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We strive to view issues pertinent to Hawai'i through a broader global lens. We balance provocative articles on contemporary legal issues with practical articles that are in the vanguard of legal change in Hawai'i and internationally, particularly on such topics as military law, sustainability, property law, and native rights.

Kūlia mākou e kilo i nā nīnau i pili iā Hawai'i me ke kuana'ike laulā. Ho'okomo mākou i nā 'atikala e ulu ai i ka hoi e pili ana i nā nīnau kū kānāwai o kēia wā a me nā 'atikala waiwai e ho'ololi ana i nā mea kū kānāwai ma Hawai'i a ma nā 'āina 'ē, me ke kālele 'ana i nā kumuhana like 'ole e like me nā kānāwai pū'ali koa, ka mālama 'āina, nā kānāwai ona 'āina, a nā pono o nā po'e 'ōiwi.

Translation by Pauahi Ho'okano

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ARTICLES

COMMENT

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The Rule of Law and Ethical Integrity: Does Haiti Need a Code of Legal Ethics?

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I. INTRODUCTION: THE EXPERIENCE OF A U.S. VISITOR

You have just read the newspaper article about the inmate whose execution is scheduled for next week. He waits on death row, his appeals exhausted. You hear a knock on your door and a client whom you have represented intermittently over the years in your defense practice arrives in your office. The client has come to seek your legal advice and requests assurances about the confidentiality of the ensuing conversation. You reassure him that the conversation will fall under the attorney-client confidentiality umbrella. The client then convincingly explains that he, rather than the inmate scheduled to be executed, committed the murder for which the inmate has been convicted and is scheduled to die. The client tells you that the inmate, whom your client does not know, had no part in the murder. Due to some physical resemblance between the inmate and your client, the sole eyewitness made an error and mistook the inmate for your client. With this recounting, your client comes to the purpose of his visit. Will your client be "off-the-hook" for the murder once the state executes the innocent inmate? As the enormity of your client's revelation begins to sink in, he reminds you that you assured him that the conversation would be confidential and pointedly demands that you keep it so.[1] What do you do?

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[1] Scholars have grappled for some time with variations of the above scenario in the context of exploring lawyers' roles and options. *See* W. William Hodes, *What Ought to be Done—What Can be Done—When the Wrong Person is in Jail or About to be Executed? An Invitation to a Multi-Disciplined Inquiry, and a Detour About Law School Pedagogy*, 29 LOY. L.A. L. REV. 1547 (1996).

This scenario aims to provoke discussion and test the limits of role morality[2] and attorney-client confidentiality. In March 2012, I presented it to the assembled law school student body at L'École Supérieure Catholique de Droit de Jérémie (ESCDROJ), in Jérémie, Haiti.[3] After acknowledging that Haiti has no death penalty[4] and asking the students to imagine, for purposes of our hypothetical and comparative analysis, that Haiti did, we began with a discussion of relevant U.S. ethics rules. We contrasted approaches to confidentiality available to the attorney in the Model Rules of Professional Conduct, which provide an exception for disclosure under the circumstances described,[5] with those of the California Rules of Professional Conduct, which arguably do not provide the same exception.[6] Then we turned to comparing those approaches with what I understood was the approach to confidentiality in the Haitian legal ethics code. Access to information about some domains of Haitian law and practice can be challenging for a visitor to obtain and I was, in truth, feeling grateful to have accessed a copy of the Haitian code of legal ethics.

During a subsequent short break in the presentation, however, a good friend and graduate of the law school in Jérémie politely informed me that

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[2] DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 105 (1988).

[3] In this section on the experience of a U.S. visitor, the "I" refers to co-author Bloch. The scenario was "enacted" by volunteers in Creole and English in front of the Haitian students and differed in small details from the version above. The presentation was part of the Hastings to Haiti Partnership (HHP), a collaboration between ESCDROJ and the University of California, Hastings College of the Law, in which Haitian and U.S. faculty and students engage in mutual exchanges of ideas, and work toward supporting the rule of law in Haiti. HHP was founded by Professors Karen Musalo and Richard Boswell with Dr. Jomanas Eustache, Dean of ESCDROJ, in 1999.

[4] Article 20 of the 1987 Constitution of Haiti explicitly abolishes the death penalty. Constitution de la Republique d'Haiti, Mar. 29, 1987, *available at* http://www.haiti.org/images/stories/pdf/constitution_francais.pdf (last visited Mar. 21, 2015) (Article 20: "La peine de mort est abolie en toute matière." ["The death penalty is abolished in all matters."]). Throughout the Article, we endeavor to offer a translation into English of materials originally quoted in French, but we recognize that approaches to translating these materials may vary.

[5] The Model Rules were amended in 2002 to allow disclosure "to the extent the lawyer reasonably believes necessary: (1) to prevent reasonably certain death or substantial bodily harm[.]" MODEL RULES OF PROF'L CONDUCT R. 1.6 (2013). For a discussion of the change, see ABA COMM. ON ETHICS & PROF'L RESPONSIBILITY, MODEL RULE 1.6 REPORTER'S EXPLANATION OF CHANGES (2000), http://www.americanbar.org/content/dam/aba/migrated/cpr/e2k/10_85rem.authcheckdam.pdf (last visited Mar. 21, 2015).

[6] The California Rules of Professional Conduct allow disclosure only "to the extent that the member reasonably believes the disclosure is necessary to prevent a criminal act that the member reasonably believes is likely to result in death of, or substantial bodily harm to, an individual." CAL. RULES OF PROF'L CONDUCT R. 3-100(B) (2013). For the language of the California exception to apply, the execution would have to constitute a "criminal act."

what I had understood was the official deontological code in Haiti, was really only a "brouillon," a draft.[7] In fact, she informed me that Haiti has no official code of legal ethics.[8] Following the break, swallowing my pride, I proceeded to correct my error, sharing with students what I had just learned and encouraging them to consider that the task of deciding upon such a code for lawyers still lay before them. This unexpected turn of events made me wonder what it might mean to practice law in a country with no official code of professional responsibility and whether having a code would be valuable.[9]

An initial inclination in favor of an official code surfaced almost instantly. Perhaps it arose so quickly because I had been under the impression that Haiti had such a code and it proved an easy transition to imagine that normatively it should have such a code. Perhaps the inclination arose so quickly because, as a legal educator and attorney, I see substantial value for clients, the judicial system, the public, and the legal profession in the U.S. in having an official compiled code to which

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[7] DROIT À L'ÉTHIQUE [LAW OF ETHICS], *available at* http://juristehaitien.chez.com /pages_textes/barreau/p_droit_ethique.htm.

[8] I was surprised to discover that there was no official code. I later learned that there is a 1979 government decree that regulates primarily administrative aspects of the legal profession, such as admission to the bar, who can and has to belong to the local bar association, as well as several provisions that relate directly to legal ethics, including a provision on attorney-client confidentiality. DÉCRET DU 29 MARS 1979 RÈGLEMENTANT LA PROFESSION D'AVOCAT, http://web.archive.org/web/20101217060656/http:/www.crijhaiti. com/fr/?page=decretprofavocat (last visited Mar. 21, 2015) [hereinafter DECREE OF MARCH 29]. For a discussion of additional related resources, see *infra* notes 40-53 and accompanying text.

[9] In the U.S., codes of legal ethics have developed over time. "Until 1970, most U.S. jurisdictions had only the ABA Canons, which were not adopted as law but often referred to as sources of law." Email from Geoffrey C. Hazard to Kate Bloch (Apr. 30, 2014) (on file with co-authors). A substantial movement toward more formal codes in the U.S. seems to have grown in the nineteenth and then continued into the twentieth century. Carol Rice Andrews, *The Lasting Legacy of the 1887 Code of Ethics of the Alabama State Bar Association*, *in* GILDED AGE LEGAL ETHICS: ESSAYS ON THOMAS GOODE JONES' 1887 CODE AND THE REGULATION OF THE PROFESSION 7-36 (2003); Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1249 (1991) ("What were fraternal norms issuing from an autonomous professional society have now been transformed into a body of judicially enforced regulations."). Today, the U.S. has not one but many official codes of legal ethics, one for each state or jurisdiction regulating a bar. Many of these modern official codes rely on or at least draw guidance from the American Bar Association's Model Rules of Professional Conduct. Courts generally oversee the ultimate enforcement of disciplinary consequences under these official jurisdictional codes as pursued by the governing bar association. Research in the field suggests that relatively detailed lawyers' oaths may have, in earlier eras, like the Middle Ages in Europe, served a similar purpose. *See* Andrews, *supra*, at 9. Even with official codes of ethics, concerns, for example, about insufficient disciplinary enforcement often remain.

attorneys agree to abide and which furnishes fundamental limits, albeit perhaps imperfect ones, on and permissions about attorney behavior, as well as, of course, a basis for recourse for clients in some disciplinary, regulatory, and other realms.[10] As the American Bar Association has noted, for example:

> In modern democratic societies based on the rule of law, lawyers play a paramount role in the administration of justice and in safeguarding human rights and fundamental freedoms. . . . Maintaining and observing clear ethical standards is a duty that lawyers owe not only to their clients, but also to the administration of justice, their profession and the society at large.[11]

But, as I reviewed conditions I had witnessed in Haiti, I began to reconsider my hasty inclination to advocate for such a code. Haiti is a country beset with extreme poverty.[12] Approximately eighty percent of the population lives below the poverty line,[13] concerns about judicial corruption are rampant,[14] and prison conditions are often profoundly problematic.[15]

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[10] Scholarship on the adoption of the 1908 Canons suggests, however, that a motive for their adoption derived from elitist and exclusionary premises. JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA, 40-53 (1976). With respect to the Canons, according to Auerbach, "[t]he immediate impetus was provided by President Theodore Roosevelt who, in his Harvard address in the spring of 1905, sharply rebuked corporate lawyers for aiding their clients in evading regulatory legislation." *Id.* at 40. But, Auerback opines that "[t]he ethical crusade that produced the Canons concealed class and ethnic hostility" that was particularly focused on "new-immigrant lawyers," who generally had less wealth and were of different religions than those lawyers writing the Canons. *See id.* at 50.

[11] *Professional Legal Ethics: A Comparative Perspective,* Legislative Assistance and Research Program, Central European and Eurasian Law Initiative, 1 (Maya Goldstein Bolocan ed., 2002), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=321700.

[12] Central Intelligence Agency, CIA WORLD FACTBOOK: HAITI, Economy, https://www.cia.gov/library/publications/the-world-factbook/geos/ha.html (last visited Mar. 21, 2015) ("Currently the poorest country in the Western Hemisphere with 80% of the population living under the poverty line and 54% in abject poverty, the earthquake further inflicted $7.8 billion in damage and caused the country's GDP to contract.").

[13] *Id.* While poverty may contribute to the problems faced by the judicial system in Haiti, it is arguably not the only significant factor. Email from Jean Elias Xavier to Kate Bloch (Apr. 14, 2014, 17:30 PST) (on file with the co-authors). ("Poverty can be considered as the bottleneck but not [so] serious [as] to be considered as dominant. Each country must have a justice system according to its cultural and economical realities and possibilities.").

[14] U.S. DEP'T OF STATE, Bureau of Democracy, Human Rights, and Labor, Country Reports on Human Rights Practices-2013: Haiti (Feb. 2014), *available at* http://www.state.gov/documents/organization/220661.pdf ("The most serious impediments to human rights involved weak democratic governance in the country; insufficient respect for the rule of law, exacerbated by a deficient judicial system; and chronic corruption in all branches of government.") [hereinafter State Department Report]. The report continues:

Although the law provides for an independent judiciary, senior officials in the

According to the U.S. State Department 2013 Haiti Human Rights Report, "[c]orruption and a lack of judicial oversight . . . severely hampered the judiciary. Human rights organizations reported that several judicial officials, including judges and court clerks, arbitrarily charged fees to initiate criminal prosecutions, and that judges and prosecutors failed to respond to those who could not afford to pay."[16] The Report opines that in

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executive and legislative branches exerted significant influence on the judicial branch and law enforcement. Allegations of high-level executive intimidation of judicial officials and corruption were frequent. MINUSTAH and international and local NGOs repeatedly criticized the government for attempting to influence judicial officials.

Id. at 13. In addition, the Report states:

The functioning of civil courts (tribunaux de paix), the lowest courts in the judicial system, was poor. Judges presided in chamber based on their personal availability and often maintained separate, full-time jobs. Law enforcement personnel rarely maintained order during court proceedings, and frequently there was no court reporter. Bribes were often the principal factor in a judge's decision to hear a case.

Id. at 15.

For an analysis of concerns about judicial corruption in Haiti, see JEAN SÉNAT FLEURY, LA PROBLÉMATIQUE DE LA RÉFORME JUDICIAIRE EN HAÏTI 24-27, 32 (2007) (suggesting, among other reforms, the development and adoption of a judicial code of ethics). For an analysis of many of the complex factors that have impeded judicial reform in Haiti, see Louis-Alexandre Berg, *All Judicial Politics are Local: The Political Trajectory of Judicial Reform in Haiti*, 45 U. MIAMI INTER-AM. L. REV. 1 (2014). According to scholarship on mediation and legal ethics codes and practice in Central Asia, a number of countries in Central Asia suffer from corruption and challenges regarding a legal ethics code. *See* Cynthia Alkon, *The Increased Use of "Reconciliation" in Criminal Cases in Central Asia: A Sign of Restorative Justice, Reform or Cause for Concern?*, 8 PEPP. DISP. RESOL. L.J. 41, 61 (2007) ("The prosecutor is still all-powerful. Judicial independence is still at best an aspiration, not a reality. Defense attorneys cannot provide an active defense. This limited role, when combined with high levels of institutional corruption, frequently turns defense attorneys into agents who facilitate resolution of a case by making pay-offs on behalf of the client to investigators, prosecutors, and judges. The legal profession in all four countries operates without any ethical framework, as ethics codes are virtually non-existent and, where they do exist, are extremely weak and not regularly enforced." (footnotes omitted)).

[15] State Department Report, *supra* note 14, at 6. The Report discusses prison conditions at some length. It notes, for example, that "UN observers indicated in 2012 that approximately [seventy] percent of prisoners and detainees suffered from a lack of basic hygiene, malnutrition, poor quality health care, and water-borne illness." *Id.* Moreover, with respect to access to clean water, in a country stricken with a cholera epidemic, the Report indicates that "[p]risons generally used well water as a source for drinking and bath water. . . . Some prison officials used chlorine to sanitize drinking water, but in general, prisoners did not have access to treated drinking water." State Department Report, *supra* note 14, at 5.

[16] State Department Report, *supra* note 14, at 14. On challenges facing the judiciary system, see also Jomanas Eustache, *The Importance of Teaching Law and the Reinforcement*

the "civil courts (tribunaux de paix), the lowest courts in the justice system, . . . [b]ribes were often the principal factor in a judge's decision to hear a case."[17]

It is a land with such limited resources that conditions of inmate confinement defy international standards and can be understood as gross violations of human rights.[18] As explained by the 2013 Report, "[o]nly the newly constructed prison in Croix des Bouquets conformed to international norms and was not significantly overcrowded. Others, including the detention facilities in Cap Haitien, Fort Liberte, Gonaives, Petionville, and Port de Paix all held more than four times the maximum number of inmates."[19] This statistic may seem abstract, but first-hand observation offers another perspective into the underlying reality. Imagine a cell that contains more than fifty men side-by-side who are so crowded together that there is insufficient room for all of them to lie down at one time and sleeping can occur only in limited shifts.[20] Imagine being trapped in such a cell 22-23 hours a day seven days a week.[21] In 2012, I visited the prison in Jérémie, Haiti, where these were the conditions.[22] As suggested by the 2013 Report, the conditions I observed in the Jérémie prison are not unique. In terms of actual meters of floor space available to each inmate, one highly respected on-the-ground grassroots organization providing legal services to inmates reports that:

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of the Judiciary System in Haiti, 32 HASTINGS INT'L & COMP. L. REV. 601 (2009) ("[S]ome behavior, misconduct, or practices, are mainly facilitated by the malfunction of the judiciary system. Alas, these behaviors are all too frequent in Haiti, for example, preventive detention beyond constitutional or legal limits and the plague of corruption in almost all State sectors.").

[17] State Department Report, *supra* note 14, at 15. On the question of concerns about corruption that may be involved in the prosecution of cases, *see also* Meena Jagannath, *Barriers to Women's Access to Justice in Haiti*, 15 CUNY L. REV. 27, 46 (2011).

[18] *See* State Department Report, *supra* note 14, at 5-6; *supra* note 15 and accompanying text; *infra* notes 23, 29 and accompanying text.

[19] State Department Report, *supra* note 14, at 5.

[20] It is not clear that adult males and male minors were necessarily housed separately. Consequently, some of the males in the cell may have been under eighteen. Conditions for women in the Jérémie Prison, while often problematic, are not necessarily as dire as those for men. Kate E. Bloch, *Representation for the Accused: Haiti's Thirst and a Role for Clinical Legal Education*, 14 OREGON REV. INT'L LAW 431, 434-35 (2012); *see also* Memorandum from Rachel Lopez, Clinical Teaching Fellow, Seton Hall Law School, on prison conditions in Jérémie and recommendations for reform to Nicole Phillips, Inst. for Justice and Democracy in Haiti (Apr. 18, 2012) (on file with the co-authors).

[21] *See* Bloch, *supra* note 20, at 434-35; Memorandum from Rachel Lopez on prison conditions to Nicole Phillips, *supra* note 20.

[22] *See* Bloch, *supra* note 20.

> [I]nmates in the prison in Mirebalais eat, sleep and live in approximately 0.4 [square meters] of space (the equivalent of one-quarter of a twin bed). International standards recommend every prisoner have 5.4 [square meters] of living space, and in some extreme circumstances the standard may be lowered to 2.0 [square meters]—about four times the space available to the inmates in Mirebalais. Without adequate space, prisoners take turns sleeping at night, and many are left standing."[23]

I would be hard pressed to imagine a code of legal ethics that condoned bribing a judge or a prosecutorial official. But, if a bribe were what it would take to save a client from months or years of pre-trial detention in such conditions or a "fee" were necessary to persuade a prosecutor to initiate a meritorious prosecution, and bribing were not an uncommon, perhaps even in some circumstances an expected, practice,[24] would a lawyer be serving a client effectively to decline to offer the prosecutor or judge a bribe for a victim's access to justice or a client's pre-trial release?[25] In describing pressures that lawyers may confront in representing clients in the justice system in Haiti, one co-author has opined that "[l]awyers are like . . . professionals climbing out of an impoverished family, where at a young

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[23] *Extreme Prison Overcrowding and Lengthy Pre-Trial Detention Continue in Haiti Despite International Court Order*, Institute For Justice and Democracy & Bureau des Avocats Internationaux, http://www.ijdh.org/extreme-prison-overcrowding-and-lengthy-pre-trial-detention-continue-in-haiti-despite-international-court-order/#.UknWUT8-d7w ("Haitian prisons consistently rank among the worst in the world. . . . The overcrowded conditions present the perfect environment for the spread of diseases such as HIV/AIDS, malaria, drug-resistant tuberculosis, and cholera. Coupled with the sweltering heat that often exceeds 100 degrees Fahrenheit, these conditions are inhumane, miserable and torturous." (footnotes and emphasis omitted)). The State Department Report also discusses the overcrowded conditions. It notes, for example:

> Prison conditions generally varied by inmate gender. Female inmates in coed prisons enjoyed proportionately more space in their cells than their male counterparts, but women at the Petionville women's prison, like men at mixed-gender prison facilities, still occupied less than [eleven] square feet of cell space per person. Female prisoners also enjoyed a better quality of life than did their male counterparts due to their smaller numbers, which wardens suggested was a contributing factor to their ease of control. Access to water and adequate plumbing was still a problem at the women's prison, which had no flushing toilets, and where one pit latrine served 296 inmates.

State Department Report, *supra* note 14, at 6. As the newly constructed prison at Croix-des-Bouquets suggests, however, there are efforts underway to improve prison conditions in Haiti. For a discussion of additional efforts and progress, see *id. at* 8-9.

[24] The issue of bribery is a complex one. Many Haitian judges, prosecutors, and lawyers refuse to engage in such practices. Officials may, however, even be at risk if they refuse a bribe. *See* Email from Roxane Dimanche to Kate Bloch (Jan. 24, 2014) (on file with the co-authors).

[25] For a discussion of the Bureau des Avocats Internationaux' success in gaining release for clients without bribery, *see infra* text accompanying note 157.

age they [may learn] that life will consist of consecutive drowning steps [where o]ne must grab any vine available to survive[, and that h]onor is for those who can afford it."[26] In this light, the question of whether a code of legal ethics should govern Haitian lawyers did not appear quite so straightforward. Although many lawyers, prosecutors, and judges[27] refuse to engage in bribery practices,[28] under some circumstances, prohibiting the bribe might discourage the lawyer from presenting it and could prejudice the client, who, as the victim of a crime, may then be unable to access justice, or as a pre-trial detainee might be condemned to extended confinement in conditions that must violate international human rights standards.[29] Upon reflection, the question of whether there should be an

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[26] Email from Roxane Dimanche to Kate Bloch (Jan. 11, 2014) (on file with the co-authors) (Roxane Dimanche commenting on potential challenges of law practice in the Haitian justice system.).

[27] A lack of resources, which could include very low salaries for judges and prosecutors, may play a role in the corruption concerns. For commentary on the salaries of judges and prosecutors in Haiti, see Leonard L. Cavise, *Post-Earthquake Legal Reform in Haiti: In On the Ground Floor*, 38 BROOK. J. INT'L L. 879, 900 (2013) ("In a country such as Haiti, . . . neither prosecutors nor judges are well paid and both are subject to corrupting influences. . . .").

[28] Many factors may affect whether bribery plays a role in a case. As explained by Jean Elias Xavier, these may include:

> a) The client's income so that he can afford to ask the lawyer about the opportunity for a bribe and to ask the lawyer to explore the possibility [of offering] it to the judge.
>
> b) The ethical character of the lawyer and his professional standard as a practice and his willingness to accept [] from the client [a] substantial amount of money for his own professional fees and to make an offer to the judge for the case that will be heard or instructed.
>
> c) The judge's ethical standard and value to accept [and]/or to cooperate with the lawyer of the party to receive the money and decide accordingly.

Email from Jean Elias Xavier to Kate Bloch (Apr. 14, 2014 17:30) (on file with the co-authors). Mr. Xavier emphasizes in his discussion of the complex issue of bribery in Haiti that

> [there] are numerous lawyers and judges who have [repudiated] such practice[s] (bribe[s]). Facing a similar situation, the . . . lawyers will decline to continue defending the client[']s case. In the same way, some judges will [m]ake the decision not to hear or instruct [on] the case. . . . [T]he reality is that it is all about choice and values. The[re] are countless lawyers who did not accept this practice and the[re] are numerous judges who are very upright in their . . . duties. The dire reality is that lawyers are most of the time[] the victims of the practice of bribes. Some other actors . . . [in] or out of the system have perceived the [need for a] bribe to release or give satisfaction to clients.

Id.

[29] *See supra* note 19 & 23 and accompanying text; *see also* Yvon Neptune v. Haiti, Merits Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 180, ¶ 137 (May 6, 2008) (footnotes and citations omitted), *available at* http://www.corteidh.or.cr/docs/casos/

official code of legal ethics for Haitian lawyers became more complex and it became evident that an answer required more analysis.[30] In addition, it was readily apparent that such an analysis should (and arguably could) not be effectively undertaken without Haitian colleagues much more familiar with the Haitian justice system than I was. As a result, the article that follows represents a collaborative exploration of whether Haiti should adopt an official code of legal ethics.[31]

Analyzing this question involves several related inquiries. The first is definitional; what qualifies as or do we understand would comprise a code of legal ethics? The second asks what prospective benefits such a code might confer. The third investigates limitations and challenges that such a code might incur. The Article concludes with an analysis of how Haiti's new (and perhaps first) law school clinic might provide a venue for a from-the-ground-up implementation and evaluation of an official deontological code for attorneys.

II. OF WHAT WOULD AN OFFICIAL CODE OF LEGAL ETHICS CONSIST?

Existing model codes and official codes of legal ethics vary,[32] although many contain similar types of provisions.[33] These usually include specific

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articulos/seriec_180_ing.pdf ("[T]he extreme overcrowding, unhygienic and unsanitary conditions and poor inmate diet at the National Penitentiary did not even approximate the standards set in the *United Nations Standard Minimum Rules for the Treatment of Prisoners*." (alteration in original)); Berg, *supra* note 14, at 4-5 ("Over the last decade, the percentage of detainees in Haiti's prisons awaiting final disposition of their cases has ranged from a low of seventy percent to a high above ninety percent, giving it one of the highest rates of pre-trial detention in the world." (footnote omitted)). For a discussion of progress and efforts to improve prison conditions, see State Department Report, *supra* note 14, at 5, 8-9.

[30] The related inquiry of why there is not currently an official code of legal ethics also appears to be a complex one, which we defer to another day and perhaps to other scholars.

[31] Extensive law reform efforts with respect to the Code of Criminal Procedure and the Penal Code are currently underway in Haiti. *See* Cavise, *supra* note 27. It may be that a confluence of proposed law reforms related to the judicial system and public discourse about them within Haiti can serve a reciprocally reinforcing purpose in enhancing the synthesis of reforms into the fabric of the Haitian justice system and public consciousness.

[32] *Compare e.g.*, Code of Conduct for European Lawyers, CCBE (2013), *available at* http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_CCBE_CoCpdf1_1382973057.pdf [hereinafter *CCBE*], *with* Law on Lawyers, Socialist Republic of Viet Nam, *available at* http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=4766 (last visited Mar. 21, 2015) [hereinafter *Vietnam Law on Lawyers*]. The codes included in this comparative section are not intended to represent a formal or exhaustive survey of international codes. Rather, they are example codes that are available in English and still offer some diversity because they are drawn from different geographic regions and cultures.

or general permissions for attorneys to engage in named behavior,[34] explicit or general prohibitions that limit or work to prevent certain behavior,[35] some aspirational elements,[36] and much room for interpretation.[37] Codes

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[33] For example, the Uniform Rules of Professional Conduct of the General Council of the Bar of South Africa requires, under section 7.1.1, that fees be reasonable and indicates that factors such as "(a) the time and [labor] required, the novelty and difficulty of the questions involved and the skill requisite properly to conduct the cause; (b) the customary charges by counsel of comparable standing for similar services; and (c) the amount involved in the controversy and its importance to the client," should be considered in determining the reasonableness of the fee. General Council of the Bar of South Africa, Uniform Rules of Prof'l Conduct R. 7.1.1, *available at* http://www.sabar.co.za/GCB-UniformRules-of-Ethics-updated-July2012.pdf (last visited Mar. 21, 2015) [hereinafter *Uniform Ethics Rules of South Africa*].

Similarly, the U.S. Model Rule of Professional Conduct 1.5 requires that fees be reasonable and indicates that factors, including the following, should be considered:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained.

MODEL RULES OF PROF'L CONDUCT R. 1.5 (2013).

[34] Example permissions include: In the Code of Conduct for European Lawyers, "3.1.1. A lawyer shall not handle a case for a party except on that party's instructions. The lawyer may, however, act in a case in which he or she has been instructed by another lawyer acting for the party or where the case has been assigned to him or her by a competent body." *CCBE*, *supra* note 32.

[35] Example prohibitions include: "Article 9. Lawyers are forbidden to commit the following acts: c) Disclosing information on cases, affairs or clients they have acquired in the process of professional practice, unless it is agreed by clients in writing or otherwise provided for by law." *Vietnam Law on Lawyers*, *supra* note 32; "[Defense] Counsel shall not: (i) contact a prospective client, his relatives or acquaintances in an attempt to solicit work from such prospective client." Charles Jalloh, *Code of Professional Conduct for Counsel with the Right of Audience Before the Special Court for Sierra Leone*, CONSOLIDATED LEGAL TEXTS FOR THE SPECIAL COURT OF SIERRA LEONE 167, 179 (2007).

[36] A relatively common aspirational element of codes involves pro bono service. For instance, Article 8 of the Law on Lawyers of Vietnam reads: "The State encourages lawyers and law-practicing organizations to provide *pro bono* legal aid." *Vietnam Law on Lawyers*, *supra* note 32.

[37] The need for interpretation is, in part, a function of the inability of positive law to address every single circumstance in advance and, in part, because language often possesses inherent ambiguity. The Uniform Rules of Professional Ethics of the General Council of the Bar of South Africa address the former explicitly: "[The Rules] are not intended to be exhaustive nor to cover every point that may arise in the course of [practice] of the profession of an advocate. In case of doubt as to the proper course of conduct to be followed by counsel, counsel is obliged, depending on the circumstances, to obtain either a ruling from his Bar Council or the advice of a member of his Bar Council or of a senior member of his/her Bar." Uniform Rules of Professional Ethics, General Council of the Bar of South Africa, *available at* http://www.sabar.co.za/rules-of-ethics.html (last visited Mar. 21, 2015);

may consist of standards or professional norms or they may consist of formal enforceable rules or some of each.[38] The question of whether such a code should be implemented in Haiti has taken on particular importance in light of action by the Federation of Haitian Bar Associations. All lawyers who practice in Haiti must belong to the local Bar Association.[39] The Federation is an organization representing those combined Bar Associations in Haiti that choose to associate together in the Federation. In 2002, the Federation adopted a code of ethics.[40] This adoption speaks volumes about Haitian lawyers' support for having a code of legal ethics and could provide the foundation for an official code. The Federation's adoption of a deontological code is thus of tremendous importance, but does not imbue that code with the force of law. For Haiti to have an official code of legal ethics, the Haitian government would need to take some formal action to promulgate a code.[41]

Our research has revealed several official Haitian documents promulgated over the previous 200 years that provide administrative regulations about the legal profession and authorize Bar Associations and/or courts to discipline attorneys.[42] Of these, a Decree of March 29,

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see also Cooper, *infra* note 65.

[38] One colleague, renowned for his acumen and judgment in the domain of legal ethics, who reviewed an earlier draft of this Article, suggested exploring the possibility of legal ethics in Haiti being "framed as 'Best' or 'Recommended' Practices, rather than law." Email from Geoffrey C. Hazard, *supra* note 9. Professor Hazard noted that "strict rules can be used by retaliation, for example against someone who has pointed to ethics rules when objecting to bribery." *Id.*

[39] DECREE OF MARCH 29, *supra* note 8 ("Article 3.- Il y aura, dans chaque juridiction d'un Tribunal Civil, un ORDRE DES AVOCATS auquel se rattachent obligatoirement tous les Avocats ayant leur domicile professionnel dans cette juridiction." [There will be, in each jurisdiction of a Civil Tribunal, an order of lawyers, with which all lawyers having their professional domicile in that jurisdiction must associate themselves.].

[40] Monferrier Dorval, Lettre à mes confrères avocats, *Le Nouvelliste*, Aug. 9, 2013 ("L'article 4 du code de déontologie (C.D.) de la profession d'avocat adopté par la Fédération des barreaux d'Haïti . . . .") [Article 4 of the Code of Professional Ethics of the legal profession adopted by the Federation of Haitian Bar Associations]; La Déontologie Professionnelle, FÉDÉRATION DES BARREAUX D'HAITI, FBH, CODE DE DÉONTOLOGIE DE LA PROFESSION D'AVOCAT [*hereinafter FBH Code*], Adopté par le Conseil d'Administration (2002) (copy on file with the authors).

[41] The Haitian Parliament could adopt a code, or, in some more limited circumstances, the Executive branch could issue a decree. *Cf.* Email from Jean Elias Xavier to Kate Bloch (Apr. 14, 2014) (on file with the co-authors).

[42] We have located and reviewed at least four official Haitian decrees or other laws related to the administration of the judiciary and/or legal profession that have been adopted in the past 200 years. The earliest we reviewed is the 1808 law on the organization of courts/tribunals of the République and the most recent is the decree of March 29, 1979, which appears to be the most recent substantial decree/law on the administration of the legal

1979 appears controlling, as its text indicates that it supersedes all prior laws and decrees to the extent that previous enactments possess inconsistent or contradictory provisions.[43] As the title of the March 29th Decree, "Decree of March 29, 1979, Regulating the Legal Profession,"[44] implies, it is primarily an administrative rather than a deontological document. It governs, for example, the qualifications necessary to become an attorney.[45] These include, among others, the requirements that the individual be Haitian, an adult, and able to enjoy his or her civil and political rights.[46] The Decree also details the administration of the bar association.[47] It regulates the voting procedures for various administrative positions of the bar and the process of the stage, or apprenticeship.[48] It prescribes specific default percentage fees for certain services and addresses a range of other administrative matters.[49] Although the Decree also contains a limited number of provisions that delineate certain ethical obligations of Haitian attorneys,[50] its primary focus is on the structure and administration of the legal profession.[51] Similarly, the action of the Federation in specifically

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profession in Haiti. In between, for example, there is the 1881 LOI SUR L'ORDRE DES AVOCATS ET SES CONSEILS DES DISCIPLINES, Réimprimée aux Cayes, Imprimerie nationale, 1881 (available in the U.S. Library of Congress rare book collection and electronically) [hereinafter *Law of 1881*]. With respect to the status of provisions of the 1808 law and others up to the Decree of March 29, 1979, the March 29th Decree states that it repeals all laws, provisions of laws, and decrees and provisions of decrees that are contrary to the Decree of March 29th. Consequently, provisions in the *Law of 1881* and others like it that contravene those of the Decree appear to have been superseded. DECREE OF MARCH 29, *supra* note 8 ("Article 87. - Le présent Décret abroge toutes Lois ou dispositions de Lois, tous Décrets ou dispositions de Décrets, tous Décrets-lois ou dispositions de Décrets-lois qui lui sont contraires . . . ." ["The present Decree repeals all laws or provisions of laws, all Decrees or provisions of Decrees, all Decree laws or provisions of Decree laws that are inconsistent with it [the 1979 Decree] . . . ."). The 1881 law indicates that it abrogates earlier laws of 1859 and 1878. The 1881 law is apparently not easy to locate, even within Haiti, as co-author Roxane Dimanche ultimately located it in the U.S. Library of Congress. Various other laws and provisions, like the Penal Code do, of course, govern attorney behavior.

[43] *See supra* note 42.

[44] DECREE OF MARCH *29*, *supra* note 8.

[45] *Id.* at Chapitre II.

[46] *Id.* at Article 5.

[47] *Id.* at Chapitre V.

[48] *Id.* at Chapitre III, Article 33.

[49] *Id.* at Article 58 (discussing fees); *see generally* DECREE OF MARCH 29, *supra* note 8, at 4 (discussing administrative matters).

[50] These include, for example, a requirement that attorneys keep clients' secrets confidential. *Id.* at Article 56; *see also* discussion *infra* notes 89-95 and accompanying text. For additional duties and obligations in the Decree, see DECREE OF MARCH 29, *supra* note 8, at Chapitre VI.

[51] *See* DECREE OF MARCH 29, *supra* note 8.

adopting a Code of Professional Ethics of the Legal Profession,[52] consistent with our Haitian colleague's correction, during one co-author's presentation to the ESCDROJ law students, indicating that Haiti does not have an official code of legal ethics, suggests that the limited provisions of earlier laws and the March 29th Decree regarding legal ethics are not understood as an official (comprehensive or perhaps adequate) code of legal ethics for Haitian lawyers.[53] In the three succeeding sections, this article analyzes whether, in the wake of the action by the Federation, the government should promulgate an official deontological code for Haitian lawyers.[54]

III. BENEFITS OF AN OFFICIAL CODE OF LEGAL ETHICS

In Haiti, under provisions of various existing codes and other instruments,[55] the Bar Associations and court already possess the authority to discipline attorneys for misconduct.[56] Consequently, promulgating an official code of legal ethics is neither a prerequisite for attorney discipline nor for redress for clients who may be victimized by attorney misconduct that is currently covered by existing laws. In the absence of an official ethics code, and in addition to navigating the requirements posed by other laws, Haitian lawyers currently might draw guidance from a variety of sources when confronted with ethical challenges, including more

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[52] *See FBH Code*, *supra* note 40 ("The Code of Professional Ethics of the Legal Profession").

[53] A call for a code of professional legal ethics also comes from lawyers in Haiti. *See, e.g.*, Jean Miguelite Maxime, Réflexions pour une revalorisation de la profession d'avocat, *Le Nouvelliste*, Aug. 24, 2007 (calling for, *inter alia*, a bar code of ethics). Moreover, co-author Roxane Dimanche conducted a search for an official code of legal ethics for Haitian attorneys during the drafting of this article. Her research efforts did unearth the hard-to-locate *Law of 1881* and also included consultation with the president of the local bar association. She concludes that "[i]f there is a code of ethics regulating lawyers' conduct, it has remained mysterious and [elusive]."

[54] Formal codes of legal ethics can and do develop from more informal sources. For example, the 1887 Code of Ethics of the Alabama State Bar Association, which is often credited as the first state bar association code in the U.S. and a significant influence on the ABA's 1908 Canons of Legal Ethics, drew upon "[p]revious works [that] had expounded on legal ethics—lawyer oaths, statutory statements of duties and academic discourses." Carol Rice Andrews, THE LASTING LEGACY OF THE 1887 CODE OF ETHICS OF THE ALABAMA STATE BAR ASSOCIATION 7-8 (2003) (citing *inter alia* Geoffrey C. Hazard, Jr. & W. William Hodes, THE LAW OF LAWYERING 1-18 (2003)).

[55] *See, e.g.*, DECREE OF MARCH 29, *supra* note 8, at 4.

[56] Chapitre V, L'Administration du Barreau, Art. 44, DECREE OF MARCH 29, *supra* note 8 ("Article 44- Le Conseil de Discipline a pour attributions: 3° De sanctionner les écarts et les fautes, sans prejudice aux actions possibles par devant les Tribunaux." [The Disciplinary Board shall: Sanction gaps and mistakes, without prejudice to possible actions in Courts.]).

experienced colleagues, the Federation's code or French or other codes. What purposes then would or could an official deontological code serve? In this Part, we examine three primary purposes for such a code, symbolic value, instrumental value, and clarifying role morality through a functional reevaluation and compilation of relevant provisions.

A. Symbolic Value

Analysts sometimes describe certain laws as having (primarily) symbolic value.[57] Symbolic value embraces the signaling functions of law: its ability to make a statement and to express commitment to an ideology or point of view.[58] Promulgating an official deontological code for lawyers triggers this signaling function. Haiti is a country rife with concerns about impunity and about the need to support the rule of law.[59] In a landscape of concern about recurring corruption and abysmal prison conditions, adopting an official code communicates support for the rule of law and the role of attorneys in supporting that rule, as well as communicating appreciation for integrity in the legal process.

In recent decades, empirical researchers have focused on the value of ethical codes, particularly in the context of corporate culture and practice.[60] In this context, researchers explain that "the mere presence of a code . . . sends a message to all employees."[61] With an expectation of enforcement, the code can communicate that ethical conduct is valued and encouraged and unethical conduct condemned. In advising about corporate ethics, one text divides employees' approaches to decision making into three categories, the "good soldier," the "loose cannon," and the "grenade."[62] Under this framework, "the code legitimizes the good soldier's behavior, teaches the loose cannons what behavior is appropriate . . ., and warns the

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[57] *See* Ryken Grattet & Valerie Jenness, *Transforming Symbolic Law into Organizational Action: Hate Crime Policy and Law Enforcement Practice*, 87 SOCIAL FORCES 501-02 (2007) (examining the effect of formal policies on hate crime enforcement).

[58] Janet S. Adams, Armen Tashchian & Ted S. Shore, *Codes of Ethics as Signals for Ethical Behavior*, 29 J. BUS. ETHICS 199, 200 (2001).

[59] *See supra* note 14 and accompanying text.

[60] *See, e.g.*, Jana L. Craft, A *Review of the Empirical Ethical Decision-Making Literature: 2004–2011*, 117 J. BUS. ETHICS 221 (2013); Muel Kaptein, *Toward Effective Codes: Testing the Relationship with Unethical Behavior*, 119 J. BUS. ETHICS 233, 233 (2011) ("A business code of ethics (BCE), which can be defined as a set [of] prescriptions developed by a company to guide the behavior of managers and employees, is the most frequently cited instrument for preventing unethical behavior in the workplace.").

[61] Adams, *supra* note 58, at 201.

[62] *Id.* (citing and describing the rubrics of L. TREVINO & K. NELSON, MANAGING BUSINESS ETHICS: STRAIGHT TALK ABOUT HOW TO DO IT RIGHT (1995)).

grenades of sanctions for unethical behavior."[63] In this way, the embrace of an ethical code can serve multiple functions for members with different approaches to decision-making. In a system in which there are strong countervailing pressures that favor problematic conduct, providing those attorneys who seek to abide by an ethical code (those who employ the "good soldier" approach) greater support for their approach can work to reinforce their commitment to that approach as well as supply a justification for a refusal to deviate from the rule-abiding approach. For attorneys who are unfamiliar with good ethical practice, the code can provide guidance. For those who would be inclined to consciously disregard good ethical practice, the code admonishes and signals the risk of negative consequences.

A code does not represent a cure-all or immediate solution to unethical behavior, but it can communicate a local, regional, or societal commitment to a set of values and best practices.[64] A code situates the discussion of possible responses to and treatment of an ethical dilemma within a framework, one that is subject to contextual influences, but also one that values ethical conduct. At a minimum, it can frame and offer a starting point for analyzing ethical concerns in legal practice.[65]

B. Instrumental Effects

A code may thus possess symbolic signaling value and provide a framework supporting ethical analysis within which to begin decision-making. Describing a law as having symbolic value can, however, also connote by omission that the law lacks genuine impact on behavior. Research, however, suggests that a law can be born symbolic and evolve to also become instrumental as it influences attitudes and effects change.[66]

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[63] *Id.* at 201.

[64] In an analysis of how legal ethics should be taught in South Africa, for example, Helen Kruuse acknowledges that "there should be rules (or a code of conduct) . . . Indeed, a code can and does act as an important reference point and/or guide." Helen Kruuse, *A South African Response to Ethics in Legal Education*, THE ETHICS PROJECT IN LEGAL EDUCATION 102, 106 (Michael Robertson et al. eds., 2011). But, Kruuse argues, "rules do not and cannot relieve lawyers of the continuing responsibility to exercise their own judgment about the appropriate course to follow." *Id.*

[65] In discussing legal ethics codes in the U.S., commentators note, for example, that "efforts to streamline the professional code of ethics from moral generalizations into more specific guidelines, important as they may be, cannot stand alone. . . . There is no way, furthermore, that we can ever anticipate all the ethical quandaries in which practitioners may find themselves." N. Lee Cooper & Stephen F. Humphreys, *Beyond the Rules: Lawyer Image and the Scope of Professionalism*, 26 CUMB. L. REV. 923, 930 (1995-96).

[66] Stuart C. Gilman, *Ethics Codes and Codes of Conduct as Tools for Promoting an*

Thus, symbolic and instrumental value may co-exist with one eliding into the other.[67] For example, scholars argue that laws prohibiting hate crime in the U.S. were perceived by "many as . . . exclusively symbolic."[68] In the hate crime context, researchers conducting an empirical study of the reporting of hate crime explain that, contrary to the perception that hate crime laws were purely symbolic, with the establishment of law enforcement agencies' formal policies on hate crime, "instrumental impacts of hate crime law do exist."[69] The study's authors indicate that "some departments and agencies do not currently have hate crime policies that signal . . . an organizational commitment to enforcing hate crime law. . . . When policies do exist, however, they generate significant positive changes in reporting."[70] In this study, symbolic became instrumental, at least by the metric of reporting.

Similarly, some empirical research in the specific domain of business ethics codes also suggests that the existence of such codes can produce instrumental impacts,[71] although other studies suggest that it produces no discernible effect.[72] In a study involving 766 participants that compared

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Ethical and Professional Public Service: Comparative Successes and Lessons, 5 (2005), http://www.oecd.org/mena/governance/35521418.pdf ("Effective codes operate at two levels: [i]nstitutional and symbolic."); *see also* Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOCIOLOGY 1531, 1535 (1992) ("[B]y influencing organizations' environments, law has an important indirect effect on organizational behavior that goes significantly beyond the direct effect of law and legal sanctions.").

[67] Grattet, *supra* note 57, at 505.

[68] *Id.* at 502, 518. The authors note that the instrumental impacts "are not uniform." *Id.* at 518. They explain that the extent of the policy's impact is dependent on the circumstances of the local law enforcement environment. *Id.*

[69] *Id.* at 518.

[70] *Id.*

[71] *See, e.g.*, Mark S. Schwartz, *The Nature of the Relationship Between Corporate Codes of Ethics and Behaviour*, 32 J. BUS. ETHICS 259-60 (2001) ("Although further research is necessary, the study found that actual examples of modified behavior due merely to the existence of a code of ethics exist . . . .").

[72] *See, e.g.*, Margaret Anne Cleek & Sherry Lynn Leonard, *Can Corporate Codes of Ethics Influence Behavior*, 17 J. BUS. ETHICS 619, 627 (1998) ("[C]odes of ethics are not powerful enough tools to affect ethical-decision making behavior."). In commenting on combating corruption in Haiti generally, one commentator noted:

> What about ethics and morality? Successful leaders set a good example. They sometimes create ethics programs for employees and citizens. Codes of conduct can be useful.
>
> Nonetheless, in the success stories I have studied, what might be called "moral reforms" are not a key to long-term success. Rather, the keys seem to revolve around systems that provide better incentives for imperfect human beings to perform in the public interest—and to avoid corruption.

perceptions of ethical behavior and culture in companies with an ethics code with perceptions in companies that lacked such a code, employees who worked in companies that had a code of ethics "gave higher ratings of company support for ethical behavior, [and] . . . more frequently reported being encouraged to behave ethically . . . ."[73] In addition, these employees "perceived fewer restrictions on their ability to behave ethically."[74]

Consistent with those studies in the corporate environment suggesting a positive influence, research in the academic environment analyzing cheating, for example, comparing cheating in academic institutions that have an honor code with cheating in those that do not, suggests that:

> code students cheat significantly less than non-code students. It seems that as students on honor code campuses weigh their responsibilities as a member of a community that is striving to be moral against the very real pressures of the outside world, a large number are deciding in favor of the community's standards and accepting the corresponding responsibilities.[75]

Nonetheless, as indicated above, not all empirical studies report positive instrumental effects of codes.[76] In a 2007 review of studies of business codes, the review authors indicate that, with respect to empirical studies, the "results are . . . mixed."[77] Perhaps, the most significant determinant lies in

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Robert Klitgaard, Addressing Corruption in Haiti, 21 (2010).

[73] Adams, *supra* note 58, at 207.

[74] *Id.* at 207. The study addresses its own limitations, including, for example, non-random sampling and "unvalidated measures." *Id.* at 209. *See also* Mark John Somers, *Ethical Codes of Conduct and Organizational Context: A Study of the Relationship Between Codes of Conduct, Employee Behavior, and Organizational Values*, 30 J. BUS. ETHICS 185, 194 (2001) ("[T]his study suggests that organizations that promote ethical behavior reap several important benefits including less wrongdoing and higher levels of employee commitment [but] [p]rofessional codes of ethical conduct in turn appeared to play a less important role in influencing employee behavior possibly because they are not part of the organizational environment."). For a study of ethical codes in newsrooms, *see* David E. Boeyink, *How Effective Are Codes of Ethics? A Look at Three Newsrooms*, 71 JOURNALISM QUARTERLY 895 (1994).

[75] Donald L. McCabe, Linda Klebe Treviño & Kenneth D. Butterfield, *Academic Integrity in Honor Code and Non-Honor Code Environments*, 70 J. HIGHER ED. 211, 231 (1999) (internal references omitted); *see also* Donald L. McCabe, Linda Klebe Treviño & Kenneth D. Butterfield, *Honor Codes and Other Contextual Influences on Academic Integrity: A Replication and Extension to Modified Honor Code Settings*, 43 RESEARCH IN HIGHER EDUCATION 357, 368 (2002) ("[W]e found that the level of academic dishonesty is highest at colleges that do not have honor codes, is moderate at modified code institutions, and is lowest at schools with traditional honor codes.").

[76] *See* Muel Kaptein & Mark S. Schwartz, *The Effectiveness of Business Codes: A Critical Examination of Existing Studies and the Development of an Integrated Research Model*, 77 J. BUS. ETHICS 111, 112-13 (2008) (listing studies with negative findings).

[77] *Id.* at 112. The article then critiques the methodology of many of the studies and

whether the company creates a culture in which the ethics code is communicated effectively and taken seriously.[78] At a minimum, it is fair to conclude that measuring the impact of a business code is challenging and definitive results are difficult to achieve, but that a number of studies show marked positive instrumental effects when a company has an ethics code.[79]

Still, the existence of ethics codes "does not necessarily help employees act ethically in the complex situations they face in their jobs."[80] A code may also enable individuals to simply follow an ethical admonition or guideline reflexively without deeper consideration of the appropriateness of that guideline in the current circumstances.[81] Ethics codes do not represent a panacea, and research has not produced uniform results, but the research suggests that such codes may possess powerful signaling and instrumental effects.[82]

For a legal ethics code to trigger positive symbolic and instrumental effects, publicity about and distribution of the code would likely need to

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proposes that "measuring the effectiveness of a business code requires multiple methods and sources of data." *Id.* at 122. Similarly, a review of more recent empirical literature from 2005-2011 explains that, of five studies about the impact of codes of ethics on ethical decision-making, "three . . . found [codes of ethics] positively impact[ed] ethical decision-making . . . [But] two findings suggested the mere existence of codes of ethics were not sufficient to influence ethical behavior or ethical awareness." Craft, *supra* note 60, at 249 (citations omitted). *See also*, Kaptein, *supra* note 60, at 234 (attributing the mixed findings "to the fact that the mere existence of BCEs [Business Code of Ethics] does not necessarily amount to its effectiveness"). *Id.* The 2011 Kaptein study examined a variety of factors with respect to the impact of BCE's and suggested, *inter alia*, that "the embedment of BCEs by management has the greatest impact on reducing unethical behavior in the workplace of all researched factors." *Id.* at 245. In ranking other important factors from the study, Kaptein explained that "quality of communication of BCEs had a stronger relationship with unethical behavior than the content of BCEs," *id.*, and that content was of greater importance with respect to unethical behavior than was "the mere existence of BCEs." *Id.* The author emphasizes the importance of steps beyond just the "first step" of adopting a BCE in making BCEs effective. *Id.* at 247.

[78] *Cf.* Adams, *supra* note 58, at 208. Jang B. Singh, *Determinants of the Effectiveness of Corporate Codes of Ethics: An Empirical Study*, 101 J. BUS. ETHICS 385, 390 (2011) ("[T]he perceived intent of the code coupled with its implementation is seen as having an impact on effectiveness. Moreover, the effectiveness of the code is linked to its communication and enforcement within the organization.").

[79] *See supra* notes 71, 73-74, 77 and accompanying text.

[80] Adams, *supra* note 58, at 202 (citing B. Toffler, MANAGERS TALK ETHICS: MAKING TOUGH CHOICES IN A COMPETITIVE BUSINESS WORLD 202 (1991)). For an article examining ways "to improve the effectiveness of codes of ethics at changing the action chosen by decision makers from one deemed to be unethical in the code to one deemed to be ethical," see John C. Lere & Bruce R. Gaumnitz, *Changing Behavior by Improving Codes of Ethics*, 22 AM. J. BUS. 7 (2007).

[81] Adams, *supra* note 58, at 202.

[82] *See supra* note 79.

play a significant role in the process of its adoption and implementation. If such a code is promulgated, formal traditional avenues of publicity in Haiti should, of course, be pursued, including radio and print publications. Even though Internet use and access is decidedly limited in parts of Haiti,[83] publication through a website or other Internet resources should be pursued to reach those who do use the Internet. In addition, cell phones form an essential communication scaffold. Effective avenues of dissemination might include options available through cell phones. Communication about both a possible ethics code as well as about any promulgation of such a code may be foundational to the code serving both symbolic and instrumental purposes.[84]

In addition to informing attorneys and influencing attorney compliance with ethical expectations, another potential instrumental effect of an official code of legal ethics might arise if significant responsibility for discipline under the code were seated with the Bar Association—as many disciplinary functions are currently.[85] In a country in which the 2013 U.S. State Department Haiti Human Rights Report indicates that "[a]llegations of high level executive intimidation of judicial officials and corruption were frequent [and] MINUSTAH and international and local NGOs repeatedly criticized the government for attempting to influence judicial officials,"[86] vesting more substantial formal authority in an independent bar might provide means for counteracting possible official intimidation. For example, if prosecutorial or judicial officials were pressured into pursuing an attorney whose client's interests differed from those of government officials, the bar might be able to intercede by publicly registering its concerns and/or insisting allegations against the attorney be directed to the bar's disciplinary processes.[87]

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[83] According to ITU, the International Telecommunication Union, a specialized agency of the UN devoted to information and communication technology, only 10.6% of individuals in Haiti used the Internet in 2013. *Percentage of Individuals Using the Internet, Haiti, available at* http://www.itu.int/en/ITU-D/Statistics/Pages/stat/default.aspx (last visited Mar. 21, 2015).

[84] Adams, *supra* note 58, at 207 (suggesting that awareness of ethics issues may derive from the creation of and introduction of the code to a greater extent than the mere existence of the code).

[85] *See* DECREE OF MARCH 29, *supra* note 8.

[86] *See* State Department Report, *supra* note 14, at 13.

[87] The State Department Report provides an example of Bar Association efforts to register discontent with judicial actions in a specific case. *Id.* at 9-10. The Report indicates:

> In late July [a] newly appointed Judge . . . ordered the arrest of . . . the plaintiff in a corruption case against the wife and son of President Martelly. The judge also issued an official summons for one of his lawyers, Andre Michel . . . In late October HNP officers detained Andre Michel on obstruction of justice charges after he refused to allow his car to be searched during an evening traffic stop. Authorities held Michel

An additional instrumental effect that might result from the promulgation of an official code relates to client confidence. In a justice system riddled with concerns about corruption, formal promulgation of a code of legal ethics may also communicate reason for renewed trust by clients in their lawyers and the system.

Thus, in addition to the potential benefits of symbolic and instrumental effects for attorneys with respect to attorney awareness and compliance with an ethics code, such a code might have ancillary benefits in terms of mediating possible official intimidation and instilling renewed faith in the system for clients.

C. Compiling a Consistent Whole and Clarifying Role Morality

Provisions that govern the behavior of attorneys specifically or govern the populace generally, and that apply to attorney behavior, can be found in various existing official Haitian codes.[88] Promulgating an official code of ethics, however, furnishes an opportunity to collect, analyze, and evaluate the relevant provisions in the context of regulating attorney behavior. For example, the Decree of March 29, 1979,[89] which sets forth provisions on requirements to become an attorney, administrative regulations about bar associations, and other related matters, along with several specific ethics provisions on attorney behavior, explicitly addresses attorney-client confidentiality.[90] In a single sentence, the Decree announces that maintaining confidentiality is an absolute duty.[91] It does not, however, discuss possible exceptions or qualifications to this rule of absolute confidentiality.[92]

> for the remainder of the night and most of the next day for questioning . . . Michel's detention prompted demonstrations in both Port-au-Prince and Cap Haiti[e]n. Following the incident, the Haitian Bar Association initiated a general strike to protest what they described as the judiciary's harassment of [the plaintiff] and Andre Michel. . . . In November, following negotiations with lawyers affiliated with Michel, [the] Judge . . . cancelled the subpoena against [Michel]. Michel met with [the Judge] at the Port-au-Prince Bar Association headquarters to answer his questions. As of December the State Prosecutor was relieved of his position and the strike ended.

Id. at 9-10.

[88] *See, e.g.*, HAITIAN PENAL CODE, CODE PÉNAL, ARTICLE 140, *available at* http://www.oas.org/juridico/mla/fr/hti/fr_hti_penal.pdf (last visited Mar. 21, 2015).

[89] *See* DECREE OF MARCH 29, *supra* note 8.

[90] *Id.*

[91] *Id.* ("Article 56.- Le secret professionnel est un devoir absolu." [Confidentiality is an absolute duty.]).

[92] *Id.* The Decree emphasizes the sanctity of this duty by indicating that attorneys cannot be required to give evidence of which their knowledge comes only through the exercise of their professional duties. *Id.* at Article 56 ("L'avocat ne peut être tenu de

Returning to the example with which this Article begins, could or should the attorney, whose client has now confessed to having murdered the victim for whose murder an innocent man awaits imminent execution, disclose that information about the client to authorities? Some might believe it immoral and unethical not to reveal. Others might interpret the trust reposing in the attorney as sacred and revealing the information as a violation of that trust.

Based on the explicit language of the Decree, violating the confidence and revealing may also violate the lawyer's duties under the Decree.[93] Keeping the confidence, which the language in the Decree suggests is the appropriate path, can be understood as an example of role morality, behavior specific to a role that may be viewed as immoral by a layperson but be encouraged or even required as an attorney.[94] Although the resolution of this ethical challenge may involve following the unqualified language of the Decree and guarding the confidence, arriving at a principled resolution of the ethics conundrum could, at a minimum, benefit from discussion and guidance for such challenges in an official code of ethics.[95] Developing and promulgating an official code enables the drafters to tackle challenges and guide members in role morality as well as potentially to clarify role morality for the general public.[96]

Developing and promulgating an official code also encourages drafters to reevaluate the provisions scattered among codes and determine if

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déposer sur les faits dont il n'a connaissance que dans l'exercice de sa profession." [The attorney cannot be required to give evidence of which his knowledge comes only through the execution of his professional duties.]).

[93] *See* DECREE OF MARCH 29, *supra* note 8.

[94] DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY (1988).

[95] For an example of an attorney considering possible approaches to an attorney-client confidentiality dilemma in an open letter to his Haitian attorney colleagues, Mr. Monferrier Dorval in *Le Nouvelliste* suggests an example circumstance of a client in a divorce case who reveals to his attorney that the client plans to assassinate his wife to take revenge upon her. Mr. Dorval describes the attorney as caught between two obligations, the duty to maintain the secret and the duty to provide assistance to persons in danger. He proposes a method of resolution for the dilemma that comprehends the lawyer as situated within his Bar Association and enables him to seek counsel from the head of the Association and work to prevent the crime from occurring. Monferrier Dorval, *supra* note 40. The approach taken by the Code of the Federation of Haitian Bar Associations on the issue of attorney-client confidentiality could also be instructive. *See FBH Code, supra* note 40, at Chapitre IV, 4.3 (discussing exceptions to the otherwise absolute duty of confidentiality).

[96] Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223, 231 (1993). In commenting on legal ethics codes in the U.S., for example, Professor Fred Zacharias argues that "[a]t least part of the codes' function is to explain the parameters of the system and attempt to identify how, when, and why a lawyer should act differently than well-intentioned laypersons might act."

reconsideration or modifications or additions are appropriate. The process of constructing a primary source document as a repository for a deontological code for lawyers invites rethinking, efforts to harmonize potentially inconsistent provisions, as well as opportunities to furnish commentary and guidance on the application of the rules and on possible limits and qualifications to them.[97] The reconsideration and compilation process brings both prosaic and complex issues of professional ethics to the fore, and can foster discussion among practitioners, members of the bench, laypersons, and academics. This process can also offer explicit recognition of where conflicts may lie among different authorities and which authorities take precedence (e.g., constitution, codes, decrees, etc.). It may also suggest that developing an official code of legal ethics should not occur in isolation, but rather in conjunction with review and reconsideration of the roles and responsibilities of other public officials.[98]

Publicizing the process and the ultimate resultant code through multiple communication vehicles could enable broader and more engaged discussion of the issues involved in evaluating and formulating a code. This could be of particular importance in overcoming obstacles that often arise in trying to access and conduct research on Haitian law and practice.[99] These dimensions of promulgating a code offer platforms to involve members of the bar, the bench, and other individuals and diverse groups in society in participating in the process of evaluating, publicizing, and codifying a set of rules or standards for attorney behavior.[100]

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[97] Drafters sometimes append comments to accompany codes of legal ethics. *See, e.g.*, Canadian Bar Association, CODE OF PROFESSIONAL CONDUCT ch. 1, cmt. 1. (2009), *available at* http://www.cba.org/cba/activities/pdf/codeofconduct.pdf ("Integrity is the fundamental quality of any person who seeks to practise as a member of the legal profession.").

[98] Jean Elias Xavier opines that:

> [a] Code of Legal Ethic[s] should not be published in isolation without a careful evaluation and involvement of the whole system and its functionaries: clerks, ushers, judges, government commissioner[s], lawyers, authorized representative[s] or authorized agent[s] (in Haiti fondés de pouvoir). Moreover, a restructur[ing] of the curriculum of the law school will be an imperative as well as a public education in [these] legal matter[s].

Email from Jean Elias Xavier to Kate Bloch (Apr. 14, 2014) (on file with the co-authors).

[99] Because many legal documents have historically not been and may still not be accessible in electronic format, conducting research about certain facets of Haitian law and practice can present substantial challenges.

[100] Involving individuals outside the bar in the process of formulating a code of legal ethics can help address the concern that "[s]imply through normal processes of dissonance—reduction and acculturation—professionals may lose sensitivity to interests at odds with their own." Deborah L. Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 TEX. L. REV. 689, 691-92 (1981) (footnote omitted).

An official deontological code for lawyers offers several potential practical benefits. They range from symbolic to instrumental value, from unearthing potential conflicts among codes and approaches to clarification, if not synthesis, and publicity as part and parcel of codification.

IV. LIMITATIONS AND CHALLENGES OF AN OFFICIAL CODE OF LEGAL ETHICS

Adopting an official code of professional ethics may produce a range of potential benefits, a number of which are described above.[101] Such a proposed code also provokes deontological as well as practical concerns. Is it ethical (or prudent) to subject attorneys in Haiti to yet another hurdle that could block or diminish access to justice or the justice system, or extend the duration of pre-trial detention for their prospective or current clients? Is it practical to anticipate implementation in an environment where concerns about corruption abound? Here, the questions are analyzed in four contexts: 1) imposing an ethical code in an environment that may favor unethical conduct; 2) imposing an ethical code as a requirement to become or practice as an attorney; 3) the risk of a code as a retaliatory tool; and 4) the influence of situational versus dispositional factors. Part V then focuses on a proposal for a venue in which to explore responses to these questions and endeavor to implement a code from the ground up.

A. Imposing an Ethics Code in an Environment that May Favor Unethical Conduct

Scholars suggest that a code of legal ethics "prevents attorneys from replacing institutional judgment with personal judgment"[102] but that "[s]uch a limitation is successful only if social institutions are intact and properly functioning such that institutional justice can be realized."[103] Operating in a context of justice system weaknesses or failures may thus encourage lawyers to apply personal judgment and defy penal prohibitions or those of an ethics code.

As noted above, individuals arrested and detained in Haiti's prisons regularly face overcrowding so extreme that inmates must sleep in shifts because they are packed into cramped cells that literally do not have

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[101] *See supra* Part III.

[102] Jennifer Daehler, *Professional Versus Moral Responsibility in the Developing World*, 9 GEO. J. LEGAL ETHICS 229, 262 (1996) (*citing* Richard A. Wasserstrom, LAWYERS AS PROFESSIONALS: SOME MORAL ISSUES, *in* ETHICAL ISSUES IN PROFESSIONAL LIFE 63 (Joan C. Callahan ed., 1988)).

[103] *Id.*

adequate floor space for all the men to lie down on the ground.[104] Haitian prisons also commonly lack adequate facilities to dispose of human waste, with, in Jérémie, for example, a bucket shared by perhaps fifty or so men at night.[105] An American Bar Association Report indicates that:

> in practice prisoners are routinely detained for periods from months to years (there is no bail system) before their cases are heard. Many never see a lawyer, and those who do have no right to private encounters and must meet with their attorneys in tiny, squalid cells crowded with other inmates.[106]

There may be ways, however, out of extended pre-trial detention. One, although not the only, way may involve bribery.[107] Attorneys in Haiti who practice in the criminal justice system often face enormous obstacles in pursuing justice for their clients. It is hard to imagine that a code of ethics would permit bribing prosecutorial or judicial officials. But without such persuasion, crime victims may be denied access to justice, and clients may remain imprisoned in dehumanizing conditions. Is it fair or just or appropriate to impose an ethics code that may install yet another obstacle to

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[104] *See supra* notes 18-23 and accompanying text.

[105] *See* Bloch, *supra* note 20, at 435; Memorandum from Rachel Lopez on prison conditions to Nicole Phillips, *supra* note 20.

[106] *Section Task Force Travels to Haiti to Train Lawyers*, *available at* http://www.americanbar.org/groups/litigation/initiatives/good_works/haiti/section_task_force_travels_to_haiti_to_train_lawyers.html (last visited Mar. 21, 2015). With respect to time spent in pre-trial detention, the State Department Report notes:

> Authorities must bring the detainee before a judge within 48 hours of arrest. By routinely holding prisoners in pretrial detention, authorities often failed to comply with these provisions. The [Office of Citizen Protector] OPC's national and 12 regional offices worked on behalf of citizens to ensure that law enforcement and judicial authorities respected the right to due process. When authorities detained persons beyond the maximum allotted 48 hours, the responsibility of the OPC was to intervene on their behalf to speed up the process. The OPC did not have the resources to intervene in all cases of arbitrary detention . . . .
>
> The judicial system rarely observed the constitutional mandate to bring detainees before a judge within 48 hours, and prolonged pretrial detention remained a serious problem. In some cases detainees spent years in detention without appearing before a judge.

State Department Report, *supra* note 14, at 9, 12. Interestingly, according to the Report, prison wardens estimated the time spent in pre-trial detention as substantially longer than other reports indicated. *Id.* at 12.

[107] For a discussion of corruption concerns, see *supra* notes 14-17 and accompanying text. *See infra* note 157 and accompanying text on the success of the attorneys of the Bureau des Avocats Internationaux (BAI) to obtain pre-trial release for clients without the use of bribery.

access to justice or to liberating one's client from conditions that must violate basic human rights?[108]

Responses to this criticism, of imposing an ethics code in an environment that may, at times, support a certain Machiavellian expediency, and that may, on occasion, favor unethical conduct, proceed along several dimensions. First, bribery already constitutes a prohibited offense in Haiti.[109] The Penal Code bars the giving of bribes to public functionaries,

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[108] Universal Declaration of Human Rights, United Nations, *available at* http://www.un.org/en/documents/udhr/ ("Article 5: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."); *see also supra* notes 15-23 & 29 and accompanying text.

[109] Code Pénal, Haitian Penal Code, arts. 137-38, 140, *available at* http://www.oas.org/juridico/mla/fr/hti/fr_hti_penal.pdf (Haiti).

IV. DE LA CORRUPTION DES FONCTIONNAIRES PUBLICS [Of the Corruption of Public Officials]

Art. 137-Tout fonctionnaire public de l'ordre administratif, judiciaire ou militaire, tout agent ou préposé d'une administration publique qui aura agréé des offres ou promesses, ou reçu des dons ou promesses pour faire un acte de sa fonction ou de son emploi, même juste, mais non sujet à salaire, sera puni de la dégradation civique et condamné à une amende double de la valeur de la promesse agréée ou des choses reçues sans que ladite amende puisse être inférieure à cinquante piastres. [Any public administrative, judicial or military servant/official, any agent or individual assigned to a task of public administration who has consented to offers, or received gifts or promises to perform an act in the line of his/her duty or position, even if it seems fair, but not subject to remuneration, will be punished by a demotion and will have to pay a fine that is twice the value of the agreed upon promise or of the things received, but the amount of the fine may not be inferior to fifty *piastres* (Gourdes).].

Art. 138.-La précédente disposition est applicable à tout fonctionnaire, agent ou préposé, de la qualité ci-dessus exprimée, qui par offres ou promesses agréées, dons ou présents reçus, se sera abstenu de faire un acte qui entrait dans l'ordre de ses devoirs. [The previous provision shall apply to any public servant, agent or individual assigned to a task as defined above, who, by offers or agreed upon promises, donations or gifts received, will have abstained from performing an act that was part of his/her duties.].

Art. 140.-Quiconque aura contraint ou tenté de contraindre par voies de fait ou menaces, corrompu ou tenté de corrompre par promesses, offres, dons ou présents, un fonctionnaire agent ou préposé, de la qualité exprimée en l'article 137, pour obtenir, soit une opinion favorable, soit des procès-verbaux, états, certificats, ou estimations contraires à la vérité, soit des places, emplois, adjudications, entreprises ou autres bénéfices quelconques, soit enfin tout autre acte du ministère du fonctionnaire, agent ou préposé, sera puni d'un emprisonnement d'un an à trois ans. [Whoever coerced or attempted to coerce by violence or threats, corrupted or attempted to corrupt by promises, offers, gifts or presents, a public servant, agent or individual assigned to a task, as defined and expressed in Article 137, to obtain a favorable opinion whether from minutes, statements, certificates, or untruthful estimates or whether positions,

including prosecutorial and judicial officials.[110] Under Haitian Penal Code Article 140, engaging in this type of corruption warrants from one to three years imprisonment.[111] Consequently, the behavior of attorneys who engage in bribery, as defined by the Penal Code, already constitutes a serious crime. While including such a prohibition in a code of ethics might interpose an additional element of dissuasion from bribing a judicial official, it does not constitute a new prohibition. One might contend that the institution of an official code of conduct that prohibits bribery would place an attorney's privilege to practice law at risk, but it is hard to imagine that this risk does not already inhere in committing the crime of bribery under the Penal Code. Courts in Haiti already have jurisdiction to punish attorneys for violations of existing legal codes, including the Penal Code, just as the courts do for other citizens of Haiti.

Second, beyond the fact that bribery is already a crime,[112] condoning unethical and, in the example given, criminal conduct by a lawyer contradicts a genuine and impassioned desire for the effective rule of law in Haiti. While it is possible that adding a code with provisions that duplicate existing (and perhaps un- or under-enforced) provisions of the Penal or other codes would cause the ethics code to become an object of derision, practicing in a legal environment where corruption may be commonplace has not undermined a desire for effective rule of law in Haiti, as evidenced, for example, by the adoption of the Federation of Haitian Bar Associations' code of legal ethics.[113] Currently, to become eligible for an apprenticeship in law, a "stage," of which successful completion may allow an individual to join the bar association and practice, law school graduates swear an oath. They promise, in the exercise of their profession, to observe the principles of dignity and honor that must characterize the conduct of a member of the order of lawyers.[114] This promise embodies a consistent refrain in Haiti, a

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employment, auctions, firms or any other profits, or finally whether any other act from the public servant's, agent's or assigned individual's ministry, shall be punished by one to three years of imprisonment.].

Id.

[110] *Id.*

[111] *Id.*

[112] Haitian Penal Code, *supra* note 109.

[113] *See FBH Code*, *supra* note 40 ("The Code of Professional Ethics of the Legal Profession").

[114] DECREE OF MARCH 29, *supra* note 8, Article 8 (*Je jure d'observer, dans l'exercice de ma profession, les principes d'honneur et de dignité qui doivent caractériser les membres de l'Ordre des Avocats)* ["I swear to observe in the duties of my profession, the principles of honor and dignity that must characterize the members of the Order of Attorneys."].

deep hope that honor and the rule of law will prevail.[115] With respect to that hope, Dr. Jomanas Eustache, Dean of ESCDROJ, opines:

> I would like to highlight the urgency of the situation and the need for all interested sectors and individuals to act swiftly, legally, and with firmness to ensure and strengthen the basis of the rule of law and the judicial system in Haiti. The result would be the demolition of the foundations of impunity in Haiti.[116]

Imposing an ethical code that advocates integrity and a consequent support for the rule of law responds to this urgent hope by anchoring the code in the passion of those who seek to build in Haiti a society governed by the rule of law. Even if the code begins as a symbol, it can serve as a powerful testament to a commitment to a justice system based on ethical professional interactions.

Third, beyond its symbolic value, naming the conduct as part of a formal code of legal ethics might serve, with adequate emphasis and support over time, to help adjust common practices. To the extent that the publicity and debate surrounding implementation of a code work to encourage a different set of customary practices and support all those prosecutorial and judicial officials and attorneys who currently refuse to engage in bribery practices, inclusion of a prohibition on bribery may decrease the acceptance of such a practice.[117] Although, at this time, in an individual case, a better outcome (for the client and perhaps for the attorney, assuming she doesn't get prosecuted for bribery) might be achieved by bribery to initiate prosecution or liberate the client from pre-trial detention conditions, over time, if attorneys regularly follow the prohibition, perhaps officials would come not to expect or feel pressured to accept bribes and would be in a position to focus greater attention on all the cases on their dockets generally, rather than preferential attention toward those few clients who have or can get the resources to hire an attorney and pay a bribe. Perhaps a movement away from bribery would spur (renewed) consideration of a bail system or an own recognizance release system[118] or other legal means to consider pre-

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[115] *See* Eustache, *supra* note 16, at 602.

[116] *Id.*

[117] In 2013, Haiti also established a High Council of the Judiciary whose work may over time come to have a significant positive influence on reform in the judiciary. ANNUAL REPORT 2013: THE STATE OF THE WORLD'S HUMAN RIGHTS, HAITI, AMNESTY INTERNATIONAL, https://www.amnesty.org/en/region/haiti/report-2013 ("In July, the High Council of the Judiciary was finally established. However, its functioning was hampered by internal divisions which resulted in the temporary withdrawal of two members, including the representative for the human rights sector. The Council is a key institution for the reform and independence of the justice system.").

[118] Release on bail or on a defendant's own recognizance are approaches commonly used

trial release.[119] One may also envision an official code of legal ethics as but one of a series of measures or changes that encourage support for professional ethical integrity and the rule of law.

B. Imposing an Ethical Code and Its Impact on Admission to the Practice of Law

Prospective attorneys in Haiti currently face significant challenges to becoming lawyers and entering the practice of law. Law school entails a four-year undergraduate degree program.[120] While costs vary, in a country in which poverty is the norm,[121] having the time to attend law school and pay tuition represent substantial barriers to successful completion of a law degree. Even if candidates successfully complete the classroom component necessary for a law degree, this turns out to be but an early challenge to entering practice. Following graduation, a candidate for legal practice must complete and defend a memoir, a substantial and demanding piece of writing.[122] Resources for the research, writing, and editing of the memoir must generally be supplied by the candidate as that process does not commonly constitute part of the law school curriculum.[123] In addition, lawyers must complete a "stage" or apprenticeship of one to two years in a government or private law office.[124] Supplementing the cost and time requirements of law school, these additional demands mean that few

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in U.S. jurisdictions to enable pretrial release of a defendant from custody prior to trial and which offer some financial or other assurance of the defendant's likely appearance at future court proceedings. *See, e.g.*, Cal. Penal Code §§ 1269b, 1270, 1273 (West 2013).

[119] "The criminal procedure code does not afford a functional bail system." State Department Report, *supra* note 14, at 11.

[120] For a discussion of the course of study for a bachelor's in law program in Haiti, see Licence en Sciences Juridiques, Université Quisqueya, *available at* http://www.university-directory.eu/jredirect/304823/Bachelors+Degrees+in+Haiti/program-courses/Bachelor-degrees/110/Universit%C3%A9+Quisqueya/HT/12675/Licence+en+Sciences+Juridiques#.VErpVhZ5H6M (last visited Mar. 21, 2015).

[121] *See* CIA WORLD FACTBOOK, *supra* note 12.

[122] Blaine Bookey, *Enforcing the Right to be Free From Sexual Violence and the Role of Lawyers in Post-Earthquake Haiti*, 14 CUNY. L. REV. 255, 274 (2011) ("The vast majority of Haitian law school graduates never become lawyers because they fail to complete the required memoir (thesis) and stage (apprenticeship) required for admission to the bar. Students of modest means, those most likely to work on behalf of the poor, find it particularly difficult to overcome these hurdles.").

[123] *See, e.g.*, Brian Concannon, Jr., *Beyond Complementarity: The International Criminal Court and National Prosecutions, A View from Haiti*, 32 COLUM. HUM. RTS. L. REV. 201, 212 n.45 (2000) (noting the lack of inclusion of the memoir process in the law school curriculum).

[124] *Id.*

candidates succeed in becoming members of the bar. One international human rights attorney acquainted with the law school system and process of admission to the bar in Haiti estimated that, in 2000, in a country of almost seven million people at the time,[125] "fewer than twenty lawyers per year are admitted to practice."[126]

What role, then, might the imposition of an official deontological code play in the likelihood that candidates succeed in entering legal practice? Would such a code pose an extra obstacle to admission? The answer to this question depends upon the expectations associated with the promulgation of the code. In some jurisdictions, admission to the practice of law requires passing an examination that tests awareness and understanding of a legal ethics code.[127] Failure to pass the examination prevents admission.[128] If the promulgation of an official code in Haiti arrives with this expectation, the requirement of success in another testing situation would make it reasonably likely that promulgation of an ethics code will further decrease the number, or delay the admission, of candidates who enter law practice in Haiti. Pre-admission proof of understanding of the ethics code embodies a messaging function and would involve a value judgment implying that a basic understanding of legal ethics is a necessary component in demonstrating one's ability to practice law professionally. With such a requirement, presumably law school curricula would adjust to provide training in the new ethics code.[129] But even with training, if the Haitian

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[125] *See* CIA WORLD FACTBOOK, *supra* note 12. Estimates put the population of Haiti at 6,867,995 in 2000. Republic of Haiti, Country Overview, Encyclopedia of the Nations, http://www.nationsencyclopedia.com/economies/Americas/Haiti.html (last visited Mar. 21, 2015); CIA World Factbook estimates Haitian population at "9,893,934 (July 2013 est.)." CIA WORLD FACTBOOK, *supra* note 12.

[126] Concannon, Jr., *supra* note 123, at 212.

[127] For example, most jurisdictions in the U.S. require applicants to pass the Multistate Professional Responsibility Examination (MPRE). Jurisdiction Information, The Multistate Professional Responsibility Examination, http://www.ncbex.org/about-ncbe-exams/mpre/ (last visited Mar. 21, 2015) ("The MPRE is required for admission to the bars of all but three U.S. jurisdictions (Maryland, Wisconsin, and Puerto Rico).... Passing scores are established by each jurisdiction.").

[128] *See, e.g.*, California, Multistate Professional Responsibility Examination, California State Bar, http://admissions.calbar.ca.gov/Examinations/MultistateProfessional ResponsibilityExamination.aspx (last visited Mar. 21, 2015) ("In addition to passing the California Bar Examination, applicants for admission to practice law in California must take and pass the Multistate Professional Responsibility Examination (MPRE) in accordance with Title 4, Division 1, Chapter 5 of the *Rules of the State Bar of California* (*Admissions Rules*).").

[129] Scholarship on moral reasoning suggests that careful attention to the approaches used to teach ethics is critical to the likely success of affecting students' moral development. Neil Hamilton & Verna Monson, *Answering the Skeptics on Fostering Ethical Professional*

experience resembles that of the U.S., some aspiring attorneys are still likely (at least initially) to fail the ethics test.[130] Whether or to what extent that cohort would overlap with the small group of law school graduates who otherwise find the resources and fulfill the requirements for admission to the bar is not clear.

In addition to training as part of a law school curriculum, but instead of a pre-admission requirement, review of a new legal ethics code could form part of post-admission continuing legal education (CLE) training. Using this approach would mean that demonstrating understanding of the new ethics code would not require overcoming a pre-admission hurdle of passing a test on the new code separate from whatever curricular requirements the law school imposed. It does, however, anticipate implementation of post-admission CLE training demands. Presumably, post-admission training on the new ethics code could also be appropriate for attorneys already in practice, and, under this CLE approach, new attorneys could join that training.

Educating lawyers and aspiring lawyers about a new legal ethics code involves choosing an option that meets the goals of signaling the importance of ethical practice and assisting those involved in the justice system to succeed in their admission to the bar and to engage in ethical practice.

C. Risk of a Code as an Obstructive or Retaliatory Tool

Another potential drawback to implementation of an official code of ethics lies in the risk that such a code could be wielded as an obstructive or retaliatory weapon.[131] This risk probably increases with official provisions

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Formation (Professionalism), 20 NO.4 PROF. LAW. 3, 5 (2011) ("There is no empirical evidence that standard, rules-oriented or doctrinal courses on ethics, jurisprudence, or philosophy have an impact on a student's moral reasoning or moral motivation and identity. There is a growing body of empirical evidence finding that educational engagements on moral issues that promote feedback on a student's ideas and conduct, self-assessment, and reflection can help foster a student's moral reasoning and internalization of moral motivation and identity." (footnote omitted)).

[130] Statistics on the Multistate Professional Responsibility Exam (MPRE) scores required to pass in each of the jurisdictions that employs the MPRE and the percentage of exam takers who achieved various scores are available from the National Conference of Bar Examiners. *See* Bar Examination and Admission Statistics—2013 Statistics, Nat'l Conf. Bar Exam'r, 34-37, *available at* http://www.ncbex.org/assets/media_files/Bar-Examiner/articles/830114statistics.pdf (last visited Mar. 21, 2015). These statistics indicate the percentage of test takers who achieve various scores. When compared to the lowest accepted score in any jurisdiction, as indicated on the site, it is apparent that a percentage of test takers fail, on a given administration of the test, to meet the minimum passing score of any jurisdiction.

[131] *See* Email from Geoffrey C. Hazard, *supra* note 9.

that embody enforceable rules rather than informative standards or norms. The concern here is that rather than serving as a guide or incentive to encourage ethical behavior, an official code of ethics might serve as an accusatory tool employed by an attorney for one side or for both in a proceeding to try to sideline or shift the focus of the proceeding or distract opposing counsel. Interestingly, one scholar has argued that "[j]ust as legal ethics does not occupy a privileged position in the curricula of foreign [non-U.S.] law schools, neither does it occupy a privileged position in the litigation of disputes in foreign [non-U.S.] courts."[132] To what extent perceptions of the role of legal ethics, and its use as an accusatory tool, might change with an increased emphasis on legal ethics in the law school curriculum or continuing legal education setting remains to be seen. If increased emphasis on legal ethics corresponds with inappropriate use of the code as a dilatory, obstructive, or retaliatory weapon, attention will need to focus on approaches that limit misuse.

D. The Influence of Situational Versus Dispositional Factors

The Federation of Haitian Bar Associations' adoption of a legal ethics code suggests substantial support for the concept of having a formal code. It also implies that many lawyers already are acting, or wish to be able to act, consistently with the demands of such a code. Nonetheless, actually promulgating an official code adds challenges. Even if promulgated, getting the code to infuse the daily actions of lawyers who may not be complying with, or even aware of, those demands multiplies the challenges. Bridging aspirations of what a code might bring to law practice to the daily individualized implementation of its provisions will almost certainly require measures beyond those involved in the promulgation of the code itself.[133] In choosing to promulgate an official code, it would be valuable to avoid having the code serve as only a paper code that, from lack of successful implementation, incurs derision and increases cynicism about the likelihood of positive professional deontological conduct.[134]

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[132] Mary C. Daly, *The Dichotomy Between Standards and Rules: A New Way of Understanding the Differences in Perceptions of Lawyer Codes of Conduct by U.S. and Foreign Lawyers*, 32 VAND. J. TRANSNAT'L L. 1117 (1999). Professor Daly argues that "[f]or better or for worse, lawyers in the United States routinely invoke the rules of professional responsibility in myriads of state and federal court cases." *Id.*

[133] Vital links in this bridge could include attention to the code in the law school curriculum, continuing education post-admission, and regular reminders about the applicability/content of the code.

[134] Adoption of a code without proper implementation may risk such derision and perhaps even an increase in ethically problematic behavior. *Cf.* Kaptein, *supra* note 60, at 247 (discussing risks of adopting a business ethics code without proper implementation).

Research on human behavior and the effect of situational versus dispositional characteristics may also inform the question of encouraging successful implementation of a code. Situational factors and pressures inherent in circumstances in which a person finds herself can override a dispositional inclination towards ethical behavior.[135] The Stanford Prison Experiment furnishes an extreme example of the influence of situational circumstances on human behavior, at least in the U.S.[136] In the experiment, Professor Zimbardo randomly assigned consenting college students to play the role of either a prison guard or a prison inmate.[137] Participating students all underwent psychological testing to qualify to engage in the experiment.[138] The evaluators only permitted students who responded "normally" on the testing to participate.[139] All students knew that the experiment consisted of a simulation prison experience.[140] The mock prison was housed in the basement of the Stanford Psychology Department and the experiment was designed to last two weeks.[141] Professor Zimbardo explains, however, that the experiment had to be terminated after six days because "[i]n only a few days, [some of] our guards became sadistic and our prisoners became depressed and showed signs of extreme stress."[142] Being placed into a role and playing that role for six days appear to have driven a number of these ordinary college students into sometimes frightening and ethically problematic behavior.[143] The prison experiment, as well as other research on the effects of situational cues, strongly suggests that, at least in some circumstances, situational cues and expectations can trump good judgment and dispositionally expected behavior.[144] The

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[135] *See, e.g.*, Philip G. Zimbardo, *Stanford Prison Experiment: A Simulation Study of the Psychology of Imprisonment Conducted at Stanford University*, STANFORD PRISON EXPERIMENT, http://www.prisonexp.org/ (last visited Mar. 21, 2015); and *infra* note 144.

[136] *Id.*

[137] Philip G. Zimbardo, *Volunteers*, STANFORD PRISON EXPERIMENT, http://www.prisonexp.org/psychology/4 (last visited Mar. 21, 2015).

[138] *Id.*

[139] *Id.*

[140] *Id.*

[141] Philip G. Zimbardo, *Constructing the Experiment*, STANFORD PRISON EXPERIMENT, http://www.prisonexp.org/psychology/5 (last visited Mar. 21, 2015).

[142] *Id.* Only a subset of the guards apparently became sadistic. Philip G. Zimbardo, *An End to the Experiment*, STANFORD PRISON EXPERIMENT, http://www.prisonexp.org /psychology/37 (last visited Mar. 21, 2015). Many, if not most, of the prisoners, however, suffered significant stress. *Id.*

[143] Philip G. Zimbardo, *An End to the Experiment*, STANFORD PRISON EXPERIMENT, http://www.prisonexp.org/psychology/37 & STANFORD PRISON EXPERIMENT, http://www.prisonexp.org/psychology/38 (last visited Mar. 21, 2015).

[144] The importance of situational cues also finds support, *inter alia*, in the famous experiments on obedience to authority conducted by Stanley Milgram. Saul McLeod, *The*

importance of situational factors in influencing human behavior implies that successful implementation of a code of legal ethics may benefit from, and perhaps depend upon, creating an environment in which ethical conduct is the expected norm and conduct consistent with that norm is supported and encouraged.[145]

In a justice system fraught with deficiencies ranging from extremely limited resources to pervasive concerns about corruption,[146] successfully infusing the responsibilities of a new legal ethics code into daily attorney interactions may require some cultural change. Creating an environment that emphasizes and supports ethical conduct within the paradigm of a new ethical code may result or at least benefit from sustained and conscientious focus on implementation and support for situational cues that encourage ethical responses.

V. NEW LAW SCHOOL CLINIC AS A VENUE FOR IMPLEMENTATION OF A CODE OF LEGAL ETHICS

The launch of what may be Haiti's first law school clinic ("the Clinic"), Groupe de Recherche, d'Analyse et d'Assistance Légale of ESCDROJ, GRAALE,[147] will present a venue for sustained and from-the-ground-up training and focus on ethics in the legal landscape. With a February 2014 United Nations' donation of three shipping containers and actual ground breaking in March 2014,[148] the law school in Jérémie, Haiti, ESCDROJ, is in the process of constructing a dedicated home for its anticipated new legal aid clinic. ESCDROJ, as an academic institution, commits itself to building

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Milgram Experiment, SIMPLYPSYCHOLOGY, http://www.simplypsychology.org/milgram.html (last visited Mar. 21, 2015). Commentators do, however, urge caution in extrapolating any universality of traits. *Id.* (citing Peter B. Smith & Michael Harris Bond, SOCIAL PSYCHOLOGY ACROSS CULTURES (2d ed. 1998)).

[145] The idea that change in systems and support for that change may be necessary to successfully address ethics challenges seems consistent with the observations of Robert Klitgaard about addressing corruption concerns more generally in Haiti. *See* Klitgaard, *supra* note 72.

[146] *See supra* Part I.

[147] *See CUA-Haiti Initiatives*, THE CATHOLIC UNIVERSITY OF AMERICA, *available at* http://lsji.law.edu/AboutCHI.cfm (last visited Mar. 21, 2015) ("ESCDROJ proposes to establish Groupe de Recherche, d'Analyse et d'Assistance Légale, a law school affiliated Criminal Justice Clinic, to serve the Jérémie and Rosseaux regions of Haiti. The Clinic will serve as a model legal clinic that can be emulated by the other nine law schools in Haiti to greatly increase access to high quality legal representation for the indigent accused.").

