RUTGERS JOURNAL OF LAW & PUBLIC POLICY

VOLUME 7 | SPRING 2010 | ISSUE 2

Editor-in-Chief
NITIN SHARMA

Executive Editors
ALISON ANDERSON
AYA SALEM

Symposium Editor
DONALD BENEDETTO

Managing Technology Editor
PRISCILLA MOORE

Business Editor
SANDY SCHLITT

Managing Editors of Articles
ALLISON GROSS
NICOLE O'HARA

Managing Research Editor
MARIA MANCINI

Managing Editors of Notes
ROBERT J. CAHALL
PHILIP MERSINGER

Submissions Editors
ERIN CARROLL
AMANDA HARBER

Lead Technology Editor
JOANNA SYKES-SAAVEDRA

Marketing Editor
MATTHEW ROBINSON

Articles Editors
JILLIAN A. CENTANNI
MEGAN HELFRICH
JENNIFER LOWES
WARREN MABEY
DAVID MOSCOW
MELISSA OSORIO
STEVEN WILSON

Technology Editors
JASON FORTENBERRY
JONATHAN ROMVARY

Notes Editors
GABRIEL BLUESTONE
LEO DONATUCCI
NICHOLAS PEDONE
RYAN C. RICHARDS
KIMBERLY SCHWARZ
CHRISTOPHER WEIR

Staff Editors
SCOTT AMITRANO
RICHARD BARCA
ERIC BERG
PETER BRYANT
CHRISTOPHER CHANCLER
SANU DEV
JONATHAN DEVITO
SHASHI DHOLANDAS
FLETCHER DUDDY
CAITLIN EDWARDS
CONRAD HABER
JOSEPH HASSELL
ALEX HERSONSKI
YOUNG JUNG
PETER KOZLOWSKI
MATT MAISEL
DREW PAKETT
ALLISON PAVERO
DANIELLE REISS
CHRISTIAN RIDDELL
EVAN SAMPSON
DAVID SOLOMON
MATTHEW STREISFELD
THOMAS SZYMANSKI
KYLE VELLUTATO
JENNIFER VOSBIKIAN
MARY WHITE
MICHAEL YOUNKER
ELIZABETH ZIMMER
LAURA ZULICK

Faculty Advisors
PHILIP L. HARVEY
SARAH E. RICKS
DAMON Y. SMITH

About the Rutgers Journal of Law & Public Policy

The *Rutgers Journal of Law and Public Policy* (ISSN 1934-3736) is published three times per year by students of the Rutgers School of Law – Camden, located at 217 North Fifth Street, Camden, NJ 08102. The views expressed in the *Rutgers Journal of Law & Public Policy* are those of the authors and not necessarily of the *Rutgers Journal of Law & Public Policy* or the Rutgers School of Law – Camden.

Form: Citations conform to *The Bluebook: A Uniform System of Citation* (18th ed. 2005). Please cite the *Rutgers Journal of Law & Public Policy* as 7 RUTGERS J.L. & PUB. POL'Y __ (2009).

Copyright: All articles copyright © 2009 by the *Rutgers Journal of Law & Public Policy*, except where otherwise expressly indicated. For all articles to which it holds copyright, the *Rutgers Journal of Law & Public Policy* permits copies to be made for classroom use, provided that (1) the author and the *Rutgers Journal of Law & Public Policy* are identified, (2) the proper notice of copyright is affixed to each copy, (3) each copy is distributed at or below cost, and (4) the *Rutgers Journal of Law & Public Policy* is notified of the use.

For reprint permission for purposes other than classroom use, please submit request as specified at http://www.rutgerspolicyjournal.org/.

Manuscripts: The *Rutgers Journal of Law & Public Policy* seeks to publish articles making original contributions in the field of public policy. The *Journal* accepts both articles and compelling essays for publication that are related to the expansive topic of public policy. Manuscripts must contain an abstract describing the article or essay which will be edited and used for publication on the website and in CD-ROM format. The *Journal* welcomes submissions from legal scholars, academics, policy makers, practitioners, lawyers, judges and social scientists.

Electronic submissions are encouraged. Submissions by email and attachment should be directed to submissions@rutgerspolicyjournal.org.

Paper or disk submissions should be directed to *Rutgers Journal of Law & Public Policy*, Rutgers University School of Law – Camden, 217 North Fifth Street, Camden, New Jersey 08102.

Subscriptions: Subscription requests should be mailed to *Rutgers Journal of Law & Public Policy*, Rutgers University School of Law – Camden, 217 North Fifth Street, Camden, New Jersey 08102, or emailed to info@rutgerspolicyjournal.org.

Internet Address: The *Rutgers Journal of Law & Public Policy* website is located at http://www.rutgerspolicyjournal.org.

OFFICERS OF THE UNIVERSITY

RICHARD L. MCCORMICK, B.A., Ph.D., *President*
MARGARET S. MARSH, B.A., M.A., Ph.D., *Interim Provost and Dean, FASC*

LAW SCHOOL ADMINISTRATION

RAYMAN L. SOLOMON, B.A., M.A., J.D., Ph.D., *Dean and Professor of Law*
JAYDEV CHOLERA, B.A., M.B.A., *Director, Finance and Administration*
JOHN S. BECKERMAN, A.B., M.A., J.D., Ph.D., *Associate Dean—Academic Affairs*
KIMBERLY D. FERZAN, B.S., J.D., *Associate Dean—Academic Affairs*
CAMILLE SPINELLO ANDREWS, B.A., J.D., *Associate Dean of Enrollment and Projects*
ANNE V. DALESANDRO, A.B., M.L.S., J.D., *Director of Law Library*
BARBARA MAYLATH, A.B., *Director of Development*
EVE BISKIND KLOTHEN, B.G.S., J.D., *Assistant Dean for Pro Bono and Public Interest Programs*
ANGELA V. BAKER, B.A., J.D., *Associate Dean of Students and Career Planning*

FACULTY

AARON ARI AFILALO, A.B., J.D., LL.M., *Professor of Law*
DAVID E. BATISTA, A.B., J.D., M.S., *Librarian*
JOHN S. BECKERMAN, A.B., M.A., J.D., Ph.D., *Visiting Professor*
LINDA S. BOSNIAK, A.B., J.D., M.A., *Distinguished Professor of Law*
HON. DENNIS BRAITHWAITE, B.S., J.D., LL.M., *Visiting Professor of Law*
A. HAYS BUTLER, B.A., J.D., M.S. (LIS), *Librarian II*
MICHAEL A. CARRIER, B.A., J.D., *Professor of Law*
FRED C. CHANDLER, Jr., B.A., LL.B., LL.M., *Professor of Law Emeritus*
GLORIA F. CHAO, B.A., M.L.S., *Librarian II*
EDWARD E. CHASE, B.A., J.D., *Professor of Law Emeritus*
VICTORIA L. CHASE, B.A., J.D., *Clinical Associate Professor of Law*
ROGER S. CLARK, B.A., LL.B., LL.M., J.S.D., LL.D., *Board of Governors Professor*
JASON K. COHEN, B.A., J.D., *Legal Writing Clinical Associate Professor*
RUSSELL M. COOMBS, B.A., J.D., *Associate Professor of Law*
LUCY COX, B.A., M.S., Ph.D., M.L.S., *Librarian II*
PERRY DANE, B.A., J.D., *Professor of Law*
JOHN H. DAVIES, B.S., LL.B., LL.M., *Professor of Law Emeritus*
MARC EDELMAN, B.S., J.D., *Visiting Assistant Professor*
JAY M. FEINMAN, B.A., J.D., *Distinguished Professor of Law*
DAVID M. FRANKFORD, B.A., J.D., *Professor of Law*
ANN E. FREEDMAN, B.A., J.D., *Associate Professor of Law*
STEVEN F. FRIEDELL, B.A., J.D., *Professor of Law*
JILL FRIEDMAN, B.A., J.D., *Director of Pro Bono & Public Interest Programs*
SANDRA GAVIN, B.A., J.D., *Director of*
BARBARA A. KULZER, *Professor of Law Emeritus*
ARTHUR B. LABY, B.A., J.D., *Associate Professor of Law*
F. GREGORY LASTOWKA, B.A., J.D., *Professor of Law*
ARNO LIIVAK, B.A., M.L.S., J.D., *Professor of Law Emeritus*
HARRY LITMAN, A.B., J.D.,*Visiting Associate Professor of Law*
MICHAEL A. LIVINGSTON, A.B., J.D., *Professor of Law*
JOHN C. LORE, III, B.A., J.D., *Clinical Associate Professor*
JONATHAN MALLAMUD, A.B., J.D., *Professor of Law Emeritus*
EARL M. MALTZ, B.A., J.D., *Distinguished Professor of Law*
AMAN MCLEOD, B.A., J.D., PH.D., *Visiting Assistant Professor*
KATHLEEN MORRIS, B.A., M.SC., J.D., *Visiting Assistant Professor*
KIMBERLY MUTCHERSON, B.A., J.D., *Associate Professor of Law*
ALISON NISSEN, B.A., J.D., *Director, Academic Success Program*
JOHN F. K. OBERDIEK, B.A., M.A., J.D., Ph.D., *Associate Professor of Law*
THOMAS ODOM, J.D., *Visiting Associate Professor*
CRAIG N. OREN, A.B., J.D., *Professor of Law*
TRACI OVERTON, B.A., J.D., *Clinical Staff Attorney*
DENNIS M. PATTERSON, B.A., M.A., J.D., Ph.D., *Board of Governors Professor*
STANISLAW POMORSKI, LL.B., LL.M., J.S.D., *Distinguished Professor of Law Emeritus*
SARAH E. RICKS, B.A., J.D., *Clinical Professor of Law and Co-Director, Pro Bono Research Project*
RUTH ANNE ROBBINS, B.A., J.D., *Clinical Professor of Law & Chair, LRW Program*
SHEILA RODRIGUEZ, B.A., M.A., J.D., *Clinical Associate Professor*

Advocacy Programs
ERIC GILSON, B.A., J.D., M.L.I.S., *Librarian III*
GEORGE GINSBURGS, Bacchalaureat Serie Mathematiques, B.A., M.A., Ph.D., *Distinguished Professor of Law Emeritus*
SALLY F. GOLDFARB, B.A., J.D., *Professor of Law*
ELLEN P. GOODMAN, A.B., J.D., *Professor of Law*
JOANNE GOTTESMAN, B.A., J.D., *Clinical Associate Professor of Law*
PHILLIP L. HARVEY, B.A., J.D., Ph.D., *Professor of Law*
N.E.H. HULL, B.A., Ph.D., J.D., *Distinguished Professor of Law*
RICHARD HYLAND, A.B., M.F.A., J.D., D.E.A., *Distinguished Professor of Law*
PAM JENOFF, B.A., M.A., J.D., *Clinical Assistant Professor*
JOHN P. JOERGENSEN, B.A., M.A., J.D.,M.S. (LIS), *Librarian II*
DONALD K. JOSEPH, B.S., LL.B., *Visiting Associate Professor of Law*
HARRIET N. KATZ, B.A., J.D., *Clinical Professor & Director of Lawyering Programs*
A. KODZO PAAKU KLUDZE, B.A., LL.B., LL.D., Ph.D., *Distinguished Professor of Law Emeritus*
DONALD KOROBKIN, B.A., A.M., J.D., *Professor of Law*
RAND E. ROSENBLATT, B.A., M.S., J.D., *Professor of Law*
PATRICK J. RYAN, B.A., M.A., J.D., LL.M., J.S.D., *Associate Professor of Law*
ROBERT SACHS, B.A., J.D., *Visiting Clinical Associate Professor*
MEREDITH L. SHALICK, B.A., M.S., J.D., *Visiting Clinical Asst. Professor of Law*
SANDRA SIMKINS, J.D., *Clinical Associate Professor of Law*
RICHARD G. SINGER, B.A., J.D., LL.M., J.S.D., *Distinguished Professor of Law*
DAMON Y. SMITH, B.A., M.U.P., J.D., *Assistant Professor of Law*
STANLEY P. STAHL, J.D., *Visiting Professor of Law*
ALLAN R. STEIN, B.A., J.D., *Professor of Law*
BETH STEPHENS, B.A., J.D., *Professor of Law*
RICK SWEDLOFF, B.A., J.D., *Visiting Associate Professor of Law*
E. HUNTER TAYLOR, *Professor Emeritus*
GERARDO VILDOSTEGUI, B.A., J.D., *Assistant Professor of Law*
CAROL WALLINGER, B.S., J.D., *Legal Writing, Clinical Associate Professor of Law*
ROBERT M. WASHBURN, A.B., J.D., LL.M., *Professor of Law*
ROBERT F. WILLIAMS, B.A., J.D., LL.M., LL.M., *Distinguished Professor of Law*

Rutgers
Journal of Law & Public Policy

VOLUME 7 FALL 2009 ISSUE 1

Current Issues in Public Policy

© 2009 by Rutgers University School of Law – Camden
ISSN 1934-3736

Rutgers
Journal of Law & Public Policy

VOLUME 7 SPRING 2010 ISSUE 2

CONTENTS

GUNS DON'T KILL PEOPLE ALTHOUGH 30,000 AMERICANS EACH YEAR WOULD DISAGREE: AN ANALYSIS OF GUN MANUFACTURER LIABILITY 187
Dustin Bower

WE WON'T VOTE FOR YOU IF YOU HAVEN'T ALREADY WON: A LOSING CANDIDATE'S PERSPECTIVE ON THE PROSPECTS FOR MEANINGFUL REFORM OF THE AMERICAN POLITICAL SYSTEM 226
Michael A. Livingston

THE WAR ON WHISKY IN THE WOMB: ASSESSING THE MERIT OF CHALLENGES TO STATUTES RESTRICTING THE ALCOHOL INTAKE OF PREGNANT WOMEN.....................259
John Stogner

FROM BRISTOL, TO HOLLYWOOD, TO A LAND FAR, FAR AWAY: CONSIDERING THE IMMIGRATION CONSEQUENCES OF STATUTORY RAPE..289
Michael S. Vastine

GUNS DON'T KILL PEOPLE, ALTHOUGH 30,000 AMERICANS EACH YEAR WOULD DISAGREE: AN ANALYSIS OF GUN MANUFACTURER LIABLITY

By Dustin Bower[1]

I. INTRODUCTION

On November 5, 2009, America was shocked and disturbed to find that a mass shooting had occurred at one of the nation's largest military posts.2 A U.S. Army psychiatrist allegedly opened fire inside Fort Hood in Texas.3 Thirteen people were killed and 30 people were injured, most of whom were U.S. military personnel.4 The "U.S. soldier, armed with at least two handguns . . . started firing until he was eventually shot four times by emergency personnel responding to the incident."5

On April 16, 2007, "thirty-three people were killed on the campus of Virginia Tech in . . . the deadliest shooting rampage

---

[1] B.A., University of Wisconsin; J.D., Hamline University School of Law. Founder and owner of Bower Law Office, P.C

[2] Kevin Whitehall, *Massacre Leaves 13 Dead at Fort Hood*, NPR, Nov. 6, 2009, http://www.npr.org/templates/story/story.php?storyId=120138496.

[3] *Id.*

[4] *Id.*

[5] *Id.*

in American history."[6] "Witnesses described scenes of mass chaos and unimaginable horror as students were lined up against a wall and shot."[7] Two people were shot and killed in a dormitory, and two and a half hours later, another 31 people, "including the gunman, were shot and killed across campus in a classroom building."[8] "According to a federal law enforcement official, the gunman did not have identification and could not be easily identified visually because of the severity of an apparently self-inflicted wound to the head."[9] "Investigators were trying to trace purchase records for two handguns found near the body."[10]

These two shootings show the horrors that gun violence can visit upon America. The problem of crimes committed with firearms is not going away.

No one can doubt the lethality of handguns in the United States. It is estimated that between 760,000 and 3.6 million defensive uses of firearms occur within our borders each year.[11] In 2006 alone, over 100,000 gunshot injuries were reported by various organizations.[12] To complicate matters, these injuries do not simply heal and go away. One study in 1999 put the total

---

6 Christine Hauser & Anahad O'Connor, *Virginia Tech Shooting Leaves 33* Dead, N.Y. TIMES, April 16, 2007, *available at* http://www.nytimes.com/2007/04/16/us/16cnd-shooting.html.

7 *Id.*

8 *Id.*

9. *Id.*

10 *Id.*

11 See Gary Kleck, Targeting Guns 187-88 tbl.5.1 (1997) (reporting various survey results regarding the implied number of defensive gun uses in 1994).

12 See Nat'l Ctr. for Injury Prevention & Control and Ctrs. for Disease Control & Prevention: Web-based Injury Statistics Query and Reporting System (hereinafter WISQARS), http://www.cdc.gov/injury/wisqars/index.html (last visited Jan. 19, 2010) (reporting the number of fatal injuries, all intents, arising from firearms-related deaths in 2006, combined with nonfatal injuries, all intents).

cost of quantifiable firearm-related injuries at $2.3 billion each year.[13]

With so many injuries causing such an astronomical drain on the economy of the United States, one would expect greater outrage on the part of the general public and in turn, a more responsive Congress. However, the history of the United States is interwoven with the concept of gun ownership.[14] Since its introduction into our Constitution in 1789, the Second Amendment has continually shaped the way Americans view their constitutional rights concerning guns. Over the course of time, the Second Amendment itself has been subject to two interpretations: first, that it is the constitutional right of American citizens to arm themselves, and second, that it gives the United States government the right to keep and maintain a well-armed militia.[15] For over a century, the Supreme Court has interpreted the Second Amendment under the former construction, and has been reluctant to allow the Federal government or individual states to limit the rights of United States citizens to purchase and possess firearms, including handguns.[16]

Our country, according to a 1996 study, has the highest rate of firearm deaths in the world compared to any other economically similar nation.[17] America also boasts the highest number of crimes involving firearms and handguns.[18] In 2006,

---

13 Philip J. Cook et al., The Medical Costs of Gunshot Injuries in the United States, 281 JAMA 447, 453 (1999).

14 U.S. Const. amend. II. See also Jon S. Vernick et al., Public Opinion Polling on Gun Policy, 12 Health Affairs 198, 198-207 (1993).

15 Vernick, supra note 13.

16 See, e.g., United States v. Cruikshank, 92 U.S. 542, 553 (1875); Presser v. Illinois, 116 U.S. 252 (1886).

17 E.G. Krug, et al., Firearm-Related Deaths in the United States and 35 Other High- and Upper-Middle-Income Countries, 27 INT'L. J. EPIDEMIOLOGY 214, 216 tbl.1 (1998).

18 *Id.* at 217 fig. 1.

there were 30,896 firearm related deaths in America.[19] With a total population of 298,362,973, this means there are roughly 10.36 firearm related deaths per 100,000 people.[20] With the results of these statistics apparent in every inner city hospital, police station, and morgue, the reasoning becomes apparent why municipalities, counties, and states across the nation have attempted to counter this epidemic with civil lawsuits and state legislation.

One of the avenues pursued by these government entities has been to file suit against the most obvious target—the gun manufacturers and distributors.[21] The rationale behind these suits is that firearms manufacturers have both the intent and knowledge that their products are being bought and used by criminals in furtherance of crimes.[22]

As of 2006, almost every jurisdiction which has heard such a case has granted summary judgment for the gun industry defendants, or has held that there exists no plausible way to connect the individual gun companies to the violent crimes committed by use of their guns.[23] This leads to the necessary

---

[19] Web-based Injury Statistics Query and Reporting System ("WISQARS") Injury Mortality Report, http://webappa.cdc.gov/sasweb/ncipc/mortrate10_sy.html (last visited Jan. 19, 2010) (showing firearm deaths for 2006).

[20] *Id.*

[21] *See generally* LEON.S. ROBERTSON, INJURY EPIDEMIOLOGY (1st ed. 1992).

[22] *See* Ileto v. Glock Inc., 349 F.3d 1191, 1196-99 (9th Cir. 2003); *see also* City of Philadelphia v. Beretta U.S.A. Corp., 277 F.3d 415, 424 n. 14 (3d Cir. 2002).

[23] *See* Sturm, Ruger & Co. v. City of Atlanta, 560 S.E.2d 525 (Ga. Ct. App. 2002); Ganim v. Smith & Wesson Corp., 780 A.2d 98, 122 (Conn. 2001); Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp., 123 F. Supp. 2d 245 (D. N.J. 2000), *aff'd*, 273 F.3d 536 (3d Cir. 2001); City of Chicago v. Beretta U.S.A. Corp., No. 98 CH 15596, 2000 WL 35509506 Ill Cir. Ct. Sept. 15, 2000) (order granting motion to dismiss); City of Gary v. Smith & Wesson Corp., No. 45D05-005-CT-243, 2001 WL 333111 (Ind. Super. Ct. Jan. 11, 2001) (order of dismissal); City of Gary v. Smith & Wesson Corp., No. 45D05-005-CT-243, 2001 WL 34134715 (Ind. Super. Ct. Mar. 13, 2001) (order denying motion to dismiss); Penelas v. Arms Tech., Inc., 778 So.2d 1042 (Fla. Dist. Ct. App. 2001),

question of whether the judicial system is even the correct venue in which to pursue reform of America's gun industry. Consider also that legislation has, for the most part, failed to reduce the violent crime and assaults associated with gun violence.[24] The same can be said of increased policing and penalties for crimes committed with firearms.[25] Part II of this paper will focus on the three leading cases of civil litigation initiated in response to gun violence. Part III of this paper will focus on the current federal and state regulation of the gun industry. Part IV of this paper will focus on the need to reform the federal regulation scheme for firearm manufacturers and licensees. Part V will focus on the need for reinterpretation of civil liability as applied to firearm manufacturers in the event that federal legislation is not passed. The next cases provide an excellent synopsis of the current interpretations of civil liability as applied to gun manufacturers.

II. BACKGROUND

ILETO V. GLOCK

In *Ileto v. Glock*,[26] a group of California citizens sued several gun manufacturers, distributors and dealers for the deaths and

---

review denied, 799 So.2d 218 (Fla. 2001); Morial v. Smith & Wesson Corp., 785 So.2d 1, 16 (La. 2001), *cert. denied*, 534 U.S. 951 (2001); City of Philadelphia v. Beretta U.S.A., Corp., 126 F. Supp. 2d 882 (E.D. Pa. 2000), *aff'd*, 277 F.3d 415 (3d Cir. 2002).

[24] *See, e.g.*, Matthew R. DeZee, *Gun Control Legislation: Impact and Ideology*, 5 Law & Policy Quarterly 3 (1983); Nicholas J. Johnson, *Imagining Gun Control in America: Understanding the Remainder Problem*, 43 WAKE FOREST L. REV. 837, 851-53 (2008).

[25] Johnson, *supra* note 23.

[26] Ileto v. Glock Inc., 349 F.3d 1191 (9th Cir. 2003).

injuries resulting from a shooting spree by Buford Furrow.[27] The suit alleged several causes of action against the defendants including public nuisance,[28] negligence,[29] negligent

---

27 *Id.* at 1194. ("On August 10, 1999, Buford Furrow "Furrow" shot and injured three young children, one teenager, and one adult at the Jewish Community Center ("JCC") in Granada Hills, California. Furrow fled the JCC with his weapons and, later that day, shot and killed Joseph Ileto ("Ileto"), a United States Postal worker who was delivering mail in Chatsworth, California").

28 *Id.* at 1198 (stating that Plaintiffs' public nuisance claim was premised on the assertion that defendants' marketing and distribution practices "knowingly created and maintained an unreasonable interference with rights common to the general public, constituting a public nuisance under California law." The appellate court rephrased the plaintiffs' position by stating that defendants supposedly:

> market, distribute, promote, and sell firearms, a lethal product, with reckless disregard for human life and for the peace, tranquility, and economic well being of the public. They have knowingly created, facilitated, and maintained an over-saturated firearms market that makes firearms easily available to anyone intent on crime. The particular firearms used in these incidents were marketed, distributed, imported, promoted, and sold by defendants in the manner set out herein, which defendants knew or should have known facilitates and encourages easy access by persons intent on murder, mayhem, or other crimes, including illegal purchasers such as Furrow. Their conduct has thereby created and contributed to a public nuisance by unreasonably interfering with public safety and health and undermining California's gun laws, and it has resulted in the specific and particularized injuries suffered by plaintiffs.

29 *Id.* at 1196 ("plaintiffs allege that each of the firearms used by Furrow (the one allegedly used at the JCC, the one used to kill Ileto, and the ones not necessarily fired but carried by Furrow in his arsenal on the day of the shootings) were marketed, distributed, imported, promoted, or sold by each of the defendants in the high-risk, crime-facilitating manner and circumstances described herein, including gun shows, 'kitchen table' dealers, pawn shops, multiple sales, straw purchases, faux 'collectors,' and distributors, dealers and purchasers whose ATF crime-trace records or other information defendants knew or should have known identify them as high-risk. Defendants' practices

entrustment,[30] and unfair business practices.[31] The suit alleged that the Federal Firearms Licensed (FFL) dealers, gun distributors, and gun manufacturers of the Glock and Norinco weapons used by Furrow possessed actual knowledge that the network of gun distribution and purchasing used by the named defendants had unreasonably interfered with the public's health and thus caused a public nuisance.[32]

To maintain an action for public nuisance, the plaintiffs in *Ileto* had to prove that each individual "must have suffered harm of a kind different from that suffered by other members of the

---

knowingly facilitate easy access to their deadly products by people like Furrow").

30 *Id.* at 1196.

31 *Id.*

32 Ileto, 349 F.3d 1191 at 1198-99 (Plaintiffs' asserted that Defendants' conduct interfered with the rights common to the public because:

> It significantly interferes with the public safety, health or peace. This interference is not insubstantial or fleeting, but rather involves a disruption of public peace and order in that it adversely affects the fabric and viability of the entire community, and a substantial number of persons within the meaning of California Civil Code § 3480. . . .
>
> It is continuing conduct, and it has produced a permanent or long-lasting effect, and defendants know or have reason to know that it has a significant effect upon the public right. Defendants continually engage in their reckless conduct even though they are continually informed of the resulting substantial, permanent, and long-lasting harm and even as they receive daily notice from the ATF of the distribution channels they use that are doing the most harm. Defendants have reason to know—and actually know—of the disastrous, continuing, and long-lasting effect of their conduct on the public. . . .
>
> Though not necessarily proscribed per se by law, defendants' conduct nevertheless undermines state and federal law restricting gun sales and possession and renders enforcement of such laws difficult or impossible. In this sense, defendants' interference with a common public right is contrary to public policy as established by state and federal law, and the interference is therefore unreasonable.)

public."[33] This means that to succeed on a claim of public nuisance, a person or group must show (1) the existence of a public right, (2) conduct by the defendant that unreasonably intervenes with that right, (3) a special injury suffered by the plaintiff or plaintiffs that is different in kind from that suffered by the rest of the public, and (4) that the defendant or defendants' unreasonable conduct is the proximate cause of the plaintiff's or plaintiffs' injuries.[34]

The suit also stated that Furrow was a convicted felon[35] and a prior psychiatric hospital patient.[36] Both of these circumstances should have prevented him from purchasing the firearms that he used to kill five people on August 10, 1999.[37] Unfortunately, Furrow was able to circumvent the checks set up by the federal government to prevent such individuals from obtaining firearms.[38] Glock was not alleged to have done anything

---

33 See *id.* at 1211 (quoting Restatement (Second) of Torts § 821B (1979) (defining a public nuisance as "an unreasonable interference with a right common to the general public")). See also City of Gary v. Smith & Wesson, 801 N.E.2d 1222, 1235 (Ind. 2003).

34 See generally Ileto, 349 F.3d at 1191.

35 *Id.* at 1195, note 4 (stating Furrow had been "convicted of assault in the second degree in 1999 in the state of Washington").

36 *Id.* (stating Furrow was committed to a psychiatric hospital in 1998).

37 It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person-

1. is under indictment for or has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
2. is a fugitive from justice;
3. is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substance Act (21 U.S.C. 802));
4. has been adjudicated as a mental defective or has been committed to any mental institution.

Id. (citing 18 U.S.C. § 922(d)).

38 *Id.* at 1197. (The actual story of how Furrow acquired the Glock used in his crime spree is complicated and confusing. The guns were initially purchased by a Washington State Police department. The department then attempted to

illegal.[39] Rather, its liability was based on a theory that it failed to reduce profits because it allegedly "knew (or a fact finder might find that it should have known) that its heightened output (all of which is legally sold) created a surplus in a secondary market, which Glock allegedly knew was utilized by 'criminals and underage end users.'"[40]

After removing the case to Federal Court,[41] the defendants moved to dismiss the case "arguing that even if all of the alleged facts were true, the plaintiffs had failed to state a legally cognizable claim."[42] The District Court granted the motion to dismiss, on the basis that nuisance laws do not apply to the lawful manufacture and sale of non-defective products.[43] The plaintiffs appealed the District Court's decision and were granted review. The Ninth Circuit Court of Appeals heard the case on June 3, 2003.[44] On appeal, the plaintiffs pursued only two of their original five claims; specifically, the negligence and public nuisance claims.[45] The plaintiffs argued the negligence

---

trade the guns back to the distributor they had initially purchased them from, in order to obtain models of a higher caliber. A local FFL dealer then intervened, with the permission of the Washington State Police Department, to facilitate the trade between the gun distributor and the police department. The result of this agreement was that the Glock Furrow used was removed from the normal tracking system used by the ATF to track gun purchasers. The Plaintiffs argued that this system was created and exploited by Glock in order to "saturate" the Washington State market with more guns that could be purchased both by the police departments and local civilians.)

39 *Id.* at 1201.

40 Ileto v. Glock Inc., 370 F.3d 860, 862 (9th Cir. 2004).

41 Ileto, 349 F.3d at 1196 (stating that Defendant "Norinco removed the action to federal court pursuant to 28 U.S.C. §§ 1330 and 1603 on the grounds that Norinco is an instrumentality of a foreign state").

42 *Id.*

43 See Ileto v. Glock, Inc., 194 F. Supp. 2d 1040, 1058, 1061 (C.D. Cal. 2002).

44 Ileto v. Glock Inc., 349 F.3d 1191 (9th Cir. 2003).

45 *Id.* (stating that plaintiffs failed to state a claim upon which relief could be sought and therefore summary judgment was appropriate).

claim hinged on the alleged fact that the defendants' "deliberate and reckless marketing strategies caused their firearms to be distributed and obtained by Furrow resulting in injury and death to plaintiffs."[46] The plaintiffs claimed that five individuals lost their lives due to a system that allowed Furrow to illegally purchase a Glock and Norinco firearm.[47]

On November 20, 2003, the Ninth Circuit upheld the District Court's finding that the plaintiffs had no viable private action against the firearm manufacturers.[48] As the Ninth Circuit pointed out, "[t]he critical feature of these claims is their breadth."[49]

TAURUS HOLDINGS, INC. V. U.S. FIDELITY AND GUAR. CO.

In *Taurus Holdings v. U.S. Fidelity*,[50] a very different liability was asserted against firearms manufacturers.[51] A Florida district court heard the cause of action initiated by

---

46 *Id.* at 1196 (citing plaintiffs' brief).

47 *Id.* at 1197.

48 *Id.* at 1212.

49 See Ileto v. Glock, Inc., 370 F.3d 860, 862 (9th Cir. 2004).

50 Taurus Holdings, Inc. v. U.S. Fid. & Guar. Co., 367 F.3d 1252 (11th Cir. 2004).

51 The products operation standard is:

All bodily injury and property damage occurring away from premises you own or rent and arising out of your product or your work except:

a. products that are still in your physical possession; or
b. work that has not yet been completed or abandoned.

"Your product" was further defined as:

Any goods or products, other than real property, manufactured, sold, handled, distributed, or disposed of by:

1. you;
2. others trading under your name; or
3. a person or organization whose business or assets you have acquired.

Id. at 1253.

Taurus asserting that the rash of civil lawsuits against the plaintiff gun manufacturer were covered under the plaintiff's insurance policies with defendants.[52] The defendants, all insurers of the plaintiff, had refused to contribute to the defense costs of Taurus in approximately 30 pending lawsuits based upon the "products-completed operations hazard" provision contained in the insurance policies.[53] The United States District Court for the Southern District of Florida previously found that there was no coverage based on the "products-completed operations hazard" provision and dismissed the case.[54]

The Eleventh Circuit Court of Appeals heard an appeal by the plaintiff, Taurus Holdings, on April 29, 2004.[55] On appeal, Taurus argued that the defendants' policies included the pending civil liability lawsuits because, "at least one claim in each of the underlying suits alleges injuries caused by Taurus' on-premises tortuous conduct," such that the products-completed operations standard did not preclude coverage.[56] The Eleventh Circuit certified the question to the Supreme Court of Florida.[57] On September 22, 2005, the Supreme Court of

---

52 *Id.*

53 *Id.* (stating that Plaintiff filed suit against various Insurance Providers, seeking, among other things, "a declaratory judgment that insurance policies issued by Insurance Providers required them to contribute to the defense costs of about 30 lawsuits pending against Taurus").

