

1-1-2016

# Integrate and Reactivate the 1968 Fair Housing Mandate

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## Recommended Citation

Courtney L. Anderson, Integrate and Reactivate the 1968 Fair Housing Mandate, 13 *Hastings Race & Poverty L.J.* 1 (2016)

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# HASTINGS RACE AND POVERTY LAW JOURNAL

VOLUME XIII

NO. 1

WINTER 2016

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University of California Hastings College of the Law  
200 McAllister Street, San Francisco, CA 94102

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Winter 2016

Volume 13, Issue 1

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The *Hastings Race and Poverty Law Journal* is committed to promoting and inspiring discourse in the legal community regarding issues of race, poverty, social justice, and the law. This *Journal* is committed to addressing disparities in the legal system. We will create an avenue for compelling dialogue on the subject of the growing marginalization of racial minorities and the economically disadvantaged. It is our hope that the legal theories addressed in this *Journal* will prove useful in remedying the structural inequalities facing our communities.



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The *Hastings Race and Poverty Law Journal* (ISSN: 1546-4652) is published Winter and Summer online by the students of UC Hastings College of the Law.

The mailing address for the HRPLJ is 200 McAllister Street, San Francisco, CA 94102-4978. Telephone number: (415) 581-8953. Fax number: (415) 581-8934 Web site: <http://www.uchastings.edu/hrplj/index.html>. Email address: [hrplj@uchastings.edu](mailto:hrplj@uchastings.edu).

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The Fair Housing Act of 1968 (“FHA”) was created to eliminate discrimination in the sale, rental and financing of housing, and to mandate affirmative actions be taken to develop fair housing throughout the United States. Numerous scholars and practitioners have lamented both the failure of the FHA to enforce its sections calling for government entities to affirmatively further fair housing, and the narrow interpretation of the FHA. This narrow interpretation has effectively rendered the FHA useless when a plaintiff claims that environmental ills have reduced the value and livability of homes, because these “non-housing” claims are too far removed from the acquisition of housing. The Office of Housing and Urban Development (“HUD”) has set forth a Proposed Rule for assessing their compliance with section 3608 of the FHA by outlining a comprehensive data collection and reporting process. This Article suggests a benefit of the Proposed Rule left unexplored by HUD: this Proposed Rule both supports the cognizance of non-housing cases under the FHA and will provide the statistical evidence necessary for a plaintiff to make a prima facie case.

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In a time when people in the United States have been taking to the streets *en masse* to protest unjust socio-legal conditions like police brutality and the draconian enforcement of immigration laws, the time is ripe to reconceptualize what it means to break the law on principle. Twenty five years ago, Harvard Law Dean Martha L. Minow conceptualized “the risks of representation” for lawyers whose clients “entertain breaking the law as one of their strategies for achieving social change.” Responding substantively to Minow’s ideas, Houston Law Professor Michael A. Olivas presented three case studies to illuminate the risks of nonrepresentation, terminated representation, and truncated representation. Taking Minow’s and Olivas’s insights seriously, this Article applies them to current socio-legal situations in the United States, like Central American children and women seeking asylum, immigrant workers at industrial food processing plants, and social activists indicted by racially compromised grand jury systems. Delving deeply into the ethical implications of representing clients “when the state regime is the law breaker,” this Article proffers the concept of *la gran lucha* (the great struggle) to advance “the understanding that our pasts are not merely multicolored: rather, our diverse heritages wind through centuries of socio-legal struggles, which transcend the current nation state.” The Article concludes by presenting a partial history of Chicana/o and other Mexican American lawyers in California and Texas in order to contextualize the efforts of lawyers, and clients, who seek to create social change today within actual lineages of and fictive genealogies of past lawyers who confronted the risks of representation.

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Today, the welfare rights movement has faltered. However, the Supreme Court's recent marriage equality decision, with its emphasis on human dignity, lends hope to the notion that the Court should also acknowledge a right to food security. This Article identifies the role human dignity has served in the Court's constitutional analysis to acknowledge and protect, for example, rights to privacy, to travel, to be heard, to self-representation, to marry, to speak freely, and to preserve bodily integrity. According to the Court, these rights are all a part of liberty. Arguably, and as FDR said, "[i]f, as our Constitution tells us, our Federal Government was established among other things, to 'promote general welfare,' it is our plain duty to provide for that security upon which welfare depends."

This Article briefly examines food insecurity in the United States, showing that approximately 17 million households in this country suffer from food insecurity. This section also identifies the Court's jurisprudence regarding welfare rights, describing cases from the early 1970s forward that have routinely favored the government. The article's crux is the five arguments why the Court should acknowledge a constitutional right to food security, discounting those arguments commentators routinely wage against such a right.

Scholars have written on human dignity as a constitutional value. This Article stands apart by linking the Court's treatment of human dignity to a right to food security based largely on the role human dignity has played in Supreme Court jurisprudence, most recently in *Obergefell v. Hodges*. The Article also debunks the five main arguments commentators level against the Court protecting such a right, and, ideally, sets the stage for renewed efforts by lawyers and commentators to pursue a fundamental right to food security.

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## NOTE

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Police accountability has quickly pressed to the forefront of national conversations and subsequently, the national political agenda. Increasing prevalence of excessive and lethal use of force by police officers induced this attention. President Obama convened a Task Force on 21st Century Policing, after the Department of Justice conducted several pattern and practice investigation of misconduct following the high-profile deaths of unarmed Michael Brown and Eric Garner. Their deaths both resulted in no criminal charges against responsible officers. Civil suit was the only option left for officer accountability.

This Note addresses the use of 42 U.S.C. §1983 as the common civil cause of action to recover monetary damages and declarative relief against law enforcement officials following lethal use of force against civilians. This Note also focuses on the role of government indemnification of officer defense and any resulting monetary awards. Indemnification conflicts with the purpose of Section 1983 to provide a cause of action against law enforcement agents who engage in abuse of power. Indemnification does not serve deterrence by (near) complete alleviation of any individual liability and stake in civil litigation resulting from an officer's use of lethal force. This Note concludes with a call to local governments to act by limiting indemnification coverage in cases of lethal force and/or findings of intentional or reckless misconduct in a court of law.

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# Integrate and Reactivate the 1968 Fair Housing Mandate

COURTNEY LAUREN ANDERSON\*

## Introduction

The Fair Housing Act (“FHA” or “Act”) was enacted in 1968 with the objective to “provide, within constitutional limitations, for fair housing throughout the United States.”<sup>1</sup> The racial segregation and tensions that were rampant throughout the United States in the 1960s were the genesis of this legislation, which aimed to create a more integrated society.<sup>2</sup> The FHA bans practices that are motivated by a

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1. Fair Housing Act of 1968, 42 U.S.C. § 3601 (1968).
2. See 114 CONG. REC. 2985 (1968) (statement of Sen. Proxmire) (noting that Title VIII will establish “a policy of dispersal through open housing . . . look[ing] to the eventual dissolution of the ghetto and the construction of low to moderate income housing in the suburbs.”). See also Stanley P. Stocker-Edwards, *Black Housing 1860–1980: The Development, Perpetuation, and Attempts to Eradicate the Dual Housing Market in America*, 5 HARV. BLACK LETTER L.J. 50 (1988). Senator Walter Mondale stated that Title VIII represents “an absolutely essential first step” toward reversing the pattern of “two separate Americas constantly at war with one another.” 114 Cong. Rec. 2274 (1968). See also *id.* at 2524 (Statement of Sen. Brooks) (“Discrimination in the sale and rental of housing has been the root cause of the widespread patterns of de facto segregation which characterizes America’s residential neighborhoods.”). See also



racially discriminatory purpose, as well as those that “have a disparate impact on minorities.<sup>3</sup> Considered as a whole, the Act is designed to fulfill “the goal of open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups.”<sup>4</sup>

The FHA has failed in its integrationist mission. A contributing factor to this failure is the narrow view that courts take when presented with a case that implicates the FHA. Nearly every instance—and these instances are few and far between—of plaintiffs successfully bringing a claim under the FHA involves a case in which the claimant alleges explicitly discriminatory intent that prohibited a protected class from acquiring access to housing.<sup>5</sup> Clearly, such obvious prejudiced incidents are in line with what the FHA seeks to prohibit. To illustrate, section 3604 of the FHA makes it unlawful to “refuse to sell or rent . . . or otherwise make unavailable or deny, a dwelling to any person because of race.”<sup>6</sup> This Section is meant to prohibit acts and laws that prevent certain individuals from attaining housing due to their membership in a protected class.<sup>7</sup> However, the section 3604 mandate to affirmatively further fair housing requires more than a reactionary punishment to a narrow category of cases.<sup>8</sup>

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*Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972) (stating the FHA’s goal of creating “truly integrated and balanced living patterns” (quoting 114 Cong. Rec. 2706, 3422 (1968))); *Southend Neighborhood Improvement Ass’n v. Cnty. of St. Clair*, 743 F.2d 1207, 1210 (7th Cir. 1984) (“The [Fair Housing] Act is concerned with ending racially segregated housing.”).

3. See *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015).

4. *Otero v. N.Y. City Hous. Auth.*, 484 F.2d 1122, 1134 (2d Cir. 1973) (“Action must be taken to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat.”).

5. *Metro. Hous. Dev. Corp. v. Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977); see, e.g., *Williamson v. Hampton Mgmt. Co.*, 339 F. Supp. 1146 (N.D. Ill. 1972). See, e.g., *Kormoczy v. Sec’y, U.S. Dep’t of Hous. & Urban Dev.*, 53 F.3d 821, 822–24 (7th Cir. 1995).

6. 42 U.S.C. § 3604(a) (2015).

7. 42 U.S.C. § 3604(d) (2015).

8. 42 U.S.C. § 3608 (2015).

Section 3608 of the FHA requires “all executive departments and agencies [to] administer their programs and activities relating to housing and urban development (including any federal agency having regulatory or supervisory authority over financial institutions) in a manner affirmatively to further the purposes of the [FHA].”<sup>9</sup> Although this language may seem revolutionary on its face, the ambiguity and lack of substantive remedies that has been afforded in the clause reduces the meaningful and practical impact it will have.

On July 19, 2013, the Department of Housing and Urban Development (“HUD”) sought to change this by issuing a proposed rule titled “Affirmatively Furthering Fair Housing” (“Proposed Rule”).<sup>10</sup> The stated purpose of this rule is to provide recipients of HUD funds with the tools they need to fulfill their statutory obligation “to take steps proactively to overcome historic patterns of segregation, promote fair housing choice, and foster inclusive communities for all.”<sup>11</sup> The tools that HUD will provide include data describing the demographics of neighborhoods, the disproportionate housing needs of protected classes, integration and segregation trends, and the racial and ethnic makeup of areas that have high concentrations of poverty.<sup>12</sup> HUD will also detail the proximity of neighborhoods to critical assets and stressors, such as schools, transportation, environmental hazards, and employment opportunities.<sup>13</sup> HUD is providing this data in order to reduce the time, effort, and expense that HUD program participants currently have to expend in collecting this material.<sup>14</sup> HUD grantees will use this data to assess determinants of fair housing, set fair housing priorities and goals, devise action plans to better affirmatively further fair housing, namely through the enhanced coordination among community and investment planning, and public sector housing

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9. 42 U.S.C. § 3608(c) (2015).

10. Affirmatively Furthering Fair Housing, 78 Fed. Reg. 43710 (proposed July 19, 2013) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576 & 903).

11. *Id.*

12. *Id.*

13. *Id.*

14. Affirmatively Furthering Fair Housing Rule, 80 Fed. Reg. 42272 (July 16, 2015) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576 & 903).

decisions.<sup>15</sup> Recipients of HUD funds transmit this information to the agency via the Assessment of Fair Housing, which will replace the Analysis of Impediments.<sup>16</sup> This Assessment of Fair Housing is designed to analyze fair housing patterns and obstacles.<sup>17</sup> HUD also intends for this data to assist other government agencies with their planning policies, and dissemination of pertinent civil rights data to public and private stakeholders.<sup>18</sup> In addition to providing the data described above, HUD will incorporate fair housing planning into other development initiatives. These initiatives include community development, and land-use policies.<sup>19</sup> The Proposed Rule also purports to encourage collaborations across regions<sup>20</sup> and that fair housing practices live.<sup>21</sup>

The Proposed Rule takes an expansive view of affirmatively furthering fair housing as exemplified by its intent to “reduce disparities in access to key community assets based on race, color, religion, sex, familial status, national origin, or disability, thereby improving economic competitiveness and quality of life.”<sup>22</sup> This language shows a significant shift from court opinions discussing this FHA issue that have sought to “prevent low cost public housing units [from being constructed] in neighborhood[s] where they do not belong.”<sup>23</sup> Despite the promise of this broad interpretation of the FHA’s intent, HUD has limited its prediction of the impact of the Proposed Rule to administrative niceties. These include alleviating the burden of compiling data on § 3608 and providing clarity on an admittedly confusing and ineffective procedure, Analysis of Impediments, that currently measures compliance with the

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15. Affirmatively Furthering Fair Housing Rule, 80 Fed. Reg. 42272 (July 16, 2015) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576 & 903).

16. *Id.*

17. *Id.*

18. *Id.*

19. Affirmatively Furthering Fair Housing, 78 Fed. Reg. 43710.

20. *Id.*

21. *Id.*

22. Affirmatively Furthering Fair Housing Rule, 80 Fed. Reg. at 42273.

23. *United States v. Yonkers Bd. Educ.*, 624 F. Supp. 1276, 1310 (S.D.N.Y. 1985).

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affirmatively furthering mandate.<sup>24</sup>

This Article sees the potential in the Proposed Rule as extending beyond logistical ease. HUD has provided the foundation to permit subject matters that indirectly affect housing, but directly affect the creation of integrated neighborhoods. The Proposed Rule can also increase the data plaintiffs are required to provide to make a prima facie disparate impact case under the Act and supports the movement to permit individuals to bring a private right of action under the FHA without utilizing additional enforcement mechanisms.

Part I of this Article provides a summary of the FHA, primarily sections 3604 and 3608, and gives insight into their intent,<sup>25</sup> success, and shortcomings. Part II describes the Proposed Rule, and how the creation of this rule was driven by a realization that increasing measurability and effectiveness of section 3608 required substantive remediation of the process by which this mandate is evaluated. Part III critiques the Proposed Rule with particular emphasis on how HUD limits the very rule that it drafted by virtue of not acknowledging the far-reaching potential of the Proposed Rule. Parts IV and V advance the promise of the Proposed Rule into substantive legal remediation by explaining how it can add the substance the lawmakers intended the FHA to possess.

## I. The Fair Housing Act

Part I provides an overview of the FHA of 1968, giving specific attention to its primary substantive sections, 3604 and 3608.<sup>26</sup> Part A discusses the genesis of the FHA and its grounding in decades of pervasive racial segregation of housing. This Part also analyzes the Act's primary enforcement mechanisms to promote fair housing by prohibiting discriminatory intent in housing availability. Part B looks at the requirement under section 3608 that government agencies

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24. *Kormoczy*, 53 F.3d 821.

25. See generally Florence W. Roisman, *Affirmatively Furthering Fair Housing in Regional Housing Markets: The Baltimore Public Housing Desegregation Litigation*, 42 WAKE FOREST L. REV. 333 (Summer 2007).

26. Fair Housing Act of 1968, 42 U.S.C. §§ 3604, 3608 (1968).

“affirmatively further fair housing.”<sup>27</sup> Going beyond simply banning discriminatory behavior, the affirmatively furthering clause creates a duty for proactive measures in federal and state actions. Part B also summarizes the requirements and challenges with judicial review and enforcement of those duties.

### A. Background and Purpose of the Fair Housing Act

The FHA of 1968 seeks to eliminate bias in housing decisions in the United States.<sup>28</sup> Namely, it prohibits discrimination in the sale, rental, and financing of housing on the basis of race or color, religion, sex, national origin, familial status, or disability.<sup>29</sup> Originally introduced in 1966 by the Johnson administration, Congress passed the FHA in the wake of Dr. Martin Luther King, Jr.’s assassination.<sup>30</sup> Because the final statutory language resulted from a Senate compromise amendment to an omnibus House civil rights bill, the legislative history is sparse with no committee reports, and the hearing records are limited to discussing the broad objective of ending urban racial ghettos.<sup>31</sup> In the decades following its passage, most states and many local governments have enacted their own fair housing laws that are equivalent to the FHA.<sup>32</sup>

Sections 3604 and 3608 of the FHA contain its primary substantive provisions. Section 3604 prohibits discrimination in the sale or rental of a dwelling or in the terms, conditions, or privileges of sale or rental of a dwelling.<sup>33</sup> Furthermore, it bars discrimination in the “provision of services or facilities in connection therewith.”<sup>34</sup> This

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27. 42 U.S.C. § 3608 (1968).

28. 42 U.S.C. § 3601 (2015).

29. *Id.*

30. Robert G. Schwemm, *The Fair Housing Act After 40 Years: Continuing the Mission to Eliminate Housing Discrimination and Segregation: Cox, Halprin, and Discriminatory Municipal Services Under the Fair Housing Act*, 41 *IND. L. REV.* 717, 757 (2008).

31. Robert G. Schwemm, *Discriminatory Housing Statements and 3604(c): A New Look at the Fair Housing Act’s Most Intriguing Provision*, 29 *FORDHAM URB. L.J.* 187, 198 (2001).

32. *Id.* at 275.

33. 42 U.S.C. § 3604(a), (b) (2015).

34. 42 U.S.C. § 3604(b).

section also forbids discriminatory intent in representing dwelling availability for inspection, sale, or rental to a party.<sup>35</sup> Likewise, it bans inducing or attempting to induce the sale or rental of a dwelling by appeal to the discriminatory motives of the seller.<sup>36</sup> Combined, these provisions seek to eliminate the impact of discriminatory intent on the availability of housing, providing a cause of action where such conduct occurs.

Section 3608(d) grants the Secretary of HUD the authority and responsibility to administer the provisions of the FHA.<sup>37</sup> The Act as written does not sit passively, providing only a cause of action for an aggrieved party. Rather, it creates a duty for all federal executive departments and agencies to affirmatively further fair housing.<sup>38</sup> Through a 1994 executive order, President Clinton expanded the authority of HUD and directed stronger measures be taken to affirmatively further fair housing in federal programs in order to better address still pervasive housing discrimination.<sup>39</sup> The order also created the President's Fair Housing Council, a cabinet level organization comprised of the heads of numerous executive agencies, designed to increase coordination across the executive branch in affirmatively furthering fair housing.<sup>40</sup>

The FHA responds to a long history of racial discrimination in housing and in the United States.<sup>41</sup> In the late nineteenth and early

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35. 42 U.S.C. § 3604(c).

36. 42 U.S.C. § 3604(d).

37. 42 U.S.C. § 3608(a).

38. 42 U.S.C. § 3608(d) ("All executive departments and agencies shall administer their programs and activities relating to housing and urban development (including any Federal agency having regulatory or supervisory authority over financial institutions) in a manner *affirmatively to further the purposes of this subchapter* and shall cooperate with the Secretary to further such purposes." (emphasis added)).

39. Exec. Order No. 12892, 3 C.F.R. § 849 (1995), *reprinted as amended in* 42 U.S.C. § 3608 app. at 5012–14 ("If all of our executive agencies affirmatively further fair housing in the design of their policies and administration of their programs relating to housing and urban development, a truly nondiscriminatory housing market will be closer to achievement.").

40. *Id.*

41. Swati Prakash, Comment, *Racial Dimensions of Property Value Protection Under the Fair Housing Act*, 101 CALIF. L. REV. 1437, 1445–46 (2013).

twentieth century, racial segregation codified racial preferences through express racial zoning and racially restrictive covenants. In *Buchanan v. Warley*, the Supreme Court of the United States struck down racial zoning as unconstitutional.<sup>42</sup> Almost a decade later, in *Village of Euclid v. Ambler Realty Co.*, the Court decided to uphold zoning land by use and density, finding this a valid exercise of the police powers of local governments, which began the shift from de jure to de facto racial segregation.<sup>43</sup> Justice Sutherland's majority opinion gave segregationists their new argument by equating apartment buildings to a nuisance, particularly when placed next to single-family residential uses.<sup>44</sup> As African Americans were much more likely to rent than own detached housing, segregating within residential uses acted as an effective proxy for race, justified in the name of preserving property values.<sup>45</sup> Throughout the twentieth and into the twenty-first century, courts have upheld ordinances on the basis of preserving such values.<sup>46</sup> This trend accelerated with post World War II "white flight" and the increasingly suburbanized sprawl of the new millennium.<sup>47</sup>

Throughout the twentieth century, both public and private sector actions worked to create residential segregation.<sup>48</sup> Initially, private homeowners sought to maintain white neighborhoods through the use of racially restrictive covenants.<sup>49</sup> Even after the courts finally stopped enforcing these covenants in 1948, the growing real estate industry took up the gauntlet of maintaining residential segregation.<sup>50</sup> It became common practice in the real estate industry to profit off white fears of

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42. *Buchanan v. Warley*, 245 U.S. 60, 74 (1917) (holding racial zoning unconstitutional on the limited basis racially based restraints on the alienation of property violated Due Process Clause of the Fourteenth Amendment).

43. See *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

44. *Id.* at 394.

45. See William Collins and Robert Margo, *Home Ownership and Race from the End of the Civil War to the Present*, 101 AM. ECON. REV., 355 (May 2011).

46. Prakash, *supra* note 41, at 1483.

47. *Id.* at 1454.

48. *Id.* at 1455.

49. *Id.* at 1457.

50. See *Shelley v. Kraemer*, 334 U.S. 1 (1948).

racial minorities though “panic selling” in transitional neighborhoods and “blockbusting.”<sup>51</sup> The federal government supported residential segregation housing through mortgage guarantee programs that refused to insure or subsidize home mortgages in integrated neighborhoods, justified as market-based risk aversion.<sup>52</sup> The federal government also subsidized public infrastructure, such as highways and utility improvements, which were specifically sited to impact racial minority housing.<sup>53</sup> These impacts were self-reinforcing as local governments zoned more industrial and commercial development near the new infrastructure, causing increasingly harmful externalities to minority communities.<sup>54</sup> Today, the cycle continues as remediation of “blight” has become the justification for widespread destruction and redevelopment of minority residential neighborhoods.<sup>55</sup>

The FHA directly addresses many of these historical issues: section 3604 directly attacks discriminatory intent in housing availability.<sup>56</sup> This section bans not only baseline bias and discrimination, but also responds directly to the practices of the real estate industry that were prevalent throughout the last century. Section 3608 addresses the more ambitious goal of eliminating disparate impact.<sup>57</sup> The section’s affirmatively furthering requirement responds to the federal government’s practices that, while at least seeming facially neutral or market-based, had the real effect of entrenching and subsidizing racially segregated housing patterns.<sup>58</sup>

Although the FHA professed noble goals, the Act as passed in 1968 included enforcement mechanisms too weak to effectively enforce the antidiscrimination provisions.<sup>59</sup> Originally, private

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51. Prakash, *supra* note 41, at 1460.

52. *Id.* at 1454.

53. *Id.* at 1456.

54. Prakash, *supra* note 41, at 1452.

55. *Id.* at 1456.

56. 42 U.S.C. § 3604(c).

57. 42 U.S.C. § 3608(d) (2015).

58. *See* 42 U.S.C. § 3608.

59. Melissa Rothstein & Megan K. Whyte, Issue Brief, *Teeth in the Tiger: Organizational Standing as a Critical Component of Fair Housing Act Enforcement* 3 AM. CONST. SOC’Y (Apr. 2012) [https://www.acslaw.org/sites/default/files/Rothstein\\_](https://www.acslaw.org/sites/default/files/Rothstein_)



enforcement provided only nominal relief, and federal agencies enforced mere handfuls of cases over the first two decades of the Act's existence.<sup>60</sup> Congress sought to redress the lack of enforcement by passing the Fair Housing Amendments Act of 1988.<sup>61</sup> The amendments added an administrative enforcement procedure, which can impose civil fines of up to \$10,000 for the first offense, \$25,000 for the second offense within five years, and \$50,000 after two or more offenses within seven years.<sup>62</sup> Congress also toughened private enforcement by removing the \$1,000 cap on punitive damages and authorizing the award of attorneys' fees to all successful plaintiffs.<sup>63</sup> Finally, Congress added disabled persons and families with children as protected classes.<sup>64</sup>

While generally positive, many commentators still express disappointment with the FHA's impact.<sup>65</sup> In particular, the FHA's failure to provide relief for plaintiff's bringing disparate impact claims has become more pronounced in the last couple of decades.<sup>66</sup> Unfortunately, the statute has been unable to correct the implicit and systemic bias underlying and maintaining segregation.<sup>67</sup> Only

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60. Fair Housing Act of 1968, Pub. L. No. 90-284, § 812(c), 82 Stat. 73, 82 (1968) (limiting the remedies for private civil enforcement to injunctive relief, actual damages, and \$1,000 in punitive damages); James A. Kushner, *An Unfinished Agenda: The Federal Fair Housing Enforcement Effort*, 6 YALE L. & POL'Y REV. 348 (1988) (finding that U.S. Department of Justice had handled approximately 30 FHA cases by 1979 but dropped to virtually nonexistent enforcement throughout the early years of the Regan administration).

61. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (1988).

62. 42 U.S.C. § 3612(g)(3) (2015).

63. 42 U.S.C. § 3613(a), (c) (2015).

64. 42 U.S.C. §§ 3604–3606.

65. Prakash, *supra* note 41, at 1461–62.

66. Stacey E. Seichshnaydre, *Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act*, 63 AM. U. L. REV. 357 nn.221-22 (2013).

67. Wendell E. Pritchett, *Where Shall We Live? Class and the Limitations of Fair Housing Law*, 35 URB. L. 399, 469–70 (2003) ("Housing discrimination and racial segregation, while they are intimately related, are not the result of the same set of factors. Achieving racial integration would require an assessment of the interaction

focusing on the transactional aspects of housing is insufficient to correct pervasive segregation. Unfortunately, recent court decisions are narrowing the focus of FHA enforcement to just those transactional aspects by construing it to only apply to actions taken before or during acquisition of the property.<sup>68</sup> These cases severely limit the potential extension of FHA's enforcement mechanisms to related non-housing issues—those that do not directly affect the ability of those residents to live where they desire—or to protect critical neighborhood assets.

### B. Affirmatively Furthering Clause

With the affirmatively furthering clause, Congress expressed a goal much broader than merely providing a mechanism to redress discriminatory intent. Indeed, one of the early FHA cases decided by the Supreme Court of the United States noted that the legislative intent of the clause created an obligation for proactive measures to address existing segregation and related barriers.<sup>69</sup> Lower courts have supported this interpretation of the affirmatively furthering clause, requiring recipients of federal HUD funds do more than simply not discriminate; rather, they must actively promote integration.<sup>70</sup>

The FHA leaves the precise scope of the affirmatively furthering

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of race and class in the creation of American communities.”).

68. See *Cox v. City of Dallas*, 430 F.3d 734, 742–43 (5th Cir. 2005) (“§ 3604(a) gives no right of action to current owners claiming that the value or ‘habitability’ of their property has decreased due to discrimination in the delivery of protective city services.”); *Halprin v. Prairie Single Family Homes of Dearborn Park Ass’n*, 388 F.3d 327 (7th Cir. 2004) (holding § 3604(a) was designed only to address “the widespread practice of refusing to sell or rent homes in desirable residential areas to members of minority groups”).

69. *Trafficante*, 409 U.S. at 211 (“the reach of the proposed law was to replace the ghettos ‘by truly integrated and balanced living patterns’” (quoting Sen. Walter F. Mondale)).

70. See, e.g., *Shannon v. U.S. Dep’t of Hous. & Urb. Dev.*, 436 F.2d 809, 816, 821–22 (3d Cir. 1970) (holding that the FHA requires HUD to affirmatively further fair housing by considering the racial and socioeconomic effects of its site selection decisions for public housing).

clause to the determination of the Secretary of HUD.<sup>71</sup> Interpreting the Act and subsequent executive orders, HUD places a number of affirmative duties on funding recipients. The primary requirement is that any federal or state agency receiving federal housing funds must analyze “impediments” to fair housing in their program and “take appropriate actions to overcome the effects of any impediments identified through that analysis.”<sup>72</sup> This most often affects local governments through participation in the Community Development Block Grant (“CDBG”) program, a common source of federal funding for the revitalization of low-income communities.<sup>73</sup> HUD’s Fair Housing Planning Guide provides local government CDBG recipients with requirements for the analysis of impediments as well as best practices for implementation of programs that actively reduce the barriers to fair housing.<sup>74</sup> After completing the analysis, each funding recipient must submit a written affirmation certifying that the program will affirmatively further fair housing.<sup>75</sup> Other requirements for certain HUD grants include development of five-year comprehensive housing affordability strategies and implementation plans.<sup>76</sup>

Despite steps taken to increase implementation of fair housing in the regulatory and administrative setting, today’s potential plaintiffs face significant problems enforcing the affirmatively furthering clause of section 3608. The first hurdle for a plaintiff is the issue of standing, because the FHA does not create a private enforcement provision to challenge the actions of HUD or funding recipients, for failing to meet their obligations under section 3608.<sup>77</sup> Private parties seeking to enforce section 3608 have turned to the Administrative Procedures

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71. 42 U.S.C. § 3608(a).

72. 24 C.F.R. § 91.225(a)(1) (2015).

73. See U.S. DEP’T OF HOUS. & URB. DEV., THE IMPACT OF CDBG SPENDING ON URBAN NEIGHBORHOODS (2002).

74. OFF. FAIR HOUS. & EQUAL OPPORTUNITY, U.S. DEP’T OF HOUS. & URB. DEV., *Fair Housing Planning Guide* (1996), <http://www.hud.gov/offices/fheo/images/fhpg.pdf>.

75. *Id.*

76. 42 U.S.C. § 12705 (2012).

77. Rothstein & Whyte, *supra* note 59, at 10.

Act (“APA”),<sup>78</sup> 42 U.S.C. § 1983, and the False Claims Act (“FCA”)<sup>79</sup> for standing to enforce the mandate.<sup>80</sup>

In 1970, *Shannon v. U.S. Department of Housing and Urban Development* became the first appellate decision involving section 3608, establishing a private party’s right to challenge HUD’s actions under the affirmatively furthering mandate.<sup>81</sup> In *Shannon*, a group of local resident plaintiffs challenged HUD’s decision to fund a public housing project that they claimed would increase racial concentrations in that portion of Philadelphia.<sup>82</sup> The court held judicial review of agency’s compliance with section 3608 was available pursuant to the APA.<sup>83</sup> More importantly, *Shannon* set the tone for all future FHA litigation by establishing the proposition that the purpose of the FHA, specifically section 3608, was racial integration for the benefit of entire communities and not merely to prevent discrimination against individual minorities.<sup>84</sup> Other section 3608 cases also endorsed this proposition.<sup>85</sup>

These initial cases established a broad view of which aggrieved parties were within the “zone of interest” required for standing under the APA.<sup>86</sup> All plaintiffs must pass the threshold question for APA

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78. 42 U.S.C. § 1983 (2015).

79. 31 U.S.C. § 3729 (2015).

80. Rothstein & Whyte, *supra* note 59, at 10.

81. *Shannon*, 436 F.2d at 820.

82. *Id.* at 811–12.

83. *Id.* at 820.

84. *Shannon*, 436 F.2d at 816–17.

85. See, e.g., *Clients’ Council v. Pierce*, 711 F.2d 1406, 1425 (8th Cir. 1983); *Alschuler v. U.S. Dep’t of Hous. & Urb. Dev.*, 686 F.2d 472, 482 (7th Cir. 1982); *Jorman v. Veterans Admin.*, 579 F. Supp. 1407, 1418 (N.D. Ill. 1984); *Young v. Pierce*, 544 F. Supp. 1010, 1017–18 (E.D. Tex. 1982); *Schmidt v. Bos. Hous. Auth.*, 505 F. Supp. 988, 996–97 (D. Mass. 1981); *Blackshear Residents Org. v. Hous. Auth. of Austin*, 347 F. Supp. 1138, 1146 (W.D. Tex. 1972).

86. *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 399–400 (1987) (“The ‘zone of interest’ test is a guide for deciding whether, in view of Congress’ evident intent to make agency action presumptively reviewable, a particular plaintiff should be heard to complain of a particular agency decision. In cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff’s interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to

suits: whether they are sufficiently aggrieved by agency action to gain standing.<sup>87</sup> The test for standing in this case is whether the interest they are claiming was harmed was an interest Congress intended to protect.<sup>88</sup> In *Shannon*, the Third Circuit held plaintiffs' interest in challenging discriminatory site selection for subsidized housing was within the "zone of interest" Congress intended to protect with the FHA.<sup>89</sup> The *Shannon* plaintiffs argued that a concentration of low rent public housing located in an area of minority "racial concentration" would have adverse social and planning consequences.<sup>90</sup> In its first FHA case, decided in 1972, the Supreme Court of the United States endorsed this broad purpose, finding Congress's intent was to replace racial ghettos with "truly integrated and balanced living patterns."<sup>91</sup>

Soon after *Shannon*, the Second Circuit further expanded the interpretation of section 3608's broad goal of racial integration.<sup>92</sup> In *Otero v. Park City Housing Authority*, minority families challenged the New York City Housing Authority's ("Authority") decision not to give displaced minority families first priority in leasing a HUD-funded affordable housing development.<sup>93</sup> The Authority based its decision on its duty under section 3608 to promote racial integration, and gave some white families priority in moving into the majority non-white area.<sup>94</sup> The Second Circuit upheld the Authority's position, stating that the Authority was obligated "to take affirmative steps to promote racial integration even though this may in some instances not operate to the immediate advantage of some non-white persons."<sup>95</sup>

Unfortunately for private proponents of the affirmatively furthering mandate, the APA provides few remedies, and then only

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permit the suit. The test is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff.").

87. Administrative Procedure Act § 10, 5 U.S.C. § 702 (2015).

88. *Shannon*, 436 F.2d at 818.

89. *Id.* at 818.

90. *Id.* at 819.

91. *Trafficante*, 409 U.S. at 211.

92. *Otero*, 484 F.2d at 1124.

93. *Id.* at 1125–29.

94. *Id.*

95. *Id.* at 1124–25.

after highly deferential judicial review. First, the APA limits claims to review of federal agency action, providing no relief for state or local agency actions.<sup>96</sup> Even when reviewing a federal agency's actions, review is highly deferential and limited to enjoining actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."<sup>97</sup>

On its face, 42 U.S.C. § 1983 seems to fill the gap by creating a private cause of action directly against state and local housing agencies. Any agency accepting HUD funding is subject to the affirmatively furthering mandate, and § 1983 provides a wide spectrum of relief for the deprivation of any civil or constitutional rights, including monetary, punitive, injunctive, and declarative relief.<sup>98</sup> Unfortunately, recent case law has called into question the broad standing of private plaintiffs under § 1983.<sup>99</sup> The Supreme Court of the United States has recently held that private enforcement of federal funding provisions under § 1983 require an "unambiguously conferred right."<sup>100</sup> The vagueness of section 3608's affirmatively furthering mandate makes one question whether Congress unambiguously intended an individually enforceable right, especially considering the section's textual concern of controlling regulatory agencies. Recent courts have split on whether section 3608 is enforceable through § 1983.<sup>101</sup> As a result, at this time § 1983 is not a viable option for widespread private enforcement of the affirmatively furthering mandate.

Recently, *Anti-Discrimination Center of Metro New York, Inc. v. Westchester County* breathed new life into private enforcement of

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96. See 5 U.S.C. § 704 (1966).

97. 5 U.S.C. § 706(2)(a) (1966).

98. See 42 U.S.C. § 1983.

99. Rothstein & Whyte, *supra* note 59, at 11.

100. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 279–283 (2002) ("We made clear that unless Congress speak[s] with a clear voice, and manifests an 'unambiguous' intent to confer individual rights, federal funding provisions provide no basis for private enforcement by § 1983.").

101. Compare *Wallace v. Chi. Hous. Auth.*, 298 F. Supp.2d 710, 714 (N.D. Ill. 2003) and *Langlois v. Abington Hous. Auth.*, 234 F. Supp.2d 33 (D. Mass. 2002) with *S. Middlesex Opportunity Council, Inc. v. Town of Framingham*, No. 07-12018-DPW, 2008 WL 4595369, at \*14–\*16 (D. Mass. Sept. 30, 2008) and *Thomas v. Butzen*, No. 04 C 5555, 2005 WL 2387676, at \*10 (N.D. Ill. Sept. 26, 2005).

section 3608.<sup>102</sup> In a novel legal move, a private advocacy organization, the Anti-Discrimination Center of Metro New York (“ADC”), sued Westchester County, an affluent predominately white suburb of New York City.<sup>103</sup> On behalf of a multi-government consortium, Westchester County obtained approximately \$50 million in federal CDBG funds from HUD between 2000 and 2006.<sup>104</sup> ADC sued under the FCA, a federal statute dating back to the Civil War, which authorizes private parties to bring *qui tam* suits in the name of the United States government against parties who have submitted false or fraudulent claims to the federal government for payment.<sup>105</sup> ADC alleged that Westchester County falsely certified to HUD that it conformed to the affirmatively furthering mandate during the challenged funding period.<sup>106</sup>

Successful FCA claims require showing that the fraud was knowingly committed.<sup>107</sup> Furthermore, the statute imposes a high evidentiary burden by requiring the enforcing party to rely on evidence not readily available to the public.<sup>108</sup> The ADC based its FCA claim on internal documents obtained through New York’s Freedom of Information Law.<sup>109</sup> Westchester County moved to dismiss, claiming the suit was barred due to ADC’s use of public information and claimed that the certifications were not fraudulent.<sup>110</sup> The court held that although the information was public, the documents were “not obtained from a source enumerated in the section 3730(e)(4)(A)

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102. U.S. *ex rel.* Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cnty., 668 F. Supp. 2d 548 (S.D.N.Y. 2009).

103. See Ford Fessenden, *County Sued Over Lack of Affordable Homes*, N.Y. TIMES (Feb. 4 2007), [http://www.nytimes.com/2007/02/04/nyregion/nyregionspecial2/04we main.html?n=Top%2FReference%2FTimes%20Topics%2FSubject%2FH%2FHousing-&\\_r=0](http://www.nytimes.com/2007/02/04/nyregion/nyregionspecial2/04we main.html?n=Top%2FReference%2FTimes%20Topics%2FSubject%2FH%2FHousing-&_r=0).

104. *Westchester*, 668 F. Supp. 2d at 550.

105. 31 U.S.C. §§ 3729(a), 3730(b)(1) (2009).

106. *Westchester*, 668 F. Supp. 2d at 561.

107. 31 U.S.C. § 3729.

108. 31 U.S.C. § 3730(e)(4).

109. Robert G. Schwemm, *Overcoming Structural Barriers to Integrated Housing: A Back-to-the-Future Reflection on the Fair Housing Act’s “Affirmatively Further” Mandate*, 100 KY. L.J. 125, 155 (2012).

110. *Id.* at 150.

jurisdictional bar [of the FCA].”<sup>111</sup> As a result, the United States Department of Justice intervened and negotiated a settlement agreement.<sup>112</sup> In the settlement, Westchester County was required to spend over \$51 million to create affordable housing units.<sup>113</sup> In such glaring instances of fraud, the FHA as written is helpful in bolstering a plaintiff’s case. However, plaintiffs utilizing the APA or 42 U.S.C. § 1983 would be able to leverage the ability to bring a disparate impact claim under the FHA. While HUD initially hailed the settlement as a “landmark civil rights settlement,” it has led to years of continued legal wrangling with little indication that Westchester County has taken any concrete steps to fully comply with the affirmatively furthering mandate.<sup>114</sup>

The post-*Westchester* changes to the FCA again leave proponents of the affirmatively furthering mandate disappointed. Future FCA claims will require true “whistleblower” information.<sup>115</sup> The statute’s requirement for an “original source” of information as a basis for a claim is unlikely to be overcome simply by analysis of publicly available data.<sup>116</sup> The other significant limitation of the FCA is that it bars claims against a State, limiting plaintiffs to claims against municipalities under the statute.<sup>117</sup> Short of a Congressional amendment creating a direct cause of action for private enforcement of section 3608, the future of enforcement of the affirmatively furthering mandate lies firmly in HUD’s hands. HUD’s Rule shows initiative to create forward momentum on this issue.<sup>118</sup>

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111. U.S. *ex rel.* Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cnty., 495 F. Supp. 2d 375, 383 (S.D.N.Y. 2007) (Subsequent to this ruling, 31 U.S.C. § 3730(e)(4)(A) was amended to preclude qui tam suits based on information obtained from public disclosure statutes.).

112. Stipulation and Order of Settlement and Dismissal, U.S. *ex rel.* Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cnty., 668 F. Supp. 2d 548 (S.D.N.Y. 2009), <http://www.westchesterhousingmonitor.org/files/Stipulation.pdf>.

113. *Id.*

114. Schwemm, *supra* note 109, at 160–63.

115. *Westchester*, 495 F. Supp. 2d at 379.

116. False Claims Act § 3730(e)(4), 31 U.S.C. § 3729 (2015).

117. 31 U.S.C. § 3729(a).

118. Affirmatively Furthering Fair Housing, 78 Fed. Reg. 43710.



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## II. Affirmatively Furthering Fair Housing Proposed Rule

The Proposed Rule “has come from necessity due to possible inefficiencies of the current system and uses various approaches to achieve its goal. This Article has framed the Proposed Rule in a more consumable form for purposes of evaluating its impact on the FHA. However, this Article does not purport to be a quick or all-inclusive guide to the Proposed Rule.

HUD created the Proposed Rule to correct the negative aspects of the current system used to assess compliance with section 3608 of the FHA and to provide guidance to communities, agencies, and individuals in fulfilling the FHA’s original promise of affirmatively furthering fair housing.<sup>119</sup> The Proposed Rule attempts to serve this purpose by aiding communities in their efforts to assess housing determinants or prioritize issues for response, and communities taking meaningful action to affirmatively further fair housing.<sup>120</sup> In order for the objectives of the Proposed Rule to be realized, the current state or process it is designed to improve must be understood. As such, Part II discusses the current process and the problems that plague it. After establishing the current state and process of the FHA, Section B will discuss the details concerning the Proposed Rule, including its purpose, goals, process, the changes being made, negative aspects, and the subsequent impact.

### A. Analysis of Impediments

The current process under which entities are evaluated for compliance with section 3608 of the FHA is called the Analysis of Impediments (“AI”). The AI is a review of both private and public sector impediments that must be conducted by entities prior to their

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119. Affirmatively Furthering Fair Housing, 78 Fed. Reg. 43710.

120. *Id.*

receipt of federal housing and community development funds.<sup>121</sup> The AI was to be used in affirmatively furthering fair housing by reviewing barriers, such as policies, practices, or procedures, which have the effect of creating a discriminatory housing environment.<sup>122</sup> HUD defines these barriers or “impediments” to fair housing choices as “any action, omission, or decision taken or that will have the effect of discrimination which restricts housing based on race, color, religion, sex, disability, familial status, [or] national origin.”<sup>123</sup> Additionally, the AI was to be used as a tool for essential community and business leaders (e.g. lenders, housing providers, policy makers, etc.) to better plan and implement actions to further fair housing.<sup>124</sup> Specifically, the AI was expected to target local laws, procedures, and practices, and assess its impact on the furthering access to fair housing.<sup>125</sup>

HUD’s suggested format for AI packages includes five general areas of coverage, with the expected introduction and executive summary at the forefront of the package.<sup>126</sup> Following the introduction and executive summary, HUD’s suggested format includes “jurisdictional background,” such as demographics, income levels, and similar dynamics unique to the jurisdiction.<sup>127</sup> The next suggested inclusion is an evaluation of the jurisdiction’s current state, such as compliance rates, complaints, acts that resulted in fines or suits filed by the United States Department of Justice.<sup>128</sup> One of the most important suggested sections calls for the identification of barriers or “impediments” to fair housing.<sup>129</sup>

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121. OFF. FAIR HOUS. & EQUAL OPPORTUNITY, U.S. DEP’T OF HOUS. & URB. DEV., FAIR HOUSING PLANNING GUIDE VOL. 1, 2-7 (1996).

122. U.S. GOV’T ACCOUNTABILITY OFF., HOUSING & COMMUNITY GRANTS: HUD NEEDS TO ENHANCE ITS REQUIREMENTS AND OVERSIGHT OF JURISDICTIONS’ FAIR HOUSING PLANS 5 (2010).

123. OFF. FAIR HOUS. & EQUAL OPPORTUNITY, *supra* note 74, at 2-8.

124. U.S. GOV’T ACCOUNTABILITY OFF., HOUSING & COMMUNITY GRANTS, *supra* note 122, at 5.

125. *Id.*

126. *Id.* at 7.

127. *Id.*

128. *Id.*

129. *Id.*

According to HUD's Fair Housing Planning Guide,<sup>130</sup> data collected for the AI consists of "generic data items" that includes zoning and land use policies, tax assessment practices, patterns of public or /assisted housing, occupancy in section 8 housing,<sup>131</sup> the type and amount of fair housing complaints or suits, and lastly, data from the Home Mortgage Disclosure Act. Public policies and practices involving housing and housing-related activities are also considered data under the AI system.<sup>132</sup> Importantly, there is no requirement for participants to actually collect or create new data in order to complete the AI. The AI system is not inflexible and entities are afforded the discretion to use existing data in its AI package.<sup>133</sup> The codified rule mandates that participants "conduct an analysis to identify impediments to fair housing choice within the State, take appropriate actions to overcome the effects of any impediments identified through that analysis, and maintain records reflecting the analysis and actions in this regard."<sup>134</sup> As such, entities may fall well within the current platform's requirements even when using established data from federal agency databases and studies, academic studies, private housing reports, and other creditable sources.<sup>135</sup>

Once entities obtain the necessary data and compile their AI reports, HUD encourages the entities to share the information with the public, government leaders, and other organizations that are also required to complete the AI.<sup>136</sup> It is important to note that AI's are normally not submitted to HUD for review or consideration.<sup>137</sup> Instead, HUD only receives an entity's summary of its AI and any

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130. OFF. FAIR HOUS. & EQUAL OPPORTUNITY, *supra* note 74, at 1.

131. See generally U.S. DEP'T OF HOUS. & URB. DEV., HOUSING CHOICE VOUCHERS FACT SHEET, [http://Portal.hud.gov/hudportal/HUD?src=/program\\_offices/public\\_in\\_dian\\_housing/programs/hcv/about/fact\\_sheet](http://Portal.hud.gov/hudportal/HUD?src=/program_offices/public_in_dian_housing/programs/hcv/about/fact_sheet) (Oct. 6, 2015, 8:00 PM) (describing the Housing Choice Voucher program [often referred to as § 8] as the "federal government's major program for assisting very low-income families, the elderly, and the disabled to afford decent, safe, and sanitary housing in the private market.").

132. OFF. FAIR HOUS. & EQUAL OPPORTUNITY, *supra* note 74, at 2-9.

133. *Id.*

134. 24 C.F.R. § 91.325(a) (2015).

135. OFF. FAIR HOUS. & EQUAL OPPORTUNITY, *supra* note 74, at 2-9.

136. *Id.* at 2-21.

137. *Id.* at 2-24.

accomplishment it may have achieved.<sup>138</sup> Under the AI process, HUD serves more as an overseer or administrator of the certification process, which requires completion of the AI for government funding.<sup>139</sup> HUD becomes more involved only after complaints or suggestions indicate that actions taken were inadequate.<sup>140</sup> Keeping with its administrative role and sparse involvement, under the AI process, HUD delegates the collection and dissemination of data, research, and information largely to the participants completing the AI.<sup>141</sup>

A report<sup>142</sup> prepared for Congress created by the United States Government Accountability Office (“GAO”) detailed many problems with the AI process, and ultimately served as a major catalyst for the creation of the Proposed Rule.<sup>143</sup> The GAO found the AI process to be ineffective and inefficient.<sup>144</sup> The negative aspects are present in the areas of supervision, administrative resources, and a general lack of clear direction.<sup>145</sup> One significant issue with the AI process is the way AI’s are created by participants and treated by HUD. In its report, the GAO found that HUD fell short in regulating AIs in many aspects, including the frequency of updates and even the contents of the AI.<sup>146</sup> The GAO also found that HUD’s regulatory requirements pertaining to AIs are limited; particularly that there is no specific requirement for participants to submit AIs to HUD for review or approval.<sup>147</sup> Although HUD may require participants to submit information

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138. OFF. FAIR HOUS. & EQUAL OPPORTUNITY, *supra* note 74, at 2–24.

139. U.S. GOV’T ACCOUNTABILITY OFF., HOUSING & COMMUNITY GRANTS, *supra* note 122.

140. OFF. FAIR HOUS. & EQUAL OPPORTUNITY, *supra* note 74, at 2–24.

141. *Id.*

142. U.S. GOV’T ACCOUNTABILITY OFF., HOUSING & COMMUNITY GRANTS, *supra* note 122.

143. Affirmatively Furthering Fair Housing, 78 Fed. Reg. 43710.

144. U.S. GOV’T ACCOUNTABILITY OFF., HOUSING & COMMUNITY GRANTS, *supra* note 122, at 31.

145. *Id.* at 29–32.

146. U.S. GOV’T ACCOUNTABILITY OFF., HOUSING & COMMUNITY GRANTS, *supra* note 122, at 6.

147. *Id.* at 6.

regarding activities that affirmatively further fair housing,<sup>148</sup> the lack of a mandate for the completion of an AI is yet another erosion of the effectiveness of the AI process. This is especially true when considering the GAO's reiteration that "the AI is a tool that is intended to serve as the basis for fair housing planning; provide essential information to policymakers, administrative staff, housing providers, lenders, and fair housing advocate[s]; and assist in building public support for fair housing efforts."<sup>149</sup>

Examining the participant's role in the AI process, the GAO has found participants to be equally responsible for eroding the effectiveness of the AI process by not adequately preparing AIs.<sup>150</sup> The GAO's evaluation discovered many participants did not complete or update their AI, or, where an AI was created, failed to provide adequate information.<sup>151</sup> For example, many of the AIs reviewed by the GAO that were considered "current" did not provide an expected timeframe for implementing proposed actions to mitigate the noted impediments, despite HUD's suggestion for inclusion of such timeframes.<sup>152</sup> Notably, HUD's unenforceable "suggestion" for the inclusion of timeframes did not amount to a mandate, even though, as stated by the GAO, the absence of timeframes reduces accountability and the ability to quantify progress.<sup>153</sup> Moreover, fifty-two of the sixty current AIs reviewed by the GAO lacked signatures of top elected officials, which may raise questions as to the support that elected officials are willing to provide in addressing issues hindering the requirement to affirmatively further fair housing.<sup>154</sup> Since HUD does not provide specific guidance as to the length of time that must lapse before an AI is considered outdated, the GAO, using HUD's general guidance and its own interviews, stipulates that an AI

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148. U.S. GOV'T ACCOUNTABILITY OFF., HOUSING & COMMUNITY GRANTS, *supra* note 122, at 17.

149. *Id.* at 6.

150. *Id.* at 5.

151. *Id.* at 15.

152. *Id.* at 18.

153. *Id.* at 9.

154. *Id.* at 20.

six or more years old should be deemed “outdated.”<sup>155</sup> Using six or more years as a benchmark, the GAO found that twenty-nine percent of AIs reviewed were outdated, and at least ten percent of the outdated AIs were over *twenty years* old.<sup>156</sup> Thus, many of these documents are not adequate tools for furthering the purpose of the FHA because current impediments are likely to go undocumented, unrealized, and thereby uncorrected.<sup>157</sup>

Administrative and enforcement issues are problematic and fall squarely on HUD.<sup>158</sup> The GAO found that HUD lacks the resources and faces competition with other priorities within its own organization, which negatively affects its capacity to review AIs and other fair housing related documents.<sup>159</sup> Moreover, the GAO reports that HUD has often failed to ask participants for their AI documentation during onsite visits.<sup>160</sup> This neglect in administrative oversight further erodes the effectiveness of the AI process, as studies have found that audits, specific investigations, visits, and a greater level of enforcement, would improve the AI process.<sup>161</sup> The GAO’s report noted a disturbing practice regarding HUD’s degree of enforcement. For instance, there are questions as to how many entities are receiving government funds without completing an AI.<sup>162</sup> Additionally, lack of HUD enforcement was evident when the GAO was unable to obtain reports from a number of participants, despite HUD’s requirement that all participants maintain AI records.<sup>163</sup> In addition to the lack of records and adequately completed AIs, a

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155. U.S. GOV’T ACCOUNTABILITY OFF., HOUSING & COMMUNITY GRANTS, *supra* note 122, at 10.

156. *Id.*

157. U.S. GOV’T ACCOUNTABILITY OFF., HOUSING & COMMUNITY GRANTS, *supra* note 122, at 10–11.

158. *Id.* at 22.

159. *Id.*

160. *Id.*

161. See Philip Tegeler, Megan Haberle, & Ebony Gayles, *Affirmatively Furthering Fair Housing in HUD Housing Programs: A First Term Report Card*, 22 J. AFFORDABLE HOUS. & CMTY. DEV. L. 27 (2013).

162. U.S. GOV’T ACCOUNTABILITY OFF., HOUSING & COMMUNITY GRANTS, *supra* note 122, at 14.

163. *Id.*

number of AI reports that were reviewed by the GAO lacked sufficient information and were packaged in a manner that left GAO officials unsure as to the document's status as an actual AI.<sup>164</sup> Examples of what the GAO obtained from participants that were tendered as AIs include: (1) a four-page survey of residents regarding fair housing issues;<sup>165</sup> (2) a two-page document that included only two sentences describing a fair housing impediment, with the remainder of the document discussing the progress of "implementing a local statute pertaining to community preservation"<sup>166</sup>; and (3) a four-page document describing the community, and no information regarding impediments or corrective actions.<sup>167</sup>

### B. Purpose, Goals and Overview of the Proposed Rule

The Proposed Rule generally seeks to further the legislative intent of the FHA by using fair housing strategies and actions in addition to planning.<sup>168</sup> Key principles of the FHA consist of overcoming themes of segregation, suppressed choice, and the lack of inclusive communities.<sup>169</sup> The Proposed Rule has the potential to be a response to inefficient and inadequate administrative support, and an overall process that lacks the essential oversight needed to attain the legislative intent of the FHA.<sup>170</sup> Similar to the AI process, the Proposed Rule focuses on fair housing planning.<sup>171</sup> However, the Proposed Rule presents a new take on planning, which furthers its broader purpose of improving the manner in which participants meet

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164. U.S. GOV'T ACCOUNTABILITY OFF., HOUSING & COMMUNITY GRANTS, *supra* note 122, at 14.

165. *Id.*

166. *Id.*

167. *Id.* at 15.

168. Affirmatively Furthering Fair Housing, 78 Fed. Reg. at 43729.

169. *Id.* at 43710.

170. *See supra* Section I.

171. Affirmatively Furthering Fair Housing, 78 Fed. Reg. at 43713 ("...this proposed rule is intended in particular to improve fair housing planning by more directly linking it to housing and community development planning processes currently undertaken by program participants as a condition of their receipt of HUD funds.").

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the requirements imposed by HUD to affirmatively further fair housing and improve fair housing choices for all people.<sup>172</sup>

In addition to improving the process, the Proposed Rule aims to provide in-depth data and resources to aid participants and “increase compliance and fewer instances of litigation.”<sup>173</sup> The four goals of the Proposed Rule, as observed through the data collected by HUD are: (1) reducing segregation, (2) eliminating racially and ethnically concentrated areas of poverty, (3) narrowing the gaps that result in protected classes having severe housing problems, and (4) reducing disparities in access to critical neighborhood assets.<sup>174</sup>

In order to fully comprehend the potential impact of the Proposed Rule’s goal of reducing disparities in access to critical neighborhood assets, it is imperative to provide background information. This will provide a more robust understanding of the characteristics of neighborhoods, which strike at the core of individuals’ livelihoods and bear on a range of outcomes.<sup>175</sup> Notably, HUD focuses its collection of data on six “dimensions,” that consist of: (1) neighborhood school proficiency, (2) poverty, (3) labor market engagement, (4) job accessibility, (5) health hazard exposure, and (6) transit access.<sup>176</sup> The rationale and history resulting in the need for these “dimensions” are based on what has been called “environmental segregation” or “environmental racism.”<sup>177</sup> The concept of environmental segregation provides that a greater percentage of localities that tend to have the worst environmental aspects tend to be occupied or slated for communities whereby a greater part of the population are minorities.<sup>178</sup> What makes up these environmental aspects has long been debated, but often seen “environmental aspects” generally consist of pollution,

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172. Affirmatively Furthering Fair Housing, 78 Fed. Reg. at 43710, 43716-29.

173. *Id.* at 43712.

174. OFF. FAIR HOUS. & EQUAL OPPORTUNITY, U.S. DEP’T OF HOUS. & URB. DEV., AFFIRMATIVELY FURTHERING FAIR HOUSING, REGULATORY IMPACT ANALYSIS 7 (2013), <http://www.regulations.gov/#!docketDetail;D=HUD-2013-0066>.

175. *Id.* at 4.

176. *Id.* at 4-5.

177. Prakash, *supra* note 41, at 1456.

178. *Id.* at 1455-56.



zoning, or quality of available municipal services.<sup>179</sup> HUD admits that the environmental aspects that further environmental segregation are not limited to the six dimensions on which HUD will procure data.<sup>180</sup> HUD notes that crime, housing unit lead, and radon levels are aspects or dimensions as well.<sup>181</sup> However, HUD has opted not to gather data on these dimensions due to inconsistency in the data, and instead “encourages program participants to supplement the [required] data ... with robust locally available data on these other assets and stressors....”<sup>182</sup>

The Proposed Rule aims to make a number of changes that include: (1) HUD providing uniform data for participants to use in their respective Assessments of Fair Housing (hereinafter “AFH”); (2) the adoption of a fair housing assessment and planning tool (the AFH) to replace the current AI;<sup>183</sup> (3) better direction regarding the purpose of the AFH and how it will be assessed; (4) a new HUD review procedure; and (5) a greater link between the AFH and participant planning that occurs as a result of the AFH.<sup>184</sup> The Proposed Rule will implement a new process that succinctly fits into what can be classified as four progressive courses of action (hereinafter “COA”), whereby subsequent COA’s are not only a progression of the prior COA, but rely on the effectiveness, usefulness, and quality of the prior COA.

*First COA: HUD Provides Data to Program Participants.* The first COA proposes a stark change from the AI process. Currently, participants utilize their own resources to acquire data to identify impediments in fair housing choices within its respective jurisdictions.<sup>185</sup> As a result, HUD has found that participants often rely on third party consultants to acquire the necessary data.<sup>186</sup> Under

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179. Prakash, *supra* note 41, at 1455.

180. OFF. FAIR HOUS. & EQUAL OPPORTUNITY, U.S. DEP’T OF HOUS. & URB. DEV., AFFIRMATIVELY FURTHERING FAIR HOUSING, DATA DOCUMENTATION 5 (2013).

181. OFF. FAIR HOUS. & EQUAL OPPORTUNITY, *supra* note 180.

182. *Id.*

183. Affirmatively Furthering Fair Housing, 78 Fed. Reg. at 43714.

184. *Id.*

185. *Id.* at 43710, 43713.

186. *Id.*

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the Proposed Rule, HUD would take over the researching and gathering role, and provide national and local data of impediments to participants.<sup>187</sup> By providing the data to program participants, HUD expects a reduction in the burdens previously imposed on participants, thereby allowing participants to better perform under the AFH.<sup>188</sup>

*Second COA: HUD Program Participants Evaluate Data of Impediments.* The second COA requires program participants, using the data provided by HUD in the first COA, to evaluate and note patterns of segregation, integration, and disparities in neighborhoods.<sup>189</sup>

*Third COA: HUD Program Participants Develop and Submit AFH Assessment.* The third COA requires program participants use the information interpreted from the data provided by HUD, information gathered from its own evaluations, and concerns arising from the data, in order to complete and submit an AFH to HUD.<sup>190</sup>

*Fourth COA: HUD Reviews the AFH Submitted by the Program Participant.* Once HUD receives the AFH from program participants, they are required to review it using new standards pursuant to the Proposed Rule.<sup>191</sup> If HUD approves the AFH, the program participants are required to inform the program in which the entity participates.<sup>192</sup> If the AFH is not approved, then HUD will inform the program participant why its AFH was not accepted, as well as explain the remedial actions that are required, and in some cases, HUD may assist the program participant in implementing those remedial measures.<sup>193</sup>

### C. Authority for the Proposed Rule

The Proposed Rule finds its authority and purpose broadly in

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187. Affirmatively Furthering Fair Housing, 78 Fed. Reg. at 43715.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

Title VIII of the Civil Rights Act of 1968 (also known as the FHA).<sup>194</sup> The 90th Congress firmly established its intent in codifying the FHA through its plain proclamation that “[i]t is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.”<sup>195</sup> Keeping within its intent, the FHA mandates broad prohibitions on discriminatory acts related to housing.<sup>196</sup> The Administration section of the FHA also gives the Proposed Rule its authority, declaring that “[a]ll executive departments and agencies shall administer their programs and activities relating to housing and urban development (including any federal agency having regulatory or supervisory authority over financial institutions) in a manner *affirmatively to further* the purposes of this subchapter and shall cooperate with the HUD Secretary to further such purposes.”<sup>197</sup>

Additionally, an Executive Order in 1994 vested the Secretary of HUD with the power to ensure applicable governmental departments and agencies operate in a manner that furthers the purpose of the FHA.<sup>198</sup> Both the legislative and executive branches established a duty for agencies and participants to further the purpose of the FHA. In addition to executive and legislative influence, the judiciary has also weighed in,<sup>199</sup> and through its interpretation has reiterated the significance of acting in a manner that furthers the FHA. With intent and interpretation clear, the policy of acting in a manner that furthers the purpose of the FHA is soundly grounded.

Rulemaking allows agencies to regulate activities that fall within its reach.<sup>200</sup> In order for an agency to make rules, it must be granted authority by Congress.<sup>201</sup> The need to enact rules may arise directly

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194. 42 U.S.C. §§ 3601–3619 (2015).

195. 42 U.S.C. § 3601 (2015).

196. 42 U.S.C. §§ 3603–3607 (2015).

197. 42 U.S.C. § 3608(d) (2015) (emphasis added).

198. Exec. Order No. 12,892, 59 Fed. Reg. 2939 (Jan. 20, 1994).

199. See *Otero*, 484 F.2d 1122 (finding the Housing Authority was “under an obligation to act affirmatively to achieve integration in housing. The source of that duty is both constitutional and statutory.”).

200. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

201. Maeve P. Carey, LIBRARY OF CONGRESS, CONGRESSIONAL RESEARCH SERVICE 2

from a legislative mandate, or new developments,<sup>202</sup> interest groups, requests from other agencies, problems affecting society that fall under the agency's authority, directives, problems with the subject agencies current policies, and a number of other influencers.<sup>203</sup> Generally, participation in the rulemaking process involves not only the proposing agency, but often times the public, other agencies, the executive branch, and at times the legislative branch. Agencies may publish an Advance Notice of Proposed Rulemaking in the Federal Register, which serves as an invitation for the public to assist in formulating and improving the draft proposed rule.<sup>204</sup> Additionally, proposed rules serve as notice to the public of an agency's plans to resolve a problem and/or change its goals.<sup>205</sup> Prior to the actual proposed rule being published in the Federal Register, where any member of the public may comment, the executive branch (particularly the President of the United States) and the Office of Information and Regulatory Affairs (hereinafter "OIRA") are afforded the opportunity to review the rule.<sup>206</sup> The President and OIRA are more likely to review the proposed rule when it raises significant policy issues, that is, when it has significant economic effects.<sup>207</sup>

Once the proposed rule is open for public comments, the public has a predetermined amount of time to submit comments, often 30 to 60 days, or longer periods for more complicated proposed rules.<sup>208</sup> After the comment period has ended, the agency, having determined that its proposed rule would actually accomplish the goals it set out, developed a proposed final rule.<sup>209</sup> Similar to the draft proposed rule,

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(2013), <https://www.hsd1.org/?view&did=739691>.

