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

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ENFORCING THE RIGHT TO BE FREE FROM SEXUAL VIOLENCE AND THE ROLE OF LAWYERS IN POST-EARTHQUAKE HAITI

Blaine Bookey[1]

INTRODUCTION

With an enormous death toll, thousands more injured or maimed, and millions pushed into further poverty and despair, Haiti faces enormous challenges. Developing a long-term legal response that advocates for the human rights of the victims of Haiti's January 12, 2010 earthquake and reduces Haiti's vulnerability to

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the next environmental, economic or political disaster will play a central role in overcoming those challenges. International lawyers working in partnership with Haitian lawyers and their clients can also play an important role in developing a legal response that advances the human rights of Haitians.

The devastation of the earthquake exposed the disastrous effects of decades-old policies that systematically undermine the Haitian government and ignore the needs of the majority of its people. The earthquake itself was a natural phenomenon, but its horrible toll is largely the product of manmade factors. Neoliberal "adjustments" and austerity measures implemented by the international community flooded Haitian markets with low-cost agricultural products and drove large numbers of Haitian farmers to leave the countryside and move into densely crowded urban slums.[2] In these "bidonvilles," the Government of Haiti failed to prevent shoddy construction on precarious slopes or to provide safer housing. As a result, victims of such measures—the poor—were some of the hardest hit victims of the earthquake. One only need compare the results of the February 27, 2010 earthquake in Chile to better understand the effects that poverty and weak rule of law can have on disaster preparedness.[3]

Women and girls in Haiti, facing a crisis of sexual violence in Haiti's displacement camps, have borne the brunt of the disaster. The collapse of social infrastructures, the erosion of family and community networks, inequitable access to services, lack of secure housing, the absence of the rule of law, and dependence resulting from economic dislocation have greatly increased the risk of rape. Rape and sexual violence, extreme violations of universal human rights in their own right, compromise the ability of women to access the full panoply of their civil, political, economic, social and cultural rights.[4]

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2 Peter Hallward, *The Fourth Invasion: Security Disaster in Haiti,* HAITIANALYSIS.COM (Jan. 22, 2010), http://www.haitianalysis.com/2010/1/22/securing-disaster-in-haiti. *See generally* PETER HALLWARD, DAMMING THE FLOOD: HAITI, ARISTIDE, AND THE POLITICS OF CONTAINMENT (2007).

3 The 8.8 magnitude of the Chile quake was 500 times more powerful than the 7.0 magnitude of the Haiti quake, but Haiti suffered 230 times more mortality. Geological differences aside, it is clear that Chile's advanced development and enforcement of laws (*e.g.*, building codes) contributed to the lower mortality rate and minimized destruction. *Quake Comparison: Chile vs. Haiti,* THE WEEK (Feb. 28, 2010, 1:28 PM), http://theweek.com/article/index/200198/quake-comparison-chile-vs-haiti.

4 *See* Catherine Albisa, *Economic and Social Rights in the United States: Six Rights, One Promise*, *in* 2 BRINGING HUM. RTS. HOME 25 (Cynthia Soohoo et al. eds., 2008) (finding that "a deeper accountability to all human rights, including civil and political rights, requires the recognition and implementation of economic and social rights and that

Under international law, the primary responsibility for the protection of human rights falls to the government of the individual state. However, this principle does not exempt foreign states and international organizations from sharing this responsibility when donating to and operating within a particular receiving state. When the devastation is such that the government of the receiving state cannot adequately perform its core functions, donor states must pursue a course that protects human rights in partnership with the government of the receiving state.

Under Inter-American Law, Organization of American States (OAS) Member States have obligations with regard to economic, social, and cultural rights and have obligations to work together to achieve these rights, particularly when a state is seriously affected by conditions it cannot remedy alone.[5] Under the OAS Charter, Member States "agree[ ] to promote by cooperative action, their economic, social and cultural development" and "the fundamental rights of the individual without distinction as to race, nationality, creed or sex."[6] Under the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, known as Convention of Belém do Pará, Member States agree to undertake progressively specific measures, including programs "to foster international cooperation for the exchange of ideas and experiences and the execution of programs aimed at protecting women who are subjected to violence."[7] Moreover, OAS Member States have concrete and specific obligations to respect the economic and social rights of the people of Haiti when providing international assistance in the region.[8]

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the protection of this set of rights is a precondition for addressing structural violence . . . .").

[5] *See* Brief submitted by Center for Human Rights and Global Justice, Robert F. Kennedy Center for Justice & Human Rights, Bureau des Avocats Internationaux, Institute for Justice & Democracy in Haiti, Zanmi Lasante, and Partners in Health to the Inter-American Commission on Human Rights [Inter-Am. Comm'n H.R.], THE HUMAN RIGHTS OBLIGATIONS OF OAS MEMBER STATES PROVIDING INTERNATIONAL ASSISTANCE IN THE REGION (Mar. 9, 2010), *available at* www.chrgj.org/projects/docs/100309-IACHRHearingHaitiEng.pdf.

[6] Charter of the Organization of American States, arts. 2(f), 3(l), Apr. 30, 1948, 119 U.N.T.S. 3.

[7] Organization of American States, Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women [hereinafter Convention of Belém do Pará], art. 8(i), June 9, 1994, 27 U.S.T. 3301, 1438 U.N.T.S. 63, *available at* http://www.cidh.oas.org/Basicos/English/Basic.TOC.htm.

[8] Just after the earthquake, the Inter-American Commission on Human Rights reminded the Haitian government, the international community, and implementing organizations of "the importance of respecting international human rights obligations in all circumstances, in particular non-derogable rights and the rights of those

To date, the Haitian government, the United Nations (UN) and the international community have not yet developed effective responses consistent with their human rights obligations to address the epidemic of sexual violence in Haiti's displacement camps. This is due in part to the exclusion of women, especially poor women, from full participation and leadership in the relief effort despite standards requiring such participation.[9] Part of the failure of the relief and development effort can also be attributed to the hold up in the delivery of funds.[10] And, of the money that has made its way to Haiti, it has overwhelmingly been distributed to non-governmental organizations (NGOs) with little accountability to donors or to the people of Haiti. This undercuts the ability of the Haitian government to effectively provide for its people. Excluding the government now might expedite relief in the short term, but it will also expedite the return of disaster when Haiti is unable to handle the next inevitable environmental or other stress. Indeed, factors such as Haiti's lack of infrastructure and notorious corruption should be good reason for investing in infrastructure and good governance, not for bypassing the government altogether.[11]

This article argues that enforcing the right to be free from sexual violence—including punishing perpetrators of violence and providing adequate security and housing—is not only required under domestic and international law but is also a sound development policy. Enforcing individual legal rights simultaneously improves women's lives (as well as that of their families) while reinforcing the rule of law and the administration of justice in Haiti. It will help build government capacity and create conditions of long-term stability necessary for enforcement of a broad range of human rights and economic, political and social development.[12]

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most vulnerable," and provided a helpful framework to understand the obligations of Member States providing international assistance to Haiti. Press Release No. 11/10, Inter-Am. Comm'n H.R., Inter-American Commission on Human Rights Stresses Duty to Respect Human Rights During the Emergency in Haiti (Feb. 2, 2010), *available at* http://www.cidh.org/Comunicados/English/2010/11_10eng.htm.

9 *See* Convention of Belém do Pará, Mar. 5, 1995; Representative of the Secretary-General, *Report on the Guiding Principles on Internal Displacement, Delivered to the Commission on Human Rights*, U.N. Doc. E/CN.4/1998/53/Add.2 (Feb. 11, 1998) [hereinafter UN Guiding Principles].

10 *Have Rich Countries Forgotten Haiti? Key Facts on International Assistance*, CENTER FOR ECONOMIC AND POLICY RESEARCH (CEPR) (Aug. 27, 2010), http://www.cepr.net/index.php/blogs/relief-and-reconstruction-watch/have-rich-countries-forgotten-haiti-key-facts-on-international-assistance.

11 MARK SCHULLER, UNSTABLE FOUNDATIONS: IMPACT OF NGOS ON HUMAN RIGHTS FOR PORT-AU-PRINCE'S INTERNALLY DISPLACED PEOPLE (2010).

12 *See generally* COMMISSION ON LEGAL EMPOWERMENT OF THE POOR & THE UNITED

Following individual cases through the Haitian legal system will reinforce larger structural reforms and development projects that have, to date, produced only marginal results.[13] It will also increase trust in the system from the bottom up, a necessary predicate for any system based on the rule of law.[14]

This article first provides a brief overview of the history of human rights in the context of sexual violence in Haiti. Next, it provides an overview of sexual violence and the vulnerability of women and girls since the earthquake. The article then discusses the historical barriers to enforcing rights in Haiti. Finally, the article discusses the role of lawyers enforcing the right to be free from sexual violence in post-earthquake Haiti, highlighting the work of the *Bureau des Avocats Internationaux* (Office of International Lawyers or BAI) and the Institute for Justice & Democracy in Haiti (IJDH) with hope of providing insight into lessons learned, recommendations, and ways for attorneys and law students in the United States to work with Haitians for positive change.

I. Human Rights of Women and Girls in Haiti

A. Brief History of Rape in Haiti

As Dr. Paul Farmer has stated, "a quick review of Haiti's history is indispensable to understanding the current muddle."[15] This section endeavors to provide a brief and by no means exhaustive overview of the recent history of rape and gender-based violence in Haiti to put the post-earthquake crisis in context.[16] This history will

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Nations Development Programme, Making the Law Work for Everyone Vol. 1 (2008), *available at* http://www.undp.org/legalempowerment/report/Making_the_Law_Work_for_Everyone.pdf.

13 Indeed, the majority of aid funding has historically been spent on larger structural projects (*e.g.*, reconstructing buildings) and training programs rather than legal aid and access to justice services. Without the latter, new buildings stand empty and newly trained staff idle.

14 For the United Nations system, the rule of law is a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires as well measures to ensure adherence to the principles of supremacy of the law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency. U.N. Secretary-General, *Guidance Note of the Secretary General: UN Approach to Rule of Law Assistance* 1 (Apr. 2008), *available at* http://www.unroll.org/doc.aspx?doc_id=2124.

15 Paul Farmer, The Uses of Haiti, 376 (3rd ed. 2006).

16 Gender-based violence "includes violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that

help lawyers working in Haiti better understand patterns of sexual violence and why the current humanitarian response has not yet developed effective measures to protect women and girls and in some cases exacerbated structural inequalities that pre-date the earthquake.[17]

Haiti is no stranger to violence against women. Under the brutal Duvalier dictatorship, women were detained, tortured, exiled, raped and executed.[18] On September 30, 1991, a military coup d'état overthrew Jean Bertrand Aristide, Haiti's first democratically elected President, initiating a three-year period of terror. Under the illegitimate regime of General Raoul Cédras, between 4,000 and 7,000 people were killed, hundreds of thousands were tortured, beaten, and forced into exile, and hundreds, if not thousands, of women were systematically raped by soldiers and paramilitary forces.[19] Women were targeted for abuse because of their political support for democracy, their intimate association with other activists, their class and their gender.[20]

More recently, a mortality study for Port-au-Prince published in *The Lancet* medical journal concluded that 35,000 women were raped between March 2004 and December 2006 in Port-au-Prince alone under the illegal regime of Gerard Latortue. More than ten percent of the perpetrators were identified as right-wing political actors.[21] Echoing these findings, the Inter-American Commission

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inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty." Gen. Rec. No. 19, Committee on the Elimination of Discrimination against Women (CEDAW), Violence Against Women (11th Session, 1992) ¶ 6, U.N. Doc. A/47/38, *available at* http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm [hereinafter Gen. Rec. No. 19].

17 As one coalition of Haitian civil society groups noted, "[t]he extent of the disaster is certainly linked to the character of the colonial and neo-colonial State our country has inherited, and the imposition of neo-liberal policies over the last three decades." *See* Statement by the Coordinating Committee of Progressive Organizations, Port-au-Prince, *Haiti: After the Catastrophe, What are the Perspectives?* (2010), http://www.normangirvan.info/wp-content/uploads/2010/01/haiti-statement-prog-orgs.pdf.

18 In fact, ironically under Duvalier, "state violence created, for the time, gender equality," in that no one was spared from the regime's repressive tactics. Carolle Charles, *Gender and Politics in Contemporary Haiti: The Duvalierist State, Transnationalism, and the Emergence of a New Feminism (1980–1990)*, 21 FEMINIST STUDIES 135, 140 (1995).

19 *See* Findings of Fact and Conclusions of Law for Doe et al. v. Constant, 04 Civ. 10108 (S.D.N.Y., Oct. 24, 2006) (finding Constant, who was the founder and leader of the Haitian paramilitary death squad Revolutionary Front for the Advancement and Progress of Haiti (FRAPH) under General Raoul Cédras's military regime, liable for torture, attempted extrajudicial killing, and crimes against humanity).

20 Benedetta Faedi, *The Double Weakness of Girls: Discrimination and Sexual Violence in Haiti*, 44 STAN. J. INT'L. L. 147, 171–73 (2008).

21 Athena R. Kolbe & Royce A. Hutson, *Human Rights Abuse and Other Criminal*

on Human Rights (IACHR) observed in a 2009 report that during the two-year period of political instability following the ouster of President Aristide in February 2004, the rate of violence against women steadily rose. Increasing poverty, deep-rooted class divisions, the proliferation of arms, rise in violent crime, and the absence of adequate crime prevention and judicial mechanisms to respond to the violence exacerbated the violence.[22]

Gender-based violence is intimately interconnected with other forms of structural oppression within Haitian society. Like most other countries around the world, Haiti has a long history of gender discrimination, which has been reinforced over centuries.[23] Gender discrimination in Haitian society systematically obstructs the ability of women to prevent or address injustice against them, and strengthens other forms of structural oppression such as economic and political discrimination.[24] Gender-based violence expert Catherine Maternowska provides some sense of how widespread violence against women is within Haitian society. All of the women she interviewed as part of her ethnographic study of Cité Soleil reported having been beaten at some point in their lives, with the majority reporting they were beaten on a regular basis.[25]

Deeply entrenched economic and political inequalities within Haitian society have enabled rape and gender-based violence against women to occur. As scholar Dennis Altman argues, rape can be a way of "preserving tradition" in society.[26] In the Haitian context, centuries of repressive politics, the collapse of the Haitian economy, and high rates of unemployment have impaired the ability of many Haitian men to fulfill their traditional gender roles as providers. Rape and other forms of violence against women, then,

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Violations in Port-au-Prince, Haiti: A Random Survey of Households, 368 THE LANCET 864, 869–70 (2006).

22 Inter-American Commission for Human Rights [Inter-Am. Comm'n H.R.], *The Right of Women in Haiti to be Free from Violence and Discrimination*, file OEA/Ser.L/V/II, Doc. 64, at ¶ 48 (2009), http://www.cidh.org/countryrep/Haitimujer2009eng/HaitiWomen09.toc.htm.

23 For a general account of gender discrimination in Haiti, *see* Faedi, *supra* note 20; Inter-Am. Comm'n H.R., *supra* note 22. For a general account of resistance to slavery in the Haitian revolution, *see* C.L.R. JAMES, THE BLACK JACOBINS: TOUSSAINT L'OUVERTURE AND THE SAINT DOMINGO REVOLUTION (1938).

24 Brian Concannon Jr., *Haitian Women's Fight for Gender Justice* 9 (2003) (unpublished), http://ijdh.org/archives/14424.

25 CATHERINE MATERNOWSKA, REPRODUCING INEQUITIES: POVERTY AND THE POLITICS OF POPULATION IN HAITI 62 (2006).

26 DENNIS ALTMAN, GLOBAL SEX (2001), quoted in MATERNOWSKA, *supra* note 25, at 70.

is a means by which men reclaim their masculinity by asserting the only power they have left—that over women.[27]

Notwithstanding, women have played an integral role in Haiti's struggle for democracy since the beginnings of the slave revolt and have developed, along with male allies, a strong network of civil society organizations.[28] Following the end of the military junta in 1994, women played a key part in compelling the reinstated government to publicly acknowledge the widespread, systematic rapes committed following the 1991 coup.[29] The advocacy of women's groups led the government to instruct the newly established National Truth and Justice Commission to pay close attention to politically-motivated sexual violence.[30] The Haitian Government also responded by establishing a *Ministère à la Condition Féminine et aux Droits des Femmes* (Women's Ministry) and launching the 2003 *Table de Concertation Nationale Contre la Violence Faites aux Femmes* (National Dialogue on the Prevention of Violence Against Women), a partnership between the government ministries, UN agencies and civil society to promote coordination between the various actors in the fight against violence against women and implement a national plan of action.[31] In 2005, Executive Decree No. 60, the result of tireless advocacy, reclassified rape under the Haitian Penal Code as a crime against the person rather than against morals and increased the severity of the available penalties.[32]

Despite advancements, challenges to enforcing women's rights remain. The layered histories of sexual violence, repression and structural inequality in Haiti, coupled with fear of social stigmatiza-

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27 *Id.*

28 *See generally* Charles, *supra* note 19; JAMES, *supra* note 23.

29 Concannon, *supra* note 24, at 26–27.

30 *See generally Truth Commission: Haiti*, UNITED STATES INSTITUTE OF PEACE, http://www.usip.org/publications/truth-commission-haiti; SI M PA RELE, RAPPORT DE LA COMMISSION NATIONALE DE VERITÉ ET DE JUSTICE (1997), *available at* http://ufdc.ufl.edu/?b=UF00085926&v=00001.

31 *See La Concertation Nationale*, UNFPA HAÏTI, http://www.unfpahaiti.org/ConcertationNationale.htm. In 2005, Haiti adopted the 2006–2011 National Plan to Combat Violence Against Women, aimed at preventing violence and attending to victims. The Plan's objectives include putting in place a mechanism for systematic data collection, prevention of violence, building capacity through promoting a multi-sectoral approach, and other strategies. Implementation has been limited.

32 Government of Haiti, *Décret modifiant le régime des Agressions Sexuelles et éliminant en la matière les Discriminations contre la Femme* [Decree Changing the Regulation of Sexual Aggressions and Eliminating Forms of Discrimination Against Women], Decree No. 60 of Aug. 11, 2005, Art. 2 (modifying Art. 278 of the Penal Code), Art. 3 (modifying Art. 279), Art. 4 (modifying Art. 280), *Journal Officiel de la Republique d'Haiti*, Aug. 11, 2005, 1, *available at* http://www.haitijustice.com/images/stories/files/pdfs/loi_agressions_sexuelles_femmes_haiti.pdf.

tion and retribution, have led to repeated violations of the right of Haitian women and girls to be free from sexual violence, and have eroded the ability of women and girls to enjoy the full range of inalienable rights. The deep historical divide between the poor majority and rich minority within Haitian society has regrettably hampered the ability of women's organizations to unite and push for a common agenda.[33] Understanding this history is crucial for adopting effective strategies to end the cycle of violence and advance Haiti's development moving forward.

B. Sexual Violence in Post-Earthquake Haiti

UN Special Rapporteurs and Representatives have called attention to the sexual violence against Haiti's displaced women and girls and conditions that exacerbate insecurity. In an October 2010 speech to the General Assembly, Rashida Manjoo, the UN Special Rapporteur on Violence Against Women, Its Causes and Consequences, highlighted the disproportionate vulnerabilities of women in post-disaster settings and their increased risk of violence, citing sexual violence in Haiti's displacement camps.[34] That same month, Walter Kälin, the then-Special Representative to the Secretary-General on the Human Rights of Internally Displaced Persons, linked pre-existing vulnerabilities of "violence and exploitation" with the post-disaster occurrence of sexual violence in Haiti.[35] Likewise, in November 2010, the IACHR issued a public statement "ex-

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[33] Women's organizations can be roughly split into two groups, non-governmental organizations (NGOs) and grassroots organizations (also known historically as "popular organizations" or OPs). The leadership and membership of Haitian women's NGOs is made up almost exclusively of middle and upper class Haitians (though perhaps less privileged in comparison to their international counterparts). These groups also typically have access to resources that the majority of Haitians lack, such as economic resources, education and European language skills, as well as international connections. While grassroots organizations do the bulk of women's organizing within Haitian society, illiteracy and financial resources restrict their capacity.

[34] Statement by Rashida Manjoo, Special Rapporteur on Violence Against Women, Its Causes and Consequences, at the 65th Session of the General Assembly Third Committee (Oct. 11, 2010), *available at* http://www.un.org/womenwatch/daw/documents/ga65/vaw.pdf. The Special Rapporteur also noted that she has "received numerous reports on the rise in violence against women and girls, in particular rape and domestic violence in IDP camps and elsewhere," *id.* at 6.

[35] He drew attention to "important levels of rape and gang-rape and also domestic violence in the camps, which [women's groups] identified to be problems that are growing in number and brutality." Walter Kälin, Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, *Human Rights of Internally Displaced Persons in Haiti: Memorandum Based on a Working Visit to Port-au-Prince* (Oct. 12–16, 2010), http://ijdh.org/wordpress/wpcontent/uploads/2010/11/Kalin_Statement_2010_Haiti_English.pdf.

press[ing] its concern over the situation in a number of camps for persons displaced by the earthquake that took place in Haiti in January 2010, especially with regard to forced evictions and sexual violence against women and girls."[36]

This section provides a brief overview of the situation for Haitian women and girls living in the displacement camps in Port-au-Prince since the earthquake. It does not attempt to provide a quantitative analysis of the prevalence of rape or gender-based violence; in fact, data is hard to come by.[37] Rather, it provides a qualitative analysis of the current crisis of safety and security for Haitian women and girls. These findings are based on interviews—conducted in May, June, July, August and October 2010 by the author and delegations of other United States lawyers—of over seventy-five women who had been raped since the January earthquake, and observations made while touring the camps and other areas where the attacks took place. The victims interviewed range in age from five to sixty.[38] This section also relies on studies conducted by other fact-finding delegations where so indicated.

1. Vulnerability of Haitian Women and Girls

Haiti's approximately one million Internally Displaced Persons (IDPs) live under makeshift shelters of bed sheets, tarps, and tents in overcrowded camps that largely lack basic necessities. International NGOs have implemented programs in an ad hoc manner, resulting in inconsistent, overlapping, and unequal resources and programming with gaps in coverage.[39] Many displaced re-

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[36] Press Release No. 114/10, Inter-Am. Comm'n H.R., Inter-American Commission on Human Rights Expresses Concern over Situation in Camps for Displaced Persons in Haiti (Nov. 18, 2010), *available at* http://www.cidh.org/Comunicados/English/2010/115-10eng.htm.

[37] For quantitative analyses of the epidemic see CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE, SEXUAL VIOLENCE IN HAITI'S IDP CAMPS: RESULTS OF A HOUSEHOLD SURVEY (2011) ("An alarming 14% of households surveyed reported that, since the earthquake, one or more members of their household had been victimized by rape or unwanted touching or both."), ATHENA R. KOLBE ET AL., SMALL ARMS SURVEY & UNIVERSITY OF MICHIGAN, ASSESSING NEEDS AFTER THE QUAKE: PRELIMINARY FINDINGS FROM A RANDOMIZED SURVEY OF PORT-AU-PRINCE HOUSEHOLDS 23 (2010) (finding that about 3% of the individuals in the sample had experienced sexual violence during the first two months after the earthquake).

[38] Although the term "survivor" is often preferred to "victim" in the United States, Haitians often choose to call themselves "victims." The terms are used interchangeably herein, and it should be noted that use of the term "victim" by Haitian women or in this article does not imply lack of agency. The word "victim" is also used here as a legal term for one who experiences a crime.

[39] Melanie Teff, *Haiti: Still Trapped in the Emergency Phase*, FIELD REPORT (Refugees

sidents report that conditions in the camps have worsened in recent months.

Displaced women and girls face chronic and increasing inaccessibility to shelter, potable water, food, adequate sanitation, medical treatment and education. Surveys conducted during the summer and fall found that only approximately ten to twenty percent of families had tents.[40] Even these shelters—many of which were battered beyond repair in their first few months of use—do not provide meaningful protection against the elements or perpetrators of violence.

Poverty and displacement make women more vulnerable to sexual violence because they must place themselves in situations of increased risk out of necessity. For example, women and girls have no choice but to use unsecure bathrooms and showers and walk long distances or through dangerous neighborhoods to obtain food and water. Very few women interviewed had any source of steady income.[41] Ever-deepening poverty constrains essentially all aspects of women's lives—for example, choices about where to live and how to travel. Destruction of support networks and livelihoods, including loss of adult male family members who provided physical security and a source of income, has only further increased vulnerability.[42]

Rape survivors interviewed expressed deep concern and anxiety over their continued vulnerability to rape and other sexual violence in the camps. Lacking other options, most remain living in the same area where they were attacked, and the attackers remain at large. None of the interviewees were aware of safe spaces or shelters where they could go. At least three of the women interviewed were raped on two separate occasions since the earthquake and several others had been raped during previous periods of unrest.[43]

International, Wash. D.C.), Oct. 6, 2010, *available at* http://www.refugeesinternational.org/sites/default/files/100710_haiti_still_trapped.pdf.

40 *See* SCHULLER, *supra* note 11, at 3; INSTITUTE FOR JUSTICE & DEMOCRACY IN HAITI (IJDH) ET AL., "WE'VE BEEN FORGOTTEN": CONDITIONS IN HAITI'S DISPLACEMENT CAMPS EIGHT MONTHS AFTER THE EARTHQUAKE 42 (2010), Appendix E, *available at* http://ijdh.org/wordpress/wp-content/uploads/2010/09/IDP-Report-09.23.10-compressed.pdf.

41 Prior to the earthquake, most women worked as merchants in the informal market, but these activities have been limited because many lost their supplies in the earthquake. *See, e.g.,* Interview #12 (May 5, 2010) (on file with author).

42 *See, e.g.,* Interview #6 (May 3, 2010) (on file with author).

43 *See, e.g.,* Interview #2 (May 10, 2010); Interview #7 (May 3, 2010); Interview #30 (June 8, 2010); Interview #37 (June 8, 2010); Interview #52 (June 2010); and Interview #54 (June 2010) (on file with author).

To make matters worse, government agents and purported landowners have been evicting homeless families from displacement camps, which has increased women's exposure to violence and destitution.[44] According to a recent survey of six displacement camps chosen at random, forty-eight percent of surveyed families have been threatened with or subjected to forced eviction.[45] According to another survey, 19 of 106 camps had been closed and the communities evicted.[46] In most cases of eviction, the government has not provided notice of an impending eviction with time to prepare or provided an alternate location in which the evicted residents can live.[47] Even when the Haitian government does provide new sites for evicted communities, the sites are in many cases uninhabitable and void of basic services.[48]

The government agents and purported property owners often lack legal grounds under Haitian and international law to evict communities from their camps. Given their inherent vulnerability, displaced persons are entitled to special protection from forced eviction under international law.[49] Only in rare circumstances are evictions of internally displaced communities lawfully permitted, and even then, the government must provide IDPs an alternate

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44 *See, e.g.,* Ansel Herz, *Haut-Turgeau, Haiti: The Camp that Vanished and the Priest Who Forced Them Out*, INTER-PRESS SERVICE (Mar. 9, 2010), http://www.mediahacker.org/2010/03/haut-turgeau-haiti-the-camp-that-vanished; Memorandum from Trans-Africa Forum Regarding Forced IDP Relocations (Apr. 12, 2010), *available at* http://www.transafricaforum.org/files/Memo%20on%20Forced%20IDP%20Relocations%20041210.pdf; Alexis Erkert Depp, *Call to Stop Forced Evictions of Haiti's Earthquake Victims*, MENNONITE CENTRAL COMM. (June 9, 2010), http://ottawa.mcc.org/stories/news/call-stop-forced-evictions-haitis-earthquake-victims; Charles Arthur, *Haiti: Earthquake Victims Face New Trials with Forced Evictions*, NOTICEN: CENTRAL AMERICAN & CARIBBEAN AFFAIRS (Apr. 29, 2010), *available at* http://www.thefreelibrary.com/HAITI:+EARTHQUAKE+VICTIMS+FACE+NEW+TRIALS+WITH+FORCED+EVICTIONS.-a0225099633.

45 *See* IJDH ET AL., WE'VE BEEN FORGOTTEN, *supra* note 40. Forced eviction is defined as the permanent or temporary removal against their will of individuals, families, and/or communities from their homes and/or lands, which they occupy without the provision of or access to appropriate forms of legal or other protection. This definition includes forced removal from IDP camps. *See* Committee on Economics, Social and Cultural Rights, General Comment 7, The Right to Adequate Housing: Forced Evictions (Sixteenth Session, 1997), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/Gen/1/Rev.6 at 45 (2003).

46 SCHULLER, *supra* note 11, at 2.

47 *See* Herz, *supra* note 44.

48 *See* SCHULLER, *supra* note 11, at 10–17.

49 *See* UN Guiding Principles, Special Rapporteur on Housing and Property Restitution, *Final Report on the Principles on housing and property restitution for refugees and displaced persons, delivered to the Commission on Human Rights*, Principle 5.3, U.N. Doc. E/CN.4/Sub.2/2005/17 (June 28, 2005).

place to live that meets international standards and due process protections such as consultation and adequate notice of eviction.[50]

The UN responded to the humanitarian crisis created by the forced evictions by negotiating a three-week moratorium on evictions with the Haitian government, lasting from April 23 until May 13, 2010.[51] It does not appear, however, that the government ever publically acknowledged the moratorium, and reports of unlawful evictions continued during this period.[52] Human rights observers continue to document unlawful evictions since the end of the moratorium. According to one estimate, in the ten months after the earthquake, 28,000 people were evicted and 144,000 people were subject to threats of eviction.[53] In February 2011, the UN Office for the Coordination of Humanitarian Affairs (OCHA) estimated that over fourteen percent of the IDP camps in Haiti were threatened with forced eviction. Haiti's actions and failures to act to prevent evictions specifically implicate the rights of women that are protected, for example, under the Convention of Belém do Pará.[54] The government is liable not only for the assistance provided by Haitian authorities in evicting residents, often through use of force or threat of force and without requiring proof of land rights from the property owner or providing any alternative sources of housing to the residents, but also for its failure to protect women from violence arising from the evictions.

The IACHR has granted two legal requests submitted by groups of advocates and attorneys for displaced Haitians, requesting that the government take immediate measures to prevent sexual violence against women and girls in displacement camps, and adopt a moratorium on forced evictions until a new government takes office and ensure that those who have been expelled are transferred to camps with minimum sanitary and security conditions.[55] Although some improvements have been made, efforts to

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50 Every person has the right to be free and protected against arbitrary displacement. Displacement is prohibited in cases of natural disasters unless the health and safety of the populations requires their evacuation. IDP Guidelines, Principles 6(2)(d), 7.

51 *See Moratorium on Forced Evictions*, CENTER FOR ECONOMIC AND POLICY RESEARCH (Apr. 23, 2010), http://www.cepr.net/index.php/relief-and-reconstruction-watch/moratorium-on-forced-evictions.

52 Ansel Herz, *As "Temporary" Camps Linger, Tensions Rise with Haitian Landowners*, IPS NEWS SERVICE (June 9, 2010), http://www.ipsnews.net/news.asp?idnews=51774.

53 Deborah Sontag, *In Haiti, Rising Call for Displaced to Go Away*, N.Y. TIMES, Oct. 4, 2010, at A4.

54 *See* Convention of Belém do Pará, *supra* note 7, arts. 3, 7, 9.

55 *See* Precautionary Measures Granted by the Commission during 2010, Inter-Am. Comm'n. on H.R., http://www.cidh.oas.org/medidas/2010.eng.htm. The full report

implement the Commission's recommendations continue to fall short.[56] Incorporating the IACHR's decisions into engagement with the domestic Haitian legal system will be discussed *infra*.

2. Psychological and Physical Effects

Sexual violence has serious consequences for women's physical, psychological, and social health. In addition to sexual violence resulting in death and serious physical injury, reproductive and sexual health consequences include sexually transmitted infections, unwanted pregnancy, and chronic pelvic pain.[57] Psychological consequences include post-traumatic stress disorder, anxiety and depression.[58] In addition, because sexual violence in disaster or conflict areas is sometimes perpetrated by a group of armed men in public or in view of family members, it can have serious psychological consequences for not only the victim but also for witnesses. Sexual violence also leads to stigma and social ostracism, which contributes to low reporting rates of sexual violence and the failure to seek medical treatment.[59]

Many of the women interviewed show signs of post-traumatic stress disorder (PTSD), including extreme fear, nervousness, helplessness, inability to sleep, nightmares and signs of depression. Several women indicated suicidal tendencies and some had even taken steps towards ending their lives. At least one woman stated that she had contemplated killing herself and her children.[60] Almost all of the survivors complained of some physical discomfort, including stomach pain, headaches, difficulty walking, and vaginal infection and bleeding.[61] At least one woman became pregnant as a result of

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requests seeking protection for women and girls from sexual violence and for displaced residents from unlawful forced evictions are available at http://ijdh.org.

56 *See* MADRE, CUNY SCHOOL OF LAW, IJDH, OUR BODIES ARE STILL TREMBLING: HAITIAN WOMEN CONTINUE TO FIGHT AGAINST RAPE (2011), *available at* http://reliefweb.int/rw/rwb.nsf/db900sid/KKAA-8CZ59M?OpenDocument.

57 J. M. CONTREAS, ET. AL., SEXUAL VIOLENCE IN LATIN AMERICA AND THE CARIBBEAN: A DESK REVIEW 36 (2010), *available at* http://www.svri.org/SexualViolenceLACaribbean.pdf.

58 AMNESTY INTERNATIONAL, DON'T TURN YOUR BACK ON GIRLS: SEXUAL VIOLENCE AGAINST GIRLS IN HAITI (2010), *available at* http://www.amnesty.org/en/library/asset/AMR36/004/2008/en/f8487127-b1a5-11dd-86b0-2b2f60629879/amr360042008eng.pdf.

59 World Health Organization, "Sexual Violence in Conflict Settings," *available at* http://www.who.int/gender/en/infobulletinconflict.pdf.

60 One woman said that she wanted to end her life because "this life has gone bad." She lost her husband and home in the earthquake. Her uncle had abused her growing up, and the attack re-traumatized her profoundly. Interview #41 (June 2010) (on file with author).

61 *See, e.g.,* Interview #18 (May 5, 2010) (on file with author).

the rape.[62] In addition to the rapes, many women and girls interviewed suffered beatings, stabbings and other injuries in the course of the attacks, and had scars and other visible injuries.[63]

A delegation of psychiatrists and trauma victim specialists traveled to Haiti with a group of lawyers in March 2010 to identify potential applicants for humanitarian parole to the United States. This specialized delegation conducted sixty-nine medical evaluations of earthquake victims, several of whom were victims of rape or other sexual assault, and found that 95.7% of the victims were suffering from PTSD, and 53.6% were suffering from depression.[64]

Serious health consequences resulting from sexual violence are further intensified due to the fact that women in post-disaster areas generally have little or no access to health care.[65] The majority of the women and girls interviewed had not seen a doctor or other medical professional at the time of the interview. There were several reasons for this: lack of knowledge of where to find services; lack of knowledge that services were provided free of charge; inability to pay for the transport to get to a clinic; and fear of retaliation and stigma.[66]

For those who had sought medical care, the majority only sought general first-aid care for injuries associated with the rapes, and did not disclose the rape to the healthcare provider because they were embarrassed or felt uncomfortable. Rape carries a stigma in Haitian society, as it does in most places. Victims were extremely reluctant to reach out for support or to even discuss their ordeal before meeting a member of KOFAVIV or FAVILEK, in whom they had trust and could confide.[67] When victims did reach out, they

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62 Interview #26 (June 7, 2010) (on file with author).

63 In one of the most egregious cases, several men attacked a woman in her thirties at her home in Martissant, a neighborhood in Port-au-Prince, during which one of the men stabbed her with an ice pick. Her small children witnessed the attack. Interview #43 (June 2010) (on file with author).

64 Victor G. Carrion, *International Psychiatry in Haiti at the Aftermath of the Earthquake*, PowerPoint presentation (Apr. 2010) (on file with author).

65 *Guidelines for Gender-Based Violence Interventions in Humanitarian Settings Focusing on Prevention of and Response to Sexual Violence in Emergencies,* INTER-AGENCY STANDING COMMITTEE, 63 (2005), http://www.humanitarianreform.org/humanitarianreform/Portals/1/cluster%20approach%20page/clusters%20pages/Gender/tfgender_GBVGuidelines2005.pdf.

66 *See, e.g.,* Interview #2 (May 10, 2010); Interview #12 (May 5, 2010); Interview #17 (May 7, 2010) (on file with author).

67 KOFAVIV or Komisyon Fanm Viktim Pou Viktim (Commission of Women Victims for Victims) is a grassroots women's organization founded in 2005. FAVILEK or Fanm Viktim Leve Kanpe (Women Victims Get Up Stand Up) is grassroots women's organization founded in 1994.

were often shunned or ignored. And, of those who had seen a doctor, the quality and type of care varied depending on the facility and availability of supplies.[68]

When women become injured by rape or fear of rape, everyone within their circle of care, especially children, suffers. When women become injured by rape or fear of rape, their ability to participate in public life and contribute to Haiti's development also suffers.

3. Impact of Gender-Based Violence on Women's Human Rights Defenders

Human rights defenders working with KOFAVIV and other grassroots groups, such as FAVILEK and KONAMAVID,[69] have been targeted for violence, including rape, and extortion for their work defending rape victims. Police response has been negligible. For example, two outspoken grassroots leaders who had been threatened at gunpoint filed a complaint with the police positively identifying the perpetrator, who remains at large. The police told the women that the camps "caused too much trouble" and the man "should have killed them all."[70]

The importance of protecting human rights defenders has been recognized as essential for ensuring human rights enforcement.[71] Special protections must be provided to individuals in Haiti who work to combat gender-based violence, including lawyers and other advocates, if gender-based violence in Haiti is to be effectively combated.

4. Political Instability Generates an Increase in Rape

An increasingly unstable political situation in Haiti has only further undermined the safety of women and girls in the camps. A dramatic increase in rapes accompanied the demonstrations pro-

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68 Some clinics did not offer services such as HIV prophylaxis or emergency contraception. Women faced prohibitively long waits, and left without being seen by a doctor. Women also reported a lack of privacy, and limited access to female healthcare providers. Medical certificates were not routinely provided. *See, e.g.*, Interview #9 (May 3, 2010) (on file with author).

69 KONAMAVID or Kodinasyon Nasyonal Viktim Direk (National Coordination of Direct Victims) is a grassroots organization in Port-au-Prince.

70 International Women's Human Rights Clinic at CUNY School of Law (IWHR) Interviews (Oct. 7, 2010) (on file with IWHR).

71 *See* Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, G.A. Res. A/Res/53/144, Annex, U.N. Doc. A/RES/53/144 (Mar. 8, 1999).

testing fraud following the November 28, 2010 presidential election.[72] The deteriorating security situation in Haiti has resulted in a diversion of the already scarce government resources and attention devoted to combating gender-based violence.[73] The Women's Ministry was already dramatically underfunded.

Haiti needs a credible government with a popular mandate to advance long-term stability and development. In July 2010, U.S. Senator Richard Lugar (R-IN) warned that "[t]he absence of democratically elected successors could potentially plunge the country into chaos."[74] Then, in October 2010, U.S. Congresswoman Maxine Waters (D-CA) and 44 other members of Congress sent a letter urging Secretary of State Hillary Rodham Clinton to support free and fair and open elections in Haiti. The letter warned that supporting flawed elections "will come back to haunt the international community" by generating unrest and threatening the implementation of earthquake reconstruction projects.[75] The international community, including the United States and other allies, ignored these warnings and well-documented evidence of unfairness, investing their influence and millions of dollars in the flawed elections.[76]

According to the Center for Economic Policy and Research, given the irregularities and other flaws in the November elections, the second round of elections would be based on arbitrary assumptions and exclusions and not lead to a result acceptable to the Haitian people.[77] Brian Concannon, expert on Haiti and former elections observer, cautioned after the November elections that un-

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72 According to KOFAVIV, women lined up at its clinic on the two days after the election to report rapes and beatings. Some women witnessed armed men entering certain camps and shooting people at random. On the third day after the elections, KOFAVIV was forced to close its clinic temporarily under threat of violence. Interview with KOFAVIV leaders (Dec. 3, 2010) (on file with author).

73 Inter-Am. Comm'n H.R., *supra* note 22.

74 *Haiti's November 28 Elections: Trying to Legitimize the Illegitimate*, INSTITUTE FOR JUSTICE & DEMOCRACY IN HAITI (Nov. 22, 2010), http://ijdh.org/archives/15456.

75 Press Release, Congresswoman Maxine Waters, Clinton Urged to Push for Free and Fair Haiti Elections (Oct. 8, 2010), *available at* http://waters.house.gov/News/DocumentSingle.aspx?DocumentID=211461.

76 *See, e.g., Foreign Powers Praise Haiti Election Decision,* ASSOCIATED PRESS, Feb. 3, 2011, *available at* http://www.cbsnews.com/stories/2011/02/03/ap/latinamerica/main7315287.shtml; Brian Concannon Jr. and Jeena Shah, *US Will Pay for Haitian Vote Fraud*, BOSTON GLOBE, Dec. 15, 2010, *available at* http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2010/12/15/us_will_pay_for_haitian_vote_fraud.

77 JAKE JOHNSTON & MARK WEISBROT, HAITI'S FATALLY FLAWED ELECTION, CENTER FOR ECONOMIC POLICY AND RESEARCH 8 (Jan. 2011, updated Feb. 2011), *available at* www.cepr.net/documents/publications/haiti-2011-01.pdf.

less new credible and inclusive elections are held, "the protests and disruption could continue for the next president's five-year term."[78] Despite these warnings, the second round elections were held on March 20, 2011. Michel Martelly (a right-wing neo-Duvalierist candidate) won the majority of votes cast, but his popular legitimacy has been questioned by Haitian authorities and citizens alike, given the pervasive irregularities throughout the process and the record low voter turnout.[79] This does not bode well for the development of the country as a whole, let alone the advancement of women's rights.

II. Barriers to Enforcing Women's Human Rights in Haiti

Dr. Jomanas Eustache, founder and Dean of the Catholic Law School of Jérémie, Haiti, describes the problems facing the administration of justice in Haiti.[80] First, he explains that "the problems facing the administration of justice in Haiti cannot be isolated from the overall political, social and economic obstacles."[81] In particular, political problems, such as politicization of the judiciary, present serious obstacles to the consolidation of a fair and equitable judicial sector. Second, like other Latin American justice systems, Haiti's lacks independence.[82] Third, the majority of Haitians lack access to the judicial system as a result of public knowledge, public confidence, cost, limited facilities and corruption.[83] Indeed, "citizens seldom avail themselves of a system they distrust."[84]

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78 Brian Concannon Jr., *How to Rebuild Haiti After the Quake*, Council on Foreign Relations (Jan. 12, 2011), http://www.cfr.org/haiti/rebuild-haiti-after-quake/p23781.

79 *See* Kim Ives, *As Martelly Mimics Aristide: Haitians Boycott Second Round Between Neo-Duvalierists*, Haïti Liberté, Mar. 23–29, 2011; Dan Coughlin, *Haiti Abstains*, The Nation, Mar. 22, 2011, *available at* http://www.thenation.com/article/159388/haiti-abstains (quoting former Haitian presidential advisor Patrick Elie arguing that the electoral process has been a farce and that "the victor of these elections will have very little popular legitimacy").

80 The Catholic Law School of Jérémie (L'École Supérieure Catholique de Droit de Jérémie) is the only law school of its kind in Haiti. It promotes public service, while welcoming students regardless of religion, gender, social, economic, or political backgrounds. *See* L'École Supérieure Catholique de Droit de Jérémie, http://escdroj.org.

81 Dr. Jomanas Eustache, *The Importance of Teaching Law and the Reinforcement of the Judiciary System in Haiti*, 32 Hastings Int'l & Comp. L. R. 602, 608 (2009).

82 *Id.* at 608–09 ("Several factors have been identified as contributing to this: (1) a tradition of Executive supremacy; (2) political instability; (3) the civil law tradition which emphasizes a bureaucratic role for the judge in application of the laws; (4) the complexity and formalism of the system; (5) lack of political base which supports and/or to whom the system is accountable; and (6) the procedures for the selection, promotion and discipline of judges.").

