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INTRODUCTION TO THE SYMPOSIUM ON BRINGING ECONOMIC & SOCIAL RIGHTS HOME: THE RIGHT TO ADEQUATE HOUSING IN THE UNITED STATES

Martha F. Davis, Maria Foscarinis, and Risa E. Kaufman*

On April 26, 2013, a packed room of close to 150 attorneys, advocates, and federal, state, and local government representatives, from over eighty organizations in fifteen states, gathered in New York City for a national symposium on Bringing Economic & Social Rights Home: The Right to Adequate Housing in the United States. Co-sponsored by the Columbia Law School Human Rights Institute, the National Law Center on Homelessness & Poverty (NLCHP), the Northeastern Law School Program on Human Rights and the Global Economy (PHRGE), and the Columbia Human Rights Law Review, the symposium connected participants to advanced legal analysis and practice from the United States and abroad to inform the housing rights movements' advocacy on behalf of homeless and poor Americans. The event was generously hosted by Skadden, Arps, Slate, Meagher & Flom.

This symposium took place at a time when the need for a human rights approach to housing has never been greater. Estimates suggest that up to 3.5 million Americans experience homelessness each year,¹ including over a million who work full or part-time yet are

* Martha F. Davis is a Professor at Northeastern University School of Law. Maria Foscarinis is the Executive Director of the National Law Center on Homelessness & Poverty. Risa E. Kaufman is the Executive Director of the Columbia Law School Human Rights Institute and a lecturer-in-law at Columbia Law School. The authors would like to thank Eric Tars for his contributions to this introductory essay, and the editors of the Columbia Law School Human Rights Law Review for co-sponsoring the Right to Housing Symposium and for their excellent work on this symposium issue.

1. See National Alliance to End Homelessness, *Homelessness Looms as Potential Outcome of Recession 5* (2009), available at http://www.endhomelessness.org/page/-/files/2161_file_Projected_Increases_in_Homelessness.pdf.

unable to pay for housing.² The crisis is worsening. A quarter of American renters spend more than half of their income on rent,³ putting these families one paycheck away from homelessness. This precariousness and instability is apparent in the number of people living doubled up with family or friends, which increased to 7.4 million people—a 9.4 percent rise from the previous year—in 2011, the most recent year for which data is available.⁴ Deep budget cuts to the Department of Housing and Urban Development (HUD) and other federal agencies due to the budget sequestration agreement have threatened the basic safety net for many people living in poverty. The resulting cuts have caused 125,000 households to lose assistance from the Housing Choice Voucher program; have diminished funds available to other shelter and housing programs, potentially causing some of them to close; and have resulted in 75,000 fewer households receiving foreclosure prevention assistance.⁵

In the midst of this housing crisis, momentum is building for a human rights-based response. Grassroots organizers, legal advocates, and policy makers are exploring the potential of human rights to frame and address issues of housing insecurity and homelessness. Legislatures in Connecticut, Illinois and Rhode Island have recently passed Homeless Bills of Rights⁶ to protect people who are homeless from discrimination in housing, employment and government services. Local communities are enacting Right to

2. See Urban Institute, *Homelessness: Programs and the People They Serve* 29 (1999), available at <http://www.urban.org/UploadedPDF/homelessness.pdf>.

3. Joint Center for Housing Studies at Harvard University, *America's Rental Housing: Evolving Markets and Needs* 28 (2013), available at <http://www.jchs.harvard.edu/americas-rental-housing>; John Griffith, Julia Gordon & David Sanchez, Center for American Progress, *It's Time to Talk About Housing* 7 (2012), available at http://www.americanprogress.org/wp-content/uploads/issues/2012/08/pdf/7_housing_questions.pdf.

4. National Alliance to End Homelessness, *The State of Homelessness in America 2013* 26 (2013), available at <http://www.endhomelessness.org/library/entry/the-state-of-homelessness-2013>.

5. *The Impacts of Sequestration: Hearing Before the S. Comm. On Appropriations*, 113th Cong. 1–3 (2013), available at <http://portal.hud.gov/hudportal/documents/huddoc?id=sequesterftestimony.pdf> (written testimony of Shaun Donovan, Secretary of the U.S. Department of Housing & Urban Development).

6. See 2013 Conn. Gen. Stat. § 1-500 (2014); 775 Ill. Comp. Stat. 45/10 (2013).

Housing resolutions.⁷ The American Bar Association approved a resolution calling for federal and state governments to take steps—legal and budgetary—to promote the human right to housing.⁸ The U.S. State Department is showcasing its engagement with the U.N. human rights system, including through its participation in the human rights treaty review and the Universal Periodic Review, and has indicated a renewed commitment to economic and social rights.⁹ The U.S. Interagency Council on Homelessness recently ran a month-long blog series addressing human rights and homelessness.¹⁰

In this generative context, the co-sponsors of the symposium convened academics, practitioners, government officials, and directly affected individuals to explore opportunities and develop strategies to advance the field of housing and human rights. Participants began the day by evaluating the connection between the right to housing and other rights. Specifically, they discussed the centrality of housing to other economic, social and cultural rights (ESCRs), including health and education, and the circumstances in which the right to housing can—and should—be formulated in terms of more widely accepted civil and political rights. Next, program participants examined international comparative approaches to the right to housing and related ESCRs and examined factors that contribute to the varying approaches. Over the lunch hour, Evan Wolfson, Executive Director of the Campaign for the Freedom to Marry, and Columbia Law School Professor Olatunde Johnson discussed lessons that advocates urging a human right to housing can draw from the

7. See, e.g., Madison Marks Two Years Since Passing Housing Rights Resolution, *The Madison Times*, Nov. 26, 2013, http://legacy.themadisontimes.com/news_details.php?news_id=3341 (documenting progress in reducing homelessness in Madison following passage of a resolution that declared housing a human right).

8. See ABA Res. 117 (2013), available at http://www.americanbar.org/content/dam/aba/administrative/homelessness_poverty/resolution117.authcheckdam.pdf.

9. Human Rights Council, Rep. of the Working Group on the Universal Periodic Review, United States of America, Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review, A/HRC/16/11/Add.1, para. 19 (Mar. 8, 2011); see also Nat'l Law Ctr. on Homelessness & Poverty, *Simply Unacceptable: Homelessness and the Human Right to Housing in the United States*, 7 (2011), available at http://www.nlchp.org/Simply_Unacceptable (assessing the current level of U.S. compliance with the human right to housing).

10. See *Human Rights and Alternatives to Criminalization*, United States Interagency Council on Homelessness, <http://usich.gov/issue/human-rights> (last visited Mar. 5, 2014).

Campaign's successes in winning support for and legal recognition of the right to marry for same-sex couples. Next, participants examined how U.S. advocates are working to build an international record on the human right to housing in the United States through engagement with U.N. mechanisms and grassroots advocacy, and explored ways to integrate the outcomes of these efforts into litigation in U.S. courts. At the end of the day, a roundtable of experts discussed opportunities for and challenges to establishing a human right to housing in the United States, including the justiciability of ESCRs and the efficacy of judicial remedies in enforcing ESCRs.

The Articles in this special issue of the *Columbia Human Rights Law Review* provide an important complement to, and expansion of, the day's discussion. Authored by symposium participants and experts in the field, these essays explore in greater detail several of the topics touched upon in the symposium and contribute to the emerging literature exploring opportunities to establish the human right to housing in the United States.

Eric Tars, Heather Maria Johnson, Tristia Bauman, and Maria Foscarinis contribute an analysis of one possible next step in promoting the human right to housing through litigation. Recognizing that achieving a right to housing in the United States will most likely be a long-term project, the authors propose that one way to begin is by expanding available remedies in litigation challenging the criminalization of homelessness. The authors focus in particular on bans on sleeping, "camping," and, in general, living in public places where the typical remedy ordered in successful challenges is an injunction against enforcement of the ban. The authors consider whether courts have authority to provide greater relief for homeless plaintiffs—perhaps including the provision of housing—and address whether human rights law and comparative legal authority, in addition to U.S. precedent, would help support such authority. The Article concludes that U.S. courts are under-using their remedial powers in this regard, and that evolving standards among international human rights courts and national constitutional courts may eventually cohere into a customary international law standard in favor of such remedies.

Risa Kaufman, Martha Davis and Heidi Wegleitner train the lens of international human rights to explicate the relationship between the right to counsel in civil cases and a right to housing. As the authors note, one strength of the human rights framework is its recognition of the interrelationship of rights: civil, political, economic, social and cultural. Just as the right to housing is a lynchpin to the

realization of other rights, so, too, is the right to counsel. In their essay, the authors set forth the international human rights framework for understanding the United States' obligation to provide a civil right to counsel when basic human needs, including housing, are at stake. They offer client stories from one legal services office in Madison, Wisconsin, alongside quantitative research, as a way to better understand the impact that legal counsel has on individuals' ability to secure and protect their housing, and discuss the implications of efforts to link a housing rights strategy to advocacy for a civil right to counsel.

Lucy Williams explores recent constitutional and statutory jurisprudence from the Constitutional Court of South Africa regarding the right to housing in South Africa. Professor Williams explores three aspects of the doctrine that have emerged in several major decisions since the Court's landmark decision on the right to housing in the 2000 case of *Grootboom*: (1) the concept of judicially required "meaningful engagement" between government entities and individuals threatened with eviction; (2) the prohibition of unfair practices by landlords and tenants under Rental Housing Act 50 of 1999; and (3) developments in the concept of just and equitable eviction under the Prevention of Illegal Eviction from, and Unlawful Occupation of, Land Housing Act 19 of 1998. Noting that each of these areas of jurisprudence has led to positive developments for tenants, Williams nevertheless raises several cautionary aspects of the emerging doctrine and human rights discourse, which, she asserts, are limited in their ability to address the vexing questions that must be answered to make the right to housing a reality.

The transcript of the lunchtime discussion between Columbia Law School Professor Olatunde Johnson and Evan Wolfson, Executive Director of the Campaign for the Freedom to Marry, reveals several lessons that U.S. housing advocates can draw from the effort to secure the freedom to marry for same-sex couples. Insisting there is no silver bullet to a successful advocacy campaign, Wolfson urges advocates to set a clear vision for their desired outcomes and develop strategies to create the necessary critical mass to support the actions of politicians and judges in concert with the vision. Wolfson notes that not all of the lessons from the campaign for marriage equality will translate to efforts to achieve a right to housing. Nevertheless, he urges housing advocates to command a strong and positive narrative, appeal to Americans' sense of justice and equality, and create manageable, effective, achievable solutions to reframe the issue of a right to housing.

Finally, Brittany Scott of the National Economic and Social Rights Initiative offers a human rights analysis of nearly a century of unequal development and investment in cities' urban cores, disparately affecting the racial minority populations that live there. She offers case studies from Chicago and Los Angeles of non-human rights-based policy approaches which promote gentrification and displacement of existing communities through the combined use of demolition of existing housing, development of higher income housing, and excessive use of police powers. As human rights alternatives, she cites the development of Community Land Trusts in Burlington and Boston which have created participatory environments for community residents and the promise of perpetually affordable housing, and Community Benefit Agreements, which exist in cities such as New Haven and San Diego, as a means of holding private developers accountable to the community.

Working from a variety of perspectives, the Articles in this Symposium edition illuminate a range of approaches to advancing the human right to housing—and social and economic rights more broadly—in the United States. From creative arguments to build a legal foundation for such a right, to ensuring access to counsel to make rights real, to comparative law and analysis, to practical models of local level laws and policies: each approach contributes to an emerging narrative supporting recognition of the human right to housing here at home. Taken together, they also suggest that much of the work now being done in the United States to further housing rights could be viewed in the broader context of the human right to housing. And perhaps by sketching out this broader agenda, these Articles contribute to a clear vision and strong, positive narrative to support the human right to housing.

CAN I GET SOME REMEDY?:
CRIMINALIZATION OF HOMELESSNESS AND
THE OBLIGATION TO PROVIDE AN
EFFECTIVE REMEDY

Eric S. Tars, Heather Maria Johnson,
Tristia Bauman, and Maria Foscarinis*

Many communities across the country continue to pass ordinances criminally punishing homeless persons for engaging in necessary, life-sustaining activities such as sleeping in public places in the absence of an indoor alternative. Courts have struck down a number of these ordinances, but the practical impact of these rulings has been limited both by the form of the remedy ordered to correct these constitutional violations—generally narrow injunctive and declaratory relief and small monetary damage awards—and by the persistence of local governments in taking the minimum necessary steps to be legally compliant while allowing the underlying problem of homelessness to persist. This Article reviews the types of remedies available and those ordered by federal and state courts in both criminalization and non-criminalization cases, and evaluates courts' reluctance to provide greater, more effective relief for homeless plaintiffs. Not only do U.S. courts have the ability to fashion comprehensive equitable remedies such as providing housing when traditional ones have been proven ineffective, but evolving standards among international human rights courts and national constitutional courts may eventually obligate them to do so in order to protect the human rights of vulnerable populations.

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I. INTRODUCTION

Every day across the country, hundreds of thousands of persons experiencing homelessness are forced to live in public spaces because of a severe lack of affordable housing, permanent supportive housing, and emergency shelter in most American communities.¹ In addition to contending with the arduous task of seeking housing, employment, and basic necessities, and the inherent danger of living outdoors, many face criminal penalties and harassment by law enforcement officials as a direct result of their unsheltered, homeless status. Such criminalization of homelessness is pervasive and takes many forms. Frequently these include prohibitions on sleeping, sitting, or storing belongings in public spaces when housing or shelter is inaccessible; law enforcement sweeps of areas in which homeless persons are living, resulting in arrests and destruction of property; and selective enforcement of public space restrictions such as loitering laws, park closure rules, and open container ordinances.² Driven by business interests or not-in-my-backyard attitudes, the

1. Based on data released by the U.S. Department of Housing and Urban Development (HUD), over 235,000 homeless persons were found living outdoors during a single night in January 2011. Office of Cmty. Planning & Dev., HUD, *The 2011 Annual Homeless Assessment Report to Congress* 14 (2012). Of these, over 100,000 persons were deemed to be chronically homeless, that is, they had been continuously homeless for over a year or had experienced at least four episodes of homelessness in the previous three years. *Id.* at 6, 10.

2. Nat'l Law Ctr. on Homelessness & Poverty, *Criminalizing Crisis: The Criminalization of Homelessness in U.S. Cities* 6–7, 17–20 (2011) [hereinafter *Criminalizing Crisis*]; Nat'l Law Ctr. on Homelessness & Poverty, *Criminalizing Crisis: Advocacy Manual* 42–56 (2011) [hereinafter *Advocacy Manual*].

ultimate goal of such measures is often to remove the visible *effects* of homelessness and poverty from downtowns, tourist destinations, residential areas, and even entire communities while doing nothing to resolve the underlying *causes*.

Criminalization violates homeless persons' constitutional and human rights and offends basic human dignity.³ Some U.S. courts have recognized that enforcement of criminalization ordinances in the absence of available shelter violates homeless persons' constitutional rights.⁴ Advocates have successfully argued that it is cruel and unusual punishment to penalize people for involuntary conduct, that is, engaging in necessary, life-sustaining conduct in public places when shelter or housing is unavailable, and that prohibiting a "necessity of life," such as a place to sleep, impedes homeless persons' freedom of travel or movement.⁵ Courts have also found that sweeps of areas where homeless people are living, and the resulting confiscation and destruction of property, violate due process and protections against unreasonable search and seizure.⁶ This reasoning

3. This Article uses the terms "constitutional" and "civil" rights to discuss rights in the U.S. domestic legal system while using "human" rights to discuss rights in the international legal system. These terms are to some extent overlapping in the actual content of the rights—indeed, part of our argument is that our domestic system of civil and constitutional rights should become even more consistent with the international human rights system—but we include both separately as appropriate to our current context.

4. Criminalizing Crisis, *supra* note 2, at 10; U.S. Interagency Council on Homelessness, Searching Out Solutions: Constructive Alternatives to the Criminalization of Homelessness 7–8 (2012), available at http://www.usich.gov/resources/uploads/asset_library/RPT_SoS_March2012.pdf [hereinafter Searching Out Solutions].

5. See, e.g., *Jones v. City of L.A.*, 444 F.3d 1118, 1132 (9th Cir. 2006) ("Los Angeles encroached upon Appellants' Eighth Amendment protections by criminalizing the unavoidable act of sitting, lying, or sleeping at night while being involuntarily homeless."), *vacated as moot*, 505 F.3d 1006 (9th Cir. 2007); *Pottinger v. City of Miami*, 40 F.3d 1155, 1156 (11th Cir. 1994) (remanding case to the district court to clarify terms of injunction issued upon a finding that "the city's practice of arresting homeless individuals for harmless life sustaining activities that they are forced to perform in public is unconstitutional"); *Anderson v. City of Portland*, No. 08-1447-AA, 2009 WL 2386056, at *7 (D. Or. July 31, 2009) ("[P]laintiffs adequately state a claim under the Eighth Amendment, in that they allege that the City's enforcement of the anti-camping and temporary structure ordinances criminalizes them for being homeless and engaging in the involuntary and innocent conduct of sleeping on public property.").

6. See, e.g., *Kincaid v. City of Fresno*, No. 1:06-cv-1445, 2006 WL 3542732, at *37 (E.D. Cal. Dec. 8, 2006) (finding that city sweeps of encampments and subsequent destruction of property of homeless individuals violates the Fourth Amendment).

has been adopted by the U.S. Interagency Council on Homelessness (USICH) in its 2012 report *Searching Out Solutions*, which is critical of criminalization.⁷ USICH goes on to note that “[i]n addition to violating domestic law, criminalization measures may also violate international human rights law, specifically the Convention Against Torture and the International Covenant on Civil and Political Rights.”⁸ Despite these victories, the criminalization of homelessness continues almost unabated and has become more prevalent in the years following the recent economic crisis. This is due to local governments’ persistent adherence to a criminalization approach, limited legal resources to monitor and challenge recurring violations of the same or similar measures, and courts’ reluctance to order remedies beyond the narrow injunctive or declaratory relief and small monetary damages awards typical in these cases.⁹

This criminalization of necessary, life-sustaining activities in public spaces does nothing to prevent or end homelessness. Rather, it fuels a *de facto* system of “managing” homelessness wherein homeless persons are cycled through the criminal justice system for a wide array of minor violations—often spending time in jail or receiving fines they cannot afford to pay—or are forced to move back and forth between neighboring communities to avoid citation or arrest. The frequent interaction with law enforcement and the criminal justice system, as well as the destabilizing effects of moving in and out of custody or between cities, perpetuates homelessness by making it even more difficult for homeless persons to secure or maintain housing, employment, and benefits.¹⁰ Persons experiencing homelessness, then, are often subjected to multiple, recurring violations of their constitutional and human rights. While specific violations may be effectively halted through injunctive relief, they are likely to recur absent relief that addresses the underlying problems of homelessness. Prolonged homelessness and the collateral consequences of criminalization further limit their ability to exercise rights critical to participation in society.

7. See *Searching Out Solutions*, *supra* note 4, at 6–8.

8. *Id.* at 8.

9. See *Criminalizing Crisis*, *supra* note 2, at 3; *Advocacy Manual*, *supra* note 2, at 42–55; *infra* Section II.

10. See *generally* *Criminalizing Crisis*, *supra* note 2, at 21 (showing prevalence of barriers to accessing employment, housing, public benefits, and healthcare due to criminalization); *id.* at 28–45 (describing the consequences of criminalization, including stories from homeless individuals who have experienced criminalization first-hand).

This Article examines the remedies used to combat criminalization and argues that we must develop law supporting the use of the broader remedies needed to redress violations of homeless persons' civil and human rights. Section II reviews the treatment of criminalization by U.S. courts with a focus on the ordered relief and the inadequacy of this relief in redressing homeless persons' civil rights violations. Section III examines lines of domestic cases involving repeated, unaddressed civil rights violations in education and prison contexts in which courts have granted broader relief and argues that such remedies should be available in the context of criminalization. In Section IV, we chart the development of a customary international law (CIL) right to an effective remedy and argue that this developing CIL norm will ultimately strengthen the legal position of domestic advocates seeking broader remedies. Finally, in Section V, we distill lessons from the domestic and international case law for advocates challenging criminalization and argue that only housing remedies will ultimately prevent criminalization and allow homeless persons to fully participate in our democratic society in accordance with their full human rights.

II. LIMITED EFFECTIVENESS OF REMEDIES IN U.S. CRIMINALIZATION CASES

U.S. courts have recognized that, in areas where available shelter space is inadequate to meet the need, homelessness is an involuntary condition.¹¹ Without access to housing, homeless people are left with no option but to perform life's necessary activities, such as sleeping and eating, in public spaces.¹² In this context, courts have found that the criminalization of homelessness violates homeless persons' rights under the Fifth, Eighth, and Fourteenth Amendments of the U.S. Constitution, as well as analogous rights enshrined in state law.¹³

11. See *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1564 (S.D. Fla. 1992) ("Because of the unavailability of low-income housing or alternative shelter, plaintiffs have no choice but to conduct involuntary, life-sustaining activities in public places. The harmless conduct for which they are arrested is inseparable from their involuntary condition of being homeless.")

12. *Id.*

13. See *id.* at 1584 (holding that arresting homeless individuals for necessary conduct is "cruel and unusual in violation of the eighth amendment, reach innocent and inoffensive conduct in violation of the due process clause of the fourteenth amendment and burden the fundamental right to travel in violation of the equal protection clause."); see also *Jones v. City of L.A.*, 444 F.3d 1118, 1138

Though the significance of these court victories cannot be denied, their practical impact has fallen short of the remedies needed to protect homeless people against the egregious and widespread nature of criminalization. As evidenced by four leading cases discussed in this section, despite rulings holding cities liable for violating homeless persons' constitutional rights, courts have offered only limited remedies. Rather than the broader protection that is within their power to offer, courts have provided narrow injunctive relief or small monetary damage awards. These limited remedies do not address the causes of homelessness directly and prove inadequate in stopping municipalities' efforts to "solve" problems with homelessness through harassing homeless persons out of the jurisdiction.

In *Pottinger v. City of Miami*, a class of homeless plaintiffs brought suit against the City of Miami, challenging its police practice of conducting systematic arrests of homeless persons to remove them from tourist and business areas.¹⁴ At trial, the U.S. District Court for the Southern District of Florida found that there were nearly ten times as many homeless individuals as available shelter beds in the city,¹⁵ leaving the plaintiffs with no choice but to conduct involuntary, life-sustaining activities in public places.¹⁶ Relying on this finding of involuntariness, the court held that punishing homeless people for "sleeping, eating, and other innocent conduct" violated their Eighth Amendment right to be free from cruel and unusual punishment.¹⁷ The *Pottinger* court further held that the City's policing practice was unconstitutionally overbroad and burdened homeless persons' fundamental right to travel, violating the due process and equal protection clauses of the Fourteenth Amendment.¹⁸ Lastly, the court held the destruction of homeless persons' property during or following

(9th Cir. 2006) (holding that the Eighth Amendment prohibits the city from punishing involuntary sitting, lying, or sleeping on public sidewalks that is an unavoidable consequence of being human and homeless without shelter in the Los Angeles), *vacated as moot*, 505 F.3d 1006 (9th Cir. 2007).

14. *Pottinger*, 810 F.Supp. at 1564.

15. *Id.* at 1558, 1564 (finding that there were fewer than 700 beds available in shelters to serve Miami's homeless population of approximately 6,000 people).

16. *Id.* at 1565.

17. *Id.* ("As long as the homeless plaintiffs do not have a single place where they can lawfully be, the challenged ordinances, as applied to them, effectively punish them for something for which they may not be convicted under the eighth amendment—sleeping, eating, and other innocent conduct.").

18. *Id.* at 1583.

arrest violated the Fourth Amendment protection against unreasonable search and seizure.¹⁹

Despite the *Pottinger* court's strong condemnation of the city's illegal practices and its recognition that "provid[ing] housing and services to the homeless" was "the ideal solution," the court hesitated to order this remedy because, "assembling and allocating such resources is a matter for the government—at all levels—to address, not for the court to decide."²⁰ Instead, the court enjoined the City of Miami from continuing its practice of arresting homeless people throughout the city and ordered that the city designate "safe zones" where homeless people could engage in necessary activities without risk of arrest.²¹

Following an appeal by the City of Miami, the case was settled by consent decree in 1998.²² As part of the settlement, the City of Miami agreed to change its police training policies, and police officers were barred from arresting homeless people for harmless, involuntary conduct without first offering them placement in an available shelter.²³ These changes in police practices, which likely would not have occurred without the court's intervention, were undoubtedly a step in the right direction. At best, however, the end result has been a tenuous truce between the parties. Homeless people are still targeted for arrest and remain without adequate housing, while the city chafes under the consent decree. Indeed, in April 2013, City of Miami Commissioners voted unanimously to ask the court to undo many of the decree's provisions.²⁴ The parties were able to come to a new settlement in December 2013 with a two-year window for more constructive solutions to work,²⁵ but the city's predilection for a criminalization approach remains barely restrained.

Similarly, in *Jones v. City of Los Angeles*, though homeless plaintiffs won an immediate court victory, the court's limited relief

19. *Id.*

20. *Id.*

21. *Id.* at 1584.

22. *Pottinger v. City of Miami*, 76 F.3d 1154 (11th Cir. 1996).

23. Settlement Agreement at 7–13, *Pottinger v. City of Miami*, No. 88-2406-CIV-ATKINS (S.D. Fla. Oct. 1, 1998).

24. Charles Rabin & Andres Viglucci, *Miami to Go to Federal Court to Undo Homeless Protection Act*, *Miami Herald* (Apr. 11, 2013), <http://www.miamiherald.com/2013/04/11/3339297/miami-to-go-to-federal-court-to.html>.

25. Addendum to Settlement Agreement at 8, *Pottinger v. City of Miami*, No. 88-2406-CIV-MORENO (S.D. Fla. Dec. 12, 2013).

left the homeless residents of Los Angeles to face other ongoing rights violations.²⁶ In *Jones*, the ACLU successfully challenged a Los Angeles ordinance prohibiting sleeping, sitting, or lying down in public on behalf of six homeless plaintiffs, arguing that the law unconstitutionally criminalized a person's homeless status.²⁷ Plaintiffs sought to permanently enjoin the City of Los Angeles from enforcing the law in Skid Row, a central gathering place for many of the city's homeless population, between the hours of 9:00 p.m. and 6:30 a.m.²⁸

Finding that the available shelter space in Los Angeles was woefully inadequate to house its tens of thousands of homeless residents, a divided panel of the Ninth Circuit enjoined enforcement of the ordinance pursuant to the Eighth Amendment's prohibition against cruel and unusual punishment.²⁹ In criminalizing the "unavoidable act of sitting, lying, or sleeping at night while being involuntarily homeless," the City of Los Angeles unconstitutionally punished people for conduct that was "involuntary and inseparable" from their homeless status.³⁰

The court was careful, though, to clarify the narrow scope of its holding and to state explicitly that it was not ordering the City of Los Angeles to do anything more than to cease unconstitutional enforcement of the law.³¹ The court went on to add that, while it recognized an obvious "'homeless problem' in the City of Los Angeles," the city was free to address that problem "in any way that it sees fit."³²

26. *Jones v. City of L.A.*, 444 F.3d 1118, 1138 (9th Cir. 2006), *vacated as moot*, 505 F.3d 1006 (9th Cir. 2007).

27. *Id.* at 1123. The ordinance stated, "[n]o person shall sit, lie or sleep in or upon any street, sidewalk or other public way," with limited exceptions. L.A., Cal., Mun. Code § 41.18(d) (2005).

28. *Jones*, 444 F.3d at 1120.

29. *Id.* at 1132 ("Because . . . the number of homeless persons in Los Angeles far exceeds the number of available shelter beds at all times . . . Los Angeles has encroached upon Appellants' Eighth Amendment protections by criminalizing the unavoidable act of sitting, lying, or sleeping at night while being involuntarily homeless.").

30. *Id.* at 1132, 1136.

31. *Id.* at 1138 ("We hold only that . . . the Eighth Amendment prohibits the City from punishing involuntary sitting, lying, or sleeping on public sidewalks that is an unavoidable consequence of being human and homeless without shelter in the City of Los Angeles.").

32. *Id.*

Following the city's motion for rehearing, the court ordered mediation and the parties ultimately reached a settlement agreement.³³ Under the terms of the settlement, the Los Angeles Police Department is barred from enforcing the challenged law between the hours of 9:00 p.m. and 6:30 a.m. Additionally, the Police Department may only enforce the law after an officer has first given a verbal warning and reasonable time for the person to move locations. Unlike in *Pottinger*, the settlement required that the city provide some additional housing, mandating that restrictions on law enforcement remain in effect until "an additional 1250 units of permanent supportive housing are constructed" within the city, with at least half of them located in the Skid Row and downtown areas.³⁴ This housing relief is miniscule, however, in comparison with the number of homeless people forced to live on the streets of Los Angeles.³⁵

Demonstrating the ease with which a city can circumvent narrowly crafted injunctive relief, shortly after *Jones*, the City of Los Angeles launched its "Safer City Initiative" in 2006.³⁶ This policy has sent dozens more police officers to Skid Row, but rather than addressing violent crime, the officers have been targeting homeless and poor African Americans for minor violations such as jaywalking and littering at staggering rates of forty-eight to sixty-five times the rate in the rest of the city.³⁷ These citations can lead to arrest and incarceration, placing further barriers between homeless persons and permanent housing.³⁸ As in *Pottinger*, the city's failure to provide affordable, permanent housing has allowed the criminalization of homelessness to continue, despite studies showing that providing housing is cheaper and more effective than a policing approach.³⁹ The

33. *Jones v. City of L.A.*, 505 F.3d 1006 (9th Cir. 2007) (vacating judgment based on settlement agreement).

34. *Id.*

35. *See Jones*, 444 F.3d at 1121 (noting that there are more than 80,000 homeless individuals in Los Angeles County and that Los Angeles' Skid Row has the highest concentration of homeless individuals in the United States).

36. Skid Row's Safer City Initiative is an intensive policing effort launched in 2006, adding 50 cops to Skid Row's one-mile radius. Ina Jaffe, *Can Los Angeles Make Skid Row Safer?*, Nat'l Pub. Radio (Apr. 21, 2009, 12:57 AM), <http://www.npr.org/templates/story/story.php?storyId=103289221>.

37. Gary Blasi & Univ. of Cal. L.A. Sch. of Law Fact Investigation Clinic, *Policing Our Way Out of Homelessness? The First Year of the Safer Cities Initiative on Skid Row 29* (2007), available at <http://www.lafla.org/pdf/policinghomelessness.pdf>.

38. *See id.* at 45.

39. *See Criminalizing Crisis*, *supra* note 2, at 9.

court's failure to exercise its power to order such impactful remedies, moreover, further enables the underlying problems to persist.

Kincaid v. City of Fresno serves as an example of how even the award of monetary damages in addition to injunctive relief has proven to be inadequate in preventing ongoing violations.⁴⁰ In *Kincaid*, plaintiffs brought suit against the City of Fresno and the California Department of Transportation for their policy of confiscating and immediately destroying the property of homeless people during "clean ups" intended to remove homeless persons and their possessions from homeless encampments on city property.⁴¹

The U.S. District Court of the Eastern District of California heard evidence that the city, without constitutionally adequate notice, periodically performed as many as twenty-five cleanups each year.⁴² As part of the cleanup effort, homeless persons' property was seized and destroyed on the spot, regardless of the items' apparent utility,⁴³ irreplaceable value,⁴⁴ or obvious necessity.⁴⁵ Indeed, even where homeless people had permission to store their belongings on private property, the city treated the items as abandoned trash.⁴⁶ The court condemned that policy, advising that it was impractical for homeless people to guard their belongings twenty-four hours a day.⁴⁷

Because it failed to provide adequate notice and provided no post-deprivation remedy, the court held the city's practice ran afoul of

40. *Kincaid v. City of Fresno*, 244 F.R.D. 597 (E.D. Cal. 2007).

41. *Id.* at 597.

42. *Id.* at 601.

43. *Kincaid v. City of Fresno*, No. 1:06-cv-1445, 2006 WL 3542732, at *9 (E.D. Cal. 2004) (finding that an unattended bicycle in good condition was destroyed as "trash" merely because it was unattended).

44. *Id.* at *9 (finding that the city destroyed one homeless woman's urn containing the ashes of her granddaughter).

45. *Id.* at *11 (finding that the city destroyed a cart containing one woman's identification papers, asthma medication, and nebulizer machine, resulting in an extended stay in the emergency room).

46. *Id.* at *6 ("[T]he City's policy is that any property that is not physically attended to by its owner is considered abandoned and is defined by the City as 'trash.' All such property will be destroyed with no chance for the owner to reclaim it.").

47. The court explained that homeless people must conduct a variety of necessary daily activities, work, or other activities and, therefore, cannot practically stay with their property 24 hours a day. The court further stated that homeless people "have an expectation of continued ownership of their property and do not intend to abandon their property because they leave it in a cart or similar device, which is covered by or wrapped in a blanket, tarp, or tent, unattended for a period of time." *Id.* at *5.

homeless persons' right to due process under the Fourteenth Amendment.⁴⁸ As a remedy, the court granted the plaintiffs motion for preliminary injunctive relief, which ultimately led to a settlement between the parties.⁴⁹ This settlement was distinguishable from those reached in *Pottinger* and *Jones* in that it included an award of monetary damages to the plaintiffs to assist them in obtaining housing. Although the final settlement for \$2.3 million was the largest of its kind in the United States, the amounts to each plaintiff were minimal.⁵⁰ Ultimately, while giving homeless persons better notice and procedural protections, the City of Fresno continued sweeps of homeless encampments, and further lawsuits on behalf of homeless plaintiffs were filed three years later.⁵¹

The most positive remedy to date can be found in the case of *Lakewood v. Steve Brigham, et al., Ocean County, et al.* which involved a challenge to the forced emptying of a homeless encampment known as Tent City.⁵² On the positive side, the court denied the city's motion to forcibly vacate Tent City, stating, "there is a governmental responsibility here to care for the poor at some level."⁵³ However, the court also questioned its authority to order the township to provide shelter, declining to advise policymakers on the matter.⁵⁴

In an April 10, 2013 consent order settling the case, the court directed a census of Tent City residents and ordered that all campers who were eligible to move into a "viable housing option," defined as at least one year in safe and adequate indoor housing in Ocean County, were required to accept the governmental assistance.⁵⁵ Those who

48. *Id.* at *38–39.

49. *Id.* at *41–42.

50. Settlement Agreement at 4, *Kincaid v. City of Fresno*, No. 06-cv-1445-OWW (E.D. Cal. June 5, 2008).

51. See *Articles on the Homeless Issue in Fresno*, Community Alliance, <http://fresnoalliance.com/wordpress/?p=1313> (last updated Nov. 11, 2013); Mike Rhodes, *Lawsuits Filed in Response to the City of Fresno's Treatment of the Homeless*, Community Alliance (Apr. 1, 2012), <http://fresnoalliance.com/wordpress/?p=4647>.

52. Twp. of Lakewood v. Brigham, No. L-2462-10 (N.J. Super. Ct. 2013).

53. Transcript of Motion for Summary Judgment Hearing at 19, Twp. of Lakewood v. Brigham, No. L-2462-10 (N.J. Super. Ct. 2013).

54. *Id.* at 23.

55. Consent Order at 4, Twp. of Lakewood v. Brigham, No. L-2462-10 (N.J. Super. Ct. 2013).

were not eligible for such alternative housing had the continued right to remain in Tent City until other arrangements could be made.⁵⁶

The *Lakewood* case is notable for its final order to require the government to provide housing to *all* the persons directly affected by the town's proposed action or, in the absence of housing, to permit those affected people to remain camping on public property. As the plaintiff's attorney, Jeffery Wild, said, "We're not here to defend Tent Cities; no one should have to live in the woods. This is about the right of everyone to have housing."⁵⁷ The significance of the outcome is somewhat tempered by the fact that the court merely sanctioned the provision of housing assistance, rather than directing it. In addition, the remedy provided is temporary, limiting the government's responsibility to provide housing to a single year.

Ultimately, these cases demonstrate that enforcing the limited civil rights protections under the Constitution leaves the violation of the human right to housing—recognized in international treaties, but not recognized under domestic law—unaddressed, which inevitably leads to further conflict between authorities and persons whose rights are violated. As long as homelessness persists in a community, businesses and residents will continue to pressure their elected officials to "do something" about the homelessness problem. Criminalizing homelessness appears at first blush to be a quick fix, but it does nothing to solve the underlying problem and, in fact, often makes it worse.⁵⁸ Only implementation of the human right to housing will remove the pressure to criminalize homelessness and allow homeless persons to fully participate in our democratic society. Yet, courts remain reluctant to order housing solutions as relief, citing federalism and separation of powers concerns.⁵⁹ As the next section

56. *Id.* at 5.

57. Associated Press, *Judge: Homeless at Lakewood's Tent City Will Be Offered Indoor Housing Instead of Evicted*, NJ.com (Mar. 15, 2013), http://www.nj.com/news/index.ssf/2013/03/judge_homeless_at_lakewoods_te.html.

58. See *Criminalizing Crisis*, *supra* note 2, at 15.

59. The court explained in *Jones v. City of L.A.* that it "do[es] not suggest that Los Angeles adopt any particular social policy, plan, or law . . . [and] do[es] not desire to encroach on the legislative and executive functions . . ." The court stated that the City could address the issue "in any way that it sees fit" and is not compelling the City to "provide sufficient shelter for the homeless, or allow anyone who wishes to sit, lie, or sleep on the streets . . . at any time and at any place within the City." 444 F.3d 1118, 1138 (9th Cir. 2006). In *Kincaid v. City of Fresno*, the court stated it would "not presume to tell elected officials of the City of Fresno how to address and resolve problems presented by the homeless." No. 106-cv-1445 OWW, 2006 WL 3542732, at *34 (E.D. Cal. Dec. 8, 2006).

discusses, even if courts fail to find the right to housing itself directly enforceable, they should find the ability to order its enforcement as part of a broad and effective remedy that ensures enjoyment of the other constitutional rights persistently violated by cities in attempting, ineffectively, to address homelessness through narrow policing practices.

III. BROAD AS NECESSARY: DEFINING THE BOUNDARIES OF EQUITABLE REMEDIES

Despite the concerns expressed by the courts in *Pottinger*, *Jones*, and *Kincaid* that they cannot order substantial changes to other branches of government or expenditure of funds,⁶⁰ federal courts have employed broader remedies, particularly in the areas of education and prison reform. While the *Pottinger* court felt it would overstep its judicial authority if it were to assemble and allocate welfare-related resources, in numerous cases courts have fashioned remedies doing just that, even against the express will of other branches of government.⁶¹ Such remedies, commonly called “structural” remedies, are directed to other branches of government to solve the underlying problem that creates the violation at issue.

Consistent with the concerns noted by the *Pottinger* court, federalism and separation of powers concerns play a role in defining the boundaries of such remedies. In a number of opinions concerning lower courts’ use of structural remedies, discussed below, the Supreme Court has provided principles indicating the proper targets and purposes of equitable relief. Typically, federal courts’ remedial powers are limited by the nature of the constitutional violation at issue. Courts must avoid remedies which aim either to eliminate a condition that does not violate the Constitution or does not “directly flow” from such a violation.⁶² Similarly, courts should typically extend their remedial powers over other institutions only so far as necessary to restore parties to the position they occupied before those institutions violated their fundamental rights. The Supreme Court has expected lower courts to determine—even in cases dealing with

60. See *supra* Section II.

61. See, e.g., *Missouri v. Jenkins (Jenkins I)*, 495 U.S. 33, 56–57 (1990) (directing lower court to order Kansas City school district to levy taxes in excess of its state law authority to tax); *Bylinski v. City of Allen Park*, 8 F. Supp. 2d 965, 975 (E.D. Mich. 1998) (directing city to levy taxes sufficient to remedy its Clean Water Act violations, even if those taxes violated the Michigan Constitution).

62. See *Milliken v. Bradley (Milliken II)*, 433 U.S. 267, 282 (1977).

unquantifiable values such as “quality of education”—the extent of governmental institutions’ harm and to fashion remedies narrowly providing victims with exactly what they improperly lost.⁶³ Lower courts have interpreted the Supreme Court’s approach as “reflect[ing] concern that the district court not go beyond the needs of the plaintiffs.”⁶⁴

Where these principles apply, they prevent courts from addressing a city’s unconstitutional criminalization of homelessness with structural remedies intended to address homelessness itself. Homelessness is not a direct effect of governments’ unconstitutional criminalization of homeless individuals. Rather, widespread homelessness is a catalyst; governments violate the Constitution as they seek to drive unsightly poverty behind bars or beyond city limits.⁶⁵ Moreover, while homeless individuals unquestionably suffer a wide manner of harms when governments criminalize their innocent, inevitable behavior,⁶⁶ the loss of their home is not among them.

However, not all cases involving violations of constitutional rights are typical. The Supreme Court has allowed lower courts to fashion remedies unconstrained by its general principles governing equitable relief when: (1) those courts have determined broader structural changes are necessary to cure an ongoing constitutional violation *and* (2) state and local authorities have demonstrated their

63. See *Missouri v. Jenkins (Jenkins III)*, 515 U.S. 70, 101 (1995) (holding the Eighth Circuit’s test expecting school desegregation remedy to maximally integrate Kansas City’s school system “clearly is not the appropriate test to be applied”).

64. *Morgan v. O’Bryant*, 687 F.2d 510, 516 (2d Cir. 1982); see also *United States v. City of Yonkers*, 197 F.3d 41, 56 (2d Cir. 1999) (“Absent a focused . . . explanation of how each individual remedial component is tailored to respond to one or another of [the vestiges of segregation], we can only conclude that the sweeping remedy imposed here exceeded the admittedly broad power of the district court.”).

65. For a summary of cases in which individuals have challenged criminalization and related practices, see *Advocacy Manual*, *supra* note 2, at 57–149. See, e.g., *Anderson v. City of Portland*, No. 08–1447–AA, 2009 WL 2386056, at *5–7 (D. Or. July 31, 2009) (denying the city’s motion to dismiss where plaintiffs stated a claim based on injuries that included exclusion from public parks).

66. See, e.g., *Advocacy Manual*, *supra* note 2, at 57–149 (summarizing cases challenging criminalization); *Jones v. City of L.A.*, 444 F.3d 1118, 1127 (“Appellants . . . have been and are likely to be fined, arrested, incarcerated, prosecuted, and/or convicted for involuntarily violating [the ordinance that prohibits sitting, lying, or sleeping on public streets].”).

longstanding unwillingness or inability to cure that violation.⁶⁷ Where other branches or other levels of government fail to act effectively to protect individuals' fundamental rights, the federal judiciary has filled the gap. In such a situation, the *Pottinger* court's "ideal solution"—housing unsheltered homeless persons—would arguably be within a court's remedial powers.

The Sixth Circuit was the first court to hold that judicial remedies could expand to become broad enough to resolve a constitutional violation other branches had failed to address. *Bradley v. Milliken* considered a lower court's remedial authority in the context of school desegregation.⁶⁸ After extensive litigation, the lower court had determined that no desegregation plans solely aimed at the Detroit city school district would effectively end segregation and had thus ordered Detroit to consider desegregation plans spanning its entire metropolitan area.⁶⁹ The Sixth Circuit upheld the district court's order, emphasizing both that the court below had found more narrowly fashioned relief would be ineffective and that the legislature had failed to take action to resolve the issue itself.⁷⁰

The Supreme Court reversed the Sixth Circuit, holding that the district court had violated the principles governing the scope of equitable relief.⁷¹ In doing so, however, it failed to address the Sixth Circuit's holding—that the district court could fashion a broader remedy when the legislature was inactive and it had concluded narrowly fashioned remedies would be ineffective. Instead, the Court re-characterized the case. In the Supreme Court's view, the citywide remedies Detroit had proposed to the district court *were* capable of effectively desegregating Detroit city schools.⁷² The Court did not directly address the lower court's conclusion that an inter-district remedy was the *only* relief capable of being effective—a deficiency in its opinion Justice Marshall noted in dissent.⁷³ It therefore did not

67. See *infra* Section III.

68. *Bradley v. Milliken*, 484 F.2d 215 (6th Cir. 1973), *rev'd*, *Milliken v. Bradley* (*Milliken I*), 418 U.S. 717 (1974).

69. See *id.* at 244 (discussing district court opinion without citation).

70. *Id.* at 245, 252.

71. *Milliken v. Bradley* (*Milliken I*), 418 U.S. 717, 745 (1974).

72. See *id.* at 747 n.22 ("The suggestion . . . that schools which have a majority of Negro students are not 'desegregated,' whatever the racial makeup of the school district's population and however neutrally the district lines have been drawn and administered, finds no support in our prior cases.").

73. *Id.* at 784 ("Nowhere in the Court's opinion does the majority confront, let alone respond to, the District Court's conclusion that a remedy limited to the

address whether, under such circumstances, the district court's broader remedy would have been appropriate.

Addressing homelessness by providing housing, rather than simply enjoining the enforcement of criminalizing ordinances, would require reallocation of significant resources by other branches of government. The Sixth Circuit's holding in *Milliken*, consistent with a long line of desegregation cases before it, showed that where those other branches had failed in their constitutional duties, it was willing to overcome the principle of separation of powers and order just such a reallocation.⁷⁴ Busing tens of thousands of school children across city and county lines would have been a hugely expensive proposition, one that the legislative branches had as yet refused to do on their own. Providing adequate housing also requires investment of new resources, and though numerous studies have shown providing housing is a more cost-effective solution, many communities have not made the necessary investment, persisting instead in ineffective and illegal criminalization.⁷⁵ Courts should not shy away from this remedy when other remedies prove as ineffective as trying to desegregate schools in a city that is already segregated from its suburbs.

Justice Thomas, in a biting concurrence in *Missouri v. Jenkins*, another education case, attempted to mark the end of federal courts' innovative exercise of what he called "virtually unlimited equitable powers," which, in his view, "has trampled upon principles of federalism and the separation of powers and has freed courts to pursue other agendas unrelated to the narrow purpose of precisely remedying a constitutional harm."⁷⁶ While the Sixth Circuit's "broad-as-necessary remedies" holding has not governed or been

city of Detroit would not effectively desegregate the Detroit city schools.") (Marshall, J., dissenting).

74. See *Milliken*, 484 F.2d at 244 (citing *Green v. Cnty. Sch. Bd. of New Kent Cnty., Va.*, 391 U.S. 430, 439–41 (1968)). The Sixth Circuit holding in *Milliken* builds on the Supreme Court's precedent in *Green*, where the Court ordered a lower court not to consider whether the school board's desegregation plan was merely an effective method for curing segregation, but whether it was the fastest, most effective method.

75. See, e.g., *Criminalizing Crisis*, *supra* note 2, at 9 (citing The Lewin Group, *Costs of Serving Homeless Individuals in Nine Cities: Chart Book* (2004)) ("In 2004, a study . . . found supportive housing to be the cheapest option in addressing the needs of homeless people when compared to jails, prisons, and mental hospitals. For several cities, supportive housing was also found to be cheaper than housing homeless individuals in shelters.")