54 *Id.* at 1252.

55 *Id.*

56 *Id.* at 1253.

57 The question to the Supreme Court of Florida was:

> Does a 'products-completed operations hazard' exclusion in a commercial general liability policy of insurance bar coverage and therefore eliminate an insurer's duty to defend the insured gun manufacturer in suits alleging negligence, negligent supervision, negligent marketing, negligent distribution, negligent advertising, negligent entrustment, public and private nuisance, failure to warn, false advertising, and unfair and deceptive trade practices based on the insured's on-premises business practices?

Id. at 1255.

Florida found that the insurers were not liable for defense fund contributions in the suits against Taurus for damages occurring from crimes and injuries associated with the products manufactured by Taurus.[58] Taurus argued that the attempt by the insurance companies to release themselves from any requirement to help Taurus defend against its lawsuits was based on a faulty belief that such exclusions were only applicable when dealing with defective products, and Taurus further argued that there was no evidence its guns had malfunctioned.[59] To the contrary, they had performed just as expected. The Eleventh Circuit, upon a review of the existing case law, determined that there were three conclusions: "first, most courts have not considered whether products-completed operations hazard exclusions should apply only to defective products; second, those that have are split on the issue; and third, the language of the policy is the most important factor."[60]

The court also made several observations regarding the scant judicial record on similar gun related litigation in the United States. Citing *Brazas Sporting Arms, Inc. v. Am. Empire Surplus Lines Ins.,* the court differentiated the case at hand from *Brazas*, stating that the underlying suit in *Brazas* revolved around the charge of flooding the firearms market with more guns than could be legally and legitimately purchased.[61]

The court next analyzed *Beretta U.S.A. Corp. v. Fed. Ins. Co.,* stating that the gun manufacturer liability policy issues in that case were almost identical to those in the case at hand.[62] In *Beretta*, the court was also asked whether bodily injury and

---

58 Taurus Holdings, Inc. v. U.S. Fid. & Guar. Co., 913 So.2d 528 (Fla. 2005).

59 *Id.* at 537.

60 *Id.*

61 Brazas Sporting Arms, Inc. v. Am. Empire Surplus Lines Ins. Co., 220 F.3d 1, 6 (1st Cir. 2000) (because "[the] suits concern off-premises conduct arising out of (not merely incidentally related to) firearms products," the court held that the insurance policy exclusion applied.)

62 *Id.* at 539 (analyzing Beretta U.S.A. Corp. v. Fed. Ins. Co., 17 Fed.Appx. 250 (4th Cir. 2001)).

property damage arising out of the use of Beretta handguns was excluded from coverage, releasing the insurance providers from the obligation of making any payments for damages.[63]

Finally, the court looked to *Bay Ins. Co. v. Bushmaster Firearms, Inc.,* for guidance.[64] In *Bushmaster*, the families of victims from the sniper shootings in Washington, D.C. in 2002 sued Bushmaster claiming that the gun had created a "public nuisance" and that liability was created through the negligent distribution of assault weapons.[65] The court in *Bushmaster* relied heavily on *Brazas* in holding that the claims against Bushmaster were excluded under the "products hazard" portion of the policy that already excluded "bodily injury" and "property damage". Thus, as in *Taurus*, *Brazas*, and *Beretta*, the court held that suits brought by those negatively impacted by gun violence, whether families or municipalities, were not covered by the gun manufacturer's insurance carrier.[66]

CITY OF PHILADELPHIA V. BERETTA

In *City of Philadelphia v. Beretta*,[67] the City of Philadelphia, along with several local civic organizations, sued Beretta, a gun manufacturer, for the costs associated with crimes involving

---

[63] *Id.* (citing *Beretta*, the court stated that "under Maryland law, the phrase "arising out of" in the products hazard exclusion requires employment of a "but for" standard of causation. *Id.* at 253. The court then held that coverage did not apply because the alleged injuries arose out of Beretta's products. The court cited with approval the reasoning in *Brazas*. *Id.* at 254").

[64] Bay Ins. Co. v. Bushmaster Firearms, Inc., 324 F.Supp.2d 110 (D.Me. 2004).

[65] *Id.* at 111.

[66] *Id.* at 112, 113.

[67] City of Philadelphia v. Beretta U.S.A. Corp., 277 F.3d 415 (3d Cir. 2002).

Beretta handguns committed within the city limits.[68] Philadelphia asserted that the costs it had incurred from the illegal use of Beretta handguns included the law enforcement costs associated with policing and apprehending criminals using Beretta handguns, as well as the various healthcare costs that flowed out of the injuries to individuals shot or killed with Beretta handguns.[69]

The District Court initially dismissed the plaintiff's asserted claims of public nuisance, negligence, and negligent entrustment.[70] On appeal, the plaintiff asserted that the District Court failed to correctly analyze the causal link between the costs incurred by the city and the defendant's conduct in marketing and distributing handguns inside and outside of the Philadelphia city limits.[71]

The United States Court of Appeals for the Third Circuit affirmed the District Court's findings in whole and went on to give a thorough discussion of the need for proximate cause to be established for the negligence claim, and the requisite standing a plaintiff must demonstrate under the public nuisance doctrine.[72] Quoting an earlier decision by the same court, the Third Circuit stated that "a plaintiff who complains of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts [is] generally said to stand at too remote a distance to recover."[73] This issue of standing was used by the Third Circuit to invalidate the plaintiff's assertions of civil liability for the defendant manufacturer.[74] The Court also

---

[68] *Id.* at 419 (stating that the costs incurred by the city included the costs associated with judicial administration, police services, emergency medical services, and educational programs).

[69] *Id.*

[70] *Id.* at 419-20.

[71] *Id.* at 424-25.

[72] *Id.* at 422-23.

[73] City of Philadelphia, 277 F.3d at 423 (quoting Holmes v. Securities Investor Prot. Corp., 503 U.S. 258, 268-69 (1992)).

[74] *Id.*

reiterated the need for proximate cause to be established for the negligence claim to survive.[75] As the Court stated, the route from the gun manufacturer to the criminal who perpetrates a crime is "long and tortuous" and thus not proximate enough to establish any causal link.[76]

STATE IMMUNITY LAWS

On February 9, 1999, Georgia became the first state to enact a firearm immunity law.[77] Just eighteen months later, over twenty states[78] had enacted laws which acted as legal obstacles to the ability to sue gun manufacturers, distributors, and Federal Firearms Licensees (FFLs).[79] Currently, most states preempt their municipalities from enacting some or all types of their own firearm laws.[80]

These laws affect both the ability of individuals and state municipalities to sue gun manufacturers under a theory of public nuisance.[81] As an example, the Georgia state statute reads in part that, "[t]he General Assembly further declares that the lawful design, marketing, manufacturing, or sale of firearms or ammunition to the public is not an unreasonably dangerous activity and does not constitute a nuisance per se."[82]

---

[75] *Id.*

[76] *Id.*

[77] Jon S. Vernick and Julie S. Mair, State Laws Forbidding Municipalities from Suing the Firearm Industry: Will Firearm Immunity Laws Close the Courthouse Door?, 4 J. HEALTH CARE L. & POL'Y 126, 134 (2000).

[78] *Id.*

[79] City of Philadelphia v. Beretta, 277 F.3d at 423.

[80] See Jon S. Vernick & Stephen P. Teret, New Courtroom Strategies Regarding Firearms: Tort Litigation Against Firearm Manufacturers and Constitutional Challenges to Gun Laws, 36 HOUS. L. REV. 1713, 1730 (1999).

[81] *See generally id.*

[82] GA. CODE ANN. § 16-11-173(a)(2) (2009).

Other states, such as Michigan, passed immunity laws in response to the safety regulations occurring in other states including Massachusetts.[83] Michigan's immunity law prohibits any suit based on a manufacturer's "[f]ailure to sell with or incorporate into the product a device or mechanism to prevent a firearm or ammunition from being discharged by an unauthorized person unless specifically provided for by contract."[84]

This trend has now reached the federal level with the introduction of federal legislation, including House Bill 1036, which would, in part, limit the liability of gun and ammunition manufacturers, dealers, distributors, and trade associations.[85] The bill's stated purpose is to "prohibit civil liability actions from being brought or continued against manufacturers, distributors, dealers, or importers of firearms or ammunition for damages resulting from the misuse of their products by others."[86] But the true ramifications of this bill can be seen more clearly in the context of the portion of the bill that unequivocally states: "[a] qualified civil liability action may not be brought in any Federal or State court."[87]

The result of these cases, when weighed with the state and local immunity laws, is a judiciary that cannot impose civil liability against gun manufacturers for crimes committed with their products unless proximate cause can be established.[88] This limits the ability of individuals and municipalities to use the judiciary to impose liability on gun manufacturers.[89] The next logical place for concerned citizens and municipalities to

---

[83] *See* Mich. Legis. Serv. P.A. 265, H.B. 5781, §15(c) (2000).

[84] *Id.*

[85] Protection of Lawful Commerce in Arms Act, H.R. 1036, 108th Cong. (2003).

[86] *Id.*

[87] *Id.* at Sec. 3(a).

[88] *See supra* notes 23-44 and 60-83.

[89] *See supra* notes 60-83.

voice their concerns and attempt to change the system is in the legislative branch of our government. The following sections will outline the current regulations imposed on gun manufacturers, distributors, and end users in the United States through federal and state laws.

E. LEGISLATIVE REGULATION OF GUN MANUFACTURERS

Congressional regulation of gun manufacturing was initiated with the passage of the Gun Control Act of 1968 (GCA).[90] Focusing primarily on distributors, the GCA made it illegal to import any handgun deemed not "particularly suitable for or readily adaptable to sporting purposes."[91] Sellers licensed under the GCA are required to keep records and perform background checks, but anyone without a GCA license, such as a secondary seller at a gun show, is not required to perform such a check.[92] Once a firearm has been sold by an FFL, it becomes invisible to ATF tracing because secondary sellers are not required to report the sale or trade of previously purchased weapons.[93]

THE SCOPE OF THE SECOND AMENDMENT ON REGULATION OF GUN MANUFACTURERS

The United States Supreme Court has refused to weigh in on the subject of the scope of the Second Amendment as it pertains to gun regulation for over sixty years.[94] In *Miller*, the Supreme Court held that the National Firearms Act of 1934 was constitutional based on the reading of the Second Amendment,

---

[90] 18 U.S.C. § 922(a)(1)(A) (2000).

[91] 18 U.S.C. § 925(d)(3) (2000).

[92] *See* ATF DEPT. OF TREASURY, FOLLOWING THE GUN: ENFORCING FEDERAL LAW AGAINST FIREARMS TRAFFICKERS 17 (2000).

[93] *Id.*

[94] United States v. Miller, 307 U.S. 174 (1939).

stating specifically that "[a] well regulated militia being necessary to the security of a free State, the right of the People to keep and bear arms shall not be infringed"[95] was interpreted to mean that a law criminalizing the possession or use of a "shotgun having a barrel of less than eighteen inches in length" was not a violation of the creation of a well regulated militia.[96]

Without much direction on the scope and power of the Second Amendment, state courts are left without recourse when determining their own judicial power to regulate the weapons that are manufactured, bought, or sold within their borders.[97] This has been the case since the late 1800's, when *United States v. Cruikshank* and *Presser v. Illinois* were decided. In *Cruikshank* and *Presser*, the United States Supreme Court held that the Second Amendment was not incorporated as a limit on State power, as compared to the rest of the bill of rights, which was incorporated by the Fourteenth Amendment.[98]

With the Supreme Court of the United States interpreting the Constitution, specifically the Fourteenth Amendment, to apply to the incorporation of the Second Amendment as a limitation on the individual States' abilities to limit and curb state legislation effecting gun manufacturers, the only other current laws affecting gun manufacturers are comprised of several state laws requiring gun manufacturers to install safety devices on handguns.[99] These laws have been upheld primarily on the reasoning that it is legal to make it more difficult for children to

---

[95] U.S. Const. amend. II.

[96] *Miller*, 307 U.S. 178 (citing Aymette v. State, 2 Humphreys (Tenn.) 154, 158 (Tenn. 1840)).

[97] *See supra* notes 89-92.

[98] United States v. Cruikshank, 92 U.S. 542, 553 (1876); Presser v. Illinois, 116 U.S. 252, 265 (1886). *See also* Quilici v. Vill. of Morton Grove, 695 F.2d 261, 265 (7th Cir. 1982).

[99] J.S. Vernick et al., *I Didn't Know the Gun Was Loaded: An Examination of Two Safety Devices That Can Reduce the Risk of Unintentional Firearm Injuries*, 20 J. PUB. HEALTH POL'Y, 427, 434-40 (1999) (explaining the various safety devices called for by Massachusetts state law).

discharge a weapon.[100] However, even these laws are being challenged by gun manufacturers and their continued constitutionality remains uncertain.[101] An example of such a situation occurred in the state of Massachusetts.[102] The Attorney General of Massachusetts created additional regulations for handguns sold within state lines so that they contained safety features including: (1) a device to prevent a young child from firing the gun; (2) a tamper-resistant serial number to assist in the tracing of guns used in crimes; and (3) a loaded chamber indicator or magazine safety to reduce the risk of unintended shootings where the shooter believed the gun was unloaded.[103] This law was directed specifically at the safety and welfare of children.[104] These laws were upheld by the Massachusetts Supreme Court and are in place today.[105]

However, there has been some action in the Supreme Court regarding the content of the Second Amendment. On Wednesday, September 30, 2009, the Supreme Court accepted an appeal challenging the ability of state and local governments to enforce strict limits on handguns and other weapons.[106] The case being appealed, *NRA of America, Inc. v. City of Chicago*, held that "one function of the second amendment was to prevent the national government from interfering with state militias."[107] It does this by creating individual rights, "but those rights may take a different shape when asserted against a state rather than

---

[100] Id.

[101] Id.

[102] Id.

[103] 940 MASS. CODE REGS 16.03, 16.05 (2009).

[104] Id.

[105] Am. Shooting Sports Council, Inc. v. Attorney Gen., 711 N.E.2d 899, 906-7 (Mass. 1999).

[106] McDonald v. City of Chi., 130 S. Ct. 48 (2009).

[107] NRA of Am., Inc. v. City of Chi., 567 F.3d 856, 859 (7th Cir. 2009).

the national government."[108] *NRA v. Chicago* deals with a ban on the possession of most handguns in two municipalities in Illinois. "After the Supreme Court held in the *District of Columbia v. Heller*, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008), that the second amendment entitles people to keep handguns at home for self-protection, several suits were filed against Chicago and Oak Park.[109] All were dismissed on the ground that *Heller* dealt with a law enacted under the authority of the national government, while Chicago is a subordinate body of a state.[110] The Supreme Court has rebuffed requests to apply the second amendment to the states."[111]

The court in *NRA v. Chicago* ponders, "[s]uppose a state were to decide that people cornered in their homes must surrender rather than fight back - in other words, that burglars should be deterred by the criminal law rather than self help."[112] Such a decision would imply that no one is entitled to keep a handgun at home for the purpose of self-defense, because self-defense itself would be a crime.[113]

Legislative Regulation through the Consumer Products Safety Commission

Another outlet for regulation, the federally created Consumer Products Safety Commission (CPSC) lacks any power to regulate the design of firearms and ammunition.[114] While the stated roles of the CPSC are to (1) issue mandatory recalls of dangerous or defective products; (2) work with manufacturers

---

108 *Id.* (citing District of Columbia v. Heller, 128 S. Ct. 2783 (2008)).

109 *NRA*, 567 F.3d at 857.

110 *Id.*

111 *Id.*

112 *Id.* at 859.

113 NRA of Am., Inc. v. City of Chi., 567 F.3d 856, 859 (7th Cir. 2009).

114 *See* Consumer Product Safety Commission Improvement Act of 1976, Pub. L. No. 94-284, § 3(e), 90 Stat. 503-04 (1976).

to institute voluntary recalls; (3) enact safety standards; and (4) ban especially hazardous products,[115] Congress has specifically forbidden the CPSC from directly regulating the firearms industry.[116] This has resulted in the regulation of firearms at a federal level to be governed almost entirely by the GCA.[117]

F. REGULATION OF GUN DISTRIBUTORS

Congressional regulation of the gun distributing industry evolved to its current position with the passage of the GCA.[118] This Act regulated the commercial sale of firearms and set up a classification system that could be used to deny certain individuals the right to purchase firearms.[119] It also created the current system of licensing used to monitor and control the distribution of firearms in the United States.[120] Under the GCA, a Federal Firearms License (FFL) is required for anyone who engages in the commercial sale of firearms.[121] These licenses limit the ability of a dealer to ship, transport, and receive firearms through interstate and foreign commerce.[122] The GCA

---

[115] C.E. Mayer, *Safety Standards Sought After Gun Locks Fail Test*, WASHINGTON POST, Feb. 7, 2001, at A1).

[116] *See* Consumer Product Safety Commission Improvements Act of 1976, Pub. L. No. 94-284, § 3(e), 90 Stat. 503-04 (1976) (stating, "[t]he Consumer Product Safety Commission shall make no ruling or order that restricts the manufacture or sale of firearms, firearms ammunition, or components of firearms ammunition, including black powder or gunpowder for firearms").

[117] *See infra* notes 111-32.

[118] 18 U.S.C. § 922 (2000).

[119] *See supra* note 90 (stating that individuals who had been convicted of felonies, were fugitives, individuals adjudicated mentally ill by a Court, aliens, individuals with restraining orders, and domestic violence offenders could not purchase firearms).

[120] 18 U.S.C. § 922(a)(1)(A) (2000).

[121] *Id.*

[122] *Id.*

also makes it illegal to sell handguns to anyone under twenty-one years of age or loan guns to anyone under eighteen years of age.[123] Further, the GCA makes it illegal to sell firearms to certain prohibited persons including convicted felons, fugitives, persons adjudicated mentally ill, aliens, persons with certain restraining orders, and domestic violence offenders.[124] Most importantly, federally licensed dealers are also required to maintain purchase and sales records for all firearms sold, report any lost or stolen guns, and notify the Bureau of Alcohol, Tobacco and Firearms (ATF) if two or more guns were sold within the previous five days to an unlicensed buyer.[125] In 2000, there was almost one FFL for every 2,487 adult U.S. citizens living in the United States.[126]

The ATF was created in 1972 to act as a federal oversight for the compliance with the GCA.[127] It is charged with the task of compiling the data received from all the federally licensed dealers in the United States.[128] The ATF's most important role, and by far the role to which the most man hours are allotted, is the tracing of crime guns.[129] This information remains within the ATF databases and is disseminated downstream to manufacturers, distributors, and dealers on a case by case basis.[130] The information obtained by the ATF, and the traces done through criminal investigations, are compiled, published

---

[123] 18 U.S.C. § 922(b)(1) (2000).

[124] 18 U.S.C. § 922(d)(1)-(9) (2000).

[125] 18 U.S.C. § 923(g)(1)(A) (2000); 18 U.S.C. § 923(g)(6) (2000); 18 U.S.C. § 922(g)(3)(A) (2000).

[126] ATF Dep't of Treasury, *Commerce in Firearms in the United States* 1, 22 Fig. 9 (2000).

[127] *Id.* at 11.

[128] *Id.* (citing the term "firearms trafficking" to mean the "illegal diversion of firearms from retail dealers" to unlawful commerce, often for profit).

[129] *Id.*

[130] *Id.*

and distributed to gun manufacturers on a regular basis.[131] When there are discrepancies, or guns are recovered from criminals or crime scenes, it is the ATF's database that provides information regarding the tracking of a crime gun's origin.[132] In 2000, the ATF reported that 1.2 percent of all dealers accounted for over half of all the criminal gun traces occurring in the United States.[133]

The ATF's primary method to accomplish its goal continues to be the gun trace.[134] To accomplish a gun trace, the ATF must first receive a trace request from a law enforcement agency.[135] Once a request and gun serial numbers have been received, the ATF inputs the number into the national Firearms Tracing System (FTS).[136] The FTS initially determines the original manufacturer of the firearm.[137] The ATF then searches the manufacturer's records, which are all contained in the FTS, to determine the distributor who bought the firearm from the manufacturer.[138] The ATF then contacts the distributor of the firearm and requests their required records pertaining to whom the distributor sold the firearm.[139] Once this information is received, the ATF can finally contact the dealer that received the

---

[131] Hamilton v. Beretta U.S.A. Corp., 750 N.E.2d 1055, 1065 (N.Y. 2001) (stating that the ATF does not inform gun manufacturers of the purpose or results of a gun trace or even the identity of the "subsequently acquired retailer or purchaser").

[132] *Id.*

[133] *Id.* at 1064, n. 5; *Commerce in Firearms in the United States, supra* note 119, at 2.

[134] *Commerce in Firearms in the United States, supra* note 125, at 19.

[135] *Id.*

[136] *Id.* at 19-20.

[137] *Id.* at 20.

[138] *Id.*

[139] *Id.*

firearm from the distributor and sold it to the end user.[140] Through this process, the ATF is able to track a serial number to the name of the consumer who purchased the gun from the federally licensed dealer. [141] Once the gun leaves the dealer's hands, no further recording of subsequent purchasers is legally required.[142] The gun, for all intents and purposes, disappears from the ATF's radar screen.[143]

G. REGULATION OF THE END USER

Most legislation dealing with firearms falls squarely on the end user. Faced with an unflinching crime rate, legislators in America have continually pushed for stiffer criminal penalties to dissuade criminals from using handguns while committing crimes.[144] A perfect example is the Federal Firearms Enhancement statute, 18 U.S.C. § 924(c), which originally provided for an additional sentence of one to ten years for the use of a firearm while committing a crime.[145] These penalties increase based on what kind of weapon is used and based on the number of offenses. This statute has a mandatory minimum five-year sentence for crimes involving violence with a handgun, and a mandatory term of thirty years for using or carrying an assault weapon.[146] It also provides a mandatory life sentence for

---

[140] *Commerce in Firearms in the United States, supra* note 125, at 19 (stating crime-gun tracing is used for three primary purposes: "(1) to link a suspect to a firearm in a criminal investigation; (2) to identify potential traffickers, whether licensed or unlicensed sellers; and (3) when sufficiently comprehensive tracing is undertaken by a given community, to detect in-state and interstate patterns in the sources and kinds of crime guns.")

[141] *Id.* at 19-20.

[142] *Id.* at 19.

[143] *Id.*

[144] 18 U.S.C. § 924(c) (1999).

[145] *Id.*

[146] *Id.*

anyone caught illegally carrying a machine gun or assault weapon for a second time.[147]

Under the Federal Firearms Enhancement statute, the mandatory minimum sentence for the use of a firearm ranges from five to thirty years depending both on the type of firearm used and whether it was brandished or discharged.[148] For a second conviction, the minimum sentence for use of a firearm ranges from twenty-five years to life in prison, depending on the type of firearm used.[149] This trend can also be seen at the state and local level, where lawmakers have favored a policy of increased maximum lengths of prison sentences for weapons offenses, resulting in a continually increasing average sentence.[150]

But beyond the criminal statutes and prison sentences handed down to those individuals convicted of the possession or use of a firearm, there are initiatives by local law enforcement agencies which have a more pervasive effect on the civil liberties of individual citizens.[151] One such example is New York City. In 1994, Former Mayor Rudolph Giuliani implemented a police strategy involving increased stop-and-frisks of pedestrians.[152] His stated goal for this intrusive campaign was the seizing of illegal guns.[153] These policies of increased prison sentences and increased stop-and-frisk initiatives are the current solutions that

---

[147] *See generally* U.S. DEPT. OF JUSTICE BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 425-26 (1997).

[148] *Id.*

[149] *Id.*

[150] *See* U.S. DEPT. OF JUSTICE BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 427, tbl. 5.53 (1997) (stating that the average sentence for the use of a deadly weapon was forty-seven months as of 1994).

[151] *See supra* notes 143-46.

[152] *See* Rudolph W. Giuliani and William J. Bratton, Police Strategy No. 1: Getting Guns of the Streets of New York (1994) (describing the policing initiative in New York City).

[153] *Id.*

federal, state, and local governments have for the problem of gun violence in the United States.[154]

III. ANALYSIS

Gun violence is not slowing down. The use of firearms is no lower today then it was ten years ago.[155] With such a clear and obvious problem, there appear to be two methods to effectuate a change in the current state of gun manufacture and sale.[156] In Part A of this analysis, reformation through the judiciary will be discussed, paying specific attention to the shortfalls of previous cases mentioned previously. Part B of the analysis will lobby for a reform of the federal legislation currently regulating the gun industry. Part B will also focus on a new role for the ATF, which may alleviate several of the current shortfalls in federal firearm regulation.[157]

A. REFORMATION THROUGH THE JUDICIARY

1. PUBLIC NUISANCE AS A CLAIM, AND THE AVOIDANCE OF SUMMARY JUDGMENT

Every case in which a governmental organization has attempted to sue gun manufacturers and distributors on a claim of public nuisance or negligence has failed at the summary

---

[154] *See supra* notes 142-49 and accompanying text (citing examples such as the Federal Firearms Enhancement statute 18 U.S.C. § 924(c), and its impact on the extension of mandatory prison sentences for a multitude of crimes).

[155] *See supra* notes 8-10 and accompanying text (giving approximate numbers of firearm uses in the U.S. annually, approximately between760,000 and 3.6 million).

[156] *See supra* note 143 and accompanying text (stating the general judiciary approach, primarily public nuisance law). *See also infra* notes 186-96 (stating the general legislative approach to curb gun violence, specifically the revocation of current manufacture immunity laws).

[157] *See infra* notes 197-215 and accompanying text (citing a proposed increase in the ATF's administrative role in gun control legislation).

judgment stage.[158] The reasoning for refusing to allow *Ileto* or *City of Philadelphia* to survive summary judgment was based almost exclusively on the issue of proximate cause and actual knowledge.[159]

As an example, in *Ileto v. Glock*, the District Court granted summary judgment on the basis that nuisance laws do not apply to the lawful manufacture and sale of non-defective products.[160] This decision was again upheld by the Ninth Circuit Court of Appeals.[161] By the Court's own acknowledgement, the link between the plaintiffs' injuries and deaths and the defendants' actions, knowledge, and control of the relevant instrumentality (guns) was too weak and tenuous to establish the proximate cause necessary for the survival of a public nuisance claim.[162]

To increase the likelihood of a plaintiff surviving summary judgment in the future, courts must take a new position on the requisite information that gun manufacturers know or should know about how their products enter and exit the legal stream of commerce.[163] Specifically, courts will need to assume that gun manufacturers have the ability to record the number of crime gun traces occurring due to their products, and internally track

---

[158] *See generally supra* note 22 and accompanying text (citing a list of the most recent cases to end in judgment for the manufacturers).

[159] *See supra* note 45-46 and accompanying text (stating both the district court's and appeals court's opinions related to the necessity for proximate cause to be shown).

[160] *See supra* note 40 and accompanying text (stating that the lawful manufacture was beyond the scope of manufacture liability).

[161] *See supra* note 41 and accompanying text.

[162] *See supra* note 49-52 and accompanying text (noting that the rash of civil suits involved in *Taurus* was dismissed due to a lack of proof for manufacture liability).

[163] *See supra* note 81 and accompanying text (citing laws for both state and municipalities, including Georgia's which refuses to regulate the manufacture of the lawful design and manufacture of firearms is beyond the scope of state nuisance law and therefore cannot be litigated in a state court).

distributors who are continually the source of ATF investigations and gun traces.[164]

Once this is assumed, courts will have to impose civil liability on manufacturers who refuse to compile such data and act accordingly with problem distributors and dealers.[165] Since the problem of crime guns has already been established to have come from a select few distributors and dealers, it may be time for the judiciary to look closely at why the gun manufacturing industry in the United States continually turns a blind eye to such information and refuses to set up internal checks and balances to deal with sellers who can be determined to have an unequal amount of crime gun traces originating from their businesses.[166]

Along with this new interpretation must come a more expansive approach to who can legally sue based on public nuisance and negligence theories.[167] Currently, municipalities suing on such a claim find themselves the recipient of summary judgment based on their inability to effectively define a class of injured people well enough to pass judicial review.[168] While precedent backs up this presumption, it may be time for state courts to break from tradition and attempt to expand municipalities' abilities to sue corporations whose products can be directly linked to crime and murder within their city limits.[169]

---

[164] *See supra* note 74 and accompanying text.

[165] *See supra* note 114 and accompanying text (explaining that the stated role of the CPSC includes several examples of regulation which the group was created to cover, including the mandatory recall of defective products and enacting safety standards).

[166] *See supra* notes 23-44 and 60-83 and accompanying text (focusing on the current lack of regulation for gun manufacturers and the free reign they enjoy in comparison to other industries).

[167] *See supra* note 69 and accompanying text (explaining the necessity for proximate cause to be established before any negligence case can survive summary judgment, and discussing who may have standing to sue for public nuisance).

[168] *See supra* note 69 and accompanying text.

[169] *See supra* notes 66-75 and accompanying text (proposing that the link a municipality must show to prove public nuisance is readily ascertainable

Until this is done, public nuisance claims will continue to fail based on summary judgment, regardless of whether they are brought by municipalities or individuals.[170]

1. Products Liability applied to Firearms Manufacturers

Another possible solution for the reform of firearms laws and regulations in the United States may be the reformation of the role of the CPSC.[171] Currently, the federally created Consumer Products Safety Commission lacks any power to regulate the design of firearms and ammunition.[172] Since Congress presently forbids the CPSC from directly regulating the firearms industry, it appears as though it will take federal congressional action to change the current situation.[173] It has been extremely difficult for states and municipalities to convince the courts that laws regulating the manufacture and production of firearms can be upheld through the work of the CPSC, since Congress' stated role for the organization forbids it.[174] If products liability law was applied to the manufacture of firearms sold within the United States, the likelihood that firearm safety would increase could almost be guaranteed.

2. Reinterpretation of state laws concerning safety features for firearms

---

through a trace of crime guns). This applies when such a trace, done by law enforcement, leads back to retailers within city limits. When a disproportionate amount of guns come from a few problem stores, this should demonstrate the link between handgun violence and gun dealers.

[170] *See supra* notes 25-49 and 60-83 and accompanying text.

[171] *See supra* notes 114-15 and accompanying text (explaining the stated role of the CPSC).

[172] *See supra* note 115 and accompanying text.

[173] *Id.*

[174] *Id.*

With the United States judicial branch unwilling to apply tort law to gun manufacturers, distributors, and dealers, the next logical step away from the judiciary is the enactment of state safety laws regulating the manufacture of firearms sold within state lines.[175] By far the greatest success story of this kind took place in Massachusetts in 1997.[176] These laws were upheld by the Massachusetts Supreme Court and are in place today.[177] Such examples show that state regulation may succeed where federal regulations fail.[178] Continued efforts by state attorneys general and legislatures may be the cure for an epidemic perpetuated by unsafe handguns.[179] If more states follow Massachusetts as an example, a wave of safety features could create an atmosphere in which gun manufacturers begin to pay closer attention to the exact causes of death resulting from their products. In such a situation, civil liability for gun manufacturers would increase, and in order to stay competitive, manufacturers would be forced to include safety as one of the highest priorities for their products.

3. Necessity for the United States Supreme Court to redefine the boundaries of the Second Amendment

With the Second Amendment as a perceived threat to state legislation and lawsuits against gun manufacturers, a reiteration of the applicable law by the United States Supreme Court seems

---

[175] *See supra* note 89-92 and accompanying text (stating that in *Cruikshank* and *Presser,* the Second Amendment did not limit a state's rights to regulate firearms in the same manner that it forbids the federal government from doing so).

[176] *See supra* note 102 and accompanying text (giving three examples of Massachusetts safety features).

[177] *See supra* note 104 and accompanying text.

