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STAND YOUR GROUND: FLORIDA'S CASTLE DOCTRINE FOR THE TWENTY-FIRST CENTURY

Christine Catalfamo

I. INTRODUCTION

In October 2005, Florida, a notoriously violent state, codified its castle doctrine and doctrine of self-defense into a group of statutes known as the "Stand Your Ground" law. This new statutory scheme abrogates the duty to retreat before using deadly force and is built upon hard, bright-line rules and presumptions that appear to do away with some of the traditional considerations of necessity and proportionality. Florida has "all the ingredients for . . . disaster" with laws involving deadly force: it is a "high-crime state with heavy urbanization, a massively overcrowded prison system, and an extremely diverse (and often tense) racial population."[1] Critics of the law fear that it goes too far and will turn the state into a modern Wild West, rather than simply secure a person's right to protect himself, his family, and his fortress against wrongful attack and intrusion.

Despite the bright lines drawn by the statute, the broad rights granted by the Stand Your Ground law (alternately called the "Shoot First" law by its critics and opponents)[2] are

[1] Clayton E. Cramer & David B. Kopel, *"Shall Issue": The New Wave of Concealed Handgun Permit Laws*, 62 TENN. L. REV. 679, 690 (1995).

[2] "Shoot First" is an abbreviation of "Shoot First, Ask Questions Later." Linda Kliendienst, *Welcome to Florida, But Look Out: Expanded Self-Defense Law Sparks Campaign to Alert Guests,* SUN-SENTINEL (Ft. Lauderdale, Fla.), Broward Metro Edition, Sept. 26, 2005, at 1B.

consistent with the underlying principles of the privilege of non-retreat and protection of life, liberty, and property embodied in the original castle doctrine. The right to stand one's ground flows from notions of honor, chivalry, and the right to freedom from attack and violation entrenched in Southern society. The Stand Your Ground law preserves the elements of necessity and proportionality historically required in justified homicide, and its bright-line rules and presumptions serve to protect those who live in modern, urban "castles" as effectively as its common law ancestor protected those who lived in wilderness or on plantations.

II. ORIGINS OF THE CASTLE DOCTRINE

The now-familiar concept of the right to stand one's ground against an attack is a doctrine of modern law, and its roots in medieval English law were slow to develop.[3] Even when English common law began to recognize the general privilege of self-defense as a justification for the use of deadly force, the defense was strongly limited by the doctrine of necessity.[4] However, the English recognized a single exception to the duty to retreat before using force: a man had the right to stand his ground and defend himself against an attack in his home.[5] The feudal maxim "a man's home is his castle" formed the basis of the

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[3] *See* Joseph H. Beale, Jr., *Retreat from a Murderous Assault*, 16 HARV. L. REV. 567 (1903). During the thirteenth century, homicide committed in self-defense was not justifiable. *Id.* at 568. A man convicted of homicide who raised evidence of self-defense could receive a pardon from the king, but he could not be acquitted. *Id.* However, homicide was considered justifiable, and thus worthy of acquittal, if it was done in execution of the law—for example, to prevent a robbery. *Id.* at 569. Eventually, the pardon became a mere formality, with the Chancellor signing the king's name, and by 1534, there is evidence that self-defense became an affirmative defense, both by statute and by common law. *Id.* at 571.

[4] *Id.* at 574 ("[I]f one murderously assailed could escape the attack by retreating, he must retreat rather than kill"); *see also* 2 BLACTON ON THE LAWS AND CUSTOMS OF ENGLAND 372 (S. Thorne trans. 1968).

[5] Beale, *supra* note 3, at 574-75; *see also* Semayne's Case, 77 Eng. Rep. 194, 195 (K.B. 1604).

"defense of habitation" doctrine, which gave rise to the modern castle doctrine.[6]

Defense of habitation in England was distinct from the doctrine of self-defense. Rather than being based on a man's right to protect himself from physical violence, defense of habitation spoke to defending his home against violation and intrusion.[7] Thus, a man could be justified in standing his ground and using force, even deadly force, if it was necessary to protect his proprietary and dignitary interests in his home,[8]

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[6] Semayne's Case, 77 Eng. Rep. at 195*; see also* Catherine L. Carpenter, *Of the Enemy Within, the Castle Doctrine, and Self Defense,* 86 MARQ. L. REV. 653, 665-670 (2003); *see also* Stuart P. Green, Article*: Castles and Carjackers: Proportionality and the Use of Deadly Force in Defense of Dwellings and Vehicles, 1999* U. ILL. L. REV. 1, 5, 8 (1999) (using the term "defense of premises" instead of "defense of habitation").

[7] "[T]he house of everyone is as to him as his . . . castle and fortress, as well as for his defense against injury and violence, *as for his repose.*" Semayne's Case, 77 Eng. Rep. at 195 *(emphasis added). See also* 1 J. BISHOP, NEW COMMENTARIES ON THE CRIMINAL LAW 517 (8th ed. 1892):

> Defence of the Castle. In the early times, our forefathers were compelled to protect themselves in their habitation by converting them into holds of defence; and so the dwelling-house was called a castle. To this condition of things the law has conformed, resulting in the familiar doctrine that while a man keeps the door of his house closed, no other may break and enter it . . . . From this doctrine is derived another; namely, that the persons within the house may exercise all needful force to keep aggressors out even, to the taking of life.

[8] "Proprietary interests" refers to a person's possessory interests in his home that arise purely out of the right to exclude that accompanies a property interest. *See* BLACK'S LAW DICTIONARY 989 (7th ed. 2000); *see also* Carpenter, *supra* note 6, at 670. "Dignitary interests" is a term of art used to refer to Fourth-Amendment-type privacy interests that arise not out of holding title, but out of

> [t]he importance of the sovereign person's ability to retain control of the single place in the world that is most clearly his or her own . . . in the sense that it is the place in which [the owner's] decisions and actions are least susceptible to intrusion from the requirements of others.

Steven P. Aggergaard, *Criminal Law—Retreat from Reason: How Minnesota's New No-Retreat Rule Confuses the Law and Cries for Alteration—State v. Glowacki*, 29 WM. MITCHELL L. REV. 657, 665 (2002)

even where the intrusion amounted to a misdemeanor and where there was no threat to the safety of the home's inhabitants.[9] The defense of habitation doctrine departed significantly from the otherwise conservative doctrine of self-defense; generally, the English favored a retreat "to the wall," out of the concern that "the right to defend might be mistaken as the right to kill."[10]

During the 1800s, United States law began to veer sharply from English common law. The American ideals of bravery and honor suited themselves to frontier life in a way that the English duty to retreat could not.[11] As the United States developed, so did the concept of the right to defend one's honor, especially in the South and the Midwest.[12] The rural, plantation-based economic system in the South, as opposed to the largely commercialized and urbanized North, lent itself to the strengthening of an unwritten code based more in equity and honor than in ordinary law.[13]

(*citing* Robert F. Schopp, JUSTIFICATION DEFENSES AND JUST CONVICTIONS 86 (1998)); *see also* Joshua Dressler, UNDERSTANDING CRIMINAL LAW 238-39 (2d ed. 1995) ("The home is a . . . source of privacy where the most intimate activities in life are conducted . . . . When a wrongdoer seeks to enter a person's dwelling, therefore, more than property has been invaded.").

[9] Bishop, *supra* note 7, at 517.

[10] F. Baum & J. Baum, LAW OF SELF-DEFENSE 6 (1970).

[11] Richard Maxwell Brown, *Southern Violence—Regional Problem or National Nemesis?: Legal Attitudes Towards Southern Homicide in Historical Perspective*, 32 VAND. L. REV. 225, 232 (1979); *see also* Aggergaard, *supra* note 8, at 659-60.

[12] *See* Brown, *supra* note 11, at 227-230. Brown notes that the disproportionate number of homicides in the South tended to arise out of the fact that southerners maintained an equal reverence for the codes of laws espoused in both the Bible and the Constitution, thus giving them an unwritten code of personal honor and family in addition to statutes. *Id.* at 228 (citing Charles S. Sydnor, *The Southerner and Laws, in* THE PURSUIT OF SOUTHERN HISTORY 62 (G. Tindall ed. 1964).

[13] Sydnor, *supra* note 12, at 65. Sydnor also noted that most southerners lived in "what might be called a state of nature," where they recognized that, in order to function properly, many of their actions must be performed outside the written law. *Id.* at 68. "To northern eyes this condition looked like an approach to anarchy and chaos; but planters thought their actions were no more lawless

Even after the South began to urbanize, the concept of the unwritten law continued to dominate and to shape southern culture into the nineteenth and twentieth centuries.[14] While the majority of southerners have always been peaceable and law-abiding, the minority was composed of "an abnormally large number of manslayers" who retained the ethics that solidified in the post-Civil War "crimson tide of killing."[15] The cultural acceptance of homicide as a method for resolving personal difficulties, such as fights in barrooms and the streets, was reflected in the legal system.[16] The doctrine of self-defense as justification or excuse for homicide was widely accepted in the South, resulting in acquittal for many homicides that would likely have been considered cold-blooded murder in the North.[17] Additionally, the British rule of retreat was declining in popularity, and by the mid-nineteenth century, the "stand-one's-ground" rule, which dictated that a person in a place he had the right to be could defend himself against an assailant without

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than the operation of a court of equity." *Id.*

[14] H.C. Brearley, The Pattern of Southern Violence, in CULTURE OF THE South 684 (W. Couch ed. 1934) (referring to the South as "below the Smith & Wesson line"). *See also* Brown, *supra* note 11, at 228 (citing J. Reed, THE ENDURING SOUTH 45-56 (1972)): "In the realm of individual behavior, southerners retain a value system and behavioral patterns that make them more tolerant of violence and the use of force than other Americans."

[15] Brown, *supra* note 11, at 229. Between the end of the Civil War and 1880, it is estimated that there were 40,000 homicides committed in the southern states. *Id.* (citing H. Redfield, HOMICIDE, NORTH AND SOUTH: BEING A COMPARATIVE VIEW OF CRIME AGAINST THE PERSON IN SEVERAL PARTS OF THE UNITED STATES 11 (1880)). Redfield equated this tendency towards violence more with culture than with the rural nature of the south. *Id.* at 4, 9-10. In the rural North, homicide rates were very low, approximately one homicide per hundred thousand inhabitants, and were comparable to the rates in England; however, in the South, the homicide rate was four to fifteen times higher than anywhere else in the civilized world. *Id.*

[16] Redfield, *supra* note 15, at 17, 57-58; *see also* Brown, *supra* note 11, at 230-32.

[17] Redfield, *supra* note 15, at 57-58, 61 (concluding that "[t]he law is recognized only as a shield to protect [the killer] from the consequences of the law").

first retreating, had become the rule in a majority of southern states.[18]

The Supreme Court first gave its approval to what became the modern castle doctrine in 1895, with *Beard v. United States*.[19] Beard had been convicted of the murder of a trespasser because the trial court instructed the jury that Beard had a duty to retreat before the use of deadly force, even on his own property.[20] In reversing Beard's conviction, the Supreme Court noted that despite the overall U.S. and British duty to retreat before using deadly force, there had been a consistent exception in both British common law and the law of many U.S. jurisdictions that permitted a man to stand his ground when attacked in his home.[21] By the beginning of the twentieth century it was well accepted in the United States that a man attacked in his own home had no duty to retreat before using

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[18] Brown, *supra* note 11, at 234. The stand-one's-ground rule also presumed that the defendant was not at fault in the altercation. *Id.* The South was not alone in this legal revolution, as the doctrine also dominated the central and western regions of the United States. *Id.* In the eastern third of the nation, as well as the Carolinas and Alabama, the rule remained that one had a duty to retreat before using deadly force. *Id.*; *see also* Beale, *supra* note 3, at 576 n.3.

[19] 158 U.S. 550 (1895).

[20] *Id.* at 555. The trial court instructed the jury that, even if Beard had an otherwise legitimate reason for killing his trespasser—if he did not kill merely to prevent a trespass, or if he was not the aggressor in the altercation—and even if the homicide seemed necessary, the jury must nevertheless find Beard guilty if he could have avoided that necessity by retreating from the altercation at any point. *Id.* at 557.

[21] *Id.* at 561-65 (citing, *inter alia*, Runyan v. State, 57 Ind. 80, 84 (1877)). The Supreme Court quoted language from the Indiana Supreme Court in *Runyan*, noting that "the tendency of the American mind seems to be very strongly against the enforcement of any rule which requires a person to flee when assailed, to avoid chastisement or even save a human life." *Id.* at 561-62. However, although the decision in *Runyan* and the language quoted by the Court in *Beard* involved the duty to retreat generally, and in the broader category of cases where a person was attacked while in a place where he had the right to be, the Court's holding was limited to a person "on his premises, outside of the dwelling-house." *Id.* at 559, 564.

deadly force, so long as he reasonably believed it necessary to save his own life.[22]

By the 1920s, the privilege of non-retreat, which was absolute when a person was in his home, had been expanded to include any situation in which the defendant was in reasonable fear of imminent death or severe bodily harm.[23] An increased understanding of human nature and the complex moral measurements required by the duty to retreat were eloquently summed up by Justice Holmes: "Detached reflection cannot be demanded in the presence of an uplifted knife."[24]

The latter half of the twentieth century saw increased urbanization and crime rates, and the drive for a broad right to self-defense increased proportionally.[25] Generally, the law has distinguished between the levels of force available, and the circumstances triggering that availability, in defense against assaults on oneself, one's family, and one's home. Therefore, while most jurisdictions retain some level of a duty to retreat before using deadly force, all jurisdictions provide an exception, rooted in the castle doctrine, allowing persons attacked in the home to stand their ground and fight regardless of the availability of an escape.[26] The doctrine is hardly uniform between states, however, and jurisdictions vary on such things like requirements of necessity,[27] proportionality, the definition

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[22] *Id.*; *see also* Alberty v. United States, 162 U.S. 499, 505, 509 (1896). In *Alberty*, the Court characterized homicide as justifiable when it was committed with "no intent on [the defendant's] part to kill his antagonist, and no purpose of doing anything beyond what is necessary to save his own life." *Id.* at 505. The Court apparently considered homicide in such cases to be merely an unfortunate and inevitable consequence of a person's right to defend himself in his home.

[23] *See, e.g.*, Brown v. United States, 256 U.S. 335, 343 (1921).

[24] *Id.*

[25] *See* James D. Brewer, THE DANGER FROM STRANGERS: CONFRONTING THE THREAT OF ASSAULT 119 (1994) ("The morgue is full of people who hoped for the best from their aggressors and were dead wrong. . . . The security that comes from knowing how to protect yourself cannot be equaled.").

[26] *See* Joshua Dressler, UNDERSTANDING CRIMINAL LAW 228 (3d ed. 2001); *see also* Aggergaard, *supra* note 8, at 663.

[27] Many jurisdictions effectively presume necessity from the fact that the

of "castle"[28] and which occupants of that castle receive protection,[29] and the levels of intrusion that may trigger the doctrine's protection.[30]

defendant is in his home. *See*, *e.g.*, State v. Thomas, 673 N.E.2d 1339, 1343 (Ohio 1997) ("[A] person in her own home has already retreated 'to the wall,' as there is no place to which she can further flee in safety."). Others, however, emphasize that "[t]he right of self defense is born of necessity and should terminate when the necessity is no more." State v. Quarles, 504 A.2d 473, 476 (R.I. 1986) (holding that deadly force in self-defense, even in the home, was only justifiable where a man is unable to prevent the attack by retreat or by the use of non-deadly force).

[28] *Compare*, *e.g.*, State v. Marsh, 593 N.E.2d 35, 38 (Ohio Ct. App. 1990) ("For purposes of a duty to retreat, a tent and a home are the logical equivalent of each other.") *with* State v. McCray, 324 S.E.2d 606, 615 (N.C. 1985) (refusing to consider a prison a "castle" although prisoner resided there).

[29] *Compare, e.g.,* People v. White, 484 N.Y.S.2d 994 (N.Y. Sup. Ct. 1984) (extending protection to "nonresident family members, household employees, baby-sitters, social guests, and others") *with* People v. Fisher, 420 N.W.2d 858, 864 (Mich. Ct. App. 1988) (refusing to protect a property owner who had not lived at the premises for eight months). The question of whether the castle doctrine applies to altercations between co-occupants is also widely debated. *Compare, e.g.,* People v. Tomlins, 107 N.E. 496, 497-98 (N.Y. 1914) ("[A] man assailed in his own dwelling . . . is under no duty to take to the fields and the highways . . . . The rule is the same whether the attack proceeds from some other occupant or from an intruder.") *with* Cooper v. United States, 512 A.2d 1002, 1006 (D.C. 1986) (holding that privilege of non-retreat does not apply against co-occupants and noting that "[a]ll co-occupants, even those unrelated by blood or marriage, have a heightened obligation to treat each other with a degree of tolerance and respect.")

[30] *Compare, e.g.,* State v. Pendleton, 567 N.W.2d 265, 268 (Minn. 1997) (holding that the use of deadly force is justified if "the offense against a person involves great bodily harm or death or is used to prevent the commission of a felony in one's home.") *with* State v. Gilbert, 473 A.2d 1273, 1276-77 (Me. 1984) (noting that deadly force is justified in preventing criminal trespass or "some other crime within the dwelling place").

III. DEVELOPMENT OF THE CASTLE DOCTRINE IN FLORIDA

Although currently codified in four statutes,[31] Florida's castle doctrine was rooted in common law until 2005.[32] During the course of more than a century, the courts waded through convoluted notions of who should retreat, how far, from whom, and what constituted a castle. In 2005, the legislature sifted through what the courts had produced, and sorted out the fuzzy borders of the castle doctrine and the right to self-defense into the bright lines of today's Stand Your Ground law.

A. COMMON LAW: THE CONVOLUTED EVOLUTION

Florida's first mention of the modern castle doctrine appears in 1892, in *Wilson v. State.*[33] There, the Court referenced the concept of a man's home as his fortress, rather than equating the doctrine with the defense of habitation:

> [O]ne's home is the castle of defense for himself and his family, and . . . an assault upon it with an intent to injure him, or any of them, may be met in the same way as an assault upon himself, or any of them, and . . . he may meet the assailant at the threshold, and use the necessary force for his and their protection against the threatened invasion and harm.[34]

More than thirty years later, the Supreme Court of Florida clarified this "right to stand one's ground" in *Pell v. State.*[35] There, the Court specified that despite the general duty to retreat before using deadly force in self-defense, a person

[31] Fla. Stat. §§ 776.012, .013, .031, .032 (2005). The term "Stand Your Ground law" refers to all four of these sections collectively.

[32] *See* CS/SB 436, 2005 Leg., 107th Sess., 2005 Fla. Laws ch. 27 (Fla. 2005) (finding that "the castle doctrine is a common-law doctrine of ancient origins.").

[33] 11 So. 556 (Fla. 1892).

[34] *Id.* at 561.

[35] 122 So. 110, 116 (Fla. 1929).

"violently assaulted on his own premises . . . may stand his ground and use such force as may appear to him as a cautious and prudent man to be necessary to save his life or to save himself from grievous bodily harm."[36] The Court stressed that this privilege of non-retreat only applied where the defendant did not provoke the conflict, and was not license for a man to "lie in wait for his adversary."[37] Thus, in its earliest days, this form of justified homicide appeared to be rooted in a man's dignitary interests in protecting his home from evildoers, rather than his property interests, and emphasized proportionality and necessity.[38]

Both *Wilson* and *Pell* dealt with a man's right to defend his home and family against trespassers. While it was well settled that a man's home is "his ultimate sanctuary" [39] against outside aggressors, the Florida courts spent close to forty years grappling with the issue of whether this sanctuary afforded the privilege of non-retreat against those with a legal right to be in the home. In 1965, with *Hedges v. State*, the Florida Supreme Court extended the privilege to attacks by invitees or guests.[40] There, a woman, while in her home, had killed her paramour by shooting him, thus cutting short his menacing movements toward her.[41] The Court explicitly rejected the state's argument that the privilege of non-retreat should only apply against attacks by trespassers, relying on *Pell* for the proposition that when a person is in his home, he has already "retreated to the wall."[42] Given this emphasis on the sanctity of the home, the

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[36] *Id.*

[37] "In cases where a combat is mutually sought, the duty of retreating seems to apply to both parties, for both being in the wrong, neither can right himself without retreating." *Id.* (citing I BISHOP'S NEW CRIM. LAW, §§ 869, 870).

[38] Pell, 122 So. at 116.

[39] Hedges v. State, 172 So. 2d 824, 827 (Fla. 1965).

[40] *Id.* at 826-27.

[41] *Id.* at 825.

[42] *Id.* at 827. The Florida Supreme Court was hardly alone in this assertion, citing cases from California, South Carolina, and Connecticut in

Court's holdings seemed straightforward and logical: if a man's castle was violated, it did not matter whether the violator was a guest or a trespasser, because the harm was the same. However, when confronted with the issue of an assault on one occupant by a co-occupant, the lower courts struggled to balance the conflicting interests of two people who shared the same "castle."[43]

Initially, the logic in *Hedges* appeared to hold solid, and the Fourth District Court of Appeal, in *Watkins v. State*, reasoned that a woman who shot and killed her common-law husband was entitled to stand her ground, because the home they shared was nonetheless "her ultimate sanctuary."[44] However, just over a decade later, in *Conner v. State*, the same court unanimously reversed its position.[45] Although initially noting that the castle doctrine was rooted in the idea that a would-be victim, when at home, had effectively already fled to the wall and need go no further, the court criticized its earlier decisions, reasoning that "[t]he castle doctrine is of ancient origin" and contemplated "only attacks from external aggressors."[46] In its ultimate conclusion that the castle doctrine was never intended to apply "where both the antagonist and the assailed are legal occupants of the same 'castle,'" the court raised two distinct rationales.[47]

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noting that "[o]ther courts have held that a man is under no duty to retreat when attacked in his own home." *Id.* (citing People v. Newcomer, 50 P. 405 (Cal. 1897); State v. Grantham, 77 S.E.2d 291 (S.C. 1953); and State v. Bissonnette, 76 A. 288 (Conn. 1910)).

[43] *Compare* Watkins v. State, 197 So. 2d 312 (Fla. 4th Dist. Ct. App. 1967) (extending castle doctrine to attacks by co-occupants) *with* Conner v. State, 361 So. 2d 774 (Fla. 4th Dist. Ct. App. 1978) (reversing *Watkins* because the "castle doctrine contemplates attacks by external aggressors"), *cert. denied,* 368 So. 2d. 1364 (Fla. 1979).

[44] Watkins, 197 So. 2d at 313; *see also* Stevenson v. State, 285 So. 2d 61 (Fla. 4th Dis. Ct. App. 1973) (reaffirming *Watkins* and holding that the doctrine of non-necessity of retreat applies even when both parties "are on the premises in question with equal authority and control").

[45] Conner, 361 So. 2d at 776.

[46] *Id.* at 775, quoting Watts v. State, 59 So. 270, 273 (1912).

[47] Conner, 361 So. 2d at 776.

First, the court characterized the doctrine as a "defense of home instruction," which would be inapplicable because "neither [of two occupants has] the legal right to eject the other" and because each "lawfully claim[s] the home as their ultimate sanctuary."[48] Second, the court emphasized the sanctity not only of the home, but of human life, reasoning that a more expansive interpretation of the castle doctrine would make it easier to justify homicide in unnecessary cases.[49] The normal doctrines of self-defense, the court reasoned, would suffice to protect family members in true mortal peril.[50]

Just two years later, the First District Court of Appeals voiced its disagreement with the Fourth District's holding in *Conner*.[51] In *State v. Bobbitt*, the First District relied on *Hedges* to support its holding that a battered wife was entitled to privilege of non-retreat against an assault by her abusive husband.[52] The court noted that the Supreme Court, in *Hedges*, had relied on a South Carolina case in support of its decision regarding attacks by guests.[53] That particular South Carolina decision held that a man who claimed to have killed his wife in self-defense was entitled to the privilege of non-retreat,[54] and

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[48] *Id.* at 775-776.

[49] *Id.* at 776. "[H]uman life is sacred and . . . due regard for it far outweighs any indignity or cowardice involved in having to retreat from one's own family. . . . To us the saving of lives is the ultimate goal for law enforcement officers and courts to achieve." *Id.*

[50] *Id.*

> Such a view does not render [a mother] defenseless against a member of her family gone berserk, because the instruction on retreat . . . concludes, "but a person placed in a position of imminent danger of death or great bodily harm to himself by the wrongful attack of another has no duty to retreat if to do so would increase his own danger of death or great bodily harm."

Conner.

[51] State v. Bobbitt, 389 So. 2d 1094 (Fla. 1st Dist. Ct. App. 1980).

[52] *Id.* at 1097.

[53] *Id.*

[54] Grantham, 77 S.E.2d at 293. "[U]nder the circumstances related here,

thus, the First Circuit reasoned, the Supreme Court must have approved of that concept.[55]

The Florida Supreme Court, which had declined to review the Fourth District's decision in *Conner*,[56] granted certiorari on the state's petition to resolve the conflict between the holdings in *Conner* and *Bobbitt*.[57] In holding that the castle doctrine did not apply to attacks between co-occupants, the Court essentially adopted the Fourth District's reasoning from *Conner*.[58] Like the *Conner* court, the Supreme Court in *Bobbitt* characterized the doctrine as "premised on the maxim that every man's home is his castle *which he is entitled to protect from invasion*."[59] Thus, the doctrine could not apply where both parties "had equal rights to be in the 'castle' and neither had the legal right to eject the other."[60] Also consistent with *Conner* was the Court's confidence that the general principles of self-defense would provide sufficient protection against attacks by co-occupants.[61]

The majority opinion in *Bobbitt* was met with considerable criticism, both in a "strong dissent" by Justice Overton[62] and in the legal community at large.[63] The dissent took issue with what

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both living in the home, his home and her home, the law imposes no duty on one to retreat in order to avoid the other, but may stand his, or her, ground . . . ." *Id.*

[55] Bobbitt, 389 So. 2d at 1097.

[56] Conner, 368 So.2d 1364.

[57] State v. Bobbitt, 415 So. 2d 724 (1982).

[58] "We agree with the following rationale expressed by . . . the Fourth District in *Conner*: '[W]e see no reason why a mother should not retreat from her son, even in her own kitchen.'" *Id.* at 726 (citing *Conner*, 361 So. 2d at 776).

[59] Bobbitt, 415 So. 2d at 726 (emphasis added).

[60] *Id.*

[61] *Id.* "As Judge Letts pointed out in *Conner*, this holding does not leave an occupant of a home defenseless against the attacks of another legal co-occupant of the premises . . . ." *Id.*

[62] *Id.* (Overton, J., and Boyd, J., dissenting).

[63] *E.g.*, Thomas Kathender, *Case Note: Criminal Law—Lovers and Other*

it felt was an arbitrary distinction based on property rights: to allow a woman to kill her paramour in self-defense without retreating, but to require that another woman retreat from her husband in an effectively identical situation, struck Justice Overton as absurd.[64] As an alternative, Justice Overton suggested that the line be drawn between intruders and non-intruders, and that in case of an attack by the latter, a limited duty of retreat should apply.[65] Citing an earlier Second District Court of Appeals decision, the dissent suggested that a person attacked by a non-intruder should have the duty to retreat to the extent reasonably possible within the house, but should not be required to flee the house before being able to stand his or her ground.[66] In criticizing the majority's historical analysis, Justice

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Strangers: Or, When is a House a Castle?—Privilege of Non-Retreat in the Home Held Inapplicable to Legal Co-Occupants—State v. Bobbitt, 11 FLA. ST. U. L. REV. 465 (1983).

[64] Bobbitt, 415 So. 2d at 726-27 (Overton, J., dissenting).

> In *Hedges*, the woman defendant was attacked by her paramour, whom she had invited into her home. The instant majority opinion refuses to apply *Hedges* holding that, because the wife's assailant was her cotenant husband, she is not entitled to the castle doctrine instruction. This places the wife in the same position as if the altercation had occurred in a public place.

Id. (citing Hedges, 172 So. 2d at 826).

[65] Bobbitt, 415 So. 2d at 726-27 (Overton, J., dissenting). "I would treat cotenants, other family members, and invitees the same and would hold, as to these types of antagonists, that one assailed in one's own home has only a limited duty to retreat." *Id.*

[66] *Id.* "Human life is precious, and deadly combat should be avoided . . . . A limited duty to retreat, as suggested by the Second District Court of Appeal in *Rippie*, is . . . an appropriate middle ground that recognizes both the duty to retreat and the sanctity of the home." *Id.* (citing Rippie v. State, 404 So. 2d 160, 162 (Fla. 2d Dist. Ct. App. 1981)). Justice Overton's proposed jury instruction, which "would cure the artificial legal distinctions and disparate results created by the majority," would read as follows:

> If the defendant was attacked in [his/her] own home . . . by a cotenant, family member, or invitee, [he/she] has a duty to retreat to the extent reasonably possible but is not required to flee [his/her] home and has the lawful right to stand [his/her] ground and meet force with force even to the extent of using force likely to cause death or great bodily harm if it was necessary to prevent death or great bodily harm to

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Overton noted that the castle doctrine "emanated from" the premise that "the home is a special place of protection and security," and that the emphasis should be on the home as a place to be free from attack, not merely from invasion.[67]

The law remained unchanged in Florida for close to twenty years after *Bobbitt* was decided. However, in 1999, the Florida Supreme Court granted certiorari in *Weiand v. State*[68] to determine whether to recede from its holding in *Bobbitt. Weiand*, which involved a woman who presented evidence of battered-spouse syndrome, presented issues of "great public importance."[69] After considering the history of the doctrine and its evolution in Florida and other jurisdictions, the Court decided to adopt Justice Overton's dissent in *Bobbitt*, citing two distinct reasons.[70] First, the Court criticized its decision in

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[himself/herself] or another.

Bobbitt, 415 So. 2d at 728-29 (Overton, J., dissenting).

[67] *Id.* at 727 (citing, *inter alia*, Tomlins, 107 N.E. at 497 ("[A] man assailed in his own dwelling . . . is under no duty to take to the fields and highways . . . . Flight is for sanctuary and shelter, and shelter, if not sanctuary, is in the home.")).

[68] 732 So. 2d 1044 (Fla. 1999).

[69] *Id.* at 1046. Weiand had been convicted of second-degree murder for shooting her husband during a violent argument in their shared apartment. *Id.* At trial, she presented evidence of battered spouse syndrome to support her claim of self-defense. *Id.* at 1048. Two expert witnesses posited that Weiand's history of abuse by her husband led her to believe that, when she shot her husband, she believed he was going to kill her. *Id.* Additionally, the experts presented various opinions as to why Weiand did not leave the apartment: first, that she had given birth seven weeks earlier; second, that she had been choked unconscious; third, that she was paralyzed with terror; and fourth, that she held a belief, based on previous experience, that attempts to leave only made her husband more violent. *Id.*

[70] Bobbitt at 1051. The majority stated:

> We now conclude that it is appropriate to recede from Bobbitt and adopt Justice Overton's well-reasoned dissent in that case. We join the majority of jurisdictions that do not impose a duty to retreat from the residence when a defendant uses deadly force in self-defense, if that force is necessary to prevent death or great bodily harm from a co-occupant.

Bobbitt as "grounded upon the sanctity of property and possessory rights, rather than the sanctity of human life."[71] Second, the Court cited an "increased understanding of the plight of domestic violence victims" as a sound policy reason for not imposing a duty to retreat.[72] Thus, with the emphasis properly on preserving the home as "the ultimate sanctuary," the castle doctrine was extended to attacks against co-occupants.[73]

The Court adopted a jury instruction identical to that proposed by Justice Overton in his dissent in *Bobbitt*.[74] Florida

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Id.

[71] *Id.* at 1052. "Bobbitt's distinction based on possessory rights may be important in the context of defending the home. . . . However, the privilege of non-retreat stems not from the sanctity of property rights, but from the time-honored principle that the home is the ultimate sanctuary." *Id.*

[72] *Id.* at 1051, 1054-56. "The more recent decisions of state supreme courts confronting this issue have recognized that imposing a duty to retreat from the residence has a potentially damaging effect on victims of domestic violence claiming self-defense." *Id.* at 1051-52 (citing Thomas, 673 N.E. 2d at 1343 and New Jersey v. Gartland, 694 A.2d 564, 569-71 (N.J. 1997)). The Court felt a duty to retreat would impose a disparate impact on domestic violence victims, while also likely reinforcing common misconceptions about the realities of domestic violence. Weiand, 732 So. 2d at 1054.

[73] *Id.* at 1052.

[74] *Id.* at 1057.

> If the defendant was attacked in [his/her] own home, or on [his/her] own premises, by a co-occupant [or any other person lawfully on the premises] [he/she] had a duty to retreat to the extent reasonably possible without increasing [his/her] own danger of death or great bodily harm. However, the defendant was not required to flee [his/her] own home and had the lawful right to stand [his/her] ground and meet force with force even to the extent of using force likely to cause death or great bodily harm if it was necessary to prevent death or great bodily harm to [himself/herself].

Id. See also Standard Jury Instructions—Crim. Cases (Castle Doctrine), 789 So. 2d 954 (Fla. 2000) (adopting jury instruction given in *Weiand* into Florida Standard Jury Instructions, with essentially no changes); *accord Fla. Standard Jury Instruction in Criminal Cases 3.04(d) ("Justifiable Use of Deadly Force").*

law, then, distinguished only between attacks by intruders and non-intruders, granting a privilege of non-retreat against attacks by the former and imposing a limited duty to retreat from attacks by the latter.[75]

Florida's castle doctrine also provided a privilege of non-retreat to those persons attacked in their place of employment.[76] In *Redondo v. State*, the Third District Court of Appeal noted that a person carried the same proprietary and dignitary interests in his place of business as he did in his home, and "ought not be required, when attacked, to flee from such hallowed ground."[77] The business premises extension had a caveat that mirrored the co-occupant exception: where both victim and assailant were employees, each had an equal claim to the place of employment, and thus the castle doctrine could not apply against attacks by co-workers.[78]

The tendency of the Florida courts to expand the common law doctrine ended in 2003, with the Third District Court of Appeals' decision in *State v. James*.[79] There, the defendant had shot his current girlfriend's allegedly abusive ex-boyfriend after a fight between the three inside the girlfriend's apartment.[80]

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[75] Weiand, 732 So. 2d at 1052. The Court was also careful to note that, although it was an increased understanding of domestic violence that provided the impetus to reconsider *Bobbitt*, the privilege of non-retreat should be available to anyone attacked in his or her home by a co-occupant, and that it would be inappropriate to distinguish domestic violence victims from other defendants. *Id.* Additionally, the Court emphasized that the privilege was contingent upon necessity. *Id.*

[76] Redondo v. State, 380 So. 2d 1107, 1110-11 (Fla. 3d Dist. Ct. App. 1980).

[77] *Id.* A person attacked "has a proprietary or near-proprietary interest" in his place of business "which is cloaked with a certain privacy protection." *Id.*

[78] Frazier v. State, 681 So. 2d 824, 825 (Fla. 2d Dist. Ct. App. 1996). Although the court was combining the reasoning of *Redondo* with the reasoning of *Bobbitt* to create the co-worker exception, the holding remained undisturbed even in light of *Weiand.*

[79] 867 So. 2d 414 (Fla. 3d Dist. Ct. App. 2003).