202. New developments may include the need for corrective actions due to the rise of unexpected or unintended events. For example, a rule may be enacted in order to close a loophole in a governmental program.

203. NAT'L ARCHIVES & RECORDS ADMIN., OFF. FED. REG., A GUIDE TO THE RULE MAKING PROCESS 2 (2011), [https://www.federalregister.gov/uploads/2011/01/the\\_rule\\_making\\_process.pdf](https://www.federalregister.gov/uploads/2011/01/the_rule_making_process.pdf).

204. *Id.* at 4.

205. *Id.*

206. *Id.* at 3.

207. *Id.*

208. *Id.* at 5.

209. *Id.* at 204.

the President and OIRA are afforded an opportunity to review the draft final rule.<sup>210</sup> The next and final step involves publishing the final rule with an effective date.<sup>211</sup>

#### D. Distinguishing the Proposed Rule from AI

The Proposed Rule aims to enact about 42 amendments or additions, most of which are minor changes. The amendments fall within sections 5, 91, 92, 570, 574, and 903 of Title 24 of the Code of Federal Regulations (hereinafter "C.F.R."), with the majority of the changes concentrated within section 91, the Consolidated Submissions for Community Planning and Development Programs section. Not all of the Proposed Rule amendments are negligible. The Proposed Rule includes significant amendments to a number of sections, such as section 5(A). In this section the Proposed Rule adds sections 5.150-164. Particularly worth noting is section 5.154, which establishes the AFH requirement that will replace the current AI.<sup>212</sup> Under the Proposed Rule, HUD program participants must develop the AFH using the information and data provided by HUD.<sup>213</sup> This is a noteworthy change from the AI process. Under the AI system, the participants use "significant staff and other resources to complete [the AI] without adequately informing subsequent planning and action."<sup>214</sup>

Another noteworthy addition is section 5.158, which requires the involvement of the community via participation and coordination in creating the AFH.<sup>215</sup> Furthermore, section 5.162 creates the presumption that an AFH is valid after 60 days of its receipt by HUD.<sup>216</sup> This presumption is overcome by written notice from HUD informing the participant that the AFH was not accepted and the reason why it was not accepted.<sup>217</sup> In an addition to the

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210. NAT'L ARCHIVES & RECORDS ADMIN., *supra* note 203, at 7.

211. *Id.*

212. Affirmatively Furthering Fair Housing, 78 Fed. Reg. at 43717.

213. *Id.*

214. *Id.* at 43719.

215. *Id.*

216. *Id.* Reg at 43717.

217. *Id.*

creation of new sections, the Proposed Rule implements significant amendments. For example, paragraph (a)(2) of section 570.601 was amended to explicitly specify that fair housing planning include taking “meaningful actions” to further the items identified in the AFH.<sup>218</sup> For a breakdown of the changes to be enacted by the Proposed Rule, see the “Affirmatively Furthering Fair Housing Proposed Rule Changes” table.<sup>219</sup>

With the intent of assisting communities and developing a strategy to further the policy of the FHA, the Proposed Rule shifts the burden of data collection from the participant to HUD, or specifically

218. Affirmatively Furthering Fair Housing, 78 Fed. Reg. at 43723.

219. *See id.*

Affirmatively Furthering Fair Housing Proposed Rule Changes			
§	Type	§	Type
5.150	New	91.415	Amendment
5.152	New	91.420	Amendment
5.154	New	91.425	Amendment
5.156	New	91.505	Amendment
5.158	New		
5.160	New	92.104	Amendment
5.162	New	92.508	Amendment
5.164	New		
5.166	New	570.3	Amendment
		570.441	Amendment
91.5	Amendment	570.480	Amendment
91.100	Amendment	570.486	Amendment
91.105	Amendment	570.490	Amendment
91.110	Amendment	570.506	Amendment
91.115	Amendment	570.60	Amendment
91.215	Amendment		
91.220	Amendment	574.530	Amendment
91.225	Amendment		
91.230	Amendment	576.500	Amendment
91.235	Amendment		
91.315	Amendment	903.2	Amendment
91.320	Amendment	903.7	Amendment
91.325	Amendment		

to HUD's Office of Policy Development and Research.<sup>220</sup> HUD will use nationally uniform sources, supplemented by local and regional information, to gather data in order to provide more uniform and accurate information.<sup>221</sup> HUD expects the data collected to largely reflect five broad areas in which participants are required to address in their AFH.<sup>222</sup> The areas of focus consist of: (1) geographic, (2) racially/ethnically concentrated areas of poverty, (3) disparity in access to community assets, (4) segregation, and (5) disproportional housing needs.<sup>223</sup> By gathering such data, it is apparent that the Proposed Rule seeks to address the cost imposed on society by the adverse effects of environmental segregation on public health.

HUD's AFFH Data Documentation draft<sup>224</sup> provides a precise breakdown of the areas of data collected, calculations, formulas, and other measures used to create the "data" that will be subsequently provided to participants.

*Geographical/Demographic Data:* One area of data collection is that of demographics, though HUD couches it more broadly as geographic information.<sup>225</sup> HUD intends to use nationally uniform sources such as census data,<sup>226</sup> which will serve as the primary source for demographic/geographic information. However, as a supplement to the census data, there may also be limited use of information from the American Community Survey.<sup>227</sup> These sources of information will be used to gather data on race, ethnicity, and poverty in the subject communities.<sup>228</sup> Unfortunately, HUD has not provided specific details regarding the use or purpose of the demographic data, separate from its use as a foundational supplement to other data

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220. Affirmatively Furthering Fair Housing, 78 Fed. Reg. at 43717.

221. *Id.*

222. OFF. FAIR HOUS. & EQUAL OPPORTUNITY, REGULATORY IMPACT ANALYSIS, *supra* note 174, at 1.

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

collected.<sup>229</sup> Nevertheless, even without further guidance, the gathering of demographical data may nonetheless serve a purpose as standalone information for participants.

*Racially/Ethnically-Concentrated Areas of Poverty:* HUD intends to provide participants with information regarding whether areas within its jurisdiction may be considered Racially/Ethnically-Concentrated Areas of Poverty, or “RCAPs/ECAPs” as coined by HUD.<sup>230</sup> HUD uses a two-part test to determine whether a locality should be deemed a RCAP/ECAP. The first part of the test involves a simple threshold: “RCAP/ECAPs must have a non-white population of 50 percent or more.”<sup>231</sup> The second part of the test is similarly straightforward, requiring the lesser of either a poverty rate that is higher than forty percent of the Federal Poverty Rate, or a poverty rate that is three times the average tract poverty rate for the metro/micro area.<sup>232</sup>

A thorough examination of RCAP/ECAP determination results in the realization that the racial/ethnic threshold test is pinned to “non-white” individuals. It is true that many of the Nation’s impoverished areas are made-up of non-whites,<sup>233</sup> however this threshold test runs the risk of excluding the poor white population. One may argue that the data point being gathered is for “racially/ethnically-concentrated” areas and therefore excluding poor whites is not a major issue, or is to be expected. Nonetheless, we know that poor whites may face the same injustices that the FHA is designed to eliminate. Unfortunately until the law is finalized and fully enforced, we will not know whether the failure to consider poor whites will have any impact on achieving the FHA’s purpose.

*Disproportionate Housing Needs:* As defined by HUD,

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229. Affirmatively Furthering Fair Housing, 78 Fed. Reg. 43710.

230. OFF. FAIR HOUS. & EQUAL OPPORTUNITY, REGULATORY IMPACT ANALYSIS, *supra* note 174, at 1.

231. *Id.*

232. *Id.*

233. Algernon Austin, *African Americans are Still Concentrated in Neighborhoods with High Poverty and Still Lack Full Access to Decent Housing*, ECON. POL’Y INST. (July 22, 2013), <http://www.epi.org/publication/african-americans-concentrated-neighborhoods/>.



“disproportionate housing needs” refers to “a circumstance when the members of a racial or ethnic group within an income level experience housing problems at least 10 percentage points more frequently than the entire population within the same income level.”<sup>234</sup> Data regarding “disproportionate housing needs” will be customized for HUD’s purposes by the United States Census Bureau, and be obtained through the Comprehensive Housing Affordability Strategy data.<sup>235</sup> The data will attempt to capture the extent of housing issues for low-income households in a particular area.<sup>236</sup>

*Community Asset Indicators:* HUD intends to provide participants with data regarding the degree in which a community offers “important community assets” and the degree to which groups of people have access to such assets.<sup>237</sup> Important community assets are social services that help facilitate a good quality of life, including quality of schools, job centers, and transit.<sup>238</sup> Specifically, HUD will focus on six areas that have been shown to have a significant bearing on community assets, including proximity to environmental health hazards, job accessibility, poverty, school quality, labor market engagement (e.g., job centers), and transit access.<sup>239</sup> Regarding the collection of data for the six specific areas, HUD intends to use school-level data from state examinations to determine the quality of schools.<sup>240</sup> Although job accessibility and transit access may appear to positively correlate, HUD’s data regarding these two areas are not necessarily interrelated and are based upon different factors. Job accessibility is based upon a locale’s distance from small, medium, and large employment centers, with larger employment centers carrying more weight.<sup>241</sup> Whereas transit access is based upon data gathered from the General Transit Feed Specification (hereinafter

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234. OFF. FAIR HOUS. & EQUAL OPPORTUNITY, REGULATORY IMPACT ANALYSIS, *supra* note 174, at 1.

235. *Id.* at 9.

236. *Id.*

237. *Id.* at 4.

238. *Id.*

239. *Id.* at 4–5.

240. *Id.* at 5.

241. *Id.* at 6.

“GTFS”) exchanges to determine the distance between rail and bus stops.<sup>242</sup> Regarding poverty, HUD will continue its trend of using established data, and use the percentage of households that receive cash-welfare, and the family poverty rate to develop the reported poverty data.<sup>243</sup> Health hazard exposures will be based upon information from the Environmental Protection Agency, and it is expected that labor market engagement will be based upon the unemployment rate, labor force participation rate, and education level of the individuals in the subject locale.<sup>244</sup> Although HUD proposes to offer a wide breadth of information, it has also included restraints to its data collection and reporting, limiting its collection of information to data that is “closely linked to neighborhood geographies and could be measured consistently at smaller levels across the country.”<sup>245</sup>

*Segregation:* To analyze segregation and provide appropriate data to participants, HUD intends to use different indices to measure this highly dimensional category.<sup>246</sup> For instance, HUD plans to use a dissimilarity index and isolation index in combination with predicted values based on racial/ethnic minority shares for a particular jurisdiction.<sup>247</sup>

### III. A Critique of the Proposed Rule

Despite the GOA’s scathing review of the current AI process, the Regulatory Impact Analysis indicates that the Proposed Rule does little to change the course of present cost and administrative inefficiencies.<sup>248</sup> As a result, success of attaining the goals of the FHA appear to rest solely on the structure of the Proposed Rule, because it

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242. OFF. FAIR HOUS. & EQUAL OPPORTUNITY, REGULATORY IMPACT ANALYSIS, *supra* note 174, at 6.

243. *Id.* at 7.

244. *Id.* at 6.

245. *Id.* at 5.

246. *Id.* at 2.

247. *Id.* at 2–3.

248. *Id.* at 10–11.

is unlikely the government will be able to point to an ancillary result (e.g., saving local governments money or instituting a more efficient process), and claim a success. In short, if the Proposed Rule fails to provide substantive assistance, it could be as inefficient and complicated as AI. Notable areas of concern include: (1) costs to federal government and participants, (2) administrative burden, and (3) uncertainty of impact.<sup>249</sup>

### A. Cost to Federal Government and Participants

HUD expects there to be an implementation cost of \$3 million to \$9 million dollars—a cost HUD qualifies as “marginal.”<sup>250</sup> Aside from implementation costs, HUD does not expect an increase in compliance costs.<sup>251</sup> HUD grounds its expectations on the belief that cost increases will affect only a few areas of the compliance process, which will be offset by reductions in cost in other areas.<sup>252</sup> Although HUD expects only marginal cost differences, HUD also concedes “the demands of the new process may result in a net increase of administrative burden for non-compliant entities....”<sup>253</sup> HUD’s concession is echoed and broadened by the National Association of Housing and Redevelopment Officials (“NAHRO”), which boasts a commanding 3,100 agencies, whose members manage over 970,000 public housing units.<sup>254</sup> NAHRO has found that the “proposed rule adds substantial administrative burden and cost [to Public Housing Authorities] without providing incremental resources.”<sup>255</sup> Although the NAHRO’s interests may be harmed by the Proposed Rule, the issues

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249. OFF. FAIR HOUS. & EQUAL OPPORTUNITY, REGULATORY IMPACT ANALYSIS, *supra* note 174, at 9–18.

250. OFF. FAIR HOUS. & EQUAL OPPORTUNITY, *supra* note 180, at 9.

251. *Id.* at 9.

252. *Id.*

253. *Id.* at 10.

254. Tamar Greenspan, National Association of Housing and Redevelopment Officials, Comment Letter On Affirmatively Furthering Housing Proposed Rule (2013), <http://www.nahro.org/sites/default/files/searchable/NAHRO%20AFFH%20Comments.pdf>.

255. *Id.*

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raised by the group are nonetheless legitimate. Additionally, though the NAHRO does not outline specific sources of the “substantial administrative burden,” one only need look to the Proposed Rule itself. As detailed in what will be codified as 24 C.F.R. § 5.156, participants will still be required to analyze and address local fair housing issues that affect housing within its jurisdiction *in addition to* being “encouraged” to perform regional assessments.<sup>256</sup> Moreover, the Proposed Rule will create 24 C.F.R. § 5.158, which requires participants to involve the community in their plans.<sup>257</sup> Minor “encouragements” and requirements proposed by HUD appear to entail minimal additional effort on their own, but their cumulative impact may support NAHRO’s claim. While there appears to be conflicting expectations between HUD, local governments, and local participants, it is unknown whether the Proposed Rule possesses issues regarding the federal government. For instance, the Proposed Rule does not provide details regarding the cost that the federal government may incur as a result of implementing or operating under the provisions of the Proposed Rule.

### **B. Administrative Issues**

Since participants are currently required to create plans and reports for certification, HUD does not anticipate that the Proposed Rule will drastically affect the time participants expend creating reports.<sup>258</sup> However, and importantly, HUD expects a negative impact on its own staff.<sup>259</sup> There is no indication in the Proposed Rule that there will be an increase in HUD’s workforce. At first glance this may appear to be a good cost-saving point, however, the idea of not increasing HUD’s resources, monetarily or in human capital, is contrary to what one would expect when considering the new burdens that the Proposed Rule will place on HUD. This

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256. *Affirmatively Furthering Fair Housing*, 78 Fed. Reg. at 43719.

257. *Id.*

258. OFF. FAIR HOUS. & EQUAL OPPORTUNITY, REGULATORY IMPACT ANALYSIS, *supra* note 174.

259. *Id.* at 9.

administrative shortcoming is even acknowledged by HUD, which states:

The regulation [the Proposed Rule] would place additional burden on HUD staff. HUD must not only review and approve the AFH, but assist program participants in identifying and analyzing elements and factors that drive or maintain disparity in fair housing choice, and in developing strategies to overcome such disparity. Much of the additional effort on the part of HUD staff is likely to be the result of increasing review activity that is not currently performed.<sup>260</sup>

The NAHRO has also commented that HUD does not have the staff capacity to properly monitor and oversee the requirements contained within the Proposed Rule.<sup>261</sup> Administrative shortcomings are not a new concern, however, and the GAO's report to Congress references HUD officials when it states that "staffing constraints will undermine officials' oversight capacity and ability to implement corrective measures."<sup>262</sup> Additionally, the Proposed Rule does not put forth information regarding competing demands on HUD's staff—another area of concern reported by the GAO.<sup>263</sup> In the GAO's report, the AI was viewed as a "low priority" due to "competing demands and limited resources."<sup>264</sup> Thus, it can be deduced that the Proposed Rule will likely result in HUD performing a greater share of administrative duties, in conjunction with providing extensive data to participants. However, HUD has not commented on any increase in human resources to assist with these increased responsibilities and there is no indication that HUD has addressed these issues as a preliminary matter.

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260. OFF. FAIR HOUS. & EQUAL OPPORTUNITY, REGULATORY IMPACT ANALYSIS, *supra* note 174, at 12.

261. Tamar Greenspan, *supra* note 254.

262. U.S. GOV'T ACCOUNTABILITY OFF., HOUSING & COMMUNITY GRANTS, *supra* note 122, at 25.

263. *Id.*

264. *Id.*

### C. Uncertainty of Impact

It would be difficult to find any regulation, or modification to a regulation, that includes definite and accurate outcomes prior to the regulation's release. Therefore, it is unsurprising that HUD is unable to provide definite assurances regarding the future impact of the Proposed Rule. As HUD has indicated, it is difficult to "predict how a jurisdiction would use the information [data provided by HUD], what decisions they would reach, and precisely how those decisions would affect the protected classes."<sup>265</sup> What is disheartening about HUD's efforts is the amount of uncertainty throughout the Proposed Rule's new process. Although HUD does not specifically address this issue, there is uncertainty regarding the quality of data that HUD will obtain given HUD's administrative environment,<sup>266</sup> which provides the foundation of the Proposed Rule and furtherance of the FHA's policies.

Aside from foundational uncertainty, there is still some insecurity about the effect that the Proposed Rule will have on the FHA's overall goals. Take for instance fair housing prioritization within jurisdictions. HUD recognizes that the data it provides local jurisdictions may confirm and support what the jurisdiction already knows, or contrarily, may prove informing.<sup>267</sup> Regardless of the relevancy or novelty of the data, there is still uncertainty with respect to how a jurisdiction sets its goals or policies in response to the data – again assuming the data is adequate.<sup>268</sup> In line with this admission, HUD has also found uncertainty in predicting "the exact policy choices that [a] jurisdiction will make and the impact that the jurisdiction's choice will have on furthering the intent of the FHA."<sup>269</sup> Will response to the data result in resident opposition,

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265. OFF. FAIR HOUS. & EQUAL OPPORTUNITY, REGULATORY IMPACT ANALYSIS, *supra* note 174, at 12.

266. U.S. GOV'T ACCOUNTABILITY OFF., HOUSING & COMMUNITY GRANTS, *supra* note 122, at 22.

267. Affirmatively Furthering Fair Housing, 78 Fed. Reg. at 43712.

268. U.S. GOV'T ACCOUNTABILITY OFF., HOUSING & COMMUNITY GRANTS, *supra* note 122, at 16.

269. *Id.* at 17–18.

preventing the local jurisdiction from taking certain action in their particular neighborhood, or as coined by HUD, “NIMBYism” (Not in my backyard)?<sup>270</sup>

HUD has outlined a number of uncertainties impacting four broad “steps” in its process. The steps outlined for purposes of reconciling uncertainties includes: (1) HUD providing data, (2) jurisdictions prioritizing actions in response to the data, (3) policy decisions of jurisdictions, and (4) the extent of the improvements/actions by the jurisdiction.<sup>271</sup> HUD has not specified any uncertainties within the first step.<sup>272</sup> Under step two, the prioritization of jurisdictions, HUD has outlined at least three uncertainties (one being the competing legitimate interests among various policies).<sup>273</sup> In step three, HUD identified the participants’ available resources as an uncertainty that may impact the Proposed Rule’s effectiveness.<sup>274</sup> In the final step, HUD recognized the extent of improvement as an uncertainty, and elaborated that the extent of any improvement in a jurisdiction will depend on a number of factors such as, individual family choices, policies of nearby jurisdictions, and choices of private and nonprofit actors.<sup>275</sup>

The uncertainties of the Proposed Rule appear plentiful, nonetheless, these uncertainties are arguably no more numerous than any other regulation that purports to amend and create new requirements. The two areas of concern for purposes of this Article include—quality of data and usability of the data—are both areas in which HUD has not provided a large amount of information. These uncertainties go directly to the issue of whether the Proposed Rule will truly further the FHA’s intent.

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270. U.S. GOV’T ACCOUNTABILITY OFF., HOUSING & COMMUNITY GRANTS, *supra* note 122, at 17.

271. OFF. FAIR HOUS. & EQUAL OPPORTUNITY, REGULATORY IMPACT ANALYSIS, *supra* note 174, at 13.

272. OFF. FAIR HOUS. & EQUAL OPPORTUNITY, REGULATORY IMPACT ANALYSIS, *supra* note 174.

273. *Id.*

274. *Id.*

275. *Id.*

#### D. HUD's Interpretation of the Impact of the Proposed Rule

Notwithstanding the acknowledged uncertainties, HUD believes a number of benefits associated with the Proposed Rule may be realized. One such benefit is that of clarity.<sup>276</sup> HUD hopes that the Proposed Rule will convey the agency's goals to participants in a manner that is clearer than those conveyed in the AI process.<sup>277</sup> HUD also expects more "focus[ed] participant attention and decision making" as an ancillary benefit from increased clarity and better understanding of HUD's goals.<sup>278</sup> Moreover, HUD anticipates that the Proposed Rule will "provide greater resources" for participants to use, which HUD hopes will result in greater compliance amongst its participants and reduce litigation.<sup>279</sup> HUD also suggests that the collection of data, as prescribed by the Proposed Rule, may reduce "logistical barriers."<sup>280</sup>

The benefits that HUD largely addresses with the Proposed Rule relate to the process of compliance and planning.<sup>281</sup> However, HUD has not opined as to whether the Proposed Rule will create or recognize a benefit at the core of the matter, which is to affirmatively further fair housing. HUD has not directly related how the increases in data will affirmatively further fair housing. For instance, HUD states, "through this rule, HUD commits to provide states, local governments ... [and] the general public with local and regional data ... [and as a result] program participants should be better able to evaluate their present environment to assess fair housing

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276. OFF. FAIR HOUS. & EQUAL OPPORTUNITY, REGULATORY IMPACT ANALYSIS, *supra* note 174, at 1.

277. *Id.*

278. *Id.*

279. Affirmatively Furthering Fair Housing, 78 Fed. Reg. at 43712.

280. OFF. FAIR HOUS. & EQUAL OPPORTUNITY, REGULATORY IMPACT ANALYSIS, *supra* note 174, at 2.

281. See Affirmatively Furthering Fair Housing, 78 Fed. Reg. at 43712 (stating "HUD is confident, however, that the rule will create a process that allows for each jurisdiction to not only undertake meaningful fair each jurisdiction to not only undertake meaningful fair housing planning, but to have capacity and a well-considered strategy to implement actions to affirmatively further fair housing").



issues . . . .”<sup>282</sup> In addition to assisting in the creation of plans to correct identified issues—assuming the data will be accurate and adequate—the Proposed Rule has great potential to provide victims of discriminatory housing practices with a legal remedy and increase their likelihood of success in prevailing when claiming a violation of section 3608 of the FHA.

However, HUD has not explicitly addressed this benefit in the Proposed Rule. HUD’s concession that the Proposed Rule will increase the administrative burden, on its already limited staff, decreases the likelihood of success for the Proposed Rule as it pertains to HUD’s general purpose of the rule that will “refine existing requirements . . . .”<sup>283</sup> Moreover, until housing discrimination victims test the new resources (e.g., the HUD-provided data) in pursuit of a viable legal remedy, there is no way to determine the true value of the data and its impact on the pursuit of fair housing.

#### **IV. Integrating the Proposed Rule into Housing Integration**

HUD has stated the four goals of the Proposed Rule: (1) reducing segregation, (2) eliminating racially and ethnically concentrated areas of poverty, (3) narrowing the gaps that result in protected classes experiencing severe housing problems, and (4) reducing disparities in access to critical neighborhood assets.<sup>284</sup> As previously discussed in Part III of this Article, HUD also restricts its predictions about the benefits of the Proposed Rule to administrative issues. Although these technical factors will benefit the landscape of fair housing, HUD has not elaborated on the Proposed Rule’s potential to create a path for individual plaintiffs to successfully bring a claim under section 3608 of the FHA. The Proposed Rule has the high likelihood of making this benefit a reality for three distinct reasons.

First, the Proposed Rule supports the contention that the scope of the FHA is not limited to cases directly in the category of housing.

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282. *Affirmatively Furthering Fair Housing*, 78 Fed. Reg. at 43712.

283. *Id.*

284. OFF. FAIR HOUS. & EQUAL OPPORTUNITY, REGULATORY IMPACT ANALYSIS, *supra* note 174, at 7.

This is the most significant benefit of the FHA that is left unexplored by the Proposed Rule. Plaintiffs bringing non-housing cases have found little success under section 3608 of the FHA because many courts have ruled that issues outside of the housing purview are also outside of the intent of the FHA.<sup>285</sup> However, the Proposed Rule has the explicit goal of reducing disparities in access to critical neighborhood assets in affirmatively furthering fair housing.<sup>286</sup> The neighborhood assets, as described earlier in this Article, range from employment, healthy environments, and transit access (none of which are “housing,” but all of which affect housing). This objective has the potential to increase the number of plaintiffs’ positive outcomes and the prevalence of non-housing cases brought under the FHA.

Secondly, the data that will be collected and synthesized pursuant to the Proposed Rule will assist plaintiffs in making the requisite prima facie case for disparate impact when bringing a claim under section 3608. The ability to prevail in a disparate impact claim often turns on the availability of reliable statistics to prove one has been discriminated against since there is an absence of evidence of intent to do the same.<sup>287</sup> The Proposed Rule would increase this data significantly. Finally, the Proposed Rule incorporates the concerns and issues of private individuals in its reformation of evaluating compliance with the “affirmatively furthering mandate.”

The remainder of this Article will detail these three benefits of the FHA beginning with how the Proposed Rule illustrates the broad intent of the FHA, leading then to the notion that cases with primary issues other than housing discrimination (non-housing cases) should

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285. See *Jersey Heights Neighborhood Ass’n v. Glendening*, 174 F.3d 180 (4th Cir. 1999); *S. Camden Citizens in Action v. N.J. Dep’t of Env’tl. Prot.*, 254 F. Supp. 2d 486 (D.N.J. 2003); *Laramore v. Ill. Sports Facilities Auth.*, 722 F. Supp. 443 (N.D.Ill. 1989); *Mackey v. Nationwide Ins. Companies*, 724 F.2d 419 (4th Cir. 1984); *Southend Neighborhood Imp. Ass’n v. Cnty. of St. Clair*, 743 F.2d 1207 (7th Cir. 1984); *Edwards v. Johnston Cnty. Health Dep’t*, 885 F.2d 1215 (4th Cir. 1989).

286. *Affirmatively Furthering Fair Housing*, 78 Fed. Reg. at 43715.

287. See *Mountain Side Mobile Estates P’ship v. Sec’y of Hous. & Urb. Dev.*, 56 F.3d 1243, 1252 (10th Cir. 1995) (stating “[f]or purposes of this opinion, we shall assume . . . that a Title VIII plaintiff may establish a prima facie case of discriminatory impact by proof of national statistics relative to U.S. households as presented here.”).

be heard under the Act. For purposes of this article, non-housing cases are those lawsuits that allege discrimination by a defendant that affects residents of a protected class in a neighborhood, but does not directly affect the ability of those resident to live where they desire. The Proposed Rule's goal of reducing disparities in access to critical neighborhood assets stresses the importance of situating the fairness of housing within the broader context of neighborhood amenities and stressors. The Proposed Rule is premised on a foundation that is contrary to the framework used by the majority of the courts who opine on these cases. As illustrated by the Proposed Rule, HUD interprets the FHA broadly and believes that the theories plaintiffs often use as the premise of their non-housing cases are central to the goal of the Act.<sup>288</sup> However, courts rarely find in favor of a plaintiff who brings a non-housing case under the FHA<sup>289</sup>

The remainder of Part IV explains why it may be advantageous for a plaintiff to bring a non-housing discrimination claim under the FHA. Then, it will provide an overview of significant non-housing cases that have been brought under the FHA, with a focus on why the courts often find that these types of cases fail to state a cognizable claim under the Act. As these cases are typically brought under section 3604, the analysis is concentrated in that portion of the FHA. The author then argues that the Proposed Rule, which focuses on section 3608, takes a view contrary to the court when examining the relevancy of non-housing arguments to the FHA. The Proposed Rule will also assist a plaintiff bringing a disparate impact claim under the FHA with constructing his or her prima facie case, because it will provide increased data.<sup>290</sup> This suggests that non-housing cases may have a higher likelihood of success if they are brought under section 3608 of the FHA.

It may seem counterintuitive to seek a remedy for a non-housing issue under the FHA; however, the FHA is arguably more

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288. *Affirmatively Furthering Fair Housing*, 78 Fed. Reg. at 43714.

289. *See, e.g., Jersey Heights*, 174 F.3d 180.

290. "[T]he provision of nationally uniform data that will be the predicate for and help frame program participants' assessment activities . . ." *Affirmatively Furthering Fair Housing*, 78 Fed. Reg. at 43714.

advantageous when compared to other nondiscrimination laws and statutes. The FHA has a strong civil rights administrative enforcement scheme,<sup>291</sup> and permits the bringing of disparate impact claims in addition to claims of discriminatory intent.<sup>292</sup> Another aspect of the FHA that plaintiffs find attractive is that while some laws require that the defendant receive federal funding, under the FHA, a claim may be filed against a defendant that receives funds from HUD, whether directly or via pass-throughs from a HUD grantee.<sup>293</sup>

All federal circuit courts that have analyzed the cognizance of disparate impact in this context have found that the intent of the FHA was to allow disparate impact claims<sup>294</sup> in addition to discriminatory intent claims.<sup>295</sup> Although disparate impact allows plaintiffs to bring a claim without providing evidence of discriminatory intent,<sup>296</sup> the burden of proving disparate impact under the FHA can be insurmountable. While there is no normative framework across the court system that dictates how to best make a prima facie disparate

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291. Olatunde C.A. Johnson, *Beyond the Private Attorney General: Equality Directives in American Law*, 87 N.Y.U. L. REV. 1339, 1348–49 (2012).

292. 42 U.S.C. § 3604(c) (2015).

293. See Austin W. King, Note, *Affirmatively Further: Reviving the Fair Housing Act's Integrationist Purpose*, 88 N.Y.U. L. REV. 2182 (2013) (“The statute places the same burden on ‘[a]ll executive departments and agencies’ in carrying out housing programs. To receive HUD grants, grantees must agree to affirmatively further fair housing. If HUD knows that a grantee has violated the requirement, it is required under 42 U.S.C. § 3805(d)(5) to seek compliance and even compel it through withdrawal of funds. The reach of AFFH is extraordinary: Every state and virtually every urban and suburban county and major municipality (collectively, ‘entitlement communities’) accepts HUD funds. Further, when states and counties pass funds to non-entitlement communities, the grantee is responsible for the sub-grantee’s compliance.”); see also Jonathan J. Sheffield, Jr., *At Forty-five Years Old the Obligation to Affirmatively Further Fair Housing Gets a Face-lift, but Will it Integrate America’s Cities?*, SOC. JUST., Paper 52 (2013), [http://ecommons.luc.edu/cgi/viewcontent.cgi?article=1051&context=social\\_justice](http://ecommons.luc.edu/cgi/viewcontent.cgi?article=1051&context=social_justice); see also Rothstein & Whyte, *supra* note 59, at 70.

294. See ROBERT G. SCHWEMM, HOUSING DISCRIMINATION LAW 48 (Bureau of National Affairs, Inc., 1983) (citing the same language in sections 3604(b), 3605, and 3631(a), and similar language in sections 3606 and 3617). See also *Inclusive Communities Project*, 135 S. Ct. 2507 (2015).

295. Seichshnaydre, *supra* note 66, at n.2.

296. 42 U.S.C. § 3608(d).

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impact case, using statistics to show disproportionate adverse effects is generally persuasive.<sup>297</sup> Part V of this Article explores in greater detail the positive impact that the Proposed Rule can have on this aspect of the FHA's burden-shifting framework.

The FHA's flexibility with respect to viable defendants and the cognizance of disparate impact claims are significant reasons as to why a plaintiff with a civil rights discrimination case, only tangentially related to the housing context, may want to bring a claim under the Act. However, all plaintiffs must still show a connection between the type of discrimination they are alleging and the type of discrimination the FHA intends to prohibit.<sup>298</sup> For example, a plaintiff claiming that a county is not affirmatively furthering fair housing, as evidenced by the county's reduction in public transportation services in underserved neighborhoods, must prove a nexus between transportation and the creation of truly integrated living patterns, as well as a general increase in fair housing opportunities for protected classes. Evidence proving this nexus requires the collection and synthesis of information evidencing the disparity.<sup>299</sup> This Article goes on to detail the problems with data collection under the FHA's current AI system. The Proposed Rule not only explicitly recognizes the connection among housing and other socioeconomic factors, but also contends that this connection was contemplated at the time of the FHA's enactment.<sup>300</sup> The Proposed Rule will also enhance the quantity and quality of data that is available for a plaintiff to use in her construction of a prima facie disparate impact claim.<sup>301</sup>

### A. Non-Housing Cases Under the FHA: The Current State

The Proposed Rule recognizes the correlation between housing

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297. Seichshnaydre, *supra* note 66, at n.2.

297. *Westchester*, 668 F. Supp. 2d 548.

298. *Inclusive Communities Project*, 135 S. Ct. at 2523 (finding that "[a] plaintiff who fails to allege facts at the pleading stage or produce statistical evidence demonstrating a causal connection cannot make out a prima facie case of disparate impact.>").

299. *Inclusive Communities Project*, 135 S. Ct. at 2523.

300. *Affirmatively Furthering Fair Housing*, 78 Fed. Reg. at 43712.

301. *Id.* at 43715.

and housing proximity to other important community assets, such as hospitals, job centers, transportation, green space and schools.<sup>302</sup> HUD's requirement that funding recipients collect data on these elements as part of evidencing that they have satisfied their obligation to affirmatively further fair housing is indicative of HUD's broader interpretation of the FHA.<sup>303</sup> This more inclusive reading of the FHA is important because it will help achieve "truly integrated living patterns," which is what the FHA intended to do, but has yet to accomplish.<sup>304</sup> The Proposed Rule will be more successful in facilitating this endeavor because acknowledging that policies outside of the realm of direct housing discrimination create and maintain segregated living provides an opportunity to address those policies using the FHA.

The Proposed Rule strengthens the connection between housing and other non-housing socioeconomic elements such as environmental conditions, schools, social services, parks, and transportation systems.<sup>305</sup> This is significant because the vast majority of plaintiffs alleging discrimination in these non-housing contexts have failed to prevail under the FHA in large part because the courts have deemed these elements are too far removed from housing.<sup>306</sup> In creating this substantive connection, the Proposed Rule not only lays down a foundation for bringing these types of cases under section 3608 of the FHA, but also increases the likelihood that these cases will succeed. This is because "affirmatively furthering" is more clearly defined and more inclusive of characteristics that are inherently linked to housing.

The following information provides details on the success of bringing claims under the FHA in instances relevant to this Article. A plaintiff has a forty-two-percent likelihood<sup>307</sup> of proving defendant

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302. Affirmatively Furthering Fair Housing, 78 Fed. Reg. at 43714–15.

303. *Id.* at 43711.

304. Sheffield, *supra* note 293.

305. Affirmatively Furthering Fair Housing, 78 Fed. Reg. at 43711.

306. See *Jersey Heights*, 174 F.3d at 192 (finding a challenge to the highway site selection process "too remotely related to the housing interests that are protected by the Fair Housing Act").

307. Seichshnaydre, *supra* note 66, at 392–402.

liability under the FHA in cases where minority groups are excluded from living in areas that are underpopulated by the same groups or in cases where housing structures with mostly minority residents are concentrated in neighborhoods that have a high presence of these groups.<sup>308</sup> In *Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n*, the Seventh Circuit held that housing exclusion cases are the primary focus of section 3604.<sup>309</sup> The court stated that, “[section] 3604(a) applied to the problem of exclusion.”<sup>310</sup> The remainder of Part IV.A. will examine cases brought under the FHA, in which regulations and plans arguably affect housing—protected under the FHA—but are not directly related to it. Plaintiffs seeking remedies for injury incurred from these “non-housing” cases have a lesser likelihood of success.<sup>311</sup> These losses can largely be attributed to a belief held by many courts: these cases are not within the scope of the FHA.<sup>312</sup> Courts in many of these non-housing cases have narrowly construed the purpose of the FHA, with the sentiment reflecting that, “[section] 3604(a) does not reach every event that might conceivably affect the availability of housing.”<sup>313</sup>

In *Jersey Heights Neighborhood Ass'n v. Glendening*,<sup>314</sup> African-American landowners claimed that the construction of a new highway violated section 3604 of the FHA.<sup>315</sup> The plaintiffs contended that the highway would create a northern boundary, precluding housing expansion in that direction.<sup>316</sup> The plaintiffs argued that they

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308. Seichshnaydre categorizes these and similar cases as “housing barrier” regulations. Seichshnaydre, *supra* note 66, at 14–15.

309. *Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n*, 388 F.3d 327, 329 (2004).

310. Prakash, *supra* note 41, at 1437.

311. Prakash, *supra* note 41.

312. *Jersey Heights*, 174 F.3d at 192.

313. *Id.*

314. *Id.* at 180.

315. “[The plaintiffs asserted] claims against state and federal agencies and officials under the Federal-Aid Highway Act, the National Environmental Policy Act, Title VI of the Civil Rights Act of 1964, the Fair Housing Act, and the Maryland Environmental Policy Act, as well as the Equal Protection Clause and 42 U.S.C. §§ 1983 and 1985.” *Id.* at 183–84.

316. *Id.* at 192.

had been excluded from the planning process of the highway, because white residents who were affected by the proposed construction received individual notice of public hearings, while African-American residents who were similarly situated did not receive such notice.<sup>317</sup> It was their contention that in selecting the particular location for the highway, sections 3604(a) and 3604(b) were violated.<sup>318</sup> Interestingly, the *Jersey Heights* court interpreted the spirit of section 3604 as solely prohibiting discrimination, and not providing a positive right.<sup>319</sup> The court reached this conclusion by applying reasoning similar to that of the court in *Lindsey v. Normet*,<sup>320</sup> a decision that focused on statutory interpretation.<sup>321</sup>

The *Jersey Heights* court held that the plaintiffs failed to state a claim under the FHA because government agencies did not refuse to make dwellings available based on race to individuals of color by electing to situate the highway bypass at the edge of the neighborhood in a predominantly African-American neighborhood.<sup>322</sup> At the time of the decision, the city of Jersey Heights was ninety-nine percent African American, as a result of displacement from the siting of other highway and discriminatory real estate practices.<sup>323</sup> Since the residents were not barred from living in areas outside of where the highway was located, the court did not believe this created the type of housing barrier that the FHA, specifically section 3604(a), was intended to prevent.<sup>324</sup> The opinion emphasized that highway siting decisions are not related to housing, and are therefore beyond the scope of the FHA.<sup>325</sup> The court found that the statute explicitly states that the prohibition on discrimination is not limited strictly to housing, but also prohibits “the terms, conditions, or privileges of sale or rental of a dwelling, or . . . the provision of services or facilities in

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317. *Jersey Heights*, 174 F.3d at 195.

318. *Id.* at 192.

319. *Id.* at 191.

320. 405 U.S. 56, 74 (1972).

321. *Jersey Heights*, 174 F.3d at 191.

322. *Id.* at 193.

323. *Id.* at 194 (King, J., concurring); see Sheffield, *supra* note 293, at n. 169.

324. *Id.* at 192–93.

325. *Id.* at 192.



connection therewith.”<sup>326</sup> The plaintiffs argued that the highway siting decision fell into the latter clause as a “housing-related service.”<sup>327</sup> However, the court stated, “[B]ecause this challenge to the highway site selection process is too remotely related to the housing interests that are protected by the Fair Housing Act, we affirm the district court’s dismissal of this count of the complaint for failure to state a claim under the statute.”<sup>328</sup>

The court in *Laramore v. Illinois Sports Facilities Authority* also decided against classifying the siting of a stadium as a housing-related service for reasons similar to that of the *Jersey Heights* court.<sup>329</sup> The *Laramore* court found that it was likely that housing-related services within the scope of the FHA included police protection, fire protection and garbage collection, but decisions on where to locate a sports stadium are not within the purview of section 3604(b) of the FHA.<sup>330</sup>

Similarly, the court in *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*<sup>331</sup> ruled that plaintiffs failed to state a claim under the FHA when the plaintiffs alleged that the granting of an air permit for the operation of a cement grinding facility in a predominantly African-American neighborhood amounted to constructive eviction.<sup>332</sup> The plaintiffs argued that the operation of this facility diminished the quality and quantity of housing in the Waterfront South neighborhood where it would be

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326. *Jersey Heights*, 174 F.3d at 192 (stating that 42 U.S.C. § 3604(b) extends to housing and housing-related services).

327. *Id.* at 192–93.

328. *Id.* (stating that 42 U.S.C. § 3604(b) extends to housing and housing-related services).

329. *Laramore v. Ill. Sports Facilities Auth.*, 722 F. Supp. 443, 452 (N.D.Ill., 1989); *Edwards v. Media Borough Council*, 430 F. Supp. 2d 445, 452–53 (E.D. Pa. 2006) (recognizing that § 3604(b) may cover police and fire protection, garbage collection, and similar municipal services, but rejecting the present claim based on defendant’s denial of a zoning variance for plaintiff’s property on the ground that this is instead “a discretionary decision comparable to administering city-owned properties or deciding where to site a highway, conduct that is not covered under § 3604(b)”).

330. *Laramore*, 722 F. Supp at 452.

331. *S. Camden Citizens in Action*, 254 F. Supp. 2d at 486.

332. *Id.* at 500.

located.<sup>333</sup> They challenged the legality of the city of Camden's pattern of siting industrial facilities that expelled high rates of environmental hazards in low-income and minority neighborhoods.<sup>334</sup> Despite the adverse health and quality of life consequences of these pollutants on housing value, the plaintiffs did not prevail.<sup>335</sup> The court cautioned against "warping [section 3604] into plenary review" and "extending the plain language of [the statute] to any official decision that has an indirect effect on the availability of housing."<sup>336</sup> Environmental hazards cases are not the only type of non-housing cases that have found little success under the FHA.<sup>337</sup>

The *South Camden* court believed that the question at issue was, "Does [the defendant] provide a service to [the plaintiff] in a manner contemplated by the Fair Housing Act?"<sup>338</sup> The court concluded that the cement-grinding permit was too indirectly tied to housing to be cognizable under section 3604(a).<sup>339</sup> Like *Laramore* and *Jersey Heights*, the court here placed this issue in a group consisting of issues that have an effect on residents in a neighborhood, but were too far removed from housing to be within the intent of the FHA.<sup>340</sup> The court distinguished these services from those that were "specific residential services" that provide "door-to-door ministrations."<sup>341</sup>

Locations of highways, roadways, stadiums and industrial facilities all affect the "economic competitiveness and quality of life" that the Proposed Rule seeks to enhance.<sup>342</sup> Residents who live near highways experience adverse health consequences at disproportionately

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333. *S. Camden Citizens in Action*, 254 F. Supp. 2d at 492.

334. Prakash, *supra* note 41, at nn. 253–257.

335. *Id.* at n.258.

336. *Id.* at n.260.

337. *Id.* at n.273.

338. *S. Camden Citizens in Action*, 254 F. Supp. 2d at 499.

339. *Id.* at 500; *see* *Reste Realty Corp. v. Cooper*, 251 A.2d 268 (N.J. 1969) ("The general rule is, of course, that a tenant's right to claim a constructive eviction will be lost if he does not vacate the premises within a reasonable time after the right comes into existence.").

340. *S. Camden Citizens in Action*, 254 F. Supp. 2d at 502.

341. *Id.* at 503.

342. EPA, *Near-Source Air Pollution Research*, <http://www2.epa.gov/air-research/near-source-air-pollution-research> (last visited Oct. 25, 2015).

higher rates than those who do not.<sup>343</sup> Car emissions are responsible for as many as fifty percent of cancers caused by air pollution,<sup>344</sup> and noise pollution increases the risk of hearing impairment.<sup>345</sup> In the case of *Jersey Heights*, the highway prevented neighbors from reaching community assets.<sup>346</sup> Neighborhoods located in and around stadiums are plagued by disproportionately high concentrations of health hazards.<sup>347</sup> The concrete parking lots that usually consume large areas of square footage can cause runoff filled with pollutants that puddle into the water supply of the surrounding neighborhoods.<sup>348</sup> In addition to contamination, this increases instances of flooding.<sup>349</sup> The days when the stadium is full brings increased traffic to the area, resulting in health hazards that accompany numerous vehicles and their emissions.<sup>350</sup> When there is a dearth of stadium visitors, the large parking lots, which could be used for economic development, take up space and prohibit the siting of neighborhood amenities.<sup>351</sup> Residing in close proximity to any of these elements results in a lower property value for homeowners and has negative implications for the economic progress of a community.<sup>352</sup> Yet, the issue of sports stadium location

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343. See TEGAN K. BOEHMER ET AL., CENTERS FOR DISEASE CONTROL & PREVENTION, RESIDENTIAL PROXIMITY TO MAJOR HIGHWAYS-UNITED STATES, 2010 (2013).

344. *The Harmful Effects of Vehicle Exhaust*, ENVIRONMENT & HUMAN HEALTH, INC., <http://www.ehhi.org/reports/exhaust/summary.shtml> (last visited Oct. 17, 2015).

345. Meg Selig, *What Did You Say?! How Noise Pollution is Harming You*, PSYCHOL. TODAY (Sept. 25, 2013), <https://www.psychologytoday.com/blog/changepower/2013/09/what-did-you-say-how-noise-pollution-is-harming-you>.

346. *Jersey Heights*, 174 F.3d at 192-94.

347. *Id.*

348. See U.S. ENVTL. PROT. AGENCY, URBAN NONPOINT FACT SHEET: CLEAN WATER IS EVERYBODY'S BUSINESS (2003), [http://water.epa.gov/polwaste/nps/urban\\_facts.cfm](http://water.epa.gov/polwaste/nps/urban_facts.cfm).

349. *Id.*

350. See *Green Sports and Transportation: The Elephant in the Room*, U. OF PENN.: KNOWLEDGE@WHARTON (Dec. 13, 2013), <http://knowledge.wharton.upenn.edu/article/green-sports-transportation-elephant-room/>.

351. Pat Garafolo & Travis Waldron, *If You Build It, They Might Not Come: The Risky Economics of Sports Stadiums*, ATLANTIC (Sept. 7, 2012), <http://www.theatlantic.com/business/archive/2012/09/if-you-build-it-they-might-not-come-the-risky-economics-of-sports-stadiums/260900/>.

352. See Anita Wright, *Costs Far Outweigh Any Perceived Benefits of Stadium*, COLORADOAN (Nov. 22, 2012), <http://archive.coloradoan.com/article/20121122/OPIN>

was found to be outside of the scope of the FHA.<sup>353</sup>

As described above, courts are rarely convinced that the subject matter of non-housing cases are closely related to housing to warrant relief under the FHA. These courts emphasized that the Act was meant to be limited to specific fair housing problems, rather than encompass discriminatory acts resulting from any activity effecting residents in a neighborhood. Despite the United States Supreme Court's broad reading of the FHA,<sup>354</sup> these narrow holdings have precluded many plaintiffs from recovering for injuries that have affected their residential property, which has obstructed the FHA's goal of creating "truly integrated communities."<sup>355</sup>

In contrast, the court in *Campbell v. City of Berwyn* did find a non-housing case cognizable under Section 3604(b).<sup>356</sup> In *Campbell*, an African-American family moved into a predominantly white neighborhood and experienced racially motivated attacks on their home.<sup>357</sup> The defendants provided twenty-four-hour police protection to the family, but then terminated this protection after a couple of weeks and replaced it with video surveillance.<sup>358</sup> As in *Southend*, the *Campbell* court concluded that section 3604(b) "applie[d] to services generally provided by governmental units such as police and fire protection or garbage collection."<sup>359</sup>

The court in *Campbell* also concluded that plaintiffs failed to state a claim under section 3604(a) because the police protection did not create a barrier to housing, but rather affected an interest in property that was already owned by the plaintiffs.<sup>360</sup> This court acknowledged the guidance provided in *Southend*.<sup>361</sup>

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ION04/311220031/Costs-far-outweigh-any-perceived-benefits-stadium.

353. *Laramore*, 722 F. Supp. at 452.

354. Prakash, *supra* note 41, at n.262.

355. *Id.* at n.269.

356. *Campbell v. City of Berwyn*, 815 F. Supp. 1138, 1144 (N.D.Ill.1993); *see also S. Camden Citizens in Action*, 254 F. Supp. 2d at 502.

357. *Campbell*, 815 F. Supp. at 1140.

358. *Id.* at 1142.

359. *Id.* (quoting *Southend*, 743 F.2d at 1210.).

360. *Id.* at 1145.

361. *Id.* at 1143. ("With respect to their Section 3604(a) claim, plaintiffs must allege

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## Part V: Taking the Proposed Rule Beyond Non-Housing

Pursuant to the Proposed Rule, HUD's position is that there is a connection among neighborhood assets, neighborhood stressors, and housing.<sup>362</sup> The author posits that the measuring the existence of these socioeconomic factors in the AFH proves that HUD interprets the intent of the FHA to be extensive. Specifically, that access to fair housing opportunities means that protected classes also have access to critical neighborhood assets. The Proposed Rule intends to incorporate fair housing planning into development and other policies and practices that "influence how communities and regions grown and develop."<sup>363</sup> Including the measurement of non-housing elements as the litmus test for determining whether an entity is affirmatively furthering fair housing aligns with a framework that includes truly integrated living patterns as a quality of life that extends beyond one's residence. In order to facilitate a non-housing claim under section 3608, it is imperative that the United States Congress eradicate the judiciary's misinterpretation of the intent of the FHA as shown by their reluctance to find in favor of plaintiffs bringing disparate impact claims and the refusal to allow private rights of action under section 3608.

### A. The Proposed Rule and Disparate Impact Claims

Despite the recognition that the FHA permits not only discriminatory intent claims, but also disparate impact claims, courts have been conservative in providing relief for plaintiffs under the disparate impact theory, for fear of reaching beyond the scope

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that defendants' discriminatory actions, or the discriminatory effects of such actions, affect the availability of housing to them. See *Southend*, 743 F.2d at 1210. Such actions must have a direct impact on plaintiffs' ability, as potential homebuyers or renters, to locate in a particular area or to secure housing. *Id.* In *Southend*, plaintiffs argued, *inter alia*, that in predominately black areas, where the County held tax deeds, the County did not comply with its statutory obligation to maintain its properties." *Id.*)

362. Affirmatively Furthering Fair Housing, 78 Fed. Reg. at 43725.

363. *Id.* at 43711.

established by Congress.<sup>364</sup> Seichshnaydre's data shows that fewer than twenty percent of plaintiffs prevailed in their FHA disparate impact claims on appeal.<sup>365</sup> In addition to reinforcing that the intent of the FHA be interpreted broadly, the Proposed Rule provides assistance to plaintiffs attempting to prove a *prima facie* case in a disparate impact claim brought under section 3604 of the FHA.<sup>366</sup> This first step in the three-part, burden-shifting framework of these claims is often successfully accomplished by using statistics to show that an act or policy has a discriminatory impact on a protected class.<sup>367</sup> The lack of data has proven a deciding factor in denying plaintiffs' relief in many FHA disparate impact cases.<sup>368</sup> The Proposed Rule will increase the availability of data that can be used in proving various aspects of a *prima facie* case (the increased information on access to critical neighborhood assets being the most significant one for purposes of non-housing cases).<sup>369</sup>

The essence of the Proposed Rule is increasing the amount and utility of data related to housing and the segregation and integration of residential neighborhoods<sup>370</sup>—the shortcomings of the AI that were extensively examined by the GAO and detailed in Part II.A. of this Article.

## **B. The Proposed Rule and a Private Right of Action**

The Proposed Rule also suggests that permitting a private right of action under section 3608 supports the intent of the FHA, as it is incongruent to prohibit a private right of action under section 3608 while using the elements that consider an individual's quality of life to measure the effectiveness of the same section.<sup>371</sup>

Private enforcement mechanisms have been instrumental in

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364. Seichshnaydre, *supra* note 66, at n.94.

365. *Id.* at n.222.

366. Affirmatively Furthering Fair Housing, 78 Fed. Reg. at 43727.

367. *Id.*

368. Seichshnaydre, *supra* note 66, at 207, nn.994–99; *but see id.* at 209–211.

369. Affirmatively Furthering Fair Housing, 78 Fed. Reg. at 43727.

370. *Id.* at 43715.

371. *Id.*

bringing about the minimal racial desegregation that has occurred,<sup>372</sup> but unfortunately there is no private right of action under section 3608. HUD has only accepted claims under section 3608 of the FHA when they also allege additional discrimination claims.<sup>373</sup> Therefore, as previously discussed in Part I.B., a plaintiff must file suit under the APA, 42 U.S.C § 1983, or the FCA.<sup>374</sup> One case in recent years found in favor of a plaintiff who brought a claim under the FCA and section 3608 of the FHA. The court in *Westchester* found that the county did not meet its obligation to affirmatively further fair housing in conformance with its acceptance of over HUD funding in the form of \$52 million in Community Development Block Grant funds.<sup>375</sup> This predominantly white county failed to mention race in its AI from 2000-2006.<sup>376</sup> As stated in Part I.B. of this Article, despite the glaring defiance of the affirmatively furthering mandate, Westchester County has still not fully complied with the settlement in this case. If it were not such an anomaly for a private individual to successfully bring a claim under section 3608, perhaps compliance would not be so easy to evade.

The Proposed Rule is tailored to benefit private actors as well as public actors. HUD states that one goal of the Proposed Rule is to “provide relevant civil rights information to the community and other private and public sector stakeholders.”<sup>377</sup> HUD aims to make the goal of affirmatively further fair housing more participatory.<sup>378</sup> The Proposed Rule has the objective of bringing members of protected classes into the decision-making process regarding the use of the data collected.<sup>379</sup> The Proposed Rule also requires that program participants incorporate community participation in the AFH.<sup>380</sup> Despite the aforementioned references to be more inclusive of individuals, there is

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372. Rothstein and Whyte, *supra* note 59, at n.91.

373. Sheffield, *supra* note 293, at 94–95.

374. *Id.* at 49, 305.

375. King, *supra* note 293, at n.91.

376. *Westchester*, 668 F. Supp.2d at 558.

377. Affirmatively Furthering Fair Housing, 78 Fed. Reg. at 43711.

378. *Id.*

379. *Id.* at 43715.

380. *Id.*

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no private right of action under section 3608 of the FHA.

The *Westchester* court stated:

At a minimum, when a grantee certifies that the grant will be ‘conducted and administered’ in conformity with the Civil Rights Act of 1964 and the Fair Housing Act, and certifies that it ‘will affirmatively further fair housing,’ the grantee must consider the existence and impact of race discrimination on housing opportunities and choice in its jurisdiction. In identifying impediments to fair housing choice, it must consider impediments erected by race discrimination, and if such impediments exist, it must take appropriate action to overcome the effects of those impediments.<sup>381</sup>

A significant impediment to fair housing choice has been the denial of individuals’ right to bring a private cause of action alleging infringement of that choice. Challenges to this barrier will find support for their arguments in the Proposed Rule.

## Conclusion

According to floor debates in the Senate leading up to the enactment of the FHA, the underlying policy behind Title VIII is to encourage the dispersion of urban ghettos and to create more integrated neighborhoods.<sup>382</sup> However, nearly fifty years later, that

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381. *Westchester*, 668 F. Supp. 2d at 566.

382. See 114 Cong. Rec. 2985 (1968) (statement of Sen. Proxmire) (noting that Title VIII will establish “a policy of dispersal through open housing . . . look[ing] to the eventual dissolution of the ghetto and the construction of low to moderate income housing in the suburbs.”); see also Stanley P. Stocker-Edwards, *Black Housing 1860–1980: The Development, Perpetuation, and Attempts to Eradicate the Dual Housing Market in America*, 5 HARV. BLACKLETTER L.J. 50 (1989). Senator Walter Mondale stated that Title VIII represents “an absolutely essential first step” toward reversing the pattern of “two separate Americas constantly at war with one another.” 114 Cong. Rec. 2274 (1968). See also *id.* at 2524 (Statement of Sen. Brooks) (“Discrimination in the sale and rental of housing has been the root cause of the widespread patterns of de facto segregation which characterize America’s residential neighborhoods.”).



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intention has not been fully realized. A neighborhood is more than a collection of houses. Where you live can dictate where you work, where your children go to school, and how healthy you are. Failing to incorporate these factors in the preeminent law intended to affirmatively further fair housing indicates a failure to understand the holistic composition of the very neighborhoods that the Act aims to integrate.

The Proposed Rule presents an opportunity to breathe new life into words that have had sentimental meaning, but lacked the gravitas needed to create measurable changes in laws that overtly or covertly disproportionately bar minorities from resources needed to attain a higher quality of life. HUD has focused on creating a technical roadmap for their fund recipients and others beholden to the mandates of section 3608. HUD is hopeful that this will result in a decrease in litigation, and an increase in administrative relief and efficiency that evaded the AI process. Without trivializing the importance of these benefits, the most promising benefit of the Proposed Rule is its return to the reason the FHA was enacted. Explicitly acknowledging that affirmatively furthering fair housing requires data showing the proximity of protected classes to not only housing, but also health, employment, education, and transportation amenities, recognizes the intent of the Act as not limited to the purchase, sale, rental, and siting of housing units. It follows that policies related to these non-housing elements must be challenged if they do not comply with the mandates of the Act.

Historically, this logic has been interrupted by courts' perception that the reach of the FHA does not extend beyond traditional notions of housing discrimination. Plaintiffs asserting that the siting of environmental hazards, inadequate police protection, and other neighborhood stressors in their predominantly African-American neighborhoods were not successful in claiming state activities that created such policies violated the FHA. With this Proposed Rule, the intent of the FHA can be aligned with the reality of living patterns to affirmatively further fair housing.

In accordance with the legislative intent that can be gleaned from congressional records, the United States Supreme Court has held that

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Title VIII should be afforded a “generous construction.”<sup>383</sup> The Proposed Rule opens the door for non-housing cases to be brought under section 3608. This will increase the likelihood that a plaintiff bringing a disparate impact claim can successfully meet the burden of presenting a prima facie case, since it will make available data supporting that unintentional acts that have disproportionately negative effects on protected classes. Individuals wishing to bring a private right of action under section 3608 are supported by the inclusion of individual rights in the language of the Proposed Rule. Honoring the generous construction that the 90th Congress intended begins with acknowledging that the strength of the Proposed Rule extends beyond data collection and technical assistance. Leveraging these strengths through legal recourse is the true path to creating integrated neighborhoods.

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383. *Trafficante*, 409 U.S. at 212.

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*La gran lucha:*  
**Latina and Latino Lawyers,  
Breaking the Law on Principle, and  
Confronting the Risks of Representation**

MARC-TIZOC GONZÁLEZ\*

**Introduction**

Chicana, Chicano, and Mexican American law professors are rare in the United States.<sup>1</sup> Although Michael A. Olivas began to teach law

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\* Associate Professor of Law, St. Thomas University School of Law, mtgonzalez@stu.edu, @marctizoc. For their encouragement and support, I thank Professors Meera E. Deo, Richard Delgado, Lauren Gilbert, Ian F. Haney López, Angela P. Harris, Michael A. Olivas, Cruz Reynoso, Ediberto Román, and Lupe S. Salinas. For excellent research assistance, I thank St. Thomas Law students, Julio Menache, J.D. expected 2016, Gwendolyn Richards, J.D. expected 2016, and Jessica Biedron, J.D. expected 2017. I dedicate this Article to the families of the “Ayotzinapa 43,” rural Mexican students who were training to become educators until they were disappeared from the city of Iguala, state of Guerrero, México, after police and military forces assaulted them on September 26-27, 2014. See, e.g., *Mexico’s Missing Students: Were 43 Attacked by Cartel-Linked Police Targeted for Their Activism?*, DEMOCRACY NOW! (Oct. 15, 2014), [http://www.democracynow.org/2014/10/15/mexicos\\_missing\\_students\\_were\\_43\\_attacked](http://www.democracynow.org/2014/10/15/mexicos_missing_students_were_43_attacked). See generally HUMAN RIGHTS WATCH, MEXICO’S DISAPPEARED: THE ENDURING COST OF A CRISIS IGNORED (2013).

1. See Michael A. Olivas, *The Education of Latino Lawyers: An Essay on Crop Cultivation*, 14 CHICANO-LATINO L. REV. 117, 129–30 (1994) (“[O]f the 94 [Latino or Latina law faculty in the United States in 1992-93], 51 are Mexican Americans, 17 are Puerto Ricans, 17 are Cuban, and the remainder are of ‘other’ Latino origin.”). Compare ASS’N OF AM. L. SCHS. 2008-2009 STATISTICAL REPORT ON LAW FACULTY, RACE & ETHNICITY 11, 16 (2009) (reporting 334 Hispanic/Latino law professors in the AALS Directory of Law Teachers), with Meera E. Deo, *Looking Forward to Diversity in Legal*

in 1982, three decades after the first Mexican American law professor (Carlos Cadena in 1952),<sup>2</sup> Professor Olivas holds the distinction of

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*Academia*, 29 BERKELEY J. GENDER L. & JUST. 352, 356, 358 (2014) (explaining that the AALS stopped publishing law faculty demographic data in 2009 and reporting 337 Hispanic/Latino law faculty, out of a total of 10,965 U.S. law faculty, in the last reported year of 2008-09); *but see* Miguel A. Méndez & Leo P. Martínez, *Toward a Statistical Profile of Latina/os in the Legal Profession*, 13 BERKELEY LA RAZA L.J. 59, 75 (2002) (noting the discrepancy between the 140 Latina/o law professors, not including administrators or visiting clinical law professors, counted by Professor Olivas in 2001, and the 241 full time Hispanic faculty members counted by the AALS for the 1999, and explaining the discrepancy from the fact that the AALS included the Latina/o professors at the three Puerto Rican law schools). Because more recent AALS and more detailed information is not publicly available, one can only speculate at the current number of law professors who identify with particular Hispanic/Latino subgroups. Using Professor Deo's 337 figure, and assuming *arguendo* that the proportion of Mexican American law faculty in the United States remains the same as it was in 1992-93 (about fifty-four per cent of the Latino total), which seems unlikely, there would have been about 182 Mexican American-identified U.S. law professors in 2008-09, who would constitute about 1.6 percent of law faculty in the United States.

