail, *supra* note 51; Schechter, *supra* note 12.

<sup>93</sup> Vail, *supra* note 51.

<sup>94</sup> See Barry, *supra* note 86 (stating that reporter Clark Kauffman helped expose the abuse and neglect in 2009); Yuki Noguchi, *A 'Wake-Up Call' To Protect Vulnerable Workers from Abuse*, NPR (May 16, 2013, 4:29 PM), <http://www.npr.org/2013/05/16/184491463/disabled-workers-victory-exposes-risks-to-most-vulnerable>.

<sup>95</sup> Barry, *supra* note 86.

unsanitary conditions.”<sup>96</sup> The men, who were hit, kicked, handcuffed and verbally abused, were paid just \$2 per day.<sup>97</sup> Referencing the 14(c) program, a Letter to the Editor in *The New York Times* noted that although the unimaginable abuse in Iowa had come to an end, “the Labor Department continues to allow the exploitation of developmentally disabled workers throughout the country.”<sup>98</sup>

However, Goodwill, which has heavily lobbied Congress not to repeal section 14(c),<sup>99</sup> justifies their support for the program on the basis of “self-determination,” reasoning that workers have a right to choose whether to participate.<sup>100</sup> Terry Farmer, of the disability rights group ACCSES, also supports the federal policy behind section 14(c) on the basis of “self-determination,” or that it enables individuals with a disability to make an “informed choice.”<sup>101</sup> This is based on the premise that section 14(c) essentially provides jobs to individuals who otherwise would not qualify for such employment.<sup>102</sup> At a Congressional hearing in 1980, General Council for one section 14(c) employer insisted that if a person with a disability “were to receive the minimum wage regardless of [his] . . . productivity . . . [it could] inhibit his motivation toward increased upward mobility and in reality encourage less productivity.”<sup>103</sup>

However, many people with a disability have found their options more restricted as a result of section 14(c), as they do not always have a choice to work at jobs that will pay them a minimum wage.<sup>104</sup> Harold Leigland, a sixty six-year old Goodwill employee and former massage therapist with a college degree who is paid \$5.46 per hour, believes that the company pays him a low wage because they know he has few alternatives.<sup>105</sup> “We are trapped. Everybody who works at Goodwill is trapped,” he says.<sup>106</sup> Leigland’s

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<sup>96</sup> Noguchi, *supra* note 94.

<sup>97</sup> *Id.*

<sup>98</sup> Gabriel Fenigsohn, Letter to the Editor, *Disabled Workers*, N.Y. TIMES (Mar. 13, 2014), [http://www.nytimes.com/2014/03/14/opinion/disabled-workers.html?\\_r=0](http://www.nytimes.com/2014/03/14/opinion/disabled-workers.html?_r=0).

<sup>99</sup> Vail, *supra* at note 51.

<sup>100</sup> See GOODWILL INDUS. INT’L, INC., EMPLOYMENT OF PEOPLE WITH DISABILITIES THROUGH FLSA SECTION 14(C) 10 (2013) (explaining that the program protects the rights of individuals to “choose” to work in such a program), <http://www.goodwill.org/wp-content/uploads/2013/06/Goodwill-14c-Fair-Wages-Position-Paper.pdf> [<http://perma.cc/XQA3-XJE8>].

<sup>101</sup> Letter from Terry R. Farmer, CEO, ACCSES, to Congresspeople (Nov. 15, 2011), <http://www.acces.org/CMS/Resources/dropbox/acceslettertocommitteeleadershipopposinghr3086.pdf> [<http://perma.cc/2S4V-DUX2>].

<sup>102</sup> *Id.*

<sup>103</sup> See WHITTAKER, *supra* note 9, at 17 (internal quotation marks omitted).

<sup>104</sup> See Schecter, *supra* note 12.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

wife Sheila, who finds the time-study tests to be the most degrading part of her job, quit working for Goodwill after four years when a time study prompted the company to cut her wages from \$3.50 to \$2.75 per hour.<sup>107</sup>

While there may be truth to the statement that section 14(c) provides employment opportunities to people who otherwise wouldn't be able to find jobs, it seems that section 14(c) may be creating or at least adding to this problem, rather than fixing it. People with a disability are essentially placed in a Hobson's choice where they are forced to work for a discriminatory sub-minimum wage or to not work at all. The realistic implications of section 14(c) are a degradation of the Act's purpose to provide work opportunities to people with a disability.<sup>108</sup> Section 14(c) emphatically creates a tradeoff where work opportunities are achieved at the cost of exploitation.

No similar provision in the FLSA provides for the payment of a productivity-based sub-minimum wage to workers without a disability. Although both workers with and without a disability could be half as productive as an experienced worker without a disability, only the worker with a disability could be paid below the minimum wage as a result.<sup>109</sup> The logical inconsistency of that fact demands an inquiry into whether there is a rational basis for such discrimination.

#### V. SECTION 14(C) VIOLATES THE FOURTEENTH AMENDMENT'S GUARANTEE OF EQUAL PROTECTION OF THE LAWS

The payment of a sub-minimum wage to people with a disability due to the relatively low productivity levels of some workers is not just unfair, it is unconstitutional. The law does not authorize the payment of sub-minimum wages to all workers below some specified level of productivity, but only to those with a disability.<sup>110</sup> It is nonsensical that workers whose low productivity is the product of apathy are guaranteed at least the minimum wage, while workers whose productivity is a result of a disability are penalized.