[80] *Id.* at 415-16. This was the defendant's second visit to his girlfriend's apartment, and they had been acquainted for approximately one week. *Id.* at 415. The victim, an ex-boyfriend, had attacked and begun choking the defendant's girlfriend, and the shooting occurred after the defendant intervened. *Id.* At the time of the shooting, the victim had retreated to the

The court declined to extend the privilege of non-retreat to the defendant, who was a guest in his girlfriend's apartment at the time.[81] Balancing the sanctity of the home against the sanctity of life, the court determined that such a broad extension would fly in the face of the duty to retreat, "grant[ing] the guest or visitor innumerable castles wherever he or she is authorized to visit," thus improperly expanding the privilege and sanctioning the use of deadly force.[82] The court's decision rested not on the fact that invitees did not have property rights in the home, but that they lacked the dignitary rights that homeowners had in their sanctuaries.[83]

The Florida courts also provided a significant limitation to the definition of "castle" by declining to include vehicles.[84] In Baker v. State, the court recognized that the "very mobility of an automobile" provides its driver with a means of retreat.[85] With concerns similar those raised in James, the court also emphasized that extending the privilege of non-retreat to

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bedroom of the apartment, and the defendant shot him through a partially-closed bedroom door. *Id.* at 416.

[81] *Id.* at 417. "[G]iven the respondent's status as a temporary social guest or visitor at the time of the alleged incident, he is not entitled to the use of the 'castle doctrine' defense or jury instruction . . . ." *Id.*

[82] *Id.*

[83] *Id.*

> The Florida Supreme Court has said that 'the privilege of non-retreat from the home stems not from the sanctity of property rights, but from the time-honored principle that the home is the ultimate sanctuary.' In the instant case, although the respondent . . . had a right to be there . . . this apartment could not . . . be deemed the respondent's ultimate sanctuary.

Id.

[84] Baker v. State, 506 So. 2d 1056, 1059 (1987).

[85] *Id.* See also Reimel v. State, 532 So. 2d 16, 17 (Fla. 5th Dist. Ct. App. 1988). In *Reimel*, the court concluded that a defendant in his car, with the motor running and an unobstructed path to exit the parking lot, could have safely retreated and that a reasonably prudent person in those circumstances would have believed that the danger was not imminent. *Id.* at 18.

vehicles, with their built-in retreat mechanism, would be to "virtually eliminate the retreat obligation."[86]

After over a century of evolution, Florida's modern castle doctrine was well within the standard American doctrine. The common law "duty to retreat," which limited the statutory right to use force in self-defense[87] provided that a homeowner, when attacked in his home, was permitted to stand his ground against his attacker and would never be required to flee the home.[88] If attacked by a co-occupant or invitee, the homeowner had a limited duty to retreat to the extent reasonably possible within the house before using deadly force.[89] Florida's castle doctrine was consistent with the doctrine's historical roots in maintaining the sanctity of one's home.[90] Many other jurisdictions, in both the north and the south, had similar common law[91] and statutory[92] schemes.

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[86] Baker, 506 So. 2d at 1059.

[87] FLA. STAT. §§ 776.012 (use of force in self-defense); 776.031 (use of force in defense of others and in defense of property other than a dwelling). Deadly force is justified only where the person reasonably believes it necessary to prevent imminent death, great bodily harm, or the commission of a forcible felony.

[88] *E.g.* Weiand, 732 So. 2d at 1058.

[89] *Id.*

[90] *Id.* at 1049-50; *see also* Tomlins, 107 N.E. at 497-98; *see also* Jones v. Alabama, 76 Ala. 8, 16 (Ala. 1884) ("Whither shall he flee, and how far, and when may he be permitted to return?").

[91] *See generally* Linda J. Sharp, *Annotation, Homicide: Duty to Retreat Where Assailant and Assailed Share the Same Living Quarters*, 67 A.L.R. 5TH 637 (1999). Sixteen jurisdictions that impose a general duty to retreat recognize an exception and do not require retreat from the residence when a homeowner is attacked by a co-occupant or invitee. Twelve of these states leave their castle doctrine exceptions to common law. *See* Davis v. State, 261 So. 2d 783, 784 (Ala. Crim. App. 1972) ("In the dwelling . . . of husband and wife, the two may live there, and such does not take away from either in favor of the other the right to stop there and defend himself") (internal quotation and citation omitted), *cert. denied*, 261 So. 2d 785 (Ala. 1972); Thomas v. State, 583 S.W.2d 32, 37 (Ark. 1979) (noting that one occupant of the home was not required to retreat from a fellow occupant); State v. Phillips, 187 A. 721, 25-26 (Del. 1936) ("We can see no more reason why one should retreat from his own house when attacked by a co-tenant . . . than when attacked by a trespasser or intruder."); State v. Jacoby, 260 N.W.2d 828, 835 (Iowa 1977)

B. STATUTORY CODIFICATION: STAND YOUR GROUND ENACTED

It was against this backdrop that the Florida legislature undertook to change and codify this common-law doctrine. Effective October 1, 2005, the Florida legislature enacted a statutory scheme that purported to clarify and codify common

("The fact that the assailant is also an occupant of the home, with an equal right to be there, does not put upon the one assaulted any duty to retreat.") (internal quotation and citation omitted); State v. Laverty, 495 A.2d 831, 833 (Me. 1985) ("[T]he dwelling place exception to the retreat rule is applicable even if the assailant is a co-dweller."); People v. Garrett, 266 N.W.2d 458, 459 (Mich. Ct. App. 1978) ("[T]here is no duty to retreat in the face of an attack when it occurs in the home where both the assailant and the assailed have an equal right to be"); State v. Glowacki, 630 N.W.2d 392, 402 (Minn. 2001) ("There is no duty to retreat from one's own home when acting in self-defense in the home, regardless of whether the aggressor is also rightfully in the home."); State v. Hafeli, 715 S.W.2d 524, 528-29 (Mo. Ct. App. 1986) (noting that a person "falls within the exception to the duty to retreat and [has] no obligation to retreat from [a co-occupant] attacker."); People v. Jones, 821 N.E.2d 955, 958 (N.Y. 2004) ("We affirm the castle doctrine in its application to occupants of the same household.") (citing Tomlins, 107 N.E. at 497); State v. Hearn, 365 S.E.2d 206, 208 (N.C. Ct. App. 1988) (noting that the castle doctrine "applies even when both defendant and victim reside in the same dwelling."); Thomas, 673 N.E.2d at 1343 ("There is no rational reason for distinction between an intruder and a cohabitant . . . and accordingly we hold that there is no duty to retreat from one's own home before resorting to lethal self-defense against a cohabitant"); *and* Grantham, 77 S.E.2d at 293 (holding that "the law imposes no duty upon one [co-occupant] to retreat in order to avoid the other" if attacked).

[92] Of the four states with statutory exceptions permitting non-retreat against a co-occupant, three have adopted the Model Penal Code. MODEL PENAL CODE § 3.04(2)(B)(II)(A) (1962); *accord* HAW. REV. STAT. § 703-304(5)(B)(I) (2005); NEB. REV. STAT. § 28-1409(4)(B)(I) (2005); 18 PA. CONS. STAT. § 505(B)(2)(II)(A) (2005). New Jersey, in response to judicial and scholarly criticism, has recently amended its self-defense statute to permit co-residents to stand their ground. *Compare* N.J. STAT. ANN. § 2C:3-4B(2)(B)(I) (2002) ("[T]he actor is not obliged to retreat from his dwelling") *with* N.J. STAT. ANN. § 2C:3-4B(2)(B)(I) (1998) (including the language "or is assailed in his dwelling by another person whose dwelling the actor knows it to be"). For the criticism which led to this revision, *see* Gartland, 694 A.2d at 571 ("[W]e commend to the legislature consideration of the application of the retreat doctrine in the case of a spouse battered in her own home."); *see also* Melissa Wheatcroft, Note, Duty to Retreat for Cohabitants—*In New Jersey, a Battered Spouse's Home is Not Her Castle,* 30 RUTGERS L.J. 539 (1999).

law as it related to the use of force in self-defense.[93] Called alternately the "Stand Your Ground" law and the "Shoot First" law (by proponents and critics respectively),[94] the bill modified two existing sections of Florida statutes, §§ 776.012 and 776.031, and created two more, §§ 776.013 and 776.032.[95] The new scheme completely abrogates the common-law duty to retreat before using deadly force in self defense so long as the person is being attacked in a place where he has a lawful right to be.[96]

Despite the lack of duty to retreat, the use of deadly force will only be justified where the person "reasonably believes such force is necessary to prevent imminent death or great bodily harm . . . or to prevent the imminent commission of a forcible felony."[97] However, the newly-created § 776.013 provides that a person using deadly force in his or her dwelling, residence, or vehicle, in response to an attack or an unlawful, forcible entry, is presumed to have held a reasonable fear of "imminent peril of death or great bodily harm."[98] This presumption does not apply in several circumstances enumerated in § 776.013(2): if

(a) The person against whom the defensive force is used has the right to be in or is a lawful resident of the dwelling, residence, or vehicle . . . and there is not an injunction for protection from domestic violence, or a written pretrial supervision order of no contact against that person; or

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[93] *See* Lloyd Dunkelberger, *Senate Gives Tentative Nod to Broadened Self-Defense Bill,* SARASOTA HERALD-TRIBUNE, March 23, 2005, at BS8 (quoting Sen. Durell Peaden, R-Crestview)*, and Lawmakers in Fla. Back Use of Deadly Force*, WASH. POST, April 6, 2005, at A05 (quoting Rep. Dennis Baxley, R-Ocala). Senator Peaden and Representative Baxley were the bill's sponsors in their respective houses.

[94] Kliendienst, *supra* note 2.

[95] The term "Stand Your Ground law" refers to FLA. STAT. § 776.012, .013, .031, .032 collectively. For a summary of the creations and amendments, see CS/SB 436, 2005 Leg., 107th Sess., 2005 Fla. Laws ch. 27 (Fla. 2005).

[96] FLA. STAT. § 776.012, .013(3), .031 (2005).

[97] FLA. STAT. § 776.012(1); see also §§ 776.013(3), 776.031. Deadly force may be used in self-defense or in defense of others. *Id.*

[98] FLA. STAT. § 776.013(1).

(b) The person or persons sought to be removed is . . . in the lawful custody or under the lawful guardianship, of the person against whom the defensive force is used; or

(c) The person who uses the defensive force is engaged in . . . or is using the dwelling, residence, or occupied vehicle to further an unlawful activity; or

(d) The person against whom the defensive force is used is a law enforcement officer . . . who enters a dwelling, residence, or vehicle in the performance of his or her official duties.[99]

The second newly-created section, § 776.032, provides for immunity from criminal prosecution and civil suit to anyone using force as permitted in §§ 776.012, 776.013, or 776.031.[100] The law provides that agencies may "use standard procedures for investigating the use of force," but may not arrest the person using force without probable cause "that the force that was used was unlawful."[101] Force might be unlawful if the person is found to have acted without a reasonable belief of necessity or if he was not in a place he or she had a right to be.[102]

IV. IS THE STAND YOUR GROUND LAW CONSISTENT WITH THE CASTLE DOCTRINE?

The Stand Your Ground law departs from the common law in several notable ways, but still retains the notions of necessity and proportionality that marked the common law castle doctrine and right to self defense. While many criticize the castle doctrine as being obsolete, as the dangers that gave rise to

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[99] FLA. STAT. § 776.013(2).

[100] FLA. STAT. § 776.032. For civil suits, the statute also awards court costs, attorney's fees, compensation for loss of income, and "all expenses incurred" by a defendant found to have been immune from prosecution. FLA. STAT. § 776.032(3).

[101] FLA. STAT. § 776.032(2).

[102] *See* JUDICIARY COMMITTEE, S. STAFF. ANALYSIS & ECONOMIC IMPACT STATEMENT, S. 2005-CS/CS/SB 436, 107th Sess., at 6 [hereinafter Judiciary Comm. Analysis] (Fla. 2005) (suggesting that presumptions created in Fla. Stat. § 776.013 are conclusive and that jury questions will include whether an entry was unlawful and whether the defendant had reason to know that the entry was unlawful).

the doctrine are no longer present in modern life, the Stand Your Ground law, with its lack of duty to retreat and the bright lines drawn by its presumptions, is ideally suited to the dangers found in the modern, urbanized South.

A. Departures From and Changes to the Common Law

While the legislature was purporting to codify, rather than change, the common law, there are several significant departures that should be noted. The most significant are the two hallmarks of the Stand Your Ground law: the removal of the duty to retreat before using deadly force when a person is in a place he has a right to be,[103] and the presumption that a person who uses deadly force in defense of the home or automobile holds a reasonable fear of imminent death or great bodily harm.[104] However, there are also several changes to the details of the castle doctrine, reflecting a disagreement between the legislature and the courts.

The castle doctrine itself is purportedly codified in § 776.013. Subsection (b) initially seems to retain the intruder/non-intruder distinction created by the courts, albeit in the form of a presumption of reasonable fear rather than a privilege of non-retreat. However, it should be noted that while the courts explicitly declined to differentiate between circumstances of domestic violence and those involving other deadly cohabitants,[105] the legislature explicitly distinguishes these situations, allowing defendants with restraining orders and evidence of domestic violence proceedings the automatic justification, and lack of duty to retreat, provided by the presumption.[106]

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[103] FLA. STAT. §§ 776.012, .013(3), .031; *see also supra* Part II at 28-31 and accompanying notes.

[104] FLA. STAT. § 776.013(1); *see also supra* Part II at 28-31 and accompanying notes.

[105] Weiand v. State, 732 So. 2d 1044, 1057 (Fla. 1999).

[106] FLA. STAT. § 776.013(2)(a), (b).

In addition to the domestic violence distinction, the legislature abandoned the common law in the statute's expansion of the castle doctrine to vehicles, in addition to dwellings or residences.[107] Section 776.013 also makes no mention of "place of employment," thus presumably lowering its status to that of "any other place [the defendant] has a right to be."[108] At common law, any defendant acting under the castle doctrine still had to prove his reasonable fear, so the legislation does not change this element for a person seeking to justify deadly force used while in his place of employment; however, common law had previously given "castle" status to the place of employment,[109] while the Stand Your Ground law declines to equate it with the home or vehicle.

It also appears that the legislature has, contrary to common law, created for each citizen "innumerable castles," extending the privilege of non-retreat in a way that courts feared would "encourage the use of deadly force" inappropriately.[110] The *James* court was specifically concerned with extending the castle doctrine because the policy rationales underlying the privilege of non-retreat in the home did not translate to situations where one was a guest in another's home.[111] However, the new legislation still extends further protection to those attacked in their own homes: someone else's apartment is still

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[107] *Compare* FLA. STAT. § 776.013(1), (5)(c) with Reimel v. State, 532 So. 2d 16, 17-18 (Fla. Dist. Ct. App. 1988) (suggesting that, as vehicles provide a means of escape, a defendant who used deadly force while in a car might never hold a reasonable fear of death or great bodily harm). In June of 2006, the Fourth District Court of Appeal held that the Stand Your Ground law made a substantive change to Florida law, creating "a new right" to "self-defense without the duty to retreat" when one was attacked in one's vehicle. Smiley v. State, 927 So. 2d 1000, 1003 (Fla.Dist. Ct. App. 2006) (holding that Stand Your Ground law is not remedial and could not apply retroactively).

[108] FLA. STAT. § 776.013(1), (3).

[109] Redondo v. State, 380 So. 2d 1107, 1110 (Fla. Dist. Ct. App. 1980).

[110] State v. James, 867 So. 2d 414, 417 (Fla. Dist. Ct. App. 2003) (declining to extend castle doctrine protection to a guest in another's apartment).

[111] *Id.* "[A]lthough [the defendant] . . . had a right to be there . . . [his girlfriend's] apartment could not . . . be deemed [his] ultimate sanctuary." *Id.*

not the invitee's ultimate sanctuary, but it is now a presumption, rather than a privilege, which distinguishes that sanctuary.[112]

The combination of the presumption of reasonable fear and the immunity from prosecution makes homicides committed in a person's home much more difficult to prosecute.[113] However, it does not automatically justify all homicides, as it permits investigation into the use of force and permits arrest with probable cause that the use of force was unlawful.[114] In prosecuted cases, questions of fact remain for the jury, such that homicides will not be justified where the defendant fell into one

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[112] *Compare* FLA. STAT. § 776.013(1)(a) (stating that "[a] person is presumed to have held a reasonable fear of imminent peril of death" in using deadly force against a person unlawfully and forcibly entering a dwelling) *with* FLA. STAT. § 776.013(3) ("A person who . . . is attacked in any other place where he or has the right to be has no duty to retreat" before using deadly force "if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm."). Additionally, FLA. STAT. § 776.012(2) reiterates this distinction in stating that a person has no duty to retreat before using deadly force if he or she believes it necessary, or "[u]nder those circumstances permitted pursuant to § 776.013." *See also* Judiciary Comm. Analysis, *supra* note 102, at 7-8 (noting that "the drafting [of the bill] is somewhat confusing in the way that the . . . duty to retreat is completely abrogated" and recognizing that § 776.013 "does not address the existence or non-existence of a duty to retreat in a dwelling.").

[113] Henry Pierson Curtis, *Gun law triggers at least 13 shootings, Cases involving the new deadly force law are handled in a broad range of ways*, ORLANDO SENTINEL (Fla.), June 11, 2006, at A1. While many law enforcement agencies routinely investigate every homicide and refer all self-defense cases to prosecutors for review, others have noted the difficulty in rebutting the "reasonable fear" presumption, and as a result, cases are often filed with reduced charges. *Id.*; *see also* J. Taylor Rushing, *Deadly-force law has an effect, but Florida hasn't become the Wild West; State attorneys say it makes filing charges more difficult for prosecutors*, FLORIDA TIMES-UNION (Jacksonville), July 10, 2006, at A1.

[114] Legislative history reveals that the Senate, at least, considered the presumptions to be conclusive, not rebuttable. Judiciary Comm. Analysis, *supra* note 102, at 6 ("Legal presumptions are typically rebuttable. The presumptions created by the committee substitute, however, appear to be conclusive."); *see also* Criminal Justice Committee, S. Staff Analysis & Economic Impact Statement, S.2005-CS/SB 436, 107th Sess., at 7 (Fla. 2005) (recognizing that the practical effect of the presumption would be to eliminate any question of fact regarding the existence of a reasonable fear). However, the state would be permitted to arrest, and prosecute, a defendant with probable cause "that the force used was unlawful." FLA. STAT. § 776.032(2).

of the exceptions to the presumption, or where the deceased was not making an unlawful and forcible entry.[115] Notably, in practice, the Stand Your Ground law has been interpreted to require claims of self-defense to be investigated, and homicides and assaults are routinely prosecuted despite this presumption.[116]

B. PROPORTIONALITY AND NECESSITY PRESERVED

In analyzing Florida's new statutory scheme, it should first be noted that, despite its bright-line rules, it preserves the elements of necessity and proportionality that have consistently marked the common-law self-defense privilege.[117] The defensive use of deadly force in general has consistently been rationalized by theories such as the utilitarian "choice of evils"—the harm avoided by killing the aggressor is greater than the harm inflicted—and the defendant-focused "right to resist aggression," based in a person's fundamental right to self-preservation.[118]

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[115] Judiciary Comm. Analysis, *supra* note 102, at 6.

[116] Curtis, *supra* note 113, and Rushing, *supra* note 113.

[117] On deadly force, necessity, and proportionality generally, see Green, *supra* note 6, at 7-8. Green notes the distinction between necessity and proportionality:

> [D]eadly force [must only be used] when, and to the extent, "necessary." As Paul Robinson has said, "The actor should not be permitted to use force when such force would be equally as effective at a later time and the actor suffers no harm or risk by waiting . . . ." The second element is that deadly force be "proportional" to the threat—i.e., that it not be excessive in relation to the harm threatened.

Id. (citing 2 Paul Robinson, CRIMINAL LAW DEFENSES 134, 131(c), at 77 (1984) (footnotes omitted) and Dressler, *supra* note 8, at 200).

[118] Green, *supra* note 6, at 6. Green lists five standard theories upon which the use of deadly force is rationalized: choice of evils, moral forfeiture, right to resist aggression, principle of double effect, and right to preserve personal autonomy. *Id. See also* George P. Fletcher, RETHINKING CRIMINAL LAW 856-65 (Oxford University Press 2000) (1978) (outlining three notions of necessity as it relates to self-defense: necessity as excuse, as a choice of evils, and as vindication of autonomy).

The same theories may be applied to the castle doctrine, although the underlying rationale of the doctrine itself is different from that underlying the doctrine of self defense.[119] In order to preserve the notions of necessity and proportionality, it is best to observe the new lack of duty to retreat not as an exception from or abrogation of necessity, but as a presumption thereof.

Many view the castle doctrine as an exception from the duty to retreat: under the common law, the use of deadly force in self-defense is typically not justified unless the defendant first retreated to the wall. The retreat to the wall is the indication of necessity: the defendant has no other choice at that point but to lose his own life.[120] Under the castle doctrine, however, a defendant does not have a duty to retreat before using deadly force.[121] Thus, some consider this as a circumstance where necessity is not required. [122] However, the rationales underlying the castle doctrine indicate that this is not an exception to the duty to retreat, but a recognition that the mere fact of being in one's house is effectively having already retreated to the wall.[123]

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[119] Green, *supra* note 6, at 3-5. Green characterizes the recent proliferation of "Shoot the Trespasser" laws as the result of a merge or confusion between the doctrines of self-defense and defense of premises, which developed separately. Id. at 5, 8; *see also supra* Part I and accompanying notes. He also notes that these laws, which he believes to be more closely aligned with defense of premises, "appear to be in conflict with a basic principle of self-defense—namely, that the force used must be proportional to the harm threatened." Green, supra note 6, at 5.

[120] *See supra* Part I and accompanying notes.

[121] FLA. STAT. §§ 776.012(2), 776.013(1). Taken together, these two statutes establish that because a person in his home is presumed to have been in reasonable fear of imminent death or great bodily harm when he uses deadly force against an intruder, he does not have a duty to retreat first and is automatically justified in the use of deadly force.

[122] *See*, e.g., Green, *supra* note 6, at 9 ("[A] defender who would otherwise have a duty to retreat has no such duty when he is in his dwelling at the time of an attack. . . . [T]he castle doctrine involves an exception to the requirement of necessity"), *and* Michelle Jaffe, Note and Comment, *Up in Arms Over Florida's New "Stand Your Ground" Law*, 30 NOVA L. REV. 155, 168 (2005) (suggesting that the castle doctrine abrogates necessity).

[123] See Judiciary Comm. Analysis, *supra* note 102. There, the Senate Judiciary Committee found that "[t]he essential policy behind the castle

The idea that a person should not be required to increase his danger by retreating from his home supports the idea that, when attacked in his home, the defendant has no other choice but to lose his life—or, at the very least, it is a recognition that retreat would only increase those chances. Those attacked in their homes are in a more vulnerable position than those on the street—at ease, eating dinner, or perhaps asleep.

The new statutes also preserve the element of proportionality in justified homicide. In describing the justified use of deadly force in home and vehicle protection, §§ 776.013(1) and (4) lay out two presumptions. First, the statute presumes that a person holds a reasonable fear of imminent peril of death or great bodily harm when that person uses deadly force in defense of himself or another against an intruder who is attempting to or has already forcibly and unlawfully entered a dwelling or occupied vehicle.[124] Second, it presumes that a person forcibly and unlawfully entering a dwelling or occupied vehicle does so with the intent to commit an unlawful act involving force or violence.[125] Florida's statute on the justifiable use of force, generally, has consistently required that a person using deadly force hold a reasonable fear of imminent death or severe bodily harm; the new statute preserves that requirement.[126] However,

doctrine is that a person in his or her home or 'castle' has satisfied his or her duty to retreat 'to the wall.'" *Id.* (citing State v. James, 867 So. 2d 414, 416 (Fla. Dist. Ct. App. 2003)).

[124] FLA. STAT. § 776.013(1)(a).

[125] FLA. STAT. § 776.013(4).

[126] FLA. STAT. § 776.012. Prior to the October 1, 2005 revisions, § 776.012 read as follows:

> [A] person is justified in the use of deadly force only if he or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another or to prevent the imminent commission of a forcible felony.

Id. The statute currently reads as follows:

> [A] person is justified in the use of deadly force *and does not have a duty to retreat* if: (1) He or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another or to prevent the imminent commission of a

the Stand Your Ground law goes one step further than the common law in preserving proportionality with its presumption regarding the intruder's intent.[127] It has never been an element, statutory or otherwise, of justifiable force that the person against whom force was used actually be committing, or attempting to commit, a forcible or violent act of any kind.[128] The focus in both Florida courts[129] and legislation had consistently been on the mental state of the person seeking to justify the use of force.[130] By presuming both the deadly threat

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> forcible felony.

Id. (emphasis added). Also, § 776.031, which has permitted the justified use of deadly force in prevention of imminent forcible felonies against a dwelling, has been left unaltered but for the addition of the "no duty to retreat" language. FLA. STAT. § 776.031.

[127] FLA. STAT. § 776.013(4).

[128] *See supra* note 126 discussing the changes to FLA. STAT. § 776.012.

[129] *See, e.g.,* Quaggin v. State, 752 So. 2d 19, 26 (Fla. Dist. Ct. App. 2000) (stating that proper focus in self-defense inquiry is the appearance created by the intruder or assailant). A typical jury instruction on the use of deadly force includes the following:

> In deciding whether defendant was justified in the use of force likely to cause death or great bodily harm, you must judge him by the circumstances by which he was surrounded at the time the force was used. *The danger facing the defendant need not have been actual;* however, to justify the use of force likely to cause death or great bodily harm, the appearance of danger must have been so real that a reasonably cautious and prudent person under the same circumstances would have believed that the danger could be avoided only through the use of that force. Based upon appearances, the defendant must have actually believed the danger was real.

Id. at 23 (emphasis added).

[130] However, an early committee report from the House of Representatives indicates that in their initial drafting and amendments of the bill, the House was under the impression that then-current Florida law required that a person seeking to claim the castle doctrine's privilege bear the burden of proving his attacker's intent to commit a forceful or violent act. H.R. Staff Analysis, H.R. 2005-HB 249, 2005 Leg., 107th Sess., at 3 (Fla. 2/17/2005). In the Staff Analysis produced by the House on February 17, 2005, the section-by-section analysis of the proposed § 776.013 describes the presumption regarding the intruder's intent, and adds an explanatory

felt by the defendant and the violent or felonious intent of the intruder or attacker, the Stand Your Ground law retains proportionality as well as necessity.[131]

Whether a person is attacked at home, where he is especially vulnerable, or on the street, without the lowered defenses and decreased range of options associated with attacks in the home, he has only a split second to react and to determine the best way to preserve his life. The old common law forced these victims to use that split second to analyze the circumstances, weigh the value of his own human life against that of his attacker, and determine the reasonableness and prudence of retreat.[132] The bright lines drawn by the Stand Your Ground law eliminate these fine-grained decisions and permit those attacked to defend themselves based on easily understood and easily applied rules. While bright lines may seem a blunt instrument to use in the context of justified homicide,[133] the fact remains that "[t]he morgue is full of people who hoped for the best from their attackers and were dead wrong."[134]

C. STAND YOUR GROUND PROPERLY APPLIES ITS ANCIENT ORIGINS TO THE REALITIES OF URBAN LIFE

For the same reasons that the Stand Your Ground law properly retains notions of necessity and proportionality, its

sentence indicating that the presumption "removes the burden" of proving intent from the person using deadly force. *Id.* Later reports on committee substitutes omit the explanatory sentences and simply describe the presumption created. H.R. Staff Analysis, H.R. 2005-HB 249 CS, 2005 Leg., 107th Sess., at 4 (Fla. 2005), and H.R. Staff Analysis, H.R. 2005-HB 249 CS/CS, 2005 Leg., 107th Sess., at 4 (Fla. 2005).

[131] *See* Green, *supra* note 6, at 25-30 (noting that the likelihood that a person attacked in the home will be faced with a deadly threat may make such a presumption reasonable and thus satisfy necessity and proportionality requirements).

[132] *See supra* Parts I & II and accompanying notes.

[133] Green, *supra* note 6, at 28-30 (suggesting that "the statistics simply do not support the view that a threat of death or serious bodily injury should be presumed whenever there is a 'felonious' entry.").

[134] Brewer, *supra* note 25, at 119.

bright lines are especially well suited for the modern, urban South, a society that emphasizes the values of honor, dignity, and living by both moral and legal codes.[135] Today's southern gentleman is not particularly different from the antebellum southern gentleman:[136] he is still polite to ladies, enjoys a good time, and places a great deal of importance on his honor and that of his family. His home is indeed his castle and his sanctuary, and he will not tolerate a breach of its barriers. The legislature agrees: the southern gentleman should not be forced to surrender his privacy and dignity to one who would break the law—both the judge- and legislator-made law as well as the natural law—nor should he be forced to back down from an attack if it comes, by chance, in the street instead of the home.[137] This outlook is consistent with the roots of the castle doctrine and self-defense under British common law. These rights are "founded in the law of nature, and [are] not nor can be superseded by any rule of society; [therefore,] nature and social duty cooperate."[138]

However, southern culture grew out of necessity. The castle doctrine developed in a time where deadly threats originated primarily from outside the home, and when retreat from the home almost certainly meant exposing oneself to increased dangers.[139] Killing an intruder was justified because it allowed

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[135] Reed, *supra* note 14, at 45-46.

[136] *Id.*

[137] The "Whereas" clauses in the bill tracking summary as approved by the Governor reflect this focus: citizens "have a right to expect to remain unmolested in their homes and vehicles," and "no person or victim of crime should be required to surrender his personal safety to a criminal, nor should a person or victim be required to needlessly retreat in the face of an intrusion or attack." CS/SB 436, 2005 Leg., 107th Sess., 2005 Fla. Laws ch. 27 (Fla. 2005).

[138] Michael Foster, CROWN CASES AND CROWN LAW 273-74 (photo. reprint 1982) (1762) (paraphrasing 1532 statute); *see also* Sydnor, *supra* note 12, at 65-68.

[139] Id.; *see also* Brown, *supra* note 11, at 232, and Carpenter, *supra* note 6, at 659 ("[F]light from home base . . . is not really fraught with the same danger that existed in the Nineteenth Century when the Castle Doctrine's privilege of non-retreat was established.").

men to protect their plantations, and the privilege of non-retreat was just as much an obligation to kill as it was permission. [140] Opponents of the Florida legislation, and of other similar statutory schemes, often criticize them as being based on an outdated notion of necessity that is no longer present in modern life.[141]

In cities especially, these arguments are strong. Stepping out of one's apartment into a Miami neighborhood is not like stepping off of one's front porch onto a plantation. Apartment buildings do not present the same isolation issues as plantations did, and a similar logic applies in the prevalence of cell phones and other "instantaneous communication systems." [142] Thus, one might question the necessity of the additional protection afforded by the castle doctrine when help might be so close at hand. However, the police protections and "instantaneous communication systems" seem to be of little help to urban Floridians against the dangers surrounding their urban castles,[143] and so the rationale of the Stand Your Ground laws may not be as obsolete as some suggest.

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[140] David I. Caplan and Susan Wimmershoff-Caplan, *Postmodernism and the Model Penal Code v. The Fourth, Fifth, and Fourteenth Amendments—and the Castle Privacy Doctrine in the Twenty-First Century*, 73 UMKC L. REV. 1073, 1096-1101 (2005). This was largely the basis for distinguishing between justifiable and excusable homicides in both American and British common law. *Id.* at 1096.

[141] *See, e.g.,* Timothy C. Herbert, *Self Defense—Retreat—Instruction on Defense of Home Need Not Be Given Where Victim and Accused are Members of the Same Household,* Conner v. State, 7 FLA. ST. U. L. REV. 729, 732 (1979); Rachel V. Lee, *A Further Erosion of the Retreat Rule in North Carolina*, 12 WAKE FOREST L. REV. 1093, 1100 (1976) ("[A] person's leaving his dwelling does not automatically ordain that he is forsaking a place of safety for one wrought with danger. The ancient reason no longer sustains the rule.").

[142] Herbert, *supra* note 141, at 732. "A man's 'castle' was more removed from the protection of the community in earlier times and police protection was not what it is today. Thus is could be argued that modern, instantaneous communications systems have made the castle doctrine obsolete." *Id.*

[143] Alfredo Triff, *Miami, Crime, and Urban Design: This is a Dangerous Place, and Dangerously Divided as Well,* MIAMI NEW TIMES, May 20, 2004 ("In inner cities, when people call for help, law enforcement's response is slow or nonexistent.").

1. DANGEROUS FORCES ASSAILING URBAN CASTLES FROM THE OUTSIDE

Florida is famous, or infamous, for two things: its gun laws and its violence. An NRA model state where guns are easily obtainable, Florida is the second most violent state in the nation.[144] The state's eighteen million residents own twenty million firearms,[145] with 362,265 permits to carry concealed weapons—numbers which rise daily.[146] Urban areas like Miami, the country's third most violent city, [147] present a unique complication here. There, the concentration and ready accessibility of firearms and concealed-carry permits[148] combine with the thriving drug trade and high violent crime rates[149] to

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[144] Jaffe, *supra* note 122, at 179 (citing Mark Schwed, *Who's Packing Heat in Florida?*, PALM BCH. POST, June 4, 2005, at 6D). Florida is currently second to South Carolina as the most violent state, despite a decrease in violent crime rates that began during the late 1980s and paralleled a nationwide drop. *Id.*

[145] Schwed, *supra* note 144. It is impossible to determine the number of gun owners in Florida, because state law forbids the keeping of any kind of list or registry of law-abiding gun owners. FLA. STAT. § 790.335(2) (2005) ("No state . . . local . . . or other governmental entity or any other person, public or private, shall . . . keep . . . any list, record, or registry of privately owned firearms or . . . of the owners of those firearms").

[146] This represents an increase of almost 2500 concealed-carry permits from the January 31, 2006 statewide total of 359,707 active permits. Div. of Licensing, Fla. Dept. of Agric. and Consumer Servs., Number of Licensees by Type (2006), *available at* http://licgweb.doacs.state.fl.us/stats/licensetypecount.html (last visited March 8, 2006).

[147] Schwed, *supra* note 144.

[148] As of February 28, 2006, Miami boasted close to forty thousand active concealed weapons permits—representing more than ten percent of the statewide total of 362,265 concealed-carry permits—whereas there are only 565 active concealed-carry permits in all of mostly-rural Dixie County. Div. of Licensing, Fla. Dept. of Agric. and Consumer Servs., Concealed Weapon/Firearm License Holders by County (2006), *available at* http://licgweb.doacs.state.fl.us/stats/cw_active.html (last visited March 8, 2006); Div. of Licensing *supra* note 147.

[149] *See* Triff, *supra* note 143 ("In 2002, with the exception of forcible rape, Miami's grim statistics were roughly double the national average in crime per 100,000 people for offenses such as murder, robbery, aggravated assault,

present a danger unheard of in either medieval England or the Old South.[150]

Legislative history indicates that both the House and the Senate were aware that the Stand Your Ground law would have a significant impact on gun laws.[151] First, although the Stand Your Ground law never mentions firearms, it deals with deadly force, which is defined by statute in Florida as including firing a firearm in the direction of another person.[152] Additionally, the fact that the National Rifle Association, led by former president and lobbyist Marion Hammer, sponsored the Stand Your Ground law further corroborates the connection.[153] It is

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burglary, larceny/theft, and motor vehicle theft."). Miami consistently has one of the highest violent crime rates in the country, as reported by the FBI in its Uniform Crime Reports (UCRs). For example, between January and June of 2005, the UCR showed approximately three thousand instances of violent crime (murder, forcible rape, robbery, and aggravated assault) and more than twelve thousand instances of property crime. Uniform Crime Reports Preliminary Semiannual Report, January – June 2005, Table 4: Offenses Reported to Law Enforcement [hereinafter UCR Preliminary Report], *available at* http://www.fbi.gov/ucr/2005prelim/table4.htm (last visited March 8, 2006).