2. See Michael Olivas, *Hernandez v. Texas: A Litigation History*, 209, 216-19 in "COLORED MEN" AND "HOMBRES AQUÍ": *HERNANDEZ V. TEXAS* AND THE EMERGENCE OF MEXICAN-AMERICAN LAWYERING (Michael A. Olivas ed., 2006) (discussing Cadena's graduation from UT Austin Law in 1940, role in litigating *Hernandez v. Texas*, 347 U.S. 475 (1954) (extending constitutional equal protection to Mexican Americans), and teaching at St. Mary's School of Law); Olivas, *supra* note 1, at 128 ("The first Mexican-American law professor was Carlos Cadena, who taught at St. Mary's Law School from 1952 to 1954 and from 1961 to 1965. He was also co-counsel in *Hernandez v. Texas*, and is thought to be the first Chicano to have argued before the U.S. Supreme Court."); Michael A. Olivas, *The "Trial of the Century" that Never Was: Staff Sgt. Macario Garcia, the Congressional Medal of Honor, and the Oasis Café*, 83 IND. L.J. 1391, 1399 (2008) ("In 1954, Cadena became the first Mexican-American law professor, joining the St. Mary's Law faculty.") [hereinafter Olivas, *Trial of the Century*]; Michael A. Olivas, *The Accidental Historian or How I Found My Groove in Legal History*, in A PROMISING PROBLEM: THE CURIOUS STATE OF CHICANA/O HISTORY IN THE TWENTY-FIRST CENTURY 3 (Carlos K. Blanton ed., forthcoming) (on file with author) (noting that Olivas became a law professor in 1982) [hereinafter Olivas, *Accidental Historian*]; Michael A. Olivas, Curriculum Vitae, <http://www.law.uh.edu/faculty/cv/MichaelOlivas2015.pdf> (last visited Oct. 16, 2015) (on file with author) [hereinafter Olivas, Curriculum Vitae]. See also Kevin R. Johnson & George A. Martínez, *Crossover Dreams: The Roots of LatCrit Theory in Chicano Studies Activism and Scholarship*, 53 U. MIAMI L. REV. 1143, 1151 (1999) ("The first [Latina law professors include] Rachel Moran and Berta Hernández, two prominent LatCrit scholars, [who] joined the academy in the 1980s.").

being regarded as the Dean of Latina and Latino (Latina/o) law professors in the United States.<sup>3</sup> For those in the know, his audacious “Dirty Dozen List” advocacy in collaboration with Hispanic National Bar Association colleagues may be the most obvious reason for this appellation and the *respeto* (respect) that it signifies.<sup>4</sup> Professor Olivas’s historic advocacy for United States law schools to hire, retain, and grant tenure to Latina/o law professors, however, is only one aspect of his lifetime of scholarship, teaching, and service to the United States’ legal profession, diverse Latina/o communities, and the nation as a whole.<sup>5</sup>

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3. See Johnson & Martínez, *supra* note 2, at 1150–51 (“Against this background of the Chicano movement, we encounter the Chicana/o law professors of the 1970s and early 1980s . . . . Among these first Chicana/o law professors are scholar activists, including, but not limited to Leo Romero, Cruz Reynoso, and Richard Delgado. . . . Another person who fits within this long history of Mexican American scholar activists is Michael Olivas (roughly of this generation), considered to be the ‘Dean’ of Latina/o law professors, who began teaching law in 1982.”) (citations omitted); Ediberto Román & Christopher Carbot, *Freeriders and Diversity in the Legal Academy: A New Dirty Dozen List?*, 83 INDIANA L. REV. 1235, 1238 n.20 (2008) (“Due in part to his efforts associated with creating the Dirty Dozen List and his tireless efforts in assisting [Latina/os] with entering the academy, Professor Olivas is affectionately referred to as the Dean of all [Latina/o] law professors.”).

4. See Johnson & Martínez, *supra* note 2, at 1151 (“When Olivas began teaching there were only 22 Latina/o law professors, and, due in no small part to his efforts, there were 125 in the spring of 1998 . . . . “To pressure law schools to increase the number of Latina/o law professors, Olivas, with the backing of the Hispanic National Bar Association, established the so-called ‘Dirty Dozen’ list, i.e., a select list of law schools in areas with a significant Latina/o population but with no Latina/o faculty. The well-publicized list placed pressure on law faculties to hire Latinos/as; [and] some schools did. Olivas also conducted workshops for lawyers interested in law teaching at the annual Hispanic National Bar Association convention.”) (citations omitted); Román & Carbot, *supra* note 3, at 1238–39 (“This List, comprised of the top twelve U.S. law schools located in high [Latina/o] populated areas but lacking a single [Latina/o] professor on the faculty, served to increase awareness of the lack of diversity at some of the nation’s top legal institutions, as well as ‘shame’ these schools into remedying the dearth of diversity within their faculties.”) (citation omitted). See also Olivas, *supra* note 2, at 128–38 (discussing the situation of the Latina/o law professoriate as of the 1992–93 academic year, and presenting an array of policy prescriptions to increase the hiring of Latina/o law professors).

5. See generally Olivas, *Accidental Historian*, *supra* note 2 (discussing Olivas’s early vocational choices, the arc of his scholarly career, and how his scholarship on higher

In this Article, I pay homage to Professor Olivas, as an exemplar of Latina/o law professors, by engaging with several works of his scholarship, particularly *“Breaking the Law” on Principle: An Essay on Lawyers’ Dilemmas, Unpopular Causes, and Legal Regimes*.<sup>6</sup> I also explain how I understand myself to have benefited from Professor Olivas’s historic advocacy for diverse Latina/o communities.<sup>7</sup> As developed below, I understand my scholarly engagement with Olivas, and both of our careers, in the context of what I call *la gran lucha* (the great struggle), “the understanding that our pasts are not merely multicolored: rather, our diverse heritages wind through centuries of socio-legal struggle, which transcend the current nation state.”<sup>8</sup> I

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education law and immigration law led him to legal history); Olivas, Curriculum Vitae, *supra* note 2.

6. Michael A. Olivas, *“Breaking the Law” on Principle: An Essay on Lawyers’ Dilemmas, Unpopular Causes, and Legal Regimes*, 52 U. PITT. L. REV. 815 (1991), *reprinted in* THE LATINO/A CONDITION: A CRITICAL READER 320–31 (Richard Delgado & Jean Stefancic eds., 1998) [hereinafter LATINO/A CONDITION] *and* LATINOS AND THE LAW: CASES AND MATERIALS 813–20 (Richard Delgado, Juan F. Perea & Jean Stefancic eds., 2008) [hereinafter LATINOS AND THE LAW].

7. *See, e.g.*, Alfredo P. García, Walking the Walk for the Latina Professoriate (discussing how Professor Olivas supported and mentored García, the first Cuban American to become dean of a law school in the United States) (unpublished manuscript) (on file with author). Dean García joined the St. Thomas University School of Law faculty in 1989. *Id.* at 1. Twenty-two years later, I joined the St. Thomas Law faculty after four years of lawyering at the Alameda County Homeless Action Center and teaching undergraduate Ethnic Studies courses at San Francisco State University and the University of California, Berkeley. *See* Marc-Tizoc González, *Critical Ethnic Legal Histories: Unearthing the Interracial Justice of Filipino American Agricultural Labor Organizing*, 3 U.C. IRVINE L. REV. 991, 1025–29 (2013) (discussing the author’s experiences as an activist, attorney, and educator based in Oakland, California, by explicating design and implementation of the course, “Interracial Justice at Law: Researching the Histories of San Francisco Bay Area Legal Advocacy Organizations,” developed as a U.C. Berkeley Chancellor’s Public Scholar, 2010–11).

8. González, *supra* note 7, at 1012. *Cf.* Rachel Anderson, Marc-Tizoc González & Stephen Lee, *Toward a New Student Insurgency: A Critical Epistolary*, 87 CAL. L. REV. 1879, 1898 n.78 (2006) (“*La lucha* refers to the people’s perpetual struggle for justice. *El pueblo* refers to the people communally working together; it also means ‘the town,’ connoting the polis.”); *see also* Virginia P. Coto, *LUCHA, The Struggle for Life: Legal Services for Battered Immigrant Women*, 53 U. MIAMI L. REV. 749, 755 n.47 (1999) (“The word “Lucha” means “the struggle” in Spanish.”).

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deploy the concept of *la gran lucha* to frame my interpretation of Olivas's career, and those of Latina/o law professors who evince principles similar to his, and to contextualize their (our) efforts within actual lineages and fictive genealogies of Latina/o lawyers across the twentieth century.<sup>9</sup>

To embark toward that conclusion, I first discuss Professor Olivas's thoughtful response to Professor Martha L. Minow's article, *Breaking the Law: Lawyers and Clients in Struggles for Social Change*.<sup>10</sup> In reviewing the three case studies that Olivas developed in order to extend Minow's inquiry into three risks of legal representation, I also discuss the scholarly response to Olivas's essay, from 1993 when the first law review publication cited to it, through 2013 when the twenty-fourth did so.<sup>11</sup> Along the way, I discuss how the case studies implicate similar risks of representation regarding reemerging socio-legal situations, particularly the situation of women and children from El Salvador, Guatemala, and Honduras who seek asylum in the United States (the risk of nonrepresentation), and the detention of people from other Latin American countries, on the basis of their unauthorized immigration status, who migrate to the United States in order to create a better life for themselves and their families (the risk of terminated representation). Toward the end of Part I, I discuss the legal scholarship, by Olivas and others, on a famous Chicano lawyer, Oscar "Zeta" Acosta, who has been acclaimed for quashing the indictment of Chicano Movement activists in late 1960s Los Angeles.<sup>12</sup>

Olivas's scholarship on Acosta illuminated the risk of truncated representation and suggested one way to confront it: rather than accede to the criminalization of his clients, Acosta subpoenaed the in-court testimony of over one hundred judges regarding their nomination practices for the Los Angeles grand jury, and he

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9. See *infra* Part II (discussing the legal history of Chicana/o and other Mexican American lawyers in California and Texas).

10. See Martha L. Minow, *Breaking the Law: Lawyers and Clients in Struggles for Social Change*, 52 U. PITT. L. REV. 723 (1991); Olivas, *supra* note 6.

11. See *infra* Appendix 1 (listing the twenty-four citing references to Olivas, *supra* note 6).

12. See *infra* Part I.C (discussing the risk of truncated representation).



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ultimately proved that they violated constitutional equal protection.<sup>13</sup>

Building upon the legal scholarship on Acosta, I conclude the Article by explaining why I interpret the work of Professor Olivas, particularly his scholarship, but also his teaching and service, under the concept of *la gran lucha*. I explicate by discussing several twentieth century Mexican American lawyers in California who preceded Acosta, and I argue that they contextualize the work of Olivas, and other Latina/o law professors, within actual lineages and fictive genealogies of people who use the law to struggle against injustice. Learning how lawyers of diverse racialized ethnic identities confronted the risks of representation in the past can benefit lawyers, and other legal workers, who struggle against injustice today.

## I. Breaking the Law on Principle: Olivas's Risk of Representation Case Studies

In this Part, I review the three case studies that Professor Olivas developed in order to extend Professor (now Harvard Law dean) Martha Minow's inquiry into three risks of representation for lawyers whose clients "entertain breaking the law as one of their strategies for achieving social change."<sup>14</sup> While reviewing each case study, I gloss how other scholars have responded to Olivas's essay and discuss how the case studies implicate similar and reemerging socio-legal situations (and their concomitant risks of representation). I end the Part by briefly discussing a few apparently new socio-legal situations that implicate the three risks of representation, which militate for further research into how lawyers might confront the risks of representation in order to ethically represent people who seek social justice under, and beyond, the color of the law.<sup>15</sup>

In 1991, almost a decade into his career as a law professor,

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13. See *infra* notes 151–53, 277–85, 292–97 and accompanying text.

14. Minow, *supra* note 10, at 723–24.

15. On the "color of law" notion, and the state action doctrine, see generally Richard H.W. Maloy, "Under Color of" – What Does It Mean?, 56 MERCER L. REV. 565 (2005), (cited approvingly in *United States v. Temple*, 447 F.3d 130, 141 n.1 (2d Cir. 2006)).

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Professor Olivas published an essay in response to Professor Minow's inquiry into how lawyers and law students could learn from clients and communities who struggled to achieve social change outside of institutions and conduct deemed lawful in a particular historical moment.<sup>16</sup> In Minow's provocative phrasing, "[W]hat can and what should lawyers do for clients who entertain breaking the law as one of their strategies for achieving social change?"<sup>17</sup> Olivas responded to Minow by focusing on the three risks of representation that she characterized as:

inherent in the lawyer-client relationship that occur when the client breaks the law in order to pursue social, political, or legal change: a risk of nonrepresentation, where no accomplished lawyer will take the case; a risk of terminated representation, when ethical requirements may jeopardize an unpopular client's defense; and a risk of truncated representation, where the lawyer's choice of tactics may undermine the very premise of the client's grievance.<sup>18</sup>

As Olivas explained his essay's purpose:

I seek to extend [Minow's] inquiry by posing several cases that elaborate upon her thesis, which I take to be that most legal education neither equips students to think strategically or ethically about enduring inequities in society, nor provides problem-solving experiences so that students can undertake social reform in life after law school.<sup>19</sup>

He then presented three case studies to illustrate the risks of representation that Minow had identified. Although each case study implicated all three risks of representation, in my view each case study highlighted a particular risk: (1) the risk of nonrepresentation for unaccompanied children from Central American countries who sought asylum in the United States in the late 1980s through federal

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16. See Minow, *supra* note 10; Olivas, *supra* note 6.

17. Minow, *supra* note 10, at 723–24.

18. Olivas, *supra* note 6, at 815.

19. *Id.* at 819.

courts located in Texas;<sup>20</sup> (2) the risk of terminated representation when lawyers organized boycotts of Israeli military courts in 1989 to protest their clients' conditions of detention and lack of due process following the first *Intifada*;<sup>21</sup> and (3) the risk of truncated representation through the startling litigation strategy attributed to Chicano lawyer Oscar "Zeta" Acosta.<sup>22</sup> Acosta defended Chicano Movement activists in the late 1960s, including those who were indicted for felony conspiracy to commit various misdemeanor crimes allegedly committed while organizing the Chicano "blowouts" of March 1968, massive student walk-out strikes against the racist conditions of their East Los Angeles high schools.<sup>23</sup> To quash the indictments, Acosta subpoenaed and interrogated more than one hundred judges in court, seeking to prove that their grand jury selection practices violated constitutional equal protection.<sup>24</sup>

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20. *Id.* at 819–35. See also Michael A. Olivas, *Unaccompanied Refugee Children: Detention, Due Process, and Disgrace*, 2 STAN. L. & POL'Y REV. 159 (1990) (discussing the detention of thousands of unaccompanied children in refugee camps without access to basic necessities) [hereinafter Olivas, *Unaccompanied Refugee Children*].

21. Olivas, *supra* note 6, at 820, 835–46. Discussing the 1987 uprising against the conditions of the "Occupied Territories" (a.k.a., the *Intifada*) in detail is beyond the scope of this Article, but for a view contemporaneous to Olivas's essay, see Richard A. Falk & Burns H. Weston, *The Relevance of International Law to Palestinian Rights in the West Bank and Gaza: In Legal Defense of the Intifada*, 32 HARV. INT'L L.J. 129 (1991).

22. Olivas, *supra* note 6, at 820, 846–54. On the life and times of Oscar Z. Acosta, see OSCAR ACOSTA, *THE AUTOBIOGRAPHY OF A BROWN BUFFALO* (1972) [hereinafter ACOSTA, *BUFFALO*]; OSCAR ACOSTA, *THE REVOLT OF THE COCKROACH PEOPLE* (1973) [hereinafter ACOSTA, *REVOLT*]; OSCAR "ZETA" ACOSTA: *THE UNCOLLECTED WORKS* (Ilan Stavans ed., 1996) [hereinafter UNCOLLECTED WORKS]. Acosta was born on April 8, 1935, in El Paso, Texas. ILAN STAVANS, *BANDIDO: OSCAR "ZETA" ACOSTA & THE CHICANO EXPERIENCE* 125 (1995). His date of death is unknown, but he disappeared off the coast of México in May 1974 and was declared legally dead on December 18, 1986. Olivas, *supra* note 6, at 854 n.154 (citing *In re Estate of Oscar Zeta Acosta*, Order No. P710333, Los Angeles Superior Court (Dec. 18, 1986)).

23. Olivas, *supra* note 6, at 820, 846–54. On the late 1960s Chicano Movement in Los Angeles, see, e.g., MARIO T. GARCÍA & SAL CASTRO, *BLOWOUT!: SAL CASTRO AND THE CHICANO FIGHT FOR EDUCATIONAL JUSTICE* (2011); IAN F. HANEY LÓPEZ, *RACISM ON TRIAL: THE CHICANO FIGHT FOR JUSTICE* (2003); CARLOS MUÑOZ, JR., *YOUTH, IDENTITY, POWER: THE CHICANO MOVEMENT* (1989). See also *Walkout* (Edward James Olmos dir., 2006).

24. Olivas, *supra* note 6, at 820, 846–54.

### A. The Risk of Nonrepresentation

Professor Olivas discusses the risk of nonrepresentation by focusing on “the case of unaccompanied refugee children, [whom] the government has openly and flagrantly precluded from receiving counsel.”<sup>25</sup> He contextualizes the detention of “unaccompanied children who have felt the violence in their Central American countries” within the then-recent “Congressional action to apologize for the internment of [around 120,000] Japanese Americans during World War II and to make long overdue restitution for their appropriated property.”<sup>26</sup> Possibly to forestall some readers’ protests that the Japanese “war relocation centers” should not be compared to refugee camps for Central American children, Olivas then details the grim conditions of confinement within the then-new camps, which the then-Immigration and Naturalization Service (“INS”) established in early 1989.<sup>27</sup>

For example, Olivas discusses the “expansion of detention facilities in rural areas such as Florence, Arizona, and El Centro,

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25. *Id.* at 819.

26. *Id.* at 820; see also COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, *PERSONAL JUSTICE DENIED* 2–3 (1983), <http://www.archives.gov/research/japanese-americans/justice-denied/> (“This policy of exclusion, removal, and detention was executed against 120,000 people without individual review[.]”) [hereinafter *PERSONAL JUSTICE DENIED*]; MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* 175 (2006) (“Presuming all Japanese in America to be racially inclined to disloyalty, the United States removed 120,000 Japanese Americans—two-thirds of them citizens—from their homes on the Pacific Coast and interned them in ten concentration camps in the interior.”) (citation omitted); Denshō, <http://www.densho.org> (last visited July 27, 2015) (preserving oral histories of Japanese Americans detained by the United States during World War II); Adam Liptak, *A Discredited Supreme Court Ruling That Still, Technically, Stands*, N.Y. TIMES (Jan. 27, 2014), [http://www.nytimes.com/2014/01/28/us/time-for-supreme-court-to-overrule-korematsu-verdict.html?\\_r=0](http://www.nytimes.com/2014/01/28/us/time-for-supreme-court-to-overrule-korematsu-verdict.html?_r=0) (noting that the United States removed 110,000 Americans of Japanese ancestry from their homes and confined them in detention camps during World War II).

27. See Olivas, *supra* note 6, at 821. See also NGAI, *supra* note 26, at 169, 175–201 (discussing the “mass incarceration [of Japanese Americans] in U.S. concentration camps from 1942 to 1945”).

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California, as well as in six sites in South Texas: Los Fresnos, Raymondsville, Port Isabel, Hondo, Brownsville, and San Benito.”<sup>28</sup> Emblematic of the “ramshackle” condition of these “detention centers,” Olivas highlights, “[O]ne site in Texas has been sardonically dubbed ‘El Corralon’ (*The Corral*), while another is a former Department of Agriculture pesticide storage facility.”<sup>29</sup> Citing to testimony before Congressional hearings, contemporary journalism, authoritative reports by government agencies and lawyers’ organizations, and reported judicial opinions, Olivas demonstrates that the detention centers failed to provide essential services to the children whom they confined, including health care, education, counseling, and access to legal services.<sup>30</sup> He concludes, “Such coercive conditions have wreaked serious damage upon the children, who often have no family members to protect their interests and who are unaware of their rights under United States law.”<sup>31</sup>

From the terrible conditions of the children’s confinement, Olivas then excoriates the INS practices that have deprived these children of their rights under constitutional due process and controlling statutes.<sup>32</sup> He explains:

The practice of detaining alien minors has advanced two ulterior motives. First, the harsh practice is used to discourage other refugees from migrating to the United States—to show them that the United States “means business.” Secondly, the practice of requiring parents or family members to appear in person and claim the children has been fashioned to “bait” undocumented families into revealing themselves to authorities.<sup>33</sup>

Drawing upon then-recent federal district court opinions, Olivas details how the INS had “acted to deprive unaccompanied alien

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28. Olivas, *supra* note 6, at 822.

29. *Id.*

30. *See id.* at 821–26.

31. Olivas, *supra* note 6, at 822.

32. *Id.* at 823–26.

33. *Id.* at 823.

minors of their rights to full hearings and other due process rights.”<sup>34</sup> For example, “the judge in *Orantes-Hernandez* found a ‘persistent pattern and practice of misconduct,’ use of ‘intimidation, threats, and misrepresentation,’ and evidence of ‘a widespread and pervasive practice akin to a policy’ concerning pressure on Salvadorans to concede their rights.”<sup>35</sup> Olivas also decried “the remote locations of the facilities, INS policies on transfer and availability of legal resources, and poor response by organized bars,” concluding that, “legal assistance to unaccompanied children is virtually non-existent.”<sup>36</sup> He highlighted that, “even though Laredo, Texas is hundreds of miles away from San Antonio, over eighty percent of the San Antonio region immigration caseload is in Laredo.”<sup>37</sup> Most egregious, in his estimation, however was “the INS practice of transferring aliens as a means of depriving them of counsel.”<sup>38</sup> Indeed, “in several instances, transfers have even been made after counsel was retained or as a blatant attempt to deny [the right to] counsel.”<sup>39</sup>

Reading Olivas’s essay some twenty-four years after it was published, I am reminded of the phrase, *plus ça change, plus c’est la même chose* (the more things change, the more they stay the same).<sup>40</sup>

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34. Olivas, *supra* note 6, at 824–25 (discussing *Flores v. Meese*, 681 F. Supp. 665 (C.D. Cal. 1988), *rev’d* by 913 F.2d 1315 (9th Cir. 1990); *Orantes-Hernandez v. Meese*, 685 F. Supp. 1488 (C.D. Cal. 1988); *Perez-Funez v. INS*, 611 F. Supp. 990 (C.D. Cal. 1984), *modified* by 619 F. Supp. 656 (C.D. Cal. 1985)). See also Olivas, *supra* note 6, at 825–26 (discussing *Comm. of Cent. Am. Refugees v. INS*, 795 F.2d 1434 (9th Cir. 1986); *Comm. of Cent. Am. Refugees v. INS*, 682 F. Supp. 1055 (N.D. Cal. 1988); *Nuñez v. Boldin*, 537 F. Supp. 578 (S.D. Tex. 1982), *appeal dismissed* 692 F.2d 755 (5th Cir. 1982)). For further discussion of *Flores*, see *infra* note 60.

35. Olivas, *supra* note 6, at 824 (citing *Orantes-Hernandez*, 685 F. Supp. 1488, 1504–05 (C.D. Cal. 1988), *aff’d sub nom. Orantes-Hernandez v. Thornburgh*, 919 F.2d 549 (9th Cir. 1990)).

36. Olivas, *supra* note 6, at 824.

37. *Id.* at 824.

38. *Id.* at 825.

39. *Id.* at 825–26 (citation omitted).

40. The phrase is attributed to the French critic, journalist, and novelist, Jean-Baptiste Alphonse Karr (Nov. 24, 1808, to Sept. 29, 1890), who coined it as an epigram in the January 1849 issue of his monthly journal *Les Guêpes* (The Wasps). See Alphonse Karr, WIKIQUOTE, at [https://en.wikiquote.org/wiki/Alphonse\\_Karr](https://en.wikiquote.org/wiki/Alphonse_Karr) (last modified Mar. 10, 2015); *plus ça change, plus c’est la même chose*, WIKTIONARY, [https://en.wiktionary.org/wiki/plus\\_ça\\_change\\_plus\\_c'est\\_la\\_même\\_chose](https://en.wiktionary.org/wiki/plus_ça_change_plus_c'est_la_même_chose)

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As a socially active law student, lawyer, and professor<sup>41</sup> over the past dozen-or-so-years, I have read and heard myriad accounts of the United States Immigration and Customs Enforcement agency (“ICE”) of the Department of Homeland Security detaining people throughout the United States, on (un/reasonable?) suspicion of them lacking authorized immigration status.<sup>42</sup> While I did not practice immigration law in this period, my Chicana/o identity,<sup>43</sup> education in

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nary.org/wiki/plus\_ça\_change,\_plus\_c'est\_la\_même\_chose (last modified Feb. 9, 2015); accord Charles Sumner Stone, Jr., *Thucydides' Law of History, or from Kerner, 1968 to Hacker, 1992*, 71 N.C. L. REV. 1711, 1733 n.82 (1993); Kathryn A. Stephens, *Introduction*, 3 ST. MARY'S J. LEGAL MAL. & ETHICS 281, 282 n.9 (2013).

41. See Anderson et al., *supra* note 8, at 1892–1905 (theorizing insurgent student activism distilled from the author’s experience in Berkeley Law student organizations from 2002 to 2005); see also González, *supra* note 7, at 1026–29 (discussing the author’s creation of the course, “Interracial Justice at Law: Researching the Histories of San Francisco Bay Area Legal Advocacy Organizations” within the context of lawyering at the Oakland, California office of the Alameda County Homeless Action Center, teaching Ethnic Studies courses at San Francisco State University and U.C. Berkeley, and serving as a director or officer of, *inter alia*, the Berkeley Law Foundation, Centro Legal de la Raza, East Bay La Raza Lawyers Association, and National Lawyers Guild – San Francisco Bay Area Chapter).

42. See, e.g., RAQUEL ALDANA & STEVEN BENDER, SALT STATEMENT ON POST 9/11 IMMIGRATION MEASURES (2007) (on file with author) (explaining the evolution of Congressional plenary power over immigration in order to increase awareness of how law has functioned to exclude noncitizens from fundamental rights); U.S. DEPT. HOMELAND SEC., BUREAU OF IMMIGRATION & CUSTOMS ENFORCEMENT, ENDGAME OFFICE OF DETENTION AND REMOVAL STRATEGIC PLAN, 2003-2012 ii (Aug. 15, 2003) (on file with author) (planning to detain and deport “all removable aliens” in order “to maintain the integrity of the immigration process and protect our homeland”); ERIK CAMAYD-FREIXAS, STATEMENT OF DR. ERIK CAMAYD-FREIXAS FEDERALLY CERTIFIED INTERPRETER AT THE U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA REGARDING A HEARING ON “THE ARREST, PROSECUTION, AND CONVICTION OF 297 UNDOCUMENTED WORKERS IN POSTVILLE, IOWA, FROM MAY 12 TO 22, 2008” (June 13, 2008), [http://judiciary.house.gov/\\_files/hearings/pdf/Camayd-Freixas080724.pdf](http://judiciary.house.gov/_files/hearings/pdf/Camayd-Freixas080724.pdf) (commenting on the arrest, prosecution, and conviction of 297 undocumented workers who were detained following a raid of Agriprocessors, Inc., the nation’s largest kosher slaughterhouse and meat packing plant, located in Postville, Iowa, and critiquing the judicial process as marred by myriad irregularities, which undermined the defendants’ due process rights and defense against federal felony charges of identity theft).

43. See Anderson et al., *supra* note 8, at 1880 n.4 (discussing the author’s Chicana/o identity).

comparative ethnic studies and critical race theory,<sup>44</sup> and affiliation with Latina and Latino Critical Legal (LatCrit) theory, praxis, and community<sup>45</sup> have informed me about the colonialist and racist histories of United States immigration policies and practices,<sup>46</sup> and motivated me to learn about their enforcement in the twenty-first century. Olivas's essay deepens and concretizes the insight that the people who have directed ICE over the past dozen years barely needed to dust off the playbooks of yesterday's INS—both as to immigrants in general and, particularly, as to children from Central American countries seeking refuge in the United States.

For example, when I first heard about ICE's practice of quickly

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44. See *id.* at 1892–1904 (discussing the author's education in critical race theory, and experiences with LatCrit theory, praxis, and community through "insurgent student activism" at Berkeley Law from 2002–05); González, *supra* note 8, at 1026, 1033–34 (discussing the author's education in comparative ethnic studies at San Francisco State University).

45. See Anderson et al., *supra* note 8, at 1897 n.76 (citing several exemplars of critical race theory); González, *supra* note 7, at 1006–07 nn.35–39 (citing exemplars of various genres of critical outsider jurisprudence, including Asian American legal scholarship, critical race feminism, critical race theory, and LatCrit theory).

46. See, e.g., NGAI, *supra* note 26, at 96–224 (discussing pre-1965 immigration law and policy regarding Filipino, Mexican, Japanese, and Chinese communities); RONALD L. MIZE & ALICIA C.S. SWORDS, CONSUMING MEXICAN LABOR: FROM THE BRACERO PROGRAM TO NAFTA xiii (2011) (arguing that postwar immigration patterns of typical Mexican immigrant workers must be understood in the context of how North American consumption practices have shaped particular labor demands for low wages and marginalized conditions). See also Anderson et al., *supra* note 8, at 1902 (contextualizing the twentieth-century *Bracero* programs and 1954's Operation Wetback within the aftermath of the 1846–48 United States invasion of México); Lauren Gilbert, *Fields of Hope, Fields of Despair: Legisprudential and Historic Perspectives on the AgJobs Bill of 2003*, 42 HARV. J. ON LEGIS. 417, 425–33 (2000) (providing a brief history of U.S. guest worker programs); González, *supra* note 7, at 993 n.2, 1017 n.70 and accompanying text (discussing the *Bracero* programs, which facilitated the entry of Mexican nationals to labor in the United States, predominantly in agriculture, from 1942–64, and discussing the conquest, occupation, and colonization of *las islas Filipinas* (the Philippine Islands) by the United States in the late nineteenth and early twentieth-century era of Asian exclusion, which subjected the archipelago's inhabitants to the status of being American nationals); Marc-Tizoc González, Who were the Braceros? What was Operation Wetback? – How Mid-Twentieth-Century Immigration and Labor Law and Policy Shape Today's Child Refugee Crisis 7 (unpublished manuscript) (on file with author).



sending an “immigrant detainee” away to a distant “detention facility” in a rural part of the state, or out of the state entirely,<sup>47</sup> it seemed not only outrageous but also lawless, as violating fundamental constitutional rights of due process and the assistance of counsel. Similarly, to me the ubiquitous ICE raids that began under the rule of President George W. Bush seemed redolent of mid-twentieth century travesties like 1954’s “Operation Wetback,” which deported over a million people who were deemed to be Mexican, including United States citizens of Mexican heritage, in a single year.<sup>48</sup> While I hope that few, if any, lawyers would deny that twentieth century history provides critical insights into the policies and practices that constitute or exacerbate injustice today, I have nevertheless spoken with many law students and lawyers who advance social justice under the color of law yet lack a deep and nuanced understanding of the socio-legal histories that contextualize

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47. See, e.g., HUM. RTS. WATCH, *LOCKED UP FAR AWAY: THE TRANSFER OF IMMIGRANTS TO REMOTE DETENTION CENTERS IN THE UNITED STATES* (2009), INTER-AM. COMMISSION ON HUM. RTS., *REPORT ON IMMIGRATION IN THE UNITED STATES: DETENTION AND DUE PROCESS*, ORG. OF AM. STATES 137–40 (Dec. 30, 2010) (describing “pervasive use of transfers between detention facilities”).

48. See, e.g., HANEY LÓPEZ, *supra* note 23, at 83 (noting that 3.8 million people were deported to Mexico from the start of Operation Wetback, and over the next five years, with only 63,515 receiving formal deportation hearings, and the deportees included many U.S. citizens); MIZE & SWORDS, *supra* note 46, at 1–2, 25–40 (discussing Operation Wetback in detail); NGAI, *supra* note 23, at 155–57 (contrasting Operation Wetback with the Mexican workers whom the United States admitted during the same period under the Bracero Program); González, *supra* note 46, at 7 (presenting a chronology of Operation Wetback); Michael A. Olivas, *The Chronicles, My Grandfather’s Stories, and Immigration Law: The Slave Traders Chronicle as Racial History*, 34 ST. LOUIS U. L.J. 425, 437–39 (1990) (“In 1954, over one million braceros were deported under the terms of ‘Operation Wetback,’ a ‘Special Mobile Force’ of the Border Patrol . . . . The Bracero Program, dehydration and Operation Wetback all presaged immigration programs of the 1980’s. During this time, the INS began ‘Operation Jobs,’ a massive early 1980’s workplace-raid program of deportations[.]”) (citations omitted). See generally JUAN RAMON GARCÍA, *OPERATION WETBACK: THE MASS DEPORTATION OF MEXICAN UNDOCUMENTED WORKERS IN 1954* (1980). On the raids of homes by ICE agents searching for “immigration fugitives,” which the Bush Administration vastly expanded in 2006, see, e.g., Nina Bernstein, *Report Says Immigration Agents Broke Law and Agency Rules in Home Raids*, N.Y. TIMES (July 22, 2009), <http://www.nytimes.com/2009/07/22/nyregion/22raids.html>.

and shape present-day inequities.<sup>49</sup> Olivas's essay provides a powerful antidote to this historical amnesia.

Indeed, as to children from Central American countries seeking refuge in the United States, Olivas's essay seems positively prophetic. In 2014, the United Nations High Commissioner for Refugees and popular media in the United States noted a "surge" in unaccompanied children, primarily from the Central American countries of El Salvador, Guatemala, and Honduras, seeking asylum in nearby countries, including the United States.<sup>50</sup> The so-called surge in unaccompanied minors apprehended at the Southwest United States border with México, which received substantial media attention in the

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49. See González, *supra* note 7, at 1020–21 ("Consequently, today's students are left to the vagaries of their own educational institutions, social networks, and serendipities—rather than being able to learn early and comprehensively about the existence of legal advocacy organizations that are dedicated to addressing the socio-legal needs of . . . differentially racialized communities."). Accord Marie A. Failing, *Necessary Legends: The National Equal Justice Library and the Importance of Poverty Lawyers' History*, 17 ST. LOUIS U. PUB. L. REV. 265, 284–87 (1998) (arguing persuasively for learning the history of the legal services movement); Olivas, *Accidental Historian*, *supra* note 2, at 21 ("I was astounded that I had been a law student, a legal scholar, and a Chicano, and I had never heard of the case [*Hernandez v. Texas*, 347 U.S. 475 (1954)] or of him [Southern District of Texas Judge James DeAnda] in this capacity [as one of the *Hernandez* lawyers].").

50. See, e.g., U.N. HIGH COMM'R FOR REFUGEES, CHILDREN ON THE RUN: UNACCOMPANIED CHILDREN LEAVING CENTRAL AMERICA AND MEXICO AND THE NEED FOR INTERNATIONAL PROTECTION 4–5 (May 2014) [hereafter CHILDREN ON THE RUN] (documenting the increased number of asylum seekers from El Salvador, Guatemala, and Honduras since 2009, with a noteworthy "surge," beginning in Oct. 2011, of unaccompanied and separated children from these countries, and from Mexico, seeking to enter the United States). See also *Children on the Run*, N.Y. TIMES (June 4, 2014), <http://nyti.ms/1kzi7lf>; Ian Gordon, *70,000 Kids Will Show Up Alone at Our Border This Year. What Happens to Them?*, MOTHER JONES (June/Aug. 2014), <http://www.motherjones.com/politics/2014/06/child-migrants-surge-unaccompanied-central-america> (reporting on "the child migrant surge," noting that the United States Border Patrol apprehended 38,833 unaccompanied minors in fiscal year 2013, and projecting as many as 74,000 such apprehensions in fiscal year 2014); Julianne Hing, *Three Myths of the Unaccompanied Minors Crisis, Debunked*, COLORLINES (July 1, 2014), <http://www.colorlines.com/articles/three-myths-unaccompanied-minors-crisis-debunked> (reporting that "the United States Conference of Catholic Bishops and the Women's Refugee Commission have noted the jump in unaccompanied minor border crossings since late 2011") (citation omitted).

summer of 2014, was first noted in fiscal year 2011 but the increase in people seeking asylum in the United States from El Salvador, Guatemala, and Honduras actually began in 2009.<sup>51</sup>

The numbers are striking, and the scale is massive. When Olivas wrote in 1991, “INS figures show[ed] over 880 alien children detained in Texas and 1,200 in California.”<sup>52</sup> In fiscal year 2009 (October 1, 2008 to September 30, 2009), the United States Customs and Border Protection (“CBP”) agency reported encountering 1,221 “unaccompanied alien children” from El Salvador, 1,115 from Guatemala, 968 from Honduras, and 16,114 from México, at the Southwest border, totaling 19,418 children.<sup>53</sup> In fiscal year 2011, CBP reported encountering 1,394 “unaccompanied alien children” from El Salvador, 1,565 from Guatemala, 974 from Honduras, and 11,768 from México, totaling 15,701 children.<sup>54</sup> This figure was about eighty-one percent of the number reported for 2009 and apparently caused by the substantial decrease in CBP encounters with unaccompanied children from México. By fiscal year 2014, however, CBP reported 16,404 “unaccompanied alien children” from El Salvador, 17,057 from Guatemala, 18,244 from Honduras, and 15,634 from México, totaling 67,399 children, or about 347 percent of the 2009 number and 429 percent of the 2011 number.<sup>55</sup> Finally, in contrast to the reported numbers of “unaccompanied alien children” *encountered* in 2014, CBP reported that it had *apprehended* 68,541 “unaccompanied alien children” at the Southwest border, plus an *additional* 68,445 family unit apprehensions.<sup>56</sup>

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51. See CHILDREN ON THE RUN, *supra* note 50, at 4–5; see also SOUTHWEST BORDER UNACCOMPANIED ALIEN CHILDREN (FY 2014), U.S. CUSTOMS & BORDER PATROL, <http://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children-2014> (last visited Nov. 3, 2015).

52. Olivas, *Unaccompanied Refugee Children*, *supra* note 20, at 160.

53. U.S. CUSTOMS & BORDER PATROL, *supra* note 51.

54. *Id.*

55. *Id.* Accord Dan Restrepo & Ann Garcia, *The Surge of Unaccompanied Children from Central America*, CTR. FOR AM. PROGRESS 2 (July 24, 2014).

56. U.S. CUSTOMS & BORDER PATROL, *supra* note 51. Accord Cindy Carcamo, *Nearly 300 Women, Children, Deported from Immigration Detention Centers*, L.A. TIMES (Aug. 21, 2014), <http://www.latimes.com/nation/nationnow/la-na-nn-ff-new-mexico-immigration-deportation-20140821-story.html> (“In the last nine months, about 63,000

In the face of such numbers, the risk of nonrepresentation for unaccompanied refugee children is stark, and relatively few structural reforms have been implemented since Olivas highlighted the problem “of the children, many of whom have meritorious asylum claims, not being able to obtain counsel in time for counsel to be of significant assistance.”<sup>57</sup> While the conditions of confinement may have improved slightly, they remain inadequate.<sup>58</sup> ICE practices still seem designed to deprive these children of their rights, notwithstanding court orders to the contrary.<sup>59</sup> Children in

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single parents with at least one child have been apprehended along the Southwest border, mainly in southern Texas. At the same time, about the same numbers of children traveling without a parent have been apprehended along the border.”).

57. Olivas, *supra* note 6, at 833.

58. See, e.g., Carcamo, *supra* note 56 (discussing a Department of Homeland Security Office of Inspector General report finding “inadequate amounts of food, inconsistent temperatures and unsanitary conditions—at various immigration holding facilities for children”). See also Anna Gorman, *Immigration Detention Centers Failed to Meet Standards, Report Says*, L.A. TIMES (July 29, 2009), <http://articles.latimes.com/2009/jul/29/nation/na-detention29>; Karen McVeigh, *Immigration Groups Allege Abuse of Migrant Minors by US Border Patrol*, GUARDIAN (UK) (June 11, 2014), <http://www.theguardian.com/world/2014/jun/11/us-unaccompanied-migrant-minors-abuse-border-patrol>; Julia Preston, *Official to Investigate Reports of Mistreatment of Minors Caught Crossing Border*, N.Y. TIMES (June 13, 2014), at A19; Nicole Flatow, *Feds Rush to Provide Basic Supplies for Surge of Migrant Kids Held in Makeshift ‘Warehouses’*, THINKPROGRESS (June 8, 2014), <http://thinkprogress.org/immigration/2014/06/08/3446282/migrant-children-surge>.

59. See, e.g., Wyl S. Hinton, *The Shame of America’s Family Detention Camps*, N.Y. TIMES (Feb. 4, 2015), <http://www.nytimes.com/2015/02/08/magazine/the-shame-of-americas-family-detention-camps.html> (“As the pro bono project in Artesia continued into fall, its attorneys continued to win in court. By mid-November, more than 400 of the detained women and children were free on bond. Then on Nov. 20, the administration suddenly announced plans to transfer the Artesia detainees to the ICE detention camp in Karnes, Tex., where they would fall under a new immigration court district with a new slate of judges.”). According to Google Maps, Artesia, New Mexico is 541.9 miles away from Karnes, Texas. See also Flores v. Holder, CV85-4544 DMG (C.D. Cal. Apr. 24, 2015), <http://media.mcclatchydc.com/smedia/2015/06/10/16/08/1exeYm.So.91.pdf> (“Tentative Ruling on Plaintiffs’ Motion to Enforce Settlement of Class Action and Defendants’ Motion to Amend Settlement Agreement”); Francisco Ordoñez, *Lawyer: I Released Judge’s Words to Protect my Clients in Family Detention*, SACRAMENTO BEE (June 11, 2015), <http://www.sacbee.com/news/nation-world/national/article23772475.html> (“U.S. District Court Judge Dolly Gee’s April 24

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“detention centers” still lack the special protections provided to children in other contexts, including an *effective* right to counsel.<sup>60</sup> Moreover, despite being particularly vulnerable and in need of protection,<sup>61</sup> Legal Services Corporation-funded programs (LSC programs) remain statutorily prohibited from serving these children,<sup>62</sup> and biases against children from Central American countries have grown ever more pernicious.<sup>63</sup> Finally, while

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tentative ruling, which has been kept secret for months, is a scathing rebuke of the Obama administration’s decision to significantly increase its use of family detention in response to a surge of mothers and children fleeing poverty and violence in Central America.”).

60. See, e.g., Sharon Finkel, Comment, *Voices of Justice: Promoting Fairness through Appointed Counsel for Immigrant Children*, 17 N.Y.L. SCH. J. HUM. RTS. 1105, 1006 (2001) (“Children in deportation hearings are entitled by statute to counsel, but this right is provided at no expense to the government.”) (citing Immigration and Nationality Act § 292, 8 U.S.C. § 1229 (Supp. 2000)). See also Ian Urbina & Catherine Rentz, *Immigrant Detainees and the Right to Counsel*, N.Y. TIMES (Mar. 30, 2013), <http://www.nytimes.com/2013/03/31/sunday-review/immigrant-detainees-and-the-right-to-counsel.html> (reporting on the legal and practical reasons why detained immigrants lack counsel).

61. See, e.g., Finkel, *supra* note 60, at 1127-32 (arguing that the law should protect children because of their intrinsic vulnerability); Olivas, *supra* note 6, at 826-33 (demonstrating U.S. law provides children with special protection in other contexts and arguing that children in immigration proceedings particularly need such protection); Olivas, *Unaccompanied Refugee Children*, *supra* note 20, at 161-62 (same).

62. See Olivas, *supra* note 6, at 831 (“[T]he Legal Services Corporation (LSC) program is statutorily prohibited from serving these aliens.”) (citation omitted); Kevin R. Johnson & Amagda Pérez, *Clinical Legal Education and the U.C. Davis Immigration Law Clinic: Putting Theory into Practice and Practice into Theory*, 51 SMU L. REV. 1423, 1429 (1998) (“Congress worsened matters in the 1980s by restricting the ability of legal services organizations receiving national Legal Service Corporation funds to represent immigrants.”) (citations omitted); Clare L. Workman, *Kids Are People Too: Empowering Unaccompanied Minor Aliens Through Legislative Reform*, 3 WASH. U. GLOBAL STUD. L. REV. 223, 245 (2004) (“Only in rare cases would the government need to appoint an attorney, and it could easily accomplish this by removing restrictions on the Legal Services Corporation’s ability to serve aliens.”).

63. Accord Keith Aoki & John Shuford, *Welcome to Amerizona—Immigrants Out!: Assessing “Dystopian Dreams” and “Usable Futures” of Immigration Reform, and Considering whether “Immigration Regionalism is an Idea whose Time has Come*, 38 FORDHAM. URB. L.J. 1, 3 (2010) (“The dystopian dream of immigration reform, of which Amerizona is just one version, is often strongly anti-immigrant, exclusionary, nativist, and even racist); Johnson & Pérez, *supra* note 62, at 1428 (“the troubles facing immigrants in this country have worsened considerably over time. Indeed, the 1990s

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pecuniary interests around the detention of immigrants and refugees may have existed in 1989-91, by 2015 the profitability of detaining immigrants and refugees had become so infamous as to obtain recognition in “mainstream” journalism.<sup>64</sup>

Perhaps the only structural reform that has been implemented better today than when Olivas penned his essays on the subject some twenty-four years ago,<sup>65</sup> is that organized bar associations, particularly the American Immigration Lawyers Association (“AILA”),<sup>66</sup> non-LSC funded specialized legal advocacy organizations

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saw the worst outbreak of nativism and restrictionist legislation since early in the twentieth century.”) (citations omitted). *See generally* JUSTIN AKERS CHACÓN & MIKE DAVIS, *NO ONE IS ILLEGAL: FIGHTING RACISM AND STATE VIOLENCE ON THE U.S.-MEXICO BORDER* (2006); *IMMIGRANTS OUT!: THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES* (Juan F. Perea ed., 1997).

64. *See, e.g.*, Nina Bernstein, *Companies Use Immigration Crackdown to Turn a Profit*, N.Y. TIMES (Sept. 28, 2011), <http://www.nytimes.com/2011/09/29/world/asia/getting-tough-on-immigrants-to-turn-a-profit.html> (“In the United States—with almost 400,000 annual detentions in 2010, up from 280,000 in 2005—private companies now control nearly half of all detention beds, compared with only 8 percent in state and federal prisons, according to government figures.”). By “mainstream,” I mean journalism that is popular in the sense of widespread readership but which tends either to identify with the power elite, or to privilege their interests. *See* Anderson et al., *supra* note 8, at 1895 n.68, 1879 n.86 (explaining the author’s usage of the word “mainstream” and the phrase “of the people,” in light of Chicana/o Studies texts and Latin American liberation philosophy conferences). On the “power elite,” *see* C. WRIGHT MILLS, *THE POWER ELITE* 3–4 (new ed. 2000) (“The power elite is composed of men [sic] whose positions enable them to transcend the ordinary environments of ordinary men and women; they are in positions to make decisions having major consequences . . . . For they are in command of the major hierarchies and organizations of modern society.”). *Cf.* *The Richest People in America*, FORBES, at <http://www.forbes.com/forbes-400/> (last visited July 12, 2015).

65. Olivas, *supra* note 6; Olivas, *Unaccompanied Refugee Children*, *supra* note 20.

66. *See* Hinton, *supra* note 59 (reporting on the efforts of Denver lawyer Christina Brown, and others, to relocate to Artesia, New Mexico in order to organize a *pro bono* project of roughly 200 attorneys, law students, and paralegals to represent detained children and women). *See also* *CARA Family Detention Pro Bono Project*, AILA Doc No. 14100656, AM. IMMIGRATION LAWYERS ASS’N, (June 5, 2015), <http://www.aila.org/practice/pro-bono/find-your-opportunity/cara-family-detention-pro-bono-project> (“Immigrants’ rights and immigrant legal services groups are announcing the establishment of a family detention project to provide legal services to children and their mothers detained in Karnes City and Dilley, Texas, and to advocate for the end

(e.g., Catholic Legal Immigration Network, the American Immigration Council, and the Refugee and Immigrant Center for Education and Legal Services),<sup>67</sup> and law school-based legal clinics, have organized spirited *pro bono publico* efforts to represent some of the Central American women and children who are seeking asylum in the United States.<sup>68</sup> Also, although they do not constitute a structural reform, detained women seeking asylum in the United States have organized profound protests against their conditions of confinement, including hunger strikes, which have increasingly received mainstream media coverage.<sup>69</sup> In turn, for one who knows about the history of Central American peoples who sought asylum in the United States in the 1980s, today's mass hunger strikes by

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of family detention"). See generally *Featured Issue: Central American Humanitarian Crisis*, AILA Doc No. 14070148, AM. IMMIGRATION LAWYERS ASS'N, (Mar. 30, 2015), <http://www.aila.org/advo-media/issues/central-american-humanitarian-crisis> (linking to numerous resources on attempts to undermine protections for asylees and unaccompanied children, due process for children in removal proceedings, government resources, AILA member action items, etc.).

67. See *CARA Family Detention Pro Bono Project*, *supra* note 66.

68. See, e.g., Johnson & Pérez, *supra* note 62, at 1426-27 (evaluating the benefits of clinical legal education for subordinated communities through a case study of the Immigration Law Clinic at the University of California at Davis School of Law). See also Antoinette Sedillo Lopez, *Learning Through Service In a Clinical Setting: The Effect Of Specialization On Social Justice And Skills Training*, 7 CLINICAL L. REV. 307, 324 (2001) (arguing for teachers of immigration law clinics to help students "see the full picture of the social and legal needs" of their clients); Liz Robbins, *Program Providing Legal Help to Immigrants Will Expand Beyond New York City*, N.Y. TIMES (May 13, 2015), [http://www.nytimes.com/2015/05/14/nyregion/program-providing-legal-help-to-immigrants-will-expand-beyond-new-york-city.html?\\_r=0](http://www.nytimes.com/2015/05/14/nyregion/program-providing-legal-help-to-immigrants-will-expand-beyond-new-york-city.html?_r=0) (reporting on the second cohort of New York's new Immigrant Justice Corps, <http://justicecorps.org>). See generally IMMIGRANT JUSTICE CORPS, <http://justicecorps.org> (last visited July 28, 2015).

69. See, e.g., Wyl S. Hinton, *A Federal Judge and a Hunger Strike Take on the Government's Immigrant Detention Facilities*, N.Y. TIMES (Apr. 10, 2015), <http://www.nytimes.com/2015/04/06/magazine/a-federal-judge-and-a-hunger-strike-take-on-the-governments-immigrant-detention-facilities.html> ("Last week, after pro-longed confinement, 78 young women at a facility in Karnes County, Tex., took the drastic final measure of prisoners everywhere: They announced a 'hunger strike' and declared their refusal to work or 'use any service in this place' until conditions improve.").

detained women evoke the original Sanctuary Movement,<sup>70</sup> and must be understood within the context of the resurgence of “sanctuary cities” over the past decade.<sup>71</sup>

A comprehensive review of the current situation of Central American people seeking asylum in the United States is beyond the scope of this Article. One takeaway point, however, is that Olivas’s description of the structural conditions faced by children from Central America who sought asylum in the United States in the late 1980s feels almost prescient. By commenting critically on several timely controversies, Olivas informed a strain of subsequent legal scholarship on the subject.<sup>72</sup> Indeed, nineteen of the twenty-four law review articles that cite to his essay did so for propositions related to the conditions of refugee children and their unmet needs for legal representation.<sup>73</sup> In contrast, relatively few scholars engaged with

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70. See, e.g., Scott L. Cummings, *The Internationalization of Public Interest Law*, 57 DUKE L.J. 891, 909–12 (2008) (discussing the public interest response to the refugee crisis of the 1980s and how the Sanctuary Movement, “in which churches were turned into sanctuaries for refugees denied legal entrance[,]” established new organizations to advocate for the rights of people seeking asylum in the United States). For early legal scholarship on the Sanctuary Movement, see, e.g., Michele Altemus, *The Sanctuary Movement*, 9 WHITTIER L. REV. 683 (1988); Toney Anaya, *Sanctuary: Because There Are Still Many Who Wait for Death*, 15 HOFSTRA L. REV. 101 (1986); Douglas L. Colbert, *The Motion in Limine: Trial Without Jury A Government’s Weapon against the Sanctuary Movement*, 15 HOFSTRA L. REV. 5 (1986); Douglas L. Colbert, *The Motion in Limine in Politically Sensitive Cases: Silencing the Defendant at Trial*, 39 STAN. L. REV. 1271 (1987); Paul Wickham Schmidt, *Refuge in the United States: The Sanctuary Movement Should Use the Legal System*, 15 HOFSTRA L. REV. 79 (1986); Kathleen L. Villarruel, Note, *The Underground Railroad and the Sanctuary Movement: A Comparison of History, Litigation, and Values*, 60 S. CAL. L. REV. 1429 (1987).

71. See, e.g., Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373 (2006); Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008); Rose Cuison Villazor, *What Is A “Sanctuary”?*, 61 SMU L. REV. 133 (2008); Rose Cuison Villazor, *“Sanctuary Cities” and Local Citizenship*, 37 FORDHAM. URB. L.J. 573 (2010); Kara L. Wild, *The New Sanctuary Movement: When Moral Mission Means Breaking the Law, and the Consequences for Churches and Illegal Immigrants*, 50 SANTA CLARA L. REV. 981 (2010).

72. See *infra* Appendix 1 (listing the twenty-four citing references to Olivas, *supra* note 6).

73. In chronological order, see Elizabeth Kay Harris, Comment, *Economic*



other aspects of his essay, including his case studies on the risks of terminated and truncated representation.<sup>74</sup>

## B. The Risk of Terminated Representation

While some people may believe that the conflict between the state of Israel and the people of Palestine is endemic or inevitable, perhaps

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*Refugees: Unprotected in the United States by Virtue of an Inaccurate Label*, 9 AM. U. J. INT'L L. & POL'Y 269 (1993); Kevin R. Johnson, *Los Olvidados: Images of the Immigrant, Political Power of Noncitizens, and Immigration Law and Enforcement*, BYU L. REV. 1139 (1993); Jonathan O. Hafen, *Children's Rights and Legal Representation—The Proper Roles of Children, Parents, and Attorneys*, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 423 (1993); Harold Hingju Koh, *America's Offshore Refugee Camps*, 29 U. RICH. L. REV. 139 (1994); Margaret H. Taylor, *Detained Aliens Challenging Conditions Of Confinement and The Porous Border of The Plenary Power Doctrine*, 22 HASTINGS CONST. L.Q. 1087 (1995); Kevin R. Johnson, *Civil Rights and Immigration: Challenges for the Latino Community in the Twenty-First Century*, 8 LA RAZA L.J. 42 (1995); Gail Quick Goeke, *Substantive and Procedural Due Process for Unaccompanied Alien Juveniles*, 60 MO. L. REV. 221 (1995); Richard Delgado, *Rodrigo's Fifteenth Chronicle: Racial Mixture, Latino-Critical Scholarship, and the Black-White Binary*, 75 TEX. L. REV. 1181 (1997); Johnson & Pérez, *supra* note 62 (1998); Kevin R. Johnson, *Race Matters: Immigration Law and Policy Scholarship, Law in the Ivory Tower, and the Legal Indifference of the Race Critique*, 2000 U. ILL. L. REV. 525; Michael A. Olivas, *Immigration Law Teaching and Scholarship in the Ivory Tower: A Response to Race Matters*, 2000 U. ILL. L. REV. 613; Finkel, *supra* note 60; Lopez, *supra* note 68; Michelle Rae Pinzon, *Was the Supreme Court Right? A Closer Look at the True Nature of Removal Proceedings in the 21st Century*, 16 N.Y. INT'L L. REV. 29 (2003); Workman, *supra* note 62; Lisa A. Cahan, *Constitutional Protections of Aliens: A Call for Action to Provide Adequate Health Care for Immigration Detainees*, 3 J. HEALTH & BIOMEDICAL L. 343 (2007); Kevin R. Johnson, *Ten Guiding Principles for Truly Comprehensive Immigration Reform: A Blueprint*, 55 WAYNE L. REV. 1599 (2009); Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005 (2010) [hereinafter "Johnson, *Racial Profiling in America*"].

74. See, e.g., Aoki & Shuford, *supra* note 63, at 21 n.67 (citing Olivas, *supra* note 6, for the proposition that "most legal education neither equips students to think strategically or ethically about enduring inequities in society, nor provides problem-solving experiences so that students can undertake social reform in life after law school"); Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461, 503 (1993) (describing briefly all three of Olivas's case studies); Johnson & Martínez, *supra* note 2, at 1151 nn.54, 57 (discussing Olivas's case study of Oscar Z. Acosta).

especially those who think of themselves as not directly implicated by it, Professor Olivas's essay reminds its readers that this conflict is historical, not natural.<sup>75</sup> Hence, people (including lawyers)—not natural forces—act within and without the rule of law in order, *inter alia*, to manage, mitigate the harms of, profit from, promulgate, survive, and/or seek an end to, the conflict. Under such a view, contesting the legality of the myriad conflicting claims between the state of Israel and the people of Palestine appears fundamental to the conflict's origin, historical evolution, and future.

Olivas begins his case study of the risk of terminated representation by acknowledging "the historical complexity and instability of the Middle East" and then quickly draws his readers' attention to a fact that has likely been overshadowed by other aspects of the conflict:<sup>76</sup> "At several times since 1989, Arab and Israeli lawyers who defend Palestinians in Israeli military courts have organized boycotts and withheld their legal services in order to draw attention to the unsatisfactory conditions of detainment."<sup>77</sup> Responding to Minow, whose consideration of the risk of terminated representation focused on lawyers who might avoid representing law-breaking clients or believe themselves ethically required to terminate representation,<sup>78</sup> Olivas deploys this remarkable case study of a work

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75. Olivas, *supra* note 6, at 836–42 (describing lawyers' responses to the *Intifada* based on discussion with Professor Jordan Paust, one of three fact finders sent to the Occupied Territories by the International Commission of Jurists in 1989, as well as published reports by the United States Department of State, lawyers' organizations, international nongovernmental organizations, and contemporary journalism). N.B. I follow Olivas in noting, "as in many issues how one views this conflict determines how one labels items, actions, and places . . . . Therefore, I stipulate that many of the place names have alternative designations, and my choices conformed with the sources of citations, not with any ideological or political predisposition." *Id.* at 836 n.69.

76. *See id.* at 838–39 (noting that the U.S. State Department's *Country Reports on Human Rights Practices* for 1989 made no mention of "the lawyers' boycott or the conditions that prompted the work stoppage.").

77. *Id.* at 836.

78. *See* Minow, *supra* note 10, at 743 ("If the client consults the lawyer before breaking a criminal law, some additional problems arise. The lawyer might feel it appropriate to breach the client's confidence and thereby terminate effective

stoppage by Arab and Israeli lawyers to address “when persons who break the law for political reasons may not find representation.”<sup>79</sup> As he refines the question: “[W]hat are a lawyer’s obligations when faced with mass prosecutions and inadequate resources, under circumstances in which the political reasons for the conflict are seemingly intractable?”<sup>80</sup>

While not unprecedented, the idea of lawyers organizing to strike against a venue seems extraordinary,<sup>81</sup> and the prosecutions following the *Intifada* were of a massive scale. As Olivas explains, “The *Intifada* began in 1987, and by July 1989, more than 30,000 Palestinians had been arrested and detained by the Israeli Defense Forces (“IDF”); by March 1991, the number had grown to more than 70,000.”<sup>82</sup> To provide legal process for these detentions, the state of Israel established new “temporary courts in both the West Bank and Gaza, in Nablus, Ramallah, Jenin, Hebron, Kalkilya, Tulkarem, Gaza City, and Khan Yunis.”<sup>83</sup> The mass detentions and prosecutions quickly raised a number of serious concerns regarding international law standards and due process, including, *inter alia*, warrantless arrests, no effective right to counsel, no right to *habeas corpus*, no procedures to notify detainees’ families or lawyers of their whereabouts, indefinite detention with no bail hearings before a judge, no written verdicts or sentencing guidelines, and limited rights of appeal.<sup>84</sup>

For example, Olivas discusses the IDF military orders and emergency defense regulations, which provided for no absolute right to see a lawyer but instead vested discretion to grant access to a lawyer with “the Prison Commander [upon] being convinced that the request to see a lawyer was made for the purpose of dealing with the legal affairs of the detainee and that it would not impede the course

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representation, or the lawyer might decide to withdraw from representing someone who plans to break the law.”).

79. Olivas, *supra* note 6, at at 836.

80. *Id.*

81. For example, Olivas notes several strikes by legal aid lawyers in New York City in 1982 and 1991. *See id.* at 843.

82. *Id.* at 836 (citation omitted).

83. *Id.* at 836.

84. *Id.* at 839–42.

of the investigation.”<sup>85</sup> Additionally, “The arrest and detention policies [were] allowed by Military Order to be secret, and all Israeli soldiers or police officers [were] authorized to make warrantless arrests.”<sup>86</sup> Also, “suspects need not be brought before a judge for eighteen days, and with an extension hearing before a military judge, six months of detention can be ordered unless charges have been filed; [and] there are no deadlines for the state to try a case.”<sup>87</sup>

These were some of the conditions that led to the lawyers’ “many attempts to bring problems to the attention of IDF officials, Israeli Bar officers, and court administration,” before deciding that “they had no choice but to strike.”<sup>88</sup> Their first work stoppage began on January 3, 1989, and “they returned to the courts on March 12. By July 1989, conditions for the lawyers and their clients had deteriorated to the extent that they felt compelled to call another strike, which lasted from July 20 to August 20, 1989.”<sup>89</sup> In essence, their demands were for conditions that would make it possible to meaningfully represent detained individuals in military courts.<sup>90</sup> In Olivas’s estimation, “It is far from clear what alternatives they had, or what effect their work stoppage had on their working conditions.”<sup>91</sup> He continues, “[S]ome conditions improved slightly as a result of the publicity, but the underlying political causes remained unresolved.”<sup>92</sup>

Perhaps because the idea of unionized lawyers seems paradoxical (although some lawyers in the United States are unionized),<sup>93</sup> or perhaps because the possibility that lawyers might

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85. Olivas, *supra* note 6, at 837 (citation omitted).

86. *Id.* at 839 (citation omitted).

87. *Id.* (citation omitted).

88. *Id.*

89. *Id.* (citation omitted).

90. *Id.*

91. *Id.* at 841.

92. *Id.*

93. See, e.g., Christine Clark, *Should Lawyers Unionize?*, LIFE OF THE LAW (Jan. 8, 2014), <http://www.lifeofthelaw.org/2014/01/should-lawyers-unionize/>; *Legal Services Staff Association UAW/NOLSW 2320*, <http://lssa2320.org> (last visited June 25, 2015); Molly McDonough, *Should Lawyers Form their own Unions?*, ABA J. (Mar. 11, 2009), [http://www.abajournal.com/news/article/should\\_lawyers\\_form\\_their\\_own\\_unions](http://www.abajournal.com/news/article/should_lawyers_form_their_own_unions); Mitchell H. Rubinstein, *Attorney Labor Unions*, NYSBA J. (Jan. 2007), <http://papers.ss>

refuse to represent individuals in order to protest a particular jurisdiction or venue seems unthinkable, taboo, or verboten, I find Olivas's description of the 1989 lawyers' strike against the IDF military courts provocative and generative. The idea of striking lawyers feels particularly powerful when counterpoised against the past and present policies, and conditions of detention for Central American women and children seeking asylum in the United States. A lawyers' strike might also be an effective strategy against recent mass detention practices for people from other Latin American countries.

Consider, for example, the judicial proceedings following the May 2008 ICE raid at the Agriprocessors, Inc. meat processing plant in Postville, Iowa, which the United States District Court for the Northern District of Iowa held in two trailers and a ballroom at the National Cattle Congress in Waterloo, Iowa.<sup>94</sup> Despite the fact that the judicial process blatantly violated fundamental due process rights,

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rn.com/sol3/papers.cfm?abstract\_id=955039; UAW LOCAL 2320 NATIONAL ORGANIZATION OF LEGAL SERVICES WORKERS, <http://nolsw.org> (last visited June 25, 2015).

