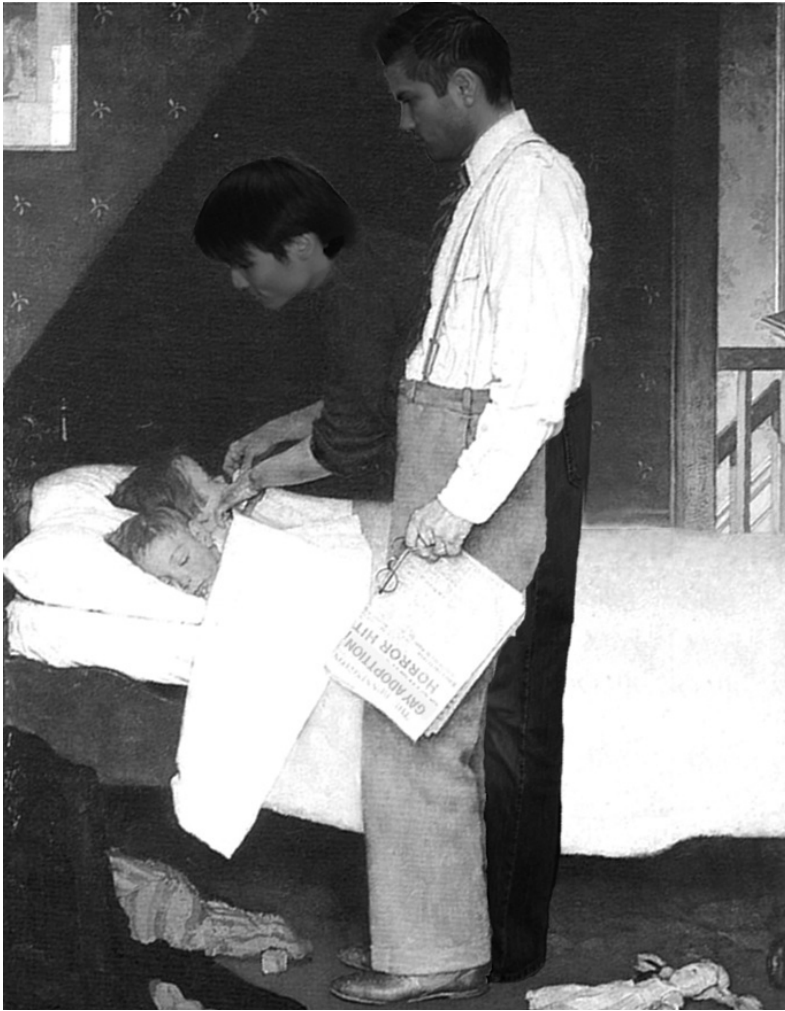


# THE MODERN AMERICAN™

A Publication Dedicated to Diversity in the Law



*“In an expanding universe, time is on the side of the outcast. Those who once inhabited the suburbs of human contempt find that without changing their address they eventually live in the metropolis.”*  
*-Quentin Crisp, The Naked Servant, 1978.*

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# LETTER FROM THE EXECUTIVE BOARD

Charles Hamilton Houston, regarded by many as one of the fathers of the civil rights movement, understood the lawyer's role and responsibility as a social engineer advocating for civil rights through the courts. Heeding Houston's words, lawyers today continue to shape our discussion of diversity and the law in a variety of ways, including challenges to statutory rules such as those limiting adoption to heterosexual couples, attempts at perfecting existing rules such as the optimistic Individuals with Disabilities Education Act, and advancements in immigration laws such as the U Visa.

The Modern American applauds the efforts of lawyers who advocate for civil rights today and who continue to honor, in the words of the 2008 presidential candidate Barack Obama, "the idea that this nation is more than the sum of its parts – that out of many, we are truly one." Our third annual symposium entitled "Civil Rights Movement 2.0: Reshaping and Rethinking the Role of the Civil Rights Movement in the 21st Century," addresses the need for a conversation among lawyers, and understands that the effective advancement of diversity depends on the combined work of lawyers in their role as social engineers.

As a reflection of our continued commitment to foster qualitative insights and discussions of diversity and the law, in this

issue of *The Modern American*, you will find an array of articles ranging from multi-ethnic identity, to health conditions for domestic workers, and diversity in the workplace. In addition, we are proud to announce that our reader base continues to expand, and now extends throughout the nation, including distribution to law practitioners, legal academics, law students, and prospective law students. Our availability on the Lexis Nexis online database, also contributes to the wide distribution of *The Modern American* to individuals in the legal profession and beyond.

In closing, *The Modern American* would like to thank our staff members who are graduating in May 2008. We commend them for their contribution to the prevalent discussion of legal issues affecting minorities in our country, and their outstanding dedication to our publication. We encourage them to keep moving forward in their role as social engineers by facilitating conversations about diversity and the law, and by challenging existing discrimination through education and action.

Sincerely,

The Executive Board  
*The Modern American*

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# DYING TO WORK: OSHA'S EXCLUSION OF HEALTH AND SAFETY STANDARDS FOR DOMESTIC WORKERS

By Chelsy Castro\*

Imagine being required to wash your bare hands in ammonia every day before starting work. Now imagine your employer requires you to sleep in an unheated basement or on a floor where sewage often overflows. Do you deserve better? Yes. Do you deserve the proper tools and protective gear to work safely? Yes. Are there federal standards to protect employees from hazardous work conditions? Yes, but not for all. Not for Angela Pena. Not for “Maria” from Colombia. Not for “Tania” from the Dominican Republic.<sup>1</sup> The Occupational Safety and Health Act of 1970 (OSHA) that protects other workers from having to wash their hands in ammonia does not protect Angela, Maria, and Tania.<sup>2</sup> They are also excluded from coverage under the National Labor Relations Act and the Fair Labor Standards Act.<sup>3</sup> These women, along with countless others, are excluded because they are domestic workers. There are currently no federally supported standards and regulations to protect the health and safety of domestic workers.

Immigrant domestic workers leave their homes to work in ours. They care for our children, nurse our elderly, clean our homes and beautify our gardens. Domestic workers contribute to the economy by “enabling their employers to increase family income...[and], in turn, spend more on consumer goods.”<sup>4</sup> They provide constant care for families in the United States, yet the United States Government does not provide protection for them.

This article explores the occupational safety and health conditions faced by domestic workers and the protections available to them. More specifically, this article identifies the reasons why domestic workers tolerate hazardous working conditions, examines OSHA’s exclusion of domestic workers, and looks at case law considering a domestic worker’s right to protection under OSHA. In addition, this article explores possible alternatives for protection available to domestic workers, and examines current and pending legislation directed at ensuring the rights of domestic workers. Finally, this article is a call to action for securing the right of domestic workers to “safe and healthful working conditions.”<sup>5</sup>

## HAZARDOUS WORKING CONDITIONS

Domestic workers are a workforce consisting mostly of immigrant women of color.<sup>6</sup> Angela, Maria, and Tania are just three of the estimated 31.1 million individuals in the United States who immigrated in pursuit of better lives for themselves and their families.<sup>7</sup> A survey of New York City domestic workers conducted by Domestic Workers United and DataCenter, a nonprofit research firm, found that the domestic workers sur-

veyed came from forty-two different countries.<sup>8</sup> Many of those surveyed had immigrated because they either could not support their families, or had no work opportunities in their home countries.<sup>9</sup> Others had immigrated to escape war, political unrest or natural disaster.<sup>10</sup>

Many domestic workers endure unsafe, and physically and psychologically unhealthy work conditions—hazardous conditions from which the federal government protects non-domestic workers.<sup>11</sup> These conditions include exposure to toxic chemicals (such as ammonia, ammonium hydroxide and bleach) and risk of injury from heavy lifting, cleaning, or lack of proper equipment.<sup>12</sup> According to

an industry-wide survey performed by Domestic Workers United and DataCenter, 30% of live-in workers perform heavy lifting or other strenuous activities; 26% work with toxic supplies; 23% clean hard-to-reach places; and 10% provide care for children or elderly people with contagious diseases.<sup>13</sup> Another survey, conducted by the San Francisco Department of Health and by DataCenter, indicated that 63% of domestic workers surveyed, almost all from Latin America, considered their jobs hazardous.<sup>14</sup> The vast majority said that they did not receive protective gear such as gloves or facemasks<sup>15</sup> and “[did] not receive training in job safety or workplace injury prevention.”<sup>16</sup> Emilia was forced to scrub the carpet on her knees.<sup>17</sup> Angela Pena, whose employer made her wash her hands in ammonia before starting work every day, recalled, “It burned my hands. The scent of the ammonia made me dizzy and I felt really sick the whole time I was working.”<sup>18</sup>

The survey by Domestic Workers United and DataCenter also revealed that 48% of all live-in domestic workers surveyed and 33% of all domestic workers surveyed had been abused by their employers in the past year.<sup>19</sup> The abuse includes, but is not limited to, feelings of discomfort, verbal abuse (including name-calling and threats), sexual advances, and physical abuse including being punched, beaten, raped, or sexually assaulted by their employers.<sup>20</sup> Examples of this abuse include that of Judy, who

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*There are currently no federally supported standards and regulations to protect the health and safety of domestic workers.*

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*48% of all live-in domestic workers surveyed and 33% of all domestic workers surveyed had been abused by their employers in the past year*

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was injured when her employer locked her in a basement.<sup>21</sup> While Judy was hospitalized, her employer told her, “I should have left you for dead; no one here knows who you are anyway.”<sup>22</sup> In another example, Vivian remembers how her employer “removed her sandal, and hit [her] and slapped [her] in the face.”<sup>23</sup>

Live-in workers are more vulnerable to abuse than day domestic workers because living in their employers’ homes isolates them from the social networks that provide the means for getting help and escaping dangerous employment.<sup>24</sup> Sharing a

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*While Judy was hospitalized, her employer told her, “I should have left you for dead; no one here knows who you are anyway.”*

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living space often makes every aspect of a live-in worker’s life, including when and how they eat and sleep, subject to an employer’s influence. Many are “physically beaten, denied access to necessary medical care when injured; and forced to sleep in substandard or hazardous living quarters.”<sup>25</sup> Maria slept in the basement, “where sewage often overflowed.”<sup>26</sup> She recalls, “I had to find cardboard in order to walk around [the sewage] and get out of the basement to go and perform my daily housework.”<sup>27</sup> Lily explains: “I was never allowed to go out anywhere by myself for fifteen years.” Ruby was forced to work despite her doctor’s orders to stop working. “The doctor told them that I had to stop working for four days, but when I went home, they told me I had to cook, clean the house and take the children to the park.”<sup>28</sup> Tania recounts, “they made me sleep in the basement with no heat in the dead of winter. They denied me food during the time I was living-in [their home] and also forbade me [from bringing] food for myself from outside.”<sup>29</sup>

Psychological abuse also contributes to the hazardous working conditions. Emilia’s employer forbade her from sitting down and from talking to people.<sup>30</sup> She was verbally abused on a regular basis.<sup>31</sup> Her employer forced her to sleep in a “malodorous and moldy”<sup>32</sup> basement. “She made me feel like garbage. I felt dehumanized.”<sup>33</sup> Tania recalled being yelled at to the point “where I was becoming sick with depression and nervousness...I could only think of hurling myself in front of passing cars because I was made to feel so bad I wanted to die.”<sup>34</sup>

### TRAPPED

Carolyn H. de Leon, a former domestic worker and a founder of Domestic Workers United, explains that “it’s really hard to galvanize domestic workers, because [they are]...dispersed in isolated homes and sometimes working 11, 12 hours a day.”<sup>35</sup> Their isolated work and position in society leaves them with little, if any, political access to protest for their own safety and health protections.

Many domestic workers endure hazardous working conditions because they do not have the financial resources to leave

their jobs, and often work for the same employer for a large part of their lives.<sup>36</sup> Requesting simple things such as gloves and facemasks or a safer method of cleaning could mean being fired or worse, beaten. For many, survival means, “We have to stay quiet.”<sup>37</sup> They fear losing their only means of providing for their families. Moreover, both the solitary nature of their work and language barriers often prevent domestic workers from developing social connections through which to seek help, making them more vulnerable to exploitation and abuse.<sup>38</sup> Lily explains: “When you are living and working in peoples homes, it’s hard because you have to do everything....And it’s just you alone....If I went out and met someone she [the employer] would not let me tell my name....I didn’t have any friends....I didn’t know where anything was, how to get around. I was always in the house.”<sup>39</sup>

### OCCUPATIONAL SAFETY AND HEALTH ACT

Congress passed OSHA in 1970 “to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources.”<sup>40</sup> Section 5(a) requires an employer to: (1) “furnish each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm;” and (2) “comply with occupational safety and health standards promulgated under [the Act].”<sup>41</sup> The rights to safety and health standards enjoyed by most American workers today contrast greatly with the conditions faced by the American worker not long ago. Charles Dickens’ tales of the miserable working conditions of the English working class were also representative of those in the United States, as evidenced by disasters such as the Triangle Shirtwaist Factory Fire of 1911.<sup>42</sup> Such disasters led to laws regulating worksite safety long before the passage of OSHA.

The enactment of OSHA was only one step in the already more than a century-old struggle for worker protections in the United States. Federal and state governments began to take a regulatory interest in workplace safety in the mid-1800s.<sup>43</sup> Massachusetts was a pioneer when it passed the nation’s first child labor law in 1836.<sup>44</sup> In 1840, the federal government took a role

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in worker safety and health regulation by restricting the hours worked by naval shipyard workers to a maximum of ten per day.<sup>45</sup> However, it was not until 1912 that the federal government passed the Esch Act, a groundbreaking piece of American health legislation that imposed a prohibitive tax on the domestic sale of white phosphorous matches in order to prevent a painful

necrosis of the jaw often contracted by workers in match factories.<sup>46</sup>

In 1936, Congress passed a predecessor to OSHA, the Walsh-Healy Public Contracts Act.<sup>47</sup> The Walsh-Healy Act prohibited any government contracts under which working conditions were “unsanitary, or hazardous or dangerous to the health and safety” of employees.<sup>48</sup> This was the federal government’s first significant step towards a widely applied policy concerning worker safety. Congress continued to build upon the foundation established by the Walsh-Healy Act as the goals of the federal government evolved over time. Although federal law adapted to the demands of both the labor unions and the business sector, it still lacked a comprehensive federal health and safety law in the late 1960s.<sup>49</sup> OSHA filled this void in 1970.

OSHA not only created safety and health standards, but also established a system by which to enforce them.<sup>50</sup> It created the Occupational Safety and Health Administration of the United States Department of Labor to articulate and implement workplace health and safety standards.<sup>51</sup> Section 5(a)(2) of OSHA requires employers to comply with standards issued by the Secretary of Labor.<sup>52</sup> These standards are based on research by the National Institute for Occupational Safety and Health.<sup>53</sup> OSHA also created a system to police employers and to ensure compliance with OSHA standards.<sup>54</sup> In addition, it established a judicial and penal system to manage conflicts over the maintenance of such standards.<sup>55</sup> Violations of OSHA are adjudicated by the Occupational Safety and Health Review Commission, and Federal Circuit Courts of Appeal review the Commission’s decisions.<sup>56</sup>

#### THE DOMESTIC WORKER UNDER OSHA

OSHA’s employment standards and enforcement system protect non-domestic workers from the risks of exploitation and abuse faced by domestic workers.<sup>57</sup> If Angela Pena were protected by OSHA, Federal Regulation 1910.132(a) would require her employer to provide and require her to use protective equipment “wherever it is necessary by reason of...chemical hazards...encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.”<sup>58</sup> Angela would not have had to burn her skin and feel dizzy and sick from washing her hands in ammonia.<sup>59</sup> Instead of offering domestic workers equal protection against such abuse, OSHA denies domestic workers like Angela such protection because domestic workers are not considered under the law to be “employed in a business of [their] employer which affects commerce.”<sup>60</sup>

While OSHA was monumental legislation, it simply does not go far enough. Section 3 of OSHA defines an employee covered by the Act as “an employee of an employer who is em-

ployed in a business of his employer which affects commerce.”<sup>61</sup> Domestic workers are not included under OSHA’s definition of employee because they are employed to work for a private home, not a profit-generating business. As a result, domestic workers are denied OSHA’s health and safety standards, as well as access to the judicial and penal system established to enforce them.

#### CASE LAW

Cases brought by domestic workers against their employers for what would be OSHA violations for covered workers, are uncommon and seemingly fruitless. Courts nationwide have upheld the exclusion of domestic workers from the protection of OSHA and similar protections offered by individual states by applying the definitions of “employee” and “place of employment” in favor of employers.

In *Rosas v. Dishong*, Rosas, the Dishong family’s landscape maintenance provider of ten years, injured his back when he fell to the ground while attempting to cut a branch at their request.<sup>62</sup> Among other claims, Rosas argued that the Dishongs did not comply with State of California Occupational Safety and Health Act statute and that this noncompliance contributed to his injuries.<sup>63</sup> Although, the court concluded that Rosas was the Dishongs’ employee, it refused Rosas relief because both California’s and

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the federal government’s Occupational Safety and Health Act excluded domestic workers.<sup>64</sup> The court pointed to a California statute that defines a “‘place of employment’ to exclude any place where persons are employed in household domestic services,” and to the Federal OSHA legislation which defines an employer as “a person engaged in business affecting commerce who has employees.”<sup>65</sup> The court reasoned that both pieces of legislation intended to exclude domestic service work because “it is unlikely [that the] average homeowner [would] expect... OSHA requirements to apply when they hire someone to trim a tree for their personal benefit and not for a commercial purpose,” and that “homeowners are ill-equipped to understand or comply with the specialized requirements of OSHA.”<sup>66</sup>

In a similar case, *Fernandez v. Lawson*, the Supreme Court of California overturned the California Court of Appeal’s decision to apply the California Occupational Safety and Health Act to a homeowner who hired Fernandez to trim a tree without complying with the applicable California Occupational Safety and Health Act standards.<sup>67</sup> Fernandez suffered a serious injury when he fell from a tree that he was trimming for Lawson, the homeowner.<sup>68</sup> The Court of Appeals applied the California Occupational Safety and Health Act because it did not consider tree trimming to be a “household domestic service.” The Court reasoned that tree trimming required a “degree of skill and expertise” which the average homeowner did not possess.<sup>69</sup> How-

ever, the California Supreme Court disagreed and found that the Court of Appeal's test to determine whether or not a task was a "household domestic service" was too confusing.<sup>70</sup>

Instead, the Supreme Court focused on the broad definition of a "household domestic service" and how it relates to a commercial or business activity. It found that the California Occupational Safety and Health Act "household domestic service" exclusion applied to tasks "in and outside a private residence" and to any duties performed "personal to the homeowner."<sup>71</sup> Thus, Lawson was not liable under the California Occupational

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*Case law demonstrates the courts' concern that it is inconvenient and impractical to protect the safety and health of domestic workers in the same way that the federal government protects the safety and health of other workers.*

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Safety and Health Act because he hired Fernandez to perform a service related to his private residence, a place not related to commercial or business activities. The Supreme Court cited the public policy and practicality concerns of *Rosas* and added its concern that if OSHA applied to homeowners, then homeowners could also be liable for "COBRA health coverage benefits, sexual harassment claims, collective bargaining agreement enforcement" and other obligations that "they would be ill-equipped to comply with."<sup>72</sup>

The judiciary's concern for practicality is also observed in *Stenvick v. Constant*, where the Court of Appeals of Minnesota similarly concluded that a homeowner was not an employer liable under the Minnesota Occupational Safety and Health Act for a scaffolder's death because the Minnesota legislature did not intend homeowners to be considered employers under the Minnesota Occupational Safety and Health Act.<sup>73</sup> The Court expressed concern that to do so would hinder homeowners' willingness to hire other workers.<sup>74</sup>

The case law demonstrates the courts' concern that it is inconvenient and impractical to protect the safety and health of domestic workers in the same way that the federal government protects the safety and health of other workers. The legal system denies domestic workers protections guaranteed to what it considers "employees." In effect, the courts treat domestic workers as independent contractors, although, in reality, most are not.

#### **DOMESTIC WORKERS LACK THE PROTECTIONS OF BOTH EMPLOYEES AND INDEPENDENT CONTRACTORS**

Domestic workers are denied the status and protections of employees under OSHA, but also lack the protections enjoyed by independent contractors. Independent contractors are also excluded from OSHA protections,<sup>75</sup> however, independent contractors, have control over how tasks are performed and what tools are used and as such, have the power to control their own safety in a work environment. Domestic workers are unique

because while the courts treat them like independent contractors for purposes of health and safety standards, domestic workers do not have the control implied by the relationship between independent contractors and employers.

While there is no uniform test to determine whether or not someone is an independent contractor, the Internal Revenue Service's "twenty (20) factor test" is often referenced and three general tests are applied: the "right to control" test, the organization test and the "economic realities test."<sup>76</sup> These three tests are used in both state and federal courts, but the "right to control" test is the most often applied to domestic workers.<sup>77</sup>

The "right to control test," defines an independent contractor "as one who carries on an independent business and contracts to do a piece of work according to his own methods, subject only to the employer's control as to results."<sup>78</sup> Courts, regardless of jurisdiction, have repeatedly defined an independent contractor as one who has the right to determine the details and methods by which to accomplish the desired result.<sup>79</sup> Thus, a domestic worker who does not control the means and methods by which he or she cleans the house, cooks, trims a tree, or cares for children or the elderly does not fit the courts' definition of an independent contractor.

The testimonials of domestic workers demonstrate that they often do not have control over how a home is cleaned, how a child is cared for, or what tools are to be used to do so. The homeowner often dictates exactly how the domestic worker is to perform her or his assigned tasks. Such working conditions deny domestic workers control over their own safety. Angela Pena did not want to wash her hands in ammonia in preparation for her tasks, but her employer required it. If Angela was protected by OSHA, her employer would be prohibited from requiring her to so injure herself. If she were treated as an independent contractor, she would not be subject to her employer's hazardous requirement. Because she is neither protected nor has the freedoms of an independent contractor, Angela either has to wash her hands in ammonia, or lose her job. As domestic workers, Angela, Maria, and Tania are all in limbo. They, like countless other domestic workers, are denied the protections of both employees and independent contractors and, defenseless, work under dangerous conditions.

#### **DOMESTIC WORKER COOPERATIVES: AN ALTERNATIVE SOURCE OF PROTECTION**

In response to the independent contractor-employer problem some domestic workers have come up with creative solutions. These innovative few have established domestic worker cooperatives. A domestic worker cooperative is a business run and owned by the individuals who provide the domestic services. The cooperative as a business entity enters into contracts with clients in the market for domestic services. The cooperative then assigns its own employees to fulfill the contracts. Thus, each domestic worker is an employee of the cooperative, not of the homeowner client.

As "a business affecting commerce who has employees," a

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*By contracting directly with the homeowners, La Mesa Cooperative and others like it provide protection for domestic workers by taking responsibility for working conditions.*

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domestic worker cooperative is subject to OSHA,<sup>80</sup> and is charged with ensuring the domestic workers' safety.<sup>81</sup> La Mesa Cooperative in New Mexico is an example of a successful domestic worker cooperative. Formed and run by domestic workers, it provides both full and part-time work and charges customers \$12.50 per hour to clean homes, offices, and yards.<sup>82</sup> Cooperatives like La Mesa follow a for-profit business model, but others have incorporated as non-profit tax-exempt organizations under the Internal Revenue Code section 501(c)(3), making them eligible to receive grants for training.<sup>83</sup> By contracting directly with the homeowners, La Mesa Cooperative and others like it provide protection for domestic workers by taking responsibility for working conditions.

If Angela Pena was a member of a domestic worker cooperative, she would not be permitted to wash her bare hands in ammonia prior to starting work everyday because Federal Regulation 1910.132(a) would compel her employer, the cooperative, to provide and require her to use protective equipment "wherever it is necessary by reason of... chemical hazards... encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact."<sup>84</sup> These domestic worker cooperatives serve as buffers, providing safety and health precautions otherwise denied to domestic workers.

Unfortunately, most domestic workers do not belong to cooperatives. They instead work invisibly in limbo, out of reach of the protections typical of employees and of independent contractors. They, like Angela, Maria, Tania, Judy, Emilia, and Lily, are too often under-paid, over-worked, and abused.

### A CALL FOR CHANGE

As the case law demonstrates, protection of domestic workers under OSHA may be too impractical to make a reality. Applying OSHA to employment in a private home creates unique challenges and conflicts. For example, OSHA grants the Secretary of Labor permission to "enter without delay and at reasonable times any factory, plant, establishment, construction site or other area workplace, or environment where work is performed by an employee of an employer."<sup>85</sup> If applied to the employment of a domestic worker, such a regulation would threaten the right to privacy expected in a private home. However, it is not necessary for domestic workers to be excluded entirely from the type of protection guaranteed to employees under OSHA just because it would be difficult to apply. Domestic workers are no less deserving of safe and healthy work environments than non-domestic workers.

The federal government expressed its "purpose and policy" to "assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources."<sup>86</sup> If the federal government will not offer domestic workers protection under OSHA, then it should at least establish comparable mechanisms to fulfill its "purpose and policy to provide for the general welfare... of every working man and woman."<sup>87</sup> Protections guaranteed by OSHA can

be adapted to fit the special conditions faced by domestic workers. For example, regulations could require an employer of a domestic worker to provide documentation to the state or federal government demonstrating proof of purchase of protective gear as well as an agreement to its use by the domestic worker. Regulations could also require employers to provide their domestic workers information on their rights to a safe and healthy work environment; information on the health and safety standards required for the relevant tasks; and information on the proper use of equipment and products to be used in domestic work. Additionally, the Occupational Safety and Health Administration could provide information, education, and training to domestic workers and their employers, as it plans to do for adult and teenage immigrant workers in fields, such as health care, manufacturing, and hospitality.<sup>88</sup>

OSHA permits any state to "assume the responsibility for development and enforcement... of occupational health and safety issue[s] with respect to which a Federal Standard has been promulgated."<sup>89</sup> Thus, if a state wishes, it may establish its own Occupational Safety and Health Act and take responsibility for its own enforcement. The Occupational Safety and Health Administration must approve of the state plans and is responsible for monitoring them. State occupational safety and health standards must be at least as effective as the comparable federal standards.<sup>90</sup> While many states adopt standards identical to the federal ones, they are permitted to promulgate standards covering hazards not addressed by federal standards.<sup>91</sup> Twenty-six states and jurisdictions have enacted their own plans.<sup>92</sup> However, only seven differ in any way from the federal OSHA standards<sup>93</sup> and none of them recognize domestic workers as beneficiaries of the rights they guarantee.<sup>94</sup> Domestic workers are excluded in many different ways - "business or commerce" restrictions, "private residence" restrictions, and the "domestic services" exclusions are a few.<sup>95</sup>

In the absence of federal legislation some local governments have taken other steps to offer domestic workers some protection. In 2003, Domestic Workers United, an organization of Caribbean, Latina, and African nannies, housekeepers, and elderly caregivers in New York City, succeeded in getting a law passed requiring "domestic worker placement agencies to provide employers with a 'code of conduct' explaining labor laws."<sup>96</sup> Additionally, the law requires such agencies to outline job responsibilities, social security requirements, and wages before worker placement.<sup>97</sup> Agencies in violation of the law face fines up to \$1,000.<sup>98</sup> Without the law, "agencies work in the employers' favor... They ask [domestic workers]...to do things

[they]... don't want to. [Domestic workers]...have to accept any conditions...or not get anything."<sup>99</sup> Critics of the legislation point out that only a small portion of domestic workers are placed by agencies, leaving the remainder of the domestic worker population to face the status quo.<sup>100</sup> However, the law is a step in the right direction; it protects domestic workers who are employed through agencies and may encourage others to seek improvements in their own work conditions.

In 2007, New York city revisited the plight of the domestic worker by amending its labor law to establish a Domestic Workers' Bill of Rights. The Domestic Workers' Bill of Rights guarantees domestic workers the right to paid holidays, vacation, and sick days.<sup>101</sup> A similar bill of rights has recently gained media attention in Montgomery County, Maryland. The Montgomery County bill of rights proposed the establishment of a living wage of \$10.50 per hour and mandated paid holidays, vacation, and sick leave, as well as family and medical leave.<sup>102</sup> It also forbade discrimination and retaliation against workers and granted domestic workers the right to complain for the violation of such rights to the Montgomery County Commission on Human Rights.<sup>103</sup> However, Montgomery County council-members are unsure whether a local government, such as Montgomery County, has the jurisdiction to enact such labor laws.<sup>104</sup> The Maryland legislature has yet to adopt the "Domestic Worker Bill of Rights."

These legislative initiatives are a step in the right direction,

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*Domestic workers do not have to be the invisible workforce. They care for the American home. It is time for America to care for them.*

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but still fail to address the safety and health concerns covered by OSHA. Though the issues of wages and hours worked are important issues faced by the domestic worker population, the legislation in New York and Maryland does not protect Angela Pena from having to wash her bare hands in ammonia everyday before work; it does not protect Emilia from having to scrub the carpet on her knees; and it does not prevent Maria, Judy and Tania's employers from requiring them to sleep in moldy, heatless, sewage-infested basements.

Domestic workers in the United States are hard-working members of our society. If the Government will not protect the health and safety of domestic work-

ers like Angela, Maria and Tania at work with OSHA, then another mechanism is required. The goal should be to not only to address the current health and safety problems that domestic workers face in the workplace, but also to establish the proper mechanisms to prevent such problems from reoccurring.

The government must pass laws protecting the health and safety of domestic workers. The laws should offer protections similar to those enjoyed by non-domestic workers under OSHA. The laws must be enforced and both domestic workers and their employers must be educated about the rights and consequences created by these laws. Laws like those passed in New York city are only the beginning. Domestic workers do not have to be the invisible workforce. They care for the American home. It is time for America to care for them.

## ENDNOTES

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<sup>1</sup> Names have been altered throughout the article.

<sup>2</sup> See Occupational Safety and Health Act [hereinafter OSHA] of 1970, 29 U.S.C. § 652 (2004).

<sup>3</sup> See generally National Labor Relations Act, 29 U.S.C. §§ 151-169 (1947); Fair Labor Standards Act of 1938; 29 U.S.C. §§ 201-219 (2007).

<sup>4</sup> See 29 U.S.C. §§ 151-169; 29 U.S.C. §§201-209.

<sup>5</sup> See 29 U.S.C. §652.

<sup>6</sup> See Domestic Workers United and DataCenter, *Home is Where the Work is: Inside New York's Domestic Work Industry* (Jul. 14, 2006), <http://www.datacenter.org/reports/homeiswheretheworkis.pdf> (last visited Mar. 7, 2008).

<sup>7</sup> See United States Census Bureau, 2000. See also American Friends Service News Archive <http://www.afsc.org/immigrants-rights/news/default.htm> (last visited Mar. 7, 2008).

<sup>8</sup> See Domestic Workers United and Datacenter, *supra* note 6.

<sup>9</sup> See *id.*

<sup>10</sup> See *id.*

<sup>11</sup> See generally 29 U.S.C. §652.

<sup>12</sup> *Id.*

<sup>13</sup> See *id.*

<sup>14</sup> Megan Tady, *Unprotected by Laws, Domestic Workers Face Exploitation*, NewStandard, Mar. 14, 2007, <http://newstandardnews.net/content/index.cfm/items/4487> (last visited Mar. 7, 2008).

<sup>15</sup> Mujeres Unidas y Activas, Day Labor Program Women's Collective of La Raza Centro Legal & Datacenter, *Behind Closed Doors: Working Conditions of California Household Workers* (Mar. 2007) <http://www.datacenter.org/reports/behindcloseddoors.pdf> (last visited Mar. 7, 2008); Tady, *supra* note 14.

<sup>16</sup> *Id.*

<sup>17</sup> Domestic Workers United and Datacenter, *supra* note 6.

<sup>18</sup> Tady, *supra* note 14.

<sup>19</sup> See Domestic Workers United and Datacenter, *supra* note 6.

<sup>20</sup> See *id.*

<sup>21</sup> See *id.*

<sup>22</sup> See *id.*

<sup>23</sup> See *id.*

<sup>24</sup> A live-in domestic worker resides in the home of his or her employer, whereas a day worker does not.

<sup>25</sup> Domestic Workers United and Datacenter, *supra* note 6.

<sup>26</sup> See *id.*

<sup>27</sup> See *id.*

<sup>28</sup> See *id.*

<sup>29</sup> See *id.*

<sup>30</sup> See *id.*

<sup>31</sup> See Domestic Workers United and Datacenter, *supra* note 6.

<sup>32</sup> See *id.*

<sup>33</sup> See *id.*

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

<sup>35</sup> Chisun Lee, *Nanny Bill Gains Political Ground*, THE VILLAGE VOICE, May 6, 2003. <http://www.villagevoice.com/news/0319,lee,43864,5.html> (last visited Mar. 7, 2008).

<sup>36</sup> See *id.*

<sup>37</sup> See *id.*

## ENDNOTES CONTINUED

- <sup>38</sup> See *id.*
- <sup>39</sup> See *id.*
- <sup>40</sup> See 29 U.S.C. §652.
- <sup>41</sup> *Id.* § 654.
- <sup>42</sup> See Occupational Safety and Health Law, American Bar Association 18 (Stephen Bokat & Horace Thompson eds., 1998). For a more in depth look at the fire, refer to David von Drehle, TRIANGLE: THE FIRE THAT CHANGED AMERICA (Grove/Atlantic Inc. 2004).
- <sup>43</sup> See American Bar Association, *supra* note 42, at 18.
- <sup>44</sup> See *id.*
- <sup>45</sup> *Id.*
- <sup>46</sup> *Id.* at 21.
- <sup>47</sup> *Id.* at 22-26.
- <sup>48</sup> *Id.* at 23.
- <sup>49</sup> American Bar Association, *supra* note 42, at 32.
- <sup>50</sup> See 29 U.S.C. §652.
- <sup>51</sup> See *id.*
- <sup>52</sup> See *id.* § 654(a) (2).
- <sup>53</sup> See Hood Et Al, WORKERS' COMPENSATION AND EMPLOYEE PROTECTION LAWS 161 (WEST PUB. CO. 1990).
- <sup>54</sup> See Occupational Safety and Health Act, 29 U.S.C. § 657 (2004).
- <sup>55</sup> See *id.* §§ 659, 660.
- <sup>56</sup> See Hood Et al., *supra* note 53, at 161, 162.
- <sup>57</sup> See 29 U.S.C. §652.
- <sup>58</sup> 29 C.F.R. 1910.132(a) (2006).
- <sup>59</sup> Tady, *supra* note 14.
- <sup>60</sup> 29 U.S.C. §652.
- <sup>61</sup> *Id.*
- <sup>62</sup> Rosas v. Dishong, 67 Cal. App. 4th 815, 817 (App. Ct. 1998).
- <sup>63</sup> Rosas, 67 Cal. App. 4th at 818.
- <sup>64</sup> *Id.* at 819.
- <sup>65</sup> *Id.* at 824.
- <sup>66</sup> *Id.* at 826.
- <sup>67</sup> Fernandez v. Lawson, 71 P.3d 779 (Cal. 2003).
- <sup>68</sup> See Fernandez 31 Cal. 4th at 34.
- <sup>69</sup> See Fernandez v. Lawson, 119 Cal. Rptr.2d 767, 775 (App. Ct. 2002).
- <sup>70</sup> See Fernandez v. Lawson, 71 P.3d 779, 425 (Cal. 2003).
- <sup>71</sup> Fernandez, 71 P.3d at 37.
- <sup>72</sup> *Id.* at 42.
- <sup>73</sup> See Stenvick v. Constant, 502 N.W. 2d 416 (Minn. App. 1993).
- <sup>74</sup> See Stenvick 502 N.W. 2d at 420.
- <sup>75</sup> See generally 29 U.S.C. §652.
- <sup>76</sup> See Rick A. Pacynski, *Legal Challenges in Using Independent Contractors*, MICH. BAR J., 72 Mich. B.J. 671, 673 (1993) (citing Kenny and Hulen, *Determining Employee or Independent Contractor Status*, 20 TAX ADVISOR 661, 662 (1989)). The "right to control" test examines whether the employer controls the time and manner in which the work is done. The organization test examines whether the worker is integrated into an organization through criteria such as graded pay and a disciplinary code. The "economic realities" test examines if the worker receives direct economic benefit from his labor, if that benefit is based on a level of skills or productivity and if the worker has a capital investment in the venture.
- <sup>77</sup> See Enoch v. Williams & Co., 370 U.S. 1 (1962). The "right to control" test is more commonly applied to domestic workers because the organization test and/or the "economic realities" test often clearly indicate that the domestic worker is not treated as an independent contractor. The subject matter in the "right to control test" is less concrete than that of the other tests.
- <sup>78</sup> Steen v. Potts, 61 N.W.2d 825, 826 (S.D. 1953); See generally 19 RICHARD A. LORD, WILLISTON ON CONTRACTS § 54:3 (4<sup>th</sup> ed.) 2007.
- <sup>79</sup> See N.L.R.B. v. A.S. Abell Co., 327 F.2d 1, 4 (4th Cir. 1964) (citing National Labor Relations Board v. Steinberg, 182 F.2d 850, 857 (5th Cir. 1950)); Blankenship v. Overholt, 786 S.W.2d 814, 816 (Ark. 1990); Markova v. United States of Am., 201 F.3d 110 (2d Cir. 2000).
- <sup>80</sup> 29 U.S.C. §652.
- <sup>81</sup> For a more in depth look at the pros and cons of domestic worker cooperatives, See Scott Cummings, *Developing Cooperatives as a Job Creation Strategy for Low-income Workers*, 26 N.Y.U. REV. L. & SOC. CHANGE 181 (1999).
- <sup>82</sup> See Ken Patterson, *Business Cooperatives Help Immigrants Climb Economic Ladder*, The American News Service, Sep. 2, 1999, <http://www.berkshirepublishing.com/ans/HTMLView.asp?parItem=S031000121A> (last visited Mar. 7, 2008).
- <sup>83</sup> *Id.*
- <sup>84</sup> 29 C.F.R. 1910.132(a) (2006).
- <sup>85</sup> 29 U.S.C. §652.
- <sup>86</sup> *Id.* § 651.
- <sup>87</sup> *Id.*
- <sup>88</sup> The Occupational Safety and Health Administration plans to present training and education programs for adult and teenage immigrant workers in an effort to ensure that "every employee has a safe and healthful workplace." See Ted Fitzgerald, *Job Safety Effort Underway for Immigrant Workers in Rhode Island*, OSHA News Release, Nov. 13, 2006, [http://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=NEWS\\_RELEASES&p\\_id=12999](http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=12999) (last visited Mar. 7, 2008).
- <sup>89</sup> 29 U.S.C. §652.
- <sup>90</sup> See *id.*; Federal Occupational Safety and Health Administration Frequently Asked Questions about State Occupational Safety and Health Plans, <http://www.osha.gov/dcs/osp/faq.html#oshaprogram> (last visited Mar. 7, 2008).
- <sup>91</sup> Alaska, Arizona, California, Connecticut, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virgin Islands, Washington, and Wyoming have state plans. See Federal Occupational Safety and Health Administration Frequently Asked Questions about State Occupational Safety and Health Plans, <http://www.osha.gov/dcs/osp/faq.html#oshaprogram> (last visited Mar. 7, 2008).
- <sup>92</sup> Federal Occupational Safety and Health Administration Frequently Asked Questions about State Occupational Safety and Health Plans, <http://www.osha.gov/dcs/osp/faq.html#oshaprogram> (last visited Mar. 7, 2008).
- <sup>93</sup> *Id.*
- <sup>94</sup> *Id.*
- <sup>95</sup> The "business or commerce" restriction, observable in the Utah, Iowa and Connecticut state OSHAs, prohibits application of OSHA to work done in the home if the homeowner does not operate a business out of his home. The "private residence" restriction, observable in the Alaska Hawaii, North Carolina, Oregon, Puerto Rico and the Virgin Islands, excludes work done in any residence. The "domestic services" restriction, observable in California, New Mexico and Arizona, excludes domestic labor. The categories are vague and incorporate a spectrum of interpretation and application.
- <sup>96</sup> See Tady, *supra* note 14.
- <sup>97</sup> See *id.*
- <sup>98</sup> See *id.*
- <sup>99</sup> See Lee, *supra* note 35.
- <sup>100</sup> See 4nanny.com, Nannies in the News, May 15, 2003, [http://www.4nanny.com/newsletters/june\\_03.htm](http://www.4nanny.com/newsletters/june_03.htm) (last visited Mar. 7, 2008).
- <sup>101</sup> See Albor Ruiz, *Our Domestic Workers Deserve Bill of Rights*, DAILY NEWS, May 31, 2007, [http://www.nydailynews.com/boroughs/2007/05/31/2007-05-31\\_our\\_domestic\\_workers\\_deserve\\_bill\\_of\\_rig-3.html](http://www.nydailynews.com/boroughs/2007/05/31/2007-05-31_our_domestic_workers_deserve_bill_of_rig-3.html) (last visited Mar. 7, 2008).
- <sup>102</sup> See Tim Craig, *Montgomery Domestic Workers Plead for Help*, WASH. POST, Feb. 8, 2005, at B02.
- <sup>103</sup> See *id.*
- <sup>104</sup> See *id.*

**THE MODERN AMERICAN**  
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# WHAT'S GOOD FOR THE GOOSE SHOULD BE GOOD FOR THE GANDER: THE IMPLEMENTATION OF FUNDAMENTAL RIGHTS IN THE WAKE OF LOFTON

By Michael Zerolnick\*

In 1977, Florida became the first state to statutorily prohibit adoption by any “homosexual” person.<sup>1</sup> This statute automatically precludes gay and lesbian individuals from adopting based solely on their sexual preference.<sup>2</sup> In 1999, a registered pediatric nurse, Steven Lofton and his cohabitating partner, Roger Croteau, challenged this same-sex couple adoption provision.<sup>3</sup> Five years later, the Eleventh Circuit examined Florida’s law to determine whether it would withstand the constitutional challenges brought by the appellants in *Lofton*.<sup>4</sup> After a lengthy legal battle, Lofton and the other appellants<sup>5</sup> were unable to overturn the statute, and the court ultimately determined that Florida’s ban on adoption by the gay and lesbian community was constitutional.<sup>6</sup>

This article provides a background of *Lofton*, including each party’s legal argument. It also provides insight into the current status of same-sex couple adoption and foster parenting in the United States. This article analyzes the court’s decision in *Lofton*, explains the legal difference between adoption and fostering, and details how each should be treated.<sup>7</sup> It presents a new analysis under the Fourteenth Amendment, and argues that there exists a fundamental right to adopt. This article also explains why strict scrutiny should be applied to the newly identified fundamental right to adopt. Finally, this article discusses the flawed reasoning of the court’s decision against same-sex couple adoption, and summarizes the importance of a new analysis in light of our societal evolution.