[148] The United Nations mission in Haiti is known as MINUSTAH (United Nations Stabilization Mission in Haiti). The Clinic has also benefitted from the effort, generosity, and support of many volunteers.

"a society where the rule of law can be enforced"[149] and to preparing students "to become servants of law and justice."[150] In training students to practice law with an emphasis on social justice and upholding the rule of law, it offers an excellent forum for nurturing ethical practice from the early phases of a student's formal introduction to, and formation of, professional role identity. Graduates of ESCDROJ regularly serve as integral employees of the justice system in the Grand'Anse Department, one of the ten departments in Haiti and the one in which ESCDROJ is located, including as "prosecutors, judges, and lawyers . . . police officers and public officials"[151] as well as serving as law faculty.[152] For many Haitian students at ESCDROJ, law school offers an early, if not initial, substantive understanding of their identity as an attorney. Studying and applying a code of legal ethics in the Clinic could serve as a catalyst to enhance students' sense of professional integrity and commitment to ethical practice. With this foundation, the GRAALE Clinic could supply a venue in which students observe and participate in shaping the culture of local legal ethical norms.

Three key elements animate GRAALE. First, in response to the dire conditions of the Jérémie prison and the desperate need for legal representation for detained inmates there, GRAALE aims to serve as a legal aid clinic, furnishing free legal defense services for indigent detained inmates.[153] Second, GRAALE aims to supply free legal counsel to victims of sexual assault crimes.[154] Haiti operates in a civil law system in which attorneys for crime victims can participate in the criminal trial and victims can receive monetary compensation from a convicted defendant as a result

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[149] *About ESCDROJ*, L'ÉCOLE SUPÉRIEURE CATHOLIQUE DE DROIT DE JÉRÉMIE, http://escdroj.org/About.html (last visited Mar. 21, 2015) ("ESCDROJ was created to help build a society where the rule of law can be enforced, where justice may flourish, and where peace may be enjoyed. We envisioned our law school as a place for those who want to become servants of law and justice, regardless of religion, gender, social, economic or political backgrounds.").

[150] *Id.*

[151] *Id.* ("Some graduates have become prosecutors, judges and lawyers. Others work as police officers and public officials to protect citizens' rights and to uphold the laws. Still others work through the electoral commission to ensure democracy. Most important, however, are teachers and professors who educate future generations about their rights and responsibilities as citizens under the law.").

[152] *Id.*

[153] It is worth noting that the *Law of 1881*, *supra* note 42, required those attorneys-in-training who were engaged in their "stage" or apprenticeship to accept representation of indigent persons accused of a crime and empowered the bar to lengthen a stage when an apprentice refused an assignment to represent an indigent accused. *See id* at Article 39.

[154] To reduce the likelihood of conflicts of interest, the Clinic plans not to represent inmates charged with sexual assault offenses.

of the criminal trial process.[155] Third, GRAALE plans to offer community mediation services to prevent cases from becoming mired in criminal justice or other court proceedings. In each of these roles, GRAALE faculty and students would have the opportunity to apply a code of legal ethics.

A commitment to ethical practice already infuses the GRAALE ideology. For example, in an early conversation with one of the founding directors, Georges-Gabrielle Paul, we explored the fundamental components of the Clinic. Ms. Paul made clear that a critical component would be developing a code of legal ethics for Clinic participants. When asked what the code should contain, the first item she enumerated was a prohibition on the offering or receiving of bribes. In combination with a range of other topics important to legal ethics, Ms. Paul envisioned ethical instruction and implementation permeating the culture of the legal aid clinic. The Clinic, with its commitment to ethical practice, furnishes an outstanding forum in which to implement ethical practice from the ground up. Through the Clinic, ESCDROJ students should be able to observe and experience the application of an ethical code from the start of their professional exposure to legal practice. These students can benefit from the opportunity to have deontological theory and practice infuse their educational environment.[156] They should have role models focused on demonstrating ethical practice in real cases. As a result, GRAALE could serve as a laboratory for the implementation of a code of legal ethics in Haiti.

This approach offers promise but will likely encounter challenges. For example, at the early stages, as GRAALE students interact with justice system participants, for whom the code would be new and perhaps not yet thoroughly integrated into their professional approach, impediments to fully realizing the goal of effective ethical practice may remain. For instance, if non-GRAALE attorneys were to engage or attempt to engage in monetary persuasion of judicial or prosecutorial officials and GRAALE attorneys and

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[155] "[T]he '*partie-civile*' process . . ., under the French system adopted by Haiti, allows the victims' claims for money damages against the defendants to piggyback on the criminal prosecution. *Partie-civile* lawyers can participate in almost all phases of the criminal case, especially the trial." Brian Concannon, *Justice for Haiti: The Raboteau Trial, 35 INT'L LAW. 641, 643 (2000), available at* http://www.ijdh.org/2001/06/archive/brian-concannon-justice-for-haiti-the-raboteau-trial/#.UuaambSIbIU (last visited Mar. 21, 2015). The co-authors do not know, however, how often crime victims actually receive monetary compensation awards through the *partie-civile* process in Haiti.

[156] Some informal research at Duke University suggests that being reminded of ethics rules at the time one may be inclined to disregard them may have some impact on increasing compliance with the rules. Louis Lavelle, *Duke's Cheating Problem*, Bloomberg Business Week, Aug. 12, 2011, *available at* http://www.businessweek.com/bschools/blogs/mba_admissions/archives/2011/08/dukes_cheating_problem.html (last visited Mar. 21, 2015).

students did not, GRAALE students might find that their ethical focus initially reduced their effectiveness in certain facets of representation, and clients might be disappointed with GRAALE student representation.

A well-respected legal organization in Haiti has, however, been successful in obtaining the pre-trial release of clients without resort to bribery.[157] For the Bureau des Avocats Internationaux ("BAI"), bribery is not an acceptable protocol,[158] and yet, through creative advocacy strategies, BAI has obtained the release of several clients, even in jurisdictions where there may be concerns about corruption.[159] Consequently, with diligent pursuit of a case and of all available ethical avenues of release, the hope is that GRAALE will be able to emulate the successes of BAI, in obtaining pre-trial release of clients, as well as encourage an expanding emphasis on ethical practice.

The confluence of encouraging factors in the Jérémie community, namely the predominance of a single law school dedicated to upholding the rule of law whose graduates regularly assume positions of power in the justice system and the anticipated launch of the GRAALE Clinic, may offer a remarkable opportunity to imbed cultural change in the legal landscape. Students can learn and apply ethical frameworks in their student days and carry those through the Clinic along their professional trajectories on a continuum into their post-law school careers in the justice system and community. Here is a chance to further nurture the culture of legal practice in the Grand'Anse Department of Haiti to underscore integrity and the rule of law.

VI. CONCLUSION

Haiti lacks an official code of legal ethics. Although adopting such a code poses challenges, the above analysis suggests that if Haiti were to adopt an official code of legal ethics, the substantial potential benefits might indeed outweigh the drawbacks. Situational factors often influence human behavior. As a result, implementing the code in an environment conducive to support for ethical practice may increase the probability of success in infusing the approaches of the code into the daily interactions of

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[157] Email from Blaine Bookey, Associate Director/Staff Attorney, Center for Gender and Refugee Studies, University of California, Hastings College of the Law, and former legal intern with BAI, to Kate Bloch (Dec. 17, 2013) (on file with co-authors) ("BAI has had a successful defense program for years and BAI, even without a code, has a strict prohibition for its attorneys against accepting bribes. . . . It has been successful in gaining the release for several clients without paying bribes . . . by engaging in creative strategies . . . .").

[158] *See* Jagannath, *supra* note 17, at 46.

[159] Bookey, *supra* note 157.

legal practitioners. The ESCDROJ GRAALE Clinic, with its emphasis on social justice and ethical practice, could provide an excellent venue in which to nurture success in the implementation of an official deontological code for Haitian attorneys.

The (Somewhat) False Hope of Comprehensive Planning*

Michael Lewyn**

I. INTRODUCTION

Some commentators describe municipal comprehensive land use plans as a potential remedy for suburban sprawl[1] (by which I mean automobile-oriented development, often in suburban areas far beyond a region's traditional urban core).[2] But in fact, states that require municipalities' zoning to be consistent with their comprehensive plans can be just as automobile-oriented as more permissive states. For example, Florida has required municipalities to comply with their own comprehensive plans since 1985,[3] yet public transit ridership in every single Florida metropolitan area is lower than the U.S. average.[4] Florida's metropolitan areas are also among the most dangerous for pedestrians.[5] By contrast, there are five

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* I published a shorter article on this topic, entitled *Plans Are Not Enough*, which can be found at 42 REAL EST. L.J. 240 (2013). In that article, I focused on the issues addressed in Part III of this Article (that is, pro-sprawl comprehensive plans). In addition to addressing those issues in more depth, this Article adds a significant amount of background (Part II), discusses how the goals of the smart growth movement can be met without comprehensive plans (Part IV) and discusses why comprehensive plans are useful regardless of their impact on smart growth (Part V).

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[1] Eric Links, *Property-hole-in-one for Land-Use Control: Endorsing the Dominance of Comprehensive Plans*, 33 WM. MITCHELL L. REV. 627, 634 (2007) (citation omitted)("Comprehensive planning is a comprehensive response to the systemic problems of sprawl."); Thomas Pelham, *Transportation Concurrency, Mobility Fees, and Urban Sprawl in Florida,* 42/43 URB. LAW. 105, 105 (2010/2011); *infra* pages 17-19.

[2] *See* Michael Lewyn, *Sprawl in Canada and the United States*, 44 URB. LAW. 85, 86 (2012) (citing numerous definitions incorporating these elements).

[3] Pelham, *supra* note 1, at 105.

[4] *See* Brian McKenzie & Melanie Rapino, *Commuting in the United States: 2009*, U.S. CENSUS BUREAU 5-6, 9 (Sept. 2011), http://census.gov/prod/2011pubs/acs-15.pdf (indicating that five percent of Americans commute via public transit and displaying a map showing that no Florida region has such high ridership).

[5] *See* Richard S. Geller, *The Legality of Form-Based Zoning Codes*, 26 J. LAND USE & ENVTL. L. 35, 64-65 (2010) (most dangerous metropolitan areas for pedestrians are in Florida); *see also* Robert D. Bullard, Glenn S. Johnson & Angel O. Torres, *The Costs and*

metropolitan areas where over ten percent of workers use public transit[6]—and only one of those regions (San Francisco) is in a state that requires cities to both create comprehensive plans and to comply with those plans.[7] Thus, it appears that the mere existence of a binding municipal comprehensive plan does not necessarily lead to less automobile-dependent, sprawling development.

This Article accordingly suggests that a municipal comprehensive plan (by which I mean a document issued by a municipality in order to guide its zoning code, as opposed to a statewide or regional plan),[8] is neither sufficient nor necessary for "smart" growth (by which I mean land development that is oriented towards bicyclists, pedestrians, and transit users, rather than favoring cars alone).[9]

Part II of the Article briefly outlines the growing prominence of both comprehensive planning and smart growth. Part III explains that comprehensive plans are not sufficient to reduce sprawl, and in fact may accelerate sprawl. Part IV of the Article shows that comprehensive plans

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Consequences of Suburban Sprawl: The Case of Metro Atlanta, 17 GA. ST. U. L. REV. 935, 996 (2001) (stating that in the 1990s, metropolitan areas with the highest rates of pedestrian fatalities were Miami and Fort Lauderdale, both in Florida).

[6] *See* Brian S. McKenzie, *Public Transportation Usage Among U.S. Workers: 2008 and 2009*, U.S. CENSUS BUREAU 5-6 (Oct. 2010), http://www.census.gov/prod/2010pubs/acsbr09-5.pdf (listing New York, New York, Boston, Massachusetts, San Francisco, California, Chicago, Illinois and Washington, D.C. as most transit-friendly regions).

[7] *See* Jerrold A. Long, *Overcoming Neoliberal Hegemony in Community Development: Law, Planning, and Selected Lamarckism*, 44 URB. LAW. 345, 361 n.61 (2012) [hereinafter Long, *Overcoming Neoliberal Hegemony in Community Development*] (the four states requiring strict compliance are California, Florida, Delaware and Oregon). In addition, the law of Washington and Wisconsin is unclear as to whether municipalities must strictly comply with comprehensive plans. *See* Jerrold A. Long, *Realizing the Abstraction: Using Today's Law to Reach Tomorrow's Sustainability*, 46 IDAHO L. REV. 341, 363-64 nn.99-100 (2010) [hereinafter Long, *Realizing the Abstraction*] (discussing Washington and Wisconsin law).

[8] *See* MARYA MORRIS, SMART CODES: MODEL LAND USE DEVELOPMENT REGULATIONS 6 (2009) (discussing how the local comprehensive plan is "a policy document in text and map form" which should be the "primary guide for whether property ought to be rezoned").

[9] *See* Whitney G. Stohr, *The Local Identity of Smart Growth: How Species Preservation Efforts Promote Culturally Relevant Comprehensive Planning*, 43 ENVTL. L. REP. NEWS & ANALYSIS 10024, 10027 (2013) (describing smart growth as "the antithesis of sprawl" and listing a variety of smart growth principles, including "increased transportation choices"). Admittedly, many lists of smart growth principles include concepts unrelated to walkability, such as "a variety of housing options," "protected open space," and "predictable" public decision-making. *Id.* However, the latter goals could be met in sprawl-dominated communities as well, and thus appear to me to be largely irrelevant to the differences between sprawl and smart growth.

are not necessary to reduce sprawl because the goals of the smart growth movement may also be furthered through statewide legislation and municipal zoning. Part V adds that comprehensive plans, although neither necessary nor sufficient for "smarter" growth, may nevertheless be desirable for a variety of reasons unrelated to smart growth.

II. BACKGROUND

The relationship of comprehensive planning and smart growth involves the intersection of two movements: the growth of state-mandated comprehensive planning in the 1960s and 1970s and the smart growth movement of more recent decades.

A. The Fall and Rise of Comprehensive Planning

If one defines comprehensive planning broadly as any sort of legislation designed to regulate a city's physical form, then such planning is older than the United States. For example, in 1681 William Penn created a street plan for the new city of Philadelphia, setting aside open spaces in the central city.[10]

But the distinction between planning and zoning is far newer. In 1909, Los Angeles enacted the first zoning ordinance in the United States.[11] In 1916, New York followed suit.[12] At first, the legality of zoning was unclear because state law did not yet explicitly authorize such regulation.[13] To solve this problem, in 1926, the U.S. Department of Commerce drafted the Standard Zoning and Enabling Act (SZEA), a model state law which gave cities the right to enact zoning laws.[14] SZEA states that zoning "shall be in accord with a comprehensive plan."[15] Two years later, the Commerce Department drafted another model statute, the Standard City Planning Enabling Act (SCPEA).[16] SCPEA provided that city-appointed planning

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[10] *See generally* JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW 16 (3d ed. 2013) (providing a more detailed account of William Penn's work in Philadelphia).

[11] Nicolas M. Kublicki, *Land Use By, For, and Of the People: Problems with the Application of Initiatives and Referenda to the Zoning Process*, 19 PEPP. L. REV. 99, 107 (1991).

[12] *Id.* at 108.

[13] *Id.*

[14] *Id.* at 108-10; *see also* U.S. DEP'T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT (1926), *available at* http://www.planning.org/growingsmart/pdf/SZEnablingAct1926.pdf (displaying a copy of the Act).

[15] *Id.* at 6.

[16] *See* Charles M. Haar & Michael Allan Wolf, *Planning and Law: Shaping the Legal*

commissions should draft comprehensive plans governing zoning, streets, and other public works.[17] The first statute was far more popular; by 1930, thirty-five states had adopted statutes based upon SZEA, and only ten states had adopted laws based upon SCPEA.[18] Today, zoning and enabling statutes based on the SZEA are virtually universal, to a much greater extent than statutes based upon the SCPEA.[19]

These statutes had limited influence upon planning.[20] The SZEA, unlike the SCPEA, required local governments to zone "in accordance with a comprehensive plan"[21] but failed to define the term "comprehensive plan" or to state what it meant for municipalities to zone in accordance with one.[22] As a result, most courts did not require cities to create formal comprehensive plans but instead held that any local decision that conformed to the city's basic land use policies was "in accordance with a comprehensive plan"[23] because a city could implicitly create a "plan" through its zoning code.[24] Although many American cities have in fact adopted comprehensive plans,[25] courts generally treat these plans as at most advisory documents.[26]

Environment of Land Development and Preservation, 40 ENVTL. L. REP. NEWS & ANALYSIS 10419, 10420 (2010); *see also* U.S. DEPARTMENT OF COMMERCE, A STANDARD CITY PLANNING ENABLING ACT (1928), *available at* http://www.planning.org/growingsmart/pdf/CPEnabling%20Act1928.pdf (displaying a copy of the Act).

[17] *See* Haar & Wolf, *supra* note 16, at 10420-21; *see also* Stuart Meck, *The Legislative Requirement that Zoning and Land Use Controls Be Consistent with an Independently Adopted Local Comprehensive Plan: A Model Statute,* 3 WASH. U. J.L. & POL'Y 295, 297-98 (2000) (describing the Act in more detail).

[18] Patricia Salkin, *The Quiet Revolution and Federalism: Into the Future*, 45 J. MARSHALL L. REV. 253, 267 (2012).

[19] *See* Gary D. Taylor & Mark A. Wyckoff, *Intergovernmental Zoning Conflicts over Public Facilities Siting: A Model Framework for Standard State Acts*, 41 URB. LAW. 653, 683 ("The SZEA was either adopted as published, or with minor variations, in all fifty states, while the format and contents of the SCPEA were followed by many, but not all states.").

[20] *See* Lesley R. Attkisson, *Putting a Stop to Sprawl: State Intervention as a Tool for Growth Management*, 62 VAND. L. REV. 979, 991 (2009) ("[T]he Standard Planning Act makes planning optional rather than mandatory for local governments.").

[21] *See* U.S. DEP'T OF COMMERCE, *supra* note 14.

[22] *See* Attkisson, *supra* note 20, at 990.

[23] *Id.*

[24] Meck, *supra* note 17, at 305.

[25] *See* JUERGENSMEYER & ROBERTS, *supra* note 10, at 25 (noting that plans became more common after mid-twentieth century federal legislation required municipalities to draft such plans in order to obtain federal funds for slum clearance).

[26] *Id.* at 31. Within this group, there is a split between states that treat the plan as legally insignificant and those that give the plan persuasive weight in judicial review of municipal zoning decisions. *See* Edward J. Sullivan, *Recent Developments in Comprehensive Planning Law*, 42 URB. LAW. 665, 666-69 (2010) (discussing cases on both sides of issue); Long,

But in the 1970s, some states began to exert more control over local land use.[27] As part of this "Quiet Revolution,"[28] several states required municipalities to adopt and comply with comprehensive plans.[29] California required zoning ordinances to be consistent with comprehensive plans in 1971.[30] Oregon required adoption of comprehensive plans in 1969,[31] and in the mid-1970s its state Supreme Court interpreted the state's preexisting legislation to require municipalities to comply with those plans.[32] During this period, the state also increased state oversight of local development by requiring municipalities to incorporate state policies into their zoning regulations.[33] Similarly, Florida's comprehensive planning rules were part of a broader set of state laws; that state required local governments to adopt, and to act consistently with, their comprehensive plans in 1975,[34] three years after the state created a state planning agency.[35] But the trend towards state-mandated planning has slowed; since 1975, only one state (Delaware) has enacted such a requirement.[36]

B. The Rise of Sprawl (and of Smart Growth)

After World War II, highways facilitated suburb-to-city commutes, and federally insured home loans helped suburban commuters afford new

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Overcoming Neoliberal Hegemony in Community Development, *supra* note 7, at 363 n.75 (footnote omitted) (as of 2003, eighteen states viewed plans as insignificant, while twenty-six gave them some weight).

[27] *See* Salkin, *supra* note 18, at 253-55 (discussing the interplay between state and federal land use control in the 1970s).

[28] *See* Edward J. Sullivan, *The Quiet Revolution Goes West: The Oregon Planning Program 1961-2011*, 45 J. MARSHALL L. REV. 357, 357 (2012) (using the term, and describing Oregon's reforms as part of the "Quiet Revolution").

[29] *See* Stephen D. Villavaso & Johanna Lundgren, *Model Comprehensive Planning Legislation for Louisiana*, 49 LOY. L. REV. 917, 925 (2003).

[30] *See* Daniel J. Curtin, Jr., *Ramapo's Impact on the Comprehensive Plan*, 35 URB. LAW. 135, 140 (2003).

[31] *See* Sullivan, *supra* note 28, at 364.

[32] *Id.* at 369. Courts required county compliance in 1973 decision, and city compliance two years later. *Id.*

[33] *Id.* at 369-70.

[34] *See* Nancy Stroud, *A History and New Turns in Florida's Growth Management Reform*, 45 J. MARSHALL L. REV. 397, 397 (2012) (describing Florida policies as part of "Quiet Revolution"); *see also id.* at 400 (describing Florida policies).

[35] *Id.*

[36] *See* Gabor Zovanyi, *The Role of Initial Statewide Smart-Growth Legislation in Advancing the Tenets of Smart Growth*, 39 URB. LAW. 371, 405 (2007). Delaware's mandatory planning requirement extended to all municipalities in 1996, and in 2001, municipalities were required to rezone all land in accordance with plans. *Id.*

homes.[37] Federal housing legislation placed most public housing in central cities, thus packing the poor into cities while causing the middle class to steer clear of neighborhoods dominated by concentrated poverty.[38] As a result of these policies (among others),[39] America's metropolitan population shifted en masse from city to suburb: in 2000, sixty-two percent of the metropolitan population lived in suburbs, up from forty-one percent in 1950.[40] These statistics actually understate the growth of suburbia, as many cities gained population only by annexing suburban territory.[41] Often, the middle and upper classes fled to suburbia, while cities became dominated by the poor.[42] More recently, the sprawl revolution has eaten its own children, as population has moved from inner suburbs to outer suburbs.[43]

1. Car-dependent suburbs

The suburbs created by this movement of population are generally not walkable, transit-accessible "streetcar suburbs."[44] Instead, they are automobile-dependent,[45] in part because of zoning. For example, zoning regulations separate land uses, meaning that, at a minimum, housing cannot be immediately adjacent to employment, schools or shopping.[46] Zoning laws also limit residential and commercial density in numerous ways, including regulations requiring every house or apartment building to consume a minimum amount of land,[47] minimum parking requirements

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[37] *See* JUERGENSMEYER & ROBERTS, *supra* note 10, at 296; *see also* Michael Lewyn, *Suburban Sprawl: Not Just an Environmental Issue*, 84 MARQ. L. REV. 301, 305-08 (2000) (discussing federal housing policy in greater detail).

[38] *Id.* at 308-10.

[39] *Id.* at 304-28 (discussing other factors making cities less attractive to middle class).

[40] *See* OLIVER GILLHAM, THE LIMITLESS CITY: A PRIMER ON THE URBAN SPRAWL DEBATE 18 (2002).

[41] *See* David Rusk, *Changing the "Rules of the Game": Tools to Revive Michigan's Fractured Metropolitan Regions*, 13 J. L. SOC'Y 197, 219-27 (2011). "Elastic" cities that were able to annex suburban territory generally grew in late 20th century, while "inelastic" cities confined within their pre-1950 boundaries usually lost population. *Id.*

[42] *Id.* at 228-29 (discussing growing city and suburb economic gap).

[43] *See* Lewyn, *supra* note 37, at 362-64 (citing examples).

[44] *See* Rusk, *supra* note 41, at 220 (using term to describe suburbs served by "streetcar lines within easy walking distance").

[45] *See* MORRIS, *supra* note 8, at 125-26 (finding that American development is often times "not conducive to walking or bicycling" and indeed "hostile toward anything but the automobile").

[46] *Id.* at 126 ("[S]harp separation of land uses" meant that "housing, employment, schools and shopping are at great distances from one another.").

[47] *See* EDWARD H. ZIEGLER, JR. ET AL., 3 RATHKOPF'S THE LAW OF ZONING AND PLANNING, § 51.10 (4th ed. 2011) (describing the various applications of lot size

requiring buildings to set aside land for off-street parking,[48] and a variety of other techniques.[49] Such anti-density regulation reduces the number of people who can live within walking distance of any given destination, thus reducing walkability still further.[50]

2. The response to sprawl, part 1: growth management

The backlash against suburban sprawl began with "growth management" laws designed to protect rural areas and newer suburbs from being overwhelmed by development.[51] For example, one 1969 case upheld a New York suburb's zoning law discouraging development in areas without adequate roads, sewers and other public facilities.[52] Similarly, Oregon's statewide growth management legislation was designed primarily to prevent farmland from being turned into suburbia.[53] But these laws did not directly attack the automobile-dependent nature of sprawl.

3. The response to sprawl, part 2: smart growth

In the 1990s, the "smart growth"[54] movement arose, and mounted a broader attack upon sprawl. Smart growth advocates point out that because driving is virtually mandatory in many suburbs, urban sprawl causes

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requirements).

[48] *See* DONALD C. SHOUP, THE HIGH COST OF FREE PARKING 22, 25 (2005) (such requirements virtually universal in United States).

[49] Other such regulations include height restrictions and "bulk" limitations prohibiting landowners from building on all of their land. *See* ZIEGLER ET. AL., *supra* note 47, at § 54.3 (describing these limits in more detail).

[50] *See infra* notes 96, 98-99 and accompanying text (explaining negative side effects of overly low density); *see also* PAMELA BLAIS, PERVERSE CITIES: HIDDEN SUBSIDIES, WONKY POLICY, AND URBAN SPRAWL 60-61 (2011).

[51] *See* Daniel R. Mandelker, *Managing Space to Manage Growth*, 23 WM. & MARY ENVTL. L. & POL'Y REV. 801, 803-04 (1999) (emphasizing that the purpose of growth management is to "time development so that local governments can budget and plan for needed services and facilities," and observing that, in the absence of growth management, growing areas may be too overwhelmed by population growth to "provide facilities and services when new development needs them").

[52] Golden v. Planning Bd., 285 N.E.2d 291, 302-03 (N.Y. 1972).

[53] Sullivan, *supra* note 28, at 367-68; *see also* JUERGENSMEYER & ROBERTS, *supra* note 10, § 9.2 (describing other growth management strategies).

[54] JUERGENSMEYER & ROBERTS, *supra* note 10, at 298 (explaining that Maryland's 1997 smart growth initiatives popularized the term). I ran a search for articles in Westlaw Classic's JLR (Journals and Law Reviews) database (which includes law reviews and similar journals) referring to "smart growth" and found not a single article before 1995. By contrast, I found 42 such articles between 1995 and 1999, and over 1400 articles after 2000.

societal vehicle mileage to increase,[55] thus leading to increased traffic congestion,[56] air pollution and greenhouse gas emissions.[57] By contrast, more compact development would reduce driving and thus reduce pollution.

For example, a recent study sponsored by the U.S. Department of Energy[58] suggests that compact, transit-oriented development reduces greenhouse gas emissions by reducing driving. In particular, the study found that doubled residential density, combined with transit-supportive land use policies and improved public transit would reduce household driving by as much as twenty-five percent.[59] In turn, such a reduction in driving would reduce U.S. greenhouse gas emissions by as much as eleven percent by 2050.[60] Similarly, Harvard economist Edward Glaeser and UCLA economist Matthew Kahn conducted a study finding that low-density, automobile-oriented regions emitted more greenhouse gases from transportation than more pedestrian- and transit-oriented regions.[61] For example, New York City, the region with the highest use of public transit,[62] emitted only 19,524 pounds of carbon dioxide (a major greenhouse gas,[63] also known as "CO2") per household from automobiles and transit users combined,[64] the lowest amount among ten metropolitan areas studied.[65] By contrast, several lower-density regions emitted over 25,000 pounds of transportation-related CO2 per household.[66] Moreover, suburbs, which tend to be less compact and more automobile-oriented, have significantly higher

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[55] *See* GILLHAM, *supra* note 40, at 75 ("Between 1980 and 1997, total annual vehicle miles traveled (VMT) in the [United States] increased by 68 percent.").

[56] *Id.* ("Between 1982 and 1996, the average annual delay experienced by individual drivers increased by 150 percent.").

[57] *Id.* at 76.

[58] *See* NATIONAL RESEARCH COUNCIL, TRANSPORTATION RESEARCH BOARD, DRIVING AND THE BUILT ENVIRONMENT ii-iii (2009), *available at* http://www.nap.edu/catalog.php?record_id=12747#toc (describing authors and sponsorship).

[59] *Id.* at 4; *see also id.* at 31-66 (describing further the relationship between density and vehicle miles traveled).

[60] *Id.* at 7.

[61] *See* Edward L. Glaeser & Matthew Kahn, *The Greenness of Cities*, HARVARD UNIVERSITY, JOHN F. KENNEDY SCHOOL OF GOVERNMENT 1 (Mar. 2008), *available at* http://www.sallan.org/pdf-docs/greencities_final.pdf ("[L]ow-density development ... is associated with far more carbon dioxide emissions than higher density construction.").

[62] *Id.*

[63] *See* Massachusetts v. EPA, 549 U.S. 497, 505 (2007) (describing carbon dioxide as a major greenhouse gas).

[64] *See* Glaeser & Kahn, *supra* note 61, at 5.

[65] *Id.* at 8.

[66] *Id.* at 5.

per-household CO2 emissions from transportation.[67] For example, New York's suburban households emitted over 3800 more pounds of transportation-related CO2 per household than did city residents.[68]

Smart growth advocates point out that sprawl has less technical side effects as well. In some regions, the majority of suburban jobs are not accessible by public transit at all.[69] Even where suburbs are transit-accessible, they are not within reasonable commuting distance of most transit users: for example, in New York City's suburbs, only fourteen percent of workers can reach the typical job by transit without commuting over ninety minutes.[70] Where people need a car to reach most jobs or other destinations, people too young, old, poor, or disabled to drive are effectively shut out of civic life.[71]

Residents of places where walking is unpleasant or dangerous are likely to get less exercise (and thus be in worse health, other factors being equal) than might otherwise be the case.[72] A recent study of transit users in Charlotte, North Carolina suggests that less car-dependent environments can create health benefits. The study's authors surveyed residents of neighborhoods near the city's new light rail line before and after the completion of the line. Use of light rail was associated with an eighty-one percent reduction in the likelihood of obesity.[73]

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[67] *Id.* at 8.

[68] *Id.* (subtracting suburbanites' 6172 pounds of automobile-related emissions per household from the 2367 pounds of public transit-related emissions per household of city residents). New York suburbanites emitted more home heating emissions than city residents as well; however, this was not the case in all metropolitan areas studied. *Id.*

[69] *See* Adie Tomer, *Where the Jobs Are: Employer Access to Labor by Transit*, BROOKINGS 7 (July 11, 2012), http://www.brookings.edu/~/media/research/files/papers/2012/7/transit%20labor%20tomer/11%20transit%20labor%20tomer%20full%20paper.pdf (displaying a chart showing data for numerous metropolitan areas; for example, in Baton Rouge area, only fifteen percent of suburban jobs are accessible by transit at all).

[70] *Id.*

[71] *See* Michael Lewyn, *New Urbanist Zoning for Dummies*, 58 ALA. L. REV. 257, 258 n.11 (2006) (describing non-environmentalist critiques of sprawl in more detail); Robert D. Bullard, *Addressing Urban Transportation Equity in the United States,* 31 FORDHAM URB. L.J. 1183, 1201 (2004) ("Many jobs have shifted to the suburbs ... where public transportation is inadequate or nonexistent.").

[72] Katherine Silbaugh, *Sprawl, Family Rhythms and the Four-Day Work Week*, 42 CONN. L. REV. 1267, 1273 (2010) (citing an American Journal of Health Promotion study examining the relationship between obesity and sprawl).

[73] John M. McDonald et al., *The Effect of Light Rail on Body Mass Index and Physical Activity*, AM. J. PREVENTATIVE MED., *available at* http://www.ncbi.nlm.nih.gov/pubmed/20621257; *see also* Vanessa Russell-Evans & Carl S. Hacker, *Expanding Waistlines and Expanding Cities: Urban Sprawl and its Impact on Obesity, How the Adoption of Smart Growth Statutes Can Build Healthier And More Active Communities*, 29 VA. ENVTL. L.J. 63, 86-87 (2011) (citing numerous other studies).

Principles commonly associated with smart growth include not only growth management policies such as limiting development of agricultural land,[74] but also improving non-automotive transportation options such as bicycling, mass transit, and walking, as well as land use policies related to the latter goal such as mixing land uses and more dense development.[75] One treatise summarizes smart growth as follows: "everything that sprawl is not."[76]

C. Comprehensive Planning and Smart Growth: Two Trends Intermingled

American lawyers, planners, and academics generally tend to consider municipal comprehensive planning to be valuable both in its own right and as a vehicle for achieving smart growth.[77] Land use professionals value planning because a comprehensive plan explains the policies behind zoning decisions (in states that require zoning to be consistent with the plan) and limits a municipality's power to make arbitrary zoning decisions.[78]

Some commentators go even further, suggesting that a comprehensive plan is a necessity for smarter growth. The American Planning Association, a nationwide organization of land use planners,[79] has published a book stating that smart growth by definition means "[u]sing comprehensive planning to [build communities embodying smart growth principles]."[80] And, after proposing numerous smart growth-oriented

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[74] *See* JUERGENSMEYER & ROBERTS, *supra* note 10, at 298.

[75] *Id.* The other smart growth principles listed by Juergensmeyer and Roberts include urban revitalization, reducing taxes, costs of infrastructure, and traffic congestion. *Id.* These goals, however, are so widely shared that they are not distinctive to the smart growth movement.

[76] *Id.*

[77] *See* Daniel R. Mandelker, *Planning and the Law*, 20 VT. L. REV. 657, 657 (1996) ("Most land use professionals support statutes and court decisions that mandate [comprehensive] planning and require zoning to be consistent with a plan."); *see also* KRISTOF BEN ASSCHE ET AL., *A Perspective on Planning, Smart Growth, and Place Branding*, in INTERNATIONAL PLACE BRANDING YEARBOOK: MANAGING SMART GROWTH AND SUSTAINABILITY 69, 70 2012 (Frank M. Go & Robert Govers eds., 2013) ("[A]cademia in the US . . . championed the smart growth concept as a repackaging of what is basically comprehensive planning" while "[g]overnments in major cities either believed in the intrinsic value of comprehensive planning or were interested in the . . . promises of smart growth.").

[78] *See infra* Part V.

[79] *See* Jean L. Coleman & Suzanne Sutro Rhees, *Where Land And Water Meet: Opportunities for Integrating Minnesota Water and Land Use Statutes For Water Sustainability*, 39 WM. MITCHELL L. REV. 920, 950 (2013) (describing the APA as "the national membership organization for planning professionals").

[80] *See* MORRIS, *supra* note 8, at 28.

revisions of zoning codes, the same book also notes: "if the community does not have a current comprehensive or master plan, it cannot achieve smart growth."[81] Similarly, one land use treatise states that without comprehensive plans, the smart growth movement could not exist.[82] Law review articles have also equated comprehensive planning and smart growth.[83]

Even critics of smart growth sometimes treat smart growth and comprehensive planning as almost synonymous. For example, one law review article states that "[s]mart growth programs affect state and local communities under state land use planning statutes that mandate local comprehensive planning for counties and municipalities"[84] and then went on to question the constitutionality of such programs.[85]

III. PLANNING IS NOT SUFFICIENT

Approximately thirty-two states require a comprehensive plan of some sort,[86] and the majority of municipalities have comprehensive plans[87]—

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[81] *Id.* at 25.

[82] *See* JUERGENSMEYER & ROBERTS, *supra* note 10, at 37-38 ("Without comprehensive and legally enforceable plans . . . neither movement [referring to the smart growth and new urbanist movements] could exist."). The new urbanist movement is closely allied with the smart growth movement, but is more focused on the details of street and building design. *Id.* at 300 (stating that new urbanism is more focused on "architectural designs").

[83] *See, e.g.*, Katherine A. Woodward, *Form Over Use: Form-Based Codes and the Challenge of Existing Development,* 88 NOTRE DAME L. REV. 2627, 2638 (2013) (defining smart growth as "[u]sing comprehensive planning [to revitalize a community]"); Ellen Margrethe Basse, *Urbanization and Growth Management in Europe*, 42/43 URB. LAW. 385, 394 (2010/2011) (same).

[84] James E. Holloway and Donald C. Guy, *Smart Growth and Limits on Government Powers: Effecting Nature, Markets and the Quality of Life under the Takings and Other Provisions*, 9 DICK. J. ENVTL. L. & POL'Y 421, 464 (2001).

[85] *Id.* at 465-67 (focusing on policies that might increase land use regulation and suggesting that harm to property owners might raise constitutional questions of various types).

[86] *See* Long, *Overcoming Neoliberal Hegemony in Community Development*, *supra* note 7, at 364-65 (stating that "[a]s many as eighteen states" do not require a comprehensive plan, indicating that at most thirty-two require such a plan).

[87] *See* Mary W. Blackford, *Putting the Public's Trust Back in Zoning: How the Implementation of the Public Trust Doctrine will Benefit Land Use Regulation*, 43 HOUS. L. REV. 1211, 1232 (2006) (stating that most municipalities have comprehensive plans); Donna Jalbert Patalano, *Police Power and the Public Trust: Prescriptive Zoning Through the Conflation of Two Ancient Doctrines,* 28 B.C. ENVTL. AFF. L. REV. 683, 698 (2001) ("Most municipalities use a comprehensive plan as a 'preliminary, sketchy, first-draft' version of their zoning ordinance.").

plans that, in several states, actually regulate the content of zoning codes.[88] But the existence of a comprehensive plan is not sufficient to reduce sprawl for two reasons. First, some plan provisions actually promote sprawl. Second, even a seemingly anti-sprawl plan may have language too equivocal to effectively promote smart growth.

A. The Wrong Kinds of Plans

Comprehensive plans sometimes have language that promotes sprawl by requiring single-use, low-density development or streets that are too wide to be safe and comfortable for pedestrians.

1. Single-use low-density sprawl

A comprehensive plan, like a zoning code, may encourage low-density, single-use development—either directly by mandating such development, or indirectly through parking and setback regulation.[89] Such restrictions reduce the number of residences that can be within walking distance of jobs, shops, or public transit, thus making cities less walkable.

a. Directly restricting density

For example, Jacksonville, Florida ("Jacksonville") is the dominant city in one of the most automobile-dependent regions in the United States.[90] That city's comprehensive plan devotes most of the city's residential acreage to low-density residential use. [91] In particular, the plan's future land use map allocates 138,949 acres to low-density residential use, as opposed to 23,187 to medium-density housing and only 74 to high-density housing.[92]

Even within the city's "urban priority areas," the maximum density in low-density zones is generally seven units per acre.[93] The plan adds that

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[88] *See supra* notes 29-36 and accompanying text.

[89] *See* Lewyn, *supra* note 2, at 114-17 (citing numerous examples of anti-density zoning).

[90] *See* McKenzie, *supra* note 6, at 5-6 (among the fifty largest U.S. metropolitan areas, only four have a lower percentage of transit ridership than Jacksonville.)

[91] *See* JACKSONVILLE PLANNING AND DEV. DEP'T, 2030 COMPREHENSIVE PLAN, FUTURE LAND USE ELEMENT 155, *available at* http://www.coj.net/departments/planning-and-development/community-planning-division/comprehensive-plan.aspx [hereinafter JACKSONVILLE LAND USE PLAN] (displaying an aerial view of Jacksonville with 2030 land use zoning).

[92] *Id.* at 149.

[93] *Id.* at 70-71 (describing "urban" part of city and stating general rules); *see also id.* at

because zoning regulations will allow numerous types of zoning districts within the city's low-density areas, "the average residential density in each category will be much lower than the maximum allowable density."[94] So under Jacksonville's current plan, many of the city's low-density residential zones will have fewer than seven units per acre.

Such low densities virtually guarantee automobile-dependent cities. As a general rule, a neighborhood must have at least seven to fifteen dwelling units per acre to support significant public transit ridership, because only such compact neighborhoods have a critical mass of people living within walking distance of a bus or train stop.[95] In areas with lower density, very few people will live within a short walk of a bus or train stop, and transit ridership will therefore be low.[96] Low density also reduces walkability even in the absence of transit service; in a less compact environment, fewer people can walk to shops and jobs because fewer people live within walking distance of shops and jobs.[97] For the same reason, low density reduces bicycling; because bicycles are slower than automobiles, fewer people will bicycle to a destination five miles away than to a destination five blocks away.[98]

Some comprehensive plans are even more aggressively anti-density than Jacksonville's plan. For example, the comprehensive plan of Alpharetta, Georgia ("Alpharetta") (an affluent outer suburb of Atlanta, Georgia)[99]

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73 (noting an exception to the seven-unit-per-acre rule).

[94] *Id.* at 69.

[95] *See* Robert H. Freilich, *The Land-Use Implications of Transit-Oriented Development: Controlling the Demand Side of Transportation Congestion and Urban Sprawl*, 30 URB. LAW. 547, 552 n.18 (2009); ANTHONY DOWNS, STILL STUCK IN TRAFFIC: COPING WITH PEAK-HOUR TRAFFIC CONGESTION 210 (2004) (explaining that seven units per acre supports bus service once every half-hour).

[96] BLAIS, *supra* note 50, at 60-61.

[97] In addition, low density may cause social harms not directly related to walkability. *See* David Schleicher, *City Unplanning*, 122 YALE L.J. 1670, 1673 (2013) (explaining that economics scholarship shows that "density provides individuals with reduced shipping costs, the benefits of market depth, and information spillovers"). On the other hand, it could be argued that these benefits of density are outweighed by the harm caused by density-related congestion. *See* Lewyn, *supra* note 2, at 111-12.

[98] *See* John R. Nolon, *Land Use For Energy Conservation and Sustainable Development: A New Path Toward Climate Change Mitigation*, 27 J. LAND USE & ENVTL. L. 295, 320 (2012) (emphasis added)(explaining that higher density means that because "the distance between origin and destination is shorter [therefore] walking, bicycling and mass transit services are more feasible").

[99] Michael Pearson, *Kurey's Face, Name Purged Councilman may Appeal Ouster*, ATLANTA J. & CONST., Aug. 20, 2005, at B1, *available at* 2005 WLNR 13113879 (describing Alpharetta as a "business-oriented suburb ... about 26 miles from Atlanta"); Editorial, *Access to Public Records Lets us Peek Inside Government's Doors*, THE INDIANAPOLIS STAR, Mar. 12, 2006, at E2, *available at* 2006 WLNR 25289645 (describing Alpharetta as a "chic"

allows no densities higher than ten dwelling units per acre.[100] Thus, the most compact areas allowed by Alpharetta's plan are only slightly more compact than Jacksonville's low-density areas.

The plan adds that in Alpharetta's "low density residential" area, the maximum density is two or three units per acre.[101] Moreover, most of the city's land is devoted to such use: the plan provides that only 3.5% of the city's land is to be "high-density residential," as opposed to 34.2% for "low density residential" and "very low density residential."[102] 4.6% of the city's land is in an intermediate density category, and the rest is devoted to civic and commercial use.[103] So, as a practical matter, roughly three-fourths of Alpharetta's residential land is devoted to low-density residential use.

Even plans that purport to be anti-sprawl may include anti-density regulations. For example, the comprehensive plan of Boise, Idaho ("Boise") incorporates "smart growth"[104] principles such as the promotion of walkable neighborhoods.[105] But even Boise's plan[106] places much of the city in a low-density "suburban" zone.[107] The plan states that in the "suburban" zone, the appropriate density range is between three and five units per acre,[108] a level not significantly different from Alpharetta or Jacksonville.[109] The suburban zones are not even Boise's least dense: the plan also provides for "large lot" zones with no more than one or two dwelling units per acre.[110] As noted above, such low densities are incompatible with significant levels of public transit service.[111]

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suburb).

[100] FINAL DRAFT, CITY OF ALPHARETTA, 2030 COMPREHENSIVE PLAN 32, *available at* http://www.alpharetta.ga.us/files/docs/pdfs/F&D/CD/Agenda_Final-Draft_6151100175_09-26-11.pdf [hereinafter ALPHARETTA PLAN] (stating that "high density residential" areas allow a maximum of 10 dwelling units per acre).

[101] *Id.*

[102] *Id.* at 89.

[103] *Id.*

[104] Jeanne Huff, *Idaho Smart Growth Doles Out Annual Awards*, IDAHO BUS. REV., NOV. 13, 2012, *available at* 2012 WLNR 24688806.

[105] *Id.*

[106] CITY OF BOISE, IDAHO, BLUEPRINT BOISE, *available at* http://pds.cityofboise.org/planning/comp/blueprint-boise/ [hereinafter BLUEPRINT].

[107] *Id.* at Future Land Use Map (between ch.3 and ch.4).

[108] *Id.* at 3-20.

[109] JACKSONVILLE LAND USE PLAN, *supra* note 91, at 69-71; ALPHARETTA PLAN, *supra* note 100, at 89 and accompanying text.

[110] *See* BLUEPRINT, *supra* note 106, at 3-19. It is worth noting, however, that the city does allow higher density zones as well. *Id.* at 3-22. Boise's mix of zones is not unique among smart growth-oriented plans. For example, Seattle's comprehensive plan seeks to promote smart growth. *See* David Fox, *Halting Urban Sprawl: Smart Growth in Vancouver and Seattle,* 33 B.C. INT'L & COMP. L. REV. 43, 54 (2010) (Seattle's plan "furthers Smart

b. Single-use zoning

The comprehensive plans discussed above combine low density with single-use zoning: that is, their land use maps include separate commercial and residential zones. These residential zones are sometimes so large that residents will not be within walking distance of anything but other houses. For example, Jacksonville's future land use map shows that one low-density residential area at the city's southern edge[112] will be about six miles wide.[113] The comprehensive plan freezes this status quo in place not only through its future land use map, but also by stating more broadly that the city may allow commercial expansion near residential areas only if such expansion "maintains the existing residential character [of such areas]."[114]

Even smart growth-oriented plans sometimes segregate commercial uses in ways that reduce walkability. For example, the Boise plan suggests that the suburban zone will consist of residential areas served by commercial "activity centers."[115] However, the city's Land Use Map suggests that these activity centers will sometimes be more than three miles apart.[116]

Obviously, few people living in the middle of these housing-only monocultures will be willing to walk (or even bike) a couple of miles to the nearest shop or job. Thus, the size of some plans' residential zones effectively mandates automobile dependence.

Growth policies"). But the plan nevertheless emphasizes that one of its goals is to "*protect* low-density, single-family neighborhoods." CITY OF SEATTLE, TOWARD A SUSTAINABLE SEATTLE, 2.13, http://www.seattle.gov/dpd/cs/groups/pan/@pan/documents/web_informational/dpdd016650.pdf [hereinafter SUSTAINABLE SEATTLE] (emphasis added).

[111] *See supra* notes 95-98 and accompanying text.

[112] JACKSONVILLE LAND USE PLAN, *supra* note 91, at 156 (displaying a future land use map which shows low-density residential zone between San Jose Boulevard and Interstate Highway 95, ending at city's southern limit).

[113] *See* Driving Directions from 12909 San Jose Boulevard, Jacksonville, FL, to Bartram Park Boulevard, Jacksonville, FL, GOOGLE MAPS, http://maps.google.com (follow "Get Directions" hyperlink; then search "A" for "12909 San Jose Boulevard, Jacksonville, FL" and search "B" for "Bartram Park Boulevard, Jacksonville, FL"; then follow "Get Directions" hyperlink).

[114] JACKSONVILLE LAND USE PLAN, *supra* note 91, at 35.

[115] *See* BLUEPRINT, *supra* note 106, at 3-20.

[116] *See id.* at 3-5 to 3-6. For example, the map illustrates that there will be "activity centers" in the city's southwest corner at Overland and Lake Hazel Roads. *Id.* The distance between the Overland/Five Mile Road intersection (the site of one activity center) and the Lake Hazel/Five Mile Road (the site of the nearest activity center to the south) is 5.2 miles. *See* Driving Directions from Overland Park Boulevard, Jacksonville, FL, to Hazel Lake Drive, Jacksonville, FL, GOOGLE MAPS, http://maps.google.com (follow "Get Directions" hyperlink; then search "A" for "Overland Park Boulevard, Jacksonville, FL" and search "B" for "Hazel Lake Drive, Jacksonville, FL"; then follow "Get Directions" hyperlink).

c. Parking regulations

Some comprehensive plans generally purport to favor smart growth;[117] nevertheless, the Seattle plan states that the city seeks to "[e]stablish off-street parking requirements for new development."[118] Although minimum parking requirements are not always mentioned in comprehensive plans, such requirements are virtually universal in the United States.[119]

Land that is used for parking lots cannot be used for housing or commerce. It follows that minimum parking requirements, by increasing the amount of land used for parking, artificially limit population density and thus reduce neighborhood walkability and transit use.[120] For example, in 1961, Oakland, California required apartment buildings to build one parking space per dwelling unit.[121] Within three years of this ordinance, the number of apartments per acre in Oakland had decreased by thirty percent.[122] If, as suggested above, other forms of anti-density regulation make cities more automobile-dependent,[123] it logically follows that minimum parking requirements do so as well.

By forcing landowners to build parking instead of residential and commercial buildings, minimum parking requirements also reduce the amount, and thus increase the price, of urban housing and commerce. Thus, minimum parking requirements may force people and businesses to move to suburbs in search of cheaper land. To be sure, these regulations also affect suburban land. But vacant land is often cheaper and more plentiful in the least developed suburbs, so suburban developers can more easily comply with minimum parking requirements by purchasing additional land.[124] By contrast, developers in already-developed cities and older suburbs may not able to purchase land so easily.

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[117] *See* JACKSONVILLE LAND USE PLAN, *supra* note 91, at 155.

[118] SUSTAINABLE SEATTLE, *supra* note 110, at 2.11. Further, it is noteworthy that Seattle's parking policies may be more moderate than those of other municipalities. While other cities might apply such requirements universally, the Seattle plan notes the city's willingness to consider removing such requirements in the more urbanized areas of the city, and to prevent parking from standing between buildings and the street. *Id.* at 2.12 (explaining that the city will "consider removing minimum parking requirements" in "urban centers" and will "generally prohibit street level parking between buildings and the street"); *see also* McIntosh, *infra* note 130 (explaining why pedestrians are worse off when parking is in front of buildings).

[119] *See* SHOUP, *supra* note 48, at 22, 25 (2005).

[120] *See supra* notes 95-98 and accompanying text (explaining density/walkability relationship).

[121] *See* SHOUP, *supra* note 48, at 143.

[122] *Id.* at 144.

[123] *See generally* Freilich, *supra* note 95 (explaining the density/walkability relationship).

[124] Michael Lewyn, *What Would Coase Do? (About Parking Regulation)*, 22 FORDHAM

These regulations also facilitate automobile-dependent development by artificially subsidizing driving. Minimum parking requirements increase the supply of parking, and thus reduce the market price of parking.[125] As a result, ninety-nine percent of vehicle trips in North America are to destinations with free parking.[126] To the extent that free parking is a result of government regulation, it is essentially a government subsidy of drivers.

Who pays for this subsidy? At first, landowners pay, because they pay for the construction of parking lots and forego revenue from land that could be used for purposes other than parking.[127] But "landowners may pass the cost of free parking on to their customers."[128] For example, a landlord might seek to recoup the cost of parking through higher rents for commercial tenants (who in turn may pass such costs to their customers by charging higher prices for goods and services) and residential tenants (who presumably pay higher rents than would otherwise be the case).[129]

It follows that minimum parking requirements lead to increased residential and commercial rents, and thus require society as a whole to subsidize driving.[130] And where driving is cheaper, it is cheaper and more convenient for people to move to automobile-dependent suburbs. Thus, minimum parking requirements also encourage sprawl by making auto-oriented suburbs more attractive.[131]

ENVTL. L. REV. 89, 92 (2010).

[125] Richard Wilson, *Suburban Parking Requirements: A Tacit Policy For Automobile Use And Sprawl,* 61 J. AM. PLAN. ASS'N 29, 34 (1995) ("When developers are required to provide more parking than is demanded, the oversupply tends to push the market price down to zero.").

[126] BLAIS, *supra* note 50, at 145.

[127] Lewyn, *supra* note 124, at 97.

[128] *Id.*

[129] *Id.* at 146; *cf.* VICTORIA TRANSPORT POLICY INSTITUTE, TRANSPORTATION COST AND BENEFIT ANALYSIS II—PARKING COSTS, 5.4:19, *available at* http://www.vtpi.org/tca/tca0504.pdf (study estimating that each "additional residential parking space effectively increases U.S. urban housing unit costs by $52,000 to $117,000").

[130] Minimum parking requirements also reduce walkability because landowners who are forced to build parking often build parking in front of buildings, forcing pedestrians to walk through parking lots to reach destinations. *See* SHOUP, *supra* note 48, at 107; Jill McIntosh, *It's No Cakewalk Being a Pedestrian*, TORONTO STAR, July 18, 2009, *available at* 2009 WLNR 13724302 (explaining that parking lots are "dangerous" because drivers are "busy looking for spots or avoiding cars backing out, making pedestrians vulnerable"). Some cities try to discourage landowners from placing parking in front of buildings. *See* SUSTAINABLE SEATTLE, *supra* note 110, at 2.12 (stating that the city will "generally prohibit street level parking between buildings and the street").

[131] Common arguments for minimum parking requirements are that these rules are necessary to (1) prevent drivers from congesting traffic while searching for on-street parking, and (2) to prevent commercial parking from "spilling over" from commercial areas into residential streets. *See* Lewyn, *supra* note 124, at 93-96. These arguments lack merit

d. A small setback for pedestrians

Seattle's comprehensive plan requires "building setback requirements from property lines . . . [for] multifamily developments."[132] Mandatory setbacks, like minimum parking requirements, reduce density and thus reduce walkability[133] because every foot of land used for setbacks cannot be used for housing. Setbacks also force pedestrians to spend more time walking between buildings and sidewalks, thus making their commutes longer and more inconvenient.

2. Anti-pedestrian street design

Jacksonville's comprehensive plan includes a "Transportation Element."[134] The Transportation Element creates right-of-way minimums, such as a 150-foot minimum for major arterials (that is, the most heavily trafficked streets)[135] and a 120-foot minimum for quieter[136] minor

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for two reasons. First, parking requirements may increase driving to such an extent that on balance they increase, rather than decreasing, traffic congestion. *See generally* Freilich, *supra* note 95; BLAIS, *supra* note 50; Schleicher, *supra* note 97; Nolon, *supra* note 98; SHOUP, *supra* note 48; Wilson, *supra* note 125 (explaining how these requirements increase driving). Second, numerous alternatives may reduce these externalities without the same negative effects as minimum parking requirements. *See infra* notes 197, 199 and accompanying text (discussing various strategies, including charging market prices for on-street parking and requiring permits for drivers in residential neighborhoods).

[132] SUSTAINABLE SEATTLE, *supra* note 110, at 2.17. The city raises a variety of justifications for this rule. First, the city claims that building setbacks "ensure access to light and air [and] provide a sense of privacy . . . ." *Id.* But all human beings breathe air no matter where buildings are placed, so air is simply irrelevant to setback requirements. Similarly, light exists wherever there is sun (except to the extent tall buildings cast shadows over a street)—so light does not justify setback requirements except in areas dominated by skyscrapers. Second, the city claims that setbacks provide "a sense of privacy." *Id.* The city supplies no evidence for this assertion. I live in a fifteen-story building, and I do not see how my apartment would be any more "private" if it was separated from the street by a patch of grass or a parking lot. Finally, the city claims that setbacks "provide adequate transition between zones of different intensities." *Id.* This claim may justify setbacks at the boundary of different zones, but not elsewhere.

[133] *See* Freilich, *supra* note 95; BLAIS, *supra* note 50; Schleicher, *supra* note 97; Nolon, *supra* note 98 and accompanying text (explaining density/walkability relationship).

[134] CITY OF JACKSONVILLE 2030 COMPREHENSIVE PLAN, TRANSPORTATION ELEMENT, http://www.coj.net/departments/planning-and-development/docs/community-planning-division/2030-comp-plan-postings/cp-posted-as-of-10-30-14/2030-transportation-element-may-2014-posted-10-14.aspx (last visited Oct. 10, 2014) [hereinafter JACKSONVILLE TRANSPORTATION PLAN].

[135] *See* JACKSONVILLE, FLA. ORDINANCE CODE § 654.106(mm)(6) [hereinafter JACKSONVILLE CODE] (defining term).

[136] *See* JACKSONVILLE TRANSPORTATION PLAN, *supra* note 134, at 35 (contrasting major

arterials.[137] Assuming that the city typically devotes about twenty feet of right-of-way to sidewalks and shrubbery,[138] these requirements mean that a major arterial might have about 130 feet of pavement and minor arterials 100 feet. Since the plan also requires most traffic lanes to be twelve feet wide (and sixteen feet wide for "outside" lanes closest to intersections)[139] it logically follows that major arterials could have as many as ten 12-16 foot lanes, and even minor arterials might have seven or eight lanes.

Jacksonville's wide streets make that city more automobile-dependent because such streets are both inconvenient and dangerous for pedestrians and bicyclists—inconvenient because a wide roadway takes more time to cross than a narrower street,[140] and dangerous because the more time a pedestrian or bicyclist spends on such a street, the more time he or she spends exposed to vehicle traffic.[141]

Planners mandate wide streets in order to help motorists drive more rapidly.[142] But when government succeeds in encouraging fast driving, it increases the risk of pedestrian injury in three ways. First, a fast driver has a narrow field of vision.[143] A motorist driving thirty miles per hour has a 150-degree field of vision.[144] By contrast, a motorist driving at twice that speed has only a fifty-degree field of vision.[145] Thus, a fast driver is less likely than a slower driver to notice a pedestrian (or for that matter, other drivers).[146]

Second, even a motorist who *does* notice another road user is less likely to be able to stop in time while driving at a rapid speed. A motorist who is driving forty miles-per-hour will be able to stop 120 feet after noticing a

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and minor arterials).

[137] JACKSONVILLE CODE, *supra* note 135, at § 654.106(mm)(7).

[138] The city requires new local streets serving residential areas to include four-foot sidewalks and new dedicated local streets serving non-residential areas to include five-foot sidewalks. JACKSONVILLE TRANSPORTATION PLAN, *supra* note 134, at 36-37.

[139] *Id.* at 33.

[140] *See* Donavan v. Jones, 658 So.2d 755, 765 (La. Ct. App. 1995).

[141] *Id.*; *see also* Wallace Immen, *City Seeks Solution to Commute Crunch,* GLOBE AND MAIL, Apr. 26, 2002, at A22, *available at* 2002 WLNR 12038490 (discussing that in downtown Toronto, pedestrians "have to run to beat the changing light" on wide streets).

[142] *See* Stephen H. Burrington, *Restoring the Rule of Law and Respect for Communities in Transportation*, 5 N.Y.U. ENVTL. L.J. 691, 701 (1996) (explaining that traffic engineers build wide streets out of "solicitude toward fast traffic").

[143] *Id.* at 704, n.50.

[144] *Id.*

[145] *Id.*

[146] *Id.*; *cf.* SIERRA CLUB, STOP SPRAWL: STREES AND TRAFFIC, http://www.sierraclub.org/sprawl/articles/narrow.asp (last visited Oct. 10, 2014) (explaining that in one community studied, "a typical 36 foot wide residential street has 1.21 [accidents per mile per year] as opposed to 0.32 for a 24 foot wide street").

pedestrian or other road user.[147] By contrast, a motorist driving half that speed will be able to stop only forty feet after seeing the other road user.[148]

Third, a car traveling rapidly is more likely to kill or maim a pedestrian or bicyclist than a slow-moving vehicle. A non-motorist has a 3.5% chance of death from a car traveling fifteen miles per hour, but the likelihood of death increases to over eighty percent when the vehicle is traveling at three times that speed.[149]

In addition, wide streets may create a visually disorienting and uncomfortable environment for pedestrians. Numerous commentators suggest that pedestrians are "drawn to streets with a feeling of intimacy and enclosure"[150] and that wide streets make pedestrians feel less enclosed.[151]

B. A Good Start, but Only a Start

Sometimes plans may fail to limit sprawl, not through aggressively pro-sprawl provisions, but by provisions that are so equivocal as to be meaningless. For example, Boise's plan states that the city wishes to promote "compact, walkable development patterns that support transit."[152] The plan tries to reach this goal by providing for "mixed-use activity centers."[153] Boise's plan states that these centers will be near established neighborhoods, so that residents of nearby blocks can walk to shopping, schools, parks, and jobs.[154]

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[147] *See* Joey Ledford, *The Lane Ranger Speeding Cars Terrify Neighborhoods*, ATLANTA JOURNAL AND CONSTITUTION, Aug. 27, 1997, at B, *available at* 1997 WLNR 3173969 ("At 20 mph, it takes you 20 feet to react [to a pedestrian or vehicle in the street] and another 20 feet to stop. At 40 mph, it's 40 feet to think and another 80 feet to stop.").

[148] *Id.*

[149] *See* Burrington, *supra* note 142, at 704 (indicating eighty-three percent risk of death from car traveling forty-four miles-per-hour). Burrington refers to pedestrians, but there is no reason to believe that a bicyclist would be in less danger.

[150] Paul Zykofsky, *Building Livable Communities with Transit*, LOCAL GOVERNMENT COMMISSION, http://www.lgc.org/build-with-transit.

[151] *Id.* (reasoning less enclosure possible "in a wide open area with busy traffic passing closely by"); *see also* ANDRES DUANY, ELIZABETH PLATER-ZYBERK & JEFF SPECK, SUBURBAN NATION: THE RISE OF SPRAWL AND THE DECLINE OF THE AMERICAN DREAM 78 (1st ed. 2001) ("If a street is to provide the sense of enclosure that pedestrians desire—if it is to feel like a room—it cannot be too wide."); *see also* J.H.CRAWFORD, CARFREE CITIES 44 (2000) ("[L]ong strips of low buildings bordering wide streets fail to create a sense of enclosure [desirable to pedestrians].").

[152] *See* BLUEPRINT, *supra* note 106, at 2-9.

[153] *Id.* at 2-34.

[154] *Id.*

On the other hand, the same plan states that these centers must also be "of a scale that is *compatible* with the surrounding neighborhood"[155]—a phrase which implies that if the surrounding neighborhood is automobile-dominated sprawl, the "activity center" must be equally so. For example, if a neighborhood is dominated by streets too wide to be safe for pedestrians and buildings set back far from the street, it could be argued that "activity centers" should contain similar features in order to be "compatible with the surrounding neighborhood."[156]

Boise's plan also states that the city will "[p]rotect existing business and industrial areas from . . . incompatible or non-complimentary uses . . . ."[157] Because the plan does not detail when businesses and residences are "compatible," this language could be used to thwart mixed-use development.

Similarly, Seattle's plan is full of language that could be used to oppose compact, pedestrian-oriented development. The plan states that the city wishes to "permit limited amounts of commercial use in what are otherwise residential zones . . . to . . . provide retail and service uses in close proximity . . . ."[158] This language seems designed to promote neighborhood walkability—but on the other hand, the plan's use of the term "limited" gives the city ample discretion to defeat this objective through restrictive zoning.

This discretion is reinforced by statements on the same page that the city wishes to establish "multifamily residential use as the predominant use in multifamily areas, to *preserve the character* of [such] areas"[159] and that the city wishes to "[l]imit the number and type of non-residential uses permitted in multifamily areas . . . to protect these areas from negative impacts of *incompatible uses*."[160] The city's invocation of neighborhood "character" and "incompatible uses" gives it ample discretion to choke off real mixed-use development, since a project that makes a neighborhood more pedestrian-friendly (for example, by increasing the amount of shopping within walking distance of houses) by definition changes the neighborhood's "character" and thus is at least partially incompatible with the status quo.

The Seattle plan also states that the city "[seeks] to focus development in transit and pedestrian-friendly-urban villages while maintaining *compatibility* between new development and the surrounding area through

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[155] *Id.* (emphasis added).
[156] *Id.*
[157] *Id.* at 2-71.
[158] SUSTAINABLE SEATTLE, *supra* note 110, at 2.16.
[159] *Id.* (emphasis added).
[160] *Id.* (emphasis added).

standards regulating the size and density of development."[161] On the one hand, the city wants to focus development on transit-friendly areas, which seems to imply more density in these areas. On the other hand, the city wants "compatibility" with the status quo, which could be interpreted to allow as little change as possible.

C. What Went Wrong?

As explained above, comprehensive plans often purport to endorse smart growth.[162] Even the comprehensive plan of Alpharetta states that development should "reduce daily vehicle use, improve air quality, promote a transit-supportive infrastructure, [and] create a pedestrian-friendly environment."[163] Similarly, Jacksonville's plan states that the city seeks to "discourage urban sprawl"[164] and encourage "smart growth practices."[165]

Yet, the comprehensive plans of Alpharetta and Jacksonville frustrate smart growth by restricting development compact enough to support public transit.[166] Why is there such a gap between rhetoric and policy? As a general rule, zoning became popular in the United States long before comprehensive plans became common.[167] Thus, most cities and counties had no comprehensive plan when they enacted zoning codes—which means that by the time the first plans were drafted, a city's land use map and density may already have been set in stone by existing zoning.[168] In such a situation, the city's path of least resistance was probably to create a plan that reflects existing zoning. Of course, a city that wished to aggressively promote smart growth could have enacted a plan that allowed more density, a greater mix of uses, or less parking than the zoning ordinance—but such a plan might have met with resistance from city residents satisfied with the status quo.

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[161] *Id.* at 2.21 (emphasis added).

[162] *See* BLUEPRINT, *supra* note 106, at 2-20.

[163] ALPHARETTA PLAN, *supra* note 100, at 12.

[164] JACKSONVILLE LAND USE PLAN, *supra* note 91, at 8.

[165] *Id.*

[166] *See* ALPHARETTA PLAN, *supra* note 100; *see also* JACKSONVILLE LAND USE PLAN, *supra* note 91.

[167] *See* JUERGENSMEYER & ROBERTS, *supra* note 10, at 24 (explaining that in the early years of zoning, "many communities prepared and adopted zoning ordinances without ever making [a] general, comprehensive plan").

[168] *See* Patalano, *supra* note 87, at 698. For example, Jacksonville had no comprehensive plan until 1970. *See* Tony Robbins, *Program Corner*, 1ST COAST PLANNER 4 (May/June 2010) at 4, http://web.archive.org/web/20110427222343/http://floridaplanning.org/firstcoast/newsletters/May-June%202010.pdf.

IV. PLANS ARE NOT (COMPLETELY) NECESSARY

As noted above, municipal comprehensive plans may contain the same sort of pro-sprawl provisions as municipal zoning codes.[169] Presumably, these policies may be altered through anti-sprawl plan provisions—so a comprehensive plan certainly *could* be a useful means of implementing smart growth policies. For example, the plan could prohibit the zoning code from mandating any densities too low to support public transit, or protect a landowner's right to choose how much parking, if any, it wished to build.

But just because a comprehensive plan could alter pro-sprawl policies does not mean that a comprehensive plan is the *only* way to alter those policies. Instead, local zoning codes or statewide legislation can be, and in fact have been, used to alter these pro-sprawl land use policies.

A. Density

For example, both zoning codes and comprehensive plans often limit density, thus making society more automobile-dependent by reducing the number of people who can live within walking or biking distance of shops, jobs or public transit.[170] In theory, a comprehensive plan could restrict a municipality's right to limit density by providing that zoning could not require densities lower than X units per acre.[171]

But the same goal could be achieved through a zoning code amendment. For example, Jacksonville's zoning code currently contains a wide variety of zones, including low-density, medium-density, and high-density zones.[172] Even in the more compact low-density zones, the city caps density at seven units per acre[173]—barely, if at all, enough to support significant public transit service.[174] However, the city could amend the zoning code to allow more density. At a minimum, the city could raise the density caps slightly, so that landowners could build subdivisions that were compact enough to support more transit service. A more radical city leadership could simply eliminate the low-density zones altogether, so that the city's lowest-density zones resembled Jacksonville's medium-density

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[169] *See supra* Part III.

[170] *See supra* Part III.A.1.

[171] *Cf.* BLUEPRINT, *supra* note 106, at 3-9 (explaining that "Regional Activity Centers" should have densities greater than twenty units per acre).

[172] *See* JACKSONVILLE CODE, *supra* note 135, §§ 656.305 to .307 (1999).

[173] *Id.* § 656.305.

[174] Freilich, *supra* note 95 and accompanying text (at least seven to fifteen units per acre required for significant transit service).

zone (in which the maximum density is typically twenty units per acre).[175] Even in suburban neighborhoods dedicated to single-family homes, such transit-supportive zoning is hardly unprecedented: for example, in Mississauga, Ontario, a suburb of Toronto,[176] one area is zoned for thirteen single-family homes per acre.[177]

B. Single-Use Zoning

As noted above, single-use zoning also impedes neighborhood walkability by creating residence-only zones that are not within walking distance of public transit, shops, or jobs.[178] Just as comprehensive plans can be used to mandate single-use zoning, they may also be used to allow mixed-use zones.[179] But zoning codes too can allow a mix of uses; in fact, numerous cities have recently adopted "form-based codes"[180] designed to facilitate exactly that.[181]

While traditional zoning regulates uses, form-based codes primarily regulate the form of development.[182] One model form-based code, the

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[175] *See* JACKSONVILLE CODE, *supra* note 135, § 656.306. It should be noted that because Florida requires cities to comply with comprehensive plans, the city would also have to amend its comprehensive plan. *See* Long, *Overcoming Neoliberal Hegemony in Community Development*, *supra* note 7, at 361 n.61. However, this change would not be necessary in states that do not require municipal zoning to be consistent with comprehensive plans. *See supra* text accompanying note 7 (suggesting that most states do not require such consistency).

[176] *See* GORDON BRUNSKILL, MOSCATO DRAWING ON WORLD CUP EXPERIENCE, ST. C. CENTRE DAILY TIMES, NOV. 14, 2003, at 1B, *available at* 2003 WLNR 16289999 ("Mississauga a suburb west of Toronto.").

[177] MISSISSAUGA, ONTARIO, ZONING BY-LAW § 4.2.2.6.1, table 4.2.1, *available at* http://www6.mississauga.ca/onlinemaps/planbldg/ZoneBylaw/DZBR1/Part%204%20-%20R01.pdf [hereinafter MISSISSAUGA BY-LAW]. Specifically, the area is zoned for 295 square meters per house. *Id.* A square meter is 10.76 square feet. *See* Goh Yihan, Tort Law In The Face of Land Scarcity in Singapore, 26 ARIZ. J. INT'L & COMP. L. 335, 343 (2009). Thus, each house must include about 3174 square feet of land (295 x 10.76), or just under one-thirteenth of an acre. *See* Arthur Allan Leff, *The Leff Dictionary of Law: A Fragment*, 94 YALE L.J. 1855, 1905 (defining one acre as containing 43,560 square feet).

[178] *See supra* notes 85-89 and accompanying text.

[179] *See generally* BLUEPRINT, *supra* note 106, 3-8 to -17 (designating certain spots as "mixed-use activity centers").

[180] *See Form-Based Codes? You're Not Alone*, PLACEMAKERS.COM http://www.placemakers.com/how-we-teach/codes-study/ (last visited Oct. 2, 2014) (explaining that 279 codes have been adopted; eighty-four percent of them have been adopted since 2003).

[181] *See* H. William Freeman, *A New Legal Landscape for Planning and Zoning: Using Form-Based Codes to Promote New Urbanism and Sustainability*, 36 MICH. REAL PROP. REV. 117, 120 (2009) ("Form-Based Codes allow for a mixture of land uses . . . .").

[182] *Id.*

SmartCode, divides land into rural zones, a suburban zone, a general urban zone, an "urban center" zone and an "urban core" zone.[183] Although the SmartCode regulates form-related issues such as building heights and the distance between buildings and the street,[184] it regulates the use of land less intensely. For example, the SmartCode provides that within the code's "suburban zone," most structures will be residential—but, unlike some plans that favor single-use zoning,[185] allows some small stores and offices in that zone.[186] Within the SmartCode's more urban zones,[187] residential, retail, and office uses are all permitted.[188]

C. Minimum Parking Requirements

As noted above, municipal comprehensive plans sometimes impose minimum parking requirements, thus reducing density beyond the requirements of anti-density regulations and forcing landowners to subsidize drivers.[189] In theory, a comprehensive plan could limit the scope of such regulations.[190]

But zoning amendments have also been used to liberalize parking regulations. Some zoning codes have completely eliminated minimum parking requirements for regional downtowns.[191] Similarly, the zoning

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[183] *See* Richard S. Geller, *The Legality of Form-Based Zoning Codes*, 26 J. LAND USE & ENVTL. L. 35, 44 (2010).

[184] *Id.* at 45-46 (skyscrapers usually in "core" zone, while two-to-five story buildings usually in "urban center" zone); *see also id.* at 47 (structures set back from street in more suburban zones, and closest to street in urban zones).

[185] *See* JACKSONVILLE LAND USE PLAN, *supra* note 91; *see also* BLUEPRINT, supra note 106.

[186] *See* Geller, *supra* note 183, at 55 (explaining that "residential neighborhoods may have restricted commercial and office uses in buildings of a residential character," such as "a small restaurant, seating no more than twenty persons").

[187] *See* CENTER FOR APPLIED TRANSECT STUDIES, SMARTCODE VERSION 9.2, *available at* http://www.transect.org/codes.html [hereinafter SMARTCODE] (describing these zones as follows: "T-4 General Urban Zone" which is "mixed use but primarily residential"; "T-5 Urban Center Zone" dominated by "higher density mixed use building"; and "T-6 Urban Core Zone, which has "greatest variety of uses").

[188] *Id.* at SC40 (listing permitted uses by zone, and showing that all of these uses allowed in T-4, T-5 and T-6 zones).

[189] *See* Freilich, *supra* note 95.

[190] For example, Seattle's plan suggests the removal of parking requirements in the city's more urban neighborhoods, and the imposition of maximum as well as minimum parking requirements. *See* SUSTAINABLE SEATTLE, *supra* note 110, at 2.12.

[191] *See, e.g.*, Maya Rao, *Downtown Minneapolis is Seen as Drowning in a Sea of Parking Lots*, STAR TRIBUNE, JULY 25, 2012, at 1B, *available at* 2012 WLNR 15632535 (in 2009, Minneapolis "eliminated minimum parking requirements for buildings in [its] downtown zoning district"); Steven Doyle, *Parking Rule Changes on Hold*, HUNTSVILLE TIMES,

code of Portland, Oregon has eliminated minimum parking requirements for small residential buildings near public transit stations.[192] Although the city has retained such requirements for larger buildings, these buildings need not provide as much parking as buildings in more automobile-oriented locations.[193] The very largest buildings in a high-transit area must provide 0.33 parking spaces per dwelling unit.[194] By contrast, in other parts of the city, landowners must provide one parking space per dwelling unit.[195]

Cities often enact minimum parking requirements in order to prevent "spillover parking." When buildings fail to provide parking for customers, some customers might park on nearby residential streets—a result that inconveniences residents of those streets who wish to park near their homes.[196] By contrast, if every apartment building or commercial building provides enough parking spaces for every conceivable user, their customers will never have a reason to park on residential streets.

However, minimum parking requirements are not the only way to prevent spillover parking. Cities may also amend their zoning ordinances to institute a parking permit system—that is, to limit parking on a residential street to residents of the street and their guests.[197]

Another reason for minimum parking requirements is to prevent "cruising"—that is, drivers wasting time searching for scarce parking spaces, thus creating congestion and pollution.[198] This problem too can be addressed through other forms of legislation. A city may deter cruising by setting parking meter prices high enough to deter some driving, thus

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JUNE 26, 2009, at 5A, *available at* 2009 WLNR 13026220 ("[T]he downtown C-3 General Business [Z]one would continue as is, with no minimum parking requirements.").

[192] *See* PORTLAND, OR., ZONING CODE § 33.226.110[D](1)(a) (2014), *available at* http://www.portlandoregon.gov/bps/article/53320 (eliminating requirements for buildings with less than 30 residential units, if such buildings "less than 1500 feet from a transit station" or within 500 feet of transit with "20-minute peak hour service").

[193] *Id.* at § 33.226.110[E].

[194] *Id.* at § 33.226.110[D](1)(d).

[195] *Id.* at tbl.266-2.

[196] *See* Douglas Laycock, *State RFRAs and Land Use Regulation,* 32 U.C. DAVIS L. REV. 755, 766 (1999) (for example, if church provides its worshippers with an insufficient number of parking spaces, city has an interest in "ensuring that the spillover from the church parking lot does not deprive neighbors of reasonable opportunity to park in their own neighborhood").

[197] *See* Cnty. Bd. of Arlington, Cnty. Va. v. Richards, 434 U.S. 5 (1977) (upholding such a system and quoting from zoning ordinance)(citation omitted).

[198] *See* Stroud v. City of Aspen, 532 P.2d 720, 723 (Colo. 1975) (upholding minimum parking requirements because such rules ensure that cars "may be placed in a stall and stilled" rather than "clog[ging] the streets, air and ears of our citizens [while in search of] parking facilities").

ensuring that enough spaces are vacant to allow enough parking for any driver who is willing to pay the price.[199]

D. Setbacks

As discussed above, comprehensive plans occasionally require buildings to be set back from streets, thus lengthening pedestrian commutes and reducing density.[200] Form-based codes are a common antidote to this policy. For example, Buffalo, New York is in the process of creating a new form-based code.[201] Although the code itself is not yet enacted, the city has created graphics showing sample buildings in each zoning district. These diagrams show that in most of the city's mixed-use and commercial areas, buildings will be in front of sidewalks, rather than being set back behind yards of landscaping or parking.[202] Similarly, the SmartCode mandates minimal setbacks of only two to six feet in its more urban zones.[203] In those zones, the SmartCode actually creates *maximum* setbacks that are smaller than the typical suburban setback.[204] Thus, the SmartCode might be as effective as a comprehensive plan in reducing setbacks.

E. Wide Streets

As noted above, the transportation sections of comprehensive plans may regulate street width—and in doing so, may require streets that are too wide to be easily crossed by pedestrians.[205] Where a comprehensive plan already addresses this issue, it should be reformed by allowing narrower rights-of-way.

But where a comprehensive plan does not already mandate wide streets, it need not be amended (or enacted, if no comprehensive plan yet exists). Most municipalities regulate street widths through subdivision

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[199] *See* SHOUP, *supra* note 48, at 296-303 (describing proposal in detail).

[200] *See supra* notes 132-33 and accompanying text.

[201] *See A Preview of Buffalo's New Zoning*, BUFFALO GREENCODE 2 (June 4, 2012), http://www.buffalogreencode.com/documents/A_Preview_of_Buffalo%27s_New_Zoning.pdf (indicating the city's new ordinance will be form-based).

[202] *Id.* at 5-8 (showing numerous examples).

[203] *See* SMARTCODE, *supra* note 187, at SC42. However, the code still mandates setbacks of at least twenty-four feet in its T-3 "suburban" zone. *Id.*

[204] *Compare id.* (stating a maximum setback of twelve to eighteen feet in T-4, T-5 and T-6 zones), *with* Chad D. Emerson, *Making Main Street Legal Again: The Smartcode Solution to Sprawl*, 71 MO. L. REV. 637, 645 n.36 (2006) ("Under conventional [American zoning] codes, for example, front setbacks must either be a [twenty-five]-foot grass yard or a paved parking lot.").

[205] *See supra* Part III.A.2.

ordinances.[206] Form-based codes sometimes seek to combine zoning codes and subdivision ordinances, and thus address street width as well as land use.[207] For example, the SmartCode lists a wide variety of possible street designs; however, it proposes no street more than eighty feet wide, and no street with more than four driving lanes.[208] Moreover, these street widths are maximums not minimums: in some areas, the code allows streets as narrow as ten feet.[209] Thus, the SmartCode might be just as effective as a comprehensive plan amendment in addressing the problem of overly-wide streets.

F. A Note on Statewide and Regional Legislation

All of the sprawl-generating policies discussed above could also be eliminated or limited through statewide legislation. For example, a state could amend its zoning enabling legislation to completely eliminate municipalities' ability to discriminate on the basis of density[210] (except perhaps in environmentally sensitive areas),[211] or to provide that a city could not mandate densities lower than the seven to fifteen dwelling units per acre sufficient to support public transit. Because states typically include a wide range of places (from the most rural to the most urban), this sort of proposal may be less feasible than local zoning reform. For similar reasons, state legislation might not be the most appropriate way to address other issues traditionally addressed in zoning ordinances (such as separation of uses, density or parking).

However, a state could accommodate regional diversity by creating regional governing bodies for its urban areas, and giving those authorities the power to override local zoning to create rules friendlier to non-motorists. For example, Oregon created a metropolitan government for the Portland region that has the power to override local zoning.[212]

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[206] *See* Emerson, *supra* note 204, at 682 (noting that while zoning ordinance typically regulates land use, "subdivision regulations focus more on dimensional standards such as street widths").

[207] *Id.*

[208] *See* SMARTCODE, *supra* note 187, at SC30. However, the SmartCode does allow six-lane streets with two lanes set aside for on-street parking. *Id.*

[209] *Id.*

[210] *See* Michael Lewyn, *You Can Have It All: Less Sprawl and Property Rights Too*, 80 TEMPLE L. REV. 1093, 1107-13 (2007) (discussing concept in more detail).

[211] *Id.* at 1107 n.91.

[212] *See* Robert Liberty, *Give and Take Over Measure 37: Could Metro Reconcile Compensations for Reductions in Value with a Regional Plan for Compact Urban Growth and Preserving Farmland?*, 36 ENVTL. L. 187, 193-97 (2006) (describing Metro, a regional government for Portland area). Metro's code in fact requires Portland-area jurisdictions to

Two issues related to sprawl are more likely to be amenable to statewide regulation. States regulate street design through traffic manuals[213] that may be used not only by state road planners, but also by local officials.[214] Even when these manuals are not technically binding upon local governments, courts defer to such manuals in determining whether a city has negligently designed its streets.[215] Currently, these manuals consider pedestrians' interests (if at all) by listing slim, walkable streets as one possible option among many.[216] But in theory, a state could limit municipalities' right to design roadways for dangerously fast traffic—for example, by recommending or requiring a maximum street width for roads other than limited-access highways.

Another issue that is amenable to statewide regulation is the location of development. As noted above, this article defines sprawl as automobile-dependent suburban development.[217] The regulations discussed above are primarily related to *how* development occurs: that is, the "automobile-dependent" half of my definition. However, statewide regulation can address *where* development occurs: that is, the "suburban" half. For example, Oregon has required its regional governments to establish urban

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set forth minimum densities. *See* OR. METRO, THE METRO CODE, § 3.07.120(B), *available at* http://www.oregonmetro.gov/sites/default/files/0307_eff_011812_including_maps_for_title_4_6_and_14_updated_010814_ord_13-1316final.pdf. But because the code does not state how high these minimum densities must be, it is not clear whether the code in fact promotes density to any significant degree.

[213] *See, e.g.*, CAL. DEPT. OF TRANSP., MAIN STREETS: FLEXIBILITY IN DESIGN AND OPERATIONS, *available at* http://www.nh.gov/dot/org/projectdevelopment/highwaydesign/contextsensitivesolutions/documents/CalTrans-Main-streets-flexibility-in-design.pdf [hereinafter CALIFORNIA MAIN STREETS]; VA. DEPT. OF TRANSP., ROAD DESIGN MANUAL, *available at* http://www.extranet.vdot.state.va.us/locdes/Electronic_Pubs/2005%20RDM/RoadDesignCoverVol.1.pdf; STATE OF N.J. DEPT. OF TRANSP., ROADWAY DESIGN MANUAL, *available at* http://www.state.nj.us/transportation/eng/documents/RDM; OR. DEPT. OF TRANSP., HIGHWAY DESIGN MANUAL (2012), *available at* http://www.oregon.gov/ODOT/HWY/ENGSERVICES/Pages/hwy_manuals.aspx#2012_English_Manual [hereinafter OREGON HIGHWAY] (discussing purpose in preface).

[214] OREGON HIGHWAY, *supra* note 213 and accompanying text; CALIFORNIA MAIN STREETS, *supra* note 213, at 3 (explaining that the purpose of the manual is to "assist communities [as well as state planners]").

[215] *See* Girard Fisher, *Design Immunity for Public Entities*, 28 SAN DIEGO L. REV. 241, 245 (1991) (opining that if city conforms to "established engineering standards" such as state manual, its actions more likely to be reasonable).

[216] *See* CALIFORNIA MAIN STREETS, *supra* note 213, at 8 (discussing lane reduction as one possible option, especially in downtown areas); *see also* OREGON HIGHWAY, *supra* note 213, § 6.2.2.1 (suggesting that in densely populated areas, streets may have narrower lanes and other features designed for slower traffic).

[217] *See* Lewyn, *supra* note 2 and accompanying text.

growth boundaries around its cities,[218] which, by restricting development in newer suburbs, increases the amount of development in cities and existing suburbs (as opposed to newer suburbs).[219] Only statewide or regional regulation can achieve effective growth boundaries because if one city or county creates growth boundaries in order to keep development out of its rural or suburban sections, development will merely leapfrog to other municipalities that refuse to enact such limits.[220]

Of course, funding decisions are also amenable to statewide reform. A state may choose to spend more money on bicycle facilities, sidewalks, and public transit, rather than devoting most of its budget to highways.[221]

V. PLANS ARE HELPFUL BUT IN WAYS THAT ARE NOT ALWAYS RELATED TO SMART GROWTH

For the reasons stated above, it appears that municipal comprehensive plans will not inevitably limit sprawl, and that a wide variety of policies other than comprehensive plans might limit sprawl. But this does not mean that comprehensive plans are a bad thing—only that such plans are not absolutely necessary or sufficient to reduce sprawl.

In fact, a comprehensive plan can improve a municipal zoning code in three ways. First, a comprehensive plan can set forth the goals and policies[222] underlying the code—for example, *why* a municipality wishes to

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[218] *See* OR. REV. STAT. § 268.390(3)(a); *see also* Attkisson, *supra* note 20 at 1001 (describing growth boundary system in more detail).

[219] *Id.* at 1001-02 (explaining that one of Oregon's objectives was to "establish a clear limit on sprawl" and that "Portland has witnessed a dramatic increase in both the volume and proportion of multiple-family and attached single-family housing, as well as an increase in the proportion of smaller and more affordable developed, single-family lots—all of which indicate an increase in the density of the region. This increase in density directly corresponds to less sprawl and greater preservation of rural landscapes") (footnotes omitted).

[220] *Id.* at 1003. It is noteworthy, however, that if a state is more effective at discouraging suburban development than at encouraging infill, it could limit the amount of new housing produced, thus creating a housing shortage and increasing housing prices. *See* Steven J. Eagle, *A Prospective Look at Property Rights and Environmental Regulation*, 20 GEO. MASON L. REV. 725, 745 n.140 (2013) (citation omitted). *But see* Jeffrey A. Michael & Raymond B. Palmquist, *Environmental Land Use Restriction and Property Values*, 11 VT. J. ENVTL. L. 437, 453-54 (2010) (noting that numerous studies have yielded unclear results as to the effect of growth boundaries on land prices). The wisdom of this argument is beyond the scope of this article.

[221] *See, e.g.*, Ryan Seher, *I Want to Ride My Bicycle: Why and How Cities Plan for Bicycle Infrastructure*, 59 BUFF. L. REV. 585, 614-16 (2011) (describing Oregon's commitment to bicycle infrastructure).

[222] *See* JUERGENSMEYER & ROBERTS, *supra* note 10, at 26 (explaining that the comprehensive plan is "future-oriented" and establishes "goals and objectives for future land

increase parking through minimum parking requirements, reduce parking through maximum parking requirements, or leave parking up to the free market. Rather than merely stating a requirement as a zoning code would, a comprehensive plan can describe general policy goals underlying that requirement,[223] and perhaps even set forth data about the city's conditions and needs. Thus, a well-drafted plan can be to a zoning code what a legislative history is to a state or federal statute—a document that explains the purpose of the law in order to guide the judges, landowners and officials who must follow and/or implement the law.