94. CAMAYD-FREIXAS, *supra* note 42, at 6 ("The NCC is a 60-acre cattle fairground that had been transformed into a sort of concentration camp or detention center. Fenced in behind the ballroom / courtroom were 23 trailers from federal authorities, including two set up as sentencing courts[.]"). See also Donna Ackermann, *A Matter of Interpretation: How the Language Barrier and the Trend of Criminalizing Illegal Immigration Caused a Deprivation of Due Process Following the Agriprocessors, Inc. Raids*, 43 COLUM. J.L. & SOC. PROBS. 363 *passim* (2010); Sioban Albiol, R. Linus Chan & Sarah J. Diaz, *Re-Interpreting Postville: A Legal Perspective*, 2 DEPAUL J. FOR SOC. JUST. 31 *passim* (2008); Erik Camayd-Freixas, *Raids, Rights and Reform: The Postville Case and the Immigration Crisis*, 2 DEPAUL J. FOR SOC. JUST. 1 *passim* (2008); Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135, 143-45 (2009); Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1301-04 (2010); Kevin R. Johnson, *The Intersection of Race and Class in U.S. Immigration Law and Enforcement*, 72 LAW & CONTEMP. PROBS. 1, 30-34 (2009); Johnson, *Racial Profiling in America*, *supra* note 73, at 1041-42; Allison L. McCarthy, Note, *The May 12, 2008 Postville, Iowa Immigration Raid: A Human Rights Perspective*, 19 TRANSNAT'L L. & CONTEMP. PROBS. 293 *passim* (2010); Peter R. Moyers, *Butchering Statutes: The Postville Raid and the Misinterpretation of Federal Criminal Law*, 32 SEATTLE U. L. REV. 651 *passim* (2009); Robert R. Rigg, *The Postville Raid: A Postmortem*, 12 RUTGERS RACE & L. REV. 271 *passim* (2011); Khari Taustin, *Still in "The Jungle": Labor, Immigration, and the Search for a New Common Ground in the Wake of Iowa's Meatpacking Raids*, 18 U. MIAMI BUS. L. REV. 283, 304-09 (2010).

not a single lawyer, nor judge, involved in those proceedings effectively protested the mass adjudications of around three hundred people—“mostly illiterate Guatemalan peasants with Mayan last names.”<sup>95</sup> As the federally certified interpreter, Dr. Erik Camayd-Freixas, testified in July 2008 before the Congressional Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, the judicial process following the Postville raid was rife with problems, including *inter alia*:

(2) The court failed to maintain physical separation and operational independence from the ICE prosecution. (3) There was inadequate access to legal counsel.... (5) At initial appearance there was no meaningful presumption of innocence. (6) Many defendants did not appear to understand their rights, particularly the meaning and consequences of waiving their right to be indicted by a grand jury. (7) There was no bail hearing, as bail was automatically denied pursuant to an immigration detainer. (8) The heavier charge of aggravated identity theft, used to leverage the Plea Agreement, was lacking in

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95. CAMAYD-FREIXAS, *supra* note 42, at 6. While 697 arrest warrants were sworn out, “late shift workers had not arrived, so ‘only’ 390 were arrested: 314 men and 76 women; 290 Guatemalans, 93 Mexicans, four Ukrainians, and three Israelis who were not seen in court.” *Id.* at 7. *See also id.* at 9 (explaining how the prosecution and court circumvented the writ of *habeas corpus* by expediting the defendants’ arraignments); Kristina M. Campbell, *Imagining a More Humane Immigration Policy in the Age of Obama: The Use of Plenary Power to Halt the State Balkanization of Immigration Regulation*, 29 ST. LOUIS U. PUB. L. REV. 415, 444 (2010) (noting egregious due process violations in the Postville raid); Chacón, *supra* note 94, at 145–47 (identifying three corrosive effects of mass plea proceedings on the administration of justice); Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 531 n.243 (2009) (commenting on the recent deflation of due process even when immigrants are ostensibly accorded formal criminal procedural protections in worksite raids); Eagly, *supra* note 94, at 1304 (noting that the “short-fuse exploding plea offer precluded meaningful evaluation by defense attorneys of whether . . . immigration relief might be possible”); McCarthy, *supra* note 94, at 298–301 (critiquing a judicially-imposed one-week deadline for defense counsel to accept a uniform plea agreement); Moyers, *supra* note 94, at 652–53 (arguing that the accelerated judicial process was premised upon two flawed interpretations of federal law).

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foundation and never underwent the judicial test of probable cause. (9) Many defendants did not appear to understand their charges or rights, insisting that they were in jail for being in the country illegally (and not for document fraud or identity theft), and insisting that they had no rights. (10) Many defendants did not know what a Social Security Number is or what purpose it serves. Because “intent” was an element of each of the charges, many were probably not guilty, but had no choice but to plead out.<sup>96</sup>

Camayd-Freixas elaborated:

Echoing what I think was the general feeling, one of my fellow interpreters would later exclaim: “When I saw what it was really about, my heart sank. . . .” Then began the saddest procession I have ever witnessed, which the public would never see, because cameras were not allowed past the perimeter of the compound (only a few journalists came to court the following days, notepad in hand). Driven single-file in groups of 10, shackled at the wrists, waists and ankles, chains dragging as they shuffled through, the slaughterhouse workers were brought in for arraignment, sat and listened through headsets to the interpreted initial appearance, before marching out again to be bused to different county jails, only to make room for the next row of 10.<sup>97</sup>

Legal scholars have subsequently accorded with many of the initial impressions of Camayd-Freixas and his colleague (and myself) that the Postville raid blatantly violated due process and other constitutional guarantees.<sup>98</sup> Indeed, the following year the United States Supreme Court, in *Flores-Figueroa v. United States*, held that prosecutors of the federal felony of identity theft, under which the

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96. CAMAYD-FREIXAS, *supra* note 42, at 3–4.

97. *Id.* at 6.

98. See sources cited *supra* note 95.

Agriprocessors, Inc. workers were charged, must “show that the defendant *knew* that the means of identification at issue belonged to another person.”<sup>99</sup> In other words, the federal crime of identity theft has a restrictive *mens rea* requirement. While the United States Courts of Appeal for the Eighth Circuit held a different view at the time of the adjudication of the Postville raid,<sup>100</sup> Olivas’s case study on the risk of terminated representation provides an empowering “counter-memory” that lawyers, and other agents of the judicial process, need not accede in “helping legitimize or even abetting the INS [now ICE] in its pernicious practices.”<sup>101</sup> While some people might excuse the Postville raid prosecutors and judges for simply applying controlling case law to the National Cattle Congress proceedings,<sup>102</sup> history may

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99. *Flores-Figueroa v. United States*, 556 U.S. 646, 657 (2009) (“We conclude that § 1028A(a)(1) requires the Government to show that the defendant knew that the means of identification at issue belonged to another person.”) (emphasis added). For discussions of *Flores-Figueroa*, see Campbell, *supra* note 95, at 444 nn.174–75; Chacón, *supra* note 94, at 144 n.52; Evelyn H. Cruz, *Competent Voices: Noncitizen Defendants and the Right to Know the Immigration Consequences of Plea Agreements*, 13 HARV. LATINO L. REV. 47, 49 n.175 (2010); Eagly, *supra* note 94, at 1303 n.133; Rigg, *supra* note 94, at 274 n.19.

100. See Moyers, *supra* note 94, at 662 (“The application of § 1028A(a)(1) was proper, however, because in the Eighth Circuit [at the time of the adjudication of the Postville raid in May 2008], the Government need not prove that a defendant knew that the means of identification the defendant transferred, used, or possessed belonged to another actual person.”). Moyers was “a judicial clerk in the Northern District of Iowa during the criminal process in Waterloo, Iowa, following the raid at Agriprocessors in Postville.” *Id.* at 651.

101. Olivas, *supra* note 6, at 835. On the concept of counter-memory, see GEORGE LIPSITZ, *TIME PASSAGES: COLLECTIVE MEMORY AND AMERICAN POPULAR CULTURE* 213–14, 228–31 (1990) (defining counter-memory as “a way of remembering and forgetting that starts with the local, the immediate, and the personal. . . . [looking] to the past for the hidden histories excluded from dominant narratives. . . . [to] reframe and refocus dominant narratives purporting to represent universal experience”).

102. *But see* Julia Preston, *Immigrants’ Speedy Trials After Raid Become Issue*, N.Y. TIMES (Aug. 9, 2008), [http://www.nytimes.com/2008/08/09/us/09immig.html?page\\_wanted=all&r=0](http://www.nytimes.com/2008/08/09/us/09immig.html?page_wanted=all&r=0) (reporting on criticism following the revelation of a 117-page manual prepared by the district court to expedite the prosecutions following the Postville raid, which “included a model of the guilty pleas that prosecutors planned to offer as well as statements to be made by the judges when they accepted the pleas and handed down sentences”).



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view the defense lawyers less charitably.<sup>103</sup> They seem to have allowed themselves to become complicit in an extraordinary judicial travesty that required the formal participation of defense lawyers, yet only a single one of them objected meaningfully by refusing to comply with the process at its start.<sup>104</sup>

Camayd-Freixas himself wrestled with this dilemma, explaining:

I seriously considered withdrawing from the assignment for the first time in my 23 years as a federally certified interpreter, citing conflict of interest.... The question was did I have one. Well, at that point there was not enough evidence to make that determination.... Moreover, as a professor of interpreting, I have confronted my students with every possible conflict scenario, or so I thought. The truth is that nothing could have prepared me for the prospect of helping our government put hundreds of innocent people in jail. In my ignorance and disbelief, I reluctantly decided to stay the course and see what happened next.<sup>105</sup>

Although Professor Camayd-Freixas is probably not exceptional for having seriously scrutinized his professional ethics following the Postville raid, his decision not only to witness the entire extraordinary judicial process but also to write publicly and to testify before

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103. *But see* Moyers, *supra* note 94, at 673–81 (discussing the attorney negotiations over the Postville raid plea agreements). *See also infra* notes 108 and 118, and accompanying text (noting the defense attorneys' deliberation over collectively rejecting the plea offers and requesting trials for each of the 305 clients criminally charged after the raid).

104. *See* Moyers, *supra* note 94, at 665–67 (discussing how the district court selected the approximately twenty defense attorneys from its Criminal Justice Act panel, and noting that one of them refused the assignment); Preston, *supra* note 102 (“One defense lawyer who received the scripts from prosecutors on the day of the raid said he became convinced that the hearings had been organized to produce guilty pleas for the prosecution. As a result, the lawyer, Rockne Cole, declined to represent any of the arrested immigrants and ‘walked out in disgust,’ he wrote in a letter to a Congressional subcommittee that is scrutinizing the raid and the legal proceedings that followed.”).

105. CAMAYD-FREIXAS, *supra* note 42, at 8.

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Congress on it does seem exceptional, if not unique.<sup>106</sup>

Even assuming that all of the officers of the court held at the National Cattle Congress in May 2008 reflected deeply on how participating in that extraordinary venue comported (or failed to comport) with their professional responsibilities,<sup>107</sup> history demonstrates that none of them chose to stop or slow down the process by terminating representation. While some of “the defense attorneys discussed among themselves the possibility of collectively rejecting the plea offers and requesting trials for each of the 305 clients criminally charged after the raid[.]”<sup>108</sup> the idea of a work stoppage or work slowdown *by terminating representation* appears not to have been contemplated. I find this unfortunate, for if any of the lawyers, other officers of the court, or even essential court personnel had struck or slowed down the court at the National Cattle Congress, they might have triggered a remedy under *habeas corpus* and thereby led to a better result for the people whom ICE detained and subjected to criminal prosecution, as well as for the overall rule of (authority under) law.<sup>109</sup>

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106. See CAMAYD-FREIXAS, *supra* note 42, at 2–3, 8 (discussing Camayd-Freixas’s deliberations on his duty as a court interpreter under Federal Criminal Code and Rules, Rule 604 (1989)). See also Moyers, *supra* note 94, at 651 (noting that Moyers was a judicial clerk in the Northern District of Iowa during the criminal process in Waterloo, Iowa, following the raid at Agriprocessors in Postville).

107. See CAMAYD-FREIXAS, *supra* note 42, at 13–14 (reporting Camayd-Freixas’s conversation with a U.S. District Court judge regarding their deliberation over the decision to charge the Postville defendants with aggravated identity theft, when so many of them lacked knowledge of the identities that they were alleged to have stolen).

108. Moyers, *supra* note 94, at 680 (citation omitted).

109. The people detained under alleged violation of the immigration laws and charged with felony identity theft could have received a fair trial on the merits, or at least a plea bargain that was actually, as opposed to merely formally, voluntary. See Moyers, *supra* note 94, at 674 (“Based on the evidence available to me, the plea agreements were the product of a subtle systemic coercion; . . . The plea agreements were not coerced in a strict sense; the terms were negotiable and the plea agreements were entered into voluntarily. The presence of a negotiable and voluntary agreement for each defendant, however, did not create meaningful free choice.”). See also Ackermann, *supra* note 94, at 393–34 (discussing how a narrative-based colloquy would have forced the court to address whether an indigenous language-speaking defendant actually understood the proceedings when translated into Spanish); Eagly,

While it might seem uncharitable to criticize the attorneys who agreed to represent the people who were detained and arrested in the Postville raid, the district court's adjudication at the National Cattle Congress recalls Olivas's question, "What do we [lawyers] do when the state regime is the law breaker?"<sup>110</sup> One response might be simply to show up and do one's job, to the best of one's ability within the myriad constraints of the law and the situation. Lawyers who seriously consider Professor Olivas's case study on the Arab and Israeli lawyers, who confronted the risk of terminated representation by deciding collectively to strike IDF tribunals in 1989, might answer differently. Such lawyers might organize themselves in order to create the conditions where they (we?) could collectively cry out, "¡Huelga!" (Strike!), or if a full work stoppage seemed strategically unsound, then such lawyers might instead whisper for a work slowdown, perhaps through a concerted "work-to-rule" action or another form of "uncivil obedience,"<sup>111</sup> especially when confronted

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*supra* note 94, at 1303 ("By the time the Supreme Court . . . interpreted the aggravated identity theft statute so that it could not be used . . . as prosecutors did in Postville . . . the Postville defendants had already served their time and been deported.") (citation omitted); Rigg, *supra* note 94, at 278 ("Again, the focus of the manual [used to adjudicate the Postville raid defendants] was on speed and ease of processing clients into guilty pleas rather than any concern for effective representation and adequate research and investigation by defense counsel."). The legal system as a whole could have avoided the corrosive tarnish that comes with papering over gross injustices. Accord Albiol et al., *supra* note 94, at 98–99 ("Taken as a whole, it seems that the fast-track process was . . . a comprehensive failure to protect the integrity of our judicial system . . . thereby boosting their funding numbers – while circumventing the individuals' rights to due process of law."); Camayd-Freixas, *supra* note 94, at 12 ("In Postville, with the fast-track criminalization of workers, DHS/ICE was also seen to co-opt and gain deterministic control over the judiciary[.]"); Chacón, *supra* note 94, at 145–47 (discussing three kinds of corrosive effects from the mass plea agreement procedures of and following the Postville raid, such as those deployed under "Operation Streamline," which *United States v. Roblero-Solis*, 588 F.3d 692 (9th Cir. 2009), held to have violated Federal Rule of Criminal Procedure 11). See generally PETER LINEBAUGH, THE MAGNA CARTA MANIFESTO: LIBERTIES AND COMMONS FOR ALL 17, 212–13 (2008) (discussing the notion of "authority under law," or that "the King is, and shall be, below the law").

110. Olivas, *supra* note 6, at 835.

111. See Jessica Bulman-Pozen & David E. Pozen, *Uncivil Obedience*, 115 COLUM. L. REV. 809, 872 n.65 (2015) (citing JEREMY BRECHER, STRIKE! 251 (revised ed. 2014) for

with a judicial process that seems all too hasty.

Of course, a work stoppage or work slowdown might violate a lawyer's professional ethics, and Professor Olivas anticipated this possibility in his 1991 essay.<sup>112</sup> As he noted, "if a refusal to participate would sabotage the [judicial] process, there would be a swift deployment of contempt citations or Rule 11 sanctions, and likely disciplinary action taken against the lawyers."<sup>113</sup> For example, earlier in his essay, Olivas noted how Rule 11 sanctions were brought against two of his heroes, NAACP Legal Defense and Education Fund ("LDF") director Julius Chambers and famed radical lawyer William Kunstler.<sup>114</sup> Rule 11 sanctions were levied against Chambers, and upheld by the Fourth Circuit Court of Appeals, "for charges

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the proposition that "work slowdowns and work-to-rule actions were common labor tactics in 1930s and were variously called 'the conscious withdrawal of efficiency,' 'striking on the job,' or 'sabotage'". See also WE ARE EVERYWHERE: THE IRRESISTIBLE RISE OF GLOBAL ANTICAPITALISM 457 (Notes from Nowhere ed., 2003), <http://www.weareeverywhere.org>, cited in Bulman-Pozen & Pozen at 818 n.32 ("The notion of the work-to-rule is brilliantly simple—workers follow every rule, no matter how foolish, inefficient, or ill-advised. They break no laws, cause as much disruption as a strike, yet everyone still gets paid!").

112. Olivas, *supra* note 6, at 842–46 (discussing how United States professional norms and disciplinary codes, as exemplified by the then-new Texas Disciplinary Rules of Professional Conduct, would likely subject striking lawyers to professional discipline under rules designed to reduce dilatory tactics and unreasonable courtroom behavior).

113. *Id.* at 842. See also *id.* at 818–19, 842–46.

114. *Id.* at 818. For more on Julius Levonne Chambers (Oct. 6, 1936–Aug. 2, 2013), see April Dudash, *Julius Chambers, Former NCCU Chancellor, Dies*, HERALD SUN (Aug. 3, 2013), <http://www.heraldsun.com/news/x807783733/Julius-Chambers-former-NCCU-chancellor-dies>; Douglas Martin, *Julius Chambers, a Fighter for Civil Rights, Dies at 76*, N.Y. TIMES (Aug. 6, 2013), <http://www.nytimes.com/2013/08/07/us/julius-chambers-a-fighter-for-civil-rights-dies-at-76.html>; *Julius L. Chambers Papers*, J. MURRAY ATKINS LIBRARY UNIV. OF N. CAROLINA AT CHARLOTTE, <http://library.uncc.edu/manuscript/ms0085> (last visited June 29, 2015). For more on William Moses Kunstler (July 7, 1919–Sept. 4, 1995), see WILLIAM KUNSTLER: DISTURBING THE UNIVERSE (Emily Kunstler and Sarah Kunstler dirs., 2010); WILLIAM M. KUNSTLER, MY LIFE AS A RADICAL LAWYER (1994); DAVID LANGUN, WILLIAM M. KUNSTLER: THE MOST HATED LAWYER IN AMERICA (1999); David Stout, *William Kunstler, 76, Dies; Lawyer for Social Outcasts*, N.Y. TIMES (Sept. 5, 1995), <http://www.nytimes.com/1995/09/05/obituaries/william-kunstler-76-dies-lawyer-for-social-outcasts.html>.

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stemming from an employment discrimination case brought by the LDF against the United States Army.”<sup>115</sup> Kunstler’s attorneys were subjected to sanctions sought by opposing counsel after he “filed suit against prosecutors and public officials in North Carolina, alleging harassment of Native Americans during a criminal investigation.”<sup>116</sup>

Thus, as Olivas explains through an exploration of the then-recently adopted Texas Disciplinary Rules of Professional Conduct, with only a few narrow exceptions, the risk of incurring court sanctions and/or professional discipline would likely deter lawyers’ work stoppages in the United States. For example, Olivas explains relevant portions of Texas State Bar Rule 3.04 (modeled after American Bar Association Model Rule 3.4), which:

requires that a Texas lawyer not “engage in conduct intended to disrupt the proceedings” or “knowingly disobey, or advise the client to disobey, an allegation under the standing rules of or a ruling by a tribunal except for an open refusal based either on an assertion that no valid obligation exists or on the client’s willingness to accept any sanctions arising from such disobedience.”<sup>117</sup>

Under such a regime, lawyers contemplating a work stoppage or work slowdown “out of principle rather than apathy” (as Olivas characterized the *status quo ante* as to the nonrepresentation of unaccompanied refugee children in 1991) would need to refuse openly to proceed at all, or at least at the rate demanded. Further, they would need to argue that no valid obligation exists to proceed at all (an argument certain to fail), or at the rate demanded (an argument with a fighting chance), or that their clients were willing to accept the sanctions arising from such disobedience (an argument that seems unlikely given the vulnerability of detained immigrant workers facing punishment for alleged federal felonies).

Notwithstanding what actually transpired in 2008, imagine if the Postville raid defense lawyers had struck the courts at the National

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115. Olivas, *supra* note 6, at 818 (citation omitted).

116. *Id.* (citation omitted).

117. *Id.* at 845 (citing TEX. GOV’T CODE ANN. § 9 (Tex. Stat Bar Rule 3.04(c)(5), (d))).

Cattle Congress.<sup>118</sup> They likely would have faced a disciplinary proceeding under the Iowa Rules of Professional Conduct, Rule 32:3.2, “A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client[,]” or Rule 32:3.5(d), “A lawyer shall not . . . engage in conduct intended to disrupt a tribunal.”<sup>119</sup> Alternatively, such lawyers might be subjected to discipline under Rule 32:3.4(c), “A lawyer shall not . . . knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists[.]”<sup>120</sup>

Of course, the hypothetically striking lawyers could assert that their conduct comports with the Iowa Rule 32:3.4 exception, as “an open refusal based on an assertion that no valid obligation exists;” however, as noted above, such an argument seems doomed to fail for an outright work stoppage, and it is unclear if it would be persuasive even as to a work slowdown—unless the slowdown took the form of a work-to-rule action (discussed below). Also, Rule 32:3.2 and Rule 32:3.5 lack any similar express exception. Moreover, even if the striking lawyers were ultimately not sanctioned for a violation of professional responsibility, they would very likely be immediately subject to punishment for contempt of court.

Indeed, Olivas concludes his case study of the risk of terminated representation by musing that “striking lawyers held in contempt would likely find themselves incarcerated, with their only avenue of appeal [being] a habeas corpus proceeding.”<sup>121</sup> While the courts might grant the clients of striking lawyers time to secure new counsel, “the clients’ principles of noncompliance would be undermined . . .

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118. According to a judicial clerk who participated in the criminal process conducted by the Northern District of Iowa at the National Cattle Congress after the Postville raid, some of “the defense attorneys discussed among themselves the possibility of collectively rejecting the plea offers and requesting trials for each of the 305 clients criminally charged after the raid.” Moyers, *supra* note 94, at 680 (citation omitted).

119. Iowa R. Civ. P. 32:3.2 (adopted Apr. 20, 2005, effective July 1, 2005); Iowa R. Civ. P. 32:3.5(d) (adopted Apr. 20, 2005, effective July 1, 2005).

120. Iowa R. Civ. P. 32:3.4(c) (adopted Apr. 20, 2005, effective July 1, 2005).

121. Olivas, *supra* note 6, at 846.

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while the real injury would fall on the lawyers' head."<sup>122</sup> Clearly, it would take extraordinary circumstances to justify such an action, yet the flawed judicial process following the Postville raid of May 2008 arguably constituted precisely the extraordinary circumstances that could justify a work stoppage, or even better, a principled work-to-rule slowdown of the judicial process in order to secure a better result—for the people whom ICE detained and subjected to criminal prosecution—as well as for the overall rule of (authority under) law.<sup>123</sup>

Returning to the hypothetical lawyers' work-to-rule slowdown, precisely because "ICE agents had sought *Miranda* waivers from each of the workers at the Agriprocessors plant and interviewed each about his or her immigration status"<sup>124</sup> prior to them having a chance to meet with an attorney, the defense attorneys might have challenged the validity of the *Miranda* waivers at their clients' initial appearances. Additionally, or in the alternative, the lawyers might have advised their clients to reject the waiver of indictment in the proposed plea agreement.<sup>125</sup> Ultimately, it appears that the initial appearances provided the lawyers with the critical opportunity to object meaningfully to the overly hasty judicial process. This was the time for a strike, or at least a work-to-rule slowdown, of the judicial process at the National Cattle Congress. Denied any meaningful opportunity to meet with their clients prior to the initial appearances, and being presented with client discovery files containing purported *Miranda* waivers and summaries of statements made to ICE agents,<sup>126</sup> the approximately twenty lawyers might have openly refused to obey the rules of the district court at the National Cattle Congress by asserting that no valid obligation existed for the initial appearances to be so truncated as to violate fundamental rights to due process or the venerable writ of *habeas corpus*.<sup>127</sup> Instead of acceding to the court's

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122. Olivas, *supra* note 6, at 846.

123. See *supra* note 109 and accompanying text.

124. Moyers, *supra* note 94, at 668 (citation omitted).

125. See Moyers, *supra* note 94, at 669. See also Rigg, *supra* note 94, at 278 (discussing prosecution by information and by indictment).

126. See Moyers, *supra* note 94, at 669–70.

127. See sources cited *supra* note 94.

(and prosecutors') demands, the defense lawyers collectively might have demanded a meaningful opportunity to meet with their clients *prior* to the initial appearances. If they had done so, it is almost certain that the court at the National Cattle Congress would not have been able to process the approximately 300 criminal defendants within the limit of *habeas corpus*—to be arraigned within seventy-two hours of their arrest.<sup>128</sup>

In history, of course, neither a strike, nor a slowdown occurred. Instead, the court process proceeded as quickly as it had been designed to function,<sup>129</sup> and the defendants were all sentenced within ten days of the May 12, 2008, Postville raid.<sup>130</sup> While this course of conduct may have comported with the Iowa Rules of Professional Conduct, in light of Professor Olivas's case studies on the risk of terminated and truncated representation, I find this result profoundly unfortunate for two reasons.

First, it seems likely that knowledge of possible court sanctions and/or professional discipline worked to deter the defense lawyers from enacting their contemplated work-to-rule slowdown.<sup>131</sup> While the four lawyers who agreed to be interviewed on the matter explained that their clients desired speedy resolutions and certainty

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128. *Accord* CAMAYD FREIXAS, *supra* note 42, at 9 ("While we waited to be admitted, the attorney pointed out the reason why the prosecution wanted to finish arraignments by 10am Thursday: according to the *writ of habeas corpus* they had 72 hours from Monday's raid to charge the prisoners or release them for deportation[.]"); Moyers, *supra* note 94, at 669 ("To avoid habeas problems, the USAO was required to charge a defendant within 72 hours of arrest at the raid.") (citation omitted). *See also* Eagly, *supra* note 94, at 1304–05 (discussing constitutional and statutory limits on the pretrial detention of people arrested without a warrant, and the rights of criminal defendants, including noncitizens, under the Bail Reform Act of 1984). *See generally* LINEBAUGH, *supra* note 109 (discussing the origins of *habeas corpus*).

129. *See* Moyers, *supra* note 94, at 675–82 (discussing the truncated processes of plea negotiations, plea hearings, and sentencing hearings).

130. *See* CAMAYD-FREIXAS, *supra* note 42, at 2 (noting that the hearings started on May 13, 2008 and ended on May 22, 2008).

131. *See supra* note 108 and accompanying text (noting the lawyers' contemplation of collectively rejecting the proposed plea agreements and requesting trials for all of the defendants).



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regarding their terms of punishment,<sup>132</sup> by the time that the lawyers were attempting to negotiate favorable plea agreements, the critical moment of the defendants' initial appearances had already passed, and with it the best chance for an effective work-to-rule slowdown was lost.

Second, and as important, the mechanistic—albeit, formal—judicial process enacted at the National Cattle Congress following the Postville raid featured egregious violations of due process and other constitutional protections, which enabled the government to propagate legal violence,<sup>133</sup> primarily by judicial mistreatment, with concomitant corrosive effects on the democratic justifications of the rule of “authority under law.”<sup>134</sup>

Among myriad others, Minow and Olivas have expressed concerns for the institutional role of the courts in justifying democratic rule.<sup>135</sup> For example, Minow opined:

Consent to be governed, one might argue, must be withheld in the face of the competing demands of equally

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132. See Moyers, *supra* note 94, at 675–77, 680–81.

133. In theorizing how protest, repression and race functioned in the Chicano Movement, Ian Haney López explains, “Judicial bias and police malpractice together imposed a reign of legal violence on East Los Angeles . . . Many Chicanos insisted that legal violence against the Mexican community proved that Mexicans were non-white . . . ‘Law’ for Chicanos . . . means the police and the courts, and legal violence refers principally to the physical force these institutions wield. Law carried out on the streets—as opposed to law on the books—convinced many Mexicans that they were Chicanos.” HANEY LÓPEZ, *supra* note 23, at 8–9. See also Ian F. Haney López, *Protest, Repression, and Race: Legal Violence and the Chicano Movement*, 150 U. PA. L. REV. 205, 207 (2001) (“I contend in this Article that legal violence, encompassing both judicial mistreatment and police brutality, substantially contributed to the emergence of a Chicano movement that stressed a non-White Mexican identity.”).

134. *Accord* Chacón, *supra* note 94, at 145–47 (discussing three corrosive effects of mass plea agreement proceedings). See also LINEBAUGH, *supra* note 109, at 17, 212–13 (discussing the notion of “authority under law”). But see ERWIN CHEREMINSKY, *THE CASE AGAINST THE SUPREME COURT* 5 (2014) (“the Court has frequently failed, throughout American history, at its most important tasks, at its most important moments . . . Now, and throughout American history, the Court has been far more likely to rule in favor of corporations than workers or consumers; it has been far more likely to uphold government abuses of power than to stop them.”).

135. See Minow, *supra* note 10, at 738; Olivas, *supra* note 6, at 856.

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important or even more important principles and allegiances. Or else one might urge that consent to the government's authority must be earned continually and anew.<sup>136</sup>

Notwithstanding his approval of these principles, however, Olivas noted, "this view assumes a fundamental fairness, competition in the marketplace of ideas, and participation in the polity."<sup>137</sup> He continued:

In the three case studies above, however, these basic ingredients were lacking: unaccompanied refugee children are victims of proxy wars, a cruel and unjust refugee policy, and inhumane conditions of confinement; thousands of Palestinians, especially Palestinian children, find themselves enmeshed in an oppressive situation not of their own making, under a rule of power, not of law; and Chicano community organizers found no satisfaction in their formal complaints about inadequate educational conditions, and were judged not by a grand jury chosen from their peers.<sup>138</sup>

The judicial process at the National Cattle Congress following the Postville raid seems to have presented a similar situation, where the "basic ingredients" were lacking. We cannot know what might have happened had defense lawyers, prosecutors, judges, court interpreters, or other essential court personnel declared a strike or slowdown by terminating representation, or by a principled work-to-rule action. However, we can imagine that in addition to predictable charges of contempt of court and/or professional disciplinary proceedings, their collective action might have garnered exactly the kind of mainstream media coverage that can promote social change by forcing "the [legal] system to confront its political underpinnings."<sup>139</sup> Indeed, the Postville raid and its flawed judicial

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136. Minow, *supra* note 10, at 738.

137. Olivas, *supra* note 6, at 856.

138. *Id.*

139. *Id.* at 854.

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process received substantial scrutiny by the mainstream media.<sup>140</sup> If a necessary component of the judicial process (e.g., the defense attorneys) had struck against the court held at the National Cattle Congress, or conducted a work-to-rule slowdown, their jail sentences for contempt of court might have catalyzed the consciousness of the other actors in that surreal venue, awakening them from the cynical and mechanistic process that passed for the “rule of law.”

Even if the defense lawyers failed to persuade their colleagues across the bar (or bench) to join them, had they struck or declared a principled work-to-rule slowdown, they could have avoided complicity with the farce of law that the nominally judicial process following the May 2008 Postville ICE raid now emblemizes.<sup>141</sup> Finally, had lawyers, or other legal workers, stopped or slowed down these proceedings in 2008, perhaps the idea of striking against the federal immigration courts in New Mexico and Texas, which have been processing much of the 2014 to 2015 “surge” in Central American women and children seeking asylum in the United States, might be regarded as a potential protest strategy.

Of course, the idea of a work stoppage or work-to-rule slowdown may seem especially wrong for lawyers whose practice focuses on representing immigrants or refugees who have been detained. Beyond general professional duties to provide access to justice by zealously representing the unrepresented, or underrepresented,<sup>142</sup> these lawyers might find the notion of withdrawing from representation, or even momentarily “terminating” representation for the vulnerable class of people who constitute their client base, strategically backwards, morally repugnant, or even antithetical to their basic commitments as lawyers. Additionally, some scholars of legal ethics believe that lawyers have no business violating the law on

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140. See, e.g., Preston, *supra* note 102. Accord Eagly, *supra* note 94, at 1301 (“Postville’s large-scale prosecution received enormous media attention[.]”).

141. See sources cited, *supra* notes 94–95.

142. See generally ABA MODEL RULES OF PROFESSIONAL CONDUCT, at Preamble (6), (9) (1983), [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/model\\_rules\\_of\\_professional\\_conduct\\_table\\_of\\_contents.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html).

principle.<sup>143</sup> Others argue that lawyers, in particular, have a special duty to protest conditions that are ostensibly under the color of law but which they perceive as violating a superior law (e.g., rights guaranteed under the United States Constitution).<sup>144</sup>

I argue, in light of the terrible histories of mass detentions within and mass deportations from the United States (e.g., Japanese Internment during World War II and 1954's Operation Wetback),<sup>145</sup> that lawyers, and other officers of the court, who encounter mass detentions and mass prosecutions in the twenty-first century should think seriously about past instances when lawyers struck against a

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143. See, e.g., Kathryn Abrams, *Lawyers and Social Change: Confronting a Plural Bar*, 52 U. PITT. L. REV. 753, 756–60 (1991) (surveying “arguments against lawyers’ involvement in social change lawbreaking”).

144. See, e.g., *id.* at 761–66 (discussing the views of lawyers who work with historically oppressed client groups in hopes of generating legal and social change, including Bill Robinson of the NAACP Legal Defense Fund, Bob Gnaizda of the California Rural Legal Assistance Program, Mary Kaufman of the National Lawyers Guild Mass Defense Office, Ken Cockrel of the Black Workers Congress, Charles Garry, legal counsel to the Black Panther Party, Sheila Okpaku of the Community Law Office in Harlem, and Oscar Acosta of the Chicano Movement). Abrams draws her discussion of these lawyers’ views primarily from MARLISE JAMES, *THE PEOPLE’S LAWYERS* (1973). For a contemporary collection of interviews with lawyers who represented people seeking social change, see ANN FAGAN GINGER, *THE RELEVANT LAWYERS* (1972). For a recent and influential work on these themes, see *CAUSE LAWYERS AND SOCIAL MOVEMENTS* (Austin Sarat & Stuart A. Scheingold eds., 2006).

145. On Japanese Internment, see *Korematsu v. United States*, 323 U.S. 214 (1944); *PERSONAL JUSTICE DENIED*, *supra* note 26, at *passim*; Anderson et al., *supra* note 8, at 1944 (contextualizing the special registration of resident immigrants following September 11, 2001, within the mass internment of Japanese Americans in the 1940s and the mass deportation of Mexican Americans in the 1930s and 1950s); Dale Minami et al., *Sixty Years after the Internment: Civil Rights, Identity Politics, and Racial Profiling*, 11 *ASIAN L.J.* 151 *passim* (2004) (discussing the historical relevance of the internment of Japanese Americans following the December 7, 1941, attack on Pearl Harbor for the “war at home” following September 11); Natsu Taylor Saito, *Beyond the Citizen/Alien Dichotomy: Liberty, Security, and the Exercise of Plenary Power*, 14 *TEMP. POL. & CIV. RTS. L. REV.* 389, 401–03 (2005) (arguing that the internment of Japanese Americans provide “the most directly applicable precedents for the post-September 11th arbitrary and indefinite detention and interrogation of at least two U.S. citizens, Yaser Esam Hamdi and Jose Padilla”). On Operation Wetback, see *MIZE & SWORDS*, *supra* note 46, at 1–2, 25–40; *NGAI*, *supra* note 26, at 155–56; Anderson et al., *supra* note 8, at 1902; *González*, *supra* note 46, at 7; *Olivas*, *supra* note 48, at 437–39.

jurisdiction to protest its fundamental judicial failures. While lawyers' strikes or work slowdowns in the United States may be so rare as to seem simultaneously unthinkable and unprofessional, the threads of history that Professor Olivas preserved should not be forgotten. His case study of Arab and Israeli lawyers who confronted an untenable system of military justice that was hastily deployed to process tens of thousands of people could inform *all* lawyers (and other professionals involved in the administration of justice). Indeed, in light of the decade-plus "preventive detention" of people whom the government has declared to be "enemy combatants" and "held" (imprisoned) at the United States military base at Guantánamo, Cuba, *inter alia*, under the suspicion of international terrorism, but without any substantive criminal charge being filed,<sup>146</sup> more lawyers, and other officers of the court, should seriously consider how to collectively confront the risk (and opportunity) of terminated representation.

While this strategy may subject lawyers to court sanctions or professional discipline, "when the state regime is the law breaker"<sup>147</sup> lawyers should not *a priori* rule out the strategy of a work stoppage or declared work-to-rule slowdown, for failing to carefully consider such strategies may well manifest the third risk of representation that Minow articulated and Olivas developed, the risk of truncated representation.

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146. See, e.g., CHEMERINSKY, *supra* note 134, at 77–88 (discussing the post-9/11 "preventive detention" cases, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), *Rasul v. Bush*, 542 U.S. 466 (2004), *Rumsfeld v. Padilla*, 542 U.S. 426 (2004), *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), and *Boumediene v. Bush*, 533 U.S. 733 (2008)); Saito, *supra* note 145, at 400–01, 403–06 (discussing the different detention conditions and judicial procedures accorded to John Walker Lindh, in contrast to Yaser Esam Hamdi and Jose Padilla, and arguing that colonialism, racism, religious discrimination, and theories of "Otherness" explain the different treatment of certain subjects, who despite being United States citizens nevertheless lack the full rights of citizenship). See also Carol Rosenberg, *Detention at Guantánamo Grinds On: 13 Years and Counting*, MIAMI HERALD (Nov. 17, 2014), <http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article3977792.html>.

147. Olivas, *supra* note 6, at 835.

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### C. The Risk of Truncated Representation

In the first extended treatment by a scholar writing in a law review, Professor Olivas selected legendary Chicano lawyer Oscar “Zeta” Acosta to discuss the risk of truncated representation.<sup>148</sup> As Minow defined it:

Lawyers who are willing to represent lawbreakers, and who find no obligation to breach the confidences of those clients, may nonetheless betray a contrast between their own perspectives and that of their clients in the course of representation. The grave risk is that lawyers will defend politically motivated lawbreakers in ways that recapitulate the very failure of the legal system that inspired the lawbreaking actions. In other words, there is a danger that the defense will pursue avenues that undermine the client’s purposes or beliefs.<sup>149</sup>

Olivas apparently selected Acosta as an exemplar of an attorney who resolved the risk of truncated representation by rebelling—arguably, in an ethical manner—against the politically inspired prosecution of his clients.<sup>150</sup> In Acosta’s grandiose and intransigent words:

No other lawyer has ever cross-examined a hundred judges. There is no precedent, nobody to show me how to do the job. So, as is my custom, I decide to go right for the throat of those dirty old men who sit over us in

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148. See Olivas, *supra* note 6, at 846–54. See also Abrams, *supra* note 143, at 766. For additional sources on the life and times of Oscar Z. Acosta, see sources cited, *supra* note 22.

149. Minow, *supra* note 10, at 747.

150. See Olivas, *supra* note 6, at 848 (“These books [authored by Acosta about his representation of Chicano protestors in Los Angeles following their 1968 indictments] certainly fulfill Martha Minow’s criterion of lawyering for the other half.”). See also *id.* at 854 (“Acosta’s defense tactics, challenging the racial composition of the grand jury process . . . led to acquittals of the defendants in both trials on all the major charges. His combination of acute political instincts and deft lawyering did not compromise his clients’ interests, and largely vindicated them.”).

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judgment. If they won't give us back our lands, at least we'll have a drop of their blood for our trouble. I'm billed as the only revolutionary lawyer this side of the Florida Gulf. And it's true: I'm the only one who actually hates the *law*.<sup>151</sup>

In less grandiose but no less intransigent rhetoric, Acosta explained:

I relate to the court system first as a Chicano and only seldom as a lawyer in the traditional sense. I have no respect for the courts and I make it clear from the minute I walk in . . . The one thing I've learned to do is how to use criminal defense work as an organizing tool. . . . I take no case unless it is, or can become, a Chicano movement case. I turn it into a platform to espouse the Chicano point of view so that that affects the judge, the jury, the spectators.<sup>152</sup>

Twenty-four years later, what can be learned from revisiting

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151. Olivas, *supra* note 6, at 853 (quoting ACOSTA, *REVOLT*, *supra* note 22, at 214). See also HANEY LÓPEZ, *supra* note 23, at 30, 33 (discussing the synergy between Acosta's personality, disdain for the legal system, substance abuse, and brilliance for representing the Chicano Movement cases). For another view on "revolutionary lawyering," see William P. Quigley, *Revolutionary Lawyering: Addressing the Root Causes of Poverty and Wealth*, 20 WASH. U. J.L. & POL'Y 101 (2006). For another Chicano's view on socio-legal struggles for justice within the United States, see, e.g., GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* (1992); Gerald P. López, *Foreword: Latinos and Latino Lawyers*, 6 CHICANO L. REV. 1 (1983); Gerald P. López, *Lay Lawyering*, 32 UCLA L. REV. 1 (1984); Gerald P. López, *The Idea of a Constitution in the Chicano Tradition*, 37 J. OF LEGAL EDUC. 162 (1987); Gerald P. López, *Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration*, 77 GEO L.J. 1603 (1989); Gerald P. López, *Shaping Community Problem Solving around Community Knowledge*, 79 N.Y.U. L. REV. 59 (2004); Gerald P. López, *Keynote Address: Living and Lawyering Rebelliously*, 73 FORDHAM L. REV. 2041 (2005). See generally *Rebellious Lawyering Institute*, <http://rebelliouslawyeringinstitute.org> (last visited July 7, 2015). Synthesizing Olivas's essay with López's influential scholarship on rebellious lawyering is beyond the scope of this Article but promises generative future work regarding models of lawyering that were innovated and evolved by Chicana/o, Mexican American, and other Latina/o attorneys.

152. Abrams, *supra* note 143, at 766 (quoting JAMES, *supra* note 143, at 349).

Olivas's case study on Acosta? Because other scholars have produced substantial scholarship on Acosta's lawyering, in particular his constitutional challenge to discriminatory grand jury selection practices in Los Angeles County,<sup>153</sup> instead of revisiting the details of his flamboyant lawyering strategy and tactics, below I make two observations—the impact of Olivas's scholarship on Acosta and the limited possibilities for Acosta's style of “revolutionary” lawyering today.

First, Olivas's early exploration of this subject likely opened the way for other socio-legal scholars to consider, or reconsider, the impact of Acosta's lawyering, and thus contributed toward informing new generational cohorts of law students and lawyers to learn from Acosta's efforts. For example, in rough chronological order, socio-legal scholars who wrote about Acosta after Olivas include: Richard Delgado and Jean Stefancic, Ian F. Haney López, Mary Romero, Steven W. Bender and Keith Aoki, Anthony V. Alfieri, and Tom I. Romero, II.<sup>154</sup> While some of these scholars may have learned about Acosta from other experiences or textual sources,<sup>155</sup> the inclusion of

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153. See, e.g., HANEY LÓPEZ, *supra* note 23, at *passim*; STAVANS, *supra* note 22, at 79–82; Haney López, *supra* note 133, at *passim*; Ian F. Haney López, *Institutional Racism: Judicial Conduct and A New Theory of Racial Discrimination*, 109 YALE L.J. 1717 *passim* (2000); Olivas, *supra* note 6, at 846–54.

154. See, e.g., HANEY LÓPEZ, *supra* note 23, at *passim*; Anthony V. Alfieri, *Color/Identity/Justice: Chicano Trials*, 53 DUKE L.J. 1569 *passim* (2004); Steven W. Bender & Keith Aoki, *Seekin' the Cause: Social Justice Movements and Latcrit Community*, 81 OR. L. REV. 595, 606 (2002); Richard Delgado, *Rodrigo and Revisionism: Relearning the Lessons of History*, 99 NW. U. L. REV. 805, 820–21 (2005); Delgado & Stefancic, *supra* note 73, at 503; Haney López, *supra* note 133, at *passim*; Haney López, *supra* note 153, at *passim*; Mary Romero, *Review Essay: Brown Is Beautiful*, 39 L. & SOC'Y REV. 211 *passim* (2005) [hereinafter Romero, *Brown is Beautiful*]; Tom I. Romero, II, *The Color of Water: Observations of A Brown Buffalo on Water Law & Policy in Ten Stanzas*, 1 U. MIAMI RACE & SOC. JUST. L. REV. 107, 107, 110, 113 (2011), reprinted in 15 U. DENV. WATER L. REV. 329 (2012) [hereinafter Romero, *Color of Water*]; Jean Stefancic, *Latino and Latina Critical Theory: An Annotated Bibliography*, 85 CAL. L. REV. 1509, 1514, 1560 (1997). See also Alfredo Mirandé, *Rascuache Lawyer: A Paradigm of Ordinary Litigation*, 1 U. MIAMI RACE & SOC. JUST. L. REV. 155, 159, 168–69 (2011) (discussing Acosta as an exemplar of “rascuache lawyering”).

155. In addition to Acosta's two books, ACOSTA, BUFFALO, *supra* note 22, and ACOSTA, REVOLT, *supra* note 22, which are classic texts of Chicana/o Studies, legal



Olivas's essay by Richard Delgado and Jean Stefancic in two annotated bibliographies published in the mid-1990s<sup>156</sup> preceded their excerpting passages from Acosta's autobiographical essay and Olivas's essay for their 1998 book, *The Latinola Condition: A Critical Reader*, and doubtlessly influenced their later casebook collaborations with Juan F. Perea and others.<sup>157</sup> Independently (judging by citations), Ian F. Haney López's concentrated focus on Acosta's lawyering in two of his articles from the early 2000s,<sup>158</sup> and his book on the subject, *Racism on Trial: The Chicano Fight for Justice*,<sup>159</sup> was not directly informed by Olivas's essay. Subsequent law review scholarship on Acosta has either reviewed Haney López's treatment of Acosta's lawyering,<sup>160</sup> focused on Acosta's constitutional challenge against discriminatory grand jury selection practices,<sup>161</sup> or deployed Acosta's literary persona as the Brown Buffalo to innovate LatCrit theory.<sup>162</sup>

Although Oscar "Zeta" Acosta may be obscure to mainstream

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scholars who have written about Acosta in law review articles have cited to texts including, *inter alia*, JAMES, *supra* note 143 (published in 1973); STAVANS, *supra* note 22 (published in 1995), and UNCOLLECTED WORKS, *supra* note 22 (published in 1996).

156. See Delgado & Stefancic, *supra* note 73, at 503; Stefancic, *supra* note 154, at 1560.

157. See LATINO/A CONDITION, *supra* note 6, at 320–38 (excerpting Olivas's essay and Acosta's autobiographical essay); LATINOS AND THE LAW, *supra* note 6, at 813–20, 832–40 (same); RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA 1212 (Juan F. Perea, Richard Delgado, Angela P. Harris, Jean Stefancic & Stefanie M. Wildman eds., 2000, 2d ed. 2007) (citing UNCOLLECTED WORKS, *supra* note 22; and Olivas, *supra* note 6).

158. Haney López, *supra* note 133; Haney López, *supra* note 153.

159. HANEY LÓPEZ, *supra* note 23. Haney López notes, "I first began this [book] project more than a decade ago while I was still in law school[.]" *Id.* at 312. He earned his J.D. at Harvard Law School in 1991. See Ian F. Haney López 1 (Aug. 2012), <https://www.law.berkeley.edu/php-programs/faculty/facultyCVPDF.php?facID=301> (curriculum vitae). He also notes that in 1992 he spoke with the trial judge in these cases, Los Angeles Superior Court Judge Arthur L. Alarcón. HANEY LÓPEZ, *supra* note 23, at 262 n.118. For biographical information about Judge Alarcón, see sources cited *infra* note 236 and accompanying text.

160. See, e.g., Bender & Aoki, *supra* note 154; Delgado, *supra* note 154; Romero, *Brown is Beautiful*, *supra* note 154.

161. See, e.g., Alfieri, *supra* note 155; Kevin R. Johnson, *Hernandez v. Texas: Legacies of Justice and Injustice*, 25 CHICANO-LATINO L. REV. 153, 182 (2005); Mirandé, *supra* note 154.

162. See Romero, *Color of Water*, *supra* note 154.

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legal scholars in the United States, he nevertheless has a place in the minds of lawyers who have considered how to represent politically motivated lawbreakers (to use Minow's evocative phrasing) in ethical ways that will support—not undermine—their clients' purposes and beliefs. In assessing the impact of Olivas's essay, with hopes of broadening its reach in the decades to come, citations show that Olivas's scholarship on Acosta directly informed Richard Delgado and Jean Stefancic, who excerpted Acosta's reflections and Olivas's discussions on how to use legal representation to reinforce clients' principles, purposes, or beliefs.<sup>163</sup> Thus, Olivas's essay facilitated later generational cohorts of law students (and the lawyers they became) to consider how Acosta used the representation of Chicano Movement activists to confront the legal violence of politically motivated prosecutions that had been tainted by discriminatory court practices pertaining to grand jury selection.<sup>164</sup>

Much as the 1989 republication of Acosta's two novels<sup>165</sup>

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163. See sources cited, *supra* note 154.

164. See Olivas, *supra* note 6, at 850–52 (discussing that the indictments were handed down three months after the Chicano walkouts, which was just before the California primary election in which Los Angeles County District Attorney Evelle Younger was a candidate for state Attorney General). Accord GARCÍA & CASTRO, *supra* note 23, at 199–200 (presenting Sal Castro's beliefs about district attorney Younger's motivation to gain political mileage by indicting the Chicano Movement activists for planning the massive East Los Angeles high school student strikes of 1968 and that the arrests were part of a Republican strategy to discredit Senator Robert Kennedy and Senator Eugene McCarthy, who had expressed public support for the student strikes, by arresting the activists the weekend before the June 4, 1968 primary election); HANEY LÓPEZ, *supra* note 23, at 168 ("At the outset Acosta and the defendants charged that the prosecutions reflected local politics. The arrests fell on the weekend preceding California primary elections."). Following Acosta, Haney López calls this case the *East L.A. Thirteen* and the subsequent case in which Acosta challenged the grand jury indictment of Chicano Movement activists the *Biltmore Six*. See *id.* at 3–4, 31–40. Respectively, their legal citations are *Castro v. Superior Court*, 88 Cal. Rptr. 500 (Cal. App. 2d Dist. 1970) and *Montez v. Superior Court*, 88 Cal. Rptr. 736 (Cal. App. 2d Dist. 1970). See Olivas, *supra* note 6, at 849 n.121, 852 n.139 (noting the case citations). Contemporary journalism on the second case reportedly used the phrase "Biltmore Seven." See Yvette C. Doss, *The Lost Legend of the Real Dr. Gonzo*, L.A. TIMES (June 5, 1998). Haney López prefers "Biltmore Six" because that is the number of people who were ultimately tried. HANEY LÓPEZ, *supra* note 23, at 36.

165. Olivas, *supra* note 6, at 847 n.121.

facilitated the early 1990s research conducted by Olivas, Haney López, and other scholars into Acosta's lawyering in defense of Chicano Movement activists,<sup>166</sup> Olivas's early scholarship on Acosta informed Delgado, Perea, and Stefancic's decision to include excerpts regarding Acosta in their books.<sup>167</sup> While Olivas notes that he first read Acosta's novels shortly after their original publication in 1972 and 1973,<sup>168</sup> their republication provided him with the opportunity to reappraise their significance for lawyering and legal education, to research contemporary and subsequent reviews of the books' literary significance for Chicana/o Studies, and to investigate Acosta's papers.<sup>169</sup> Similarly, several years after the republication of Acosta's novels, Latin America and Latino Studies Professor Ilan Stavans published two books regarding Acosta (in 1995 and 1996).<sup>170</sup> In turn, Acosta's novels and Stavans's books informed Haney López's extensive scholarship on Acosta's self-styled revolutionary Chicano lawyering,<sup>171</sup> which together with the books by Delgado and Stefancic,<sup>172</sup> and Delgado, Perea, and Stefancic,<sup>173</sup> provide a robust set

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166. See, e.g., HANEY LÓPEZ, *supra* note 23; STAVANS, *supra* note 22; UNCOLLECTED WORKS, *supra* note 22; Haney López, *supra* note 133; Haney López, *supra* note 153; Olivas, *supra* note 6.

167. See *supra* notes 156–57 and accompanying text.

168. Olivas, *supra* note 6, at 847.

169. See Olivas, *supra* note 6, at 847–48. See also Salvador Güereña, *Guide to the Oscar Zeta Acosta Papers, CEMA 1*, DEPARTMENT OF SPECIAL COLLECTIONS, UNIVERSITY OF CALIFORNIA, SANTA BARBARA LIBRARY (1998), [http://www.oac.cdlib.org/findaid/ark:/13030/tf187004xn/entire\\_text/](http://www.oac.cdlib.org/findaid/ark:/13030/tf187004xn/entire_text/) (1998).

170. STAVANS, *supra* note 22; UNCOLLECTED WORKS, *supra* note 22.

171. HANEY LÓPEZ, *supra* note 23; Haney López, *supra* note 133; Haney López, *supra* note 153.

172. LATINO/A CONDITION, *supra* note 6.

173. LATINOS AND THE LAW, *supra* note 6. For symposium essays responding to the publication of this casebook, see Rodolfo F. Acuña, *On Pedagogy*, 12 HARV. LATINO L. REV. 7 (2009); Keith Aoki & Kevin R. Johnson, *Latinos and the Law: Cases and Materials: The Need for Focus in Critical Analysis*, 12 HARV. LATINO L. REV. 73 (2009); Steven W. Bender, *Knocked Down Again: An East L.A. Story on the Geography of Color and Colors*, 12 HARV. LATINO L. REV. 109 (2009); Richard Delgado et al., *Author's Reply: Creating and Documenting a New Field of Legal Study*, 12 HARV. LATINO L. REV. 103 (2009); Gerald P. López, *Changing Systems, Changing Ourselves*, 12 HARV. LATINO L. REV. 15 (2009); Michael A. Olivas, *The Art and Science of Casebooks*, 12 HARV. LATINO L.

of resources for lawyers, law students, and others who might be interested in learning from Acosta's style of lawyering today—notwithstanding the seemingly limited possibilities for it—which comprises the second of my two observations on Olivas's case study on Oscar "Zeta" Acosta.

As Olivas noted, Los Angeles Superior Court Judge Arthur L. Alarcón cited Acosta for contempt of court twice during the second of the two Chicano Movement trials in which Acosta challenged the grand jury indictment, *Montez v. Superior Court* (also known as the *Biltmore Six*).<sup>174</sup> Acosta spent a total of seven days in jail for his conduct during that trial.<sup>175</sup> The image and reality of a lawyer in jail under such circumstances did not start, or stop, with Acosta,<sup>176</sup> but his

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REV. 1 (2009); Lisa R. Pruitt, *Latinas/os, Locality, and Law in the Rural South*, 12 HARV. LATINO L. REV. 135 (2009); Cristina M. Rodríguez, *Latinos: Discrete and Insular No More*, 12 HARV. LATINO L. REV. 41 (2009); Leticia M. Saucedo, *National Origin, Immigrants, and the Workplace: The Employment Cases in LATINOS AND THE LAW and the Advocates' Perspective*, 12 HARV. LATINO L. REV. 53 (2009).

174. Olivas, *supra* note 6, at 854. Accord HANEY LÓPEZ, *supra* note 23, at 38 ("Judge Alarcon twice jailed Acosta for contempt of court."). On the colloquial name for the case, see *supra* note 164.

175. HANEY LÓPEZ, *supra* note 23, at 38.

176. For three examples of lawyers who served time in jail, consider Mahatma Gandhi, Nelson Mandela, and Lynne Stewart. See, e.g., THE CASE OF LYNNE STEWART: A JUSTICE DEPARTMENT ATTACK ON THE BILL OF RIGHTS *passim* (National Lawyers Guild ed. 2005) (discussing the conviction of 65-year-old attorney Lynne Stewart under charges of conspiracy, making false statements, and providing and concealing material support to terrorist activity for issuing a press release regarding her client in 2000); THE GANDHI READER: A SOURCEBOOK OF HIS LIFE AND WRITINGS 59–71 (Homer A. Jack ed., 1994) (discussing Gandhi's first imprisonment, where he was sentenced to hard labor at the Johannesburg, South Africa jail in 1908 for failing to show his registration certificate, which he had burned, in *Satyagraha* resistance to the "Black Act," the Transvaal Asiatic Registration Act of 1906); Stephen Ellmann, *Two South African Men of the Law*, 28 TEMP. INT'L & COMP. L.J. 431, 433–37 (2014) (discussing Nelson Mandela's 1962 trial for leaving South Africa without a passport and inciting people to strike, attainment of his LL.B., and successful defense of his law license while imprisoned at Robben Island); Charles J. Ogletree, Jr., *From Mandela to Mthwana: Providing Counsel to the Unrepresented Accused in South Africa*, 75 B.U. L. REV. 1, 8–9 (1995) (discussing the anti-Apartheid symbolism of Mandela's *pro se* representation against charges of leaving South Africa without a passport and incitement to strike).

punishment for contempt of court provides a sobering reminder of the complexity and insidiousness of legal violence. Indeed, for those who may have found impractical my earlier discussion of the possibilities of a work stoppage by terminated representation or of a work-to-rule slowdown, I call attention to Olivas's assessment of Acosta's lawyering strategies, "Acosta's trial tactics of twenty years ago landed him in jail for contempt. Today, I doubt he could remain licensed for the same strategy, even though the political powerlessness that characterized Latinos in 1970 is even more acute in the 1990s."<sup>177</sup> I agree with Olivas's conclusions, as I find all accounts of Acosta's lawyering audacious and brazen.

Of course, I have never been charged with contempt of court, nor otherwise been threatened directly with jail time, so perhaps Acosta's self-professed hatred for the law is beyond my legal imagination. At the same time, many years before I became a lawyer, I confronted conduct that I interpreted as racially motivated police harassment, as well as instances of express white supremacist racism.<sup>178</sup> Also, as a

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177. Olivas, *supra* note 6, at 856–57.

178. Here are two anecdotes. First, on Easter Sunday, April 3, 1994, a police officer detained and questioned me while I was sitting in a downtown Sacramento park beside a public artwork that had been defaced with a graffiti. Suspicious of me for this vandalism, the officer interrogated me, patted me down, looked nearby for evidence of any tool that I might have used, and asked for my driver's license. Innocent, I complied without protest but with growing frustration until the officer said that the graffiti was "Mexican graffiti" and took my photograph with a Polaroid camera, at which time I expressed my indignation. Posing flippantly for the camera, I asked him, "Is anything that you are doing legal?" In response the officer shoved my license back into my hand and ordered me to leave the park, which I immediately did. (For a description of a similar police practice of photo-graphing Chicana/o youth elsewhere in California at around the same time, here under the express pretense that they were gang members, see Cruz Reynoso, *Cultural Diversity: Reality and Ideal*, 6 LA RAZA L.J. 209, 210 (1993).)

Four years earlier, I had begun to confront members of the several neo-Nazi skinhead youth gangs that populated Sacramento and its environs. See generally SKINHEADS IN AMERICA: RACISTS ON THE RAMPAGE, SOUTHERN POVERTY LAW CENTER INTELLIGENCE REPORT SPECIAL EDITION 18, 26 (n.d.), [http://www.splcenter.org/sites/default/files/downloads/publication/Skinheads\\_in\\_America\\_0.pdf](http://www.splcenter.org/sites/default/files/downloads/publication/Skinheads_in_America_0.pdf) (discussing the neo-Nazi "American Front" skinheads). In the Sacramento of my youth, skinheads accosted me in high school, on the street, and in several other locales. While I personally

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lawyer at the nonprofit Alameda County Homeless Action Center in Oakland, California, from November 2006 until December 2010, I represented impoverished individuals who sought Social Security disability benefits.<sup>179</sup> During those four years, working in a job perhaps similar to the one that Acosta fled prior to representing the Chicano Movement cases discussed above,<sup>180</sup> I encountered conduct from judges that I interpreted as, biased, perhaps unconsciously, on the bases of race, gender, and class.<sup>181</sup> Even though I practiced law

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avoided physical violence, others were not so fortunate. See Tim Grieve, *Over the Edge*, SACRAMENTO BEE (Sept. 2, 1990), at F1 (reporting on the Aug. 21, 1990 fight between rival skinhead gangs in Sacramento, which resulted in the murder of Paul Carallo, a young man affiliated with the Skinheads Against Racial Prejudice). As one response to this violence, I joined a nascent community group, Anti-Racist Action, organized against white supremacy at my high school, and participated in a Nov. 17, 1990, march and rally against white supremacy at the state capitol. See Maria E. Camposeco, *150 Protest Over Racist Skinheads*, SACRAMENTO BEE (Nov. 18, 1990), at B3. See generally *A History of Anti-Racist Action*, ANTI-RACIST ACTION, [http://antiracistaction.org/?page\\_id=30](http://antiracistaction.org/?page_id=30) (last visited July 13, 2015).

179. See González, *supra* note 7, at 1026–27 (noting the author’s work at the Alameda County Homeless Action Center). See also *supra* note 7 (discussing the author’s experience as an activist, attorney, and educator based in Oakland, California). See generally Alameda County Homeless Action Center, <http://homelessactioncenter.org> (last visited July 7, 2015).

180. See HANEY LÓPEZ, *supra* note 23, at 30 (noting Acosta’s “brief stint as a legal aid attorney”); Olivas, *supra* note 6, at 848 (quoting “Acosta’s description of his first legal job, in Oakland, California Legal Services”).

181. For example, one day in court, I represented two women in separate hearings before the same Social Security Administration administrative law judge. In the morning, my client was an African-American woman with neither any drug-related conviction, nor any other evidence conflicting with her testimony as to when she had stopped her prior admitted substance abuse. The judge denied her claim for disability benefits primarily on the basis that he found her testimony not credible. In the afternoon, my client was a racially White woman whose conviction for driving under the influence of alcohol conflicted with her testimony as to the duration of her sobriety. The judge approved her claim, finding her substance abuse immaterial to her disability claim. While I felt frustrated during the first hearing, suspecting that the judge might be subjecting my client to invidious stereotypes about African-American women and crack, a student intern (who was a racially White woman and had accompanied me to both hearings), interpreted the cases starkly in terms of race. As I recall, she explained how similar my clients appeared to each other in terms of their flat affect and medical histories. From her point of view, the different treatment seemed explicable only by

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with the myriad benefits of an education in law that featured critical race theory, LatCrit theory, and other genres of critical outsider jurisprudence,<sup>182</sup> as a Chicana/o who was active in the local bar,<sup>183</sup> and while living in the same community as the office where I worked, I often felt perplexed at how to object effectively to seemingly invidious discrimination against my clients—in terms that would not unduly antagonize the judge.<sup>184</sup> Worried about not prejudicing my client's interests by objecting insolently to conduct that I believed evidenced invidious animus, implicit bias, unconscious racism, or common sense racism,<sup>185</sup> I instead chose to build and preserve the record in

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race: indeed, the second client's racial Whiteness apparently functioned to trump evidence of record that contradicted her testimony, whereas the first client's racial Blackness apparently rendered her testimony not credible.

182. See *supra* note 44 (noting the author's education in critical outsider jurisprudence and comparative ethnic studies). Indeed, I studied *Racism on Trial* in my second semester at Berkeley Law with Haney López and after already having gained a passing knowledge of Oscar Zeta Acosta from my graduate education at San Francisco State University. Approximately four and a half years later I began teaching undergraduate students at San Francisco State University and U.C. Berkeley in courses that I redesigned, which syllabi included *Racism on Trial*. See González, *supra* note 7, at 1025–29 (discussing the author's experience of teaching undergraduate Ethnic Studies courses).