76. See *Missouri v. Jenkins (Jenkins III)*, 515 U.S. 70, 100 (1995).

deemed persuasive in subsequent opinions,⁷⁷ the Supreme Court has returned to a more expansive view of equitable power in its cases involving prison reform.⁷⁸

Most recently, in *Brown v. Plata*, the Court considered the validity of a lower court's order directing California to reduce overcrowding in its penal system to 137% of capacity in order to remedy the "unconstitutional medical and mental health care."⁷⁹ Under the Supreme Court's general principles governing equitable relief, the lower court's order in *Plata* was both improperly targeted and improperly purposed: It targeted overcrowding—the precursor to medical neglect—rather than medical neglect itself.⁸⁰ It also stood to place many inmates in a substantially better position: California pointed out that its prison system would likely need to release many inmates—including some whose rights had never been violated—early in order to comply with the court order.⁸¹

Despite these defects, the Supreme Court upheld the lower court's order.⁸² Its opinion was exhaustive, but its reasoning succinct:

77. The Sixth Circuit itself retreated from its reasoning the following year, ruling that a district court had not abused its discretion when it approved a desegregation plan for Chattanooga high schools which, due to city-to-suburb migration, had not actually resulted in an integrated school system. *See* *Mapp v. Bd. of Ed. of Chattanooga, Tenn.*, 525 F.2d 169, 171–72 (6th Cir. 1975). The court did not even require the Chattanooga school board to propose a plan it believed would be effective. A dissent argued that "the Supreme Court has repeatedly held that ineffective freedom of choice plans are not a substitute for desegregation in fact [and] the defendant school board should be required to propose a new and realistic plan to meet its constitutional duty." *Id.* at 177 (Edwards, J., dissenting).

78. *See* *Hutto v. Finney*, 437 U.S. 678, 687 (1978) (holding district court "had ample authority to go beyond earlier orders" after "taking the long and unhappy history of the litigation into account"); *Inmates of Occoquan v. Barry*, 844 F.2d 828, 842 (D.C. Cir. 1988) ("[T]he Supreme Court understands the equitable discretion of district courts to be at its zenith after prison authorities have abdicated their remedial responsibilities . . .") (citing *Hutto*, 437 U.S. 678)).

79. *Brown v. Plata*, 131 S. Ct. 1910, 1927 (2011).

80. *See id.* at 1959 ("[T]he court's remedy is not narrowly tailored to address proven and ongoing constitutional violations.") (Alito, J., dissenting).

81. *Id.* at 1939 ("Reducing overcrowding will also have positive effects beyond facilitating timely and adequate access to medical care . . .").

82. It is arguable that the Supreme Court upheld the lower court's injunction on the basis of specific statutory provisions governing prison litigation since 1995, rather than on the basis of its precedents governing equitable relief. The Prison Litigation Reform Act of 1995 (PLRA) provides that "no court shall enter a prisoner release order" unless it finds that "crowding is the primary cause of the violation of a Federal right . . ." 18 U.S.C. § 3626(a)(3)(E)(i) (2012). Arguably, it is the PLRA that allows courts to look to the causes of a

The population reduction [is] of unprecedented sweep and extent. Yet so too is the continuing injury and harm For years . . . California's prisons [have] fallen short of minimum constitutional requirements Over the whole course of years during which this litigation has been pending, no other remedies have been found to be sufficient. Efforts to remedy the violation have been frustrated by severe overcrowding in California's prison system.⁸³

Plata suggests that if a court were to determine a government had, over a prolonged period, failed effectively to cure its unconstitutional criminalization of its homeless citizens, that court would have the authority to fashion a remedy addressing homelessness directly. Under ordinary circumstances, neither homelessness nor prison overcrowding are appropriate targets for equitable remedies. Both homelessness and prison overcrowding are precursors to constitutional violations, not constitutional violations themselves or effects of violations. Both homeless individuals whom courts grant housing and prison inmates whom courts grant less crowded accommodations (or early release) would be placed in a better position than they would have been had their constitutional rights not been violated.⁸⁴ According to typical guidelines, neither

constitutional violation, rather than only to its effects. However, this interpretation of the statute is unlikely. In general, the PLRA narrowed courts' ability to restructure prisons, insisting that remedies may extend "no further than necessary" to correct the violation of rights of "a particular plaintiff or plaintiffs" and that prospective relief must be "narrowly drawn" to be "the least intrusive means necessary." 18 U.S.C. § 3626(a)(1)(A) (2012). This provision of the statute is better interpreted as intended to prevent courts from ordering prisoner release in cases such as *Hutto v. Finney*, where many interdependent factors rendered prisoners' conditions of confinement unconstitutional. 437 U.S. 678, 688 (1978). The Judicial Impact Statement prepared while Congress was considering the PLRA supports this interpretation, glossing the subsection as barring relief "unless the plaintiff proves that crowding is the primary cause of the deprivation." Judicial Impact Office, Admin. Office of the U.S. Courts, Judicial Impact Statement: Violent Criminal Incarceration Act of 1995, at 4–5 (1995) (emphasis added) (quoting Violent Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994)).

83. *Plata*, 131 S. Ct. at 1923.

84. It can be argued that courts have greater obligation and latitude to fashion equitable relief in cases involving prisoners, due to their custodial relationship. However, at least the *Lakewood* court, operating under state law, noted the state has some duties toward homeless persons as well. See *Twp. of Lakewood v. Brigham*, No. L-2462-10 (N.J. Super. Ct. 2013). Finding such a

should be within the scope of equitable relief. Nonetheless, where homeless individuals, like the inmates in *Brown v. Plata*, have suffered for years while their homelessness has frustrated efforts to remedy their unconstitutional criminalization, a trial court could fashion a remedy aimed at homelessness itself, despite longstanding principles governing equitable relief.⁸⁵

IV. INTERNATIONAL STANDARDS AND COMPARISONS: THE EVOLVING RIGHT TO AN EFFECTIVE REMEDY

As discussed above, recent Supreme Court precedent suggests that courts have discretion over whether to grant equitable remedies to the parties before them and, in certain circumstances, the appropriate scope of those remedies.⁸⁶ Indeed, that remedial authority may reach beyond the underlying right in cases where violations are extensive and prolonged and no other remedy has proven effective. Under international law, however, judicial *discretion* concerning remedies is ripening into an *obligation* to provide remedies broad enough to guarantee the cessation of ongoing violations of fundamental rights.⁸⁷ These developments can serve to inform U.S. courts' exercise of their authority and may also serve as a source of additional authority.

The practices of the international community increasingly suggest that victims of fundamental rights violations have a *right* to remedies broad enough to prevent the harms they have suffered from recurring. International human rights documents, the U.N. Human Rights Committee, the U.N. General Assembly, regional human rights courts, foreign high courts, and scholars of international law have begun to recognize the affirmative obligation of courts to provide remedies on broad-as-necessary terms. All of these institutions recognize, to varying degrees, courts' duty to step outside their typical role and provide relief broad enough to ensure effective solutions

stand-alone *duty* may be challenging under domestic law, but finding the ability to provide services as a part of an effective remedy need not be.

85. *Cf. id.* at 1923.

86. See Russell L. Weaver et al., *Principles of Remedies Law* 16–17 (2d ed. 2007); 14A C.J.S. *Civil Rights* § 485 (2013).

87. The international right to an effective remedy protects both individuals' international human rights and their constitutional rights within their domestic legal system. Universal Declaration of Human Rights, G.A. Res. 217(III)A, art. 8, U.N.Doc A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR]. Therefore, the international portion of this Article will refer generally to the concept of "fundamental rights."

where narrower remedies have proven ineffective and governments have proven intransigent.

As these court practices continue to develop, they are accumulating the characteristics of a norm of customary international law (CIL). Customary international law results from consistent practices undertaken by states out of a sense of legal obligation; it is generally viewed by American courts as a sort of international common law that is persuasive, if not binding.⁸⁸ Even before reaching this status, however, such practices may serve as persuasive or instructive authority for American courts.⁸⁹

Currently, the practice of viewing the imposition of broad-as-necessary remedies as courts' obligation is visible to one degree or another within international, regional, and national fundamental rights jurisprudence. What follows is an outline, within each of these levels, of the jurisprudence, codifications, and other practices contributing to this developing norm.⁹⁰

A. International Authorities

The individual right to an effective remedy is well established in international law. The preponderance of multilateral human rights treaties, including widely accepted documents such as the International Covenant on Civil and Political Rights (ICCPR)⁹¹ as

88. See, e.g., Restatement (Third) of Foreign Relations § 102(2) (1987) (defining customary international law as law that “results from a general and consistent practice of states followed by them from a sense of legal obligation”).

89. See, e.g., Martha F. Davis, *The Spirit of Our Times: State Constitutions and International Human Rights*, 30 N.Y.U. Rev. L. & Soc. Change 359, 366, 371–75 (2006) (discussing the responsibility states have to consider international human rights and other transnational norms in making state constitutional decisions and arguing that states may have an obligation under the Supremacy Clause to implement CIL at a state level).

90. Evidence of state practices may include widely accepted multilateral agreements, Restatement (Third) of Foreign Relations § 102 cmt. i (1987), and resolutions of the General Assembly of the United Nations, *id.* § 103(2)(d). See also *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 719 (9th Cir. 1992) (citing *Filartiga v. Pena-Irala*, 630 F.2d 876, 882–84 (2d Cir. 1980)) (holding that the UDHR, as a resolution from the U.N. General Assembly, was a “powerful and authoritative statement of the customary international law of human rights”); the decisions of international and national high courts, Restatement (Third) of Foreign Relations § 103(2)(a–b) (1987); and highly regarded secondary scholarship, *id.* § 103(2)(c).

91. International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171 (entered

well as the Universal Declaration of Human Rights (UDHR),⁹² incorporate individuals' "right to an effective remedy" for violations of their fundamental rights.⁹³

However, international authorities have yet to agree whether this right includes a right to substantive relief broad enough to address underlying causes of rights violations when such relief is necessary to ensure that ongoing violations cease.⁹⁴ The U.N. Human Rights Committee, the body of independent experts charged by the ICCPR with monitoring States Parties' implementation of the treaty,⁹⁵ believes "[c]essation of an ongoing violation is an essential element of the right to an effective remedy."⁹⁶ The U.N. General Assembly, guided by these international sources more generally, has taken a less normative view.⁹⁷ Its Basic Principles on victims' rights to remedies and reparations suggests that the right to an effective

into force Mar. 23, 1976) [hereinafter ICCPR]. The United States considers widely accepted multilateral agreements as evidence of customary international law. Restatement (Third) of Foreign Relations § 102(3) (1987).

92. UDHR, *supra* note 87, art. 8. The United States considers the UDHR an authoritative statement of customary international law. *See Siderman de Blake*, 965 F.2d at 719.

93. *See* Theo Van Boven, *Victim's Rights to a Remedy and Reparation: The New United Nations Principles and Guidelines*, in *Reparations for Victims of Genocide, War Crimes, and Crimes Against Humanity: Systems in Place and Systems in the Making* 19, 22 (Carla Ferstman et al. eds., 2009).

94. The word "remedy" has both a procedural and a substantive dimension. Dinah Shelton, *Remedies in International Human Rights Law* 7 (2d ed. 2005). Procedurally, it refers to "processes by which arguable claims . . . are heard and decided." *Id.* Substantively, it refers to "the relief afforded the successful claimant." *Id.* In the international community, the word "reparation" is used most frequently to refer to the substantive dimension of remedies, *see id.*, while the European Court of Human Rights uses the term "redress," *see, e.g., Ananyev & Others v. Russia*, App. Nos. 42525/07 & 60800/08, ¶¶ 108–09 (Eur. Ct. H.R. Jan. 10, 2012), *available at* <http://www.echr.coe.int> (using the term "redress" to refer to the substantive dimension of remedies). This Article will uniformly employ the term "relief."

95. *See* ICCPR, *supra* note 91, art. 28–45 (establishing the Human Rights Committee, its procedures, and its competencies).

96. U.N. Human Rights Comm., General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 15, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) [hereinafter General Comment No. 31].

97. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, Preamble, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Mar. 21, 2006) [hereinafter Basic Principles].

remedy allows courts to exercise discretion as to whether to fashion relief intended to ensure that recurring violations cease.⁹⁸ The original drafter of the Basic Principles considers the right to effective remedies “not yet a firm *acquis* but an emerging duty,” and in particular believes states have not yet reached any general consensus concerning courts’ responsibility to provide specific forms of relief.⁹⁹

B. Regional Human Rights Courts

While the right to judicial measures broad enough to prevent recurring violations is not yet CIL, the evolving practices of regional human rights courts suggest that these courts do believe in a legal obligation for the judiciary to craft relief broad enough to ensure that states’ violations of fundamental rights will not recur. The Inter-American Court of Human Rights (IACtHR) has taken it upon itself to craft such structural relief directly. The European Court of Human Rights (ECtHR), while more sensitive to concerns of state sovereignty and the limitations of its role, has recently indicated that domestic judiciaries may be obligated to fashion structural relief under certain circumstances in order to satisfy victims’ right to effective relief. Both approaches suggest these courts feel some obligation to provide broad-as-necessary relief to victims.

1. The Inter-American Court of Human Rights

The IACtHR provides victims with a full-fledged individual right to structural relief as a component of the right to an effective remedy. Like the U.N. Human Rights Committee,¹⁰⁰ the Court considers guarantees of non-repetition to be a necessary part of

98. The drafting history of the Basic Principles indicates that the word “shall” precedes obligatory provisions, whereas the word “should” indicates a provision that is less categorical. *See* Rep. of the Second Consultative Meeting on the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law, U.N. Econ. & Soc. Council, Oct. 20–23, 2003, ¶ 45, U.N. Doc. E/CN.4/2004/57 (Nov. 10, 2003). While the Basic Principles provide that states “shall” make available “adequate, effective, prompt and appropriate remedies, including reparation,” Basic Principles, *supra* note 97, at Principle 2(c), they also provide that victims “*should*, as appropriate . . . be provided with full and effective reparation,” *id.* at Principle 18 (emphasis added), and that reparation “*should* include, where applicable, . . . [e]ffective measures aimed at the cessation of continuing violations,” *id.* at Principle 22 (emphasis added).

99. *See* van Boven, *supra* note 93, at 31.

100. *See* General Comment No. 31, *supra* note 96, and accompanying text.

effective relief as a matter of customary international law.¹⁰¹ Therefore, the Court has often issued “non-repetition measures” ordering offending states to make structural changes,¹⁰² which a former Senior Attorney at the Court has expressly compared with the United States’ structural remedies.¹⁰³ For example, when the Court found that Mexico had cultivated a culture of impunity for crimes against women in Ciudad Juárez, the Court issued fourteen affirmative injunctions.¹⁰⁴ These directed Mexico to undertake such tasks as establishing independent oversight of its justice department’s investigations into gender-based violence and to “[a]mplify the participation of women in the design and implementation of public policy and decision-making at all levels and across all sectors of government.”¹⁰⁵

Unfortunately, despite the creative and progressive jurisprudence of the IACtHR itself, its judgments have,

101. See, e.g., *Molina-Theissen v. Guatemala*, Reparations and Costs, ¶¶ 39–40 (Inter-Am. Ct. H.R. July 3, 2004), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_108_ing.pdf (explaining that the responsibility to provide “adequate reparations” for violations of States’ international obligations is a principle of CIL); The “Street Children” Case (*Villagrán-Morales v. Guat.*), Reparations, Inter-Am. Ct. H.R. (ser. C) No. 77, ¶ 98 (May 26, 2001) (finding that the American Convention on Human Rights obligates State parties to ensure non-repetition of rights violations). The right to an effective remedy is also incorporated into numerous treaties under which the Court adjudicates. See, e.g., *American Declaration of the Rights and Duties of Man*, O.A.S. Res. XXX, 9th Int’l Conference of American States, art. 18, O.A.S. Official Record, OEA/Ser.L/V/II.23, doc.21 rev.6 (1948), reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser.L.V/II.82 doc.6 rev.1, at 17 (1992); *American Convention on Human Rights*, opened for signature Nov. 22, 1969, art. 25, O.A.S.T.S. No. 36, 1144 U.N.T.S. 143 (entered into force July 18, 1978).

102. Alexandra Huneeus, *Courts Resisting Courts: Lessons from the Inter-American Court’s Struggle to Enforce Human Rights*, 44 *Cornell Int’l L.J.* 493, 506 (2011).

103. See Thomas M. Antkowiak, *Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond*, 46 *Colum. J. Transnat’l L.* 351, 387 (2008).

104. *González et al. (“Cotton Field”) v. Mexico*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶ 602 (Nov. 16, 2009); Huneeus, *supra* note 102, at 501.

105. See Inter-Am. Comm’n H.R., *The Situation of the Rights of Women in Ciudad Juárez, Mexico: The Right to be Free from Violence and Discrimination*, OEA/Ser.L/V/II.117, doc. 44 ¶ 169(4) (2003), available at <http://www.cidh.org/annualrep/2002eng/chap.vi.juarez.htm> (setting out “[g]eneral recommendations to enhance the efficacy of the right of the women of Ciudad Juárez to be free from violence”).

unfortunately, been largely ignored and even resisted by domestic courts charged with implementing them.¹⁰⁶ Although the IACtHR has a well-developed monitoring system, because of the frequently contentious nature of the cases affecting countries with deeply ingrained problems of impunity, relatively few orders that involve structural remedies are actually complied with by states.¹⁰⁷ Thus, while these decisions may serve as useful guiding precedent for litigators in the United States to share with courts, examples of how these decisions have improved the enjoyment of human rights for victims in the Americas is sadly limited.¹⁰⁸

2. The European Court of Human Rights

The ECtHR, in contrast, is only beginning to evolve toward the idea that the right to an effective remedy obligates courts to provide broad-as-necessary relief, including structural relief. Yet in cases where it awards such relief, compliance is more robust. While the ECtHR upholds applicants' right to an effective remedy under the European Convention,¹⁰⁹ its approach to relief has traditionally been more conservative. Typically, it awards successful claimants declaratory judgments that establish breaches of the Convention, sometimes coupled with monetary relief.¹¹⁰ Where states have systemic issues that contribute to recurring rights violations, the Court may order those states to resolve their issues, but has stopped short of fashioning solutions itself.¹¹¹

106. See Huneeus, *supra* note 102, at 494–95.

107. See *id.* at 503, 507–09.

108. See David C. Baluarte & Christian M. De Vos, Open Soc'y Justice Initiative, From Judgment to Justice: Implementing International and Regional Human Rights Decisions 63–65 (2010), available at <http://www.opensocietyfoundations.org/sites/default/files/from-judgment-to-justice-20101122.pdf> (explaining that the IACtHR and the Commission “have struggled with low levels of implementation of their final recommendations and orders in contentious cases”)

109. [European] Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, art. 13, Europ. T.S. No. 14, 213 U.N.T.S. 211, 232 (entered into force Sept. 3, 1953) [hereinafter European Convention].

110. See Ingrid Nifosi-Sutton, *The Power of the European Court of Human Rights to Order Specific Non-Monetary Relief: A Critical Appraisal from a Right to Health Perspective*, 23 Harv. Hum. Rts. J. 51, 51 (2010).

111. See European Court of Human Rights Press Unit, Factsheet–Pilot Judgments (2013), available at http://www.echr.coe.int/Documents/FS_Pilot_judgments_ENG.pdf (“It is for the State, subject to the supervision of the Committee of Ministers of the Council of Europe, to choose how to meet its

However, in recent years the ECtHR has taken steps transforming its traditional practices in a manner that suggests its growing recognition of victims' right to broad-as-necessary relief. In its 2005 case, *Hirst v. United Kingdom*, the Court offered the applicants relief beyond a declaratory judgment, finding that the United Kingdom had violated the European Convention and leaving it up to the State party to affect the necessary and appropriate policy reforms.¹¹² Within the past two years, the Court has gone even further in situations where states have persistently violated the European Convention's Article 3 prohibition against inhumane or degrading treatment or punishment. For example, the Court fashioned relief restructuring Russia's domestic judicial system and strongly suggested states generally should provide structural relief in their own courts.

After its declaratory relief failed to effectively cure the United Kingdom's practice of denying suffrage to its prison inmates, the ECtHR provided unprecedented specific equitable relief. In *Hirst*, the Court held that the U.K.'s blanket ban denying suffrage to its prison inmates violated the European Convention.¹¹³ However, it explicitly denied its capacity to provide guidance on how the United Kingdom should reform its voting laws, even though the U.K. government had requested such assistance.¹¹⁴ In 2010, when U.K. inmates again challenged the not-yet-lifted ban, the United Kingdom argued the ECtHR lacked jurisdiction over their case because the inmates had failed to exhaust their appeals in its domestic judicial system.¹¹⁵

Faced with five years of government inaction, the ECtHR held that declaratory relief alone was, in this situation, ineffective. The Court was unwilling to rule—as the U.K. Equality and Human Rights Commission had urged¹¹⁶—that declaratory relief was inherently

obligation under Article 46 (binding for and execution of judgments) of the Convention.”). This practice reflects the traditional CIL norm governing repetitive violations: states have a duty to ensure that violations cease, but victims do not have a corresponding right to demand specific orders accomplishing this end from courts. See, e.g., *LaGrand* (Germany v. United States), Judgment, 2001 I.C.J. 466, 513 (June 27); Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, ¶ 3, U.N. Doc. A/RES/56/83 (Jan. 28, 2002).

112. *Hirst v. United Kingdom* (No. 2), 2005-XI Eur. Ct. H.R. 189, 216–17.

113. *Id.* at 217.

114. See *id.* at 216.

115. *Greens & M.T. v. United Kingdom*, App. Nos. 60041/08 & 60054/08, ¶ 60 (Eur. Ct. H.R. Nov. 23, 2010), available at <http://www.echr.coe.int>.

116. See *id.* ¶ 89.

ineffective. However, it did hold that, because other victims of the violation had already received declaratory relief in the U.K. court system, the complainants had not failed to exhaust *effective* domestic remedies by foregoing their right to appeal for declaratory relief before domestic courts.¹¹⁷

On the basis of this argument, the Court proceeded to fashion injunctive relief and maintain oversight over the issue. Noting “the lengthy delay to date,” the Court ordered the U.K. to introduce legislative proposals to amend its policy within six months of the Court’s judgment.¹¹⁸ The Court also made clear that it was retaining independent authority to revisit the question of the U.K.’s prisoner suffrage policy.¹¹⁹ It suspended a large number of identical challenges to the U.K. policy, emphasizing that it would restore those challenges to its docket should the U.K. fail to comply with its legislative timeline.¹²⁰

While the ECtHR stopped short in 2010 of restructuring the U.K.’s prison system itself in *Greens & M.T.*, it has recently asserted its authority to restructure states’ domestic judiciaries in order to provide them with the means to offer broad-as-necessary remedies themselves, at least in cases involving violations of the Article 3 prohibition of inhuman or degrading treatment or punishment. In *Ananyev & Others v. Russia*, after eleven years and dozens of declaratory judgments finding Russia’s penal system systematically violated individuals’ Article 3 rights, the Court held that Russia had violated inmates’ Article 13 right to an effective remedy as well.¹²¹

117. See *id.* ¶ 68. Notably, U.K. courts issuing declaratory judgments on the issue had refused plaintiffs’ requests to fashion equitable relief on reasoning quite similar to the U.S. courts’ typical limitations on equitable remedies. See *id.* ¶ 33 (quoting *R. v. Sec’y of State, ex parte Toner & Walsh*, [2007] NIQB 18 (N. Ir.)); see also *id.* ¶ 35 (quoting *Chester v. Sec’y of State for Justice & Another*, [2009] EWHC (Admin) 2923 (Eng.)).

118. *Id.* ¶ 115.

119. *Id.* ¶¶ 120–21.

120. *Id.* ¶ 121. The Court granted the U.K. an extension pending its judgment in *Scoppola v. Italy (No. 3)*, App. No. 126/05, 56 Eur. H.R. Rep. 19 (2013), a case concerning the legitimacy of Italy’s more tailored ban on inmate voting under the European Convention. Press Release, Registrar of the European Court of Human Rights, Court Adjourns 2,354 Prisoners’ Voting Rights Cases (Mar. 26, 2013), available at <http://hudoc.echr.coe.int/webservices/content/pdf/003-4306526-5151000>. The Court has decided not to reconsider pending applications against the U.K. until, at the latest, September 30, 2013. *Id.*

121. *Ananyev & Others v. Russia*, App. Nos. 42525/07 & 60800/08, ¶ 184 (Eur. Ct. H.R. Jan. 10, 2012), available at <http://www.echr.coe.int>. The ECtHR first held Russia’s penal system violated its inmates’ Article 3 rights in 2002. See

Specifically, Russia had failed to demonstrate that it provided any relief that effectively improved the complainants' situations.¹²²

The relief the Court fashioned to resolve Russia's Article 13 violation was unprecedented. While the Court was unwilling to order specific changes to Russia's prison system in order to directly resolve the State's Article 3 violations, it *was* willing to order specific structural changes to Russia's domestic judicial system to ensure Russian courts would have the authority to provide effective relief.¹²³ The Court proceeded to issue several directives to Russia requiring it to establish a monitoring authority for its detention facilities.¹²⁴ Moreover, it strongly hinted that the State should equip its own court system with the power to provide structural relief to protect Article 3 rights.¹²⁵

In the nineteen months since *Ananyev*, the Court has moved quickly to fortify and expand its new doctrines. Unlike its response to the United Kingdom, it did not adjourn similar cases from Russia¹²⁶ and has since moved quickly to reiterate *Ananyev's* novel precedents in multiple opinions concerned with nearly identical allegations.¹²⁷ In one recent case, the Court went further in holding that remedies not including measures intended to prevent recurring violations are

id. ¶ 179 (noting that *Kalaashnikov v. Russia*, 2002-VI Eur. Ct. H.R. 93, was the first such finding by the Court). By January 2012, the Court had found that the Russian penal system's conditions of confinement violated Article 3 in more than 80 cases. *Id.* ¶ 184.

122. *See id.* ¶ 106 (noting effective remedies should be "legally binding decision[s] that would be capable of bringing about an improvement in the complainant's situation or would serve as a basis for obtaining compensation"); *id.* ¶ 112 (finding that a theoretically effective remedy was ineffective where Russia could not demonstrate its practical effectiveness).

123. *See id.* ¶ 212 ("[T]he Court's findings under this provision require clear and specific changes to the domestic legal system that would allow all people in the applicants' position to complain about alleged violations of Article 3 . . . and to obtain adequate and sufficient redress . . . at the domestic level.").

124. *See id.* ¶¶ 215–16.

125. *See id.* ¶ 219.

126. *See id.* ¶ 236.

127. *See, e.g.,* Dirdizov v. Russia, App. No. 41461/10, ¶ 88 (Eur. Ct. H.R. Nov. 27, 2012), available at <http://www.echr.coe.int> ("The remedy, which has not produced a substantial body of case-law or a plethora of successful claims in more than eighteen years of existence, leaves genuine doubts as to its practical effectiveness."); Reshetnyak v. Russia, App. No. 56027/10, ¶ 77 (Eur. Ct. H.R. Jan. 8, 2013), available at <http://www.echr.coe.int> (following the same procedure and reasoning).

inherently ineffective.¹²⁸ When applying *Ananyev* principles to Italy, the Court indicated its intention to carefully scrutinize the effectiveness of domestic remedies (as it did in *Ananyev*) specifically in situations involving structural violations of Article 3.¹²⁹ This most recent precedent signals to states that, while the European Court feels it cannot force them to provide their domestic courts with the power to fashion structural remedies, it will more carefully scrutinize the effectiveness of court systems without that power when it considers applicants' claims of inhuman or degrading treatment or punishment. As the ECtHR's jurisprudence concerning its authority to restructure domestic judiciaries in order to provide effective relief continues to develop, it contributes to the body of international practices supporting victims' right to broad-as-necessary relief.

C. National High Courts

While structural injunctions are rare,¹³⁰ they exist in the jurisprudence of a significant number of countries.¹³¹ At least two foreign high courts have considered themselves obligated to fashion structural relief—including comprehensive orders similar in scope to the order approved by the U.S. Supreme Court in *Plata*¹³²—where necessary to resolve ongoing human rights violations.

128. *Dirdizov*, App. No. 41461/10, ¶¶ 72–83 (“The State cannot escape its responsibility by purporting to erase a wrong by a mere grant of compensation in [cases where prisoners are suffering inhuman and degrading treatment].”).

129. *Cf. Affaire Torreggiani et Autres c. Italie*, Req. Nos. 43517/09, 55400/09, 57875/09, 61535/09, 35315/10 & 37818/10, ¶ 54 (Eur. Ct. H.R. Jan. 8, 2013) (citing *Ananyev & Others v. Russia*, App. Nos. 42525/07 & 60800/08 (Eur. Ct. H.R. Jan. 10, 2012), available at <http://www.echr.coe.int>), available at <http://www.echr.coe.int> (holding that the structural nature of the violations in conditions of confinement cases makes preventive remedies in those cases particularly difficult to effectuate); *Ananyev*, App. Nos. 42525/07 & 60800/08, ¶ 219 (suggesting structural remedies are highly desirable in such situations).

130. See David Landau, *The Reality of Social Rights Enforcement*, 53 Harv. Int'l L.J. 189, 203 (2012) (“[S]tructural injunctions are very rare in the comparative context.”).

131. At least a handful of non-English-speaking countries employ structural injunctions. See *id.* at 222 (Colombia); *id.* at 230 (Brazil); *id.* at 235 n.246 (Argentina); *In Re: Certain Amicus Curiae Applications; Minister of Health & Others v. Treatment Action Campaign & Others* 2002 (5) SA 721 (CC), at ¶ 109 (S. Afr.) (citing *Second Abortion Case*, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 28, 1993, 88 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 203 (208) (Ger.)).

132. See *supra* notes 79–81 and accompanying text.

The South African Constitutional Court, bound by its constitution to provide parties with “appropriate relief,”¹³³ rejected an argument that its lower courts were limited to passing declaratory judgments. The Court upheld a lower court’s orders directing the government to implement a specific national program to uphold individuals’ right to health care.¹³⁴ Citing international precedents, including the United States’ structural remedies jurisprudence, the Court recognized that “courts in other countries also accept that it may be appropriate . . . to issue injunctive relief against the state.”¹³⁵ Then, in dicta, it noted that structural relief was likely obligatory where less drastic remedies had proven ineffective.¹³⁶

The Supreme Court of India, to which the South African Constitutional Court referred when building its own ruling,¹³⁷ has gone even further. Like the lower court in *Brown v. Plata*,¹³⁸ the Indian Supreme Court has asserted its authority to look beyond the rights violation at issue and fashion a structural remedy aimed at the violation’s underlying cause under a broad-as-necessary theory. Unlike most U.S. district courts, the Indian Supreme Court felt that providing such a remedy was its *obligation*.

Operating under both constitutional and international provisions concerning the right to an effective remedy,¹³⁹ the Indian Supreme Court considered the validity of Article 24 of the Indian Constitution, which forbids children under fourteen from working in factories, mines, or other “hazardous employment.”¹⁴⁰ After surveying the multiplicity of international, constitutional, and domestic

133. S. Afr. Const., 1996, art. 38.

134. *In Re: Certain Amicus Curiae Applications; Minister of Health & Others*, (5) SA 721 (CC), at ¶¶ 113, 124–29.

135. *Id.* ¶¶ 107–08 (discussing *Brown v. Bd. of Educ. of Topeka, Kan.* (*Brown II*), 349 U.S. 294 (1955); *M.C. Mehta v. State of Tamil Nadu & Others*, (1996) 6 S.C.C. 756 (India); and other cases).

136. *See id.* ¶¶ 113, 129.

137. *See id.* ¶ 108 (“Even a cursory perusal of the relevant Indian case law demonstrates a willingness on the part of the Indian courts to grant far-reaching remedial orders.”).

138. *See supra* notes 79–81 and accompanying text.

139. The Indian Constitution provides a “right to Constitutional Remedies” and the Supreme Court has the power to issue affirmative injunctions where appropriate to enforce individual rights. India Const. art. 32, §§ 1–2. In *M.C. Mehta*, a case involving child labor, the Court was also bound to consider the Convention on the Rights of the Child (CRC). *M.C. Mehta v. State of Tamil Nadu & Others*, (1996) 6 S.C.C. 756 at ¶ 15 (India).

140. *M.C. Mehta*, 6 S.C.C. 756, at ¶ 3A (citing India Const. art. 24).

provisions regulating child labor,¹⁴¹ the Court concluded that illegal child labor persisted in spite of these measures because of an underlying structural cause: endemic poverty.¹⁴² Confronting this structural problem, the Court ordered comprehensive structural relief, directing each state to attempt to relocate its children into non-hazardous employment and, where alternative employment was not possible, to pay the child's parents a monthly stipend, as long as that child attended school.¹⁴³

The Right to an Effective Remedy Including Structural Relief is an Emerging Customary International Law Norm

The interpretation of the Human Rights Committee, combined court decisions from the Americas, South Africa, and India, and evolving human rights jurisprudence in Europe, all suggest a significant number of countries see themselves as obligated to provide relief sufficiently broad enough to ensure that states' ongoing violations of human rights, once identified, effectively end. Where governments have not effectively resolved the structural causes of ongoing rights violations, international bodies and domestic high courts are stepping in with broad structural remedies. Once a consistent practice of some recognizable group of states triggers courts' obligations under sufficiently similar circumstances, victims' right to sufficiently broad relief could become established as a binding norm of Customary International Law.¹⁴⁴

V. CONCLUSION

While U.S. Supreme Court rulings have swung back and forth between expansive and narrow interpretations of judicial authority to fashion "structural" relief that addresses the underlying cause of rights violations, including ordering other branches of government to

141. *Id.* ¶¶ 15–24.

142. *See id.* ¶ 26 (“[P]overty is the basic reason which compels parents of a child, despite their unwillingness, to get it employed.”).

143. *Id.* ¶ 31.

144. *Cf.* Restatement (Third) of Foreign Relations § 102(2) (1987) (“Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.”). This Article covers state practice in Europe, the United States, Latin America, India, and South Africa. Speculatively, the earliest group of states to be bound by this developing norm might be democratic societies with independent judiciaries. *Cf. id.* § 102 cmt. (e) (discussing how customary law between states may develop as a result of regional grouping). A more exhaustive comparative legal study would be needed to confirm this hypothesis.

take corrective action, the recent *Plata* precedent indicates the pendulum may be swinging in the direction of greater ability to fashion these equitable remedies.¹⁴⁵ This authority is limited to cases where the violation is extensive and persists over time. Moreover, the authority appears to be discretionary, with no apparent obligation for courts to exercise it, even when these conditions are present.

International standards and court decisions go further in some cases and consensus seems to be moving towards the view that, where conditions warrant, structural remedies are a matter of right, not simply discretion. Significantly, some of this international authority is looking to U.S. jurisprudence on structural remedies, as well as to international legal principles. Recent Supreme Court cases,¹⁴⁶ as well as rulings by lower federal and state courts,¹⁴⁷ have relied on international standards and rulings as persuasive authority, particularly as sources of “evolving standards of decency” in interpreting the Eighth Amendment.¹⁴⁸ The role of U.S. jurisprudence in shaping this growing international consensus may bolster its persuasiveness to American courts. Even prior to a finding that this has solidified into a CIL norm, which would be binding in U.S. courts, advocates could use the above cases and standards as persuasive evidence of how domestic courts should approach these cases.¹⁴⁹

145. See *supra* Section III.

146. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 575–79 (2005) (discussing negative international opinion regarding imposing the death penalty on juveniles); *Lawrence v. Texas*, 539 U.S. 558, 577 (2003) (“The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries.”).

147. See, e.g., *Brennan v. Florida*, 754 So.2d 1, 14 & n.18 (Fla. 1999) (Anstead, J., concurring) (considering the ICCPR in a case where the court struck down the juvenile death penalty under the Florida Constitution); *Sterling v. Cupp*, 290 Or. 611, 622 & n.21 (1981) (en banc) (discussing international standards for prisoner treatment); *Bott v. Deland*, 922 P.2d 732, 740–41 (Utah 1996) (discussing *Sterling*, 290 Or. 611, and its consideration of international standards), *abrogated on other grounds by* *Spackman ex rel. Spackman v. Bd. of Box Elder Cnty. Sch. Dist.*, 2000 UT 87, 16 P.3d 533; *Moore v. Ganim*, 660 A.2d 742, 780 (Conn. 1995) (Peters, J., concurring) (arguing that international human rights treaty provisions support the interpretation that the Connecticut Constitution provides a social welfare requirement); *Boehm v. Superior Court*, 178 Cal. App. 3d 494, 502 (Cal. Ct. App. 1986) (citing to the UDHR to support interpreting California’s welfare statute to include food, clothing, and housing allowances), *abrogated on other grounds by* *Saldana v. Globe-Weis Sys. Co.*, 285 Cal. Rptr. 385 (Cal. Ct. App. 1991).

148. See *Roper*, 543 U.S. at 563.

149. *Davis*, *supra* note 89, at 366, 371–75.

In the criminalization context, which often involves interpretation of the Eighth Amendment's broad prohibition on cruel and unusual punishment, the willingness of courts to exercise such authority—and plaintiffs to demand it—could make a tremendous difference. Numerous court rulings have upheld homeless plaintiffs' constitutional rights in the face of laws or practices that make criminal their public performance of the ordinary activities of daily life, such as eating, sleeping, or sitting, in the absence of any private place to perform them.¹⁵⁰ However, these rights continue to be violated because the underlying issue remains unaddressed; only remedying the lack of adequate housing will eliminate the conflict between cities' desire to remove visible poverty from public places and the needs of people without access to a private place to perform necessary life activities. As demonstrated by cities' renewal and only slightly modified enforcement of criminalization policies following the *Jones* and *Kincaid* decisions, this conflict will continue in the absence of a substantive remedy.¹⁵¹

The *Pottinger* court, aware of this underlying problem, resorted to “safe zones” as a remedy. These zones, however, merely delay the conflict rather than resolve it. While homeless people may be able to perform daily life activities within such zones and rights violations may thus be avoided, it is likely that violations will nonetheless continue to occur. Given development trends, it is unlikely that cities will decide to designate areas as permanent “safe zones” or, even if they did so, that those zones would adequately address cities' concerns such that they would voluntarily end their efforts to remove visibly homeless people from public places.

The *Lakewood* settlement is a clear step in the right direction. It addressed the immediate violation by enjoining the eviction or punishment of the homeless individuals in Tent City, but also prevented recurrence, at least in the intermediate term, by providing housing for one year to all residents.¹⁵² Similar positive approaches to addressing homelessness through constructive, rather than destructive, means have been achieved in a growing number of other cities.¹⁵³ Although these remedies have been achieved through negotiation, not court mandate, the *Lakewood* court's assertion that

150. See *supra* Section II.

151. *Id.*

152. See Consent Order, *supra* note 55, at 5.

153. See Julie Hunter et al., Nat'l Law Ctr. on Homelessness & Poverty, Welcome Home: The Rise of Tent Cities in the United States (forthcoming 2014); Searching Out Solutions, *supra* note 4.

“there is a governmental responsibility here to care for the poor at some level” perhaps indicates the emergence of an awareness of the underlying right to housing—not explicit in domestic law, but clear in international law—and the desire to address violations of that right.¹⁵⁴ The advantage of domestic courts using the emerging international norm on effective remedies is that courts need not develop the right to housing as an independent right, but may still ensure the enjoyment of that right as part of the remedy preventing further Eighth Amendment violations.

The domestic and international authority in favor of structural remedies is significant and provides a basis for courts confronting violations such as those in *Pottinger*, *Jones*, *Kincaid*, and *Lakewood* to order meaningful, substantive relief. Indeed, a 2012 report by the U.S. Interagency Council on Homelessness emphasized that criminalization measures may violate not only our domestic Constitution, but also our international human rights treaty obligations under the International Covenant on Civil and Political Rights and Convention Against Torture.¹⁵⁵ Thus, the report encourages communities to pursue constructive alternatives. In instances where ongoing violations can be documented and there is evidence of official resistance to the protection of homeless individuals’ rights, a court may order remedies that address homelessness itself, not just its criminalization. Such remedies could include, for example, ordering officials to provide housing and social services to homeless persons who are targeted by criminalization.

Increased utilization of structural remedies offers the prospect of longer-lasting, meaningful solutions that address the concerns of cities as well as the needs of homeless individuals. These remedies are also cost effective: providing housing is less costly—often by substantial margins—than deploying the criminal justice system to “sweep” homeless people away.¹⁵⁶ Furthermore, such remedies would conserve judicial resources by breaking the repetitive cycle of litigation followed by revised city ordinances aimed at accomplishing the same goal of removing homeless individuals. In

154. Transcript of Motion for Summary Judgment, *supra* note 53, at 14.

155. Searching Out Solutions, *supra* note 4, at 8.

156. See Criminalizing Crisis, *supra* note 2, at 9 (citing The Lewin Group, Costs of Serving Homeless Individuals in Nine Cities: Chart Book (2004)) (“In 2004, a study . . . found supportive housing to be the cheapest option in addressing the needs of homeless people when compared to jails, prisons, and mental hospitals. For several cities, supportive housing was also found to be cheaper than housing homeless individuals in shelters.”).

short, such structural remedies would provide true relief to all involved.

THE INTERDEPENDENCE OF RIGHTS: PROTECTING THE HUMAN RIGHT TO HOUSING BY PROMOTING THE RIGHT TO COUNSEL

By Risa E. Kaufman, Martha F. Davis and Heidi M. Wegleitner*

[S]ubstance and procedure are often deeply entwined.
-Justice John Paul Stevens, *MacDonald v. Chicago*¹

This Article trains the lens of international human rights to explicate the relationship between the right to counsel in civil cases and a right to housing. A strength of the human rights framework is its recognition of the interrelationship of rights: civil, political, economic, social and cultural. Just as the right to housing is a lynchpin to the realization of other rights, so, too, is the right to counsel. This article first sets forth the international human rights framework for understanding the U.S.'s obligation to provide a civil right to counsel when basic human needs, including housing, are at stake. It then offers client stories from a legal services organization in Wisconsin, alongside quantitative research, as a way to better understand the impact that legal counsel has on individuals' ability to secure and protect their housing, and, finally, discusses the implications of advocacy efforts to link a housing rights strategy to efforts to secure the civil right to counsel.

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1. 130 S. Ct. 3020, 3090 (2010) (dissenting).

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I. INTRODUCTION

Julia had a right to housing.² Living in public housing with her young daughter, she was entitled to a rent reduction after she lost her job. With no other income, the family relied solely on child

2. This story, like the other profiles in this Article, is based on the experiences of individuals represented by Legal Action of Wisconsin, a statewide legal services organization. Names have been changed to protect client confidentiality.

support payments, but even so, Julia could have afforded the minimal \$50/month rental charge for which she was eligible. However, the local housing authority refused to adjust her payments. The family faced eviction and Julia's landlord sued her in small claims court for her unpaid rent.

Julia had a right to housing. But it took the intervention of legal counsel to make that right a reality. Legal Action of Wisconsin intervened on Julia's behalf, and the court dismissed the eviction. Legal Action reported the problem to the U.S. Department of Housing and Urban Development (HUD), who directed the landlord to accept an affordable payment plan for amounts Julia actually owed. Most importantly, Julia and her young daughter were able to stay in their public housing unit paying an affordable rent amount.

For Julia, as for most individuals, substance and procedure were intertwined. While there is no recognized federal constitutional right to housing, several federal statutes protect aspects of the right, including the Protecting Tenants at Foreclosure Act,³ the Fair Housing Act,⁴ Section 8 of the Housing Act of 1937,⁵ and the Violence Against Women Act.⁶ Numerous state laws offer complementary protections. Without a lawyer, however, people facing a loss of housing are often unable to avail themselves of these protections.

3. Pub. L. No. 111-22, §§ 701-04, 123 Stat. 1661 (2009), *clarified and amended* by Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1484, 124 Stat. 1376 (2010).

4. 42 U.S.C. §§ 3604, 3605 (prohibiting discrimination in the sale, rental, and financing of housing and housing related transactions).

5. 42 U.S.C. § 1437f (authorizing rental payment assistance for low-income households). The Section 8 rent assistance program was established “[f]or the purpose of aiding low-income families in obtaining a decent place to live and of promoting economically mixed housing.” 42 U.S.C. § 1437f(a). Public housing agencies (PHAs) issue Section 8 vouchers to program participants to obtain housing in the private rental market. Once a participant's application for rental housing is approved by the prospective landlord, the PHA enters into a housing assistance payment (HAP) contract with the landlord, which among other terms, sets forth the contract rent, the tenant contribution to the rent and the amount subsidized by the Community Development Agency (CDA) with HUD funds. The rent contribution for Section 8 households is based on the adjusted monthly household income, which approximates 30% of the income. Tenant participants may be terminated from the rent assistance program for substantial program violations. Prior to termination of the rent assistance, the participant is entitled to notice and the opportunity for a hearing to dispute the proposed termination in accordance with due process requirements.

6. 42 U.S.C. § 14043e-11 (providing housing protections for domestic violence survivors).

Although legal representation is fundamental to safeguarding human rights, millions of people in the United States lack representation when facing a crisis such as eviction or foreclosure. In the United States, only a small fraction of the legal problems experienced by low-income people—fewer than one in five—are addressed with the assistance of legal representation.⁷ State and county level data indicate that a high percentage of defendants—in some places over ninety percent—are unrepresented in proceedings involving foreclosure.⁸ Similarly, tenants are overwhelmingly unrepresented in housing courts, in stark comparison to landlords.⁹

Like the right to housing, a categorical right to counsel in civil cases is not recognized under the federal Constitution.¹⁰ And federal programs providing civil counsel to people who are poor or low-income

7. Legal Servs. Corp., Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans 1 (2009), available at http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf.

8. See Melenca Clark & Maggie Barron, Brennan Ctr. for Justice, Foreclosures: A Crisis in Legal Representation 12, 14 (2009), available at <http://www.brennancenter.org/page/-/Justice/Foreclosure%20Report/ForeclosuresReport.pdf> (examining data from various states which suggests that large numbers of homeowners are unrepresented in foreclosures); Legal Servs. Corp., *supra* note 7 (finding that the number of unrepresented litigants is increasing rapidly).

9. See Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of Judges, Mediators, and Clerks*, 67 Fordham L. Rev. 1987, 2063–64 n. 339 (1999) (10% of tenants sued for eviction in New York City are represented by counsel, while 75–90% of landlords are represented); Dist. of Columbia Access to Justice Comm'n, *Justice for All? An Examination of the Civil Legal Needs of the District of Columbia's Low-Income Community* 76 (2008) (finding 3% of tenants represented by legal counsel in eviction cases before the court).

