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*Elizabeth de Berardinis*
THE CORRECTIVE USE OF LAWSUIT DATA IN POLICING: RECONSTRUCTING THE VOCABULARY OF RACIAL PROFILING

AMOS N. JONES *

“In order to get beyond racism, we must first take account of race. There is no other way.”[1]

INTRODUCTION

A long-standing instrumentality in the quest for a more perfect American Union is the systematic governmental practice of collecting data to identify, diagnose, and resolve serious racial disparities.[2] Despite the growing attack on overtly corrective actions taken in light of lingering inequality, data collection has exposed actionable racial disparities.[3] There appears to have emerged no serious argument at any point on the ideological spectrum that racial data should cease to be collected by public entities.[4] Even in the most recent constitutional


First, the Civil Rights Act of 1991, which codifies the Supreme Court's unanimous decision in Griggs v. Duke Power Co., requires the collection of racial data. The Act, overwhelmingly supported in Congress, steers a sensible course between requiring racial preference on the one
challenge to affirmative action in public education, the most extreme opponents of race-conscious admissions policies do not seem to want to end racial data collection. In fact, such advocates rely on the collection of such racial data to inform and bolster their arguments. Thus, the collection of racial data is assumed to embody sound public policy, which is capable of informing the advancement of constitutional rules of law regarding equal protection and preserving the rights set forth in the Fourteenth Amendment.

In the decades following the Civil Rights Movement and the growth of American tort law, a volume of litigation has proliferated; particularly, against police departments accused of discriminating against Blacks in both employment and enforcement. Section 1983 of the Civil Rights Act of 1871 is now regarded as “the primary vehicle for asserting federal claims against local public entities and public employees [in that the statute’s] broad language . . . led to its present status as the primary source of redress for a wide variety of governmental abuses.” To be sure, § 1983 published cases tripled between 1980 and 2000.

hand, and placing the entire burden of proving discrimination on victims on the other hand. Under the Act, when an employment practice produces a statistical racial imbalance, or ‘disparate impact,’ in the workplace, employers bear the burden of defending the practice with reference to a race-neutral justification of ‘business necessity.’ Abolish racial categories, and the Act becomes unenforceable. Likewise, old-style affirmative action guidelines, which require employers to cast a wider net to garner a diverse applicant pool (without providing preferences in decision-making), require race to be a definable category. This practice is widely supported, backed by conservatives and liberals alike.

(citations omitted)).


6 Id.

7 See infra notes 21-22.

8 VICTOR E. KAPPELER, CRITICAL ISSUES IN POLICE CIVIL LIABILITY 3-5 (3rd ed. 2001).


Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.
In recent years, a growing body of legal scholarship analyzed whether and to what extent police departments use lawsuit data as a means to correct discriminatory practices. Professor Joanna Schwartz’s empirical research includes a detailed study of the ways in which law enforcement agencies gather and analyze information from lawsuits that have been brought against them, focusing on the role of lawsuits in organizational decision-making.\(^\text{12}\) Schwartz exposes serious informational failures that often prevent informed decision-making by showing that information from litigation is used only in rare instances by law enforcement agencies.\(^\text{13}\) She recently built on this work with a more informed analysis.\(^\text{14}\) Joining that conversation, Randall Johnson of the University of Chicago published his findings in October, 2012 based on a newly formed § 1983 dataset.\(^\text{15}\) Using this information, he asserted that lawsuit data collection does not positively correlate with greater deterrence of § 1983 cases; nevertheless, police departments are equipped to learn from third-party data if they so desire.\(^\text{16}\)

Such scholarship plainly assumes that police officers are capable of being sensitized and empowered toward reform.\(^\text{17}\) That assumption certainly has foundation,\(^\text{18}\) support,\(^\text{19}\) and merit.\(^\text{20}\)

\(^{11}\) KAPPELER, supra note 8, at 5–7.


\(^{13}\) Id. at 1066–67.


\(^{16}\) Id. at 31–33 (challenging Schwartz’s methodology as to their shared research question: “When officials consider information from lawsuits, [do] they use [this data] to reduce the likelihood of future [police misconduct cases]?”).

\(^{17}\) See David Cole, Race, Policing, and the Future of the Criminal Law, 26 HUM. RTS. 2, 2-3 (1999). “Absent race and class disparities, the privileged among us could not enjoy substantial constitutional protection of our liberties as we do; and without those disparities, we could not afford the policy of mass incarceration that we have pursued over the past two decades.” See also Bernard Harcourt, Unconstitutional Police Searches and Collective Responsibility, 3 CRIMINOLOGY AND PUBLIC POLICY 363, 375 (2004) (discussing deliberate decisions not to know about the human costs of aggressive, discretionary policing strategies associated with the war on drugs, “[t]he most important thing in the public policy debates, then, is to decide with eyes wide open and brutal honesty, how much unconstitutionality we are prepared to live with—how many sexual batteries of black suspects we are willing to perform. We get to decide”).


\(^{19}\) See generally Craig B. Futterman, H. Melissa Mather & Melanie Miles, The Use of Statistical Evidence to Address Police Supervisory and Disciplinary Practices: The Chicago Police Department’s Broken System, 1 DEPAUL J. SOC. JUST. 251, 259 (2008) (demonstrating that the analysis indicates that if the Chicago Police Department had an effective disciplinary system, it’s officers would have been deterred from participating in racial misconduct).

\(^{20}\) See Karen M. Blum, Municipal Liability Under § 1983, 15 TOURO L. REV. 1535, 1540 (1999) (training police officers in certain areas may be necessary to avoid constitutional violations); see also City of New York
This article adopts that assumption and argues the reasoning it animates should extend into another critically important aspect of policing in the United States.

This article argues that the growing professionalism of law enforcement agencies, coupled with the advancements in data collection, justifies a re-categorization of racial profiling such that the practice reclaims its appropriate place in law enforcement. The article also assumes that if police departments are capable of self-reform along those lines, then they are capable of distinguishing racial profiling from its evil cousin, racism, and adopting better practices in light of this information using the very assumptions driving the proliferation of studies on the use of lawsuit data in deterring police misconduct. Racial profiling derives from a police practice spanning more than thirty years of permissible general characteristic profiling, while racism remains an illegal means of law enforcement. This article calls for a clarification


This increased professionalism includes the ability to acknowledge wrongdoing and to correct course, if necessary. An example is the joint effort by the Federal Bureau of Investigation and U.S. Department of Justice decision to review thousands of cases that were handled by all FBI Laboratory hair and fiber examiners. This review will determine whether flawed forensics and inaccurate or exaggerates agent testimony led to numerous wrongful convictions in local and federal cases; see Spencer S. Hsu, *Justice Dep., FBI to review use of forensic evidence in thousands of cases*, Wash. Post, July 10, 2012, available at http://articles.washingtonpost.com/2012-07-10/local/35488079_1_new-review-fbi-laboratory-historical-cases.

See Data Collection Resource Center, *Background and Current Data Collection Efforts*, http://www.racialprofilinganalysis.neu.edu/background/#Jurisdictions%20Collecting (last visited Feb. 19, 2013). For example, Northeastern University’s Data Collection Resource Center tracks jurisdictions that actively collect “racial profiling” data. Participating jurisdictions collect this information for a number of reasons.


See infra notes 71 and 85; but see Lisa Bloom, *Zimmerman Prosecutors Duck the Race Issue*, N.Y. Times, July 15, 2013, available at http://www.nytimes.com/2013/07/16/opinion/zimmerman-prosecutors-duck-the-race-issue.html?pagewanted=all (legal analyst suggesting the potential error in attempts to segregate race from profiling by opining in the case the *State of Florida v. George Zimmerman*: “In an odd ruling, Judge Debra Nelson decided that the word ‘profiling’ — but not the phrase ‘racial profiling’ — could be used in opening statements. But what other kind of profiling could possibly have been involved here? Could jurors — and the public — seriously imagine that Mr. Zimmerman considered Mr. Martin a criminal solely because he was walking slowly in the rain as he chatted on the phone?”): accord Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-racial Society*, 91 N.C. L. Rev. 1555, 1599-1600 (2013) (Reasserting a suggestion that a “race-switching jury instruction” is an appropriate way in which race can be made appropriately salient in trials:

In an interracial case involving a claim of self-defense, a party concerned with the influence of racial stereotypes could request, or the judge could sua sponte give, a race-switching jury instruction, one that suggests to jurors that they imagine the same facts and circumstances but simply switch the race of the defendant with the race of the victim. For example, if the defendant is a White man and the victim is a Black man, jurors would imagine the same facts with a Black male defendant and a White male victim. If jurors come to a different conclusion about the reasonableness of the defendant’s belief that he needed to use deadly force in self-defense, this should alert jurors to the possibility that racial stereotypes and implicit racial bias may have
on the discourse of policing and constitutional law in order to clear the way for sensible, sound, race-conscious strategies that would properly empower police officers while leaving all communities – Black neighborhoods overburdened by the brunt of urban crime – safer and freer.26

In re-imagining the discourse, the article concedes up front that racial profiling is rightfully contested as a law-enforcement mechanism,27 having been identified by Cornel West in the 1990s as sociologically problematic,28 attacked by the Rev. Al Sharpton as inherently racist,29 and litigated by a cadre of talented personal injury lawyers as unconstitutional.30 But the article identifies an important dynamic that is also often unaddressed. Self-evident in conversations and thoughts about the topic of racial profiling, is the tension between the long-established necessity and value of affirming responsible profiling in general and the necessity and value of continuing to combat deadly racism that is endemic in American law enforcement, from the traffic cop level all the way through the ranks of federal prosecutors and courts.31 The article seeks to inspire the discourse around the issue to include a space for identifying racism, while applying a non-racist method to a powerful law enforcement approach that can be appropriate and helpful to fight crime in all communities.

Part I establishes the definitions of racial profiling and clarifies their relationship to racism, a distinct problem, with which profiling has been too extensively conflated.32 Part II applies the definitions of racial profiling and racism to the kinds of fact patterns that resulted in lawsuits frequently found in the latest empirical studies; categorizing various methods of law enforcement profiling that, when undertaken properly, can be a positive approach that even Black political leaders should endorse because of its positive impact on Black communities in the aggregate.

28 See CORNEL WEST, RACE MATTERS 1-7 (1993).
29 Cf. Vasugi V. Ganeshanathan, Sharpton Sounds Off on Racial Profiling, THE HARVARD CRIMSON, Nov. 23, 1999, available at http://www.thecrimson.com/article/1999/11/23/sharpton-sounds-off-on-racial-profiling/. “The Reverend Al Sharpton urged students to protest racial profiling in a speech last night at Lowell Lecture Hall. . . . ‘This issue has cut across all racial lines,’ Sharpton said. ‘There is nothing more stressful than being black in America, where you are victimized by cops and robbers.’”
31 For a comprehensive treatment of the effects of this pervasive bias, see ANGELA DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 40 (2007). “It’s easier to simply go forward with the prosecution than engage in the thorny exercise of confronting the very police officers on whom they rely to successfully prosecute their cases.”
32 See infra, note 37.
In the final analysis, this article declares racial profiling, where practiced appropriately, is an inherently beneficial policing practice, rather than an albatross that deprives disadvantaged minority groups of their hard-won civil rights and liberties. In fact, this article calls for a policy of racially profiling white motorists in those areas where data indicates they are disproportionately likely to break the law. The article thereby serves to augment the record for the continuous calls to end the never-defensible racism in American policing that has stubbornly endured since the founding of the Republic.

The article concludes on a projected note of hope that can further the discussion surrounding appropriate racial profiling versus unacceptable racism, and how law enforcement policies and practices can benefit from aggregated data to draw that distinction.

I. UNTANGLING “RACIAL PROFILING” FROM RACISM

Professor Deborah A. Ramirez, Jennifer Hoopes, and Tara Lai Quinlan have carefully considered definitions in this area of law in their article Defining Racial Profiling in a Post-September 11 World:

It is evident that the definition one chooses will determine one’s perception of the scope of the problem and the need for a response to it. Therefore, to better understand and address the issue of racial profiling, courts, law enforcement agencies, community groups, and scholars must clearly define “racial profiling” and determine what role race should play in law enforcement actions. Over the last decade, two very different definitions of “racial profiling” have emerged, one narrow and one broad, both attempting to define the

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33 A number of reports indicate that law enforcement agencies should subject non-Hispanic whites to greater levels of scrutiny, and show greater deference to minority citizens, especially within the context of traffic stops. See, e.g., Sylvia Moreno, Race a Factor in Texas Stops; Study Finds Police More Likely to Pull over Blacks, Latinos, WASH. POST, Feb. 25, 2005, at A03, available at http://www.washingtonpost.com/wp-dyn/articles/A51613-2005Feb24.html; Christina Jewett, Racial Report a Concern; Analysis Shows Blacks Are Pulled Over at Higher Rate, SACRAMENTO BEE, June 11, 2006, at B1; James Kimberly, Minorities Stopped at Higher Rate in DuPage, CHI. TRIB. (April 29, 2006), available at http://www.highbeam.com/doc/1g1-145106717.html. On the other hand, a form of profiling that could be called “reverse-reverse profiling” has been noticed in so-called “re-gentrifying” sections of urban centers, where white residents who live among mostly black residents are stopped and questioned by police on the assumption that they are out of their places; for criminal reasons. Despite the fact that no studies or articles treating this phenomenon were found in the course of researching for this article, a former white police officer in North Carolina volunteered to the author that his force frequently engaged in this kind of profiling of whites. A white female attorney who moved into a largely black Crown Heights section of Brooklyn, N.Y., levied this allegation against the New York Police Department and cited her formal complaint to the former New York City Public Advocate for repeated illegal searches on her white boyfriend by police officers in Crown Heights, who assumed they were present in that black area to engage in criminality rather than to dwell.
law enforcement practice of using race as part of the calculus in determining whom to question, stop, or search.

Under the narrow definition, racial profiling occurs when a law enforcement action is based on the race of the suspect, so that race is the sole criterion for questioning, stopping, or searching a suspect. Relying on this narrow definition, virtually all law enforcement agencies can honestly say that, as a matter of policy, they do not engage in racial profiling and direct their officers not to engage in it. During the era of Jim Crow, there were police departments in this country that engaged in this form of racial profiling. While there may be some that still do, such a department would be the rare exception rather than the rule. Similarly, there certainly continue to be individual police officers who will stop a young black male solely because that person is young and black and either driving or walking in a white community, but few of them would concede that the stop was based solely on the race of the suspect. In short, this narrow definition defines away the problem of racial profiling by limiting it to the relatively rare instance when race, by itself, is the sole basis for the stop or search. As Professor Randall Kennedy has often observed, even the most racist police officers do not act solely on the basis of race; other factors ordinarily also come into play. However, by allowing race to be one factor among many, courts have, in effect, adopted this narrow definition.

According to the broader definition, racial profiling occurs when a law enforcement officer relies upon race, ethnicity, national origin, or religion as one of several factors in determining whom to stop, search, or question. Under this definition, racial profiling occurs whenever race is part of the calculus of suspicion, which may include other factors such as gender, age, general appearance, and behavior. “Properly understood, . . . racial profiling occurs whenever police routinely use race as a negative signal that, along with an accumulation of other signals, causes an officer to react with suspicion.” Under this definition, the use of race as one of many factors need not be conscious; it may be the unconscious product of racial stereotyping. Consequently, with this definition, racial profiling includes actions by law enforcement officers who are acting in good faith, and who believe sincerely that they are not using race as a factor but who in reality are unconsciously making inferences as to criminal behavior that rely on little more than generalized racial stereotypes.34

I adapt, for the purposes of this and future discussions, the definition chosen by Ramirez and her co-authors, “whose terms bridge the divide between the narrow and the broad definition.”

Racial profiling, rather than focusing on individualized behavior or suspicion for additional investigation, is an inappropriate use of race, ethnicity, or national origin. The authors continue, “[t]he use of race is not inappropriate if law enforcement has specific, concrete evidence linking race to a particular person or particular criminal incident.”

There are practical benefits to choosing this definition:

The first part of the definition prohibits law enforcement from using race, ethnicity, or stereotypes as factors in selecting whom to stop, search, or question. Instead, it focuses the police on the behavior of the individual and requires more specificity to stop and search. When law enforcement uses race as a signal for criminality in initiating law enforcement actions, it results in ineffective law enforcement, strained community relations, and violations of basic civil rights. By using multi-layered profiles based on intelligence information and behavioral factors, however, rather than simply casting the net broadly to include just members of one race, one ethnicity, or one religion, police can be more probative and can more effectively focus their criminal investigations on appropriate criminal suspects. Both in the pre-September 11 and post-September 11 contexts, the use of race alone, or even as a component in creating a criminal profile designed to prevent future crime, reduces the effectiveness of law enforcement.

I, like many subsequent authors who have undertaken empirical studies of the correlation between race and traffic stops, arrests, and convictions, adopt this approach because its utility has been validated throughout the last eight years since the appearance of Ramirez’s article.

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35 Id. at 1205.

36 Id. Footnoting the modifier “inappropriate,” Ramirez et al. assert the particular importance of distinguishing between the “inappropriate” use of race and the “illegal” use of race. Circumstances under which we argue the use of race is inappropriate and therefore constitutes racial profiling may very well be ‘legal’ according to the courts. See Brown v. City of Oneonta, 221 F.3d 329, 339 (2d. Cir. 2000) (“Yet our role is not to evaluate whether the police action in question was the appropriate response under the circumstances, but to determine whether what was done violated the Equal Protection Clause.”), amending and superseding 195 F.3d 111 (2d Cir. 1999), reh’g en banc denied, 235 F.3d 769 (2d Cir. 2000), cert. denied, 534 U.S. 816 (2001).

37 Ramirez, supra note 34, at 1205.

38 Id. at 1205–06.

39 To be sure, a number of economic studies empiricize racial profiling. See, e.g., Vani K. Borooah, Racial Bias in Police Stops and Searches: An Economic Analysis, 17 EUR. J. OF POL. ECON. 17, 32-33 (2001) (estimating a model using data on stops and searches in ten separate areas in England); Bernard E. Harcourt, Rethinking Racial Profiling: A Critique of the Economics, Civil Liberties, and Constitutional Literature, and of Criminal Profiling
In addition to racial profiling, racism is also defined in a variety of ways. This article adopts Phyllis A. Katz’s widely accepted definition of racism, which provides for the differential treatment of individuals on the basis of their racial group membership. This paper refers to both the appropriate and inappropriate uses of race by police through racial profiling; however, I modify the term with either “appropriate” or “inappropriate,” depending on whether the use of race, ethnicity, or national origin is based upon specific, concrete evidence linking race to a particular person or particular criminal incident. I assert, moreover, that inappropriate racial profiling is racist.

II. EXAMINING THE UTILITY OF THE CORRECTED TERMINOLOGY

The lawsuits, which form the basis of the data sets of Part I, contain a number of powerful contemporary accounts of Blacks’ encounters with police officers, including traffic stops, searches, and various types of other apprehensions. According to legal theorist Charles J. Ogletree, Jr., “little evidence of racial reconciliation” can be found in Los Angeles, the site of the 1991 beating of Rodney King. Ogletree discusses Voltaire Rico Sterling, a Black actor, writer, attorney, and educator, who was followed and subsequently stopped by two White police officers.


41 PHYL rIS A. KATZ, TOWARDS THE ELIMINATION OF RACISM 3 (Phyllis A. Katz ed., 1976). See also Faye Crosby et al., Recent Unobtrusive Studies of Black and White Discrimination and Prejudice: A Literature Review, 87 PSYCHOL. BULL. 546, 546 (1980) (“Racism may be examined at two levels: One may measure discriminatory behavior, and one may infer prejudiced attitudes. Stereotyping, which involves the presumption of certain attributes in an individual solely on the basis of racial groups, is one form of prejudice.”).


43 OGLE TREE, supra note 30, at 12–13.
officers in his Beverly Hills community for “driving while [B]lack.” Ogletree likewise discusses Michael Lawson, a prominent Los Angeles attorney, who was regularly stopped and interrogated while traveling in cars with Black male friends or White or light-skinned Black women, because “the Los Angeles Police Department in particular . . . made a regular practice of profiling young Black men.” Ogletree also discusses the late attorney and advocate Johnnie L. Cochran, Jr., who in the early 1980s, while driving his Rolls Royce was pulled over for no apparent reason. The experience of watching their innocent father have guns drawn at him as White police officers asked him to step out of his car left Cochran’s young son and daughter emotionally shattered. Cochran labeled this experience as “Driving While Black.”

Ogletree’s concept of racial profiling discussed in Defending Profiling While Combating Racism, coincides with the definition offered by Ramirez. Ogletree presents an episode of inappropriate profiling by Maryland State Police officers. Robert Wilkins, a Washington, D.C. lawyer, drove “in a rented Cadillac with relatives across the country for his maternal grandfather’s funeral in Chicago in 1992.” Just before 6 a.m., Wilkins and his relatives were pulled over by police on Interstate 68 in downtown Cumberland, Maryland. The officer said he paced the car at 60 miles-per-hour in a 40 mile-per-hour zone. After the driver provided his identification, the officer asked to search the car. The driver ultimately decided not to sign the “Consent to Search” form that the officer had given him. After some back and forth between the parties, Wilkins explained that there could be no search without an arrest and that, furthermore, the driver had done nothing to establish probable cause for an arrest. Despite Wilkins’ explanation, the officer contained the family inside the car until a dog was brought to sniff the vehicle. The officer then instructed them to exit the car so that a search could be

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44 Id. at 149–51.
45 Id. at 136–37.
46 Id. at 140.
47 Id.
48 Id.
50 OGLETREE, supra note 29, at 102.
51 Jones, supra note 47, at 194 (summarizing the procedural history of the Robert Wilkins case).
52 Id.
53 Id.
54 Id.
55 Id.
56 Id.
57 Id.
conducted.\textsuperscript{58} Although Wilkins offered to show the officer an obituary to prove that they had attended a funeral, the officer persisted with his demands.\textsuperscript{59} Eventually, two additional officers arrived with a german shepherd.\textsuperscript{60} The german shepherd sniffed the vehicle, but found no indication of contraband or drugs.\textsuperscript{61} The officers then permitted the family to leave.\textsuperscript{62}

Represented by the American Civil Liberties Union, Wilkins sued the Maryland State Police for profiling under § 1983.\textsuperscript{63} In the heart of \textit{Presumption of Guilt}, Ogletree explains the reasoning behind the lawsuit:

[T]he ACLU wanted to examine the legal basis for the stop and ways to keep it from happening to other innocent citizens. As a result of the filing of the lawsuit, Robert and his counsel ultimately received the criminal intelligence report for the Maryland state police. According to Robert, the report discussed the problem of crack cocaine in the Cumberland, Maryland, area and advised Maryland troopers that traffickers “were predominantly black males and black females.” The report indicated that “these dangerous armed traffickers generally traveled early in the morning or late at night along Interstate 68, and that they favored rental cars with Virginia registration.” Having traveled on I-68 early in the morning, in a Virginia rental car, Robert and his family fit this broad profile. The problem, of course, is that no one in the car was dangerous, and certainly no one had any drugs or weapons.\textsuperscript{64}

Although the account suggests that the criminal intelligence report supports inappropriate racial profiling, this report appears to characterize the actions of the police officers as non-racist. As Professor Ramirez et al. explain, using race is appropriate if law enforcement has specific, concrete evidence linking race to a particular person or particular criminal incident.\textsuperscript{65} Moreover, the Maryland State Police, in seeking to fight against the crack-cocaine epidemic that ravaged Black communities in the early 1990s, followed public policy endorsed by the Congressional

\textsuperscript{58} Id.
\textsuperscript{59} Id.
\textsuperscript{60} Id.
\textsuperscript{61} Id.
\textsuperscript{62} Id.
\textsuperscript{63} OGLETREE, supra note 29, at 106.
\textsuperscript{64} Id. at 195.
\textsuperscript{65} Ramirez, supra note 34, at 1205.
Black Caucus.\textsuperscript{66} The Congressional Black Caucus, at the time, voted for draconian punishment for crack-cocaine possession and dealing.\textsuperscript{67}

In 1986, a majority of the Congressional Black Caucus favored federal sentencing disparities with respect to crimes involving crack powder cocaine.\textsuperscript{68} Were the majority of the Congressional Black Caucus members engaged in inappropriate racial profiling? Were they racist? The Caucus was neither engaged in racial profiling nor was it racist, but was merely engaged in appropriate racial profiling designed to make communities safer for all.\textsuperscript{69} In spite of the legislation’s unintended consequence of criminalizing a considerable portion of Black men, the Congressional Black Caucus sought to promote safer communities through the use of proper racial profiling.\textsuperscript{70}

Professor Randall Kennedy argues that critics are severely misguided when they claim, based on a disproportionate number of incarcerated Blacks, that the criminal justice system is racially discriminatory.\textsuperscript{71} Professor Kennedy contends “while liberal criticism of the criminal justice system has traditionally focused on the disparate harms inflicted on [B]lack defendants or suspects by law enforcement officials, . . . other [B]lack citizens – the ‘law-abiding’ – are benefited from the incarceration of large numbers of [B]lack criminals, because most crime is intraracial.”\textsuperscript{72} Kennedy maintains that the racially disparate results of the criminal justice system do not harm Black citizens as a class because only a subset of the class is actually harmed, those that break the law, while a law-abiding subset is benefited.\textsuperscript{73} Therefore, because the system

\begin{footnotes}
\item[67]Id. at 943.
\item[68]See, e.g., Randall Kennedy, \textit{Is Everything Race? The New Republic}, Jan. 1, 1996, A18, at A20 (noting that “eleven of the then twenty black members of the Congress supported” the 1986 Anti-Drug Abuse Act, which codified the 100-to-1 crack to powder cocaine sentencing disparity).
\item[69]Id.
\item[70]See Mascharka, \textit{supra} note 64.
\item[71]Randall Kennedy, \textit{The State, Criminal Law, and Racial Discrimination: A Comment}, 107 HARV. L. REV. 1255, 1260 n.20 (1994); David Cole, \textit{The Paradox of Race and Crime: A Comment on Randall Kennedy’s ‘Politics of Distinction,’} 83 GEO. L. J. 2547, 2571 (1995). But see Norm Parish, \textit{Blacks Say Profiling of Arabs is Racism; Polls Show Many Favor Scrutiny After Hijackings}, ST. LOUIS POST-DISPATCH, at C1 (Oct. 17, 2001) (Troubled by polls showing support for racial profiling in the wake of Sept. 11, National Urban League president Hugh Price stated, “‘We should see in these polls’ findings more evidence of the perniciousness of racial profiling itself, no matter how it’s seemingly bolstered by glib or urgently declared rationalizations . . . These polls show that whenever people speak up in favor of racial profiling, they always favor its use against some other group, not theirs.’”)
\item[72]Cole, \textit{supra} note 69 at 2547.
\item[73]Kennedy, \textit{supra} note 66.
\end{footnotes}
benefits some Black citizens while burdening others, Kennedy puts forth the argument that the system does not discriminate on the basis of race.  