[150] *See* Cramer & Kopel, *supra* note 1, at 690 (noting that in Miami, "crime and racial tensions are particularly high.").

[151] Legislative history confirms what could otherwise be assumed from Florida culture. The "Whereas" clauses of the bill, as enacted and in all committee substitutes offered by both the Senate and the House of Representatives, rely on § 8 of Article I of the State Constitution, which "guarantees the right of people to bear arms in defense of themselves." CS/SB 436, 2005 Leg., 107th Sess., 2005 Fla. Laws ch. 27 (Fla. 2005); *see also, e.g.*, Judiciary Committee Amendment, S. 2005-CS/SB 436, 2005 Leg., 107th Sess., at 7, *available at* http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=662002.html&DocumentType=Amendments&BillNumber=0436&Session=2005 (last visited March 8, 2006).

[152] FLA. STAT. § 776.06(1) (Fla. 2005). Deadly force, however, is not limited to the use of firearms. *See* Garramone v. State, 636 So. 2d 869, 871 (Fla. Dist. Ct. App. 1994). Whether a given type of force constitutes deadly force is a factual inquiry into whether death was the natural, probable, and foreseeable consequence of the act in question. *Id.* The use of a firearm is deadly force as a matter of law, because by definition, a firearm is a "deadly weapon which fires projectiles likely to cause death or great bodily harm." *Id.* (quoting Miller v. State, 613 So. 2d 530, 531 (Fla. 3d Dist. Ct. App. 1993).).

[153] Alan Gomez, *House Passes NRA-Backed Gun Proposal; Bush to Sign*, PALM BCH. POST (Fla.), Apr. 6, 2005, at 1A.

unsurprising, then, that the public has consistently characterized the Stand Your Ground law as a "gun law."[154]

The availability of firearms and concealed-carry permits are not the only factors in urban dangers. Miami's exceptionally high violent crime rates include more than just assault with deadly weapons: aggravated assault, forcible rape and sexual assault, and robbery are also consistently high.[155] The drug trade, which thrives in Miami, is constantly attended by violent crime, including street-level armed robberies and bystanders shot during gang confrontations.[156] All of this is exacerbated by the high degree of racial tension in Miami's extremely diverse ethnic population mix.[157]

The type of housing found in urban settings—multi-dwelling units such as rowhomes, apartments, and condominiums—create a dimension not present in the more rural "castles,"

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[154] *See, e.g.,* Manuel Roig-Franzia*, Fla. Gun Law to Expand Leeway for Self-Defense, NRA to Promote Idea in Other States,* WASH. POST, Apr. 26, 2005, at A01; Eric Ernst*, Too Bad Gun Law Deputizes Us All*, SARASOTA HERALD-TRIBUNE (Charlotte Edition) (Fla.), October 7, 2005, at BC1.

[155] UCR Preliminary Report, *supra* note 149.

[156] Miami has been classified by the Office of National Drug Control Policy as a "High-Intensity Drug Trafficking Area." National Drug Control Strategy, The High Intensity Drug Trafficking Area Program: 2004 Annual Report (2004), *available at* http://www.whitehousedrugpolicy.gov/publications/policy/hidta04/south_florida.html (last visited March 8, 2006).

> Drug-related street level violence is common. The daily newspapers report shootings of innocent children who were in the wrong place at the wrong time when rival gang members confront each other over drug turf. Street-level armed robberies are the most commonly reported violent crime. Kidnappings occur every day by addicts robbing for money to purchase drugs. Drug owners who are robbed of their product and its profit buy murder contracts. Intimidation and retaliation are by-products of the drug trade; witnesses testifying at drug trials and their relatives are threatened and intimidated by violence.

Id. On the connections between the drug trade and violent crime, *see generally* Bernard A. Groper, U.S. Dept. of Justice, Probing the Links Between Drugs and Crime (1985).

[157] Cramer & Kopel, *supra* note 1, at 690.

where the homes and occupants are more distanced from one another. Here, the outside forces threatening one's castle are much closer than the original castle doctrine contemplated. Close to twenty-five years ago, in *State v. Page*, the Florida courts considered the applicability of the castle doctrine to fight between neighbors in an apartment building.[158] When the defendant shot and killed his neighbor on the common walkway shared by the two apartments, the Court declined to extend the privilege of non-retreat, citing a policy rationale: "[A]s our society moves more and more toward communal-type dwellings . . . [extending the privilege] would, in effect, allow shootouts between persons with equal rights to be in a common area."[159] Likewise, gun control advocates fear that the Stand Your Ground law will turn Florida into a modern Wild West, with shoot-outs between citizens eager to stand their ground.[160]

The increased proximity of residents in apartment buildings and rowhomes, as opposed to those living in more spread-out rural areas, means an increased proximity to danger. If an attack from a deadly neighbor who lived miles away justified a privilege of non-retreat in antebellum America, certainly an attack from a neighbor who lives no more than a few feet away justifies the privilege even further. Rather than granting each person innumerable castles, as the *James* court feared,[161] the removal of the duty to retreat outside of the home simply recognizes an increased need for self-defense which is especially intense in the type of communal dwellings found in cities like Miami.

Importantly, as many pro-firearm supporters point out, these concerns over shoot-outs are identical to the panic raised when Florida streamlined its process to obtain concealed

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[158] State v. Page, 418 So. 2d 254 (Fla. 1982).

[159] *Id.* at 255. It should be noted that the court relied on the now-overruled *Bobbitt* in its holding. While the decision was based on an arguably outdated and disfavored emphasis on property rights, the logic it embodies in this policy rationale outlasts the holding.

[160] *See, e.g.*, Suzanne Goldenberg, *Florida Backs Right to Shoot,* GUARDIAN (London), Apr. 8, 2005, at 16 *and Armed and Dangerous: NRA-Backed Gun Bill Deadly for Florida,* DAYTONA NEWS-J., Mar. 14, 2005, at 04.

[161] State v. James, 867 So. 2d 414, 417 (Fla. Dist. Ct. App. 2003).

weapons permits.[162] While the violent crime rates in Florida have actually decreased since then, it is impossible to prove a causal relationship between the heightened availability of weapons and the concurrent reduction in violent crime.[163] It is difficult to use such data to advocate either for or against the freedom to use deadly force defensively; however, it shows that the increased availability of deadly force does not in and of itself automatically result in an increased use of deadly force.

2. STAND YOUR GROUND BETTER PROTECTS AGAINST THE DANGER WITHIN

Danger from the outside world is still very real, but the danger that arises from within the home should not be discounted. Both the Florida courts and legislature, reflecting an increased understanding of the severity of domestic violence problems, have taken this phenomenon into account in shaping the law. The Stand Your Ground law allows domestic violence victims to use force in defending against their deadly cohabitants in a way that reflects the high urban incidence of domestic violence crime.[164]

The Supreme Court, in *Weiand*, dedicated a significant portion of its opinion to examining the disproportionate effects

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[162] Jaffe, *supra* note 122, at 181; Jacqui Goddard, Florida *Boosts Gun Rights, Igniting a Debate*, CHRISTIAN SCI. MONITOR, May 10, 2005, at 2.

[163] *See* Jaffe, *supra* note 122, at 180. There are studies that purport to negate fears of vigilantism by showing that guns are used more frequently in self-defense than in punishment of criminals. At the same time, other studies deflate images of the noble defense of home and family by showing that defensive gun use occurs more often outside of the home. *Id.* (citing Deborah Azrael & David Hemenway, *In the Safety of Your Own Home: Results from a National Survey on Gun Use at Home*, 50 SOC. SCI. & MED. 285, 289 (2000) and Tomislav Kovandzic et al., *Defensive Gun Use: Vengeful Vigilante Imagery Versus Reality: Results from the National Self-Defense Survey*, 26 J. CRIM. JUST. 251, 258 (1998)).

[164] The Florida Department of Law Enforcement reports 15,765 incidents of domestic violence crime in Miami-Dade County in 2004, as compared to 62 reported incidents in rural Dixie County. Fla. Dept. of Law Enforcement, Total Domestic Violence Crime by County, 2004, *available at* http://www.fdle.state.fl.us/FSAC/Crime_Trends/domestic_violence/2004dvbycounty.htm (last visited March 7, 2006).

a duty to retreat against cohabitants had on domestic violence victims.[165] Recognizing the high numbers of women who were either injured or killed as a result of domestic violence, the Court noted that "retaining a duty to retreat . . . clearly penalizes spouses, and particularly wives, in defending themselves from an aggressor spouse."[166] Additionally, the Court noted that imposing a duty to retreat would also reinforce myths about domestic violence in judges, juries, and the public at large, regarding the victim's freedom to leave and the severity of the beatings.[167]

The legislature put an interesting spin on the cohabitant exception to the castle doctrine as espoused in *Weiand*. While the *Weiand* court refused to distinguish between attacks by cohabitants in situations of domestic violence and other attacks,[168] the Stand Your Ground law retains a distinction. The

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[165] Weiand v. State, 732 So. 2d 1044, 1052-56 (Fla. 1999). The Court recognized that "domestic violence attacks are often repeated over time, and escape from the home is rarely possible without the threat of great personal violence or death." *Id.* at 1053 (internal quotation and citation omitted). "Developments in all three branches of government since [our decision in] *Bobbitt* reflect the public's concern regarding the plight of victims of domestic violence." *Id.* at 1055.

[166] *Id.* at 1054 (quoting State v. Rippie, 419 So. 2d 1087, 1087 (Fla. 1982) (Overton, J., dissenting)). The Court also quoted several statistics from the Governor's Task Force on Domestic Violence, including that 73% of domestic violence victims are female, that domestic violence is the single major cause of injury to women, that more than four thousand women die annually "at the hands of their abuser[s]," and that domestic violence accounted for 39% of female homicide victims in 1995. *Id.* at 1053. (internal citations omitted).

[167] *Id.* at 1054-55.

> There is a common myth that the victims of domestic violence are free to leave the battering relationship any time they wish to do so, and that the "beatings could not have been too bad for if they had been, she certainly would have left." [. . .] A jury instruction placing a duty to retreat from the home on the defendant may serve to legitimize the common myth and allow prosecutors to capitalize upon it.

Id. at 1054, *citing* State v. Kelly, 97 N.J. 178, 205 (N.J. 1984).

[168] *Id.* at 1057. "[Although] [i]t is our increased knowledge of . . . domestic violence that provides the impetus for reconsidering our decision in *Bobbitt*[,] . . . we consider it inappropriate to distinguish between victims of domestic

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presumption of reasonable fear created by § 776.013(1) generally does not apply "if the person against whom the defensive force is used has the right to be in or is a lawful resident of the dwelling, residence, or vehicle."[169] This arguably reflects the "intruder/non-intruder" distinction created by the Florida courts[170] while accounting for the lack of duty to retreat in those invitees or guests who have a right to be in another's home.[171] However, the presumption will apply if the person attacked has an "injunction for protection from domestic violence or a written pretrial supervision order of no contact against" the cohabitant aggressor.[172]

The legislature, then, apparently took issue with the common law's reluctance to provide additional protection to domestic violence victims.[173] The extension of the presumption is essential in light of the reality that domestic violence is extremely common in urban areas. Despite a decrease in violent crime levels, Miami still showed nearly sixteen thousand reported incidents of domestic violence crime in 2004.[174]

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violence and other defendants who have been attacked by a co-occupant." *Id.*

[169] FLA. STAT. § 776.013(2)(A).

[170] Weiand, 732 So. 2d at 1057.

[171] FLA. STAT. § 776.013(3). The invitee or guest still needs to prove that he or she believed that the use of deadly force was reasonably necessary.

[172] FLA. STAT. § 776.013(2)(a).

[173] As introduced in both the House and the Senate, the bill contained no exceptions to the presumption provided in § 776.013(1). H.R. 2005-HB 249, 2005 Leg., 107th Sess., at 2-3, (Fla. 2005), *available at* http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=_h0249__.doc&DocumentType=Bill&BillNumber=0249&Session=2005 (last visited March 8, 2006); S. 2005-SB 436, 2005 Leg., 107th Sess., at 2-3 (Fla. 2005), *available at* http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=_s0436__.html&DocumentType=Bill&BillNumber=0436&Session=2005 (last visited March 8, 2006).

[174] Fla. Dept. of Law Enforcement, *supra* note 164. This represents a decrease of about 4.5% from 2003 levels, and, with Miami's population of around 2.4 million, represents a rate of 662.4 crimes per 100,000 persons. Id.

Additionally, while the culture in southern cities like Miami retains the values of the South at large, the enhanced sense of community present in urban areas is undeniable. In the past, this sense of community translated the privilege of non-retreat provided by the castle doctrine into an obligation.[175] Men owed a duty to their community to see to it that the laws were enforced: if you killed a would-be robber or rapist, there was no chance that he would continue on to rob or rape your neighbors.[176] The sense of gratitude from a man's neighbors, if he kills a serial rapist in his inner-city neighborhood, is inevitably immense: not only has the man prevented a rape of his wife, and prevented a rape of the home, but he has protected his neighbors' homes, wives, and daughters from the trauma and horror.[177] Far from being obsolete, then, it appears that the castle doctrine, especially as codified in the Stand Your Ground law, has roots consistent with and perfectly suited to protecting modern urban realities.

IV. CONCLUSION

Despite the warnings of an impending Wild West mentality filled with vigilantism, Florida has been remarkably quiet since the inception of the Stand Your Ground law. While a handful of citizens have invoked the law, there continues to be a noticeable lack of duels and shootouts on Florida streets and shared apartment walkways.[178] The Florida courts recognized the line

[175] D. & S. Caplan, *supra* note 140, at 1096-1101. The Caplans note that at least one version of the early law triggered an individual's rights and responsibilities at the mere attempt to break "any dwelling house." *Id.* at 1097-98, *citing* Semayne's Case, 77 Eng. Rep. at 194 n.(c).

[176] "A justifiable homicide protected future victims. Dispatching a violent felon was considered to be not only a prerogative of the victim but also a duty of citizenship and a welcome service to the community." D. & S. Caplan, supra note 140, at 1100.

[177] Triff, *supra* note 143. "A community's identity is definitely more than its physical territory, more than its race, language, and traditions." *Id.*

[178] Between January and June, 2006, approximately fifteen self-defense claims were filed in various Florida counties. Curtis, *supra* note 113. Of those claims, at least three resulted in convictions of murder, with four remaining under review as of the date of publication. *Id.* In three homicides,

drawn by the Stand Your Ground law in April 2006 with *State v. Smiley*.[179] There, the Fourth District Court of Appeals held that the Stand Your Ground law would have justified a cab driver in failing to retreat before killing a drunken and apparently knife-wielding passenger; however, under the old law, the driver would have been required to retreat.[180] Similarly, when a 23-year-old prostitute was accosted by a client, who threatened to kill her and then kill himself, the Stand Your Ground law permitted her to wrestle away his gun and use it to defend herself.[181] Under the old law, the woman would have been required to flee rather than fend off her attacker.[182] Despite the colorful cases receiving media coverage, it is clear that the vast majority of the "six million registered gun users" have declined to use their "license to kill."[183]

Almost a century ago, Justice Holmes recognized that "[d]etached reflection cannot be demanded in the presence of an

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there were no charges filed, and additionally, there were no charges filed in two cases where the victim was either wounded or uninjured. *Id.*

[179] State v. Smiley, 927 So. 2d 1000 (Fla. Dist. Ct. App. 2006). The cabdriver, Smiley, was charged with the murder of passenger Morningstar, who was allegedly reluctant to leave the cab at its destination. Adam Liptak, *15 States Expand Right to Shoot in Self-Defense*, NEW YORK TIMES, August 7, 2006, at A1. Smiley used a stun gun to "hasten his exit," and Morningstar apparently flashed a knife once outside the cab. *Id.* Smiley responded by firing his gun twice, first at Morningstar's feet and then into his body, killing him. *Id.*

[180] Smiley, 927 So. 2d at 1003. The court noted that "[b]ecause the incident in question occurred in Smiley's vehicle, Smiley would have had a duty to retreat prior to the use of deadly force against the victim. After the enactment of the new law, Smiley would have had no duty to retreat." *Id. at 1002-03.* Because the incident occurred in November 2004 and because the law did not apply retroactively, Smiley was not entitled to its expanded defense. *Id.* A divided Supreme Court of Florida granted review on September 1, 2006, but will rule on briefs only and declined to hear oral argument. Smiley v. State, 937 So. 2d 123 (2006).

[181] Liptak, *supra* note 179. The woman, Jacqueline Galas, was not charged. *Id.*

[182] Liptak, *supra* note 179.

[183] Goldenberg, *supra* note 160.

uplifted knife."[184] Recently, Marion Hammer has echoed these sentiments: "Nobody has the right to decide what's in your mind and heart when you're under attack. So the important thing is to make it more dangerous for the attacker than for the victim."[185] Due to the success of the Stand Your Ground law in Florida, the NRA has backed similar laws to enactment in at least fifteen states, [186] with legislation still pending in at least six others,[187] and plans to introduce similar laws in at least eight more states during 2007. This has been the plan from the beginning, according to NRA Executive Vice President Wayne LaPierre: Florida was to be "the first step of a multi-state strategy" where the NRA would ride its "big tailwind . . . from state legislature to state legislature. . . . [I]f John Kerry held a shotgun in that state, we can pass this law in that state."[188] If Marion Hammer is correct, then in all states the law will soon be "on the side of the victim,"[189] and people will be permitted to defend themselves, even in their urban castles.

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[184] Brown v. United States, 256 U.S. 335, 343 (1921).

[185] Curtis, *supra* note 113.

[186] Liptak, *supra* note 179.

[187] Andrew Metz, *NRA Targets New York, Other States with "Stand Your Ground" Bill,* Knight-Ridder/Tribune Business News, NEWSDAY (New York, N.Y.), Apr. 28, 2005, at A27; *see also Stand Your Ground Getting More Looks,* U.P.I. (Atlanta), Feb. 24, 2006, *available at* http://www.upi.com/NewsTrack/view.php?StoryID=20060224-095206-6827r.

[188] Roig-Franzia, *supra* note 154.

[189] Goddard, *supra* note 162.

LIBERTY FOR ALL? JUVENILE CURFEWS: ALWAYS AN UNCONSTITUTIONAL AND INEFFECTIVE SOLUTION

Orly Jashinsky

Imagine the scene: you are sitting in your living room at 11:05 pm on a Wednesday night peacefully reading a magazine. Suddenly, you hear police sirens blaze and a voice muffled through a megaphone shout, "you two . . . stop right there, don't move!" You toss down the magazine, run to the window, pull back the shades, and intently look outside. You see two young men being placed into a police car, but you do not see anything to indicate what they have done. The next morning you tear the local newspaper apart, eagerly searching to find out what these boys had done. You find nothing.

Thinking that the story has not broken yet, you look again the next morning. Still nothing. You think to yourself, "how bizarre, the local paper prints everything that goes on in this neighborhood." You resign yourself to always wonder what these boys had done, but are just thankful that your street is safer from crime.[190] However, this is a misconception. A crime had been committed and acted upon by the police, but to the detriment of society, not the betterment. These boys violated your city's non-emergency juvenile curfew by doing nothing more than walking down your street an hour and five minutes past the ten o'clock curfew.[191]

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[190] This is a fictional hypothetical created for illustrative purposes. However, while the situation is a hypothetical, it is not atypical.

[191] Typical juvenile curfews provide restrictions on where minors can and cannot be between certain hours. *See* KANSAS CITY, MO., CODE § 50-237(a) (1998) ("it is unlawful for any minor under the age of 18 years to loiter, wander,

Incidents like the one described above are becoming more common in today's urban metropolises. More states have authorized municipalities to create juvenile curfew laws. Therefore, police are now able to crack down on the criminal youth who are committing such "atrocities" as returning from a late night movie, running out to the local 7-Eleven to get a slurpee, or perhaps the gravest crime of them all, going to the park for a late night game of basketball. Cities are plagued by these types of juvenile crimes. Luckily, the communities are protected by non-emergency juvenile curfew ordinances that enable the police to detain these harmful offenders and remove them from the streets.[192]

I. HISTORY AND OVERVIEW OF CURFEW USAGE AND POPULARITY

Non-emergency juvenile curfew ordinances are gaining popularity in America's cities with each passing year.[193] In 1995 a survey of 1,000 cities with populations greater than 30,000 found that seventy percent of the cities had enacted non-

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stroll, or play … at such places, between the hours of 11:00 p.m. on any day and 6:00 a.m. of the following day…"); *see also* N.J. PUB. L., 2005 ch. 23.

[192] While juvenile curfews are gaining popularity, some cities have still attempted to implement alternative programs to reduce juvenile crime. *See, e.g.*, Boston Police Dep't & Partners, *The Boston Strategy to Prevent Youth Violence, Prevention, Intervention, and Enforcement* 12 (1997). The City of Boston reported to have no plans of implementing a curfew and instead was creating a community-based approach to provide minors with alternative activities to occupy their time. The philosophy of the plan is to create an infrastructure in which youth would not get in trouble in the first place and therefore will not become part of the criminal justice system later.

[193] William Ruefle & Kenneth Mike Reynolds, *Curfews and Delinquency in Major American Cities*, 41 CRIME & DELINQ. 347, 355-58 (1995). This article includes an analysis of proposed policies in California and Florida. Both states have considered implementing statewide juvenile non-emergency curfews, instead of leaving the decision to each municipality, which is the common practice. Despite discussion, the proposals have not produced the support necessary and so far no action has been taken. Currently Hawaii is the only state that has a mandatory statewide curfew. *Id.* at 347-348.

emergency curfews laws.[194] By the year 2000, the number of cities with curfews was increasing steadily at a rate of three percent per year.[195] In 2005, New Jersey joined the growing trend and adopted legislation enabling its municipalities to expand on the existing juvenile curfews.[196]

Despite the popularity of juvenile curfew ordinances, they have only recently become the norm in American cities. Curfews were originally used only in emergency situations and carefully drafted to last only as long as the perceived emergency. The first curfews were implemented immediately before the Civil War in an effort to quell potential African American rebellions.[197] Later, in the early 1900s, curfews were used in

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[194] William Ruefle & Kenneth Mike Reynolds, *Cities with Curfews Trying to Meet Constitutional Test*, WASH. POST, Dec. 26, 1995. The study also found that an additional six percent or twenty three cities were contemplating enacting curfews at the time the study was being conducted. Some cities, aware of the potential constitutional challenges to the curfew law, made the law optional. They gave the parents of school aged children a consent form to allow the police to detain their children if they were caught after hours in violation of the curfew. However, this practice is not the norm and in most municipalities the curfew laws are mandatory. *Id.* at A13.

[195] Andra J. Bannister et al., *A National Police Survey on the Use of Juvenile Curfews*, 29 J. CRIM. JUSTICE 233 (2001).

[196] N.J. PUB. L. 2005 ch. 23 (2)(3)(b)(1). The bill reads:

> A municipality is hereby authorized and empowered to enact an ordinance making it unlawful for a juvenile of any age under 18 years within the discretion of the municipality to be on any public street or in a public place between the hours of 10:00 p.m. and 6:00 a.m. unless accompanied by the juvenile's parent or guardian or unless engaged in, or traveling to or from, a business or occupation which the laws of this State authorize a juvenile to perform. Such an ordinance may also make it unlawful for any parent or guardian to allow an unaccompanied juvenile to be on any public street or in any public place during those hours.

Id.

The bill's main sponsor was Senator Wayne Bryant from District five which includes Camden and Glouster County. *Id.*

[197] Peter L. Scherr, *The Juvenile Curfew Ordinance: In Search of a New Standard of Review*, 41 WASH. U. J. URB. & CONTEMP. L. 163, 164-66 (1992).

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American cities as part of an effort to curtail the vagrancy problem created by the ever-growing new immigrant population. [198] Then, during the 1960s and 1970s, local authorities utilized curfew ordinances to combat race riots in urban areas spawned by the civil rights movements and controversy surrounding desegregation.[199]

However, it was not until World War II that emergency curfews were first introduced as a mechanism to control the youth.[200] During the war, juvenile crime increased significantly, many speculated that the increase was attributable to the lack of parental supervision.[201] In response to the increase in crime caused by the temporary lack of parental supervision, cities enacted emergency curfews to specifically target the youth.[202] Unlike today's curfews, these curfews were uncontested because they were enacted solely for emergency purposes.[203] Like other emergency curfews, the juvenile curfews only lasted as long as the emergency situation, once the war and parental supervision resumed, the curfews were repealed.[204]

In the last twenty-five years, non-emergency juvenile curfews have gained enormous popularity for the first time ever in this country.[205] Cities across the nation have offered various

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Describing the history of curfew ordinances and attempting to reconcile the constitutional debate.

[198] *Id.*

[199] *Id.*

[200] Tamara Henry, *Curfews Attempt to Curb Teen Crime*, USA TODAY, Apr. 5, 1995.

[201] *Id.*

[202] *Id.*

[203] *Id.*

[204] *Id.*

[205] John F. Harris, *Clinton Praises Youth Curfew in New Orleans: President Continues to Push to Combat Juvenile Curfew Crime*, WASH. POST, May 31, 1996, at A14 (chronicling the reemergence of the juvenile curfews as well as President Clinton's endorsement of them).

rationales for the reemergence of curfew laws and their application to only the youth. Most policymakers assert that these laws are an effort to deter juvenile victimization and delinquency. [206] Others have suggested that the curfews are an effort to deter gang violence.[207] Some cities claim that the curfew laws are an effort to assist parental supervision.[208] While other cities offer no rationale at all, but are simply responding to the public's concerns, and a desire to meet constituency's demands, even if they are unfounded. [209]

The recent increase in juvenile curfew ordinaces arguably reflects the public's desire for safer streets. But Curfew laws merely provide a false sense of security because the majority of evidence suggests that juvenile curfews are ineffective.[210] A study of the New Orleans curfew revealed that juvenile crime declined nine percent during curfew hours. [211] However, the statistics were misleading because this decrease was offset by an increase in crime during non-curfew hours. [212] The same study also indicated that juvenile arrests had declined by five percent during curfew hours.[213] This was the same decline experienced

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[206] Note, *Curfew Ordinances and the Control of Nocturnal [sic] Juvenile Crime*, 107 U. PA. L. REV. 66, 66 n.5 (1958).

[207] *Id.*

[208] Jeremy Toth, *Juvenile Curfew: Legal Perspectives and Beyond*, 14 IN PUB. INTEREST 39, 81-82 (1994-1995).

[209] *Juvenile Proceedings and Records*, JUVENILE JUSTICE REFORM INITIATIVES IN THE STATES: 1994-1996 (Office of Juvenile Justice and Delinquency Prevention), http://ojjdp.ncjrs.org/pubs/reform/ch2_i.html.

[210] Carol M. Bast & K. Michael Reynolds, *A Look at Juvenile Curfews: Are they Effective?* 39 CRIM. L. BULL. 5 (2003) (chronicling the success of the juvenile curfews and the legal challenges brought in four cases).

[211] *See generally* Robert E. Shepard Jr., *The Proliferation of Juvenile Curfews*, 12 CRIMINAL JUSTICE MAGAZINE, Spring 1997, *available at* http://www.abanet.org/crimjust/juvjus/cjcurfew.html.

[212] *Id.*

[213] *Id.*

during the previous two years, before the curfew had been enacted. [214]

While the majority of evidence suggests that cities with juvenile curfews did not experience any changes in crime commission as a result of the curfews, there was one change that occurred - litigation.[215] Parents, teenagers, and communities across the country have, and continue to, use the court system to mount challenges to their city's juvenile curfew laws.[216] Parents have based their challenges on the First Amendment, Fourteenth Amendment, and Due Process Rights implicated by the void for vagueness doctrine. [217] Additionally, some

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[214] *Id.*; *see also* Michael H. Cottman, *Curfew Questions Persist*,. WASH. POST, Sept. 8, 1999, at B1 (describing the conditions for curfew implementation in Washington, D.C. Not only did the study indicate similar results of ineffectiveness as the New Orleans study did, but the curfews also created administrative difficulties. The curfew was enacted without any mechanisms for how the enforcement would be carried out, where and how long the violators will be held, and how to let parents know about the curfew). *See also* THE IMPACT OF JUVENILE CURFEW LAWS IN CALIFORNIA (Center on Juvenile and Criminal Justice 1998) (uncovering the skewed statistics law enforcement present in favor of the curfew's effectiveness), http://www.cjcj.org/pubs/curfew/curfew.html. For example, statistics from Monrovia, California report a fifty four percent decline in daytime burglaries since the curfew was enacted. However, prior to the curfew's enactment Monrovia experienced a forty percent decline in daytime burglaries and had only thirteen burglary arrest in the year prior to the curfew's enactment. Additionally, the decline was not compared to that of cities that did not enforce their curfews.

[215] Bast, *supra* note 21, at 7.

[216] *Id.*

[217] Challenges to the constitutionality of juvenile curfew laws have also been brought by parents in defense of their own rights. Most curfew provisions impose liabilities of fines, community service, or in some cases, even imprisonment on the parents who fail to abide by the curfew laws. Parents have challenged the curfews claiming it is a violation of their fundamental right to dictate the upbringing of their children without undue interference from the state. Most courts have held that parents do have a fundamental right to control the upbringing of their children, but that the right is not absolute. The right is subject to imposition by the government so long as the government has a compelling reason and is not unduly burdening the right of the parent. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 231 (1972) (holding that parents have a fundamental right against undue adverse interference by the state) *and* Troxel v. Granville, 530 U.S. 57, 57 (2000) (holding that the "Fourteenth Amendment's

individuals and social action groups have brought facial challenges to the laws.[218] They sought either declaratory judgment that the laws are unconstitutional, or injunctive relief to prevent the police from enforcing the curfew laws.[219]

The judicial response from the courts has been just as varied as the challenges to the curfew law. [220] Currently, there is a four-way circuit split among the appellate courts as to the constitutionality of juvenile curfew laws and the correct level of review under which these laws should be scrutinized. [221] Courts that have upheld the laws have done so either under a strict scrutiny review,[222] or intermediate review. [223] Courts that have invalidated the laws have done so based on Due Process Rights implicated by either the void for vagueness or overbreadth doctrines.[224]

The confusion and debate among the courts continues, necessitating a uniform approach. However, uniformity will not come from the Supreme Court. In 1998, the Supreme Court denied certiorari in *Schleifer v. Charlottesville*. The denial marked the third time the Court had declined to resolve much less consider the issue of the constitutionality of juvenile

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Due Process Clause has a substantive component that 'provides heightened protection against government interference with certain fundamental right and liberty interests,' including parents' fundamental right to make decisions concerning the care, custody, and control of their children.") (quoting Washington v. Glucksberg, 521 U.S. 702, 720).

[218] Hodgkins v. Peterson, 355 F.3d 1048, 1052-54 (7th Cir. 2004).

[219] *Id.*

[220] Patyk J. Chudy, *Doctrinal Reconstruction: Conflicting Standards in Ajudicating Juvenile Curfew Challenges*, 85 CORNELL L. REV. 518, 535 (2000).

[221] *Id.* at 522

[222] *See* Qutb v. Strauss, 11 F.3d 488 (5th Cir. 1993).

[223] Schleifer v. Charlottesville, 159 F.3d 843, 857 (4th Cir. 1998).

[224] Hodgkins v. Peterson, 355 F.3d 1048, 1062-64 (7th Cir. 2004).

curfews.[225] Even the Supreme Court's denial of certiorari cannot provide any guidance for the courts. Every time the Supreme Court has denied certiorari, the Court of Appeals for the Fourth Circuit decision was based on a different constitutional theory and therefore a different level of scrutiny.[226]

Having no guidance from the Supreme Court, cities and their residents were left guessing as to whether non-emergency juvenile curfew ordinances are constitutional, and what level of review should guide this inquiry. This note will explore the constitutional dilemma and establish a uniform result based on existing Supreme Court precedent. The first part will, (1) examine the language of the curfew laws that create the four-way circuit split, (2) comment on their similarity, and (3) reconcile how or why courts have used differing standards of review. The second part will, (1) address the differing standards of review used by the circuit courts, (2) attempt to reconcile them and, (3) suggest a uniform method that the courts should adopt based on existing Supreme Court precedent. The last part will explore where the juvenile curfew laws are most prevalent and in turn the demographic that they effect the most.

II. ONE LAW, FOUR STANDARDS: RECONCILING THE DIFFERING STANDARDS OF JUDICIAL REVIEW APPLIED TO JUVENILE CURFEW LAWS

Currently, there is a four way circuit split among the appellate courts as to the constitutionality of non-emergency

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[225] *Schleifer*, 159 F.3d 843. *See, e.g.,* Bykofsky v. Middletown, 535 F.2d 1245 (3rd Cir. 1976) (unpublished table decision), *cert. denied*, 429 U.S. 964 (1976) (Marshall and Brennan, JJ., dissenting) (explaining that the curfew laws touched on constitutional issues pertinent to many municipalities and because of that he would have granted certiorari). The other case the Supreme Court denied hearing the issue was in *Qutb*, 11 F. 3d 488 (5th Cir. 1993), *cert. denied*, 511 U.S. 1127 (1994).

[226] *See Schleifer*, 159 F.3d 843 (upholding juvenile curfew under an intermediate scrutiny review); *Bykofsky*, 535 F.2d 1245, (upholding a juvenile curfew ordinance under a rational scrutiny review); and *Qutb*, 11 F. 3d 488 (upholding juvenile curfew ordinance under a strict scrutiny review).

juvenile curfews laws, and a unified level of scrutiny should be determined.[227] The split results from differing views over what rights are affected by the curfews. Some courts focus their analysis on whether minors have a fundamental right to free movement, and therefore debate over what level of scrutiny the courts should use.[228] In contrast, other courts focus on whether the juvenile curfews infringe on the minor's and parent's rights to due process of law.[229] These courts consider whether the curfew ordinances are unconstitutional due to the vagueness of overbreadth doctrines.[230] The different constitutional focuses used by the courts, and therefore the different outcomes reached is surprising because all courts are considering similar curfews with similar effects, and almost identical language.

In *Schleifer* and *Qutb,* the Court of Appeals for the Third and Fifth Circuits considered the constitutionality of almost identical juvenile curfew ordinances. The court in *Schleifer* considered section 17-7(b) of the Charlottesville, Virginia Code that made it a misdemeanor for "a minor, during curfew hours, to remain in or upon any Public Place within the City, to remain in any motor vehicle, operating or parked . . . or to remain in or

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[227] Chudy, *supra* note 31.

[228] *See* Nunez v. San Diego, 114 F. 3d 935, 938 (9th Cir. 1997) (holding that although age is not a suspect class, the curfew should still be strictly scrutinized because minors have a fundamental right to free movement); *Qutb*, 11 F. 3d at 496 (holding that even if minors have a fundamental right to free movement and therefore strict scrutiny is used, the law is still constitutional because the state has a compelling interest in enacting the curfew laws).

[229] *Nunez*, 114 F. 3d at 938 (holding that aside from violating the fundamental right to free movement, the law is unconstitutional because it is overbroad and therefore a violation of parent's and minor's right to due process).