10. The U.S. Supreme Court has established a right to counsel in criminal cases. *Gideon v. Wainwright*, 372 U.S. 335, 342–44 (1963) (requiring counsel be appointed for indigent defendants in state court facing imprisonment due to felony charges); *Argersinger v. Hamelin*, 407 U.S. 25, 37 (1972) (requiring counsel for indigent defendants in state court facing imprisonment due to misdemeanor charges). However, the U.S. Supreme Court has not established a similar protection for individuals in the civil context. In fact, the Court has created a presumption against appointing counsel in any civil case where physical liberty is not in the balance. *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 31–32 (1981) (finding no categorical right to counsel when termination of parental rights is at stake). And it has refused to find a categorical right to counsel even in some civil cases where lengthy jail sentences are, in fact, imposed. *Turner v. Rogers*, 131 S. Ct. 2507, 2520 (2011) (finding no categorical right to counsel for indigent contemnors facing jail time for failing to pay child support, at least where the plaintiff is neither the state nor represented by counsel).

are under-funded and severely restricted.¹¹ The result is a crisis in unmet legal needs which disproportionately harms racial minorities and women, and which seriously jeopardizes the right to housing for millions living in the United States.

Thus, a rigorous effort to protect the right to housing in the United States must also seek to secure the right to counsel in civil cases. This is a key insight offered by international human rights law. As the U.N. expert on poverty and human rights recently noted, “access to justice is a human right in itself, and essential for tackling the root causes of poverty. . . . Lack of legal aid for civil matters can seriously prejudice the rights and interests of persons living in poverty, for example when they are unable to contest tenancy disputes [and] eviction decisions.”¹² The U.N. Special Rapporteur on Adequate Housing has written that legal remedies against forced evictions are only effective where civil legal aid is also provided.¹³

This Article explores the relationship between the right to housing and the right to counsel through the lens of international human rights, and urges an integrated advocacy approach. A strength of the human rights framework is its recognition of the interrelationship of rights: civil, political, economic, social and cultural. Just as the right to housing is a lynchpin for the realization of other rights, so, too, is the right to counsel. Part II of this Article sets forth the international human rights framework supporting the right to counsel when basic human needs, including housing, are at stake. Part III details the impact that legal representation has on individuals’ ability to protect their right to housing, offering client stories from a legal services organization in Wisconsin, alongside quantitative research to illustrate the link between the right to legal counsel and the right to housing. Part IV explores the challenges to securing legal counsel when basic human needs such as housing are at stake. Part V details advocacy efforts to expand the right to counsel, particularly in cases where basic needs such as housing are at stake, and Part VI concludes by discussing the implications of

11. See Part IV, *infra*.

12. Special Rapporteur on Extreme Poverty and Human Rights, *Report on Access to Justice for People Living in Poverty*, Human Rights Council, ¶ 62, U.N. Doc. A/67/278 (August 9, 2012) (by Maria Magdalena Sepúlveda Carmona).

13. Special Rapporteur on Adequate Housing, *Report of the Special Rapporteur on Adequate Housing as a*

Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in this Context, Human Rights Council, ¶ 69, U.N. Doc. A/HRC/22/46 (Dec. 24, 2012) (by Raquel Rolnik).

tying advocacy for the right to housing to a strategy that promotes the right to counsel, explicating the importance and ancillary benefits of pairing the two in a nuanced and intentional way.

II. INTERNATIONAL LAW RECOGNIZES THE IMPORTANCE OF LEGAL COUNSEL IN CIVIL CASES IMPLICATING BASIC NEEDS.

International law recognizes what is reflected in the client experience recounted above, and that of others confronting a potential loss of housing: Legal representation is fundamental to safeguarding fair, equal, and meaningful access to the legal system as a whole, and is critical to safeguarding other human rights, including the right to housing.¹⁴

14. The right to adequate housing is firmly rooted in international human rights law. *See, e.g.*, Universal Declaration of Human Rights, Art. 25, ¶ 6, G.A. Res. 217 (III) A, U.N. Doc. A/810 (Dec. 10, 1948) (“Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing [...]”). The International Covenant on Social, Economic, and Cultural Rights (ICESCR), ratified by 160 countries, further enshrines housing as a universal human right. The relevant provision, Article 11.1, states: “The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.” The provision is similar to Article 25 of the Universal Declaration, but contains an operational clause stating “[t]he States Parties will take appropriate steps to ensure the realization of this right” Int’l Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 6 I.L.M. 360, 993 U.N.T.S. 3 [hereinafter ICESCR]. The Committee on Economic, Social, and Cultural Rights, the committee of experts charged with overseeing the implementation of ICESCR, has made it clear that the right to adequate housing is fundamental, not secondary, to other social and economic rights. Comm. on Economic, Social, and Cultural Rights, General Comment 4, *The Right to Adequate Housing*, U.N. Doc. E/1992/23 (Dec. 13, 1991) [hereinafter General Comment 4]. The right to housing is enshrined in other core human rights conventions, as well. *See, e.g.*, The Convention on the Elimination of All Forms of Racial Discrimination art. 5, 21 Dec. 1965, 660 U.N.T.S. 195 [hereinafter Race Convention] (placing an obligation on States Parties to ensure that all citizens, regardless of race, have an equal opportunity to enjoy the right to housing, along with several other fundamental civil, political, economic and social rights); The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) art. 14.2h, Dec. 18, 1979, 1249 U.N.T.S. 13 (requiring state parties to ensure that women in rural areas, “enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications”); The Convention on the Rights of the Child art. 27.1, Nov. 20, 1989, 1577 U.N.T.S. 3 (recognizing the right of the child to “a standard of living adequate for the child’s physical, mental, spiritual, moral and social development”); The Convention on the Rights of the Child art. 27.3, Nov. 20, 1989,

The International Covenant on Civil and Political Rights (ICCPR), ratified by the United States in 1992, requires member states to ensure meaningful access to justice, including meaningful access to counsel in civil cases where the interests of justice so require. Article 14 of the ICCPR guarantees procedural fairness, providing, in relevant part, that “[a]ll persons shall be equal before the courts and tribunals. In the determination of ... his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”¹⁵

Article 2 of the ICCPR establishes that each state bound by the treaty must undertake to “ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy”¹⁶ Article 26 reiterates the guarantee of non-discrimination.¹⁷

As articulated by the Human Rights Committee, these protections extend to the right to counsel in certain civil cases. General Comment 32 clarifies that Article 14’s guarantee of equality before the law encompasses access to the legal system, including access to counsel in civil cases:

Access to administration of justice must effectively be guaranteed in all such cases to ensure that no individual is deprived, in procedural terms, of his/her right to claim justice The availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way States are encouraged to provide free legal aid in

1577 U.N.T.S. 3 (requiring that “States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing”); American Declaration on the Rights and Duties of Man art. 11, OEA/Ser.L.V/II.23, doc. 21, rev. 6 (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82, doc. 6, rev. 1 at 17 (stating that, “Every person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources”).

15. Int’l Covenant on Civil and Political Rights, art. 14, Mar. 23, 1976, 999 U.N.T.S. 171 [hereinafter ICCPR].

16. *Id.* art. 2.

17. *Id.* art. 26 (“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.”).

[non-criminal cases], for individuals who do not have sufficient means to pay for it. In some cases, they may even be obliged to do so.¹⁸

The Human Rights Committee has on several occasions noted concern over states' failure to provide counsel in various types of civil cases, including those implicating the right to housing.¹⁹

Concerned with the United States' human rights record in this regard, prior to its 2014 review of the United States' compliance with the treaty, the U.N. Human Rights Committee asked the United States to provide it with information on steps the country has taken to improve legal representation in civil proceedings. In particular, the Committee expressed concern for litigants belonging to racial, ethnic and national minorities,²⁰ and the lack of legal representation for women victims of domestic violence.²¹

18. U.N. Human Rights Comm., *General Comment 32: Article 14, Right to Equality before Courts and Tribunals and To a Fair Trial*, ¶ 10, U.N. Doc. CCPR/C/GC/32 (Aug. 23, 2007).

19. For example, in its Concluding Observations regarding the Czech Republic's compliance with the Covenant, the Committee noted with concern that, in order to rectify the problem of discrimination in housing faced by the Roma, the Czech Republic should "provide legal aid for victims of discrimination." U.N. Rep. of the Human Rights Comm., *Concluding Observations—Czech Republic*, ¶ 16, U.N. Doc. CCPR/C/CZE/CO/2 (2007). In commenting on Sweden's treatment of its indigenous Sámi population, the Committee recommended that the government provide adequate legal aid to Sámi villages in land rights disputes. U.N. Rep. of the Human Rights Comm., *Concluding Observations—Sweden*, ¶ 21, U.N. Doc. CCPR/C/SWE/CO/6 (2009). See also U.N. Rep. of the Human Rights Comm., *Concluding Observations—Chile*, ¶ 14, U.N. Doc. CCPR/C/CHL/CO/5 (2007) (commenting on restrictions on trade unions by the government in Chile, the Committee recommended that the government make legal aid available to workers in order for their complaints to be heard successfully). The Committee has made similar recommendations with regard to treatment of asylum seekers by the governments in Switzerland and El Salvador. With regard to Switzerland, Committee recommended that "[t]he State party should review its legislation in order to grant free legal assistance to asylum-seekers during all asylum procedures, whether ordinary or extraordinary." U.N. Rep. of the Human Rights Comm., *Concluding Observations—Switzerland*, ¶ 18, U.N. Doc. CCPR/C/CHE/CO/3 (2009). With regard to El Salvador, the Committee recommended that the government "ensure that persons subject to deportation proceedings benefit from an effective right to be heard, to have an adequate defence and to request that their case be reviewed by a competent authority." U.N. Rep. of the Human Rights Comm., *Concluding Observation—El Salvador*, ¶ 17, U.N. Doc. CCPR/C/SLV/CO/6 (2010).

20. U.N. Human Rights Comm., *List of Issues in Relation to the Fourth Periodic Report of the United States of America Adopted by the Committee at its 107th Session*, ¶8(e), U.N. Doc. CCPR/C/USA/Q/4 (Apr. 21, 2013). In its response

The Convention on the Elimination of All Forms of Racial Discrimination (“Race Convention”), which the United States ratified in 1994, likewise protects the right to counsel in civil cases, particularly where the absence of counsel has a disparate impact on racial, ethnic and national minorities. Articles 5 and 6 of the Convention address fair procedure and adjudication, requiring that States take positive steps to ensure effective access to the apparatus of the State’s justice system, including in civil matters.²² The Committee on the Elimination of All Forms of Racial Discrimination (CERD), which monitors implementation of the Race Convention, has issued General Recommendation 31, which highlights the importance of making it easier for victims of racism to seek civil redress in the courts by, *inter alia*, providing free assistance of counsel.²³ More generally, General Recommendation 29 recommends that State Parties “take the necessary steps to secure equal access to the justice system for all members of descent-based communities, including providing legal aid, facilitating group claims and encouraging non-governmental organizations to defend community rights.”²⁴

The CERD has taken particular notice of the United States’ failure to provide counsel in civil cases. During its 2008 review of the United States, the CERD expressed concern that the lack of civil counsel for persons living in poverty disproportionately and

to this questions raised in the Committee’s List of Issues, the United States cited the work of the Department of Justice’s Access to Justice Initiative, which was established in 2010 “to help the justice system efficiently deliver outcomes that are fair and accessible to all, irrespective of wealth and status.” U.S. Written Responses to the Questions from the U.N. Human Rights Comm. Concerning the Fourth Periodic Report, ¶ 29, July 3, 2013, *available at* <http://www.state.gov/j/drl/rls/212393.htm> [hereinafter U.S. Written Responses].

21. U.N. Human Rights Comm., *supra* note 20, ¶ 20. In its response to this question raised in the Committee’s List of Issues, the United States cited to increased services for domestic violence victims under the Violence Against Women Act and the Family Violence Prevention and Services Act. United States Written Responses, *supra* note 20, ¶ 106-07.

22. Race Convention, *supra* note 14, arts. 5–6, at 220–22.

23. Comm. On the Elimination of Racial Discrimination, *General Recommendation XXXI on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System*, Rep. on its 66th and 67th Sess., Feb. 21–March 11, Aug. 2–19, 2005, ¶ 17, U.N. Doc. A/60/18 (2005).

24. Comm. On the Elimination of Racial Discrimination, *General Recommendation XXIX on Article I, Paragraph 1, of the Convention (Descent)*, ¶ 21, U.N. Doc. A/57/18 (Nov. 1, 2002).

negatively affects racial minorities in the United States,²⁵ and recommended that the United States “allocate sufficient resources to ensure legal representation of indigent persons belonging to racial, ethnic and national minorities in civil proceedings, with particular regard to those proceedings where basic human needs, such as housing, health care, or child custody, are at stake.”²⁶

Numerous independent international human rights experts have likewise emphasized the importance of ensuring access to counsel in civil cases, particularly where counsel is necessary to secure basic human needs. Specific to the right to housing, in 2012, the U.N. Special Rapporteur on the right to adequate housing noted that legal remedies are an important procedural protection against forced evictions, but that such remedies are only effective where provision is made for the supply of civil legal aid.²⁷ Similarly, U.N. Special Rapporteurs have noted that civil counsel can play a significant role in vindicating and protecting the rights of racial minorities,²⁸ women,²⁹ and migrants.³⁰ As these experts note,

25. Comm. on the Elimination of Racial Discrimination, *Concluding Observations—United States of America*, ¶ 22, U.N. Doc. CERD/C/USA/CO/6 (May 8, 2008).

26. *Id.* In its next periodic report to the CERD, filed in June 2013, the United States acknowledged that “the United States faces challenges in . . . its provision of free and affordable civil legal services to the poor and middle class. We recognize that these challenges are felt acutely by members of racial and ethnic minorities.” Periodic Report of the United States of America to the United Nations Committee on the Elimination of Racial Discrimination, Concerning the International Convention on the Elimination of All Forms of Racial Discrimination, June 12, 2013, ¶ 62. The United States then cited to the work of the Department of Justice’s Access to Justice Initiative as addressing these disparities. *Id.* ¶¶ 63–64.

27. U.N. Special Rapporteur on Adequate Housing, *supra* note 13, ¶ 69.

28. U.N. Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, *Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance on the Implementation of General Assembly Resolution 65/199*, Annual Report to the Human Rights Council, ¶¶ 10, 35, U.N. Doc. A/HRC/18/44 (July 21, 2011) (by Githu Muigai).

29. See U.N. Special Rapporteur on Violence Against Women, Its Causes & Consequences, *Integration of the human Rights of Women and the Gender Perspective: Violence Against Women*, Annual Report to Comm. on Human Rights: International, Regional and National Developments in the Area of Violence against Women (1994–2003), ¶ 90, U.N. Doc. E/CN.4/2003/75 (Jan. 6, 2003) (by Radhika Coomaraswamy) (“States should establish, strengthen or facilitate support services to respond to the needs of actual and potential victims, including . . . legal aid”); U.N. Special Rapporteur on Violence Against Women, Its Causes & Consequences, *Annual Report to Comm. on Human Rights:*

meaningful access to civil counsel is often a critical precursor to exercising many other rights. The U.N. Special Rapporteur on extreme poverty recently commented in the context of people living in poverty, “[l]ack of legal aid for civil matters can seriously prejudice the rights and interests of persons . . . for example when they are unable to contest tenancy disputes, eviction decisions, immigration or asylum proceedings, eligibility for social security benefits, abusive working conditions, discrimination in the workplace or child custody decisions.”³¹

Most recently, in a 2013 report to the U.N. General Assembly, the U.N. Special Rapporteur on the independence of judges and lawyers noted that “legal aid is an essential component of a fair and efficient justice system founded on the rule of law . . . it is also a right in itself and an essential precondition for the exercise and enjoyment of a number of human rights”³² including the right to a fair trial, the right to an effective remedy, the right to liberty and security of person, the right to equality before the courts and tribunals and the right to counsel.³³

The right to counsel in civil cases implicating basic needs has been established by other human rights tribunals, as well. The European Court of Human Rights (ECtHR) and the Inter-American Commission on Human Rights have both articulated states’ obligation to provide counsel in civil cases. In 1979, the ECtHR ruled in *Airey v. Ireland* that the right to fair trial may demand that a state

The Due Diligence Standard as a Tool for the Elimination of Violence Against Women, ¶ 83, U.N. Doc. E/CN.4/2006/61 (Jan. 20, 2006) (by Yakin Ertürk) (“States must ensure that quality physical and psychological health services and legal assistance are provided to victims of violence.”).

30. Special Rapporteur on the Human Rights of Migrants, *Promotion and Protection of All Human Rights, Civil Political, Economic, Social and Cultural Rights, Including the Right to Development*, Human Rights Council, ¶ 46, U.N. Doc. A/HRC/7/12 (Feb. 25, 2008) (by Jorge Bustamante); see also Special Rapporteur on the Human Rights of Migrants, *Specific Groups and Individuals: Migrant Workers*, Comm. on Human Rights, ¶ 24, U.N. Doc. E/CN.4/2003/85 (Dec. 30, 2002) (by Gabriela Rodríguez Pizarro) (“When the migrant must take the initiative for such [administrative] review, lack of awareness of the right to appeal and lack of access to free legal counsel can prevent the migrant from exercising his/her right in practice.”).

31. See U.N. Special Rapporteur on Extreme Poverty and Human Rights, *supra* note 12, § 62.

32. U.N. Special Rapporteur on the Independence of Judges and Lawyers, *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, ¶ 20, U.N. Doc. A/HRC/23/43 (Mar. 15, 2013) (by Gabriela Knaul).

33. *Id.* ¶ 28.

provide free legal assistance to those unable to obtain it when that assistance is necessary to provide effective access to the court.³⁴ The ECtHR later expanded on this statement, suggesting that the countries within the Council of Europe are required to provide free legal assistance as a human right where there is an inequality of arms and counsel is necessary to ensure a fair hearing.³⁵ Today, all forty-seven countries in the Council of Europe provide legal aid, including free or low-cost counsel, in civil and administrative matters implicating basic human rights, such as housing, family, employment, and public benefits—although some discretion is left to each state in developing eligibility criteria, and the former Soviet states have lagged behind the Western European countries in implementing this right.³⁶

The Charter of the Organization of American States, of which the United States is a member, contains explicit support of the civil right to counsel, stating a goal to “dedicate every effort” to “[a]dequate provision for all persons to have due legal aid in order to secure their rights.”³⁷ The Inter-American Commission on Human Rights has reinforced this view, noting that states can be obligated to provide free civil legal services to those without means in order to prevent a violation of their right to fair trial and judicial protection.³⁸

34. “[The right to fair trial] may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory, as is done by the domestic law of certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or of the case.” *Airey v. Ireland*, 2 Eur. Ct. H.R. 305, ¶ 24–6 (1979).

35. See *Steel & Morris v. United Kingdom*, 22 Eur. Ct. H.R. 403 (2005).

36. See Raven Lidman, *Civil Gideon: A Human Right Elsewhere in the World*, Clearinghouse Rev. J. Poverty L. & Pol’y, Vol. 40, Nos. 3–4. (July–August 2006) 288, 291. Lidman cites a comprehensive list of resources providing further information on specific Council of Europe member states. See *id.* at ¶ 291.

37. Charter of the Org. of Am. States art. 45, *opened for signature* Apr. 30, 1948, 1609 U.N.T.S. 119, *amended* by Protocol of Buenos Aires, O.A.S.T.S. No. 1-A (1967), *further amended* by Protocol of Cartagena, O.A.S.T.S. No. 66 (1985), *further amended* by Protocol of Washington, OEA/Ser.A/2 Add. 3 (SEPF) (1992), *further amended* by Protocol of Managua, OEA/Ser.A/2 Add. 4 (SEPF) (1993).

38. Inter-Am. Comm’n on Human Rights, *Access to Justice as a Guarantee of Economic, Social, and Cultural Rights: A Review of the Standards Adopted by the Inter-American System of Human Rights*, at 1–2, OEA/Ser.L.V/II.129 Doc. 4 (September 7, 2007).

III. LEGAL REPRESENTATION SIGNIFICANTLY IMPACTS THE RIGHT TO HOUSING

The lesson drawn from the international standards and findings explored above is that the right to housing and the right to counsel are interdependent and intertwined. Research and real-life stories confirm the importance of counsel in protecting the human right to housing.

A. Quantitative Data Suggests that Legal Representation Is Critical to Protecting the Right to Housing.

Though more research in this area is needed,³⁹ studies indicate that, as a general matter, lack of legal representation dramatically impairs the ability of low-income people to navigate the court system effectively and attain successful outcomes.⁴⁰ Represented parties enjoy statistically more favorable results in family law,⁴¹ domestic violence,⁴² and small claims cases.⁴³ Those who are represented by an attorney before administrative agencies

39. See Alan Houseman, *The Justice Gap: Civil Legal Assistance Today and Tomorrow*, Center for American Progress, 15 (June 2011), <http://www.americanprogress.org/wp-content/uploads/issues/2011/06/pdf/justice.pdf> (last visited Feb. 2, 2014) (recommending that the Justice Department or Legal Services Corporation house permanent research units to study ways to improve the delivery of civil legal aid); see also Rebecca L. Sandefur & Aaron C. Smyth, Am. Bar Found., *Access Across America: First Report of the Civil Justice Infrastructure Mapping Project 22* (2011) (noting that the most recent national survey of civil legal need took place in 1994 as a service project of the American Bar Association Consortium on Legal Services and the Public).

40. See *Documenting the Justice Gap*, *supra* note 7, at 26; see also Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel Is Most Needed*, 2010 Fordham Urb. L.J. 37, 47–49 (discussing reports on the poor outcomes of unrepresented tenants in housing court); Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 Fordham L. Rev. 1987 (1999) (proposing a revised role for judges, mediators, and clerks to better address the needs of unrepresented litigants and improve their outcomes in court).

41. See Engler, *supra* note 40, at 51–55; see also Laura K. Abel & Susan Vignola, *Economic and Other Benefits Associated with the Provision of Civil Legal Aid*, 9 Seattle J. Soc. Just. 139, 150–53 (2010) (discussing how legal aid for the indigent dramatically improves outcomes, increasing the probability of family reunification as well as the odds of legal success for the poor).

42. See Amy Farmer & Jill Tiefenthaler, *Explaining the Recent Decline in Domestic Violence*, 21 Contemp. Econ. Pol'y 158, 164–65 (2003).

43. See Engler, *supra* note 40, at 55–58.

governing such vital issues as social security, unemployment benefits, and immigration also have a higher success rate—in some cases up to two or three times higher—than those who are unrepresented in comparable cases.⁴⁴

Numerous studies have found that legal representation particularly impacts outcomes in housing court. A study in Maricopa County, Arizona, found that while approximately 87 percent of landlords were represented in the County Justice Courts, virtually no tenants were represented, and most eviction cases took less than a minute to be heard by the court—with many heard and considered in less than twenty seconds.⁴⁵ Unrepresented tenants rarely had their eviction cases dismissed.⁴⁶

A recent pilot study in Massachusetts found that extensive assistance from lawyers is essential to preserving tenants' housing in eviction cases,⁴⁷ confirming earlier findings in a study of summary process eviction cases in Massachusetts courts.⁴⁸

44. *Id.* at 58–59; *see also* N.H. Citizens Comm'n on the State Courts, *Report and Recommendations*, 10–11 (June 1, 2006), http://www.courts.state.nh.us/press/2006/cc_report.pdf (last visited Feb. 2, 2014) (unrepresented individuals typically do an inadequate job of self-representation, resulting in compromised justice). *But see* James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 *Yale L.J.* 2118, 2124–25 (2012) (discussing a recent randomized study that reached a different conclusion, finding that a particular clinic staffed by law students did not yield positive results). This study has been subject to critical scrutiny. *See Symposium on What Difference Representation Makes*, *Concurring Opinions*, <http://www.concurringopinions.com/archives/category/representation-symposium> (last visited Feb. 2, 2014).

45. William E. Morris Inst. for Justice, *Injustice In No Time: The Experience of Tenants in Maricopa County Justice Courts 2* (2005), *available at* <http://morrisinstituteforjustice.org/docs/254961Finalevictionreport-P063.06.05.pdf>.

46. *Id.*

47. Boston Bar Ass'n Task Force on the Civil Right to Counsel, *The Importance of Representation in Eviction Cases and Homelessness Prevention* (March 2012), <http://www.bostonbar.org/docs/default-document-library/bba-crtc-final-3-1-12.pdf> (last visited Feb. 2, 2014); *see also generally* D. James Greiner, Cassandra Wolos Pattanayak & Jonathan Hennessy, *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 *Harv. L. Rev.* 901 (2013) (finding that providing legal counsel to indigent tenants doubled their chances of success in eviction cases).

48. Mass. Law Reform Inst., 2005 Summary Process Survey 3, 8 (2005), *available at* http://webcache.googleusercontent.com/search?q=cache:F1qmqP9PhJ4J:www.masslegalservices.org/system/files/library/2005_summary_process_survey.pdf+massachusetts+law+reform+institute+summary+process+survey+1995&cd=1&hl=en&ct=clnk&gl=us (finding that landlords were represented

A study of evictions in New Haven, Connecticut, concluded that tenants represented by legal services lawyers were more than three times more likely to avoid eviction than tenants without lawyers.⁴⁹ Even where legal services lawyers were unable to defeat their clients' evictions, they were able to substantially delay the evictions.⁵⁰

A study of landlord/tenant courts in Washington, D.C., found that approximately 3 percent of tenants who appeared in landlord/tenant court were represented by counsel.⁵¹ Of the cases filed in landlord/tenant court, approximately 75 percent were closed due to dismissals or default judgments in the favor of the landlord.⁵² Of the remaining 25 percent, two-thirds were closed by confessions of judgment or consent agreements, notwithstanding tenants' claims or defenses.⁵³ In contrast, tenants who were represented by counsel rarely entered consent judgments.⁵⁴

A New York City study found the impact of legal counsel for poor tenants statistically significant: while 28 percent of the tenants in control group cases (without a lawyer) defaulted or failed to appear in housing court, only about 16 percent of those tenants provided with lawyers did, and while 52 percent of control group cases had judgments issued against them, only 32 percent of tenants provided with lawyers had judgments issued against them.⁵⁵

by lawyers in 66% of the cases and were awarded possession in 76% of the cases, while tenants had legal representation in 6% of the cases and were awarded possession in only 2% of cases).

49. See Steven Gunn, *Eviction Defense for Poor Tenants: Costly Compassion or Justice Served?*, 13 *Yale L. & Pol'y Rev.* 385, 413 (1995).

50. *Id.*

51. See Distr. of Columbia Access to Justice Comm'n, *Justice for All? An Examination of the Civil Legal Needs of the District of Columbia's Low-Income Community* 8, 73–74 (2008), available at <http://www.dcaccessstojustice.org/files/CivilLegalNeedsReport.pdf>.

52. *Id.*

53. *Id.*

54. *Id.*

55. See Carroll Seron, Gregg Van Ryzin & Martin Frankel, *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 *Law & Soc'y Rev.* 419, 426–27; see also generally Kira Krenichyn & Nicole Schaefer-McDaniel, *Results from Three Surveys in New York City Housing Courts* 7, 22 (2007), available at <http://www.civilrighttocounsel.org/pdfs/NYCHousingCourts.pdf> (reporting that in a total of 1787 surveys conducted in New York City housing courts, 392 respondents had their own lawyer); Andrew Scherer, *Why People Who Face Losing Their Homes in Legal Proceedings Must Have a Right to Counsel*, 3 *Cardozo Pub. L. Pol'y & Ethics J.* 699 (2006) (arguing that “people who face losing their homes

Moreover, lack of access to civil counsel disparately impacts racial minorities, women, and other vulnerable groups. Racial minorities and women are overly represented among people who qualify for civil legal assistance,⁵⁶ and access to justice studies indicate that such groups make up a disproportionate number of litigants without representation. In New York City family and housing courts, for example, the vast majority of litigants without representation are racial minorities.⁵⁷ Similarly, in Pennsylvania family courts, most low-income litigants, which include a disproportionate number of racial minorities and women, lack representation.⁵⁸ Further illustrating the intersection of race and gender, a California study found that about 85% of litigants appearing in family court without an attorney were women, the majority women of color.⁵⁹ The U.N. Committee on the Elimination of Racial Discrimination recognized this problem when it expressed concerns over the disparate impact that lack of counsel in civil cases has on racial and ethnic minorities in the United States.⁶⁰

in legal proceedings must have a right to be represented by counsel in those proceedings, whether or not they can pay for counsel"); Harvey Gee, *From Hallway Corridor to Homelessness: Tenants Lack Right to Counsel in New York Housing Court*, 17 *Geo. J. on Poverty L. & Pol'y* 87 (2010) (arguing that affording tenants in New York City Housing Court legal representation is a step towards realizing the court's original goal of better serving the city's dynamic population); N.Y. Cnty. Lawyers' Ass'n, *The New York City Housing Court in the 21st Century: Can It Better Address the Problems Before It?*, 12 n.1 (2005) *available at* http://www.nycla.org/siteFiles/Publications/Publications195_0.pdf (noting that practitioners have estimated "that 90 to 95 percent of tenants are unrepresented by counsel, whereas 85 percent of landlords are represented").

56. See *Documenting the Justice Gap*, *supra* note 7, at 27; Alemayehu Bishaw & Jessica Semega, *Income, Earnings, and Poverty Data from the 2007 American Community Survey*, U.S. Census Bureau, 20 (Aug. 2008), *available at* <http://www.census.gov/prod/2008pubs/acs-09.pdf>.

57. Office of the Deputy Chief Administrative Judge for Justice Initiatives, *Self-Represented Litigants: Characteristics, Needs, Services: The Results of Two Surveys*, 3 (2005), *available at* http://www.nycourts.gov/reports/AJJI_SelfRep06.pdf.

58. Penn. Supreme Ct. Comm. on Racial and Gender Bias in the Justice System, *Final Report*, 457 (2003), *available at* http://www.painterbranchcommission.com/_pdfs/FinalReport.pdf.

59. Cal. Judicial Council Advisory Comm. on Racial and Ethnic Bias in the Cts., *Final Report*, 13 (Jan. 1997), *available at* <http://www.courts.ca.gov/documents/rebias.pdf>.

60. Comm. on the Elimination of Racial Discrimination, UNHCR Subcomm, *Concluding Observations—United States of America*, Feb. 18 –Mar. 7, 2008, 72d Sess., ¶ 22, U.N. Doc. CERD/C/USA/CO/6 (May 8, 2008).

B. Client Stories from One Legal Services Organization Illustrate the Impact of Counsel on the Right to Housing.

The findings outlined above are reflected in the lived experiences of people confronting a threatened loss of housing. This section explores the impact of counsel on the right to housing through the lens of Legal Action of Wisconsin, a Legal Services Corporation-funded organization.⁶¹ Every jurisdiction faces unique challenges and these cases are not intended to cover exhaustively the types of housing cases encountered by legal services offices around the country. Rather, these client stories offer illustrative examples of how at least one legal services office typically functions to protect and promote the component parts of the right to housing for its clients,⁶² underscoring the interrelationship between the rights to access to legal representation and housing.

1. Protecting Legal Security of Tenure

Legal security of tenure is an integral component of the right to adequate housing.⁶³ Security of tenure means that the state must protect tenants from arbitrary involuntary removal from their land or residence. A key element of security of tenure is thus legal protection from forced eviction, the threat of eviction, and harassment.⁶⁴

The bulk of the work of the legal services attorneys at Legal Action of Wisconsin, Inc. is protecting the security of tenure of its clients, specifically homelessness prevention. The security of a client's tenure, and the ability of an applicant for legal services to obtain representation, is dependent on the type of situation. Not all tenures are equally secure. In Wisconsin, in most ordinary landlord-tenant relationships, there is no right to continued occupancy upon the

61. The Legal Services Corporation (LSC) was created by Congress in 1974 as an independent nonprofit corporation to promote equal access to justice and provide grants for civil legal assistance to low-income Americans. Legal Servs. Corp. Act, 42 U.S.C. § 2996(2) (2008).

62. General Comment 4, *supra* note 14, at ¶8 (stating that under international law, adequate housing must include the following seven components: (1) legal security of tenure; (2) availability of services, materials, facilities and infrastructure; (3) affordability; (4) habitability; (5) accessibility; (6) location; and (7) cultural adequacy); *see also* U.N. Office of the High Comm'r for Human Rights, Fact Sheet No. 21 (Rev.1), The Right To Adequate Housing, (2009), *available at* http://www.ohchr.org/Documents/Publications/FS21_rev_1_Housing_en.pdf (explaining that adequate housing must "at a minimum" satisfy these seven identified criteria).

63. General Comment 4, *supra* note 14, at ¶ 8(a).

64. *Id.*

completion of a lease term or the non-renewal of a periodic tenancy; that is, there is no good cause or just cause requirement for termination of tenancy at the end of a term.⁶⁵

Nevertheless, some federal and state laws do provide security of tenure for Wisconsin residents in certain situations, including good cause protections for mobile home park tenants;⁶⁶ additional notice and time to vacate for tenants in foreclosure under the federal Protecting Tenants at Foreclosure Act of 2009;⁶⁷ protections for domestic violence victims under Wisconsin's Open Housing Law,⁶⁸ Safe Housing Act,⁶⁹ and the federal Violence Against Women Act;⁷⁰ and good cause protections for tenants in federally assisted housing.⁷¹

65. See Wis. Stat. Ann. §704 (West 2013). This is Wisconsin's landlord-tenant law for private housing, which outlines the required procedures for lease termination and eviction. The law covers periodic tenants as well as those who have a fixed-term lease. See, e.g., Wis. Stat. §704.19(2) (2013) ("A periodic tenancy or a tenancy at will can be terminated by either the landlord or the tenant only by giving to the other party written notice complying with this section . . ."); Wis. Stat. §704.25(1) (2013) ("If a tenant holds over after expiration of a lease, the landlord may in every case proceed in any manner permitted by law to remove the tenant and recover damages for such holding over.").

66. See Wis. Stat. Ann. §710.15 (West 2013); see also Wis. Admin. Code ATPC § 125 (1998) (outlining fair trade practices for manufactured home communities).

67. 12 U.S.C. § 5201 (2009). The Act mandates that tenants of landlords whose buildings are in foreclosure be given 90 days' notice of the termination of their lease in the event that the building is sold and tenants are required to vacate the premises. See, e.g., American Law Reports, *Construction and Application of Protecting Tenants at Foreclosure Act of 2009*, 65 A.L.R. Fed. 2d 217 (2012) (explaining the application of the 90 days' notice provision).

68. See Wis. Stat. Ann. § 106.50 (West 2013) (providing a tenant who is a victim of domestic abuse a defense to an action for eviction brought by a landlord if the landlord knew or should have known that the basis for the action for eviction is conduct that related to the commission of domestic abuse and the tenant has appropriately notified the landlord of the circumstances).

69. See Wis. Stat. §704.16 (West 2013) (allowing a landlord to terminate the tenancy of a renter who causes another resident in the same rental community to face an imminent threat of physical harm, even if the offending renter's tenancy has not reached the end of a rental period).

70. See Violence Against Women Reauthorization Act of 2013, Pub. L. 113-4, 127 Stat. 54, 102 (2013) (to be codified at 42 U.S.C. § 14043e-11) (providing that an applicant to or a tenant of a public housing program covered under the Act may not be evicted from or denied participation in the public housing program based on his or her status as a victim of domestic violence).

71. See 24 C.F.R. § 880.607 (2013). This chapter of the Code of Federal Regulations, effective November 26, 2010, governs "termination of tenancy and modification of lease" procedures for all federal public housing, including Section 8 subsidized housing, which is available to low-income families. Section

Yet, even when tenants have these rights, they may not be aware of them. And when they are, they lack the legal training to raise defenses and claims when facing the loss of housing. The assistance of counsel in these situations is therefore critical to enforcement of the limited number of protections promoting security of tenure for low-income tenants. The following are a handful of typical cases handled by Legal Action attorneys working to protect the right to housing.

a. Enforcing the Good Cause Protection for Mobile Home Tenants

Susan was elderly and disabled and receiving long-term supportive care to live independently in her mobile home, which contained many expensive modifications for her disability to facilitate her independent living. She enjoyed spending time with her two cats and loved to garden. Susan contacted Legal Action when facing eviction from the mobile home park when the park owner decided not to renew her lot lease. As mentioned above, the tenancy of mobile home park tenants cannot be terminated, during or at the end of a lease term, absent good cause.⁷² The attorney for the park owner did not allege the good cause requirement under state law and Legal Action prevailed on the court to dismiss the case against her. Then the park tried to buy Susan out of her lease, but, with the support of counsel, she refused the offer and the park owners did not renew the effort to terminate. Due to Legal Action's intervention, the court dismissed the eviction action, allowing time for the intervention of supportive services, which assisted Susan with cleaning her yard, the primary concern of the park owner. Susan has since passed away but she was able to finish out her life in her home, living independently, enjoying her cats and her garden.

b. Protecting Tenants in Foreclosed Properties

Karen called Legal Action after the Sheriff posted a notice on her door stating that it had a writ to remove her from her rental unit due to an eviction. Legal Action advised Karen on how to file a motion to re-open the eviction judgment and stay the writ of restitution of

880.607(b)(1) lists the permissible grounds for terminating a tenancy, which are: material noncompliance with the lease (e.g., non-payment of rent); criminal activity or alcohol abuse by a tenant; and other "good cause," "which may include the failure of a family to accept an approved modified lease form." *Id.*

72. Wis. Stat. Ann. § 710.15 (West 2013).

the premises. Legal Action appeared at the motion hearing and prevailed upon the court to dismiss the eviction action because the eviction plaintiff had already lost the property in foreclosure and no longer was entitled to possession of the premises. Karen's attorney informed Karen of her right to stay on the premises under the federal Protecting Tenants at Foreclosure Act⁷³ and to negotiate a new lease with the new owner. Maintaining her housing was critical to Karen's ability to maintain her state social services job.

c. Good Cause and Right to Cure Notices for Subsidized Housing Tenants

Matthew and his wife Renee are elderly and disabled. Matthew cannot read or write and Renee relies on a wheelchair for mobility and also has some cognitive disabilities. Matthew and Renee called Legal Action when they were facing eviction from their subsidized housing unit for allegedly selling drugs. It was alleged that Matthew sold his prescription morphine pills to a police informant. Matthew and Renee both denied the charges. Yet the landlord attempted to terminate their tenancy without providing them with an opportunity to cure the alleged lease violation, which is required under state law for leases of one year or less.⁷⁴ Recognizing the relationship between Matthew's disability and the threatened eviction, Legal Action worked with supportive services available through the county to ensure that Matthew's medication was properly delivered, organized and secured so he could protect himself from persons who tried to take advantage of him and his access to prescription opiates. With the intervention of Legal Action, the court dismissed the case on grounds of deficient notice and the couple was able to remain in their subsidized housing unit.

d. Protecting Victims of Domestic Violence

Toya was homeless with eight children when she called Legal Action seeking help. She had recently returned to her former home to retrieve her children from their father, who had tried to rape her and had severely beaten her on previous occasions. When she returned to the home, she realized that her children's father had removed her from the family's federally subsidized Section 8 voucher.⁷⁵ Toya called

73. See 12 U.S.C. § 5201 (2009).

74. Wis. Stat. Ann. § 704.17(2)(a)–(b) (West 2013).

75. Federal law provides that a new Section 8 voucher may be issued when a family has moved out of a public housing unit "in order to protect the health or

Legal Action from the shelter where she and her children were staying. As a victim of domestic violence, Toya has certain protections from the loss of housing benefits if it relates to her being a victim of domestic violence.⁷⁶ Legal Action intervened and made a successful argument to the public housing agency to issue the family's Section 8 voucher to Toya, who had obtained a domestic abuse injunction against the children's father and secured placement rights for the children. She was able to convince her prior landlord to rent to her with the Section 8 voucher and the children were able to return to the neighborhood where they had gone to school and made friends.

2. Ensuring Affordability

Affordability is another key component of the human right to adequate housing. This requires that "personal or household financial costs associated with housing should be at such a level that the attainment and satisfaction of other basic needs are not threatened or compromised."⁷⁷ If the cost of rent accounts for so much of a family's income that they do not have enough resources for adequate food, education, health care, and other basic needs, then the housing is not affordable, and the right to adequate housing has not been fulfilled.

a. Recovering Rent Assistance

Angela and her children were evicted from their apartment in Madison after they stopped receiving assistance from the federal Section 8 program, which had helped the family pay their rent. Angela's Section 8 payments were taken away after she was sued by a former landlord, who claimed she owed more than \$1,400 for an unpaid water bill and property damage. Angela disputed the amount she owed the landlord. She said that a leaking pipe in the ground was the reason her water bill suddenly ballooned to more than \$800. Nevertheless, she started making regular payments on the debt to her former landlord, but the payments ended when Angela lost her job. Angela said she made a deal with the landlord to stop paying while she was unemployed. But soon she got a letter saying her Section 8 benefits were being terminated because of the past-due

safety of an individual who is or has been the victim of domestic violence, dating violence, or stalking and who reasonably believed he or she was imminently threatened by harm from further violence if he or she remained in the assisted dwelling unit." See 42 U.S.C.A. § 1437(f) (West 2013).

76. See *supra* notes 68–70 and accompanying text.

77. General Comment 4, *supra* note 14.

debt. Without Section 8, Angela couldn't afford rent, was evicted and lost all of her property because she had nowhere to store it. She and her children, who range in age from three to fifteen, were homeless and sleeping on the floor of her mother's small apartment. Trying to fix the situation herself, Angela went to the initial administrative grievance hearing, where, without an attorney to represent her, she lost. A supervisor with the Section 8 program suggested she seek the help of a lawyer. Angela called Legal Action and a staff attorney filed a challenge to the termination decision in circuit court. The judge ruled that Angela's Section 8 assistance had been improperly terminated and should immediately be restored. Several weeks later, Angela was able to obtain a lease with her Section 8 voucher and once again provide stable, affordable housing for her family.

3. Accessibility, Habitability, and Services for Persons with Mental Health Challenges

The human right to housing requires more than a "building with four walls and a roof." Housing is habitable only if residents are guaranteed physical safety and provided with adequate space, as well as protection against the natural elements and "other health hazards."⁷⁸ Housing must also be accessible to those entitled to it, with "some degree of priority consideration" given to disadvantaged groups, including the elderly and persons with mental illness. Under international law, "both housing law and policy should take fully into account the special housing needs of these groups."⁷⁹

The Legal Action office routinely represents tenants, usually the elderly and/or disabled, in eviction proceedings initiated due to the tenants' hoarding behavior—which landlords argue is a lease violation. These cases demonstrate the need for counsel to intervene to enforce tenants' right to a reasonable accommodation of a mental health disability that directly relates to the basis for eviction, to slow down the eviction process to allow sufficient time for therapeutic and supportive services to intervene, and to preserve tenants' housing.

Henry is a 75-year-old man who lives in a rental unit in a complex in rural Wisconsin. For many years, he delivered newspapers for a living and met many people in his community through that service. He liked to go through the papers, especially the obituaries, and cut out articles related to persons he knew. He kept many of these papers stacked in his apartment. He also took pride in an

78. U.N. Office of the High Comm'r for Human Rights, *supra* note 62, ¶ 4.

79. General Comment 4, *supra* note 14, ¶ 8(e).

extensive library of church hymnals and had several pet cats. Henry called Legal Action when he was sued for eviction because his landlord said he was not maintaining his unit and the clutter was making it hard to treat for an infestation. Legal Action requested a reasonable accommodation on behalf of Henry to allow time for him to correct the conditions in his unit. Legal Action was able to work with the county public health department for follow-up inspections, which targeted the most concerning areas of the unit, to allow Henry to dispose of refuse, move excess items into storage, and get his unit in compliance with the applicable property maintenance and health codes. His tenancy was secured through the intervention of counsel and cooperation with local government entities.

IV. THE CHALLENGES OF OBTAINING COUNSEL TO PROTECT THE RIGHT TO HOUSING

As the data and client stories reflect, legal representation significantly impacts individuals' ability to secure and protect the right to housing. Yet with no recognized right to counsel in civil cases, and because of budget constraints and federal restrictions on federally funded legal services providers, the vast majority of civil legal needs go unmet, including when basic needs such as housing are at stake.

A. No Recognized Right to Counsel in Civil Cases Where Basic Needs Are at Stake

A categorical right to counsel in civil cases is not recognized under the federal Constitution. Although the U.S. Supreme Court has found a right to counsel in criminal cases,⁸⁰ the Court conducts a stringent case-by-case due process analysis in civil cases to determine whether the Constitution requires the appointment of counsel.⁸¹ Indeed, the Court has refused to find a categorical right to counsel

80. *Gideon v. Wainwright*, 372 U.S. 335, 346 (1963) (requiring counsel be appointed for indigent defendants in state court facing imprisonment due to felony charges); *Argersinger v. Hamelin*, 407 U.S. 25, 35 (1972) (requiring counsel for indigent defendants in state court facing imprisonment due to misdemeanor charges).

81. *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 35 (1981) (finding no categorical right to counsel when termination of parental rights is at stake).

even in some civil cases where lengthy jail sentences are, in fact, imposed.⁸²

The lack of federal constitutional protection notwithstanding, all fifty states have various statutory provisions that require the state government to provide at least a limited right to counsel in some subset of civil matters, primarily in family law matters, involuntary commitment, and medical treatment.⁸³ In addition, there are a number of smaller categories in which states provide a right to counsel in civil cases, such as civil arrest or the release of mental health records.⁸⁴ However, no state provides a general right to counsel for all civil cases, including for housing cases.⁸⁵

B. Funding Constraints

With no comprehensive right to counsel in civil cases, the primary safety net for civil counsel is the Legal Service Corporation (LSC), a federally funded independent non-profit corporation that funds civil legal services for people who are poor and low-income.⁸⁶ Yet, over the past several years, LSC has been hit with massive cuts to its congressional appropriations. Its budget steadily decreased from \$420 million in 2010 to \$341 million in 2013.⁸⁷ These decreases

82. *Turner v. Rogers*, 131 S. Ct. 2507, 2602 (2011) (finding no categorical right to counsel for indigent contemnors facing jail time for failing to pay child support, at least where the plaintiff is neither the state nor represented by counsel).

83. Laura K. Abel & Max Rettig, *State Statutes Providing for a Right to Counsel in Civil Cases*, 40 Clearinghouse Rev. J. of Poverty L. & Pol'y 245, 245–48 (2006).

84. *Id.*

85. Until 2001, Indiana had a statute that stated, “If the court is satisfied that a person who makes an application [for in forma pauperis status] does not have sufficient means to prosecute or defend the action, the court shall . . . (2) assign an attorney to defend or prosecute the cause.” Ind. Code § 34-10-1-2 (1998). As one court put it, the statute as it read at that time “mandates that courts appoint counsel for indigent civil litigants in all situations The threshold determination of indigency is a matter within the sound discretion of the trial court Once indigency is established, a trial court has no discretion under the statute to determine whether to grant a request for appointed counsel.” *Dickson v. D'Angelo*, 749 N.E.2d 96, 99 (Ind. Ct. App. 2001). The statute was amended in 2001 to say that a court “may, under exceptional circumstances, assign an attorney to defend or prosecute the cause.” Ind. Code § 34-10-1-2 (2001).