The concept of a minimum wage is now well entrenched in our society, as many recognize the exploitation that occurs in its

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<sup>107</sup> *Id.*

<sup>108</sup> *See* 29 U.S.C. § 214(c)(1) (2015).

<sup>109</sup> *Id.*

<sup>110</sup> *See* SAMUEL R. BAGENSTOS, THE CASE AGAINST THE SECTION 14(C) SUBMINIMUM WAGE PROGRAM 6, [https://nfb.org/images/nfb/documents/word/14c\\_report\\_sam\\_bagenstos.doc](https://nfb.org/images/nfb/documents/word/14c_report_sam_bagenstos.doc) [<https://perma.cc/NW7U-V9E3>].

absence. It would seem farfetched to imagine certain groups of workers without a disability to be exempt from the minimum wage based solely on stereotypes about their productivity. However, when the concept of paying “substandard” workers was debated at Congressional hearings regarding the passage of the section 14(c), some argued that the phrase should also encompass workers in certain regions of the country, namely, in the South.<sup>111</sup> Southern workers, they argued, were slower in movement and less production-oriented and thus should be eligible to be paid sub-minimum wages.<sup>112</sup>

The FLSA creates certain minimum wage exemptions for learners, apprentices, messengers, and students.<sup>113</sup> Those exemptions apply to people because of the nature and characteristics of the job or the learning experience they provide.<sup>114</sup> Section 14(c), however, denies a group of people the equal opportunity to be paid the minimum wage for any job based on an immutable and potentially lifelong status—being a person with a disability.<sup>115</sup>

The Equal Protection Clause of the Fourteenth Amendment commands that no State shall “deny to any person within its jurisdiction the equal protection of the laws.”<sup>116</sup> The Supreme Court’s seminal case of *City of Cleburne v. Cleburne Living Center* held that people with a disability are a protected class for purposes of the Fourteenth Amendment,<sup>117</sup> according the classification rational basis review “with a bite.” Under rational basis review, which is used for social or economic classifications, legislation is generally “presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.”<sup>118</sup> “The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.”<sup>119</sup> Furthermore, “a bare . . . desire to harm a politi-

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<sup>111</sup> See WHITTAKER, *supra* note 9, at 7.

<sup>112</sup> *Id.*

<sup>113</sup> BAGENSTOS, *supra* note 110, at 6 (discussing 29 U.S.C. § 214(a)-(b)).

<sup>114</sup> See BAGENSTOS, *supra* note 110, at 6.

<sup>115</sup> *Id.*

<sup>116</sup> U.S. CONST. amend. XIV.

<sup>117</sup> *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985) (applying a slightly heightened form of scrutiny to a disability classification than the Court had used in other cases, such as *Order of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342 (1944), where the Court used “true rational basis scrutiny” and was highly deferential to the legislature).

<sup>118</sup> *City of Cleburne*, 473 U.S. at 440; see also *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 174-75 (1980); *Vance v. Bradley*, 440 U.S. 93, 97 (1979).

<sup>119</sup> *City of Cleburne*, 473 U.S. at 446.

cally unpopular group” is not a legitimate state interest.<sup>120</sup>

In *City of Cleburne*, the Court held that a Texas city’s municipal zoning ordinance requiring a “special use permit” to be obtained for the operation of a group home for individuals with an intellectual disability, violates the Equal Protection Clause of the Fourteenth Amendment.<sup>121</sup> The Court found that there was no rational basis for the city’s belief that a group home for persons with an intellectual disability would pose a threat to the city’s legitimate interests.<sup>122</sup> The Court also held that the permit requirement was rooted in irrational fear of, or prejudice against, people with an intellectual disability, which is not a legitimate state interest.<sup>123</sup>

The Court first found the ordinance to raise a constitutional issue because it facially denied respondents equal protection of the laws.<sup>124</sup> This is so because, although the permit was required for a home used for the care of persons with an intellectual disability, the city did not require a special use permit for similar buildings, such as apartment houses, fraternity or sorority houses, dormitories, apartment hotels, hospitals, nursing homes, or private clubs.<sup>125</sup> Similarly, section 14(c) draws a distinction between people with and without a disability, rendering people with a disability entirely exempt from minimum wage laws.<sup>126</sup> The discrimination can thus be deduced from the face of the statute.

The next issue in the equal protection analysis is whether the reason for the differential treatment is rationally related to a legitimate government interest.<sup>127</sup> The question at the heart of this analysis, the Court stated, “is whether it is rational to treat [individuals with an intellectual disability] differently.”<sup>128</sup> In *City of Cleburne*, the Court found that there was no rational basis for the city’s concerns involving individuals with an intellectual disability when those same concerns did not apply to other houses permitted in the area such as boarding and fraternity houses.<sup>129</sup>

The inquiry therefore is whether there is a rational basis for

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<sup>120</sup> U.S. Dep’t of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

<sup>121</sup> *City of Cleburne*, 473 U.S. at 450.