183. See *supra* note 41 (noting the author's service to local bar associations).

184. See *supra* note 181 (discussing an anecdote of judicial conduct that the author perceived as evidencing invidious discrimination).

185. For a recent analysis of invidious animus, see Susannah W. Pollvogt, *Unconstitutional Animus*, 81 *FORDHAM L. REV.* 887 (2013). The literature on implicit bias and unconscious racism has become voluminous. For two classic texts on the subject, see Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 *STAN. L. REV.* 1161 (1995) and Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 *STAN. L. REV.* 317 (1987). For several recent articulations, see Debra Lyn Bassett, *Deconstruct and Superstruct: Examining Bias Across the Legal System*, 46 *U.C. DAVIS L. REV.* 1563 (2013); Andrew W. Briebresco, *Latinola Plaintiffs and the Intersection of Stereotypes, Unconscious Bias, Race-Neutral Policies, and Personal Injury*, 13 *J. GENDER RACE & JUST.* 373 (2010); Jerry Kang, *Trojan Horses of Race*, 118 *HARV. L. REV.* 1489 (2005); Antony Page, *Batson's Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 *B.U. L. REV.* 155 (2005). For the theory of race and racism as common sense, see HANEY LÓPEZ, *supra* note 23, at 110–30. For a precursor theory, see Haney López, *supra* note 153, especially pages 1774–76.

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order to prevail on appeal—a strategy that almost always ultimately worked—but at an immeasurable human cost to my impoverished clients, who were compelled to wait for a seemingly interminable period before receiving their disability benefits.

Thus, I feel impressed by Acosta's style of confronting the risk of truncated representation by objecting audaciously and brazenly to the invidious discrimination under which his clients had been indicted. While I have been willing to contest racist acts to which I, or a friend, was directly subject, as a lawyer I have been careful to safeguard my clients' individual cases before the judge. In contrast, Acosta directly contested the white supremacist legal violence arrayed against his clients, worrying less about their individual interests and more about how their cases implicated the broader Chicano Movement.<sup>186</sup> Although controversial, this choice was likely ethical, for Acosta's clients knew, or quickly came to learn, who they were getting when they agreed for him to represent them. As politically prepared Chicano Movement activists, most of them were willing to subject themselves to representation by a "revolutionary" lawyer who not only understood their experiences of racism in Los Angeles but dedicated himself to translating their experiences of racism into evidence of unconstitutional discrimination in the grand jury selection process.<sup>187</sup>

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186. See *supra* note 151 and accompanying text (discussing Acosta's understanding of how to use criminal defense work as an organizing tool for the Chicano movement). Accord HANEY LÓPEZ, *supra* note 23, at 29–30, 40 (discussing Acosta's dedication to the Chicano Movement); Olivas, *supra* note 6, at 854 (concluding that Acosta's challenge to the grand jury selection process combined "acute political instincts and deft lawyering [that] did not compromise his clients' interests, and largely vindicated them").

187. Compare GARCÍA & CASTRO, *supra* note 23, at 204, 213 ("Right from there I [Sal Castro] didn't have too much confidence in Oscar [Acosta]. He was erratic, and I found out later he was a druggie. I was glad that I also had the ACLU lawyers working on my case and those of the others arrested . . . I told Acosta that I could afford another lawyer so he would be free to help the others. He was too unstable and crazy."), with HANEY LÓPEZ, *supra* note 23, at 40 ("Acosta and the defendants conceived of these cases as vehicles to promote the Chicano movement, and they attempted to use the courts as a stage upon which to unmask judicial bias against Mexicans."), and Olivas, *supra* note 6, at 854 n.13 ("[East L.A. Thirteen defendant Carlos



Perhaps this fact, clients who are politically prepared, who perhaps even expect, to receive punishment for their social activism,<sup>188</sup> most limits the possibilities for Acosta's style of revolutionary lawyering today. This is not to say that such clients do not exist. One need only consider the young people who began coming out as "Undocumented and Unafraid" since 2010,<sup>189</sup> the "Occupy Wall Street" protests that erupted in 2011,<sup>190</sup> and the "Black Lives Matter"

Muñoz] chose not to hire Acosta as his lawyer, as he believed Acosta wanted to plead him guilty and 'make martyrs out of all of us.' While his esteem for Acosta grew over the two trials, [Muñoz] felt Acosta was a publicity hound and careless lawyer."). See also HANEY LÓPEZ, *supra* note 23, at 233 ("[After the *Biltmore Six* acquittals] Acosta was fed up with being a movement lawyer. On several occasions he ran into conflict with his clients, with both sides wondering about the other's true commitment. And he had also tired of practicing a profession that he hated.") (citation omitted).

188. *Accord* HANEY LÓPEZ, *supra* note 23, at 164–77 (theorizing the emerging common sense of protest, legal repression, and race in the Chicano Movement and how it led activists to expect legal violence).

189. See, e.g., UNDOCUMENTED AND UNAFRAID: TAM TRAN, CINTHYA FELIX, AND THE IMMIGRANT YOUTH MOVEMENT (Kent Wong et al. eds., 2012); DREAMS DEPORTED: IMMIGRANT YOUTH AND FAMILIES RESIST DEPORTATION (Kent Wong & Nancy Guardernos eds., 2015); Raquel Aldana, Beth Lyon & Karla Mari McKanders, *Raising the Bar: Law Schools and Legal Institutions Leading to Educate Undocumented Students*, 44 ARIZ. ST. L.J. 5 (2012); Laura Corruner, "Coming Out of the Shadows": *Dream Act Activism in the Context of Global Anti-Deportation Activism*, 19 IND. J. GLOBAL LEGAL STUD. 143 (2012); René Galindo, *Undocumented & Unafraid: The DREAM Act 5 and the Public Disclosure of Undocumented Status as a Political Act*, 44 URB. REV. 589 (2012); Jayesh M. Rathod, *Protecting Immigrant Workers Through Interagency Cooperation*, 53 ARIZ. L. REV. 1157, 1164 (2011); Natasha Rivera-Silber, "Coming Out Undocumented" in the Age of Perry, 37 N.Y.U. REV. L. & SOC. CHANGE 71 (2013); Rose Cuison Villazor, *The Undocumented Closet*, 92 N.C. L. REV. 1 (2013).

190. See, e.g., Tabatha Abu El-Haj, *All Assemble: Order and Disorder in Law, Politics, and Culture*, 16 U. PA. J. CONST. L. 949 (2014); David Dana & Nadav Shoked, *Public, by Necessity*, 13 SEATTLE J. FOR SOC. JUST. 341 (2014); Trina Jones, *Occupying America: Dr. Martin Luther King, Jr., the American Dream, and the Challenge of Socio-Economic Inequality*, 57 VILL. L. REV. 339 (2012); Sarah Kunstler, *The Right to Occupy: Occupy Wall Street and the First Amendment*, 39 FORDHAM URB. L.J. 989 (2012); Robin Lipp, Note, *Protest Policing in New York City: Balancing Safety and Expression*, 9 HARV. L. & POL'Y REV. 275 (2015); Janos D. Marton, *Representing an Idea: How Occupy Wall Street's Attorneys Overcame the Challenges of Representing Non-Hierarchical Movements*, 39 FORDHAM URB. L.J. 1107 (2012); Udi Ofer, *Occupy the Parks: Restoring the Right to Overnight Protest in Public Parks*, 39 FORDHAM URB. L.J. 1155 (2012); Stephen Tower, Comment, *Not in My Front Yard: Freedom of Speech and State Action in New York City's*

movement that emerged in 2012 after George Zimmerman killed Trayvon Martin.<sup>191</sup> Similarly, thinking about the lawyers who represent Wikileaks Editor-in-Chief Julian Assange<sup>192</sup> and national security whistleblower Edward Snowden<sup>193</sup> reinforces the understanding that a substantial number of people are willing to break the law on principle in order to effect social change. At the same time, however, after decades of *kulturkampf* (culture war) and other forms of *revanchism* (right-wing revenge-taking),<sup>194</sup> the number of

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*Privately Owned Public Spaces*, 22 J.L. & POL'Y 433 (2013); Christine Verbitsky, Note, *The Occupy Wall Street Movement and the Constitution: Protesters Preoccupied with the First Amendment*, 29 TOURO L. REV. 1003 (2013); Timothy Zick, Book Review, *Liberty's Refuge: The Forgotten Freedom of Assembly* by John D. Inazu, 91 TEX. L. REV. 375 (2012).

191. See *About Us*, BLACK LIVES MATTER, <http://blacklivesmatter.com/about> (last visited Oct. 17, 2015) (“#BlackLivesMatter was created in 2012 after Trayvon Martin’s murderer, George Zimmerman, was acquitted for his crime, and dead 17-year old Trayvon was post-humously [sic] placed on trial for his own murder.”). See also Mario L. Barnes, *Taking A Stand?: An Initial Assessment of the Social and Racial Effects of Recent Innovations in Self-Defense Laws*, 83 FORDHAM L. REV. 3179 (2015); Jim Freeman, *Supporting Social Movements: A Brief Guide for Lawyers and Law Students*, 12 HASTINGS RACE & POVERTY L.J. 191, 192 (2015); Laverne Lewis Gaskins, *Justice Demands That Black Lives Matter*, NBA NAT’L B. ASS’N MAG. 26 (Dec. 2014); Justin Hansford & Meena Jagannath, *Ferguson to Geneva: Using the Human Rights Framework to Push Forward A Vision for Racial Justice in the United States After Ferguson*, 12 HASTINGS RACE & POVERTY L.J. 121 (2015); Kenneth Lawson, *Police Shootings of Black Men and Implicit Racial Bias: Can’t We All Just Get Along*, 37 U. HAW. L. REV. 339 (2015); L. Song Richardson, *Police Racial Violence: Lessons from Social Psychology*, 83 FORDHAM L. REV. 2961 (2015); Arnetta Rogers, Note, *How Police Brutality Harms Mothers: Linking Police Violence to the Reproductive Justice Movement*, 12 HASTINGS RACE & POVERTY L.J. 205 (2015).

192. See JUSTICE FOR ASSANGE, <https://justice4assange.com> (last visited Oct. 17, 2015). See generally WIKILEAKS, <https://wikileaks.org/index.en.html> (last visited Oct. 17, 2015).

193. See Russell Brandom, *Edward Snowden’s Lawyer will Keep your Secrets*, THE VERGE (June 24, 2014), <http://www.theverge.com/2014/6/24/5818594/edward-snowdens-lawyer-jesselyn-radack-will-keep-your-secrets>; Charlie Savage & Matt Apuzzo, *Snowden Retained Expert in Espionage Act Defense*, N.Y. TIMES (Apr. 28, 2014), <http://www.nytimes.com/2014/04/29/us/snowden-retained-expert-in-espionage-act-defense.html>.

194. On *revanchism* in the United States, see NEIL SMITH, *THE NEW URBAN FRONTIER: GENTRIFICATION AND THE REVANCHIST CITY* 44–47 (1996); Marc-Tizoc González, *Hunger, Poverty, and the Criminalization of Food Sharing in the New Gilded Age*, 23 AM. U. J. GENDER & SOC. POL’Y & L. 231, 235–36, 257–59, 279–80 (2015). On *kulturkampf*, see, e.g., Francisco Valdes, “We Are Now of the View”: *Backlash Activism*,

people who are willing to break the law on principle in the United States may be a relatively small proportion of the populace. Also, what Olivas feared in 1991 continues to constrain the possibilities for Acosta's style of revolutionary lawyering today. As Olivas noted then:

I have a nagging fear that much of the monkey wrenching, in law and curriculum, will be done by those who do not share my politics. And they rule the world, not I. The expanded use of sanctions, such as those directed at two of my heroes, William Kunstler and Julius Chambers, makes me believe that the interests of neither Linda Brown nor the Chicago Seven could be vigorously defended in today's climate. Derrick Bell can be monkey wrenched in a law class. Jerry Falwell can sue *Hustler*, all the way to the Supreme Court, but Andrea Dworkin is threatened with sanctions if she argues that *Hustler* literally harms women.<sup>195</sup>

Notwithstanding today's obvious crackdowns and more subtle constraints on dissent, however, it is well worth remembering Oscar "Zeta" Acosta and his strident defense of Chicano Movement activists in Los Angeles. Indeed, I look forward to cultivating broader knowledge and critical discourse over what Acosta, and his contemporary and predecessor Chicana/o, Mexican American, and other Latina/o lawyers attempted and accomplished in the twentieth century.<sup>196</sup> As I explain below, contextualizing lawyers' work within

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*Cultural Cleansing, and the Kulturkampf to Resurrect the Old Deal*, 35 SETON HALL L. REV. 1407 (2005).

195. Olivas, *supra* note 6, at 855 (citations omitted).

196. See, e.g., "COLORED MEN" AND "HOMBRES AQUÍ", *supra* note 2 (discussing the rise of Mexican American lawyering through an examination of the four Mexican American lawyers, Carlos Cadena, James de Anda, Gus Garcia, and Johnny Herrera, who established constitutional equal protection for Mexican Americans); IN DEFENSE OF MY PEOPLE: ALONSO S. PERALES AND THE DEVELOPMENT OF MEXICAN-AMERICAN PUBLIC INTELLECTUALS (Michael A. Olivas ed., 2013) (discussing the life and times of Alonso S. Perales (1898-1960), the third Mexican American attorney in the state of Texas); Michael Bennett & Cruz Reynoso, *California Rural Legal Assistance (CRLA): Survival of a Poverty Law Practice*, 1 CHICANO L. REV. 1 *passim* (1972) (discussing the origins and initial

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*la gran lucha*, can help them—rather, us—create socio-legal conditions under which more people may suffer less injustice under the color of law.

## II. *La gran lucha*

Engaging with Olivas's essay on lawyers' dilemmas, unpopular causes, and legal regimes has deepened my appreciation for the three risks of representation that Martha Minow identified—nonrepresentation, terminated representation, and truncated representation. Contemplating Olivas's three case studies and applying their insights to recent and ongoing controversies, I find that his scholarship offers critical insights into the socio-legal conditions that tend to keep legal representation out of reach for certain populations. Furthermore, his work evinces a breath of "critical hope"<sup>197</sup> as to how lawyers might organize themselves to stop, or at least slow down a law breaking regime, and an absurd memory of the Chicano Movement that nonetheless proves instructive for the kinds of identities and relationships that might empower lawyers whose clients contemplate breaking the law on principle in order to transform their socio-legal situation.

Much more could be written, and I hope that my contribution will encourage other scholars in future years to apply Olivas's insights to, *inter alia*, the emerging youth movements of today, such as #BlackLivesMatter and the Dreamers, those who are "Undocumented

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struggles of California Rural Legal Assistance); Michael A. Olivas, *From a "Legal Organization of Militants" into a "Law Firm for the Latino Community": MALDEF and the Purposive Cases of Keyes, Rodriguez, and Plyler*, 90 DENV. U. L. REV. 1151 (2013) (discussing the origins and organizational evolution of the Mexican American Legal Defense and Education Fund); Tom I. Romero, II, *MALDEF and the Legal Investment in a Multi-Colored America*, 18 BERKELEY LA RAZA L.J. 135, 136 n.10 (2007) (discussing the origins of MALDEF and describing its 1967 founding as the Mexican American Legal Defense (MALD) by San Antonio, Texas attorney Peter Tijerina).

197. See PAOLO FREIRE, *PEDAGOGY OF HOPE: RELIVING PEDAGOGY OF THE OPPRESSED* 2 (Robert R. Barr trans., Continuum Publ'g Co. 2004) (discussing the need for critical hope, "based on the need for truth as an ethical quality of the struggle").

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and Unafraid.”<sup>198</sup> Instead of delving into current social movements, however, I end this Article by discussing my conceptualization of *la gran lucha*, and how I perceive myself in relationship to Olivas, Acosta, and actual lineages and fictive genealogies of attorneys of Mexican heritage who attempt to use the law to transform socio-legal conditions so that more people may suffer less, and so that the power elite may be brought down to a point where their authority comes beneath the rule of law.<sup>199</sup>

### A. Lineages of Struggle

As noted at the start of this Article, by *la gran lucha*, I mean “the understanding that our pasts are not merely multicolored: rather, our diverse heritages wind through centuries of socio-legal struggle, which transcend the current nation state.”<sup>200</sup> This concept derives from my experiences as a Chicana/o who was born and raised amidst the contradictions of the final quarter of the twentieth century, experienced predominantly in my hometown of Sacramento, California (1975-1996), with a sojourn in the Inland Empire of Southern California (1996-1998), and a dozen years in the San Francisco Bay Area (1998-2010), where I lived longest in Oakland, California (2002-2010). From 2002 to 2005, I trained to become a lawyer at Berkeley Law, during the start of the War on Terror(ism) and the years when the Supreme Court of the United States barely upheld the constitutionality of racially conscious affirmative action in higher education.<sup>201</sup> Through my formal education in law and concurrent “insurgent” student activism,<sup>202</sup> I transfigured my then-recent graduate education in interdisciplinary social science, visual anthropology, and comparative ethnic studies into what has become a decade-plus engagement with one of the

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198. See sources cited, *supra* notes 189 & 191.

199. On the notion of authority under law, see LINEBAUGH, *supra* note 109, at 17, 211–12.

200. See sources cited and discussed *supra* note 8.

201. See Anderson et al., *supra* note 8, at 1892–1905; González, *supra* note 7, at 1026.

202. On insurgent student activism, see Anderson et al., *supra* note 8, at 1892–1905.

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academic movements sparked by the previous decades' organization of critical legal studies, feminist critical legal theory, critical race theory, and other genres of critical outsider jurisprudence—LatCrit theory, praxis, and community.<sup>203</sup>

As a Chicana/o law student enrolled amidst a critical mass of other students *de colores* (of colors) who had inherited a set of student organizations that reached back to the Power-Identity movements of the 1960s, I benefited immeasurably from engaging with my peers in various actions and campaigns, endeavoring to reform our law school and to intervene in the broader social struggles of our times by playing our position as student activists at one of California's elite law schools.<sup>204</sup> While working alongside my peers, I oriented my education in law to study under critical race theorists who were affiliated with LatCrit theory, praxis, and community, like Angela P. Harris and Ian F. Haney López, and I engaged in the production of

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203. For my contributions to the published LatCrit symposia, in reverse chronological order, see Marc-Tizoc González, *Habeas Data: Comparative Constitutional Interventions from Latin American against Neoliberal States of Insecurity and Surveillance*, 90 CHI. KENT L. REV. 641 (2015) (Afterword for LatCrit symposium "Toward Equal Justice in Law, Education and Society"); César Cuauhtémoc García Hernández & Marc-Tizoc González, *Fifteen Years of Reconstructing the World*, 14 HARV. LATINO L. REV. 243 (2011) (Foreword for LatCrit XV symposium); Marc-Tizoc González & Christopher J. Curran, *Food Justice as Interracial Justice*, 43 U. MIAMI INTER-AM. L. REV. 207 (2011) (Article for LatCrit symposium for the South-North Exchange on Theory, Culture, and Law on "The Global Politics of Food"); Marc-Tizoc González, Yanira Reyes, Belkys Torres & Charles Venator Santiago, *Afterword: The LatCrit Task Force Recommendations: Findings and Recommendations of a Self-Study of the LatCrit Board, 2009*, 18 AM. U. J. GENDER & SOC. POL'Y & L. 853 (2010) (Afterword for LatCrit XIV symposium); Marc-Tizoc González, *Latinalo (Public/Legal) Intellectuals, Social Crises and Contemporary Social Movements*, 18 AM. U. J. GENDER & SOC. POL'Y & L. 787 (2010) (Essay for LatCrit XIV symposium) [hereinafter González, *Latinalo (Public/Legal) Intellectuals*]; Marc-Tizoc González, Yanira Reyes-Gil, Belkys Torres & Charles Venator Santiago, *Afterword: Change and Continuity: An Introduction to the LatCrit Evolution Taskforce Recommendations*, 8 SEATTLE J. FOR SOC. JUST. 303 (2009) (Afterword for LatCrit XIII symposium); Marc-Tizoc González, *Counter-Disciplinarity in the Critical Education Tradition in LatCrit Theory*, 8 SEATTLE J. FOR SOC. JUST. 107 (2009) (Cluster Introduction for LatCrit XIII symposium); Marc-Tizoc González, *Tracing the Critical Education Tradition in LatCrit Theory, Praxis & Community*, 4 FIU L. REV. 85 (2008) (Cluster Introduction LatCrit XII symposium).

204. See Anderson et al., *supra* note 8, at *passim*.

socio-legal knowledge at the *Berkeley La Raza Law Journal*.<sup>205</sup> As a member and officer of La Raza Law Students Association and the Coalition for Diversity, I learned that some of my peers and I shared actual kinship regarding past, and ongoing, struggles for social justice.<sup>206</sup> I also had the opportunity to read Ian F. Haney López's *Racism on Trial: The Chicano Fight for Justice*,<sup>207</sup> which analyzed historical events that were vital to my familial history.

For example, my mother, Petra M. Valadez (born in 1944 in Sanderson, Texas), was a Chicana schoolteacher in Los Angeles County in 1968.<sup>208</sup> Her parents, Ramón V. Valadez (May 11, 1898 – October 6, 1976) and María M. Valadez (August 6, 1911 – July 5, 1996), immigrated to Sanderson, Texas in 1929 from Allende, Coahuila, México. *La familia* (the family) *Valadez* migrated to Salinas, California in December 1946, where they worked in the fields and packing sheds of the Salinas Valley until the late 1960s.<sup>209</sup> Petra M. Valadez graduated from Gonzales High School in 1961, and she earned her B.A. in 1965 and her California teaching credential in 1966 from California State University, Hayward (now CSU East Bay).<sup>210</sup> As a schoolteacher, she became active in the Chicano Movement in Los Angeles until she was arrested during the April 24, 1969, protest of Governor Ronald Reagan's speech recounted by Haney López as leading up to the case of the *Biltmore Six*.<sup>211</sup>

While Haney López focused on Oscar "Zeta" Acosta's defense against the criminal prosecution of the alleged arson and conspiracy to commit arson in several of the upper floors in the Biltmore Hotel,<sup>212</sup> as my mother relates it, a group of Chicana/o Movement activists stood up just as Governor Reagan started his speech and began to clap loudly in order to disrupt it. Immediately after they stood, however,

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205. See Anderson et al., *supra* note 8, at 1896–98.

206. See, e.g., *id.* at 1898–1903; González, *Latina/o (Public/Legal) Intellectuals*, *supra* note 203, at 792–93.

207. HANEY LÓPEZ, *supra* note 23.

208. See González, *supra* note 7, at 991, 1032 n.119.

209. *Id.*

210. *Id.* at 1032 n.119.

211. See *Montez*, 88 Cal. Rptr. 736; HANEY LÓPEZ, *supra* note 23, at 35.

212. See, e.g., HANEY LÓPEZ, *supra* note 23, at 36–40.

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police officers rushed to arrest them.<sup>213</sup> Though charges against her were eventually dropped because, as she explains, the police photograph barely failed to include her, her arrest nevertheless resulted in the temporary suspension of her teaching credential.<sup>214</sup> Unable to work as an educator, she left Los Angeles for Sacramento to live with a sister, and in 1969, she enrolled in the Mexican American Education Project at Sacramento State College (later California State University, Sacramento).<sup>215</sup> During her studies in Sacramento, she met my father.

Alfonso Z. González (August 2, 1931 – May 1, 2006) was born in Sacramento to José Z. González (April 16, 1903 – August 27, 1967) and Josephine Z. González (August 27, 1904 – March 20, 1990).<sup>216</sup> His parents met in Pocatello, Idaho, after emigrating separately from different parts of México, José from Aguas Caliente, Aguas Caliente and Josephine from Gómez Palacio, Durango. They married on March 15, 1925. Shortly thereafter, their oldest son, Florentino,

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213. *Accord* HANEY LÓPEZ, *supra* note 23, at 35.

214. *Cf.* GARCÍA & CASTRO, *supra* note 23, at 207–08, 213–20 (discussing Sal Castro’s experience of being barred from teaching at Lincoln High School, allegedly under a state education code prohibiting an indicted felon from teaching; his temporary reassignment to a non-teaching job; and the community protest of his reassignment, including a weeklong sit-in at the school district office where the Los Angeles Board of Education met, which ultimately persuaded the board to reinstate him). Although reinstated to teach in the 1968–69 academic year, Castro experienced reprisals from various school officials for the next five years. *See id.* at 221–34, 244–46, 248.

215. *See Mexican American Education Project*, INSTITUTE FOR DEMOCRACY AND EDUCATION, <https://sites.google.com/site/democracyandeducationorg/chicano-mexican-american-digital-history-project/mexican-american-education-project> (last visited Oct. 17, 2015). *See also* Petra Valadez, *A Rationale and a Teaching Unit for Changing the Social Studies and Educational Curricula to Institute Sensitized Representation of the Chicano Experience* (1972) (unpublished M.A. thesis, California State University, Sacramento) (on file with author).

216. *See* Robert D. Davila, *Attorney an Activist for Latino Justice*, SACRAMENTO BEE, May 4, 2006, at B1. The following account derives from published documents as noted below, my recollection of familial stories, my nascent genealogical research, and several texts that I wrote for college classes in 1996 and 1997 and for a 2003 speech that I delivered at the occasion of a Mexican American Educational Association scholarship being named after my then living father. (All unpublished documents on file with author).



contracted diphtheria. On the advice of a doctor, they migrated from Pocatello to Sacramento in 1927 so that he could benefit from the warmer climate. Accompanying José, Josephine, and their children (Florentino and Dora) were Josephine's mother, Luisa Zúñiga and little sister, Julia Z. Orñelas.<sup>217</sup> In Sacramento, they found seasonal work at the Libby, McNeil & Libby cannery, until José obtained a job as a welder with the railroad in 1937.<sup>218</sup>

Raised in the neighborhood of Oak Park, Sacramento,<sup>219</sup> Alfonso Z. González was a member of what Chicana/o Studies scholars have named the Mexican American Generation.<sup>220</sup> Like most of his siblings,

217. Interview with Rosemarie Sánchez, Sacramento, California (Aug. 1, 2015).

218. *Accord Davila*, *supra* note 216; *González*, *supra* note 7, at 1033. For a discussion of labor organizing at this cannery with emphasis on the role of Mexican American women, see VICKI L. RUIZ, CANNERY WOMEN, CANNERY LIVES: MEXICAN WOMEN, UNIONIZATION, AND THE CALIFORNIA FOOD PROCESSING INDUSTRY, 1930–1950, at 57, 103–10 (1987). My notes are discrepant regarding for which railroad José worked, with some stating the Southern Pacific and others the Union Pacific. Several of my cousins, however, believe that it was the Southern Pacific. In 1996 the two railroad companies merged. See *Southern Pacific Railroad*, UNION PACIFIC, [https://www.up.com/aboutup/special\\_trains/heritage/southern\\_pacific/index.htm](https://www.up.com/aboutup/special_trains/heritage/southern_pacific/index.htm) (last visited Oct. 17, 2015).

219. On the history of Oak Park, Sacramento, see generally SACRAMENTO'S OAK PARK (Lee M.A. Simpson ed., 2004). For an early account of a Mexican immigrant's acculturation to life in Sacramento, see ERNESTO GALARZA, BARRIO BOY 189–266 (1971). For other accounts of growing up in early to mid-twentieth century Mexican American families in and around Sacramento, see RICHARD RODRIGUEZ, HUNGER OF MEMORY: THE EDUCATION OF RICHARD RODRIGUEZ (1982); RICHARD RODRIGUEZ, DAYS OF OBLIGATION: AN ARGUMENT WITH MY MEXICAN FATHER (1992); RICHARD RODRIGUEZ, BROWN: THE LAST DISCOVERY OF AMERICA (2002); Michael Nava, *Gardenland, Sacramento, California*, in HOMETOWNS: GAY MEN WRITE ABOUT WHERE THEY BELONG 21 (John Preston ed., 1991).

220. For influential explanations of the formation of the "Mexican-American Generation" under a theory of successive "political generations" of people of Mexican heritage in the United States, see MARIO T. GARCÍA, MEXICAN AMERICANS: LEADERSHIP, IDEOLOGY AND IDENTITY, 1930–60, at 1–7, 13–22 (1990); GEORGE J. SÁNCHEZ, BECOMING MEXICAN AMERICAN: ETHNICITY, CULTURE AND IDENTITY IN CHICANO LOS ANGELES, 1900–1945, at 11–13 (1993) (arguing that a new Mexican American ethnic identity emerged in the 1930s through processes of cultural adaptation without substantial economic mobility). See also DAVID GUTIÉRREZ, WALLS AND MIRRORS: MEXICAN AMERICANS, MEXICAN IMMIGRANTS, AND THE POLITICS OF ETHNICITY 69–116 (1995) (discussing Mexican American ethnic politics prior to 1940); HANEY LÓPEZ, *supra* note

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he attended C.K. McClatchy High School, where he befriended one of the daughters of California governor Earl Warren, who would direct her chauffeur to pick up her friends and drive them to school in her limousine.<sup>221</sup> As he described it, Sacramento's small Mexican American community of that time centered around community dances and other cultural events organized by the Mexican consulate office and other local organizations.<sup>222</sup> Encouraged to consider attending college through conversations with the governor's daughter and her friends, who often discussed where they planned to enroll, when asked, González answered that he would attend the University of California, Berkeley (U.C. Berkeley). After graduating from high school in 1949,<sup>223</sup> he enrolled at Sacramento City College, where he earned his A.A. in 1951.<sup>224</sup> The following year, he

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23, at 70–84 (discussing the Mexican American generation with a focus on its evolving racial identity); F. ARTURO ROSALES, *CHICANO!: THE HISTORY OF THE MEXICAN AMERICAN CIVIL RIGHTS MOVEMENT 90–127* (1996) (discussing the Mexican American generation through civil rights organizations and labor struggles).

221. Although I have yet to verify the name of the governor's daughter, Earl Warren was governor during 1943 to 1953, which includes the period when Alfonso Z. González was in high school. *Earl Warren*, THE GOVERNOR'S GALLERY, CALIFORNIA STATE LIBRARY, <http://governors.library.ca.gov/30-Warren.html> (last visited Oct. 17, 2015). Warren had three daughters, Virginia, Dorothy, and Nina Elizabeth, who were born in 1929, 1931, and 1934 respectively. See Patricia Sullivan, *Socialite Virginia Warren Daly, 80, Dies*, WASH. POST (Mar. 4, 2009), <http://www.washingtonpost.com/wpdyn/content/article/2009/03/03/AR2009030303561.html>; Alden Whitman, *Earl Warren, 83, Who Led High Court In Time of Vast Social Change, Is Dead*, N.Y. TIMES (July 10, 1974), <http://www.nytimes.com/learning/general/onthisday/bday/0319.html>; *The Warren Children*, LIFE 42-44 (July 26, 1948); From the *Washington Post*, *Daughter of Chief Justice Warren Dies*, L.A. TIMES (Nov. 26, 1986), [http://articles.latimes.com/1986-11-29/news/mn-16243\\_1\\_chief-justice-warren](http://articles.latimes.com/1986-11-29/news/mn-16243_1_chief-justice-warren).

222. Cf. Kelly Johnson, *Sacramento Mexican Consulate Relocates to Natomas*, SACRAMENTO BUSINESS J. (Feb. 4, 2011), <http://www.bizjournals.com/sacramento/news/2011/02/04/sacramento-mexican-consulate-moves.html> (noting the consulate office's then-68-year history in Sacramento). On the role of consulate offices in Mexican American history, see generally GILBERT G. GONZÁLEZ, *MEXICAN CONSULS AND LABOR ORGANIZING: IMPERIAL POLITICS IN THE AMERICAN SOUTHWEST* (1999).

223. THE MEXICAN AMERICAN DIRECTORY 81–82 (Arturo Palacios ed., 1969); Davila, *supra* note 216.

224. FELICIANO RIVERA, *A MEXICAN AMERICAN SOURCE BOOK WITH STUDY GUIDELINE 126* (1970).

matriculated to U.C. Berkeley.<sup>225</sup> His studies were interrupted, however, when the United States Army drafted him into the Korean War.<sup>226</sup> González served in military intelligence and was assigned to a base in Germany,<sup>227</sup> from which he traveled widely in Europe while on leave. A few years later, he obtained an early honorable discharge in order to resume his studies, which he completed in 1956, earning a B.A. in the Regional Group Major on Hispanic America.<sup>228</sup> He then worked for a year as a social worker for the Sacramento County Welfare Department in an in-home health care program for the elderly before enrolling in law school in the fall of 1957.<sup>229</sup> As he told it, part of his motivation to become a lawyer came from his grandmother, *Doña* Luisa, who told him that she aspired for him to become a doctor or a lawyer.<sup>230</sup> At the same time, she instilled in him her *dicho* (proverb) to feel proud of being Mexican *en su carne y hueso* (in his flesh and bones).

Although González related that several Mexican students were enrolled at Boalt Hall (U.C. Berkeley's law school) with him, he recalled being one of only three *Mexican American* law students

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225. See INTERNATIONAL HOUSE BERKELEY ALUMNI DIRECTORY 1993, at 27 (dating the start of González's residence at the U.C. Berkeley International House as 1952).

226. In order to obtain a grave marker from the government, the author confirmed González's military service shortly after his death. González was discharged honorably with the rank of corporal as a veteran of the Korean War.

227. My notes on the location of the base where González was stationed are contradictory. Earlier notes indicate the base was at Stuttgart, Germany. Later notes state that the base was in Giessen, Germany. According to the United States Department of Veterans Affairs, González's detailed military record was destroyed in the July 12, 1973 fire at the National Personnel Records Center in Overland, Missouri. See generally Walter W. Stender & Evans Walks, *The National Personnel Records Center Fire: A Study in Disaster*, 37 AMER. ARCHIVIST 521 (1974), [https://www.archives.gov/st-louis/military-personnel/NPRC\\_fire\\_a\\_study\\_in\\_disaster.pdf](https://www.archives.gov/st-louis/military-personnel/NPRC_fire_a_study_in_disaster.pdf).

228. THE MEXICAN AMERICAN DIRECTORY, *supra* note 223, at 81; RIVERA, *supra* note 224, at 126. The Regional Group Majors reflect an earlier organization of the university. See, e.g., UNIVERSITY OF CALIFORNIA—GENERAL CATALOGUE 79–80 (Sept. 21, 1942) (on file with author) (describing the Regional Group Majors and specifying the requirements for the Regional Group Major on Hispanic America).

229. See THE MEXICAN AMERICAN DIRECTORY, *supra* note 223, at 81; Davila, *supra* note 216.

230. See RIVERA, *supra* note 224, at 126; Davila, *supra* note 216.

enrolled during those years, which he believed to have been the largest concentration up until that time.<sup>231</sup> One of those students was a young man named Cruz Reynoso, who was a 3L (third-year law student) when Alfonso Z. González was a 1L (first-year law student). For many readers, Cruz Reynoso needs no introduction. Professor of Law Emeritus at the U.C. Davis School of Law and inaugural holder of the Boochever and Bird Chair for the Study and Teaching of Freedom and Equality, he was the first Mexican American to serve on the California Courts of Appeal (Third District, from 1976 to 1982) and the Supreme Court of California (from 1982 to 1986).<sup>232</sup> After the politicization of the California judicial reconfirmation process

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231. *Accord* ANDREA GUERRERO, SILENCE AT BOALT HALL: THE DISMANTLING OF AFFIRMATIVE ACTION 2 (2002) (noting that only twenty students enrolled at Boalt Hall from 1911 to 1964 identified as Latino) (citation omitted). *See also* BOALT HALL PROFESSIONAL DIRECTORY (Sept. 8, 1992) (on file with author). This 33-page document lists Latina/o Boalt Hall alumni alphabetically by last name, along with their year of graduation, known job, and contact information. Including González, it features twelve Latino (all male) alumni who graduated before 1961: Augustus L. Castro, Class of 1936, Renzo A. Del Pero, Class of 1939, Alejandro F. DeSantos, Class of 1956, Alfonso Z. González, Class of 1960, Richard A. Ibañez, Class of 1936, G. Ernest López, Class of 1952, Raymond E. Mellana, Class of 1948, Cruz Reynoso, Class of 1958, Richard R. Rivera, Class of 1950, Albert J. Salera, Class of 1956, Edward E. Serres, Class of 1960, and Robert J. Soares, Class of 1958. *Id.* at 6, 9, 13, 15, 17, 19, 25, 26, 28, 29, 30.

232. *See* KENNETH C. BURT, THE SEARCH FOR A CIVIC VOICE: CALIFORNIA LATINO POLITICS 299–300 (2007); Cruz Reynoso, *Brief Remembrances: My Appointment and Service on the California Court of Appeal and Supreme Court, 1976-1987*, 13 BERKELEY LA RAZA L.J. 15, 15 (2002). *See also* CRUZ REYNOSO: SOWING THE SEEDS OF JUSTICE (Abby Ginzberg dir. 2010), <http://www.reynosofilm.com>; Bennett & Reynoso, *supra* note 196, at *passim*; Kristina Horton Flaherty, *Cruz Reynoso Honored as 'Legal Giant,'* CAL. BAR J. (Oct. 2009), <http://archive.calbar.ca.gov/Archive.aspx?articleId=96466&categoryId=96412&month=10&year=2009>; Alan Houseman, *Interview with Cruz Reynoso*, NAT'L EQUAL JUST. LIBRARY, GEO. U. L. CTR. ORAL HIST. COLLECTION (Aug. 12, 2002) <http://www.law.georgetown.edu/library/collections/nejl/reynoso-transcript.cfm>; NPR Staff, *At Age 80, Trailblazer Keeps Fighting for Justice*, NPR (Sept. 28, 2011), <http://www.npr.org/2011/09/28/140876184/at-age-80-trailblazer-keeps-fighting-for-justice>; Keith Roberts, *An Inter-view with Justice Cruz Reynoso*, 51 THE JUDGE'S J. 4 (Summer 2012); Cruz Reynoso, U.C. DAVIS SCHOOL OF LAW, <https://law.ucdavis.edu/faculty/reynoso/> (last visited July 13, 2015). Reynoso's papers have recently been archived. *Cruz Reynoso Papers D-401*, U.C. DAVIS SPECIAL COLLECTIONS, <http://www.oac.cdlib.org/findingaid/ark:/13030/c8ns0x5r/admin/> (last visited July 20, 2015) (describing the collection and providing links to three inventories).

successfully targeted him for removal from that Court, along with Chief Justice Rose Bird and Associate Justice Joseph Grodin,<sup>233</sup> Reynoso worked at the Sacramento office of the Los Angeles-based law firm of O'Donnell & Gordon,<sup>234</sup> and then at Kaye, Scholer, Fierman, Hays & Handler.<sup>235</sup> He then returned to academia, teaching at the UCLA School of Law from 1991 to 2001 and the U.C. Davis School of Law from 2001 to 2006, before transitioning into emeritus status.<sup>236</sup> Throughout his career, he also served on numerous boards and commissions,<sup>237</sup> including the United States Commission on Civil Rights from April 19, 1993 to December 7, 2004.<sup>238</sup> Among Reynoso's myriad awards and honors, President Clinton awarded him the Medal of Freedom, the highest civilian honor of the United States, on

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233. See BURT, *supra* note 232, at 310; Alma Cook, *State Election Returns: Final Compilations*, L.A. TIMES (Nov. 6, 1986), [http://articles.latimes.com/1986-11-06/news/mn-16714\\_1\\_returns](http://articles.latimes.com/1986-11-06/news/mn-16714_1_returns); Flaherty, *supra* note 232; Philip Hager, *Reynoso Uses Media Campaign in Effort to Retain Judgeship*, L.A. TIMES (Oct. 19, 1986), [http://articles.latimes.com/1986-10-19/news/mn-6219\\_1\\_cruz-reynoso](http://articles.latimes.com/1986-10-19/news/mn-6219_1_cruz-reynoso); Houseman, *supra* note 232, at paras. 64 & 66; NPR Staff, *supra* note 232; Reynoso, *supra* note 232, at 27. The history of his reconfirmation campaign, Friends of Reynoso, has yet to be told. *But see* CRUZ REYNOSO: SOWING THE SEEDS OF JUSTICE, *supra* note 232 (referencing the campaign).

234. Frank Clifford, *Defeated Justice Reynoso to Join L.A.-Based Law Firm*, L.A. TIMES (Jan. 3, 1987), [http://articles.latimes.com/1987-01-03/local/me-2197\\_1\\_law-firm](http://articles.latimes.com/1987-01-03/local/me-2197_1_law-firm).

235. Philip Hager, *Justice Prevails: Cruz Reynoso Was Swept Off the State Supreme Court With Rose Bird, but Now He's Found New Causes and a New Career*, L.A. TIMES (Aug. 13, 1989), [http://articles.latimes.com/1989-08-13/magazine/tm-885\\_1\\_supreme-court-justices](http://articles.latimes.com/1989-08-13/magazine/tm-885_1_supreme-court-justices).

236. See Flaherty, *supra* note 232; Houseman, *supra* note 232, at paras. 66 & 68; NPR Staff, *supra* note 233; Roberts, *supra* note 232, at 4.

237. See, e.g., Hager, *supra* note 233 (noting Reynoso's service on the board of directors for the Latino Issues Forum, the Mexican American Legal Defense and Educational Fund, and the Natural Resources Defense Council, and his membership on the California Post-Secondary Education Commission and a California Bar commission on legal aid).

238. U.S. GENERAL ACCOUNTABILITY OFF., U.S. COMMISSION ON CIVIL RIGHTS: AGENCY LACKS BASIC MANAGEMENT CONTROLS, GAO/HEHS-97-125, 37 (July 1997) (dating Reynoso's appointment to the Commission as Apr. 19, 1993 and the commissioners' concurrence to President Clinton's designation of Reynoso as Vice Chair on Nov. 19, 1993); Erica Werner, *Top Two Commissioners Resign From Civil Rights Panel*, WASH. POST (Dec. 8, 2004), <http://www.washingtonpost.com/wp-dyn/articles/A45327-2004Dec7.html>.

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August 9, 2000.<sup>239</sup> In all, Reynoso is a famed Latino leader, civil rights lawyer, and prolific scholar.

My aim now is to contextualize Reynoso and González as two of the small number of Mexican American attorneys in postwar California. These earlier generational cohorts of attorneys can be imagined as constituting a fictive genealogy of Latina/o lawyers who confronted the risks of representation on behalf of clients who broke the law—sometimes on principle and other times merely by being in the United States. For example, Reynoso graduated from Boalt Hall in 1958, studied Mexican Constitutional Law in Mexico City on a Ford Foundation fellowship, joined the State Bar of California in May 1959, and began his law practice in El Centro, a small town in Imperial County, California.<sup>240</sup> González graduated from Boalt Hall in 1960, joined the California Bar in June 1962, and became the first Mexican American attorney in private practice in Sacramento.<sup>241</sup> He regarded *Hurtado v. Superior Court*<sup>242</sup> as his most important case. *Hurtado* involved a claim of wrongful death, arising from a January 19, 1969

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239. See BURT, *supra* note 232, at 318; Regina McConahay, *Law Professor Cruz Reynoso Receives Presidential Medal of Freedom*, UCLA NEWSROOM (Aug. 10, 2000), <http://newsroom.ucla.edu/releases/Law-Professor-Cruz-Reynoso-Receives-1677>.

240. See U.C. BERKELEY SCH. OF LAW BOALT HALL ALUMNI DIRECTORY 2010, at 134, 187 (2010) [hereinafter BOALT HALL ALUMNI DIRECTORY]; BOALT HALL PROFESSIONAL DIRECTORY, *supra* note 231, at 25; Houseman, *supra* note 232, at paras. 2 & 4; Reynoso, *supra* note 232, at 17; Cruz Reynoso, *Democracy and Diversity*, ERNESTO GALARZA COMMEMORATIVE LECTURE 10 (1987), [http://web.stanford.edu/dept/csre/pdfs/Second\\_Annual\\_Lecture\\_1987.pdf](http://web.stanford.edu/dept/csre/pdfs/Second_Annual_Lecture_1987.pdf); Roberts, *supra* note 230, at 4; Cruz Reynoso, STATE BAR OF CAL., <http://members.calbar.ca.gov/fal/Member/Detail/29470> (last visited July 13, 2015).

241. See BOALT HALL ALUMNI DIRECTORY, *supra* note 240, at 188; BURT, *supra* note 232, at 217; Attorney Search – Alfonso Zuniga Gonzalez, STATE BAR OF CAL., <http://members.calbar.ca.gov/fal/Member/Detail/33140> (on file with author); BOALT HALL PROFESSIONAL DIRECTORY, *supra* note 231, at 13; Davila, *supra* note 216. Burt calls him “Sacramento’s first Mexican-American attorney.” BURT, *supra* note 232, at 229. González, however, related that one Mexican American attorney preceded him in Sacramento although this man (whose name I have forgotten) worked for a government agency.

242. 11 Cal. 3d 574, 582, 522 P.2d 666, 671 (1974) (holding that the state should apply its own law in a tort claim filed in California by a resident of a foreign state or country, where the foreign jurisdiction has no interest in having its own law applied).

automobile accident, brought by the next of kin (widow and children) of a Mexican national, Antonio Hurtado, who was a resident and domiciliary of the state of Zacatecas and “was in California temporarily and only as a visitor.”<sup>243</sup> At the trial court, the defendants argued unsuccessfully to apply Zacatecas law to limit their liability.<sup>244</sup> The California Court of Appeal for the Third District, however, reversed, limiting the plaintiffs to “the maximum amount recoverable under Mexican law... 24,334 pesos or \$1,946.72 at the applicable exchange rate of 12.5 pesos to one dollar.”<sup>245</sup> After carefully considering the matter, the Supreme Court of California held that the state should apply its own law because the foreign jurisdiction had no interest in having its own law applied.<sup>246</sup> In essence, *Hurtado* stands for the proposition that a Mexican life is not worth less than the life of a California resident.

## B. Fictive Genealogies

Neither Reynoso, nor González, however, were among the first California attorneys of Mexican heritage.<sup>247</sup> Because my research into

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243. *Hurtado*, 11 Cal. 3d at 578.

244. *Id.*

245. *Id.* at 579; see also *Hurtado v. Super. Ct. Cnty. of Sacramento*, 35 Cal. App. 3d 176, 110 Cal. Rptr. 591 (Ct. App. 1973). Online inflation calculators show that \$1,946.72 in 1969 equals \$12,621.59 in 2015. See *CPI Inflation Calculator*, BUREAU OF LABOR STATISTICS, [http://www.bls.gov/data/inflation\\_calculator.htm](http://www.bls.gov/data/inflation_calculator.htm) (last visited Nov. 2, 2015).

246. *Hurtado*, 11 Cal. 3d 574.

247. A contemporary Mexican American of similar national stature to Cruz Reynoso should be mentioned here. Mario G. Obledo (Apr. 9, 1932 – Aug. 18, 2010), the “Godfather of the Latino Movement,” earned his LL.B. from the St. Mary University School of Law in 1960 (and later his J.D.), and he joined the State Bar of Texas in April 1961. See Emma Brown, *Mario G. Obledo, 78, Latino Civil Rights Pioneer, Dies*, WASH. POST (Aug. 23, 2010); Kenneth C. Burt, *In Memoriam: Mario Obledo, Godfather of the Latino Movement, 1932–2010*, 23 HARV. J. HISPANIC POL’Y 107 (2010–2011); Charles E. Cantú, *Observations on the Evolution of Minorities in the Law: From Law School to Practice*, 4 SCHOLAR 185, 186 (2002); Douglas Martin, *Mario Obledo, Hispanic Civil Rights Leader, Dies at 78*, N.Y. TIMES (Aug. 20, 2010); Elaine Woo, *Mario Obledo Dies at 78; California Secretary of Health and Welfare, Latino Civil Rights Leader*, L.A. TIMES (Aug. 21, 2010). See generally *Mario G. Obledo Papers*, U.C. DAVIS SPECIAL COLLECTIONS, <http://www.oac.cdlib.org/findaid/ark:/13030/c8zw1nzz/admin/>. The

the histories of Mexican American lawyers in California is nascent, here, I only name and briefly describe a small set of predecessors to Reynoso and González. For example, legal historians believe that the first Mexican American lawyer to argue before the United States Supreme Court was Manuel Ruiz, Jr. (July 25, 1905 – 1986).<sup>248</sup> Ruiz earned his LL.B. from the University of Southern California Law School (now, USC Gould School of Law) in 1930, as that school's first known Latino alumnus, joined the California Bar in June of that year, and has been dubbed the "California Dean of Mexican-American Lawyers."<sup>249</sup> From 1935 to 1968, Ruiz was an attorney of record in forty-six reported judicial opinions in state and federal courts.<sup>250</sup> In

many organizations that he helped create and lead include, *inter alia*, the Hispanic National Bar Association, La Raza Lawyers, Mexican American Legal Defense and Education Fund (MALDEF), National Coalition of Hispanic Organizations, and Southwest Voter Registration Education Project. He led MALDEF as it moved its headquarters from San Antonio, Texas to San Francisco, California in 1970, and taught at Harvard Law School as a fellow in 1974-75 until California Governor Jerry Brown appointed him in 1975 to be Secretary of the California Health and Welfare Agency. BURT, *supra* note 232, at 298; KENNETH BURT, *THE HISTORY OF MAPA AND CHICANO POLITICS IN CALIFORNIA* 22 (1982) [hereinafter BURT, *HISTORY OF MAPA*]; ROSALES, *supra* note 220, at 264. Obledo's biography merits serious scholarly attention, which is beyond the scope of this Article. Several later highlights in his career, however include that he ran unsuccessfully for California governor in 1982, served as president of the League of United Latin American Citizens and chair of the National Rainbow Coalition during the 1980s, and received the Presidential Medal of Freedom in 1998 from President Bill Clinton. David Reyes, *Seasoned Activist's Passions Burn Bright Again*, L.A. TIMES (Aug. 2, 1998), <http://articles.latimes.com/1998/aug/02/news/mn-9476>.

248. IN DEFENSE OF MY PEOPLE, *supra* note 196, at xii-xiii (discussing Ruiz, noting his years of birth and death, citing *Buck v. California*, 353 U.S. 99 (1952), and explaining the evidence that indicates Ruiz was the first Mexican American lawyer to argue before the Supreme Court). See also C. Del Anderson, *Guide to the Manuel Ruiz Papers, 1931-1986*, MANUEL RUIZ PAPERS, M0295, DEPT. OF SPECIAL COLLECTIONS, STANFORD UNIVERSITY LIBRARIES (1998), [http://www.oac.cdlib.org/findaid/ark:/13030/tf9199p0dg/entire\\_text/](http://www.oac.cdlib.org/findaid/ark:/13030/tf9199p0dg/entire_text/) (noting Ruiz's date of birth but not death).

249. MUÑOZ, *supra* note 23, at 45; *One Hundred Years of Law and Ardor 1900-2000*, USC TROJAN FAMILY MAGAZINE (Summer 2000), [http://www.usc.edu/dept/pubrel/trojan\\_family/summer00/Law/law\\_pg2.html](http://www.usc.edu/dept/pubrel/trojan_family/summer00/Law/law_pg2.html); Anderson, *supra* note 248, at 3; Attorney Search – Manuel Ruiz, STATE BAR OF CAL., <http://members.calbar.ca.gov/fal/Member/Detail/11771> (on file with author).

250. On July 20, 2015, the author conducted a WestlawNext search for "Manuel



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1941, he helped to found and lead the Coordinating Council for Latin American Youth.<sup>251</sup> In that capacity, he supported the Sleepy Lagoon Defense Committee and protested the so-called Zoot Suit Riots of June 1943.<sup>252</sup> In recognition of his leadership and anti-discrimination advocacy, in 1943, Governor Earl Warren appointed Ruiz to the California Committee on Youth in Wartime (later the California Youth Committee).<sup>253</sup> In 1963, he helped incorporate the Mexican American Political Association (MAPA),<sup>254</sup> and the following year he was elected to serve as MAPA Legal Counsel.<sup>255</sup> Active in the MAPA leadership, five years later, he nevertheless lost his campaign for MAPA President.<sup>256</sup> In 1970, however, President Richard Nixon appointed Ruiz (who was a Republican) to the United States Commission on Civil Rights, which had just published its report, *Mexican Americans and the*

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Ruiz, Jr.” and filtered for reported cases. The original search produced forty-seven cases and the filter resulted in forty-six. WestlawNext, <https://lawschool.westlaw.com/> (follow “WestlawNext” hyperlink; then search “Manual Ruiz, Jr.”; then click “Cases” and narrow by “Reported”).

251. See MARK BRILLIANT, *THE COLOR OF AMERICA HAS CHANGED: HOW RACIAL DIVERSITY SHAPED CIVIL RIGHTS REFORM IN CALIFORNIA 1941-1978*, at 82; BURT, *supra* note 232, at 41. See also Ariela J. Gross, “*The Caucasian Cloak*”: *Mexican Americans and the Politics of Whiteness in the Twentieth-Century Southwest*, 95 *GEO. L.J.* 337, 356–57 nn.105–07 (2007).

252. BRILLIANT, *supra* note 251, at 82; BURT, *supra* note 232, at 41–44. On the Sleepy Lagoon murder and the so-called Zoot Suit Riots, see generally LUIS ALVAREZ, *THE POWER OF THE ZOOT: YOUTH CULTURE AND RESISTANCE DURING WORLD WAR II* (2008); ROGER BRUNS, *ZOOT SUIT RIOTS* (2014); EDWARD J. ESCOBAR, *RACE, POLICE, AND THE MAKING OF A POLITICAL IDENTITY: MEXICAN AMERICANS AND THE LOS ANGELES POLICE DEPARTMENT, 1900-1945* (1999); MAURICIO, MAZÓN, *THE ZOOT-SUIT RIOTS: THE PSYCHOLOGY OF SYMBOLIC ANNIHILATION* (1988); EDUARDO OBREGÓN PAGÁN, *MURDER AT THE SLEEPY LAGOON: ZOOT SUITS, RACE, AND RIOT IN WARTIME L.A.* (2003); CATHERINE S. RAMÍREZ, *THE WOMAN IN THE ZOOT SUIT: GENDER, NATIONALISM, AND THE CULTURAL POLITICS OF MEMORY* (2009); MARK A. WEITZ, *THE SLEEPY LAGOON MURDER CASE: RACE DISCRIMINATION AND MEXICAN-AMERICAN RIGHTS* (2010); American Experience, *Zoot Suit Riots*, PBS (2001), <http://www.-pbs.org-/wgb-h/-ame-x/-zoot/index.html>.

253. BRILLIANT, *supra* note 251, at 82; Burt, *supra* note 232, at 47–48, 102; Anderson, *supra* note 248, at 3.

254. Anderson, *supra* note 248, at 3.

255. BURT, *supra* note 232, at 217.

256. *Id.* at 273.

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*Administration of Justice in the Southwest*,<sup>257</sup> and in 1971, Ruiz spoke at the MAPA installation and awards banquet.<sup>258</sup> The following year, he self-published *Mexican American Legal Heritage in the Southwest*.<sup>259</sup>

Ruiz himself was not the first Mexican American attorney of California.<sup>260</sup> Rather, Ruiz can be understood as one in a fictive genealogy of Mexican American lawyers of California. For example, Richard A. Ibañez (October 6, 1910 – November 30, 2007) graduated from Boalt Hall in 1936, joined the California Bar in November 1937, and served as a Los Angeles Superior Court judge from 1975 to 1994.<sup>261</sup> Enrique P. “Hank” López, believed to be the first Mexican American alumnus of Harvard Law School, graduated in 1948 and

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257. Anderson, *supra* note 248, at 3. See also U.S. COMM’N ON CIVIL RIGHTS, MEXICAN AMERICANS & THE ADMINISTRATION OF JUSTICE IN THE SOUTHWEST (1970), <http://babel.hathitrust.org/cgi/pt?id=uiug.30112057601483;view=1up;seq=1>.

258. BURT, HISTORY OF MAPA, *supra* note 247, at 17.

259. MANUEL RUIZ, JR. MEXICAN AMERICAN LEGAL HERITAGE IN THE SOUTHWEST (1972, 2d ed. 1974). For further information about Ruiz, see María G. Mendoza, Manuel J. Ruiz, Jr.: The First Latino to Argue Before the United States Supreme Court (Mar. 2011) (unpublished manuscript), [http://www.researchgate.net/publication/249789056\\_Manuel\\_J.\\_Ruiz\\_Jr.\\_The\\_First\\_Latino\\_to\\_Argue\\_Before\\_the\\_United\\_States\\_Supreme\\_Court](http://www.researchgate.net/publication/249789056_Manuel_J._Ruiz_Jr._The_First_Latino_to_Argue_Before_the_United_States_Supreme_Court).

260. See, e.g., BURT, *supra* note 232, at 31–32 (naming attorneys Ernesto R. Orfila and A.P. ‘Tony’ Entenza”). Entenza joined the California Bar in February 1922. Attorney Search – Entenza, STATE BAR OF CAL., <http://members.calbar.ca.gov/fal/Member/Detail/8364> (on file with author). Orfila joined the California Bar in July 1918. Attorney Search – Orfila, STATE BAR OF CAL., <http://members.calbar.ca.gov/fal/Member/Detail/577> (on file with author). Searching for “Orfila” in the California Bar website also produces a nineteenth century Mexican American attorney, Antonio Orfila, who joined the bar in October 1887. See *id.* As with all critical ethnic legal-histories, the roots of Mexican American lawyers transcend the twentieth century.

261. See BOALT HALL ALUMNI DIRECTORY, *supra* note 240, at 184; BURT, *supra* note 232, at 72–73; SÁNCHEZ, *supra* note 220, at 322 n.7; Attorney, Former Family Law Judge, L.A. TIMES (Jan. 25, 2008), <http://articles.latimes.com/2008/jan/25/local/me-passings25.S2>; Attorney Search – Richard Ibanez, STATE BAR OF CAL., <http://members.calbar.ca.gov/fal/Member/Detail/15940> (on file with author). Ibañez may have been one of the first two Latino alumnus of Boalt Hall. See BOALT HALL PROFESSIONAL DIRECTORY, *supra* note 241, at 6, 15 (listing Ibañez and Augustus L. Castro as members of the Class of 1936).

was admitted to the California Bar in January 1949.<sup>262</sup> Carlos M. Terán was admitted to the bar in June 1949, appointed to the Los Angeles Municipal Court in 1957, and elevated by Governor Edmund G. “Pat” Brown, Sr. to the Los Angeles Superior Court in 1959.<sup>263</sup> Arthur L. Alarcón (August 14, 1925 – January 28, 2015), the judge who presided over several of the Chicano Movement cases litigated by Oscar “Zeta” Acosta, earned his LL.B. in 1951 from the University of Southern California Law School and joined the California Bar in January 1952<sup>264</sup> (Acosta himself joined the California Bar in June 1966).<sup>265</sup> Louis García

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262. BURT, HISTORY OF MAPA, *supra* note 247, at 4–5; Attorney Search – Henry Lopez, STATE BAR OF CAL., <http://members.calbar.ca.gov/fal/Member/Detail/20558> (on file with author); Burt A. Folkart, *Enrique (Hank) Lopez; Attorney, Activist*, L.A. TIMES (Oct. 25, 1985), [http://articles.latimes.com/1985-10-25/local/me-14459\\_1\\_lopez](http://articles.latimes.com/1985-10-25/local/me-14459_1_lopez). Kenneth Burt names him “Henry ‘Hank’ Lopez.” BURT, HISTORY OF MAPA, *supra* note 247, at 4. His California Bar webpage lists him as “Henry Preston Lopez.” Attorney Search – Henry Lopez, *supra*. His obituary names him “Enrique (Hank) Lopez,” and that is the name under which he published. *See, e.g.*, ENRIQUE HANK LOPEZ, THE HARVARD MYSTIQUE: THE POWER SYNDROME THAT AFFECTS OUR LIVES FROM SESAME STREET TO THE WHITE HOUSE (1979).

263. BURT, HISTORY OF MAPA, *supra* note 247, at 5; Attorney Search – Carlos Teran, STATE BAR OF CAL., <http://members.calbar.ca.gov/fal/Member/Detail/21096> (on file with author); Monica Rodriguez, *Services for Retired Pomona Judge Carlos M. Teran Planned Friday*, CONTRA COSTA TIMES (June 18, 2009), [http://www.contracostatimes.com/california/ci\\_12624944](http://www.contracostatimes.com/california/ci_12624944).

264. *See* Attorney Search – Arthur Alarcon, STATE BAR OF CAL., <http://members.calbar.ca.gov/fal/Member/Detail/22743> (on file with author); Cal. App. Ct. Legacy Project, *Interviewee Biography: Justice Arthur L. Alarcón* (n.d.) (on file with author); Press Release, U.S. Courts for the Ninth Cir. Pub. Info. Office, Court of Appeals Mourns Passing of Senior Circuit Judge Arthur L. Alarcón (Jan. 29, 2015) (on file with author). Governor Edmund “Pat” Brown, Sr. appointed Alarcón to the Los Angeles Superior Court in 1964, where he served until 1978 when Governor Edmund “Jerry” Brown, Jr. appointed him to the California Court of Appeal for the Second Appellate District. *Id.* at 2. He served therein until 1979, when President Carter appointed him to the United States Court of Appeals for the Ninth Circuit, where he served until taking senior status in 1992. *Id.*

265. Attorney Search – Oscar Acosta, STATE BAR OF CAL., <http://members.calbar.ca.gov/fal/Member/Detail/38731> (last visited Oct. 7, 2015). *Accord* STAVANS, *supra* note 22, at 73 (noting that Acosta passed the California Bar exam on his second attempt in June 1966). Although Acosta was declared legally dead in December 1986, Olivas, *supra* note 6, at 854 n.154, as of this writing no one has adequately notified the State Bar of California in order for Acosta’s California Bar webpage to reflect his

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joined the California Bar in February 1953, was appointed by Governor Pat Brown to the Fair Employment Practices Commission, co-founded La Raza Lawyers (with Mario Obledo and Cruz Reynoso) in 1971, and later became presiding judge of the San Francisco Municipal Court.<sup>266</sup> Leopoldo G. “Leo” Sanchez was admitted to the state bar in July 1954 and ran successfully against an incumbent judge to win a seat in the East Los Angeles Municipal Court in November 1960.<sup>267</sup> Robert T. Baca graduated from the Loyola Law School and was admitted to the state bar in January 1956.<sup>268</sup> After running unsuccessfully for public office in the 1960s, he became a municipal court judge in 1976 until Governor Jerry Brown appointed him to the superior court in 1979.<sup>269</sup> One could go on, and indeed for the most part, the histories of California’s Mexican American and Chicana/o lawyers have yet to be written.<sup>270</sup>

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death. Instead, his record of administrative actions shows that he was suspended for failure to pay bar member fees on Dec. 12, 1974.

266. BURT, HISTORY OF MAPA, *supra* note 247, at 10, 12, 20; *About Us*, SAN FRANCISCO LA RAZA LAWYERS, <http://larazalawyers.org/about-us/> (last visited Oct. 7, 2015); Attorney Search – Louis Garcia, STATE BAR OF CAL., <http://members.calbar.ca.gov/fal/Member/Detail/23987> (on file with author). The organizers of La Raza Lawyers eventually launched state and national organizations, including California La Raza Lawyers Association and the Hispanic National Bar Association. HISPANIC NATIONAL BAR ASSOCIATION MEMBERSHIP DIRECTORY 1986 vi-vii [hereinafter HNBA DIRECTORY].

267. BURT, HISTORY OF MAPA, *supra* note 247, at 5; Attorney Search – Leo Sanchez, STATE BAR OF CAL., <http://members.calbar.ca.gov/fal/Member/Detail/25510> (on file with author). Two years later he lost his election campaign for a seat on the Los Angeles Superior Court. BURT, *supra* note 232, at 7.