83 *Id.*

84 *Id.* at 609.

The majority of impoverished Haitians do not avail themselves of the formal justice system, but deeply ingrained gender discrimination places women at an even greater disadvantage if they try. Survivors of sexual violence face added fears of social stigmatization and retribution, which, along with distrust in the ability of the judicial system to protect them, causes many women victims of sexual violence to remain silent. This distrust of the legal system is not unfounded, since a woman's word is more likely than not to be discounted or altogether ignored. For example, Haitian judges, prosecutors and police routinely dismiss rape cases where the victim does not have a medical certificate or did not seek treatment within seventy-two hours, even though Haitian law does not require the certificates to establish the offense.[85] This policy reflects the belief that women's testimony is inherently untrustworthy.[86]

The climate of impunity created by this system in which justice goes to the highest bidder, in which only the rich can hire competent attorneys and finance police investigations, reinforces the centuries-old social division in Haitian society between the vast majority who are poor and the few who are wealthy.[87] Indeed, the UN Independent Expert on the situation of human rights in Haiti, Michel Forst, has chosen the fight against impunity as one of the main themes of his recent meetings with country authorities and others. During his visit to Haiti in February 2011 he urged presidential candidates to spearhead the fight against impunity: "I hope that solemn commitments will be made and that signals will be sent for a greater respect for human rights, judicial reform, the fight against impunity and access to basic services for all."[88]

Impunity is widespread for crimes of rape and other gender-based violence. Rape in Haiti is easy to commit and hard to deter in large part because the Haitian justice system is inaccessible to women. Women are underrepresented among Haiti's judges, prosecutors and lawyers. Effective navigation of the system requires the help of a paid lawyer. Legal proceedings are usually conducted in

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85 MADRE, ET. AL., *supra* note 55.

86 Lawyers are working to pursue cases even in the absence of medical evidence while at the same time working to encourage the Haitian Medical Association to take responsibility and better train doctors to complete these certificates.

87 For more information regarding the structural nature of impunity in Haiti, *see* Mario Joseph, *Human Rights and Justice in Haiti*, in LET HAITI LIVE 99–116 (Melinda Miles & Eugenia Charles, eds. 2004).

88 Press Release, Office of the High Commissioner on Human Rights, UN Independent Expert on Haiti: "Impunity Must End," (Feb. 24, 2011), *available at* http://www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=10764&LangID=E.

French, which most women do not understand, rather than the universal language, Haitian Creole. When women appear in Haitian courts, their testimony is often discounted, through rules such as the medical certificate requirement or societal bias by judges, prosecutors and jurors (most of whom are men).[89]

Access to legal services is particularly problematic. Eighty percent of the population is desperately poor,[90] and cannot afford to pay legal services. Despite the great need, Haiti lacks a tradition of organized public assistance lawyering. Although individual lawyers have and do provide pro bono assistance, there is no training or support for these efforts. More importantly, there are no structures in place for lawyers to work systematically against systemic violations of rights. The vast majority of Haitian law school graduates never become lawyers because they fail to complete the required *memoire* (thesis) and *stage* (apprenticeship) required for admission to the bar. Students of modest means, those most likely to work on behalf of the poor, find it particularly difficult to overcome these hurdles.

The justice system's inaccessibility not only inhibits rape prosecution. By preventing women from going to court to enforce the full spectrum of their rights—e.g. contract rights, employment rights, childcare and alimony rights—the inaccessibility reinforces other societal discrimination and helps keep women poor and vulnerable to a range of dangers, including rape.

The challenges facing Haiti's legal system are significant, but they are not unique. Many of Haiti's problems are common among nations emerging from decades of dictatorship or conflict. Every country endures a period where its justice system is not functional for a large group of its citizens. Indeed, in the United States the legal system is still inaccessible for many, especially women and other low-income Americans.[91] The road in the United States from

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89 Of the women interviewed in connection with this article, only two reported receiving medical certificates; others reported that they were unaware of the importance of the certificates in documenting rape for prosecution and their right to request them. In one instance, a clinic stated that they were out of certificates. Meeting with SOFA (May 7, 2010) (on file with author).

90 *The World Factbook – Haiti*, CIA, https://www.cia.gov/library/publications/the-world-factbook/geos/ha.html.

91 *See* LEGAL SERVICES CORPORATION, DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 27 (2009), *available at* http://www.lsc.gov/pdfs/documenting_the_justice_gap_in_america_2009.pdf ("Three out of four clients are women—many of whom are struggling to keep their children safe and their families together.").

Plessy v. Ferguson[92] to *Brown v. Board of Education*[93] provides a salient example. As we saw in *Parents Involved v. Seattle School District* in 2007,[94] the road to equal education for all American youth is far from traveled.

Despite the myriad barriers, Haiti's justice system has had successes since its transition to democracy.[95] For example, the Raboteau massacre trial (discussed in more detail *infra*) proved that the Haitian justice system can work for victims of human rights abuses when cases are pursued with diligence and persistence. The Raboteau trial provided invaluable training in complex litigation for the lawyers and judges involved and can serve as a model for cases that seek to enforce women's human rights.[96]

The tools to enforce the right of women and girls to be free from sexual violence are available in Haiti. The Haitian Penal and Civil Codes, even if imperfect, provide a structure for prosecuting these cases and holding accountable those responsible for protecting women.[97] Haiti's Constitution explicitly recognizes that "[t]he

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92 163 U.S. 537 (1896) (upheld constitutionality of state laws requiring racial segregation in private businesses, under the doctrine of "separate but equal").

93 347 U.S. 483 (1954) (overturned *Plessy*, declared unconstitutional state laws establishing separate public schools for black and white students).

94 551 U.S. 701 (2007) (held racial balancing is not a compelling state interest and found public school plans assigning students for the purpose of achieving racial integration unconstitutional).

95 *See* Christopher Stone, *A New Era for Justice Sector Reform in Haiti*, Harvard Kennedy School, Faculty Research Working Paper Series (July 2010), describing signs of improvement in Haiti's justice sector prior to the earthquake.

96 *See* Brian Concannon, Jr., *Justice for Haiti: The Raboteau Trial*, 35 INT'L LAW. 641 (2001); Brian Concannon, Jr., *Beyond Complementarity: The International Criminal Court and National Prosecutions, a View from Haiti*, 32 COLUM. HUM. RTS. L. REV. 201 (2000).

97 Domestic Haitian law concerning rape and sexual assault can be found in Articles 278, 279, 280, 281, and 283 of the Haitian Penal Code, which incorporate the Presidential Decree of July 6, 2005 reclassifying rape as a criminal offense rather than a moral offense. The BAI reports that recent judgments of Haitian courts have established the elements of the crime of rape as including 1) sexual penetration, 2) absence of consent, and 3) criminal intent, and that judges hearing complaints of rape in Port-au-Prince have generally adopted this legal definition.

International law is also important to domestic prosecution of rape in Haiti. Under Article 276-2 of the Haitian Constitution, once Haiti approves and ratifies a treaty, the content of the treaty becomes part of Haitian domestic law and supersedes previous inconsistent law. Haiti has ratified several treaties that contain provisions relevant to the prosecution of rape, for example, *inter alia*, the Convention on the Elimination of All Forms of Discrimination against Women, Convention on the Rights of the Child, the International Covenant on Civil and Political Rights, and the American Convention on Human Rights.

Although some reforms—for example, implementing procedures for using forensic evidence and evidentiary rules resembling rape shield legislation in the United States and other countries—would be desirable, they are not necessary for litigation to begin.

State has the absolute obligation to guarantee the right to life, health, and respect of the human person for all citizens without distinction, in conformity with the Universal Declaration of the Rights of Man."[98] The State also recognizes under the Constitution, "the right of every citizen to decent housing, education, food and social security."[99]

The Government of Haiti has ratified various international human rights instruments that have direct bearing on women's human rights, including the right to be free from rape and other gender-based violence. These include: the Women's Convention, International Covenant on Civil and Political Rights (ICCPR), International Convention on the Elimination of All Forms of Racial Discrimination (CERD), and Convention on the Rights of the Child (Children's Convention).[100] In the Latin American and Caribbean region, Haiti is a member of the Organization of American States (OAS), and has ratified the Convention of Belém Do Pará, as well as the American Convention on Human Rights (ACHR).[101] According to the Haitian Constitution, upon approval and ratification, international treaties become part of domestic law and abrogate any conflicting laws.[102] This article now turns to ways that lawyers can work with women and communities to take advantage of these tools.

III. The Role of Lawyers in Enforcing Women's Rights in Post-Earthquake Haiti

Enforcing the right to be free from sexual violence—including punishing perpetrators of violence and providing adequate security and housing—is not only required under domestic and international law but is also a sound development policy. Enforcing individual legal rights improves the lives of women and girls (as

98 *Constitution de la République d'Haïti* 1987, art. 19.

99 *Id.*, art. 22.

100 Haiti ratified CERD in 1972, CEDAW in 1981, ICCPR in 1991 (by accession) and the Children's Convention in 1995. *See* the UN Treaty Collection Databases, Status of Ratifications, *available at* http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=EN.

101 Haiti ratified the Convention of Belém do Pará in 1997 and the ACHR in 1977. *See Basic Documents Pertaining to Human Rights in the Inter-American System,* Inter-Am. Comm'n H.R., http://www.cidh.oas.org/Basicos/English/Basic.TOC.htm.

102 "Les Traités, ou accords internationaux, une fois sanctionnés et ratifiés dans les formes prévues par la Constitution, font partie de la Législation du Pays et abrogent toutes les Lois qui leur sont contraires." ["Once international treaties or agreements are approved and ratified in the manner stipulated by the Constitution, they become part of the legislation of the country and abrogate any laws in conflict with them."] *Constitution de la République d'Haïti* 1987, art. 276-2.

well as those of their families) while reinforcing the rule of law and the administration of justice in Haiti for the benefit of many. By empowering victims and building government capacity, it will help create conditions of long-term stability necessary for enforcement of a broad range of rights and implementation of effective economic development programs.[103] Following individual cases through the Haitian legal system will reinforce larger structural reforms and development projects that have, to date, produced only marginal results. It will also increase trust in the system from the bottom up, a foundation necessary for any system based on the rule of law.

This section discusses the work of the *Bureau des Avocats Internationaux* and the Institute for Justice & Democracy in Haiti, which are working together with a broad range of partners to implement a comprehensive rights-based approach to enforce the rights of women and girls as a foundation for fighting poverty and reducing vulnerability.[104] In so doing, this section endeavors to provide practical information and strategies for Haitian and international lawyers providing legal services, as well as principles to guide governments and others in setting funding priorities and program design. The essential principles that guide the BAI/IJDH approach discussed herein can be adapted to programs enforcing a broad range of women's human rights and the rights of the poor more generally.

A. The Comprehensive Rights-Based Approach of the BAI and IJDH

The Office of the High Commission for Human Rights describes a human rights-based approach as "a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights."[105] It involves principles including, *inter alia*, accountability, transparency, partici-

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103 *See* MAKING THE LAW WORK FOR EVERYONE VOL. 1, *supra* note 12 ("In too many countries, the laws, institutions, and policies governing economic, social, and political affairs deny a large part of society the chance to participate on equal terms. The rules of the game are unfair. This is not only morally unacceptable; it stunts economic development and can readily undermine stability and security.").

104 The author thanks BAI Legal Fellows Annie Gell and Jeena Shah and BAI Attorneys Mario Joseph and Esther Felix for their contributions and tireless advocacy advancing the rights of the poor in Haiti.

105 OFFICE OF THE UNITED NATIONS HIGH COMMISSION FOR HUMAN RIGHTS, FREQUENTLY ASKED QUESTIONS ON A HUMAN RIGHTS-BASED APPROACH TO DEVELOPMENT COOPERATION 15 (2006), *available at* http://www.ohchr.org/Documents/Publications/FAQen.pdf.

pation, and capacity building. Meeting these exhortatory principles can be challenging in practice.[106] However, the work of the BAI and IJDH over the last sixteen years demonstrates that well-conceived and persistent advocacy can meet these challenges and have concrete effects on advancing human rights in Haiti.

Managed by renowned human rights attorney Mario Joseph, the BAI is a public interest law firm based in Port-au-Prince, Haiti.[107] It was founded by the Haitian government in 1995 to pursue human rights cases, originally focusing on cases arising from Haiti's 1991–94 de facto military dictatorship.[108] The BAI no longer receives support from the government, relying on support from IJDH and other individuals and foundations, but continues to implement its "victim-centered" approach that combines traditional legal strategies with empowerment of victims' organizations and political advocacy.[109] The vast majority of the BAI's clients are living in extreme poverty. IJDH, directed by well-known Haiti expert Brian Concannon who formerly co-managed the BAI, is a non-profit organization based in Boston, Massachusetts. IJDH was established in 2004 as an affiliate organization to the BAI that provides legal, financial and logistical support for BAI's work, advocates for a more just U.S. foreign policy to Haiti, and pursues litigation in international courts.

The organizations' comprehensive, rights-based approach includes three key components: (1) victim-centered legal advocacy with a focus on building the domestic legal system, which combines traditional lawyering with organizing and public advocacy work to empower poor people to help enforce their own rights; (2) grassroots collaboration and leadership development to prepare grassroots organizations to serve as equal partners in the litigation and advocacy work; and (3) a focus on programs that target the root causes of vulnerability.

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106 United Nations Development Programme, Programming for Justice: Access for All. A Practitioner's Guide to a Human Rights-Based Approach to Access to Justice (2005), *available at* http://regionalcentrebangkok.undp.or.th/practices/governance/a2j/docs/ProgrammingForJustice-AccessForAll.pdf.

107 The law firm structure was chosen to provide the most protection for the office from potential government retaliation. In practice, the BAI functions more like a non-profit and does not charge for its legal services.

108 Brian Concannon, Jr., *The Bureau des Avocats Internationaux, a Victim-Centered Approach*, in Effective Strategies for Protecting Human Rights (David Barnhizer ed., 2001).

109 *Id. See generally* Ken Bresler, *If You Are Not Corrupt, Arrest the Criminals: Prosecuting Human Rights Violators in Haiti* (Harvard Kennedy School Project on Justice in Times of Transition, 2003).

The Raboteau massacre trial, spearheaded by the BAI, provides the most successful example of this comprehensive approach and a starting point for understanding the organizations' current legal responses to needs generated by Haiti's earthquake.[110] Under the Haitian legal system, BAI lawyers who represented the victims in the Raboteau case were able to take advantage of the *partie-civile* (civil party) process, which allows a claim for civil damages to piggyback on a criminal prosecution. *Partie-civile* lawyers are permitted to participate in most aspects of the proceedings including introducing evidence and examining witnesses.[111] Indeed, involvement of the victims and their lawyers was essential to moving the case forward.[112]

In November 2000, after years of tireless advocacy, a jury convicted fifty-seven defendants, including the top military and paramilitary leadership of Haiti's 1991–94 de facto dictatorship. The defendants who were present in Haiti were taken into custody. During the civil damages portion of the trial, victims were awarded 1 billion gourdes, the equivalent of US$140 million at the time. The defendants were also ordered to pay fines and costs to the State.[113] The trial is considered the best complex prosecution ever in Haiti and one of the most significant human rights cases any-

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110 Raboteau is a neighborhood in the coastal city of Gonaïves located in northwest Haiti. Under the Duvalier and *de facto* regimes, Raboteau was considered one of the "hearts of resistance." *See* POTE MAK SONJE: THE RABOTEAU TRIAL (Hirshorn & Cynn, 2008). Immediately following the first coup d'état in 1991, Raboteau residents took to the streets in protest where soldiers met them with bullets. From 1991–1994, the people of Raboteau continued their nonviolent resistance despite systematic repression by the military and paramilitary forces. From April 18–22, 1994, preceding the imminent return of deposed President Aristide, the attacks culminated. Forces killed and wounded many and arrested, imprisoned, and tortured many more. The death toll will never be known. *See* Concannon, *Justice for Haiti*, *supra* note 96.

111 *See* Jeremy Sarkin, *Reparations for Gross Human Rights Violations as an Outcome of Criminal Versus Civil Court Proceedings, in* OUT OF THE ASHES: REPARATION FOR VICTIMS OF GROSS AND SYSTEMATIC HUMAN RIGHTS VIOLATIONS 171 (K. De Feyter et al., ed. 2005) ("In the *partie civile* system, the benefits for victims are considerable . . . right to be represented . . . and be fully informed of all important issues and developments in the case.").

112 For example, lawyers and victims distrusted the chief prosecutor in Raboteau. The BAI urged his replacement privately, to no avail. However, when victims protested his placement publicly through letters, radio announcements and protests, the prosecutor was eventually replaced. Concannon, *Justice for Haiti*, *supra* note 96.

113 Victims' attorneys, led by the U.S.-based Center for Justice & Accountability, successfully recovered, in Florida state court, some damages from Colonel Carl Dorélien. Dorélien had been convicted *in absentia* in the Raboteau trial and was thereafter found liable by a federal jury in the United States for torture, extrajudicial killing, arbitrary detention and crimes against humanity. Coincidentally and conveniently, Dorélien was living in Florida and had won the lottery. On May 16, 2008, $580,000, what was left of the lottery funds, was disbursed to victims.

where in the Americas, and has been hailed by observers on both sides of the aisle as fair.[114]

Although the victims were unable to collect the money damages for several years, they were eventually able to collect a small portion of the judgment through legal action taken in the United States.[115] The Raboteau Victims' Association, one of the grassroots organizations that worked with the BAI over more than a decade on the case, voluntarily gave ten percent of its recovery to their lawyers so that they could continue to represent victims in similar situations.[116] This action demonstrates that the case went a long way towards meeting one of the BAI's stated goals in pursuing the case: to build at least a "scintilla of trust" in the justice system.[117] The lawsuit not only achieved some justice for the victims in that case, it had significant benefits for Haiti's justice system on a more global scale.[118]

Since the earthquake, the organizations are working to apply this proven approach to enforce the right of women and girls to be free from sexual violence, including prosecuting perpetrators of violence and holding government authorities accountable for failing to meet their obligations to protect. The organizations have a long-standing commitment to advancing the rights of women in Haiti. Lawyers with the BAI and IJDH were integral to the prosecution of Emmanuel "Toto" Constant, former paramilitary leader, in the

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114 Concannon, *Justice for Haiti, supra* note 95.

115 *See* Jean v. Dorélien*: Haiti: The High Command and the Raboteau Massacre*, CENTER FOR JUSTICE AND ACCOUNTABILITY, http://cja.org/article.php?list=type&type=78 (summarizing federal and state cases).

116 The Raboteau Victims' Association is still active and continues to advocate on behalf of the right of the poor. They were organized and ready to take action after several hurricanes ravaged Gonaïves in 2008.

117 Bresler, *supra* note 108, at 8.

118 On April 21, 2005, shortly after the second coup, the *Cour de Cassation* (Haiti's highest court) vacated the convictions of the sixteen defendants found guilty during the Raboteau trial. The court reversed a determination—including its own affirmation in 2000—that the Haitian Constitution required a jury trial. Defendants convicted *in absentia* have sought to have their convictions vacated based on the High Court's decision. *See* Mario Joseph and Brian Concannon Jr., *Analysis of Cour de Cassation Decision Vacating Raboteau Massacre Convictions* (June 6, 2005), http://www.ijdh.org/articles/article_recent_news_6-6-05-c.htm. Although the decision arguably did not vacate the *in absentia* rulings, given its limited discussion of the impropriety of the jury, there are lower court opinions from Gonaïves holding that the 2005 reversal applies to both sets of defendants. It remains to be seen how the Cour de Cassation will deal with this issue. The Court's reversal, and release of several defendants from prison following the 2004 *coup d'état*, was obviously a blow to the victims. However, the victims still believe that their fight was worthwhile and the benefits for the justice can still be seen. Indeed, the case is now taught in some law schools.

United States.[119] In 2006, a United States District Court issued a default judgment, finding Constant liable for torture, crimes against humanity and the systematic use of violence against women, including rape, and awarded plaintiffs US$19 million in damages. To date, this suit remains the only successful action holding someone for the state-sponsored campaign of rape that occurred during the 1991–94 period.[120] Starting in the mid-1990s, the BAI laid the groundwork for domestic prosecution of the military and paramilitary commanders who sponsored the widespread rape of Haitian women. However, before the case came to fruition, Haiti's democracy suffered another setback with the ouster of President Aristide in 2004.[121]

Many of the barriers to enforcing women's rights in Haiti remain—poverty, discrimination, deep fissures between the poor and the elites—but the BAI and IJDH are hopeful that with the devastation of the earthquake has also come renewed attention and commitment to advancing human rights in Haiti.[122]

B. Post-Earthquake Projects Enforcing Women's Rights

In the several months following the earthquake, the BAI office in Port-au-Prince (luckily spared from collapse) served as a central gathering spot for individuals and groups to coordinate emergency actions.[123] Dozens of women, girls and other displaced persons who came to the BAI reported instances of rape, forced evictions and other human rights violations. In response to this great need,

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119 Constant is the founder of the *Front pour l'Avancement et le Progrès Haitien* (Front for the Advancement and Progress of Haiti or FRAPH), a Haitian death squad organized in mid-1993.

120 *See* Doe v. Constant, 354 Fed. Appx. 543 (2d Cir. 2009), *cert. denied*, Constant v. Jane Doe 1, 131 S. Ct. 179 (2010). *See also Doe v. Constant: Haiti: Death Squads and Gender-Based Violence*, CENTER FOR JUSTICE & ACCOUNTABILITY, http://www.cja.org/section.php?id=75.

121 Concannon, *Gender Justice*, *supra* note 24.

122 Former dictator of Haiti, Jean-Claude "Baby Doc" Duvalier returned to Haiti after twenty-five years in exile in France. It is unlikely Duvalier would have returned without a belief that he would not be held to account for the human rights violations committed during his reign. However, the Haitian government is pursuing a legal case against him, with the help of BAI lawyers, for financial and other crimes. This demonstrates that the climate in Haiti has progressed. The Duvalier case presents another opportunity to provide justice for victims and end impunity. However, it remains to be seen how a new administration, elected through irregular and fatally flawed procedures (discussed *supra*) will do.

123 Even before the earthquake, the BAI office hosted press conferences and meetings for grassroots groups, which bring in dozens of people every day. The office also provides workspace, computers and telecommunications to grassroots groups that would not otherwise have access to such facilities.

the BAI and IJDH launched the Rape Accountability and Prevention Project (RAPP) and the Housing Rights Advocacy Project (HRAP).[124] The Projects incorporate victim-centered legal and public advocacy as well as grassroots collaboration and development. By punishing perpetrators and forcing a more effective response by law enforcement and the justice system more generally, the Projects aim to deter future violations. Despite the myriad challenges, steady progress is being made.

The legal advocacy components of the Projects include a combination of criminal and civil lawsuits in Haitian courts and initiatives with international forums such as the UN Human Rights Council, UN Commission on the Status of Women and the Inter-American Commission on Human Rights. The BAI has hired two Haitian attorneys and paralegals to pursue the cases, assisted by international legal fellows and volunteers. Indeed, another goal of the projects is to create a corps of well-trained and motivated public interest lawyers in Haiti.[125] With established connections to grassroots organizations, including KOFAVIV, FAVILEK and KONAMAVID, the Projects were able to begin work immediately and have conducted several training sessions with grassroots groups to prepare them to participate as partners in the litigation.[126]

With respect to RAPP, the legal actions pursue individual perpetrators, where identifiable, and authorities who fail to respect their duty to protect vulnerable women and girls and provide assistance to rape victims. BAI involvement has led to arrests of alleged perpetrators in several cases, including a police officer suspected of raping a fifteen-year-old girl.[127] Most cases are still in the investigatory phase. However, in one case, involving the rape of a four-year-old girl, the investigatory judge has transferred the case to the Criminal Tribunal. The BAI expects the Criminal Tribunal to hear the case by June or July 2011, which will be the office's first completed case. This case will set the bar for future cases and help

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124 For more information *see Haiti Rape Accountability and Prevention Project*, IJDH, http://ijdh.org/projects/rapp and *Haiti Housing Rights Advocacy Project*, IJDH, http://ijdh.org/projects/housing.

125 BAI training has become a feeder program for public service careers. BAI alumni serve as judges, prosecutors, non-profit lawyers and top Ministry of Justice officials.

126 In the weeks following the earthquake, the organizations distributed thousands of "Know Your Rights" fliers in the camps through the BAI's networks. Fliers available at http://ijdh.org/projects/lern#lern-projects.

127 The BAI expects a decision soon from the investigating judge either dismissing the case or transferring the case to the trial court.

identify bottlenecks in the system for future legal strategy and focus advocacy efforts.[128]

Recognizing that international law can play an important role in filling gaps in domestic law as well as strengthening legal bases for responsibility, BAI attorneys are working to incorporate into domestic work the IACHR decision granting precautionary measures to victims of gender-based violence in the camps.[129] For example, BAI led a press conference announcing the IACHR decision to women's groups and the Haitian press in January 2011, and is working on incorporating the decision into the standard written complaint filed in gender-based violence cases in Haitian courts.

With respect to HRAP, the BAI is currently developing an action in Haitian courts that will seek to enforce rights related to housing provided under Haitian law, as well as the IACHR decision ordering the Haitian government to halt evictions of camp residents.[130] Meanwhile, BAI lawyers have used the IACHR housing decision as an organizing and negotiating tool to prevent illegal,

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128 While pursuing these cases, the BAI is also committed to ensuring that the defendants' due process rights are respected. For more information regarding the BAI's representation of indigent defendants and efforts to enforce the rights of prisoners, see *Health and Human Rights in Prisons Project*, IJDH, http://ijdh.org/projects/hhrpp.

129 The Commission's gender-based violence decision, Precautionary Measure 340/10, includes the following legally binding recommendations:

> 1. Ensure medical and psychological care is provided in locations available to victims of sexual abuse of 22 camps for those internally displaced. This precautionary measures decision, in particular, ensures that there be: a. privacy during examinations; b. availability of female medical staff members, with a cultural sensitivity and experience with victims of sexual violence; c. issuance of medical certificates; d. HIV prophylaxis; and e. emergency contraception.
> 2. Implement effective security measures in the 22 camps, in particular, provide street lighting, an adequate patrolling in and around the camps, and a greater number of female security forces in police patrols in the camps and in police stations in proximity to the camps;
> 3. Ensure that public officials responsible for responding to incidents of sexual violence receive training enabling them to respond adequately to complaints of sexual violence and to adopt safety measures;
> 4. Establish special units within the police and the Public Ministry investigating cases of rape and other forms of violence against women and girls; and,
> 5. Ensure that grassroots women's groups have full participation and leadership in planning and implementing policies and practices to combat and prevent sexual violence and other forms of violence in the camps.

Precautionary Measures Granted by the Commission during 2010, INTER-AM. COMM'N HUM. RTS., http://www.cidh.oas.org/medidas/2010.eng.htm.

130 The Commission's housing decision, Precautionary Measure 367/10, includes the following legally binding recommendations:

violent evictions, outside of the court system. In one camp, a landowner used armed men to intimidate displaced residents. The residents showed the armed men a letter from the Commission, which surprisingly caused them to leave. The BAI then distributed more extensive "Know Your Rights" materials in the camp that included, *inter alia*, the IACHR decision. After the landowner saw the materials, he offered to negotiate with the residents and the International Office for Migration, an intergovernmental organization working in Haiti on housing and migration issues. The landowner specifically requested that the BAI be present at the meeting, scheduled for March 2011. This change of events has turned the oft-repeated Creole proverb on its head: *konstitisyon se papye, bayonet se fè* (the Constitution is paper, bayonets are steel).

As discussed above, many barriers to enforcing women's rights in Haiti remain, some resulting from a lack of governmental will, others from a lack of governmental capacity. For example, police officers often refuse to pursue aggressors unless they are caught in the act or immediately thereafter. This reflects a lack of will on the part of the police to protect women, but also reflects the realities of police capacity. Without facilities to conduct an investigation, police understand that arrest may be futile. BAI lawyers can help investigate vital evidence as well as break down discriminatory views that a woman's testimony alone is insufficient.

The fear of retaliation presents a barrier to the pursuit of legal action. Many of the BAI's clients have been threatened by their alleged rapists (or their friends or family). Some clients have relocated their homes or gone into hiding. In some instances, the suspects' family or friends have tried to bribe the victim to not bring cases forward. In many cases, clients have expressed to the BAI that they are at risk of violence whether or not they bring legal action.

> 1. Adopt a moratorium on the expulsions from the camps for internally displaced persons until a new government can take office;
> 2. Ensure that those who have been illegally expelled from the camps are transferred to places with minimum sanitary and security conditions;
> 3. Guarantee that those who have been internally displaced have access to effective remedies in court and before other competent authorities;
> 4. Implement effective security measures to safeguard the physical integrity of the camps' inhabitants, guaranteeing in particular the protection of women and children;
> 5. Train security forces on the rights of displaced persons, in particular their right not to be expelled from the camps by force; and
> 6. Ensure that international cooperation agencies have access to the camps for internally displaced persons.

Id.

The BAI is unable to guarantee the safety of its clients and discusses the risks before taking on a case, but ultimately the clients must decide for themselves if bringing legal action is worth the risk.[131] The support of grassroots groups helps clients deal with their fear, cope with their trauma, and empower themselves to pursue legal action despite the challenges, which reiterates the importance of the comprehensive, victim-centered approach.

Although daunting, the myriad barriers are not insurmountable. Domestic legal action is a vital part of a multi-faceted approach to enforcing women's rights, though often neglected.[132] Filing cases that can be used to highlight the successes and expose the failures of the system will force the Haitian justice system to perform better and build public confidence therein. International attorneys can play an important role in supporting these efforts through developing meaningful and sustained partnerships with Haitian attorneys and grassroots federations.

C. Involvement of International Attorneys

The BAI and IJDH have always collaborated with a wide range of partners on all of their work, including several law school clinics, law firms, and organizations such as the International Senior Lawyers Project (ISLP). As the Creole proverb goes, *men anpil chay pa lou* (many hands makes the load light). In 2010, for example, ISLP sent two attorneys from Canada and Belgium to support the BAI's work providing representation to indigent defendants in rural jurisdictions. The attorneys provided training to the Haitian lawyers as well as the prosecutors, other defense attorneys, judges and local law enforcement officials. The impacts of this work have been felt; BAI lawyers have been successful in securing pre-trial release and speedy trials for several prisoners. In 2011, ISLP will send an attorney to support the rape cases.

In response to an outpouring of offers from U.S. lawyers and law students wanting to get involved in justice projects in Haiti after the earthquake, IJDH created the Lawyers' Earthquake Response Network (LERN).[133] LERN is a national network of lawyers

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131 Protection of victims and witnesses is not provided for in Haiti law. HANS JOERG ALBRECHT, LOUIS AUCOIN AND VIVIENNE O'CONNOR, UNITED STATES INSTITUTE OF PEACE, BUILDING THE RULE OF LAW IN HAITI: NEW LAWS FOR A NEW ERA 4 (2009), *available at* http://www.usip.org/files/resources/haiti_rol.pdf.

132 *See* Concannon, *Beyond Complementarity*, *supra* note 96.

133 The Student Hurricane Network, set up to provide legal services for victims of Hurricane Katrina in New Orleans, provided inspiration for the name of the group. *See* STUDENT HURRICANE NETWORK, http://www.studentjustice.org.

working with Haitian lawyers, primarily at the BAI, to implement a legal response to the recent earthquake in Haiti.[134] LERN members, individuals as well as those affiliated with law schools, law firms and other organizations, support the work of the BAI and also direct their own projects in areas related to enforcing environmental rights and advocating for just immigration opportunities in the U.S. and for long-term, effective international assistance to Haiti.

Lawyers and law students involved with LERN's Gender and Housing Working Groups have been involved in a wide array of activities supporting the BAI's rape and housing projects. They have conducted legal research for use in domestic Haitian cases, orchestrated fact-finding delegations collecting evidence and testimony for legal cases, held strategy and training sessions with BAI lawyers and grassroots groups, and filed reports and testified before UN bodies.[135]

A team of lawyers and law students affiliated with LERN, led by MADRE, CUNY Law School's International Women's Human Rights Clinic, the Center for Constitutional Rights, and IJDH, achieved the groundbreaking victories before the IACHR discussed above. More recently, in February 2011, lawyers with the BAI, IJDH and MADRE team led international law trainings empowering women to engage with the UN system and educating women about their human rights under Haitian and international law. Lawyers, with the help of the U.S. Human Rights Network, are working with grassroots groups to engage in the Haiti Universal Periodic Review (UPR) held by the UN Human Rights Council in October 2011. Among the UPR submissions include recommendations for enforcing the right to be free from sexual violence, including the importance of domestic legal systems to this end.

In addition, NYU's Center for Global Justice and Human Rights has conducted an academic study regarding gender-based violence as related to violations of other economic and social rights that will help inform domestic legal and advocacy strategies.[136] The University of Miami Law School's Human Rights Clinic is con-

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134 Since then, over 400 lawyers, law professors and law students—many of them top experts in their field—have joined the network. *See Earthquake Response*, IJDH, http://ijdh.org/projecs/lern (last visited Mar. 24, 2012).

135 The fact-finding delegations included several collaborators: Center for Constitutional Rights, Digital Democracy, Goldin Institute, IJDH, MADRE, Morrison & Foerster LLP, TransAfrica Forum, the University of Virginia Human Rights Clinic and the You.We.Me. Disaster Law and Policy Center.

136 *See* CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE, *supra* note 37.

ducting research regarding the responsibility to protect for use in domestic litigation. TransAfrica Forum has hosted several congressional briefings featuring Haitian women grassroots leaders in a forum traditionally closed to their voices. The full depth of these projects and others are beyond the scope of this article, but it is enough to say, the approaches are many.

Training and solidarity from international lawyers cannot be underestimated. Involvement of international attorneys provides invaluable substantive knowledge and practical lawyering skills that empower Haitian attorneys to take the best from all systems to inform their work. It also provides valuable training for government officials and court employees rooted in the context of a real case. It helps Haitian attorneys at the BAI feel less isolated and raises their profile, which not only improves the efficacy of their advocacy but also helps keep them safe. When challenging a system that has long run on corruption and inequality, one can make enemies. International support can work to deter those who would seek to stop BAI attorneys from continuing their work.

The BAI and IJDH are working to transform the social context that underlies the vulnerability of all poor Haitian women and girls to assault and other violations of their human rights. Following cases through the Haitian justice system, as evidenced by the Raboteau trial, requires perseverance and support of a larger movement. Lawyers and law students in the United States and elsewhere can support these efforts through LERN or other partnerships where Haitians set the priorities. These collaborations will not only improve conditions in Haiti, but also provide international attorneys unique insight into the connections between poverty and injustice and provide tools that will help lawyers use legal skills to serve the poor in Haiti and elsewhere to achieve positive, fundamental change, or as they say in Haiti, *chanjman tout bon vre.*[137]

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137 "Haitian women often sum up the transition [of Haiti from a society rife with corruption and social division to a more egalitarian society where minimum needs are met] with the single word '*chanjman*' ('change'), to indicate the comprehensiveness they seek, sometimes adding '*tout bon vre*' ('truly, completely') to indicate the depth." Concannon, *Gender Justice, supra* note 24.

THE CRIMINALIZATION OF PEACEMAKING, CORPORATE FREE SPEECH, AND THE VIOLENCE OF INTERPRETATION: NEW CHALLENGES TO CAUSE LAWYERING

Avi Brisman†

I. INTRODUCTION

In February 2005, shortly after radical lawyer Lynne F. Stewart had been convicted of charges that she aided and abetted terrorism, David Feige, in an article entitled *An Elegy for Radical Lawyering*, proclaimed: "[Stewart's] indictment alone [in April 2002] had a chilling effect on defense attorneys, and the conviction may well mean the government gets what it really wants—a docile defense bar that refuses to touch terrorism cases for fear of themselves becoming targets."[1] Radical lawyering did not, in fact, die with Stewart's conviction or with her 28-month prison sentence handed down in October 2006.[2] But Feige is correct that the jury in Stewart's case effectively "criminalized radical lawyering"[3] (or, at least, a type of radical lawyering)—an argument that has become more salient when one considers that Stewart was resentenced in July 2010

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1 David Feige, *Radical Sheik: An Elegy for Radical Lawyering*, SLATE (Feb. 14, 2005, 5:04 PM), http://www.slate.com/id/articles/news_and_politics/jurisprudence/2005/02/radical_sheik.html

2 *Lynne Stewart Sentenced to Prison, but Free Pending Appeal*, THE CHAMPION, Dec. 2006, at 6, (Jack King & Phyllis E. Mann), *available at* http://nacdl.org/champion.aspx?id=939.

3 Feige, *supra* note 1.

to 120 months (10 years).[4] And while the defense bar has not cowered to the point of refusing all terrorism cases, Feige is also right that Stewart's indictment, conviction, initial sentence, and now current sentence has had a "chilling effect" on defense attorneys.[5]

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[4] *See, e.g.*, John Eligon, *A Defendant Pays the Price for Talking to Reporters*, N.Y. TIMES, July 17, 2010, at A17 (reporting that the judge increased the sentence to ten years after Stewart made remarks to the media interpreted as showing a lack of remorse); John Eligon, *Heftier Term for Lawyer in Terrorism Case*, N.Y. TIMES, July 16, 2010, at A22 (noting that trial judge resentenced Stewart to ten years after the Second Circuit Court of Appeals determined her first sentence to be too lenient).

[5] *See, e.g.*, United States v. Reid, 214 F. Supp. 2d 84, 95 (D. Mass. 2002) (taking judicial notice of the federal government's indictment of Stewart for violating the SAMs ("Special Administrative Measures") applicable to Rahman under 18 U.S.C. § 1001 and deploring "its chilling effect on those courageous attorneys who represent society's most despised outcasts"); Tamar R. Birckhead, *The Conviction of Lynne Stewart and the Uncertain Future of the Right to Defend*, 43 AM. CRIM. L. REV. 1, 1, 4, 11–12, 16, 50 (2006) (discussing the broader impact of the post-9/11 version of the SAMs and its potential to "chill" the attorney-client relationship, and describing how in the wake of Stewart's indictment, "many among the defense bar did express genuine concern that the Sixth Amendment right to effective assistance of counsel had been placed in peril. . . . Lawyers, chastened by the *Stewart* case, felt themselves engaging in self-censorship, declining to raise certain topics of conversation with their incarcerated clients—ranging from issues with clear potential for controversy, such as politics and religion, to case-related questions regarding criminal intent and association—for fear that they might lead to uncharted, and potentially dangerous, waters. Some expressed that this resultant 'chill' would inalterably jeopardize the attorney-client relationship, while others predicted that the defense bar would become increasingly less willing to represent alleged terrorists due to the very real potential of being subjected to criminal prosecution."); Heidi Boghosian, *Taint Teams and Firewalls: Thin Armor for Attorney-Client Privilege*, 1 CARDOZO PUB. L. POL'Y & ETHICS J. 15, 16 (2003) (stating that the message that the indictment of Lynne Stewart sent to lawyers was "direct and unambiguous: represent accused terrorists and you too may be arrested," asserting that the 2001 amendments to 28 C.F.R. § 501.3 "are clearly an attempt to intimidate lawyers into not representing a specific class of defendants and to distract the public from focusing on existing flaws in terrorism intelligence gathering," and concluding that "[c]riminalizing Stewart's alleged violations of special administrative measures evidences Ashcroft's intention to intimidate other lawyers from representing politically outspoken or controversial clients. The true motivation behind Lynne Stewart's indictment is clearly evident. It is an attempt by the Attorney General to terrorize the defenders of justice with hopes of preventing them from protecting that which the government claims it is fighting to secure: the continued existence of a democratic American way of life."); Mary Cheh, *Should Lawyers Participate in Rigged Systems? The Case of Military Commissions*, 1 J. NAT'L SECURITY L. & POL'Y 375, 403 (2005) (stating that the "conviction of Lynne Stewart . . . serves as a chilling reminder that advocacy for unpopular defendants can have serious consequences."); Alissa Clare, *We Should Have Gone to Med School: In the Wake of Lynne Stewart, Lawyers Face Hard Time for Defending Terrorists*, 18 GEO. J. LEGAL ETHICS 651, 651–52, 662–64, 666–68 (2005) (discussing how Stewart's conviction will chill zealous advocacy and legal representation for accused terrorists, and concluding that "Stewart's case should make all attorneys sit up and take notice. . . . [A]ttorneys will decline representation of unpopular defendants altogether. But maybe that's the point."); Marjorie Cohn, *The Evisceration of the Attorney-Client Privilege in the Wake of September 11, 2001*, 71 FORDHAM L. REV. 1233, 1254–55 (2003) ("The government's monitoring of Lynne Stewart's conversations with her cli-

ent, communications which should have been protected, poses a threat to the vitality of the attorney-client privilege and the principles that undergird it. Her indictment will, and in all likelihood was designed to, deter lawyers from representing unpopular clients, which imperils the very fabric of our constitutional system of criminal justice. . . . Ashcroft's indictment of Lynne Stewart, based upon her alleged violation of special administrative measures she was forced to sign in order to communicate with her client, will have a chilling effect on attorneys who may otherwise represent people facing political crimes in this emotionally-charged historical period."); Sharon Finegan, *Pro Se Criminal Trials and the Merging of Inquisitorial and Adversarial Systems of Justice*, 58 CATH. U. L. REV. 445, 476 n.172 (2009) (stating that "lawyers put themselves at risk when representing politically unpopular defendants and abiding by their clients' wishes") (citing to Richard Acello, *Stewart Conviction: A Big Chill?*, 4 ABA J. EREP (2005)); Kevin R. Johnson, *Civil Liberties Post-September 11: A Time of Danger, a Time of Opportunity*, 2 SEATTLE J. FOR SOC. J. 3, 7 (2003) (describing how actions by the federal government in the aftermath of September 11, 2001 have "unquestionably chilled the attorneys representing detainees," and stating that "Stewart's indictment could not help but strike fear into the hearts of the attorneys seeking to provide legal assistance to alleged terrorists."); Jackie Lu, *How Terror Changed Justice: A Call to Reform Safeguards that Protect Against Prosecutorial Misconduct*, 14 CORNELL J.L. & POL'Y 377, 401 (2006) (stating that "[a]fter the Lynne Stewart conviction, defense attorneys may be tempered in their advocatory pursuit by the looming threat of criminal liability."); Margaret Raymond, *Criminal Defense Heroes*, 13 WIDENER L.J. 167, 182 (2003) (discussing Lynne Stewart's case and commenting that "the threat of prosecution is surely intimidating to criminal defense lawyers."); Tom D. Snyder, Jr., *A Requiem for Client Confidentiality?: An Examination of Recent Foreign and Domestic Events and Their Impact on the Attorney-Client Privilege*, 50 LOY. L. REV. 439, 450 (2004) (suggesting that Lynne Stewart's case raises the possibility that defense lawyers will "find themselves the subject of a criminal indictment supported in part by conversations with their own clients."); Tom Stephens, *Civil Liberties After September 11: Background of a Crisis*, 61 GUILD PRAC. 4, 10 (2004) (stating that the prosecution of Lynne Stewart sent "a clear message to other lawyers about the consequences of defending fundamental rights in the context of today's political climate."); Marjorie Cohn, *First They Came for Lynne Stewart,* 16(9) PRISON LEGAL NEWS, Sept. 2005, at 14, 15 (arguing that "Lynne Stewart's indictment, and conviction, will also chill attorneys from taking on cases of unpopular clients."); William Glaberson, *Lawyers Take Uneasy Look at the Future*, N.Y. TIMES, Feb. 11, 2005, at B8 (discussing how for lawyers who take politically unpopular cases, Lynne F. Stewart's conviction "was a warning that they could be prosecuted, too"); Andrew P. Napolitano, Op-Ed., *No Defense*, N.Y. TIMES, Feb. 17, 2005, at A27 ("No doubt the outcome of this case will have a chilling effect on lawyers who might represent unpopular clients. Since 9/11 the federal government's message has been clear: if you defend someone we say is a terrorist, we may declare you to be one of them, and you will lose everything."); Philip Shenon, *Lawyers Fear Monitoring in Cases on Terrorism*, N.Y. TIMES, Apr. 28, 2008, at A14 ("Across the country . . . lawyers who represent suspects in terrorism-related investigations complain that their ability to do their jobs is being hindered by the suspicion that the government is listening in, using the eavesdropping authority it obtained—or granted itself—after the Sept. 11 terrorist attacks," and noting that some lawyers "have found themselves under criminal investigation in recent years as a result of terrorism-related cases."); Margot Adler, *Jury Deliberates Case of Lawyer Accused of Helping Terrorist* (NPR radio broadcast Jan. 13, 2005), *available at* http://www.npr.org/templates/story/story.php?storyId=4282198 (discussing the "chilling effect" that Lynne F. Stewart's case on the legal profession, as well as attorney Gerald Lefcourt's position that the government's purpose in prosecuting Stewart is to warn lawyers not to defend terrorist and other unpopular clients); Elaine Cassel, *The Lynne Stewart Case: When Representing an Accused Terrorist Can Mean the Lawyer Risks Jail,*

Too, COUNTERPUNCH (Oct. 12, 2002), http://www.counterpunch.org/cassel1012.html (claiming that Stewart's case "sends a clear warning to attorneys: Don't represent accused terrorists, or you could be our next suspect," and surmising that it may "make conscientious lawyers worry that they will not be able to do their job properly with such clients. A lawyer may wonder if she can be zealous when torn between avoiding her own prosecution and representing his client."); Elaine Cassel, *The Lynne Stewart Guilty Verdict: Stretching the Definition of "Terrorism" to Its Limits*, FINDLAW (Feb. 14, 2005), http://writ.news.findlaw.com/cassel/20050214.html ("Defense attorneys who represent alleged terrorists—or even detainees who are merely suspected of some connection to terrorism—now know that the government may listen in on their attorney-client communications. They also know that this eavesdropping may give rise to evidence that may be used in their *own* prosecution for terrorism if they cross the imaginary line drawn by the government."); Nat Hentoff, *High Noon for Ashcroft, Stewart, and the Defense Bar*, VILLAGE VOICE, Apr. 16, 2002, http://www.villagevoice.com/2002-04-16/news/high-noon-for-ashcroft-stewart-and-the-defense-bar/ (stating that Stewart's indictment will "'create a huge, chilling effect—indeed, a glacial effect—on attorneys approached by highly controversial clients to represent them'" (quoting Jonathan Turley)); Sheilah Kast & Mimi Wesson, *Jailed Cleric's Lawyer Guilty* (NPR radio broadcast Feb. 13, 2005), *available at* http://www.npr.org/templates/story/story.php?storyId=4497372 ("'[M]any in the criminal defense community expressed the fear that [the prosecution] was intended as an effort to chill the efforts of zealous defense attorneys . . . [A]lthough some are still characterizing it as a persecution of a devoted attorney, others are willing to see it as a warning only that attorneys who represent defendants accused of terroristic crimes should be careful to observe the limits of their professional role'" (quoting Mimi Wesson)); Robert Smith, *Lawyer Found Guilty in Aiding Terrorist Client* (NPR radio broadcast Feb. 11, 2005), *available at* http://npr.org/templates/story/story.php?storyId=4494792 (describing Stewart's fear that her case has had a "chilling effect on defense lawyers around the country"); c*f.* Anthony S. Barkow & Beth George, *Prosecuting Political Defendants*, 44 GA. L. REV. 953, 975 (2010) (concluding that "the Stewart case demonstrates that, in politically charged cases, the most powerful message to the public is sent when a conviction is obtained. Prosecutors who heed this message will be cautious in their charging decisions and make sure that their allegations are based on evidence that will very likely prevail at trial. Additionally, the Stewart case demonstrates that—in terms of public perception, at least—the government's message is best sent by way of a conviction, not an indictment or the Attorney General's interaction with the media when charges are brought"); Mary Elizabeth Basile, *Loyalty Testing for Attorneys: When is it Necessary and Who Should Decide?*, 30 CARDOZO L. REV. 1843, 1883 (2009) (concluding that "[t]he case of Lynne Stewart should not engender fear that the criminal defense bar will be prevented from performing its important role in society by the looming threat of prosecution under the 'material support' provision of the USA Patriot Act because the Stewart case was a rare instance of an attorney getting too involved in her client's illegal activities. The mere fact of representing an unpopular client will *not* implicate a criminal defense attorney, as that would be a violation of the Sixth Amendment"); Tung Yin, *Boumediene and Lawfare*, 43 U. RICH. L. REV. 865, 887 (2009) (discussing the "deterrent value" of Lynne Stewart's prosecution); Editorial, *Over the Line*, WASH. POST, Feb. 18, 2005, at A28 (claiming that "[Stewart's] conviction will chill defensework only to the extent that lawyers confuse defending terrorists with participating in their illegal activities"); *see generally* Lawrence S. Goldman, *Martha and Lynne: The Stewart Sisters and the Expansion of White Collar Criminal Prosecution*, THE CHAMPION, Aug. 2008 at 8, available at http://nacdl.org/champion.aspx?id=845 (comparing the prosecutions of Martha Stewart and Lynne Stewart and stating that while "sentences in the white collar area probably have more general deterrent effect than in others . . . the recent emphasis on prosecuting white collar individuals and corporations for acts pre-

Stewart's case represents the most direct and most publicized attack on radical lawyering.[6] What I wish to suggest in this article is that three recent developments (not including Stewart's new sentence) present—or have the potential to present—serious challenges to all stripes of cause lawyering.[7] Only one of these developments—*Holder v. Humanitarian Law Project*,[8] which was decided at the end of the 2009-10 Supreme Court term—involved designated terrorists or terrorist organizations.[9] The other case, *Citizens United v. Federal Election Commission*,[10] decided earlier in the 2009-10 term, struck down a provision of the McCain–Feingold Act and held that corporate funding of independent political broadcasts in candidate elections could not be limited under the First Amendment.[11] The third development is a ballot initiative in Oklahoma—a measure approved by voters in the November 2010 election requiring that courts rely on federal or state law when handing down decisions and prohibiting them from using international law or Sharia law (Islamic law) when making rulings.[12] This

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viously not considered criminal (or sometimes even wrong) and on substantially increasing white collar penalties [is] both unfair and unlikely to be effective").