Nevertheless, the Wilkins matter made its way through the Maryland courts and in 1995 the case was settled. Wilkins was awarded $50,000 in damages plus $46,000 in attorney’s fees for the three years of litigation. The state also agreed to no longer use race-based drug courier profiles as law-enforcement tools. In addition, a new Maryland State Police policy was instituted to prohibit race as a factor in determining whom to stop, detain, or search without further evidence, as well as a host of other safeguards against racially discriminatory practices. Although the court case was settled, Wilkins’s litigation exposed numerous instances of racism on interstate highways patrolled by the Maryland State Police. The police reports in Maryland indicated that 70 to 75 percent of people searched on the Interstate 95 – the corridor linking Richmond, Virginia, Washington, D.C., New York City, and other major East Coast cities – were Black, even though Blacks represented only 17 percent of those driving on the highway and only 17 percent of traffic violators. By the same token, Ogletree reports that Maryland State Police searched over 400 Blacks in comparison to 100 Whites to find similar drugs or other contraband on individuals. Ogletree concludes, “[i]t was clear that a disproportionate number of African Americans were stopped and searched without any valid basis.” Finally, Ogletree reveals, “[m]ore than a decade after his encounter with the police, Robert Wilkins again brought suit against the Maryland [S]tate [P]olice, asserting that the practices of racial profiling continued and that court intervention was warranted to change these persistent discriminatory practices.”

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75 OGLETREE, supra note 30, at 106–07.
76 Id.
77 Id. at 107.
78 Id. at 107-08.
79 Id. at 107.
80 Id.
81 Id.
82 Id.
83 Id. at 108.
Aside from the aim of the Wilkins litigation to end racial profiling, a useful change in the “persistent discriminatory practices” could have been made as soon as this Black–White enforcement disparity was found to be in dissonance with the reality of White criminality. If appropriate racial profiling is constitutionally permissible and appropriate public policy, then the increased likelihood of White lawlessness, apparent on the examined stretch of Maryland roadway, would appear to justify substantial increases in racial profiling of White motorists by the Maryland police; profiling that would be deemed appropriate according to the concepts proposed in this article. By making this connection, countless lives could be saved in at least one area of vital contemporary concern: the mass-shooting phenomenon that has rocked the United States. Over the last ten years, both the frequency and severity of mass shootings in the U.S. (and globally) has become larger and more acute.

In Newtown, Connecticut, a shooting spree on December 14, 2012, by a twenty year-old gunman at an elementary school left twenty-eight people dead. This included twenty children, six adults at the scene, the shooter himself, and his mother. On December 11, 2012 in Portland,

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84 See OGLETREE, supra note 29 at 107;
85 Unfortunately, however, the seminal and current research analyzing discrimination lawsuits’ affects on changing police conduct seems to confirm Wilkins’s experience that even a settlement agreement containing monitoring can be flouted by policing agencies hell-bent on acting out their racial biases against blacks. See Schwartz, supra note 12, at 1023, 1028.

Another deficiency in the scholars’ data selections is their uniform inability to take into account the civilian complainants whose grievances to the police agencies go unaccepted or unprocessed, a reality supported by recent news reports. See Graham Rayman, NYPD’s Reporting Problem: Reactions to our ‘NYPD Tapes’ confirmation came like a swift billy club to the skull, THE VILLAGE VOICE, Mar. 14, 2012, http://www.villagevoice.com/2012-03-14/news/nypd-blowback/; see also Lou Chibbaro Jr., 5 lesbians attacked; police refuse to take report, WASHINGTON BLADE, Aug. 5, 2011, http://www.washingtonblade.com/2011/08/05/5-lesbians-attacked-police-refuse-to-take-report/ (reporting that, despite D.C.’s Human Rights Act of 1978, which protects lesbians, and the District’s hate-crime law that offers protection to lesbians, officers responding to the attack refused to take reports on the scene; “[a]n officer assigned to the D.C. police Gay & Lesbian Liaison Unit did make a report of the incident three days later, on Aug. 2”). In later work, this author argues for the creation of Civilian Preview Boards, analogous to Civilian Review Boards, to serve as safe, extra-agency spaces in which citizens would initially file complaints against offending police agencies to forestall agency obfuscation and cover-ups for which certain agencies have become famous.

Critiques of her methodology notwithstanding, Schwartz continues to uncover serious information failures that often prevent informed decision-making, showing that litigation information is used only in rare instances by law enforcement agencies.

88 Id.
Oregon\textsuperscript{89}, a masked gunman opened fire in a crowded shopping mall.\textsuperscript{90} The gunman killed two people and seriously injured a third before he turned the gun on himself.\textsuperscript{91} Authorities said the shooter’s assault weapon jammed, which prevented further carnage.\textsuperscript{92} In Oak Creek, Wisconsin, a white supremacist shot six people and a policeman at a Sikh temple, and then shot himself in the head in August, 2012.\textsuperscript{93} In Aurora, Colorado, a gunman killed twelve and injured fifty-eight at a screening of “The Dark Knight Rises” in July, 2012.\textsuperscript{94} In Oakland, California, a former student at a Christian college fatally shot seven people and injured three in April, 2012.\textsuperscript{95} In Copley Township, Ohio, a man in a family dispute shot and killed his girlfriend and six other people with a handgun in August, 2011.\textsuperscript{96} In Geneva, Alabama, a lone gunman in a violent family feud killed eleven victims, ages eighteen months to seventy-four years old, in March, 2009.\textsuperscript{97} In Omaha, Nebraska, police officers killed a nineteen-year-old man after he shot nine people at a department store in December 2007.\textsuperscript{98} In Blacksburg, Virginia, a student at Virginia Tech killed thirty-two classmates and wounded twenty-five before he committed suicide in April, 2007.\textsuperscript{99} In Red Lake, Minnesota, a sixteen-year-old boy killed a total of eleven people in a shooting spree, including his grandfather and his grandfather’s girlfriend in March, 2005.\textsuperscript{100} In Columbus, Ohio, a fan shot a Pantera guitarist at a concert as he performed onstage, then fired at fans, killing four people in December, 2004.\textsuperscript{101}

Gun manufacturers and gun-rights advocates have asserted over the years: “Guns don’t kill people. People kill people.”\textsuperscript{102} Regardless of one’s acceptance or rejection of that

\begin{thebibliography}{100}
\bibitem{90} Otis, \textit{supra} note 83.
\bibitem{91} \textit{Id}.
\bibitem{92} \textit{Id}.
\bibitem{93} \textit{Id}.
\bibitem{94} \textit{Id}.
\bibitem{95} \textit{Id}.
\bibitem{96} Otis, \textit{supra} note 83.
\bibitem{97} \textit{Id}.
\bibitem{98} \textit{Id}.
\bibitem{99} \textit{Id}.
\bibitem{100} \textit{Id}.
\bibitem{101} \textit{Id}.
\end{thebibliography}
aphorismic characterization of a vexing criminal problem with Second Amendment implications, a question remains in the emergent mass-shooting criminological phenomenon: *which* people kill? According to Professor Hugo Schwyzer, the overwhelming majority of the shooters in the mass-shooting cases were White men.\(^{103}\) Should race be used as a factor in attempting to prevent or solve these kinds of crimes? It appears that various scholars’ socio-historical empirical studies and careful data analysis suggest that racial profiling has a place in this context after all. For example, in light of the Aurora, Colorado, movie theater shooting, Professor Schwyzer asked (and answered):

> [a]re [W]hite men particularly prone to carrying out the all-too-familiar mass killings of which last week’s Aurora shooting is just the latest iteration? Is there something about the [W]hite, male, middle-class experience that makes it easier for troubled young men to turn schools and movie theaters into killing fields? In a word, yes.\(^{104}\)

Professor Schwyzer has entered the discussion just as complex questions on the permissible restraints on Second Amendment rights are moving to the forefront in political and judicial contexts.

**CONCLUSION**

Rather than hewing to “naïve non-judgmentalism [that] masquerades as moral humility,”\(^{105}\) sensible scholars, politicians, and policy-makers ought to, at this turning point in America’s constitutional dialogue over crime prevention and restraints on liberty, enter the thicket of reality by embracing racial profiling for the good that it can accomplish in some dangerous criminal contexts.

Unfortunately, in spite of the emerging sophistication in the empirical approach to correcting and preventing unlawful police practices, racial profiling continues to persist. As recently as August, 2012, the United States Transportation Security Administration (“TSA”) responded to 30 complaints filed by officers administering security screenings at Logan

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\(^{104}\) Id.

\(^{105}\) I apply this construction from R. Albert Mohler, Jr.’s original usage of the phrase. *See* R. ALBERT MOHLER, JR., CULTURE SHIFT: ENGAGING CURRENT ISSUES WITH TIMELESS TRUTH 48 (Multnomah Books 2008) (“Moral cowardice has denied the inherent evil of immoral acts. Moral relativism has denied any objective judgment of right and wrong. A naïve non-judgmentalism often masquerades as moral humility.”).
International Airport. The officers accused colleagues of “targeting minorities” at checkpoints. TSA declared in a statement “racial profiling is not tolerated within the ranks of TSA. Profiling is not only discriminatory, but it is also an ineffective way to identify someone intent on doing harm.” Yet, the complaints against fellow officers included allegations that “[B]lack, Hispanic, and Middle Eastern passengers had been routinely pulled aside for searches and questioning in screenings designed to scan for suspicious behavioral cues such as sweating, fidgeting, or avoiding eye contact” amid “mounting pressure from program managers to tally high numbers of stops and searches.” That very day, a headline in the Boston Globe stated, “Rep. William Keating calls for Congressional hearing on alleged racial profiling by TSA at Logan airport.” It would be far more constructive to hold hearings focused on the actual problem of racism.

Had police agencies embarked upon a project so properly framed after the Civil Rights Movement and tort law revolution at the end of the last century, perhaps, the documented and persistent racial discrimination problem in new data scholars are examining would not remain. In order to identify and isolate the salient issues, to embark upon a project targeted in solving the problem of police misconduct against minorities, contemporary scholars will have to address the nagging problem of improper terminology identified in *Defending Profiling* but deconstructed and properly contextualized in this article.

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107 Id.

108 Id.


110 Id.

111 There, the author called attention to one datum obtained during litigation that would support the contention that “white motorists” should be profiled by Maryland police on a stretch of Interstate 95 in Maryland for drug-possession offenses. Amos N. Jones, *Defending Profiling While Combating Racism: A Companion to Ogie Lee’s ‘Presumption of Guilt,’” 33 N.C. CENT. L. REV 187, 197 (2011).

112 Future work on racism as opposed to racial profiling should focus on the effectively deputized civilian marketplace, especially as found among security personnel and other functionaries who serve airports, where individuals frequently justify their purely race-based targeting of innocent consumers on presumed threats to the safety of guilty whites. *Accord* DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM 47 (2003) (“By January 2002 ... the Council on American-Islamic Relations had already received 1,658 reports of discrimination, profiling, harassment, and physical assaults against persons appearing Arab or Muslim, a three-fold increase over the prior year. The reports included beatings, death threats, abusive police practices, and employment and airline-related discrimination.”); cf. Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 U. CHI. LEGAL. F. 163, 223-25 (emphasizing “the racial tax [that] profiling imposes on the innocent” and devoting a section to airport security).
MINORITY OWNERSHIP: AN UNDENIABLE FAILURE OF FCC MEDIA OWNERSHIP POLICY

DR. CHRISTOPHER TERRY *

INTRODUCTION

The Federal Communications Commission’s (“FCC” or “Commission”) minority ownership policy has worked its way into the FCC’s larger media ownership and diversity debate. In December, 2003, Sherille Ismail, senior counsel in the FCC’s Office of Strategic Planning, stated that, “diversity includes the goal of increasing ownership of broadcast facilities by women and minorities through a variety of policies.”

First, this Article will analyze radio industry data regarding minority-formatted radio stations in the top fifty radio markets to determine the ratios between minority formatted stations and local minority populations. Furthermore, this Article will examine the structure of companies that were identified as operating a minority-formatted radio station within a top fifty market as a test of whether a group or independent ownership was more likely to result in the presentation of a minority based format.

Proponents of increasing the levels of minority ownership of media outlets rely on the belief that an increase in minority ownership will result in an increase in the amount of programming targeted at minorities. While the relationship between ownership and content diversity is complicated, some ownership factors have demonstrated that the race of owners has an effect on content production. In terms of minority ownership, Laurie Mason, Christine M. Bachen and Stephanie L. Craft determined that minority owners are more likely to offer

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2 See Martin Gilens & Craig Hertzman, Corporate Ownership and News Bias: Newspaper Coverage of the 1996 Telecommunications Act. 62 J. Pol. 369, 369-86 (2000). Other factors that have demonstrated effects on content are organizational structure and corporate interest.
programming formatted for minorities and minority-owned stations were more likely to tailor their news content towards minority concerns and audiences.³

While providing minorities the opportunity to own additional media outlets would appear to be a straightforward policy approach to increase content diversity, historically, the Commission used four policies to increase the amount of minority targeted media content. The first policy was ascertainment, which required broadcast stations to assess the needs of the local community.⁴ This process was accomplished by a series of meetings between media outlets and members of the local community to discuss issues of public concern. This dialogue served as a proxy for citizen access to the media and kept media organizations connected to their local communities. As part of the license renewal process, stations were required to demonstrate coverage of the issues raised in ascertainment proceedings.⁵ In terms of minority content, ascertainment was assumed to provide local broadcasters a method to reach into minority communities and provide coverage directed towards minority audiences.⁶

Alongside the ascertainment process, the FCC relied upon the Fairness Doctrine to increase minority-targeted content.⁷ The FCC believed the Fairness Doctrine’s requirement for balanced coverage of issues concerning the public would promote the coverage of minority issues, and the Doctrine’s requirements for a multisided discussion of public issues would provide an outlet for minority voices.⁸

The agency also assessed the effectiveness of these two policies by promoting the coverage of minority issues, and concluded that minorities were being underserved by broadcast outlets.⁹ The FCC’s solution was to increase the number of minorities working within the media.¹⁰ Subsequently, the FCC adopted the standard for broadcasters, which barred discrimination on the basis of race.¹¹

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⁵ Id. at 57.

⁶ Id. at 62.

⁷ Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1257 (1949).


¹⁰ 1978 Policy Statement, supra note 8, at 979.

¹¹ Id.
While the Equal Employment Opportunity ("EEO") requirements increased the number of minorities employed by media companies and made them more visible, the hiring policies had a limited effect on the diversity of media content reaching audiences.\(^{12}\) One important reason for this result was that, despite the increase in the numbers of minorities employed by media outlets,\(^{13}\) few minorities held upper level positions where they were able to influence the programming content selection process.\(^{14}\)

In 1978, with the realization that EEO policies failed to enhance viewpoint diversity, the FCC adopted policies designed to increase direct minority ownership of broadcast outlets.\(^{15}\) The FCC reasoned that minority owners of local stations are best positioned to serve local minority audiences.\(^{16}\) To increase the number of minority owners, the FCC adopted a policy that made minority status a "qualitative enhancement" of a license applicant's qualifications for a broadcast facility.\(^{17}\) The FCC implemented tax incentives to assist minorities with purchasing power.\(^{18}\) The FCC also permitted, in specific circumstances, the transfer of licenses at "distressed sales" prices\(^{19}\) to minorities.\(^{20}\)

The minority ownership enhancement policies were challenged, and were initially upheld in 1990 by the United States Supreme Court in *Metro Broadcasting Inc. v. FCC.*\(^{21}\) The dispute in *Metro* involved a comparative bidding proceeding for the rights to construct and operate a new UHF television station in Orlando, Florida.\(^{22}\) The FCC awarded the license and construction permit to a competitor, Rainbow Broadcasting.\(^{23}\) The agency gave a substantial enhancement to Rainbow because its ownership was 90% Hispanic, while Metro had only one minority partner.

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\(^{12}\) The FCC determined that minority issues were continuing to be ignored by local broadcasters. *See Federal Communications Commission's Minority Ownership Task Force, Minority Ownership Report, (1978)* [hereinafter Minority Ownership Report].


\(^{14}\) *Id.*

\(^{15}\) *1978 Policy Statement, supra* note 8, at 981.

\(^{16}\) *Minority Ownership Report, supra* note 12.

\(^{17}\) *1978 Policy Statement, supra* note 8, at 982-83.

\(^{18}\) *Id.* at 983.

\(^{19}\) *Id.* at 982-85. Distressed properties were stations failing economically or facing a license revocation proceeding. The distress sale policy fast tracked the license transfer between parties.

\(^{20}\) Anastos, *supra* note 13, at 8. One goal of the distress sale policy was to assist minority owners with financing. By reducing the value of the station sold under the distress sale policy to seventy-five percent of its actual market value, the Commission created an equity base for investors that provided security when making loans.

\(^{21}\) *Metro Broadcasting Inc. v. FCC, 497 U.S. 547 (1990).*

\(^{22}\) *Id.* at 558.

\(^{23}\) *Id.* at 559.
with a 19.8% stake. Due to this disparity, the FCC gave Rainbow a “substantial enhancement” that comparatively outweighed Metro’s “local residence and civic participation advantage.”

Prior to the Metro decision, Shurberg Broadcasting also challenged the FCC’s distress sale policy after filing a construction permit to build a station in Hartford, Connecticut. At the time, the permit was mutually exclusive to a station already on the air, which the owners, Faith Center, were trying to sell under the distress sale policy. The FCC approved the transfer of the station under the distress sale policy in 1980, but the applicant had financing problems that caused the abandonment of the transfer. By June of 1984, the FCC approved a second transfer of the station’s license under the distress sale policy to minority applicant, Astroline Communications. Shurberg petitioned the FCC to hold a comparative hearing to examine the mutually exclusive applications, claiming that the distress sale policy violated its Equal Protection rights. The FCC refused to hold the hearing, awarded the license to Astroline, and rejected the Shurberg challenge as “without merit” by December, 1984.

Both Metro and Shurberg challenged the FCC’s decision in federal court on the grounds that the policies violated the Equal Protection Clause; however, the FCC’s Metro decision was upheld, while the Shurberg decision was overturned. In Shurberg, the majority held that the distress sale policy was not “narrowly tailored to remedy past discrimination or to promote programming diversity.” The cases were eventually consolidated when the Supreme Court granted a writ of certiorari.

In the 5-4 decision, the majority held that both FCC minority enhancement policies could withstand intermediate scrutiny of the Fourteenth Amendment’s Equal Protection Clause. In applying intermediate scrutiny review, the Court held that the minority ownership policies at

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24 Id.
25 Id.
26 Id. at 562-63.
27 Id.
28 Id.
29 Id. at 562 (citing Faith Center Inc., 99 F.C.C. 2d 1164, 1171 (1984)).
30 Id. at 563.
32 Metro, 497 U.S. at 563.
33 Id.
34 See Metro, 497 U.S. 547.
35 Id. at 566.
issue in *Metro* served the important governmental objective of providing the public with diverse programming reflecting all races and ethnicities.\(^{36}\)

On a substantially related point, the Court found that the minority ownership policies were closely related to the long-standing policy goal shared by both Congress and the FCC in the advancement of minority ownership and hiring practices to achieve greater broadcast content diversity.\(^{37}\) Justice Brennan, writing for the majority, described diverse views and information on the airwaves as a “robust exchange” of ideas that minorities could bring through these policies which would result in a positive influence of news making and promote diversity in the hiring practices of existing media outlets.\(^{38}\) The Court also stated a belief that the previous policies, including ascertainment, had failed to provide a necessary level of minority content to listeners.\(^{39}\)

Justice Brennan also stated that it was of “overriding significance” that the enhancement and distress sale policies had been specifically mandated and approved by Congress.\(^{40}\) In light of these factors, the Court ruled that the substantial government interest in promoting diversity outweighed any Equal Protection violations, adding that the petitioners were free to bid on any other stations that became available.\(^{41}\)

In 1995, the *Metro* decision, which protected the licensing enhancement program, was largely overturned by a non-broadcast case, *Adarand Constructors Inc. v. Pena*.\(^{42}\) In *Adarand*, the four dissenters in the *Metro* decision and newly appointed Justice Clarence Thomas struck down a federal program granting preferences to minorities bidding on public works projects.\(^{43}\) The *Adarand* majority held that the lower court should have applied strict scrutiny review to the policies at issue in *Metro*.\(^{44}\)

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36 *Id.* at 567-68.
37 *Id.* at 568-71.
38 *Id.* at 567-70.
39 *Id.* at 586-87.
40 *Id.* at 563.
41 *Id.* at 596.
42 See generally *Adarand Constructors Inc. v. Pena*, 515 U.S. 200 (1995) (applying intermediate standard of review in a nonbroadcast challenging a federal program designed to provide highway contracts to disadvantaged businesses).
43 *Id.*
44 The opinion states:

We hold today that all racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further
Since the *Metro* decision, the FCC has done little in terms of minority ownership policies.\(^{45}\) The distress sale policy was discontinued, first by refusing to extend the policy to women, and then later refusing to extend the policy to spectrum auctions in 1990.\(^{46}\) The FCC prefers to deal with media ownership and content diversity through the ownership based Outlet Diversity Policy. Beginning in 1992, the FCC began to relax its ownership limits, allowing for an increase in the number of commonly owned properties. Ownership limits were relaxed by the FCC again in 1994 and by Congress following the passage of the 1996 Telecommunications Act, which eliminated the nationwide limits on radio station ownership.\(^{47}\)

In December of 2007, the FCC adopted a new policy proposal dealing with the ownership of broadcast facilities by minorities and women.\(^{48}\) The proposal adopted financial standards created by the Small Business Administration ("SBA"), based on gross sales revenue for a radio or television company.\(^{49}\) The new policy was implemented as part of a larger FCC effort to increase the number of small independent owners of media properties.\(^{50}\) Relying on the central premise of the FCC’s long standing Outlet Diversity Policy,\(^{51}\) the FCC believed that an increase in the number of “small media owners”\(^{52}\) would result in an increase in diversity of programming content, including targeting minority audiences.\(^{53}\) Because the FCC was no longer allowed to favor minority applicants directly,\(^{54}\) the agency relied on the SBA to create a class of applicants compelling governmental interests. To the extent that Metro Broadcasting is inconsistent with that holding, it is overruled.

*Id.* at 226-27.

\(^{45}\) In 1995, the FCC did update the biannual station ownership reports to include a section inquiring about minorities who are involved in the ownership of a station. Information gathered from these reports is discussed in the next section.

\(^{46}\) While awaiting a decision from the Supreme Court in the *Shurberg* and *Metro* cases, the Commission closed down a rulemaking proceeding that could have expanded the Distress Sale policy to new categories of participants, including women. *Notice of Inquiry [into] Distress Sale Policy of Broadcast Licensees*, 5 FCC Rcd. 397 (1990).


\(^{49}\) *Id.*

\(^{50}\) *Id.*


\(^{52}\) “Small media owners” consist of owners who operate single or a small group of stations.

\(^{53}\) 2007 Order, supra note 48, at 5.

called “eligible entities.” The “eligible entities” were required to meet financial standards created by the SBA based on gross sales revenue for a radio or television company.

The policy proposed in 2007 represented a significant change from the earlier minority ownership initiatives. In fact, it was not only a minority ownership policy, but a broader and more comprehensive diversity policy. In crafting the new policy, the FCC relied on the long standing Outlet Diversity Policy and the agency’s continuing belief that more media owners assures more content diversity. By diversifying ownership, the FCC believes a wider array of programming services will become available. The policy relies on the creation of new, independently owned, media outlets; an organizational structure the FCC believes is more likely to have ties to a local community and the needs of the local audience.