[230] Specifically, if a law is vague it can be declared unconstitutionally vague when (1) it fails to give the person of average intelligence proper warning and indication of what activity is prohibited or (2) is drafted to unclearly that it would lend itself to arbitrary enforcement and give the police too much discretion in how the law is applied. *See generally* Kolender v. Lawson, 461 U.S. 352, 361-362 (1983) (explaining that a law that is overbroad implicates due process and will be found unconstitutional when it is drafted so broadly as to impose liability on some people and harms that were not the intended targets of the law).

upon the premises of any Establishment within the City." [231] Additionally, the code provided exceptions that if the minor were engaged in, he or she would be exempt from liability under the curfew ordinance.[232]

The exceptions specified that the minor would not be charged with a misdemeanor for curfew violations if the minor was: (1) with a parent, (2) involved in an emergency, (3) engaged in employment or returning home from work, (4) on the sidewalk directly abutting his or her residence, (5) attending an activity sponsored by a school, religious, or civic group, (6) on an errand for a parent with a signed note, (7) involved in interstate travel or, (8) exercising a right protected by the First Amendment.[233] The plaintiffs in *Schleifer* asserted that the curfew ordinance violated the minor's First, Fourth, Fifth, and Fourteenth amendment rights.[234] The court did not agree. [235]

The court held that none of the minor's rights hade been unconstitutionally violated.[236] It reasoned that because the minor's Fourteenth Amendment rights were not coextensive with those of adults, no fundamental right was being infringed upon by the curfew.[237] Therefore, since a fundamental right had not been violated, the court held that an intermediate level of review should be afforded to the ordinance.[238] Under an intermediate scrutiny standard, a law is valid if the government can prove that is it substantially related to achieving an important government interest. The court relied on the city's

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[231] *Schleifer*, 159 F.3d at 857 (citing CHARLOTTESVILLE, VA., CODE § 17-7(b)(1-8)(1996).

[232] *Id.*

[233] *Id.* at 846.

[234] *Id.*

[235] *Id.* at 851.

[236] *Id.*

[237] *Schleifer*, 159 F.3d at 847.

[238] *Id.*

purported reason for establishing the curfew and found it was an important interest.[239]

The city urged that the purpose of the ordinance was to "protect the general public through the reduction of juvenile violence and crime . . . [and to] promote the safety and well-being of . . . persons under the age of seventeen (17) … and foster and strengthen parental responsibility."[240] Without much further explanation, the court concluded that the city's interests were legitimate and that the means chosen to achieve those interests were substantially related to achieving the curfew's stated purpose.[241]

Similar to the Third Circuit in *Schleifer*, the Fifth Circuit in *Qutb* upheld an almost identical juvenile curfew ordinance, but under a different level of constitutional review. [242] In *Qutb*, the juvenile curfew ordinance provided that a minor committed a misdemeanor in violation of the curfew law if, "he remains in any public place or on the premises of any establishment within the city during curfew hours."[243] Similar to the ordinance challenged in *Schleifer*, the ordinance in *Qutb* also provided an extensive list of exceptions that would absolve the minor of liability if compliance with the exception could be proved.[244]

The exceptions provided that a minor would not be charged with a misdemeanor if the minor was, (1) with a parent, (2) on an errand under the direction of the parent, (3) in a vehicle that was engaged in interstate travel, (4) involved in an emergency, (5) on a side walk abutting the minor's house or a neighbor's house as long as the neighbor did not complain, (6) attending a school, religious, or recreational activity sponsored by the school or other civic organization, or (7) exercising First

[239] *Id.* at 851.

[240] *Id.* at 856.

[241] *Id.*

[242] Qutb v. Strauss, 11 F. 3d 488.

[243] *Qutb*, 11 F.3d at 497 (citing DALLAS, TEX., CODE, CH. 31§ 31-33(b)(1) (1992)).

[244] *Id.* at 490.

amendment rights.[245] Like the plaintiff in *Schleifer*, in *Qutb* they challenged the constitutionality of the juvenile curfew ordinance.[246] They asserted that the law was a violation of the minor's First, Fourth, Fourteenth and Fifth Amendment rights.[247]

The court did not agree with the plaintiffs, although they did afford the claims a stricter level of review. The court noted that the rights of minors to move about freely were curtailed by the curfew ordinance.[248] The court further noted that the right to move about freely was a fundamental right, requiring any law infringing on that right to be strictly scrutinized. [249] In order for a law to be found constitutional under a strict scrutiny review the law must be necessary to promote a compelling government interest, and be narrowly tailored to achieve that compelling interest.

The court upheld the ordinance despite the strict level of review because it found that the city's interest was compelling and that the law was narrowly tailored to achieve that interest.[250] The court found that the city's stated purpose for the ordinance was compelling because section 31-33 of the Dallas Code provided that the purpose of the ordinance was to, "reduce juvenile crime and victimization, while promoting juvenile safety and well-being…"[251] The court felt that increasing the safety of juveniles and reducing crimes was a compelling

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[245] *Id.* at 497 (citing DALLAS, TEX., CODE CH. 31, §§ 31-33(c)(1)(A-H)(1992)).

[246] *Id.* at 495.

[247] *Id.* at 491 n.4. The plaintiffs also asserted that the ordinance was unconstitutionally vague, however the court dismissed this argument by merely stating it did not have merit without explaining why. *See id.*

[248] *Qutb*, 11 F.3d at 492.

[249] *Id.* The court simply assumed the right to free movement was a fundamental right and did not provide any analysis as to how this conclusion was reached. *Id.* and *see supra* note 59 and accompanying text.

[250] *Id.* at 493.

[251] *Id.* (citing DALLAS CODE § 31-33 (1990)).

government interest.[252] The court further found that the city had narrowly tailored the law because the curfew was the least restrictive means of accomplishing the city's stated goals.[253] The court held that the curfew was the least restrictive means because the drafters provided an extensive list of exempted activities.[254] The court seemed to indicate that in the absence of these exemptions, the constitutional propriety of the curfew law could be more questionable.[255]

While the Fifth and Third Circuits reached the same conclusion that the curfew ordinances were constitutional, they did so using different avenues. Although both the activities prohibited, and the language of the ordinances were almost identical, the circuit courts used different constitutional standards in reaching their conclusions. While the difference between *Schleifer* and *Qutb* is slight, the discrepancy between other circuits is more drastic. Contrary to the Third and Fifth Circuits, which both found juvenile curfews constitutional under an intermediate and strict review respectively, the Ninth Circuit in *Nunez ex rel. v. City of San Diego*[256] held very differently. The difference is surprising since, once again, the language of the curfew prohibitions as well as the exemptions were almost identical.

In *Nunez*, the plaintiff contested her son's arrest under the San Diego non-emergency juvenile curfew ordinance.[257] The

[252] *Id.* at 492.

[253] *Qutb*, 11 F.3d at 493. The court did not require any statistical proof be given that the curfew was an effective means of achieving the stated goals. Rather the court was satisfied merely because the city had what appeared to be a compelling State interest. *Id.*

[254] *Id.* at 492-93. The court placed the greatest emphasis on the exemption for First Amendment activities stating that, "most notably, if the juvenile is exercising his or her First Amendment rights, the curfew ordinance does not apply." *Id.* at 494. However, once again, the court did not inquire into the effectiveness of the exception.

[255] *Id.* at 493-94 ("To be sure, the defenses are the most important consideration in determining whether this ordinance is narrowly tailored").

[256] 114 F.3d 935 (9th Cir. 1997).

[257] *Id.* at 938.

ordinance said it was a misdemeanor, "for any minor under the age of eighteen years of age to loiter, idle, wander, stroll, or play in or upon the public streets, highways, roads, alleys, parks, playgrounds, wharves, docks, or other public grounds, public places, and public buildings, public places of amusement and entertainment, vacant lots or other unsupervised places…"[258] Like the curfews in both *Schleifer* and *Qutb*, the ordinance in *Nunez* also provided a list of exceptions.[259]

The exceptions provided that the minor was exempt from liability if he or she was, (1) with an adult, (2) on an emergency or errand directed by the parent, (3) returning home from a meeting, entertainment, or local recreational activity directed or supervised by the local educational authorities or, (4) was out in connection with some legitimate business, profession or occupation.[260] The plaintiff asserted that despite the provision of exceptions, the law was nonetheless unconstitutional because it violated the minor's Fourteenth Amendment rights and was unconstitutional due to vagueness.[261]

Despite the similarity between the San Diego ordinance and the ones considered by the Third and Fifth Circuits in the previous cases, the Ninth Circuit invalidated the curfew ordinance and agreed with both of the plaintiff's arguments.[262] First, the court determined that the right being infringed upon by the curfew was a fundamental right- the right to move freely- and therefore must be strictly scrutinized.[263] The Ninth Circuit

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[258] *Id.* (citing SAN DIEGO, CAL., MUNICIPAL CODE, art. 8 § 58.01 (1947)).

[259] *Id.* at 938-39.

[260] *Id.* (citing SAN DIEGO, CAL., MUNICIPAL CODE, art. 8 § 58.01 (1947)).

[261] *Id.* at 940, 944. .

[262] *Id.* at 949. ("we hold that the ordinance is unconstitutional even if given a broad construction to avoid vagueness problems.").

[263] *Id.* at 944. When finding that the right to move about freely was a fundamental right, the court relied on *United States v. Wheeler*, 254 U.S. 281, 293 (1920) which stated,

in *Nunez* applied the same strict scrutiny review standard as the court in *Qutb* used; that the law would only be found constitutional if it was necessary to achieve a compelling government interest and was narrowly tailored to achieve that compelling goal.[264] However, the court in *Nunez* reached a different conclusion then the court in *Qutb*.

While the court *Qutb* found that the juvenile curfew was constitutional under a strict scrutiny review, the court in *Nunez* found that the contrary was true.[265] The court noted that while the city's interest in "protect[ing] children from nighttime dangers, to reduce juvenile crime, and to involve parents in control of their children," were compelling government interests, the ordinance failed a strict scrutiny review because it was not narrowly tailored to achieve the city's interest.[266]

In order for a law to be considered narrowly tailored, the method chosen to achieve the stated goals of the law must be the least restrictive means available.[267] The court found that the least restrictive means had not been used and therefore the law was not narrowly tailored to survive strict scrutiny for two reasons. The first was that statistical evidence showed that juvenile curfews had consistently failed to produce the desired reduction in juvenile crime.[268] Secondly, the exceptions

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> In all the states from the beginning down to the adoption of the articles of Confederation the citizens thereof possessed the fundamental right, inherent in citizens of all free governments, peacefully to dwell within the limits of their respective states, to move at will from place to place therein, and to have free ingress thereto and egress therefrom....

Id.

[264] *Nunez*, 114 F.3d at 947.

[265] *Id.* at 948.

[266] *Id.* at 946, 949.

[267] *Qutb*, 11 F.3d at 492 (citing Pugh v. Rainwater, 557 F.2d 1189, 1195 (5th Cir.1977), *vacated on other grounds*, 572 F.2d 1053 (5th Cir.1978)).

[268] *Nunez*, 114 F. 3d at 948. Specifically, the court relied on a Justice Department Report that showed that juvenile crime peaked at 3:00pm, when students were let out of school, and then again at 6:00pm when after school sports training ended. Additionally, a report by the San Diego police

provided by the ordinance were too narrow to protect the minor's fundamental rights.[269] The exemptions were too narrow because they did not provide exemptions for many activities that minors could and should legitimately engage in.[270]

In addition to invalidating the curfew ordinance based on a fundamental rights analysis, the court in *Nunez* also invalidated the law based on a due process analysis.[271] The court stated that in order for a law to not infringe on due process rights by being overly vague the law must, "(1) define the offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and (2) establish standards to permit the police to enforce the law in a non-arbitrary ... manner."[272]

In finding that the ordinance was unconstitutionally vague, the court relied on the plain language of the ordinance and the breadth of the enumerated exceptions.[273] The court found that the language was vague because the terms used in the ordinance could reasonably be construed as having several meanings; therefore it could not provide an ordinary person with notice of exactly what activities would result in liability.[274] Furthermore, both the broad language describing the prohibited acts and the exemptions from liability provided the police with unfettered discretion as to how the curfew would be enforced.[275]

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department showed that juvenile crime had been steadily decreasing for six consecutive years and the curfew had only been in place for one of those years. *Id.* at 947.

[269] *Id.* at 949.

[270] *Id.* at 948.

[271] *Id.* at 942-44.

[272] *Id.* at 940 (citing Kolender v. Lawson, 461 U.S. 352, 357 (1983)).

[273] *Nunez*, 114 F. 3d at 940.

[274] *Nunez*, 114 F. 3d at 943.

[275] *Id.* at 942-43. The court specifically noted that if the terms, "loiter, wander, idle, stroll or play," were to be defined as 'hanging out' as the city suggested, then the definition was useless because hanging out could be interpreted just as arbitrarily as the terms, "loiter, wander, idle, stroll of play," that were contained in the ordinance itself. *Id.* at 941.

While the curfew considered by the court in *Nunez* was very similar to those considered by the courts in *Qutb* and *Schleifer*, it was not identical. The curfews in both *Qutub* and *Schleifer* contained exemptions for First Amendment activities, and the curfew considered in *Nunez* did not. The court in *Qutb* placed considerable weight on the availability of the First Amendment exemption and it appears to have been the court's deciding factor in determining that the curfew withstood a strict scrutiny constitutional review.[276]

Aware of the importance of First Amendment protection, the court in *Nunez* invalidated the curfew for an additional reason; overbreadth.[277] The court held that the ordinance violated minors' due process rights because it was overly broad, encompassing activities that the curfew was not intended to prevent and that minors could lawfully engage in.[278] The court explained that the overly broad doctrine invalidated a law based on the potential infringements of the rights of those not before the court if the very existence of the law might potentially cause others to refrain from constitutionally protected free speech or expression.[279] The court noted that while the curfew regulated conduct and not speech, it still infringed on minors' rights to engage in First Amendment activities during the curfew hours because it provided no exemptions for any form of First Amendment expression or association during the curfew hours.[280]

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[276] *Qutb*, 11 F.3d at 494. *See supra* note 66.

[277] *Nunez*, 114 F. 3d at 949.

[278] *Id.* at 948.

[279] *Id.* at 949-51.

[280] *Id.* at 951. In reaching this conclusion the court relied on the three-part test articulated by the Supreme Court in *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). There the Supreme Court held that in order for an ordinance to be considered a reasonable time, place and manner restriction, (1) it must be content neutral, (2) it must be narrowly tailored to a significant government interest; and (3) it must leave open enough alternate channels for legitimate expression. Since the ordinance here provided a blanket prohibition against all activities outside the home during certain hours, the ordinance failed to provide any alternate channels for legitimate expression. *Id.*

While the examination of *Qutb*, *Schleifer*, and *Nunez* based on the First Amendment distinction appears to reconcile the constitutional confusion created by juvenile curfews, this reconciliation is misleading. In *Hodgkins v. Peterson,* the Seventh Circuit invalidated a juvenile curfew ordinance that contained an exemption for First Amendment activities, illustrating that a First Amendment exemption is not definitive proof of constitutionality.[281]

In *Hodgkins,* the court considered the constitutional validity of a juvenile ordinance that made it a misdemeanor for a minor to be in public place during certain hours.[282] Similar to the curfew ordinances in the previous cases, the Indiana law exempted any minor from liability if the minor was engaged in prohibited conduct while, (1) accompanied by the child's parent, guardian or custodian; (2) accompanied by an adult specified by the child's parent, guardian, or custodian; (3) participating in, going to, or returning from lawful employment, a school sanctioned activity, a religious event, an emergency involving the protection of a person or property from an imminent threat of injury or substantial damage, an activity involving the exercise of the child's rights protected under the First Amendment to the United States Constitution or Article 1, Section 31 of the Constitution of the State of Indiana, or both, such as freedom of speech and the right of assembly, or an activity conducted by a nonprofit or governmental entity. [283]

Plaintiffs challenged the constitutionality of the curfew ordinance. The parents of the minors whom were charged with violating the curfew argued that the First Amendment exemption was an insufficient protection of minor's First Amendment rights.[284] The parents of the minors who were

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[281] 355 F.3d 1048, 1054 (7th Cir. 2004).

[282] *Id.* at 1052 (citing IND. CODE 31-37-3-3).

[283] *Hodgkins*, 355 F.3d at 1053 (citing IND. CODE § 31-37-3-3 (1996)).

[284] *Id.* at 1053-54. The minor's mother also argued that the ordinance unduly burdened her fundamental right to raise her children, as she desired freedom government intrusion. She asserted that part of a parent's job was to prepare children for adulthood. The ordinance restricted this by foreclosing the option of providing later curfews for their children when they showed the requisite maturity and responsibility to have a later curfew. The court rejected

charged with violating the curfew argued that the First Amendment exemption was an insufficient protection of minor's First Amendment rights.[285] Additionally, parents of children who were are subject to the ordinance brought a facial challenge alleging that the curfew law creates a chill that imposes on their First Amendment rights. They asserted that it 'chilled' minors' willingness to participate in legitimate First Amendment activities by creating a fear of liability.[286] They urged that minors and parents are given no guidance as to what activities would be properly exempted from liability.[287]

The court agreed with the plaintiffs and found that the ordinance "is not narrowly tailored to serve a significant governmental interest and fails to allow for ample alternative channels for expression."[288] The court reasoned that despite the content neutral prohibition created by the ordinance, the government regulation of non-speech was so intimately connected to expressive conduct, that an affirmative defense for First Amendment activities could not render the ordinance constitutional.[289] "[T]he affirmative defense for participating in First Amendment activities does not significantly reduce the chance that a minor might be arrested for exercising his First Amendment rights."[290] Because the curfew implicated First Amendment rights, it would only be constitutional if the curfew

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that parent's argument explaining that while parents do have a right to control the upbringing of their children, this right is not absolute. The state can impede on a parent's right to raise their children so long as it is for a compelling reason, and the intrusion does not unduly burden the parents' role and authority. The court also noted that all parents are presumed to have their children's safety in mind, and since the law was enacted to protect the safety of minors, it could not be an undue burden on parents' because it is in line with their assumed parental goals. *See generally id.*

[285] *Id.*

[286] *Id.* at 1056.

[287] *Id.*

[288] *Id.* at 1064.

[289] *Hodgkins*, 355 F.3d at 1064.

[290] *Id.*

law was, "no more restrictive than necessary to further the governmental interest."[291]

The city asserted that the government's interest and purpose in creating the curfew was to "lower drug and alcohol use by youth, decrease crime committed by and against minors, foster parental involvement in their children's conduct, and empower parents who wish to set limits on their children's nighttime activities.."[292] However, the curfew ordinance regulates the ability of minors to engage in some of the purest and most protected forms of speech and expression, almost every form of public expression during the late night hours. Thus the curfew law limits the speech of the plaintiffs.[293] The court noted that while this was a legitimate government interest, the curfew was improper because it did not utilize the least restrictive means possible.[294] Under the "no more restrictive than necessary" standard, the "[g]overnment may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals."[295] The means were not the least restrictive means because many of the minors whom the exemptions could legitimately shield from liability were not beyond the risk of being stopped and detained under the ordinance.[296] This was the case because the ordinance did not require the suspecting officer to look beyond his or her immediate observation of the circumstances.[297] Therefore, the exemption only protected minors whom the officer actually saw participating in a protected activity.[298] If a police officer

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[291] *Id.* at 1060.

[292] *Id.* at 1054.

[293] *Id.* at 1058.

[294] *Id.* at 1062.

[295] *Hodgkins*, 355 F.3d at 1060 (citing *Ward*, 491 U.S. at 799).

[296] *Id.*

[297] *Id.* at 1061.

[298] *Id.* at 1062.

stopped a teenager at 1:00am and the teenager claimed he or she was returning from a political rally, the police officer did not have an obligation to inquire any further and could lawfully detain the minor if he desired.[299]

The decisions reached by the above four circuits, particularly the Seventh Circuit's treatment of a curfew ordinance with a First Amendment exception, are irreconcilable. Absent the decision in *Hodgkins*, the curfews and the courts' positions on their constitutionality might have been reconcilable. Before *Hodgkins*, even in the absence of review by the Supreme Court, the consensus among the circuits appeared to be that a juvenile curfew ordinance would withstand any level of constitutional review as long as it contained a First Amendment exception. However, after the court's decision in *Hodgkins*, a general rule is impossible to discern and the decisions are irreconcilable warranting the adopting of a uniform approach.

III. ADOPTING A UNIFORM METHOD TO REVIEW THE CONSTITUTIONALITY OF JUVENILE CURFEW ORDINANCES.

Post *Hodgkins*, there is discrepancy as the constitutional rights of minors depending on what circuit they reside in. A resident of the Fifth Circuit is afforded a lower level of First Amendment protection and rights than those who reside in the Seventh Circuit.[300] Traditionally, it has been the role of the Supreme Court to firmly establish the degree to which government regulations and laws may infringe upon these rights. [301] This task is critical because when it comes to issues of

[299] *Id.* at 1061.

[300] The Fifth circuit held that even if a minor has a fundamental right to free movement, that right is not violated by the curfew ordinance because the ordinances could withstand a strict scrutiny review. In contrast, the Seventh circuit held that a juvenile curfew was an unconstitutional violation of minors rights to move about freely because the ordinance could not withstand an intermediate level of scrutiny. *See supra* note 54, at 17; *see also supra* note 101, at 26.

[301] *See, e.g,* NANCY E. WALKER ET. AL., CHILDREN'S RIGHTS IN THE UNITED STATES: IN SEARCH OF A NATIONAL POLICY 10-12 (1999) (arguing that one reason why there is judicial inconsistency in decisions that affect the rights of minors is

constitutionality, there cannot be any distinction among the jurisdictions.

Citizens of all states must be afforded the same constitutional rights as of those of other states. While the Supreme Court has systematically declined to resolve the issue directly, the Court's precedent regarding due process rights and the void for vagueness doctrine is instructive in resolving the discrepancy. If it is applied by the circuit courts then it would establish a uniform rule for determining the constitutionality of juvenile curfew ordinances.[302]

In *Kolender v. Lawson,* the Supreme Court reaffirmed the long standing proposition that in order for a statute to not violate a citizen's due process rights the statute must define the offense with, "sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."[303] The court noted that beyond the language of the statute necessary to give citizens notice, another important aspect of the vagueness doctrine was that the, "legislature establish minimal guidelines to govern law enforcement."[304]

because the composition of the Supreme Court keeps changing, it has gone from mostly liberal to mostly conservative. Therefore, the majority has not been willing to grant minors rights that are coextensive with those of adults. Additionally, points to a difference among the justices regarding their desire to look to social science findings as evidence of minors' development and abilities).

[302] *See supra* note 30, at 13; *see also supra* note 32, at 13.

[303] Kolender v. Lawson, 461 U.S. 352, 357 (1983) (citing Village of Hoffman Estates v. Flipside, 455 U.S. 489 (1982); Smith v. Goguen, 415 U.S. 566 (1974); Grayned v. City of Rockford, 408 U.S. 104 (1972); Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); Connally v. General Construction Co., 269 U.S. 385 (1926)). *Kolender* dealt with a Caliornia statute that required person who loiters or wanders on street to provide "credible and reliable" identification when requested by a police officer. The court held that while the void for vagueness doctrine encompassed both a notice and arbitrary enforcement requirement, the more important factor was the arbitrary enforcement. Therefore the court held that this ordinance was unconstitutionally vague because the legislature did not establish guidelines to determine what was considered "credible and reliable" identification and in failing to do so did not provide any guidelines to govern law enforcement and protect people against arbitrary enforcement.

[304] *Id.* at 358 (citing Smith v. Goguen, 415 U.S. 566, 574 (1974)).

Guidelines are necessary because the court feared that without them the law would merely be a "standardless sweep [that] allows policemen [and] prosecutors. . . to pursue their person predilections."[305]

In *Kolender*, the Supreme Court invalidated a statute that required anyone who wandered or loitered on the streets to provide, "credible and reliable" identification and to account for their presence when requested by a police officer.[306] The Court concluded that the statute perpetuated arbitrary enforcement by the police because it did not provide any standard for determining what the suspect needed to do in order provide credible proof justifying his presence on the street. Because no standard was articulated, the police had complete discretion to determine whether the suspect satisfied the requirements and whether of not the suspect should be detained.[307] The Court concluded that the effect of the statute was to allow people to lawfully walk the streets subject to the whim and desire of patrolling officers, an overly broad statute and therefore a violation of citizen's due process rights.[308]

Following *Kolender*, many circuit courts applied the Supreme Courts analysis of the void for vagueness doctrine to juvenile curfews and in doing so found that the curfew ordinances were unconstitutionally vague and therefore a violation of due process. In *City of Summer v. Walsh*, the court held that a juvenile curfew ordinance prohibiting minors from "remaining" in a public place during curfew hours was unconstitutionally vague because "remain" was defined as "linger or stay," terms that lead to arbitrary interpretation and enforcement in the hands of police.[309]

In *S.W. v. State*, the court held that a juvenile curfew that provided an exemption for minors engaged in an emergency or

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[305] *Id.*

[306] *Id.* at 352.

[307] *Id.* at 358.

[308] *Kolender*, 461 U.S. at 358.

[309] City of Summer v. Walsh, 91 P.3d 1111 (Wash. 2003).

special occasion was unconstitutionally vague because it was impossible to define the terms with sufficient definiteness that would cure the selective and arbitrary enforcement it afforded the police.[310] Similarly, in *Allen v. Bordertown*, the court held that a curfew law that provided an exemption for minors engaged in legitimate business was unconstitutionally vague because the term 'legitimate' was not defined and was left up to whim of enforcing police officers. [311]

In the above mentioned cases, the courts specifically turned to the Supreme Court for guidance despite the fact that the constitutionality of juvenile curfews laws had never been expressly spoken of by the Supreme Court in any regard. Contrary to the above cases, the Fifth Circuit in *Qutb* declined to address the due process void for vagueness implications of the juvenile curfew.[312] There, the plaintiffs mounted several constitutional challenges to the curfew ordinance before the district court, including a void for vagueness challenge.[313] However, the district court invalidated the ordinance based solely on a fundamental rights analysis, and therefore that was the only issued addressed by the appellate court on appeal. [314] On appeal, the Fifth Circuit focused its inquiry solely on the constitutional fundamental rights implicated by the juvenile curfew ordinance. Had the court considered the void for vagueness doctrine articulated by the court in *Kolender* it is likely that the court would have reached a different conclusion.

In contrast to the court in *Qtub*, the court in *Hodgkins* specifically addressed the plaintiff's due process arguments and

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[310] S.W. v. State, 431 So. 2d 339 (1983).

[311] Allen v. Bordertown, 524 A.2d 478 (1987). *See also* In re Doe, 513 P. 2d 1383, (1973) (holding a juvenile curfew ordinance unconstitutionally vague because it included the term "loiter." Court held that the term was too vague and imprecise because it failed to give proper notice as to what conduct constituted unlawful activity and because of its broad sweep it had the effect of inhibiting otherwise lawful conduct).

[312] Qutb v. Strauss, 11 F.3d 488, 491 (5th Cir. 1993).

[313] *Id.* at 490.

[314] *Id.*

invalidated the curfew ordinance by finding it overly broad.[315] However, similar to the court in *Qutb*, the court in *Hodgkins* did not specifically apply the Supreme Court's void for vagueness rule articulated in *Kolender*. The curfew ordinances considered by both these courts are identical in prohibited acts and the exemptions they provide, as well as indicative of how juvenile curfews have commonly been designed.[316] Therefore, the differing outcomes and subsequent government regulation that the two either prohibit or allow are a direct contradiction to one another and present a troubling and irreconcilable constitutional outcome.

Applying the Supreme Court's void for vagueness doctrine from *Kolender* to the curfews considered by the courts in *Qutb* and *Hodgkins* will produce a uniform rule and remedy the discrepancy in the constitutionality of these ordinances currently created by the case law. In both *Qutb* and *Hodgkins* the curfew ordinances provided exemptions for minors engaged in First Amendment activities. In *Qtub*, it was precisely this exemption that cured any fundamental rights violations, however it cannot cure the due process violations, which the court failed to consider.

In order for a statute or ordinance that imposes criminal liability or sanctions to sustain a due process challenge it must meet two requirements. First, it must define the offense with sufficient definiteness to allow an ordinary person to know what conduct is prohibited.[317] Secondly, it must provide specific guidelines to eliminate the potential for arbitrary or discriminatory enforcement by police.[318] Juvenile curfews by their very nature and design can never be designed in such a way that would meet these requirements.

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[315] *Hodgkins*, 355 F.3d at 1060.

[316] The ordinances in both cases provided that if a minor was found in a public place between certain hours he would be violating the curfew. The ordinances also provided that a minor could absolve himself of liability if the questioning officer found he complied with one of the listed exemptions. *See supra* Part I for a more detailed discussion on the similarity of the curfew ordinances.

[317] *Kolender*, 461 U.S. at 348.

[318] *Id.*

All juvenile curfew laws follow a similar pattern. One section lists, and at times attempts to define, the prohibited acts. Another section lists, but often fails to define, exemptions that if the minor is engaged in will foreclose liability. Prohibited acts in juvenile curfew ordinances always contain a prohibition against being present in public places during the curfew hours. Post *Qutb*, juvenile curfew laws always contained an exemption for, among other things, First Amendment activities.[319]

The first component of curfew ordinances does not present a due process violation. Courts have repeatedly considered void for vagueness challenges in regard to prohibited acts. They have uniformly held that with careful drafting; the prohibited acts could be listed and defined in such a way that would remedy any vagueness concerns. However, the second component of curfew ordinances does present vagueness problems and has not been afforded the same consistent treatment by the courts. In *Qutb* and *Hodgkins* both curfews considered provided that a minor would not be liable for a curfew violation if he or she was involved, "in an activity involving the exercise of the child's rights protected under the First Amendment," of the federal or state constitutions, "such as freedom of speech and the right to assembly."[320] This exemption will always create a due process void for vagueness problem for three reasons.

The first is that they it cannot be designed in a way that would give an ordinary person notice of what is prohibited. Courts have had a difficult time muddling through First Amendment jurisprudence on their own, it is impossible to think that an ordinary person, particularly a minor would be knowledge enough to unravel this exemption on their own. At the most basic level, First Amendment jurisprudence contains two tracts, content regulation, and time, manner and place regulation. In order for a law to properly regulate the time, manner and place of speech it must be, (1) content neutral, (2) narrowly tailored to serve a significant government interest, and (3) allow ample alternative channels for expression.[321]

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[319] *See supra* Part I for a discussion of other exemptions commonly provided by juvenile curfew ordinances.

[320] *Hodgkins*, 355 F.3d at 1061; *Qutb*, 11 F.3d at 491.

[321] *Ward*, 491 U.S. at 791.

Therefore, whether or not an activity is truly a First Amendment activity that would exempt a minor from liability depends on how the activity participated in would fair under these requirements. An inquiry would need to be done on a case-by-case basis into each activity. A minor is not equipped to make this inquiry, and if they desired to participate in an activity would face the risk of liability in most cases. Furthermore, it is likely the arresting officer who will make this inquiry, which he too is not equipped to make, should not be given that arbitrary power to determine if a minor has a legitimate First Amendment excuse.

Additionally, this case-by-case inquiry presents the second due process problem created by the First Amendment exemption. The exemption has a chilling effect on a minor's willingness to engage in first amendment activities because the exemption provides no guidance as to what activities are proper.[322] Minors will only learn what activities are protected by the exemption after they have been engaged in. At that point, the minor might be faced with potential liability, a risk that many are not willing to take. As such, the curfew ordinances create a deterrent against engaging in many constitutionally protected activities.

The third reason why the First Amendment exemption presents a due process right violation is because the exemption cannot be designed in a way that would eliminate arbitrary or discriminatory enforcement by police. Just as the courts have struggled with what time, manner, and place regulations are proper, so too will the police. An inquiry would need to be made into the propriety of government regulation of these activities in every case. This is a task that police are not equipped to undertake, and also do not have to. As the ordinances are designed, police are under no obligation to investigate beyond the immediate observable facts. If a minor is seen on the streets the police can inquire into why they are there, and if the first

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[322] *See Hodgkins*, 355 F.3d at 1061 (mother argued before the appellate court that even though the curfew ordinance provided an exception for first amendment activities, there was not way for a girl of that age to know what activates are in fact properly protected and therefore the girl would likely refrain from any activity that is questionable, thus to exception chills her ability and willingness to exercise her first amendment right).

amendment is used as an explanation, the police do not have to believe the minor.

In *Kolender*, the Supreme Court was precisely concerned with this problem. The Court invalidated a law in that case because it did not create any uniform standard to prove the propriety of someone's presence on the street. The court noted that a person was, "entitled to continue the walk the public streets 'only at the whim of any police officer' who happens to stop that individual."[323] The first amendment exemption in juvenile curfews, which the Fifth Circuit found instrumental in proving the curfew's constitutionality, presents this exact problem.

Like the lack of standards for the vagrancy law in *Kolender*, the First Amendment exemption also imposes liability, "only at the whim of any police officer who happens to stop the individual.[324]" This is the case because a minor's detention for violating the curfew will depend on whether the officer considers the explanation for the minor's presence as qualifying as a proper First Amendment activity. While any error will be corrected later during the required hearing procedure, this still creates arbitrary and discriminatory enforcement. Studies indicate that most detentions for curfew violations occur in lower income minority neighborhoods.[325]

IV. CONCLUSION

Juvenile curfews laws create troubling constitutional consequences that have only been exacerbated by the Supreme

[323] *Kolender*, 461 U.S. at 358.

[324] *Id.*

[325] *See* Pamela Katz, *Curfews Infringe on Parent's Rights.*, TIMES UNION (ALBANY, NY), June 23, 1996 at E2 (discussing a survey done analyzing curfews in San Francisco, Oakland, and New Orleans performed by The Center for Juvenile Justice—a public policy institute). The study suggests that the curfew ordinances are commonly used in the low income minority neighborhoods because it is the easiest way for law makers to attempt a revitalization of these high crime and blighted areas. *Id.* However, the study indicates that the curfews are a good technique in theory, but does not produce the desired results. *Id.*

Court's silence.[326] Circuit courts have interpreted differing constitutional rights for minors based on almost identical juvenile curfew ordinances. On the issue's first denial of certiorari by the Supreme Court, Justice Marshall dissented and wrote, "I believe this case posses a substantial constitutional question one which is of importance to thousands of towns with similar ordinances, I would grant a writ." [327]

Had the Court agreed with Justice Marshall, there is no doubt that the confusion would have been resolved long ago. However, in light of the Court's silence, circuit courts should not, as they have done, create their own constitutional standards. Rather, the current Supreme Court precedent, while not directly on point, must guide the constitutional inquiry. If applied, it would produce a uniform result that non-emergency juvenile curfews cannot be drafted with sufficient definiteness to with stand a due process void for vagueness review.

The Supreme Court's law on void for vagueness is clear. I order for a law to not violate a person's right to due process that law much both provide notice to citizens about what activities are prohibited, as well as define the law in such a way so to provide standards for law enforcement and prevent arbitrary enforcement of the law. The problems with juvenile curfew laws are twofold.

Firstly, the people on whom these laws will have the greatest affect are usually those people that are the least informed about the law and therefore lack notice.[328] The pattern surrounding curfew laws has been to enact them in blighted, poor, urban areas, which leads directly the second problem with the curfews.