6 *See* Avi Brisman, *Reframing the Portrait of Lynne F. Stewart*, 12 J.L. SOC'Y 1 (2011) (arguing that the impact of Stewart's case extends beyond the specifics of her representation and the defense of individuals accused of terrorism).

7 While the terms "radical lawyering" and "cause lawyering" are sometimes used interchangeably, *see, e.g.*, Carrie Menkel-Meadow, *The Causes of Cause Lawyering: Toward an Understanding of the Motivation and Commitment of Social Justice Lawyers*, *in* CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 31, 33 (Austin Sarat & Stuart Scheingold eds., 1998), some scholars distinguish "radical lawyering" from other types of "cause lawyering." *See, e.g.*, Stuart Scheingold & Anne Bloom, *Transgressive Cause Lawyering: Practice Sites and the Politicization of the Professional*, 5 INT'L J. LEGAL PROF. 209, 215–16 (1998) (describing how "radical cause lawyers" endeavor to make changes in the basic structures of society and join forces with the social movements and their transformative interests and values). I conceive of "cause lawyering" rather capaciously and treat "cause lawyer" as an umbrella term that includes "radical lawyers," as well as "proceduralist" lawyers who resemble mainstream or traditional lawyers in their belief in the fundamental soundness of the legal system, and who seek to maintain law's legitimacy by providing "equal justice." *See* Thomas M. Hilbink, *You Know the Type. . . .: Categories of Cause Lawyering*, 29 LAW & SOC. INQUIRY 657, 661, 665–73 (2004). In my article, I deliberately employ the term "cause lawyer" so as to include both "radical lawyers" and those who consider themselves "cause lawyers" simply because they work to serve "unmet legal needs" (i.e., represent clients who cannot afford a lawyer)—the least "transgressive" of cause lawyers. *See* Scheingold & Bloom, *supra* at 213–16.

8 Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010).

9 The U.S. Secretary of State has the power to designate an organization as a foreign terrorist organization. 8 U.S.C. § 1189 (2006).

10 Citizens United v. Federal Election Comm'n, 558 U.S. ___, 130 S. Ct. 876 (2010).

11 *Id.*

12 Oklahoma State Election Board, State Questions for General Election, State

article argues that these three developments, while different and seemingly unrelated,[13] when considered collectively, illustrate new challenges to "cause lawyering." But first, a couple of comments about the ways in which "cause lawyering" has been conceptualized are in order.

II. Typologies and Continua of Cause Lawyering

Although "cause lawyering" presents definitional problems—in part because it is practiced in different ways for the benefit of different groups[14]—it is "frequently directed at altering some aspect of the social, economic, and political status quo"[15] and

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Question No. 755 (Nov. 2, 2010), *available at* http://www.ok.gov/elections/documents/sq_gen10.pdf. *See* A. G. Sulzberger, *Voters Face Decisions on a Mix of Issues*, N.Y. Times, Oct. 6, 2010, at A17. *See also* Bobby Eberle, *'Save Our State' vs. Islam in Oklahoma*, Gopusa The Loft (Oct. 21, 2010, 7:13 AM), http://www.gopusa.com/theloft/2010/10/21/save_our_state_vs_islam_in_oklahoma; *Oklahoma Lawmakers Seek Voter Backing to Ban Shariah from Courts*, Foxnews.com, June 15, 2010, ttp://www.foxnews.com/politics/2010/06/15/oklahoma-lawmakers-seek-voter-backing-ban-shariah-courts.

The word for Islamic religious law has been transliterated into English in a number of different ways, including Sharia, Shariah, Shari'a, Sharī'ah,Sha'aria,and Sha'ria, among others. As someone who does not speak Arabic, I cannot profess to know which form is most accurate. Because the ballot title that Oklahoma voters saw on their ballot referred to Islamic law as "Sharia Law," I will use this form throughout this article. Doing so should not, in any way, be construed as support for the measure—which should be obvious based on my discussion in Part IV *infra*.

13 Floyd Abrams discusses *Humanitarian Law Project v. Holder* in the same essay as *Citizens United*, but—and to my disappointment—does not integrate his analyses or think more broadly about their (combined) implications. Instead, he simply describes the case as one of a number of First Amendment cases decided during the October 2009 term and concludes, "[w]hen I think of *Citizens United*, I think of Citizens United. I think of the political documentary it produced, one designed to persuade the public to reject a candidate for the presidency. And I ask myself a question: if that's not what the First Amendment is about, what is?" Floyd Abrams, *Citizens United and Its Critics*, 120 Yale L.J. Online 77, 88 (2010).

14 *See supra* note 7. *See also* Austin Sarat & Stuart Scheingold, *Cause Lawyering and the Reproduction of Professional Authority: An Introduction*, *in* Cause Lawyering: Political Commitments and Professional Responsibilities 3, 5 (Austin Sarat & Stuart Scheingold eds., 1998) (stating that "providing a single, cross-culturally valid definition of the concept [of cause lawyering] is impossible" and acknowledging that "cause lawyering is a contested concept"); Terence C. Halliday, *Politics and Civic Professionalism: Legal Elites and Cause Lawyers*, 24 Law & Soc. Inquiry 1013, 1015 (1999) (describing "cause lawyering" as "a portmanteau concept with relatively little denotative precision"); Hilbink, *supra* note 7, at 660 (stating that "[d]efining cause lawyering is a massive challenge"). *See generally* Raymond Michalowski, *All or Nothing: An Inquiry into the (Im)Possibility of Cause Lawyering Under Cuban Socialism*, *in* Cause Lawyering: Political Commitments and Professional Responsibilities 523, 543 (Austin Sarat & Stuart Scheingold, eds. 1998) (urging a distinction between "*cause lawyering* as a broad category of attorney activism" (emphasis added) and "*cause litigating* as a specific activist strategy" (emphasis in original)).

15 Sarat & Scheingold, *supra* note 14, at 4. *See also* Hilbink, *supra* note 7, at 659

> [c]haracterized by a willingness to challenge mainstream representations of professionalism by, among other ways, taking sides in social conflicts. In so doing, cause lawyers, in effect, become advocates not only, or primarily, for their clients but for causes with which the clients' cases are associated—and with which the lawyer identifies.[16]

Perhaps because of the definitional challenges of "cause lawyering" and the ambiguity surrounding the term, scholars have attempted to craft "cause lawyering" typologies, spectra, and paradigms.

Law professor Thomas M. Hilbink, for example, identifies a tripartite typology: "proceduralist" lawyering (which resembles mainstream or traditional lawyering, reflects a belief in the fundamental soundness of the legal system, and seeks to maintain law's legitimacy by providing "equal justice");[17] "elite/vanguard" lawyering (which treats "law as a superior form of politics" and believes that "law has the capacity to render substantive justice" and that through test-case litigation and substantive law reform one can change society);[18] and "grassroots" (which views law as "just another form of politics and is skeptical of law's utility as a tool of social change" and thus seeks to promote economic, legal, political and social transformation by working closely and in solidarity with social movements).[19]

Political scientist John Kilwein introduces a "continuum of lawyering styles" that includes "individual client lawyering," "impact lawyering," "mobilization lawyering," and "client voice lawyer-

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(describing "cause lawyers" as attorneys who "deploy their legal skills to challenge prevailing distributions of political, social, economic, and/or legal values and resources").

16 Scheingold & Bloom, *supra* note 7, at 209. *See also* Michalowski, *supra* note 14, at 523, 542 (quoting Sarat and Scheingold for the belief that cause lawyering involves "'a self-conscious choice to give priority to causes rather than to client service,'" and noting that cause lawyering is normally understood to "take[ ] place outside of the state when attorneys deploy litigation in support of social movements seeking to pressure the state to grant some rights claim."). *See generally* Austin Sarat, *Between (the Presence of) Violence and (the Possibility of) Justice*, *in* CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 317, 333 (Austin Sarat & Stuart Scheingold eds., 1998) (noting the criticism that cause lawyers are "lawyers without clients" (citation omitted)); Stuart Scheingold, *The Struggle to Politicize Legal Practice: A Case Study of Left-Activist Cause Lawyering*, *in* CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 118, 119 (Austin Sarat & Stuart Scheingold eds., 1998) (explaining that lawyers "are *expected* to defend their clients in a vigorous and partisan manner while remaining neutral to their clients' objectives, activities, and identities" (emphasis added), but that "[t]he two things that distinguish the left-activist project are its fundamental challenges to the society and to the profession.").

17 *See* Hilbink, *supra* note 7, at 665–73.

18 *Id.* at 673–81.

19 *Id.* at 681–90.

ing."[20] The goal of "individual client lawyering," Kilwein explains, is to provide legal services to those individual clients who might otherwise be without representation. Such lawyers tend to view the basic structure of the justice system as being essentially equitable and impartial, and frequently consider their work to be the "fine-tuning needed to make the justice system and society operate more fairly."[21] In contrast, "impact lawyering," usually conducted through class action suits or strategically chosen individual cases, seeks to remedy conditions in society that affect a group (such as the poor) "to change policy, law, and social systems in such a way that the status of marginalized groups [i]s improved."[22] In "mobilization lawyering," the lawyer attempts to "establish a new dialogue with her or his client and demythologize the myth of legal efficacy."[23] Here, lawyers "do what they can for their clients within the existing legal structure" and "let clients know that the efficacy of traditional legal services is severely limited."[24] The goal with "mobilization lawyering" is to try to work to change "the hegemonic structure that adversely affects the poor" by giving "clients greater class consciousness, a recognition that they are part of an oppressed group in society with a history."[25] The hope is that "[c]lients would be made aware that they are part of a greater group whose members suffer similar problems as a result of the hegemonic structure of society. Ideally, similarly situated clients would develop a dialogue that would eventually lead to a unified mobilization of clients."[26] Like "mobilization lawyering," "client voice lawyering"—Kilwein's fourth category—attempts to empower the client further and eliminate the hierarchical differences in the client-lawyer relationship. But "client voice lawyering" endeavors to go further than "moblization lawyering." As Kilwein explains, "[i]n a parallel space separated from the structured world of litigation, 'clients could speak their own stories of suffering, accountability and change.' This dialogue would allow clients to learn about themselves and people like them, about the (in)efficacy of litiga-

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[20] John Kilwein, *Still Trying: Cause Lawyering for the Poor and Disadvantaged in Pittsburgh, Pennsylvania*, *in* CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 181, 183–86 (Austin Sarat & Stuart Scheingold eds., 1998).

[21] *Id.* at 183–84, 187.

[22] *Id.* at 189.

[23] *Id.* at 185.

[24] *Id.*

[25] *Id.*

[26] Kilwein, *supra* note 20. Kilwein also regards the "mobilization lawyer" as one who "foster[s] client-community dialogue, thereby aiding the expansion of class mobilization." *Id.*

tion, and the use of power . . . ."[27]

Political scientists Stuart Scheingold and Anne Bloom, to offer a third example, present a "transgressive continuum" (or "continuum of transgressive legal practice") with a "conventional end" and a "transgressive end."[28] They situate "cause lawyering directed toward serving *unmet legal needs*" (defined in terms of clients who cannot afford a lawyer) at the "conventional end" and "radical cause lawyering" (which endeavors to make changes in the basic structures of society and join forces with the social movements and their transformative interests and values) and post-structurally-inspired "critical cause lawyering" (which focuses less on large-scale transformative politics than on rejecting hierarchy at micro-sites of power, e.g., the workplace, family, community, lawyer-client relationship) at the "transgressive end."[29] In between "unmet legal needs" and "radical-critical," Scheingold and Bloom place "civil liberties" and "civil rights" lawyering (which is court-focused and seeks to protect and/or extend legal and constitutional rights) and "public policy" cause lawyering (which is conducted in legislature and administrative agencies and which blurs the law-politics distinction, advancing a policy agenda identified by the lawyer(s)).[30]

Without passing judgment on these typologies—or on those not mentioned—I lean more heavily in this article on the rich continuum offered by Scheingold and Bloom to assess the impact of *Holder v. Humanitarian Law Project*, *Citizens United v. Federal Election Commission*, and Oklahoma's "Sharia Law Amendment" on cause lawyering. In the parts that follow, I suggest that each of these developments presents a challenge for cause lawyers—with *Humanitarian Law Project* and Oklahoma's "Sharia Law Amendment"

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27 *Id.* at 186 (quoting Lucie White, *Mobilization on the Margins of the Lawsuit: Making Space for the Clients to Speak*, 16 N.Y.U. REV. L. & SOC. CHANGE 535, 546 (1987–88)). I must confess that the distinction between "mobilization lawyering" and "client voice lawyering" is a bit difficult to discern—or, at least, Kilwein does not adequately articulate what "client voice lawyering" endeavors to achieve that "moblization lawyering" does not or cannot. But Kilwein's discussion in his section on "client voice lawyering" of the troubles lawyers encounter when representing the poor is helpful for my discussion of the potential impact of Oklahoma's "Sharia Law Amendment" in Part V *infra*.

28 Scheingold & Bloom, *supra* note 7, at 213.

29 *Id.* at 214–16.

30 *Id.* at 214–15. In *The Struggle to Politicize Legal Practice: A Case Study of Left-Activist Cause Lawyering*—his chapter in *Cause Lawyering: Political Commitments and Professional Responsibilities*—Scheingold discusses "left-activist lawyering" and explains that "[u]nlike the traditional civil liberties lawyer, who will defend legal and constitutional principles—free speech for Nazis, fair trials for right-wing terrorists, and so forth—left-activists narrow their conception of representation to political allies." Sarat & Scheingold, *supra* note 14, at 128.

introducing new obstacles to a range of cause lawyers, and *Citizens United* creating new impediments to, as well as new possibilities for, "public policy cause lawyering."

III. *HUMANITARIAN LAW PROJECT* AND THE CRIMINALIZATION OF PEACEMAKING

In *Humanitarian Law Project v. Holder*, the Supreme Court upheld the federal statute that makes it a crime to provide "material support" to foreign terrorist organizations—including "expert advice or assistance," "training," "personnel," or "service"—even if such help takes the form of support for the humanitarian and political activities of the organization, legal training for peacefully resolving conflicts, and political advocacy.[31] Humanitarian Law Project (HLP)—a non-profit organization (with consultative status at the United Nations) "devoted to protecting human rights and promoting the peaceful resolution of conflict by using established international human rights law and humanitarian law"[32]—wanted to train members of the Kurdistan Workers' Party (PKK) and the Liberation Tigers of Tamil Eelam (LTTE) to use international law to resolve disputes peacefully.[33] HLP challenged the constitutional-

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[31] 130 S. Ct. 2705 (2010). For a concise overview of the procedural history of the case and the Supreme Court opinion, *see The Supreme Court, 2009 Term–Leading Cases*, 124 HARV. L. REV. 259–69 (2010); Holder v. Humanitarian Law Project (08-1498), CORNELL LAW SCHOOL LEGAL INFORMATION BULLETIN, http://www.topics.law.cornell.edu/supct/cert/09-89 (last visited Mar. 17, 2011). *See also* Renee Newman Knake, *The Supreme Court's Increased Attention to the Law of Lawyering: Mere Coincidence or Something More?*, 59 AM. U. L. REV. 1499, 1513–16 (2010); Patricia Millett, Kevin R. Amer, Jonathan H. Eisenman & Josh N. Friedman, *Mixed Signals: The Roberts Court and Free Speech in the 2009 Term*, 5 CHARLESTON L. REV. 1, 20–23 (2010); Editorial, *A Bruise on the First Amendment*, N.Y. TIMES, June 22, 2010, at A26; Editorial, *Terrorism and Free Speech*, N.Y. TIMES, Feb. 23, 2010, at A26; John Farmer Jr., Op-Ed., *What Does it Take to Aid a Terrorist?*, N.Y. TIMES, Feb. 23, 2010, at A27; Adam Liptak, *Before Justices, First Amendment and Aid to Terrorists*, N.Y. TIMES, Feb. 24, 2010, at A15; Adam Liptak, *Justices Uphold a Ban on Aiding Terror Groups*, N.Y. TIMES, June 22, 2010, at A1; Adam Liptak, *Right to Free Speech Collides with Fight Against Terror*, N.Y. TIMES, Feb. 11, 2010, at A18; Tony Mauro, *Justices Uphold Law Criminalizing 'Material Support' for Terror Groups*, N.Y.L.J., June 22, 2010, at 1; Rebecca Vernon & Frederick Wu (James McConnell ed., 2010), Humanitarian Law Project v. Holder (09-89).

[32] HUMANITARIAN LAW PROJECT, http://hlp.home.igc.org (last visited Mar. 17, 2011).

[33] *See* Adam Tomkins, *Criminalizing Support for Terrorism: A Comparative Perspective*, 6 DUKE J. CONST. L. & PUB. POL'Y 81, 82 (2010) (explaining that HLP wanted to "teach PKK members to petition the United Nations and other representative bodies for relief; and they wished to engage in political advocacy on behalf of Kurds living in Turkey and Tamils living in Sri Lanka."). It bears mention that by the time the case reached the Supreme Court, the LTTE had been defeated militarily in Sri Lanka. The Court thus noted that "helping the LTTE negotiate a peace agreement with Sri Lanka appears to be moot . . . . [W]e do not consider the application of § 2339B to those

ity of the statute, 18 U.S.C. § 2339B, which makes it a federal crime to "knowingly provid[e] material support or resources to a foreign terrorist organization,"[34] on two grounds: 1) it "violated their freedom of speech and freedom of association under the First Amendment, because it criminalized their provision of material support to the PKK and the LTTE, without requiring the Government to prove that plaintiffs had a specific intent to further the unlawful ends of those organizations;"[35] and 2) the statute was impermissibly vague under the Due Process Clause of the Fifth Amendment. The Supreme Court disagreed on both grounds and expressed concerns about the fungibility of money and terrorist organizations' ability to exploit and manipulate the well-intended support of organization such as HLP: "'[m]aterial support' is a valuable resource by definition. Such support frees up other resources within the organization that may be put to violent ends. It also importantly helps lend legitimacy to foreign terrorist groups—legitimacy that makes it easier for those groups to persist, to recruit members, and to raise funds—all of which facilitate more terrorist attacks."[36]

Writing about the intersection of "attorney regulation" and free speech in the context of *Humanitarian Law Project* and *Milavetz, Gallop & Milavetz, P.A., et al. v. United States*—which involved a challenge to the bankruptcy regulation that prohibits lawyers from offering advice about the accumulation of additional debt in the contemplation of filing for bankruptcy[37]—Professor Renee Newman Knake asserts:

[T]he Supreme Court's treatment of this federal statutory con-

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activities here." 130 S. Ct. at 2717. *See* Steven Lee Myers, *A Kurdish Rebel Softens His Tone for Skeptical Ears*, N.Y. TIMES, Jan. 1, 2011, at A8, for a report on the PKK's apparent interest in pursuing peace, rather than war.

[34] Congress has amended the definition of "material support or resources" on a number of occasions, but at the time of the Court's ruling, it was defined as follows:

> Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization . . . that the organization has engaged or engages in terrorist activity . . . or that the organization has engaged or engages in terrorism . . . .

18 U.S.C. § 2339B(a)(1) (2006). The authority to designate an entity a "foreign terrorist organization" rests with the Secretary of State, 8 U.S.C. § 1189(a)(1), (d)(4), and the terms "terrorist activity" and "terrorism" are defined in 8 U.S.C. § 1182(a)(3)(B)(iii) and 22 U.S.C. § 2656f(d)(2), respectively.

[35] 130 S. Ct. at 2714.

[36] *Id.* at 2725.

[37] 130 S. Ct. 1324 (2010).

> straint on attorney advice may very well have significant ramifications for lawyers and clients. The results of these cases may have considerable repercussions for clients who need complete and accurate legal advice about bankruptcy or humanitarian aid efforts, and for their attorneys who are under ethical obligations to deliver that information. The Supreme Court's ruling in these cases also may adversely impact the ability of attorneys to offer advice in other areas of law, for an affirmation of these statutory restrictions on legal advice potentially emboldens Congress to impose similar restraints in other areas of law.[38]

For Knake, an attorney's ability to deliver factual, full, and frank legal guidance is integral to the attorney-client relationship, and the cases of *Milavetz* and *Humanitarian Law Project*, she argues, will have "considerable repercussions for clients who need complete and accurate legal advice about bankruptcy or humanitarian aid efforts, and for their attorneys who are under ethical obligations to deliver that information."[39] While Knake is worried about the impact of these cases on clients specifically seeking guidance about bankruptcy or peace-making activities—and about how attorneys should negotiate these limits on the delivery of legal advice with their established ethical duties—she has a larger concern: Congressional involvement in the attorney-client relationship.[40] According to Knake, the First Amendment rights of lawyers and clients are under attack and the decisions in *Milavetz* and *Humanitarian Law Project* may embolden Congress to "legislate away the lawyer's ability to advise her client" in other areas of the law.[41]

Knake's comments illuminate the impact that *Humanitarian Law Project* may have on "individual client lawyering" (to use Kilwein's category) or "cause lawyering directed toward serving unmet legal needs" (to use Scheingold and Bloom's). But because the case essentially criminalizes individual, organizational, and non-state-sponsored peacemaking by prohibiting lawyers from working with designated foreign terrorist organizations to bring about peace, it may affect more "transgressive" lawyers who often share some of the interests, values, and perspectives of their clients.[42] As noted above, "radical cause lawyering" endeavors to make changes

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38 Knake, *supra* note 31, at 1516.

39 Renee Newman Knake, *Contemplating Free Speech and Congressional Efforts to Constrain Legal Advice*, 37 RUTGERS L. REC. 12, 19 (2010).

40 *Id.* at 16–17, 19.

41 *Id.* at 16–17.

42 The extent to which the lawyer shares her client's *goals*, as well as the *means* and *methods* for achieving them, can prove problematic for the lawyer and client. *See* Brisman, *supra* note 6.

in the basic structures of society, and radical cause lawyers often join forces with the social movements and their transformative interests and values.[43] Just as I have explained elsewhere,[44] I do not intend to suggest here that lawyers who join designated "foreign terrorist organizations" or who engage in "terrorist activities" or who counsel their clients to participate in "terrorism" (however defined)[45] should avoid the repercussions of their decisions and actions. But the decision in *Humanitarian Law Project* may discourage some cause lawyers who (had) hope(d) to use international human rights law to bring about social and political change because the case effectively turns would-be peacemakers into criminals and places the ability to resolve conflicts peacefully solely in the hands of the federal government and its approved-of agents. Thus, to some extent, *Humanitarian Law Project* is really a case about the scope of State power—a case that essentially shows a lack of faith in individuals and groups (to resolve conflicts), and a belief that peaceful resolution to disputes must be according to/within State-defined parameters.[46] Just as the State has had a monopoly over the response to crime,[47] it now appears to have similar control over

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43 *See* Scheingold & Bloom, *supra* note 7, at 216.

44 Avi Brisman, *Rethinking the Case of Matthew F. Hale: Fear and Loathing on the Part of the Illinois Bar Committee on Character and Fitness*, 35 CONN. L. REV. 1399, 1424 (2003) (concluding that "a bar applicant who belongs to a terrorist cell or who claims to support terrorist activities would most likely be rejected based on the rule of [*Law Students Civil Rights Research Council v. Wadmond*, 401 U.S. 154 (1971)], a bar applicant who supports a terrorist's criticisms of the U.S. government, but not the violent means, should not be denied admission.").

45 For a discussion of the moniker "terrorism," and the confusion generated by the terms "eco-terrorism," which is often used by governmental officials and corporate officers to refer to actions taken in the name of the Earth and for the sake of environmental protection—actions more appropriately labeled "ecodefense," "ecotage," or "monkeywrenching"—and "environmental terrorism," the name frequently given to acts that use the environment as a tool for indiscriminate violence or threatened violence to large numbers of innocent civilians for the purpose of causing disruption, panic, harm and death (such as tampering with a food or water supply or the release of nuclear material or biological weapons), *see* Avi Brisman, *Crime-Environment Relationships and Environmental Justice*, 6 SEATTLE J. FOR SOC. JUST. 727, 754–60 (2008).

46 *See generally* Avi Brisman, *"Docile Bodies" or Rebellious Spirits: Issues of Time and Power in the Waiver and Withdrawal of Death Penalty Appeals*, 43 VAL. U. L. REV. 459 (2009) (describing how the State retains its relevance and flexes its muscle through "endless" forms of talking and conversation).

47 *See* Nils Christie, *Conflicts as Property*, 17 BRITISH J. CRIMINOLOGY 1, 1, 3 (1977) (describing how "[v]ictims of crime have . . . lost their rights to participate. . . . [C]onflicts have been taken away from the parties directly involved and thereby have either disappeared or become other people's property. . . . [I]n a criminal proceeding . . . the proceeding is converted from something between the parties into a conflict between one of the parties and the state."); Rick Sarre, *Restorative Justice: Translating the Theory into Practice*, 1 U. NOTRE DAME AUSTL. L. REV. 11, 11–12 (1999)

peacemaking. Cause lawyers may (come to) regard *Humanitarian Law Project* as a reflection of law—and lawyers'—limited potential to "repair the world."[48]

IV. *CITIZENS UNITED* AND CORPORATE FREE SPEECH

In *Citizens United v. Federal Election Commission*, the U.S. Supreme Court struck down a provision of the McCain–Feingold Act and held that corporate funding of independent political broadcasts in candidate elections could not be limited under the First Amendment.[49] The Court's determination that corporations have the same free speech rights as individuals reversed decades of precedent and granted corporations the right to spend freely in candidate elections.[50] Not surprisingly, the case drew much interest from election law and campaign finance law specialists, as well as from First Amendment jurisprudence experts,[51] and generated much attention in the 2010 midterm election season about the role and influence of money on elections.[52] Even if one does not believe

(discussing how victims used to take the lead in organizing communal reactions to law-breaking and how now, the State takes action against offenders).

48 *See* Brisman, *supra* note 6 (quoting GEOFFREY C. HAZARD ET AL., THE LAW & ETHICS OF LAWYERS 1064 (3d ed. 1999)).

49 130 S. Ct. 876.

50 *Id.* Citizens United overruled Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990) and McConnell v. Federal Election Comm'n, 540 U.S. 93 (2003).

51 *See, e.g.*, Darrel C. Menthe, *The Marketplace Metaphor and Commercial Speech Doctrine: Or How I Learned to Stop Worrying About and Love* Citizens United, 38 HASTINGS CONST. L.Q. 131 (2010); David Solan, Comment, *In the Wake of* Citizens United, *Do Foreign Politics Still Stop at the Water's Edge?*, 19 TUL. J. INT'L & COMP. L. 281 (2010); ADAM SKAGGS, BUYING JUSTICE: THE IMPACT OF *Citizens United* on Judicial Elections, Brennan Center for Justice (2010), *available at* http://www.brennancenter.org/page/-/publications/BCReportBuyingJustice.pdf?nocdn=1.

52 *See, e.g.*, Jill Abramson, *Return of the Secret Donors*, N.Y. TIMES, Oct. 17, 2010, at WK1; Matt Bai, *This Donation Cycle Catches G.O.P. in the Upswing*, N.Y. TIMES, Oct. 21, 2010, at A21; Jan Witold Baran, Op-Ed, *Stampede Toward Democracy*, N.Y. TIMES, Jan. 26, 2010, at A23; Adam Cohen, Op-Ed, *A Century-Old Principle: Keep Corporate Money Out of Elections*, N.Y. TIMES, Aug. 11, 2009, at A20; Ronald Dworkin, *The "Devastating" Decision*, N.Y. REV. BOOKS, Feb. 25, 2010, at 39; Brett Michael Dykes, *Left and Right United in Opposition to Controversial SCOTUS Decision*, YAHOO!NEWS (Feb. 17, 2010) http://news.yahoo.com/s/ynews/ynews_ts1137 (commenting on the question of the influence of money and campaign spending in elections); Editorial, *A Jury Convicts Tom DeLay*, N.Y. TIMES, Nov. 25, 2010, at A38; Editorial, *After Citizens United*, N.Y. TIMES, Apr. 20, 2010, at A20; Editorial, *A Welcome, if Partial, Fix*, N.Y. TIMES, Feb. 17, 2010, at A22; Editorial, *The Court's Blow to Democracy*, N.Y. TIMES, Jan. 22, 2010, at A30; Editorial, *The Court and Campaign Finance*, N.Y. TIMES, Sept. 11, 2009, at A26; Editorial, *The Court and Free Speech*, N.Y. TIMES, Apr. 24, 2010, at A18; Editorial, *The Secret Election*, N.Y. TIMES, Sept. 19, 2010, at WK8; Editorial, *Stealth Money*, N.Y. TIMES, Oct. 18, 2010, at A34; David D. Kirkpatrick, *A Buck for Your Vote, Sir? (Prove It)*, N.Y. TIMES, Jan. 24, 2010, at WK1; David D. Kirkpatrick, *Lobbies' New Power: Cross Us, and Our Cash Will Bury You*, N.Y. TIMES, Jan. 22, 2010, at A1; Adam Liptak, *Day at Supreme Court Augurs a Victory on*

that *Citizens United* was wrongly decided—and I think it was[53]—one might still do well to note its impact on one aspect of cause lawyering.

In *Speaking Law to Power: Occasions for Cause Lawyering*, Richard Abel observes that much scholarly attention on cause lawyering has centered on litigation.[54] Although Abel recognizes the role of litigation,[55] he focuses on the confrontation between law and state power[56]—on "how the structure, process, and personnel of legal institutions shape the interaction between law and power."[57] Abel's discussion of the electoral process is most relevant here. According to Abel, "[p]ower inequality assumes many guises"—one of which is manifested or reflected in the "differential ability to participate in and influence the polity: the size and organization of interest groups, their material resources and political sophistication, access to the media, ideological position, and incumbency."[58] For Abel, "[b]ecause elections are quintessentially political, law plays a lim-

Political Speech, but How Broad?, N.Y. TIMES, Sept. 10, 2009, at A28; Adam Liptak, *Former Justice O'Connor Sees Ill in Election Finance Ruling*, N.Y. TIMES, Jan. 27, 2010, at A16; Adam Liptak, *Justices, 5-4, Reject Corporate Campaign Spending Limit*, N.Y. TIMES, Jan. 22, 2010, at A1; Adam Liptak, *Justices Turn Minor Movie Case into a Blockbuster*, N.Y. TIMES, Jan. 23, 2010, at A13; Adam Liptak, *Rare Session for Supreme Court*, N.Y. TIMES, Jan. 21, 2010, at A22; Adam Liptak, *Viewing Free Speech Through Election Law Haze*, N.Y. TIMES, May 4, 2010, at A20; Michael Luo, *Groups Push Legal Limits in Advertising*, N.Y. TIMES, Oct. 18, 2010, at A10; Michael Luo & Stephanie Strom, *Donor Names Remain Secret as Rules Shift*, N.Y. TIMES, Sept. 21, 2010, at A1; ; Jeffrey Toobin, *Without a Paddle*, THE NEW YORKER, Sept. 27, 2010, at 34, 40; Ian Urbina, *Consequences for State Laws in Court Ruling*, N.Y. TIMES, Jan. 23, 2010, at A1; *see generally* David Brooks, *Don't Follow the Money*, N.Y. TIMES, Oct. 19, 2010, at A31.

53 Although an in-depth discussion of *Citizens United* is outside the scope of this article, I will use this occasion to note that I agree with Justice Stephen Breyer who, in speaking more generally about government regulation of certain activities affecting speech (e.g., campaign finance, corporate advertising about matters of public concern, and drugstore advertising that informs the public about the availability of custom-made pharmaceuticals), has written that the First Amendment should be read "not in isolation but as seeking to maintain a system of free expression designed to further a basic constitutional purpose: creating and maintaining democratic decision-making institutions." STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 39 (2005).

54 Richard Abel, *Speaking Law to Power: Occasions for Cause Lawyering*, *in* CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 69, 70 (Austin Sarat & Stuart Scheingold eds., 1998).

55 Abel points out that "[c]ause lawyers may concentrate on litigation in part because their skills are essential; but the judicial forum is particularly attractive to the powerless as well because courts *must* hear every claim and give reasons for their decisions." *Id.* at 95.

56 "Because law constitutes the state, law can reconfigure state power. Because the state usually acts through law, the state can be constrained by law." *Id.* at 69.

57 *Id.* at 70.

58 *Id.* at 69.

ited role."[59] While the Supreme Court's decision in *Bush v. Gore*[60] might have changed the tenor and tone of this statement, Abel is correct that "cause lawyers can use law to structure the competition for political power."[61] Abel's assessment, however, takes on new meaning after *Citizens United*.

Abel contends that:

> Lawyers can seek to configure districts and voting algorithms to maximize the power of subordinated people and organize the timing and process of elections to increase turnout. They can facilitate participation by new political parties and seek term limits to reduce the advantages of incumbency. Most important, if also most difficult, they can restrain the translation of economic power into political dominance, devising rules limiting campaign contributions, equalizing media access, and prohibiting political activity by government employees . . . .[62]

Cause lawyers still play a role in districting and eligibility to vote.[63] But *Citizens United*, which gave corporations the unlimited right to spend money on political candidates, further affirms the correlation between economic power and political dominance. In other words, by holding that corporations have the same free speech rights as individuals, the Court in *Citizens United* further skewed the already differential ability to participate in and influence the polity.[64] Because *Citizens United* affects cause lawyers' role with respect to issues concerning limits to campaign contributions and media access, cause lawyers may have to rethink how they use law to structure the competition of political power—if they do at all.

To a large extent, the type of cause lawyering that Abel discusses in his section on the electoral process falls under Scheingold and Bloom's category of "public policy cause lawyering," which

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59 *Id.* at 71.

60 531 U.S. 98 (2000).

61 Abel, *supra* note 54, at 74.

62 *Id.*

63 *See id.* at 72. *See generally* Avi Brisman, *Toward a More Elaborate Typology of Environmental Values: Liberalizing Criminal Disenfranchisement Laws and Policies*, 33 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 283 (2007) (discussing the impact of criminal disenfranchisement on national, state and local elections, as well as its effect on both felons' and ex-felons' home communities and the communities where convicted offenders are incarcerated, arguing for a consideration of criminal disenfranchisement as an "environmental" issue, and suggesting a series of reforms to state criminal disenfranchisement laws and policies).

64 *See generally* Noah Feldman, *What a Liberal Court Should Be*, N.Y. TIMES, June 27, 2010, Magazine at 38, 42 (describing the "antidistortion value"—"the concern that corporations will have a disproportionate effect on elections by providing more money than individuals can.").

they situate between "unmet legal needs" and "radical-critical" in their "continuum of transgressive legal practice."[65] According to Scheingold and Bloom,

> Public policy cause lawyering is professionally transgressive, in part, just because it is less likely to be conducted in the courts than in legislatures and administrative agencies. In addition, its objective is to advance a policy agenda *identified by the cause lawyers, themselves,* as in the public interest. Thus, public policy cause lawyering is neither about remedying individual grievances nor even about asserting rights. All of this further attenuates the lawyer-client relationship while at the same time flaunting the profession's carefully cultivated image of political neutrality.
>
> Whether public policy cause lawyering is politically transgressive depends . . . on how sweeping its aspirations are and on whether it goes through, or attempts to bypass, "normal" politics . . . Typically, however, public policy cause lawyering is more cautious and may well be less politically transgressive than civil rights and civil liberties cause lawyering. This is because a decision to pursue discrete policy goals in the political arena entails reliance on lobbying of legislative, executive and regulatory agencies. Insofar as public policy cause lawyers, thus, decide to play the insiders' game, they must play it by the insiders' rules—privileging immediate substantive outcomes and the bargaining necessary to achieve them. In contrast, civil rights and civil liberties lawyers tend to turn to the courts because the other institutions of the state have been unresponsive to their claims.[66]

In the aftermath of *Citizens United*, some cause lawyers may find themselves (once-and-for-all) fed up with efforts at "the conventional end of the continuum"—i.e., trying to reform, rather than transform the system.[67] "Lawyering at this end of the continuum is . . . about deploying legal practice to get the state, the society and the profession to live up to their established ideals,"[68] Scheingold and Bloom explain, and some cause lawyers may lose hope (if they have not already) in this possibility after *Citizens United*.

But other cause lawyers may feel that *Citizens United* simply forces them to reorient how they conduct "public policy cause lawyering"—*how* they use law to structure the competition of/for political power (in the electoral process), not *whether* they do so. For

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65 *See* Scheingold & Bloom, *supra* note 7, at 215.

66 *Id.* (internal footnotes omitted).

67 *Id.* at 245.

68 *Id.*

example, with the Supreme Court's decision in *Citizens United*, corporations may spend freely in candidate elections; issues regarding the federal law that limits "soft money" donations to political parties remain, however, and in November 2010, the Supreme Court declined to hear a campaign finance case that would have allowed it to clarify aspects of its *Citizens United* ruling regarding "registration and disclosure requirements that apply to political action committees."[69] Given the rate with which the Roberts Court has ruled for business interests,[70] cause lawyers may find, then, that *Citizens United* has simply forced them to dig in their heels, rather than abandon ship.

To offer another example, Public Citizen—the national, nonprofit consumer advocacy organization—examined disclosure forms filed with the Federal Election Commission (FEC) to determine which groups paid for "electioneering activities" during the 2010 mid-term elections, who funded those groups, and which candidates were supported or attacked by these outside groups.[71] The organization determined that outside groups' contributions "were hidden and concentrated, and that the independent groups pushed their support to conservative candidates."[72] According to Public Citizen, *ten* groups out of at least 149 independent organizations spending money to influence the midterm elections were responsible for *65%* of the $176.1 million expended by the end of

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69 *See* Adam Liptak, *Viewing Free Speech Through Election Law Haze*, N.Y. TIMES, May 4, 2010, at A20; Adam Liptak, *Justices to Weigh Broader Right to Legal Aid*, N.Y. TIMES, Nov. 2, 2010, at A22 (the appeal the Court declined to hear was *Keating v. Federal Election Committee*, 131 S. Ct. 553 (2010). The case below was SPEECHNOW.ORG V. FEDERAL ELECTION COMM'N., 599 F.3d 686 (D.C. Cir. 2010).).