Despite the FCC’s stated goal of diversity enhancement, the agency argued that the type of minority enhancements at issue in Metro must now be subject to strict scrutiny. Therefore, the fastest way for a new policy to be implemented and bypass any constitutional barriers is to apply the policy as “race neutral.” Rather than providing ownership enhancements to minorities directly, the FCC argued that minorities and women could qualify under its new policy for startup media companies.

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55 The eligible entity must hold:

(1) 30 percent or more of the stock/partnership shares and more than 50 percent voting power of the corporation or partnership that will hold the broadcast license; or (2) 15 percent or more of the stock/partnership shares and more than 50 percent voting power of the corporation or partnership that will hold the broadcast licenses, provided that no other person or entity owns or controls more than 25 percent of the outstanding stock or partnership interests; or (3) more than 50 percent of the voting power of the corporation if the corporation that holds the broadcast licenses is a publicly traded company.


56 Id.

57 Id. at 4.

58 2002 Review, supra note 51, at 18517.

59 Id.

60 2007 Order, supra note 48, at 5.

61 See id. at 5-6.

62 The FCC believes that by implementing the new policy on a race-neutral basis, and avoiding constitutional scrutiny on equal protection grounds, the policy can be implemented, and have demonstrable results much quicker. Id. at 6.

63 Id. at 17. The Commission is seeking comment on whether a special category of “eligible entity” should be created to assist minorities and women with the acquisition of media outlets, but for now the diversity policy will remain race and gender neutral.
Relying on existing financial standards created by the SBA for radio and television companies, the FCC replaced minority qualifiers with the “eligible entity” ownership category.\textsuperscript{64} To become an eligible entity, an applicant must meet the SBA standards as defined by total annual sales of an organization or its parent company.\textsuperscript{65} For radio, the qualifying limit was $6.5 million and for television the limit was $13 million.\textsuperscript{66} In addition, an eligible entity must hold:

(1) 30 percent or more of the stock/partnership shares and more than 50 percent voting power of the corporation or partnership that will hold the broadcast license; or
(2) 15 percent or more of the stock/partnership shares and more than 50 percent voting power of the corporation or partnership that will hold the broadcast licenses, provided that no other person or entity owns or controls more than 25 percent of the outstanding stock or partnership interests; or
(3) more than 50 percent of the voting power of the corporation if the corporation that holds the broadcast licenses is a publicly traded company.\textsuperscript{67}

This definition is also an outgrowth of the previous FCC definition of a station (or stations) with minority ownership.\textsuperscript{68} Currently, the FCC defines minority ownership of a broadcast outlet as “one or more minorities which, in the aggregate, have greater than 50\% voting interest in the broadcast licensee entity.”\textsuperscript{69}

The eligible entity designation was first challenged and rejected by the United States Third Circuit Court of Appeals, which remanded the proceedings to the FCC.\textsuperscript{70} In July 2011, the Circuit remanded the FCC’s decision for a second time.\textsuperscript{71} While in the middle of the 2010 review process, the Circuit again cited procedural and evidential problems with the FCC’s actions:

\textsuperscript{64} 2002 Biennial Review Order, 18 FCC Rcd. at 13810-12, (2002). The “eligible entity” term was originally defined by the Commission in a 2002 order that provided an exception to the prohibition on the transfer of grandfathered station combinations that violated the local ownership rules. Transfers of these station combinations were allowed if the transfer was to an entity that would qualify as a small business under the SBA standards for media companies.

\textsuperscript{65} Id. at 13811.

\textsuperscript{66} Id.

\textsuperscript{67} 2007 Order, supra note 48, at 12.


\textsuperscript{69} Id.

\textsuperscript{70} The FCC’s 2003 media ownership decision was overturned in the first of two judicial reviews, conducted by the Third Circuit Court of Appeals. See Prometheus Radio Project v. FCC, 373 F.3d 372 (3d Cir. 2004).

\textsuperscript{71} See Prometheus Radio Project v. FCC, 652 F.3d 431, 437-8 (3d Cir. 2011) (the second time the Circuit remanded the decisions); see also Prometheus Radio Project v. FCC, 373 F.3d 372 (3d Cir. 2004) (the first time the Circuit remanded the decisions).
The Commission failed to meet the notice and comment requirements of the Administrative Procedure Act (the “APA”). We also remand those provisions of the Diversity Order that rely on the revenue-based "eligible entity" definition, and the FCC’s decision to defer consideration of other proposed definitions (such as for a socially and economically disadvantaged business (“SDB”)), so that it may adequately justify or modify its approach to advancing broadcast ownership by minorities and women.72

With respect to the procedural aspects of the policy, the FCC’s irregular actions taken on the day of the vote were matched with questions about the agency’s second failure to make the changes public prior to a vote.73 During oral argument at the 2011 Prometheus Radio Project v. FCC appeal, the FCC argued that two questions located in paragraph thirty-two of the Further Notice of Proposed Rulemaking (FNPR) counted as sufficient public notice of the changes.74 The majority was notably skeptical of the agency’s argument, and suggested that the FCC’s failure to provide adequate notice about how the new policy would work, both individually and in conjunction with other media ownership rules, was a “significant omission[.]”75

Furthermore, in terms of evidence and rationale, the majority was unconvinced by the FCC’s actions regarding diversity and found that the agency’s eligible entity designation was arbitrary and capricious because it “lacks a sufficient analytical connection to the primary issue that the Diversity Order intended to address.”76 In both the 2004 Prometheus decision (“Prometheus I”) and the 2011 Prometheus decision (“Prometheus II”), the common theme was based on an entire absence of data or evidence from the record to support the FCC’s decisions.77 In light of this common theme, the majority in Prometheus II was extremely critical of the FCC’s failure in 2007 to meet the requirements of the remand regarding the ownership of stations by women and minorities that was issued in Prometheus I.78 Suggesting that the agency had “in large part punted” on the issue,79 the court’s 2011 ruling imposed a mandate that the remand had to be addressed before the completion of the 2010 Quadrennial Review:

72 The Third Circuit overturned the 2007 eligible entity policy in the second judicial review of the FCC’s media ownership policy. Prometheus, 652 F.3d at 437-8 (the second time the Circuit remanded the decisions).
73 Id. at 451-53.
74 Id. at 446.
75 Id. at 450.
76 Id. at 471.
77 See generally Prometheus Radio Project v. FCC, 652 F.3d 431 (3d Cir. 2011) (Prometheus II); Prometheus Radio Project v. FCC, 373 F.3d 372 (3d Cir. 2004) (Prometheus I).
78 Prometheus, 652 F.3d at 467-68 (Prometheus II).
79 “Despite our prior remand requiring the Commission to consider the effect of its rules on minority and female ownership, and anticipating a workable SDB definition well before this rulemaking was completed, the Commission has in large part punted yet again on this important issue. While the measures adopted that take a strong stance against discrimination are no doubt
[T]he eligible entity definition adopted in the Diversity Order lacks a sufficient analytical connection to the primary issue that Order intended to address. The Commission has offered no data attempting to show a connection between the definition chosen and the goal of the measures adopted—increasing ownership of minorities and women. As such, the eligible entity definition adopted is arbitrary and capricious, and we remand those portions of the Diversity Order that rely on it. We conclude once more that the FCC did not provide a sufficiently reasoned basis for deferring consideration of the proposed SDB definitions and remand for it to do so before it completes its 2010 Quadrennial Review.  

The ruling also signaled that the court’s patience with the FCC over these issues was strained. Nowhere was this more palpable than in footnote 42, in which the majority scolded the agency for failing to meet its obligations to develop evidence, and scoffed at the agency’s justification that the task was difficult:

Stating that the task is difficult in light of Adarand does not constitute considering proposals using an SDB definition. The FCC’s own failure to collect or analyze data, and lay other necessary groundwork, may help to explain, but does not excuse, its failure to consider the proposals presented over many years. If the Commission requires more and better data to complete the necessary Adarand studies, it must get the data and conduct up-to-date studies, as it began to do in 2000 before largely abandoning the endeavor. We are encouraged that the FCC has taken steps in this direction and we anticipate that it will act with diligence to synthesize and release existing data such that studies will be available for public review in time for the completion of the 2010 Quadrennial Review.

Although overturned and remanded for lack of supporting evidence, the 2007 initiative by the FCC was, at least in part, a response to valid citizen concerns about minority access and minority ownership raised during the agency’s 2006 quadrennial media ownership proceeding. However, “the overall level of minority and female ownership in the broadcast industry remains dismal” across the United States. The data collected by the FCC in 2003 painted a bleak positive, the Commission has not shown that they will enhance significantly minority and female ownership, which was a stated goal of this rulemaking proceeding. This is troubling, as the Commission relied on the Diversity Order to justify side-stepping, for the most part, that goal in its 2008 Order.”

Prometheus, 652 F.3d at 471-72 (Prometheus II).

80 Id. at 471.
81 See id. at 471.
82 Id. at 471 n.42.
83 See id. at 472.
84 See id. at 470.
picture of minority ownership.\textsuperscript{85} Minority ownership of radio stations was claimed by only 391 of the 13,696 (2.85\%) radio stations on the air.\textsuperscript{86} Of the 1,749 commercial and educational television stations, only sixteen claimed to be owned by minorities (0.91\%).\textsuperscript{87} The FCC compiled similar data from ownership reports filed in 2004 and 2005.\textsuperscript{88} A comparable report filed by the FCC in 2005 revealed that of the 12,844 stations that filed FCC form 323 or 323-E,\textsuperscript{89} only 460 broadcast stations (3.6\%) met the Commission’s defined criteria for minority ownership.\textsuperscript{90}

Researchers using the FCC’s ownership data have suggested that the FCC’s data on minority and female ownership “is extremely crude and subject to a large enough degree of measurement error to render it essentially useless for any serious analysis.”\textsuperscript{91} Arie Beresteanu and Paul B. Ellickson, in a study included in the FCC’s 2006 Media Ownership Rulemaking Inquiry, explored the rates of minority and female ownership of the three traditional media outlets broadcast radio, television, and newspapers.\textsuperscript{92} Using ownership data provided by both the FCC and the Census Bureau, the authors found that minorities and females are both “clearly underrepresented,” in comparison to their populations, but at nearly the same rates they are underrepresented in “almost all industries of the economy.”\textsuperscript{93} Between 2002 and 2005, minorities, as a whole, never reached four percent combined ownership of broadcast television and radio stations.\textsuperscript{94} Additionally, the Beresteanu and Ellickson study included data on the ownership of radio and television stations by African-Americans for the years 1991, 1996, 2001, and 2006, which demonstrates that ownership of media outlets by African-Americans represents a small percentage of the total number of broadcast stations on the air.\textsuperscript{95}

Using radio industry and ratings data, Todd Chambers, explored the ownership and programming patterns of Spanish language radio stations in the fifty metropolitan areas with the


\textsuperscript{86} Id. at 22 tbl. 11.

\textsuperscript{87} Id.

\textsuperscript{88} Id.

\textsuperscript{89} FCC Form 323 Ownership Report for Commercial Broadcast Stations is an ownership report filed by stations every two years. FCC Form 323-E is filed by educational and noncommercial stations. Form 323-E does not collect information on Minority ownership.


\textsuperscript{91} Beresteanu et al., supra note 85 at 2-3.

\textsuperscript{92} See id. at 2.

\textsuperscript{93} Id.

\textsuperscript{94} Id. at 22 tbl. 11.

\textsuperscript{95} Id. at 21 tbl. 10.
highest populations of Hispanics.\textsuperscript{96} Using the industry-defined formula, which identifies the unique Spanish formats in a single market, Chambers concluded that just over twenty percent (314 of 1,545) of the stations in these markets carried a Spanish language format.\textsuperscript{97}

The data also revealed that larger radio companies controlled the stations within these markets.\textsuperscript{98} Clear Channel Communications and Infinity controlled almost a third of all the stations in those markets.\textsuperscript{99} According to Chambers, HBC, which provides a Spanish language format to fifty of sixty-one total stations, and Entravision, which provides a Spanish language format to forty-one of fifty-five total stations were the radio ownership groups that provided the most service to Hispanic audiences.\textsuperscript{100} It is clear from the results of Chambers’ study that large radio groups have not diversified their outlets into stations carrying primarily minority-targeted content. However, mid-size companies, owned and operated by minorities, are the primary media organizations that provide a large quantity of minority content to audiences.

The evidence suggests that outlets owned by minorities provide more minority-based content. Furthermore, this evidence suggests that mid-size companies are providing the most minority-targeted programming. To address this, the FCC adopted a policy that is “race-neutral” and focuses on the creation of small media organizations. Given these contradictions, is the new policy arbitrary and capricious?

\textbf{Methodology}

To generate ratings, broadcast radio stations often rely on niche programming. Niche radio formats are designed to attract specific demographic groups. Since radio ratings are much lower on a station-by-station basis than broadcast television, radio stations which attract a marketable demographic can remain economically viable.\textsuperscript{101}

\textsuperscript{97} Id. at 41.
\textsuperscript{98} See id. at 41-42.
\textsuperscript{99} Id.
\textsuperscript{100} Id.
This paper uses an approach suggested by the FCC’s Program Diversity measurement to examine the content of the commercial radio stations in the top fifty radio markets by format.\textsuperscript{102} Program diversity makes assumptions about actual content of broadcasts based on the “type” of programming.\textsuperscript{103} The FCC measures program diversity on a program-by-program basis by assigning a station’s programs to various categories.\textsuperscript{104} Program diversity resulted in a measurement of the number of program formats, rather than a direct analysis of the content. The FCC used this method to measure television content as early as the 1960s.\textsuperscript{105}

While a straight count of radio stations by format leaves some questions unanswered about the actual content a station carries,\textsuperscript{106} the FCC cited,\textsuperscript{107} and even funded, studies using station format as a proxy measurement for content diversity.\textsuperscript{108} Although format might be considered a crude measure of a station’s actual content in terms of radio, where a single “format” will dominate a station’s programming, the program diversity measurement does provide an opportunity to examine the content of a large number of stations.

Katz Media maintains an online database called the Radio Research Center.\textsuperscript{109} Data on radio markets is organized by Metro Survey Area (“MSA”) and is updated regularly.\textsuperscript{110} Each of the top fifty radio markets MSAs were broken down and coded for the total number of commercial stations, number of Hispanic formats,\textsuperscript{111} number of Black formats,\textsuperscript{112} and the

\begin{flushleft}
\textsuperscript{103} 2002 Review, supra note 51, at 18518.
\textsuperscript{104} Id.
\textsuperscript{105} Id.
\textsuperscript{108} Id.
\textsuperscript{110} Id. Katz defines an MSA as “[t]he primary reporting area for local radio. Metro Survey Area definitions generally correspond to the federal government’s Metropolitan Areas, subject to exceptions dictated by historical industry usage and other marketing considerations as determined by Arbitron.”
\textsuperscript{111} Id. Hispanic music formats included: "Hispanic", "Ranchera", "Nortena", "Bando", "Tropical", "Tejano." Hispanic informational formats included Spanish language stations with a News-Talk, Sports, or All News Format.
\textsuperscript{112} Id. The Black Format is a “specific” format as defined by Katz. This category was expanded to include the format “urban talk” as the demographic information and description of the formats was nearly identical.
\end{flushleft}
number of “Other” minority formats.113 Audience data on a market’s Hispanics and African-American populations were also collected from the Katz database.114 This process provides the sample for addressing research question one (“RQ1”).115

RQ1: How does the ratio of minority formatted stations in a market compare to the percentage of the local population that are minorities?

For this analysis, the number of minority stations was broken down into three groups: Hispanic formats, Black formats and “Other” minority formats. The Katz Media database provided data on Hispanic and African-American populations in each market as a percentage of the total population,116 and these ratios were compared to the number of stations in a market identified as providing a programming format designated for either minority group.

Following the primary analysis, data was collected on the organizational structure of each company identified as operating a Hispanic formatted radio station within the top fifty markets.117 The number and format of other commonly owned stations was compiled as a test of the ownership structures providing minority programming.

Research question two (“RQ2”) is primarily concerned with the size, in terms of the total number of commonly owned stations, of the companies providing minority programming. This study seeks to address which type of media companies, large or small, provide minority programming, rather than examining whether stations list a minority owner with 50% control.

RQ2: What are the organizational structures of companies in the top fifty markets that provide minority programming formats?

The FCC’s new initiative, based on the SBA’s guidelines, was designed to encourage the creation of smaller media companies.118 Both the smallest and largest radio companies carry minority-programming formats.119 A policy promoting smaller startup stations may be an

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113 Id. “Other” is a format designation in the Katz database that represents minority formats that do not meet the criteria for inclusion in one of the other categories. The database provides very little information on these formats.

114 Id.

115 Id.


117 Id. The island of Puerto Rico is MSA 15. The population data for the market was incomplete, but every station in the market is listed as running a Hispanic format. As a result, the available data for the market is reported, but it is excluded from the analysis. The Middlesex, NJ, MSA 41, is listed separately, but the market imports many stations from New York City due to geographic proximity. The San Diego market imports the signal of many stations from across the Mexican border and these cross-border stations were also eliminated from the sample.


119 Id.
ineffective way to promote viewpoint diversity if large consolidated media companies are already providing a variety of programming that targets minorities. Examining whether or not a station has a minority person or persons in control of 50% or more of the voting tells us little about what level of service or what type of content is being provided to the public. Therefore, RQ2 will examine how the size of a company relates to its format selection.

RESULTS

Based upon the Katz Media database, a total of 1,568 commercial radio stations operate in the top fifty markets. Of those stations in the top fifty markets, thirty-six stations, operating in Puerto Rico, were eliminated from the final sample. The final sample consisted of 1,532 stations. Of those stations, 225 carry a defined Hispanic format, nineteen carry a defined Black format, and twenty-four stations carry another ethnic or minority format. The market-by-market results are summarized below.

Table 1: Results

<table>
<thead>
<tr>
<th>Market</th>
<th>MSA</th>
<th>Stations</th>
<th>Hispanic Population (%)</th>
<th>Hispanic Radio Stations</th>
<th>Black Population (%)</th>
<th>Black Radio Stations</th>
<th>Other Minority Radio Formats</th>
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<td>4</td>
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<td>4</td>
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<td>Chicago, IL</td>
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<td>8</td>
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<td>7.2</td>
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<td>3</td>
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<td>Dallas, TX</td>
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<td>15y</td>
<td>14</td>
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<td>1</td>
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<td>35y</td>
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121 Id.
122 Id.
123 Id. Twenty Hispanic markets with at least as many Hispanic-formatted stations, by percentage, as the local Hispanic population, have been indicated in the table by a “y.” As none of the top fifty markets contain Black-formatted stations at a rate which meets or exceeds the local Black population, no Black stations are indicated in such a manner.
<table>
<thead>
<tr>
<th></th>
<th>City</th>
<th>Rank</th>
<th>Hispanic Stations</th>
<th>Ratio</th>
<th>Year</th>
<th>Non-Hispanic Stations</th>
<th>Ratio</th>
<th>Hispanic to Non-Hispanic Ratio</th>
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Hispanic formatted stations operate in forty-two of the top fifty markets.\(^{124}\) In twenty markets, the ratio of Hispanic stations to the total number of commercial radio stations is equal

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\(^{124}\) Id.
to or exceeds the percentage of the local Hispanic population.\textsuperscript{125}\footnote{Id.} Los Angeles has the highest number of Hispanic stations, followed by Dallas, Miami and Phoenix.\textsuperscript{126}\footnote{Id.} Puerto Rico has the highest number of Hispanic stations but, as stated, was not included in the final sample.\textsuperscript{127}\footnote{Id.; see also footnote 93, \textit{supra}, for explanation on the Black market breakdown.} 

“Black” formatted stations operate in fifteen markets.\textsuperscript{127}\footnote{Id.} Four of the top fifty markets have two operating Black-targeted stations.\textsuperscript{128}\footnote{Id.} Conversely to the Hispanic market, there is an absence of stations in the top fifty markets with a ratio of Black-formatted stations equal or exceeding the percentage of the local population that is African-American.\textsuperscript{129}\footnote{Id.} Based on analysis from the Katz Media Database, the study suffers from a limitation that undercounts stations targeting African American audiences with an all music format. The data provided is for stations targeting African Americans with an informational format. 

There are sixty-eight different owners operating at least one Hispanic station in the top fifty markets.\textsuperscript{130}\footnote{Id.} The organizational structures that operate Hispanic stations range from a single independent station owners to the largest radio company in the United States, Clear Channel Communications.\textsuperscript{131}\footnote{Id.} Fifty-three of the sixty-eight companies operate only minority-formatted stations.\textsuperscript{132}\footnote{Id.} The organizations that operate only minority formatted stations range from one to seventy-three stations.\textsuperscript{133}\footnote{Id.} From the fifty-three station owners that operate only minority formatted radio stations, forty-seven of the owners operate six or fewer stations.\textsuperscript{134}\footnote{Id.} Of the strictly minority stations, twenty-seven of the owners operate only a single station.\textsuperscript{135}\footnote{Id.} 

In the top fifty markets there are an additional fifteen station owners who operate a Hispanic formatted radio station.\textsuperscript{136}\footnote{Id.} These markets range in size from three to 1,220 stations; ownership groups operate a total of ninety-one minority formatted stations.\textsuperscript{137}\footnote{Id.} Out of seven of
these station groups, each operate fifteen stations or less. Three groups are operating a vast majority of the minority stations accounted for by these seven station groups.

**DISCUSSION**

The results, based upon the Katz Media database, demonstrate a handful of challenges for the FCC to consider as it moves forward. First, many of the media companies providing minority programming are small. These smaller companies consist of a single or just a handful of stations. This is not always the case; four of the largest radio companies in the United States, including the largest, Clear Channel Communications, provide minority formats in some markets. Many of the midsize companies providing minority formats are focused largely or entirely upon minority programming.

Second, Hispanic stations match the local audiences at a rate closer than the number of stations targeted at African-Americans. This study suffers from a limitation in design because it undercounts stations with music formats that are targeted at African-Americans. The results demonstrate that African-American audiences are being seriously shortchanged in comparison to their local populations. Another underpinning of the limitations of the study is that even if the music-formatted stations that target African-American demographics were counted, music based formats frequently lack the news and public affairs programming that is essential to meeting the FCC’s goal of viewpoint diversity.

Implementation of a policy that directly addresses this shortcoming will not be an easy task for the FCC. Relying on ownership and market conditions to create viewpoint diversity is a potentially suspect policy decision. The FCC’s unwillingness to test the theory of the relationship of ownership to viewpoint diversity remains apparent in the agency’s 2007 Order. Stations with an “informational format” are the most likely to contribute to the diversity of viewpoints. It is important to recognize that when sports-talk stations are excluded, there is an average of less than two commercial informational stations per market in the top fifty radio MSAs. The average is even lower in terms of minority informational formatted stations. The Katz analysis of the stations in each of the top fifty markets identified 240 stations with an informational format. When "sports" and "sports talk" formatted stations are eliminated from the aforementioned group of stations, less than 100 stations remain. By including the markets that

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138 Id.
139 Id.
have no minority programming and separating out the entertainment formats from the sample, an average of 0.45 stations per market are providing minority informational content.

Potential minority owners face additional obstacles regarding informational programming targeting large minority audiences. Such programming, which would make stations economically viable, is aimed at an audience that tends to be located in large cities where the value of a station is much higher than in smaller markets. Although the FCC sought to address this issue as part of the eligible entity policy, without the tax incentives or the distress sale policies, which created favorable conditions of the sale of media outlets to minorities, there appears to be little opportunity available for minority groups, including women, to acquire broadcast stations at an increased rate.

Even in the face of these criticisms, the FCC’s focus on smaller broadcasters to increase content diversity is not entirely without merit. The majority of owners operating Hispanic-formatted stations in the top fifty markets are smaller media operations with six or fewer stations, and more than half of these operate only a single station. This finding supports the FCC’s contention that an increase in content diversity is likely the result of smaller broadcast operations with local community ties.141

This study analyzes minority ownership in an indirect way—by focusing on content that is targeted at two major minority groups: Hispanics and African-Americans. As with any study regarding media ownership policy, the best method to test the effectiveness of the current policy would be to examine the actual content of stations. In direct contrast, relying on a measure of format diversity is less desirable than a direct content analysis, but remains a necessary methodological choice given the large number of radio stations that were examined for this study.

Significantly, the FCC considered both television and radio stations under this new policy in attempting to increase minority ownership. However, radio, as the broadcast medium that excels in providing targeted programming to local audiences, should be the primary focus of any broadcast diversity policy. Furthermore, smaller radio companies can be economically viable through providing targeted programming to niche audiences in a local market. Essentially, if the FCC wishes to remain both race and content neutral while enhancing the opportunity for minorities to own media properties, the FCC should focus on the continued creation of smaller media organizations as way to accomplish its stated diversity goals.

141 2007 Order, supra note 48, at 3.
THE ROLE OF AMERICAN INDIVIDUALISM IN THE CURRENT STATE OF PUBLIC SCHOOLS

KEHINDE DUROWADE

INTRODUCTION

It is an undisputed fact of life—the children of today will be the leaders of tomorrow. If these children are to successfully lead in the future, they must develop leadership skills. Are opportunities for such leadership development equally available to all, or are some children deprived of the indispensable tools necessary to fulfill their role as future leaders? Unfortunately, in the current public education system, some children are deprived of fulfilling their leadership potential.

This paper will posit American individualism, coupled with its historical and modern-day racism, has bred a nation of indifferent individuals who hide behind the rhetoric of private choice to justify blatant educational inequities, most notably exemplified in judicial decisions on public education and legislative actions. In exploring extreme American individualism, this paper will focus narrowly on elementary and secondary education, as well as the case law surrounding education funding.