<sup>122</sup> *Id.* (finding no rational basis for why the city’s interests in avoiding population density and lessening street congestion would apply to the group home but not to fraternity and sorority houses or hospitals).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 450.

<sup>125</sup> *Id.*

<sup>126</sup> See 29 U.S.C. § 214(c) (2015).

<sup>127</sup> *City of Cleburne*, 473 U.S. at 446.

<sup>128</sup> *Id.* at 449.

<sup>129</sup> *Id.*

exempting from the minimum wage only people whose work productivity may be lower due to disability, but not those whose diminished productivity is due to some other cause. The statute that includes section 14(c) states that its purpose is to prevent the curtailment of opportunities for employment for individuals whose productive capacity is impaired by “age, physical or mental deficiency, or injury.”<sup>130</sup> This is certainly a commendable ambition, and one that would likely be found a legitimate interest of the state. However, the means chosen to effectuate that interest, exempting people with a disability from the minimum wage, is not rationally related to it.

The basis of the statute is that according people with a disability protection of the minimum wage would lead to curtailment of their employment opportunities.<sup>131</sup> The Court in *City of Cleburne* held the ordinance requiring a “special use permit” unconstitutional because there was no rational justification proffered for why the city’s concerns—avoiding concentration of population and lessening street congestion—applied only to group homes for people with a disability and not to fraternity or sorority houses and hospitals.<sup>132</sup> Similarly, there is no rational basis for why the concern underlying the “special wage certificate”—an increase in unemployment—applies only to people with a disability and not to people without a disability receiving the minimum wage.

The reasoning behind section 14(c) can be analyzed in line with the same arguments used in opposition to the general minimum wage.<sup>133</sup> Eleanor Roosevelt pointed out in her Congressional testimony in 1959 that the same arguments raised against establishing any legal minimum wage have been used repeatedly for more than half a century.<sup>134</sup> Two of the most common arguments used to oppose the standard minimum wage are the threats of job loss and economic decline.<sup>135</sup> Some of those same arguments, namely that the minimum wage would raise unemployment, still prevail today and are essentially codified in section 14(c). However, the argument that a minimum wage “would ultimately harm the very work-

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<sup>130</sup> 29 U.S.C. § 214(c)(1).

<sup>131</sup> *Id.*

<sup>132</sup> *City of Cleburne*, 473 U.S. at 450.

<sup>133</sup> See, e.g., NAT’L EMP’T LAW PROJECT & CRY WOLF PROJECT, CONSIDER THE SOURCE: 100 YEARS OF BROKEN-RECORD OPPOSITION TO THE MINIMUM WAGE I (Mar. 2013), <https://www.nelp.org/content/uploads/2015/03/Consider-The-Source-Minimum-Wage.pdf> [<https://perma.cc/URX6-JXXE>].

<sup>134</sup> *Id.* at 1.

<sup>135</sup> *Id.* at 3-4.

ers it is intended to help,” has been used to criticize standard state and federal minimum wages for more than a century.<sup>136</sup> An analysis of one-hundred years of public statements, congressional testimonies, editorials, media interviews and other public records reveal that this argument has been repeatedly espoused and continuously rejected by Congress as insufficient to rebut the maintenance of a minimum wage.<sup>137</sup>

Since the passage of the minimum wage, opposition groups mainly comprised of corporations and conservative politicians have claimed that it decreases living standards,<sup>138</sup> or has “caused more misery and unemployment than anything since the Great Depression.”<sup>139</sup> As a report by the National Employment Law Project notes, many minimum wage opponents couch their opposition in the guise of concern for low-wage workers.<sup>140</sup> “There is an extensive record of minimum wage critics, especially elected officials, justifying their opposition to the minimum wage as defenders of the interests of workers affected by this policy.”<sup>141</sup>

The notion that competitive wages would deprive people with a disability of the opportunity for employment is the same argument that underlies the 14(c) program.<sup>142</sup> Congressional findings listed in the TIME Act report that many employers with a history of paying sub-minimum wages benefit from philanthropic donations and preferred status when bidding on federal contracts.<sup>143</sup> Those same employers claim that paying the minimum wage to their workers with a disability would diminish their profits and reduce their workforce.<sup>144</sup>

The continued existence of the minimum wage is evidence that the allegation that unemployment will rise if a minimum wage is enacted, which has been espoused in Congressional hearings, has been rejected. Similar to the “special use permit” in *City of Cleburne*, the “special wage certificate” implemented by section 14(c) is an unconstitutional denial of equal protection of the laws. There is no rational basis for the federal government to be con-

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<sup>136</sup> *See id.* at 1.

<sup>137</sup> *See id.* at 7-9.

<sup>138</sup> *Id.* at 12.

<sup>139</sup> *Id.* at 14.

<sup>140</sup> *Id.* at 2.

<sup>141</sup> *Id.* at 7.

<sup>142</sup> *See* WHITTAKER, *supra* note 9, at 9.

<sup>143</sup> Transition to Integrated and Meaningful Employment Act, H.R. 188, 114th Cong. (2015), <https://www.congress.gov/bill/114th-congress/house-bill/188/text> [<https://perma.cc/8BYM-M9UC>].