This advantage of comprehensive plans, however, is not specifically tied to smart growth or sprawl. A smart growth-oriented plan can inform future policymakers that the goal of the zoning code is to promote smart growth. However, a pro-sprawl plan can easily inform policymakers that the goal of the code is to promote sprawl. Additionally, however, a plan may also embody goals not directly related to urban form. For example, a city may create a plan that is designed to exclude lower-income people from upper-income neighborhoods[224] or a plan designed to limit such exclusion by encouraging landowners to build affordable housing.[225]

In this regard, a comprehensive plan is similar to a government budget. A government budget might set forth "liberal goals" such as mitigating income inequality or "conservative goals" such as imprisoning felons. However, in either case, the existence of a budget might allow a city or state to achieve these goals more efficiently than if the jurisdiction passed individual appropriation bills without considering how much revenue the government wished to spend.

A second advantage of a comprehensive plan is that it can be used to prevent arbitrary zoning decisions. For example, if a city has to comply

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use"); MORRIS, *supra* note 8, at 6 (explaining that the comprehensive plan "a policy document"); Meck, *supra* note 17, at 316 (stating that planning "provides the policy framework for the administration of land use controls"). Note that some descriptions of the purposes of the comprehensive plan are far more general. For example, one article states that comprehensive plans "set out goals for the betterment of a jurisdiction's citizenry." Yusuf Z. Malik, *The Religious Land Use and Institutionalized Persons Act: A Perspective on the Unreasonable Limitations Provision*, 78 TENN. L. REV. 531, 561 (2011). But nearly any government action is arguably for the "betterment of [the] citizenry"; thus, this definition of the goals of planning is too broad to be accurate. *Id.*

[223] *See* JUERGENSMEYER & ROBERTS, *supra* note 10, at 26 (explaining that the comprehensive plan is not a "static blueprint" but instead may be "periodically reevaluated and amended").

[224] *Cf.* JUERGENSMEYER & ROBERTS, *supra* note 10, at 206 (explaining that some states prohibit such "exclusionary zoning"; however, U.S. Supreme Court has declined to do so).

[225] *Id.* at 216 (discussing "inclusionary zoning" techniques designed to achieve such goals).

with a preexisting plan, it may be less likely to make arbitrary, whimsical zoning decisions.[226] Assuming for the sake of argument that comprehensive plans are less likely to be arbitrary than zoning ordinances,[227] this argument applies just as much to sprawl-oriented comprehensive plans as to plans furthering smart growth. Just as a plan may reflect a consistent vision of pedestrian-friendly development, it may also reflect a consistent vision of sprawling, automobile-oriented development.

Third, planning is comprehensive. While a zoning ordinance might address land use in isolation, a comprehensive plan may be more likely to address a wide variety of related concerns, such as land use, transportation, and environmental issues.[228] For example, Jacksonville's comprehensive plan includes not only a "land use" element and a "transportation" element, but also sections relating to housing, historic preservation, recreation, conservation, capital improvements, public schools, other infrastructure, and intergovernmental relations.[229]

Because a comprehensive plan is not always limited to land use, such a plan will promote a community's vision more effectively than zoning alone. The drafters of a truly comprehensive plan, for example, will consider land use issues while drafting the plan's transportation section, but this is true whether the planners favor sprawl or smart growth. Thus, a completely sprawl-oriented comprehensive plan will promote sprawl more effectively than zoning alone, just as a smart growth-oriented plan might promote smart growth more effectively than zoning alone.

On the other hand, not all comprehensive plans embody a coherent vision. In the real world of politics, a comprehensive plan may be a compromise between a variety of visions. For example, the comprehensive plans of Boise and Seattle contain both provisions that seem to favor smart growth and provisions that could be interpreted to favor sprawl.[230]

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[226] *See* Mandelker, *supra* note 77, at 658 (stating that a member of an American Bar Association committee asked "land use lawyers and professors" why comprehensive plans were important, to which the most common answer "was that the most important function of the comprehensive plan is to prevent arbitrary land use decisions"); *see also id.* at 659-60 (listing numerous examples of arbitrary decisions such as zoning that applies different rules to similarly situated landowners).

[227] *Id.* at 662 (noting possibility that comprehensive plans, like zoning rules, may reflect capture of political process by special interests).

[228] *See* JUERGENSMEYER & ROBERTS, *supra* note 10, at 28 (planning process may address "land use, transportation, environment, utilities, housing" and other issues).

[229] *See* JACKSONVILLE LAND USE PLAN, *supra* note 91.

[230] *See supra* notes 104-11, 115-33, 152-60 and accompanying text.

In sum, comprehensive planning is a tool that enables a community to achieve its vision more effectively—yet this tool can be used just as easily for sprawl as for smart growth.

VI. CONCLUSION

The purpose of this Article is to criticize attempts to equate municipal comprehensive plans with smart growth. Although both comprehensive plans and smart growth may be desirable, they need not go together. A comprehensive plan, like a zoning ordinance, is a procedural tool that may be used to achieve a wide variety of substantive ends.

It follows that the mere existence of a comprehensive plan is not sufficient to create smarter growth. In fact, comprehensive plans sometimes favor sprawl by mandating single-use, low-density zoning and wide, automobile-oriented streets. Further, comprehensive plans are not necessary to achieve smarter growth. Although a comprehensive plan can encourage smart growth by allowing compact development, mixed use, and narrower streets, a reformed zoning code can also achieve these goals. A comprehensive plan can be useful insofar as it explains or consistently applies the policies behind a municipal zoning code—but this benefit applies to sprawl-oriented plans and codes as well as to those that encourage smart growth.

Without a Trace: The U.N. Commission of Inquiry's Recognition of North Korea's Enforced Disappearance of South Korean Citizens

Michele Park Sonen*

> At the end of the Second World War so many people said 'if only we had known[,] if only we had known the wrongs that were done in the countries of the hostile forces' . . . . Well, now the international community does know[.] There will be no excusing of failure of action because we didn't know . . . .[1]

I. INTRODUCTION

On February 7, 2014, the United Nations Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea[2] ("Commission") issued a report condemning the North Korean regime for unimaginable crimes against humanity and recommending that North Korea be referred to the International Criminal Court ("ICC").[3] The report marked a breakthrough for advocates who had been fighting for decades to hold the government of North Korea accountable for its crimes.[4] Until the

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[1] Statement by Michael Kirby, Chair of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea. *World Must Act on North Korea Rights Abuse, Says UN Report*, BBC NEWS ASIA (Feb. 17, 2014, 7:33 PM), http://www.bbc.com/news/world-asia-26220304.

[2] The official name for North Korea is the Democratic People's Republic of Korea ("DPRK"). *See North Korea*, TRAVEL.STATE.GOV (Nov. 25, 2013), http://travel.state.gov/content/travel/english/legal-considerations/judicial/country/korea-north.html.

[3] *See* Human Rights Council, Rep. of the Comm'n of Inquiry on Human Rights in the Democratic People's Republic of Korea, 25th Sess., Mar. 3-28, 2014, ¶¶ 87, 94(a), U.N. Doc. A/HRC/25/63 (Feb. 7, 2014), *available at* http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/a_hrc_25_63.pdf.

[4] *See* Philippe Dam, *Commission of Inquiry and Its Implications for North Korea*, HUMAN RIGHTS WATCH (Sept. 2, 2013), http://www.hrw.org/news/2013/09/02/commission-

Commission, no formal international body had thoroughly investigated North Korea's human rights violations, despite decades of reports of starvation, political prison camps, arbitrary and indefinite detentions, and public executions.[5] While the international community had been consumed by the regime's proliferation of nuclear weapons, the Commission brought its human rights record into the international spotlight.[6]

Among the Commission's chief concerns was an issue that many were unfamiliar with: the abduction or "enforced disappearance" of South Korean citizens by the government of North Korea.[7] In the decades following the Korean War, the government of North Korea abducted over 3800 South Korean citizens.[8] Although most of the abductees were eventually returned to South Korea, 516 remain missing, and North Korea has never been held accountable.[9] To this day, there is very little English language scholarship on this issue.[10]

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inquiry-and-its-implications-north-korea.

[5] *See generally* U.S. DEP'T OF STATE: BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, DEMOCRATIC PEOPLE'S REPUBLIC OF KOREA 2013 HUMAN RIGHTS REPORT (2014), *available at* http://www.state.gov/documents/organization/220414.pdf.

[6] *See* Dam, *supra* note 4.

[7] Human Rights Council, *supra* note 3, ¶¶ 64, 66. South Korea is not alone in having its citizens abducted by the government of North Korea. Reported cases of abduction from Japan, China, and other nations exist as well. *See id.* The abductions from Japan, in particular, have received significant attention both domestically and abroad. *See also infra* text accompanying note 122. This Article focuses only on the abduction of South Korean citizens following the Korean War.

[8] *See* CITIZENS' ALLIANCE FOR N. KOR. HUMAN RIGHTS, 2011 ACTIVITY REPORT 17 (2012), *available at* eng.nkhumanrights.or.kr/board/download.php?fileno=1070. The North Korean government also abducted up to 100,000 South Koreans during the Korean War. *See* Human Rights Council, Rep. of the Detailed Findings of the Comm'n of Inquiry on Human Rights in the Democratic People's Republic of Korea, 25th Sess., Mar. 3-28, 2014, ¶¶ 848-89, U.N. Doc. A/HRC/25/CRP.1 (Feb. 7, 2014), *available at* http://www.ohchr.org/documents/hrbodies/hrcouncil/coidprk/report/a.hrc.25.crp.1_eng.doc.

[9] *See* Human Rights Council, *supra* note 8, ¶ 895.

[10] The author is aware of only two articles addressing the abduction of South Korean citizens. *See generally* Fred Ross III & Jae Chun Won, *North Korean Kidnappers: A Response to Illegal Abductions by the Democratic People's Republic of Korea Before the Working Group on Enforced and Involuntary Disappearances*, 9 REGENT J. INT'L L. 277 (2013); Brad Williams & Erik Mobrand, *Explaining Divergent Responses to the North Korean Abductions Issue in Japan and South Korea*, 69 J. ASIAN STUD. 507 (2010), *available at* http://profile.nus.edu.sg/fass/polmej/JAS%20Williams%20Mobrand.pdf. Some scholarship exists, however, about the abduction of Japanese citizens. *See, e.g.*, Robert J. Lundin III, Note, *International Justice: Who Should Be Held Responsible for the Kidnapping of Thirteen Japanese Citizens?*, 13 TRANSNAT'L L. & CONTEMP. PROBS. 699 (2003). The abductions of Japanese citizens generally have received far more attention internationally than the abductions of South Korean citizens. *See also supra* text accompanying note 7; *infra* note 122.

In the months following the Commission's report, the United Nations Human Rights Council recommended that the General Assembly[11] submit the report to the Security Council so that the Security Council could refer North Korea to an international justice mechanism, most likely the ICC.[12] The Security Council is the only body with the authority to refer states that are not parties to the Rome Statute, such as North Korea, to the ICC.[13]

For nearly fifty years, both South Korea and the international community paid little attention to the enforced disappearance of South Korean citizens.[14] But today, the families of the 516 missing abductees are closer than ever to justice. Framing the abductions issue in the language of human rights has given the silenced victims and their families a voice, as well as basis in international law on which to call for justice.

This Article tracks the evolution of the South Korean abductions issue and places it within the context of present-day developments at the United Nations. It first explores how international human rights law transformed the issue of enforced disappearances on the Korean peninsula, bringing it from an issue of relative obscurity to the center stage of international law and the door of the ICC. Second, it discusses how the factual findings in the Commission of Inquiry's report illustrate that the abduction and continued holding of the 516 missing South Korean citizens is a crime against humanity under the Rome Statute and gives rise to individual criminal responsibility for North Korean government officials at the ICC.

To so do, this Article proceeds in five parts. Part II tells the story of the approximately 3800 South Koreans who were abducted in the decades following the Korean War, including the 516 South Koreans who are still missing and presumed to remain in North Korea. Part III summarizes the domestic and international responses to the abductions. It first discusses the insufficient response of the South Korean government in the decades

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[11] Shortly before publication of this Article, the United Nations General Assembly voted in favor of a resolution asking the Security Council to consider referring North Korea to the ICC. *See, e.g.*, *UN General Assembly Seeks North Korea ICC Charges*, BBC NEWS (Dec. 18, 2014, 6:59 PM), http://www.bbc.com/news/world-asia-30540379. Because this development unfolded as this Article was finalized for publication, it is discussed separately following this Article. *See infra* A Note on Recent Developments.

[12] *See* Human Rights Council, Situation of Human Rights in the Democratic People's Republic of Korea, 25th Sess., Mar. 3-28, 2014, ¶ 7, U.N. Doc. A/HRC/25/L.17 (Mar. 26, 2014), *available at* http://reliefweb.int/sites/reliefweb.int/files/resources/G1412494.pdf.

[13] *See* Rome Statute of the International Criminal Court art. 13(b), July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute], *available at* http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf; WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 96-101 (1st ed. 2001) (citation omitted).

[14] *See infra* Part III.

following the disappearances, followed by the government's recent efforts to resolve the abductions. It then outlines the work of the United Nations to date on this issue, illustrating how engaging the international community and framing the abductions as a human rights violation brought the issue to the forefront of a growing international movement for justice in North Korea.

Part IV turns to the Commission of Inquiry. It provides an overview of the Commission's work, its findings and recommendation that the Security Council utilize the ICC, and developments in the year following the Commission's report, placing particular focus on the Commission's recognition of the continued holding of the 516 abductees as enforced disappearances in violation of human rights law and as crimes against humanity. Part V then considers the Commission's report within the context of the Rome Statute and the ICC. It explains how the factual findings of the Commission illustrate that, by continuing to hold the 516 abductees, government officials in North Korea are indeed committing crimes against humanity that give rise to criminal responsibility at the ICC. Adjudication by the ICC, however, will continue to be out of reach absent a referral by the Security Council. With this political consideration in mind, in Part VI this Article explores the likelihood of the Security Council's referral and next steps for the abductees and human rights advocates. Even if politics prevent immediate referral to the ICC, the increased international attention already given to this issue has brought the abductees and their families closer toward justice. Further progress is needed, however, and the international community must prioritize accountability and redress.

II. THE DISAPPEARANCE OF 516 SOUTH KOREAN CITIZENS

A. Vanished Without a Trace

On the [twenty-ninth] of April 1970, two gunboats from North Korea came to our boat. Our boat was about [fifty] miles away from the border . . . . [T]hese two gunboats approached us[, and then] ten armed people, North Koreans, were shooting at us. And they were yelling at us, 'come down or we'll kill you[.]' . . . Our captain, at that time, was about to rise. They shot a gun at him. They just said one instruction, if we don't follow, they will shoot us right away. That was very scary so we were not able to ask why they were doing what they were doing. They asked us to step down so we did. And if we didn't do what they asked us to do, they said that they would kill us right away. So, we did what we were told to do, we went into the dining room. Then they closed the door. Anyway, these two gunboats from North Korea pulled our boat for about an hour. Right about when we were about to cross the border, I think the [Republic of] Korea[] navy discovered us and started

> *attacking us. However, our boat [had] already crossed the [thirty-eighth] line, so we were already in the territory of North Korea.*[15]

In the decades following the ceasefire agreement that halted the Korean War on July 27, 1953, approximately 3835 South Korean citizens were abducted by the Democratic People's Republic of Korea ("DPRK").[16] The vast majority of the abductees—eighty-nine percent—were fishermen captured from their fishing boats by the DPRK navy.[17] Others included office workers, vacationing teenagers, high school students, members of the South Korean military and coast guard, and even a well-known actress and a director.[18] Several were kidnapped overseas, in regions as far away as West Germany, Austria, and Norway.[19] The North Korean government eventually returned most of the abductees—3319 of them—within two years of their kidnapping, but 516 abductees are believed to remain in North Korea.[20] Most of them were never heard from again.[21] North Korea largely denies their existence.[22]

The initial kidnappings were nearly always random—North Korea would pick up whatever fishing boat happened to be near the Northern Limit Line

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[15] Testimony of Mr. Lee Jae-geun, a fisherman aboard a boat captured by North Korea in 1970. Human Rights Council, *supra* note 8, ¶ 888 (citation omitted).

[16] *See id.* ¶ 884. The abductions occurred from 1955-1992, with the majority taking place throughout the 1960s and 1970s. *See id.* ¶¶ 884-905; *see also* KOR. INST. FOR NAT'L UNIFICATION, WHITE PAPER ON HUMAN RIGHTS IN NORTH KOREA 527 (2013) [hereinafter WHITE PAPER], *available at* http://www.kinu.or.kr/eng/pub/pub_04_01.jsp (detailing the number of abductees from 1965-2000).

[17] *See* Human Rights Council, *supra* note 8, ¶¶ 885-86; Williams & Mobrand, *supra* note 10, at 510.

[18] *See* Human Rights Council, *supra* note 8, ¶¶ 900-04 (citations omitted); *see also* Williams & Mobrand, *supra* note 10, at 510.

[19] *See* Human Rights Council, *supra* note 8, ¶ 904; Williams & Mobrand, *supra* note 10, at 510.

[20] *See* Human Rights Council, *supra* note 8, ¶ 884. Some sources state that there are 517 missing abductees. *See* WHITE PAPER, *supra* note 16, at 526-27 (estimating that 517 abductees from South Korea remain held in North Korea); Citizens' Alliance for N. Korean Human Rights & Handong Int'l Law Sch., *General Allegations to the United Nations Working Group on Enforced or Involuntary Disappearances: Abductions of Citizens of the Republic of Korea by the Democratic People's Republic of Korea in the Decades Following the Korean War*, 9 REGENT J. INT'L L. 287, 291 (2013) [hereinafter Citizens' Alliance] (citation omitted) (stating that 517 abductees are believed to remain in North Korea). For consistency, this Article uses the figure provided in the report of the Commission of Inquiry.

[21] *See* WHITE PAPER, *supra* note 16, at 533-34.

[22] *See* WHITE PAPER, *supra* note 16, at 533 ("In short, North Korea still refuses to admit any cases of South Korean civilian abductions during the postwar years."). North Korea has both denied holding any South Koreans and argued that all abductees came to North Korea voluntarily or now wish to remain in North Korea. *See id.*

of the Yellow Sea, the territorial border of North and South Korea.[23] But then the government would make strategic selections on whom from the group to keep.[24] Typically, North Korean agents investigated the crew for several months to select abductees they found useful, usually the youngest and most physically fit.[25] The regime sought South Koreans it could turn into spies, or who could help train North Koreans for spy missions in South Korea.[26] They forced many abductees to attend spy-training facilities and threatened those who failed to perform well.[27] For example, Mr. Lee, an abductee who later escaped North Korea, recalled being taken to the mountains and threatened to take his espionage training more seriously:

> When I was in this [espionage] school, I did not really study. I was not very attentive for a few days, then one day, they took me and they said they would just take me for a walk. They took me in a car, I think we drove for about two hours, deep into a mountain. There was nobody in the mountain where they stopped the car. The driver showed me two guns that he had with him, and he said[,] '[W]ill you continue to be defiant? You have to kneel or you will have to eat the bullets[.'] So I asked, '[D]o you have to kill me?' And he said[,] '[I]f you don't listen to us, why should I let you live?' So I said, '[O]kay, I will kneel, I will be subservient.' So that is why I was able to survive, I was able to live.[28]

Others defectors from North Korea similarly reported that South Korean abductees trained North Korean spies to adjust to life in South Korea.[29] Those who did not perform well at espionage schools were sent to work in factories.[30] Others, presumably those North Korea did not find useful, were detained in prison camps.[31]

In its boldest and most shocking kidnapping, North Korea hijacked a commercial airplane and abducted all fifty people on board.[32] On December 11, 1969, ten minutes after the Korean Air flight's 12:25 p.m. departure, a North Korean agent hijacked the Seoul-bound plane and

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[23] *See* Citizens' Alliance, *supra* note 20, at 297. Some ships may have crossed into North Korean territory. *See* Human Rights Council, *supra* note 8, ¶ 885. Even if this is true, it does not excuse North Korea's refusal to repatriate the passengers and crew. *See id.*

[24] *See* Human Rights Council, *supra* note 8, ¶ 887.

[25] *See* Human Rights Council, *supra* note 8, ¶¶ 886-87; WHITE PAPER, *supra* note 16, at 526; Telephone Interview with Lilian Lee, Program Officer, Citizens' Alliance for North Korean Human Rights (Mar. 21, 2014) [hereinafter Lee].

[26] *See* WHITE PAPER, *supra* note 16, at 531; Williams & Mobrand, *supra* note 10, at 510.

[27] *See* Human Rights Council, *supra* note 8, ¶ 891.

[28] *Id.* (citation omitted).

[29] *See* WHITE PAPER, *supra* note 16, at 531.

[30] *See* Human Rights Council, *supra* note 8, ¶ 892.

[31] *See* WHITE PAPER, *supra* note 16, at 531-32.

[32] *See* Human Rights Council, *supra* note 8, ¶ 897.

rerouted it to an airfield near Wonsan, a coastal city in western North Korea.[33] When the plane landed, the only indication to the passengers that they were in the North was the presence of heavily armed military surrounding the plane.[34]

The hijacking provoked national outcry,[35] and over two months later, the Red Cross was finally able to negotiate the return of the passengers and crew.[36] But of the fifty South Koreans kidnapped, only thirty-nine returned.[37] North Korea detained the remaining eleven against their will, including the flight attendants and pilot, presumably because they were relatively young and highly skilled.[38] A film producer was among the eleven kept by North Korea.[39]

Most of the 516 abductees, including the eleven on the Korean Air flight, were never heard from again.[40] To this day, over forty years later, most families do not even know if their loved ones are alive.[41]

B. Life in North Korea

Because the flow of information in and out of North Korea is tightly controlled, little is known about the specific circumstances of the abductees that remain in North Korea.[42] However, the dismal state of human rights generally in the DPRK is now well known.[43] The country is tightly controlled by a totalitarian regime led by "the world's first Communist

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[33] *See* Citizens' Alliance North Korean Human Rights, *Korean Airlines Flight Hijacked by North Korea (Eng with French Subtitles)*, YOUTUBE (June 17, 2012) [hereinafter Citizens' Alliance], https://www.youtube.com/watch?v=k6NzSILCsig; Human Rights Council, *supra* note 8, ¶ 897; Ross & Won, *supra* note 10, at 277-78 (citations omitted).

[34] *See* Citizens' Alliance, *supra* note 33.

[35] *See id.*

[36] *See id.*

[37] *See* Ross & Won, *supra* note 10, at 277 (citation omitted); Citizens' Alliance, *supra* note 33.

[38] *See* Human Rights Council, *supra* note 8, ¶ 897.

[39] *See id.*

[40] *See* Ross & Won, *supra* note 10, at 277 (citation omitted). Four of the 516 abductees have been permitted to participate in state-organized separated family reunions. *See infra* text accompanying note 117 for further discussion of reunions. One of the flight attendants recently participated in a reunion. *See* Lee, *supra* note 25.

[41] *See* Ross & Won, *supra* note 10, at 277 (citation omitted).

[42] *See* U.S. DEP'T OF STATE: BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2011: DEMOCRATIC PEOPLE'S REPUBLIC OF KOREA 1 (2012), *available at* http://www.state.gov/documents/organization/186491.pdf.

[43] *See* HUMAN RIGHTS WATCH, WORLD REPORT 2013: EVENTS OF 2012, at 341-46 (2013), *available at* https://www.hrw.org/sites/default/files/wr2013_web.pdf.

monarchy," the Kim family.[44] In 1994, Kim Jong Il succeeded his father, the late Kim Il Sung, the revered first leader of North Korea.[45] In 2011, Kim Jong Il was succeeded by his son, the young Kim Jong Un.[46]

The Kim regime is brutal and repressive. The state claims an "absolute monopoly over information and total control of organized social life."[47] It deprives its citizens of freedom of thought, conscience, religion, expression, information, and association.[48] For example, the government controls nearly all social activities,[49] and access to media is restricted to state-approved outlets;[50] watching foreign movies or listening to South Korean radio stations are punishable crimes.[51] The regime also strictly limits individuals' movement.[52] Citizens' place of residence is determined largely by their position in North Korea's socio-political caste system, *songbun*,[53] which divides the population into three classes representing citizens' perceived loyalty to the regime: the loyal class, wavering class, or hostile class.[54] Citizens are born into their class based on their bloodline, and their class status generally remains static throughout their lifetime.[55] Those in the loyal class are the privileged; only they are eligible for prestigious employment positions, permitted to live in North Korea's showcase city, Pyongyang, and given greater access to food.[56] By contrast, the hostile class is relegated to rural areas and given limited access to education, food rations, and other government services.[57] Abductees are most often placed

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[44] ANDREI LANKOV, THE REAL NORTH KOREA: LIFE AND POLITICS IN THE FAILED STALINIST UTOPIA 68 (2013).

[45] *See* Chico Harlan, *North Korea Invokes Great Leader, Kim Il Sung, in Power Transfer to Grandson*, WASH. POST (Dec. 24, 2011), http://www.washingtonpost.com/world/asia_pacific/north-korea-invokes-great-leader-kim-il-sung-in-power-transfer-to-grandson/2011/12/23/gIQAUVDDFP_story_1.html.

[46] *See generally* U.S. DEP'T OF STATE: BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES-2012: DEMOCRATIC PEOPLE'S REPUBLIC OF KOREA 2012 HUMAN RIGHTS REPORT (2013) [hereinafter STATE DEPARTMENT COUNTRY REPORT], *available at* 2013 WL 1884303.

[47] Human Rights Council, *supra* note 3, ¶ 26.

[48] *See id.*

[49] *See id.* ¶ 28.

[50] *See id.* ¶ 29.

[51] *See id.*

[52] *See id.* ¶ 40; WHITE PAPER, *supra* note 16, at 504.

[53] *See* Human Rights Council, *supra* note 3, ¶ 39.

[54] *See* LANKOV, *supra* note 44, at 41-42 ("In most cases people are classified in accordance to what the person or his/her direct male ancestors did in the 1940s and early 1950s.").

[55] *See id.*

[56] *See* Human Rights Council, *supra* note 3, ¶ 39; LANKOV, *supra* note 44, at 42.

[57] *See* U.S. DEP'T OF STATE: BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, DEMOCRATIC PEOPLE'S REPUBLIC OF KOREA 2012 HUMAN RIGHTS REPORT 9 (2013)

in the hostile class.[58] Citizens of North Korea, particularly members of the hostile and wavering classes, are not permitted to leave their provinces even temporarily—special permission is required to travel within the country.[59] International travel is forbidden.[60] The state also predominantly determines citizens' place of employment.[61] To ensure its control over the people, state surveillance and control is unceasing,[62] and abductees are subjected to particularly heavy monitoring.[63] Activities considered anti-state, such as criticizing the government, result in severe punishment.[64]

Punishment in North Korea is generally arbitrary, grossly disproportionate, and carried out with impunity.[65] In the worst cases, individuals accused of political crimes—practicing Christianity, for example—are detained incommunicado in North Korea's infamous political prison camps, *kwanliso*.[66] Detainees are given no due process,[67] imprisoned indefinitely,[68] and forced to endure inhumane treatment including torture,[69] starvation,[70] rape,[71] and forced abortions.[72] The regime also detains three generations of the accused's family to further deter ideology it deems unacceptable.[73] Current estimates indicate that up to 120,000 people are detained in such prison camps.[74] Hundreds of thousands are estimated to

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[hereinafter HUMAN RIGHTS REPORT], *available at* http://www.state.gov/documents/organization/204420.pdf.

[58] *See* Human Rights Council, *supra* note 8, ¶ 989.

[59] *See* Human Rights Council, *supra* note 3, ¶¶ 39-40.

[60] *See* HUMAN RIGHTS REPORT, *supra* note 57, at 8; Human Rights Council, *supra* note 3, ¶ 42.

[61] *See* Human Rights Council, *supra* note 8, ¶ 334.

[62] *See* LANKOV, *supra* note 44, at 45.

[63] *See* Human Rights Council, *supra* note 8, ¶¶ 984-85 (citations omitted).

[64] *See* Human Rights Council, *supra* note 3, ¶ 28.

[65] *See id.* ¶¶ 56-63.

[66] *See id.* ¶ 59; LANKOV, *supra* note 44, at 45-50; DAVID HAWK, THE HIDDEN GULAG: THE LIVES AND VOICES OF "THOSE WHO ARE SENT TO THE MOUNTAIN" 25 (2d ed. 2012), *available at* http://www.hrnk.org/uploads/pdfs/HRNK_HiddenGulag2_Web_5-18.pdf.

[67] *See* Human Rights Council, *supra* note 8, ¶ 754.

[68] *See id.* ¶ 755.

[69] *See id.* ¶ 760 (citations omitted).

[70] *See id.* ¶ 769.

[71] *See id.* ¶ 766 (citations omitted).

[72] *See id.* ¶ 764 (citations omitted).

[73] *See* Human Rights Council, *supra* note 3, ¶ 59; *see also* HAWK, *supra* note 66, at 29; LANKOV, *supra* note 44, at 47-48. This practice, referred to as "guilt by association[,]" happens less frequently today than in previous decades. Human Rights Council, *supra* note 3, ¶ 59.

[74] *See* Human Rights Council, *supra* note 3, ¶ 61.

have perished in *kwanliso* in the past fifty years.[75] Some abductees are believed to be among those detained in *kwanliso*.[76]

For many North Koreans, particularly those lacking adequate access to food, each day is a fight for survival.[77] Thousands each year thus feel compelled to escape and embark on the perilous journey to security and freedom in a new country.[78] Most defectors follow similar routes. First, they illegally cross North Korea's heavily guarded northern border, the Tumen River, to reach China.[79] Because armed officers will either shoot on sight or arrest escapees, defectors must provide bribes or carefully time their crossing to avoid being caught.[80] Many are not successful.[81]

For those who successfully reach China, the border crossing marks only the beginning of a dangerous journey. Security officers in China actively search for North Korean refugees and repatriate them back to North Korea[82] where refugees face severe punishment that can include execution, torture, and indefinite detention in a prison camp.[83] The Chinese government claims such repatriation is permissible under international law on the ground that the North Koreans are not refugees but illegal economic migrants.[84] Many international law experts challenge this position.[85]

To evade Chinese security officers, defectors must travel undetected across the entire country, often with no money or Chinese language ability,

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[75] *See id.* ¶ 60.

[76] *See* WHITE PAPER, *supra* note 16, at 531-32.

[77] *See, e.g.*, Human Rights Council, *supra* note 8, ¶¶ 370-71 (discussing difficulties of street children, or *Kotjebi*).

[78] *See id.* ¶ 385. In the 1990s, as a result of the escalating hunger and starvation in the country, many North Koreans illegally crossed into China to "flee from economic despair and the underlying human rights violations." *Id.* In the 2000s, although the worst of the famine had subsided, people continued to flee in search of food. *See id.* ¶ 392 (citation omitted). Today, the motivations to defect are more varied and are sometimes political. *See id.* ¶ 390. Often, North Koreans initially intend to remain in China for only a limited time to earn money, but after learning more about life outside the DPRK, they attempt to reach South Korea. *See id.* ¶ 392-93.

[79] *See* MELANIE KIRKPATRICK, ESCAPE FROM NORTH KOREA: THE UNTOLD STORY OF ASIA'S UNDERGROUND RAILROAD 23 (2012).

[80] *See id.* (citation omitted).

[81] *See* Human Rights Council, *supra* note 8, ¶¶ 388-89.

[82] *See id.* ¶¶ 435-37.

[83] *See id.* ¶¶ 405-34. The severity of the punishment depends on multiple factors, including the reason the individual defected. *See id.* ¶ 409-10. Individuals found to have contacted South Koreans or Christian missionaries are typically punished most severely. *See id.* ¶ 409.

[84] *See id.* ¶¶ 441-42, 447.

[85] *See id.* ¶ 442-47; *see also* T. Kumar, *China's Repatriation of North Korean Refugees*, AMNESTY INT'L USA (Mar. 5, 2012), http://www.amnestyusa.org/news/news-item/china-s-repatriation-of-north-korean-refugees.

to reach a South Korean embassy in a "safe" country such as Thailand that will not deport them back to North Korea.[86] The journey can take years,[87] and without assistance, many are not successful.[88] Women are particularly vulnerable, as they often become victims of sex trafficking.[89]

In spite of these difficulties, between 1000 and 3000 North Korean defectors successfully reach South Korea each year,[90] while many others remain in China.[91] Nine South Korean abductees are among those who escaped North Korea and safely reached South Korea.[92]

III. EFFORTS TO RESOLVE THE DISAPPEARANCES IN SOUTH KOREA AND THE INVOLVEMENT OF THE UNITED NATIONS

A. South Korean Response

The history of the Korean peninsula following the Korean War has colored the South Korean response to the abductions. During the years of authoritarian rule in South Korea (1963-1988), the South Korean government treated the abductees and their families with intense suspicion and discrimination rather than providing them with support.[93] Like the United States during the McCarthy era, a pervasive fear of communism and espionage enveloped South Korea in the wake of the Korean War.[94] Many in South Korea considered abductees "leftist deserters and therefore

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[86] *See* Human Rights Council, *supra* note 8, ¶ 393. *See generally* KIRKPATRICK, *supra* note 79 (discussing the routes used by North Korean escapees to reach South Korea safely).

[87] *See* WHITE PAPER, *supra* note 16, at 500 (explaining that, in the past, traveling through China to South Korea typically took up to two years, but today many reach South Korea within a year). Several female defectors also reported being forced to live with Chinese men for years before they were able to reach South Korea. *See* Human Rights Council, *supra* note 8, ¶¶ 438, 466-67 (citations omitted).

[88] *See* Human Rights Council, *supra* note 8, ¶ 436 (discussing the arrest of North Koreans in China); KIRKPATRICK, *supra* note 79, at 173-74 (explaining that North Koreans cannot survive the journey without assistance).

[89] *See* Human Rights Council, *supra* note 8, ¶¶ 455-70.

[90] *See id.* ¶ 389 n.490; WHITE PAPER, *supra* note 16, at 499-500.

[91] *See* WHITE PAPER, *supra* note 16, at 499-500. An exact number is unavailable, but some estimate that as many as 100,000 North Koreans live in China. *See id.* at 459.

[92] *See* Human Rights Council, *supra* note 8, ¶ 1145; MINISTRY OF UNIFICATION, 2014 WHITE PAPER ON KOREAN UNIFICATION 127 (2014), *available at* http://eng.unikorea.go.kr/content.do?cmsid=1819.

[93] *See* Human Rights Council, *supra* note 8, ¶ 907; Lee, *supra* note 25. In her capacity as a Program Officer at the Citizens' Alliance of North Korean Human Rights, Ms. Lee conducted interviews of many of the abductees and their family members. *See id.*

[94] *See* Lee, *supra* note 25.

untrustworthy."[95] Their connection to the North turned them into potential spies,[96] in part because the South Korean government could not confirm that they indeed had been kidnapped, as opposed to voluntarily defecting.[97] Such fears were exacerbated by a 1968 attack by North Korea on the official presidential residence in South Korea.[98]

Returned abductees and the families of those still missing were placed under heavy surveillance.[99] Government officials repeatedly showed up at their homes to ask if the missing abductees had made contact or to look for evidence themselves.[100] Many families relocated within South Korea to escape the attention from the authorities, but often the move roused increased suspicion and additional visits from the police.[101] This lasted for decades.[102] The daughter of an abducted fisherman recalled that shortly after her marriage, over ten years after her father disappeared, a government official suggested that the money she had used to purchase her new furniture had come from her father's compensation for being a spy in the North.[103]

Families of the abductees also faced discrimination and were ostracized from their communities for having a relative potentially involved with North Korea.[104] The government further denied family members access to higher education and banned them from government employment.[105]

The South Korean government also made no real attempt to seek repatriation of the abductees during those years.[106] That South Korea itself was under authoritarian rule and regularly committed atrocities against its people rather than fighting for their rights played a role, as did the limited communication between the two Koreas.[107] Although it likely wanted the abductees repatriated, the South Korean government did not prioritize the issue and appeared to be unwilling to use its limited communication with

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[95] Human Rights Council, *supra* note 8, ¶ 907.

[96] *See id.*; *see also* Williams & Mobrand, *supra* note 10, at 529 (explaining that if "someone disappeared to North Korea, that person and those close to him or her were viewed with suspicion as possible DPRK sympathizers").

[97] *See* Lee, *supra* note 25.

[98] Human Rights Council, *supra* note 8, ¶ 907 (citation omitted).

[99] *See id.* ¶¶ 907-08 (citations omitted); Lee, *supra* note 25.

[100] *See* Lee, *supra* note 25.

[101] *See* Human Rights Council, *supra* note 8, ¶ 908 (citation omitted).

[102] *See id.* ("The [South Korean] policy of monitoring the relatives of persons forcibly disappeared for national security reasons continued until the late 1990s.").

[103] *See* Lee, *supra* note 25.

[104] *See* Williams & Mobrand, *supra* note 10, at 529; Lee, *supra* note 25.

[105] *See* Human Rights Council, *supra* note 8, ¶ 908; Williams & Mobrand, *supra* note 10, at 529.

[106] *See* Williams & Mobrand, *supra* note 10, at 521-23.

[107] *See id.* at 521.

the North to negotiate for them.[108] As a result, many abductees and families felt abandoned and further victimized by the South Korean government.[109] One family member expressed a common frustration among the abductees and their loved ones: "The police have done nothing to help us. The only thing they have done is put a surveillance on us. It seems that the South Korean government has never appealed or . . . complained to North Korea about the abductees."[110]

Only in recent years has the government begun advocating for the abductees,[111] although its advocacy has remained limited. For years, North Korea refused to discuss any abduction that took place after the Korean War, limiting discussions to South Korean prisoners of war and civilians abducted during the war.[112] Finally, in 2006, North Korea agreed to confirm the status of both post-war and wartime abductees, but only in the larger context of families that were separated due to the Korean War.[113] This approach anguished many families, because the absorption of the abductions into the larger separated families issue meant that there would be no foreseeable short-term resolution.[114] The then-government of South Korea nonetheless agreed to the approach in part due to its "Sunshine Policy," which prioritized business ventures and peaceful coexistence over human rights, including resolution of the abductions issue.[115] Characterizing the abductions as "separated families"[116] had one benefit, however. It enabled a few family members to briefly reunite with abductees during official reunions of families separated by the war.[117] To

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[108] *See id.*

[109] *See* Human Rights Council, *supra* note 8, ¶ 907.

[110] *Id.* ¶ 908 (citation omitted).

[111] *See* Lee, *supra* note 25. The current administration states its position as follows: "Since the inter-Korean summit in 2000, the [South Korean] government has consistently attempted to engage the North in a dialogue to resolve the issue of South Korean POWs and abductees." MINISTRY OF UNIFICATION, *supra* note 92, at 128. It states that it recognizes resolving the abductees issue as "a key task of its North Korea policy, recognizing [it] as part of the state's basic duty to protect its nationals." *Id.* at 129. It also supports United Nations activities concerning the abductees. *See id.*

[112] *See* WHITE PAPER, *supra* note 16, at 533.

[113] *See id.* at 533-34; *see also* Williams & Mobrand, *supra* note 10, at 523.

[114] *See* Human Rights Council, *supra* note 8, ¶ 910.

[115] *See id.*

[116] *See id.* ¶¶ 910-11.

[117] *See id.* ¶ 911. Occasionally, North and South Korea agree to hold multi-day reunions of families that were separated during the Korean War. *See* Chico Harlan, *For Some North and South Koreans, a Long-Awaited Family Reunion*, WASH. POST (Feb. 20, 2014), http://www.washingtonpost.com/world/for-some-koreans-a-long-awaited-reunion/2014/02/20/2e6d916c-9a19-11e3-b1de-e666d78c3937_story.html. To participate, family members must enter a lottery in South Korea, and, if selected, obtain "life verification" from North

date, only four post-war abductees have been permitted to participate in the reunions.[118]

The government of South Korea also recently made small restitutions available to abductees and their families as compensation for their suffering.[119] A 2007 South Korean law provided returned abductees with a grant to assist resettlement and entitled abductees' families to assistance and compensation.[120] As of October 2010, the government provided nearly $15 million to 426 abductees and their families.[121]

Although its recent efforts are commendable, the South Korean government's response remains insufficient. It has not ensured redress for the 516 abductees and their families who are aging rapidly. It has neither succeeded in securing their return, nor has it acquired any information about their whereabouts, aside from the four abductees who participated in separated family reunions.[122]

Korea through the Red Cross. *See* Human Rights Council, *supra* note 8, ¶ 911. Family members of the abductees were rarely given a "life verification," and when they were it was on the condition that no mention be made of the how the families became separated. *See id.*

[118] *See* WHITE PAPER, *supra* note 16, at 534 (stating that 2 of the 516 abductees participated in separated family reunions in 2009); Harlan, *supra* note 117 (stating that two others participated in 2014).

[119] *See* Human Rights Council, *supra* note 8, ¶ 912 (citation omitted). In Korean, the restitution is called *ui-ro-geum*, which translates literally as "reward for suffering." *Id.*

[120] *See id* (citation omitted).

[121] *See* MINISTRY OF UNIFICATION, *supra* note 92, at 130; Currency Conversion from KRW to USD, YAHOO! FINANCE, finance.yahoo.com/currency-converter/ (in first box, insert "KRW" for "country or currency" and "14,510,000,000" for "amount"; then, in second box, insert "USD" for "country or currency"). The government provided payment for 425 cases, totaling KRW 14.51 billion. *See* MINISTRY OF UNIFICATION, *supra* note 92, at 130. Of the total disbursal, roughly $13 million (KRW 12.914 billion) was paid as monetary compensation to 416 families ($30,000 on average per family); roughly $1.5 million (KRW 1.528 billion) was paid as settlement allowances to eight persons ($190,000 average per person); and $68,000 (KRW 68 million) to "one person as compensation for death or injury caused by exercise of public power by the state." *See* MINISTRY OF UNIFICATION, *supra* note 92, at 130; Currency Conversion from KRW to USD, *supra* (in first box, insert "KRW" for "country or currency" and "[the amount of KRW]" for "amount"; then, in second box, insert "USD" for "country or currency"). *But see* Human Rights Council, *supra* note 8, ¶ 912 (stating that at the end of 2010, families of 517 abductees had received payment).

[122] The South Korean government's response stands in stark contrast to that of Japan. Throughout the 1970s and 1980s, the government of North Korea also abducted a number of Japanese nationals. *See* Williams & Mobrand, *supra* note 10, at 509. Although the Japanese government is certain of only 17 cases, some predict that at least 100 individuals became victims of disappearance by North Korea. *See* Human Rights Council, *supra* note 8, ¶ 931 (citations omitted). They, too, were kidnapped to further espionage activities. *See id.* ¶ 928. Unlike in South Korea, the Japanese government strongly protested the abductions, putting resolution of the issue center stage in its North Korea policy. *See* Williams & Mobrand, *supra* note 10, at 507, 516-19. As a result, Japan achieved an admission and apology from

B. Engaging the United Nations

Roughly five years ago, activists and family members turned to the United Nations to help resolve and bring attention to the abductions issue.[123] One approach involved submitting cases of missing persons to the United Nations Working Group on Enforced or Involuntary Disappearances ("Working Group").[124] The Working Group, established by the United Nations Human Rights Council, exists in part to "assist the relatives of disappeared persons to ascertain the fate and whereabouts of their disappeared family members."[125] It applies the definition of enforced disappearance found in the United Nations' 1992 Declaration on the Protection of All Persons from Enforced Disappearance.[126] Under the Declaration, enforced disappearances occur when individuals are "arrested, detained or abducted against their will or otherwise deprived of their liberty" by either government officials, or "organized groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the [g]overnment."[127] The perpetrator must also "refus[e] to disclose the fate or whereabouts of the persons concerned" or refuse to "acknowledge the deprivation of their liberty."[128]

Family members or friends of disappeared persons, including intergovernmental or non-governmental organizations ("NGOs") working on behalf of victims, may submit reports of disappearances to the Working Group.[129] If the group determines that the case comports with the definition

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Kim Jong Il himself for the abduction of thirteen Japanese nationals. *See id.* at 518. Japan also secured the return of five of those abductees and was informed that the other eight had died, although that allegation was never confirmed. *See* Human Rights Council, *supra* note 8, ¶ 933; Justin McCurry, *North Korea's Kidnap Victims Return Home After 25 Years*, GUARDIAN (Oct. 15, 2002, 8:54 PM), http://www.theguardian.com/world/2002/oct/16/northkorea.japan.

[123] *See* U.N. HUMAN RIGHTS: OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, WORKING GROUP ON ENFORCED OR INVOLUNTARY DISAPPEARANCES: MANDATE, http://www.ohchr.org/EN/Issues/Disappearances/Pages/DisappearancesIndex.aspx (last visited Oct. 11, 2014) [hereinafter U.N. HUMAN RIGHTS].

[124] *See id.*

[125] *Id.*

[126] *See* Declaration on the Protection of All Persons from Enforced Disappearance, G.A. Res. 47/133, at pmbl., U.N. Doc. A/RES/60/1 (Dec. 18, 1992) [hereinafter Declaration], *available at* http://www.un.org/documents/ga/res/47/a47r133.htm; U.N. HUMAN RIGHTS, *supra* note 123.

[127] *See* Declaration, *supra* note 126, at pmbl.

[128] *Id.*

[129] *See* Human Rights Council, Working Grp. on Enforced or Involuntary Disappearances, Methods of Work of the Working Group on Enforced or Involuntary Disappearances, ¶ 12, U.N. Doc. A/HRC/WGEID/102/2 (May 2, 2014), *available at*

of enforced disappearance in the Declaration,[130] it transmits the case to the accused government and requests an investigation to clarify the fate or whereabouts of the missing person.[131] The Working Group acts as "a channel of communication" between the families of the disappeared and the governments concerned.[132] Because of the Working Group's "universal humanitarian mandate[,]" it is allowed to investigate and communicate with North Korea despite the country's status as a "non-participating countr[y]" that is not bound by the relevant treaties and conventions.[133]

Most of the cases involving the post-war abductees were submitted to the Working Group by the Seoul-based NGO Citizens' Alliance for North Korean Human Rights ("Citizens' Alliance").[134] To date, Citizens' Alliance has transmitted twenty-nine cases on behalf of the families of the 516 missing abductees.[135] At the time of publication, nineteen of those cases had been transmitted to the North Korean government.[136] North Korea has responded to only five of those cases, denying the existence of the abductees in defensive and outrageous language:

> The three cases mentioned . . . are not cases of enforced disappearances. There is no person in my country who has been enforcedly or involuntarily

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http://www.ohchr.org/EN/Issues/Disappearances/Pages/Annual.aspx.

[130] *See id.* ¶ 9.

[131] *See id.* ¶ 11.

[132] *Id.* ¶ 2.

[133] Ross & Won, *supra* note 10, at 282-83.

[134] *See* Patricia Goedde, *Legal Mobilization for Human Rights Protection in North Korea: Furthering Discourse or Discord?*, 32 HUM. RTS. Q. 530, 539 (2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1799805. Citizens' Alliance is one of the "most organized and vocal NGOs" in South Korea advocating for human rights in North Korea. *Id.* Citizens' Alliance regularly advocates at the United Nations and internationally for improvement of the human rights situation inside North Korea and the treatment of North Korean refugees by China and other countries. *See History*, CITIZENS' ALLIANCE FOR N. KOREAN HUMAN RIGHTS, https://eng.nkhumanrights.or.kr:444/info/2013.htm (last visited Oct. 11, 2014). See CITIZENS' ALLIANCE FOR N. KOREAN HUMAN RIGHTS, https://eng.nkhumanrights.or.kr:444/main.htm (last visited Oct. 27, 2014), for further information about the work of Citizens' Alliance. The author of this Article is currently a Program Officer at Citizens' Alliance.

[135] *See* Lilian Lee, *The Work of Citizens' Alliance for North Korean Human Rights on Abductions of South Korean Nationals by North Korea*, *in* INTERNATIONAL CONFERENCE ON ENFORCED DISAPPEARANCES: SOLIDARITY, STRATEGIES, AND SOLUTIONS 46, 47 (2014), *available at* https://eng.nkhumanrights.or.kr:444/board/bbs_view.php?no=13&board_table=bbs_past&page=1&word=&searchItem=&cate_id= (data current through January 2014 and calculations completed by the author); Interview with Miri Cha, Program Officer, Citizens' Alliance for North Korean Human Rights (Nov. 14, 2014). Citizens' Alliance submitted an additional case in 2004, but it was a unique case of a South Korean citizen abducted in China while near the border of North Korea. *See* Lee *supra*; *see also* Lee, *supra* note 25.

[136] *See* Lee, *supra* note 135, at 47.

> disappeared or detained against his or her will. In totality, communications on the "cases" . . . are concocted plots of the hostile forces against the DPRK and therefore have nothing to do with the lofty humanitarian mission of your Working Group.[137]

Although activists do not expect the Working Group to change North Korea's position, bringing the issue to the international human rights stage benefits the abductees in other ways. Transmission of their cases by the United Nations signifies that these disappearances are the concern of the international community and potentially in violation of international human rights norms.

The Special Rapporteur appointed for North Korea has also played a role in bringing enforced disappearances into the public eye. Special Rapporteurs are appointed by the Human Rights Council of the United Nations to act as fact-finders in situations involving alleged human rights violations.[138] As of December 2013, thirty-two Special Rapporteurs actively worked worldwide.[139]

The Human Rights Council has appointed a Special Rapporteur to investigate human rights in North Korea since 2004.[140] It was not until recent years, however, that the enforced disappearances of South Korean nationals became an area of the Special Rapporteur's focus. In its first report in 2005, the Special Rapporteur extensively analyzed the abductions of Japanese nationals, but only mentioned the abduction of other foreign nationals, without specific reference to South Korean citizens.[141] The following reports made little or no mention of the South Korean abductees until 2011,[142] when the then-newly appointed Special Rapporteur, Marzuki

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[137] *Id.* (alterations in original).

[138] *See* PHILLIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS: THE SUCCESSOR TO INTERNATIONAL HUMAN RIGHTS IN CONTEXT 846 (2013).

[139] *See* OFFICE OF THE U.N. HIGH COMM'R FOR HUMAN RIGHTS, UNITED NATIONS SPECIAL PROCEDURES: FACTS AND FIGURES 2013, at 2-4 (2014), *available at* http://www.ohchr.org/Documents/HRBodies/SP/Facts_Figures2013.pdf.

[140] *See id.* at 2.

[141] *See* Special Rapporteur on the Situation of Human Rights in the Democratic People's Republic of Korea, *Question of the Violation of Human Rights and Fundamental Freedom in Any Part of the World, Rep. of the Special Rapporteur on the Situation of Human Rights in the Democratic People's Republic of Korea*, Comm'n on Human Rights, ¶¶ 39-40, U.N. Doc. E/CN.4/2005/34 (Jan. 10, 2005) (by Vitit Muntarbhorn), *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/101/97/PDF/G0510197.pdf?OpenElement.

[142] *See generally* Special Rapporteur on the Situation of Human Rights in the Democratic People's Republic of Korea, *Rep. of the Special Rapporteur on the Situation of Human Rights in the Democratic People's Republic of Korea*, Human Rights Council, U.N. Doc. A/HRC/16/58 (Feb. 21, 2011) (by Marzuki Darusman) [hereinafter 2011 Special Rapporteur Report], *available at* http://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A-HRC-16-58.pdf; Special Rapporteur on the Situation of Human Rights in the Democratic

Darusman, discussed in detail, for the first time, the post-war abduction of South Korean nationals.[143] Significantly, the Special Rapporteur noted that his attention was drawn to the issue only after "meetings with the Government of the Republic of Korea, NGO representatives and the families of the abductees,"[144] illustrating both the obscurity of this issue within the international human rights community, and the importance of activists' advocacy and the South Korean government's support.

Also significant was the Special Rapporteur's recognition that the abductions are matters of international concern, not merely an intra-Korea conflict. The Special Rapporteur stated:

> The Special Rapporteur stresses that the question of abductions is not only a bilateral issue between the Democratic People's Republic of Korea and Japan or the Republic of Korea, but one that concerns the international community at large and has strong and direct links to the human rights situation in the Democratic People's Republic of Korea. It is thus incumbent upon the authorities of the Democratic People's Republic of Korea to settle this long-standing question of abduction and look at wider issues of the human rights and humanitarian situation of the people in the Democratic People's Republic of Korea.[145]

People's Republic of Korea, *Human Rights in the Democratic People's Republic of Korea, Rep. of the Special Rapporteur on the Situation of Human Rights in the Democratic People's Republic of Korea*, Gen. Assembly, U.N. Doc. A/64/224 (Aug. 4, 2009) (by Vitit Muntarbhorn), *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/440/61/PDF/N0944061.pdf?OpenElement; Special Rapporteur on the Situation of Human Rights in the Democratic People's Republic of Korea, *Human Rights Situations that Require the Council's Attention, Rep. of the Special Rapporteur on the Situation of Human Rights in the Democratic People's Republic of Korea*, Human Rights Council, U.N. Doc. A/HRC/7/20 (Feb. 15, 2008) (by Vitit Muntarbhorn), *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/106/15/PDF/G0810615.pdf?OpenElement; Special Rapporteur on the Situation of Human Rights in the Democratic People's Republic of Korea, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council", Rep. of the Special Rapporteur on the Situation of Human Rights in the Democratic People's Republic of Korea*, Human Rights Council, U.N. Doc. A/HRC/4/15 (Feb. 7, 2007) (by Vitit Muntarbhorn), *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/106/68/PDF/G0710668.pdf?OpenElement; Special Rapporteur on the Situation of Human Rights in the Democratic People's Republic of Korea, *Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World, Rep. of the Special Rapporteur on the Situation of Human Rights in the Democratic People's Republic of Korea*, Comm'n on Human Rights, U.N. Doc. E/CN.4/2006/35 (Jan. 23, 2006) (by Vitit Muntarbhorn), *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/103/75/PDF/G0610375.pdf?OpenElement.

[143] *See* 2011 Special Rapporteur Report, *supra* note 142, ¶¶ 18-25.

[144] *See id.* ¶ 20.

[145] *Id.* ¶ 25.

In April 2013, based on findings made by the Special Rapporteur with respect to the human rights situation in North Korea, the Human Rights Council recognized the need for a fact-finding mechanism with more resources.[146] It thus established a Commission of Inquiry ("Commission") to investigate the systematic, widespread, and grave human rights violations in North Korea.[147] The resolution establishing the Commission specifically called for investigation of "enforced disappearances, including in the form of abductions of nationals of other [s]tates,"[148] among violations of other human rights including the rights to food, life, freedom of movement, and freedom from arbitrary detention.[149] The following section, Part IV, discusses the Commission of Inquiry in more detail.

IV. THE COMMISSION OF INQUIRY ON HUMAN RIGHTS IN THE DEMOCRATIC PEOPLE'S REPUBLIC OF KOREA

A. The Commission of Inquiry's Work and Findings

Establishment of the Commission of Inquiry by the Human Rights Council marked the first significant step toward holding North Korea accountable for its human rights violations. Commissions of inquiry serve as fact-finding mechanisms for the United Nations.[150] Although their findings are not binding and do not necessarily carry legal weight, they can play an important role in "transform[ing] public and governmental understanding of a situation" and have "the potential to promote wide-ranging political or institutional reform."[151] Further down the road, they can also play a "crucial role in attributing criminal responsibility and laying

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[146] *See* Human Rights Council Res. 22/13, Situation of Human Rights in the Democratic People's Republic of Korea, 22d Sess., Feb. 25-Mar. 22, 2013, ¶ 5, U.N. Doc. A/HRS/RES/22/13 (Apr. 9, 2013), *available at* http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/a_hrc_res_22_13.pdf.

[147] *See id.* The official title of the Commission is the "Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea." Human Rights Council, *supra* note 8, ¶ 1.

[148] *See* Human Rights Council Res. 22/13, *supra* note 146, ¶ 5 (citation omitted).

[149] *See id.* (citation omitted) (stating that "the [C]ommission of [I]nquiry will investigate the systematic, widespread and grave violations of human rights in the Democratic People's Republic of Korea[,] . . . including the violation of the right to food, the violations associated with prison camps, torture and inhuman treatment, arbitrary detention, discrimination, violations of freedom of expression, violations of the right to life, violations of freedom of movement, and enforced disappearances, including in the form of abductions of nationals of other [s]tates, with a view to ensuring full accountability, in particular where these violations may amount to crimes against humanity").

[150] *See* ALSTON & GOODMAN, *supra* note 138, at 846-47.

[151] *Id.* at 847.

the groundwork for subsequent prosecutions."[152] The Commission of Inquiry for North Korea has indeed played this role, attracting media attention and catalyzing further action from the United Nations.[153]

Each Commission's specific parameters are governed by its mandate.[154] The mandate for the North Korea Commission called for an investigation of the DPRK's "systematic, widespread[,] and grave violations of human rights" in nine areas, including the enforced disappearance of foreign nationals.[155] The mandate also acknowledged the possibility that these human rights violations amounted to "crimes against humanity."[156] But perhaps most significantly, the Commission was to conduct the investigation to "ensur[e] full institutional and personal accountability"[157] and propose measures that could lead to accountability, such as establishing an ad-hoc tribunal or referring crimes to the ICC.[158] This signaled the possibility that the investigation could be used to initiate international criminal proceedings against officials in North Korea.

The Commission conducted its investigation over more than six months.[159] Predictably, the North Korean government refused the Commission access into the country to gather evidence, but the Commission obtained testimony through public hearings in Seoul, Japan, Washington D.C., and London.[160] Over eighty victims, witnesses, and

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[152] *Id.*

[153] *See generally Comm'n of Inquiry on Human Rights in the Democratic People's Republic of Korea*, UN HUM. RTS.: OFF. OF THE HIGH COMMISSIONER FOR HUM. RTS., http://www.ohchr.org/EN/HRBodies/HRC/CoIDPRK/Pages/CommissionInquiryonHRinDPRK.aspx (last visited Oct. 11, 2014) (providing the latest news regarding the Commission of Inquiry on Human Rights in the DPRK).

[154] *See generally Commissions and Investigative Bodies*, REPERTOIRE OF THE PRAC. SECURITY COUNCIL, http://www.un.org/en/sc/repertoire/subsidiary_organs/commissions_and_investigations.shtml (last visited Oct. 11, 2014) (providing a list of "all commissions established by the Security Council").

[155] *Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea: Mandate*, UN HUM. RTS.: OFF. OF THE HIGH COMMISSIONER FOR HUM. RTS., http://www.ohchr.org/EN/HRBodies/HRC/CoIDPRK/Pages/Mandate.aspx (last visited Oct. 11, 2014). The nine areas of focus were: (1) human rights violations of the right to food, (2) human rights violations associated with prison camps, (3) torture and inhuman treatment, (4) arbitrary detention, (5) discrimination, (6) violations of individuals' freedom of expression, (7) violations of the right to life, (8) violations of individuals' freedom of movement, and (9) enforced disappearances, including in the form of abductions of nationals of other states. *See id.*

[156] *Id.*

[157] *Id.*

[158] *See* Human Rights Council, *supra* note 8, ¶¶ 15, 1201.

[159] *See id.* ¶ 28 (stating that the Commission first met in July 2013 and released its report in February 2014).

[160] *See id.* ¶¶ 21-27, 30-31.

experts testified, including abductees who had returned to South Korea and family members of those still missing.[161]

On February 7, 2014, the Commission released its report, finding "systematic, widespread and gross" human rights violations occurring in North Korea, including the enforced disappearance of South Korean nationals.[162] It further concluded that such disappearances constituted crimes against humanity—specifically, the systemic abduction of, and refusal to repatriate, persons from other countries in order to gain labor and other skills for the DPRK.[163] In evaluating crimes against humanity, the Commission applied a "reasonable grounds" standard,[164] under which it found that an incident or pattern of conduct had occurred when the Commission obtained "a reliable body of information, consistent with other material, based on which a reasonable and ordinarily prudent person ha[d] reason to believe that such incident or pattern of conduct ha[d] occurred."[165] Although lower than the standard required in criminal proceedings to sustain an indictment, the reasonable grounds standard was, according to the Commission, "sufficiently high to call for further investigations into the incident or pattern of conduct and, where available, initiation of the consideration of a possible prosecution."[166]

As expected, North Korea rejected the Commission's report. Signaling a lack of interest in instituting change, its ambassador to the United Nations stated: "The [C]ommission of [I]nquiry on the DPRK is none other than a marionette representing the ill-minded purpose of its string pullers including the United States and its followers who are endeavoring to eliminate the socialist system on the pretext of human rights . . . ."[167] Despite this rejection, the recognition by the Commission of ongoing human rights violations and crimes against humanity in North Korea was a milestone. For the abductees and their families, the Commission's

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[161] *See id.* ¶ 30.

[162] Human Rights Council, *supra* note 3, ¶¶ 24, 64-73.

[163] *See id.* ¶ 79. The following human rights violations were also found to be crimes against humanity: "[E]xtermination, murder, enslavement, torture, imprisonment, rape, forced abortions and other sexual violence, persecution on political, religious, racial and gender grounds, the forcible transfer of populations, . . . and the inhumane act of knowingly causing prolonged starvation." *Id.* ¶ 76.

[164] *See* Human Rights Council, *supra* note 8, ¶¶ 67-68. The Commission also used the "reasonable grounds" standard with respect to its "factual determinations on individual cases, incidents, and patterns of state conduct." *Id.* ¶ 67.

[165] *Id.* ¶ 68.

[166] *Id.*

[167] Stephanie Nebehay & Tom Miles, *Long Road to Hold Kim, North Korea Liable for Crimes*, REUTERS (Mar. 16, 2014, 11:34 AM), http://www.reuters.com/article/2014/03/16/us-korea-north-un-crimes-insight-idUSBREA2F0G020140316.

recognition of the abductions as crimes against humanity also carried significant weight. It framed the abductions squarely within the larger context of the kind of egregious behavior the international community has condemned and avowed to end. It also paved the way for further action, possibly by the ICC.

B. The Path to the International Criminal Court

The Commission recommended that the United Nations Security Council refer North Korea to the ICC.[168] Because North Korea never ratified the governing statute of the ICC,[169] the Rome Statute, one of the only ways in which the court may begin investigations is through a referral from the Security Council.[170] The recommendation by the Commission to refer the matter to the ICC was thus monumental, as it proposed a concrete and viable path towards international legal action.

In March 2014, a month after releasing its report, the Commission presented its findings and recommendations to the United Nations Human Rights Council ("Council").[171] The Council is comprised of forty-seven member states, with representatives from each of the major geographic areas.[172] Speaking on behalf of the Commission, the Honorable Michael Kirby, Chair of the Commission, likened North Korea's crimes to those of Nazi Germany and insisted that the international community help ensure accountability:

> If the Human Rights Council is not the place to speak up about the atrocities that we have been told of, or to speak about accountability, then where is the venue? Is there any venue? Or is the world to continue to look the other way? If the International Criminal Court is not the place where crimes

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[168] *See* Human Rights Council, *supra* note 8, ¶ 1201(1).

[169] *See Chapter XVIII Penal Matters: Rome Statute of the International Criminal Court*, UN TREATY COLLECTION (last visited Oct. 28, 2014), https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en.

[170] *See* Rome Statute, *supra* note 13, arts. 12-13, *available at* http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf.

[171] *See Statement by Mr Michael Kirby Chair of the Commission of Inquiry on the Human Rights in the Democratic People's Republic of Korea to the 25th Session of the Human Rights Council, Geneva, 17 March 2014*, U.N. HUM. RTS.: OFF. OF THE HIGH COMMISSIONER FOR HUM. RTS., http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14385&LangID=E (last visited Oct. 11, 2014) [hereinafter *Michael Kirby*].

[172] *See United Nations Human Rights Council: Membership of the Human Rights Council*, UN HUM. RTS.: OFF. OF THE HIGH COMMISSIONER FOR HUM. RTS., http://www.ohchr.org/EN/HRBodies/HRC/Pages/Membership.aspx (last visited Oct. 11, 2014).

> against humanity are to be addressed, then where do we seek accountability for these wrongdoings?[173]

The Council passed a resolution during that session condemning the human rights situation in North Korea and calling for the General Assembly to submit the Commission's report to the Security Council for appropriate action, including referral to an international justice mechanism.[174] Specifically, the Council stated that it "[c]ondemn[ed] in the strongest terms the long-standing and ongoing systematic, widespread and gross human rights violations . . . in the [DPRK] . . . ."[175] It expressed "grave concern at the detailed findings made by the [Commission,]"[176] with specific reference to, among other actions, the "[s]ystematic abduction, denial of repatriation and subsequent enforced disappearance of persons, including those from other countries, on a large scale and as a matter of [s]tate policy."[177] In October 2014, the General Assembly was poised to take up the issue of human rights in North Korea and perhaps refer the situation to the Security Council.[178]

In April 2014, the Security Council members held an "Arria Formula" meeting where they were briefed by the Commission.[179] An Arria Formula meeting is an informal and confidential gathering of the Security Council members in order to allow for a "frank and private exchange of views."[180] At the meeting, "a majority of Security Council members indicated support for a formal debate . . . on whether North Korea should be referred to the ICC."[181] Representatives from China and Russia, however, two nations with veto power at the Security Council, did not attend the meeting, indicating possible lack of support for the referral.[182]

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[173] *See Michael Kirby*, *supra* note 171.

[174] *See* Human Rights Council, *supra* note 12, ¶¶ 2, 7.

[175] *Id.* ¶ 2 (emphasis omitted).

[176] *Id.*

[177] *Id.* ¶ 3(f).

[178] *See* Nebehay & Miles, *supra* note 167; *Social, Humanitarian & Cultural: Third Committee*, GEN. ASSEMBLY OF THE U.N.: SOC., HUMANITARIAN & CULTURAL-THIRD COMMITTEE, http://www.un.org/en/ga/third/ (last visited Oct. 11, 2014); *see also infra* A Note on Recent Developments (discussing further updates as this Article went to publication).

[179] *North Korea: Critical Juncture on Eve of Obama Asia Trip*, HUM. RTS. WATCH (Apr. 22, 2014) [hereinafter *Obama Asia Trip*], http://www.hrw.org/news/2014/04/22/north-korea-critical-juncture-eve-obama-asia-trip.

[180] *Working Methods Handbook: Background Note on the "Arria-Formula" Meetings of the Council Members*, U.N. SEC. COUNCIL, http://www.un.org/en/sc/about/methods/bgarriaformula.shtml (last visited Oct. 11, 2014).

[181] *See Obama Asia Trip*, *supra* note 179.

[182] *See id.*

Referral to the ICC would be a significant step toward justice, particularly because the ICC is the only permanent international criminal justice mechanism with the authority to find individual criminal liability.[183] That authority would enable leaders in North Korea, potentially even Kim Jong Un himself, to be held individually responsible for the crimes against humanity, including the enforced disappearances committed in North Korea.

V. NORTH KOREA'S ENFORCED DISAPPEARANCES AS A CRIME AGAINST HUMANITY UNDER THE ROME STATUTE

If the Security Council refers North Korea and the Commission's report to the ICC, the court would be bound by its governing statute, the Rome Statute.[184] Under the statute, the court may exercise jurisdiction only over genocide, war crimes, aggression, and crimes against humanity.[185] Enforced disappearance is recognized as one of eleven enumerated crimes against humanity.[186] As discussed above, the Commission of Inquiry concluded that the enforced disappearance of foreign nationals indeed constituted a crime against humanity and presented findings supporting that conclusion.[187] The Commission's discussion, however, of enforced disappearance as a crime against humanity was not specific to the Rome Statute, and it encompassed all abductions of foreign nationals, including those that occurred during the Korean War and from Japan.[188]

The following section explores the Commission's findings within the specific framework of the Rome Statute and with respect to the 516 missing post-war abductees. Because of the lack of evidence currently available, this Article does not specifically identify the individuals that should be held responsible. Such a determination depends on information likely available only in North Korea, where access to information is tightly controlled. This section also discusses the problem of temporal jurisdiction, which limits the court to adjudication of crimes that occurred after the Rome Statute took

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[183] *See generally* INT'L CRIMINAL COURT, UNDERSTANDING THE INTERNATIONAL CRIMINAL COURT (n.d.), *available at* http://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf (discussing information about the International Criminal Court) (last visited Oct. 28, 2014).

[184] *See id.* at 3-4.

[185] *See* SCHABAS, *supra* note 13, at 21.

[186] *See* Rome Statute, *supra* note 13, art. 7(1)(i), *available at* http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf.

[187] *See supra* Part IV.

[188] *See* Human Rights Council, supra note 8, ¶¶ 1138-53 (citations omitted).

effect in 2002.[189] It suggests how the ICC could overcome this hurdle by recognizing jurisdiction over "continuing" crimes.[190]

Development of law regarding enforced disappearances under the Rome Statute remains in its nascent stages. To date, the court has not yet addressed disappearances in any of its decisions.[191]

A. Temporal Jurisdiction Under the Rome Statute

An initial hurdle the ICC would face is temporal jurisdiction or *ratione temporis*.[192] Under Articles 11 and 24 of the Rome Statute, the court's jurisdiction is limited to crimes committed after the Rome Statute entered force on July 1, 2002.[193] Because no officially recognized abductions of South Koreans occurred after that date, the court would need to resolve a threshold jurisdictional question that to date remains unsolved: whether the court may exercise jurisdiction over "continuing crimes," or crimes that were initiated before the entry into force of the Rome Statue but maintained until after that date.[194] Enforced disappearance is widely regarded as the paradigm continuing crime so long as the victim remains missing.[195]

Neither previous decisions nor the text of the Rome Statute states whether the court may exercise jurisdiction over continuing crimes.[196] Doing so, however, would reflect a reasonable reading of the statute and its

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[189] *See* Rome Statute, *supra* note 13, arts. 11(1), 24(1), *available at* http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf.

[190] The other requisite forms of jurisdiction do not pose a problem. Subject matter jurisdiction would be fulfilled by virtue of the fact that enforced disappearances are an enumerated crime against humanity, while territorial and personal jurisdiction would be established by the Security Council referral. *See* SCHABAS, *supra* note 13, at 56, 62-64.

[191] *See generally Situations and Cases*, INT'L CRIM. CT., http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx (last visited Oct. 11, 2014) (discussing cases brought before the ICC).

[192] *See* WILLIAM A. SCHABAS, THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE 273-75 (2010).

[193] *See* Rome Statute, *supra* note 13, arts. 11(1), 24(1), *available at* http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf.

[194] *See* SCHABAS, *supra* note 192, at 418-19; *see also* Alan Nissel, *Continuing Crimes in the Rome Statute*, 25 MICH. J. INT'L L. 654, 659 (2004) (citations omitted) (discussing the jurisdictional limits of the Rome Statute).

[195] *See* SCHABAS, *supra* note 192, at 418-19; WORKING GROUP ON ENFORCED OR INVOLUNTARY DISAPPEARANCES: GENERAL COMMENT ON ENFORCED DISAPPEARANCE AS A CONTINUOUS CRIME, at pmbl., ¶ 1 (n.d.) [hereinafter WORKING GROUP], *available at* http://www.ohchr.org/Documents/Issues/Disappearances/GC-EDCC.pdf (last visited Oct. 28, 2014).

[196] The Rome Statue is intentionally silent on continuing crimes; the drafters knew such crimes would pose a jurisdictional issue but they chose to keep the issue unresolved. *See* SCHABAS, *supra* note 192, at 418-19.

accompanying document, the "Elements of the Crimes."[197] The Elements of the Crimes document—although largely ambiguous—states in a footnote that the crime of enforced disappearance falls within the court's jurisdiction only if the "attack" occurred after the statute entered into force.[198] "Attack" is not defined, but a reasonable interpretation would encompass any act that violates a state's continuing obligations under international law, including the continued disappearance of an individual.[199] Interpreting "attack" to encompass the continued detention of the 516 abductees would allow the court to exercise temporal jurisdiction over these disappearances, even though the initial kidnappings occurred prior to 2002.[200] Such a reading would be consistent with the conclusions of other human rights bodies, including the United Nations Human Rights Committee, European Court of Human Rights, and the Inter-American Court of Human Rights, as well as with the Working Group on Enforced or Involuntary Disappearances.[201]

B. Specific Elements of the Crime Against Humanity of Enforced Disappearance

With respect to the elements of the crime against humanity of enforced disappearance, the Rome Statute and the Elements of Crimes contain both objective and subjective elements concerning the nature of the disappearance, the involvement of the state, and the intent of the perpetrator. The findings made by the Commission illustrate that the abduction and continued holding of the 516 South Korean citizens meets these specific elements. The Rome Statute defines enforced disappearances as:

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[197] Preparatory Comm'n for the Int'l Criminal Court, Rep. of the Preparatory Comm'n for the Int'l Criminal Court, 4th Sess., Mar. 13-31, 2000, 5th Sess., June 12-30, 2000, U.N. Doc. PCNICC/2000/1/Add.2 (Nov. 2, 2000) [hereinafter Elements of Crimes]. Elements of Crimes "assist the [c]ourt in the interpretation and application of articles 6, 7, and 8." Rome Statute, *supra* note 13, art. 9, *available at* http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf. Under article 21 of the Rome Statute, in reviewing sources of authority, the ICC refers first to the Elements of Crimes, in conjunction with the statute itself and its Rules of Procedure and Evidence. *See id.* at art. 21.

[198] *See* Elements of Crimes, *supra* note 197, at art. 7(1)(i) n.24; SCHABAS, *supra* note 192, at 419.

[199] *See* Nissel, *supra* note 194, at 670-71 (citations omitted).

[200] The disappearance of those who have since passed away should also be considered continuing crimes. Until the DPRK provides credible evidence of their death, their whereabouts remain unknown. *See* Human Rights Council, *supra* note 8, ¶ 1154 (citations omitted).

[201] *See id.* at 668. *See generally* WORKING GROUP, *supra* note 195.

[T]he arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a [s]tate or a political organization, followed by a refusal to acknowledge that deprivation of freedom . . . , with the intention of removing them from the protection of the law for a prolonged period of time.[202]

The Elements of Crimes requires that:

1. The perpetrator:
   (a) Arrested, detained or abducted one or more persons; or
   (b) Refused to acknowledge the arrest, detention or abduction, or to give information on the fate or whereabouts of such person or persons.
2. (a) Such arrest, detention or abduction was followed or accompanied by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons; or
   (b) Such refusal was preceded or accompanied by that deprivation of freedom.
3. The perpetrator was aware that:
   (a) Such arrest, detention or abduction would be followed in the ordinary course of events by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons; or
   (b) Such refusal was preceded or accompanied by that deprivation of freedom.
4. Such arrest, detention or abduction was carried out by, or with the authorization, support or acquiescence of, a [s]tate or a political organization.
5. Such refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons was carried out by, or with the authorization or support of, such [s]tate or political organization.
6. The perpetrator intended to remove such person or persons from the protection of the law for a prolonged period of time.
7. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

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[202] Rome Statute, *supra* note 13, art. 7(2)(i), *available at* http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf.

8. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.[203]

Each element is discussed below. For ease of analysis, the objective elements are discussed first, followed by the subjective elements.

1. Objective elements: Elements 1, 2, 4, 5, and 7

Elements 1 and 2 require abduction by the perpetrator, the deprivation of freedom, and the refusal to acknowledge the abduction or provide information.[204] These requirements are easily met, as indicated by the Commission's findings that 3835 South Korean citizens were abducted by North Korea, that 516 of those individuals "are believed to remain disappeared"[205] and have been denied the right to leave the country,[206] and that almost all of them "have not been permitted any contact with their families or the authorities of [South Korea]."[207]

Elements 4 and 5 pertain to the state's involvement.[208] They require the authorization, support, or acquiescence of the government for both the initial abduction and the subsequent refusal to acknowledge the abduction or provide information.[209] Despite lacking access to evidence and testimony inside North Korea, the Commission established the direct involvement of the state in the initial abductions based on testimony by former North Korean government officials that the disappearances implicated an intelligence bureau "under the effective command" of the former leader of North Korea, Kim Jong Il, and a three-star general in the North Korean army.[210] The general conveyed orders to abduct South

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[203] Elements of Crimes, *supra* note 197, at art. 7(1)(i) (footnotes omitted).

[204] *See id.*

[205] Human Rights Council, supra note 8, ¶ 884.

[206] *See* Human Rights Council, *supra* note 3, ¶ 68. With respect to the treatment of abductees that remain in North Korea, the Commission also stated the following:

> [The forcibly disappeared] were all denied the right to leave the country. They have also been subject to severe deprivation of their liberty and freedom of movement within the Democratic People's Republic of Korea, denied the right to recognition as a person before the law, and the right not to be subjected to torture and other cruel, inhuman or degrading treatment. All of the forcibly disappeared have been placed under strict surveillance. They have been denied education and employment opportunities.

Id.

[207] Human Rights Council, *supra* note 8, ¶ 895.

[208] *See* Elements of Crimes, *supra* note 197, at art. 7(1)(i).

[209] *See id.*

[210] Human Rights Council, *supra* note 8, ¶¶ 895-96 (citations omitted).

Korean citizens based on information about targets received from a military research center that existed in part to abduct citizens from Japan and Korea.[211] In addition, according to testimony before the Commission, the North Korean navy carried out abductions of South Korean fisherman.[212]

With respect to the government's role in denying the disappearances and failing to provide further information, the Commission explained that, but for a select handful of all of the disappeared (including the Korean War abductees and other foreign nationals), North Korea "refused altogether to acknowledge the deprivation of freedom and hence also failed to give information on the fate and whereabouts of the disappeared persons."[213] For example, North Korea falsely claimed that the eleven abductees from the hijacked Korean Air flight remained in North Korea of their own will and later rebuffed efforts to secure their release.[214] And for most of the disappeared whose families attempted to participate in the separated family reunions, North Korea refused to confirm their life statuses, stating that the disappeared were either dead or that life verification was not possible.[215] It remains unclear if the reports of death are credible.[216] The government's refusal to engage in discussions regarding the abductees, coupled with its responses to the Working Group denying the existence of the disappeared, support finding that the government of North Korea is responsible for failing to provide information.

Element 7 requires that the enforced disappearances occurred within a widespread or systematic attack.[217] This element repeats the general requirement in international criminal law that isolated and unique acts—even if egregious—do not rise to the level of a crime against humanity.[218] In the Rome Statute, this requirement is codified in Article 7, which limits crimes against humanity to acts "committed as part of a widespread or systematic attack directed against any civilian population."[219]

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[211] *See id.* ¶ 896 (citation omitted).

[212] *See id.*

[213] *Id.* ¶ 1145.

[214] *See id.* ¶ 897 (citation omitted) (stating that it became clear during a press conference with the thirty-nine returned passengers that the eleven missing abductees did not remain in the DPRK voluntarily).

[215] *See id.* ¶ 911; *see also supra* text accompanying note 117.

[216] *See, e.g.*, Human Rights Council, *supra* note 8, ¶¶ 934, 936, 939, 953, 956 (citations omitted) (questioning the alleged deaths of abductees from Japan).

[217] *See* Elements of Crimes, *supra* note 197, at art. 7(1)(i)(8).

[218] *See* LISA OTT, ENFORCED DISAPPEARANCE IN INTERNATIONAL LAW 162 (2011) (citations omitted).

[219] Rome Statute, *supra* note 13, art. 7(1), *available at* http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf.

The critical phrase is "widespread or systematic." Those two conditions are disjunctive; only one need be established.[220] "Widespread" is quantitative and generally requires a large-scale attack and number of victims, while "systematic" is qualitative and refers to "the organi[z]ed nature of the acts of violence and to the improbability of their random occurrence."[221]

The disappearance of 516 South Korean citizens at least qualifies as systematic. A systematic attack generally encompasses an organized plan that furthers a common policy, follows a regular pattern, and results in repeated action.[222] The findings of the Commission illustrate that the abduction of South Korean citizens occurred as part of an organized state plan to acquire individuals with specialized skills. According to the Commission, the government of North Korea "used its land, naval and intelligence forces to conduct abductions and arrests."[223] Those operations were "approved at the level of the Supreme Leader," and the "vast majority" of abductees were disappeared to "gain [labor] and other skills for the [state]."[224] Some abductees, the Commission continued, "were used to further espionage and terrorist activities."[225] Moreover, credible evidence from a former North Korean security official indicated that the abductions of fishing boats were conducted "in a similar manner."[226] These findings support the conclusion that the abductions satisfy the objective elements of the crime against humanity of enforced disappearance.

2. Subjective elements: Elements 3, 6, and 8

Elements 3, 6, and 8 introduce *mens rea* conditions. They require that the perpetrators knew that the abductions would be followed by a refusal to acknowledge the disappearances or provide information (Element 3); that the perpetrators intended to remove the abductee from the protection of the law (Element 6); and that the perpetrators knew the disappearance occurred within the context of a widespread or systematic attack against a civilian population.[227]

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[220] *See* SCHABAS, *supra* note 192, at 148 (citation omitted); *see also* OTT, *supra* note 218, at 169 (citation omitted).

[221] SCHABAS, *supra* note 192, at 148 (citation omitted).

[222] *See id.* (quotation omitted).

[223] Human Rights Council, *supra* note 8, ¶ 1014.

[224] *Id.*

[225] *Id.*

[226] *Id.* ¶ 886.

[227] *See* Elements of Crimes, *supra* note 197, at art. 7(1)(i).

Although identifying specific perpetrators is beyond the scope of this article, high-level government officials, including Kim Jong Il, appear to have had the requisite knowledge and intent. As stated above, the Commission heard testimony implicating an intelligence bureau under the effective command of Kim Jong Il.[228] In addition, the circumstances surrounding the disappearances, coupled with tight state control, indicate a comprehensive plan orchestrated at the highest level of government.[229] The initial abductions implicate both the North Korean navy and army,[230] and it is unlikely that any North Korean servicemen could have carried out such large-scale kidnappings without orders from high-ranking officials. Once in North Korea, ordinary citizens would have been unable to order the abductees into espionage training or factory work, nor banish abductees to political prison camps.[231] The long-standing pattern of abducting skilled individuals and potential spies, starting from the Korean War, further indicates a strategic and intentional plan on the part of the North Korean government.[232] That the government facilitated the abductions and prohibited abductees from leaving the country or contacting family members or the government in South Korea indicates that the DPRK intended to make legal protections unavailable to the disappeared, or at least futile. Neither law enforcement nor the judiciary in North Korea were likely able to provide recourse for the abductees, as shown by general lack of rule of law in the DPRK.[233] Thus, although identifying specific individuals is currently premature, the totality of the circumstances points to the requisite intent and knowledge at the highest level of government in North Korea.

VI. CONCLUSION: LOOKING FORWARD

For decades, the South Korean victims of enforced disappearance and their families had nowhere to turn after their own government largely cast them aside. But the recent framing of the abductions as human rights violations breathed new life into the issue and gave the victims a new channel for redress. What was a little known inter-Korea issue only a

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[228] *See supra* text accompanying note 210.

[229] *See* Human Rights Council, *supra* note 8, ¶ 1151.

[230] *See id.* ¶ 1014.

[231] *See supra* text accompanying notes 26-31.

[232] *See* Human Rights Council, *supra* note 8, ¶¶ 848-54; *id.* ¶ 860 (discussing Korean War abductees); *id.* ¶¶ 925-28 (discussing Japanese nationals); *id.* ¶ 963 (discussing women from other countries).

[233] *See id.* ¶ 123 (noting the absence of the rule of law in the DPRK); *id.* ¶ 1146 (stating that seeking protection of the DPRK would have been futile for the abductees).

decade ago, has now become an issue of serious international concern. As stated by the Commission, "For a nation state which seeks to live alongside other nation states, [the forcible disappearances of foreign nationals], in defiance of the sovereignty of other states and the rights of foreign nationals guaranteed under international law, [are] exceptional."[234]

The Commission of Inquiry's recommendation that North Korea be referred to the International Criminal Court was a landmark achievement for the millions of people who are victims of the regime's crimes, including the 516 disappeared South Korean citizens and their families. The facts found by the Commission indicate that government officials in North Korea should be held criminally responsible for the disappearances through an international judicial mechanism. The ICC, as recommended by the Commission, would be an appropriate forum.

The international community is taking steps in this direction, as evidenced by the recent resolution of the Human Rights Council recommending further action.[235] Referral of North Korea to the ICC is now in the hands of the international political process and rests on positive votes by both the United Nations General Assembly and the Security Council.

Unfortunately, the political reality is that such referral may be just out of reach for now. Many suspect that China, an ally of North Korea, would use its veto power as one of the five permanent members of the Security Council to shield North Korea.[236] Its condemnation of the Commission's report—calling it "divorced from reality"—is perhaps indicative of its political stance.[237] China may also have its own motives to block the referral as its policy of repatriating North Korean refugees could come under scrutiny, and any upset in the Korean peninsula could lead to a massive influx of North Korean refugees into northeast China.[238] But even if China blocks a positive vote at this time, referral to the ICC would remain a viable option in future years should circumstances change.

In addition, even a vetoed Security Council referral would provide benefit to the disappeared and other victims of the Kim regime. It would send a strong message to North Korea that its behavior, including the

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[234] *Id.* ¶ 1012.

[235] *See generally supra* notes 174-177.

[236] *See* Ben Blanchard & James Pearson, *China Rejects U.N. Criticism in North Korea Report, No Comment on Veto*, REUTERS (Feb. 18, 2014), http://www.reuters.com/article/2014/02/18/us-china-korea-north-idUSBREA1H0E220140218.

[237] Madison Park, *China, North Korea Slam U.N. Human Rights Report as 'Divorced from Reality'*, CNN (Mar. 18, 2014, 1:14 PM), http://edition.cnn.com/2014/03/18/world/asia/north-korea-human-rights-response/.

[238] *See* DREW THOMPSON & CARLA FREEMAN, FLOOD ACROSS THE BORDER: CHINA'S DISASTER RELIEF OPERATIONS AND POTENTIAL RESPONSE TO A NORTH KOREAN REFUGEE CRISIS 4 (2009), *available at* http://uskoreainstitute.org/pdf/USKI_FAB_040109.pdf.

enforced disappearance of foreign nationals, violates international criminal and human rights norms in ways that are unacceptable to the international community. The momentum from the Security Council vote could sway other nations to prioritize human rights, including the disappearances, in their bilateral discussions with North Korea. South Korea, in particular, is in the best position to do so.

Through engaging the international human rights community, and particularly the Human Rights Council of the United Nations, activists have made tremendous progress in bringing the enforced disappearance of South Korean nationals into the international spotlight. Although many significant obstacles remain along the path to redress, the Commission of Inquiry's findings and recommendation that the ICC be utilized, as well as the action the report has thus far catalyzed, have already brought the victims of these international crimes one step closer to justice.

A NOTE ON RECENT DEVELOPMENTS

As this Article was prepared for publication, the United Nations General Assembly passed a landmark resolution acknowledging the Commission's findings and encouraging the Security Council to ensure accountability by considering referral of the situation in North Korea to the ICC.[239] On December 18, 2014, the resolution passed by a 116-to-20 vote, with 53 abstentions.[240] The support for the resolution occurred in spite of North Korea's "charm offensive" in the months prior to the vote.[241] With the apparent goal of encouraging member states to reject any language calling for accountability, North Korea unexpectedly began to engage with the international community over its human rights record.[242] For example, North Korean diplomats met with the Special Rapporteur for the first time and offered to allow him access to the country if the resolution's sponsors removed the provision recommending referral to the ICC.[243] North Korea

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[239] Louis Charbonneau, *U.N. Members Want North Korea in International Court for Rights Abuses*, REUTERS (Dec. 18, 2014, 12:49 PM), http://www.reuters.com/article/2014/12/18/us-northkorea-rights-un-idUSKBN0JW24420141218.

[240] *Id.*

[241] *See* Matt Schiavenza, *North Korea's Unsuccessful Charm Offensive*, THE ATLANTIC (Nov. 17, 2014, 3:11 PM), http://www.theatlantic.com/international/archive/2014/11/north-koreas-charm-offensive-un-international-criminal-court/382849/; Michelle Nichols, *North Korea Halts U.N. Charm Offensive Over Human Rights Record*, REUTERS (Nov. 10, 2014, 6:22 PM), http://www.reuters.com/article/2014/11/10/us-northkorea-un-idUSKCN0IU2DS20141110.

[242] *See* Nichols, *supra* note 241.

[243] *See id.*

apparently halted the charm offensive when it became clear that its efforts were unsuccessful.[244]

This Article went to print before the Security Council considered the issue. At the time of publication, however, many continued to suspect that the ICC remained out of reach because of a likely veto by China.[245] Nonetheless, the General Assembly vote alone represents an important milestone for North Korean human rights. It already succeeded in sending a powerful message to North Korea that it could no longer avoid scrutiny for its past and present human rights violations.