268. BURT, HISTORY OF MAPA, *supra* note 247, at 7 (noting Baca’s unsuccessful election campaign for the California Assembly); Attorney Search – Robert Baca, STATE BAR OF CAL., <http://members.calbar.ca.gov/fal/Member/Detail/26672> (on file with author); Ruth Brown, *Longtime Kern County Judge Dies at 89*, BAKERSFIELD CALIFORNIAN (Nov. 4, 2014), <http://www.bakersfield.com/news/2014/11/05/longtime-kern-county-judge-dies-at-89.html>.

269. Brown, *supra* note 268.

270. While many histories have been written about Mexican American and Chicana/o communities, community organizations, labor organizing, political advocacy, and social movements in California, other states, and historic territories of the United States, these works typically only mention that a particular person was an attorney and rarely highlight how lawyers as a class contributed distinctively to those

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To reorient on one of my concluding points: in his 1991 essay, Professor Olivas's case study on Oscar "Zeta" Acosta called the attention of legal scholars to this quixotic Chicano lawyer, who brazenly confronted the risks of representation faced by his Chicano Movement activist clients. Although most legal scholars did not pay heed, a few, including Richard Delgado and Jean Stefancic, carefully considered Olivas's treatment of Acosta, and apparently believed that Olivas's essay, and Acosta's example of "rebellious lawyering"<sup>271</sup> merited inclusion in several of their subsequent books.<sup>272</sup> A question not completely addressed by Olivas in 1991, however, is why did Acosta believe that he could prevail in this claim? Because of Ian F. Haney López's meticulous research, we now know that the *East L.A. Thirteen* motion to quash the indictment cited to *Hernandez v. Texas*, the 1954 United States Supreme Court case that extended

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histories. See, e.g., BURT, *supra* note 232 (discussing the twentieth century origins of California Latino politics in early-to-mid-century Mexican American community organizing); BURT, HISTORY OF MAPA, *supra* note 247 (discussing the founders and organizers of the Mexican American Political Organization from its postwar predecessor organizations like the Community Service Organization and California Democratic Council through 1982). See also GARCÍA, *supra* note 220; GUTIÉRREZ, *supra* note 220; ROSALES, *supra* note 220; SÁNCHEZ, *supra* note 220. One approach to this project of ethnic legal history would be to determine the earliest attorneys and judges of Mexican American heritage in the several states of the Southwest and to explore the lawyers' organizations that they created. Michael Olivas, among others, has conducted groundbreaking work in that respect regarding Mexican American attorneys in Texas. See, e.g., sources cited, *supra* note 196; see also Michael A. Olivas, *Reflections upon Old Books, Reading Rooms, and Making History*, 76 UMKC L. REV. 811 (2008). Also, in addition to cross-referencing law school alumni directories with extant histories of Mexican Americans and Chicanas/os, one might review sources like national organizations' directories, HNBA DIRECTORY, *supra* note 266 (the first membership directory of the Hispanic National Bar Association); LA RAZA LAWYERS OF CALIFORNIA 1983, at 1 ("This is the first statewide directory of Raza attorneys."); *National Roster of Spanish Surnamed Elected Officials* (Frank C. Lemus ed., 1973), reprinted from 5 AZTLÁN-CHICANO J. OF THE SOC. SCIENCES AND THE ARTS 313, 322-23 (1973) (listing thirteen judges of various California courts and one county clerk under the headings "California - State Officials - Judicial Department").

271. On Gerald P. López's theory of rebellious lawyering, see sources cited, *supra* note 151.

272. See sources cited, *supra* notes 156-57.

constitutional equal protection to Mexican Americans.<sup>273</sup> But how did Acosta come to know of *Hernandez*?

In studying Acosta's lawyering under Haney López in 2003 and subsequently teaching undergraduate courses of Ethnic Studies that discussed his book, *Racism on Trial*, I came to believe that Acosta's knowledge of *Hernandez* likely derived from his historical proximity to the case. Born in El Paso, Texas on April 8, 1935,<sup>274</sup> Acosta joined the California Bar in June 1966,<sup>275</sup> so it seemed more likely than not that he knew about the triumph of *Hernandez* through the *Zeitgeist* in which he lived.<sup>276</sup> Returning to the subject a dozen years later, however, I found myself unsatisfied with my prior notion of cultural diffusion and intrigued that Acosta's public writings never refer expressly to *Hernandez*.<sup>277</sup>

Consider that in Acosta's 1971 autobiographical essay, he credited the idea of the grand jury challenge to "an acid experience."<sup>278</sup> Also, in the opening of his essay, "Challenging Racial

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273. 347 U.S. 475 (1954); HANEY LÓPEZ, *supra* note 23, at 42, 174–78, 264 n.6. Although the motions cited to *Hernandez*, the appellate opinion in *East L.A. Thirteen* did not. See *Castro*, 88 Cal. Rptr. 500. (The appellate opinion in *Biltmore Six*, however, did cite to *Hernandez*. *Montez*, 88 Cal. Rptr. 736). Olivas later explored *Hernandez* in great detail. See e.g., "COLORED MEN" AND "HOMBRES AQUÍ", *supra* note 2, at *passim*; Olivas, *supra* note 1, at 128. As Olivas explains, he did not know of *Hernandez* until a chance conversation alerted him to the importance of the case and the instrumental role that (by then Judge) James De Anda had played in it. See "COLORED MEN" AND "HOMBRES AQUÍ", *supra* note 2, at xvii; Olivas, *Accidental Historian*, *supra* note 2, at 19–22. His first article citing to *Hernandez* was published in 1994. Olivas, *supra* note 1, at 128.

274. HANEY LÓPEZ, *supra* note 23, at 28; STAVANS, *supra* note 22, at 125; UNCOLLECTED WORKS, *supra* note 22, at xix.

275. See sources cited, *supra* note 264.

276. See HANEY LÓPEZ, *supra* note 23, at 275 n.13 (discussing California legislative proceedings questioning the grand jury selection process in 1963 and 1964).

277. See, e.g., HANEY LÓPEZ, *supra* note 23, at 174–76 (discussing Acosta's journalism on the grand jury challenge); STAVANS, *supra* note 22, at 79–82 (discussing Acosta's 1969 essay, "Challenging Racial Exclusion on the Grand Jury"); UNCOLLECTED WORKS, *supra* note 22, at xiv, 13–14, 281–89 (commenting on Acosta's views on grand jury discrimination and reproducing the essay that he wrote about racial exclusion from grand juries).

278. UNCOLLECTED WORKS, *supra* note 22, at 14 ("Most of the big ideas I've gotten for my lawyer work have usually come when I am stoned. Like the Grand Jury challenge was the result of an acid experience. A lot of the tactics I employ I get the

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Exclusion on the Grand Jury: The East L.A. 13 vs. the L.A. Superior Court," which Ilan Stavans states was written in 1969 and published "in a small law school news service, *Caveat*,"<sup>279</sup> Acosta began by asserting that no one in California had successfully quashed an indictment based on a challenge to the composition of the grand jury.<sup>280</sup> He then claimed:

The East L.A. 13 did what had not been done by any Mexican American: They challenged the jurisdictional power of the indicting body (the Grand Jury) on grounds of its discriminatory selection and resultant unrepresentative character by the very judicial officers, the Superior Court judges, who would not [sic] inquire into their allegedly criminal conduct.<sup>281</sup>

Acosta continued:

Laying the groundwork for appeals to the Supreme Court, they retained expert witnesses and used cardboard boxes full of documentary and statistical evidence to legally establish their identity as a people separate and distinct from the majority, thereby meeting the constitutional requirement of "classification" which is a pre-condition to a demand for consideration and representation from

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ideas for when I am stoned, which is not to say that I wouldn't get them if I wasn't stoned. A lot of my creativity has sprung from my use of these psychedelic drugs."). Ilan Stavans dates the autobiographical essay as "written circa 1971." *Id.* at xii.

279. See STAVANS, *supra* note 22, at 80; UNCOLLECTED WORKS, *supra* note 22, at xiv. Haney López provides another citation for Acosta's essay on grand jury exclusion that Stavans reprinted: Oscar Acosta, *The East L.A. 13 vs. The L.A. Superior Court*, 3 EL GRITO 12 (1970). HANEY LÓPEZ, *supra* note 23, at 288 n.1.

280. UNCOLLECTED WORKS, *supra* note 22, at 281. In making this claim, Acosta referenced several contemporaneous cases, which he asserted featured unsuccessful motions to quash, involving Black Panther Party leader Huey Newton and the assassin of Robert F. Kennedy, Sirhan Sirhan. *Id.* Haney López provides the case citations as *People v. Newton*, 87 Cal. Rptr. 394 (Cal. App. 1st Dist. 1970), and *People v. Sirhan*, 497 P.2d 1121 (Cal. 1972). HANEY LÓPEZ, *supra* note 23, at 274 n.8.

281. UNCOLLECTED WORKS, *supra* note 22, at 283.

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within their group upon the Grand Jury.<sup>282</sup>

After eight paragraphs in which Acosta outlined his challenge to the Los Angeles County grand jury system,<sup>283</sup> he then cited to the Civil Rights Act of 1875, an unnamed 1880 Supreme Court opinion, a 1966 Fifth Circuit opinion, *Brooks v. Beto*, and a 1940 Supreme Court opinion, *Smith v. Texas*.<sup>284</sup> Nowhere does he name *Hernandez v. Texas*.

How should legal scholars interpret Acosta's failure to publicly credit the Mexican American lawyers who litigated *Hernandez*? Initially, I felt tempted to conclude that Acosta had dissimulated out of seemingly characteristic flamboyance and hunger for the limelight. I then considered if it was simply an error of omission, but quickly discarded this hypothesis. Before identifying the correct citation for *Smith v. State of Texas*,<sup>285</sup> I wondered if Acosta might have fabricated *Smith* in order to create a cipher for *Hernandez*.<sup>286</sup> Ultimately, however, I found it more productive to worry less about whether Acosta developed the grand jury strategy himself, in order to consider how other members of the legal team contributed to the winning strategies.

This hypothesis bears exploration because the legal team in *East*

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282. UNCOLLECTED WORKS, *supra* note 22, at 283.

283. *Id.* at 283–85.

284. See UNCOLLECTED WORKS, *supra* note 22, at 286–88. Either Acosta in his manuscript, the essay's original publisher, or Stavans in his reprint mistook the *Smith* citation as "311 U.S. 218." UNCOLLECTED WORKS, *supra* note 22, at 287. The correct citation is *Smith v. State of Texas*, 311 U.S. 128 (1940). In contrast, *Brooks v. Beto*, 366 F.2d 1 (1966), from which Acosta quotes significantly in the essay, bears its correct citation.

285. Using Acosta's citation, "311 U.S. 218" the author's WestlawNext search conducted on July 14, 2015 brought up the case, *Schriber-Schroth Co. v. Cleveland Trust Co.*, 311 U.S. 211 (1940). Searching for "Smith v. Texas" throughout the year 1940 in the WestlawNext database of U.S. Supreme Court opinions produced a single hit for a two-sentence long opinion. *Smith v. State of Texas*, 309 U.S. 651 (1940) ("The motion for leave to proceed in forma pauperis is granted. The petition for writ of certiorari to the Court of Criminal Appeals of the State of Texas is granted."). Broadening the search to "Smith v. State of Texas" finally identified the correct case, 311 U.S. 128 (1940), and suggested that the error was simply a transposition.

286. The *East L.A. Thirteen* motion to quash cited to *Hernandez*. HANEY LÓPEZ, *supra* note 23, at 264 n.6. Acosta's citation to *Brooks v. Beto*, in his racial exclusion essay was accurate, and the case cited multiple times to *Hernandez*. See, e.g., *Brooks*, 366 F.2d at 4 n.4. *Brooks*, however, never mentioned the word "Mexican." See *id.*



*L.A. Thirteen* was numerous and included attorneys substantially more experienced than Acosta, including individuals who were affiliated with the American Civil Liberties Union, the National Lawyers Guild, and the nascent Chicano Legal Defense Committee.<sup>287</sup> In particular, future research into *East L.A. Thirteen*, *Biltmore Six*, and the other Chicano Movement cases should explore the dynamics of the legal teams, especially the influence of Hugh R. Manes,<sup>288</sup> Fred

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287. See HANEY LÓPEZ, *supra* note 23, at 30–31, 260 n.84 (“The National Lawyers Guild supplied Neil Herring and Samuel Rosenwein, and A.L. Wirin and Fred Okrand from the ACLU also greatly helped out . . . . Other attorneys involved in the Chicano cases included Herman Sillas, Paul Posner, Hugh Manes, Al Michaelson, Ralph Segura, Joe Ortega, Elnora Livezey and Joan Anderson) (citations omitted). See also GARCÍA & CASTRO, *supra* note 23, at 213, 354 n.30 (discussing the Chicano Legal Defense Committee and Chicano Legal Defense Fund) (citations omitted).

288. Hugh R. Manes earned his law degree from Northwestern University in 1952 and joined the California Bar in July 1953. Attorney Search—Hugh R. Manes, STATE BAR OF CAL., <http://members.calbar.ca.gov/fal/Member/Detail/24354> (on file with author). He began his law practice at Wirin, Rissman & Okrand and dedicated his career to litigating against police misconduct, trying over 400 cases in his career. Elaine Woo, *Hugh R. Manes Dies at 84; Lawyer Fought for Victims of Police Misconduct*, L.A. TIMES (June 18, 2009), <http://www.latimes.com/local/obituaries/la-me-hugh-manes18-2009jun18-story.html>. See also Hugh R. Manes Papers (Collection 1854), UCLA LIBR. SPECIAL COLLECTIONS, CHARLES E. YOUNG RES. LIBR. (2010), available at [http://www.oac.cdlib.org/findaid/ark:/13030/kt6199s3dp/entire\\_text/](http://www.oac.cdlib.org/findaid/ark:/13030/kt6199s3dp/entire_text/). While he was not listed on the reported opinion for *East L.A. Thirteen*, he was listed as an attorney of record in the *Biltmore Six*, and Haney López identifies Manes as one of the attorneys with whom he spoke while researching for his book. *Montez*, 88 Cal. Rptr. 736; HANEY LÓPEZ, *supra* note 23, at 313.

Okrand,<sup>289</sup> Herman Sillas,<sup>290</sup> and A.L. Wirin.<sup>291</sup>

289. Fred Okrand earned his law degree at USC in 1940 and joined the California Bar in December of that year. *The ACLU of Southern California Mourns the Loss of Fred Okrand, Legal Director Emeritus*, ACLU OF S. CAL. (Mar. 19, 2002), <https://www.aclusocal.org/the-aclu-of-southern-california-mourns-the-loss-of-fred-okrand-legal-director-emeritus/> [hereinafter *ACLU Mourns*]; Attorney Search – Fred Okrand, STATE BAR OF CAL., <http://members.calbar.ca.gov/fal/Member/Detail/17351> (on file with author). He began his legal career at Gallagher & Wirin but left with Al Wirin to affiliate with the ACLU of Southern California as a volunteer attorney after the United States entered World War II and began to intern Japanese Americans. Elaine Woo, *Fred Okrand, 84; Fought Key ACLU Battles*, L.A. TIMES (Mar. 21, 2002), <http://articles.latimes.com/2002/mar/21/local/me-okrand21>. In 1972, he became the ACLU of Southern California’s first legal director. *ACLU Mourns, supra*; *Longtime Civil Liberties Lawyer Fred Okrand Dies at 84*, METRO. NEWS-ENTER. (Mar. 21, 2002), <http://www.metnews.com/articles/okra032102.htm>. Thus, as Haney López notes, Okrand was affiliated with the ACLU during *East L.A. Thirteen*. HANEY LÓPEZ, *supra* note 23, at 260 n.84. In 1984, Okrand retired from his position and became Legal Director Emeritus of the ACLU Foundation of Southern California. *ACLU Mourns, supra*. According to the author’s July 23, 2015, search for “Fred Okrand,” WestlawNext lists him as an attorney of record in 528 reported judicial opinions. WESTLAW, <https://lawschool.westlaw.com/> (follow “WestlawNext” hyperlink; then search “Fred Okrand” (with quotation marks) and select “Cases”; then narrow by “Reported”).

290. Herman Sillas graduated from the UCLA School of Law and joined the California Bar in January 1960. Herman Sillas, STATE BAR OF CAL., <http://members.calbar.ca.gov/fal/Member/Detail/30281> (last visited Oct. 8, 2015); *Herman’s Bio*, <http://www.hermansillas.com/finearts.home-bio.asp> (last visited Oct. 8, 2015); *Law Office of Herman Sillas*, <http://www.hermansillas.com/firm.html> (last visited Oct. 8, 2015). After the Watts Riots of 1965, Sillas joined the Los Angeles County Human Relations Commission, and the following year he helped organize the Association of Mexican American Educators. Kenya Davis-Hayes, *Herman Sillas’ Art and Activism*, KCET L.A. (Oct. 22, 2013), <http://www.kcet.org/arts/artbound/counties/los-angeles/herman-sillas-chicano-activist.html>. In 1968, Sal Castro hired Sillas to represent him in *East L.A. Thirteen*, and in the same period, Sillas helped to found MALDEF and served on its board of directors. GARCÍA & CASTRO, *supra* note 23, at 213, 228-31, 248; Davis-Hayes, *supra*; *Herman’s Bio, supra*; *Law Office of Herman Sillas, supra*; Theresa Mesa, *Research Guide to the Records of Mexican American Legal Defense and Educational Fund, 1968-1983*, SPECIAL COLLECTIONS M0673, DEPT. OF SPECIAL COLLECTIONS, STANFORD UNIV. LIBRARIES, 229, 257, 1209-10 (1997, 2004), <http://oac.cdlib.org/findaid/ark:/13030/tf9f59p0b2>; Reynaldo A. Valencia, *What If You Were First and No One Cared: The Appointment of Alberto Gonzales and Coalition Building Between Latinos and Communities of Color*, 12 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 21, 30 (2005). In 1975, Governor Jerry Brown appointed Sillas to serve as Director of California’s Department of Motor Vehicles, and in 1977, President Jimmy Carter appointed him to serve as United States Attorney for the Eastern District of California, where he

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More experienced than Acosta, the court records leave traces of

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served until October 1980. *Herman's Bio, supra; Law Office of Herman Sillas, supra*. Today, he maintains a law practice in San Clemente, California, publishes a monthly column in the local newspaper, and maintains a career as a fine artist. *See generally View From the Pier*, <http://www.hermansillas.com/pier.asp> (last visited Oct. 8, 2015).

291. Born in Russia in 1901, A.L. Wirin immigrated to the United States as an infant. 11 REPORT OF THE SENATE FACT-FINDING SUBCOMMITTEE ON UN-AMERICAN ACTIVITIES IN CALIFORNIA 169 (1961), <http://content.cdlib.org/view?docId=kt396n99b3&query=&brand=calisphere> [hereinafter UN-AMERICAN ACTIVITIES IN CALIFORNIA]; A.L. Wirin, DENSHO ENCYCLOPEDIA, <http://encyclopedia.densho.org/A.L.%20Wirin/> (last visited Oct. 8, 2015); Paul Weeks, *Lawyer Fought for All Rights*, RECORDNET.COM (May 1, 2007), [http://www.recordnet.com/apps/pbcs.dll/article?AID=/20070501/A\\_LIFE07/705010315/-1/A\\_LIFE07](http://www.recordnet.com/apps/pbcs.dll/article?AID=/20070501/A_LIFE07/705010315/-1/A_LIFE07). Wirin "attended primary schools in Massachusetts, majored in philosophy and economics at Harvard, [and] received his law degree from Boston College. After graduating, he engaged for a short while in social work both in Boston and in Brooklyn, New York, then came to Los Angeles to practice his profession." UN-AMERICAN ACTIVITIES IN CALIFORNIA, *supra*, at 169. Wirin joined the California Bar in July 1930, the ACLU of Southern California hired him as its first civil rights lawyer in 1931, and he became active in the National Lawyers Guild. UN-AMERICAN ACTIVITIES IN CALIFORNIA, *supra*, at 169-73; Attorney Search - A. L. Wirin, STATE BAR OF CAL., <http://members.calbar.ca.gov/fal/Member/Detail/11892> (on file with author); *From 1923 to 1940*, ACLU OF S. CAL., <https://www.aclusocal.org/our-history/from-1923-to-1940/> (last visited Oct. 8, 2015). Socially active over a legal career spanning more than four decades, he died in 1978. A.L. Wirin, *ACLU Counsel*, ST. PETERSBURG TIMES (Feb. 6, 1978), <https://news.google.com/newspapers?id=cgpZAAAAIIBAJ&sjid=mlkDAAAAIIBAJ&pg=6725%2C5048999>. According to the author's WestlawNext search of July 23, 2015, "A. L. Wirin" is listed in 558 reported judicial opinions, ranging from 1931 through 1977, including 176 cases with the U.S. Supreme Court. WESTLAW, <https://lawschool.westlaw.com/> (follow "WestlawNext" hyperlink; then search "A. L. Wirin" (with quotation marks) and select "Cases"; then narrow by "Reported"). Supreme Court cases in which he was an attorney of record include, *inter alia*: *Yasui v. United States*, 320 U.S. 115 (1944) (representing Minoru Yasui); earlier and later phases of *Korematsu v. United States*, 319 U.S. 432 (1943) (representing Fred Toyosaburo Korematsu), 324 U.S. 885 (1945) (petition for rehearing denied) (representing amicus curiae Japanese American Citizens League); *Oyama v. State of California*, 332 U.S. 663 (1948) (representing Oyama petitioners). Wirin also supported the plaintiffs in *Mendez v. Westminster*, 161 F.2d 774 (1947) (representing Japanese-American Citizens League) and other Mexican American school desegregation cases. *See* Michael A. Olivas, *Review Essay—The Arc of Triumph and the Agony of Defeat: Mexican Americans and the Law*, 60 J. LEGAL EDUC. 354, 361-62 (2010); Jeanne M. Powers & Lirio Patton, *Between Mendez and Brown: Gonzales v. Sheely (1951) and the Legal Campaign Against Segregation*, 33 LAW & SOC. INQUIRY 127, *passim* (2008).

the senior lawyers' influence,<sup>292</sup> especially in *East L.A. Thirteen*, and one can imagine their spirited discussions regarding the feasibility of the grand jury challenge and how they ultimately determined that Acosta should implement it. Acosta himself questioned thirty-three judges on the stand in *East L.A. Thirteen* before the First Amendment challenge ultimately prevailed on appeal.<sup>293</sup> He continued the strategy in *Biltmore Six* with the support of the elder Manes, but apparently not with the support of Okrand and Wirin (the ACLU attorneys) or Sillas (Sal Castro's attorney).<sup>294</sup> Thankfully, Haney López has deposited the court transcripts, legal briefs, and police records that his research uncovered with the Oscar Zeta Acosta Papers at the University of California, Santa Barbara.<sup>295</sup> Thus, it remains for an enterprising scholar to braid together the histories of the Chicano Movement legal teams into a multi-colored history of how lawyers of various racialized ethnic identities worked together across several generational cohorts to protect the freedom of the Chicano Movement activists whom Acosta is credited for representing.<sup>296</sup>

For his part, contemporaneous with the proceedings, Acosta concluded his essay on grand jury racial exclusion by lamenting why lawyers had not previously raised the issue of racial exclusion from the grand jury as a defense to criminal indictment. He asserted that this failure, "unfortunately reflects upon the legal profession."<sup>297</sup> He went on:

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292. See HANEY LÓPEZ, *supra* note 23, at 260 n.84; *Compare Castro*, 88 Cal. Rptr. 500, *with Montez*, 88 Cal. Rptr. 736.

293. HANEY LÓPEZ, *supra* note 23, at 313; Haney López, *supra* note 153, at 1722 n.8; *see also id.* at 1845–83 (excerpting the transcript of Acosta's examination of the judges in *East L.A. Thirteen*).

294. *See Montez*, 88 Cal. Rptr. at 737 (listing the petitioners' attorneys as "Oscar Zeta Acosta, Neil M. Herring, Margolis, McTernan, Smith, Scope & Herring and Hugh R. Manes").

295. HANEY LÓPEZ, *supra* note 153, at 1845. *See also Güereña*, *supra* note 169 (Acosta Papers finding aid).

296. *See, e.g.,* Genevieve Carpio, *Unexpected Allies: David C. Marcus and his Impact on the Advancement of Civil Rights in the Mexican-American Legal Landscape of Southern California*, in *BEYOND ALLIANCES: THE JEWISH ROLE IN RESHAPING THE RACIAL LANDSCAPE IN SOUTHERN CALIFORNIA 1* (George J. Sanchez ed., 2012).

297. *UNCOLLECTED WORKS*, *supra* note 22, at 288.

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That it requires imagination and hard work is understandably a contributing factor; but perhaps the most compelling reason for their failure to raise the issue is that ultimately what the lawyer says in such a motion is an indictment of the profession which he professes and a castigation of the society to which he belongs.<sup>298</sup>

In my view, Acosta's elision of the source of the brilliant defense strategy that he personally implemented on an unprecedented scale is less important than the historical fact, recorded in the motion to quash, that he and his colleagues relied on the precedent established by an earlier team of Mexican American lawyers, who, after several attempts, persuaded the Supreme Court to extend equal protection to Mexican Americans in 1954.<sup>299</sup> Because of the excellent scholarship of Professor Olivas and other socio-legal scholars, a recounting of *Hernandez* here is unnecessary.<sup>300</sup> Rather, I conclude this Article by highlighting the historical context through which Acosta, and senior lawyers, knew of and relied upon *Hernandez*, and I argue for the importance of researching the oft-obscure, yet nonetheless concrete connections and personal relationships that constitute critical aspects of what I term *la gran lucha*.

## Conclusion

While predictably subject to criticism as bombastic or otherwise pretentious, I mean for the concept of *la gran lucha* to contextualize and highlight the centurial, interracial, and transnational social struggles of myriad peoples. In this interpretation of history, Chicana/o and other Mexican American attorneys, pre- and postwar, in California, Texas, and elsewhere, contributed their partial histories of socio-legal struggle, and they often collaborated with attorneys,

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298. UNCOLLECTED WORKS, *supra* note 22, at 288.

299. *Hernandez*, 347 U.S. 475.

300. See, e.g., "COLORED MEN" AND "HOMBRES AQUÍ," *supra* note 2 (publishing new research on *Hernandez v. Texas* following a symposium commemorating its fiftieth anniversary).

and others, of diverse racialized and ethnic identities. These critical ethnic legal histories deserve to be carefully researched and accurately recounted.

While many of these histories have yet to be told, in this, as in so many respects, Michael A. Olivas has charted paths for others to explore and planted seeds for others to cultivate.<sup>301</sup> Thus, I understand Olivas to act within a fictive genealogy of Chicana/o, Mexican American and other Latina/o lawyers who seek to use the law to transform the socio-legal conditions that criminalize, impoverish, and otherwise marginalize our communities. The *Hernandez* lawyers are in this lineage—Carlos Cadena, James De Anda, Gustavo “Gus” García, and Johnny Herrera—and beyond them stand the first three Mexican American lawyers of Texas: J.T. Canales, Manuel C. Gonzáles, and Alonso S. Perales.<sup>302</sup> Before and after the first lawyers of Texas, perhaps waiting patiently in the shadows, there are many others whose histories have yet to be unearthed and remembered.<sup>303</sup> In their own times, in myriad ways, these people and

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301. See “COLORED MEN” AND “HOMBRES AQUÍ,” *supra* note 2; IN DEFENSE OF MY PEOPLE, *supra* note 196; Olivas, *supra* note 1; Olivas, *Trial of the Century*, *supra* note 2; Olivas, *Accidental Historian*, *supra* note 2; Olivas, *supra* note 6; Olivas, *supra* note 48; Olivas, *supra* note 196; Olivas, *supra* note 270; Olivas, *supra* note 291.

302. See “COLORED MEN” AND “HOMBRES AQUÍ,” *supra* note 2, at *passim* (discussing the rise of Mexican American lawyering through an examination of the four *Hernandez* lawyers); IN DEFENSE OF MY PEOPLE, *supra* note 196, at xi-xii (discussing the first three Mexican American lawyers of Texas—J.T. Canales, who graduated from the University of Michigan Law School in 1899, Manuel C. Gonzáles, who attended law school at St. Louis University and graduated from the University of Texas Law School in 1924, and Alonso S. Perales who completed law school in 1925 at the school that later became George Washington University); Olivas, *supra* note 291, at 364–65 (discussing the four *Hernandez* lawyers and the first three Mexican American lawyers of Texas); Lupe S. Salinas, *Gus Garcia and Thurgood Marshall: Two Legal Giants Fighting for Justice*, 28 T. MARSHALL L. REV. 145 (2003) (discussing the *Hernandez* lawyers).

303. See, e.g., Olivas, *supra* note 270, at 815–18 (discussing the Rev. Antonio José Martínez y Santistevan (1793 to 1867), who trained as a priest and lawyer in Durango (the then-provincial capital of Nueva Vizcaya, New Spain) before he founded a small seminary at Taos in 1833, where he printed books of formal logic as well as legal treatises, and which he converted into a law school when the United States occupied what became the territory of New Mexico in 1848).

countless others confronted the risks of representation. Learning about their experiences, successes, and failures can provide new generational cohorts with valuable lessons in how to transform socio-legal conditions so that more people may suffer less injustice under the color of law.<sup>304</sup>

As I have written elsewhere, entire fields of critical ethnic legal histories lie fallow, awaiting scholars and students whose careful collaboration can make their memories green.<sup>305</sup> Through such work we can help advance *la gran lucha*. By educating ourselves, newer generations of lawyers, and other legal workers who care for our diverse communities' intertwined destinies, we can contest today's *revanchism* in the United States and beyond, so that all oppressive authority succumbs to the rule of law.<sup>306</sup>

*Con safos.*

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304. *E.g.*, BURT, HISTORY OF MAPA, *supra* note 247, at 2 ("This history [of the Mexican American Political Association] serves as a guide for the leaders who are yet to surface. It was written so that mistakes can be avoided, and the positive can be expanded upon with new ideas, creating the potential for *betterment*.").

305. *See* González, *supra* note 7, at 1012, 1021–22 n.82, 1030, 1048, 1058–59, 1061–62 (discussing various aspects of critical ethnic legal histories).

306. On *revanchism* in the United States, *see* SMITH, *supra* note 194, at 44–47; González, *supra* note 194, at 235–36, 257–59, 279–80. *See also* Valdes, *supra* note 194, at *passim* (discussing the judicial backlash of *kulturkampf* politics). On the notion of authority under the rule of law, *see* LINEBAUGH, *supra* note 109, at 17, 212–13.

**Appendix 1. Citing References to Michael A. Olivas, “Breaking the Law” on Principle.<sup>307</sup>**

	Author	Title	Citation	Year
1.	Elizabeth Kay Harris	<i>Comment, Economic Refugees: Unprotected in the United States by Virtue of an Inaccurate Label</i>	9 AM. U.J. INT’L L. & POL’Y 269, 301 n.188, 304 n.203	1993
2.	Kevin R. Johnson	<i>Los Olvidados: Images of the Immigrant, Political Power of Noncitizens, and Immigration Law and Enforcement</i>	BYU. L. REV. 1139, 1215 n.302	1993
3.	Jonathan O. Hafen	<i>Children’s Rights And Legal Representation— The Proper Roles of Children, Parents, and Attorneys</i>	7 NOTRE DAME J.L. ETHICS & PUB. POL’Y 423, 424 n.4, 442 n.77	1993
4.	Richard Delgado & Jean Stefancic	<i>Critical Race Theory: An Annotated Bibliography</i>	79 VA. L. REV. 461, 503	1993
5.	Harold Hingju Koh	<i>America’s Offshore Refugee Camps</i>	29 U. RICH. L. REV. 139, 140 n.4	1994

307. This table derives from a WestlawNext search of “Citing References” to Olivas, *supra* note 6, and is provided for readers interested in the twenty-four law review publications that cited to his essay from 1993 to 2013. WESTLAW, <https://lawschool.westlaw.com/> (follow “WestlawNext” hyperlink; then follow “Secondary Sources” hyperlink; then select “Law Reviews & Journals” and search “52 U. Pitt. L. Rev. 815”; then select “Citing References” tab).



6.	Margaret H. Taylor	<i>Detained Aliens Challenging Conditions Of Confinement And The Porous Border of The Plenary Power Doctrine</i>	22 HASTINGS CONST. L.Q. 1087, 1113 n.126, 1115 n.139, 1125 n.189	1995
7.	Kevin R. Johnson	<i>Civil Rights and Immigration: Challenges for the Latino Community in the Twenty-First Century</i>	8 LA RAZA L.J. 42, 49 n.34, 50 n.36	1995
8.	Gail Quick Goeke	<i>Substantive and Procedural Due Process for Unaccompanied Alien Juveniles</i>	60 MO. L. REV. 221, 233 n.91	1995
9.	Richard Delgado	<i>Rodrigo's Fifteenth Chronicle: Racial Mixture, Latino-Critical Scholarship, and the Black-White Binary</i>	75 TEX. L. REV. 1181, 1191 n.60	1997
10.	Kevin R. Johnson & Amanda Perez	<i>Clinical Legal Education and the U.C. Davis Immigration Law Clinic: Putting Theory into Practice and Practice into Theory</i>	51 SMU L. REV. 1423, 1427 n.19, 1458 n.121	1998
11.	Kevin R. Johnson & George A. Martínez	<i>Crossover Dreams: The Roots of Latcrit Theory in Chicana/o Studies Activism and Scholarship</i>	53 U. MIAMI L. REV. 1143, 1151 nn.54 & 57	1999
12.	Kevin R. Johnson	<i>Race Matters: Immigration Law and Policy Scholarship, Law in the Ivory Tower, And the Legal Indifference of the Race Critique</i>	2000 U. ILL. L. REV. 525, 532 n.31, 553 n.146	2000

13.	Michael A. Olivas	<i>Immigration Law Teaching and Scholarship in the Ivory Tower: A Response to Race Matters</i>	2000 U. ILL. L. REV. 613, 620 n.31, 637 nn.119 & 122	2000
14.	Antoinette Sedillo Lopez	<i>Learning Through Service in a Clinical Setting: The Effect of Specialization on Social Justice and Skills Training</i>	7 CLINICAL L. REV. 307, 324 n.94	2001
15.	Sharon Finkel	<i>Comment, Voice of Justice: Promoting Fairness through Appointed Counsel for Immigrant Children</i>	17 N.Y.L. SCH. J. HUM. RTS. 1105, 1108 nn.20 & 21	2001
16.	Jerome McCristal Culp, Jr.	<i>Seventh Aspect of Self-Hatred: Race, Latcrit, And Fighting the Status Quo</i>	55 FLA. L. REV. 425, 437 n.19	2003
17.	Michelle Rae Pinzon	<i>Was the Supreme Court Right? A Closer Look at the True Nature of Removal Proceedings in the 21st Century</i>	16 N.Y. INT'L L. REV. 29, 62 n.224	2003
18.	Claire L. Workman	<i>Note, Kids Are People Too: Empowering Unaccompanied Minor Aliens Through Legislative Reform</i>	3 WASH. U. GLOBAL STUD. L. REV. 223, 245 nn.141 & 142, 246 n.144	2004
19	Luke Shulman-Ryan	<i>Note, Evidence - the Motion in Limine And the Marketplace of Ideas: Advocating for the Availability of the Necessity Defense for Some of the Bay State's Civilly Disobedient</i>	27 W. NEW ENG. L. REV. 299, 364 n.447	2005

20	Lisa A. Cahan	Note, <i>Constitutional Protections of Aliens: A Call for Action to Provide Adequate Health Care for Immigration Detainees</i>	3 J. HEALTH & BIOMEDICAL L. 343, 366 nn.97 & 98	2007
21.	Kevin R. Johnson	<i>Ten Guiding Principles for Truly Comprehensive Immigration Reform: A Blueprint</i>	55 WAYNE L. REV. 1599, 1606 n.22, 1620 n.101	2009
22.	Kevin R. Johnson	<i>How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce And Whren v. United States And the Need for Truly Rebellious Lawyering</i>	98 GEO. L.J. 1005, 1008 n.6	2010
23.	Keith Aoki & John Shuford	<i>Welcome to Amerizona — Immigrants Out!: Assessing “Dystopian Dreams” And “Usable Futures” Of Immigration Reform, And Considering Whether “Immigration Regionalism Is An Idea Whose Time Has Come</i>	38 FORDHAM URB. L.J. 1, 21 n.67	2010
24.	Marjorie Florestal	<i>A Tale of Two Compadres: Teaching International Trade And Development Across Cultures</i>	26 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 33, 59 n.118	2013

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# The *Obergefell* Marriage Equality Decision, with Its Emphasis on Human Dignity, and a Fundamental Right to Food Security

MAXINE D. GOODMAN\*

## Introduction

Many believe the United States Supreme Court's decision in *Obergefell v. Hodges*<sup>1</sup> reflects a new era of tolerance and decency in our country, with love winning out over politics and discrimination.<sup>2</sup> Our nation has progressed beyond the close-mindedness of the past, when same-sex couples were treated as second class citizens in our society, not entitled to the basic rights which all of us should enjoy. After the Court announced its decision, President Obama said from the Rose

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1. 135 S. Ct. 2584 (2015).

2. Byron Tau, *Obama Calls Supreme Court Decision a Victory for America*, WALL ST. J. (June 26, 2015), <http://www.wsj.com/articles/obama-calls-supreme-court-ruling-on-gay-marriage-a-victory-for-america-1435335722??mod=capitaljournalrelatedbox>; Marianne Williamson, *Marriage Equality: It's a Beautiful Thing When Democracy Prevails*, HUFFINGTON POST (June 30, 2015), [http://www.huffingtonpost.com/marianne-williamson/marriage-equality-when-de\\_b\\_7678490.html](http://www.huffingtonpost.com/marianne-williamson/marriage-equality-when-de_b_7678490.html); Andrew O'Hehir, *America is Changing and Marriage Equality is a Huge Victory – But We Need to Go So Much Further*, SALON (June 26, 2015), [http://www.salon.com/2015/06/27/america\\_is\\_changing\\_and\\_marriage\\_equality\\_is\\_a\\_huge\\_victory\\_but\\_we\\_need\\_to\\_go\\_so\\_much\\_further/](http://www.salon.com/2015/06/27/america_is_changing_and_marriage_equality_is_a_huge_victory_but_we_need_to_go_so_much_further/).

Garden, "Today we can say, in no uncertain terms, that we have made our union a little more perfect."<sup>3</sup> As Justice Kennedy wrote in affirming petitioners' fundamental right to marry in *Obergefell*: "[t]hey ask for equal dignity in the eyes of the law. The Constitution grants them this right."<sup>4</sup> Countless commentators applauded the Court's opinion for its commitment to essential human rights, reliance on human dignity, and affirmation of society's evolved sense of decency.<sup>5</sup>

In *Obergefell*, the Court described petitioners' constitutional argument as a "just claim to dignity."<sup>6</sup> The Supreme Court's reliance on human dignity as the value underlying the due process and equal protection guarantees to which the petitioners were due in *Obergefell*, resembles the Court's reliance on human dignity in other Supreme Court decisions.<sup>7</sup> At other times, the Court has ruled to affirm the human dignity of the mistreated prison inmate, the defendant who wants to avoid giving self-incriminating testimony in court, the alleged criminal whose stomach the police forcibly pumped to obtain evidence, the defendant who wants to represent herself, and the government detractor who objected in obscene language to the draft. In each case, the Court relied on human dignity to remedy a constitutional infraction.

Yet, with all the congratulations, pride, and gratefulness to the Supreme Court on the marriage equality decision,<sup>8</sup> and the bountiful

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3. Adam Liptak, *Supreme Court Ruling Makes Same Sex Marriage a Right Nationwide*, N.Y. TIMES (June 26, 2015), available at <http://www.nytimes.com/2015/06/27/us/supreme-court-same-sex-marriage.html>.

4. *Obergefell*, 135 S. Ct. at 2608.

5. Sara El Yafi, *Why the Supreme Court's Decision to Legalize Gay Marriage Will Benefit You Wherever You Are on the Planet*, HUFFINGTON POST (July 13, 2015), [http://www.huffingtonpost.com/sara-elyafi/why-the-supreme-courts-decision-to-legalize-same-sex-marriage-will-benefit-you-wherever-you-are-on-the-planet\\_b\\_7749828.html](http://www.huffingtonpost.com/sara-elyafi/why-the-supreme-courts-decision-to-legalize-same-sex-marriage-will-benefit-you-wherever-you-are-on-the-planet_b_7749828.html) (congratulating "all human beings" on the decision). The "evolving standards of decency that mark the progress of a maturing society" language comes from the Supreme Court's ruling in *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion).

6. *Obergefell*, 135 S. Ct. at 2596.

7. See discussion *infra* Part II.C.

8. This author wholeheartedly joins the "it's about time" refrain and excitement over the Court's decision.

commentary about the Court's emphasis on human dignity,<sup>9</sup> this author finds it difficult not to take stock of where we are in terms of advancing the most essential needs of Americans, as part of protecting their dignity. The United States joined other developed nations in affirming marriage equality, recognizing, again, the fundamental right of all adults to marry. Yet, in our prosperous nation, in 2014, the Children's Defense Fund reported there are 14.7 million poor children and 6.5 million extremely poor children living in the United States.<sup>10</sup> Countless commentators have decried the state of the poor in this country, calling for renewed efforts to combat poverty.<sup>11</sup> In a nation where the Court has acknowledged the right of all to marry, as a testament to their human dignity, the Court has never recognized the right of all to food security, and an end to poverty, as a testament to that same human dignity.

Obviously, the two issues present a host of differences in terms of constitutional analysis. The major difference is the positive versus negative rights distinction, which this Article addresses in Section III.A. Yet, the Court's willingness to advance human dignity provides a meaningful common thread between the right to marry and the right to

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9. Jeffrey Rosen, *The Dangers of a Constitutional 'Right to Dignity'*, ATLANTIC (Apr. 29, 2015), <http://www.theatlantic.com/politics/archive/2015/04/the-dangerous-doc-trine-of-dignity/391796/> ("Justice Kennedy invoked the word 'dignity' five times in the oral arguments; and other lawyers invoked it 16 times. It was central to the opening statements of Solicitor General Don Verrilli. 'The opportunity to marry is integral to human dignity,' he began. 'Excluding gay and lesbian couples from marriage demeans the dignity of these couples.' It was also one of the first words uttered by the plaintiff's lawyer, Mary L. Bonuato."); Liz Halloran, *Explaining Justice Kennedy: The Dignity Factor*, NPR (June 28, 2013), <http://www.npr.org/sections/the-two-way/2013/06/27/196280855/explaining-justice-kennedy-the-dignity-factor> ("The [human dignity] concept appears no less than nine times in the landmark 26-page decision overturning the 1996 law blocking federal recognition of gay marriage.").

10. Marian Wright Edelman, *Foreword to Ending Child Poverty Now*, CHILDREN'S DEFENSE FUND 4 (2015), <http://www.childrensdefense.org/library/data/ending-child-poverty-now-1.html>.

11. See CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS* (2004); Evgeny Krasnov, Note: *Freedom from Food: on the Need to Restore FDR's Vision of Economic Rights in America, and How It Can Be Done*, 41 HOFSTRA L. REV. 735 (2013); Dennis D. Hirsch, *The Right to Economic Opportunity: Making Sense of the Supreme Court's Welfare Rights Decisions*, 58 U. PITT. L. REV. 109, 134 (1996).

food security. This Article links the Supreme Court's reliance on human dignity as a constitutional value most recently in *Obergefell* to the Court's ability to recognize a fundamental right to food security<sup>12</sup> under a Fourteenth Amendment Due Process or Equal Protection analysis. Ideally, at some point soon, commentators will proclaim, "It's about time" when the Court acknowledges food security as a fundamental right.

At one time, such a constitutional analysis and outcome seemed likely. In 1970, the Court ruled in *Goldberg v. Kelly*,<sup>13</sup> that only *after* a fair hearing could social services terminate benefits of welfare recipients. Justice Brennan wrote with regard to the nation's provision of assistance to the needy that "from its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders."<sup>14</sup> The Court noted the inextricable link between human dignity and food security, describing welfare as the means of bringing "within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community."<sup>15</sup> Around the same time, in the mid-60s, with the "War on Poverty," President Lyndon Johnson promised a right to food security, linking it to human dignity, when he said, "We have a right to expect a job to provide food for our families, a roof over their head, clothes for their body...."<sup>16</sup> He described the impact of poverty: "Poverty not only strikes at the needs

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12. For purposes of this article, food security means "access by people at all times to enough food for an active, healthy life." *Food & Nutrition Assistance*, U.S. DEP'T OF AGRIC., <http://www.ers.usda.gov/topics/food-nutrition-assistance.aspx> (last updated June 8, 2015). Food insecurity thus means "access to adequate food is limited by a lack of money and other resources." Alisha Coleman-Jensen, Christian Gregory & Anita Singh, *Household Food Security in the United States in 2013*, U.S. DEP'T OF AGRIC. ECON. RES. REPORT NO. ERR-173, 1 (Sept. 2014).

13. 397 U.S. 254 (1970).

14. *Id.* at 264–65.

15. Scholars have supported the notion of a fundamental right to food security under the Fourteenth Amendment. See Peter B. Edelman, *The Next Century of our Constitution: Rethinking our Duty to the Poor*, 39 HASTINGS L.J. 1 (1987); Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 U. PA. L. REV. 1277 (1993).

16. President Lyndon B. Johnson, Remarks at Cumberland, Maryland City Hall (May 7, 1964) in U.C. SANTA BARBARA AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=26223>.

of the body. It attacks the spirit and it undermines human dignity.”<sup>17</sup>

However, since the mid-1970s, most Supreme Court opinions regarding welfare rights have favored the government, and the Court has routinely reversed lower court decisions favoring the poor.<sup>18</sup> The welfare rights movement, once compared to the Civil Rights Movement,<sup>19</sup> has lost steam. It is as though the legal community has, largely, left those in poverty behind. Unfortunately, the notion that human dignity means a right to food security on the part of every American, a bedrock principle of other nations’ constitutions and of international law,<sup>20</sup> and, arguably, necessary to liberty and general welfare, has lost traction.<sup>21</sup> As Louis Henkin states, “[o]ur welfare state does not supply what human dignity requires today. There is no respect for human dignity in tolerating poverty and homelessness, de facto segregation, and the growth of an ‘underclass.’”<sup>22</sup>

This Article proceeds in three parts. Section I provides a brief background of human dignity as a value in international law as well as the constitutional jurisprudence of the United States and other nations. This section also provides the various definitions that courts, nations, and legal documents have ascribed to the term. Then, Section II briefly discusses food insecurity in the United States and legislative efforts to provide for the needy. This Article uses “food insecurity” to mean “the lack of access to enough affordable, nutritious food to fully meet basic needs at all times due to lack of financial resources.”<sup>23</sup>

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17. Johnson, *supra* note 16.

18. See *infra* Section I.C.

19. See Hirsch, *supra* note 11.

20. The Universal Declaration of Human Rights provides that “[e]veryone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care . . . .” G.A. Res. 217 (III) A, Article 25(1), Universal Declaration of Human Rights (Dec. 10, 1948). See *infra* part III.E.

21. See Hirsch, *supra* note 11 at 134.

22. Louis Henkin, *Dignity and Constitutional Rights*, THE CONSTITUTION OF RIGHTS, HUMAN DIGNITY AND AMERICAN VALUES 227 (Michael J. Meyer & William A. Parent eds., 1992).

23. See *Introduction: Hunger in the U.S.*, WHYHUNGER, <http://www.whyhunger.org/frontend.php/overlay/simpleIndex?id=2056>. See also U.S. DEP’T OF AGRIC., *supra* note 12.



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The section also summarizes the Supreme Court's treatment of welfare cases<sup>24</sup> from the 1960s until the present time.

Section III provides five reasons the Supreme Court should acknowledge a fundamental right to food security for all American citizens. Fundamental means, just as with other liberty rights under a Due Process Clause analysis, that unless it is *necessary* for the government to interfere with the right to achieve a *compelling* government objective, the government action is prohibited. This Article does not describe the exact case that should be brought to get this question before the Supreme Court; rather, it encourages the legal community to reinvigorate the legal fight for this fundamental right, at a time when doing so just might succeed.

The five reasons the Court should establish this fundamental right are grounded in existing constitutional jurisprudence involving human dignity, viewed largely through the lens of *Obergefell*. Though many have written on human dignity in constitutional jurisprudence,<sup>25</sup> scholars have written little on the necessary connection between human dignity and food security and why the Supreme Court should acknowledge this link. As we applaud *Obergefell* as a reflection of the Court's commitment to human dignity, commentators should pause to consider a jurisprudence which affirms the right of all citizens to marry on Fourteenth Amendment due process and equal protection grounds but which fails to recognize a right to food security for all citizens. This Article strives to show why our evolved sense of decency and our existing Supreme Court jurisprudence support such a right.

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24 "Welfare cases" mean lawsuits involving federal and state welfare programs, such as Aid to Families with Dependent Children, Food Stamps, and other safety net programs.

25. See Jordan Paust, *Human Dignity as a Constitutional Right: Jurisprudentially Based Inquiry into Criteria and Content*, 27 HOW. L.J. 145 (1984); Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169 (2011); Erin Daly, *Human Dignity in the Roberts Court: a Story of Inchoate Institutions, Autonomous Individuals, and the Reluctant Recognition of a Right*, 37 OHIO N.U. L. REV. 381 (2011).

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## I. Background of Human Dignity as a Value in International and Constitutional Law

This section briefly describes the philosophical and religious underpinnings of human dignity as a legal concept, as well as its meaning and use under international law, in United States Supreme Court jurisprudence, and as a value or right in other nations' constitutions.

### A. Philosophical and Religious Underpinnings of Human Dignity

The American concept of human dignity underlying human rights and constitutional guarantees is believed to have originated from the German philosopher Immanuel Kant,<sup>26</sup> who posited, "to treat people with dignity is to treat them as autonomous individuals able to choose their destiny."<sup>27</sup> He defined dignity as "a quality of intrinsic, absolute value, above any price, and thus excluding any equivalence."<sup>28</sup> Kant's "formula of ends" meant that people should behave in such a way "that you treat humanity, both in your person and in the person of each other individual, always at the same time as an end, never as a mere means."<sup>29</sup> Accordingly, human dignity, as opposed to something with a price, cannot be replaced by anything else, and it is not relative to anyone's desires.<sup>30</sup> As one scholar

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26. "Thomas Paine eloquently invoked the natural dignity of man as the reason to protect individual rights that transcend authoritative rule. Paine's conception of dignity marked a distinct break from the British rule where dignity had more of an ancient Roman connotation and was reserved for the nobility or aristocracy. Thomas Jefferson and Alexander Hamilton shared Paine's views." See Rex D. Glensy, *The Right to Dignity*, 43 COLUM. HUM. RTS. L. REV. 65, 77 (2011).

27. See Izhak Englard, *Uri and Caroline Bauer Memorial Lecture: Human Dignity: From Antiquity to Modern Israel's Constitutional Framework*, 21 CARDOZO L. REV. 1903, 1918–20 (2000).

28. *Id.*

29. *Id.*

30. Hugo Adam Bedau, *The Eighth Amendment, Human Dignity, and the Death Penalty*, Henkin, *supra* note 22, at 153–56.

describes Kant's theory, "the humanity in each of us is of infinite value, and this explains why we must respect the humanity of others as we respect the humanity in ourselves."<sup>31</sup>

Commentators also ascribe a religious source to human dignity as relied on in Supreme Court jurisprudence, stemming from the Judeo-Christian notion that all people are created in the image of God. The Book of Genesis provides that God created man in God's own image.<sup>32</sup> As such, "there is a divine 'spark,' as it were, in human beings. This element establishes man's humanity and grants him unique status among the creatures in God's creation, or in other words, his dignity."<sup>33</sup> Professor George Fletcher equates this Biblical source with Kant's theory that each life has a dignity beyond price: "Kant's idea of universal humanity functions as the secular analogue to creation in the image of God."<sup>34</sup>

Religions throughout the world are important sources for the conception of human dignity. In Catholicism, for example, "human life is sacred and [Catholicism professes] that the dignity of the human person is the foundation of a moral vision for society"; Pope Benedict XVI stated that "the dignity of man is the locus of human rights"; the Catechism of the Catholic Church teaches that man was created in God's image.<sup>35</sup> Many scholars attribute the commitment to human dignity shown by Justices Kennedy and Brennan to their religious upbringings and beliefs.<sup>36</sup> Some commentators contend the nation's

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31. George Fletcher, Essay, *In God's Image: the Religious Imperative of Equality under Law*, 99 COLUM. L. REV. 1608, 1619 (1999).

32. *Genesis* 1:26. See Neomi Rao, *On the Use and Abuse of Dignity in Constitutional Law*, 14 COLUM. J. EUR. L. 201, 206 (2008) ("The notion of Imago Dei in *Genesis* was a universal attribute shared by all human beings.").

33. Rao, *supra* note 32, at 206.

34. Fletcher, *supra* note 31, at 1619.

35. *Life and Dignity of The Human Person*, U.S. CONF. OF CATH. BISHOPS, <http://www.usccb.org/beliefs-and-teachings/what-we-believe/catholic-social-teaching/life-and-dignity-of-the-human-person.cfm> (last visited Oct. 7, 2015).

36. See Deborah A. Roy, *Justice William J. Brennan, Jr., James Wilson, and the Pursuit of Equality and Liberty*, 61 CLEV. STATE L. REV. 665, 678 (2013) ("Brennan believed Catholic social teaching had adopted the concept of human dignity, which derived from the belief that man was created in the image of God. Justice Brennan echoed this thought in a speech to the Jewish Theological Seminary in 1964, stating

founding principles all originate in Judeo-Christian principles, which emphasize the man in God's image to human dignity connection.

Our nation's history provides overwhelming evidence that America was birthed upon Judeo-Christian principles. The first act of America's first Congress in 1774 was to ask a minister to open with prayer and to lead Congress in the reading of four chapters of the Bible. In 1776, in approving the Declaration of Independence, our founders acknowledged that all men "are endowed by their Creator with certain unalienable rights ..." and noted that they were relying "on the protection of Divine Providence" in the founding of this country. John Quincy Adams said, "The Declaration of Independence laid the cornerstone of human government upon the first precepts of Christianity."<sup>37</sup>

Regardless of source, whether religious or philosophical, or the two combined, human dignity means every individual has intrinsic and equal worth.<sup>38</sup> Human dignity is another manner of referring to a person's worth, which differs from a person's merit: "human beings do not vary in their dignity or worth. Their dignity or worth is a kind of value that all human beings have equally and essentially."<sup>39</sup> Arthur Chaskalson, President of the Constitutional Court of South Africa from 1994 until his retirement as Chief Justice in 2005,<sup>40</sup> said, "respect for dignity implies respect for the autonomy of each person, and the

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'the Old and New Testament teach that all men have rights – that every individual has Rights because as a child of God he is endowed with human dignity.'").

37. J. Randy Forbes, *Obama Is Wrong When He Says We're Not a Judeo-Christian Nation*, U.S. NEWS (May 7, 2009, 3:15 PM), <http://www.usnews.com/opinion/articles/2009/05/07/obama-is-wrong-when-he-says-were-not-a-judeo-christian-nation>.

38. Bedau, *supra* note 30, at 153–56.

39. *Id.* at 153.

40. Mandela made him the first president of the new Constitutional Court in 1994; Chaskalson had served on Mandela's defense team for treason in 1963 and was an ardent opponent of Apartheid. He wrote the opinion abolishing the death penalty. See Rebecca Davis, *Death of a Lion of the Law*, DAILEY MAVERICK, (Dec. 12, 2012, 2:44 AM), [http://www.dailymaverick.co.za/article/2012-12-03-death-of-a-lion-of-the-law-arthur-chaskalson/#.VaA\\_KVzBwXA](http://www.dailymaverick.co.za/article/2012-12-03-death-of-a-lion-of-the-law-arthur-chaskalson/#.VaA_KVzBwXA) ("The day after the Constitutional Court was formally opened on 14 February 1995, the 11 green-robed judges heard their first case. Their first ruling was on the unconstitutionality of the death penalty, and they would go on to rule on a host of other vital issues, including the recognition of same-sex marriages and the right of all South Africans to a roof over their head.").

right of everyone not to be devalued as a human being or treated in a degrading or humiliating manner.”<sup>41</sup> Commentators posit an emphasis on human dignity in international law arose from rejecting totalitarianism’s lack of respect and dehumanizing treatment of citizens.<sup>42</sup>

## B. Human Dignity in International Law

Human dignity became connected to human rights as the premier value of the New World Order in response to the atrocities of fascism and Nazism of World War II.<sup>43</sup> Governments and human rights groups sought to protect human dignity against the abuses of totalitarian regimes.<sup>44</sup> As such, international legal texts, such as the United Nations Charter and Universal Declaration on Human Rights, affirm the dignity of all men and women, with the Declaration’s Preamble recognizing the “inherent dignity and . . . the equal and inalienable rights of all members of the human family.”<sup>45</sup> Article One of the Declaration states: “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”<sup>46</sup> The United Nations Charter affirmed faith in human rights and dignity and thus required a pledge to promote respect for, and observance of,

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41. Arthur Chaskalson, *Human Dignity as a Constitutional Value*, in *THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE* 135 (David Kretzmer and Eckart Klein eds., 2002).

42. See Maxine D. Goodman, *In the Holocaust’s Shadow: Can German and American Constitutional Jurisprudence Provide a “New Guarantee” of Human Dignity?*, 4 *BRIT. J. AM. LEGAL STUD.* 303 (2015).

43. *Id.* at 133.

44. Julie Resnick & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 *STAN. L. REV.* 1921, 1939 (2003) (“Our review of the deployment of the term dignity of persons . . . documents.”).

45. G.A. Res. 217 (III), Universal Declaration of Human Rights (Dec. 10, 1948), [http://www.ohchr.org/EN/UDHR/Documents/UDHR\\_Translations/eng.pdf](http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf); MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS*, appendix 7 (2001).

46. *Id.*

human rights and fundamental freedoms.<sup>47</sup>

Other international legal instruments and treaties treat human dignity as a preeminent value underlying human rights, with commentators frequently describing the connection between human dignity and human rights.<sup>48</sup> Human dignity “furnishes each one of us, whether strong or weak, politically powerful or disenfranchised, competent or inept, and whatever our race, religion, sex, or sexual orientation, with an infeasible moral standing to protest (or to have protested on our behalf) all insidious attempts to degrade our persons.”<sup>49</sup>

In addition to the international community rallying around human dignity as protecting against the abuses of a totalitarian regime, individual nations included the value in their constitutions. Article I of Germany’s Basic Law, adopted by the West German states in 1949, proclaims “the dignity of man is inviolable. To respect and protect it is the duty of all state authority.”<sup>50</sup> Under German constitutional law, human dignity is not subject to balancing against other rights, such as freedom of expression.<sup>51</sup> Rather, human dignity prevails as the value underlying fundamental rights and supporting the individual’s “free unfolding of personality.”<sup>52</sup> After World War II, Japan, West Germany, and Italy were among the first to include human dignity in their constitutional documents.<sup>53</sup>

Nations including France, Canada, Israel, and South Africa now rely heavily on human dignity as a lodestar constitutional value.<sup>54</sup>

47. Glendon, *supra* note 45, at 78.

48. *See id.*

49. Henkin, *supra* note 22, at 48.

50. Ernest Benda, *Fifty Years of German Basic Law, The New Departure for Germany: the Protection of Human Dignity (Article I of the Basic Law)*, 53 S.M.U. L. REV. 443, 443 (2000) (citing Article 1, 1 of the German Constitution).

51. *Id.*

52. James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1161 (2004).

53. Doron Shulztiner & Guy E. Carmi, *Human Dignity in National Constitutions: Functions, Promises, and Dangers*, 62 AM. J. COMP. L. 461, 465 (2014).

54. *See* Luis Roberto Barroso, *Here, There, and Everywhere: Human Dignity in Contemporary Law and in the Transnational Discourse*, 35 B.C. INT’L & COMP. L. REV. 331 (2012) (describing how other nations’ included human dignity as a constitutional

Guy E. Carmi and Doron Shulztiner describe nations' use of the term in their constitutions, including a comprehensive description of what the term is meant to protect.<sup>55</sup> In South Africa, the right to human dignity is embedded as a discrete right in the Bill of Rights, with the Constitutional Court affording the right special weight.<sup>56</sup> As these commentators describe, nations differ both in terms of their reliance on human dignity as a fundamental value in constitutional jurisprudence, as well as on the value's meaning.<sup>57</sup> As shown below, the United States has developed its own constitutional jurisprudence of human dignity, despite the absence of an explicit guarantee in the United States Constitution.

### C. Human Dignity as a Value in United States Constitutional Jurisprudence

Although the United States Constitution does not explicitly use the term human dignity,<sup>58</sup> the Supreme Court has repeatedly relied on the value, most often linked to the Bill of Rights. In *Miranda v. Arizona*, the Court held that "the constitutional foundation underlying the privilege [Fifth Amendment right against self-incrimination] is the respect a government must accord to the dignity and integrity of its citizens."<sup>59</sup> And, when describing the role of human dignity in death

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value following the international human rights instruments and German constitution).

55. See Shulztiner & Carmi, *supra* note 53.

56. Arthur Chaskalson, *Dignity as a Constitutional Value: A South African Perspective*, 26 AM. U. INT'L L. REV. 1377, 1377 (2011). According to Chaskalson, the Constitutional Court stresses human dignity because of South Africa's history of Apartheid. He quotes this language from a court decision: "Respect for the dignity of all human beings is particularly important in South Africa. For apartheid was a denial of a common humanity. Black people were refused respect and dignity and thereby the dignity of all South Africans was diminished. The new Constitution rejects this past and affirms the equal worth of all South Africans."

57. Shulztiner & Carmi, *supra* note 53.

58. Some state constitutions, including Illinois, Louisiana, and Montana, actually enumerate dignity as protected under their constitutions. MONT. CONST. art II, § 4; LA. CONST. art. I § 3; ILL. CONST. art 1, § 20; see Burt Neuborne, *Forward: State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881, 893-95 (1989).

59. *Miranda v. Arizona*, 384 U.S. 436, 460 (1996).

penalty jurisprudence under the Eighth Amendment, the Court has said that “even the vilest criminal remains a human being possessed of common human dignity”<sup>60</sup> The Court has repeatedly proclaimed, “The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.”<sup>61</sup>

After World War II and the adoption of the Universal Declaration of Human Rights, “the Court embraced dignity as something possessed by individuals,” rather than just states and other entities, relying on the concept in its constitutional interpretation.<sup>62</sup> Commentators opine it was in response to the war and adoption of international legal norms in the Universal Declaration of Human Rights that the Court “changed the content of U.S. constitutional law to name dignity as a distinct and core value.”<sup>63</sup>

In 1944, Justice Frank Murphy<sup>64</sup> used the term “dignity” in his

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60. *Furman v. Georgia*, 408 U.S. 238, 305 (1972) (per curiam).

61. *Trop v. Dulles*, 356 U.S. 86 (1958); *Atkins v. Virginia*, 536 U.S. 304, 311 (2001) (quoting *Trop v. Dulles*).

62. Resnick & Suk, *supra* note 45, at 1926, 1939 (“As a result of WWII when legal and political commentary around the world turned to the term dignity to identify rights of personhood . . . Dignity talk in the law of the United States is an example of how U.S. law is influenced by the norms of other nations, by transnational experiences, and by international legal documents.” “Our review of the deployment of the term dignity of persons in the constitutional law of the United States demonstrates that use of the word began during World War II and expanded as the term was embraced in the 1948 Universal Declaration of Human Rights and in other nations’ constitutive legal documents.”).