The first part of this paper discusses past and present inequities in funding public education, with specific emphasis on Illinois. This paper argues conditions in Illinois have not improved despite the changes that have been made. The second part discusses the concept of a “judicial blindfold” – how a prevailing majority of the United States Supreme Court has closed its eyes to the immense damage certain individual private choices cause to society as a whole. This portion also examines how the Illinois Supreme Court has followed in the footsteps of the United States Supreme Court, as well as how the legislatures of several states have responded to the issue of educational inequality. The third part specifically explores how American individualism justifies willful blindness and indifference to blatant educational inequities. This paper proposes that a cultural shift is necessary to address these inequalities. The paper further advises that a shift may be accomplished through understanding the inherent connection between education and the liberty to participate in a democratic government, which is exemplified by Justice Kennedy’s liberal jurisprudence. This paper concludes with responses to an anticipated originalist critique; even though the founders regarded education as necessary for the realization
of a free and democratic government, the founders did not anticipate this characterization of education.

I. A LOOK AT THE STATE OF PUBLIC SCHOOLS IN AMERICA: THEN AND NOW

Illinois

In his book, *Savage Inequalities: Children in America’s Schools*, Jonathan Kozol recounts his personal observations from the 1980s of the vast disparities in the public school system between classes and races in East Saint Louis, Chicago, New York City, and Camden amongst other cities. In the first two chapters, Kozol described schools predominantly attended by Black and Hispanic children in East Saint Louis and Chicago, where systematic problems in each city impacted the local school districts. In Chicago, Kozol noted an aging teacher predicament, finding a two-to-one ratio of teachers older than sixty years of age compared to teachers younger than thirty years of age. Compounding the aging teacher dilemma, the school district’s low salary scale made it difficult to attract youthful teachers. Consequently, these circumstances forced the city to rely on low-paid and sometimes unreliable substitutes, who represented more than one-quarter of the teaching force. Worse yet, the local systematic problems also created a school supply shortage, such that in one Chicago school, a deficiency of

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3. *Id.* at 7, 23, 42.

4. *Id.* at 51.

5. *Id.*

6. *Id.* at 51-52.
beakers and Bunsen burners forced a chemistry class to substitute popcorn poppers for Bunsen burners and pieces of plastic soda bottles for laboratory dishes. Other examples of the effects of funding shortages ranged from the use of outdated textbooks and non-existent science laboratories to insufficient bathroom facilities with only two functioning facilities for 700 children. Alternatively, a nearby affluent, suburban school, where Black children constituted only 1.3% of the total school population, boasted superior laboratories, up-to-date technology, seven gymnasiums, and even an Olympic-sized pool.

The evident disparities between Chicago and neighboring suburban schools did not arise by happenstance. The parents of students who attended those more affluent, suburban districts consistently vetoed redistribution of school funding to the poorer districts by a ratio of nine-to-one. That sentiment was echoed by suburban legislators who characterized the poorer districts as “sinkhole[s]”; to further elaborate, Governor Thompson explained, “[w]e can’t keep throwing money into a black hole.” As a result of those legislative funding decisions, high schools in Chicago received at least $3,000 less for each student per year in comparison to the amounts received by affluent neighboring suburban public high schools in 1989. Kozol explained the discrepancy was due, at least in part, to the “arcane machinery” by which Illinois financed public education – property taxes.

Although local property taxes were offset by federal and state contributions, those supplemental contributions were insufficient to account for the local wealth disparities amongst the city and its suburbs. Cities’ limited tax revenues must also be diverted to meet non-educational needs that wealthy suburbs face on a more modest level. For example, police and fire department costs are greater in cities as a result of higher crime rates and more dilapidated housing. According to Kozol, total yearly spending in Illinois, accounting for all funding sources, ranged from $2,100 per student in the poorest districts to more than $10,000 per student.

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7 Id. at 52.
8 Id. at 63.
9 Id. at 66.
10 Id. at 65.
11 Id. at 67.
12 Id. at 53.
13 Id. at 54.
14 Id.
15 See id. at 55.
16 Id. at 56.
17 Id.
in the richest districts.\textsuperscript{18} Such funding inconsistencies translate to vast discrepancies in educational aptitudes;\textsuperscript{19} 27\% of high school graduates read at an eighth-grade reading level or below, whereas many students who attended affluent suburban schools read at a twelfth-grade level by the time they were in seventh grade.\textsuperscript{20} Kozol estimated that “nearly half the kindergarten children in Chicago’s public schools [would] exit school as marginal illiterates.”\textsuperscript{21}

While there have been changes since Kozol wrote his book in the late 1980s, some conditions have remained the same. Educational disparities between districts persist due to Illinois’ continued overreliance on local property tax funding.\textsuperscript{22} Although the Illinois constitution places the “primary responsibility to finance public education” on the state,\textsuperscript{23} “the [s]tate pays only 36\% of school expenses compared to the national average of 50\%.”\textsuperscript{24} In 2010, Illinois was one of three states that received an failing grade for funding fairness in a report prepared by Forbes;\textsuperscript{25} more recently, in 2012, Illinois was ranked 48\textsuperscript{th} in the nation for state funding of public schools.\textsuperscript{26} The per-pupil expenditure in predominantly minority districts was approximately half of the per pupil expenditure in predominantly White districts.\textsuperscript{27} For example, Northbrook School District, which was over 97\% White and Asian, spent $15,706 per student annually, whereas Dolton School District, which was 97.6\% Black, spent only $7,978 per student annually.\textsuperscript{28}

Not only have per pupil expenditure discrepancies remained, but the racial composition of failing public schools continues to mirror the statistics noted in Kozol’s book. As of 2004, in Illinois, “a [B]lack student [was forty times] more likely to attend a chronically failing public

\begin{footnotesize}
\begin{enumerate}
\item Id. at 57.
\item See id. at 58.
\item Id. at 65.
\item Id. at 58.
\item See Rick Guzman, An Argument for a Return to Plessy v. Ferguson: Why Illinois Schools Should Reconsider the Doctrine of “Separate but Equal” Public Schools, 29 N. Ill. U. L. Rev. 149, 162 (2008). Despite its complexity, the Illinois school funding formula essentially sets a minimum pupil expenditure and then distributes General State Aid based on a three-tiered system, which considers the ability of a school district to pay, average daily attendance, and the poverty concentration of students within the district, to distribute state aid to the districts with the greatest need, although the formula does little to compensate for the overreliance on property taxes. Id.
\item ILL. CONST. art. X, § 1.
\item See Guzman, supra note 22, at 163.
\item Id.
\item See Guzman, supra note 22, at 162.
\item Id.
\end{enumerate}
\end{footnotesize}
school than a white student” since a majority of the state’s worst schools are predominantly Black.  

Correspondingly, “[a] recent study by The Civil Rights Project at Harvard University ranked Illinois . . . ‘among the top four segregated states in the nation for [B]lack students.’”

In addition, current reading levels have hardly improved since the release of Kozol’s book; there are still enormous disparities amongst neighboring Illinois schools, such as between Aurora and Naperville. In Aurora, where 90% of the student body is Black or Hispanic, “fewer than [29% of its high school students] met the reading standards,” while “over 70% of the students met or exceeded the reading standards in Naperville’s predominantly White . . . high school.” Teachers in districts comparable to Naperville are paid 20% higher salaries than those in districts like Aurora, which provide substantial incentives and prove to be more attractive for attaining and retaining quality teachers. These phenomena are similar to those described by Kozol in the late 1980s. While Illinois schools may now possess more than two working facilities for 700 students and working Bunsen burners, equality in public education remains out of reach for some of the Illinois populace.

New Jersey

New Jersey’s public education system has also been criticized for the sustained disparate conditions its students experience. Kozol observed the public schools of Camden, East Orange, and Jersey City, which faced, much like urban schools in Illinois, teacher and supply shortages in some districts, disparate conditions between neighboring public schools, and the effect of overreliance on local property taxes for educational funding.

The difficulties Illinois faced in attracting and retaining quality teachers was also a
predicament in some New Jersey public schools.\textsuperscript{38} The principal of Pyne Point Junior High School simply explained that “[s]alaries are far too low[;] . . . teachers have to work two jobs to pay the rent.”\textsuperscript{39} The same public schools with teacher shortages also lacked basic supplies.\textsuperscript{40} In Camden, Kozol noted half of the students had no textbooks.\textsuperscript{41} In Pyne Point Junior High, the typing teacher utilized “battered-looking” typewriters “that should have been thrown out ten years [prior]” for computer instruction\textsuperscript{42} and science classrooms in some districts contained neither laboratory stations nor proper instruments – students utilized plastic cocktail glasses for makeshift beakers.\textsuperscript{43} Additionally, similar to Illinois, some New Jersey public school facilities were rundown exposed plaster remnants where ceiling tiles were once located and school yards littered with various forms of refuse, including hypodermic needles discarded by nearby medical labs.\textsuperscript{44}

According to Kozol, the deplorable conditions in some New Jersey public schools were nonexistent in neighboring districts.\textsuperscript{45} Compare, for instance, the East Orange High School, with 2,000 students, 99\% of whom were Black, which had four physical education teachers and no track field, to the nearby Montclair High School, which had two recreation fields, four gyms, a dance room, a wrestling room, a weight room with a universal gym, tennis courts, a track, indoor areas for fencing, and, not to mention, thirteen full-time physical education teachers for its 1,900 students.\textsuperscript{46} When per-pupil spending was compared, another nearby district, Millburn, spent $1,500 more per student than East Orange.\textsuperscript{47} These inequalities were a result of New Jersey’s educational funding method.\textsuperscript{48}

Despite new legislation aimed to address these disparities, little has changed for the

\textsuperscript{38} Id. at 141.
\textsuperscript{39} Id.
\textsuperscript{40} Id.
\textsuperscript{41} Id. at 138, 141.
\textsuperscript{42} Id. at 138-39.
\textsuperscript{43} Id. at 139.
\textsuperscript{44} Id. at 139-40.
\textsuperscript{45} Id. at 157.
\textsuperscript{46} Id.
\textsuperscript{47} Id.
\textsuperscript{48} See N.J. DEP’T OF EDUC., Education Funding Report, 54 (Feb. 23, 2012), http://www.nj.gov/education/stateaid/1213/report.pdf (“Before [the amount of State aid provided to the district] . . . can be calculated, the district’s “Local Fair Share” must be determined; Local Fair Share is the Department’s estimate of the district’s ability to raise local levy based on the district’s equalized property and income wealth. A district’s Adequacy Budget, less its Local Fair Share, is the amount of State aid due the district.”).
underfunded New Jersey public schools.\textsuperscript{49} Introduced in 2012, the Urban Hope Act “represented the first major departure in how state policy and programs deal with [thirty-one] low-income school districts.”\textsuperscript{50} The legislation enabled up to four public-private schools to be built and run by nonprofit organizations appointed by school boards.\textsuperscript{51} The Act’s effectiveness was quickly challenged; ultimately, further budget cuts for poor school districts were presented before the New Jersey Budget Committee.\textsuperscript{52}

II. JUDICIAL BLINDFOLD AND LEGISLATIVE RESPONSES

Judicial Blindfold

Decisions by the U.S. Supreme Court in conjunction with some state supreme courts have either circumvented or abstained from the issue of educational inequities. Case law from the United States Supreme Court and the Illinois Supreme Court illustrates such judicial inaction.

U.S. Supreme Court

The Supreme Court in \textit{Plessy v. Ferguson} promulgated the long-standing doctrine of separate but equal,\textsuperscript{53} which remained in force until \textit{Brown v. Board of Education}.\textsuperscript{54} In \textit{Brown}, the Supreme Court recognized the importance of educational equality:

\begin{quote}
[Education is perhaps the most important function of state and local governments. . . . It is required in the performance of our most basic public responsibilities. . . . It is the very foundation of good citizenship. . . . In these
\end{quote}


\textsuperscript{50} \textit{Id.}

\textsuperscript{51} \textit{Id.}


\textsuperscript{53} \textit{Plessy v. Ferguson}, 163 U.S. 537 (1896) (holding that separate facilities for Blacks and Whites satisfied the Fourteenth Amendment so long as those facilities were also equal).

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.\textsuperscript{55}

Nineteen years later, the Supreme Court had another opportunity to remove barriers, specifically wealth-based barriers, to equal educational opportunities in \textit{San Antonio Independent School District v. Rodriguez}.\textsuperscript{56} The Court, however, rejected plaintiffs’ claim under the Equal Protection Clause of the Fourteenth Amendment and upheld the Texas system of financing public education even though it was largely responsible for substantial inter-district disparities stemming from the differences in the amounts of money collected through local property taxation.\textsuperscript{57} In so holding, the Court determined the poor were not a suspect class\textsuperscript{58} and education was not a fundamental right entitled to strict scrutiny review.\textsuperscript{59}

The Court’s holding in \textit{San Antonio Independent School District} also questioned the assumption that the “poorest families are . . . clustered in the poorest property districts.”\textsuperscript{60} To rebut that assumption, the Court cited only one report from Connecticut\textsuperscript{61} and ignored evidence to the contrary.\textsuperscript{62} “Indeed, there is reason to believe that the poorest families are not necessarily clustered in the poorest property districts. A recent and exhaustive study of school districts in Connecticut concluded that [i]t is clearly incorrect . . . to contend that the ‘poor’ live in ‘poor’ districts.”\textsuperscript{63} That reasoning begs the question: where exactly do the poor live? The Court circumvented the logical connection between wealth and environment – poor individuals usually cannot afford to live in an affluent district and will, therefore, most likely, live in a poor

\textsuperscript{55} Id. at 493 (emphasis added).
\textsuperscript{57} See id. at 15, 54-55.

\textsuperscript{58} Id. at 22-25 (Appellees failed to demonstrate the system operated to the “peculiar disadvantage of any class definable as indignant, or a composed of persons whose incomes are beneath any designated poverty level, . . . [to address] the fact that . . . lack of personal resources has not occasioned an absolute deprivation of the desired benefit[;] . . . [and to define any] . . . of the traditional indicia of suspectness.”).
\textsuperscript{59} Id. at 35-40 (noting “[e]ducation . . . [was] not among the rights afforded explicit protection in the Federal Constitution,” and the absolute denial of a federal government benefit was not at stake but a system providing a relatively worse public benefit was the basis).
\textsuperscript{60} Id. at 23.

\textsuperscript{61} Id. at 22-23; \textit{see also} Guzman, \textit{supra} note 22, at 174 (noting the astounding nature of the majority’s sweeping generalization based on a single uncorroborated study from Connecticut).

\textsuperscript{62} \textit{See} Kimberly Jenkins Robinson, \textit{The Case for a Collaborative Enforcement Model for a Federal Right to Education}, 40 U.C. Davis L. Rev. 1653, 1655-56 (2007) (citing several studies which show that low income and minority school children attend inferior schools relative to their more affluent and white counterparts).

\textsuperscript{63} \textit{San Antonio Indep. Sch. Dist.}, 411 U.S. at 23 (emphasis in original).
Consequently, according to Justice Marshall, the majority ignored Brown’s earlier mandate – to make education available on equal terms.\(^\text{65}\) In his dissent, Justice Marshall noted:

> Appellees do not now seek the best education Texas might provide. They do seek, however, an end to state discrimination resulting from the unequal distribution of taxable district property wealth that directly impairs the ability of some districts to provide the same educational opportunity that other districts can provide with the same or even substantially less tax effort. The issue is, in other words, one of discrimination that affects the quality of education which Texas has chosen to provide its children.\(^\text{66}\)

Nine years later in Plyler v. Doe, the Supreme Court invalidated a Texas law which effectively denied the right of education to undocumented children.\(^\text{67}\) In light of the total deprivation of education at issue, the Doe Court focused on the effect the Texas law would have on children of illegal immigrants.\(^\text{68}\) The Court considered the harm of decreased literacy, individual advancement, and self-sufficiency, as well as the social, economic, intellectual, and psychological effects the law would have on the students.\(^\text{69}\)

The Court’s reasoning in Plyler should also apply to a system of education that produces, essentially, the same harmful effects through grossly unequal education stemming from unequal funding.\(^\text{70}\) Due to the Supreme Court’s arguable abstention from addressing educational inequities, the issue became the states’ responsibility.

Illinois Supreme Court

In line with the aforementioned jurisprudence of the United States Supreme Court, the Supreme Court of Illinois held there was no constitutional guarantee of educational equality in Committee for Educational Rights v. Edgar.\(^\text{71}\) In Edgar, the plaintiffs alleged “under the present financing scheme, vast differences in educational resources and opportunities exist among the state’s school districts as a result of differences in local taxable property wealth[.]”\(^\text{72}\)

\(^{64}\) See Robinson, \textit{supra} note 63, at 1655-56.

\(^{65}\) \textit{San Antonio Indep. Sch. Dist.}, 411 U.S. at 70-72.

\(^{66}\) \textit{Id.} at 115-16 (Marshall, J., dissenting).


\(^{68}\) \textit{Id.} at 222-24

\(^{69}\) \textit{Id.}

\(^{70}\) Guzman, \textit{supra} note 22, at 176-77 (evidence showed that entire classes of children are functionally illiterate or more than 90% non-proficient).


\(^{72}\) \textit{Id.} at 1182.
In its opinion, the court examined various provisions on education in the Illinois Constitution:

A fundamental goal of the People of the State is the educational development of all persons to the limits of their capacities. The State shall provide for an efficient system of high quality public educational institutions and services. . . . The State has the primary responsibility for financing the system of public education.

To rationalize its holding in light of the language of the Illinois Constitution, the majority explained the constitutional language merely states it was the “goal” of the state to provide the best possible education, which does not equate to a constitutional guarantee of educational equality in the state of Illinois.

Interestingly, the court failed to note the modifier immediately preceding “goal” in the state Constitution: “fundamental.” When phrased as it is found in the state constitution – “A fundamental goal of the People of the State is the educational development of all persons to the limits of their capacities” – the language mandates educational development be pursued methodically. Other states have found state constitution provisions describing educational development as a fundamental goal raises the status of education to that of a fundamental right, based on even less stringent language in their respective Constitutions. The Edgar court also held that the “high quality” language used in the Illinois Constitution did not provide a principled basis for judicial standardization and, therefore, the task of defining high quality education was not a judicial function. As dissenting Justice Freeman noted, however, interpretation of the law is the province of the judiciary. Nevertheless, the Illinois Supreme Court left the Illinois Legislature to define “high quality education.” Since education has been placed within the

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73 Id.
74 Id. at 1183.
75 ILL. CONST. art. X, § 1.
76 Edgar, 672 N.E.2d at 1187 (“[T]his court reviewed [the legislative history] . . . and held that the final sentence of section [one] ‘was intended only to express a goal or objective, and not to state a specific command.’”)
77 See id.
78 ILL. CONST. art. X, § 1 (emphasis added).
79 See, e.g., N.H. CONST. pt. II, art. 83; see also Claremont Sch. Dist. v. Governor, 703 A.2d 1353, 1358 (N.H. 1997) (“[f]irst and foremost is the fact that our State Constitution specifically charges the legislature with the duty to provide public education. This fact alone is sufficient in our view to accord fundamental right status to the beneficiaries of the duty.”)
80 Edgar, 672 N.E.2d at 1191.
81 Id. at 1193.
82 See id. at 1207 (Freeman, J., concurring in part and dissenting in part).
83 See id. at 1193.
purview of states legislatures, each state has unsurprisingly defined its duty differently.\textsuperscript{84}

\textit{Legislative Responses}

Since the United States Supreme Court determined education was not a fundamental right,\textsuperscript{85} subsequent state legislative responses to improve educational equality in their respective states have varied.

\textbf{Illinois}

The Illinois Legislature has continued its overreliance on property taxes, despite overwhelming evidence that the system perpetuates the disparities between the highest- and lowest-poverty districts,\textsuperscript{86} consequently, Illinois sustains the worst achievement gap between poor and wealthy students in the nation.\textsuperscript{87} Specifically, the state uses a foundational formula to determine how much the state will contribute to each district to afford every student a “high quality” education.\textsuperscript{88} Originally, the “high quality” education level was set arbitrarily; now, the level is tied to real performance standards on the Illinois SAT.\textsuperscript{89} Despite improvements, the system has yet to properly supply Blacks and other minority students with an adequate education, let alone a “high quality” education.\textsuperscript{90}

\textbf{New Jersey}

Unlike the Illinois Supreme Court, the Supreme Court of New Jersey in \textit{Robinson v. Cahill} held the New Jersey Legislature’s system of financing public education violated the state’s constitutional guarantee of a “thorough and efficient” education due to the great disparity in per-pupil spending.\textsuperscript{91} The New Jersey Legislature, however, refused to comply with the

\begin{itemize}
\item \textsuperscript{84} See Appendix II for constitutional language used by each state to provide for education.
\item \textsuperscript{85} \textit{San Antonio Indep. Sch. Dist.}, 411 U.S. at 35.
\item \textsuperscript{86} Guzman, \textit{supra} note 22, at 162.
\item \textsuperscript{87} \textit{Id.}
\item \textsuperscript{88} Lucille L. T. Eckrich, \textit{Public School Funding in Illinois}, Ill. State Univ. (2011-12), http://my.ilstu.edu/~lteckri/PublicSchoolFundingInIllinoisFY12.pdf.
\item \textsuperscript{89} \textit{Id.}
\item \textsuperscript{90} See Guzman, \textit{supra} note 222, at 160.
\item \textsuperscript{91} Robinson v. Cahill, 303 A.2d 273, 297-98 (N.J. 1973).
\end{itemize}
court’s order until, after numerous legal challenges, the court closed the schools.92 The legislature’s reluctant compliance resulted in the passage of the Public School Education Act of 1975.93 That legislation was challenged with a later series of litigation in Abbott v. Burke.94 Specifically, plaintiffs alleged the Act did not sufficiently ameliorate the disparities between poor and wealthy districts.95 During the legislature’s multiple attempts to obey the court’s ruling to equalize funding, Abbott returned to the New Jersey Supreme Court twelve times.96 In its twelfth decision, the court approved various additional programs for the Abbott districts; the legislature complied with the court order to achieve parity.97 The aforementioned Urban Hope Act was also designed to equalize public school funding across districts.98 The effectiveness of that legislation has yet to be determined.

New York

In 2007, New York passed the Education Budget and Reform Act of 2007 that doled out more aid to public schools in poorer districts.99 Financial aid provided from 2007 through 2009 assisted schools by providing additional assistance to struggling students, reducing class sizes, and expanding programs that made school more engaging.100 Due to the budget crisis, however, these funds were frozen and the governor proposed an additional $1.4 billion in cuts to education funding, which would bring poor public schools back to their original funding levels.101

Texas

In recent years, Texas’ state sponsorship of public education has ranged from 33% to 45% while local property tax sponsorship has remained relatively constant around 45%, with the remaining amounts coming from federal sources, which demonstrates a significant continued

94 Id. at 454-56.
95 Id.
96 Ryan, supra note 92, at 459-61.
97 Id. at 461.
100 Id.
101 Id.
reliance on property taxes.\textsuperscript{102} The state has seen numerous attempts at reform, one of which proposed to use funds from the state’s education foundation to assist local districts that were unable to generate the minimum prescribed funding amount through property taxes.\textsuperscript{103} Critics contend this is not an effective equalization plan because it forces wealthy districts to send money to poorer districts without impartial state oversight.\textsuperscript{104}

Kentucky

Other state legislatures, for example, Kentucky’s, have followed their respective state supreme courts’ directives. The Kentucky Legislature enacted a sweeping and thorough reform package after the Supreme Court of Kentucky held that the state’s entire system of funding was unconstitutional and commanded the Kentucky Legislature to “re-create and re-establish a system.”\textsuperscript{105} The newly reformed package, the Kentucky Education Reform Act, “both increased expenditures overall and reduced spending disparities.”\textsuperscript{106} As a result, state funding increased by 34\%,\textsuperscript{107} and “the range between high- and low-spending districts dropped by 27\%.”\textsuperscript{108} The Act was “hailed as the ‘nation’s most comprehensive experiment in educational reform.’”\textsuperscript{109} The plaintiffs, who brought the lawsuit prompting reform, were from predominantly White, rural districts.\textsuperscript{110} Significantly, plaintiffs from White, rural districts tend to be more successful in bringing forth litigation that results in successful educational reform than plaintiffs from predominantly minority districts.\textsuperscript{111}

Vermont

In \textit{Brigham v. State}, the Supreme Court of Vermont held that revenue disparities created by state reliance on local property taxes deprived children of their constitutional right to equal

\textsuperscript{102}Texas Taxpayers and Research Association, \textit{An Introduction to School Finance in Texas} (2012), \url{available at http://www.ttara.org/files/document/file-4f1732f763446.pdf}.


\textsuperscript{104}Id.


\textsuperscript{106}Ryan, \textit{supra} note 92, at 466.

\textsuperscript{107}Id.

\textsuperscript{108}Id.

\textsuperscript{109}Id.

\textsuperscript{110}Id.