70 *See* Adam Liptak, *Justices Offer Receptive Ear to Business Interests*, N.Y. TIMES, Dec. 19, 2010, at 1, 26 (reporting that in the five terms of the Roberts Court, business interests have prevailed 61 percent of the time, compared with 46 percent in the last five years of the Rehnquist Court and 42 percent by all courts since 1953). *See generally* Feldman, *supra* note 64, at 38, 41 (describing how "constitutional progressives still say that the courts should defer to economic regulation by the government. But the ideal of judicial restraint has been undercut by the selective and opportunistic way in which liberals and conservatives alike have invoked it. And conservatives have once again mastered the art of depicting corporate interests in terms of individual liberties.").

71 Dorry Samuels and Josh Little, *U.S. Chamber, Other Groups Pour Millions into Campaigns*, PUBLIC CITIZEN NEWS (Public Citizen, Washington, D.C.), Nov./Dec. 2010, at 1, 6. "Electioneering activities" include "electioneering communication" (an advertisement broadcast before an election that "mentions a federal candidate but stops short of advocating a vote for or against the candidate") and "independent expenditures," which "expressly advocate for the victory or defeat of a candidate." Taylor Lincoln, *Disclosure Eclipse: Nearly Half of Outside Groups Kept Donors Secret in 2010; Top 10 Groups Revealed Sources of Only One in Four Dollars Spent*, PUBLIC CITIZEN, Nov. 18, 2010, at 1, 3, http://www.citizen.org/documents/Eclipsed-Disclosure11182010.pdf.

72 Samuels and Little, *supra* note 71, at 1, 6.

October 2010—and that corporate money favored Republican candidates by a margin of 10-to-1.[73] Given this imbalance, cause lawyers might work to investigate whether various groups have the goal of influencing elections as their primary purpose. If such groups are registered as 501(c)(4) organizations, they would be in violation of tax laws, which preclude such organizations from having political campaign activity as their primary purpose.[74] "Public policy cause lawyers" might also seek the passage of the DISCLOSE Act (which purportedly would enhance disclosers and disclaimers, as well as prevent foreign entities from influencing the outcome of U.S. elections),[75] work for the approval of the Shareholder Protection Act, which would mandate shareholder authorization before a public company may make certain political expenditures,[76] or push for the passage of the Fair Elections Now Act—a bill that would create a public financing system for congressional elections, thereby limiting the influence of big money campaign donations and encouraging candidates with limited resources to run for office,[77] among other measures.[78] Ultimately, the personal motivations of the individual lawyer may determine whether the Court's opinion in *Citizens United* permitting unlimited corporate spending in federal elections is interpreted as a sign of the limitations of liberal legalism (and thus, perhaps, a need for more radical lawyering) or is regarded as creating new possibilities for using law to curb the influence of economic resources on political power.

V. The Oklahoma "Sharia Law Amendment" and the Violence of Interpretation

The Oklahoma International Law Amendment (also known as the Oklahoma "Sharia Law Amendment" and the Oklahoma "Save Our State" Amendment[79])—a legislatively-referred constitutional

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73 *Id.* at 6.

74 Under the federal tax code, 501(c)(4) organizations, unlike 501(c)(3) organizations, are not limited in the amount of time or money they can devote to lobbying, and may participate in political campaigns and elections, as long as campaigning is not the organization's primary purpose. 26 U.S.C. § 501(c)(3), (4) (2010).

75 Democracy is Strengthened by Casting Light on Spending in Elections Act, H.R. 5175, 111th Cong. (2010).

76 Shareholder Protection Act of 2010, H.R. 4790, 111th Cong. (2010).

77 Fair Elections Now Act, S. 752, H.R. 1826, 111th Cong. (2010).

78 Public Citizen, for example, has called for a constitutional amendment that would overturn the *Citizens United* ruling to clarify that corporations should not be treated as people under the First Amendment. *See* Samuels and Little, *supra* note 71, at 6.

79 Joel Siegel, *Islamic Sharia Law to Be Banned in, Ah, Oklahoma*, ABC News, June 14,

amendment—appeared on the November 2, 2010 general election ballot and presented Oklahomans with the opportunity to amend the Oklahoma Constitution to require courts to rely on federal and state law when deciding cases, and to prohibit them from considering or using international law or Sharia law. The ballot title that voters saw on their ballot read as follows:

> This measure amends the State Constitution. It changes a section that deals with the courts of this state. It would amend Article 7, Section 1. It makes courts rely on federal and state law when deciding cases. It forbids courts from considering or using international law. It forbids courts from considering or using Sharia Law.
>
> International law is also known as the law of nations. It deals with the conduct of international organizations and independent nations, such as countries, states and tribes. It deals with their relationship with each other. It also deals with some of their relationships with persons.
>
> The law of nations is formed by the general assent of civilized nations. Sources of international law also include international agreements, as well as treaties.
>
> Sharia Law is Islamic law. It is based on two principal sources, the Koran and the teaching of Mohammed.
>
> Shall the proposal be approved?
>
> For the proposal
>
> Yes: _____
>
> Against the proposal
>
> No: _____

The measure passed with broad support–70.08% of 992,594 total votes (or 695,650) were in favor of the proposal.[80] A lawsuit was filed in the United States District Court for the Western District of Oklahoma immediately after the passage of the measure,[81] and on November 29, 2010, United States District Court Judge Vicki Miles-Lagrange issued an injunction prohibiting state officials from certifying the election results for State Question 755 until the district

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2010, http://abcnews.go.com/US/Media/oklahoma-pass-laws-prohibiting-islamic-sharia-laws-apply/story?id=10908521&tqkw=&tqshow= (last visited Sept. 20, 2011).

80 Sam Dillon, *Oklahoma—Election Results 2010*, N.Y. TIMES, Nov. 4, 2010, at A13.

81 *See* Memorandum in Support of Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction, Muneer Awad v. Paul Ziriax, No. CIV-10-1186-M (W.D. Okla. Filed Nov. 29, 2010), *available at* http://www.cair.com/Portals/0/pdf/argument.pdf.

court could rule on the merits of the case.[82]

Some might be quick to diminish the significance of the passage of the Amendment and the subsequent injunction barring the law from taking effect in the state because judges in Oklahoma had not been using Sharia law in their decisions prior to the November vote[83]—indeed, the chief author of the bill even referred to it as a "a pre-emptive strike against Sharia law coming to Oklahoma."[84] Thus, putting aside the constitutional issues raised in the lawsuit,[85]

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82 Awad v. Ziriax, No. CIV-10-1186-M, 2010 WL 4814077 (W.D. Okla. Nov. 29, 2010). *See also* Barbara Hoberock, *Injunction Issued on 755*, TULSA WORLD, Nov. 30, 2010, *available at* http://www.tulsaworld.com/news/article.aspx?subjectid=16&articleid=20101130_16_A1_ULNSbP539600; Tim Talley, *Court Order Blocks Okla. Amendment on Islamic Law*, ASSOCIATED PRESS/YAHOO!NEWS, Nov. 8, 2010, http://news.yahoo.com/s/ap/20101108/ap_on_re_us/us_islamic_law_lawsuit.

83 *See* Steve Biehn, *SQ 744, 754, and 755 Draw Voters' Interest*, THE ARDMOREITE, Oct. 10, 2010, http://www.ardmoreite.com/news/x1197813401/SQ-744-754-and-755-draw-voters-interest ("Since judges in Oklahoma are already bound to follow state and federal law in their courtrooms, critics question why such a measure is even on the ballot. The question does offer voters an outlet to voice their anger at followers of the Muslim faith."). *Compare* Editorial, *Our SQ Choices*, THE OKLAHOMAN, Oct. 17, 2010, http://www.newsok.com/our-sq-choices/article/3505493?custom_click=headlines_widget ("This is another feel-good measure that has no practical effect and needn't be added to the Oklahoma Constitution. The question would prohibit the use of international or Sharia law when cases are decided in Oklahoma courts. As it is, judges exclusively use state and federal law to guide their judicial decision-making. Passing the question might make some politicians happy and make some Oklahomans feel better. That's all it would do. Voters should reject it as unnecessary."), *and* Editorial, *Our Take on the State Questions*, THE ENID NEWS AND EAGLE, Oct. 18, 2010, http://enidnews.com/opinion/x154637225/Our-take-on-the-state-questions ("This measure would prohibit the use of international or Sharia law when cases are decided in Oklahoma courts. There is no need for this law because judges exclusively use state and federal law to guide their decisions. This is meant as nothing more than a feel-good measure."), *and* Editorial, *State Questions: Only One, SQ 757, Worth Passing*, TULSA WORLD, Oct. 24, 2010, http://www.tulsaworld.com/opinion/article.aspx?subjectid=61&articleid=20101024_61_0_Eleven670211 ("SQ 755 would prohibit state judges from using international law, and specifically Shariah law, in making their decisions. The proposal is bigoted and seeks to solve a nonexistent problem. It should be rejected."), *and* Editorial, *OUR VIEW: State Questions 754, 755*, THE OKLAHOMA DAILY, Oct. 27, 2010, http://oudaily.com/news/2010/oct/27/our-view-state-questions-754-755/ ("Oklahoma couldn't miss out on the Islamophobia in America. If passed, SQ 755 would outlaw the use of Sharia Law in state courts. The idea that these courts use or could use Sharia is ridiculous, and the measure implies Oklahoma's Muslims are all extremists trying to subvert U.S. laws. Let's not marginalize the state's Muslim population."), *with* Robert Spencer, *Sharia? What Sharia?*, HUMAN EVENTS (Oct. 19, 2010) http://www.humanevents.com/article.php?id=39471 (arguing that "there is plenty of evidence of attempts to establish the primacy of Islamic law over American law, and much to indicate that Sharia is anything but benign.").

84 Mark Schlachtenhaufen, *Sharia Law, Courts Likely on 2010 Ballot*, THE EDMOND SUN, June 4, 2010, http://www.edmondsun.com/local/x1996914371/Sharia-law-courts-likely-on-2010-ballot.

85 Because this Article is concerned with the potential impacts of various legal developments on cause lawyering, rather than the strengths and weaknesses of the legal

some might contend that the Amendment, even if it were to become law, would have little impact on decision-making or lawyering.[86] But I would suggest that regardless of the outcome, cause lawyers should take notice. And if the Amendment does become law—if judges are not permitted to consider international law or Sharia law (however infrequently this may occur)—then one potential outcome is that criminal defense lawyers will likely not make such arguments in court, thereby curtailing their ability to creatively defend their clients, and lawyers in civil suits may be limited (or *feel* limited) in their pursuit of or discouraged from finding "creative solutions to problems so [as to] minimize contentious argument and satisfy more party needs."[87]

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and public policy arguments of different positions, I will not analyze the merits of the different parties' arguments, the reasoning behind Judge Miles-Lagrange's order, or speculate on the outcome of the case.

86 It bears mention that although Oklahoma has very few Muslims—only 30,000 out of a population of 3.7 million—some fear that the Amendment, if it becomes law, could discourage foreign companies from doing business in the state if they believe international agreements will not be honored in court. *See* Eberle, *supra* note 12.

87 Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5, 25 (1996). Menkel-Meadow's full statement is as follows: "expanding the stories, the interests, the issues, and the stakes actually enhances the likelihood of making 'trades' and finding other creative solutions to problems so that we can minimize contentious argument and satisfy more party needs." Although Menkel-Meadow is not discussing Sharia law, I am suggesting here that when judges are permitted to consider more types of law, lawyers can tell better stories, which can result in better client defense and more creative problem-solving/dispute resolution. Conversely, when lawyers are limited in the substance or language of their legal discourse, then their legal power is diminished—and often greatly so. *See* Sally Engle Merry, *Resistance and the Cultural Power of Law*, 29 LAW & SOC'Y REV. 11, 14 (1995) (explaining that "[c]ourts . . . provide performances in which problems are named and solutions determined. These performances include conversations in which the terms of the argument are established and penalties determined. The ability to structure this talk and to determine the relevant discourse within which an issue is framed in other words, in which the reigning account of events is established is an important facet of the power exercised by law, as carefully described by recent studies of legal discourse."). *See generally* JOHN M. CONLEY & WILLIAM M. O'BARR, JUST WORDS: LAW, LANGUAGE, AND POWER 14 (1998) (concluding that "language is not merely the vehicle through which legal power operates: in many vital respects, language *is* legal power. The abstraction we call power is at once the cause and the effect of countless linguistic interactions taking place every day at every level of the legal system. Power is thus determinative of and determined by the linguistic details of legal practice . . . ."); Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L. J. 814, 827 (1987) (explaining that "the interpretation of law is never simply the solitary act of a judge concerned with providing a legal foundation for a decision which, at least in its origin, is unconnected to law and reason. . . . The practical content of the law which emerges in the judgment is the product of a symbolic struggle between professionals possessing unequal technical skills and social influence. They thus have unequal ability to marshal the available juridical resources through the exploration of exploitation of 'possible rules,' and to use them effectively, as symbolic weapons, to win their case. The juridical effect of the rule—its *real* meaning—can be discovered in

Restrictions on the use of international law and Sharia law also run the risk of a certain kind of violence—*interpretive violence*.[88] As

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the specific power relation between professionals. Assuming that the abstract equity of the contrary positions they represent is the same, this power relation might be thought of as corresponding to the power relations between the parties in the case.").

For more in-depth analysis of the ways in which legal discourse in various legal forums (e.g., courts, law offices, mediation centers) affect and define identities and relationships among and between various legal "players" (including clients, litigants, defendants, and others "using" the law), *see, e.g.*, JOHN CONLEY & WILLIAM M. O'BARR, RULES VERSUS RELATIONSHIPS: THE ETHNOGRAPHY OF LEGAL DISCOURSE (1990); Lynn Mather & Barbara Yngvesson, *Language, Audience, and the Transformation of Disputes*, 15 LAW & SOC'Y REV. 775 (1980–81); SALLY ENGLE MERRY, GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING CLASS AMERICANS (1990); William M. O'Barr & John M. Conley, *Lay Expectations of the Clinical Justice System*, 22 LAW & SOC'Y REV. 137 (1988); William M. O'Barr & John M. Conley, *Litigant Satisfaction Versus Legal Advocacy in Small Claims Court Narratives*, 19 LAW & SOC'Y REV. 661 (1985); Austin Sarat & William L. F. Felstiner, *Law and Strategy in the Divorce Lawyer's Office*, 20 LAW & SOC'Y REV. 93 (1986).

88 *See* Austin Sarat & Thomas R. Kearns, *Making Peace with Violence: Robert Cover on Law and Legal Theory*, *in* LAW, VIOLENCE, AND THE POSSIBILITY OF JUSTICE 49, 52 n.37 and accompanying text (Austin Sarat ed., 2001) (citing HAROLD BLOOM, THE ANXIETY OF INFLUENCE: A THEORY OF POETRY (1973). *See also* Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 44, 53 (1983) (arguing that "[b]y exercising its superior brute force . . . the agency of state law shuts down the creative hermeneutic of principle that is spread throughout our communities. . . . Judges are people of violence. Because of the violence they command, judges characteristically do not create law, but kill it. Theirs is the jurispathic office. Confronting the luxuriant growth of a hundred legal traditions, they assert that *this one* is law and destroy or try to destroy the rest."); Robert M. Cover, *Violence and the Word*, 95(8) YALE L.J. 1601, 1615 (1986) ("When judges interpret, they trigger agentic behavior within just such an institution or social organization. On one level judges may appear to be, and may in fact be, offering their understanding of the normative world to their intended audience. But on another level they are engaging a violent mechanism through which a substantial part of their audience loses its capacity to think and act autonomously.").

Note that according to one Cover scholar, Cover "distinguished between the word or 'interpretation,' with its suggestion of 'social construction of an interpersonal reality through language,' and 'violence,' as 'pain and death,' with its language—and 'world-destroying' capacity." Marianne Constable, *The Silence of the Law: Justice in Cover's "Field of Pain and Death," in* LAW, VIOLENCE, AND THE POSSIBILITY OF JUSTICE 49, 83 (Austin Sarat ed., 2001). This does not mean that Constable believes that Cover did not find violence in legal interpretation. Indeed, Cover begins *Violence and the Word* by asserting:

> Legal interpretation takes place in a field of pain and death. This is true in several senses. Legal interpretive acts signal and occasion the imposition of violence upon others: A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life. Interpretations in law also constitute justifications for violence which has already occurred or which is about to occur. When interpreters have finished their work, they frequently leave behind victims whose lives have been torn apart by these organized, social practices of violence. Neither legal interpretation nor the violence it occasions may be properly understood apart from one another. This much is obvious, though the growing literature that argues for the centrality of interpretive practices in law blithely ignores it.

Kim Lane Scheppele describes in *Narrative Resistance and the Struggle for Stories*:

> We (those who subscribe to American law as a set of practices) need cases; we thrive on facts. With facts, we make stories, and we worry about the application of rules to the stories we make . . . We can no more do law without stories than we can fly without mechanical devices. Stories are already always everywhere in American legal scholarship, no matter how doctrinal the scholarship is. To a civilian lawyer, Americans appear obsessed with stories."[89]

Similarly, Dragan Milovanovic explains that "[l]awyers construct stories. Stories are organizational devices for presenting believable (plausible) chains of events,"[90] and George P. Lopez describes how "[l]aw is not a collection of definitions and mandates to be memorized and applied but a culture composed of storytellers, audiences, remedial ceremonies, a set of standard stories and arguments, and a variety of conventions about storywriting, storytelling, argument making, and the structure and content of legal

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COVER, *Violence and the Word*, *supra* at 1601. What I believe Constable is suggesting here is that Cover differentiated between legal interpretations that lead to or bring about violence and the violent acts themselves—"interpretations which occasion violence are distinct from the violent acts they occasion." *Id.* at 1613. In other words, Cover sought first to distinguish the "physical pain" or pain "in the flesh" from the interpretive act that propagate or otherwise order or result in violence, and second, to distinguish between judicial interpretation that leads to "real" or "actual" violence and the "figurative" or "literary" violence that "strong poets do to their literary ancestors." *Id.* at 1609 n.20. *See also* Peter Fitzpatrick, *Why the Law is also Nonviolent*, *in* LAW, VIOLENCE, AND THE POSSIBILITY OF JUSTICE 49, 147 (Austin Sarat ed., 2001). Cover's goal was simultaneously to call attention to the way in which law (via legal interpretation) is violent without diminishing the actual pain one experiences when one loses one's freedom, property, children, or life as a result of a judicial decree.

89 Kim Lane Scheppele, *Narrative Resistance and the Struggle for Stories*, 20 LEGAL STUD. F. 83, 83–84 (1996). *See also* JAMES M. DONOVAN, LEGAL ANTHROPOLOGY: AN INTRODUCTION xviii (2008) (stating that "[m]uch of law concerns . . . telling of stories"). *See generally* Cover, *Nomos and Narrative*, *supra* n.88 at 4–5 ("We inhabit a *nomos*—a normative universe. We constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void. The student of law may come to identify the normative world with the professional paraphernalia of social control. The rules and principles of justice, the formal institutions of the law, and the conventions of a social order are, indeed, important to that world; they are, however, but a small part of the normative universe that ought to claim our attention. No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each decalogue a scripture. Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.").

90 Dragan Milovanovic, *Law, Ideology, and Subjectivity: A Semiotic Perspective on Crime and Justice*, *in* VARIETIES OF CRIMINOLOGY: READINGS FROM A DYNAMIC DISCIPLINE 231, 243 (Gregg Barak, ed., 1994) (citing BERNARD S. JACKSON, LAW, FACT AND NARRATIVE COHERENCE (1991)).

stories . . . ."[91] But, as Kilwein explains (in the context of discussing "client voice lawyering"), "lawyers who represent the poor need to be aware of the potential interpretive violence they perpetrate as they transform their clients' stories into . . . universal legal narratives, that is, accounts that are accepted and acted upon by the legal system."[92]

Admittedly, the translation of stories into legal narratives based on international law or Sharia law *may still risk* interpretive violence—because "[c]lients want more than a translation of their story into a universal legal narrative; they want the ability to express their own, untranslated personal narratives."[93] Nevertheless, re-

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91 GEORGE P. LOPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE 43 (1992).

92 Kilwein, *supra* note 20, at 186. *See also* Anthony V. Alfieri, *Disabled Clients, Disabling Lawyers*, 43 HASTINGS L.J. 769 (1992); Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narratives*, 100 YALE L.J. 2107 (1991); Steve Bachman, *Lawyers, Law, and Social Change*, 13 N.Y.U. REV. L. & SOC. CHANGE 1 (1984-85); Christopher P. Gilkerson, *Poverty Law Narratives: The Critical Practice and Theory of Receiving and Translating Client Stories*, 43 HASTINGS L.J. 861 (1992); Gerald P. Lopez, *Training Lawyers to Work with the Politically and Social Subordinated: Anti-Generic Legal Education*, 91 W. VA. L. REV. 350 (1989); Paul R. Tremblay, *Toward a Community-Based Ethic for Legal Services Practice*, 37 UCLA L. REV. 1101 (1990); Lucie White, *Mobilization on the Margins of the Lawsuit: Making Space for the Clients to Speak*, 16 N.Y.U. REV. L. & SOC. CHANGE 534 (1987–88); Lucie White, *Paradox, Piece-Work, and Patience*, 43 HASTINGS L.J. 853 (1992); Stephen Wizner, *Homelessness: Advocacy and Social Policy*, 45 U. MIAMI L. R. 387 (1990–91). *See generally* Pierre Bourdieu, *supra* note 87, at 834 (explaining that "[t]hose who tacitly abandon the direction of their conflict themselves by accepting entry into the juridical field (giving up, for example, the resort to force, or to an unofficial arbitrator, or the direct effort to find an amicable solution) are *reduced to the status of client*. The field transforms their prejuridical interests into legal cases and transforms into social capital the professional qualifications that guarantees the mastery of the juridical resources required by the field's own logic." (emphasis added)).

93 Kilwein, *supra* note 20, at 186 (citing Austin Sarat, ". . . *The Law Is All Over": Power, Resistance and the Legal Consciousness of the Welfare Poor*, 2 YALE J.L. & HUMAN. 343 (1990)); White, *Paradox, Piece-Work and Patience, supra* note 92. S*ee generally* Bourdieu, *supra* note 87, at 831–32 ("Entry into the juridical field implies the tacit acceptance of the field's fundamental law, an essential tautology which requires that, within the field, conflicts can only be resolved *juridically*—that is, according to the rules and conventions of the field itself. For this reason, such entry completely redefines ordinary experience and the whole situation at stake in any litigation. As is true of any 'field,' the constitution of the juridical field is a principle of constitution of reality itself. To join the game, to agree to play the game, to accept the law for the resolution of the conflict, is tacitly to adopt a mode of expression and discussion implying the renunciation of physical violence and of elementary forms of symbolic violence, such as insults. It is above all to recognize the specific requirements of the juridical construction of the issue. Since juridical facts are the products of juridical construction, and not vice versa, a complete retranslation of all of the aspects of the controversy is necessary in order . . . to institute the controversy *as a lawsuit*, as a juridical problem that can become the object of jurisdically regulated debate. Such a retranslation retains as part of the case everything that can be argued from the point of view of legal

strictions on a judge's use of international law or Sharia law (which raise their own questions regarding "judicial independence"[94]) may not only limit a lawyer's right and privilege to define her approach as a lawyer to defend her client in criminal cases,[95] but might infringe on her *representation* in the sense of "storytelling"—in the sense of presenting and depicting different points of view, values, opportunities, tragedies, and social pathologies in both criminal and civil cases alike.[96] Indeed, for many clients, feeling as if one's story has been told may—and often is—ultimately more important than the outcome of the case.[97]

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pertinence, and only that; only whatever can stand as a fact or as a favorable or unfavorable argument remains.").

94 *See generally* David S. Law, *Judicial Independence*, *in* THE INTERNATIONAL ENCYCLOPEDIA OF POLITICAL SCIENCE (Bertrand Badie, Dirk Berg-Schlosser & Leonardo Morlino eds., 2011), *available at* http://works.bepress.com/david_law/22/; A.G. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bench*, N.Y. TIMES, Nov. 4, 2010, at A1. For a discussion of the importance of "lawyers' independence," *see* Peter Margulies, *Lawyers' Independence and Collective Illegality in Government and Corporate Misconduct, Terrorism, and Organized Crime*, 58 RUTGERS L. REV. 939 (2006). *See also* Legal Services Corp. v. Velazquez, 531 U.S. 533, 545 (2001) (noting importance of "an informed, independent bar"); Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988); Anthony Lewis, *Civil Liberties in a Time of Terror*, 2003 WIS. L. REV. 257, 268.

95 *See* Brisman, *supra* note 6.

96 Scheppele, *supra* note 89, at 87. *See also* AUSTIN SARAT, *Situating Law Between the Realities of Violence and the Claims of Justice: An Introduction*, *in* LAW, VIOLENCE, AND THE POSSIBILITY OF JUSTICE 3, 8 (Austin Sarat, ed., 2001) (discussing how the law can be violent "in the ways it uses languages and in its representational practices, in the silencing of perspectives and the denial of experience, and in its objectifying epistemology" (internal footnotes omitted)). Menkel-Meadow claims that "different people will interpret the same 'fact' in different ways," and, thus, that "if 'truth' is to be arrived at, it is best done through multiple stories and deliberations." Menkel-Meadow, *supra* note 87, at 8, 20. In this article, I stop short of discussing whether "truth"—either "absolute truths" or "particular truths"—can be arrived at and, if so, whether it is best accomplished through multiple stories and deliberations. *See* Joan Chalmers Williams, *Culture and Certainty: Legal History and the Reconstructive Project*, 76 VA. L. REV. 713 (1990). Instead, I contend, as I have elsewhere, that opening the avenues for more stories to be told and increasing the ways in which (those) stories are told produces not just "edifying conversation," but "strategies through which a population, inevitably divided by differences over a very broad range of affairs, can seek a series of . . . understandings"—both provisional and long-term ones. *Id.* at 735. *See also* Avi Brisman, *Appreciative Criminology and the Jurisprudence of Robert M. Cover*, Paper presented at the Annual Meeting of the American Society of Criminology Annual Meeting, San Francisco, CA (Nov. 20, 2010); Avi Brisman, *Judicial Decision-Making in Problem-Solving Courts: A Case of "*Kadi-*Justice"?* Paper presented at 13th Annual Association for the Study of Law, Culture and the Humanities (ASLCH) Conference, Brown University, Providence, RI (Mar. 19, 2010).

97 *See e.g.*, PETER JUST, DOU DONGGO JUSTICE: CONFLICT AND MORALITY IN AN INDONESIAN SOCIETY 15 (2000) (asserting that litigants seeking justice are at least as interested in having audiences to whom they can tell their stories, in whom they can rouse the sense of pity and awareness, outrage and indignation, terror and grief that has brought them to whatever pass they have been brought to achieve whatever therapeu-

In *The Force of Law: Toward a Sociology of the Juridical Field*, French sociologist Pierre Bourdieu writes:

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tic ends are available); E. ALLEN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988) (analyzing the fairness of procedures and social processes); LAWRENCE ROSEN, LAW AS CULTURE: AN INVITATION 52 (2006) (explaining that in some cases, "procedural justice may outstrip the desire for victory alone" and that "courts that fail to respond to actual litigant needs and designs may become deeply alienated from the cultures they ostensibly serve."); JONATHAN SIMON, *The Vicissitudes of Law's Violence*, *in* LAW, VIOLENCE, AND THE POSSIBILITY OF JUSTICE 17, 25 (Austin Sarat, ed., 2001) (noting the "substantial psychological evidence suggesting that procedural fairness does matter, even to those who lose in legal conflict"); JAMES BOYD WHITE, WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY 265 (1984) ("The fact that the case is always a narrative means something from the point of view of the litigant in particular. For him the case is, at its heart, an occasion and a method in which he can tell his story and have it heard"); Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUSTICE 283–357 (2003); *see also* Lewis H. LaRue, *A Jury of One's Peers*, 33 WASH. & LEE L. REV. 841 (1976); *see generally* J. John Paul Lederach and Ron Kraybill, *The Paradox of Popular Justice: A Practitioner's View*, *in* THE POSSIBILITY OF POPULAR JUSTICE: A CASE STUDY OF COMMUNITY MEDIATION IN THE UNITED STATES 357, 368 (Sally Engle Merry and Neal Milner, eds., 1995) (describing how the success of justice systems based on restorative notions are not necessarily measured by the final outcome or legal result, "but rather by the degree to which people feel they have an impact, that they have been treated fairly, that they have understood each other, that they have better mechanisms for making decisions and handling their differences, and that their key issues have been addressed"); JOHN THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS (1975) (analyzing methods of conflict resolution in the context of social psychology); TOM R. TYLER, WHY PEOPLE OBEY THE LAW (Princeton University Press, 2006); TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS (Russell-Sage Foundation, 2002); Robert J. MacCoun, *Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness*, 1 ANNUAL REV. L. & SOC. SCI. 171, 171–201 (2005); Dragan Milovanovic, *"Rebellious Lawyering": Lacan, Chaos, and the Development of Alternative Juridico-Semiotic Forms*, 20 LEGAL STUD. F. 295, 297–98 (1996) (stating that "success in criminal law [practice] is an exercise in constructive narratives that have plausibility in the eyes of criminal justice practitioners and the jurors. Accordingly, segments of the population that are disenfranchised find themselves more at risk in the use of dominant symbolizations and constructions, whereas higher income individuals remain 'beyond incrimination.'"); Michael D. Reisig, *Procedural Justice and Community Policing Programs: What Shapes Residents' Willingness to Participate in Crime Prevention Programs?*, 1(3) POLICING 356, 356–69 (2007); Sarre, *supra* note 47, at 12 (explaining that "cultural and gender issues are . . . officially irrelevant to adversarial criminal proceedings, although they may, in fact, be crucial to the etiology of the incident in the first place and crucial to the outcome. Thus, at the end of the day, many parties tend to leave the modern criminal justice system experience embittered, burdened with costs and often determined to seek further action, judicial and extrajudicial, if at all possible. This is a common experience amongst many victims, offenders and their families alike."); Jason Sunshine and Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 L. & SOC. REV. 513, 513–48 (2003); Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimization*, 57 ANNUAL REV. PSYCHOLOGY 375, 375–400 (2006); Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO STATE J. CRIM. L. 231, 231–75 (2008).

> [E]ntry into the juridical field requires reference to and conformity with precedent, a requirement which may entail the distortion of ordinary beliefs and expressions . . . . Precedents are used as tools to justify a certain result as well as serving as the determinants of a particular decision; the same precedent, understood in different ways, can be called upon to justify quite different results. Moreover, the legal tradition possesses a large diversity of precedents and of interpretations from which one can choose the one most suited to a particular result.[98]

I cite Bourdieu here because—and I wish to be perfectly clear about this point—I am *not* suggesting that international law or Islamic law serve as binding precedent. I am not arguing that international law or Islamic law should trump U.S. law (constitutional or statutory, federal or state), nor am I urging federal, state, or local judges consistently or regularly consult foreign law or Sharia law.[99] While I eschew the myopic "legal isolationism"[100] (and bor-

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98 Bourdieu, *supra* n.87, at 832-33.

99 In the last decade, the United States Supreme Court considered foreign and international law in Atkins v. Virginia, 536 U.S. 304 (2002); Lawrence v. Texas, 539 U.S. 558 (2003); and Roper v. Simmons, 543 U.S. 551 (2005)—which sparked a huge academic and public debate about the propriety of citing of foreign and international law in U.S. constitutional law cases. *See, e.g.*, Adam Liptak, *Justices Agree to Take Up Life-Without-Parole Sentences for Young Offenders*, N.Y. TIMES, May 5, 2009, at A16. For an overview, *see The Debate Over Foreign Law in* Roper v. Simmons, 119 HARV. L. REV. 103 (2005)—especially footnotes 9, 10. For a more in-depth analysis, *see, e.g.*, Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109 (2005); Jeremy Waldron, *Foreign Law and the Modern* Ius Gentium, 119 HARV. L. REV. 129 (2005); Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148 (2005). *See also* Austen L. Parrish, *Storm in a Teacup: The U.S. Supreme Court's Use of Foreign Law*, 2007 U. ILL. L. REV. 637; Osmar J. Benvenuto, Note, *Reevaluating the Debate Surrounding the Supreme Court's Use of Foreign Precedent*, 74 FORDHAM L. REV. 2695 (2006). While a comprehensive analysis is well-outside the scope of this Article, I will briefly note that my position is akin to that of the Israeli jurisprudent, Aharon Barak, who has lamented the hesitancy of U.S. judges to contemplate foreign law, as well as that of U.S. Supreme Court Justice Ruth Bader Ginsburg, who has defended the use of foreign law by American judges. Barak states: "Regrettably, the United States Supreme Court makes very little use of comparative law . . . [M]ost Justices of the United States Supreme Court do not cite foreign case law in their judgments. They fail to make use of an important source of inspiration, one that enriches legal thinking, makes law more creative, and strengthens the democratic ties and foundations of different legal systems . . . American law in general, and its constitutional law in particular, is rich and developed. American law is comprised of not one but fifty-one legal systems. Nonetheless, I think that it is always possible to learn new things even from other democratic legal systems that, in their turn, have learned from American law." Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. Rev. 16, 114 (2001). Similarly, Justice Ginsburg has asked, "'Why shouldn't we look to the wisdom of a judge from abroad with at least as much ease as we should read a law review article written by a professor?'" (quoted in Adam Liptak, *Ginsburg Shares Views on Influence of Foreign Law on Her Court, and Vice Versa*, N.Y. TIMES, Apr. 12, 2009, at A14). Citing a decision of a foreign court does not

derline xenophobia) of those scholars, judges, and jurisprudence experts who assert that U.S. judges should ignore foreign courts and their legal rulings,[101] I also recognize that some features of Islamic law are downright draconian.[102] But, as Milovanovic explains in *"Rebellious Lawyering": Lacan, Chaos, and the Development of*

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mean that the judge considers herself bound by foreign law. Rather, citing a foreign case means that the judge has found power in the reasoning of that foreign precedent. *See id.*; Roper v. Simmons, 543 U.S. 551, 578 (2005) ("It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom." (Kennedy, J.)). *See generally* Rick Sarre, *Is There a Role for the Application of Customary Law in Addressing Aboriginal Criminality in Australia*, 8(2) CRITICAL CRIMINOLOGY 91, 97 (1997) (explaining that "[t]here is quite a difference . . . between acknowledging traditional practices and granting customary law a status equal to the common law applying generally"). According to Ginsburg, ignoring foreign courts and their legal rulings would have been completely at odds with the views of the United States' founding fathers, who were very interested in the opinions and laws of other countries. *See* Editorial, *A Respect for World Opinion*, N.Y. TIMES, Aug. 3, 2010, at A22. Furthermore, the failure to engage foreign decisions has resulted in diminished influence for the United States Supreme Court. *See, e.g.*, Adam Liptak, *Ginsburg Shares Views on Influence of Foreign Law on Her Court, and Vice Versa*, N.Y. TIMES, Apr. 12, 2009, at A14 ("'You will not be listened to if you don't listen to others'") (quoting Justice Ginsberg); Adam Liptak, *U.S. Court, a Longtime Beacon, is Now Guiding Fewer Nations*, N.Y. TIMES, Sept. 18, 2008, at A1, A30. *Cf.* Gerald V. La Forest, *The Use of American Precedents in Canadian Courts*, 46 ME. L. REV. 211 (1994); Anthony Lester, *The Overseas Trade in the American Bill of Rights*, 88 COLUM. L. REV. 537 (1988).

100 Editorial, *A Respect for World Opinion*, N.Y. TIMES, Aug. 2, 2010, at A22.

101 *Compare* Thompson v. Oklahoma, 487 U.S. 815, 868 n.4 (1988) (Scalia, J., dissenting) ("The plurality's reliance upon Amnesty International's account of what it pronounces to be civilized standards of decency in other countries . . . is totally inappropriate as a means of establishing the fundamental beliefs of this Nation."), *with* Cristina Silva, *Muslim Law Taking Hold in Parts of US*, ASSOCIATED PRESS, Oct. 7, 2010, *available at* http://www.msnbc.msn.com/id/39564255/ns/politics-decision_2010/t/angle-muslim-law-taking-hold-parts-us/#.Tl0ZPzuk9aU ("My thoughts are these, first of all, Dearborn, Michigan, and Frankford, Texas are on American soil, and under constitutional law. Not Sharia law. And I don't know how that happened in the United States. It seems to me there is something fundamentally wrong with allowing a foreign system of law to even take hold in any municipality or government situation in our United States" (quoting U.S. Senate candidate Sharron Angle (R-Nev.)), *with* Eliyahu Stern, *Don't Fear Islamic Law in America*, N.Y. TIMES, Sept. 2, 2011 ("Shariah is a mortal threat to the survival of freedom in the United States and in the world as we know it" (quoting Republican presidential candidate New Gingrich)). Justice Scalia's comment strikes me as short-sighted, Angle's and Gingrich's as xenophobic and inaccurate.

102 *See, e.g.*, Norimitsu Onishi, *Stricter Brand of Islam Spreads Across Indonesian Penal Code*, N.Y. TIMES, Oct. 28, 2009, at A6. Similarly, Sarre notes that there are instances "where customary law may offend other human rights and the laws based upon those rights." Sarre, *supra* note 47, at 99. Thus, a call for greater flexibility for judges to consult international law or Sharia law (or customary law practices, in the case of Sarre) should not be interpreted as endorsement of all of the substance and features of those legal regimes.

Alternative Juridico-Semiotic Forms, "certain narrative constructions reflecting dominant understandings can take precedence in [U.S.] law, whereas other narratives, other voices, other desires remain denied, or find incomplete expression in legal discourse."[103] Depriving judges of the opportunity to consider or use international law or Sharia law can discourage a lawyer from using all the tools at her disposal to construct a(n) (alternative) narrative for her client,[104] which can be an important part of procedural justice.[105] Rather than restricting lawyers' storytelling abilities, we should, as Professor Carrie Menkel-Meadow argues, "rethink the ways to permit *more* voices, *more* stories, *more* complex versions of reality to inform us and to allow all people to express [their] views."[106] Or, as Robert M. Cover argued in his pleas for judicial toleration and respect, "[w]e ought to invite new worlds."[107] Doing so may actually

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103 Milovanovic, *supra* note 97, at 295.

104 Menkel-Meadow "envision[s] a greater multiplicity of stories being told, of more open, participatory, and democratic processes, yielding truths that are concrete but contextualized, explicitly focused on who finds 'truth' for whose benefit." Menkel-Meadow, *supra* note 87, at 23–24. I suggest that when a judge is allowed to consider more types of law (e.g., international, Sharia), lawyers can tell more stories (and better ones), increasing the likelihood of arriving at the "truth"—or, at the very least—diminishing the potential for "distort[ing] the truth." *Id.* at 21.

105 Milovanovic might add that constructing alternative narratives might help the lawyer to overcome—or, at least, reveal—"the various biases and prejudices embodied in law." Milovanovic, *supra* note 97, at 295.

106 Menkel-Meadow, *supra* note 87, at 31 (emphases added). *See also* Bruce A. Arrigo, *Postmodern Justice and Critical Criminology: Positional, Relational, and Provisional Science*, *in* CONTROVERSIES IN CRITICAL CRIMINOLOGY 43, 46–49 (Martin D. Schwartz & Suzanne E. Hatty eds., 2003) (lamenting that "[l]egal language endorses only that speech that reaffirms its own legitimacy to settle disputes. Anything falling outside of the judicial sphere is declared inadmissible, irrelevant, immaterial . . . Entire ways of knowing are denied expression and legitimacy in the courtroom," and arguing that because "certain ways of knowing are privileged while certain others are not" we need to "include the voices of those whose understanding of the world would otherwise remain dormant and concealed . . . to embrace articulated differences, making them a part of the social fabric of ongoing civic interaction"); DONOVAN, *supra* note 89, at 256 (calling for increased study of the "embedded parochialisms" of the U.S. legal system, and stressing the need for decision makers to be "more sympathetic to the lifeways of other people"); Milovanovic, *supra* note 90, at 233 (describing how "[t]he trial represents the occasion in which a clash of alternative constructions of reality takes place. It is 'a struggle in which differing, indeed antagonistic world-views confront each other. Each, with its individual authority, seeks general recognition and thereby its own self-realization.' Clients, however, are disempowered from the onset of the battle when deferring to the expertise of their mouthpieces, lawyers. It is the state's version of truth or understanding that ultimately prevails, and hence the symbolic field is repeatedly created anew" (quoting Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 814, 837 (1987)).

107 Cover, *Nomos and Narrative*, *supra* note 88, at 68. *See also* Austin Sarat, *Situating Law Between the Realities of Violence and the Claims of Justice: An Introduction*, *in* LAW, VIOLENCE, AND THE POSSIBILITY OF JUSTICE 3, 10 (Austin Sarat ed., 2001) (describing

result in greater respect for and trust in the U.S. legal system by immigrants unfamiliar it.[108]

Recognizing that Oklahoma's very small Muslim population has not called for greater reliance on international law or Sharia law, that Oklahoma judges were not leaning on foreign law or Islamic law in making their decisions, and that the amendment requiring Oklahoma courts to rely on federal and state law when deciding cases, and prohibiting them from considering or using international law or Sharia law may never become law, this Part has set forth the following arguments:

1. If judges are not permitted to consider international law or Sharia law, then criminal defense lawyers may be less inclined to make such arguments in court, thereby curtailing their ability to creatively defend their clients, and lawyers in civil suits may feel limited in their pursuit of, or discouraged from, finding "creative solutions to problems so [as to] minimize contentious argument and satisfy more party needs"[109]—a potentially unfortunate development given that "[m]ost enduring solutions and satisfactory outcomes are likely to occur in a non-adversarial environment than an adversarial one."[110]

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how Cover "urged judges to tolerate and respect the normative claims of communities whose visions of the good did not comport with the commands and requirements of state law"); Austin Sarat & Thomas R. Kearns, *Making Peace with Violence: Robert Cover on Law and Legal Theory*, *in* LAW, VIOLENCE, AND THE POSSIBILITY OF JUSTICE 49, 56–65 (Austin Sarat ed., 2001) (explaining that Cover believed that state law "should be tolerant and respectful of alternative normative systems rather than trying to make them bend, lest they be destroyed by the ferocious force that the state routinely deploys," and that whenever possible, state law should "let new worlds flourish"). For a discussion of Cover's "vision of plural normative worlds," *see* Martha Minow, *Introduction: Robert Cover and Law, Judging, and Violence*, *in* NARRATIVE VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER 1, 1–11 (MARTHA MINOW, MICHAEL RYAN, & AUSTIN SARAT EDS., 1995); MICHAEL RYAN, *Meaning and Alternity*, *in* NARRATIVE VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER 267, 267–76 (MARTHA MINOW, MICHAEL RYAN, & AUSTIN SARAT EDS., 1995); Brisman, *Appreciative Criminology and the Jurisprudence of Robert M. Cover*, *supra* note 96.

108 *See* Menkel-Meadow, *supra* note 87, at 29 (explaining that "[w]ithin our own borders multicultural concerns are revealed when immigrants from other systems either fear or will not use our system because they do not understand or trust it, or when it is alien to what they know" (internal footnote omitted). *See generally supra* note 47 [re procedural justice]; Sarre, *supra* note 47, at 17 (discussing the notion of "legitimacy"—"a greater willingness of participants to accept the justice system if it recognizes crucial relationships" (citing A. Bottoms, *Avoiding Injustice, Promoting Legitimacy and Relationships*, *in* RELATIONAL JUSTICE: REPAIRING THE BREACH 58 (J. Burnside & N. Baker eds., 1994))).

109 *See* Menkel-Meadow, *supra* note 87, at 25. For a discussion of "consistency" versus "democratic creativity" in the context of juvenile justice, *see id.* *See also* Sarre, *supra* note 47, at 21.