## BACKGROUND

### BACKGROUND OF LOFTON

Steven Lofton and Roger Croteau raised three foster children who were HIV positive from birth.<sup>8</sup> Despite giving “exemplary”<sup>9</sup> care to these foster children and receiving the “Outstanding Foster Parenting”<sup>10</sup> award, Lofton’s adoption application was rejected in accordance with Florida’s statutory scheme. Lofton then filed suit challenging the constitutionality of the statute.<sup>11</sup>

The appellants relied on three main arguments in asserting that Florida’s statute was unconstitutional. First, the appellants claimed that the statute was a violation of their “rights to familial privacy, intimate association, and family integrity under the *Due Process Clause of the Fourteenth Amendment*.”<sup>12</sup> Further, they claimed that the Supreme Court’s decision in *Lawrence v. Texas*<sup>13</sup> “recognized a fundamental right to private sexual intimacy and that the Florida statute, by disallowing adoption by individuals who engage in homosexual activity, impermissibly burdens

the exercise of this right.”<sup>14</sup> Finally, the appellants asserted that Florida’s statute violates the Fourteenth Amendment’s Equal Protection Clause by prohibiting only gay and lesbian individuals from adopting children.<sup>15</sup>

The Eleventh Circuit found the appellants’ due process argument without merit,<sup>16</sup> and held that the appellants’ right-to-family-integrity argument failed to state a claim.<sup>17</sup> The court explained that fostering and adoption are statutorily created privileges,<sup>18</sup> and therefore the Department of Children and Family Services may remove a child from a household whenever it believes it is in the child’s best interest.<sup>19</sup> Finally, the Eleventh Circuit held that *Lawrence* did not create a fundamental right to private sexual intimacy so it did not apply to the case at hand.<sup>20</sup>

The court also invalidated the appellants’ equal protection challenge<sup>21</sup> by reiterating the Supreme Court’s holding in *Romer v. Evans*<sup>22</sup> stating, “[u]nless the challenged classification burdens a fundamental right or targets only a suspect class, the *Equal Protection Clause* requires only that the classification be rationally related to a legitimate state interest.”<sup>23</sup> The court in *Lofton* held both that Florida’s statute did not burden any fundamental right, and that lesbian and gay individuals were not considered a suspect class.<sup>24</sup> Thus, when viewed under the appropriate standard of rational basis review, Florida’s statute was deemed to be rationally related to Florida’s permissible government interest in “encouraging a stable and nurturing environment for the education and socialization of its adopted children.”<sup>25</sup>

### FOSTERING AND ADOPTING IN THE UNITED STATES

While the outcome of *Lofton* is troubling, the predicament that the gay and lesbian population continues facing across the country is not as bleak as many of *Lofton*’s critics attempt to portray. Currently, every state in the country allows gay and lesbian individuals to foster children.<sup>26</sup> Recent court decisions have found regulations and statutes that prohibit fostering by gay and lesbian individuals unconstitutional, indicating that courts are increasingly supporting the right of gay and lesbian individuals to foster children.<sup>27</sup> In June 2006, the Supreme Court of Arkansas upheld a challenge to a state regulation that prevented gay and lesbian individuals from becoming foster parents.<sup>28</sup> Simi-

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*the predicament that the gay and lesbian population continues facing across the country is not as bleak as many of Lofton’s critics attempt to portray.*

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larly, a Missouri Circuit Court judge recently “overturned a Missouri Department of Social Services decision denying a woman’s application to become a foster parent because she is a lesbian.”<sup>29</sup>

Other states have demonstrated that, unlike the decision in *Lofton*, gay and lesbian individuals should be legally allowed to adopt. Aside from Florida, Utah,<sup>30</sup> and Mississippi,<sup>31</sup> no other state,<sup>32</sup> including the District of Columbia, has any specific provision precluding the gay and lesbian community from adopting.<sup>33</sup> California and Vermont have gone as far as to specifically provide statutory protection to gay and lesbian individuals seeking to adopt.<sup>34</sup> Tennessee gives foster parents preference to adopt their foster children, regardless of their sexual orientation.<sup>35</sup> States such as California, Vermont, and Tennessee demonstrate that *Lofton* represents the exception rather than the norm.<sup>36</sup> Recent court decisions, like the Virginia case of *Roe v. Roe*, seem to be moving away from restricting gay and lesbian individuals’ right to adopt.<sup>37</sup> Recent cases in Indiana, Massachusetts, New York, and Vermont provide examples of other courts’ progressive views of gay and lesbian adoption.<sup>38</sup>

Perhaps most encouraging, Florida’s views on gay and lesbian adoption appear to be changing. In 2002, eight former supporters of the anti-homosexual adoption law signed a proclamation stating, “in 1977, we were among the state legislators who helped pass Florida’s law prohibiting gay people from adopting children. We now realize that we were wrong. This discriminatory law prevents children from being adopted into loving, supportive homes—and we hope it will be overturned.”<sup>39</sup> More recently, both Florida’s House and Senate have proposed legislation that would eliminate the outright ban on homosexual adoption, and replace it with a clear and convincing standard of review, which gay and lesbian individuals would have to meet in order to adopt.<sup>40</sup>

## ANALYSIS

*Lofton* serves as a paradigm for the challenges of gay and lesbian adoption, and demonstrates the importance and necessity of prompt anti-discriminatory advancements in constitutional interpretation. “While this country has realized increased acceptance of homosexual adoption, morality concerns based on religious condemnation of homosexuality and the belief that a child is best raised in a traditional household, consisting of one mother and one father who are married, has set the backdrop for withholding gay adoption rights.”<sup>41</sup> Currently, only two states have anti-discrimination statutes in place,<sup>42</sup> leaving forty-five<sup>43</sup> states’ laws susceptible to discriminatory measures. For example, while Florida’s legislation to lift the homosexual adoption ban seems encouraging, it instead continues to impose a tremendous burden on gay and lesbian individuals wishing to adopt.<sup>44</sup>

### ANALYSIS OF LOFTON

The Florida Circuit Court in *Lofton* overshadowed the existing implied fundamental right to adopt by using the appellants’ inadequate arguments against them and by creatively utilizing

semantics to formulate the court’s decision.<sup>45</sup> The appellants made compelling constitutional arguments,<sup>46</sup> yet they conceded the argument that ultimately could have achieved their goals.<sup>47</sup> By agreeing that there is no fundamental right to adopt or to be adopted,<sup>48</sup> and that adoption is simply a state-created privilege, the parties in *Lofton*<sup>49</sup> conceded that “adoption is not a right, it is a statutory privilege.”<sup>50</sup>

In arriving at its decision, the court relied heavily on the Supreme Court decision in *Smith v. Org. of Foster Families for Equal. & Reform*.<sup>51</sup> *Smith* explored the right to familial privacy as it related to foster parents and foster children.<sup>52</sup> The Florida Circuit Court relied heavily on the Supreme Court’s comments in *Smith* that distinguished the foster family from the natural family.<sup>53</sup> In its application of this precedent however, the *Lofton* court went beyond the Supreme Court’s comments. Following *Smith*, the *Lofton* court determined that because adoption is a creation of the state, no such fundamental right exists.<sup>54</sup> This erroneous conclusion highlights the crucial difference between adoption and foster care.

Foster care is “a [temporary] child welfare service which provides substitute family care...when adoption is neither desirable nor possible.”<sup>55</sup> It is true that “whatever emotional ties may develop between foster parent and foster child have their origins in an arrangement in which the State has been a partner from the outset.”<sup>56</sup> Fostering is substantially akin to a contractual arrangement.<sup>57</sup> Similar to any ongoing performance contract, Florida may rescind the relationship at any time.<sup>58</sup> Additionally, fostering, by its very design under Florida law, is intended to be a means to an end while the state searches for a permanent adoptive home for the child.<sup>59</sup>

Adoption on the other hand, is not a contract.<sup>60</sup> Instead, adoption is the end that fostering seeks to achieve; it is the legal equivalent of biological parenthood.<sup>61</sup> As the Circuit Court stated in *Lofton*, potential adoptive parents are asking the state to confer official recognition on a relationship where no natural filial bond exists.<sup>62</sup> This recognition creates the highest level of constitutional insulation from subsequent state interference.<sup>63</sup> “In many cases, they also are asking the state to entrust into their permanent care a child for whom the state is currently serving as *in loco parentis*.”<sup>64</sup>

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*adoption is the end that fostering  
seeks to achieve; it is the legal  
equivalent of biological parenthood*

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Prospective adoptive parents seek creation of this filial bond from the state.<sup>65</sup> The Supreme Court has noted that liberty interests may result from positive law sources.<sup>66</sup> In adoption cases, while the state may continue to serve as *in loco parentis*, it instead chooses to place the child for adoption.<sup>67</sup> As a result, the Fourteenth Amendment is implicated and must ensure that “the state-created right is not arbitrarily abrogated.”<sup>68</sup>

## FUNDAMENTAL RIGHT TO ADOPT

One way to establish the right of gay and lesbian individuals to adopt is for the court to identify a fundamental right being impinged upon.<sup>69</sup> The Equal Protection Clause of the Fourteenth Amendment states that no state shall “deny to any person...the equal protection of the laws.”<sup>70</sup> The appellants in *Lofton* argued that the Equal Protection Clause required that gay and lesbian individuals be considered a suspect class, thus garnering strict scrutiny and not merely rational basis review.<sup>71</sup> Their primary basis for this argument was the Supreme Court’s decision in *Romer v. Evans*,<sup>72</sup> which invalidated a Colorado amendment as discriminating against the gay and lesbian population.<sup>73</sup>

The appellants in *Lofton* also unsuccessfully asserted that their Due Process rights had been violated.<sup>74</sup> The Due Process Clause of the Fourteenth Amendment asserts that no State shall “deprive any person of life, liberty, or property, without due process of law.”<sup>75</sup> This clause guarantees the right to pursue life with limited governmental intrusion, specifically with respect to

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### *The fundamental right to adopt violated in Lofton stems from a Due Process right*

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fundamental rights.<sup>76</sup> The appellants argued that *Lawrence*<sup>77</sup> established fundamental rights to both family integrity and private sexual intimacy.<sup>78</sup>

By finding that gay and lesbian individuals did not constitute a suspect class, the Eleventh Circuit Court dismissed appellants’ Equal Protection challenge.<sup>79</sup> The court also struck down appellants’ Due Process argument,<sup>80</sup> and focused instead on “the fact that the *Lawrence* Court never applied strict scrutiny, the proper standard when fundamental rights are implicated, but instead invalidated the Texas statute on rational-basis grounds....”<sup>81</sup> In expressing its reluctance to create a new fundamental right, the Eleventh Circuit noted the Supreme Court’s statement in *Washington v. Glucksberg*<sup>82</sup> that the “‘utmost care [must be exercised] whenever [it is] asked to break new ground’ in the field of fundamental rights.”<sup>83</sup>

While adequate care must be given in cases where new fundamental rights will be granted, such caution is unnecessary in applying fundamental rights that are already in existence.<sup>84</sup> Not all fundamental rights are expressly listed in the Constitution. Implicit fundamental rights include protections of “personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.”<sup>85</sup> The fundamental right to adopt violated in *Lofton* stems from a Due Process right created through the Equal Protection Clause.<sup>86</sup> Although the appellants in *Lofton* could have prevailed on either their Due Process claim or their Equal Protection claim, they arguably would have prevailed had they combined the two.<sup>87</sup>

The Supreme Court specifically noted in *Washington v. Glucksberg*, “in a long line of cases, [it has been] held that, in

addition to the specific freedoms protected by the Bill of Rights, the ‘liberty’ specially protected by the Due Process Clause includes the [right] to have children.”<sup>88</sup> The existence of a fundamental right to have children however, cannot independently remedy the issue at hand. Because the *Lofton* court refused to recognize gay and lesbian individuals as a suspect class, applying this fundamental right is inadequate.<sup>89</sup> Thus, appellants would have to argue for the Court to define a new suspect class, namely men, in the context of the fundamental right to adopt.

Men should not universally be considered a suspect class. The suspect class should be applied to men in the specific context of adoption (or, the right to have children). In this context, men have an immutable characteristic that only carefully crafted jurisprudence can address in an equitable manner. The Equal Protection Clause purports to provide the benefits of the laws and rights equally and keep “governmental decisionmakers from treating differently persons who are in all relevant respects alike.”<sup>90</sup> Speaking for the Court in *Romer v. Evans*,<sup>91</sup> Justice Kennedy clearly indicated that it is constitutionally impermissible to identify persons by a single trait and then deny them protection of the laws.<sup>92</sup> *Lofton* typified exactly what *Romer* scorned. *Lofton* prevented men, albeit gay men, from realizing their fundamental right to have children.<sup>93</sup> Whether homosexuality should be considered a suspect class is irrelevant under this framework.

In modern times, with the advent of sperm banks, a woman can have a child independent of a man.<sup>94</sup> With the aid of a willing and able surrogate mother, an individual man or woman may have children.<sup>95</sup> Both conception and surrogacy require a woman to be actively involved in the process<sup>96</sup> yet only adoption provides a man the ability to parent a child without the involvement of a woman.<sup>97</sup>

Precedent supporting a man’s right to adopt under the Fourteenth Amendment’s Equal Protection Clause exists.<sup>98</sup> The Supreme Court has stated on multiple occasions, “it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a

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*“...it is constitutionally impermissible to identify persons by a single trait and then deny them protection of the laws.”*

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person as the decision whether to bear or beget a child.”<sup>99</sup> Analysis of the Supreme Court’s comments indicates that men deserve the right to have children as well. Most importantly, the Supreme Court indicated that this right belongs to an *individual*.<sup>100</sup> Further, the Court noted that this right entailed an individual’s decision to “bear or beget” a child.<sup>101</sup> The Court, recognizing that the right was due to all persons, used language that was applicable to women, “to bear,” and to men, “to beget,” rather than language applicable only to women, such as “to conceive.”<sup>102</sup> Since men cannot conceive, adoption becomes the most viable alternative, and therefore analysis should extend to

adoption. Thus, according to the Equal Protection Clause, men may not be denied a fundamental right simply because they cannot conceive.

### STANDARD OF REVIEW

Because the law restricting adoption to a certain class of people has now been shown to burden a fundamental right, rational basis review is no longer the appropriate standard.<sup>103</sup> Instead, the appropriate standard is strict scrutiny, whereby any infringement that might arise must be narrowly tailored to serve a compelling government interest.<sup>104</sup>

#### COMPELLING STATE INTERESTS

##### 1. MORALITY

As Florida did in *Lofton*, a state may assert that its legislation precluding gay and lesbian adoption is supported by morality interests.<sup>105</sup> Florida claimed that its moral disapproval of homosexuality was consistent with its right to legislate social morality.<sup>106</sup> However, the District Court invalidated this purpose as insufficient.<sup>107</sup> While states may legislate in order to achieve ends that they believe to be morally good,<sup>108</sup> they may not “be the decisive factor in holding up a statute.”<sup>109</sup>

In *Lofton*, prejudicial views of homosexuality as immoral prevented the appellants from adopting.<sup>110</sup> The Supreme Court has held that legislative decisions predicated upon prejudicial views may not be sustained.<sup>111</sup> For example, the Court in *Palmore v. Sidoti*<sup>112</sup> astutely remarked:

The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect. Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private...prejudice that they assume to be both widely and deeply held.<sup>113</sup>

The Court in *Palmore* also noted the potential negative impact of biases on children.<sup>114</sup> Although the decisions in *Lofton* and *Palmore* turned on different facts, the two cases can be reconciled. While *Palmore* dealt with a child whose parent married someone of another race,<sup>115</sup> it is analogous to a circumstance where a child would live with a parent of a specific sexual preference. The *Palmore* Court recognized that a child living with a “different” parent would encounter difficulties and pressures deriving from social biases.<sup>116</sup> It follows that similar social biases would exist for a child living in a gay or lesbian household. Regardless, the Court ruled that such prejudices could not justify the classification.<sup>117</sup>

Florida’s Department of Children and Family Services uses certain requirements and considerations to evaluate the parent hoping to adopt prior to finalizing an adoption.<sup>118</sup> One such mandate, which is impermissible under this new fundamental right analysis, requires prospective adoptive parents to sign an

affidavit of good moral character.<sup>119</sup> Michigan statutes, which identify the state’s “best interests” considerations, similarly require prospective adoptive parents to be morally fit.<sup>120</sup> When used to inflict prejudice toward the gay and lesbian community, such a requirement is unconstitutional under this new fundamental right analysis.<sup>121</sup>

Whether morality standards are accepted or condemned by the court, moral biases are implicit in restrictions and bans on gay and lesbian adoption. Although *Lawrence* does not apply

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#### *moral biases are implicit in restrictions and bans on gay and lesbian adoption*

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specifically to gay and lesbian adoption,<sup>122</sup> the opinion stated that the obligation of the United States Supreme Court “is to define the liberty of all, not to mandate its own moral code.”<sup>123</sup> Accordingly, it is the obligation of all other courts to heed the Supreme Court’s message and not hinder gay and lesbian adoption on moral grounds.

##### 2. BEST INTERESTS OF THE CHILD

Independent of a fundamental right, another way to establish gay and lesbian parentage is from the standpoint of prospective adoptees. Courts must support litigants’ assertions that it is in the best interests of children to allow gay and lesbian individuals to adopt.<sup>124</sup>

Florida’s interest in providing adoption as evidenced in *Lofton*, is to “create adoptive homes that resemble the nuclear family as closely as possible.”<sup>125</sup> A state’s overriding interest in promoting adoption is to provide individuals with the opportunity to become parents.<sup>126</sup> The state may not identify those individuals whom it deems *most* capable of parenting an adoptive child, but rather those who are *adequately* capable of parenting the child in accordance with the proper guidelines.<sup>127</sup> The “best interests of the child” is the appropriate standard when determining whether a person is adequately capable of parenting an adoptive child.<sup>128</sup>

Although the right to adopt is fundamental in nature under this new analysis, it is still a public act rather than a private one.<sup>129</sup> “[P]rospective adoptive parents are electing to open their homes and their private lives to strict scrutiny by the state.”<sup>130</sup> The Supreme Court has not formulated a specific framework for determining adequacy in the context of an adoption proceeding, and due to the fact-driven nature of the “best interests” analysis, it cannot. However, it has indicated the importance of protecting the interests of children,<sup>131</sup> and has suggested the states should decide what factors are appropriate for the “best interests” standard.<sup>132</sup>

Some states merely indicate that the best interests of the child should govern in adoption placement, but do not specifically provide the factors to be considered.<sup>133</sup> Other states do provide specific factors as a guide.<sup>134</sup> For example, Florida’s

statute indicates a number of factors to consider in screening adoption applicants, including physical and mental health, income and financial status, and housing.<sup>135</sup> Nearly all other states with analogous guidelines<sup>136</sup> provide for the adequacy of the prospective adoptive parent's physical, mental, or emotional health.<sup>137</sup> Furthermore, those states typically conduct background checks to determine if the prospective parents have any history of abuse or criminal record.<sup>138</sup> Although no formal framework exists for the "best interests" standard, the standard is applicable<sup>139</sup> whether the proceeding is one for adoption, visitation, custody, or the like.<sup>140</sup> As such, it is insightful to look at another case involving children and examine the "best interests" analysis.

In 1994, the Supreme Court of South Dakota presided over *Van Driel v. Van Driel*,<sup>141</sup> a case involving the custody of an eight-year-old daughter and a five-year-old son.<sup>142</sup> The children's father sought a modification of the custody agreement, citing the mother's lesbian relationship as sufficient grounds for the change.<sup>143</sup> Appropriately, the court used the "best interests" standard to resolve the dispute.<sup>144</sup>

The court in *Van Driel* invalidated the husband's argument that the lesbian relationship of the children's mother *per se* contravened the best interests of the children.<sup>145</sup> The court explained that "immoral conduct by one parent does not automatically render that parent unfit to have custody of the [children]. The parent's conduct must be shown to have had some harmful effect on the children."<sup>146</sup> The court, echoing Justice Blackmun's dissent in *Bowers v. Hardwick*, subsequently stated that "[p]ersonal conceptions of morality... have no place in the resolution of this [type of] controversy."<sup>147</sup> The court held that because the record provided no indication of parental unfitness or harm to the children, there was no cause to modify the custody agreement.<sup>148</sup>

In 2000, the Supreme Court of New Jersey decided a custody dispute between the biological mother of twin children and her former domestic partner. In *V.C. v. M.J.B.*,<sup>149</sup> the former domestic partner claimed she was the psychological parent of the two children and, as such, deserved partial custody.<sup>150</sup> The court defined a psychological parent as "one who, on a day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child's psychological need for an adult."<sup>151</sup> After applying both the four-step test delineating psychological parenthood and the "best interests" factors<sup>152</sup> in New Jersey's statutory scheme, the court found that each woman was a "fully capable, loving parent committed to the safety and welfare of the twins."<sup>153</sup> While the court ultimately denied joint custody to the mother's former partner, this determination was based solely on the duration of separation from the children and not her sexual preference.<sup>154</sup>

There is a considerable amount of information required to make a sufficient "best interests" determination in any case sur-

rounding children. For example, the court in *V.C.*, illustrated that sexual preference should have very little, if any, significance in the context of custody proceedings.<sup>155</sup> The Supreme Court of New Jersey acknowledged that the case revolved around a lesbian couple, but expressed that the standard was applicable to all similarly situated couples.<sup>156</sup> Ultimately, classifying gay and lesbian individuals to preclude them from adopting is not narrowly tailored enough to serve a compelling government interest.

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### 3. NARROW TAILORING

The Fourteenth Amendment ensures that "government may treat people differently because of [a single characteristic] only for the most compelling reasons."<sup>157</sup> Once the fundamental right to adopt is acknowledged, *Lofton* can easily be compared to *Palmore v. Sidoti*.<sup>158</sup> In *Palmore*, a state court divested a biological mother of the custody of her infant child because she remarried a person of a different race.<sup>159</sup> The Supreme Court reversed the decision, applying the "best interests" standard to find that there was no issue as to the mother's fitness.<sup>160</sup> Similarly, placing a child in an adoptive home using the best interest standard is a compelling government interest for purposes of the Equal Protection Clause.<sup>161</sup>

The Court in *Palmore* specifically noted that a primary objective of the Fourteenth Amendment was to eliminate racial discrimination.<sup>162</sup> Although the timing of the Fourteenth Amendment's ratification supports this claim,<sup>163</sup> it is now the amendment that stands for the purpose of eradicating discrimination on the basis of *any* single characteristic.<sup>164</sup>

Homosexuality is one such discriminatory characteristic against which the Fourteenth Amendment should safeguard. Homosexuality has never explicitly been considered a suspect class,<sup>165</sup> but in the context of a fundamental right and under the guise of the Fourteenth Amendment, it must garner such consideration.<sup>166</sup> As the *Romer* Court stated, "a classification of persons undertaken for its own sake, [is] something the Equal Protection Clause does not permit."<sup>167</sup> Precluding gay and lesbian individuals from adopting presents such a classification.

### COMMENTARY

There are many other reasons for allowing gay and lesbian individuals to adopt, aside from considering the right to adopt as a fundamental right. When the rational basis "rug" is pulled out from under Florida,<sup>168</sup> common sense illuminates just how tenuous Florida's "best interests" arguments are.

### THE NUCLEAR FAMILY

The image of the nuclear family has traditionally adhered to a certain framework. For example, the Supreme Court in *Lehr v. Robertson*<sup>169</sup> indicated that state laws have historically shown a preference for the concept of a formal, marital family.<sup>170</sup> In *Smith*, the Court held that "the usual understanding of 'family' implies biological relationships."<sup>171</sup> Following this traditional

framework, Florida contends that the purpose of its adoption policy is to “create adoptive homes that resemble the nuclear family as closely as possible.”<sup>172</sup>

While these statements are true, they represent only one historical notion of “family.”<sup>173</sup> Today it is increasingly difficult to define a nuclear family. In 2006, census data indicated that the traditional marital view of a family is no longer the norm.<sup>174</sup> Accordingly, the Supreme Court has recognized that the notion of family may change with the passage of time. *Moore v. City of East Cleveland*<sup>175</sup> showed that traditional notions of family should be expanded in particular circumstances.<sup>176</sup> Citing to *Moore*, the Court held in *Lehr* that “a recognized family unit is...entitled to constitutional protection.”<sup>177</sup>

Approximately twenty years after *Smith*, *Moore*, and *Lehr*, the Supreme Court specifically noted the evolution of the family structure in *Troxel v. Granville*.<sup>178</sup> In this noteworthy case, the Supreme Court held that “[t]he demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household.”<sup>179</sup> Because of the flux in family structure,<sup>180</sup> efforts to place children in traditional nuclear families cannot be considered even rationally related to the state’s interest.<sup>181</sup>

#### HOUSEHOLD STABILITY

In *Lofton*, Florida’s Department of Children and Family Services (“DCFS”) asserted that homes with married mothers and fathers “provide the stability that marriage affords and the presence of both male and female authority figures, which it considers critical to optimal child development and socialization.”<sup>182</sup> The state offers no evidence to support its claim that the marital family structure is “more stable” than other household arrangements.<sup>183</sup> Under rational basis review, a state does not need evidentiary support to sustain its legislation.<sup>184</sup> However, under this new fundamental right analysis, the state has the impossible task of providing evidence to support its claim.<sup>185</sup>

No evidence exists to support the assertion that a home without a married mother and father does not provide an atmosphere for “optimal child development and socialization.” If a dual-parent household is so “critical,” it would not be in the best interests of a child to be in any other familial structure other than the one asserted by the DCFS. However, there exists no evidence that it is “critical.” In fact, if every household with both a mother and father was to be considered intrinsically stable, no child in a dual-parent household would ever be removed from his or her parent’s care. There are instances where a child is removed from a dual-parent household because remaining in the household would not be in the best interest of the child.

Just as there is no evidence to support the claim that dual-parent households are “optimal,” no evidence exists to support the opposite conclusion that single-parent households are unstable in all cases.<sup>186</sup> If this were true, all children in single-parent households would be removed because it would always be in the best interest of the child. Clearly this is a preposterous proposal as many single-parent households present high-functioning envi-

ronments for children. Similarly, a household composed of gay or lesbian individuals does not automatically equate to one of instability. If a gay or lesbian individual’s household was to be considered intrinsically unstable, it would be in the best interest to remove a child from a household containing at least one gay or lesbian parent. But to date, there is no pending legislation in Florida or any other state to this effect.

“Unprovable assumptions” previously provided a legitimate basis for upholding the adoption statute. Under strict scrutiny, these “unprovable assumptions” would be insufficient.<sup>187</sup> The determination of stability would necessarily be driven by the facts and circumstances of each individual case.<sup>188</sup> Adoption and prospective adoptive parents should be accorded the same treatment.

#### PARENTAL ABILITY

Florida contended that the decision to preclude homosexual adoption was permissible, and cited the importance of heterosexual mothers and fathers<sup>189</sup> as role models in shaping a child’s sexual and gender identity.<sup>190</sup> The state attempted to create a causal link between homosexuality and a lack of parenting ability, a connection that is patently irrational.

In legitimizing Florida’s preclusion of homosexual adoption, the Circuit Court in *Lofton* remarked:

It is chiefly from parental figures that children learn about the world and their place in it, and the formative influence of parents extends well beyond the years spent under their roof, shaping their children’s psychology, character, and personality for years to come.... The adage that “the hand that rocks the cradle rules the world” hardly overstates the ripple effect that parents have on the public good by virtue of their role in raising their children....<sup>191</sup>

Florida denies gay and lesbian individuals the right to adopt, but allows, and even encourages, the gay and lesbian community to “rock the cradle”<sup>192</sup> by fostering children.<sup>193</sup> This is a clear manifestation of the court’s contradictory view.<sup>194</sup>

Furthering their contradiction, it appears as though Florida courts prevent gay and lesbian individuals from adopting because they fear the child’s health or safety would be negatively impacted.<sup>195</sup> The *Lofton* court stated that a child’s best interests are served by his or her parent’s ability to personally relate to the child’s problems and “assist the child in the difficult transition to heterosexual adulthood.”<sup>196</sup> This does not account for

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scenarios where heterosexual parents have a lesbian or gay child. In those instances, would it be consistent with the “best interests” standard to remove the child from the parent’s care? The ability of a parent to relate to his or her child’s sexuality should not be the determining factor of whether that parent-child bond should be sustained.<sup>197</sup>

Given the existing allowable exposure to harm in our society,<sup>198</sup> it does not make sense to prevent children from being placed into adoptive homes absent a clear indication of harm.<sup>199</sup> Children are removed from their parent’s care if there is a current, short-term, showing of unfitness or gross misconduct.<sup>200</sup> It therefore stands to reason that if there is no showing of unfitness or gross misconduct, prospective parents should not be denied the custody of a child.

The Supreme Court in *Troxel* stated that “parents possess

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*Instead of sexual preference, the focus should be placed on the ability of the prospective parents to be parents...*

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what a child lacks in maturity, experience, and capacity for judgment required for making life’s difficult decisions.”<sup>201</sup> Yet, there exists no test to serve as a precursor to parenthood that quantifies maturity; there is no minimum age before which parenting is prohibited; and there is no law precluding persons with a criminal background from having children. Although the Court’s statement in *Troxel* does not always hold true, these traits are far more worthy of focus than sexual preference. Instead of sexual preference, the focus should be placed on the ability of the prospective parents to be parents. A scheme already exists to determine proper placement into an adoptive home: the best interests of the child.<sup>202</sup> In 2005, the Eleventh Circuit Court heard *Behrens v. Reiger*,<sup>203</sup> a Florida adoption case that had no issues regarding sexual preference. Instead, *Behrens* was decided pursuant to the “best interests” factors outlined in Florida’s Administrative Code.<sup>204</sup>

The best interests of a child waiting to be adopted are served by looking predominantly at the fitness and character of the prospective parents.<sup>205</sup> If it is determined that sexual preference is a component of character and should therefore be looked at along with the plethora of other considerations, so be it. Nonetheless, there are two certainties regarding the “best interests” standard. First, a child’s best interests are served by placing the child in a loving and supportive home, or one where he or she will have the

opportunities to grow and prosper.<sup>206</sup> Second, such intent focus on the sexual preference of prospective adoptive parents is not in the best interests of a state’s “future citizens”<sup>207</sup> because its main impact is to bolster bigotry, continue closed-mindedness, and perpetuate prejudice.

## CONCLUSION

The status of the gay and lesbian community’s adoption is currently in a state of limbo.<sup>208</sup> Some states have passed legislation in favor of gay and lesbian adoption, some have allowed legislation against it, and others have left the topic unclear.<sup>209</sup> Meanwhile, year after year, state courts are forced to decide cases challenging various legislation and governmental policy related to the adoption of children by gay and lesbian individuals.<sup>210</sup> Unless the state legislatures can recognize the need to pass progressive legislation, a decision from the Supreme Court is imperative.

The *Lofton* court claimed that there was no precedent to sustain a constitutional challenge with respect to gay and lesbian adoption.<sup>211</sup> Regardless, a lack of precedent does not lead to an incontrovertible conclusion of correctness. As the Court said in *Casey*, referring to its decision in *Loving v. Virginia*,<sup>212</sup>

Marriage is mentioned nowhere in the Bill of Rights and interracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause.<sup>213</sup>

Furthermore, the Supreme Court in *Lawrence* expressly stated that “*Bowers* was not correct when it was decided, and it is not correct today.”<sup>214</sup> Accordingly, it can be seen that mere precedent does not always denote correctness, nor does a lack of precedent indicate that it should not exist. Precedent exists to make this decision. The evolution of our society over the last one hundred, two hundred, or even five hundred years, provides the appropriate precedent.

By utilizing this analysis and the level of scrutiny associated with a fundamental right to adopt, men, including gay men, may garner protection from the type of discriminatory legislation upheld in *Lofton*. Moreover, a decision by the Supreme Court implementing this analysis will clarify any ambiguity and insulate from further discrimination gay and lesbian individuals who merely wish to care for children.

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## ENDNOTES

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<sup>1</sup> See FLA. STAT. § 63.042(3) (2003) (stating that “no person eligible to adopt under this statute may adopt if that person is a homosexual”); *Lofton v. Kearney*,

157 F. Supp. 2d 1372, 1374 (S.D. Fla. 2001).

<sup>2</sup> See *Kearney*, 157 F. Supp. 2d at 1375; see also *Lofton v. Sec’y of Dep’t of Children & Family Servs.*, 358 F.3d 804, 807 (11th Cir. 2004) (arguing that Florida’s statute prevents adoption by *practicing* homosexuals, defined by Florida courts to include only those applicants “who are known to engage in current, voluntary homosexual conduct”); FLA. STAT. § 63.042(3) (mandating that “no person eligible to adopt under this statute may adopt if that person is a homosex-

- ual”).
- <sup>3</sup> See *Lofton v. Butterworth*, 93 F. Supp. 2d 1343, 1344 (S.D. Fla. 2000) (describing how Lofton and Croteau filed suit against the Department of Children and Families, and claimed that Fla. Stat. § 63.042(3) (2003), which prohibits adoption by homosexuals, violated their civil rights).
- <sup>4</sup> *Lofton v. Sec’y of Dep’t of Children & Family Servs.*, 358 F.3d at 809.
- <sup>5</sup> The other appellants were John Roe, an eleven year old; Roe’s guardian, Douglas E. Houghton, Jr., a clinical nurse specialist; Wayne LaRue Smith, an attorney; and his partner, Daniel Skahen, a real estate broker.
- <sup>6</sup> *Lofton*, 358 F.3d at 827.
- <sup>7</sup> This article asserts that *Lofton* was decided in a manner that bears stark similarity to the Court’s decision in *Dred Scott v. Sandford*, 60 U.S. 393 (1857). This decision by the Supreme Court was not sound in accordance with proper constitutional analysis. Instead, the decision was outcome-driven rather than fact-driven because of the racist nature of our society at the time. The Court eventually remedied this injustice by overturning *Scott* through *Plessy v. Ferguson*, 163 U.S. 537 (1896) and ultimately, *Brown v. Bd. of Educ.*, 347 U.S. 483, 494-95 (1954). In truth, the decision in *Lofton*, denying rights to homosexuals will “prove to be quite as pernicious” as the Supreme Court’s decision in *Scott* which denied rights to free blacks. See *Plessy*, 163 U.S. at 559. Plainly, the outcome in *Lofton* is unfair and inappropriate given our society’s proclivity for justice, impartiality, and tolerance.
- <sup>8</sup> *Lofton*, 358 F.3d at 807.
- <sup>9</sup> *Id.*
- <sup>10</sup> See *Kearney*, 157 F. Supp. 2d at 1375 (mentioning that Lofton received the award from the Children’s Home Society, a child placement agency licensed by Florida’s predecessor agency to the Department of Children and Families).
- <sup>11</sup> *Lofton*, 358 F.3d at 808.
- <sup>12</sup> *Id.* at 809.
- <sup>13</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).
- <sup>14</sup> *Lofton*, 358 F.3d at 809.
- <sup>15</sup> *Id.*
- <sup>16</sup> *Id.* at 817.
- <sup>17</sup> *Id.* at 815.
- <sup>18</sup> *Id.* at 811-12.
- <sup>19</sup> *Lofton*, 358 F.3d at 814.
- <sup>20</sup> *Id.* at 817. (distinguishing *Lofton* from *Lawrence* on two grounds, namely the court pointed out that *Lofton* involved minors whereas *Lawrence* did not, and the court pointed to the fact that *Lofton* dealt with a statutory privilege, rather than a criminal prohibition).
- <sup>21</sup> *Id.* at 826.
- <sup>22</sup> *Romer v. Evans*, 517 U.S. 620, 631 (1996).
- <sup>23</sup> *Lofton*, 358 F.3d at 818.
- <sup>24</sup> *Id.*
- <sup>25</sup> *Id.* at 819.
- <sup>26</sup> *Contra* Elizabeth L. Maurer, *Errors That Won’t Happen Twice: A Constitutional Glance at a Proposed Texas Statute That Will Ban Homosexuals From Foster Parent Eligibility*, 5 APPALACHIAN J. L. 171, 190 (Spring 2006).
- <sup>27</sup> See *infra* notes 28, 29.
- <sup>28</sup> *Dep’t of Human Servs. v. Howard*, No. 05-814, 2006 Ark. LEXIS 418, at \*2 (Ark. 2006) (finding the regulation unconstitutional because it violated the separation of powers doctrine, and stating that the regulation did “not promote the health, safety, or welfare of foster children but rather acts to exclude a set of individuals from becoming foster parents based upon morality and bias.”); *Id.* at \*12.
- <sup>29</sup> Press Release, American Civil Liberties Union, Missouri Judge Rules That Lesbian Can Be Foster Parent, (Feb. 17, 2006), available at <http://www.aclu.org/lgbt/parenting/24195prs20060217.html> (last visited Mar. 7, 2008).
- <sup>30</sup> UTAH CODE ANN. § 78-30-1 (2002) (prohibiting adoption by anyone, heterosexual or homosexual, who is cohabiting in a non-legally valid relationship).
- <sup>31</sup> MISS. CODE ANN. 93-17-3(2) (2000) (denying adoption to same-sex couples).
- <sup>32</sup> Maurer, *supra* note 26 at 171, 190 (commenting that currently, no state has a law preventing homosexuals from being foster parents, though Texas has proposed legislation to that effect. Texas’s proposed legislation seeks to impinge on the rights of homosexuals by banning homosexuals from foster parent eligibility, and thus, the legislation would likely precipitate an attack on Texas’s homosexual adoption laws); 2005 Tex. ALS 268 (2005).
- <sup>33</sup> ALA. CODE § 26-10A-5 (2007); ALASKA STAT. § 25.23.020 (2007); ARIZ. REV. STAT. § 8-103 (2006); ARK. CODE ANN. § 9-9-204 (2007); COLO. REV. STAT. § 19-5-202 (2007); CONN. GEN. STAT. § 45a-726a (2007) (Sexuality may be considered); 13 DEL. CODE § 951 (2007); D.C. CODE § 16-302 (2007); GA. CODE ANN. § 19-8-3 (2007); HAW. REV. STAT. § 578-1 (2007); IDAHO CODE ANN. § 16-1501 (2007); 750 ILL. COMP. STAT. 50/2 (2007); IND. CODE ANN. §§ 31-19-2-2 (2007); 31-19-2-3 (2007); IOWA CODE § 600.4 (2005); KAN. STAT. ANN. § 59-2113 (2007); KY. REV. STAT. ANN. § 199.470 (2007); LA. REV. STAT. ANN. § 9:461 (2007); Me. Rev. Stat. Ann tit. 18-A § 9-301 (2007); Md. CODE ANN., FAM. LAW § 5-3A-29 (2007); MASS. GEN. LAWS ch. 210, § 1 (2007); MICH. COMP. LAWS SERV. § 710.22 (2007); MINN. STAT. § 259.22 (2005); Mo. Rev. Stat. § 453.010 (2007); MONT. CODE ANN., § 42-1-106 (2007); NEB. REV. STAT. § 43-101 (2007); NEV. REV. STAT. ANN. § 127.190 (2007); N.H. REV. STAT. ANN § 170-B:4 (2007); N.J. STAT. ANN. § 9:3-43 (2007); N.M. STAT. ANN. § 32A-5-11 (2007); N.Y. DOM. REL. § 110 (2007); N.C. GEN. STAT. § 48-1-103 (2007); N.D. CENT. CODE, § 50-12-03 (2007); OHIO REV. CODE ANN. 3107.03 (2007); 10 OKL. STAT. § 7503-1.1 (2007); OR. REV. STAT § 109.309 (2007); 23 PA. CONS. STAT. ANN. § 2312; R.I. GEN. LAWS § 15-7-4 (2007); S.C. CODE ANN. § 20-7-1670 (2007); S.D. CODIFIED LAWS § 25-6-2 (2007); TENN. CODE ANN. § 36-1-115(a) (2007); TEX. FAM. CODE ANN. § 162.001 (2007); VA. CODE ANN. § 63.2-1201 (2007); WASH. REV. CODE § 26.33.140 (2007); W.VA. CODE § 48-22-201 (2007); WIS. STAT. § 48.82 (2007); WYO. STAT. ANN. § 1-22-103 (2007).
- <sup>34</sup> CAL. FAM. CODE § 9000(b) (2007), VT. STAT. ANN. TIT. 15A, § 1-102 (2007). (codifying anti-discrimination provisions for “all persons engaged in providing care and services to foster children [to] have fair and equal access to all available programs”); Cal. Welf. & Inst. Code § 16013(a) (2007).
- <sup>35</sup> TENN. CODE ANN. § 36-1-115(g)(1) (2006) (providing that foster parents get first preference to adopt the child so long as the child was in the foster home for at least twelve months). There is no indication in the Tennessee code that this provision would not equally apply to homosexuals, especially since Tennessee allows homosexuals to adopt.
- <sup>36</sup> *Lofton*, 358 F.3d 804.
- <sup>37</sup> *Roe v. Roe*, 324 S.E.2d 691, 694 (1985) (holding that a biological father’s “immoral and illicit relationship renders him an unfit and improper custodian as a matter of law [because] 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”).
- <sup>38</sup> See *In re Adoption of K.S.P.*, 804 N.E.2d 1253 (Ind. Ct. App. 2004) (overturning the denial of appellant’s uncontested petition to adopt the biological children of her domestic partner); *Adoption of Tammy*, 619 N.E.2d 315 (1993) (concluding that the adoption of partner’s biological daughter was proper in accordance with the child’s best interests); *Adoption of B.L.V.B.*, A.2d 1271 (1993) (finding that all the requirements for the adoption had been met and the adoption was in the best interests of the children); *In re Jacob*, 660 N.E.2d 397 (1992) (reversing the denial of adoptive petitions because statutory law allowed for separated married adults, unmarried adults, and homosexuals to adopt).
- <sup>39</sup> Press Release, American Civil Liberties Union, ‘We Were Wrong,’ Say Former Legislators Who Voted For Florida Gay Adoption Ban Nearly 25 Years Ago (Mar. 7, 2002) available at <http://www.aclu.org/lgbt/parenting/11856prs20020307.html> (last visited Mar. 7, 2008); see also Melinda Young, *Discrimination for the Sake of the Children*, 44 WASHBURN L. J. 247, 250 (2004).
- <sup>40</sup> S.B. 172, 108th Reg. Sess. (Fl. 2006); H.B. 123, 108th Reg. Sess. (Fl. 2006) (alleging that the proposed legislation would require homosexuals to show by clear and convincing evidence that “the adoptee resides with the person proposing to adopt the adoptee, the adoptee recognizes the person as the adoptee’s parent, and granting the adoptee permanency in that home is more important to the adoptee’s developmental and psychological needs than maintaining the adoptee in a temporary placement”). Even so, this legislation died in committee due to lack of sufficient support.
- <sup>41</sup> Ethan M. Krasnoo, *Foster Care & Adoption*, 7 GEO. J. GENDER & L. 999, 1011 (2006) (discussing the policy reasons for banning adoptions based on sexual orientation) (internal citations omitted); see also Young, *supra* note 39, at 260 n.150 (citing that Appellant’s brief in *Lofton* illustrated twelve states whose laws discouraged the exposure of children to homosexuality).
- <sup>42</sup> CAL. FAM. CODE § 9000(b) (2007), VT. STAT. ANN. TIT. 15A, § 1-102 (2007).
- <sup>43</sup> Forty-five states include all those that do not have specific anti-discrimination statutes in effect (Vermont and California) or states which specifically discriminate against homosexuals (Florida, Utah & Mississippi); See note 33.
- <sup>44</sup> See S.B. 172, 108th Reg. Sess. (Fl. 2006); H.B. 123, 108th Reg. Sess. (Fl. 2006).
- <sup>45</sup> *Lofton*, 358 F.3d at 809; see also *infra* note 50.
- <sup>46</sup> *Id.* at 812, 815 (arguing that appellants are entitled to a constitutional liberty interest “because they share deeply loving emotional bonds that are as close as those between a natural parent and child”). The right to private sexual intimacy is impermissibly burdened by the Florida statute’s denying adoption to anyone choosing to engage in homosexual conduct. Florida’s legislation is not rationally related to a legitimate state interest; see also Young, *supra* note 39, at 253, 257 (repeating that “the families argued that in case after case, in which the legislative history revealed that a discriminatory law was enacted simply to express dislike for a group, the United States Supreme Court has invalidated the law.”