<sup>144</sup> *Id.*

cerned that a minimum wage would cause high unemployment for workers with lower productivity due to a disability, but not for workers with lower productivity due to some other cause.

While the means chosen, the sub-minimum wage program, should be found unconstitutional, the state interest, preventing the curtailment of employment opportunities for individuals with a disability, is certainly a legitimate one. It would be absurd to create a minimum wage exemption for all workers who are less productive than the most experienced worker. The state must therefore find some other way to avoid curtailing employment opportunities for such individuals without using a law that unfairly discriminates against them. This highlights the important role of the state in ensuring that employment opportunities are not curtailed for people with a disability and calls into question the barometers society uses to gauge the value of work.

#### VI. PRODUCTIVITY ALONE IS NOT AN ACCURATE MEASUREMENT OF THE VALUE OF WORK

Productivity is virtually the only standard by which section 14(c) measures the value of work.<sup>145</sup> A vast array of problems arise when the worth of an individual’s work is reduced to such a rigid and narrow category. In Congressional hearings regarding section 14(c), James Gashel, speaking for the National Federation of the Blind, exclaimed, “I am here to tell you that the safeguards are not working.”<sup>146</sup> The problems, he said, were largely structural: the power imbalance permits management to make all of the decisions and the workers are placed at a disadvantage because they enter the workshops under the presumption of low productivity, having to prove themselves worthy of the national minimum wage.<sup>147</sup>

##### A. *Productivity as a Sole Criterion Undervalues Workers*

Using productivity as the sole measurement has led to employers systematically devaluing their section 14(c) workers. The program has thus created a construction of the employer-employee relationship in which employers view their participation in section 14(c) as an act of charity, as if they are not also benefitting from

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<sup>145</sup> See 29 U.S.C. § 214(c)(1)(A)-(C) (2015) (allowing wages to be set “lower than the minimum wage . . . commensurate with those paid to nonhandicapped workers, employed in the vicinity in which the individuals under the certificates are employed, for essentially the same type, quality and quantity of work, and related to the individual’s productivity.”).

<sup>146</sup> See WHITTAKER, *supra* note 9, at 30.

<sup>147</sup> *Id.*

the participants' work.<sup>148</sup> This dynamic was noted over thirty years ago when a 1979 investigative article written by *The Wall Street Journal*, which later prompted Congressional interest in the matter, pointed out that to management, "its blind workers aren't employees but 'clients.'"<sup>149</sup> The casting of workers as clients of their employers is a feature of the 14(c) program that continues to this day.<sup>150</sup> Congressional hearings have likewise made apparent that employers do not distinguish "employee" from "client" when referring to workers with a disability, suggesting that employers believe that *they* are the ones providing a service.<sup>151</sup>

It is often through sanctimonious characterizations that employers speak of their participation in the 14(c) program. For example, a Barnes & Noble spokeswoman justified the company's participation in the program on her belief that it provided jobs to "people who would otherwise not have the opportunity to work."<sup>152</sup> Similarly, Goodwill's position paper on section 14(c) states that the "special minimum wage will preserve opportunities for people with disabilities who would otherwise lose the chance to realize the many tangible and intangible benefits of work."<sup>153</sup> The testimonial by a father of a section 14(c) worker featured in Goodwill's position paper goes as far as to call the job not charity but a "gift," stating, "Goodwill gave us the greatest gift we could ever receive: a future!"<sup>154</sup>

Although these explanations fall squarely within Congress's proffered purpose of section 14(c), "to prevent curtailment of opportunities for employment [for individuals with a disability],"<sup>155</sup> employees are not the only ones who benefit from such an arrangement. An opinion piece in *Forbes* reports that employers large and small have realized that hiring individuals with an intellectual or developmental disability is not just a "feel-good gesture" but also a "smart business decision with enormous dividends."<sup>156</sup> The article, co-written by Carlos Slim Helú, the second richest man in the

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<sup>148</sup> *Id.* at 16.

<sup>149</sup> *Id.* at 13.

<sup>150</sup> See, e.g., GOODWILL INDUS. INT'L, *supra* note 100.

<sup>151</sup> See WHITTAKER, *supra* note 9, at 16-17.

<sup>152</sup> Schecter, *supra* note 12 (internal punctuation omitted).

<sup>153</sup> GOODWILL INDUS. INT'L, *supra* note 100, at 14.

<sup>154</sup> *Id.*

<sup>155</sup> 29 U.S.C. § 214(c)(1) (2015).