110 Sarre, *supra* note 47, at 13. Note that at least one commentator has found that

2. Restrictions on a judge's use of international law or Sharia law may limit a lawyer's right and privilege to define her approach as a lawyer in defending criminal cases; and might infringe on her *representation* (in criminal and civil suits) in the sense of "storytelling"—that is, presenting and depicting different points of view, values, opportunities, tragedies, and social pathologies; for many civil litigants and criminal defendants, feeling as if one's story has been told can contribute to a sense of procedural justice and may—and often is—ultimately more important than the outcome of the case.
3. Rather than limiting voices, stories, and versions of reality, we should—as an increasingly multicultural society and as a legal system reflecting this increasingly multicultural society—endeavor to permit more voices, more stories, more complex versions of reality to inform us and to allow all people to express their views; doing so may actually result in greater respect for and trust in the U.S. legal system by immigrants unfamiliar with it.

What does this mean for cause lawyers? Should the measure eventually become law, it has the potential to affect the nature of representation for even the most conventional cause lawyers in Oklahoma—those who engage in "cause lawyering directed toward serving unmet legal needs" (or "proceduralist lawyering"). As articulated above, such lawyers will have at their disposal fewer tools to creatively defend their clients, seek solutions to civil suits, and provide their clients with a sense of procedural justice. Outside of Oklahoma, groups and organizations espousing hateful "Save Our State" views may feel emboldened by the developments in Oklahoma and may try to follow suit, pushing for similar types of measures in their states.[111] Civil rights and civil liberties cause law-

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some lawyers involved in alternative dispute resolution (ADR) (still) approach ADR with an "adversarial" mindset. *See* Menkel-Meadow, *supra* note 87, at note 97 and accompanying text.

111 Recently, legislative leaders in at least half a dozen states, including Georgia, Mississippi, Nebraska, Oklahoma, Pennsylvania, and South Carolina, have indicated that they will propose bills similar to the controversial Arizona law, adopted in the spring of 2010, authorizing state and local police to inquire about the immigration status of anyone they detained for other reasons if they had "reasonable suspicion" that the person was an illegal immigrant. Although a federal court has suspended central provisions of the Arizona statute, legislative leaders appear undeterred; some have also announced measures to crack down on illegal immigration by canceling automatic U.S. citizenship for children born in this country to illegal immigrant parents, as well as legislation to punish employers who hire illegal immigrants and measures to limit access to public colleges and other benefits to illegal immigrants. Julia Preston, *Political Battle on Immigration Shifts to States*, N.Y. TIMES, Jan. 1, 2011, at A1, A11. This willingness to follow Arizona's lead despite the federal court stay suggests that the anti-immigration current may be sufficiently strong as to inspire initiatives

yers, then, may feel compelled to fight such measures, affecting the contours of their agendas and caseloads.[112]

VI. CONCLUSION

In October 2010, the Census Bureau reported that nearly one in five Americans are either immigrants or were born in the United States to at least one parent from abroad.[113] In 2009, 12% of the population (36.7 million people) were immigrants and 11% of the population (33 million) were children of at least one immigrant parent.[114] According to Elizabeth M. Grieco, chief of the Census Bureau's Foreign-Born Population Branch, the "second generation" was more likely to be better educated and earn more, and less likely to be living in poverty, suggesting that "children of immigrants are continuing to assimilate over time as they have in past generations."[115]

From an anthropological perspective, *assimilation* refers to the process of change that a minority ethnic group may experience when it moves to another country where another culture dominates—a process that entails the minority group's adoption of the patterns and norms of the new country's dominant culture, often to the point that the minority group ceases to exist as a separate cultural unity.[116] Assimilation may be independent of educational achievement and economic success. In other words, the "second generation"—children of an immigrant parent or parents—can achieve economic success without assimilating, and assimilation

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modeled after Oklahoma's "Sharia Law Amendment," despite the present injunction. *See, e.g.*, Stern, *supra* note 101 ("More than a dozen American states are considering outlawing aspects of Shariah law. Some of these efforts would curtail Muslims from settling disputes over dietary laws and marriage through religious arbitration, while others would go even further in stigmatizing Islamic life: a bill recently passed by the Tennessee General Assembly equates Shariah with a set of rules that promote 'the destruction of the national existence of the United States.'").

112 *See generally* Preston, *supra* note 111, at A11 (reporting that Latino and immigrant advocate legal organizations are preparing for court challenges to Arizona-style anti-immigration bills, as well as legislation intended to eliminate birthright citizenship for American-born children of illegal immigrants).

113 Sam Roberts, *Washington: 1 in 5 Americans Have Close Ties Elsewhere*, N.Y. TIMES, Oct. 20, 2010, at A17.

114 *Id.* According to the Census Bureau, in New York, the number of African-born immigrants has increased from 78,500 in 2000 to nearly 125,000 in 2009; immigrant advocates, however, believe that the number is higher than the Census Bureau estimates for 2009. Nadia Sussman, *West African Immigrants Find a Shepherd in an Imam in Harlem*, N.Y. TIMES, Nov. 3, 2010, at A24.

115 Roberts, *supra* note 113, at A17.

116 *See* CONRAD PHILLIP KOTTAK, WINDOW ON HUMANITY: A CONCISE INTRODUCTION TO ANTHROPOLOGY 381–82 (3rd ed. 2008).

can occur without the minority ethnic group making educational or economic gains. In fact, many anthropologists contend that in the United States (as well as in Canada), *multiculturalism*, not assimilationism, is of growing importance.[117] Under the multicultural model, which is the opposite of assimilationist model, cultural diversity is valued and individuals are socialized into the dominant (national) culture and ethnic culture. Rather than being a "melting pot," the United States and Canada can be better described as "ethnic salads," where "each ingredient remains distinct, although in the same bowl, with the same dressing."[118]

Thus, what the Census Bureau's report really reveals is that because of immigration and differential population growth, the ethnic composition of the United States is changing dramatically. Various political developments, however, suggest that for many this is not a welcome phenomena—from Oklahoma's "Sharia Law Amendment," discussed above, as well as its recent amendment to the state constitution making English the official language of the state[119] to the *de facto* "ethnic expulsion" that could result from Texas Republican Senators Kay Bailey Hutchison and John Cornyn's blocking of the DREAM Act, a bill that would have granted citizenship to thousands of young illegal immigrants if they enrolled in higher education or enter military service, to *de*

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117 *Id.* at 383.

118 *Id.* at 385.

119 Oklahoma State Question 751, known as the "English is the Official Language of Oklahoma Act," appeared on the November 2, 2010 ballot in Oklahoma as a legislatively-referred constitutional amendment. The measure passed easily with 740,918 of 980,822 voters (or 75.54%) voting in favor of the amendment—the largest margin of the eleven state questions on the ballot. *See* Marc Lacey, *California Rejects Marijuana Legalization as Nation Votes on Issues Big and Small*, N.Y. TIMES, Nov. 3, 2010, at P8. On November 9, 2010, a lawsuit was filed in Tulsa County District Court against the measure by James C. Thomas, a Tulsa attorney and University of Tulsa law professor. *See also* James. C. McKinley, Jr., *Oklahoma Surprise: Islam as an Election Issue*, N.Y. TIMES, Nov. 15, 2010, at A12; Michael McNutt, *Oklahoma English-only Measure Challenged*, NEWSOK.COM, Nov. 11, 2010, http://newsok.com/oklahoma-english-only-measure-challenged/article/3513258#ixzz155USgwAS.

It bears mention that Oklahoma's "English-only" efforts are not anomalous. *See, e.g.*, Peter Applebome, *Yes, English is Spoken Here. But, Just in Case, it's Now the Law*, N.Y. TIMES, May 13, 2010, at A22 (describing efforts to require that all business in Jackson, N.Y., be conducted in English); *Judge Sentences HispanicMen to Learn English*, ASSOCIATED PRESS, Mar. 27, 2008, *available at* http://www.msnbc.msn.com/id/23831149/ns/us_news-crime_and_courts (reporting that Luzerne County Judge Peter Paul Olszewski, Jr., ordered three Spanish-speaking men to learn English or go to jail); Editorial, *The Candidate from Xenophobia*, N.Y. TIMES, Apr. 29, 2010, at A30 (discussing Alabama gubernatorial candidate Tim James' vow to put an end to "that grave threat posed by driver's license tests being conducted in any language but English," and quoting Mr. James for the proposition that, "This is Alabama. We speak English.").

jure ethnic expulsion in Arizona, where it is now a crime to be in the state without a visa.[120] Indeed, an "ugly nativist strain [seems to

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[120] *See* James C. McKinley, Jr., *After Dream Act Setback, Eyeing a Sleeping Giant*, N.Y. TIMES, Dec. 21, 2010, at A23.

European countries are also struggling with multiculturalism and rising anti-immigrant sentiment. *See* DEREK MCGHEE, THE END OF MULTICULTURALISM? TERRORISM, INTEGRATION AND HUMAN RIGHTS (Maidenhead: McGraw-Hill/Open University Press 2008). S*ee also* David Prior, *Disciplining the Multicultural Community: Ethnic Diversity and the Governance of Anti-Social Behaviour*, 9(1) SOC. POL'Y. & SOC'Y. 133, 133 (2009) (explaining that "multiculturalism has come under challenge as a result of three distinct developments: the 2001 disturbances in Bradford, Oldham and Burnley and subsequent similar events elsewhere; the perceived threat of Muslim terrorism to national security post 9/11 and especially since the London bombings of 2005; and the growth of 'new' immigration from EC accession states and other regions including Africa"); Michael Slackman, *Right-Wing Sentiment Collects, Ready to Burst Its Dam*, N.Y. TIMES, Sept. 22, 2010, at A8 (discussing how Sweden elected an anti-immigrant party to Parliament for the first time in September 2010, France has been repatriating Roma, and Germany has been debating Thilo Sarrazin's book, *Germany Does Away with Itself*, which asserts that the growing number of Muslim immigrants are "dumbing down" German society); Michael Weissenstein, *Culture Clash: European Art Provokes Muslims*, ASSOCIATED PRESS, Mar. 15, 2010, *available at* http://www.huffingtonpost.com/huff-wires/20100315/europe-art-and-insults/ (discussing rising European unease with a rapidly growing Muslim minority, including the electoral success by an anti-Islamic Dutch party, moves to ban veils in France and minarets in Switzerland, and arrests in Ireland and the U.S. in an alleged plot to kill a Swedish cartoonist who produced a crude black-and-white drawing of Muhammad with a dog's body in 2007).

For a discussion of issues in Denmark, *see, e.g.*, Reuters, *Danish Pol: Ban Arab TV Channels*, METRO, Nov. 1, 2010, *available at* http://www.metro.us/newyork/article/678295. For France, *see, e.g.*, JOHN R. BOWEN, , WHY THE FRENCH DON'T LIKE HEADSCARVES? ISLAM, THE STATE, AND PUBLIC SPACE (2008); Linda Chavez, Op-Ed, *Banning the Burqa*, NEW YORK POST, May 22, 2010, http://www.nypost.com/p/news/opinion/opedcolumnists/banning_the_burqa_QLNZArwCXHYohKXszTSSeJ; Jean-François Copé, Op-Ed, *Tearing Away the Veil*, N.Y. Times, May 5, 2010, at A31; Abby Ellin, *Fitness Tailored to a Hijab*, N.Y. TIMES, Sept. 10, 2009 at E1, E12; Steven Erlanger, *Burqa Furor Scrambles the Political Debate in France*, N.Y. TIMES, Sept. 1, 2009, at A6; Steven Erlanger, *Face-Veil Issue in France Shifts to Parliament for Debate,* N.Y. TIMES, Jan. 27, 2010 at A9; Steven Erlanger, *For a French Imam, Islam's True Enemy is Radicalism,* N.Y. TIMES , Feb. 13, 2010, at A6; Steven Erlanger, *Parliament Moves France Closer to a Ban on Facial Veils,* N.Y. TIMES, July 14, 2010 at A6; Steven, Erlanger, *France: Senate Passes Bill on Facial Veils,* N.Y. TIMES, Sept. 15, 2010, at A6; Steven Erlanger, *France: Full-Face Veil Ban Approved,* N.Y. TIMES, Oct. 8, 2010, at A8; *cf.* Maïa de la Baume, *France's Palate Acquires a Taste for Halal Food, to the Delight of Muslims,* N.Y. TIMES, Sept. 9, 2010, at A10. For Germany, *see, e.g.*, Judy Dempsey, *Germany: After Merkel's Comments, President Makes Trip to Turkey*, N.Y. TIMES, Oct. 19, 2010, at A13; Audrey Kauffmann, *Merkel Says German Multi-Cultural Society Has Failed*, AGENCE FRENCH PRESSE, Oct. 17, 2010, http://www.commondreams.org/headline/2010/10/17-2; Nicholas Kulish, *German Mosque Used by 9/11 Plotters Is Closed*, N.Y. TIMES, Aug. 10, 2010, at A9; Michael Slackman, *A Messenger Is Denounced, but His Book Grips Germany*, N.Y. TIMES, Sept. 3, 2010, at A4; Michael Slackman, *Hitler Exhibit Explores a Wider Circle of Guilt*, N.Y. TIMES, Oct. 16, 2010, at A1, A7. For the Netherlands, *see, e.g.*, Associated Press, *The Netherlands: New Trial Ordered for Anti-Islam Lawmaker*, N.Y. TIMES, Oct. 23, 2010, at A5; Ian Buruma, Op-Ed., *Totally Tolerant, Up to A Point*, N.Y. TIMES, Jan. 30, 2009, at A29; Stephen Castle, *Dutch Opponent of Muslims Gains Ground*, N.Y. TIMES, Aug. 6, 2010, at A4; Alan Riding, Essay, *Navigating Expression and Religious Taboos*, N.Y. TIMES, Jan. 22, 2005, at A25; Marlise

be] running on the edges of American life"[121] and rarely a day seems to pass where the newspapers do not report an instance of the harassment or mistreatment of ethnic "others" in the U.S.[122] Anti-Islamic sentiments in the U.S. seem to be growing—and growing more pernicious.[123]

Simons, *Militant Muslims Act to Suppress Dutch Film and Art Show*, N.Y. TIMES, Jan. 31, 2005, at A4; Toby Sterling, *Dutch Prosecutors Seek Acquittal of Anti-Islam Pol*, HUFFINGTON POST, Oct. 15, 2010, http://www.huffingtonpost.com/huff-wires/20101015/eu-netherlands-hate-speech. For Sweden, *see, e.g.*, Stephen Castle, *Anti-Immigrant Party Rises in Sweden*, N.Y. TIMES, Sept. 14, 2010, at A12. For Switzerland, *see, e.g.*, Nick Cumming-Bruce & Steven Erlanger, *In Bastion of Tolerance, Swiss Reject Construction of Minarets on Mosques,* N.Y. TIMES, Nov. 30 2009, at: A6, A12; Ross Douthat, Op-Ed., *Europe's Minaret Moment,* N.Y. TIMES, Dec. 7, 2009, at A29; Editorial, *A Vote for Intolerance*, N.Y. TIMES, Dec. 1, 2009, at A34; Michael Kimmelman, *When Fear Turns Graphic,* N.Y. TIMES, Jan. 17, 2010, at AR1, AR26; Reuters, *Libya: Qaddafi Calls for Holy War on Switzerland over Mosques,* N.Y. TIMES, Feb. 26, 2010, at A9; Peter Stamm, Op-Ed., *Switzerland's Invisible Minarets,* N.Y. TIMES, Dec. 5, 2009, at A19; John Tagliabue, *Baking Swiss Treats Amid Acid Debate,* N.Y. TIMES, Jan. 27, 2010, at A9.

121 Ginia Bellafante, *Postracial Vigilantes in a World in Peril*, N.Y. TIMES, Sept. 7, 2010, at C1.

122 *See, e.g.*, AFP, *240,000 Dollars Awarded to Man Forced to Cover Arab T-shirt*, Jan. 5, 2009, http://www.google.com/hostednews/afp/article/ALeqM5i9_XPfpm0_Xi0USqY-9P3ds2OhJg; AFP, *Student Detained over Arabic Flashcards, Lawsuit Says*, Feb. 10, 2010, http://www.google.com/hostednews/afp/article/ALeqM5i-JHBrLMJVn_S_ymxLHjmAgrNyZg (last visited Dec. 23, 2010); Liz Robbins, *9 Muslims Are Pulled from Plane and Denied Re-entry; Airline Apologizes Next Day*, N.Y. TIMES, Jan. 3, 2009, at A9; John Schwartz, *Iraqi Gets $240,000 Settlement in T-Shirt Incident at U.S. Airport*, N.Y. TIMES, Jan. 8, 2009, at A16; Stephanie Strom, *A.C.L.U. Report Says Antiterror Fight Undercuts Liberty of Muslim Donors*, N.Y. TIMES, June 16, 2009, at A14.

123 *See, e.g.*, Al Baker, *Teenagers Are Charged in Harassment at a Mosque*, N.Y. TIMES, Sept. 1, 2010, at A18; Robbie Brown, *Arson Case at Mosque in Tennessee Spreads Fear*, N.Y. TIMES, Aug. 31, 2010, at A10; N.R. Kleinfeld, *Rider Asks Cabdriver If He Is Muslim, Then Stabs Him*, N.Y. TIMES, Aug. 26, 2010, at A19; Ray Rivera & Karen Zraick, *Man Held in Cab Stabbing Showed Zeal for Veterans*, N.Y. TIMES, Aug. 27, 2010, at A17. *See also* Damien Cave, *Far from Ground Zero, Obscure Pastor is Ignored No Longer*, N.Y. TIMES, Aug. 26, 2010, at A14, A18; Damien Cave, *Gainesville, Aghast, Disavows Pastor's Talk of Burning Koran*, N.Y. TIMES, Sept. 11, 2010, at A1, A12; Damien Cave, *In Florida, Many Lay Plans to Counter a Pastor's Message*, N.Y. TIMES, Sept. 8, 2010, at A16; Damien Cave & Anne Barnard, *Florida Minister Wavers on Plans to Burn Koran*, N.Y. TIMES, Sept. 10, 2010, at A3; *Church Weighs Koran Burning After Warning on Troop Safety*, METRO, Sept. 8, 2010, at 06; Susan Dominus, *In a Taxicab, an Opening for Frank Talk*, N.Y. TIMES, Aug. 28, 2010, at A14; Antonio Gonzalez, *Afghans Protest, Fla. Pastor Plans to Meet NY Imam*, YAHOO! NEWS (Associated Press), Sept. 10, 2010, http://www.deseretnews.com/article/700064345/As-Afghans-protest-Florida-pastor-plans-to-meet-New-York-imam.html; Laurie Goodstein, *Concern is Voiced over Religious Intolerance*, N.Y. TIMES, Sept. 8, 2010, at A16; Liz Goodwin, *Even Pastor's Old Church Condemns Quran-burning*, YAHOO! NEWS, Sept. 8, 2010, http://news.yahoo.com/s/yblog_upshot/20100908/pl_yblog_upshot/even-pastors-old-church-condemns-quran-burning; Steven Greenhouse, *Offended Muslims Speak Up*, N.Y. TIMES, Sept. 24, 2010, at B1; Nicholas D. Kristof, Op-Ed., *Message to Muslims: I'm Sorry*, N.Y. TIMES, Sept. 19, 2010, at WK11; James C. McKinley, *A Claim of Pro-Islam Bias in Textbooks*, N.Y. TIMES, Sept. 23, 2010, at A21; Alissa J. Rubin, *2 Afghans Killed in Protest over Koran*, N.Y. TIMES, Sept. 13, 2010, at A14; Brian Stelter, *A Fringe Pastor, a Fiery Stunt and the Media Spotlight's Glare*, N.Y. TIMES, Sept. 8, 2010, at A1; Robert F.

Worth, *Ayatollah Speaks of Plot to Abuse Koran*, N.Y. TIMES, Sept. 14, 2010, at A6; Jim Yardley & Hari Kumar, *In Kashmir, Reports of Koran Desecration in the U.S. Bring Violent Reactions*, N.Y. TIMES, Sept. 14, 2010, at A6; *cf.* Ross Douthat, Op-Ed., *Islam in Two Americas*, N.Y. TIMES, Aug. 16, 2010, at A19.

Anti-Islamic sentiments have been apparent and pronounced in the controversy surrounding the building of a mosque/Islamic Center a couple of block from Ground Zero. For a discussion *see, e.g.*, Matt Bai, *I'm American. And You?*, N.Y. TIMES, Aug. 8, 2010, at WK1; Michael Barbaro, *Bloomberg's Fierce Defense of Muslim Center Has Deep Roots*, N.Y. TIMES, Aug. 13, 2010, at A1; Michael Barbaro & Javier C. Hernandez, *Mosque Plan Clears Hurdle in New York*, N.Y. TIMES, Aug. 4, 2010, at A1; Michael Barbaro & Marjorie Connelly, *New York Poll Finds Wariness for Muslim Site*, N.Y. TIMES, Sept. 3, 2010, at A1; Michael Barbaro, *Political Leaders' Rift Grows on Islam Center*, N.Y. TIMES, Aug. 25, 2010, at A17; Anne Barnard, *After Day of Intense Talks, Muslim Leaders United Behind Community Center*, N.Y. TIMES, Sept. 21, 2010, at A22; Anne Barnard, *Calling to Allah, from Lower Manhattan*, N.Y. TIMES, Aug. 14, 2010, at A15; Anne Barnard, *Developer Starts to Pay Taxes Owed on Islamic Center Site*, N.Y. TIMES, Sept. 18, 2010, at A18; Anne Barnard, *For Muslim Center Sponsors, Early Missteps Fueled a Storm*, N.Y. TIMES, Aug. 11, 2010, at A1; Anne Barnard, *Imam Says Moving Center Could Embolden Radicals*, N.Y. TIMES, Sept. 9, 2010, at A26; Anne Barnard, *Imam Talks Compromise on Islamic Center, but Says Site Isn't on Hallowed Ground*, N.Y. TIMES, Sept. 14, 2010, at A25; Anne Barnard & Christine Haughney, *Islamic Center also Challenges a Young Builder*, N.Y. TIMES, Aug. 27, 2010, at A1; Anne Barnard & Manny Fernandez, *On Anniversary of Sept. 11, Rifts Amid Mourning*, N.Y. TIMES, Sept. 12, 2010, at A1; Anne Barnard, *One Project, One Faith, and Two Men Who Differ*, N.Y. TIMES, Sept. 17, 2010, at A20; Charles M. Blow, Op-Ed., *A Lesson from 9/11*, N.Y. TIMES, Sept. 11, 2010, at A19; Thanassis Cambanis, *Looking at Islamic Center Debate, World Sees the U.S.*, N.Y. TIMES, Aug. 26, 2010, at A12; Helene Cooper, *Obama Tries to Calm Tensions in Call for Religious Tolerance*, N.Y. TIMES, Sept. 11, 2010, at A1; William Dalrymple, Op-Ed., *The Muslims in the Middle*, N.Y. TIMES, Aug. 17, 2010, at A27; Sam Dolnick, *Visiting Ground Zero, Asking Allah for Comfort*, N.Y. TIMES, Sept. 10, 2010, at A1; Maureen Dowd, Op-Ed., *Our Mosque Madness*, N.Y. TIMES, Aug. 18, 2010, at A23; Editorial, *Mistrust and the Mosque*, N.Y. TIMES, Sept. 3, 2010, at A20; Editorial, *The Constitution and the Mosque*, N.Y. TIMES, Aug. 17, 2010, at A26; Editorial, *Sept. 11, 2010: The Right Way to Remember*, N.Y. TIMES, Sept. 11, 2010, at A18; Editorial, *Who Else Will Speak Up?*, N.Y. TIMES, Aug. 31, 2010, at A20; Editorial, *Xenophobia, Here and Abroad*, N.Y. TIMES, Aug. 6, 2010, at A22; Sheila Anne Feeney, *Mosque Ire Hurts Muslims*, AM New York, Aug. 18, 2010, at 03; Samuel G. Freedman, *Muslim and Islam Were Part of Twin Towers' Life*, N.Y. TIMES, Sept. 11, 2010, at A12; Thomas L. Friedman, Op-Ed., *Surprise, Surprise, Surprise*, N.Y. TIMES, Aug. 22, 2010, at WK8; Laurie Goodstein, *Around Country, Mosque Projects Meet Opposition*, N.Y. TIMES, Aug. 8, 2010, at A1; Elissa Gootman, *Students' Assigned Reading Stirs Debate*, N.Y. TIMES, Sept. 2, 2010, at A31; Michael M. Grynbaum, *City Buses to Get Ads Opposing Islam Center*, N.Y. TIMES, Aug. 10, 2010, at A18; Michael M. Grynbaum, *Dispute over Ad Opposing Islamic Center Highlights Limits of the M.T.A.'s Powers*, N.Y. TIMES, Aug. 12, 2010, at A22; Michael M. Grynbaum, *Imam Says Politics Has Stoked Controversy over Center*, N.Y. TIMES, Aug. 30, 2010, at A17; Michael M. Grynbaum, *Proposed Muslim Center Draws Opposing Protests*, N.Y. TIMES, Aug. 23, 2010, at A14; Heather Haddon, *Pols Fuel Mosque Ire*, AM NEWYORK, Aug. 25, 2010, at 03; Ellis Henican, *Anniversary Now an Insincere Publicity Circus*, AM NEWYORK, Sept. 10–12, 2010, at 03; Ellis Henican, *Mike's Gutsy Defense of Mosque*, AM NEWYORK, Aug. 6–8, 2010, at 04; Carl Hulse, *G.O.P. Seizes on Islamic Center Near Ground Zero as Election Issues*, N.Y. TIMES, Aug. 17, 2010, at A12; Porochista Khakpour, Op-Ed., *My Nine Years as a Middle-Eastern American*, N.Y. TIMES, Sept. 12, 2010, at WK13; Nicholas D. Kristof, Op-Ed., *Is This America?*, N.Y. TIMES, Sept. 12, 2010, at WK13; Nicholas D. Kristof, Op-Ed., *Taking Bin Laden's Side*, N.Y. TIMES, Aug. 22, 2010, at WK10; James C. McKinley, *A Claim of Pro-Islam Bias in Textbooks*, N.Y. TIMES, Sept. 23,

Cause lawyers can and should continue to work for justice and equality—as cause lawyers of various stripes have always done[124] — and should endeavor to promote tolerance, diversity, and respect[125] by using the law to fight anti-Islamic, anti-immigration and other xenophobic forces. They have their work cut out for them and will encounter new challenges in the process: *Humanitarian Law Project v. Holder* may impede direct client representation, as well as extra-state efforts at peace; the decision in *Citizens United* will further the role of money in the quest for political power, and reveals the extent to which we need cause lawyers to help turn the tide of treating corporate interests as individual liberties.[126] Oklahoma's "Sharia Law Amendment" may, in practice, have the least impact on cause lawyering in Oklahoma or elsewhere. But it does not inspire much confidence—at least, not great confidence in the Oklahoma electorate—and could be a harbinger of things to come in other states and jurisdictions.[127] I would like to think that courts are still protectors of minority rights.[128] While "a process

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2010, at A21; TY MILBURN, *Opposing Views on Proposed Islamic Center Heard at Queens Forum*, NY1, Nov. 22, 2010, http://www.ny1.com/content/top_stories/?ArID=129407; Erik Ortiz, *Mosque Saga Boils*, AM NEW YORK, Sept. 10–12, 2010, at 03; Sharon Otterman, *A Mosque Invisible to Many Is a Target*, N.Y. TIMES, Sept. 4, 2010, at A14, A15; Feisal Abdul Rauf, Op-Ed., *Building on Faith*, N.Y. TIMES, Sept. 8, 2010, at A27; JOHN SCHWARTZ, *Zoning Law Aside, Mosque Projects Face Battles*, N.Y. TIMES, Sept. 4, 2010, at A11; SHERYL GAY STOLBERG, *Obama Strongly Backs Islam Center Near 9/11 Site*, N.Y. TIMES, Aug. 14, 2010, at A1, A15; Sheryl Gay Stolberg, *Obama Says Mosque Remarks Were About Rights*, N.Y.TIMES, Aug. 15, 2010, at A4; Nadia Sussman, *West African Immigrants Find a Shepherd in an Imam in Harlem*, N.Y. TIMES, Nov. 3, 2010, at A24; Paul Vitello, *For High Holy Days, Rabbis Weigh Their Words on Proposed Islamic Center*, N.Y. TIMES, Sept. 9, 2010, at A26.

124 *See* Hilbink, *supra* note 7, *passim*. *See generally* Kenneth W. Mentor & Richard D. Schwartz, *A Tale of Two Offices: Adaptation Strategies of Selected LSC Agencies*, 21 JUST. SYS. J. 143, 145 (2000) (discussing the concept of cause-lawyering, with its principal focus on changing the legal balance toward greater equality for the poor").

125 *See* Austin Sarat & Thomas R. Kearns, *Making Peace with Violence: Robert Cover on Law and Legal Theory*, *in* LAW, VIOLENCE, AND THE POSSIBILITY OF JUSTICE 49, 59 (Austin Sarat ed., 2001).

126 *See* Feldman, *supra* note 64, at 43 (asserting that "[c]orporate rights should not be confused with individual rights").

127 *See* Stern, *supra* n.101 (describing more than a dozen states efforts to outlaw aspects of Shariah law, and arguing that "The crusade against Shariah undermines American democracy, ignores our country's successful history of religious tolerance and assimilation, and creates a dangerous divide between America and its fastest-growing religions minority. . . . Anti-Shariah legislation fosters a hostile environment that will stymie the growth of America's tolerant strand of Islam. The continuation of America's pluralistic religious tradition depends on the ability to distinguish between punishing groups that support terror and blaming terrorist activities on a faith that represents roughly a quarter of the world's population.").

128 The scope and capacity of courts to protect minority rights has been widely discussed and debated. *See, e.g.*, BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS

that forces minority rights onto an unwilling populace will often not 'stick' in a democracy,"[129] democracy ultimately benefits when its peoples enjoy full equality and unencumbered legal representation, and feel encouraged to participate in the polity, make use of its courts, and contribute to the marketplace of ideas. We will need (more) cause lawyers to ensure that this is still is—or, at least, *can be*—the case.

(1991); W. Lawrence Church, *History and the Constitutional Role of Courts*, 1990 WIS. L. REV. 1071 (1990); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980); Michelle T. Friedland, *Disqualification or Suppression: Due Process and the Response to Judicial Campaign Speech*, 104 COLUM. L. REV. 563 (2004); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1 (1996); Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339 (2000); ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT (1960); Wendy E. Parmet, *Stealth Preemption: The Proposed Federalization of State Court Procedures*, 44 VILL. L. REV. 1 (1999); David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265 (2008); Steven Shiffrin, *Liberalism, Radicalism, and Legal Scholarship,* 30 UCLA L. REV. 1103 (1983).

129 WILLIAM N. ESKRIDGE, JR., EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS 148 (2002).

GRASSROOTS WOMEN'S ORGANIZATIONS' FIGHT FOR FREEDOM FROM SEXUAL VIOLENCE AND RECOGNITION UNDER DOMESTIC AND INTERNATIONAL LAW

April Marcus†

The sun was beginning to set in Port-au-Prince as we approached the new KOFAVIV[1] clinic and the open air living room let us hear the singing and clapping as we entered. Although we received a warm welcome, the stories that the women were about to share provided a harsh contrast to the pleasant scene we were presently a part of; stories of helping strangers, friends, and family members, who like them, are victims of sexual violence, displacement, and uncertainty.

The Haiti Project at the International Women's Human Rights Clinic (IWHR) at CUNY School of Law left for Port-au-Prince, Haiti on October 7, 2010. Our goal was to collect firsthand evidence of the conditions in the displacement camps. We were able to speak with three groups of people to broaden our understanding and to seek out the disconnect between what was happening on the ground and the official responses to these issues. We spoke to residents in the camps, the service providers operating in the camp, and government agencies. This information was then compiled and included in our petition for precautionary measures to be filed with the Inter-American Commission on Human Rights.

The women that we met from KOFAVIV spoke about the work they do in the camps, assisting victims and identifying rapists. If a woman becomes the victim of an attack, she is put in touch with a KOFAVIV member who then accompanies the victim to the camp committee or police, to the hospital to obtain a medical certificate,

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1 KOFAVIV, in Creole, stands for Komisyon Fanm Viktim pou Viktim (in English, *The Commission of Women Victims for Victims*). Members are women who have been victims of sexual violence who are social workers in the displacement camps helping current victims of sexual violence.

and to the Bureau des Avocats Internationaux (BAI) lawyers in order to begin building a legal case. Due to the nature of their work, BAI lawyers and KOFAVIV agents are being targeted by the rapists and their cohorts. Some KOFAVIV agents have had to flee their camps and go into hiding after serious threats to their lives.

The leaders of KOFAVIV also spoke about their exclusion from meetings with the Gender Based Violence Sub-Cluster[2] ("GBV Sub-Cluster") meetings with members of MINUSTAH (United Nations Stabilization Mission in Haiti)[3] and the Women's Ministry. These meetings are held near the UN Logistics Base ("Log Base"), extremely far from the displacement camps. We traveled by car from downtown Port-au-Prince to the Log Base in over an hour of bumper-to-bumper traffic; it is difficult to imagine having to transfer between several different crowded tap-taps (Haitian public transportation buses) in order to go to these meetings. Additionally, the meetings are conducted only in French with no Creole translation.[4] The reasoning provided to us by the GBV Sub-Cluster representatives for this was that translating would be too time consuming.[5] Exclusion of grassroots women's groups' voices from the conversation is to encourage the "waste and misdirection of aid by donor countries."[6] However, the UN Security Council

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2 The U.N. Gender-Based Violence Sub-Cluster in Haiti (the "GBV Sub-Cluster") is coordinated by United Nations Population Fund (UNFPA) and United Nations Children's Fund (UNICEF), and includes U.N. and NGO membership as well as Ministries of the Government of Haiti. The Sub-Cluster takes the lead on addressing gender-based violence in complex emergencies, natural disasters, and other such situations. Lisa Davis & Blaine Bookey, *Fanm ayisyen pap kase: Respecting the Right to Health of Haitian Women and Girls*, 13(1) HEALTH AND HUM. RTS. J. 14 n.69 (2011), available at http://www.hhrjournal.org/index.php/hhr/article/viewArticle/410/618-refs1.

3 MINUSTAH was established in June 2004 by Security Council Resolution 1542. S.C. Res. 1542, U.N. Doc. S/RES/1542 (Apr. 30, 2004), *available at* http://www.un.org/en/peacekeeping/missions/minustah/. Its original mandate was to restore a secure and stable environment, to promote the political process, to strengthen Haiti's Government institutions and rule-of-law structures, as well as to promote and to protect human rights. *Id.* at ¶ 7(I). After the earthquake, the Security Council ordered an increase in the overall force levels of MINUSTAH to support the immediate recovery, reconstruction and stability efforts in the country. UNITED NATIONS STABILIZATION MISSION IN HAITI (MINUSTAH), *Restoring a Secure and Stable Environment*, http://www.un.org/en/peacekeeping/missions/minustah/ (last visited Nov. 2, 2011).

4 Interview with KOFAVIV agents, in Haiti (Oct. 8, 2010) (on file with author).

5 Interview with MINUSTAH at U.N. Logistics Base, in Haiti (Oct. 11, 2010) (on file with author).

6 *See* Request for Precautionary Measures Under Article 25 of the Commission's Rules of Procedure, by Int'l Women's Human Rights Clinic (IWHR) at the City Univ. of N.Y. (CUNY) Sch. of Law, MADRE, Inst. for Justice & Democracy in Haïti (IJDH), Bureaux des Avocats Internationaux (BAI), Morrison & Foerster LLP, Ctr. for Constitutional Rights (CCR) & Women's Link Worldwide, at Appendix A (Oct. 19, 2010),

Resolution codified the importance of grassroots women's groups' input in Resolution 1325[7] stating that this resolution further recognizes that women and girls are "the vast majority of those adversely affected" by armed conflict or natural disaster that creates internal displacement.[8] Due to this, the Security Council "[u]rges Member States to ensure increased representation of women at all decision-making levels in national, regional, and international institutions and mechanisms for the prevention, management, and resolution of conflict."[9] The inclusion of grassroots groups is necessary in both law and practice. Other participants in the GBV Sub-Cluster meetings are not residents of the displacement camps and are therefore unable to provide information that is both applicable and reflective of the community there.

For example, aid agencies handed out battery-operated flashlights to women in the camps. Unfortunately, once the batteries ran out, these flashlights were useless because the women could not afford to replace the batteries.[10] Including the consultation and participation of grassroots women's groups would have ensured that wind-up or solar-powered flashlights were provided, thereby using donor money in the most efficient and useful way possible.

Another instance demonstrating the exclusion of KOFAVIV and other grassroots organizations is the GBV Sub-Cluster's refusal to put KOFAVIV's name on the referral cards. These cards are handed out to rape victims in the camps providing information on medical clinics and other resources. The work that KOFAVIV does in the camps is essential to the prosecution of rapists and ensuring that camp resident victims are given proper medical attention. The fact that they are excluded from the cards is a disservice not only to KOFAVIV, but to the camp residents who need their assistance.

When formally inquired as to why they could not be included on these cards, the GBV Sub-Cluster responded that it was due to KOFAVIV's inability to ensure private areas for counseling victims to preserve their confidentiality, regardless of the fact that they had

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available at http://www.madre.org/index/press-room-4/news/iahcr-sets-recommendations-for-haitian-government-to-address-sexual-violence-in-idp-camps-544.html [hereinafter Request for Precautionary Measures].

7 S.C. Res.1325, at 1, U.N. DOC. S/RES/1325 (Oct. 31, 2000), *available at* http://www.un.org/Docs/scres/2000/sc2000.htm.

8 S.C. Res. 1325, ¶ 4.

9 S.C. Res. 1325, ¶ 1.

10 Interviews with IDP ("Internally Displaced Persons") residents of Place St. Anne, in Haiti (Oct. 10, 2010) (on file with MADRE).

lost their clinic in the earthquake.[11] However, the GBV Sub-Cluster knew that KOFAVIV was in partnership with the BAI and, through previous site visits to BAI offices, knew that they had private offices where interviews with victims could take place in complete privacy and with confidentiality.

Our trip to Haiti accomplished all of the goals that we set out to achieve and more. Not only did we collect evidence that would make our petition persuasive to the Commission, but we also uncovered the discriminatory intent behind the GBV Sub-Cluster's motives. The work that KOFAVIV agents were doing under such harsh conditions and the opportunity to meet these women in person increased the need for succeeding in our petition, knowing that its success could make their jobs and lives just a little bit easier.

Before filing the request for precautionary measures, we weighed the advantages and disadvantages of such an action. A petition for precautionary measures is extremely advantageous in "serious and urgent" situations where traditional legal domestic remedies are unavailable.[12] The court system in Haiti has not been hospitable to rape prosecutions, and it is almost impossible to build a successful rape case without the cooperation of the police. The Court, like most displaced residents of Port-au-Prince, was operating out of a tent after the earthquake. Since the earthquake in January 2010, the incidence of rape has increased, and the nature of the attacks has become more violent.[13] This situation is clearly serious as well as urgent. Residents of Port-au-Prince have been living in the camps for over a year at this point with no clear end in sight; making these camps a safer place to live and prevent future attacks against women is extremely urgent and long overdue.

On the other hand, in filing the precautionary measures, we were asking the Commission to set new precedent. If the Commission granted our petition, it would be the first time that precautionary measures were used to protect a collective group of unnamed women. In the past, petitioners were able to keep their names anonymous, but petitions were only granted for specific individuals. Here, we were asking for protection for all residents in 22 of the camps in Port-au-Prince. These camps were selected because they were locations where KOFAVIV agents lived and pro-

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11 Email from Sian Evans, UNFPA GBV Sub-Cluster representative, to Lisa Davis, Instructor, IWHR Clinic, CUNY School of Law (Aug. 20, 2010) (on file with author).

12 *Article 25: Precautionary Measures*, RULES OF PROC. OF THE INTER-AM. COMM'N H.R. (2009), *available at* http://www.cidh.oas.org/Basicos/English/Basic18.RulesOfProcedureIACHR.htm.

13 Request for Precautionary Measures, *supra* note 6, at 4-6.

vided services. Since we were asking the Commission to break from precautionary measures precedent, we had an alternative plan if the Commission was unwilling to grant the measures solely on that basis. Thirteen women had come forward who were willing to be named in the petition, even though they faced great retaliation. In our petition we argued that the Haitian government has knowledge of the frequency and number of rapes in the displacement camps yet fails to exercise due diligence by essentially allowing the current circumstances in the camps to exist. This was yet another unprecedented argument we were asking the Commission to grant. According to the Secretary-General's Study on Violence Against Women, "States are accountable for the actions of non-State actors if they fail to act with due diligence to prevent, investigate, or punish [human rights violations] and provide an effective remedy."[14] The government's failure to fulfill their role in providing lighting and security in the camps and its further failure to diligently prosecute and punish the attackers deem the state accountable for the rapes, even though they are committed by private actors. Although state responsibility for non-state actors has been addressed in human rights law, it is a relatively new and evolving concept.[15] If the Inter-American Commission on Human Rights were to grant our precautionary measures, it would be the first time they would incorporate the due diligence and state responsibility standard.

Our petition to the Commission described the rape crisis in the displacement camps using accounts from KOFAVIV members collected from our trip.[16] It described contributing factors to the situation in the camps, such as lack of security and lighting.[17] Additionally, it included the threats to the KOFAVIV agents for their work in the camps,[18] the lack of recourse for the victims, and their inability to prosecute their attackers.[19] Difficulty in obtaining proper medical attention, including emergency contraception, HIV prophylaxis, availability of female doctors, and the inability to receive a medical certificate, were also addressed.[20] After our meetings in Port-au-Prince, and what we learned from our meetings

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14 U.N. Secretary-General, *Report of the Secretary-General: In-depth Study on All Forms of Violence Against Women*, ¶ 255, *delivered at the 61st Session of the General Assembly*, U.N. Doc. A/61/122/ADD.1 (July 6, 2006) *available at* http://www.un.org/womenwatch/daw/documents/ga61.htm (last visited Nov. 2, 2011).

15 *Id.*

16 Request for Precautionary Measures, *supra* note 6, at 4-6.

17 *Id.* at 9.

18 *Id.* at 7–8.

19 *Id.* at 9.

20 *Id.* at 8.

with the representatives from MINUSTAH and the GBV Sub-Cluster, we stressed the importance of having voices from the women's grassroots movement heard in the planning. The applicable law for the petition to the Commission was the American Convention on Human Rights, which Haiti ratified in 1977.[21]

After we filed the petition for precautionary measures, we received encouraging feedback from other organizations, individuals, and our contact at the Commission. If the measures were granted, we would then have a blueprint to ending sexual violence in Haiti that is supported by a regional official ruling and could then encourage donor states to contribute to this new structure run by the Haitian government.

In a decision that broke from tradition and precedent, the Commission wrote a letter to the government of Haiti asking them to investigate and document the sexual abuse in the displacement camps.[22] In addition to this letter, the Commission released a public statement that raised many of the issues to which we alerted them in our petition.[23] The public statement backed our recommendations for security provisions both around and inside the camps, and especially near the bathrooms,[24] where many of the camp residents told us they were attacked or felt unsafe. Additionally, the statement laid out specific guidelines that the government needed to implement:

> [T]he Commission recommended to the State of Haiti that it ensure the presence of security forces around and inside the IDP ("Internally Displaced Persons") camps, in particular female security forces and especially near the bathrooms; improve lighting inside the camps; implement measures to facilitate the filing of legal actions and to improve the efficiency of judicial investigations, including in particular training police officials in their duties related to cases of violence against women; and provide free assistance by specialized doctors who have experience in treating victims of sexual violence.[25]

The GBV Sub-Cluster received our petition along with the press release from the Commission. When they read the petition, they had trouble identifying which camps were being referred to since

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21 *Id.* at 12.

22 MADRE, IWHR Clinic at CUNY School of Law & IJDH, Our Bodies Are Still Trembling: Haitian Women Continue to Fight Against Rape, One Year Update, at 11 (2011) [hereinafter "Our Bodies Are Still Trembling"], *available at* http://reliefweb.int/rw/rwb.nsf/db900sid/KKAA-8CZ59M?OpenDocument.

23 *Id.*

24 Request for Precautionary Measures, *supra* note 6, at 13.

25 Our Bodies Are Still Trembling, *supra* note 22, at 11–12.

only the French names are used in the Cluster system.[26] The 22 camps named in the petition are camps where KOFAVIV works and listed for us; therefore, the camp names are listed in Creole. And yet, they failed to ask KOFAVIV for their assistance in identifying the camps.