86. *See supra* note 61 and accompanying text.

87. *LSC Funding*, Legal Servs. Corp. (July 15, 2013), <http://www.lsc.gov/congress/lsc-funding>. In September 2012, Congress allocated \$350 million to the Legal Services Corporation for Fiscal Year 2013. This was eventually reduced to \$341 million due to sequestration in late March 2013. *Id.*

are of particular concern as they come at a time of economic crisis, when more and more Americans are falling below federal poverty guidelines and are in more need of civil legal services than ever before.⁸⁸

The recession has also affected LSC grantees' non-federal sources of funding, leaving major holes in the budgets of LSC-funded organizations.⁸⁹ Interest on Lawyer Trust Account (IOLTA) programs are the largest national source of civil legal funding after LSC grants, amounting to 13 percent of funding for LSC-funded organizations in 2008 and serving as an even more critical source for programs that do not receive LSC funds.⁹⁰ The latest economic recession resulted in a significant decline in interest rates and a consequent decrease in revenues which IOLTA uses to fund legal services organizations. From 2007 to 2009, IOLTA revenues decreased 75 percent, from \$371 million to just \$92 million.⁹¹

These funding decreases cripple the budgets for civil legal services organizations, impacting the number of cases they pursue and the resources they provide. Due to funding reductions between 2010 and 2013, LSC organizations were forced to eliminate more than 1,000 staff positions and close more than 30 offices.⁹²

As a result, LSC and its grantees have been unable to meet the demand for civil legal services. According to the LSC's 2009 report *Documenting the Justice Gap in America*, "for every client served by an LSC-funded program, one person who seeks help is turned down because of insufficient resources."⁹³ LSC-funded organizations reject nearly one million cases because they lack the funding to handle them.⁹⁴ State legal needs studies conducted from 2000 to 2009 indicate that less than 20 percent of legal problems experienced by low-income persons are addressed with the assistance of legal representation.⁹⁵

88. *Civil Legal Services: Low Income Clients Have Nowhere to Turn Amid the Economic Crisis*, Brennan Ctr. for Justice, 1 (June 25, 2010), http://brennan.3cdn.net/ed5d847dfcf163a02a_exm6b5vya.pdf.

89. *Id.* at 2.

90. *Id.*

91. *Id.*

92. John G. Levi, Opening Remarks at the 2013 White House Forum on Increasing Access to Justice (April 16, 2013), *available at* <http://www.lsc.gov/board-directors/chairmans-page/statements/lsc-chairman-john-levis-remarks-2013-white-house-forum>.

93. Legal Servs. Corp., *supra* note 7, at 1.

94. *Id.* at 9–11.

95. *Id.* at 3.

The funding situation for Legal Action of Wisconsin is illustrative. Over the last few years, “basic field” money from LSC (which can be used for any civil case consistent with LSC Regulations) has declined and Legal Action has become more dependent on specific grants to maintain staff and conduct core services, including representation in housing cases.⁹⁶ Indeed, one of the authors is the only full time housing attorney in Legal Action’s Madison office, which covers nine counties in southern Wisconsin.

A 2007 study by the Wisconsin State Bar found that Wisconsin’s primary legal service providers, Legal Action of Wisconsin and Wisconsin Judicare, only had resources to handle 16,000 cases per year—about 20 percent of individuals who qualify for help through their programs.⁹⁷ Some who qualify are not aware that these services exist and do not come to them for help, but many others are turned away. This means that in Wisconsin, over half a million people who faced significant legal problems were left to represent themselves.⁹⁸ In fact, these statistics may underestimate the civil justice gap in Wisconsin, as they predate the latest economic recession, which pushed an ever-growing number of people into poverty.

Moreover, in the last few years much of the funding of Legal Action’s housing work has come not from basic field LSC money, but from HUD homelessness prevention and homelessness assistance grants.⁹⁹ These grants have specific requirements that limit the work Legal Action can do, where it can do it, and the timeliness of its intervention.¹⁰⁰

96. E-mail from John F. Ebbott, Exec. Dir. Legal Action of Wis., to Heidi M. Wegleitner (Mar. 18, 2014) (on file with the author).

97. See State Bar of Wis., Access to Justice Committee, Bridging the Justice Gap: Wisconsin’s Unmet Legal Needs, Final Report 7 (March 2007), available at <http://www.nlada.org/DMS/Documents/1173539417.81/WIreportfinalATJ.pdf>.

98. *Id.*

99. Legal Action received around \$3.23 million in LSC grants in 2013, compared with \$4.36 million in 2010. LSC grants accounted for 42 percent of Legal Action’s funding in 2012. *Program Profile: Legal Action of Wisconsin, Inc., Legal Servs. Corp.*, <http://www.lsc.gov/local-programs/program-profile?RNO=550010> (last visited February 10, 2014).

100. See, e.g., U.S. Dep’t of Housing and Urban Dev. Emergency Shelter Program Desk Guide 21–34 (2001), available at <https://www.onecpd.info/resource/829/emergency-shelter-grants-program-desk-guide/>.

C. Federal Restrictions on LSC Funding

As a general matter, LSC-funded organizations everywhere are subject to restrictive federal rules governing who may receive their legal services and the kinds of legal services they may provide. Some of these restrictions impact the availability of legal services for all cases.¹⁰¹ Others directly impact the ability of legal services lawyers to engage in housing-related matters. For example, LSC-funded organizations are prohibited from representing the vast majority of undocumented and other categories of immigrants,¹⁰² with some narrow exceptions.¹⁰³ Federal restrictions also prohibit LSC-funded organizations from defending individuals in public housing eviction cases if the person threatened with eviction has been charged or convicted with a drug crime related to the sale, distribution or manufacture of a controlled substance and the public agency asserts that this drug charge or conviction threatens the health or safety of other tenants or employees.¹⁰⁴

101. For example, LSC bases its eligible population on the federal poverty level threshold as established by the federal poverty guidelines and thus serves clients who are at or below 125 percent of the poverty line, which for a family of four amounts to an income of \$27,938 a year. Legal Services Corporation: Income Level for Individuals Eligible for Legal Assistance, 77 Fed. Reg. 4909, 4910 (Feb. 1, 2012) (codified at 45 C.F.R. § 1611 (2012)).

102. Restrictions on Legal Assistance to Aliens, 45 C.F.R. § 1626 (2011); *see also* Alan W. Houseman & Linda E. Perle, Center for Law & Social Policy, What Can and Cannot Be Done: Representation of Clients by LSC Funded Programs 5 (Jan. 22, 2009), *available at* www.clasp.org/admin/site/publications/files/0524.docx.

103. LSC-funded organizations may represent immigrants who are lawful permanent residents, who are married to, the parent of, or the unmarried minor child of a U.S. citizen, or who have been granted a certain recognized status. 45 C.F.R. § 1626.4 (2011). The Trafficking Act and the reauthorization of the Violence Against Women Act also permit organizations to use non-LSC funding to represent undocumented individuals who have been battered or subjected to extreme cruelty by a spouse or parent as well as undocumented individuals whose children have been battered or subjected to extreme cruelty. Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2979, § 104(a)(C) (2005). However this representation must be “directly related to the prevention of, or obtaining relief from, the battery or cruelty.” 45 C.F.R. § 1626.4(2) (2011).

104. Restriction on Representation in Certain Eviction Proceedings, 45 C.F.R. § 1633 (2011). In addition, LSC funded organizations may not engage in the political process through advocacy or representation before legislative bodies on pending or proposed legislation, nor may they represent clients or client interests in front of administrative agencies that direct rulemaking. Restrictions on Lobbying and Certain Other Activities, 45 C.F.R. § 1612 (2011); *see also* Houseman & Perle, *supra* note 101, at 3–4 (describing the one exception where, if

The LSC appropriations legislation further restricts and limits the activities of LSC grantees by extending the federal restrictions to all the grantees' activities, even those fully financed with non-LSC funding.¹⁰⁵ Known as the "poison pill," this provision restricts the legal tools and activities available to organizations that take a single dollar of LSC funding.¹⁰⁶ According to a 2009 report, nationwide, this restriction annually inhibits over \$490 million of state, local and private funding, which is fifty-eight percent of the resources of LSC grantees.¹⁰⁷ It also potentially deters non-federal spending on legal services by extending federal restrictions to funding provided by state, local, and private funders.¹⁰⁸ In order to escape these federal restrictions on non-federal funding sources, LSC recipients must set up affiliate or separate entities and transfer the non-LSC funds to these new organizations for use in federally restricted activities.¹⁰⁹ Commentators have noted that these efforts to "unrestrict" non-federal money waste scarce resources by requiring the creation of inefficient, duplicative organizations, further limiting the funding available to civil legal services.¹¹⁰

approached by a government body with the request, an LSC-Funded organization may use non-LSC funds "to respond to a written request for information or testimony" regarding legislation or rule-making and may "participate in public comment in a rulemaking proceeding"). Federal restrictions also forbid conducting or participating in grassroots lobbying and prohibit LSC-funded groups from establishing training programs that "[a]dvocate particular public policies" or "political activities" or to "[t]rain participants to engage in activities prohibited by the Act . . ." 45 C.F.R. § 1612 (2011). Moreover, LSC-funded organizations cannot initiate, participate, or engage in class actions. 45 C.F.R. § 1617 (2011).

105. See 45 C.F.R. § 1610 (2011); see also Houseman & Perle, *supra* note 101, at 4 (noting that recipients of LSC funds cannot use "funds from non-LSC sources to undertake the activities that are subject to the restrictions" placed on LSC funds).

106. *FY 2011 Appropriations Process for Civil Legal Services*, Brennan Ctr. for Justice (March 11, 2011), <http://www.brennancenter.org/analysis/fy-2011-appropriations-process-civil-legal-services>.

107. Rebecca Diller & Emily Savner, Brennan Ctr. for Justice, *A Call to End Federal Restrictions on Legal Aid for the Poor*, i (2009), http://brennan.3cdn.net/7e05061cc505311545_75m6ivw3x.pdf.

108. *Id.*

109. Houseman & Perle, *supra* note 101, at 4.

110. Diller & Savner, *supra* note 106, at i.

V. EFFORTS TO EXPAND THE RIGHT TO CIVIL COUNSEL AS A MEANS OF PROTECTING BASIC HUMAN NEEDS

Given the limitations described above, and recognizing the importance of access to counsel to protect the right to housing, advocates have sought to ensure broader protections for the right to counsel in civil cases as a means of securing basic needs, including where the right to housing is at stake. These strategies include litigation efforts to expand state constitutional protections, legislative and other policy efforts to establish pilot projects, and advocacy with international human rights mechanisms.

A. Domestic Advocacy Efforts to Expand the Right to Counsel

One strategy for establishing the right to counsel seeks to establish the right in categories of cases implicating basic needs on a state-by-state basis, through litigation to recognize state constitutional protections. Indeed, state courts have issued decisions recognizing a right to counsel in cases involving orders of protection for domestic violence, abuse and neglect proceedings, paternity proceedings, civil commitment, civil contempt, and civil forfeiture.¹¹¹ This strategy has not yet yielded success as a means to protect the right to housing.

More successful are efforts by policy makers, bar associations, and Access to Justice Commissions seeking legislative and policy changes to promote a right to counsel in civil cases where basic human needs, including housing, are at stake. In 2006, the American Bar Association (ABA) unanimously approved a resolution urging “federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low-income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody, as determined by each jurisdiction.”¹¹² Four years later, in 2010, the ABA adopted the ABA Basic Principles for a Right to

111. See John Pollock, *The Case Against Case-by-Case: Courts Identifying Categorical Rights to Counsel in Basic Human Needs Cases*, 61 Drake L. Rev. 763 (2013).

112. Howard H. Dana, Am. Bar Ass’n, Resolution 112A, 13 (2006), available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_06A112A.authcheckdam.pdf (identifying the basic needs “most critical for low income persons and families”).

Counsel in Civil Legal Proceedings,¹¹³ and the ABA Model Access Act, providing language for state legislators seeking to implement a statutory right to counsel.¹¹⁴

State and local legislatures, Access to Justice Commissions, and bar associations recently have instituted innovative pilot programs and other efforts to explore whether providing counsel in certain civil cases leads to more accurate outcomes, cost savings, and/or greater judicial efficiency. Several of these touch on the right to housing. California established a pilot program to examine the provision of civil legal representation for indigent parties through the Sargent Shriver Civil Counsel Act in 2009. The program provides roughly \$9.5 million per year for six years to seven organizations in order to provide civil legal representation for indigent parties in claims involving basic human needs such as housing, guardianship, and child custody cases.¹¹⁵ In 2011, the Maryland Access to Justice Commission released a detailed list of implementation strategies for the civil right to counsel.¹¹⁶ In 2013, the Maryland General Assembly passed a bill creating a Task Force, staffed by the Commission, to study implementing a civil right to counsel in basic human needs cases.¹¹⁷ The Texas Access to Justice Commission has also taken steps to support “right to civil counsel” pilot programs, creating in 2009 a new category of grant for precisely that purpose.¹¹⁸ In

113. Am. Bar Ass’n, Resolution 105 (Revised), (2010), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_105_revised_final_aug_2010.authcheckdam.pdf.

114. Am. Bar Ass’n, Resolution 104 (Revised), 1 (2010), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_104_revised_final_aug_2010.authcheckdam.pdf.

115. Press Release, Legal Aid Found. of L.A., Los Angeles Legal Groups Receive \$8.4 Million to Assist Individuals and Families in Housing Cases (April 29, 2011), *available at* <http://www.lafla.org/pdf/Final%20Shriver%20Release%204.29.pdf>. For the list of grantees, see *Sargent Shriver Civil Counsel Act Pilot Projects*, California Courts, <http://www.courts.ca.gov/15703.htm> (last visited Feb. 10, 2014).

116. Maryland Access to Justice Commission, *Implementing a Civil Right to Counsel in Maryland* (2011), *available at* <http://www.courts.state.md.us/mdatjc/pdfs/implementingacivilrighttocounselinmd2011.pdf>.

117. Maryland Judiciary Committee, Senate Bill 262/House Bill 129: Task Force to Study Implementing a Civil Right to Counsel in Maryland (Mar. 18, 2013), <http://mgaleg.maryland.gov/2013RS/bills/hb/hb0129t.pdf>.

118. Press Release, Texas Access to Justice Foundation, Texas Access to Justice Foundation Awards New Grants for Pilot Projects Impacting the Texas Legal Delivery System (Dec. 15, 2009), *available at* <http://www.teajf.org/news/releases/Special-Board-Impact-Grants.aspx>. Similarly, the North Carolina Access to Justice Commission sponsored two pieces of

addition, the Boston Bar Association's Civil Right to Counsel Task Force conducted pilot programs in two different housing courts to ascertain the impact of counsel in eviction cases,¹¹⁹ and recently received money from the Massachusetts Attorney General to conduct a second round of eviction pilots.

In Wisconsin, Legal Action has been engaged in a unique effort to establish a right to counsel in civil cases implicating basic needs through litigation and an administrative rulemaking petitions. The litigation strategy has sought to establish a right to counsel primarily in family court proceedings, using claims based on sections of the Wisconsin Constitution and *Griffin v. Illinois*.¹²⁰ In *Kelly v. Warpinski*,¹²¹ Legal Action pursued declaratory relief directly with the Wisconsin Supreme Court on behalf of two mothers, each in a custody dispute with the fathers who were represented by attorneys.¹²² Legal Action did not have the resources to represent the women in their disputes, so it pursued a declaratory judgment seeking attorneys for them, naming the two trial court judges as respondents and moving to include the Wisconsin Counties Association as well. Despite compelling arguments from the petitioners and several *amici*, the state supreme court denied the case

legislation in 2009 and 2011 (ultimately unsuccessful) that would have appropriated funds for small pilot projects. See House Bill 1915, Session 2009 (as referred to the Judiciary II Subcommittee, May 20, 2011), available at <http://www.ncleg.net/Sessions/2009/Bills/House/PDF/H1915v1.pdf>; House Bill 895, Session 2011 (as referred to the Appropriations Committee, April 21, 2011), available at <http://www.ncga.state.nc.us/sessions/2011/bills/house/pdf/h868v1.pdf>.

119. See Boston Bar Ass'n Task Force on the Civil Right to Counsel, *supra* note 47.

120. In *Griffin*, the U.S. Supreme Court held that Illinois violated Griffin's Fourteenth Amendment rights to due process and equal protection when it denied his appeal of his criminal conviction because he could not afford the cost of the transcription of the trial record and requested it be paid at the public's expense. *Griffin v. Illinois*, 351 U.S. 12 (1956). For a detailed discussion of this litigation strategy, see John F. Ebbott, To Gideon via Griffin: The Experience in Wisconsin, *Clearinghouse Rev.* 223 (2006).

121. *Kelly v. Warpinski*, No. 2004 AP00 2999-OA (Wis. Apr. 26, 2005), available at <http://wscca.wicourts.gov/pdfs/0F9966B13F13E10C338D35C97B4B74D5/caseDetails2644744588181141068.pdf>.

122. One of the mothers had previously signed a stipulation giving primary placement to the father if she moved more than 25 miles from the city where the father lived; the other mother had joint custody and placement with the father but was concerned that the father was abusing their two young children. Ebbott, *supra* note 119, at 224.

without issuing an opinion.¹²³ The strategy has now shifted to the circuit court level, where petitioners pursue the right to counsel argument in individual cases, appealing denials of the right to counsel by trial court judges.¹²⁴ These cases have thus far failed to yield a decision affirming the right to publicly funded counsel in civil cases, although some dissenting opinions in the appellate courts have been sympathetic.¹²⁵

In addition to this litigation strategy, Legal Action of Wisconsin has sought to establish the right to counsel through an administrative rulemaking proposal. In 2010, Legal Action of Wisconsin's Executive Director filed a petition with the Supreme Court of Wisconsin requesting that the court add a section to Supreme Court Rule 11.02, requiring publicly funded civil counsel appointments.¹²⁶ The petition was based on the inherent authority of the courts to appoint counsel for indigent persons in civil cases.¹²⁷ The Wisconsin Supreme Court declined to adopt the petition (and a supplemental petition to establish a pilot "right to counsel" project for domestic violence victims) on the grounds that they did not fit within

123. See Ebbott, *supra* note 119, at 225; Kelly v. Warpinski, No. 2004 AP00 2999-OA (Wis. Apr. 26, 2005).

124. See Ebbott, *supra* note 119, at 225–26 (citing Garcia v. Cir. Ct. of Milwaukee Cnty., 2005 AP00 1696-LV and 2005 AP00 1699-W (Wis. Ct. App. Jun. 29, 2005); Paternity of K.J.P.: Jerome E.P. v. Diana R.M., No. 2005AP1957-LV (Wis. Oct. 19, 2005); Paternity of K.J.P.: State ex rel. Diana M. V. Richland County, 2005 AP 1958-W (Wis. Oct. 19, 2005); Marriage of Olson, 2005 AP 2087-LV (Wis. Oct. 19, 2005); State ex rel. Olson v. Sauk County, 2005 AP 2088-W (Wis. Oct. 19, 2005); and State ex rel. Diana M./Lyle Olson v. Circuit Courts for Richland and Sauk Counties, 2005 AP 2609-W (Wis. Oct. 19, 2005)).

125. See Ebbott, *supra* note 119, at 225.

126. The petition provided:

(2) Appearance by attorney. PROVIDED. Where a civil litigant is indigent (defined as below 200% of the federal poverty guidelines), the court shall provide counsel at public expense where the assistance of counsel is needed to protect the litigant's right to basic human needs, including sustenance, shelter, clothing, heat, medical care, safety and child custody and placement. In making the determination as to whether the assistance of counsel is needed, the court may consider the personal characteristics of the litigant, such as age, mental capacity, education, and knowledge of the law and of legal proceedings, and the complexity of the case.

Petition to the Supreme Court of Wisconsin to Establish a Right to Counsel in Civil Cases (Sep. 30, 2010), available at <http://www.wicourts.gov/supreme/docs/1008petition.pdf>.

127. Piper v. Popp, 167 Wis. 2d 633, 638 (1992); Joni B. v. State, 202 Wis. 2d 1, 8 (1996).

the scope of the rule and because the “parameters of the proposal are difficult to discern and the effect of the proposal on circuit courts and counties is largely unknown but may be substantial.”¹²⁸ On September 30, 2013, Legal Action filed a similar petition with the Wisconsin Supreme Court, calling for a rule to provide guidance to circuit courts as to when attorneys should be appointed for low income litigants and requesting that the state Supreme Court fund an appointment of counsel pilot program for indigents in selected categories of civil cases involving basic human needs.¹²⁹ That proposal is currently pending.

B. International Advocacy Efforts Urging a Right to Counsel

Advocates are also actively engaging international human rights mechanisms to build recognition of the importance of a right to counsel in the United States, particularly in cases where basic human needs, such as housing, are at stake. In 2007, when the United States was being reviewed for its compliance with the International Covenant on the Elimination on All Forms of Racial Discrimination (the “Race Convention”), a coalition of groups spearheaded by Northeastern University School of Law’s Program for Human Rights in the Global Economy (PHRGE) submitted a shadow report to the CERD, the committee of human rights experts monitoring compliance with the treaty, highlighting the disproportionate impact of the absence of civil counsel on racial minorities in the United States.¹³⁰ PHRGE representatives and other advocates then attended the formal review of the United States in Geneva, Switzerland in 2008 and spoke directly with CERD delegates, urging the Committee to address the United States’ failure to meet its obligations. As a direct result of these efforts, the Committee’s concluding observations included a strong admonition of the United States’ failure to provide civil counsel to low-income individuals. The Committee noted “with

128. In the matter of the petition to establish a right to counsel in civil cases, No. 10-08, 2012 WI 14 (Feb. 24, 2012). The court was careful to point out, however, that the decision on the petition did not undermine previous holdings that recognize the court’s inherent authority to appoint civil counsel. Thus, it is still possible for indigent litigants to receive a publicly funded attorney in a civil case. Legal Action has accordingly developed pro se motion packets to facilitate pro se litigants’ pursuit to legal representation and equal access to justice.

129. Petition to the Supreme Court of Wisconsin to Establish Pilot Project and Create Rule Governing Appointment of Counsel in Civil Cases, 13–15, available at <http://www.wicourts.gov/supreme/docs/1315petition.pdf>.

130. Martha F. Davis, *In the Interests of Justice: Human Rights and the Right to Counsel in Civil Cases*, 25 *Touro L. Rev.* 147 (2009).

concern the disproportionate impact [of existing practice] on indigent persons belonging to racial, ethnic and national minorities.”¹³¹ The Committee further urged the United States to “allocate sufficient resources to ensure legal representation of [these persons] in civil proceedings, [particularly] where basic human needs, such as housing, health care, or child custody, are at stake.”¹³² PHRGE made extensive reference to the Committee’s findings in a U.S. Senate Judiciary Committee hearing on American compliance with international human rights treaties in December 2009.¹³³

Similarly, during the 2013-14 review of the United States for its compliance with the International Covenant on Civil and Political Rights (ICCPR), advocates, this time led by Columbia Law School’s Human Rights Clinic and Institute, lobbied the U.N. Human Rights Committee to include in its agenda for the review questions about access to counsel in civil cases. As a result, in advance of the review, the Committee asked the United States what steps it had taken to improve legal representation for civil proceedings, in particular for defendants belonging to racial, ethnic, and national minorities,¹³⁴ and to ensure legal representation for women victims of domestic violence.¹³⁵ The advocacy groups then submitted a detailed shadow report for the Committee’s consideration during the review, highlighting the civil justice gap and offering recommendations for federal reform, including establishing a right to counsel in federal civil cases where basic human needs, including housing, are at stake.¹³⁶ As with the CERD review in 2008, advocates traveled to

131. Comm. on the Elimination of Racial Discrimination, Consideration of Reports Submitted by States Parties Under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America, 72d Sess., Feb. 18–Mar. 7, 2008, U.N. Doc. CERD/C/USA/CO/6, ¶ 22 (May 8, 2008).

132. *Id.*

133. *The Law of the Land: U.S. Implementation of Human Rights Treaties Before the Subcomm. on Human Rights and the Law of the S. Comm. on the Judiciary*, 111th Cong. 431 (2009) (statement of Northeastern University School of Law).

134. Human Rights Comm., List of Issues In Relation to the Fourth Periodic Report of the United States of America (CCPR/C/USA/4 and Corr.1), adopted by the Committee at its 107th Session (March 11–28, 2013), U.N. Doc. CCPR/C/USA/Q/4, 109th Sess., (April 29, 2013).

135. *Id.* at ¶ 20.

136. Columbia Law School Human Rights Clinic, Access to Justice: Ensuring Meaningful Access to Counsel in Civil Cases, Response to the Fourth Periodic Report of the United States to the United National Human Rights Committee (August 2013).

Geneva for the ICCPR review in March 2014 to meet with Committee members and urge the Committee to make specific recommendations with regard to the right to counsel in civil cases.

U.S. advocates have engaged with other U.N. experts to highlight the importance of a right to counsel in civil cases, as well. In 2009, the U.N. Special Rapporteur on the right to adequate housing, Raquel Rolnik, made an official visit to the United States. In conjunction with the visit, the National Coalition for a Right to Civil Counsel¹³⁷ submitted testimony for Rolnik's consideration, highlighting both the civil justice gap in the United States, particularly in cases involving housing, and the importance of legal representation in securing the right to housing.¹³⁸ In 2013, the coalition responded to the Special Rapporteur's solicitation for civil society input on a thematic report on the security of tenure of the urban poor, and in written comments urged the Special Rapporteur to include a recommendation explicitly calling for a right to counsel in housing cases.¹³⁹ While the resulting draft guidelines did not explicitly call for a right to counsel, they did emphasize the importance of fully operational legal aid systems to ensure that people's rights are protected.¹⁴⁰ The Coalition submitted a second round of comments to the Special Rapporteur, again urging her to make an explicit call for a right to counsel.¹⁴¹

137. In 2003, advocates seeking to establish a right to counsel in civil cases formed the National Coalition for a Civil Right to Counsel, which has grown to over 240 participants from 35 states. The Coalition's mission is to "encourage, support, and coordinate advocacy to expand the recognition and implementation of a right to counsel in civil cases." *About the Coalition*, Nat'l Coal. for a Civil Right to Counsel, http://www.civilrighttocounsel.org/about_the_coalition/coalition_basics/ (last visited Mar. 6, 2014). Through the Public Justice Center, the coalition provides technical support and collects and coordinates model pleadings, legal research, and pro bono and amicus support for litigation and other advocacy efforts to establish a right to counsel in civil cases. *Id.*

138. Testimony of National Coalition for the Civil Right to Counsel to Raquel Rolnik, UN Special Rapporteur on Adequate Housing, Official U.S. Mission, Nov. 8, 2009 (on file with author).

139. E-mail from John Pollock, Coordinator, National Coalition for a Civil Right to Counsel, to Risa Kaufman, Exec. Dir., Columbia Law School Human Rights Institute (October 5, 2013) (on file with the author).

140. Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, Draft for Consultation, Recommendations on Security of Tenure of the Urban Poor (Sept. 30, 2013) (by Raquel Rolnik), available at <http://www.ohchr.org/Documents/Issues/Housing/SecurityTenure/DraftRecommendationsSep2013.pdf>.

141. E-mail from John Pollock to Risa Kaufman, (October 5, 2013).

VI. IMPLICATIONS OF PAIRING A RIGHT TO HOUSING WITH THE RIGHT TO COUNSEL

There is no denying the practical truth of the insight derived from international human rights law that rights are indivisible and interdependent—that is, that civil and political rights, such as the right to fair procedures, are inseparable from economic and social rights, such as the right to housing.¹⁴² The above examples from Wisconsin confirm this, and underscore the importance of a strategy that pursues a right to housing *alongside* a right to counsel, rather than one which considers the two as alternative, or even opposing, strategies. Indeed, in the scenarios described above, the individual clients—Angela, Toya, Karen, Susan, Mathew, and Henry—did have a right to housing, however circumscribed. But that substantive right was unrealized until they obtained the assistance of Legal Action of Wisconsin. Access to counsel and to the courts—nominally procedural rights—were critical to the realization of, and enforcement of, individuals' rights to housing. The housing rights would have been illusory without accompanying procedural rights and, in these cases, availability of counsel.

By the same token, procedural assistance is of little ultimate value if there are no underlying rights to enforce or protect. Procedural rigor, including appointment of counsel, may delay the resolution of a matter, and as Henry's situation demonstrates, delay may be helpful for many clients.¹⁴³ Procedural protections can also have dignitary value for the affected individual.¹⁴⁴ However,

142. See Part III, *supra*. The indivisibility of rights is directly addressed in the Vienna Declaration and Programme of Action. World Conference on Human Rights, June 14–25, 1993, *Report of the World Conference on Human Rights, Report of the Secretary-General*, 48th Sess., 22d plen. mtg., part I, ¶ 5, U.N. Doc. A/CONF.157/24 (1993), reprinted in 32 I.L.M. 1661 (1993). For a critical examination of how the rhetoric of indivisibility has been used in different political contexts, see Daniel J. Whelen, *Indivisible Human Rights: A History* (2010).

143. The professional ethics rules in a number of jurisdictions acknowledge that seeking delay for a client may be ethically permissible, so long as the delay is not unreasonable. See, e.g., Texas Disciplinary Rules of Prof'l Conduct, Rule 3.02 ("Because such tactics are frequently an appropriate way of achieving the legitimate interests of the client that are at stake in the litigation, only those instances that are unreasonable are prohibited"); D.C. Rules of Prof'l Conduct, Rule 3.2 ("A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.").

144. For two classic discussions of the dignitary value of procedure, see Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative*

procedural assistance is surely hollow if the end result is invariably just a more gradual loss of housing for the individual litigant rather than vindication of a right to housing.

Instead of treating advocacy for the right to counsel and the right to housing as mutually exclusive pursuits, pairing these two goals expands the strategic palette for advocates while creating the potential for new alliances. This pairing, which draws on human rights approaches, makes particular sense in the U.S. context, where both state and federal courts tend to view their plenary authority over substantive rights narrowly.¹⁴⁵

A. Shaping Judicial and Legislative Strategies

As United States-based advocates press for an expanded right to housing, they do so from within a federal legal system that, as a constitutional matter, generally eschews economic and social rights, and a state-level system that is currently not much more open.¹⁴⁶ Compounding this is the fact that domestic courts are reluctant to intervene in substantive areas with financial implications for the state because of separation of powers concerns.¹⁴⁷ Even in New York State, where the state constitution explicitly provides for “aid, care, and support of the needy,”¹⁴⁸ courts have moved cautiously, sometimes preferring to engage in a prolonged dialogue with the state legislature rather than issue judicial mandates that directly extend government benefits.¹⁴⁹

Adjudication in Mathews v. Eldridge, 44 U. Chi. L. Rev. 28, 49–52 (1976); Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights-Part I*, 1973 Duke L.J. 1153, 1172–76 (1973).

145. Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Rationality Review*, 112 Harv. L. Rev. 1131, 1153–54 (1999) (observing that both federal and state courts use a deferential rationality standard for reviewing the constitutionality of social and economic legislation and urging that state courts rely on state constitutional provisions to depart from the federal approach).

146. *Id.*; see also Alana Klein, *Judging as Nudging: New Governance Approaches for the Enforcement of Constitutional Social and Economic Social Rights*, 39 Colum. Hum. Rts. L. Rev. 351, 391–92 (2008) (noting that “[f]ew consider the United States a source of models for the judicial enforcement of [social and economic rights.]”).

147. See, e.g., *Peavler v. Bd. of Comm'rs of Monroe Cnty.*, 528 N.E.2d 40, 44 (Ind. 1988) (“The separation of powers doctrine forecloses the courts from reviewing political, social and economic actions within the province of coordinate branches of government.”).

148. N.Y. Const. art XVII, § 1.

149. See, e.g., Mathew Mozian, *Reining In Interim Relief's Cottage Industry: A Call to Resolve Jiggetts*, 64 Alb. L. Rev. 397 (2000) (describing 13 years of

In contrast to this cautious approach in the area of economic and social rights, courts have often seen procedural protections as their special bailiwick. For example, when construing state or federal due process protections—as opposed to constitutional provisions concerning the general welfare—both state and federal courts have been much more ready to set standards for government. This generalization holds true even when meeting those procedural standards will entail significant government expenditures.¹⁵⁰ Given the courts' relatively favorable orientation toward procedural protections, pairing the right to housing and the right to counsel can help facilitate a nuanced strategy for housing advocates that takes advantage of the particular capacities of, and constraints on, the federal and state judiciaries as well as legislatures.

The Wisconsin experience is illustrative of this theory. In 2010, in their first petition to the Wisconsin Supreme Court, the Wisconsin advocates sought to have the Court encourage trial courts to appoint counsel “where the assistance of counsel is needed to protect the litigant’s rights to basic human needs, including sustenance, shelter, clothing, heat, medical care, safety and child custody and placement.”¹⁵¹ This was thus in the nature of an appeal to promote the general welfare, including “shelter,” or housing.

In their administrative conference discussions of the petition, the Justices focused on the Wisconsin due process precedents, which held that an indigent civil litigant is entitled to an individualized determination of the constitutional necessity of appointed counsel in her case.¹⁵² In their second petition to the Wisconsin Supreme Court,

litigation involving back and forth between the New York courts and legislature regarding the required level of shelter allowances under Article 17).

150. Both of the Supreme Court’s iconic cases addressing procedural fairness, *Gideon v. Wainwright*, 372 U.S. 335 (1963) and *Goldberg v. Kelly*, 397 U.S. 254 (1970), had the effect of mandating significant government expenditures to provide appointed counsel and extend fair hearings, respectively.

151. In the Matter of the Petition to Establish a Right to Counsel in Civil Cases, No. 10-08, 2012 WI 14 (Wis. Sup. Ct. Feb. 24, 2012).

152. See *Piper v. Popp*, 167 Wis. 2d 633 (1992); *Joni B. v. State*, 202 Wis. 2d 1 (1996). These cases held that a court must determine on a case-by-case basis whether to appoint counsel by weighing the three *Mathews v. Eldridge* elements against the *Lassiter* presumption against appointed counsel. If the *Mathews v. Eldridge* due process elements suffice to rebut the presumption against appointed counsel, then due process requires the appointment of counsel. Following these decisions, in 2000 the Wisconsin Court of Appeals held, in *In the Interest of Xena X. D.-C. v. Tammy L.D.*, 2000 WI App 200 (2000), that when a party requests counsel or when the circumstances otherwise raise a reasonable concern that the party will not be able to provide meaningful self-representation, the court must

filed on September 30, 2013, the Wisconsin advocates thus changed the language of their requested rule to target these due process standards: “where the appointment of counsel is necessary *to ensure a fundamentally fair hearing* in a court proceeding which will affect the litigant’s basic human needs, including . . . shelter”¹⁵³ The Wisconsin advocates also changed the legal memorandum in the “motion packet” which they provide to *pro se* litigants to file requesting counsel to focus on the Court’s prior due process standards: “In each case, the circuit court must determine what constitutes as meaningful opportunity to be heard and whether that requires appointment of counsel in the particular instance.”¹⁵⁴ The Wisconsin advocates believe that this “zeroing in” on due process protections and requirements strengthens the argument for appointment of counsel, which will in turn strengthen low-income individuals’ ability to retain or obtain housing. Because of this, they are optimistic about the current efforts to use procedural protections to enhance economic and social rights.¹⁵⁵

B. A Differentiated Strategy

It is a given that housing advocates in the United States will continue to use a variety of creative mechanisms to expand substantive housing rights for their constituencies. For example, twenty states already provide legislative mechanisms to protect gays and lesbians experiencing discrimination in housing; advocacy work is ongoing in the remaining jurisdictions to expand those protections.¹⁵⁶ Also notable is recent work by the National Law

exercise the discretion conferred by *Joni B.* whether to appoint counsel. The Wisconsin Supreme Court and Court of Appeals thus set due process appointment-of-counsel standards for the Wisconsin trial courts.

153. Petition To Establish A Rule Guiding Courts In The Exercise Of Their Inherent Power To Appoint Counsel In Civil Cases, at 23, No. 13-15, (Wis. Sup. Ct. Sept. 30, 2013), *available at* <https://www.wicourts.gov/supreme/docs/1315petition.pdf> (emphasis added).

154. Legal Action of Wis., *Memorandum in Support of Motion Seeking Appointment of Counsel*, in Civil Gideon Motion Packet 4, *available at* <http://www.legalaction.org/data/cms/Civil%20Gideon%20Motion%20Packet.pdf> (citing *Joni B. v. State*, 202 Wis. 2d 1, 13 n.7 (1996)).

155. E-mail from John F. Ebbott, Exec. Dir. Legal Action of Wis., to Heidi M. Wegleitner (Dec. 5, 2013).

156. *See Study Finds Housing Bias Against Same-Sex Couples*, U.S.A. Today (June 18, 2013, 4:44 PM), <http://www.usatoday.com/story/news/nation/2013/06/18/housing-bias-same-sex-couples/2435417/> (describing HUD study); *LGBT Rights*, Am. Civil Liberties Union, <https://www.aclu.org/lgbt-rights> (last

Center on Homelessness and Poverty to incorporate progressive standards into local reporting processes on homelessness.¹⁵⁷ As a strategic matter, it makes sense to continue focusing efforts to expand substantive housing protections on the legislative branches, where real gains are possible in many jurisdictions.

At the same time, the right to counsel can be a part of that legislative/executive agenda. For example, armed with data, advocates for expansion of housing anti-discrimination measures to address sexual orientation discrimination can make the case that any proposed changes should include an expanded right to appointed counsel for those who cannot otherwise afford representation. This is not simply an add-on to a housing rights agenda; access to counsel is critical to the successful expansion of the underlying right to be free of discrimination.

If the legislative will is sufficient to support expansion of housing rights, it may also be sufficient to support their protection and enforcement through appointed counsel for low-income individuals. However, at the same time that advocates pursue a legislative strategy, there will be opportunities to engage courts in reviewing the adequacy of existing protections.

In some states, it may make sense to press directly for recognition of broader rights to housing. For example, the Ohio state constitution's language offers some promise of housing rights, and the aforementioned provision of the New York State constitution, Article XVII, suggests the possibility of a minimum level of housing protection in the state.¹⁵⁸

More often, however, the federal constitutional due process clause or its state analogues will offer the best opportunity to expand housing rights through the courts. In general, these claims will arise from situations of grave inequality—for example, between a housing authority's legal representation in a complex Section 8 case and the

visited Mar. 6, 2014) (describing advocacy to end housing discrimination against LGBT individuals).

157. See, e.g., Amien Essif, *A Bill of Rights for the Homeless*, In *These Times* (July 29, 2013), http://inthesetimes.com/article/15227/a_bill_of_rights_for_the_homeless (describing Rhode Island Homeless Bill of Rights and other similar state measures).

158. See Ohio Const. art 8 § 16, available at <http://www.legislature.state.oh.us/constitution.cfm?Part=8&Section=16> (noting that it is in the public interest of the state to provide housing); see also Bradley R. Haywood, *Right to Shelter as a Fundamental Interest under the New York State Constitution*, 34 Colum. Hum. Rts. L. Rev. 157 (2002) (arguing that the right to shelter should be seen as a fundamental right protected by the state constitution).

lack of representation available to the low-income tenant. In these sorts of cases, there is ample opportunity to present classic due process arguments based on, *inter alia*, the need to maintain equality in access to the courts as a part of the integrity of the judicial system.¹⁵⁹ Courts at both the state and federal levels have recognized their competence to address such claims.¹⁶⁰ In some state court cases involving such inequalities, in fact, access to court-appointed counsel has been identified as one of the remedies appropriately ordered by the court.¹⁶¹

In the international sphere, where the indivisibility of rights is well recognized, this sort of differentiated strategy might be considered antithetical to the spirit of the human rights treaties governing this area. But in the domestic context, recognition of the indivisibility of rights leads in a different direction—to a strategy that pairs the right to housing with the right to counsel in a nuanced approach that takes into account the strengths of different targets of advocacy.

C. Expanded Alliances

A housing rights strategy that pairs direct housing rights advocacy with the right to counsel may also provide a basis for building new alliances and broadening supportive coalitions.

In recent years, the American Bar Association has called for both a right to counsel in civil cases implicating basic human needs¹⁶²

159. See, e.g., Oscar Vilhena Vieira, *Inequality and the Subversion of the Rule of Law*, 4 Sur: Int'l J. Hum. Rts. 26 (2007) (examining “the effects of the polarization of poverty and wealth on the legal system, especially in relation to one of the core ideals of the Rule of Law: that people should be treated impartially by the law and by those responsible for its implementation”).

160. Courts have, for example, used the due process clause to require the state to affirmatively address inequality in access to medically necessary abortion. See, e.g., *Moe v. Sec’y of Admin. & Fin.*, 417 N.E. 2d 387 (Mass. 1981); *Doe v. Maher*, 515 A.2d 134 (Conn. Super. Ct. 1986). For discussion in federal court, see *Villegas v. Concannon*, 742 F. Supp. 1083 (D. Or. 1990) (ordering the state, under the due process clause, to provide expedited hearings to food stamp recipients in certain circumstances).

161. See *Flores v. Flores*, 598 P.2d 893 (Alaska 1979) (noting inequality between parties when one was represented and the other was not); see generally William L. Dick Jr., *The Right to Appointed Counsel for Indigent Civil Litigants: The Demands of Due Process*, 30 Wm. & Mary L. Rev. 627 (1989).

162. See Am. Bar Ass’n, Task Force on Access to Civil Justice, Report to the House of Delegates 9–10 (2006), available at <http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf> (resolution urging governments to provide legal counsel as of right in certain civil cases, including housing cases);

and government support for the human right to adequate housing.¹⁶³ Other bar groups, however, have offered strong support for procedural protections (perceived to be neutral in nature), yet virtual silence on the substantive protections (perceived to be inherently political).¹⁶⁴ Incorporating the due process arguments into the housing rights agenda, then, invites broader participation in the right to housing coalition by groups that are primarily concerned with procedural fairness and recognizes that, as a practical matter, housing rights are worth little if enforcement mechanisms perpetuate inequalities.

By the same token, pairing the right to housing with the right to counsel may have the effect of muting some of the political opposition to expanded housing rights. Unequal access to procedural protections is a particularly hard status quo to defend. It goes to the fundamental fairness of our judicial system, an issue on which most people are unwilling to compromise.¹⁶⁵ While this pairing will certainly not have the effect of completely overcoming opposition to expanded housing rights, it has the potential to disarm and diffuse some of the staunchest opposition.

A danger with this strategy would be, as with any dilution of issues, that advocates might be tempted to “settle” for expanded rights to counsel in housing matters and lose both their momentum and their focus on the underlying substantive right to housing. However, as discussed below, the ancillary strategic benefits of this pairing suggest that the likelihood of such an outcome is minimal.

Am. Bar Ass’n, ABA Model Access Act (2010), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_104_revised_final_aug_2010.authcheckdam.pdf.

163. Am. Bar Ass’n, Comm. on Homelessness & Poverty et al., Report to the House of Delegates 117 (2013), *available at* <http://nlchp.org/content/pubs/Resolution117%20Revised%20by%20RC%20FINAL8-13-131.pdf>.

164. *See, e.g.*, Alaska Bar Ass’n Pro Bono Comm., http://civilrighttocounsel.org/pdfs/alaska_bar_resolution_9_2_2008.pdf; *see also* Pennsylvania Bar Ass’n Access to Justice Comm., http://www.pabar.org/public/committees/LEG04/Resolutions/Resolution%20to%20Cosponsor%20ABA%20Model%20Act%20approved%20_2_.pdf; San Francisco “Right to Civil Counsel City,” <http://www.sfbar.org/jdc/legal-services/rtcc/right-to-civil-counsel-pilot-program.aspx>.

165. *See, e.g.*, Opportunity Agenda, Talking Immigration Issues Today: Due Process and Basic Rights 1 (2013) (“Most audiences believe that protecting basic rights like due process in the legal system are central to preserving and upholding American values of security, fair treatment, and freedom from government persecution”), http://opportunityagenda.org/files/field_file/2013.05.22_immigrationnarrative_twopager.pdf.

D. Ancillary Strategic Benefits

An advocacy strategy that pairs the right to housing with the right to appointed counsel in housing cases would have a number of ancillary benefits that could potentially strengthen the effort to expand substantive protections and maintain momentum on those issues.

First, expanding procedural protections for housing, including a right to counsel, will necessarily involve recognition of the importance of housing as a component of individual and family well-being. The *Goldberg v. Kelly* line of cases is instructive in this regard.¹⁶⁶ In *Goldberg*, the plaintiffs argued that welfare was an entitlement and therefore subject to constitutional due process protections; the defendants agreed, but disagreed with the level of process required.¹⁶⁷ While the Supreme Court stopped short of requiring appointed counsel for cases involving welfare denial, it did mandate a new and broader range of protections through the fair hearing system and, in doing so, recognized that welfare is more like an entitlement than a gratuity.¹⁶⁸ As the majority recognized in *Goldberg*, welfare was necessary as a means to live.¹⁶⁹ The constitutional status accorded welfare in this case has had a lasting impact on the protections afforded individuals navigating the welfare system.¹⁷⁰ A strategy seeking to establish procedural protections around housing might similarly be a vehicle for greater recognition of the need for stable housing and the impact of its absence.

Second, to the extent that due process-based claims have traction and the right to counsel in housing matters is expanded on the federal or state level, the voices of those affected by housing instability will be amplified in the courts and consequently in other

166. *Goldberg v. Kelly*, 397 U.S. 254 (1970); *see also* *Whiteside v. Smith*, 67 P.3d 1240 (Colo. 2003) (en banc) (citing *Goldberg*, invalidating fee requirement imposed on indigent workers seeking to challenge termination of temporary disability benefits); *Welfare Rights Org. v. Crisan*, 661 P.2d 1073 (Cal. 1983) (citing *Goldberg* to extend privilege to communications between welfare recipient and lay representative in administrative welfare termination proceeding).

167. *Goldberg*, 397 U.S. at 261.

168. *Id.* at 263.

169. *Id.* at 265.

170. *See, e.g.*, Charles A. Reich, *Symposium: The Legacy of Goldberg v. Kelly: A Twenty Year Perspective: Beyond the New Property: An Ecological View of Due Process*, 56 *Brook. L. Rev.* 731, 731 (1990) (referring to *Goldberg* as a “landmark in the evolution of social justice”); Lynn Slater & Kara R. Finck, *Social Work Practice and the Law* 66 (2012) (exploring continued relevance of *Goldberg* for welfare recipient clients).

policy-making institutions. The judicial system is currently distorted by low-income persons' lack of equal access. As low-income individuals are increasingly in a position to access the legal system and bring their claims forward, these distortions will begin to ease, and both courts and policymakers will have a more complete and accurate picture of the impacts of current policies.

Finally, every advocacy campaign needs a starting point, preferably one that has broad appeal and some chance of early successes that will sustain it over the long haul. Pairing the right to counsel with the right to housing provides such a starting place and the possibility of building from one domestic legal theory—namely due process—to the next, a right to housing. Rather than stymie the advocacy campaign, this paired approach holds the possibility of building a higher profile and building up momentum over the course of the long campaign.