\textsuperscript{111}Id. (detailing evidence tending to show that legislative responses to court orders when minority districts win are more obstinate than when non-minority districts with similar challenges win).
educational opportunities. Four months after that decision, the Vermont Legislature enacted a bill creating a statewide reserve from property taxes for schools, which gave Vermont a mechanism to reallocate locally generated funds from wealthy districts to other districts. This “Robin Hood” approach generated widespread debate and opposition from taxpayers in wealthy districts. Legislation to end inequitable educational funding has been characterized as a “foot-dragging, half-hearted, two-faced effort, accompanied by much hemming and hawing, whimpering and whining, and winking and nodding.” This type of characterization is frequently employed by the public in its open and fierce opposition to the proposed plan of devoting additional resources to public schools attended primarily by minority children.

III. THE NEED FOR A CULTURAL SHIFT

The Role of American Individualism in the Current State of American Public Schools

The beauty of American individualism can be found in the U.S. Supreme Court’s protection of minority rights through its recognition of implicit Constitutional rights, such as the right to privacy and the right to raise one’s children as one sees fit. American culture, however, does not always cultivate societal harmony. Alexis Henri de Tocqueville described that concept in his book Democracy in America. He portrayed American individualism as

[a] mature and calm feeling, which disposes each member of the community to sever himself from the mass of his fellows and to draw apart with his family and friends, so that after he has thus formed a little circle of his own, he willingly

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113 Ryan, supra note 92, at 467-68.
114 Id. at 468.
116 Ryan, supra note 92, at 471.
American individualism is underlies the discourse of public school funding. As previously mentioned, the beauty of collectivism is the willingness to overlook one’s individual needs for the collective’s so that societal harmony may prevail. Society, unfortunately, does not embrace this ideal; the White majority has severed itself from its fellow creatures, leaving the rest of society to fend for itself.\textsuperscript{120} An example of such a cultural void is illustrated with the current divide found in Illinois public schools.\textsuperscript{121} American individualism lacks an explanation for the majority’s open and fierce rejection of attempts to equalize funding for all public schools,\textsuperscript{122} especially given the potential for great improvement in education quality for minority students. As previously mentioned, attempts at reform have either been met by a blind judiciary\textsuperscript{123} or legislative recalcitrance.\textsuperscript{124} When state legislatures institute change to benefit predominantly Black or Hispanic school districts, public outrage frequently pours from predominantly White districts.\textsuperscript{125}

W.E.B. Du Bois’ characterization of the White identity in his book, \textit{Souls of White Folk}, written over a hundred years ago, rings true even in today’s continuing battle over educational equality:

\begin{quote}
Being [W]hite means . . . having the power to reduce some realities to abstractions; to reduce some lives to statistics; to reduce some communities to worlds that are pervasively “different” and that intrude on “our” world only to the extent that they are at times geographically, or politically, proximate to our destinations. It means having the power to isolate and ignore.\textsuperscript{126}
\end{quote}

Du Bois’ proposes an unnervingly accurate description of judicial and legislative responses to inequality within educational institutions. How else may the obstinate reaction to equalizing education be explained? Of course, many would take offense to the suggestion that they are racist, but willful indifference is just as destructive. When individuals blur inequities by repeating rhetoric about private choice, they hide behind the notion that racism no longer exists.

\begin{flushright}
\textsuperscript{120} Id.
\textsuperscript{121} Guzman, supra note 22, at 155-57 (noting that Illinois is one of the most segregated states in the nation).
\textsuperscript{122} Ryan, supra note 92, at 472-73.
\textsuperscript{123} Guzman, supra note 22, at 120.
\textsuperscript{124} See Ryan, supra note 92, at 457.
\textsuperscript{125} See id. at 467-68.
\end{flushright}
and placate themselves with the idea that they have nothing against racial minorities. By doing so, members of the White majority have transformed from active civil rights advocates, who made great strides toward equality, to “passive people of goodwill who think they do no harm.” There is still an unyielding barrier, or “glass ceiling,” evidenced by various sociological studies—

[Ninety-seven percent of the senior managers of Fortune 1000 industrial and Fortune 500 companies are white; 95 to 97% are male. . . . African American men with professional degrees earn 79% of the amount earned by white males who hold the same degrees and are in the same job categories.]

In general, the income of America’s White citizens averages approximately double that of America’s Black citizens; in addition, White citizens are two times more likely than Black citizens to live in a family with an income exceeding $50,000. Due to this income disparity, “public schools remain largely, involuntarily racially segregated.”

Research suggests individualism is correlated to negative racial attitudes and behavior, including a lack of empathy and discounting effects of racial discrimination. That notion explains the unending battle surrounding the creation of equal educational opportunities for minority students in America today. The idea that the current state of education cannot be attributed to any one individual, but instead is the result of private choice, is contradicted by both the history and present-day reality of American racism. Public schools in America are indeed the result of historical racial prejudice sanctioned by the state, coupled with modern day willful indifference, which is fostered by the “canon of ‘colorblindness’” and “the ethos of ‘individual choice.’” There is abundant evidence demonstrating inadequate funding results in inadequate education, which places all students in a position where they may not succeed and reach their

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127 See Hayman, supra note 115, at 674; Sharon Elizabeth Rush, Sharing Space: Why Racial Goodwill Isn’t Enough, 32 Conn. L. Rev. 1, 19 (1999) (discussing the identity of white people with goodwill, who advocate for color-blindness and reject affirmative action because in their view, racial equality already exists).

128 Rush, supra note 127, at 19.


130 See Hayman, supra note 115, at 678.

131 Rush, supra note 127, at 21 (emphasis added).

132 Hayman, supra note 115, at 674; see also PAUL M. SNIDERMAN & MICHAEL G. HAGEN, RACE AND INEQUALITY: A STUDY IN AMERICAN VALUES 107, 112 (1985).

133 Hayman, supra note 115, at 674.

134 Id.

135 See, e.g., Kozol, supra note 2.
full potential. Thus, many minority students in America are educated merely so that they remain in the same social status into which they were born.\textsuperscript{136} With such a state of affairs, the current public education system is arguably reminiscent of a time in American history when the some believed that Blacks should only receive vocational education.\textsuperscript{137}

\textit{Collectivism is the Way Forward}

A cultural shift is necessary. Society must recognize the damage that willful indifference and blindness can cause to minority students who are denied equal educational opportunities. Knowledge of racism is insufficient; deliberate steps must be taken to acknowledge and overcome the practical effects of racism so society as a whole can benefit.\textsuperscript{138} Minority students are not the only victims of educational inequality.\textsuperscript{139} While \textit{de jure} segregation is now prohibited and purposeful racism is no longer the norm, students often encounter the same segregation as preceding generations.\textsuperscript{140} These students, who come of age in homogenous schools, are likely to perpetuate the same evil previous generations faced, as younger generations emerge as the leaders of tomorrow.\textsuperscript{141} “‘Racism’ is perpetuated, in a sense, by its own long-standing tradition . . . [I]nauthentic attempts to resolve the dissonance may actually be the entrenchment of racist beliefs.”\textsuperscript{142} Consequently, American society is plagued with a never-ending cycle.

This predicament, however, is not insurmountable. Indeed, evidence suggests racism can be unlearned.\textsuperscript{143} If racism can be unlearned, the requisite cultural shift is possible and equal opportunities will be available for \textit{all} students, regardless of race or ethnicity.

\begin{itemize}
  \item \textsuperscript{138}See Rush, supra note 127, at 30-31.
  \item \textsuperscript{139}See, e.g., Ryan, supra note 92, at 473 (studies show that 82\% of whites assumed school finance reform would benefit only minorities).
  \item \textsuperscript{140}See Hayman, supra note 115, at 669-70.
  \item \textsuperscript{141}\textit{Id.}
  \item \textsuperscript{142}\textit{Id.}
  \item \textsuperscript{143}\textit{Id.} at 670.
\end{itemize}
Justice Kennedy’s Liberal Jurisprudence as a Means of Achieving Collectivism

A cultural shift may be achieved in the same manner in which cultural shifts are often achieved: through the judiciary. The U.S. Supreme Court’s awareness of the effects of educational inequity was demonstrated in landmark decisions which have shaped the nation’s ideology in many respects. Justice Kennedy’s opinions on liberty interests, especially those regarding free speech, are enlightening. His approach is relevant, as it recognizes that such freedoms inevitably depend upon an educated public. Many state constitutions have already recognized the connection between education and the liberty to participate in our democratic government. As previously demonstrated in parts I and II, students in predominantly minority districts have not received, historically or presently, the education necessary to properly equip them to participate in a democratic government. Consequently, there can be no true marketplace of ideas if a substantial number of citizens – in this case, minorities – lack the requisite tools to exercise their free speech right.

Justice Kennedy’s position on liberty is influenced by egalitarian philosophers, such as John Stuart Mill. Mill remarked upon the importance of the freedom of speech: “[F]reedom of ideas if a substantial number of citizens . . . on the part of every voter in a government by means of Achieving Collectivism

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144 Hayman, supra note 115, at 728 (explaining Supreme Court decisions “send a powerful normative message about the behaviors that are constitutionally acceptable and socially appropriate”).


147 See, e.g., CAL. CONST. art. IX § 1 (provides that “a general diffusion of knowledge and intelligence [is] essential to the preservation of the rights and liberties of the people”); TEX. art. VII, § 1 (provides that “a general diffusion of knowledge [is] essential to the preservation of the rights and liberties of the people”); ARK. CONST. art. 14, § 1 (provides that “intelligence and virtue [are] the safeguards of liberty and the bulwark of a free and good government); MO. CONST. art. IX, § 1(a) (provides that “a general diffusion of knowledge and intelligence [is] essential to the preservation of the rights and liberties of the people”); IDAHO CONST. art. IX, § 1 (provides that “the stability of a republican form of government depend[s] mainly upon the intelligence of the people”); N.D. CONST. art. VIII, § 1 (provides that “a high degree of intelligence . . . on the part of every voter in a government by the people [is] necessary in order to insure the continuance of that government and the prosperity and happiness of the people”); IND. CONST. art. 8, § 1 (provides that “knowledge and learning, generally diffused throughout a community, [is] essential to the preservation of a free government”); S.D. CONST. art VIII, § 1 (provides that “the stability of a republican form of government depend[s] on the…intelligence of the people”); MINN. CONST., art. XIII, § 1 (provides that “the stability of a republican form of government depend[s] mainly upon the intelligence of the people”); R.I. CONST. art. XII, § 1 (provides also that “the diffusion of knowledge, as well as of virtue among the people, [is] essential to the preservation of their rights and liberties”); N.H. CONST. pt. second, art. 83 (provides that “knowledge and learning, [is] essential to the preservation of a free government”); ME. CONST. art. VIII, Pt. 1, § 1 (provides that “a general diffusion of the advantages of education [is] essential to the preservation of the rights and liberties of the people”).

of opinion, and freedom of the expression of opinion’ is necessary ‘to the mental well-being of mankind (on which all their other well-being depends).’”

Justice Kennedy’s subscription to this ideology helps explain his opinions in cases such as Citizens United v. Federal Election Commission, Simon & Schuster, Inc. v. Members of N.Y. Crime Victims Board, and Hill v. Colorado, which all demonstrate his aversion to interfering with an individual’s constitutional right of expression.

Justice Kennedy’s liberal jurisprudence aims at protecting human dignity and remedying the inability of a person to reach his or her potential. Educational inequity presents precisely the problem that Justice Kennedy’s jurisprudence has sought to limit: “Kennedy’s conception of dignity . . . [emphasizes] enabling people to . . . pursue their own constitutional visions.” Students deprived of an adequate education will struggle to make this pursuit.

Moreover, the essence of a democratic system is the ability of citizens to critique their government. A true democratic system is unattainable if only some are prepared to participate by receiving a proper education. Similarly, an educational funding mechanism that results in disparate opportunities between the affluent and non-affluent, such as the type employed in Illinois, does not provide the foundation for students to reach their potential and fully participate in the democratic process. Application of a liberal jurisprudence, which specifically emphasizes the value of human dignity, is necessary to remedy the aforementioned situation.

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149 Id. at 8 (quoting J.S. Mill, ON LIBERTY (1859)).

150 Citizens United v. Fed. Election Comm., 558 U.S. 310, 339 (Justice Kennedy detailed the importance of speech in a democratic government, stating “Speech is an essential mechanism of democracy. . . . The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it.”).

151 Simon & Schuster, Inc. v. Members of the N.Y. Crime Victims Bd., 502 U.S. 105, 123-25 (1991) (Justice Kennedy wrote a concurring opinion supporting the court’s holding that a New York law designed to prevent criminals from profiting from the publication of memoirs about their crimes was unconstitutional. According to him, it was “unnecessary and incorrect” to ask whether the challenged law was justified by any compelling state interest because “the sole question is, or ought to be, whether the restriction is in fact content based,” . . . and if the answer was “yes,” the law could not be constitutionally sustained.).


153 See Kelso, supra note 148.

154 Knowles, supra note 152, at 43.

155 Id.

156 Citizens United, 558 U.S. at 339.

157 Knowles, supra note 152, at 42-43.

158 Id. at 43.
As soon as society realizes equal educational opportunities are necessary for a better government, a better populace, a better democracy – in essence, a better collective – the aforementioned cultural shift will have begun.

Responses

Naturally, the first response to the position of this paper is increasing funding does not necessarily result in better schools and better student performance. Indeed, one Pennsylvania school district epitomizes this position. The Chester Upland School District is one of the poorest school districts in Pennsylvania and receives 70% of its budget from the state. Program cuts, staff furloughs, and claims of mismanagement are recurrent within this district. A report from Education Secretary Ronald Tomalis found the “school district's fiscal records [] in ‘complete disarray,’ and officials there cannot be trusted to spend . . . state subsidies on essential items.” In January, 2012, a federal judge ordered the state to provide the district $3.2 million to cover payrolls and bills for a month. Secretary Tomalis' report describes an “almost irretrievably broken system of managing district finances and personnel, including a payroll with 54 questionable or unverified employees” and by example discusses a consultant who “could not recall another school district whose business office was in such poor shape in terms of lack of documentation, internal controls and infrastructure.”

No doubt, proper management is essential if the results anticipated by this article are to be achieved, but the funds to be managed must be available in the first place. It has already been established that wealthier districts look remarkably better, have more facilities and personnel, and provide significantly more opportunities for its students, than schools in poorer districts. Indeed, where funding for poorer school districts was increased through legislative action or state

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160 See Matheson, supra note 159.
161 See Hardy, supra note 159.
162 Matheson, supra note 159.
163 Hardy, supra note 159.
164 Matheson, supra note 159.
165 Id.
reform, there were significant positive results in those schools. It is essentially like any other business venture – capital investment is essential to creating a quality product, as are people who can properly manage. The case of Chester Upland School District is a sad one, but it illuminates the necessity of proper management. Even the above-cited sources note that the issue with the school district is the “almost irretrievably broken system of managing finances and personnel.” Accountability issues must be part of the discussion of funding equity.

There is also the originalist response to the position posited by this article. An originalist might assert the framers of the Constitution did not include a “right” to education. It is important to remember, however, the framers were themselves educated and staunch supporters of education and liberty. “[B]efore the adoption of the Constitution, the Confederate Congress exercised the power to subsidize local public education, the effect of which was the proliferation of schools.” Clearly, there was a tradition of high regard for education. “Historical research reveals that George Washington, James Madison, and Thomas Jefferson made the wide dissemination of education one of their foremost concerns; they considered an educated populace essential to the survival and health of the fledgling republic.” Among the three, Thomas Jefferson was most known for his love of education; he believed that a democratic government could only be maintained if there was pervasive access to education.

The notion that education should not be considered a liberty interest conflicts with state constitutional provisions on education. As previously noted, most state constitutions contain provisions with language extolling the importance of education for a democratic government. Since education was deemed essential by the framers of our federal Constitution, it is inconsistent to justify educational inequity – and by extension, inadequate education for minority students – under the premise that the framers did not anticipate it as a liberty interest. Originalist courts should view educational funding inequities as a barrier to the training of

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166 See Gottfred, supra note 100.
167 See Matheson, supra note 159.
168 See Bitensky, supra note 146, at 627-28.
169 Id. at 627.
170 Id.
172 Bitensky, supra note 146, at 628.
173 Id.; see also Bourgin, supra note 171, at 133-34.
174 Id.
175 Bitensky, supra note 146, at 628; See also Bourgin, supra note 172, at 133-34.
potential contributors to the marketplace of ideas. Recognizing the inherent connection between adequate education and the right to free speech will “ensure fulfillment of the right.” 176

Likewise, there is a Tenth Amendment concern here as well. The argument is that it is essential to safeguard from federal regulation an area that has traditionally been under state control—education. It is however notable that the role of the federal government in education has expanded in the past few decades; 177 for example, the passing of the National Defense Education Act of 1958, 178 the Civil Rights Act of 1964, 179 the Elementary and Secondary Education Act of 1965, 180 and most recently, the No Child Left Behind Act have all been promulgated with the objective of closing the achievement gap between economically and racially advantaged and disadvantaged school children. 181 These laws demonstrate an acknowledgment of the fact that states need encouragement from the federal government in facilitating a more universal and equal form of education. Particularly because the vestiges of past state discrimination in the area of education, coupled with adamant refusal of the majority populace to recognize the racism in the current system, has perpetuated the status quo. If education is eventually elevated to a fundamental right as advocated in this paper, it follows that the method in which public schools are currently being funded, i.e. via local property taxes, is unconstitutional based on its discriminatory effect on minorities. The solution proffered will not take education out of the state’s control, but instead provide the federal government with more freedom to do what it has attempted to all along: 182 that is, prevent invidious discrimination in schools, provide money to be spent on raising up the lowest performing members of the state’s public school system, and ensure that all children are given the opportunity to reach their highest potential. 183 Despite the apparent tension between this notion and the Tenth Amendment, this is a workable solution under the Constitution given the “truism” that the Tenth Amendment does not affirmatively limit any authority delegated to the federal government by the Constitution. 184

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176 Bitensky, supra note 146, at 626.
178 Id.
179 Id.
180 Id.
183 See Pendell, supra note 177, at 543.
184 Id.
CONCLUSION

Change is needed in the current public education system; it must be multifaceted, stemming from the judiciary, the legislature, and a majority of the populace. Once there is recognition that quality education is inherently connected to the exercise of free speech, society will assume a collectivist approach. Such an approach is the only way to repair the damage that private choice and individualism has caused education. As previously noted, there can be no true marketplace of ideas unless all citizens are given an opportunity to contribute. It is high time we overcame these anti-democratic barriers and ensure that all students have the opportunity to reach their full potential and become the leaders of tomorrow.
Appendix I

The table below shows the average ranking of each state in 2008 with regard to state sponsorship of education as opposed to local funding, with number “1” representing the most sponsorship.\textsuperscript{185}

<table>
<thead>
<tr>
<th>State</th>
<th>Rank</th>
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<tbody>
<tr>
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<td>Alaska</td>
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<tr>
<td>Arizona</td>
<td>36</td>
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<td>Arkansas</td>
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<td>California</td>
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<td>Colorado</td>
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Appendix II

Below is a table showing the constitutional language used by the states to provide for education:

<table>
<thead>
<tr>
<th>State</th>
<th>Constitutional Language</th>
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<tbody>
<tr>
<td>Alabama</td>
<td>Establishment and operation of schools. ALA. CONST. art. XIV, § 256</td>
</tr>
<tr>
<td>Alaska</td>
<td>System of public schools open to all children of the State. ALASKA CONST. art. VII, § 1</td>
</tr>
<tr>
<td>Arizona</td>
<td>General and uniform public school system. ARIZ. CONST. art. XI § 1</td>
</tr>
<tr>
<td>Arkansas</td>
<td>General, suitable, and efficient system of free public schools ARK. CONST. Art. 14, § 1</td>
</tr>
<tr>
<td>California</td>
<td>System of common schools by which a free school shall be kept up and supported CAL. CONST. Art. IX, § 5</td>
</tr>
<tr>
<td>Colorado</td>
<td>Thorough and uniform system of free public schools throughout the state. COLO. CONST. Art. IX, § 2</td>
</tr>
<tr>
<td>Connecticut</td>
<td>There shall always be free public elementary and secondary schools in the state. CONN. CONST. art. VIII, § 1</td>
</tr>
<tr>
<td>Delaware</td>
<td>General and efficient system of free public schools. DEL. CONST. art X, § 1</td>
</tr>
<tr>
<td>Florida</td>
<td>Uniform, efficient, safe, secure, and high quality system of free public schools. FLA. CONST. art IX, § 1</td>
</tr>
<tr>
<td>Georgia</td>
<td>Adequate public education for the citizens. GA. CONST. art VIII, § 1</td>
</tr>
<tr>
<td>Hawaii</td>
<td>System of public schools free from sectarian control HAW. CONST. art X, § 1</td>
</tr>
<tr>
<td>Idaho</td>
<td>General, uniform, and thorough system of public, free common schools. IDAHO CONST. art IX, § 1</td>
</tr>
<tr>
<td>Illinois</td>
<td>Efficient system of high quality public educational institutions and services. ILL. CONST. art X, § 1</td>
</tr>
<tr>
<td>Indiana</td>
<td>A general and uniform system of common schools. IND. CONST. art VIII, § 1</td>
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<tr>
<td>State</td>
<td>Description</td>
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<td>-------------</td>
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</tr>
<tr>
<td>Kansas</td>
<td>Intellectual, educational, vocational and scientific improvement by establishing and maintaining public schools. KAN. CONST. art. VI, § 1</td>
</tr>
<tr>
<td>Kentucky</td>
<td>Efficient system of common schools throughout the State. KY. CONST. § 183</td>
</tr>
<tr>
<td>Louisiana</td>
<td>Provide for the education of the people of the state and shall establish and maintain a public educational system. LA. CONST. art. VIII, § 1</td>
</tr>
<tr>
<td>Maine</td>
<td>Suitable provision, at their…expense, for the support and maintenance of public schools. ME. CONST. art. VIII, pt 1, § 1</td>
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<tr>
<td>Maryland</td>
<td>Thorough and efficient system of free public schools. MD. CONST. art. VIII, § 1</td>
</tr>
<tr>
<td>Michigan</td>
<td>System of free public elementary and secondary schools as defined by law. MICH. CONST. art. VIII, § 2</td>
</tr>
<tr>
<td>Minnesota</td>
<td>A general and uniform system of public schools…[and] a thorough and efficient system of public schools throughout the state. MINN. CONST. art XIII, § 1</td>
</tr>
<tr>
<td>Mississippi</td>
<td>Provide for the establishment, maintenance, and support of free public schools. MISS. CONST. art. VIII, § 201</td>
</tr>
<tr>
<td>Missouri</td>
<td>Free public schools for the gratuitous instruction of all persons in this state. MO. CONST. art. IX, § 1(a)</td>
</tr>
<tr>
<td>Montana</td>
<td>System of education which will develop the full educational potential of each person. Equality of educational opportunity is guaranteed to each person. MONT. CONST. art X, § 1</td>
</tr>
<tr>
<td>Nebraska</td>
<td>Free instruction in the common schools of this state. NEB. CONST. art. VII, § 1</td>
</tr>
<tr>
<td>New Mexico</td>
<td>A uniform system of free public schools. NM. CONST. art. XII, § 1</td>
</tr>
<tr>
<td>Nevada</td>
<td>Uniform system of common schools. NEV. CONST. art. XI, § 2</td>
</tr>
<tr>
<td>New Hampshire</td>
<td>Cherish the interest of literature and the sciences, and all seminaries and public schools. N.H. CONST. pt. II, art. 83</td>
</tr>
<tr>
<td>New Jersey</td>
<td>Thorough and efficient system of free public schools. N.J. CONST. art. VIII, § 4</td>
</tr>
<tr>
<td>New York</td>
<td>System of free common schools wherein all the children may be educated. N.Y.</td>
</tr>
<tr>
<td>State</td>
<td>Article and Section(s)</td>
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<td>---------------------</td>
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<tr>
<td>North Carolina</td>
<td>A general and uniform system of free public schools. N.C. CONST. art. IX, § 2</td>
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<tr>
<td>North Dakota</td>
<td>System of public schools free from sectarian control. N.D. CONST. art. VIII, § 1</td>
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<tr>
<td>Ohio</td>
<td>Provision shall be made by law for the organization, administration and control</td>
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<td>of the public school system of the state. OHIO CONST. art. VI, § 3</td>
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<tr>
<td>Oklahoma</td>
<td>System of free public schools wherein all the children of the State may be educated. OKLA. CONST. art. I, § 5</td>
</tr>
<tr>
<td>Oregon</td>
<td>Uniform and general system of Common schools. OR. CONST. art. VIII, § 3</td>
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<tr>
<td>Pennsylvania</td>
<td>Thorough and efficient system of public education. PA. CONST. art. III, § 14</td>
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<tr>
<td>Rhode Island</td>
<td>Promote public schools… and adopt all means… deem[ed] necessary and proper to secure</td>
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<td>to the people the advantages and opportunities of education. R.I. CONST. art. XII, § 1</td>
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<tr>
<td>South Carolina</td>
<td>System of free public schools. S.C. CONST. art. XI, § 3</td>
</tr>
<tr>
<td>South Dakota</td>
<td>A general and uniform system of public schools. S.D. CONST. art. VIII, § 1</td>
</tr>
<tr>
<td>Tennessee</td>
<td>Maintenance, support and eligibility standards of a system of free public schools. TENN. CONST. art. XI, § 12</td>
</tr>
<tr>
<td>Texas</td>
<td>Efficient system of public free schools. TEX. CONST. art. VII, § 1</td>
</tr>
<tr>
<td>Utah</td>
<td>A public education system, which shall be open to all children of the state.</td>
</tr>
<tr>
<td></td>
<td>UTAH CONST. art. X, § 1</td>
</tr>
<tr>
<td>Virginia</td>
<td>System of free public elementary and secondary schools for all children of school age…</td>
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<td>and shall seek to ensure that an educational program of high quality is established and</td>
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<td>continually maintained. VA. CONST. art. VIII, § 1</td>
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<tr>
<td>Washington</td>
<td>General and uniform system of public schools. WASH. CONST. art. IX, § 2</td>
</tr>
<tr>
<td>West Virginia</td>
<td>Thorough and efficient system of free schools. W. VA. CONST. art. XII, § 1</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>Establishment of district schools, which shall be as nearly uniform as</td>
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<td>Practicable.</td>
<td>WIS. CONST. art. X, § 3</td>
</tr>
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<tr>
<td>Wyoming</td>
<td>Complete and uniform system of public instruction. WYO. CONST. art. VII, § 1</td>
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THE IMMIGRATION GAMBLE: ELIMINATING THE DIVERSITY VISA PROGRAM

MELISSA CHAPASKA *

I. INTRODUCTION

The United States of America prides itself on the notion that it is a “nation of immigrants.”¹ As such, it comes as no surprise that issues relating to immigration are consistently at the forefront of American legal discourse. Recently, businesses are beginning to demand a comprehensive immigration reform to fix, what is described, as a broken system.² As the debate on immigration reform evolves, differing opinions emerge regarding the policy supporting the current immigration system.³ Many ponder whether the immigration policy of yesterday will satisfy the needs of our country in the future.⁴

As John F. Kennedy opined, “[i]mmigration policy should be generous; it should be fair; it should be flexible.”⁵ Given the history of America as a “melting pot” with people diverse in race, ethnicity, and cultural background, it makes logical sense that the country’s immigration policy would focus on promoting diversity. However, it is argued that the Diversity Visa Program (“DV program”), with the aim to promote diversity, is not generous, fair, or flexible to future immigrants.⁶ In fact, critics of the DV program claim it causes significantly more procedural headaches than actual diversity.⁷

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¹ See generally JOHN F. KENNEDY, A NATION OF IMMIGRANTS (1986).
³ Id.
⁴ See generally OFFICE OF MGMT. & BUDGET, STATEMENT OF ADMINISTRATION POLICY: H.R. 6429 – STEM JOBS ACT OF 2012 (2012) [hereinafter H.R. 6429] (Demonstrating the Administration’s desire to “building a 21st-century immigration system that meets the Nation’s economic and security needs through common-sense, comprehensive immigration reform.”).
⁵ KENNEDY, supra note 1, at 82.
⁶ RUTH ELLEN WASEM, CONG. RESEARCH SERV., DIVERSITY IMMIGRANT VISNA LOTTERY ISSUES 9 (2011); see generally Diversity Visa Program and Its Susceptibility to Fraud and Abuse: Hearing Before the H. Subcomm.
Immigration law is a complex and controversial topic; consequently, many important aspects of immigration law fall beyond the scope of this Note. If the Legislature’s recent focus on comprehensive immigration reform is any indication of the magnitude of future reform, then the examination of the DV program, outlined in this Note, merely scratches the surface of the immigration reform debate. In fact, the DV program accounts for a relatively small portion of American immigration. The DV program receives its fair share of attention as legislators attempt to achieve immigration reform that seeks to maintain the integrity of our immigration system.