[178] *Id.*

[179] *See supra* notes 102-04 and accompanying text (using the Massachusetts Attorney General as an example of how state officials can create laws that pass state constitutional muster).

timely.[180] Since *Miller*, federal courts have upheld most restrictions of weapons under the same thinking—that a gun not suitable for a militia (for example an assault rifle) can be regulated without the infringement of the United States Second Amendment.[181]

But this has left a hole for the state courts to carefully fill.[182] Since the late 1800's, when *United States v. Cruikshank* and *Presser v. Illinois* were decided, states have continued to push at the perceived boundaries of the Second Amendment.[183] The most successful initiatives have been closely tied to the safety and welfare of children.[184] These state laws have incorporated the state police powers as a tool to regulate the gun industry.[185] Further initiatives will likely prove successful in the coming decade, as state supreme courts have been unwilling to overturn the first of these laws.[186]

B. REFORMATION THROUGH THE LEGISLATURE

It is a fact that the judiciary is becoming less of a legitimate avenue to pursue reformation of the gun industry.[187]

---

[180]. *See supra* notes 94-95 and accompanying text (explaining that *Miller* has set a precedent in which "militia" now applied to the average citizen's right to purchase and own firearms).

[181] *See supra* note 96.

[182] *See supra* notes 89-92 and 97 and accompanying text (demonstrating that state courts have been without much direction since the 1800s).

[183] *See supra* notes 89-92 and 97 and accompanying text.

[184] *See supra* notes 102-04 and accompanying text (stating that the Massachusetts Attorney General's safety feature was created specifically to reduce the risk of handgun discharge by a child).

[185] *See supra* note 97 and accompanying text (explaining that the sole safety legislation to pass in the United States has been derived from statutes upheld through the state police power).

[186] *See supra* note 97.

[187] *See supra* notes 76-81 and accompanying text (citing immunity laws as an example of legal obstacles to gun reform legislation. This preemption

This equates to a system that allows for the relatively free manufacture and distribution of guns, and forces the weight of judicial regulation behind the punishment of criminals who would use them for crime. While on its face this does not seem like a ludicrous idea, in practice, tougher criminal sentences for gun possession and use in criminal activities has not reduced the rate of crimes committed with firearms.[188] The next likely avenue for industry reform and regulation is via the federal and state legislatures. The following section will discuss ways in which reform can be accomplished, with the end goal being a reduction in the rate of crimes and injuries associated with firearms.

REVOCATION OF LOCAL, STATE, AND FEDERAL MANUFACTURE IMMUNITY LAW

One of the most disconcerting legislative trends for states in regards to firearms lawsuits has been the increase in state and municipality immunity laws.[189] These laws have created an insurmountable obstacle for many municipalities and individuals seeking to sue the gun industry.[190] The result has been the exclusion of the judicial branch from acting in its role as an enforcer of liability.[191]

---

precludes the ability of citizens and municipalities to impose regulation on the gun industry through civil tort claims).

[188] *See supra* note 23 and accompanying text.

[189] *See supra* notes 76-81 and accompanying text (stating that 19 states had passed state immunity laws within 18 months of the first law). *See also supra* note 71 (stating there are currently more than 40 states with such immunity laws).

[190] *See supra* note 78 and accompanying text (discussing the Georgia statute and how its language forbids suits against gun manufacturers for public nuisance, stating that the design, marketing or making of a firearm is not a dangerous activity).

[191] *See supra* notes 82-83 and accompanying text (citing the Michigan immunity statute and discussing how its language forbids suits against gun manufacturers for failing to sell a device to stop the unauthorized discharge of a firearm.) *See also supra* notes 84-85 and accompanying text (citing House Bill 1036, further limiting gun manufacturers from liability).

With the bar set by these immunity laws insurmountable in some cases, such as in Michigan, the landscape of civil cases brought against the gun industry in the future is likely to change drastically.[192] These obstacles, either currently in place or likely to be enacted under current administrations, greatly limit the ability of states, municipalities, and private individuals to litigate against those who create the weapons responsible for the inordinate number of injuries and deaths involving firearms occurring each year in the United States.[193] If this trend continues, it may one day completely bar the ability to file civil lawsuits against the gun industry as House Bill 1036 would do.[194] If this occurs and states, municipalities and individuals still seek to reform the gun industry, new avenues must be investigated.

A very plausible question in response to these immunity statutes may be "why?" What stake does a state have in preventing municipalities and individuals from litigating their claims in the judicial system created specifically to address such issues of liability and blame? The legislations that have thus far enacted immunity laws cite a fear of the proliferation of such suits.[195] But immunity laws can act as a complete bar to such civil suits, and thus destroy any regulatory power the judiciary may impose on the firearms industry.[196]

With this current situation, and with success stories such as Massachusetts, the next step for state and municipalities in gun regulation should be to increase the amount and scope of safety

---

[192] *See supra* note 83 (presenting the Michigan Immunity statutes provision).

[193] *See supra* note 77 and accompanying text (providing statistical data on the number of state immunity laws).

[194] *See supra* notes 84-85 and accompanying text (citing House Bill 1036, limiting gun manufacturers further from liability).

[195] *See supra* note 85 and accompanying text (citing fears of excessive civil liability litigation as one of the reasons behind the drafting and passage of House Bill 1036).

[196] *See supra* note 85 and accompanying text.

regulations for firearms manufacturers.[197] Furthermore, with many states having already created internal safety administrative organizations, these state product safety boards should be interpreted by judiciary as having the power to monitor, regulate and dictate the safety requirements for gun manufacturers doing business within state lines. This will likely be a legitimate course of action in the coming decade, as lawsuits based on tort liability continue to fail under the status quo.

INCREASE IN THE NUMBER AND SCOPE OF FEDERAL LAWS REGARDING THE ROLE OF THE ATF

When the current system of gun regulation is dissected, it becomes apparent that several key mistakes occur through the role of the ATF.[198] The gun trace methodology does not accomplish the goal of reducing gun violence for one important reason.[199] The information obtained by the ATF, and the traces done through criminal investigations, are not compiled, published and distributed to gun manufacturers on a regular basis.[200] This practice of compiling extremely useful data, and then allowing it to go unused in the fight against the use of criminal activities using firearms, is not only a loss for society, but is also a waste of valuable information and resources.[201] In order to remedy this problem, several reforms need to take place within the ATF.

---

[197] *See supra* notes 102-04 and accompanying text (providing examples of the scope of Massachusetts firearm safety law).

[198] *See supra* note 141 and accompanying text (explaining the lack of the ATF's role in monitoring the sales and purchases of guns once they leave a dealer's premises, effectively cutting the ATF out of its role as the administrative agent in charge of policing gun trafficking).

[199] *See supra* note 130 and accompanying text.

[200] *See id.*

[201] *See supra* notes 128-32 and accompanying text.

Perhaps this would not be such an impediment to the reduction of the illegal gun market if the problem of crime guns was pervasive or too spread out to determine whether specific distributors or dealers were more likely to divert guns into the illegal market. But this is not the case. In 2000, the ATF published a report that unequivocally showed that of the more than 70,000 licensed firearm dealers in the U.S., 1.2 percent had been responsible for over 50 percent of all gun traces done in 1998.[202] The current system of collecting and searching gun registry information contains no requirement for the ATF to disseminate the information it compiles on gun traces to the impacted manufacturers, distributors, or even dealers except on a case by case basis.[203] The result of this policy is that manufacturers are ignorant about which of their distributors may be involved in the illegal gun market.[204] Furthermore, dealers also have no idea whether the distributors they buy from may also be selling guns into the black market.[205]

So the current system stands, with 1.2 percent of all dealers accounting for over half of all the criminal gun traces occurring in the United States.[206] Without learning from this incredible mistake, the illegal gun market will continue to be provided a safe harbor, while gun manufacturers, distributors, and dealers close their eyes to the epidemic in their backyards.

There currently exist no federal laws requiring the ATF to distribute the statistics it collects on the number of gun traces occurring in relation to specific manufacturers, distributors, or

---

[202] *See supra* notes 128-33 and accompanying text (explaining the process by which the ATF obtains such data, and also citing the data itself).

[203] *See supra* notes 130-32 and accompanying text.

[204] *See supra* notes 124-32 (explaining how the ATF's data on gun traces is not readily available to manufacturers). The ATF contacts the sole distributor and manufacturer involved, which effectively muffles the reporting of problem businesses.

[205] *See supra* note 132.

[206] *See supra* note 132 and accompanying text (giving the exact number listed in the text).

dealers.[207] While the data exists in the ATF computer banks, this information is only released to the public, and thus the gun industry, on an annual basis.[208]

This is the first component of the reformation of the ATF's role in the prevention and reduction of crimes involving firearms.[209] If a federal law was created mandating the gun traces done by the ATF to be compiled and immediately dispersed to the various gun manufacturers, the ability of gun manufacturers to continually use the excuse of ignorance against claims of negligent entrustment would finally begin to erode.[210]

Gun manufacturers are not currently required to inform dealers and distributors of the number and prevalence of FFL crime gun traces originating from their respective businesses, and vice versa.[211] This fact can be further extrapolated to conclude that the manufacturers most likely do not want to be informed of that information. If gun manufacturers were required by law to compile lists and trends of every dealer/distributor gun trace and had civil liability imposed upon them based on any negligence occurring in response to this data, perhaps courts would be more sympathetic to a cause of action initiated by those injured or killed by the manufacturers' products.

Once legislation is created that requires the ATF to inform gun manufacturers of which dealers and distributors are having crime gun traces originate from their businesses, a multitude of further regulations could be easily implemented.[212]

---

[207] *See supra* note 131 (explaining how the ATF's data on gun traces stops completely once a gun leaves the dealer's store, not to be recorded again unless it is used in a crime).

[208] *See supra* notes 128-31 (stating the ATF's general role of data collection and its policy of publishing its data on a federally mandated annual basis).

[209] *See supra* note 131.

[210] *See supra* note 130.

[211] *See supra* note 131 and accompanying text (stating that discrepancies in registration or a handgun confiscated during the commission of a crime are the two sole reasons for which the ATF will do a gun trace).

[212] *See supra* note 131 and accompanying text (stating that the ATF is not required to disseminate crime gun trace information to manufacturers and

The first could be a system which rates and classifies dealers depending on the number and prevalence of crime gun traces originating from their business operations. The federal government could implement a set of rules to govern the ratings applied to dealers that have crime gun traces originate from their businesses.

But this article is not in favor of statutory criminal penalties for those dealers responsible for a prevalence of crime gun traces. Instead, a system of self-enforcement might arise, primarily through civil lawsuits directed at manufacturers who continue to do business with dealers and distributors after the manufacturers have been informed of an inordinate amount of crime gun traces originating from specific businesses.[213]

Therefore, criminal penalties would not be needed. If manufacturers realized that continuing to do business with distributors and dealers who were obviously responsible for a disproportionate amount of crime gun traces could be the basis for civil liability, these manufacturers would quickly make the correct business decision and cease to sell to certain distributors and dealers. If manufacturers became civilly responsible for their business decisions regarding selling to certain dealers, it would seem only right to increase the requirements necessary for future dealers to obtain a Federal Firearm License.[214]

This would serve two purposes simultaneously. First, it would ensure that future federally licensed dealers would resist the temptation to partake in the lucrative crime gun trade.[215] Second, it would assure gun manufacturers that their dealings

---

distributors outside of the parties involved in the gun's purchase and sale, effectively cutting off communication with other manufacturers and distributors in the area who could also be affected by a high incidence of gun traces occurring from one specific dealer or distributor).

[213] *See supra* note 131.

[214] *See supra* notes 117-25 and accompanying text (citing how the Gun Control Act passed in 1968 is the last federal law enacted that directly controls and monitors the purchase and sale of firearms).

[215] *See supra* note 122 and accompanying text (the GCA does create criminal penalties for gun dealers, but only for selling guns to individuals under age 18, to individuals with a felony conviction, or to individuals with a history of mental disability).

with dealers would be protected by a higher federal standard, thus helping to ensure gun manufacturers that not all of the liability was being placed at their feet without any requisite federal attempts to reduce the likelihood of the system to allow gun manufacturers to incur such liability.[216]

Many individuals who favor an unregulated industry may see this idea as a limitation on the average citizen's ability to acquire and possess a completely legal product. But this argument falls flat when the number of federal dealers is weighed against the number of U.S. citizens.[217] As stated previously, there is almost one FFL for every 2,487 adult U.S. citizens living in the United States.[218] This large number indicates that tougher regulations on federally licensed dealers will not inhibit the ability of the average U.S. citizen to continue purchasing firearms.[219]

V. CONCLUSION

There is a continual increase in the number of illegal guns confiscated in the United States each year. That this trend has not seen a substantial reduction, and that the current regulations and laws regarding the criminalization of gun use and the civil laws involving the manufacture, distribution, and final sale of handguns are inadequate, indicates that changes to the current system must be made.

It is obvious that current legislation and judicial interpretation are not making the desired impact. The multitude of lawsuits filed by municipalities and individuals have failed, often on summary judgment based on (1) the inability of plaintiffs to prove a causal link between the manufacturers/distributors/dealers and the final end users who actually commit the crimes or (2) the inability to prove that gun

---

[216] *See supra* note 114.

[217] *See supra* note 125 and accompanying text.

[218] *Id.*

[219] *Id.*

manufacturers/distributors/dealers are aware of the magnitude and ramifications of the gun traces done each day by the ATF.

The current system, which provides manufacturers and distributors with no incentive to self-regulate, must change. The United States now needs laws and judicial decisions that can create an atmosphere in which the manufacturers and distributors take a more active role in policing the federally licensed dealers to whom they sell. This would immediately have an impact on the 1.2 percent of dealers responsible for over 50 percent of all the gun traces done by the ATF. Without reforms, the current system of unaccountability will continue, with the end result being the continually increasing loss of American lives.

WE WON'T VOTE FOR YOU IF YOU HAVEN'T ALREADY WON: A (LOSING) CANDIDATE'S PERSPECTIVE ON THE PROSPECTS FOR MEANINGFUL REFORM OF THE AMERICAN POLITICAL SYSTEM

By Michael A. Livingston[1]

This paper grows out of my experience as a law professor running unsuccessfully for two offices—the Cheltenham, Pennsylvania School Board in 2007 and the United States Congress, a race in which I was nominated but later withdrew, in 2008—together with a citizen's sense of unease with the contemporary state of American politics. Having run losing races two times in as many years, I have an admittedly jaundiced perspective. But like Dorothy in Oz, it is sometimes necessary to experience something before understanding it; if I don't speak in a totally neutral matter, neither do I speak out of complete ignorance either.

My experience—and my post-campaign observations—convinced me that the American political system is in pretty bad shape, notwithstanding an interesting 2008 Presidential election and the choice of what most people, at least until recently, regarded as a fairly competent President (more on that later). I'll begin with a few examples:

1. A combination of financial advantage, gerrymandered

[1] Professor of Law, Rutgers-Camden School of Law. A.B. Cornell, 1977; J.D. Yale, 1981. I would like to thank Sam Issacharoff and the participants in a Rutgers Camden Law faculty seminar for helpful comments on an earlier draft of this article. Special thanks to Shefali Jaiswal and Marissa Sharples for outstanding and creative research assistance. All mistakes are my own.

districts, and name recognition ensure that a majority of congressional elections, and an even higher portion of state legislative contests, are by and large uncompetitive, to the point that they attract little media coverage and even less voter interest. Well-intentioned reforms have increased the financing problem, while technological advances have made gerrymandering even more efficient than it was before. The courts, for their part, have taken a diffident attitude toward the districting problem and have (if anything) exacerbated financing inequalities. Even if these problems could be fixed, the lack of reliable information about most races provides an enormous advantage to incumbents and discourages quality challengers in all but a handful of contests.

2. Political campaigns have become an extension of commercial marketing, with little substance and even less connection to governing. Campaigns are run by political professionals who operate from the twin maxims that emotions are stronger than logic and negative emotions are stronger than positive ones; those who refuse to participate are, more often than not, losers. Politics itself has become a professional career that is both unavailable and unattractive to people with other skills. The demand for candidates with high "name recognition" has in turn led to a degree of nepotism unprecedented in the history of the Republic. Of the Senate seats vacated in 2008 by the incoming President, Vice President, and Secretary of State, a leading candidate for one was the daughter of a former President (Caroline Kennedy); for another, a placeholder designed to enable election of the new Vice President's son (Beau Biden); while the third (Obama's) was allegedly put up for sale to the highest bidder.[2] The forty-third president was the son of the forty-first; the almost-Democratic nominee was the wife of the forty-second; and all but two major party presidential

[2] Carl Hulse, *Senate Vacancies Leave a String of Sordid Tales*, N.Y. TIMES, Dec. 11, 2008, at A40. *See also* Jeff Coen et al., *Feds Arrest Gov. Blagojevich to Stop ... A Political "Crime Spree,"* CHI. TRIB., Dec. 10, 2008, at 1 (discussing alleged plan to sell appointment to Senate seat).

candidates since 1988 (including every single Democrat) attended Yale, Harvard, or both.[3]

3. A combination of ideological polarization, fundraising needs, and gerrymandered election districts have contributed to levels of partisanship and incivility that are unprecedented in modern American history.

Most proposals for reform have focused on the obvious problems—campaign finance and electoral districting reform—and indeed no change is likely to be successful without addressing these traditional issues.[4] Yet I am dubious that such reforms can or will be enough. A combination of constitutional and practical issues means that both of these issues will likely continue to be addressed in an incomplete, scattershot fashion. Each of them is, moreover, an outcome as much as a cause of structural problems. Campaign contributions are essentially a bet on the winner of an election: so long as the system favors certain candidates (especially incumbents) over others, money and endorsements will likely find their way to them. Gerrymandering results from the effort by political parties, already in power, to perpetuate their advantage: given a system of geographic districts—many or most of them existing only for

---

3 *See* Michael Medved, *Yale, Harvard and the Oval Office*, USA TODAY, June 11, 2008, at 11A; The Presidents, http://www.whitehouse.gov/about/presidents (last visited Mar. 24, 2010).

4 There is a wide selection of recent literature on campaign finance reform. *See generally* RODNEY A. SMITH, MONEY, POWER, AND ELECTIONS: HOW CAMPAIGN FINANCE REFORM SUBVERTS AMERICAN DEMOCRACY (2006); MELVIN I. UROFSKY, MONEY AND FREE SPEECH: CAMPAIGN FINANCE REFORM AND THE COURTS (2005); PETER J. WALLISON & JOEL M. GORA, BETTER PARTIES, BETTER GOVERNMENT: A REALISTIC PROPOSAL FOR CAMPAIGN FINANCE REFORM (2009). On gerrymandering and the redistricting problem, see, STEVE BICKERSTAFF, LINES IN THE SAND: CONGRESSIONAL REDISTRICTING IN TEXAS AND THE DOWNFALL OF TOM DELAY (2007); THOMAS L. BRUNELL, REDISTRICTING AND REPRESENTATION: WHY COMPETITIVE ELECTIONS ARE BAD FOR AMERICA (2008); PARTY LINES: COMPETITION, PARTISANSHIP, AND CONGRESSIONAL REDISTRICTING (Thomas E. Mann & Bruce E. Cain eds., 2005). A good summary of these and other issues is provided in SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS (3d ed. 2007).

the purpose of that particular election—it is unlikely to be completely eliminated. Even if they did succeed, neither reform would address the twin problems of name recognition and lack of policy substance that characterize modern political campaigns.

To address these issues, and the more general problems of contemporary (especially legislative) elections, I believe that more radical changes are necessary. Specifically, I propose that we must rethink our reliance on geographically drawn, winner-take-all elections—including their Presidential equivalent, the Electoral College—and substitute a full or partial proportional representation (PR) system as exists now in several foreign countries. There is a sizable body of literature on PR and its potential advantages for the American political system, much of which relates to the issue of minority representation and its limitations under the current electoral system.[5] The name of Lani Guinier, Harvard law professor and rejected Assistant Attorney General nominee during the Clinton Administration, comes especially to mind.[6] What is missing is a broader critique that connects the question of electoral methodology to the larger crisis of American politics, moving beyond the problems of individual groups to a more deep-seated reform program.

This article attempts to provide that critique, against the background of a more general discussion of (in my view) the sorry state of current electoral politics and how it can be improved. Part I of the article discusses the problems with the current electoral system, combining my own experiences with the insights of other, more detached observers. Part II emphasizes current reform efforts, including campaign finance reforms and efforts to tackle the gerrymandering problem, and suggests their limitations. Part III presents a proposal for a proportional representation system, either as a full or partial substitute for the current, geographically based arrangement, considering the experience of other countries and its implications for the American experience. Part IV considers

---

5 *See* discussion *infra* Part III.

6 *See* discussion *infra* Part III A.

collateral issues including the Electoral College, the role of the President, and constitutional issues in a change of electoral systems. Part V is the conclusion.

I. MONEY, PARTISANSHIP, AND LACK OF SUBSTANCE: MY SIX-MONTH LESSON ON THE PROBLEMS WITH THE CURRENT ELECTORAL SYSTEM

When I decided to run for Congress, I was invited to meet with three staffers for a sitting United States Senator, who wanted to look me over and determine if I was worth helping out in my new quest.[7] (I was not yet, and would never be, worthy to meet the Senator himself.) I began, slowly and deliberately, to describe my background and ideas: the lack of effective representation that I thought the district was now receiving; the need for positions that bridged the gap between the Democratic and Republican parties; the importance of new perspectives and not leaving it all to the lifetime politicians. (A reporter later told me that these sounded a lot like Obama's positions, which would put me in the wrong party, although no one ever accused me of having his people skills.)

After about five minutes, one of the staffers cut me off and began to give me what might be called the "Politics 101" lecture. Nobody, he or she (I was too nervous to notice which) said, cared much about my ideas. Politics, they explained, was about winning. Endorsements and campaign contributions—the lifeblood of politics—were investments, i.e., bets on a winning, or what looked like a winning, candidate. Did I have support from the key personalities in the city and state parties? Was I willing to take a leave of absence from my job, campaign full time, and put $100,000 or more of my own funds into the race? Did I have a professional campaign manager, and was I willing to invest my own money in hiring one? Unless the answers to

7 Propriety demands that I not name the Senator involved. However, I can say that he is seventy-nine years old, lives in Philadelphia, and recently changed political parties. He has represented his state for twenty-nine years, and is up for reelection in 2010.

these questions were "yes," they suggested I would be best advised to put my ideas in an academic article or op-ed piece. One of the staffers wished me luck and gave me a cell-phone number (staffers are not supposed to do political business in a Senate office). My calls to it were never returned.

The Senator in question had a reputation for what might charitably be called hardball politics—and a related reputation for indifference, if not hostility, toward his party at that time. Yet his staff had for the most part spoken the truth, a truth I would have been better off taking to heart while I still could. Politics was indeed about winning. Other than abortion, which seems to be a litmus test for voters on both sides of the spectrum, I was rarely asked my position on any issue. Campaign contributions and endorsements were indeed a form of investment; in a long-shot race, I had little chance at getting much of either, and most of the $10,000 or so I raised came from friends, family, or people in the party who guessed (wrongly, I think) that this might not be my last race. A few months later, after reading of an event for local party candidates that I had not been invited to, I dropped out of the race. My successor, an amiable young ward leader, fared little better. He raised even less money than I did,[8] and the main local newspaper endorsed his opponent without bothering to interview him.[9]

On a certain level, none of this is particularly troublesome. As some wag once put it, "politics ain't beanbag."[10] One expects

---

[8] FEC Campaign Finance Reports and Data, http://www.fec.gov/finance/disclosure/srssea.shtml (search 2007-2008 election cycle; Pennsylvania, District 2; for the office of U.S. House) (last visited Mar. 22, 2010).

[9] *See* Editorial, *Election Roundup; Based on Leadership*, PHILA. INQUIRER, Nov. 2, 2008, at E04; *see also* Editorial, *Pa. Districts, U.S. House; Reenlist Murphy*, PHILA. INQUIRER, Oct. 23, 2008, at A22 (explaining the strong likelihood of incumbents' success in 1st and 2nd Congressional Districts); Marcia Gelbart, *Brady and Fattah Should Cruise to Re-election*, PHILA. INQUIRER, Oct. 27, 2008, at B01.

[10] The remark has been attributed to Mr. Dooley, a cartoon character created by Finley Peter Dunne in late nineteenth century Chicago. The full quotation is "Politics ain't bean bag. 'Tis a man's game; an' women, childher,

a certain rough-and-tumble quality, and when running as a Republican in one of the five most Democratic districts in a country—in a Democratic year to boot—a sense of humor plainly comes in handy. In truth, if it had been a more closely contested district, I never would have been nominated.

Yet, a few things still disturbed me. The first was the difference between this race and the race for the local school board that I had run the previous year. In that race, too, we had been heavily outnumbered; in that race, too, we had few resources and knew deep down that we couldn't win. Yet the race was engaging, exciting, and fulfilling. Every person on whose door I knocked seemed to have a child in the public schools and a theory of where they had gone wrong; every tenth house or so seemed to house a former school board candidate. In the congressional race, by contrast, many people did not know what district they lived in, or who the incumbent congressman was. Several were apparently absent from civics class, and could not quite grasp the difference between Washington and Harrisburg, where the state legislature sits.

The second was that my experience—if somewhat extreme—seemed all too common among congressional candidates. Following the other local races, including some that were among the most closely contested in the nation, I saw virtually no intelligent debate or even discussion of issues at anything beyond the most puerile level. The more successful candidates (typically incumbents) appeared simply to sit in a room, raise money, and run a burst of last-minute congressional ads that displayed them meeting voters over a backdrop of warm music and taking pot shots at their opponents for some generally trivial offense. The challengers struggled to gain attention by touting their own resumes, which seemed always to involve some kind of military service, and suggested that they would lower taxes, defend families, and otherwise be more in touch with voters' "values" than their opponents. The one challenger to gain serious traction did so on the basis of a mean-spirited, anti-immigrant appeal, which was rendered somewhat comical

---

an' pro-hybitionists'd do well to keep out iv it." FINLEY PETER DUNNE, MR. DOOLEY: IN PEACE AND IN WAR, at xiii (Boston, Small, Maynard & Company 1899). Gender aside, it remains accurate a century later.

by his own obviously Italian-immigrant name.[11] One candidate, whom I met at a local event, was interrupted by his campaign manager each time he began to speak (he lost anyway).

Third, and perhaps most frustrating, was the disconnect between the process and the people involved in it. The former was unremittingly cynical, with money and (to a somewhat lesser extent) endorsements virtually the only thing that mattered and policy a distant last. Yet most of the candidates seemed personally idealistic, hard-working, and committed to public service; almost all of them struck me as people who could be making more money, with substantially less effort, elsewhere. It is possible that they simply enjoyed the process of pressing the flesh and being the center of attention: even plainly losing candidates, like myself, become something of a celebrity. Maybe they enjoyed circulating letters and buttons with their names on them and commanding applause from people they have never met and will, in all likelihood, never meet again. Yet, to some extent, they seemed simply resigned to the "rules of the game," like first-year law students who put up with humiliation from their professors, even though the original reasons for the system are shrouded in mythology and the link to their professional training is far from clear.

Finally, I was struck by the distance between the congressional races and broader political developments. The year in question, 2008, was among the most politically exciting in recent memory. An outsider, Barack Obama, captured the nomination and the presidency with a campaign that, if conventional in some respects, excited many with its substantive content and appeal to renewal. Another outsider, Sarah Palin, similarly excited many observers with her plain-folks charm,

---

[11] *See* Tom Infield, *Immigration Fuels Kanjorski-Barletta Race*, PHILA. INQUIRER, Oct. 17, 2008, at B01 (identifying illegal immigration as an important issue in the 2008 Congressional election and a powerful tool to incite voters); *see also* American Humanity, *Hazleton's "English-Only" Mayor, Lou Barletta, Running for Congress*, http://americanhumanity.wordpress.com/2008/02/28/hazletons-english-only-mayor-lou-barletta-running-for-congress/ (Feb. 28, 2008, 09:28 EST) (describing the controversy surrounding the candidate and his supporters); Lou Barletta for Congress, http://www.loubarletta.com/ (last visited Mar. 22, 2010).

although her political contribution was more debatable. Yet almost none of this excitement seemed to carry over to the legislative races. When I introduced myself to Jake Tapper, a national correspondent in Cheltenham to cover the Clinton-Obama race, he seemed more interested in my thirteen year old son, although (as the father of any teenager will tell you) this is something of a day-to-day occurrence.

The combination of these factors suggested that something more than the usual disillusionment with politics—or the inevitable frustrations of a loser—were at stake here. There was something not quite right with the electoral process, especially as it concerned legislative elections. Alternatively, there were, more exactly, a series of things wrong with the electoral process, of trends that had developed separately but which, in the aggregate, now threatened the integrity of the entire process. I set out to look beyond my own experience at what others, older and wiser than myself, had to say on the topic.

When people complain about the current state of American politics, a number of issues tend to come up. The first is the influence of money. Elections, it is said, go not to the best candidates but to those who are better funded, providing unfair advantage not only to incumbents (who can raise money more easily) but also to wealthier candidates, or at the very least those who represent wealthy interests. Campaign finance reform, it is suggested, has, if anything, exacerbated the problem, imposing limits on campaign contributions but (for constitutional reasons) allowing rich candidates to fund their own campaigns essentially without limit.[12] When people talk about "changing" Congress, this is most frequently what they mean.[13]

---

[12] *See generally* sources cited *supra* note 4. The seminal case, *Buckley v. Valeo*, held that campaign expenditures from a candidate's own personal funds, together with those by independent groups, were a form of constitutionally protected free speech. 424 U.S. 1, 54, 79-80 (1976). *Buckley* and its progeny are responsible for the current situation in which candidates for federal office are severely limited in their ability to raise money from their fellow citizens. *See id.* at 23-38. However, candidates are free to spend their own money without meaningful restriction. *See id.* at 54. Even indirect efforts to deal with this problem have run afoul of the courts; for example in *Davis v. Federal Election Commission*, the Supreme Court, by a 5-4 vote, struck down the so-called "Millionaire's Amendment" which provided a liberalization of fundraising rules for candidates facing a wealthy, self-financed opponent. 128 S. Ct. 2759, 2763-

A second complaint is excessive partisanship. Politics, it is said, has become unnecessarily polarized, the country divided between "red" and "blue" states and the two principal parties increasingly inflexible in their conservative or liberal ideologies. This complaint is theoretically separate from that in the previous paragraph, but finds a practical link, in that fundraising tends to be easier at the two extremes than at the political middle and moderates—unless they are independently wealthy or already hold elective office—may find themselves squeezed out. The disappearance of liberal Republicans in the North, and the relatively small number of conservative Democrats, are two examples of this phenomenon. The issues are also linked by the phenomenon of so-called "gerrymandering" or partisan drawing of political districts, which create "safe" districts for political loyalists and make fundraising by their opponents all but impossible, thereby eliminating serious competition in all but a handful of areas. The near paralysis of Congress (especially the Senate) in 2009 is often tied to this phenomenon.[14]

A third, more amorphous complaint relates to the substance, or lack of it, in modern political campaigns. Campaigns are thought to be both trivial and increasingly negative, the politics of personal attack replacing that of serious debate on important

---

765 (2008). A good summary of the Supreme Court's role in election law is found in RICHARD L. HASEN, THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM *BAKER V. CARR* TO *BUSH V. GORE* (2003).

[13] *See, e.g.,* Change Congress, http://change-congress.org (last visited Mar.22, 2010) (emphasizing financing reform as key to a better Congress); *see also* discussion *infra* p. 14.

[14] On excessive partisanship in the Bush (and Obama) eras, see ALAN I. ABRAMOWITZ, THE DISAPPEARING CENTER: ENGAGED CITIZENS, POLARIZATION, AND AMERICAN DEMOCRACY (forthcoming Apr. 2010); RED AND BLUE NATION?: CONSEQUENCES AND CORRECTION OF AMERICA'S POLARIZED POLITICS (Pietro S. Nivola & David W. Brady eds., 2008); *see also* Amy Walter, *From Post-Partisanship to Polarization*, NAT'L J., Apr. 6, 2009, *available at* http://www.nationaljournal.com/njonline/ol_20090406_7573.php (finding President Obama had the largest partisan gap in early approval ratings of any new President in 40 years).

policy issues.[15] Since politics ought in theory to be about substance, this is a troublesome development in its own right, but it tends also to reinforce the first two problems, because advertising (especially negative advertising) tends to be expensive and negative campaigning promotes confrontation rather than compromise on key policy issues. The alleged lack of substance reflects a related but distinct complaint regarding the professionalization of politics, with campaigns driven by what are essentially advertising or publicity experts and politicians themselves frequently lacking in any meaningful real world (i.e., nonpolitical) experience. The presence of Karl Rove, a lifelong political consultant, as a counselor in the Bush White House is often cited as an extreme example of this trend; David Axelrod has a similar role in the Obama Presidency.[16]

The three principal complaints above—the influence of money, political polarization, and the lack of substance in contemporary campaigns—are merely the most outstanding of a litany of criticisms, including failure of the current system adequately to represent minority interests; the rise of celebrity candidates and (in some cases) family dynasties; and specific irritants like the electoral college, which is in theory *sui generis* but is effectively an extension of the congressional voting system to presidential elections.[17] While the loudest complaints concern the U.S. Congress, the situation at the state level is if anything worse: the status of New York State politics was so unresponsive that neither house of the state legislature changed

---

[15] For an interesting take on this problem by a prominent—if not necessarily nonpartisan—journalist, see JOE KLEIN, POLITICS LOST: HOW AMERICAN DEMOCRACY WAS TRIVIALIZED BY PEOPLE WHO THINK YOU'RE STUPID (2006).