VII. CONCLUSION

International conceptions of the indivisibility of rights have profound implications for domestic advocacy strategies concerning the right to housing. History demonstrates that domestic courts are more open to remedying procedural unfairness than ordering direct reallocation of funds to address human needs. Yet the insights of international law as well as the practical experiences of individual clients make clear that the “procedural” right to counsel and the “substantive” claim to adequate housing are deeply intertwined. Recognizing these connections, and building alliances across organizations that address these issues, can yield a powerful and nuanced strategy for change.

THE RIGHT TO HOUSING IN SOUTH AFRICA: AN EVOLVING JURISPRUDENCE

Lucy A. Williams*

This Article focuses on recent South African constitutional and statutory jurisprudence regarding the right to housing, and attempts to analyze both its transformative possibilities and its doctrinal limitations. The South African Constitutional Court's housing rights jurisprudence is more developed than that regarding any other social and economic right contained in the South African Constitution, with eviction cases having been a particular focus of the Constitutional Court. I address three aspects of major recent South African cases relating to the right to housing: the concept of judicially required "meaningful engagement" between government entities and individuals threatened with eviction, the prohibition of unfair practices by landlords and tenants under the Rental Housing Act 50 of 1999, and developments in the concept of just and equitable eviction under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Housing Act 19 of 1998. In each context, I first describe the important ways in which this jurisprudence has benefited the poor and then present a critical perspective identifying both issues of concern and what might be called "unintended consequences." I conclude by arguing that while the universality and moral force of human rights discourse assists in giving meaning and content to housing rights by exposing the social construction of poverty and by shifting the focus from individual fault and dependency to society's responsibility, human rights discourse alone provides limited analytical assistance in addressing the difficult economic and institutional questions that must be faced in order to make housing rights a reality.

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I. INTRODUCTION

This Article focuses on recent South African constitutional and statutory jurisprudence regarding the right to housing, attempting to analyze both its transformative possibilities and its doctrinal limitations.¹ In 1996, South Africans adopted what has been called a “transformative” constitution² that includes in its Bill of

1. There is, of course, rich jurisprudence in other countries of the Global South regarding social and economic rights, particularly in Colombia, Argentina and India. *See, e.g.*, Corte Constitucional [C.C.] [Constitutional Court], enero 22, 2004, Sentencia T-025/04 (Colom.) (ordering specific social and economic rights for individuals displaced due to the Colombian civil war), *available at* <http://www.corteconstitucional.gov.co/relatoria/2004/t-025-04.htm>; Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 8/7/2008, “Mendoza, Beatriz S. y otros c. Estado Nacional y otros / daños y perjuicios,” *Jurisprudencia Argentina* [J.A.] (2008-III-278) (Arg.) (ordering relief related to the contamination of the Matanza-Riachuelo River, which had resulted in massive violations of health and environmental rights for several million people who live alongside or near the river); *see generally* Human Rights Law Network, *Right To Food* (Suresh Nautiyal ed., 4th ed., 2009) (discussing *People’s Union for Civil Liberties v. Union of India*, Writ Petition (Civil) No. 196 of 2001 and containing all orders of the Indian Supreme Court between 2001-2009 regarding food distribution).

2. Discussing the South African Constitution, Karl Klare first used the concept of “transformative constitutionalism,” defined as:

[A] long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country’s political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law. I have in mind a transformation vast enough to be inadequately captured by the phrase “reform,” but something

Rights a broad spectrum of social and economic rights.³ The Constitution expressly obliges the government to “promote and fulfil” these rights,⁴ and mandates that every court, tribunal and forum must, when interpreting the Bill of Rights, “promote the values that underlie an open and democratic society based on human dignity, equality, and freedom”⁵ and, when interpreting legislation and when developing common or customary law, “promote the spirit, purport and objects of the Bill of Rights.”⁶ While important social and economic rights cases have arisen in many fields, the greatest progress has been made with respect to the right of access to adequate housing.⁷ This Article focuses on recent constitutional and statutory developments regarding the right to housing, seeking to identify developments that reveal the transformative possibilities of rights adjudication but also identifying limiting factors and problems. By “transformative possibilities,” I mean the capacity of social and economic rights adjudication to move the law in the

short of or different from “revolution” in any traditional sense of the word. In the background is an idea of a highly egalitarian, caring, multicultural community, governed through participatory, democratic processes in both the polity and large portions of what we now call the “private sphere.”

Karl Klare, *Legal Culture and Transformative Constitutionalism*, 14 SAJHR 1, 150 (1998).

Justices of the Constitutional Court have frequently opined that the South African Constitution is transformative in nature. For example, Justice Kate O’Regan has stated: “[The Constitutional] Court has emphasised on many occasions [that] our Constitution is a document committed to social transformation.” *Mkontwana v. Nelson Mandela Metro. Municipality* 2005 (1) SA 530 (CC) at 565 para. 81 (S. Afr.) (footnote and citations omitted). Chief Justice Arthur Chaskalson as he then was, stated that “a commitment . . . to transform society . . . lies at the heart of our new constitutional order.” *Soobramoney v. Minister of Health (KwaZulu-Natal)* 1998 (1) SA 765 (CC) at 771 para. 8 (S. Afr.). And in delivering the Prestige Lecture at Stellenbosch University in 2006, Chief Justice Pius Langa remarked that “[b]oth the Constitutional Court and other courts view the Constitution as transformative It is clear that the notion of transformation has played and will play a vital role in interpreting the Constitution.” Pius Langa, Chief Justice, Prestige Lecture at Stellenbosch University: Transformative Constitutionalism (Oct. 9, 2006).

3. For example, in addition to the right to access to housing, the South African Constitution also provides for the right to access to health care, food, water, and social security, albeit within progressive realization, and the right to education, including adult basic education. S. Afr. Const., 1996 §§ 26, 27, 29.

4. S. Afr. Const., 1996 § 7(2).

5. S. Afr. Const., 1996 § 39(1)(a).

6. S. Afr. Const., 1996 § 39(2).

7. S. Afr. Const., 1996 § 26(1).

direction of social justice, open space for the poor and excluded groups to fight for access to social goods, and encourage political inclusion and grassroots participation in fashioning social policy. In this Article, I focus on recent developments in housing litigation in South Africa, particularly at the level of the Constitutional Court.

A comprehensive discussion of South African jurisprudence regarding the right to housing is beyond the scope of this Article.⁸ Rather this Article captures my remarks at the symposium, “Bringing Economic and Social Rights Home: The Right to Adequate Housing in the U.S.”,⁹ at which I was asked to address recent right to housing developments in South Africa that might provide additional arguments that would assist U.S. advocates in advancing their work and strategies.

The South African Constitutional Court’s housing rights jurisprudence is more developed than that regarding any other social and economic right contained in the South African Constitution.¹⁰ The Court’s extensive attention to housing rights is partly explained by the profound trauma of forced removals and evictions during the apartheid era.¹¹ While apartheid as a political system is associated with the period from 1948 to 1994, the framework of race-based land occupation was entrenched long before 1948.¹² Harmful effects of this

8. For interested readers, see Sandra Liebenberg, *Socio-Economic Rights: Adjudication Under a Transformative Constitution* 268–317, 399–407, 419–23, 439–42 (2010). For the author’s analysis of South African social and economic rights jurisprudence, see Lucy A. Williams, *Issues and Challenges in Addressing Poverty and Legal Rights: A Comparative United States/South African Analysis*, 21 SAJHR 436 (2005) [hereinafter Williams, *Comparative*]; Lucy A. Williams, *The Role of Courts in the Quantitative-Implementation of Social and Economic Rights: A Comparative Study*, 3 Const. Ct. Rev. 141 (2010).

9. Lucy A. Williams, Remarks at the Columbia Law School Human Rights Institute, Northeastern University School of Law Program on Human Rights and the Global Economy, and the National Law Center on Homelessness & Poverty Symposium: Bringing Economic & Social Rights Home: The Right to Adequate Housing in the U.S. (Apr. 26, 2013).

10. S. Afr. Const., 1996. South Africans often refer to the Constitution as the “Final Constitution,” as distinguished from the “Interim Constitution,” Constitution of the Republic of South Africa, 1993, Act 200 of 1993, which governed during the negotiation and drafting of the final text.

11. See Michael Robertson, *Dividing the Land: An Introduction to Apartheid Land Law*, in *No Place to Rest: Forced Removals and the Law in South Africa* 122–36 (Christina Murray & Catherine O’Regan eds., 1990).

12. For example, The Black Land Act 27 of 1913 and the Development Trust and Land Act 18 of 1936 together set apart only 13 percent of South Africa’s land for occupation by the African majority. See Colin Bundy, *Land, Law and Power: Forced Removals in Historical Context*, in *No Place to Rest: Forced*

legacy endure in the new South Africa, and the maldistribution of property continues to be a major source of political and legal contention. The ANC-led government has been criticized by grassroots movements for the slow pace of its reform efforts to address this problem.¹³ The jurisprudence regarding the right to housing has developed within this social and political context.

Within the housing field, eviction cases have been a particular focus of the Constitutional Court's developing social and economic jurisprudence. One factor is the extreme crisis of housing associated with urbanization. In addition, eviction cases involve the threat of an immediate harm to identified individuals. Therefore grassroots mobilization is usually easier to arouse in this context than in cases regarding day-to-day poverty and lack of subsistence provision. Finally, a number of South African non-governmental organizations have focused on evictions, including the Centre for Applied Legal Studies, the Legal Resources Centre, and the Socio-Economic Rights Institute of South Africa.

While the issue of whether social and economic rights should be included in the South African Constitution was highly debated at the time of the Constitution's drafting,¹⁴ the 1996 South African Constitution ultimately incorporated several specific social and economic rights. But the state's obligations regarding social and economic rights were largely qualified by the phrases "reasonable legislative and other measures," "progressive realization," and "available resources."¹⁵ As a result, litigants have had much more

Removals and the Law in South Africa 3–12 (Christina Murray & Catherine O'Regan eds., 1990).

13. *Why South Africa's Land Reform Agenda is Stuck*, Integrated Reg'l Info. Networks (Aug. 15, 2013), <http://www.irinnews.org/report/98572/why-south-africa-s-land-reform-agenda-is-stuck>; Greg Nicolson, *(Mis)understanding Land Reform: An Issue Ripe for Political Plucking*, Daily Maverick (Dec. 12, 2013, 01:35 AM), <http://www.dailymaverick.co.za/article/2013-10-31-misunderstanding-land-reform-an-issue-ripe-for-political-plucking>.

14. Dennis M. Davis, *The Case Against the Inclusion of Socio-Economic Demands in a Bill of Rights Except as Directive Principles*, 8 SAJHR 475 (1992); Hugh Corder et al., *A Charter for Social Justice: A Contribution to the South African Bill of Rights Debate* (1992).

15. An analysis of these qualifications on social and economic rights in the South African Constitution is beyond the scope of this Article. For a discussion of the "reasonableness review" standard developed in *Soobramoney v. Minister of Health (KwaZulu-Natal)* 1998 (1) SA 765 (CC) (S. Afr.); *Gov't of the Republic of S. Afr. v. Grootboom* 2001 (1) SA 46 (CC) (S. Afr.); and *Minister of Health v. Treatment Action Campaign (No. 2)* 2002 (5) SA 721 (CC) (S. Afr.), see Liebenberg, *supra* note 8, at 131–223.

success invoking the protection of a social and economic right when it is directly threatened or infringed by negative conduct (such as an unfair eviction). The Constitutional Court in *Government of the Republic of South Africa v. Grootboom* found that the Constitution incorporated “at the very least, a negative obligation placed upon the State and all other entities and persons to desist from preventing or impairing the right of access to adequate housing.”¹⁶ However, the constitutional adequacy of the government’s programs to fulfill its affirmative obligations to give effect to social and economic rights is tested under a broad and deferential “reasonableness review” standard.¹⁷ An individual is not ordinarily entitled to immediate delivery of any particular social good.¹⁸

In Part II of this Article, I set forth the South African constitutional provisions and statutes that I will address in my discussion of the evolving South African housing rights jurisprudence. I then address three aspects of major recent South African cases relating to the right to housing. In Part III, I address the concept of judicially required “meaningful engagement” between government entities and individuals threatened with eviction, which may lead to alternative accommodations or in situ housing renovations that negate the need for eviction. In Part IV, I discuss the prohibition of unfair practices by landlords and tenants under the Rental Housing Act 50 of 1999, and the decision of the Constitutional Court not to address such issues by developing the common law as provided in Section 39(2) of the Constitution. In Part V, I discuss recent developments in the concept of just and equitable eviction under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Housing Act 19 of 1998.

Throughout, I note that while many of the evolving doctrines promise some positive developments for tenants, several troubling trends must be noted as well. In each Part, I first describe the important ways in which this jurisprudence has benefited the poor and then present a critical perspective identifying both issues of concern and what might be called “unintended consequences.” I

16. *Grootboom* 2001 (1) SA at 66 para. 34. See also *Jaftha v. Schoeman* 2005 (2) SA 140 (CC) (S. Afr.) (holding that a creditor seeking to enforce a trivial loan may not do so through the normal procedure of attaching the debtor’s property if the result is that a poor person will be evicted from her residence).

17. *Soobramoney* 1998 (1) SA at 765. See Williams, *Comparative, supra* note 9, for a juxtaposition of the U.S. individual statutory social welfare entitlement and South African constitutional reasonableness review.

18. *Soobramoney* 1998 (1) SA at 765.

conclude by arguing that while the universality and moral force of human rights discourse assists in giving meaning and content to housing rights by exposing the social construction of poverty and by shifting the focus from individual fault and dependency to society's responsibility, human rights discourse on its own provides limited analytical assistance when addressing the difficult economic and institutional questions that must be faced in order to make housing rights a reality.

II. CONSTITUTIONAL AND STATUTORY PROVISIONS

A. South African Constitutional Provisions

Section 26 of the 1996 South African Constitution contains three sub-sections relating to housing.¹⁹ Sections 26(1) and (2) provide for the right of access to adequate housing, albeit with important qualifications. One of the earliest South African Constitutional Court's social and economic rights cases, *Grootboom*, interpreted these provisions. In *Grootboom*, a group of homeless adults and children, who had nowhere else to go to escape the mid-winter cold, congregated on a sports field, but could not erect adequate shelters because their building materials had been burned and bulldozed in a previous eviction that was reminiscent of apartheid-era evictions.²⁰ They brought an emergency action against the government seeking temporary shelter until they could obtain permanent accommodation. The Constitutional Court found a violation of the right of access to adequate housing, holding that Section 26 obliges the state not only to devise and implement a coherent, co-ordinated housing program, but to provide such program for those in most desperate need.²¹ The Court held that since existing housing policy and programs did not make specific provision for those in extreme distress such as the

19. Section 26 of the Constitution provides:

- (1) Everyone has the right to have access to adequate housing.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right.
- (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

S. Afr. Const., 1996 § 26.

20. *Grootboom* 2001 (1) SA at 46.

21. *Id.* at 68 paras. 40–41.

claimants, the government had failed to take constitutionally required, reasonable measures to progressively realize the right to housing.²²

The Court entered a declaratory order that the various levels of government “devise, fund, implement and supervise measures to provide relief to those in desperate need.”²³ While the specific applicants in the *Grootboom* case did not achieve the housing they sought in the litigation (indeed, the named applicant, Ms. Grootboom, died without having ever received permanent housing),²⁴ the judgment had a major impact on housing policy in South Africa. Among other things, it led to a new program, the 2003 Housing Assistance in Emergency Situations, incorporated into Chapter 12 of the National Housing Code in 2004, establishing a program for emergency housing and upgrading of informal settlements.²⁵ However, much of the South African Constitutional Court’s jurisprudence since *Grootboom* has focused on the third sub-section of Section 26 of the Constitution, which states that “No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.” This provision will be a primary focus of this Article.

B. Relevant South African Statutes

The two relevant housing statutes that the Constitutional Court has relied on in conjunction with Section 26(3) of the constitution most recently are the Rental Housing Act²⁶ and the

22. *Id.* at 69, 78, 79, 87 paras. 43–44, 64, 66, 68, 99.

23. *Id.* at 86 para. 96.

24. The fact that the *Grootboom* plaintiffs did not receive adequate housing resulted largely from an inadequate settlement agreement entered into before the Constitutional Court’s decision in the case. *Id.* at 85 para. 91.

25. Kate Tissington, Socio-Economic Rights Institute of South Africa, A Resource Guide to Housing in South Africa 1994-2010: Legislation, Policy, Programmes and Practice 44 (2011) (“*Grootboom* thus gave rise to a right to emergency housing and a means for its enforcement, at least through the application of the Emergency Housing Programme.”); see generally Malcolm Langford, *Housing Rights Litigation: Grootboom and Beyond*, in Socio-Economic Rights in South Africa: Symbols or Substance? (Malcolm Langford et al. eds., 2014) (assessing the impact of *Grootboom* achieving improved housing rights).

26. Rental Housing Act 50 of 1999 (S.Afr.).

Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE Act).²⁷

The Preamble to the Rental Housing Act states that “there is a need to balance the rights of tenants and landlords and to create mechanisms to protect both tenants and landlords against unfair practices and exploitation,” and to “introduce mechanisms through which conflicts between tenants and landlords can be resolved speedily at minimum cost to the parties.”²⁸ The Act empowers the Member of the Executive Council responsible for housing in each province to create a Rental Housing Tribunal,²⁹ and provides that tenants or landlords “may in the prescribed manner lodge a complaint with the Tribunal concerning an unfair practice.”³⁰ “Unfair practices” are defined as: “(a) any act or omission by a landlord or tenant in contravention of the Act; or (b) a practice prescribed as a practice unreasonably prejudicing the rights or interests of a tenant of a landlord.”³¹ The Act specifically gives the landlord the right to terminate a lease “in respect of rental housing property on grounds that do not constitute an unfair practice and are specified in the lease.”³²

Prior to the adoption of the PIE Act, the apartheid-era Prevention of Illegal Squatting Act (PISA)³³ rendered unlawful occupiers subject both to summary eviction and criminal prosecution. Even if individuals had lived their entire lives on the land occupied, a new owner could withdraw permission to remain, and the occupiers would be quickly and forcibly removed.³⁴ PISA was an integral part of the residential segregation that was a “cornerstone of the apartheid policy.”³⁵

The PIE Act was expressly passed to give effect to Section 26(3) of the Constitution.³⁶ It repealed PISA and decriminalized squatting, and it also made the eviction process subject to

27. Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (S.Afr.).

28. Rental Housing Act 50 of 1999, Preamble (S.Afr.).

29. *Id.* § 7.

30. *Id.* § 13(1).

31. *Id.* § 1.

32. *Id.* § 4(5)(c).

33. Prevention of Illegal Squatting Act 52 of 1951 (S.Afr.).

34. *Port Elizabeth Municipality v. Various Occupiers* 2005 (1) SA 217 (CC) at 222 para. 8 (S. Afr.).

35. *Id.* at 222 para. 9.

36. *Id.* at 224 para. 11.

requirements designed to ensure that homeless people would be treated with dignity while they were awaiting access to new housing development programs.³⁷ It contains two central operative provisions: Section 4 governs evictions brought by owners of land, and Section 6 governs evictions brought by organs of state. Both require courts asked to order an eviction to consider whether it would be “just and equitable” to grant the eviction. Section 4 differentiates between occupiers who have occupied the land for less than or more than six months, but in both cases requires the court to consider “all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women.”³⁸ Where the occupier has occupied the land for more than six months, the Act also requires the court to consider whether “land has been made available or can reasonably be made available by a municipality or other organ of state or other land owner for the relocation of the unlawful occupier.”³⁹ The distinction that appears in the text of Section 4 between those living in housing before and after six months has been eroded in *Occupiers of Portion R25 of the Farm Mooiplaats 355 JR v. Golden Thread Ltd.*⁴⁰ and *The Occupiers, Shulana Court*,

37. *Id.* at 224 para. 12.

38. Section 4 provides:

(6) If an unlawful occupier has occupied the land in question for less than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women.

(7) If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.

Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, § 4(b)–(7) (S.Afr.).

39. *Id.* § 4(7).

40. *Occupiers of Portion R25 of the Farm Mooiplaats 355 JR v. Golden Thread Ltd.* 2012 (2) SA 337 (CC) (S. Afr.).

11 Hendon Road, Yeoville, Johannesburg v. Steele.⁴¹ Initially, the Supreme Court of Appeal in *Shulana Court* found that since a court considering an eviction under Section 4(6) must consider all “relevant circumstances,” “where the availability of alternative land is relevant, then it is obligatory for the court to have regard to it.”⁴² In *Mooiplaats*, Justice Yacoob went further:

While this distinction [between Sections 4(6) and 4(7)] is important, I do not think it is decisive to the justice-and-equity enquiry. This is because, if a court has before it a case in which the land occupation falls short of six months, it is obliged to consider all the relevant circumstances. In an enquiry of this kind a court should determine what the relevant circumstances are. Close to 200 families would have been evicted and in all probability rendered homeless consequent upon the order of the High Court. In the face of this consequence the question whether the City was reasonably capable of providing alternative land or housing was of crucial importance.⁴³

Section 6 sets out factors to be considered in deciding whether granting an eviction is just and equitable,⁴⁴ although these factors are

41. *Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v. Steele* 2010 (9) BCLR 911 (SCA) (S. Afr.).

42. *Id.* at 917 para. 13.

43. *Mooiplaats* 2012 (2) SA at 344 para. 16.

44. Section 6 provides:

(1) An organ of state may institute proceedings for the eviction of an unlawful occupier from land which falls within its area of jurisdiction, except where the unlawful occupier is a mortgagor and the land in question is sold in a sale of execution pursuant to a mortgage, and the court may grant such an order if it is just and equitable to do so, after considering all the relevant circumstances, and if—(a) the consent of that organ of state is required for the erection of a building or structure on that land or for the occupation of the land, and the unlawful occupier is occupying a building or structure on that land without such consent having been obtained; or (b) it is in the public interest to grant such an order.

(2) For the purposes of this section, “public interest” includes the interest of the health and safety of those occupying the land and the public in general. (3) In deciding whether it is just and equitable to grant an order for eviction, the court must have regard to—(a) the circumstances under which the unlawful occupier occupied the land and erected the building or structure; (b) the period the unlawful occupier and his or her family have resided on the land in question; and (c) the

not exclusive.⁴⁵ The enumerated factors include the circumstances in which the occupier came to be on the land, the length of time of the occupation, and the availability of suitable alternative accommodations.

III. MEANINGFUL ENGAGEMENT AND DEMOCRACY

As leading South African legal scholar Danie Brand has argued, the courts must heed a “constitutional imperative . . . through their work in socio-economic rights cases . . . to advance . . . the kind of democracy (a thick, or empowered conception of democracy) envisaged in the South African Constitution.”⁴⁶ Brand and other scholars have argued, by extension, that litigants and advocacy groups should understand and assess their social and economic rights litigation not just in terms of gaining access to social goods but also as a practice for broadening democracy and empowering people at a grassroots level.⁴⁷ A very promising development along these lines is the doctrine of meaningful engagement which has significant potential both for popular empowerment and for improving public administration by bringing “local knowledge” into the decision making process. As the Constitutional Court articulated in *Port Elizabeth Municipality v Various Occupiers* in 2004, “one potentially dignified and effective mode of achieving sustainable reconciliations of the different interests involved is to encourage and require the parties to engage with each other in a pro-active and honest

availability to the unlawful occupier of suitable alternative accommodation or land.

Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, § 6(1)–(3) (S.Afr.).

45. *Port Elizabeth Municipality v. Various Occupiers* 2005 (1) SA 217 (CC) at 234–35 para. 30 (S. Afr.).

46. Danie Brand, *Judicial Deference and Democracy in Socio-Economic Rights Cases in South Africa*, 22 Stellenbosch L. Rev. 614, 614 (2011).

47. *See generally id.* at 630–37 (suggesting approaches courts should adopt, and thus by implication that litigants should advocate for such approaches); *see also* Danie Brand, *Courts, Socio-economic Rights and Transformative Politics* 117–18 (Mar. 31, 2009) (unpublished doctoral dissertation, Stellenbosch University) (on file with the author) (concluding that courts cannot completely avoid the limiting impact of adjudication on transformative politics, and should aim to remain aware of their impact instead); Karl Klare, *Concluding Reflections: Legal Activism After Poverty Has Been Declared Unconstitutional*, 22 Stellenbosch L. Rev. 865 (2011); Henk Botha, *Representing The Poor: Law, Poverty and Democracy*, 22 Stellenbosch L. Rev. 521 (2011).

endeavour to find mutually acceptable solutions.”⁴⁸ The Court noted that such a process could function to reduce expenses of litigation, avoid tensions, narrow issues in dispute, and enable parties to relate in a “pragmatic and sensible” fashion.⁴⁹

Here I focus on three of the several South African Constitutional Court cases⁵⁰ that have discussed meaningful engagement: *Occupiers of 51 Olivia Road v. City of Johannesburg*,⁵¹ *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes*,⁵² and *Abahlali baseMjondolo Movement SA v. Premier of the Province of KwaZulu-Natal*.⁵³

In *Occupiers of 51 Olivia Road v. City of Johannesburg*, over four hundred occupiers of two buildings in inner city Johannesburg appealed an order authorizing their eviction because the buildings in which they were residing were allegedly unsafe.⁵⁴ Two days after the application for leave to appeal was heard, the Constitutional Court issued an order that the city and the applicants “engage with each other meaningfully” in an effort to resolve the differences between the parties “in light of the values of the Constitution” and “to alleviate the plight of the applicants . . . by making the buildings as safe and as conducive to health as is reasonably practicable.”⁵⁵ The City was also ordered to report back to the Court on the results of the engagement.⁵⁶ The Court further explained that, although the concept of meaningful engagement had not been directly raised before the Court by the parties, the concept had roots as far back as the *Grootboom* judgment.⁵⁷

48. *Port Elizabeth* 2005 (1) SA at 239 para. 39.

49. *Id.* at 240 paras. 42–43.

50. These include *Port Elizabeth, id.*; *Minister of Pub. Works v. Kyalami Ridge Envtl. Ass'n.* 2001 (3) SA 1151 (CC) (S. Afr.); *Joseph v. City of Johannesburg* 2010 (4) SA 55 (CC) (S. Afr.); and *Schubart Park Residents' Ass'n v. City of Tshwane Metro. Mun.* 2013 (1) SA 323 (CC) (S. Afr.).

51. *Occupiers of 51 Olivia Rd. v. City of Johannesburg* 2008 (3) SA 208 (CC) (S. Afr.).

52. *Residents of Joe Slovo Cmty., Western Cape v. Thubelisha Homes* 2010 (3) SA 454 (CC) (S. Afr.).

53. *Abahlali baseMjondolo Movement SA v. Premier of Province of Kwazulu-Natal* 2010 (2) BCLR 99 (CC) (S. Afr.).

54. *Olivia Road* 2008 (3) SA at 210 para. 1. These evictions were pursuant to the National Building Regulations and Building Standards Act 103 of 1977 and section 20 of the Health Act 63 of 1977.

55. *Olivia Road* 2008 (3) SA at 212 para. 5.

56. *Id.*

57. *Gov't of the Rep. of S. Afr. v. Grootboom* 2001 (1) SA 46 (CC) at 84 para. 87 (S. Afr.) “The respondents began to move onto the New Rust land during

In *Olivia Road*, building both on *Grootboom* and *Port Elizabeth*, the Constitutional Court began to give more content to the concept. Calling engagement “a two-way process in which the City and those about to become homeless would talk to each other meaningfully,” the Court laid out a list of possible objectives of such engagement, although it also stressed that “[t]here is no closed list.”⁵⁸ It suggested that engagement might be used to determine:

- (a) What the consequences of the eviction might be;
- (b) Whether the city could help in alleviating those dire consequences;
- (c) Whether it was possible to render the buildings concerned relatively safe and conducive to health for an interim period;
- (d) Whether the city had any obligations to the occupiers in the prevailing circumstances; and
- (e) When and how the city could or would fulfil these obligations.⁵⁹

The Court was aware of power imbalances likely to exist between the parties to meaningful engagement in an eviction context. It recognized that the people about to be evicted were vulnerable and might be unwilling to meaningfully engage due to lack of understanding of the importance of the process.⁶⁰ It held that this does not release the municipality from responsibility, but required that the municipality make reasonable efforts to engage.⁶¹ The Court emphasized that “People in need of housing are not, and must not be regarded as a disempowered mass. They must be encouraged to be pro-active and not purely defensive. Civil society organisations that support the peoples’ claims should preferably facilitate the engagement in every possible way.”⁶²

September 1998 and the number of people on this land continued to grow relentlessly. I would have expected officials of the municipality responsible for housing to engage with these people as soon as they became aware of the occupation. I would have also thought that some effort would have been made by the municipality to resolve the difficulty on a case-by-case basis after an investigation of their circumstances before the matter got out of hand. The municipality did nothing and the settlement grew by leaps and bounds.” *Id.*

58. *Olivia Road* 2008 (3) SA at 215 para. 14.

59. *Id.*

60. *Id.* at 216 para. 15

61. *Id.* The Court’s statement was undoubtedly well intended, although its choice of the words “lack of understanding” to characterize a situation of vulnerability and disempowerment was unfortunate.

62. *Id.* at 217 para. 20.

The engagement between the government and those about to become homeless must be “structured, consistent and careful”⁶³ and based on the constitutional value of openness rather than secrecy.⁶⁴ Further, “a complete and accurate account of the process of engagement including at least the reasonable efforts of the municipality within that process” would need to be filed with the court should the municipality proceed with the eviction action in court.⁶⁵ Significantly, “[t]he absence of any engagement or the unreasonable response of a municipality in the engagement process would ordinarily be a weighty consideration against the grant of an ejectment order.”⁶⁶

It is important to place the *Olivia Road* judgment in its procedural context. The Court noted that meaningful engagement should ordinarily happen *before* litigation “unless it is not possible or reasonable to do so because of urgency or some other compelling reason.”⁶⁷ It also emphasized that there had been no effort by the municipality to engage with the people who would become homeless as a result of the eviction prior to the time that the eviction action was brought, even though the municipality must have been aware that the occupiers would become homeless as a result of the eviction.⁶⁸ In this case, the Court ordered meaningful engagement after hearing arguments, but before rendering judgment. The Court handed down judgment after the parties had reached a successful comprehensive settlement and submitted it to the Court.⁶⁹

One year later, in *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes*, the Constitutional Court required the three respondents—Thubelisha Homes, the National Minister for Housing and the Minister of Local Government and Housing, Western Cape⁷⁰—to engage meaningfully with a large informal

63. *Id.* at 217 para. 19.

64. *Id.* at 217–18 para. 21.

65. *Id.*

66. *Id.*

67. *Id.* at 219 para. 30.

68. *Id.* at 215 para. 13.

69. It is important, however, to note that the Constitutional Court may have stepped away from the rigorous meaningful engagement approach evidenced in *Olivia Road* in the *Joe Slovo* and *Blue Moonlight* judgments. Indeed, there has not been a Constitutional Court case since *Olivia Road* in which the Court adopted the “strong” meaningful engagement *prior* to evictions approach including the court’s retaining oversight.

70. The eviction was not sought by the City of Cape Town, which owned the property, but rather by Thubelisha Homes Ltd., a public company established by

community faced with eviction that had been instituted to make way for formal housing under the government's housing development project. Here, unlike in *Olivia Road*, the requirement for meaningful engagement was included in the Court's judgment *upholding* the eviction order.⁷¹ Five judgments were written, all of which supported the order prepared by Justice Yacoob. Some judgments found serious fault with the engagement process that took place prior to the litigation in that it was top-down, unstructured, and devoid of mutual understanding. For example, Justice Sachs noted:

The evidence suggests the frequent employment of a top-down approach where the purpose of reporting back to the community was seen as being to pass on information about decisions already taken rather than to involve the residents as partners in the process of decision-making itself. As this Court has made clear, meaningful engagement between the authorities and those who may become homeless as a result of government activity, is vital to the reasonableness of the government activity.⁷²

Justice Ngcobo, joined by Justice Sachs and Deputy Chief Justice Moseneke, stated that meaningful engagement involves treating residents with respect and showing care for their dignity.⁷³ They articulated nine goals of the engagement process in the context of a housing development program that would provide the residents with information about the details, the purpose and the implementation of the program.⁷⁴

the government to undertake housing development. *Residents of Joe Slovo Cmty., Western Cape v. Thubelisha Homes* 2010 (3) SA 454 (CC) at 497 para. 126 (S. Afr.).

71. Subsequently, in other judgments, meaningful engagement has been ordered in cases involving different procedural postures. For example, in *Shubart Park*, residents were removed from a residential complex without an eviction order because the complex was allegedly unsafe. Among other things, the Constitutional Court ordered engagement regarding restoration and return to the Schubart Park residence and alternative accommodation until restoration is complete. *Schubart Park Residents' Ass'n v. City of Tshwane Metro. Municipality* 2013 (1) SA 323 (CC) at 339 para. 53 (S. Afr.)

72. *Joe Slovo* 2010 (3) SA at 571–72 para. 378. See also Justice Moseneke's discussion of the lack of formal notice before the urgent eviction application was filed, and how the respondents "did not give the residents of Joe Slovo the courtesy and the respect of meaningful engagement which is a pre-requisite of an eviction order under section 6 of the PIE." *Id.* at 510 para. 167.

73. *Id.* at 529–30 para. 238.

74. These included: "the purpose of the program, the purpose of the relocation, arrangements for temporary residential units where in-situ

In a much more comprehensive and formal way than it did in the *Olivia Road* case, the Court provided a detailed engagement order which included a range of issues on which the government was required to effectively consult, including detailed standards regarding the nature of the alternative accommodation to be provided.⁷⁵ Interestingly, the government parties to the case provided these details after argument but before judgment at the request of the Court.

Deputy Chief Justice Moseneke specifically noted that the Court would retain jurisdiction to supervise the result of the meaningful engagement.⁷⁶ Nevertheless, commentators have criticized the judgment as trivializing the devastating impact that the relocation would have had on the residents, reducing their interest to one of mere “convenience.”⁷⁷

It is significant that in the ensuing engagement process, the authorities became convinced that *in-situ* upgrading of the Joe Slovo

development is not possible, how and when relocations will take place, the amount of notice to be given before relocation actually takes place, consequences of relocation, including the extent to which the lives of the residents will be disrupted, whether the government will help to alleviate any dire consequences, the criteria for determining who of the residents will be resettled in the area that has been developed, and where those residents who cannot be accommodated in the developed area will be provided with permanent housing.” *Id.* at 531 para. 242.

75. The temporary residential accommodation unit must:
- 10.1 be at least 24m² in extent;
 - 10.2 be serviced with tarred roads;
 - 10.3 be individually numbered for purposes of identification;
 - 10.4 have walls constructed with a substance called Nutec;
 - 10.5 have a galvanized iron roof;
 - 10.6 be supplied with electricity through a pre-paid electricity meter;
 - 10.7 be situated within reasonable proximity of a communal ablution facility;
 - 10.8 make reasonable provision (which may be communal) for toilet facilities with water-borne sewerage; and
 - 10.9 make reasonable provision (which may be communal) for fresh water.

Id. at 6 para 10.

76. *Id.* at 80 para 139.

77. See Stuart Wilson & Jackie Dugard, *Taking Poverty Seriously: The South African Constitutional Court and Socio-Economic Rights*, in *Law and Poverty: Perspectives from South Africa and Beyond* 236–37 (Sandra Liebenberg & Geo Quinot eds., 2012) (citing judgment of Justice O’Regan, para. 321, judgment of Justice Sachs, para. 399, judgment of Justice Yacoob, para. 107).

settlement (which had been previously proposed by the occupants in their court papers as the appropriate alternative and been rejected by the government parties) was a feasible alternative to eviction.⁷⁸ The reason for this decisional shift is unclear—it has been suggested that the government parties, even after proposing the explicit provisions for the relocation, might have decided that it was less expensive to abandon the eviction than to comply with the Constitutional Court order.⁷⁹

The *Abahlali* judgment, also rendered in 2009, involved a challenge by a grassroots shackdweller movement in Durban to the KwaZulu-Natal Elimination and Prevention of Re-emergence of Slums Act of 2007 (Slums Act).⁸⁰ In striking down Section 16 of the Act, which required the municipality to commence eviction proceedings against unlawful occupiers if the owner of the land on which the occupiers were residing failed to do so, the Constitutional Court stated:

No evictions [under the PIE Act] should occur until the results of the proper engagement process are known. Proper engagement would include taking into proper consideration the wishes of the people who are to be evicted; whether the areas where they live may be upgraded *in situ*; and whether there will be alternative accommodation.⁸¹

In other words, the Court found that engagement is not “meaningful” if it occurs after the municipality has already decided to begin eviction proceedings, and that relocation should be a last resort only after *in situ* salvaging had been investigated.⁸²

The use of meaningful engagement as a remedy in South Africa⁸³ should be carefully analyzed and explored by advocates in the

78. *Residents of Joe Slovo Cmty v. Thubelisha Homes* 2011 (7) BCLR 723 (CC) at 736–39 para. 30 (S. Afr.).

79. Telephone Interview with Steve Kahanovitz, Lawyer, Legal Resource Centre (Jan. 13, 2014). Kahanovitz was the lawyer for the applicants in *Joe Slovo*.

80. KwaZulu-Natal Elimination and Prevention of Re-emergence of Slums Act 6 of 2007 (S. Afr.).

81. *Abahlali baseMjondolo Movement SA v. Premier of Province of Kwazulu-Natal* 2010 (2) BCLR 99 (CC) at 133 para. 114 (S. Afr.).

82. *Id.* at 119 para. 69, 135 para. 120.

83. Note the related approaches utilized by the Colombian Constitutional Court. Corte Constitucional [C.C.] [Constitutional Court], enero 22, 2004, Sentencia T-025/04, available at <http://www.corteconstitucional.gov.co/relatoria/2004/t-025-04.htm>, *supra* note 1 (where the Court has held public hearings and created a permanent monitoring chamber that provided a forum for

United States. Although the United States obviously does not have a constitutional provision that parallels Section 26(3) of the South African Constitution, nor is there anything akin to the PIE statute, some form of meaningful engagement might be fashioned under U.S. law through courts' powers to develop equitable remedies. This has the potential to develop collaborative, deliberative decision-making processes that could ultimately empower marginalized populations and enhance democracy.

However, each avenue for creative advocacy must be viewed through a cautionary lens. First, experience shows that, to be effective, a court ordering meaningful engagement must articulate in detail a structure to govern the process, specific goals or questions that need to be addressed, and a mechanism for judicial oversight of the results of the engagement.

Second, as recognized by the Court in *Olivia Road*, a minimum step necessary to address the extreme power imbalances among the stakeholders—the marginalized population, the private developers, and the state entities—is providing the occupiers or similar claimants with substantial expert legal assistance and other expertise.⁸⁴ Otherwise, the engagement will be merely a sham and a waste of time, ultimately disempowering the marginalized population.

Finally, the “engagement” between the occupier groups and their lawyers/advocates is as important as the engagement between the occupiers and the other stakeholders. Contrary to the mainstream version of “apolitical lawyering” in which lawyers simply serve as neutral mouthpieces for the interests of their clients, the experience of grassroots movements reveals that lawyers bring their own values into the engagement. Unless careful attention is paid by the movements and their lawyers alike, lawyers' values can negatively influence, among other things, the advice they give and the representational tactics they choose. Moreover, the process of interaction between lawyer and client constantly generates new

dialogue and debate among state institutions and civil society); Corte Constitucional [C.C.] [Constitutional Court], julio 31, 2008, Sentencia T-760-08, available at <http://www.corteconstitucional.gov.co/relatoria/2008/t-760-08.htm> (where the Court is experimenting with various methods of dialogue and working groups with diverse stakeholder composition).

84. Author's conversation with Advocate Stuart Wilson. See also Stuart Wilson, *Planning for Inclusion in South Africa: The State's Duty to Prevent Homelessness and the Potential of "Meaningful Engagement,"* 22(3) Urb. F. 265 (2011) (describing the engagement process in *Olivia Road*).

perceptions of interests. This production of new interests, identities and relations is an inevitable part of the engagement.⁸⁵ This can be empowering for both clients and lawyers, but only if the process is accompanied by continuous dialogue, mutual awareness, and criticism. These values influence, among other things, the advice they give and the representational tactics they choose. The process of interaction constantly constructs new interests.

IV. UNFAIR PRACTICES UNDER THE RENTAL HOUSING ACT AND THE COMMON LAW

As noted in Part II.B, the Rental Housing Act regulates the relationships between private landlords and tenants in rental housing, and is intended to expeditiously and at minimum cost protect both parties from unfair practices. *Maphango v. Aengus Lifestyle Properties*⁸⁶ involved an attempted eviction of tenants from residential flats in Johannesburg and raised the question of unfair practices between non-state parties, i.e., landlords and tenants.⁸⁷ The leases in the case contained two relevant provisions: (1) a clause allowing either the landlord or tenant to terminate the lease on short notice after the first year of occupancy, and (2) a clause limiting the amount by which the rent could be raised from year to year if the tenancies were to continue over a period of years, which was the case in *Maphango*. The landlord attempted to cancel the leases pursuant to the first clause, raise the rents to nearly double what the tenants had been paying—more than allowed in the second clause—and lease the apartments back to the tenants if they were willing to pay the higher rental amount. The tenants filed a complaint before the Gauteng Rental Housing Tribunal—which is, as noted, a body created under the Rental Housing Act—arguing that the landlord’s actions constituted an “unfair practice” within the statute.⁸⁸ The Tribunal informed the landlord that it was “attending to this matter,” requested that the landlord “refrain from issuing eviction notices,” convened a mediation hearing that was unsuccessful, and set a date

85. William H. Simon, *The Dark Secret of Progressive Lawyering: A Comment on Poverty Law Scholarship in the Post-Modern, Post-Reagan Era*, 48 U. Miami L. Rev. 1099, 1102–08 (1994).

86. *Maphango v. Aengus Lifestyle Properties (PTY) Ltd.* 2012 (3) SA 531 (CC) (S. Afr.).

87. Rental Housing Act 50 of 1999 (S. Afr.).

88. *Maphango* 2012 (3) SA at 537 para. 13.

for an arbitration hearing.⁸⁹ Instead of refraining, the landlord responded by filing an eviction action. The tenants, deciding that they did not have the energy and resources to litigate in both forums, withdrew their complaint before the Tribunal.⁹⁰ Among other claims, they contended that the eviction action was unlawful as an “unfair practice” under the Rental Housing Act.⁹¹

When the landlord’s eviction action reached the Constitutional Court, the Court found that the Rental Housing Act provided that no final judicial action on the landlord’s action for eviction could be ordered before the Tribunal had made its determination both of the “unfair practice” question and of any remedial consequences. In making its ruling, the Court interpreted the Rental Housing Act in light of the Constitution.⁹² The Court held that the right of access to adequate housing found in Section 26 “ripples out to private rights when the state itself takes measures to fulfill the right. These may affect private relationships.”⁹³

In applying these principles, the Court found that the Rental Housing Act “superimposes its unfair practice regime on the contractual arrangement the individual parties negotiate.”⁹⁴ As a result, “where a tenant lodges a complaint about a termination based on a provision in a lease, the Tribunal has the power to rule that the landlord’s action constitutes an unfair practice, even though the termination may be permitted by the lease and the common law.”⁹⁵ This “subjects lease contracts and the exercise of contractual right to scrutiny for unfairness in light of both parties’ rights and interests.”⁹⁶ The Constitutional Court found that the Tribunal’s determination as to whether the landlords’ termination of the tenants’ leases was an unfair practice would be quite pertinent to a subsequent determination as to whether to grant an eviction under Section 26(3)

89. *Id.* at 537–538 para. 13–14.

90. *Id.* at 27 para. 45.

91. *Id.* at 27 para. 46.

92. Section 39(2) of the South African Constitution provides: “When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.” S. Afr. Const., 1996 § 39(2).

93. *Maphango* 2012 (3) SA at 544 paras. 33–34.

94. *Id.* at 551 para. 51.

95. *Id.* at 552 para. 52.

96. *Id.* at 552 para. 53.

of the Constitution because the court ruling on the eviction must consider “*all the relevant circumstances.*”⁹⁷

But the Court declined to rule on a deeper issue that was argued in the case. Section 39(2) of the South African Constitution requires courts not only to interpret legislation to promote Bill of Rights values, but also to develop the common and customary law so as to promote the goals of the Bill of Rights.⁹⁸ The Court declined the invitation to rule on whether the common law of contracts, if interpreted to allow an eviction under the circumstances at bar, would be consistent with the spirit and values of the Bill of Rights. More specifically, the Court expressed no view as to whether the common law of contracts should be “developed” pursuant to Section 39(2) to bar enforcement of a terminable-at-will clause used as a device to drastically increase the rent in violation of the spirit of the increase-limitation clause.⁹⁹

In addition, Acting Justice Zondo, as he then was, joined by Chief Justice Mogoeng and Justice Jafta, authored a disturbing dissenting judgment based on archaic and formalistic contracts thinking which would have allowed the landlord to terminate the lease in violation of the lease’s evident spirit and intent. As articulated in the dissent, the leases were entered into freely and voluntarily with a clause that allowed either the landlord or the tenant to terminate the lease for no reason.¹⁰⁰ As such, the landlord should be able to use the lease termination provision to overrule the lease provision setting caps on rental increases.¹⁰¹ Although its rhetoric would have fit in well in the 19th century, the dissent reflects the neo-liberal direction now threatening to derail the development of South African transformative jurisprudence.

The *Maphango* case provides much from which advocates and scholars in the United States can learn. U.S. housing advocates and scholars need to launch a project of systematically interrogating, challenging, and, to the extent possible, developing the U.S. common law according to such humane principles as we can find in the U.S.

97. *Id.* at 554 para. 61.

98. *Id.* at 551 para. 51.

99. *Id.* at 552 para. 55. For an extensive overview of South African judgments that exemplify the courts’ struggle with the constitutional mandate of Section 39(2) to develop the common law so as to promote bill of rights values, see Dennis M. Davis & Karl Klare, *Transformative Constitutionalism and the Common and Customary Law*, 26 SAJHR 403 (2010).

100. *Maphango* 2012 (3) SA at 574–75 paras. 124–27.

101. *Id.* at 575 para. 127.

and state constitutions. The U.S. Constitution does not have the equivalent of a Section 39(2) as in the South African Constitution, but United States jurisprudence does contain cases such as *New York Times v. Sullivan*,¹⁰² which held that common law adjudication (in that case, defamation claims) must be scrutinized in light of the values of the First Amendment to the U.S. Constitution. While the United States is a long way from the transformative potential of a Section 39(2), that does not mean that U.S. advocates should not re-think which tools are available within U.S. jurisprudence to develop the common law in view of equalitarian imperatives located in constitutional and, where applicable, federally preemptive texts.