<sup>156</sup> Carlos Slim Helú & Anthony K. Shriver, Opinion, *Pledging "I'm In To Hire" Individuals With Intellectual and Developmental Disabilities*, FORBES (Oct. 21, 2014 5:06 pm), <http://www.forbes.com/sites/realspin/2014/10/21/pledging-im-in-to-hire-individuals-with-intellectual-and-developmental-disabilities/>.

world, states, “The fact is, the profile of a worker with IDD [“intellectual or developmental disabilities”] reads like that of an ideal employee. Employees with IDD are often . . . dependable, engaged, motivated and highly productive.”<sup>157</sup>

A study conducted by the Institute for Corporate Productivity, or “i4cp,” analyzing the practices of high-performance organizations, strikingly reported that organizations deemed high-performance—based on measures of profitability, market share, revenue growth, and customer satisfaction—are 37% more likely than low-performance companies to hire a worker with a disability.<sup>158</sup> The high-performance companies do so for the straightforward reason that the workers with a disability are “good talent matches for open positions.”<sup>159</sup> Good talent matches can be a crucial aspect of creating a work environment in which a worker can thrive. Job incompatibility is detrimental to both the worker and the company. For example, Sheila Leigland, previously mentioned,<sup>160</sup> left her employment at Goodwill when the company cut her wages from \$3.99 to \$2.75 per hour due to a time study.<sup>161</sup> Leigland is blind and was timed on her ability to complete the visually demanding task of hanging clothing in accordance with specific requirements, including separating the clothing by gender and facing certain directions.<sup>162</sup>

Recent Congressional findings, as set forth in the TIME bill, maintain that employees with a disability, when provided the proper rehabilitation services, trainings, and tools, can be as productive as employees without a disability.<sup>163</sup> Moreover, even those individuals that are considered to have the most severe disabilities have successfully obtained employment where they earn minimum wage and higher.<sup>164</sup> This raises important questions: how does soci-

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<sup>157</sup> *Id.*

<sup>158</sup> Elizabeth Picciuto, *Hiring People with Disabilities Isn't Just the Right Thing to Do – It's Good for Business*, THE DAILY BEAST (Oct. 27, 2014 5:45 am), <http://www.thedailybeast.com/articles/2014/10/27/hiring-people-with-disabilities-isn-t-just-the-right-thing-to-do-it-s-good-for-business.html> [<http://perma.cc/Y7BF-A2NY>].

<sup>159</sup> *Id.*

<sup>160</sup> See Schecter, *supra* note 12.

<sup>161</sup> Susan Adams, *Does Goodwill Industries Exploit Disabled Workers?*, FORBES (July 30, 2013 7:23 pm), <http://www.forbes.com/sites/susanadams/2013/07/30/does-goodwill-industries-exploit-disabled-workers/>.

<sup>162</sup> *Id.*

<sup>163</sup> Transition to Integrated and Meaningful Employment Act, H.R. 188, 114th Cong. (2015), <https://www.congress.gov/bill/114th-congress/house-bill/188/text> [<https://perma.cc/8BYM-M9UC>].

<sup>164</sup> *Id.*

ety quantify and value work, and how correct are these measurements?

*B. What Factors Contribute to the Value of Work?*

Although section 14(c) employees, like all workers, typically benefit from working, businesses benefit from their work as well.<sup>165</sup> While productivity is an essential part of work, it is certainly not the only component, and in some cases may not even be the most important component. The emphasis placed on productivity by section 14(c) is thus not only discriminatory but also unrealistic, as it fails to reflect the many qualities that account for an individual's contribution to her workplace.

One study reports that more than 75% of employers from the two-hundred organizations surveyed<sup>166</sup> rated their employees with an intellectual or developmental disability as "good" or "very good" on most performance factors, including work quality, productivity, motivation, engagement, integration with co-workers, dependability, and attendance.<sup>167</sup> Of great significance is the fact that productivity is just one among seven factors used to indicate an employee's value.<sup>168</sup> Additionally, certain workplace tasks may be conducted in such a way that quantifying productivity is not feasible. In a job assembling flower arrangements, for example, the aesthetic value of the product is essential to its worth and is something that cannot be easily quantified. Approximately seventy-five of the workers employed by Habitat International, Inc., a Tennessee-based company that produces indoor and outdoor rugs, have a disability, including severe disabilities.<sup>169</sup> CEO David Morris relies on his company's statistics to support his claim that workers with a disability are beneficial to business.<sup>170</sup> Morris reports that his workers are extremely loyal, contributing to low absenteeism and low turno-

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<sup>165</sup> See, e.g., Helú & Shriver, *supra* note 156 (reporting that companies enjoy "enormous dividends" from hiring people with a disability).

<sup>166</sup> See Eric Davis, *What Your D&I Policy is Missing: Employing People with Intellectual and Developmental Disabilities*, I4CP (Oct. 15, 2014), <http://www.i4cp.com/trendwatchers/2014/10/15/what-your-d-i-policy-is-missing-employing-people-with-intellectual-and-developmental-disabilities> [<http://perma.cc/2AYR-R7N5>].

<sup>167</sup> See Picciuto, *supra* note 158.

<sup>168</sup> See Davis, *supra* note 166.

<sup>169</sup> *Our People*, HABITAT INT'L, INC., <http://www.habitaint.com/people.htm> [<http://perma.cc/Y58M-Y2S3>].