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[326] The Supreme Court has denied certiorari three times: first in *Bykofsky v. Borough of Middletown*, 535 F. 2d 1245 (3rd Cir. 1976). *cert. denied* U.S. 964 (1976); second in *Qutb v. Strauss*, 11 F. 3d 488 (5th Cir. 1993), cert. denied, 511 U.S. 1127 (1994), third in *Schleifer v. City of Charlottesville*, 526 U.S. 1018 (1999).

[327] *Bykofsky*, 429 U.S. at 965 (Marshall, J., dissenting).

[328] Daniel A. Grech, *Curfew Popular but Not a Crime Fighter,* WASHINGTON POST, June 16, 1999, at V3. Study shows that campaign to educate parents about the curfew failed. *Id.* In Prince William County Washington D.C, 40,000, flyers explaining the curfew law were passed out to the parents of middle and high school aged children. *Id.* Only three out of four parents of teenagers knew about the curfew. *Id.*

The curfews are often used in these areas as a tool to combat the growing crime rate and drug problem in these areas.[329] [330]However, the law gives police officers a way around probable cause by allowing them to stop a suspicious looking minor merely for being on the street.

In turn the police are allowed to search this person, in the most invasive ways, and in that way discover information of materials that obtained any other way would have been a violation of due process.

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[329] Mike A. Males & Dan Macallair, *An Analysis of Curfew Enforcement and Juvenile Justice in California*, 1999 WESTERN CRIMINOLOGY REVIEW. 1(2), *available at* http://wcr.sonoma.edu/v1n2/males.html. Study was conducted to measure the effectiveness of juvenile curfews in two cites with similar populations, similar crime rates, and a similar amount of youth in poverty in the same geographical area. The study was conducted in San Francisco and San Hose in 1999. One city strictly enforced its curfew law while the other did not. Both cities maintained almost identical crime rates during the study regardless of whether they enforced the curfew or not. *See, e.g.*, Waters v. Barry, 711 F. Supp 1125, 1139 (D.D.C. 1989). One federal judge noted that "[v]irtually everything that the [curfew] seeks to thwart—violence, trade in illicit narcotics—is already illegal, and carries sanctions far more painful than a night of detention. Logic thus suggests that the only juveniles for whom the [curfew] will likely have meaning will be those already inclined to obey the law." *Id.* at 1139.

NOTE – CONGRESS, ARE YOU LISTENING? – THE "NO CHILD LEFT BEHIND" ACT AND ITS FAILURE TO ACCOUNT FOR TRAGIC DOMESTIC SITUATIONS OF URBAN YOUTH

Jonathan C. Pentzien[*]

INTRODUCTION

Imagine for a moment that you are three years old again.[331] Your biological mother has been diagnosed with bipolar disorder[332] and your biological father left before you were born.

[*] J.D. Candidate, Rutgers School of Law – Camden, May 2007; B.S., University of Notre Dame, 2001. I would like to thank my wife, Janine, for her love and support during the last three years of law school. I also want to thank her for providing the inspiration for this Note after witnessing her tireless efforts as a social worker helping impoverished, abused, and neglected children and children with autism.

[331] This story is a true account of a young child and her experience, as told to me in an interview with a social worker who worked in Washington, D.C.'s child welfare system from 2002-2004 (Oct. 15, 2005). For confidentiality reasons the names of all parties involved in this story, including the name of the Washington, D.C. agency, will not be disclosed.

[332] The National Institute of Mental Health describes the disorder as "a brain disorder that causes unusual shifts in a person's mood, energy, and ability to function. . . . [which] can result in damaged relationships, poor job or school performance, and even suicide." NIMH: Bipolar Disorder, http://www.nimh.nih.gov/publicat/bipolar.cfm#intro (last visited Mar. 18, 2007). Though people with bipolar disorder can be treated and are able to lead full and productive lives with treatment, *see id.*, this child's mother did not pursue regular psychiatric treatment and did not take her prescribed medications regularly.

As a result of your mother's inability to maintain a job, her dramatic, often frightening mood swings, and lastly, a verbalized threat of potential harm, the local child protective services enters your home to remove you from the dangerous situation and places you in the custody of the family court. Over the course of the next year, the court makes "reasonable efforts" to reunite you with your biological mother.[333]

During this time, you are placed with foster parents. The foster family consists of a husband and wife, both of whom maintain steady jobs, and five female children who immediately accept you as another sibling. The amount of love and nurturing you receive from this family is something you have not experienced before, and your social worker is amazed at how happy you seem. In fact, after eight months you are referring to the foster parents as "mom" and "dad."

However, under court order, your social worker must take you once a week to a supervised visit with your biological mother. There are several weeks where your biological mother simply does not show up for the visit. When she does, your mother's time is spent either on her cell phone ignoring you, attempting to teach you to call her "mom" because your foster parents are not your "real" parents, or telling you that, despite what your foster parents have told you, Santa Claus does not exist because such a thought is against her, and therefore your, religion. This routine continues for over one year, before the

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[333] *See* Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, § 101, 111 Stat. 2115, 2116-17 (codified as amended in scattered sections of 42 U.S.C.). An important aspect of the ASFA is its clarification of the "reasonable efforts" requirement for foster care and adoption placements by amending section 471(a)(15) of the Social Security Act, which provides that "in determining reasonable efforts to be made with respect to a child . . . the child's health and safety shall be the paramount concern." *Id.* at 2116 (codified as amended at 42 U.S.C. § 671(a)(15)(A) (2006)); *see also* discussion *infra* Part I.B. However, this does not affect the primary goal at the outset of almost every situation where a child is removed from his or her home "to preserve and reunify families." § 101, 111 Stat. at 2116 (codified as amended at § 671(a)(15)(B)); *see also* Santosky v. Kramer, 455 U.S. 745, 753-54 (1982) (holding that biological parents have "[t]he fundamental liberty interest . . . in the care, custody, and management of their child," and that before parental rights can be terminated "[the government] must provide the parents with fundamentally fair procedures" under the Due Process Clause of the Fourteenth Amendment); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 545, 772-73 (2d ed. 2002).

court's goal for a permanent placement becomes adoption by your foster parents rather than reunification with your biological mother.

How confusing would you find this situation? Maybe three years old is too young to envision the psychological effects you might eventually experience. Imagine instead that you are nine years old.[334] Your single mother works two jobs, and is barely able to make ends meet, though she certainly tries her best. All you have known throughout your life is poverty, often finding even the most basic human needs of food and clothing lacking. Most days when you come home from school, the house is empty and you are left unsupervised to do as you please.

Thinking this particular day is no exception, you decide to hang out with your friends for a while rather than going straight home. When you arrive home a little after dark, you find your mother waiting in the kitchen and she is irate. Before you realize what is happening, she throws you into a chair, ties you up with rope, and proceeds to hit you repeatedly with her closed fists. No explanation is given for this sudden outburst, and your mother simply unties you and walks away. Several days later, you are removed from your home by child protective services,[335] and the family court ultimately places you with your uncle while making reasonable efforts to reunify you with your mother.[336]

Imagine either of these are the domestic situations you live with, typified by poverty, violence, and confusion resulting from continuous movement between foster parents, the family courts, and visits with your biological parent. Yet, this is only one half of the time spent during the waking hours of a child. The other half is spent in public schools. Given the extraordinary difficulties faced by many impoverished urban children outside of school, as the two stories above attempt to demonstrate, the ability to focus adequately and learn in school is significantly

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[334] This is also a true account of a child and his experience before he entered Washington, D.C.'s child welfare system. *See supra* note 331.

[335] The child was removed by child protective services after the young boy's aunt and grandmother reported visible bruises on his face and body.

[336] *See supra* note 333.

more difficult than for most children in stable domestic situations.[337]

This Note focuses on the goal of the No Child Left Behind Act of 2001[338] (NCLB or "the Act") to close the gap in educational achievement between students in more affluent areas and the most troubled students in impoverished urban areas.[339] In particular, the Note is concerned with the legislature's failure to take sufficient account of the severe domestic situations faced by many urban youth in establishing this goal.

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[337] Before examining the scientific studies on this point, *see* discussion *infra* Part III.B, I will provide a story from my own experience with the youth who are the focus of this Note as an illustration of this assertion: During the spring 2006 academic term I participated in the Marshall-Brennan Fellowship program, where I and another law school classmate had an opportunity to teach constitutional law to high school students in Camden, New Jersey. Camden is one of the poorest urban cities in America, and was ranked "the most dangerous city in America" in the fall of 2005 for the second straight year. *See* Jeffrey Gettleman, *It's the Most Dangerous City. But Is It Turning Around?*, N.Y. TIMES, Nov. 22, 2005, at B1. My colleague and I taught in a quasi-private school for students who were not successful in the two largest public high schools in Camden for various reasons, though the students themselves and their families want them to continue with their education. We had one student who came to class regularly and was clearly capable of understanding the material, but often slept through class despite repeated attempts to engage her. Initially we just assumed this student wasn't interested in the material or was apathetic. However, we came to find out that the student was a seventeen year-old single mother raising a three year-old child. Her comment to us about her habitual sleeping was this: "You see how tired you are when you have a three year-old that won't go to sleep at night." I did not know whether she lived with her parents or was on her own, but regardless I could not imagine the difficulty this student faced in continuing to pursue her high school education. It was extremely disheartening after realizing the difficulties arising from her domestic situation, and I then understood why she was having a difficult time focusing in the classroom.

[338] Pub. L. No. 107-110, 115 Stat. 1425 (codified as amended in scattered sections of 20 U.S.C.).

[339] *See* NCLB § 101, 115 Stat. at 1439 (codified as amended at 20 U.S.C. § 6301 (2006)) (setting forth the purpose of the Act, which "is to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assessments").

NCLB is primarily concerned with increasing proficiency in the subject areas of math and reading.[340] In an attempt to meet the rigorous demands of the Act and avoid sanctions against their schools,[341] many teachers will be forced to streamline their curriculum, with a primary focus on preparing students for annual standardized tests in those subjects.[342] In light of the tragic domestic situations that many urban students face, there is a significant disconnect between the goals of NCLB and the realities of an impoverished urban child's domestic life. It is difficult to believe that a child faced with situations similar to those related above will be able to reconcile those realities with the "benefit" found in successful achievement on a standardized test.

At the outset, I recognize that under-funded facilities, violence, and unqualified teachers are all problems faced by today's urban public schools and its students.[343] Also, in the

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[340] *Id.* at 1445 (codified as amended at § 6311(b)(1)(C)) (requiring that states have academic standards in subjects "including at least mathematics [and] reading or language arts"). However, it should be noted that science was added to the subjects requiring academic standards beginning in the 2005-2006 school year. *Id.* The Act requires that the academic standards set by the state "include the same knowledge, skills, and levels of achievement expected of all children." *Id.*

[341] *See id.* at 1479 (codified as amended at § 6316(b)(1)(A)) (establishing sanctions for school's that fail "for 2 consecutive years, to make adequate yearly progress").

[342] *See* Richard F. Elmore, *Testing Trap*, HARV. MAG., Sept.-Oct. 2002, *available at* http://www.harvardmagazine.com/on-line/0902140.html (arguing that the provisions of NCLB are "considerably at odds with the technical realities of test-based accountability").

[343] *See generally* John Herbert Roth, *Education Funding and the Alabama Example: Another Player on a Crowded Field*, 2003 BYU EDUC. & L.J. 739 (discussing the problem of inadequate public school funding in the context of programs requiring that students "pay-to-play" in order to participate in certain extracurricular activities); Anthony J. Christmas, Note, *Educated Fools from Uneducated Schools: Whether the No Child Left Behind Act Will Be an Effective Remedy to the Inadequate Funding of Inner City Urban Schools and Ultimately Improve the Education of Low-Income Blacks*, 6 RUTGERS RACE & L. REV. 177 (2004) (discussing inadequate public school funding); Susan L. Caulfield, *Creating Peaceable Schools*, 567 ANNALS 170, 171 (2000) ("Throughout the last decade of the twentieth century increasing attention has been given to the use of violence by adolescents, particularly violence in and around schools."); Linda Darling-Hammond,

area of family law, by no means do I intend to minimize the grave intrusion the government and courts make on the fundamental right of being a parent when parental rights are ultimately terminated.[344] However, such topics are outside the scope of this Note, except for a discussion of the current state of the law with regard to the permanent placement of a child removed from his or her home,[345] as well as tangential references to the qualification of teachers required by NCLB[346] and the argument that there is a lack of funding to implement the requirements of the Act.[347]

This Note will consist of three parts. The first part will provide demographical information, using Washington, D.C. as a primary example, to illustrate the magnitude of poverty faced by urban youth today. It will then discuss the Adoption & Safe Families Act of 1997, its role in the child welfare system and goals of family law courts, as well as studies required to measure its effectiveness.

The second part of this Note will look at NCLB, focusing specifically on its purpose and the general requirements the Act places on public schools and teachers. It will also look at the effects the Act has had on school curriculums, teachers, and students, with a particular focus on the standardized testing resulting from NCLB.

The final part will consider studies and literature regarding the psychological effects of poverty, abuse, and neglect on children, and how the effects impact their classroom performance. These effects will demonstrate why the legislature must begin to treat child welfare, domestic troubles, and

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Access to Quality Teaching: An Analysis of Inequality in California's Public Schools, 43 SANTA CLARA L. REV. 1045, 1045 (2003) (discussing the large number of teachers working in California public schools without adequate preparation or licensing, and recognizing that "teachers' expertise and effectiveness are increasingly critical to the success of education in California as elsewhere in the nation")

[344] *See* Santosky v. Kramer, 455 U.S. 745, 753-54 (1982).

[345] *See infra* notes 354-3 and accompanying text.

[346] *See infra* notes 17-20 and accompanying text.

[347] *See infra* notes 30, 38 and accompanying text.

education reform as interconnected issues, rather than separately solvable issues, in order to end the cycle of child poverty and inadequate child education in poorer regions. The Note will conclude by presenting two ideas on how this might be accomplished: (1) by improving congressional communication with experts who understand the impacts of tragic domestic situations on classroom performance; and (2) by adding a requirement under the Act that schools engage children in higher-order, creative thinking in the classroom, rather than focusing only on math and reading.

I. IMPOVERISHED CHILDREN AND FAMILY LAW

A. CHILD POVERTY – A SERIOUS PROBLEM

To illustrate the enormity of the problem of children living in impoverished situations, let's look at the demographics of a generally poorer and more urban area such as Washington, D.C. as compared with the United States as a whole.[348] The following table will make the numbers readily comparable:

[348] The data was obtained from the United States census completed in 2000 by the United States Census Bureau. *See* District of Columbia QuickLinks, http://quickfacts.census.gov/qfd/states/11000lk.html [hereinafter District of Columbia] (follow "Economic characteristics" hyperlink) (last visited Mar. 18, 2007); Profile of Selected Economic Characteristics: 2000, Geographic area: United States, http://censtats.census.gov/data/US/01000.pdf#page=3 (last visited Mar. 18, 2007).

Table 1: Families Living in Poverty: Comparison of Washington, D.C. and the United States

Categories	Washington, D.C.	United States	Difference
Families[349] with an income below $15,000 (%)	17.6	10.1	7.5
Families below poverty level[350] (%)	16.7	9.2	7.5
Families with related children under 18 years of age below poverty level (%)	24.5	13.6	10.9
Families with related children under 5 years of age below poverty level (%)	29.5	17.0	12.5
Families with female householder (i.e., no husband present) below poverty level (%)	30.0	26.5	3.5
Families with female householder raising related children under 18 years of age below poverty level (%)	37.3	34.3	3.0
Families with female householder raising related children under 5 years of age below poverty level (%)	47.7	46.4	1.3

[349] A family is defined by the United States Census Bureau as "A group of two or more people who reside together and who are related by birth, marriage, or adoption." *See* District of Columbia, *supra* note 348 (follow "Economic characteristics" hyperlink; then follow "Glossary" hyperlink at top of webpage).

[350] The United States Census Bureau measures poverty by

> us[ing] a set of money income thresholds that vary by family size and composition to determine who is in poverty. If a family's total income is less than the family's threshold, then that family and every individual in it is considered in poverty.

Poverty – How the Census Bureau Measures Poverty, http://www.census.gov/hhes/www/poverty/povdef.html (last visited Mar. 18, 2007).

This data standing alone is shocking enough, particularly when you consider the higher levels of poverty occurring at the doorstep of our nation's Capitol building and its leadership.[351]

More relevant to this Note, however, is the connection that is made between the presence of poverty and the incidence of child abuse and neglect. This connection is alarming because of how incredibly strong it is. Consider the following statistics: children from families with annual incomes below $15,000, as compared with families making over $30,000 annually, are twenty-two times more likely to experience some form of abuse or neglect.[352] Further, children from the lowest income families

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[351] Obviously Washington, D.C. is not the only urban area facing such daunting statistics of poverty. Numbers from other similarly situated large cities include: (1) Chicago – 16.6% of families below poverty level and 26.4% of families with related children under 5 years of age below poverty level, *see* Chicago city, QuickLinks, http://quickfacts.census.gov/qfd/states/17/1714000lk.html (follow "Economic characteristics" hyperlink) (for the remaining cities, the same two percentage categories will be presented in the following manner – x% / y%); (2) New York – 18.5% / 28.3%, *see* New York city, QuickLinks, http://quickfacts.census.gov/qfd/states/36/3651000lk.html (follow "Economic characteristics" hyperlink); (3) Philadelphia – 18.4% / 30.1%, *see* Philadelphia city, QuickLinks, http://quickfacts.census.gov/qfd/states/42/4260000lk.html (follow "Economic characteristics" hyperlink); (4) Los Angeles – 18.3% / 29.5%, *see* Los Angeles city, QuickLinks, http://quickfacts.census.gov/qfd/states/06/0644000lk.html (follow "Economic characteristics" hyperlink); (5) Atlanta – 21.3% / 36.7%, *see* Atlanta city, QuickLinks, http://quickfacts.census.gov/qfd/states/13/1304000lk.html (follow "Economic characteristics" hyperlink). As a point of comparison, looking at the statistics for a large city such as San Francisco – generally thought of as one of the more affluent large cities in the United States – only 7.8% of families are below poverty level and only 12.7% of families with related children under 5 years old are below poverty level. *See* San Francisco city, QuickLinks, http://quickfacts.census.gov/qfd/states/06/0667000lk.html (follow "Economic characteristics" hyperlink).

[352] *See* EXECUTIVE SUMMARY OF THE THIRD NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT, http://www.childwelfare.gov/pubs/statsinfo/nis3.cfm [hereinafter THIRD NATIONAL INCIDENCE STUDY] (last visited Mar. 18, 2007). The U.S. Department of Health & Human Services, Administration for Children & Families defines "neglect" as:

> [T]he failure to provide for a child's basic needs. Neglect can be physical, educational, or emotional. *Physical neglect* can include not

are almost fifty-six times more likely to be educationally neglected, eighteen times more likely to be sexually abused, and over twenty-two times more likely to be seriously injured from abuse or neglect than children from higher income families.[353]

B. ADOPTION AND SAFE FAMILIES ACT OF 1997[354]

Looking at the above data, and seeing the connection between children in impoverished situations and the increased likelihood of abuse or neglect, it should come as no surprise that a local child protective services agency is vital to the well-being of children who need to be removed from such situations.[355] However, the concern after removal from a dangerous situation becomes stability for the child, both physically and emotionally, which often is not found in a temporary foster care situation. While there will already be significant psychological effects on children in domestic situations where removal is required,[356] it is important for a child to find a more stable situation in order to feel more secure at home and to have greater focus in the classroom.

> providing adequate food or clothing, appropriate medical care, supervision, or proper weather protection (heat or coats). *Educational neglect* includes failure to provide appropriate schooling, special educational needs, or allowing excessive truancies. *Psychological neglect* includes the lack of any emotional support and love, chronic inattention to the child, exposure to spouse abuse, or drug and alcohol abuse.

CHILD WELFARE INFORMATION GATEWAY, APPENDIX A: GLOSSARY OF TERMS, DEFINITION OF NEGLECT, http://www.childwelfare.gov/pubs/usermanuals/courts/appenda.cfm (last visited Mar. 18, 2007).

[353] THIRD NATIONAL INCIDENCE STUDY, *supra* note 352.

[354] Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.).

[355] This is not to say that child protective services are not important to children who are abused or neglected in more affluent homes. They absolutely are. However, this Note is focused exclusively on the plight of children in impoverished, urban areas and the importance of family law and education law in their lives.

[356] *See infra* notes 60-64 and accompanying text.

Congress recognized this in 1979, in considering enactment of the Adoption Assistance and Child Welfare Act of 1980 (AACWA),[357] which aimed to decrease emphasis on foster care placement by having states establish subsidized adoption assistance programs with federal matching contributions.[358] The goal was to "encourage greater efforts to find permanent homes for children either by making it possible for them to return to their own families or by placing them in adoptive homes."[359] Despite this laudable goal, in 1997 Congress found that the national foster care caseload had grown to almost five hundred thousand, and the average child removed from the home because of dangerous domestic situations would spend almost three years in foster care.[360]

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[357] Pub. L. No. 96-272, 94 Stat. 500 (codified as amended in scattered sections of 42 U.S.C.). According to the session law, the AACWA was intended "[t]o establish a program of adoption assistance, to strengthen the program of foster care assistance for needy and dependent children, [and] to improve the child welfare, social services, and aid to families with dependent children programs . . . ." *Id.*

[358] S. REP. NO. 96-336, at 1 (1979).

[359] *Id.* Under the federal subsidy program, it was the responsibility of the state to determine which children in foster care "would be eligible for adoption assistance because of special needs" that discouraged their adoption. *Id.* at 1-2. In particular, the state would have to demonstrate that a child could not be returned to the home of his or her relatives and that he or she could not be adopted without the offering of financial assistance, unless a search for a "non-subsidized adoptive family . . . would be against the best interests of the child . . . ." *Id.* at 2. Even then, the state would still have to determine that the child could not be placed without adoption assistance "because of some specific factor or condition which makes the child hard to place." *Id.* If a child met these requirements, the state could offer adoption assistance to parents adopting the child, as long as the income of the potential adoptive parents did not exceed 125 percent of the median income for a family of four in the state. *Id.*

[360] H.R. REP. NO. 105-77, at 7-8 (1997). Based on these statistics, Congress recognized the growing need to reduce the number of children in foster care and the corresponding need to increase the number of adoptions in the United States. *Id.* at 7. Part of the congressional plan to increase adoptions included incentive payments directly to states for each adoption over the total number of adoptions in the state during the previous year. *Id.* These incentive payments would be $2000 higher if the adopted child had special needs. *Id.* Congress noted, based on testimony and scientific studies:

One of the primary barriers to adoption cited by witnesses before the congressional committee was the requirement under the AACWA that states make "reasonable efforts" to assist troubled families and reunify them with their children.[361] The concern was that "[f]ederal statutes, the social work profession, and the courts sometimes err[ed] on the side of protecting the rights of parents," and thus "too many children [were] subjected to long spells of foster care or [were] returned to families that reabuse[d] them."[362]

A second barrier to adoption was that states often moved too slowly in moving children toward permanent placements.[363] The main reason given for this slow movement was that child protective case workers were consumed with providing protection to numerous children in immediate danger, and therefore children in foster care placement were assumed to be

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> [A]doption is an effective way to assure that children grow up in loving families and that they become happy and productive citizens as adults. . . . [A]doption is preferable to foster care and . . . the nation's children would be well served by a policy that increases adoption rates.

Id. at 8.

[361] *Id.* The reasonable efforts criterion required states to do everything possible to avoid removing a child from his or her home, and where removal became necessary, to make reasonable efforts to return the child to his or her home. *Id.* As Congress noted, the intent of the policy was for the state to provide services to families "so that they can continue to fulfill their child rearing function." *Id.*; *see also* Santosky v. Kramer, 455 U.S. 745, 753-54 (1982); CHEMERINSKY, *supra* note 333, at 772-73.

[362] H.R. REP. NO. 105-77, at 8. However, it is important to note that Congress continued to recognize the "importance and essential fairness" of the reasonable efforts requirement. *Id.* Rather than a complete reversal of the policy and the $4.5 billion spent helping troubled families and their children (which would probably be unconstitutional under *Santosky* anyway), Congress sought a "measured response to allow States to adjust their statutes and practices so that in some circumstances States will be able to move more efficiently toward terminating parental rights and placing children for adoption." *Id.*

[363] *Id.*

safe from immediate harm and were not provided adequate attention.[364]

In response to these barriers, Congress passed the Adoption and Safe Families Act of 1997 (ASFA), the purpose of which was "to promote the adoption of children in foster care."[365] Specifically, Congress attempted to address the issues with the "reasonable efforts" requirement and the slow placement of children by states in three significant ways. First, the ASFA clarifies the reasonable efforts requirement by stating that "the child's health and safety shall be the paramount concern."[366] The ASFA also creates an exception to the reasonable efforts requirement where a court of competent jurisdiction determines that "the parent has subjected the child to aggravated circumstances."[367] Second, the ASFA requires that a permanency hearing be held within twelve months of placement in foster care, which would determine the permanency plan for

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[364] *Id.* at 8-9.

[365] Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.).

[366] ASFA § 101, 111 Stat. at 2116 (codified as amended at 42 U.S.C. § 671(a)(15)(A) (2006)). Generally, reasonable efforts must be made to preserve families before removing a child from the child's home, and placing him or her in foster care. *Id.* (codified as amended at § 671(a)(15)(B)). When a child is removed from his or her home, reasonable efforts generally must be made to reunify the child with his or her biological parent(s), as long as it is possible for the child to return safely to the home. *Id.* *But see infra* note 367 and accompanying text for the exceptions to the reasonable efforts requirement.

[367] *Id.* (codified as amended at § 671(a)(15)(D)(i)). Aggravated circumstances are defined by state law, but can include abandonment, torture, chronic abuse, and sexual abuse. *Id.* In addition, reasonable efforts to preserve or reunify families are not required where a court finds that the parent of the child has: murdered another child of the parent; committed voluntary manslaughter of another child of the parent; had any other criminal involvement in the murder or voluntary manslaughter of another child (e.g., aiding or abetting); or committed felony assault resulting in serious bodily injury to the child or another child of the parent. *Id.* (codified as amended at § 671(a)(15)(D)(ii)). A final exception to the reasonable efforts requirement exists where a court determines that the parental rights to a sibling of the child have been terminated involuntarily. *Id.* at 2117 (codified as amended at § 671(a)(15)(D)(iii)).

the child - i.e., reunification with the parent(s), placement for adoption, referral for legal guardianship, or placement in an alternative permanent living arrangement.[368] Finally, where a child has been in the foster care system for fifteen of the most recent twenty-two months, or a parent has committed serious crimes provided under the statute, the state is *required* to file a petition to terminate the parental rights of the child's parents and to identify a suitable family for adoption.[369]

While again, Congress's goals in passing the ASFA are admirable, recent studies required under the ASFA[370] show that there are still significant permanency issues for urban, impoverished youth. Returning to Washington, D.C. again as an example of a more urban and generally poorer city, data from fiscal year 2002 demonstrates the following:[371]

[368] ASFA § 302, 111 Stat. at 2128-29 (codified as amended at § 675(5)(C)).

[369] ASFA § 103, 111 Stat. at 2118 (codified as amended at § 675(5)(E)). This requirement is subject to certain limited exceptions, including situations where: the child is being cared for by a relative; a state agency has documented proof that there is a compelling reason for determining that the petition would not be in the best interests of the child; or the state determines that it has not provided the family of the child sufficient services necessary for the safe return of the child to the family's home. *Id.*

[370] *See* ASFA § 402, 111 Stat. at 2134 (requiring that any information reported under the ASFA be supplied to the Secretary of Health and Human Services through data meeting requirements established pursuant to section 479 of the Social Security Act, 42 U.S.C. § 679 (2006)).

[371] Data obtained from CHILDREN'S BUREAU OF THE U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, CHILD WELFARE OUTCOMES 2002: ANNUAL REPORT (2002) [hereinafter CHILD WELFARE OUTCOMES], *available at* http://www.acf.hhs.gov/programs/cb/pubs/cwo02/index.htm (follow "Chapter VI. State Data Pages" hyperlink; then follow "District of Columbia" hyperlink). While it would be helpful to present data from other cities similarly situated to Washington, D.C., as I did earlier with the poverty statistics, *see supra* note 351, the annual report only provides data for particular states (and the District of Columbia) as a whole.

Table 2: Permanent Placements of Foster Children: Comparison of Washington, D.C. and the United States

Outcome Measures	**Washington, D.C.**	**United States (national median) **national standard**	**Difference**
All foster children discharged to a permanent home (%)	82.1	86.1	(4.0)
Children with a diagnosed disability discharged to a permanent home (%)	65.5	79.8	(14.3)
Children, older than age 12 when entering foster care, discharged to a permanent home (%)	47.9	72.0	(24.1)
Children who experienced no more than 2 placements during their first 12 months in foster care (%)	84.5	86.7 or more**	(2.2)
Children age 12 or younger placed in a group home or institution (%)	29.5	8.6	20.9

One key statistic that could not be measured for D.C., based on a discrepancy in the data, was the time spent in foster care before reunification, adoption, or an alternative permanent placement.[1] Looking instead at the data for the entire United States, which presents a grim enough view, of the 532,000 children in foster care at the end of fiscal year 2002, the average length of stay in foster care was thirty-two months.[2] Note that both the total number of children in foster care and the average length of stay are still directly in line with the numbers that led

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[1] *See* CHILD WELFARE OUTCOMES, *supra* note 41.

[2] *Id.* (follow "The Annual Adoption and Foster Care Analysis and Reporting System (AFCARS) Report: FY2002" hyperlink under the "Appendices" heading). It should be noted that while the *mean* number of months spent in foster care was thirty-two, the *median* number of months was eighteen. *Id.*

to Congress's passage of the ASFA in 1997, and in fact the total number has now well exceeded the 500,000 threshold.[3] Thus, despite congressional attempts to improve the stability of children removed from their homes, and subsequently enabling them to focus better in the classroom, the above data demonstrates that there is still considerable work to be done.

II. NO CHILD LEFT BEHIND ACT

A. PURPOSE OF NO CHILD LEFT BEHIND ACT AND THE ACT'S REQUIREMENTS

At this point, a review of the No Child Left Behind Act of 2001[4] (NCLB or "the Act") is important in order to provide a framework for how the Act has impacted schools, students and teachers with its stringent requirements and its dramatic overhaul of public school education.[5] In particular, a background on the Act's requirements is necessary to

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[3] *See supra* note 360 and accompanying text.

[4] Pub. L. No. 107-110, 115 Stat. 1425 (codified as amended in scattered sections of 20 U.S.C.).

[5] At the outset, it is worth noting the extraordinary importance of public school education in our society. In its landmark decision of *Brown v. Board of Education* over fifty years ago, the Supreme Court eloquently recognized this fact:

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

347 U.S. 483, 493 (1954).

understand how the impact of traumatic domestic situations on impoverished students will manifest in the classroom, as it is now structured under NCLB.

On January 8, 2002, President George W. Bush signed into law NCLB,[6] which amended and reauthorized the Elementary and Secondary Education Act of 1965 (ESEA).[7] While many recognized passage of the Act as a rare instance of bipartisan cooperation given the magnitude of the educational reform at issue,[8] the final version of NCLB still required significant

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[6] *See generally* Elisabeth Bumiller, *Focusing on Home Front, Bush Signs Education Bill*, N.Y. TIMES, Jan. 9, 2002, at A16; Dana Milbank, *With Fanfare, Bush Signs Education Bill; President, Lawmakers Hit 3 States in 12 Hours to Tout Biggest Schools Change Since '65*, WASH. POST, Jan. 9, 2002, at A3.

[7] *See, e.g.*, NCLB § 101, 115 Stat. at 1439-1620 (codified as amended in scattered sections of 20 U.S.C.) (amending Title I of the ESEA and titling it "Improving the Academic Achievement of the Disadvantaged"). For a brief background and history of the ESEA, see Peter Zamora, Note, *In Recognition of the Special Educational Needs of Low-Income Families?: Ideological Discord and its Effects Upon Title I of the Elementary and Secondary Education Acts of 1965 and 2001*, 10 GEO. J. ON POVERTY L. & POL'Y 413, 417-18 (2003).

[8] *See* Bumiller, *supra* note 6 (stating that the bill was "a bipartisan compromise reached even as Congress was consumed by the events of Sept. 11," and going on to note that "[passage of the bill] may also have been one of the last displays of bipartisanship this year"); Milbank, *supra* note 6 ("President Bush today signed into law the broadest rewriting of federal education policy in decades, celebrating Washington's top bipartisan achievement of 2001 . . . ."). In a prescient foreword to a report on NCLB, President Bush wrote:

> Bipartisan education reform will be the cornerstone of my Administration.
>
> . . . .
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> Bipartisan solutions are within our reach. If our country fails in its responsibility to educate every child, we[']re likely to fail in many other areas. But if we succeed in educating our youth, many other successes will follow throughout our country and in the lives of our citizens.
>
> . . . [T]his blueprint will serve as a framework from which we can all work together Democrat, Republican, and Independent to strengthen our elementary and secondary schools. Taken together, these

compromise between Democrats and Republicans.[9] The primary purpose of the Act is to provide all children with an equal and fair opportunity at a high-quality education and to ensure that they reach proficient levels on state academic achievement standards and academic assessments.[10] In particular, the Act focuses on "meeting the educational needs of low-achieving children in our Nation's highest-poverty schools."[11] To achieve this purpose there are three significant requirements of NCLB.[12]

> reforms express my deep belief in our public schools and their mission to build the mind and character of every child, from every background, in every part of America. And I am very open to working with Members of Congress who have additional ideas to meet our shared goals.
>
> I look forward to working with Congress to ensure that no child is left behind.

President George W. Bush, Foreword, Report on No Child Left Behind, http://www.whitehouse.gov/news/reports/no-child-left-behind.html#1 (last visited Mar. 15, 2007).

[9] *See* David S. Broder, *Long Road to Reform; Negotiators Forge Education Legislation*, WASH. POST, Dec. 17, 2001, at A1; *see also* Bumiller, *supra* note 6 (noting that White House advisers called the bill a bipartisan success, "even though [President Bush] had to make major concessions for its passage, including giving up on a voucher program for private schools").

[10] NCLB § 101, 115 Stat. at 1439 (codified as amended at 20 U.S.C. § 6301 (2006)). The Act goes on to provide twelve ways this purpose can be accomplished, some of which include – ensuring that high-quality academic features are aligned with challenging state academic standards; holding schools and states accountable for improving the academic achievement of all students; providing resources to schools where needs are greatest; and allowing parents the opportunity to participate in the education of their children. *See id.* at 1439-40 (codified as amended at § 6301(1)-(12)).

[11] *Id.* at 1440 (codified as amended at § 6301(2)).

[12] *See* James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 939 (2004) ("The most significant changes have to do with teachers, testing, and accountability.").