V. THE “JUST AND EQUITABLE” CLAUSE OF THE PIE ACT

As noted earlier, the PIE Act that repealed and replaced PISA significantly altered the legal framework governing the relationship between private property owners’ and occupants’ rights. Specifically, it requires courts asked to order an eviction to consider whether it would be “just and equitable” to grant the order. Along with *Joe Slovo I*, previously discussed, several cases have interpreted the “just and equitable” provision of the PIE Act in the context of Section 6, which governs evictions brought by organs of state. However, here I discuss recent housing issues in cases involving evictions brought by private landowners that concern the conflict between the constitutional right of access to adequate housing and a private owner’s right to property. I focus on the 2011 judgment in *City of Johannesburg Metropolitan Municipality v. Blue Moonlight Properties*,¹⁰³ which concerned whether and under what circumstances residential tenants slated to be moved in an otherwise lawful eviction are entitled to be afforded temporary, transitional housing before the eviction may take place.

Blue Moonlight raised an issue not raised in the *Maphango* judgment. As noted earlier, *Maphango* involved non-state parties—tenants and a private landlord—challenging the validity of the eviction as an unfair practice under the Rental Housing Act—an eviction ultimately held to be invalid. A central part of my analysis of *Maphango* was that the state is always intimately involved when private rights are enforced by courts, and that the failure of the Constitutional Court to interpret the common law of contracts in light

102. 376 U.S. 254 (1954).

103. *City of Johannesburg Metro. Municipality v. Blue Moonlight Properties* 2012 (2) SA 104 (CC) (S. Afr.).

of “the spirit, purport and objects of the Bill of Rights”¹⁰⁴ was a missed opportunity to exercise its authority under Section 39(2) of the Constitution so as to promote the goals of the Bill of Rights.

Blue Moonlight represents a variation on this theme. The principal respondent in *Blue Moonlight* was an arm of government, the City of Johannesburg, and most of the Court’s analysis concerned the responsibilities and obligations of the state with respect to displaced tenants in a valid eviction. As in *Maphango*, however, the moving force in *Blue Moonlight* was a private developer; the developer’s plans and actions precipitated the situation in which the tenants sought assistance from the state. Although this issue was avoided in the Court’s treatment, the case implicitly but powerfully posed the question as to whether private developers should be called upon to absorb some social dislocation costs attributable to their business, or profit-seeking, activities. In other words, *Blue Moonlight* integrally involved the organs of state in the eviction process as well as private owners.

Blue Moonlight builds on the jurisprudence of *President of the Republic of South Africa v. Modderklip Boerdery (Pty) Ltd.*¹⁰⁵ In *Modderklip*, about 400 people who had been evicted from the previous site where they had an informal settlement moved onto land that they mistakenly believed was owned by a municipality. In fact, it was privately owned by Modderklip Farm.¹⁰⁶ Within six months of the initial occupation of the property, Modderklip instituted eviction proceedings in the Johannesburg High Court under Section 4 of the PIE Act. The order was granted, and the settlers were given two months to vacate.¹⁰⁷ While the case proceeded through its early stages, the informal settlement grew to approximately 40,000 occupiers,¹⁰⁸ which gives some indication of how desperate the housing situation is in South Africa. The sheriff refused to execute the eviction order without a deposit of 1.8 million Rand (then approximately \$220,000) to cover the costs of the eviction.¹⁰⁹

104. S. Afr. Const., 1996 § 39(2).

105. *Pres. of the Rep. of S. Afr. v. Modderklip Boerdery (Pty) Ltd.* 2005 (5) SA 3 (CC) (S. Afr.).

106. *Id.* at 9, 20 paras. 3, 35.

107. *Id.* at 10 para. 7.

108. *Id.* at 10 para. 8.

109. *Id.* at 11 para. 9.

The Constitutional Court found that the land owner's constitutional right of access to courts,¹¹⁰ read with the Constitution's rule-of-law guarantee,¹¹¹ had been violated by the state's failure "to take reasonable steps to ensure that Modderklip was, in the final analysis, provided with effective relief" regarding the valid eviction order it had obtained.¹¹² However, the Court also ruled that "the residents are entitled to occupy the land until alternative land has been made available to them by the state or the provincial or local authority," and that the state must compensate Modderklip for the use of the land by the occupiers during that interim period.¹¹³ Because the eviction order itself was not appealed, the *Modderklip* Court had no occasion in the first instance to discuss whether the eviction was "just and equitable" under the PIE Act.

In the 2011 judgment of *Blue Moonlight*, 81 adults and five children were occupants of an industrial building in the Johannesburg central business district.¹¹⁴ One child was disabled, two adults were pensioners, and several households were headed by females.¹¹⁵ All of them had lived in the warehouse for more than six months, one of them had lived there since 1976 and another since 1990.¹¹⁶ Their occupation had previously been legal, they had paid rent until either 2004 or 2005, and the current owner (Blue Moonlight Properties) had purchased the building in 2004 knowing that it was occupied.¹¹⁷

Blue Moonlight sought eviction of the occupiers so that it could redevelop the property.¹¹⁸ The occupiers opposed the eviction on the grounds that it would render them homeless, a constitutionally problematic outcome.¹¹⁹ The developers in turn claimed that their

110. "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum." S. Afr. Const. 1996 § 34.

111. "The Republic of South Africa is one, sovereign, democratic state founded on the following values: . . . Supremacy of the constitution and the rule of law." S. Afr. Const., 1996 § 1.

112. *Modderklip* 2005 (5) SA at 23 para. 51.

113. *Id.* at 28 para. 68.

114. *City of Johannesburg Metro. Municipality v. Blue Moonlight Properties* 39 2012 (2) SA 104 (CC) at 108 para. 6 (S. Afr.).

115. *Id.*

116. *Id.* at 108 para. 7.

117. *Id.* at 10, 21 paras. 7–8, 39.

118. *Id.* at 10, 11–12 paras. 8, 11.

119. *Id.* at 11–12 para. 11.

continued presence would amount to an “arbitrary deprivation of property” in violation of Section 25(1) of the Constitution.¹²⁰ The High Court ordered the eviction. When the case reached the Constitutional Court, the point of focus was whether, considering all the circumstances, the eviction was “just and equitable” under the PIE Act, read as it must be in light of the Constitution.¹²¹ Initially, the Court stated that pertinent considerations to be addressed included: (1) the rights of the owner in a constitutional and PIE era; (2) the obligations of the City to provide accommodation; (3) the sufficiency of the City’s resources; (4) the constitutionality of the City’s emergency housing policy; and (5) an appropriate order to facilitate justice and equity in the light of the conclusions on the earlier issues.¹²²

The Constitutional Court found that the developers were entitled to evict the occupiers, but that the eviction would not be “just and equitable” under the PIE Act until the City provided the occupiers with temporary accommodation.¹²³ It ordered the City to provide the occupiers such accommodations within five months of the date of the judgment. Specifically, the Constitutional Court found that:

It could reasonably be expected that when land is purchased for commercial purposes the owner, who is aware of the presence of occupiers over a long time, must consider the possibility of having to endure the occupation for some time. Of course a property owner cannot be expected to provide free housing for the homeless on its property for an indefinite period. But in certain circumstances an owner may have to be somewhat patient, and accept that the right to occupation may be temporarily restricted, as Blue Moonlight’s situation in this case has already illustrated. An owner’s right to use and enjoy property at common law can be limited in the process of the justice and equity enquiry mandated by PIE.¹²⁴

In other words, in circumstances where an eviction of occupiers from private property would render the occupiers homeless,

120. S. Afr. Const., 1996 § 25(1).

121. *Blue Moonlight* 2012 (2) SA at 115 para. 30.

122. *Id.* at para. 33.

123. *Id.* at para. 97. The Court noted the length of time the occupiers had been on the property, the fact that the residency had once been lawful, the fact that the eviction would render the individuals homeless, and that there was no “competing risk of homelessness on the part of Blue Moonlight.” *Id.* at para. 39.

124. *Id.* at para 40.

the rights of developers may have to yield to the occupiers' right to housing, albeit not indefinitely.¹²⁵

The City contended that it was bound to provide temporary accommodation *only* for those evicted and relocated by the City primarily due to hazardous building conditions, but not those who would be rendered homeless as a result of eviction by private landowners.¹²⁶ For persons evicted by private landowners, the City policy was to investigate and assess "whether a particular set of circumstances merits the submission to Province of an application for assistance under Chapter 12 [of the Housing Code]."¹²⁷ The Court found that this distinction was unconstitutional under the equal protection¹²⁸ and right to housing provisions of the Constitution.¹²⁹

A point of interest in the case is that with respect to the question of the sufficiency of the City's resources, the Court was unmoved by Johannesburg's argument that it did not have the money to provide alternative housing because it had not and could not budget for those evicted by private landowners. The Court responded that if the City did not properly budget for this situation, it cannot now complain that it lacked the resources for compliance with its legal obligations.¹³⁰

Blue Moonlight, without doubt, was a victory for the poor residents. However, housing rights advocate should be concerned about one aspect of the consequences of this type of relief ordered. In effect, the Court ordered the City to subsidize a private developer. Developers are incentivized to buy up derelict properties, evict persons who have been staying on these properties in desperate circumstances for many years and then seek to make a handsome profit by way of gentrification. No party to the proceeding, nor the Court or the progressive bar, addressed the distributive consequences of the decision, which are, in essence, that the City—i.e., the taxpayer—is going to absorb the social-dislocation costs of economic development, rather than the developer. Of course, it is better for the

125. In making this ruling, the Constitutional Court found that the protection against arbitrary deprivation of property must be balanced against the right to access to adequate housing and the right not to be arbitrarily evicted. *Id.* at 17 para. 34.

126. *Id.* at 35–36 para. 76.

127. *Id.* at 38 para. 81.

128. S. Afr. Const., 1996 § 9(1) ("Everyone is equal before the law and has the right to equal protection and benefit of the law.").

129. *Blue Moonlight* 2011 (2) SA at 131 para. 87.

130. *Id.* at 126–27 paras. 71–74.

City to pay these costs than to visit them on the evicted tenants. As a long-term question, however, a coherent plan to supply housing for the poor requires assessment of some relocation costs to developers; not to do so results in the taxpayer subsidizing the developer's profits while getting nothing in return that might be used to deliver social goods.¹³¹

Another troubling aspect of *Blue Moonlight* is the Constitutional Court's failure to follow up and enforce compliance with its judgment. When the City refused for three months to engage with the residents or their lawyers and the eviction date was looming, the residents again approached the Constitutional Court. The Court dismissed their urgent application, later stating that it was not the appropriate forum to enforce or vary the orders it gives on appeal even though the developer demurred in court with respect to any urgency regarding developing the land.¹³²

VI. CONCLUSION

Adequate housing for all is a crucial, if minimal, requisite of human stability. The symposium at which these remarks were addressed raised critical questions and challenges for U.S. advocates regarding whether and how human rights discourse can be effectively deployed in the United States to secure a right to housing. Here I have tried to relate some important experiences and draw lessons from South Africa that might spur discussion and debate in the U.S. advocacy community.

Human rights discourse, particularly social and economic rights discourse, can make an effective contribution to realizing housing for all in our society, but is, I believe, ultimately a limited tool. The strength of social and economic rights discourse is twofold. First, it is a powerfully resonant and mobilizing rhetoric that articulates the moral imperative of guaranteeing a decent condition

131. A more optimistic outcome fervently to be desired is that the *Blue Moonlight* judgment will precipitate a negotiated process of cooperation between the authorities and developers. The firm strictures of *Blue Moonlight* regarding alternative housing might introduce a delay factor that is uncongenial to developers' plans, in which case developers may find it in their self-interest to assume a portion of the transition costs.

132. Jackie Dugard & Stuart Wilson, *Beyond Blue Moonlight: The Implications of Judicial Avoidance over, and Executive Non-compliance with, Judgments Regarding Alternative Accommodation in Johannesburg's Inner City* (forthcoming 2014).

and livelihood for all and exposes the gendered, racial and cross-nation inequality of the status quo. Second, it has the potential to shift discussion away from a myopic focus on and concern with individual responsibility and a false discourse of “dependency” on government-funded social welfare programs without recognizing the interdependency of all in society.¹³³ Human rights discourse moves the framing of the discussion into a universal approach in which society has and assumes responsibility to provide for the subsistence needs of all.

Its weakness, however, is that beyond abstractions (the right of all people to equal concern of the state, the right of everyone to live in dignity, rights to social goods, et cetera), human rights discourse tells us precious little that we need to know in order to address questions of institutional design and delivery. The strength of human rights is discursive—human rights principles can *move* people—but human rights concepts have very little analytical traction. For example, they cannot tell us much about how to design and finance social welfare policies that incorporate and deliver on the rights to housing, social assistance, water, education, health care and universal social assistance. Courts and legislatures in countries with constitutions containing progressive social and economic rights provisions face difficult decisions about how to stretch limited resources to build housing, deliver water, provide medical care, construct schools, and so on. Human rights discourse affirms that all of these are profound moral imperatives and should be legal requirements in a just society, but it gives little guidance on how to set priorities, make the inevitable tradeoffs among the panoply of social and economic rights, or establish institutional systems that will produce results on the ground. Moreover, decisions of this kind are not merely “technical” problems; they implicate controversial choices that will result in differential distributive outcomes for groups in society. Focusing on human rights discourse takes the debate about social welfare policy and programs away from a now disintegrating model based primarily on participation in waged work, but does not give us answers to the hard questions of institutional design that

133. The understanding of the social and legal construction of the discourse of dependency is beyond the scope of this Article. See Nancy Fraser & Linda Gordon, *A Genealogy of Dependency: Tracing a Keyword of the Welfare State*, 19 *J. of Women in Culture & Soc’y* 309, 314–319 (1994); Lucy A. Williams, *The Legal Construction of Poverty: Gender, “Work,” and the “Social Contract,”* in *Law and Poverty: Perspectives from South Africa and Beyond* 21–39 (Sandra Liebenberg and Geo Quinot, eds. 2012).

those of us committed to income/asset equality must address. So while I am very committed to the dissemination of human rights discourse and particularly to sophisticated development of social and economic rights discourse, I remain skeptical that the human rights framework is a magic bullet.

Recent South African social and economic rights jurisprudence provides lessons that should push the thinking of U.S. housing advocates. Can we use U.S. equity jurisprudence to promote a concept similar to “meaningful engagement”? Can we draw principles of social and economic justice from our federal and state constitutions? Can we re-imagine private common law doctrines so that they reflect our constitutional vision? Broad principles of human rights take us only so far, that is, to the threshold of complicated and vexing questions of economic development, distribution and redistribution. Responsible advocates cannot shy away from such questions, seeking a false sense of security in the purity of human rights doctrine, but rather must engage with these “messy” problems of finance, economic growth, social organization, and administration.

TRANSCRIPT OF APRIL 26, 2013 SYMPOSIUM
KEYNOTE DISCUSSION BETWEEN EVAN
WOLFSON AND OLATUNDE JOHNSON

O. Johnson¹: This lunchtime session is an invitation to think critically about strategy. Before we accomplish anything around law and policy, and political change, there is always that moment in which someone tells you that it's impossible-that you can't actually change a narrative that quickly. And so the thought behind having Evan Wolfson come talk to us was to really think about whether we could draw lessons from a movement which has seen considerable success in the last few years. Evan Wolfson is the founder and president of Freedom to Marry, the campaign to win marriage equality nationwide. He is the author of several books. He has a Wikipedia page, which may even be correct. I don't know if you have people who correct it occasionally, Evan. Time Magazine named him one of the 100 most influential people in the world. So we're very lucky to have him as our lunchtime speaker, and when he was asked to speak, he was asked to really help us to dig deeper into strategies. How do you make progress around a difficult issue? How do you use litigation? How do you frame goals? How do you use multiple strategies and interact with other forms of political mobilization. So with that I'm going to turn it over to Evan, and I just thought I'd

1. Olati Johnson is a Professor of Law at Columbia Law School where she teaches legislation and civil procedure, and writes about modern civil rights legislation, congressional power, and innovations to address race and poverty in the United States. Select publications include *The Agency Roots of Disparate Impact* (Harv. C.R.-C.L. 2014); *Beyond the Attorney General: Equality Directives in American Law* (N.Y.U. Law Review 2012); *Stimulus and Civil Rights* (Columbia Law Review 2011), *The Last Plank: Rethinking Public and Private Power to Further Fair Housing* (Penn. Journal of Constitutional Law 2011); and *Disparity Rules* (Columbia Law Review 2007). From 2001 to 2003, Professor Johnson served as constitutional and civil rights counsel to Senator Edward M. Kennedy on the Senate Judiciary Committee and prior to that, Professor Johnson worked at the NAACP Legal Defense Fund (LDF) where she conducted trial and appellate level litigation to promote racial and ethnic equity in employment, health, and higher education. She graduated in 1995 from Stanford Law School and from Yale University in 1989. After law school Professor Johnson clerked for David Tatel on the U.S. Court of Appeals for the D.C. Circuit and then for Justice John Paul Stevens on the United States Supreme Court.

throw out a general question: What can this right to housing movement, a very different context from gay marriage, learn from your effort and from your successes?

E. Wolfson²: Well thank you very much. It's good to be with you. I'm going to talk a little bit, but then we should have a dialogue so that you who are the real experts in your field of right to housing—something very important and something I'm not an expert in—can take what applies and discard what doesn't apply. You can best figure out what insights you might want to draw from our experiences, rather than my sort of guessing what the best insights are for you. So let me just start with that caveat, that number one I am not an expert in housing. You are, and so I look forward to hearing from you and your drawing from what I have to say.

My second caveat is that although we have had, as Professor Johnson said, enormous success of late and truly do now have irrefutable momentum in our quest to end the exclusion of gay couples from marriage—momentum not only in the United States but now globally—we are far from finished. We have in the United States as of this week ten states where we've won the freedom to marry, but that leaves forty of course where gay couples are still denied the freedom to marry. We have as of this week seventeen countries on, as of last week, five continents where gay couples can share in the freedom to marry... up from virtually zero a little more than a decade ago. Wonderful momentum, wonderful progress, quite inspiring and important for couples all around the world. But obviously seventeen countries out of 200 something is still plenty of room to go.

2. Evan Wolfson is founder and president of Freedom to Marry, the campaign to win marriage nationwide. In 1983, Wolfson wrote his Harvard Law School thesis on gay people and the freedom to marry. During the 1990's he served as co-counsel in the historic Hawaii marriage case that launched the ongoing global movement for the freedom to marry, and has participated in numerous gay rights and HIV/AIDS cases. He earned a B.A. in history from Yale College in 1978; served as a Peace Corps volunteer in a village in Togo, West Africa; and wrote the book, *Why Marriage Matters: America, Equality, and Gay People's Right to Marry*, published by Simon & Schuster in July 2004. Citing his national leadership on marriage and his appearance before the U.S. Supreme Court in *Boy Scouts of America v. James Dale*, the *National Law Journal* in 2000 named Wolfson one of "the 100 most influential lawyers in America." *Newsweek* / *The Daily Beast* dubbed him "the godfather of gay marriage" and *Time Magazine* named him one of "the 100 most influential people in the world." In 2012, Wolfson received the Barnard Medal of Distinction alongside President Barack Obama.

And I guess the third caveat I want to give is that although in our dialogue today, and maybe with questions from you, this Freedom to Marry campaign is kind of trotted around as some kind of model of success for all the other movements we care about. But let me assure you for most of the work—work that is not even still finished yet—it’s been much more of a muddle than a model. So it’s going to sound very logical and clear and clean—and I do think we do have lessons and successes for colleagues and partners to draw on. But our work is far from finished, and far from perfect, and it was never as neat as it may sound theoretically. Now, having said all of that, let me just give a little bit of an answer and then we’ll go into Q and A that will help tease out more.

E. Wolfson: So what has the Freedom to Marry movement, and the Freedom to Marry campaign—of which I am the founder and president—what have we done well? What is it that I think we do have an example to offer? I think the first and probably most important is that in Freedom to Marry — the organization I head, and in the Freedom to Marry movement that we have generated now around the world — we have employed and sharpened and stayed with what I think of as a “**ladder of clarity**.” A real hierarchy of clarity that has informed what we want to do, what we’re encouraging others to join us in doing, and what we need to do so that we can then hold ourselves accountable, fill in the gaps, and figure it out.

So what do I mean by a hierarchy of clarity? I mean first and foremost we put forward a clear goal, the **vision** of what we want, and we worked to make sure it was a vision that would be inspiring, that would be empowering. And putting forward that vision with clarity is very, very important, because the prerequisite for success is to get people to believe you can succeed. And then the prerequisite for maintaining that success is to be able to know how you’re doing as you go along and adapt as you proceed. Having put forward a very clear vision that reframed the narrative, that changed peoples’ understanding of what was possible, enlarged it, and summoned people to the cause, everything else we needed to do has been able to flow from the clarity of that vision, that goal of what winning is. If you can’t say what winning is in a way that the people you’re seeking to get into the work can understand, then it’s very hard to rally people and motivate people to do the work. If you can’t define how we know when we’ve won, then you may be doing a lot of great work, but it’s not work that’s going to get you to the goal you may have in your heart.

So from that first rung of vision on this ladder of clarity we then said, okay if that's our goal what is the **strategy**? And we thought long and deep and hard about what were the elements, what were the access points, what were the things that needed to happen in order to win the freedom to marry, in order to end the exclusion of gay couples from marriage? And not to spend a lot of time on the freedom to marry because we're here today to talk about cross-movement lessons, but let me just give you a brief example, or a brief summary of what that strategy is.

In order to win the freedom to marry we asked ourselves—how are we going to do that? Well the answer is that social justice movements, civil rights progress like this in the United States, succeed when at the end of a patchwork struggle one of two national actors brings the country to national resolution. Those two national actors are most likely the Supreme Court and sometimes Congress. So the entire strategy that we then developed was what do we need to do, what's the foundation we need to lay, what's the climate we need to create that will empower one or both of those national actors to bring the country to national resolution? Now neither of these two actors does the right thing at the beginning of a movement. These movements take years, decades, sometimes centuries. So we understood that the strategy required thinking about what we needed to do in the end game—getting the Supreme Court or Congress—to finish the job, and would therefore have a long middle and first game as to laying the foundation to get them to do it.

The short answer is in order to have that happen, in order to have the Supreme Court or Congress do the right thing, a movement such as ours, and likely such as yours, has to achieve (1) a critical mass of states that have moved in the right direction, and (2) a critical mass of public support that together create the climate that inspires more elected officials and judges and ultimately justices to do the right thing. So working back from that we said, how are we going to mount a strategy? What is the work we have to do in order to achieve that critical mass of states and that critical mass of public opinion?

Now this is not a secret strategy, this is not some brilliant thing we just made up. This comes from the lessons of social justice movements such as ours. It's on our website, we call it the Roadmap to Victory.³ The Roadmap talks about the interlocking tracks of work

3. <http://www.freedomtomarry.org/pages/roadmap-to-victory>

that we need to proceed on—synergistically, not sequentially—in order to create that climate for the ultimate national resolution.

Working down from strategy on this ladder of clarity we then said, what are the **vehicles** we want to pursue? What are the particular opportunities for action on these tracks of the Roadmap to Victory that will achieve the critical mass of states and the critical mass of public support that will set the stage for the Supreme Court or Congress to act? And by vehicles I mean things like how do you win X, Y, or Z state? In this state it might be a litigation-centered strategy, in that state it might be a legislative strategy, in this other state it may require defense against the anti-gay assaults. The anti-gay forces (in order to solidify the discrimination we are challenging) not only had the discrimination embedded into the law, but over the last fifteen or so years have mounted a radical un-American strategy on their side of actually cementing the anti-gay discrimination into constitutions in order to prevent the normal political branches and the normal judicial action from applying. So we had to fold in defensive strategy as well as the need to proceed affirmatively, but all with the strategic insight that wins trump losses. That you may take some hits, but if you have your vision, if you have your strategy, if you have your vehicles for moving forward, building that critical mass of states, engaging the public in a way that grows the public support—that momentum of winning will pull you through the inevitable hits you will take along the way.

And finally on this ladder of clarity of vision, of strategy, of vehicles, the bottom rung is **action steps**. The more specific, the more concrete, the more compelling you can make your calls to action for your stakeholders, your colleagues, your litigators, your lobbyists, your activists, your public that needs to be telling their stories—the more you can create the tools and specific actions as to how people can do something that will help advance a vehicle right up that ladder of clarity—the more likely you are to win.

And although again this sounds very clean and logical, and now perfectly laid out, we obviously developed this and pursued it in an imperfect way—but I think with a great deal of relative success. And I think it is the key to the success. Let me mention a few other elements and then we'll turn to questions. I'll keep these briefer and we can elaborate on them if you want.

So I've talked about this ladder of clarity and the elements of it. Freedom to Marry also has built a **campaign model**. We have constantly set our eyes on a prize, a goal, and built a campaign to

achieve it. And that's not only the movement with all kinds of players, and organizations, and partners, and now allies, and others stepping in—which nobody runs but becomes an organic thing in and of itself. But rather, driving that movement, guiding that movement, generating that movement is an organization, a central campaign that is going to go out of business when this is done—even when many of the other partner organizations who are doing important pieces will remain. But they're multi-front, multi-issue, multi-constituency. Freedom to Marry has one goal, one constituency, one front, and is able to focus and catalyze and drive. We're able to look for where the gaps are and fill them. We're able to make sure that the battles don't start from scratch. We're able to share the lessons learned in this state with that state, in this court case with that court case and so on. We've brought those **central capacities** to the challenge of framing the message and delivering the message through diverse messengers in a way that has built that public support. And we functioned as a funding engine, we've worked hard to raise the money not just for my own organization and the campaign, but for the various players and partners in this work in order to make sure that no matter whose watering-can the funding goes through, the field is getting the water.

E. Wolfson: This campaign has delivered what I've called the **4 multi's**; that is to say it has been multi-year, multi-state, multi-partner, and multi-methodology. It brings together the various organizations with their respective pieces into the mix, all in furtherance of the same strategy, operating in many states and on many fronts in an affirmative, sustained effort over more than a quick-gratification timeline. We have made sure to fill in the gaps and deploy litigation, public education, direct action, lobbying and legislative work—all of what Dr. King called the methodologies of social change—to make sure that they're all working as much as possible and in reinforcement of each other, in furtherance of a common strategy.

Our strategy has been **both federal and state**. We've understood that the work needed to achieve what we seek in Congress or the Supreme Court is shaped by, as I said earlier, progress in the states. And at the same time, the conversation you have in the national dialogue helps create a climate in which you can achieve your wins in the states.

The campaign has been **non-partisan and inclusive**. We've worked hard in fact to bring in conservative voices, business voices, Republican voices—and I think you've all seen the success and shifts that that has brought along. And we have worked hard, despite our

own sometimes cranky, personal impulses, to welcome people in—even people who maybe should have been there earlier, or got it wrong before they got it right, or aren't with us on all the other things we necessarily care about as people and as activists. Our goal here is to bring whoever will come in for furtherance of the goal.

So let me just sum up by saying: I think that you have to do two things when you put forward the vision and the strategy that follows from it. You have to get people to hold two thoughts in their head at the same time. First, you have to put forward a vision, you have to make people believe that this change, this call to justice, this rise to fairness is possible and will happen; because that's what inspires people to come. You have to convey that we can win, we will win, we are winning. And at the same time you also have to be trickily careful not to make people think it's "inevitable". Because then it leaves out the part where they actually do the work. It's not impossible, and only in the grandest historical sense is it inevitable. The truth is it's here where we do the work and we are winning, and will win if we do the work.

O. Johnson: We can all agree that this was an incredibly powerful presentation, and I want to move from that and to dig deeper into it by asking you about some of the messiness that this effort probably entailed and how success comes about. So one set of questions I have are: how do you engage players at all levels? At lunch, I was sitting at the table with someone who works on foreclosure prevention issues in Brooklyn and she was saying that these are issues that are very important for her organization and for her in terms of housing and the right to housing. But she's also doing her day-to-day work, so how do you engage participants at all levels? A part of that question is also that there are various players in any of our movements around civil rights who may want to have a different kind of strategy. So it sounds like a neat sort of agreement towards a campaign, but I'm sure there were a lot of challenges involved. How do you actually engage all of these different players given this complexity?

E. Wolfson: I know that it may sound neat and clear, it was not neat, it was not uniform. It still isn't done. But I think what made it succeed to a relative degree was, first of all, a lot of repetition. I mean we had tons of meetings. At an earlier point, back in my hair days, I was called "the Paul Revere of marriage" because I was going around the country talking to anyone who would listen, saying, "Marriage is coming, marriage is coming. We have the opportunity to win this." In speech after speech after speech, in

meeting after meeting after meeting, in coalition convening after convening, I would pull together people and reach out to them to really explain much of what we just talked about very briefly today.

What really pushed this movement into action, embarking us on the course that we're now seeing globally, was, the freedom to marry case in Hawaii during the 1990's, which launched this ongoing global movement. And as co-counsel in that case, I could always leave the room knowing I was going to go and keep pushing it anyway. Whether people agreed or disagreed, I had the credibility to come in and lay it out.

The power of the vision, and the persuasive and persistent delivery of the notion that it was attainable and that this was what was going to happen more or less, did prompt people to think anew, embark, and ultimately begin to get the strategy and want to be part of it in some way. Now that didn't necessarily mean that they signed on with this organization or this campaign, or even formally said "I agree with that strategy." But the repetition and the engagement, and then the success of the work as it unfolded—whether people got it or not—all reinforced an understanding of the strategy. So then more players were able to bring their pieces to the work, regardless of whether they were formally committed to the strategy or not. The strategy got imbibed, understood, and then perpetuated. At the same time, more and more players—both funders and advocate organizations, and then ultimately allies as well—did actually begin to expressly get their strategy, and see their role, and their importance, and bring their piece to the table.

I would say the other part is that we worked hard to create a mechanism that would enable everyone to share in the glory. To bring their part to the table. To be able to be part of the strategy and the campaign, again whether formally or informally, whether smoothly or not smoothly. It didn't matter that, for example, I am sure there are many people in this room who have never heard of Freedom to Marry. That's because we haven't spent a lot of time trying to brand or promote just for its own sake. We're just as happy if people understand that in New York we pulled together a coalition that didn't have anybody's name, New Yorkers United for Marriage. Or that in Rhode Island which we won two days ago, or was it yesterday—I'm losing track.

Audience 1: Congratulations.

E. Wolfson: We built Rhode Island United for Marriage, and it was all about creating the opportunity for everyone to bring

their part to the table, without refusing to acknowledge their need for involvement, credit, engagement, leadership and so on, but hopefully having imbibed and understanding the strategy.

O. Johnson: Yeah, that's very helpful. Next, I'm interested in the role of litigation. You just spoke briefly about the Hawaii case as kicking this effort off. And you've talked about the importance of multiple methodologies, which I hear is a sort of lesson from a range of social movements—a lesson you really internalized in this campaign and part of what you see as making it effective. But what do you think the contribution of litigation is in your campaign, as you reflect back? And then also, how do you make sure that litigation is connected to these other kinds of forces, and the litigators act like they are connected to these other kinds of forces?

E. Wolfson: Yeah, I mean litigation is extremely important. It was the driving engine of the campaign. It's what first turned this from a dream that people may have had, but had been taught to believe was unattainable, into something that began to seem attainable. I got leadership cachet from being the co-counsel on the Hawaii litigation. Indeed, the world changed because we had the Hawaii litigation, where we won for the first time ever a court ruling saying the government has to show a reason for this exclusion—exclusion that had been rubber stamped in the first wave of litigation right after the Stonewall Riots.

Stonewall was 1969; by 1971 there were three cases brought by couples in different states challenging the denial of marriage. So gay people have been fighting for the freedom to marry since the dawn of what we erroneously think of as the beginning of the modern gay rights movements with Stonewall. And yet the first wave was too early. It didn't succeed because we hadn't yet created this critical mass of discussion and broken the silence around gay people.

The second wave of freedom to marry litigation, propelled primarily by Hawaii, had a very different course. It was that litigation there that began to get people to think we could win. Once we delivered that message and began creating the opportunities for people to plug in and engage, people could bring political organizing, the all-important conversations in public opinion engagement, and the other methodologies into what was at that point still very much a litigation-centered strategy.

But as successful and pivotal as that transformative, galvanizing Hawaii litigation was, it wasn't enough. In the Hawaii case we won in the courts; we won the 1993 Hawaii Supreme Court

ruling saying the government has to show a reason. The case was sent back down to trial, and in 1996 we had the world's first trial on what reason there is for excluding gay people for marriage. We won that trial. The judge found there was no good reason. What happened next, however, as the case began making its way back up for what all experts believed was going to be affirmance by the Hawaii Supreme Court—given that there was no reason for the denial—is that the anti-gay forces poured millions of dollars into a 1998 campaign to amend the constitution of Hawaii and prevent the courts from ruling.

So the lesson that was learned there, ten years before Proposition 8, was that if we're going to succeed, litigation—vital and crucial as it is and absolutely valid and legitimate as a tactic, a methodology of social change—must be accompanied by political organizing and public education: framing the narrative, bringing the political piece into the mix alongside the reasoning piece. Bringing the persuasion and emotional piece alongside the logical piece, adding the other methodologies alongside litigation, that was what led to the creation of Freedom to Marry and my effort to have a mechanism that would help make all that happen. And again Freedom to Marry doesn't do everything, hasn't done everything, but has made the space, mechanism, coordination, and the call to a common strategy that has enabled those pieces to come in alongside the continuing important litigation.

O. Johnson: Yes, I wanted to shift to a question about how you choose a narrative and a frame and a message. You said, for instance that Freedom to Marry didn't brand itself, but I think that the phrase has a lot of public resonance. As I was walking here today I saw one of the many ads that bombard us as we go through Time Square, and it said "freedom." And immediately imprinted in my brain was to marry. Right? It's been a very successful branding. But you were also playing on messages about freedom that are pervasive in our culture. Another one is equality. Marriage equality. So how did you choose a frame and a narrative? And what lessons are there for others?

E. Wolfson: You're absolutely right. And absolutely, putting forward a narrative, thinking of the words that will compel others to speak up, is essential. At the same time we often put a lot of emphasis on these kinds of discussions on "message," which is important, and tend to neglect "message delivery," which is really important. Getting people to talk with others—whether they use quote-unquote or the exact right words or not—is more important than just the words themselves. That said, the words, the delivery,

and the messengers together can obviously be a very mighty force in growing public opinion. We went from 27% supporting the freedom to marry in 1996, when I was doing that trial in Hawaii, 58% of the American people supporting the freedom to marry today. That's in just seventeen years. That is breathtakingly fast, although in our daily lives it is painfully slow. Public opinion change obviously is the climate creator that enables more and more of these elected officials to do the right thing. So a short answer to your question is that we put a lot of time and energy into message and message delivery, making the case, and most importantly encouraging everyone to make the case to the people they can most effectively reach.

A good example of how important that was came a few years ago in the wake of Proposition 8, when Freedom to Marry regrouped after that painful loss in California, and really looked at what we had been doing. How had we won or lost battles going back several years? We pulled the data sets we could get, we crunched some eighty-five to 103 different data sets from different campaigns. We thought about our experience in talking to tens and hundreds of thousands of people across the country. And to make a long story short, we determined that though the case we'd been making and the language we'd been using had been effective in growing from people thinking this was something they never thought about (and never would happen, and it didn't even make any sense) not that long ago, to a near majority by 2008 – though we'd come that far, there was still a slice of people who were reachable but not yet reached, and that whatever we were saying or doing had not yet gotten them. So what could we do more effectively to make the case in a way that they would be motivated?

What we found was that in talking so much about the legal consequences of being denied the freedom to marry and the justice arguments—legitimate and valid and compelling as they are to many of us—there was a slice of people for whom that did not resonate. The justice argument for them did not answer the question why should gay people have the right to marry? They agreed in theory that gay people should not be treated unfairly, but they didn't understand: why marriage? So we dug deep and really worked hard to identify which parts of our case we could better highlight that would reach those people without stepping on our own delivery of the message with other parts of the case that were valid and compelling but didn't move them.

And if you now think back on it you will see that there has been a shift in the movement and how, happily, now the national dialogue talks about it. Several years ago it was more of a justice and

abstract principle kind of case. Now when people talk about it, it's personal—it's about love and commitment and family, and treating others as you'd want to be treated. And those are all valid—not spin or just “messaging”—that is truly what the core of this has always been. But we realized we needed to do a better job of delivering it, and Freedom to Marry first cracked that code and put that forward. Then we reached out and have worked hard to propagate that emphasis, that frame, through all the different messengers so that now people talk about it naturally. That's how they have come to think about it, but we helped create that rethinking of how best to explain it.

The most compelling example, if you want to think from your own experience, was when President Obama last year talked about how he had moved on the freedom to marry. He didn't speak as a lawyer or constitutional law scholar, or even, particularly, as president; he explained his journey, his “evolution,” in ways that were personal and authentic, and thus compelling. He talked about his daughters, Malia and Sasha, and how they had talked with him and helped change his mind. That's how we have encouraged ourselves and others to make this case because that's what it's about: It's about love and commitment and family. We need to talk about it that way because then people, who in their own lives consider marriage important, can now come to understand that gay couples have the same aspirations.

So that's an example of how as a movement we worked strategically and focused—through research, analysis, and through delivering this information to as many different voices as we could (in order to generate an echo chamber of delivery in a drumbeat of message and explanation that would encourage more and more people to talk about this)—on a way that would move the next swath of people we need it to move.

Now a lot of this is detailed in a really excellent article that *The Atlantic Magazine* did last year.⁴ I mean it spoke very highly of Freedom to Marry so of course I love it. But I actually think it's the best independent, in depth analysis of how a campaign like ours was able to succeed in some very important victories last year. It was by a reporter named Molly Ball in *The Atlantic Magazine*. It talks in much more detail about what I'm describing here.

4. ADD LINK: <http://www.theatlantic.com/politics/archive/2012/12/the-marriage-plot-inside-this-years-epic-campaign-for-gay-equality/265865/>

O. Johnson: Okay, so I have a final question before I ask all of you and open it up. You mentioned other countries, and I wonder how the international and global context played into all of this. How, did you use international law? Also were we in the United States leading or following? How did the international context hurt and help in this conversation?

E. Wolfson: Right, well obviously every country is different. Every country has its own culture, its own language, its own legal context, and so on. And the political and legal mechanisms for success—the vehicles as I described them earlier—are different in fourteen of the seventeen countries that we've won. There, marriage is determined by law at the national level. Parliament passes a law and that does that, or in a handful of countries the, the judicial system can do it. Not every country has the same rigorous judicial review that we have. So each country is different, and three of the seventeen are federal systems where we have now won the freedom to marry in some parts of the country but have yet to achieve the national victory that we achieved a few days ago in France.

So as a legal, political, and strategic matter each one is different. What is common though is the kinds of case you need to make, the way you need to explain this. The kind of climate you want to create, the generating of the personal conversations, the talking about families, telling stories, making it a question of empathy and connection—that has been a successful strategy that we have been able to share with our colleagues who then know best how to adapt and implement that in their particular countries.

International law has not yet played a significant role in any of these victories, though undoubtedly, as we begin to hit – again—a critical mass of victories in Europe, there will be renewed attempts. So far we haven't succeeded at invoking European community law and human rights standards with regard to mobility and respect cross border. Now that we've won France, so far the most populous country we've won nationally, I expect that there will be more engagement. We're working hard to win the freedom to marry in Britain at least before the end of the year. And obviously we're working hard to win more ground here in the United States. So that momentum continues, and at some point there will be international law mechanisms that will come into play. But I think in the same way, you have to make that happen by working to hit a critical mass.

O. Johnson: All right, so let's open it up. Do you want to start here in front?

Audience 2: I know that you said that you're not an expert in housing, but I was up in Albany working on rent stabilization law the year that it got passed. And we were told by the governor's office: I'm sorry yours is gonna cost, the marriage proposal is gonna cost. The other thing is that I'm not sure that the populations that we're talking about working with have as much money and capital as some of your communities. Some have, but not all. So raising money is a little bit more difficult. But the real issue here is that the questions we're raising in the housing movement have to do with the very essence of this society, which is private property. And so you're really coming up against something. I'm not saying that the prejudice against the right to marry isn't also a fundamental Christian part of this and had to be overcome. But this monetary issue seems, in my opinion changes it somewhat. Maybe you don't see it that way.

E. Wolfson: When you say "the monetary issue", I'm not sure what you mean. Do you mean the monetary issue as in the communities you're serving are not as well funded, or do you mean the fact that there are greater financial stakes in securing the right to housing?

Audience 2: The latter.

E. Wolfson: Well, first of all, I do absolutely think that just because certain things have worked in one movement or on one question in furtherance of one strategy, that doesn't necessarily mean everything automatically goes to the next one. Even within the gay rights panoply of things we care about, marriage is not the only thing that matters. I do believe that there has been no more compelling ground shifter and door opener than the fight for the freedom to marry. But we still have to have strategies and work to end employment discrimination, and to secure safety and support for youth and seniors, etc. There is no one thing that automatically does everything.

And I think you're right—that in some ways the stakes on both sides have a very different balance. When gay people win the freedom to marry, we're not going to use up the marriage licenses, and no one is going to have to marry a gay if he or she doesn't want to. So in reality a core reason for our success and a core element of the strategy has been to remind a lot of people that they don't care.

So I agree with you that it's not an automatic transfer from one to the other, but I do think there are elements that you might be able to take to heart. For example: though the economic stakes balance is very, very different, on the other hand in some ways yours

therefore is very, very important to a lot of people—and something people ought to be able to connect with if you’ve made the case powerfully and successfully enough. The right mix of stories, the right mix of engagement, and stories that don’t only make it a case of “us the privileged” and “do we want to throw crumbs to a few who are unfortunate?” You have to find a way, as we did, of making this a common concern and a common engagement. And it may not be the exact same pattern as ours, but I think the challenge is still applicable. Likewise, there are big financial interests that you are fighting against—I agree with that. But we had very entrenched interests who have great resources to draw on—that whether or not they’re the same you know, real estate capital interests, huge investment in a power structure, the subordination of women, or the disparagement of gay people—and were willing to, and have been willing to put their resources into question as well. So yes, it’s different. But I think there are commonalities. And most importantly, I think that what your movement needs to do is to better command the narrative that summons more people to action by appealing to their own values of justice, compassion, and treating others as you want to be treated—so that people don’t feel it’s this giant all or nothing / “how do I even begin to deal with something so big?” situation. I think this is part of the challenge and I’m guessing it is part of the challenge you may face. So again, I don’t think it’s one-size-fits-all, but I think there are lessons to be learned.

O. Johnson: All right.

Audience 3: I have a short question. Evan, first of all thank you for that wonderful description of your campaign. I think we can draw some lessons from it. My question has to do with the name of the campaign: Freedom to Marry. That immediately grabbed my attention, and I wonder if you can speak to that. I noticed you did not choose “right to marry”. We’ve been talking about the right to housing. Freedom in some ways has negative connotations in our world because of the stigma of people living on the street because it’s their lifestyle choice or because they like it. That’s at least what comes to my mind, so I wonder if you could talk a little bit about the choice of “Freedom to Marry”. And understanding that you’re not an expert on housing and on our world, but do you have any thoughts about “rights” versus “freedom”, or how it goes from the question of messaging? And maybe can you talk a little bit about how you came to that naming?

E. Wolfson: Well again, we’re about to talk about words, and I’m happy to do that cause I do think words are very

important—but I really want to underscore that even more important than words is message delivery, engaging people, and getting more people to reach the people around them. No one campaign and no one organization is going to be able to be the most effective ambassador to everybody. You've got to get the multiple voices. And the most important elements of delivery are authenticity, connection, and compelling arguments—armed with useful information and, hopefully, some good words.

So with those principles in mind, I chose “Freedom to Marry” because I think “freedom” does really speak powerfully to deep American values and is also true to the legal victory we sought to achieve. The Supreme Court cases have talked about the freedom to marry and about that freedom to marry as a fundamental freedom. And because marriage is preeminently about choice and commitment, it seemed to be the right language. And also because I always knew that this was not just about making the people who already agreed with me feel good—this was about finding people who don't yet agree and helping them to see it in values they embrace and understand.

Much of the time that I've been in this work—whether when I was co-counsel on the Hawaii case and working at Lambda Legal, or building this Freedom to Marry central campaign to push past the successes and failures of the 1990's—people have known me to tell them not to call it “gay marriage.” “Don't talk about same-sex marriage. Talk about marriage. Talk about marriage equality. Talk about the freedom to marry.” That was the most important shift that I really wanted to get, because it changed and changes peoples' understanding of what we're fighting for. We're not fighting for something, new and special just for us or lesser and other, called “gay marriage.” We're saying the extant freedom to marry is what gay people seek to *share*. The government has no good reason for us not being able to share in that.

So that was the most important language shift that I have tried to propel, along with the connection to core values such as love, commitment, family, fairness, and freedom. And it has led to, as you noted earlier, much more common use of the phrase “marriage equality” or just talking about marriage or freedom to marry—all of which are much better and important not only as a matter of words but because if you go and watch the news shows now and the debates now, our opponents' favorite talking line these days is to say: “Gays, gays should be treated okay. I mean we're not against gays. They should be fine, but they don't have a right to—quote/unquote— ‘redefine marriage for the rest of us.’”

That's their talking point: how marriage is "defined." And my response to that is that marriage is not "defined" by who is denied it. When gay people share in the freedom to marry, it's marriage. It's the same marriage. It's just that more people are able to do it. That's an important conceptual change that we had to bring to the American people, and then had to see it win in court as well as in legislative battles.

So all of that is talking, I think, some degree usefully and some degree probably not as relevantly for you guys. But it's that kind of thinking, backed up by research, and testing, and analysis, and testing both in terms of polling and focus groups and so on. But then also experience tested to see what really resonates and persuades, and not just what feels good to you, but what moves the people you need to move. So those are the things that I would really focus on. I think freedom is powerful because freedom is a deep American value and a really important personal thing. And I, personally, am a big fan of freedom so I think it's a very resonant and powerful phrase. I actually prefer freedom to marry to the one that probably is being used more often now: marriage equality.

And that again is in part because I think equality, while everybody believes in it, it's not something that tends to automatically motivate people to action. They first have to have the connection – to see and feel the equalness—and then they can put the roadmap of equality on it. "Marriage equality" works well for people who already are with us; it doesn't persuade people because nobody talks in their own life about equality when it comes to marriage. They talk about love, and commitment, and connection, and choice, i.e., freedom.

So to me these are the kinds of ways you need to think about how you talk about what you're talking about. Right to Housing, to me, sounds like an absolutely important, valid, and compelling cause. But is that the most effective way to make the connection to the people who haven't gotten it yet? Or is there a more personal, compelling, real and authentic (a more image summoning) way of talking about it that would be more powerful? And again, it's not just about finding a silver bullet three-word phrase. It's the whole frame and set of methodologies in which you *deliver* the engagement and persuasion.

O. Johnson: All right, we're being given the signal that we don't even have time for one more question. With that I just want to thank you. This was an incredible presentation.