After evaluating the failures of the program, this Note proposes that the visas allocated to the DV program should be reallocated to a merit-based program that is designed to focus on a prospective immigrant’s overall characteristics and not simply their geographic location. In section I, this Note offers the background and underlying policy considerations of the program. It analyzes procedural and policy-related problems resulting from the program and addresses the arguments in favor of maintaining the program. In section II, this Note provides an overview of legislation, both past and current, with an emphasis on the merit-based point system recently proposed by the Border Security, Economic Opportunity and Immigration Modernization Act. In conclusion, this Note advocates for the elimination of the diversity visa system in favor of a merit-based point system.

II. THE DIVERSITY VISA PROGRAM: PURPOSE AND PROCEDURE

A. A Nation of Immigrants: The Purpose of the DV Program

The DV program is a component of Congress’ attempt to reform the immigration system through the Immigration Act of 1990. One of the purposes of immigration reform was to...
“further enhance and promote diversity.”\textsuperscript{12} This admirable, albeit relatively vague, purpose is partially rooted in the “open society” principle.\textsuperscript{13} According to the “open society” principle, immigration is necessary to promote “cultural diversity and enrichment.”\textsuperscript{14} Congress aimed to increase diversity with the creation of the DV program by increasing the number of immigrants from countries with low rates of immigrant admission.\textsuperscript{15} In other words, the DV program aimed to increase immigrant diversity by allowing those who are underrepresented, in the employment and family-based preference categories, the opportunity to apply for an immigrant visa.\textsuperscript{16}

\textbf{B. Qualifying for a Diversity Visa}

A unique aspect of the DV program is the lack of restrictions placed on diversity visa applicants.\textsuperscript{17} Unlike other visa programs provided by Congress, the DV program does not require that a prospective immigrant possess familial or employment ties to the United States in order to be considered eligible for a diversity visa.\textsuperscript{18} To qualify for a diversity visa, a prospective immigrant must meet only three requirements.\textsuperscript{19} First, a prospective immigrant must be a native of a low-admission foreign state.\textsuperscript{20} Low-admission foreign states are all countries not designated as high-admission by the Attorney General.\textsuperscript{21} High-admission foreign states are those that have sent more than 50,000 immigrants to the United States in the past five years.\textsuperscript{22} Second, in order for a prospective immigrant to be eligible for the diversity visa, the immigrant must possess at least a high school education or its equivalent.\textsuperscript{23} Finally, the prospective immigrant must be granted admissibility to enter the United States.\textsuperscript{24}

\textsuperscript{14} Id. at 460.
\textsuperscript{16} Id.
\textsuperscript{17} Id.
\textsuperscript{18} Id.
\textsuperscript{19} 22 C.F.R. § 42.33(a)(1).
\textsuperscript{20} Id.
\textsuperscript{21} Id.
\textsuperscript{22} For the DV-2013, natives of the following “high-admission” countries were not eligible to participate in the Diversity Lottery: Bangladesh, Brazil, Canada, China, Colombia, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, India, Jamaica, Mexico, Pakistan, Peru, Philippines, South Korea, United Kingdom (excluding Northern Ireland), and Vietnam. Instructions for the 2013 Diversity Visa Program (DV-2013), BUREAU OF CONSULAR AFFAIRS, available at http://travel.state.gov/pdf/DV_2013_instructions.pdf.
\textsuperscript{23} 22 C.F.R. § 42.33(a)(1).
\textsuperscript{24} Zonneveld, supra note 15, at 554.
legally permitted to enter the United States. An immigrant is legally permitted to enter the United States so long as he or she does not satisfy any of the ten basic inadmissibility grounds provided by the Immigration and Nationality Act. If an immigrant is found to possess grounds for inadmissibility their diversity visa application is denied.

C. Applying for a Diversity Visa

The Department of State is responsible for issuing 50,000 diversity visas each year as prescribed by Congress. The 50,000 diversity visas are apportioned to six separate regions: Africa, Asia, Europe (not including Northern Ireland), North America (not including Mexico), Oceania, and South America (including Mexico, Central America, and the Caribbean). The number of visas assigned to each region is based on the total immigrant admissions from each region over a 5-year period, and the greatest numbers of visas are allocated to the regions with the lowest level of immigration.

The first stage of the diversity visa process is referred to as the diversity visa “lottery,” which is a procedure used to ensure that diversity visas are issued to eligible applicants randomly. There is no fee associated with an application to the diversity visa lottery. Prospective applicants may enter the lottery by electronically submitting a short petition through the State Department’s website. Computer software utilized by the State Department assigns a random number to each petition submitted and then reorders the petitions based on rank. The State Department is then responsible for selecting a number of petitions for approval from each

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26 For instance, an immigrant may be inadmissible to the United States for health-related or security related (among other) reasons, including possible terrorist connections or past criminal history. Id.
27 Fraud Hearing, supra note 6, at 22 (Statement of Anne W. Patterson, Deputy Inspector General, U.S. Dep’t of State).
28 Originally, Congress provided for 55,000 diversity visas annually. However, in 1997, the Nicaraguan and Central American Relief Act (NACARA) devoted 5,000 of the 55,000 annual diversity visas to the NACARA program. Diversity Visa Program (DV-2013) – Selected Entrants, BUREAU OF CONSULAR AFFAIRS, available at http://travel.state.gov/visa/immigrants/types/types_5715.html.
29 8 U.S.C. § 1151(e)
31 8 U.S.C. § 1153(c)(1).
33 Instructions for the 2013 Diversity Visa Program (DV-2013), supra note 22 at 2.
34 Id. All entry forms for the diversity visa lottery must be done electronically because the State Department no longer accepts paper petitions.
35 22 C.F.R. § 42.33(c).
The chosen participants, or the “winners” of the diversity visa lottery, earn the right to file for a diversity visa.\textsuperscript{37}

It is important to note that at this stage, the prospective immigrant has only “won” the right to apply for a diversity visa and not the right to an immigrant visa itself.\textsuperscript{38} In addition to meeting the requirements of eligibility, a prospective immigrant is responsible for paying a diversity lottery fee and undergoing an interview with a consular officer to determine their eligibility.\textsuperscript{39} Time constraints may also affect an otherwise eligible immigrant’s chance to be awarded a diversity visa.\textsuperscript{40} For example, approved petitions are valid only until midnight of the last day of the year in which the petition was approved; an approved petition not processed within this deadline expires, making the individual ineligible to receive a diversity visa.\textsuperscript{41} A prospective immigrant issued a diversity visa will gain permanent resident status in the United States.\textsuperscript{42}

III. CRITICISMS AND ARGUMENTS IN SUPPORT OF THE DIVERSITY VISa PROGRAM

\textbf{A. The DV Program’s Purpose: What is Diversity?}

Critics maintain that the DV program does not diversify the American population; instead, the program only diversifies the immigrant population.\textsuperscript{43} The distinction is important because it is a critical measurement of the diversity we wish to achieve through immigration, and whether the DV program serves this purpose.\textsuperscript{44} A majority of the American population self-identifies as white, whereas the immigrant population is heavily comprised of immigrants of

\textsuperscript{36} Id.

\textsuperscript{37} Applications for the diversity lottery are submitted two years before the actual visa is issued. For instance, “winners” of the 2014 visa lottery submitted their applications between October and November of 2012. \textit{Electronic Diversity Visa, BUREAU OF CONSULAR AFFAIRS, available at https://www.dvlottery.state.gov/}.


\textsuperscript{39} The fee to apply for a diversity visa through the lottery program is currently $330. 22 C.F.R. § 22.1.

\textsuperscript{40} 22 C.F.R. § 42.33(d).

\textsuperscript{41} Id.

\textsuperscript{42} 8 U.S.C. §1153.

\textsuperscript{43} Newton, supra note 38, at 1057-58.

\textsuperscript{44} Id.
Hispanic and Asian origin.\textsuperscript{45} In fact, immigration is a major contributing factor in the rapid growth of the Hispanic and Asian population in America.\textsuperscript{46} Still, Hispanics and Asians remain underrepresented in the American population.\textsuperscript{47} However, if the diversity visa was intended to diversify the American population in general, it is surprising that many Hispanics and Asians do not qualify for the diversity visa due to high levels of immigration from Hispanic and Asian countries.\textsuperscript{48}

The prohibition of many Asian and Hispanic immigrants from the DV program is partially the result of Congress’ use of regions to allocate diversity visas.\textsuperscript{49} Through the use of regions, Congress appears to equate diversity with geographic location.\textsuperscript{50} Critics claim that the effects of using a region system inevitably leads to discrimination on the basis of an immigrant’s national origin.\textsuperscript{51} In order to fully understand the basis for this criticism, an important question must be addressed: why did Congress choose to use a region system to determine diversity visa eligibility?

Critics claim that the region system is proof Congress did not intend for the diversity visa to create diversity in America, but rather stifle diversity.\textsuperscript{52} Rather, Congress’ use of the region system suggests that the DV program’s real goal is to counteract increasing immigration from Asians and Hispanics by encouraging European immigration.\textsuperscript{53} For example, the region system adversely effects South America’s participation in the DV program.\textsuperscript{54} Including Mexico, Central America, and the Caribbean as part of the region of South America heavily restricts natives of

\begin{footnotesize}
\begin{enumerate}
\item[46] Id.
\item[47] Per the 2010 Census, Hispanics and Asians comprised 16% and 5% of the total population, respectively. Id.
\item[50] Id.
\item[52] Fraud Hearing, supra note 6, at 16. Professor Jan Ting observes “[t]he so-called diversity visas might properly be called anti-diversity visas, since they were created to offset the diversity resulting from non-discriminatory immigration.”
\item[53] PETER H. SCHUCK, DIVERSITY IN AMERICA: KEEPING GOVERNMENT AT A SAFE PLACE 127 (2003).
\item[54] See generally, Wardle, supra note 51.
\end{enumerate}
\end{footnotesize}
South American countries by drastically reducing the number of available visas for South Americans.\footnote{55}{8 U.S.C. § 1153(c)(1)(F).}

In light of Congress’ broad definition of the South American region, critics find it troubling that the law explicitly considers Northern Ireland a separate country from the United Kingdom.\footnote{56}{SCHUCK, supra note 53, at 125-27.} By making this distinction, the large number of immigrants originating from the United Kingdom does not preclude Northern Ireland from participation in the DV program.\footnote{57}{Id. at 125.} Some proponents of the DV program judge Congress’ definition of the South American region and special treatment of Northern Ireland as indicative of the ulterior motive behind the DV program – creating a “new, white, European, English-speaking, largely Irish immigration stream”\footnote{58}{Id. at 127.} to counteract increasing Hispanic and Asian immigration.\footnote{59}{U.S. CENSUS BUREAU, supra note 45.} For this reason, critics conclude, the DV program discriminates on the basis of an immigrant’s national origin while failing to promote diversity.\footnote{60}{Newton, supra note 38, at 1055-56.}

On the other hand, others observe that the term “diversity” is not, by itself, an easily defined term.\footnote{61}{Beverly Baker-Kelly, United States Immigration: A Wake Up Call!, 37 HOW. L.J. 283, 294 (1994) (questioning whether the focus of diversity should “be on geographical, racial, ethnic, or cultural diversity?”).} While critics argue there is an obvious correlation between race, ethnicity, and geographic location,\footnote{62}{Newton, supra note 38, at 1056.} supporters claim that Congress’ use of the region system is not meant to be discriminatory, or that it was the least discriminatory option.\footnote{63}{Id. at 1066.} That the region system employed by the DV program is the result of Congress’ desire to select a “politically neutral” definition of diversity by focusing on an immigrant’s geographic location and not an immigrant’s race or ethnicity.\footnote{64}{Wardle, supra note 51, at 1986.} Furthermore, supporters argue the DV program is not intended to create overall diversity in America.\footnote{65}{Newton, supra note 38, at 1065.} Instead, the DV program seeks to remedy the imbalance caused by the underrepresentation of certain immigrants by other immigration programs.\footnote{66}{Id. at 1055-56.} Viewing this as the true purpose of the DV program, the program achieves this goal by providing an
immigration opportunity to immigrants who do not qualify for the other family and skill-based immigration programs.67

Supporters claim the DV program is the “only realistic opportunity” for immigrants from certain parts of the world to immigrate to the United States.68 For example, without the diversity visa, immigration from Africa would account for only 3 percent of immigration under the family and employment-based categories.69 Supporters note the diversity visa remedied this underrepresentation of Africans in our immigration system, with immigrants from Africa receiving a large share of diversity visas.70 Based on this evidence, supporters conclude the DV program is not discriminatory, but rather serves to remedy the already existing discrimination caused by the family and employment-based visa categories.71

B. The Diversity Visa Program’s (Lack of) Eligibility Criteria: Who Qualifies?

Arguably, one of the most criticized aspects of the DV program is the dearth of eligibility criterion, in comparison to other immigrant visa programs. In order to qualify for any other immigrant visa besides the diversity visa, a prospective immigrant must have either specific familial ties to the United States or some employment-related skill.72 The policy behind the family and employment-based immigration programs is to “ensure that immigrants entering our country have a stake in continuing America’s success and have the needed skills to contribute to our Nation’s economy.”73 Recipients of diversity visas, on the other hand, often lack familial or employment ties to the United States.74 Instead, critics claim diversity visa recipients receive their visas based on geographic location and random chance, and therefore do not have the same “stake in our country’s success” as family and employment-based immigrants.75

However, supporters of the diversity visa do not believe the program should be eliminated in its entirety, arguing that Congress’ humanitarian policy of encouraging diversity should not be disregarded.76 They argue that an elimination of the diversity visa is an

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67 Id. at 1064-65.
69 DV Elimination Hearing, supra note 7, at 6 (Testimony of Rep. Zoe Lofgren, Member, H. Judiciary Subcomm. on Immigration Policy & Enforcement).
70 Newton, supra note 38, at 1065.
71 Id. at 1067.
72 Id. at 1058.
73 Fraud Hearing, supra note 6, at 5 (Opening Statement of Rep. Goodlatte, Member, H. Judiciary Comm.).
74 SCHUCK, supra note 53, at 128.
75 H. COMM. ON THE JUDICIARY, supra note 68, at 7; see also DV Elimination Hearing, supra note 7, at 29 (Testimony of Rep. Goodlatte, Member, H. Judiciary Comm.).
76 Fraud Hearing, supra note 6, at 50 (Opening Statement of Rep. Sheila Jackson Lee, Member, Subcomm. on Immigration, Border Security, & Claims).
elimination of an important part of our country’s history – the acceptance of all sorts of immigrants, not only those with a specific set of economically favorable skills or familial ties to the United States. These supporters believe the diversity visa sends an important message to the rest of the world “that we continue to welcome immigrants from a diversity of backgrounds and nations of origin[;]” a message that may be lost if the DV program is eliminated.  

C. The Diversity Visa Process: How Does it Work?

At a Congressional hearing which examined the Diversity Visa Program, Professor Jan Ting stated that “the [diversity visa] lottery is incomprehensibly complicated, a cruel deception of the overwhelming majority of the millions of would-be immigrants who apply for it every year.” First, the 50,000 diversity visas allotted for the DV program are hardly reflective of the program’s large number of applicants. In fact, the large number of diversity visa lottery applicants combined with the small number of available visas presents little chance of actually winning the lottery. Furthermore, even the number of “winners” selected in the diversity visa lottery is not reflective of the number of visas that are ultimately awarded. This is the unfortunate result of the State Department’s policy of selecting almost twice as many lottery winners as there are available diversity visas.

The State Department acknowledges that a prospective immigrant’s failure to meet the eligibility requirements coupled with the strict time limitation may prevent an immigrant from qualifying for a diversity visa. As such, the State Department accounts for the fact that approximately half of the diversity visa lottery winners will not be eligible to receive a diversity visa.  

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77 DV Elimination Hearing, supra note 7, at 128 (Testimony of Resident Commissioner Pedro Pierluisi, Member, H. Judiciary Subcomm. on Immigration Policy & Enforcement).

78 Id.

79 Fraud Hearing, supra note 6, at 12 (Statement of Professor Jan Ting, Temple University James E. Beasley School of Law).


81 While the specific odds of winning depends on the number of available visas allotted to and the number of applicants in the applicant’s country of origin, generally speaking, applicants have less than a 1% chance of actually winning the diversity lottery. Id.

82 Almost half of those selected in the diversity visa lottery will not actually receive a diversity visa. Smirnov v. Clinton, 806 F. Supp. 2d 1, 5 (D.D.C. 2011).

83 H. COMM. ON THE JUDICIARY, supra note 68, at 3 (“About 45 percent of the selectees fail to meet the minimum educational or work experience or training requirements, fail to supply the required medical information, or fail to complete the additional required paperwork either completely or on time.”).

84 Instructions for the 2013 Diversity Visa Program (DV-2013), supra note 22.
visa, by selecting twice as many winners as there are available visas. Many lottery winners that are eligible for a diversity visa and file timely applications are denied the chance to immigrate due to the State Department’s “first-come, first-served” policy. In this sense, diversity visa lottery winners are similar to “recipients of large envelopes from organizations like Publishers Clearinghouse [who] announce[] in huge letters that the person is ALREADY A WINNER, but contains a disclaimer buried in the middle of the packet that explains that the only thing that has been won is a chance at the big prize.” Unfortunately, many diversity lottery winners do not fully grasp the ambiguity of their visa, resulting in wasted time, money, and hope in preparation for the uncertain chance that they will be able to immigrate to the U.S. It is important to note the State Department makes no guarantees that a diversity visa lottery winner will receive a diversity visa. Furthermore, the diversity visa lottery provides opportunities to a diverse group of applicants who do not otherwise qualify for other immigration programs.

D. The DV Program’s Susceptibility for Fraud: Is it Credible?

One procedural criticism of the DV program is that it is susceptible to fraud and harms the credibility of our immigration system. For instance, despite the State Department’s requirement that each applicant may only submit one entry to the lottery program, critics claim that it is typical for applicants to submit more than one entry. By submitting multiple entries, sometimes under false aliases, prospective immigrants seek to increase their chance of selection in the lottery.

In addition to fraud on the part of the applicants, the DV program is also susceptible to fraudulent activity on the part of third parties. Both the State Department and the Federal

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85 In fact, processing delays outside of the prospective immigrant’s control may prohibit their ability to receive a diversity visa. Monger, supra note 9 (“The number of new Diversity LPRs decreased significantly from 2011 to 2012, possibly as a result of a slight delay in releasing the selection results and the implementation of a new Entrant Status Check procedure by the Department of State, which required applicants to retrieve their selection status online.”). Id.


88 Smirnov, 806 F. Supp. 2d at 7. (Acknowledging that some diversity lottery winners had taken significant actions upon learning that they had been selected in the diversity visa lottery, such as quitting their jobs and selling land, to prepare for their immigration to the United States.)

89 Diversity Visa Program (DV-2013) – Selected Entrants, supra note 28.

90 See generally Fraud Hearing, supra note 6; see also DV Elimination Hearing, supra note 7.

91 Fraud Hearing, supra note 6, at 33 (statement of Dr. Steven A. Camarota, Ph.D., Director of Research, Ctr. for Immigration Studies).

92 Id.

Trade Commission warn prospective diversity visa applicants about the existence of these scams. While diversity visa scams arise in a variety of forms, the common thread is the extortion of money from unknowing diversity visa applicants. Critics of the DV program claim that these third party scams are the result of the complicated lottery system, which is confusing for foreign applicants.

Supporters of the program do not deny the existence of fraud. However, supporters argue fraud alone is not a compelling reason to abandon the DV program. Instead, some claim the program’s issues with fraud can be remedied through the implementation of additional safeguards to prevent abuse of the diversity visa lottery system. In fact, the State Department already took steps towards combating diversity visa fraud by conducting more extensive background checks and warning prospective applicants about the existence of fraudulent programs.

Some put forth the argument that the diversity visa’s susceptibility to fraud extends far past multiple entries and Internet scams. Following the terrorist attacks on September 11, 2001, critics began to question whether terrorists could take advantage of the DV program to enter the United States. The first concern raised by critics is that the program is open to countries that are known state-sponsors of terrorism, such as Pakistan. Furthermore, critics cite to known cases of immigrants with connections to terrorism gaining permanent residency in the United States through the DV program. In 2004, the Deputy Inspector General for the Department of State acknowledged that the DV program “contains significant vulnerabilities to
national security as hostile intelligence officers, criminals, and terrorists attempt to use it to enter the United States as permanent residents.”

For this reason, the Deputy Inspector General suggested that Congress bar state-sponsors of terrorism from participation in the diversity lottery. Despite this recommendation, state-sponsors of terrorism are still eligible to participate in the diversity visa lottery.

Supporters note that diversity visa recipients are subject to the same level of review and scrutiny as other immigrant visa recipients. They argue all diversity recipients are subject to background checks and are screened by consular officers to ensure they are not barred from receiving a diversity visa based on any of the inadmissibility grounds, which include membership in a terrorist organization. Additionally, in 2007 the United States Governmental Accountability Office reported the DV program did not pose any real threat to national security. Supporters note that the DV program’s threat to national security is overstated because only four of the 800,000 immigrants who have entered the United States through the DV program had a connection to terrorism.

IV. EXPLORING OTHER OPTIONS: PROPOSED LEGISLATION TO END THE DIVERSITY VISA PROGRAM

In spite of protest from supporters for reform of the DV program, most proposed legislation related to the DV program seeks to end the program in its entirety. For example, in 2005, the House of Representatives passed the Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005 (“Immigration Control Act of 2005”). The stated purpose of this Act was to “strengthen enforcement of the immigration laws [and] to enhance border

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106 Id. at 10 (Statement of Anne W. Patterson, Deputy Inspector General, U.S. Dep’t of State).
107 Id.
108 Over 6,000 immigrants from Iran, a well-known state-sponsor of terrorism, won the 2013 diversity visa lottery. Diversity Visa Program (DV-2013) – Selected Entrants, supra note 28 at 3.
109 H. COMM. ON THE JUDICIARY, supra note 68, at 25.
110 Id.
112 DV Elimination Hearing, supra note 7, at 128 (Testimony of Resident Commissioner Pedro Pierluisi).
114 H.R. 4437.
security.” Considering this purpose in the context of the noted fraud and national security concerns about the DV program, it is no surprise that the Immigration Control Act of 2005 included a provision to eliminate the DV program in its entirety. While the Immigration Control Act of 2005 managed to pass the House of Representatives, it failed to pass the Senate.