## ENDNOTES CONTINUED

and that “the families argued that Lawrence expressly rejected the State’s reliance on moral disapproval as a legitimate basis for discriminating against gays and lesbians”).

<sup>47</sup> See Young, *supra* note 39 at 260-61.

<sup>48</sup> Lofton, 358 F.3d at 811.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 809 (citing Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 845 (1977) (reminding that “unlike biological parentage, which precedes and transcends formal recognition by the state, adoption is wholly a creature of the state”)); see also Krasnoo, *supra* note 41, at 1007.

<sup>51</sup> Smith, 431 U.S. 816 (1977).

<sup>52</sup> Smith, 431 U.S. at 842-47 (noting differences between the foster family and the natural family); see *cf.* Lofton, 358 F.3d at 813.

<sup>53</sup> See Lofton, 358 F.3d at 809 (citing Smith, 431 U.S. at 842-47) (stating, “unlike the natural family, which has ‘its origins entirely apart from the power of the State,’ the foster parent-child relationship ‘has its source in state law and contractual arrangements’”).

<sup>54</sup> See Lofton, 358 F.3d at 809 (“Unlike biological parentage, which precedes and transcends formal recognition by the state, adoption is wholly a creature of the state”).

<sup>55</sup> Smith, 431 U.S. at 823.

<sup>56</sup> *Id.* at 845.

<sup>57</sup> *Id.*

<sup>58</sup> See Lofton, 358 F.3d at 814 (mentioning that the “DCF may remove a foster child anytime that it believes it to be in the child’s best interests”); see also Maurer, *supra* note 26, at 181 (clarifying that “a contractual right does not qualify as an ‘intrinsic human right’ to have a family”).

<sup>59</sup> Lofton, 358 F.3d at 814; See also Smith, 431 U.S. at 823.

<sup>60</sup> See *cf.* Smith, 431 U.S. at 823.

<sup>61</sup> *Id.* at 824, 845 n.51.

<sup>62</sup> See Lofton, 358 F.3d at 810.

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

<sup>64</sup> *Id.*

<sup>65</sup> See Discussion, *supra* Fostering and Adoption in the United States.

<sup>66</sup> Smith, 431 U.S. at 845 (citing Wolff v. McDonnell, 418 U.S. 539, 557 (1974)).

<sup>67</sup> See Young, *supra* note 39, at 257 n.126 (stating that “while adoption is a state-conferred privilege, it is nonetheless a parenting option available and denial of adoption to one class of persons and not another offends this country’s notions of fundamental fairness and substantive due process”) (internal citations omitted).

<sup>68</sup> Wolff, 418 U.S. at 557.

<sup>69</sup> See Zablocki v. Redhail, 434 U.S. 374, 388 (1978); Lofton, 358 F.3d at 815, 818 (arguing that “unless the challenged classification burdens a fundamental right or targets a suspect class, the *Equal Protection Clause* requires only that the classification be rationally related to a legitimate state interest....As we have explained, Florida’s statute burdens no fundamental rights”); see also Maurer, *supra* note 26 at 177-78 (adding that “additionally, many gays and lesbians argue that the privacy rights surrounding homosexuals are fundamental rights that deserve stricter scrutiny than mere rational basis”).

<sup>70</sup> U.S. CONST. amend. XIV, § 1.

<sup>71</sup> Lofton, 358 F.3d at 820 (presenting the argument that the Florida statute was not rationally related to the state’s interest in promoting marital adoptive families).

<sup>72</sup> Romer, 517 U.S. at 620.

<sup>73</sup> *Id.* at 623-624. The amendment prohibited all legislative, executive, or judicial action at any level of state or local government designed to protect homosexual persons.

<sup>74</sup> See *infra* notes 78, 80, 81.

<sup>75</sup> U.S. CONST. amend. XIV, § 1.

<sup>76</sup> See Young, *supra* note 39, at 252; see also Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (detailing that government may only infringe on fundamental liberty interests provided that “the infringement is narrowly tailored to serve a compelling state interest”) (internal quotations and citations omitted). The Supreme Court has stated that respect is demanded by the Constitution for the autonomy of people making choices “involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, [which] are central to the liberty protected by the Fourteenth Amendment...” *Lawrence*, 539 U.S. at 574 (2003) (quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992)).

<sup>77</sup> *Lawrence*, 539 U.S. at 558.

<sup>78</sup> Lofton, 358 F.3d at 809.

<sup>79</sup> *Id.* at 818 (claiming, “all of our sister circuits that have considered the question have declined to treat homosexuals as a suspect class”).

<sup>80</sup> *Id.* at 815, 817.

<sup>81</sup> *Id.* at 817.

<sup>82</sup> *Washington v. Glucksberg*, 521 U.S. at 720.

<sup>83</sup> Lofton, 358 F.3d at 817.

<sup>84</sup> See *cf.* *id.*

<sup>85</sup> *Casey*, 505 U.S. at 851.

<sup>86</sup> See discussion *infra* Part III.B.

<sup>87</sup> *Id.*

<sup>88</sup> *Glucksberg*, 521 U.S. at 720 (internal citations omitted).

<sup>89</sup> See Lofton, 358 F.3d at 818; see also Romer, 517 U.S. at 631 (describing legislative classification as upheld “so long as it bears a rational relation to some legitimate end,” and determining that if, however, the law burdens a fundamental right or targets a suspect class, a higher level of scrutiny will be applied).

<sup>90</sup> Lofton, 358 F.3d at 818 (quoting Nordlinger v. Hahn, 505 U.S. 1, 10 (1992)).

<sup>91</sup> Romer, 517 U.S. 620.

<sup>92</sup> *Id.* at 633; see also Young, *supra* note, 39 at 257 n.126.

<sup>93</sup> Lofton, 358 F.3d at 827.

<sup>94</sup> Artificial insemination became widespread during the 1950’s. Marsha Garrison, *Law Making for Baby Making: an Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 845 (2002) (documenting that the first in-vitro fertilization baby was born in England in 1978); Genetics and Public Policy Center, available at <http://www.dnapolicy.org/genetics/chronology.jhtml.html>.

<sup>95</sup> Garrison, *supra* note 94, at 850 (informing that contracting surrogacy emerged in the United States in the late 1970’s).

<sup>96</sup> See Garrison, *supra* note 94, at 850.

<sup>97</sup> See *cf.* *id.*

<sup>98</sup> See Lehr v. Robertson, 463 U.S. 248, 265 (1983) (declaring that a sovereign “may not subject men and women to disparate treatment when there is no substantial relation between the disparity and an important state purpose”); see also Craig v. Boren, 429 U.S. 190 (1976) (holding that the gender-based differential that resulted from the Oklahoma statute invidiously discriminated and constituted a denial of the equal protection of the laws to males who were 18 to 20 years of age).

<sup>99</sup> See, e.g., *Lawrence*, 539 U.S. at 565 (emphasis in original); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (emphasis in original).

<sup>100</sup> See *Lawrence*, 539 U.S. at 565; *Eisenstadt*, 405 U.S. at 453.

<sup>101</sup> See *Lawrence*, 539 U.S. at 565; *Eisenstadt*, 405 U.S. at 453.

<sup>102</sup> Dictionary.com Home Page, <http://dictionary.reference.com/> (last visited Mar. 7, 2008) (defining “bear” as to give birth to, and explaining that only women can actually give birth, making it apparent that “to bear” is applicable to women; to “beget” is defined as to procreate (especially, a male parent); “conceive” is defined as: to become pregnant).

<sup>103</sup> See Lofton, 358 F.3d at 818 (claiming that the question can no longer be “whether the challenged legislation is rationally related to a legitimate state interest”).

<sup>104</sup> *Lawrence*, 539 U.S. at 593.

<sup>105</sup> *Kearney*, 157 F. Supp. 2d at 1375, 1382.

<sup>106</sup> See *id.*; Maurer, *supra* note 26 at 182.

<sup>107</sup> *Kearney*, 157 F. Supp. 2d at 1375, 1382 (citing Romer, 517 U.S. at 633 (1996)).

<sup>108</sup> *Id.* at 1382 (internal citations omitted) (arguing that the government may legislate “to achieve things which it believes is morally good[;] the government cannot merely justify singling out a group of citizens for disfavor simply because it morally disapproves of them”).

<sup>109</sup> Maurer, *supra* note 26, at 175 (citing Bowers v. Hardwick, 478 U.S. 186, 199 (1986), overruled, *Lawrence*, 539 U.S. 558 (Blackmun, Brennan, Marshall, & Stevens, JJ., dissenting)).

<sup>110</sup> See *Kearney*, 157 F. Supp. 2d at 1375, 1382; Maurer, *supra* note 26 at 182.

<sup>111</sup> See *infra* note 113.

<sup>112</sup> *Palmore v. Sidoti*, 466 U.S. 429 (1984).

<sup>113</sup> *Id.* at 433 (internal citations and quotations omitted).

<sup>114</sup> See *id.*

<sup>115</sup> *Id.* at 430.

<sup>116</sup> *Id.* at 433.

<sup>117</sup> *Palmore* 644 U.S. at 434.

<sup>118</sup> FLA. ADMIN. CODE ANN. r. 65C-16.005(3)(a)-(o) (2003).

<sup>119</sup> FLA. ADMIN. CODE ANN. r. 65C-16.005(3)(m) (2003); see also Lofton, 358 F.3d at 810.

<sup>120</sup> MICH. COMP. LAWS SERV. § 710.22(g)(vi) (2007).

<sup>121</sup> See Young, *supra* note 39 at 253-54 & n.83 (defining morality as not okay with respect to discrimination on the basis of interracial relationships, women working outside the home, unrelated persons living together, and the mentally disabled). Certain restrictions would be permissible under a strict scrutiny standard.

<sup>122</sup> See Lofton, 358 F.3d at 817.

## ENDNOTES CONTINUED

<sup>123</sup> *Lawrence*, 539 U.S. at 571 (2003) (quoting *Casey*, 505 U.S. at 850).

<sup>124</sup> See discussion Part II.C.1.b.

<sup>125</sup> *Lofton*, 358 F.3d at 818. See also discussion *infra* Part III.A.

<sup>126</sup> *Contra Lofton*, 358 F.3d at 811.

<sup>127</sup> *Contra id.* at 810-11 (detailing that duty of the child's welfare is borne by the state, acting *parens patriae* for children who have lost their natural parents).

<sup>128</sup> See *Lofton*, 358 F.3d at 810; see also *Troxel v. Granville*, 530 U.S. 57, 69 (2000) (indicating a third-party visitation); *Lehr v. Robertson*, 463 U.S. 248, 248 (1983) (referring to a putative father who attempted to vacate an order of adoption); *Behrens v. Reiger*, 422 F.3d 1255, 1261 (deciding to place a child in a prospective adoptive home); *V.C. v. M.J.B.*, 163 N.J. 200, 227-28, 748 A.2d 539, 554 (2000) (custody and visitation).

<sup>129</sup> See *Lofton*, 358 F.3d at 810-11.

<sup>130</sup> See *id.*

<sup>131</sup> See *Palmore*, 466 U.S. at 433.

<sup>132</sup> See *Lehr*, 463 U.S. at 248 (stating that the outcome in adoption cases is determined by state law); see, e.g., *Behrens*, 422 F.3d at 1261.

<sup>133</sup> See, e.g., 13 DEL. CODE. § 915 (2007); MD. CODE ANN., FAM. LAW § 5-349 (a)(2) (2007); MONT. CODE ANN. § 42-1-102 (2007); R.I. GEN. LAWS § 15-7-2 (e) (2007); S.D. CODIFIED LAWS § 25-6-2 (2007); UTAH CODE ANN. § 78-30-1.5 (2007); VA. CODE ANN. § 63.2-1205 (2007); WASH. REV. CODE § 26.33.010 (2007).

<sup>134</sup> See, e.g., A.A.C. § R6-5-6614(D) (2007) (taking into account wishes of the child's birth parent, racial, cultural, and ethnic background of the child, placement of the child's siblings); COLO. REV. STAT. § 19-5-210 (2007); 89 ILL. ADMIN. CODE 309.20 (2007) (looking at physical welfare and safety of the child, child's sense of attachments, child's community ties); MICH. COMP. LAWS, SERV. § 710.22(g) (2007) (considering desirability of maintaining continuity, permanence as a family unit of the proposed adoptive home, moral fitness, mental and physical health, ability to adopt adoptee's siblings); MINN. STAT. § 260C.212 (2007) (pointing to a child's health, safety, and welfare); N.M. STAT. ANN. § 32A-5-14.1 (2007) (including criminal history); 23 PA. CONS. STAT. § 2530 (2007) (considering home environment, family life, parenting skills, age, physical and mental health, social, cultural and religious background, facilities and resources of the adoptive parents and their ability to manage their resources, parental fitness).

<sup>135</sup> FLA. ADMIN. CODE ANN. r. 65C-16.005(3) (2003); *Lofton*, 358 F.3d at 810.

<sup>136</sup> See, e.g., ALASKA ADMIN. CODE r. 660-5-22-.03(6) (2007) (looking at age, marital status, criminal records check, motivation, financial stability, employment, health, residence, citizenship); IOWA CODE § 600.8(1)(a) (2007) (taking into account home environment, criminal background, emotional maturity, finances, health, relationships); KAN. STAT. ANN. § 38-1583(b) (2007) (considering health, disability, criminal background); S.C. CODE ANN. § 20-7-1740(1) (2007) (including home environment, emotional maturity, finances, health, relationships, criminal background).

<sup>137</sup> See *id.*

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

<sup>139</sup> The author recognizes the seeming irony of a standard which can be described as congruous yet have no formal structure. Nevertheless, by its very nature, the "best interests" standard is used for nearly all cases involving children.

<sup>140</sup> See *Lofton*, 358 F.3d at 810; see also, *Troxel*, 530 U.S. at 69; *Lehr v. Robertson*, 463 U.S. 248, 248 (1983) (describing the attempt by a putative father to vacate an order of adoption); *Behrens v. Reiger*, 422 F.3d 1255, 1261 (deciding to place a child in a prospective adoptive home); *V.C. v. M.J.B.*, 163 N.J. 200, 227-28, 748 A.2d 539, 554 (2000) (concluding custody and visitation).

<sup>141</sup> *Van Driel v. Van Driel*, 525 N.W.2d 37-38 (S.D. 1994).

<sup>142</sup> *Id.* at 38.

<sup>143</sup> *Id.* (holding that the mother was awarded primary physical custody).

<sup>144</sup> *Id.* at 39.

<sup>145</sup> *Id.*

<sup>146</sup> *Van Driel*, 525 N.W.2d at 37-38.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 39-40 (finding that the mother and partner were affectionate and attentive to children and discreet about their relationship, and that psychologist's evaluation found no harm to children).

<sup>149</sup> *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000).

<sup>150</sup> *V.C.*, 748 A.2d at 541-42, 555 (stating that former partner sought joint legal custody for decision-making purposes, not joint physical custody); see generally *id.* at 218-26, 748 A.2d at 548-53 (discussing and analyzing generally the psychological parent).

<sup>151</sup> *V.C.*, 748 A.2d at 551 (internal citations omitted) (defining "one who..." as opposed to "a heterosexual who..." indicates the court's intent to treat sexual preference as irrelevant).

<sup>152</sup> See N.J. STAT. ANN. 9: 2-4 (2007) (enlisting "best interests" considerations in

the context of a custody dispute, and stating that these considerations are similar in nature if not in kind to those used in the context of adoption proceedings, such as parents' ability to agree, communicate and cooperate in matters relating to the child, stability of the home environment offered, fitness of the parents).

<sup>153</sup> *V.C.*, 748 A.2d at 555.

<sup>154</sup> *Id.* at 555.

<sup>155</sup> *Id.* at 539, 542.

<sup>156</sup> *Id.*

<sup>157</sup> *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995); see also *supra* note 94 (concluding that only individual characteristics which are associated with a fundamental right would require compelling reasons that would allow government to treat people differently)).

<sup>158</sup> *Palmore*, 466 U.S. at 429.

<sup>159</sup> *Id.* at 430.

<sup>160</sup> *Id.* at 430, 432 (stating that "the child's welfare was the controlling factor").

<sup>161</sup> *Id.* at 433.

<sup>162</sup> *Id.* at 432 (referring to the "Constitution's commitment to eradicating discrimination based on race," and adding that "a core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race").

<sup>163</sup> The U.S. Constitution Online, <http://www.usconstitution.net/constamnotes.html#Am14> (last visited Mar. 7, 2008) (detailing that the Fourteenth Amendment was ratified in 1868, on the heels of the Civil War, and granted citizenship to former slaves and ensured that they would not be discriminated against based on their race).

<sup>164</sup> See Discussion, *supra* Fostering and Adoption in the United States (discussing the Equal Protection Clause).

<sup>165</sup> See *Lofton*, 358 F.3d at 818; *Kearney*, 157 F. Supp. 2d at 1381-82.

<sup>166</sup> See discussion *supra* Fostering and Adoption in the United States (arguing that the right to adopt cannot arbitrarily be denied to homosexuals, especially men).

<sup>167</sup> *Romer*, 517 U.S. at 635.

<sup>168</sup> See Discussion, *infra* in Parts III. A-D.

<sup>169</sup> *Lehr*, 463 U.S. 248.

<sup>170</sup> *Id.* at 257.

<sup>171</sup> *Lofton*, 358 F.3d at 812 (quoting *Smith*, 431 U.S. at 843 (internal citations omitted)).

<sup>172</sup> *Lofton*, 358 F.3d at 818.

<sup>173</sup> See, e.g., *Moore*, 431 U.S. 494 (reminding that the statute defined "family" as "a number of individuals related to the nominal head of the household or to the spouse of the nominal head of the household living as a single housekeeping unit in a single dwelling unit, but limited" to certain individuals); *Belle Terre v. Boraas*, 416 U.S. 1, 2 (1974) (The ordinance defined family as: "one or more persons related by blood, adoption, or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants. A number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption, or marriage shall be deemed to constitute a family").

<sup>174</sup> *Maurer*, *supra* note 26 at 187-88 & note 157.

<sup>175</sup> 431 U.S. 494 (1977).

<sup>176</sup> See generally *id.* (finding that a housing ordinance categorizing a second grandchild living in his grandmother's home was found to violate the Due Process Clause of the Fourteenth Amendment).

<sup>177</sup> *Lehr*, 463 U.S. at 258 (emphasis added).

<sup>178</sup> *Troxel*, 530 U.S. at 60 (centering on the issue of grandparent visitation after the child's father died); *Id.* at 65 (claiming that the petitioner grandparents sought to increase their visitation rights in accordance with a Washington statute permitting anyone to petition for visitation, if it was in the best interests of the child); *Id.* at 69-70 (holding that the statute violated the mother's due process rights and the fundamental parental right to make decisions concerning the care, custody, and control of their children).

<sup>179</sup> *Id.* at 63.

<sup>180</sup> See *id.*

<sup>181</sup> See *Moore*, 431 U.S. at 504-05 (stating that "ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition... Even if conditions of modern society have brought about a decline in extended family households, they have not erased the accumulated wisdom of civilization, gained over the centuries and honored throughout our history, that supports a larger conception of the family").

<sup>182</sup> *Lofton*, 358 F.3d at 818-19.

<sup>183</sup> *Id.* at 819 (emphasis added).

## ENDNOTES CONTINUED

<sup>184</sup> *Id.* at 818 (citing *Heller v. Doe*, 509 U.S. 312, 320 (1993)).

<sup>185</sup> See Discussion, *supra* Standard of Review..

<sup>186</sup> See *cf.*, *Van Driel*, 525 N.W.2d at 39.

<sup>187</sup> *Lofton*, 358 F.3d at 819-20 (internal citations and quotations omitted).

<sup>188</sup> See Discussion, *supra* Best Interests of the Child.

<sup>189</sup> See *Lofton*, 358 F.3d at 818-819 (arguing that the fact that Florida felt compelled to specify *heterosexual* role models as opposed to role models in general shows the glaring nature of the underlying prejudice against homosexuals).

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 819.

<sup>192</sup> See Young, *supra* note 39 at 248 (commenting that Florida approached Lofton and Croteau on multiple occasions).

<sup>193</sup> See *id.*

<sup>194</sup> Compare *Lofton*, 358 F.3d at 819, with Young *supra* note 39, at 248.

<sup>195</sup> See generally *Lofton*, 358 F.3d at 819-20 (predicting that a lack of stability of a dual-parent household would impair the ability to shape the child's sexual and gender identity).

<sup>196</sup> *Id.* at 822 (quoting Dep't of Health & Rehabilitative Servs. v. Cox, 627 So. 2d 1210, 1220).

<sup>197</sup> In actuality, Florida's decision to preclude homosexual adoption stems from a concern that children adopted by homosexual parents will be more likely to become homosexual themselves. See Jenni Hetzel-Gaynor, *What About the Children? The Fight for Homosexual Adoption After Lawrence and Lofton*, 51 WAYNE L. REV. 1271 (Fall 2005) (discussing generally public policy issues raised by gay adoption). Ultimately, if homosexuals as parents would have such

an adverse impact on the child, it would seem proper that the state remove the children of any homosexual parent, whether biological or otherwise.

<sup>198</sup> See, e.g., *Lofton*, 358 F.3d at 819-20, 822.

<sup>199</sup> See Jennifer L. Rosato, *Children of Same-Sex Parents Deserve the Security Blanket of the Parentage Presumption*, 44 FAM. CT. REV. 74, 80 (January 2006) (considering what rights are important to children of same-sex couples).

<sup>200</sup> *V.C.*, 748 A.2d at 548-49.

<sup>201</sup> *Troxel*, 530 U.S. 57, 68 (internal citations and quotations omitted).

<sup>202</sup> See Discussion *supra* Best Interests of the Child.

<sup>203</sup> *Behrens*, 422 F.3d 1255 .

<sup>204</sup> FLA. ADMIN. CODE ANN. r. 65C-16.005(6) (2007).

<sup>205</sup> See *Flynn v. May*, 157 Md. App. 389, 409 (Md. Ct. Spec. App. 2004).

<sup>206</sup> *Alma Soc. v. Mellon*, 601 F.2d 1225, 1235 (1979); *Finstuen v. Edmondson*, 2006 U.S. Dist. LEXIS 32122, at \*28 (2006).

<sup>207</sup> *Lofton*, 358 F.3d at 819.

<sup>208</sup> See Discussion *supra* Background of Lofton..

<sup>209</sup> *Id.*

<sup>210</sup> See, e.g., *Butterworth*, 93 F. Supp. 2d at 1343-1344; *Howard* 2006 LEXIS 418 at \*2; Press Release, American Civil Liberties Union, Missouri Judge Rules That Lesbian Can Be Foster Parent, (Feb. 17, 2006), available at <http://www.aclu.org/lgbt/parenting/24195prs20060217.html> (last visited Mar. 7, 2008); *K.S.P.* 804 N.E.2d 1253.

<sup>211</sup> *Lofton*, 358 F.3d at 811.

<sup>212</sup> *Loving v. Virginia*, 388 U.S. 1 (1967).

<sup>213</sup> *Casey*, 505 U.S. at 847-48.

<sup>214</sup> *Lawrence*, 539 U.S. at 578.

## CONGRATULATIONS

TO

## WCL'S ASIAN PACIFIC AMERICAN LAW STUDENT ASSOCIATION

ON HOSTING\*

## THE FIRST ANNUAL ASIAN PACIFIC AMERICANS AND THE LAW DINNER

*The Inaugural Dinner explored the continuing need to empower Asian Pacific Americans' participation in the practice of law and recognized WCL alumni and students who are committed to serve the APA community. The Dinner also highlighted the on-going commitment and work needed to ensure equality and justice for all communities in the 21st century. For information about next year's event, contact WCL's APALSA at [apalsa@wcl.american.edu](mailto:apalsa@wcl.american.edu).*

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# THE GREAT BURDEN ON AMERICAN DISABLED STUDENTS: THE AFTERMATH OF SCHAFFER V. WEAST

By Nicole Thompson\*

In response to the great difficulties that students with disabilities face, Congress passed the Individuals with Disabilities Education Act (“IDEA”) in 1975.<sup>1</sup> IDEA guarantees that “all children with disabilities have available to them a free appropriate public education.”<sup>2</sup> The statute delineates the roles and responsibilities of schools and parents and details how programs for children with disabilities should be developed and, subsequently, how they can be challenged.<sup>3</sup> Yet, the statute fails to address which party bears the burden of proof in determining the appropriateness of the Individualized Education Program (“IEP”), the curriculum that a school develops for an individual student.<sup>4</sup> The assignment of the burden of proof is important because in the case that both parties provide no evidence or equally persuasive evidence, the court will find for the party that does not bear the burden. In November of 2005, the United States Supreme Court heard the case of Maryland student Brian Schaffer, in which his parents tried to prove that Brian’s Montgomery County school should bear the burden of proof in IDEA hearings. The Court issued its opinion disagreeing with the Schaffers and held that the challenging party holds this burden at all stages of review of an IEP; the challenging party is almost always the parents of the student participating in the IEP.<sup>5</sup> This article addresses the potential impact of that decision on the seven million disabled students currently receiving benefits through IDEA and focuses particularly on those students in lower income families. The article also considers the broader long term effects of the *Schaffer* case on society.

## BACKGROUND

### BACKGROUND OF IDEA

The United States education system has a history of severely neglecting the needs of students with physical, mental, and learning disabilities.<sup>6</sup> In *Schaffer*, the Supreme Court acknowledged that disabled children were “either totally excluded from school or sitting idly in regular classrooms awaiting the time when they were old enough to drop out.”<sup>7</sup> This left disabled children totally unprepared for secondary education or the job market.<sup>8</sup> In an attempt to change this pattern of neglect, Congress passed IDEA in 1970 as part of the Education for the Handicapped Act.<sup>9</sup>

To carry out its aim, IDEA places an affirmative obligation on the states to provide adequate programs for each disabled child.<sup>10</sup> Schools must determine whether the attendant child has disabilities as defined under 20 U.S.C. § 1401(3) and assess what special needs the child may have.<sup>11</sup> Once the school identifies a child with disabilities and his or her corresponding special needs, the school must both develop IEPs that serve this child’s

particular needs and review the IEPs annually to ensure that the child’s needs are being met at each stage of the child’s development.<sup>12</sup>

Although IDEA places the responsibility of properly educating disabled children on the school, the parents of the child with disabilities are also involved.<sup>13</sup> The parents must be informed if their child is identified as possibly disabled and must give consent in order for the child to be tested for disabilities.<sup>14</sup> Furthermore, parents are included as members of the team that approves the IEP the school board develops for the child.<sup>15</sup> Parents have the right to examine any records or test scores for their child and have the right to request an independent evaluation.<sup>16</sup> If the par-

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ents do not approve the IEP, whether during the initial development or any other stage, they may seek an administrative “impartial due process hearing.”<sup>17</sup> If a party is displeased with the result of the due process hearing, the party has the right to bring a civil action.<sup>18</sup> Some jurisdictions have ruled that in civil actions, parents who are not attorneys may not appear pro se on behalf of their child and must therefore be represented by counsel.<sup>19</sup>

Without proper direction from the legislature, the states split on the issue of who bears the burden of proof in a parent-initiated hearing. The Second, Third, Seventh, Eighth, Ninth and D.C. Circuits have placed the burden on the school district while the Fifth, Sixth, and Tenth Circuits have placed the burden on the parents.<sup>20</sup> In February of 2005, the Supreme Court accepted this issue and granted cert to *Schaffer v. Weast*.<sup>21</sup>

### FACTS IN SCHAFFER V. WEAST

Brian Schaffer attended a private school from kindergarten until seventh grade where he consistently struggled academically.<sup>22</sup> He was subsequently diagnosed with learning and speech-language disabilities, leading his parents to seek an appropriate public educational environment to meet Brian’s needs.<sup>23</sup> The Schaffers contacted their local school district, Montgomery County of the Maryland Public School System (“MCPSD”), and informed them of Brian’s situation and his pending public school enrollment. MCPSD evaluated Brian and

offered an IEP in which a special education teacher would assist Brian and five other disabled students in a classroom filled with twenty-five students without disabilities.<sup>24</sup> Fearing that this IEP “would have been like throwing him in a lion’s den,”<sup>25</sup> the Schaffers rejected the school district’s plan and requested an administrative hearing to challenge the proposed IEP.<sup>26</sup>

IDEA specifies that when an administrative hearing is initiated to determine the appropriateness of an IEP, the child remains in the learning environment he or she was in before the IEP was developed.<sup>27</sup> Since both parties agreed that the traditional classroom environment was an inappropriate environment for Brian,<sup>28</sup> the Schaffers enrolled Brian in a private school for the duration of the proceedings, where Brian was taught in smaller classes received greater attention for his disability.<sup>29</sup>

### PROCEDURAL HISTORY OF SCHAFFER

Under IDEA, the Schaffers sought an “impartial due process hearing”<sup>30</sup> before an Administrative Law Judge (hereinafter “ALJ”).<sup>31</sup> The ALJ, though noting the evidence to be in equipoise, sided with the Fourth Circuit’s reluctance in *Tice v. Bote-tourt County School Board*.<sup>32</sup> to “second-guess the judgment of education professionals” and ruled that the Schaffers should bear the burden of proof and that the proposed IEP was appropriate.<sup>33</sup>

The Schaffers subsequently challenged the ALJ’s ruling in the Montgomery County District Court of Maryland.<sup>34</sup> The District Court found for the Schaffers and held that in IDEA cases where the parents are challenging an initial IEP, the burden should always be on the school.<sup>35</sup> However, in cases where an existing IEP is challenged, the burden should be on the challenging party.<sup>36</sup> The court reasoned that since IDEA was enacted to protect the interests of disabled students, and so, placing the burden on the school was therefore the best way to ensure that the needs of disabled students were properly safeguarded.<sup>37</sup> MCPSD appealed the District Court’s ruling to the United States Court of Appeals for the Fourth Circuit.<sup>38</sup> While the appeal was pending, Brian’s parents accepted a different IEP from MCPSD.<sup>39</sup> Brian was enrolled in the new public school, but the case remained active to determine tuition reimbursement and the issue of which party should bear the burden in future cases.<sup>40</sup> Pending the appeal, the ALJ reviewed the case and found for the Schaffers, and the District Court subsequently affirmed that the burden should be on the school district.<sup>41</sup> Later, the Court of Appeals granted the appeal and found for MCPSD, reasoning that Congress’ lack of direction indicates that the traditional placement of the burden should apply.<sup>42</sup>

In turn, the Schaffers appealed to the United States Supreme Court, which granted cert.<sup>43</sup> Though the Supreme Court rejected all the Schaffers’ arguments and ultimately held that the party challenging the IEP has the burden of showing that the IEP is inappropriate, there were differing opinions as to the where the burden should lie.<sup>44</sup> Justice O’Connor, writing for the majority, relied on the traditional placement of the burden of proof and

deferred to the school district’s opinion.<sup>45</sup> Justice Breyer dissented, arguing that in light of the legislature’s silence, each state should decide the issue on its own.<sup>46</sup> Justice Ginsberg’s dissent pointed out the difficulties parents will face and that the true purpose of IDEA was to protect the interests of disabled children.<sup>47</sup> Justice Stevens concurred, agreeing with most of Justice Ginsberg’s arguments but ultimately deferring to the opinion of the school district.<sup>48</sup>

### IMPLICATIONS OF LOFTON ON LOWER INCOME STUDENTS

#### EVIDENTIARY STANDARDS FOR PARENTS CHALLENGING IEPs

Parents challenging an IEP must prove the program is inappropriate by a preponderance of the evidence.<sup>49</sup> In order to meet this standard, the judge must find that the facts are more probable for that party.<sup>50</sup> For parents, satisfying the burden of proof is not merely evidentiary procedure, but also takes a psychological and financial toll. Proving an IEP to be inadequate will require a thorough showing of the child’s educational records and test scores, testimony of outside experts in regards to regarding the child’s particular situation, and the assistance of counsel. Parents will need to invest a great deal of money and time into meeting this burden, especially when facing a well-resourced school board that is likely to have already tested and observed the child in developing the IEP and have staff experts ready to testify. Before their case reached the Court of Appeals, the

Schaffers reported spending over \$35,000 in attorney fees alone.<sup>51</sup> Parents in lower income families often do not have the resources for such an undertaking, let alone the luxury to take time from work to invest the time and effort necessary to meet such

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*parents will have to pay for attorneys’ fees...whether they win or lose.*

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a burden. Considering these factors, it is not difficult to see how the evidentiary burden set forth by the Supreme Court deters parents from challenging the school’s IEP even if their child is being severely disadvantaged.

#### COUNSEL

As the state is not required to provide parents with counsel, parents will have to pay for attorneys’ fees. Unlike plaintiffs in injury suits, the parents will have to pay these fees whether they win or lose. While the language of IDEA states that parents may be able to recover litigation costs at the judge’s discretion, there are restrictions on the payment of the fees.<sup>52</sup>

In *Winkelman v. Parma City School District*, the Supreme Court ruled that plaintiff have the right to represent themselves and their child without the assistance of counsel in IDEA cases that reach federal court.<sup>53</sup> *Winkelman* highlights the fact that many parents are overwhelmed by the expenses of attempting to meet this burden. Even though this ruling allows parents to cut to costs of attorney fees, parents will be at an unfair disadvantage facing school districts that have the aid of experienced counsel and learning experts. Furthermore, without counsel representing the parents, the process would likely be much longer,

more expensive and more burdensome for the court and the schools; parents representing themselves pro se would have no experience in a courtroom or in education law, thereby requiring more time and court assistance to work through the process.

### EXPERTS

In order to meet the burden of proof, parents also must hire experts to test the child and evaluate the school's plan and testify at trial in order to respond to the school district staff likely to testify as expert witnesses. This cost can be prohibitive, as exemplified by The Brain Clinic in New York, which charges \$200 an hour for child evaluations and estimates that an average analysis costs around \$1700.<sup>54</sup> This estimate does not include the costs of trial preparation and time testifying that would likely increase the price. Furthermore, in *Arlington Central School District v. Murphy*, the Supreme Court recently ruled that parents do not have the right to recover the costs of experts, witnesses or non-lawyer consultants hired in the course of trial.<sup>55</sup> Thus, these costs would compound other incurred costs for parents regardless of the merits or outcome of the case.

### EFFECTS ON SOCIETY OVERALL UNDERMINE THE PURPOSE OF IDEA

IDEA was enacted to promote the interests of disabled students and ensure these children receive a free, appropriate education.<sup>56</sup> Without an appropriate education that meets the learning needs of the disabled child, he or she will not have the skills required for secondary education or the job market. As seen above, many families with legitimate claims may be discouraged from challenging IEPs. Although schools are likely working in good faith to provide quality education in accordance with IDEA, it is foreseeable that schools are going to make mistakes, especially in the face of limited time and resources. Furthermore, even with all the testing and observation, schools may not be able to understand a child as well as a parent does. Even though most parents are not learning experts, they often have the most contact with their child and have a different understanding than that of a school official.