[16] Though the two are not fond of each other. *See* Johanna Neuman, *David Axelrod vs. Karl Rove: The Sniping Continues*, L.A. TIMES, Feb. 16, 2009, http://latimesblogs.latimes.com/washington/2009/02/axelrod-v-rove.html.

[17] *See* discussion *infra* Part II B.

hands for 40 years,[18] while Pennsylvania legislative districts are so grotesque that a newspaper ran an editorial consisting of a map of one district without the need for additional comment.[19] Nor is presidential politics immune. While the election of Obama proved that it was possible for an "outsider" to win, he was also by far the best-funded candidate, and won the primary if not the general election largely by manipulation of a series of nearly incomprehensible caucus and primary rules. Until the last three weeks, when Obama's win was assured, newspapers debated horror show possibilities of McCain (or Obama) winning, like Bush in 2000, with a minority of popular votes.

II. CURRENT REFORM EFFORTS: FINANCE REFORM, REDISTRICTING, AND EFFORTS TO IMPROVE VOTER EDUCATION

The problems I encountered were, then, not limited to me, but extreme versions of criticisms made by numerous others. The question is, what can be done about them? I am hardly the first person to take up this challenge. Numerous volumes have been written, and piles of effort expended, to reform the electoral system. These efforts have not been wholly unsuccessful, yet the system remains in many ways worse than it

---

[18] *See* Danny Hakim & Jeremy W. Peters, *Albany G.O.P. Wrests Control of the Senate*, N.Y. TIMES, June 9, 2009, at A1 (describing how Democrats had assumed control of the NY State Senate in January of 2009 after being the minority party for over 40 years, but quickly lost their majority in a parliamentary maneuver); Nicholas Confessore, *Majority Rule in the Senate Even Includes Photocopiers*, N.Y. TIMES, Apr. 27, 2008, at A31 (noting that the gerrymandering which has ensured Republican control of the Senate has preserved Democratic domination of the State Assembly); Richard Perez-Pena, *Legislating the New York Way In a Chronic Case of Gridlock*, N.Y. TIMES, Oct. 20, 2002, at 1.; Nicholas Capuano, Note, *Silent Blight: New York's Brownfields & Environmental Justice*, 20 PACE ENVTL. L. REV. 811, 828 (2003).

[19] Editorial, *Redistricting; Connect the Blots*, Phila. Inquirer, June 16, 2008, at A14; *see also* Editorial, *Pa. 172nd: Case Study on How Districts Get Career Politicians*, POCONO RECORD, May 21, 2008, http://www.poconorecord.com/apps/pbcs.dll/article?AID=/20080521/NEWS04/805210310.

was before. What has gone wrong, and how could we do a better job?

This section considers the principal reform efforts to date. These fall into three broad categories: attempts to reform campaign financing; efforts to promote nonpartisan drawing of electoral districts, or otherwise fight gerrymandering; and efforts to promote the flow of unbiased information about candidates and their substantive positions. Each, and its limitations, is considered in turn.

A. Campaign Finance Reform

Historically the most common kind of reform proposal concerns campaign finance. Indeed, reform legislation has been enacted for both congressional and presidential races. Under the McCain-Feingold legislation—itself an amendment to earlier legislation—House and Senate candidates are limited to $2,000 in donations from individuals and $5,000 from PACs (political action committees), although there is no limit on the use of their personal resources.[20] The so-called "Millionaire's Amendment," under which the funding limits were relaxed for candidates facing wealthy, self-funded opponents, was held unconstitutional in 2008.[21] Moreover, limitations on corporate and similar expenditures were struck down in January of

---

[20] *See* 2 U.S.C. § 441a (1)(A), (2)(A) (2006); *see also* Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002). The original finance limits were included in the 1974 amendments to the Federal Election Campaign Act of 1972, Pub. L. No. 92-225, 86 Stat. 3 (1974), which also established the Federal Election Commission (FEC) to monitor the rules. For a comprehensive, if not exactly user-friendly, guide to the laws, see Federal Election Commission, Law & Regulations, http://www.fec.gov/law/law.shtml (last visited Mar. 24, 2010). A somewhat more accessible source is provided by the Campaign Legal Center. *See* http://www.campaignlegalcenter.org/BCRA.html (last visited Mar. 24, 2010). The individual spending limits are indexed for inflation since the passage of the law.

[21] Davis v. Federal Election Commission, 128 S. Ct. 2759, 2775 (2008).

2010.[22] An elaborate series of rules deals with loans, transfers between campaigns, and other collateral issues.[23]

Taking a step beyond contribution limits, the U.S. has, since 1976, provided for direct public financing of Presidential candidates, with each candidate receiving an amount that "matches" his or her private contributions under a complex formula.[24] Contribution limits similar to those in congressional races also apply to presidential candidates.[25] The system has in many ways been a success, but has recently shown signs of collapsing; numerous candidates have opted out of the system in primary elections, and, in 2008, Barack Obama became the first to opt out in the general election.[26] Given Obama's success, it seems likely that other candidates will do likewise in the future.

Several states apply their own limits, although many are rather porous. Pennsylvania, for example, has no monetary limit on contributions and the only serious limit is that no contributions can be accepted from corporations or other

---

[22] Citizens United v. Federal Election Commission, 130 S. Ct. 876, 913 (2010).

[23] 2 U.S.C. §§ 431-456 (2006). The Federal Election Commission also provides an electronic compilation. *See* Federal Election Campaign Laws, www.fec.gov/law/feca/feca.pdf (last visited Mar. 24, 2010).

[24] The public financing system involves a number of different expenditure and regulatory rules that are spread out between different statutory provisions. A detailed explanation of the system is found at the Federal Election Commission website, http://www.fec.gov/pages/brochures/pubfund.shtml (last visited Mar. 24, 2010).

[25] 2 U.S.C. § 441a (1)(A), (2)(A) (2006).

[26] *See Obama Opts Out of Public Funding: Says Public Financing of Presidential Elections as it Exists Today is Broken*, MSNBC.com, June 19, 2008, http://www.msnbc.msn.com/id/25259863/. An overview of the public finance system is provided at George Washington University's Democracy in Action, http://www.gwu.edu/~action/2008/presfin08.html (last visited Mar. 24, 2010).

proscribed donors.[27] Individuals can, and do, give as much as they please.[28]

The McCain-Feingold legislation and similar limits have come under attack from both sides: from critics (mostly conservatives) who believe they are an unconstitutional limitation on free speech, and from others (primarily liberals) who believe they do not go far enough.[29] The Change Congress movement, associated with Stanford (now Harvard) Professor Lawrence Lessig, has called for a "donor strike" until members of Congress accept more stringent rules that, according to the website, will make elections "citizen-funded and not special interest-funded."[30] The movement's goal is a financing system based on a "hybrid of small-dollar donations and public financing of elections," designed to keep big money out of politics.[31] Lessig himself expressed an interest in running for Congress in 2008 but subsequently withdrew.[32] Change Congress essentially continues the work of Common Cause and

---

[27] 25 PA. STAT. ANN. § 3253 (2006).

[28] 25 PA. STAT. Ann. § 3254(c) (2006). The Pennsylvania Department of State, Division of Campaign Finance and Lobbying Disclosure rules are available at http://www.dos.state.pa.us/portal/server.pt/community/reporting_law/17466 (last visited Mar. 24, 2010).

[29] Greg Pierce, Not *Forgotten*, WASH. TIMES, July 16, 2007, at A06 (describing the outrage of some voters and lobbying groups at the legislation).

[30] *See generally* Fix Congress First, http://www.fixcongressfirst.org/ (last visited Mar. 24, 2010).

[31] *Id.* at http://www.fixcongressfirst.org/pages/about.

[32] Lessig came close enough to running that he opened a campaign website. *See* Lessig.org, http://www.lessig.org/blog/2008/02/on_why_i_am_not_running.html (last visited Mar. 24, 2010). The site explains his decision to withdraw and vows to continue his reform efforts.

similar groups who pushed for earlier campaign reform legislation and opposed its weakening.[33]

Campaign finance limitations have registered important successes, and improving these rules will remain an important part of any reform effort. But they only go so far. The exceptions for self-financing candidates and, now, for corporate and similar expenditures,[34] remain huge and, for the time being, unclosable loopholes in the congressional rules, while the presidential financing system (or at least its public financing portion) is currently on life support. The preference for political action committees, and the relatively low limits on individual contributors, seems to place a premium on "bundlers" and other campaign professionals with a skill in manipulating and at times circumventing the existing rules. Nor can the complaints of conservatives, who see even the current rules as an illegitimate restriction on their right to free speech, be completely discounted.[35]

Beyond these practical issues lies a more fundamental economic problem, which goes back to my original meeting in the Senator's office. Campaign contributions, as his staffers helpfully explained, are essentially bets on the success of a given candidate. With a very few exceptions, candidates do not win because they raise more money; they raise more money because people think they can win. If all private contributions were to be banned tomorrow, the most likely result would not be a more level playing field, but an equal or greater advantage for incumbents—who would retain enormous advantages in name recognition and media access and no longer have to consider the at least conceivable possibility of a well-funded challenger—together with a turn to even more celebrity candidates who would be able to achieve such recognition without spending

---

33 About Fix Congress First, http://www.fixcongressfirst.org/pages/about (last visited Mar. 24, 2010).

34 *Citizens United*, 130 S. Ct. at 913-14.

35 *See* Pierce, *supra* note 29.

their own or somebody else's money.[36] This is before one even considers the likely cheating or evasion that would take place as those with an interest in legislation sought indirect ways (use of aircraft or limousines, creation of "independent" (527) bodies to support a candidate, etc.) to influence the outcome.[37]

Put differently, as long as elections turn largely on name recognition and media access rather than political substance, the process will remain an imbalanced one. Campaign finance reform may change the nature of the imbalance but is unlikely to eliminate it completely. That doesn't mean that all such efforts should be abandoned, but it does suggest they are unlikely to be sufficient on their own.

B. DISTRICTING ISSUES AND THE GERRYMANDERING PROBLEM

The term gerrymander dates back to the nineteenth-century Massachusetts politician Elbridge Gerry. Legend has it that Gerry and his associates outlined a particularly gruesome district, which a newspaper cartoonist likened to a salamander and his editor substituted Gerry's own name for the first two syllables.[38] The phrase describes efforts to draw election districts to the advantage of one political party, with special reference to districts which are oddly or gruesomely shaped in order to do so.[39]

---

[36] Barack Obama, for example, would have had a much smaller chance of overtaking Hillary Clinton had he not been able to employ his superior fundraising capacity among people who, for various reasons, were unhappy with the front-running candidate. *See* http://www.fec.gov/press/presssummary.pdf (last visited Mar. 24, 2010) (showing pre-nomination campaign receipts by Democratic candidates through June 30, 2008).

[37] See generally Richard Briffault, The 527 Problem . . . and the Buckley Problem, 73 GEO. WASH. L. REV. 949 (2005).

[38] *See* Fair Vote: The Center for Voting and Democracy, http://www.fairvote.org/fvo-glossary#glossary-g (last visited Mar. 24, 2010).

[39] A dictionary definition is "to divide (a territorial unit) into election districts to give one political party an electoral majority in a large number of

The struggle against gerrymandering—or more precisely, the effort to draw nonpartisan (or less partisan) electoral districts—has historically been the "second front" in electoral reform, surpassed only by campaign finance reform. Like the latter, it has registered some successes in the political and judicial arenas. In extreme cases, courts have struck down egregious districting schemes (although generally only when some aspect of racial or similar discrimination was involved).[40] A few states, notably those with divided legislatures or governors of a different political party, have entrusted their entire districting processes to nonpartisan commissions.[41]

Notwithstanding the above, there is a perception that gerrymandering is getting worse rather than better with time, for a number of reasons. First, gerrymandering is a product of political polarization. As the country becomes more polarized—as it divides further into "red" and "blue" zones with a relatively small number of swing states—there is a concomitant tendency for state governments to be dominated by one or another party rather than split evenly between the two. Since state governments are responsible for drawing both federal and state election districts, the potential for abuse is very large.

Second, computer technology—which might in theory be employed to draw fairer, less biased election districts—is also quite good at doing the opposite. In one highly publicized case, computers were used to help draft a plan to ensure virtually permanent Republican dominance of the Texas congressional

---

districts while concentrating the voting strength of the opposition in as few districts as possible." *See* http://www.merriam-webster.com/dictionary/GERRYMANDERING (last visited Mar. 24, 2010).

[40] *See* League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 399 (2006).

[41] The examples have, at various times, included the states of Arizona, Hawaii, Iowa, Washington, and New Jersey. *See Nonpartisan Redistricting*, Democratic Leadership Counsel, May 8, 2004, http://www.dlc.org/ndol_ci.cfm?kaid=139&subid=900083&contentid=252625 (last visited Mar. 24, 2010).

delegation, a plan most (although not quite all) of which was ultimately approved by the Supreme Court.[42]

Finally, the courts have taken a diffident attitude regarding challenges to politically as opposed to racially motivated districting plans.[43] Indeed by permitting, with certain limitations,[44] the intentional drawing of "majority-minority" districts in order to prevent the dilution of minority voting strength, the courts have arguably increased the number of oddly shaped or contorted districts, together with the polarization of the political process, albeit in a theoretically good cause.[45]

The gerrymandering problem underlies a number of other electoral issues—noncompetitive races, political polarization, unequal campaign finance, voter apathy—and must be confronted in any reform effort. But it is a difficult issue to confront alone. As in the case of campaign finance reform, this is partly a practical problem. With the redistricting process controlled by politicians—and with courts unwilling to intervene other than in truly exceptional cases—any progress is likely to be slow and incremental. Nor is it easy to blame the courts. There being no such thing as a perfect districting plan, it is

---

[42] *League of United Latin Am. Citizens*, 548 U.S. at 447 (requiring redrawing of one Latino-majority district but otherwise upholding Republican-inspired Texas redistricting plan).

[43] *Id.*; *see also* Vieth v. Jubelirer, 541 U.S. 267, 305-06 (2004) (upholding Pennsylvania redistricting that was intended to favor Republican candidates). On gerrymandering in Pennsylvania following the *Vieth* case, see http://killgerrymander.wordpress.com/ (Pennsylvania anti-gerrymander website and blog) (last visited Mar. 24, 2010). For a national website with a similar purpose, see Americans for Redistricting Reform, http://americansforredistrictingreform.org (last visited Mar. 24, 2010).

[44] *See* Shaw v. Reno, 509 U.S. 630, 653-54 (1993) (applying "strict scrutiny" to majority-minority districts).

[45] *See generally* DAVID LUBLIN, THE PARADOX OF REPRESENTATION: RACIAL GERRYMANDERING AND MINORITY INTERESTS IN CONGRESS (Princeton University Press 1999) (1997) (arguing that majority-minority districts have increased minority representation in Congress but also increased the number of conservative Republicans, especially in the South).

understandable that judges would prefer to avoid line-drawing in cases that do not involve constitutionally protected interests. There remains the use of political pressure, to compel less partisan districts or (in the best case) the use of nonpartisan commissions; but this is an unreliable weapon.

I think the redistricting approach also suffers from a broader, conceptual flaw. Even if geographic districts could be drawn perfectly, they would remain unrepresentative in a larger theoretical sense. Because of this difficulty, even a completely nonpartisan system would not solve the underlying problem.

The whole concept of electoral districts is based on the idea that the country is divided primarily along geographic lines. In the early years of the Republic, this was probably true to a significant extent. But it has not been for a long time. Voting patterns are much more likely to be determined by race, gender, age and other factors than by the state or county in which the voter resides. Even the alleged differences between "red" and "blue" states tend, on reflection, to result from differences in the demographic composition of the states (including economics and culture as well as race, gender, etc.) as much as or more than geographic location. This is even truer when one considers election districts within the same state or metropolitan area. Indeed, since the creation of equally sized districts frequently requires that they ignore municipal boundaries, congressional or state legislative districts typically do not capture political or geographic distinctions of significance to local residents: in my area, districts cross in and out of Philadelphia with little, if any, regard for local differences.

The limitations of geographic districts are compounded by their increasing size. In Pennsylvania, state representative (*i.e.*, assembly) districts have approximately 60,000 residents, an area small enough for a determined candidate to go "door-to-door" and meet a majority of voters in person.[46] While these districts face the same conceptual problems as U.S.

---

[46] *See* National Conference of State Legislatures, Constituents per State Legislative District, www.ncsl.org/Legislatures/Elections/Redistricting/ConstituentsperStateLegislativeDistrict/tabid/16643/Default.aspx (citing average figure of 60,498, as of the 2000 census) (last visited Mar. 24, 2010).

Representative districts—and are in many cases even more grotesquely gerrymandered—they at least compensate for this problem with a sense of intimacy and responsibility of the representative to his or her constituents. By contrast, a congressional district now has about 700,000 residents, an area which is at once small enough to manipulate but large enough that it is impossible to reach most voters other than by expensive TV advertising.[47] Indeed, it is not an exaggeration to say that today's congressional districts exist only in the minds of political professionals: I found it difficult even to locate a map of the Second District, let alone to reach its voters, without professional assistance.

The persistence of gerrymandering, coupled with the inherent limits of a purely geographic system, suggest that the Guinier analysis should be expanded to a more generic critique of the existing electoral system. Part III of this article makes an attempt at this synthesis.

C. VOTER EDUCATION INITIATIVES: THE "SMART VOTER" APPROACH

A common complaint about the current system is the lack of informed debate and (what amounts to its correlate) the persistence of negative, personal campaigning. One obvious way to correct this is by providing better information about the candidates and their positions. This is in effect the role of the League of Women Voters, which has for many years provided nonpartisan election guides containing this type of material. Newspapers and television provide similar information and (where possible) sponsor debates and similar forums.

In recent years, a number of websites, with appealing names like Project Vote Smart[48] and the Smart Voter project,[49] have

---

47 *See* Congressional District Analysis and Insights, http://proximityone.com/cd.htm (last visited Mar. 24, 2010) (district populations as of 2009). While theoretically equal, the populations within individual districts vary because of fluctuations since the most recent census and the rule requiring that each state contain at least one district.

48 *See* Project Vote Smart, www.votesmart.org (last visited Mar. 24, 2010).

taken these efforts into the online age. These websites ask candidates to take positions on a long series of issues and (in some cases) to supplement these answers with personal statements.[50] These answers and statements are then made available, free of charge, to online viewers.[51] Such nonpartisan sites supplement the various sundry questionnaires from interest groups that flood candidates' mailboxes, asking their positions on issues of interest to members.

In theory, this type of website would be of great assistance to voters, providing substantive information and short-circuiting the candidate's own websites, which tend (understandably) to be less than neutral in content. By and large, this doesn't happen, for at least two reasons. First, the sites tend to be, well, boring, providing a list of rather mechanical answers to equally mechanical questions; political junkies love them, but it is doubtful most ordinary voters ever see them. In theory, this could be addressed with livelier, more interactive sites—imagine a site that enabled one to receive spoken, YouTube-style answers and stage an impromptu debate—but for the most part, this hasn't happened.

Second, candidates—when they bother to respond at all—tend to make rather predictable and risk-averse responses to the survey questions. I realized this when, curious about my opponent's policies, I looked up his position on abortion at one of his sites. Whereas I had taken an intermediate position, he had checked the box that said, essentially, there should be no restrictions on abortions in any circumstances. It is hard to believe he thinks that (say) abortions should be permitted in the thirty-ninth week, or without medical care; he was, I surmised, simply taking the most liberal position available, consistent with the views of his faction and likely financial supporters.[52] Other candidates behaved, more or less, in similar fashion.[53]

---

49 *See* Smart Voter, www.smartvoter.org (last visited Mar. 24, 2010).

50 *See generally* sources cited *supra* notes 48 and 49.

51 *Id.*

52 To his credit, Chaka Fattah has detailed discussions of his views on abortion and other issues at his official congressional website. *See* Congressman Chaka Fattah's Stance on Today's Pressing Issues,

Conspiring against informational efforts are the same structural limitations observed in connection with previous issues. When I ran for school board, in an area with a population of about 40,000 and an electorate perhaps twenty percent that size, I was struck by the number of voters who knew who I was and what positions I had taken. (One woman, as I approached her porch, called out "I'm not voting for you" before I introduced myself.) In a district of 700,000 plus, many of who do not know who their representative is, the provision of sophisticated, web-based information is likely to make a marginal difference. This is especially true in lower-income, less "wired" areas where the problem of noncompetitive elections is typically the most serious. Again, this does not mean the effort should not be made, but it does suggest that a more systematic approach is needed, in which current reform efforts would be part of a larger examination of the existing system and its underlying assumptions. It is to this effort that we now turn.

---

http://fattah.house.gov/index.cfm?sectionid=4§iontree=4 (last visited Mar. 24, 2010). My point concerns the overall process rather than him personally.

53 Interest group questionnaires are even more entertaining, as they tend to ask questions in such language that one appears an ogre for even considering disagreement. A 2008 survey from the National Rifle Association (NRA) Political Victory Fund, for example, contained the following question: "Do you support the current federal law that prohibits anti-gun elected officials from using predatory lawsuits to bankrupt American firearms makers under a mountain of legal bills?" National Rifle Association Political Victory Fund: 2008 Presidential Campaign Survey, http://www.nrapvf.org/survey/Candidate.aspx (last visited Mar. 24, 2010). An AFL-CIO survey asked "What would you do to curb the outsourcing of public-service jobs to the private sector, which can result in reducing the pay and benefits of workers who perform such services?" Working Families Vote 2008: AFL-CIO's Candidate Questionnaire, http://www.aflcio.org/issues/politics/questionnaires.cfm (last visited Mar. 24, 2010). Surveys of this type may or may not provide voters with useful information, but they do not do much to promote serious debate.

III. BREAKING THE LOGJAM: PROPORTIONAL REPRESENTATION, THE GUINIER THESIS, AND THE PROSPECT FOR SYSTEMIC REFORM

In the preceding sections we observed that many (although not all) of our existing difficulties are related in some way to the underlying electoral system. The principal characteristic of the system, in turn, is its reliance on geographically defined, single-member districts, with the results of elections determined on a "first past the post" basis without (in most cases) the requirement of an absolute majority.[54] This system is extended--albeit in a quirky way--to Presidential elections, the Electoral College consisting of a series of winner-take-all elections in nearly all of the fifty states and the District of Columbia, the results of these individual races then being agglomerated into a combined electoral total.

The problems with this system are many and varied, and several previous authors have addressed them. The difficulty is in channeling their observations into a coherent program of reform, which incorporates the issues referred to above (campaign finance, gerrymandering, and voter education) without being swallowed by them. A further challenge arises from the observations themselves, many of which arose in response to specific problems—notably the issue of minority representation—and need to be combined into a more unified, systematic approach.

The remainder of this article attempts to make such a synthesis. I begin with the work of Lani Guinier, who has criticized the current system as unfair to minorities and proposed various practical reforms. While most of these reforms are of an incremental nature, including the use of at-large or multi-member constituencies and the creation of specially crafted minority districts, Guinier and others have at times suggested proportional representation as a more systematic alternative. I then turn to the work of Douglas Amy and other political scientists who have called more overtly for a

---

54 I am ignoring here, for simplicity's sake, a number of states with runoff requirements, primarily in state and local elections.

PR system, examining their arguments and the critiques other scholars have made of them. Following this, I present two alternate proposals for a modified PR system that takes into account the special features of the United States and the problems identified above. I conclude with a few words about "collateral" problems including Presidential elections, the Electoral College, and the matter of constitutional change.

A. THE GUINIER THESIS AND ITS IMPLICATIONS

Lani Guinier is most famous for failing to be confirmed as a Clinton Administration official in 1993, a failure that resulted (in part) from the perceived radical character of her academic work.[55] But she is also perhaps the most creative thinker on electoral process in the legal academy, with recommendations that—while originally applied to the dilution of minority voting strength—have potentially broader implications.

Guinier's work proceeds from the belief that the 1965 Voting Rights Act and its progeny rested on a flawed theory: that increased electoral participation by African-Americans would culminate in the election of more African-American officials and, eventually, in equal political representation for black and white Americans. To remedy this inadequacy, she proposes a second or third generation series of reforms that would result, not just in more equal representation, but in more equal access to political power—a model of "taking turns," as she puts it, rather than imposing the white majority's will on a formally equal but substantively powerless black community. Instead of creating more single-member black majority districts, which she believes result in symbolic but little actual power for minorities, she proposes changes in the underlying electoral (*i.e.*, voting) system to ensure that black votes outside such districts would no longer be wasted, together with changes in legislative

---

[55] The failure was especially painful given the sense that Clinton abandoned Guinier in the middle of the confirmation process. *See* Michael Kelly, *Words and Deeds: The Guinier Affair Aggravates Clinton's Credibility Problem*, N.Y. TIMES, Jun. 6, 1993, at 41.

procedures to ensure more effective representation of minority interests in the lawmaking process itself.[56]

Most of Guinier's proposals consist of incremental changes to the existing system, what are sometimes called "semi-proportional" or hybrid electoral methods. The most prominent of these is a sort of cumulative voting system, under which multi-member constituencies would replace the current single-member variety and voters would have the option of casting one vote for each candidate or concentrating ("cumulating") votes in favor of one candidate they especially wanted to see elected.[57] (A similar system is often used in the election of corporate directors.)[58] At other points, she experiments with weighted voting or other hybrid systems.

In her later work, however, Guinier suggests that the real culprit may be the geographic district system itself, which she believes "wastes" the votes of the minority of voters in any district and makes it difficult or impossible to form coalitions that cross geographic lines.[59] She notes further that—while her work concerns primarily African-Americans—similar difficulties would confront any geographically defined group that was reduced to the political margins under the current system.[60]

I would go further than Guinier, to suggest that the geographic system is indeed the underlying problem and that efforts to improve the system—for white as well as African-American voters—are unlikely to be successful unless this problem is confronted. This is true both for practical reasons

---

56 *See generally* LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY 71-156 (1994).

57 *Id.* at 149-150.

58 *See generally* JEFFREY D. BAUMAN, ALAN R. PALMITER & FRANK PARTNOY, CORPORATIONS: LAW AND POLICY 341-43 (6th ed. 2007) (1982).

59 *See* GUINIER, *supra* note 56, at 136-37. "The key point is that criticisms leveled at race-conscious districting . . . should in fact be directed at the process and the theory of geographic districting itself." *Id.* at 137.

60 *Id.* at 137 ("It is districting itself which is anomalous, because geographic definitions of group identity . . . are often so artificial.").

(geographic districts inevitably impede the progress of coalitions that express themselves in a non-geographic fashion) and theoretical ones (by dividing the country in a way that no longer reflects its deeper, more significant cleavages, geographic representation is a flawed model for modern democracy). I would add—and I think Guinier would agree—that the debate over minority representation, as exemplified by *Shaw v. Reno*[61] and related Supreme Court cases, has if anything exacerbated the gerrymandering problem and increased the polarization inherent in the existing system.

The considerations above suggest the need to expand Guinier's critique, and its resulting incremental changes, into a more general proposal for a new electoral setup. But where is such a proposal to come from?

B. PROPORTIONAL REPRESENTATION AND ITS ADVOCATES

One answer may come from the work of political scientists who have, (characteristically) been rather bolder than legal scholars, urging replacement of the entire geographic system with a proportional representation (PR) method. Under PR, rather than relying on geographic districts, seats in parliament are awarded in proportion to a party's percentage of the overall national vote. For example, in a 100-seat legislature, a party receiving forty percent of votes would receive forty seats, thirty percent thirty seats, and so on regardless of the part of the country from which they received their votes. To prevent an excessive number of parties and other anomalies, this system is often leavened with a percentage floor (*e.g.*, five percent) below which no party may be seated, or combined in a hybrid arrangement with single- or multi-member geographic districts.

Professor Douglas Amy, who is probably the leading expert on the subject, has suggested several advantages of proportional representation over our current system. These include, in no particular order, breaking the two-party monopoly of political power; encouraging more issue-oriented, higher turnout

---

61 *See generally* Shaw v. Reno, 509 U.S. 630 (1993).

elections; eliminating the gerrymandering problem; and electing more women and minorities to public office.[62] Amy notes the various objections to PR, including its alleged complexity, encouragement of small parties and unstable governing coalitions, representation of radical or fringe elements, and failure to represent legitimate geographic interests—but he concludes (not surprisingly) that these are outweighed by its many advantages.[63] Finally, he notes that many European and other countries have discarded geographic systems in favor of some version of PR, suggesting that it may be a more modern, mature form of democratic participation.[64]

As Amy recognizes, foreign countries use various different forms of PR. These range from the single national list system in Israel to the multi-member district system in Italy to the combination of proportional and geographic voting employed in the Federal Republic of Germany. He suggests that a hybrid or modified system, rather than an Israeli-type "pure" PR method, might work best in an American context.[65]

---

[62] *See* DOUGLAS J. AMY, REAL CHOICES/NEW VOICES: THE CASE FOR PROPORTIONAL REPRESENTATION ELECTIONS IN THE UNITED STATES 21-152 (1993). Similar arguments, by Amy, and others, are available online. *See* PR Library: Readings in Proportional Representation, http://www.mtholyoke.edu/acad/polit/damy/prlib.htm (last visited Mar. 24, 2010). On the debate between various electoral systems, see SAMUEL J. ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 1194-2002 (3d ed. 2007). For a website on the subject of electoral (voting) reform, see Fair Vote: The Center for Voting and Democracy, http://www.fairvote.org (last visited Mar. 24, 2010).

[63] Amy, *supra* note 62, at 153-82.

[64] *Id.* at 155-82.

[65] *Id.* at 183-97. An interesting hybrid system, combining elements of Amy's and Guinier's proposals, is the Single Transferable Vote (STV) system used in Cambridge, Massachusetts municipal elections, in which voters rank candidates according to various levels of preference and the preferences are combined, using a prearranged system, in order to produce the winners. *See* Spotlight on Reform: Cambridge, http://archive.fairvote.org/?page=241 (last visited Mar. 24, 2010).

C. ADOPTING PROPORTIONAL REPRESENTATION TO AN AMERICAN CONTEXT

Based on my experience as a candidate, I would second Amy's arguments, but with three principal differences. First, although I understand that a more "progressive" political system is an important goal for Amy and Guinier, I am somewhat skeptical that a proportional system will achieve this goal. While arguably encouraging the election of more minorities and women, PR would also give voice to rightward-leaning, populist groups whose power is reduced, although not eliminated, by geographic voting. This is not a convincing argument against PR, but it does suggest some caution.

Second, I believe that—if he overstates some arguments—Amy understates an additional argument against geographic districts, namely, their direct and I believe inevitable connection with campaign financing inequities. So long as elections consist primarily of a struggle for "name recognition"—a situation I believe unavoidable in large, single-member districts—it is difficult to see how the need for money and consequent distortion of campaigns can be avoided. Indeed, many incremental reforms would actually increase these inequities, by making it still more difficult for challengers to compete with celebrity candidates or well-financed incumbents.

Finally, while Amy remains agnostic on the question, I believe that a pure, Israeli-style system of PR is unworkable in the United States, because of the size of the country and the persistence of legitimate geographic interests. An American context also requires recognition of the Federal system and the role of the States which, as a general rule, are stronger than sub-national entities in most foreign countries. Therefore, I believe that any new system would have to be a hybrid on the German or Italian model, with the addition of special, uniquely American features designed to address these issues.

One intriguing idea is to elect one house of Congress (or a state legislature) on the basis of PR and the other on the basis of single- or multi-member geographic districts, perhaps with some protection for states with small populations but large geographic areas, on the model of the current U.S. Senate. Such a system offers the possibility of a balance between proportional and geographic methods, while also providing a clearer role for the Senate, whose legitimacy has been increasingly challenged

in recent years.[66] An alternative might be to elect both houses with a hybrid system using a national list to elect (say) one-half of the members and a series of multi-member constituencies to elect the remaining half. Either of these systems carries risks, but also confronts the problems of the existing system in a creative, direct manner.