The Haitian government never responded to the letter from the Commission. Therefore, the Commission came out with a decision in favor of the petitioners on December 22, 2010.[27] The decision made legally binding recommendations on the Haitian government, which include ensuring medical and psychological care for all victims of sexual abuse in the 22 named camps.[28] This care is to encompass privacy during exams, availability of female staff members, issuance of medical certificates, HIV prophylaxis, and emergency contraception,[29] and it sets new precautionary measures precedent by protecting all of the women in the 22 named camps. Additionally, this is the first time that emergency contraception was required by the Commission in a precautionary measures decision. Hopefully this will open the door to the Commission granting emergency contraception in other rape cases, and the general availability of emergency contraception in other nations who comprise the Organization of American States.[30]

Additionally, this petition is the first that applies the due diligence requirement from the Belem do Para,[31] which establishes state responsibility to prevent third-party violence against women.[32] The Commission found that because the Haitian government knew

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26 Statement of Lisa Davis, Instructor, IWHR Clinic at CUNY (Feb. 3, 2011) (on file with IWHR Clinic).

27 Inter-Am. Comm'n H.R., *Case of Women and Girls Victims of Sexual Violence Living in 22 Internally Displaced Persons Camps*, Precautionary Measures Granted by the Commission, no. MC-340-10 (Dec. 22, 2010), summary of decision *available at* http://www.cidh.oas.org/medidas/2010.eng.htm. *See also* Inter-Am. Comm'n H.R., Letter to IWHR Clinic et al., (2010), *available at* http://www1.cuny.edu/mu/law/2011/01/20/inter-american-commission-issues-unprecedented-recommendation-to-end-sexual-violence-of-displaced-women-based-on-iwhr-petition/.

28 *See* Request for Precautionary Measures, *supra* note 6, at 19.

29 *Id.*

30 The Organization of American States (OAS) was formed in 1948 with a charter signing in Bogota, Colombia. Haiti was one of the original 21 member states. OAS, *Our History*, http://www.oas.org/en/about/our_history.asp (last visited Nov. 2, 2011).

31 Organization of American States, Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, June 9, 1994, 27 U.S.T. 3301, 1438 U.N.T.S. 63 [hereinafter Convention of Belém do Pará], *available at* http://www.cidh.oas.org/Basicos/English/Basic.TOC.htm. Haiti ratified the Belem do Para in 1997. OAS, *Signatories and Ratifications*, http://www.oas.org/juridico/english/sigs/a-61.html (last visited Nov. 2, 2011).

32 Convention of Belém do Pará, *supra* note 32, at arts. 1, 2, 7.

of the amount and frequency of the rapes in the IDP camps and did not require more security, lighting, and medical assistance, they are responsible for the actions of third parties committing these rapes and failed in their responsibility to prevent them from happening. This new precedent has the potential to expand the number and type of precautionary measures granted in rape cases in every country that has signed an international convention with a due diligence clause. The fact that this decision was made to protect all of the women who live under the threat of sexual violence is a recognition of a woman's human right "to be free from sexual violence, [and] that sexual violence is one of the gravest forms of human rights violations."[33]

The decision also required the implementation of effective security measures, including street lighting and patrolling in and around the camps.[34] In addition to increased patrolling of security officers, the decision required the formation of "special units within the police and the Ministry Public investigating cases of rape and other forms of violence against women and girls."[35] This element is extremely important to reducing the amount of rapes and attacks in the camps. The impunity for rapists in combination with the lack of security in the camps has lead to the current situation. Increased security and guaranteed investigative follow-through is imperative in decreasing the instances of rape in the camps. The decision also seeks to ensure that the public officials who respond to the incidents of sexual violence have received training to "respond adequately . . . and adopt safety measures."[36]

The Commission's decision also requires that "grassroots women's groups have full participation and leadership in planning and implementing policies and practices to combat and prevent sexual violence and other forms of violence in the camps."[37] This decision brings the GBV Sub-Cluster in cooperation with international law under United Nations Security Council Resolution 1325. The Committee, noting the immediate importance of the presence of grassroots women's organizations participation, makes this decision in the nontraditional venue of precautionary measures. As

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33 Inter-Am. Comm'n H.R., *Case of Women and Girls Victims of Sexual Violence Living in 22 Internally Displaced Persons Camps*, Precautionary Measures Granted by the Commission, no. MC-340-10 (Dec. 22, 2010), summary of decision *available at* http://www.cidh.oas.org/medidas/2010.eng.htm.

34 OUR BODIES ARE STILL TREMBLING, *supra* note 22, at 12.

35 *Id.*

36 *Id.*

37 *Id.*

previously mentioned, precautionary measures are more akin to preliminary injunctions whose purpose is to take effect immediately until a longer term solution can be negotiated. Here, the Committee's requirement of grassroots women's organizations participation is a long-term goal usually beyond the jurisdiction of traditional precautionary measures.

These precautionary measures have been granted, but much of the work is yet to be done. Because many elements of the Commission's decision require programs to be implemented, police and medical staff to be trained, and the breaking down of traditional ideologies and hierarchies within the UN and Haitian government, the international community must work together in realizing these goals. However, it is important to remember the essential goal as being the empowerment of the Haitian government as leaders of these new formations, so that they are not solely dependent on the foreign aid.

Currently, the International Women's Human Rights Clinic, MADRE[38], and the other partners to the petition have written a letter to the Commission requesting an in-person meeting to "advise [the Commission] on their negotiations with the UN and the Haitian government as well as provide technical assistance in implementing the recommendations."[39] In addition to the in-person meeting with the Commission, representatives from the International Women's Human Rights Clinic and MADRE went to Haiti in early February to meet with the Women's Minister and her Chief of Staff regarding the Commission's decision.[40] Although inclusion of grassroots groups was initially resisted, during the course of the meeting, the Ministry agreed to list KOFAVIV on the referral cards and look into providing Creole translation during the Sub-Cluster meetings.[41] Going forward, we suggested the creation of a national consultation day where UN agencies, various Ministries in the Haitian government, and other key civil society members collaborate in drawing up a revised national plan of action for addressing and preventing gender-based violence in Haiti. The goal is to work with

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[38] MADRE is a New York-based non-profit dedicated to advancing women's rights throughout the world. *See* http://www.madre.org.

[39] Letter from IWHR Clinic at CUNY et al., to Dr. Santiago A. Canton, Executive Sec'y of the Inter-American Comm'n on Human Rights (Jan. 24, 2011) (on file with IWHR Clinic).

[40] Email from Lisa Davis, Instructor, IWHR Clinic at CUNY, to author (Feb. 7, 2011) (on file with author).

[41] *Id.*

the existing structures, but implement the blueprint as created by the precautionary measures and the Commission.

The progress we have made in six months has been overwhelming. Now that the precautionary measures have been granted, the potential for success has exponentially increased. The decision by the Commission, though binding, is unenforceable. Now that the petition has been won, the only way to ensure its implementation is to diligently work with the government for the advantage of all parties. With the cooperation of the Women's Ministry and the GBV Sub-Cluster, there is a greater chance that protection will be provided for the women residing in the IDP camps and that the decision will be implemented and enforced.

MANY VOICES: COMBINING INTERNATIONAL HUMAN RIGHTS ADVOCACY AND GRASSROOTS ACTIVISM TO END SEXUAL VIOLENCE IN HAITI

Yifat Susskind[1]

On January 12, 2010, less than one minute of violent shaking took over 200,000 lives in Haiti and rendered more than one million more homeless. The reverberations of the earthquake are still being felt. Haitian women have remained at the epicenter of a corollary disaster: an epidemic of sexual violence in the displacement camps of Port-au-Prince.

Since the earthquake, MADRE, an international women's human rights organization, has worked with our local partner organization, KOFAVIV[2], a Haitian grassroots women's group founded by and for rape survivors. The two organizations have implemented community-based anti-violence strategies in the camps and worked to meet the most urgent needs of rape survivors. This short-term action has been coupled with an international human rights advocacy strategy to create lasting change that protects the lives and rights of women living in hazardous conditions in the camps.

This paper will chronicle the advocacy approach behind the broader human rights "Campaign to End the Epidemic of Rape in Haiti." The campaign has succeeded in opening political and policymaking spaces previously closed to Haitian grassroots women activists and generated a landmark legal decision. These advances reflect a model in which the expertise of an international women's human rights organization is mobilized in the service of a community-based women's group. The approach enables international human rights mechanisms that are far removed from the local con-

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1 Yifat Susskind is the Executive Director of MADRE, an international women's human rights organization. She works with women's human rights activists from Latin America, the Middle East, Asia, and Africa to create programs in their communities to address women's health, violence against women, economic and environmental justice, and peace building. Many thanks go to Lisa Davis, MADRE Human Rights Advocacy Director and Clinical Professor of Law for the International Women's Human Rights Clinic at CUNY School of Law, the attorneys and advocates who spearheaded the submission of the petition for precautionary measures to the Inter-American Commission on Human Rights (IACHR), and our Haitian grassroots partners whose bravery and uncompromising vision propels the international movement to demand Haitian women's human rights.

2 *Komisyon Fanm Viktim Pou Viktim* or Commission of Women Victims for Victims.

text to be activated in a manner responsive to the self-identified needs and political demands of women who are themselves the survivors of gross human rights violations. While legal advocacy for human rights is often most effectively undertaken in the international arena, human rights violations are necessarily local events. Crafting a legal strategy that is an organic extension of a broader grassroots political mobilization serves to bridge the gap between the local and international arenas of advocacy, strengthening the work of each.

After the Earthquake, Mobilizing to End Sexual Violence in the Displacement Camps

In the many hundreds of tent cities haphazardly built to shelter those with no other place to go, and now blanketing the Haitian capital of Port-au-Prince and surrounding areas, women and girls face horrifying levels of sexual violence. Many lost their families, saw their possessions and livelihoods destroyed, and now struggle to survive with little protection or support. More than two years after the disaster struck, women living in the displacement camps still suffer the same threats: a lack of security, a lack of lighting, a lack of privacy or adequate housing, and a lack of accessible health facilities. The combination of these pernicious factors has meant that women live in constant fear of a rapist intercepting them on the way to poorly lit and distant latrines or easily breaching their flimsy tarp tents to assault them during the night.

These conditions were triggered by the events of January 12, 2010. In the immediate aftermath of the earthquake, many individuals and large aid organizations struggled to overcome the significant obstacles that stood in the way of delivering humanitarian relief.[3] Rushing to help but not knowing the lay of the land, their efforts faltered, and aid supplies languished far from those they were meant to assist.[4] However, MADRE had already worked in Haiti for many years and had established relationships with both Haitian and regional women's groups. Even with roads destroyed and the airport closed, these local connections allowed us to cir-

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[3] *See* MADRE, IWHR Clinic at CUNY School of Law & IJDH, Our Bodies Are Still Trembling: Haitian Women Continue to Fight Against Rape, One Year Update, at 11 (2011), *available at* http://reliefweb.int/rw/rwb.nsf/db900sid/KKAA-8CZ59M?OpenDocument.

[4] Yifat Susskind, *Aid is Power: Who Do You Want to Empower?*, MADRE News (Feb. 2, 2010), http://www.madre.org/index/press-room-4/news/aid-is-power-who-do-you-want-to-empower-287.html.

cumvent barriers that hindered the delivery of aid by larger organizations.

Through our sister organization KOFAVIV, immediate relief from MADRE was able to be directed effectively and where it was needed most. The commitment to providing emergency relief in response to the crisis—even before the advent of any longer-term legal advocacy strategy—was key to building ties with women at the heart of the crisis. These relationships, in turn, facilitated the partnership that, in subsequent months, drove the advocacy campaign to combat sexual violence.

Since its founding in 2004, KOFAVIV has built a strong network of community organizers and women's rights activists fighting to end sexual violence. After the earthquake, the surviving members of KOFAVIV joined countless others who were displaced and forced to live in the dehumanizing and dangerous conditions of the camps. With support from MADRE, KOFAVIV distributed kits of basic supplies like pots, blankets, and soap to women and their families. They created an open gathering space in one section of a camp, giving people a place to come together and begin the long process of rebuilding community networks destroyed in the earthquake. They worked to combat the mounting sense of isolation and of communal disintegration created by the destruction of entire neighborhoods and by living in a maze of hastily erected tents.

As these efforts progressed, women in the camps made clear that they had identified protection from rampant and rising sexual violence as their number one priority, even above ensuring access to food. In response, MADRE, working with KOFAVIV, launched a "Campaign to End the Epidemic of Rape in Haiti." As most of KOFAVIV's members live in the displacement camps, the campaign was rooted in their first-hand understanding of conditions that women face. Moreover, the campaign was driven by KOFAVIV's expertise in empowering survivors of sexual violence to become human rights defenders. Through human rights training and psycho-social support, rape survivors come to recast the abuse they have endured not as unavoidable misfortune, but as the violation of rights they are owed. The shift is not only a personal transformation that facilitates healing; it is a gateway to survivors of violence becoming human rights activists. The campaign combined this aspect of KOFAVIV's work with MADRE's decades of experience developing community-based anti-violence strategies and using international advocacy in the service of local efforts to protect and advance women's human rights.

A Model for Effective Local/Global Activism

A common feature of colonialism and more recent economic globalization is that local conditions, particularly in the poorest countries, are typically generated and exacerbated by policies put in place far from the impacted community. Those in the community often have very little access to decision-making, which may take place in foreign capitals or at international financial institutions. Activists seeking to develop local solutions often find their efforts to be Sisyphean and ultimately exhausting ventures, undermined by externally imposed limitations. For instance, in Haiti, efforts to combat poverty have been stymied for years by policies of the International Monetary Fund, with no consultation from local communities. Campaigns to build truly representative democracy were undone by staunch foreign support for regimes like that of the Duvaliers.

MADRE demands a space for community-based activists' voices to be heard in arenas typically cloistered for international elites. We devote resources—and campaign for others to do the same—to facilitating the participation of grassroots women through efforts such as popularizing human rights legal texts, arranging for translation, financially compensating community activists for their time and expenses incurred in the work, and providing the training and support needed for community-based women to represent themselves effectively in international meetings or in testimonies to UN human rights bodies.

All the while, we maintain the injunction to "act locally," to root our global strategies in the priorities of grassroots women and to translate our victories at the international level into concrete tools that support local advocacy strategies. This simultaneous engagement at the local and global levels expands the range of possible venues for action by community-based activists and it grounds and substantiates international advocacy by making it immediately relevant and accountable to those it is meant to serve.

In this model, community-based women have the necessary support to identify the violations they face, formulate remedies, and then pursue legal backing of those remedies, often in the international arena. We have sometimes heard despondent human rights lawyers say, "We won a positive ruling, but nothing changed." That is because it is incumbent on us to *make* the change. Community-based activists recognize that a favorable international ruling is only as good as its implementation. When we secure a victory, often in the form of legal recommendations or

concluding observations on a human rights report, it signals a halfway mark in an advocacy campaign. Then starts the work to ensure that local activists have the training and strategies they need to pursue the realization of that legal victory: for any actual advance in human rights requires that international recommendations be "brought home" through popular trainings that enable local activists and their allies to demand relevant policy changes.

Pivotally, the interplay between local activism and international advocacy creates a positive feedback loop, in which advocacy victories at the international level made possible by grassroots input then cycle back into the hands of community-based activists. These activists use these victories to strengthen their local demands for policy implementation and eventually to bring reports of their progress back to the international level. Each iteration of this process further reinforces efforts to secure human rights at the local level.

Applying the Model in Haiti

This model has informed MADRE's work with our partner organizations in Haiti. Always, the impetus for this type of concerted action comes from the local conditions of human rights abuse, as observed, lived, and confronted by the community-based groups on the ground. In the case of the earthquake's aftermath in Haiti, the early reports of rape we received from our partners and our history of gender-sensitive disaster response alerted us to this escalating crisis in the camps, and MADRE was able to mobilize quickly in response.

As the level of sexual violence in the camps began to escalate, the strong presence of local women's groups on the ground provided an indispensable first response to the crisis. KOFAVIV organized distributions of whistles and flashlights, simultaneously conducting a public education campaign to spread the word that a woman in danger should blow the whistle three times to summon the help of her community. They organized community-based security patrols to ensure women's safety in their tents and as they moved about the camp. As a continuation of their long-standing work to provide medical and psycho-social care to rape survivors, they arranged group-counseling meetings and accompanied rape survivors to medical facilities to seek assistance.

Even as women in the camps were proving to be critical first-responders to the twin crises of the earthquake and the epidemic of sexual violence unleashed in the aftermath, their expertise and

their agency went unrecognized by the authorities administering the displacement camps in Haiti. Following the earthquake, a dizzying array of international interventions were constructed, few with input from local civil society and even fewer that acknowledged the work done by grassroots women to confront the growing and ever-present threat of sexual violence. For instance, as a part of the response of the United Nations, a "cluster" system was erected to coordinate the activities of international agencies and NGOs around a series of issues, including gender-based violence (GBV).[5]

Despite the critical services being provided by KOFAVIV and other Haitian grassroots women's organizations, they were excluded from the regular meetings of the GBV sub-cluster. The meetings were conducted in French to facilitate participation by international organizations, rather than in Haitian Kreyol, the language spoken fluently by members of the grassroots women's groups.[6] The meetings were held on a UN base located far from the camps, rendering it even more difficult for women to afford the time and money to attend. Making matters worse, women lacking the appropriate UN pass would be denied entry to the securitized setting of the UN base. This failure to prioritize consultation with grassroots women living and organizing in the camps undermined the accuracy of the sub-cluster's needs assessment and the effectiveness of its activities.

Meanwhile, at the international level and as the reconstruction agenda was drafted, the exclusion of grassroots women's voices persisted. At a major donor conference held at UN Headquarters in New York City in March 2010, MADRE was a key organization pushing for the inclusion of Haitian women's perspectives and recommendations in those deliberations. Our demands were ignored. As a result of these and other marginalizations, sexual violence against Haitian women remained at the bottom of the policy-making agenda. All this, while grassroots women's groups were systematically gathering evidence to bolster their concrete policy recommendations: for increased security presence in the camps; for

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[5] The UN Gender-Based Violence Sub-Cluster in Haiti (the "GBV Sub-Cluster"). For more information, see http://oneresponse.info/Pages/default.aspx.

[6] *See* Request for Precautionary Measures Under Article 25 of the Commission's Rules of Procedure, by Int'l Women's Human Rights Clinic (IWHR) at the City Univ. of N.Y. (CUNY) Sch. of Law, MADRE, Inst. for Justice & Democracy in Haïti (IJDH), Bureaux des Avocats Internationaux (BAI), Morrison & Foerster LLP, Ctr. for Constitutional Rights (CCR) & Women's Link Worldwide, at Appendix A (Oct. 19, 2010), *available at* http://www.madre.org/index/press-room-4/news/iahcr-sets-recommendations-for-haitian-government-to-address-sexual-violence-in-idp-camps-544.html [hereinafter Request for Precautionary Measures].

the installation of lighting; for streamlined and efficient legal processes for women filing a claim of rape; for medical assistance from doctors trained specifically to respond to sexual violence; and more.

Together, MADRE and KOFAVIV strategized to overcome these obstacles of exclusion. Even as we implemented emergency measures in the camps, we turned our attention to achieving long-term solutions and eradicating abusive conditions through human rights advocacy at the international level.

Testimony Before the UN Human Rights Council

Malya Villard-Appolon was raped during the 1991-94 military dictatorship and came together with other rape survivors to create KOFAVIV. After the earthquake, as KOFAVIV's work became even more urgent, Ms. Villard-Appolon was one of the key leaders organizing women in the camps, and hers was one of the many critical voices not considered in processes led by international agencies and NGOs.

On June 7, 2010, accompanied by attorneys from MADRE, the Institute of Justice and Democracy in Haiti (IJDH) and the law firm Morrison & Foerster, Malya attended and testified before the 14th Session of the UN Human Rights Council in Geneva, a body specializing in monitoring human rights conditions around the world. Before a packed room of UN representatives, she told them about the grave danger to women's lives in the camps. In her testimony, she reported:

> Conditions in the displacement camps, following the January 12 earthquake, have greatly exacerbated women's vulnerability to rape. I live in a tent in a camp. I have witnessed violence against women and girls. And, I have also witnessed the completely inadequate government response. KOFAVIV has recorded at least 242 cases of rape since the earthquake. But, we have yet to see a case prosecuted.[7]

This was the first time the UN representatives in that room had heard directly from a woman living in the camps, who could testify as a first-person witness and who could demonstrate clearly both the needs and the proper course of action. Without her presence, the topic would have remained an abstract concern, lacking immediacy. Ms. Villard-Appolon's testimony galvanized a new sense

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[7] *Oral Intervention of Malya Villard-Appolon*, MADRE NEWS (June 7, 2010), http://www.madre.org/index/press-room-4/news/madre-partner-from-haiti-testifies-before-the-un-human-rights-council-403.html.

of urgency, which finally translated into an international focus on the question of sexual violence in the camps.

Petitioning the Inter-American Commission on Human Rights

Early in 2010, MADRE began to prepare for another major international push to demand concrete actions to address the rape crisis in the camps: the submission of a legal petition to the Inter-American Commission on Human Rights (IACHR). The human rights entity of the Organization of American States (OAS), the IACHR is imbued with the authority to issue legally binding recommendations, known as precautionary measures, which its member states are obligated under international law to uphold. Through the process of filing a legal petition, MADRE and our partners saw yet another opportunity to secure a space at the international level for women's voices, in a manner that could generate concrete local results.

We joined with a group of attorneys from the International Women's Human Rights (IWHR) Clinic at CUNY School of Law, Women's Link Worldwide, the Center for Constitutional Rights, the Institute for Justice and Democracy in Haiti, Morrison & Foerster as well as grassroots groups in Haiti, including KOFAVIV, FAVILEK,[8] KONAMAVID,[9] and The Bureau des Avocats Internationaux.[10] Drawing from months of on-the-ground evidence-gathering and interviews with rape survivors, together these groups crafted a legal petition that took the stories and the demands of grassroots women and translated them into the legal format required for such a mechanism. Submitted on October 21, 2010, it called for urgent action to confront an epidemic of sexual violence in the camps for displaced people, revealing a shocking pattern of rape, beatings, and threats against the lives of women and girls living in the camps. Furthermore, it asked the IACHR to require the government of Haiti and the international community to take such immediate action as ensuring security, installing lighting, and guaranteeing access to medical care in the camps.

In a series of unprecedented actions, the IACHR moved to advance the demands codified in the petition. Upending their standard practice, the IACHR simultaneously sent a letter to the

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8 *Fanm Viktim, Leve Kanpe* or Women Victims, Get Up Stand Up.

9 *Kodinasyon Nasyonal Viktim Direk* or National Coordinator of Direct Victims.

10 The Bureau des Avocats Internationaux (BAI), a public interest law firm in Port-au-Prince that launched the Rape Accountability and Prevention Project (RAPP) in June 2010, represents over 50 women and girls in rape cases.

government of Haiti calling for an investigation and issued a public statement on November 18, 2010 decrying the conditions of sexual violence in the camps, choosing not to defer their response until after having heard the Haitian government's position. This acceleration of the IACHR's standard procedures reflected the sense of urgency created by the infusion of grassroots voices into cogent legal argumentation.

In early January 2011, the IACHR made its final decision, concurring with the petitioners and issuing a legally binding set of recommendations to the Haitian government: ensure medical and psychological care to rape survivors; install lighting and implement effective security measures in 22 displacement camps; ensure that public officials are trained to respond appropriately to incidents of sexual violence; create special units within law enforcement to investigate violence against women and girls; and guarantee access for grassroots women's groups in planning and policy-making to address sexual violence.

The IACHR enacted other landmark moves. In past decisions, governments were only held responsible for rape committed by state actors, yet the IACHR expanded on this precedent. It held the Haitian government responsible for violations committed by private individuals. Furthermore, while the petition for precautionary measures was submitted specifically on behalf of thirteen Haitian women and girls, it also made explicit reference to the severe human rights violations impacting *all* Haitian women and girls in 22 displacement camps who had experienced or were under threat of sexual violence. The inclusion of this last measure was both aspirational and necessary. Previous decisions to protect women facing the threat of sexual violence have been implemented for specific individuals; the precautionary measures granted on behalf of an unnamed and uncounted group of women represents a new precedent.

Our work with our grassroots partners had clearly shown us that the type of policy action necessary to remedy the human rights violations of the thirteen women and girls was also urgently needed by the many more that had not come forward. Looking at our evidence, the IACHR concurred, granting the precautionary measures for all women and girls facing sexual violence in the 22 camps. A legal precedent was set, bolstering the recognition of the right to be free from sexual violence, and international women's human rights advocates worldwide were afforded yet one more tool in their struggle. For communities under siege around the world,

this decision has created new possibilities to demand attention and legal protection.

The decision also emphasized the need for the participation of grassroots women's groups. This written recognition of this principle is a vital tool in combating the exclusion of grassroots voices that has hamstrung human rights advocacy efforts and that undermines the democratic imperative of international law.

Creating a Positive Feedback Loop Between the Local and the Global

Attracting the attention of international human rights bodies and experts is not the ultimate aim of our campaign; our focus remains on changing the concrete conditions that women living in the displacement camps experience. To make real change possible in women's lives, we have worked since the IACHR's decision to take these advances, conduct human rights trainings to ensure that their content is meaningful to our grassroots partners, and facilitate their access to policy-making circles to voice their demands that their internationally-recognized rights be implemented.

This model holds the promise of allowing us to reach what some would call an overly-ambitious goal: ending the epidemic of rape in the displacement camps in Haiti. This approach flies in the face of complacent attitudes that assume the inevitability of sexual violence against women and asserts that the strategic efforts of committed activists can have world-changing effects.

Yet, it also offers another hope. It changes international law in favor of women's human rights, setting legal precedents that can be used in other places at other times. In so doing, we build on the groundbreaking work of women's human rights advocates who challenged international law when it failed to meet the demands of grassroots women and who created a foundation for this model of advocacy. In the 1990s, they fought for the International Criminal Tribunals for Rwanda and the former Yugoslavia to recognize rape as a weapon of war, refusing arguments that cast sexual violence as merely incidental. For years, these advocates demanded an end to the use of politically motivated rape to terrorize women activists in Haiti and beyond. The international legal standards and advocacy tools we have at our disposal today are thanks to their ceaseless work. Continuing that legacy, we strengthen a body of tools and strategies that can be put in place to protect the rights of women in Haiti and around the world, today and in the future.

In our response to sexual violence in Haiti, the effective com-

bination of grassroots activism and international human rights advocacy has built a momentum that holds out extraordinary promise. Within reach, we can see a future where real action is taken to protect women and girls from rape and where international law reflects the priorities of grassroots women.

CAN YOU REALLY BE A GOOD ROLE MODEL TO YOUR CHILD IF YOU CAN'T BRAID HER HAIR? THE UNCONSTITUTIONALITY OF FACTORING GENDER AND SEXUALITY INTO CUSTODY DETERMINATIONS

Christina M. Tenuta†

I. Introduction

The best way to defend your constitutional rights as a parent may be to enroll in beauty school. One trial court[1] implied that the ability of a parent to style a child's hair is a relevant consideration in the determination of a child custody dispute.[2] While family courts make decisions about what traits children should learn from their parents with respect to gender and sexuality, the constitutional dimensions of these role model arguments remain murky.[3] Court decisions that consider the gender and sexuality of the parents and child have threatening constitutional implications. A parent's ability to be a parent and specifically, style their child's hair, has little or nothing to do with the gender and sexuality of the parent or child. If courts do want to make constitutionally sound custody determinations based on gender and sexuality, then it should not be done on such flimsy grounds, such as hair braiding.

Over the past fifty years courts have grappled with how parents' gender and sexuality affects childhood development and whether or not it should be considered as a factor in child custody

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1 Many of the cases cited in this article refer to trial court decisions. Although higher courts later overturned some family court decisions, trial court judges' opinions provide an insightful glimpse into family court judges' perspective on gender and sexuality during child custody determinations.

2 Dalin v. Dalin, 512 N.W.2d 685, 691 (N.D. 1994) (Sandstrom, J., dissenting). Through testimony, the court considered the father's ability to style his child's hair because it perceived hairstyling as one of the important traits that parents must possess as a role model for their children in custody disputes.

3 The father in *Dalin* appealed the trial court's custody decision, claiming that the trial court based its decision on improper gender bias. However, there were no constitutional issues raised. The appeal did not include a constitutional argument, and as such, the appellate court applied the gender standard but did not discuss its constitutionality. *Dalin*, 512 N.W.2d at 687.

disputes.[4] While some courts are now attempting to settle custody disputes without employing gender and sexuality as determining factors, not all courts do so. When courts take this liberal approach, gender and sexuality may still have an effect, even indirectly, on custody determinations. For example, gender had an implied effect on the custody decision of Roland W. Dalin's daughter, after the court asked how he fixed his three year-old daughter's hair in the morning.[5] Mr. Dalin responded to the judge by saying,

> Um, I normally just pull it back and put it in a pony tail. I haven't gotten to the point where I can learn how to braid. So I have my mother assist me in helping her getting her hair braided. And I comb it. I wash it. And I generally just kind of put it in a pony tail.[6]

Was it because he could not braid his daughter's hair, or show her how to braid her own hair, that Mr. Dalin lost custody of his daughter?[7] Is he less of a parent for not being able to fix his daughter's hair? Is a mother less of a parent if she cannot provide a heterosexual stepparent?

In another example, sexuality was a prominent and explicit factor in the decision regarding a custody dispute when the court ruled in favor of the heterosexual father and his new wife.[8] The lesbian mother lost custody because she was not considered a nurturing caretaker, even though her partner regularly attended the child's field trips and ate lunch with the child at school twice a month.[9] On the other hand, the heterosexual stepmother was considered an appropriate caretaker, despite the fact that the opinion does not mention anything about her having shared these same activities with the child.[10]

When deciding custody or visitation, judges will sometimes invoke a role model argument looking at which parent is better suited for their child's psychosexual development.[11] Some role

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4 *See* Heidi C. Doerhoff, *Assessing the Best Interest of the Child: Missouri Declares that a Homosexual Parent is Not Ipso Facto Unfit for Custody*, 64 MOR. L. REV. 949, 950 (1999). *See also* Michael S. Wald, *Adults' Sexual Orientation and State Determination Regarding Placement of Children*, 40 FAM. L.Q. 381 (2005).

5 *Dalin*, 512 N.W.2d at 691 (Sandstrom, J., dissenting) (discussing trial court testimony regarding gender).

6 *Id.* (quoting the father's testimony at the trial court).

7 *Id.* (Sandstrom, J., dissenting) (discussing trial court testimony regarding gender).

8 *See Ex parte* J.M.F., 730 So. 2d 1190, 1194–96 (Ala. 1998).

9 *See id.*

10 *See id.* at 1195.

11 *See generally* Krotoski v. Krotoski, 454 So. 2d 374, 376 (La. Ct. App. 1984); Weber

model arguments are gender focused, such as the notion that a boy needs a strong male role model or a girl needs to learn feminine activities from her mother.[12] Others are sexual, specifically heterosexual: this child needs an opposite-sex parent or parents in a heterosexual relationship, as a role model so that the child can develop as a heterosexual.[13] Judges can be both implicit and explicit in making a role model argument. However, whether based on gender or sexuality, explicit or implicit, this paper demonstrates that such determinations are based on outmoded ideas that are harmful to families. Moreover, while family courts consider the intersection of custody with gender and sexuality, the Supreme Court has ruled on issues of gender and sexuality. After *Craig v. Boren*, states cannot employ traditional gender roles,[14] and homosexuality is protected by the privacy rights of the Fourteenth Amendment in *Lawrence v. Texas*.[15] This paper explores the effects of *Craig v. Boren* and *Lawrence v. Texas* on custody decisions based on issues of gender and sexuality and argues that these two cases render some custody decisions unconstitutional. Ideally, family courts should use the decisions of *Craig* and *Lawrence* as a new basis for future attitudes toward gender and sexuality in custody determinations. This paper argues that judges act unconstitutionally when they make gendered or heterosexist role model arguments, thus violating *Craig* and *Lawrence*.[16]

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v. Weber, 512 N.W.2d 723, 725 (N.D. 1994); *In re* J.S. & C., 324 A.2d 90, 96 (N.J. Super. Ct. Ch. Div. 1974).

12 *E.g.*, Sandlin v. Sandlin, 906 So. 2d 39, 41 (Miss. Ct. App. 2004); Harris v. Harris, 647 A.2d 309, 312, 314 (Vt. 1994).

13 *E.g.*, Pleasant v. Pleasant, 628 N.E.2d 633, 637, 639 (Ill. App. Ct. 1993); S. v. S., 608 S.W.2d 64, 66 (Ky. Ct. App. 1980); Dailey v. Dailey, 635 S.W.2d 391, 394 (Tenn. Ct. App. 1981).

14 Craig v. Boren, 429 U.S. 190, 198 (1976).

15 Lawrence v. Texas, 539 U.S. 558, 578 (2003) ("The Texas statute [criminalizing homosexual conduct] furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.").

16 For the purposes of this paper, I use the terms "gender" and "sexuality" in a postmodern context, which "understand[s] 'sexuality' and 'gender' predominantly as productions of human discourse rather than as natural phenomena." WILLIAM N. ESKRIDGE & NAN D. HUNTER, SEXUALITY, GENDER, AND THE LAW 584 (2nd ed. 2004). In particular, when I use the terms "gender" and "sexuality" I use them as they are socially constructed by the legal system, as changing ideological reflections. For example, when citing to law and custody cases, I rely on the terms "sex" and "gender" (and use them somewhat interchangeably) to reflect the gender identity that the court has assigned to mothers and fathers based on "male" and "female" identities. I use the term "sexuality" to mean the heterosexual or homosexual orientation of the parent as described by the court in each particular case. *See* Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CALIF. L. REV. 1, 21–23 (1995) (discussing

In Part II of this paper, I offer a brief history of how courts have treated sexuality and gender in relation to custody disputes. Part III describes the role model argument used by courts, based on which parent's gender and or sexual orientation is appropriate for the child's development. Part IV demonstrates how the role model argument is unconstitutional based on the Supreme Court's decisions in *Craig v. Boren* and *Lawrence v. Texas*. Finally, Part V concludes that gender and sexuality should not be used as a substitute for evaluating parenting skills in custody cases. The state's only interest should be supporting safe and healthy sexuality and gender development for all children and families.

II. A Brief History of Sexual Orientation, Gender and Custody

The concepts of sexuality and gender are often intertwined in the realm of child custody disputes.[17] The gender of the parent or their child has been raised as an issue by judges in cases of both same-sex and different-sex families. A major reason for the intermingling of gender and sexuality in child custody disputes is that child custody laws have traditionally reflected heterosexual assumptions and models of parenthood.

The roots of this traditional legal doctrine stem from models of heterosexual marriage and reflect patriarchal viewpoints of parenthood.[18] In family law, the basis for recognizing individuals as

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how the words "sex" and "gender" have, somewhat mistakenly, evolved). Sex refers to biophysical traits of "men" and "women," and gender indicates a socially constructed notion of "male," "female," "masculine," and '"feminine." Nevertheless, this "physical/social distinction" is often ignored, confused or conflated. Legal doctrine has not thus far provided for a set definition of "sex" and "gender."

17 *See* Pleasant v. Pleasant, 628 N.E.2d 633, 637 (Ill. App. Ct. 1993). *See also* Clifford J. Rosky, *Like Father, Like Son: Homosexuality, Parenthood, and the Gender of Homophobia*, 20 Yale J.L. & Feminism 257, 343 (2009) (identifying how common it is for courts in custody and visitation cases to conflate gender and sexual development stereotypes).

18 Trimble v. Gordon, 430 U.S. 762, 769 (1977) ("No one disputes the appropriateness of Illinois' concern with the family unit, perhaps the most fundamental social institution of our society."); *Ex parte* J.M.F., 730 So. 2d 1190, 1196 (Ala. 1998) ("While much study, and even more controversy, continue to center upon the effects of homosexual parenting, the inestimable developmental benefit of a loving home environment that is anchored by a successful [heterosexual] marriage is undisputed."); Marvin v. Marvin, 18 Cal. 3d 660, 684 (Cal. 1977) ("Lest we be misunderstood, however, we take this occasion to point out that the structure of society itself largely depends upon the institution of marriage."); Ruthann Robson, Lesbian (Out)Law: Survival Under the Rule of Law 130 (1992); Nadine A. Gartner, *Lesbian (M)otherhood: Creating an Alternative Model for Settling Child Custody Disputes*, 16 Law & Sexuality Rev. 45, 48, 54 (2007).

parents is the institution of heterosexual marriage.[19] For example, "the law's emphasis on the formal link and status of parenthood was essentially secondary to and derived from the formal relationship of marriage."[20] The doctrinal framework of child custody law began with a patriarchal idea of a father's absolute rights to the custody of children based on property rights. Under common law, a father's right to ownership and control of his children was analogous to having title, which included the legal duty to support them.[21] Later, courts shifted towards the gender biased standard in favor of the mother—the tender years doctrine.[22] This doctrine was based on the idea that *mother love* is natural and better than a father's love.[23] Following the tender years doctrine[24] and in response to second-wave feminism,[25] courts have now applied a more gender-neutral custody standard, referred to as the primary caretaker presumption.[26] This standard takes into account factors such

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19 *In re* J.S. & C., 324 A.2d 90, 92 (N.J. Super. Ct. Ch. Div. 1974) ("The right of a natural parent to its child must be included with the bundle of rights associated with marriage, establishing a home and rearing children."); Lehr v. Robertson, 463 U.S. 248, 256–57 (1983) ("The institution of marriage has played a critical role both in defining the legal entitlements of family members and in developing the decentralized structure of our democratic society."). Because marriage has played such a central role in society, state courts typically favor *formal families* when determining the best interests of the child. *See* Boddie v. Connecticut, 401 U.S. 371, 389 (1971) (Black, J., dissenting) ("The institution of marriage is of peculiar importance to the people of the States. It is within the States that they live and vote and rear their children. . . . The States provide for the stability of their social order, for the good morals of all their citizens, and for the needs of children from broken homes. The States, therefore, have particular interests in the kinds of laws regulating their citizens when they enter into, maintain, and dissolve marriages."). Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy; Balancing the Individual and Social Interest*, MICH. L. REV. 463, 464 (1983) ("The way family relationships are defined has significant legal consequences because our laws bestow great benefits upon families.").

20 Kath O'Donnell, *Lesbian and Gay Families: Legal Perspectives, in* CHANGING FAMILY VALUES 77, 86 (Caroline Wright & Gill Jagger eds., 1999).

21 MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES 76 (1995) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1765–1769) 452–53 (1869)).

22 *See generally* Gartner, *supra* note 18, at 55.

23 Freeland v. Freeland, 159 P. 698, 699 (Wash. 1916) ("Mother love is a dominant trait in even the weakest of women, and as a general thing surpasses the paternal affection for the common offspring, and, moreover, a child needs a mother's care even more than a father's."). *See also* ROBSON, LESBIAN (OUT)LAW, *supra* note 18.

24 *See also Ex parte* Devine, 398 So. 2d 686, 689 (Ala. 1981) (noting that tender years presumption developed from an 1830 case in Maryland where the court reviewed policy considerations regarding why a child should remain with the mother).

25 *See generally* Rachel F. Moran, *How Second-Wave Feminism Forgot the Single Woman*, 33 HOFSTRA L. REV. 223 (2004) (discussing second-wave feminism as beginning in the 1960s and 1970s, a movement for women's rights and liberation that consisted largely of white, middle-class women).

26 ROBSON, LESBIAN (OUT)LAW, *supra* note 18; *In re* the Marriage of Petersen, 2010

as which parent feeds, bathes, and grooms the child; it was often applied with a gender bias that favored the mother.[27]

WL 4484445 (Iowa Ct. App. 2010) (showing a gender neutral application where Supreme Court upheld lower court's decision to award joint custody to both parents after determining that the father was the primary caretaker, including pre- and post-daycare activities, during the marriage). *See, e.g.*, *In re* Marriage of Davis, WL 4493049 (Cal. Ct. App. Nov. 10, 2010) (noting that the emotional bond between the child and the primary caretaker is an important factor to maintain custody arrangement); *In re* Marriage of Zigler, 529 S.W.2d 909 (Mo. Ct. App. 1975) (awarding custody to mother, who as the primary caretaker was responsible for the child's health, personal and educational needs, created a "proper home environment" for the child, and made day-care arrangements, in contrast to father who had not found a school near his home for the child).

> In establishing which natural or adoptive parent is the primary caretaker, the trial court shall determine which parent has taken primary responsibility for, inter alia, the performance of the following caring and nurturing duties of a parent: (1) preparing and planning of meals; (2) bathing, grooming and dressing; (3) purchasing, cleaning, and care of clothes; (4) medical care, including nursing and trips to physicians; (5) arranging for social interaction among peers after school, i.e. transporting to friends' houses or, for example, to girl or boy scout meetings; (6) arranging alternative care, i.e. babysitting, day-care, etc.; (7) putting child to bed at night, attending to child in the middle of the night, waking child in the morning; (8) disciplining, i.e. teaching general manners and toilet training; (9) educating, i.e. religious, cultural, social, etc.; and, (10) teaching elementary skills, i.e., reading, writing and arithmetic.

Garska v. McCoy, 278 S.E.2d 357, 363 (W. Va. 1981) (describing the application of the primary caretaker custody doctrine).

[27] *See, e.g.*, *Garska*, 278 S.E.2d at 363 (discussing how in some families the father may perform the role of the primary caretaker, but in *traditional* families, the mother did not work "and performed the traditional and honorable role of homemaker" while the father "played the traditional role of breadwinner, working eight to ten hours a day," and updating the tender years doctrine to the newer primary caretaker doctrine by simply substituting the words "mother" and "maternal" with "primary caretaker parent"). *See also* Gartner, *supra* note 18, at 55 n.10; *In re* Marriage of Burgess, 913 P.2d 473, 479 (Cal. 1996) ("Although they saw their father regularly, their mother was, by parental stipulation and as a factual matter, their primary caretaker."). Gordon v. Gordon, 577 P.2d 1271 (Okla. 1978), illustrates how courts began to take the role of the primary caretaker into consideration when facing constitutional attacks on the statutory tender years presumption from the father. The custody determination still favors mothers, where court awarded custody to mother, noting she had been the primary caretaker of the child since birth:

> It is indeed an old notion that a child of tender years needs a mother more than a father, but defendant has not persuaded us that this notion is either unsound or unconstitutional. We believe that consideration of the cultural, psychological and emotional characteristics that are gender related make this custodial preference one of "those instances where the sex-centered generalization actually (comports) to fact." Craig v. Boren, supra, 429 U.S. at 199. The statute's additional provision that children who are of an age to require education and preparation for labor or business should be placed in the father's custody further reinforces our decision. This provision makes clear the essential fact that this statute is not concerned entirely with the "rights" of parents to

Starting in the 1960's when courts first began hearing lesbian and gay custody disputes, courts categorically discriminated against gay and lesbian parents.[28] At the time, a parent's sexuality was applied as a *per se* ban on custody. For example, a California court ordered a gay father to move out of the home that he shared with his partner, and "immediately . . . take up residence in the home of his parents."[29] The court required the paternal grandmother to accompany the children during any visitation with their father, and ordered psychiatric treatment for his homosexual behavior "until further order of the Court."[30] Thirteen years later, the Supreme Court of Georgia upheld the trial court's decision to award custody of an eight-year-old girl to her paternal grandparents, reasoning that the mother, who "lived an immoral life," left her daughter in the custody of her female friends, who "taught the child about 'the gay life.'"[31] The *per se* ban on custody continued well into the 1980's when the Supreme Court of Virginia held that the father's "exposure" of his homosexual relationship to his child rendered him as "an unfit and improper custodian as a matter of law."[32]

Beginning in the 1970's, in an effort to transition away from the outright gender bias of the "primary caretaker presumption" and sexual orientation discrimination of the *per se* ban on custody

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> their children. In addition to, and far beyond, their rights, the paramount purpose of the statute is to serve the welfare and best interests of children.