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[244] *See id.*

[245] *See supra* note 239; Mirjam Donath, *U.N. Panel Calls for North Korea Referral to International Court*, REUTERS (Nov. 18, 2014, 5:25 PM), http://www.reuters.com/article/2014/11/18/us-northkorea-un-rights-idUSKCN0J22EG20141118.

Real Men

Luke A. Boso*

ABSTRACT

Men experience discrimination every day at work and at school because they fail to look or behave like real men. Most courts now hold that men can prove sex discrimination by presenting evidence that the defendant harassed or bullied the plaintiff because he fails to conform to sex stereotypes. But judges in these cases are reluctant to find that defendants intended to discriminate "because of sex," which is required to state a valid claim under statutory antidiscrimination law. Instead, judges routinely grant defendants' motions for summary judgment and to dismiss based on little more than their own ideals about what masculinity means and whether the plaintiff's gender presentation matches those ideals.

This Article encourages judges to analyze sex stereotyping evidence contextually, taking into consideration factors such as the parties' geographic and spatial locations, race, and class. If a plaintiff's gender presentation differs from the dominant gender norms in the relevant context, that difference, accompanied by harassment, should support an inference of discriminatory intent. A contextual intent approach recognizes that what it means to be gender conforming is different depending on who and where one is, and that sex stereotyping evidence likewise varies case-by-case. Attention to context will lead to more accurate determinations of whether a plaintiff's gender differs from what is accepted and expected, and thus whether it is fair to infer that a plaintiff was harassed for those differences.

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This Article challenges implicit social and legal assumptions that real masculinity exists. By deconstructing manhood's meanings, it seeks to create more space for all men and women to perform gender freely. If the law better protects men who deviate from rigid gender constraints, the law also sends a normative message that masculinity and femininity—whatever those terms mean to each individual—are equally valuable. If men feel safe to behave in less conventionally masculine ways, perhaps femininity will gradually cease to be a tool that divides real men from failed men, and perhaps masculinity will lose its privileged status in the gender hierarchy.

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I. INTRODUCTION

Men and boys experience discrimination every day at work and at school because they fail to look or behave like *real* men. Society encourages, coerces, and explicitly commands boys and men to "be a man" and "man up."[1] These directives embody the implicit lessons that men and women

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[1] Peter Sattler, *Miller Lite Man Up Campaign Scarf*, YOUTUBE (Feb. 12, 2012), http://www.youtube.com/watch?v=AJCosUEsUZI&list=PL161E77F6CA7C4FE0. Directives to "man up" permeate everything from pop culture to politics. For example, Miller Lite beer recently ran advertisements shaming men for "feminine" behavior—such as carrying a bag or wearing a scarf—and demanding that they "man up." *Id.* Politicians likewise chide each other to "man up." Notable examples include statements from Representatives Michele Bachmann and Rick Nolan directed at the Obama administration. *See* Gina Miller, *Rep. Michele Bachmann to Obama Administration: Man Up!*, DAKOTA VOICE (June 10, 2010), http://www.dakotavoice.com/2010/06/rep-michele-bachmann-to-obama-administration-man-up/; Associated Press, *Rep. Rick Nolan: Firings Needed Over Health Law Woes*, TWINCITIES.COM (Oct. 23, 2013, 12:37 PM), http://www.twincities.com/news/ci_24370983/minn-s-nolan-firings-needed-over-health-law. *See generally* PAUL O'DONNELL, MAN UP!: 367 CLASSIC SKILLS FOR THE MODERN GUY (2011) (providing a how-

are inherently different, and that there are right and wrong ways to be men and women.[2] Feminism has succeeded to some extent in provoking society to challenge its long-held assumptions that women must look and behave in certain ways.[3] But we have made less cultural progress in deconstructing manhood's mandates.[4]

By validating the idea that only some men are *real* men, society exerts tremendous pressure on boys and men to do masculinity correctly.[5] The wrong expression, gesture, article of clothing, joke (or response to a joke), hobby, pronunciation of a word, word choice, favorite color, hope, dream, or sexual preference—among nearly every other aspect of life—can call one's masculinity into question.[6] Contrary to prevailing orthodoxy,

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to guide on how to "man-up").

[2] In 2013, for example, a Garnett, Kansas school suspended a thirteen-year-old boy because he wore a purse "emblazoned with lilac flowers" to school. Rene Lynch, *Kansas Boy, 13, Suspended for Wearing Purse to School*, L.A. TIMES (Nov. 7, 2013, 3:34 PM), http://www.latimes.com/nation/shareitnow/la-sh-boy-suspended-for-wearing-purse-20131107,0,5748745.story#axzz2qykcq9T3.

[3] *See, e.g.*, Miss. Univ. for Women v. Hogan, 458 U.S. 718, 729 (1982) (holding unconstitutional a public nursing school's women-only admissions policy because "excluding males from admission to the School of Nursing tends to perpetuate the stereotyped view of nursing as an exclusively woman's job" (citation omitted)); United States v. Virginia, 518 U.S. 515, 550 (1996) (holding unconstitutional a public military university's men-only admissions policy because "generalizations about 'the way women are,' [and] estimates of what is appropriate for *most women*, no longer justify denying opportunit[ies] to women" (emphasis in original)).

[4] *See, e.g.*, Michael Kimmel, *Integrating Men into the Curriculum*, 4 DUKE J. GENDER L. & POL'Y 181, 183 (1997) (stating, "gender is everywhere, and yet masculinity is oddly invisible"). This idea has parallels and overlaps in critical race theory, which similarly suggests that whiteness plays a role in cognizable social categories but is either invisible or unarticulated. *See* Devon W. Carbado, *Colorblind Intersectionality*, 38 SIGNS 811, 817 (2013) (citation omitted); *see also* Hugh Campbell & Michael Mayerfeld Bell, *The Question of Rural Masculinities*, 65 RURAL SOC. SOC'Y 532, 543 (2000) (encouraging analysis that "that makes masculinities visible to men" who are oblivious to its constructed nature and the privileges it entails, "and to women, who have been most commonly disadvantaged by those privileges").

[5] "Because of rigid gender roles, a binary model of gender, and inflexible rules for male and female behavior in this society, any male child (or adult) who differs from the male gender norm behavior is at increased risk for mistreatment." Franklin L. Brooks, *Beneath Contempt: The Mistreatment of Non-Traditional/Gender Atypical Boys*, 12 J. GAY & LESBIAN SOC. SERVICES 107, 108 (2000); *see also* Theo G.M. Sandfort et al., *Gender Nonconformity, Homophobia, and Mental Distress in Latino Gay and Bisexual Men*, 44 J. SEX RES. 181, 187 (2007) (explaining that "gender nonconformity in boys is considered as more serious and induces stronger rejection compared with gender nonconformity in girls").

[6] *See generally*, C.J. PASCOE, DUDE, YOU'RE A FAG: MASCULINITY IN SEXUALITY IN HIGH SCHOOL (2007), *available at* http://smellslikecollege.com/PSYdocs/Dude.pdf (demonstrating how innocuous traits and behaviors become important gender markers in the

masculinity is not a self-defining biological truth.[7] Instead, masculinities are contextually shifting collections of individuals' stereotypes and presumptions about how men should behave.[8] Perhaps we have resisted thinking critically about masculinity because its harms to men are not obvious. To understand how masculinity harms men, then, we must first discard one of its core tenants—that real men are tough—and accept that all of us, men and women alike, are vulnerable.[9]

Law reflects these cultural tendencies to think of masculinity in biologically deterministic ways, and to shrug off the possibility that men are vulnerable. For years, courts regularly rejected male sex discrimination claims, and the resistance was most pronounced when men alleged sex discrimination at the hands of other men.[10] As sexual harassment law has evolved, and as evidence of sex stereotyping has become an accepted way of proving discriminatory intent, most courts (but not all)[11] now accept that sex discrimination includes treating a man differently because he fails to

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perpetual process of masculinity construction and reinforcement). Everyday experiences corroborate this observation: traditionally, for example, infant boys are adorned with blue accessories, while girls receive pink; boys are encouraged to play competitive sports, while girls are pushed towards dance, ballet, and gymnastics; and romantic comedies are widely perceived as "chick flicks," while action films are marketed predominately towards men. In fact, so salient are cultural artifacts to our gender conceptions that antidiscrimination law does not preclude employers from requiring different grooming and dress standards for men and women. *See* Jespersen v. Harrah's Operating Co., Inc., 444 F.3d 1104, 1110 (9th Cir. 2006) ("We have long recognized that companies may differentiate between men and women in appearance and grooming policies, and so have other circuits." (citations omitted)).

[7] Nancy E. Dowd, *Asking the Man Question: Masculinities Analysis and Feminist Theory*, 33 HARV. J.L. & GENDER 415, 421 (2010) ("Masculinities are . . . frequently taken for granted as hard-wired, as 'boys being boys' and as 'men being men.'" (citation omitted)).

[8] *See generally* Luke A. Boso, *Policing Masculinity in Small-Town America*, 23 TEMP. POL. & CIV. RTS. L. REV. (forthcoming 2015) (on file with author) (highlighting differences between how people in rural communities and urban areas generally expect men to behave).

[9] *See, e.g.*, Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Subject*, 20 YALE J.L. & FEMINISM 1, 8-12 (2008) (explaining that vulnerability is an inherent part of humanity); Michael Kimmel & Abby L. Ferber, *"White Men Are This Nation:" Right-Wing Militias and the Restoration of Rural American Masculinity*, 65 RURAL SOC. 582, 585 (2000) (discussing how poverty, diminishing jobs, and geopolitical isolation leave white, rural men feeling vulnerable; in response, efforts to display a socially required tough and self-sufficient version of masculinity take different and often violent forms).

[10] *See, e.g.*, Giddens v. Shell Oil Co., No. 92-8533, 12 F.3d 208, at *1 (5th Cir. Dec. 6, 1993) (concluding that "[h]arassment by a male supervisor against a male subordinate does not state a claim under Title VII even though the harassment has sexual overtones"). In the 1980s and 1990s, courts often dismissed male same-sex harassment cases by limiting the scope of actionable claims under Title VII. *See, e.g.*, *id.*

[11] *See, e.g.*, Wasek v. Arrow Energy Servs., Inc., 682 F.3d 463, 467-68 (6th Cir. 2012).

conform to sex stereotypes.[12] This is a welcome legal development, but a crucial question has emerged in its wake: how should the law evaluate evidence of sex stereotyping? In other words, how should judges and juries determine whether a defendant intended to discriminate against a man because he failed to conform to masculine norms?

To answer that question, it seems intuitive that judges and juries require a working definition of what masculinity means, or, better yet, some mechanism for determining what male norms govern within the particular context of which the alleged discrimination occurs. Yet, most judges fail to approach the male stereotyping question with nuance or sensitivity. Many evaluate a defendant's intent by doing what can aptly be described as taking judicial notice of masculinity's meaning, and then comparing a plaintiff's behavior with that idiosyncratic definition.[13] Others rely solely on a plaintiff's opinion about why *he* thinks he was the target of harassment.[14] As a result, the jurisprudential expansion of sex discrimination law has done astonishingly little to protect vulnerable men; judges regularly dismiss men's sex discrimination claims or reject them on a defendant's motion for summary judgment.[15]

Few scholars have theorized about how to assess male and female norms under the modern sex stereotyping doctrine,[16] and there is a dearth of legal analysis in case law.[17] This Article suggests a modest recalibration for evaluating intent in sex discrimination claims that involve evidence of stereotyping. Rather than applying an unspoken form of judicial notice, or relying exclusively on a plaintiff's speculative beliefs about why he or she was targeted for discrimination, courts should approach intent contextually and draw inferences from difference. In other words, judges should pay explicit attention to the social context in which discrimination occurs to gauge a defendant's intent, taking into consideration factors such as the

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[12] *See, e.g*, Doe by Doe v. City of Belleville, Ill., 119 F.3d 563 (7th Cir. 1997), *cert. granted and judgment vacated sub nom.* City of Belleville v. Doe by Doe, 523 U.S. 1001 (1998); Nichols v. Azteca Rest. Enters., 256 F.3d 864 (9th Cir. 2001).

[13] *See generally* Anita Cava, *Taking Judicial Notice of Sexual Stereotyping*, 43 ARK. L. REV. 27, 40 (1990) (explaining that courts label sex stereotyping as impermissible but fail to explain what the forbidden practice entails.)

[14] *See infra* Part III.A-B.

[15] *See infra* Part II.B, III.A.

[16] *See* Valorie K. Vojdik, *Gender Outlaws: Challenging Masculinity in Traditionally Male Institutions*, 17 BERKELEY WOMEN'S L.J. 68, 88 (2002) ("The very notion of masculine and feminine is under-developed in judicial analysis.").

[17] *See, e.g.*, David S. Cohen, *No Boy Left Behind? Single-Sex Education and the Essentialist Myth of Masculinity*, 84 IND. L.J. 135, 152 (2009) (noting that, although sex stereotyping is unlawful under Title IX, "it is hard to find a coherent body of literature identifying and defining these stereotypes—particularly as they apply to males").

parties' geographic, occupational, and spatial locations;[18] the parties' races; the parties' ages; and the parties' respective classes. If a plaintiff's gender presentation differs from the prevailing gender norms under the relevant circumstances, this difference alone should support an inference of discriminatory intent.

Approaching intent contextually recognizes that what it means to be gender conforming is different depending on who and where one is, which means that evidence of sex stereotyping likewise changes according to context.[19] For example, in some contexts, boys who participate in Tae Kwon Do may be perceived as gender nonconforming, and be bullied accordingly.[20] In other contexts, men who use "Wet Ones" wipes in the restroom may be labeled effeminate and harassed accordingly.[21] Further, a contextual intent approach has sound doctrinal mooring. In *Oncale v. Sundowner Offshore Services, Inc.*,[22] the Supreme Court instructed lower courts to consider "social context" when assessing the severity and pervasiveness of discriminatory conduct.[23] This Article argues that context is equally relevant to the underlying requirement that discrimination be *because of* a protected trait. Attention to context will lead to more accurate determinations of whether a plaintiff's gender differs from what is accepted and expected, and in turn, whether it is fair to infer that plaintiff was harassed for those differences.[24]

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[18] Place is an under-explored yet crucially important aspect of the social context that creates and reinforces gender stereotypes for men and women alike. *See, e.g.*, Hazel Andrews, *"Tits Out for the Boys and No Back Chat": Gendered Space on Holiday*, 12 Space & Culture 166, 167 (2009) ("[E]xperience and the embodiment of gender are not simply given but arise in the social interactions within particular social locations."); Linda Lobao, *Gendered Places and Place-Based Gender Identities: Reflections and Refractions*, *in* COUNTRY BOYS: MASCULINITY AND RURAL LIFE 267, 267 (Hugh Campbell, Michael Mayerfeld Bell & Margaret Finney eds., 2006) ("[G]ender relations, like other social relations, are not inseparable from space but occur in space . . . ."); Rachel Woodward, *Warrior Heroes and Little Green Men: Soldiers, Military Training, and the Construction of Rural Masculinities*, *in* COUNTRY BOYS: MASCULINITY AND RURAL LIFE, *supra*, at 235, 236 (asserting that "gender identities are constructed in space, with reference to place and through the relationship of the body to space").

[19] *See* Frank Rudy Cooper, *"Who's the Man?": Masculinities Studies, Terry Stops, and Police Training*, 18 COLUM. J. GENDER & L. 671, 684 (2009) (noting a consensus among theorists around the idea that our individual sense of manliness comports "with the traditions of our particular society").

[20] *See* Theno v. Tonganoxie Unified Sch. Dist. No. 464, 394 F. Supp. 2d 1299, 1304 (D. Kan. 2005); *see also infra* Part II.B.

[21] *See* EEOC v. Boh Bros. Constr. Co., 689 F.3d 458, 462 (5th Cir. 2012) *reh'g granted en banc*, 731 F.3d 444 (5th Cir. 2013).

[22] 523 U.S. 75 (1998).

[23] *See id.* at 81-82.

[24] *See* Nancy Levit, *Feminism for Men: Legal Ideology and the Construction of*

Although modest, this judicial recalibration is especially important for men who bring sex discrimination claims against other men. Judges, the majority of whom are men, seem to have special difficulty viewing masculinity as a performance over which others exert significant control—perhaps because such a revelation defies the independence and self-determination that society tends to require of its men.[25] A contextual intent approach challenges implicit assumptions that masculinity is a stable, monolithic concept. It reflects the central lessons of masculinities theory, which suggests that multiple versions of masculinity coexist in every social milieu,[26] some are more dominant than others, and these dominant versions are the templates for appropriate male behavior.[27] Men who deviate even slightly from the governing male archetype can read as gender nonconforming, and even facially gender-neutral deviations may transform into proxies for femininity.[28]

This Article proceeds as follows: Part II.A discusses the basics of sex discrimination law and explains sex stereotyping theory as one method to prove intent. Part II.B discusses whether sex stereotyping is an evidentiary tool available to plaintiffs in same-sex sexual harassment cases, and

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Maleness, 43 UCLA L. REV. 1037, 1088 (1996) (courts must identify the generic man that typifies the male norms against which other men are judged).

[25] Campbell Leaper, *The Use of Masculine and Feminine to Describe Women's and Men's Behavior*, 135 J. SOC. PSYCHOL. 359, 359-60 (1995) (finding that people typically think of masculine traits in terms of agency—"such as independence, confidence, and assertiveness").

[26] To "understand masculinity" we have to "understand the changing social contexts in which particular representations and practices of masculinity emerge." Hugh Campbell, Michael Mayerfeld Bell & Margaret Finney, *Masculinity and Rural Life: An Introduction*, *in* COUNTRY BOYS: MASCULINITY AND RURAL LIFE, *supra* note 18, at 1, 10 (emphasis omitted); *see also* NANCY E. DOWD, THE MAN QUESTION: MALE SUBORDINATION AND PRIVILEGE 26 (2010) (describing the existence of multiple masculinities); R.W. CONNELL, THE MEN AND THE BOYS 10 (2001) ("We need to speak of 'masculinities,' not masculinity.").

[27] *See* PASCOE, *supra* note 6, at 5 ("[A]chieving a masculine identity entails the repeated repudiation of the specter of failed masculinity."); *see also* CONNELL, *supra* note 26, at 11 (explaining that, although all men are expected to live up to dominant forms of masculinity, most "live in a state of some tension with, or distance from" them); R.W. Connell & James W. Messerschmidt, *Hegemonic Masculinity: Rethinking the Concept*, 19 GEND. & SOC'Y 829, 832 (2005), *available at* http://www.engagemen-me.org/sites/default/files/Hegemonic%20Masculinity-%20Rethinking%20the%20Concept%20%28R.%20W.%20Connell%20and%20James%20W.%20Messerschmidt%29.pdf (describing "hegemonic masculinity" as a social construct that embodies the "currently most honored way of being a man" in a given social context, which requires "all other men to position themselves in relation to it").

[28] *See, e.g.*, Ann C. McGinley, *Creating Masculine Identities: Bullying and Harassment "Because of Sex"*, 79 U. COLO. L. REV. 1151, 1155 (2008) (understanding how multiple masculinities work with and against each other can explain when and why certain traits and behaviors, though not overtly sexual or gendered, become gendered).

criticizes courts that foreclose this evidentiary route as impermissibly attempting to narrow the meaning and scope of sex as a protected category. Part III explores sex stereotyping in male sex discrimination claims, discussing litigation successes and failures as well as contradictions in legal doctrine. Part IV turns to a full discussion of how courts can apply contextual intent to analyze sex stereotyping evidence, which in turn better reflects the social malleability of gender norms. Part IV.A urges courts to be more willing to infer discriminatory intent, and Part IV.B suggests how courts should use context to think holistically about male sex stereotypes.

Throughout, the Article stresses that masculinity and heterosexuality are inextricably linked given that the prototypical man in nearly all contexts is heterosexual. By contrast, when gay men bring sex discrimination claims against other men and rely on sex stereotyping evidence to prove intent, most judges interpret the evidence as about sexual orientation and not sex; judges fail to see heterosexuality as the cornerstone of normative masculinity in American culture broadly and from town to town more narrowly. Understanding how and why certain men become targets for harassment bolsters the argument that discrimination against gay men is also discrimination because of sex.

At the outset, it is important to explain why this Article focuses on men when women continue to face pervasive discrimination at the hands of men. Put simply, "[o]ne does not have to be male to experience masculinity."[29] Because gender is relational, how men conduct their lives has a direct and often negative impact on women.[30] Indeed, dominant forms of masculinity are defined by their opposition to and presumed superiority over femininity.[31] By exposing the pliable nature of masculinity, this Article deconstructs the meaning of manhood and seeks space for all men and women to perform gender more freely. Releasing men from rigid gender constraints has the potential to equalize the value that society places on masculinity and femininity,[32] which in turn can liberate us all.[33]

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[29] Campbell et al., *supra* note 26, at 2.

[30] *See, e.g.*, Ann C. McGinley & Frank Rudy Cooper, *Masculinities, Multidimensionality, and the Law: Why They Need One Another*, *in* MASCULINITIES AND THE LAW: A MULTIDIMENSIONAL APPROACH 1, 3-4 (Frank Rudy Cooper & Ann C. McGinley eds., 2012) (explaining that masculinities are social constructs that encourage men to compete with each other, and women function as pawns in the competition).

[31] *See* Frank Rudy Cooper, *Against Bipolar Black Masculinity: Intersectionality, Assimilation, Identity Performance, and Hierarchy*, 39 U.C. DAVIS L. REV. 853, 898-99 (2006) (citation omitted) ("To be a full man, one must distinguish oneself from femininity. One accomplishes that by distancing himself from the qualities associated with women and from women themselves.").

[32] *See* Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 68 (1995)

II. SEX STEREOTYPING

Sex discrimination law is a complex amalgamation of both federal legislation and judicial interpretation. This Article does not suggest a new theory of discrimination or question the values underlying those that already exist.[34] Instead, this Article works within existing theories of discrimination and methods of proof, and it provides fresh interpretive guidance to help courts more accurately assess when discrimination is "because of sex."[35] More specifically, this Article's doctrinal anchor is hostile environment[36] sexual harassment claims—a form of disparate treatment discrimination—and the use of sex stereotyping as one evidentiary route to prove that discrimination is because of sex. By offering a fuller description of what sex stereotyping means and the various forms it can take, this Article seeks to bring sex discrimination doctrine one step closer to achieving its imagined purpose, which, as the Supreme Court

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("[O]ne of the most effective ways to improve the value of something coded as feminine . . . is to make it accessible and acceptable in men.").

[33] *See* DOWD, *supra* note 26, at 3-7 (describing the price men pay for gender privilege, including the physical and mental violence that men suffer as a consequence of and condition for accomplishing masculinity); *see also* Darren Lenard Hutchinson, *"Gay Rights" for "Gay Whites"?: Race, Sexual Identity, and Equal Protection Discourse*, 85 CORNELL L. REV. 1358, 1362-68 (2000) (deploying "multidimensionality" as a theory to understand how even individuals in relatively privileged identity groups can experience unique forms of oppression).

[34] For discussion on theories of discrimination and analysis of the values underlying existing theories, see Nancy Levit, *Changing Workforce Demographics and the Future of the Protected Class Approach*, 16 LEWIS & CLARK L. REV. 463, 473 (2012) (arguing against a purely categorical approach to antidiscrimination law because "some types and lived experiences of discrimination are simply omitted from federal and state protection"). *See generally* Zachary A. Kramer, *The New Sex Discrimination*, 63 DUKE L.J. 891 (2014) (critiquing existing theories of discrimination and offering a new theory that focuses on plaintiffs' subjective experiences); Luke A. Boso, *Disrupting Sexual Categories of Intimate Preference*, 21 HASTINGS WOMEN'S L.J. 59 (2010) (applying Vicki Schultz's disruption theory of discrimination to intimate partner preferences, wherein the legal focus shifts from the individual to institutional actors who create difference-producing dynamics).

[35] For another example of contemporary legal scholarship that offers a new way to interpret Title VII's "because of sex" language, see generally Victoria Schwartz, *Title VII: A Shift from Sex to Relationships*, 35 HARV. J.L. & GENDER 209 (2012) (arguing that courts should interpret Title VII to prohibit discrimination because of an individual's sex viewed in relation to others).

[36] In hostile environment harassment claims, harassment must be (1) because of sex and (2) "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 66-67 (1986) (alterations in original omitted) (citations omitted) (internal quotation marks omitted). This Article is concerned only with the first of those two elements.

has stated, is to "strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."[37]

Sex stereotyping is "perhaps the most transformative" theory of sex discrimination.[38] The sex stereotyping doctrine expanded the very concept of sex discrimination beyond formal sex segregation to more subtle forms of differential treatment regarding demands on, and assumptions about, the way people look and act.[39] Because the Supreme Court rendered sex stereotyping a viable way to prove sex discrimination in *Price Waterhouse v. Hopkins*,[40] women and men who do not meet stereotyped expectations of femininity and masculinity enjoy federal protection in workplaces and schools from bullying and harassment. Despite its revolutionary potential, however, the sex stereotyping doctrine has problems and some unanswered questions.

The next Part discusses some of those lingering issues, and it proceeds in two sections. Part II.A discusses the basic framework of sex discrimination law, the foundation of sex stereotyping doctrine as an evidentiary route for proving the requisite intent to discriminate, and the unique problems that arise in claims involving same-sex harassment. Part II.B examines male sex stereotyping claims specifically. It focuses on how judges analyze evidence relevant to the question of whether a man suffers discrimination because he fails to conform to male sex stereotypes.

A. Sex Stereotyping as Evidence of Intentional Sex Discrimination

In 1964, Congress passed Title VII of the Civil Rights Act, federally modifying the at-will employment rule by prohibiting employers from discriminating against individuals "because of" such individual's sex or other protected trait.[41] Eight years later, Congress passed Title IX, amending the Civil Rights Act to prohibit discrimination "on the basis of" sex in federally assisted education programs.[42] Courts generally analyze

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[37] Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (citation omitted), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1075, *as recognized in* Burrage v. United States, 134 S. Ct. 881 (2014).

[38] *See* Zachary A. Kramer, *Of Meat and Manhood*, 89 WASH. U. L. REV. 287, 290 (2011) (citation omitted).

[39] *See id.* at 290-91 (citation omitted).

[40] *See Price Waterhouse*, 490 U.S. at 251.

[41] "It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (2012).

[42] *See* 20 U.S.C. § 1681(a) (2012).

sex discrimination claims under Title IX just as they do under Title VII,[43] and the seemingly simple language in these two statutes has prompted decades of scholarly and judicial consternation.

Three different yet interrelated structural questions are at issue in sex discrimination claims, all of which independently generate considerable debate: (1) what does "discrimination" mean; (2) what does it mean to discriminate against someone "because of" or "on the basis of" a protected trait; and (3) when is discrimination because of or on the basis of "sex"? This Article suggests that, at least in sex discrimination claims involving stereotyping, it is impossible to meaningfully disaggregate the second and third questions.

Taking the initial question first—what does discrimination mean?—it is enough for this Article's purposes to note that courts have adopted a variety of legal theories to define discrimination, one of which is disparate treatment.[44] Under a disparate treatment theory, a plaintiff proves his or her case by demonstrating that "[t]he employer simply treats some people less favorably than others because of their [protected trait]."[45] Elaborating on what conduct constitutes disparate treatment, the Supreme Court in *Meritor Savings Bank v. Vinson*[46] held that sex-based harassment that creates a hostile or abusive work environment is an actionable form of discrimination.[47] Courts have subsequently held that Title IX likewise prohibits sex-based harassment that creates a hostile or abusive educational environment.[48]

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[43] *See, e.g.*, Gossett v. Okla. *ex rel.* Bd. of Regents for Langston Univ., 245 F.3d 1172, 1176 (10th Cir. 2001) (citations omitted) ("Courts have generally assessed Title IX discrimination claims under the same legal analysis as Title VII claims."); Frazier v. Fairhaven Sch. Comm., 276 F.3d 52, 65-66 (1st Cir. 2002) (citations omitted) (relying on the Title VII analysis in *Oncale* to hold that a hostile environment claim based upon same-sex harassment is cognizable under Title IX); Theno v. Tonganoxie Unified Sch. Dist. No. 464, 377 F. Supp. 2d 952, 963-64 (D. Kan. 2005) (citation omitted) ("[T]he court readily concludes that same-sex student-on-student harassment is actionable under Title IX to the same extent that same-sex harassment is actionable under Title VII.").

[44] *See* Ann C. McGinley, *¡Viva La Evolución!: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. & PUB. POL'Y 415, 446 (2000) ("Soon after enactment of Title VII in 1964, there developed two strands of discrimination law: disparate treatment and disparate impact.").

[45] Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

[46] 477 U.S. 57 (1986).

[47] *Id.* at 66-67 (citation omitted).

[48] *See Frazier*, 276 F.3d at 65-66 (relying on the Title VII analysis in *Oncale* to hold that a hostile environment claim based upon same-sex harassment is cognizable under Title IX); *Theno*, 377 F. Supp. 2d at 963-64 ("[T]he court readily concludes that same-sex student-on-student harassment is actionable under Title IX to the same extent that same-sex harassment is actionable under Title VII.").

The second and third questions posed above are this Article's focus. Intent is the lynchpin of all disparate treatment cases—whether "because of" or "on the basis of" sex, race, color, religion, or national origin.[49] But determining whether a defendant intended to discriminate because of a protected trait has proven problematic. For years, judges and scholars have engaged in a rigorous conversation about how to define these traits and determine when they motivate discriminatory treatment.[50] The conversation is difficult, and the answers are evasive for two primary reasons.

First, discrimination often takes subtle, non-obvious forms.[51] For example, in our modern era, very few employers are likely to be explicit about their sex- or race-based hiring preferences and workplace standards.[52] Critical race scholars argue persuasively that the more common forms of discrimination occur when purportedly race-neutral practices and policies force people of color to conform to white cultural norms.[53] Take for example a policy that prohibits employees or students from wearing all-braided hairstyles (cornrows).[54] Given this hairstyle's social and historical

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[49] *See* David S. Schwartz, *When Is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. PA. L. REV. 1697, 1710 (2002).

[50] *See* Cava, *supra* note 13, at 55 (citation omitted) (asserting that "the operative measure for handling stereotyping claims seem to be: We can't define it, but we know it when we see it").

[51] *See* Nancy Levit, *supra* note 24, at 1102-03 (explaining that most sex stereotyping is subtle rather than easily recognizable, and is often couched in facially neutral language seemingly unrelated to gender). *See generally* Kimberly A. Yuracko, *Trait Discrimination as Race Discrimination: An Argument About Assimilation*, 74 GEO. WASH. L. REV. 365 (2006) (examining various subtle and contextual forms of race discrimination); DEVON W. CARBADO & MITU GULATI, ACTING WHITE?: RETHINKING RACE IN POST-RACIAL AMERICA (2013) (describing how modern race discrimination springs from how closely a person conforms to traits and behaviors associated with a given race).

[52] *See* U.S. EQUAL OPPORTUNITY COMM'N, PROHIBITED EMP'T POLICIES/PRACTICES, http://www1.eeoc.gov//laws/practices/index.cfm?renderforprint=1 (last visited Oct. 12, 2014) (stating that "it is illegal to discriminate against someone (applicant or employee) because of that person's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information").

[53] *See generally* CARBADO & GULATI, *supra* note 51 (describing how modern race discrimination springs from how closely a person conforms to traits and behaviors associated with a given race).

[54] Renee Rogers argued that the all-braided hairstyle is "a fashion and style adopted by Black American women, reflective of cultural, historical essence of the Black women in American society." Rogers v. Am. Airlines, 527 F. Supp. 229, 231-32 (S.D.N.Y. 1981). The district court was not persuaded, and it held that the airline's grooming policy was not discrimination because of race. *Id.* at 233. Recently, a charter school sent a seven-year old girl home for wearing her hair in dreadlocks. Rebecca Klein, *Tiana Parker, 7, Switches Schools After Being Forbidden From Wearing Dreads*, THE HUFFINGTON POST (Sept. 5,

context as a source of Black pride and heritage,[55] many argue that such a policy is discrimination because of race.[56]

Second, how the law analyzes a defendant's intent often depends on how the law defines the protected trait at issue. When courts analyze intent, the question is about more than just intent in the abstract; the question is about intent to discriminate on the basis of a protected trait.[57] Thus, in all Title VII or Title IX cases, the distinct legal questions about intent (because of) and the protected trait (e.g., sex) inescapably blur. Accordingly, methods for proving intent and the legal meaning and scope of protected traits have developed in tandem.

In early sex discrimination cases, courts approached the analysis with a narrow definition of sex in mind. Relying on the presumed lack of legislative history regarding Congress' decision to add sex to federal antidiscrimination statutes,[58] courts often reasoned, "discrimination on the basis of sex should be given a narrow, traditional interpretation."[59] This traditional understanding inevitably meant discrimination because of biological sex,[60] and courts inferred the requisite intent to discriminate by the mere fact of male and female segregation.[61] However, the biological approach sometimes led to harsh and counter-intuitive consequences. In the 1970s, for example, the Supreme Court refused to see pregnancy discrimination as sex discrimination, even though only biological women

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2013, 11:57 AM), http://www.huffingtonpost.com/2013/09/05/tiana-parker-dreads_n_3873868.html. The school forbade her to return with the hairstyle, which ultimately compelled her to switch schools. *Id.*

[55] *See Rogers*, 527 F. Supp. at 231-32.

[56] For a race-conscious and personal critique of the *Rogers* case, see generally Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365 (1991).

[57] Raytheon v. Hernandez, 540 U.S. 44, 52 (2003) (stating that "[l]iability in a disparate-treatment case depends on whether the protected trait" actually motivated the adverse employent action or harassment (quotation omitted)).

[58] For a rich corrective discussion about extensive debates in the 1960s regarding the reach of sex discrimination law, see generally Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 HARV. L. REV. 1307 (2012).

[59] *See, e.g.*, Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1085-86 (7th Cir. 1984) (stating that under Title VII, discrimination against "transsexuals" is not discrimination because of sex).

[60] *See, e.g.*, Julie A. Greenberg, *Health Care Issues Affecting People with an Intersex Condition or DSD: Sex or Disability Discrimination?*, 45 LOY. L.A. L. REV. 849, 879 (2012) ("The typical early successful sex discrimination cases involved men or women who were treated differently because of their biological sex.").

[61] *See* Franklin, *supra* note 58, at 1313 (stating that the traditional understanding of sex discrimination refers only to "practices that divide men and women into two groups perfectly differentiated along biological sex lines").

can become pregnant.[62] Thus, if an employer refused to hire a pregnant woman, that employer lacked the legal intent to discriminate because of sex.

Similarly, in different-sex sexual harassment cases, courts routinely infer discriminatory intent from mere differences in treatment between men and women based on biological assumptions about sex differences and desire.[63] Courts presume that when a man sexually harasses a woman he does so because of his sexual desire for that woman or women generally.[64] In other words, courts employ biological assumptions about heterosexual attraction as presumptive evidence of discriminatory intent. Scholars such as Vicki Schultz argue that this presumption-based inference misses the point that men often harass women because of power and not necessarily sexual desire.[65] Further, scholar Zachary Kramer asserts that this line of reasoning permits sexual orientation-based intent to guide sex discrimination analysis, which, as discussed more fully below, courts forbid in same-sex sexual harassment cases.[66] Thus, different (i.e., double) standards govern depending on whether men harass women or men.

Biological definitions of sex, and biology-based presumptions regarding discriminatory intent, might be handy shortcuts in some cases. But, they overlook an important dimension of sex discrimination, which is how gender affects both the definition of "sex" and a defendant's subjective motivations for firing, harassing, or taking some other disparate action

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[62] *See* Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 136-40 (1976), *superseded by statute*, Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076, *as recognized in* Shaw v. Delta Airlines Inc., 463 U.S. 85 (1983). The Supreme Court reasoned that an employer-sponsored insurance plan that excluded pregnancy from coverage discriminated between non-pregnant and pregnant persons, and was thus not discrimination because of sex. *See id.*

[63] *See, e.g.*, Zachary A. Kramer, *Heterosexuality and Title VII*, 103 NW. U. L. REV. 205, 224-27 (2009) (citations omitted) (stating that in different-sex harassment cases, courts' causation analysis infers intent from sexual desire, which ignores that this form of discrimination is both because of sex and sexual orientation); *see also* Yvonne Zylan, *Finding the Sex in Sexual Harassment: How Title VII and Tort Schemes Miss the Point of Same-Sex Hostile Environment Harassment*, 39 U. MICH. J.L. REFORM 391, 400 (2006) (citation omitted) (asserting that intent was often inferred from presumed heterosexual sexual desire); Schwartz, *supra* note 49, at 1718-19, 1723 (stating that "sexual harassment cases have developed with less attention to the intent of the discrimination" in part because courts presume that harassers act out of sexual interest or desire, and in part because courts are "silent on . . . causation . . . [when] the facts d[o] not suggest a [sexual] desire-based narrative").

[64] *See* Kramer, *supra* note 63, at 226.

[65] *See* Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2133 (2003) (citations omitted).

[66] *See* Kramer, *supra* note 63, at 224-27.

against a person. Gender refers to the cultural and social ways in which men and women express or perform maleness and femaleness,[67] and a defendant's desire to punish or reward how someone performs maleness or femaleness is often at the root of bullying and harassment.

Sex discrimination law took a huge evolutionary step forward in 1989 when the Supreme Court decided *Price Waterhouse v. Hopkins*,[68] which reflects a more robust understanding of how social perceptions of masculinity and femininity affect the interrelated issues of discriminatory intent and the definition of "sex" as a protected trait. In *Price Waterhouse*, Ann Hopkins filed a sex discrimination claim against her employer—not because she was treated disparately because she was a biological woman,[69] but because she was treated disparately for failing to behave and look as her employer believed a biological woman should.[70] In the words of a Price Waterhouse partner, Hopkins needed to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[71]

The Court ultimately held that disparate treatment motivated by sex stereotyping is actionable discrimination because of sex.[72] In so holding, the Court stated, "we are beyond the day when an employer [can] evaluate employees by assuming or insisting that they [match] the stereotype associated with their group."[73] As a result, the Court simultaneously broadened sex as a protected trait by holding that it encompasses gender (i.e., demands on women to be feminine), and explained that evidence of "sex stereotyping" is one way to prove discriminatory intent.[74]

Price Waterhouse was a major advancement in sex discrimination jurisprudence. First, it affirmatively incorporated social and cultural notions of gender as part of what "sex" as a protected trait means under

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[67] *See* Case, *supra* note 32, at 20-21 (citations omitted) (explaining that gender—or the performance of sex—is marked in society according to differences in voice, gestures, clothing, and personal appearance); *see also* Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353, 416 (2000) (noting increasing acceptance of the view that "we all perform our sex to some degree"). For the seminal text on gender's socially constructed and relational nature, see generally JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY (1990).

[68] 490 U.S. 228 (1989), *superseded by statute*, Civil Rights Act of 1991, Tit. I, § 107(a), 105 Stat. 1075, *as recognized in* Burrage v. United States, 134 S. Ct. 881 (2014).

[69] *See id.* at 233-36. In this case, disparate treatment meant being passed over for partnership in favor of another candidate. *See id.*

[70] *See id.*

[71] *Id.* at 235 (citation omitted).

[72] *See id.* at 251.

[73] *Id.* (citations omitted).

[74] *See id.* at 250-51.

federal antidiscrimination law; thus, the prohibition of discrimination because of sex necessarily includes a prohibition of discrimination because of gender.[75] Second, it opened up a new evidentiary route to proving that discrimination is because of sex in disparate treatment cases. According to the Court:

> Remarks at work that are based on sex stereotypes do not inevitably prove that gender played a part in a particular employment decision. The plaintiff must show that the employer actually relied on her gender in making its decision. In making this showing, stereotyped remarks can certainly be *evidence* that gender played a part.[76]

In other words, sex stereotyping is not sex discrimination per se, but plaintiffs can introduce evidence of sex stereotyping to prove an alleged discriminator's intent to treat a person disparately because of that person's sex.[77] *Price Waterhouse* continued the trend of courts developing a variety of different ways to prove discriminatory intent.[78] In the absence of direct evidence, such as explicit sex-differentiating rules, sex stereotyping is thus an independent category of circumstantial evidence upon which plaintiffs can rely.[79]

B. Sex Stereotyping as Evidence of Intentional Same-Sex Sex Discrimination

Some courts have been unwilling to read *Price Waterhouse* as broadly articulating a new evidentiary route to prove intent to discriminate because of sex in disparate treatment cases. The principal confusion arises in claims of harassment between two people of the same biological sex, and the

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[75] *See, e.g.*, McGinley, *supra* note 28, at 1199 (citations omitted) (arguing that, after *Price Waterhouse*, "it is illegal to harass a person because of his failure to conform to gendered expectations").

[76] *Price Waterhouse*, 490 U.S. at 251 (emphasis in original).

[77] *See id.*

[78] *See* Ann C. McGinley, *Masculinities at Work*, 83 OR. L. REV. 359, 379 (2004) ("A number of ways of proving disparate treatment have evolved."); Schwartz, *supra* note 49, at 1713 (stating that courts that "expressly focus on the need to prove discriminatory intent" do not require comparative evidence and instead often look to other forms of evidence, "one common form of which, of course, consists of sexist or racist remarks").

[79] *See* McGinley, *supra* note 78, at 379. Other forms of circumstantial evidence include "anecdotal evidence of the treatment of other members of the plaintiff's class, statistics concerning the differential treatment of the members of the protected class, the . . . failure to adhere to . . . policies, derogatory comments about members of the protected class[,] . . . and/or comparisons to treatment of persons who are not members of the protected class." *Id.*

Supreme Court itself significantly muddied the waters in its 1998 *Oncale v. Sundowner Offshore Services, Inc.*[80] opinion.

In *Oncale*, Joseph Oncale filed a sex discrimination suit under Title VII after he was harassed by three men on the all-male offshore oil rig where he worked.[81] Oncale alleged that, on separate occasions, two co-workers, Danny Pippen and Brandon Johnson, restrained him while his supervisor, John Lyons, placed his penis on Oncale's neck and arm.[82] On another occasion in the communal shower, Pippen and Johnson restrained Oncale while Lyons forced a bar of soap into Oncale's anus.[83] Throughout Oncale's three-month period of employment, Pippen and Lyons threatened Oncale repeatedly with rape.[84] Both the federal district and appellate court ruled against Oncale, reasoning that same-sex harassment is not actionable sex discrimination under Title VII.[85] The Supreme Court reversed and remanded, holding that same-sex harassment is a valid legal claim.[86]

Although *Oncale* is a landmark victory for victims of same-sex harassment, the Court unnecessarily complicated the legal analysis by explicitly discussing certain evidentiary routes available to prove intent. Writing for the Court, Justice Scalia noted that courts and juries can easily infer intent in different-sex cases where the conduct involves "explicit or implicit proposals of sexual activity" because "it is reasonable to assume those proposals would not have been made to someone of the same sex."[87] What Justice Scalia seemingly means, of course, is that heterosexual desire usually motivates discriminatory conduct in different-sex sexual harassment cases. Indeed, the Court's explicit discussion of intent in *Oncale* is a stark example of the aforementioned contradiction that has developed in same-sex versus different-sex sexual harassment cases.

In a now famous and contested move, the Court went on to articulate three evidentiary routes that same-sex harassment plaintiffs may use to prove that discrimination is because of sex. First, explicit proposals of sexual activity will support an inference of intent if there is "credible evidence that the harasser was homosexual."[88] This inferential jumping point, like using presumed heterosexual desire to infer discriminatory intent

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[80] Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998).

[81] *See id.* at 77.

[82] *See* Oncale v. Sundowner Offshore Servs., Inc., 83 F.3d 118, 118 (5th Cir. 1996), *rev'd*, 523 U.S. 75 (1998).

[83] *See id.* at 118-19.

[84] *See id.* at 118.

[85] *Id.*

[86] Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 82 (1998).

[87] *Id.* at 80.

[88] *Id.*

in different-sex cases, is fraught, and scholars have spilled much ink criticizing it.[89] Second, intent can be proven, "for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace."[90] Finally, a "same-sex harassment plaintiff may also . . . offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace."[91] The Court ended this discussion by reiterating, "*Whatever* evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted discrimination because of sex."[92]

Notably absent from *Oncale* is any mention of *Price Waterhouse*, and the Court did not include sex stereotyping among the three evidentiary routes available for proving intent.[93] The Supreme Court has yet to explicitly answer an important question in federal sex discrimination law: can a plaintiff alleging same-sex sexual harassment prove discriminatory intent by showing that the harasser was motivated by the plaintiff's gender nonconformity?

Most circuits that have addressed the question agree that the Supreme Court articulated three evidentiary routes as illustrative and not to foreclose other avenues.[94] In contrast, the Sixth Circuit and several lower courts have

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[89] *See generally* Jessica A. Clarke, *Inferring Desire*, 63 DUKE L.J. 525 (2013) (examining fifteen years of sexual harassment decisions).

[90] 523 U.S. at 80.

[91] *Id.* at 80-81.

[92] *Id.* at 81 (emphasis added) (internal quotation marks omitted).

[93] *See id.* at 80-81.

[94] Seven circuits have answered the question in the affirmative. *See* James v. Platte River Steel Co., 113 F. App'x 864, 867 (10th Cir. 2004) (alteration in original) (citation omitted) (internal quotation marks omitted) ("[T]here is nothing in the Supreme Court's decision [in *Oncale*] indicating that the examples it provided were meant to be exhaustive rather than instructive."); Nichols v. Azteca Rest. Enters., 256 F.3d 864, 874 (9th Cir. 2001) (allowing a man whose coworkers harassed him for acting "too feminine" to bring a same-sex harassment claim); Pedroza v. Cintas Corp. No. 2, 397 F.3d 1063, 1068 (8th Cir. 2005) (describing the *Oncale* factors as "non-exhaustive"); Shepherd v. Slater Steels Corp., 168 F.3d 998, 1009 (7th Cir. 1999) ("[W]e discern nothing in the Supreme Court's [*Oncale*] decision indicating that the examples it provided were meant to be exhaustive rather than instructive."); EEOC v. Boh Bros. Constr. Co., 731 F.3d 444, 456 (5th Cir. 2013) (en banc) (citations omitted) ("[N]othing in *Oncale* overturns or otherwise upsets the Court's holding in *Price Waterhouse:* a plaintiff may establish a sexual harassment claim with evidence of sex-stereotyping."); Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 264 (3d Cir. 2001) (stating that "a plaintiff alleging same-sex sexual harassment might demonstrate that the harassment amounted to discrimination because of sex" if "the harasser was acting to punish the victim's noncompliance with gender stereotypes"); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 261 n.4 (1st Cir. 1999) ("[A] man can ground a claim on

suggested that *Oncale*'s evidentiary routes are exclusive, and these courts continue to rule against plaintiffs who rely on sex stereotyping evidence to prove that a same-sex harasser discriminated against them because of sex.[95] Until September 2013, the Fifth Circuit similarly shunned sex stereotyping as a method of proof in Title IV cases.[96] However, in an en banc opinion, *EEOC v. Boh Bros. Construction Co.*, the Fifth Circuit formally reversed course and declared that "a plaintiff may establish a sexual harassment claim with evidence of sex-stereotyping," including in same-sex sexual harassment cases.[97]

While the most recent *Boh Bros.* decision is a welcome development for employees who face gender-based sex discrimination, a panel of judges on the Fifth Circuit explicitly declined to incorporate sex stereotyping as an evidentiary route to prove intentional sex discrimination under Title IX in June 2014.[98] In *Carmichael v. Galbraith*, parents brought a Title IX sex discrimination suit on behalf of their deceased son Jon, alleging that he was repeatedly bullied at school; the last of these incidents allegedly occurred just "a few days before Jon took his life."[99] During that final incident, members of the football team "'stripped [Jon] nude and tied him up' and 'placed [Jon] into a trash can' while calling him 'fag,' 'queer,' and 'homo.'"[100] The complaint alleged that the harassment was "based on gender or gender-based stereotypes," but, in reversing and remanding the district court's order dismissing plaintiffs' complaint on other grounds, the Fifth Circuit stated: "we have no need at the present time to address the applicability of decisions under Title VII, such as *Price Waterhouse v. Hopkins* . . . or *EEOC v. Boh Brothers Construction Co.*, . . . to Title IX claims involving acts of harassment committed by students in middle school."[101] It therefore remains unclear to what extent Title IX protects

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evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity.").

[95] *See, e.g.*, Wasek v. Arrow Energy Servs., Inc., 682 F.3d 463, 467-68 (6th Cir. 2012) (explaining that victims of same-sex harassment cannot prove discrimination "because of sex" via sex stereotyping); Willborn v. Formosa Plastics Corp. Of Tex., No. 13-04-007-CV, 2005 WL 1797022, at *7 (Tex. App. July 28, 2005) (stating that *Oncale*'s three evidentiary routes are exclusive). In *Boh Bros.*, an en banc panel of Fifth Circuit read *Wasek* more generously, reasoning that the court declined to "expressly consider the issue because the plaintiff's claim fell into *Oncale*'s first category." 731 F.3d at 455 n.6.

[96] *See* 731 F.3d at 463.

[97] *See id.* at 456 (citation omitted).

[98] Carmichael v. Galbraith, 574 F. App'x 286, 290-91 (5th Cir. 2014) (per curiam) (citation omitted).

[99] *Id.* at 288.

[100] *Id.* (alteration in original).

[101] *Id.* at 288, 290-91 (citation omitted).

gender nonconforming students from peer harassment based on their gender nonconformity—at least in Texas, Louisiana, and Mississippi.[102]

As this Article goes to print, several other circuits have yet to address whether plaintiffs can rely on sex stereotyping evidence to prove sex discrimination under Title VII and Title IX. If and when those circuits confront this issue, hopefully they will perceive how little analytical sense it makes to exclude sex stereotyping from actionable sex discrimination. To eliminate this tool from plaintiffs' bag of evidentiary resources is little more than a misguided attempt to revert sex discrimination analysis to a time when the Court limited the definition of "sex" to biology.[103] *Price Waterhouse* kicked that door open, and it clearly established that sex includes gender for the purposes of federal protection.[104] Simply put, if sex discrimination includes gender discrimination under *Price Waterhouse*, then men who punish other men for failing to conform to sex stereotypes have discriminated because of sex.

Moreover, evidence of sex stereotyping bears little meaningful distinction from the other examples of circumstantial evidence that the *Oncale* Court cites approvingly. As illustrations of ways one might prove intent, each of the three *Oncale* evidentiary examples are at root about demonstrating how the context in which someone's words or actions occur can reveal that person's desire to treat another person differently based on their sex. "Sex specific" and "derogatory" remarks that indicate "general hostility" towards the presence of one particular sex in the workplace[105] are likely similar to or the same as sex-specific and derogatory remarks that indicate general hostility towards a particular manifestation of masculinity or femininity in the workplace. One could interpret those comments as indicating an aversion to working with people who have a penis, or one could interpret those comments as indicating an aversion to working with a person who has a penis and who incorrectly manifests the gendered requirements that go with penis ownership. Surely, the Supreme Court was interested in protecting more than just the former.

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[102] UNITED STATES COURTS, COURT LOCATOR, http://www.uscourts.gov/court_locator.aspx (last visited Oct. 16, 2014) (showing that Texas, Louisiana, and Mississippi are under the Fifth Circuit's jurisdiction).

[103] *See* Greenberg, *supra* note 60, at 879.

[104] *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1075, *as recognized in* Burrage v. United States, 134 S. Ct. 881 (2014).

[105] Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80-81 (1998).

III. MALE SEX STEREOTYPING

Most courts now permit men to bring sex discrimination claims against other men, and many of those courts permit men to rely on evidence of sex stereotyping to prove discriminatory intent.[106] But an important question stems from these two positive legal developments: what counts as evidence of sex stereotyping? How should judges and juries determine whether a defendant acted to punish or police gender nonconformity, or whether a defendant simply engaged in horseplay or juvenile behavior?[107]

Courts have been largely unwilling to infer intent as they do in different-sex sexual harassment cases. This is exactly the wrong approach. To demonstrate why this is the wrong approach, it is helpful to understand what courts currently do (and do not do).

Judges have special difficulty analyzing evidence of male sex stereotyping. Male sex stereotyping claims are a relatively recent innovation,[108] and judges often appear ill-equipped to handle the task of identifying and naming male norms. Judges, after all, are consumers of and participants in American culture, and rarely are any of us forced to critically examine the social ingredients necessary to be a man. Instead, society implicitly accepts masculinity as a fixed and stable concept, and most men express little outward doubt that they live up to its unspoken requirements.[109]

In sharp contrast to certain strands of feminism and some prominent women's rights groups that seek to identify, contest, and rise above female stereotypes, there is little mainstream political will to do the same with respect to masculine stereotypes.[110] This is in part because masculinity is

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[106] *See, e.g.*, EEOC v. Harbert-Yeargin, Inc., 266 F.3d 498 (6th Cir. 2001); English v. Pohanka of Chantilly, Inc., 190 F. Supp. 2d 833 (E.D. Va. 2002).

[107] *See, e.g.*, *Harbert-Yeargin, Inc.*, 266 F.3d at 522 (holding alleged sexual harassment was simply "male horseplay in a male workplace"); *English*, 190 F. Supp. 2d at 846 (denying workplace sexual harassment claim because sexually suggestive comments and coworker's act of rubbing his genitalia on plaintiff "amount[ed] to teasing and horseplay").

[108] For one of the first cases to recognize that discrimination against a man who fails to conform to masculine norms is actionable sex discrimination, see generally Doe by Doe v. City of Belleville, Ill., 119 F.3d 563 (7th Cir. 1997), *cert. granted and judgment vacated sub nom.* City of Belleville v. Doe by Doe, 523 U.S. 1001 (1998). *See generally* Colleen Keating, *Extending Title VII Protection to Non-Gender-Conforming Men*, 4 MOD. AM. 82 (2008).

[109] *See* Tobias Barrington Wolff, *Civil Rights Reform and the Body*, 6 HARV. L. & POL'Y REV. 201, 211 (2012) (theorizing that transgender bodies unsettle some males' understanding of male gender as "stable, fixed, and inevitable").

[110] Feminism's primary concern has been to end the subordination of women, and part of that project "has been to dissect and deconstruct gender-based stereotypes." Cohen, *supra* note 17, at 141 (citation omitted). Conversely, feminism has "done little to examine the

valued in ways that femininity is not.[111] Indeed, many prominent feminist projects have revolved around breaking barriers of access to traditionally male institutions and practices[112]—without accompanying attempts to change the aggressive and macho cultures permeating those institutions.[113] This leaves masculinity unchecked, naturalized, and idealized.

This Article argues that, in law, one consequence of our collective antipathy towards deconstructing masculinity is that men who introduce evidence of sex stereotyping to prove their sex discrimination claim do so with little guidance or certainty. Male plaintiffs are largely subject to the referential viewpoint of judges: what does the presiding judge think masculinity means, and will that judge perceive the plaintiff as gender nonconforming? Strategically, men can sometimes help their case by explicitly characterizing themselves as overtly effeminate. This, however, obscures the ways in which masculinity or gender nonconformity subtly operates; a man does not have to self-identify as effeminate to be harassed as insufficiently masculine. Masculinity is measured by a wide variety of metrics and proxies, and male sex stereotyping can manifest in any number of unconventional ways.

This Part surveys the legal landscape regarding male sex discrimination claims involving stereotyping. It highlights cases where men have successfully shown that sex stereotyping motivated discrimination, as well as cases where courts have been unwilling to see discrimination as a product of perceived male gender nonconformity. In so doing, it underscores the hapless state of the law in this area and demonstrates the

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more sophisticated and subtle ways in which stereotypes, particularly those stereotypes that have been internalized, affect men." *Id.* (quotation omitted).

[111] *See* Case, *supra* note 32, at 18 (arguing that "what is seen as masculine is more highly valued than what is seen as feminine").

[112] *See, e.g.*, United States v. Virginia, 518 U.S. 515, 516 (1996) (denying defendant's claim that the all-male Virginia Military Institute's adversative method could not be taught "unmodified, to women" or without "destroy[ing] VMI's program[,]" but declining to question the appropriateness or desirability of the adversative method as a tool used primarily to reinforce masculinity); *see also* Francine Banner, *"It's Not All Flowers and Daisies": Masculinity, Heteronormativity and the Obscuring of Lesbian Identity in the Repeal of "Don't Ask, Don't Tell"*, 24 YALE J.L. & FEMINISM 61, 113 (2012) (noting that mainstream concerns about repealing "Don't Ask, Don't Tell" were "overwhelmingly focuse[d] on the preservation of masculinity and historically masculine values"—charges that LGBT activists attempted to rebut, thus implicitly accepting masculine value preservation as a worthy goal).

[113] In a federal case challenging the constitutionality of The Citadel's male-only admissions policy, Professor Vojdik bucked the trend by arguing that the "price of admission . . . should not compel conformance to masculine norms or identity." Vojdik, *supra* note 16, at 71.

need for a more nuanced and analytical approach to sex stereotyping claims.

A. Unsuccessful Claims: Of Gay Men, Clean Men, and Single Men

In case after case, courts grant defendants' motions to dismiss or for summary judgment by concluding that the evidence on which the plaintiff relies does not relate to manliness.[114] Dispositive pretrial motions are the graveyard for many male sex discrimination claims, and an analysis of these cases reveals that judges simply fail to recognize that masculinity means different things to different people.

Perhaps the most common way that judges dispose of these claims is by tying the evidence to the plaintiff's actual or perceived homosexuality.[115] Scholar Zachary Kramer has dubbed this strain of jurisprudence "bootstrapping."[116] Because Title VII and Title IX do not explicitly include sexual orientation as a protected trait,[117] courts reason that a sex stereotyping claim should not be used to "bootstrap protection for sexual orientation" into federal antidiscrimination law.[118] Courts that are concerned about bootstrapping rely almost exclusively on the gay-related insults that men use against other men to frame the evidence as concerning sexual orientation and not sex.[119] Examples of insults that can turn a sex discrimination claim into a sexual orientation discrimination claim include:

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[114] *See, e.g.*, *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000) (affirming the district court's order granting defendant's motion to dismiss).

[115] *See, e.g.*, Vickers v. Fairfield Med. Ctr., 453 F.3d 757, 770 (6th Cir. 2011).

[116] *See* Kramer, *supra* note 63, at 219-20.

[117] For a comprehensive analysis of how sexual orientation remains unprotected under federal workplace law, see Jennifer C. Pizer, Brad Sears, Christy Mallory & Nan D. Hunter, *Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits*, 45 LOY. L.A. L. REV. 715, 742 (2012) ("No federal statute explicitly prohibits employment discrimination based on sexual orientation or gender identity."). *See also* Ari Ezra Waldman, *Tormented: Antigay Bullying in Schools*, 84 TEMP. L. REV. 385, 406-08 (2012) (stating that sexual orientation is not an explicitly protected trait under Title IX).

[118] Dawson v. Bumble & Bumble, 398 F.3d 211, 218 (2d Cir. 2005) (citation omitted) (internal quotation marks omitted) (asserting that a sex stereotyping theory does not "bootstrap protection for sexual orientation into Title VII"). In *Dawson*, plaintiff failed to produce sufficient evidence to prove that the alleged discrimination was because of her failure to conform to feminine stereotypes. *See id.* (citation omitted).

[119] *See Simonton*, 232 F.3d at 35 (outlining the litany of comments that plaintiff's male coworkers directed at him, including "go fuck yourself, fag," "suck my dick," "so you like it up the ass?[,]" and "fucking faggot" considered by the court in affirming the district court's order granting defendant's motion to dismiss).

calling a man "gay,"[120] "faggot,"[121] "queer,"[122] and "fruitcake";[123] commanding a man to "suck my dick";[124] and suggesting that a man likes giving "blow jobs"[125] or having anal sex with other men.[126]

As Valorie Vojdik and other scholars have argued, judges are fundamentally wrong to characterize insults like these as concerning only sexual orientation; to the contrary, they often have everything to do with sex.[127] Social scientists who study gender, and masculinity more specifically, commonly find that men harass other men to prove or shore up their own masculinity.[128] Harassment is a form of competition and serves as one way to demonstrate dominance; the harasser is coded as strong and therefore masculine, while the victim is marked as weak and therefore feminine.[129] Gay-related insults are such a common part of this competitive ritual because of longstanding assumptions that gay men are weak and effeminate.[130] Calling another man a "fag" or gay is thus an easy way for

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[120] *See, e.g.*, EEOC v. Family Dollar Stores, Inc., No. 1:06-CV-2569-TWT, 2008 WL 4098723, at *15-16 (N.D. Ga. Aug. 28, 2008) (describing how plaintiff's coworkers repeatedly called him gay).

[121] *See, e.g.*, Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 259-60 (3d Cir. 2001) (explaining how among the other torments plaintiff suffered, one of his coworkers said, "everybody knows you're a faggot," "everybody knows you're gay as a three dollar bill," and "everybody knows you take it up the ass").

[122] *See, e.g.*, Dawson v. Entek Int'l., 630 F.3d 928, 933 (9th Cir. 2011) (stating that plaintiff's coworkers called him a "queer," "homo," "fag," and "Tinker Bell," and told others that plaintiff liked to "suck dick" and "take it up the ass").

[123] *See, e.g.*, Dandan v. Radisson Hotel Lisle, No. 97 C 8342, 2000 WL 336528, at *1 (N.D. Ill. Mar. 28, 2000) (describing the "steady" barrage of "vulgar and obscene insults" that plaintiff's coworkers directed at him; one of plaintiff's coworkers regularly called him "names like fruitcake, fagboy, and Tinkerbell").

[124] *See, e.g.*, Sisco v. Fabrication Techs., Inc., 350 F. Supp. 2d 932, 936 (D. Wyo. 2004) (noting that plaintiff's male supervisor repeatedly told him to "suck my dick").

[125] *See, e.g.*, Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 257 n.1 (1st Cir. 1999) (detailing the "abuse" plaintiff suffered; in one incident, a person put a sign on plaintiff's desk that read, "Blow Jobs 25¢").

[126] *See, e.g.*, EEOC v. Boh Bros. Construction Co., 689 F.3d 458, 460 (5th Cir. 2012) *reh'g granted en banc*, 731 F.3d 444 (5th Cir. 2013).

[127] *See generally* Vojdik, *supra* note 16.

[128] *See* Ann C. McGinley, *Erasing Boundaries: Masculinities, Sexual Minorities, and Employment Discrimination*, 43 U. MICH. J.L. REFORM 713, 721 (2010) (citation omitted) (explaining that the pressure to prove masculinity is constant and dangerous).

[129] *See* Kim Shayo Buchanan, *Our Prisons, Ourselves: Race, Gender and the Rule of Law*, 29 YALE L. & POL'Y REV. 1, 42-43 (2010) (citations omitted). If one is a real man, "he can withstand the hazing, join the team, and dish it out in turn." *Id.* at 38.

[130] *See generally* Michael J. Higdon, *To Lynch a Child: Bullying and Gender Nonconformity in Our Nation's Schools*, 86 IND. L.J. 827 (2011). Professor Higdon describes how homophobic bullying begins in grade school against boys who are perceived to have "qualities that are antithetical to the notion of hegemonic masculinity." *Id.* at 838

the harasser to appear stronger and more masculine than the person at whom the insult is lobbed.[131] It is inconsequential whether a man thinks his victim sexually desires men because the insults serve primarily as a way to distinguish between *real* men and failed men.[132]

Moreover, same-sex harassment also serves a policing function, wherein men and women who support a masculine and feminine binary as part of the social order punish those who stray from acceptable gender norms. Men who exhibit weak qualities are not only easy targets for would-be harassers who hope to bolster their own masculinity, but are also penalized for defying male gender privilege and therefore calling other men's status into question.[133] Thus, even if a harasser knows that another man is in fact gay or bisexual, and he calls that man a "fag" or some other antigay term, this conduct is at least as much about sex as it is sexual orientation.

Finally, insults that call into question a man's heterosexuality are so effective at debasing masculinity because the most enduring male sex stereotype is that men have sex with women.[134] Heterosexuality is the cornerstone of normative masculinities in most social contexts given the simple truth that most men are straight.[135] Because heterosexuality is woven so tightly into dominant conceptions of what it means to be a man, discrimination because of sexual orientation becomes discrimination because of sex.[136]

(citations omitted).

[131] *See* PASCOE, *supra* note 6, at 53-58 (explaining that men use epithets like "fag" to discipline other men when they fail at masculine tasks and reveal themselves to be weak—weakness is synonymous with femininity).

[132] *See id.* at 22, 82; *see also* Yoshino, *supra* note 67, at 448 (explaining that homosocial hazing and razzing are "means of making men" insofar as those who can take it are real men while those who cannot are failed men).

[133] *See* Case, *supra* note 32, at 3.

[134] *See* McGinley, *supra* note 78, at 404 ("[T]he ultimate stereotype about men is that they are active during sexual relations, and have sexual relations exclusively with women."); MARTHA C. NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW 26 (2010) (theorizing that stereotypes about American masculinity include the belief that men are impenetrable, which helps explain why straight men are often threatened by gay men).

[135] GARY J. GATES, HOW MANY PEOPLE ARE LESBIAN, GAY, BISEXUAL, AND TRANSGENDER? 1 (2011), *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-How-Many-People-LGBT-Apr-2011.pdf (approximating that 3.5% of adults in the United States identify as gay, lesbian, or bisexual).

[136] Scholars have long urged judges to see sexual orientation discrimination in this manner. For examples of canonical works in this field, see generally Zachary A. Kramer, Note, *The Ultimate Gender Stereotype: Equalizing Gender-Conforming and Gender-Nonconforming Homosexuals Under Title VII*, 2004 U. ILL. L. REV. 465 (2004); Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994); Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND.

Some courts do understand this. In *Heller v. Columbia Edgewater Country Club*,[137] for example, the court found that heterosexuality relates directly to conceptions about how men and women should act. The *Heller* court explained that a jury could reasonably find that the plaintiff was harassed because she "did not conform to [defendant's] stereotype of how a woman ought to behave[;]" the plaintiff "is attracted to and dates other women," whereas the defendant "believes that a woman should be attracted to and date only men."[138]

Similarly, in *Centola v. Potter*,[139] another court perceptively explained, "[s]exual orientation harassment is often, if not always, motivated by a desire to enforce heterosexually defined gender norms. In fact, stereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women."[140]

Finally, in *Terveer v. Billington*,[141] a court denied a motion to dismiss because the plaintiff alleged that he was "a homosexual male whose sexual orientation is not consistent with the [d]efendant's perception of acceptable gender roles," that his "status as a homosexual male did not conform to the [d]efendant's gender stereotypes associated with men under [defendant's] supervision," and that "his orientation as homosexual had removed him from [defendant's] preconceived definition of male."[142] For this judge, the plaintiff's allegation that his homosexuality defied the defendant's conflation of masculinity and heterosexuality was sufficient to keep the claim alive. However, based on extensive research, these appear to be the only three cases where a judge espouses this enlightened view regarding the mutually reinforcing and interdependent role of gender norms and sexual orientation.

A second method by which judges dispose of male sex stereotyping claims is to rely exclusively on a plaintiff's own beliefs regarding the cause of discrimination. For example, in *Hamm v. Weyauwega Milk Products,*

L.J. 1 (1994); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187 (1988).

[137] 195 F. Supp. 2d 1212 (D. Or. 2002).

[138] *Id.* at 1224.

[139] 183 F. Supp. 2d 403 (D. Mass. 2002).

[140] *Id.* at 410. "The gender stereotype at work here is that 'real' men should date women, and not other men." *Id.* (citation omitted); *see* Vickers v. Fairfield Med. Ctr., 453 F.3d 757, 763 (6th Cir. 2006) ("[A]ll homosexuals, by definition, fail to conform to traditional gender norms in their sexual practices."); Rosando v. Am. Airlines, 743 F. Supp. 2d 40, 58 (D.P.R. 2010) (citation omitted) (internal quotation marks omitted) ("It is conceivable that a reasonable juror could find that Rosando was discriminated on the basis of sex, due to his failure to conform with sexual stereotypes about what 'real' mean do and don't do.").

[141] No. 12–1290(CKK), 2014 WL 1280301 (D.D.C. Mar. 31, 2014).

[142] *Id.* at *9.

Inc.,[143] the district court granted defendant's motion for summary judgment by deferring to plaintiff's stated beliefs about why he believed his male coworkers harassed him.[144] As the court noted, and as the Seventh Circuit cited approvingly, plaintiff "himself characterizes the harassment of his peers in terms of work-related disputes and perceptions of his sexual orientation and does not link their comments to his sex."[145] Similarly, in *Dawson v. Entek International*,[146] the Ninth Circuit held that, based on plaintiff's "own testimony that he does not exhibit effeminate traits," the district court below was correct to conclude that plaintiff was not discriminated against because he failed to fit the "male stereotype."[147] Many other courts have likewise faulted plaintiffs for not putting themselves into an effeminate box.[148]

This Article does not suggest that a plaintiff's insights and speculation about why a defendant harassed him are irrelevant. To the contrary, the plaintiff is likely one reliable source for revealing key insights about what gender norms operate in the relevant context, and, in turn, to what gender norms a defendant expected a plaintiff to conform. In fact, courts would be wrong to discount a plaintiff's testimony on these points, and plaintiffs' attorneys would be wise to solicit this kind of information.

Unless and until antidiscrimination law moves away from a model focused on intent and protected traits[149] and towards a model focused on the lived experiences of discrimination, plaintiffs' stated beliefs about a defendant's discriminatory motivation are just one piece of the puzzle. Plaintiffs' conjecture might tell courts little about a defendant's actual intent given that many male plaintiffs may not want to admit (or do not realize) that something about their conduct calls their masculinity into

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[143] 332 F.3d 1058 (7th Cir. 2003).

[144] *See id.* at 1065.

[145] *Id.*

[146] 630 F.3d 928, 933 (9th Cir. 2011).

[147] *Id.* at 937-38.

[148] *See, e.g.*, James v. Platte River Steel Co., 113 F. App'x 864, 867 (10th Cir. 2004) (citation omitted) ("We also note that [plaintiff] has made no showing that [defendant's employee] harassed him due to the fact that he failed to conform to gender stereotypes. To the contrary, [plaintiff] testified at his deposition that he had 'no clue' why [defendant's employee] singled him out for harassment."); Martin v. N.Y. State Dep't of Corr. Servs., 224 F. Supp. 2d 434, 446 (N.D.N.Y. 2002) ("[Plaintiff's] affidavit is devoid of any statement that he acts in an effeminate manner. The record also fails to demonstrate any evidence that [plaintiff] acts, or is even perceived to act, in an effeminate manner.").

[149] See Kramer, *supra* note 34, at 902 (citation omitted) (critiquing intent as "the touchstone of disparate treatment"); *see also* Levit, *supra* note 34, at 469 (explaining that as people become "less different in group-based ways, but perhaps more uniquely different as individuals[,]" the protected class approach "will fail to redress systematically the real discrimination happening in workplaces").

question in others' eyes. Further, relying only on plaintiffs' beliefs—particularly if those beliefs provide a way for courts to tie the evidence to the fatal sexual orientation "bootstrapping"[150] concern—smacks of indifference or hostility to the very idea of male sex stereotyping as a cause of action.

Finally, and perhaps most problematic, judges often dispose of male sex stereotyping cases based on their own instincts. Judges conclude that, to them, the plaintiff *seems* sufficiently masculine, and thus any discrimination could not possibly be because the plaintiff failed to conform to sex stereotypes. This analysis is tantamount to taking judicial notice of what masculinity means, and, as a corollary, what evidence of gender nonconformity must look like.

A good example of how judicial notice can carry the day in these cases is *Mowery v. Escambia County Utilities Authority*.[151] Steve Mowery, a white self-identified straight man whom defendant employed as a utility service technician, claimed that his male coworkers harassed him because he failed to conform to masculine stereotypes.[152] Judge Richard Smoak, Jr. of the District Court for the Northern District of Florida acknowledged that the plaintiff could state a valid claim if he was able to show that "the harassment he allegedly suffered was based on his perceived failure to conform to a masculine gender role."[153] The court dismissed Mowery's claim, however, because the "alleged harassment experienced by Mowery [was] isolated to comments relating to Mowery's perceived sexual orientation, not to his manliness."[154] In discussing the facts Mowery pled to support his claim, Judge Smoak reasoned:

> Being forty years old, owning a home and truck, living alone, and not discussing one's sexual partners are not feminine gender traits. These characteristics may reflect stereotypes associated with a homosexual lifestyle, but they are not stereotypes associated with a feminine gender. In fact, owning a truck and working as a utility service technician in a water and sewage treatment company are characteristics that are more commonly associated with a masculine gender role.[155]

Judge Smoak granted defendant's motion for summary judgment and disallowed Mowery's case to go before a jury based solely on his own

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[150] *See* Kramer, *supra* note 63, at 219-20.

[151] Mowery v. Escambia Cnty. Util. Auth., No. 3:04CV382-RS-EMT, 2006 WL 327965 (N.D. Fla. Feb. 10, 2006).

[152] *Id.* at *1.

[153] *Id.* at *7 (citation omitted).

[154] *Id.*

[155] *Id.*

beliefs about what traits do and do not serve as proxies for masculinity.[156] According to Judge Smoak, Mowery was inoculated from harassment motivated by a failure to conform to masculine expectations because he owns a truck[157] and works a presumably rough, dirty job as a utility service technician.[158] Most judges are white, heterosexual, and upper class men,[159] and these characteristics represent the most dominant version of masculinity in America.[160] Based on that mainstream vantage point, these judges may fail to see how overt markers of heterosexuality—in this case, living with a female partner and talking openly and crudely about one's heterosexual sex life—could be central to blue collar workers' masculinity producing rituals.[161] Some might intuitively agree with Judge Smoak's assessment, but, for legal purposes, it amounts to judicial notice uninformed by social context, made absent searching or thoughtful analysis, and guided by seemingly little more than a judge's own vantage point.[162]

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[156] *See id.* at *22.

[157] Many men shore up masculinity by developing and exercising "manly" skills, as well as by using the equipment necessary to perform those skills. *See* Margaret K. Nelson & Joan Smith, *Economic Restructuring, Household Strategies, and Gender: A Case Study of a Rural Community*, 24 FEMINIST STUD. 79, 91 (1998), *available at* http://www.jstor.org/discover/10.2307/3178620?uid=3739632&uid=374486571&uid=2&uid=3&uid=3739256&uid=60&sid=21104355911231. Particularly for men in small towns, equipment such as a "pickup truck[,]" a "John Deere tractor[,]" and a "chain[saw]" have symbolic masculine importance. *Id.*

[158] One dominant form of masculinity in America "is associated with heavy, dangerous, dirty, skilled, and interesting work, as well as with mobile and/or moving machinery." Cliff Cheng, *Marginalized Masculinities and Hegemonic Masculinity: An Introduction*, 7 J. MEN'S STUD. 295, 297 (1999).

[159] This is changing, however, as President Obama has appointed more women, people of color, and LGBT persons than any President in history. *See* WHITE HOUSE, THIS IS THE FIRST TIME OUR JUDICIAL POOL HAS BEEN THIS DIVERSE, http://www.whitehouse.gov/share/judicial-nominations (last visited Oct. 16, 2014).

[160] Typically the "masculinity that defines white, middle class, early middle-aged, heterosexual men is the masculinity that sets the standards for other men." Michael S. Kimmel, *Masculinity as Homophobia: Fear, Shame and Silence in the Construction of Gender Identity*, *in* FEMINISM & MASCULINITIES 182, 184 (Peter F. Murphy ed., 2004). Dominant forms of masculinity can change, however, depending on context. *See* Ann C. McGinley, *Work, Caregiving, and Masculinities*, 34 SEATTLE U. L. REV. 703, 706 (2011). To evaluate evidence of male sex stereotyping from only this race, age, and class specific conception of masculinity misses how other forms of masculinity can become dominant in different contexts, such as in "blue collar workplaces or prisons." *Id.*

[161] *See, e.g.*, Buchanan, *supra* note 129, at 38 ("[O]ne important way for men to establish their masculinity is to bond with other men through ritualized forms of sexual talk and touching.").

[162] *See* McGinley, *supra* note 78, at 432 (urging judges to refrain from reflexively disposing cases prior to trial without first acting "thoughtfully" and being "fully aware" of the existence of multiple masculinities).

Consider also *EEOC v. Boh Bros. Construction Co.*,[163] where a self-identified straight man who worked as an ironworker in an all-male crew, Kerry Woods, claimed that his coworkers harassed him because he failed to conform to male stereotypes.[164] One of Woods' coworkers, Chuck Wolfe, harassed him mercilessly; Wolfe called Woods a "faggot" and a "princess[,]" repeatedly exposed his genitals to Woods, and simulated anal sex when Woods bent over to perform job duties.[165] Wolfe also ridiculed Woods as "girlish" for using "Wet Ones" wipes instead of toilet paper when Woods used the restroom at construction sites.[166] The district court allowed the case to go to trial, where a jury returned a verdict in favor of Woods.[167] The Fifth Circuit Court of Appeals, however, vacated the jury's verdict because, according to the court, there was no evidence that Woods is effeminate.[168] "[I]t is a circular truth that a plaintiff may not recover based on nonconformance to gender stereotypes unless the plaintiff conforms to nonconformance gender stereotypes[,]" and, the court went on, using Wet Ones wipes "*does not strike us* as overtly feminine."[169]

The Fifth Circuit segregated the pervasive antigay workplace language from the realm of sex discrimination by characterizing it as mere "vulgarity,"[170] ignoring that men repudiate the feminine and police other men's masculinity through antigay insults.[171] This is typical of sex stereotyping analysis.

More interesting, however, is the court's pronouncement that using wipes on the job rather than toilet paper was not "overtly feminine."[172] Yet dominant male gender norms emerge based on what the most authentically masculine men in a particular milieu do, and for many men in blue-collar jobs who fail to live up to more economically powerful middle class exemplars of manhood, achieving masculinity is often contingent on demonstrating "strength, pain management, and toughness."[173] Proving that

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[163] 689 F.3d 458 (5th Cir. 2012) *reh'g granted en banc*, 731 F.3d 444 (5th Cir. 2013).

[164] *See id.* at 459.

[165] *See id.* at 460.

[166] *See id.* at 459.

[167] *See id.* at 460.

[168] *See id.* at 462-63.

[169] *Id.* at 462 (emphasis added).

[170] *See id.*

[171] Many men discriminate against other men who display characteristics or behaviors not in line with how they see themselves as men because they "need to prove that they themselves are not feminine and are therefore masculine." McGinley, *supra* note 128, at 759.

[172] *Boh Bros. Constr. Co.*, 689 F.3d at 462.

[173] Edward W. Morris, *The 'Hidden Injuries' of Class and Gender Among Rural Teenagers*, *in* RESHAPING GENDER AND CLASS IN RURAL SPACES 221, 228 (Barbara Pini &

one is hard or tough in such an environment can require the repudiation of certain creature comforts, of which Wet Ones wipes may easily be one. In this way, something that seems entirely unrelated to gender becomes a proxy for effeminacy.[174]

These cases demonstrate that judges artificially distinguish masculinity from heterosexuality and ignore the ways in which seemingly benign traits and behaviors become gendered. Even where courts acknowledge heterosexuality as a masculine norm, they neglect to explain why federal law does not protect the men who are nonconforming. "For all we know, [plaintiff] fits every male 'stereotype' save one—sexual orientation—and that does not suffice to obtain relief under Title VII."[175] This illustrates how courts take judicial notice of masculinity's meaning, haphazardly carve out certain traits and behaviors from its definition, and arbitrarily determine whether a plaintiff's evidence matches closely enough to what the presiding judge thinks a masculinity breach should look like.

B. Successful Claims: Masculinity Does Not Include "Pizzazz"

Not all male sex stereotyping claims lose on a motion to dismiss, a motion for summary judgment, or even, as in the later-vacated *Boh Brothers Construction Co.* decision, a motion to vacate a jury verdict. Like in unsuccessful sex discrimination cases, though, successful cases lack meaningful analysis regarding what male sex stereotypes are and how stereotyping can occur. These cases usually depend on artful pleading and the particular way in which plaintiffs frame facts for their success, and the analysis tends to fall into two overlapping categories.

First, courts are sometimes willing to believe that discrimination may be because of sex when the harassing conduct is explicitly and unambiguously gendered. In these cases, the facts presumably speak for themselves and no further proof of intent is required.[176] In *Nichols v. Azteca Restaurant*

Belinda Leach eds., 2011) (citation omitted) (describing blue collar masculinities).

[174] *See* Kramer, *supra* note 38, at 310 (citations omitted) (discussing how vegetarianism serves as a proxy for effeminacy, and how discrimination against vegetarian men is fueled by the stereotype that real men eat meat).

[175] Gilbert v. Country Music Ass'n, 432 F. App'x 516, 520 (6th Cir. 2011) (affirming the district court's order granting defendant's motion to dismiss).

[176] Doe by Doe v. City of Belleville, Ill., 119 F.3d 563, 577 (7th Cir. 1997) (citation omitted) (finding that "[i]n view of the overt references to [plaintiff's] gender and the repeated allusions to sexual assault, it would appear unnecessary to require any further proof that [plaintiff's] gender had something to do with this harassment; the acts speak for themselves in that regard"), *cert. granted and judgment vacated sub nom.* City of Belleville v. Doe by Doe, 523 U.S. 1001 (1998). Following *Oncale*, the mere sexual nature of harassing conduct is typically not enough to demonstrate that discrimination is because of

Enterprises, Inc.,[177] for example, the Ninth Circuit held that workplace harassment directed at the male plaintiff, Sanchez, was motivated by the belief that Sanchez "did not act as a man should act."[178] Citing as dispositive sex stereotyping evidence, the court noted that Sanchez was harassed for carrying a serving tray "like a woman," Sanchez's coworkers frequently called him "she" and "her," and "the most vulgar name-calling directed at Sanchez was cast in female terms."[179]

Similarly, in *Rhea v. Dollar Tree Stores, Inc.*,[180] a district court found sufficient evidence to conclude that a (female) supervisor may have discriminated against two male plaintiffs because they did not conform "to the male gender stereotype."[181] According to the court, the relevant sex stereotyping evidence included incidents where the plaintiffs' supervisor called them "bitch," and where she told one that "he looked more like a man after [he] cut his shoulder-length hair."[182] In other cases, courts have found sufficient evidence of sex stereotyping where a male was told to "toughen up and stop acting like a little girl,"[183] where a male was told he was not a "real man" because he wore an earring,[184] and where a boy's classmates called him "'Jessica,' a girl's name."[185]

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sex. *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998) (alterations in original) (internal quotation marks omitted) (plaintiffs "must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted *discrimina[tion]*" because of sex (emphasis in original) (internal quotation marks omitted)); Schwartz, *supra* note 49, at 1782 (noting that after *Oncale*, courts should no longer rely simply on the sexual nature of conduct to infer discrimination because of sex). *But see* Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1066 (9th Cir. 2002) (en banc) ("The physical attacks to which [plaintiff] was subjected, which targeted body parts clearly linked to his sexuality, were 'because of . . . sex.' Whatever else those attacks may, or may not, have been 'because of' has no legal consequence.").

[177] Nichols v. Azteca Rest. Enters., 256 F.3d 864 (9th Cir. 2001).

[178] *Id.* at 874 (reversing the lower court's judgment and entering a judgment in defendant's favor on plaintiff's sex discrimination claim following a bench trial).

[179] *Id.* at 874.

[180] Rhea v. Dollar Tree Stores, Inc., No. 04-2254 ML/V, 2005 WL 2600213 (W.D. Tenn. Oct. 12, 2005).

[181] *Id.* at *3 (denying defendant's motion for summary judgment).

[182] *Id.*

[183] Doe v. Brimfield Grade Sch., 552 F. Supp. 2d 816, 823 (C.D. Ill. 2008) (denying defendant's motion to dismiss plaintiff's Title IX sex discrimination claim).

[184] Kay v. Independence Blue Cross, No. CIV.A. 02-3157, 2003 WL 21197289, at *5 (E.D. Pa. May 16, 2003) (concluding that the harassment was motivated by sex stereotyping, but granting defendant's motion for summary judgment because the harassment was not severe and pervasive), *aff'd*, 142 F. App'x 48 (3d Cir. 2005).

[185] Montgomery v. Indep. Sch. Dist. No. 709, 109 F. Supp. 2d 1081, 1090 (D. Minn. 2000) (denying defendant's motion to dismiss).

The outcome in these cases is probably correct despite the paltry analysis. No matter where in the United States one goes, certain physical and emotional characteristics, behaviors, and words, are nearly universally associated with men and women, and invoking them in tandem with disparate treatment may require little additional analysis or explanation.[186] In *Price Waterhouse v. Hopkins*, at the very birth of sex stereotyping theory, the Supreme Court picked up on these widely shared gendered truisms and observed that "it takes no special training to discern sex stereotyping in a description of an aggressive female employee as requiring 'a course at charm school.'"[187] The Court seemingly approved the use of judicial notice where sex stereotypes are deeply woven into our national fabric, and are thus easily understood by most American citizens. Even where sex stereotypes exist on a national scale and are ubiquitous, however, courts should be cautious in reflexively crediting the belief that a particular word, trait, or behavior is masculine or feminine because doing so fails to disrupt the naturalness of those beliefs and reinforces a false binary.[188]

In the second category of successful male sex stereotyping claims, courts find sufficient evidence when the plaintiff characterizes himself or his conduct as effeminate or in some way woman-like. This is the inverse of the problem highlighted above, where courts seize on a plaintiff's hesitancy to impugn his own masculinity, or his cluelessness about how other people read his gender performance, to dispose of the sex discrimination claim. If a plaintiff characterizes himself as effeminate, however, this presumably satisfies courts' oft-made requirement that a male plaintiff identify the "observable" way in which he fails to conform to sex stereotypes.[189]

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[186] According to the most generalized American articulation, men are commonly thought to be "aggressive, active, independent, analytic, and confident," while women are commonly thought to be "passive, dependent, warm, social, and sensitive." Cava, *supra* note 13, at 34 (citation omitted).

[187] 490 U.S. 228, 256 (1989) *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1075, *as recognized in* Burrage v. United States, 134 S. Ct. 881 (2014); *see also* Levit, *supra* note 24, at 1102 ("The Supreme Court's latest message about gender stereotyping in [*Price Waterhouse*] may mislead observers into thinking that stereotypes are readily recognizable.").

[188] *See* Vojdik, *supra* note 16, at 88. "Laws and legal doctrines contain ideological messages. What courts say and do matters, since legal language shapes and reinforces social meanings." Levit, *supra* note 24, at 1115.

[189] *See* Vickers v. Fairfield Med. Ctr., 453 F.3d 757, 764 (6th Cir. 2006) (affirming the district court's order dismissing plaintiff's claim because plaintiff "failed to allege that he did not conform to traditional gender stereotypes in any observable way at work"); Dawson v. Bumble & Bumble, 398 F.3d 211, 221 (2d Cir. 2005) ("Generally speaking, one can fail to conform to gender stereotypes in two ways: (1) through behavior or (2) through appearance."); *see also* Edward J. Reeves & Lainie D. Decker, *Before ENDA: Sexual Orientation and Gender Identity Protections in the Workplace Under Federal Law*, 20 L. &

Though the legal outcomes are favorable for male plaintiffs, the presiding judges nevertheless fail to consider whether a *defendant* perceived a plaintiff as gender nonconforming in the relevant social context. Worse, this precludes otherwise actionable claims by those who do not wish to characterize themselves or their behavior as feminine because of cultural forces that stigmatize effeminate men.[190]

Prowel v. Wise Business Forms, Inc.[191] is an especially noteworthy example of how a plaintiff's self-identification as effeminate can satisfy the discriminatory intent requirement. *Prowel* is also significant because it reveals how perceptions of masculinity are nuanced (and, frankly, sometimes bizarre) depending on where one lives and in what industry one works.

In this case, Brian Prowel worked as a machinist at a rural Pennsylvania plant, and he self-identifies as a gay, *effeminate* man.[192] His male co-workers repeatedly called him names like "Princess," "Rosebud," and "fag," and pulled stunts like placing "a pink, light-up, feather tiara with a package of lubricant jelly" in his work space.[193] Prowel brought a Title VII sex discrimination claim against his employer, arguing that he was harassed because he failed to conform to male sex stereotypes.[194] The district court granted the defendant's motion for summary judgment,[195] but the Third Circuit Court of Appeals reversed and reasoned that "[t]he record demonstrate[d] that Prowel has adduced evidence of harassment based on

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SEXUALITY 61, 71 (2011) (noting that, where they have permitted men to prove sex discrimination via sex stereotyping evidence, courts require plaintiffs "to identify the observable, nonconforming gender behavior upon which the discrimination could be based").