Soon after the Immigration Control Act of 2005, the DV program again faced elimination. In 2007, the House passed the Consolidated Appropriations Act of 2008, which included a provision to cease funding the DV program. While this bill was ultimately signed into law, amendments to the bill resulted in reduced funding for the DV program for one fiscal year and not the original proposal of total elimination of funding. As a result, the DV program survived yet another legislative attack.

In 2009 there was another attempt to abolish the DV program through the introduction of the Security and Fairness Enhancement for America Act (“SAFE for America Act”). Similar to the argument used to advance support of the Immigration Control Act of 2005, supporters of the SAFE for America Act justified the elimination of the Diversity Visa by citing fraud and national security concerns. However, the SAFE for America Act failed to pass the House in 2011.

As illustrated above, the elimination of the DV program is not a novel legislative idea. However, recent legislation aiming to abolish the DV program has gone through an evolution. Unlike the bills discussed above, recent legislation focuses less on disposing the diversity visa

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115 Id.
116 Id.
117 The elimination of the diversity visa program was one of many controversial areas addressed by the Immigration Control Act of 2005; therefore, the elimination of the diversity visa may not have been a significant reason for the Act’s failure to pass the Senate. Id.
119 Id.
123 H. COMM. ON THE JUDICIARY, supra note 68, at 3.
system due to its failings, and more on creating a positive economic impact by increasing the number of visas available for immigrants holding advanced degrees.\(^{126}\)

For example, the STEM Jobs Act of 2012 sought to eliminate the DV program in order to provide more visas to immigrants with advanced degrees in science, technology, engineering, and mathematics.\(^{127}\) While the STEM Jobs Act of 2012 passed the House, the Act did not survive in the Senate.\(^{128}\)

Soon after the death of the STEM Jobs Act of 2012, the Supplying Knowledge-based Immigrants and Lifting Levels of STEM Visas Act (‘SKILLS Visa Act’) was formulated.\(^{129}\) The SKILLS Visa Act would have eliminated the DV program in order to increase the number of visas available for investors, entrepreneurs, and immigrants with advanced degrees.\(^{130}\) Although supporters praised the SKILLS Visa Act for providing benefit to the economy, opposition to the SKILLS Visa Act remained focused on the Act’s attempt to dispose of the DV program.\(^{131}\) As with bill proposed before it, the SKILLS Visa Act managed to pass the House of Representatives, but did not survive the Senate.\(^{132}\)

The most recent attempt to dispose of the DV program is found in the Senate’s Border Security, Economic Opportunity and Immigration Modernization Act of 2013 (“Immigration Modernization Act”).\(^{133}\) Unlike the STEM Jobs Act discussed above, which was condemned as a “narrowly tailored proposal” by the Obama Administration,\(^{134}\) the Immigration Modernization Act is comprehensive in nature and addresses numerous areas of immigration law.\(^{135}\) If the Immigration Modernization Act becomes law, the DV program will be repealed in its entirety and diversity visas will no longer be issued after 2015.\(^{136}\) The 50,000 visas allocated to the DV


\(^{127}\) H.R. 6429, supra note 4.


\(^{129}\) H.R. 2131, supra note 113.

\(^{130}\) Id.


\(^{134}\) OFFICE OF MGMT. & BUDGET, supra note 4.

\(^{135}\) S. 744, supra note 113.

\(^{136}\) Id. at § 2303.
program would be reallocated to a merit-based point system (“Point System”). 137 This particular Point System would award 120,000 to 250,000 visas per year on the basis of points awarded for each immigrant’s individual characteristics. 138 A large number of points are awarded to immigrants who possess specific employment-related skills or familial ties to the United States. 139 For example, out of one hundred points, an immigrant may receive up to fifteen points for holding an advanced degree, up to twenty points for employment experience, and up to ten points for certain familial relationships. 140

However, the Point System also accounts for factors beyond familial ties and employment-related skills. 141 While the Immigration Modernization Act repeals the terms of the diversity visa, the Act retains the diversity status concept by allocating five points to natives of low-admission countries, out of a possible one hundred or eighty-five points, depending on which tier the applicant falls under. 142 During the formulation of this Note, the Immigration Modernization Act has passed the Senate and is currently awaiting a decision from the House. 143

V. PROPOSED SOLUTIONS

This Note does not seek to minimize the fact that some prospective immigrants from certain countries would be adversely affected by the elimination of the DV program. 144 What it does suggest, however, is that a merit-based program that emphasizes an immigrant’s individual characteristics would better serve the economic and social goals of our immigration system rather than a system that relies merely on a combination of an immigrant’s geographic location and chance.

The DV program should be eliminated for a number of reasons. First, while the DV program may remedy the underrepresentation of those from certain countries, it does not justify

137 Id. at § 2301.
138 Id.
139 Id.
140 Id.
141 Other factors include an immigrant’s civic involvement, age, and English proficiency. Id.
142 The merits-based points system is a two-tier system. The first tier is for “highly skilled immigrants,” which awards points on a one hundred-point scale. The second tier is for “less skilled immigrants” and awards points on an eighty-five-point scale. Immigrants in either tier are eligible to receive five points if they are natives of a low-admission country. Id.
143 Bowman, supra note 8.
144 Newton, supra note 38, at 1059-66.
the program’s use of a region system to discriminate against other immigrants based on their national origin.145 Furthermore, the program does not provide immigrants from underrepresented countries a likely chance at immigration, in light of the nearly impossible odds that a diversity visa applicant will be awarded a visa.146 Relatedly, the DV program’s highly criticized random lottery system frustrates normal immigration criteria by awarding visas based solely on chance.147 The DV program’s complexity makes it susceptible to fraud and poses a threat to national security, thereby harming the credibility of our entire immigration system.148 Finally, the DV program fails its stated purpose, with no evidence that it significantly increased racial or ethnic diversity in the American population.149

Supporters argue that the DV program’s problems can be fixed, but that is unlikely given the magnitude of problems and the current state of our struggling immigration system.150 This is especially true when options exist that better reflect the immigration system’s social and economic goals. Therefore, the DV program should be eliminated and its visas reallocated through a merit based system.

One proposal involves reallocating diversity visas to investors, entrepreneurs, and immigrants holding advanced degrees (“highly-skilled immigrants”).151 This concept was applied in the STEM Jobs Act of 2012 and the SKILLS Visa Act.152 Supporters of eliminating the diversity visa, in favor of highly skilled immigrants, argue that the DV program does not stimulate the economy because recipients tend to be less educated and hold fewer job prospects.153 Highly skilled immigrants, on the other hand, tend to be well educated and help stimulate the economy by increasing America’s ability to compete in the global market.154 While this solution may be economically beneficial, many question the social benefit of

145 Id. at 1056-57.
146 DV Elimination Hearing, supra note 7, at 29 (Testimony of Rep. Goodlatte, Member, H. Judiciary Comm.).
147 Id.
148 H. COMM. ON THE JUDICIARY, supra note 68, at 4 (Statement of Anne W. Patterson, Deputy Inspector General, U.S. Dep’t of State).
149 Newton, supra note 38, at 1058.
150 H. COMM. ON THE JUDICIARY, supra note 68, at 24.
153 Schuck & Tyler, supra note 151, at 360.
154 Id.
sacrificing the humanitarian-based DV program for an immigration program that is solely based on an immigrant’s "value."  

Another solution is to eliminate the DV program so that the 50,000 visas allocated to the DV program can be used to create more available visas for a Point System, as proposed by the Immigration Modernization Act. Reallocating diversity visas to a Point System is a reasonable solution for a number of reasons. A Point System is more fair and flexible than other proposed options, and would reallocate diversity visas to only those immigrants who possess advanced degrees or skills. Unlike the previously proposed STEM and SKILL Acts, a Point System would not completely disregard the humanitarian purpose served by providing visas to diversity applicants. In fact, the Point System proposed by the Immigration Modernization Act would still serve to encourage immigration from low-admission countries by allocating points for an immigrant’s diversity status. While some criticize the Immigration Modernization Act’s Point System for allocating only a few points for an immigrant’s diversity status, the point system is flexible, allowing for more points to be allocated for different characteristics as deemed necessary. Furthermore, the merit-based program’s selection process would be fair; issuing visas based on the timing of an immigrant’s application and their specific characteristics and not by random selection. Finally, unlike the piecemeal approach made by the STEM and SKILL Acts, a merit-based system would be a large step toward actual, comprehensive immigration reform.


156 Assuming the remaining 5,000 visas would still be used for the NACARA program. Diversity Visa Program (DV-2013) – Selected Entrants, supra note 28.

157 S.744, supra note 113.

158 Compare H.R. 2131, supra note 113, with S.744, supra note 113.

159 H.R. 2131, supra note 113; H.R. 6429, supra note 4.

160 S. 744, supra note 113.

161 Id.


163 S. 744, supra note 113.

164 Id.

165 Schreiber, supra note 155.
VI. CONCLUSION

Ultimately, the DV program should be eliminated; however, the policy of promoting diversity through immigration should not be abandoned. Instead, diversity visas should be reallocated to a merit-based points system, similar to the system proposed by the Immigration Modernization Act. While the Point System proposed by the Immigration Modernization Act is far from perfect, it is a step in the right direction toward achieving effective immigration reform. Implemented correctly, a merit-based selection process can succeed where the DV program has failed, by strengthening the credibility of our immigration system and promoting diversity in America fairly.

166 THE IMMIGRATION POLICY CTR., supra note 162.
167 Id.
HUMAN TRAFFICKING IN THE UNITED STATES:  
A PERSPECTIVE ON DOMESTIC LEGISLATION AT THE FEDERAL AND STATE LEVELS

ELIZABETH DE BERARDINIS

“We will have an unchallenged, open, panoramic opportunity on a global scale to demonstrate the finest aspects of what we know in this country: peace, freedom, democracy, human rights, benevolent sharing, love, the easing of human suffering. Is that going to be our list of priorities or not?”

INTRODUCTION

Twenty-five year old Lisa walks into my office one day and tells me she has been a victim of human sex trafficking. Lisa grew up in a rural area of Mexico. She was poor, unemployed, and had practically no education. Eventually, she met a group of men who promised her a better life in America. One of these men even promised to marry her upon arriving in the United States, enticing her that much more. After illegally crossing the border with these men, neither legitimate employment nor a better life was waiting for Lisa. The men told her she was in debt to them for traveling expenses, and would be forced into prostitution. Lisa was held against her will and intimidated with verbal and physical abuse. Lisa was monitored by the men during the day and taken to various hotels for prostitution at night.

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2 The facts of Lisa’s story are based off of U.S. v. Cortes-Meza, 411 F. App’x 284 (11th Cir. 2011). The names and location of the incident have been changed, but the relevant facts remain the same.
3 Cortes-Meza, 411 F. App’x at 286.
4 Id.
5 Id.
6 Id.
7 Id.
8 Id.
9 Id.
10 Id.
tells me she was sold for $25 per fifteen minute session. At times, she was required to service over twenty clients a night. When Lisa objected, the men threatened to call her father and tell him she was now a prostitute. As her potential attorney, Lisa asks me, “What can I do?”

Sadly, Lisa’s story is not unique. Human trafficking is on the rise in the United States. Between January 2008 and June 2010, there were 2,515 suspected incidents of human trafficking in America. Approximately eight in ten incidents are classified as sex trafficking, while one in ten are labor trafficking. However, these statistics present a skewed landscape because they represent only confirmed incidents of human trafficking. As Professor Susan Tiefenbrun remarks, “[s]tatistics on trafficking are unreliable and difficult to verify because of the secrecy of the sex trafficking industry and the social stigma attached to sexual activity.” It is estimated that primarily women and children, between 14,500 to 17,500 people, are trafficked to the U.S. each year. More troubling is the number of American youths who are at risk of becoming victims of sex trafficking. According to the U.S. Department of Health and Human Services, “between 244,000 and 325,000 American youth are considered at risk for sexual exploitation.”

Emphasis is usually placed on the international level regarding the atrocities of human trafficking. Therefore, this Note will focus on trafficking at the domestic level, particularly human sex trafficking. First, this Note will provide a definition of human trafficking used at the international and domestic levels. Second, it will address legislation at the domestic level by examining federal legislation and state legislation viewed through a regional lens. Third, the

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11 Id.
12 Id.
13 Id.
15 Id.
16 Id.
17 Id.
21 Id.
22 Brief comparisons to international principles will be used in order to highlight the problem of human trafficking at the domestic level.
23 The regional lens will encompass legislation from Pennsylvania, New Jersey and Delaware.
shortcomings of existing federal legislation will be explored. Finally, this Note will explain what additional steps need to be taken domestically so that victims such as Lisa can receive the justice they rightfully deserve.

I. WHAT IS HUMAN TRAFFICKING?

A. Definition of Human Trafficking Used at the International Level

A lay definition of trafficking is a practical starting point. Trafficking can be defined as “concentrating one’s efforts or interests; to trade or barter.” Expounding upon this basic concept is the legal definition of human trafficking: “the illegal recruitment, transportation, transfer, harboring, or receipt of a person, esp. one from another country, with the intent to hold the person captive or exploit the person for labor, services, or body parts.” The United Nations Office on Drugs and Crime provides a comprehensive definition used at the international level. Article III of The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons defines human trafficking as:

[T]he recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

This modern definition of human trafficking contains broad terms, such as force or fraud, to describe how a victim is trafficked. Furthermore, “victims do not need to be transported across

25 BLACK’S LAW DICTIONARY (9th ed. 2009).
27 Id.
28 CLAWSON ET AL., supra note 20, at 3.
international or other boundaries in order for trafficking to exist.”\textsuperscript{29} Congress expanded upon this definition of human trafficking at the domestic level.\textsuperscript{30}

\textbf{B. Definition at the Domestic Level – Two Categories of Severe Trafficking}

Congress divides severe human trafficking into two distinct categories: sex trafficking and labor trafficking.\textsuperscript{31} Sex trafficking is defined as “the recruitment, harboring, transportation, provision or obtaining of a person for the purpose of a commercial sex act in which a commercial sex act is induced by force, fraud, or coercion, or in which the person forced to perform such an act is under the age of 18.”\textsuperscript{32} Moreover, “a commercial sex act means any sex act on account of which anything of value is given to or received by any person.”\textsuperscript{33} Labor trafficking is defined “as the recruitment, harboring, transportation, provision or obtaining of a person for labor services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.”\textsuperscript{34} Trafficking arises in settings such as: “domestic servitude, restaurant work, janitorial work, sweatshop factory work, and migrant agricultural work.”\textsuperscript{35} This paper’s focus is on the latter aspect of severe trafficking as a form of modern day slavery.

\textbf{C. Victims of Sex Trafficking}

Sex trafficking victims are more likely to be White (26\%) or Black (40\%).\textsuperscript{36} More startling, however, is that “four-fifths of victims in confirmed sex trafficking incidents were identified as U.S. citizens (83\%).”\textsuperscript{37} Although trafficking occurs internationally and

\begin{itemize}
  \item \textsuperscript{29} \textit{Id.}
  \item \textsuperscript{31} \textit{Id.}
  \item \textsuperscript{33} \textit{Id.}
  \item \textsuperscript{34} \textit{Id. at} 3-4.
  \item \textsuperscript{35} \textit{Id. at} 4.
  \item \textsuperscript{36} BANKS ET AL., \textit{supra} note 14, at 1. In contrast, victims of labor trafficking were more likely to be Hispanic (63\%) or Asian (17\%).
  \item \textsuperscript{37} \textit{Id.} Conversely, labor trafficking victims were identified as undocumented aliens (67\%) or qualified aliens (28\%).
\end{itemize}
domestically, the victims share very similar characteristics.\textsuperscript{38} Most traffickers take advantage of an individual’s vulnerability.\textsuperscript{39}

Traffickers prey on those with few economic opportunities and those struggling to meet basic needs. Traffickers take advantage of the unequal status of women and girls in disadvantaged countries and communities, and capitalize on the demand for cheap, unprotected labor and the promotion of sex tourism in some countries.\textsuperscript{40} Victims of human trafficking, both international and domestic, share other characteristics that place them at risk for being trafficked. These include poverty, young age, limited education, lack of work opportunities, lack of family support (e.g., orphaned, runaway/throwaway, homeless), family members collaborating with traffickers, history of previous sexual abuse, health or mental health challenges, and living in vulnerable areas (e.g., areas with police corruption and high crime).\textsuperscript{41,42}

Additionally, trafficking victims are stereotyped as passive victims of sexual exploitation.\textsuperscript{43} International victims “are also unfamiliar with the language and culture of the United States – especially when traffickers constantly move them within a nationwide network of brothels to keep them isolated and disoriented.”\textsuperscript{42} Furthermore, victims of sex trafficking are frequently classified as malnourished and hungry.\textsuperscript{43}

\textbf{D. Mechanisms Traffickers Employ to Entice their Victims}

Traffickers typically hoodwink international victims into the United States by promising a better life and greater economic opportunities.\textsuperscript{44} The majority of international victims come from poor nations where there is prevalent organized crime, violence against women and children, and government corruption with political instability and armed conflict.\textsuperscript{45} Additionally, traffickers “recruit women in clubs by drugging them and then using the drug or alcohol dependency to maintain control over the victims.”\textsuperscript{46} Moreover, these victims often suffer further abuse from traffickers when traveling documents are destroyed, families are threatened with

\begin{itemize}
\item\textsuperscript{38} CLAWSON ET AL., supra note 20, at 7 (providing a comprehensive list of traits).
\item\textsuperscript{39} Id.
\item\textsuperscript{40} Id. (citations omitted).
\item\textsuperscript{43} Id.
\item\textsuperscript{44} CLAWSON ET AL., supra note 20, at 8.
\item\textsuperscript{45} Id. at 7 (citations omitted).
\end{itemize}
harm, or victims are bonded with debt they cannot repay.\footnote{47 CLAWSON ET AL., supra note 20, at 8 (citation omitted).} Victims who are subject to physical and psychological abuse from their traffickers often develop “severe physical disabilities, drug addictions and mental health problems, such as rape trauma, post-traumatic stress disorder, depression, and memory loss.”\footnote{48 Nack, supra note 46, at 824.}

Individuals trafficked domestically are typically minors.\footnote{49 CLAWSON ET AL., supra note 20, at 4.} Statistically, minors comprise about half of the estimated 600,000-800,000 yearly victims of human trafficking across international borders.\footnote{50 Id.} The most susceptible victims are runaway youth and minors.\footnote{51 Id. at 4-5.} However, the domestic statistics are not nearly as comprehensive or reliable as statistics referencing the number of women trafficked into the United States.\footnote{52 Id. at 5.} Moreover, minors are not the only segment of the population who are at risk.\footnote{53 Id.} For example, the Department of Justice concluded that “nearly half of all [trafficking] incidents investigated between January 1, 2008 and June 30, 2010, involved allegations of adult prostitution (48%).”\footnote{54 BANKS ET AL., supra note 14, at 3.} Since the statistics do not paint a full picture of the issue of human trafficking within the United States,\footnote{55 Id.} it is imperative to analyze the domestic legislation used to combat it.

II. DOMESTIC LEGISLATION

A. Federal Legislation – The Trafficking Victims Protection Act

Human trafficking is often called “modern day slavery.”\footnote{56 CLAWSON ET AL., supra note 32, at 4.} The master-slave relationship is the defining characteristic of “antebellum” slavery, wherein the “master had the power to deny those facets of life that constitute essential attributes of personhood and thereby transform persons into little more than property.”\footnote{57 Nidhi Kumar, Note, Reinforcing Thirteenth and Fourteenth Amendment Principles in the Twenty-First Century: How to Punish Today’s Masters and Compensate Their Immigrant Slaves, 58 RUTGERS L. REV. 303, 308} Elements of the antebellum slavery ideology, which
Human trafficking in the United States dominated the southern states before and during the Civil War, continue in some aspects of American society today.\textsuperscript{58} For instance, traffickers, functioning as de facto masters by taking away victims’ passports, forbid communication with other people, and frequently deny medical treatment to intentionally isolate victims.\textsuperscript{59}

The Thirteenth Amendment can be thought of as the starting point to fighting modern day slavery. This reconstruction amendment was ratified by the states on December 6, 1865.\textsuperscript{60} Section I of the Thirteenth Amendment formally abolished slavery stating “[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”\textsuperscript{61} Section II of the amendment is the enforcement mechanism wherein “Congress [has the] power to enforce this article by appropriate legislation”;\textsuperscript{62} thus, armed with the authority to pass laws necessary and proper for abolishing slavery.

Congress enacted its first piece of federal legislation to combat sex trafficking in 2000.\textsuperscript{63} The Trafficking Victims Protection Act (“TVPA”) was enacted to eradicate the evils of human trafficking at the domestic level.\textsuperscript{64} The purposes of this Act are “to combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims.”\textsuperscript{65} Prior to the adoption of the TVPA, no comprehensive law existed to penalize the range of offenses involved in trafficking.\textsuperscript{66} The TVPA is a three-pronged piece of legislation that addresses prevention, prosecution, and protection.\textsuperscript{67} The Presidential-level interagency task force (“Task Force”), which includes the Secretaries of State, Labor, and Health and Human

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{58} Id.
\item \textsuperscript{59} Id.
\item \textsuperscript{60} THE LIBRARY OF CONGRESS, Primary Documents in American History: 13th Amendment to the U.S. Constitution (last visited September 8, 2013), http://www.loc.gov/rr/program/bib/ourdocs/13thamendment.html.
\item \textsuperscript{61} U.S. CONST. amend. XIII, § 1.
\item \textsuperscript{62} U.S. CONST. amend. XIII, § 2.
\item \textsuperscript{63} See generally Trafficking Victims Protection Act, 22 U.S.C. §§ 7101-7200 (2000); see also U.S. CONST. art. I, § 8, cl. 18 (Necessary and Proper clause).
\item \textsuperscript{64} 22 U.S.C. §§ 7101-7200 (2000).
\item \textsuperscript{65} § 7101(a).
\item \textsuperscript{66} § 7101(b)(14).
\item \textsuperscript{67} § 7103(d)(2).
\end{itemize}
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Services, as well as the Attorney General and other high-level federal officials, enforces these objectives. Therefore, it is imperative to discuss each prong individually.

i. The Prevention Prong of TVPA

The TVPA requires the elite Task Force to complete a number of requirements in order to prevent the trafficking of persons. The Task Force is responsible for measuring and evaluating the progress of the United States and other countries in eliminating trafficking. Additionally, it is charged with collecting and organizing data, which requires “significant research and resource information on domestic and international trafficking.” The State Department then “issue[s] an annual report on the anti-trafficking efforts of foreign countries,” as required by the TVPA. This report contains a list of countries who fully comply with the minimum standards set forth by the TVPA. Moreover, the annual report also contains lists of countries that have not yet fully complied with TVPA standards but are making significant efforts to be in compliance, as well as those countries which are not making significant efforts to comply with the TVPA.

The Task Force uses the data to “establish and implement international initiatives . . . includ[ing] micro-lending programs, job training and counseling, educational programs, public awareness programs, and grants to non-governmental organizations (NGOs).” Any country that fails to “comply with minimum standards for the elimination of trafficking” and does “not mak[e] significant efforts to bring itself into compliance with such standards” is ineligible to receive “nonhumanitarian, nontrade-related foreign assistance” from the United States.

Intuitively, the prevention prong of TVPA is designed to prevent human trafficking domestically. The TVPA also attempts to mitigate the problem internationally. Because the

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70 § 7103(d)(2).
71 § 7103(d)(3).
72 Srikantiah, supra note 41, at 174.
73 § 7107(b)(1)(A).
74 § 7107(b)(1)(B), (C).
75 CLAWSON ET AL., supra note 32, at 5.
76 § 7107(a)(1)-(2).
77 §§ 7103, 7104, 7107.
78 Id.
TVPA is advocated as a “victim-centric” piece of legislation, the prosecution and protection prongs are the most pivotal parts of this legislation.  

ii. The Prosecution Prong of TVPA

The TVPA provides various crimes under which traffickers may be prosecuted. 80 For example, it punishes crimes for sex trafficking children, forced labor, and confiscating passports of victims or other documents in furtherance of a trafficking scheme. 81 Most importantly, the TVPA “extended the definition of involuntary servitude to include non-violent coercion such as psychological coercion.” 82 This is significant because it overrules the Supreme Court’s decision in United States v. Kozminski, which held that “violations of involuntary servitude must include threats or acts of physical or legal coercion.” 83 Furthermore, the burden of proof has been lowered by the most recent version of the TVPA for individuals accused of sex trafficking. 84 The mens rea has been amended from “knowledge” to “reckless disregard” for those “defendants who come into contact with victims forced to engage in commercial sex acts.” 85 This provision, however, only applies to the component relating to minor victims of sex trafficking. 86 The Act uses the “reckless disregard” standard for “offsite brothel landlords who have not had reasonable opportunity to observe the victims.” Thus, the Act permits “ancillary supporters of trafficking to be convicted if they were willfully blind to the minor status of the victims engaged in commercial sex.” 87 This change to TVPA is substantial because it makes the burden of proof less stringent for offenders who claim to have no knowledge of a minor’s age. 88

Additionally, the TVPA provides harsh penal punishments for individuals convicted of human trafficking. 89 Defendants convicted of crimes involving trafficking are punishable by a

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79 See 22 U.S.C. §§ 7101-7200 (2000). Because TVPA provides benefits to victims of severe trafficking while not criminalizing those subjected to human trafficking within America’s borders, it can be classified as a victim oriented piece of federal legislation.