Unfortunately, if a school does make a mistake and develops and assigns an inappropriate IEP, the outcome can be life-changing for a child. By placing the burden of proof on the parents, IDEA fails to afford the education system with a meaningful set of checks and balances to ensure the child is receiving the

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*...the drop-out rate of identified disabled students who have been assigned IEPs is 41% higher than that of non-disabled students*

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proper educational assistance, weighting the appeals process in favor of the school to the disadvantage of the child.

With no meaningful opportunity for many parents to chal-

lenge an inappropriate IEP, there will likely be an increase in school drop-out rates for students with disabilities. A recent report prepared for the U.S. Department of Education by the National Dropout Prevention Center for Students with Disabilities found that in some states, the drop-out rate of identified disabled students who have been assigned IEPs is 41% higher than that of non-disabled students.<sup>57</sup> This disparity clearly demonstrates that, even with current IDEA legislation, schools are still not meeting the needs of disabled students. A student assigned an inappropriate IEP will not be able to flourish academically and will likely be held to a low level of performance. As stated above, identified disabled students are at a high risk for dropping out already; thus, being a disabled student with poor school performance puts a student at even greater risk for dropping out.<sup>58</sup> Furthermore, the risk is even greater for a disabled student of low socioeconomic status with poor school performance as a result of an inappropriate IEP.

Another likely result of the decision in *Schaffer* is a de-

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*Some disabled children of higher socioeconomic status may be able to overcome these hurdles with the help of private tutoring and college test preparation, but students without access to these resources will be left behind.*

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creased rate of college enrollment by disabled students. If a disabled child with an inappropriate IEP does not drop out and manages to struggle through high school and graduate, she will still not have the skills necessary to enter college. Some disabled children of higher socioeconomic status may be able to overcome these hurdles with the help of private tutoring and college test preparation, but students without access to these resources will be left behind. Without the prospect of college, the disabled individual will be forced to enter the job market and may face many hurdles in becoming a fully productive member of society. This exclusion not only has negative effects on an individual's self-esteem, but may also shift a great burden onto society overall. Without a college degree or the basic academic skills and abilities developed in high school, the individual will be unable to compete in the job market and may have to rely on government support through programs such as welfare, Medicaid, and unemployment. The public costs of supporting an individual are well over the costs of ensuring the individual receives an appropriate education.

Although the burden assigned by *Schaffer* will be shared by many disabled students and their families, it is clear this burden will not be shared equally. During the 2000 Congressional Hearings concerning IDEA, Senator Simon noted, "when a parent is poor, of a minority group, or not well-versed in the intricacies of the law and regulations, the inequities of the situation are greatly increased."<sup>59</sup> Furthermore, this investigation found that 16% of

elementary and middle school-aged disabled students speak a language other than English at home.<sup>60</sup> As members of Congress have conceded, it is clear that disadvantaged populations, including racial and ethnic minorities and non-English speakers, have an even greater battle to fight in IDEA cases and will be disproportionately affected by the Supreme Court's decision.

### THE WAY FORWARD

In order for IDEA to be effective and to ensure that disabled children receive appropriate education, it is imperative that the focus is placed on the interest of the students. There are different approaches Congress may take to help ensure that disabled students are receiving the education they need.

The most effective way to ensure the rights of disabled students are protected would be for Congress to rewrite IDEA so that it clearly and affirmatively places the burden of proof on the school district in all IDEA hearings. This change would give all parents a realistic opportunity to ensure the rights of their child are protected at every stage. Drawing from the opinion of the Fourth Circuit, Congress could also rewrite the legislation to place the burden affirmatively on the school district in all cases involving an initial IEP, but place the burden on the challenging party in cases involving a reviewed IEP.<sup>61</sup> Finally, another option is for Congress to rewrite IDEA to enact a burden-shifting scheme. First, parents would be required to present a prima facie case in order to show that an IEP is inappropriate, and the burden would then be placed on the school district to prove otherwise. This would alleviate much of the burden on parents as they would not have to gather all the resources need to completely prove their case; yet, it would also serve as a safeguard for the school district to ensure that there is substantial issue at hand before having to present the evidence. Although these proposals provide varying degrees of protections at different levels of IEP review, any would be an improvement from the current status of IDEA and would help to bring the focus back to disabled students.

### CONCLUSION

The Supreme Court in *Brown v. Board of Education* stated:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for

education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.<sup>62</sup>

Just 50 years later, in *Schaffer*, the Supreme Court departed from this logic and imposed a tremendous hurdle for parents to overcome in order to ensure their disabled child receives an appropriate education.

Throughout the arguments presented by the school district and the Supreme Court's opinion, there is one consistent theme: money. The school district's primary argument is that they just cannot handle any additional burdens of IDEA, and sadly, this may be true. When IDEA was enacted in 1975, Congress committed the federal government to provide 40% of the funding for

programs with the states supplementing the rest.<sup>63</sup> Year after year, the federal government has failed to meet this goal. In 2007, the authorized amount of funding was \$16.9 billion, yet Congress appropriated only \$10.7 billion. This amount leaves the state with the tremendous challenge of providing

an extra 37% of the funding for these programs because the federal government failed to keep its promise.<sup>64</sup> Without proper resources, school districts cannot meet the requirements of IDEA. As a result, and with *Schaffer* as their means, the school districts have shifted some of this burden to families. If the federal government provided adequate funding, school districts may not have so many of the existing problem in creating appropriate IEPs, accepting the burden of proof in IDEA cases and, overall, preserving the best interest of each disabled child. Unfortunately, until these resources are provided and the burden is shifted, disabled students will not be provided the education they have been guaranteed.

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*it is clear that disadvantaged populations, including racial and ethnic minorities and non-English speakers, have an even greater battle to fight in IDEA cases and will be disproportionately affected*

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## ENDNOTES

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<sup>1</sup> 20 U.S.C. § 1400 et seq. (2008).

<sup>2</sup> *Id.* at § 1400 (d)(1)(A).

<sup>3</sup> *Id.* at § 1415.

<sup>4</sup> *Id.* at § 1414 (d).

<sup>5</sup> *Schaffer v. Weast*, 546 U.S. 49 (2005)

<sup>6</sup> *Schaffer*, 546 U.S. at 52.

## ENDNOTES CONTINUED

<sup>7</sup> *Id.* (quoting H.R. Rep. No. 94-332, p. 2 (175)).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> 20 U.S.C. § 1400.

<sup>11</sup> *Id.* at § 1414 (a)(1)(c).

<sup>12</sup> *Id.* at § 1414 (d)(1)(a).

<sup>13</sup> 20 U.S.C. § 1401 (19).

<sup>14</sup> 20 U.S.C. § 1414 (c)(3).

<sup>15</sup> *Id.* at § 1414 (d)(1)(B).

<sup>16</sup> *Id.* at § 1415 (b)(1).

<sup>17</sup> *Id.* at (f).

<sup>18</sup> *Id.* at (i)(2).

<sup>19</sup> See Cavanaugh v. Cardinal Local Sch. Dist., 409 F.3d 753 (6th Cir. 2005); see also Collinsgru v. Palmyra Bd. of Educ., 161 F.3d 225 (3d Cir. 1998).

<sup>20</sup> Second, Third, Seventh, Eighth, Ninth and D.C Circuits include Alabama, Arizona, California, Connecticut, Delaware, Hawaii, Idaho, Indiana, Illinois, Iowa, Missouri, Minnesota, Montana, Nebraska, Nevada, New Jersey, New York, North Dakota, Oregon, Pennsylvania, South Dakota, Vermont, Washington, and Wisconsin. Fifth, Sixth, Tenth Circuits include Colorado, Kansas, Kentucky, Louisiana, Maryland, Michigan, Mississippi, New Mexico, North Carolina, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming; See, e.g., Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 122 (2d Cir. 1998); E.S. v. Independent Sch. Dist., 135 F.3d 566, 569 (8th Cir. 1998); Carlisle Area Sch. v. Scott P., 62 F.3d 520, 533 (3d Cir. 1995), cert. denied, 517 U.S. 1135 (1996); Clyde K. v. Puyallup Sch. Dist., 35 F.3d 1396, 1398 (9th Cir. 1994); Salley v. St. Tammany Parish Sch. Bd., 57 F.3d 458, 467 (5th Cir. 1995); Doe v. Board of Educ., 9 F.3d 455, 458 (6th Cir. 1993), cert. denied, 511 U.S. 1108 (1994); Johnson v. Independent Sch. Dist., 921 F.2d 1022, 1026 (10th Cir. 1990), cert. denied, 500 U.S. 905 (1991).

<sup>21</sup> *Schaffer*, 546 U.S. at 49.

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

<sup>23</sup> *Id.*

<sup>24</sup> Interview with Jocelyn Schaffer (2006).

<sup>25</sup> Ken Millstone, *Schaffer v. Weast: Potomac's Family's Case to be Heard by Supreme Court*, THE CONNECTION NEWSPAPERS, Oct. 7, 2005, <http://www.connectionnewspapers.com/article.asp?archive=true&article=67462&paper=70&cat=190> (last visited March 5, 2008).

<sup>26</sup> *Schaffer*, 546 U.S. at 55.

<sup>27</sup> See *cf.* 20 U.S.C. § 1415 (k).

<sup>28</sup> *Schaffer*, 546 U.S. at 55.

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

<sup>30</sup> 20 U.S.C. § 1415 (f).

<sup>31</sup> *Schaffer*, 546 U.S. at 55.

<sup>32</sup> Tice v. Botetourt County Sch. Bd., 908 F.2d at 1200, 1207 (4th Cir. 1990).

<sup>33</sup> Brian S. v. Paul L. Vance, 86 F. Supp. 2d 538, 540-541 (D. Md. 2000).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 545.

<sup>36</sup> *Id.* at 545.

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

<sup>38</sup> Weast v. Schaffer, 377 F.3d 449 (4th Cir. 2004)

<sup>39</sup> *Schaffer*, 546 U.S. at 55.

<sup>40</sup> *Id.*

<sup>41</sup> Jerry Weast v. Brian Schaffer, 240 F. Supp. 2d 396 (D. Md. 2002).

<sup>42</sup> *Weast*, 377 F.3d at 453.

<sup>43</sup> *Schaffer*, 546 U.S. at 49.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 51-62.

<sup>46</sup> *Id.* at 69.

<sup>47</sup> *Id.* at 63.

<sup>48</sup> *Schaffer*, 546 U.S. at 63.

<sup>49</sup> 20 U.S.C. § 1415 (i)(2)(B)(iii).

<sup>50</sup> BLACK'S LAW DICTIONARY 712 (7th ed. 1999).

<sup>51</sup> Interview with Jocelyn Schaffer (2006).

<sup>52</sup> 20 U.S.C. § 1415(i)(3)(B)-(G).

<sup>53</sup> Winkelman v. Parma City Sch. Dist., 127 S. Ct. 1994, 1995 (2007).

<sup>54</sup> See The Brain Clinic Frequently Asked Questions, available at <http://www.thebrainclinic.com/faq.html#faq3> (last visited March 5, 2008).

<sup>55</sup> Arlington Central Sch. Dist. v. Murphy, 126 S. Ct. 2455 (2006).

<sup>56</sup> *Schaffer*, 546 U.S. at 51.

<sup>57</sup> U.S. DEPT. OF EDUC., NATIONAL DROPOUT PREVENTION CENTER FOR STUDENTS WITH DISABILITIES (April 2006), [http://www.ndpc-sd.org/assistance/docs/Indicator\\_2--Dropout.pdf](http://www.ndpc-sd.org/assistance/docs/Indicator_2--Dropout.pdf) (last visited March 5, 2008).

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

<sup>59</sup> U.S. DEPT. OF EDUC., *Twenty-Second Annual Report to Congress of the Implementation of the Individuals with Disabilities Education Act* at II-37 (2000), <http://www.ed.gov/about/reports/annual/osep/2000/chapter-2.pdf>.

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

<sup>61</sup> *Weast*, 240 F. Supp. 2d at 402.

<sup>62</sup> Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

<sup>63</sup> 20 U.S.C. § 1411 (a).

<sup>64</sup> 10.7 billion is 64% of 16.9 billion.

## THE MODERN AMERICAN CONGRATULATES

VINCENT ENG (WCL '95)

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AMY TAI (WCL '08)

ON RECEIVING THE SERVICE AWARDS IN RECOGNITION OF THEIR  
COMMITMENT, LEADERSHIP AND SERVICE TO  
THE ASIAN PACIFIC AMERICAN COMMUNITY

GIVEN BY

WCL'S ASIAN PACIFIC AMERICAN LAW STUDENT ASSOCIATION  
AT WCL'S APA AND THE LAW DINNER

# LEGAL PROTECTIONS FOR AN INVISIBLE POPULATION: AN ELIGIBILITY AND IMPACT ANALYSIS OF U VISA PROTECTIONS FOR IMMIGRANT VICTIMS OF DOMESTIC VIOLENCE

By Jamie Rene Abrams\*

Domestic violence has oft been described as a “hidden war” taking place in the privacy of the home. Undocumented immigrants in the United States are also commonly labeled as “invisible,” living outside the sights and minds of society. When undocumented immigrants become the victims of domestic violence these two social phenomena coalesce, compounding feelings of fear, isolation, and marginalization. In 2000, Congress began to give a voice to this silent and invisible population by enacting the Battered Immigrant Women Protection Act (“BIWPA”) as part of the Trafficking Victims Protection Act.<sup>1</sup>

Advocates for immigrants and victims of domestic violence generally championed the BIWPA because it created a new non-immigrant classification, known as a “U” visa, for victims of certain qualifying criminal activity.<sup>2</sup> The new status offers immigration protections to victims of certain statutorily enumerated crimes that occurred in the United States and resulted in “substantial physical or mental abuse.”<sup>3</sup> The victim must also show that they have information about qualifying criminal activity and that they “ha[ve] been helpful, [are] being helpful, or [are] likely to be helpful” in the investigation or prosecution of that activity.<sup>4</sup> The new classification addressed a gap left by prior Violence Against Women Act (“VAWA”) legislation in its efforts to protect immigrant victims of domestic violence who are neither married to citizens nor lawful permanent residents.<sup>5</sup> On September 17, 2007, the United States Citizenship and Immigration Services (“USCIS”) finally rescued the U visa from seven years in administrative limbo, publishing an interim rule that outlined the specific eligibility requirements and procedures to obtain U visa nonimmigrant status.<sup>6</sup> While advocates applaud the new visa in many respects, they simultaneously express a guarded caution that aspects of the scope of the rule, its intersection with other immigration proceedings, and the processing of applications may undermine the intent and effectiveness of the visa. This article reviews the procedural background of the U visa legislation, summarizes the interim rule requirements, highlights the broad categories of advocates’ comments submitted in response to the interim rule, and analyzes the impact and effectiveness of the U visa statutory and regulatory framework.

## BACKGROUND OF THE U VISA LEGISLATION

In enacting the BIWPA, Congress recognized that undocu-

mented immigrant victims of crimes may be reluctant to pursue the arrest or prosecution of criminal activity committed against them, thwarting the goals of law enforcement and putting many victims in further danger.<sup>7</sup> These concerns are often daily realities for victims of domestic violence-related crimes who may already face social and physical isolation, fear and threats of deportation from their abuser, and other social, economic, and psychological hurdles to reporting crime.<sup>8</sup> Congress intended the BIWPA to address these concerns by “strengthen[ing] the ability of law enforcement agencies to investigate and prosecute cases of domestic violence, sexual assault, trafficking of aliens and other crimes while offering protection to victims of such crimes.”<sup>9</sup> The BIWPA generally requires the petitioner to present evidence that he or she: has suffered substantial mental or physical abuse as a result of having been a victim of certain qualifying criminal activity; has information regarding the relevant criminal activity; and has provided assistance to government officials in the investigation and prosecution of such criminal activity.<sup>10</sup> The statute delegated the authority to USCIS to promulgate regulations defining the U visa application procedures, evidentiary burdens, and other key implementing details.<sup>11</sup>

Since 2000, USCIS has taken modest steps to establish U visa guidelines and to make available the victims’ protections that Congress intended through interim relief procedures.<sup>12</sup> Despite much public pressure and litigation, it took USCIS seven years to promulgate an interim rule for public comment.<sup>13</sup> The reorganization of the Department of Homeland Security after September 11, 2001 was a major factor in the delay,<sup>14</sup> as was the

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complicated intersection between U visas and other areas of immigration law. The delay left many petitioners uncertain about whether, when, and how to file a petition for a U visa. USCIS acknowledged that the delay had potential implications on immigrant victims of crimes, and concluded that

there was a compelling need for rapid implementation. While the Administrative Procedure Act generally requires that the agency solicit and address public comments before issues the final rule, USCIS invoked a public interest exception to make its interim rule take effect thirty days after publication.<sup>15</sup>

Regardless of the cause of the delay, for seven years immigrant victims of crimes have lacked both the full protection of the law and clear application approval guidelines. Although advocates and regulators can only speculate as to how many meritorious petitioners have remained in the shadows during this ad-

ministrative limbo, USCIS received approximately 8,000 applications for interim relief before publishing the interim rule in September 2007.<sup>16</sup> USCIS adjudicated the petitions it received and granted interim status to approximately 5,800 petitioners that presented a *prima facie* case.<sup>17</sup> The interim rule necessarily also explains how petitioners with interim status should proceed.

The interim rule is a much-anticipated and long overdue publication. It provides more comprehensive structure and guidelines to the U visa application process and thus more protection and certainty to victims. Yet, absent public comment and a final rule, it fails to offer finality to both petitioners and practitioners. For example, threshold questions regarding the role of law enforcement, the definition of victim, and intersections with other immigration laws remain unanswered, making it difficult for practitioners to advise their clients. USCIS accepted public comments on the interim rule through November 16, 2007.<sup>18</sup> Dozens of advocates weighed in with both praise and concern. It is unknown when USCIS will issue its final rule

### SUMMARY OF THE U VISA INTERIM RULE AND THE PUBLIC'S RESPONSE

The interim rule fills critical gaps in the statutory scheme. USCIS further defines the eligibility requirements, burdens of proof, administrative implementation, the U visa's scope, caps on admissions, and the admission of qualifying family members.

#### PETITIONER ELIGIBILITY REQUIREMENTS

To file for U visa relief, the enabling legislation and the interim rule require the victim to submit a petition (Form I-918, Petition for U Nonimmigrant Status) and to demonstrate four eligibility requirements: (1) The petitioner must show that he or she "has suffered substantial physical or mental abuse as a result of having been a victim of qualifying criminal activity"<sup>19</sup>; (2) The petitioner must "possess credible and reliable information establishing that he or she has knowledge of the details concerning the qualifying criminal activity upon which his or her petition is based"<sup>20</sup>; (3) The petitioner must demonstrate that she "has been helpful, is being helpful, or is likely to be helpful to a certifying agency in the investigation or prosecution of the qualifying criminal activity upon which his or her petition is based"<sup>21</sup>; (4) The criminal activity upon which the petitioner bases his or her petition must have violated a law of the United States.<sup>22</sup> While seemingly straightforward, the statute and interim rule further unpack the nuances and complexities of these requirements. The following sections analyze each requirement in turn.

#### PETITIONER HAS SUFFERED SUBSTANTIAL PHYSICAL OR MENTAL ABUSE FROM A QUALIFYING CRIMINAL ACTIVITY

The statute and regulations require proof that the petitioner "has suffered substantial physical or mental abuse as a result of having been a victim of criminal activity."<sup>23</sup> This element has two distinct parts: the scope of "substantial physical or mental abuse" and the definition of "victims of qualifying criminal activity."

The statutory requirement of a showing of "substantial

physical or mental abuse" is of critical importance to victims of domestic violence.<sup>24</sup> USCIS took precautions to implement a rule that acknowledged the complexities and challenges of petitioners in abusive relationships. The interim rule defines "physical or mental abuse" as "injury or harm to the victim's physical person, or harm to or impairment of the emotional or psychological soundness of the victim."<sup>25</sup> USCIS selected this definition after reviewing other regulations promulgated under VAWA, intending to encompass a "wide range of physical or mental harm."<sup>26</sup> In determining whether the abuse meets the "substantial" threshold, USCIS will consider, but is not limited to, the following factors: "the nature of the injury inflicted or suffered; the severity of the perpetrator's conduct; the severity of the harm suffered; the duration of the infliction of the harm; and the extent to which there is permanent or serious harm to the appearance, health, or physical or mental soundness of the victim, including aggravation of pre-existing conditions."<sup>27</sup>

This standard allows USCIS the flexibility to consider the severity of abuse from either the perspective of the injury to the petitioner or the abuse inflicted by the perpetrator.<sup>28</sup> USCIS will also look at "[a] series of acts taken together" as evidence of substantial abuse.<sup>29</sup> No one factor will be considered a prerequisite, nor will any one factor create a presumption of substantial abuse,<sup>30</sup> further expressing USCIS' preference for "case-by-case determinations."<sup>31</sup> USCIS will "consider the abuse in its totality."<sup>32</sup>

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*USCIS took precautions to implement a rule that acknowledged the complexities and challenges of petitioners in abusive relationships.*

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The interim rule also articulated how petitioners, such as victims of domestic violence, should prove this eligibility requirement. The petitioner must submit "credible evidence" of substantial physical or mental abuse showing both the nature and severity of the abuse.<sup>33</sup> While many practitioners followed this practice informally, the interim rule added a specific requirement that the petitioner must submit a written personal statement, including a description of the abuse suffered because of the criminal activity.<sup>34</sup> "Credible evidence" might also include the following submissions: "reports and/or affidavits from judges and other court officials, medical personnel, school officials, clergy, social workers and other social service personnel; protection orders and related legal documents; photos of visible injuries supported by affidavits; and affidavits from witnesses, acquaintances or family members who have personal knowledge of the facts regarding the criminal activity."<sup>35</sup>

Congress intended that the "victims of qualifying criminal activity" eligibility requirement be both flexible and expansive. The definition includes a wide range of crimes that constitute domestic violence and impact immigrant victims, including rape,

sexual assault, assault, and trafficking (as well as the attempt of any of the statutorily enumerated crimes).<sup>36</sup> USCIS explicitly did not limit the definition to specific crimes as defined in various jurisdictions' statutes.<sup>37</sup> It also included broad language covering "any similar activity" to those crimes specifically listed in the statute.<sup>38</sup> Thus, while frequently identified as a statute impacting victims of domestic violence, the statute and the interim rule in fact covers a wide range of criminal activity.

USCIS categorizes a victim of a crime in three separate ways. In classifying an individual as a direct victim of a crime, USCIS considers whether an individual has suffered "direct and proximate harm."<sup>39</sup> This approach is similar to the Attorney General Guidelines for Victims and Witness Assistance.<sup>40</sup> A bystander of a crime may qualify for status on "a case-by-case basis" if he or she suffered direct injury.<sup>41</sup> Although the statute is silent regarding the possible culpability of the victim in the qualifying criminal activity, USCIS' definition of victim expressly *excludes* those who are culpable for the qualifying criminal activity; while applicants with culpability in *other* crimes – even related ones – remain eligible.<sup>42</sup> For example, an applicant who participates in the crime of smuggling to obtain entry into the United States may still apply for protection as a victim of an involuntary servitude crime, despite her involvement in the crime of smuggling.

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*A bystander of a crime may qualify for status on "a case-by-case basis" if he or she suffered direct injury.*

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In addition to qualifying as a direct victim of criminal activity, the interim rule also includes limited categories for indirect victims, also derived from the Attorney General Guidelines. In cases of murder, manslaughter, or incompetent or incapacitated victims over the age of 18, the interim rule defines indirect victims to include the direct victim's spouses and children less than 21 years of age.<sup>43</sup> For direct victims in the same categories but under the age of 18, the interim rule also covers parents and unmarried siblings under 18.<sup>44</sup> USCIS highlighted one important way in which the interim rule deviates from the Attorney General Guidelines, which USCIS otherwise followed. Whereas the Attorney General Guidelines only define indirect victims to include the first eligible and available person in the hierarchy listed above, USCIS' definition is more flexible in that any individual may qualify, not just the first available individual.<sup>45</sup> Thus, an incapacitated victim's spouse and children may all qualify as indirect victims. USCIS believed that this interpretation best implemented the statutory framework and intent.

Victims of crimes such as witness tampering, obstruction, or perjury are approached differently than those of murder or manslaughter.<sup>46</sup> Victims of crimes not targeted against the person include individuals who have suffered direct and proximate harm, "where there are reasonable grounds to conclude that the perpetrator principally committed the offense as a means: (1)

To avoid or frustrate efforts to investigate, arrest, prosecute, or otherwise bring him or her to justice for other criminal activity; or (2) to further his or her abuse or exploitation of or undue control over the alien through manipulation of the legal system."<sup>47</sup>

*PETITIONER HAS KNOWLEDGE OF THE DETAILS OF A QUALIFYING CRIME*

The BIWPA also requires the petitioner to present "credible and reliable information establishing that he or she has knowledge of the details" of the crime.<sup>48</sup> The interim rule refined this requirement to state that the petitioner must possess "specific facts."<sup>49</sup> USCIS required the petitioner to have information relating to the same crime upon which the petitioner bases his or her request for relief.<sup>50</sup> USCIS believed that such an interpretation was necessary to embrace Congress' intent to "facilitate the investigation and prosecution of criminal activity of which immigrants are targets while providing protection for victims of such criminal activity."<sup>51</sup> Where the victim was under the age of sixteen at the time of the crime, or the victim is incapacitated or incompetent, a parent, guardian, or "next friend" may instead possess information relating to the criminal activity.<sup>52</sup>

One critical tool for petitioners to meet this requirement is the "U Nonimmigrant Status Certification," known generally as the Law Enforcement Certification ("LEC"). As discussed more fully below, the petitioner must obtain a certification from a qualifying law enforcement official. The petitioner may use this requirement to show knowledge of the crime and may also submit other evidence, such as "reports and affidavits from police, judges, and other court officials."<sup>53</sup> The petitioner's required personal statement should also contain details of the criminal activity, including the nature of the activity, when it occurred, the person responsible, any events surrounding it, and how law enforcement came to prosecute it.<sup>54</sup>

*PETITIONER HAS BEEN HELPFUL, IS BEING HELPFUL, OR IS LIKELY TO BE HELPFUL IN AN INVESTIGATION OR PROSECUTION OF QUALIFYING CRIMINAL ACTIVITY*

Perhaps the most distinguishing eligibility requirement in the U visa application process is the statute's requirement that a petitioner "has been helpful, is being helpful, or is likely to be helpful to a certifying agency in the investigation or prosecution" of the qualifying criminal activity.<sup>55</sup> USCIS articulated these certification requirements in the interim rule, which have important ramifications for victims of domestic violence.

The interim rule required the petitioner to include a Supplement B Form for agency certification in the application.<sup>56</sup> USCIS will give this certification "significant weight."<sup>57</sup> Certifying law enforcement officials must demonstrate their qualifications to complete the form, select the category of criminal activity involved, describe the relevant criminal investigation, describe any injuries to the victim, identify and describe the type of help that the victim is providing, and explain the involvement of any of the victim's family members.<sup>58</sup> USCIS specifically stated that the rule did not require actual prosecution, thus reaffirming the range of cooperation available.<sup>59</sup> The petitioner may also submit

other evidence of helpfulness, such as “trial transcripts; court documents; police reports; news articles; copies of reimbursement forms for travel to and from court, affidavits of other witnesses or officials.”<sup>60</sup>

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*In applying for permanent resident status, the petitioner must not have refused or failed to cooperate in providing “information and assistance reasonably requested.”*

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While the interim rule broadly defined the range of eligible certifying agencies, it limited the scope of individuals within each agency who may provide certifications. The interim rule defined “certifying official” as a law enforcement agency, an agency with criminal investigative jurisdiction, a prosecutor, or a judge.<sup>61</sup> USCIS interpreted the term broadly to include agencies such as child protective services, the Equal Employment Opportunity Commission, and the Department of Labor.<sup>62</sup> It also included agencies involved in the detection, conviction, and sentencing of qualifying criminal activity.<sup>63</sup> The interim rule expressly required that in order to issue U visa certifications, the signatory must be either the head of the qualifying agency or a supervisor designated by the head.<sup>64</sup> USCIS explained that this additional requirement was “to ensure the reliability of certifications.”<sup>65</sup> USCIS interpreted the statute to require an “ongoing responsibility on the alien victim to provide assistance, assuming there is an ongoing need for the applicant’s assistance.”<sup>66</sup> In applying for permanent resident status, the petitioner must not have refused or failed to cooperate in providing “information and assistance reasonably requested.”<sup>67</sup>

#### JURISDICTION OF THE CRIMINAL ACTIVITY

The petitioner must also show that the crime “occurred in the United States (including Indian country and U.S. military installations) or in the territories or possessions of the United States, or violated a U.S. federal law that provides for extraterritorial jurisdiction to prosecute the offense in a U.S. federal court.”<sup>68</sup> USCIS clarified the phrase “occurred in the United States” to include qualifying criminal activity committed both in the country and in violation of U.S. law.<sup>69</sup> The language “violated the laws of the United States” covers criminal activity outside the United States that violated domestic law, thus encompassing criminal laws with extraterritorial jurisdiction.<sup>70</sup> USCIS referred petitioners to the LEC as one method to meet this burden of proof.<sup>71</sup> Petitioners may also submit any other credible evidence, including the relevant statutory provisions of the criminal activity and other facts that demonstrate the activity meets the list of qualifying crimes.<sup>72</sup>

#### FILING AND VISA ADMINISTRATION

In addition to defining eligibility requirements, the interim rule also outlined the filing and administrative procedures to obtain U visa nonimmigrant classification. The petitioner must

submit the Form I-918, a signed law enforcement certificate (signed within six months of filing), any other credible evidence he or she wishes the USCIS to consider, and a personal statement describing the facts of victimization.<sup>73</sup> USCIS required the petitioner’s personal statement, desiring to learn about the victimization “from the petitioner in his or her own words.”<sup>74</sup> Applicants may apply for relief from either inside or outside of the United States.<sup>75</sup>

USCIS has adjudication authority over all petitioners for U nonimmigrant status.<sup>76</sup> There is no deadline for new petitioners to file for relief; thus, petitioners have the discretion to apply during an ongoing investigation or after the prosecution. However, USCIS imposed a filing deadline for petitioners who have already received interim relief since 2001.<sup>77</sup> Petitioners who received USCIS interim relief status since 2001 must file within 180 days of the effective date of the interim rule.<sup>78</sup>

USCIS administers the U visa adjudication process centrally at its Vermont Service Center.<sup>79</sup> Importantly, these officials are specially trained in domestic violence cases. USCIS first conducts a *de novo* review of the petition, along with any other submitted credible evidence, and then issues a written decision.<sup>80</sup> If USCIS denies the petitioner’s application, it will first issue a written explanation of its denial to the petitioner, which the petitioner may then appeal to the Administrative Appeals Office.<sup>81</sup> If USCIS grants the petition, the petitioner will receive written notice of the decision, which is effective as of the approval date.<sup>82</sup> USCIS will also issue a Form I-94 Arrival-Departure record, providing official documentation of the petitioner’s U nonimmigrant status.<sup>83</sup> This can offer critical protections for victims who fear deportation or immigration inquiries.

Petitioners granted U nonimmigrant status may remain in the United States for up to four years.<sup>84</sup> Extensions beyond four years are available where the government determines that continued presence is “necessary to assist in the investigation or prosecution” of the crime.<sup>85</sup> USCIS also has the authority to later grant the alien permanent resident status if the petitioner shows the following: that they have not “unreasonably refused to provide assistance in a criminal investigation or prosecution” of the crime committed against them; they have been continuously present in the United States for a three-year period; and their presence in the United States is justified by humanitarian reasons, family necessities, or public interest.<sup>86</sup> USCIS has not

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*USCIS also has the authority to later grant the alien permanent resident status*

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yet issued regulations governing subsequent applications for permanent resident status, so the details of this process and the likelihood of obtaining such relief remain uncertain. U nonimmigrant status and derivative status also authorize employment in the United States.<sup>87</sup>

Qualifying family members of the U visa petitioner are also eligible for admission.<sup>88</sup> The petitioner may apply on behalf of eligible family members either at the time of the initial petition or thereafter.<sup>89</sup> Eligible family members include the petitioner's spouse, child, parent (if the petitioner is under 21 years of age), or unmarried sibling under 18 years of age.<sup>90</sup> Petitioners must first show the existence of a qualifying relationship at the time of the filing and that the relationship will last through approval.<sup>91</sup>

Congress imposed a statutory cap limiting the number of issued visas to 10,000 per fiscal year,<sup>92</sup> excluding derivative family members.<sup>93</sup> The interim rule acknowledges that "within the first few fiscal years after publication of this regulation, it will receive petitions for U nonimmigrant status from more than 10,000 principal aliens."<sup>94</sup> USCIS will place petitioners who are otherwise eligible for admission, but whose admission would exceed the 10,000 visa cap, on a waiting list in the order of approval.<sup>95</sup> The purpose of the waiting list "is to respect the intent of the numerical limitation imposed by Congress while still allowing the legislation to achieve maximum efficacy."<sup>96</sup> The interim rule also gives USCIS the discretion to remove a petitioner from the wait list.<sup>97</sup>

Many petitioners seeking U visa status also face other immigration hurdles in obtaining relief. A substantial number of petitioners are otherwise inadmissible for legal entry into the United States on one or more grounds, such as entering the United States without papers. The interim rule requires that those petitioners facing other immigration hurdles must file concurrently Form I-192 "Application for Advance Permission to Enter as Nonimmigrant" along with the other initial U visa evidence and Form I-918.<sup>98</sup> Congress gave USCIS the authority to issue waivers of inadmissibility to petitioners who are otherwise inadmissible to the United States if it determines that a waiver is "in the public or national interest."<sup>99</sup> In adopting the interim rule, however, USCIS further limited its discretion in considering inadmissibility waivers for "violent or dangerous crimes" to cases where "extraordinary circumstances" exist.<sup>100</sup> There is no right to appeal a denial of an inadmissibility waiver.<sup>101</sup>

Other petitioners may already have faced or are facing adverse immigration proceedings prior to seeking U visa relief. For example, petitioners might already be in removal proceedings or subject to a final order of removal or deportation. USCIS expressly stated that such petitioners may apply for U nonimmigrant status, notwithstanding the other pending proceedings, but that filing for relief would not otherwise affect the ongoing adverse proceedings.<sup>102</sup>

#### *ADVOCATES WEIGH IN WITH BOTH PRAISE OF AND CONCERNS WITH THE INTERIM RULE*

USCIS requested public comments on its interim rule through November 16, 2007. In response, immigrants' rights activists, domestic violence practitioners, various coalitions, and

other interested parties, submitted written comments to the agency. This article highlights the broad categories of comments submitted on behalf of advocates representing immigrant women and victims of domestic violence, but does not attempt to address all comments in their entirety.<sup>103</sup> Advocates praised aspects of the rule, such as a broader definition of domestic violence including both physical and mental abuse, an interpretation of "substantial harm" that incorporates patterns of abuse, and agency recognition of the ways in which criminals use the law enforcement system to control and further victimize immigrants. Commentators also voiced concerns with the interim rule, however, which this article divides into three categories: the scope of the rule, its intersection with other immigration proceedings, and the processing of applications.

#### *ADVOCATES' COMMENTS CONCERNING THE SCOPE OF THE INTERIM RULE*

Advocates' comments identified three primary areas in which the interim rule exceeded the scope of the statute calling for: (1) The elimination of the "supervisor" or "agency head" requirement governing LECs; (2) The broadening of the definition of "victim of qualifying criminal activity,"; and (3) Greater flexibility surrounding waivers for criminal convictions.

Advocates repeatedly and strenuously requested that USCIS remove the extra requirement imposed by the interim rule that a centralized law enforcement "supervisor" or "agency head" must sign certifications confirming the victim's cooperation,<sup>104</sup> arguing that the requirement imposed unnecessary bureaucratic constraints, exceeded the scope of the statute, and undermined the purpose of the law.<sup>105</sup> This is particularly problematic because many agencies have already developed effective approval

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*Many petitioners seeking U visa status also face other immigration hurdles in obtaining relief*

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systems that would have to change with the interim rule, risking delay and confusion for petitioners. The "chain of command" approach is also precarious because it minimizes the likelihood

that the victim would interact with someone familiar with the case and trained in victim's services.<sup>106</sup> For example, many agencies currently rely on individuals with special expertise, such as domestic violence or bilingual officers, to manage the certification process.<sup>107</sup> Advocates expressed concern that the "agency head" requirement might jeopardize the sensitivity and institutional knowledge that these trained units bring to the certification process. Advocates generally agreed that Congress gave each agency the flexibility to implement a system that works within its structure and that USCIS should not intervene in that process. Some proposed revisions included: asking the signatory to check a box affirming that the agency has assigned or authorized the signatory to evaluate and issue certifications,<sup>108</sup> leaving each agency with the discretion to implement authorization procedures, and adopting an alternate standard requiring the signatory to have "actual knowledge" of the criminal activity gained through either the investigation or prosecution of the criminal activity.<sup>109</sup>

Advocates also called for a broadening of both the definitions of “victim” and the definition of “qualifying criminal activity.” They argued that USCIS should construe “victim of qualifying criminal activity” to include the broadest possible group of eligible victimized family members.<sup>110</sup> The existing language required that the direct victim be an alien, but advocates requested broadening the definition to include United States citizens.<sup>111</sup> For example, advocates explained that situations may arise where a child is a United States citizen born to alien parents.<sup>112</sup> If that citizen child was the victim of a sexual crime, the parents would need to play a critical role in reporting and assisting in the prosecution of that sexual crime.<sup>113</sup> The current language of the interim rule would not offer U visa relief to reporting and cooperating parents, yet these parents would likely face the same fears and obstacles coming forward to law enforcement without lawful status that a direct petitioner would. USCIS’ proposed interpretation would be more consistent with both the interim relief procedures and prior adjudications.

Advocates also argued that direct victims under the age of twenty-one need not be deceased, incompetent, or incapacitated for eligible family members to qualify as “indirect victims.”<sup>114</sup> This interpretation is consistent with federal and state law as well as the prior adjudication of interim relief procedures. Advocates also sought clarification of the definition of “qualifying criminal activity.” Some indicated that USCIS improperly conflated two distinct requirements – that the noncitizen has been a victim of a crime, and that the noncitizen has helped in the prosecution of a crime.<sup>115</sup> Advocates strenuously argued that a petitioner should qualify for U visa relief if he or she was the victim of one enumerated crime and has helped in the prosecution of another.<sup>116</sup>

Some advocates also requested that USCIS remove the additional requirement that applicants show “extraordinary circumstances” in waivers of inadmissibility for criminal convictions. The regulations currently state that, “in cases involving violent or dangerous crimes of inadmissibility based on the security and related grounds . . . USCIS will only exercise favorable discretion in extraordinary circumstances.”<sup>117</sup> Advocates contended that USCIS’ standard of review is already discretionary under the statute and that Congress did not contemplate or authorize further limitations on agency discretion in cases involving violent or dangerous crimes.<sup>118</sup> Advocates also noted that separating out violent or dangerous crimes violates the statute.<sup>119</sup> The removal of the language “extraordinary circumstances” would better emphasize a full and fair consideration of individual circumstances.

#### U NONIMMIGRANT CLASSIFICATION’S INTERSECTIONS WITH OTHER IMMIGRATION PROCEEDINGS

In addition to raising concerns regarding the scope of the

rule and its coverage, advocates also proposed four key changes to remedy problematic intersections between U visa classifications and existing immigration law: a U visa exemption to the ninety-day deadline to reopen proceedings; an automatic stay of removal for U visa applicants; a limited duration for U visa petitioners in detention; and modifications to the requirements and procedures governing waivers of inadmissibility.