As Professor Brian Soucek points out, however, the requirement that a male plaintiff be perceived as gender nonconforming based on his observable behavior at work, as opposed to being perceived as gender nonconforming based on known information about a plaintiff's behavior outside of work, is unique to male sex stereotyping claims. *See generally* Brian Soucek, *Perceived Homosexuals: Looking Gay Enough for Title VII*, 63 AM. U. L. REV. 715 (2014). In cases involving female sex stereotypes or racial stereotypes, by contrast, courts seldom require a defendant to literally see the plaintiff defying or engaging in stereotypical behavior; cognitive knowledge alone is sufficient. *See generally id.*

[190] This is true for both straight and self-identified gay men. For a discussion on how some gay men place a premium on acting and being perceived as masculine while simultaneously repudiating all things feminine, see generally Dale Carpenter, *Straight Acting*, 9 MINN. J.L. SCI. & TECH. 803 (2008).

[191] 579 F.3d 285 (3d Cir. 2009).

[192] *See id.* at 287.

[193] *Id.*

[194] *See id.* at 286.

[195] *See id.* at 291.

gender stereotypes."[196] According to the Third Circuit, the relevant sex stereotyping evidence was as follows:

> [Prowel] acknowledged that he has a high voice and walks in an effeminate manner. In contrast with the typical male at Wise, Prowel testified that he: did not curse and was very well-groomed; filed his nails instead of ripping them off with a utility knife; crossed his legs and had a tendency to shake his foot "the way a woman would sit." Prowel also discussed things like art, music, interior design, and decor, and pushed the buttons on his nale encoder [machine] with "pizzazz."[197]

This case is a victory for gay and other gender nonconforming men everywhere because it creates room for men to successfully deviate from prevailing assumptions about appropriate male behavior, and it provides legal protection for doing so. Nevertheless, it is unclear what specific male sex stereotypes Prowel violated. Is cursing a male sex stereotype? Is ripping off fingernails with a utility knife a male sex stereotype? Do *real* men refrain from discussing art, music, interior design, and décor? The court does not explain what male sex stereotypes are, nor does it tease out precisely how Prowel deviated from them. Instead, the court seems to find Prowel's "effeminate traits" self-evident.[198]

On the other hand, *Prowel* demonstrates how courts might consider social context to infer discriminatory intent. In discussing Prowel's gender presentation, the court made a key point: Prowel's observable behavior and appearance was "[i]n contrast with the typical male *at Wise*."[199] This is a tacit recognition that masculinity is not an inherently knowable concept such that each person's definition will be consistent. A judge's referential vantage point for deciphering male norms is simply not applicable here.[200] In this case, the blue-collar men who worked at the Wise Business Forms plant in the small town of Butler, Pennsylvania[201] served as the dominant masculine referent to which Prowel was expected to conform. They defined what it means to be a man in that geographic and cultural place.

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[196] *Id.*

[197] *Id.*

[198] See *id.* (noting as a matter of fact that "Prowel's effeminate traits did not go unnoticed by his co-workers").

[199] *Id.* (emphasis added).

[200] *See* Virginia v. Black, 538 U.S. 343, 388 (2003) (Thomas, J., dissenting in part) ("In every culture, certain things acquire meaning well beyond what outsiders can comprehend.").

[201] In 2011, Butler's estimated population was 13,943. U.S. CENSUS BUREAU, TOTAL POPULATION: 2007-2011 AMERICAN COMMUNITY SURVEY 5-YEAR ESTIMATES, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_11_5YR_B01003&prodType=table (last visited Oct. 17, 2014).

Accordingly, it was necessary for the court to evaluate the defendant's intent according to this context, which demonstrated that Prowel's version of masculinity differed from the masculinity performed by his male harassers. This reasonably supported an inference that Prowel was harassed because of sex.

IV. CONTEXTUALIZING SEX STEREOTYPING

Sex stereotypes, put simply, "are beliefs about the nature of men and women."[202] Unlawful sex stereotyping, then, is discriminating against someone because he or she does not match those beliefs.[203] Whose beliefs and what those beliefs are matter when determining whether failure to conform to sex stereotypes motivates discrimination.

As this Article shows, sex stereotyping analysis is often inconsistent and unprincipled.[204] Without being explicit, judges tend to rely on judicial notice, using themselves and their own experiences as the guiding template for analyzing the sex stereotyping evidence before them; they rely solely on the plaintiffs' subjective impressions of defendants' motivations; and they superficially distinguish antigay slurs (e.g., "what a fag") from more overtly sex-oriented slurs (e.g., "what a pussy").[205] These approaches occlude the diversity of gender norms and gendered meanings,[206] and arbitrarily determine who is protected from sex discrimination and who is not.[207]

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[202] Cava, *supra* note 13, at 34; *see* Love v. Motiva Enters., No. 07-5970, 2008 WL 4286662, at *10 (E.D. La. Sept. 17, 2008) (explaining that sex stereotypes are "based on society's general ideas about traits commonly thought to be shared by persons of the same physical type").

[203] *See* Centola v. Potter, 183 F. Supp. 2d 403, 408-09 (D. Mass. 2002) (defining sex stereotyping as "generalizing from the characteristics of a group to those of an individual, making assumptions about an individual because of that person's gender, assumptions that may or may not be true").

[204] "A number of courts have held that the plaintiff made out a cause of action for sex stereotyping. With nearly identical facts, others have held that the plaintiff did not . . . ." McGinley, *supra* note 28, at 1220 (citation omitted). *See generally* Cava, *supra* note 13.

[205] *See infra* Part III.A (discussing judges relying on judicial notice and their own instincts in sex stereotyping cases).

[206] There are multiple versions of masculinity and femininity, and to speak of these as singular concepts essentializes gender. Cheng, *supra* note 158, at 303.

[207] *See, e.g.*, Darren Rosenblum, *Queer Intersectionality and the Failure of Recent Gay and Lesbian "Victories"*, 4 L. & SEXUALITY 83, 95 (1994), *available at* http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1209&context=lawfaculty (noting that courts relying on "traditional" gender norms—meaning white and middle class gender norms—"deny sexual and gender subversive litigants and ignore their priorities").

As scholar Kenji Yoshino notes, we all perform our sex but the nature of that performance depends on who is in the audience.[208] Accordingly, what counts as masculine and feminine is different for everyone, even if only subtly. Normative masculinity may not manifest in the same ways for a wealthy, middle-aged, white man, in contrast with a poor, young, person of color.[209] It may differ for urbanites and rural dwellers, Northerners and Southerners, or those who live on the coasts versus the mountains.[210] It may require different aesthetics and expression in a white-collar office and a blue-collar factory, and will splinter even more according to what position the employee holds, whether the workplace is in the country or the city, or what race and age the employee is. Sex stereotyping analysis thus requires a new, more nuanced approach.

A. Inferring Intent

The existence of multiple, diverse, and nuanced understandings of masculinity suggests that it is nearly impossible to identify the precise trigger that sets off discriminatory conduct. Inevitably, courts almost always must infer intent from circumstantial evidence because direct evidence (e.g., an admission that the defendant perceived the plaintiff to be gender nonconforming and engaged in discrimination on that basis) is exceedingly rare. This is a core reason that sex stereotyping as an alternative method of proof was born.

On their quest to uncover defendants' intent in male sex stereotyping cases, however, many courts are remiss to draw discriminatory inferences from sex stereotyping evidence because they fail to understand the relevant contexts that inform the evidence. In fact, some courts dismiss context as irrelevant. In *Love v. Motiva Enterprises*,[211] for example, female employee Love brought a sexual harassment suit against her employer based on her female coworker's behavior.[212] Love cited evidence that she did not conform to her coworker's ideas of acceptable femininity, which in this case meant being a "liberated, physically fit woman."[213] The court rejected

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[208] *See* Yoshino, *supra* note 67, at 416.

[209] *See* Cooper, *supra* note 19, at 685 ("Because of the intersectionality of identities, there is not one form of masculine identity, but a plurality of identities, such as a working-class white masculinity, an upper-class gay black masculinity, and so on.").

[210] *See generally* Boso, *supra* note 8 (explaining that because of common geographic and socio-economic factors, rural men have fewer options for performing normative masculinity than urban men, and male gender norms are strikingly similar from one small town to the next).

[211] No. 07-5970, 2008 WL 4286662 (E.D. La. Sept. 17, 2008).

[212] *See id.* at *2.

[213] *Id.* at *9.

Love's sex stereotyping evidence, reasoning that Love's co-worker's idea of proper femininity "by definition cannot constitute a stereotype, which is based on *society's* general ideas about traits commonly thought to be shared by persons of the same physical type. Whatever [Love's co-worker's] *individual* ideas may have been about women's liberation and physical appearance, these do not constitute gender stereotypes . . . ."[214]

This is exactly the wrong approach.[215] The *Love* court universalized masculinity and femininity by deferring to fabled societal standards regarding appropriate male and female behavior. Yet sex stereotyping is inherently idiosyncratic and individual. Judges cannot gauge defendants' intent merely by using society-at-large as the guide because their interpretation of society's standards is inevitably biased by their own social position. Moreover, that biased interpretation tells us little about how an individual defendant expected others to express gender in any given place or time.

Going forward, courts must think contextually about intent, which means that the parties' race, class, age, geographic location, and workplace cultures—among other factors—are relevant in the evidentiary analysis.[216] Considering these factors will help courts identify masculine norms within a given context, which will shed light on whether the plaintiff differed from those norms in some way. Given the ways in which men police the boundaries of acceptable manhood, courts should then infer discriminatory intent from the mere difference between the plaintiff's version of masculinity and the prevailing, dominant model.

This jurisprudential recalibration is not revolutionary, but it is significant. It also has a solid legal foundation. On at least two occasions, in both race and sex discrimination cases, the Supreme Court has gestured towards the importance of social context in analyzing the elements of Title VII claims. The first exemplar comes from *Oncale v. Sundowner Offshore Services, Inc.*[217] The *Oncale* Court exhausted most of its energy by emphasizing that actionable same-sex harassment must be "because of sex," and by discussing three potential ways to prove this requisite element of intent.[218] Importantly, and although the Court does not frame the discussion in this

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[214] *Id* at *10 (emphasis added).

[215] *See* Soucek, *supra* note 189, at 750 (citations omitted) (noting that the *Love* court's rejection of defendant's idiosyncratic conceptions of appropriate femininity stands in contrast to the evidence other courts rely on in determining a defendant's intent).

[216] *See* McGinley, *supra* note 28, at 1161-62 (citations omitted) (stating that "[i]ndividuals perform and construct their gender identities through social context[,]" and this is a "complex system affected by race, class, education, and other variables").

[217] Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998).

[218] *See id.* at 78-81; *see also supra* Part II.A-B (discussing *Oncale*).

way, the practical effect of the three articulated evidentiary routes is to give lower courts simple tools for inferring intent from social context. In other words, the Supreme Court has already instructed lower courts to infer intent from environmental factors in same-sex sexual harassment cases—just not (yet) from sex stereotypes.

However, sexual harassment claims also include another element. The Court reminds us that the discriminatory conduct must also be so "severe or pervasive" as to create a hostile or abusive environment.[219] Applied to same-sex harassment cases, the Court states that this "inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target."[220] Unsurprisingly, a number of lower courts have seized on this "social context" language in analyzing the hostile environment element of sexual harassment claims under both Title VII and Title IX.[221]

Moreover, the Supreme Court has been frank about the importance of contextual intent in race discrimination cases. In a 2006 per curiam decision, *Ash v. Tyson Foods, Inc.*,[222] the Supreme Court applied contextual intent to evaluate whether sufficient evidence supported a jury conclusion that a purportedly race-neutral hiring decision was actually discrimination "on account of race."[223] In *Ash*, two black men sought management

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[219] 523 U.S. at 81 (citation omitted).

[220] *Id.*

[221] *See, e.g.*, EEOC v. Finish Line, Inc., 915 F. Supp. 2d 904, 921 (M.D. Tenn. 2013) (citing *Oncale* for the proposition that sensitivity to social context informs whether sexual harassment is "sufficiently severe or pervasive to constitute a hostile work environment under Title VII"); Doe *ex rel.* A.N. v. E. Haven Bd. of Educ., 430 F. Supp. 2d 54, 61 (D. Conn. 2006) (citing *Oncale* for the proposition that sensitivity to social context informs whether sexual harassment "was so severe, pervasive, or objectively offensive as to deprive [plaintiff] of access to the educational opportunities or benefits" of school under Title IX).

[222] 546 U.S. 454 (2006).

[223] *Ash* is a disparate treatment case involving an employer's adverse employment action—a decision not to promote. *Id.* at 455. This case was not about peer sexual harassment. For adverse employment action cases, both the Supreme Court and Congress have established specific burden-shifting frameworks for proving unlawful discrimination because of a protected trait, and the applicability of a given framework usually depends on whether the evidence of unlawful discrimination is direct or circumstantial. *See generally* Mitchell v. City of Pittsburgh, 995 F. Supp. 2d 420 (W.D. Pa. 2014) (explaining the three-step burden shifting analysis applied to Title VII employment discrimination claims). The components of each framework and the analysis for when each applies is complicated and fragmented, and is beyond the scope of this Article. *But see generally* Martin J. Katz, *Unifying Disparate Treatment (Really)*, 59 HASTINGS L.J. 643 (2008) (walking readers through the murkiness and proposing a way towards a unified disparate treatment doctrine). This Article is not concerned with the burden-shifting analysis in *Ash*; it is interested only in the Supreme Court's discussion of the evidence that goes to the question of whether defendant discriminated because of race.

promotions at the Alabama poultry plant where they worked, but the defendant ultimately hired two white men.[224] At trial, plaintiffs produced evidence that, on several occasions, the white hiring manager referred to both black petitioners and several other black men as "boy."[225] Plaintiffs argued that this evidence demonstrated the defendant's intent to discriminate because of race, but the Eleventh Circuit Court of Appeals disagreed: "While the use of 'boy' when modified by a racial classification like 'black' or 'white' is evidence of discriminatory intent, . . . the use of 'boy' alone is not evidence of discrimination."[226] The Supreme Court subsequently rejected the Eleventh Circuit's narrow evidentiary interpretation:

> Although it is true the disputed word will not always be evidence of racial animus, it does not follow that the term, standing alone, is always benign. The speaker's meaning may depend on various factors including context, inflection, tone of voice, local custom, and historical usage. Insofar as the Court of Appeals held that modifiers or qualifications are necessary in all instances to render the disputed term probative of bias, the court's decision is erroneous.[227]

Oncale and *Ash* both demonstrate that it is appropriate for lower courts to consider social context—including "local custom" and place-based factors—to infer a defendant's intent to discriminate because of a protected trait. In race discrimination cases following *Ash*, some lower courts have done just that.[228] These cases typically involve facially neutral comments

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[224] *See* 546 U.S. at 455.

[225] *Id.* at 456.

[226] Ash v. Tyson Foods, Inc., 129 F. App'x 529, 533 (11th Cir. 2005), *vacated and remanded by* 546 U.S. 454 (2006).

[227] 546 U.S. at 456.

[228] *See, e.g.*, Jackson v. Dunn Constr. Co., 927 F. Supp. 2d 1229, 1244 (N.D. Ala. 2013) (denying summary judgment motion on race discrimination claim). The court in *Jackson* stated:

> Determining what the speaker here meant when he purportedly called [plaintiff] 'boy' over 200 times is a matter for the trier of fact since it will involve an evaluation of the context and other factors to ascertain whether the usage was benign or designed to demean and harass [plaintiff] because of his race.

Id. at 1243; *see* Smith v. Draughons Junior Coll., Inc., No. 3:10–00873, 2012 WL 86935, at *9 (M.D. Tenn. Jan. 11, 2012) (denying summary judgment motion on a race discrimination claim because a "reasonable jury could determine that, from both an objective and subjective standpoint, [p]laintiffs worked in an environment permeated with racial comments . . . and racial insensitivity"); Carter v. Luminant Power Servs. Co., No. 3:10–CV–1486–L., 2011 WL 6090700, at *27 (N.D. Tex. Dec. 6, 2011) (denying summary judgment motion on a race discrimination claim because "a reasonable jury could infer that the comments . . . were race-based"). The *Carter* court explained that though the supervisor's comments might appear "nondiscriminatory or nonracist" when "isolated from context," the history behind

that are in fact racially loaded because of the history of racism in the geographies at issue.

However, courts have been reluctant to consider social context with respect to sex stereotyping evidence. The research for this Article uncovered only one case, *Robertson v. Dodaro*,[229] in which a court cited *Ash* for the proposition that "context, inflection, tone of voice, and local custom" can inform whether seemingly sex-neutral comments and actions can support an inference of discrimination in sex stereotyping cases.[230] In *Dodaro*, a female plaintiff's supervisors described her as "dismissive," "superior," "condescending" and "sarcastic," critiqued her "tone of voice," and noted that she was not "smiling enough" and "looked unhappy."[231] Plaintiff argued that these comments stemmed from a sex-stereotypical "belief that female employees should appear 'softer.'"[232] Unfortunately, although the court nodded to the importance of contextual intent, it failed to meaningfully analyze that context. Rather than identify what female norms governed in plaintiff's workplace, the court stated without explanation that nothing about the social context in which these comments were made supported plaintiff's characterization of the evidence as gender charged.[233]

Courts can do better. First, they must be more willing to infer intent from circumstantial evidence. Second, and importantly, they must understand that the circumstantial evidence before them often means more than meets the eye. Social context constantly imbues words, conduct, and human characteristics with different gendered meaning, and judges must not assume to know what all of those meanings are. The Article now turns to a fuller annunciation of this latter point.

B. Analyzing the Evidence

Gender is relational and culturally informed, and no two individuals will express masculinity or femininity in precisely the same ways. Nor will two individuals possess identical ideas about how others should perform their gender (to the extent that one is concerned about policing others' gender conformity). This reality potentially confounds sex stereotyping analysis: what does it mean to conform to male or female sex stereotypes when there is no uniform masculinity or femininity to which one must conform? The

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certain words and the manner in which they were used suggests discriminatory intent. *See id.*

[229] 767 F. Supp. 2d 185 (D.D.C. 2011).

[230] *Id.* at 194.

[231] *Id.* at 193.

[232] *Id.*

[233] *See id.* at 195.

answer lies in identifying and understanding the dominant, emblematic versions of gender in any given social context. These dominant versions of masculinity or femininity serve as the tool for evaluating men and women in a particular setting.[234]

Accordingly, it is inappropriate for judges to take judicial notice of masculine and feminine norms in most cases, except perhaps where our shared national history and traditions render certain sex stereotypes nearly universally known and accepted. Instead, judges should permit and encourage plaintiffs to gather and introduce evidence about gender norms.[235] In some cases, particularly where discrimination occurs in a large heterogeneous city or workplace, this may require expert testimony. But in cases where discrimination occurs in a more homogenous, insular, or small-scale locale, this may simply be a matter of deposing defendants or other relevant witnesses (or even seeking affidavits or declarations) and soliciting sworn testimony about how masculinity and femininity is perceived in that context.

If judges permit plaintiffs to engage in this kind of evidence-gathering process rather than applying their own gender standards to the case at hand, it will be much easier for plaintiffs to then demonstrate how their gender presentation departs from the dominant standard.[236] This is hardly a radical proposal. While a more robust evidentiary process may make it harder for defendants to succeed on motions to dismiss and for summary judgment, that result in no way runs afoul of Title VII's and Title IX's central purpose, which is to protect people from sex discrimination.[237] To the contrary, judges' current unwillingness to interrogate the various meanings of manhood and womanhood contravenes the spirit of antidiscrimination law because it leaves victims of more subtle forms of sex discrimination without a legal remedy.

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[234] *See* Connell & Messerchmidt, *supra* note 27, at 846 (explaining that dominant masculinities work "in part through the production of exemplars of masculinity" which "have authority despite the fact that most men and boys do not fully live up to them").

[235] In adverse employment action cases, the relevant dominant gender referent is that which a plaintiff's employer embodies or values. In sexual harassment cases, the relevant dominant gender referent is that which a plaintiff's harasser embodies or values.

[236] Professor Kramer articulates the same point in a slightly different way and argues that in employment discrimination cases, plaintiffs must "paint a clear picture of both the employer's gender expectations and the specific ways in which the employee departs from these expectations." Kramer, *supra* note 38, at 300-01.

[237] *See* Diane Heckman, *The Entrenchment of the Glass Sneaker Ceiling: Excavating Forty-Five Years of Sex Discrimination Involving Educational Athletic Employment Based on Title VII, Title IX and the Equal Pay Act*, 18 VILL. SPORTS & ENT. L.J. 429, 430 (2011) (explaining that Title VII and Title IX were enacted by Congress to prevent "discrimination in employment based on sex").

In male sex stereotyping cases, then, it matters little whether a plaintiff deviates from masculine norms in ways that the presiding judge would characterize as feminine, or even whether a plaintiff thinks of himself as masculine or feminine. For a boy or an adult man, simply being different from the most dominant form of masculinity in a schoolroom, workplace, or small town can mark him as not a *real* man. Differences can render seemingly sex-neutral traits and behaviors proxies for femininity, and it is reasonable to infer that people who treat boys and men disparately based on these differences are discriminating on the basis of sex. Plaintiffs are entitled to make this showing in court, and they should not have their claims thrown out by judges who are unwilling to think critically about gender.

To make this showing, courts and plaintiffs alike must be mindful of how seemingly gender-neutral factors dramatically affect sex stereotyping evidence. For decades, feminists and queer theorists in a wide variety of disciplines have stressed that identities are intersectional, and human experiences—and specifically oppression—cannot be explained without understanding how various aspects of identity work together.[238] In intersectionality theory's nascent years, scholar Kimberlé Crenshaw discussed overlapping identities in the context of gendered violence, explaining that "the violence that many women experience is often shaped by other dimensions of their identities, such as race and class."[239] Social scientists who study gender have since expanded on racial and class-based axes of intersectionality to incorporate other factors.[240]

Place is another, yet relatively under-studied axis on which identities are formed, and it refers to the physical realities of where one is located as well as less tangible aspects associated with that physical environment, "from

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[238] Alexis Annes & Meredith Redlin, *The Careful Balance of Gender and Sexuality: Rural Gay Men, the Heterosexual Matrix, and "Effeminophobia"*, 59 J. HOMOSEXUALITY 256, 258 (2012), *available at* http://www.academia.edu/4028133/The_Careful_Balance_of_Gender_and_Sexuality_Rural_Gay_Men_the_Heterosexual_Matrix_and_Effeminophobia/ (intersectionality explains "how gendered people are situated based on race, class, and sexuality," and how this positioning affects and is affected by social interactions).

[239] Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242 (1991).

[240] *See, e.g.*, Peggy F. Bartlett, *Three Visions of Masculine Success on American Farms*, *in* COUNTRY BOYS: MASCULINITY AND RURAL LIFE, *supra* note 18, at 47, 49 ("Since the 1990s, researchers have stressed that gender is not monolithic and unchanging but rather varies by place, time, and social position."); Annes & Redlin, *supra* note 238, at 258 (asserting that recent studies show how "space also has a decisive role in shaping individuals' sexual and gender identity"); Connell & Messerschmidt, *supra* note 27, at 847 (noting that dominant versions of masculinity vary "by local context, and such local versions inevitably differ somewhat from each other").

social relationships to economic opportunity."[241] Along with race and class, this Article suggests that place is one of the most salient factors affecting what evidence of sex stereotyping looks like. The physical and social factors encompassed by the concept of place affect how each of us behaves on a daily basis. Over time, these patterns of behavior solidify and become gendered.

Moreover, the gendering of certain traits and behaviors occurs on both large and small scales.[242] As scholar Lisa Pruitt explains, "[a]ttention to scale allows assessment of social, economic, and legal experience at different spatial resolutions. An awareness of other spaces—greater and smaller, encompassing and nested within—enhances our understanding of those experiences."[243] In other words, some gender norms manifest over broad, sweeping geographies where patterns of behavior in a particular urban area, region, or country may infuse particular acts, words, and artifacts with widely accepted meanings; the South as a region, for instance, requires very different gender negotiations than in the Pacific Northwest.[244] Simultaneously, however, the physical, social, and economic realities present at smaller scales—such as in a particular office, factory, neighborhood, or small town—alter (and sometimes contradict) the relevant measuring apparatus for acceptable male and female gender presentation.

Two contemporary sex stereotyping cases, *Lewis v. Heartland Inns of America, LLC*[245] and *Dawson v. Bumble & Bumble*,[246] demonstrate how social context, and specifically places, affect the analysis of sex stereotyping evidence and show how gender difference (or lack of difference) is a central component of sex stereotyping evidence. The referential scale is different in both cases: the entire "Midwest" in one,[247]

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[241] Lisa R. Pruitt, *Gender, Geography & Rural Justice*, 23 BERKELEY J. GENDER. L. & JUST. 338, 340 (2008). Pruitt distinguishes space from place, explaining that place is a more concrete subset of space. Under this view, space is an abstract idea, and it refers "both to the familiar idea of physical surroundings . . . and to the impact that particular spatial configurations have on many aspects of life." *Id.* By contrast, place is a concrete subset of space, and "[a]nalysis based on place considers particular locales, taking into account the range of characteristics that distinguish one place from another." *Id.* (citation omitted). This Article is concerned primarily with place.

[242] For a discussion of how "scale" affects analysis of certain social phenomena, including gendered practices, see *id.* at 383-85.

[243] *Id.* at 383 (citation omitted).

[244] *See* David Bell, *Homosexuals in the Heartland: Male Same-Sex Desire in the Rural United States*, *in* COUNTRY VISIONS 178, 179 (Paul Cloke ed., 2003).

[245] 591 F.3d 1033 (8th Cir. 2010) (reversing district court's order granting defendant's motion for summary judgment).

[246] 398 F.3d 211 (2d Cir. 2005) (affirming district court's order granting defendant's motion to dismiss).

[247] *See Lewis*, 591 F.3d at 1035-36.

and a single workplace in New York City in the other.[248] But attention to these divergent geographies affected the outcome in both.

In *Lewis*, a female employee brought a sex discrimination claim under Title VII after she was fired from her job working as a hotel desk clerk in a small town outside of Des Moines, Iowa.[249] When the Director of Operations saw Lewis first-hand, he determined that she "lacked the 'Midwestern girl look'" and was thus not suited to work at the front desk.[250] In her sex discrimination claim, Lewis alleged that she was fired because she failed to conform to her employer's "preferred feminine stereotype."[251]

Despite an inability or unwillingness to describe what it means to look like a "Midwestern girl" and how specifically the plaintiff differed from that look according to the Director's gender standards,[252] the Eighth Circuit agreed with the lower court that the Director's comment was evidence of sex stereotyping.[253] The court appeared to accept that the defendant judged the plaintiff's femininity according to a standard that, though hard to succinctly characterize, requires women to conform to place-specific standards of beauty. The mere fact that plaintiff's gender presentation differed from this idiosyncratic standard of female beauty supported an inference that the discriminatory treatment was because of sex.

In *Dawson*, the courts were less sympathetic to the plaintiff's sex discrimination claim, yet the result, this Article somewhat controversially argues, may have been correct. In this case, plaintiff Dawson, "a self-described lesbian female, who does not conform to gender norms in that she does meet stereotyped expectations of femininity," worked at a high-end hair salon in Manhattan and failed to receive the promotion she sought.[254] As a result, she alleged sex discrimination because of her gender nonconformity.[255] Most legal scholars know this case primarily because of

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[248] *See Dawson*, 398 F.3d at 214.

[249] *See Lewis*, 591 F.3d at 1035-36.

[250] *Id.* Plaintiff "prefers to wear loose fitting clothing, including men's button down shirts and slacks. She avoids makeup and wore her hair short at the time." *Id.*

[251] *Id.* at 1038.

[252] In a study of lesbian women in the Midwest, participants further mystified the "Midwestern girl look" stereotype by explaining, "nonfeminine gender presentations are in fact acceptable and typical for all women in rural areas, regardless of sexual identity." Emily Kazyak, *Disrupting Cultural Selves: Constructing Gay and Lesbian Identities in Rural Locales*, 34 QUALITATIVE SOC. 561, 577 (2011).

[253] *See Lewis*, 591 F.3d at 1039.

[254] Dawson v. Bumble & Bumble, 398 F.3d 211, 213 (2d Cir. 2005).

[255] *See id.* at 213-14. The court describes the relevant sex stereotyping evidence as follows: (1) two coworkers frequently referred to Dawson as "Donald" in front of clients and other coworkers; (2) a coworker stated that Dawson "[wore] her sexuality like a costume," making the implication that Dawson failed to "conform to gender norms and appeared to be a lesbian;" and (3) another coworker exclaimed, "in extremely vulgar and

the Second Circuit's wrongheaded disaggregation of sexual orientation from sex stereotypes as a rationale for denying gay, lesbian, and bisexual people relief from sex discrimination.[256] In the less frequently discussed district court opinion, however, Judge Marrero engages in a sophisticated sex stereotyping analysis, attempting to identify the place-specific norms that determined how Dawson's peers judged her without assuming that gender norms are monolithic.[257]

The district court began its analysis by explaining that the "social context" in which Dawson's sex discrimination claim arises is "critical."[258] The court goes on to reason that in this social context—which both Dawson and the defendants agree is "heterogeneous" and "strives for the avant garde and extols the unconventional"—it is "peculiarly challenging . . . to classify what behavior does or does not conform to gender norms, [and] what look, gesture or bearing may or may not deviate from defined expectations of what is or is not acceptable social conduct."[259] In other words, although Dawson might be gender nonconforming under widely accepted markers for what femininity means in the national ethos, in this context and in this place, Dawson's femininity was measured against a version of femininity that seems to reject the very concept. Dawson's gender was not sufficiently different from her co-workers because these employees collectively disavowed masculinity and femininity as standards to which men and women must conform; there was simply no prevailing dominant feminine standard from which Dawson could deviate. Because gender standards were malleable and even rejected in this environment, the court could not fairly infer discriminatory intent.

While Dawson lost her case and the Second Circuit perpetuated the myth that sex stereotypes have nothing to do with sexual orientation, the lower court paved a way forward for legal analysis by showing sensitivity to the ways in which gender norms differ according to context. *Dawson* is an unusual case in that the relevant context was a counter-majoritarian, urban workplace that rejects gender conformity as a concept worthy of reverence. In most contexts, however, gender standards exist, and conformity to the dominant model is enforced. Courts must seek to identify the dominant model and its working normative parts when analyzing sex stereotyping

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threatening terms" that he thought Dawson "needed to have sex with a man." *Id.* at 215.

[256] The court cited approvingly to cases denying legal relief to gay and lesbian plaintiffs who bring sex stereotyping claims, noting that "[s]tereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality." *Id.* at 218 (alteration in original) (citation omitted).

[257] *See* Dawson v. Bumble & Bumble, 246 F. Supp. 2d 301 (S.D.N.Y. 2003).

[258] *Id.* at 309.

[259] *Id.* at 311.

evidence, and they must infer intent when the plaintiff deviates from those norms; otherwise, the law permits sex stereotyping to persist unchecked, and it naturalizes unspoken requirements about behavior as just the way men and women are.

V. CONCLUSION

The Supreme Court revolutionized sex discrimination law when it decided *Price Waterhouse v. Hopkins*[260] in 1989. Suddenly, what counted as actionable *discrimination* "because of sex" included treating someone differently because he or she is gender nonconforming. But more than two decades later, courts continue to struggle with sex discrimination claims involving stereotyping, particularly in same-sex harassment cases involving men and boys. In evaluating plaintiffs' sex stereotyping claims, courts have failed to engage in a principled analysis of what masculinity and femininity mean and are bullish about inferring intent. Whether a plaintiff survives a motion for summary judgment or a motion to dismiss typically depends on the presiding judge's own conception of male and female norms, and what that judge thinks gender nonconformity means. And because judges tend to dispose of male sex stereotyping cases quickly, plaintiffs have few evidentiary avenues to unearth subtle gender norms and illustrate how his conduct or appearance differed from the relevant expectations.

What it means to conform to gender norms depends on a host of intersectional social, economic, and cultural variables, and the context in which discrimination occurs is critical to inferring defendants' intent in Title VII and Title IX cases. This Article does not purport to concretely define masculinity, but it does call for judges to engage in a critical evaluation of gender, and to see masculinity and femininity as performance rather than fact.

A principal lesson that comes from deconstructing manhood is that masculinity, regardless of where it takes shape, is a cocktail of cues from other men about how to act and look. And in any given social context, a relatively small group of men actively shape and texture the relevant referents for acceptable male behavior. Put simply, male gender nonconformity is any form of difference from the prevailing masculine script, and even presumptively sex-neutral characteristics can call a man's masculinity into question. Some forms of difference are decidedly more susceptible to policing than others.[261] Men of color in majority white areas,

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[260] 490 U.S. 228 (1989).

[261] "We come to know what it means to be a man in our culture by setting our definitions in opposition to a set of 'others'—racial minorities, sexual minorities, and, above all, women." Kimmel, *supra* note 160, at 182.

for example, are obvious targets.[262] Gay and bisexual men, and men who are perceived to be gay or bisexual, are inherently different from most men in nearly every context, and are thus regular victims of same-sex bullying and harassment.

It is crucial that judges allow plaintiffs to identify the operative gender norms against which defendants evaluate them before ruling on whether discrimination against a particular plaintiff is because of sex. Based on societal perceptions for what is normal, people are stigmatized, attacked, and killed every day if their gender expression strays from prevailing norms.[263] A nuanced, more thoughtful legal approach will protect more men and women from unlawful discrimination, and it will help free us all from the oppressive demands of a deeply gendered society.

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[262] *See, e.g.*, Cooper, *supra* note 31, at 899 (explaining that men of color are either feminized or hypersexualized because they are "outside of the norm to which men are supposed to aspire"); Devon W. Carbado, *Masculinity by Law*, *in* MASCULINITIES AND THE LAW: A MULTIDIMENSIONAL APPROACH 51, 53 (Frank Cooper & Ann C. McGinley eds., 2012) (explaining that, in American society generally, the normative, referential man is white: the "intersectionality of white normatively masculine men defines what it means to be a man").

[263] *See* Meredith R. Palmer, Note, *Finding Common Ground: How Inclusive Language Can Account for the Diversity of Sexual Minority Populations in the Employment Non-Discrimination Act*, 37 HOFSTRA L. REV. 873, 904 (2009) (citation omitted).

Making State Merit Scholarship Programs More Equitable and Less Vulnerable

Aaron N. Taylor*

Since the 1993 arrival of Georgia's Helping Outstanding Pupils Educationally (HOPE) Program, merit scholarships have become popular tools for states seeking to maximize human capital within their borders. However, research has concluded both that the bulk of merit scholarships goes to students with the least financial need, and the popularity of these programs has led to a de-emphasis on need-based scholarship funding in some states. These trends are even more worrisome when these programs are funded by lottery revenue, as is the case with HOPE. Lotteries are inherently regressive because the people who play (and pay related taxes) tend to be poor and less educated. Therefore, when lottery revenue is distributed in the form of scholarships to higher-income recipients, this regressivity is exacerbated. This Article presents two policy proposals for reducing socioeconomic and racial disparities in state merit scholarship awarding while also alleviating the fiscal pressures that tend to beset lottery-funded programs. The first proposal is to implement a need-based scholarship program with an early engagement component. The second proposal is to award merit scholarships using a "merit-aware" index.

I. INTRODUCTION

Since the 1993 arrival of Georgia's pioneering Helping Outstanding Pupils Educationally Program—colloquially, though incompletely, known as the HOPE Scholarship[1]—merit scholarships have become popular tools for states seeking to maximize human capital within their borders. The goals and purposes of these programs often relate to encouraging students to engage and excel academically, keeping those deemed most talented from leaving the state, and encouraging higher education participation and

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[1] The HOPE Program is actually comprised of two scholarships, of which the HOPE Scholarship is one, along with the Zell Miller Scholarship. *See* GEORGIA'S HOPE PROGRAM, https://secure.gacollege411.org/Financial_Aid_Planning/HOPE_Program/_default.aspx (last visited Oct. 5, 2014). The Program also includes two grants—the HOPE Grant and the HOPE GED Grant. *See id.* The scholarships are merit-based, taking into account grades and/or standardized test scores. *See id.* Neither grades nor test scores are considered for initial grant eligibility. *See id.*

attainment.[2] As many as thirty other states have instituted such programs since 1993,[3] with eight of them, like HOPE, funded by state lottery revenue.[4]

For much of the 1990s, lottery revenue outpaced costs borne by these programs; but in the last decade as tuition rates have risen and more students have become eligible for the awards, the programs have encountered solvency issues.[5] As a result, states have tightened eligibility criteria and placed other limitations on the awards.[6] But even before states implemented these cost-saving measures, disparities between those most likely to receive the awards and those least likely were being observed. Research has concluded both that the bulk of merit scholarships goes to students with the least financial need[7] and the popularity of these programs has led to a de-emphasis on need-based scholarship funding in some states.[8]

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[2] *See* TENN. HIGHER EDUC. COMM'N, A COMPARISON OF STATES' LOTTERY SCHOLARSHIP PROGRAMS 5 (2012), *available at* http://thec.ppr.tn.gov/THECSIS/Lottery/pdfs/Special Reports/A%20Comparison%20of%20States'%20Lottery%20Scholarship%20Programs%20120717.pdf.

[3] Christopher Cornwell & David B. Mustard, *Georgia's HOPE Scholarship and Minority and Low-Income Students: Program Effects and Proposed Reforms*, *in* STATE MERIT SCHOLARSHIP PROGRAMS AND RACIAL INEQUALITY 77, 79 (Donald E. Heller & Patricia Marin eds., 2004), *available at* http://civilrightsproject.ucla.edu/research/college-access/financing/state-merit-scholarship-programs-and-racial-inequality/heller-marin-state-merit-scholarship-2004.pdf.

[4] TENN. HIGHER EDUC. COMM'N, *supra* note 2, at 5. States with lottery-funded merit scholarship programs are: Arkansas, Florida, Georgia, Kentucky, New Mexico, South Carolina, West Virginia, and Tennessee. *Id.*

[5] *See, e.g.*, Kathy Lohr, *Georgia's HOPE Scholarship Dwindles Amid Cutbacks*, NPR (Apr. 5, 2011, 1:03 PM), http://www.npr.org/2011/04/05/135146704/georgias-hope-scholarship-dwindles-amid-cutbacks; *see also, e.g.*, Brittany Shammas, *Bright Futures Scholarship Cuts Squeezing College Students as Tuition Increases*, NAPLES DAILY NEWS (Jul. 10, 2012, 5:10 A.M) http://www.naplesnews.com/news/2012/jul/10/bright-futures-scholarship-cuts-squeezing-as.

[6] *See, e.g.*, Cornwell & Mustard, *supra* note 3, at 90-91 (explaining reforms undertaken by Georgia in order to stem HOPE Scholarship shortfalls); *see also, e.g.*, Colin A. Knapp, *An Evaluation of Florida's Bright Futures Scholarships in a Fiscally Constrained Era*, BACKGROUNDER, 1, 7 (2012), *available at* http://www.jamesmadison.org/wp-content/uploads/Backgrounder_BrtFuturesSchlrshpEval_KnappFeb12.pdf (explaining reforms undertaken by Florida in order to stem Bright Futures Scholarship shortfalls).

[7] Christopher Cornwell & David B. Mustard, THE DISTRIBUTIONAL IMPACTS OF LOTTERY FUNDED AID: EVIDENCE FROM GEORGIA'S HOPE SCHOLARSHIP 14 (2000), *available at* http://people.terry.uga.edu/mustard/courses/e4850/Transfers.pdf ("[D]istribution of [scholarships] based on merit provides funding disproportionately to relatively wealthy counties with higher concentrations of whites, thus exacerbating the inequities in the collection of [lottery] funds.").

[8] *See* Donald E. Heller, *State Merit Scholarship Programs: An Overview in* STATE MERIT SCHOLARSHIP PROGRAMS AND RACIAL INEQUALITY 13, 15 (Donald E. Heller &

The fundamental nature of lotteries makes these trends even more worrisome. Lotteries are inherently regressive because the people who play (and pay related taxes) tend to be poor and less educated.[9] Therefore, when lottery revenue is distributed in the form of scholarships to higher-income recipients, this regressivity is exacerbated.[10]

Socioeconomic and racial disparities in the awarding of state-funded merit scholarships are restricting higher education access and choice among low-income students and those of color. Demographic trends, however, including the rise of college-age people of color, require that education access and choice be broadened and attainment be increased.[11] A critical component of increasing attainment is leveraging financial aid in effective and efficient ways. As demand for lottery scholarships further outstrips revenue, states must consider new ways to ensure the viability of the programs through increasingly efficient uses of these funds.

This Article presents two policy proposals for reducing socioeconomic and racial disparities in state merit scholarship awarding while also alleviating the fiscal pressures that tend to beset the lottery-funded programs. The first proposal is to implement a need-based scholarship program with an early engagement component. The second proposal is to award merit scholarships using a "merit-aware" index.

Part II of this Article provides a history of student aid, including the seemingly alternating prominence of the need-based and merit-based forms. Part III explains the problems associated with state merit aid programs, using Georgia's HOPE and Florida's Bright Futures, the two largest lottery scholarship programs, to illustrate salient issues. In Part IV, the policy proposals are presented.

II. HISTORY OF STUDENT AID

The history of student aid is almost as old as American higher education itself. It began in 1643 with a gift of 100 pounds made to Harvard College

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Patricia Marin eds., 2004), *available at* http://civilrightsproject.ucla.edu/research/college-access/financing/state-merit-scholarship-programs-and-racial-inequality/heller-marin-state-merit-scholarship-2004.pdf.

[9] *See* Cornwell & Mustard, *supra* note 7, at 2.

[10] *See id.* at 2-3; *see also* J. RODY BORG & MARY O. BORG, THE REVERSE ROBIN HOOD EFFECT: THE DISTRIBUTION OF NET BENEFITS FROM THE FLORIDA BRIGHT FUTURES SCHOLARSHIP 3 (2007), *available at* http://stoppredatorygambling.org/wp-content/uploads/2012/12/The-Reverse-Robin-Hood-Effect-The-Distribution-of-Net-Benefits-From-the-Florida-Bright-Futures-Scholarship.pdf (characterizing this trend as a "reverse Robin Hood effect").

[11] PETER SMITH, THE QUIET CRISIS: HOW HIGHER EDUCATION IS FAILING AMERICA 78 (2004).

("Harvard") by a wealthy English philanthropist, Ann Radcliffe.[12] This gift, "America's first scholarship," was intended to support "the yearly maintenance [of a] poor scholer [sic]."[13] Radcliffe had three principle motives for funding the scholarship.[14] In addition to helping needy students, she desired to support her fellow countrymen who had settled the Massachusetts colony and promote Christian-based enlightenment, a guiding principle of Harvard's founding.[15]

The gift, however, fell victim to realities that bear strong resemblances to contemporary pressures on scholarship funding. For starters, the initial award was made to the son of Thomas Weld.[16] Weld, the head of a parish in Roxbury, was also Harvard's chief fundraiser and the man who secured the gift from Radcliffe.[17] And while he was no rich man by Radcliffe's standards, he likely possessed above-average wealth.[18] So the ostensibly need-based award was actually awarded based on "personal patronage . . . [and] extended family loyalties."[19] In addition, in 1713, the scholarship was merged with general funds and appropriated for purposes unrelated to student aid.[20] For many years, the gift arguably served none of Radcliffe's principle motives. It took a "fit of honest guilt" on Harvard's part for the scholarship to be reinstated in 1893.[21]

Student aid, in general, encompasses loans, work-study, and of course, scholarships and grants.[22] This policy history focuses primarily on scholarships and grants.[23] These forms of aid are most typically divided

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[12] *See* RUPERT WILKINSON, AIDING STUDENTS, BUYING STUDENTS: FINANCIAL AID IN AMERICA 2 (2005) (alteration in original).

[13] *Id.*

[14] *See id.*

[15] *See id.* at 4; *see also id.* at 1 (asserting that the desire to "build a Godly civilization in the wilderness" was a factor motivating Radcliffe's support of Harvard).

[16] *See id.* at 1-2.

[17] *See id.*

[18] *See id.* at 2.

[19] While Radcliffe expressed a desire to endow a need-based award, kinship ties and religious loyalties were important to her as well. *See id.* Therefore, awarding a scholarship to the son of a clergyman made sense to her. *See id.*

[20] *See id.* at 3.

[21] *Id.*

[22] *See generally* WILLIAM R. DOYLE, A NEW PARTNERSHIP: RESHAPING THE FEDERAL AND STATE COMMITMENT TO NEED-BASED AID (2013), *available at* http://www.sheeo.org/sites/default/files/publications/4_CED_A_New_Partnership_Financial_Aid_Report.pdf (providing a comprehensive overview of the student aid system).

[23] *See generally Grants and Scholarships*, FEDERAL STUDENT AID: AN OFFICE OF THE U.S. DEPARTMENT OF EDUCATION, https://studentaid.ed.gov/types/grants-scholarships (providing general information about grants and scholarships).

into two classifications: need-based and merit-based.[24] Though the first scholarship was need-based, America has a long historical relationship with merit scholarships as well. Indeed many scholarship programs have required, either by directive or in practice, recipients to possess qualities that conform to both notions, merit and financial need.[25]

A. Motives and Markets

Any history of student aid in America must explore the interplay between the motives behind the scholarships and the markets that influence their funding. The early Colonial period saw a relatively robust targeting of aid to needy students at some colleges.[26] Through much of the nineteenth century, the bulk of scholarships at Harvard went to needy students.[27] Harvard sought to use aid as a means of "recruiting poor and promising students to become enlightened leaders against 'barbarism, ignorance, and irreligion.'"[28] By the late 1600s, a third of Harvard students came from what would now be considered working-class backgrounds.[29] Similarly, during this time, about half of students at Dartmouth College ("Dartmouth") attended at no cost, in return for future missionary work.[30]

Harvard and Dartmouth saw the broadening of access to education as conferring societal benefits.[31] In addition to curing perceived scourges such as irreligion, there was a sense at these institutions that broad access (among white Protestant males) also promoted a "pragmatic sense of justice."[32] But the market forced these relatively altruistic principles to the background.[33] Burgeoning faculty ranks and student enrollments prompted both Harvard and Dartmouth to limit their financial commitment to need-based student aid and focus more on recruiting affluent, full-paying students who could underwrite institutional expansion.[34]

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[24] *See* WILKINSON, *supra* note 12, at 15.

[25] *See id.* ("Scholarships aimed at needy students have usually been scarce enough to require impressive qualities of one kind or another to get them.").

[26] *See id.* at 66-67.

[27] *See id.*

[28] *Id.* at 67.

[29] *See id.* (describing how student aid "helped Harvard expand its social reach").

[30] *See id.* Dartmouth was founded as "a bi-racial (Indian-white) institution for training Indian missionaries as well as generally combating the 'ignorance and irreligion' of . . . New Hampshire." *Id.*

[31] *See id.* at 69.

[32] *See id.* (asserting that these colleges "wanted to select and support 'deserving' poor students so they could be more 'useful' to society").

[33] *See id.* at 67.

[34] *See id.* at 67-68. The pressure to enroll more full-pay students continues today. *See*

The period between the American Revolution and the Civil War saw a vast increase in the number of colleges, particularly westward into the new territories.[35] This expansion proceeded "without restraint" from the late eighteenth century through the mid-nineteenth century.[36] Fueled mainly by religious denominations, the expansion led to a proliferation and democratization of education that was celebrated by some and vilified by others.[37] The proliferation of institutions created a market for low-tuition, high-aid pricing policies.[38]

This market was also influenced by a popular anti-elitism that had taken hold. Principles of access to higher education gained popular footing, while "[h]ereditary privilege and 'aristocratic' exclusiveness were discredited."[39] Schools were seen as the settings in which common leaders for the new republic would be trained.[40] Student aid symbolized the newly evolved ideology, and thus, many colleges of this time saw student aid as a tool of survival, both financial and political. Some colleges used low-cost tuition policies as a means of promoting themselves as providers of social mobility.[41] Williams College ("Williams"), for example, began to leverage "charitable aid" to the benefit of "the very poorest student," in providing a path into the ministry.[42] But like in other places, the market eventually rendered the appeal of full-payers irresistible to Williams.[43] Falling enrollments, due to the institution's inability to keep pace with rising costs and rising student need, prompted Williams to change the socioeconomic

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INSIDE HIGHER ED, THE 2011 INSIDE HIGHER ED SURVEY OF COLLEGE & UNIVERSITY ADMISSIONS DIRECTORS 7 (Scott Jaschik & Doug Lederman eds., 2011), *available at* http://www.insidehighered.com/sites/default/server_files/files/9-20finaladmissions report.pdf. In a recent survey, over one-third of college and university admissions directors at four-year institutions stated that they had recently undertaken increased efforts to recruit students who could pay full price. *See id.* Among public doctoral universities, the proportion was more than half. *See id.*

[35] *See* WILKINSON, *supra* note 12, at 69.

[36] *See* CHRISTOPHER J. LUCAS, AMERICAN HIGHER EDUCATION: A HISTORY 117 (2nd ed. 2006).

[37] *See id.* at 116 (discussing the different historical opinions of the "overbuilding" of colleges after the Civil War).

[38] *See* WILKINSON, *supra* note 12, at 70 ("To survive, the colleges had to charge low prices and provide 'charity' aid and easy credit."). Kenyon College ("Kenyon") in Ohio was started based on this premise. *See id.* at 81. Its founder promoted Kenyon's "unexampled cheapness." *Id.* (citation omitted).

[39] *Id.* at 70.

[40] *See id.* ("[T]he new republic was often seen to require an educated citizenry and a good supply of leaders, provided by schools and colleges open to rising talent.").

[41] *See* LUCAS, *supra* note 36, at 123.

[42] WILKINSON, *supra* note 12, at 71.

[43] *See id.*

make-up of its student body.[44] Williams is said to have gone from being populated by "half-bumpkin, half-scholar figures" to being comprised of "fashionably dressed young men" from "families of 'high standing.'"[45]

1. Enter the public institutions

As the nation's first institutions of higher education, private colleges dictated early trends in student aid (and higher education in general). However, in the late nineteenth century, the federal government pushed public higher education onto the scene in a major way.[46] The Morrill Act of 1862 ("Act") provided for the establishment of public agriculture and mechanical arts colleges.[47] The Act is described as "a landmark in American higher education," and is cited as the federal government's first major "extraordinarily permissive" attempt at expanding higher education.[48] The Act, and its 1890 extension to the former Confederate states (collectively, "Morrill Acts"), spurred the founding or increased prominence of some of the country's very best universities.[49] Flagship public universities, such as the University of Florida, Louisiana State University, and Texas A&M University, and many historically black universities, such as Florida A&M University and North Carolina A&T State University, are land-grant institutions.[50] And while land-grant institutions are overwhelmingly public, Cornell University ("Cornell"), a private institution and member of the Ivy League, also has a land-grant designation.[51]

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[44] *See id.* at 71-72.

[45] *Id.*

[46] *See* Martin Trow, *Federalism in American Higher Education*, *in* HIGHER LEARNING IN AMERICA, 1980-2000, at 39, 57 (Arthur Levine ed., 1993).

[47] Through the Morrill Acts, the federal government granted each eligible state 30,000 acres of land per member of Congress. *See* Charles P. Pierce, *The Morrill Act, 150 Years On: Is This Still in Our DNA?*, THE POLITICS BLOG (Jul. 10, 2012), http://www.esquire.com/blogs/politics/morrill-act-of-1862-10520324. Initial eligibility hinged principally on whether or not a state had seceded from the Union; beyond that, states were free to dispose of the land grants in virtually any manner they pleased, and then use the proceeds for agricultural and mechanical arts education. *See id.*

[48] Trow, *supra* note 46, at 57.

[49] *See id.*; Lawrence E. Gladieux & Jacqueline E. King, *The Federal Government and Higher Education*, *in* AMERICAN HIGHER EDUCATION IN THE TWENTY-FIRST CENTURY: SOCIAL, POLITICAL, AND ECONOMIC CHALLENGES 163, 164 (Philip G. Altbach, Robert O. Berdahl, & Patricia Gumport eds., 2d. ed. 2005).

[50] *See* APLU MEMBERS, http://www.aplu.org/page.aspx?pid=249 (providing a list of land-grant institutions) (last visited Mar. 30, 2013).

[51] *See id.*

The Morrill Acts funded some student aid as well, including state-parceled scholarships.[52] Some states also used leverage gained from the Morrill Acts to make other student aid arrangements with institutions. For example, New York induced Cornell to award a full-tuition scholarship to a student from each Assembly district in return for land grant funds.[53] By the late nineteenth century, more than forty percent of Cornell students attended on full-tuition scholarships, including all of its agriculture students.[54]

Historically, student aid had been funded mainly by charities and philanthropists supporting the extant private colleges; however, the end of the Civil War and the passage of the Morrill Acts engendered a "new era" in which public institutions, receiving public money for student aid, grew in prominence.[55] Of course, given their sources, these funds came with political griping. In North Carolina, accusations of elitism and exclusion in the awarding of need-based scholarships were levied.[56] These attacks were often inspired by larger anti-intellectual suspicions that couched public colleges and universities as "citadels of privilege" and "godless institutions."[57] For many reasons, cultural and political, the view that public student aid should be directed at the needy remained a popular espousement, even if in practice, elitism and affluent lineage (which has often masqueraded as merit) were the primary selection criteria.[58]

B. The Rise of Merit Scholarships

The late nineteenth century saw institutions place a greater emphasis on merit scholarships.[59] Merit awards, of course, were not new, but "until the late 1860s they were seldom clearly designated as such in college literature."[60] This shift aligned with a larger cultural shift that saw ideals of individualism and social Darwinism take hold within the American psyche.[61] In fact, the shift away from need-based aid could be

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[52] *See* WILKINSON, *supra* note 12, at 80. The most common form of Morrill Acts student aid was work on the college farm. *See id.* These arrangements made sense, given the Acts' mandated focus on agriculture and mechanical arts. *See id.*

[53] *See id.*

[54] *See id.*

[55] MICHAEL S. MCPHERSON & MORTON OWEN SCHAPIRO, THE STUDENT AID GAME: MEETING NEED AND REWARDING TALENT IN AMERICAN HIGHER EDUCATION 107 (1998).

[56] *See* WILKINSON, *supra* note 12, at 81.

[57] *Id.*

[58] *See id.*

[59] *See id.* at 99.

[60] *Id.*

[61] *See id.* at 97-98. ("[Social Darwinism's] main adherents believed that too much

characterized as a broad rejection. Arthur T. Hadley, president of Yale during the period, called need-based scholarships "demoralizing" and argued that such aid was insulting to the recipients.[62] He also questioned the legitimacy of some students' professed neediness.[63] By the early twentieth century, need-based scholarships had become "handouts," and handouts were un-American.[64]

Merit scholarships were also viewed by institutions as means of improving academic standing and prestige.[65] This was a view promoted by Andrew White, Cornell's first president, as he believed that merit scholarships would attract "a most valuable class" made up of individuals who would eventually ascend to "high positions."[66] In 1895, Dartmouth incorporated merit criteria into its need-based scholarships by tying the value of the aid to academic performance and requiring recipients to maintain high grades in order to remain eligible for the aid.[67] University of Chicago and Swarthmore College also notably used merit scholarships as a way to improve their academic standing.[68] Even Oberlin College, one of the staunchest early advocates of need-based aid, established a merit scholarship program in the late 1920s.[69]

Institutions were not the only entities establishing merit aid programs during this period. The states and the federal government followed the trend as well. However, public sector programs were not as unabashedly merit-based as their institutional counterparts. In 1864, the State of New Jersey funded a merit scholarship program at Rutgers, and in 1914, the State of New York established its Regents scholarship program.[70] These scholarships were awarded based on competitive examination, but they

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provision for social welfare . . . threatened nature's 'selection of the fittest,' shoring up the unfit rather than rewarding the fit and vigorous through competitive struggle.").

[62] *Id.* at 98.

[63] *See id.* In lieu of need-based aid, Hadley promoted ideas that would later become very familiar means of financing higher education: low-interest loans and student employment. *See id.*

[64] *Id.* at 99.

[65] *Id.* at 102 ("[M]erits were not just a way of buying good students but of signaling, to other students and the world at large, that the college stood for academic excellence.").

[66] *Id.* at 100 (citation omitted).

[67] *See id.* at 100-01.

[68] *See id.* at 101.

[69] *See id.* at 101-02 (citation omitted).

[70] *See id.* at 100 (citations omitted).

were not totally divorced from traditional access goals.[71] These programs were precursors to contemporary state merit programs.[72]

In 1944, the federal government revolutionized federal aid with the passage of the GI Bill.[73] Described as "one of the best things that ever happened to American higher education[,]"[74] the GI Bill provided direct aid to students, not based on need, but service[75]—arguably a conception of merit. The Soviet's launching of Sputnik spurred the passing of the National Defense Education Act in 1958.[76] The Act established the first federal subsidized loan program, with the goal of encouraging higher education participation in order to prevent the Soviets from gaining an advantage in science and technology.[77] Benefits written into the Act were merit-based, and attempts by the Eisenhower administration to include need-based provisions were met with fierce opposition.[78] But need-based aid was set to return to prominence, and like the previous shifts, this renewed emphasis would be the result of a shift in popular thinking.

C. The "Re-rise" of Need Based Scholarships

One of the most significant and enduring developments in the history of student aid was the founding of the College Scholarship Service ("CSS") in 1954.[79] The CSS was a cooperative of institutions seeking a uniform method of determining financial need.[80] The forces underlying the founding of the CSS included a desire to squelch bidding wars for students.[81] An additional motivation, however, was an emerging

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[71] *See id.* ("[T]he early state awards were meant not so much to compete against other colleges for good students as to get anyone of ability to go to college at all, especially among college-suspicious farmers.").

[72] *See id.*

[73] *See* Trow, *supra* note 46, at 58.

[74] *See id.*

[75] *See* IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA 118 (2005) (explaining that all veterans who served ninety days or more without a dishonorable discharge were eligible to receive benefits).

[76] *See* SANDRA R. BAUM, FINANCIAL AID TO LOW-INCOME COLLEGE STUDENTS: ITS HISTORY AND PROSPECTS 3 (1987), *available at* http://files.eric.ed.gov/fulltext/ED377265.pdf.

[77] *See id.*

[78] See *id.* at 4.

[79] *See* MCPHERSON & SCHAPIRO, *supra* note 55, at 6-7.

[80] *See id.* at 6.

[81] *See* WILKINSON, *supra* note 12, at 121 (asserting that the CSS sought to create a "shame culture" among member schools around the awarding of merit scholarships and bidding wars for students); *see also id.* at 123 (identifying "price and cost control" as another

"professional and liberal ethos" among admissions officers at the elite schools of the time.[82] Member institutions collectively expressed a desire to use student aid to improve society. The views of John U. Monro, Harvard's first director of student aid and a founder of the CSS, typified the "liberal sentiment"[83] that formed the philosophical basis of the CSS. Monro was a scholarship student himself both in boarding school and later at Harvard, and he is said to have possessed "an antiestablishment streak . . . [and] a deep desire to nurture ability among the disadvantaged."[84]

In some ways, CSS was highly influential on higher education generally; in other ways, not so much. Methods of means-testing developed by CSS influence how federal need-based student aid is awarded today;[85] however, CSS was largely ineffective at slowing the rise in the use of merit aid by institutions.[86] While many elite colleges today adhere to the principles advocated by CSS, the use of merit aid has endured at most selective institutions.[87]

In the 1960s, however, the fight for civil rights and the War on Poverty gripped the nation.[88] During this decade, the perils of inequality were highlighted for all to see, and curing those inequities became a target of national focus.[89] This restive climate served as an impetus behind a new federal emphasis on access.[90] Where the Morrill Acts broadened higher education access mainly by encouraging states to invest in higher education infrastructure, the Higher Education Act of 1965 broadened access by encouraging investments in students.[91] Among other things, the Act funded Educational Opportunity Grants, which were targeted at students with "exceptional financial need."[92]

During the 1970s, the federal government supported a seemingly ever-growing list of aid programs.[93] Most prominently, the period saw the

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motivation behind the founding of the CSS).

[82] *Id.* at 121.

[83] *Id.* at 121, 123.

[84] *Id.* at 121-22.

[85] *See* MCPHERSON & SCHAPIRO, *supra* note 55, at 9.

[86] *See id.* at 109 ("Despite the influence of CSS, the awarding of scholarship aid based solely on the basis of merit continued to be a part of the American scene.").

[87] *See id.* at 130 (stating that the most selective institutions are not as involved in merit aid as less selective institutions).

[88] *See* BAUM, *supra* note 76, at 4-5.

[89] *See id.*

[90] *See id.* at 5.

[91] *See* Gladieux & King, *supra* note 49, at 174-75 (arguing that the Act represented the first sign of a federal commitment to access in higher education).

[92] WILKINSON, *supra* note 12, at 54.

[93] *See id.* at 54-62.

advent of Basic Educational Opportunity Grants, which later became known as Pell Grants,[94] which remains the hallmark need-based aid program.[95] These grants were instituted as part of the Education Act of 1972.[96] Federal support of need-based aid peaked in the 1970s; but the 1980s and the Reagan era would cease the expansion.[97]

D. The Reassertion of the Market

The 1980s were characterized by rising tuition and falling student aid.[98] Moreover, the decade saw a continued expansion in the numbers of eighteen to twenty-four year olds enrolled in higher education.[99] This expansion was a response to the widening earning differentials between college graduates and those with only high school diplomas.[100] Also during the 1980s, student loans became the centerpiece of the federal student aid equation,[101] and public institutions saw significant cutbacks in state higher education appropriations.[102] The discretionary nature of higher education funding made it an easy target of cuts once health care costs and other entitlements began to strain state budgets.[103] The market reasserted itself in the 1980s, and need-based aid paid the proverbial price.

1. The golden age of the merits

If there is one phrase that could capture the essence of student aid funding in the 1990s, it would be the "The Golden Age of the Merits." The decade inherited many trends from its predecessor. College enrollments continued to rise.[104] Increasing tuition costs further weakened the value of

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[94] *See id.* at 224.

[95] *See* U.S. DEP'T OF EDUC., 2009-2010 FEDERAL PELL GRANT PROGRAM END-OF-YEAR REPORT 1 (2011), *available at* http://www2.ed.gov/finaid/prof/resources/data/pell-2009-10/pell-eoy-09-10.pdf. During the 2009-2010 school year, approximately thirty billion dollars was distributed to over eight million recipients. *See id.*

[96] *See* WILKINSON, *supra* note 12, at 54.

[97] *See* BAUM, *supra* note 76, at 10-11.

[98] *See* THOMAS J. KANE, THE PRICE OF ADMISSION: RETHINKING HOW AMERICANS PAY FOR COLLEGE 59 (1999).

[99] *See id.* at 139.

[100] *See id.* ("As the payoffs to postsecondary education rose, students and families responded.").

[101] *See* BAUM, *supra* note 76, at 37-38.

[102] *See* KANE, *supra* note 98, at 59.

[103] *See id.* at 69 ("The states with the largest increases in [Medicaid spending per capita] were among those with the largest increases in public four-year tuition.").

[104] *See id.* at 139.

Pell Grants.[105] Also, federal student lending continued to grow.[106] The 1990s also saw for the first time in about three decades the affordability concerns of middle and upper-income students take precedence over access issues.[107] In 1997, higher education tax credits and other financial incentives were codified.[108] The cost of the new tax expenditures was about the same as the Pell Grant program, with virtually all the relief going to middle and upper-class families.[109] This "redistribution" of aid away from low-income students served ends that were neither equitable nor efficient in promoting college enrollment.[110]

The strategic use of merit aid as a "defensive strategy" against competitive, zero-sum enrollment management pressures has been an enduring theme for institutions since at least the early 1970s.[111] One researcher asserted, "[m]erit aid is often the only prudent response to a more competitive environment [or market] of college applicants."[112] The 1990s saw "spectacular" increases in merit aid.[113] These increases were most prevalent among less prestigious doctorate-granting and research private universities, liberal arts colleges, and the most selective research and doctorate-granting public universities.[114] These classes of institutions are highly susceptible to market pressures. Only the most selective private universities have been spared from the merit aid arms race.[115]

2. State merit aid

Probably the most profound student aid development of the 1990s is the advent of state merit aid programs.[116] While state merit aid can trace its roots back more than a century, the modern movement is on a scope much larger and more deliberate than previously seen.[117] Broad-based state merit

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[105] *See* COLLEGE BOARD, TRENDS IN STUDENT AID 17 (2006), *available at* https://trends.collegeboard.org/sites/default/files/SA_2006.pdf.

[106] *See* KANE, *supra* note 98, at 67.

[107] *See id.* at 41-43.

[108] *See id.*

[109] *See id.* at 40-43.

[110] *See* MCPHERSON & SCHAPIRO, *supra* note 55, at 41.

[111] *See id.* at 120 ("Many institutions are apparently using merit aid as part of a defensive strategy, hoping to preserve enrollment levels and student quality in the face of declining applicant pools.").

[112] KANE, *supra* note 98, at 80 (citation omitted).

[113] *See* MCPHERSON & SCHAPIRO, *supra* note 55, at 60.

[114] *See id.* at 118-19.

[115] *See id.* at 120 (explaining that the fierce competition for seats at these schools makes merit awards unnecessary and expensive).

[116] *See* TENN. HIGHER EDUC. COMM'N., *supra* note 2, at 5.

[117] *See* WILKINSON, *supra* note 12, at 99.

aid, which can be funded through a variety of sources, including lottery revenue,[118] arrived in Georgia in 1993, and there has been an incremental, but steady, diffusion across state borders ever since.[119] Quite simply, Georgia's HOPE Program fundamentally changed the nature of higher education student aid and finance.[120] There are three most commonly cited motivating factors for enacting these programs: encouraging students to engage and excel academically, keeping those deemed most talented from leaving the state, and encouraging higher education participation and completion.[121] Given the popularity of the programs, there is undoubtedly a political motivation as well.[122]

Since 1981, state merit aid from all sources has increased from a barely perceptible $100,000[123] to $1.8 billion in 2009-2010[124]—a stunning 18,000-fold increase. This increase accelerated after the enactment of Georgia's HOPE.[125] In that same period, need-based aid grew from $900 million[126] to $6.3 billion[127]—a relatively modest seven-fold increase. So while the overwhelming bulk of state aid remains need-based, the trend lines lean heavily in favor of merit-based aid. And it seems only a matter of time before merit aid becomes the predominant form of state assistance to students.

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[118] *See* TENN. HIGHER EDUC. COMM'N., *supra* note 2, at 5 (listing the other sources as including "tobacco settlement revenues, land leases and sales, turnpike revenues, [and] state general funds").

[119] *See id.* at 8. Besides Georgia, four states implemented lottery-funded scholarship programs in the 1990s, and three states implemented lottery-funded scholarship programs in the 2000s. *See id.*

[120] *See id.* at 6 ("Evidence of Georgia'[s] influence can be seen in the way the programs are structured, the naming of programs, and the legislative discussions surrounding the founding of states' programs."); *see also* CARL VINSON INSTITUTE OF GOVERNMENT, HOPE SCHOLARSHIP: JOINT STUDY COMMISSION REPORT 6 (2004) [hereinafter VINSON REPORT], *available at* http://www.cviog.uga.edu/free-downloads/hope-joint-study-commission-report.pdf (asserting that America's Hope Program, the federal tax credit program passed in 1995, was modeled after Georgia's HOPE Program).

[121] *See id.* at 5.

[122] *See, e.g.*, BORG & BORG, *supra* note 10, at 10-13 (explaining the political appeal of Florida's Bright Futures Scholarship Program).

[123] *See* DONALD E. HELLER, INSTITUTIONAL AND STATE MERIT AID: IMPLICATIONS FOR STUDENTS 3-4 (2008), *available at* http://www.researchgate.net/publication/255635807_Institutional_and_State_Merit_Aid_Implications_for_Students.

[124] LESLEY MCBAIN, STATE NEED-BASED AND MERIT-BASED GRANT AID: STRUCTURAL INTERSECTIONS AND RECENT TRENDS 4 (2011), *available at* http://www.aascu.org/uploadedFiles/AASCU/Content/Root/PolicyAndAdvocacy/PolicyPublications/State%20Need-Based%20and%20Merit-Based%20Grant%20Aid.pdf.

[125] *See* HELLER, *supra* note 123, at 4 (displaying graph plotting increases).

[126] *See id.* at 3.

[127] MCBAIN, *supra* note 124, at 4.

Many researchers have concluded that the rise of merit aid has led to a decreased emphasis on, and funding of, need-based aid. One study of twelve states with merit aid programs found that the amount spent on need-based aid accounted for less than a third of the more than $1 billion dedicated to merit scholarships.[128] Florida provides an apt illustration: in 1997-1998, the first year of its merit-based Bright Futures Scholarship Program, need-based aid accounted for 35% of all state aid awarded.[129] By 2011, that proportion fell to 24%.[130] And while need-based funding grew less than four-fold during the period, Bright Futures funding grew more than six-fold.[131] Other researchers, however, have challenged the idea that increases in merit scholarship funding have universally led to need-based funding decreases, arguing that while this theory may hold true in states where funding of need-based scholarships has traditionally been a priority, the conclusion does not hold in states like Georgia, where large-scale funding of the sort never existed and is politically untenable.[132]

III. THE PROBLEMS

Socioeconomic and racial disparities in the awarding of state merit scholarships are restricting higher education access and choice among low-income students and those of color. Demographic trends, however, including the rise of college-age people of color, require that higher

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[128] Heller, *supra* note 8, at 15 (calculating that the twelve states spent $1.175 billion on merit aid and $349 million on need-based aid in 2003).

[129] Calculations completed by author. *See* FLA. DEP'T OF EDUC., ANNUAL REPORT TO THE COMMISSIONER 1997-1998, at v (1998) [hereinafter ANNUAL REPORT 1998], *available at* http://www.floridastudentfinancialaid.org/SSFAD/pdf/annualreport97-98.pdf.

[130] Calculations completed by author. *See* FLA. DEP'T OF EDUC., 2010-2011 ANNUAL REPORT TO THE COMMISSIONER 1 (2011) [hereinafter ANNUAL REPORT 2011], *available at* http://www.floridastudentfinancialaid.org/SSFAD/pdf/annualreport10-11.pdf.

[131] In 1998, $69,566,969 was awarded through Bright Futures, compared to $423,269,545 in 2011. *Compare* ANNUAL REPORT 1998, *supra* note 129, at v (listing 1998 data), *with* ANNUAL REPORT 2011, *supra* note 130, at 1 (listing 2011 data). In the same period, need-based funding grew from $38,109,539 to $136,498,665. *Compare* ANNUAL REPORT 1998, *supra* note 129, at v (listing 1998 data), *with* ANNUAL REPORT 2011, *supra* note 130, at 1 (listing 2011 data).

[132] *See* Cornwell & Mustard, *supra* note 3, at 87; *see also* WILLIAM R. DOYLE, DOES MERIT BASED AID "CROWD OUT" NEED BASED AID? 21 (2008), *available at* http://link.springer.com/article/10.1007%2Fs11162-010-9166-3 (stating, albeit cautiously, that no "statistically significant impact of merit-based aid on need-based aid" had been found in the study); KANE, *supra* note 98, at 84 (arguing that because students are contributors to the educational process, low-income students benefit from the presence of high-achieving merit aid recipients, thus blunting any negative effects on the availability of need-based aid).

education access and choice be broadened and attainment be increased. It has been estimated that blacks and Hispanics will account for more than 80% of the rise in college-age youth.[133] Equalizing the higher education attainment rates of those groups to those of white students would result in $225 billion in added national wealth each year.[134] A critical component of increasing attainment is leveraging financial aid in effective and efficient ways.

While state merit aid has been found to increase college participation in some states, the bulk of this aid goes to students with the least financial need and those who would have likely attended college anyway.[135] This trend gets to the heart of the programs' inefficiency. Public money is most efficiently used when incentivizing socially beneficial behavior that likely would not have otherwise occurred.[136] So an expenditure that subsidizes college attendance for individuals who would have attended anyway is less efficient than the subsidization of an individual at risk of not attending. In addition, the inequity in distribution has prompted many researchers to conclude convincingly that these programs widen inequities in college access and choice—amounting to further educational, economic, and social stratification and a squandering of human capital.[137] These effects are further exacerbated in states that fund merit scholarships with lottery revenue.[138] The inherently regressive nature of lotteries creates more of an imperative to ensure that scholarship funds are distributed in an equitable manner. Unfortunately, as states tighten merit scholarship eligibility requirements to account for budget shortfalls, poorer students are at even greater risk of being left out of the windfall.

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[133] *See* SMITH, *supra* note 11, at 78 ("The populations that do not prosper in our schools constitute the majority in the American future.").

[134] *See id.* at 82-83 (characterizing the benefits in "human terms" as "incalculable").

[135] *See* Patricia L. Farrell, *Who Are the Students Receiving Merit Scholarships?*, *in* STATE MERIT SCHOLARSHIP PROGRAMS AND RACIAL INEQUALITY 47, 69 (Donald E. Heller & Patricia Marin eds., 2004), *available at* http://civilrightsproject.ucla.edu/research/college-access/financing/state-merit-scholarship-programs-and-racial-inequality/heller-marin-state-merit-scholarship-2004.pdf.

[136] *See* KANE, *supra* note 98, at 19 ("A dollar in federal subsidy that does not lead to a change in behavior leaves the nation no better prepared than before.").

[137] *See* Farrell, *supra* note 135, at 70-71 (asserting that without reevaluation of the merit scholarship program, the lasting effect will be a more stratified education system, economic, and social system).

[138] *See* TENN. HIGHER EDUC. COMM'N, *supra* note 2, at 5 (listing states with lottery-funded merit scholarship programs).

A. Disparities in Awarding

> For the past thirty years, the national agenda in higher education has been defined by goals of "access" and "choice," access labeling the goal of ensuring that no American is denied the opportunity to attend some kind of postsecondary institution by reason of inability to pay and choice labeling the goal of giving students a reasonable menu of alternative colleges from which they can pick the one that best fits their needs.[139]

In spite of this agenda, statistics relating to educational access and choice illustrate a common trend: disparities along social strata and as a result, racial lines. Regarding access, while 77% of high school graduates from the highest income quartile enroll in a four-year college by the age of twenty-six, only 39% of those from the lowest quartile enroll.[140] Among those who enrolled in college, 72% of the wealthiest students graduated by the age of twenty-six, compared to only 40% of the poorest.[141] These trends led to an overall graduation rate (including those who did not enroll in college) of 52% for the wealthiest cohort and a woeful 11% for the poorest.[142] There is no wonder that almost 80% of all college graduates come from the top-half of the income strata, while only 1% comes from the bottom decile.[143]

Economic trends in the United States give these socioeconomic attainment trends a racial element. The median net worth of white households is twenty times greater than the median net worth of black households and eighteen times greater than the median Hispanic household.[144] Given the role that wealth plays in educational attainment,[145]

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[139] MCPHERSON & SCHAPIRO, *supra* note 55, at 2.

[140] *See* WILLIAM G. BOWEN, MATTHEW M. CHINGOS & MICHAEL S. MCPHERSON, CROSSING THE FINISH LINE: COMPLETING COLLEGE AT AMERICA'S PUBLIC UNIVERSITIES 23 (2009) (citation omitted). The overall college enrollment rate was 58%. *See id.* at 21.

[141] *See id.* at 23.

[142] *See id.*

[143] *See* Robert Haverman & Kathryn Wilson, *Access, Matriculation, and Graduation*, *in* ECONOMIC INEQUALITY AND HIGHER EDUCATION: ACCESS, PERSISTENCE, AND SUCCESS 17, 26 (Stacy Dickert-Conlin & Ross Rubenstein eds., 2007).

[144] *See* PAUL TAYLOR ET AL., WEALTH GAPS TO RECORD HIGHS BETWEEN WHITES, BLACKS AND HISPANICS 13 (2011), *available at* http://www.pewsocialtrends.org/files/2011/07/SDT-Wealth-Report_7-26-11_FINAL.pdf. The median for white households in 2009 was $113,149, the median for black households was $5677, and the median for Hispanic households was $6325. *See id.*

[145] *See* Aaron N. Taylor, Reimagining Merit as Achievement 23-25 (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2231516 (providing a comprehensive overview of the effects of wealth in educational achievement and attainment).

these disparities contribute to higher college participation and attainment rates among whites compared to blacks and Hispanics.[146]

Regarding choice, rising tuition rates and the falling value of need-based aid have weakened the ability of "lower-income students . . . to gain access to institutions other than community colleges."[147] As a result, while almost half of the richest students attend a four-year university, only 13.5% of the poorest students do.[148] Thus, like higher education access, choice of institution seems to be diminishing among low-income students.

The tuition and student aid trends contribute to the related phenomenon of "undermatching." Undermatching occurs when a student selects a less selective college than he was qualified to attend.[149] Students attending less selective schools tend to graduate at lower rates, and take longer to do so when compared to "observationally equivalent" students attending more selective schools.[150] This trend reflects the fact that selective, well-endowed schools tend to offer "richer instructional, extracurricular, and other resources" as well as more generous institutional aid.[151] Thus, undermatching can lower a student's chances of graduating.[152] Family income has been found to correlate with undermatching. A study of North Carolina high school seniors found that 59% of students in the bottom income quartile undermatched, compared to 27% of students in the top quartile.[153] Financial considerations influence college choice, and given the risks presented by undermatching, they impact attainment rates too.

The "national agenda" cited earlier now eschews equity and focuses on narrow conceptions of merit. This shift is most apparent in the way state merit scholarships are often awarded. For example, the most generous awards through Florida's Bright Futures require students to have a

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[146] *See* BOWEN ET AL., *supra* note 140, at 29-31. Parental education also contributes to graduation rate disparities, with children who have at least one parent who graduated from college more likely to graduate from college themselves than the children of two parents who did not graduate. *See id.* at 24.

[147] MCPHERSON & SCHAPIRO, *supra* note 55, at 47. "Low-income students are increasingly rare at four-year colleges and universities . . . ." *Id.* at 49.

[148] *See id.* at 45.

[149] *See* BOWEN ET AL., *supra* note 140, at 99-100.

[150] *See id.* at 100.

[151] CAROLINE HOXBY & CHRISTOPHER AVERY, THE MISSING "ONE-OFFS": THE HIDDEN SUPPLY OF HIGH-ACHIEVING, LOW INCOME STUDENTS 2 (2013), *available at* http://www.brookings.edu/~/media/Projects/BPEA/Spring%202013/2013a_hoxby.pdf.

[152] *See* BOWEN ET AL., *supra* note 140, at 100.

[153] Parental education was also correlated, with 64% of students with no college education between their parents undermatching, compared to 41% among students with at least one college educated parent, and 31% among students with at least one graduated school educated parent. *See* BOWEN ET AL., *supra* note 140, at 103.

minimum 3.5 GPA and an ACT score of at least twenty-nine,[154] a ninety-third percentile score.[155] Access to advanced coursework, such as the International Baccalaureate Curriculum, provides advantages and alternative pathways to eligibility on an unequal basis.[156] These are the mechanisms through which socioeconomic gaps in higher education participation are widened. As one group of researchers noted, "the shift of financial aid policy toward merit-based programs . . . has been especially detrimental to students at the bottom of the income distribution."[157]

Many advocates of merit aid have argued that differences in academic preparation are to blame for higher education disparities. This argument is plausible, as socioeconomic and racial differences in academic preparation have been widely documented.[158] Poor teacher quality, high teacher turnover, and decrepit facilities have all been identified as culprits behind the subpar college preparation of many students of color and the poor.[159] One researcher asserted that "differences in college attendance by family income reflect longer-term differences in high- and low-income families' investments in educational attainment."[160] Fundamentally, inadequate academic preparation is a problem endemic to poor students and those of color.[161]

Based on the literature, however, differences in academic preparation are only partly to blame. Many researchers have challenged the idea that lack of academic preparation was the primary cause of socioeconomic college

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[154] OFFICE OF STUDENT FINANCIAL ASSISTANCE, 2014-15 BRIGHT FUTURES STUDENT HANDBOOK, CHAPTER 1: INITIAL ELIGIBILITY REQUIREMENTS 3 [hereinafter BRIGHT FUTURES HANDBOOK], *available at* http://www.floridastudentfinancialaid.org/SSFAD/PDF/BFHandbookChapter1.pdf.

[155] NATIONAL RANKS FOR TEST SCORES AND COMPOSITE SCORE, http://www.actstudent.org/scores/norms1.html (last visited Apr. 3, 2013) [hereinafter NATIONAL RANKS].

[156] BRIGHT FUTURES HANDBOOK, *supra* note 154, at 4-5.

[157] Bridget Terry Long & Erin Riley, *Financial Aid: A Broken Bridge to College Access*, 77 HARV. EDUC. REV. 39, 45 (2007), *available at* http://isites.harvard.edu/fs/docs/icb.topic1233004.files/Long%20Riley%202007%20Financial%20Aid%20-%20A%20Broken%20Bridge%20to%20Access%20-%20HER.pdf.

[158] *See, e.g.*, Michal Kurlaender & Stella M. Flores, *The Racial Transformation of Higher Education*, *in* HIGHER EDUCATION AND THE COLOR LINE: COLLEGE ACCESS, RACIAL EQUITY, AND SOCIAL CHANGE 11, 26 (Gary Orfield, Patricia Marin & Catherin L. Horn eds., 2005) (indicating "the unequal preparation many African American and Latino students receive in their K-12 schooling" in explaining disparities).

[159] *See* Michael Kirst, *Secondary and Postsecondary Linkages*, *in* ECONOMIC INEQUALITY AND HIGHER EDUCATION: ACCESS, PERSISTENCE, AND SUCCESS 44, 47 (Stacy Dickert-Conlin & Ross Rubenstein eds., 2007).

[160] KANE, *supra* note 98, at 98.

[161] *See, e.g.*, Long & Riley, *supra* note 157, at 40-41.

participation and attainment disparities. One researcher concluded that millions of academically prepared, low-income students were being denied educational opportunities due to financial difficulty.[162] Another study concluded, "[l]ow-income high school graduates in the top academic quartile attended college only at the same rate as high-income high school graduates in the bottom quartile of achievement."[163] Focusing on selective colleges only, another study estimated that while there were 2.5 high-achieving/high-income high school seniors to every one high-achieving/low-income senior in the overall population, the proportion balloons to fifteen-to-one within selective college application pools.[164] The implication of these findings is that socioeconomic factors, including ability to pay, remain powerful influencers upon college participation, choice, and therefore attainment, even when academic preparation is not an issue.

The failure of student aid to keep pace with rising education costs has further restricted the access of low-income students to higher education, even at public institutions.[165] The buying power of Pell Grants has diminished to its lowest levels ever, with the maximum grant in 2013-2014 only covering about 63% of average in-state tuition and fees at four-year institutions and only 31% of the average cost of attendance.[166] At private schools, the maximum grant covers only 19% of tuition and fees; just 14% of cost of attendance.[167] Not only does ability to pay, and perceptions thereof, heavily influence enrollment decisions among poor students, poor families are more likely to overreact to tuition increases.[168] This inclination is evidenced by lower proportional enrollment among low-income students,

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[162] *See* Edward P. St. John, *The Impact of Financial Aid Guarantees on Enrollment and Persistence: Evidence from Research on Indiana's Twenty-First Century Scholars and Washington State Achievers Programs*, *in* STATE MERIT SCHOLARSHIP PROGRAMS AND RACIAL INEQUALITY 123, 125 (Donald E. Heller & Patricia Marin eds., 2004), *available at* http://civilrightsproject.ucla.edu/research/college-access/financing/state-merit-scholarship-programs-and-racial-inequality/heller-marin-state-merit-scholarship-2004.pdf.

[163] Long & Riley, *supra* note 157, at 40 (citation omitted).

[164] This study did not argue that lack of student aid led to these disparities; in fact the authors highlight the fact that many of the low-income students could attend a selective school for less than the cost of a non-selective school. *See* HOXBY & AVERY, *supra* note 151, at 6-7.

[165] *See* MCPHERSON & SCHAPIRO, *supra* note 55, at 14.

[166] Twenty years ago, the maximum Pell grant covered 91% of average tuition and fees and 37% of the cost of attendance at public four-year institutions. *See* MAXIMUM PELL GRANT AS PERCENTAGE OF TUITION AND FEES AND TOTAL CHARGES OVER TIME, http://trends.collegeboard.org/student-aid/figures-tables/fed-aid-maximum-pell-grant-percentage-total-charges-over-time (last visited Sept. 5, 2014).

[167] Twenty years ago, the maximum Pell grant covered 21% of average tuition and fees and 15% of the cost of attendance at private four-year institutions. *See id.*

[168] *See* KANE, *supra* note 98, at 10.

even though the value of higher education, in terms of future earnings, outpaces increases in tuition.[169] These trends prompt many researchers to argue rightly that our national imperative should be to increase higher education access and attainment among the people who need it most by reducing costs of attendance.[170] A state merit scholarship program premised on equity, rather than narrow notions of merit, could be a highly effective means of broadening access and choice. The prevailing frameworks, however, restrict pathways in manners that are inequitable and threaten the very viability of the scholarship programs.

B. Viability Issues

In its first year, the Georgia Lottery grossed more than a billion dollars, breaking the national record.[171] This left $360 million for its HOPE Program, a more than adequate amount given the program's limited early scope and expenses.[172] This favorable economic climate prompted Georgia lawmakers to expand eligibility over the next few years, including lifting the income cap from $66,000 to $100,000 in 1994, and doing away with it completely in 1995.[173] In three years, participation in the program had tripled, thanks to expanded eligibility and expanded awareness.[174] After a relative lull in expansion between 1997 and 2000,[175] the program began to grow anew,[176] prompting Georgia lawmakers to respond in 2004 by tightening eligibility criteria, freezing the award for student fees, and setting new fiscal "triggers" for cutting the program's book awards.[177] The re-imposition of an income cap, a seemingly obvious response to the fiscal realities, was discussed but not implemented.[178] The aftermath of the 2004 reforms saw some decreases in the number of recipients; but by 2011, the

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[169] *See id.* at 10-11.

[170] *See* MCPHERSON & SCHAPIRO, *supra* note 55, at 14 ("[T]here is persuasive evidence that reducing the price lower-income students must pay significantly influences their decisions about attending college.").

[171] *See* VINSON REPORT, *supra* note 120, at 4.

[172] In its first year, the number of HOPE participants was 42,807 and the cost was $21.4 million. *See id.*

[173] Other major changes included funding four years of study, rather than the initial two years. *See id.* at 4-5.

[174] The number of participants was more than 123,000 in the 1995-1996 school year. *See id.* at 5.

[175] *See id.* at 7 (estimating yearly growth of 3-6% per year during this period).

[176] *See id.* at 8 ("From FY 2000 to 2001, HOPE expenditures rose from $209 million to $277 million, an increase of nearly one-third in a single year."); *see also id.* (blaming the elimination of the Pell grant offset for much of the increase in expenditures).

[177] *See* Heller, *supra* note 8, at 17.

[178] *See id.*

recipients had increased another fifteen percent to a record high of 256,380.[179] That year, expenditures reached a record high as well at $747 million.[180] And all the while, lottery deposits had plateaued,[181] and tuition at the state's public universities increased significantly, more than doubling at the University of Georgia between 2005 and 2011.[182]

In response to this explosive growth, HOPE underwent another major round of reforms in 2011. The minimum GPA to receive a HOPE scholarship or grant was raised from 2.0 to 3.0, as was the minimum GPA to maintain it.[183] In addition, the HOPE Scholarship no longer covered full tuition at public institutions, but rather was capped at 90%.[184] Full-scholarship awards were reserved for recipients of the newly created Zell Miller Scholar Program, which requires a minimum GPA of 3.7[185] and either an SAT score around the eightieth percentile[186] or an ACT score in the eighty-third percentile.[187] Book and fee allowances also were eliminated, and remedial courses were no longer covered by program funds.[188]

Since the implementation of the 2011 reforms, the number of HOPE recipients has declined more than 30%, and the total dollar amount of the awards has declined almost 46%.[189] There is no doubt that reforms were

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[179] STUDENTS EARNING GEORGIA'S HOPE SCHOLARSHIPS AND GRANTS, http://www.gsfc.org/gsfcnew/SandG_facts.cfm?sec=3 (last visited Oct. 6, 2014) [hereinafter GEORGIA'S HOPE SCHOLARSHIPS AND GRANTS].