<sup>170</sup> Sarah Blahovec, *It's About TIME: Ending Subminimum Wages for Workers with Disabilities*, HUFFINGTON POST (Apr. 10, 2015, 5:41 PM), [http://www.huffingtonpost.com/sarah-blahovec/its-about-time-ending-sub\\_b\\_7041592.html](http://www.huffingtonpost.com/sarah-blahovec/its-about-time-ending-sub_b_7041592.html) [<http://perma.cc/75L2-MCJ7>].

ver due to job dissatisfaction or firings.<sup>171</sup> Those qualities save costs to the business by allowing the entire plant to be overseen by just two managers.<sup>172</sup> Additionally, due to the effectiveness of the workers, there have been no back orders and almost no product defects.<sup>173</sup>

In retail stores such as Goodwill, where customer service is likely an essential part of the establishment, the employee’s ability to interact pleasantly with customers is presumably a very valuable quality. However, DOL guidance documents expressly state that, “[b]ehavioral factors—such as social skills . . . willingness to follow orders, etc.—may not be used when evaluating the workers’ productivity.”<sup>174</sup> Although it may be argued that the exclusion of these characteristics could be for the benefit of certain workers, this is not always the case. Some workers may excel in areas such as interacting with customers and co-workers or the ability to follow orders, and yet these skills are not accounted for in their compensation.

Employing people with a disability also places businesses in good standing with their communities, which companies may use this to their advantage. Goodwill’s website, for example, advertises its employment of people with a disability; the company’s main webpage features a video interview of “Robbie,” a worker with a disability employed by the company.<sup>175</sup>

The rhetoric of 14(c) employers is plagued with examples of the many ways its employees benefit from work.<sup>176</sup> These statements are not untrue, as all people benefit from work.<sup>177</sup> However, it is axiomatic that employers benefit from the work of their employees, too. The idea that benefiting from one’s work is a reason to pay that individual less<sup>178</sup> is harmful to all workers, not just those with a disability. Moreover, productivity is just one among many

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<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *How Hiring People with Disabilities Has Paid Off for Habitat International, Inc.*, HABITAT INT’L, INC., <http://www.habitatint.com/payoff.htm> [<http://perma.cc/6C7W-RYBR>].

<sup>174</sup> DOL FACT SHEET #39E, *supra* note 66.

<sup>175</sup> GOODWILL INDUS. INT’L, INC., <http://www.goodwill.org> (last visited May 31, 2015).

<sup>176</sup> *See, e.g.*, GOODWILL INDUS. INT’L, *supra* note 100.

<sup>177</sup> *See* Cicero, *supra* note 16, at 80 (“[A] transcendent reason for work that assumes an almost spiritual dimension based on intrinsic human needs, such as purpose, meaning, worth, fulfillment, dignity, and respect.”).

<sup>178</sup> *See* Schecter, *supra* note 12 (statement by Goodwill International CEO Jim Gibbons) (“It’s typically not about their livelihood. It’s about their fulfillment. It’s about being a part of something.”).

factors that can be used to measure a worker's contribution to their work environment and to their employer.<sup>179</sup> Using productivity as the sole criterion, as section 14(c) does, is thus overly simplistic and leads to a chronic undervaluing of the work done by individuals with a disability.

## VII. RECONCEPTUALIZING ASSUMPTIONS ABOUT WORK AND WHY PEOPLE WORK

Formulating processes to improve the experience of work for people with a disability must begin with an analysis of how we understand work and our assumptions about why people work. In directly correlating the value of one's work with productivity, section 14(c) epitomizes the concept that work is a purely economic arrangement from which therapeutic benefits are not to be expected. This patently ignores the reality that a majority of people exact psychological benefits from working,<sup>180</sup> that work and wellbeing are intrinsically linked,<sup>181</sup> and that society as a whole benefits when its population is employed.<sup>182</sup>

### A. *Work as a Purely Economic Arrangement*

"Employ" is defined in the FLSA as "to suffer or permit to work."<sup>183</sup> The use of the word "suffer" as not just an expectation but also as a definition of work is telling. The repeal of section 14(c), if it were to be carried out, could not exist in a vacuum, but would have to be accompanied by a shift in social consciousness. This would necessarily have to begin with examining the intrinsic value of work to an individual's life. The prevailing consciousness of work perceives work as "the giving up of leisure . . . in return for compensation,"<sup>184</sup> typically in the form of income. A central tenet of this view is that the employment relationship is "merely a function of the market where economic prerogative is controlling."<sup>185</sup>

The justification that employers use for section 14(c)—that

<sup>179</sup> See Davis, *supra* note 166 (discussing other factors that account for the value of an employee's work such as work quality, motivation, engagement, integration with co-workers, dependability and attendance).

<sup>180</sup> Priebe et al., *supra* note 13, at 469 .

<sup>181</sup> See Cicero, *supra* note 16, at 80.

<sup>182</sup> See *Jobs*, OECD BETTER LIFE INDEX, <http://www.oecdbetterlifeindex.org/topics/jobs> [<http://perma.cc/GG3P-DKNW>].

<sup>183</sup> 29 C.F.R. § 525.3(g) (2015).

<sup>184</sup> Howard Lesnick, *The Consciousness of Work and the Values of American Labor Law*, 32 BUFF. L. REV. 833, 843 (1983).