82 CLAWSON ET AL., supra note 32, at 5.


85 Id.


87 Id.

88 Id.

89 Srikantiah, supra note 41, at 173.
twenty year sentence, or life for cases of sex trafficking in children under fourteen. Moreover, “if death resulted from the incident, or if the violation included kidnapping and/or aggravated sexual abuse, the defendant could be imprisoned for any term of years up to life.” Additionally, those found guilty pursuant to the “reckless disregard” standard of a minor’s age face a mandatory minimum sentence of 10 to 15 years. 

The TVPA also contains harsh economic penalties for those found guilty of human trafficking. Arguably, the greatest deterrent effect of TVPA is the mandatory provision requiring restitution to victims. The restitution “must be for the ‘full amounts of the victim’s losses,’ plus the greater of the value of the victim’s services or minimum wage under the Fair Labor Standards Act.” Moreover:

[t]he “full amount of victim’s losses” as defined by section 2259(b)(3) includes medical services related to physical, psychiatric, or psychological care, physical or occupational therapy or rehabilitation, necessary transportation, temporary housing, child care expenses, lost income, attorney’s fees, as well as other costs incurred, and any other losses incurred by the victim as a proximate result of the offense.

Beyond the monetary gain to victims, they may also be eligible for various benefits.

iii. The Protection Prong of the TVPA

The TVPA provides additional protections to individuals who qualify as victims of severe trafficking. It expressly states that victims “should not be inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts committed as a direct result of being trafficked, such as using false documents, entering the country without documentation, or working without

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91 Clawson et al., supra note 32, at 5-6.
92 Women’s UN Report Network, supra note 70.
93 See Srikantiah, supra note 41, at 173.
94 Sangalis, supra note 42, at 419.
95 Id.
98 Id.
If a victim is afforded protections under the TVPA, she may be provided with immigration relief and/or social services.\footnote{99}{Id.}

Regarding immigration relief, law enforcement officials may request “continued presence” or the T-visa for victims.\footnote{100}{22 U.S.C. §§ 7101-7200 (2000); Srikantiah, supra note 41, at 174.} Continued presence provides illegal aliens and immigrants “a temporary legal status for witnesses during a trafficking prosecution.”\footnote{101}{Srikantiah, supra note 41, at 174.} However, this status does not provide victims a permanent residence in America; it simply prevents the victim from being deported.\footnote{102}{Id.; see 22 U.S.C. § 7105(c)(3) (2004).} Conversely, the T-visa may provide victims an opportunity to gain lawful residence in the United States.\footnote{103}{Srikantiah, supra note 41, at 174.} The T-visa “is a three-year temporary visa with a pathway to permanent legal status.”\footnote{104}{Id.} In order for a victim to qualify for a T-visa, trafficking victims must meet the following qualifications:

1. the victim is or has been a victim of a severe form of trafficking in persons as defined in section 7102(8) of the TVPA;
2. the victim is physically present in the United States…on account of such trafficking;
3. the victim has complied with requests for help in the investigation or prosecution of traffickers or has not reached the age of 15; and
4. the victim would suffer extreme hardships involving unusual or severe harm upon removal from the United States.\footnote{105}{Srikantiah, supra note 41, at 174.}

Additionally, the number of T-visas issued is limited to 5,000 per year by TVPA.\footnote{106}{8 U.S.C. § 1184(o)(2) (Supp. IV 2004); Srikantiah, supra note 41, at 175.} Most importantly, a victim must complete a certification stating she is either “willing to assist in every reasonable way in the investigation and prosecution of severe forms of trafficking in persons” or is “unable to cooperate with such a request due to physical or psychological trauma.”\footnote{107}{8 U.S.C. § 1101(a)(15)(T)(i); CLAWSON ET AL., supra note 32, at 6.} After three years under the T-visa status, the victim is eligible to adjust her “status to lawful permanent residence and, subsequently, to naturalize and become a U.S. citizen.”\footnote{108}{8 U.S.C. § 1101(a)(15)(T)(i)(III)(bb); Srikantiah, supra note 41, at 175.}
In addition to immigration protection, a victim may also be entitled to social services from the Department of Health and Human Services (HHS). HHS can provide both medical and social services to victims. According to HHS, such benefits may include the following:

cash assistance and medical care, Temporary Assistance for Needy Families (TANF), Medicaid, food stamps and other federally funded or administered benefits and services. Young people who have been victims of trafficking and choose to cooperate with law enforcement officials to prosecute traffickers can benefit from a new streamlined process to apply for and receive federal financial aid for college. . . In addition, HHS will carry out pilot programs to establish residential treatment facilities in the United States for children and teenagers subjected to domestic trafficking.

Yet, this list is not exclusive. Other benefits may include shelter, food, legal assistance, and translation services. However, to be eligible for benefits, the victim must complete the same aforementioned certification and additional requirements, which will be discussed in part three of this Note.

B. State Legislation to Combat Human Trafficking

My potential client may also have a cause of action at the state level. Forty-nine states and the District of Columbia have at least one form of anti-trafficking law. However, this Note will focus on state legislation at the regional level, which will include Pennsylvania, New Jersey, and Delaware, in that order.

i. Pennsylvania’s Anti-Trafficking Legislation

Pennsylvania criminalizes traffickers who subject victims to forced labor or services. Similar to TVPA, Pennsylvania provides a working definition of what constitutes forced labor or services. The statute outlaws forced labor or services procured through threat of bodily injury,
physically retraining a person unlawfully, “abuse or threat[en] to abuse the law or legal system,” confiscating a person’s passport or legal documents, or “engag[ing] in criminal coercion of another person.” 119 Regarding the burden of proof, the mens rea to prove a trafficking offense in Pennsylvania is “knowingly.” 120 Unlike TVPA, Pennsylvania’s statute does not contain a lesser degree of mens rea when proving a defendant has committed a trafficking crime against a minor. 121

Similar to TVPA, Pennsylvania harshly penalizes traffickers. 122 If convicted, a trafficker could face up to ten years in prison. 123 However, if the victim is under the age of eighteen, a trafficker could face up to twenty years in prison. 124 In addition to incarceration, individuals found guilty of human trafficking must provide restitution to the victim, including: (1) gross income or value to the person who received labor or services from the victim; or (2) the value of the victim’s labor based on the minimum wage of the state. 125 This provision is almost identical to its federal counterpart. 126

Although Pennsylvania imposes harsh penalties upon those convicted of human trafficking, unlike the TVPA, it does not contain provisions for prevention. 127 Despite the fact that Pennsylvania does not mandate statutory reporting requirements, the National Human Trafficking Resource Center (NHTRC) has provided annual reports since 2009. 128 The NHTRC reports are akin to the TVPA’s prevention requirements.

As previously stated, Pennsylvania legislation does not contain mandatory anti-trafficking protection provisions like the TVPA. 129 However, there are a variety of organizations and referral options available to victims in Pennsylvania. 130 For example, Dawn’s Place “is a non-profit organization that proactively supports women negatively affected by commercial...

119 § 3001(1)-(5).
120 § 3002(a).
121 § 3002(a)-(b).
123 18 PA. CONS. STAT. § 1103(2) (2012).
125 18 PA. CONS. STAT. § 3003(a)(1)-(2) (2012).
126 See Sangalis, supra note 42, at 419.
127 §§ 3001-3004.
130 POLARIS PROJECT, supra note 116, at 15.
sexual exploitation by providing services to women and raising awareness through education, prevention, public policy reform and community collaborations.”

In January, 2012, Pennsylvania successfully prosecuted its first offender under the state’s anti-trafficking legislation. A man and woman from Delaware County were convicted of human trafficking after a source informed law enforcement officials that the traffickers had posted pictures of a victim online in order to solicit clients for prostitution. The victim told detectives “about a list of ‘rules’ she was supposed to follow, such as ‘daddy is the law,’ ‘never tell daddy no,’ and ‘any disrespect can cause you to get your head knocked off.’” The male trafficker was sentenced “to 18-60 months in a state correctional facility with 10 years of sexual offender probation . . . [and] must also register as a sex offender under Megan’s Law for 10 years.” The female trafficker “was sentenced to one to two years in prison with five years of sex offender probation.” As evidenced by the above-mentioned case, Pennsylvania’s anti-trafficking legislation is clearly working.

ii. New Jersey’s Anti-Trafficking Legislation

New Jersey’s legislation aimed at combatting human trafficking is similar to the current legislation in Pennsylvania. New Jersey does not explicitly define sex or labor trafficking. However, an individual commits a crime of trafficking when he “knowingly holds, recruits, lures, entices, harbors, transports, provides or obtains, by any means, another, to engage in sexual activity . . . or to provide labor or services.” Trafficking can occur through threats of

132 See POLARIS PROJECT, supra note 116, at 15.
134 Id.
135 Id.
136 Id.
137 Id.
139 Id.
140 § 2C:13-8(1).
seriously bodily harm, by a plan intended to deceive the victim that he or she would be subject to severe bodily harm, or by “destroying, concealing, removing, confiscating, or possessing” immigration or government documentation regarding the victim’s identity.\textsuperscript{141}

New Jersey has legislation that also provides harsh penal and economic penalties for those convicted of human trafficking.\textsuperscript{142} New Jersey’s human trafficking statute categorizes the crime as a felony in the first degree.\textsuperscript{143} A trafficker could face incarceration up to twenty years without the possibility of parole; or, he could be subject to twenty years to life in prison with the possibility of parole after serving twenty years.\textsuperscript{144} Similar to federal legislation, those convicted of trafficking must provide restitution to victims.\textsuperscript{145}

The New Jersey legislature has incorporated the protections provided in the TVPA into its own statute:

In a case involving a victim of human trafficking . . . the Office of Victim-Witness Advocacy or the county prosecutor's office involved in the case shall ensure that the victim of human trafficking obtains assistance in receiving any available benefits or services, including assistance in receiving any necessary certifications or endorsements needed to be recognized as having federal T non-immigrant status for the purpose of receiving any federal benefits or services available pursuant to the "Trafficking Victims Protection Reauthorization Act of 2003[.]\textsuperscript{146}

New Jersey has gone a step further in providing additional social services to victims. A victim of human trafficking can qualify as an “eligible alien,” who may be entitled to welfare benefits pursuant to the Work First New Jersey (WFNJ) program.\textsuperscript{147} WFNJ is a program designed to provide “temporary cash assistance and many other support services to families through the Temporary Assistance for Needy Families (TANF) program.”\textsuperscript{148} The social services provided by WFNJ are similar to those provided at the federal level by the Department of Health and Human Services.

\textsuperscript{141} § 2C:13-8(1)(a)-(d).
\textsuperscript{142} § 2C:13-8(2)(d)-(e).
\textsuperscript{143} § 2C:13-8(2)(d).
\textsuperscript{144} Id.
\textsuperscript{145} § 2C:13-8(2)(e).
\textsuperscript{146} N.J. STAT. ANN. § 52 4B-44(e) (West 2012).
\textsuperscript{147} § 44:10-44; § 44:10-55.
Similar to Pennsylvania, New Jersey does not contain a prevention prong to its anti-trafficking legislation.\textsuperscript{149} However, similarly in Pennsylvania, the National Human Trafficking Resource Center (NHTRC) provides an annual report of trafficking incidents within the state.\textsuperscript{150} New Jersey also has an organization in place to aid those individuals who have been victims of human trafficking.\textsuperscript{151} In January, 2012, New Jersey, held its Second Annual Human Trafficking Awareness Day to “train and assist law enforcement,” to “coordinate statewide efforts,” and “increase the successful interdiction and prosecution of trafficking of human persons.”\textsuperscript{152}

\textit{iii. Delaware’s Anti-Trafficking Legislation}

Delaware’s human trafficking legislation is essentially a miniature version of the TVPA.\textsuperscript{153} It contains a model that is similar to the TVPA’s three-pronged system of prevention, prosecution and protection; however, it is much less detailed than its federal counterpart.\textsuperscript{154} Regarding the prevention prong, Delaware’s Attorney General, together with the state’s Department of Health and Social Services, must issue a report “outlining how existing victim/witness laws and regulations respond to the needs of trafficking victims . . . and suggesting areas of improvement and modification.”\textsuperscript{155} In addition, they must also issue a report detailing “how existing social service programs respond or fail to respond to the needs of trafficking victims…and areas needing improvement and modification.”\textsuperscript{156}

Regarding prosecution, Delaware criminalizes traffickers who subject victims to “commercial sexual activity” and “forced labor or services.”\textsuperscript{157} A trafficker will be found guilty if proven that he knowingly caused or threatened to cause physical harm, by “physically restraining or threatening to physically restrain another person,” “abusing or threatening to abuse the law,” or destroying or confiscating passports, immigration documents, or other forms of government identification documents.\textsuperscript{158} Traffickers who are convicted could face from five

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\textsuperscript{149} § 2C:13-8.
\textsuperscript{151} \textit{Id}.
\textsuperscript{152} \textit{Division of Criminal Justice, New Jersey Human Trafficking Task Force, N.J. Dep’T of Law & Public Safety, Office of the Attorney General}, http://www.nj.gov/oag/dcj/humantrafficking/ (last visited October 28, 2013). This event was held on January 11, 2012.
\textsuperscript{153} DEL. CODE ANN. tit. 11, § 787 (2013).
\textsuperscript{155} § 787(d)(1).
\textsuperscript{156} § 787(d)(2).
\textsuperscript{157} § 787(a)(2)-(3).
\textsuperscript{158} § 787(b)(1)(a)-(d).
\end{flushleft}
years to life in prison, depending on the classification of the felony.\textsuperscript{159} Additionally, like TVPA and other states in the region, Delaware mandates that offenders pay restitution to victims.\textsuperscript{160}

In terms of protection, the statute does not expressly mandate immigration or social services like the TVPA.\textsuperscript{161} However, it can be implicitly read into the statute pursuant to the above-mentioned reporting requirements.\textsuperscript{162} Delaware’s Department of Health and Social Services provides social services such as cash assistance, temporary assistance for needy families (TANF), and food stamps. In addition to state funded social services, non-profits also exist in Delaware to assist victims of human trafficking.\textsuperscript{163} For example, People’s Place provides programs and services to families, adults, and children, such as counseling, education, prevention, intervention, supportive services, and advocacy.\textsuperscript{164}

III. Negative Aspects and Problems Associated with the TVPA

In theory, the three-pronged approach to the TVPA appears to operate as an effective countermeasure to human sex trafficking. In practice, however, the prosecution and protection prongs place high burdens on victims in order to receive justice and benefits they rightfully deserve. Part three of this Note will briefly address some of the problems associated with the TVPA.

A. Identifying Victims of Sex Trafficking is Easier Said that Done

Congress has conceded that the greatest challenge in helping victims of sex trafficking is locating and identifying them.\textsuperscript{165} Sex trafficking victims are quickly labeled by law enforcement officials as illegal immigrants and prostitutes when they do come forward to law enforcement officials.\textsuperscript{166} Labeling victims as prostitutes is a “disservice to all victims of human

\textsuperscript{159}tit. 11, § 4205(b)(1)-(5).
\textsuperscript{160}§ 787(c)(1)-(2).
\textsuperscript{161}Id.
\textsuperscript{162}§ 787(d)(2).
\textsuperscript{165}Rieger, supra note 113, at 245.
\textsuperscript{166}Id. at 246.
Criminalizing victims as prostitutes goes against the fundamental reasons for enacting TVPA. Therefore, “it is essential that these officials receive the proper training to be able [to] seek out trafficking victims by proper investigation and identification of these women as victims rather that criminals.” Additionally, “the TVPA provides funding for training programs, but it is underutilized.”

B. Meeting the TVPA’s Stringent Standard of “Severe Trafficking”

In order for a victim to receive benefits under the protection prong or subject her trafficker to prosecution pursuant to the TVPA, the survivor must be able to prove that she was subjected to a “severe form of trafficking in persons.” The TVPA defines a severe form of sex trafficking in persons as:

sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or [ . . . ] services, through the use of force, fraud, or coercion for the purpose of involuntary servitude, peonage, bondage, or slavery.

Victims who do not meet this rigid definition do not receive benefits and are unable to bring a cause of action against their trafficker. Typically, women who meet the severe component of the TVPA are kidnapped, taken to another country, sold into trafficking, and forced to work in the sex industry. However, the women who often do not qualify as victims of a severe form of sex trafficking are migrant sex workers. These victims “have consented to come to the United States and to work in the sex industry, but . . . find themselves in slave-like conditions.”

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168 Rieger, supra note 113, at 245-46.

169 Id. at 246.

170 Srikantiah, supra note 41, at 174.


172 Rieger, supra note 113, at 245, 251.

173 Id. at 249.

174 Id.

175 Id.
C. The Certification Process & The Mandatory Provision to Assist the Prosecution May Preclude a Victim Access to Her Benefits

Meeting the definition of severe trafficking is a threshold issue. A survivor must also be certified as a victim of a “severe form of trafficking.” To complete the certification, “[a]n adult victim has to prove that she was ‘subject to performing commercial sex acts’ induced by force, fraud, coercion.” In addition to the certification, a victim must be prepared to reasonably assist in the prosecution of her traffickers. Moreover, a victim must validly apply for a T-visa or must be available to prosecute the traffickers. The process of certification is usually long and arduous, spanning weeks or months.

Moreover, in order to be eligible for immigration benefits, a victim must be willing to cooperate with law enforcement officials in the prosecution of her trafficker. Victims “who are unwilling or unable to cooperate will not be entitled to TVPA protection from immigration detention or deportation.” If a victim is granted the “continued presence” status under the immigration protection prong of the TVPA, it “may be revoked at any time should officials deem the victim uncooperative.”

D. Obtaining a T-Visa Can Be Very Difficult

In addition to the above problems, actually obtaining a T-visa can be an extremely difficult process. In order to qualify, the victim must also demonstrate “extreme hardship involving unusual and severe harm upon removal.” Many victims are unable to establish the extreme hardship elements and are deported from the United States.

176 See Clawson et al., supra note 32, at 6-7.
177 Rieger, supra note 113, at 247.
178 Id.
179 Id.
180 Id.
181 Id.
182 Id.
183 Id.
184 Rieger, supra note 113, at 252.
185 Id.
186 Id.
IV. OPTIONS BEYOND TVPA: A CALL TO DO MORE AT THE DOMESTIC LEVEL

Many scholars and advocates argue the federal government needs to do more at the domestic level to truly ensure traffickers are punished for their atrocious crimes. The TVPA purports to be a victim-centric law; however, more needs to be done domestically in order to provide these victims with actual justice. Part four of this Note will briefly address ways in which Congress can strengthen the TVPA, while also providing alternative means to prosecute offenders.

A. Reforming the Requirements for Benefits Under TVPA

To qualify for benefits under the TVPA, an international adult must be a victim subjected to a “severe form of trafficking.” In practice, “this has proven difficult, given the struggle to define trafficking and the inexperience of law enforcement in recognizing it.” Next, the victim “must then be willing to cooperate with all reasonable requests by law enforcement” in order to receive benefits under the TVPA. Despite Congress’ assurances that the TVPA focuses on victims, low numbers of victims are granted protection. In 2003, President George W. Bush announced a $50 million initiative to combat human trafficking. However, since TVPA’s enactment in 2000, “the law granted benefits to several hundred victims out of a pool of tens of thousands.” Furthermore, “as of 2008, the Department of Homeland Security received 394 applications and only granted 247 T-visas.” As statistics can only be taken at their face value, more needs to be done at the domestic level, including reforms to federal legislation, in order to truly fight the evils of human trafficking.

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188 Sangalis, supra note 42, at 436.
189 Id.
190 Sadruddin et al., supra note 68, at 391.
192 Sadruddin et al., supra note 68, at 393.
B. Creating an International Sex Trafficking Registry Akin to the United States’

Sex Offender Registry to Combat Trafficking of Persons

One scholar argues for an international human trafficking registry to eradicate the evils of human trafficking. Professor Brown advocates for U.S. sex offender laws to provide a model “for the creation of an international trafficking registry that would both increase public support for the prosecution of trafficking offenders and potentially deter sex trafficking on a global scale.” Combating sex trafficking on a global level would help eradicate trafficking at home and abroad. Moreover, “a sex trafficking registry would also be an additional strategy for law enforcement,” to ultimately strengthen TVPA. An international sex registry would bolster the prevention and prosecution aspects of TVPA because “collecting trafficker information and creating a database that is accessible to law enforcement agencies internationally will assist in the prosecution of traffickers everywhere.”

C. Prosecuting Traffickers Through Other Legislative Means: Common Law Claims

If all else fails with prosecuting human traffickers under TVPA, the government should resort to common law tort claims. The civil claims of false imprisonment and intentional infliction of emotional distress may provide victims alternative means for holding traffickers accountable. Tort claims may provide victims “greater flexibility” than federal statutory claims. Moreover, “tort law may be a more appropriate means to address such claims because it has traditionally evolved in response to changing social circumstances and needs.” Most importantly, since judges are hesitant to overrule the legislature, these alternative means may be more effective as the courts may be more receptive to common law claims.

The Second Restatement of Torts defines false imprisonment as:

(1) An actor is subject to liability to another for false imprisonment if
   (a) he acts intending to confine the other or a third person within boundaries fixed by the actor, and

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194 See generally id.
195 Id. at 31.
196 Id. at 39-40.
197 Id. at 40.
198 Id.
200 Id.
201 Id.
(b) his act directly or indirectly results in such a confinement of the other, and
(c) the other is conscious of the confinement or is harmed.

(2) An act which is not done with the intention stated in Subsection (1, a) does not make the actor liable for the other for a merely transitory or otherwise harmless confinement, although the act involves an unreasonable risk of imposing it and therefore would be negligent or reckless if the risk threatened bodily harm.\(^{202}\)

The most crucial aspect of false imprisonment is “restrain of the individual.”\(^{203}\) In order for a victim to satisfy the elements of this cause of action, the trafficker “must have deprived [the victim] of [their] liberty or forced [the victim] to go or remain somewhere against [their] will.”\(^{204}\) Additionally, if the trafficker’s words or conduct cause the victim to reasonably believe that he or she was not at liberty to leave, then violence or physical restraint is not necessary to prove false imprisonment.\(^{205}\)

The Second Restatement of Torts defines the intentional infliction of emotional distress as:

(1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm. (2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress (a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or (b) to any other person who is present at the time, if such distress results in bodily harm.\(^{206}\)

To prove the aforementioned elements, a victim must demonstrate that the trafficker’s conduct was so outrageous it caused severe emotional distress.\(^{207}\) This may be a difficult task to prove because the conduct must exceed that which is usually tolerated in a civilized society, be “regarded as atrocious and utterly intolerable in a civilized community”, or be outside the bounds of decency.\(^{208}\) Notwithstanding the high burden of proof, courts have identified limited circumstances where human trafficking will qualify as outrageous. For example, the following circumstances are deemed outrageous conduct: “trafficking victims were living in isolated circumstances and facing language and cultural barriers, were of a young age, suffered physical

\(^{202}\) Restatement (Second) of Torts § 35 (1965).
\(^{203}\) Note, supra note 199, at 2593.
\(^{204}\) Id.
\(^{205}\) Id.
\(^{206}\) Restatement (Second) of Torts § 46 (1965).
\(^{207}\) Note, supra note 199, at 2591.
\(^{208}\) Id.
abuse by the trafficker of his affiliates, or were laboring or living under other difficult circumstances.”

Pennsylvania, New Jersey and Delaware all have statutory and common law claims for false imprisonment and intentional infliction of emotional distress. These three states all have statutes regarding false imprisonment, which are similar to the Restatement’s definition. However, a cause of action for intentional infliction of emotional distress defers to the Restatement’s definition, and therefore remains a common law claim.

A potential negative ramification of bringing these tort actions is the applicability of the statute of limitations. For these regional states, the statute of limitations is two years for tortious personal injury claims. Nevertheless, “[c]ivil suits are also a means of giving control back to the victim.” While prosecuting a trafficker under TVPA, a victim must be willing to cooperate at all times with federal prosecutions; in contrast, “civil suits...are exclusively controlled and directed by the victims from beginning to end.” The potential for monetary damages awarded by the court is another benefit for victims who file a civil complaint. Not only do civil damages aid victims who are greatly in need of economic compensation, high awards of damages may deter future traffickers.

V. Conclusion

It is apparent the federal government is attempting to eradicate the problem of human trafficking within the United States via its comprehensive legislation known as the Trafficking Victims Protection Act. Although TVPA is admirable, much work remains at the domestic level to further prevent human trafficking, as well as providing easier mechanisms to prosecute

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209 Id. at 2592.


214 Id. at 254.

215 Id.

216 Id.
traffickers and provide benefits to victims. Strengthening the TVPA will help aid in the demise of human trafficking both domestically and internationally. Moreover, bringing tort actions against traffickers may be an easier way to prosecute offenders. The federal government is making steps in the right direction to end modern day slavery; but, more needs to be done so my potential client, Lisa, can truly receive the benefits and justice she deserves.