[180] *See id.*

[181] GA. STUDENT FIN. COMM'N, AN OVERVIEW OF LOTTERY REVENUES, EXPENDITURES, AND HOPE 63 (2010) [hereinafter LOTTERY REVENUES 2010], http://www.gsfc.org/main/publishing/pdf/common/presentation_draft_for_aug2v2.pdf (showing a flat trend line from 2008 onward).

[182] *See id.* at 56 (increasing from $1684 in 2005, to $3535 in 2011).

[183] *See* GA. STUDENT FIN. COMM'N, STATE PROGRAM UPDATES SUMMARY (2013) [hereinafter PROGRAM UPDATES], *available at* http://www.gsfc.org/MAIN/publishing/pdf/2011/state_programs_updates_summary.pdf (stating the requirements for HOPE scholarship recipients graduating from high school in 2011 or later).

[184] HOW HOPE CHANGES WILL AFFECT USG STUDENTS, http://www.usg.edu/student_affairs/students/how_hope_changes_will_affect_usg_students (last visited Oct. 6, 2014) [hereinafter HOPE CHANGES].

[185] *See* PROGRAM UPDATES, *supra* note 183; *see also* HOPE CHANGES, *supra* note 184.

[186] Eightieth percentile is a rough estimate. The way the SAT is scored makes it difficult to identify a percentile rank for scores combined across two or more sections. *See* THE COLLEGE BOARD, SAT PERCENTILE RANKS (2012), http://media.collegeboard.com/digitalServices/pdf/research/SAT-Percentile-Ranks-2012.pdf.

[187] *See* NATIONAL RANKS, *supra* note 155.

[188] *See* PROGRAM UPDATES, *supra* note 183.

[189] In 2010-2011, 256,380 recipients received a total of $747.6 million. *See* GEORGIA'S HOPE SCHOLARSHIPS AND GRANTS, *supra* note 179. In 2013-2014, those numbers declined to 198,299 and $532.9 million respectively. *See id.*

needed to shore up projected budget shortfalls.[190] However, low-income students bore the brunt of this sacrifice.[191] Today, the Georgia Lottery is experiencing modest growth,[192] and optimistically, there is talk of easing some of the most deleterious 2011 reforms,[193] albeit not enough. The latest round of reforms have been successful at easing some of the immediate threats to HOPE's fiscal viability, but given that the pain of the reforms is being felt disproportionately by the poor, the program has been rendered less equitable and less efficient.

Florida's Bright Futures Scholarship Program[194] is facing similar viability issues. Created in 1997 as "the umbrella program for all state-funded scholarships based on academic achievement in high school,"[195] there have always been concerns about the program's fiscal viability.[196] Unlike Georgia, Florida's lottery had existed more than a decade before the establishment of its lottery scholarship,[197] and there were already signs that

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[190] *See* LOTTERY REVENUES 2010, *supra* note 181, at 68 (projecting 2012 expenditures as $1.2 billion but deposits as less than $884 million).

[191] For example, enrollment in technical schools fell much more dramatically than in the university system. *See* Dave Williams, *Bill Easing HOPE Grant Standard Clears Georgia House*, ATLANTA BUSINESS CHRONICLE (Mar. 7, 2013, 12:57 PM), http://www.bizjournals.com/atlanta/news/2013/03/07/bill-easing-hope-grant-standard-clears.html.

[192] *See* Maggie Lee, *Gov. Deal to Propose HOPE Changes*, TELEGRAPH (Jan. 16, 2013), http://www.macon.com/2013/01/16/2319047/gov-deal-to-propose-hope-changes.html ("In the third quarter of calendar year 2012, the lottery transferred about $221 million to pre-K, college and university programs, some $16 million more than the same time in 2011."); *see also* GA. STUDENT FIN. COMM'N, PROJECTED LOTTERY REVENUES THROUGH FY 2016 AND EFFECTS ON HOPE SCHOLARSHIP AWARD LEVELS 16 (2012) [hereinafter PROJECTED LOTTERY REVENUES], *available at* http://www.gsfc.org/MAIN/publishing/pdf/2012/020312_HOPE_presentation.pdf (projecting an increase in lottery deposits of almost $7 million, about 1%, between 2012 and 2013).

[193] *See* DEAL BACKS EFFORT TO EXPAND ACCESS TO TECH SCHOOLS, http://gov.georgia.gov/press-releases/2013-02-07/deal-backs-effort-expand-access-tech-schools (last visited Oct. 6, 2014).

[194] Bright Futures is comprised of three separate merit-based aid programs: the Florida Academic Scholars Award, the Florida Medallion Scholars Award, and the Florida Gold Seal Vocational Scholars Award. *See* ANNUAL REPORT 2011, *supra* note 130, at 24.

[195] FLA. POSTSECONDARY EDUC. PLANNING COMM'N, FLORIDA'S BRIGHT FUTURES SCHOLARSHIP PROGRAM: A BASELINE EVALUATION 5 (1999) [hereinafter BRIGHT FUTURES EVALUATION], *available at* http://www.cepri.state.fl.us/pdf/bffin.pdf.

[196] *See id.* at 6 ("[T]he program's cost might eventually become prohibitive.").

[197] Florida voters approved a constitutional amendment authorizing a lottery in 1986, eleven years before the creation of Bright Futures. *See* OFFICE OF PROGRAM POLICY ANALYSIS AND GOV'T ACCOUNTABILITY, JUSTIFICATION REVIEW: SALE OF LOTTERY PRODUCTS PROGRAM, at i (2002), *available at* http://www.oppaga.state.fl.us/reports/pdf/0211rpt.pdf.

lottery revenue had plateaued.[198] In 1998, the first year Bright Futures awards were made, 42,319 students received $69,566,969 in scholarship funds.[199] By 2009, the number of recipients had increased almost five-fold to 202,469, and the amount awarded had ballooned six-fold to $429,012,109.[200] During this period, Bright Futures' share of deposits to the lottery trust fund more than tripled, from nine percent to twenty-nine percent.[201] This unsustainable growth prompted Florida lawmakers to enact a series of reforms over the next few years. In 2009, Bright Futures tuition payouts were tied to an amount set by the Legislature, thereby decoupling payouts from tuition increases.[202] In 2010, phased-in increases in the minimum ACT and SAT scores were enacted, and the window of time in which a high school graduate could apply for Bright Futures funding was decreased from seven years to five years.[203] In 2011, ACT and SAT minimums were increased again.[204] In 2012, the application window was restricted again, with high school graduates now required to accept their first Bright Futures award within two years (down from three) of graduating or lose all future eligibility.[205]

Like Georgia's HOPE, Bright Futures was in need of reform. But once again, the painful aspects of reform will fall disproportionately on low-income students. Increases in minimum test scores (as much as thirty-four percentiles on the ACT)[206] will prevent a disproportionate number of low-income students from qualifying for the program's most lucrative scholarships. Restricting the application window will disproportionately disadvantage low-income students, who often enroll in college later as non-

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[198] *See* BRIGHT FUTURES EVALUATION, *supra* note 195, at 6 (explaining that lottery revenues had been stagnant for years and were projected to remain stagnant).

[199] FLA. DEP'T OF EDUC., ANNUAL REPORT TO THE COMMISSIONER 2009-10, at 33 (2010), *available at* http://www.floridastudentfinancialaid.org/SSFAD/pdf/annualreport09-10.pdf (providing an itemization of recipient and disbursement data from 1997-2010).

[200] *See id.*

[201] Calculations completed by author. *See* FLA. DEP'T OF EDUC., 2013-14 EDUCATION APPROPRIATIONS 12 (2014), *available at* http://www.fldoe.org/fefp/pdf/Lotbook.pdf.

[202] *See* Knapp, *supra* note 6, at 10; *see also* OFFICE OF STUDENT FIN. ASSISTANCE, FLORIDA LEGISLATIVE UPDATES AND HISTORY OF FINANCIAL AID CHANGES (2014), *available at* http://www.floridastudentfinancialaid.org/SSFAD/home/latestInfo.pdf (providing list of reforms from 2007-2014).

[203] *See* Knapp, *supra* note 6, at 10.

[204] *See id.* at 9.

[205] *See id.* at 6.

[206] The ACT minimum score for the Florida Medallion Scholars award will increase from twenty (forty-ninth percentile) in 2012 to twenty-six (eighty-third percentile) in 2014. *See* BRIGHT FUTURES INITIAL ELIGIBILITY, http://www.floridastudentfinancialaid.org/ssfad/PDF/BFEligibilityAwardChart.pdf (last visited Oct. 7, 2014); *see also* NATIONAL RANKS, *supra* note 155 (providing ACT score percentiles).

traditional students and take longer to finish.[207] And while decoupling Bright Futures payouts from tuition was a logical response to runaway tuition increases,[208] this reform saddles students with increases above the stipulated rate, and low-income students, who are more price sensitive and more likely to overreact to price increases, will experience the most hardship. Once again, an income cap was not among the latest reforms (and never has been a part of Bright Futures); but with recent data showing that thirty-two percent of Bright Futures recipients come from families with incomes of $100,001 and above, a cap could have been the most consequential reform of all.[209]

Other states with lottery scholarships have had to wrestle with many of the same issues as Georgia and Florida. In Tennessee, a cost-saving 2011 reform, which cut the number of credit-hours covered by its HOPE Scholarship, will cause 3000 students to unexpectedly lose scholarships for which they were eligible when they initially enrolled in college.[210] New Mexico's lottery scholarship is also facing a projected 2014 shortfall of $5 million.[211] Furthermore, Arkansas lawmakers recently cut the maximum four-year college awards through its lottery scholarship from $18,000 to $14,000.[212] This is the second cut to Arkansas's lottery scholarship since its enactment in 2010.[213]

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[207] *See* BOWEN ET AL., *supra* note 140, at 71 (presenting data showing a positive relationship between family income and time-to-degree).

[208] Research has shown that institutions respond to increases in aid eligibility with tuition and/or fee increases. *See* Michael J. Rizzo, *State Preferences for Higher Education Spending: A Panel Data Analysis, 1977-2001*, *in* WHAT'S HAPPENING TO PUBLIC HIGHER EDUCATION? 3, 7 (Ronald G. Ehrenberg ed., 2006).

[209] A plurality of Bright Futures awardees, forty percent, came from families with income of $50,000 or less. *See* FLA. DEP'T OF EDUC., 2013-14 EDUCATION APPROPRIATIONS 6 (2014), *available at* http://www.fldoe.org/fefp/pdf/Lotbook.pdf. A more useful statistic would be the percentage of actual funding going to students in each income bracket. It is likely that the most lucrative awards disproportionately go to the wealthiest students.

[210] *See* Associated Press, *HOPE Scholarship Funding Running Out for Some*, THE DAILY HERALD (Jan. 8, 2013, 7:55 PM), http://columbiadailyherald.com/sections/news/state/hope-scholarship-funding-running-out-some.html.

[211] *See* STATE OF NEW MEXICO, REPORT OF THE LEGISLATIVE FIN. COMM. TO THE FIFTY FIRST LEGISLATURE: FIRST SESSION 27 (2013), *available at* http://www.nmlegis.gov/lcs/lfc/lfcdocs%5Cbudget%5C2014RecommendVolI.pdf.

[212] *See* Steve Brawner, *Commentary: Graduation Rates Increasingly Important in Funding*, TIMES RECORD ONLINE EDITION (Mar. 1, 2013, 5:05 AM), http://swtimes.com/sections/opinion/steve-brawner/commentary-graduation-rates-increasingly-important-funding.html. Two-year college awards were cut from a maximum of $4500 to $4000. *See id.*

[213] *See* Luke Jones, *Cuts in Lottery Scholarships Challenge Arkansas Colleges*, ARKANSAS BUSINESS (June 3, 2013, 12:00 AM), http://www.arkansasbusiness.com/article/92774/cuts-in-lottery-scholarships-challenge-arkansas-colleges?page=all.

IV. POLICY PROPOSALS

The following are two policy proposals that would be effective at targeting state merit scholarship funds in the most efficient and equitable ways:

- Implement a need-based scholarship program with an early engagement component.
- Use a "merit-aware" index to award state merit-based scholarships.

The overarching goals of each proposal are to use available public funds, including lottery funds, to help close disparities in higher education participation and attainment, while ensuring the fiscal viability of the programs. The first proposal is need-based; the second is merit-based. Each proposal is intended to be an alternative to the other (and all others). However, components of either could conceivably be incorporated into the other. The proposals are offered as general frameworks; as such, not every detail is presented.

A. Need-Based Scholarship Program with Early Engagement Component

This proposal is modeled after Indiana's Twenty-first Century Scholars Program ("Twenty-first Century"), the state's need-based aid program, which was founded in 1990 with a goal of raising "the educational aspirations and attainment of low and moderate income Hoosier families."[214] Twenty-first Century is only open to students who qualify for free or reduced lunch, and like its merit-based counterparts, Twenty-first Century seeks to maximize human capital.[215] Indiana's focus, however, is less on rewarding narrow notions of merit and more on incentivizing socially beneficial behavior that may not have otherwise occurred. Implicit in Twenty-first Century are two keen acknowledgements: 1) that public funds are most beneficial when used to broaden opportunity, not solidify existing inequities, and 2) early guarantees of financial aid increase college participation and attainment among low-income students.[216]

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[214] IND. COMM'N FOR HIGHER EDUC., INDIANA'S TWENTY-FIRST CENTURY SCHOLARS PROGRAM: YEARS OF IMPACT 1 (2012) [hereinafter YEARS OF IMPACT], *available at* http://www.in.gov/che/files/21st_Century_Scholar_Report.pdf.

[215] The program has six principle objectives: 1) reduce the number of high school dropouts; 2) "[i]ncrease the number of students prepared to enter the workforce[;]" 3) increase college participation; 4) reduce the financial burden of college; 5) "[d]ecrease drug and alcohol abuse[;]" and 6) "[i]mprove the overall quality of life for many Indiana residents[.]" *Id.*

[216] In terms of participation, Twenty-first Century Scholars are more likely to graduate

1. Structure

The proposed program would pay up to 150 credit-hours towards an academic (undergraduate or graduate), vocational, or technical program at a public college or university in the state.[217] Recipients would be free to use their eligibility in any way they wish, whether to pursue one degree or to earn multiple degrees.[218] Continued eligibility would require remaining in good academic standing at their higher education institutions. The program would be aimed at students from low- and moderate-income families, with an income cap set at no higher than the median level for the state.

For initial eligibility, the only academic criteria would be adherence to a curriculum of core courses and a cumulative high school GPA at the minimum passing level.[219] But in order to incentivize socially beneficial behavior, all participants would be required to sign a pledge of good citizenship. The pledge, made in middle school, would require participants to remain crime- and drug-free and, when appropriate, submit timely applications for college admission and federal financial aid.[220]

The program would also feature a college planning and engagement component. This component would be premised on the goal of educating the family about the child's potential higher education options and the necessary steps to pursuing those options. Lack of information about the admissions and financial aid processes contribute to socioeconomic

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high school, more likely to earn a college prep (Core 40) diploma, and more likely to enroll in college. In terms of attainment, Scholars lag behind all students in college completion, but exceed completion rates among other low-income college students. And when broken down by race, black and Hispanic Scholars exceed their peers (low-income and not) in college completion. *See also* Edward P. St. John & Choong-Guen Chung, *Merit and Equity: Rethinking Award Criteria in the Michigan Merit Scholarship Program*, *in* PUBLIC FUNDING OF HIGHER EDUCATION: CHANGING CONTEXTS AND NEW RATIONALES 124, 129 (Edward P. St. John & Michael D. Parsons eds., 2005) (explaining the success of Twenty-first Century using a specific framework called the Balanced Access Model).

[217] Recipients could use their tuition benefits at private, non-profit and for-profit schools, with the amount set at the median cost of a similar program at a public school.

[218] Budgetary practicality might require a maximum timeframe in which to use the eligibility, maybe three years after high school graduation to take the first award and seven years to exhaust eligibility.

[219] Mandatory curricula are a common component of state merit scholarship programs. *See generally* BRIGHT FUTURES HANDBOOK, *supra* note 154. *But see* YEARS OF IMPACT, *supra* note 214, at 2 (explaining that Indiana does not require, but encourages, Twenty-first Century participants to adhere to the state's Core 40 curriculum).

[220] Indiana requires that students apply to college and for financial aid during their senior year in high school. There is merit to this approach. *See* YEARS OF IMPACT, *supra* note 214, at 1.

disparities in higher education participation and attainment rates.[221] Through the program, participants would be provided with information and support in navigating these processes, as well as information tying higher education to the job market. In its best form, this assistance would be akin to the student having her own admissions counselor, a benefit a low-income student is rarely afforded.[222]

2. Potential criticisms

This proposal is not without potential criticisms. An argument could be made that states would lose human capital because strong students may be induced to attend college out of state because of better scholarship offers. However, a strong argument could be made that the benefits of increasing higher education participation and attainment would outweigh the burdens of losing some of the perceived "best and brightest."[223] At least one study has concluded that the benefits of keeping these students in-state are "much too small to justify using economic development as a rationale for merit-based student aid programs."[224] Relatedly, there seems to be some question of the effectiveness of merit scholarships in keeping these students in-state anyway. In Florida, a bill was recently introduced, and later withdrawn, that would have required recipients of Bright Futures funds to reimburse the state if they left.[225] The bill was motivated by a desire to cut program costs and assumedly was rooted in some angst regarding the effectiveness and efficiency of the program's incentives.[226]

One of the strongest arguments in favor of merit aid is that strong students add quality to the academic experience and therefore confer

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[221] *See* KANE, *supra* note 98, at 12 ("[D]ifferential access to information about applying to college and about the rigors of college life is likely to lead some students to underinvest in their education."); *see also* Christopher Avery & Thomas J. Kane, *Student Perceptions of College Opportunities: The Boston COACH Program*, *in* COLLEGE CHOICES: THE ECONOMICS OF WHERE TO GO, WHEN TO GO, AND HOW TO PAY FOR IT 355, 378 (Caroline M. Hoxby ed., 2004), *available at* http://www.hks.harvard.edu/fs/cavery/Student%20Perceptions%20of%20College%20Opportunities.pdf (proposing interventions, principally tied to providing information and support, to close socioeconomic college enrollment gaps).

[222] *See* STRIVE FOR COLLEGE HELPS LOW-INCOME STUDENTS NAVIGATE COLLEGE ADMISSIONS, https://www.db.com/usa/content/en/2563.html (last visited Oct. 7, 2014).

[223] This argument would be rooted in the view that public funds are used most efficiently when incentivizing socially beneficial behavior that otherwise would not have happened. *See* KANE, *supra* note 98, at 19.

[224] Rizzo, *supra* note 208, at 8 (citing the study).

[225] *See* H.R. 35, 2013 Leg. Reg. Sess. (Fla. 2013), *available at* http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=_h0035__.docx&DocumentType=Bill&BillNumber=0035&Session=2013.

[226] *See id.*

benefits upon their peers.[227] Therefore, a cogent argument could be made that basing state aid on need rather than merit would diminish the quality of the academic experience. But to the extent that this argument is valid, it still seems that the potential costs associated with losing some strong students are outweighed by the benefits of broadening access.

A practical shortcoming of the proposal would be political. Need-based aid is not as popular among voters as merit aid. Wealthier residents tend to vote and donate to political campaigns in higher proportions than poorer residents.[228] In short, they are able to influence the political process in ways that benefit their interests and in ways that poorer residents cannot. Therefore, in order to gain popular support for need-based aid, economic arguments would have to take precedence over those relating to ideals such as fairness.

B. Use a "Merit-Aware" Index to Award State Merit-Based Scholarships

This proposal is modeled after an admissions program developed by William Goggin[229] and is based on three premises:

- State merit scholarship programs should not be used to effectively punish children for being stuck in low-performing schools.[230]
- "[I]ndicators of merit become indicators of achievement only when context is considered."[231]

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[227] *See* KANE, *supra* note 98, at 84.

[228] *See, e.g.*, U.S. CENSUS BUREAU, CENSUS BUREAU REPORTS HISPANIC VOTER TURNOUT REACHES RECORD HIGH FOR CONGRESSIONAL ELECTION (2011), *available at* http://www.census.gov/newsroom/releases/archives/voting/cb11-164.html ("People living in families who earned $100,000 or more were more than twice as likely to vote as those who lived with families earning less than $20,000 . . . ."); *see also, e.g.*, HENRY E. BRADY, WHY DO RICH PEOPLE MAKE POLITICAL CONTRIBUTIONS?: SOME SURPRISING RESULTS FROM A FORMAL MODEL 22 (2004), *available at* http://www.russellsage.org/sites/all/files/u4/Brady_Why%20Do%20Rich%20People%20Make%20Political%20Contributions.pdfweb.archive.org/web/20101230224909/ (demonstrating that campaign contributions trend upward as income increases).

[229] *See* William J. Goggin, *A "Merit-Aware" Model for College Admissions and Affirmative Action*, 83 POSTSECONDARY EDUC. OPPORTUNITY 1, 3 (1999), *available at* http://www.postsecondary.org/last12/83599Goggin.pdf.

[230] *See* St. John & Chung, *supra* note 216, at 126 (criticizing Michigan's Merit Scholarship Program for holding "low-income . . . students accountable for attending low-quality schools rather than holding schools accountable and encouraging schools to improve").

[231] Taylor, *supra* note 145, at 53.

- "[T]he extent to which a student's achievement has exceeded what could reasonably have been expected given his or her academic background" is a reliable measure of chances of college success.[232]

1. Structure

A merit-aware index considers an applicant's admissions indicators in light of the applicant's background. The goal of this approach is to measure an applicant's level of actual achievement.[233] For example, a simple merit-aware index could determine achievement by subtracting the average ACT score at an applicant's high school from the applicant's own score:

- If Applicant A scores a twenty-four on the SAT and the average at his high school is seventeen, he would have an index score of seven.
- If Applicant B scores a twenty-six on the SAT and the average at her high school is twenty-three, she would have an index score of three.
- If Applicant C scores a twenty-seven on the SAT and the average at her high school is twenty-five, she would have an index score of two.

Of the three applicants, Applicant A has the highest index score (seven) and, therefore, would have the best chance of receiving a merit scholarship, even though he has the lowest ACT score. Given her low index score (two), Applicant C would have the worst chance of receiving a scholarship, even though she has the highest ACT score. In the context of admissions, a simple merit-aware index has been shown to predict persistence as well as admissions tests.[234] Indexes could incorporate other criteria such as score percentiles, GPA, class rank, and even socioeconomic factors.[235]

A merit-aware index represents a practical approach to addressing the problems of inequities in the awarding of state merit scholarships. A threshold benefit would be that it would help reduce the extent to which ability to pay influences college participation and choice. And pursuant to the common motivations behind merit scholarships, a merit-aware index would incentivize academic achievement, possibly to an even greater extent given the relative nature that achievement would be measured. The index

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[232] Goggin, *supra* note 229, at 4.

[233] *See* Taylor, *supra* note 145, at 60.

[234] *See* Edward P. St. John, Ada B. Simmons & Glenda Droogsma Musoba, *Merit-Aware Admissions in Public Universities*, THE NEA HIGHER EDUC. J. 35, 39 (2001), *available at* http://www.nea.org/assets/img/PubThoughtAndAction/TAA_01Win_05.pdf; *see also* St. John & Chung, *supra* note 216, at 131 (concluding that a merit-aware selection process would increase racial and ethnic diversity among state-funded merit scholarship recipients).

[235] *See, e.g.*, Taylor, *supra* note 145, at 54 (presenting an index-based Achievement Framework).

would still incentivize the "best and brightest" students to remain in-state, though the definition of best and brightest would be broadened. But, most importantly, children would no longer be punished for attending subpar schools—a decision over which they have no control.

The index could also enhance the quality of students within public high schools. It is possible that many parents would decide to enroll their children in "weaker" public schools rather than "stronger" private schools, in order to increase the chances of their children qualifying for a scholarship.[236] Such behavior could benefit these schools, as the integration of strong students among weaker ones benefits the weaker students more than it hurts the stronger ones.[237] Lastly, the index would also allow for relatively fast (e.g. yearly) assessment and tweaking. In its most effective form, the index would allow legislatures to adjust scholarship eligibility criteria based on available funds and ensure that the pool of eligible students represents the aims of the program.

2. Potential criticisms

The index would require policymakers to reframe popularly-held conceptions of merit. State policymakers would have to convincingly promote a less common perception of merit—one that places standardized test scores, GPAs, and other factors in environmental contexts, rather than in a so-called objective "vacuum." The index could also increase pressure on students to out-perform each other. This pressure would reflect the fact that students are competing against each other rather than pre-set criteria. The process of tweaking the index would invariably become a political exercise, increasing the chances that the program could pursue perverse

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[236] A recent study concluded that Texas's Top 10% Plan prompted families to move into neighborhoods with lower-performing schools in order to improve their children's chances of gaining admission into the state's flagship universities. *See* KALENA E. CORTES & ANDREW I. FRIEDSON, RANKING UP BY MOVING OUT: THE EFFECT OF THE TEXAS TOP 10% PLAN ON PROPERTY VALUES 4 (2012), *available at* http://users.nber.org/~cortesk/KCortes%20AFriedson%20PV%20and%20Top10.pdf. Through the plan, students in the top ten percent of their high school graduating classes gain automatic admission into any of the state's public colleges and universities. *See* Fisher v. Univ. of Tex. at Austin, 645 F. Supp. 2d. 587, 592 (W.D. Tex. 2009), *vacated*, 133 S. Ct. 2411 (2013). The plan's accounting of the school context renders it "merit-aware" in its philosophical approach. *See* Taylor, *supra* note 145, at 60.

[237] *See, e.g.*, MCPHERSON & SCHAPIRO, *supra* note 55, at 113 (discussing research that concludes "mixing weak and strong students raises the overall performance of the student population as the gains of the weak students exceed the losses of the strong students"); *see also* CORTES & FRIEDSON, *supra* note 236, at 20 (concluding that family relocations prompted by the Texas Top 10% plan led to greater proportional increases in property value among homes in the bottom quintile).

interests. In addition, while the elements of a simple index could be easily grasped and calculated by parents, students, and other stakeholders, a more complicated index would be potentially less transparent.

V. CONCLUSION

The history of student aid has seen a constant battle between the ideals that prompted Ann Radcliffe to make her first gift to Harvard and the realities that have prompted institutions and governments to focus their priorities on less equitable aims. Today, the student aid trend is heavily tilted to merit aid. This approach, however, leads to socioeconomic and racial disparities in higher education participation and attainment. If the U.S. is to maintain and increase its world standing,[238] it must integrate disadvantaged populations into higher education. In advocating for this integration, advocates of need-based aid must cloak their arguments in efficiency and market-based realism in order to counter the compelling, though shortsighted, arguments in favor of merit aid.

State merit scholarships increase inequity in college access and choice—amounting to further educational, economic, and social stratification and a squandering of human capital. These trends are exacerbated when the source of the funds is lottery revenue, which is inherently regressive. The proposals presented in this Article would help alleviate these deleterious trends, while also helping cure the persistent fiscal vulnerabilities besetting the programs.

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[238] THE WHITE HOUSE: PRESIDENT BARACK OBAMA, HIGHER EDUCATION, http://www.whitehouse.gov/issues/education/higher-education ("The President has also set a new goal . . . that by 2020, America would once again have the highest proportion of college graduates in the world.").

Governing the Single-Family House: A (Brief) Legal History

Priya S. Gupta*

This Article investigates connections between the extensive New Deal law and regulation that led to the proliferation of single-family detached houses and the continuing racial disparities in housing security and ownership in the United States. Too often, the pervasiveness of the single-family house as the ideal form of ownership and racial inequalities in accessing it have been treated as merely results of free market forces or social preferences. This Article complicates that narrative by bringing to the forefront the extensive federal and local governance that profoundly shaped the U.S. housing market and social preferences as well as the physical landscape of residences in America.

Drawing on the work of urban historians, architects, and geographers as its foundation, this analysis studies the physical landscape of the single-family house (its form, intended occupants, and location) against the myriad of case law, zoning ordinances, and federal regulation that built it across America. This historical account of government intervention and ideology enables us to understand the current crises in housing, from municipal bankruptcies to the disparate racial impacts of the Foreclosure Crisis, in the much larger context of the creation of suburbia and single-family houses at the expense of cities and racial minorities in them. Against this historical backdrop, these current crises appear not as distinct phenomena, but rather as closely intertwined events. Their disparate racial impacts also appear less accidental or

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unexpected. This Article argues that these phenomena—depleted cities, the Foreclosure Crisis, and racial disparities in housing—are not the "natural" results of a free market. They are the inevitable results of a century's worth of deliberate policy choices, all of them aimed at inscribing a particular societal structure—the white nuclear family—into the physical landscape of American housing.

I. INTRODUCTION

If the American Dream were to have a shape, an identity, and an address, it would look like a single-family house. Over time, this house may have changed—it has gotten larger and more creative and its inhabitants and locations have become more diverse—but a tangible core of it remains the quintessential feature of the Dream.

As the title of this Article suggests, this is a legal history of a material construction, one whose pull on the popular imagination and background of common-sense desires has more often than not gone unquestioned. Like the concept of home ownership itself, the single-family house is bundled

into collective desires, and ultimately market behavior and public policy. How did a narrowly defined material construct—the detached, housing unit, with a bit of grass occupied by a nuclear family and combined with a narrow form of ownership (the fee simple)—become central to the more amorphous desire called "the American Dream"? Part of this story is about the construction of this form of housing in American suburbs—its particular architectural forms and its locations. Another part of the story is the role of Property law, regulation, and government resources in that construction. But, really, the story told here is about how the normative foundations of racial exclusion and the prevalence of free market rhetoric supported and legitimized the construction of that house and the promulgation of those laws. In short, this Article foregrounds connections between law and the physical landscape of housing in the United States in order to understand ongoing racial housing inequality today. These socio- and spatio-legal foundations of the single-family house are critical to understanding how:

- In July 2013, Detroit, once home to 1.8 million people and a booming auto industry, entered into bankruptcy—a process which added even more strain on its depleted population of just over 700,000.[1] Meanwhile, twenty miles away in a suburb called Bloomfield Hills where the population is 87% white,[2] the median household income is more than $125,000[3] and the median home value is over $570,000.[4]

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[1] According to 2010 Census figures, Detroit's population is 713,777. Kate Linebaugh, *Detroit's Population Crashes*, WALL ST. J., (Mar. 23, 2011, 12:01 AM), http://online.wsj.com/article/SB10001424052748704461304576216850733151470.html ("Detroit's population has fallen steadily since the heyday of the auto industry in the 1950s, when it peaked around two million, but the declines have accelerated in recent years as manufacturing jobs have disappeared and the mortgage crisis has devastated even stable, middle-class neighborhoods."); *see also* Joseph E. Stiglitz, *The Wrong Lesson From Detroit's Bankruptcy*, N.Y. TIMES (Aug. 11, 2013, 11:44 PM), http://opinionator.blogs.nytimes.com/2013/08/11/the-wrong-lesson-from-detroits-bankruptcy/.

[2] U.S. Census Bureau, *Race and Hispanic or Latino Origin: 2010*, http://factfinder2.census.gov/faces/nav/jsf/pages/community_facts.xhtml (click on "Race and Hispanic or Latino Origin" link) (last visited Sept. 27, 2014).

[3] U.S. Census Bureau, *Selected Economic Characteristics: 2008-2012 American Community Survey 5-Year Estimates*, http://factfinder2.census.gov/faces/nav/jsf/pages/community_facts.xhtml (type in "Bloomfield Hills, Michigan" in search bar; then click "Income" on left menu; then click "Selected Economic Characteristics (Employment, Commute, Occupation, Income, Poverty, . . .") link) (last visited Sept. 27, 2014). The mean income is over $210,000. *Id.*

[4] U.S. Census Bureau, *Selected Housing Characteristics: 2008-2012 American Community Survey 5-Year Estimates*, http://factfinder2.census.gov/faces/nav/jsf/pages/

- In large part because of financial losses related to housing during the Foreclosure Crisis, "from 2005 to 2009, inflation-adjusted median wealth fell by 66% among Hispanic households and 53% among black households, compared with just 16% among white households."[5] As a result of these declines, the typical black household had just $5,677 in wealth (assets minus debts) in 2009, the typical Hispanic household had $6,325, and the typical white household had $113,149.[6]

- And, despite the changes in lending policies in the 1990s meant to increase lending towards racial minorities, vast racial inequality in housing ownership persists. In homeownership alone, Blacks and Hispanics have a rate almost 30% below that of Whites.[7]

How did the city once described as the "Paris of the West"[8] end up here, and in such sharp contrast to its suburbs? Why did racial minorities bear

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community_facts.xhtml (type in "Bloomfield Hills, Michigan" in search bar; then click "Housing" on left menu; then click "Selected Housing Characteristics (Occupied or Vacant, Year Built, Rooms, Own or Rent, Home Value, . . .") link) (last visited Sept. 27, 2014).

[5] RAKESH KOCHHAR, RICHARD FRY & PAUL TAYLOR, TWENTY-TO-ONE: WEALTH GAPS RISE TO RECORD HIGHS BETWEEN WHITES, BLACKS, HISPANICS, PEWRESEARCHCENTER (July 26, 2011), *available at* http://www.pewsocialtrends.org/files/2011/07/SDT-Wealth-Report_7-26-11_FINAL.pdf ("White and black homeowners also saw the median value of their home equity decline during this period .... Among white homeowners, the decline was from $115,364 in 2005 to $95,000 in 2009. Among black homeowners, it was from $76,910 in 2005 to $59,000 in 2009.").

[6] *Id.*; *see also* THOMAS SHAPIRO, TATJANA MESCHEDE & SAM OSORO, *THE ROOTS OF THE WIDENING RACIAL WEALTH GAP: EXPLAINING THE BLACK-WHITE ECONOMIC DIVIDE* (Feb. 2013), *available at* http://iasp.brandeis.edu/pdfs/Author/shapiro-thomas-m/racialwealthgapbrief.pdf (stating that, after looking at the same set of families that Pew did, over 25 years, "the total wealth gap between white and African-American families nearly triples, increasing from $85,000 in 1984 to $236,500 in 2009" and exploring how segregation has led to wealth gaps in homeownership). Additionally, racial disparities are increasing. "[T]he white-to-black and white-to-Hispanic wealth ratios were much higher in 2009 [19:1 and 15:1] than they had been at any time since 1984 [12:1 and 8:1], the first year for which the Census Bureau published wealth estimates by race and ethnicity based on SIPP data." KOCHHAR ET AL., *supra* note 5.

[7] With regard to homeownership, at the end of the Fourth Quarter of 2013, homeownership for Non-Hispanic Whites was 73.4% (down from a high of 76% in 2004); for Blacks, 43.2% (down from a high of 49% in 2004); for Hispanics, 45.5% (down from a high of nearly 50% in 2007). News Release, U.S. Census Bureau, Residential Vacancies and Homeownership in the Fourth Quarter 2013 (Jan. 31, 2014, 10:00 AM), *available at* http://www.census.gov/housing/hvs/files/qtr413/q413press.pdf; Information Please Database, *U.S. Gross Domestic Product or Expenditure 1930-2007*, http://www.infoplease.com/ipa/A0104575.html.

[8] *Architect Louis Kamper Made Detroit the "Paris of the West,"* MICHIGAN RADIO

the brunt of the Foreclosure Crisis through loss of homes and reduced wealth?[9] Why have all of these crises (urban, foreclosure, and financial) resulted in the further exclusion of racial minorities from equal access to housing ownership in the United States?

Rather than address these three phenomena—the rise in municipal bankruptcies,[10] the disproportionately high levels of foreclosure faced by racial minorities,[11] and the lack of access to housing ownership for racial

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(Sept. 17, 2014, 7:47 PM), http://michiganradio.org/post/architect-louis-kamper-made-detroit-paris-west.

[9] "Since 2007, 10.9 million homes went into foreclosure. While the majority of the affected families are white, borrowers of color are more than twice as likely to lose their homes. These higher foreclosure rates reflect a disturbing reality: borrowers of color were consistently more likely to receive high-interest risky loan products, even after accounting for income and credit scores." SHAPIRO ET AL., *supra* note 6.

[10] *See e.g.*, Michelle Wilde Anderson, *The New Minimal Cities*, 123 YALE L.J. 1118 (2014).

[11] *See* National Community Reinvestment Coalition, *Homeownership and Wealth Building Impeded: Continuing Lending Disparities for Minorities and Emerging Obstacles for Middle-Income and Female Borrowers of All Races* (Apr. 2006), *available at* http://www.ncrc.org/images/stories/pdf/research/ncrc-oa-prrac%20report%204-06.pdf (finding "persistent fair lending disparities for minorities" in home loan data); Allen J. Fishbein & Patrick Woodall, *Women are Prime Targets for Subprime Lending: Women are Disproportionately Represented in High-Cost Mortgage Market* (Dec. 2006), *available at* http://www.consumerfed.org/pdfs/WomenPrimeTargetsStudy120606.pdf (presenting data showing how women are more likely to receive subprime loans than men with similar incomes and wealth and how "[w]omen of color are the most likely to receive subprime loans and white men are the least likely to receive subprime loans at every income level"); Monique W. Morris, NAACP, *Discrimination and Mortgage Lending in America: A Summary of the Disparate Impact of Subprime Lending on African Americans* 3 (Mar. 2009), http://naacp.3cdn.net/4ca760b774f81317c4_klm6i6yxg.pdf ("African Americans are 15 to 16 percent more likely to receive a higher-rate ARM purchase loan than if they were white.").

In particular, "[u]pper income African American women are nearly five times more likely to receive subprime purchase mortgages than upper income white men and upper income Latino women are nearly four times more likely to receive subprime purchase mortgages than upper income white men." Fishbein & Woodall, *supra*, at 4. Subprime loans are more likely to result in foreclosure. *See* John Leland, *Baltimore Finds Subprime Crisis Snags Women*, N.Y. TIMES, Jan. 15, 2008, http://www.nytimes.com/2008/01/15/us/15mortgage.html.

For more on fraud faced by racial minorities, see Chunlin Leonhard, *Subprime Mortgages and the Case for Broadening the Duty of Good Faith*, 45 U.S.F. L. REV. 621 (2011) and Benjamin Howell, Note, *Exploiting Race and Space: Concentrated Subprime Lending as Housing Discrimination*, 94 CAL. L. REV. 101 (2006).

For more on resistance to foreclosure, see HANNAH DOBBZ, NINE-TENTHS OF THE LAW: PROPERTY AND RESISTANCE IN THE UNITED STATES (2012). In 2011, there was a group of activists in New York who would interrupt foreclosure court proceedings with singing.

minorities—as distinct from each other, or as the results of unfair lending practices, deregulation of mortgages and financial instruments, a declining economy, or other proximate causes (so to speak), this Article takes several enormous steps back and brings to the forefront connections between housing inequality today and the historical construction of the single-family house in the American suburb.[12] This analysis looks at the spaces in which we reside in the States (how they are organized and designed) and the regulatory structures that constructed them. The argument offered here, simply put, is that housing inequality and its related crises are not random phenomena or the results of a free market, but the inevitable result of a century's worth of deliberate policy choices, all of them aimed at inscribing a particular societal structure—the white nuclear family—into the *physical* landscape of American housing. The extent of the government regulation and law behind the creation of the physical structures in housing norms and patterns is often glossed over, as increasingly spatial patterns and architecture, housing inequality, and even segregation[13] are attributed to impersonal market forces.[14] However, it is important to excavate and narrate this history of government regulation in order to show how the rhetorical construction of a "free market," as part of the larger individualistic liberal discourse, paints a false sense of neutrality and equality and is in fact a misnomer, considering the ubiquitous presence of

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Steven Thrasher, *How Singing Paused Foreclosure Court in Brooklyn*, THE VILLAGE VOICE (Oct. 11, 2011, 10:40 AM), http://blogs.villagevoice.com/runninscared/2011/10/how_singing_foreclosure.php (including a link to a video of one of the protests, which readers are highly encouraged to watch).

[12] By "suburb," I mean "a low-density, residential environment on the outskirts of . . . cities, occupied primarily by families of similar class," which is a slight adaptation of Nicolaides and Wiese's definition. For that definition, see Becky M. Nicolaides & Andrew Wiese, *Introduction* to THE SUBURB READER 7 (Becky M. Nicolaides & Andrew Wiese eds., 2006). This article focuses primarily on suburbs that are incorporated into their own municipalities.

[13] *See infra* Part II; *see also* Thomas J. Sugrue, *The New American Dream: Renting*, WALL ST. J., http://online.wsj.com/article/SB10001424052970204099045743504326 77038184.html (last updated Aug. 14, 2009) ("It seemed that segregation was just the natural working of the free market, the result of the sum of countless individual choices about where to live. But the houses were single—and their residents white—because of the invisible hand of government.").

[14] Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1845 (1994); DAVID M.P. FREUND, COLORED PROPERTY: STATE POLICY & WHITE RACIAL POLITICS IN SUBURBAN AMERICA 9 (2007) (discussing the "supposedly nonideological market considerations" and investment "protection" purportedly driving white preferences for homogenous neighborhoods).

law.[15] The "free market" in housing, as explored in this analysis, has left many people and communities behind while privileging certain others.[16] Only when this role of the state in establishing and perpetuating such privilege is recognized, can the cracks in the liberal discourse be revealed, and can a state (or society) be fully called to action to acknowledge responsibility for inequality and to actively seek and implement solutions that recognize the need for systemic change.[17]

More concretely, this Article recognizes the difficulty in ever addressing housing inequality if we do not even *see* it written in space, physical structures, and landscape.[18] Often, when law's role in exclusionary housing is considered, it is in the context of zoning regulations and the surrounding case law.[19] The account offered here proposes to excavate the normative values that existed *before* and *behind* those laws and that are now written into the material constructions of houses, suburbs, and cities. I do not attempt to rewrite an entire history of housing (which has been done by various urban and architectural historians[20]) or of exclusionary zoning (as has been done by legal scholars[21]). Rather, I use three dimensions of the suburban house of the American Dream to illustrate the extensive law and regulation which built the single-family house in this exclusionary manner: the structure of the house itself,[22] its intended inhabitants,[23] and its location in the suburbs.[24]

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[15] *See infra* Part II.C.2.

[16] *Id.* For a fascinating socio-legal account of privilege, see Arthur F. McEvoy, *Privilege and Responsibility*, 42 WASH. U. J.L. & POL'Y 23 (2013).

[17] *See generally* Martha Albertson Fineman, *Beyond Identities: The Limits of an Antidiscrimination Approach to Equality*, 92 B.U. L. REV. 1713 (2012) (discussing state responsiveness).

[18] With this aim in mind, I follow Richard T. Ford's cue recognizing that "if racial segregation is a collective social responsibility rather than exclusively the result of private transgressions, it must either be accepted as official policy or be remedies through collective action." Ford, *supra* note 14, at 1845.

[19] *See infra* Part III.

[20] *See, e.g.*, KENNETH JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES (1985); ROSALYN BAXANDALL & ELIZABETH EWEN, PICTURE WINDOWS: HOW THE SUBURBS HAPPENED (2000); DIANNE HARRIS, LITTLE WHITE HOUSES: HOW THE POSTWAR HOME CONSTRUCTED RACE IN AMERICA (2013); DOLORES HAYDEN, REDESIGNING THE AMERICAN DREAM: GENDER, HOUSING, AND FAMILY LIFE (rev. ed. 2002); GWENDOLYN WRIGHT, BUILDING THE DREAM: A SOCIAL HISTORY OF HOUSING IN AMERICA (1981).

[21] *See infra* Part III.

[22] *See infra* Part II.

[23] *See infra* Part III.

[24] *See infra* Part IV.

I begin my analysis with the single-family house as it emerged during the New Deal in Part I. I argue that the extensive regulation put in place to secure the building of single-family detached houses across America was part of a political and social campaign on the part of the government to entrench this house as the aspirational norm for American society, grounded in the idea of seclusion and separation as personal fulfillment, and sold to the populace as mere enablement of free market forces. The reframing of extensive government regulation and resource expenditure as merely supporting (rather than creating) the market has served (and continues to serve) to obscure the huge role the government has always played in exclusion in housing. The two themes presented here—racial separation and the obscuring of the active government role through free market rhetoric—run through the entire Article.

Part II fills this house with its intended occupants—a white nuclear family with a breadwinner father and housewife mother—a vision which has firm roots in the idea of separation from racial minorities, first legitimated by segregation within cities, and then perpetuated by segregation between cities and suburbs. I argue that, while circumstances have certainly changed since the New Deal's explicit support for this family, the entitlement of the white nuclear family remains difficult to shift and can be found deeply embedded in case law and land use norms today.

Finally, Part III locates this house in the suburb and studies the local governance structures that brought about the huge racial and resource divides between city and suburb to argue that they continue to enable the suburb to exclude racial minorities and "protect" their local wealth legally.

Through each of these parts, I bring us to the present day and show how the vestiges of the New Deal and post-war legal and regulatory structures continue to have effect, either because they are still in place or because despite modification, they are able to persist below superficial changes in rhetoric or law.[25] Indeed, they are written into the very buildings we live in, as more than 44% of the nation's current housing stock was built before 1970,[26] the primary years of regulation I explore. The particular aspects of more recent exclusion highlighted (reverse red-lining, zoning, discriminatory lending, and others) can be seen as just some of the

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[25] *See generally* Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996) (discussing the evolution of the law and rhetoric of American family structures).

[26] Mousumi Sarkar, *How American Homes Vary By the Year They Were Built* 1 (U.S. Census Bureau, Hous. & Household Econ. Statistics Div., Working Paper No. 2011-18), *available at* http://www.census.gov/hhes/www/housing/housing_patterns/pdf/Housing%20by%20Year%20Built.pdf.

individual hardy weeds that were able to take hold in the lush environment provided by federal, state, and local government action through the decades.

That said, the bulk of my narrative and argument is broader than those recent examples and aims at bringing to the forefront the vast networks of government regulation and law which serve to create this (weed-filled) environment by directly excluding racial minorities from the so-called American Dream, by legitimizing such exclusion, and by providing the necessary circumstances for further exclusion to take place through private actors, economic forces, and social behaviors. The latter point, that the government law and regulation at all levels and in all branches enabled seemingly "private" exclusion through the decades, is central to my argument for how we can recognize racial exclusion *built* into housing today.

II. WHAT: THE STRUCTURE OF THE AMERICAN (DREAM) HOUSE

> *It is within the space and form of the building in which the social is most frequently constituted, in which its visual image announces its presence – in the city, in the nation, and in various distinct worlds.*
>
> - Anthony King[27]

In addition to using histories of law, the housing market, and racial relations to understand the legal regulation of housing, this paper uses space as a focal lens. Just as the history of when and where one lives profoundly influences one's life, so does space shape material reality and beliefs relating to one's culture, identity, and lifestyle. Therefore, this section studies the physical structure of the ideal housing unit as the context in which to see patterns of American residential life's dialectical relationship with housing regulation and law.

In the words of Edward Soja, "[t]oday . . . it may be space more than time that hides consequences from us, the 'making of geography' more than the 'making of history' that provides the most revealing tactical and theoretical world."[28] With that in mind, part of the story of the material and theoretical residential twentieth century world can be told through the racial privilege inscribed into its buildings and its highways, its cities and its suburbs. By examining these spatial structures, in particular the house, we

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[27] ANTHONY D. KING, SPACES OF GLOBAL CULTURES 5 (2004).

[28] EDWARD W. SOJA, POSTMODERN GEOGRAPHIES: THE REASSERTION OF SPACE IN CRITICAL SOCIAL THEORY 1 (2d ed. 2011).

can observe legal and regulatory moments which left their mark long after repeal or revision.

The space in which we live our lives is political, ideological, and shapes the very lives we often think we are simply living out in them. Space codifies and also shapes history. An examination of society through the lens of time, without consideration of what is written into our physical structures and how it will shape our futures, would be necessarily incomplete. As Foucault observed, "we do not live in a kind of void, inside of which we could place individuals and things."[29] This is very true for American suburbs and housing patterns. They define how lives are conducted and how society is constructed in the States—how it is organized, who is privileged to live where, which activities can take place at which locations—in ways that often remain hidden.

What is written in our spaces? Henri Lefebvre observed that "every society in history has shaped a distinctive social space that meets its intertwined requirements for economic production and social reproduction."[30] American visions of economic production and social reproduction through time are written into our single-family houses. What visions of production and reproduction are these? Who made them and for what ends? How are racial distinctions reproduced through this production of space?[31] Further, how is this all written into, supported by, and perpetuated by law?

The symbol of the single-family detached house is deeply entrenched in the American consciousness as the "American Dream."[32] And, while home ownership in the countryside had been a part of such consciousness since perhaps the founding of the U.S., the mass proliferation of this particular

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[29] Michael Foucault, *Of Other Spaces, Heterotopias*, ARCHITECTURE, MOVEMENT, CONTINUITÉ 5 (1984), *available at* http://foucault.info/documents/heterotopia/foucault.heterotopia.en.html.

[30] DOLORES HAYDEN, THE POWER OF PLACE: URBAN LANDSCAPES AS PUBLIC HISTORY 19 (1997).

[31] Race and space remains under-explored in scholarship. *See* Dianne Harris, Conference Paper, *Little White Houses: Critical Race Theory and the Interpretation of Ordinary Dwellings in the United States, 1945-60* (2005), *available at* http://warrencenter.fas.harvard.edu/builtenv/Paper%20PDFs/Harris.pdf ("To my knowledge, there are no extant studies that examine the relationship of racism to house form itself.").

[32] The single-family house is the pinnacle of homeownership, which "has long been considered a part of the 'American Dream.'" U.S. Census Bureau, *Historical Census of Housing Tables: Homeownership*, https://www.census.gov/housing/census/data/owner.html (last revised Aug. 28, 2012) [hereinafter U.S. Census Bureau Homeownership]; *see also* discussion of *Euclid infra* Part III.

form and the location in subdivisions occurred in large part because of government efforts during and after the New Deal.[33]

This part will first lay out the proliferation of this particular architectural form before turning to the regulation and law that constructed it and the social norms that were constituted and reinforced through it. The complex federal and local government structures which supported the establishment of this house and its environs as the American ideal continue to have an enormous influence on current legal and social structures, as argued below.

A. The Architectural Forms of the Single-Family House

From the 1930s to 1950s, the federal government sought to restart the economy through a massive push for homeownership. This was an economically rational strategy: house construction, highway construction, and sales of consumer products (to fill said house) did in fact help America after the Depression and World War II as GDP climbed from $91.2 billion in 1930 to $526.4 billion by 1960.[34] Homeownership went from approximately 44% in 1940 to 62% in 1960.[35] Single-family house construction in particular flourished.[36] Along with this, the makeup of households changed considerably. In 1900, the most common household contained *seven or more* people, while from 1940 to 2000, the most common household contained *two* people.[37]

The dominant architectural form and location of the ideal American house that took hold was the single-family detached house, located in a suburb outside of a central city.[38] As other scholars have frequently

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[33] *See infra* p. 246.

[34] Information Please Database, *U.S. Gross Domestic Product or Expenditure 1930-2007*, http://www.infoplease.com/ipa/A0104575.html. Housing continues to be a significant part of any economic growth strategy. Bipartisan Policy Center, *Housing's Impact on the Economy: Infographic from the BPC Housing Commission Highlights the Housing Industry's Historical Impact on Economic Growth* (Feb. 12, 2012), http://bipartisanpolicy.org/projects/housing-commission/housings-impact-economy.

[35] U.S. Census Bureau Homeownership, *supra* note 32.

[36] U.S. Census Bureau, *Historical Census of Housing Tables: Homeownership by Selected Housing and Demographic Characteristics*, https://www.census.gov/housing/census/data/ownerchar.html (last revised Aug. 28, 2012) [hereinafter U.S. Census Bureau Housing Characteristics].

[37] U.S. CENSUS BUREAU, DEMOGRAPHIC TRENDS IN THE 20TH CENTURY: CENSUS 2000 SPECIAL REPORTS 140 (Nov. 2002), *available at* http://www.census.gov/prod/2002pubs/censr-4.pdf.

[38] By "form" I refer to the residential design most supported in regulations and popular imagination: the single-family detached house, of which certain power structures are privileged and perpetuated. *See generally* BAXANDALL & EWEN, *supra* note 20.

explored, Levittown, Long Island perhaps most exemplified this form.[39] Levittown is Long Island's sprawling, mass produced cookie-cutter private suburban development, aimed at the veteran coming home from war and starting a family.[40] Advertisements which proliferated during this time show the occupants for whom these houses were being built: nuclear families with a male breadwinner, female housewife and their two kids.[41] The architectural design of the house supports this organization: one master bedroom for the couple, one bedroom (sometimes two) for the kids, a family room, living room, kitchen, garage, and small lawn.[42]

Each house was designed to enclose the nuclear family in their own separate world—enjoying their own entertainment (television), play areas for children (lawns), and gardens and backyards,[43] as delineated by (white picket) fences. The subdivisions such as Greenbelt, which was also built by the Levitts, were often not built like villages—there were few sidewalks,[44] town squares or shared spaces, very little within walking distance, and limited public space.[45]

The separate world was convenient for stimulating the post-war economy through an increased focus on consumerism.[46] New consumer goods were needed to fill the spaces of suburban homes and to support the new myths of lifestyle: washing machines, kitchen appliances, and cars, for example. Government regulation supported this expenditure through increased support for consumer credit.[47]

This particular version of homeownership (the single-family detached house) flourished in the years after World War II and continues to have a strong hold on the social norm of housing, as current figures reveal.[48] In

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[39] *See* BARBARA M. KELLY, EXPANDING THE AMERICAN DREAM: BUILDING AND REBUILDING LEVITTOWN (1993).

[40] *See id.*

[41] *See* BAXANDALL & EWEN, *supra* note 20, at 135-39.

[42] *See* HARRIS, *supra* note 20, at 44-45 for an extended description of one such house.

[43] *See generally* Harris, supra note 31; s*ee also* Sarah Schindler, *Banning Lawns*, 82 GEO. WASH. L. REV. 394 (2014).

[44] BAXANDALL & EWEN, *supra* note 20, at 76.

[45] *See generally* THE SUBURB READER (Becky M. Nicolaides & Andrew Wiese eds., 2006).

[46] For more on consumerism, see KING, *supra* note 27, at 98 (discussing how "[s]uburban culture is a consuming culture . . . . suburbia has become the crucible of a shopping economy").

[47] Federal Credit Union Act, Pub. L. No. 467, 48 Stat. 1216 (1934); *see also* David M.P. Freund, *Marketing the Free Market: State Intervention and the Politics of Prosperity in Metropolitan America*, *in* THE NEW SUBURBAN HISTORY 11, 15 (Kevin M. Kruse & Thomas J. Sugrue eds., 2006).

[48] *See* U.S. Census Bureau, *supra* note 36.

1950, the U.S. had 55% overall homeownership in their residences, and in single-family detached homes, nearly 73% were owned by their resident.[49] By 2000, overall homeownership was at 66%, and nearly 87% of single-family detached homes were owned by the resident.[50] Despite great shifts in how families and households are configured, the percentage of housing stock comprised of single-family houses has not adapted: as of 2000, around 60% of the housing stock is comprised of single-family detached homes whereas in 1940, it was 63.6%.[51]

B. New Deal Law and Regulation

This societal re-ordering of diverse household structures into single-family houses was supported by a myriad of government regulation and law. The federal government created the Federal Housing Administration ("FHA") in 1934 in order to expand homeownership through widening the mortgage market by offering mortgage insurance.[52] The FHA actively supported the construction of these houses through subsidies, tax breaks, and resources,[53] and changed lending structures to enable purchase of these houses.[54] Local governments promoted these houses by exclusively zoning for them.[55]

First, the establishment of the powerful FHA in 1934 made great strides in building the vision of America housed in single-family homes. The FHA was created with the explicit purpose to "encourage improvement in housing standards and conditions, to provide a system of mutual mortgage insurance."[56] Along with the Veterans Administration ("VA"),[57] the FHA underwrote mortgages that made the single-family homes possible and

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[49] *Id.*

[50] *Id.*

[51] U.S. Census Bureau, *Historical Census of Housing Tables: Units in Structure, available at* https://www.census.gov/housing/census/data/units.html (last revised Aug. 28, 2012). The percentage was 63.3% in 1950, 68.8% in 1960, 66.2% in 1970, 61.8% in 1980, and 59% in 1990. *Id.* In the 1970s and 80s, there was a brief move to build more multi-family homes. Sarkar, *supra* note 26, at 1-6.

[52] U.S. Dep't of Housing and Urban Dev., *The Federal Housing Administration (FHA)*, http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/fhahistory (last visited Nov. 21, 2014).

[53] *Id.*

[54] *Id.*

[55] See *infra* Part III.

[56] Preamble, National Housing Act, Pub. L. No. 73-479, 48 Stat. 1246 (1934).

[57] The VA was established under the Servicemen's Readjustment Act of 1944 (G.I. Bill of Rights), Pub. L. No. 78-346, 58 Stat. 284.

prevalent. The ratings for these mortgages (which would determine the rate at which banks could insure mortgages) were based on a number of factors, including priority for the single-family house structure. The government underwriting of mortgages also meant that mortgages became within reach of middle class citizens. Prior to this overhaul, mortgages were often for a very low percentage of the house price and for limited periods of time. After the FHA started underwriting them, mortgage terms shifted to longer terms (30 year mortgages) and for higher percentages (80% or even higher).[58]

Second, the federal government actively supported projects like Levittown through subsidies, tax breaks, and public infrastructure projects (such as building of highways to make suburban towns accessible).[59] The government also discredited public and communal housing by framing such projects in the discourse of communism and welfare, which would have implications for years to come.[60] From 1947-1948, Joe McCarthy, the then junior Senator from Wisconsin, "took control" of the Senate Joint Committee Study and Investigation of Housing.[61] While the Committee was tasked with investigating the housing shortage, "[i]ts real goal, however, was to discredit . . . government-subsidized public housing and

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[58] *See* Priya S. Gupta, *The American Dream, Deferred: Contextualizing Property after the Foreclosure Crisis*, 73 MD. L. REV. 523 (2013).

[59] Federal Highway Act of 1956 (National Interstate and Defense Highways Act), Pub. L. No. 627, 70 Stat. 374.; s*ee* William E. Nelson & Norman R. Williams, *Suburbanization and Market Failure: An Analysis of Government Policies Promoting Suburban Growth and Ethnic Assimilation*, 27 FORDHAM URB. L.J. 197, 206-14 (1999) (discussing how New York "constructed Nassau County's highway system to keep pace with the spread of automobiles" and also how the government supported the construction of Long Island Rail Road for commuters from New York City). However, the institution of these programs and the availability of automobiles to those of less economic means was a specific concern of the FHA with regards to keeping the races separate and their valuations of property high. *See* discussion of the FHA Underwriting Manual from 1936 *infra* Part III.B.1 and the Underwriting Manual of 1936 Part II Paragraph 305 (voicing concern that "[t]he development of modern transportation systems, extensions of and changes in routes of transportation lines within individual communities, and the making available of automobiles to families of comparatively low purchasing power have promoted the development of new residential districts and greatly speeded the rate of declines in the desirability and value of established ones"); *see also* KELLY, *supra* note 40.

[60] *See, e.g.*, DONALD CRAIG PARSON, MAKING A BETTER WORLD: PUBLIC HOUSING, THE RED SCARE, AND THE DIRECTION OF MODERN LOS ANGELES 117 (2005). Public housing, another strand of this history, is fascinating as well, but unfortunately outside the scope of the current project, which seeks to show how the seemingly private single-family house was not such a private endeavor.

[61] BAXANDALL & EWEN, *supra* note 20, at 90.

slum clearance."[62] McCarthy took the opportunity to extol rhetoric that the private housing industry would be a way to prosperity[63] and moved the government away from supporting communal living and toward detached nuclear family houses in suburbs. In these public forums, he argued that public housing arrangements were socialist[64] as well as a "breeding ground" for communism.[65]

Third, the government focused its resources on the singular single-family house to the detriment of other housing designs. For example, it withdrew support for communal structures such as shared housing projects for female shipyard workers in Oregon and female mill workers in Boston.[66] Through the FHA and government policies, builders and designs aimed at single-family unattached homes were prioritized whereas builders who did not conform to their design norms were left behind.[67]

Finally (and most significantly), local governments passed zoning regulations which limited the location of multi-family houses or the number of units per lot, mandated minimum plot and house sizes, and restricted who could live together in houses.[68] This shaped the demographics of residential populations directly and until the present day (recall the fact that as more than 44% of the nation's housing stock was built before 1970).[69] As is clear from federal government policy, local government protective measures, and public discourse, this form of housing remains at the pinnacle of the American ideal.

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[62] *Id.* at 91. For a vivid example of Senator McCarthy's disparaging of public housing during a hearing in Detroit, see *Joint Committee Study and Investigation of Housing: Hearing before the U.S. Senate*, 80th Cong. 401 (1947) (statement of Sen. Joseph R. McCarthy).

[63] *Id.* at 92 (quoting *Joint Committee Study and Investigation of Housing: Hearing before the U.S. Senate*, 80th Cong. 10 (1947) (statement of Sen. Joseph R. McCarthy).

[64] *Id.* at 92-93.

[65] *Id.* at 91.

[66] HAYDEN, *supra* note 20, at 19-21; MARGARET CRAWFORD, BUILDING THE WORKINGMAN'S PARADISE: THE DESIGN OF AMERICAN COMPANY TOWNS 26 (1996).

[67] Fed. Hous. Admin., TECHNICAL BULLETIN NO. 7, PLANNING PROFITABLE NEIGHBORHOODS 8-17 (1938), *available at* http://codesproject.asu.edu/sites/default/files/code_pdfs/Pages_Planning_Profitable_Neig_1938c.pdf (providing "principles of land division that make neighborhoods more desirable"); *see also* JACKSON, *supra* note 20, at 208.

[68] *See* JACKSON, *supra* note 20, at 242 ("[Z]oning became a way for suburbs to pirate from the city only its desirable functions and residents.").

[69] Sarkar, *supra* note 26.

C. Reading Norms in the Law: Seclusion and the Free Market

Law perpetuates the privileging of certain classes of the population in housing through spatial patterns and architecture in its determination of which populations can live in which spaces, and what kinds of lifestyles are promoted and prohibited. This establishment of legitimate persons and activities is accomplished both explicitly and implicitly. The implicit establishment—where privilege is hidden—serves to perpetuate and strengthen the existing power structures.[70] How then can one study how privilege is written into domestic space?

Residential patterns exemplify the relation between space, social ordering, and power.[71] Studying these carefully reveals the living patterns they enable and the communities they define.[72] First, where one lives determines one's living patterns, including one's work potential, commute(s), lifestyle, and health. A life conducted in a Chicago housing project would necessarily have very different daily moves and activities (and across time, a lifetime of difference) than one in a Silicon Valley suburb or a Nevada desert.

Secondly, where one lives shapes one's identity and communal culture through macro-level forces (law, jurisdiction, and nationality) and micro-level forces (neighbors, interests, responsibilities, and activities) in a profound way. Just as the history of where we live shapes our identity, so does space. The histories of culture and identity of the places we live in are embedded in the spaces around us: in our local architecture,[73] home location and design, and the process we find ourselves engaging in to make a home in a locality.[74]

An insightful example of local architecture as a reflection of culture is Michael Crutcher's reading of historical negotiations and dialogues between Creole, African American, and white American cultures in the

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[70] *See* Ellen J. Pader, *Space of Hate: Ethnicity, Architecture, and Housing Discrimination*, 54 RUTGERS L. REV. 881, 891 (2002).

[71] *See* James Duncan & Nancy Duncan, *Aesthetics, Abjection & White Privilege in Suburban New York*, *in* LANDSCAPE AND RACE IN THE UNITED STATES 157 (Richard H. Schein ed., 2006).

[72] *Id.*

[73] Camille Wells, social historian of architecture, describes how "most buildings can be understood in terms of power or authority – as efforts to assume, extend, resist, or accommodate it." HAYDEN, *supra* note 30, at 33.

[74] For a detailed exploration of how black neighborhoods contain and construct racial histories in New Orleans, see Michael Crutcher, *Historical Geographies of Race in a New Orleans Afro-Creole Landscape*, *in* LANDSCAPE AND RACE IN THE UNITED STATES 23 (Richard H. Schein ed., 2006).

New Orleans' French Quarter, Faubourg Tremé, and surrounding neighborhoods.[75] His analysis highlights several ways to read a landscape for cultural and identity indicators, including: what kinds of identities and cultures could express themselves in buildings (e.g., churches, architectural styles, housing styles), who lives where, which houses will be remodeled or destroyed as the city develops, the uses of public space for different types of celebrations (in New Orleans' case, Mardi Gras), what kinds of activities a local civic or community center might be built to accommodate (e.g., jazz), and municipal boundaries.[76] These are just some of the indicators of culture and identity, which we can then study in other spaces.

A residence in a particular locality also in large part determines the contours of one's choice of home design, and this home design itself is central to this formation of identity and culture. As architectural historian Dianne Harris has noted, "[h]omes . . . are primarily sites in which identities are produced and performed in practical, material and repetitively reaffirming ways."[77] Therefore, we must take a close look inside the form of the house, to excavate how it works to construct and reify social norms of race.[78]

This section explores the nature of the authority attempted to be exercised through this house form, where this vision came from, and how it was sold to the populace. A closer look at the regulation, law, and campaigns supporting this form reveals two rhetorical themes propagated around the American house: (1) personal fulfillment through the seclusion of the suburbs, which in practice meant separation from minority populations, and (2) the hidden nature of the extensive government hand in white flight through the framing of lending support by the government as merely facilitating a "free" market.

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[75] *Id.*

[76] *Id.* at 23-24.

[77] HARRIS, *supra* note 20, at 14 (citing James S. Duncan & David Lambert, *Landscapes of Home*, in A COMPANION TO CULTURAL GEOGRAPHY 387 (eds. James S. Duncan, Nuala C. Johnson, & Richard Schein) (2004)).

[78] *Id.* at 13-14. For a recent example of a house constructed to conform to certain (Hindu) cultural norms, see Mark Roth, *Family Builds House That Caters to Hindu Traditions*, DETROIT FREE PRESS, Dec. 7, 2014, www.freep.com/story/money/real-estate/michigan-house-envy/2014/12/07/hindu-home-construction-pittsburgh/19932713.

1. Separation as a racial code

Suburbs embody separation, and the idea of separation as fulfillment has roots as far back as the Enlightenment.[79] Separation had always been a part of the idyllic countryside and houses away from the city.[80] However, the massive changes in policy, law, financing, building, and the mass-marketing of these images and ideals that occurred during and after the New Deal brought this dream within reach for many in the (newly forming) middle —but only for members of certain populations—and sharpened the edges of this dream to specifically exclude others.[81] While new suburban histories show us how demographics are changing and becoming more heterogeneous, the baselines and foundations of the idea of suburban life as idyllic and exclusionary remain relevant and powerful norms even today.[82]

The idea of fulfillment through seclusion, cleanliness, and other dreams of the suburbs that filled American hearts and minds, were facilitated by law, policy, and the structure of the housing market.[83] While these terms (seclusion, cleanliness, and quiet) may appear to be innocuous, these words are not value neutral and are laden with comparisons to their opposites. In short, they are constructed in opposition to the stereotype of the messy, nonwhite, close quarters of the city. Once we recognize the darker sides of "seclusion," we begin to see how this idea worked to structure who would be included or excluded from the new "secluded" suburban housing.

These terms were also supported by coding of racial terms in real estate literature which signified white neighborhoods: secure, stable, possessing integrity, culture, (low in) crime, (high in) school quality, (high in) property values, and private.[84] Further, brokers recognized ethical constraints requiring their adherence to these practices of coding.[85]

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[79] *Id.* at 115-16.

[80] *See id.* at 115 (discussing the Enclosure movement, privatization of property and ensuring exclusion).

[81] *Id. at* 35-37.

[82] *See* Kevin M. Kruse & Thomas J. Sugrue, *Introduction* to THE NEW SUBURBAN HISTORY (Kevin M. Kruse & Thomas J. Sugrue eds., 2006). The ideal of separation continues today: "the essence of the modern suburb is physical, social, and spatial separation." KING, *supra* note 27, at 99.

[83] James A. Kushner, *Apartheid in America: A Historical and Legal Analysis of Contemporary Racial Residential Segregation in the United States*, 22 HOW. L.J. 547, 533-43 (1979).

[84] HARRIS, *supra* note 20, at 38; s*ee also* Kushner, *supra* note 87, at 566 n. 46 (disproving the misconception that black residents of a neighborhood lower real estate values).

[85] *Developments in the Law: Zoning*, 91 HARV. L. REV. 1427, 1668-89 (1978)

Such images and ideas were reinforced by media, advertising campaigns and articles, for example, a 1950 *House Beautiful* feature article declaring climate control,[86] privacy, and the American Style as "the three big ideas" for house design.[87] As Harris explains, these ideas appeared in numerous print media and were linked to Cold War nationalistic ideas of house design as "crucial tools in the effort to establish the cultural supremacy of capitalism, democracy, and the American national identity."[88]

Exploring one of these words in particular—privacy—highlights how such terms are laden with racial and other normative ideals regarding identity. Harris argues that "[l]ike images of whiteness and its connection to sanitary, sparely decorated, quiet, and tidy environments . . . privacy—both as a term and as a spatial imperative—became a rhetorical device, a strategy for articulating and asserting specific values that were linked to racial, class, and sexual identities."[89] This prioritization of privacy manifested itself both in the separation of the detached home for nuclear families, but also within the spaces of the house itself.[90] The detached home and its neighborhood design was a far cry from the noises, smells, and activity of urban street life.

The lack of privacy in urban tenements was seen by economists and social reformers to be "correlated directly with the propagation of immorality and public health problems."[91] The privacy, cleanliness, and morality of the suburban subdivision then stood in stark contrast to the impurities of urban life. In this way, privacy also indicated separation and protection from outsiders, and a pure family with respectability and social and economic class status.[92]

(discussing how courts were willing to find violation of equal protection in racially discriminatory regulation that were not discriminatory on their face, but then stopped after Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977)); *see infra* Part IV for a further discussion of *Arlington*.

[86] Climate control is another interesting trend—the promotion of man or science conquering, shaping nature. It is outside the scope of this paper to explore this fully, but climate control could also be linked to the increase in personal manicured lawns and landscaping. *See* HARRIS, *supra* note 20, at 112; *see also* Schindler, *supra* note 43.

[87] *Id.*

[88] *Id.*

[89] *Id.* at 113.

[90] *Id.*

[91] *Id.* at 116.

[92] *Id.* at 118-19 (noting the link between class, private property and race). Roots of respectability through how land is used (or propriety and property) can be traced to dispossession of Native Americans in part justified by their so deemed under uses of land and of course their race. *See* Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1721 (1993).

Within the house as well, noises, smells, and activity were confined in places such as separate play rooms for (the chaos and mess of) children,[93] and, in two-story houses, in bedrooms on the second floor, so that houses could remain clean and quiet and family members could have their own private spaces. Housing design books privileged privacy by diagramming human activities (such as sleeping, making love, excreting, washing, and eating) against ideal levels of privacy (private, semi-private, public, and so on) in their advice to architects.[94]

This idea of privacy in house design and suburban planning was not just the work of architects, it was supported by federal agencies and the judiciary. As part of the determination of whether a dwelling has "livability" for a "typical family," the FHA Underwriting Manual from 1938 prioritized privacy, giving higher ratings for buildings that had privacy for bedrooms and where the structure was placed on the lot to "take the fullest advantage of . . . privacy."[95] The 1952 Manual continued this trend, explicitly stating that "[a] high degree of privacy, from without as well as from within the dwelling, enhances livability and continuing appeal [and] [i]t is essential to a high feature rating."[96] It went on to give specific design specifications which support privacy, such as placement of bathroom doors.[97] Moreover, as discussed in Part III,[98] municipalities have long had the power to determine the "character of community" which was understood to mean the quiet suburban life described above. After the concepts of 'privacy' and 'seclusion' and others such as the 'free market', are unpacked, the regulations which supported this bucolic vision become less innocuous.

2. The (not so) free market

During and after the New Deal, the federal government constructed a powerful narrative about housing and the free market.[99] This narrative sold the extensive regulation and public resources devoted to the single-family

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[93] HARRIS, *supra* note 20, at 149.

[94] *See, e.g.*, *id.* at 147.

[95] Fed. Hous. Admin., UNDERWRITING MANUAL: UNDERWRITING AND VALUATION PROCEDURE UNTIL TITLE II OF THE NATIONAL HOUSING ACT (1938). The 1936 Manual had started this line of assessment by giving higher ratings for houses that had sleeping quarters with privacy, and whose placement on their lot also provided for privacy. *See* Underwriting Manual of 1936, *infra* note 165, at Part II ¶¶ 133, 136-37.

[96] FHA Underwriting Manual 1952, *quoted in* HARRIS, *supra* note 20, at 139.

[97] *Id.*

[98] *See infra* Part III (discussion surrounding *Euclid*).

[99] *See* Freund, *supra* note 47, at 12-14.

house as supportive of the market, rather than as welfare initiatives.[100] The narrative simultaneously applied a free market gloss to both regulation and segregation.[101] First, the FHA, VA, and other federal agencies marketed the extensive suburb building support regulations and funding for white people as merely "unleash[ing]" frozen markets and "unloosen[ing]" existing funds that in "no way disrupted American capitalism."[102] Second, the narrative included how segregation was not only the result but also *necessary* due to the "impersonal and value-neutral" free market and economics.[103] This theory of segregation became "conventional wisdom among white businesspeople and consumers,"[104] which further distanced the public from inclinations to take affirmative steps to alleviate the social ill. As David Freund explains, the form of racism was not static, running underneath changing rhetoric above it.[105] Rather, ideas of racial difference adapted to the times, doubtlessly influenced and mutually reinforced by the changing rhetoric regarding justifications for separation.[106]

This story of white suburban growth as the result of free market forces was actively marketed to the American public by the government through pamphlets, advertisements, canvassing efforts, and presentations at various "regional home fairs" across the nation in order to promote house construction and buying.[107] Moreover, these campaigns were conducted in close collaboration with private enterprise entities that were also consulted in formulating the FHA policies themselves.[108] Both strands of this rhetoric were reproduced by private entities and the press, framing the "post-war housing boom as the fruit of free enterprise and . . . public housing as an unwarranted strain on the market."[109] Even today, the U.S. Census website touts post-war homeownership as a largely market driven phenomenon: "The post-World War II surge in homeownership was remarkable. A booming economy, favorable tax laws, a rejuvenated home building industry, and easier financing saw homeownership explode nationally, topping 60 percent in just two decades."[110]

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[100] *Id.*
[101] *Id.*
[102] *Id.* at 11, 13 & 28.
[103] *Id.* at 21.
[104] *Id.*
[105] FREUND, *supra* note 14, at 13.
[106] *Id.*
[107] Freund, *supra* note 47, at 21.
[108] *Id.* at 19.
[109] *Id.* at 29; *see also* Kushner, *supra* note 83, at 578.
[110] U.S. Census Bureau Homeownership, *supra* note 32.

This tension between the invisibilizing of government support for certain market structures and the framing of social welfare programs (meant for minorities) as extra government expenditure runs deep in U.S. welfare history. From the early twentieth century, legal realists have drawn attention to the contradiction embedded in the U.S. narrative of the free market.[111] Speaking about labor in 1923, Hale argued that the seemingly "natural" channels to which industry flowed and the distribution of wealth and income in a community were a result of the coercive arrangements put in place by certain groups, some of whom exercised control of government machinery.[112] This meant that in the case of disadvantaged laborers who had fewer and weaker coercive weapons (basically, their only weapon was to withhold their labor), it was disingenuous to ignore the context in which they operated and then to construct law as if there existed equal bargaining and coercive power.[113] At both the foreign and domestic economic level then, he argued that "systems advocated by . . . *laissez-faire* [proponents] are in reality permeated [by] coercive restrictions of individual freedom, and with restrictions, moreover, out of conformity with any formula of 'equal opportunity' or of 'preserving the equality of others.'"[114] If we apply these ideas to housing regulation during and after the New Deal, we might say that the systems advocated by laissez-faire proponents are in reality permeated by allocations of resources and power through funding and the drawing of boundaries to preserve these existing disparities in distribution, and that these forces work *against* equal opportunity, not merely not in conformity with it.

This dichotomy of rhetoric remained applicable to housing through the next seven decades, and exists even today. These tensions are emblematic of a public willful ignorance as to how racial disparities were constructed and furthered by government policies which shaped the so-called "free market" at the expense of those without equal power. The disparities are perpetuated by powerful narratives that cast any regulation attempting to level the playing field as socialism or unjust government expenditure. The

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[111] *See, e.g.*, Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1918); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-coercive State*, 38 POL. SCI. Q. 470 (1923); Morris Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927). For comprehensive secondary accounts, see DUNCAN KENNEDY, THE RISE & FALL OF CLASSICAL LEGAL THOUGHT (2006); LAURA KALMAN, LEGAL REALISM AT YALE: 1927-1960 (1986); Joseph Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465 (1988).

[112] *See* Robert L. Hale, *Coercion and Distribution in a Supposedly Non-coercive State*, 38 POL. SCI. Q. 470, 491-92 (1923). Hale spends considerable effort to explicate his use of the word "coercion." Readers are encouraged to look at his work directly.

[113] *Id.* at 472-73.

[114] *Id.* at 470.

narratives are codified by policy circles which celebrate the free market version self-help[115] and see New Deal and post-war white home-buyers as enterprising folks who pulled themselves up by their bootstraps. The narratives also frame populations meant to receive government assistance in the form of public housing or integration efforts as a drain on the free market economy and unnecessary government intrusion.[116]

Robert O. Self situates this tension in the propagation of a certain version of "manhood" post World War II: "[a]rguments against civil rights, affirmative action, and other state intervention on behalf of people of color and poor people increasingly bore the stamp of [an] individualistic, bootstrap version of male-breadwinner ideology."[117] This version of "[m]anhood signaled many things, dependency on government was not among them."[118] In this way, both conservatives and liberals sought to "rehabilitate" the (white) American male after World War II.[119] They had different methods for doing this: "social programs, remunerative market work and military service"[120] for liberals, and (so-called) bootstrap market freedom for conservatives, but both sought to "return him to his property place at the head of the family."[121]

As I have argued elsewhere, the expanded lending initiated during the Clinton administration and continued during the George W. Bush administration were equal on their face, but they continued to uncritically privilege the single-family detached house.[122] Clinton's Department of Housing and Urban Development ("HUD") Secretary Henry G. Cisneros explicitly promoted ownership of the single-family house as the pinnacle of the American Dream and advocated for expanded lending based on this view.[123] This was further reinforced by George W. Bush through his "Ownership Society,"[124] which added themes of personal ownership and

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[115] *See* Freund, *supra* note 47, at 28 (discussing FHA and its extolling of "do-it-yourself" rhetoric in a 1960s publication looking back twenty-five years).

[116] ROBERT O. SELF, ALL IN THE FAMILY: THE REALIGNMENT OF AMERICAN DEMOCRACY SINCE THE 1960S 413 (2012).

[117] *Id.* at 20.

[118] *Id.* at 20.

[119] *Id.* at 17.

[120] *Id.* at 21.

[121] *Id.* at 19-21.

[122] Gupta, *supra* note 58, at 537.

[123] *Id.* at 535.

[124] *Id.* at 537; s*ee also* The White House, *Fact Sheet: America's Ownership Society: Expanding Opportunities*, *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2004/08/20040809-9.html.

To give every American a stake in the promise and future of our country, we will bring

responsibility to this vision, reminiscent of conservatives during LBJ's Great Society.[125] Echoes of the prizing of bootstrap self-help persist today, in the "Ownership Society" and the framing of a self-starter who buys a house as a good citizen on the route to financial prosperity, but who is hit later by the declining economy and government reluctance to provide assistance as an irresponsible borrower undeserving of public expenditures.[126]

Studying this tension between self-help and welfare rhetoric against the background of Freund's evidence regarding active government construction of a free market narrative[127] (despite extensive government regulation) and bailout measures for banks during the Financial Crisis, highlights how weak a foundation the distinction rests on. In short, the tension is actually a deliberately constructed rhetorical one. Government regulation existed to assist the white house buyer (the white male) in his "return to the head of the family" after the War and later to financial institutions (which for the most part do not have very many racial minorities in positions of leadership).[128] Government regulation was also developed to try to alleviate inequality through civil rights, affirmative action, public housing, welfare programs, and mortgage assistance before the Crisis. However, throughout the twentieth century, and into the twenty-first, these were cast as very different endeavors, and then pitted against each other in rhetorical extremes. These extremes were then used to justify only tepid support for minority house buyers during the Crisis and otherwise.

The effect of government support for white suburbia and its avoidance of alleviation of segregation through free market language, is that when segregation and inequality perpetuate after the legality of segregation is gone, it looks like it was the free market all along. The rhetoric of policy and regulations may have changed through the twentieth century—from racial discrimination to self-fulfillment through the secluded suburb built by the free market—but racial privilege was nonetheless preserved as blacks

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> the highest standards to our schools, and build an ownership society. We will widen the ownership of homes and businesses, retirement savings and health insurance-preparing our people for the challenges of life in a free society.

President George W. Bush, Second Inaugural Address (Jan. 20, 2005), *available at* http://www.npr.org/templates/story.php?storyId=4406172.

[125] *See* SELF, *supra* note 117, at 21.

[126] *See* Gupta, *supra* note 58.

[127] *See* Freund, *supra* note 47.

[128] SELF, *supra* note 116, at 21.

stayed separate in the deteriorating urban conditions and owned houses in far less numbers as described in the next two Parts.[129]

III. WHO: THE FORMATION OF THE AMERICAN IDEAL OF THE NUCLEAR FAMILY

To design the private domestic sphere was to design the family, and to design the family was to assimilate and affirm American identity.

\- Dianne Harris[130]

Single-family suburban houses were built for occupants who would further particular visions of American society. This Part argues that the housing design prioritizing the single-family house was the result of deliberate government action envisioning a particular societal ordering, which further elevated the white nuclear family and distanced the minority family and other kinds of households from the American Dream, despite changes in law and rhetoric towards more inclusion over the last seventy years.

A. Building the Family

During the New Deal and then post-war with returning veterans and a fear of communism on the rise, the organizing societal unit shifted toward the nuclear family, in contrast to urban residences, which included other organizations of families or communities.[131] This vision of autonomous nuclear families has early roots, where women were seen to be guardians of home life.[132] It was promoted by the government during the 1940s in part to build national identity and postwar patriotism.[133]

Rhetoric regarding the massive move of population to the suburbs focused on family, nation building, providing for veterans, and the need to jumpstart the economy, among other reasons. Advertisements and media

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[129] *See infra* Parts III, IV.

[130] HARRIS, *supra* note 20, at 122.

[131] *See* THE SUBURB READER, *supra* note 45, at 257-343.

[132] Catherine Beecher, *How to Redeem Women's Profession from Dishonor*, *in* THE SUBURB READER 47-48 (Becky M. Nicolaides & Andrew Wiese eds., 2006).

[133] HARRIS, *supra* note 20, at 112 (noting that "climate control, privacy and American style" are indicators of capitalism, democracy, and American national identity). For more on the nuclear family and nation building, see MONA DOMOSH & JONI SEAGER, PUTTING WOMEN IN PLACE: FEMINIST GEOGRAPHERS MAKE SENSE OF THE WORLD 21 (2001) (discussing proper domesticity and Americanization).

reinforced the ties of nationalism and nuclear families and suburbia.[134] As explained by Dianne Harris, "family" can be seen as a code used by marketing strategies in which "nuclear family was the vehicle through which Americans climbed the rungs of the social ladder."[135] This was translated into marketing which attempted to commodify "domestic bliss and social stability" through "family fetishism."[136] House forms and families were both meant to conform to a certain design.[137]

This model of the nuclear family as an organizing unit was supported by both liberals and conservatives.[138] It consisted of a married man and woman who "established a home with only two generations present [(parents and children)], and in which the husband worked in the paid workforce while the wife engaged solely in family labor."[139] Robert O. Self details how the masculine identity of a breadwinning husband was central to this ideology, which stretched from the New Deal into Johnson's Great Society.[140] If we accept his definition of "male breadwinning" as divided labor whereby "men's work was public, remunerative, and family sustaining [while] women's work was domestic, caregiving, and if it was remunerative, supplementary to their husbands' wages,"[141] we can see how massive suburbanization played on this ideal well by providing the separate spaces and places for this ideal wife to reign freely in the domestic domain.[142]

Self notes that male breadwinning "functioned as an organizing mythology of social life and was believed to be the bedrock of a sound family and by extension a sound society."[143] In fact, he argues that the

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[134] HARRIS, *supra* note 20, at 64.

[135] *Id.* at 122.

[136] *Id.*

[137] For more on "Public iconography of white nuclear family bliss," see Brodkin, *quoted in* HARRIS, *supra* note 20, at 83. For more on house design conformity, and the removal of nooks and varieties of design in the move toward mass production and assimilation, see NORBERT SCHOENAUER, 6,000 YEARS OF HOUSING (2003).

[138] SELF, *supra* note 117, at 10.

[139] *Id; see also* HARRIS, *supra* note 20, at 85 (discussing "the heteronormative ideals of domesticity and gender roles" found in mass media images of houses). Additionally, for a discussion regarding the white nuclear family in images and national identity, see *id.* at ch. 3.

[140] SELF, *supra* note 117, at 18.

[141] *Id.*

[142] This idealization of separation and the "home as a haven" for the nuclear family also entrenched gender roles by organizing women into housewives with significant responsibilities to work at home, live life in isolation from community forms of urban life and workplaces, and in nuclear family units. *See id.* at 104.

[143] *Id.* at 18.

male breadwinner model was "more than social science and cultural touchstone . . . [h]e drove public policy."[144] For social welfare liberals, the public policy driven by the male breadwinner included social programs to help them gain employment in the market, various social safety nets, and subsidized vast suburban housing.[145] And, conservatives had their own version of the "bootstrap" self-starter male.[146] This ideal nuclear family, as explored in the law and regulation below, did not just happen to be white, it was meant to be so.

B. The Nuclear Family's Secure Foundation of Regulation, Laws, and Norms

1. Regulatory and resulting social support for the white nuclear family

In the midst of Jim Crow laws, a number of cities passed segregation zoning ordinances designating residential areas by race in the early 1900s.[147] By the time the ordinances were deemed illegal in *Buchanan v. Warley*[148] in 1917 and subsequently repealed, they had already done the work of segregating many residential spaces.[149] It would not be so easy to undo them, physically or socially; they had codified and legitimized the sentiments of one segment of society.[150] Despite the federal government striking down the laws, once such deeply held prejudices had been legitimated by the local government, they would not be easily reversed or undone.[151] Legitimacy of societal norms comes in small steps, and, once aggregated, cannot be shifted so easily.

After the illegalization of racial zoning laws in *Buchanan*, a variety of other methods succeeded in preserving segregation. These methods involved government sanctioning through the collusion of cities,[152]

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[144] *Id.*

[145] See SELF, *supra* note 116, at 17-21.

[146] SELF, *supra* note 117, at 46; *see also infra* Part IV.

[147] *See* Gupta, *supra* note 58. An understanding of urban segregation is necessary in order to see how it was normalized so that subsequent suburban segregation seemed unsurprising and publicly sanctioned.

[148] 245 U.S. 60 (1917).

[149] Many cities attempted to get around the illegalization by crafting such ordinances in a way that was not similar to the one at issue in *Buchanan*. *See, e.g.*, Hurd v. Hodge, 162 F.2d 233 (D.C. Cir. 1947).

[150] Ford, *supra* note 14, at 1861.

[151] *Id.*

[152] *See, e.g.*, Garrett Power, *Apartheid Baltimore Style: The Residential Segregation Ordinances of 1910-1913*, 42 MD. L. REV. 289, 321 (1983). In the case of Baltimore, this

judiciaries, homeowners associations,[153] realtors,[154] real estate associations,[155] builders,[156] and lenders.[157] These forces all added to the

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might involve threats of building code violations if one tried to integrate neighborhoods, as well as violent actions by local populations to keep people out, and the effective sanctioning of such threats and actions by local government by choosing not to police them.

[153] *See* Ford, *supra* note 19, at 1883.

[154] *See* Kushner, *supra* note 83, at 598-600.

[155] *See* Harris, *supra* note 31.