IV. COLLATERAL ISSUES: THE PRESIDENT, THE ELECTORAL COLLEGE, AND THE MATTER OF CONSTITUTIONAL CHANGES

Changes in electoral systems inevitably focus attention on the separation of powers and the role of different branches of Government, although the two are in theory distinct. For example, a PR system might, although it would not necessarily, entail a shift to a more parliamentary form of government, in which the President would be chosen from the majority coalition rather than being elected separately as under current law. I take no position here on this issue, but neither am I afraid to confront it.

One institution that would be unlikely to survive a shift to PR is the Electoral College, which is, in effect, an extension of geographic representation to presidential elections, and a rather clumsy one at that. After the 2000 election, and the possibility or even probability of its eventual repetition, this change should not be difficult to defend. As a theoretical matter, the elimination of the Electoral College should properly be part of an overall change in electoral system rather than a free-standing adjustment, which would provide for proportional election of

---

[66] On the (dubious) legitimacy of the Senate as an institution—even without a change in voting systems—see Lynn A. Baker & Samuel H. Dinkin, *The Senate: An Institution Whose Time Has Gone?*, 13 J.L. & POL. 21 (1997); *see also* SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) 49-62 (2006) (attacking "our illegitimate Senate" for its unrepresentative nature and other perceived failures). Levinson, who has a way with words, at one point calls the Senate "a travesty of the democratic ideal." *Id.* at 60.

the executive but leave the rest of the geographic system in place.[67]

In discussing a switch to PR—like any structural reform—one must sooner or later discuss the problem of implementation. There is some debate as to which aspects, if any, of this switch could be accomplished legislatively and which would require a constitutional amendment. A change at the federal level, which permitted all or some representatives to be elected without regard to State boundaries, would plainly require constitutional change. Some lesser changes might be accomplished by legislation or at the State level. It should be remembered that there have been several previous changes in election method, including the direct election of senators (Seventeenth Amendment) and extension of the franchise to women and African-Americans.[68] Therefore, a change in voting method would continue this pattern rather than making an unprecedented break.[69]

Finally, it is interesting to consider electoral reform in light of the current deadlock in Washington, as reflected most dramatically in the recent debate over health care reform. Some of the more common complaints about the current situation, such as the polarization of our politics and the crassness of many politicians, would only be partially addressed by such reforms. But many others would be. The dominance of special interests in the process results to a very large degree from the

---

[67] The Electoral College reinforces geographical voting by providing a "winner take all" result in all but two states and adding a two-vote premium (equivalent to each State's senators) to each State's total. The effect, much like that of the Senate, is to over-represent small states and effectively to disenfranchise the losing side in each jurisdiction. *See* BRUCE ACKERMAN, THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY 245-66 (2005); *see also* BUSH V. GORE: THE QUESTION OF LEGITIMACY (Bruce Ackerman ed., 2002) (assessing legitimacy of the process that elected George W. Bush in 2000).

[68] U.S. CONST. amends. XVII, XIX, XV.

[69] *See* SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 1209-294 (3d ed. 2007).

current system of campaign finance, which (in turn) relates directly to electoral methods. The ability of legislators (especially Senators) to demand special geographically targeted provisions—essentially bribes—in return for their support likewise flows directly from the geographic nature of elections and the narrowness of the resulting interests. Even the polarization of politics, while it has many different sources, is exacerbated by the gerrymandering of election districts which is part and parcel of the geographic method.

There is an increasing awareness among scholars that many of these issues are linked, and that major, structural changes may be necessary if American politics is to avoid the fate of ancient Rome and other declining cultures.[70] Electoral reform is hardly the only solution to the problem. But it is an important piece of the puzzle.

V. CONCLUSION

It's no fun to lose an election, yet failure can focus the mind in a way that is otherwise unlikely. While my own defeats were surely my own responsibility, my experience as a candidate suggested to me that there are larger flaws in the existing electoral system, including the exaggerated influence of money, an excessively partisan political environment, and a general lack of substance in the electoral process. The experience further suggested that the proposals most commonly made for improving the system—campaign finance reform, an assault on gerrymandering, and better voter education—are insufficient to

---

[70] The work of Sanford Levinson and Bruce Ackerman is especially important in this context. *See* Levinson, *supra* note 66; Ackerman works cited, *supra* note 67; and the accompanying text. Arguments of a similar ilk have frequently been aired at the Balkinization blog, http://balkin.blogspot.com (last visited Mar. 24, 2010), where Levinson is a regular blogger and Ackerman (although not a blogger) serves as a frequent inspiration. A potential criticism of these bodies of work is that the authors tend to be identified with the political left and their analysis may accordingly fail to engender bipartisan support. By identifying problems with the electoral system that originate from a very different political perspective, I hope to begin a conversation that crosses traditional lines.

address these problems. Instead, we need to begin thinking about a new electoral method, which replaces, or at the very least supplements single-member, geographically based districts with a proportional or similar system. The work of lawyers like Lani Guinier, and political scientists like Douglas Amy, provides an important basis for such proposals, although there is a need to extend their work and build it into a more sophisticated critique of the existing system and possible replacements. The project is at an early stage and many questions remain to be answered. But it is hard to imagine one more important.

THE WAR ON WHISKEY IN THE WOMB: ASSESSING THE MERIT OF CHALLENGES TO STATUTES RESTRICTING THE ALCOHOL INTAKE OF PREGNANT WOMEN

John Stogner[1]

I. Introduction..260
II. The Concerns over Drinking While Pregnant.............261
III. The Statutes in Question...266
IV. Debunking the Arguments Against Restricting Alcohol Use in Pregnancy..272
A. Addressing Privacy Concerns..................273
B. Equal Protection Concerns......................278
i. The Gender Argument.............................278
ii. The Pregnancy Status Argument.............281
iii. The Socioeconomic Argument................284
V. Conclusion..287

---

[1] Department of Sociology and Criminology & Law, University of Florida. The author would like to acknowledge the work of Research Assistant Claudio Balladares whose efforts gathering information relevant to the manuscript led to a number of improvements to later drafts and a more thorough final analysis.

I. INTRODUCTION

Several states have started legislating against alcohol use by pregnant women in an attempt to reduce the prevalence of Fetal Alcohol Syndrome, and a number of additional states have considered or are considering similar legislation.[2] This disease, while detrimental and costly, is completely preventable through abstention from alcohol during pregnancy.[3] Though the states' goals of improving public health are noble, some individuals argue that this benefit only comes at the cost of unconstitutionally reducing personal rights and freedoms.[4] These opponents claim that statutes like those that exist in Oklahoma, South Dakota, South Carolina, and Wisconsin are unconstitutional because they violate women's rights to privacy and the Equal Protection Clause of the Fourteenth Amendment.[5] In order to disprove these claims, it is necessary to first review the statutes being attacked, their historical enforcement, and the issue of Fetal Alcohol Syndrome. Using this information and prior relevant court decisions, it is shown that these statutes violate neither an individual's constitutional right to privacy nor the Equal Protection clause.

---

[2] Alaska, California, Delaware, Georgia, Indiana, Maryland, Massachusetts, Minnesota, Tennessee, and Virginia all at one time considered legislation similar to that implemented in Wisconsin and South Dakota. *States Grapple with Civil Commitment of Pregnant Drug Users*, 10 ALCOHOLISM & DRUG ABUSE WKLY., May 11, 1998, at 1; s*ee also State Lawmakers, Prosecutors Continue to Target Pregnant Substance Users*, 20 ALCOHOLISM & DRUG ABUSE WKLY., March 24, 2008, at 1.

[3] Larry Burd, *Fetal Alcohol Syndrome*, 9 ADDICTION BIOLOGY 115, 115-18 (2004).

[4] See Alison M. Leonard, Note, Fetal Personhood, Legal Substance Abuse, and Maternal Prosecutions: Child Protection or "Gestational Gestapo"?, 32 NEW ENG. L. REV. 615, 626-27, 637-39 (1998).

[5] *Id.* at 651-57.

II. THE CONCERNS OVER DRINKING ALCOHOL WHILE PREGNANT

Mothers who drink alcoholic beverages put their unborn children at severe risk for a large number of birth defects and disorders. Alcohol use by a pregnant woman is just as harmful to a fetus as cocaine, heroin, or other illegal drugs.[6] Infants born to mothers who drank alcohol during pregnancy have been shown to have reduced birth weight, birth length, head circumference, and lower Apgar scores.[7] Prenatal alcohol abuse can lead to Fetal Alcohol Spectrum Disorders (FASD) or Fetal Alcohol Syndrome (FAS), which is characterized by a combination of different malformations and mental deficiencies directly caused by exposure to alcohol as a fetus.[8] Children with FASD/FAS often have difficulty demonstrating common sense, understanding concepts, solving problems, or organizing information.[9] They also may have problems with their memory, attentiveness, and vision.[10] FASD/FAS can cause a variety of facial deformities including almond shaped eyes, the absence of a philtrum, a thin upper lip, a pointed chin, and a low nasal

---

[6] American Medical Association Board of Trustees Report, *Legal Interventions During Pregnancy: Court-Ordered Medical Treatments and Legal Penalties for Potentially Harmful Behavior by Pregnant Women*, 264 JAMA 2663, 2666 (1990) [hereinafter AMA, Report].

[7] Susan J. Tarr & Jean L. Pyfer, *Physical and Motor Development of Neonates/Infants Prenatally Exposed to Drugs in Utero: A Meta-Analysis*, 13 ADAPTED PHYSICAL ACTIVITY Q. 269, 278 (1996).

[8] Kathryn Page, *The Invisible Havoc of Prenatal Alcohol Damage*, 4 J. CENTER FOR FAMILIES, CHILD., & CTS. 67, 76 (2003).

[9] *Id.* at 76-77.

[10] *See generally* NAT'L INST. ON ALCOHOL ABUSE & ALCOHOLISM, U.S. DEP'T HEALTH & HUMAN SERVS., 10TH SPECIAL REPORT TO THE U.S. CONGRESS ON ALCOHOL & HEALTH 285-95 (2000), *available at* http://pubs.niaaa.nih.gov/publications/10report/intro.pdf (discussing memory and attention problems); William V. Good, *Commentary on 'Visual Impairment and Ocular Abnormalities in Children with Fetal Alcohol Syndrome' by K. Strömland*, 9 Addiction Biology 159, 159-60 (2004) (discussing vision problems).

bridge.[11] It may also lead to genital abnormalities and stunted growth.[12] FAS is considered to be the leading cause of mental retardation; affected children often cause problems in schools since they can exhibit hypersensitivity and explosive reactions.[13]

FAS is medically diagnosed by noting three key symptoms and the mother's drinking. For a child to be diagnosed with FAS, he or she must exhibit stunted growth, some form of mental deficiency, and facial malformations, and the mother's drinking during pregnancy must be confirmed.[14] Children showing only physical symptoms of the disease are classified as having Fetal Alcohol Effect (FAE).[15] These children exposed to alcohol in utero have been shown to have significantly impaired muscle development and motor skills.[16]

A number of children exhibit the mental deficiencies that prenatal alcohol use causes but do not possess the facial malformations or growth deficiencies.[17] Recent research has suggested that the presence of facial morphology is dependent not only on alcohol consumption, but on the alcohol interacting with certain genetic factors.[18] Children free of facial

---

[11] Ann P. Streissguth, Sterling K. Clarren & Kenneth L. Jones, *Natural History of the Fetal Alcohol Syndrome: A 10-Year Follow-Up of Eleven Patients*, 2 LANCET 85 (1985).

[12] James C. Overholser, *Fetal Alcohol Syndrome: A Review of the Disorder*, 20 J. CONTEMP. PSYCHOTHERAPY 163, 165 (1990).

[13] Page, *supra* note 8, at 76-78.

[14] Ann P. Streissguth et al., *Fetal Alcohol Syndrome in Adolescents and Adults*, 265 JAMA 1961, 1961 (1991) [hereinafter Streissguth, *FAS in Adolescents and Adults*].

[15] S. Ioffe & V. Chernick, *Prediction of Subsequent Motor and Mental Retardation in Newborn Infants Exposed to Alcohol in Utero by Computerized EEG Analysis*, 21 NEUROPEDIATRICS 11, 16 (1990).

[16] *Id.* at 11-17.

[17] Utpala G. Das et al., *Alcohol Dehydrogenase 2*3 Affects Alterations in Offspring Facial Morphology Associated with Maternal Ethanol Intake in Pregnancy*, 28 ALCOHOLISM: CLINICAL & EXPERIMENTAL RES. 1598, 1598 (2004).

[18] *Id.*

malformations but exhibiting alcohol related mental deficiencies are diagnosed as having Alcohol Related Neurodevelopmental Disorder (ARND), a condition that is three times more prevalent than FAS.[19] In both children who are diagnosed with FAS and those that are not, prenatal alcohol exposure has been shown to impair executive functioning, hinder the ability to generate and verbalize concepts, and reduce problem solving ability.[20] These individuals also have been shown to be far more likely to have behavioral problems as children[21] and to be more delinquent in adolescence.[22] While this may be partially the result of the strong correlation between an expectant mother's risky behavior and her poor parenting after birth,[23] the physical and mental damage caused by prenatal exposure to alcohol directly lead to a variety of negative behaviors.[24] Some even fear that individuals with substance abuse-related deficits are more likely to engage in the same problematic behavior as their parents due to improper socialization and reduced self-control.[25]

---

[19] Erin N. Linder, Note, *Punishing Prenatal Alcohol Abuse: The Problems Inherent in Utilizing Civil Commitment to Address Addiction*, 2005 U. ILL. L. REV. 873, 884.

[20] Christie L. McGee et al., *Children with Heavy Prenatal Alcohol Exposure Demonstrate Deficits on Multiple Measures of Concept Formation*, 32 ALCOHOLISM: CLINICAL & EXPERIMENTAL RES. 1388, 1395-97 (2008).

[21] Heather C. Olson et al., *Association of Prenatal Alcohol Exposure with Behavioral and Learning Problems in Early Adolescence*, 36 J. AM. ACAD. CHILD ADOLESCENT PSYCHIATRY 1187, 1192-93 (1997).

[22] *See* Diane K. Fast, Julianne Conry & Christine A. Loock, *Identifying Fetal Alcohol Syndrome Among Youth in the Criminal Justice System*, 20 J. DEVELOPMENTAL & BEHAV. PEDIATRICS 370 (1999).

[23] Streissguth, *FAS in Adolescents and Adults*, *supra* note 14, at 1965-66.

[24] *Id.* at 1966.

[25] Judy Howard, *Substance Use During Pregnancy: Legal and Social Responses: Chronic Drug Users as Parents*, 43 HASTINGS L.J. 645, 656-58 (1992).

It is estimated that between 0.33 and 1.9 of every 1000 live births in the western world are diagnosed with FAS.[26] This means that over 50,000 babies are born each year with alcohol related symptoms.[27] These estimates still fall short of depicting the tragic frequency of fetal alcohol syndrome as a significant portion of children with FAS symptoms are never diagnosed with the malady.[28] The lifetime treatment costs for a newborn diagnosed with FAS are estimated to exceed $1 million[29] and the cost to society of supporting an individual with FAS amounts to almost $5 million dollars by the end of his or her lifetime.[30] This estimate includes costs related to health care, welfare, education, and the criminal justice system (as these individuals are often responsible for a disproportional number of crimes).[31] Reducing the incidence of FAS by just 1% would save almost $8 billion over the life of the next generation.[32] Children with FAS place an unnecessary and preventable strain on already burdened education, justice, and welfare systems in addition to placing costly demands on their families.

---

[26] *See* Ernest L. Abel & Robert J. Sokol, *A Revised Conservative Estimate of the Incidence of FAS and its Economic Impact*, 15 ALCOHOLISM: CLINICAL & EXPERIMENTAL RES. 514, 515-16 (1991); Judith A. Jones, Comment, *Fetal Alcohol Syndrome—Contrary Issues of Criminal Liability for the Child and His Mother*, 24 J. JUV. L. 165, 166 (2003).

[27] James Drago, Note, *One for My Baby, One More for the Road: Legislation and Counseling to Prevent Prenatal Exposure to Alcohol*, 7 CARDOZO WOMEN'S L.J. 163, 164 (2001).

[28] Burd, *supra* note 3, at 117.

[29] Sameer Deshpande et al., *Promoting Alcohol Abstinence Among Pregnant Women: Potential Social Change Strategies*, 23 HEALTH MARKETING Q. 45, 48 (2005).

[30] Chris Kellerman & Teresa Kellerman, *The Five Million Dollar Baby; The Economics of FAS* (2000), http://www.come-over.to/FAS/EconomicsFAS.htm.

[31] *Id.*

[32] Burd, *supra* note 3, at 117.

FASD/FAS, ARND, and FAE are made even more tragic by the fact that they are completely preventable disorders. Though the exact mechanism is unknown and the quantity of alcohol that has to be ingested to cause these conditions is in question, all of these conditions are caused by an expectant mother's drinking and can be prevented by abstaining from alcohol until giving birth.[33] Though medical care may help those with one of these diseases, the effects of alcohol on a fetus are neither curable nor reversible.[34] Both the World Health Organization[35] and the United States Surgeon General[36] have warned about the dangers of alcohol use by pregnant women. This has led to sufficient publicity for the dangers to be considered common knowledge; however, many pregnant women still fail to exhibit self-control. While pregnant women drink significantly less than their non-pregnant peers, 11.6% still report drinking alcohol, 3.7% engage in binge drinking, and one in every 143 pregnant women admit to heavy drinking.[37] Other studies have shown that 3.3% of pregnant women drink two or more alcoholic drinks per day.[38] Despite the increased public awareness of the dangers of drinking while pregnant, drinking

---

[33] Kenneth R. Warren & Laurie L. Foudin, *Alcohol-Related Birth Defects—The Past, Present, and Future*, 25 ALCOHOL RES. & HEALTH 153, 156 (2001).

[34] *Id.* at 157.

[35] World Health Organization [WHO], *Framework for Alcohol Policy in the WHO European Region* 15 (2006), *available at* http://www.euro.who.int/document/e88335.pdf.

[36] Press Release, U.S. Dep't Health & Human Servs., U.S. Surgeon General Releases Advisory on Alcohol Use in Pregnancy (Feb. 21, 2005), *available at* http://www.surgeongeneral.gov/pressreleases/sg02222005.html.

[37] SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., U.S. DEP'T HEALTH & HUMAN SERVS., PUB. NO. SMA 08-4343, RESULTS FROM THE 2007 NATIONAL SURVEY ON DRUG USE AND HEALTH: NATIONAL FINDINGS 33 (2008), *available at* http://oas.samhsa.gov/nsduh/2k7nsduh/2k7Results.pdf.

[38] *See* ERNEST L. ABEL, FETAL ALCOHOL SYNDROME (1990).

during pregnancy increased fourfold during the 1990s.[39] Countless fetuses are exposed to pointless risks. It is clear that some individuals need the help of society and the state to help them best care for their unborn children.

III. THE STATUTES IN QUESTION

Statutes that criminalize drinking while pregnant and those that allow for civil commitment of individuals who refuse to abstain from alcohol while pregnant have been attacked by some who oppose the legislation on the grounds that it invades individuals' right to privacy or violates the Equal Protection Clause of the Fourteenth Amendment.[40] These statutes, though rarely enforced, give states either the freedom to detain a pregnant woman in order to ensure that she does no further damage to her fetus by drinking or to punish those that have injured their children in an effort to deter others from making the same destructive choices.[41] Wisconsin, South Dakota, and Oklahoma all allow for the use of civil confinement as a preventive measure while South Carolina chooses the more punitive option.[42]

It should be noted that these and other states' efforts have not been limited to intrusive and punitive approaches to dealing with the problem. Many have made efforts to increase public awareness, offer substance abuse treatment programs, and create interventions that may reduce prenatal substance exposure.[43] These routes have been supported by and are preferred by feminist advocacy groups and public health

---

39 Pat O'Brien, *Is it Alright for Women to Drink Small Amounts of Alcohol in Pregnancy?*, 335 BRIT. MED. J. 856 (2007).

40 *Id.*; *see also* Leonard, *supra* note 4, at 651-57.

41 AMA, Report, *supra* note 6, at 2667.

42 *See* discussion *infra* pp. 8-12.

43 Sue Thomas, Lisa Rickert & Carol Cannon, *The Meaning, Status, and Future of Reproductive Autonomy: The Case of Alcohol Use During Pregnancy*, 15 UCLA WOMEN'S L.J. 1, 17 (2006).

organizations.[44] Since these efforts have failed to eliminate the problem, states have used the statutes in question to involve themselves in the reproductive process in an attempt to reduce the overall prevalence of FAS. Each of these statutes will be briefly detailed before their constitutionality, and the constitutionality of similar future statutes, is explored.

After failing to successfully criminally prosecute women after the birth of infants suffering the substance abuse related problems, Wisconsin turned to preventative, rather than punitive, legislation.[45] Under Wisconsin law, an expectant mother can be taken into civil custody if her "habitual lack of self-control in the use of alcoholic beverages" poses a risk to her unborn child.[46] This statute does not prevent or criminalize drinking of alcohol by women who may become or might be pregnant. It only restricts drinking by those who are aware of their pregnancy, and it also does not allow for the civil confinement of an expectant mother unless she refuses or has refused to participate in services to aid with her problems of abuse.[47] She, therefore, must have been made aware of the state's concerns and offered a way to handle the abuse, such as entering a voluntary treatment program, before being taken into custody. This leaves civil confinement as a last resort after the pregnant woman has been offered a chance to freely participate in rehabilitation programs. Women violating this statute can be confined to a hospital, licensed community-based residential

---

44 *Id.*

45 *See* State v. Deborah J.Z., 596 N.W.2d 490, 495-96 (Wis. Ct. App. 1999) (holding that an unborn child was not a "human being" for purposes of homicide and reckless injury statutes); WIS. STAT. ANN. § 48.193(1)(c) (West 2008).

46 WIS. STAT. ANN. § 48.193(1)(c) (West 2008).

47 *Id.* The statute uses the terminology of expectant mother rather than pregnant person. This would indicate that only those who are aware of their future status as a mother are subject to WIS. STAT. ANN. § 48.193. Similarly, the statute requires that she must be offered the option of entering voluntary treatment before the statute applies. Since the recommendation of voluntary treatment would be made due to her pregnancy, she would necessarily be aware of her pregnancy.

facility or the home of a family member.[48] An intake worker is responsible for determining placement and may choose to release the expectant mother after medical advice and counseling.[49] In the cases in which the confined individual is not released by an intake worker, a hearing is guaranteed within the next forty eight hours of the work week.[50] Judges hearing these cases may release the expectant mother, restrict her associations and movement, refer her to a supervisory agency, or continue her confinement until the risk has abated.[51]

South Dakota, whose legislators emphasize that approximately one quarter of the newborns born on the state's Native American reservations suffer from fetal alcohol syndrome,[52] has enacted legislation that allows for family members, physicians, or other concerned adults to petition the court to civilly detain any pregnant female who is abusing harmful substances.[53] The petitioner is appointed an attorney who is responsible for submitting a written report to the circuit court within five days.[54] If the court decides that a claim has merit, the pregnant woman may be held against her will for up to ninety days in either a treatment program, hospital, or relative's home.[55] The holding institution may apply for a court order to have the commitment extended if the woman has not given birth and still poses a risk to the fetus at the end of ninety days.[56] It should be noted that this statute applies not only to

---

[48] § 48.207(1m).

[49] § 48.203 (3)-(6).

[50] § 48.213(1) (West 2008).

[51] § 48.213(3).

[52] Victoria J. Swenson & Cheryl Crabbe, *Pregnant Substance Abusers: A Problem That Won't Go Away*, 25 ST. MARY'S L.J. 623, 627-28 (1994).

[53] S.D. CODIFIED LAWS § 34-20A-70 (2004).

[54] *Id.*

[55] § 34-20A-81.

[56] §§ 34-20A-70, 34-20A-82 (2004).

pregnant women but also to those that have harmed or threatened to harm themselves.[57]

Oklahoma's legislature expressly notes that public health care efforts such as improving prenatal medical services and offering substance abuse treatment programs are preferable to more intrusive policies aimed at preventing prenatal alcohol exposure.[58] They, however, also argue that both ethical and financial concerns warrant the state's intervention in the reproductive process.[59] District attorneys are allowed to create multidisciplinary teams that are charged with determining the appropriate course of action in each case, which may include petitioning for involuntary commitment.[60] Oklahoma law in many ways mirrors that of South Dakota. The pregnant woman may be detained before the hearing,[61] the court is allowed to choose a variety of confinement alternatives,[62] and the continuation of the commitment is reevaluated every three months.[63] In another attempt to combat prenatal exposure to harmful substances, Oklahoma's legislature has required the Department of Human Services to create and maintain an up-to-date list of infants born with symptoms of prenatal alcohol exposure.[64] This record includes demographic information, the results of any medical evaluations, and treatment efforts designed to serve as a tool for research.[65]

While other states have been unsuccessful in their attempts to do so, South Carolina has successfully used criminal

---

[57] § 34-20A-70.

[58] OKLA. STAT. ANN. tit. 63, § 1-546.1 (West 2004).

[59] *Id.*

[60] OKLA. STAT. ANN. tit. 63, § 1-546.5.

[61] OKLA. STAT. ANN. tit. 43A, § 5-413(A) (West 2001).

[62] § 5-416(B).

[63] § 5-420(A).

[64] OKLA. STAT. ANN. tit. 63, § 1-550.3(A).

[65] § 1-550.3(A), (B).

charges against pregnant women who abuse substances.[66] One plausible goal of these prosecutions is to discourage similarly situated women from engaging in the same behavior. Rather than using legislation directed solely at the act of drinking while pregnant, South Carolina prosecutes women who abuse substances while pregnant under its child abuse standards.[67] Beginning with *Whitner v. State*, the state has charged convicted women who have used substances by claiming that a fetus fits the criteria of a child under the age of eleven as described in child abuse and neglect statutes.[68] The court noted that since a fetus was defined as a person for civil actions[69] and, more importantly, homicide statutes[70] once it reached the third trimester, there was no reason for it not to be classified as a person for abuse and neglect standards.[71] The United States Supreme Court has refused to hear *Whitner*[72] and South Carolina's policies remain in effect.

Many states have chosen not to enact legislation similar to that of Oklahoma, South Dakota, and Wisconsin due to concerns that laws which forbid the use of alcohol by pregnant women are very difficult to enforce.[73] Alcohol's role in society

---

[66] Rommel P. Cruz, *The Greatest Source of Wealth: Washington State's Response to Prenatal Substance Abuse*, 41 GONZ. L. REV. 1, 2 (2005).

[67] *Id.* at 8-9; S.C. CODE ANN. § 20-7-50 (1985).

[68] 492 S.E.2d 777, 779-81 (S.C. 1997).

[69] *Id.* at 779 (noting that "South Carolina has long recognized that viable fetuses are persons holding certain legal rights and privileges" (citing Hall v. Murphy, 113 S.E.2d 790 (S.C. 1960))).

[70] *Id.* at 780 (citing State v. Horne, 319 S.E.2d 703 (S.C. 1984)).

[71] *Id.* at 780 ("Indeed, it would be absurd to recognize the viable fetus as a person for purposes of homicide laws and wrongful death statutes but not for purposes of statutes proscribing child abuse.").

[72] Whitner v. South Carolina, 523 U.S. 1145 (1998).

[73] Michelle D. Wilkins, Comment, *Solving the Problem of Prenatal Substance Abuse: An Analysis of Punitive and Rehabilitative Approaches*, 39 EMORY L.J. 1401, 1427-28 (1990).

and the legitimacy of the alcohol industry can hinder enforcement efforts and it is also difficult to prove when a woman first becomes aware of her pregnancy.[74] In other areas, it seems that judges and prosecutors are attempting to create their own policies. Some pregnant women face jail time for offenses that normally result in probation when prosecutors are able to convince judges, or when judges decide on their own, that incarceration will prevent the women from using substances while pregnant.[75] While these altered penalties may prevent some expectant mothers from further damaging their fetus, the creation of maternal substance use policies seems to be a more appropriate responsibility for the legislative branches rather than for the courts.[76]

Some states that do not allow for either the confinement of pregnant women who abuse alcohol or the criminal prosecution of women who give birth to FAS-affected children have taken other actions based on child abuse statutes. Florida, Illinois, Indiana, Nevada, North Dakota, Oklahoma, Rhode Island, South Carolina, South Dakota, Texas, Utah, Virginia, and Wisconsin all consider exposing a fetus to harmful substances to be a form of either abuse or neglect.[77] The federal government also has enacted a similar policy, requiring health care providers who become aware of children showing signs of prenatal exposure to harmful substances to report the cases to child

---

74 *Id.* at 1428.

75 United States v. Vaughn, 117 Daily Wash. L. Rep. 441 (D.C. Super. Ct. 1989). Vaughn received a 6 month jail sentence for a minor offense (check forgery) that typically results in probation so that she would be forced to remain in a controlled environment where future substance abuse and its harmful effects on her fetus could be prevented because she had allegedly abused substances while pregnant prior to the conviction. *Id.*

76 Alma Tolliver, Case Note, *Child Abuse Statute Expanded to Protect the Viable Fetus: The Abusive Effects of South Carolina's Interpretation of the Word "Child,"* 24 S. ILL. U. L.J. 383, 387-89 (2000).

77 Thomas, *supra* note 43, at 26 n.122.

protective services.[78] The following analysis is limited to those statutes that include penalties for maternal alcohol use and excludes those that only legislate against illicit substances[79] or are focused on requiring health care providers to report cases of substance abused children after birth.[80] While the statutes of other states that focus on maternal alcohol abuse[81] are not directly discussed, their similarity to those of Wisconsin, South Dakota, or South Carolina suggests that their legality will also be similar.

IV. DEBUNKING THE ARGUMENTS AGAINST RESTRICTING ALCOHOL USE IN PREGNANCY

Though the statutes enacted in Wisconsin, South Dakota, and Oklahoma are driven by noble goals and legitimate government interests, some challenge that these statutes violate the constitutional rights of pregnant women.[82] These opponents criticize these statutes and similar policies on a number of grounds, claiming that statutes restricting alcohol use during pregnancy violate pregnant women's right to privacy and also violate the Equal Protection clause by unconstitutionally discriminating on the basis of either gender, pregnancy status, or socioeconomic status. The following analysis will explore each of these four claims that critics present and provide evidence that the statutes in question do not violate these rights and are indeed constitutional.

---

[78] Ellen M. Weber, *Child Welfare Interventions for Drug-Dependent Pregnant Women: Limitations of a Non-Public Health Response*, 75 UMKC L. REV. 789, 792 (2007).

[79] *E.g.*, 705 ILL. COMP. STAT ANN. STAT. 405/2-3(1)(c) (West 2007).

[80] *E.g.*, UTAH CODE ANN. § 62A-4a-404 (West 2004).

[81] *See, e.g.*, N.D. CENT. CODE § 25-03.1-02 (2009); MINN. STAT. ANN. § 253B.02(2) (West 2007).

[82] See Lynn M. Paltrow, *Pregnancy, Domestic Violence, and the Law: The Interface of Medicine, Public Health, and the Law: Governmental Responses to Pregnant Women Who Use Alcohol or Other Drugs*, 8 DEPAUL J. HEALTH CARE L. 461, 465-67 (2005) [hereinafter Paltrow, Governmental Responses].

A. ADDRESSING PRIVACY CONCERNS: STATUTES DISALLOWING ALCOHOL USE BY PREGNANT WOMEN DO NOT VIOLATE AN INDIVIDUAL'S RIGHT TO PRIVACY.

Opponents of statutes that allow for either criminal prosecution or civil confinement of pregnant women who endanger their unborn children by drinking alcohol claim that these statutes unconstitutionally restrict the privacy rights of women without sufficient justification.[83] These arguments hinge on the right of an individual to be free from governmental control over decisions regarding his or her body. The right to privacy is granted to citizens through a variety of Amendments, but this right is not absolute. In some cases, the needs and goals of states may justify legislation that limits, or even invades, individual privacy rights. These statutes must be warranted by a government interest, linked to the goal of that interest, and must reach the goal by the least intrusive means possible. The degree to which each one of these criteria must be met is dependent on the act being regulated. Before depicting how current legislation passes the appropriate tests, it is important to examine previous cases that have defined the right to privacy, the rights of a pregnant female, and the rights of a fetus, which are all central to the statutes' constitutionality.