63. *Id.* at 1941.

64. Justice Murphy was vehemently opposed to discrimination of any type, and his opinions while on the Court were certainly informed by the events in Europe during his tenure on the bench. Commentators link Justice Murphy’s Catholic faith and concerns for labor to his strong interest in and reliance on human dignity. See Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT’L. L. 655 (2008); Theodore J. St. Antoine, *Essay: Justice Frank Murphy and American Labor Law*, 100 MICH. L. REV. 1900, 1924 (June 2002) (“He brought to the law and the art of judging some eminently worthy values. Among them was an unceasing determination to see realized in the daily lives of ordinary people such basic human rights as freedom of expression, fair and equal treatment, personal dignity, and the capacity to form organizations to promote their political, economic, and social well-being.”). Yet, arguably, the horrors of World War II, in response to which he formed



dissent in *Korematsu v. United States*.<sup>65</sup> Fred Korematsu was convicted of remaining in a designated military area in violation of the military requirement that persons of Japanese ancestry be excluded from that area.<sup>66</sup> The Court upheld the exclusion program based on military necessity. Justice Black, writing for the majority, said the Court “could not reject the finding of the military authorities” that the exclusion was necessary.<sup>67</sup>

In his dissenting opinion, Justice Murphy opposed the race-based classification based on human dignity concerns:

To give constitutional sanction to that inference in this case, however well-intentioned may have been the military command on the Pacific Coast, is to adopt one of the cruelest of the rationales used by our enemies to destroy the dignity of the individual and to encourage and open the door to discriminatory actions against other minority groups in the passions of tomorrow.<sup>68</sup>

Justice Murphy described the military orders as falling “into the ugly abyss of racism” and as going beyond the brink of constitutional power.<sup>69</sup> Justice Murphy again called forth the notion of dignity, this time “human dignity,” in his dissent in *Yamashita v. Styer*.<sup>70</sup> Tomoyuki

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the group described herein, also contributed to his inclusion of this value in his jurisprudential decision-making.

65. 323 U.S. 214, 240 (1944). Justice Murphy also dissented in *Screws v. United States*, 325 U.S. 91, 135 (1945) (considering the constitutionality of police officers’ convictions under Section 20 of the Federal Criminal Code) (Justice Murphy stated that by beating an African-American man to death, police had deprived him of the “respect and fair treatment that befits the dignity of man, a dignity recognized and guaranteed by the Constitution.”).

66. *Korematsu*, 323 U.S. at 216. Korematsu’s residence was in San Leandro, California, one of the areas from where all persons of Japanese ancestry were excluded.

67. *Id.* at 219.

68. *Id.* at 240 (Murphy, J., dissenting).

69. Justice Murphy was the first to use the term “racism” in a Supreme Court opinion. *Frank Murphy Hall of Justice*, DETROIT: THE HISTORY AND FUTURE OF THE MOTOR CITY (Dec. 2012), <http://detroit1701.org/Frank%20Murphy%20Hall%20of%20Justice.html>.

70. 327 U.S. 1, 28 (1946).

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Yamashita, a general of the Japanese army who was convicted by a military commission of violating laws of war, sought a writ of habeas corpus challenging the jurisdiction and legal authority of the military commission that convicted him. The Court denied the petition for certiorari.

In his dissent, Justice Murphy wrote:

[I]f we are ever to develop an orderly international community based upon a recognition of human dignity, it is of the utmost importance that the necessary punishment of those guilty of atrocities be as free as possible from the ugly stigma of revenge and vindictiveness."<sup>71</sup>

Justice Murphy ended his lengthy dissent with another reference to dignity: "While peoples in other lands may not share our beliefs as to due process and the dignity of the individual, we are not free to give effect to our emotions in reckless disregard of the rights of others."<sup>72</sup>

After this, human dignity continued to play a role in American constitutional jurisprudence. Several Supreme Court justices have referred to the concept at one time or another, while Justices Murphy,

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71. *Yamashita*, 327 U.S. at 29 (Murphy, J., dissenting).

72. *Id.* at 41.

Frankfurter,<sup>73</sup> Brennan,<sup>74</sup> and Kennedy<sup>75</sup> have given the value the most “air time,”<sup>76</sup> relying on it to underlie protection against cruel and unusual punishment, privacy rights, and other explicit constitutional guarantees. The more conservative justices have also discussed the value and its role in the nation’s constitutional jurisprudence.<sup>77</sup>

Commentators contend that, generally speaking, in American constitutional jurisprudence, human dignity is most closely tied to liberty; human dignity and liberty allow for individuals to live autonomously, without state interference.<sup>78</sup> As this Article will address later, many argue that the notion of human dignity as liberty is inconsistent with the Court acknowledging a fundamental right to food security, as this necessitates government interference. Others proclaim the opposite—that liberty cannot

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73. In *McNabb v. United States*, Justice Felix Frankfurter used the term dignity in 1943 as part of the rationale for requiring that those who are arrested are taken before the committing authority without delay. 318 U.S. 332, 343 (1943) (“The purpose of this impressively pervasive requirement of criminal procedure is plain. A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process.”). He also used the term in his concurring opinion in *Glasser v. United States*, 315 U.S. 60, 89 (1942) (Frankfurter, J., concurring) involving a defendant’s Sixth Amendment rights: “Whether their [the Bill of Rights] safeguards of liberty and dignity have been infringed in a particular case depends upon the particular circumstances.”).

74. Justice Brennan, after serving in World War II as an Army JAG, served as a judge in New Jersey courts before joining the Supreme Court in 1956. He was Catholic, as was Justice Frank Murphy, who relied heavily on human dignity in his decision-making. See Deborah A. Roy, *Justice William J. Brennan, Jr., James Wilson, and the Pursuit of Equality and Liberty*, 61 CLEV. ST. L. REV. 665 (2013). According to Leslie Melzer Henry, Brennan “invoked ‘dignity’ in an astounding thirty-nine opinions during his tenure on the Court.” Henry *supra* note 25, at 171. See RAOUL BERGER, *Justice Brennan, ‘Human Dignity,’ and Constitutional Interpretation*; Henkin, *supra* note 22 at 10.; Stephen J. Wermeil, *Essay: Law and Human Dignity: The Judicial Soul of Justice Brennan*, 7 WM. & MARY BILL OF RTS. J. 223 (1998).

75. One commentator referred to Justice Kennedy as “the dignity whisperer.” Dahlia Lithwick, *An Argument for Dignity*, SLATE (Apr. 28, 2015, 6:16 PM), [http://www.slate.com/articles/news\\_and\\_politics/supreme\\_court\\_dispatches/2015/04/gay\\_marriage\\_arguments\\_at\\_supreme\\_court\\_anthony\\_kennedy\\_on\\_dignity.html](http://www.slate.com/articles/news_and_politics/supreme_court_dispatches/2015/04/gay_marriage_arguments_at_supreme_court_anthony_kennedy_on_dignity.html).

76. See Henry, *supra* note 25 (comparing frequency of use of the concept).

77. See *infra* Part III.D.

78. Whitman, *supra* note 52, at 1161.

exist for those who lack food security.<sup>79</sup>

## II. Food Insecurity in America, Government Assistance, and the Court's Decisions Regarding Welfare

According to the United States Department of Agriculture, in 2013, 14.3 percent of American households (17.5 million households) were food insecure.<sup>80</sup> These households “had difficulty at some time during the year providing enough food for all their members due to a lack of resources.”<sup>81</sup> Fourteen percent of households in the United States were food insecure despite welfare and food stamp programs, meant to provide assistance to Americans in need.<sup>82</sup> Approximately nine percent of these households had children.<sup>83</sup> In 2013, “49.1 million Americans lived in food insecure households, including 33.3 million adults and 15.8 million children.”<sup>84</sup> Present rates of poverty in the United States are higher than in several other industrialized nations.<sup>85</sup>

In terms of reasons for food insecurity, according to the organization, WhyHunger, federal food programs face increasing resource cuts. The organization notes that some who are eligible for food assistance do not receive it, and, at times, the assistance provided is not sufficient to remedy food insecurity.<sup>86</sup> The organization also notes that circumstances like immigration status and income level can

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79. For instance, Franklin D. Roosevelt said, “We have come to a clearer realization of the fact . . . that true individual freedom cannot exist without economic security and independence.” President Franklin D. Roosevelt, State of the Union Message to Congress (January 11, 1944) in THE AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=16518>.

80. *Hunger and Poverty Fact Sheet*, FEEDING AMERICA, <http://www.feedingamerica.org/hunger-in-america/impact-of-hunger/hunger-and-poverty/hunger-and-poverty-fact-sheet.html> (last visited Oct. 7, 2015).

81. *Food & Nutrition Assistance*, U.S. DEP'T OF AGRIC., <http://www.ers.usda.gov/topics/food-nutrition-assistance/.aspx> (last updated June 8, 2015).

82. *Id.*

83. *Hunger and Poverty Fact Sheet*, *supra* note 80.

84. *Id.*

85. See Helen Hershkoff, Forward: *Positive Rights and the Evolution of State Constitutions*, 33 RUTGERS L.J. 799, 801 (2002).

86. WHYHUNGER, *supra* note 23.

affect an individual's right to assistance.<sup>87</sup>

In 2013, food insecurity varied dramatically from state to state, with the percentage of food insecurity ranging from 8.7 percent in North Dakota to 21.2 percent in Arkansas.<sup>88</sup> Cities also see a great disparity in food insecurity, with Memphis, San Antonio, Washington, D.C., and San Francisco currently among the poorest American cities; in Memphis, twenty-six percent of its residents had been food insecure sometime during 2014.<sup>89</sup> Regardless of location, across the board, the nation's children suffer the most from food insecurity. During the 2012 to 2013 school year, fifty-one percent of pre-Kindergarten through twelfth grade students were eligible to receive free and reduced-price lunches, illustrating the striking level of poverty among this population.<sup>90</sup>

The history of welfare in the United States reflects, at best, the lack of a national commitment to the plight of the poor and, at worst, a steady decline during the past fifty years in our commitment to caring for the needy. Welfare programs to provide cash assistance to the poor in the United States came about after the Great Depression, when the government undertook to better assist families with the necessities of food and shelter. In advancing his New Deal agenda, President Franklin Delano Roosevelt ("FDR") said, "If, as our Constitution tells us, our Federal Government was established among other things, to 'promote general welfare,' it is our plain duty to provide for that security upon which welfare depends."<sup>91</sup> Congress enacted the Social Security Act in 1935 to provide unemployment and

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87. WHYHUNGER, *supra* note 23.

88. Alex Henderson, *10 Cities Where an Appalling number of Americans are Starving*, SALON (Jan. 10, 2015, 5:00 AM), [http://www.salon.com/2015/01/10/10\\_cities\\_where\\_an\\_appalling\\_number\\_of\\_americans](http://www.salon.com/2015/01/10/10_cities_where_an_appalling_number_of_americans).

89. *Id.*

90. Lyndsey Layton, *Majority of U.S. Public School Students are in Poverty*, WASH. POST (Jan. 16, 2015) [https://www.washingtonpost.com/local/education/majority-of-us-public-school-students-are-in-poverty/2015/01/15/df7171d0-9ce9-11e4-a7ee-526210d665b4\\_story.html](https://www.washingtonpost.com/local/education/majority-of-us-public-school-students-are-in-poverty/2015/01/15/df7171d0-9ce9-11e4-a7ee-526210d665b4_story.html).

91. President Franklin Delano Roosevelt, Message to Congress on the Objectives and Accomplishments of the Administration, (June 8, 1934) in U.C. SANTA BARBARA AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/index.php?pid=14690>.

old-age insurance, maternal and general health programs, and general economic assistance for the needy.<sup>92</sup> The main purpose of these categorical assistance programs was to encourage state governments to provide “new and greatly enhanced welfare programs.”<sup>93</sup> Title IV-A of the Social Security Act established Aid for Families with Dependent Children (“AFDC”), a joint federal-state program. It was created to provide economic support for needy, dependent children and those who care for them.<sup>94</sup>

During the period from adoption of AFDC through the 1960s, the number of families receiving support increased dramatically, from 162,000 to 1,875,000.<sup>95</sup> Critics challenged existing programs for not providing job training and opportunities. Accordingly, in May 1964, President Lyndon B. Johnson declared a “War on Poverty,” with the Economic Opportunity Act to provide job training and education. Johnson said, “We have a right to expect a job to provide food for our families, a roof over their head, clothes for their body and with your help and with God’s help, we will have it in America!”<sup>96</sup>

Around the same time, Congress passed the first law creating a permanent food stamp program,<sup>97</sup> which allows eligible low-income

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92. SUNSTEIN, *supra* note 11, at 51.

93. Shapiro v. Thompson, 394 U.S. 618, 644 (1969) (Warren, J., dissenting).

94. AFDC reimburses each participating state with a percentage of the funds it expends.

95. Eugene M. Lewit, Donna L. Terman & Richard E. Behrman, *Children and Poverty: Analysis & Recommendations*, 7 J. CHILD. & POVERTY (1997), <http://www.princeton.edu/futureofchildren/publications/journals/article/index.xml?journalid=53&articleid=284&sectionid=1869>.

96. President Lyndon Baines Johnson, Remarks at Cumberland, Maryland City Hall (May 7, 1964), in U.C. SANTA BARBARA AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=26223>; see also WAR ON POVERTY (PBS 1998), <http://www.pbs.org/wgbh/americanexperience/features/bonus-video/presidents-economy-lbj/>.

97. *A Short History of SNAP*, U.S. DEP’T OF AGRIC. FOOD AND NUTRITION SERVICE, <http://www.fns.usda.gov/snap/short-history-snap> (last visited Oct. 2, 2015) (“On Jan. 31, 1964, President Johnson requested Congress to pass legislation making the FSP permanent. Secretary Orville Freeman submitted proposed legislation to establish a permanent FSP on April 17, 1964.”).

individuals to purchase food.<sup>98</sup> The food stamp program, despite sustaining significant funding cuts and then rebounding from those cuts with changing political climates, serves as one of the most enduring and effective parts of the “social safety net.”<sup>99</sup> It has at times served as the “gap filler” where other programs have failed; of those who receive food stamps, eighty percent receive other types of benefits as well.<sup>100</sup> Today, the Supplemental Nutrition Assistance Program (“SNAP”) continues to provide monthly benefits for eligible families.

Yet, during the 1970s, with growing inflation, the rate of benefits decreased significantly and, according to Cass Sunstein, “Nixon’s appointees stopped an unmistakable trend in the direction of recognizing social and economic rights.”<sup>101</sup> In the 1980s the welfare program came under increased, bipartisan criticism for its inability to properly and effectively assist those in need.<sup>102</sup> The Reagan Administration expressed disdain for welfare programs not linked to jobs. In describing his desired welfare reforms, which would emphasize work and jobs, Reagan quoted President Roosevelt from his State of the Union address on January 4, 1935, warning that welfare was “a narcotic, a subtle destroyer of the human spirit” and

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98. *A Short History of SNAP*, U.S. DEP’T OF AGRIC. FOOD AND NUTRITION SERVICE, <http://www.fns.usda.gov/snap/short-history-snap> (last visited Oct. 2, 2015) (“On Jan. 31, 1964, President Johnson requested Congress to pass legislation making the FSP permanent. Secretary Orville Freeman submitted proposed legislation to establish a permanent FSP on April 17, 1964.”). The program’s mission is “providing relevant, vital help to boost nutrition, economic security and health among seniors, children, people with disabilities, and unemployed or low-income working families.”

99. R. SHEP MELNICK, *BETWEEN THE LINES, INTERPRETING WELFARE RIGHTS* 183 (1994).

100. *Id.* at 185.

101. SUNSTEIN, *supra* note 11, at 169 (describing Nixon as “the anti-Roosevelt” in terms of social and economic rights). Sunstein also describes how Nixon’s Supreme Court appointee, Warren Burger, and Burger’s Court, “nipped these developments [social and economic rights] in the bud, and by 1975 the whole idea of minimum welfare guarantees had become implausible.”

102. *Id.*

that “we must now escape the spider’s web of dependency.”<sup>103</sup>

In the first two years of Reagan’s presidency, the food stamp program sustained \$6 billion in budget cuts.<sup>104</sup> Reagan believed in a welfare system that imposed norms of work and certain family values, whereby a man living in a household should provide for the family as husband and father, rather than allowing government support for those in other types of family and household relationships.<sup>105</sup>

In 1996, President Bill Clinton signed into law the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (“PRWORA”), abolishing the AFDC and presumably “reforming” the welfare state.<sup>106</sup> Clinton stated he wanted to “end welfare as we know it.”<sup>107</sup> At the time, most of those relying on the welfare cash benefits were women with children, and the idea was that because of the healthy economy, those women could find jobs.<sup>108</sup> The statute replaced existing programs with a cash welfare block grant called the Temporary Assistance for Needy Families (“TANF”) program.<sup>109</sup> Some of the goals were to end welfare as an entitlement program,<sup>110</sup> require recipients to work, place a lifetime limit of five years on cash benefits, discourage out-of-wedlock births, and enhance enforcement of child support.<sup>111</sup>

The program gave states fixed amounts (limited to five years) in

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103. Robert Pear, *Reagan Seeks Welfare Plan to Free Poor From Government Dependency*, N.Y. TIMES, Feb. 5, 1986, <http://www.nytimes.com/1986/02/05/us/reagan-seeks-welfare-plan-to-free-poor-from-government-dependency.html>.

104. Melnick, *supra* note 99, at 230.

105. *Id.* at 129.

106. Cf. Peter Edelman, *The Worst Thing Clinton Has Done*, ATLANTIC, Mar. 1997, <http://www.theatlantic.com/magazine/archive/1997/03/sun3/the-worst-thing-bill-clinton-has-done/376797/>.

107. *Id.*

108. Ed Koch, *It’s Time to Reexamine The Welfare Reform Law of 1996*, HUFFINGTON POST, (Apr. 19, 2012), [http://www.huffingtonpost.com/ed-koch/Welfare-reform\\_b\\_1428284.html](http://www.huffingtonpost.com/ed-koch/Welfare-reform_b_1428284.html).

109. *Id.*

110. See Jennifer E.K. Kendrex, *Punishing the Poor Through Welfare Reform: Cruel and Unusual?* 64 DUKE L.J. ONLINE 121 (2015).

111. *Id.*



the form of block grants designed to establish programs of temporary assistance.<sup>112</sup> The act does not require states to provide any specific assistance to the poor.<sup>113</sup> Instead, it added time limits and work rules and capped federal spending. Critics claimed that the reforms allowed states to stop providing cash assistance to the poor, most of whom could not find jobs because they were competing with skilled and semi-skilled middle-class workers, thus exacerbating the nation's poverty challenges.<sup>114</sup> Those who supported the new program praised the decreased dependency by the needy.<sup>115</sup>

Many contend that the end of AFDC, along with the 2007 to 2009 Great Recession, worsened the plight of America's poor.<sup>116</sup> Present rates of poverty in the United States are higher than in several other industrialized nations.<sup>117</sup> Several recent studies find that as many as one in every four low-income single mothers is unemployed and lacking cash aid—approximately four million women and children.<sup>118</sup>

The Supreme Court's role with regard to Congress and these programs in terms of advancing human dignity concerns related to food security, though inconsistent, has generally favored the government, against the interests of the poor and food insecure. Initially, in the late 1960s and early 1970s, the Supreme Court appeared willing to acknowledge a fundamental right to food security. In *Goldberg v. Kelly*,<sup>119</sup> *King v. Smith*,<sup>120</sup> and *Shapiro v.*

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112. Edelman, *supra* note 106.

113. Again, as described above, the poor can still turn to food stamps and Medicaid for some relief.

114. *Id.*

115. Jason DeParle, *Welfare Limits Left Poor Adrift as Recession Hit*, N.Y. TIMES (Apr. 7, 2012), [http://www.nytimes.com/2012/04/08/us/welfare-limits-left-poor-adrift-as-recession-hit.html?\\_r=1](http://www.nytimes.com/2012/04/08/us/welfare-limits-left-poor-adrift-as-recession-hit.html?_r=1).

116. See Hershkoff, *supra* note 87, at 801 ("Since 1996, . . . about two and a half million former welfare recipients have entered the labor market, earning, on average, only seven dollars an hour for a thirty hour work week—yielding an income below that of the poverty level for a household of two or more individuals.").

117. *Id.*

118. DeParle, *supra* note 115.

119. 397 U.S. 254 (1970).

120. 392 U.S. 309 (1968) (deciding Alabama's "substitute father" regulation, which denied AFDC benefits to the children of a mother who "cohabits" in or outside

*Thompson*,<sup>121</sup> the Court ruled in favor of welfare recipients in cases challenging provisions that would lessen or stop their benefits. For instance, in *Goldberg*, petitioners challenged the procedures New York used to terminate mothers' welfare benefits.<sup>122</sup> Under that state's law, welfare benefits could be denied based on a caseworker's mere doubts as to a recipient's eligibility.<sup>123</sup> A recipient could seek review of the caseworker's justifications by way of a hearing, but only after the state had terminated the benefits.<sup>124</sup> The Court held that because welfare benefits were like property, the government had to provide due process before taking them away.<sup>125</sup>

Despite these early cases, the early 1970s showed a weakening of Supreme Court support for rights of welfare recipients, a change scholars attribute to "the rising hegemony of the 'moral majority,' which argued that entitlement to basic rights should be predicated on behavioral prescriptions unrelated to actual need."<sup>126</sup> In *Dandridge v. Williams*, the Court rejected the notion that the "maximum grant" provision of Maryland's AFDC, by which families, no matter the number of children, could receive only a certain amount of benefits, violated the Equal Protection Clause.<sup>127</sup> The Court applied a rational basis test to the constitutional analysis rather than treating the classification (families with greater numbers of children) as a

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her home with any single or married able-bodied man, was inconsistent with the Social Security Act; the Court did not decide the constitutionality of the regulation.).

121. 394 U.S. 618 (1969) (striking down durational residency requirements as part of welfare benefits. Specifically, the Court addressed the 1992 part of the California statute regarding Aide to Families with Dependent Children limiting maximum welfare benefits during a resident's first year of residency in California to the amount the resident was receiving in his prior residence. For the California residents who sued, the statute resulted in substantially lower welfare benefits than they would have received, absent the statutory provision. The Court held the statute unconstitutional because it infringed on the resident's "right to travel," a right "firmly embedded in our jurisprudence.").

122. *Goldberg*, 397 U.S. at 257.

123. *Id.* at 258.

124. *Id.* at 256.

125. *Id.*

126. Bridgette Baldwin, *In Supreme Judgment of the Poor: The Role of the United States Supreme Court in Welfare Law and Policy*, 23 WIS. J.L. GENDER & SOC'Y 1, 13 (2008).

127. 397 U.S. 471, 486 (1970).

protected or suspect class requiring strict scrutiny standard of review and a compelling state interest; thus, the Court rejected the argument that the cap violated a fundamental right to welfare.<sup>128</sup> In their dissent, Justices Brennan and Marshall chided the majority for using the same constitutional test used for business regulations for “the literally vital interests of a powerless minority—poor families without breadwinners . . . .”<sup>129</sup>

A decade later, the Court again failed to affirm the poor’s human dignity in *Harris v. McRae*.<sup>130</sup> In *Harris*, a class of pregnant women sued, claiming the Hyde Amendment of the Medicaid program violated the equal protection guarantees of the Due Process Clause by denying them funding for medically necessary abortions.<sup>131</sup> At issue was whether the Medicaid program, which subsidizes a woman’s medically necessary services, could fail to subsidize a medically necessary abortion.<sup>132</sup> The Court rejected the plaintiffs’ constitutional claim, holding that due process does not confer entitlement to federal funds for the protected right to have an abortion.<sup>133</sup> The Court held as follows:

[R]egardless of whether the freedom of a woman to choose to terminate her pregnancy for health reasons lies at the core or the periphery of the due process liberty recognized in *Wade*, it simply does not follow that a woman’s freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices.<sup>134</sup>

While human dignity prevailed in allowing women the freedom to

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128. *Williams*, 397 U.S. at 487 (“By the early 1970s, however, the Court had rejected the view that the federal Constitution guarantees any right to minimal subsistence, declaring instead that ‘the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court.’”).

129. *Id.* at 520 (Brennan, J., dissenting).

130. 448 U.S. 297 (1980).

131. *Id.* at 332.

132. *Id.* at 301.

133. *Id.* at 318.

134. *Id.* at 316.

choose whether to terminate a pregnancy, human dignity was outweighed when the government had to get involved by paying for that freedom.

Justice Marshall, dissenting in *McRae*, referred to the Hyde Amendment as “the product of an effort to deny to the poor the constitutional right recognized in *Roe v. Wade*.”<sup>135</sup> Justice Marshall linked the outcome to the Court’s “unwillingness to apply the constraints of the Constitution to decisions involving the expenditure of governmental funds.”<sup>136</sup> While not using the term human dignity, Justice Marshall reflected on a welfare recipient’s dilemma to either have the child or obtain a “back-alley” abortion.<sup>137</sup> Justice Blackmun, in his dissent, described as “condescension” the Court’s statement that a Medicare recipient needing a medically necessary abortion “may go elsewhere for her abortion.”<sup>138</sup>

In the late 1980s, the Court continued to rule in favor of the government in a series of cases in which petitioners challenged the constitutionality of certain eligibility requirements in welfare statutes.<sup>139</sup> In *Luckhard v. Reed*, the Court ruled that personal injury awards should be counted as income for purposes of determining welfare eligibility.<sup>140</sup> In that case, the petitioner received a lump sum

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135. *McRae*, 448 U.S. at 338 (Marshall, J., dissenting).

136. *Id.* at 347.

137. *Id.* at 346.

138. *Id.* at 348 (Blackmun, J., dissenting).

139. See *Lyng v. Int’l Union, UAW*, 485 U.S. 360 (1988); *Bowen v. Gilliard*, 483 U.S. 587 (1987) (The Court used a rational basis analysis to affirm constitutionality of the provision at issue, which authorized AFDC to require that a family’s eligibility for benefits take into account, with certain exceptions, the income of all parents, brothers, and sisters living in the same home, which would include child support payments for one of the children from a non-custodial parent.). In his dissenting opinion, Justice Brennan discusses the government’s infringement of a fundamental right: “the Government “‘directly and substantially’ interfere[s] with family living arrangements, and thereby burden[s] a fundamental right. The infringement is direct, because a child whose mother needs AFDC cannot escape being required to choose between living with the mother and being supported by the father. It is substantial because the consequence of that choice is damage to a relationship between parent and child.” *Id.* at 624.

140. *Luckhard v. Reed*, 481 U.S. 368, 381 (1987).

personal injury payment, which disqualified her from AFDC funds.<sup>141</sup> If the government had treated the payment as an asset, the petitioner would have lost benefits for only the month in which she received the award.<sup>142</sup> The Court affirmed the state's treatment of the award as income, thus disqualifying the permanently disabled mother from AFDC benefits.<sup>143</sup> The Court also ruled against welfare benefits in *Lynn v. UAW*, upholding the state's denial of food stamps to a striking employee who was losing income because of the strike.<sup>144</sup> The Court agreed with the state that participation in the strike made petitioner ineligible for food stamps.<sup>145</sup>

In 1995, the Court in *Anderson v. Edwards*, upheld a California provision of the AFDC that groups into a single "assistance unit" all needy children living in the same household, including non-siblings, if one adult cares for them.<sup>146</sup> Petitioner, who was caring for her minor granddaughter and two grandnieces in the same household, sued because the California rule resulted in a \$200.00 decrease in her AFDC benefit (she had a higher amount of benefits when caring for only her granddaughter).<sup>147</sup> The Ninth Circuit Court of Appeals ruled the California provision violated federal law, but the Supreme Court disagreed.<sup>148</sup>

As shown, human dignity has proven frail as a constitutional value in cases involving the government's provision of economic assistance. This is so despite the strong ties between liberty, which the Court has routinely ruled to protect, and food security. Cass Sunstein highlights FDR's vision of a second Bill of Rights, premised on the notion that "necessitous men are not free men," saying: "[u]nlike the Constitution's framers, 'we have come to a clear realization of the fact that true individual freedom cannot exist

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141. *Reed*, 481 U.S. at 373.

142. *Id.* at 371.

143. *Id.* at 383.

144. 485 U.S. 360, 369 (1988).

145. *Id.*

146. *Anderson v. Edwards*, 514 U.S. 143, 145 (1995).

147. *Id.* at 148.

148. *Id.* at 149.

without economic security and independence.”<sup>149</sup> In light of the Court’s advancement of human dignity in *Obergefell*, reasons for the Court’s failure to acknowledge a right to food security have become increasingly fragile.

### **III. Five Reasons the United States Supreme Court Should Establish a Fundamental Right to Food Security**

The Court should affirm human dignity in welfare rights cases by acknowledging a fundamental right to food security under the Fourteenth Amendment Due Process or Equal Protection Clauses. The Court’s existing jurisprudence regarding liberty and human dignity, and international and foreign legal standards relating to food security evidences this conclusion. This section provides five arguments as to why the Court should acknowledge this right; each argument also provides a response to the counterargument as to why the Court has not and should not recognize such a right.

#### **A. The Positive/Negative Rights Distinction Lacks Merit in View of Supreme Court Human Dignity Jurisprudence.**

In his dissenting opinion in *Obergefell*, Justice Thomas emphasizes his position that human dignity serves as a constitutional value with regard to only negative rights: “Our Constitution—like the Declaration of Independence before it—was predicated on a simple truth: One’s liberty, not to mention one’s dignity, was something to be shielded from—not provided by—the State.”<sup>150</sup>

Justice Thomas linked the foundational principles of this country, as reflected in the Declaration of Independence’s “all men are created equal” proclamation, to its religious underpinnings that all men are created in the divine image “and therefore [are] of inherent worth.”<sup>151</sup>

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149. SUNSTEIN, *supra* note 11.

150. *Obergefell*, 135 U.S. at 2639 (Thomas, J., dissenting).

151. *Id.*

Justice Thomas then concluded that because of all citizens' innate human dignity, the government cannot advance nor impede the value.<sup>152</sup>

Commentators posit the Court relies on human dignity only to affirm negative rights, not positive ones that create obligations on the part of the State.<sup>153</sup> One commentator describes this distinction as follows: "[n]egative rights comprise defensive claims against invasion by the state; the citizen can assert a negative right against the government, ... positive rights extend a sword, entailing affirmative claims that can be used to compel the state to afford substantive goods or services" based on the Constitution.<sup>154</sup>

Despite the distinction, which many commentators reject as groundless with regard to a fundamental right to food security,<sup>155</sup> this argument lacks merit for several reasons. First, the government's commitment already exists. Our nation has already obligated itself to provide assistance to families in need, through programs such as TANF, WIC,<sup>156</sup> and food stamps. Arguably, the Court's present role is to ensure the government does not unfairly and without due process deprive citizens of access to these resources.<sup>157</sup> Yet, for the

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152. *Obergefell*, 135 U.S. at 2639 (Thomas, J., dissenting).

153. See Whitman, *supra* note 52, at 1161.

154. See Hershkoff, *supra* note 85.

155. *Id.* at 810 (questioning the validity of this distinction in view of constitutional challenges involving, for instance, denial of a parade permit; the commentator asks whether this challenge involves interference with a right or right to provision of police and other governmental services); Krasnov, *supra* note 11, at 737.

156. The United States Department of Agriculture Food and Nutrition Service describes WIC as a nutrition program for women, infants, and children ("WIC") that "provides Federal grants to States for supplemental foods, health care referrals, and nutrition education for low-income pregnant, breastfeeding, and non-breastfeeding postpartum women, and to infants and children up to age five who are found to be at nutritional risk." *Women, Infants, and Children (WIC)*, U.S. DEP'T OF AGRIC., <http://www.fns.usda.gov/wic/women-infants-and-children-wic> (last visited Oct. 5, 2015).

157. See Kendrex, *supra* note 110, at 138 ("Neither Congress nor the states can deny welfare benefits in a way that violates an individual's freedom of association or freedom to travel, and welfare cannot be denied without a full and fair hearing. Likewise, welfare cannot be instituted or revoked in a way that violates the Eighth Amendment.").

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past forty-five years, the Court has routinely ruled in favor of the government and against the poor.

With regard to obligations toward the poor, the Court has, in the past, relied on human dignity to rule in favor of a fundamental right to assistance under the Fourteenth Amendment Due Process and Equal Protection Clauses. In *Goldberg v. Kelly*, Justice Brennan linked the petitioner's constitutional claim to living with human dignity,<sup>158</sup> stating, "From its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders."<sup>159</sup> Justice Brennan went on to describe the impact of the state's failure to provide public assistance.

Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community. At the same time, welfare guards against the societal malaise that may flow from a widespread sense of unjustified frustration and insecurity. Public assistance, then, is not mere charity, but a means to "promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity."<sup>160</sup>

*Goldberg*,<sup>161</sup> *Shapiro*,<sup>162</sup> *United States Department of Agriculture v. Moreno*,<sup>163</sup> and *Boddie v. Connecticut*<sup>164</sup> reflect the Court embracing

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158. *Goldberg v. Kelly*, 397 U.S. 254, 264–65 (1970).

159. *Id.*

160. *Id.*

161. *Goldberg*, 397 U.S. 254 (1970).

162. *Shapiro v. Thompson*, 394 U.S. 618 (1969).

163. 413 U.S. 528, 543 (1973) (holding an amendment to the Food Stamp Act that excluded from eligibility any household containing someone unrelated to the others in the household, and thus discriminated against "hippies," violated the Fifth Amendment).

164. 401 U.S. 371, 382 (1971) (holding that due process prohibits the State from denying opportunity to dissolve a marriage because of inability to pay courts costs from indigence).



economic rights regarding the poor.<sup>165</sup> In *Goldberg*, Justice Brennan commenced a path in which the Court, looking through the due process lens, relied on a national “commitment” to assure the human dignity of all citizens by providing a minimum standard of life.<sup>166</sup>

Additionally, in other circumstances, the Supreme Court has relied on human dignity to satisfy constitutional guarantees, even when doing so requires an affirmative obligation on the government’s part. For instance, in Eighth Amendment jurisprudence with regard to prison conditions, the Court has ruled that the government must take steps to ensure the fair treatment of incarcerated individuals.<sup>167</sup> As Justice Kennedy said in *Brown v. Plata*, a prison overcrowding case involving inmates’ claims of inadequate health care: “A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society.”<sup>168</sup> Accordingly, once the government takes on the obligation to incarcerate, it must do so fairly based largely on human dignity concerns.

Public schooling provides another example. In *Brown v. Board of Education*, the Court sought to advance the human dignity of African-American children by striking down the “separate but equal” doctrine.<sup>169</sup> The Court never used the term human dignity; yet, the Court emphasized the demeaning impact on African-American children of having to attend a separate school from their white counterparts: “To separate them from others of a similar age and qualification solely because of their race generates a feeling of insecurity as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”<sup>170</sup> This ruling

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165. SUNSTEIN, *supra* note 11, at 159–62 (“By the late 1960s, the Court seemed to be moving toward recognition of a robust set of social and economic rights.”).

166. *Goldberg*, 397 U.S. at 265 (“From its founding, the Nation’s basic commitment has been to foster the dignity and well-being of all persons within its borders.”).

167. *Brown v. Plata*, 131 S. Ct. 1910, 1929 (2011).

168. *Id.* at 1928.

169. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *see Plessy v. Ferguson*, 163 U.S. 537 (1896).

170. *Brown*, 347 U.S. at 494.

created an affirmative obligation on the government's part to ensure the children's access to equal schools: "Today, education is perhaps the most important function of state and local governments ... 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>171</sup> As Cass Sunstein notes, many of our "negative rights" cost the government money and require the government's affirmative steps.<sup>172</sup>

In the 1960s, under President Johnson, the Government commenced an "unconditional" War on Poverty, with state and the federal government undertaking programs to provide resources for the needy.<sup>173</sup> Arguably, as with public education, Social Security, Medicare, and conditions on incarceration, the Court's current role is to strike down government attempts to unfairly interfere with individuals' access to the assistance (like denying benefits without a hearing). However, the welfare cases of the past fifty years reflect the Court doing just the opposite: affirming the government's attempts to lessen and chip away at access to government resources.<sup>174</sup>

### **B. The Court's Conception of Human Dignity, with its Strong Ties to Liberty is Consistent with a Right to Food Security.**

Liberty enjoys a paramount role in our constitutional jurisprudence based on the Founding Fathers' distrust of government and need to ensure against tyranny and government intrusion.<sup>175</sup> Many argue that since liberty serves as this nation's lodestar value, as

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171. *Brown*, 347 U.S. at 493.

172. SUNSTEIN, *supra* note 11, at 200.

173. The War on Poverty was part of President Lyndon Johnson's "Great Society." President Lyndon B. Johnson, Annual Message to Congress on the State of the Union (Jan. 8, 1964), <http://www.presidency.ucsb.edu/ws/?pid=26787>.

174. *See infra* Part III.

175. Edward Eberle, in one of his many comprehensive articles comparing Germany and the U.S., summarizes the key difference between the two nations' constitutional jurisprudence as "the vision of the Constitution they are pursuing, an American constitution of liberty as compared to a German constitution of dignity." Edward J. Eberle, *Equality in Germany and the United States*, 10 S.D. INT'L L.J. 63, 120 (2008).

opposed to human dignity, the preeminent value in other nations,<sup>176</sup> the Court's reliance on human dignity is limited to those instances that involve freedom from government interference and affirm privacy and autonomy. As Neomi Rao, who has written extensively on the contours and various meanings of human dignity, explains, "The positive, communitarian dignity at the heart of the welfare state is not the prevailing one in the United States. In American political and legal discourse, dignity is primarily associated with individual rights, a classical liberal understanding of freedom from interference."<sup>177</sup>

Some argue that economic rights are inconsistent with civil rights and liberty.<sup>178</sup> For instance, the Reagan administration<sup>179</sup> sought to "recast the vocabulary of the human rights debate" to eliminate economic rights.<sup>180</sup> The administration posited that human rights include "only 'political rights and civil liberties.'"<sup>181</sup> According to those who hold this view, "by recognizing economic rights, the government 'waters down' civil and political rights and undermines individual liberty."<sup>182</sup>

However, as with the Patient Protection and Affordable Care Act,<sup>183</sup> Social Security, Medicare, and public schooling, human dignity

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176. See Goodman, *supra* note 42 (comparing German and American notions of human dignity in constitutional jurisprudence); see Marc Chase McAllister, *Human Dignity and Individual Liberty in Germany and the United States as Examined Through Each Country's Leading Abortion Case*, 11 TULSA J. COMP. & INT'L L.J. 491, 491 (2004) (positing that securing civil liberties, not protecting human dignity, is the lodestar value of the American Constitution).

177. Neomi Rao, *American Dignity and Healthcare Reform*, 35 HARV. J.L. PUB. POL'Y 171, 174 (2013), [http://www.harvard-jlpp.com/wp-content/uploads/2013/10/35\\_1\\_171\\_Rao.pdf](http://www.harvard-jlpp.com/wp-content/uploads/2013/10/35_1_171_Rao.pdf).

178. Krasnov, *supra* note 11, at 756 (citing Philip Alston, *U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: the Need for an Entirely New Strategy*, 84 AM. J. INT'L L. 365, 385 (1990)).

179. Ronald Reagan was President from January 1981 to January 1989.

180. WILLIAM F. FELICE, *THE GLOBAL NEW DEAL: ECONOMIC AND SOCIAL HUMAN RIGHTS IN WORLD POLITICS* 238 (2010).

181. *Id.*

182. Krasnov, *supra* note 11, at 745.

183. Congress passed the Affordable Care Act, which President Obama then signed into law on March 23, 2010. On June 28, 2012, the Supreme Court upheld key

as liberty can certainly coexist with (and be enhanced by) the government's provision of resources. Many argue the government's provision of health care/insurance enhances liberty, just as public education provides freedom and opportunity to those who partake of it.<sup>184</sup> As FDR said, with regard to his "Second Bill of Rights,"<sup>185</sup> and the inadequacy of the first Bill of Rights, "We have come to a clearer realization of the fact ... that true individual freedom cannot exist without economic security and independence."<sup>186</sup> Arguably, the 14.7 million children living in poverty in the United States lack the same freedom and opportunities to participate in democracy as their counterparts who are food secure or enjoy "freedom from want."<sup>187</sup>

Regarding the differences between European and American notions of human dignity, commentators describe European nations' conception of human dignity as advancing the free unfolding of personality—the individual's right to develop and flourish.<sup>188</sup> In Germany and other nations, this right to flourish necessitates the government providing the basics of education, work, and food.<sup>189</sup> In Germany, the *Sozialstaat*, or social state principle, along with the promise of human dignity obligate the state to act on behalf of its citizens to secure their welfare and freedom.<sup>190</sup>

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provisions of the health care law. 42 U.S.C. § 300gg–11 (2010), <http://housedocs.house.gov/energycommerce/ppacacon.pdf>.

184. See SUNSTEIN, *supra* note 11, at 217–18.

185. *Id.*

186. FDR's third freedom, from his famous "Four Freedoms" speech, was freedom from want: "economic understandings which will secure to every nation a healthy peacetime life for its inhabitants everywhere in the world." President Franklin D. Roosevelt, Annual Message to Congress on the State of the Union (Jan. 6, 1941), <http://www.fdrlibrary.marist.edu/pdfs/fftext.pdf>.

187. *Goldberg*, 397 U.S. at 265 (1970) (Justice Brennan expressly tied welfare and providing for those in need to "securing the Blessings of Liberty.").

188. Edward J. Eberle, *Human Dignity, Privacy, and Personality in German and American Constitutional Law*, 1997 UTAH L. REV. 963, 966 (1997).

189. *See id.*

190. Human dignity arises from Article 1 of the Basic Law and the social state principle arises out of Article 20, which provides at section (1): "The Federal Republic of Germany is a democratic and social federal state." DEUTSCHER BUNDESTAG, BASIC LAW OF THE FEDERAL REPUBLIC OF GERMANY 27 (2012), [https://www.bundestag.de/blob/284870/ce0d03414872b427e57fccb703634dcd/basic\\_law-data.pdf](https://www.bundestag.de/blob/284870/ce0d03414872b427e57fccb703634dcd/basic_law-data.pdf).

The German Constitutional Court (“GCC”) has held that human dignity, with other constitutional guarantees, “imposes an obligation on the state to provide at least minimal subsistence to every individual.”<sup>191</sup> The GCC has used the promise of human dignity “to give meaning to the ‘existential minimum’ of social welfare in the German Basic Law, by which society is obliged to provide everyone with the socioeconomic conditions adequate for a dignified existence.”<sup>192</sup>

Fundamentally, the *Sozialstaat* obligates the state to act on behalf of its citizens to secure their dignity, welfare, and freedom. Certainly the obligation to enact social welfare measures is part of this. But so is the idea that the state has a moral duty to act on behalf of its citizens over a wide range of measures such as education, protection of human life, human security, and achievement of social justice. Further, the state is to respect and guarantee individual freedom and protect against violations of personal rights. The proactive duties associated with the state reflect a vision of man as not just an isolated, sovereign individual, but a person bound to, and defined within, a community. The idea of *Sozialstaat* obligates the state to create and maintain necessary social conditions so that man can thrive.<sup>193</sup>

Thus, the German idea of freedom suggests freedom *with* help from the government, rather than freedom *from* the government.<sup>194</sup> As Erin Daly explains the GCC’s interpretation of human dignity and the social state principle: “dignity means that people must have some control over their lives, must not be forced by circumstance to devote their lives to finding food or protection from the elements.”<sup>195</sup>

The GCC’s *Hartz IV* judgment illustrates the *Sozialstaat* principle. In *Hartz IV*, the GCC ruled the federal legislature had failed to properly determine social welfare benefits based on the legislature’s

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191. McCrudden, *supra* note 64.

192. Katherine G. Young, *The Minimum Core of Economic and Social Rights*, 33 YALE J. INT’L L. 113, 134 (2008).

193. Edward J. Eberle, *The German Idea of Freedom*, 10 OR. REV. INT’L L. 1, 52–53 (2008).

194. *Id.*

195. ERIN DALY, DIGNITY RIGHTS 155 (2013).

lack of underlying statistical investigation.<sup>196</sup> In reaching its decision, the GCC relied on the guarantee of human dignity, which provides an enforceable right to a subsistence level of benefits. This right “guarantees the whole subsistence minimum by a uniform rights guarantee[,] which encompasses both the physical existence of the individual that is food, clothing, household goods . . . and a minimum of participation in social, cultural and political life.”<sup>197</sup> Again, the state is not *giving* people dignity, but “merely enables every individual to lead a life that is consistent with human dignity, and uphold[s] the possibility of self-determination and autonomy.”<sup>198</sup>

American constitutional jurisprudence reflects a strong liberty component tied to human dignity, where state interference is a catalyst for dignity concerns, as in cases involving the right to choose (autonomy), and right to privacy (right to be left alone).<sup>199</sup> In *Roe v. Wade*<sup>200</sup> and the other cases involving abortion, the Court emphasized the right to choose. In 1992, in revisiting its abortion jurisprudence from *Roe v. Wade*, the Court in *Planned Parenthood v. Casey*,<sup>201</sup> described a woman’s right to choose:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, its meaning, of the universe, and of the mystery of human life.<sup>202</sup>

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196. See Stefanie Egidy, Casenote, *The Fundamental Right to the Guarantee of a Subsistence Minimum in the Hartz IV Decision of the German Constitutional Court*, VOL 12, NO. 11 GERMAN L.J. 1961 (2011).

197. *Hartz IV* 125 BVerfGE 175 (2010); DONALD P. KOMMERS AND RUSSELL A. MILLER, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 50 (3d ed. 2012).

198. *Id.* at 1970.

199. KOMMERS AND MILLER, *supra* note 197, at 1970.

200. 410 U.S. 113 (1973).

201. 505 U.S. 833 (1992) (plurality opinion) (reaffirming *Roe*’s basic holding, yet holding the legislature could constitutionally limit the right to abortion).

202. *Id.* at 851 (plurality opinion).

In *Casey*, Justice Stevens, concurring in part and dissenting in part in the opinion, described a woman's "authority" to choose whether to have an abortion as "an element of basic human dignity."<sup>203</sup> Commentators note the "intertwining nature of dignity, liberty, and privacy"<sup>204</sup> in these cases.

Our existing constitutional jurisprudence in criminal law,<sup>205</sup> racial and gender discrimination,<sup>206</sup> free speech,<sup>207</sup> and right to marriage equality<sup>208</sup> all reflect a conception of human dignity aligned with liberty as allowing the individual to flourish within society, not despite society. For instance, in *Cohen v. California*, the Court overturned Paul Cohen's arrest for wearing a jacket that said "f\*\*k the draft."<sup>209</sup> Justice Harlan noted the purpose of preserving human dignity in striking down the government's case.<sup>210</sup> Citing the concurring opinion by Justice Brandeis in *Whitney v. California*,<sup>211</sup> Justice Harlan noted that freedom of expression "will ultimately produce a more capable citizenry and more perfect polity and . . . no other approach would comport with the premise of individual dignity

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203. *Casey*, 505 U.S. at 916 (Stevens, J., concurring in part, dissenting in part).

204. Daly, *supra* note 179; see Rao, *supra* note 32, at 204 ("Individual liberty and freedom from interference emphasize the primacy of the individual, a being who chooses his own life. When courts invoke dignity in the context of holding off the government, they are invoking the idea that dignity rests in individual agency, the ability to choose without state interference.").

205. See *McKaskle v. Wiggins*, 465 U.S. 168, 176–77 (1984) ("The right to appear *pro se* exists to affirm the dignity and autonomy of the accused and to allow the presentation of what may, at least occasionally, be the accused's best possible defense.").

206. See *Roberts v. United States Jaycees*, 468 U.S. 609, 625 (1984) (noting the "deprivation of personal dignity that surely accompanies equal access to public establishments" (quoting *Heart of Atlanta Hotel, Inc. v. U.S.*, 379 U.S. 241, 250 (1964))).

207. *Bose Corp. v. Consumers Union*, 466 U.S. 485, 503 (1984) ("The First Amendment presupposes that the freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole.").

208. See *United States v. Windsor*, 133 S. Ct. 2675, 2689 (2013).

209. *Cohen v. California*, 403 U.S. 15, 26 (1971).

210. *Id.* at 24.

211. 74 U.S. 357, 375–77 (1927).

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and choice upon which our political system rests.”<sup>212</sup>

In *Roberts v. United States Jaycees*, a gender discrimination case, Justice Brennan described the effect of discrimination on the individual’s ability to thrive in society: “It thereby both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life.”<sup>213</sup> In these cases, the Court protected an interest much like the European free unfolding of personality, an interest that involves an individual’s identity and ability to flourish in society. Without food security and the accompanying dignity, an individual lacks the ability to participate in political, economic, and cultural life. As one commentator notes: “Rhetorically speaking, how can people exercise their free choice if they have no food on the table, or if they are unable to treat their sicknesses? Thus, positive dignity mandates state action to alleviate these conditions.”<sup>214</sup>

And, in *Obergefell*, Justice Kennedy described what liberty provides:

The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity. The petitioners in these cases seek to find that liberty by marrying someone of the same sex and having their marriages deemed lawful on the same terms and conditions as marriages between persons of the opposite sex.<sup>215</sup> In addition[,] these liberties extend to certain “personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.”<sup>216</sup>

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212. *Cohen*, 403 U.S. at 24.

213. *Roberts*, 468 U.S. at 625.

214. Glensy, *supra* note 26, at 66.

215. *Obergefell*, 135 U.S. at 2593.

216. *Id.* at 2597.



### C. The Supreme Court Has Ruled to Affirm Fundamental Rights Not Expressly Provided in the Constitution.

The Supreme Court has often relied on values and rights not expressly found in the Constitution. Human dignity itself is a value not mentioned in the Constitution; yet the Court has routinely relied upon it, though, as commentators often note, without providing its contours or definition.<sup>217</sup> Accordingly, while the Justices quibble over its meaning,<sup>218</sup> with some leaning on it much more heavily, and commentators continue to debate its relevance and definition, most agree the value plays a role in our constitutional jurisprudence.<sup>219</sup>

Some argue human dignity is among the nation's founding principles. In the Federalist Papers, Alexander Hamilton mentions human dignity as a lodestar value, arguing for adoption of the Constitution as "the safest course for your liberty, your dignity, and your happiness."<sup>220</sup> FDR called the Bill of Rights, "the great American charter of personal liberty and dignity."<sup>221</sup> As Judge Walter Mansfield wrote, in a case involving welfare benefits, the General Welfare

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217. See Maxine Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740 (2006); Rao, *supra* note 32, at 206 (2008); Henry, *supra* note 25, at 171; Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. 183 (2011).

218. See *infra* Part III.D.

219. See Paust, *supra* note 25; Henkin, *supra* note 22. In terms of the nation's Founders, the Declaration of Independence of 1776 states as a "self-evident truth" that "all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these, are Life, Liberty, and the Pursuit of Happiness." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). The Declaration goes on to state that government's purpose is "to secure these rights." Accordingly, the Court has repeatedly tied human dignity to Liberty.

220. THE FEDERALIST NO. 1 (Alexander Hamilton); Glensy, *supra* note 26, at 77; Parent, *supra* note 50, at 69 (noting that Alexander Hamilton, in the Federalist Papers, stated: "Yes, my countrymen, I own to you, that, that after having given in my attentive consideration, I am clearly of the opinion, it is your interest to adopt it. I am convinced, that this is the safest course for your liberty, your dignity, and your happiness.").

221. President Franklin D. Roosevelt, 131 Proclamation 2524, Bill of Rights Day (November 27, 1941), in U.C. SANTA BARBARA AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=16046>.

Clause of the Constitution's Preamble requires economic security:

Receipt of welfare benefits may not at the present time constitute the exercise of a constitutional right. But among our Constitution's expressed purposes was the desire to "insure domestic tranquility" and "promote general Welfare." Implicit in these phrases are certain basic concepts of humanity and decency. One of these, voiced as a goal in recent years by most responsible governmental leaders, both state and federal, is the desire to insure that indigent, unemployable citizens will at least have the bare minimums required for existence without which our expressed constitutional rights and liberties frequently cannot be exercised and therefore become meaningless.<sup>222</sup>

At the same time, the Court has acknowledged fundamental rights not expressly mentioned in the Constitution, the most famous among them being privacy. Although the Constitution does not mention privacy, the Supreme Court has acknowledged a right to privacy, based on human dignity, beginning in the 1960s with *Griswold v. Connecticut*, which involved the dispensing or use of birth control devices.<sup>223</sup> In *Griswold*, the Court first recognized the right to personal privacy under the Fourth and Fifth Amendments, made applicable to the states by the Fourteenth Amendment. The Court ruled unconstitutional a Connecticut statute prohibiting the dispensing or use of birth control devices to or by married couples.<sup>224</sup> In an opinion by Justice Douglas, the Court relied on penumbras emanating from the specific guarantees of the Bill of Rights.<sup>225</sup>

The opinion emphasized the sanctity of marriage, stating:

We deal with a right of privacy older than the Bill of

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222. *Rothstein v. Wyman*, 303 F. Supp. 339, 346–47 (S.D.N.Y. 1969).

223. *Griswold v. Connecticut*, 381 U.S. 479, 481–82 (1965).

224. *Id.* at 485.

225. *Id.* at 484 ("The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.").

Rights—older than political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred.<sup>226</sup>

In *Eisenstadt v. Baird* in the 1970s, and coming to the forefront more recently in *Lawrence v. Texas*, the Supreme Court has acknowledged the right to privacy “emanating” from the express guarantees, grounded in human dignity; it protects individuals against unwarranted government intrusion in their homes, bedrooms, and private affairs.<sup>227</sup>

The Court affirmed the “right to marry” in *Zablocki v. Redhail*, striking down as an equal protection violation, a law that prevented fathers who were behind on their child support payments from marrying.<sup>228</sup> The Court noted in *Loving v. Virginia*, primarily an equal protection decision, that “the freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”<sup>229</sup> And recently in *Obergefell*, the Court applied, as its second principle, that “the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals.”<sup>230</sup>

Not only has the Court ruled in favor of rights to privacy and to marriage but the Court has also struck down the constitutionality of statutes based on the “right to travel,” a right certainly not mentioned

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226. *Griswold*, 381 U.S. at 486; *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (establishing the right of unmarried people to possess contraceptives); *Lawrence v. Texas*, 539 US 558, 575–78 (2003) (Justice Kennedy discusses the stigma “all that imports for the dignity of the persons charged. The State cannot demean their existence or control their destiny by making their private conduct a crime”). *Bowers v. Hardwick*, 478 U.S. 186 (1986).

227. *Eisenstadt*, 405 U.S. at 453; *Lawrence*, 539 U.S. at 578.

228. 434 U.S. 374 (1978) (“Since our past decisions make clear that the right to marry is of fundamental importance, and since the classification at issue here significantly interferes with the exercise of that right, we believe that ‘critical examination’ of the state interests advanced in support of the classification is required.”).

229. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

230. *Obergefell*, 135 S. Ct. at 2599.

in the Constitution. In both *Shapiro v. Thompson*<sup>231</sup> and *Saenz v. Roe*,<sup>232</sup> the Court struck down durational residency requirements as part of welfare benefits. Specifically, the Court addressed the 1992 part of the California statute regarding AFDC that limited maximum welfare benefits during a resident's first year of residency in California to the amount the resident was receiving in his prior residence.<sup>233</sup> For the California residents who sued, the statute resulted in substantially lower welfare benefits than they would have received, absent the statutory provision.<sup>234</sup> The Court held the statute unconstitutional because it infringed on the resident's "right to travel," a right "firmly embedded in our jurisprudence."<sup>235</sup>

Similarly, in *Boddie v. Connecticut*, the Court advanced "a right to be heard" by striking down Connecticut's procedures for commencing a divorce action; the procedures required welfare recipients to pay court fees and costs for service of process, which restricted their access to the courts when suing for divorce.<sup>236</sup> Justice Harlan, writing for the Court, acknowledged "the right to be heard:" "No less than these rights, the right to a meaningful opportunity to be heard within the limits of practicality, must be protected against denial by particular laws that operate to jeopardize it for particular individuals."<sup>237</sup>

Each of these rights, none of which is expressly guaranteed in the Constitution and some of them fundamental based on the Court's analysis, arise out of the Court's role in preserving individuals' human dignity. Likewise, the Fourteenth Amendment Due Process and Equal Protection Clauses or a "penumbra" arising from a specific

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231. 394 U.S. 618, 642 (1969) (conurrence) (citing *United States v. Guest* for the notion that "the constitutional right to travel from one State to another ... has been firmly established and repeatedly recognized.").

232. 526 U.S. 489 (1999).

233. At the time of the decision, California, according to Justice Stevens, was one of the most generous states in terms of welfare benefits under the Aid to Families with Dependent Children programs. It had the sixth highest benefit levels. *Saenz*, 526 U.S. at 492.

234. *Id.* at 506–07.

235. *Id.* at 498.

236. 401 U.S. 371, 377–78 (1971).

237. *Id.* at 379.

guarantee, when aligned with human dignity concerns, should provide for a constitutional right to food security in the United States.

**D. The Supreme Court Should Rule in Favor of a Fundamental Right to Food Security Because Poverty Shames, Demears, and Humiliates, and the Court Has, in the Past, Ruled to Remedy Shame and Humiliation.**

As Tevya, the milkman from Anatevka says to God at the beginning of “If I Were a Rich Man,”<sup>238</sup> in *Fiddler on the Roof*: “Dear God, you made many, many poor people. I realize, of course, that it’s no shame to be poor. But it’s no great honor either!”<sup>239</sup> Commentators routinely link poverty to shame, in addition to poverty’s link to poor health and lack of education.<sup>240</sup> Regarding the humiliating impact of being poor, one commentator discussing poverty in England writes, “poverty is inextricably linked to shame across societies; it suggests that to ignore stigma is potentially to miss out on some of the most corrosive effects of poverty.”<sup>241</sup>

In discussing the earned income tax credit, a commentator recently praised it for providing a benefit to the poor without stigma: “While decades of research has shown that other anti-poverty programs tend to confer stigma, isolating the poor from mainstream society, this tax credit generates strong feelings of inclusion and hope for upward mobility.”<sup>242</sup>

The Court has routinely ruled in favor of petitioners seeking redress for constitutional infractions stemming from government

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238. From *Fiddler on the Roof*, a musical by Jerry Bock and Sheldon Harnick.

239. *If I Were a Rich Man lyrics*, LYRICSMANIA.COM, [http://www.lyricsmania.com/if\\_i\\_were\\_a\\_rich\\_man\\_lyrics\\_fiddler\\_on\\_the\\_roof.html](http://www.lyricsmania.com/if_i_were_a_rich_man_lyrics_fiddler_on_the_roof.html) (last visited Nov. 12, 2015).

240. Caroline Gregorie, *Study Reveals Sad Link Between Poverty and Children’s Brain Development*, HUFFINGTON POST (Mar. 30, 2015), [http://www.huffingtonpost.com/2015/03/30/brain-development-poverty\\_n\\_6968758.html](http://www.huffingtonpost.com/2015/03/30/brain-development-poverty_n_6968758.html).

241. Declan Gaffney, *The Missing Dimension of Poverty: Stigma*, *New Statesman*, (Feb. 15, 2013), <http://www.newstatesman.com/economics/2013/02/missing-dimension-poverty-stigma>.

242. Laura Tach & Kathryn Edin, *When Taxes Aren’t a Drag*, *N.Y. TIMES* (Apr. 13, 2105), [http://www.nytimes.com/2015/04/13/opinion/when-taxes-arent-a-drag.html?\\_r=0](http://www.nytimes.com/2015/04/13/opinion/when-taxes-arent-a-drag.html?_r=0).

treatment that demeans or humiliates. Search and seizure and prisoner treatment cases illustrate when the Court finds it necessary to step in to strike down whatever government action results in humiliation.<sup>243</sup> For instance, in *Hope v. Pelzer*, the Court struck down as unconstitutional an Alabama prison's practice of handcuffing misbehaving prisoners to a hitching post.<sup>244</sup> In describing the humiliating nature of the hitching post punishment (in the sun, without adequate water or bathroom breaks), the Court emphasized that what underlies the Eighth Amendment "is nothing less than the dignity of man."<sup>245</sup>

Regarding Fourth Amendment due process protection against unreasonable searches and seizures, the Court's language suggests an unwavering commitment to human dignity, in terms of avoiding shame and humiliation (however, the results at times belie this unwavering commitment).<sup>246</sup> In *Rochin v. California*,<sup>247</sup> after his arrest for allegedly possessing morphine in violation of California law, Mr. Rochin was forcibly taken to a hospital. Once there, under a police officer's direction, "a doctor forced an emetic solution through a tube

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243. See Goodman, *supra* note 217, at 767–76.

244. *Hope v. Pelzer*, 536 U.S. 730, 730 (2002).

245. *Id.* at 738.

246. See *Skinner v. Railway Labor Executives' Ass'n*, 482 U.S. 602 (1989) in which the Court affirmed the constitutionality under the Fourth Amendment of mandatory blood and urine tests for railroad employees under regulations promulgated by the Federal Railroad Administration. The Court held no warrants or reasonable suspicion were required before the testing because, in the balance, the government had a strong interest in obtaining the test results to ensure public safety. The employees had a diminished expectation to privacy because the test's intrusiveness was minimal. Justices Marshall and Brennan dissented in *Skinner v. Railway Labor Executives' Ass'n*, emphasizing the indignity and humiliation suffered by employees at having the sample taken. Urination is "among the most private of activities," according to the dissenting Justices, especially with a monitor listening at the door. *Id.* at 645. Justice Marshall likened the assault on personal dignity in *Skinner* to the World War II relocation-camp and McCarthy-era cases in terms of the denials of liberty in times of perceived necessity. *Id.* at 635. He wrote of the danger of sacrificing fundamental freedoms in the name of exigency: "History teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure." *Id.*

247. 342 U.S. 165 (1952) (the "shocks the conscience" decision).

into Rochin's stomach against his will. This 'stomach pumping' produced vomiting. In the vomited matter were found two capsules which proved to contain morphine."<sup>248</sup>

The Court, in an opinion by Justice Frankfurter, held that police violated Mr. Rochin's due process rights, describing the force used against him as brutal and "offensive to human dignity."<sup>249</sup> In 1984, the Court again struck down as unconstitutional a bodily intrusion where police sought to compel a criminally accused individual to undergo surgery to remove a bullet that might implicate the accused in criminal proceedings.<sup>250</sup> In applying the Fourth Amendment protection, the Court described the "extent of intrusion upon the individual's dignitary interests in personal privacy and bodily integrity."<sup>251</sup>

In *Lawrence v. Texas*,<sup>252</sup> the Supreme Court relied on human dignity when describing how the Texas anti-sodomy law at issue demeaned those subject to its prohibition.<sup>253</sup> The Court overturned *Bowers v. Hardwick*,<sup>254</sup> holding that a Texas law prohibiting homosexual sodomy violated the Equal Protection Clause of the Fourteenth Amendment in part because it was demeaning.<sup>255</sup> The Court further explained, "The State cannot demean their existence or control their destiny by making their private conduct a crime."<sup>256</sup> Justice Kennedy described the privacy interest at stake as follows: "It

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248. *Rochin*, 342 U.S. at 166.

249. *Id.* at 174. *But see* *Schmerber v. California*, 384 U.S. 757 (1966), in which the Court reached the opposite result, holding the intrusion constitutional, for mandatory testing of a criminally accused's blood for alcohol content. The Court, in an opinion by Justice Brennan, described the Fourth Amendment as protecting "personal privacy and dignity against unwanted intrusion by the State." *Id.* at 767. The blood tested passed constitutional muster only because the test chosen to measure blood-alcohol was reasonable under the circumstances and was performed in a reasonable manner.