> These codes were embedded in real estate industry literature.... The National Association of Real Estate Boards (NAREB) textbook, Fundamentals of Real Estate Practice from 1939 and 1946 made explicit connections between race and property values. The book's authors stated that some immigrant groups more readily assimilate and are therefore less detrimental, such as Germans who are clean and thrifty people. They take pride in keeping their property clean and in good condition.... Unfortunately, this cannot be said of all the other nations which have sent their immigrants to our country. Some of them have brought standards and customs far below our own levels. ... Like termites they undermine the structure of any neighborhood in which they creep.

HARRIS, *supra* note 20 (quoting KEVIN FOX GOTHAM, RACE, REAL ESTATE, AND UNEVEN DEVELOPMENT: THE KANSAS CITY EXPERIENCE, 1900-2000 (2002)).

See also Carol M. Rose, *Property Law and the Rise, Life, and Demise of Racially Restrictive Covenants 20* (Arizona Legal Studies Discussion Paper No. 13-21, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2243028 (click "Download This Paper" link) ("Between 1924 and 1950, the National Association of Real Estate Boards included in its Code of Ethics the clause that no 'Realtor' (a term that would be trademarked for the Association) would introduce into a neighborhood 'members of any race or nationality, or any individual whose presence will clearly be detrimental to property values in that neighborhood.' In keeping with this plank, real estate brokers' were often leading figures in neighborhood covenant drives in older municipalities. Thus the practices that were to come to be known as racial 'steering' were not only widespread, but were regarded, no doubt sincerely, as ethical obligations for reputable brokers."). Brokers were also scared of reprisal and boycott by white property owners. Ford, *supra* note 14, at 1854.

[156] *See* Wendell E. Pritchett, Conference Paper, *From Theory to Practice: Race, Property Values and Suburban America in the Post-War* Years (Apr. 30, 2005), *available at* http://www.warrencenter.fas.harvard.edu/builtenv/Paper%20PDFs/Pritchett.pdf (discussing how in Levittown, PA, post Shelley v. Kramer, 334 U.S. 1 (1948), "[d]espite the efforts of civil rights activists, Levitt and the builders of post-war suburbia entrenched racial segregation with little government opposition").

In particular, the limited finance policies of government agencies to minorities were furthered by private industry through the National Association of Home Builders ("NAHB"), a powerful industry organization which included "real estate lobbyists, merchant builders, and groups such as the U.S. Chamber of Commerce, the United States Savings and Loan League, the National Association of Retail Lumber Dealers, and the Mortgage Bankers Association" and had strong alliances with civic organizations. HARRIS, *supra* note 20, at 36.

The NAHB advocated for urban renewal but, as Dianne Harris argues, was "complicit in the redlining and racist practices of the FHA" which resulted in very limited financing

normalizing of segregation and inequality as societal structures. Violence and social pressure also played a huge role in keeping urban segregation entrenched long after these had been repealed.[158] Such violence should not have been surprising though, as it was in large part legitimated through the institutions that had introduced and perpetuated separation as a social norm. These structures would then replicate themselves in the divide between suburbia and inner cities. The normative power of explicit or implicit government support and institutionalization through all of these processes should not be underestimated.[159]

The most well-known segregationist methods were the racial covenants, or private agreements not to sell or rent to blacks.[160] These were found in deeds and agreements with homeowners associations. Contrary to popular belief that these were largely 'private' measures, these covenants were upheld by judiciaries,[161] and propagated by the federal government itself through the FHA,[162] as explained below.

The FHA promoted segregation and discrimination in several direct ways. As Charles Abrams commented in 1955, "from its inception FHA set itself up as the protector of the all-white neighborhood."[163] In furtherance

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available to nonwhites. "[W]hites could buy . . . [remodeled] houses with no down payments, yet nonwhites could get nothing better than fifteen-year loans with down payments of 50 percent." HARRIS, *supra* note 20, at 36-37.

[157] As James Kushner notes, banks in the 1960s would only issue loans in integrated areas if there was FHA or VA mortgage insurance. Kushner, *supra* note 83, at 600.

[158] *See* FREUND, *supra* note 14, at 382.

[159] In the case of Village of Euclid Ohio v. Ambler Realty Co., 272 U.S. 365 (1926), "by codifying into public law patterns generated by private factors, ordinances excluding multiple dwellings constituted an unprecedented governmental endorsement of pre-existing class-segregated configurations." Martha A. Lees, *Preserving Property Values? Preserving Proper Homes? Preserving Privilege? The Pre-Euclid Debate Over Zoning for Exclusively Private Residential Areas*, 56 U. PITT. L. REV. 367, 378 & 439 (1994).

I argue that actually these racial (and class) configurations were not a result of purely private factors and were not "pre-existing" but the main point remains salient—government codification and endorsement of prejudice into law is significant and occurred through cases such as *Euclid* and in the regulations discussed in this section.

[160] Rose, *supra* note 155, at 9 ("Racial covenants became especially prevalent after the Buchanan case took racial zoning off the table; after that case, racial covenants seemed to be the only practicable route to prevent willing white owners from selling to willing minority buyers over long periods of time.").

[161] *See* Meade v. Dennistone, 196 A. 330 (Md. 1938); Queensborough Land Co. v. Cazeaux et al., 67 So. 641 (La. 1915) (upholding discriminatory discretion for property transfer).

[162] *See* Ford, *supra* note 14, at 1848.

[163] HARRIS, *supra* note 20, at 36.

of this goal, it even "sent its agents into the field to keep Negroes and other minorities from buying houses in white neighborhoods."[164]

The 1936 FHA Underwriting Manual lays out specific criteria for the underwriting of mortgages which evaluates the borrower and the location of the house.[165] These criteria explicitly disadvantage people based on race and social class. The regulations lay out "adverse influences" which lower the rating of neighborhoods.[166] In particular, the "infiltration of inharmonious racial groups" or "lower-class occupancy" would lower the valuation.[167] Moreover, the Manual operated under and promoted the belief that "[i]f a neighborhood is to retain stability it is necessary that properties shall continue to be occupied by the same social and racial classes" and that changes in "social or racial occupancy generally [led] to instability and a reduction in values."[168] Mortgages on properties in neighborhoods "protected" from these factors received higher ratings.

The Manual also includes provisions for evaluating the borrower by examining, for example, their "reputation" and "associations." In their guidance for this evaluation, the Manual notes that "[i]ndividuals who have interests, ideals, habits, and moral and ethical codes in common usually associate with each other" and that "[a] high rating, *of course*, could hardly be ascribed in cases where the borrower's chosen associates are other than substantial, law-abiding, sober-acting, sane-thinking people of approved ideals and acceptable ethical and moral standards."[169] Given how racial minorities were seen during this time and throughout the entire Manual, it is

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[164] *Id.*

[165] Fed. Hous. Admin., UNDERWRITING MANUAL: UNDERWRITING AND VALUATION PROCEDURE UNTIL TITLE II OF THE NATIONAL HOUSING ACT (1936) [hereinafter Underwriting Manual of 1936]; *see also* Memorandum from Richard Stearns to Jenkins File on the Racial Content of the FHA Underwriting Practices, 1934-1962 (Sept. 13, 1983) (PL 034638-50 at PL 034640-41), *available at http://archives.ubalt.edu/aclu/pdf/Plex48.pdf* [hereinafter FHA Underwriting Manual Memo].

[166] *See* Underwriting Manual of 1936, *supra* note 165, at Part I ¶ 306(2) (including "[a] decline, or danger of decline, of the desirability of the neighborhood through the influx of people of lower living standards" as an adverse influence).

[167] *Id.* at Part I ¶ 323(3) & Part II ¶¶ 210, 229. While the explicit articulation of race is eventually dropped a few generations of manuals later, it remained through embedded proxies for race, for example, in requirements regarding wealth or regarding the "character" of the mortgagor and their "attitude towards obligations" that included "in some instances, [the presence of] C.O.D. accounts." Fed. Hous. Admin., UNDERWRITING MANUAL: UNDERWRITING AND VALUATION PROCEDURE UNDER TITLE II OF THE NATIONAL HOUSING ACT ¶¶ 215, 1634 (1947).

[168] *Id.* at Part II ¶ 233. The entwinement of (perceived) property values and race will be revisited in Part III.

[169] *Id.* at Part II ¶ 313 (emphasis added).

not surprising that less than two percent of the FHA subsidies went to nonwhite families.[170]

The FHA Manual also propagated racially restrictive covenants in deeds in order to get underwritten or subsidized mortgages. It provided a model covenant: "no persons of any race other than [race to be inserted] shall use or occupy any building or any lot, except that this covenant shall not prevent occupancy by domestic servants of a different race domiciled with an owner or tenant."[171]

These requirements had a profound effect on the real estate industry and financing. They influenced builders to adopt covenants so that their projects would be eligible for the mortgage underwriting.[172] And, lending banks also "relied heavily on [this underwriting] to make their own loan decisions."[173] Therefore, the federal government "not only channeled federal funds away from black neighborhoods but was also responsible for a much larger and more significant disinvestment in black areas by private institutions"[174] through its own lending policies and the legitimation of racism in lending. Discriminatory lending was then reinforced through the spatial divisions between populations, enabling a system of red-lining (designating certain neighborhoods and populations to be excluded from loans) to flourish.[175]

While these covenants were struck down in *Shelley v. Kraemer*[176] in 1948, similar to the local segregation ordinances, they had accomplished the goals of normalizing and preserving segregation: first within cities and then, between city and suburb.[177] There were societal norms and other methods to preserve it, including coding adhered to by brokers, intimidation by home owners associations, lobbying by industry associations, and other forms of local government support.[178] As a result of the obscuring of the

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[170] HARRIS, *supra* note 20, at 34.

[171] FHA Underwriting Manual Memo, *supra* note 165, at 3-4.

[172] Ford, *supra* note 14, at 1848.

[173] DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 52 (1993); *see also* Ford, *supra* note 14, at 1848.

[174] MASSEY & DENTON, *supra* note 173, at 52.

[175] *See* Raymond H. Brescia, *Subprime Communities: Reverse Redlining, The Fair Housing Act and Emerging Issues in Litigation Regarding the Subprime Mortgage Crisis*, 2 ALB. GOV'T L. REV. 164, 179 (2009).

[176] 334 U.S. 1, 20 (1948).

[177] Moreover, some persisted well after *Shelley*. For examples from New Orleans, Winston-Salem, Birmingham, and Palm Beach, see Kushner, *supra* note 83, at 562; Richard Schein, *Race and Landscape in the United States*, *in* LANDSCAPE AND RACE IN THE UNITED STATES 1, 9 (Richard Schein ed., 2006).

[178] There was also the use of reversion interests for violations of segregation. See

government's role in proliferating these covenants and discriminatory lending, these covenants and the related practices constituted a "subtle, pernicious, and (at least to whites) invisible form of racism that '[hid] behind a color-blind rhetoric of privatism and free-market advocacy.'"[179]

In subsequent years, the commitment to keeping the white nuclear family as the unit of society was strengthened through land use regulations and cases which did not allow successful challenges to these zoning laws.[180] The judicial support for the separate, white nuclear family would prove very difficult to shift, as explained below and in Part IV.

2. Jurisprudential support for the white nuclear family

Throughout the decades following World War II, law supported and continues to support the vision of seclusion and the ideal suburb through zoning meant for nuclear families.[181] The definition of "family" in zoning law is a complex web of case law and local ordinances. "Single family use" definitions may include any of the following non-mutually exclusive elements: composition of the members of the household, requirement for a single "head of household," functioning as a single housekeeping unit, operating for a non-profit purpose, and being stable and sufficiently permanent.[182] The equating of "single family use" with nuclear families has loosened over time, but there remains a prevalence of limitations on who can live together, often defined in terms of "family."[183]

This section will illustrate the entrenchment of the norm that municipalities should be able to limit who lives together in a way that privileges families by examining several seminal cases. The first ones show the particular privileging of the family (*Village of Belle Terre v.*

RICHARD R. W. BROOKS & CAROL M. ROSE, SAVING THE NEIGHBORHOOD: RACIALLY RESTRICTIVE COVENANTS, LAW, AND SOCIAL NORMS (2013), for a fascinating history of racially restrictive covenants, including a discussion of these reversionary interests.

[179] HARRIS, *supra* note 20 (quoting KEVIN FOX GOTHAM, RACE, REAL ESTATE, AND UNEVEN DEVELOPMENT: THE KANSAS CITY EXPERIENCE, 1900-2000, 149 (2002)).

[180] *See infra* Part III.

[181] *See* Ford, *supra* note 14, at 1857 ("The structure of racially identified space is more than the mere vestigial effect of historical racism; it is a structure that continues to exist today with nearly as much force as when policies of segregation were explicitly backed by the force of law.").

[182] Tim Iglesias, *Defining "Family for Zoning: Contemporary Policy Challenges, Legal Limits, and Options*, 37 ZONING AND PLANNING LAW REPORT 1 (2014) 1-2. For a comprehensive account of the status of "family" in zoning law, see *id.*

[183] *See id.*

Boraas [184]) and the slight loosening of the definition of who constitutes a family (*Moore v. City of East Cleveland*[185]). These cases raise the question of whether it is appropriate for municipalities to even have the prerogative to govern who lives with whom—to answer that question, we will then turn to the seminal case crystallizing the power to zone, *Village of Euclid v. Ambler Realty Co.*[186] Finally, we'll have a brief discussion of *Town of Huntington, N.Y. v. Huntington Branch, National Association for the Advancement of Colored People*,[187]—a case that illustrates how case law might evolve, if the histories and contexts of discrimination are taken into account when adjudicating claims relating to exclusionary zoning.

In 1974, in the case of *Village of Belle Terre v. Boraas*,[188] six college students in NY brought a case against the State of New York for violating a variety of constitutional rights, most notably, their right of association, through the zoning statute which restricted the use of residences to "one-family," with "family" defined as "one or more persons related by blood, adoption, or marriage, or not more than two unrelated persons, living and cooking together as a single housekeeping unit"[189] and which explicitly excluded "lodging, boarding, fraternity or multiple dwelling houses."[190] On appeal, the Supreme Court ruled that the regulation was not unconstitutional in that it possessed a rational relationship to a permissible state objective.[191]

What values drove this decision regarding the permissibility of the state objective (and the use of the rational relationship standard instead of heightened scrutiny)? The court dismissed concerns regarding the potential reduced property values as a result of a restricted rental market.[192] Interestingly, this is quite a shift from the rhetoric of private property espoused in *Buchanan*.[193] Private property and equal protection and rights of association, though interesting bedfellows, give way to some higher principles not explicitly articulated by the court. The implicit higher principles seem to be a combination of a respect for idyllic family values meant to flourish in the suburbs and a respect for municipalities' autonomy

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[184] 416 U.S. 1 (1974).
[185] 431 U.S. 494 (1977).
[186] 272 U.S. 365 (1926).
[187] 488 U.S. 15 (1988).
[188] 416 U.S. 1 (1974).
[189] *Id.* at 1.
[190] *Id.* at 2.
[191] *Id.* at 8.
[192] *Id.* at 9.
[193] 245 U.S. 60 (1917).

(through using the decreased standard of rational relationship by dismissing discrimination early on).[194]

Regarding the pursuit of a certain kind of society through idyllic family units, not only is the municipality's objective *permissible*, but it also appears to be laudable. The Court characterizes the "state objective" several times, each time vividly portraying with approval the municipality's vision of their community embodied in the statute.[195] The Court notes:

> A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. . . . [The police power] is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.[196]

The vision presented by the village and affirmed by the Court paints a picture of a very particular kind of population: one organized around nuclear family units in quiet seclusion.[197] The ideals of separation, independence, and the nuclear family as organizing societal unit are vividly embodied in this kind of law. Seclusion in suburbs as a legitimate way of ordering society and life is not an obvious social norm. As numerous scholars have explored, the U.S. is one of the only countries in the world that organizes its society around the suburb and the idea of separation rather than an urban consciousness of energy and community.[198] Separate houses and family units as an ideal seems intuitive in today's age in America, but it was not always so.

Even in Justice Marshall's dissent, where he recognized the contradiction of addressing density concerns by restricting residents based on blood relations rather than in number, he explicitly "agree[d] with the majority" that the objectives asserted were legitimate ones: "restricting uncontrolled growth, . . . keeping rental costs at a reasonable level, and making the community attractive to families."[199] On the municipality autonomy point as well, Marshall agreed with the majority that "zoning is a complex and important function of the State" and that "[i]t may indeed be the most

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[194] Vill. of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974).

[195] *Id.* at 7-9.

[196] *Id.* at 9.

[197] The court also notes that "the regimes of boarding houses, fraternity houses and the like present urban problems" because "more people occupy given space; more cars continuously pass by; more cars are parked; noise travels with crowds." *Id.*; *see also* Ford, *supra* note 14, at 1873 (discussing how *Belle Terre* "sought to preserve its character as a community of traditional families").

[198] *See* Jackson, *supra* note 20.

[199] *Belle Terre*, 416 U.S. at 13 (Marshall, C.J., dissenting).

essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life."[200] He reiterates in his closing lines that he "would not ask the village to abandon its goal of providing quiet streets, little traffic, and a pleasant and reasonably priced environment in which families might raise their children."[201] While the concept may be difficult to define, the ideal of a quiet secluded suburb for families seems to be accepted without critique in both opinions—though perhaps Marshall shifts it gently in his articulation to allow for "family life" but not to exclude others in the process.[202]

The Court found that the municipality's requirements for household composition were not discriminatory, but did not address those who would be left out of this way of life. Marshall points out that this meant that

> Belle Terre imposes upon those who deviate from the community norm in their choice of living companions significantly greater restrictions than are applied to residential groups who are related by blood or marriage, and compose the established order within the community. The village has, in effect, acted to fence out those individuals whose choice of lifestyle differs from that of its current residents.[203]

Richard Ford's arguments about the self-perpetuating homogeneity of communities ring true in these words.[204] Once lines are drawn, and communities define themselves a certain way, outsiders may never have the opportunity to join, and will just be pushed into nearby localities, which may be the point.[205]

Moreover, as Marshall points out, the concerns regarding population density may have been solved with a regulation which limited numbers of people living in a house, not requiring blood relations between them.[206] There must be more at stake than numbers—it is this vision of a certain kind of family life that is winning at the end of the day.[207]

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[200] *Id.*

[201] *Id.* at 20.

[202] *Id.* at 16-17.

[203] *Id.*

[204] Ford, *supra* note 14, at 1910.

[205] *Id.*

[206] *Belle Terre*, 416 U.S. at 19-20 (Marshall, C.J., dissenting).

[207] Unfortunately, as feared by some, *Belle Terre* has been cited numerous places and has worked to entrench exclusion. Moore v. City of East Cleveland, 431 U.S. 494 (1977), affirmed *Belle Terre*, but struck down legislation which defined "family" too narrowly. Note Brennan's recognition of how many minority families live in non-nuclear configurations. Of course these different family structures had been well known, even

Three years later, in *Moore v. City of East Cleveland*, the Supreme Court would once again revisit the idea of who could live together.[208] In that case, a grandmother challenged a zoning ordinance that prevented her from living with two of her grandchildren (who were cousins).[209] The Court upheld the power of municipalities to restrict persons living together to "families," but held that East Cleveland's definition of nuclear family was too narrow to be Constitutional.[210]

If it is legal for one municipality to zone for families only, then the implications if all municipalities in all residential spaces in the country decided to zone this way, are significant. In short, by protecting municipalities' abilities to zone in an exclusionary way, do our courts risk creating a situation where certain people who want to live in non-family group settings do not have a place to live?[211] To address this issue, we turn first to *Euclid* in order to explore the justifications offered for the protection of zoning powers, and then to *Huntington*, to see how courts may choose to take the consequences of those outside the municipality into account when determining discrimination.

In 1926 in *Village of Euclid v. Ambler Realty Co.*,[212] the Supreme Court confirmed the power of the Village of Euclid (governmentally, a separate municipality although physically, a suburb of Cleveland) to determine their own zoning districts and uses.[213] *Euclid*'s ruling meant that despite disadvantage to property owners who sought to keep land uses and property values high by separating their properties from industrial users, the municipality could keep its districts' use designations. The Court used the opportunity to extend their arguments beyond industrial uses and to conflate apartment buildings and businesses.

> The development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire

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before that. Bruno Lasker, a sociologist from 1920, argued that immigrants often preferred multi-family homes and so that zoning ordinances which excluded these "cut the foreign-born of American home neighborhoods as effectively as if they were prohibited from living there." Lasker, *quoted in* Lees, *supra* note 159, at 387.

[208] 431 U.S. 494 (1977).

[209] *Id.* at 496.

[210] *Id.* at 505-06.

[211] This concern played out increasingly in cases involving same-sex couples who are prevented from living together because of zoning ordinances. *See* Iglesias, *supra* note 182; *see, e.g.*, HARRIS, *supra* note 20, at 80 (regarding a magazine who had a homosexual man in his home in a photo shoot and purposely adding a female for a domestic scene).

[212] 272 U.S. 365 (1926).

[213] *Id.* at 397 (determining that "the ordinance [establishing a comprehensive zoning plan] in its general scope and dominant features . . . is a valid exercise of authority").

> section for private house purposes; that in such sections very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district.[214]

The Court goes on to discuss how apartment houses interfere with "free circulation of air and monopoliz[e] the rays of the sun which otherwise would fall upon the smaller homes,"[215] and how they bring

> disturbing noises incident to increased traffic and business, and the occupation, by means of moving and parked automobiles, or larger portions of the street, thus detracting from their safety and depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favorable localities—until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed.[216]

These continued affirmations of entitlement and encroachment continue to pervade zoning cases regarding the single-family house today in numerous judicial pronouncements.[217]

While many cases continue to protect the prerogative of municipalities to zone in an exclusionary way, there has been at least some recognition that those left outside of the zone of inclusion need to be taken into account. In 1988, the issue of multi-family housing zoning came to the Supreme Court again in *Town of Huntington, N.Y. v. Huntington Branch, Nationall Ass'n for the Advancement of Colored People*,[218] this time with regard to claims under the Fair Housing Act (Title VIII of the Civil Rights Act of 1968).[219]

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[214] *Euclid*, 272 U.S. at 394.

[215] *Id.*

[216] *Id.*

[217] *See e.g.*, White Oak Prop. Dev., LLC v. Washington Twp., Ohio, 606 F.3d 842 (6th Cir. 2010) (upholding *Belle Terre* and stating that the municipalities goals to "make [the] community more attractive by assisting [in] the preservation of open space, unique natural resources and natural terrain features" were legitimate ones that bore a rational relationship to an ordinance that limited the number of unrelated people who could live together); Ames Rental Prop. Ass'n v. City of Ames, 736 N.W.2d 255 (Iowa 2007) (upholding *Belle Terre* and finding that a zoning ordinances restricting dwellings to single-family structures did not violate Equal Protection under the Iowa Constitution); McMaster v. Columbia Bd. of Zoning Appeals, 719 S.E.2d 660 (S.C. 2011) (holding that a zoning ordinance that limited to three the number of unrelated individuals who may live together as a single housekeeping unit did not violate the Due Process Clause of State Constitution of South Carolina in that it furthered the legitimate governmental interests of controlling the undesirable qualities associated with mass student congestion).

[218] 488 U.S. 15 (1988).

[219] Pub. L. 90-284, 82 Stat. 81 (1968).

The NAACP and two individual plaintiffs claimed that Huntington's refusal to amend their zoning ordinance restricting private multi-family housing projects to certain urban renewal zones and its refusal to rezone the particular area at issue violated the Fair Housing Act.[220] The parties claimed different standards of review for the second claim (the particular site rezoning): NAACP and plaintiffs argued that the court should use the disparate impact standard and the Town argued that the decision not to rezone should be analyzed under discriminatory intent standard (as in *Arlington,* explored in Part IV).[221] The Supreme Court declined to rule on which test was the appropriate one for the specific rezoning refusal, but acknowledged that the parties and the Court of Appeals agreed that for the first claim—zoning ordinances which restricted private multi-family housing in the entire community to urban renewal areas—the appropriate standard was disparate impact.[222] Under that standard, disparate impact had been shown and the justification for the ordinance to encourage urban development, was found inadequate.[223] Part of this disparate impact analysis included the contention that "the community as a whole was harmed by segregation," the views that segregation was "a consequence of the legally created structure of racialized space," and that both "blacks and the community as a whole [were] victims of that structure."[224]

This expanded view of both space and history—the space considered is both urban as well as the suburban area and the history includes segregation—is significant. Once segregation and its effects are contextualized in a way that legal realists imagine law should recognize, the legal standard of disparate impact and possible remedies becomes more apparent and more compelling. These kinds of understandings of space and history are needed today to contradict several widely held assumptions. First, the expanded view of history shines a light on free market explanations of housing inequality by recognizing, once again, the structures that allowed for exclusionary zoning. Second, the analysis in *Huntington* problematizes the political processes of local governments, which result in those exclusionary zoning measures through seemingly legitimate forums. It does this by showing how these processes are inherently closed off from those who most need the laws to change.[225] Finally, and most importantly, it shifts our understanding of who is harmed

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[220] *Id.* at 16-17.
[221] *Huntington*, 488 U.S. at 17.
[222] *Id.* at 18.
[223] *Id.*
[224] Ford, *supra* note 14, at 1895.
[225] *Id.*

by segregation by contending that segregation is harmful to an entire community, not just to the excluded.[226] This upends perceptions as to what constitutes harm and who is harmed. As Ford discusses, it also reframes the debate from asking courts to favor one group over another to "favor one value over another."[227]

Support of this particular design meant entrenchment of the ideal of the white nuclear family housed in its own separate world.[228] These cases must be read against the backdrop of what kinds of families were actually living in suburbs after the war—and so, who was making those rules, who was being excluded, and how the norm of each separate world for this nuclear family was further entrenched and codified.[229]

C. Vestiges of Housing Patterns Privileging the White Nuclear Family

The racial patterns entrenched during and after the New Deal in the construction of housing meant for middle class white nuclear families have resulted in continued significant disadvantages for the poor and racial minorities.[230] Racial minorities are more likely to organize themselves in extended family structures but face an America with few duplexes or spaces of multifamily structures, restrictions on apartment complexes to less privileged areas (in certain areas with lower tax bases, poorer schools and services), limitations on unrelated persons or more than one family sharing in households, and the heavy legitimacy placed on the idea of one nuclear family with only two generations per one detached house.[231]

Moreover, disadvantages in tax structure remain. As was recently reported in *The New York Times*:

> Many Long Island towns and villages have property tax systems that punish poor minorities and protect wealthier whites because they don't adequately recognize the lower property values in minority neighborhoods. Also, as found throughout the country, federal, state and local authorities on Long Island have failed to eliminate racial steering that reinforces segregated housing patterns. Indeed, minority communities on Long Island are saddled with more substandard housing or polluting industries than whiter, more affluent communities.[232]

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[226] *Id.*

[227] Ford, *supra* note 14, at 1895, 1898.

[228] *See* HARRIS, *supra* note 20, at Chapter 4.

[229] *Id.*

[230] *See* FREUND, *supra* note 14, at 176-97.

[231] *See generally* HARRIS, *supra* note 20.

[232] Lawrence C. Levy, *Race and the Suburbs*, N.Y. TIMES (Oct. 30, 2008, 5:12 PM),

Even when the explicitly racialized polices have been reformed, the inequalities perpetuate through seemingly neutral market-based rationales for zoning restrictions,[233] as further explored in Part IV. Patterns of segregation also set up the conditions of segregation that made certain populations vulnerable to predatory lending before the Foreclosure Crisis.[234] The spatial patterns and regulations explored in this paper enabled fraudulent lending practices, in particular one such practice called "reverse red-lining."

"Red-lining" was the banks' practice of delineating lines on maps to identify populations who would not receive their loans.[235] The FHA's practice of racist underwriting criteria facilitated and enabled red-lining to the exclusion of racial minorities throughout the suburbanization boom.[236] In the 1990s and early 2000s, a reversal of this practice took place, whereby lenders delineated minority populations geographically to target for loans with worse rates, hidden information, and other fraudulent strings attached.[237] This process became known as reverse red-lining.[238] Because of the segregationist policies legitimized and furthered throughout the previous century, this process was geographically convenient in certain urban areas. For example, Baltimore experienced shocking practices of reverse red-lining whereby banks targeted black churches, communities, and neighborhoods by drawing lines, using minority brokers, and other strategies.[239] Certainly, the proliferation of fraudulent information and practices was facilitated by the closed geographies of neighbors availing themselves of such loans (limited outside information and consultations), and the trust placed in 'local' brokers of the same ethnicity.

And so, not surprisingly, high disparities in homeownership continue to exist. More and more racial minorities have moved to suburbs in the last 20 years, and now, their numbers are approximately proportional to their share of the population.[240] However, ownership continues to be disparate. In

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http://campaignstops.blogs.nytimes.com/2008/10/30/race-and-the-suburbs/?_php=true&_type=blogs&_r=0.

[233] *See generally* FREUND, *supra* note 14.

[234] *See* Brescia, *supra* note 175, at 179.

[235] Gupta, *supra* note 58.

[236] See *infra* Part II.C.

[237] *See* Brescia, *supra* note 175, at 179-81.

[238] *Id.*

[239] Gupta, *supra* note 58, at 574-77.

[240] William H. Frey, *Melting Pot Cities and Suburbs: Racial and Ethnic Change in Metro America in the 2000s*, STATE OF METROPOLITAN AMERICA (May 2011), *available at* http://www.brookings.edu/~/media/research/files/papers/2011/5/04%20census%20ethnicity%20frey/0504_census_ethnicity_frey.pdf.

2000, homeownership across the United States was 66%.[241] For White householders, it was 71%;[242] for Black householders, it was 46%;[243] for Hispanic householders, 46%.[244]

Finally, not surprisingly, there have been massive changes in the way that people and families organize themselves. Between 1950 and 2000, married-couple households declined from more than three-fourths (78%) of all households in 1950 to just over half (52%) of all households in 2000.[245] And, 59% of married-couple households included at least one of their own children under age eighteen in 1960, but by 1990 and in 2000, less than half (46%) of married-couple households have a child under age eighteen.[246] Also, the growth in the number of households has far outpaced the growth in population: "[f]rom 1900 to 2000, the total U.S. population increased from 76 million to 281 million, an increase of 270%";[247] however, the total number of U.S. households grew from 16 million to 105 million during that time—an increase of 561%.[248] Interestingly, most of the increase in the number of households occurred among households having one or two members, which accounted for nearly two-thirds (65%) of the total U.S. increase in the number of households over those hundred years.[249] Households with one to two people now represent 58% of the total number of households.[250] Despite these demographic changes, the ideal *vision* of the nuclear family meant to inhabit these housing structures has not really changed, nor has the prevalence of the detached house as the ideal and prevalent form.

This architectural form of residence, located in the suburb, remains the societal baseline of homeownership, along with the norms that accompany it—including separation. Separation based on the promotion of the nuclear family unit and on the idea of who should live with whom and where they should live—as opposed to the promotion of community or some kind of shared goal (perhaps community service, economic/welfare satisfaction of needs, etc.)—was confirmed by zoning laws, as explored in the next Part.

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241 U.S. CENSUS BUREAU, *supra* note 52, at 132.
242 *Id.*
243 *Id.*
244 *Id.*
245 *Id.* at 148.
246 *Id.* at 162.
247 *Id.* at 140.
248 *Id.*
249 *Id.*
250 *Id.*

IV. WHERE: LOCATING THE SINGLE-FAMILY HOUSE IN THE SUBURBS

Establishing social distinctions in metropolitan space—through such means as segregation in schools and housing, redlining and municipal neglect, restrictive land use policies . . . served not only to reinforce and extend certain kinds of inequality, but to naturalize them, to make them an aspect of the landscape, the very world itself. Thus, spatial distinctions did not merely reify existing social hierarchies, but they helped shape ideas and understandings of them in ways that perpetuated them through time. In building suburbia, Americans built inequality to last.

- Becky M. Nicolaides and Andrew Weise[251]

As argued throughout this Article, suburban patterns of living found in the U.S. are not the result of purely impersonal market forces. Rather, the space and the related market structures were created and regulated by federal, state, and local governments.[252] Through the proliferation of regulations such as house financing for returning veterans, decreased down-payment requirements, longer mortgage terms, and support for the house building industry, the federal government facilitated an unprecedented wave of house construction and ownership in newly created suburban areas outside of cities during and after the New Deal.[253] Vast numbers of people moved from urban and rural areas to the suburbs.[254] In 1910, 21% of the population lived in central cities; only 7% lived in suburbs.[255] After 1940, suburbs accounted for more population growth than central cities and in 1960, 32% of the nation's population lived in central cities and 31% in suburbs.[256] Moreover, by 2000, over half of the population lived in suburbs.[257]

The rapid shifts of population out of the inner cities left many cities to decay, to the benefit of nearby suburbs with stronger tax bases.[258] Not surprisingly, with the rise in population in suburban areas, there was also a slow rise of the power of local governments.[259] Local governments possess

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[251] Nicolaides & Wiese, *supra* note 12, at 6.

[252] *See* Freund, *supra* note 47, at 11-12.

[253] *See supra* Parts II.A-B.

[254] *See Introduction* to *Chapter 1: The Transnational Origins of the Elite Suburb*, *in* THE SUBURB READER 13-14, 13 (Becky M. Nicolaides & Andrew Wiese eds, 2006).

[255] U.S. CENSUS BUREAU, *supra* note 52, at 33.

[256] *Id.*

[257] *Id.*

[258] *See* KATHERINE L. BRADBURY, ANTHONY DOWNS & KENNETH A. SMALL, URBAN DECLINE AND THE FUTURE OF AMERICAN CITIES 12 & 26 (1982).

[259] *See id.* at 208.

extraordinary power in their ability to issue zoning ordinances, through which they design the nature of the polity, its location, and its physical surroundings and legitimate activities.[260] Their zoning laws and regulations and legitimation of certain societal norms and allocation of resources were then reified and supported through lending and other public-private coordination.[261]

This section explores both of these phenomena: (1) the gutting of inner cities by drawing borders around municipalities (which have proven to be exclusionary and resistant to change) and (2) zoning as a method to entrench white entitlement to such borders.[262] Through both of these phenomena, race is a flashpoint again for the weaknesses of notions of equality in a liberal system.

A. Separation from the Inner City

Local control often serves to mask preservation of access to resources and exclusion.[263] The separation of residences and workplaces fostered the creation of class-segregated neighborhoods.[264] This made it possible for "local governments to serve these class-segregated residential areas exclusively, thereby linking segregation by class, race, and ethnicity to questions of local control."[265] This version of local control conflicts directly with equal opportunity "access to services and programs within a metropolitan area."[266]

Detroit is a telling example of this. Detroit's powerful economy and industry attracted whites and blacks alike in the early twentieth century.[267]

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[260] For example, "[l]ocalities with the power to regulate land uses might limit the construction of multi-family housing and moderately priced detached units to certain areas of town, or might even exclude such development all together." Ford, *supra* note 14, at 1855. For a seminal, comprehensive treatment of the suburb in legal thought, see Kenneth A. Stahl, *The Suburb as a Legal Concept: The Problem of Organization and the Fate of Municipalities in American Law*, 29 CARDOZO L. REV. 1193 (2008).

[261] *Id.*

[262] In order to more fully understand the forces behind suburbanization and the racial motivations, the simultaneous processes at work in the inner city must be told at the same time.

[263] Ann Durkin Keating, *Building Chicago: Suburban Developers and the Creation of a Divided Metropolis*, *reprinted in* THE SUBURB READER 147, 152 (Becky M. Nicolaides & Andrew Wiese eds., 2006).

[264] *Id.*

[265] *Id.*

[266] *Id.*

[267] FREUND, *supra* note 14, at 21.

However, the growth of suburbs after World War II, and the white exodus to them, coincided with economic decline as industry began to relocate.[268] Blacks were increasingly shut out of the few jobs available.[269] With the help of government funding, Detroit's white suburbs of small houses, very similar to the ones in the city itself, grew quickly.[270] The white residents then invested in various technologies of exclusion: separate local incorporation, covenants, exclusionary zoning, and other methods cloaked in seeming legitimate local political processes.[271] In short, the growth of suburbs that were incorporated separately effectively drew walls around wealth through separate governance and tax structures.

In an article in *Detroit Saturday Night* from 1922, suburban Highland Park "resist[ed] annexation" to nearby Detroit on grounds that they enjoyed a lower tax rate, had "95 per cent [sic] paved" roads, "a seat in school for every child all day," "plenty of water," "a policeman past every home in the city every hour of the night and every school crossing is protected by a uniformed policeman," more firemen per thousand people than Detroit, and finally, as one resident put it, "let us be frank about it—[Highland Park] distrusts Detroit."[272] We see the disastrous effects of this separation at the time of this writing—a bankrupt city only miles from affluent suburbs.[273]

When the issue of integrated school busing as a solution to segregation in Detroit and its suburbs reached the Supreme Court in *Milliken v. Bradley*,[274]

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[268] *Id.* at 21-22.

[269] *Id.* at 22.

[270] *Id.*

[271] *See id.* at 243-399.

[272] *Highland Park, Very Well Satisfied, Is Deaf to Annexation*, DETROIT SATURDAY NIGHT (Nov. 25, 1922), *reprinted in* THE SUBURB READER 138-40 (Becky M. Nicolaides & Andrew Wiese eds., 2006) [hereinafter *Highland Park*].

[273] *See supra* pp. 237-39.

[274] 418 U.S. 717 (1974), aff'd, 433 U.S. 267 (1977). The racial makeup of schools had played a part in the initial underwriting criteria, which stated that, with respect to valuation of properties:

> The social class of the parents of children at the school will in many instances have a vital bearing. Thus, although physical surroundings of a neighborhood area may be favorable and conducive to enjoyable, pleasant living in its locations, if the children of people living in such an area are compelled to attend school where the majority or a goodly number of the pupils represent a far lower level of society or an incompatible racial element, the neighborhood under consideration will prove far less stable and desirable than if this condition did not exist.

Underwriting Manual of 1936, *supra* note 165, at Part II ¶ 266.

The Manual also states bluntly that "[s]chools should be appropriate to the needs of the new community and they should not be attended in large numbers by inharmonious racial groups." *Id.* at Part II ¶ 289.

the Court found that since there was no evidence that the suburbs had engaged in de jure segregation, "they could not be forced to participate in the busing remedy."[275] By separating city from suburb, the Court effectively changed the relationship at two levels: between state and local entity and between the local entities themselves. At the state level, cities and suburbs might have been seen as 'agents of the state'[276] and therefore state responsibility for discrimination could be remedied through the smaller governmental units.[277] However, municipalities were recast as not only autonomous from the state, but also from each other—meaning that the (white) suburb was separate from the previously segregated Detroit—in effect absolving the suburb from having to participate in urban integration remedies. These separations result in *protection* of the suburb, reified boundaries, and leaves limited spaces available for remedies to be implemented. Their effects on Detroit today are clear as the city enters bankruptcy.[278]

Detroit's population in the 2010 Census was nearly 83% Black and nearly 7% Hispanic.[279] Before Detroit's bankruptcy, these two populations had already been hit hard by the Foreclosure Crisis and the larger Financial Crisis. First, they suffered from massive foreclosures and evictions.[280] In response to the large numbers of abandoned buildings, the city actually tore down buildings, in attempt to send the land back to nature.[281] Now, the same population faces massive uncertainty around pensions and city services in addition to increased crime,[282] closed schools, declining city services as a result of a depleting tax base, and much fewer jobs.[283] Even

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[275] Ford, *supra* note 14, at 1875 (citing *Milliken*, 418 U.S. at 749).

[276] *Id.*

[277] *Id.*

[278] *See supra* note 1 and accompanying text.

[279] U.S. Census Bureau, *Quick Facts about Detroit Michigan*, http://quickfacts.census.gov/qfd/states/26/2622000.html (last revised July 8, 2014, 6:44 PM).

[280] *See* Mich. State Hous. Dev. Auth., *Michigan Foreclosure Data*, *available at* http://www.michigan.gov/documents/mshda/Data_230191_7.pdf (last visited Sept. 27, 2014).

[281] *See* Tony Favro, *US Cities Use Demolition As Planning Tool But Results Are Often Problematic*, CITY MAYORS DEV. 16 (May 7, 2006), http://www.citymayors.com/development/demolition_usa.html.

[282] "Detroit had the highest rate of violent crime for any U.S. city over 200,000 in 2012." *10 Things to Know About Detroit*, FORBES (Aug. 26, 2013, 3:58 PM), http://www.forbes.com/pictures/mkk45imek/still-burdened-by-crime-3/.

[283] *See* Monica Davey, *Big Dreams, but Little Consensus, for a New Detroit*, N.Y. TIMES, Sep. 2, 2013, http://www.nytimes.com/2013/09/03/us/dreams-but-little-consensus-for-a-new-detroit.html?hpw&_r=0.

birth and death certificates were recently delayed in a brief budget debacle.[284]

Meanwhile, as noted in the Introduction, wealthy suburbs outside Detroit, with their local tax bases, still enjoy high per capita incomes and house values.[285] Much of this can be explained by the zoning powers and entrenchment of municipal borders explored below.

B. Zoning: The Local Political Governance of Space

The process through which local governments decide allocations of land use replicates the exclusion and power differentials in place in local communities. In the initial decision making processes[286] for how space will be used, majoritarian politics are often at play as municipalities may ignore or even actively seek to harm the interests of various groups within the locality.[287] The less powerful are left to try to form coalitions with other groups and gain access to resources to support their campaigns. Over time, the power and resources granted by privilege of use and the exclusion of outsiders only become more entrenched[288] and seemingly the result of "natural" market forces. Not surprisingly, these powers inherent in residence mean that residence is a political and identity-affirming or aspirational decision. As Richard Ford notes:

> [r]esidence in a municipality or membership in a homeowners association involves more than simply the location of one's domicile; it also involves the right to act as a citizen, to influence the character and direction of a jurisdiction or association through the exercise of the franchise, and to share in public resources.[289]

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[284] *See* Hunter Stuart, *Detroit Temporarily Stopped Issuing Death Certificates After It Ran Out Of Paper In July*, HUFFINGTON POST, Sept. 5, 2013, http://www.huffingtonpost.com/2013/09/05/detroit-death-certificates-paper-ran-out_n_3873008.html; *Bankruptcy delays birth, death certificates in Detroit*, ASSOCIATED PRESS, Aug. 29, 2013, *available at* http://www.foxnews.com/us/2013/08/29/bankruptcy-delays-birth-death-certificates-in-detroit/.

[285] *See supra* note 3.

[286] This is all assuming one can even determine a 'starting' moment in time.

[287] *See* Ford, *supra* note 14, at 1844.

[288] *See generally* David Ray Papke, *Keeping the Underclass in Its Place: Zoning, the Poor, and Residential Segregation*, 41 THE URBAN LAWYER 787 (2009); David Ray Papke, *The Rise and Fall of the "Underclass": Ideology and Governmental Exclusion of the Poor through Zoning*, in PROPERTY AND SOVEREIGNTY: LEGAL AND CULTURAL PERSPECTIVES (James Charles Smith, ed.) (2013).

[289] *Id.* at 1847.

1. Zoning power

Local governments determine uses of space through their power to issue: (1) comprehensive plans and goals; (2) building codes and other related codes, including design and aesthetic regulations and historical building regulation; (3) subdivision regulations, including the "location and design of streets, sewers, parks, and other infrastructure, and the leverage to make developers pay for most of these improvements;"[290] and (4) zoning ordinances, including the size and shapes of lots, placement of buildings, and the "uses to which the land and buildings may be put."[291]

Zoning power in particular determines the permitted uses of, and activities in, space and in doing so, determines the character of communities. It is a powerful tool for local governments to control land use, ensure adequate services and utilities, attract and keep investment and businesses, and maintain a healthy tax base.[292] Zoning is controlled by the local government whose governance structures remain at the center of a range of debates regarding the appropriate reach of their power and their autonomy from the state.[293] Specific areas of dispute include: inclusion/exclusion of certain populations and activities, the balance and location of commercial/residential properties, transportation routes and land, and other issues relating to the government's commitment to social expenditure or fiscal restraint.[294] As such, zoning is at the heart of a variety of powerful methods of exclusion.

Additionally, the boundaries of suburbs and governance units have been a source of debate for decades: are they their own municipalities or part of nearby cities?[295] Further, within those boundaries, there has been much debate as to whether they are autonomous units or merely smaller structures through which policies of the state should flow.[296] Suburban governments and polities, not surprisingly, often opt to be separate entities from nearby cities and also attempt to be separate from the state so that they can limit their responsibility for the metropolitan area.[297]

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[290] ROBERT C. ELLICKSON, VICKI L. BEEN, RODERICK M. HILLS, JR., & CHRISTOPHER SERKIN, LAND USE CONTROLS: CASES AND MATERIALS 84 (4th ed. 2013).

[291] *Id.*

[292] *See* Ford, *supra* note 14, at 1855-56.

[293] *See* ELLICKSON ET AL., *supra* note 290, at 84-85.

[294] *See generally id.* at 83-299.

[295] *See Introduction to Chapter 5: The Politics of Early Suburbia*, *in* THE SUBURB READER 135, 135 (Becky M. Nicolaides & Andrew Wiese eds., 2006) [hereinafter Nicolaides & Wiese Chapter 5 Intro].

[296] *Id.* at 135-36.

[297] *Id.* at 136.

These powers have a profound effect in shaping the nature of a polity in a jurisdiction, as recognized as early as 1926 by the federal government. The Standard State Zoning Enabling Act ("SZEA") of 1926[298] listed such powers of local governments to issue regulations regarding congestion, measures taken in the name of safety and health, prevention of overcrowding, "undue concentration of population," parks, transportation, water, sewage, schools, with consideration of the "*character of the district and its peculiar suitability for particular uses*, and with a view to conserving the value of buildings and encouraging the most appropriate use of land."[299] The SZEA clearly recognizes that the power to determine the use of land is the power to determine the character of communities who live on it.

Zoning determinations of how local space will be used are profoundly instrumental in constructing the nature of a polity.[300] For example, a definition of a community as "equestrian," as Ford explains, could then justify ordinances "forbidding the construction of a home on any lot too small to accommodate stables and trotting grounds, or may even ban automobiles from the jurisdiction."[301] This colorful illustration proves the point well. Use of space involves political decisions regarding legitimacy and the kinds of society a state wants to exist. When viewed analogously to how government categorization of populations as simultaneously measuring and seeking to constitute a particular kind of measurable population,[302] so too do determinations of "use" of space create and then reinforce the kinds of populace which localities wish to host and govern.

Municipalities are indeed empowered to make such determinations for themselves. When, in *Euclid*, the Supreme Court confirmed the power of municipalities to determine their own land use zones, it effectively ended the debate regarding whether zoning fell under the police powers of the states to issue regulations for health, safety, welfare, morals or if it deprived property owners of their property rights without due process—in short, whether zoning was constitutional or not.[303] The Supreme Court decided that the Village of Euclid did in fact have the power to regulate their village

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[298] ADVISORY COMM. ON ZONING, U.S. DEP'T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT UNDER WHICH MUNICIPALITIES MAY ADOPT ZONING REGULATIONS (rev. ed. 1926), *available at* https://www.planning.org/growingsmart/pdf/SZEnablingAct1926.pdf.

[299] *Id.* at 6-7 (emphasis added).

[300] Ford, *supra* note 14, at 1871.

[301] *Id.*

[302] *See* JAMES C. SCOTT, SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED (1998).

[303] 272 U.S. 365, 394-97.

into different zones and prescribe uses for each one (in this case, restricted industrial presences).[304]

Because municipalities have such powers, their borders become very significant. Once in place, such borders become difficult to change, as the homogeneity of ruling polity are able to exclude outsiders who often lack standing to sue or vote.[305] It takes the very rare action at the state level to change such doctrine. In a series of cases in New Jersey, the courts established the "Mount Laurel Doctrine," which requires municipalities to consider the general welfare beyond their borders, and to affirmatively implement low and moderate cost housing.[306] Unfortunately this doctrine remains a minority position in the U.S. And so, unequal access to material resources and the power to shape land uses is perpetuated and entrenched.[307] As explored below, race often ends up as the flashpoint of such disproportionate access to resources. If spaces were segregated and never actively undone, not surprisingly, privilege structures remain in place, and power and patterns of societal ordering replicate themselves.

2. Governance structures, embedded demographics, and entitlement to borders

With Detroit's bankruptcy in 2013, and some calling for a "metropolitan" governance view of the city which would recognize the interdependency of suburbs and city, the attitudes and powers of privilege expressed in *Detroit Saturday Night*[308] and in *Milliken*[309] are particularly stinging.[310]

These moves entrenched entitlement to these borders and even a sense that segregated communities were a *right* of white homeowners. Thomas Sugrue contextualizes this sense of entitlement with the shifts in

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[304] *Id.* at 397.

[305] Ford, *supra* note 14, at 1861.

[306] See S. Burlington Cnty. NAACP v. Township of Mount Laurel, 336 A.2d 713 (N.J. 1975) and S. Burlington Cnty. NAACP v. Township of Mount Laurel, 456 A.2d 390 (N.J. 1983), for two cases which establish the Mount Laurel Doctrine that is commonly applied in New Jersey.

[307] *Id.*; *see also* Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115 (1996).

[308] *Highland Park*, *supra* note 272.

[309] 418 U.S. 717 (1974), *aff'd*, 433 U.S. 267 (1977).

[310] For more commentary on the situation in Detroit, see *Sunday Dialogue: Can Suburbs Help Cities?*, N.Y. TIMES, Aug. 3, 2013, http://www.nytimes.com/2013/08/04/opinion/sunday/sunday-dialogue-can-suburbs-help-cities.html?pagewanted=all (New York Times "[r]eaders discuss taking a regional approach to reviving Detroit").

nationalistic rhetoric and homeownership policy after World War II.[311] He discusses how "[t]he notion of the white entitlement to a home in a racially homogeneous neighborhood was firmly rooted in New Deal housing policy"[312] through supporters of federal agencies (Home Owners' Loan Corporation ("HOLC") and the FHA).[313] These agencies promoted homeownership in the interests of "national security and self-preservation" and the rhetoric of President Franklin Delano Roosevelt who "frequently alluded to the ideal of a nation of free homeowners in his speeches, and . . . included the right to a decent home in his 1944 'Second Bill of Rights.'"[314]

These ideas resonated with the white residents in 1940s Detroit, in particular, with those who "had struggled, usually without the benefit of loans or mortgages, to build meager homes of their own in the city."[315] They now welcomed government assistance in the form of mortgages and loan support.[316] The rest of President Roosevelt's rhetoric—not just homeownership but nationalism—resonated as well and white residents "began to view home ownership as a perquisite of citizenship" by World War II.[317] Moreover, they supported the federal "insistence that mortgages and loans be restricted to racially homogeneous neighborhoods."[318] In short, these white residents of Detroit "came to expect a vigilant government to protect their segregated neighborhoods."[319]

Such legitimation of entitlement only leads to its further entrenchment.

> If a new community imposed racial restrictions from the beginning, . . . residents would develop a belief that they had a "right" to a homogenous neighborhood, and changing the racial pattern later would be extremely difficult. If, however, urban areas were developed according to comprehensive plans that provided for the construction of housing for all income levels, and, if the program was implemented carefully and without discrimination, integration could succeed.[320]

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[311] Thomas J. Sugrue, *Crabgrass-Roots Politics: Race, Rights, and the Reaction Against Liberalism in the Urban North*, 82 J. AM. HIST. 551, 564 (1995).

[312] *Id.* at 564.

[313] *Id.*

[314] *Id.*

[315] *Id.*

[316] *Id.*

[317] *Id.* For an interesting visual example of nationalist rhetoric mixed with housing construction and design, see Videotape: Better Housing News Flashes No. 1, 1935 (Fed. Hous. Admin. 1935), *available at* http://research.archives.gov/description/7040.

[318] Sugrue, *supra* note 311, at 564.

[319] *Id.*

[320] Pritchett, *supra* note 156, at 10.

The borders protecting this entitlement have proven very difficult to change, as insular communities do not have a responsibility to accommodate non-residents, which results in a cycle of entrenched segregation. As Ford points out, the "position and function of jurisdictional and quasi-jurisdictional boundaries . . . helps to promote a racially separate and unequal distribution of political influence and economic resources."[321] The inequalities and the political boundaries then serve to mutually reinforce each other. "Thus, racial segregation persists in the absence of explicit, legally enforceable racial restrictions."[322]

As argued throughout this paper, it is this invisibility of privilege and allocation of resources that renders it most difficult to change. In the case of borders, it is the invisibility of the lines as deeply political that makes them appear natural. In fact, as Ford explains, spaces and corresponding associations which inherently exclude people may be hard to see because "the tautology of community self–definition is masked when a group can be spatially defined: 'We are (simply) the people who live in area X.'"[323] It takes work to unpack the borders of area X, and remember how it was decided who got to live there, enjoy access to X's resources, and therefore be part of that association.[324] Again, assumptions of equality, colorblindness, or access without recognition of historical processes serve to mask the underlying disparities of resources and distribution, rather than to alleviate them.

Once segregation existed, it was there to stay because boundaries do not change easily. Law would perpetuate segregation by respecting local boundaries as givens, rather than as political designs.[325] And once boundaries are given, they operate to exclude in the way Ford describes:

> local boundaries, once established, are difficult to alter; segregated localities form autonomous political units whose internal political processes tend to replicate existing demographics; wealthier localities have strong economic incentives to enact policies of exclusionary zoning to maintain homogeneity of class and therefore race; and, each of these factors tends to reinforce the others.[326]

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[321] Ford, *supra* note 14, at 1844.

[322] *Id.* at 1844-45.

[323] Ford, *supra* note 14, at 1860; *see also* Kushner, *supra* note 83, at 634 (discussing Warth v. Seldin, 422 U.S. 490 (1975), and the lack of standing for non-residents to challenge exclusionary land use practices).

[324] *See* Ford, *supra* note 14, at 1860.

[325] *Id.* at 1845.

[326] *Id.* at 1861.

This entrenchment is reinforced by courts who have treated cities and suburbs as autonomous, each absolved of responsibility towards the other, despite their inter-dependence for jobs, labor, services, and cultural and social life, as the *Milliken* case from Detroit showed.[327]

In the 1977 decision of *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[328] the Supreme Court once again confirmed a municipality's prerogative to protect municipalities' zoning preferences for detached single-family houses.[329] In this case, a nonprofit real estate developer who had planned to build a low and moderate income multi-family residence and several individual plaintiffs brought suit against the local authorities alleging racial discrimination in violation of the Fourteenth Amendment and the Fair Housing Act based on their refusal to rezone the area to allow for the construction.[330] The Village of Arlington successfully argued that if they allowed such housing, it would have a negative effect on property values.[331] The Supreme Court upheld Arlington's decision not to rezone, stating that the plaintiffs had not proven the necessary discriminatory intent or purpose as a motivating factor in the decision, as required to prove a violation of the Equal Protection Clause of the Fourteenth Amendment.[332] Of course, unless local authorities are particularly inept, they are very unlikely to explicitly state racist motivations or provide other clear evidence of such. By requiring evidence of intent (and not just racial impact)[333] in order to prove discrimination, the Court effectively closed off much future litigation involving homogeneous suburban enclaves.[334]

The history of how the federal government itself enabled property values to become a proxy to accomplish racially exclusionary zoning, through free market rhetoric extolling how suburbs grew seemingly on their own, and by directly making racially integrated areas lower value through the FHA

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[327] *Id.* at 1870.

[328] 429 U.S. 252 (1977).

[329] *Id.* at 270-71.

[330] *Id.* at 272.

[331] *Id.* at 258.

[332] The Court remanded the case on the Fair Housing Act claim. *Id.* at 252.

[333] The racial implications of the village's zoning decision were clear, as plaintiffs had provided evidence of the likely integrated racial make-up of residents and the fact that, as Justice Powell's opinion recognized, in the 1970 census, six years before this case was argued, "only [twenty-seven] of the Village's 64,000 residents were black." *Id.* at 255.

[334] *See* Daniel R. Mandelker, *Racial Discrimination and Exclusionary Zoning: A Perspective on Arlington Heights*, 55 TEX. L. REV. 1217, 1218 (1977) ("Under the Supreme Court's approach, exclusionary zoning is subject to challenge as racially discriminatory only in the most blatant cases.").

regulations, is lost here. Interestingly, while the Court does not rule in a way that seems to recognize this history, it quotes the lower Court of Appeals, which had struck down the restrictive zoning in Arlington and relied on *Kennedy Park Homes Association v. City of Lackwanna*,[335] in recognizing that "the denial of rezoning must be examined in light of its 'historical context and ultimate effect.'"[336] However, after this acknowledgement, the Court goes on to affirm its previous holding[337] that "racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause"[338] and that such purpose may not be the dominant or primary one, but should be a motivating factor, and even suggests ways that a legislative history might have shown such intent, though not present here.[339] While recognizing the inevitable racial impact of the regulation,[340] the Court does not address the need for redress of historical wrongs raised by the Court of Appeals or the problematic societal effects of the exclusion that would inevitably result from allowing "protecting property values" to be a valid basis for zoning.[341]

In an illustration of the self-perpetuation of homogeneous communities explored above, Ford draws out how the Court in *Arlington* "accepted local boundaries as the demarcation of an autonomous political unit," despite the operation of such boundaries (and zoning policy) to exclude "outsiders" from the political processes that resulted in the exclusion.[342] He argues that the Courts' deference to the locality's internal political process was unjustified because "it [was] this very political process (as well as the boundaries that shape that process) that [was] at issue."[343] If the historical context of the constitution of the community and the boundaries had been taken into account, perhaps the Court would have thought it justified to allow the plaintiffs to open space for societal change through integrated residences.

These entrenched borders and structures perpetuated through municipal codes remain today. As the American population has not been moving more towards the heteronormative male breadwinner family described

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[335] 436 F.2d 108, 112 (2d Cir. 1971), *cert. denied*, 91 S. Ct. 1256 (1971).

[336] *Arlington*, 429 U.S. at 260.

[337] *Id.* at 264 (citing Washington v. Davis, 426 U.S. 229 (1976)).

[338] *Id.* at 265.

[339] *Id.* at 268.

[340] *Id.* at 269.

[341] *Id.* at 273. Marshall and Brennan dissent in part, but only that the entire case should have been remanded for the Court of Appeals to review in light of the *Davis* precedent.

[342] Ford, *supra* note 14, at 1874.

[343] *Id.*

above (and not surprisingly, has in fact become even more heterogeneous),[344] the excessive availability of one form of a single-family detached house in the suburb is even more misaligned with the needs and finances of American individuals and families.[345] The size and form of this house, now spread in subdivisions across the States, limited peoples' purchase options to residences that were often a stretch of their finances.

There was considerable pressure to make these leaps of faith though, in that the owners of such houses continue to enjoy better locations with better services and schools. Moreover, creative financing during economic growth years made the deeply embedded American Dream appear within reach for those who had grown up without it.[346] Another vestige of the previous hundred years which further exacerbated the pressures to buy is the poor location of zoning districts for rentals and apartment buildings.[347]

Other zoning measures excluding access to racial minorities, including municipal codes, continue to be in place across municipalities.[348] As discussed with regard to the notion of privacy and the shift toward market language, seemingly racially neutral language can nevertheless have significant racial impact.[349] Zoning ordinances that privilege socio-economic class also have disparate racial impacts.[350] And so, exclusions based on limitations on multi-family housing design and ownership, minimum plot size,[351] minimum house size, income requirements, or restrictive relational requirements for occupants, and resource allocation away from public transport and walking accessibility also serve to further housing inequality.[352]

Exclusionary zoning has also exacerbated the inability to meet mortgage payments (potentially leading to foreclosure) in sometimes not so obvious ways. For example, some mortgage holders in Baltimore have turned to

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[344] *See* U.S. CENSUS BUREAU, *supra* note 55.

[345] *See supra* Part II.C.

[346] *See* Gupta, *supra* note 58.

[347] It is outside the scope of this article to fully discuss this phenomenon, but the fact that rental housing was particularly hit by the Foreclosure Crisis further exacerbated the effects again, for lower income (disproportionately racial minority) populations.

[348] Vill. of Belle Terre v. Boraas, 416 U.S. 1, 17 (1974).

[349] HARRIS, *supra* note 20.

[350] *See* Ford, *supra* note 14, at 1860.

[351] See *Introduction to Chapter 15: Our Town: Inclusion and Exclusion in Recent Suburbia*, *in* THE SUBURB READER 439-40 (Becky M. Nicolaides & Wiese eds., 2006) ("By the mid-1960s, lots of one-half acre or more were required to build a home in huge portions of American suburbia, and the trend was toward even larger minimums."); Paul Davidoff & Neil Newton Gold, *Exclusionary Zoning*, 1 YALE REV. L. & SOC. ACTION 56, 59 (1970).

[352] *See id.* at 439-67.

renting out rooms in their houses to boarders in order to be able to meet mortgage payments—but many localities continue to have restrictions on this practice.[353] Limitations on boarders have deep roots in social norms, again illustrating the power of the social norm of the nuclear family embedded in land use. Historically, boarders were seen as disruptive to nuclear family structures, invaders of privacy, they were also seen to engender immorality.[354]

By entrenching legitimate lifestyles, associations, and processes of exclusionary governance, local government and land use law have thereby operated to construct a certain polity and exclude others through the very spatial structures in which we live. Once these structures are built and firmly rooted in law and legitimacy, they have proven very difficult to undo.

V. CONCLUSION: HOUSING INEQUALITY, INVISIBLE PRIVILEGE, AND THE SINGLE-FAMILY HOUSE

This Article has explored how racial privilege is inscribed into our spatial patterns of residence and the very physical structures (houses) within those patterns and how this inscription, across time, served to reify and replicate this privilege into society and societal norms. An understanding of these orientations then helps us see the structural disadvantages for racial minorities in housing ownership today.

Housing inequality and the crises faced largely by racial minorities in the Foreclosure Crisis and various pockets of urban decay are not merely the result of the free market, through the twentieth century or today. Without an adequate appreciation of the role of the government in this inequality, once again in the 2000s, the need for consumerism to boost the economy, combined with unregulated credit and fraud, led to the massive Foreclosure Crisis. The sequence of the subprime meltdowns and ensuing foreclosures, unforeseen in scale, should not have been entirely surprising, though, given historical precedent in which lending fraud had worked before.[355]

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[353] John Leland, *Homes at Risk, More Owners Consider Taking in Boarders*, N.Y. TIMES, July 16, 2008, http://www.nytimes.com/2008/07/16/us/16share.html?pagewanted=all. A recent case in Utah challenged a zoning restriction on boarders in accessory apartments but lost. *See* Anderson v. Provo City Corp., 108 P.3d 701 (Utah 2005).

[354] *See* HARRIS, *supra* note 20, at 116. Interestingly, "in the current movie 'Kit Kittredge: An American Girl,' in which a Depression family takes in boarders to save its home, a motley assortment of strangers unsettle family life." Leland, *supra* note 353.

[355] As Garrett Power explains, in Baltimore in the 1950s, after lenders had turned to black populations to take out loans,

The widespread focus on individuals operating in their own self-interest in a market environment invisibilizes the privilege that the white middle class enjoys in liberal discourse more generally as well. Through rhetoric and policies regarding the free market, certain individuals and communities—those not as able to access this market for a variety of reasons—are left behind. The deeply embedded values of "equality" or self-help then serve to mask this exclusion from the system, wherein people do not exist in equal bargaining positions.[356] This phenomenon can be seen in many parts of today's economy, and housing is just one powerful example of how racial inequality shows the cracks in the seeming commitment of liberal policies to equality and individual opportunity.

The hidden nature of privilege enables its entrenchment in localities through the use of political power.[357] In fact, the very hiding itself is seen to be a "hallmark of white privilege" and can be said to be "true for a range of ideologies that are designed into the spaces that surround us."[358] This entrenchment is reinforced by courts' willingness to take the boundaries of localities as given, regardless of the homogeneity of residents who then make decisions within these borders. Relatedly, outsiders are then expected to conform or choose to live elsewhere.[359] The insistence on "equality," "colorblindness," or similar assumptions regarding equal bargaining power and status, without recognizing the reality of existing disparities also feeds into this perpetuation of privilege.

Legitimacy surrounding the house speaks volumes about legitimacy of who can live where, who is considered a good citizen in America, and who

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> speculators broadened their market. They used their credit to borrow money from financial institutions. Turned-over houses were then sold on easy terms to low-income, high risk black buyers pursuant to 'buy-like-rent' contracts. The sales were often illusory; foreclosure was the rule rather than the exception. The speculator would sell and resell the same house to a series of buyers. By this technique the blockbusters took a profit from the under-class as well as the middle-class Negroes. Blockbusting transferred tens of thousands of houses from the white market to the black market.

Garrett Power, *Apartheid Baltimore Style: The Residential Segregation Ordinances of 1910-1913*, 42 MD. L. REV. 289, 321 (1983).

[356] *See* Hila Keren, *Law and Economic Exploitation in an Anti-classification Age*, 42 FLA. ST. U. L. REV. (forthcoming). Additionally, I have written elsewhere about the shift in discourse from minority house buyers pre-Crisis to those facing foreclosure as "irresponsible borrowers." *See* Gupta, *supra* note 58, at 3.

[357] "In well-to-do communities, powers conferred by political autonomy were often deployed to protect the town's class and racial exclusivity." Nicolaides & Wiese Chapter 5 Intro, *supra* note 295, at 136.

[358] Harris, *supra* note 31, at 2.

[359] Ford, *supra* note 14, at 1872-73; *see* discussion of *Milliken supra* Part IV.A.

deserves property. In short, how Americans regulate their houses is in large part how they regulate their society.[360] How the single-family house has been regulated shows us who it was meant to house and enable.

Perhaps architecture alone is not going to liberate people.[361] Even so, this building—the single-family detached house—and the spatial patterns that surround it have been used to exclude and limit liberty for some. We know the history of these prolific structures. We see the decay in urban environments, bankruptcies, disproportionate effects of crises, and inequality of ownership. Where do we go from here? Could the built suburbs ever be a place of liberation? Could they ever be reimagined to further other social norms than those they were constructed to support?

Perhaps, with an understanding of the power exercised through law and regulation that shaped our current housing market and collective imagination, federal, state, and local government can be called upon to act again—but this time, in a way that rebuilds and restructures American housing with the goals of dismantling privilege and promoting more inclusive visions of legitimacy and equality.

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[360] For an interesting discussion regarding culture and the house, see JAN COHN, THE PALACE OR THE POORHOUSE: THE AMERICAN HOUSE AS CULTURAL SYMBOL xi (1979) ("[T]he house has been, and continues to be, the dominant symbol for American culture. . . . Therefore, to examine what Americans have said about houses, their own and those of other men, is to examine what Americans have said about their culture.").

[361] As Foucault has been quoted as saying, liberty is, in fact, a "practice." Gwendolyn Wright & Paul Rabinow, *Spatialization of Power: A Discussion of the Work of Michel Foucault*, SKYLINE, Mar. 1982, at 14-15.

Palila, People, and Politics: Perfect Facts, Law, and Lawsuits with Imperfect Results

Joanna C. Zeigler*

E aha ana lā Emalani?
E walea a nanea a'e ana i ka leo hone o ka Palila,
'Oia manu noho kuahiwi

What is it that Emalani is doing?
Relaxing and enjoying the sweet voice of the Palila,
Those birds that dwell upon the mountain[1]

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[1] *Emma Kaleleonalani Ma Kohala*, ULUKAU: THE HAWAIIAN ELECTRONIC LIBRARY (last visited Nov. 10, 2014) [hereinafter *Emma*], http://ulukau.org/elib/cgi-bin/library?e=d-0mauna-000Sec--11en-50-20-frameset-book-palila-1-011escapewin&a=d&d=D0.5.139&toc=0 (quoting *He Inoa Pi'i Mauna no Kaleleonalani*, a 1882 song about Queen Emma's visit to Mauna Kea).

I. INTRODUCTION

In the early morning, approximately twenty to thirty people of all ages gather outside the Hawai'i Department of Land and Natural Resources ("DLNR") office in Hilo, Hawai'i, waving signs in protest of the aerial hunt of mouflon sheep that will take place later that day on the mountain of Mauna Kea.[2] The signs say: "Stop the Massacre," "What About the Keiki?" and "Stop the Inhumane Waste."[3] As cars drive by, many honk in support of the protesters.[4] The protesters represent the Big Island hunting community and are upset with DLNR for many reasons surrounding the aerial hunts.[5] The main reason the protestors are upset about the aerial hunts is because the end goal is to remove all of the sheep from the

[2] *See Mauna Kea Sheep Eradication Protested Outside DLNR*, BIG ISLAND VIDEO NEWS (Aug. 29, 2013) [hereinafter *Mauna Kea Sheep*], http://www.bigislandvideo news.com/2013/08/29/video-mauna-kea-sheep-eradication-protested-outside-dlnr/.

[3] *See id.*

[4] *See id.*

[5] *See id.*

mountain, thereby eliminating a source of hunting in Hawai'i.[6] The sheep are being removed as the result of a federal court mandate because the sheep degrade the native ecosystem that an endangered Native Hawaiian bird, the Palila,[7] depends on.[8] Thus, the removal of the sheep has become a complicated and controversial matter between those who encourage the protection of native ecosystems and those who feel they are entitled to hunt.

The removal of sheep on Mauna Kea is a critical detail to the story of protecting the Palila; an endangered bird found only in a small area of the mountain of Mauna Kea, located on the Big Island of Hawai'i.[9] The Division of Forestry and Wildlife ("DOFAW")[10] must remove the sheep because of several federal court mandates interpreting the Endangered Species Act ("ESA") definition of "take."[11] *All* sheep must be removed from the critical habitat of the Palila, because the sheep eat the māmane tree that the Palila depends on for food and survival.[12] These federal court decisions have proven controversial, and removing the sheep from Mauna Kea has become a politically influenced action. DLNR, who was mandated to remove the sheep, faces balancing community pressure to resist the mandate, such as that of the protesting hunters, with complying with a federal court order. As a result, the Palila's story did not end with its many victories in the courtroom.[13] Instead, its battle continues. Over the last thirty-five years, incremental accomplishments continue to advance the protection of this vulnerable bird population, with the hope that complete recovery is still possible.

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[6] *See id.*

[7] In this Article, any Hawaiian language used will not be italicized because it is the native, indigenous language of Hawai'i, not a foreign language. Italicization will be used to preserve the integrity of cited material. *See* HAW. REV. STAT. § 1-13 (2013) ("English and Hawaiian are the official languages of Hawai['i."); *see, e.g.*, Breann Nu'uhiwa, *Government of the People, By the People, for the People: Cultural Sovereignty, Civil Rights, and Good Native Hawaiian Governance*, 14 ASIAN-PAC. L. & POL'Y J. 57 n.38 (2013). For further information about the Palila see *infra* Part II.A.1.

[8] *See infra* Part II.B.

[9] Paul C. Banko et al., *Response of Palila and Other Subalpine Hawaiian Forest Bird Species to Prolonged Drought and Habitat Degradation by Feral Ungulates*, *BIOLOGICAL CONSERVATION* 157, Jan. 2013, at 70, 70-71 (citations omitted), *available at* http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1645&context=usgsstaffpub.

[10] DOFAW is a division of DLNR that is "[r]esponsible for the management of [s]tate-owned forests, natural areas, public hunting areas, and plant and wildlife sanctuaries." *Divisions: Forestry and Wildlife (DOFAW)*, DEP'T OF LAND AND NATURAL RES., dlnr.hawaii.gov/division-offices/ (last visited Nov. 20, 2014).

[11] *See infra* Part II.C.

[12] *See* H. DOUGLAS PRATT, THE HAWAIIAN HONEY CREEPERS 205 (2005).

[13] *See infra* Part II.C.

Many interested parties serving as stakeholders influence Palila protection in different ways depending on their values. Some value the Palila simply to hear its sweet call as in the song above relating Queen Emma's visit to Mauna Kea.[14] Others value biodiversity and preventing vulnerable species of any kind from entering the non-reversible status of extinction.[15] Others have an interest in the Palila litigation because the lawsuits mandate the removal of all sheep from the Palila's critical habitat, which in theory means that those who hunt on the mountain lose a place to hunt.[16] Specifically, the main stakeholders involved in Palila protection include: (1) conservationist groups, including the Sierra Club, Hawai'i Audubon Society, and American Bird Conservancy; (2) the State of Hawai'i DLNR; (3) hunters who hunt sheep on Mauna Kea; and (4) the federal United States Fish and Wildlife Service ("USFWS").

The interplay of these stakeholders involves thirty-five years of litigation, community resilience, and the continued presence of sheep in Palila critical habitat, despite several federal court decisions mandating the removal of the sheep.[17] This Article focuses on how the ESA and the facts in the Palila cases set the stage for a perfect outcome for Palila protection. Despite these circumstances, however, the Palila population continues to decline.[18] Thus, the Palila's story demonstrates that without follow through, it will not become a success story, even with a great law and successful court decisions.[19]

Part II of this Article first describes the physical characteristics of the Palila and its dependence on a specific habitat, the māmane-naio forest. Part II then sets forth the ESA provisions that are relevant to the Palila. Part II lastly outlines the Palila's important litigation history in chronological order. Next, Part III analyzes each of the stakeholders involved in Palila protection and how the ESA and resulting court decisions affects each stakeholder's perspective and influence on Palila protection. Finally, Part IV concludes the Article.

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[14] *See Emma*, *supra* note 1.

[15] *See generally* U.S. FISH & WILDLIFE SERVICE, WHY SAVE ENDANGERED SPECIES? (2005), *available at* http://www.fws.gov/nativeamerican/pdf/why-save-endangered-species.pdf (discussing why endangered species should be saved).

[16] *See Mauna Kea Sheep*, *supra* note 2.

[17] *See infra* Part II.C.

[18] *See infra* Part II.A.2.

[19] *See generally 110 Success Stories For Endangered Species Day 2012*, CENTER FOR BIOLOGICAL DIVERSITY, http://www.esasuccess.org/report_2012.html (last visited Oct. 17, 2014) (defining success within the meaning of the ESA through recovery rates of the species listed).

II. BACKGROUND

A. The Palila: A Description of the Plaintiff

The Palila is not a typical charismatic megafauna compared to a polar bear or a wolf, which draw sympathy across the world. It is a small bird found only in the State of Hawai'i, and even within the state, many residents of Hawai'i have never seen it.[20] The Palila has, however, drawn much attention in the legal community due to many visits to the United States District Court District of Hawai'i,[21] two trips to the United States Ninth Circuit Court of Appeals,[22] and its reference in an opinion of the United States Supreme Court.[23] With the facts and law on its side, the Palila managed to win every lawsuit it brought to court. Its fame in the courtroom, however, is not the reason why biologists study the Palila. To those who study the Palila, its physical characteristics are distinct and its specialized habitat make it a remarkable bird found on Mauna Kea.

1. The Palila's physical characteristics and habitat

The Palila is a distinct bird on Mauna Kea. If one knows what a Palila looks like, it is unmistakable when it is spotted. Palila are considered large compared to other Hawaiian forest birds at nineteen centimeters in length.[24] The Palila is a Hawaiian honeycreeper with a blunt bill.[25] The upper part of its body is grey and the under parts are white.[26] The wing and tail feathers are "dark brown with golden yellow edgings . . . producing a greenish-yellowish appearance."[27] It has a yellow head, with the male being more golden and the female more lemon yellow.[28]

The Palila exists only in a single habitat: the māmane-naio forest,[29] and it "cannot persist long where māmane is sparsely distributed or confined to

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[20] *See Jason Scott Lee Plays Palila in PSA,* BIG ISLAND VIDEO NEWS (Dec. 11, 2013), http://www.bigislandvideonews.com/2013/12/11/video-jason-scott-lee-plays-palila-in-psa/. "Not many people are familiar with what a Palila is and why they are worth saving." *See id.* (quoting Robert Stephens).

[21] *See infra* Part II.C.1, 3, 5-6.

[22] *See infra* Part II.C.2, 4.

[23] *See* Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 693-95 (1995).

[24] *See* PRATT, *supra* note 12, at 204.

[25] *See id.*

[26] *Id.*

[27] *Id.*

[28] *See id.*

[29] *See id.* at 19.

a narrow band of elevation."[30] This is because the Palila feeds primarily on the seeds found in the green pods of the māmane tree.[31] "The m[ā]mane trees [are] the Palila's entire world, their seeds, pods, and flowers its food, their screen of the mountain mists its water, their twigs and leaves its nests, their branches its roosts and nest sites."[32]

The Palila's habitat range was historically much broader than it is today. In the past, the Palila was found on three of the five volcanoes on the island of Hawai'i:[33] Hualālai, Mauna Loa, and Mauna Kea.[34] Presently, its habitat is restricted to the southwestern slope of Mauna Kea, which is five percent of its historical range.[35] The Palila is found on Mauna Kea between the elevations of about 6000 and 9000 feet.[36] Thus, its distinct characteristics, highly specialized diet, and constricted habitat range make the Palila a unique bird on Mauna Kea.

2. Threats to the Palila

The Palila are faced with many threats, which affect its population numbers and ability to recover. As of 2014, the most recent estimate of the Palila population ranges between 1328 and 1802 birds.[37] Since 1998, Palila numbers have declined sixty-eight percent.[38] The United States Geological Survey ("USGS") predicts, "[a]t the present rate of decline, the species could be extinct very soon[,] . . . and even under improved environmental conditions, this diminished population will be slow to rebound due to low reproductive rates . . . ."[39] The Palila is faced with several threats that both

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[30] Banko et al., *supra* note 9, at 71 (citations omitted).

[31] *See id.* at 70 (citations omitted); *see also* CONSERVATION BIOLOGY OF HAWAIIAN FOREST BIRDS: IMPLICATIONS FOR ISLAND AVIFAUNA 514 (Thane K. Pratt et al. eds., 2009) [hereinafter CONSERVATION BIOLOGY] (citation omitted) ("At the root of the Palila's vulnerability is its dietary dependence on the unhardened seeds of the māmane.").

[32] Oliver A. Houck, *More Unfinished Stories: Lucas, Atlanta Coalition, and Palila/Sweet Home*, 75 U. COLO. L. REV. 331, 403 (2004).

[33] *See* Banko et al., *supra* note 9, at 71-72; *see also Palila: Distribution—Where Palila Live*, MAUNA KEA FOREST RESTORATION PROJECT, http://dlnr.hawaii.gov/restoremaunakea/home/palila/ (last visited Apr. 26, 2014) (stating that the Palila existed in the māmane forest on Kaua'i and O'ahu prior to the arrival of western explorers, known from sub-fossil remains).

[34] *See* PRATT, *supra* note 12, at 205.

[35] Banko et al., *supra* note 9, at 71 (citations omitted).

[36] *See* PRATT, *supra* note 12, at 205.

[37] Email from Robert Stephens, Supervisor, Mauna Kea Forest Restoration Project, to author (Apr. 14, 2014, 20:23 HST) [hereinafter Stephens] (on file with author).

[38] Email from Robert Stephens, Supervisor, Mauna Kea Forest Restoration Project, to author (Apr. 25, 2014, 12:16 HST) (on file with author).

[39] Banko et al., *supra* note 9, at 74 (citations omitted).

directly and indirectly affect its ability to survive as an abundant population. Examples of known, present threats to the Palila include: drought, climate change, predators, and ungulates.[40] All of these factors act as a challenge for Palila to thrive in viable population numbers.

During times of drought, māmane seed production is reduced, and in turn, there is a reduction in Palila reproduction rate.[41] In 2003, Palila populations peaked after a long period of relatively normal weather.[42] However, the population declined each year after 2003 when drought conditions persisted.[43] Drought is, therefore, a likely contributor to the Palila's recent decline.

Climate change may also contribute to the Palila's decline. It is predicted that climate change will "modify Hawaiian forest bird habitats, food webs, and the distributions of invasive threats."[44] In addition, "[c]limatic trends indicate that [P]alila's habitat will become even drier[,] . . . which will . . . further reduce carrying capacity."[45] Therefore, climate change may act to exacerbate current drought conditions.

Feral cats also threaten the survival of the Palila. Although the Palila has natural predators such as the Native Hawaiian short-eared owl, or Pueo, and the Native Hawaiian hawk, or 'Io, the "non-native feral cat is the most threatening predator to [P]alila."[46] Western Mauna Kea, where the Palila population is concentrated, has a high population of feral cats.[47] Palila are particularly vulnerable to feral cats because it did not evolve with these cats in its habitat.[48] As a result, feral cats are responsible for a loss of approximately ten percent of Palila nests annually.[49]

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[40] *See id.* at 71; *see also Threats: Non-native Predators*, MAUNA KEA FOREST RESTORATION PROJECT, http://dlnr.hawaii.gov/restoremaunakea/home/threats/ (last visited Mar. 24, 2014). Other threats to the Palila include fire and invasive plants. *See Threats: Fire*, MAUNA KEA FOREST RESTORATION PROJECT, http://dlnr.hawaii.gov/restoremaunakea/home/threats/ (last visited Mar. 24, 2014) (citation omitted) ("The presence of large amounts of fine fuel from grasses, dry climate, and human ignition sources produces a significant risk of wildfire in this area year-round."); *Threats: Invasive Plants*, MAUNA KEA FOREST RESTORATION PROJECT, http://dlnr.hawaii.gov/restoremaunakea/home/threats/ (last visited Mar. 24, 2014) (citation omitted) ("Weeds pose threats to māmane forest habitat by escalating fire risks and displacing native plant species.").

[41] *See* Banko et al., *supra* note 9, at 75 (citations omitted).

[42] *See id.* (citations omitted).

[43] *See id.* (citations omitted).

[44] *Id.* at 71 (citations omitted).

[45] *Id.* (citations omitted).

[46] *Threats: Non-native Predators, supra* note 40.

[47] *See id.*

[48] *See id.*

[49] *See id.*; *see also* CONSERVATION BIOLOGY, *supra* note 31, at 520 (stating that "[m]ost cat predation involves nestlings").

Although drought, climate change, and feral cats are serious threats to Palila, "the most important, long term manageable threat to the population is habitat degradation by feral sheep and mouflon sheep."[50] In the early 1800s, cattle, goats, and sheep were introduced to Palila habitat, "killing or damaging trees and shrubs, removing seedlings, and exacerbating erosion."[51] In the early 1900s, foresters and sugar plantation owners recognized the damage that the herbivores caused, and a system of forest reserves were established.[52] Beginning in 1934, tens of thousands of sheep were removed from Mauna Kea, totaling approximately 47,000 over the next decade.[53] In the 1950s, after World War II, a shift in management occurred as the popularity of hunting on Mauna Kea increased.[54] In 1957, state biologists began hybridizing mouflon sheep with feral sheep to improve the quality of the game animals.[55] By 1959, the sheep and feral goat populations had rebounded from the previous control efforts.[56] Presently, all of the sheep on Mauna Kea are hybrid-mouflon sheep.[57]

Māmane, and all Hawaiian plants, did not evolve with defense mechanisms, such as thorns or spines to defend against browsing of herbivorous vertebrates, including sheep, because these types of animals did not naturally occur in Hawai'i.[58] The long-term presence of browsing sheep on Mauna Kea has changed the composition of vegetation on the mountain.[59] The sheep remove seedlings and wound saplings and trees, which reduces tree and shrub cover.[60] By eating seedlings, the sheep prevent regeneration of the forest.[61] Then, "[a]s older trees die off with no young ones to replace them, the forest disappears."[62]

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[50] Banko et al., *supra* note 9, at 75 (citations omitted).

[51] *Id.* at 71. (citation omitted).

[52] *See* Steven C. Hess & Paul Banko, *Sheep vs. Palila on Mauna Kea: After 200 Years of Habitat Damage, Can Native Palila Recover?*, WILDLIFE PROF., Fall 2011, at 60, 61, *available at* http://www.usgs.gov/ecosystems/pierc/science-picks/maunakea/svp.pdf; Houck, *supra* note 32, at 402 (citation omitted) ("In 1903, the legislature established a system of forest reserves on the main islands . . . .").

[53] Hess & Banko, *supra* note 52, at 61 (citations omitted) (stating that "foresters and Civilian Conservation Corps workers drove and hunted animals by foot and on horseback").

[54] *See id.*

[55] *See* Hess & Banko, *supra* note 52, at 61.

[56] *See id.*

[57] *See* Stephens, *supra* note 37.

[58] *See* ALAN C. ZIEGLER, HAWAIIAN NATURAL HISTORY, ECOLOGY, AND EVOLUTION 195 (2002); *see also Threats: Non-native Predators, supra* note 40 (stating that before the 1700s "there were no grazing or browsing mammals anywhere in the islands").

[59] *See* Banko et al., *supra* note 9, at 61-62 (citations omitted) (discussing the "ultimate and complete destruction of the habitat").

[60] *See id.* (citations omitted).

Between 1998 and 2010, a combination of public hunting and aerial shooting removed nearly 11,000 sheep from Palila critical habitat.[63] This rate of removal fell well below the annual rate of removal needed for eradication because widespread browse damage continued to persist on the mountain.[64] However, USGS studies indicate, "robust habitat recovery is possible in the absence of browsing."[65] Looking at long-term recovery for the Palila, USGS predicts, "increased tree cover through ungulate eradication and habitat restoration will result in higher soil moisture through increased cloud water interception[,] . . . as well as less grass cover and reduced fire risk."[66] Therefore, removing ungulates from Palila habitat would produce benefits to the entire native ecosystem.

B. Endangered Species Act Provisions Applicable to Palila Protection

The ESA is the federal statute that affords legal protections to the Palila. In 1973, the ESA passed with overwhelming popularity.[67] Although Congress focused on protecting the charismatic megafauna of the nation when passing the law, the statute has proven to protect all species regardless of their media appeal.[68] In 1978, the Supreme Court of the United States stated that "Congress intended endangered species to be afforded the highest of priorities."[69]

Upon the passage of the ESA, Congress declared that "the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction."[70] Congress also recognized that "[t]he two major causes of extinction are hunting and destruction of natural habitat."[71]

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[61] *See Suit Filed to Protect Endangered Palila Bird in Hawai'i: State's Violation of Three Court Orders Contributes to Drastic Decline*, EARTHJUSTICE (Mar. 23, 2009), http://earthjustice.org/news/press/2009/suit-filed-to-protect-endangered-palila-bird-in-hawai-i.

[62] *Id.*

[63] *See* Banko et al., *supra* note 9, at 75 (citation omitted).

[64] *See id.*

[65] *Id.* (citation omitted).

[66] *Id.* at 76 (citations omitted).

[67] *See* Shannon Petersen, Comment, *Congress and Charismatic Megafauna: A Legislative History of the Endangered Species Act*, 29 ENVTL. L. 463, 477-78 (1999) (citations omitted).

[68] *See id.* at 479-80 (citations omitted).

[69] Tenn. Valley Auth. v. Hill, 437 U.S. 153, 174 (1978).

[70] 16 U.S.C. § 1531(a)(4) (2012).

[71] S. REP. NO. 93-307, at 2990 (1973) (Conf. Rep.).

Therefore, the ESA became a legal mechanism with the goal of bringing imperiled species back to a thriving population.[72]

The Secretary of the Interior determines whether a species is threatened or endangered based on five factors: "(A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence."[73] In 1967, the Palila was among the first species[74] listed as endangered,[75] and it remains on the current list of endangered species.[76] Concurrently, when a species is designated as endangered, there must be a designation of any habitat "considered to be critical habitat."[77] The Palila's critical habitat encompasses a donut shape around the upper slopes of the entire mountain of Mauna Kea between the elevations of 6000 and 9000 feet.[78]

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[72] Mary Christina Wood, *Protecting The Wildlife Trust: A Reinterpretation of Section 7 of the Endangered Species Act*, 34 ENVTL. L. 605, 606 (2004) (citation omitted).

[73] 16 U.S.C. § 1533(a)(1) (2012).

[74] *See First Species Listed as Endangered*, U.S. FISH & WILDLIFE SERVICE, http://www.fws.gov/endangered/species/faq-first-species-listed.html (last updated May 16, 2013) [hereinafter *Endangered*].

[75] *See* 50 C.F.R. § 17.11(h) (2013).