The United States Supreme Court has guaranteed to women the right to make decisions regarding whether or not to have a child whether married[84] or unmarried.[85] This is considered a fundamental right, and legislation that interferes with that right must pass the test of strict scrutiny.[86] However, the legislation at issue in this article does not control the decision to have children, but only certain behavior that is allowed during the process of having children, so it will not face this strict test.

---

83 *Id.*

84 *See* Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965).

85 *See* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

86 *Griswold*, 381 U.S. at 485.

In 1973, the United States Supreme Court ruled in the pivotal case, *Roe v. Wade*, that a woman had the fundamental right to choose whether or not to continue an unwanted pregnancy.[87] While this may initially appear to bolster the arguments against the statutes in question, it should be noted that the Court only ruled that a woman's fundamental rights included the decision whether or not to have an abortion, and it did not speak to other issues that occur during the pregnancy. The importance of the ruling for the current argument comes from the Court's analysis of the third trimester. The Court found that the state does have a compelling interest in the health and well-being of a potential citizen[88] which is the same interest pursued by states that enact legislation prohibiting prenatal alcohol use. Many states have used *Roe* to guide their decisions on when they can act against harm to an unborn child.[89] The Court later withdrew the trimester system,[90] but gave the states the right to establish rules and regulations regarding abortions as long as they did not place an "undue burden" on women seeking abortions.[91] States gained the ability to define when a fetus becomes viable and deserving of the state's protection.

Some states initially attempted to charge pregnant women who exposed their unborn children to drugs with delivering controlled substances to a minor.[92] The states argued in these cases that the women passed these controlled substances to a minor through the umbilical cord shortly after their use.[93] These cases were either unsuccessful or overturned,

---

[87] 410 U.S. 113 (1973).

[88] *Id.* at 162.

[89] *See, e.g., In re* Ruiz, 27 Ohio Misc. 2d 31, 34 (Com. Pl. 1986); *In re* Smith, 492 N.Y.S.2d 331, 334-35 (N.Y. Fam. Ct. 1985).

[90] Webster v. Reprod. Health Servs., 492 U.S. 490, 517-20 (1989).

[91] Planned Parenthood v. Casey, 505 U.S. 833, 876-79 (1992).

[92] *See, e.g.,* Johnson v. State, 602 So. 2d 1288, 1290 (Fla. 1992).

[93] *Id.*

and the Florida Supreme Court suggested that legislators should drive policy rather than litigators.[94] States had traditionally been reluctant to charge women with abuse or neglect of an unborn child until the 1980s. Even those women who were convicted during the 1980s had their sentences overturned because courts doubted that a viable fetus fell under the definition of a child or person.[95] In these cases, the courts suggested that if harm towards a fetus was going to prosecutable, then it must be defined and legislated against rather than being creatively worked into current standards as many prosecutors had tried.[96] That, however, changed in 1996. The Supreme Court of South Carolina upheld the sentence of Cornelia Whitner who had been convicted of the abuse and neglect of her child due to the effects of her substance abuse while pregnant.[97] The court noted that since a viable fetus was considered a person for homicide statutes[98] and wrongful death

---

[94] *Id.* at 1294. Johnson was initially convicted of a first degree felony and sentenced to fifteen years probation for delivering cocaine to each of her children through the umbilical cord; however, her conviction was later overturned. *Id.* at 1294.

[95] *See, e.g.*, Reyes v. Superior Court of San Bernardino County, 141 Cal. Rptr. 912, 915 (Cal. Ct. App. 1977). Reyes was warned by a nurse about the dangers of not seeking treatment for her heroin addiction while pregnant. She ignored the advice, gave birth to addicted twins, and was charged with two felony counts of endangering a child. Her conviction was overturned due to the court's decision that the legislature did not specifically mention fetuses as protected by child endangerment statutes. *Id.* at 912, 915. *See also* People v. Stewart, No. M508197 S.D. Mun. Ct. (Stewart was charged under a statute intended to require both parents to financially support their children, but written broadly enough to encompass failure to provide adequate health care.).

[96] *See* Kary Moss, *Substance Abuse During Pregnancy*, 13 HARV. WOMEN'S L.J. 278, 279-80 (1990).

[97] Whitner v. State, 492 S.E.2d 777, 786 (S.C. 1997).

[98] *Id.* at 780. *See also* State v. Horne, 319 S.E.2d 703, 704 (S.C. 1984); Commonwealth v. Cass, 467 N.E.2d 1324 (Mass. 1984) (indicating, in a vehicular homicide case, that a fetus could be the victim of a criminal act).

litigation[99] it should equally be considered a person for statutes that prevent lesser harms.[100] Though the United States Supreme Court refused to hear *Whitner*,[101] the case sets the foundation for other states to begin to legislate against acts that can harm a fetus as long as they define a viable fetus as a person that can be the victim of any other crime. However, most states seeking to criminalize fetal endangerment through substance abuse have created or are attempting to create new legislation specific to fetal abuse rather than following South Carolina's example.[102] South Carolina has since charged a number of women who use alcohol during pregnancy with child abuse[103] and has even convicted women of homicide if their substance abuse leads to the death of the child before birth.[104]

Those who oppose statutes disallowing pregnant women to drink claim that these statutes interfere with a fundamental right and should face the strict scrutiny test. However, this is an attempt to mislead the courts by proposing that a woman's right to make decisions about whether to become pregnant or regarding her pregnancy is the issue. However, the statutes of interest do not legislate against a woman's right to become pregnant or to terminate her pregnancy. The statutes merely regulate alcohol use, which is not a fundamental right. Therefore, the legislation is only required to pass the rational basis test. This test requires that the legislation be focused on a legitimate government interest and that the legislation has a reasonable or rational relationship with the goal.

As discussed previously, women who drink while pregnant expose their unborn children to a variety of health

---

[99] *Whitner*, 492 S.E.2d at 782-83. *See also* Hall v. Murphy, 113 S.E.2d 790, 793 (S.C. 1960); Mone v. Greyhound Lines Inc., 331 N.E.2d 916, 920 (Mass. 1975); Fowler v. Woodward, 138 S.E.2d 42, 44 (S.C. 1964).

[100] Whitner v. State, 492 S.E.2d at 780.

[101] Whitner v. South Carolina, 523 U.S. 1145 (1998).

[102] Drago, *supra* note 27, at 177.

[103] *See* Paltrow, *supra* note 82, at 488.

[104] State v. McKnight, 576 S.E.2d 168, 179 (S.C. 2003).

problems and deformities. The problems, such as FASD/FAS, ARND, and FAE, significantly impair a child's ability to function in society and cost the government millions of dollars.[105] One of the state's most important objectives is to maintain the health of its citizens and prevent unnecessary suffering. The Supreme Court has acknowledged that states have a more than legitimate interest in the health of a viable fetus[106] and individual states have the right to define when that right begins.[107] Since a state may define a viable fetus as a person and grant that fetus rights, its health is a legitimate government interest and thus the statutes at issue pass the first part of the rational basis test.

States such as South Carolina, who criminally prosecute mothers who consume alcohol while pregnant, likely do so in an attempt to deter other women who are pregnant from risking harm to their fetuses in addition to punishing the offender. One of the major goals of punishment, generally, is deterrence—not only deterrence of the individual arrested, but also of others who may commit a similar offense. The threat of imprisonment is reasonably related to the prevention of forbidden actions, such as drinking while pregnant, which in turn is directly related to reducing the prevalence of FASD and other similar conditions.

Statutes that allow for civil confinement of individuals who drink while pregnant also pass this part of the rational basis test, but in a different way. Being confined and prevented from having access to alcohol keeps a woman who is prone to abusing substances from doing any further harm to her fetus. This incapacitates her, because her ability to do additional harm is restricted. Though the cessation of drinking does not reverse the damage, it does directly prevent additional damage to the fetus, which is the state's legitimate interest.

The statutes at issue pass both prongs of the rational basis test for interfering with a non-fundamental privacy right—the right to consume alcohol while pregnant. The state does have a legitimate interest in preventing dangers to the health of

---

[105] *See* Kellerman, *supra* note 30.

[106] Roe v. Wade, 410 U.S. 113, 150 (1973).

[107] Planned Parenthood v. Casey, 505 U.S. 833, 843 (1992).

unborn children, and the legislation is more than reasonably related to that goal. In addition, these statutes restrict privacy rights in the least intrusive way that will result in the desired goal. Though less intrusive alternatives exist, such as optional counseling programs, studies have found that FAS continues to be a problem.[108] Thus, these less intrusive alternative programs are likely ineffective at solving the problem of drinking while pregnant.

B. EQUAL PROTECTION CONCERNS

In order to dismiss the concerns that Wisconsin law, South Dakota law, or South Carolina's enforcement of child abuse and neglect statutes violate the Equal Protection clause of the Fourteenth Amendment, it is necessary to individually examine and disprove each of the claims that opponents raise against those statutes. As will be demonstrated, these statutes and policies do not violate Equal Protection standards by discriminating on the basis of gender, pregnancy status, race, or socioeconomic status.

i. THE GENDER ARGUMENT: STATUTES DISALLOWING ALCOHOL USE BY PREGNANT WOMEN DO NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT BY UNNECESSARILY DISCRIMINATING AGAINST WOMEN ON THE BASIS OF THEIR GENDER.

Opponents of statutes that criminalize the use of alcohol by pregnant women or that allow for civil confinement of substance abusing expectant mothers claim that these laws violate the Fourteenth Amendment's guarantee of Equal Protection for both genders. The Fourteenth Amendment prevents the government from establishing separate categories of people under the law without a sound governmental interest, but it does not prevent the government from creating legislation that separates individuals into non-discriminatory groups for a

---

[108] Robert Whereatt & Gordon Slovut, *Drastic Steps Aim to Fight Alcohol Use in Pregnancy*, STAR TRIB. (Minneapolis, Minn.), Feb. 6, 1998, at 1B.

sound governmental interest that is connected to the law.[109] The requisite level of importance of the government's interest and the degree of connection between that interest and the law required for the legislation to be constitutional both vary according to the type of groupings that the law creates. The appropriate test for gender discrimination legislation is intermediate scrutiny.[110] However, in *Geduldig v. Aiello*, the Supreme Court ruled that legislation applying to pregnancy should not be subject to the same standards as those in which gender alone is the key issue.[111]

In *Geduldig* the Supreme Court affirmed that "[w]hile it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification."[112] The Court explained that legislation may be unconstitutional if pregnancy and related conditions are "mere pretexts" to create discrimination against one gender, but it would not otherwise create an issue of gender discrimination.[113] This remains true even if the legislation is not gender neutral as long as the issue is a condition specific to that gender rather than the gender itself.[114] Legislation legitimately linked to pregnancy status rather than the female gender's unique ability to become pregnant creates the two groups—pregnant and non-pregnant persons—rather than discriminating between males and females.[115] Therefore, even though capable, this legislation is not required to pass the test of intermediate scrutiny required for gender discrimination, but it still must meet the applicable constitutional standard for the differing treatment of pregnant and non-pregnant persons.

---

[109] *See* Craig v. Boren, 429 U.S. 190 (1976).

[110] *Id.* at 197; Hutchins v. State, 188 F.3d 531, 541 (D.C. Cir. 1999).

[111] Geduldig v. Aiello, 417 U.S. 484, 494-97 (1974).

[112] *Id.* at 496 n.20.

[113] *Id.*

[114] *Id.*

[115] Margaret P. Spencer, *Prosecutorial Immunity: The Response to Prenatal Drug Use*, 25 CONN. L. REV. 393, 413 (1993).

Opponents of statutes that criminalize the use of substances while pregnant may argue that the verdict of *UAW v. Johnson Controls, Inc.* returned issues linked to pregnancy status to a form of gender discrimination.[116] However, those arguments are highly flawed due to lack of correlation between the current issue and the one decided in *UAW*. First, the ruling in *UAW* applies only to discrimination in the workplace[117] and has since been hypothetically applied to other settings. UAW and its co-defendants established a policy that barred all women from working in factories where they were exposed to lead unless they provided medical proof that they were unable to have children.[118] The Court ruled that this was a form of gender discrimination in the workplace and that gender was the impermissible classification at issue.[119] The decision was based largely on factors not related to the current issue of alcohol exposure to a fetus. The Court identified that a key factor in this case was that both genders of UAW workers could experience reproductive damage by being exposed to lead and this damage could affect a potential child from either parent's preconception exposure.[120] In contrast, a male's alcohol consumption after conception cannot result in FAS as a female's drinking might. Current legislation that restricts alcohol use for women more than it does for men only disallows that use for women after they become aware of their pregnancy, rather than banning all fertile females from drinking. Women and men can legally drink to the same degree until conception. UAW's policies discriminated against women on the basis of their ability to become pregnant, not on their current pregnancy status.[121] In *UAW*, the basis of discrimination was the capacity to become

---

[116] *See* UAW v. Johnson Controls, Inc., 499 U.S. 187 (1991).

[117] *Id.* at 210-11.

[118] *Id.* at 196.

[119] *Id.* at 197-99.

[120] *Id.* at 198.

[121] *Id.*

pregnant, not pregnancy status as is involved in *Geduldig* and the present issue of prenatal alcohol consumption.

ii. THE PREGNANCY STATUS ARGUMENT: STATUTES DISALLOWING ALCOHOL USE BY PREGNANT WOMEN DO NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT BY UNNECESSARILY DISCRIMINATING AGAINST INDIVIDUALS ON THE BASIS OF THEIR PREGNANCY STATUS.

The statutes in question do create two separate groups under the law, but these statutes are constitutional due to the specificity and importance of the government's goal. These statutes divide citizens on the basis of their pregnancy status, forming two groups: of pregnant women and persons who are not pregnant. As discussed previously, this classification does not place the same burden on the government as would a claim of gender discrimination.[122] Therefore, the legislation at issue is only required to pass the rational basis test, meaning that 1) it must be shown to be based on a legitimate government interest and 2) it must have a reasonable or rational relationship to that state interest.[123]

Previous sections have detailed that an expectant's mothers use of alcohol can have a number of adverse effects on a fetus. The array of disorders that this alcohol use can lead to include facial malformations, attention deficient disorder, hyperactivity, mental retardation, eye impairment, learning disorders, and motor dysfunctions.[124] These symptoms of fetal alcohol syndrome occur in up to 50,000 newborns per year.[125] This represents a significant portion of the country's newborn

---

[122] Geduldig v. Aiello, 417 U.S. 484, 502-03 (1974).

[123] Michelle D. Mills, Comment, *Fetal Abuse Prosecutions: The Triumph of Reaction Over Reason*, 47 DEPAUL L. REV. 989, 1028-29 (1998).

[124] Jennifer D. Thomas & Edward P. Riley, *Fetal Alcohol Syndrome: Does Alcohol Withdrawal Play a Role,?* 22 ALCOHOL HEALTH & RES. WORLD 47, 48 (1998).

[125] Drago, *supra* note 27, at 164.

population that may never be able to fully integrate into society and the workforce.

One of the government's greatest concerns should be the health and welfare of its citizens, and one of its greatest duties is to protect those who cannot protect themselves. There is no question that the public health concerns stemming from prenatal alcohol abuse satisfy the legitimate state interest requirement of the rational basis test. Further, the government's legitimate interest in maintaining a capable workforce and healthy economy are also served by this legislation. Individuals with FAS may require a great deal of care and not be able to contribute to society.

Opponents to these statutes challenge that the government's legitimate interest should only be in the health and autonomy of its current citizens rather than future citizens. This is untrue in the case of a viable fetus. The Supreme Court has held that the government has the right to legislate on behalf of a fetus and that the health of a viable fetus represents a compelling government interest.[126] Later decisions even gave states the authority to define the rights of a fetus so long as they did not place "undue burden" on the expectant mother.[127] Even opponents of this legislation are unlikely to argue that an inability to drink alcohol while pregnant represents an undue burden. While the government's ability to control a person's decisions prior to conception is limited,[128] it does have a legitimate interest in preserving the health of viable fetuses as defined by the states.

While not all pregnant women who consume alcohol deliver infants with features linked to FAS, the symptoms discussed earlier have been linked directly to prenatal alcohol use. The state's goal in this legislation is to positively impact public health by reducing the incidence and prevalence of fetal alcohol symptoms. The statutes in question are directly related to this goal, because their methods deter pregnant women from

---

[126] Roe v. Wade, 410 U.S. 113, 163 (1973).

[127] Planned Parenthood v. Casey, 505 U.S. 833, 874 (1992).

[128] Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965).

drinking and prevent them from continued drinking if they show a "habitual lack of self control."[129] The connection between the legislation and its goal passes and exceeds the reasonable or rational relationship requirement for the rational basis test. Therefore, even though these statutes create separate groups under the law of pregnant and non-pregnant persons, this distinction is constitutional due to the government's legitimate interest and the reasonable relationship between the legislation and that interest.

A related argument made by those who oppose legislation directed at preventing prenatal alcohol exposure is that the legislation allows for women to be confined or prosecuted on the basis of their status as a pregnant substance abuser. The Court has ruled in *Robinson v. California* that individuals cannot be prosecuted or discriminated against based on their status as a substance abuser.[130] It follows logically that a woman cannot be prosecuted for her status as a pregnant substance abuser. Fortunately, the legislation in question does not discriminate based on either of these statuses. The legislation is focused on actions (drinking while pregnant) rather than status (an alcoholic who is pregnant). Actions, such as the use of substances, associated with a status are not immune from prosecution.[131] In *Robinson*, the Court ruled that the Eighth Amendment's guarantee against cruel and unusual punishment was violated when an individual was prosecuted for his status as an abuser,[132] but in *Powell*, the Court noted that this logic should not be extended to preventing prosecution for acts associated with the status.[133] The legislation does not allow for confinement of a person because she is a pregnant alcoholic, but rather because she commits the act of drinking while pregnant.

---

[129] WIS. STAT. ANN. § 48.193 (West 2008).

[130] 370 U.S. 660, 667 (1962).

[131] *See* Powell v. Texas, 392 U.S. 514, 536-37 (1968).

[132] *Robinson*, 370 U.S. at 665-67.

[133] *Powell*, 392 U.S. at 532-36. Powell was responsible for violating policies restricting public intoxication, but could not have been prosecuted due to being an alcoholic. *Id.*

iii The Race and Socioeconomic Status Argument: Statutes disallowing alcohol use by pregnant women do not violate the Equal Protection Clause of the Fourteenth Amendment by unnecessarily discriminating against minority women on the basis of their race or against lower class women on the basis of their income.

Opponents of legislation that criminalizes or allows civil commitment for alcohol abuse while pregnant claim that these statutes violate the Equal Protection Clause not only by distinguishing between pregnant and non-pregnant persons, but by distinguishing between pregnant women of different races and different socioeconomic classes.[134] This opposition claims that pregnant women who are minorities or of lower economic status are more likely to use harmful substances, to be tested for harmful substances, and to be penalized for their substance abuse.[135] While these claims may have merit for statutes that include illegal drugs such as cocaine or heroin, they are completely unfounded for legislation specific to alcohol. Each of the three aforementioned claims can easily be dispelled on both the issues of race and socioeconomic status.

The first apparent concern is that minority women are more likely to use alcohol than Caucasian women, and that women of lower socioeconomic status use alcohol more than those in the middle and upper class. This is untrue in both instances. The National Institute on Alcohol Abuse and Alcoholism of the National Institutes of Health reports in its National Household Survey on Drug Abuse that alcohol use among both African Americans and Hispanics between eighteen and thirty-four years-old is actually less than that of Caucasians of the same age.[136] In no year between 1994 and 2002 was the

---

[134] *See* Lynn M. Paltrow, *Pregnant Drug Users, Fetal Persons, and the Threat to* Roe v. Wade, 62 ALB. L. REV. 999, 1033-35 (1999).

[135] *Id.*

[136] Nat'l Inst. on Alcohol Abuse & Alcoholism, Percent Reporting Alcohol Use in the Past Year by Age Group and Demographic Characteristics, 1994-2002,

percentage of minority respondents who reported using alcohol higher than that of Caucasians.[137] In more recent studies, Caucasian women have been shown to still be more likely to drink alcohol while pregnant.[138] Studies have also shown that there is near equal use of alcohol among those who are employed full-time, part-time, or unemployed in the eighteen to thirty-five year-old age range.[139] While in some years, alcohol use is higher in the unemployed group than the part-time group, it is actually lower in most cases, and appears to be consistently lower than the alcohol use of the upper class.[140] Other studies have indicated that alcohol use in females does not vary by socioeconomic status.[141] Since alcohol use does not vary by either type of employment or socioeconomic status, the decision to legislate against alcohol use during pregnancy is not intended to discriminate against those with limited financial means.

The claim that minorities and women in lower classes are more likely to be tested for illegal substance abuse when seeking health care may be true, and arguments that this creates the problem of deterring pregnant women from seeking medical care may be correct.[142] However, this is a concern for illicit substance abuse and alcohol use. There are accepted medical tests that can show that a person recently used cocaine or heroin even some time after the intoxicating effects have passed.[143]

---

http://www.niaaa.nih.gov/Resources/DatabaseResources/QuickFacts/AlcoholConsumption/dkpat3.htm (last visited Feb 9, 2010).

[137] *Id.*

[138] SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., *supra* note 37.

[139] *Id.* at 35.

[140] *Id.* at 37.

[141] Ira J. Chasnoff, Harvey J. Landress & Mark E. Barrett, *The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 322 NEW ENG. J. MED. 1202, 1204 (1990).

[142] *See* Michelle Oberman, *Sex, Drugs, Pregnancy, and the Law: Rethinking the Problems of Pregnant Women Who Use Drugs*, 43 HASTINGS L.J. 505, 540-41 (1992).

[143] *Id.*

However, there is currently no medical test use to determine if a woman has consumed alcohol during her pregnancy unless she is still under the influence when she visits the physician. Similarly, there is no biomarker that a laboratory can link to a fetus's exposure to alcohol.[144] While research at three hospitals is attempting to discover a specific marker or test that identifies alcohol use while pregnant, no such test has been accepted.[145] Women under Wisconsin law are confined only after testimony or police observation confirming continued alcohol use, and not based on medical tests.[146] States that prosecute offenders criminally would use the child's symptoms of FASD after birth rather than medical tests during pregnancy for the physical proof of the harm.[147] These symptoms are equally likely to be noticed in babies in all classes and races. Women of all races and classes are able to receive medical care equally free from testing and identification so long as they are not currently under the influence of alcohol when they visit their physician. The current lack of testing procedures defeats the argument that these statutes are more likely to test or identify minority and lower class alcohol abusers. This claim is also inappropriate due to the fact that tests for substances are performed by physicians and not by the state, and that such a challenge is only appropriate if the state determines who gets tested.[148]

Finally, the claim that females of minority race and low economic status are more discriminated against in the process

---

[144] Center for Disease Control and Prevention, Identifying Alcohol-Exposed Pregnancies Through Biomarkers, http://www.cdc.gov/ncbddd/fasd/pastactivities-identifying.html (last visited Feb. 10, 2010).

[145] *Id.*

[146] WIS. STAT. ANN. § 48.193(1m)(d).

[147] *See* CDC *supra* note 144. No test exists for repeat in utero alcohol exposure; thus, FAS risk before birth cannot accurately be evaluated. Since pre-birth evidence of injuries is nonexistent, evidence of the harm following birth, therefore, serves as the only available proof of abuse or neglect. This should not deter prenatal care in those states utilizing existent child abuse statutes.

[148] *See* Blum v. Yaretsky, 457 U.S. 991, 1005 (1982).

of arrest is equally unjustified. The concern of opponents is not in the way that the statutes are facially written, but in how they are applied and enforced.[149] The opponents fear that these statutes will be utilized against offenders in the lower class or minority women more often than against Caucasian women of higher socioeconomic status.[150] This concern could be valid if opponents were able to show that the statutes are being applied disproportionately. However, the statutes have been utilized too rarely to depict a pattern of prejudice.[151] There is no evidence that the statutes have been enforced discriminately at this point[152] and there is no reason to believe they will be enforced more discriminatorily than any other law. For the claim that these statutes are being applied discriminately to survive, statistical proof must exist, but opponents have been unable to offer this proof or evidence that it has occurred.

V. CONCLUSION

Fetal Alcohol Syndrome should be a major concern not only to legislators and those in the medical field, but to all those citizens residing in states with a high incidence rate. The health of its citizens is one of a state's most pressing interests and those states that have been proactive in attempts to reduce birth defects should be applauded for their efforts. Not only do the statutes at issue give the states another means of reducing the problem, but they do so in a legal and minimally intrusive way. The current statutes in South Dakota, South Carolina, and Wisconsin that are used to deter and prevent women from drinking violate neither the Equal Protection Clause of the

---

[149] *See* Carol Gosain, Note, *Protective Custody for Fetuses: A Solution to the Problem of Maternal Drug Use? Casenote on* Wisconsin ex. rel Angela v. Kruzicki, 5 GEO. MASON L. REV. 799, 835-36 (1997).

[150] Carolyn Coffey, Note, Whitner v. State*: Aberrational Judicial Response or Wave of the Future for Maternal Substance Abuse Cases?*, 14 J. CONTEMP. HEALTH L. & POL'Y 211, 246 (1997).

[151] *See* Linder, *supra* note 19, at 896.

[152] Drago, *supra* note 27, at 181.

Fourteenth Amendment nor an individual's right to privacy. These states, and all others, may make efforts to prevent pregnant women from drinking in an attempt to reduce the occurrence of Fetal Alcohol Syndrome without violating the constitutional rights of their citizens.

FROM BRISTOL, TO HOLLYWOOD, TO A LAND FAR, FAR AWAY: CONSIDERING THE IMMIGRATION CONSEQUENCES OF STATUTORY RAPE

Michael S. Vastine[1]

A presidential race shines a spotlight on a teenage pregnancy.[2] A teen idol takes a hiatus from her hit television program as she becomes a teen mother.[3] Tabloids fill with confirmed and unconfirmed romances of young celebrities and their (sometimes only slightly) older paramours. At the height of steroid allegations against major league baseball players, an all-star pitcher faces public allegations over a long-running

---

[1] Michael S. Vastine is Assistant Professor and Director of the Immigration Clinic at St. Thomas University School of Law.

[2] *See* John Bresnahan, *GOP Establishment Wrestles with Bristol Palin Pregnancy*, Sept. 1, 2008, http://www.cbsnews.com/stories/2008/09/01/politics/politico/thecrypt/main4405099.shtml.

[3] *Jamie Lynn Spears Pregnancy Raises Legal Questions*, http://www.cnn.com/2007/SHOWBIZ/TV/12/19/spears.statutory.rape/ (last visited Jan. 21, 2010). In Spears' home state of Louisiana, it is a misdemeanor for someone aged seventeen to nineteen to have consensual sex with someone age fifteen to seventeen if the difference between their ages is more than two years. In California, where she tapes her show, it is a misdemeanor to have sex with someone younger than 18 if the age difference is less than three years. If the age difference is over three years, the act is a felony. Spears was sixteen and her boyfriend was eighteen or nineteen at the time of conception, but the location of the offense is unknown. No charges have been filed.

affair with his country music star girlfriend, possibly dating back to when the singer was a child.[4]

The Homeland Security webpage and newspapers nationwide fill with details of enforcement efforts against "fugitive" sexual violators.[5] Troubling news articles about sex offender recidivism cause commentators to call for even tougher laws and enforcement.[6] Meanwhile the Miami newspaper fills with stories of registered sex offenders forced to sleep under a bridge, since zoning ordinances ban them from residing at nearly every other location in town.[7]

In addition to the criminal charges and social stigma, non-citizens with convictions for sexual offenses can be deported in several ways. The most onerous classification is as an "aggravated felon," a class that is satisfied by having a conviction

---

[4] Lester Munson, *Allegations Unlikely to See Court, But Could Trouble Clemens*, Apr. 29, 2008, http://sports.espn.go.com/mlb/columns/story?columnist=munson_lester&id=3372199. ("Roger Clemens says country singer Mindy McCready is a family friend. Others have told the New York Daily News that Clemens was involved in a decade-long affair with McCready after the two reportedly met when Clemens was a 28-year-old Boston Red Sox pitcher and she was a 15-year-old singer.").

[5] Andrew Becker & Anna Gorman, Nonviolent Crimes and Deportation; A New Study Says Most Illegal Immigrants With Criminal Records Who Are Sent Home Are Not Violent Offenders, L.A. TIMES, Apr. 15, 2009, at A20. As seen by ICE, "[p]romoting public safety is part of ICE's core mission. . . . Removing these individuals from our communities and from our country reduces a significant safety vulnerability." The counter view, from family members of a deportee removed because of an old statutory rape offense is "that was a mistake he did when he was a teenager. . . . He shouldn't be punished for that."

[6] *See* Jane Velez-Mitchell, *Commentary: Get Tougher on Sex Offenders*, Jan. 14, 2009, http://www.cnn.com/2009/CRIME/01/13/mitchell.sex.crime/index.html. The author's outrage is prompted by the story a repeat sex offender suspected of homicide while on probation.

[7] *See* Julie Brown, *Iowa Statute May Provide Answer to Bridge Sex-Offender Saga*, MIAMI HERALD, July 24, 2009, *available at* http://www.miamiherald.com/news/miami-dade/story/1155178.html.

that constitutes "sexual abuse of a minor."[8] Any such conviction after 1996 mandates deportation, and forecloses any application for relief from deportation.[9] Thus, an immigration judge cannot consider any positive equities of the immigrant or sympathetic factors relating to the conviction prior to ordering removal.[10]

On its face, this is a very reasonable scheme, one that protects our nation's children and enumerates clear consequences for sexual offenses. However, a number of factors could lead to the conclusion that by mandating deportation the present system is in fact not accomplishing its stated goals.

This paper will address the immigration consequences for violating domestic criminal statutes turning on the age of consent for sexual activity. It will subsequently look at trends in enforcement of these statutes. Next, I will address federal decisions construing the immigration consequences attaching to the state court convictions, arising at the Board of Immigration Appeals and the United States Courts of Appeals.

Finally, I hope to address whether there could be an alternate model for adjudicating immigration cases that involve statutory rape; one that could adequately account for cultural cues from the non-citizens' own experiences and possibly identify a point for marking a distinction between predatory child abusers and permissive teenagers and young adults where the only "abuse" in the sexual relationship is implied by the inability to consent.

RETHINKING AN OBVIOUS CATEGORY

Part of my motivation for exploring this topic was a recent article by Professor Nancy Morawetz, "Rethinking Drug Inadmissibility,"[11] an article that explored whether harsh and

---

[8] Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(A) (2006) [hereinafter INA].

[9] *Id.*

[10] *Id.*

[11] Nancy Morawetz, *Rethinking Drug Inadmissibility*, 50 WM. & MARY L. REV. 163 (2008).

inflexible application of the Immigration and Nationality Act (INA) was out of touch with modern society's use of controlled substances, and that the resulting impact of the hyper-morality was not, in fact, having the necessary impact on immigration.[12] Morawetz argued that banning individuals with minor drug offenses, whether resulting in convictions or not, not only limited professional immigration, but also had a destructive impact on families disproportionate to its positive value as a deterrent to drug use.[13] She further argued that in a culture where the last three Presidents of the United States have admitted to contact with illegal substances, it would be possible to amend the immigration statute to reflect contemporary cultural reality while remaining exclusive enough to screen out serious drug offenders.[14]

I believe that statutory rape similarly requires a close look to see if the deportation of offenders necessarily achieves a legitimate enforcement objective, and if not, consideration of whether the offense could be considered in a way that could be uniform nationwide, so that immigrants have equal notice and equal sanction for a criminal sexually abusive act. Also, given the variety of ways in which statutory rape may be sanctioned under the INA, each charge requires a close look to see if it is appropriate for youthful sexual crimes, considering how the immigration courts and courts of appeals have grappled with each issue. I further want to consider where the line should be drawn to achieve the desired moral objective, which is somewhere between the puritanical and the prurient. I am reluctant to accept that the current state, where youthful sex bars offenders from all forms of immigration relief, is not over-exclusive.

A recent student note in the New York Law School Law Review addressed part of what I seek to address in this article.[15]

---

[12] *Id.*

[13] *Id.* at 202-03.

[14] *Id.* at 165, 169.

[15] William J. Johnson, *When Misdemeanors are Felonies: The Aggravated Felony of Sexual Abuse of a Minor*, 52 N.Y.L. Sch. L. Rev. 419 (2007-2008).