IS URBAN POLICY MAKING WAY FOR THE WEALTHY? HOW A HUMAN RIGHTS APPROACH CHALLENGES THE PURGING OF POOR COMMUNITIES FROM U.S. CITIES

Brittany Scott*

This Article explores the increased prevalence of zero-tolerance policing strategies within low-income neighborhoods in major United States cities undergoing post-industrial redevelopment. To contextualize this trend, the Article assesses past public policies that isolated particular communities—for example, communities of color—within cities for decades, while economic resources were concentrated outside of cities. As a critical reference point, the Article also introduces a human rights approach to housing and land development. The Article then parses two case studies, the Safer Cities Initiative in Los Angeles’ Skid Row community and the “mixed-income” redevelopment of Chicago’s public housing. This examination scrutinizes the roles played by government, business, and media in shaping the dominant public discourse, which supports policies and practices that exacerbate existing inequities and violate myriad human rights of community members experiencing poverty and homelessness. The Article argues that criminalization expedites the displacement of “undesirable” occupants from valuable urban space through state action. The Article also determines that displacement through criminalization often renders the inequitable outcomes of redevelopment virtually invisible. Finally, the Article explores what directly-impacted communities are doing, and can do, locally to advance new models and alternative policy solutions rooted in the principles of human rights.

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I. INTRODUCTION

U.S. cities have experienced a recent influx of middle-class and affluent people. Simultaneously, long-time low-income residents are suddenly struggling to remain in cities against a tide of new investment and wealthy neighbors. Though the restructuring of urban space is often attributed to unknowable "market forces," in fact the government plays a pivotal role. Since the height of the New Deal social reforms, however, that role has shifted greatly. Most noticeably, city governments appear to assert themselves as territorially rooted market participants, proposing "public-private partnerships" in which they contribute authority over land use planning and policing, and mix public money with private capital.

Mobilized by these "public-private partnerships," the displacement of low-income communities—often deemed "less desirable" and often communities of color—not only makes way for new and enhanced real estate profits, but also disguises the large-scale entrenchment of inequities by focusing on manufactured criminality. This unconscionable situation is not inevitable; there are practical and equitable alternatives.

Parts II and III review historic and contemporary policies and practices that have shaped U.S. cityscapes. Part IV articulates a human rights approach to land development, focusing on norms and standards that would secure adequate housing for all people. Part V looks into the human impact of contemporary development by providing two case studies on ongoing struggles for the right to housing in Chicago and Los Angeles. Finally, Part VI concludes with

some examples of how a human rights-based approach offers real solutions to the ongoing crisis of displacement in U.S. cities.

II. IT WAS NO NEW DEAL

The legacies of the Great Depression and World War II redefined how and where the U.S. population was housed.¹ In response to the real estate boom and bust of the 1920s, high unemployment and a steep rate of foreclosures in the 1930s, and the poor quality of low-cost housing in U.S. cities, the U.S. government stepped into new roles in housing and land development.² These new roles, however, only deepened old divisions and inequities.³ In the middle of the 1930s, the government created two distinct public systems for housing the nation and gave preeminence to one: publicly subsidized private enterprise.⁴

The dominant system protected, and thus encouraged, private investment in home mortgages. The Housing Act of 1934 created the Federal Housing Administration (FHA) to insure lenders against losses in case borrowers defaulted; in exchange, lenders would offer “standardized” low-cost home loans (with low down payments and low fixed interest rates) to eligible borrowers.⁵ The Act also allowed FHA to create the Federal National Mortgage Association (Fannie Mae) to buy FHA-insured loans from lenders and sell them to investors.⁶ The premise of this system was to enable lenders to make more home loans with more affordable terms to more people.⁷

The subordinate system—publicly owned low-cost rental housing, i.e. the public housing program—was imagined as part of a large-scale public works program administered by the temporary

1. *Infra* notes 18–32.

2. See, e.g., *HUD Historical Background*, U.S. Dep’t of Hous. & Urban Dev. (May 18, 2007), <http://www.hud.gov/offices/adm/about/admguides/history.cfm> (citing high unemployment and poor housing conditions as prominent factors in the passing of the Housing Acts of the 1930s and 1940s); Cong. Budget Office, *Fannie Mae, Freddie Mac, and the Federal Role in the Secondary Mortgage Market 3* (2010) (referencing the drop in home prices and rise in foreclosures as key factors in the decision to create several new federal agencies involved in housing, including the Federal Housing Administration).

3. *Infra* notes 18–23.

4. *Infra* notes 5–14.

5. National Housing Act, Pub. L. No. 84-345, 69 Stat. 646 (codified at 12 U.S.C. § 1701).

6. *Id.*

7. *HUD Historical Background*, *supra* note 2.

Public Works Administration (PWA).⁸ The Housing Act of 1937 institutionalized a permanent version of the PWA's Housing Division, declaring it U.S. policy "to alleviate present and recurring unemployment and to remedy the unsafe and insanitary housing conditions and the acute shortage of decent, safe and sanitary dwellings for families of low income . . ." by employing the nation's funds and credits.⁹ The Act gave the new U.S. Housing Authority (succeeded by the U.S. Department of Housing and Urban Development, or HUD) the ability to make low-cost loans to local public housing agencies (PHAs) to demolish "slum" housing and develop public housing, and to make grants to PHAs to keep rents low and maintain the properties.¹⁰

Following World War II, the public housing program was shaped by intense political battles.¹¹ The Housing Act of 1949 more closely tied the public housing program to the objectives of "slum clearance" and "urban renewal."¹² The Act also clarified that "private housing enterprise shall be encouraged to serve as large a part of the total need as it can," and ensured that public housing could not compete with private industry through, for example, strict spending caps on construction and an "equal elimination" rule that required PHAs to, for each public unit created, destroy a "substandard" unit.¹³ Local governments could eliminate "slums and blighted areas" and meet the basic housing needs of low-income families wherever private enterprise did not, but their involvement was entirely voluntary.¹⁴

While public housing faced continuing opposition from private industry,¹⁵ Congress continuously expanded the liability of federal agencies involved in insuring, buying and selling mortgages. In 1944, the G.I. Bill promised World War II veterans the benefits of "standardized" mortgages—that is, loans with low fixed interest

8. National Industrial Recovery Act, Pub. L. No. 73-90, 48 Stat. 195 (1933) (repealed 1935).

9. Housing Act of 1937, Pub. L. 75-412, 50 Stat. 888 (current version at 42 U.S.C. § 1437).

10. *Id.* at 891–94.

11. Alexander Von Hoffman, *Enter the Housing Industry, Stage Right: A Working Paper on the History of Housing Policy* 11–12 (Joint Ctr. for Hous. Studies of Harvard Univ., Working Paper No. W08-1, 2008), available at http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/w08-1_von_hoffman.pdf.

12. Housing Act of 1949, Pub.L. 81-171, 63 Stat. 413 (current version at 42 U.S.C. § 1441).

13. *Id.* at 413, 416, 430.

14. *Id.* at 413.

15. Von Hoffman, *supra* note 11, at 13.

rates—with no down payments. These mortgages are commonly called “VA insured loans” since, like the FHA, the U.S. Department of Veterans Affairs protects lenders against losses in case borrowers default.¹⁶ In the 1970s, Congress chartered two for-profit, government-sponsored enterprises (the Federal Home Loan Mortgage Corporation, shortened to Freddie Mac, and a privatized Fannie) to buy and sell “standard” mortgages not insured by FHA or VA (the Government National Mortgage Association, Ginnie Mae, was created to buy and sell those loans).¹⁷

The two distinct New Deal housing schemes helped define the inequitable nature of development in the post-war period. Both institutionalized existing segregationist practices within the housing system based on race and class: while the mortgage system excluded low-income families and African Americans (even when taking income into account), local governments reinforced existing patterns of residential racial and class segregation when choosing sites for public housing.¹⁸

Focused on managing investment risks, FHA and VA increased access to housing through the 1970s based on people’s ability to pay as measured by income levels and credit histories.¹⁹ Most notoriously, FHA incorporated “residential security maps” used by the real estate industry into underwriting standards.²⁰ The term “redlining” refers to the practice of using red lines on these maps to delineate areas where lenders would not invest—and neighborhoods with a majority African-American population were placed within these lines—regardless of various households’ ability to otherwise satisfy lending criteria.²¹ By 1962, the U.S. government had insured \$120 billion in home loans and the homeownership rate jumped 20

16. Serviceman’s Readjustment Act of 1944, Pub. L. 78-346, 58 Stat. 291–93 (current version in scattered sections of 38 U.S.C.).

17. Federal National Mortgage Association Charter Act, ch. 649 § 201, 68 Stat. 612 (1954), amended by Housing and Urban Development Act, Pub. L. No. 90-448, 68 Stat. 612 (1968) (codified at 12 U.S.C. § 1716); Federal Home Loan Mortgage Corporation Act, Pub. L. No. 91-351, 84 Stat. 450 (1970) (codified at 12 U.S.C. § 1451).

18. J.A. Stoloff, *A Brief History of Public Housing* 7 (2004).

19. See Lan Cao, *Looking at Communities and Markets*, 74 *Notre Dame L. Rev.* 841, 855 (1999) (arguing that the pattern of so-called “rational redlining” is shaped by economic motivations, as well as discourse about community and culture).

20. Margalynne Armstrong, *Race and Property Values in Entrenched Segregation*, 52 *U. Miami L. Rev.* 1051, 1057 (1998) (finding several FHA policies tied property valuation to racial discrimination).

21. *Id.*

percent.²² The beneficiaries were more than 98 percent white and heavily concentrated in new suburban developments.²³

A confluence of factors set the stage for suburbanization and the decline of urban land values. Primarily, the suburbs were a profitable location for developers to build.²⁴ With widespread car ownership and federally funded highways, municipalities outside city centers offered cheaper land, tax advantages, and lower risks of declining property values through exclusionary land use planning.²⁵ Furthermore, cities were experiencing housing shortages exacerbated by the post-war demobilization and the migration of millions of people to cities. As the U.S. government heavily subsidized suburbanized development, redlined urban neighborhoods were confronted by progressive phases of disinvestment.²⁶ Urban land values dropped, and more active neighborhood-wide forms of disinvestment followed, including: the transformation of owner-occupied units to rentals; under-maintenance and abandonment by landlords; and loss of commercial enterprise, retail and services, and ultimately jobs.²⁷

By June 1966, urban renewal projects had razed over 400,000 housing units, forcibly displacing entire communities—just over half of which were non-white.²⁸ Construction of public housing units often lagged behind.²⁹ In addition to the re-concentration of low-income residents into public housing high-rises, the construction of the highway system often cut through the hearts of communities.³⁰ PHAs

22. *Race—The Power of an Illusion: The House We Live In* (PBS television broadcast May 8, 2003); Daniel K. Fetter, *How do Mortgage Subsidies Affect Home Ownership? Evidence from the Mid-Century GI Bills*, 5 *Am. Econ. J.* 111 (2013) (estimating VA and FHA insurance, as well as broader changes in mortgage terms, accounts for 40% of the rise in homeownership).

23. *Race—The Power of an Illusion: The House We Live In*, *supra* note 22.

24. Neil Smith, *The New Urban Frontier: Gentrification and the Revanchist City* 59–60 (1996).

25. *Id.*; William A. Fischel, *An Economic History of Zoning and a Cure for its Exclusionary Effects*, 41 *Urb. Stud.* 317, 320–21 (2004) (explaining dominance of single-family home use in U.S. zoning history).

26. Smith, *supra* note 24, at 66–67.

27. *Id.*

28. William J. Collins & Katharine L. Shester, *The Economic Effects of Slum Clearance and Urban Renewal in the United States* 4 (Nat'l Bureau of Econ. Research, Working Paper No. 10-W13, 2010).

29. The program did not increase the housing supply in cities with housing shortages. Additionally, funding for new construction fell short of the authorized number with the first Housing Act. Stoloff, *supra* note 18, at 10.

30. See Quintin Johnstone, *The Federal Urban Renewal Program*, 25 *U. Chi. L. Rev.* 301, 309–10 (1958).

sold cleared land at a discount to private developers for residential, commercial and industrial development (63 percent) and delegated the rest for streets and highways (27 percent) and public or “semi-public” use (11 percent).³¹ Often, the cleared land sat barren for a long time, much to the dismay of displaced residents.³²

III. ADDING SALT TO THE WOUNDS: THE RETURN OF MARKET FUNDAMENTALISM

In the 1970s, a new majority of the U.S. population lived in suburban areas³³ and decades of disinvestment in urban areas had created Depression-like conditions for predominately African-American low-income communities isolated from job growth in the suburbs.³⁴ While the Civil Rights Movement secured some important victories and placed racial justice at the center of housing organizing,³⁵ a “colorblind” neoliberal political bloc ultimately displaced the New Deal coalition that dominated national politics from 1932 through the 1960s.³⁶ Thus began a shift in U.S. housing policy toward a market fundamentalist approach to housing the nation premised on dismantling public housing and intensifying efforts to underwrite the market.

Based on the logic of “personal responsibility” (not collective responsibility), the Reagan administration severely restricted federal aid for housing low-income people. HUD’s budget—accounting for 95% of federal spending on low-income housing assistance—was cut by 79%, from \$94.4 billion in 1978 to \$19.7 billion in 1989 (in constant 2002 dollars).³⁷ Each subsequent administration has kept HUD’s

31. Collins & Shester, *supra* note 28, at 4.

32. Neil Smith, *New Globalism, New Urbanism: Gentrification as Global Urban Strategy*, 34 *Antipode* 427 (2002).

33. Robert A. Beauregard, *When America Became Suburban* 132 (2006).

34. John Herbers, *Black Poverty Spreads in 50 Biggest U.S. Cities*, N.Y. Times, Jan. 26, 1987, <http://www.nytimes.com/1987/01/26/us/black-poverty-spreads-in-50-biggest-us-cities.html>.

35. Larry Lamar Yates, *Housing Organizing for the Long Haul: Building on Experience* (2002), <http://comm-org.wisc.edu/papers2002/yates/yates.htm>.

36. Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* 47 (1st ed. 2010) (providing analysis of how colorblindness functions to “trivialize and disguise” structural racism).

37. Cushing N. Dolbeare & Sheila Crowley, *Changing Priorities: The Federal Budget and Housing Assistance 1976-2007*, at 16 (2002).

budget near this low point,³⁸ allowing buildings to deteriorate and new construction to come to a halt.³⁹

By the 1990s, the seductive reductive logic that public housing “caused” crime and perpetuated concentrations of poverty helped garner public support for demolitions and the integration of punitive policies and practices that target public housing communities.⁴⁰ The Clinton administration gave PHAs resources and guidance for zero-tolerance policing, introducing “one-strike” evictions—making mere suspicion of drug-related or criminal activity a sufficient basis for eviction—and imposed eligibility requirements that punished people with criminal records by restricting access to public housing.⁴¹

Clinton also introduced the HOPE VI⁴² program, providing PHAs with federal funds to leverage private capital to “revitalize” public housing deemed “severely distressed” into mixed income developments, requiring only a fraction of the units in new developments be available according to the same affordability formula as public housing⁴³ (in public housing, each household contributes 30 percent of their income⁴⁴). Congress repealed a one-for-one replacement requirement in 1998, enabling the steady decline in the nation’s public housing stock.⁴⁵

38. *Id.*

39. Peter Drier, *Federal Housing Subsidies: Who Benefits and Why?*, in *A Right to Housing: Foundation for a New Social Agenda* 111 (Rachel G. Bratt et al. eds., 2006) [hereinafter *Right to Housing*].

40. Barbara Ehrenreich, *How We Cured “The Culture of Poverty,” Not Poverty Itself*, *Mother Jones*, Mar. 15, 2012, available at <http://www.motherjones.com/politics/2012/03/barbara-ehrenreich-what-causes-poverty> (explaining the influential “culture of poverty” theory attributing poverty to the behaviors and culture of people experiencing it).

41. Screening and Eviction for Drug Abuse and Other Criminal Activity, 66 Fed. Reg. 28776 (May 24, 2001); W. Reg’l Advocacy Project, *Without Housing: Decades of Federal Housing Cutbacks, Massive Homelessness, and Policy Failures* 22 (2010) [hereinafter *Without Housing*] (explaining that public housing “crackdowns” began with anti-drug legislation in 1988; in 1996, “one-strike” evictions were legally established; and, in 1998, mere suspicion became sufficient grounds).

42. HOPE VI stands for Housing Opportunities for People Everywhere.

43. Quality Housing and Work Responsibility Act of 1998, Pub. L. 105-276, § 535, 112 Stat. 2518.

44. Brooke Amendment, Pub. L. No. 91-152, § 213, 83 Stat. 389 (1969), amended by the Omnibus Budget Reconciliation Act, Pub. L. No. 97-35, § 322, 95 Stat. 400 (1981).

45. Susan J. Popkin et al., *A Decade of HOPE VI: Research Findings and Policy Challenges*, the Urban Institute 15, 21 (2004); see Nat’l Hous. Law Project

Newer programs have encouraged the involvement of private developers in the construction and operation of housing for low-income people through tax breaks, cheap loans, and rent subsidies.⁴⁶ Some of these programs that were initially introduced in the 1960s and 1970s—notably Section 8, which uses a similar affordability formula to public housing (based on a tenant’s actual income) to subsidize low-income tenants’ rental payments in the private market—were substantially curtailed by cuts to HUD’s budget in the 1980s.⁴⁷ One program, however, enjoys enduring political support: the low-income housing tax credit (LIHTC) program, created in 1986.⁴⁸ The program allocates credits to investors in a development project that sets aside a portion of housing units to rent at rates affordable to households earning 50 percent or 60 percent of area median income (AMI).⁴⁹ Because this affordability formula is tied to the median income of an entire metropolitan area (rather than a tenant’s actual income), many low-income residents find they are too poor for these supposedly affordable housing units.⁵⁰ In fact, the average annual income for public housing households is \$13,827,⁵¹ while the median income for all U.S. households is \$64,400.⁵² Even though AMI, for the purposes of “affordable” housing calculations, differs across regions, virtually nowhere in the nation are the incomes of public housing tenants sufficient for the “affordable” housing created by LIHTCs.⁵³

et al., *False HOPE: A Critical Assessment of the HOPE VI Public Housing Redevelopment Program 25–26* (2002) (noting that while HUD declared that Section 8 rental assistance vouchers would be given to displaced public housing tenants, most families were transferred to other public housing sites, and as many as 20 percent were “lost” in the process, i.e. were no longer receiving assistance).

46. Charles L. Edson, *Affordable Housing—An Intimate History*, in *The Legal Guide to Affordable Housing Development 7–10* (Tim Inglesias & Rochelle E. Lento eds., 2011) (naming the Sections 202, 221(d)(3), 236, 515, 23 and 8 programs).

47. *Id.* at 10; Dolbeare, *supra* note 37, at 6.

48. Tax Reform Act, 26 U.S.C. § 42 (1986).

49. *LIHTC Basics*, U.S. Dep’t of Hous. & Urban Dev., http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/affordablehousing/raining/web/lihtc/basics (last visited Jan. 31, 2014).

50. See Ctr. for Urban Pedagogy, *What is Affordable Housing?* 18–20, 32–33 (2009).

51. *Resident Characteristics Report*, U.S. Dep’t of Hous. & Urban Dev., http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/systems/pic/50058/rcr (last visited Dec. 31, 2013).

52. Memorandum from U.S. Dep’t of Hous. & Urban Dev. on *Estimated Median Family Incomes for Fiscal Year 2013* (Dec. 11, 2012) (on file with author).

53. See Joint Ctr. for Hous. Studies of Harvard Univ., *America’s Rental Housing: Evolving Markets and Needs 8* (2013) (observing that, alone, LIHTCs

At the same time, Congress passed laws to combat discrimination in the mortgage system. The Fair Housing Act of 1968 prohibited discrimination on the basis of race and gender in public and private housing,⁵⁴ and the Community Reinvestment Act of 1977 set out to encourage lenders to extend credit in neighborhoods historically redlined.⁵⁵ However, narrow judicial interpretations of the former, and weak provisions in the latter, made enforcement virtually impossible.⁵⁶

By the 1990s, making homeownership affordable was a feature of national politics.⁵⁷ Congress loosened underwriting standards for mortgage lenders⁵⁸ and established monetary goals for Fannie and Freddie to buy and sell loans made to low-income families.⁵⁹ It also created federal grants to cover down payment and closing costs of low-income homebuyers.⁶⁰ In 2000, Fannie and

fail to make units affordable to extremely low-income households, but that they are sometimes used in combination with other forms of assistance, such as Section 8 vouchers, although this is not a requirement of the program); Furman Ctr. for Real Estate and Urban Policy at New York Univ., *What Can We Learn about the Low-Income Housing Tax Credit Program by Looking at the Tenants? 4-5* (2012), available at http://furmancenter.org/files/publications/LIHTC_Final_Policy_Brief_v2.pdf (finding 40% of LIHTC units serve extremely low-income households, 70% with the assistance of an additional form of subsidy, and that, generally, LIHTC tenants experience higher rent burdens than public housing or Section 8 tenants, contributing more of their income toward rent than what is traditionally considered affordable) (last visited Jan. 31, 2014).

54. 42 U.S.C. § 3601.

55. 12 U.S.C. § 2901.

56. See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 269–71 (1977) (requiring a showing of discriminatory intent, rather than discriminatory effect); Allen J. Fishbein, *The Community Reinvestment Act After Fifteen Years: It Works, But Strengthened Federal Enforcement is Needed*, 20 *Fordham Urb. L.J.* 293, 294–95 (1992) (explaining that, while the law directed federal regulators to evaluate, rate, and “take into consideration” lenders’ records of meeting the credit needs of low- and moderate-income neighborhoods, no penalties were mandated for non-compliance).

57. See, e.g., U.S. Dep’t of Hous. & Urban Dev., *Homeownership and Its Benefits*, Urban Policy Brief, No. 2 (1995), available at <http://www.huduser.org/publications/urbaff/upb2.html> (last visited Jan. 31, 2014) (describing the findings of HUD’s research into the “nature and significance of homeownership’s presumed benefits, particularly for lower income households and other underserved populations” at the behest of then President Clinton).

58. Michael E. Stone, *Pernicious Problems of Housing Finance*, in *Right to Housing*, *supra* note 39, at 94–96.

59. Edward J. Pinto, *Government Housing Policies in the Lead-up to the Financial Crisis: A Forensic Study*, Discussion Draft (2011).

60. American Dream Downpayment Assistance Act, Pub. L. No. 108-186, 117 Stat. 2685 (2003) (current version at 24 U.S.C. § 12821 (2012)).

Freddie expanded their loan purchases to include subprime mortgages.⁶¹ “Subprime” refers to the perception that the borrower is likely to default, and, on this basis, is offered less favorable terms, such as higher and variable interest rates.⁶² Thus, low-income households were granted access, but only in exchange for higher costs and greater future risks and uncertainty than higher-income households.⁶³

The massive infusion of global capital and rampant speculation in the housing market (fueled by the U.S. government’s expansion of mortgage insurance), helped push home prices up 188 percent from 1997 to 2006.⁶⁴ Urban redevelopment efforts led to a reversal of white flight,⁶⁵ driving up property values in cities and making it hard for long-time low-income residents to remain in their communities.⁶⁶ Today, no major metropolitan area offers a two-bedroom apartment at fair market rent that is affordable to someone making minimum wage.⁶⁷ In fact, across the nation, half of all renters and a quarter of mortgaged homeowners are saddled with housing costs they cannot afford and are vulnerable to displacement.⁶⁸

61. Theresa R. DiVenti, U.S. Dep’t of Hous. & Urban Dev., *Fannie Mae and Freddie Mac: Past, Present and Future*, 11 *Cityscape: J. Pol’y Dev. & Res.*, 231, 236 (2009).

62. See, e.g., Ben Bernanke, Chairman, Fed. Reserve, Address at the Federal Reserve Bank of Chicago Annual Conference (May 17, 2007) (transcript available at <http://www.federalreserve.gov/newsevents/speech/bernanke20070517a.htm>).

63. John Emmeus Davis, Nat’l Hous. Inst., *Shared Equity Homeownership: The Changing Landscape of Resale-Restricted, Owner-Occupied Housing* (2006).

64. S&P Down Jones Indices, *S&P/Case-Shiller 10-City Composite Home Price Index*, <http://us.spindices.com/indices/real-estate/sp-case-shiller-10-city-composite-home-price-index> (last visited Jan. 31, 2014).

65. Kristen Wyatt, *In a Reversal, Cities Outgrowing Suburbs*, *Wash. Times*, Jun. 28, 2012, available at <http://www.washingtontimes.com/news/2012/jun/28/in-a-reversal-cities-outgrowing-suburbs/>.

66. Diana K. Levy et al., *The Urban Inst.*, *In the Face of Gentrification: Case Studies of Local Efforts to Mitigate Displacement* 3 (2006).

67. Nat’l Low Income Hous. Coal., *Out of Reach 2012: America’s Forgotten Housing Crisis* 11 (2012).

68. Michael E. Stone, *Housing Affordability: One-Third of a Nation Shelter-Poor*, in *Right to Housing*, *supra* note 39 (noting the shortfall of affordable units forces families to make impossible choices between paying for equally essential goods and services); Joint Ctr. for Hous. Studies of Harvard Univ., *supra* note 53 (reporting a record number of renters burdened by unaffordable housing costs); see also Blake Ellis, *Student Homelessness Hits Record High*, *CNNMoney*, Oct. 24, 2013, available at <http://money.cnn.com/2013/10/24/pf/homeless-students/> (reporting that 1.2 million school-age children experienced homelessness during the 2011–12 academic year).

Between the growth in subprime loans (from approximately 1 in 20 mortgages in 1994 to 1 in 5 in 2006)⁶⁹ and the economic crisis, millions of homeowners have lost their housing to foreclosure.⁷⁰ At the same time, the U.S. government has spent over \$1 trillion bailing out mortgage investors for defaulting borrowers.⁷¹ FHA regulations require lenders to convey unoccupied (“marketable”) title to a home to file for insurance benefits.⁷² In practice, this appears to have created incentives to evict households served by federal mortgage insurance (rather than modify loans).⁷³ While the foreclosure crisis had a widespread impact, entire blocks of foreclosed homes are concentrated in urban communities of color—historically redlined and disproportionately targeted by predatory subprime mortgages.⁷⁴

The policies described above reflect the ideological grip of market fundamentalism—that is, the dogmatic belief that the best interests of society are served when public policies and resources are directed to facilitating and protecting investments in the “private” market. Although the housing needs of a vast number of U.S. households consistently go unmet—a fact supported by abundant empirical data⁷⁵—this paradigm persists in national debates and policymaking. The imposition of market fundamentalism is also progressively eliminating any guarantee of affordable housing within re-invented cities for the lowest income residents; approximately

69. Chris Arnold, *Economists Brace for Worsening Subprime Crisis*, Nat’l Pub. Radio, Aug. 7, 2007, available at <http://www.npr.org/templates/story/story.php?storyId=12561184>.

70. *New Ideas to Address the Glut of Foreclosed Properties: Hearing Before the S. Comm. on Banking, Housing, Urban Affairs*, 112th Cong. (2011) (statement of Laurie Goodman, Amherst Securities Group).

71. U.S. Gov’t Accountability Office, GAO-11-696, *Opportunities Exist to Strengthen Policies and Processes for Managing Emergency Assistance* 114 (2011).

72. 24 C.F.R. § 203.670 (1996).

73. In response, through the Helping Families Save Their Homes Act of 2009, Congress allowed the FHA to use partial claims and incentive payments to motivate lenders to modify FHA-insured loans. See Press Release, U.S. Dep’t of Hous. & Urban Dev., HUD Secretary Donovan Announces New FHA-Making Home Affordable Loan Modification Guidelines (Jul. 30, 2009), available at http://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2009/HUDNo.09-137.

74. Laura Gottesdiener, *The Backyard Shock Doctrine*, TomDispatch.com (Aug. 1, 2013), available at <http://www.tomdispatch.com/blog/175731/>

75. See, e.g., Stone, *supra* note 68, at 38 (remarking on the enduring inability of the U.S. housing system to provide adequate housing for everyone in the nation, Stone recalls President Roosevelt’s famous 1937 speech, in which he stated, “I see one-third of a nation ill-housed . . .”).

300,000 public housing units have been demolished or sold off since 1994, with an additional 10,000 lost each year.⁷⁶ Despite critique that HOPE VI projects have tracked to sites with the greatest potential to attract private investment (as opposed to greatest unmet capital needs), and re-concentrated low-income residents off-site,⁷⁷ second and third generation programs have followed under subsequent administrations, including the Choice Neighborhoods Initiative (CNI) and the Rental Assistance Demonstration (RAD) program.⁷⁸

IV. A RIGHTS-BASED APPROACH TO HOUSING AND LAND DEVELOPMENT

Sixty-five years after the United States made the mortgage system the centerpiece of U.S. housing policy, all evidence points to the reality that private debt-financed homeownership will never secure adequate housing for a sizable portion of the population. Indeed, the United Nations' Special Rapporteur on the Right to Adequate Housing stated in a 2009 report on the global financial crisis that "markets alone are unable to achieve adequate housing for all," calling for public intervention in the form of "alternatives to private mortgage and ownership-based housing systems," "the development of new financial mechanisms and tenure arrangements,"

76. U.S. Dep't of Hous. & Urban Dev., Report of Total Proposed and Total Actual Unit Activity for Each Project (2012), *available at* http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/systems/pic/sac.

77. Popkin, *supra* note 45.

78. *Choice Neighborhoods*, U.S. Dep't of Hous. & Urban Dev., http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/ph/cn (last visited Jan. 31, 2014); *Rental Assistance Demonstration*, U.S. Dep't of Housing and Urban Dev., <http://portal.hud.gov/hudportal/HUD?src=/RAD>. CNI expands on HOPE VI by supporting public-private efforts to redevelop "struggling neighborhoods with distressed public housing or HUD-assisted housing," not simply public housing, while RAD allows PHAs to pursue private mortgage debt to fund redevelopment through converting public housing properties to the Section 8 program. *Id.* Both programs re-introduce the notion of "one-for-one replacement", however, CNI allows publicly-owned rental units to be replaced with Section 8 rental assistance vouchers (paper certificates), while RAD opens the door to similar permanent losses of guaranteed affordable housing stock. See Campaign to Restore Nat'l Hous. Rights & Nat'l Econ. & Social Rights Initiative, *Selling Off Public Housing: A Human Rights Analysis of HUD's New Funding Plan* (2011), *available at* http://www.nesri.org/sites/default/files/Public_Housing_Issue_Brief.pdf.

and increased funding and construction of public housing.⁷⁹ In human rights terms, the Special Rapporteur concluded, “whether access to adequate housing is possible cannot be based on such income-based competition which [is] unacceptable discrimination.”⁸⁰ Moreover, when combined with the elimination of space dedicated to housing the lowest income residents, the market approach fails to prevent the perpetuation of social exclusion and segregation.⁸¹

We can and should guarantee truly affordable housing to everyone in neighborhoods with access to good jobs and schools, among other necessities. By placing people at the center of policy and practice—rather than market imperatives or the whim of budgeting cycles—human rights offer a normative framework that starts from basic human needs and places clear obligations on governments and private actors. Within this framework, debate focused on personal responsibility and manufactured criminality is refocused on equality, dignity and human rights.

Human rights norms begin with the principle that the purpose of a housing system is to secure adequate housing for all people, not to secure investments. Foundational human rights notions that deliver the moral authority needed to confront the subjugation of human needs to profit motives—such as universal access,⁸² equitable use of resources,⁸³ and participatory governance⁸⁴—define the approach. These notions are particularly relevant in the U.S. housing context, in which a surplus of housing exists alongside homelessness,⁸⁵ lack of affordability,⁸⁶ and re-occurring patterns of

79. Special Rapporteur on Adequate Housing, *Report on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in this Context*, ¶¶ 83, 86, U.N. Doc. A/HRC/10/7 (Feb. 4 2009) (by Raquel Rolnik).

80. *Id.* ¶ 50.

81. Special Rapporteur on Adequate Housing, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this Context*, ¶ 42, U.N. Doc. A/67/286 (Aug. 10, 2012) (by Raquel Rolnik) [hereinafter HRC-2012-1].

82. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

83. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI) A, at 3, U.N. Doc. A/6316 (Dec. 16, 1966).

84. Special Rapporteur on Extreme Poverty and Human Rights, *Report of the Special Rapporteur on Extreme Poverty and Human Rights*, U.N. Doc. A/HRC/23/36 (March 11, 2013) (by Magdalena Sepúlveda Carmona).

85. Octavio Nuiry, *America's 14.2 Million Vacant Homes: A National Crisis*, RealtyTrac (May 14, 2013), <http://www.realtytrac.com/content/news-and-opinion/americas-142-milion-vacant-homes-a-national-crisis-7723>.

segregation.⁸⁷ These standards can offer guidance on how a housing system should be structured and financed.⁸⁸

Because the right to housing belongs to all people, regardless of their income, race, or other social status, housing must be treated as more than a financial asset or commodity.⁸⁹ Nor is mere shelter sufficient to satisfy the obligations imposed by human rights.⁹⁰ To realize the right to housing for all people, the requisite services, goods, and infrastructure must be subject to some degree of public control.⁹¹ In particular, human rights experts identify public control over land use, a critical housing resource, as indispensable to achieving the right to housing and addressing obstacles inherent in the business model of private development.⁹²

Housing and other development initiatives must not cause the forced removal of individuals and communities from the housing and

86. See *supra* note 70.

87. Richard Fry & Paul Taylor, Pew Research Ctr., *The Rise of Residential Income Segregation by Income*, Pew Research Center (2012), <http://www.pewsocialtrends.org/2012/08/01/the-rise-of-residential-segregation-by-income/> (noting the persistence and prevalence of racial segregation, albeit relative decline, and the 30-year increase in income segregation in 27 of the 30 major U.S. metropolitan areas); see also Marc Seitles, *The Perpetuation of Residential Racial Segregation in America: Historical Discrimination, Modern Forms of Exclusion, and Inclusionary Remedies*, 14 J. Land Use & Envtl. L. 89, 95–97 (1996) (connecting racial isolation to zoning practices and the siting of affordable housing).

88. See, e.g., Anja Rudiger, *Reviving Progressive Activism: How a Human Rights Movement Won the Country's First Universal Health Care Law*, *New Politics* (Nov. 6, 2011), <http://newpol.org/content/reviving-progressive-activism-how-human-rights-movement-won-country's-first-universal-health>.

89. Comm. on Econ., Soc. & Cultural Rights, *General Comment No. 4: The Right to Adequate Housing*, ¶ 7, U.N. Doc. E/1992/23 (Dec. 13, 1991) [hereinafter CESCR-4].

90. *Id.*

91. Special Rapporteur on Adequate Housing, *Promotion and Protection of All Human Rights, Civil, Political, Economic Social and Cultural Rights, Including the Right to Development*, ¶ 5, U.N. Doc. A/HRC/7/16 (Feb. 13, 2008) (by Miloon Kothari) (suggesting “public goods and services” be added to the essential components of “adequate” housing).

92. *Id.* ¶ 30 (“The inability or unwillingness of States to control speculation and rein in rising rental and home prices through appropriate intervention in the market, is a major obstacle to the implementation of the right to adequate housing.”); Special Rapporteur on Adequate Housing, *Report of the Special Rapporteur on Adequate Housing*, ¶¶ 6, 78, U.N. Doc. A/HRC/22/46 (Dec. 24, 2012) (by Raquel Rolnik) [hereinafter HRC-2012-2] (noting that land speculation undermines tenure rights and that “[p]ublic land remains one of the most important potential sources of land for housing the poor”).

land they occupy, whether temporarily or permanently.⁹³ Forced evictions, including those that occur due to unbridled land speculation, have long been recognized as severe violations of not only the human right to housing, but also myriad other human rights.⁹⁴ Therefore, the circumstances for evictions must be strictly controlled,⁹⁵ and, where unavoidable after full consultation with affected people, alternative adequate housing must be provided.⁹⁶

As noted above, the right to participation is a fundamental human rights tenet and is key to ensuring that public policy is accountable to the people that it is meant to serve. In the housing context, people and communities have the right to participate in the planning, implementation, and decision-making about how their right to housing is ensured,⁹⁷ and a special effort must be made to include the most marginalized groups, such as homeless people. The housing system must also be transparent in design⁹⁸ and provide the means for everyone to hold powerful actors within the system accountable.⁹⁹ To ensure this is the case, monitoring and evaluation systems,¹⁰⁰ public access to all relevant information in straight-forward language, and appropriate public and private remedies must be available to enable all people to measure and oversee progress toward human rights standards.

Another central human rights tenet is the principle of equity—namely, that people and communities with the greatest needs should have their needs met first. Human rights norms require housing resources, particularly public subsidies and surplus property, to be acquired and distributed in response to human needs in a

93. Comm. on Econ., Soc. & Cultural Rights, *General Comment No. 7: The Right to Adequate Housing: Forced Evictions*, ¶ 2, U.N. Doc. E/1998/22, at 113 (May 14, 1997).

94. *Id.* ¶ 8.

95. *Id.* ¶ 9.

96. *Id.* ¶ 17.

97. HRC-2012-2, *supra* note 92, ¶ 10; United Nations Conference on Human Settlements, Vancouver, Can., May 31–June 11, 1976, *The Vancouver Declaration on Human Settlements and the Vancouver Action Plan, Recommendation E.4: Wide involvement*, at 76, U.N. Doc. A/CONF.70/15 [hereinafter Vancouver HABITAT].

98. Second United Nations Conference on Human Settlements, Istanbul, Turkey, June 3–14, 1996, *Habitat Agenda*, ¶¶ 48, 204, A/CONF.165/14.

99. Declaration on Cities and Other Human Settlements in the New Millennium, G.A. Res. S-25/2, U.N. Doc. A/RES/S-25/2 (Aug. 16, 2001).

100. HRC-2012-1, *supra* note 81, ¶ 17.

non-discriminatory way.¹⁰¹ Allocations of subsidies and resources must rectify existing disparities, particularly between communities.¹⁰² In other words, housing resources must be used effectively and sustainably to guarantee adequate housing for all, leaving no one behind and addressing historic disinvestments and predatory investments. Community action and self-help housing amongst the least advantaged should be supported.¹⁰³ As our case studies reflect below, this has hardly been the American experience. A human right to housing approach, in contrast, would truly be the New Deal that everyone needs to live in peace, dignity, and security.

V. CASE STUDIES: WHAT'S A CITY TO DO?

City governments are increasingly dealing with the growing crises of poverty and homelessness by defining the people most impacted as the problem that needs to be addressed, rather than recognizing how they have been affected by inequitable and exclusionary policies and practices. Instead of addressing root causes, cities have focused on removing the “blight” of poverty from high-value real estate, thereby gentrifying neighborhoods and exacerbating or ignoring underlying problems. Not only is public housing being torn down across the country, but, since the 1980s, cities have opened temporary homeless shelters¹⁰⁴ that, at best, provide a temporary roof, and, at worst, help mask the true dimensions of the crisis of homelessness.¹⁰⁵ Moreover, spurred by

101. Declaration on Social Progress and Development, G.A. Res. 2542 (XXIV), U.N. Doc. A/RES/24/2542, art. 16 (Dec. 11, 1969) (recommending fiscal systems and government spending be used to equitably re-distribute income to promote social progress); CESCR-4, *supra* note 89, ¶ 7; Vancouver HABITAT, *Recommendation C.9: National housing policies*, *supra* note 97, at 47 (including under-utilized housing stock as an available resource to States to meet housing needs).

102. See CESCR-4, *supra* note 89, ¶¶ 8, 11; Declaration on the Right to Development, G.A. Res. 41/128, U.N. Doc. A/RES/41/128, art. 5 (Dec. 4, 1986).

103. CESCR-4, *supra* note 89, ¶ 10; Vancouver HABITAT, *supra* note 97, § 3, ¶ 8.

104. Without Housing, *supra* note 41, at 5.

105. See *id.* at 16 (explaining the evolution of the federal response to homelessness from emergency shelters to various, underfunded, supportive housing programs that target particular populations); see, e.g., Shelter Partnership, Inc., *Operating at Capacity: Family Shelters in Los Angeles County* (2006) (capturing the varied stay limits of shelters within the countywide system); City of Chicago, *Shelter System*, http://www.cityofchicago.org/city/en/depts/fss/provdrs/emerg/svcs/shelter_system.html (last visited Jan. 31, 2014) (noting that many of the city's emergency shelters are closed during the day and

organized business interests, punitive local measures offered as solutions increasingly target homeless people.¹⁰⁶ Premised on the fallacy that individuals, if faced with high enough fines and jail time, will stop choosing to be poor and homeless, these policies increasingly subject low-income communities to police surveillance seeking to manage street life.¹⁰⁷ These tactics are most apparent along the distinct “gentrification frontiers” marked by the class- and race-based disparities that define urban redevelopment.¹⁰⁸ The consequences of failed policies and draconian punitive approaches are the subject of the following case studies.

A. “Plan for Transformation:” Chicago, IL

Chicago was once home to the second-largest stock of public housing in the United States, with nearly 43,000 units and an almost entirely African-American population¹⁰⁹ in the hundreds of thousands.¹¹⁰ The Chicago Housing Authority (CHA) reports that its Plan for Transformation (PFT) was 85% complete by the end of fiscal year 2011.¹¹¹ The city has torn down eighty-two public housing buildings citywide, including twenty-four towers in CHA’s most notorious complex, Cabrini-Green, spending over \$1.5 billion in the process.¹¹² In place of public housing, PFT promises new mixed-income housing, including 15,000 public housing family units and 10,000 additional units reserved for senior citizens.¹¹³ CHA asserts that PFT “goes far beyond the physical structure of public housing. It aims to build and strengthen communities by integrating

that transitional shelters allow people experiencing homelessness to stay up to 120 days with required case management services).

106. Nat’l Coal. for the Homeless & Nat’l Law Ctr. on Homelessness & Poverty, *A Dream Denied: The Criminalization of Homelessness in U.S. Cities* 25–78 (2006) (documenting a 25-year trend).

107. George L. Kelling & James Q. Wilson, *Broken Windows*, *The Atlantic*, Mar. 1, 1982, available at <http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/> (making the oft-cited argument in favor of a “broken windows” policing strategy targeting “disorderly people,” including “panhandlers” and “loiterers”).

108. Katherine Beckett & Steve Herbert, *Banished: The New Social Control in Urban America* 73–74 (2010).

109. Ben Austen, *The Last Tower: The Decline and Fall of Public Housing*, *Harper’s Magazine*, May 2012, at 42.

110. *Id.*

111. Chi. Hous. Auth., Revised FY2011 Moving to Work Annual Report: Plan for Transformation Year 12, at 4 (2012).

112. Austen, *supra* note 109, at 42.

113. *Id.*

public housing and its leaseholders into the larger social, economic and physical fabric of Chicago.”¹¹⁴ Or, as Mayor Richard M. Daley, Chicago’s mayor for twenty-two years, phrased it, “I want to rebuild their souls.”¹¹⁵

Based on this premise, the government insists the demolition of the city’s public housing has been good for residents.¹¹⁶ Property owners and developers, around Cabrini at least, have been more blunt:

You can’t miraculously invite market-rate people to buy on a nine-acre island in the shadow of Cabrini,” developer Dan McLean noted “There’s just no point because it wouldn’t fly.” Mary McGinty, the president of the Near North Property Owners Association, was equally frank. “Middle-class and upper-class people won’t move into Cabrini if it’s surrounded by buildings that are a problem The majority of Cabrini-Green needs to be pulled down.”¹¹⁷

In the early 1990s, real estate investments poured into neighborhoods bordering Lake Michigan north of the city’s central business district (known as the Loop). With its unique proximity to Chicago’s Gold Coast, business interests in Cabrini’s demolition were strong. In 1995, residential property sales in the two-block radius around Cabrini totaled around \$6 million.¹¹⁸ By 2000, annual sales had reached \$120 million, and sales from 2000 to 2005 neared \$1 billion.¹¹⁹

The demolition of Chicago’s large, centrally located public housing was accomplished as much in the public imagination as by bulldozers and cranes. Systemic disinvestment and the use of new zero-tolerance policing and evictions have been immensely powerful tools.¹²⁰ By the time CHA announced a comprehensive redevelopment

114. Chi. Hous. Auth., *The Plan for Transformation*, http://www.thecha.org/pages/the_plan_for_transformation/22.php (last visited Feb. 12, 2014).

115. *Transcript: Daley’s Last Speech to City Council*, Chicago Sun-Times, May 5, 2011.

116. Chi. Hous. Auth., *supra* note 114, at para. 6.

117. David Peterson, *A Great Chicago Land Grab*, Z Magazine, Apr. 1997, available at <http://www.thefrictioninstitute.org/landgrab.htm>.

118. Austen, *supra* note 109, at 43.

119. *Id.*

120. See *Henry Horner Mothers Guild v. Chi. Hous. Auth.*, 824 F. Supp. 808 (N.D. Ill. 1993) (considering Chicago public housing tenants who sought relief from *de facto* demolition).

plan for Cabrini in 1998, fewer than 6,000 people remained (of 15,000 people at its peak).¹²¹

In 1992, Cabrini was quickly turned into a national symbol for “everything wrong with public housing” after the shooting of a seven-year-old boy received incessant news coverage.¹²² The media and political pundits were quick to make the leap that public housing caused crime.¹²³ While public housing was not immune to crime, in the three years prior to the shooting, violent crimes in Chicago’s public housing had risen only 21 percent, while rates in the rest of Chicago jumped 31 percent.¹²⁴ Furthermore, noted one *New York Times* reporter, Cabrini was “not the most crime-plagued public housing project in Chicago.” Rather, it was the “closest to the wealth of the city’s Near North Side.”¹²⁵ In reality, Cabrini residents did better on most indicators of economic and social wellbeing compared to residents in public housing further from the jobs and schools on the city’s Near North Side.¹²⁶

In the week after the shooting, hundreds of police officers, federal agents and city workers engaged in warrantless “emergency” sweeps of each of the Cabrini buildings looking for weapons (finding only nine guns in total) and drugs, forcibly removing occupants without leases, and sealing off four of the high-rises.¹²⁷ Later, when the sweeps were found unconstitutional in a challenge brought by the ACLU,¹²⁸ the Clinton administration gave CHA \$10 million to deploy

121. Coal. to Protect Pub. Hous. et al., *From Housing to Homelessness: The Truth Behind the CHA’s Plan for Transformation*, available at www.limits.com/cpph/Public%20Housing%20Flier.pdf.

122. Mick Dumke, *The Shot that Brought the Projects Down*, Chicago Reader, Oct. 14, 2012 (five-part series), available at <http://www.chicagoreader.com/Bleader/archives/2012/10/12/the-shot-that-brought-the-projects-down-part-one-of-five>.

123. *Id.*

124. Patrick T. Reardon, *Without Sweeps, CHA Crime Might Be Worse*, Chi. Tribune, Oct. 26, 1992, available at http://articles.chicagotribune.com/1992-10-26/news/9204070132_1_cabrini-green-violent-crime-crime-statistics-show.