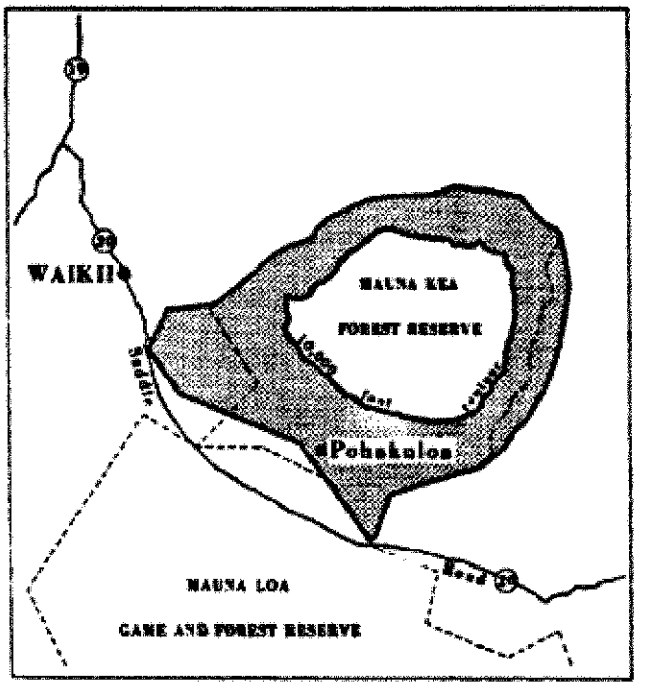
[76] *See id.*

[77] 16 U.S.C. § 1533(a)(3)(A)(i) (2012). Although the ESA requires the United States Fish and Wildlife Service ("USFWS") to designate critical habitat, USFWS does not always comply with this requirement. *See, e.g.*, Thomas F. Darin, *Designating Critical Habitat Under the Endangered Species Act: Habitat Protection Versus Agency Discretion*, 24 HARV. ENVTL. L. REV. 209, 235 (2000) ("Unfortunately, the most significant provision in the ESA to protect habitat—the requirement that the Department of Interior through FWS designate critical habitat concurrently with a species' listing—has been abused by FWS to the present date."); Kalyani Robbins, *Recovery of an Endangered Provision: Untangling and Reviving Critical Habitat Under the Endangered Species Act*, 58 BUFF. L. REV. 1095, 1107 (2010) (citation omitted) ("Although the ESA was amended in 1978 to make critical habitat designation mandatory, the Fish and Wildlife Service has only rarely done so, even since that time.").

[78] *See* 50 C.F.R. § 17.95-b-Birds-Part 10 (2013).

In each of the lawsuits involving the Palila, the plaintiffs sued for a violation of Section 9 of the ESA.[79] Section 9 makes it unlawful for anyone to "take" any endangered species.[80] The term "take" means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[81] Section 9 is wide sweeping because it applies to all persons, including government agents and private parties.[82] Section 9 also applies to all land, including private property.[83]

As part of its enforcement mechanism, the ESA includes a citizen suit provision.[84] This provided the plaintiffs in the cases involving the Palila a mechanism to bring a lawsuit in federal court.[85] The provision provides that "any person may commence a civil suit on his own behalf . . . to enjoin any person . . . who is alleged to be in violation of any provision" of the ESA.[86] In 1997, the United States Supreme Court noted that the language



Id.

[79] *See* 16 U.S.C. § 1538 (2012).

[80] *Id.* § 1538(a)(1)(B).

[81] *Id.* § 1532(19).

[82] Steven P. Quarles et al., *The Unsettled Law of ESA Takings*, 8 NAT. RESOURCES & ENV'T, Summer 1993, at 10.

[83] *See id.*

[84] *See* 16 U.S.C. § 1540(g) (2012).

[85] *See infra* Part II.C.

[86] *See* 16 U.S.C. § 1540(g)(1)(A).

of the ESA's citizen suit provision is an "authorization of remarkable breadth."[87] The citizen suit provision "plays an important role in the protection of endangered species: its 'obvious purpose is to encourage enforcement.'"[88] The plaintiffs in each of the lawsuits involving the Palila took on the important role of enforcing the ESA against DLNR for a "taking" of the Palila.

C. The Palila Appears in Court Six Times as the Plaintiff in Each Suit

> "As an endangered species under the Endangered Species Act . . . the [Palila], . . . a member of the Hawaiian honeycreeper family, also has legal status and wings its way into federal court as a plaintiff in its own right."[89]

Armed with the ESA for protection, the Palila went to court as the main named plaintiff and its standing has never been challenged.[90] Michael Sherwood, lawyer for the plaintiffs, brought a taxidermy mount of a Palila to court, loaned from the Bernice Pauahi Bishop Museum, symbolizing its presence as a plaintiff to the lawsuit.[91] According to Sherwood, Judge Samuel P. King took interest in the stuffed Palila and asked to examine it in court.[92] Sherwood was prepared to defend the Palila's standing, however the issue was never challenged, and the Palila has remained the lead plaintiff in all of its cases against DLNR.[93]

The first case involving the Palila lacked precedent to guide the court's decision as the ESA was passed only a few years earlier.[94] Therefore, Judge King relied mostly on the language of the ESA, its regulations, and

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[87] Bennett v. Spear, 520 U.S. 154, 164 (1997).

[88] Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt., 698 F.3d 1101, 1115 (2012) (quotation omitted).

[89] Palila v. Haw. Dep't of Land & Natural Res. (*Palila IV*), 852 F.2d 1106, 1107 (9th Cir. 1988).

[90] *See* Houck, *supra* note 32, at 405 (citation omitted); *see also* Elizabeth L. DeCoux, *In the Valley of the Dry Bones: Reuniting the Word "Standing" with Its Meaning in Animal Cases*, 29 WM. & MARY ENVTL. L. & POL'Y REV. 681, 729 (2005) ("Although it recognized the Palila's standing, the court conducted no examination of the facts pursuant to the irreducible constitutional minimum, nor any analysis as to whether the Palila met that standard.").

[91] *See* Telephone Interview with Michael Sherwood, Retired Lawyer, Earthjustice (Mar. 4, 2014) [hereinafter Sherwood].

[92] *See id.*

[93] *See id. But see* Cetacean Cmty. v. Bush, 386 F.3d 1169, 1171, 1179 (9th Cir. 2004) (holding that the world's cetaceans do not have standing under the ESA); Hawaiian Crow ('Alal[ā]) v. Lujan, 906 F. Supp. 549, 552 (D. Haw. 1991) (granting the defendants' motion to dismiss the 'Alalā as a plaintiff, stating that the 'Alalā is clearly not a "person" under the ESA, and ordering its name stricken from the caption).

[94] *See* Houck, *supra* note 32, at 411.

the intent of Congress to reach his decision. Based on the facts, science, and the law presented, Judge King went out on a limb for the Palila and interpreted the language of the statute broadly to ensure Palila protection. Although Judge King was involved in many interesting cases in his career, he admitted that the Palila case was his favorite.[95] The following is a chronological account of the six major cases involving the Palila.

1. 1979: The Palila's first appearance in court

In 1979, with Judge King presiding, the Palila, along with the Sierra Club, Hawai'i Audubon Society, and Alan C. Ziegler (collectively "Palila"), brought a lawsuit against Hawai'i Department of Land and Natural Resources and Susumu Ono in his official capacity as Chairman of the Hawai'i Board of Land and Natural Resources (collectively "DLNR") for declaratory and injunctive relief under the ESA.[96] The plaintiffs contended that the defendants were "taking" the Palila in violation of Section 9 of the ESA.[97] The United States District Court for the District of Hawai'i ruled that the defendants violated the ESA by "maintaining feral sheep and goats" in the Palila's critical habitat located on the mountain of Mauna Kea.[98]

The court's analysis compared the history of the Palila to its status at the time of the lawsuit.[99] The court stated that "[e]xperts agree that the Palila population is dangerously close to that minimum number of individuals below which a population cannot drop if the species is to survive."[100] The court also noted that DLNR maintained populations of feral sheep and feral goats for sport-hunting within a game management area that included most of the Palila's critical habitat.[101]

The district court stated that DLNR was "fully aware of the destructive impact that the browsing game animals have had on the m[ā]mane-naio ecosystem."[102] DLNR contended that the forest had improved when compared to its condition thirty years ago.[103] DLNR also argued that

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[95] *See* Douglas Martin, *Samuel P. King, Judge and Critic of Hawaiian Charity, Dies at 94*, N.Y. TIMES, Dec. 12, 2010, at A42, *available at* http://www.nytimes.com/2010/12/12/us/12king.html?_r=2&.

[96] *See* Palila v. Haw. Dep't of Land & Natural Res. (*Palila I*), 471 F. Supp. 985, 987 (D. Haw. 1979).

[97] *See id.*

[98] *Id.* at 999.

[99] *See id.* at 988-89 (citations omitted).

[100] *Id.* at 988 (citation omitted).

[101] *See id.* at 989.

[102] *Id.* at 990 (citation omitted).

[103] *See id.*

"regeneration of the forest would occur if small numbers of feral sheep and goats were allowed to remain," and therefore DLNR "should be permitted to undertake a program of 'intensive management,' which would protect the forest while providing for hunter interests."[104] The court countered DLNR's proposal stating that it was an ineffective solution because: (1) DLNR was too susceptible to hunter pressure to increase the size of the feral sheep herd; and (2) even a small number of sheep and goats are destructive to the forest "due to their tendency to browse in flocks and denude an area totally."[105]

DLNR challenged the ability of the United States to enforce the ESA against DLNR under two theories, and the court raised a third theory sua sponte. DLNR first made a Tenth Amendment argument because the Palila resides solely within Hawai'i and no federal lands or federal funds were involved.[106] The court determined that the Tenth Amendment does not restrict enforcement of the ESA for two reasons.[107] First, the United States entered into several treaties with other countries promising to protect the flora and fauna of the world, which makes it a matter of national concern.[108] Second, the court stated that protecting endangered species falls under Commerce Clause powers because:

> [A] national program to protect and improve the natural habitats of endangered species preserves the possibilities of interstate commerce in these species and of interstate movement of persons, such as amateur students of nature or professional scientists who come to a state to observe and study these species, that would otherwise be lost by state inaction.[109]

Therefore, the court determined that the ESA is enforceable against DLNR regardless of the fact that the Palila is only found within the State of Hawai'i.

DLNR next contended that there was no "taking" of the Palila.[110] The court concentrated on the term "harm" contained in the definition of "take."[111] In turn, the court stated that "harm" is defined as "'significant environmental modification or degradation,' which actually injures or kills wildlife."[112] The court determined that "[t]he undisputed facts bring the

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[104] *Id.* (citation omitted).
[105] *Id.* (citation omitted).
[106] *See id.* at 992.
[107] *See id.* at 995.
[108] *See id.* at 993.
[109] *Id.* at 995 (citation omitted).
[110] *Id.*
[111] *See id.* (citation omitted).
[112] *Id.* (quotation omitted).

acts and omissions of defendants clearly within these definitions."[113] Therefore, DLNR was responsible for an unlawful "taking" of the Palila.[114]

The court sua sponte analyzed whether DLNR was immune from suit under the Eleventh Amendment based on the proposition that "a state may not be sued by its own citizens . . . without its consent."[115] The court determined that the Eleventh Amendment does not "bar an action against the state itself where Congress has clearly manifested its intent to abrogate constitutional immunity and the state has impliedly consented to be sued."[116] In other words, "Congress has the authority to abrogate state immunity in the exercise of the powers granted to it under the Constitution."[117] The ESA "expressly authorizes private citizens to bring suit enjoining a general class of defendants who violate the Act, including 'the United States and any other governmental instrumentality or agency.[']"[118] The "State consents to be sued under the [ESA] when its wildlife management activities extend to areas regulated under the federal government's commerce and treaty-making powers."[119] Therefore, the Eleventh Amendment does not bar an action against the state in this case because Congress abrogated state immunity under the ESA.

The decision in *Palila I* is significant for two main reasons. First, the decision underscored the power of the Section 9 "take" provision in the ESA because it was applied to a state governmental entity.[120] Second, determining that habitat modification was within the definition of "harm" and therefore a "take" was an expansive reading of the statute, which would set the stage for many subsequent lawsuits across the country.[121] As discussed below, however, *Palila I* was hardly the end of the Palila's fight in the courtroom.

2. 1981: The Palila goes to the Ninth Circuit

In 1981, DLNR appealed the district court's decision that maintaining feral sheep and goat populations on Hawai'i State lands constituted a

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[113] *Id.*

[114] *See id.*

[115] *Id.* at 996 (citation omitted).

[116] *Id.* (citation omitted).

[117] *Id.* at 997.

[118] *Id.* (quotation omitted).

[119] *See id.* at 998.

[120] Jonathan Durrett & Christopher Yuen, *Palila v. Department of Land and Natural Resources: "Taking" Under Section Nine of the Endangered Species Act of 1973*, 4 HAW. L. REV. 181, 193 (1982).

[121] *See* Houck, *supra* note 32, at 419-420.

"taking" under the ESA.[122] The Ninth Circuit Court of Appeals issued a short two-page opinion stating, "We agree with Judge King's insightful and thorough discussion . . . ."[123] In addition to agreeing with the district court's analysis of the "take" provision, the Ninth Circuit added discussion on policy.[124] The court stated that in maintaining feral sheep and goats in Palila critical habitat, DLNR violated the ESA because it was shown that the activity endangered the Palila.[125] The court also noted that this finding is consistent with the ESA's "legislative history showing that Congress was informed that the greatest threat to endangered species is the destruction of their natural habitat."[126] Therefore, according to *Palila I* and *Palila II*, maintaining feral sheep and goat populations constitutes a "taking" under the ESA. Furthermore, both courts' decisions are in line with Congress's purpose for the ESA.

3. 1986: The Palila encounters more problems on the mountain

In 1986, with Judge King again presiding, the Palila initiated another lawsuit against DLNR, and the Sportsmen of Hawai'i intervened.[127] The issue in this case was whether the existence of mouflon sheep in Palila critical habitat constituted a "taking" under the ESA.[128] This lawsuit underscored the "competing interests of mouflon sheep hunters on the slopes of Mauna Kea and . . . the endangered bird species Palila, which makes its home there."[129] In 1979, the mouflon sheep were specifically excluded from *Palila I* because DLNR was studying the impacts of mouflon sheep on Mauna Kea, and both DLNR and hunters claimed mouflon sheep did not present the same potential harm as feral sheep and goats.[130] Based on the findings of the study, however, the Palila filed

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[122] Palila v. Haw. Dep't of Land & Natural Res. (*Palila II*), 639 F.2d 495, 495-96 (9th Cir. 1988).

[123] *Id.* at 497.

[124] *See id.* at 497-98.

[125] *See id.*

[126] *Id.* at 498.

[127] Palila v. Haw. Dep't of Land & Natural Res. (*Palila III*), 649 F. Supp. 1070 (D. Haw. 1986). Prior to deciding this case, Judge King denied a motion for summary judgment brought by DLNR, finding a genuine issue of material fact as to whether "complete eradication of mouflon sheep, or for that matter all four-legged animals, is necessary." Palila v. Haw. Dep't of Land & Natural Res., 631 F. Supp. 787, 790 (D. Haw. 1985).

[128] *See Palila III*, 649 F. Supp. at 1072.

[129] *See id.* at 1071.

[130] *See id.*

another action in court essentially identical to the 1979 action, this time targeting mouflon sheep.[131]

In 1979, at the time of *Palila I*, the Palila population was estimated to be between 1400 and 1600 birds.[132] In 1986, at the time of *Palila III*, the population increased to approximately 2200 birds, but experts agreed that this was not a "significant 'upward trend'" and, therefore, the population remained "static" and was still endangered.[133] The mouflon sheep population at the time of *Palila III* was estimated at approximately 501 sheep, with 412 sheep found in Palila critical habitat.[134]

Between *Palila I* and *Palila III*, the Secretary of the Interior revised the definition of "harm."[135] At the time of *Palila I*, "harm" was defined as "'significant environmental modification or degradation[,]' which actually injures or kills wildlife."[136] In comparison, at the time of *Palila III*, "harm" was defined as "an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering."[137]

DLNR argued that the purpose of the new definition was to stress that "there must be an 'actual injury' to wildlife from habitat destruction or modification."[138] It argued that "actual injury" is a pattern of decline in the number of Palila.[139] Therefore, DLNR argued that because the Palila population remained static, no "actual injury" occurred, and as a result, there was no "take."[140]

Judge King did not agree with DLNR's characterization of "harm."[141] He found a broader interpretation of "harm" stating, "Habitat destruction that prevents the recovery of the species by affecting essential behavioral patterns causes actual injury to the species and effects a taking under section 9 of the Act."[142] In looking at the statute, the court concluded, "Congress intended to prohibit habitat destruction that harms an endangered species."[143] Therefore, the court determined that it was proper to analyze

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131 *Id.*
132 *Id.* at 1073 (citation omitted).
133 *Id.* (citation omitted).
134 *Id.* at 1074.
135 *Id.* at 1075.
136 *Palila I*, 471 F. Supp. 985, 995 (D. Haw. 1979) (quoting 50 C.F.R. § 17.3 (1978)).
137 *Palila III*, 649 F. Supp. at 1075 (quoting 50 C.F.R. § 17.3 (1985)).
138 *Id.*
139 *See id.*
140 *See id.*
141 *Id.*
142 *Id.*

whether mouflon sheep had a similar negative effect as that of the feral goats and sheep from *Palila I*.[144]

Judge King concluded that the mouflon sheep caused the same destructive impact to the māmane forest as the feral sheep and goats.[145] The court found that mouflon sheep caused "harm" to the Palila because "significant habitat degradation [wa]s *actually presently injuring* the Palila by decreasing food and nesting sites, so that the Palila population [wa]s suppressed to its current critically endangered levels."[146]

Similar to *Palila I*, DLNR argued for multiple use on Mauna Kea and stated that it was possible to maintain both a viable sport-hunting population and a healthy māmane forest.[147] The court found two problems with DLNR's proposition. The first problem was that it was not clear if the māmane forest was regenerating to any significant extent, and even if it was, it would take many years for a māmane tree to be strong enough to withstand any sheep grazing.[148] The second problem was that the multiple-use approach did not fit within the purpose of the ESA.[149] After a "harm" is identified, the ESA "leaves no room for mixed use or other management strategies or policies."[150] Even the state's biologist admitted on the stand that there were no studies to support DLNR's proposition of a multiple-use scenario.[151] The court rejected the multiple-use argument because it "plays Russian roulette with a critically endangered species."[152] Therefore, the court required DLNR to remove the mouflon sheep from Palila critical habitat on Mauna Kea.[153]

4. 1988: DéjàVu for the Palila revisiting the Ninth Circuit

In another short opinion, the Ninth Circuit affirmed Judge King's decision in *Palila III*.[154] The first line in the court's opinion states that

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[143] *Id.* at 1076 (citation omitted).

[144] *See id.* at 1078.

[145] *See id.* at 1079.

[146] *Id.* at 1080 (emphasis in original) (citation omitted).

[147] *See id.*

[148] *See id.* at 1080-81 (citation omitted) ("Even if the m[ā]mane seedlings were taking root, it would take between [twenty-five] and [fifty] years before the trees were large enough to withstand grazing by sheep and to provide food and shelter for the Palila.").

[149] *See id.* at 1081.

[150] *Id.*

[151] *Id.* at 1081-82 (citation omitted).

[152] *Id.* at 1082.

[153] *Id.* at 1082-83.

[154] Palila v. Haw. Dep't of Land & Natural Res. (*Palila IV*), 852 F.2d 1106, 1110 (9th Cir. 1988).

"[t]his is the fourth round of judicial activity involving a six-inch long finch-billed bird called [P]alila, found only on the slopes of Mauna Kea on the Island of Hawai[']i."[155] In *Palila IV*, the court examined whether the district court's interpretation of harm was consistent with the Secretary of Interior's interpretation because the Secretary is charged with enforcing the ESA and is entitled to deference.[156]

When deciding if the interpretations were consistent, the court looked to the promulgation notice for the amendment to 50 C.F.R. § 17.3, published in the Federal Register.[157] When the regulation was amended, "the Secretary noted that harm includes not only direct physical injury, but also injury caused by impairment of essential behavior patterns via habitat modification that can have significant and permanent effects on a listed species."[158] The court also noted that the Secretary let the decision from *Palila I* stand.[159] The court concluded that the district court's interpretation of "harm," including habitat destruction that could drive the Palila to extinction, was consistent with the Secretary's interpretation.[160]

Similar to the district court, the Ninth Circuit dismissed DLNR's proposal for retaining a viable hunting population of mouflon sheep in Palila critical habitat.[161] Therefore, the court affirmed the district court's decision stating, "[H]abitat degradation that could result in extinction constitutes 'harm.'"[162]

5. 1999: Back to district court to reinforce the previous court mandates

In 1999, the Palila found its way back to court because DLNR's sheep eradication efforts, mandated from thirteen years prior, were put on hold.[163] Between 1987 and 1998, "a total of 4,746 animals were harvested, consisting of 1,959 feral and hybrid sheep, 2,098 mouflon sheep, and 26 goats."[164] The goats were no longer considered a problem on Mauna Kea for the Palila.[165] In addition, the state's biologist, John Giffin, reported that the eradication efforts had measurable success in improving Palila critical

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[155] *Id.* at 1107.
[156] *Id.* at 1108 (citation omitted).
[157] *See id.* (citation omitted).
[158] *Id.* (citation omitted).
[159] *See id.* (citation omitted).
[160] *Id.*
[161] *Id.* at 1109-10.
[162] *Id.* at 1110.
[163] *See* Palila v. Haw. Dep't of Land & Natural Res. (*Palila V*), 73 F. Supp. 2d 1181, 1184 (D. Haw. 1999).
[164] *Id.* at 1183.
[165] *Id.*

habitat.[166] Plaintiffs, in this case, alleged that DLNR had relaxed its eradication efforts due to political pressure from the hunting community.[167]

The eradication efforts of DLNR resulted in opposition of the hunting community because the number of sheep available to hunt decreased.[168] The hunting community solicited the attention of political officials, pressuring them to resist the prior federal court mandates to remove all feral sheep and goats, as well as mouflon sheep.[169] As a result, Governor Benjamin J. Cayetano wrote to DLNR Director Michael Wilson ordering a hold on the eradication of sheep on Mauna Kea.[170] Governor Cayetano stated that he believed DLNR should again appeal the court mandates based on new data that was collected over the years.[171] Representative Patsy T. Mink also asked DLNR to reconsider eradicating the sheep and allow a population to be retained under control.[172]

Just before the present lawsuit, the plaintiffs and DLNR entered into a stipulation relating to DLNR's eradication activities.[173] Three stipulations were made:

> 1. The [s]tate will use its best efforts to minimize migration of [ungulates into Palila critical habitat] . . . .
>
> 2. The [s]tate will continue to implement a program of public involvement in the ungulates eradication efforts. . . .
>
> 3. Beginning November 18, 1998, and semi-annually thereafter the [s]tate shall do aerial sightings in the critical habitat area. If any ungulates are sighted in that area, the [s]tate will commence aerial shooting and will shoot any ungulates sighted in that area.[174]

Defendant, Sportsmen of Hawai'i, Inc., was not given the chance to give input into the stipulations.[175] As intervenors, the hunters alleged there was a sufficient change of circumstances to adjust the original decree, and that the Palila and sheep should be allowed to coexist.[176] The court did not agree with the hunters. It stated that a court order is modified only when "it is no longer 'equitable' that the judgment should have prospective

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[166] *Id.* at 1183-84.
[167] *Id.* at 1184.
[168] *Id.*
[169] *See id.*
[170] *See id.* (citation omitted).
[171] *Id.* (citation omitted).
[172] *Id.* (citation omitted).
[173] *Id.* at 1185.
[174] *Id.*
[175] *See id.*
[176] *Id.* at 1186.

application, not when it is no longer convenient to live with the terms of the decree."[177] After analyzing whether the decree should apply, the court concluded, "[M]ouflon sheep can always be reintroduced on Mauna Kea. Palila[,] once extinct[,] are gone forever. In the weighing of the relative merits of the situation, there has not been a shifting of the original equities."[178]

> The state also asked that the eradication order be amended because:
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> (1) it is extremely difficult, if not impossible, to completely eliminate all the sheep from the Palila's critical habitat; and
>
> (2) the numbers of sheep in the recent past . . . have not significantly modified or degraded the m[ā]mane forest to the extent that the Palila is injured; and
>
> (3) less sheep do not necessarily amount to more Palila.[179]

The court, however, stood by its original decision and 1998 stipulation, stating that it did not require the "[s]tate to achieve total success within any fixed time frame."[180] Although the court recognized the state's "competing political pressures" and "serious budgeting problems[,]" it ordered the state to continue eradication efforts under the existing orders.[181]

6. 2013: The federal court mandate preempts the county of Hawai'i's new code

In 2013, the Palila once again found itself in district court because the County of Hawai'i enacted a code attempting to ban aerial eradication of animals.[182] The District Court of Hawai'i, with Judge Michael Seabright presiding,[183] granted a preliminary injunction to the county ordinance that attempted to ban aerial hunting because the ordinance was preempted by

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[177] *Id.* (citation omitted).

[178] *Id.* at 1187.

[179] *Id.*

[180] *Id.* at 1189.

[181] *Id.* The Sportsmen of Hawai'i ("SOH") appealed the decision to the Ninth Circuit Court of Appeals, however the case was dismissed for lack of jurisdiction because SOH did not have standing independent of DLNR. *See* Palila v. Haw. Dep't of Land & Natural Res., No. 99-17477, 2000 WL 1844302, at *1 (9th Cir. Dec. 14, 2000) (citation omitted).

[182] Palila v. Haw. Dep't of Land & Natural Res. (*Palila VI*), No. 78-00030 JMS, 2013 WL 1442485, at *1-2 (D. Haw. Apr. 8, 2013).

[183] Judge King passed away in 2010; therefore, Judge Seabright heard this case. *See* Martin, *supra* note 95. In the forward to Judge King's memoir, U.S. Senator Daniel K. Inouye wrote, "It was clear to all who dealt with [Judge King] that he was sincere. He was the real deal. Hawai'i was fortunate to have had Sam King on the bench. He served the people of Hawai'i well and brought honor to our state and nation." Daniel K. Inouye, *Foreword* to SAMUEL P. KING, JUDGE SAM KING: A MEMOIR 1 (2013).

the stipulated order from 1998, stating that mouflon sheep must be eradicated from Palila critical habitat.[184]

In this case, both DLNR and the Palila sought a preliminary injunction to the ordinance.[185] Both parties asked the court for: (1) a declaration that the ordinance was preempted by the 1998 stipulation order; and (2) an order enjoining the County of Hawai'i from prosecuting anyone who participates in state eradication efforts.[186] The court concluded that "if a person (such as a State Department of Land and Natural Resources employee, or a contractor working under specific direction of such a State employee) is specifically engaged in complying with the terms of the 1998 Stipulated Order, they cannot be prosecuted" under the county ordinance.[187]

Palila VI and all of the Palila lawsuits highlight that the Palila's story includes a variety of stakeholders involved in the outcomes. The court opinions, however, do not paint the full picture of the complexity of fulfilling the federal court mandates. Often, the people and the politics surrounding the Palila have been given priority over its protection. The following analysis further describes each stakeholder's involvement in protecting the Palila and how the lawsuits affect their positions.

III. ANALYSIS OF STAKEHOLDER PERSPECTIVES ON PROTECTING PALILA: WHY DOES A CONTROVERSY EXIST?

The Palila's legal saga began in 1979, and today, thirty-five years later, its battle continues. Although the State of Hawai'i was ordered to remove all sheep from Palila critical habitat in 1979 and 1986,[188] it failed to fulfill this mandate. At the time of this Article, there are still hybrid-mouflon sheep living on Mauna Kea in Palila critical habitat.[189] The district court's strict view of protecting Palila, requiring that all ungulates be removed from Palila critical habitat, is favored by some and strongly disfavored by others. These differing perspectives have influenced the State of Hawai'i's actions in managing its land on Mauna Kea.

The story of the Palila involves many interested stakeholders who act both to positively influence Palila protection, as well as stall fulfillment of the federal court mandates to remove sheep from Palila critical habitat. Each stakeholder holds an important perspective and speaks to the variety

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[184] *See Palila VI*, No. 78-00030 JMS, 2013 WL 144245, at *4.

[185] *Id.* at *2.

[186] *Id.*

[187] *Id.* at *4.

[188] *Palila III*, 649 F. Supp. 1070, 1082-83 (D. Haw. 1986).

[189] *See Threats: Sheeps and Goats*, RESTORE MAUNA KEA REFORESTATION PROJECT, dlnr.hawaii.gov/restoremaunakea/home/threats (last visited Nov. 20, 2014).

of interests that are involved in saving a single endangered species, which adds to the complexity of its story. The court's mandate is simple; however, analyzing the case on the ground unfolds many aspects that play into fulfilling the mandate that are not found within the written opinions of the court.

Interested stakeholders regarding the Palila include: conservation organizations, the State of Hawai'i DLNR, hunters, and the federal USFWS. The following analysis examines each stakeholder's role with regards to the Palila and examines who ultimately benefits from Palila protection under the ESA. Each stakeholder adds a story within itself, showing that protecting a species under the ESA is not as simple as it may seem.

A. Conservationists and Conservation Organizations: The Plaintiffs Standing Beside the Palila When No One Else Would

Conservation organizations and concerned individuals were the thrust behind the Palila lawsuits, acting as plaintiffs, and therefore playing an important stakeholder role in Palila protection. The citizen suit provision of the ESA affords private citizens the right to act as enforcers of the ESA,[190] and without this type of oversight from citizens, the Palila's case may have gone unnoticed by the courts. Congress had the foresight to acknowledge the importance of protecting endangered species and recognized that USFWS, the agency charged with administering and enforcing the ESA,[191] does not have the resources to pursue every violation of the ESA.[192] Therefore, citizens play the valuable role of enforcement to ensure that the goals of the ESA are fulfilled.

1. A thoughtful scientist takes on the role of activist for the Palila

Alan C. Ziegler, a plaintiff in the Palila lawsuits, worked for the Bernice Pauahi Bishop Museum as the head of the Department of Vertebrate Zoology.[193] In 1967, Ziegler was inspired to save the māmane forest after reading of its destruction in the article, *A Forest Dies on Mauna Kea*, by Richard E. Warner.[194] Warner's article explains that "the exotic species

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[190] 16 U.S.C. § 1540(g) (2012).

[191] *Id.* § 1532(15).

[192] *See* SARAH MATSUMOTO ET AL., CITIZENS' GUIDE TO THE ENDANGERED SPECIES ACT 18 (2003), *available at* http://earthjustice.org/sites/default/files/library/reports/Citizens_Guide_ESA.pdf.

[193] *See* ZIEGLER, *supra* note 58 (describing the author on the inside the front cover).

[194] Houck, *supra* note 32, at 404.

were beginning to eat themselves out of house and home" and the "[mā]mane forest commenced to take on a ragged, sickly appearance."[195] Warner describes the māmane tree line as a "stark nightmarish scene of devastation and ruin"[196] and predicts that "[d]estruction of the forest will inevitably result in the loss of its associated endemic bird life."[197] Warner's description of the mountain relays powerful imagery of Mauna Kea turning into a wasteland.

In the 1970s, Ziegler approached attorney Michael Sherwood to inform him that the Palila was in danger of extinction because of destruction to the Palila's habitat.[198] Ziegler went to Sherwood for help to legally protect the Palila against the destruction of its native habitat because feral sheep and goats were stripping the forest down to nothing.[199] Thus, Sherwood needed to use the ESA to show that the chain of causation linking the sheep and goats to the Palila was a violation of the law.[200] Sherwood eventually went to court armed with enough facts and science to convince Judge King to courageously rule that DLNR was responsible for a "take" of the Palila.[201] Thus, the Palila's legal story began with a concerned scientist, an innovative attorney, and a courageous judge. However, no one knew that the first lawsuit in 1979 was just the beginning of a long saga;[202] one packed with resistance and noncompliance throughout its tale.

2. Conservation organizations join the fight

In addition to Ziegler, many conservation organizations demonstrate an interest in Palila protection and proactively deliver support to the Palila and the resulting federal court mandates. The Sierra Club and the Hawai'i Audubon Society took an active role as plaintiffs in each of the Palila cases. As a national organization, the Sierra Club's mission is "[t]o explore, enjoy, and protect the wild places of the earth[,]" as well as "[t]o practice and promote the responsible use of the earth's ecosystems and resources."[203] Similarly, Hawai'i Audubon Society's mission is "[t]o foster community values that result in the protection and restoration of native ecosystems and

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[195] Richard E. Warren, *A Forest Dies on Mauna Kea: How Feral Sheep Are Destroying [a] Hawaiian Woodland*, PAC. DISCOVERY, Mar.-Apr. 1960, at 6, 8.

[196] *Id.* at 10.

[197] *Id.* at 11.

[198] *See* Sherwood, *supra* note 91.

[199] *Id.*

[200] *Id.*

[201] *Id.*

[202] *Id.*

[203] *Mission Statement*, SIERRA CLUB, http://www.sierraclub.org/policy/ (last visited Feb. 27, 2014).

conservation of natural resources through education, science and advocacy in Hawai[']i and the Pacific."[204] Protecting Palila falls in line with both organizations' missions and both have remained a plaintiff throughout all thirty-five years of Palila litigation.

As plaintiffs, conservation organizations have acted to keep DLNR on track in complying with the federal mandates. For example, in 2009, plaintiffs went back to court to enforce earlier decisions and brought specific requests with them.[205] One such request was that DLNR fulfill its duty stipulated in 1998 to prevent ingress of sheep and goats through constructing and maintaining an ungulate proof fence.[206] In their motion, the plaintiffs also put pressure on DLNR to create a realistic timeline of fulfilling its obligations and requested the completion "of an ungulate-proof fence around the lower boundary of the Palila's critical habitat no later than June 1, 2011."[207] In the end, a timeline was not firmly set because DLNR had made good faith efforts towards eradication; however, David Henkin, an attorney for Earthjustice, describes it as "losing in the court but winning on the ground."[208] Going back to court forced DLNR to keep its eradication efforts as a priority rather than letting the issue fall to the wayside as it had in the past.[209] Although a fixed timeline for building a fence was not set, at the time of this Article, DLNR has completed twenty-four of the thirty-nine miles of the construction of the fence around Mauna Kea, enclosing most of Palila critical habitat to prevent ingress of ungulates, with funding secured for the remaining portions.[210] This type of action from conservation organizations is necessary to hold DLNR accountable for its responsibility to protect the Palila and ensure that progress is made towards fulfilling the federal mandate to remove sheep.[211]

Another non-profit organization that actively participates in Palila protection is the American Bird Conservancy ("ABC"). ABC's mission is to "conserve native birds and their habitats throughout the Americas."[212]

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[204] *About Us*, HAWAI[']I AUDUBON SOCIETY, http://www.hawaiiaudubon.org.#!about-us/c14e3 (last visited Mar. 2, 2014).

[205] Memorandum in Support of Motion, Palila v. Haw. Dep't of Land & Natural Res., Civ. No. 78-0030 (2009), *available at* http://earthjustice.org/sites/default/files/library/legal_docs/palila-complaint-32309.pdf.

[206] *See id.* at 16-19.

[207] *Id.* at 21.

[208] Telephone Interview with David Henkin, Attorney, Earthjustice (Mar. 6, 2014) [hereinafter Henkin].

[209] *Id.*

[210] Telephone Interview with Robert Stephens, Project Supervisor, Mauna Kea Forest Restoration Project (Feb. 6, 2014) [hereinafter Stephens].

[211] *Id.*

[212] *About ABC*, AMERICAN BIRD CONSERVANCY, http://www.abcbirds.org/aboutabc/

ABC "has made the Palila one of its high-priority species" for conservation work.[213] As an active participant in Palila protection, ABC provides monetary support to DOFAW programs to effectively conduct forest restoration of Palila habitat.[214]

In addition, ABC lobbied the United States Congress, resulting in increased funds to USFWS that were used to build the new fence encompassing the majority of Palila critical habitat.[215] The effort to fund the building of the fence helped to fulfill the 1998 stipulation, which stated that "[t]he [s]tate will use its best efforts to minimize migration of [ungulates] into the critical habitat for the Palila on Mauna Kea . . . . Those efforts may include but shall not be limited to: maintenance, repair, and upgrading of the forest reserve perimeter fencing."[216] Without the efforts of ABC and USFWS to secure funding, DLNR might not have had the ability to fulfill one of the conditions from the 1998 stipulation.[217]

From the perspective of Dr. Chris Farmer who works for ABC and works closely with Palila, the ESA is necessary to protect the Palila and the court was correct in its interpretation of the "harm" that sheep cause to the Palila's habitat on the mountain.[218] The biggest obstacle at this point is continuing the current momentum to achieve successful sheep eradication.[219] In 2013, approximately 3000 sheep were removed from Mauna Kea; however, the challenge of eradication lies in locating the last remaining animals.[220] Completing the court mandate will take continued funding for eradication efforts, dedication and focus, and awareness that it is a long-term process.[221] It may be a number of years before all sheep are removed from the mountain, but it can take more than twenty years for recovery of the māmane forest.[222] In addition, DLNR will have to continue monitoring for the re-introduction of sheep and fence inspection and maintenance.[223] Without this type of diligence, the Palila will continue to

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index.html (last visited Feb. 27, 2014).

[213] *Saving Palila*, AMERICAN BIRD CONSERVANCY, http://www.abcbirds.org/abcprograms/oceansandislands/saving_palila.html (last visited Feb. 27, 2014).

[214] *See id.*

[215] Telephone Interview with Dr. Chris Farmer, Science Coordinator for Endangered Hawaiian Birds, American Bird Conservancy (Feb. 14, 2014) [hereinafter Farmer].

[216] *Palila V*, 73 F. Supp. 2d 1181, 1185 (D. Haw. 1999).

[217] Telephone Interview with William Aila, Chairperson, Department of Land and Natural Resources (Mar. 25, 2014) [hereinafter Aila].

[218] Farmer, *supra* note 215.

[219] *Id.*

[220] *Id.*

[221] *Id.*

[222] *Id.*

[223] *Id.*

be in danger.[224] Therefore, recovery of the species is a long-term commitment that will take constant monitoring before positive results are measured.

3. Has the ESA optimally served conservation organizations?

In the 1970s, Zielger turned to Sherwood to use the ESA, a new broad sweeping federal statute, to help a bird in dire need of protection.[225] The purpose of the ESA fell in line with the goal to protect the Palila, yet thirty-five years later, the Palila population remains in distress. Although each lawsuit technically resulted in a win for the plaintiffs, has the ESA adequately addressed the problem and satisfied the needs of the plaintiffs bringing the lawsuits?

Based on the outcome of each Palila case, the ESA fulfilled its end of the bargain to protect the Palila. The outcome in each case was clear: remove sheep and other ungulates from Palila critical habitat. Although the removal of ungulates does not solve the entire problem for the Palila, as there are other threats to its existence, it is undisputable that the māmane forest will eventually recover without the presence of ungulates.[226] Although other threats may still be present, with a healthy forest, the Palila would have more area to use for survival rather than the constricted forest that it currently resides in.[227]

Without the ESA, it is hard to imagine what state the Palila would be in today. Most conservationists and scientists agree: there is no question the Palila would be worse off without the ESA and the court orders.[228] Recently, the removal of sheep has increased;[229] however, it is frustrating for conservationists to see the sheep remain present on the mountain.[230]

The question remains then, if the law and court orders effectively should protect Palila, why is the Palila still in peril? The answer lies in the lack of follow through. Conservation organizations have received victorious outcomes;[231] however, the state has failed to follow through and fulfill the

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[224] *Id.*

[225] Sherwood, *supra* note 91.

[226] Telephone Interview with Paul Banko, Research Wildlife Biologist, Pacific Island Ecosystems Research Center, U.S. Geological Survey (Feb. 11, 2014) [hereinafter Banko].

[227] Telephone Interview with Marjorie Ziegler, Executive Director, Conservation Council for Hawai'i (Apr. 4, 2014) [hereinafter Ziegler].

[228] Banko, *supra* note 226; Farmer, *supra* note 215; Henkin, *supra* note 208; Stephens, *supra* note 210; Ziegler, *supra* note 227.

[229] Stephens, *supra*, note 210.

[230] *See Sheep Eradication: Public Hunting*, MAUNA KEA REFORESTATION PROJECT, http://dlnr.hawaii.gov/restoremaunakea/home/management/ (last visited Nov. 19, 2014).

[231] *See supra* Part II.C (discussing conservationist organizations who have litigated cases

federal mandates.[232] The Palila's story is based on federal court mandates that the state did not follow, which has caused little to no repercussions. As former Earthjustice attorney Michael Sherwood stated, "Usually when a federal judge tells you to do something the reaction is 'Yes Sir!'"[233] In this situation, however, the state did not react in this way. Short of holding the director of DLNR in contempt of court or the court taking over the administration of DLNR, which are extreme measures, the plaintiffs were left with no choice but to keep taking DLNR back to court to reinforce previous rulings.[234] Each time, DLNR continuously defended its position and effectively stalled the fulfillment of the mandates.[235] The Palila's story is not complete, therefore, without analyzing the perspective of DLNR and its role with respect to Palila protection.

B. The State of Hawai'i: Given a Controversial Task to Fulfill

The State of Hawai'i DLNR plays a primary stakeholder role in the story of the Palila. The state, as the defendant in each Palila lawsuit, was forced to defend its game management practices on Mauna Kea, specifically within Palila critical habitat.[236] Although the state vigorously argued for multiple-use management on Mauna Kea, the court determined in every case that feral sheep and goats and mouflon sheep must be removed within Palila critical habitat.[237] Therefore, despite the state's efforts to justify a multiple-use system, it did not convince the court that it was feasible under the ESA.

Within the State of Hawai'i, DLNR is the state agency that is charged with protecting, conserving, and managing "Hawai['']i's unique and limited natural, cultural and historic resources held in public trust for current and future generations."[238] DLNR was the defendant in the Palila cases because the plaintiffs alleged and convinced both the district court and the Ninth Circuit that DLNR was managing state land in such a way that contributed to a decline in Palila populations and, therefore, a "take" existed.[239] Thus,

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to protect the Palila).

[232] *See infra* Part III.B.1 (discussing the state's struggles to protect the Palila).

[233] Sherwood, *supra* note 91.

[234] *See supra* Part II.C (discussing previously litigated cases involving the protection of the Palila).

[235] *Id.*

[236] *Id.*

[237] *Id.*

[238] *Mission Statement*, DEPARTMENT OF LAND AND NATURAL RESOURCES, http://dlnr.hawaii.gov/ (last visited Feb. 13, 2014).

[239] *See supra* Part II.C.1-4.

DLNR was left with a federal mandate to remove ungulates from Palila critical habitat without consideration of other ways to manage the land.

1. The state struggles to balance many interests and the influence of political pressure

Along with its land management duties, DLNR has an interest in managing the lands of the state consistently with the interests of the citizens of the state, and must therefore balance a variety of viewpoints.[240] As a result of the federal court mandates to remove the sheep on Mauna Kea, DLNR has struggled with balancing the interests of hunters that use Mauna Kea for hunting, and preserving the natural habitat for an endangered species, the Palila. In balancing its obligations, DLNR has consistently supported the position that a multiple-use program with intensive management of the sheep (allowing a small number of animals to remain in Palila critical habitat) is the best way to ensure protection of the Palila while also satisfying hunters' desires to use the mountain for hunting.[241] The court in *Palila I* recognized DLNR's struggle with balancing these obligations when it stated that the intensive management proposal "would be an ineffective solution to regeneration of the forest because of inevitable hunter pressure to increase the feral sheep herd as long as any sheep remain in the forest, [and DLNR] demonstrated susceptibility to that pressure."[242]

In addition to hunter pressure, DLNR also received political pressure throughout the history of Palila litigation. As demonstrated in *Palila V* in 1998, Governor Cayetano instructed DLNR to halt the eradication of the sheep.[243] In addition, Representative Mink took the position that the sheep remaining on the mountain should be allowed to stay.[244] Politicians pressured DLNR to allow the sheep to remain despite ample scientific data concluding that the sheep and Palila cannot coexist.[245] The political

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[240] *See About: About DLNR*, DEP'T OF LAND AND NATURAL RES., dlnr.hawaii.gov/about-dlnr/ (last visited Nov. 20, 2014).

[241] *See, e.g.*, *Palila I*, 471 F. Supp. 985, 990 (D. Haw. 1979) ("Defendants argue that since regeneration of the forest would occur if small numbers of feral sheep and goats were allowed to remain, they should be permitted to undertake a program of 'intensive management' which would protect the forest while providing for hunter interests." (footnote omitted)).

[242] *Id.*

[243] *See Palila V*, 73 F. Supp. 2d. 1181, 1184 (D. Haw. 1999).

[244] *See id.* at 1184-85.

[245] *See* J. O. Juvik & S. P. Juvik, *Mauna Kea and the Myth of Multiple Use Endangered Species and Mountain Management in Hawai['i]*, 4 MOUNTAIN RES. AND DEV. 191, 192 (1984) (stating that "in small and remote insular ecosystems such as Hawai['i] the concept of multiple use is largely a myth"); Paul G. Snowcroft & Jon G. Giffin, *Feral Herbivores*

pressure illustrated in *Palila V* came nineteen years after the original federal court mandate to remove sheep, highlighting that the controversial nature of removing sheep from Mauna Kea, continued to exist. Even today, thirty-five years after the original mandate, there remains backlash to any removal of sheep from the mountain.[246]

2. A shift in leadership gives hope for the survival of the Palila

Although DLNR has not removed the sheep from Mauna Kea, the state has taken steps towards Palila protection, marking a shift in management that emphasizes protecting the Palila rather than hunting the sheep. From the perspective of the current director of DLNR, William Aila, it does not matter what he personally thinks about the decisions of the federal courts; he has to fulfill the mandate no matter what.[247] Aila recognizes that according to the court decisions, he cannot consider the hunter perspective because according to the court order, *all* sheep must be removed from Palila critical habitat.[248]

In 2002, DLNR set aside two leased ranch lands for māmane forest restoration on Mauna Kea, demonstrating a move toward Palila protection.[249] The areas were set aside because of a realignment project for "Saddle Road," the highway that cuts through the saddle of three volcanoes on the Big Island: Mauna Loa, Mauna Kea, and Hualālai.[250] The highway moved into Palila critical habitat, therefore, the state set aside two areas called Ka'ohe and Pu'u Mali to mitigate the loss of habitat, which were later fenced and removed of sheep.[251] After the mitigation agreement, the state also created a program, Mauna Kea Forest Restoration Project

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Suppress M[ā]mane and Other Browse Species on Mauna Kea, Hawai[']i, J. OF RANGE MGMT., Sept. 1983, at 638, 638, *available at* http://digitalcommons.library.arizona.edu/objectviewer?o=http%3A%2F%2Fjrm.library.arizona.edu%2FVolume36%2FNumber5%2Fazu_jrm_v36_n5_638_645_m.pdf (stating that "m[ā]mane regenerated little or not at all in areas where sheep tended to concentrate, especially at tree line").

[246] *See, e.g.*, *Mauna Kea Sheep*, *supra* note 2 (stating perspectives of a Mauna Kea hunter opposed to the aerial hunting of sheep).

[247] Aila, *supra* note 217.

[248] *Id.* (emphasis added).

[249] *See* CONSERVATION BIOLOGY, *supra* note 31, at 523-25; *see also Forest Restoration*, MAUNA KEA REFORESTATION PROJECT, http://dlnr.hawaii.gov/restoremaunakea/home/management/ (last visited Feb. 27, 2014).

[250] *See* CONSERVATION BIOLOGY, *supra* note 31, at 523-24; *see also Forest Restoration*, *supra* note 249.

[251] *See* CONSERVATION BIOLOGY, *supra* note 31, at 523-24.

("MKFRP"), to actively restore the māmane forest within the mitigation areas.[252]

Another demonstration of progression towards Palila protection occurred when the state resisted pressure from the County of Hawai'i's passing of an ordinance banning aerial hunts on the island.[253] The ordinance sent a message to DLNR that the people of the County of Hawai'i[254] opposed the aerial hunts of sheep that take place on Mauna Kea and elsewhere on the island.[255] DLNR, under the directorship of Aila, went to court, this time with the plaintiffs at its side rather than the hunters. DLNR asked the court to rule that the federal mandate to remove sheep preempted the county ordinance.[256] The resistance to comply with the County of Hawai'i ordinance and the creation of MKFRP are two examples that mark a shift in DLNR's approach to Palila protection, which continues to gain momentum.

a. The creation of programs charged with Palila habitat restoration

MKFRP was created with the goal to "facilitate management that benefits Palila" throughout its critical habitat, and mainly in two ungulate-free, fenced, mitigation areas.[257] The project focuses on forest restoration, community outreach, fence maintenance, and predator control.[258] Therefore, the goal of MKFRP generally addresses threats to the Palila and specifically is connected to the federal mandate because it maintains the fence that will eventually go around the entire mountain to encompass Palila critical habitat. Fence maintenance also complies with the 1998 stipulation to build and maintain a fence around the mountain to prevent the ingress of sheep.[259] DLNR did not charge MKFRP with sheep removal, however, leaving this major requirement of the court mandate unassigned to a particular project.

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[252] Stephens, *supra* note 210.

[253] *See* HAW. CNTY. CODE § 14-112 (2005), *available at* http://www.hawaiicounty.gov/lb-countycode/#countycode; *see also* Nancy Cook Lauer, *State Sues over Aerial Hunting Ban*, WEST HAWAI['I] TODAY (Mar. 26, 2013, 12:05 AM), http://westhawaiitoday.com/sections/news/local-news/state-sues-over-aerial-hunting-ban.html.

[254] The County of Hawai'i encompasses the entire Big Island. *See generally Planning Department*, COUNTY OF HAWAI'I, http://www.cohplanningdept.com/ (last visited Apr. 5, 2014) (providing information about the County of Hawai'i).

[255] Telephone Interview with Tony Sylvester, Hunter, Member of Hawai'i County Game Management Advisory Commission (Feb. 13, 2014) [hereinafter Sylvester].

[256] *See Palila VI*, No. 78-00030 JMS, 2013 WL 1442485, at *2 (D. Haw. Apr. 8, 2013).

[257] *Forest Restoration*, *supra* note 249.

[258] *See id.*

[259] *See Palila V*, 73 F. Supp. 2d. 1181, 1185 (D. Haw. 1999).

Working extensively in ungulate-free areas convinced the supervisor of MKFRP, Robert Stephens, that the federal court decisions are correct because the sheep noticeably cause damage to the forest.[260] According to Stephens, there is a striking difference of natural regeneration inside the fenced areas versus outside where the sheep remain.[261] For example, in 2006, all sheep were removed from the Ka'ohe Restoration Area.[262] Just six years later, in 2012, MKFRP measured 192 māmane saplings per acre inside the restoration area, compared to only twenty-seven māmane saplings per acre outside the restoration area.[263] This means that "[n]atural regeneration was over seven times higher in the area without sheep."[264] This information shows that sheep are damaging the habitat, and the results are there for anyone who uses the mountain to see. With this type of result after just six years, the forest would look completely different today if the sheep were properly removed thirty-five years ago after Judge King's first ruling.

Palila also need large expanses of intact forest to thrive, which further underscores the correctness of Palila court decisions.[265] Currently, Palila are only found where māmane covers a large elevation gradient.[266] This occurs because the māmane at higher elevations produce pods in the winter, and the māmane at lower elevations produce pods in the summer; thus, creating a year-round food source for Palila.[267] Therefore, if sheep continue to consume māmane seedlings, the habitat will become too constricted to effectively support Palila.

In the last year, with a shift in leadership at the DOFAW Island of Hawai'i Branch Office in Hilo, and more funding from USFWS, an increased effort to fulfill the federal court mandate occurred with higher numbers of sheep removed during aerial hunts.[268] Since 1998, 8227 sheep were removed during aerial hunts.[269] In 2013 alone, 1992 sheep were removed using this technique.[270] Thus, in the last fifteen years, almost one-

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[260] Stephens, *supra* note 210.

[261] *Id.*

[262] *Signs of Success*, AM. BIRD CONSERVANCY BLOG, http://abcbirds.wordpress.com/tag/palila/ (last visited Dec. 2, 2014).

[263] *See Forest Restoration: Monitoring Natural Regeneration*, MAUNA KEA FOREST RESTORATION PROJECT, http://dlnr.hawaii.gov/restoremaunakea/home/management/ (last visited Nov. 18, 2014).

[264] *Id.*

[265] Stephens, *supra*, note 210.

[266] *Id.*

[267] *Id.*

[268] *Id.*

[269] Stephens, *supra* note 37.

[270] *Id.*

fourth of all the sheep removed from aerial hunts were removed last year.[271] This effort shows remarkable progress in the effort to remove sheep.

It is important to keep momentum toward Palila protection moving forward to ensure success of all sheep removed from Palila critical habitat.[272] In the long term, Stephens identified three main challenges to fulfilling the federal mandates to remove the sheep from the mountain. First, as stated in the 1998 stipulation, a fence is necessary to prevent ingress.[273] In 2010, DLNR first started building the fence around Palila critical habitat, and its completion and maintenance is necessary to ensure sheep will not repopulate the area.[274] Second, there remains a lack of funding to implement continued rigorous aerial shooting needed to effectively and efficiently remove the sheep.[275] Third, removing sheep from Mauna Kea is a politically and socially contentious issue.[276] If DLNR is not fully committed to removing all sheep from Mauna Kea, then follow through of the law will not happen.[277] Currently, DLNR is demonstrating a desire to fulfill the federal mandate; however, completion will depend on a continuous and vigorous effort until all sheep are removed.

b. Resisting pressure from Hawai'i County Council to stop eradication efforts

In 2013, DLNR demonstrated a readiness to take the federal mandate seriously when it went to court to seek a declaration that the federal mandate to remove sheep preempted a Hawai'i County Ordinance attempting to ban aerial hunts on the Big Island.[278] The goal of the Hawai'i County Council in creating the ordinance was to demonstrate its opposition to sheep removal on Mauna Kea.[279] Therefore, the county council used its

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[271] Stephens, *supra* note 37.

[272] Stephens, *supra* note 210.

[273] *Id.*

[274] *Id.*

[275] *Id.*

[276] *Id.*

[277] *Id.*

[278] *See Palila VI*, No. 78-00030 JMS, 2013 WL 1442485, at *2 (D. Haw. Apr. 8, 2013); *see also* HAW. CNTY. CODE § 14-112 (2005), *available at* http://www.hawaiicounty.gov/lb-countycode/#countycode.

[279] Sylvester, *supra* note 255; *see also* Dave Smith, *Council Moves to Ban Shooting of Animals from Choppers*, BIGISLANDNOW.COM (June 7, 2012), http://bigislandnow.com/2012/06/07/council-moves-to-ban-shooting-of-animals-from-choppers/ ("The bill is aimed at the practice by the state Department of Land and Natural Resources to control ungulates, primarily sheep and goats on the slopes of Mauna Kea.").

political influence to emphasize its commitment to and solidarity with the hunters.

In 2012, in response to hunter protests, the Hawai'i County Council passed a county code declaring the aerial eradication of animals unlawful.[280] The code states:

> (a) The County of Hawai'i is charged with the ultimate responsibility to protect, preserve, and enhance the health, safety, and welfare of the people of Hawai'i Island. With regard to the bond between the people and the land, the County of Hawai'i hereby finds:
>
> (1) Animal eradication by aerial shooting is in conflict with the cultural and traditional values of the people of Hawai'i County;
>
> (2) Aerial hunting eradication creates unnecessary risk to human life, while also disturbing endangered flora and fauna; and
>
> (3) Animal population control measures can be performed in a manner that is harmonious with the culture, values, and principles of the people.
>
> (b) The purpose of this article is to declare:
>
> (1) Animal eradication by aerial shooting on Hawai'i Island shall no longer be practiced;
>
> (2) The State of Hawai'i should conform and comply with the provisions of this article;
>
> (3) Other methods of animal population control must be used. Any such method to be enacted will take in to account the will of the people, which requires effective communication and concerted effort to remain linked to the people that take responsibility for the land and its resources; and
>
> (4) The State of Hawai'i should increase public access to the areas of Hawai'i Island that will allow hunters and gatherers the opportunity to provide subsistence to the families of Hawai'i Island. Valuable food resources should be consumed rather than wasted.[281]

Although the court decided that the 1998 stipulation order preempted the county code,[282] it was a statement by the local government, further fueling opposition to the removal of sheep on Mauna Kea. Even without the force of law, the county code caused a fourteen-month delay in aerial shootings.[283] It is efforts such as the ordinance that cause challenges and

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[280] HAW. CNTY. CODE § 14-112 (2005), *available at* http://www.hawaiicounty.gov/lb-countycode/#countycode.

[281] *Id.* § 14-111.

[282] *See Palila VI*, No. 78-00030 JMS, 2013 WL 1442485, at *4 (D. Haw. Apr. 8, 2013).

[283] Stephens, *supra* note 210.

derails progress for protecting the Palila.[284] The county code again highlights the controversy that plays into carrying out the removal of sheep on Mauna Kea. It also demonstrates the struggle DLNR faces when fulfilling the federal mandate to remove the sheep. Although simple on paper, the mandate affects many individuals who strongly disagree with the decision and may have the ability to influence the government at all levels.

3. Did the federal court assign the state with an impossible task?

In 1979, when Judge King first ruled that feral sheep and goats must be removed from Palila critical habitat,[285] the court did not set out a plan for how the State would fulfill the mandate in its decision. The simple directive to remove sheep from a mountain unraveled into a complex situation involving other factors such as rugged terrain, a lack of funding, and opposition from the community. Therefore, the task to remove sheep was not as simple as the court order made it sound.

The terrain of Mauna Kea is not easy to traverse. Hidden underneath the tall grass is loose ʻaʻā (volcanic rock) that the sheep easily climb but is difficult for humans to hike on.[286] In addition, the Palila critical habitat covers an elevation change of 5000 to 10,000 feet, and within that elevation, there are many gulches and puʻu (hills) for the sheep to easily hide.[287] Therefore, the area on Mauna Kea that the sheep inhabit exemplifies the difficulty of locating every single sheep on the mountain.[288]

Even given the complex terrain of Mauna Kea, with the help of helicopters and a true aggressive effort, the state could have removed the sheep in a time frame of thirty-five years.[289] In 1934, foresters conducted sheep drives on Mauna Kea on foot and on horseback, eliminating tens of thousands of sheep.[290] In addition, a fence enclosing the Mauna Kea forest reserve was erected between 1935 and 1937, after which, "nearly 47,000 sheep and over 2200 other ungulates were removed in the following [ten]

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[284] *Id.*

[285] *See Palila I*, 471 F. Supp. 985 (D. Haw. 1979); *see also supra* Part II.C.1 (discussing *Palila I* and the court's decision).

[286] Aila, *supra* note 217.

[287] *Id.*

[288] *Id.*

[289] Telephone Interview with Keith Swindle, Senior Special Agent, U.S. Fish and Wildlife Service Office of Law Enforcement (Mar. 25, 2014) [hereinafter Swindle].

[290] *See* S.C. HESS & J.D. JACOBI, THE HISTORY OF MAMMAL ERADICATIONS IN HAWAIʻI AND THE UNITED STATES ASSOCIATED ISLANDS OF THE CENTRAL PACIFIC 70 (2011) (citation omitted), *available at* http://www.issg.org/pdf/publications/island_invasives/pdfHQprint/1Hess.pdf.

years by foresters and Civilian Conservation Corps workers."[291] In addition, the National Park Service has successfully eradicated goats in Volcano National Park located on the volcano, Mauna Loa, that neighbors Mauna Kea.[292] These examples demonstrate that although the terrain on Mauna Kea is challenging, it is possible to overcome the challenge if a concerted effort exists.

Next, the state faces a serious obstacle of funding the efforts needed to remove sheep from Mauna Kea.[293] Utilizing a helicopter for aerial hunts, building a fifty-five mile fence on rugged terrain to enclose Palila critical habitat, and hiring state employees to carry out the work requires an expansive budget.[294] As an example, the fence encompassing Palila critical habitat requires millions of dollars to complete.[295] Without a guarantee of funding, it is impossible for the state not only to remove all of the sheep, but also to ensure that the sheep will remain outside of Palila critical habitat.[296] The shift in leadership within DLNR, however, shows that where there is a will, there is a way, because once the state applied for more money from USFWS, they received it.[297] In 2010, the state started building the fence around Mauna Kea, and recently in 2013, more sheep were removed in the aerial hunts than in previous years because of the availability of funding.[298]

Finally, opposition to the removal of sheep has been a major factor swaying the actions of DLNR, making it difficult to fulfill the mandate. As the next section demonstrates, hunters have had a strong voice throughout the story of the Palila. Contrary to the perspective of Aila that the mandate must be fulfilled no matter what, DLNR previously created a forum for hunters to speak out and be heard. Hunters' influence over the eradication of sheep speaks to whether DLNR was really given an impossible task to fill or if a lack of will was actually guiding its decision-making.

In Judge King's memoir, he wrote about the state's reaction to the mandate to remove sheep.[299] He stated that "[t]he state dragged its feet, for

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[291] *Id.*

[292] *Id.* (stating that the eradication "proved the technical feasibility of eradicating ungulates from large areas of multi-tenure islands and developed specific techniques necessary to accomplish the task"). In 1989, goats were also eliminated from Haleakalā on Maui using techniques developed in Volcano National Park. *See id.* at 68.

[293] Aila, *supra* note 217.

[294] *Id.*

[295] Stephens, *supra* note 37.

[296] Aila, *supra* note 217.

[297] *See infra* Section III.D (discussing how the federal government supports the Palila outside the courtroom).

[298] Stephens, *supra* note 210.

[299] *See generally* SAMUEL P. KING, JUDGE SAM KING: A MEMOIR 68-69 (2013)

the simple reason that hunters have more political power than birds do."[300] In reaction to the state dragging its feet, one day in court he mentioned, "Maybe I should take over the Department of Land and Natural Resources."[301] He stated that it was not meant as a threat, however, "[t]he next day, the state had riflemen shooting goats from an airplane."[302] Judge King's account of DLNR's actions exemplifies its lack of will to fulfill the federal mandate. Thus, the Palila's saga continues, and the stakeholders involved in the litigation cannot be fully understood without accounting for the hunter's perspective.

C. Hunters on Mauna Kea: A Strong Voice of Influence

Hunters play an important role as a stakeholder in the Palila story by intervening in the lawsuits as well as demonstrating their position through media and other sources.[303] The hunting community as a whole includes many perspectives regarding removal of sheep on Mauna Kea, however, one perspective, that at least *some* sheep should remain on the mountain, has proven influential in the state's decision-making and management of sheep on the mountain. Generations of hunting has created a custom on the Big Island for those who actively participate and share in the tradition of eating game animal meat with family and friends.[304] To keep this tradition alive, the hunting community successfully influenced decision makers within the State of Hawai'i to stall the eradication efforts of sheep on Mauna Kea and allow the sheep to remain there.[305]

Many hunters grew up hunting with their family members on Mauna Kea.[306] Hunting is a way of life with important historical ties to the Big Island community.[307] Hunters gain a connection with the environment while hunting by spending time outside and carefully observing their surroundings.[308] In addition, hunting allows youth to gain responsibility

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(discussing the state's and hunters' reaction to the sheep removal mandate).

[300] *Id.* at 69.

[301] *Id.* (internal quotation marks omitted).

[302] *Id.*

[303] This Article does not attempt to convey the perspective of every hunter that uses Mauna Kea. This Article intends to summarize the views of those who have taken an active role in the Palila litigation and those who have made their perspective known through media or interviews with the author of this Article.

[304] Sylvester, *supra* note 255.

[305] Stephens, *supra* note 210.

[306] *See, e.g.*, Ryan Kohastu, *The Wild Sheep of Mauna Kea: A Hunting Story*, YOUTUBE (Dec. 4, 2013), https://www.youtube.com/watch?v=2uPM6YDExPs.

[307] *See id.*

[308] *See id.*

and an understanding of where food comes from.[309] After generations of sharing in the tradition, hunters feel that hunting is an integral part of the island lifestyle that would be lost without sheep on Mauna Kea.[310]

1. Attorney for the hunters argues for alternative perspectives

Attorney John S. Carroll decided to represent the hunters in all three of the Palila cases in which hunters intervened[311] because he wanted to accurately represent this community perspective.[312] Carroll, an experienced hunter on Mauna Kea since the 1960s, believes that sheep have almost no impact on the māmane forest.[313] He presented the argument to Judge King that sheep actually benefit the forest.[314] He supported his argument by stating that the dry grass on the mountain acts as a flashy fuel that poses an extreme fire risk to the forest.[315] He argued that the sheep eat the grass, thereby reducing the fire hazard to the mountain.[316] However, his argument conflicts with the scientific studies conducted regarding sheep stomach contents that show the sheep have a strong preference for māmane and not grass.[317]

Judge King found the argument "disingenuous" that a remnant population of sheep on Mauna Kea would not harm the Palila.[318] Judge King also noted that even if fire is a serious danger, it is "irrelevant to the issue of whether sheep should continue to be removed."[319] The argument that sheep act as fire control was finally shut down when Judge King stated, "The proposition that ungulates are the best defense against fire suggests that in order to save the Palila from extinction by fire we should increase the number of sheep so they can share in the destruction of the Palila."[320] Despite scientific studies and Judge King's remarks, Carroll disagrees with the outcome of the case.[321]

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309 *See id.*

310 *See id.*

311 *See Palila III*, 649 F. Supp. 1070 (D. Haw. 1986); *Palila IV*, 852 F.2d 1106 (9th Cir. 1988); *Palila V*, 73 F. Supp. 1181 (D. Haw. 1999).

312 Telephone Interview with John S. Carroll, Attorney at Law (Mar. 27, 2014) [hereinafter Carroll].

313 *Id.*

314 *Id.*

315 *Id.*

316 *Id.*

317 Hess & Banko, *supra* note 52, at 63.

318 *Palila V*, 73 F. Supp. 2d 1181, 1186-87 (D. Haw. 1999).

319 *Id.* at 1187.

320 *Id.*

321 Carroll, *supra* note 312.

2. Additional arguments from hunters against sheep removal

Hunters argue against the decision to remove sheep from both a legal and emotional position. For example, U.S. District Court Judge Martin Pence expressed to Judge King that the ruling resulting in removal of sheep upset him.[322] Judge Pence loved to hunt on the Big Island and told Judge King, "You shouldn't have done that!"[323] Judge King stated he was not bothered by the statement; however, because "[i]t came down to enforcing laws passed by Congress to protect endangered species . . . . Whether [he] personally agreed with the law was not an issue."[324] This reaction demonstrates both the significance hunters from the Big Island place on hunting and also Judge King's loyalty to the Palila despite the controversy associated with his ruling.

Many other hunters also do not agree with Judge King's interpretation of the law. An advocate for the hunter community, Tony Sylvester, believes the court manipulated the word "taking" because the sheep do not actually eat the birds, and therefore there is not a direct taking of the animal.[325] Many hunters would admit there should not be an infinite number of sheep on the mountain, but feel it is an extreme measure to eliminate *all* of the sheep.[326] These hunters believe that a managed population of sheep should be allowed to co-exist with the Palila.[327] In addition, hunters view the federal court mandate as one-sided because it only addresses sheep and not other factors that threaten the Palila, such as predators and drought.[328]

Removing sheep from the mountain also creates opposition within the hunting community because the aerial hunts are seen as wasting a food source.[329] For those that hunt game animals to feed their family, shooting sheep on the mountain and leaving them to rot appears inhumane.[330] Although DLNR salvages a fraction of the sheep and distributes them to people who sign up for the salvage,[331] many animals are not salvageable

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[322] *See* KING, *supra* note 299, at 69; *see also Palila I*, 471 F. Supp. 985 (D. Haw. 1979).

[323] *Id.* (internal quotation marks omitted).

[324] *Id.*

[325] Sylvester, *supra* note 255.

[326] *Id.*; Telephone Interview with Ryan Kohatsu, Hunter on Mauna Kea (Apr. 16, 2014) [hereinafter Kohatsu].

[327] Sylvester, *supra* note 255.

[328] *Id.*

[329] *See Mauna Kea Sheep*, *supra* note 2.

[330] *See id.*

[331] *See generally* STATE OF HAW. DEP'T OF LAND AND NATURAL RES., NOTICE OF ANIMAL CONTROL ACTIVITIES AND TEMPORARY CLOSURE OF MAUNA KEA FOREST RESERVE, MAUNA KEA ICE AGE NATURAL AREA RESERVE, PALILA MITIGATION LANDS, AND KA['OHE GAME MANAGEMENT AREA (2014), *available at* http://dlnr.hawaii.gov/dofaw/files/2014/03/Legal_

and are left behind.[332] Thus, animals meant for hunting and consumption are "wasted" in the eyes of those who take advantage of the opportunity to hunt them.

For families that have hunted on Mauna Kea for generations, clearing the mountain of sheep also appears to be a waste of land.[333] Land would no longer be available for the purpose of hunting sheep, and therefore, the land would not be utilized in the way that hunters are familiar. In addition, to prevent ingress, a six-foot tall fence will enclose Palila critical habitat, creating the image of a barrier and the appearance of restricting community access.[334] Despite the fact that there are gates and entrance points along the fence, enclosing the land in this manner is seen as an "assault to the community."[335] The state continues to fence in areas that were once hunted, which appears "hostile and unfair."[336] In the eyes of the hunting community, their hunting privileges are slowly disappearing.[337]

3. County code proves ineffective at stopping aerial hunting of sheep

Hunters also feel that their perspective has fallen on deaf ears.[338] For example, to obtain attention from the state, hunters supported the passing of the Hawai'i county code that banned aerial hunting on the island of Hawai'i, viewing it as a way for the state to hear their voice.[339] Council Chairman Dominic Yagong, the sponsor of the bill banning aerial hunts, stated that the bill was meant to give the hunting community a voice.[340] He emphasized that hunting has been part of the community's heritage for hundreds of years and that the bill was based on emotion and cultural traditions.[341] Yagong stated, "This is personal; this is emotional."[342] These statements underscore the controversy surrounding the federal court

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Notice_-_Mauna_Kea_Closure.pdf (providing information regarding receiving salvaging permits).

[332] Sylvester, *supra* note 255; Kohatsu, *supra* note 326 (stating that only approximately thirty animals are salvaged because many times they are shot among the trees where helicopters cannot access them).

[333] *See Mauna Kea Sheep*, *supra* note 2.

[334] *See id.*

[335] Kohastu, *supra* note 326.

[336] *Id.*

[337] *Id.*

[338] Sylvester, *supra* note 255.

[339] *Id.*; *see also* Big Island Video News, *Hunting Bills Go Before Hawai'i County Council*, YOUTUBE (June 8, 2012), http://www.youtube.com/watch?v=a4O07Mv88Uc.

[340] *See* Big Island Video News, *supra* note 339.

[341] *See id.*

[342] *Id.*

mandate and the attempts of the hunting community to exert political influence to stop the removal of sheep.

Although hunters feel that their voices have fallen on deaf ears, they have been successful in some senses. Their political influences have managed to stall eradication of sheep for the last thirty-five years.[343] DLNR originally went to court with the hunters at its side and tried to achieve a result that could appease all stakeholders. Unfortunately for the hunting community, the ESA is not flexible in its protection measures. If there is a "take," it is a violation of the statute and must be stopped.[344] In the end, according to the ESA, the Palila is the ultimate stakeholder that must be protected at all costs.

In summary, stakeholders in the Palila litigation have included conservation organizations, DLNR, and hunters. The next section explains how one additional stakeholder, USFWS, plays an important role in the Palila's story as the administrator and enforcer of the ESA, and the agency ultimately responsible for the court's interpretation of the term "take."

D. The Federal Government: Supporting the Palila Outside the Courtroom

Although USFWS was not a party to the Palila lawsuits, it remains a stakeholder in Palila protection as the principal agency responsible for administering the ESA.[345] As part of the mission of USFWS, it must "[p]rotect endangered and threatened species, and then pursue their recovery."[346] The mandate to remove sheep from Palila critical habitat pursues the recovery of the Palila. Therefore, follow through on the part of the state to fulfill the federal mandate also plays a critical part in the mission of USFWS.

When a violation of the ESA occurs, USFWS may seek civil penalties, criminal proceedings, as well as injunctive relief.[347] USFWS, however, did not directly involve itself in the Palila lawsuits and instead allowed the citizens suits to go forward without taking enforcement action as an agency. Therefore, the Palila was left with the only form of relief under the citizen suit provision, injunctive relief.[348]

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[343] Stephens, *supra* note 210.

[344] *See supra* Part II.C (discussing multiple cases where the court analyzed a "take").

[345] *See* 16 U.S.C. § 1532(15) (2012); MATSUMOTO ET AL., *supra* note 192, at 12.

[346] *Overview*, U.S. FISH & WILDLIFE SERVICE, http://www.fws.gov/Endangered/about/index.html (last updated May 7, 2013).

[347] *See* 16 U.S.C. § 1540(a)(1), (b)(1), (e)(6) (2012).

[348] *See id.* § 1540(g)(1)(A).

Although USFWS did not bring an enforcement action against the State of Hawai'i, it plays another significant role as a stakeholder. USFWS Pacific Islands Office actively gives funding to the State of Hawai'i for endangered species protection, and the state is also granted funds under Section 6 of the ESA.[349] USFWS also grants funds through the federal Pittman-Robertson Wildlife Restoration Act ("Pittman-Robertson Act").[350] Thus, USFWS actively involves itself in Palila protection through funding the state's wildlife protection activities.

1. The federal government was not an active participant in the litigation

Throughout the Palila lawsuits, USFWS was aware of the peril facing the Palila, however, it chose not to bring an enforcement action. USFWS's awareness is evidenced in two ways. First, because the plaintiffs brought a citizen suit, they were required to comply with the notice provision of the ESA.[351] This requires a citizen plaintiff to give the Secretary of Interior as well as any alleged violator sixty days' notice before bringing an action.[352] The purposes of the notice provision are to "(1) giv[e] the alleged violator an opportunity to remedy the alleged violations; and (2) giv[e] the federal agencies with statutory enforcement powers an opportunity to commence their own enforcement action."[353] Notice was never challenged in the Palila lawsuits. Therefore, the plaintiffs in *Palila I* through *Palila VI* gave USFWS proper knowledge of the alleged ESA violation, and USFWS chose to let the citizen suit go forward without taking action itself.

Second, USFWS had knowledge of Palila habitat destruction due to sheep because the United States Geological Survey ("USGS") conducted numerous studies involving the Palila and the threats to its survival.[354] USGS provides "impartial information on the health of our ecosystems and environment."[355] When invited to do so, USGS acts as a research and technical advisor to USFWS and advises USFWS on biological

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[349] *See id.* § 1535(d)(1); *see also* MATSUMOTO ET AL., *supra* note 192, at 28 ("Section 6 of the ESA allows any state to enter into an agreement with the federal government to protect threatened or endangered species and sets up grants to states to participate in endangered species programs through the Cooperative Endangered Species Conservation Fund.").

[350] *See* 16 U.S.C. § 669 *et seq.* (2012).

[351] *See id.* § 1540(g)(2)(A)(i).

[352] *See id.*

[353] Hawksbill Sea Turtle v. Fed. Emergency Mgmt. Agency, 126 F.3d 461, 472 (3d Cir. 1997) (citation omitted).

[354] *See generally.* Banko et al., *supra* note 9 (discussing federal studies conducted on Mauna Kea).

[355] *About USGS*, USGS SCIENCE FOR A CHANGING WORLD, http://www.usgs.gov/about usgs/ (last visited Feb. 26, 2014).

implications of management.[356] USGS studies indicate that removal of sheep would allow for Palila recovery.[357] Therefore, despite USFWS's knowledge of the habitat destruction on Mauna Kea and how it affects the Palila, it did not proactively bring a lawsuit against the state in its own right and instead relied on the plaintiffs' ability to bring a citizen suit.

There are likely several reasons that the Department of Justice ("DOJ") may decide not to bring a lawsuit against the state. The DOJ must balance many considerations when deciding whether to bring a case to court. For example, in 1979, the Palila likely did not present a strong enough case for the DOJ to move it forward. After the citizen suits commenced, DOJ likely saw its resources would be more effective elsewhere.[358] In this case, therefore, the Palila benefited from Congress including a citizen suit provision in the ESA. It is unclear what the status of the Palila would be today without private citizens driving its protection.

2. The role of USFWS in Palila protection

USFWS has taken an active role in Palila recovery, despite its inaction to compel the removal of sheep on Mauna Kea through legal means. USFWS provides discretionary funds to the State of Hawai'i in two main capacities relating to endangered species: (1) USFWS Pacific Islands Office provides funding; and (2) USFWS provides grant money through Section 6 of the ESA[359] and through the Pittman-Robertson Act.[360] Both forms of funding support wildlife restoration and preservation, however, each grant emphasizes two very different concepts. Section 6 funds activities strictly associated with endangered species,[361] whereas Pittman-Robertson funds ("P-R funds") are more closely tied to wildlife restoration associated with hunting programs.[362] In reality, carrying out the mandate requires a huge amount of effort and money to rehabilitate Mauna Kea's damaged ecosystem.[363] Thus, the grant money from USFWS is essential to ensuring that efforts are taken to continue the rehabilitation process.

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[356] Banko, *supra* note 226.

[357] *Id.*

[358] Swindle, *supra* note 289.

[359] *See* 16 U.S.C. § 1535(c)-(d) (2012).

[360] *See id.* § 669b.

[361] *See Grants: Overview*, U.S. FISH & WILDLIFE SERV., http://www.fws.gov/endangered/GRANTS/index.html (last updated Oct. 30, 2014) [hereinafter *Grants*].

[362] *See Wildlife & Sport Fish Restoration Program Overview*, U.S. FISH & WILDLIFE SERV., http://wsfrprograms.fws.gov/Subpages/GrantPrograms/WR/WR.htm (last updated Aug. 11, 2014).

[363] Telephone Interview with David Leonard & Marilet Zablan, U.S. Fish & Wildlife Service (Mar. 6, 2014) [hereinafter Leonard & Zablan].

a. Endangered species rely on funding

Section 6 of the ESA creates a fund to provide grants to states and territories that participate in conservation projects.[364] In 2013, USFWS announced that it would fund "nearly $32 million in grants to twenty states to help advance their collaborative efforts to conserve America's rarest species."[365] A small portion of the Section 6 funding granted to the State of Hawai'i is dedicated to Palila protection.[366] For example, USFWS grants funds to MKFRP for Palila counts and the monitoring of Palila population trends.[367] Monitoring the number of Palila in the wild ultimately contributed to alarming the community of the urgency of the Palila's situation.[368] In 2008, experts detected a steep decline in the Palila population, and as a result, USFWS made funding available for a broad-spectrum protection plan.[369] Without the ability to monitor Palila populations, its dire situation would not be as clear.

In addition, USFWS Pacific Islands Office itself provides funding for Palila protection directly related to the federal court mandate.[370] USFWS awarded $4.8 million to DLNR,[371] which provided ninety-five percent of the funding to build the fence around Palila critical habitat, with funding also dedicated to repairing the fence when necessary.[372] At the time of this Article, DLNR has built twenty-four miles of the fence, costing approximately two million dollars, with fifteen miles of fence line remaining to be built.[373] This shows the immense cost of fulfilling one aspect of the federal mandate and the state's dependence on funding from USFWS to ensure follow through.

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[364] *See* 16 U.S.C. § 1535 (2012); *Grants*, *supra* note 361.

[365] Gavin Shire, *U.S. Fish and Wildlife Service Boosts State Endangered Species Conservation Efforts with $32 Million in Grants*, U.S. FISH AND WILDLIFE SERV. (July 9, 2013), http://www.fws.gov/home/newsroom/32milliongrantsstateendangeredspeciesNR0709 2013.html.

[366] Leonard & Zablan, *supra* note 363.

[367] *Id.*

[368] *Id.*

[369] *Id.*

[370] *Id.*

[371] Stephens, *supra* note 37.

[372] Leonard & Zablan, *supra* note 363.

[373] *Id.* The total fence line now includes twenty-nine miles of continuous ungulate-proof fence around the southern half of Mauna Kea. *Id.*

b. Are P-R funds appropriate for the State of Hawai'i and its fragile ecosystems?

In addition to Section 6 funding, the State of Hawai'i receives P-R funds, which are provided by a completely separate funding regime. The Pittman-Robertson Act ("Act") provides funding to states for wildlife restoration.[374] After recognizing important game species were reduced to small numbers, the life of the Act was extended at the urging of organized sportsmen, state wildlife agencies, and the firearms and ammunition industries.[375] The grant funds are acquired through a tax on ammunition and firearms used for sport hunting.[376] Most of the P-R funds made available to states are used to develop and maintain wildlife management areas.[377] Thus, P-R funds are meant to give states an opportunity to ensure viable wildlife populations, with an emphasis on creating an increased opportunity for sport hunting.

P-R funds allocated to Hawai'i contribute to a unique situation in which the preserving of wild game animals does not necessarily contribute to a healthier overall ecosystem as it would in states where game animals are native. As evidenced in the Palila cases, animals hunted in Hawai'i are not native, and in turn, are destructive to the natural ecosystem. Hunting, nevertheless, is a valued activity in Hawai'i.[378] P-R funds are an important aspect of keeping the historic tradition of hunting viable.[379] With P-R funds available in Hawai'i, the complexity of the Palila's story becomes intertwined in a contradictory practice of saving endangered species, while at the same time supporting the hunting of animals that cause the demise of many endangered species through habitat destruction.

However, distributing P-R funds in Hawai'i does not result in automatic destruction of the forest. USFWS distributes the funds, but does not instruct the state on how to spend it.[380] The state presents a proposal to USFWS and if mutually agreed upon, the funds are granted.[381] The funds are discretionary for the state; therefore, USFWS cannot put conditions on

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[374] *Federal Aid Division—The Pittman-Robertson Federal Aid in Wildlife Restoration Act*, U.S. FISH & WILDLIFE SERV., http://www.fws.gov/southeast/federalaid/pittmanrobertson.html (last updated Jan. 21, 2010).

[375] *See id.*

[376] *See id.*

[377] *See id.*

[378] *See supra* Part III.C (discussing the significance of hunting to hunters on Mauna Kea).

[379] *See* Doug Stewart, *Conservation: A Law that Keeps on Giving*, NAT'L WILDLIFE FED'N (Jan. 1, 2012), http://www.nwf.org/news-and-magazines/national-wildlife/animals/archives/2012/pittman-robertson-act.aspx.

[380] Telephone Interview with Ruth Utzurrum, Wildlife and Sport Restoration Program, U.S. Fish & Wildlife Service (Mar. 25, 2014).

[381] *Id.*

the money and instruct the state on how to effectively manage its game.[382] The state, having discretion regarding how to implement P-R funds, can decide on its own to use the funds to manage hunting in a responsible way.[383]

DLNR now uses P-R funds for the eradication of sheep in Palila critical habitat through the State Wildlife Grant. In 2014, the State of Hawai'i received a total of $468,779 through the State Wildlife Grant Program.[384] The state also received $1 million from a competitive State Wildlife Grant, of which $250,000 went towards funding the eradication of sheep on Mauna Kea.[385] This shift in use of the grant money again marks progress in the effort of DLNR towards Palila protection. With this type of responsible usage of available funding, DLNR increases its ability to finally remove the rest of the sheep from Palila critical habitat.

The availability of funds from USFWS to the State of Hawai'i is critical to ensure that the federal mandate is fulfilled and that DLNR will continue its current efforts. Increased funding for sheep eradication, which increased the number of aerial shootings per year, allowed DLNR to effectively lower the numbers of sheep living in Palila critical habitat.[386] In addition, because of USFWS funding, the fence on Mauna Kea is almost complete, which prevents ingress of sheep (in the portions where the fence is complete) currently outside of Palila critical habitat.[387] With this type of funding, the recovery of the māmane forest and, in turn the Palila, looks bright.[388] The focus on funding must remain until *all* the sheep are removed because with even just a few sheep, the population bounces back quickly, making all recent efforts frivolous.[389] The survival of Palila depends on the momentum currently in place and whether the follow through will continue to the very end.

Congress intended for the USFWS to use the ESA to "halt and reverse the trend toward species extinction, whatever the cost."[390] The Palila's story exemplifies the enormous cost of saving a single species. USFWS assists the State of Hawai'i through monetary means to fulfill its obligation

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382 *Id.*

383 *See id.*

384 Memorandum from United States Department of the Interior, Fish and Wildlife Service to State Fish and Wildlife Agencies, et al. (Feb. 28, 2014), *available at* http://wsfrprograms.fws.gov/Subpages/GrantPrograms/SWG/SWG2014Apportionment.pdf.

385 Stephens, *supra* note 37.

386 *Id.*

387 *Id.* (stating that there is still ingress on the northeast side of the mountain where five miles of fence line is incomplete).

388 *Id.*

389 *Id.*

390 Tenn. Valley Auth. v. Hill, 437 U.S. 153, 184 (1978).

of protecting the Palila and saving it from extinction. Without USFWS providing these necessary funds, the monetary burden for the state would be too great.[391] Thus, although USFWS was not an actor in the enforcement of the state's violation of the ESA, it is a very significant stakeholder in ensuring the Palila's recovery.

IV. CONCLUSION

The Palila, an endangered bird found only in a small area on the mountain of Mauna Kea, serves as an example of the complexities that play into the protecting endangered species. Although the ESA is read as a wide sweeping law, it cannot overcome the practical, on the ground factors associated with endangered species protection. In the case of the Palila, the court's interpretation of the ESA was simple: the sheep eat the māmane, which in turn "harms" the Palila, and results in a "take" of the species. Even with this simple ruling, the federal mandate was not fulfilled, and the story of the Palila's struggle to survive has continued for thirty-five years.

Despite a mandate from federal court to remove sheep from Palila critical habitat, the State of Hawai'i DLNR continued to allow the presence of sheep on Mauna Kea. Stakeholders' interests are among the complexities of fulfilling the mandate regarding Palila protection. The stakeholders in the Palila's story have influenced the court opinions as well as DLNR's actions. Each stakeholder's view is important and critical to how Palila protection has ultimately played out.

The main stakeholders in the Palila's story include: conservationists, DLNR, hunters, and USFWS. Conservationist Alan C. Ziegler, along with conservation organizations, were the thrust behind all Palila lawsuits and assumed the role of the plaintiffs to argue that DLNR was responsible for a "take" of the Palila. DLNR, as the defendant, argued for a management scheme that would allow the sheep and the Palila to co-exist, thereby satisfying the hunters and at the same time protecting the endangered species. Hunters intervened as a defendant with DLNR, hoping to convince the court of their perspective that the sheep do not harm and may even possibly benefit the Palila. In the end, "[w]hile it may have turned out to be something of a losing cause[,] [Judge King] sided with the [Palila,]"[392] interpreted the ESA broadly, and mandated that the sheep be removed from Palila critical habitat. Finally, USFWS did not participate in the litigation and instead supports the Palila through awarding the state grant money to ensure protection of this critically endangered bird.

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[391] Aila, *supra* note 217.

[392] KING, *supra* note 299, at 68.

The Palila, as the ultimate stakeholder, must be protected at all costs. After thirty-five years, the Palila's status remains critical, but its situation is more hopeful now than any other time in the last sixty or more years.[393] Conservation organizations remain vigilant at making sure the state follows through with the mandate. As a result, the state currently is making huge strides towards sheep eradication. With this momentum, it remains possible that this little yellow bird on Mauna Kea can join the list of ESA success stories.

Hope for the Palila's survival remains so that in twenty-five or thirty years, future generations will be able hear the sweet song of the Palila just as Queen Emma did so many years ago during her visit to Mauna Kea.[394] Ultimately, "[w]ith extinction there is no turning back, no second chance, no instant replay to see who should be penalized."[395] Regardless of DLNR's inaction in the past and whose perspective is right, it is time to move forward before the Palila is gone forever.

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[393] Stephens, *supra* note 37.

[394] *See Emma*, *supra* note 1.

[395] MATSUMOTO ET AL., *supra* note 192, at 52 (statement of Tom Turner).

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We strive to view issues pertinent to Hawai‘i through a broader global lens. We balance provocative articles on contemporary legal issues with practical articles that are in the vanguard of legal change in Hawai‘i and internationally, particularly on such topics as military law, sustainability, property law, and native rights.

Kūlia mākou e kilo i nā nīnau i pili iā Hawai‘i me ke kuana‘ike laulā. Ho‘okomo mākou i nā ‘atikala e ulu ai i ka hoi e pili ana i nā nīnau kū kānāwai o kēia wā a me nā ‘atikala waiwai e ho‘ololi ana i nā mea kū kānāwai ma Hawai‘i a ma nā ‘āina ‘ē, me ke kālele ‘ana i nā kumuhana like ‘ole e like me nā kānāwai pū‘ali koa, ka mālama ‘āina, nā kānāwai ona ‘āina, a nā pono o nā po‘e ‘ōiwi.

Translation by Pauahi Ho‘okano

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