Id. See also Dodd v. Dodd, 93 N.Y.S.2d 401 (N.Y. Sup. Ct. 1978) (holding that mother should be awarded custody of children because she was primary caretaker, was more sensitive to their needs, and provided a better role model for the children).

28 Evans v. Evans, 8 Cal. Rptr. 412, 414 n.1 (Cal. Ct. App. 1960) (discussing trial court's visitation order that required homosexual father to leave his home that he shared with his partner to instead reside with his parents and seek psychiatric help); Jacobson v. Jacobson, 314 N.W.2d 78 (N.D. 1981) (noting that mother's homosexuality was the overriding factor even though the trial court determined both parents as "fit, willing and able" to assume custody of the children), *overruled by* Damron v. Damron, 670 N.W.2d 871 (N.D. 2003). The Supreme Court was concerned that the mother Sandra would be living with Sue after she admitted to a sexual relationship with Sue prior to the termination of the marriage. The Court acknowledged that Sandra's children would be affected once they become aware of their mother's homosexuality. *Jacobson*, 314 N.W.2d at 80–81. Commonwealth *ex. rel.* Bachman v. Bradley, 91 A.2d 379 (Pa. Super. Ct. 1952) (holding that it was proper for the trial court to limit father's custody because of his homosexual tendencies and immoral conduct); Collins v. Collins, No. 87-238-II, 1988 WL 30173, at *1 (Tenn. Ct. App., Mar. 30, 1988) (holding that "[a]fter hearing all the evidence, the trial court found that the lifestyle of the [m]other was not conducive to the best interests of the child. She therefore awarded custody to [f]ather").

29 *Evans*, 8 Cal. Rptr. at 414 n.1.

30 *Id.*

31 Bennet v. Clemens, 196 S.E.2d 842, 843 (Ga. 1973).

32 Roe v. Roe, 324 S.E.2d 691, 694 (Va. 1985).

for gay and lesbian parents, courts started to apply "the best interest of the child standard."[33] Currently, the best interest of the child test consists of various factors, based on state statutes[34] and case law, which are weighed by a judge to determine which parent can act in the best interest of the child.[35] For example, according to the New York State Court of Appeals, "primary among the circumstances to be considered in determining the best interests of the child are the ability to provide for the child's emotional and intellectual development, the quality of the home environment and the parental guidance provided."[36] Thus, courts will include a variety of factors when crafting their own best interest of the child test.

A parent or child's sexuality or gender could be considered as factors among many within the "best interest test," and given varying degrees of importance by judges on a case-by-case basis.[37] For example, in Alabama, the child custody statute states that, "the court may give custody . . . having regard to . . . the age and sex of the child."[38] However, when sexuality and gender are considered as factors in custody disputes, judges have relied on harmful myths about same-sex parents that have produced negative outcomes regarding the child's custody.[39] Commonly used arguments against

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33 J.A.D. v. F.J.D., 978 S.W.2d 336, 339 (Mo. 1998). This Court applied the "guiding star" legal standard for determining custody disputes—the "best interest of the children" test. *Id.* It stated that a homosexual parent is not "ipso facto unfit for custody," even though it is permissible for the court to consider a parent's homosexual misconduct. *Id. In re* Marriage of Teepe, 271 N.W.2d 740, 742 (Iowa 1978); ROBSON, LESBIAN (OUT)LAW, *supra* note 18.

34 *See generally* WIS. STAT. ANN. § 767.41(2)(2) (West 2011); ALA. CODE § 30-3-1 (1998).

35 *See, e.g.*, Blew v. Verta, 617 A.2d 31, 35 (Pa. Super Ct. 1992) ("The standard 'best interest of the child' requires us to consider the full panoply of a child's physical, emotional, and spiritual well-being."). *See also* ROBSON, LESBIAN (OUT)LAW, *supra* note 18, at 130.

36 Louise E.S. v. W. Stephan S., 477 N.E.2d 1091, 1092 (N.Y. 1985).

37 *Compare* J.L.P. v. D.J.P., 643 S.W.2d 865, 870 (Mo. Ct. App. 1982) ("The case law indicates . . . that homosexual parents' rights may be restricted if, under the circumstances, the imposition of certain restrictions is in the best interests of the children."), *with In re* J.S. & C., 324 A.2d 90, 92 (N.J. Super. Ct. Ch. Div. 1974) The court concluded that a parents' homosexuality "does not *per se* provide sufficient basis for a deprivation of visitation rights." *Id.* at 92.

38 ALA. CODE §30-3-1 (1998).

39 *See, e.g.*, J.L.P. v. D.J.P., 643 S.W.2d 865, 869 (Mo. Ct. App. 1982) ("Every trial judge, or for that matter, every appellate judge, knows that the molestation of minor boys by adult males is not as uncommon as the psychological experts' testimony indicated."); Jacobson v. Jacobson, 314 N.W.2d 78, 80 (N.D. 1981), *overruled by* Damron v. Damron, 670 N.W.2d 871 (N.D. 2003). The Court in *Jacobson* discussed that, despite the increased acceptance of homosexuality, homosexuality is still not *normal*, and thus it cannot ignore sexuality as a factor. "It is not inconceivable that one day our society will accept homosexuality as 'normal.' Certainly it is more accepted today than it was

awarding custody to gay and lesbian parents include the fear that children will be molested by their gay parents,[40] develop homosexual preferences,[41] suffer psychological harm,[42] become infected by HIV/AIDS,[43] or experience harassment and stigmatization for hav-

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only a few years ago. We are not prepared to conclude, however, that it is not a significant factor to be considered in determining custody of children, at least in the context of the facts of this particular case. Because the trial court has determined that both parents are 'fit, willing and able' to assume custody of the children we believe the homosexuality of Sandra is the overriding factor." Bottoms v. Bottoms, 457 S.E.2d 102, 108 (1995) (holding that even though mother's lesbianism does not *per se* make her an unfit parent, "[c]onduct inherent in lesbianism is punishable as a Class 6 felony in the Commonwealth, Code § 18.2-361; thus, that conduct is another important consideration in determining custody."). The trial judge in *In re* Marriage of Cabalquinto, 669 P.2d 886, 888 (Wash. 1983) said, "a child should be led in the way of heterosexual preference, not be tolerant of this thing [homosexuality]" and that "it can[not] do the boy any good to live in such an environment. It might do some harm." The Supreme Court wrote, "[i]n reviewing the entire record before us, we cannot tell what standards of law the trial court followed in reaching its decision on visitation rights. While the findings and conclusions of law suggest the homosexuality of the father was not the determining factor the unfortunate and unnecessary references by the trial court to homosexuality generally indicate the contrary." *Id.* at 888.

[40] J.L.P. v. D.J.P., 643 S.W.2d 865, 867, 869 (Mo. Ct. App. 1982) (denying gay father custody for fear that his son would be molested by him or his homosexual friends despite expert psychologist testimony that most sexual molestation occurs among heterosexuals).

[41] S. v. S., 608 S.W.2d 64, 66 (Ky. Ct. App. 1980) (expressing concern that the child "may have difficulties in achieving a fulfilling heterosexual identity of her own in the future."); J.L.P. v. D.J.P., 643 S.W.2d 865, 869 (Mo. Ct. App. 1982) ("The father directly testified that he thought it would be 'desirable' for his child to become a homosexual . . . . The whole tenor of the father's appeal and his conduct in the trial and appellate stages demonstrate that he is oriented towards the 'cause' of homosexuality. The trial court could take into consideration the fervor of the father's beliefs concerning homosexuality in assessing the possibility of harm to the child arising from that conduct which the trial court characterized as 'seductive in nature.' "); *In re* J.S. & C., 324 A.2d 90, 96 (N.J. Super. Ct. Ch. Div. 1974) (finding persuasive psychologist's testimony in favor of the heterosexual parent that "the total environment to which the father exposed the children could impede healthy sexual development in the future . . . [T]he father's milieu could engender homosexual fantasies causing confusion and anxiety which would in turn affect the children's sexual development . . . . [I]t is possible that these children upon reaching puberty would be subject to either overt or covert homosexual seduction which would detrimentally influence their sexual development."); Dailey v. Dailey, 635 S.W.2d 391, 394 (Tenn. Ct. App. 1981) (concluding that awarding custody to lesbian mother would harm the child because homosexuality is a harmful, socially unacceptable, learned practice that will only damage the child's future).

[42] N.K.M. v. L.E.M., 606 S.W.2d 179 (Mo. Ct. App. 1980) (noting the husband's argument that custody modification removing daughter from lesbian mother's custody was warranted due to concern that mother's lesbian relationship would have an "unwholesome" and "unhealthy" effect upon daughter's mental health); *In re* J.S. & C., 324 A.2d 90, 96 (N.J. Super. Ct. Ch. Div. 1974) (expert psychologist testified that limiting subject children's exposure to father's homosexual lifestyle was considered to be "good preventative psychiatry").

[43] Stewart v. Stewart, 521 N.E.2d 956 (Ind. Ct. App. 1988) (seeking custody modifi-

ing gay parents.[44]

When applying the best interest of the child standard, some courts strive for a neutral application while other courts still retain traces of gender-biased notions of child rearing and homophobia.[45] This reality is not surprising, considering that the best interest of the child standard stems from heterosexual legal traditions.[46] Heterosexual marriage has historically played a central role in determining legal parenthood doctrines, thereby infusing child custody doctrine with heterosexism.[47]

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cation because of custodial father's sexuality and HIV-positive status); J.P. v. P.W., 772 S.W.2d 786, 786–89 (Mo. Ct. App. 1989) (mother sought to supervise child's visit with his father to protect child from exposure to AIDS); *In re* Adoption of Charles B., 50 Ohio St. 3d 88, 95 (1989) (Resnick, J., dissenting) (discussing that child should not be adopted by a homosexual parent due to the increased risk of contracting HIV). *See also* David K. Flaks, *Gay and Lesbian Families: Judicial Assumptions, Scientific Reality*, 3 WM. & MARY BILL RTS. J., 345, 361 (1994) (discussing a case where a mother was not allowed to kiss her daughter for fear of infecting her daughter with AIDS.). *See also* Clifford J. Rosky, *Like Father, Like Son: Homosexuality, Parenthood, and the Gender of Homophobia*, 20 YALE J.L. & FEMINISM 257 (2009).

44 Jacobson v. Jacobson, 314 N.W.2d 78, 81 (N.D. 1981), *overruled by* Damron v. Damron, 670 N.W.2d 871 (noting court's observation that children will "suffer from the slings and arrows of a disapproving society" when determining custody); Blew v. Verta, 617 A.2d 31, 35 (Pa. Super Ct. 1992) (overturning trial court decision to limit lesbian mother's custody based on other people's reaction to her sexuality. "The trial court based a finding of detriment not on the mother's homosexual relationship itself but rather on other individuals' reaction to the mother's relationship."); Collins v. Collins, No. 87-238-II, 1988 WL 30173, at *3 (Tenn. Ct. App. Mar. 30, 1988) ("[S]he faces a life that requires her to keep the secret of her mother's lifestyle, or face possible social ostracism and contempt. This adds tremendous pressure to a young child's life."); Roe v. Roe, 324 S.E.2d 691, 694 (Va. 1985) (noting that "the conditions under which this child must live daily are not only unlawful but also impose an intolerable burden upon her by reason of the social condemnation attached to them, which will inevitably afflict her relationships with her peers and with the community at large.").

45 *Compare* Blew v. Verta, 617 A.2d 31, 36 ("In Nicholas' case, one of life's realities is that one of his parents is homosexual . . . . Nicholas' best interest is served by exposing him to reality and not fostering in him shame or abhorrence for his mother's nontraditional commitment."), *with* Dailey v. Dailey, 635 S.W.2d 391, 396 (Tenn. Ct. App. 1981) (noting best interest standard warranted removal of unlimited visitations with lesbian mother because, "[t]o permit this small child to be subjected to the type of sexually related behavior that has been carried on in his presence in the past under the proof in this record could provide nothing but harmful effects on his life in the future."). *See also* ROBSON, LESBIAN (OUT)LAW, *supra* note 18, at 130-31.

46 *See* O'Donnell, *supra* note 20, at 77.

47 *See* J.P. v. P.W., 772 S.W.2d 786, 787 (Mo. Ct. App. 1989) (describing how father had oral sex regularly with his male partner, in contrast to the "normal" sex he had with his wife); O'Donnell, *supra* note 20, at 77 (writing about how the legal notions of parental rights have been constructed around the institution of heterosexual marriage, O'Donnell expressed "concern about the perceived decline of the family and urgings to return to 'family values,' [which] are firmly based in an ideology of family life [and] can be described as highly traditional and which revolves around a nuclear unit based in heterosexual marriage."). *See also* Gartner, *supra* note 18, at 53–54 (not-

The best interest of the child standard provides judges broad discretion to determine what type of family structure is most suitable for the child's development.[48] Moreover, judges use their wide latitude to assert their own homophobic notions[49] and gender bias into the standard.[50] The best interest of the child test, therefore, "often is applied as if it is the best-interest-of-the-state-test, especially where judges reason that it is in the best interests of a child to grow up in a conventional state-approved family."[51]

The ability of judges to apply the best interest of the child standard according to their own perceptions of gender is evidenced by a 1989 study, conducted by the Massachusetts judiciary to determine if the best interest of the child standard was applied with any sort of gender bias from the judge.[52] The results from this study showed that "in 24,000 divorce cases involving child custody issues, the courts found for the biological mother 93.4% of the time, the biological father 2.5% of the time and some form of joint custody 4% of the time."[53] Although this study was conducted twenty-two years ago, divorcing couples still face the same innate stigma placed on them by the judicial system, which is further complicated by complex familial constructs.[54]

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ing that when settling child custody cases, courts apply legal doctrines that "stem from models of heterosexual marriage and embody stark gender biases that do not translate when applied to [homosexual] couples").

48 J.A.D. v. F.J.D., 978 S.W.2d 336, 340 (Mo. 1998) ("The trial court has broad powers . . . to impose restrictions and requirements upon visitation for the health and well-being of the children."); N.K.M. v. L.E.M., 606 S.W.2d 179, 183 (Mo. Ct. App. 1980) (noting that judges possess "wide latitude" when making custody decisions as to the best interest of the child). *See also* Wald, *supra* note 4 at 423.

49 *See* N.K.M. v. L.E.M., 606 S.W.2d 179, 183 (Mo. Ct. App. 1980) (analogizing mother's lesbian partner to social deviants, thereby justifying visitation decree that protects child from mother's lesbian partner). In an example of a judge's tendency to insert his or her own homophobic notions, one judge analogized mother's lesbian partner to a social deviant stating that "[s]uppose the persona non grata were an [sic] habitual criminal, or a child abuser, or a sexual pervert, or a known drug pusher? To cut off association with such a person as a condition to the child custody would be entirely reasonable." *Id.* at 183. *See also* Gartner, *supra* note 18, at 56.

50 N.K.M. v. L.E.M., 606 S.W.2d 179, 183–84, 189 (Mo. Ct. App. 1980) (noting that court determined mother is a lesbian based on evidence that she is "servient," and has a close friend who has a "powerful, dominant" personality, and does most of the driving for the two women, further asserting that teenage daughters need a "mother figure").

51 ROBSON, LESBIAN (OUT)LAW, *supra* note 18, at 130.

52 Massachusetts Supreme Judicial Court, *Gender Bias Study of the Court System in Massachusetts* (1989), *reprinted in* 24 NEW ENG. L. REV. 745 (1990).

53 Jeffrey A. Dodge, *Same-Sex Marriage and Divorce: A Proposal for Child Mediation*, 44 FAM. CT. REV. 87, 96–97 (2006) (referring to a study conducted by Massachusetts Supreme Judicial Court).

54 Sandlin v. Sandlin, 906 So. 2d 39, 41–42 (Miss. Ct. App. 2004) (determining that

When applied to custody disputes between gay parents, some applications of the best interest of the child standard included an inquiry into the "morality" of homosexuality.[55] Also considered were the effects that homophobic reactions from third parties would have on the child in question.[56] Such an analysis further demonstrates the ability of judges to apply the best interest of the child standard according to their own ideas of sexuality. Using this analysis, both lines of inquiry are clearly biased to favor the heterosexual parent.[57]

Today, courts often apply the best interest of the child as a balancing test by weighing the parents' sexuality as one factor among many in custody hearings such as visitation.[58] Even when courts attempt to balance a parent's sexuality as one factor among many in the best interest of the child test, judicial bias often results in a limitation of parental rights, as was done in the following Missouri Court of Appeals case.[59]

> We are not forbidding the parent from being a homosexual . . . . We are restricting the parent from exposing these elements of her 'alternative life style'. . . . We fail to see how these restrictions impose or restrict the parent's equal protection or privacy rights, where these restrictions serve the best interest of the child.[60]

In this case, the court considered the displays of affection and sleeping arrangements between the mother and her lesbian partner in order to determine the mother's visitation rights. The court found that "[a]ll of these factors present an unhealthy environment for minor children. Such conduct can never be kept private enough to be a neutral factor in the development of a child's values and character."[61] The court further stated that it "will not ig-

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daughter needs mother's care and advice and son needs male role models); ROBSON, LESBIAN (OUT)LAW, *supra* note 18, at 130; Massachusetts Supreme Judicial Court, *supra* note 52.

55 *In re* Marriage of Teepe, 271 N.W.2d 740 (Iowa 1973) (considering father's homosexuality to be "sexual misconduct," as one factor, among many, in making custody determination); S.E.G. v. R.A.G., 735 S.W.2d 164, 166 (Mo. Ct. App. 1987).

56 *Blew*, 617 A.2d at 35 (vacating the lower court's order based in part on the fear of third-party homophobic reactions).

57 *See generally* ESKRIDGE & HUNTER, *supra* note 16. Eskridge and Hunter assert that when an inquiry is made into either the morality of sexual orientation or how third parties relate to parents' sexuality, the inquiry is "slanted" in favor of heterosexual parents, leaving homosexual parents at a disadvantage.

58 S.E.G. v. R.A.G., 735 S.W.2d 164, 166 (Mo. Ct. App. 1987).

59 *Id.* at 167.

60 *Id.*

61 *Id.*

nore such conduct by a parent which may have an effect on the children's moral development."[62] Thus, the court restricted the mother's visitations rights because it determined that such factors had a negative impact on the child.

Many courts still apply the best interest of the child test with a heterosexual bias, in a way that discriminates against gay parents. For example, one court rejected a lesbian mother's suggestion that a broader best interest of the child standard be used, preferring a narrower test where homosexuality could never be a neutral factor in determining the best interest of the child.[63] This court explained its reason for applying a narrow best interest of the child test by writing, "[s]ince it is our duty to protect the moral growth and the best interests of the minor children, we find Wife's arguments lacking. Union, Missouri is a small, conservative community with a population of about 5,500. Homosexuality is not openly accepted or widespread."[64]

The sex of the child in relation to the sex of the parent can also be identified as a factor to be considered when courts apply the best interest of the child test to custody or visitation cases.[65] Judges have employed this factor in an implicit and explicit fashion. Implicitly, judges may rely on what they perceive to be commonly understood notions of gender and sex;[66] or explicitly, when the parents' gendered behavior is so outside normative boundaries that judges feel compelled to identify it as such.[67]

Explicitly, in *Bark v. Bark*, an Alabama case, the court began by stating the elements of the standard that facially incorporate a gender classification: "In making its determination of where the best interests of a child may lie, the court should be guided by such factors as the sex and age of the children."[68] The court then goes on to elaborate on other factors that implicate gender, including, "the respective home environment of the parties, the characteristics of those seeking custody, and the capacity and interest of each parent to provide for the varying needs of the children."[69] These

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62 *Id.*

63 S.E.G. v. R.A.G., 735 S.W.2d 164, 166 (Mo. Ct. App. 1987).

64 *Id.*

65 *See* Bark v. Bark, 479 So. 2d 42 (Ala. Civ. App. 1985).

66 *See* N.K.M. v. L.E.M., 606 S.W.2d 179, 183, 186 (Mo. Ct. App. 1980) (wherein an expert witness asserted that teenage daughters need a "mother figure").

67 *See id.* at 186 (restricting mother's custody because mother was 'subservient' to a close female friend who had a "powerful . . . dominant" personality, and did most of the driving for the two women).

68 *Bark*, 479 So. 2d at 43.

69 *Id.*

factors were applied in such a way as to operate as a proxy for facial gender categorization, by favoring a heterosexual father who conforms to paternal gender norm stereotypes, and disfavoring the lesbian mother who does not.[70] When applying the best interest of the child standard, the court looked at the following evidence: "[T]he mother, besides working, is devoting a great deal of her time to her female lover, who spends the night with her frequently . . . . Based on this evidence . . . the trial court could have reasonably concluded that . . . the mother's primary concern was not her children but her lover; therefore, the children's best interest would be served by placing their custody with their father."[71] This analysis relies heavily on gender stereotypes of mothers being bottomless wells of affection and care for their children, and anything less, especially a diversion that could be identified as sexual, is a catastrophic blow to her natural mothering abilities, rendering her unnatural and unfit to parent. Tellingly, the court here mentions nothing about the father's sexuality, whether he does or does not have a relationship, how much time he devotes to his job or new partner, or even what kind of parent he is. It says only that when the "burden" of childrearing "shift[ed]" to the father, he "very willingly assumed the child caring burden and has done an outstanding job."[72] The court leaves the impression that a mother has the assumed and unquestionable duty of taking care of her children, and if she dares object, then she will face punishment. For a father, however, childrearing is a "burden" but one that he must heartily bear if his ex-wife is a lesbian. Rather than actually relying on which parent can better meet the child's developmental needs, or even striving for a equal division of childrearing responsibilities, the *Bark* court begins with the premise that it is the mother's role to do so, a job that a woman must do full time, completely absent of any outside work or sexual interests. And if she cannot meet this high standard, then the court will punish the mother by awarding custody of her children to the father.

Often times the distinction between implicit and explicit use of gender or sexuality is blurred, depending on the particular judge's notions and personal beliefs about gender and sexuality.[73] In other words, even when judges believe their custody determinations do not employ gender or sexuality as a factor, they are in fact

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70 *See id.*

71 *Id.*

72 *Id.*

73 *See* Dalin v. Dalin, 512 N.W.2d 685, 688–89 (N.D. 1994).

doing just the opposite: making a determination that the child is better off with one parent due to their gender or sexuality.[74] For example, the Supreme Court of North Dakota offered the following as a defense of the court's judgment that the father who could not braid his daughter's hair was better off with her mother:

> Gender bias in judicial proceedings is wholly unacceptable . . . . We agree that if the trial court assumed that fathers, as a group, are incapable of adequately raising their daughters, it would be relying on an improper factor to determine custody . . . . However, we do not believe the above exchange evidences that the trial court based its custody determination on the misguided, stereotypical assumption that daughters require female caregivers . . . [t]he trial court merely followed up Roland's attorney's inquiry as to who did the cooking and Roland's disclosure that he relied on his mother for tasks such as potty training and hair braiding . . . Under the circumstances, we conclude that the trial court's questions were not motivated by or evidence of gender bias.[75]

As courts have become more aware of issues of sexuality in particular, some courts have adopted the "nexus test."[76] The "nexus test" is an attempt at a more neutral approach to the application of the parent's sexuality as a factor in the best interest of the child test in custody disputes.[77] In some jurisdictions judges look for a nexus between the parent's sexual orientation and the harm to the child when weighing a parent's sexuality as a factor.[78] The nexus test re-

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74 *See id.*

75 *Id.* at 689.

76 *See* Constant A. v. Paul C. A., 496 A.2d 1, 12 (Pa. Super. Ct. 1985) (Beck, J., dissenting) (arguing for the use of the nexus test, whereas the majority adopted the best interest of the child standard). Judge Beck wrote:

> I would hold that a parent's homosexuality is a relevant consideration *if* it can be shown that the parent's homosexual behavior adversely affects the child(ren). In order for homosexuality to be relevant there must be a clear factual showing of a connection between the parent's homosexuality and its adverse effect on the well-being of the child(ren). *Id.* (Beck, J., dissenting).

77 *See* Delong v. Delong, 1998 WL 15536, at *11 (Mo. Ct. App. Jan 20, 1998). ("[A]n irrefutable presumption, where a parent's homosexual conduct is, alone, determinative, is inherently inconsistent with the best interests of the child standard. . . . Accordingly, a nexus approach is adopted in custody cases involving the issue of a parent's sexual conduct.").

78 *See id. See also, e.g.*, T.C.H. v. K.M.H., 784 S.W.2d 281, 284–85 (Mo. Ct. App. 1989) (rejecting the *per se* approach to determining parental unfitness, but nevertheless finding a nexus between a lesbian mother's homosexual conduct and adverse effects on the 'morality' and 'well-being' of her children.); M.P. v. S.P., 404 A.2d 1256, 1263 (N.J. Super. Ct. App. Div. 1979) (noting lack of evidence that a lesbian mother's homosexuality would adversely affect her daughters.); Wald, *supra* note 4, at 427.

quires the court to find a relationship between parental sexuality and harm to the child.[79] "Under the 'true' nexus approach, the burden of persuasion is allocated so that there must be proof that parental sexuality will have an adverse impact on the child."[80] However, despite the more evenhanded intent of the nexus test, some courts still find it appropriate to apply the test in such a way that requires the homosexual parents to prove an absence of harm to the children.[81] For example, judges often consider factors such as whether the gay parent is "discreet" versus "flamboyant" when making custody determinations between heterosexual and homosexual parents.[82]

While the nexus test is based on the best interest of the child standard and considers homosexuality as only a factor, it is not the sole factor in awarding custody unless the homosexual conduct of the parent harms the child.[83] The homosexual orientation of a parent is not by itself evidence that the parent is unfit.[84] Sexual orientation can also be considered as a secondary factor by a court even if there is a statute that establishes a list of primary factors (not including sexuality) to be considered in awarding custody, because all factors need to be considered.[85]

Courts have explained and applied the nexus test thusly:

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79 S.N.E. v. R.L.B., 699 P.2d 875, 878 (Alaska 1985).

80 Ruthann Robson, *Our Children: Kids of Queer Parents & Kids Who are Queer: Looking at Sexual Minority Rights From a Different Perspective*, 64 ALB. L. REV. 916, 919 (2001).

81 *See Delong*, 1998 WL 15536, at *12 (R 10.9(a)(ii) (ordering trial court to apply the nexus test and determine what effect, if any, mother's homosexuality has on children"). *See also, e.g.*, Thigpen v. Carpenter, 730 S.W.2d 510, 513–14 (Ark. Ct. App. 1987) (adopting nexus test with the presumption that "illicit sexual conduct on the part of the custodial parent is detrimental to the children" and determining that "homosexuality is generally socially unacceptable"); McGriff v. McGriff, 99 P.3d 111, 117 (Idaho 2004) (noting that court applied nexus test); T.C.H. v. K.M.H., 784 S.W.2d 281 (Mo. Ct. App. 1989) (upholding the application of the nexus test); Robson, *Our Children*, *supra* note 80, at 919.

82 M.A.B. v. R.B., 510 N.Y.S.2d 960, 963 (N.Y. Sup. Ct. 1986) (granting custody to a gay father on the ground that the "father's behavior has been discreet, not flamboyant."); Clifford R. Rosky, *Like Father, Like Son: Homosexuality, Parenthood, and the Gender of Homophobia,* 20 YALE J.L. & FEMINISM 257, 270 (2009).

83 Pryor v. Pryor, 709 N.E.2d 374, 378 (Ind. Ct. App. 1999) (relying on precedent to hold that "sexual orientation as a single parental characteristic is not sufficient to render that parent unfit to retain physical custody of a child"); Paul C. v. Tracy C., 622 N.Y.S.2d 159, 160 (App. Div. 1994) (citing state case law to hold that "[w]here a parent's sexual preference does not adversely affect the children, such preference is not determinative in a child custody dispute").

84 Hodson v. Moore, 464 N.W.2d 699, 701 (Iowa Ct. App. 1991) (finding that a "discreet homosexual relationship" is not a *per se* bar to custody of a child).

85 Hassenstab v. Hassenstab, 570 N.W.2d 368, 372 (Neb. Ct. App. 1997) (holding that sexual acts are interpreted as sexual misconduct, but that adverse effects or damage by reason of the sexual acts must be shown to justify a change in custody).

> [I]ndiscreet behavior, such as living with someone of the opposite sex without the benefit of marriage, is only a factor to be considered, and our case law requires that there be evidence presented showing that such misconduct is detrimental to the child. . . . Such misconduct is not evidence in itself of a substantial detrimental effect on a child despite the absence of any proof of harm to the child.[86]

Even when finding that homosexuality by itself cannot be a basis for custody modification, one court has found that it was a valid concern of the heterosexual mother's that the father was insensitive when communicating with his daughters about his sexuality.[87] Here, the trial court judge held that the father's decision to "openly co-habit[ate]" with his male partner should be communicated in an appropriate manner because it will spark questions from the children and their friends, and be an issue in the "conservative culture and morays (sic) in which the children live. Father has shown some insensitivity to the girls' needs regarding his lifestyle, even contrary to the recommendations of the Court-appointed evaluator."[88] While the Supreme Court of Idaho went on to clarify that it was not basing a change in custody on the father's sexuality, it nevertheless acknowledged that *how* a parent communicates their homosexuality to their children was relevant for custody determinations.[89] The Court even went so far as to say the mother's request that a professional counselor assist both parents in explaining the father's homosexuality was reasonable.[90] Even though the court believed it did not use homosexuality alone as a basis for modifying custody, it clearly placed great weight on the father's sexuality, stating that,

> [w]hile we acknowledge that homosexuality is a sensitive issue and that a parent may feel he or she has a valid concern about the way in which the other parent communicates this to their children; whether or not a parent's sexual orientation will, in and of itself, support a change in custody of the children is a different issue altogether.[91]

It is doubtful, that it is a "different issue altogether" though, when there is no mention of whether the mother's lifestyle required appropriate explanation to the children, or required the assistance of

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86 Jones v. Haraway, 537 So. 2d 946, 947 (Ala. Civ. App. 1988).
87 McGriff v. McGriff, 99 P.3d 111, 117 (Idaho 2004).
88 *Id.* at 117.
89 *Id.*
90 *Id.* at 118.
91 *Id.* at 117.

a professional counselor. One might argue that *all* divorcing couples would do well to employ the assistance of a professional when explaining the new divorce arrangement to their children, or when introducing new partners into the children's lives. However, the court reserved that special standard only for the homosexual parent, indicating that the father's sexuality did in fact have some bearing on the court's custody determination.[92]

Key to the application of the nexus test is the requirement that parents show how the other parent's sexuality will have a harmful effect on the child.[93] Appellate courts sometimes differ from trial courts in their evaluation of the evidence offered to show such harm.[94] The Supreme Court of Alabama reversed a Court of Civil Appeals application of the nexus test, after the trial court found that there was no evidence indicating that a mother's lesbian relationship had a detrimental effect upon the child.[95] The Supreme Court, however, agreed with the trial court's application of the nexus test, which, after hearing evidence from counselors that the child "touch[ed] herself 'excessively' in the genital area . . . might have issues of anger and sexuality" and might be the victim of sexual abuse (a suspicion stemming from the father's concern over the mother's sexuality), granted the father's motion to change custody.[96] The Supreme Court also found the testimony from the child's appointed guardian *ad litem* to be persuasive: "studies suggest that a child reared by homosexual parents could suffer exclusion, isolation, a drop in school grades, and other problems."[97] The Supreme Court granted custody to the father because, even though evidence showed the mother loved the child, "she has chosen to expose the child continuously to a lifestyle that is 'neither legal in this state, nor moral in the eyes of most its citizens.'"[98] Instead, the Court favored the father and stepmother, because they "have established a two-parent home environment where hetero-

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92 *Id.* at 118.

93 The nexus test is not uniformly used or applied in all jurisdictions. Even when it is applied, there are often a lot of variations in its applications due to the nature of family courts. When considering the parent's sexuality in a custody determination, the nexus test requires that there is a relationship or connection between a parent's sexual conduct, homosexual or heterosexual, and the harm to the child. Delong v. Delong, 1998 WL 15536, at *11 (Mo. Ct. App. Jan 20, 1998); M.P. v. S.P., 404 A.2d 1256, 1263 (N.J. Super. Ct. App. Div. 1979); T.C.H. v. K.M.H., 784 S.W.2d 281, 284–85 (Mo. Ct. App. 1989).

94 *Ex parte* J.M.F., 730 So. 2d 1190, 1194 (1998).

95 *Id.* at 1194.

96 *Id.*

97 *Id.*

98 *Id.* at 1196.

sexual marriage is presented as the moral and societal norm."[99]

As demonstrated in all of these cases, judges have wide latitude to enforce custody orders based on myths about homosexuals as parents and gender bias.[100] Charlotte Patterson, a psychologist specializing in childhood development in the context of family, writes that "[o]ne issue underlying . . . judicial decision making in custody litigation . . . has been questions concerning the fitness of lesbians and gay men to be parents."[101] Patterson identifies four major categories of fear about the effects of lesbian or gay parents on children reflected in judicial decision-making about child custody and in public policies: 1) disturbances in sexual identity; 2) psychological health; 3) difficulty in social relationships; and 4) heightened risk of sexual abuse.[102] In sum, for gay and lesbian parents, sexuality takes center stage above all other factors, including their parenting abilities. They are considered risks for no reason other than being perceived as overtly sexual and promiscuous, regardless of what type of parent they may actually be.

III. The Role Model Argument

An argument against awarding custody to homosexual parents based on notions of gender and sexuality is that children will not develop well without normative gender[103] and sexual role models.[104] This role model argument is often based on psychological and sociological theories[105] asserting that children benefit from and deserve a role model of each gender in order to develop properly.[106] Courts have applied the role model argument to both heterosexual and homosexual families. For example, a judge can

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99 *Id.* at 1195.

100 *See generally* Wis. Stat. Ann. § 767.41(2)(2) (West 2011); Ala. Code § 30-3-1 (1998).

101 Charlotte J. Patterson, *Children of Lesbian and Gay Parents*, 63 Child Dev. 5, 1025, 1029 (1992).

102 *Id.*

103 Harris v. Harris, 647 A.2d 309, 312, 314 (Vt. 1994) (upholding the trial court's determination that, though ostensibly not based on gender bias, the boy should remain in the custody of this father because they enjoy hunting, fishing and playing softball together and his father could teach him "things a young boy should know").

104 *In re* J.S. & C., 324 A.2d 90, 96 (N.J. Super. Ct. Ch. Div. 1974) (finding persuasive psychologist's testimony that "the total environment to which the father exposed the children could impede healthy sexual development in the future . . . the father's milieu could engender homosexual fantasies causing confusion and anxiety which would in turn affect the children's sexual development . . . it is possible that these children upon reaching puberty would be subject to either overt or covert homosexual seduction which would detrimentally influence their sexual development.").

105 Patterson, *supra* note 101, at 1027–28.

106 *See In re J.S. & C.*, 324 A.2d at 96.

apply the role model argument in custody disputes involving a homosexual parent when the judge determines that the children need to learn about both gender and sexuality from heterosexual parents as role models.[107] Additionally, the role model argument can be used to award custody between two heterosexual parents by matching the child's gender to the parent's gender, such as the father-daughter hair braiding example mentioned in the Introduction.[108] In applying the role model argument between two heterosexual parents in a custody dispute, one court awarded custody of the daughter to the mother, and custody of the son to the father because "the health and sex of Corey favored Ricky, considering the need for a strong father figure to act as a role model, but the health and sex of Rikkita favored Sandra, considering the need for her mother's guidance and advice."[109] One court explicitly justified considering the parents' sex during custody disputes by writing,

> [t]he problem is that man and woman were not created alike or even equal in all respects, and all the laws and constitutional amendments in the world cannot change that fact. Can you really say to a trial judge who decides custody of a baby who is being breast-fed that he should not consider the sex of the parents?[110]

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107 S. v. S., 608 S.W.2d 64, 66 (Ky. Ct. App. 1980) (expressing concern that the child "may have difficulties in achieving a fulfilling heterosexual identity of her own in the future.").

108 Dalin v. Dalin, 512 N.W. 2d 685, 691 (N.D. 1994). *See also Harris,* 647 A.2d at 314.

109 Sandlin v. Sandlin, 906 So. 2d 39, 41 (Miss. Ct. App. 2004) *citing* Moore v. Moore, 183 S.E.2d 172, 174 (Va. 1971) (holding that custody of the girls is awarded to the mother because the mother is universally recognized as the natural guardian and custodian of her children and is a fit and proper person); Wallace v. Wallace, 420 So. 2d 1326, 1328 (La. Ct. App. 1982) (upholding trial court's decision to award custody of boy to father, and custody of girl to mother); Giffin v. Crane, 351 Md. 133 (Md. 1998) (holding that the trial court's gender-based classification violated state constitution). The Court of Appeals of Maryland remanded the custody case back to the trial court after it reviewed the lower court's unambiguous record that custody of the daughter should go to the mother because the daughter needed a "female hand." *Id.* at 155. In the dissenting opinion, Judge McAuliffe explained that he does not agree with the appellate court's decision arguing that the trial court's references to gender was relevant to the custody determination: "I do not understand the majority to hold that consideration of gender is always inappropriate in a custody case. . . . Judges should be precluded from concluding that a special relationship, bonding, or ability to communicate between a parent and a child exists solely on the basis that the parent and child are of the same sex; judges should not be precluded from finding the existence of such a relationship from the facts of the case, even though that relationship may have resulted in part from the reality that the parent and child are of the same sex." *Id.* at 156–7 (McAuliffe, J., dissenting).

110 Gay v. Gay, 737 S.W.2d 94, 95 (Tex. App. 1987).

As such, this court applied the role model argument based on its own unverified assumptions that men and women are not equals.

One court, employing the role model argument, presumed that parents' gender largely defines the home environment that they provide their children.[111] For example, a state appellate court in Louisiana wrote that the "difference between the [mother's home and the father's home] is psychologically based. As the child is approaching puberty, both experts testified that it would be more beneficial to the child to be with a same-sex parent during the difficult puberty transitional years."[112] In other words, the Louisiana court linked gender with certain pubescent psychological needs, which it determined could only be found in the home of a same-sex parent.

In some instances, courts have considered expert testimony from child psychologists who base their custody recommendations solely on parents' gender, even without having interviewed both parents.[113] As a witness, one psychologist stated that, "if both parents are equally capable of parenting, if both parents love the child, the boy is still better off with the father."[114] In a report entered into evidence, the same psychologist wrote:

> [The father] is an excellent model for sex appropriate development. . . . If the assumption could be made that the mother is equally capable of parenting [the child], the data obtained in the area of child development become relevant in helping to made [sic] a decision in this case. This child is more likely to experience normal healthy development if placed in the primary custody of his father.[115]

Despite its application to both same-sex and different-sex families, the role model argument is particularly damaging—and unconstitutional—for same-sex families because it often conflates gender roles and sexuality. In fact, it relies even more heavily on harmful stereotypes of gender and sexuality. According to one scholar,

> [a]lthough judicial fears of 'inherent' damage to the child, such

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111 Krotoski v. Krotoski, 454 So. 2d 374, 376 (La. Ct. App. 1984).

112 *Id.*

113 Weber v. Weber, 512 N.W.2d 723, 725 (N.D. 1994); *Giffin*, 351 Md. at 142-144 (hearing expert testimony at trial that psychologically, daughters need to bond with their mothers, and that it is not uncommon for children to communicate more effectively with their same-sex parent); Scott v. Scott, 665 So. 2d 760, 765 (La. Ct. App. 1995) (considering a clinical psychologist's testimony that seeing two adult women being affectionate together would be a "destructively emotional event" for a child who believed that only males and females are supposed to be intimate with each other).

114 *Weber*, 512 N.W.2d at 725.

115 *Id.*

> as impairment of emotional or moral development, are faced by many parents because of . . . sexual behavior, the homosexual parent is met with judicial concerns that the child will be gay . . . or that the parent will be a poor role model.[116]

When explicitly making the role model argument, opponents of gay parenting articulate a number of concerns over how parents' sexuality will potentially (negatively) influence their children's sexual and gender development. For example, some of the fears that underlie the role model argument include: "the fear that the sons of lesbians and gay men will be less masculine and more feminine than the sons of heterosexual parents and that the daughters of lesbian and gay men will be less feminine and more masculine than the daughters of heterosexual parents";[117] the "argument that male children can best learn from their male parents what it means to be a complete man and a good father and that female children can best learn from their mothers what it means to be a complete woman and a good mother";[118] and "the idea that men as fathers and women as mothers have unique and complementary skills and attributes that are absent whenever a woman tries to father a child and a man tries to mother a child."[119] Thus, the role model argument is often used to address the court's concern that same-sex parenting will negatively affect the child's sexual and gender development.

Lynn Wardle is a major proponent of the belief that gay parents will negatively influence their children's sexual and gender development. In fact, his writing is often cited by those making arguments against gay and lesbian parenthood. In his writings, Wardle emphasizes that parents are important as role models for their children of the same gender because

> [c]hildren learn to be adults by watching adults. Children are generally more compliant with the parent of the same sex. The importance of the opposite-gendered parent for the complete emotional and social development of the child is now recognized as well: Boys and girls build their notions of their sex roles from experience with both sexes. The loss of cross-gender parenting may have severe emotional consequences for the

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116 Katheryn D. Katz, *Majoritarian Morality and Parental Rights*, 52 ALB. L. REV. 405, 448 (1988).

117 Carlos Ball, *Lesbian and Gay Families: Gender Nonconformity and the Implications of Difference*, 31 CAP. U. L. REV. 691, 717 (2003).

118 *Id.* at 716 (citing Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children,* 1997 U. ILL. L. REV. 833, 854 (1997)). *See also* Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children,* 1997 U. ILL. L. REV. 833, 861-62 (1997).

119 Ball, *supra* note 117, at 710.

> child. For example, the absence of a father in the home may result in a daughter having trouble relating to men throughout her adult life. Indirectly, it is also best for children to be raised by both a father and a mother because men mature and become most responsible and relate better to children when they have raised children. This is true in part because the transition from adult male to father is a much more complex task than some imagine.[120]

The Supreme Court of Alabama, quoting Wardle, noted that "the record contains evidence from which the trial court could have concluded that '[a] child raised by two women or two men is deprived of extremely valuable developmental experience and the opportunity for optimal individual growth and interpersonal development."[121] The Court focused on a doctor's testimony that "a child is best served by having both a male and female role model in the house, rather than two male, or two female, role models."[122]

Courts have generally accepted sociological and psychological theories that assume children need male and female role models, which same-sex families cannot provide.[123] "Theories of psychological development have traditionally emphasized distinctive contributions of both mothers and fathers to the healthy personal and social development of their children. As a result, many theories predict negative outcomes for children who are raised in environments that do not provide these two kinds of inputs."[124] These social learning theories are concerned about the possibility that a child with lesbian or gay parents will not develop according to norms for his or her own sex, or will be without a same-gender role model entirely.[125] This is a typical argument used against gay and lesbian parents seeking custody of their children.

The prominence of a parent's homosexual relationships in custody decisions often seems to reflect judges' personal prejudice against homosexuality as much as their fear of wayward childhood development. In *Cook v. Cook*, the "crux of the case," according to the judge, was the mother's lesbian relationship with a woman

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120 Wardle, *supra* note 118, at 860–61.

121 *Ex Parte* J.M.F., 730 So. 2d 1190, 1196 (Ala. 1998) (Wardle, *supra* note 118, at 860–61).

122 *Id.* at 1193.

123 *See, e.g.*, S. v. S., 608 S.W.2d 64, 66 (Ky. Ct. App. 1980); *Ex Parte J.M.F.*, 730 So. 2d at 1196; Weber v. Weber, 512 N.W.2d 723, 725 (N.D. 1994).