First, to demonstrate that all students are achieving the "challenging academic standards" set by each state,[13] periodic student assessments (i.e., tests) are required.[14] Some notable requirements of the assessments include that they: 1) are the same for all children tested; 2) measure proficiency in, at a minimum, mathematics and reading or language arts, and by school year 2007-2008, measure proficiency in science; 3) are administered at least once during grades three through five, grades six through nine, and grades ten through twelve; 4) are administered yearly in math and reading for students in grades three through eight, beginning in school year 2005-2006; and 5) can be administered, at the discretion of the state, to measure proficiency in subjects other than math, reading, and science.[15] Further, the results of the assessments must be enabled "to be disaggregated within each State, local educational agency, and school . . . by each major racial and ethnic group . . . and by economically disadvantaged students as compared to students who are not economically disadvantaged."[16]

Second, beginning the first day of the school year following passage of NCLB, all educational agencies receiving federal funds under the Act are required to hire teachers who are

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[13] NCLB § 101, 115 Stat. at 1444 (codified as amended at § 6311(b)(1)). Challenging academic standards are divided into two parts under the Act: 1) challenging academic *content* standards in academic subjects and 2) challenging student academic *achievement* standards. *Id.* at 1445 (codified as amended at § 6311(b)(1)(D)) (emphasis added). The academic content standards must: 1) specify what children are expected to know and be able to do; 2) contain coherent and rigorous content; and 3) encourage the teaching of advanced skills. *Id.* The student academic achievement standards must: 1) be aligned with the state's academic content standards; 2) describe two higher levels of achievement (proficient and advanced) that determine how well children are mastering material in the state academic content standards; and 3) describe a lower level of achievement (basic) to provide complete information about the progress of lower-achieving children toward mastering the higher levels of achievement. *Id.*

[14] *See id.* at 1449 (codified as amended at § 6311(b)(3)(A)).

[15] *Id.* at 1449-52 (codified as amended at § 6311(b)(3)(C)). There are actually fifteen requirements for the assessments under NCLB, with several subparts for many of them. *See id.* (codified as amended at § 6311(b)(3)(C)(i)-(xv)).

[16] *Id.* at 1451-52 (codified as amended at § 6311(b)(3)(C)(xiii)).

"highly qualified."[17] Further, each state is required to develop a plan detailing how it will ensure that all teachers teaching in core academic subjects will be highly qualified by the end of school year 2005-2006.[18] Under regulation passed by the Department of Education, a highly qualified teacher is defined as a teacher who has "obtained full State certification."[19] Teachers who had certification or licensure requirements waived on a temporary or emergency basis are not considered highly qualified.[20]

Finally, NCLB requires each state to establish a single accountability system to ensure that all public schools are

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[17] *Id.* at 1505 (codified as amended at § 6319(a)(1)).

[18] *Id.* (codified as amended at § 6319(a)(2)). The plan must establish annual measurable objectives for each local educational agency and school that meet three minimum requirements. *Id.* at 1505-06. First, the plan must include an annual increase in the percentage of highly qualified teachers at each local educational agency and school, thus ensuring that schools will meet the 2005-2006 school year deadlines for highly qualified teachers teaching in core academic subjects. *Id.* Second, it must include an annual increase in the percentage of teachers who receive high-quality professional development, thereby enabling teachers to become highly qualified and successful in the classroom. *Id.* at 1506. Finally, a state's plan can include any discretionary features that the state educational agency deems appropriate to increase teacher qualifications. *Id.*

[19] 34 C.F.R. § 200.56(a)(1)(i) (2006). While obtaining full state certification is the most obvious way a teacher is considered "highly qualified," it is not the only thing teachers must accomplish under the regulation. If a teacher is new to the profession, he or she also must hold a bachelor's degree and demonstrate sufficient knowledge and teaching skills in various subjects, depending on the academic level at which the teacher plans to teach. § 200.56(b). For a teacher entering the public elementary school level, he or she must pass a "rigorous State test," demonstrating subject knowledge and teaching skills in reading/language arts, writing, math, and other subjects pertinent to the elementary school curriculum. § 200.56(b)(2). For a teacher entering the public middle and high school level, he or she must pass a "rigorous State test" in each subject the teacher will teach, or the teacher must complete, for each subject he or she will teach, an undergraduate major, a graduate degree, coursework equivalent to an undergraduate major, or advanced certification/credentialing. § 200.56(b)(3). If a teacher is not new to the profession, he or she must hold a bachelor's degree and meet the requirements just discussed from paragraph's (b)(2) or (3) under the regulation. § 200.56(c).

[20] § 200.56(a)(4).

making "adequate yearly progress" toward the goals of the Act.[21] A key feature of every state accountability system is that it "*shall* . . . include *sanctions* and rewards," which the states will use to hold schools "accountable for student achievement."[22] Also, the Act specifies that adequate yearly progress shall be defined in a manner that "applies the *same* high standards of academic achievement to *all* public elementary school and secondary school students in the State," along with other guidelines for definition.[23] Schools that fail to make adequate yearly progress for two consecutive years will be "identif[ied] for school improvement," and a series of sanctions will be imposed under the Act that vary depending on the number of consecutive years a school is identified.[24]

B. Effects of NCLB as Related to Students, Teachers, and School Curriculums

In light of the significant requirements in the areas of testing, teaching, and accountability, many educators believe that NCLB "strengthens the hands of those who are working to

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[21] NCLB § 101, 115 Stat. at 1445-46 (codified as amended at § 6311(b)(2)(A)).

[22] *Id.* at 1446 (emphasis added).

[23] *Id.* at 1446-47 (codified as amended at § 6311(b)(2)(C)) (emphasis added). Other requirements for the "adequate yearly progress" definition are that it must: be statistically valid and reliable; result in continuous and substantial academic improvement for all students; measure the progress of all schools based primarily on academic assessments; include separate measurable annual objectives for continuous and substantial improvement; and include graduation rates for public secondary school students as well as at least one other academic indicator. *Id.*

[24] *Id.* at 1479 (codified as amended at § 6316(b)(1)(A)). One of the key features of NCLB is the "school choice" provided to students and their parents when a school is identified for improvement. *Id.* (codified as amended at § 6316(b)(1)(E)). Following identification of a school for improvement, the local educational agency must, no later than the first day of the school year following identification, provide every student enrolled in the school an opportunity to transfer to another school served by the local education agency. *Id.* The alternative school can include a public charter school, and, of course, it must not have been identified for improvement itself. *Id.*

improve overall achievement and close the achievement gaps" in public schools.[25] However, they also uniformly agree that the Act is far from perfect.[26] Specifically, there are four notable aspects of NCLB that are cited as requiring congressional attention: 1) the adequate yearly progress formula; 2) the ineffectiveness of the sanctions imposed by the Act; 3) lack of funding; and, most importantly for purposes of this Note, 4) the effects of yearly testing on teachers, students and school curriculums. I will give a short synopsis of the first three effects before providing greater detail on testing.

Several commentators have argued that the adequate yearly progress formula does not measure "progress" of *individual* students, but rather determines whether a *certain percentage* of students can reach uniform proficiency benchmarks set by the state.[27] Also, a concern is that the formula does not measure progress of the *same* students over time, but rather measures the proficiency of *different groups* of students at one point in time.[28] As a result of the inadequacies with the adequate yearly progress formula, concerns have also been raised that the sanctions imposed by NCLB are ineffective because schools labeled in the media as "failing" (i.e., "identif[ied] for improvement" under the Act) will see drains on resources as a result of the sanctions when resources are needed the most.[29]

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[25] *See* Kati Haycock, Director of the Education Trust, *Congressional Testimony: Review of No Child Left Behind Act*, Sept. 30, 2005. In an opening statement before testimony was provided by Ms. Haycock, the Chairman of the Committee on Education and the Workforce, Representative John Boehner of Ohio, "noted that NCLB has precipitated a fundamental shift in America's educational system, fostering a culture of accountability that is producing significant gains in student achievement." *Id.*

[26] *Id.* Chairman Boehner also acknowledged in his opening statement that implementation of the Act has seen "a few bumps" along the way. *Id.*

[27] *See* Ryan, *supra* note 12, at 940-41; American Federation of Teachers, *What's Wrong with the No Child Left Behind Act's Adequate Yearly Progress Formula?*, http://www.aft.org/topics/nclb/downloads/AYPresearch.pdf (last visited Mar. 15, 2007).

[28] American Federation of Teachers, *supra* note 27.

[29] *See* Ryan, *supra* note 12, at 945-46 ("[T]he media have translated 'in need of improvement' to mean 'failing,' fueling the popular perception that any school that does not make AYP . . . is a failing school."); American

One of the loudest cries heard regarding NCLB is the lack of funding provided by Congress to implement the plans, programs, and testing required by the Act, which are necessary to achieve the adequate yearly progress in student proficiency.[30]

Despite the fact that there are many concerns and limitations of NCLB, the primary focus here is the effect that standardized testing required under NCLB has on teachers, students, and school curriculums. In particular, three common concerns cited regarding testing are the reliability and validity of test scores, the curriculum narrowing that occurs as a result of test preparation, and how teachers and students react when testing is the only measure of performance.[31]

First, with regard to the reliability of testing, studies have shown that seventy percent of the change in testing scores from year-to-year, whether by grade level or school, is simply random

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Federation of Teachers, *School Improvement*, http://www.aft.org/topics/nclb/schoolimprove.htm (last visited Mar. 15, 2007) ("[M]isidentification of schools drains resources from schools that truly need assistance and causes parents and communities to lose confidence in their school staffs and the accountability process."); William J. Mathis, *No Child Left Behind: Costs and Benefits*, 84 PHI DELTA KAPPAN 679 (2003), *available at* http://www.pdkintl.org/kappan/k0305mat.htm ("Schools labeled as 'failing' will not receive their label because they have failed. Rather, schools will be branded because they are in poor or diverse neighborhoods, because they are small and rural, because they are underfunded, and because the [adequate yearly progress] system cannot tell the difference between a learning gain and random noise.").

[30] *See* Ryan, *supra* note 12, at 933 (citing several sources arguing that the federal government has failed to fund all costs associated with NCLB); *NCLB: The High Cost of Broken Promises*, AMERICAN TEACHER, Dec. 2003-Jan. 2004, *available at* http://65.110.81.56/pubs-reports/american_teacher/dec03_jan04/NCLB.html (stating that NCLB has been under funded by $9 billion).

[31] *See* Mathis, *supra* note 29; *see also* Elmore, *supra* note 342 (arguing that "the federal government is now accelerating the worst trend of the current accountability movement: that performance-based accountability has come to mean testing alone"); Haycock, *supra* note 25 ("Chief among the concerns are that some schools are responding to the challenges by resorting to rote teaching, obsessive test preparation, or narrowing of the curriculum.").

variation.[32] Thus, any differences in student body test scores, combined with statistical errors in the tests themselves, make it impossible to know whether the tests truly measure gains or losses in performance.[33] Further, there are concerns that the tests administered by the states do not validly represent the curriculum expectations for an educated, well-rounded student.[34] Because most of the standardized tests administered focus on math and reading, and most states claim that their tests are "aligned" with their curriculum standards, "social studies and science get short shrift."[35]

This concept of validity is closely related to the narrowing of school curriculums that is often cited as resulting from the focus on standardized testing.[36] As Kati Haycock, Director of the Education Trust, stated before Congress, "[O]bsessive test preparation, or narrowing of the curriculum . . . are neither inevitable nor wise. . . . I have never come across a high-performing school that was inordinately focused on 'drill and kill' or test-prep strategies."[37] However, because of the funding shortfall many schools face, particularly those in impoverished areas, "[t]hose [schools] that have embarked on large-scale

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[32] Mathis, *supra* note 29 (citing study done by Thomas Kane and Douglas Staiger in April 2001 at Stanford University titled "Volatility in School Test Scores: Implications for School-Based Accountability Systems").

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *See* sources cited *supra* note 31; Sam Dillon, *Schools Cut Back Subjects to Push Reading and Math*, N.Y. TIMES, Mar. 26, 2006, at A1 ("Thousands of schools across the nation are responding to the reading and math testing requirements laid out in No Child Left Behind, President Bush's signature education law, by reducing class time spent on other subjects and, for some low-proficiency students, eliminating it."); *see also* Jonathan Kozol, *Still Separate, Still Unequal: America's Educational Apartheid*, HARPER'S MAGAZINE, Sept. 2005, at 41, 53 (noting that since the enactment of NCLB, the number of standardized tests students must take has nearly doubled, and that number will probably increase again after the year 2006 when the Act will require further standardized testing).

[37] Haycock, *supra* note 25.

testing are stretched to their limits just managing test-development work or monitoring testing contractors."[38] Due to the significant focus of NCLB on test scores as a measure of student proficiency, it is hard to imagine a school that would not be forced to embark on large-scale testing. As a result, to avoid being labeled in the media as a "failing" school, schools and teachers in impoverished areas are inevitably forced to narrow the curriculum to focus on the content (i.e., math and reading) that will result in higher test scores.[39]

Finally, of significant concern is the reaction of schools and students to the external accountability NCLB places on them as a result of testing – rewards for high performance and sanctions for low performance.[40] Unfortunately, this consequence of NCLB ignores the fundamental principle that "*internal* accountability must precede *external* accountability."[41] Inherently, lower performing schools are low-performing because the organization itself does not understand, or at least is inadequately equipped to implement, the necessary norms and expectations of what a good school looks like.[42] Thus, traditionally low performing schools do not possess the means to become sufficiently accountable internally, such that the external accountability provided by testing and test scores mean anything of significance. Furthermore, the increased pressure on students themselves to perform well on standardized tests, which provide the only method to measure their performance under NCLB, is likely to aggravate the already existing

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[38] Elmore, *supra* note 342.

[39] Mathis, *supra* note 29. The Dillon article provides the most recent example of studies done on this effect of the Act. Dillon, *supra* note 36. It is staggering to consider that in some schools, students are barred from taking any subjects except math, reading, and gym. *Id.* One teacher who teaches English to certain students for three consecutive periods and others twice a day was quoted in the article as saying, "I have some little girls who are dying to get out of this class and get into a mainstream class . . . . But I tell them the only way out is to do better on [California's Standardized Testing and Reporting program]." *Id.*

[40] Elmore, *supra* note 342.

[41] *Id.*

[42] *Id.*

inequalities between low-performing and high-performing schools and students.[43]

III. BREAKING THE CYCLE OF INADEQUATE CHILD EDUCATION

A. PSYCHOLOGICAL EFFECTS OF POVERTY, ABUSE, AND NEGLECT ON CHILDREN

Part I established that there is a poverty crisis facing today's urban youth and that there is a strong correlation between a child living in poverty and subsequent abuse or neglect of that child by his or her parent(s). Further, despite the efforts of Congress in passing the ASFA, there are still significant issues regarding its effectiveness to date. The next question to ask is what the general psychological effects are for children in poverty and, in particular, impoverished children faced with situations of physical abuse, neglect, and lack of permanency. By looking first at the general psychological effects, it is then possible to analyze how children in such circumstances are impacted as they try to learn in the classroom, and further, how they might respond to the requirements under NCLB.

Before one can understand the psychological effects, it is important to recognize the substantive, negative consequences poverty has on a child. An impoverished child often is raised without enough to eat, lacking proper clothing, receiving inadequate healthcare, learning in crowded classrooms, and living in unsafe and inadequate homes.[44] It is also safe to say that poverty kills: impoverished children, as compared to children raised in higher-income families, are twice as likely to die from birth defects, three times more likely to die from all causes combined, four times more likely to die in fires, and five times more likely to die from diseases and parasites.[45] The

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[43] *Id.*

[44] NORA S. GUSTAVSSON & ELIZABETH A. SEGAL, CRITICAL ISSUES IN CHILD WELFARE 62 (1994).

[45] Marian Wright Edelman, *Introduction* to ARLOC SHERMAN, WASTING AMERICA'S FUTURE: THE CHILDREN'S DEFENSE FUND REPORT ON THE COSTS OF CHILD POVERTY, at xvii (1994).

problem is compounded by the fact that "[m]any poverty-related problems and deficits interact and combine with each other in a unique way for every child, so we cannot make real headway against the effects of poverty by tackling them one at a time."[46]

The substantive consequences of poverty on children have led to well documented impairment of physical, social, and emotional development.[47] Impoverished children often are unable to "develop warm, secure, trusting relationships early in life,"[48] and have heightened anger and aggressiveness.[49] Further, poor children are twice as likely as wealthier children to develop extreme behavior problems, and strong connections have been found between poverty and juvenile delinquency.[50] Such deviant behavior is often linked to low self-esteem, because children who have few experiences of success in life may engage in such behavior as a means to increase their feelings of self worth.[51]

The psychological effects on impoverished children are even more pronounced when they are faced with situations of physical abuse, neglect, and long-term foster care (i.e., lack of permanency). At this point, it may be helpful to recall the two stories discussed in the introduction.[52] Try and put yourself back in the position of those two young children as you consider how those particular situations might lead to the effects discussed here.

Children subjected to physical abuse tend to be more violent toward both their siblings and parents, and an experience of

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[46] *Id.*

[47] GUSTAVSSON & SEGAL, *supra* note 44, at 62 (citing LISBETH B. SCHORR, WITHIN OUR REACH: BREAKING THE CYCLE OF DISADVANTAGE (1988)).

[48] SCHORR, *supra* note 47, at 29-30.

[49] ARLOC SHERMAN, WASTING AMERICA'S FUTURE: THE CHILDREN'S DEFENSE FUND REPORT ON THE COSTS OF CHILD POVERTY 90 (1994).

[50] *Id.* at 90-91.

[51] J. JEFFRIES MCWHIRTER ET AL., AT-RISK YOUTH: A COMPREHENSIVE RESPONSE 85 (2d ed. 1998).

[52] *See supra* text accompanying notes 331-334.

violence in childhood has been associated with adult violence.[53] Research indicates that physically abused children are at a higher risk of growing up to commit criminal offenses, and the higher the level of violence in the family, the more violent the offenses will be.[54] Often, children will cope with threatening environments by becoming particularly aware of dangers in the environment, coupled with a high anxiety level, as a direct result of abuse.[55]

Further, studies have shown that children confronted with instances of physical abuse and neglect can be delayed in language development.[56] Children who are maltreated by their parents or caregivers are also more likely to show signs of failure in normal adaptation, as compared to their non-maltreated counterparts.[57] As a result, their levels of social competence, self-esteem, and problem-solving abilities are diminished.[58] Children who are abused or neglected generally feel a lack of control over what has happened in their lives, which results in a sense of helplessness toward life in general or in particular about themselves, others, and the world.[59]

Lastly, the psychological effects of foster care, and in particular continuous movement between different placements in foster care, have been studied extensively.[60] Most obviously,

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[53] Raymond H. Starr, Jr. et al., *Life-Span Development Outcomes of Child Maltreatment, in* THE EFFECTS OF CHILD ABUSE AND NEGLECT: ISSUES AND RESEARCH 1, 7, 9 (Raymond H. Starr, Jr. & David A. Wolfe eds., 1991).

[54] *Id.* at 12.

[55] Kenneth N. McRae & Sally E. Longstaffe, *The Behaviour of Battered Children – An Aid to Diagnosis and Management, in* CHILD ABUSE: A COMMUNITY CONCERN 13, 18 (Kim Oates ed., 1982).

[56] DAVID A. WOLFE, PREVENTING PHYSICAL AND EMOTIONAL ABUSE OF CHILDREN 32 (David H. Barlow ed., 1991).

[57] *Id.* at 35.

[58] *Id.*

[59] VERNON R. WIEHE, WORKING WITH CHILD ABUSE AND NEGLECT 145 (1996).

[60] *See* JOHN T. PARDECK, THE FORGOTTEN CHILDREN: A STUDY OF THE STABILITY AND CONTINUITY OF FOSTER CARE 2-3 (1982) (citing numerous

children who experienced several placements tended to exhibit more emotional problems than those foster children who did not.[61] In particular, studies have found a correlation between a foster child's confusion of self-identity and a high number of placements.[62] Also, it has been proven that there is an inverse relationship between a former foster child's social effectiveness and sense of well being, and the total number of placements experienced by the child.[63] Thus, where a higher number of placements have been experienced, the former foster child will be less socially effective and generally will have a lower sense of well-being.[64]

B. Connection between Domestic Situation and Educational Performance

In light of the psychological effects discussed above, it is important to highlight the manner in which the effects of the domestic situation may manifest themselves in school and the classroom. One clear result of the anger, distractibility, anxiety, and lack of self-control of children in these domestic situations is increased behavioral problems and acting out in the classroom.[65] When a student acts out in class, fights, or argues with fellow classmates, and neglects to turn in homework, learning is affected, and such behaviors are often related to school failure.[66]

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studies regarding the "association . . . between multiple replacements and the foster child's emotional and behavioral well being").

[61] *Id.* (citing HENRY S. MAAS & RICHARD E. ENGLER, CHILDREN IN NEED OF PARENTS 105 (1959); E.A. WEINSTEIN, THE SELF IMAGE OF THE FOSTER CHILD 66-67 (1960)).

[62] *Id.* at 3 (citing David Fanshel & Henry S. Maas, *Factorial Dimensions of the Characteristics of Children in Placement and Their Families*, 33 CHILD DEV. 123, 123-44 (1962)).

[63] *Id.* (citing Elizabeth G. Meier, *Adults Who Were Foster Children*, 13 CHILD. 16, 16-21 (1966)).

[64] *Id.*

[65] WIEHE, *supra* note 59, at 145.

[66] MCWHIRTER ET AL., *supra* note 51, at 69.

Another effect, which likely accounts at least in part for Congress's passing of NCLB, is that children living in poverty are proven to have lower test scores on the whole, whether the test measures IQ or achievement in particular subjects.[67] Children who are raised in poverty for the first five years of their lives score nine points lower on an IQ test than children living in families who were never poor.[68] Further, in nationwide testing intended to measure vocabulary, reading, and math achievement for children ages three and older, long-term poor children ranked eleven to twenty-five percentile points below children whose long-term family incomes were at least three times higher than the poverty line.[69] This leads to increased rates of impoverished children being diagnosed with learning disabilities who may be in need of special education, and who are at greater risk of falling behind a grade level in school.[70]

Even when a child may not be deemed to have a learning disability per se or may not be in need of individualized special education, many schools will group students according to ability level.[71] Given that children dealing with difficult domestic situations are proven to generally have lower test scores than their peers, it is very likely that an inordinate number of such students would be placed in low-ability classrooms. Children placed in different ability groups learn very quickly which group they have been assigned to and where it ranks relative to others.[72] Often, what is found in these situations is that the

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[67] SHERMAN, *supra* note 49, at 78-79.

[68] *Id.* at 78.

[69] *Id.* at 79.

[70] *Id.* at 79-80.

[71] GUSTAVSSON & SEGAL, *supra* note 44, at 44-45. Many of us probably experienced this separation in our own public schools. Generally there are three levels, where the lowest is a remedial level, followed by a general level, and finally the advanced placement, or honors, level. Usually students will begin in the general level by default and will subsequently be placed in the remedial level when their ability levels demonstrate that it is necessary, or, alternatively, students will be asked if they would like to be placed in the honors class assuming they can pass some sort of aptitude test.

[72] *Id.* at 45. This is especially true in situations seen today, where lower-ability students, as a result of the requirements of NCLB, are forced out of

expectations of teachers for the class – higher expectations for high-ability classes and lower expectations for low-ability classes – combined with the inevitable self-fulfilling prophecy of the students, will lead to educational harm to the students placed in the lower ability classroom.[73]

The frequent end result of these classroom issues often faced by students in difficult domestic situations – behavioral problems, lower test scores, subsequent segregation by ability – is the decision by those students to drop out of school. Studies show that the drop out rate of low-income children has consistently been twice as high as the rate for middle-income

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nearly every subject *except* math and reading in order to enable them to perform better on standardized tests. *See* Dillon, *supra* note 36; *supra* note 39 and accompanying text. Any student forced to take English for three consecutive periods or twice during the same school day, while his or her peers are taking a regular and diverse course load, will easily comprehend the ability level they are a part of and where that level ranks relative to the others.

[73] GUSTAVSSON & SEGAL, *supra* note 44, at 45. While the seminal case of *Brown v. Board of Education* dealt with segregation based solely on race, the Supreme Court's rationale also speaks persuasively to the educational impact segregation by ability levels might have on students. The Court stated, "To separate [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way *unlikely to ever be undone*." Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954) (emphasis added). The Court went on to consider favorably a finding by the lower Kansas court detailing the effect separation can have on a child's educational opportunities:

> A sense of inferiority affects the motivation of the child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.

Id. (alteration in original) (citation omitted).

One can only imagine the sense of false inferiority students in lower ability classrooms feel as a result of their segregation. Combine this feeling with the psychological effects on students faced with difficult domestic situations, and it becomes readily apparent how unlikely it is that such feelings will ever be undone.

youths since 1972.[74] Also, less than thirty percent of children and adolescents in an "out-of-home placement" (i.e., removed from their biological family's home) either graduate from high school or earn a General Equivalency Diploma.[75] Over the last thirty years, when asked to give the main reasons for leaving school before graduation, these children claim: 1) a dislike for school because school was boring and not relevant to their needs; 2) low academic achievement and poor grades; 3) poverty and a desire to work full time because of a need for money; and 4) lack of belonging and a sense that nobody cared.[76]

C. The Problem and Two Suggested Solutions

The fundamental problem with NCLB is that there is no evidence, either in the legislative history or in the manner by which the Act was implemented, that Congress took sufficient, if any, account of the extraordinary nature of the problems facing a significant number of today's urban youth. Children in public schools today do not live in two wholly separable worlds, one in school and the other at home or in an alternative domestic situation. As I have shown, the significant negative psychological effects of poverty, abuse, neglect, and lack of permanency carry over into the classroom, impacting a child's academic performance, as well as his or her decision whether to remain in school at all.

Yet, the legislative history of NCLB is void of any recognition by Congress of a child's circumstances outside of the classroom and the psychological effects these domestic situations actually have.[77] While the Act itself has the purpose to provide higher quality education to low-achieving students in high-poverty

[74] SHERMAN, *supra* note 49, at 81.

[75] GUSTAVSSON & SEGAL, *supra* note 44, at 43.

[76] MCWHIRTER ET AL., *supra* note 51, at 100.

[77] *See generally* H.R. REP. NO. 107-63(I) (2001) (stating simply that the House "recommend[s] that the bill as amended" should be passed, and then proceeding to lay out the entire Act as amended with no discussion about the reasoning or studies done before recommending passage).

schools,[78] NCLB does not provide any insight or means by which schools and teachers can meet the Act's stringent requirements while still adequately connecting with children experiencing tumultuous lives outside of the classroom.

The lack of congressional insight into the breadth of this problem is illustrated further when one considers the subsequent congressional hearings that have occurred regarding NCLB. In those hearings, Congress heard from the director of the Education Trust,[79] the superintendent of Richmond, Virginia's public schools,[80] and the United States Secretary of the Department of Education,[81] in order to get a sense of what has worked and what still needs to be addressed under the Act. Social workers in child protective services and child psychologists were nowhere to be found at these congressional hearings. Yet, despite the efforts of educators and the requirements of NCLB, who would be better equipped to provide insight into the domestic situations of urban youth and the manner in which those situations might adversely affect their school performance than these types of professionals?

Last, but certainly not least, the legislature's decision to make standardized testing the only means by which a child's educational progress will be measured shows a lack of thorough understanding of the psychological problems many of today's urban school children face. As the first two sections of Part III of this Note demonstrated, children living in poverty, and children who are abused, neglected or forced to move repeatedly between foster homes generally have low self-esteem, problems with anger, high anxiety, and difficulties with problem-solving. Without going further into the other psychological effects previously discussed, it is quite clear that these effects alone would sufficiently impair a child's ability to perform well on a

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[78] *See supra* notes 10-11 and accompanying text.

[79] *See* Haycock, *supra* note 66; *see also supra* notes 25-26 and accompanying text.

[80] *See* Deborah Jewell-Sherman, Superintendent of Richmond Public Sch., *Congressional Testimony: Review of No Child Left Behind Act*, Sept. 30, 2005.

[81] *See* Margaret Spellings, U.S. Sec'y of the Dep't of Educ., *Congressional Testimony: Review of No Child Left Behind Act*, Sept. 30, 2005.

standardized test. This is particularly true where the stringent requirements of NCLB have led to schools and teachers "teaching to the test,"[82] rather than providing any successful strategies for a child to cope with the stresses of the test.

So, what are the solutions to this problem? I offer two. First, at the most fundamental level, Congress needs to communicate more thoroughly with *all* individuals who have insight into the situations confronting today's urban youth. NCLB is an ambitious piece of legislation with admirable goals, but it will not work when viewed from just one angle – that the Act only involves schools and educators. Congress must take the time to better understand the full scope of an impoverished, abused or neglected child's life by hearing from social workers in the field who witness the situations many of these urban youth confront everyday. It also needs to involve experts in child psychology, who can provide a thorough understanding of the effects of poverty, abuse, and neglect, and who can give practical suggestions for ways to better connect with children in the classroom. Until congressional decisions on education reform are informed by experts who understand all areas of a troubled youth's life, inadequate child education and child poverty will continue in poorer urban communities.

Second, Congress needs to modify the requirements of NCLB to ensure that all schools are mandated to involve some level of higher-order, creative thinking into their curriculum. While it is true that standardized tests have traditionally been the primary tool by which education at all levels measures academic proficiency, it should not be the only measure. Children need an outlet and an opportunity to express themselves in ways other than demonstrating an aptitude solely in reading, math, and science, particularly children faced with extreme situations at home.[83]

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[82] *See supra* notes 31-43 and accompanying text.

[83] *See* MCWHIRTER ET AL., *supra* note 51, at 73 ("[M]uch of the school day is spent learning facts and developing isolated skills. . . . Students have little enthusiasm for such a curriculum and over time become passive players in the schooling process, doing little but what they are required to do."). McWhirter goes on to note:

> A curriculum that hinders or ignores moral education, development of social skills, student dialogue, and *critical thinking* invites

NCLB should be amended, requiring schools to incorporate elective coursework into their curriculum that has no direct relationship to the periodic assessments mandated under the Act.[84] These courses could be anything from creative writing and journalism, to drama and public speaking, to painting and industrial arts. Such a requirement would force schools to realize that simply "teaching to the test" does its students a disservice by failing to provide them with a well-rounded education, and in particular leads troubled youth to the conclusion that "school [is] boring and not relevant to their needs" before they choose to drop out altogether.[85] Of course, in creating this requirement, Congress must recognize that

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> boredom and dependence, limits students' goals and decision-making capabilities, and *does little to help at-risk students*. The curriculum must be flexible enough to adapt to the needs of students.

Id. at 73-74 (emphasis added).

[84] As the Act is written now, states *may* set academic standards for subjects it deems important, but NCLB only *requires* standards for mathematics, reading or language arts, and, beginning in the 2005-2006 school year, science. NCLB, Pub. L. No. 107-110, § 101, 115 Stat. 1425, 1445 (codified as amended at 20 U.S.C. § 6311(b)(1)(C) (2006)); *see also supra* note 340 and accompanying text. However, as noted in Sam Dillon's recent *New York Times* article, it is simply not happening, and in fact the polar opposite is occurring for students in need of educational assistance. *See* Dillon, *supra* note 36; *see also supra* note 39 and accompanying text.

[85] MCWHIRTER ET AL., *supra* note 51, at 100. The increased focus on math and reading has led to a split among educational experts on the effect it will have on students. Dillon, *supra* note 36. Some contend that NCLB's focus on basic skills is leading to higher achievement in thousands of low-performing schools. *Id.* However, other experts warn that "by reducing the academic menu to steak and potatoes, schools risk giving bored teenagers the message that school means repetition and drilling." *Id.* It would seem that the latter group of experts is more likely correct in light of the reasons high school dropouts gave for leaving school, including that school is "boring." *See supra* note 76 and accompanying text. Thomas Sobel, an education professor and a former New York State education commissioner was quoted in Dillon's article as saying, "Only two subjects? What a sadness . . . . That's like a violin student who's only permitted to play scales, nothing else, day after day, scales, scales, scales. They'd lose their zest for music." Dillon, *supra* note 36. I for one could not imagine spending five of six class periods during a school day on math, reading, and gym, as close to twenty percent of students in a Sacramento, California junior high school do today. *See id.*

appropriate levels of federal funding need to be provided to adequately establish such programs in schools that are already struggling financially.[86]

> Children who are abused, neglected, homeless . . . and uneducated are defined as at-risk children. . . .
>
> . . . An educator's responsibility is no longer limited to academic instruction but also encompasses a child's social and emotional development. . . .
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> . . . .
>
> At-risk children are good people in bad lives. They have been hurt and need to be heard. . . . At-risk children, when given a tool for communication and people who listen, become children with hope.[87]

Maybe it is time for Congress to start listening.

[86] *See supra* notes 30, 38 and accompanying text.

[87] KATHLEEN VAN ANTWERP, "I CAN'T COME TO SCHOOL TODAY…MY MOM'S IN PRISON AND I DON'T HAVE A RIDE" 83-85 (1998).

WEIGHING IN ON TITLE VII: THE IMPACT OF THE BORGATA CASINO'S WEIGHT REQUIREMENT ON FEMALE BEVERAGE SERVERS

Jen Purnell

The Borgata Hotel, Casino and Spa[88] in Atlantic City, New Jersey recently came under attack for the strict weight policy that is imposed on its beverage servers. The weight requirement provides sanctions for any employee whose weight increases by more than seven percent from the time at which a baseline weight was established. Critics of the policy argue that there is no business reason to require cocktail servers to undergo mandatory weigh-ins, and that a beverage server's size has no bearing on his or her ability to mix or serve a drink. According to management, the policy was implemented as a means of ensuring that the staff maintains an appearance that is equivalent to their appearance as of the date on which they were hired.

Borgata asserts that the weight requirement is a way of maintaining its image. Like other employers in the restaurant and fashion industries who have come under attack for allegedly discriminatory policies, the Borgata's cocktail servers (or as the female cocktail servers are known, "Borgata Babes") are one part of the overall business scheme that enables them to deliver a unique, high quality product. The Borgata Babes are an essential part of the Borgata's image, and as such, these cocktail servers must maintain their physical appearance.

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[88] The Borgata Hotel Casino and Spa in Atlantic City New Jersey is an unconsolidated joint venture between Boyd Gaming Corporation and MGM Mirage.

This note will discuss the current law under which alleged victims of discrimination by the Borgata's weight requirement may pursue Title VII claims, and whether such avenues for litigation are adequate to address the harms allegedly suffered by these victims. An analysis of potential claims under both the disparate treatment, and disparate impact models will be assessed in an effort to evaluate the possibility of success either theory.

This note will argue that despite recent allegations and attacks on the Borgata's weight policy, Title VII sex discrimination claims under either the disparate treatment or disparate impact models cannot be successfully pursued as a result of this policy. Although the majority of the Borgata's beverage servers are women, and therefore more likely than their male counterparts to feel the impact of the weight requirement, this note will further contend that the inability to pursue gender discrimination claims as a result of the Borgata's implementation of the weight requirement should not invalidate the requirement *per se*. Where, as here, an employer has implemented a facially neutral policy that is applied equally to both male and female employees, sex discrimination claims are inappropriate, despite the proportional differences in the number of male and female employees who are working in the same line of employment.

I. THE SKINNY ON WEIGHT REQUIREMENTS UNDER TITLE VII

Title VII of the Civil Rights Act of 1964[89] ("Title VII") is a broadly crafted statute designed to protect employees from discriminatory action by employers. It provides that employers shall not discriminate as to any term of employment based on "race, color, religion, sex, or national origin."[90] Title VII does not provide any protection based on any other classification of persons. Other statutes such as the Americans with Disabilities Act of 1990 ("ADA"),[91] or the Age Discrimination in

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[89] Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (2000).

[90] *Id.* at § 2000e-2(a)(1).

Employment Act (ADEA)[92] provide specific protections for additional classes of persons who may not fall within the scope of Title VII protection.