Advocates argued that USCIS should create a U visa exemption to the ninety-day deadline to reopen.<sup>120</sup> The interim rule allows petitioners to submit U visa applications even when the individual has a final order of removal. Procedurally, however, in order to give effect to this right, petitioners have to seek both a discretionary stay of removal and a motion to reopen and terminate proceedings. Advocates asserted that by the time the petitioner files for a U visa, many applicants will have already

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*...by the time the petitioner files for a U visa, many applicants will have already exceeded the ninety-day deadline to file a motion to reopen to terminate removal proceedings*

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exceeded the ninety-day deadline to file a motion to reopen to terminate removal proceedings.<sup>121</sup> Falling outside of this statutory motion deadline leaves applicants subject to the discretion of Immigration and Customs Enforcement (“ICE”) to agree to a joint motion to reopen.<sup>122</sup> As with any discre-

tionary process, this presents considerable challenges and uncertainty for applicants. ICE may refuse to consent to the motion to reopen. The immigrant may refuse to approach ICE for fear of deportation. There will also be increased cost and delay with the filing of the motion. To address this concern, advocates requested that USCIS create a U visa exemption to the ninety-day deadline to reopen. This exemption would be similar to the VAWA regulations, which allows petitioners to move to reopen in cases of extraordinary circumstances or extreme hardship.

Advocates requested that USCIS incorporate an automatic stay of removal for U visa applicants following an agency determination that the pending petition meets the *prima facie* eligibility requirements.<sup>123</sup> This proposal is consistent with the regulations governing “T” visas for victims of trafficking. It also ensures that the victim will not be removed in the course of an active investigation or prosecution, thus rendering her unable to cooperate and derailing prosecution or investigation.

Advocates also argued that the interim rule might improperly extend the duration of detention for petitioners.<sup>124</sup> While detained applicants would ordinarily be eligible for release after six months, the current regulations appear to extend the period of duration for U nonimmigrant status petitioners. Advocates argued that this undermines the intent of the statute to encourage cooperation and to provide humanitarian relief, and instead penalizes U visa applicants for no legitimate reason. Advocates requested that USCIS clarify the rule such that petitioners who are *prima facie* eligible for U visa relief be released from detention in a shorter timeframe,<sup>125</sup> and at a minimum USCIS should withdraw the new rule providing the opportunity for release within six months under the detention rules.

Advocates also argued that requiring the applicant to submit at the time of the petition both Form I-192 and an Application for Advance Permission to Enter as a Nonimmigrant improperly places the burden on the applicant to determine inadmissibility grounds.<sup>126</sup> Rather, consistent with USCIS practice, the Department of Homeland Security should be required to make an initial determination of inadmissibility. The applicant would then have the opportunity to respond and contest a finding of inadmissibility.

#### MODIFICATIONS TO INTERIM RULE REQUIREMENTS FOR PROCESSING APPLICATIONS

Advocates also called for three key changes to the interim rule requirements for processing applications: the introduction of a fee waiver provision for waivers of inadmissibility; an extension to the application period for petitioners with interim relief; and modification of the “age-out” provisions governing derivative applicant. Advocates almost uniformly contested the lack of a fee waiver procedure for applicants submitting a waiver of inadmissibility.<sup>127</sup> Without a fee waiver, the waiver of inadmissibility costs approximately \$545, “serv[ing] as a virtual bar to accessing status” for many otherwise eligible U visa petitioners.<sup>128</sup> Advocates argued that providing a fee waiver provision is consistent with USCIS’ preamble explaining the broad basis for its blanket fee waiver for Form I-918.

Advocates also argued that 180 days is an insufficient period to allow current victims with interim relief status to file a U nonimmigrant visa application, requesting instead an application period of one or two years to account for the extensive caseloads of many service-providers and the difficulties in contacting and communicating with the client base.<sup>129</sup> This proposed modification impacts the approximately 5,800 petitioners who have already received interim relief through USCIS’ prior adjudication.

Advocates also proposed modifications to lock-in the age of qualifying unmarried siblings at the date of application for interim relief.<sup>130</sup> Under the interim rule, USCIS considers the relevant age of qualifying unmarried siblings from the date of the subsequent submission. Advocates argued that this rule effectively penalizes derivative family members unfairly for USCIS’ seven-year delay in implementing the interim rule. Advocates argued that USCIS should adopt a more equitable approach and measure the relevant age from the date of the interim relief application, not the filing of an I-918. Advocates argued for the same modification to address parents of siblings of minors turning twenty-one. Other advocates argued for an amendment to 8 C.F.R. § 214.14(f)(4)(ii) requiring that the relationship between the petitioner and the qualifying family member need only exist at the time of the filing and need not continue through the adjudication process.

#### IMPACT AND ANALYSIS

While U nonimmigrant status offers significant protections for victims of crimes, the following four potential obstacles may still hinder successful implementation of the statutory framework: the integral role of law enforcement personnel, the chang-

ing landscape of immigration policy in the United States, aggressive caps on visas, and the risks of re-victimization.

#### THE INTEGRAL ROLE OF LAW ENFORCEMENT

Successful implementation of the statutory framework hinges on the role of law enforcement as necessary facilitators. This presents various potential obstacles for victims of crime. Many of the same barriers that led to the statute’s enactment threaten the success of its implementation. Absent active efforts to educate and sensitize law enforcement personnel, victims may fear interacting with law enforcement to obtain the protection. Women face significant barriers in reporting violence and participating in the prosecution of crimes, including intense shame, limited language ability, cultural differences, lack of knowledge about the criminal justice system, and unpleasant experiences with legal institutions in their country of origin.<sup>131</sup> Interviews with immigrant women show that their interactions with police are often hampered by law enforcement’s limited knowledge of women and domestic violence generally, the lack of available translators, insufficient sensitivity to issues of culture and gender, and a lack of understanding as to why immigrants might be reluctant to talk to police or provide details of the crime.<sup>132</sup>

To ensure a successful implementation, regulators and not-for-profit organizations should incorporate training and awareness programs for both law enforcement and immigrant communities.<sup>133</sup> This is particularly true for agencies that do not act as traditional law enforcement but have certification authority under the rule, such as child protective services, the Department of Labor, and the Equal Employment Opportunity Commission.<sup>134</sup>

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*To ensure a successful implementation, regulators and not-for-profit organizations should incorporate training and awareness programs for both law enforcement and immigrant communities.*

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It is also important to monitor whether the administrative burdens on law enforcement personnel undermine cooperation. Police may be deterred from prosecuting crimes against aliens because of the increased administrative burden that may result. Because law enforcement personnel are the gatekeepers to certifying the U visa application, it is important to monitor their discretion in making initial determinations of arrest and their willingness to implement this regulatory scheme.

Lastly, there are also potential risks for law enforcement abuse in interacting with victims of qualifying criminal activity.<sup>135</sup> As one scholar phrased it: “[s]ince immigration law, by definition, applies only to a vulnerable population group – non-citizens – the harshness and the limited venues for averting deportation make the only alternative provided – cooperation – even more rife with abuse.”<sup>136</sup> The premise of the U visa protec-

tion is cooperation with law enforcement – the same actor who has the discretionary power to issue the requisite certifications. Under the existing statutory and regulatory scheme, potential abuses of power may include the unreviewable discretion of law enforcement in issuing certifications;<sup>137</sup> retaliatory immigration or criminal actions against victims who refuse to cooperate; ethnic, geographic, gender, or regional inconsistencies in enforcement; and the risks of coercive cooperation leading to exaggerated or misinformation.<sup>138</sup>

#### **THE CHANGING LANDSCAPE OF IMMIGRATION POLICY IN THE UNITED STATES**

In addition to the implementation challenges faced by the integral role of law enforcement, the landscape of immigration policy in the United States has also changed dramatically since the BIWPA's enactment in October of 2000. These changes support a re-evaluation of the existing statutory and regulatory structure. The BIWPA pre-dated the attacks of September 11, 2001, the "War on Terrorism", and the related concerns over borders and national security. Immigration policy has since become a top federal and local priority, as evident from recent presidential and congressional legislative priorities,<sup>139</sup> grassroots rallies and marches to raise awareness of federal proposals in immigrant communities,<sup>140</sup> and 2008 campaign rhetoric and platforms.<sup>141</sup>

Federal and local law enforcement is involved in immigration issues and enforcement on a much more significant level than in 2000. This magnifies the fears that aliens face in reporting crimes and interacting with police. Some jurisdictions have so-called "sanctuary policies" that offer varying degrees of protection to unauthorized aliens who report a crime to the police.<sup>142</sup> While these "sanctuary policies" are intended to protect undocumented aliens during interaction with law enforcement personnel, they are both too infrequent and too irregular to overcome implementation obstacles.<sup>143</sup> Other jurisdictions, however, have become *more* proactive and aggressive in immigration law enforcement.<sup>144</sup> The result for undocumented aliens is a tremendous amount of uncertainty and confusion, likely to result in a higher unwillingness to report crimes than Congress had considered when passing the BIWPA.<sup>145</sup>

This political dynamic also calls into question the intersection of immigration law and criminal law upon which Congress built this statutory scheme. As one scholar put it, "[i]mmigration law has become an adjunct to criminal law as it is being used to further punish criminal offenders and to reward those who cooperate in criminal investigations."<sup>146</sup> The merits and effectiveness of such a legislative structure warrants Congress' review from the lens of today's political landscape.

#### **AGGRESSIVE LIMIT OF VISAS RENDERS PROGRAM TOO NARROW IN APPLICATION TO ACHIEVE POLICY OBJECTIVES**

Congress legislated a 10,000 per year cap on U visas,<sup>147</sup> and USCIS implemented a procedure to wait list eligible petitioners after reaching the statutory cap.<sup>148</sup> Since the relief became available on an interim basis in August 2001, USCIS has

granted 5,800 interim visas to applicants.<sup>149</sup> Rough estimates suggest that this cap leaves perhaps as much as ninety percent of the need unmet.<sup>150</sup> In the interim rule, USCIS acknowledges that the cap will leave a considerable gap.<sup>151</sup> Congress' stated goals in implementing this legislation were to "curtail criminal activity, protect victims of crimes committed against them in the United States, and encourage victims to fully participate in the investigation of the crimes and the prosecution of the perpetrators."<sup>152</sup> Successful implementation of these goals requires both a fundamental rethinking of the way immigrant victims of crime view the criminal justice system and more widespread awareness of the relief mechanisms available to potential applicants. With 10,000 visas a year, it seems debatable whether Congress can meaningfully effectuate these goals. It is critical to ensure that the target population is both aware of the relief and able to utilize it. Many may be reluctant to seek relief because of the uncertainty of the waitlist, and many are also non-English speakers without legal assistance.<sup>153</sup> USCIS should therefore monitor implementation in order to track whether this cap is adequate to meet Congress' stated goals.

#### **THE U VISA NON-IMMIGRANT CLASSIFICATION FURTHER EMBEDS AND REINFORCES THE VICTIMIZATION PROCESS**

The U visa nonimmigrant procedures may reinforce the victimization that the petitioner already experienced. Congress' requirement that petitioners cross a "substantial abuse" threshold in cases of certain violent crimes is unnecessary and duplicative. The "substantial abuse" burden of proof may ensure that appropriate cases of obstruction, witness tampering, and extortion are selected for U visa protection. In inherently violent crimes, however, such as rape, torture, and sexual assault, the additional requirement that the victim prove substantial physical and mental abuse is unnecessary. Compiling and submitting such proof further reinforces the victimization process, which undermines the healing and restoration process for victims. For example, at least one comment submission noted that the interim rule requires all applicants to submit a written declaration in support of their petition.<sup>154</sup> By making written statements a requirement instead of a permissible form of "credible evidence," the rule re-traumatizes the victim by forcing them to recount the details of the crime.<sup>155</sup>

#### **CONCLUSION**

Through the U visa nonimmigrant classification, Congress has undoubtedly taken great strides to give voice to the silent, hidden, and invisible experience that many undocumented immi-

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*The result for undocumented aliens is a tremendous amount of uncertainty and confusion, likely to result in a higher unwillingness to report crimes than Congress had considered when passing the BIWPA.*

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grants face as victims of crimes like domestic violence in the United States. U visas fill critical gaps left by VAWA and offer much-anticipated and much-needed safeguards to immigrant victims of domestic violence.<sup>156</sup> U visas also have the potential to give victims of crimes the courage and the protection to pursue the investigation and prosecution of crimes. Yet, the forces of invisibility and silence remain tremendous forces to overcome in today's political landscape, particularly where the demands of law enforcement and immigration policy intersect. For example, advocates for these vulnerable populations have highlighted in the comment process that the existing interim rule suffers from several weaknesses or raises areas of concern in its administration, scope, and intersection with existing immigration law.

The advocate community continues to assess USCIS' response in remediating these identified concerns. Yet, as discussed

above, the statutory and regulatory framework still faces at least four critical obstacles to successful implementation: the integral role of law enforcement personnel; the changing landscape of United States immigration policy; the cap on admission; and the reinforcement of the victimization experience. The direction of United States immigration law raises larger issues as it relates to protections of immigrant victims of crime. It is essential that USCIS and Congress monitor the implementation and effectiveness of U visa regulations to ensure that it meets its stated goals. It is only through the successful implementation of programs such as the U visa nonimmigrant status that we can illuminate the continuing plight of immigrant victims of domestic violence, and in turn ensure an environment of protection and justice for this population.

## ENDNOTES

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<sup>1</sup> Trafficking Victims Protection Act, Pub. L. No. 106-386, 114 Stat. 1477-1480 (2000).

<sup>2</sup> *Id.* See generally H.R. 3083, *The Battered Immigrant Women's Protection Act of 1999: Hearing on H.R. 3083 Before the House Judiciary Comm. Immigration and Claims Subcomm.*, 106<sup>th</sup> Cong. 134-148 (2000) (Prepared Testimony of Leslye Orloff, Director Immigrant Women Program, NOW Legal Defense and Education Fund) ("The Act will go far toward furthering the original purpose of VAWA's immigration provisions – freeing battered immigrant women abused by citizen and lawful permanent residence spouses or parents to report the abuse to police, to seek help and to prosecute their abusers for the multiple crimes they commit against family members."). *But see* *Hearing on 3083 Before the H. J. Comm. Immigration and Claims Subcomm.*, 106<sup>th</sup> Cong. 108-115 (2000) (Prepared Testimony of Duke Austin) (testifying that this legislation creates a "vast loophole of potential fraud and abuse").

<sup>3</sup> See 8 U.S.C. § 1101(U) (2007).

<sup>4</sup> See *Id.* at § 1101(U)(i)-(iv)

<sup>5</sup> The scope of VAWA did not cover at least the following categories of immigrants: "those abused by citizen and lawful permanent resident boyfriends; immigrant spouses and children of abusive non-immigrant visa holders or diplomats; immigrant spouses, children, and intimate partners abused by undocumented abusers; and non-citizen spouses and children of abusive United States government employees and military members living abroad." Karyl Alice Davis, *Unlocking the Door by Giving her the Key: A Comment on the Adequacy of the U-Visa as a Remedy*, 56 ALA. L. REV. 557, n.69 (Winter 2004) (citing Leslye E. Orloff & Janice V. Kaguyutan, *Offering a Helping Hand: Legal Protections for Battered Immigrant Women: A History of Legislative Responses*, 10 AM. U. J. GENDER SOC. POL'Y & L. 95, 163 (2001)); see also *Hearings* (Prepared Testimony of Congresswomen Jackson-Lee); *Hearings*, (Prepared Testimony of Barbara Strack, Acting Executive Associate Commissioner, Office of Policy and Planning, Immigration and Naturalization Service); *Hearings*, 106<sup>th</sup> Cong. 158-165 (2000) (Prepared Testimony of Bree Buchanan, J.D. Public Policy Director, Texas Council on Family Violence); *Hearings*, 106<sup>th</sup> Cong. 79-86 (2000) (Prepared Testimony of Congresswoman Jan Schakowsky).

<sup>6</sup> See generally *New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status*, 72 Fed. Reg. 53,036 (Sept. 17, 2007) (effective date October 17, 2007); 72 Fed. Reg. 54,813 (Sept. 27, 2007) (correcting the September 17, 2007 version).

<sup>7</sup> 72 Fed. Reg. 53,014.

<sup>8</sup> See generally Cecilia Menjivar and Olivia Salcido, *Immigrant Women and Domestic Violence: Common Experiences in Different Countries*, 16 GENDER & SOC'Y 898 (2002) (assessing the multiple challenges immigrant women face when they resettle in a foreign country), available at <http://www.jstor.org/view/08912432/sp030012/03x0180x/0>.

<sup>9</sup> 72 Fed. Reg. 53,015 (2007).

<sup>10</sup> 8 U.S.C. § 1184 (p)(2) (2008).

<sup>11</sup> 8 C.F.R. § 214.14 (d) (2008).

<sup>12</sup> USCIS took some steps to manage the process, including initiating an interim relief process. 72 Fed. Reg. 53,015 (2007) (noting that "USCIS implemented procedures to ensure that those aliens who appeared to be eligible for U nonimmigrant status under the BIWPA would not be removed from the United States until they had an opportunity to apply for such status"). Beginning in August 2003, the USCIS began accepting petitions for U visa interim relief at its Vermont Service Center, thus centralizing the process.

<sup>13</sup> The Center for Human Rights and Constitutional Law filed a class action lawsuit in the Central District of California against the Department of Homeland Security on October 17, 2005. The Plaintiffs challenged the agency's failure to issue U visas. See *Complaint for Mandamus, Rodriguez Ruiz v. Chertoff*, (2005) (Case No. EDCV 05-0966), available at <http://www.ilw.com/immigdaily/cases/2005,1201-rodriguez.pdf> (last visited on Mar. 5, 2008).

<sup>14</sup> Memorandum from Associate Director of Operations of U.S. Department of Homeland Security to Director Vermont Service Center (Oct. 8, 2003), available at <http://www.nationalimmigrationproject.org/domesticviolence/Uvisas/Uvisaindex.htm> (last visited on Mar. 5, 2008).

<sup>15</sup> "Many immigrant crime victims fear coming forward to assist law enforcement until this rule is effective. Thus, continued delay of this rule further exposes victims of these crimes to danger, and leaves their legal status in an indeterminate state. Moreover, the delay prevents law enforcement agencies from receiving the benefits of the BIWPA and continues to expose the U.S. to security risks and other effects of human trafficking. Therefore, delay in the implementation of these regulations would be contrary to the public interest." 72 Fed. Reg. 53,014 (2008).

<sup>16</sup> See Viji Sundaram, *U Visa Gives Immigrant Women Victims a New Chance*, New America Media, Sept. 21, 2007, available at [http://news.newamericamedia.org/news/view\\_article.html?article\\_id=345ac44e65dd9d7761188595c37c7046](http://news.newamericamedia.org/news/view_article.html?article_id=345ac44e65dd9d7761188595c37c7046) (last visited Mar. 5, 2008).

<sup>17</sup> See *id.*

<sup>18</sup> News Release, *USCIS Publishes New Rule for NonImmigrant Victims of Criminal Activity*, Sept. 5, 2007, available at [http://www.uscis.gov/files/pressrelease/U-visa\\_05Sept07.pdf](http://www.uscis.gov/files/pressrelease/U-visa_05Sept07.pdf) (last visited Mar. 5, 2008).

<sup>19</sup> 8 C.F.R. § 214.14(b)(1) (2008).

<sup>20</sup> *Id.* § 214.14(b)(2).

<sup>21</sup> *Id.* § 214.14(b)(3).

<sup>22</sup> *Id.* § 214.14(b)(4) (including territories or possessions of the United States, Indian country, and U.S. military facilities within the scope of the regulations).

<sup>23</sup> 8 U.S.C. § 1101(U)(1)(i) (2008).

<sup>24</sup> 8 C.F.R. § 214.14 (b) (2008).

<sup>25</sup> *Id.* § 214.14(a)(8).

<sup>26</sup> 72 Fed. Reg. 53,017 (2007) (interpreting the VAWA terms "battery" and "extreme cruelty" and interchangeable with "abuse").

<sup>27</sup> 8 C.F.R. § 214.14 (b)(1) (2008).

<sup>28</sup> 72 Fed. Reg. 53, 018 (2007).

<sup>29</sup> 8 C.F.R. § 214.14 (b)(1) (2008).

<sup>30</sup> *Id.* § 214.14 (b)(1).

## ENDNOTES CONTINUED

- <sup>31</sup> 72 Fed. Reg. 53,018 (2007).
- <sup>32</sup> *Id.*
- <sup>33</sup> DEPARTMENT OF HOMELAND SECURITY, OMB No. 1615-0104, INSTRUCTIONS FOR FORM I-918, PETITION FOR U NONIMMIGRANT STATUS, *available at* <http://www.uscis.gov/files/form/I-918instr.pdf> (last visited Mar. 5, 2008).
- <sup>34</sup> 8 C.F.R. § 214.14 (c)(2)(3) (2008).
- <sup>35</sup> *Id.*
- <sup>36</sup> 8 U.S.C. § 1101(a)(15)(U)(iii) (stating that “criminal activity” involves one or more of the following activities: rape, torture, trafficking, incest, domestic violence, sexual assault, abusive sexual contact, prostitution, sexual exploitation, female genital mutilation, being held hostage, peonage, involuntary servitude, slave trade, kidnapping, abduction, unlawful criminal restraint, false imprisonment, blackmail, extortion, manslaughter, murder, felonious assault, witness tampering, obstruction of justice, or perjury).
- <sup>37</sup> 72 Fed. Reg. 53,018 (2008).
- <sup>38</sup> 8 C.F.R. § 214.14(a)(9) (2008).
- <sup>39</sup> 72 Fed. Reg. 53,017 (2007).
- <sup>40</sup> *Id.* at 53,016.
- <sup>41</sup> *Id.*
- <sup>42</sup> *Id.* (noting that the exclusion would *not* cover any criminal activity, just the qualifying criminal activity).
- <sup>43</sup> 72 Fed. Reg. 53,017 (2007).
- <sup>44</sup> *Id.*
- <sup>45</sup> 72 Fed. Reg. 52,017 (2007).
- <sup>46</sup> *Id.*
- <sup>47</sup> *Id.* at 53,017 (citing 8 C.F.R. 214.14(a)(14)(ii)).
- <sup>48</sup> 8 U.S.C. § 1101(U)(1)(ii) (2008).
- <sup>49</sup> 8 C.F.R. § 214.14(b)(2) (If the petitioner is a child or incapacitated, the parent or guardian may have the necessary information).
- <sup>50</sup> 72 Fed. Reg. 53,018 (2007).
- <sup>51</sup> *Id.*
- <sup>52</sup> 8 U.S.C. § 1101(a)(15)(U)(i)(II) (2008); 8 C.F.R. § 214.14(a)(7) (2008). “Next friend” is an individual who acts for the benefit of the petitioner). 72 Fed. Reg. 53,019 (2008).
- <sup>53</sup> DEPARTMENT OF HOMELAND SECURITY, *supra* note 33. The instructions require additional evidence in cases involving a child or incompetence.
- <sup>54</sup> *Id.*
- <sup>55</sup> 8 U.S.C. § 1101(U)(1)(iii) (2008).
- <sup>56</sup> DEPARTMENT OF HOMELAND SECURITY, OMB No. 1615-0104, I-918 SUPPLEMENT B, U NONIMMIGRANT STATUS CERTIFICATION, (2007), *available at* <http://www.uscis.gov/files/form/I-918.pdf> (last visited Mar. 5, 2008).
- <sup>57</sup> DEPARTMENT OF HOMELAND SECURITY, *supra* note 33.
- <sup>58</sup> *Id.*
- <sup>59</sup> 72 Fed. Reg. 53,020 (2007).
- <sup>60</sup> DEPARTMENT OF HOMELAND SECURITY, *supra* note 33.
- <sup>61</sup> 8 C.F.R. § 214(a)(3) (2008).
- <sup>62</sup> 72 Fed. Reg. 53,019 (2007).
- <sup>63</sup> *Id.*
- <sup>64</sup> 8 C.F.R. § 214(a)(3) (2008).
- <sup>65</sup> 72 Fed. Reg. 53,023 (2007).
- <sup>66</sup> *Id.* at 53,019 (USCIS believed this interpretation is consistent with the plain language of the statute).
- <sup>67</sup> 8 C.F.R. § 214.14(b)(3) (2008) (The Interim Rule includes special criteria and exceptions for minors and incompetents).
- <sup>68</sup> 8 C.F.R. § 214.14(b)(4) (2008).
- <sup>69</sup> 72 Fed. Reg. 53, 410, 53,020 (2007).
- <sup>70</sup> *Id.*
- <sup>71</sup> DEPARTMENT OF HOMELAND SECURITY, *supra* note 33.
- <sup>72</sup> *Id.*
- <sup>73</sup> 8 C.F.R. 214.14(c)(2) (2008).
- <sup>74</sup> 72 Fed. Reg. 53,024 (2007).
- <sup>75</sup> *Id.* at 53,021 (contrasting this requirement to U nonimmigrant status).
- <sup>76</sup> *Id.*
- <sup>77</sup> *Id.*
- <sup>78</sup> *Id.*
- <sup>79</sup> *Id.* (noting that the Vermont Service Center personnel are trained in handling these petitions).
- <sup>80</sup> 8 C.F.R. § 214.14(c)(4) (2008).
- <sup>81</sup> *Id.* § 214.14(C)(ii).
- <sup>82</sup> 72 Fed. Reg. 53,028 (2007).
- <sup>83</sup> 8 C.F.R. § 214.14(c)(5)(i)(A) (2008).
- <sup>84</sup> *Id.* § 214.14(g) (Supplement A to Form I-918 is a Petition for Qualifying Family Member of U-1 Recipient).
- <sup>85</sup> *Id.* § 214.14(g)(ii).
- <sup>86</sup> 8 U.S.C. § 1513(f)(1).
- <sup>87</sup> *Id.* § 1184(p)(3)(B).
- <sup>88</sup> 8 C.F.R. § 214.14(f) (2008).
- <sup>89</sup> 72 Fed. Reg. 53025 (2007).
- <sup>90</sup> 8 C.F.R. § 214.14(f)(1) (2008).
- <sup>91</sup> *Id.*
- <sup>92</sup> *Id.*
- <sup>93</sup> 72 Fed. Reg. 53023 (2007).
- <sup>94</sup> *Id.* at 53,027.
- <sup>95</sup> 8 C.F.R. § 214.14(d)(2) (2008).
- <sup>96</sup> 72 Fed. Reg. 53,027 (2007).
- <sup>97</sup> 8 C.F.R. § 214.14(d)(3) (2008).
- <sup>98</sup> *Id.*
- <sup>99</sup> 72 Fed. Reg. 53,021 (2007) (except in cases of Nazi persecutions, genocide, acts of torture, or extrajudicial killings).
- <sup>100</sup> *Id.* at 53,021.
- <sup>101</sup> *Id.* § 212.17(b)(2).
- <sup>102</sup> 72 Fed. Reg. at 53,022 (2007).
- <sup>103</sup> There were 108 submissions posted on Regulations.gov relating to the U nonimmigrant classification rules *available at* [http://www.regulations.gov/search/search\\_results.jsp?No=40&sid=1179EF6CA92B&Ne=2+8+11+8053+8054+8098+8074+8066+8084+8055+8&Ntt=new%20classifications%20for%20victims&Ntk=All&Ntx=mode+matchall&N=8100+8060+4294967210&css=0](http://www.regulations.gov/search/search_results.jsp?No=40&sid=1179EF6CA92B&Ne=2+8+11+8053+8054+8098+8074+8066+8084+8055+8&Ntt=new%20classifications%20for%20victims&Ntk=All&Ntx=mode+matchall&N=8100+8060+4294967210&css=0) (last visited Mar. 5, 2007). This count includes cover letters, attachments, and comments. The author reviewed all submissions in preparing this article. Approximately a dozen of the submissions express anti-immigration sentiment and suggest that this classification encourages false reporting and constitutes a piecemeal amnesty program. Because these comments do not address the substance of the interim rule, but rather critique United States immigration policy overall, they are not addressed in this article.
- <sup>104</sup> 8 C.F.R. 214.14(a)(3)(i) (2008).
- <sup>105</sup> *See, e.g.*, Comment Submitted by National Immigration Project of the National Lawyers Guild at 2, Nov. 15, 2007, Docket No. USCIS-2006-0069.
- <sup>106</sup> *See, e.g.*, Comment Submitted by Safe Horizon, Nov. 16, 2007, USCIS-2006-0069.
- <sup>107</sup> *See, e.g.*, Comment Submitted by North Carolina Attorney, Nov. 16, 2007, Docket No. USCIS-2006-0069.
- <sup>108</sup> *See, e.g.*, Comment Submitted by Legal Aid of North Carolina, Nov. 15, 2007, Docket No. USCIS-2006-0069.
- <sup>109</sup> *See, e.g.*, Comment Submitted by Lutheran Immigration and Refugee Services, Nov. 15, 2007, USCIS-2006-0069.
- <sup>110</sup> *See, e.g.*, Comment Submitted by Idaho Coalition Against Sexual and Domestic Violence, the Idaho Network to End Domestic Violence and Trafficking Against Immigrants, and Catholic Charities of Idaho, Nov. 16, 2007, Docket No. USCIS-2006-0069.
- <sup>111</sup> *Id.*
- <sup>112</sup> *Id.*
- <sup>113</sup> *Id.*
- <sup>114</sup> 8 C.F.R. § 214.14(a)(14)(i) (2008).
- <sup>115</sup> *See, e.g.*, Comment Submitted by National Immigration Project of the National Lawyers Guild at 2, Nov. 15, 2007, Docket No. USCIS-2006-0069.
- <sup>116</sup> The comments offered an example where a petitioner was previously sexually abused by her father, but the statute of limitations on that crime had run. The petitioner later possesses information and helps in the prosecution of her father for kidnapping her sibling. In this scenario, advocates argued that the petitioner should be eligible to apply for relief consistent with the statutory language because she was the victim of one crime (sexual abuse) and assisted in the prosecution of another crime (kidnapping). *See, e.g.*, Comment Submitted by National Immigration Project of the National Lawyers Guild at 2, Nov. 15, 2007, Docket No. USCIS-2006-0069.
- <sup>117</sup> 8 C.F.R. § 212.17(c)(2) (2008).
- <sup>118</sup> *See, e.g.*, Comment Submitted by National Immigration Project of the National Lawyers Guild at 2, Nov. 15, 2007, Docket No. USCIS-2006-0069.
- <sup>119</sup> *Id.*
- <sup>120</sup> *See, e.g.*, Comment Submitted by Catholic Charities, Immigration and Legal Services, Nov. 16, 2007, Docket No. USCIS-2006-0069.
- <sup>121</sup> *See, e.g.*, Comment Submitted by National Immigration Project of the National Lawyers Guild at 2, Nov. 15, 2007, Docket No. USCIS-2006-0069.
- <sup>122</sup> *See, e.g.*, 8 C.F.R. § 214.14(c)(1)(i).
- <sup>123</sup> *Id.*
- <sup>124</sup> *See, e.g.*, Comment Submitted by National Immigration Project of the National Lawyers Guild at 2, Nov. 15, 2007, Docket No. USCIS-2006-0069.

## ENDNOTES CONTINUED

<sup>125</sup> Advocates pushed for the withdrawal of 8 C.F.R. §§ 214.14(c)(1)(ii) and (f)(2)(ii).

<sup>126</sup> See, e.g., Comment Submitted by Catholic Charities, Nov. 16, 2007, Immigration and Legal Services, Docket No. USCIS-2006-0069.

<sup>127</sup> See, e.g., Comment Submitted by National Immigration Project of the National Lawyers Guild at 2, Nov. 15, 2007, Docket No. USCIS-2006-0069; Comment Submitted by Legal Aid of North Carolina, Nov. 15, 2007, Docket No. USCIS-2006-0069; Comment Submitted by Catholic Charities, Nov. 16, 2007, Immigration and Legal Services, Docket No. USCIS-2006-0069; Comment Submitted by Safe Horizon, Nov. 16, 2007, USCIS-2006-0069.

<sup>128</sup> Comment Submitted by National Immigration Project of the National Lawyers Guild at 2, Nov. 15, 2007, Docket No. USCIS-2006-0069.

<sup>129</sup> See, e.g., Comment Submitted by Catholic Charities, Nov. 16, 2007, Immigration and Legal Services, Docket No. USCIS-2006-0069.

<sup>130</sup> See, e.g., Comment Submitted by National Immigration Project of the National Lawyers Guild at 2, Nov. 15, 2007, Docket No. USCIS-2006-0069.

<sup>131</sup> See, e.g., Erez and Hartley, *Battered Immigrant Women and the Legal System: A Therapeutic Jurisprudence Perspective*, WESTERN CRIMINOLOGY REVIEW 4(2), 155, 158-159 (2003), Indira K. Balram, *The Evolving, Yet Still Inadequate, Legal Protections Afforded Battered Immigrant Women*, 5 UNIV. OF MARYLAND, J. OF RACE, RELIGION, GENDER AND CLASS 387, 388-90 (Fall 2005).

<sup>132</sup> Erez & Hartley, *Battered Immigrant Women and the Legal System: A Therapeutic Jurisprudence Perspective*, WESTERN CRIMINOLOGY REVIEW 4(2), 155, 162 (2003).

<sup>133</sup> "Increased community education will both increase the likelihood that a battered immigrant woman will encounter a helpful response when she turns to personal supports in her community and generally increase her knowledge about domestic violence laws and services available." Erez & Hartley, supra note 132 at 158-159; see also Gail Pendleton, *Ensuring Fairness and Justice for Noncitizen Survivors of Domestic Violence*, JUV. AND FAM. CT. J. at 69 (2003) (suggesting a publicity campaign would aid investigators in obtaining the cooperation of undocumented victims of crime).

<sup>134</sup> 72 Fed. Reg. 53,019.

<sup>135</sup> Nora V. Demleitner, *Immigration Threats and Rewards: Effective Law Enforcement Tools in the "War" on Terrorism*, 51 EMORY L. J. 1059, 1060 (Summer 2002) ("Any situation in which a law enforcement agency holds substantial power over an individual can lead to abuses. The immigration context is no exception.").

<sup>136</sup> *Id.*

<sup>137</sup> One advocate suggested that it would be a violation of due process for a law enforcement officer to not provide a written denial of the request for certification. Marlene Dougherty argued that the alien victims should have the right to review by an impartial decision-maker. Comment of Marlene A. Dougherty, available at <http://regulations.gov> (last visited Mar. 5, 2008).

<sup>138</sup> *Supra* note 135, at 1085-1090.

<sup>139</sup> In the last years of his presidency, President Bush made immigration reform a top domestic concern. After failed reform passages in 2006, a bipartisan bill was introduced into the Senate in 2007. The Senate measure would have coupled tighter border security and cracked down on the hiring of illegal immigrants. The bill eventually stalled after senators from both parties refused to cut off debate and move to a final vote, with Democrats creating an unlikely alliance with President Bush. See Jonathan Weisman, *Immigration Overhaul Bill Stalls in Senate Bipartisan Compromise Collapses; Reid Says Measure May Return*, WASH. POST, June 8, 2007 at A01. However, while the federal government has been unable to overhaul immigration law, states have slowly started taking tough immigration stances "creating a national patchwork of incongruous immigration

laws that some observers fear will make it far more difficult to enact any comprehensive, federally mandated bill down the line." See Anthony Faiola, *States' Immigrant Policies Diverge In Differences, Some See Obstacles For a National Law*, WASH. POST, Oct. 15, 2007 at A01.

<sup>140</sup> In May 2006, immigrant workers took part in a nationwide demonstration titled a "Day Without an Immigrant." Immigrants skipped work and boycotted businesses to demonstrate their economic influence in a quest for amnesty for the country's 11 million illegal immigrants. See Jenalia Moreno, *The Immigration Debate; Boycott felt here, elsewhere; But many say it's business as usual, even as thousands miss a day of work*, HOUS. CHRON., May, 2, 2006, at A1; Michael Martinez, *Rallies draw over 1 million*, CHI. TRIB., May 2, 2006 at C13.

<sup>141</sup> In a 2007 Gallup poll, immigration was ranked fourth among the issues important to voters in 2008 election. See *What Voters Want*, available at <http://www.gallup.com/poll/103534/What-Voters-Want.aspx> (Last visited on Mar. 5, 2008). The major Democratic and Republican candidates running for president differ among the stances each takes on the issue. See *Immigration: Election Center 2008*, available at <http://www.cnn.com/ELECTION/2008/issues/issues.immigration.html> (last visited Mar. 5, 2008).

<sup>142</sup> *Id.*

<sup>143</sup> Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. 1449, 1466-67, 1482-83 (July 2006).

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> Demleitner, supra note 135 at 1059; see also Karyl Alice Davis, *Unlocking the Door by Giving her the Key: A Comment on the Adequacy of the U-visa as a Remedy*, 56 ALA. L. REV. 557, 576 (Winter 2004) (concluding that the U-visa "relied too heavily on the criminal justice system," a system in which "immigrant women have little trust due to cultural barriers, language barriers, and experiences of racial discrimination").

<sup>147</sup> 8 C.F.R. § 214.14 (d) (2008).

<sup>148</sup> See generally 72 Fed. Reg. at 53,033 (2007) (describing the other methods that USCIS considered).

<sup>149</sup> See Nina Bernstein, *Special Visas For Victims Remain Elusive Despite a Law*, N.Y. TIMES, Mar. 7, 2007, at B6.

<sup>150</sup> Kittrie, supra note 143 at 1465.

<sup>151</sup> 72 Fed. Reg. 53,014 (2007).

<sup>152</sup> *Id.* at 53032

<sup>153</sup> Comment submitted by Michancy Schultz on November 16, 2007, available at <http://www.regulations.gov> (last visited Mar. 5, 2008), highlights that she ran the summary in the interim rule through a "Flesch-Kincaid" readability assessment and concluded that the summary of the rule had a readability level of twelfth grade. Schultz questioned whether "an immigrant with limited English capabilities will be able to read or understand this rule without some kind of professional assistance." See *id.* at 4. (comments by Shultz).

<sup>154</sup> Comment submitted by the Immigrant Center for Women and Children, November 15, 2007, available at <http://www.regulations.gov> (last visited Mar. 5, 2008) (citing the requirement at 8 C.F.R. 214.14(c)(2)(iii)).

<sup>155</sup> *Id.*

<sup>156</sup> See generally *Hearings* at 134-148 (Prepared Testimony of Leslye Orloff, Director Immigrant Women Program, NOW Legal Defense and Education Fund) ("H.R. 3083 is designed to correct unforeseen problems in the legislation and erosions in access to VAWA that have prevented many of the needy domestic violence victims VAWA sought to protect from seeking help."). Some of the gaps that Orloff highlights include children who "age-out" under VAWA, the U.S. residence requirement, the effect of changes in the abuser's immigration status, and the challenges of implementing the "extreme hardship" and "public charge" provisions of VAWA.

# THE ACCESS DIVIDE: THE ROLE OF THE FCC AND THE COURTS IN MINORITY OWNERSHIP

By Angela Winters\*

On December 18, 2007<sup>1</sup>, the Federal Communications Commission voted in favor of repealing a 32-year old rule that prohibited broadcasters in the twenty largest media markets from owning newspapers in the same market. This vote was the culmination of an eighteen-month review of the agency's media ownership rules, which included a series of public meetings across the country and feedback from thousands of individuals and groups on the issue.<sup>2</sup>

Depending on who you talk to, December 18<sup>th</sup> was either one of the worst days for minority ownership in the industry for advocates of women and minority-owned businesses, or one of the best days for advocates of consolidation and increased competition. The vote was 3-2, drawn across partisan lines, with opposing Democrat commissioners Michael Copps and Jonathan Adelstein expressing disappointment with the decision and warning of its consequences. The majority, supported by Republican Chairman Kevin Martin, Deborah Taylor Tate and Robert McDowell, felt that the ruling was both well overdue and in line with Congressional recommendations to review rules considering the changes in technology and the market. This close ruling will almost certainly be challenged in court.

The original proposal had prompted strong opposition from civil rights organizations, minority professional media associations, many individuals in Congress, and those within the industry. Each group expressed a highly visible and vocal objection to the ruling, believing it harmful to existing and prospective women and minority owners. These objectors also believed that the ruling should have been delayed until an independent diversity task force had conducted more research and made final recommendations.

In response to the criticism, Chairman Martin rejected the notion that the rules adopted on December 18<sup>th</sup> would favor big business before women and minority-owned businesses, and stated that these rules were specifically intended to further the goals of competition, diversity, and localism, all crucial factors in the future of an industry in transition.<sup>3</sup> Several separate measures were also adopted by the commission on December 18<sup>th</sup> in order to punish discrimination in broadcast transactions, and to promote minority participation in the industry, with particular attention to the transition to digital broadcasting.<sup>4</sup> While some civil rights organizations applaud these steps as separate from the cross-ownership ruling, others say these measures were reached "without adequate data and any thorough study of the issue."<sup>5</sup> Certain organizations also believe that the agency should have addressed these measures fully before pursuing wider reform of

the cross-ownership rules.<sup>6</sup>

Both of the decisions made on December 18<sup>th</sup> mark the latest chapters in a contentious relationship between the FCC and civil rights organizations over the agency's record of promoting minority ownership. While the FCC has played a role in several advances for minorities, with occasional interference by the courts, this relationship is mostly marred by setbacks, which some view as a major cause of the media-diversity crisis existing today.