124 Patterson, *supra* note 101, at 1027–28.

125 Carlos A. Ball, *Warring with Wardle: Morality, Social Science, and Gay and Lesbian Parents*, 1998 U. ILL. L. REV. 253, 305 (1998).

named Shannon.[126] At trial, when drafting the joint custody agreement, the court inserted a "Shannon Clause," which read, "[n]either parent shall allow Shannon Maloney to be associated with the minor children and thereby not allowing her to live or visit in the home at 2961 Highway 4, Ringgold, Louisiana."[127] Though the court apparently found that Shannon's "athletic . . . build" was relevant, it did not include any description of any of the other parents' physicality.[128] A mental health counselor, who testified on the merits of the 'Shannon Clause,' "warned that the children would suffer greatly if brought up in a homosexual environment. This view was informed by his belief that a lesbian partner would distort the children's (especially the girls') perception of female role models."[129]

In some cases, the sexual activity of both parents can be an issue in custody disputes.[130] One mother made allegations that the father "is involved in adulterous relationships with women to which the minor child is subjected," while the father alleged that "[t]he mother has been and plans to continue to live in a lesbian relationship."[131] After a "careful consideration," which included noting that the father admitted to "adultery and/or fornicating with various women," and using illegal drugs, and warning that the court did not "condone his actions," the court considered the impact the father's behavior might have on his three year-old daughter:[132]

> As yet, this conduct does not seem to have affected Cynthia. Indeed, nothing in the record indicates that she is even aware that such conduct occurs. The father has taken care to insure that the child remains unaware of both the illegal drug use and the adultery. Thus far, he has been successful.[133]

Here, the court gave the father the benefit of the doubt by assuming that he would be able to "successfully" carry on his "fornicating" without his daughter noticing and made no mention of his sexual activity possibly affecting his daughter. The lesbian mother, however, did not receive a similar vote of confidence. The court concluded that the mother's sexuality *per se* would indeed harm her daughter as she approaches "young womanhood":

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126 Cook v. Cook, 965 So. 2d 630, 632 (La. Ct. App. 2007).
127 *Id.*
128 *Id.* at 633.
129 *Id.*
130 *See, e.g.*, Bennett v. O'Rourke, 1985 WL 3464, at *4 (Tenn. Ct. App. Nov. 5, 1985); Peyton v. Peyton, 457 So. 2d 321, 322 (La. App. 2d Cir. 1984).
131 *Bennett*, 1985 WL 3464, at *1.
132 *Id.* at *2.
133 *Id.*

> Admittedly, Cynthia has been examined and found to be normal, well adjusted, and unaffected as yet by the fact that her mother is a lesbian. However . . . '[t]he Court does not need to wait, though, till the damage is done. If the child's situation is such that damage is likely to occur as her sexual awareness develops with the approach of young womanhood, the court may in a proper case remove her from the unwholesome environment.' In light of the fact that here the homosexual parent and the minor child are both female, we consider this factor particularly important because of the increased chance of role-modeling.[134]

In response to such cases that remove children from the custody of their homosexual parents,[135] gay and lesbian scholars have downplayed the correlation between the sexual orientation of the parent and the development of their children. As a defensive posture against attacks from lawyers and judges who believe that homosexuality negatively impacts children, some scholars assert that there is simply no correlation between a parent's sexuality and their children's development.[136] As Judith Stacey and Timothy J. Biblarz note, "[b]ecause anti-gay scholars seek evidence of harm, sympathetic researchers defensively stress its absence."[137] They found that

> [t]his body of research, almost uniformly, reports findings of no notable differences between children reared by heterosexual parents and those reared by lesbian and gay parents, and that it finds lesbian and gay parents to be as competent and effective as heterosexual parents. Lawyers and activists struggling to defend child custody and adoption petitions by lesbians and gay men . . . have drawn on this research with considerable success. Although progress is uneven, this strategy has promoted a gradual liberalizing trend in judicial and policy decisions.[138]

However, other research has shown a connection between sexual orientation and child development.[139] Some lesbian and gay scholars and legal theorists strive to use such a connection as an argu-

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134 *Id.* at *3 (*quoting* L. v. D., 630 S.W.2d 240, 245 (Mo. Ct. App. 1982)).

135 *See Ex Parte* J.M.F., 730 So. 2d 1190, 1196 (noting Wardle's research that children need two heterosexual parents for proper development).

136 Patricia J. Falk, *The Gap Between Psychosocial Assumptions and Empirical Research in Lesbian-Mother Child Custody Cases, in* REDEFINING FAMILIES: IMPLICATIONS FOR CHILDREN'S DEVELOPMENT, 131–56 (Adele Eskeles Gottfried & Allen W. Gottfried eds., 1994).

137 Judith Stacey & Timothy J. Biblarz, *(How) Does the Sexual Orientation of Parents Matter?* 66 AM. SOC. REV. 160 (2001).

138 *Id.* at 160.

139 *See* Gillian A. Dunne, *Opting into Motherhood: Lesbians Blurring the Boundaries and Transforming the Meaning of Parenthood and Kinship*, 14 GEND. & SOC'Y. 11 (2000).

ment in favor of awarding lesbian and gay parents custody. Judith Stacey has written that some sociological data "implies that lesbian parenting may free daughters and sons from a broad but uneven range of traditional gender prescriptions. It also suggests that the sexual orientation of mothers interacts with the gender of children in complex ways."[140] Stacey believes that lesbian and gay family advocates should explore these differences but must not trivialize gay and lesbian parents' fear of losing their parental rights.[141] Stacey does not believe, however, that such "social science research provides . . . grounds for taking sexual orientation into account in the political distribution of family rights and responsibilities."[142]

If such data is to be used by homosexual parenting advocates, then it is also important to examine the interplay between the concepts of sexuality and gender used by courts. Often times the notions of gender and sexuality are unintentionally co-mingled or arbitrarily separated.[143] This is again, due in large part to the wide amount of discretion afforded family court judges, and a result of each judge relying on their own personal knowledge of, or education about, gender and sexuality. Whatever the cause, when judges conflate sexuality and gender in a custody determination, the result is often debilitating to the custody claims of gay and lesbian parents in particular.[144]

As Clifford Rosky notes,"[f]or opponents of gay and lesbian parenthood, concerns about gender development are rarely expressed by themselves, and they are often expressed as synonyms or euphemisms for concerns about sexual development."[145] Argu-

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140 Stacey & Biblarz, *supra* note 137, at 168–170.

141 *Id.* at 170. Researchers who are sympathetic to the right of gays and lesbians to become parents stress the absence of any connection between the parents' sexuality and any negative impact on their children. Because they are defending the parental rights of gays and lesbians against attacks from anti-gay scholars, their research only focuses on the absence of any negative connections, rather than focusing on the presence of positive outcomes for children of gay and lesbian parents.

142 *Id.* at 179.

143 Collins v. Collins, No. 87-238-II, 1988 WL 30173, at *6 (Tenn. Ct. App. Mar. 30, 1998) (Tomlin, P.J., concurring) ("While we are dealing with lesbianism, there is no ground for a gender-based distinction. Therefore, I shall speak to this issue solely in terms of homosexuality. Homosexuality has been considered contrary to the morality of man for well over two thousand years.").

144 Pleasant v. Pleasant, 628 N.E.2d 633, 637, 639 (Ill. App. Ct. 1993) (using an inquiry about a display of the male gender at a gay pride parade as a substitute for making inquiries about sexuality, when judge asked the Respondent mother about the masculinity of the participants in a gay pride parade). *See also* Valdes, *supra* note 16, at 20 (discussing how the conflation of sex and gender affects the entire legal system).

145 Rosky, *supra* note 17, at 345.

ments about improper gender role-modeling are often veiled anxieties about children not learning the appropriate gender role, which in turn might affect, or even harm, their sexual development, because they might *become* gay. In *Pleasant v. Pleasant*, the court found that a ten-year-old child whose lesbian mother brought him to a gay pride parade had a "gender identity problem." The judge, concerned about the level of masculinity exhibited by men at the parade, asked if there were "men who [were] not masculine in the parade," in order to make the custody determination.[146] Other times, courts' concern over the sexual identity of the child is more explicit. Such fears were articulated by one psychological expert who testified that a four-year-old boy should live with parents in "a normal relationship wherein males and females adhere to their roles," because "homosexuality is a learned trait and it would be very difficult for [the child] to learn and approximate sex role identification from a homosexual environment."[147] Whether courts state it explicitly or implicitly, the role model argument is often used in cases where the judge, not the parent, is concerned that the child will become a homosexual or develop gender identity problems.

Clifford Rosky, in *Like Father, Like Son: Homosexuality, Parenthood, and the Gender of Homophobia,* explores the intersection of gender and sexuality in child custody cases by analyzing the gender of homophobia expressed by litigants, experts, and judges. Rosky accomplishes this "[b]y conducting a comparative analysis of reported family law opinions, showing that gay and lesbian parents are subjected to gender-influenced stereotypes in custody and visitation cases—stereotypes that are influenced by the parent's gender, the child's gender, and the judge's gender."[148] Instead of "lump[ing]" together gay fathers and lesbian mothers, or sons and daughters, Rosky pulls apart each unique relationship and compares cases.[149]

Rosky's research uncovered a pattern whereby even though judges apply the role model argument equally to lesbian moms and gay dads, there is an unequal application to sons and daughters.[150] Rosky identifies that family courts express concern over gay parents raising sons, more often than daughters, when deciding custody

146 *Pleasant*, 628 N.E.2d at 637, 639.

147 Dailey v. Dailey, 635 S.W.2d 391, 394 (Tenn. Ct. App. 1981).

148 Rosky, *supra* note 17, at 260.

149 *Id.*

150 *Id.* at 297.

and visitation disputes.[151] Rosky posits that one explanation for more concern over the role modeling and sexual development of sons can be attributed to theories about sexual development that assumes children's relationships with their gay parents will affect their sexuality. He notes that, "conventional assumptions about the process of sexual development [are] that before puberty, children have both homosexual and heterosexual tendencies, and that during puberty, they develop sexual relationships based on models provided by adults, especially parents."[152]

Rosky refines his point by comparing old and new theories of childhood sexual development.[153] The old theory considers homosexuality to be a mental disorder and attributes its development in boys to domineering mothers.[154] The new theory has traded homosexuality for "Gender Identity Disorder of Childhood" (GIDC).[155] The new theory is more specifically focused on the gender development of boys. The theorists still blames "over-involv[ed]" or "overprotective[ ]" mothers for their sons' effeminacy. Most importantly, the theory finds that gender identity disorders are "precursor[s] to homosexuality in adulthood" mostly for boys.[156] Rosky theorizes that such a disproportionate focus on homosexual parents, as gay role models to sons that may become gay, reveals the gendered homophobia of judges, experts and litigants who are more fearful of male homosexuality than female homosexuality.[157]

Rosky's hypothesis leads one to speculate what, if any, interest the state has in monitoring the gender and sexuality development of children. Rosky suggests that such a gendered and heterosexist application of the role model argument belies the state's true interest in promoting the "fantasy" that gay and lesbian children do not, or should not, exist, and if they do, then they do not matter or should cease to exist.[158]

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151 *Id.*

152 *Id.* at 295.

153 *Id.* at 301 (citing Eve Kosofsky Sedgwick, *How to Bring Your Kids Up Gay: The War on Effeminate Boys*, *in* TENDENCIES 154 (1993)).

154 Rosky, *supra* note 17, at 301–02.

155 *Id.* at 303.

156 *Id.* at 303–04 (citing Kenneth J. Zucker & Robert L. Spitzer, *Was the Gender Identity Disorder of Childhood Diagnosis Introduced into DSM-III as a Backdoor Maneuver to Replace Homosexuality? A Historical Note*, 31 J. SEX & MARITAL THERAPY 31, 32 (2005); AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, DSM-IV-TR, at 576–82 (4th ed., text rev., 2000)).

157 *Id.* at 349.

158 *Id.* at 347.

IV. The Role Model Argument as Unconstitutional

Whether or not the state's true interest is actually to ignore or discourage the presence of gay children, the state does have an interest in protecting the welfare of children and families.[159] According to the best interest of the child doctrine, the court's role is to determine which parent will have custody of their child in a way that benefits the child, without unconstitutionally infringing upon their protected familial rights.[160]

In the past, advocates have employed a number of arguments to challenge the constitutionality of custody determinations focusing on parents' and children's rights to equality and liberty.[161] To do so, proponents of gay parents' rights have made challenges based on the Supreme Court's decisions in *Palmore v. Sidoti*, *United States v. Virginia*, and *Romer v. Evans*.

The Supreme Court's decision in *Palmore v. Sidoti* demonstrates the unconstitutionality of certain custody factors, by holding that race cannot be used as a factor in custody determinations.[162] At issue in *Palmore* was whether a white mother, married to a black man, could retain custody of her white daughter. The Court held that it is not permissible under the Equal Protection Clause of the Constitution for courts to consider private biases (such as racism), or the effects of the private bias upon the child, when making custody determinations.[163] The *Palmore* case offers a helpful defense

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159 Albright v. Albright, 437 So. 2d 1003, 1005 (Miss. 1983) ("We reaffirm the rule that the polestar consideration in child custody cases is the best interest and welfare of the child.").

160 *See generally In re* J.S. & C., 324 A.2d 90 (N.J. Super. Ct. Ch. Div. 1974). The Court first acknowledged parents' rights to visitation with and custody of their children. However, the court opined that the court may trump these rights if doing so would protect the best interest of their child. Parental "rights will fall in the face of evidence that their exercise will result in emotional or physical harm to a child or will be detrimental to the child's welfare . . ." *Id.* at 95.

161 *See generally id.* The Court concludes that all parents, hetero- and homosexual alike, have constitutionally protected fundamental rights to their children, rights that may not be restricted on the basis of sexual orientation. The court holds that "[t]he right of a parent, including a homosexual parent, to the companionship and care of his or her child, insofar as it is for the best interest of the child is a fundamental right protected by the First, Ninth, and Fourteenth Amendments to the United States Constitution. That right may not be restricted without a showing that the parent's activities may tend to impair the emotional or physical health of the child." *Id.* at 92. Wald, *supra* note 4, at 391.

162 Palmore v. Sidoti, 466 U.S. 429, 434 (1984).

163 *Id.* at 433. The Court concluded that it is impermissible to allow private biases and consider speculative injuries when determining custody. The Court raised the issue as "whether the reality of private biases and possible injury they might inflict are not permissible considerations for removal of an infant child from custody of its natural mother . . . . The Constitution cannot control such prejudices but neither can it

against opponents who argue that children of gay parents will grow up to be stigmatized or harassed.[164] *Palmore* held that even if harassment can be shown to exist, the harassment is nevertheless a private bias of homophobic or heterosexist people, and as such, it is not a factor that can be constitutionally considered in a custody case.[165]

Carlos Ball discusses the strength of a constitutional challenge to bans on gay adoption based on *United States v. Virginia,* an argument that is analogous to an argument against bans on gay and lesbian custody.[166] Ball contends that because the Supreme Court held in *United States v. Virginia* that laws based on overbroad gender stereotypes violate the Equal Protection Clause, laws prohibiting gays and lesbians from adopting are unconstitutional because they cannot withstand heightened scrutiny.[167] Citing *United States v. Virginia*, Ball writes,

> [i]t is constitutionally impermissible for the state to be in the business of promoting the perpetuation of traditional gender roles from one generation to the next. The idea that women (in this case mothers) are better able to provide children with certain benefits and that men (in this case fathers) are better able to provide *distinct* benefits is exactly the kind of impermissible reliance on traditional gender stereotypes that the Supreme Court, in other contexts, has rejected.[168]

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tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Id.*

164 Katharine T. Bartlett identifies an issue of gender underlying the issue of race in *Palmore*, which received no attention from the Supreme Court except to note that the white mother began living with her African-American boyfriend before they were married. On this subject, the Court wrote that the mother's "'see[ing] fit to bring a man into her home and carry[ing] on a sexual relationship with him without being married to him' showed that she 'tended to place gratification for her own desires ahead of her concern for the child's future welfare.'" Bartlett hypothesizes this judgment as an example of how courts discriminate against women by "penalizing" mothers who cohabitate outside of marriage more severely than fathers are penalized for similar living arrangements. Katharine T. Bartlett, *Comparing Race and Sex Discrimination in Custody Cases,* 28 HOFSTRA L. REV. 877, 881 (2000) (quoting *Palmore*, 466 U.S. at 431).

165 *Palmore*, 466 U.S. at 429.

166 Ball, *supra* note 117, at 731, citing United States v. Virginia, 518 U.S. 515 (1996) ("It is easy to foresee a state's possible response to the use of sex discrimination arguments as a way of challenging a ban on adoption by lesbian and gay couples. The first likely response would be that the ban is not sex discrimination because . . . [t]here is . . . no burden imposed on women that is not imposed on men and vice-versa. The same kind of argument proved to be unsuccessful in *Loving v. Virginia*.")

167 Ball, *supra* note 117, at 732 ("[I]t is . . . interesting to explore whether, assuming a court were to apply heightened scrutiny, the state's interest in having children raised by a man and a woman in order to provide children with appropriate gender role modeling could survive that form of scrutiny. I do not believe it could.").

168 *Id.*

Rosky raises a possible defense using *Romer v. Evans*, where the Supreme Court held that the Equal Protection Clause does not permit state action based solely on "animus" toward gay men and lesbians.[169] "After all, the state's interest in preventing the development of gay and lesbian children amounts to little more than a desire to minimize the number of gay and lesbian adults in the world—the pursuit of a fantasy that gay and lesbian *people* will cease to exist."[170] Rosky reveals the weakness of this constitutional challenge arguing it would be "naïve" to rely on *Romer* alone to protect the rights of gay and lesbian parents where they would not be subjected to role model stereotyping in custody disputes, given that there are barely any "constitutional protections historically afforded to gay men and lesbians."[171] Despite the lack of historical precedent afforded to the parental rights of homosexual parents,[172] significant groundwork can, and should, be laid in order to demand constitutional protections for all homosexual families; such progress can be made by employing arguments based on *Lawrence* and *Craig*.

When judges make gendered role model arguments they rely on overbroad gender stereotypes,[173] which are prohibited by the 1976 Supreme Court case, *Craig v. Boren*.[174] In *Craig*, the court held that a law prohibiting the sale of 3.2% beer to males under the age of 21, while allowing sales to females over the age of 18, denied 18- to 20-year-old males equal protection of the laws in violation of the Fourteenth Amendment.[175] To survive constitutional challenge,

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169 Rosky, *supra* note 17, at 347 (citing Romer v. Evans, 517 U.S. 620 (1996)).

170 *Id.* at 347 (citing Eve Kosofsky Sedgwick, *in* TENDENCIES 154, 161 (1993)).

171 *Id.* at 348.

172 *Id.*

173 Craig v. Boren, 429 U.S. 190, 198 (1976). In *Craig*, the Court discusses cases that "provide[ ] the underpinning for decisions that have invalidated statutes employing gender as an inaccurate proxy for other, more germane bases of classification." *Id.* at 198. Specifically, *Craig* references the term "overbroad" and relies on the *Schlesinger* decision, which states in part,

> [i]n both *Reed* and *Frontiero* the challenged classifications based on sex were premised on overbroad generalizations that could not be tolerated under the Constitution. In *Reed*, the assumption underlying the Idaho statute was that men would generally be better estate administrators than women. In *Frontiero*, the assumption underlying the Federal Armed Services benefit statutes was that female spouses of servicemen would normally be dependent upon their husbands, while male spouses of servicewomen would not.

Schlesinger v. Ballard, 419 U.S. 498, 507 (1975).

174 *Craig*, 429 U.S. at 210.

175 *Id.* at 210 ("We conclude that the gender-based differential contained in Okla. Stat., Tit. 37, § 245 (1976 Supp.) constitutes a denial of the equal protection of the laws to males aged 18–20 and reverse the judgment of the District Court.").

the Court ruled that gender classifications must withstand intermediate scrutiny: they "must serve important governmental objectives and must be substantially related to achievement of those objectives."[176] In *Craig*, the court said that even though traffic safety is an important government interest, gender discrimination was not substantially related to that objective.[177] By making sex a suspect classification under the Equal Protection clause, requiring intermediate scrutiny, the court provided greater protections to individuals harmed by sex-based discrimination. In summary, after *Craig*, the state may not inculcate traditional gender roles for either men or women, unless the sex or gender classification can pass intermediate scrutiny.[178]

When judges make custody determinations based on gendered role model arguments, they rely on unconstitutional stereotypes of gender in violation of *Craig*.[179] The most blatant violation of *Craig* occurs when courts apply a best interest of the child standard that explicitly lists "the sex of the child" among the factors to be considered such as health and age of the child.[180] In *Sandlin v. Sandlin*, the court based its custody decision, in part, on the belief that the daughter, because of her sex, needed her mothers "guidance and advice."[181] With no further explanation

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176 *Id.* at 197 (holding that gender-based classifications must serve important governmental objectives and must be substantially related to the achievement of those objectives and that evidence of differences between drunken driving incidents between male and females is insufficient to support the gender-based classification contained in the statute in question).

177 *Id.* at 199–200. The Court noted the presence of an important government interest where "[c]learly, the protection of public health and safety represents an important function of state and local governments." *Id.* However, the Court ultimately held that gender discrimination was unconstitutional because "appellees' statistics in [the Court's] view cannot support the conclusion that the gender-based distinction closely serves to achieve that objective and therefore the distinction cannot under Reed withstand equal protection challenge."

178 *Id.* at 210.

179 *Id.*

180 *See, e.g.*, Hagen v. Hagen, 226 N.W.2d 13, 16 (Iowa 1975) (noting that the court gives serious consideration to a parent's moral misconduct in addition to other factors, including, but not limited to, the child's age and sex and the child's current home environment and the petitioner's home environment); Albright v. Albright, 437 So. 2d 1003, 1005 (Miss. 1983) ("We reaffirm the rule that the polestar consideration in child custody cases is the best interest and welfare of the child. . . . Age should carry no greater weight than other factors to be considered, such as: health, and sex of the child").

181 Sandlin v. Sandlin, 906 So. 2d 39, 41 (Miss. Ct. App. 2004) (finding that the male subject child required a strong father figure to act as a role model and the female subject child required her mother, considering her need for her mother's "guidance and advice").

from the court as to what kind of "guidance" and "advice" the daughter required, it is clear the decision was based on a stereotype of women and girls, and especially mothers and daughters, as close, intensely communicative "friends." Gendered role model "arguments are based on a notion that there are two distinct sexes—indeed, biologically distinct—each with different skills to be learned, manners (and mannerisms) to be absorbed, habits to be ingrained, desires to be reinforced."[182] Furthermore, opponents of gay parenting "use gender as a proxy" for parenting, believing that a family comprised of both a male and a female parent, will provide specific, gendered benefits to their offspring.[183]

This raises serious doubts as to how the court is equipped to know whether mothers and fathers provide benefits to their own same-sex offspring. It is highly unlikely that judges are aware of some ideal concept of male and female children and can identify the necessary missing ingredient that one parent can provide better than the other, on account of their sex or gender. It is more likely that, rather than secret knowledge, courts fall back on generalized stereotypes based on their own experiences or education.[184] In *In re Marriage of Cabalquinto*, the Appellate Court noted that the trial judge expressed "strong antipathy to homosexual living arrangements" and concerns that the child "should be led in the way of the heterosexual preference."[185] Some judges, due to the wide latitude to make custody determinations, display their heterosexist bias by making unnecessary references to parents' sexuality where

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182 Bartlett, *supra* note 164, at 890. *See also* Weber v. Weber, 512 N.W.2d 723, 725–27 (N.D. 1994) (determining that the trial court award of custody of son to father was not clearly erroneous, even though based in part on testimony by expert, who had not met with the mother, that boys are better off with their fathers).

183 Ball, *supra* note 117, at 718. *See also* S.N.E. v. R.L.B., 699 P.2d 875, 879 (Alaska 1985) (discussing whether a lesbian mother would increase the likelihood that her son would also become a homosexual).

184 *See, e.g.*, N.K.M. v. L.E.M., 606 S.W.2d 179, 183 (Mo. Ct. App. 1980) (noting that judges possess "wide latitude" when making custody decisions as to the best interest of the child); *In re* Marriage of Cabalquinto, 669 P.2d 886, 888 (Wash. 1983); *In re* Marriage of Balashov, No. 62378-8-I, 2010 Wash. App. LEXIS 185 (Wash. Feb. 1, 2010). Although "[t]he court did not find that Dimitri's sexual orientation would be harmful to his relationships with his children[, it still] noted it as a factor that *may affect* his relationships in general." (emphasis added). *Id.* at 20. The court stated that it "did not consider Dimitri's sexual orientation in a negative light but simply as one of several changes to which the children were going to have to adjust, a process the court intended to facilitate by allowing them to remain in familiar surroundings for [only one] year." *Id.* at 21. The court ordered that the homosexual father have custody of his children for one year because it was in the best interest of the children to finish the school year with their respective schools and then ordered that their heterosexual mother retain legal custody of the children. *Id.* at 18.

185 *In re* Marriage of Cabalquinto, 669 P.2d at 888.

it has no bearing on the best interest of the child.[186] The Supreme Court of Washington commented that a trial court judge had no legal standards for denying the homosexual parent custody when it made unnecessary references to the father's homosexuality.[187] Although the Supreme Court of Washington recognized that "[v]isitation rights must be determined with reference to the needs of the child rather than the sexual preferences of the parent," trial courts continue to incorrectly apply gender and sexual orientation in the best interests of the child standard.[188] The lower court failed to do a true "best interest of the child analysis" when it chose to rely on such broad and vague assumptions instead of probing further into how the child communicated with both of her parents and on what issues, in order to determine which parent could best meet those particular needs.[189]

In addition to the *straightforward* gender classification that some judges apply in resolving custody disputes that make sex of the parent and child an explicit factor in the best interest of the child analysis,[190] there exists another, perhaps more subtle, gender classification that occurs when judges make custody determinations involving homosexual parents.[191] In cases like this, the courts' decisions are not so explicitly linked to the sex of the parent or

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186 *See id.*

187 *Id.*

188 *Id.* (remanded back to trial court to determine whether the homosexual father should have visitation rights, stating that "[t]he best interests of the child remain paramount.").

189 *Cf.* Ball, *supra* note 117, at 718 (discussing how family law courts should focus on parents' ability to provide children with life's "basic necessities," rather than focusing on the parties' gender).

190 *See* N.K.M.v. L.E.M., 606 S.W.2d 179, 186 (Mo. Ct. App. 1980) (affirmed the lower court's modification of the original decree because there was a changed circumstance: a homosexual woman in the mother's home); *see also* Bark v. Bark, 479 So. 2d 42, 43 (Ala. Civ. App. 1985); Sandlin v. Sandlin, 906 So. 2d 39, 41 (Miss. Ct. App. 2004).

191 *See* M.A.B. v. R.B., 134 Misc. 2d 317, 331 (N.Y. Sup. Ct. 1986) (noting that homosexual father is a worthy parent, because "[h]is homosexuality is not flaunted."). *See also N.K.M.*, 606 S.W.2d at 185. The Missouri Court of Appeals interpreted the evidence of the trial court through its own lens of normative heterosexist stereotypes when it described the mother's lesbian partner, Betty, using negative terms, such as 'powerful and dominant.' *Id.* at 186. Further, it falsely depicted Betty's relationship with the child, Julie, as one motivated by Betty's lecherous desire to indoctrinate the child into the undesirable lifestyle of lesbianism:

> There emerges from the evidence a picture of Betty as a powerful, a dominant personality. She had befriended Julie and had won her affection and her loyalty. She had broached the idea of homosexuality to the child. Allowing that homosexuality is a permissible life style—an "alternate life style", as it is termed these days—if voluntarily chosen, yet who would place a child in a milieu where she may be inclined toward it?

child (as they are in the case where the daughter needed her mother as a female role model), but are more based on implicit notions of gender, sexuality and child development.[192]

According to Rosky, the underlying concern shifts to gendered role models reflecting a deeper fear that, without a heterosexual role model, kids will grow up to mirror their gay parents, especially a gay parent of the same sex.[193] Rosky argues that when courts link gender identity disorder to sexuality, they are interpreting certain non-conforming gendered behavior as an early indicator of homosexuality, assuming "effeminate" boys will grow up to be gay men, and "masculine" girls will grow up to be lesbians.[194]

Such a chain of inferences can be seen when courts compare the post-divorce relationships of a heterosexual father and lesbian mother. Courts often do this by relying on a gender stereotype of the heterosexual step-mother as a nurturer and caretaker and favoring her over the mother's new same-sex partner.[195] Conjuring up images of Donna Reed,[196] one court wrote,

> The trial court also heard evidence indicating that the father is no longer a single parent, but has now established a happy marriage with a woman who loves the child, assists in her care, and has demonstrated a commitment to sharing the responsibility of rearing the child should the father gain custody of her.[197]

In contrast, the child's lesbian step-mother (G.S.) is not described in such loving and devoted fashion. Her relationship with the child is described matter-of-factly as testimony, instead of being inter-

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> She may thereby be condemned, in one degree or another, to sexual disorientation, to social ostracism, contempt and unhappiness.

Id.

192 *See, e.g.*, S.E.G. v. R.A.G., 735 S.W.2d 164, 166 (Mo. Ct. App. 1987) (deciding that mother's lesbian relationship will never be considered a "neutral factor" in her children's development).

193 Rosky, *supra* note 17, at 345 n.517.

194 *See id.* at 343 (citing Valdes, *supra* note 16, arguing that courts generally conflate sex, gender, and sexual orientation).

195 *See, e.g.*, *Ex parte* J.M.F., 730 So. 2d 1190, 1195 (Ala. 1998). In that case, the court heard testimony from an expert witness, Dr. Collier, who testified that after reviewing at least 50 studies on the effect on children of growing up in a homosexual household, he consistently found that there is no evidence of any harm to the children. *Id.* at 1193. Studies revealed "that a homosexual couple with good parenting skills is just as likely to successfully rear a child as is a heterosexual couple." *Id.* at 1195. The court still awarded custody in favor of the heterosexual father.

196 Donna Reed, an actress who stared in the 1950's family sitcom, *The Donna Reed Show*, came to symbolize the quintessential suburban American wife and mother. *Donna Reed Biography*, BIOGRAPHY.COM, http://www.biography.com/articles/Donna-Reed-9542105 (last visited Mar. 24, 2011).

197 *Ex parte* J.M.F., 730 So. 2d at 1195.

preted by the court as proof of a home where the child's emotional and physical needs could be met.[198] Despite the fact that "G.S. shares in the child's upbringing in the way of a devoted stepmother and that . . . G.S. regularly attends school functions and meetings with the mother, accompanies the child on school field trips, and eats lunch with the child at school twice a month," the court does not decide she has demonstrated enough of a commitment to sharing the responsibility of child rearing as the heterosexual stepmother.[199] Because of her sexuality, and despite all the specifics the court can point to, G.S. is only acting "in the way of a . . . stepmother." On the other hand, the heterosexual stepmother, because of her sexuality, is automatically considered to be the true, ideal stepmother for the child, enough so that her presence in the father's life tips the custody scale in his favor.[200]

While it is clear that family courts often rely on overbroad gender stereotypes when making custody determinations, the next question, according to *Craig*, is whether the government can pass intermediate scrutiny by demonstrating important governmental objectives and show a substantially related means tailored to the important governmental interest. While the government has never been required to state its objective for using gender classifications in custody cases, a reasonable assumption would be that the most obvious objective it has in making such gender classification is the children's protection and their well-being. While protecting children is recognized as a legitimate government interest,[201] gender classifications for custody cases still would not pass intermediate scrutiny because the means are not substantially related to the important objective. There is little evidence in the field of childhood development indicating that children are harmed when they lack a role model of the same sex.[202] Research does demonstrate, however, that children are harmed when they are separated from healthy parents and families.[203]

Charlotte Patterson, a psychologist specializing in childhood

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198 *Id.* at 1192.

199 *Id.*

200 *Id.*

201 Zablocki v. Redhail, 434 U.S. 374, 388 (1978) (accepting the need to protect children as an important government interest, in which the means must be substantially related to that interest).

202 *See* Falk, *supra* note 136, at 143–46.

203 *See* Michael Wald, *State Intervention on Behalf of Neglected Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985, 994 (1975) ("Removing a child from his family may cause serious psychological damage—damage more serious than the harm intervention is supposed to prevent."). *See also* Robson, *Our Children*, *supra* note 80, at 920

development in the context of family, has studied the children of lesbian and gay men in custody disputes and found that, "in the resolution of custody disputes . . . the legal system in the United States has frequently operated under strong but unverified assumptions about difficulties faced by children of lesbians and gay men, and there are important questions about the veridicality of such assumptions."[204] Patterson has researched and empirically tested these assumptions and concludes that, "There is no evidence to suggest that psychosocial development among children of gay men or lesbians is compromised in any respect relative to that among offspring of heterosexual parents. Despite longstanding legal presumptions against gay and lesbian parents in many states . . . not a single study has found children of gay or lesbian parents to be disadvantaged in any significant respect relative to children of heterosexual parents."[205]

For example, Patterson reviews studies measuring gender identity and gender role behavior of children of lesbian mothers compared to that of children of single heterosexual mothers.[206] The tests explored the children's gender identity and gender role behavior based on stick figure drawings they were asked to make. Of the few children who drew an opposite sex figure, only three exhibited gender issues during clinic interviews. Among those three children, only one child has a lesbian parent.[207] Patterson cites other tests, such as picking a "sex-typed toy" that is consistent with conventional gender ideas, or identifying vocational choices within typical limits for conventional sex roles.[208] Patterson concludes, from a survey of such studies, that "[r]esults for both children of lesbian and heterosexual mothers were closely in accord with those for the general population, and there were no differ-

("In fact, much greater harm is caused by judicial decisions that deprive a child of the care and companionship of his or her parent.").

204 Patterson, *supra* note 101, at 1026. Patterson, a child psychiatrist, surveys studies conducted by social scientists about children of lesbian and gay parents. Her studies focus on the sex, identity, personal development, and social relationships of children raised in a homosexual household. Martha Kirkpatrick, Catherine Smith, & Ron Roy, *Lesbian Mothers and Their Children: A Comparative Survey*, 51 AM. J. ORTHOPSYCHIATRY 545, 545–551 (1981) (comparing children of lesbian mothers to children of single heterosexual mothers is relevant to custody cases).

205 Patterson, *supra* note 101, at 1036.

206 *Id.* at 1030 (citing Kirkpatrick et al., *supra* note 204).

207 Kirkpatrick et al., *supra* note 204, at 548.

208 Patterson, *supra* note 101, at 1030 (citing Richard Green, *Sexual Identity of 37 Children Raised by Homosexual or Transsexual Parents*, 135 AM. J. PSYCHIATRY 692–97 (1978)).

ences between children of lesbian and heterosexual mothers."[209]

While the role model argument is based on overbroad gender stereotypes, gender classification in custody disputes using the role model argument does not necessarily discriminate based on gender because courts rely equally on stereotypes of men and women and do not actually favor one gender over the other. While there is some concern, based on a study of California residents, that the best interest of the child test makes a discriminatory gender classification by preferring mothers to fathers,[210] there is less support for the conclusion that the role model argument (as an element of the best interest of the child test) discriminates between men and women. This holds true for the cases when the determining factor is that children need *both* male and female role models. However, by making such a gender classification and determining children need both male and female role models, courts are discriminating based on sexuality against same-sex couples who cannot provide parents of both genders in the same household.[211] Katharine T. Bartlett argued in her article that there is also a concern that fathers suffer gender discrimination in custody cases where judges favor fathers over mothers.[212] "Another set of discrimination claims concerns the complaint of fathers that the sex-based double standard works against them, not in their favor."[213]

In *Lawrence v. Texas,* the U.S. Supreme Court held that the state cannot enforce sexual conformity by prohibiting private sexual activity between consenting adults of the same sex.[214] At issue in *Lawrence* was a Texas statute that prohibited "deviate sexual intercourse" that was applied to sexual activity between same sex couples.[215] The Court held the statute unconstitutional and reaffirmed the constitutional protection for privacy, applying that privacy right to consensual homosexual activity.[216] *Lawrence* is a

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209 Patterson, *supra* note 101, at 1030.

210 Bartlett, *supra* note 164, at 886. *See* ELEANOR E. MACCOBY AND ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 99–103 (1992) (identifying disproportional results where women obtain custody in 80% to 90% of cases in California).

211 *In re* Marriage of Dorworth, 33 P.3d 1260 (Colo. Ct. App. 2001) (discussing trial court modification application where mother sought to restrict father's visitation rights to visit their daughter because his sexuality would confuse the child, who was raised to believe a family consisted of only a mother, a father, and a child).

212 Bartlett, *supra* note 164.

213 MACCOBY AND MNOOKIN, *supra* note 210, at 99–103.

214 Lawrence v. Texas, 539 U.S. 558 (2003).

215 *Id.* at 563.

216 *Id.* at 578 ("The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.").

landmark decision because it recognizes a liberty interest in private, consensual, homosexual conduct.[217]

Lawrence is a powerful tool with which to attack state discrimination against gays and lesbians because it is the closest the Supreme Court has come to recognizing the equal right of homosexuals under the Constitution.[218] It does so, however, without labeling the liberty interest as a fundamental right, which would require strict scrutiny.[219] This leaves the standard of scrutiny to be applied open for debate, and allows states room to prefer or prohibit different forms of sexual orientation.[220] Despite the lack of strict scrutiny, however, *Lawrence* can still be applied to family law, with implications for how courts use role model arguments when making custody determinations for same-sex parents.[221]

In the context of family law, *Lawrence* reinforces that privacy is a constitutionally protected right under the liberty clause of the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.[222] It analogized the privacy at stake in *Lawrence* to the privacy rights recognized in the birth control case, *Griswold v. Connecticut*,[223] and the abortion rights cases, *Roe v. Wade*[224] and *Planned Parenthood of Southern Pa. v. Casey*,[225] from which the concept of

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217 *Id.*

218 *See id.* In explaining why the Constitutional right to liberty applies equally to all people, regardless of sexuality, the Court stated "adults may choose to enter upon [a same-sex] relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice." *Id.* at 567.

219 *See id.* Justice Scalia expressed his preference for strict textualism when he stated that "nowhere does the Court's opinion declare that homosexual sodomy is a 'fundamental right' under the Due Process Clause; nor does it subject the Texas law to the standard of review that would be appropriate (strict scrutiny) if homosexual sodomy *were* a 'fundamental right.'" *Id.* at 586. (Scalia, J., dissenting).

220 ESKRIDGE & HUNTER, *supra* note 16, at 94.

221 *See* McGriff v. McGriff, 99 P.3d 111, 117 (Idaho 2004).

222 Lawrence v. Texas, 539 U.S. 558, 564–65 (2003).

223 Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (identifying privacy as a fundamental right that protects the use of contraception among married couples, based on the privacy interest that exists within the institution of marriage and within the protected space of the marital bedroom).

224 Roe v. Wade, 410 U.S. 113 (1973) (holding that a women's right to privacy within the concept of liberty of the Equal Protection Clause of the Fourteenth Amendment includes the fundamental right to abortion).

225 Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992) (reaffirming the right to privacy is located within the concept of liberty of the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution and includes the right to abortion).

family privacy stems.[226]

In all of these privacy cases, including *Lawrence*, the Court recognized that the government was infringing on "fundamental personal interests relating to family."[227] By correlating *Griswold*, *Roe*, and *Lawrence*, the Court in *Lawrence* paints a trajectory of Constitutional privacy rights, from *Griswold* to *Lawrence*, excluding *Bowers*[228] as a mistakenly decided case that should be overruled.[229] *Bowers* is excluded from this line of privacy cases[230] because it did not identify consensual homosexual relationships as a privacy right.[231] Conversely,[232] *Lawrence* makes a strong link from family, marriage, and procreation to homosexuality.[233] "In calling for a more generous characterization of the liberty interest at stake, the Court analogized directly to the marital privacy right vindicated in *Griswold*."[234] Thus, the Court acknowledged the connection between the right to homosexuality and the fundamental rights of privacy and liberty

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226 *Lawrence*, 539 U.S. at 564. *Lawrence* discussed the "broad" definition of liberty in cases from the early twentieth century, such as *Pierce v. Society of Sisters* and *Meyer v. Nebraska*. These cases are relevant to the *Lawrence* decision because of how its discussion of liberty ultimately gave rise to the recognition of privacy as a substantive due process right within the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution, which occurred in *Griswold v. Connecticut*.

227 David D. Meyer, *The Constitutionalization of Family Law*, 42 FAM. L.Q. 529, 550 (2008).

228 Bowers v. Hardwick, 478 U.S. 186 (1986).

229 Lawrence v. Texas, 539 U.S. 558, 578 (2003) ("*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.").

230 Meyer, *supra* note 227, at 549–50.

231 *Bowers*, 478 U.S. at 190–191 ("[A]ccepting the decisions in these [privacy] cases . . . we think it evident that none of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy . . . . No connection between family, marriage, or procreation . . . and homosexual activity . . . has been demonstrated").

232 Meyer, *supra* note 227, at 550 ("Whereas *Bowers* had seen '[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other,' *Lawrence* saw plenty." (citing *Bowers*, 478 U.S. at 191)).

233 *Lawrence*, 539 U.S. at 566–67. The Court discussed the connection between the rights to family and the rights to homosexuality.

> The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time. That statement, we now conclude, discloses the Court's own failure to appreciate the extent of the liberty at stake. To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse.

Lawrence, 539 U.S. at 566–67 (internal citations omitted).

234 Meyer, *supra* note 226, at 550 (citing Lawrence v. Texas, 539 U.S. 558, 567).

within the Constitution.[235]

In *Lawrence*, the Court emphasized that the question was not the legality of sexual acts, but the protection of private intimacy.[236] Justice Kennedy wrote, "the . . . statutes . . . purport to do no more than prohibit a particular sexual act . . . . The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals."[237] Finally and most significantly for family law, *Casey* held that, "our laws and traditions afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education,"[238] and *Lawrence* followed by concluding that, "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do."[239]

Given the privacy protection extended to homosexuals in *Lawrence*, the role model custody standard applied in custody cases intrudes upon the privacy rights of same-sex parents to raise their children and have a family. One court grappled with the implications of *Lawrence* when making a custody determination between a gay father and his heterosexual ex-wife by recognizing that, after *Lawrence*, homosexuality was essentially "a protected practice under the Due Process Clause of the United States Constitution" and that "[t]his decision . . . has at least some bearing on the degree to which homosexuality may play a part in child custody proceedings."[240]

When judges deny custody or visitation to lesbian or gay parents because the parents are not heterosexual and cannot provide both a "male" and a "female" role model, they are infringing upon the constitutionally protected privacy rights of lesbian and gay par-

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235 Lawrence v. Texas, 539 U.S. 558, 578 (2003).

236 *Id.* at 567.

237 *Id.*

238 *Id.* at 573–74. The Court strengthens the connection between the privacy right in *Casey* and the privacy right in *Lawrence* by quoting the following from *Casey*:

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

Id. (citing Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992).

239 *Lawrence*, 539 U.S. at 574.

240 McGriff v. McGriff, 99 P.3d 111, 117 (Idaho 2004).

ents, in violation of *Lawrence*. For example, in *Ex Parte J.M.F,* the Court stated that its decision was *not* based solely on the mother's sexual conduct, but was instead based on the following:

> Rather, it is a custody case based upon two distinct changes in the circumstances of the parties: (1) the change in the father's life, from single parenthood to marriage and the creation of a two-parent, heterosexual home environment, and (2) the change in the mother's homosexual relationship, from a discreet affair to the creation of an openly homosexual home environment.[241]

Under *Lawrence*, the above custody determination is an unconstitutional violation of the mother's rights because it uses her sexuality to deny her privacy rights to family and child-rearing.

V. Conclusion

Ideally, the father in *Dalin* and the mother in *Ex Parte J.M.F.,* should not have lost custody of their children because they could not braid hair or provide a heterosexual step-mother, respectively. Both parents lost custody in courts that used gender and sexuality as a stand-in for parenting skills, in violation of their constitutional rights. However, both cases should serve as incentive for courts to create a definition of family that evaluates parents less on their sexuality and gender and more on their ability to provide for their children.

When making custody determinations, the state should have no interest in limiting or guiding the gender and sexuality development of children, but should support and encourage safe and healthy sexuality and gender development for all children and families. Children and their parents deserve no less than to have courts protect, rather than attack, their rights to a healthy and secure family.

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241 *Ex parte* J.M.F., 730 So. 2d 1190, 1194 (Ala. 1998).