<sup>185</sup> Cicero, *supra* note 16, at 83.

workers with a disability are paid less in part because their employment is beneficial to them<sup>186</sup>—is precisely the construction of the employee-employer relationship that must be corrected. Notably, in defining the term “employ,” the FLSA expressly states that “[t]he determination of an employment relationship does not depend upon the level of performance or whether the work is of some therapeutic benefit.”<sup>187</sup> Although the FLSA recognizes the existence of an employment relationship even where there is a therapeutic benefit, the 14(c) employers seem to view the fact that their employees derive a therapeutic benefit from work as a justification for their decreased compensation.<sup>188</sup> For example, when questioned about the 14(c) program, Goodwill International CEO Jim Gibbons, who was awarded a \$729,000 salary in 2011, stated, “It’s typically not about their livelihood. It’s about their fulfillment. It’s about being a part of something.”<sup>189</sup>

The statement made by the Goodwill CEO suggests that earning a livelihood is not only detached from the expectation of fulfillment or a sense of common purpose, but that the former is actually at odds with the latter. This advances the jaded notion that basic human needs, such as emotional fulfillment,<sup>190</sup> are attained through a trade-off of livelihood. This idea goes against other provisions of the FLSA,<sup>191</sup> and against the interests of working people generally.

#### B. *Work is Intrinsically Linked to Therapeutic Benefits*

The reality that an individual gains more than a paycheck from working should not be seen as an aberration, but as a norm. For all workers, with or without a disability, there “exists a transcendental reason for work that assumes an almost spiritual dimension based on intrinsic human needs, such as purpose, meaning, worth, fulfillment, dignity, and respect.”<sup>192</sup> All 14(c) employees who have a disability still have the ability to work.

On an individual level, employment has significant effects on

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<sup>186</sup> See GOODWILL INDUS. INT’L, *supra* note 100.

<sup>187</sup> 29 C.F.R. § 525.3(g).

<sup>188</sup> See Schechter, *supra* note 12.

<sup>189</sup> *Id.*

<sup>190</sup> See generally Priebe et al., *supra* note 13.

<sup>191</sup> See 29 C.F.R. § 525.3(g) (2015) (“The determination of an employment relationship does not depend upon the level of performance or whether the work is of some therapeutic benefit.”).

<sup>192</sup> Cicero, *supra* note 16, at 80.

physical and mental health,<sup>193</sup> as well as on subjective well-being.<sup>194</sup> These individual benefits have widespread effects, as societies with higher levels of employment are wealthier, more politically stable, and healthier.<sup>195</sup> However, in accounting for the psychological benefits of employment, “[w]orking conditions can be as important as job availability.”<sup>196</sup> “Work represents many people’s main recognised contribution to the community where they live, and it is a source of pride and dignity; the quality of their jobs is therefore fundamental for them.”<sup>197</sup> The ability to work is therefore meaningful only if people can be employed in a dignified manner, free from legalized discrimination. In a series of Congressional hearings on section 14(c) in 1980, Donald Elisburg, Assistant Secretary for Employment Standards with responsibility over section 14(c), stated that the yardstick for measuring the success of the program “must also be measured in more human terms,” namely, “sense of accomplishment and self-respect as well as income earned.”<sup>198</sup>

As previously mentioned, Freud believed that one of the two most fundamental components of mental health is the ability to work.<sup>199</sup> In requiring people to work under the condition of inequality, section 14(c) denies an entire group of people who are able to work the ability to do so with dignity. Refocusing the emphasis of work from purely economic and tangible terms to intangible benefits is not merely the job of workers, but of employers as well. In recognizing the role of work, and more importantly of the worker in society, the importance placed on the physical output of an employee should be deemphasized in light of the drastic psychological and social advantages society as a whole derives when its population is gainfully employed.<sup>200</sup>

### C. *Policies to Remedy and Replace Section 14(c) of the FLSA*

If work came to be known as an entity intrinsically linked to well being and if employment was viewed as a societal rather than

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<sup>193</sup> See generally Wilson, S.H. & Walker, G.M., *Unemployment and Health: A Review*, 107 PUB. HEALTH J.153, 153-62 (1993).

<sup>194</sup> See Andrew E. Clark & Andrew J. Oswald, *Unhappiness and Unemployment*, 104 ECON. J. 648 (1994).

<sup>195</sup> See OECD BETTER LIFE INDEX, *supra* note 182.

<sup>196</sup> OECD, HOW’S LIFE?: MEASURING WELL-BEING 58 (2011), <http://dx.doi.org/10.1787/9789264121164-en> [<http://perma.cc/AY3U-ETB2>].

<sup>197</sup> *Id.*

<sup>198</sup> See WHITTAKER, *supra* note 9, at 15.

<sup>199</sup> See *Frequently Asked Questions*, FREUD MUSEUM LONDON, <http://www.freud.org.uk/about/faq/> [<http://perma.cc/QW77-NNF4>].

<sup>200</sup> See OECD BETTER LIFE INDEX, *supra* note 182.

an individual responsibility, a multitude of policies to replace section 14(c) would become available. Although there is no one solution to this problem, there are certainly processes that can provide equal employment opportunities to individuals with a disability. As the recently proposed TIME Act suggests, the DOL should halt the issuing of any new section 14(c) certificates, and a plan should be put in place to phase out the program entirely.<sup>201</sup> The repeal of the sub-minimum wage program and a transition into integrated and meaningful employment for people with a disability is essential. As part of this process, protections would need to be put in place to ensure that individuals with a disability are not left out of the workforce altogether.