This article analyzes these issues, and demonstrates the FCC's trend toward disregarding discrimination and denying access to minorities in ownership. The article will also comment on the responsibilities that come with ownership for non-minority owners. Though civil rights organizations and the FCC need each other in order to be successful, recent decisions have decreased the level of trust in each other, while also birthing a new strategy in civic action that gives those in opposition to the agency's proposals and decisions more power than ever. There have been small steps towards progress, including the ruling on December 18<sup>th</sup> to punish discrimination in broadcasting. However, it seems that for every small advancement, the FCC also takes a step back. In light of the resulting deadlock, a solution to this conflict is more crucial now than ever. The changing face of the market, as well as new technology, means the telecommunications and media industry has to deal with the reality of consolidation while also catering to the needs of emerging markets and fulfilling its obligation to society.

## THE NUMBERS

The current state of diversity in the media and telecommunications industries, which make up about 1/6 of the U.S. economy, is grim.<sup>7</sup> Minorities, who constitute 34% of the American population, own less than 10% of the media outlets, a percentage that has steadily decreased since 1998.<sup>8</sup> While some see the FCC data on its advancement of minority groups as contradictory, incomplete, or arrived at through flawed methodology, the data does demonstrate a stark difference between population demographics and media ownership. Non-Hispanic white males control 76.6% of all stations, leaving women, who represent 51% of the U.S. population, with 4.97% of all stations; Latino Americans, who represent 14% of the U.S. population, control 3.26% of all stations; African Americans, who represent 13% of the U.S. population, control 1.3% of all stations; and Asian Americans, who represent 4% of the U.S. population, control 0.44% of all stations.<sup>9</sup> The vast majority of minority-owned stations are techni-

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cally inferior AM stations or low-powered FM stations and most are licensed to towns far from central cities.<sup>10</sup> Only four of the 400-plus cable channels available in the U.S. are minority-controlled (TV One, The Black Family Channel, SiTV and The Africa Channel). The Black Entertainment Channel was sold to Viacom in 2000.<sup>11</sup> Minority ownership in the telecom sector, including wireless, is negligible, with a few small companies holding licenses in a handful of rural communities.<sup>12</sup> Of the 100 most-visited U.S. websites, none are owned by minorities.<sup>13</sup>

This issue goes beyond just fairness for women and minority owners. Advocates for civil rights issues in the telecom industry are actively urging the FCC to take immediate, determinative steps to reverse these numbers because of the powerful role this particular industry plays in society. Media and telecommunications are the primary definers of both our culture in America and the world at large. Regarding the need for a diversity task force, Rev. Jesse Jackson, Sr., founder of the Rainbow/PUSH Coalition, said that the lack of minority owners leads to minorities being depicted in the media as “less intelligent than we are, less hard working than we are, less patriotic than we are and more violent.”<sup>14</sup> According to Jackson, ownership is central to civil rights issues because control of the media translates into control of the issues on the nation’s social agenda.<sup>15</sup>

### THE BAD HISTORY

Vocal opponents of the FCC’s latest ruling see it as more of the same discrimination and exclusion that they have been fighting for decades. “In our attempts to kick the doors in, we’ve submitted countless proposals, most of which the FCC has rejected, ignored existed or placed on eternal hold,” said David Honig,<sup>16</sup> Executive Director of the Minority Media & Telecommunications Council, which represents more than fifty organizations before the FCC. Honig added that case history and administrative actions show that while the FCC is supposed to remove market entry barriers for smaller businesses, it has instead been the primary obstacle for minority owners and interests.<sup>17</sup>

In the 1950s, the FCC renewed the construction license of Southland Television,<sup>18</sup> a segregationist owned station. The FCC gave full faith and credit to a Louisiana segregation law that was in direct contradiction to the Telecommunications Act of 1934, which prohibited regulation in communication by wire and radio from discriminating on the basis of race.<sup>19</sup>

In *Lamar Life*,<sup>20</sup> a case decided during the turbulent civil rights movement, the FCC renewed the license of WLBT in Jackson, Mississippi to a White Citizens Council Leader. This Council Leader urged re-segregation and deliberately cut off programming when the NAACP was expected to appear. The ruling was quickly reversed when the United Church of Christ asked the D.C. Circuit Court to intervene based on WLBT’s refusal to fulfill its obligation to serve the general public interest, including the sharing of opposing views in favor of integration.

<sup>21</sup> The court later ordered the FCC to deny the renewal of the license and noted that a “curious neutrality-in-favor-of-the-licensee seems to have guided the Examiner in his conduct.”<sup>22</sup>

In 1965, the FCC further reversed minority owner’s progress when it established what became known as the Ultravision Rule. This rule required that in order to qualify for a permit, an applicant must have enough funds to cover all costs and a full year of operating capital.<sup>23</sup> Although this rule did not consider race or gender, the standard, which lasted until 1981, made it almost impossible for anyone other than the very wealthy to get a license. During that time, the qualifying group was almost exclusively made up of white male owners.

In 1973, the National Black Media Coalition submitted sixty-one minority ownership and EEO proposals to the FCC, who rejected all of them.<sup>24</sup> In 1983, the agency refused to hold a hearing on WAVY-TV in Norfolk, Virginia despite allegations owners did not invite black employees to the station Christmas party because they wanted to hold it at a segregated country club.<sup>25</sup>

In the 1990s, the FCC and the courts continued to disappoint civil rights groups with a seeming inability to enforce minority and local ownership policies in comparative hearings,

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*the lack of minority owners leads to minorities being depicted in the media as “less intelligent than we are, less hard working than we are, less patriotic than we are and more violent.”*

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despite existing evidence of abuses by license owners.<sup>26</sup> The FCC had to get rid of most of its diversity-focused initiatives when the *Adarand v. Peña* ruling in 1995 heightened the standard of scrutiny for federal race-conscious programs from intermediate to strict scrutiny.<sup>27</sup> Strict scrutiny requires the showing of a compelling government interest in order to consider race in forming ownership policies.<sup>28</sup>

Changes in the Administration create obstacles for advancement, and investigations vary depending on the political priorities of the current president and the person he or she appoints to head the commission. Civil rights groups were pleased with the 1999 National Telecommunications & Information Administration’s (“NTIA”) study showing several factors that lead to what it termed “the digital divide,” including consolidations that adversely impact minority ownership.<sup>29</sup> However, after a new administration came to power in 2001, NTIA concluded their study by stating that there was no real race or class division in internet access, and also stopped publishing its minority ownership report.<sup>30</sup>

The FCC has faced internal conflict in relation to diversity, as evidenced by the December 18<sup>th</sup> hearing, in which some commissioners rejected or ignored the attempts of other commissioners to support diversity. In 2000, FCC Chairman William Kennard released five studies on minority ownership with the intention of building a legal framework to help restore previously successful policies that had been repealed or neglected.<sup>31</sup> The

Commission has yet to publicly mention evaluating these studies.

### THE GOOD HISTORY

Despite the aforementioned setbacks, the FCC has been somewhat involved in minority advancements. The FCC, Congress, and the courts have all played a role in advancing the interests of women and minority owners through administrative acts, sparse case history, and incentive-based regulation. In the 1940s, the FCC created the Fairness Doctrine based on authority in §315 of the Telecommunications Act of 1934.<sup>32</sup> In the 1970s, the D.C. Circuit Court ruled that minority ownership should be a factor in broadcast licensing,<sup>33</sup> and must be a factor in the FCC's administration of its spectrum management policies.<sup>34</sup>

In 1974, FCC Chairman Richard Wiley convened the first Minority Ownership Task Force, which resulted in the tax certificate and distress sale policies.<sup>35</sup> Both policies were applauded by civil rights and professional minority groups. The FCC's various incentive-based regulations are probably the only areas in which the agency, civil rights groups, and the industry can agree. A few policies are worth noting.

The Comparative Hearing Policy was created in 1973 when the D.C. Circuit held that it must consider minority ownership as a comparative factor in choosing among mutually exclusive applicants for new construction permits.<sup>36</sup> The Tax Certificate Policy was adopted in 1978 and permitted a company selling a broadcast or cable property to minorities to defer the capital gains taxes on the sale if the seller reinvested in comparable property.<sup>37</sup> This led to more than 200 minority-owned stations.<sup>38</sup> The Distress Sale Policy, established in 1978, allows a seller in danger of losing his license to sell his station to a minority-owned company for 75% of market value or less, and thereby avoid paying a hefty penalty.<sup>39</sup> This policy has resulted in more than fifty stations being sold to minorities, and is the only such policy still in place today.<sup>40</sup>

### DRASTIC CHANGES OF THE 1990S

There is no doubt that the 1990s changed the landscape for many existing and prospective minority owners in the industry. The Telecommunications Act of 1996 created several amendments and caused dramatic changes intended to support diversity in ownership. Gender was added to the list of prohibited discriminations in § 151 of the Telecommunications Act, and § 257 now requires triennial reports on efforts to eliminate market entry barriers for small, minority, & female-owned businesses.<sup>41</sup> Probably the most important change was to end the comparative hearing process by deciding that all wireless licenses would be issued through auctions.<sup>42</sup> The FCC used this "designated entity" structure to provide bidding advantages to small and minority-owned businesses.<sup>43</sup> And while the creation of the Telecom-

munications Development Fund could have been a significant source of funding for minority broadcast and telecommunications entrepreneurs, it was terminated in 2005.

In 1996, William Kennard became the first minority to chair the FCC. His focus seemed to be primarily in wireless communications and hoped to close the digital divide in access to the internet. He also actively encouraged new owners to spin off stations to minority owners during a heavy consolidation period. He challenged broadcasters to open new doors to women, and helped push for the creation of the Quetzal/Chase Communications Partners LP Fund with \$175 million in beginning funds.<sup>44</sup>

When authorizing the creation of television "duopolies" in 1999, the FCC took steps to protect minority ownership by adopting the "Failing Station Solicitation Rules," which requires any applicant for a duopoly to show that "active and serious efforts" were made to either sell the station or allow for buyers outside the market.<sup>45</sup> In 1998, The Rainbow/PUSH Coalition created the Media & Telecommunications Project to monitor industry legislation regarding minorities, and it now holds a yearly symposium attended by industry leaders, FCC Commissioners and investors interested in minority and women owners.

In 2003, the FCC established the Advisory Committee on Diversity for Communications in the Digital Age, with twenty-nine experts from the industry. Since their last meeting in December 2004, the committee has been deprived of staff and denied the ability to hold meetings.<sup>46</sup> 2003 was also the year the FCC first voted 3-2 to deregulate broadcast ownership rules, thereby allowing a single company to own up to one newspaper,

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*The Distress Sale Policy... has resulted in more than fifty stations being sold to minorities, and is the only such policy still in place today.*

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three TV stations and eight radio stations in the biggest markets.<sup>47</sup> When Chairman Powell originally presented this proposal in 2002, civil rights organizations were distressed. But instead of fighting unaided as in the past, this time the minority community had the assistance of the Ameri-

can public and several other groups.<sup>48</sup> If not for groups like the National Association of Hispanic Journalists and Commissioners Copps and Adelstein speaking publicly about the issue, the American public might not have had the opportunity to learn the rules. More than 2 million Americans filed comments, 99% of which were in opposition.<sup>49</sup> But despite all the public involvement, media watchdog groups tracked only one national network reporting on the proposal at 4:30 a.m. on some day in September 2002.<sup>50</sup>

Minority Media and Telecommunications Council Executive Director Honig stated prior to the FCC's 2003 ruling on ownership that he and several other civil rights and religious organizations wanted to propose a rule banning transactional discrimination on the basis of race and gender. Although there was generally no opposition to this proposal, the FCC eventually held that it would "decline to adopt a rule without further consideration of its efficacy as well as any direct or indirect effects on the value and alienability of broadcast licenses."<sup>51</sup> Honig

added that this argument connecting the ban of transactional discrimination affect the value was last made during the filibuster of the 1968 Fair Housing Act. At this time, senators argued that the policy would adversely affect the value of property.<sup>52</sup> In actuality, property value in general rose after the Fair Housing Act passed.

### THE PROMETHEUS RADIO PROJECT

Those who believed that the 2003 ruling, which allowed a single company to own up to one newspaper, three TV stations, and eight radio stations in the biggest markets would put women and minorities at an even bigger disadvantage against big media firms, did not give up. Several broadcasters and organizations banded together and were represented by the Media Access Project, a non-profit public interest telecommunications law firm. They named the effort, The Prometheus Radio Project.

In *Prometheus Radio Project v. FCC*, the plaintiffs argued not only that the new rules would give giant companies even more power, which was not in the interest of the American public, but that the process that led to the vote was “faulty.”<sup>53</sup> The FCC argued that it had ample authority to change the rules pursuant to the Telecommunications Act of 1996, that it took efficiencies of common ownership into account, and that it placed reasonable limits to protect smaller and minority-owned businesses.<sup>54</sup> In vacating the FCC’s decision, the court temporarily blocked the new rules and ordered the agency to retain the old rules during the stay.<sup>55</sup> Using strong language, the judges stated that the diversity index measurements used by the FCC to weigh cross-ownership employed several “irrational assumptions and inconsistencies.”<sup>56</sup> The Supreme Court turned down the FCC’s appeal. It seems like the FCC was focusing on economics as the measurement for what makes good policy, but there is much more to a change as big as this one, affecting an industry that plays such a unique role in society. The public opposition, noted by the Court, called for more qualitative considerations to determine if the negative sociological effects outweighed the economic benefits.

### A NEW FIGHT

Despite the defeat, the FCC began a renewed effort to de-regulate ownership, and civil rights organizations were again lobbying against the rules by presenting the agency with proposals to help protect diversity ownership if the rules passed. In spite of this, the December 18<sup>th</sup> ruling was the same as the 2003 ruling. In addition to requesting a delay, many groups again stated that the elimination of ownership restraints may set back the expansion of minority ownership by a generation.<sup>57</sup>

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*the elimination of ownership restraints may set back the expansion of minority ownership by a generation.*

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Referring to the ruling as a relatively minor loosening, Martin disagreed, stating that competition would guard against a con-

centration of too much power in the hands of big media.<sup>58</sup> In response to those calling for a delay, the FCC will likely share evidence that they held eight public hearings across the country, listened to thousands of oral comments, reviewed over 166,000 written comments, commenced ten independent studies, and sought industry input.<sup>59</sup>

In a proactive move on December 4, 2007, the Senate Commerce Committee unanimously passed a bill to block the December 18<sup>th</sup> vote, requiring another ninety days for comments and separate hearings for both diversity and localism before the vote is taken.<sup>60</sup> Andrew Schwartzman, President and CEO of the Media Access Project, has promised to take the FCC back to the

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*Most civil rights groups agree that policies allowing a la carte payment per channel, and giving local broadcasters priority carriage over cable systems would be a death knell for small and minority programmers.*

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same court that rejected the 2003 rules, if Congress does not act on the Committee’s bill.<sup>61</sup> Civil rights organizations are ready to continue the fight. Rainbow/PUSH leader, Jackson, says the ruling seems like a “bizarre act of retribution,” designed to undermine the recent progress of channels like TVOne.<sup>62</sup> Most civil rights groups agree that policies allowing a la carte payment per channel, and giving local broadcasters priority carriage over cable systems would be a death knell for small and minority programmers.<sup>63</sup>

### SEPARATE MEASURES

The response on December 18<sup>th</sup> to the adoption of diversity measures to help women and minority-owned businesses gain access to capital was overwhelmingly positive. Some examples of these measures are changing permit deadlines, requiring proof of non-discrimination to renew a license, giving priority for eligible entities in certain duopoly situations, and revising the exception to the prohibition on the assignment or transfer of grandfathered radio station combinations.<sup>64</sup> The FCC will also convene an annual “Access-to-Capital” conference focused on investment and financing for women and minority owners.<sup>65</sup> With the analog to digital TV broadcast transition beginning in February 2009, there will be spectrum to spare, which Chairman Martin wants to lease to women and minority owners, but Commissioner Adelstein refers to this as “media sharecropping,” and not a viable alternative.<sup>66</sup>

Despite a disagreement on some definitions, the Minority Media and Telecommunications Council was very pleased with the adoption of twelve of the minority ownership proposals it presented to the agency on behalf of the many civil rights and professional organizations it represents, such as The National Association of Black-Owned Broadcasters, and the Women’s

Institute for Freedom of the Press. It was also pleased with the thirteen proposals out for comment. Honig said that the measures taken will likely produce an increase of 5-10% in revenue and help women and minority owners secure more capital.<sup>67</sup> These solutions are very much in line with the requests of the National Association of Broadcasters which believes that adopting policies that emphasize public/private partnerships and rely on market-based stimulants will be the most successful strategy.<sup>68</sup>

The only negative response to the measures was less because of the measures themselves, but more because of their timing and impact in comparison to the larger ruling. Rev. Jackson said that the passing of these measures is more of a “public relations effort intended to allay fears by offering up what is now widely seen as a consolation prize.”<sup>69</sup>

### FINDING SOLUTIONS

Some suggestions to improve the situation are small, such as making things easier by revising and simplifying the Form 323 Ownership Report to be more transparent, as well as expanding the class of owners required to file the form.<sup>70</sup> Some are larger solutions, such as the Diversity Credit System proposed by the MMTC in which similar to the one utilized by the EPA, credits would be attached to licenses and given or taken away based on the holder’s diversity record.<sup>71</sup> Honig believes this will incentivize diversity, deincestivize concentration, minimize regulatory intervention, and provide a new source of capital for minority businesses.<sup>72</sup>

In dealing with sensitive issues such as race and gender, incentives are the best way to address the conflict when the government is involved, especially after *Adarand* established that the strict scrutiny standard applies to racial classifications. With the consumer power of women and minorities growing by the billions every year, the FCC should have no problems in devising incentives. *Grutter v. Bollinger*, which established that diversity itself is a compelling government interest, could work in the FCC’s favor as long as the agency does not give women and minority owners an advantage that would seem unreasonable.<sup>73</sup> If larger owners see this as unreasonable, it could invite legal action that would inundate the agency with lawsuits from owners with limitless resources. Fighting these lawsuits would occupy the agency’s time, and it would no longer be useful to anyone.

The FCC has to get behind the issues in a consistent, outspoken, and public way. Support for programs has seemed to depend only on the political makeup on the current Commission and Administration. As this fight is an uphill battle, losing momentum based on elections and appointments can be extremely detrimental. The agency needs to do a better job of acknowledging the proposals at the hearings and giving reasons for their rejection, or why there is a delay in a decision. This basic level

of respect will go a long way in making the relationship between the FCC and civil rights organizations one of partners and not adversaries.

The organizations representing minority owners need to continue to work with each other. The work of groups like the National Association of Hispanic Journalists, who got the word out to civil rights organizations, politicians, and the American public prior to the 2003 ruling, seemed to be a helpful factor in the post-ruling court decisions. The Prometheus Radio Project also showed the results of combining forces. These organizations need to continue to work with the FCC despite their differences. Even though the agency’s history is distressing and the ownership rules may be a blow to the organization’s efforts, other recent measures and changes to policy show an effort by the FCC to address the issue in a positive way. Due to the insistence of organizations like Rainbow/PUSH and MMTC, the agency has no choice. The only way to get past the rhetoric, push for the gathering of real data, and spur action, is to build the consensus among commissioners to lead the organization in the right direction.

### CONCLUSION

There is a consensus that the FCC must react to the drastic changes in the telecommunication and media industries. When the ownership rules were made in 1975, the media and telecommunications landscape was very different, and devices like cable, satellite television, and the Internet did not yet exist. As Chairman Martin said in his press statement on December 18<sup>th</sup>, the FCC must find a balance between the need to support the availability and sustainability of the industry without harming diversity.<sup>74</sup> This is the basic challenge of marrying government regulation with market needs. The FCC has a statutory obligation to do both, and organizations like the National Association of Black Owned Broadcasters, the Diversity Task Force of the Federal Communications Bar Association, and programs like the NTIA’s Minority Telecommunications Diversity Program, will be their best source for solutions.

First and foremost, nothing of real substance can be done until the true state of minority-ownership is assessed at every level in every market, using measurements that are consistent regardless of who is performing the study, or the incumbent administration. Indeed, impartiality could be ensured by requiring a third party to conduct the investigations. The negligible status of minorities in the telecommunications arm of the industry is a glaring indictment of the FCC. With the Telecommunications Act of 1996, the FCC created legislation allowing smaller telecom owners to enter the market with less capital and less ability to build new facilities, and it missed a great opportunity to create a focus on the lag in diversity ownership.<sup>75</sup>

The future of the American consumer market lies in embracing diversity, which touches and affects every U.S. industry.

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Telecommunications and the media are the ways in which people connect with one another, shaping societal discourse and presenting our culture, beliefs, leadership, and priorities to the rest of the country and the world. In turn, the media industry will also be changed by the growing numbers of people of color in

other nations, who have access to their products and services. Survival under these inevitable conditions will hinge on an industry's ability to give people what they want. More regulation is not the answer, but more collaboration, incentives, and more diverse ownership could be.

## ENDNOTES

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<sup>1</sup> Hereinafter December 18<sup>th</sup>.

<sup>2</sup> Corey Boles, *FCC Votes To Relax Cross-Media Ownership Rule*, DOW JONES NEWSWIRES, Dec. 8, 2007.

<sup>3</sup> Kevin J. Martin, FCC Chairman, Opening Statement at Hearing for Media Cross-Ownership, Nov. 9, 2007.

<sup>4</sup> John Dunbar, *FCC: Offer New Options To Minorities*, ASSOCIATED PRESS, Oct. 12, 2007.

<sup>5</sup> John Eggerton, *Minority Groups Make Last Effort to Delay Vote*, BROAD. & CABLE, December 18, 2007, <http://www.broadcastingcable.com/article/CA6513592.html> (last visited Mar. 7, 2008).

<sup>6</sup> See Boles, *supra* note 2.

<sup>7</sup> Minority Media and Telecommunications Council [hereinafter MMTC], *Internet \$10b, Radio \$21b, TV \$42.5b, Cable/Satellite \$54.1b, Telecommunications \$54.1b*, LAW & POLICY AT THE INTERSECTION OF MEDIA, TELECOM AND CIVIL RIGHTS, Jan. 2006 at 1.

<sup>8</sup> Press Release, National Association of Black Journalists (Dec. 18, 2007) (on file with author); Press Release, *NABJ To Congress: Reverse the FCC's Media Consolidation Decision*, (Dec. 18, 2007) (on file with author).

<sup>9</sup> S. Derek Turner & Mark Cooper, *Out of The Picture: Minority & Female TV Station Ownership in the United States*, FREE PRESS, Oct. 2006, at 2; MMTC, LAW & POLICY AT THE INTERSECTION OF MEDIA, TELECOM AND CIVIL RIGHTS, Jan. 2006 at 1; Alexa Top 500 Report, <http://alexa.com>, (click on Traffic Rankings & United States) (last visited Mar. 7, 2008).

<sup>10</sup> See *id.*

<sup>11</sup> See *id.*

<sup>12</sup> See *id.*

<sup>13</sup> See *id.*

<sup>14</sup> See Dunbar, *supra* note 4.

<sup>15</sup> See Eggerton, *supra* note 5.

<sup>16</sup> Telephone Interview with David Honig (Dec. 15, 2007).

<sup>17</sup> *Id.*

<sup>18</sup> *Southland Television v. FCC*, 266 F.2d 686, 687 (D.C. Cir. 1959).

<sup>19</sup> Telecommunications Act, 47 U.S.C. § 151 (1934).

<sup>20</sup> *Lamar Life Broad. Co. v. FCC*, 403 U.S. 939 (1965); *But see*, *Office of Comm'n of the United Church of Christ v. FCC* 359 F. 2d 994 (D.C. 1966).

<sup>21</sup> *United Church of Christ*, 359 F.2d at 998.

<sup>22</sup> *Office of Comm'n of the United Church of Christ v. FCC*, 425 F.2d 543, 547 (D.C. Cir. 1969).

<sup>23</sup> *Ultravision Broad. Co.*, Memorandum Opinion and Order, 1 F.C.C. 2d 544.

<sup>24</sup> MMTC, *supra* note 9, at 3.

<sup>25</sup> *Id.* at 13.

<sup>26</sup> *Bechtel v. FCC*, 10 F.3d 875, 878 (D.C. Cir. 1992) (finding the application of integration preference to be arbitrary and capricious).

<sup>27</sup> *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 205 (1995); *But see* *Metro Broad. v. FCC*, 497 U.S. 547, 552 (1990).

<sup>28</sup> *Adarand*, 515 U.S. at 205; *Metro Broad.* 497 U.S. at 552.

<sup>29</sup> National Telecommunications & Information Administration [hereinafter NTIA], *Falling Through The Net: Defining The Digital Divide*, July 1999, <http://www.ntia.doc.gov/ntiahome/ftn99/contents.html> (last visited Mar. 7, 2008).

<sup>30</sup> David Honig, Executive Director, MMTC, Remarks at Fordham University Conference on Diversity Metrics (Dec. 15, 2003).

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

<sup>32</sup> *Id.*

<sup>33</sup> *TV 9, Inc. v. FCC*, 495 F.2d 929, 933 (D.C. Cir. 1974).

<sup>34</sup> *Garrett v. FCC*, 513 F.2d 1056, 1059 (D.C. Cir. 1975) (detailing that policies regarding regulatory radio frequency responsibility are shared by the FCC and the NTIA).

<sup>35</sup> FCC Advisory Committee on Diversity for Communications in the Digital

Age, *Recommendation on Incentive-Based Regulations*, June 1, 2004 at 1, <http://www.fcc.gov/DiversityFAC/recommendations.html> (last visited Mar. 7, 2008).

The Tax Certificate Policy allowed companies to sell broadcast or cable property to minorities in exchange for capital gains tax benefits. The Distress Sale Policy allows existing license owners looking to sell avoid an FCC Hearing and hefty fees if they sell to a minority-owned company at no more than 75% of fair market value.

<sup>36</sup> *Id.*; See also, *Multiple Ownership of AM, FM & TV Broadcast Stations*, 100 FCC 2d 74, 94 (1985).

<sup>37</sup> FCC Advisory Committee *supra* note 35, at 1.

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

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> 47 U.S.C. § 151.

<sup>42</sup> *Id.*

<sup>43</sup> FCC Advisory Committee on Diversity for Communications in the Digital Age, *Transactional Opportunity*, June 14, 2004, at 7.

<sup>44</sup> FCC, *Previous Commissioner Biographies*, <http://www.fcc.gov/commissioners/previouscommish.html> (last visited Mar. 7, 2008).

<sup>45</sup> See FCC Advisory Committee, *supra* note 35 at 7.

<sup>46</sup> See Honig remarks, *supra* note 30.

<sup>47</sup> Juan Gonzalez & Joseph Torres, *How Long Must We Wait?*, Democracy Now!, 2004 at 17.

<sup>48</sup> See *id.*

<sup>49</sup> Michael Copps, FCC Commissioner, Remarks at the Future of Music Policy Summit, Washington, D.C., 2004.

<sup>50</sup> FAIR: Fairness & Accuracy in Reporting, *Broadcast Networks File FCC Comments—But Not Stories*, <http://www.fair.org/index.php?page=1633> (last visited Mar. 7, 2008).

<sup>51</sup> See Honig, *supra* note 30.

<sup>52</sup> See *id.*

<sup>53</sup> Press Release, Prometheus Radio Project, Oral Arguments on Prometheus vs. FCC, Fate of the Media Hangs in the Balance (Feb. 11, 2004).

<sup>54</sup> Brief of Respondents at 2, 3, Prometheus Radio Project v. FCC, No. 03-3388 (3d Cir. 2003).

<sup>55</sup> Prometheus Radio Project v. FCC, 373 F.3d 372, 382 (3d Cir. 2004).

<sup>56</sup> *Id.* at 402.

<sup>57</sup> See Eggerton, *supra* note 5.

<sup>58</sup> See Boles, *supra* note 2.

<sup>59</sup> Press Release, FCC, Chairman Martin's Press Statement (Dec. 18, 2007).

<sup>60</sup> John Eggerton, *Senate Commerce Committee Passes Bill to Block FCC's December 18 Vote*, BROAD. & CABLE, Dec. 4, 2007.

<sup>61</sup> Ira Teinowitz, *FCC Approves Martin's Cross-Ownership Plan*, TVWEEK, Dec. 18, 2007, [http://www.tvweek.com/news/2007/12/fcc\\_approves\\_martins\\_crossowne.php](http://www.tvweek.com/news/2007/12/fcc_approves_martins_crossowne.php) (last visited Mar. 7, 2008).

<sup>62</sup> Jesse Jackson, *FCC's 'Media Sharecropping' Initiative*, S.F. CHRON., Dec. 18, 2007 at B5.

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

<sup>64</sup> Press Release, FCC, FCC Adopts Rules to Promote Diversification of Broadcast Ownership (Dec. 18, 2007).

<sup>65</sup> *Id.*

<sup>66</sup> See Dunbar, *supra* note 4.

<sup>67</sup> Press Release, MMTC, MMTC Applauds The FCC's Minority Ownership Decision (Dec. 18, 2007).

<sup>68</sup> Reply Comments at 2, NAB to FCC, MB Docket 121, 277, 4-228, 1-235, 01-317.

<sup>69</sup> See Jackson, *supra* note 62.

<sup>70</sup> See Turner, *supra* note 9.

<sup>71</sup> See Honig, *supra* note 30.

<sup>72</sup> *Id.*

<sup>73</sup> *Grutter v. Bollinger*, 539 U.S. 306, 320 (2003) (holding that Univ. of Mich. Law School can use the need for diversity as a factor in admissions).

<sup>74</sup> See FCC, *supra* note 59.

<sup>75</sup> Telecommunications Act, 47 U.S.C. § 151 (1996).

# DIVERSITY INITIATIVES IN THE WORKPLACE: THE IMPORTANCE OF FURTHERING THE EFFORTS OF TITLE VII

By Daniela M. de la Piedra\*

Over the years, diversity has become an important issue in the workforce. While affirmative action programs originally targeted practices in the recruitment, hiring, and retention of female and minority applicants,<sup>1</sup> diversity initiatives today benefit all employees by fostering an appreciation and understanding of diverse backgrounds, which results in happier workers and greater productivity and profit for the employer.

This article explores the need for, and the legality of, employer diversity initiatives in the private sector, and ways in which private employers may protect themselves against reverse discrimination suits in the implementation of these programs. In the discussion, this article examines the history of inclusion and diversity in the American workplace, as well as Supreme Court jurisprudence on diversity and affirmative action in educational settings and in the workforce. In making recommendations, this article makes the case for diversity initiatives and suggests ways in which a company may educate its employees about the importance of inclusion in the workplace, and subsequently, how employers can translate that awareness into effectively diversifying their workforce.

## HISTORY OF DIVERSITY

### EXECUTIVE ORDERS AND TITLE VII

Until the 1960s the majority of Americans lived in government-sanctioned segregation that permeated schools, restaurants, and the workplace. The federal government outlawed segregation in public spaces through the landmark Civil Rights Act (“the Act”) of 1964, with Title VII of the Act cementing past attempts at fairness and inclusion in the workplace.<sup>2</sup> These previous attempts at change and equality had been developing for decades. In 1941, President Roosevelt signed Executive Order 8802 to reaffirm the country’s anti-discrimination policy, prohibiting discrimination in the defense industry or government on the basis of race, creed, color, or national origin.<sup>3</sup> The Executive Order called for the full and equitable participation of all workers. This was the first presidential action taken to prevent employment discrimination; however, it fell short of effectuating change since it failed to establish an enforcement authority for the government. Seven years later, President Truman issued Executive Order 9981, which established the President’s Committee on Equality of Treatment and Opportunity in the Armed Services to oversee and effectuate changes necessary to end discrimination within the armed forces on the basis of race, color, religion, or national origin.<sup>4</sup> Although Executive Order 9981 did not specifically mandate desegregation of the armed forces, a few days after issuing the order President Truman explained at a press con-

ference that the intent of the order was to desegregate the military branch.<sup>5</sup>

The Civil Rights Movement led to the passage of Title VII, which prohibits employers from discriminating against employees on the basis of race, color, religion, sex, and national origin with respect to a person’s compensation, terms, conditions, or privileges of employment.<sup>6</sup> The purpose of Title VII is to achieve equal employment opportunities for participants in the workforce by eliminating historical and artificial barriers that operated against disadvantaged groups in the past.<sup>7</sup> Notably, Title VII was not meant to allow or require employers to provide preferential treatment to achieve the goals of the statute. Combined with a growing societal sense of social and moral obligation, however, the civil rights laws sparked interest in workplace diversity programs and initiatives around the country.<sup>8</sup>

### SUPREME COURT JURISPRUDENCE SUPPORTS DIVERSITY INITIATIVES IN THE WORKPLACE

The Supreme Court first addressed Title VII and the use of voluntary race-conscious affirmative action plans in the workplace in *United Steelworkers of America v. Weber*.<sup>9</sup> The Court decided whether Title VII forbade private employers and unions from voluntarily agreeing upon bona fide affirmative action plans that granted racial preferences in the petitioner’s plan by reserving half of the openings in the newly created in-plant training programs for blacks.<sup>10</sup>

The Court found that the affirmative action plan in *Weber* had been voluntarily entered into by the employer and the union through a collective bargaining agreement.<sup>11</sup> The plan was designed to eliminate racial disparities in the petitioner’s almost all-white craft-work forces. The Court held that Title VII did not prohibit all private and voluntary race-conscious affirmative action plans and explained that the plan in question worked toward the same goals as Title VII—to help place blacks on equal footing with whites in the workforce.<sup>12</sup> The Court clarified that §703 (j) of the Act states only that nothing in Title VII may be interpreted to *require*, as opposed to *permit*, an employer to grant preferential treatment. Subsequently, the Court concluded that Congress did not intend to forbid all affirmative action pro-

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grams.<sup>13</sup>

The *Weber* Court provided important guidance for future diversity plans. The Court asserted that a plan is lawful if: (1) the purpose of the plan is to eliminate the racial imbalance in a particular workforce; (2) the plan does not unnecessarily trammel the interests of the white employees; and (3) the plan is a temporary measure, lasting until racial imbalance is rectified.<sup>14</sup>

In *Johnson v. Transportation Agency of Santa Clara*, the Court further clarified the legality of race and gender-conscious decision-making processes in a job promotion situation.<sup>15</sup> Petitioner Paul Johnson brought an action against his employer when, pursuant to its affirmative action plan, the employer overlooked Johnson to promote a female employee, Diane Joyce. The Court ultimately held that the employer did not violate Title VII when it took Joyce's sex into account in its decision to promote Joyce instead of Johnson.<sup>16</sup>

The employer's affirmative action program was formed to address the recognized small percentage of women and minority employees that were placed in management, professional, and technical positions. The employer felt that a plain prohibition of discrimination was not enough to remedy the effects of previous discriminatory practices, and would not help to place disabled persons, women, and people of color on equal footing with others as an affirmative action plan would.<sup>17</sup> The plan did not have quotas, but it allowed the consideration of gender and ethnicity to enter the evaluation of qualified candidates for positions where those groups were underrepresented. This was done in order to reach the goal of a work force composition that reflected that of the area labor force.<sup>18</sup> Consequently, the Court found that the affirmative action was lawful because the plan was well thought out; it sought to remedy a past wrong; it did not unnecessarily trammel the rights of others; and it had reasonable built-in bench marks by which to evaluate the progress and necessity of the plan.<sup>19</sup>

In addition to allowing affirmative action programs in employment, the Supreme Court has recognized the value of diversity and its use as a tool to remedy underrepresentation of certain classes. In *Grutter v. Bollinger*, the Court found that the University of Michigan Law School's race-plus diversity plan to be holistic, narrowly-tailored, and temporary, and thus constitutional.<sup>20</sup> The law school did not have quotas, and the race of an applicant was one of numerous factors taken into consideration in admission decisions, which themselves were individualized and flexible.<sup>21</sup>

The Court in *Grutter* explained that by increasing the diversity of the school, the diversity plan had substantial benefits such as promoting cross-racial understanding, breaking down stereotypes, and contributing to a more engaging and enlightening classroom discussion.<sup>22</sup> The Court emphasized the importance of diversity by noting that the benefits are real and that major businesses in the United States have acknowledged that the only

way to gain the skills to succeed in a global market is to have diverse employees with different cultures, opinions, and ideas.<sup>23</sup>

#### AFFIRMATIVE ACTION VS. DIVERSITY INITIATIVE

Although affirmative action programs and diversity initiatives address diversity in the workplace, they do so through different approaches. Title VII does not require an employer to affirmatively address racial, gender, or other class imbalances in the workplace. Therefore, based on the anti-discrimination law alone, an employer is not in violation of Title VII for merely

failing to address inclusion. By contrast, affirmative action programs are mandatory for employers, forcing employers to meet certain standards to level the playing field and to balance the representation of diverse groups in the workplace.<sup>24</sup>

Affirmative action programs often have a remedial purpose based on past historical discrimination or disadvantages experienced by a certain class. Contractors who work with the government, for example, are expressly prohibited from discriminating on the basis of protected traits and sometimes are also required to implement affirmative action programs to increase the participation of women and minorities.<sup>25</sup>

Unlike affirmative action, however, diversity plans are voluntary and are meant to have the long-term benefit of increased productivity and profit.<sup>26</sup> In addition to government and employer-imposed diversity initiatives, clients of companies may also play a role in forcing an employer to address its diversity strengths and weaknesses. For instance, some clients require contractual provisions mandating certain levels of diversity for teams that will work on specific issues. Clients demand this type of service because they recognize the strength and business-sense of diversity, which in turn forces employers to evaluate their progress and maintenance of diversity goals and achievements.<sup>27</sup>

Affirmative action programs and diversity plans are often confused as being the same thing, but in fact the two programs have different origins and varying goals. Affirmative action programs are imposed on employers by the government and have a narrow focus on race and gender, and the hiring process from an established applicant pool. Alternatively, a diversity plan is self-imposed by the employer and addresses ways in which to expand the applicant pool to all underrepresented communities, as well as to address other aspects and components of the workplace environment.

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## THE RELEVANCE OF DIVERSITY TO BUSINESSES TODAY

Diversity initiatives address multiple issues that employers face in dealing with employees, clients, and business in general. First, diversity initiatives help the employer's business look more like society at large. Due to societal factors, minorities and women continue to be disproportionately underrepresented in most fields, reducing their experience and benefits in the workplace.<sup>28</sup> These initiatives recognize this disparity and target a more diverse group of potential applicants which the employer would not otherwise be aware of. Additionally, the recognition of employees' varying qualities of experience in the workplace makes it possible for employers to provide additional support to these groups.

Second, employers have realized that diversity affects the bottom line.<sup>29</sup> By bringing in a diverse group of employees, an employer has a heterogeneous pool of talent from which to obtain novel ideas and solutions. This asset in turn leads to unique outcomes that more effectively solve a client's needs and lead to greater profits. This aspect of diversity initiatives also addresses the changing demographics of customers and markets.<sup>30</sup> Employers must keep up with new markets and cultures in order to develop and maintain a business advantage in their field.

Third, diversity initiatives help employees to learn about their differences, and to understand and respect each other inside and outside of the workplace.<sup>31</sup> An increased sense of connect-edness and camaraderie reduces conflicts and increases satisfaction levels, which result in more effective and higher quality productivity. Finally, diversity initiatives not only increase revenue, but they can also reduce costs.<sup>32</sup> By effectively managing diversity, attracting great talent, reducing turnover, and preventing lawsuits, a company can save a substantial amount of money.