The note is a helpful discussion of the irony of misdemeanor sexual offenses constituting "aggravated felonies" under the INA.[16] I would like to go a step further and consider whether the distinction should be made at whether the conduct is necessarily "abusive" before it can constitute the aggravated felony of "sexual abuse of a minor."[17]

Although this topic is emotionally challenging and perhaps politically unpopular, I think it is significant that a behavior that is not intentionally abusive can give rise to a series of harsh immigration consequences. At first blush it may seem obvious, or at least logical, to assume that statutory rape could be categorized as either "sexual abuse of a minor,"[18] a "crime of child abuse"[19] or "child neglect,"[20] or as a "crime involving moral turpitude."[21] I hope that a close examination of these

---

[16] *Id.* at 420. Sexual abuse of a minor need not be a felony to be an "aggravated felony" under precedent from the Board of Immigration Appeals and U.S. Courts of Appeals. *See also* INA § 101(a)(43)(A) (2005).

[17] As discussed below, in many instances courts have implied potential for violence, ergo abuse in prohibited sexual acts.

[18] INA § (a)(43)(A) (2006).

[19] INA § 237(a)(2)(E)(i) (2006). Any alien who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable. For purposes of this clause, the term "crime of domestic violence" means any crime of violence (as defined in section 16 of title 18, United States Code) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabitating with or has cohabitated with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who protected from that individual's acts under the domestic or family laws of the United States or any State, Indian tribal government, or unit of local government.

[20] *Id.*

[21] Crimes involving moral turpitude cause immigration consequences both when the non-citizen arrives (either initially or upon return from a trip abroad) and in certain circumstances, after the admission. INA § 212(a)(2)(A)(i)(I) (2006) ("[A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential

immigration offenses reveals that each of these grounds of deportability is at once a good and bad fit for the offense of statutory rape.

As a final means of introduction, I must mention the irony that in immigration removal proceedings, perhaps particularly in criminal immigrant defense work, counsel must intentionally separate the personal conduct from the legal consequence. This means that in discussing the legal problem facing the immigrant, analysis is limited to a technical exercise where the attorneys and the immigration judge are bound by the cold record of conviction.[22] Circumstances, reasoning and excuses are irrelevant if they are not reflected in the charging document, judgment, sentence or plea.[23] Recent precedent has slightly

---

elements of a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime is inadmissible."). INA § 237(a)(2)(A)(i) (2006) ("Any alien who is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 1255(j) of this title) after the date of admission, and is convicted of a crime for which a sentence of one year or longer may be imposed is deportable.").

[22] INA § 240(c)(3)(B) (2006); Taylor v. U.S., 495 U.S. 575, 600, 602 (1990). Under a well-established scheme, the immigrant is either saved or doomed based on the language of the record of conviction. They may capitalize on a well-crafted or fortunate plea that avoids an onerous deportation consequence. Alternately, their fate is sealed by a deal struck with a prosecutor. In the interest of judicial economy and finality, the immigration judge may not look behind the record of conviction to ascertain the actual facts that supported the charge and conviction. Sometimes this helps the immigrant. Other times this does not.

[23] *See Taylor*, 495 U.S. at 600. To determine whether a particular conviction is an aggravated felony, the Court first applies the "categorical" approach looking only to the statutory definition of the offense. If the statutory definition of the offense of conviction is broader than the definition of the relevant removal offense, the Court applies a "modified" categorical approach in an attempt to determine the conduct for which the defendant was actually convicted. Under the modified categorical approach, the Court looks beyond the language of the statute to a narrowly specified set of documents that are part of the record of conviction in order to determine the conduct for which the alien was convicted. *See generally* Shepard v. United States, 544 U.S. 13 (2005). For a detailed discussion of examples of the categorical and modified categorical approached to analyzing convictions to determine immigration consequences, *see* Michael Vastine, *Being Careful What You Wish For: Divisible Statutes –*

expanded the range of documents to include police reports, but these are almost always less favorable to the alien than any other document relating to the criminal case. If the immigrant has been physically present in the United States at the time of the initiation of Removal Proceedings, the Department of Homeland Security bears the burden of proving that the record of conviction mandates a finding of the immigration consequence.[24] If the immigrant is entering the country from abroad he must prove that the same conviction does not bar his entry, or at a minimum, that it does not bar a waiver of the criminal infraction that stands as an obstacle to the resumption of his life in the U.S.[25]

Until and unless statutory eligibility for relief from removal (deportation) is proven, the immigrant does not have the right to present facts or witnesses, to testify about the underlying facts of the conviction, or to offer any other personal merits or equities that he has contributed to the country during their life.

Identifying a Non-Deportable Solution to a Non-Citizen's Criminal Problem, 29 CAMPBELL L. REV. 203 (2007).

[24] *In re* Silva-Trevino, 24 I. & N. Dec. 687, 703 n. 4 (BIA 2008). *Silva-Trevino*, which happens to involve a conviction for child molestation (technically "indecency with a child" under Title 5, Section 21.11(a)(1) of the Texas Penal Code), expanded the long-established standard under *Taylor* and added a third step to the categorical and modified categorical analysis as follows: To determine whether a conviction is for a crime involving moral turpitude, immigration judges and the Board of Immigration Appeals should (1) look to the statute of conviction under the categorical inquiry and determine whether there is a "realistic probability" that the State or Federal criminal statute pursuant to which the alien was convicted would be applied to reach conduct that does not involve moral turpitude; (2) if the categorical inquiry does not resolve the question, engage in a modified categorical inquiry and examine the record of conviction, including documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript; and *(3) if the record of conviction is inconclusive, consider any additional evidence deemed necessary or appropriate to resolve accurately the moral turpitude question.* Silva-Trevino, 24 I. & N. Dec. at 688 – 690 (emphasis added). *See also* Tex. Penal Code Ann. § 21.11 (Vernon 2009).

[25] INA § 240(a) (2006); *see also* INA § 101(a)(13)(C) (returning lawful permanent residents are legally considered "seeking an admission" and subject to the same grounds of inadmissibility as a newly arriving immigrant or visitor, or other non-immigrant, if they have been convicted of a crime since acquiring residency).

Thus, the statutory rapist will potentially be deported for a most personal intimate act without any participation in the legal process.

As can likely be surmised - and as a way of full disclosure of non-objectivity and rooting interest in this argument - my professional biography is limited to defense of immigrants, with the vast majority of my clients being immigrants with criminal convictions. I believe there is an important social function in defending people who have likely done "bad things" and think it is important to reflect on the structure that labels people as "bad," particularly when this means ejection and banishment from our midst via deportation. My past legal adventures involve challenges that neither stealing nor dealing in stolen property necessarily constitutes a "theft offense" for immigration purposes[26] and that Florida drug trafficking is not necessarily "illicit trafficking in a controlled substance."[27] My concern is not so much that I help criminal immigrants "get away" with their offenses, but to ensure that, if possible, they clear the legal hurdles of the initial technical round of Removal Proceedings, so that they may have a day in court, that their family have an opportunity to testify and participate in the legal process and that all voices are heard. This way, win or lose, the immigrant is able to have an opportunity to make his case and explain away or take responsibility for his transgressions. They can identify what is redeeming in their lives that may counter some of their obvious negative baggage. Thus defending the guilty can have an important social, perhaps even

---

[26] *See* Jaggernauth v. U.S. Atty. Gen, 432 F.3d 1346, 1353 (11th Cir. 2005). The Florida theft statute criminalizes temporary and permanent takings, as well as appropriations of property, so if the record of conviction does not mandate a finding of a temporary or permanent taking, the immigrant may benefit from the possibility that he merely "appropriated" property of another, not considered a theft for immigration purposes.

[27] *In re Figuerreo* (BIA 2008) (unpublished, on file with author) (In addition to penalizing transactional and manufacturing offenses, the Florida "Trafficking in Cocaine" statute bars actions that include possessory offenses over a minimum quantity of narcotic, thus not necessarily satisfying the aggravated felony of a drug trafficking offense, as defined by *Lopez v. Gonzalez*, 549 U.S. 47 (2006)).

transformative, role in the lives of immigrant communities. I believe this role is one as equally important as the role of defending the innocent.[28]

The exact topic of statutory rape has bothered me for the last few years, ever since a young man attended a legal orientation session I was conducting at the Krome Immigrant Detention Center in the outskirts of Miami. I was a new attorney and made a presentation every week to immigrants detained because of their criminal convictions. The kid was nineteen at the time and had received probation for the statutory rape of his girlfriend. At his final day of reporting to his probation officer he was arrested by agents from the Immigration and Naturalization Service.[29] He had entered the United States as a permanent resident when he was a toddler, but had never acquired citizenship. He seemed intelligent, yet humble, and was truly embarrassed to be sitting where he was - in immigration detention - when he was supposed to be attending freshman orientation at the University of Georgia, having earned a scholarship for graduating near the top of his high school class. His girlfriend stayed in touch with him by sending letters and he showed me the letters and some pictures. This correspondence was the one bright spot for him in the daily grind of detention, where he was housed in the "red" unit for immigrants charged as aggravated felons.

After reviewing his papers I asked him whether his family still supported him through his predicament. He detailed a supportive family unit including two close siblings. He also told me about the man whom he hoped could be his star witness at his Removal Hearing with the immigration judge. This witness

---

[28] For terrific reading on this subject from those more insightful than myself, *see* Barbara Allen Babcock, *Defending the Guilty*, 32 CLEV. ST. L. REV. 175 (1983-84) and Abbe Smith, *Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things,* 28 HOFSTRA L. REV. 925 (2000).

[29] *See generally* INA § 236 (2006) (the Immigration and Naturalization Service (now DHS) is charged by Congress to identify criminal aliens by tracking state databases and to take them into custody upon their release); INA § 236(c) bars the release of many criminal aliens, including aggravated felons and criminal residents arriving from abroad seeking reentry.

would be none other than his girlfriend's father. A year earlier, this father had called for the young man's arrest. He remained in close contact with the state prosecutors, and had negotiated the terms of the conviction and sentence after catching the young man having sex with his daughter in her family home. The father had wanted to teach the young man a lesson about responsibility and the consequences of being insensitive and disrespectful to the parents of his girlfriend, adults who had been accepting of the serious relationship and welcoming to the young man. Like most Americans and immigrants, the father had no idea of the extent of the full consequences of the conviction. Now that the young man faced deportation, his parents and his girlfriend's family had pooled money and were hiring an excellent private attorney. It turned out that my *pro bono* services were not needed.

Several weeks later I saw the attorney outside the immigration court with a large group of distraught family members. The young man had just been ordered deported in a brief hearing. His family was in attendance along with his girlfriend and her parents, all of whom had driven to Miami from Georgia for the hearing. No witness had been allowed to testify on his behalf, to tell the judge that the conviction was the result of reckless but natural youthful behavior, that the family had healed and forgiven him, or that they had seen the young man take responsibility for his actions. The girlfriend's father asked the attorney if it would make a difference if his daughter married the young man, and indicated that he would support their marriage, especially if it would save the young man from deportation. The last thing I heard him say was that he wanted the attorney to go back into court and tell the judge that even as the father (of the statutory rape victim) he really didn't intend or want this (deportation) to happen.

In subsequent years I saw a few cases that featured arrests or convictions for various sexual crimes, including prostitution, lewd and lascivious assault and lewd battery. In addition to representing the convicted, I represented several victims of sexual assault, incest and child molestation, all of whom received immigration benefits for participating in the prosecution of the perpetrators of the crimes.

An interesting trend in the cases I saw was that the convicted tended to maintain that they were factually innocent of the charges, but that they entered no contest pleas out of

desperation to negotiate a punishment of probation rather than going to trial and risking conviction and significant jail time as a sexual offender.[30] I frequently was persuaded by their explanations, whether because of factual impossibility of the molestation or assault (a school bus driver whose own teenage sons were in the front seat of the bus at the time of the alleged fondling of one of their ex-girlfriends; immigrant who pointed toward a young boy's penis while using a neighboring urinal and told the boy that the boy had a "good one"); or because of minimal sentences sought by prosecutors for seemingly egregious offenses (twelve months probation for alleged repeated manual-vaginal sexual penetration of three girls ages 6-8 over the course of several months).

In contrast, over the last year I have participated in the intake of several typical cases of statutory rape involving young people. In each instance the convicted immigrant did not protest his innocence. Further, there was a great range in the punishment of the behavior inconsistent with the similarities in the conduct. In three separate cases of near-identical facts, ages, and age spreads between young men and younger girls, I have seen wildly disparate results in the convictions and the subsequent immigration consequences.

I have learned to have some professional detachment from my clients' problems, to empathize while limiting the transference of their personal torments and fears. Still, I felt truly sorry and embarrassed for a recent client who was chastised by an immigration judge who said that he (the judge) was protecting innocent children from abusers like my client, when referring to a statutory rape involving an eighteen year old boy and a fifteen year old girl.[31] Although many social ills –

---

[30] *See generally* Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?* 14 GEO J. LEGAL ETHICS 355 (2001); William Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH L. REV 505, 509 (2001). Negotiating a plea process is a potentially coercive endeavor that many scholars and attorneys have argued risks undermining the integrity of the criminal justice system, as the judge is eliminated from a fact-finding function and the prosecutor is able to mete out acceptable terms and punishment, all based on the insecurity of a defendant fearing trial and facing redundant charges.

[31] I suppose I am part of the "problem" according to editorials including The National Review:

teenage pregnancy, unwanted or under-supported children, high school attrition – may be attributable to an over-sexed younger population, I do not assign the same moral reprehensibility to this phenomenon, nor see how mandatory deportation of the older violator solves society's ills, heals families or promotes any moral ascension. It is out of concern and empathy for sympathetic immigrants sanctioned by the overbearing nature of the Immigration and Nationality Act and the destruction – rather than preservation - of families that I posit the following analysis.

THE AGGRAVATED FELONY GROUNDS: SEXUAL ABUSE OF A MINOR, CRIMES OF VIOLENCE

In the immigration context, a crime categorized as an aggravated felony carries the most dire consequences. Any aggravated felony conviction after April 24, 1996 results in deportation without recourse for any permanent resident of the United States.[32] The aggravated felony bars the immigrant from

---

> [T]he nation's deportation abyss is governed by one reality: "It ain't over 'til the alien wins." Immigration lawyers and ethnic activists run a massive, lucrative industry whose sole objective is to help illegal aliens and convicted criminal visa holders evade deportation for as long as possible. Entry into this country should be a privilege, not a right.

Michelle Malkin, *It Ain't Over 'Til the Alien Wins - Deportation realities*, NATIONAL REVIEW ONLINE, June 13, 2007, http://article.nationalreview.com/?q=ZWU5MGZhZDEzNDg1ODFhMjI1M2JjMjQ3ZDQwMDVkOWE=.

I see the role of immigration defense attorneys as preventing the forced departure of their clients by fighting for the rights provided to the accused by Congress. Furthermore, I would argue that either side in any profession may face the same accusation of profiting from serving the interest of their clients, as may the shareholders in the prison-industrial complex that benefits from the massive increase in immigration detention beds since the advent of "mandatory detention" of criminal immigrants, passed in 1996 and effective since 1998.

[32] Prior to passage of IIRIRA, a broad form of discretionary relief was available under INA § 212(c) for residents who had been domiciled in the United States for seven years. The only criminal disqualification from being heard for a balancing of the individual equities of the case was if the immigrant

the discretionary relief of Cancellation of Removal (generally otherwise available to immigrants with residency for five years who have been legally present in the United States for seven years prior to their offense).[33] It further bars relief under INA § 212(h) (requiring seven years of residency prior to initiation of Removal Proceedings and a showing of extreme hardship to U.S. citizen or Resident family members).[34] Even if the immigrant fears harm in his home country, he are barred from asylum, and possibly even withholding of removal (an asylum-like relief with a higher burden of proof – the "more likely than not" standard - for applicants who apply more than one year after entering the U.S. or who have disqualifying crimes)[35] as his aggravated felony conviction is deemed to be a "particularly serious crime," as determined by a five-year sentence (whether served or not) or by opinion of the Attorney General.[36] The only relief that an "aggravated felon" can definitely apply for is deferral of removal

---

had been convicted for an aggravated felony and served more than five years in prison for the offense. INA § 212(c) relief remains available in cases of guilty pleas entered prior to April 24, 1996 and in certain limited other situations. *See e.g.*, INS v. St. Cyr., 533 U.S. 289 (2001).

[33] INA § 240A(a) (2006).

[34] INA § 212(h) (2006), "[n]o waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony or the alien has not lawfully resided continuously in the United States for a period of not less than 7 years immediately preceding the date of initiation of proceedings to remove the alien from the United States."

[35] INA § 208(a)(2); § 208 (b)(2)(B) (2006) .

[36] INA § 241(b)(3)(B)(ii) (2006); 8 C.F.R. § 208.16(d)(2) (2009). In the context of withholding of removal:

> [A]n alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime. The previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particular serious crime.

under the United Nations Convention Against Torture (CAT),[37] but this limited relief, which does not guarantee release from an immigration detention center, requires a showing that his home government, through intentional action, will more likely than not torture the immigrant upon his return home via deportation.[38] Even if the immigrant wins a CAT case, the immigration judge still enters an order of removal, with the deportation stayed for the duration of the certainty of the threat.[39] This period is spent in a jail—hardly a place where a labeled child sex offender wants to remain indefinitely.

As a consequence of the near-certainty of deportation for aggravated felons, there have been myriad challenges to each of the twenty-one categories within the definition, with the goal being for the immigrant to argue that the criminal statute that he violated does not necessarily fall within the pertinent category. Ensuing appellate authority from the Board of Immigration Appeals (BIA), U.S. Courts of Appeals and the United States Supreme Court has provided guidance on the scope of the aggravated felony definitions.[40]

SEXUAL ABUSE OF A MINOR

Unlike other sections of the aggravated felony definition, INA § 101(a)(43)(A) does not reference any federal statute for guidance on the issue of what constitutes "sexual abuse of a

---

[37] 8 C.F.R. § 208.17(c) (2009). "Nothing in this section [deferral of removal under Convention Against Torture] shall alter the authority of the Service to detain an alien whose removal has been deferred under this section and who is otherwise subject to detention. In the case of such an alien, decisions about the alien's release shall be made according to part 241 of this chapter" (regarding release of certain irremovable aliens, usually considered 90 days after the deportation order becomes final).

[38] 8 C.F.R. § 208.17(b)(1) (2009).

[39] 8 C.F.R. § 208.17(d)(1) (2009).

[40] Michael Vastine, Being Careful What You Wish For: Divisible Statutes – Identifying a Non-Deportable Solution to a Non-Citizen's Criminal Problem, 29 CAMPBELL L. REV. 203 (2007) (discussing some of these cases and the divisible statute strategy).

minor." In comparison, the aggravated felonies of drug trafficking, firearms trafficking, money laundering, explosives offenses, crimes of violence, ransom, child pornography, racketeering, commercial prostitution, espionage, tax evasion, alien smuggling, crimes after reentry, and counterfeiting all reference definitions found elsewhere in the United States Code.[41] Because of the lack of specific reference, immigrants have litigated the minutiae of what might constitute a proper definition of sexual abuse of a minor. In 2006, the BIA concluded that for purposes of INA § 101(a)(43)(A) a "minor" is defined as a person under the age of 18. The BIA incorporated the federal definition of a minor from 18 U.S.C. 3509(a)(2),[42]

---

[41] *See generally* INA § 101(a)(43) (2006).

[42] 18 U.S.C. § 3509 (2009) Child victims' and child witnesses' rights:
(a) Definitions. - For purposes of this section –
(1) the term "adult attendant" means an adult described in subsection (i) who accompanies a child throughout the judicial process for the purpose of providing emotional support;
(2) the term "child" means a person who is under the age of 18, who is or is alleged to be –
(A) a victim of a crime of physical abuse, sexual abuse, or exploitation; or
(B) a witness to a crime committed against another person;
(3) the term "child abuse" means the physical or mental injury, sexual abuse or exploitation, or negligent treatment of a child;...
(8) the term "sexual abuse" includes the employment, use, persuasion, inducement, enticement, or coercion of a child to engage in, or assist another person to engage in, sexually explicit conduct or the rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children;
(9) the term "sexually explicit conduct" means actual or simulated –
(A) sexual intercourse, including sexual contact in the manner of genital-genital, oral-genital, anal-genital, or oral-anal contact, whether between persons of the same or of opposite sex; sexual contact means the intentional touching, either directly or through clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of

finding it to be the best guide for establishing a definition of the term 'minor.' This is significant because in most states the age of consent is sixteen, so this is more liberal than the federal definition for immigration purposes.

In 2001, the Board of Immigration Appeals, in *Matter of Crammond,* instructed that as a threshold matter the underlying crime must be a felony, and that an aggravated felony may not actually be a state misdemeanor offense.[43] The BIA vacated the decision on procedural grounds six months later.[44] Reconsidering the issue in 2002 in *Matter of Small*, a divided BIA acceded to a trend in the U.S. Courts of Appeals and held that misdemeanor sexual offense convictions could constitute aggravated felonies.[45] Thus, precedent dictates the linguistic torturing of the adjective "aggravated" and noun "felony" to result in a broad treatment in which any misdemeanor sexual offense involving a minor (under 18) would trigger the aggravated felony definition and the accompanying mandatory deportation.[46] This logic counters the reasoning of the U.S. Supreme Court in the context of the "drug trafficking"

---

any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify sexual desire of any person;...

(10) the term "sex crime" means an act of sexual abuse that is a criminal act

[43] *In re* Robin Juraine Crammond, 23 I. & N. Dec. 9, 19 (BIA 2001). Crammond had his conviction reduced from a felony to a misdemeanor. *Id.* at 10.

[44] *See In re* Robin Juraine Crammond, 23 I. & N. Dec. 179 (BIA 2001) (Crammond departed the United States while the appeal was pending, thus relieving the BIA of its jurisdiction over his case).

[45] *In re* Anderson David Justin Small, 23 I. & N. Dec. 448, 450 (BIA 2002).

[46] *See* Lopez v. Gonzalez, 549 U.S. 47, 54 (2006). "Humpty Dumpty used a word to mean 'just what [he chose] it to mean -- neither more nor less,' and legislatures, too, are free to be unorthodox. Congress can define an aggravated felony. . . in an unexpected way. But Congress would need to tell us so . . . ." (quoting L. Carroll, *Alice In Wonderland and Through the Looking Glass* 198 (Messner 1982)).

aggravated felony, which requires a crime to be a felony under federal Controlled Substances Act before it can be considered an aggravated felony under the INA.[47]

Subsequent challenges took on the entire phrase "sexual abuse of a minor," arguing that since it is not defined by INA § 101(a)(43)(A), a variety of conduct may fall outside of the definition, primarily if the conduct is not abusive in nature. There has been a recent change within the Ninth Circuit Court of Appeals in this regard. The Ninth Circuit has held that the most instructive way to evaluate whether a state statutory rape offense is an aggravated felony is to compare the offense to the federal definition of "sexual abuse of a minor." In 2006, the court held in *Afridi v. Gonzales*[48] that California Penal Code § 261.5(c)[49] categorically constitutes "sexual abuse of a minor."

---

47 *Id.* at 51. In *Lopez,* the U.S. Supreme Court corrected statutory interpretations of a South Dakota drug offense that created "incoherence with any commonsense conception of 'illicit trafficking,' the term ultimately being defined. The everyday understanding of 'trafficking' should count for a lot here . . . And ordinarily 'trafficking' means some sort of commercial dealing. Commerce, however, was no part of Lopez's South Dakota offense of helping someone else to possess." *Id.* at 53 (internal citations omitted). Despite any labeling to the contrary in the state criminal codes, a state offense only qualifies as a "felony punishable under the Controlled Substances Act" if it proscribes *conduct* punishable *as a felony* under that federal law. The *Lopez* court went on to say "mere possession is not, however, a felony under the federal CSA." *Id.*

48 Afridi v. Gonzales, 442 F.3d 1212 (9th Cir. 2006).

49 CAL. PENAL CODE § 261.5 (West 2000):

(a) Unlawful sexual intercourse is an act of sexual intercourse accomplished with a person who is not the spouse of the perpetrator, if the person is a minor. For the purposes of this section, a "minor" is a person under the age of 18 years and an "adult" is a person who is at least 18 years of age.

(b) Any person who engages in an act of unlawful sexual intercourse with a minor who is not more than three years older or three years younger than the perpetrator, is guilty of a misdemeanor.

(c) Any person who engages in an act of unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator is guilty of either a misdemeanor or a felony, and shall be punished by imprisonment in a county jail not exceeding one year, or by imprisonment in the state prison.

(d) Any person 21 years of age or older who engages in an act of unlawful sexual intercourse with a minor who is under 16 years of age is

However in 2008, in *Estrada-Espinosa v. Mukasey,* when revisiting the same issue, the court analyzed all four California statutory rape provisions — California Penal Code §§ 261.5(c), 286(b)(1), 288a(b)(1), and 289(h) — and came to the opposite conclusion, finding that each statute defines conduct that is categorically broader than the "generic" definition of "sexual abuse of a minor."[50]

The Ninth Circuit's construction in *Estrada* is an interesting choice, one obviously favorable to the immigrant. Since the term "sexual abuse of a minor" is not defined in the INA and it does not make reference to any other statute, the court sought out a "generic" term to rely upon for its analysis. Rather than canvass state laws to determine the "average" definition, the court decided that Congress had separately opined on the correct definition since it had enumerated this as a federal offense within 18 U.S.C. § 2243. The court then incorporated the federal definition of "sexual abuse of a minor," despite not being required to do so by INA 101(a)(43)(A). For instances of "consensual" (non-forcible) sex with a minor, 18 U.S.C. § 2243 labels as a criminal anyone who "knowingly engages in a sexual act with another person who (1) has attained the age of 12 years but has not attained the age of 16 years; and (2) is at least four years younger than the person so engaging; or attempts to do so." The penalty for this offense is a fine, imprisonment of not more than 15 years, or both.

Thus, the generic offense of "sexual abuse of a minor" requires four elements: (1) a mens rea level of knowingly; (2) a sexual act; (3) with a minor between the ages of 12 and 16; and (4) an age difference of at least four years between the defendant and the minor.[51]

Fortunately for Estrada, he was convicted under four different California statutes respectively criminalizing unlawful

---

> guilty of either a misdemeanor or a felony, and shall be punished by imprisonment in a county jail not exceeding one year, or by imprisonment in the state prison for two, three, or four years.

[50] Estrada-Espinoza v. Mukasey, 546 F.3d 1147, 1152 (9th Cir. 2008).

[51] *Id.*

sexual intercourse with a minor (defined as a person under 18) who is more than *three* years younger than the perpetrator (CCA § 261.5(c)); an act of sodomy with another person who is under 18 years of age (§ 286(b)(1)); an act of oral copulation with another person who is under 18 years of age (§ 288a(b)(1); and an act of sexual penetration with another person who is under 18 years of age (§ 289(h)).[52] The record of conviction did not establish the actual age difference between Estrada and his girlfriend.[53] Although he was certainly convicted of intercourse with a minor more than three years younger than himself, the record of conviction did not prove that he was necessarily four years older than his girlfriend as would be required under the federal definition.

The other three charges raise additional concerns about the fairness of construction of INA § 101(a)(43)(A). The BIA initially found that Estrada was an aggravated felon based on the sexual activities of penetration, oral copulation, and sodomy with a person under eighteen—criminal sexual activities in the State of California where the age of consent is eighteen.[54] Thus, a state conviction for sexual activity between an eighteen year old and a (factually) consenting 17 year old would constitute a crime due to the absence of legal consent.

Because §101(a)(43)(A) is labeled sexual "abuse," it would seem necessary to consider the record of conviction for factual abusiveness if there is factual consent in a statutory rape case. Physical abuse has been defined as physical or nonphysical misuse or maltreatment or use or treatment so as to injure, hurt, or damage.[55] These traits are easily identifiable in a record of conviction, and certainly would be noted in a police report.

---

52 *Id.* at 1158.

53 *See id.*

54 *Id.* at 1150-51; CAL. PENAL CODE § 261.5(a) (2000). "Unlawful sexual intercourse is an act of sexual intercourse accomplished with a person who is not the spouse of the perpetrator, if the person is a minor. For the purposes of this section, a "minor" is a person under the age of 18 years and an "adult" is a person who is at least 18 years of age."

55 U.S. v. Padilla-Reyes, 247 F.3d 1158, 1163 (11th Cir. 2001).

Further, charges would be pressed if there was any likelihood of proving the allegation.

For argument's sake, it appears that Estrada was possibly factually guilty of the federal offense of "sexual abuse of minor" under 18 U.S.C. § 2243, since he may have had the minimum four year age difference. The appellate record shows that he was twenty when he began dating his girlfriend, and that she was fifteen or sixteen, although the girlfriend led Estrada to believe that she was eighteen.[56] There was no suggestion of abuse in any form. The couple had a relationship that was approved by both parents and they even lived together in the home of Estrada's parents.[57] They had a child together, at one time maintained a separate residence, and Estrada-Espinoza worked to support this family.[58] If they had simply solemnized their relationship by marriage, no prosecution would have been possible under § 261.5(c).[59] Yet, notwithstanding the stability of their relationship, in other jurisdictions—and previously in the Ninth Circuit—he would have been deportable without recourse.

In comparison to the "consensual" statutory rape case, the presence of abuse can be dispositive in molestation cases, cases with greater age differences, or cases that involve young children. Analyzing California statute § 288(a) in 1999, the Ninth Circuit found that if the state statute criminalizes activity that is both "sexual" and involves a "minor," and the act is necessarily abusive, then it will satisfy the aggravated felony definition.[60] In *Baron-Medina*, this abuse was found to exist

---

[56] *Estrada-Espinoza*, 546 F. 3d at 1150. The minority view among states permits a defense of mistake of age in criminal proceedings for statutory rape.

[57] *Id.*

[58] *Id.*

[59] *Id.* at 1160.

[60] CAL. PENAL CODE § 288(a) (2000). Any person who willfully and lewdly commits any lewd or lascivious act, including any of the acts constituting other crimes provided for in Part 1, upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years.

where the record showed "the use of young children as objects of sexual gratification" since this is "corrupt, improper and contrary to good order" and "constitutes maltreatment, no matter its form."[61] *Baron-Medina* remains authoritative, even after *Estrada*, as it pertains to a different statute and has been upheld and distinguished from *Estrada* by the recent decision in *Medina-Villa*.[62]

On its face, *Baron-Medina* seems quite logical and compliant with INA § 101(a)(43)(A), as it purges society of "sexual" offenders involving a "minor," but practice examples show a blurring of factual abusiveness. In a recent case that I have reviewed, an eighteen-year old immigrant was convicted under § 288(a). At age seventeen, he began dating and entered a sexual relationship with a thirteen-year old girl. The relationship was known to and accepted by both families. The boy turned eighteen and the relationship continued. He was charged criminally for sex that occurred after he turned eighteen and before the girl turned fourteen two months later. Prosecutors could have charged him under § 261.5 (like Estrada), but instead charged him with violating § 288(a). He certainly touched an

---

[61] United States v. Baron-Medina, 187 F.3d 1144, 1147 (9th Cir. 1999). In the context of a challenge to the federal sentencing guidelines by a defendant caught illegally re-entering the U.S. following deportation, *Baron-Medina* challenged whether California Penal Code § 288(a) necessarily constituted "sexual abuse of a minor" qualifying as a "crime of violence" warranting a sentencing increase, in light of *Estrada*'s apparent limitation on the definition of "sexual abuse of a minor." The Ninth Circuit later held in *United State v. Medina-Villa* that,

> "[b]ecause we do not believe that our en banc panel intended such a bizarre result, but was expressly considering statutory rape statutes only, we do not read *Estrada-Espinoza* to hold that § 2243 provides the only relevant definition of the term 'sexual abuse of a minor' found in U.S.S.G. § 2L1.2. Thus, *Medina-Maella*'s and *Baron-Medina*'s holdings that a violation of California Penal Code section 288(a) constitutes 'sexual abuse of a minor' and warrants a sixteen-level increase under U.S.S.G. § 2L1.2 as a 'crime of violence' remain valid law subsequent to *Estrada-Espinoza*. The district court did not err in increasing Medina's offense level by sixteen, thereby enhancing Medina's sentence." 567 F.3d 507, 516 (9th Cir. 2009).