If the government chooses to exempt employers from paying the minimum wage to workers with a disability, the government should subsidize their employment to supplement the paid income of the workers to match the minimum wage. Therefore, if a worker is paid 50% of the minimum wage by her employer, the government should pay the remaining 50%. This remedy would be ideal for three primary reasons. First, as previously discussed, it is not just the worker herself that benefits from being gainfully employed—societies as a whole are healthier, wealthier, and more politically stable when their populations are employed.<sup>202</sup> As such, the financial burden of the sub-minimum wage, which is heavy for an individual worker to bear, should be spread more evenly throughout society since society benefits as well.

Second, requiring the government to subsidize the portion of the paycheck that the employer does not pay would serve as an incentive for government oversight of employers. Presumably, the government would want to decrease the amount of money it spends, and would therefore make certain that employers are paying workers an accurate wage by ensuring that they are matching employees to compatible jobs, properly administering the time studies and accurately reporting results. This would likely lead to regular systematic and self-initiated reviews by the DOL of time studies, productivity reports, and payment of workers, all of which employers should be required to maintain in records.<sup>203</sup> By placing taxpayer money into the equation, the program would create government accountability, since all taxpayers would have an interest

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<sup>201</sup> Transition to Integrated and Meaningful Employment Act, H.R. 188, 114th Cong. (2015).

<sup>202</sup> See OECD BETTER LIFE INDEX, *supra* note 182.

<sup>203</sup> See GAO, *supra* note 17 (reporting that the DOL does not conduct self initiated investigations into employer compliance with requirements of the program).

in ensuring that employers were not paying workers with a disability an artificially low wage. It may also give the government an incentive to penalize employers who fail to adequately comply with the law, as they would be abusing not only workers but taxpayers, as well.

Third, subsidizing the paychecks of employees to guarantee that they are paid the minimum wage achieves the goal of preventing curtailment of employment opportunities for people a disability while eradicating the discriminatory effects of section 14(c). Subsidizing the employment would be an appropriate means to achieve that government interest, and would thus comport with the Fourteenth Amendment's requirement that people be protected equally by the law.<sup>204</sup>

Additionally, rather than assuming that a worker with a disability is unable to meet the productivity requirement, there should be a rebuttable presumption that the individual is capable of meeting minimum productivity standards, the burden of which should be placed on the employer to disprove.<sup>205</sup> This would help to equalize the power imbalance that workers feel when they enter the workshops under the presumption of low productivity, having to prove themselves worthy of the national minimum wage.

If the government believes employers should have to pay a wage that only reflects the productivity of a worker, the government should pay the remaining wage to account for all of the benefits society attains from having an employed population. Government-subsidized wages would create incentives for taxpayers to hold the government accountable for its policies and to ensure that workers are not being exploited. Although there is much work to be done in shaping these new policies, it is certain that in regard to the sub-minimum wage program under section 14(c), we can do better.

### VIII. CONCLUSION

Although well-intentioned when it was initially enacted,<sup>206</sup> section 14(c) of the FLSA has remained frozen in time while society

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<sup>204</sup> U.S. CONST. amend. XIV.

<sup>205</sup> See MICHAEL MORRIS ET AL., SECTION 14C OF THE FAIR LABOR STANDARDS ACT: FRAMING POLICY ISSUES 21 (Apr. 2002), [http://bbi.syr.edu/publications/morris/Policy\\_Report\\_042002.doc](http://bbi.syr.edu/publications/morris/Policy_Report_042002.doc) [<http://perma.cc/5JET-33MX>].

<sup>206</sup> 29 U.S.C. § 214(c)(1) (2015) (stating as its purpose "to prevent curtailment of opportunities for employment . . . of individuals . . . whose earning or productive capacity is impaired by age, physical or mental deficiency or injury").

has continued to progress.<sup>207</sup> This form of state-sanctioned discrimination is not an answer to a problem, but is a problem in itself. Section 14(c) hurts not only workers with a disability, but affects all workers by placing the actual worth of employees solely on the quantities they produce.<sup>208</sup> Work must be understood as intrinsically linked to well being in order for employers, as well as society, to value the contributions of workers beyond their physical output.<sup>209</sup> Therefore, beginning with a shift in how we view work, we can strive to reach a place where the worker will become “more important than the object produced.”<sup>210</sup>

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<sup>207</sup> See *The Issue of Fair Wages for Workers with Disabilities*, NAT’L FED’N OF THE BLIND, <https://nfb.org/fair-wages> [<https://perma.cc/G98Y-X2XD>].

<sup>208</sup> See 29 U.S.C. § 214(c)(1)(C) (requiring wages to be paid “related to the individual’s productivity”).

<sup>209</sup> See Cicero, *supra* note 16, at 80; OECD BETTER LIFE INDEX, *supra* note 182; Clark & Oswald, *supra* note 194.

<sup>210</sup> See David L. Gregory, *Catholic Labor Theory and the Transformation of Work*, 45 WASH. & LEE L. REV. 119, 128 (1988).