A. GENDER DISCRIMINATION CLAIMS BROUGHT BASED ON GROOMING REQUIREMENTS UNDER TITLE VII

Title VII protects against employers discriminating based on immutable characteristics.[93] Although gender discrimination is protected, grooming requirements that only apply to one gender have been considered facially neutral.[94] The reasons asserted for this treatment of facially discriminatory grooming requirements include that the "'primary thrust' of Title VII is to ban employer reliance on sex stereotypes that pose 'distinct employment disadvantages for one sex,'"[95] and that grooming does not pertain to a "fundamental right."[96] In addition, differing grooming requirements for members of the two sexes are often not considered discriminatory.[97] However, the Ninth

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[91] Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (2000).

[92] Age Discrimination in Employment Act, 29 U.S.C. § 630 (2000).

[93] HAROLD S. LEWIS, JR. & ELIZABETH J. NORMAN, EMPLOYMENT DISCRIMINATION LAW AND PRACTICE 88-89 (2d ed. 2004). Title VII also protects against discrimination on the basis of religion, which could arguably be a mutable characteristic. 42 U.S.C. §§ 2000e-2000e-17 (2000).

[94] LEWIS & NORMAN, *supra* note 6, at 88 (noting that requiring only men to maintain short hair has been considered neutral treatment, not express disparate treatment).

[95] *Id.* (quoting Knott v. Missouri Pac. R.R., 527 F.2d 1249, 1251 (8th Cir. 1975)).

[96] *Id.* at 88-89. Lewis and Norman assert that Title VII was crafted to extend "beyond the minimal fundamental rights that enjoy constitutional protection . . . by assuring that employment status is not disadvantaged by any distinction based on race, sex, religion or national origin." *Id.*

[97] *Id.* at 89. The imposition of different grooming requirements on different genders, or the application of these requirements in different ways as to members of different sexes is often ignored because of differences in the two genders. *Id.* (citing Craft v. Metromedia, Inc., 766 F.2d 1205 (8th Cir. 1985); Carroll v. Talman Fed. Sav. & Loan Ass'n, 604 F.2d 1028 (7th Cir. 1979); Earwood v. Continental Southeastern Lines, Inc., 539 F.2d 1349 (4th

Circuit held that a facially discriminatory weight requirement, which imposed different maximum allowable weight limits for male and female flight attendants, violated Title VII under a theory of disparate treatment.[98]

B. INDIVIDUAL DISPARATE TREATMENT

A Title VII gender discrimination plaintiff asserting a disparate treatment theory must show that the employer intended to discriminate against the individual because of his or her gender.[99] A plaintiff may prove an employer's intent to discriminate by offering direct evidence that the "employer

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Cir. 1976); Fagan v. National Cash Register Co., 481 F.2d 1115 (D.C. Cir. 1973)).

[98] Frank v. United Airlines, Inc., 216 F.3d 845, 854-55 (9th Cir. 2000). In *Frank*, female flight attendants brought a class action suit challenging United Airlines' maximum weight policy as violative of Title VII, the ADEA, and the ADA. *Id.* at 848. The weight policy imposed different maximum weight limits for its male and female flight attendants. *Id.* at 854. The court stated that different maximum weight requirements for men and women would have been acceptable based on differences in frame size of the two sexes, but that the weight requirements were discriminatory because the maximum weight for women was based on a medium build woman, and the maximum weight for men was based on a large build man. *Id.* at 854-55.

[99] LEWIS & NORMAN, *supra* note 6, at 165. It is also possible for a plaintiff to assert a discrimination claim under Title VII based on a theory of systemic disparate treatment. *Id.* at 230. Systemic disparate treatment is usually proven in reliance on statistical evidence to show that a protected group has collectively suffered the effects of an employer reaching a number of discriminatory decisions. *Id.* There is no systemic disparate treatment so long as an employer achieves a distribution of employees that accurately reflects its pool of qualified applicants. *Id.* (citing International Brotherhood of Teamsters v. U.S., 431 U.S. 324 (1977)). A systemic disparate treatment theory enables more than one individual to take advantage of the remedy should the employer be found liable for violating Title VII. *Id.* at 231. Although individual examples may amplify the showing of disparate treatment, in systemic disparate treatment cases statistical evidence alone may suffice to show discrimination. *Id.* at 232. In such a case, the plaintiff must show that there exists a "statistically significant 'gross disparity' between observed and expected protected group representation." *Id.* at 233. Where the disparity is so great that it is capable of demonstrating that the discrimination was the "employer's routine operating procedure such that relief should be granted to the entire underrepresented class." *Id.*

would or did act against the plaintiff because of his or her protected characteristic."[100] A plaintiff may also produce direct evidence of an employer policy framed in terms of one of the Title VII protected classes, along with evidence that the policy adversely impacted the plaintiff.[101]

A showing of direct evidence will ordinarily create a presumption of discrimination.[102] Courts attach different meanings as to what constitutes "direct evidence" sufficient to create the presumption of discrimination,[103] but agree that "weakly proved or inherently ambiguous" evidence cannot be considered direct evidence.[104] In addition to its initial burdens, once direct evidence of discrimination is presented, the plaintiff may also bear the burden of demonstrating that the discriminatory policy or comments are related to the action at issue.[105]

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[100] LEWIS & NORMAN, *supra* note 6, at 165 (citing Troupe v. May Dep't Stores Co., 20 F.3d 734 (7th Cir. 1994)).

[101] *Id.* (citing Perry v. Woodward, 199 F.3d 1126, 1134 (10th Cir. 1999), *cert. denied*, 529 U.S. 1110 (2000)).

[102] *Id.*

[103] *Id.* at 165-66. Some courts define direct evidence as that which "if believed would prove the existence of the fact without interferences or presumption." *See id.* (citing Laderach v. U-Haul of Northwestern Ohio, 207 F.3d 825, 829 (6th Cir. 2000)). Other courts define evidence as that which "directly reflects the alleged discriminatory animus." *Id.* at 166 (citing Lightfoot v. Union Carbide Corp., 110 F.3d 898, 913 (2d Cir. 1997); Kerns v. Capital Graphics, Inc., 178 F. 3d 1011, 1017-18 (8th Cir. 1999); Hennessy v. Penril Datacomm Networks, Inc., 69 F.3d 1344, 1348-50 (7th Cir. 1995)).

[104] *Id.* at 166. At a minimum, for evidence to constitute direct evidence it must have been 1) made by the person with the power to make the decision about the plaintiff's employment, or someone who has influence over that decision maker; and 2) the statement's content and context must suggest that the employer-decision maker relied on the statements in question and their properties of bias in rendering the adverse decision. *Id.* at 168 (citing Rios v. Rossotti, 252 F.3d 375 (5th Cir. 2001); Schreiner v. Caterpillar, Inc., 250 F.3d 1096, 1099 (7th Cir. 2001); Kennedy v. Schoenberg, Fisher & Newman, Ltd., 140 F.3d 716 (7th Cir. 1998); Trotter v. Board of Trustees, 91 F.3d 1449 (11th Cir. 1996); Bruno v. City of Crown Point, 950 F.2d 355 (7th Cir. 1991)).

[105] *Id.* at 172.

Where there is not direct evidence to support a showing of disparate treatment, a plaintiff can use circumstantial evidence to create inferential proof of discrimination.[106] Such circumstantial evidence falls into one of three categories: suspicious timing evidence, statistical evidence, or pretext evidence.[107] Inferential proof is the most common means relied upon by plaintiffs to assert a prima facie case of discrimination against an employer because most employers are well enough counseled to avoid framing policies in terms that are not facially neutral.[108]

The inferential burden of proof is a standard that enables the plaintiff to establish a prima facie case based on an inference that the employer engaged in discriminatory activity.[109] The Supreme Court outlined the requirements for such a prima facie

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[106] LEWIS & NORMAN, *supra* note 6, at 179.

[107] *Id.* Suspicious timing evidence includes "suspicious timing, ambiguous statements, or other behavior toward or comments directed at other employees in the protected group from which an inference of discriminatory intent might be drawn." *Id.* Statistical evidence includes "statistical or anecdotal [evidence], that persons outside the plaintiff's protected group, otherwise similarly situation to the plaintiff were treated differently with respect to the relevant terms and conditions of employment." *Id.*; *see also* McDonnell Douglas v. Green, 411 U.S. 792, 805 (1973) (quoting Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245 (10th Cir. 1970) ("statistics as to petitioner's employment policy and practice may be helpful to a determination of whether . . .[employer action] conformed to a general pattern of discrimination . . ."). A prerequisite to relying upon statistical evidence is that the person to whom the plaintiff is comparing herself to must be similarly situated. LEWIS & NORMAN, *supra* note 6, at 179. Finally, pretext evidence is presented after a plaintiff makes a prima facie showing of discrimination by her employer. *Id.* at 181. *See* St. Mary's Honor Center v. Hicks, 509 U.S. 502, 515 (1993) ("a reason cannot be proved to be 'a pretext for discrimination' unless it is shown *both* that the reason was false, *and* that discrimination was the real reason"). Once an employer rebuts a plaintiff's prima facie case of discrimination, the plaintiff must be "afforded a fair opportunity to show that . . . [the] stated reason for . . . rejection was in fact pretext." McDonnell Douglas, 411 U.S. at 804.

[108] LEWIS & NORMAN, *supra* note 6, at 167-68, 181-82.

[109] *See* Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981) ("Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee.").

case in *McDonnell Douglas v. Green*.[110] The plaintiff must establish its prima facie case by a preponderance of the evidence.[111] Although it is more difficult to prove disparate treatment using circumstantial evidence,[112] the difficulty in determining what constitutes direct evidence leads many plaintiffs to fall under the inferential scheme of proof.[113] Once a prima facie case of discrimination has been made, the burden of production shifts to the defendant-employer to rebut the presumption of discrimination.[114]

Under a disparate treatment theory of discrimination, some showing of facial discrimination in terms of a policy, statements, or actions taken by an employer is required. Absent some indication of a facially discriminatory policy, statement, or

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[110] 411 U.S. at 802. The plaintiff bears the burden of establishing a prima facie case of discrimination. *Id.* A prima facie case of discrimination is fact specific to the type of discrimination being asserted but will be usually comprised of some specific elements. *Id.* The plaintiff must ordinarily show that she "(1) belongs to a protected group; (2) applied for or continued to desire the position in question; (3) met minimum uniform qualifications to receive or retain the position at the time of the adverse action; and (4) was rejected, and thereafter the employer continued to receive applications from persons having the complainant's qualifications." LEWIS & NORMAN, *supra* note 6, at 181-82; *see also* McDonnell Douglas, 411 U.S. at 802 (outlining elements of a prima facie case of racial discrimination under Title VII).

[111] *Burdine*, 450 U.S. at 252-53.

[112] It is more difficult to prove disparate treatment under the *McDonnell Douglas* inferential scheme of proof because plaintiff is required to show that the particular employment decision was tied to the discriminatory activity in some way. LEWIS & NORMAN, *supra* note 6, at 166-67.

[113] LEWIS & NORMAN, *supra* note 6, at 167-68. In the gender and age discrimination contexts there is even greater controversy than in cases involving allegations of racial discrimination when determining what constitutes direct evidence of discrimination, and what may be considered stray remarks that are inadequate to constitute direct evidence of a showing of discrimination. *Id.* at 171.

[114] *McDonnell Douglas*, 411 U.S. at 802. "The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Id.* If an employer is able to rebut the presumption, the burden returns to the plaintiff to show that the reasons asserted by the employer were merely a pretext for the discriminatory action that adversely impacted the plaintiff. *Id.* at 804.

action, it is impossible to produce direct evidence of discrimination, or to produce evidence sufficient to create an inference of discrimination.

Recently, the distinction between the use of direct or indirect evidence came closer to being absolved when the Supreme Court indicated that the treatment of direct and indirect evidence should be the same.[115]

The distinction between direct and indirect evidence does not apply to instances where an employer adopts a policy that relies upon a prohibited classification as a condition of employment.[116] An employer's only defense where there is "express" evidence[117] of discrimination is to assert that the policy based on the classification is the result of a bona fide occupational qualification ("BFOQ").[118] The BFOQ affirmative defense is available only in disparate treatment cases when the characteristic at issue is necessary to further general business goals.[119] There is no requirement that the qualification be the *central element* of the employer's business, but it must relate to its "normal operation."[120]

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[115] LEWIS & NORMAN, *supra* note 6, at 173 (citing Desert Palace v. Costa, 539 U.S. 90 (2003)). *Desert Palace* eliminates the distinction between direct and indirect evidence when determining whether the employer relied on an unlawful, discriminatory reason in reaching a decision. *Id.* Under the Court's holding in *Desert Palace*, regardless of what kind of evidence is relied upon, direct or indirect, the "plaintiff may obtain an instruction requiring the defendant to persuade that it would have made the same employment decision for an independent lawful reason." *Id.* at 173, 219.

[116] *Id.* at 174. Prohibited classifications include those listed in Title VII: race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a). An example of this type of policy would be where an employer decides that no woman could hold a given position, or that only whites could hold a certain job.

[117] LEWIS & NORMAN, *supra* note 6, at 174. Express evidence has different legal significance than direct evidence.

[118] *Id.* The BFOQ defense is ineligible for discrimination cases based on race. *Id.*

[119] *Id.* at 175.

[120] *Id.*

The Supreme Court has limited the BFOQ defense as available only in certain instances.[121] The Supreme Court's most recent decision relating to the BFOQ affirmative defense provides that the characteristic must be essential to both the employer's business, and the position at issue.[122] This decision also rejected the defense as to employers when it is grounded in the employer's economic concerns relating to the business.[123]

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[121] *Id.* The employer bears the burden of demonstrating that the discriminatory policy relates to a "trait that goes to the 'essence' of the enterprise *and* bears a 'high correlation' to the plaintiff's ability to perform her particular job." *Id.* (citing Western Air Lines, Inc. v. Criswell, 472 U.S. 400 (1985) (emphasis in original)). The requirement that the trait in issue relate to the essence of the employer's business is derived from the *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1977), decision, in which a requirement that flight attendants be female in order to provide passengers with psychological reassurance or sexual titillation was struck down. LEWIS & NORMAN, *supra* note 6, at 175; Diaz, 442 F.2d at 388 (indicating that the use of the word necessary in the statute "requires that we apply a business necessity test, not a business convenience test . . . [which] is valid only when the essence of the business operation would be undermined . . ."). The Fifth Circuit found that the essence of the airline's business was providing safe travel rather than enhancing the pleasantness of the environment because of the "cosmetic effect that female stewardesses provide." Diaz, 442 F.2d at 388. In *Weeks v. S. Bell Tel. and Tel. Co.*, 408 F.2d 228 (5th Cir. 1969), the Fifth Circuit indicated that the "employer's evidence must demonstrate that 'all or substantially all' members of the excluded group lack the required trait and would therefore be unable to adequately perform that function." LEWIS & NORMAN, *supra* note 6, at 175; Weeks, 408 F.2d at 234. This stringent test eliminates the ability of employers to assert this defense based on differences in strength or stamina to adequately perform a job. LEWIS & NORMAN, *supra* note 6, at 176.

[122] LEWIS & NORMAN, *supra* note 6, at 176; *see* International Union, U.A.W. v. Johnson Controls, 499 U.S. 187 (1991).

[123] LEWIS & NORMAN, *supra* note 6, at 177. A fear that costs will increase as a result of hiring persons who possess a particular trait that is protected against discrimination will not amount to an affirmative defense for engaging in the prohibited activity. *Id.* This does not, however, preclude employers from asserting a defense of increased costs as a result of alleged disparate impact discrimination claims in which a neutral practice disproportionately affected a protected group. *Id.*

C. DISPARATE IMPACT

Discrimination cases under Title VII can also be pursued under a disparate impact theory. When a facially neutral policy exists, but plaintiffs nevertheless allege that they have disproportionately felt the impact of an employer's policy, a discrimination claim under this theory may be appropriate.[124] However, one of the challenges associated with pursuing this type of claim is that it may be difficult to evaluate and determine whether a facially neutral employer practice has a disparate impact on plaintiffs.[125] Regardless of the method of proof demanded by the court, such a disparity must be "based on a fair and logical comparison."[126]

1. GRIGGS *AND THE ORIGIN OF THE DISPARATE IMPACT CLAIM*

The disparate impact theory of discrimination emerged under the Supreme Court's holding in the seminal case of *Griggs v. Duke Power Company*.[127] Upon the emergence of a

[124] *Id.* at 244. A disparate impact theory depends upon a showing that an employer's actions "deprive[d] or tend[ed] to deprive . . . [the] individual of employment opportunities." *Id.* (quoting § 703(a)(2)). Because the focus is on the individual, an employer who demonstrates diversity in his employees may not be absolved from liability. *Id.* at 244.

[125] The 1991 amendments to the Civil Rights Act and the Supreme Court's decisions do not set forth a concrete method of evaluating whether an employer's actions result in a disparate impact to a protected group of individuals. *Id.* The EEOC's Uniform Guidelines on Employee Selection Procedures "provide that a protected group's selection rate which is less than eighty percent of the rate for the group with the greatest success will be regarded . . . as evidence of adverse impact". *Id.* (citing 29 C.F.R. § 1607.4). Some courts have adopted the eighty percent standard to determine whether disparate impact has occurred. *Id.* (citing Smith v. Xerox Corp., 196 F.3d 358, 365 (2d Cir. 1999); *In re* Employment Discrimination Against The State of Alabama, 198 F.3d 1305, 1312 (11th Cir. 1999); Waisome v. Port Auth. of New York & New Jersey, 948 F.2d 1370, 1376 (2d Cir. 1991)).

[126] LEWIS & NORMAN, *supra* note 6, at 246. To assert a prima facie case of disparate impact a plaintiff must demonstrate through a comparison between the group to which it belongs and all persons who could be subject to the policy. *Id.*

[127] 401 U.S. 424 (1971). Under the Court's holding in *Griggs*, "practices fair in form but discriminatory in effect may violate Title VII even though the

disparate impact theory of discrimination, employer defenses to refute such claims also emerged.[128] In such cases, upon the complainant meeting its burden of proving the occurrence of disparate impact as a result of a facially neutral practice, the defendant-employer could assert a defense based on some relationship between the requirement in question and the employer's business.[129]

The requisite degree of relatedness between the asserted business requirement and the policy in question has been debated since its inception.[130] There was also a question over who bore the burden of persuasion when such a defense was asserted.[131] The Supreme Court has subsequently resolved both of these issues.[132]

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employer's motivation in adopting the practice is neutral or benign." LEWIS & NORMAN, *supra* note 6, at 242; *Griggs*, 401 U.S. at 431. The Court in *Griggs* also noted that "Title VII prohibits the use of employment criteria that operate in a racially exclusionary fashion and do not measure the skills or abilities necessary to performance of the jobs for which those criteria are used." *Griggs*, 401 U.S. at 429.

[128] LEWIS & NORMAN, *supra* note 6, at 242-43.

[129] When it promulgated the disparate impact theory of discrimination in *Griggs*, the Supreme Court noted that an employer could avoid liability by demonstrating that the "challenged requirement related to the job in question." *Id.* at 246; *Griggs*, 401 U.S. at 431. It also stated that the employer would be required to provide evidence that the action be "'demonstrably' or 'manifestly' related to the job in question, or that the practice be a matter of business 'necessity.'" LEWIS & NORMAN, *supra* note 6, at 246; *Griggs*, 401 U.S. at 431, 432. The Court's use of the terms "demonstrably," "manifestly," and "necessity" suggest that something more than a mere relationship between the policy and the job in question would be required for an employer to prevail on a defense that was founded on relationship to the business in question.

[130] *See supra* note 43.

[131] LEWIS & NORMAN, *supra* note 6, at 247.

[132] *See* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 657 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074-1076.

2. *THE IMPACT OF* WARDS COVE *ON DISPARATE IMPACT CLAIMS*

In *Wards Cove v. Atonio*, the Supreme Court attempted to resolve much of the confusion surrounding disparate impact discrimination cases.[133] The majority established that a prima facie showing is made when a facially neutral practice has a "significantly disparate impact" on a protected class of persons.[134] The *Wards Cove* opinion also established the threshold of relevance that must be shown between an employer's business and the challenged policy.[135] The Court in *Wards Cove* further held that the employer carries the burden of showing that the challenged practice "serves, in a significant way, the legitimate employment goal of the employer," but need not be "'essential,' or 'indispensable' to the employer's business."[136] The *Wards Cove* opinion also indicated that where a plaintiff demonstrates that a lesser discriminatory alternative to the challenged practice was available as pretext evidence, but a prima facie case for discrimination was not created.[137]

When the Civil Rights Act of 1991 ("the Act")[138] was enacted, it attempted to overrule parts of *Ward's Cove*.[139] The

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[133] *Id.*

[134] *Id.* The *Wards Cove* Court also suggested that the evidence required was like that of the statistical evidence required in systemic disparate treatment cases. LEWIS & NORMAN, *supra* note 6, at 245. *See supra* note 12.

[135] 490 U.S. 642.

[136] LEWIS & NORMAN, *supra* note 6, at 247-48 (quoting Wards Cove, 490 U.S. at 659).

[137] LEWIS & NORMAN, *supra* note 6, at 248. The *Wards Cove* opinion also indicated that the proposed alternative needed to be "equally effective," and that "'cost or other burdens' are 'relevant in determining whether they would be equally as effective.'" *Id.*; Wards Cove, 490 U.S. at 661.

[138] Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074-1076.

[139] LEWIS & NORMAN, *supra* note 6, at 248. Section 3 of the preliminary provision on legislative purpose indicates that Congress intended to codify the holdings of *Griggs* and other Supreme Court decisions rendered prior to *Wards Cove*. *Id.* at 251; Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074-1076, Interpretive Memorandum Section 3, Purposes. Prior versions of the purposes section of the statute expressed the intention to

amendments to the Act affected elements of disparate impact discrimination claims relating to the plaintiff's prima facie case, an employer's defenses, and the plaintiff's rebuttal regarding available alternative practices.[140] In addition, the Act returns the burden of persuasion for the business necessity defense to the employer, and marginally increases the showing required to rebut a prima facie case. Nevertheless, the statute remains favorable to employers, particularly as to the business necessity defense.[141] The net result of these statutorily implemented changes appears to be somewhat more stringent than that set forth in *Wards Cove*, but similar to the standard required when raising a business necessity defense in discrimination suits under other statutes.[142]

"overrule the *Wards Cove* business necessity definition." LEWIS & NORMAN, *supra* note 6, at 251 n. 38 (citing HR 1 Section (o)(2)). The statute also includes a provision that indicates "only one specified interpretive memorandum may be 'relied upon in any way as legislative history in construing or applying . . . any provision of this Act that relates to *Wards Cove*—Business necessity/accumulation/alternate business practice.'" LEWIS & NORMAN, *supra* note 6, at 252 (citing Section 105(b) of the Civil Rights Act of 1991). The referenced memorandum is dated October 25, 1991 and is almost identical to the statement in Section 3 regarding business necessity and job relatedness concepts. LEWIS & NORMAN, *supra* note 6, at 252.

[140] LEWIS & NORMAN, *supra* note 6, at 252.

[141] *Id.* at 251. In *Wards Cove*, the Court indicated that the employer had to produce some evidence that the allegedly discriminatory practice serves "in a significant way, the legitimate goals of the employer." 490 U.S. at 659 n. 9. Upon the implementation of the Act in 1991, the employer is now required to show that the practice is job related and consistent with business necessity. LEWIS & NORMAN, *supra* note 6, at 251. (citing Section 105(a) (adding Title VII § 703(k)(1)(A)(i), 42 U.S.C.A. § 2000e-2(k)(1)(A)(i))).

[142] LEWIS & NORMAN, *supra* note 6, at 251. The business necessity defense to a disparate impact claim closely resembles the BFOQ defense that can be asserted by the employer in a disparate treatment case. *Id.*; *see* discussion, *supra,* Part I.B., pp. 10-15. However, the showing required for the business necessity defense under a disparate impact case appears to be less than that required under a disparate treatment case. LEWIS & NORMAN, *supra* note 6, at 251. To successfully assert a business necessity defense, the employer must show that the facially neutral practice is "necessary to the business," as compared with the requirement under *Diaz* that the BFOQ defense go to the "*essence* of the business." *Id.* (quoting Diaz v. Pan American World Airways, Inc., 442 F.2d 385, 388 (5th Cir. 1971) (*emphasis added*)). Similarly, the requirement that the facially neutral practice be related to the job is less

3. THE EFFECT OF THE 1991 AMENDMENTS TO THE CIVIL RIGHTS ACT OF 1967

Under the revised statute, a plaintiff may establish a prima facie case by demonstrating three things.[143] First, the plaintiff must demonstrate that a statistically significant disparity exists as a result of the facially neutral employment practice that is at issue.[144] The plaintiff must also show that there exists a facially neutral employment practice that is itself the cause of the disparity.[145] Finally, the plaintiff is required to demonstrate the existence of an actual causal relationship between the disparity and the challenged practice.[146]

Once the plaintiff establishes a prima facie case based on these elements, the burden then shifts to the employer to refute the prima facie case by demonstrating that the challenged practice "serves a legitimate, non-discriminatory business objective. . . ."[147] If an employer is able to demonstrate that the challenged practice serves a business objective, the plaintiff may rebut this defense by proving that an alternative, nondiscriminatory practice would have "served the defendant's stated objective equally as well."[148] However, the effect of the

demanding than the *Weeks* requirement for the second prong of the BFOQ defense that "all or substantially all" members of a protected class would be incapable of performing the task. *Id.* (citing *Weeks*, 408 F.2d at 234 (5th Cir. 1969)). The business necessity defense available under Title VII is akin to the defense in the Americans with Disabilities Act which provides that employer screening devices having an adverse impact on disabled individuals will not violate the statute if it can be demonstrated that they are "job-related and consistent with business necessity." *Id.* at 251 n. 36 (citing 42 U.S.C. § 12113 (2000)).

[143] LEWIS & NORMAN, *supra* note 6, at 251.

[144] *Id.* at 248-49 n. 28 (citing EEOC v. Joe's Stone Crab, Inc., 220 F.3d 1263, 1274 (11th Cir. 2000) (citations omitted)).

[145] *Id.* at 249.

[146] *Id.*

[147] *Id.* (quoting Joe's Stone Crab, 220 F.3d at 1275).

[148] *Id.* (quoting Joe's Stone Crab, 220 F.3d at 1275).

amendments to the Act on these three elements of a disparate impact claim remains ambiguous.[149]

Although the Act appears to relieve some of the plaintiff's burden, remnants of loosened requirements from *Wards Cove* remain. For instance, the holding in *Wards Cove* required a plaintiff to identify the practice that caused the disparate impact.[150] Currently in a Title VII discrimination claim, the plaintiff no longer must separate the single practice that is causing the disparate impact, provided he can show that the practice comprises an integral part of a decision making process from which it cannot be separated.[151] The statute further enables the employer to demonstrate that a particular business practice, even one the employee demonstrates is a part of a decision making process, does not have the complained of disparate impact.[152] Although this appears to undercut the complaining party's ability to challenge an entire process, it may instead provide recognition that the employer is in a position to

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[149] LEWIS & NORMAN, *supra* note 6, at 249. Although the Act makes clear that an asserted business purpose is an affirmative defense to a disparate impact discrimination claim, it does not clarify the quantum of evidence required for the plaintiff to meet its burden of a prima facie case; it fails to define what constitutes business necessity; and it maintains the ability of an employer to adopt an alternative practice to escape liability with no indication of the time at which this alternative practice must be implemented to avoid liability. *Id.*

[150] *Id.* at 250 (citing Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 657 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074-1076).

[151] *Id.* (citing Section 105(a) (adding Title VII § 703(k)(1)(B)(i))). If the challenged practice is not part of a decision-making process whose parts are incapable of separation, then the plaintiff bears the burden of showing that "each particular challenged employment practice causes a disparate impact." *Id.*

[152] *Id.* (citing § 703(k)(1)(B)(ii)). Under subsection (ii), the employer is not required to demonstrate that there is a business necessity for a particular practice, provided he can show that it does not cause the complained of disparate impact. § 703(k)(1)(B)(ii). This suggests that even where the employee is unable to separate a particular practice from an entire process, the employer may be able to himself separate an individual practice from an entire process by demonstrating that the particular practice does not cause a disparate impact. LEWIS & NORMAN, *supra* note 6, at 250-51.

better understand the structural components and reasons behind certain practices that he has chosen to implement.[153]

Congress expressly eliminated the ability of the judiciary to rely on the *Wards Cove* holding when evaluating the business necessity defense and related concepts, but in so doing provided little guidance about the manner in which these terms should be interpreted.[154] The Act indicates that Congress's purpose was to codify the concepts articulated in *Griggs* and its progeny in subsequent decisions rendered prior to the Court's decision in *Wards Cove*.[155]

The case law prior to *Wards Cove* reflects an evolution from an initially narrow interpretation of the business necessity defense, to the loose interpretation promulgated in the *Wards Cove* opinion.[156] Cases decided soon after *Griggs* narrowly construed the business necessity defense, although most addressed the issue in dicta.[157] Later decided cases began to

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[153] The statute seems to recognize that the employer should not be punished because a complaining party is not privy to information about the structural composition of business decisions, and instead places a renewed burden on the employer, the person in the best possible position to know the reason behind a business decision, to show that a single practice does not result in a disparate impact, and therefore must not be part of an entire decision making process.

[154] Civil Rights Act of 1991, *supra* note 51, at § 3; § 105(b).

[155] Civil Rights Act of 1991, *supra* note 51, at § 3.

[156] Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074-1076.

[157] LEWIS & NORMAN, *supra* note 6, at 252 (citing Dothard v. Rawlinson, 433 U.S. 321, 331 n. 14 (1977) (requiring that the challenged practice be "necessary to safe and efficient job performance"); Albermarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (requiring a "manifest relation" between the challenged practice and job requirements)). Both of these early disparate impact decisions' discussions in dicta of the business necessity defense seemed to potentially limit the availability of such a defense to employers. LEWIS & NORMAN, *supra* note 6, at 253. The "manifest relation" language in *Albermarle* implies the need for an absolute connection between the facially neutral practice and the job in question. Albermarle, 422 U.S. at 425. Moreover, if binding, the requirement articulated in *Dothard* would be virtually impossible to enforce because safety and efficiency are often competing interests within the workplace. LEWIS & NORMAN, *supra* note 6, at 252.

loosen the Court's interpretation of the employer's business necessity defense, culminating in the *Wards Cove* decision.[158]

Congress's actions in amending Title VII, and its forbidding the use of the *Wards Cove* holding amounts to uncertainty in determining how the business necessity defense should be implemented.[159] Despite Congress expressly forbidding the judiciary from considering the *Wards Cove* holding when evaluating cases under the Act,[160] the flavor of *Wards Cove* continues to permeate some decisions subsequent to the 1991 amendments.[161] Other courts have declined to embrace an interpretation that is so close to the one articulated in *Wards*

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[158] LEWIS & NORMAN, *supra* note 6 at 253 (citing Connecticut v. Teal, 457 U.S. 440, 451 (1982) (finding that the employer's use of a test was not an "artificial, arbitrary, or unnecessary barrier, because it measured skills related to effective performance")). In *New York City Transit Auth. v. Beazer*, 440 U.S. 568 (1979) the Court noted that the "manifest relationship" standard articulated in *Albermarle* may not require as high a burden as the language itself might indicate. LEWIS & NORMAN, *supra* note 6, at 253. The Court in *Beazer* stated that the standard would be met if the goals of safety and efficiency are "significantly served by – even if they do not require" the disputed practice. *Id.;* Beazer, 440 U.S. at 587. The Court's plurality opinion in *Watson v. Ft. Worth Bank and Trust* affirmed the *Beazer* dicta. 487 U.S. 977, 998 (1988). In *Watson*, the Court stated that the manifest relationship standard could be met if the allegedly discriminatory practice "'significantly served' 'legitimate business purposes.'" LEWIS & NORMAN, *supra* note 6, at 253 (citing Watson, 487 U.S. at 998). However, the preliminary provision on legislative purpose section 3 may not permit reliance on the *Watson* opinion because it is merely a plurality. *Id.* at 253 n. 46. Notwithstanding the possibility that *Watson* may not be relied upon in interpreting the provision of the Civil Rights Act of 1991 that deals with the business necessity defense in this context, the *Watson* opinion nevertheless demonstrates the progression from a strict interpretation of the business necessity defense in *Albermarle* to the much looser interpretation in *Wards Cove* and its more immediate predecessors.

[159] LEWIS & NORMAN, *supra* note 6, at 254 n. 49.

[160] Civil Rights Act of 1991, *supra* note 51, at § 3; § 105(b).

[161] LEWIS & NORMAN, *supra* note 6, at 254 (citing Fitzpatrick v. City of Atlanta, 2 F.3d 1112 (11th Cir. 1993) (upholding the validity of a ban on beards because the practice was justified as a matter of business necessity, despite recognizing its disparate impact on black men.); *but see* Kennedy v. District of Columbia, 654 A.2d 847 (D.C.App. 1994) (reaching the opposite conclusion under the Washington, D.C. Human Rights Act)).

Cove, and have instead returned to something closer to the narrower *Griggs/Dothard* standard.[162]

4. THE THIRD CIRCUIT'S TREATMENT OF THE BUSINESS NECESSITY DEFENSE AFTER WARDS COVE AND THE 1991 AMENDMENTS TO THE ACT

The Third Circuit appears to have returned to the narrower *Griggs/Dothard* standard.[163] In *Lanning v. Southeastern Pennsylvania Transportation Authority*, the Third Circuit announced its support for the *Griggs/Dothard* standard following Congress's passing the 1991 Amendments.[164] The court in *Lanning* advances support for the notion that in order for an employee requirement to be valid, it must be limited to the "minimum qualifications that are necessary to perform the job in question successfully."[165] However, in so holding, the Third Circuit recognized that the Supreme Court has yet to affirmatively rule on this issue.[166] Thus there remains a myriad of potential outcomes as discussed above.

There is further uncertainty when considering the statute's implications on the plaintiff's opportunity to rebut the employer's asserted business necessity defense.[167] Prior to the

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[162] LEWIS & NORMAN, *supra* note 6, at 255 (citing Bradley v. Pizzaco of Neb., Inc., 7 F.3d 795 (8th Cir. 1993) (holding that Domino's Pizza's 'no beard' rule did not rise to the level of a "true business necessity" because bearded workers would not impact whether someone would order pizza); Lanning v. Southeastern Pa. Transp. Auth., 308 F.3d 286 (3d Cir. 2002) (stating that the practice of using a discriminatory cutoff score on an examination is acceptable when the score validly measures the minimum qualifications necessary for successful performance of the job at issue); Firefighter's Inst. for Racial Equal. v. City of St. Louis, 220 F.3d 898 (8th Cir. 2000) (holding that test with disparate impact on minorities was acceptable because it was a job related business necessity)).

[163] *See* Lanning, 181 F.3d 478.

[164] *Id.* at 487-91.

[165] *Id.* at 490.

[166] *Id.* at 488.

[167] LEWIS & NORMAN, *supra* note 6, at 255.

Court's decision in *Wards Cove*, the business necessity defense was rebutted when the plaintiff showed that an alternative practice, resulting in less discriminatory impact on the protected class, would meet the employer's business needs.[168] The *Wards Cove* decision narrowed the availability of plaintiff's rebuttal by requiring the plaintiff to show that the suggested alternative practice would be equally effective.[169] Although economic burdens on the employer ordinarily did not preclude finding that a violation of Title VII had occurred under a disparate treatment theory,[170] the Court's opinion in *Wards Cove* indicated that cost, as well as other burdens that would be imposed upon the employer in implementing the alternative, would be evaluated when determining whether the suggested alternative is equally effective.[171]

As with the other components of the business necessity defense, the amendments to the Act return the law to its state prior to the *Wards Cove* decision.[172] However, the equally effective standard announced in Wards Cove was previously promulgated by the Supreme Court in *Watson v. Fort Worth Bank and Trust*.[173] Therefore, courts may rely upon the *Watson* decision when evaluating the meaning of "equally effective."[174]

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[168] *Id.* at 255-56 (citing Albermarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975)).