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Management consultant John P. Fernandez, conducted research on various companies to explore the real effects and benefits that flow from a company's commitment to diversity.<sup>33</sup> Fernandez's research shows that the best way for an employer to fulfill their clients' needs is by maintaining a diverse group of employees. For example, in order to be successful, a company must identify a market segment's needs, preferences, and expectations. The most effective way to achieve this is through research and analysis by people who share common characteristics with the market segment being targeted. To that end, the Goodyear Tire & Rubber Company conducted research on women's needs on the road and subsequently developed tires that better addressed women's focus on safety.<sup>34</sup> Similarly, the Cadillac Motor Car Division of General Motors Corporation developed a luxury model car for women based on results from various focus

groups.<sup>35</sup> The key members of the team – engineers, finance, and marketing managers – were all female.<sup>36</sup>

Fernandez also points to the severe effect on profits that can occur when there is a failed attempt to achieve a cultural understanding. For example, when a car-rental company in Hong Kong tried to promote itself by giving away green hats, the promotion failed because it had neglected the cultural meaning of the hats: in Chinese superstition, when a man wears a green hat, this means that his wife is cheating on him. Similarly, a Spanish language version of the Microsoft Word application inadvertently provided a series of offensive synonyms for ethnic groups. In both circumstances, had these companies used more diverse teams working in these markets and on these issues, those scenarios could have been avoided, along with their embarrassment and reduced profits.<sup>37</sup>

## GUIDANCE ON LAWFUL AND UNLAWFUL "DIVERSITY" PRACTICES

Beyond the foundation for the roots of diversity initiatives and the need for diversity awareness, implementation, and management, one must look at the structure within which businesses may develop these initiatives. The Supreme Court's guidance on diversity within educational settings proves instructive for addressing similar issues in the workplace. Additionally, the lower courts have also issued instructive opinions. Employers should examine and evaluate the diversity needs of their organizations, and then should seek to develop programs that fit those needs within the confines of the law.

### DIVERSITY INITIATIVES FOUND LAWFUL

Federal courts have had the opportunity to examine and rule on diversity initiatives by employers, and provide additional guidance on what constitutes a lawful plan. In deciding whether an employer has violated Title VII by instituting a diversity initiative, courts look at factors such as the right of an employer to diversify its workforce, the potential needs and benefits of diversity, and the plan's consistency with Title VII objectives.

The U.S. District Court for the Eastern District of Pennsylvania has dealt with the right of an employer to develop a diversity initiative, explaining that proof of such an initiative, on its own, is not enough to prove reverse discrimination. In *Donaldson v. Exelon*, the plaintiffs, a group of older white men, alleged discrimination based on age and race, asserting that "diversity" within the company was equivalent to discrimination against older white men, such as themselves.<sup>38</sup> The plaintiffs sought to certify the class, but the court denied such a certification citing a failure of the plaintiffs to point to a particular shared injury.<sup>39</sup> Although the class did not get past the classification hurdle, the court went on to explain that an employer's diversity program, on its own, is not enough proof of discrimination, and that such diversity plans are generally lawful.<sup>40</sup> Citing *Grutter*, the court discussed an employer's right to be concerned with, and address, diversity in the workplace, and that an employer's decision to diversify is in fact a smart business decision that correlates with change in the global market.<sup>41</sup>

In *Peterson v. Hewlett-Packard*, the Ninth Circuit found that the employer's diversity initiative, comprised of hanging up "diversity posters" displaying employees who were black, Latino, and homosexual did not violate Title VII.<sup>42</sup> Additionally, the court in *Peterson* found that the employer was not required to accommodate Peterson who, in response to the "diversity posters", exhibited Biblical scripture condemning homosexuality which, though in his cubicle, was large enough to be legible from adjacent corridor.<sup>43</sup> The court reasoned that efforts to eradicate discrimination against homosexuals or other groups in the workplace are consistent with, and work toward the goals of, Title VII.<sup>44</sup> A campaign that devotes special attention to the prejudice surrounding homosexuality in order to increase tolerance and respect is not unlawful.<sup>45</sup> Furthermore, the employer in this case had taken special care to develop the diversity initiative at a three-day conference and subsequent planning meetings that were attended by many employees.<sup>46</sup>

The court in *Peterson* held that the employer lawfully terminated Peterson because his religious passages created a hostile and intolerant work environment in violation of the company's anti-harassment policy, and because Peterson failed to remove the passages that the company regarded as demeaning and degrading.<sup>47</sup> Although complete harmony is not a goal of Title VII, the court held that the statute does not require employers to accept or accommodate employee discomfort that manifests itself in demeaning behavior toward others.<sup>48</sup> Unlike Peterson's aggressive passages, the employer's diversity poster series did not attack anyone based on class membership, and instead fostered tolerance and inclusion.<sup>49</sup>

In *Moranski v. General Motors*, the Seventh Circuit examined the legality of affinity groups created in the workplace of a private employer.<sup>50</sup> General Motors ("GM") created the opportunity to start affinity groups as an effort to support employees from diverse backgrounds and to improve company performance.<sup>51</sup> The Affinity Program Guidelines however, did not recognize entities that shared only a common interest or activity, or groups that were organized around a religious purpose.<sup>52</sup> When the plaintiff submitted an application for the "GM Christian Employee Network," the company denied him Affinity Program status. Shortly thereafter, the plaintiff filed a suit alleging that GM had committed unlawful religious discrimination against him when it rejected his application.<sup>53</sup>

The Seventh Circuit held that the employer's denial of recognition for a Christian affinity group did not constitute religious discrimination in violation of Title VII.<sup>54</sup> The court acknowledged that while some companies recognize affinity groups that are organized on the basis of religion, an employer may lawfully prohibit the recognition of any religious groups in its workplace.<sup>55</sup> The court found that GM did not violate Title

VII because GM would also have rejected the application if the plaintiff had been of a different religion, as the plaintiff would fail to establish a prima facie case of discrimination because he would not have been able to show that, all other things being equal, a person of a different religion was treated differently.<sup>56</sup> The Affinity Group Guidelines, a voluntary program designed by the employer over the years, treated all employees with a religious position equally, and was thereby in accordance with Title VII. The company did not recognize as an Affinity Group any group organized around a religious position.<sup>57</sup>

Courts such as the Seventh Circuit have ruled that recruiting from minority communities and expanding the pool of candidates and applicants is lawful.<sup>58</sup> Similar to *Grutter*, the Seventh Circuit in *Mlynczak v. Boldman* pointed to the fact that the employer did not set quotas, and that once the applicant pool was set, the employer did not make a decision to hire an applicant based on his or her minority status.<sup>59</sup> The court also emphasized that to increase diversity, an employer may lawfully use an open, nationwide, and competitive application process as opposed to one restricted to internal candidates, especially if internal employees are themselves not diverse.<sup>60</sup>

#### **DIVERSITY INITIATIVES AND PRACTICES FOUND UNLAWFUL**

In addition to providing clarifications on what employers can lawfully do to diversify their workforce, courts have issued opinions that help employers understand which actions may be illegal even in the name of diversity and inclusion. Although an employer may have good reason to diversify, it must comply with Title VII at all times.

The Fifth Circuit in *Clements v. Fitzgerald's Mississippi* held that an employer cannot fire an employee to replace him with a "diverse" employee who has less experience.<sup>61</sup> The court in *Clements* found that where a manager made comments that an employee was boring and bland, told others that he wanted to diversify the workplace, fired the employee despite a contractual obligation not to, and subsequently replaced the employee with a less qualified person for the sake of diversity, there was circumstantial evidence of racial discrimination.<sup>62</sup> The court in this case made it clear that an employer cannot discharge a qualified employee and replace him or her with a less qualified person only for the purpose of diversifying the company, especially if there is a contractual obligation to continue the employment of the original employee.<sup>63</sup>

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cusses, an employer may not add diverse applicants haphazardly into the hiring process.<sup>64</sup> The plaintiff in *Rudin v. Lincoln Land Community College* filed a suit for discrimination on the basis of race and sex due to the employer's failure to hire her for an instructor position.<sup>65</sup> The person selected for the position, Paul Hudson, a black male, was screened out by the hiring team and therefore was not selected for an interview. However, when the list of interviewees reached the Equal Employment Opportunity Officer, she added Hudson back onto the list.<sup>66</sup> After the interviews, the plaintiff was ranked second highest and Hudson was ranked second from the bottom.<sup>67</sup> Due to various and contradictory explanations, it is not clear who in the company received the interview scores and when these were received, but the employer ultimately hired Hudson instead of the plaintiff.<sup>68</sup>

The *Rudin* court found that the addition of Hudson into the interview pool combined with other facts and circumstances in this case, constituted circumstantial evidence of racial discrimination.<sup>69</sup> Hudson was effectively allowed to bypass the first elimination round because of his race. The court also found it probative that the employer failed to follow its own internal procedure in the hiring process, stating that the employer's systematic abandonment of its hiring procedures was circumstantial evidence of discrimination.<sup>70</sup> The Seventh Circuit also noted that an employer's failure to follow its own hiring procedures could constitute pretext evidence for unlawful discrimination.<sup>71</sup> Additionally, the court explained that administrative pressure to hire a "diverse" candidate is not a legitimate, non-discriminatory reason to hire a candidate over another more qualified candidate.<sup>72</sup>

#### RECOMMENDATIONS: USING DIVERSITY TO COMBAT DISCRIMINATION IN THE WORKFORCE AND TO KEEP UP WITH THE GLOBAL MARKETPLACE OF IDEAS, CULTURES, AND PEOPLE

As evidenced by the various courts that have ruled on employers' diversity plans and initiatives, there is a good amount of guidance for employers to rely on in developing their own lawful initiatives. Employers who wish to diversify their workforce can begin their efforts by expanding their candidate pool to target non-traditional communities while keeping in mind that they cannot subsequently give preference to minority applicants in the hiring process. Employers may also promote diversity and inclusion within their workplace through various initiatives, and are not obligated by law to tolerate offensive resistance and reactions to their diversity programs and plans, since this type of behavior contradicts the very purpose of the employer's diversity programs. Lastly, an employer has a right to design its own diversity initiative, but it must be well thought out and it must include a type of evaluation system to assess progress.

At the same time, employers must be mindful of giving un-

merited preference to minority groups, and should refrain from ignoring their own internal procedures in order to increase diversity. Employers have a right to diversify their workforce in order to keep up with today's global market; however, they may not "unnecessarily trammel" on the rights of other employees.<sup>73</sup> Addressing diversity needs within a company is an important step toward creating an efficient and profitable company. Businesses should work on helping their current workforce reach full potential before raising the diversity of employees. A company could become more efficient at attracting and hiring traditionally underrepresented groups of people, but if the company's culture is not conducive to retaining minority employees, all efforts at attracting diverse candidates are wasted when turnover is high and uncontrollable.

In Fernandez's research, he found that many employees do not understand what diversity really is or why it is important for anyone to focus on it.<sup>74</sup> This provides the starting point for an employer who wishes to develop and implement a diversity program. The company should survey the staff to see where they stand on the issue of diversity, and what their attitudes about diversity are. Once the company has evaluated what its starting point is, it can begin to develop an appropriate plan for its workplace.

To effectively educate and raise awareness about diversity, employers need to first have the right leadership to pave the way. This leadership, whether it is the board of directors or managing supervisors, needs to reflect the makeup of the company or the makeup the company aims to achieve. This will not only legitimize the company's commitment to diversity, but it will also allow the company to invent a better diversity plan devised by a diverse group of people with real life experience. If companies start instituting diversity at the top levels, this will set the precedent for lower level positions, and there will be a trickle-down effect throughout the company.<sup>75</sup> Additionally, the inclusion of women, people of color, and other minority groups on committees, is important. However, the education of diversity cannot be assigned solely to diversity committees, nor should these be given the full responsibility of developing and implementing a company's diversity plan.<sup>76</sup>

Employers should implement diversity training in a variety of ways. Employers could provide a safe space for dialogue, either formal or informal, to raise awareness and foster an under-

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standing of how different people experience the workplace and what employees' needs are in order for them to reach their full potential in the workplace. Employers should also put more effort into including those people who are less likely to attend social

events, such as women and people of color. Employers should find out why certain people generally choose not to attend certain social events, and should use that feedback to organize different events that evoke a greater sense of belonging in

these underrepresented groups.<sup>77</sup>

Another way to build support for employees in a company is to create affinity groups that center around a particular trait, whether it is gender, race, or disability. Many times, these groups will be formed by employees themselves, but it is important for a company to show support, whether it be through funding, resources, or simply by creating a safe space for these groups to meet. Affinity groups are important for traditionally underrepresented groups as it gives these groups a chance to share experiences, seek and give advice, and build camaraderie.<sup>78</sup>

Along with the creation of affinity groups, employers should develop mentoring programs. Mentors can provide fellow employees with guidance and advice, as well as a better understanding of the company's culture, which will raise employees' awareness of the language and rules of the workplace, and will empower them to achieve better results in their work.<sup>79</sup>

A company must not only provide support to its diverse staff, but must also provide support and training to the company as a whole in order to create an environment that is truly understanding, knowledgeable, and accepting. Employers should provide ongoing communication to stress their commitment to diversity needs, and the implementation of diversity programs. Training should also be provided to management so they can learn how to manage diversity effectively—increase the applicant pool, reduce turnover, increase satisfaction and retention – and how to measure results and progress.<sup>80</sup> Furthermore, companies should work to make diversity less of a foreign concept by making it a part of other trainings sponsored by the employer. The understanding of diversity is a transferable skill set, and should be included and reinforced in trainings across the board to increase cross-cultural understanding and to help employees work more effectively with each other in different settings of a workplace.

Once a company has addressed its internal diversity needs, it is ready to develop programs and initiatives to target underrepresented groups as potential candidates and employees. In order to increase diversity within a company, the company will need to attract new and talented people, and there are various ways by which an employer can achieve this. Employers may choose to develop a partnership with schools or establish an internship

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program that focuses on recruiting people from underrepresented groups.<sup>81</sup> The hope is that through these programs, the company will increase its candidate pool and will do so with candidates that are groomed for the company early on, before graduating from college. Employers may also gain additional exposure by participating in career fairs targeted at the various traditionally underrepresented groups. In many instances, employers need to promote themselves, and *they* must go to the diverse candidates rather than the other way around. Similarly, companies can also consider marketing themselves by partnering with other organizations and sponsoring events that focus on diversity issues.<sup>82</sup> This will not only stress the company's commitment to diversity, but it can also attract less traditional candidates that may not have been exposed to the company otherwise.

Another effective way for an employer to demonstrate its commitment to diversity is by using diverse suppliers.<sup>83</sup> An employer's support of another workplace that is diverse can make the employer more efficient and thus a better choice for its business. Additionally, if an employer can show that it works with diverse groups, it is more likely to better understand the importance of diversity and how to manage it in its own workplace.

## CONCLUSION

Diversity is a critical concept that is important for businesses' bottom lines, employees' productivity, and clients' satisfaction. The Supreme Court has recognized the importance of diversity in educational settings as well as in corporate America. Clients themselves are beginning to demand that diverse teams work on their issues or cases. To be successful in today's competitive global market, with innovative ideas, cross-cultural awareness, and enhanced productivity, businesses need to educate themselves on diversity – how to address it, increase it, and manage it. Diversity is no longer an option, but rather a necessity.

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## ENDNOTES

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<sup>1</sup> See *infra* Supreme Court Jurisprudence Supports Diversity Initiatives in the Workplace (differentiating between affirmative action and voluntary programs).

<sup>2</sup> Civil Rights Act of 1964, 42 U.S.C. § 2000e.

<sup>3</sup> Exec. Order No. 8802, 3 C.F.R. 957 (1938-1943).

<sup>4</sup> Exec. Order No. 9981, 3 C.F.R. 722 (1942-1948), *reprinted as amended in* 5 U.S.C. § 171.

<sup>5</sup> See *Desegregation of the Armed Forces: Chronology*, HARRY S. TRUMAN LIBRARY & MUSEUM, <http://www.trumanlibrary.org/whistlestop/>

[study\\_collections/desegregation/large/index.php?action=chronology](http://study_collections/desegregation/large/index.php?action=chronology) (last visited Mar. 9, 2008).

<sup>6</sup> Civil Rights Act of 1964 § 703, 42 U.S.C. § 2000e-2(a) (2006).

<sup>7</sup> See *Griggs v. Duke Power Co.*, 401 U.S. 424, 426-27 (1971) (explaining that Title VII proscribes practices, tests, and procedures that are facially neutral but discriminate based on a protected trait such as race).

<sup>8</sup> See Kate McCormick, *The Evolution of Workplace Diversity*, HOUS. LAW. 12 (Mar./Apr. 2007) available at [http://www.thehoustonlawyer.com/aa\\_mar07/page10.htm](http://www.thehoustonlawyer.com/aa_mar07/page10.htm).

<sup>9</sup> *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979).

<sup>10</sup> *United Steelworkers* 443 U.S. at 199 (explaining that during the first year of the affirmative action program, the employer selected thirteen craft trainees, which included seven black trainees and six white trainees). The most senior black in the program had less seniority than many whites who were not accepted

## ENDNOTES CONTINUED

into the program, one of them being Brian Weber, who sued the employer alleging that the affirmative action program racially discriminated against him in violation of Title VII. *Id.* at 201.

<sup>11</sup> *Id.* at 201.

<sup>12</sup> *Id.* at 208.

<sup>13</sup> *Id.* at 205-06.

<sup>14</sup> *Id.* at 208-09.

<sup>15</sup> *Johnson v. Transp. Agency of Santa Clara*, 480 U.S. 616 (1987).

<sup>16</sup> *Id.* 619-20.

<sup>17</sup> *Id.* at 620-21.

<sup>18</sup> *Id.* at 621-22.

<sup>19</sup> *Id.* at 634-39.

<sup>20</sup> *Grutter v. Bollinger*, 539 U.S. 306, 334-35 (2003).

<sup>21</sup> *Compare id.*, with *Gratz v. Bollinger*, 539 U.S. 244, 269-70 (2003) (finding that an admissions plan that assigns a certain number of admissions points to all underrepresented minority applicants is unlawful and unconstitutional).

<sup>22</sup> *Grutter*, 539 U.S. at 330.

<sup>23</sup> *Id.*

<sup>24</sup> See McCormick, *supra* note 8, at 13.

<sup>25</sup> Exec. Order No. 11246, 41 C.F.R. 60.

<sup>26</sup> See McCormick, *supra* note 8, at 13.

<sup>27</sup> See Robert Duncan, Partner, Hogan & Hartson, Remarks at a Conference by American University, Washington College of Law and the Seventh Annual Meeting of the Dean's Diversity Council: Revisiting the Law School Diversity Imperative: Access and Definition (Nov. 8, 2007).

<sup>28</sup> While women tend to be underrepresented in many fields, there are gendered fields and jobs such as nursing and teaching that have a higher concentration of female employees and thus an underrepresentation of male employees. However, this paper will focus on historically discriminated groups that continue to show a general need for support.

<sup>29</sup> See Jon A. Gier & Holly R. Lake, *Meeting the Diversity Challenge: Race and Gender-Conscious Decisions in Recruiting*, PRACTICING LAW INSTITUTE, LITIGATION & ADMINISTRATIVE PRACTICE COURSE HANDBOOK SERIES 827, 829 (Oct. 2007).

<sup>30</sup> See Executive Diversity Services, *Business Case*, <http://www.executivediversity.com/case/index.htm> (last visited Mar. 9, 2008).

<sup>31</sup> See McCormick, *supra* note 8, at 11.

<sup>32</sup> See Executive Diversity Services, *supra* note 30.

<sup>33</sup> See John P. Fernandez, *RACE, GENDER, AND RHETORIC* (McGraw-Hill 1999).

<sup>34</sup> Fernandez *supra* note 33, at 225.

<sup>35</sup> Fernandez *supra* note 33, at 226-27.

<sup>36</sup> Fernandez *supra* note 33, at 226-27.

<sup>37</sup> Fernandez *supra* note 33, at 220.

<sup>38</sup> *Donaldson v. Exelon Corp.*, No. 05-1542, slip op., at 1-2 (E.D. Pa. Sept. 14, 2006).

<sup>39</sup> *Id.* at \*9

<sup>40</sup> *Id.* at \*12

<sup>41</sup> *Donaldson*, 2006 U.S. Dist. No. 05-1542 at 3.

<sup>42</sup> *Peterson v. Hewlett-Packard*, 358 F.3d 599 (9th Cir. 2004)

<sup>43</sup> *Id.* at 601-02, 608 (finding that the managers and Peterson were unable to resolve the issue -- Peterson offered to remove the passages, which violently referred to putting homosexuals to death, only if in turn the employer took down the "Gay" poster, but asserted he would keep his passages posted if the poster was not removed) Subsequently, the employer gave Peterson time off with pay to reconsider his position, however, when Peterson returned to work he reposted the passages, which led to his termination for insubordination.

<sup>44</sup> *Peterson*, 358 F.3d at 603.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 605.

<sup>48</sup> *Id.* at 607-08.

<sup>49</sup> *Id.* at 604-05.

<sup>50</sup> *Moranski v. Gen. Motors Corp.*, 433 F.3d 537 (7th Cir. 2005).

<sup>51</sup> *Id.* at 538-39

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 539.

<sup>54</sup> *Id.* at 538.

<sup>55</sup> *Id.* at 541

<sup>56</sup> *Moranski*, 433 F.3d at 540.

<sup>57</sup> *Id.* at 542, n.3 (noting that federal employers have different obligations; the First Amendment prohibits them from excluding all subject matter concerning religion from a forum for speech.)

<sup>58</sup> See generally *Mlynczak v. Boldman*, 442 F.3d 1050 (7th Cir. 2006).

<sup>59</sup> *Id.* at 1054. But see *Johnson v. Transp. Agency of Santa Clara*, 480 U.S. 616 (1987) (taking sex into account in a promotion decision because the employer had an affirmative action program in place that was meant to remedy the employer's past discriminatory acts).

<sup>60</sup> *Mlynczak*, 442 F.3d at 1059.

<sup>61</sup> *Clements v. Fitzgerald's Miss., Inc.*, 128 Fed. Appx. 351 (5th Cir. 2005).

<sup>62</sup> *Clements*, 128 Fed. Appx. at 352-53.

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

<sup>64</sup> *Rudin v. Lincoln Land Cmty. Coll.*, 420 F.3d 712 (7th Cir. 2005).

<sup>65</sup> *Rudin*, 420 F.3d at 715.

<sup>66</sup> *Id.* at 716.

<sup>67</sup> *Id.* at 717.

<sup>68</sup> *Id.* at 717-18.

<sup>69</sup> *Id.* at 721 (noting that the employer did not argue that it was engaging in affirmative action to remedy past discrimination on the part of the institution). It seems that the employer's act of inserting a candidate back into the applicant pool *may* have been lawful if the employer had been trying to remedy past discriminatory acts.

<sup>70</sup> *Rudin*, 420 F.3d at 723.

<sup>71</sup> *Id.* at 727 (citing *Giacoletto v. Amax Zinc Co., Inc.*, 954 F.2d 424, 427 (7th Cir. 1992)).

<sup>72</sup> *Id.* at 722.

<sup>73</sup> *Weber*, 443 U.S. at 208.

<sup>74</sup> See FERNANDEZ, *supra* note 33, at 204-11.

<sup>75</sup> See Tannette Johnson-Elie, *Opportunities, Powerful Woman Hopes to Empower Others*, MILWAUKEE J. SENTINEL, Nov. 14, 2007, at D1 available at <http://www.jsonline.com/story/index.aspx?id=685903>.

<sup>76</sup> See ABA Commission on Women in the Profession, *VISIBLE INVISIBILITY: WOMEN OF COLOR IN LAW FIRMS* 38 (2006) (suggesting ways to address high turnover rates of women of color in law firms).

<sup>77</sup> ABA Commission, *supra* note 70, at 39.

<sup>78</sup> See ABA Commission, *supra* note 70, at 39; see generally FERNANDEZ, *supra* note 29, at 212-213.

<sup>79</sup> See Sharon E. Jones, *The Real Deal: Success Strategies for Minority Partners and Associates*, PRACTICING LAW INSTITUTE, LITIGATION & ADMINISTRATIVE PRACTICE COURSE HANDBOOK SERIES 747, 752 (Dec. 2007).

<sup>80</sup> See Executive Diversity Services, *supra* note 30.

<sup>81</sup> See FERNANDEZ, *supra* note 33, at 213.

<sup>82</sup> See FERNANDEZ, *supra* note 33, at 213.

<sup>83</sup> See FERNANDEZ, *supra* note 33, at 214.

# MULTI-HUED AMERICA: THE CASE FOR THE RECOGNITION OF A MULTIETHNIC IDENTITY IN US DATA COLLECTION

By Kamaria A. Kruckenberg\*

## BACKGROUND

### WHAT'S IN A NAME? WHY RACE LABELS MATTER IN THE LAW

Racial categorization is used to enforce civil rights laws, including monitoring equal access in housing, education, employment, and other areas. While the census is the most obvious way to collect this data, Americans also register racial identity through household surveys, medical research, and a variety of administrative forms, such as school registration and mortgage lending applications.<sup>3</sup> In order to ensure fairness, numerous anti-discrimination laws, both state and federal, require government contractors, recipients of government funds, and other private bodies to track racial and ethnic data.<sup>4</sup>

However, racial classification is not only used for general statistical calculations. Race, as marked on birth certificates, employment applications, and educational forms, has the potential to have a powerful impact on a person's life. One obvious example is the use of ethnic identity for affirmative action in either the workplace or an educational setting. Besides these practical applications, the Census and other such documents play an important role in shaping the American ethnic landscape.

“In the language of social constructivism, the census helps to construct recognizable identities....’ The census is not merely a passive recorder of statistics, but rather, it actively defines racial identity, and this makes it a potent tool for marginalized groups seeking redress.”<sup>5</sup>

### HISTORY OF THE CENSUS AND A PUSH FOR CHANGE

The US Census first recognized multiethnic people in 1850, when “Mulattos” were counted separately from blacks under the category “Color.”<sup>6</sup> In the following decades, “Mulattos” were accompanied by “Quadroons” and “Octoroons.”<sup>7</sup> All those terms were included to test Josiah C. Nott’s theory that multiethnic people were biologically inferior to whites or blacks and subject to early death.<sup>8</sup> The additional terms were dropped from the Census by 1920, presumably because Nott’s racist theory came to naught (pardon the pun).<sup>9</sup> Between 1920 and 2000, the census displayed no recognition of multiple races.<sup>10</sup>

In the decades after the United States Supreme Court struck down all bans on interracial marriage in *Loving v. Virginia* in 1967, the number of families with multiethnic members grew rapidly, and some people began to balk at listing only one race.<sup>11</sup> As a result, the OMB considered proposals to amend the classification system. In 1988, the OMB considered a proposal to

*My little girl in her multi-hued skin  
When asked what she is, replies with a grin  
I am a sweet cuddlebums,  
A honey and a snugglebums:  
Far truer labels than those which are in.*<sup>1</sup>

The above poem resonates deeply with me, and it should: my mother wrote it about me. She recited its lines to me during my childhood more times than I can count. It was a reminder that I, daughter of a woman whom the world saw as white and a man whom the world called black, could not be summed up into any neat ethnic category. The poem told me that, though my skin reflected the tones of a variety of cultures, I was more than the sum of my multiple ethnic identities. Over my lifetime, I have recalled this message each time someone asked, “What are you?” and every time I checked “other” in response to the familiar form demand that I mark one box to describe my race.

The classification of multiethnic individuals like myself recently has been the focus of many heated debates. The Office of Management and Budget (“OMB”) sets the racial categories used on numerous forms, including the census. In 1997, the OMB revised Statistical Policy Directive 15, its rule for racial data classification, requiring all federal agencies to allow individuals to mark multiple races on all federal forms.<sup>2</sup> Because the implications of the classification of multiethnic individuals in federal racial data collection are potentially far reaching, this change has been surrounded by controversy. The census tracks the numbers and races of Americans for legislative and administrative purposes. This information is particularly important for this country’s enforcement of civil rights laws.

Numerous authors argue that the recognition of multiethnic identity will hamper traditional civil rights efforts. They claim that policies that maintain civil rights must win out over the individual caprice of those who advocate for multiethnic recognition. On the other hand, many argue that the recognition of the personal meaning of multiethnic identity is important and does not hamper the traditional goals of civil rights groups.

In this article I explore the context of this debate by examining both the history of race and the census. I then examine both sides of the multiethnic characterization argument. Finally, I end the article with a proffered solution to the controversy.

change the census form to include a multiracial box but dropped it after federal agencies, including the Equal Employment Opportunity Commission (“EEOC”) and the Civil Rights Division of the Department of Justice, objected.<sup>12</sup> The OMB considered a proposal for change again in 1993 and continued to contemplate the issue for the next four years. In the end, the OMB rejected a multiracial box in favor of the instruction to “mark one or more” races for all government data collection.<sup>13</sup>

### THE SHOWDOWN

The change was not the result of a strong push from the major civil rights organizations, but was instead proposed and supported by a small, loosely organized group of multiracial advocates. In fact, most major civil rights organizations either remained neutral, or opposed to the shift.<sup>14</sup> The Mexican American Legal Defense and Educational Fund (“MALDEF”), the National Association for the Advancement of Colored People (“NAACP”), and the Urban League rejected or ignored requests for support made by the American Multiethnic Association (“AMEA”), one of the key groups behind the census change.<sup>15</sup> After the OMB’s announcement that it would not add a multiracial box, but would instead examine the option of choosing multiple races, these civil rights organizations moved from opposition toward a kind of grudging neutrality.<sup>16</sup> Surprisingly, multiethnic advocates enjoyed support from conservatives like Newt Gingrich, who saw the multiracial classification issue as an opportunity to promote anti-affirmative action and other color-blind policies.<sup>17</sup>

Implementation of the 1997 amendment has been slower than expected,<sup>18</sup> and multiracial advocates say that compliance is still not uniform, even though agencies were expected to implement the new format by January 1, 2003.<sup>19</sup> Meanwhile, the debate has moved to the states. Between 1992 and 1998, eight states added some form of multiracial designation and legislators in five other states introduced multiracial designation bills.<sup>20</sup> In 1997, thirty-one states reported receiving requests to add a multiracial category to school forms.<sup>21</sup> Thus, the issue of multiethnic identity continues to be a hotspot on the nation’s political radar.

### WHAT BLOOD FLOWS THROUGH MY VEINS? RACE AND BIOLOGY

In order to fully understand the multiethnic argument, one must first understand the context in which it exists. This is a nation that has struggled with race from its beginning. Europeans formulated the notion of biological race during the colonialist era to legitimize the subordination of residents of Asia, Africa, and the Americas.<sup>22</sup> These racial categories were based on external traits, primarily skin color, facial features, and the shape and size of the head and body. Throughout the eighteenth and nineteenth centuries, scientists theorized that humans had racial essences that flowed through blood and determined physical, psychological, and racial identity.<sup>23</sup>

Modern science has since demonstrated that “any significant biological differences between racial groupings are illusory.”<sup>24</sup> “Races, in the sense of genetically homogenous populations, do

not exist in the human species today, nor is there any evidence that they ever have existed in the past.”<sup>25</sup> Many Americans still believe in biological race, yet, most of what we think of when we discuss race is not about biology; rather the social, political, and legal construct of race has defined much of who we are. “Insofar as race is biologically false, but ethnicity is pervasive in daily life and universal as a narrative and social sciences subject,” for the purpose of distinguishing the historical idea of biological race from the broader idea of a constructed identity, as well as for a clearer analysis and discussion of the topic, I will primarily use the term “ethnicity” throughout this article.<sup>26</sup>

Mulatto: (Myoo-lä’-tO) n. from the Spanish ‘mulato,’ young mule

1. The first-generation offspring of a black person and a white person

Mule: (myool), n.

1. The sterile offspring of a female horse and a male donkey<sup>27</sup>

Slavery involved the social, political, and economic subordination of blacks for the benefit of whites. In order for slavery to exist, a clear separation of the races was necessary. Mixed-race people posed a challenge to this racial system.<sup>28</sup> Throughout the history of the United States, most jurisdictions have considered those of mixed black and white heritage to be black un-

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*USCIS took precautions to implement a rule that acknowledged the complexities and challenges of petitioners in abusive relationships.*

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der the law. Under this “one-drop rule,” anyone with any known black ancestry was considered black, referencing the belief that any amount of black blood would contaminate white racial purity. Courts took this rule as being a matter of common knowledge.<sup>29</sup> Anthropologists term practices like the single-drop rule “hypodescent,” wherein multiethnic children are assigned to the racial category of the parents with the lowest social status.<sup>30</sup> Such a system serves to maintain the social hierarchy in the face of racial mixing by policing the gates of the higher social caste. Under such a paradigm, it is possible to move down from the higher social category, but power is maintained for the elite by the impossibility of upward movement into the higher social group. The single-drop rule is unique to the United States, and even within the US, applies only to blacks.<sup>31</sup>

Despite the fairly consistent legal recognition of those of black and white ancestry as only black, in practice and popular view, multiethnic individuals always have been treated differently. Lighter-skinned slaves were often granted higher status positions on plantations, and were more likely to be liberated from slavery, perhaps because of the pervasiveness of sexual

relations between slave owners and slaves.<sup>32</sup> For this reason, before the abolition of slavery, multiethnic people were “disproportionately represented among the free,” and many multiethnic people “achieved a certain amount of education and economic security” closer to that of whites.<sup>33</sup> During those years, some “light skinned blacks” formed “blue vein” societies, which were social groups limited to wealthy blacks whose skin was light enough to permit full view of the veins on the wrist.<sup>34</sup> During the antebellum period, South Carolina and Louisiana recognized multiethnic people as distinct from the black community and created a third racial category of “free persons of color.”<sup>35</sup>

Despite the privileged position enjoyed by some multiethnic people, many Americans thought that the mixing of races would harm both blacks and whites—the mulatto degeneracy theory.<sup>36</sup> The very definition of mulatto, “a sterile hybrid,” speaks to the belief that “people from Africa and people from Europe are two different animal species, species that should lead separate lives, species that cannot be family.”<sup>37</sup> Multiethnicity frightened white Americans because it challenged the idea of racial purity, and more significantly, racial superiority.<sup>38</sup> A judge in 1896 explained such thinking:

The amalgamation of the races is not only unnatural, but it is always productive of deplorable results. Our daily observation shows us, that the offsprings [sic] of these unnatural connections are generally sickly and effeminate, and that they are inferior in physical development and strength to the blood of either race.<sup>39</sup>

Even American fiction casts multiethnic people as psychologically different because of their race: the socially confused and tormented mulatto, the untrustworthy “half-breed” Native American and white mix, and the criminal mestizo appear throughout American literature.<sup>40</sup>

#### **A HIDDEN MAJORITY: MULTIETHNIC NUMBERS PAST, PRESENT AND FUTURE**

Thanks in no small part to slavery, the paradigm of race in America has always centered on the black/white axis; however, mixing has occurred across all ethnic groups. While some estimate that as many as 90 percent of blacks have some multiethnic background,<sup>41</sup> today, 30 percent of Asians and 28.4 percent of Latinos are in interracial marriages, compared to only 10.2 percent of blacks.<sup>42</sup>

Although it is difficult to estimate the growth of the multiethnic population because such data was not historically tracked, the growth in interracial couples may give some hint. In 1970, there were an estimated 321,000 interracial unions in the United States. By 1990, that number had increased to 1.5 million.<sup>43</sup> Some studies suggest that the number of children in interracial

families grew from fewer than 500,000 in 1970 to roughly 2 million in just twenty years.<sup>44</sup> This figure does not include multiracial Latinos because Latino is classified as an “ethnic” group in the census rather than a “racial” group.<sup>45</sup> In the 2000 Census, 6.8 million people picked more than one racial or ethnic category, and nearly half were under the age of 18, demonstrating that our society is becoming increasingly multiethnic.<sup>46</sup> According to

the most recent Census Bureau estimates, the number of non-Latino multiethnic Americans has grown by around one million since the 2000 Census.<sup>47</sup>

#### **SAY IT LOUD, MULTI-ETHNIC AND PROUD: THE IMPORTANCE OF MULTIRACIAL SELF-WORTH**

Just as many other groups throughout history have struggled for rights and recognition, multiethnic individuals are now engaged in the same struggle. Critics continue to belittle the multiethnic identification by arguing that its importance is far outweighed by potential negative policy implications. Such critiques ignore two key points: first, personal experiences have major policy implications, and second, personal experiences are intrinsically important.

The phrase, ‘The personal *is* political,’ was used by the women’s movement and other movements as a recognition that shared personal experiences come out of the social and political constructions of American life. When multiethnic people describe feelings of alienation when filling out “Other” in the race category on forms, or when asked, “What race are you *really*?,” they are stating that they too have a shared identity and shared experience that comes from the socio-political landscape. Multiethnic people make up at least two percent of the population and that figure is growing rapidly. This group’s shared experiences are significant and their interests should be taken into account when making policy decisions. One of the core purposes of civil rights organizations is to seek recognition of the shared personal experiences of their members, and by devaluing the experience of multiethnic people, civil rights advocates ignore their own historical struggle to show that their group experience was a matter of concern for all Americans. The difference between the multiethnic agenda and the traditional civil rights agenda is how much they have achieved. The multiracial movement is literally and figuratively the child of the civil rights movement.

The very fact that the concept of multiethnicity has created such controversy is an indicator that the issue taps into important social and political questions about the meaning of race and identity. Indeed, the issue of multiethnicity was central to one of the most important race cases in United States history, *Plessy v. Ferguson*, in which Homer Plessy (an “octoroon,” or one-eighths black) challenged railroad segregation both on the grounds that it was unconstitutional and on the grounds that it

## CROSS

My old man's a white old man  
And my old mother's black.  
If ever I cursed my white old man,  
I take my curses back.  
If ever I cursed my old black mother  
And wished she were in hell,  
I'm sorry for that evil wish  
And now I wish her well.  
My old man died in a fine big house.  
My ma died in a shack.  
I wonder where I'm gonna die,  
Being neither white nor black?<sup>49</sup>

Beyond the policy implications of personal identity, it is also important not to dismiss the intrinsic significance of multiethnic people's personal experience. According to psychologist Erik Erikson, racial identity figures prominently in individuals' ability to construct a complete, healthy self identity.<sup>50</sup> In *Brown v. Board of Education*, the Supreme Court placed a great weight on the effects that school segregation had on the self-esteem of black children.<sup>51</sup> *Brown* still stands for the proposition that the personal and psychological impact of government action (or inaction) matter.<sup>52</sup> If the systematic denial of a multiethnic identity has a similar personal effect on multiethnic children and adults, society should be concerned.

While many critics consider the desire for a multiethnic identity trivial, for most minorities, the importance of group pride and identity is self-evident. The Black Power Movement in the 1960s and 1970s emphasized the importance of the individual's sense of self-worth in regards to racial identity. As *Time Magazine* put it in 1967: "There is indeed evidence that black pride is nourishing the new Negro's determination to take over his own destiny and accept no definition of blackness but his own."<sup>53</sup> Why should multiethnic people be denied that same right?

## CRITIQUING THE CRITIQUES

The scope of this article is such that I could not hope to catalogue every objection raised to multiethnic identification. I will, however, attempt to summarize and briefly respond to some of the most common critiques of a multiracial category on the census and multiethnic identity in general.

### WRECKING RACE: MULTIETHNICITY AND PUBLIC POLICY

One of the chief objections to the inclusion of a multiracial category on the census was the policy concern over how counting would impact civil rights legislation. Tabulation procedures matter immensely because the size of a protected group is a factor in determining whether discrimination has occurred.<sup>54</sup> If

multiethnic people were counted separately, the numbers of Latinos, Asians, and blacks would dwindle significantly, making discrimination harder to prove.<sup>55</sup> The OMB's choice not to create a separate multiracial box was in direct response to this fear of the dilution of historically protected ethnic groups.<sup>56</sup> The OMB also proscribed that those marking white and any other race category be placed in the non-white category for data tabulation purposes.<sup>57</sup> Because of this practice, numerical dilution is not currently a serious practical concern.

Proponents of the dilution theory assume that multiethnic individuals should be considered full members of protected ethnic groups for civil rights purposes. While the question is uncomfortable, it must be asked: if civil rights protections are provided on the basis of historical inequality, should a person with one white parent receive the same benefits as a person with two parents of color? These issues are particularly salient in regard to affirmative action.<sup>58</sup> Because multiethnic people have experiences distinct from mono-ethnic individuals, it is arguable that multiethnic people should be counted separately.

Some of the more skeptical critics see multiracial classification as a tool used by conservatives to end programs like affirmative action. This suggests that multiracial activists fail to see the policy implications of their actions, or that they are actually complicit with those who are working against the interests of people of color.<sup>59</sup> In May 1997, speaking before the House of Representatives' Government Management, Information, and Technology Subcommittee, Harold McDougall, Director of the Washington Bureau of the NAACP, publicly expressed this concern, stating, "The census may not be the correct place to make

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*If multiethnic people were counted separately, the numbers of Latinos, Asians, and blacks would dwindle significantly, making discrimination harder to prove.*

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such a personal statement."<sup>60</sup> One unidentified government analyst put it more bluntly: "There's no concern on any of these people's part about the effect on policy; it's just a subjective feeling that their identity needs to be stroked. What they don't understand is that it's going to cost their own groups."<sup>61</sup> Though multiracial advocates are not necessarily conservative

themselves, conservative politicians have been eager to encourage multiracialism, often with the apparent hope of promoting color blindness.<sup>62</sup> When Harvard Professor Kim M. Williams surveyed advocates for multiracialism, she found that Democratic members of multiracial organizations were willing to welcome Republican support, but Williams surmised that these members were unaware that "their powerful GOP allies had probably surfaced...because they were intent on undermining civil rights enforcement efforts."<sup>63</sup> Even if multiethnic activists consciously chose to accept Republican support despite opposing the overall conservative agenda, multiethnic advocates would be less susceptible to Republican designs if civil rights groups and Democratic allies were more supportive.