250. *Winston v. Lee*, 470 U.S. 753 (1984).

251. *Id.* at 761.

252. 539 U.S. 558 (2003).

253. *Id.* at 575-78 (Justice Kennedy discusses the stigma "all that imports for the dignity of the persons charged. The State cannot demean their existence or control their destiny by making their private conduct a crime.").

254. 478 U.S. 186 (1986).

255. *Lawrence*, 539 U.S. at 558.

256. *Id.* at 578.

suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons.”<sup>257</sup> Accordingly, the Court has repeatedly treated human dignity as the antidote to laws and government acts that demean and humiliate.

The *Windsor* Court noted that the Fifth and Fourteenth Amendments “withdraw . . . from Government the power to degrade or demean . . . .”<sup>258</sup> In *Obergefell*, the Court discussed the “stigma” ascribed to the children of same sex couples who are unable to marry.

Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue here thus harm and humiliate the children of same-sex couples.<sup>259</sup>

This language resembles the language found in *Brown v. Board of Education*,<sup>260</sup> written sixty years ago, in which the Court described the impact of separate but equal on children as follows: “To separate them from others of a similar age and qualification solely because of their race generates a feeling of insecurity as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”<sup>261</sup> In both cases, the Court leans heavily on human dignity as the value underlying the constitutional guarantees at stake and the need to redress “institutionalized humiliation.”<sup>262</sup>

Likewise, the Court should acknowledge a fundamental right to

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257. *Lawrence*, 539 U.S. at 567.

258. *Windsor*, 133 S. Ct. at 2695.

259. *Obergefell*, 135 U.S. at 2593 (Much of the opinion is written in terms of protecting children).

260. 347 U.S. 483 (1954).

261. *Brown*, 347 U.S. at 494.

262. See Bruce Ackerman, *Dignity is a Constitutional Principle*, N.Y. TIMES (Mar., 29, 2014), [http://www.nytimes.com/2014/03/30/opinion/sunday/dignity-is-a-constitutional-principle.html?\\_r=0](http://www.nytimes.com/2014/03/30/opinion/sunday/dignity-is-a-constitutional-principle.html?_r=0).



food security because, among other ills involving health and education, poverty shames. Dissenting in *Wyman v. James*,<sup>263</sup> Justice Marshall noted the “severe intrusion upon privacy and family dignity” arising from welfare visits to a family’s home.<sup>264</sup> This anti-shame conception of human dignity is certainly controversial. Justice Scalia challenges this “anti-shame” conception of human dignity in *Indiana v. Edwards*,<sup>265</sup> a case involving whether a state that insists a defendant, whom the court deems competent to stand trial, not represent himself (for competency concerns) violates that defendant’s right to self-representation.<sup>266</sup> The Court, in an opinion by Justice Breyer, explained that the right of self-representation will not preserve a defendant’s human dignity (as it is meant to do) if the defendant lacks the mental capacity to conduct his defense without the assistance of counsel.<sup>267</sup>

The dissenting justices questioned the Court’s conception of human dignity as remedying conduct that demeans and shames.<sup>268</sup> Rather, according to Justice Scalia, human dignity means “being master of one’s fate rather than a ward of the State—the dignity of individual choice.”<sup>269</sup> He goes on to say “if the Court is to honor the particular conception of ‘dignity’ that underlies the self-representation right, it should respect the autonomy of the individual by honoring his choices knowingly and voluntarily made.”<sup>270</sup> Thus, the State should never step in to interfere with individual choice even if that choice leads to humiliation on the part of the petitioner.<sup>271</sup> Scalia suggested the government actually impedes an individual’s

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263. 400 U.S. 309 (1971).

264. *Id.* at 340 (Marshall, J., dissenting).

265. 554 U.S. 164 (2008).

266. In *McKaskle v. Wiggins*, 465 U.S. 168 (1984), the Court affirmed the constitutional right of self-representation with Justice O’Connor saying, “The right to appear *pro se* exists to affirm the dignity and autonomy of the accused and to allow the presentation of what may, at least occasionally, be the accused’s best possible defense.” *Id.* at 176-177.

267. *Id.*

268. *James*, 400 U.S. at 347 (Marshall, J., dissenting).

269. *Edwards*, 554 U.S. at 187.

270. *Id.*

271. *Id.*

dignity by insisting on the use of counsel.<sup>272</sup>

In *Obergefell*, Justice Thomas provided a different definition of human dignity. Justice Thomas wrote that because dignity is innate, the government can never advance it or deprive an individual of it.<sup>273</sup> In his dissenting opinion, which many commentators criticize for its reference to the dignity of slaves,<sup>274</sup> Justice Thomas described the “corollary” of human dignity as follows:

Human dignity cannot be taken away by the government. Slaves did not lose their dignity (any more than they lost their humanity) because the government allowed them to be enslaved. Those held in internment camps did not lose their dignity because the government confined them. And those denied governmental benefits certainly do not lose their dignity because the government denies them those benefits. The government cannot bestow dignity, and it cannot take it away.<sup>275</sup>

Thus, unlike Justice Scalia, Justice Thomas defined the notion as something immutable, inherent in each person regardless of state action or inaction. Justices Scalia and Thomas have conceded that human dignity serves as a value; the differences come in what the value means and requires. According to Justices Thomas and Scalia, human dignity will never serve as a reason for the Court to rule on a constitutional issue because it is immutable—everyone has it, all the time, so the State cannot infringe on it or fail to afford it. Yet, as shown here, the Court, international and foreign law, the federal government, and state governments have all (at times) taken the

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272. *Edwards*, 554 U.S. at 187.

273. *Obergefell*, 135 S. Ct. at 2639 (Thomas, J., dissenting).

274. Scott Eric Kaufman, *Thomas’ Offensive Comparison: Same-Sex Marriage Opponents are Like Slaves—Defeated but Still Possessing Dignity*, SALON.COM (Mar. 26, 2015), [http://www.salon.com/2015/06/26/thomas\\_offensive\\_comparison\\_same\\_sex\\_marriage\\_opponents\\_are\\_like\\_slaves\\_defeated\\_but\\_still\\_possessing\\_dignity/](http://www.salon.com/2015/06/26/thomas_offensive_comparison_same_sex_marriage_opponents_are_like_slaves_defeated_but_still_possessing_dignity/). See Jamil Smith, *Clarence Thomas’s Disgraceful Definition of Human Dignity*, NEW REPUBLIC (June 26, 2015), <http://www.newrepublic.com/article/122178/clarence-thomas-marriage-equality-dissent-all-about-him>.

275. *Obergefell*, 135 S. Ct. at 2639.

opposite approach, applying the need to protect, preserve, restore, and at times advance human dignity to remedy individualized, institutional humiliation and shame.

**E. The Court has Often Relied on International Legal Standards and Foreign Law,<sup>276</sup> Both of Which Require Food Security.**

With regard to food security in the international arena, the United States “increasingly finds itself an outlier to an emerging global consensus.”<sup>277</sup> It has “ratified fewer major human rights treaties than any other economically developed democracy....”<sup>278</sup>

Under international law, all citizens have a right to food security based largely on the promise of human dignity. Article 25 of the Universal Declaration of Human Rights provides as follows:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care[,] and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.<sup>279</sup>

And, the International Covenant on Economic, Social, and Cultural Rights (“ICESCR”) provides at Article 11:

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276. See Rex. D. Glensy, *The Use of International Law in U.S. Constitutional Adjudication*, 25 EMORY INT’L L. REV. 197 (2011) (identifying the differences between international legal standards and foreign law).

277. See Bruce Porter, *Judging Poverty: Using International Human Rights Law to Refine the Scope of Charter Rights*, 15 J. LAW & SOCIAL POL’Y 117, 122 (2000) (“On the other hand, our [Canada’s] approach to human rights protections has not incorporated this fundamental difference and has tended to conform more to a U.S. style rights regime in which social and economic rights have been accorded little recognition.”).

278. Aaron X. Fellmeth, *Leading from (a Bit) Behind: the United States and International*, 40 N.C. J. INT’L L. & COM. REG. 977, 988 (2014).

279. UNIVERSAL DECLARATION OF HUMAN RIGHTS, [http://www.ohchr.org/EN/UDHR/Documents/UDHR\\_Translations/eng.pdf](http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf); Glendon, *supra* note 47, at xv-xvi.

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed....<sup>280</sup>

The United States has signed but not ratified the Covenant, thus it is not bound to adhere to it.<sup>281</sup> There are 164 parties to the ICESCR, but only 6 signatories.<sup>282</sup> One commentator notes the United States' refusal to ratify the Convention, *and* its refusal, along with only one other country, to ratify the Convention on the Rights of the Child.<sup>283</sup> The United States has maintained this position of failing to affirm these covenants despite these treaties being based on the fundamental notion that "[a]ll human beings are born free and equal in dignity and rights."<sup>284</sup>

Other nations' constitutions provide for a fundamental right of food security, tied to human dignity. The South African Bill of Rights<sup>285</sup> provides that everyone has a right to sufficient food and water,

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280. United Nations, Office of the High Commissioner for Human Rights, Status of Ratification, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>.

281. *Id.* at 754 ("The President's signature indicates at least a political willingness to be bound by the Covenant . . . thus, should the U.S. government decide to start systematically depriving its citizens of basic economic rights, it would be in breach of the ICESCR.").

282. United Nations, Office of the High Commissioner for Human Rights, Status of Ratification, <http://indicators.ohchr.org/>; Krasnov, *supra* note 11, at n. 6.

283. Porter, *supra* note 277, at 123.

284. UNIVERSAL DECLARATION OF HUMAN RIGHTS, *supra* note 279.

285. See SUNSTEIN, *supra* note 11, at 217 (describing the South African Constitution as "the world's leading example of a transformative constitution" because so much of it was aimed at eliminating the system and effects of apartheid).

and the State must take “reasonable legislative and other measures within its available resources, to achieve the progressive realization of that right.”<sup>286</sup> The Bill of Rights in the South African Constitution “enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.”<sup>287</sup>

The landmark case involving socioeconomic rights, particularly the right to housing, *Government of the Republic of South Africa v. Grootboom*<sup>288</sup> acknowledged the interrelatedness of the socioeconomic rights with the civil and political rights in its reading of the Constitution. The Constitutional Court proclaimed, “[T]here can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter.”<sup>289</sup> Affording socioeconomic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2.”<sup>290</sup> *Grootboom* focused on the right to adequate housing; however, the Constitutional Court acknowledged that the socioeconomic rights included in the Constitution cannot only exist on paper but must actually be implemented.<sup>291</sup> The Court held the basic necessities of life are provided to all to affirm the promise of a society based on human dignity.<sup>292</sup> According to the Court, the state must take affirmative steps to remedy the plight of those living in poverty, the homeless, or those residing in inhabitable dwellings.<sup>293</sup>

Similarly, the German Basic Law contains both objective and subjective rights; the objective rights *obligate* the government to fulfill the objective values outlined in the Basic Law.<sup>294</sup> Objective rights are described as forming “part of the legal order, the order public, [and]

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286. *Bill of Rights*, S. AFRICAN CONST., Ch. 2, Section 27(1)(b), (2), <http://www.justice.gov.za/legislation/constitution/chp02.html>.

287. *Id.* at Section 7(1).

288. *Gov’t of the Republic of S. Afr. v. Grootboom*, 2000 1 (CC), <http://www.saflii.org/za/cases/ZACC/2000/19.html>.

289. *Id.*

290. *Grootboom*, *supra* note 288, at para. 23.

291. *Id.* at para. 20.

292. *Id.* at 34.

293. *Id.* at 20 (para. 24).

294. DEUTSCHER BUNDESTAG, *supra* note 190.

thereby taking their place among the governing principles of German society.”<sup>295</sup> Accordingly, the state has affirmative obligations to secure certain rights, including the rights to basic necessities to live, as described in the *Hartz IV* decision.<sup>296</sup>

The Supreme Court has certainly relied on both international law standards as well as the standards of individual nations as persuasive authority for its decisions. The *Miranda* decision relies on English and Scottish law for the warnings police must provide those whom they plan to interrogate and the results of those procedures.<sup>297</sup> In *Miranda*, Justice Warren explained:

The experience in some other countries also suggests that the danger to law enforcement in curbs on interrogation is overplayed. The English procedure, since 1912 under the Judges’ Rules, is significant. As recently strengthened, the Rules require that a cautionary warning be given an accused by a police officer as soon as he has evidence that affords reasonable grounds for suspicion....<sup>298</sup>

In *Roper v. Simmons*,<sup>299</sup> a 2005 decision striking down capital punishment for juvenile offenders, Justice Kennedy wrote: “The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.”<sup>300</sup> Justice Kennedy cited the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child.<sup>301</sup> Likewise, in Justice Kennedy’s opinion in *Lawrence v. Texas*,<sup>302</sup> he cited three decisions of the European Court of Human Rights, noting that homosexual conduct was accepted as “an integral part of human freedom.”<sup>303</sup>

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295. DEUTSCHER BUNDESTAG, *supra* note 190, at 969.

296. *See supra* Part III.B.

297. *Miranda v. Arizona*, 384 U.S. 436, 468–88 (1966).

298. *Id.* at 486.

299. 125 S. Ct. 1183 (2005).

300. *Id.* at 578.

301. *Id.* at 576.

302. 539 U.S. 558 (2003).

303. *Id.* at 577.

The Court's practice of relying on this persuasive authority to bolster its analysis is certainly controversial, with certain justices showing more of a willingness to do so.<sup>304</sup> Justice O'Connor encouraged courts' continued reliance on foreign and international law as a way "to innovate, to experiment, and to find new solutions to the new legal problems that arise each day; they offer much from which we can learn and benefit."<sup>305</sup> The Court has certainly shown its willingness to benefit from these authorities in its prior constitutional analysis, and therefore, it should once again look to other nations and international law standards to acknowledge food security as a fundamental right in this country.

## Conclusion

Lawyers and academics should restore efforts to persuade the Court that just as the Constitution protects human dignity by allowing Americans to marry, to travel, to make private decisions about personal issues like contraception, and, if incarcerated, to receive adequate health care, so too should all Americans enjoy a right to food security. Today, approximately 17.5 million households in the United States live without this very basic necessity, and many of those living without food are children. Certainly, the promises of general welfare, ordered liberty, and living with dignity, all of which the Court has relied on, are diminished for those who lack sufficient food and nutrition. This Article seeks to reignite the necessary discussion about the challenges of a Supreme Court jurisprudence in which human dignity requires a right of all to marry but, up until this point, does not acknowledge a fundamental right to food security for all.

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304. See Diane Marie Amann, Cynthia R.L. Fairweather & Vivian Rhoe, *Using International Law to Defend the Accused*, 1 CAL. CRIM. L. REV. 1, 13 (2000). See David T. Hutt & Lisa K. Parshall, *Divergent Views on the Use of International and Foreign Law: Congress and the Executive Versus the Court*, 33 OHIO N.U. L. REV. 113 (2007).

305. SANDRA DAY O'CONNOR, *THE MAJESTY OF THE LAW, REFLECTIONS OF A SUPREME COURT JUSTICE* (2003) 234–35 (discussing reasons American judges should increase their reliance on foreign and international law).

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# Police Terror and Officer Indemnification

ALLYSSA VILLANUEVA\*

## Introduction

On May 6, 2012, Oakland Police Officers Miguel Masso and Joseph Fesmire initiated a stop of Alan Bluford and two friends in Oakland, CA.<sup>1</sup> The facts are disputed but the altercation escalated resulting in Bluford sustaining three fatal gunshot wounds from Officer Masso.<sup>2</sup> Bluford was an 18-year-old high school senior.<sup>3</sup> No weapons were found on Bluford and witnesses stated he was not a threat to anyone around.<sup>4</sup> In July of 2012, Bluford's mother filed suit in federal district court under 42 U.S.C. § 1983 for violation of her son's civil rights against the Oakland Police Department and the individual officers involved.<sup>5</sup> In June of 2014, the case settled with an award agreement in the amount of \$110,000 to Bluford's family and was approved by the Oakland City Council.<sup>6</sup>

These homicides are portrayed as aberrations from routine

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1. Bluford v. City of Oakland, No. 12-CV-0379-WHO, 2014 WL939939, at \*1 (N.D. Cal. Mar. 6, 2015).

2. *Id.*

3. *Alan Bluford FAQ*, JUSTICE4ALANBLUEFORD.ORG (Nov. 12, 2012), <http://justice4alanblueford.org/2012/11/12/alan-blueford-faq/>.

4. *Id.*

5. Complaint for Damages for Violations of Civil Rights and Wrongful Death, Bluford v. City of Oakland, No. C12-03791 (N.D. Cal. July 19, 2012).

6. *Family of Teen Killed by Oakland Police Receives \$110k Settlement*, ABC 7 NEWS (June 4, 2014), [http://abc7news.com/news/family-of-teen-killed-by-oakland-police-receives-\\$110k-settlement/94178/](http://abc7news.com/news/family-of-teen-killed-by-oakland-police-receives-$110k-settlement/94178/).



policing and as rare “accidents.”<sup>7</sup> However, this atomized focus on each single event transforms them into a spectacle and it is the job of the spectacular to draw attention away from the banality of police murder as standard operating procedure.<sup>8</sup> The spectacularized event of murder by police is actually routine.<sup>9</sup> Police power is unique because it is the government’s central grant of authority to use physical repression and violence against citizens.<sup>10</sup> This includes implied power over life and death.<sup>11</sup> Police actions must be reviewed because a unique aspect of their power is the ability to use lethal force against unarmed citizens.<sup>12</sup> Even if there were no demonstrable pattern of police malpractice, the experience of American history suggests that safeguards must be constructed against any grant of state power as large as that given to the police.<sup>13</sup>

Critical Race Theory (“CRT”) was founded as a critique of the law as an institution complicit in the creation and sustenance of racism, discrimination, and other forms of societal inequality.<sup>14</sup> This Note offers a critique of indemnification law specifically, and § 1983 generally, as the main civil cause of action for homicides committed by police in the line of duty. Furthermore, CRT provides an analytical framework to assess the current economy of

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7. Steve Martinot & Jared Sexton, *The Avant-Garde of White Supremacy*, 9 SOCIAL IDENTITIES: J. FOR THE STUDY OF RACE, NATION, & CULTURE 2, 6 (2003).

8. *Id.*

9. Reported data shows that officers have killed 600-800 people every year in the past decade, which suggests a routine, if not daily, occurrence. ANDREA M. BURCH, *2003-2009 Statistical Tables*, BUREAU OF JUSTICE STATISTICS, ARREST-RELATED DEATHS 4 at T1 (2011).

10. Government police power is the general power to infringe on individual liberty to serve the public welfare. See *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962).

11. ZENITH GROSS, POLICE POWER AND CITIZENS’ RIGHTS: THE CASE FOR AN INDEPENDENT REVIEW BOARD 4 (ACLU ed., 1966); Achille Mbembe, *Necropolitics*, 15 PUBLIC CULTURE 11, 11 (*Translated by Libby Mientjes*, 2003).

12. *Id.* at 4.

13. *Id.* at 14.

14. CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT xiii-xiv (Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas eds., 1995).

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police violence, its historical trajectory, and legal structuring through a racial lens.

Before attending law school, I completed an undergraduate honors thesis entitled “Police Terror and Anti-Black Genocide in the United States.”<sup>15</sup> That thesis examined the issue of officer-involved homicides through a Black Studies and Ethnic Studies framework. The scope of this Note is limited to lethal police violence as it becomes subject to § 1983 litigation through a Critical Race Theory lens. The Note focuses specifically on § 1983 civil suits and the doctrine of indemnification; it will not include any discussion of potential criminal liability or nonlethal forms of police use of force.

Often, the only direct consequences for officers comes internally from their department or the locality they serve.<sup>16</sup> These commonly include: paid administrative leave, work suspension, negative reports in their file, job transfer, and other disciplinary measures. Many civil rights laws rely heavily on the assumption that police officers pay judgments and settlements out of their own pockets.<sup>17</sup> However, most officers do not.<sup>18</sup> The court’s jurisprudence prohibiting municipal liability for punitive damages was designed to protect taxpayers from bearing the costs of officer misconduct.<sup>19</sup> However, recent studies reveal that taxpayers almost always satisfy both compensatory and punitive damage awards assessed against their sworn servants.<sup>20</sup> This cost shifting effectively undercuts any liability potentially imposed on

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15. Allyssa Villanueva, *Police Terror and Anti-Black Genocide in the United States* (June 13, 2012) (unpublished B.A. honors thesis, U.C. San Diego) (on file with the Ethnic Studies Department, U.C. San Diego).

16. There is no comprehensive tracking of discipline and punishment rates of officers who use excessive force. This is due in part to the lack of mandated reporting and to the fact that many aspects of personnel decisions are not available for public disclosure. For officers’ thoughts and experiences with discipline, see DAVID WEISBURD ET AL., THE POLICE FOUNDATION, “THE ABUSE OF POLICE AUTHORITY: NATIONAL STUDY OF POLICE OFFICERS’ ATTITUDES” loc. 31 (2001) (online report) <http://www.policefoundation.org/wp-content/uploads/2015/06/Weisburd-et-al.-2001-The-Abuse-of-Police-Authority.pdf>.

17. Joanna Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 887 (2014).

18. *Id.*

19. *Id.* at 888.

20. *Id.* at 890.

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an individual officer through court judgment.

To address this practice, which fails to serve the goal of deterrence of lethal police misconduct, I propose excluding public monetary awards resulting from officer-involved homicides from indemnification coverage so that officers will bear sole responsibility. Individual liability is a necessary component in the regime of police reform to increase officer accountability and to decrease the number of officer-involved homicides of unarmed civilians each year.

I will first discuss the current problems of lethal police violence. I then discuss the doctrine of indemnification. I will then center my discussion on civil suits brought under 42 U.S.C. § 1983 and how the doctrine of indemnification, as applied, undermines the goals of the statute as well as the goal of deterring lethal police violence, which is my primary concern. I conclude by proposing my own solutions directed at local governments.

## **I. Overview of the Problem of Officer-Involved Homicides in the United States**

A central hurdle to defining the problem of officer-involved homicides is the lack of national and uniform reporting requirements. Departments currently participate in federal reporting programs on a voluntary basis.<sup>21</sup> Therefore, no one knows exactly how many people die each year at the hands of law enforcement. Reporting mandates are a key component to federal police reform.<sup>22</sup>

The United States (U.S.) Department of Justice publishes reports on arrest-related deaths nation-wide.<sup>23</sup> In the Department's most recent report of data from 2003 to 2009, homicide by law enforcement was the leading cause of arrest-related death and increased by eight

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21. Reporting mandates may accompany consent decrees resulting from Department of Justice investigations of unconstitutional "pattern and practices." 42 U.S.C. § 14141 (1994).

22. PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, INTERIM REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING 8 (2015).

23. BURCH, *supra* note 9, at Fig. 1.

percent over the course of the reporting period.<sup>24</sup> Regardless of the manner of death, 4,813 people died in the course of arrest during this period.<sup>25</sup> Local governments are uniquely positioned to address this problem as 73.3 percent of arrest-related deaths reported to the federal government from 2003-2009 involved local police departments.<sup>26</sup>

### A. Officer-Involved Homicides Are a Manifestation of Racism.

Nationally, communities have organized protests, educational events, media blackouts, and occupations to demonstrate their dissatisfaction with officer-involved homicides and the lack of remedies, consequences, or meaningful reform.<sup>27</sup> The existing data also support the public's charges of racial inequality in arrest and arrest-related deaths.<sup>28</sup> The existence of racial category in the federal government's reports presupposes a racial dynamic in the tactic of police lethal violence.<sup>29</sup> Racism is the ordinary means through which dehumanization achieves ideological normality and it is through the practice of dehumanizing people that produces a racial category.<sup>30</sup> Regardless of intent, our national policing structure results in the disproportionate victimization and risk of death to civilians based on race.

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24. *Id.*

25. BURCH, *supra* note 9, at T1.

26. *Id.* at T17.

27. See, e.g., Kenrya Rankin Naasel, *RECAP: From #BlackLivesMatter to #RiseUpOctober, a Day of Protest*, COLORLINES (Oct. 26, 2015, 1:51 PM) <http://www.colorlines.com/articles/recap-blacklivesmatter-riseupoctober-day-protest>; David Nakamura & Hamil Harris, *20 Years After the Million Man March, a Fresh Call for Justice on the Mall*, WASH. POST (Oct. 10, 2015), [https://www.washingtonpost.com/politics/20-years-after-the-million-man-march-a-fresh-call-for-justice-on-the-mall/2015/10/10/b3d8ffca-6f66-11e5-b31c-d80d62b53e28\\_story.html](https://www.washingtonpost.com/politics/20-years-after-the-million-man-march-a-fresh-call-for-justice-on-the-mall/2015/10/10/b3d8ffca-6f66-11e5-b31c-d80d62b53e28_story.html).

28. BURCH, *supra* note 9, at T3 (disaggregating statistics by racial categories, including "White, non-Hispanic;" "Black non-Hispanic," "Hispanic," "Other," "Unknown").

29. *Id.*

30. RUTH WILSON GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* 243 (2007).

Overall, 27.8 percent of all arrests were Black people yet thirty-one percent of the reported deaths related to arrest were Black victims.<sup>31</sup> Between 2003 and 2009, 1,529 Black victims were killed during arrests, which amounts to about one Black person per day, giving rise to the popularized slogan that a Black person is killed every twenty-eight hours by state or local law enforcement personnel in the U.S.<sup>32</sup> During the time period of this study, the national Black population was reportedly under thirteen percent.<sup>33</sup> Every historical study of police use of fatal force has found that persons of color (principally Black males) are a disproportionately high percentage of the persons shot by police compared to their representation in the general population.<sup>34</sup> If the number of Black people killed annually by law enforcement personnel is not alarming enough, consider the total number of victims, irrespective of race and/or gender.<sup>35</sup> Black people are more likely to be killed by police now than they were fifty years ago.<sup>36</sup>

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31. BURCH, *supra* note 9, at T3.

32. BURCH, *supra* note 9.

33. JESSE MCKINNON, *THE BLACK POPULATION: 2000*, 1 (2001). It is also important to note that California is the leading state in arrest-related deaths, with 775 total reported deaths over the six-year period. See BURCH, *supra* note 9.

34. Hubert G. Locke, *The Color of Law and the Issue of Color: Race and the Abuse of Police Power*, in *POLICE VIOLENCE: UNDERSTANDING AND CONTROLLING POLICE ABUSE OF FORCE* 129, 135 (William A. Geller & Hans Toch eds., 1996).

35. Citizen-generated databases estimated that 1,029 people were killed by law enforcement in 2014. See Jay Symopoulus, *Citizen Run Database Show over 1,000 People Killed by Cops in 2014*, FREE THOUGHT PROJECT (Dec. 10, 2014), <http://thefreethoughtproject.com/data-shows-1000-people-killed-cops-2014/>. The last report released by the Bureau of Justice Statistics totaled 4,813 deaths in custody or during attempted arrests from 2003-2009. See *More than 4,800 Arrest-Related Deaths Reported from 2003 to 2009*, BUREAU OF JUSTICE STATISTICS (Nov. 17, 2011, 10:00 AM), <http://www.bjs.gov/content/pub/press/ard0309stpr.cfm>.

36. Recent data estimates that police killed 238 Black people in 2014. See Tony Ortega, *Black Americans Killed by Police in 2014 Outnumbered Those Who Died on 9/11*, RAW STORY (Apr. 8, 2015, 12:47 PM), <http://www.rawstory.com/2015/04/black-americans-killed-by-police-in-2014-outnumbered-those-who-died-on-911/>.

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### B. Racism Manifested in Officer-Involved Homicides is Historical.

Although heightened attention to systemic police violence is recent, the practice is historical. Gerald Robin's study remarked that throughout several past sociological studies, "Regardless of the index used, then, the Negro's tendency to be a subject of police slayings is excessive [noting that] for a nation as a whole the ratio of Negro to white rates of the victim-offender was 7 to 1, respectively."<sup>37</sup> A study conducted in Philadelphia from 1950 to 1960 found that 87.5 percent of the victims of homicides by police were Black while the current population of the city was only twenty-two percent Black.<sup>38</sup>

In a subsequent study produced in 1974, research determined that the death rate for Blacks was found to be consistently nine times higher than for whites for the entire period of 1950-1968 in his study of police killings of "unarmed" civilians.<sup>39</sup> This study suggested that the rise in Black victims of homicide by police is attributable to the rise in Black militancy and political struggle during the time period.<sup>40</sup> One year later, an article on police killings in the U.S. from 1965 to 1969 based on the National Vital Statistics systems report combined this previous data and determined that Black people were killed by the police at a rate thirteen times higher than for whites and not the nine to ten times previously reported.<sup>41</sup> The report also offered details that thirty percent of the civilians killed from 1965 to 1969 were not involved in criminal activity. This is confirmed by a report released by the Police Foundation, which reveals that as many as forty percent of civilians killed by the police were not involved in serious criminal conduct.<sup>42</sup> These studies provide evidence of a history of racist and anti-Black

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37. Gerald Robin, *Justifiable Homicide by Police Officers*, 54 J. CRIM. L. & CRIMINOLOGY 223, 226 (Summer 1963).

38. *Id.* at 2.

39. Sid Haring, Tony Platt, Richard Speigman & Paul Takagi, *The Management of Police Killings*, 8 CRIME & SOC. JUSTICE 34, 34 (1977).

40. *Id.*

41. *Id.* at 36.

42. *Id.* at 39. The Police Foundation's mission is to advance policing through innovation and science. *Id.*

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policing practices in the U.S. The ratio has increased between Black and white victims even while the Black American population has declined.<sup>43</sup>

### C. Officers Enjoy a Unique Level of Impunity.

The police continue to kill civilians. Officer impunity adds insult to injury. Though officer-involved homicides are a daily occurrence, criminal prosecutions of police officers for misconduct in the line of duty are exceedingly rare.<sup>44</sup> Police officers have been indicted in every region of the U.S. for acting under the color of law, unlawfully shooting the victim, and taking away his or her constitutional right not to be deprived of life and liberty without due process of law. However, federal indictments do not mean that justice has been obtained because all too often the police officers involved are found not guilty. From 2009 to 2011, 2,716 officers throughout the U.S. faced allegations of excessive force.<sup>45</sup> Of those 2,716 officers, only twenty-eight were charged with a crime and fourteen were convicted which is only a 0.5 percent conviction rate.<sup>46</sup> As evidence of historical trend, 180 out of 228 officers indicted by the federal government between 1971 and 1975 were acquitted.<sup>47</sup>

These data reveal a continued pattern of protection and justification for officers who kill. Impunity itself is troubling but becomes intolerable when data and other evidence indicate that

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43. The Black U.S. population was 13.2 percent in 2012. U.S. CENSUS BUREAU, THE BLACK ALONE POPULATION IN THE UNITED STATES: 2012 (May 2, 2015), <http://www.census.gov/population/race/data/ppl-ba12.html>. The same year, there were 313 reported extrajudicial killings of Black people, amounting to one Black person killed every twenty-eight hours. ARLENE EISEN, OPERATION GHETTO STORM: 2012 ANNUAL REPORT ON EXTRAJUDICIAL KILLINGS OF 313 BLACK PEOPLE BY POLICE, SECURITY GUARDS AND VIGILANTES 12 (2014), [http://www.operationghettostorm.org/uploads/1/9/1/1/19110795/new\\_all\\_14\\_11\\_04.pdf](http://www.operationghettostorm.org/uploads/1/9/1/1/19110795/new_all_14_11_04.pdf).

44. Marshall Miller, Note, *Police Brutality*, 17 YALE L. & POL'Y REV. 149, 152 (1998).

45. David Packman, *The Problem with Prosecuting Police in Washington State*, NAT'L POLICE MISCONDUCT REPORTING PROJECT (Feb. 21, 2011, 12:55 AM), <http://www.policemisconduct.net/the-problem-with-prosecuting-police-in-washington-state/>.

46. *Id.*

47. Harring et al., *supra* note 39, at 40.

officer-involved homicides are also informed by systemic racism.<sup>48</sup> Though they occur at different times and places, these homicides are similar to the extent that they are premised on the logic of anti-Black racism.<sup>49</sup>

Furthermore, victims cannot defer to the existing structure of criminal justice when the alleged perpetrator of illegal behavior is an officer of the law. Even though police officers are employees of the local or state government, victims' families must turn to these same structures to seek justice. This triggers distrust in the legal system, which is exacerbated when there are seemingly no consequences for officers who are responsible for the death of an unarmed civilian. These notions of the state as the arbiter of justice and the police as the unaccountable arbiters of lethal violence are two sides of the same coin.<sup>50</sup>

## II. 42 U.S.C. § 1983 and its Application to Local and State Governments and Individual Police Officers

42 U.S.C. § 1983 is the most commonly used civil cause of action to remedy homicides caused by police officers, therefore, it follows that indemnification also occurs in cases alleging unconstitutional conduct under § 1983 against law enforcement personnel.<sup>51</sup> Indemnification protects police officers from individual liability for monetary judgments entered against them and ensures that a prevailing plaintiff can collect their court-ordered judgment.<sup>52</sup>

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48. Locke, *supra* note 34, at 137. Hubert Locke's research on race and police violence concludes that officers are more likely to use reasonable force against Blacks which increases the likelihood that such officers will adopt an aggressive or hostile approach to Black suspects but not white suspects.

49. Villanueva, *supra* note 15, at 40.

50. Martinot & Sexton, *supra* note 7, at 2.

51. Martin Schwartz, *Should Juries be Informed that Municipality Will Indemnify Officer's § 1983 Liability for Constitutional Wrongdoing?*, 86 IOWA L. REV. 1209, 1211 (2001).

52. *Id.*



The Court's jurisprudence of § 1983 has developed as tort law.<sup>53</sup> Therefore, tort principles determine available remedies, which include compensatory, punitive, and exemplary damages. Compensatory damages are strictly provided to compensate the prevailing party for the injury suffered, thus these awards must correlate with the actual harm to the aggrieved party.<sup>54</sup> On the contrary, punitive damages are awarded as retribution and deterrence of the offending party's unlawful actions.<sup>55</sup> *Smith v. Wade* held that the threshold showing for awarding punitive damages in § 1983 cases requires that defendants be motivated by "evil motive or intent" or show "reckless or callous indifference to the federally protected rights of others."<sup>56</sup> The amounts awarded for punitive damages are left to the discretion of the jury or fact finder.<sup>57</sup> Exemplary damages are awarded when a defendant's behavior results from an "evil state of mind" including recklessness or spite.<sup>58</sup> Exemplary damages differ from punitive awards in that they may also serve compensatory functions.<sup>59</sup>

States and municipalities throughout the country frequently indemnify police officers to protect them from personal liability for monetary awards. States such as California mandate that public entities defend their employees in suit and pay any "judgments, compromises, or settlements agreed to in the process."<sup>60</sup> A 2014 study found that approximately 9,225 civil rights cases were resolved with payments to plaintiffs between 2006 and 2011 in the forty-four largest police jurisdictions in the country.<sup>61</sup> Of those cases, officers financially contributed to settlements or judgments in approximately 0.41

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53. *Smith v. Wade*, 461 U.S. 30, 34 (1983).

54. James R. Mckown, *Punitive Damages: State Trends and Developments*, 14 REV. LITIG. 419, 422-23 (1995).

55. *Id.*

56. *Smith*, 461 U.S. at 56.

57. *Id.* at 54.

58. Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 517 (1957).

59. *Id.* at 520-21.

60. See, e.g., CAL. GOV'T CODE § 825(a) (1995).

61. Schwartz, *supra* note 17, at 912-13.

percent of the cases and only 0.02 percent of the total dollars paid.<sup>62</sup> Furthermore, no officer paid any portion of a punitive damage award assessed against him or her.<sup>63</sup> A subsequent study of police misconduct suits confirmed that no City of Oakland police officer has paid settlement costs in civil rights-related cases since 1990.<sup>64</sup> The information collected further evinces that the largest police departments in the country *each* paid, on average, upwards of \$20 million in settlements from 2006 to 2010.<sup>65</sup> Indemnification shifts these costs from the individual officers and their respective police departments to cities and their resident taxpayers. Indemnification thus operates to make citizens, including the victims, pay the costs of lethal police misconduct.

Municipalities are specifically subject to § 1983 suits whereas the Eleventh Amendment gives states immunity against such suits and any resulting damages.<sup>66</sup> Municipalities often indemnify officers for compensatory damages under § 1983. State indemnification statutes regarding punitive and exemplary damages commonly require that the employee must (1) have acted within the scope of employment, (2) not have engaged in intentional, reckless, or malicious wrongdoing, and (3) be in the best interest of the public entity.<sup>67</sup> All three factors are weighed under the “sole discretion” of the government or public entity.<sup>68</sup>

Municipalities, specifically, are immune from being assessed punitive damages in § 1983 suits.<sup>69</sup> However, *Smith* held that officers may be sued in their individual capacity and assessed punitive

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62. *Id.*

63. *Id.* at 916.

64. Abraham Hyatt, *Oakland Spent \$74 Million Settling 417 Police Brutality Lawsuits*, OAKLAND POLICE BEAT (Apr. 9, 2014), <http://oaklandpolicebeat.com/2014/04/oakland-spent-74-million-settling-417-police-brutality-lawsuits/>; JOHN L. BURRIS, BLUE VS. BLACK: LET'S END THE CONFLICT BETWEEN COPS AND MINORITIES 22–23 (1999).

65. Schwartz, *supra* note 17, at 912–13.

66. *Id.* at 1214; U.S. CONST. amend. XI.

67. Schwartz, *supra* note 51, at 1217; *see, e.g.*, CAL. GOV'T CODE § 825(b).

68. CAL. GOV'T CODE § 825(b).

69. *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981).

damages.<sup>70</sup> In practice, municipalities pay the cost of punitive damages. However, the threshold findings required to award punitive damages should make an officer ineligible for indemnification. A municipality's obligation to indemnify an officer for punitive damages does not make the municipality the real party in interest, and thus does not violate the holding in *Newport*<sup>71</sup> that municipalities are immune from punitive damages under § 1983.<sup>72</sup> This precedent leaves municipalities responsible for damage awards that may rest primarily on punishment of the officer and not on compensation for the plaintiff. Furthermore, evidence that the municipality may indemnify the defendant is not admissible at trial.<sup>73</sup> In general, federal courts exclude this information from the jury just as liability insurance is excluded in tort cases.<sup>74</sup> State courts have not resolved whether a jury should be informed of this fact.<sup>75</sup>

The two prominent justifications in favor of officer indemnification are (1) that officers will be deterred from performing their jobs and (2) indemnification ensures that the plaintiff will be made whole. To the first claim, there is no factual basis to assert that law enforcement will be chilled if officers are not indemnified since no municipality has implemented a reform to deny indemnification of their officers in lawsuits for lethal use of force against unarmed civilians. Though this may be a legitimate concern, studies show that officers rarely pay any out-of-pocket costs for their defense or to satisfy awards assessed against them.<sup>76</sup> Many states require governments to provide officers with legal representation to defend claims arising from conduct or omission within the scope of officers' employment, regardless of whether the department ultimately

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70. *Smith*, 461 U.S. at 35.

71. *Newport*, 453 U.S. at 271.

72. Schwartz, *supra* note 51, at 1220; *see also* *Cornwell v. Riverside*, 896 F.2d 398 (1990); *Bell v. Milwaukee*, 536 F. Supp. 462 (1982).

73. Schwartz, *supra* note 51, at 1220.

74. *Id.* at 1229–30.

75. *Id.* at 1212.

76. Schwartz, *supra* note 17, at 890.

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indemnifies the officer.<sup>77</sup> Available evidence indicates that law enforcement officers are almost always provided with defense counsel paid by municipalities when they are sued.<sup>78</sup> Finally, refusing to perform one's job without indemnification presupposes conduct that warrants litigation. This is a reasonable expectation for law enforcement occupations. However, it becomes unreasonable to expect indemnification in the context of litigation regarding conduct that rises to the level of evil that warrants punitive damages.

The second justification that plaintiffs will not be made whole is the most compelling. Yet even this justification is not wholly merited, for at least two reasons. First, a plaintiff who has lost a relative due to an officer-involved homicide can never be made truly "whole" in the tortious sense, or be put back into the same position they were in before the incident, because the victim is deceased. On this ground, the tort of wrongful death is more egregious than lesser degrees of injury cognizable under tort law yet offers the same remedies. Second, police are government agents, funded through public dollars, and controlled by local and state governments. The public should all be uncomfortable allowing state agents whose primary mission is to "protect and serve" and enforce the law to commit arguably the most heinous crime—homicide—with no direct personal or financial liability.

The California Supreme Court addressed both arguments in its 1976 holding, in *Williams v. Horvath*, that state indemnification applies to officer defendants in § 1983 federal suits.<sup>79</sup> The court expressly rejected the argument that indemnification deprives plaintiffs of their rights to full relief, because this would mean that governments are never liable for their employees' conduct, and would actually limit plaintiffs' recovery.<sup>80</sup> The Court comments, "[I]t may be argued that to permit indemnification would remove an effective deterrent to illegal police conduct—the potential of personal liability. But in truly egregious cases the

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77. *Id.*; see, e.g., Cal. Gov't Code § 825(a) (1995).

78. *Id.* at 915. Officer defendants are usually represented by a city attorney or county counsel.

79. 16 Cal.3d. 834, 836 (1976).

80. *Id.* at 845.

indemnification statutes expressly forbid reimbursement by the entity.”<sup>81</sup> Government indemnification or constructive indemnification by police unions and foundations show the opposite of this theory: near complete indemnification no matter the alleged conduct or judgment. Local governments assume entire liability for defense and fulfillment of awards with no responsibility resting on the individual officer whose conduct is the impetus of the suit.

### III. The Legislative and Judicial History of 42 U.S.C. § 1983 and its Application

42 U.S.C. § 1983 makes it unlawful for any person, under color of law, to deprive any citizen of any rights, privileges, or immunities secured by the U.S. Constitution and federal and state law.<sup>82</sup> Section 1983 does not confer substantive rights to potential plaintiffs, but creates a cause of action to vindicate rights found either in the U.S. Constitution or federal statute.<sup>83</sup> Section 1983 was originally enacted as the “Ku Klux Klan Act” to provide a remedy for civil rights violations inflicted by anyone acting “under the color of law.”<sup>84</sup> Section 1983 was passed in response to voluminous reports of Ku Klux Klan (“KKK”) violence and the inability of local governments to address it.<sup>85</sup> Nonenforcement of the law on the state and local level was the main problem identified by Congress at the time of the Act’s passage.<sup>86</sup> The Act was passed with the larger purpose of ensuring that lower governments would enforce the Civil Rights Act of 1866 and the Fourteenth Amendment. Congressman Lowe of Kansas expressed at the time that:

While murder is stalking abroad in disguise, while

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81. *Id.* at 848.

82. 42 U.S.C. § 1983.

83. *Id.*

84. Civil Rights Act of 1871 (Act Apr. 20, 1871, c. 22, § 1, 17 Stat. 13) (also referred to as “Enforcement Act of 1871,” “Third enforcement Act,” or “Third Klu Klux Klan Act”).

85. *Monroe v. Pape*, 365 U.S. 167, 174 (1961).

86. *Id.*

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whippings, lynching and banishing have been visited upon unoffending American citizens, the local administrators have been found inadequate or unwilling to apply the proper corrective measures. Combinations, darker than the night that hides them, conspiracies, wicked as the worst of felons could devise, have gone unwhipped of justice. Immunity is given to crime and the records of public tribunals are searched in vain for any evidence of effective redress.<sup>87</sup>

The Supreme Court of the United States addressed the specific question of whether police officers are equally subject to § 1983 suits in *Monroe v. Pape*.<sup>88</sup> In that case, the plaintiffs alleged that thirteen Chicago police officers broke into their home without a search or arrest warrant, made all the residents stand naked in their living room, ransacked their belongings, detained Plaintiff Monroe for questioning for ten hours without access to an attorney, then released Monroe with no charges.<sup>89</sup> The Court held that acting “under color of” the law is interpreted as a misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.<sup>90</sup> Since the *Monroe* decision held that police are certainly subject to suits under this provision, § 1983 suits have increased.<sup>91</sup>

Subsequently, *Monell v. Department of Social Services of the City of New York*, addressed whether a municipality can be the subject of suit under § 1983.<sup>92</sup> The *Monell* Court overruled the portion of *Monroe* that held that local governments are completely immune from suit under § 1983.<sup>93</sup> The Court held that local governments and officials can be

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87. Cong. Globe, 42d Cong. 1st Sess., 374 (1871) (remarks of Rep. Lowe) (quoted in *Wilson v. Garcia*, 471 U.S. 261, 276 (1985)).

88. *Monroe*, 365 U.S. at 174.

89. *Monroe*, 365 U.S. at 169.

90. *Id.* at 184.

91. Sheldon H. Nahmad, *Personal Viewpoint: The Mounting Attack on Section 1983 and the 14th Amendment*, 67 A.B.A. J. 1575, 1586 (1981).

92. 436 U.S. 658, 658 (1978).

93. *Id.* at 658.

sued directly under § 1983 for alleged constitutional violations as a result of an official policy or custom which results in a “pattern or practice” of misconduct.<sup>94</sup> Indemnification creates a liability relationship that mirrors the tort concept of *respondeat superior* between municipalities and its officers.<sup>95</sup> *Respondeat superior* imposes vicarious liability on an employer because of the conduct or omission of its employee.<sup>96</sup> However, the Supreme Court held in *Monell* that vicarious liability through *respondeat superior* is inapplicable to § 1983 suits.<sup>97</sup>

The original 1871 Act also included provisions for harsher punishment when the underlying charge is a criminal offense including larger fines and extended prison sentences.<sup>98</sup> In *United States v. Harris*, the Court interpreted these provisions when the State brought criminal conspiracy charges against Tennessee Sheriff, R. G. Harris, and nineteen others who removed four men from a county jail and subsequently beat one man to death.<sup>99</sup> The Court held that the criminal provisions were unconstitutional because Congress did not have constitutional authority to regulate private individuals.<sup>100</sup> *Harris* was only recently overturned in *United States v. Beebe*.<sup>101</sup> In *Beebe*, the defendants were indicted under the Hate Crimes Prevention Act of 2009 for conspiracy to commit a federal hate crime and the racially motivated harassment and assault of a developmentally disabled Navajo minor.<sup>102</sup> The Court held that Congress did have authority to enact the criminal provisions under the power granted by the Thirteenth Amendment and that racially motivated violence is a badge and incident of slavery.<sup>103</sup> Section 1983 was enacted to

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94. *Id.* at 659.

95. Schwartz, *supra* note 17, at 889.

96. 51 A.L.R. Fed. 285 § 2(a) (1981).

97. *Monell*, 436 U.S. at 707.

98. Civil Rights Act of 1871 (Act Apr. 20, 1871, c. 22, § 1, 17 Stat. 13).

99. *U.S. v. Harris*, 106 U.S. 629, 629–31 (1883).

100. *Id.* at 640–42.

101. 807 F. Supp. 2d 1045 (2011).

102. *Id.* at 1047; *see also* 18 U.S.C. § 249 (Hate Crimes Prevention Act of 2009).

103. *Beebe*, 807 F. Supp 2d at 1051 & 1056.

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counteract domestic terrorism and nonenforcement of the law, often perpetrated by the same person: law enforcement officers. Indemnification, especially in the blanket application we see today, undercuts the purpose of § 1983 by circumventing direct liability and denying citizens full protection from violence by those “acting under color of law.”<sup>104</sup>

#### **IV. Circumvention of the Original Purpose of § 1983 Through Officer Indemnification**

Our nation has declared racism a problem of the police force itself, embedded in police policies and in individual officer discretion.<sup>105</sup> If police are racist, and racism manifests itself in lethal police misconduct, officer indemnification is, in effect, the symbolic sanctioning of these attitudes and practices. Officer-involved homicides are an auxiliary constituent of the carceral state, a revised practice of lynching with many of the same tenets linking racism, criminalization, and domestic terrorism.<sup>106</sup>

##### **A. Officers Involved in Lethal Misconduct Do Not Face Legal Consequences.**

As this Note has described, officer-involved homicides contribute to our society’s long legacy of state terror and oppression. Furthermore, the legal recourse for this violence is inadequate. Criminal prosecution of officers is exceedingly rare, and the few that are charged rarely result in conviction.<sup>107</sup> Civil suits are often the only way to impose legal liability on officers following a homicide. The

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104. *Monroe*, 365 U.S. at 174 (discussing the purpose and history of Section 1983 to redress civil rights violations by law enforcement or failure to enforce the law by local law enforcement).

105. PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING, *supra* note 22.

106. Terrorism defined as the use of violence and intimidation in pursuit of political aims.

107. Allyssa Villanueva, *Police Terror and Prosecutorial Discretion*, (UC Hastings College of the Law, working paper, 2015) (on file with author) (providing an overview of problems in criminal prosecution of officers and suggested solutions for local governments).



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main justification for indemnification is its supposed benefit to plaintiffs by ensuring that the liability of insolvent officers will shift to municipalities whom are able to pay monetary awards.<sup>108</sup> However, this reduces the legitimate substantive claims of constitutional violations resulting in death to a mere discussion of money. Indemnification contributes to the banality of police terror when it has the power to curtail this practice. Indemnification, as applied, shields officer defendants and does nothing to shield citizens from the violence that gives rise to § 1983 suits. This injustice is exacerbated by the low rates of criminal prosecution of officers who are found to have unlawfully used lethal or excessive force against unarmed civilians who posed no threat to them while in the line of duty. Local government involvement to assist with monetary remedies diminishes the significance of the violation and the injury to the plaintiffs that often includes racism and unjust lethal violence by government agents.

**B. The Current Application of Indemnification to § 1983 Suits Does Not Serve the Goal of Deterrence.**

The prospect and accumulation of civil suits, unfortunately, may not be enough to actually deter officers or encourage governments to implement policies that will have such a deterrent effect. A recent study found that the six police departments, constituting thirty-two percent of officers in the largest police departments across the country, do not gather or analyze information from lawsuits against them or their officers in any comprehensive or systematic way.<sup>109</sup> This information could be used for preventative and remedial measures including: early identification of problematic officers with a history of

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108. *See, e.g., Williams v. Horvath*, 16 Cal. 3d 834, 847 (1976) (holding that indemnification does not frustrate purpose of § 1983 but rather furthers the purpose by ensuring that Plaintiffs can recover from Defendants and that municipalities can be liable).

109. Joanna Schwartz, *Myth & Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decision-making*, 57 UCLA L. REV. 1023, 1045 (2010).

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misconduct or complaints, identification of patterns & trends, and investigation of claims made in lawsuits.

Furthermore, individuals charged under § 1983, who are not officers of the law, do not have the benefit of an agency to indemnify their awards. Such defendants must bear the total brunt of the liability. Indemnification creates a more favorable outcome for officer defendants compared to civilian defendants for the same violation. This “privilege” available to officer defendants is unsettling because officers are currently subject to § 1983 more frequently than civilians.<sup>110</sup> Blanket indemnification results in no legal accountability, criminal or civil, to individual officers engaged in misconduct. There are countless examples of officers, chiefs, and other officials who have revealed deep-seated racist beliefs and attitudes.<sup>111</sup>

### **C. The Current Law Enforcement Regime is Directly Connected to a Legacy of Domestic Terrorism in the U.S.**

The KKK is arguably the most well-known domestic terrorist organization in the U.S.<sup>112</sup> The KKK was directly responsible for the systematic perpetration of centuries of racialized domestic terror, inflicted upon African Americans, in particular.<sup>113</sup> Reports estimate that countless police departments across the country actively participated in at least fifty percent of documented lynchings in the U.S. between 1880 and 1950, and passively condoned a majority of the rest.<sup>114</sup> An important and ironic dynamic of this history of state-sponsored violence is the commonly known fact that many KKK

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110. Nahmad, *supra* note 91.

111. See, e.g., Associated Press, *7 San Francisco Officers Suspended over Racist Texts*, HUFFINGTON POST, [http://www.huffingtonpost.com/2015/04/03/cops-racist-text-suspend\\_n\\_7001580.html](http://www.huffingtonpost.com/2015/04/03/cops-racist-text-suspend_n_7001580.html) (Apr. 4, 2015, 8:59 AM).

112. *Extremist Files: Ku Klux Klan*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/ideology/ku-klux-klan> (last visited Oct. 17, 2015).

113. *Id.*

114. Robert A. Gibson, *The Negro Holocaust: Lynching and Race Riots in the United States, 1800-1950*, YALE NEW HAVEN TEACHERS INST. (2015), <http://www.yale.edu/ynhti/curriculum/units/1979/2/79.02.04.x.html>.

members and participants in these high-profile, coordinated, and widely celebrated acts of terrorism were in fact, distinguished members of the law enforcement community. Officers were routinely complicit in refusing to charge known KKK terrorists, to vindicate its victims, and allowing mobs and terror groups to forcefully take victims from police custody. Concerned citizens and hate-tracking organizations, like the Southern Poverty Law Center, have discovered officers belonging to the KKK or other hate groups that conflict with the mission of police departments.<sup>115</sup> Most police departments do not currently screen officers for hate group affiliation.<sup>116</sup> These facts intensify the demand for equal policing that is free of racism and discrimination.

For a nation-state like the U.S., sovereignty means the capacity to define who matters and who dies.<sup>117</sup> In a local context, police are given that power of discretion. Licensed by law, the mere capacity of the police for vicious and “irrational” violence is an important part of the state’s repressive apparatus, regardless of statistical frequency.<sup>118</sup> The willingness of the police to kill people exerts a control power far beyond any statistical measure of the actual incidence of police killings.<sup>119</sup> Even with statistical measure, victims are unequal along racial lines.

## V. Proposed Reform at the Local Government Level to Deter Lethal Use of Force

The objectives of this proposed reform are deterrence and

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115. Allie Jones, *This Florida Police Department Can’t Stop Hiring KKK Members*, GAWKER (July 14, 2014, 2:51 PM), <http://gawker.com/two-alleged-kkk-members-fired-from-florida-police-depar-1604795204>.

116. Renee Lewis, *No Police Screening for KKK, Hate Group Membership, Florida Case Shows*, AL JAZEERA (July 15, 2014, 2:30 PM), <http://america.aljazeera.com/articles/2014/7/14/kkk-florida-police.html>.

117. Achille Mbembe, *Necropolitics*, 15 PUB. CULTURE 11, 11 (Translated by Libby Mientjes, 2003).

118. Haring, et al., *supra* note 39, at 42.

119. *Id.*

punishment. At the least, municipal governments should not indemnify punitive awards based on officer misconduct, because the awards are based solely on findings of egregious misconduct and imposed for the purpose of punishment, not compensation. Complete non-indemnification of officers in any suit resulting from lethal misconduct (as opposed to nonlethal) is needed from employing agencies to deter lethal use of force policies and practice. A strict policy will force officers to not just think about the potential of civil suit but also the possibility of personal liability for monetary awards.

Prosecutorial discretion and internal investigations following officer-involved homicides demonstrate an unwillingness to criminally charge officers causing current national controversy. As discussed in Part IV, arguments that without indemnification people will not become officers or that officers cannot perform their jobs are unpersuasive. Furthermore, direct personal liability for civil awards puts an extreme financial burden on the officer(s) based on the fact that awards can reach millions of dollars. It is unlikely that officers will bear the burden alone. Police culture has created an ironclad system of moral, political, and financial support from police unions, foundations, and the larger American public.<sup>120</sup> Many of these organizations use their power to fund attorneys and support campaigns for officers. The National Police Misconduct Statistics and Reporting Project estimates that civil litigation related to police misconduct cost \$72 billion in 2009 alone.<sup>121</sup> Simple exposure to civil liability requires minimal reform effort with a potential for high societal impact. Local governments should not be in the business of indemnifying punitive awards by definition of the degree of conduct required to warrant punitive damages. Furthermore, local governments can use their statutory discretion to refuse to indemnify

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120. See, e.g., online fundraising campaigns for Officer Darren Wilson who was acquitted by a jury at trial for death of 18-year-old Michael Brown in Ferguson, Missouri; Carolyn M. Brown, *Over \$500,000 in Crowd Funding Raised for Ferguson Officer Darren Wilson*, BLACK ENTER. (Sept. 5, 2014), <http://www.blackenterprise.com/news/over-500000-raised-for-ferguson-officer-darren-wilson-before-sites-shut-down/>.

121. *National Police Misconduct Statistics and Reporting Project, 2009 Quarterly Q2 Report*, CATO INST., <http://www.policemisconduct.net/statistics/quarterly-q2-2009/> (last visited Apr. 21, 2015).

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officers in the specific class of cases involving the use of lethal force.

In the narrow case of officer-involved homicides, civil law reduces the violation to a mere tort that seeks to compensate victims and their families, rather than punish or deter the defendant. This effectively devalues citizens' lives; a value that is not even paid by the officer(s) responsible. Personal liability will strengthen deterrence. Deterrence is furthered by the threat of contempt of court proceedings if an officer refuses to pay a civil award. While state laws differ, contempt of court generally refers to the disobedience of any lawful judgment or order of the court.<sup>122</sup> The penalties for contempt of court vary and may include: jail time, community service, fines, and attorney fees.<sup>123</sup> Direct liability for civil damages may lead to other punitive measures if officers fail to take responsibility under court order.

When police and their supporters feel the true weight of the millions of dollars that are assessed in damages and settlements each year against municipalities for lethal officer misconduct, they might re-consider their position on the issue. Officers will certainly consider whether their discretion to use lethal force in the field is worth the risk to their personal finances with knowledge that their City will not indemnify them in suit. This shift of thinking from "Can I use lethal force?" to "Should I use lethal force?" will save countless lives. Cities will also have more money available to fund any number of other critical expenditures. It is true that non-indemnification will leave some successful plaintiffs without payment or delayed payment. Arguments for liability that turn on compensation shift the focus away from the structural issue of officer-involved homicides to monetary awards and a party's ability to pay. Individual victim compensation does not address the structural problems of policing that this Note intends to address.

Indemnification effectively circumvents individual liability that 42 U.S.C. § 1983 was designed to impose. Victims are left without the

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122. See, e.g., Cal. Civ. Proc. Code § 1209(a); La. Code of Civ. Proc. § 221 *et seq.*; N.Y. Code § 2308; Haw. Rev. Stat. § 571-81.

123. 17 C.J.S. Contempt § 5 (2015).

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legal right to life and liberty, and their families are left without an institution to provide them with justice. The law, clothed in the ethic of impunity, is simply contingent on the repetition of its own violence.<sup>124</sup> The least that local governments can do to remedy the historical trajectory of racist and anti-Black state violence is not indemnify its officers in cases involving homicide, especially when a court finds the officer's misconduct is as egregious or evil as to meet the higher standard required for punitive damages.

Each officer should be held individually liable for such civil awards. States such as California grant sole discretion to the public agency of whether to fulfill punitive or exemplary damages.<sup>125</sup> Furthermore, all states have an exemption for memorandum of understandings ("MOUs").<sup>126</sup> The terms of an MOU are bargained for between the police union and the municipality. These are a few of the opportunities for municipalities to limit their liability to satisfy awards based on officer misconduct.

## Conclusion

American society does not yet function as an idyllic state in which all vestiges of racism, oppression, and malicious deprivation of constitutional rights have been eliminated.<sup>127</sup> When police kill, the shock of the violence and the weight of the resulting awards are absorbed by local governments and their taxpayers. However, it is the local governments who are generally empowered to impose direct consequences on their officers and best situated to address the problems raised in this Note.

The individual officers who are the perpetrators of lethal violence and defendants in subsequent suits face no personal stake in the current regime of civil legal remedies. Criminal liability is even more of a rarity imposed on individual officers. Racism exists at the individual, interpersonal, and structural levels of society. No form

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124. Martinot & Sexton, *supra* note 7, at 8.

125. See, e.g., Cal. Gov't Code § 825(b) (1995).

126. See *supra* Part I.C. for an in-depth discussion of officer impunity.

127. *Williams*, 16 Cal. 3d at 841.

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of jurisprudence, civil or criminal, has been successful in imposing individual accountability for the citizen's life prematurely ended by police violence. Current remedies and suggested policy reforms are consistently structural. Reform must be instated at every level and indemnification limitations must be aimed at the individual and interpersonal level of this systemic violence.

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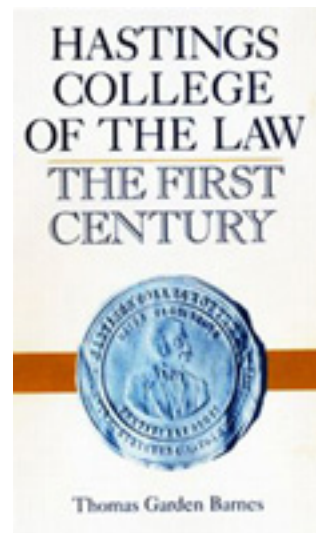
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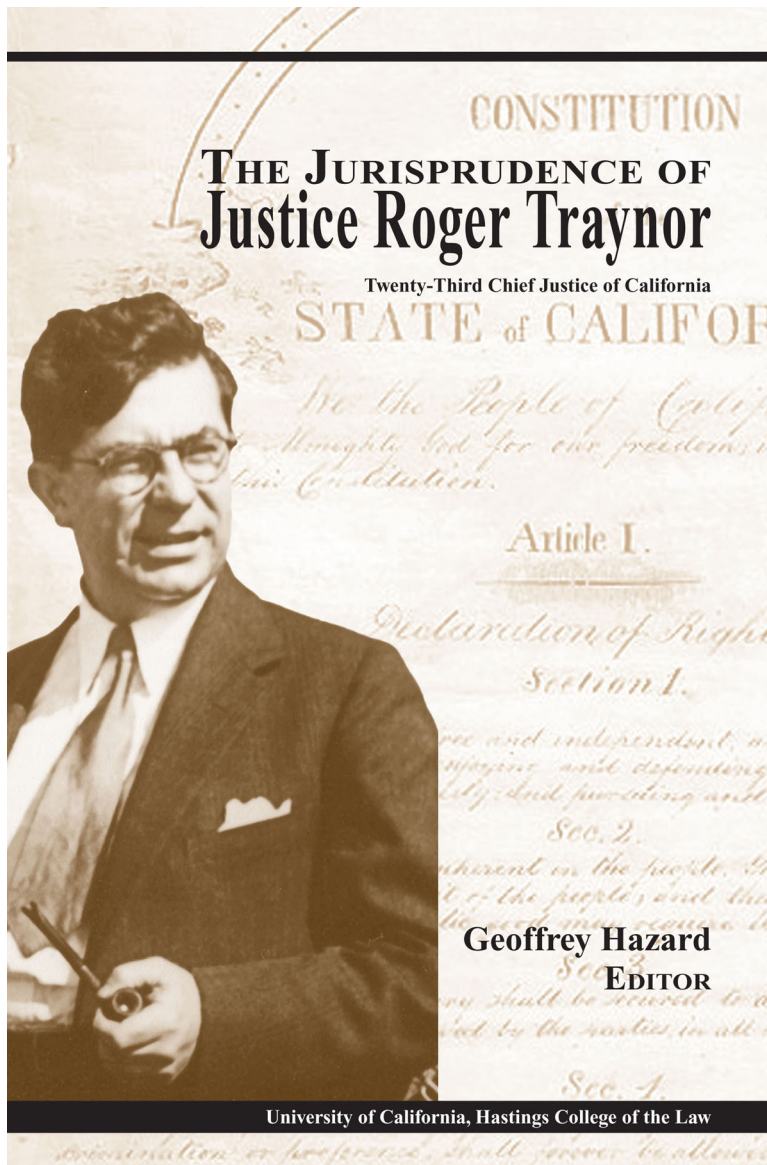
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