[169] *Id.* at 256 (citing Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 661 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074-1076).

[170] *Id.* (citing Int'l Union, UAW v. Johnson Controls, 499 U.S. 187 (1991)).

[171] *Id.* (citing Wards Cove, 490 U.S. at 661).

[172] *Id.* at 256 (citing § 105(a)).

[173] Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 998 (1988).

[174] LEWIS & NORMAN, *supra* note 6, at 256. The concerns expressed earlier in this note about the ability of the Court to rely upon its earlier plurality opinion in *Watson* are less marked in this instance than in the context of the business necessity defense and the job relatedness standard. *Id.* at 256 n. 59. The "equally effective" standard, although related to the business necessity and job relatedness standards does not fall directly within either of these classifications. *Id.* The limitations imposed by Congress when describing the legislative purposes in Section 3 and the directive Interpretive

However, even if the *Watson* construction of "equally effective" is rejected, it remains unclear how much additional expense an employer will have to incur to implement a proposed alternative.[175]

Despite the uncertainty created by the 1991 Amendments, one of the Act's clearest expressions may render these concerns moot. Under the Act, liability will only attach to the employer when he refuses to implement a proposed alternative practice that is less discriminatory than the one complained of.[176] Like other provisions relating to the business necessity defense, the notion that an employer can avoid liability by implementing a proposed alternative first surfaced in the Court's plurality opinion in *Watson*.[177] This sentiment was later announced as part of the *Wards Cove* opinion.[178]

Memorandum, therefore, are unlikely to limit the Court in the same way when it is considering which sources to consult about the requirement that proposed alternatives be equally effective. *Id.* Therefore, courts may rely on *Watson*, in which the Court first expressed its support for the interpretation of equally effective that was later adopted in *Wards Cove,* to construe the "equally effective" requirement, identically to the interpretation announced in the *Wards Cove* opinion. *Id.*

[175] *Id.* at 256. Lewis and Norman indicate that they believe it is unlikely that the amount of expense an employer will need to bear will rise to the level required in making "reasonable accommodations" to individuals protected under the Americans with Disabilities Act. *Id.* at 256 n 60. Under the ADA, an employer must make reasonable accommodations unless he can demonstrate that doing so would cause an "undue hardship." *Id.* (citing 42 U.S.C.A. § 12112(b)(5)). Undue hardship is defined as "an action requiring *significant* difficulty or expense." *Id.* (citing 44 U.S.C.A. § 12111(10)) (*emphasis added*).

[176] *Id.* at 257 n.61 (citing section 105(a)(ii) (adding subsection (k)(1)(A)(ii) to § 703 of Title VII, 42 U.S.C.A. § 2000e-2)).

[177] *Id.* at 257-58; Watson, 487 U.S. at 998. *See* discussion about the use of *Watson* holding, *supra* note 87.

[178] LEWIS & NORMAN, *supra* note 6, at 256-57 (citing Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 661 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074-1076). Although in seeking to return the law to its state prior to the *Wards Cove* decision the statute expressly forbids the courts from referencing the *Wards Cove* opinion in interpreting the Act, the *Watson* opinion is probably capable of being referenced. LEWIS & NORMAN, *supra* note 6, at 257. This provision should be interpreted using the same resources available to interpret other sections of

Thus, the only potential source of ambiguity in the statute, where an employer is seeking to avoid liability by implementing an alternative practice, is the timing of such implementation.[179] The employer can almost certainly avoid liability by implementing the alternative practice prior to the time that a private suit is filed.[180] There is also support for the notion that the employer may be able to avoid liability by implementing a proposed alternative during the latter stages of a trial on the merits of a private suit.[181] If the Supreme Court interprets the statute as affording an employer the opportunity to implement a proposed alternative during the late stages of trial, the employer will be able to avoid liability because he will have committed no violation in accordance with the Act.[182] The result of such a statutory construction would be that complaining employees would almost never be granted any relief, be ineligible for

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the statute that do not expressly address business necessity or job relatedness standards. *See supra* note 85.

[179] LEWIS & NORMAN, *supra* note 6, at 257.

[180] *Id.* The language used in this context is adversarial in nature. The use of the terms "respondent" and "complaining party" indicate that the employer will not be unable to avoid liability by refusing to implement a proposed alternative practice prior to the time a complaint is filed with the EEOC, or other local or state agency. *Id.* However, the use of the terms "respondent" and "complaining party", rather than "plaintiff" and "defendant", provides support for an interpretation that would enable the employer to avoid liability only when it implements a proposed alternative prior to a private suit being filed. *Id.*

[181] *Id.* The refusal to adopt an alternative is found within the title that establishes how to establish an unlawful employment practice based on disparate impact. *Id.* (citing Theodore Y.Blumoff & Harold S. Lewis Jr., *The Reagan Court and Title VII: A Common-Law Outlook On a Statutory Task*, 69 N.C. L. Rev 1, 43-44 (1990)). Moreover, the language used in Section 703(k)(1)(A)(ii) supports a construction that enables the employer to avoid liability until the later stages of trial. *Id.* at 257-58. Under Section 703(k)(1)(A)(ii) a violation is established only when the employer "'refuses to adopt' an alternative practice," but the violation is established "only after the complaining party 'makes the demonstration' of such a practice." *Id.* Therefore, it is likely that a judicial trial would be required because "demonstrates" as defined by new Section 701(m) refers to satisfying evidentiary burdens of proof. *Id.*

[182] *Id.* at 257-58.

attorneys fees, and have little incentive to pursue claims of this nature.[183]

Notwithstanding of the ambiguities that arise from the amendments to the Act, and the Act's asserted purpose,[184] the Act remains favorable to employers who are defending against disparate impact causes of action.[185] The burdens of proof required by the parties, and the employer's ability to implement an alterative practice late in the adversarial process in order to avoid liability make it difficult for protected parties alleging violations to prevail under a disparate impact theory of discrimination under Title VII.

II. THE BORGATA HOTEL CASINO AND SPA

Atlantic City's Borgata is a trendy, hip, and modern casino. In keeping with its efforts to attract a young and hip clientele, the Borgata has taken measures to ensure that its staff meets the desires of this demographic. One such effort, which has come under attack, is the casino's attempt to regulate the appearance of its employees. In its efforts to regulate the appearance of certain employees, the casino has imposed a weight requirement on all of its beverage servers. The majority of the employees subject to this policy are women, who are affectionately referred to as the Borgata Babes. This section will discuss the casino generally, as well as its challenged weight policy.

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[183] LEWIS & NORMAN, *supra* note 6, at 258. Despite there being a potential future benefit to other similarly situated members of the protected class, it is unlikely that individuals would be willing to invest the time or money to undertake such private suits. *Id.* In addition, private attorneys would likely be unwilling to undertake representation in such cases, for fear that they would not be compensated based on an employer's implementation of an alternative practice at the eleventh hour. *Id.* Since there is no prohibition on the use of procedural practices that avoid or diminish defendants' liability for attorneys' fees, the likelihood that attorneys will be unwilling to undertake such cases is particularly great. *Id.* at 258; *see id.* n.64.

[184] 42 U.S.C. §§ 2000e-2000e-17. The purpose asserted was returning the law to its state prior to the Supreme Court's decision in *Wards Cove v. Atonio*. 42 U.S.C.A. § 1981 Note 3, Purposes.

[185] LEWIS & NORMAN, *supra* note 6, at 259.

A. THE BORGATA'S VIBE

On July 3, 2003, the Borgata Hotel Casino and Spa was the first new hotel casino to open in Atlantic City, New Jersey in thirteen years.[186] The Borgata is a joint venture between gaming powerhouses Boyd Gaming[187] and MGM Mirage.[188] Upon its opening in 2003, spokesmen for the two companies described the Borgata as a "defining project,"[189] and as standing "for the promise that Atlantic City will become an engaging center of travel, leisure, and entertainment. . . ."[190]

The investors' hopes and goals for the company took the form of a luxury hotel casino[191] in Atlantic City where the visitors are encouraged to "escape, indulge and play."[192] The focus on fun and enjoyment in every arena of the resort is a

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[186] Press Release, *First New Hotel Casino in Atlantic City in 13 Years Opens for Business* (July 3, 2003), available at http://prnewswire.com/cgi-bin/stories.pl?ACCT=104&STORY=/www/story/07-08-2003/0001978271&EDATE=.

[187] *Id.* Boyd Gaming owns and operates eighteen gaming entertainment properties. Its operations are multi-jurisdictional and include operations in Nevada, New Jersey, Mississippi, Illinois, Indiana, and Louisiana. Boyd Gaming Corporation Company Profile, http://www.boydgaming.com/about/.

[188] MGM Mirage owns and operates twenty four gaming properties in Nevada, Mississippi and Michigan. It is an investor in four other properties located throughout the United States and in the United Kingdom, including The Borgata Hotel Casino and Spa in Atlantic City, NJ. MGM Mirage Mission Statement, http://www.mgmmirage.com/missionstatement.asp.

[189] *See* Borgata Opening Press Release, *supra* note 99, (quoting William S. Boyd, Chairman and Chief Executive Officer of Boyd Gaming).

[190] *Id.* (quoting Terry Lanni, Chairman and Chief Executive Officer of MGM Mirage).

[191] *Id.* At the time the resort opened, the Borgata Hotel Casino and Spa property was comprised of 2002 guest rooms and suites, 125,000 square feet of gaming, 145 gaming tables, 3,650 slot machines, eleven destination restaurants, eleven retail boutiques, a fifty-thousand-square-foot spa, seventy thousand square feet of event space, and parking for more than seven thousand cars.

[192] *Id.* (quoting Terry Lanni, Chairman and CEO of MGM Mirage).

primary component of Borgata's image.[193] This philosophy and image is apparent without even visiting Borgata. A trip to Borgata's website evokes the same lighthearted feelings by referring to the hotel-casino resort as your "Happy Place."[194]

In conjunction with its desire to exhibit a feeling of fun and happiness, Borgata's marketing strategy also includes elements of sexiness. Borgata bills itself as "the place 'to ditch your inhibitions and let loose.'"[195] Borgata's property is peppered with nude images and artwork.[196] To this end, no detail is left unnoticed; conventional hotel room "do not disturb" signs are replaced by a reversible sign that boasts "tied up" on one side, and begs "tidy up" on the other.[197]

Like the feeling of fun and happiness the resort hopes to convey, Borgata's sexy vibe also permeates its website.[198] This sexy image is conveyed throughout Borgata's website, including the section devoted to shopping.[199] When visiting Borgata's website, users who click on the link labeled "shop" are directed to a site that immediately reinforces the sexy image of the

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[193] The Borgata's website evokes the notion that the Borgata is ***the*** place to visit and have fun. The site features bold colors with modern lettering. Words like style, fun, and happy permeate the site. *See* Borgata Home Page, http://www.theborgata.com/main.cfm?Section=home00 &TabType=H&SideNav=root&Content=home00. There is an entire section of the site devoted to "Borgata Style," implying that the casino itself exudes a style. Browsers of the site are directed to click on the web link to Borgata Style to "See What's Happening," "See Who is Happening," and to "See the Scene." *Id.*

[194] The Borgata's homepage encourages visitors to "bring your happy place home" by visiting its on-line shopping gallery. Borgata Home Page, *supra* note 106.

[195] Jacqueline L. Urgo, *Grievance filed over forced weigh-ins; Borgata tells its Babes to stay thin or be fired*, PHILA. INQUIRER, Feb. 18, 2005, at A1.

[196] *Id.* "Everywhere you look – the walls, the ceilings, the artwork – is a mélange of nude images." *Id.*

[197] *Id.*

[198] *See* Borgata Home Page, *supra* note 106.

[199] *See* Borgata Home Page, *supra* note 106. Shopping is a feature both at Borgata's property in Atlantic City and on its website.

Borgata through an image of the Babes of Borgata Calendar.[200] There is also a direct link that provides more information about the calendar generally, and how to order a copy.[201] The women featured in the calendar are employees of the resort who have been selected to represent Borgata through this medium.

For those unfamiliar with the Borgata's sexy image,[202] the featured picture of the calendar leaves little to the imagination.[203] The link to the Babes of Borgata site provides those unfamiliar with the "Borgata Babes" a definite idea of what may be included in the Babes' job description, namely looking sexy.[204] In addition, the press release describing the process by which a female associate may be included in the calendar provides further insight about the expectations and demands placed upon the Babes.[205] The calendar is described as an effort to highlight the beauty of the Borgata,[206] and

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[200] The "shop" link directs users to a page where one-third of the page is devoted to advertising the Babes of Borgata annual calendar. The remainder of the site is devoted to showcasing high-end luxury retail brands and shops located at the Atlantic City property itself. *See* http://www.theborgata.com/main.cfm?Section=shop00&TabType=A&SideNav=shop&Content=shop00.

[201] *See* http://www.theborgata.com/main.cfm?Section=shop01&TabType=A&SideNav=. CAL&Content=CALLP.

[202] Press Release, The Borgata, "2006 'BABES OF BORGATA' CALENDAR DEBUTS WITH HEIGHTENED STYLE (hereinafter "Calendar Press Release") (November 7, 2005), http://www.theborgata.com/main.cfm?Section=media01&TabType=A&SideNav=pressreleases&Content=media01&CSSID=336 (quoting Danielle Carfagno as saying "I really think that the 2006 calendar reflects Borgata's upscale and sensual atmosphere.").

[203] *See* The Borgata Web Site, *supra* note 114.

[204] The calendar features Carol Bernaola, Playboy's Playmate of the Millennium, as its cover model. Calendar Press Release, *supra* note 115.

[205] *Id.* Prior to being selected as a (calendar) Babe in 2006, more than 125 associates participated in a three day audition.

[206] *Id.* (quoting 2006 calendar photographer Richard Dean as saying the Calendar "is influenced by the beauty of Borgata as a destination as well as by the beauty of Borgata's associates . . .").

appearing in the calendar is viewed as an honor for the twelve associates who are selected to represent the Borgata Babes.[207]

B. BORGATA'S WEIGHT REQUIREMENT

To encourage Borgata's highly visible employees to assist in maintaining the sexy image of the resort, Borgata has imposed a weight requirement upon its beverage servers.[208] Although the focus surrounding the weight requirement has primarily centered on the Borgata Babes,[209] the weight requirement is facially neutral because it applies to both male and female cocktail servers and bartenders.[210]

The Borgata is the only one of Atlantic City's twelve casinos to enact a weight policy for its employees.[211] It is also the only casino that does not offer a more conservative uniform option for its beverage servers.[212] Borgata indicates that appearance

[207] *See id.* (quoting Danielle Carfagno as saying "I was thrilled when I was chosen to appear in the 2006 Babes of Borgata Calendar for the second year in a row.").

[208] Editorial, *The Borgata's Scales of Injustice: They've got you, Babes*, PHILA. INQUIRER, Feb. 24, 2005, at A18.

[209] Although the primary focus surrounding the impact of the weight requirement has been on women, at least one man has also challenged Borgata's weight requirement as discriminatory in nature. James McNally, a man who wanted to work as a bartender at the Borgata, filed suit to challenge the policy under the American's with Disabilities Act. John Curran, *Atlantic City imposes weight-gain restrictions on cocktail servers and warns of firings for going Gain of 7 percent is the most allowed*, SUN HERALD (Biloxi, MS), February 24, 2005, at C8.

[210] *Id.* The policy will apply to anyone gaining more than seven percent of their body weight. *Id.* The weight requirement applies to approximately 200 employees, 160 of whom are women, affectionately known as "Borgata Babes." *Countdown* (MSNBC television broadcast February 21, 2005)(transcript available on Westlaw at 2005 WLNR 2710919).

[211] Urgo, *supra* note 108.

[212] All of the other casinos in Atlantic City, NJ offer uniform options that include flat shoes and either pants or shorts as an alternative to skirts. Judy DeHaven, *REFLECTING ON WEIGHTY MATTERS: 'Borgata babes' policy attracts rights inquiries*, STAR-LEDGER (Newark, NJ), Apr. 26, 2005, at 13.

and grooming have always been an important part of hiring criteria for beverage servers.[213] Borgata further notes that despite appearance and grooming being important criteria in making hiring decisions, absent a policy that addressed weight fluctuations, enforcing these criteria post-hire was difficult.[214] Borgata management also stated that the requirements imposed upon beverage servers are there because the appearance of the beverage servers is a "major part of [Borgata's] marketing strategy."[215]

Borgata's appearance guidelines for these employees indicate that men must have a "clean, well-defined, healthy appearance," and that women must have a "clean, hourglass figure."[216] To maximize the effect of the hourglass figure, female beverage servers wear a costume comprised of a short skirt[217] and designer bustier[218] with velvet straps that cross above their breasts.[219]

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[213] Curran, *Borgata Babes' Grievance Rejected; Casino sticking to weight limits for servers*, STAR-LEDGER (Newark, NJ), March 3, 2005, at 43. When Borgata opened, its press kit referred to the Borgata Babes as "part fashion model, part beverage server, part charming host . . . and ambassadors of hospitality." Urgo, *supra* note 108.

[214] Curran, March 3, 2005, *supra* note 126.

[215] Urgo, *supra* note 108. Borgata's vice president of talent compared the Borgata Babes to the Dallas Cowboys cheerleaders and indicated that they are "the brand and the image and the ambassadors for Borgata." DeHaven, *supra* note 125 (quoting Cassie Fireman, Borgata's VP for talent).

[216] Urgo, *supra* note 108. A letter provided to the candidates who auditioned for cocktail server positions indicated that women were required to have a "natural hourglass figure" and men were required to have a "V-shaped torso," however, there was no mention of weight restrictions at the time of the candidates' auditions. DeHaven, *supra* note 125.

[217] Editorial, *supra* note 121.

[218] The bustiers worn by Borgata's female beverage servers are designed by Zac Posen. Gersh Kuntzman, *American Beat: Babes Up in Arms An Atlantic City casino says its cocktail waitresses must be thin. Could gamblers – and drinkers – possibly care?*, Newsweek Web Exclusives, Feb. 28, 2005, at Society, 2005 WLNR 6567258.

[219] Editorial, *supra* note 121.

Under the Borgata's weight policy, any cocktail server or bartender who gains more than seven percent of his or her body weight can be suspended without pay for up to ninety days.[220] The Borgata will offer the services of a personal trainer and nutritionist to any beverage server who has been suspended under the weight policy due to an increase of seven percent or more of his or her body weight.[221] However, if a server is unable to lose the weight during the period of his or her suspension, he or she will be fired.[222] As part of its weight policy, Borgata has included special provisions to address medical conditions including pregnancy.[223]

In February 2005, Borgata conducted initial weigh-ins of its beverage servers to establish a baseline weight for each, against which any fluctuations in weight would be measured.[224] This baseline weight will enable Borgata management to enforce the weight policy in a fair and effective manner.[225] Servers are told

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[220] Suzette Parmley, *Fit the Mold or Else*, PHILA. INQUIRER, May 22, 2005, at E1.

[221] DeHaven, *supra* note 125.

[222] *Id.* It is ambiguous whether the requisite weight loss is the full amount of the weight gained, as measured at the time the baseline weight was taken, or if it is a loss of a sufficient amount of weight to render the server within the allowable seven percent gain. Presumably, a loss of weight sufficient to have the server fall within the permissible amount of gain would be adequate. Failure to enforce the policy in this way would raise questions about the fairness of the administration of the weight policy.

[223] Urgo, *supra* note 108. During pregnancy a Borgata Babe may wear a transitional uniform. *Id.* The transitional uniform is available 180 days prior to the date on which a beverage server begins her maternity leave. *Id.* The transitional uniform is a less-sexy version of the miniskirt and bustier normally worn by female beverage servers. *Id.* Following a three- to six-month maternity leave, the new mothers may again wear the transitional uniform for up to ninety days. *Id.* During the ninety-day transitional period following maternity leave, to be in compliance with the seven percent weight requirement, Borgata Babes must lose the weight they gained as a result of pregnancy. *Id.* If, after the ninety day transitional period, a beverage server is unable to comply with the seven percent rule, she may be fired in accordance with the weight policy. *Id.*

[224] *Id.*; Curran, March 3, 2005, *supra* note 126.

[225] All new employees who are subject to the weight requirement will be weighed upon hiring to establish an initial baseline weight measurement

by supervisors when they are to be weighed.[226] In addition, Borgata management indicated that there are "certain triggers," for instance, when a beverage server requests a larger uniform, which will result in a subsequent weigh-in.[227]

Opponents of Borgata's weight policy claim that there are a number of adverse effects that stem from its implementation. Among them, the potential for women to develop eating disorders,[228] age discrimination,[229] objectification of women,[230] and the health of pregnant women, who may fear gaining too much weight during pregnancy[231] top the list of opponents' concerns.

On the other hand, Borgata seems to have no qualms about expressing the fact that it expects a great deal of its beverage servers.[232] To compensate for these high demands, Borgata offers its beverage servers many perks.[233] The attitude of Borgata management appears to be that, although we are expecting a great deal of our employees, we are providing them with all the tools necessary to ensure they are successful in their endeavors.

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against which fluctuations in weight will be assessed. DeHaven, *supra* note 126.

[226] Urgo, *supra* note 108.

[227] *Id.* (quoting Cassie Firestone, Borgata's Vice President of Talent.)

[228] John Curran, *Casino weight rule faces new attacks; Two "Borgata Babes" go to the state with discrimination complaints*, PHILA. INQUIRER, April 28, 2005, at B4; Curran, February 24, 2005, *supra* note 122.

[229] Curran, April 28, 2005, *supra* note 141; DeHaven, *supra* note 125.

[230] Urgo, *supra* note 108.

[231] DeHaven, *supra* note 125.

[232] *See* Urgo, *supra* note 108 (quoting Cassie Fireman, Borgata Vice President of Talent as saying "the casino may demand a lot from its cocktail servers . . .").

[233] *Id.* According to Cassie Fireman, Borgata Vice President of Talent, beverage servers have unlimited use of the casino's health club, access to spa treatments, and forty-five minutes of "dressing and grooming time" built into their work day. *Id.*

III. RAISING A TITLE VII GENDER DISCRIMINATION CLAIM UNDER THE BORGATA'S WEIGHT POLICY

It is unlikely that aggrieved Borgata Babes will be able to raise a challenge to the Borgata's weight policy under Title VII under either a disparate treatment, or a disparate impact theory. Under Title VII, the only protected class into which the Babes fall is gender.[234] The facial neutrality of Borgata's weight policy, makes it unlikely that there will be a claim of disparate treatment as long as the policy is enforced equally as to men and women who are subject to the policy.[235] In addition, a disparate impact allegation will also likely fail because plaintiffs will have difficulty proving disparate impact under Title VII. Moreover, even if plaintiffs can assert a prima facie case of disparate impact under Title VII, Borgata may be able to raise a "business necessity" defense to successfully defeat such a claim.[236]

A. TITLE VII CLAIM UNDER A DISPARATE TREATMENT THEORY OF DISCRIMINATION

Borgata Babes' claims of disparate treatment under Title VII must fail because Borgata's weight policy is facially neutral. In order to prove a prima facie case of disparate treatment a plaintiff must show, through direct or circumstantial evidence, that an employer would or did act against the plaintiff because of her gender.[237] There is nothing to indicate that Borgata has imposed or enforced its weight policy to target only women.

In addition, the Borgata employs significantly more women than men in the positions that are subject to the weight requirement.[238] Moreover, there is no indication that Borgata is interested in reducing the number of women who are employed

[234] *See* Title VII, 42 U.S.C. §§ 2000e-2000e-17.

[235] *See* discussion *supra* Part I.B.

[236] *See* discussion *supra* Part I.C.

[237] *See* discussion *supra* Part I.B.

[238] *See supra* note 123.

in these positions, or that Borgata is using the weight requirement to reduce the number of women who are employed in these positions.[239] Borgata needs its Babes to promote and maintain its young, sexy, cool image, and acknowledges the importance of the Babes to this image.[240] Therefore, it is logically inconsistent that the Borgata would be attempting to treat women differently when it so clearly values them in the position of Borgata Babe. It will therefore be ineffective for plaintiff-Babes to assert a Title VII claim under a disparate treatment theory of discrimination based on Borgata's facially neutral weight policy.

B. Title VII Claim Under a Disparate Impact Theory of Discrimination

Plaintiffs alleging a violation of Title VII based on the Borgata's weight policy under a disparate impact theory of discrimination are also likely to be unsuccessful. To make a prima facie case of discrimination under a disparate impact theory, plaintiffs must provide evidence that an employer's actions deprived the individual who is a member of the protected class of employment opportunities.[241] In order to prove their prima facie case, Plaintiff-Babes would be required to demonstrate a significantly disparate impact on women through statistical evidence.[242]

In order for a plaintiff to show that she had been suffered discrimination under a disparate impact theory, she would need

[239] To the contrary, Borgata seeks to promote the Borgata Babes as much as possible. It produces and markets a calendar displaying some of its hottest Babes, and acknowledges that the Borgata Babes are part of the image and branding of the resort. *See supra* notes 113-20 and accompanying text; *see also supra* note 128.

[240] *See supra* note 127 (quoting Cassie Fireman, Vice President of Talent for Borgata referring to babes as "ambassadors of the resort").

[241] *See supra* note 39.

[242] Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 650-51 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074-1076; *see also* discussion concerning prima facie case in a disparate impact case, *supra* note 39 and accompanying text.

to adduce statistical evidence that similarly situated male employees suffered a lesser impact under Borgata's weight policy, and that the cause of this impact was a result of the facially neutral weight policy.[243] Plaintiffs would be required to demonstrate that, as a result of the Borgata's weight policy, relatively more women than men were fired.[244] In the alternative, female plaintiffs may attempt to make a showing of disparate impact by demonstrating that, regardless of the consequences of the weigh-ins, more women were targeted for random weigh-ins than their male counterparts. However, the latter theory is of little value because the actual disproportionate adverse impact on women will be difficult to demonstrate, and the remedy will be inadequate to make pursuing such a case worthwhile.[245]

Assuming *arguendo* that plaintiffs are able to make a prima facie case of discrimination under a disparate impact theory, Borgata would have an opportunity to rebut such a case by

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[243] Wards Cove, 490 U.S. at 650-51. However, statistical evidence alone may not be sufficient to establish a prima facie case of discrimination. *See id.* at 655 (stating that the statistical evidence presented was insufficient to make a prima facie case of disparate impact).

[244] Lanning v. Southeastern Penn. Transp. Auth. *("Lanning I"),* 181 F. 3d 478, 485 (3d Cir. 1999). Plaintiffs establish a prima facie case of disparate impact by demonstrating that application of a facially neutral standard has resulted in a significantly discriminatory hiring pattern. *Id.*

[245] Unlike in a disparate treatment case, in a disparate impact case compensatory and punitive damages are unavailable. LEWIS & NORMAN, *supra* note 6, at 346-47; 42 U.S.C. § 2000e-5; 42 U.S.C. § 1981a; Section 402 of Pub.L. 102-166. The only damages award that is available is equitable in nature and is focused on ceasing the discriminatory conduct and making the individual whole, usually through an award of damages in the form of back pay. LEWIS & NORMAN, *supra* note 6, at 330-32. If a Borgata Babe is alleging only that women are targeted for weigh-ins more frequently than men, the only remedy available would be for the employer to cease conducting the weigh-ins in the manner that resulted in disparate impact upon women. Since there would be no monetary award under the facts of such a case, it is unlikely that plaintiff-Babes would be willing to engage in a lengthy law suit to effect this end. Moreover, it may pose substantial risk to the job security of currently employed Babes who initiated such an action. Even if these women were not fired ***because*** they engaged in a lawsuit, it may predispose their employer against them, making them more susceptible to discharge for other reasons.

demonstrating that the weight requirement is a business necessity under the Act.[246] Relying on the Third Circuit's interpretation of this requirement in *Lanning*, it is unlikely that this defense would prevail. The court in *Lanning* indicated that the challenged requirement would need to reflect the ability of an employee to perform the job in question.[247]

The likelihood of success of the business necessity defense depends in large part upon the court's interpretation of the Borgata Babes' job function and responsibilities. Depending upon whether a narrow or broad interpretation of the Babes' job function is adopted, will dictate the likelihood of the Borgata's success in asserting the business necessity defense. Under its narrowest interpretation, the one advocated by opponents of the policy,[248] the Babes' job function would be limited to the ability to perform tasks related to the serving of beverages to the resorts customers while they are present in the casinos.

However, the Borgata appears to view the Babes' job as being comprised of more than just carrying a full tray of drinks to deliver to its casino patrons. The Borgata describes its Babes as "part fashion model, part beverage server, part charming host . . . and ambassadors of hospitality."[249] It is clear from this description alone that The Borgata expects more from the Babes than merely adequate beverage serving skills.

On previous occasions, courts have been reluctant to adopt broader job descriptions or to uphold discriminatory policies that are not directly related to the job function in question. For

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[246] Once the plaintiffs have established a prima facie case, the burden shifts to the employer to show that the employment practice is "job related for the position in question and consistent with business necessity . . . ." 42 U.S.C. § 2000e-2(k).

[247] *Lanning I*, 181 F.3d at 185 (citing Griggs v. Duke Power Company, 401 U.S. 424, 431-33 (1971)).

[248] One opponent of the policy stated that "I don't think you have to be a 98-pound woman to serve someone a drink to make it taste better." DeHaven, *supra* note 125 (quoting Susan Blight, a 38-year-old waitress at Trump Taj Mahal in Atlantic City, New Jersey); *but see id.* (quoting Stan Miller, an eighty-two year old man as saying "It sounds unfair, but the guys want to look at the pretty girls.").

[249] *See supra* note 126.

example, in *Diaz v. Pan American World Airways, Inc.*, the Fifth Circuit was unwilling to find that the imposition of a weight requirement upon female flight attendants was necessary, despite it being desirable.[250] In other instances, courts have been unwilling to find that a requirement was a business necessity, despite the evidence that such a quality would amount to more effective or improved job performance.[251]

Even if the Court adopted a broad job description, as described by Borgata, it is likely the business necessity defense would fail in the Third Circuit. Evaluating each of the Babes' job functions based on the Borgata's own description, despite the desirability of the weight policy, there is nothing to indicate that, the weight policy is necessary to the effective performance of these functions.[252]

Setting aside the responsibility of beverage server, the other job functions Borgata claims belong to its Babes are also not contingent upon maintaining a specific weight. Fashion models, although most commonly thought of as sylphlike figures, do come in more than one size. In addition, there is nothing to indicate that a plus-sized woman, or, more accurately, a woman who gains more than seven percent of her body weight, would be any less capable of being an "ambassador of hospitality" or "charming host." Furthermore, it is likely that the Babes would be able to point to other Atlantic City casinos in which people

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[250] 442 F.2d 385, 388 (5th Cir. 1971).

[251] *See*, *e.g.*, Griggs, 401 U.S. 424 (rejecting the use of standardized intelligence tests and diploma requirements despite the employer's contention that these would improve overall work performance at the employer's power plant). In *Griggs*, the Court held that although these requirements may be useful, they could not be used to exclude disproportionately a protected group when the employer failed to show that they do not test an applicant's ability to perform the job in question. 401 U.S. at 431. S*ee also* Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975). In *Albemarle,* an employer attempted to justify the use of verbal exam and high school diploma requirements in making promotion decisions. 422 U.S. at 408-11. Despite the findings of an industrial psychologist whose studies found that the tests were job related based on a statistical correlation, the Court rejected the employer's contention that the requirements were, in fact, job related. *Id.* at 429-30.

[252] *See, e.g.*, Diaz, 442 F.2d at 388 (noting that an airline's primary function is the safe transport of passengers).

successfully perform a similar job function without the imposition of a restrictive weight policy.

Although the business necessity defense appears to be unavailable under these circumstances, it is unlikely the court would even need to consider the availability of the defense. Plaintiffs would first have to meet the burden of establishing a prima facie case of discrimination that was caused by the weight policy. Given the difficulty plaintiffs will face in adducing evidence to support such a claim, Borgata Babes are unlikely to successfully assert a disparate impact discrimination claim under Title VII. Since discrimination claims under the theories of disparate treatment and disparate impact are both equally likely to fail, a Title VII discrimination claim is unavailable as a possible course of action to Babes alleging gender discrimination.

IV. ALTERNATIVES TO TITLE VII CLAIMS OF DISCRIMINATION

Although the Borgata Babes may not be successful in asserting a claim of gender discrimination, it is possible that some subsets of the Babes may be able to successfully raise discrimination claims under other statutes. To the extent that there is discriminatory treatment of an individual under the Americans with Disabilities Act,[253] such an individual may be able to successfully make a claim. In addition, it may be possible for older Babes, or older hopeful Babes to assert a claim of discrimination based on the Age Discrimination in Employment Act.[254] Finally, there may also be discrimination claims that are capable of being raised under New Jersey state anti-discrimination statutes. However, the availability of these claims will depend upon whether the individuals who seek to raise them meet the requirements set forth in the relevant statutes.

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[253] *See* Americans With Disabilities Act of 1990, 42 U.S.C. §12101 (2000).

[254] *See* Age Discrimination in Employment Act, 29 U.S.C. §621 (2000).

V. CONCLUSION—WHY THE BORGATA'S POLICY DOES NOT MERIT AMENDING TITLE VII TO INCLUDE "WEIGHT DISCRIMINATION"

Title VII was enacted with the intent of eliminating discrimination on the basis of certain protected classes. These classes are defined by the immutable quality of the characteristics they are designed to protect. Race, gender, color, national origin, and religion are all characteristics that comprise part of someone's identity in such a way that they become part of the person who holds the quality in question. Weight is simply not a characteristic that belongs among these.

Moreover, in an effort to combat other forms of discrimination Congress has chosen not to amend Title VII, but has instead enacted other legislation to address these harms.[255] Amending Title VII to address discrimination based on weight would open the floodgates to other interest groups who would advocate that Title VII needs to be amended to address discrimination based on any fathomable reason.

Furthermore, incorporation of a provision into Title VII to eliminate weight-based discrimination would amount to problems in the administration of the law. Unlike an immutable characteristic, or a characteristic that can be clearly defined, weight exists on a continuum. The need to artificially draw the line at some point to determine who would be protected under such legislation would amount to difficulty. Administrative problems would also develop because as the relative size of the population changes, the law would need to be regularly revised to account for overall changes in the weight of the general population.

Clinically obese persons may be able to raise discrimination claims under the ADA. The ADA has determined what is "fat enough" to constitute a disability under the act, it is unnecessary to provide additional protections under Title VII, beyond those which are provided in the ADA. If Congress determines that weight discrimination poses such a problem that it rises to the level of requiring the enactment of legislation to protect victims, then it is free to enact legislation to address this concerns. However, expanding the realm of Title VII's established

[255] *See, e.g.,* 42 U.S.C. §12101 (2000); 29 U.S.C. §621 (2000).

framework is not the place to include such protections. Moreover, if Title VII is to retain any of its protections, then it must remain dedicated to protecting those individuals who suffer from discrimination based on an immutable characteristic. To expand the statute otherwise would open the door to discrimination challenges based on any number of characteristics, and would effectively limit the protection that Title VII currently provides.