While civil rights organizations have been largely skeptical of the motives of multiracial advocates "given the company they

keep,” small groups with little political power of their own do not have the luxury of choosing their allies.<sup>64</sup> Multiethnic recognition on the census eventually succeeded because multiethnic identity is not inherently partisan.<sup>65</sup> “Democrats wanted multiracial recognition *without* adverse civil rights consequences, while Republicans wanted multiracial recognition *with* adverse civil rights consequences.”<sup>66</sup>

Civil rights organizations do not benefit from either opposing multiethnic classification or remaining on the sidelines. Given the left-leaning tendencies of most advocates, civil rights groups had and continue to have, the opportunity to bring multiethnic advocates into their fold. If civil rights groups choose not to use that opportunity, it will be a great loss both for multiethnic organizers and for themselves.

#### **BIOLOGY AND DESTINY: MULTIRACIAL OR MULTIETHNIC**

One of the more intellectually interesting critiques of multiethnic identity is that it reinforces the idea that race is biological. Christine Hickman takes particular issue with multiethnic identity for this reason, arguing that what she calls the “Mulatto system,” has its own version of the one-drop rule in which one drop of white blood “elevates a Black person out of the Black race.”<sup>67</sup> According to Hickman, society has created a black ethnic identity that is not biological but instead cultural, and multiethnicity threatens to eliminate this social unity.

There is no logical reason why multiethnic identity must depend on biology. A multiethnic person may see himself as such because his cultural experience is different from his monoethnic peers. The difficulty many multiethnic people experience when answering the ubiquitous question, “What are you?” comes from the recognition that biology does not provide a good answer. If multiethnicity were only biological, then a simple list, such as, “I am black, white, and Native American,” would suffice. However, for a multiethnic person, the answer may be something more like: “I don’t feel that I fit in any of the categories.”<sup>68</sup> While a multiethnic/multiracial label may never be fully satisfactory (no ethnic label can be), it does capture something about the unique position of people of mixed heritage in our society.

#### **MULTIRACIALS IN THE MIDDLE: THE FEAR OF MULTIETHNIC FLIGHT**

“If the old saying ‘one drop of Black blood makes you Black’ were reversed to say one drop of White blood makes you White, would the biracials still be seeking a separate classification?”<sup>69</sup> One of the most common critiques of the multiethnic identity movement is the assertion that multiracial people are merely claiming that identity in order to escape from a lower social status race. When Tiger Woods told the world that he did not consider himself black, but instead “Cablinasian,” (Caucasian, Black, Indian, and Asian), “some blacks saw Woods’ assertion of a multiracial identity as a sellout that could

begin an epidemic of ‘passing.’”<sup>70</sup> During a 1993 Congressional hearing on census categories, Arthur Fletcher, a black member of the U.S. Commission on Civil Rights, testified, “I can see a whole host of light-skinned black Americans running for the door the minute they have another choice. All of a sudden they have a way of saying, ‘In this discriminatory culture of ours, I am something other than black.’”<sup>71</sup> Two underlying beliefs animate those who expound such concerns, and together they explain the evident passion of the speakers. The first belief is that multiethnic people rightfully belong in a particular category, and want to leave it. The second belief is that it harms that racial category when multiracial people leave.

At first glance, the argument that multiethnic people belong in one racial component category appears to reflect an antiquated adherence to the idea of the single-drop rule that continues to imagine biology to be the driving force of race. However, a second look demonstrates that this argument deserves more credit. Hickman claims that through the one-drop rule, social and political forces “created the African-American race as we know it today...unit[ing] this race as a people in the fight against slavery, segregation, and racial injustice.”<sup>72</sup> In other words, multiethnic people belong in the black category because of their shared history and struggle with blacks.

While eloquent, this theory ignores several issues. First, as discussed above, the experience of mixed blacks has always been different from those of blacks. Throughout American history, multiethnic people always have been treated both better and worse than their counterparts. Second, in the forty years since the Supreme Court struck down all bans on interracial marriage, a greater consciousness of the unique experience of those whose parents are of different ethnicities has developed. As the world continues to change, the social forces that shaped

our idea of what creates blackness have also changed, and the old racial categories may no longer apply. Third, even if multiethnic people have much in common with their black peers, it does not mean that a forced inclusion is best for anybody.

Perhaps the most obvious problem with this theory is to the lack of evidence that multiethnic people actually are trying to opt out of black racial heritage by asserting a multiethnic identity. When Marcus Garvey claimed that only unmixed Africans counted as black, he drew impassioned, hostile responses from mulatto leaders in the black community.<sup>73</sup> On the Harvard Law School campus, most members of MLSA are also members of other ethnic affinity groups.<sup>74</sup> If multiethnic people are as eager to deny black racial identity as Hickman seems to suggest, then one must wonder how multiracial people benefit the racial solidarity and black pride that Hickman argues will suffer from a multiethnic classification. This proposition ignores the real possibility that multiethnic people may be striving to create, maintain, and gain recognition of multiple identities that better reflect their experiences.

The fear of multiethnic flight can only serve to alienate multiethnic people from the ranks of other groups. Kim Williams put it succinctly when she said: "If abandonment is part of the problem, then blacks need to ask themselves who is abandoning whom; it is not always so clear."<sup>75</sup>

### TOWARDS A NEW RACE PARADIGM: A PROPOSAL

Civil rights advocates ought to support and encourage multiethnic people as they struggle for governmental recognition. The experience of multiethnic individuals is descriptively different than that of their monoethnic peers and ethnic self-identification is a basic right that once was championed by civil rights groups. Both civil rights and multiethnic activists stand to benefit from such a partnership.

#### *A WORLD OF DIFFERENCE: THE UNIQUE MULTIETHNIC EXPERIENCE*

While some writers argue that because it crosses culture, heritage, and physical biology, multiethnic status is different from other ethnic categories, multiethnic people share certain characteristics.<sup>76</sup> The socioeconomic status of bi-ethnic people, for instance, consistently falls between that of the lower and higher status parent.<sup>77</sup> Additionally, multiethnic people frequently report prejudice based on having varied heritages.<sup>78</sup> Finally, there is a growing sense of multiethnic community, which will further develop as multiethnicity becomes more prevalent and accepted. Perhaps the demand for a multiethnic identity is reflective of a new understanding of race, one that recognizes that the lines that divide us by race or ethnic status are actually quite blurry.

#### *PROVIDING THE FREEDOM OF SELF-IDENTIFICATION*

Perhaps the strongest reason to recognize multiethnicity is that self-definition ought to be encouraged. The individual and collective right of ethnic self-identification has been recognized and exercised by other racial and ethnic advocates as they redefined themselves with new terms like *Chicano*, *Xicano*, *Latino*, *Asian American*, *Black*, *African American*, or *Native American*. Multiethnic people are similarly looking for a way to turn ex-

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*Giving an official label to those who identify as multiethnic creates a forum in which to discuss the discrimination and marginalization of those experiences.*

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periences of alienation, racism, and marginalization into positive experiences of shared cultural identity. Giving an official label to those who identify as multiethnic creates a forum in which to

discuss the discrimination and marginalization of those experiences. Recognition is the first step toward securing rights.

Self-definition allows people to express an ethnic identity that causes less cognitive dissonance with their experience than being forced to choose between ethnicities.<sup>79</sup> The recognition of multiethnic identity marks a shift to an understanding of race that is more fluid and multi-faceted than before.

Of course, some multiethnic people will not want such a label, but for those who do, the classification system ought to be flexible. Recognizing that racial identification is not a simple process in which any given person can correctly categorize any other is beneficial to all. Internal perspective ought not be the only factor in determining someone's ethnicity, but individuals deserve as much freedom as reasonably possible to engage in good-faith self-definition.<sup>80</sup> While a multiple race box may not make sense for data collection given its potential negative impact on civil rights enforcement, the ability of multiethnic people to list multiple identities provides room for the growth of a concept of multiethnic identity. It seems the least society can offer.

### CONCLUSION

#### *STAND TOGETHER OR FALL APART: A MULTI RACIAL CIVIL RIGHTS MOVEMENT*

The growth in the numbers of multiethnic people has forced America to ask what race means today. While multiethnic advocates have noted the point so often that it is almost cliché, a recognized multiethnic identity will benefit society if only by raising the question. Civil rights advocates now must consider whether they are more concerned with the principles they have espoused, including self-identification and multicultural pride and acceptance, or in maintaining the system as it is. Multiethnic identity is a double-edged sword because it begs the question of how we can move to a world in which our historical race categories do not limit us without risking the accomplishments that civil rights advocates struggled so hard and long to achieve.

If civil rights comes to encompass multiethnic rights, civil rights groups are likely to gain members who currently may feel unrepresented. This is especially true given the concern that multiethnic advocates have been willing to work with conservatives to accomplish their goals. If more established civil rights leaders step forward, the multiethnic agenda and the civil rights agenda can be framed hand in hand, rather than in potential conflict. Additionally, multiethnic individuals ought to be free to be members of ethnic groups without feeling required to check their multiethnic identity at the door. In a world increasingly aware of multiculturalism, the framing of fluid identities, including multiple identities, ought to be a priority.

## ENDNOTES

\* Kamaria A. Kruckenberg, a University of California – Berkeley alumnus with a Bachelors degree in History, is currently completing her third year of law school at Harvard Law School in Cambridge, Massachusetts.

<sup>1</sup> Joanna Kruckenberg, *Untitled*, (1984) (on file with author).

<sup>2</sup> Office of Mgmt. & Budget, *Standards for the Classification of Federal Data on Race and Ethnicity* (Jun. 9, 1994), available at [http://www.whitehouse.gov/omb/fedreg/notice\\_15.html](http://www.whitehouse.gov/omb/fedreg/notice_15.html) (last visited Mar. 7, 2008).

<sup>3</sup> *Id.* (detailing that the federal standard for data collection for all of these forms is the same as for the census).

<sup>4</sup> Tseming Yang, *Choice and Fraud in Racial Identification: The Dilemma of Policing Race in Affirmative Action, The Census and A Color-Blind Society*, 11 MICH. J. RACE & L. 367, 413 (2006).

<sup>5</sup> Patricia Palacios Paredes, *Latinos and the Census: Responding to the Race Question*, 74 GEO. WASH. L. REV. 146, 147 (2005).

<sup>6</sup> Naomi Zack, *American Mixed Race: The U.S. 2000 Census and Related Issues*, 17 HARV. BLACKLETTER L.J. 33, 34 (2001).

<sup>7</sup> Kim M. Williams, MARK ONE OR MORE: CIVIL RIGHTS IN MULTIRACIAL AMERICA 23 (The University of Michigan Press 2006).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> JAMES DAVIS, WHO IS BLACK? ONE NATION’S DEFINITION 12 (The Pennsylvania State University Press 1991).

<sup>11</sup> *Loving v. Virginia*, 388 U.S. 1 (1967).

<sup>12</sup> Williams, *supra* note 7, at 39.

<sup>13</sup> Office of Mgmt. & Budget, *supra* note 2.

<sup>14</sup> Williams, *supra* note 7, at 42.

<sup>15</sup> Williams, *supra* note 7, at 43.

<sup>16</sup> Office of Mgmt. & Budget, *supra* note 2.

<sup>17</sup> Williams, *supra* note 7, at 121 (stating that “the elected officials most open to the idea of multiraciality over the past decade have been conservative Republicans in Congress and state legislators (mostly Democrats) representing affluent, suburban districts”).

<sup>18</sup> Francis Wardle, *We Have Only Just Begun, Interracial Voice*, (2003), available at <http://www.webcom.com/intvoice/wardle4.html> (last visited Mar. 7, 2008).

<sup>19</sup> Office of Mgmt. & Budget, *supra* note 2.

<sup>20</sup> Williams, *supra* note 7, at 65. (Six states, Ohio, Illinois, Indiana, Michigan, Maryland, and Georgia passed legislation to introduce the category. Florida and North Carolina added a designation administratively. California, Minnesota, Oregon, Massachusetts, and Texas legislators also proposed multiracial categories for their states). California is currently considering legislation to establish a “mark one or more” approach to racial data classification. S.B. 26 (Ca. 2007), available at [http://info.sen.ca.gov/cgi-bin/postquery?bill\\_number=sb\\_26&sess=CUR&house=S&site=sen](http://info.sen.ca.gov/cgi-bin/postquery?bill_number=sb_26&sess=CUR&house=S&site=sen) (last visited Mar. 7, 2008).

<sup>21</sup> Williams, *supra* note 7, at 65.

<sup>22</sup> Zack, *supra* note 6, at 41.

<sup>23</sup> Zack, *supra* note 6, at 38.

<sup>24</sup> Yang, *supra* note 4, at 382 (citing Stephen J. Gould, THE MISMEASURE OF MAN (1981)).

<sup>25</sup> American Association of Physical Anthropologists, *AAPA Statement on the Biological Aspects of Race* (1996), available at <http://www.physanth.org/positions/race.html> (last visited Mar. 7, 2008).

<sup>26</sup> Zack, *supra* note 6, at 39.

<sup>27</sup> JUDY SCALES-TRENT, NOTES OF A WHITE BLACK WOMAN 99 (The Pennsylvania State University Press 1995).

<sup>28</sup> Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the US Census*, 95 MICH. L. REV. 1161, 1173 fn. 35 (1997). The fear of the creation of a large mixed populace can be traced as far back as 1630. The first reported judicial decision to allude to blacks at all was an interracial fornication case in this year.

<sup>29</sup> Davis, *supra* note 10, at 15; see also, SCALES-TRENT, *supra* note 27, at 4 (declaring that “the laws [governing hypodescent], however, were not uniform. They varied from state to state, they often varied, as well, within a given state over time. Hence, a person might be white in one state and black in another. Or a person might be black under state law one day, and the next day white—or vice-versa”).

<sup>30</sup> Zack, *supra* note 6, at 34.

<sup>31</sup> Davis, *supra* note 10, at 13 (commenting that until recently in fact, most Americans who were of white and Japanese or Chinese ancestry were forced to present themselves as non-Asian because they were not accepted as Asian within those ethnic communities); PAUL R. SPICKARD, *The Illogic of American Racial Categories*, in RACIALLY MIXED PEOPLE IN AMERICA 12, 20 (Maria P. P. Root ed.) (Sage Publications, 1992).

<sup>32</sup> G. REGINALD DANIEL, *Passers and Pluralists*, in RACIALLY MIXED PEOPLE IN AMERICA, 91, 103 (Maria P. P. Root ed.) (Sage Publications, 1992).

<sup>33</sup> *Id.* at 96.

<sup>34</sup> *Id.* at 94-95.

<sup>35</sup> Davis, *supra* note 10, at 34-35, 45 (adding that in South Carolina, controversy raged over whether to move towards a strict one-drop rule well after the end of Reconstruction).

<sup>36</sup> URSULA M. BROWN, THE INTERRACIAL EXPERIENCE: GROWING UP BLACK/WHITE RACIALLY MIXED IN THE UNITED STATES 37 (Praeger Publishers, 2001).

<sup>37</sup> SCALES-TRENT, *supra* note 27, at 100.

<sup>38</sup> Hickman, *supra* note 28, at 1176-77 (arguing that the underlying intent of Colonial-era anti-miscegenation laws was “to debase to a still lower status the offspring of blacks...[and] to leave women of color without protection against white men”).

<sup>39</sup> BROWN, *supra* note 36, at 29.

<sup>40</sup> Cynthia Nakashima, *Creation and Denial of Mixed-Race People*, in RACIALLY MIXED PEOPLE IN AMERICA 162.

<sup>41</sup> Davis, *supra* note 10, at 21.

<sup>42</sup> Williams, *supra* note 7, at 32.

<sup>43</sup> *Id.*

<sup>44</sup> Gregory Rodriguez, *Do the Multiracial Count?* Salon.com, Feb. 15, 2000, <http://archive.salon.com/news/feature/2000/02/15/census/> (last visited Mar. 7, 2008) (finding that a recent analysis of birth records by the Public Policy Institute of California indicated that 15 percent of all births in the Golden State are multiracial or multiethnic).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> Census Bureau, *Estimates of United States Population for July 1, 2006* (May 17, 2006), available at <http://www.census.gov/popest/national/asrh/NC-EST2006-asrh.html> (last visited Mar. 7, 2008).

<sup>48</sup> *Plessy v. Ferguson*, 63 U.S. 537 (1896).

<sup>49</sup> Langston Hughes, SELECTED POEMS 158 (Alfred A. Knopf, 1970).

<sup>50</sup> BROWN, *supra* note 36, at 1; see also, James H. Jacobs, *Identity Development in Biracial Children*, in RACIALLY MIXED PEOPLE IN AMERICA, 190, 206 (Maria P. P. Root, ed.) (Sage Publications, 1992) (stating that “the social, legal, and institutional acknowledgment of children’s biracial group membership would facilitate the difficult task of constructing a positive biracial identity”).

<sup>51</sup> *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

<sup>52</sup> See, e.g., Lani Guinier, *From Racial Liberalism to Racial Literacy: Brown v. Board of Education and the Interest-Divergence Dilemma*, 91 THE JOURNAL OF AMERICAN HISTORY 91 (Vol. 1, 2004), available at <http://www.historycooperative.org/journals/jah/91.1/guinier.html>.

<sup>53</sup> *Black Power & Black Pride*, TIME MAGAZINE, Dec. 1, 1967, available at <http://www.time.com/time/magazine/article/0,9171,712007-1,00.html> (last visited Mar. 7, 2008).

<sup>54</sup> THE NEW RACE QUESTION: HOW THE CENSUS COUNTS MULTIRACIAL INDIVIDUALS 15 (Joel Perlmann and Mary C. Waters eds, 2002).

<sup>55</sup> Williams, *supra* note 7, at 59.

<sup>56</sup> Williams, *supra* note 7, at 58-59.

<sup>57</sup> Zack, *supra* note 6, at 36.

<sup>58</sup> While the author believes that to ensure actual diversity, multi-ethnic people should be able to receive affirmative action benefits and should be able to choose whether they wish to primarily identify with a particular ethnic group, others will likely disagree. The discussion should be had on a policy level, not simply swept under the rug.

<sup>59</sup> See Lawrence Wright, *One Drop of Blood*, THE NEW YORKER, Jul. 24, 1994 (declaring that “those who are charged with enforcing civil-rights laws see the Multiracial box as a wrecking ball aimed at affirmative action, and they hold those in the mixed-race movement responsible”).

<sup>60</sup> *Federal Measures of Race and Ethnicity and the Implications for the 2000 Census: Hearing Before the Subcomm. on Gov’t Mgmt, Info., and Tech. of the H. Comm. On Gov’t Reform and Oversight*, 105<sup>th</sup> Cong. (1997) (statement of Harold McDougall Director of Washington Bureau, NAACP on May 22, 1997).

<sup>61</sup> Wright, *supra* note 59.

<sup>62</sup> *Id.* at 107 (finding that most multiracial advocates surveyed considered themselves Democrats).

<sup>63</sup> *Id.* at 108.

<sup>64</sup> *Id.* at 109.

<sup>65</sup> Williams, *supra* note 7, at 122 (holding that “democrats wanted multiracial recognition *without* adverse civil rights consequences, while Republicans wanted multiracial recognition *with* adverse civil rights consequences”).

<sup>66</sup> Williams, *supra* note 7, at 122

<sup>67</sup> Hickman, *supra* note 28, at 1191. One only can assume that Hickman is not aware of the offensive nature of the term “mulatto.”

## ENDNOTES CONTINUED

<sup>68</sup> See BROWN, *supra* note 36, at 48 (the author has varying senses of her own ethnic identity that have shifted based on my community, age, and personal belief. This kind of unwillingness to accept a biological definition of race is common amongst multi-ethnic people); See also, David R. Harris & Jeremiah Joseph Sim, *Who Is Multiracial? Assessing the Complexity of Lived Race*, 67 AMERICAN SOCIOLOGICAL REVIEW 614, 618 (Aug. 2002) (finding that multiracial adolescents identify their race differently when asked at school and at home, unlike age, gender, and socioeconomic status).

<sup>69</sup> Hickman, *supra* note 28, at 1163 (citing letter to the editor EBONY MAGAZINE, Nov. 1995).

<sup>70</sup> Jack E. White, *I'm Just Who I Am*, TIME MAGAZINE, May 05, 1997, available at <http://www.time.com/time/magazine/article/0,9171,986278-3,00.html> (last visited Mar. 7, 2008).

<sup>71</sup> *Id.*

<sup>72</sup> Hickman, *supra* note 28, at 1166.

<sup>73</sup> Davis, *supra* note 10, at 175.

<sup>74</sup> Interview with Joanna Bettis, MLSA President (Apr. 2, 2007).

<sup>75</sup> Williams, *supra* note 7, at 131.

<sup>76</sup> See MICHAEL C. THORNTON, *Is Multiracial Status Unique?*, in RACIALLY MIXED PEOPLE IN AMERICA 321, 324.

<sup>77</sup> Jennifer Hochschild, *Going Back to Class? The Reemergence of Class in Critical Race Theory*, 11 MICH. J. RACE & L. 99, 112-13 (Fall 2005).

<sup>78</sup> Such experiences include being shunned by members of monoethnic groups as not being black, Chinese, or Latino enough; experiencing prolonged staring; being bullied into claiming to be monoethnic; or being described as “a mistake.”

<sup>79</sup> Multiethnic people should be allowed to identify themselves as such, but in making room for a newly recognized identity, multiethnic activists must take care to not attempt to force people to join their ranks.

<sup>80</sup> While self-identification itself may not be enough to give credit to anyone who asserts a different ethnic identity, multiethnic people that do not fit into the current categories, represent a large and growing number, both of which suggest that the recognition of a difference makes sense in our society.

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## MOVIE REVIEW

### ***OF CIVIL WRONGS AND RIGHTS: THE FRED KOREMATSU STORY***

Written and Directed by: Eric Paul Fournier (Pushtan Productions 2000)

Reviewed by Jenny Myers\*

December 7, 1941, “a date which [lives] in infamy”<sup>1</sup> is also a day that challenged the notions of American freedom and civil liberties. This day caused Japanese-Americans to question what it means to be an American. Shortly after the attack on Pearl Harbor, President Franklin Roosevelt signed Executive Order 9066, ordering the internment of all Japanese-Americans, as a “military necessity.” *Of Civil Wrongs and Rights: The Fred Korematsu Story* is a documentary about the “tragedy of a democratic institution that failed its people,” and Fred Korematsu, one of only a handful of Japanese-Americans to challenge the internment.

Fred Korematsu was born in Oakland, California. He was a welder who lived in San Francisco during World War II. Japanese-Americans were acutely aware of their race and unequal status during the war. Fred lost his job working in a shipyard because of his race. Before December 7, 1941, Fred remembers his family speaking with pride about their Japanese ancestry. After the attack on Pearl Harbor, Fred remembers the disgust of his father and the fear of his family. Many families burned everything in their homes that connected them to Japan. Fred recalls, “We expected the worst to happen. And it did.”

Fred refused to comply with the Executive Order because he knew it was wrong. When his family left for Tanforan, a “staging area” that would temporarily house the Japanese-Americans until they were sent to internment camps, Fred stayed behind and took steps to avoid being discovered. He changed his name and had plastic surgery to change the shape of his eyes. Before he could flee to Nevada, Fred was discovered and arrested for failing to report for relocation. After a brief stay in jail, Fred was sent to Tanforan, a converted horse track where the internees were housed in horse stalls with dirt floors, and plank walls with gaping holes.

Fred was largely alone in his resistance. The legislative branch supported the Executive Order; it held no hearings on the matter. The agriculture industry in California supported the Order as a way of eliminating competition and because of racism. Even groups charged with protecting civil liberties refused to fight. Many of the leaders of the American Civil Liberties Union (“ACLU”) were close friends of President Roosevelt and did not want to challenge him during a time of war. ACLU attorneys were only permitted to offer *amicus* briefs in cases challenging the internment and were prohibited from directly representing parties. Under threat of ouster, Ernest Besig, the Execu-

tive Director of the ACLU of Northern California, persuaded Fred to challenge the internment as a violation of his constitutional right to due process and as racial discrimination. While a few other individuals challenged the Executive Order, the Japanese American Citizens League, the largest group representing Japanese-Americans, stood by silently. The group issued a policy directive opposed to challenging the constitutionality of the internment, and the Japanese-American community as a whole did not speak of resistance.

Fred and his attorney brought suit for the violations of civil liberties. They lost in the lower courts and appealed the decision all the way to the Supreme Court, only to lose again. The Supreme Court failed in its duties to ask probative questions. The government blatantly argued that Fred was a member of an “enemy race” and that the internment was justified as a military necessity. The Justices took the word of Lieutenant General DeWitt and required no further evidence of the “threat.” In the time of war, the Justices were reluctant to question a General about military necessity and seemed to feel it was their patriotic duty to support the Executive Order.

Fred was eventually sent to Topaz, an internment camp in Utah, and was soon recognized by the community for his challenge of the Executive Order. His contradiction of the policy directive of the Japanese American Citizens League earned him a cold reception. He was stigmatized by the community and lived a very lonely life in the camp. Fred chose not to talk about the case even after being released in 1944. He later met his wife Katherine and the couple started a family. Fred was very aware of his criminal record and lost job opportunities because of it. The stigma from the country and his community followed him, and it was so great that Fred’s teenage daughter learned of his Supreme Court case in school before she heard about it from him.

The country interned all of the citizens of an entire race with one Executive Order. 101,000 people lost their liberty, many lost everything they owned, and some even lost their lives because of the internment. Upon release, the government offered no apology and acknowledged no mistake.

Almost forty years later, while researching a book, law professor Peter Irons came across the government’s records of the Korematsu case, as well as two others that challenged the internment. Irons discovered astonishing internal memos. The memos uncovered evidence that the reports of Lieutenant General

DeWitt to President Roosevelt, the same reports the government relied on in the Korematsu case, were directly contradicted by reports of J. Edgar Hoover from the Federal Bureau of Investigations, Naval Intelligence, Army Intelligence, and the Federal Communications Commission. There was no military necessity for internment because there had been no instances of any Japanese-American giving aid to Japanese forces. Further, the memos revealed that the Department of Justice was aware of this contradiction at the time of Fred's challenge. The government attorneys knowingly made misrepresentations to the Supreme Court and failed to disclose relevant evidence.

In 1983, armed with this new evidence, Peter Irons tracked Fred down and asked him to reopen his case. Fred was happy to do it. This time the Japanese-American community was behind him. His legal team was comprised mostly of young Japanese-Americans who joined the fight to vindicate their families and their community, and to expose the complete failure of the United States government and Executive Order 9066. There was immense pressure not to lose this case again.

The team brought suit in a California district court under *coram nobis*. The challenge alleged that an error had been committed before the court and needed to be reversed. *Coram nobis* challenges are reserved for criminal cases in which the sentence has already been served. The government attorneys were conflicted about how to respond. Fred was offered a pardon and the government continued to delay. Instead of arguing the merits, the government attorney asked the court not to reopen old wounds. Ultimately the judge determined that the government was confessing error and reversed Fred's conviction. In a powerful but simple statement before the judge and a very crowded

courtroom, Fred spoke about the indignity and humiliation of the internment. He stated, "Horse stalls are for horses, not for people." He continued saying this could happen to any American citizen that looks different or comes from another country. He asked the judge to protect the Constitution not just for him, but for the benefit of the whole country.

Almost forty years after the infamous decision, Fred's conviction was vacated on October 4, 1983. Unfortunately, the lower court's decision in Fred's case is not binding on the Supreme Court and the 1942 decision is still legal precedent. In 1998, President Bill Clinton presented Fred with the Presidential Medal of Freedom, and Fred took his rightful place as a hero of the civil rights movement.

Fred and his wife Katherine were very active in community events and regularly spoke at showings of the film to warn audiences about the dangers of history repeating. In the film, Fred speaks briefly about Desert Storm and alluded to a very real possibility of Arab-Americans facing the same fate as Japanese-Americans. President Abraham Lincoln recognized the struggle for the unfinished work of equality at the time of the Civil War. It is clear that work is still unfinished.

*Of Civil Wrongs and Rights* premiered in 2000, the year before the attacks on September 11, 2001. The film is increasingly relevant as the country struggles with the same issues faced during World War II. What are the powers of the President in a time of war? What is the role of the legislative branch with regard to war time policies? Will the Judiciary continue to ask probative questions in this very trying time? Undertones of past events warning about a detrimental future are unmistakable in the film. Fred closes the movie with sound advice, as he states, "Don't be afraid to speak up."

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<sup>1</sup> President Franklin Roosevelt, Address before the Congress of the United States of America (Dec. 8, 1941)

# LEGISLATIVE UPDATES

*By Amalia Greenberg\**

## **H.R. 2129: “Feeding America’s Families Act of 2007”**

This Act updates the Food Stamp Act of 1977 with four billion dollars in improvement, including inflation adjustments and new programs to better meet the needs of participants.<sup>1</sup> Folded into the Farm Bill, the Act passed 231 to 191 on July 27, 2007 and now sits before the Senate. Although the Act comes up for review almost every five years, Congress has not updated the Act for thirty years despite inflation and changing agricultural and economic conditions in the United States.

According to the new proposal, the minimum benefit of ten dollars a month that was set in the 1970’s, will increase to about thirty dollars a month. The current national food stamp budget averages twenty-one dollars per week per participant, or essentially one dollar per meal. The Act indexes benefit levels to the current rate inflation, which ensures that the purchasing power of the food stamps remains constant to the dollar.

Recognizing that only sixty percent of persons eligible to receive food stamps actually do, the Act seeks to open access to eligible candidates including families with children, disabled persons, and persons of color. Currently, over eighty percent of participant food stamp members include families with children, and approximately a quarter of families have a disabled member. The Act also extends the food stamp program to all documented immigrants, including Legal Permanent Residents, a provision originally removed in 1996. Additionally, as part of the Farm Bill, members of the Congressional Black Caucus, including Representative Maxine Waters (CA), added a provision of \$100 million to settle discrimination claims by Black farmers against the Agriculture Department.<sup>2</sup> Representative James McGovern (MA) introduced the Act on May 3, 2007.

## **H. R. S. 456: “Gang Abatement and Prevention Act of 2007”**

The Bill seeks to “increase and enhance law enforcement resources committed to investigation and prosecution of violent gangs, to deter and punish violent gang crime, to protect law-abiding citizens and communities from violent criminals, to revise and enhance criminal penalties for violent crimes, to expand and improve gang prevention programs, and for other purposes.” The bill establishes new federal gang crimes and imposes tougher federal penalties for violation of gang crimes in hopes of decreasing gang violence and participation.

The Bill earmarks approximately \$500 million for prevention efforts and another \$500 million towards enforcement, recognizing that “neither strategy works without the other.”<sup>3</sup> This translates into one billion dollars over a five-year period. The Bill significantly increases mandatory penalties for violent acts committed by gang members and institutes a separate federal

crime for committing, conspiring, or attempting to commit violent crimes in furtherance of a gang. For example, for any serious violent felony, the penalty would range up to thirty years without parole. Other crimes of violence, including an “actual or intended use of physical force against the person of another” are subject to twenty years in prison. The Bill criminalizes the recruitment into a criminal street gang with a penalty of up to ten years, or if done from prison, up to twenty years. The Bill previously contained federal death penalty and mandatory minimum provisions that have since been struck.

Community-based organizations strongly oppose the Bill because it will neither deter gangs nor protect communities. Organizations protest that the Bill’s definition of gangs and gang crimes unduly overreaches law enforcement and discretionarily targets communities of color. The Bill defines a gang as a group of five youths who regularly associate and commit what could be considered a gang crime on three occasions, and thus all five would be eligible for prosecution under the gang law, even individuals in the group who did not participate in the crime. The definition also includes those who have left gangs, and subjects them to the additional federal penalties.

Senator Dianne Feinstein (CA) introduced the Bill on January 31, 2007 and has forty-four co-sponsors. Representative Adam Schiff introduced the Bill to the House in September 2007, and it currently has seventeen co-sponsors.

## **H.R. 1940: “Birthright Citizenship Act of 2007”**

The Act amends the Immigration and Nationality Act to limit right of citizenship to a person born in the United States if the person is born to parents, one of whom is: (1) a U.S. citizen or national; (2) a lawful permanent resident who resides in the United States; or (3) a non-citizen performing active service in the armed forces.

The sponsors of the Act would in effect reinterpret the Constitution’s Fourteenth Amendment Section 1, which reads: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States.” Supporters of the Act argue that the government misapplies the Fourteenth Amendment, which they allege was drafted to specifically apply to freed slaves and not undocumented immigrants. The passage of the Act would avoid the daunting task of amending the Constitution through the implementation of federal legislation. Opponents of the Act contend that the U.S. government has correctly interpreted the *jus soli* provision of the Fourteenth Amendment. Denying citizenship to a person born in the United States based on one’s legal status would ignore a historically recognized right by the federal courts and political

branches, and thus strip from a person the first-line of defense of individual rights. European immigrants have traditionally enjoyed a presumption to birthright citizenship, while immigrants of Asia, Africa, and Latin America have fought to defend this right from the political whim of the governing parties.

Representative Nathan Deal introduced the Act on April 19, 2007, and it currently has ninety-seven co-sponsors. An almost identical bill was introduced in the House in 2005.

#### **H.R. 4088: “Secure America Through Verification and Enforcement (SAVE) Act of 2007”**

The “SAVE Act,” a strictly immigration enforcement package, proposes to enhance border security and enforcement of existing immigration laws and to expand the employer verification program, Basic Pilot, from currently 30,000 employers to over 6 million employers.<sup>4</sup> Unlike previous comprehensive immigration reform proposals, the Act disregards the rights and demands of U.S. citizen employers and employees and non-citizens alike by imposing a one-sided approach to immigration.

In efforts to decrease unauthorized employment, the Act would require that all employers use Basic Pilot, an electronic employment verification system that mandates review of all workers’ status including U.S. citizens, new hires, and current employees. The Basic Pilot raises serious alerts for employers and employees alike. The Act provides no assurances that the system will be accurate and updated, or that it will provide privacy protections for the wealth of personal information available on the system. The Act does not extend legal recourse to workers who lose employment due to system errors. Additionally, the Act requires that the Social Security Administration (SSA) check the validity of employees’ social security numbers (SSN)

and report to DHS all employers who have W-2 forms and SSN that do not match the system’s numbers. This places undue burdens on the SSA and employers, in addition to subjecting employees to discrimination and potentially job loss for U.S. citizens.

Additionally, the Act proposes to increase Immigration and Customs Enforcement (ICE) and Border Patrol agents, detention centers, and federal district court judges to detain and prosecute a larger number of removal cases. Opponents to the Act warn that by allowing enforcement of federal laws through local police, the Act would likely lead to mistakes in its application and civil rights violations. The Act would also place a further burden on already overstretched local police departments, and would create increased distrust and violence between immigrants and the police.<sup>5</sup>

Immigrants’ and workers’ rights advocates warn Congressional members that the Act is a misguided policy that will “do nothing to address... the devastation that this broken system creates: exploited workers, thousands of deaths in the desert, and over three million U.S. citizen children living in constant fear that their parents will be deported.”<sup>6</sup> They maintain that the Bill will lead to greater exploitation of citizen and non-citizen workers by pushing non-citizen workers “deeper underground” and harming citizens through the flawed employment verification system.<sup>7</sup>

Representative Heath Schuler (NC) and Brian Bilbray (CA) introduced the Act on November 6, 2007. It currently has 134 cosponsors in the House. It is identical to Senator Mark Pryor’s (AR) proposed Bill before the Senate S. 2368.

\* Amalia Greenberg is currently completing her second year of law school at American University Washington College of Law

<sup>1</sup>Editorial, *Holding the Hungry Hostage*, N.Y. TIMES, Dec. 7, 2007, [http://www.nytimes.com/2007/12/07/opinion/07fri2.html?\\_r=1&scp=1&sq=Holding+the+Hungry+Hostage+&st=nyt&oref=slogin](http://www.nytimes.com/2007/12/07/opinion/07fri2.html?_r=1&scp=1&sq=Holding+the+Hungry+Hostage+&st=nyt&oref=slogin) (last visited Mar. 8, 2008).

<sup>2</sup>David Herszenhorn, *House Passes Farm Bill, Expanding Food Stamps*, N.Y. TIMES, July 28, 2007, available at <http://www.nytimes.com/2007/07/28/us/28farm.html?scp=1&sq=House+Passes+Farm+Bill%2C+Expanding+Food+Stamps&st=nyt> (last visited Mar. 8, 2008).

<sup>3</sup>S. REP. NO. 110-11964, September 21, 2007 (quoting Senator Leahy in his address to the Senate).

<sup>4</sup>Immigration Policy Center, *The “Secure America with Immigration and Enforcement” (“SAVE Act”) of 2007 (H.R. 4088) Summary and Analysis of Provisions*; Immigration Policy Center, Dec. 2007, <http://www.immigrationpolicy.org/index.php?content=fc071215> (Last visited Mar. 8, 2008).

<sup>5</sup>*Id.*

<sup>6</sup>See *sign-on letter in opposing HR. 4088/S.2368*, available at, <http://www.aila.org/content/default.aspx?bc=1019%7C6712%7C11536%7C23817> (Last accessed Mar. 8, 2008) (over 200 advocacy groups signed the letter opposing the SAVE Act).

<sup>7</sup>*Id.*

## ANNOUNCING

# The Women's Bar Association Annual Awards Dinner

Featuring

Speaker and the Recipient of the WBA Torchbearers Award

***JUSTICE RUTH BADER GINSBURG***

At

**The National Building Museum\***

**May 15, 2008**

**6:00 - 9:00 p.m.**

\*Located at 401 F Street, NW, Washington, DC 20001. Registration is available at [www.wbadc.org](http://www.wbadc.org).

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# SPOTLIGHT



**Ms. Ana Avedaño** is the Associate General Counsel and Director of the Immigrant Worker Program at the American Federation of Labor-Congress of Industrial Organizations (AFL-CIO). She graduated from the University of California at Berkeley, and from the Georgetown University Law Center. Ms. Avedaño has devoted her career to empowering immigrant workers and their families. She currently provides legal and technical analysis on matters related to immigration and workers' rights, and labor unions and their members in all sectors of the U.S. economy, including farm workers to high technology workers. Moreover, Ms. Avedaño manages international matters related to immigration for the AFL-CIO.

Prior to joining the AFL-CIO, Ms. Avedaño served as Assistant General Counsel to the United Food and Commercial Workers International Union, where she was a front-line advocate in organizing, bargaining, and representation campaigns for immigrant workers. Ms. Avedaño has testified before the United States Congress on U.S. immigration policy and its effect on workers, as well as before the Informal Interactive Hearings of the U.N. General Assembly on International Migration and Development. Ms. Avedaño has also served in the Appellate Court Branch of the National Labor Relations Board, and in private practice in both San Francisco and the District of Columbia.



**Mr. Gustavo Torres** is the Executive Director of CASA of Maryland and has held this position since 1994. Mr. Torres has been recognized both nationally and internationally for his leadership and vision regarding the immigrants' rights movement in the United States. CASA of Maryland is a community organization, founded in 1985 by both Americans and Central American refugees that were fleeing their home countries due to civil war.

The purpose of CASA of Maryland is to respond to the human needs of those refugees arriving in the D.C. metropolitan area. Originally a union leader from Colombia, Mr. Torres came to the U.S. to avoid political persecution. Under his leadership, CASA has grown from a small organization to a nationally awarded multi-service Latino advocacy and support agency.

Mr. Torres has been in various leadership positions, such as acting as the founding President of the Maryland Latino Coalition for Justice, a statewide grassroots lobbying organization, and participating as Board President of the National Day Labor Organizing Network. He has served on numerous task forces and leadership groups addressing issues of diversity, immigrant rights, and multiculturalism across the D.C. metropolitan area. As a result of his efforts, Mr. Torres has received a number of awards and distinctions, like the Ford Foundation's prestigious "Leadership for a Changing World" award in 2001. Additionally, under his direction, CASA of Maryland has received numerous awards and national recognition, such as the Mexican American Legal Defense Fund Community Service Award in 2006.

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