[62] *Medina-Villa,* 567 F.3d 507.

underage child's body with sexual intent, satisfying § 288(a).[63] However, the exact form of the touching included sexual intercourse, an act that would seem a more severe touching or more potentially abusive behavior than would justify being charged as such. Interestingly, § 288(a) mandates deportation in the Ninth Circuit, while § 261.5 does not. The facts of *Estrada* are neither steeped in moral superiority nor less factual "abusiveness." In fact Estrada probably (factually) had the required four year age spread in ages to satisfy the federal criminal definition of sexual abuse of a minor, but unlike this example, he was saved by a very general record of conviction that did not prove more than the three year spread. Unfortunately for the eighteen-year old boy, he was doomed by his record of conviction despite similar acts.

Sexual contact is not required for an act to constitute sexual abuse. For example, the Texas Penal Code criminalizes indecency with a minor, under age 17, via either sexual contact or mere exposure. In 1999, the Board of Immigration Appeals issued a decision split 9-4-4, in which it found that indecency by exposure constitutes sexual abuse.[64] The case requires a close look because it shows the court's consternation and lack of unanimity over acts that involve sex with children. The majority canvassed federal statutes, finding four relevant examples of sexual abuse laws, and observed that three definitions require sexual contact. The majority found these definitions requiring "contact" overly limiting.[65] Not finding that the Texas statute satisfied the requirements of any federal crime, the majority instead relied on a definition of 'abuse victim' located in a federal procedural rule found at 18 U.S.C. § 3509(A)(8), regarding the use of videotaping and videoconferencing for child testimony in certain crimes.[66] The majority extrapolated, via

---

[63] *See Baron-Medina*, 187 F.3d at 1147.

[64] *In re* Pedro Rodriguez-Rodriguez, 22 I. & N. Dec. 991 (BIA 1999).

[65] *Id.* at 996 ("the definition set forth in 18 U.S.C. §§ 2242, 2243, and 2246 is, in our view, too restrictive to encompass the numerous state crimes that can be viewed as sexual abuse and the diverse types of conduct that would fit within the term as it commonly is used").

[66] *Id.*

reference to Black's Law Dictionary, that since abuse could involve physical or mental maltreatment, the alien's indecent exposure necessarily was an aggravated felony.[67]

CRIME OF VIOLENCE

In contrast to "sexual abuse of a minor," the aggravated felony of a "crime of violence" is defined in the INA. It includes offenses for acts defined in 18 U.S.C. § 16 that result in a sentence of a year or more.[68] Cases construing 18 U.S.C. § 16(b) hold that it is necessary to examine the criminal conduct required for conviction, rather than the consequence of the crime, to find if the offense, by its nature, involves "a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." To find that an offense is a crime of violence under 18 U.S.C. § 16(b), a causal link between the potential for harm and the "substantial risk" of "physical force" being used must be present.[69]

This issue is dealt with directly in *Matter of B-*, holding that statutory rape is a crime of violence.[70] In 2006, the First Circuit

---

[67] *Id.*

[68] 18 U.S.C. § 16:

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

[69] *See, e.g.*, *In re* Edward Paul Sweetser, 22 I. & N. Dec. 709 (BIA 1999). In the case of a conviction for criminally negligent child abuse under sections 18-6-401(1) and (7) of the Colorado Revised Statutes related to the accidental bathtub drowning of the immigrant's son, force was found not to be an element of the offense, which was characterized by negligence, not violence.

[70] *In re* B-, 21 I. & N. Dec. 287 (BIA 1996). The BIA held that the respondent's conviction for second-degree rape in violation of Article 27, section 463(a)(3) of the Annotated Code of Maryland, for which the respondent was sentenced to 10 years' imprisonment, constituted a "crime of violence" and thus was an "aggravated felony" under section 101(a)(43) of the INA.

sustained the argument that statutory rape presents an inherent risk of violence, thus making it an aggravated felony.[71] The First Circuit agreed with the BIA's reasoning that "just as girls between the age of fourteen and sixteen run the risk of physical injury during intercourse with a man over eighteen, there is also a substantial risk that physical force may be used during such acts."[72] According to the court, this danger exists even when the younger participant factually consents to the sexual act, since they cannot legally have provided consent. The minority view is that factual consent negates the risk of force[73] unless there is a significant age difference between the parties.[74]

There are some logical flaws with the majority view. As an initial matter, every state has a statute criminalizing rape and sexual assault, crimes that vary widely but are generally punished more severely than statutory rape, distinguished as a willing act by an individual legal incapable of consent. Additionally, nearly all state statutes have enhanced penalties or separately enumerated crimes for statutory rape if the incident is marked by either an actual threat of violence or by any aggravating factor in the power differential between the parties, including if the offender was a teacher, coach, relative or

---

[71] Aguiar v. Gonzales, 438 F.3d 86 (1st Cir. 2006); *cert. denied* 549 U.S. 1213; 127 S. Ct. 1251. Aguiar, a permanent resident, was convicted of four counts of third degree sexual assault under R.I. Gen. Laws § 11-37-6 (1997). The facts surrounding the case showed that he had sexual intercourse with a child one day shy of her sixteenth birthday. The immigrant was only eighteen years old at the time. The Immigration Judge found that he had committed a crime of violence, and found him deportable under 8 U.S.C.S. § 1227(a)(2)(A)(iii). The court found that this offense involved a substantial risk of physical force since under R.I. Gen. Laws § 11-37-6 (1997), a child under the age of sixteen was unable to consent to sexual intercourse and that because of the presumed higher age and experience of the perpetrator, the statute clearly contemplated that a substantial risk of the use of physical force existed.

[72] *Id.* at 87.

[73] Valencia v. Gonzales, 431 F.3d 673, 677 (9th Cir. 2005).

[74] Xiong v. Immigration and Naturalization Serv., 173 F.3d 601 (7th Cir. 1999).

caregiver.[75] In the absence of any aggravating factor, it is not apparent that abusiveness should be imputed to all cases where the consent by the younger participant is not legally valid.

As discussed above, in immigration proceedings, the adjudicator is bound by the record of conviction and limited to a categorical view of the offense, as set out in the violated statute. The court is not free to surmise any additional facts outside of this limited record.[76] "Crimes of violence" must be specific

---

[75] *See, e.g.,* Alaska Stat. §§ 11.41.434 Sexual Abuse of a Minor in the Second Degree.

(a) An offender commits the crime of sexual abuse of a minor in the second degree if

(1) being 17 years of age or older, the offender engages in sexual penetration with a person who is 13, 14, or 15 years of age and at least four years younger than the offender, or aids, induces, causes or encourages a person who is 13, 14, or 15 years of age and at least four years younger than the offender to engage in sexual penetration with another person;

(2) being 16 years of age or older, the offender engages in sexual contact with a person who is under 13 years of age or aids, induces, causes, or encourages a person under 13 years of age to engage in sexual contact with another person;

(3) being 18 years of age or older, the offender engages in sexual contact with a person who is under 18 years of age, and the offender is the victim's natural parent, stepparent, adopted parent, or legal guardian; ...

(5) being 18 years of age or older, the offender engages in sexual contact with a person who is under 16 years of age, and

(A) the victim at the time of the offense is residing in the same household as the offender and the offender has authority over the victim; or

(B) the offender occupies a position of authority in relation to the victim.

(6) being 18 years of age or older, the offender engages in sexual penetration with a person who is 16 or 17 years of age and at least three years younger than the offender, and the offender occupies a position of authority in relation to the victim; or

(7) being under 16 years of age, the offender engages in sexual penetration with a person who is under 13 years of age and at least three years younger than the offender.

[76] *Taylor*, 495 U.S. 575, 601 (1990).

intent crimes, so inadvertent, unintentional risk of violence is irrelevant to the analysis. This rationale was evident in *Leocal v. Ashcroft*, in which the U.S. Supreme Court recognized that drunk driving resulting in severe bodily injury was not a crime of violence since the *mens rea* could be tied to accidental or negligent conduct.[77] One can argue that drunk driving is inherently more likely to result in violence than consensual sex, yet even drunk driving that results in injury or even death is not a "crime of violence."

Following the B.I.A.'s reasoning, it would logically follow that any firearm offense must be a crime of violence, since a firearm by its nature carries the potential for violence, both intentional and inadvertent. Similarly, every drug crime (particularly every narcotics transaction) could be co-labeled as a crime of violence; because the interrelation of narcotics sales and violence is well established, the potential for violence might be inherent if narcotics are present.

The fluidity and inconsistency of statutory rape laws further undermine the conclusion that statutory rape has an inherent violent potential. For example, Arizona law specifies that a person commits "sexual misconduct" with a minor by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person who is under eighteen years of age.[78] A person commits the more serious offense of sexual assault by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person without consent of such person.[79] A defendant may have an affirmative

---

[77] *Leocal v. Ashcroft*, 543 U.S. 1, 9-10 (2004).

[78] ARIZ. REV. STAT. ANN. § 13-1405 (2008) (effective Jan. 1, 2009). The statute provides:

> A. A person commits sexual conduct with a minor by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person who is under eighteen years of age.
>
> B. Sexual conduct with a minor who is under fifteen years of age is a class 2 felony and is punishable pursuant to section 13-705. Sexual conduct with a minor who is at least fifteen years of age is a class 6 felony.

[79] ARIZ. REV. STAT. ANN. § 13-1406 (2008) (effective Jan. 1, 2009).

defense against statutory rape if the victim is fifteen, sixteen, or seventeen years of age, if the defendant is under nineteen years of age or attending high school and is no more than twenty-four months older than the victim, and the conduct is consensual.[80] Thus, a fifteen year old boy is raped and inherently exposed to a risk of violence when he has sex with his seventeen year old girlfriend, but if he is a day short of two years younger than her, he escapes from harm's way. Astonishingly, a teenager married to the (even much older) offender ensures (via marriage, apparently) that the same sexual act will not risk any harm, despite most courts finding the age differential itself to be the sole cause of the inherent potential for violence in mutually desired sexual activity.[81]

Even the Ninth Circuit, despite addressing the threat of violence or "abuse" in a way favorable to the immigrant in *Estrada*, found that "the assumption that a minor's legal

---

[80] ARIZ. REV. STAT. ANN. §13-1407. Defenses ...

> B. It is a defense to a prosecution pursuant to sections 13-1404 [Sexual Abuse] and 13-1405 [Sexual Contact with a Minor] in which the victim's lack of consent is based on incapacity to consent because the victim was fifteen, sixteen or seventeen years of age if at the time the defendant engaged in the conduct constituting the offense the defendant did not know and could not reasonably have known the age of the victim. ...
>
> F. It is a defense to a prosecution pursuant to sections 13-1405 and 13-3560 if the victim is fifteen, sixteen or seventeen years of age, the defendant is under nineteen years of age or attending high school and is no more than twenty-four months older than the victim and the conduct is consensual.

[81] *See In re V-F-D-*, 23 I&N Dec. 859 (BIA 2006) ("The respondent was convicted under a statute that criminalizes sexual activity between an adult who is at least 24 years of age and a minor who is at least 7 or 8 years younger, i.e., 16 or 17 years of age. Fla. Stat. Ann. § 794.05(1). This is a significant age discrepancy that reflects the seriousness and exploitative nature of the crime"); *Chery v. Ashcroft*, 347 F.3d 404, 408 (2d Cir. 2003) ("A defendant may be convicted where no actual force is used - for instance, where a 17-year-old male is convicted for having sexual intercourse with his 15-year-old girlfriend. Doubtless, cases can be imagined where a defendant's conduct does not create a genuine probability that force will be used, but the risk of force remains inherent in the offense").

incapacity implies that the proscribed sexual intercourse is non-consensual . . . may be valid where the minor is a younger child but does not hold true where the victim is an older adolescent, who is able to engage in sexual intercourse voluntarily, despite being legally incapable of consent."[82] Nonetheless, as noted above, the *Estrada* court also observed that marriage would have cured the threat – even if a younger child was involved – and thereby (inexplicably) made the otherwise inherently dangerous sodomy, oral sex and penetration non-criminal and thereby non-abusive and harmless.

HISTORY OF DEPORTABILITY FOR ABUSE OF MINORS

Prior to enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), INA § 101(a)(43)(A) was limited to murder.[83] The terms "rape" and "sexual abuse of a minor" were added in an expansion of the definition of what constitutes an aggravated felony and an overall increase in the severity of the consequences for aliens convicted of crimes, including providing for the permanent inadmissibility of an alien convicted of an aggravated felony who has been previously ordered removed.[84]

Congress also added grounds of deportability for "Crimes of Domestic Violence, Stalking, or Violation of Protection Order, [and] Crimes Against Children" via the IIRIRA.[85] Thus, the INA now provides that "any alien who at any time after entry is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable."[86] Congress' intent behind the amendment was to

---

[82] *Estrada-Espinoza*, 546 F.3d at 1154 (emphasis added).

[83] INA 101(a)(43) (1996), 8 U.S.C.A. § 1101(a)(43) (West 1995) (current version 8 U.S.C.A. § 1101(a)(43) (2009)).

[84] *See* IIRIRA § 301(b)(1), 110 Stat. at 3009-575 (codified as section 212(a)(9)(A)(i) of the Act, 8 U.S.C. § 1182(a)(9)(A)(i) (Supp. II 1996)).

[85] IIRIRA § 350, 110 Stat. at 3009-586 (codified as section 237(a)(2)(E) of the Act).

[86] INA § 237(a)(2)(E)(i) (2006).

provide that an alien convicted of crimes of domestic violence, stalking, or child abuse would be deportable, whereas the crimes of rape and *sexual* abuse of a minor are distinguished as aggravated felonies, making aliens convicted of those crimes both deportable and ineligible for most forms of immigration benefits or relief from deportation.[87] Congress' intent, then, was to expand the definition of an aggravated felony and to provide "a comprehensive statutory scheme to cover crimes against children."[88]

IS STATUTORY RAPE NECESSARILY A CRIME INVOLVING MORAL TURPITUDE?

If the immigrant has traveled abroad after his conviction, then upon his return,[89] he are charged with being inadmissible under INA § 212(a)(2)(A) for having committed a crime involving moral turpitude.[90] Alternatively, if the potential immigrant is in the United States and is eligible to adjust (or re-adjust) his status to permanent residency, he is similarly barred by conviction of a crime involving moral turpitude.[91] Either situation puts the immigrant in a legal posture where he bears the burden of proof to demonstrate that he is, in fact, not inadmissible.[92] On the other hand, he is not contesting the

---

[87] H.R. CONF. REP. NO. 104-828, § 350, at 95-96 (1996).

[88] Rodriguez-Rodriguez, 22 I. & N. Dec. 991, 994 (BIA 1999).

[89] Pursuant to INA § 101(a)(13)(C), an alien who is a permanent resident of the U.S. is considered to be seeking admission, and therefore is subject to the grounds of inadmissibility, if since acquiring resident status, he has been convicted of an offense that makes him inadmissible, including crimes involving moral turpitude and controlled substances violations. INA § 101(a)(13)(C) (2005); 8 U.S.C.A. § 1101(a)(13)(C) (2006).

[90] There is an exception only for petty offenses – misdemeanors with an actual punishment of less than six months of confinement. INA § 212(a)(2)(A)(ii)(II) (2006); 8 U.S.C.A. § 1182(a)(2)(A)(ii)(II) (2006).

[91] INA § 212(a)(2)(A)(i).

[92] INA § 240(c)(2) (2006); 8 U.S.C.A. § 1229a(c)(2) (2006).

aggravated felony ground. Instead, he must dispute that the crime is not a crime involving moral turpitude. If he loses on this issue, he then must argue that he is eligible for one of the discretionary forms of relief (usually Cancellation of Removal or INA § 212(h), as discussed above), but the aggravated felony ground will bar him from this application at that point in the proceedings.[93]

Crimes involving moral turpitude are not defined in the INA, but there is a great deal of precedent defining the term.[94] Although a flexible concept, it is defined as conduct that is (1) "inherently vile, base, depraved, contrary to the accepted rules of morality and the duties owed between persons or to society in general," (2) "per se morally reprehensible and intrinsically wrong or *malum in se*, so that the nature of the act and not the statutory prohibition of it renders the crime one of moral turpitude," (3) at its essence being composed of evil or malicious intent, requiring a vicious motive or a corrupt mind, and (4) requiring knowing or intentional conduct.[95]

Predictably, I am concerned about the broad implications of statutory rape constituting a crime involving moral turpitude. Perhaps most unfortunately for my arguments, the most recent major case on the issue from the B.I.A., *Matter of Silva-Trevino*, involves highly unfavorable facts involving a molestation of a child by a sixty-four year old man.[96] Consequently, I wish to reiterate my earlier premise that my discussion contemplates youthful and mutually desired sexual activities, not unilateral actions by a predatory pedophile. However, the standard of *Silva-Trevino* remains instructive for any closer offense.

---

[93] *See* INA § 212(h) (2006); 8 U.S.C.A. § 1182(h) (2006); INA § 240A(a) (2006), 8 U.S.C.A. § 1229b(a) (2006).

[94] *See, e.g.*, *In re* Franklin 20 I. & N. Dec. 867, 868 (BIA 1994).

[95] *In re* Phong Nguyen Tran, 21 I. & N. Dec. 291, 292-93 (BIA 1996) (internal citations omitted).

[96] *See In re* Cristoval Silva-Trevino, 24 I. & N. Dec. 687, 690 (BIA 2008).

The *Silva-Trevino* case arose from a plea of no contest to the Texas criminal offense of "indecency with a child,"[97] a second-degree felony punishable by a 2- to 20-year prison term. The Texas statute specifically makes it illegal for a person to engage in "sexual contact" with a child younger than seventeen years old who is not the person's spouse, unless the person is "not more than three years older than the victim and of the opposite sex."[98] The Texas statute at issue in this case applies only to intentional sexual contact, specifically the "intent to arouse or gratify the sexual desires of any person."[99]

Certain sexual acts with a minor have been held not to involve moral turpitude because the acts in question involved "sexual interest that would be natural and normal if motivated by conduct directed at an eighteen-year old," so long as it is not an element of the crime that the defendant knew, or should have known, that the acts were directed at a child.[100] Aware of this loophole, Silva-Trevino argued that it was theoretically possible that he was not knowingly more than three years older than his victim.[101] In disagreeing with Silva-Trevino's argument, the Attorney General concluded that there must be a "realistic probability, not a theoretical possibility," that the Texas statute would be applied to reach conduct that does not involve moral turpitude.[102] Because Silva-Trevino was a sixty four-year-old man at the time of the incident, his claim was factually ludicrous—although legally (tactically) reasonable under the traditional "categorical" analysis of criminal convictions. His theoretical possibility did not help him escape from categorization as having committed a crime involving moral turpitude.

---

97 TEX. PENAL CODE ANN. § 21.11 (Vernon 2009).

98 *Id.*

99 *Id.*

100 *See* Nicanor-Romero v. Mukasey, 523 F.3d 992, 1001 (9th Cir. 2008).

101 *Silva-Treveno*, 24 I. & N. Dec. at 691.

102 *Id.* at 697.

Despite Silva-Trevino's personal defeat, and the defeat of the restrained analysis under the pure categorical approach, the decision is instructive for youthful sexual offenders. Theoretically, they will be able to prevail by demonstrating a reasonable possibility that their offense, despite losing in criminal court – with or without a mistake of age defense (the minority view in state statutes) – might still demonstrate a non-deportable offense if the statute is broad enough and there is an actual probability of the unintentional nature of the immoral behavior, since the behavior may be reasonable if believed to be targeted at a person over the age of consent.

I am reluctant to accept that statutory rape is necessarily morally abhorrent. It is obvious that undesired molestation is morally wrong, but consenting sexual activity is less clear, particularly when the participants are fairly close in age. As a first point of contention, CIMT precedent requires that the behavior be *malum in se*.[103] I would argue that the offense is nicknamed statutory rape because it is not *malum in se*, it is *malum prohibitum*. The laws are more of a social regulation than a moral code. Actual rape via duress and sexual assault are inherently wrong, as is child molestation, and thus they are penalized more harshly.

My argument is underscored by the remarkable inconsistency among laws around the country. As detailed in *Estrada*, the statutory rape section of the federal definition of sexual abuse of a minor requires that the younger participant be age 12-16 and the older participant be at least four years older. California's age of consent is eighteen, but in some states it is seventeen and in others it is sixteen.[104] Although moral turpitude implicates the duties owed society, a *malum in se* offense by definition cannot be dependent upon a community-based standard that should not be subject to wide regional variation.

---

[103] *Malum in se* is defined as "a crime or an act that is inherently immoral, such as murder, arson, or rape." BLACK'S LAW DICTIONARY (8th ed. 2004).

[104] *See* Asaph Glosser et al., STATUTORY RAPE: A GUIDE TO STATE LAWS AND REPORTING REQUIREMENTS 6 (2004), http://www.lewin.com/content/publications/3068.pdf (last visited Jan. 29, 2010).

My complaint in essence is this: if an act is *inherently* wrong, the next jurisdiction should not have a different rule.[105] The Jamie Lynn Spears example is illustrative. If she, at sixteen, had sex with her older boyfriend in their home states of Louisiana or Mississippi, the act would not be a crime if he was less than two years older than her; but in her place of employment—California—the offense would be a misdemeanor.

Additionally, the definition calls for the act to be "inherently vile, base, depraved, contrary to the accepted rules of morality and the duties owed between persons or to society in general so that it is intrinsically wrong, not just wrong because of its prohibition."[106] State law provides that marriage may eliminate the criminality of sex across the age of consent. I find this peculiar. If the act of sexual contact with children that crosses the age of consent is inherently evil – as are theft, fraud, and intentionally violent crimes – then this same act within a marriage should not be any more morally correct. Similarly, beating or defrauding a spouse is not mitigated by the presence of the relationship. It is bizarre to consider that marriage could be a cure-all for any immoral or *malum in se* acts.

In the United States, the marriageable age is eighteen in forty-seven states, with the exceptions being Pennsylvania (16),[107] Nebraska (17)[108] and Mississippi (17 for males, 15 for females).[109] Exceptions are available in every state for marriage with either parental or judicial consent. If parents can condone a child's marriage – which legalizes the child's sexual acts – then the same permissive attitude toward extra-marital sex might also be a more appropriate benchmark for a violation of any moral code. I will discuss the current *ad hoc* practical application of this phenomenon (parental consent or acquiescence) in a subsequent section.

---

[105] Hyperbole is based on my youth spent in a Maryland county adjacent to the three-county state of Delaware.

[106] *In re* Franklin 20 I. & N. Dec. 867, 868 (BIA 1994).

[107] 23 PA. CONS. STAT. ANN. § 1304 (West 1997).

[108] NEB. REV. STAT. §§ 42-102 (1978); 42-105 (1943).

[109] MISS. CODE ANN. § 93-1-5 (West 2008).

To illustrate the paradox of the present immoral moral scheme, consider former Georgia statute §16-6-3, which defined statutory rape as "when he or she engages in sexual intercourse with any person under the age of 16 years and not his or her spouse."[110] However, with parental permission, children may marry at sixteen.[111] Until 2006, the child "rape" victim could marry at any age—regardless of parental permission—if the girl or woman was pregnant.[112] Thus, the law seemed to encourage post-pregnancy marriage of the victim and "rapist." Of course, a post-rape marriage would not retroactively nullify the rape – a serious offense under Georgia law that carries punishment ranging from a misdemeanor term to a minimum of ten years, depending on the age differential.[113] Finally, approval by the parents is irrelevant for the marriage to proceed, so this final

---

[110] GA. CODE ANN. § 16-6-3 (West 2006) provides that:"(a) person commits the offense of statutory rape when he or she engages in sexual intercourse with any person under the age of 16 years and not his or her spouse, provided that no conviction shall be had for this offense on the unsupported testimony of the victim."

[111] *Id.* at § 19-3-37 (West 2006).

[112] *Id.* (notes following the statute).

[113] GA. CODE ANN. § 16-6-3 (West 2006) Statutory rape
(b) Except as provided in subsection (c) of this Code section, a person convicted of the offense of statutory rape shall be punished by imprisonment for not less than one nor more than 20 years; provided, however, that if the person so convicted is 21 years of age or older, such person shall be punished by imprisonment for not less than ten nor more than 20 years. Any person convicted under this subsection of the offense of statutory rape shall, in addition, be subject to the sentencing and punishment provisions of Code Section 17-10-6.2.

(c) If the victim is at least 14 but less than 16 years of age and the person convicted of statutory rape is 18 years of age or younger and is no more than four years older than the victim, such person shall be guilty of a misdemeanor.

In 2006, the state legislature eliminated the loophole in state law that allowed couples of any age to get married without parental consent in the case of pregnancy. This change has been partially attributed to the result of a case of a thirty-seven year-old woman who married a fifteen year-old boy after she became pregnant.

supposed social protection and moral enforcement is eliminated. Despite any post-conception marriage, the older offender, if an immigrant, would be considered guilty of a crime involving moral turpitude.

INCONSISTENT PROSECUTION UNDERMINES THE MORAL AUTHORITY OF THE LAW ITSELF

Statistics and common knowledge reveal that teenagers are sexually active.[114] With most states having a low-level criminal offense for sexual activity that does not require a minimum age split, it stands to reason that there exists a tremendous amount of criminal conduct involving kids where one is sixteen and one is younger. Even stable teenage relationships will necessarily have a moment in which the older partner passes the age of consent, and thereby would be committing a crime if they continue sexual activity. This is despite (quite obviously) being unharmed by their own sexual activity in the same relationship prior to passing the age of consent. Most of the U.S. population

---

[114] *See* The Kaiser Family Foundation, *U.S. Teen Sexual Activity* (2005) http://www.kff.org/youthhivstds/upload/U-S-Teen-Sexual-Activity-Fact-Sheet.pdf (internal citations omitted):

> The percentage of high school students who have had sexual intercourse increases by grade. In 2003, 62 percent of 12th graders had had sexual intercourse, compared with 33 percent of 9th graders. . . . Most (74%) sexually active females aged 15-19 have partners who are the same age or 1-3 years older; for a quarter of girls, their first partners were 4 or more years older. The younger a girl is when she has sex for the first time, the greater the average age difference is likely to be between her and her partner.

See also The Heritage Foundation, Christine C. Kim, *Teen Sex: the Parent Factor*, Backgrounder (The Heritage Found., Washington, D.C.), Oct. 7, 2008, at 1, *available at* http://www.heritage.org/research/family/bg2194.cfm: "(t)he statistics on teen sexuality in the United States are troubling. About 7 percent of high school students report having had sex before the age of 13. By ninth grade, one-third of high school students have engaged in sexual activity, and by 12th grade, two-thirds."

does not have a criminal record and certainly neither do most adolescents.[115]

Of concern to me is the process by which the convictions are achieved. Anecdotally, I am convinced that the "criminality" is typically a gauge of whether a younger girl's father is angry about his daughter having sex or not. In my example of my consultation with the detained teenager from Georgia, the father had initially been furious and demanded the arrest and conviction of the young man. This is not the only possible result of a parent's discovery of a child's sexual activity.

I recently consulted three offenders who had very different results. The first was a Georgia case where the older man was twenty and had been led to believe that the girl was seventeen when she was really fifteen. Their relationship was discovered when the girl became pregnant. The angry father at first wanted only for the man to pay for an abortion, but the girl had a natural miscarriage during plea negotiations. The father changed his mind and encouraged the prosecutors to push for the maximum punishment, which in this case was a ten-year minimum sentence.

By comparison, I recently reviewed two Florida cases involving seventeen-year-old immigrant boys and fourteen-year-old girls. Their relationships resulted in adult charges of lewd battery (Florida's statutory rape statute) under Florida Statute § 800.04(4), defined simply as "engag[ing] in sexual activity with a person 12 years of age or older but less than 16 years of age."[116] The first case (discussed earlier) involved a boy whose family was granted asylum. His arrest ended in a conviction and probation. He was ordered deported after an admonishment by the immigration judge, and faced denial of withholding of removal and protection under the United Nations Convention Against Torture.

---

[115] Only 6.6% of the United States population have gone to prison. U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Criminal Offenders Statistics,* available at http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=836 (last visited Jan. 29, 2010).

[116] FLA. STAT. ANN. § 800.04(4)(a) (West 2008). Note that the statute does not require intent, abuse, or an age differential.

The final case involved an immigrant boy who had not been present in the United States long enough to be eligible for any form of relief from removal if convicted, even if the crime was only labeled as a crime involving moral turpitude. The girl's father – who had initially called the police – ultimately decided that his primary desire was for the couple to stay away from each other and did not insist upon a conviction for a sexual crime, which would require the boy to register as a sex offender and subject him to deportation. Instead, the father blessed a prosecution deal for the boy to plead guilty to felony battery and a sentence of probation, despite the fact that there was complete dissonance between his act and the elements of felony battery, which requires a prior conviction for battery—a criminal history that the boy did not have.[117] By taking this plea, the boy did not risk an immigration consequence for his offense.

CONCLUSION AND RECOMMENDATIONS

As is revealed from the cases discussed above, challenges to deportability based on consensual sex turn on "abusiveness" and potential for violence. Alternately, immigration consequences attach if the crime involves moral turpitude. I agree with the conclusion that because a crime of moral turpitude requires behavior that is base, depraved and *malum in se*, statutory rape cannot categorically involve moral turpitude because marriage would nullify any criminal aspect of the crime. Thus, in a statutory scheme in which consensual sex between married individuals with a wide age gap and drastically different sexual

---

[117] FLA. STAT. ANN. § 784.03(2) (West 2001). The statute provides:

> A person who has one prior conviction for battery, aggravated battery, or felony battery and who commits any second or subsequent battery commits a felony of the third degree, punishable as provided in § 775.082, § 775.083, or § 775.084. For purposes of this subsection, "conviction" means a determination of guilt that is the result of a plea or a trial, regardless of whether adjudication is withheld or a plea of *nolo contendere* is entered.

experience is not even *malum prohibitum*, it cannot follow that the same act between unmarried individuals is *malum per se*.

If not morally wrong, it is illogical that such conduct is *per se* abusive. It therefore is not possible that "consenting" sex necessarily constitutes "sexual abuse of a minor" without some aggravating factor or even a minimal *mens rea* requirement. In addition to the marriage cure, it is neither comprehensible to me that intent to abuse is not necessary, nor is there any answer to the fact that in most states, ignorance and mistake of age are not defenses to a criminal charge of statutory rape. The offense is based on a regulatory function, with criminality attaching to intentional, consensual sex simply by the fact of the age of one participant.

Finally, each state has a criminal scheme that punishes actual rape and molestation that could adequately screen out "sexual abusers." In the administrative process of assessing immigration consequences of crimes, I think a more appropriate scheme for analyzing charges of deportability would construe "abuse" in its commonplace meaning, which involves an intentional harm, rather than a statutory offense not tied to the wrongfulness of the act but to the age of the actor. Most molestation offenses and lewd act, lewd contact, or assault statutes require an inappropriate sexual intent. This is more appropriate for a deportation ground than for a straight statutory rape being manipulated to constitute an aggravated felony.

Perhaps the most suitable solution to the immigration consequences of statutory rape would be a restoration of more judicial discretion. This is not a novel suggestion and has been made repeatedly by immigration advocates since the repeal of INA § 212(c), which provided discretionary relief formerly available to any immigrant present in the U.S. for seven years who had served less than five years in jail. The five-year sentence would separate truly egregious offenders who were judged harshly by the criminal court from minor offenders with short terms or probation. With broader discretion, immigration judges could determine the extent of any "abuse" and weigh it in a balancing of equities, an exercise in which the immigrant must discuss the crime, show contrition for his actions, and demonstrate some form of rehabilitation in the time following his conviction.

Second, at a minimum, courts should consider accepting the Ninth Circuit's methodology from *Estrada*, requiring a four-year age gap between the offender and the victim. By accepting an empirically demonstrable definition for statutory rape triggering the "sexual abuse of a minor," we would more accurately screen out young offenders while punishing whose who are older enough to possibly have a coercive affect on the younger partner.

Finally, in order to meet the true language of INA § 101(a)(43)(A), an analysis of the record of conviction is in order to determine, similarly to the logic in *Silva-Trevino*, whether there is a realistic possibility of "factual" abuse, rather than presuming some implied abuse or risk of violence that imputes abuse to the act. The downside to this scheme would be the need for a great investment of resources, as an immigration judge would need to examine the facts of the conviction. This is time-consuming work. I believe that rather than considering this effort to be a waste of resources, it is a necessary step. A true sexual offender will continue to suffer the deportation consequences tied to his heinous act. The "statutory rapist" may be able to prove his merits in a discretionary hearing. At a minimum, a distinction must be made between the truly heinous and those whose acts are criminal only because of a regulation.