125. Don Terry, *Chicago Housing Project Basks in Tense Peace*, N.Y. Times, Nov. 2, 1992, at A10 [hereinafter Terry-1].

126. Don Terry, *The Final Farewell at Cabrini Green*, N.Y. Times, Dec. 9, 2010, available at <http://www.nytimes.com/2010/12/10/us/10cnccabrini.html?pagewanted=all&r=0>.

127. Terry-1, *supra* note 125; see also Robert Lee, *Proposal to ‘Seal Off’ Projects is Part of a National Trend*, Balt. Sun, Jan. 16, 1991, available at http://articles.baltimoresun.com/1991-01-16/news/9113000464_1_public-housing-annapolis-philadelphia-housing (describing similar “sweep” programs in Philadelphia, Chicago, Newark and Boston).

128. See *Pratt v. Chi. Hous. Auth.*, 848 F. Supp. 792, 797 (N.D. Ill. 1994).

180 additional police officers to patrol CHA buildings and encouraged “constitutional” stop-and-frisk practices (with funds meant for rehabilitation services), and began calling for PHAs to demolish and replace public housing with mixed-income development by leveraging public money to secure private debt.¹²⁹

In 1995, HUD initiated a federal takeover of CHA that lasted through 2000.¹³⁰ By 1996, the HUD-controlled CHA joined city officials in unveiling a billion-dollar Near North Side Redevelopment Plan for Cabrini—the “direction public housing must go,” said Joseph Shuldiner (the federally appointed receiver).¹³¹ Between 1996 and 1998, overall CHA occupancy rates declined by more than 20%.¹³² In 1997 alone, CHA, wielding its new one-strike authority, filed evictions against more than a quarter of the families living in the Cabrini-Green Homes Extension, a mix of mid- and high-rise buildings, while filing against less than 1% of families at Altgeld Gardens on the far South Side, an area removed from gentrification pressures.¹³³ In 2000, the city announced the Plan for Transformation (PFT), proposing to take the model for redeveloping public housing, introduced at Cabrini, citywide.¹³⁴

Thirteen years after PFT was initiated and several more years since the first Cabrini high-rises were taken offline, J.R. Fleming, a former resident of Cabrini and organizer with the Coalition to Protect Public Housing, told *Harper’s Magazine* that the “Plan for Devastation could be considered a success, if the metric was forcing poor people off prime real estate and moving them to areas where there were even fewer jobs and transportation options, where crime, gang activity, and schools were worse.”¹³⁵ Recent research supports Fleming. While 75% of CHA families have expressed an interest in returning to their old neighborhood, fewer than 20 percent

129. Gwen Ifill, *Clinton Asks Help On Police Sweeps in Public Housing*, N.Y. Times, Apr. 17, 1994, available at <http://www.nytimes.com/1994/04/17/us/clinton-asks-help-on-police-sweeps-in-public-housing.html>.

130. Joel Kaplan & Flynn McRoberts, *Officially, HUD Takes Over CHA*, Chi. Tribune, May 31, 1995, at 1.

131. Don Terry, *Chicagoans Split on Housing Plan*, N.Y. Times, Jun. 29, 1996, at 1.

132. Brian Rogal, *CHA Families Exit as Eviction Threat Grows*, Chi. Reporter, Sep. 28, 2007, at 4–5 (originally published in March 1999).

133. *Id.* at 4.

134. Chi. Hous. Auth., *supra* note 114.

135. Austen, *supra* note 109, at 46. In 2009, Fleming co-founded the Chicago Anti-Eviction Campaign. See Anti-Eviction Campaign, <http://www.chicagoantieviction.org> (last visited Jan. 31, 2014).

will be able to return because of the higher rents of replacement units, in addition to prohibitive new eligibility requirements.¹³⁶ In many cases, to date, cleared sites that public housing tenants hope to repopulate sit vacant.¹³⁷ Although many families threatened with eviction walked away without Section 8 vouchers,¹³⁸ those who did take a voucher faced new challenges on the private market, given the insufficient supply of affordable units.¹³⁹ So far, more than 90 percent of CHA residents have been re-segregated to high-poverty neighborhoods with limited access to good jobs and good schools under PFT.¹⁴⁰

B. “Safer Cities Initiative:” Los Angeles, CA

The Skid Row community in downtown Los Angeles is home to an estimated 12,000-15,000 residents, of whom 95 percent are extremely low-income and a third are homeless.¹⁴¹ Seventy-five percent of Skid Row residents are African American, and African American men are particularly over-represented in the community’s homeless population.¹⁴² “Comprising about 0.85 square miles, Skid

136. Sudhir Venkatesh & Isil Celimli, *Tearing Down the Community*, Shelterforce, (2004), <http://www.nhi.org/online/issues/138/chicago.html>.

137. Austen, *supra* note 109, at 43.

138. In 1997, 86.3% of those who moved out of Cabrini did not leave with a voucher. Rogal, *supra* note 132.

139. Molly Thompson, *Relocating from the Distress of Chicago Public Housing to the Difficulties of the Private Market: How the Move Threatens to Push Families Away from Opportunity*, 1 NW. J. L. & Soc. Pol’y 267, 290 (2006) (presenting key differences in the relatively successful Gautreaux Program relocating 7,000 CHA residents—largely to low-poverty suburban areas—compared to the private market struggles and re-segregation of residents forced to move under PFT).

140. William P. Wilen, Dir. of Hous. Litig., Sargent Shriver, Nat’l Ctr. on Poverty Law, Testimony before the Nat’l Comm’n on Fair Hous. & Equal Opportunity (July 15, 2008); Susan J. Popkin et al., Urban Institute, *The CHA’s Plan for Transformation: How Have Residents Fared?* 3–4 (2010), available at <http://www.urban.org/uploadedpdf/412190-CHAs-Plan-for-Transformation.pdf>.

Following a sample of residents relocated from a public housing development on Chicago’s Near South Side, the Chicago Panel Study found many residents felt the quality of their housing and sense of safety had improved, but that they generally continued to live in poor and predominately African American neighborhoods, suffered from “shockingly poor health,” and struggled with additional costs imposed by the private housing market.

141. L.A. Cmty. Action Network, Federal Bureau of Investigation, *Color of Law—Civil Application, Request for Investigation and Remedies for Violations of Title 42, U.S.C., Section 14141 (Police Misconduct Statute) 2* (2006).

142. *Id.*

Row contains about 0.18 percent of the land area of the city but about 7.6 percent of the homeless population, a density forty two times the citywide average [as of 2005].¹⁴³ It is no coincidence that a disproportionate number of homeless people live in Skid Row. It is, as one service provider put it, “an endangered low income housing community,” in which the majority of residents live in low-cost housing affordable to the very poor.¹⁴⁴ A high proportion of the city’s shelter beds are also available in Skid Row.¹⁴⁵

Low-income housing and homeless services were systematically concentrated into the confines of Skid Row and away from hoped-for redevelopment of the central business district. In 1976, the L.A. City Council adopted an official “containment” policy with the passage of a redevelopment plan institutionalizing a compromise between developers that wanted to keep the homeless away from new development and homeless advocates who wanted to see more services.¹⁴⁶ By the mid-1980s, the policy became less popular with business interests raising concerns that “spillover into the central business district threatened the value of investments”¹⁴⁷ and, in 2002, the Central City Association (CCA) issued a report, asserting:

Downtown Los Angeles is on the cusp of an urban renaissance. Our fondest dreams of Smart Growth, with workers living in affordable, high density buildings near transit, employment, cultural, and retail centers may finally become a reality in Downtown. However, this renaissance is threatened every day by street encampments, drug deals, overdoses, and panhandlers.¹⁴⁸

This “urban renaissance,” according to the Urban Land Institute, began with the city’s political and business leaders coming

143. Gary Blasi & the UCLA Sch. of Law Fact Investigation Clinic, *Policing Our Way Out of Homelessness?: The First Year of the Safer Cities Initiative on Skid Row* 9 (2007).

144. Bernard E. Harcourt, *Policing L.A.’s Skid Row: Crime and Real Estate Redevelopment in Downtown Los Angeles [An Experiment in Real Time]*, 2005 U. Chi. Legal F. 325, 336 (2005).

145. Blasi, *supra* note 143, at 10.

146. Harcourt, *supra* note 144, at 391.

147. Kelsey Longmuir, *Power, Poverty and Policy: Evaluating Anti-Violence Strategies in the Context of Los Angeles’ Skid Row* 15 (April 2011) (Senior Comprehensive Project, Occidental College) (on file with author).

148. Cent. City Ass’n of L.A., *Downtown’s Human Tragedy: It’s Not Acceptable Anymore* 7 (2002), available at <http://ccala.org/downloads/LegAffrsPublications/2002CCAhomelessnesswhitepaper.pdf>.

together and passing the Adaptive Reuse Ordinance in 2000, permitting conversion of “functionally obsolete buildings” to residential uses.¹⁴⁹ Since 2000, downtown Los Angeles has seen \$15 billion in investments tailored to attract young professionals.¹⁵⁰

In 2002—the same year CCA published its report—the L.A. Police Department’s (LAPD) Central Area, covering Skid Row, produced a document called “Homeless Reduction Strategies,”¹⁵¹ which was the basis of the LAPD’s subsequent crackdown on homeless people. A central strategy has been enforcement of a rarely used quality-of-life ordinance, which made it a punishable offense to sit, lie, or sleep on the street, sidewalk or any other public way.¹⁵² LAPD, under the ordinance’s authority, began near daily sweeps of Skid Row.¹⁵³ In 2003, a federal judge found the sweeps unconstitutional, noting that “human beings are biologically compelled to rest, whether by sitting, lying or sleeping” and enjoined the city from enforcing the ordinance so long as the number of homeless persons exceeded the number of available shelter beds.¹⁵⁴

For years, there was widespread agreement that there were far more homeless people than beds to accommodate them—in the range of 80,000 homeless people in L.A. County and only 14,000 beds.¹⁵⁵ The official policy of the LAPD is that it does not enforce quality-of-life ordinances against anyone conducting life-necessitating activities in public. So, each night, the LAPD says, it calls seven shelters to determine the number of empty beds, finding on average between seventy and 140.¹⁵⁶ With this data, the LAPD asserts there

149. John C. Cushman, III, *Downtown LA’s Urban Renaissance*, Urban Land Ins. L.A. (Dec. 29, 2011), <http://la.uli.org/urban-landscape/downtown-las-urban-renaissance/>.

150. *Id.*

151. L.A. Police Department document, “Homeless Reduction Strategies: Central Area,” October 4, 2002. FI000754.

152. L.A. Mun. Code § 41.18(d).

153. Eric Malnic, *Police Continue Homeless Sweeps on Skid Row Despite ACLU Suit*, L.A. Times, Feb. 21, 2003, at B3.

154. *Edward Jones v. City of L.A.*, 444 F.3d 1118, 1136 (9th Cir. 2006).

155. *Id.* at 1121–22; *id.* at 1130 n.4 (finding “a chronic and severe gap between the number of homeless individuals and the number of available beds in Los Angeles”).

156. Anat Rubin, *Critics Dispute LAPD’s Assessment of Shelter*, Daily Journal, Oct. 19, 2006, at 1. *But see* Gary Blasi, *Shelter Availability in Los Angeles’ Skid Row and the Enforcement of L.A.M.C §41.18(d) (2006)*, available at www.law.ucla.edu/docs/SHELTER%20AVAILABILITY%20IN%20LA-1113.pdf.

(disputing the claim that there are significant numbers of shelter beds available for homeless individuals in the Skid Row area of Los Angeles).

are plenty of empty beds and claims Skid Row's homeless residents are "shelter resistant."¹⁵⁷ In reality, of course, once homeless, people are forced to choose between engaging in certain activities in public, despite cultural expectations, or waiting in line to sleep in a shelter bed, which may disappear quickly. And, either way, sleeping in a shelter bed likely requires returning to the street the next morning.

Nevertheless, in 2006, the LAPD, Mayor Antonio Villaraigosa, and City Attorney Rocky Delgadillo launched the Safer Cities Initiative (SCI) in Skid Row.¹⁵⁸ At SCI's launch, they deployed fifty additional uniformed officers to Skid Row.¹⁵⁹ They also sent dozens of undercover narcotics officers, resulting in an unprecedented concentration of police resources in a neighborhood with relatively low violent crime rates.¹⁶⁰ While the LAPD Central Area's 2002 Homeless Reduction Strategy "referred to efforts to control the 'criminal homeless element' almost as if the phrase was redundant, the beginning of the Safer Cities Initiative in 2006 was marked by a more nuanced [communications] approach."¹⁶¹ Police Chief William Bratton claimed:

The condition of being homeless in and of itself is not a crime. Los Angeles police officers will focus their activities on behavior, not the condition of being homeless. . . . The criminal element, which preys upon the homeless and mentally ill, will be targeted, arrested and prosecuted to the fullest extent of the law. But we will never arrest our way out of this problem, nor do we intend to.¹⁶²

Little evidence backs up city claims of SCI's positive aspects.¹⁶³ In contrast, the L.A. Community Action Network (LA CAN), a resident-led community organization based in Skid Row, has seen time and again how SCI's increased policing prevents people from accessing housing and services. As a result of arrest, 52% of residents surveyed report losing housing and 42% report losing

157. Rubin, *supra* note 156.

158. Press Release, Los Angeles Police Department, Chief Bratton Gives Safer Cities Update on Skid Row (June 8, 2007), *available at* http://www.lapdonline.org/june_2007/news_view/35562.

159. *Id.*

160. Blasi, *supra* note 143, at 41 (noting that violent crime in Skid Row is "not particularly exceptional . . . relative to the other parts of the inner city").

161. *Id.* at 42 (footnote omitted).

162. *Id.* (citing the Mayor's Office).

163. Duke Helfand & Richard Winton, *Bratton Admits Skid Row Displacement*, L.A. Times, Oct. 4, 2007, at B2.

services. Due to policing and mass arrests, citations and detentions have become the norm; 8 in 10 residents fear the police.¹⁶⁴

According to LA CAN's documentation, SCI impacts not just homeless people, but also the housed.¹⁶⁵ A 2010 survey LA CAN conducted with 200 demographically representative Skid Row residents (both housed and homeless) showed incredibly high rates of citation (56 percent) and arrest (54 percent) in the past year; handcuffing and/or searches (75 percent) due to minor crosswalk violations (which made up the majority of citations issued); and a prevalent perception of racial profiling by LAPD (75 percent). Amongst homeless individuals living on Skid Row, the numbers are even higher, with 82.8 percent receiving a citation, 82.1 percent an arrest, and 89.3 percent a stop/detainment in the last year.¹⁶⁶

LA CAN also points out that the fines issued under SCI are generally between \$159 and \$191; most Skid Row residents live on between \$221 and \$850 per month.¹⁶⁷ In just a few months after non-payment, the fines can increase to over \$600, the person's driver's license may be suspended, and a warrant is often issued for arrest.¹⁶⁸ Reviewing data from SCI's first year, UCLA's School of Law Fact Investigation Clinic noted that while serious crime had declined in Skid Row, this was in an area that was not particularly exceptional in terms of violent crime relative to other parts of the city,¹⁶⁹ and there was no causal evidence linking the policing of minor infractions to any drop in crime.¹⁷⁰ Rather than reducing crime, LA CAN argues that quality-of-life laws create and enforce segregated space, keeping impoverished and homeless people out of public spaces and out of public consciousness.¹⁷¹ As Pete White, Co-Director of LA CAN put it in a recent interview:

164. L.A. Cmty. Action Network, Community-Based Human Rights Assessment of Skid Row's Safer Cities Initiative 1, 4 (Dec. 2010), available at <http://cangress.org/wp-content/uploads/2012/11/sci-2010-report-final1.pdf>.

165. *Id.* at 1 (noting Skid Row's citations rate is 69 times that of other neighborhoods, with roughly 24,000 citations issued in the first 2 years of SCI—roughly one citation per year per resident).

166. *Id.*

167. *Id.*

168. *Id.*

169. Blasi, *supra* note 143, at 41.

170. *Id.* at 42.

171. See, e.g., Paul Boden, *The Quality of Whose Life? An Introduction to America's Modern Anti-Poor Movement*, Huffington Post, (Oct. 5, 2010), http://www.huffingtonpost.com/paul-boden/the-quality-of-whose-life_b_749280.html (showing how quality-of-life laws serve to banish homeless

People want to think that displacement and gentrification are just about market forces banishing people. But, in reality, that's driven by policy and often also driven by state action and police forces to move those who have another sense of 'place' for the 'space.'¹⁷²

VI. RE-ENVISIONING THE CITY'S ROLE: HUMAN RIGHTS ALTERNATIVES TO CRIMINALIZATION

While the entire U.S. housing system is in dire need of transformation, this Section focuses on what communities, organizing and building power, can do locally. Cuts in federal aid for low-income housing and community development programs do not dictate the all-out abandonment of low-income communities by city governments. Even if claims of resource scarcity were accurate, much can be done under the auspices of community and municipal control to alleviate human suffering and meet fundamental human needs.

To begin with, a city can institutionalize the treatment of housing as a fundamental human need and human right rather than a commodity or financial asset. The City of Burlington, Vermont, advanced at least part of this notion in 1984 when it made "perpetual affordability" the cornerstone of its housing policy.¹⁷³ Under city law, housing produced using public subsidies must be forever affordable. To achieve this, city officials and housing activists created a community land trust (CLT) with a \$200,000 city grant.¹⁷⁴ A CLT is a nonprofit organization that holds land for the benefit of the community—keeping it out of the speculative market, like a PHA.¹⁷⁵ Though Burlington's CLT retains ownership of the land, it typically sells buildings constructed on top to individuals, cooperatives,

people like past unconstitutional exclusionary Jim Crow and vagrancy laws). Boden is the Organizing Director of the Western Regional Advocacy Project, a coalition of homeless-led community groups, including LA CAN.

172. *Los Angeles Community Action Network Organizers Becky Dennison and Pete White*, KPFFK Pacifica (March 19, 2013), <http://voicesfromfrontlines.com/los-angeles-community-action-network-organizers-becky-dennison-and-pete-white/#.UwqFcfISZqU>.

173. Vermont Housing and Conservation Trust Fund Act, Vt. Stat. Ann. Tit. 10, § 321 (1987).

174. John Emmeus Davis & Alice Stokes, *Lands in Trust, Homes that Last: A Performance Evaluation of the Champlain Housing Trust 9* (2009).

175. International Independence Institute, *The Community Land Trust*, in *The Community Land Trust Reader 221* (John Davis ed., 2010).

nonprofit landlords, or any other entity, providing exclusive land use through long-term ground leases.¹⁷⁶

The advantage many advocates see in the “classic CLT model” (compared to a classic PHA) is the ability to create—through a flexible nonprofit structure—new means of accountability for the intended beneficiaries of public investments and opportunities for direct participation in development projects that affect them, while safeguarding against the loss of subsidized units. PHAs are notoriously influenced by business interests wanting to use the PHA’s land for profit.¹⁷⁷ This dynamic repeatedly gives rise to community frustrations at the inability to control the use of land they occupy.¹⁷⁸ CLTs offer one structure through which communities can exert this control.¹⁷⁹

As land owner and lessor, the CLT is responsible for ensuring long-term community objectives (e.g., access to affordable housing) are achieved from public investments.¹⁸⁰ To maintain affordability, the CLT obliges resale restrictions and reserves a right to first purchase.¹⁸¹ It also reserves the right to prevent losses of subsidized housing to absentee owners and in cases of foreclosure.¹⁸² Under regular performance reviews, Burlington’s CLT is successful at maintaining housing consistently affordable to the same income bracket as initial households leave and new households move in.¹⁸³

If a nonprofit strategy is pursued, as in the case of Burlington, city governments will still have an important role to play. For one, cities must establish performance requirements to oversee

176. Davis & Stokes, *supra* note 174, at 10–11.

177. Institute for Community Economics, *Land and Property: Individuals and Communities*, in *The Community Land Trust Reader*, *supra* note 175, at 239.

178. *Id.*

179. The “classic CLT” has a tri-partite governing board elected by a dual membership: people who live in housing on CLT land and other people who live in a defined “community” area; board members represent each membership class and an equal part is elected by the entire membership. *Id.* at 221. Fleming and other former CHA residents, many homeless, have also proposed a “people’s housing authority” with greater accountability mechanisms. Shanika Gunaratna, *A People’s Housing Authority*, *Chicago Tonight*, WTTW, Jun. 18, 2013, <http://chicagotonight.wttw.com/2013/06/18/people-s-housing-authority>.

180. *See id.*

181. John E. Davis, *Shared Equity Homeownership: The Changing Landscape of Resale-Restricted, Owner-Occupied Housing* 18–19 (2006).

182. *Id.* (noting options for notice of default; opportunity to cure; opportunity to acquire property after foreclosure; and opportunity to control the property after foreclosure).

183. Davis & Stokes, *supra* note 174, at 21–27.

the overseer, ensuring compliance with, for example: non-discrimination in occupant selection; resale restrictions; and the provision of adequate alternatives in cases of eviction.

Achieving perpetual affordability is only part of the affordability problem. The first problem is ensuring housing is affordable to extremely low-income people, and making household contributions commensurate with household incomes. For this, the equitable use of public resources is key, regardless of whether a PHA, CLT or other “non-speculative social owner”¹⁸⁴ owns the property. City governments can prioritize spending as well as surplus property dispositions to subsidize the operations and maintenance of housing for low-income people. While Burlington’s CLT has primarily focused on making homeownership an affordable *and* stable option for lower-income people (60 percent AMI),¹⁸⁵ Picture the Homeless—a grassroots organization led by people who are or have been homeless in New York City—identified several CLTs in urban areas that house extremely low-income people.¹⁸⁶ When asked how they cover their costs, nearly half said they received more than 50 percent their funding from government sources: federal, state and local.¹⁸⁷ Almost half also received land and housing cheaply (or donated) from government agencies.¹⁸⁸

In the midst of the foreclosure crisis, while millions of vacant homes plague urban areas, established CLTs, organized communities, and housing advocates have highlighted the role municipalities could play in equitably redistributing these unutilized properties. In particular, advocates recognize public land banks, emerging throughout the country in the last decade, offer a tool that could be used in partnership with social owners to increase the number of permanent low-cost housing units.¹⁸⁹ Through the municipal powers

184. By “non-speculative social owner” we mean any entity, subject to resident control, which holds housing off the market for the benefit of a defined community.

185. Davis & Stokes, *supra* note 174, at 40.

186. City Coll. of N.Y. & Picture the Homeless, National Survey of Community Land Trusts and Mutual Housing Associations: Executive Summary (2011), available at http://www.picturethehomeless.org/PTH_National_CLT_Survey_Findings.pdf.

187. *Id.*

188. *Id.*

189. See, e.g., Campaign to Take Back Vacant Land, Put Abandoned Land in Our Hands: A City-Community Partnership to Transform Blight into Jobs, Homes and Parks (2011); John E. Davis, *The Untapped Potential of Land Bank Land Trust Partnerships*, *Rooflines* (Oct. 31, 2012),

granted to public land banks, cities acquire, clear title to, and re-distribute vacant housing.¹⁹⁰ While existing public land banks mainly clear title to put the land back in the market,¹⁹¹ priorities could be attached to policies governing land banks, directing surplus property to social owners and meeting housing needs.¹⁹²

Another key strategy involves stemming losses to existing deeply affordable housing, whether owned by a government, for-profit, or non-profit entity. There are various means of public intervention available, including: regulatory power to prevent deterioration, demolition and conversion; prioritizing public funds for converting units at risk of loss to social owners or to stabilize units already under social ownership; and ensuring, if there is a loss, persons displaced are provided with adequate alternative housing.¹⁹³ Perhaps most importantly, these efforts should go hand-in-hand with enhancing occupant protections and introducing accountability mechanisms that create structural support against future loss.¹⁹⁴

Community participation was key to the success story of Dudley Street Neighborhood Initiative (DSNI) in the Roxbury/North Dorchester area of Boston, long the poorest neighborhood in the city.¹⁹⁵ Beginning in the 1950s, an unnatural disaster of government negligence, banking discrimination, and arson for profit had stripped the neighborhood of services and destroyed homes and businesses.¹⁹⁶ By the early 1980s, nearly one-third of Dudley land lay vacant.¹⁹⁷ The empty lots became illegal dumping grounds for garbage and toxic waste. The community worried it would be driven out altogether by urban renewal, favoring costly housing, office towers, upscale retail,

http://www.rooflines.org/2928/the_untapped_potential_of_land_bank_land_trust_partnerships.

190. Frank S. Alexander, *Land Banks and Land Banking* 9 (2011).

191. Sage Computing, Inc., *Revitalizing Foreclosed Properties with Land Banks* 3 (2009) (stressing the incentive for local governments to transform “tax-delinquent” property into “tax revenue-generating” properties).

192. Alexander, *supra* note 190, at 106.

193. John E. Davis, *Between Devolution and the Deep Blue Sea: What’s a City or State to Do?*, in *Right to Housing*, *supra* note 39 (presenting U.S.-based best practices for creating more equitable outcomes in development).

194. See Dick Cluster, *The Right to Housing: A Blueprint for Housing the Nation* 24–26 (1989).

195. *Dudley Street Neighborhood Initiative Creates an Urban Village*, Civic Practices Network, <http://www.cpn.org/topics/community/dudly.html> (last visited February 8, 2014) [hereinafter CPN].

196. *Id.*

197. Holly Sklar, *Dudley Street Neighborhood Initiative: Building on Success, 1984-2002*, at 2 (2002).

and high profits for developers over affordable homes and local businesses.

Instead of leaving their fate in the hands of city planners and private developers, residents did something extraordinary.¹⁹⁸ Dudley residents founded a community organization, DSNI. They organized a Don't Dump On Us campaign and cleaned up the vacant lots, building community hope and power.¹⁹⁹ Then, they flipped planning on its head. Instead of trying to influence a top-down urban renewal process led by city government and developers, they created their own bottom-up comprehensive revitalization plan²⁰⁰ and, in 1987, convinced the city to adopt it.²⁰¹ In 1988, DSNI made history as the only community group in the nation to win the power of eminent domain to acquire vacant land for resident-led development.²⁰² DSNI is a useful reminder that municipalities have enormous powers that can be harnessed by communities to prevent displacement and meet their particular community needs.

DSNI created a CLT to hold the land off the market.²⁰³ Over the past two decades, it has repurposed much of the land with affordable housing for low-income families.²⁰⁴ Today, DSNI's CLT holds 1,300 parcels of land for the benefit of the community and has the only permanently affordable housing in Boston.²⁰⁵ The membership-driven CLT, with a board comprised of mostly residents (and minority representation of community partners from nonprofits, faith groups and small businesses),²⁰⁶ ensures residents have a central role in land use and development decisions that impact their living conditions.²⁰⁷ This lasting infrastructure enables the community to assert control over land they hold in common, and the collective power to promote broader transformation in public policies beyond their community's boundaries.

198. CPN, *supra* note 195.

199. Dudley Street Neighborhood Initiative, www.dsni.org (last visited Feb. 8, 2014).

200. DAC Int'l. Inc., *The Dudley Street Neighborhood Initiative Revitalization Plan: Comprehensive Community Controlled Strategy 7–8* (1987).

201. Sklar, *supra* note 197.

202. *Id.*

203. CPN, *supra* note 195.

204. Sklar, *supra* note 197.

205. Dudley St. Neighborhood Initiative, <http://www.dsni.org/history> (last visited Feb. 23, 2014).

206. *Id.*

207. *Id.*

In recent years, community benefit agreements (CBAs) have become a common tool used on the East and West Coasts to prevent the worst excesses of development.²⁰⁸ CBAs are legally enforceable contracts, in which a developer agrees to provide community benefits—often including affordable housing or financial contributions to an affordable housing trust—in exchange for a community’s agreement not to oppose a particular project. They typically arise from a substantial community response to a project, and the strongest CBAs tend to derive from the powerful organizing of a broad coalition of community and labor groups. In some jurisdictions, CBAs are enhanced by statutory provisions enabling public enforcement of CBAs through the city’s incorporation of them into public development agreements.²⁰⁹ They can provide rights-based targets for the project and hold the developer accountable to the community through litigation. Of course, litigation may be beyond the reach of community groups. For this and other reasons, entering into CBAs may not be a sufficiently robust solution. Instead of waging case-by-case campaigns for CBAs, communities may be better off codifying similar conditions often sought through CBAs into local law and linking the use of public resources with a citywide community needs assessment.

VII. CONCLUSION

There is no band-aid solution to the growing crises of mass homelessness and poverty. The eradication begins with building a public consciousness and dialogue that acknowledges that these circumstances are untenable. We must also recognize, as this Article makes evident, that we create poverty and homelessness through our policies and practices. The barriers that keep so many families from enjoying adequate and secure housing, full participation in community life, dignified education and employment, and good health, are not for a lack of dreams, work, or morality. The obstacles are structural and emerge from a lack of collective responsibility. Human rights provide a powerful framework for beginning to develop the language, tools, new models, and comprehensive solutions sorely

208. Patricia E. Salkin & Amy Lavine, *Negotiating for Social Justice and the Promise of Community Benefits Agreements: Case Studies of Current and Development Agreements*, 17 J. Affordable Hous. & Cmty. Dev. L. 113, 130 (2008).

209. Julian Gross, *Community Benefits Agreements: Definitions, Values, and Legal Enforceability*, 17 J. Affordable Hous. & Cmty. Dev. L. 35, 47 (2008).

needed to move us from creating poverty to ensuring dignity for every community, family, and individual in the United States.

As this brief account suggests, local governments have an important role to play in the realization of equitable housing alternatives. Government agencies can (and have) successfully helped initiate these alternatives. Local governments should not only cease to inflict harm on community members with the greatest housing needs by criminalizing homelessness and poverty, but should also become advocates for a new human rights approach by working with communities to meet the basic needs of all residents and advocating for broader transformations in state and national policy.

THE CUBBYHOLE CONUNDRUM: FIRST AMENDMENT DOCTRINE IN THE FACE OF DECEPTIVE CRISIS PREGNANCY CENTER SPEECH

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Across the country, a number of cities have enacted ordinances requiring faith-based crisis pregnancy centers (CPCs) to disclose to pregnant women that they are not licensed medical facilities and do not provide abortion referrals. This Note seeks to examine the problem that these ordinances pose for First Amendment doctrine. Unable to appropriately situate the CPC speech within the exceptions created by the Supreme Court for commercial and professional speech, lower courts have applied strict scrutiny as a default to review the ordinances. However, speech in the CPC context retains the same characteristics that justify the departure from strict scrutiny in the commercial and professional contexts. Additionally, the traditional values undergirding the First Amendment's protection of speech do not support according the CPC speech full protection.

This Note argues that the courts should reorient the First Amendment's doctrinal landscape, so as to combine some of the rigidly defined, discrete categorical exceptions to strict scrutiny into a comprehensive and flexible category of "false public accommodation speech." In this category, where the speech at issue is likely to be of low First Amendment value and where government regulation is more likely to be permissible, the courts could apply an intermediate level of scrutiny that would still protect core political speech from illicit government regulation, but would refrain from imposing an often insurmountable burden on permissible regulations like those in the CPC cases. Adopting this approach would not dramatically distort or reconfigure the First Amendment landscape as it stands, but would

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merely reaffirm the existing, though perhaps unstated, object of the Supreme Court’s First Amendment doctrine – to ferret out impermissible government regulatory motives that affront the true purpose of the First Amendment.

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I. INTRODUCTION

Across the United States, a number of non-profit, pro-life religious organizations operate what have come to be termed “crisis pregnancy centers” (CPCs). CPCs are not licensed medical facilities and are not staffed by licensed medical providers, but offer free services to pregnant women, including ultrasounds, counseling, education, and pregnancy testing.¹ While a non-profit provision of

1. Minority Staff of the H. Comm. on Gov’t Reform, False and Misleading Health Information Provided By Federally Funded Pregnancy Resource Centers,

pregnancy services is a welcome complement to prenatal medical care, evidence indicates that CPCs work to obscure their pro-life agenda, designing advertisements for their services to make it appear as though pregnant women will be informed of all their options.² In order to attract pregnant women and divert them from accessing abortion services, CPCs locate themselves next to or in the vicinity of medical clinics that offer abortion services and present themselves as medical facilities or abortion providers—even going so far as to advertise under “abortion services” in the Yellow Pages.³

Additionally, much of the information provided about the risks of abortion by the CPCs is distorted, inaccurate, or misleading.⁴ There are numerous accounts of staff members touting the benefits of adoption, showing pictures and videos of fetal development, describing abortion as “killing,” and telling stories of women living to regret their choice to have an abortion.⁵ These tactics pose a real danger to the health of pregnant women, as the delay caused by CPC deception may prevent them from accessing services until they are no longer able to receive an abortion safely or legally.⁶ Additionally, these centers target and are predominately accessed by women who are young, members of minority groups, or poor.⁷ The tactics of CPCs

109th Cong. 1 (2006) [hereinafter The Waxman Report], available at <http://www.chsourcebook.com/articles/waxman2.pdf>.

2. *Id.* at 2.

3. See NARAL Pro-Choice New York Foundation, “She Said Abortion Could Cause Breast Cancer”: A Report On: The Lies, Manipulations, and Privacy Violations of Crisis Pregnancy Centers in New York City 7–8, 11 (Oct. 2010) [hereinafter NARAL NY Report], available at <http://www.prochoiceny.org/assets/bin/pdfs/cpreport2010.pdf>.

4. The Waxman Report, *supra* note 1, at 7–13. For example, despite medical consensus that there is no causal relationship between abortion and breast cancer, or between abortion and future infertility, many CPCs warn clients that having an abortion will increase the risk of breast cancer and abortion-induced infertility. Additionally, even though scientific evidence supports the proposition that abortion does not cause future psychological harm, many of the CPCs warned clients that having an abortion would result in serious psychological and emotional trauma. *Id.*

5. *Id.* at 12–13.

6. Melissa Kleder & S. Malia Richmond-Crum, The Truth Revealed: Maryland Crisis Pregnancy Center Investigation 5 (Jan. 14, 2008) [hereinafter NARAL MD Report], available at <http://www.prochoicemd.org/assets/bin/pdfs/cpreportfinal.pdf> (noting that the provision of sonograms and STI testing are tactics used by CPCs to delay women from making decisions regarding unintended pregnancy).

7. *Id.* at 2.

are therefore problematic, not only posing a threat to general public health, but specifically compromising the reproductive well-being of already marginalized and at-risk members of society.⁸

In response to such findings, Baltimore,⁹ Montgomery County,¹⁰ and New York City¹¹ have all passed legislation mandating

8. *Id.*; see also The Waxman Report, *supra* note 11 (describing the misleading practices of CPCs, including providing false information about the risks of abortion and delaying access to proper medical facilities until it is too late to safely or legally obtain an abortion); NARAL NY Report, *supra* note 33 (same).

9. See Balt., Md., Health Code § 3-501 (2013). In December 2009, the City of Baltimore enacted Ordinance 09-252 in order to curb the disingenuous strategies of what the ordinance terms “limited-service pregnancy centers,” which it defines as “any person (1) whose primary purpose is to provide pregnancy-related services; and (2) who: (i) for a fee or as a free service, provides information about pregnancy-related services; but (ii) does not provide or refer for: (A) abortions; or (B) nondirective and comprehensive birth-control services.” *Id.* The ordinance requires such centers to provide their clients and potential clients with “a disclaimer substantially to the effect that the center does not provide or make referral for abortion or birth-control services,” on “easily readable” signs “conspicuously posted in the center’s waiting room.” *Id.* § 3-502. Failure to adhere to the requirements of the ordinance can result in civil penalty of up to \$150. *Id.* § 3-506; Balt., Md., City Code art. 1 § 41-14(6) (2013).

10. Res. 16-1252, 2010 Montgomery Cnty. Council (Md. 2010). Montgomery County followed suit, adopting Resolution 16-1252 in February 2010, requiring any “limited service pregnancy resource center,” defined as “an organization, center or individual that: (a) has a primary purpose to provide pregnancy-related services; (b) does not have a licensed medical professional on staff; and (c) provides information about pregnancy-related services, for a fee or as a free service,” to post at least one disclaimer sign in the Center indicating that it “does not have a licensed medical professional on staff; and [that] the Montgomery County Health Officer encourages women who are or may be pregnant to consult with a licensed health care provider.” *Id.*

11. N.Y.C., N.Y., Admin. Code § 20-815 (2011). Local Law 17 defines the “pregnancy services centers” to be regulated as centers whose “primary purpose . . . is to provide services to women who are or may be pregnant” and “that either (1) offer[] obstetric ultrasounds, obstetric sonograms or prenatal care . . . or (2) [have] the appearance of a licensed medical facility.” *Id.* In making the determination of whether a facility has “the appearance of a licensed medical facility,” factors to be considered include whether the center:

- (a) offers pregnancy testing and/or pregnancy diagnosis; (b) has staff or volunteers who wear medical attire or uniforms; (c) contains one or more examination tables; (d) contains a private or semi-private room or area containing medical supplies and/or medical instruments; (e) has staff or volunteers who collect health insurance information from clients; and (f) is located on the same premises as a licensed medical facility or provider or shares space with a licensed medical provider.

that CPCs make certain direct disclosures to clients. Among other things, these ordinances require that facilities defined by the legislation as “limited-service pregnancy centers” post easily readable disclaimer signs in their waiting rooms, informing clients that they are not licensed medical facilities staffed by licensed medical professionals, and do not provide abortions or abortion referrals.¹² The CPCs have challenged these ordinances as unconstitutional infringements on their First Amendment rights,¹³ arguing that they

Id. If a center has two or more of these factors, this serves as prima facie evidence that it has the “appearance of a licensed medical facility.” *Id.* Such centers must disclose in any advertisements, orally upon client request, and in signs posted in the entrance of the center and in the waiting room whether they provide abortion, emergency contraception, and prenatal care referrals, whether there is a licensed medical professional on staff, and that “the New York City Department of Health and Mental Hygiene encourages women who are or who may be pregnant to consult with a licensed medical provider.” *Id.* § 20-816.

12. See Balt., Md., Health Code § 3-501 (2013); Res. 16-1252, 2010 Montgomery Cnty. Council (Md. 2010); N.Y.C., N.Y., Admin. Code § 20-815 (2011). Some of the ordinances impose additional requirements. New York’s Local Law 17, for example, requires that warnings be posted in the centers and as well as on CPC advertisements. It mandates that oral disclosures be made to women who phone for information or visit the center, regarding whether the center offers abortion or emergency contraception and whether it is staffed by medical professionals. Local Law 17 and the Montgomery County Resolution also both mandate that any facility which falls under the ordinances’ definition of a ‘pregnancy service center’ must disclose that the respective Department of Health or Health Officer “encourages women who are or who may be pregnant to consult with a licensed medical provider.” This Note focuses only on a discussion of the compelled factual disclosures on the waiting room signs regarding what services are provided by CPCs and whether the CPCs are staffed by licensed medical professionals. It does not address the free speech implications of additional oral disclosure requirements or the Department of Health encouragement provision. In 2013, the Fourth Circuit affirmed the Maryland district court’s decision to enjoin the Resolution’s compelled pronouncement that “the Montgomery County Health Officer encourages women who are or may be pregnant to consult with a licensed health care provider.” See *Centro Tepeyac v. Montgomery Cnty.*, 722 F.3d 184 (4th Cir. 2013). In January 2014, the Second Circuit struck down this provision in New York’s Local Law 17 after conducting a strict scrutiny analysis. See *Evergreen Ass’n, Inc. v. City of New York*, 740 F.3d 233, 249–50 (2d Cir. 2014). As scholars have noted, this provision poses more of an affront to the speech rights of the CPCs, as it “requires the centers to repeat the state’s normative message” rather than simply compelling the disclosure of “factual and uncontroversial information” in order to remedy misconception. See Jennifer M. Keighley, *Can You Handle the Truth? Compelled Commercial Speech and the First Amendment*, 15 U. Pa. J. Const. L. 539, 570 (2012).

13. U.S. Const. amend. I, “Congress shall make no law . . . abridging the freedom of speech, or of the press.”

compel the CPCs to post a government message that curtails the CPCs' ideological speech regarding their opposition to abortion.¹⁴

This Note seeks to highlight the First Amendment “doctrinal cubbyhole”¹⁵ problem that cities face in defending the requirements imposed by ordinances that attempt to safeguard the reproductive health of pregnant women.¹⁶ Much debate has revolved around whether the cities can appropriately fit the targeted speech within either the commercial speech or professional speech doctrine, so as to shield the ordinances from First Amendment strict scrutiny.¹⁷ These doctrines, while currently persisting in a rather muddled state, have been developed by the Court based upon the determination that the government should have more leeway to restrict the First Amendment rights of speakers in commercial and professional contexts. The Court has therefore applied a less rigid standard of

14. See Response Brief of Appellee and Principal Brief of Cross-Appellants for En Banc Rehearing at 12–22, *Greater Balt. Ctr. For Pregnancy Concerns, Inc. v. Mayor of Baltimore*, 683 F.3d 539 (4th Cir. 2012) (Nos. 11-1111, 11-1185), 2012 WL 4341891, at *12–36 [hereinafter CPC Response Brief].

15. The concept of “doctrinal cubbyholes” was employed by Marvin F. Hill, Jr. and James A. Wright to analyze employee speech. Hill and Wright maintained that courts create “doctrinal cubbyholes” into which they drop certain categories of speech based on their subjective determinations about its social importance and whether or not it is deserving of protection. See Marvin F. Hill, Jr. & James A. Wright, *Riding With the Cops and Cheering for the Robbers: Employee Speech, Doctrinal Cubbyholes, and the Duty of Loyalty*, 25 Pepp. L. Rev. 721, 746 (1998); see also *Tucker v. Cal. Dept. of Educ.*, 97 F.3d 1204, 1209 (indicating awareness “of the dangers of reducing the First Amendment to a series of doctrinal cubbyholes and of warping different fact situations to fit into the boxes we have created”).

16. While the ordinances also impose other requirements and mandate disclosures directly on any advertisements issued by the CPCs, this Note will focus on the disclosure signs required to be posted in CPC waiting rooms that compel CPCs to state that they “do not provide or make referral for abortion or birth-control services” and that they retain “no licensed medical provider on-staff.” See *supra* note 12. This Note concerns the effect of these mandated disclosures on the ability of the CPCs to exercise their First Amendment rights and the broader implications of an analysis regarding the constitutionality of the ordinances under First Amendment doctrine and values.

17. See *Evergreen Ass’n, Inc. v. New York*, 801 F. Supp. 2d 197, 203–06 (S.D.N.Y. 2011), *aff’d in part, vacated in part*, 740 F.3d 233 (2d Cir. 2014); *Greater Balt. Ctr. For Pregnancy Concerns, Inc. v. Mayor of Baltimore*, 683 F.3d 539, 552–55 (4th Cir. 2012), *aff’d in part, vacated in part en banc*, 721 F.3d 264 (4th Cir. 2013).

scrutiny when evaluating the constitutionality of government regulation in these limited areas.¹⁸

The CPC cases present an interesting quandary for First Amendment doctrine. The similarity between the regulated CPC speech and less protected commercial and professional speech, alongside the absence of traditional First Amendment value considerations that would support fully protecting CPC speech in this case, suggests that the cities' compelled disclosure requirements should withstand a First Amendment challenge. However, because the Supreme Court has confined the application of the commercial and professional exceptions to specifically defined contexts, it is hard to see how a court could cram the CPC speech into either a commercial or professional speech cubbyhole without distorting First Amendment doctrine in these areas. We are thus presented with a novel situation, in which misleading speech that has both quasi-professional and quasi-commercial characteristics is immunized against good-faith government regulation designed to protect pregnant women because present First Amendment doctrine does not contain a suitable exception to strict scrutiny for this unique case.

This Note concludes that First Amendment doctrine should permit government regulation of misleading speech in the public accommodation or service provision arena when it is motivated by a desire to protect public consumers rather than to restrict the speaker from professing a particular ideological belief. In order to set the stage for the discussion, Part II of this Note begins by providing the requisite background on the CPC cases. This Part reviews the state of relevant First Amendment doctrine and details challenges to government regulation of CPC speech as ruled on by the Fourth

18. See generally Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. Pa. L. Rev. 771, 774 (1999) (contrasting the Court's treatment of commercial and professional speech with that of non-commercial and non-professional speech); see also *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563 (1980) ("The Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression."); *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2672 (2011) ("Indeed the government's legitimate interest in protecting consumers from 'commercial harms' explains 'why commercial speech can be subject to greater governmental regulation than noncommercial speech.'"); *Gonzales v. Carhart*, 550 U.S. 124, 157 (upholding federally mandated abortion disclosures and noting that "under our precedents it is clear the State has a significant role to play in regulating the medical profession").

Circuit and the Second Circuit. Part III identifies the problem posed by the CPC's deceptive speech for First Amendment doctrine. It does so by: (1) explaining why CPC speech is ill-situated within either the commercial or professional speech doctrine; (2) highlighting the doctrinal inconsistency that would result should regulation of CPC speech face strict scrutiny; and (3) attempting to identify the root cause of this problem within the context of First Amendment doctrine. In Part IV, this Note suggests a solution to the confusion created by the novel CPC case. The courts should reorient the First Amendment's doctrinal landscape so as to combine some of the rigidly defined, discrete categorical exceptions to strict scrutiny into a comprehensive and flexible category of "false public accommodation speech." In this category, where the speech at issue is likely to be of low First Amendment value and where government regulation is more likely to be permissible, the courts could apply an intermediate level of scrutiny that would still protect core political speech from illicit government regulation, but would refrain from imposing an often insurmountable burden on permissible regulations like those in the CPC cases.

II. DECEPTION AND EXCEPTIONS: A BRIEF OVERVIEW OF THE RELEVANT FIRST AMENDMENT DOCTRINE AND THE CPC CASES

A. The Compelled Commercial and Professional Speech Exceptions: Defining the Doctrinal Cubbyholes

In order to fully examine the validity of the claims brought by the CPCs and the defense mounted by the cities, and to determine the appropriate application of the standard of review in these cases, it is necessary to discuss the history and current status of the relevant aspects of First Amendment doctrine. Much of the debate has centered on whether the CPC speech can be classified as "commercial," thereby subjecting the regulations to the less searching standard of judicial scrutiny reserved for the commercial arena. The cities have also likened the ordinances to laws compelling the speech of medical doctors in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, which were upheld by the Court as a valid exercise of state power over the speech of licensed professionals.¹⁹ This section will discuss the evolution and theoretical underpinnings

19. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 882–83 (1992).

of the compelled speech doctrine and the commercial and professional speech doctrines, taking note of the judicial rationale behind the exceptions allowing for increased governmental regulation in these areas, as well as the limitations placed on the application and extension of these exceptions by the Court.

1. Compelled Speech

The Supreme Court has historically interpreted the First Amendment to prohibit government regulations that either restrict individual speech or compel an individual to speak a government-favored message.²⁰ The Court has therefore held that “[t]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.”²¹ Government laws that compel individuals or organizations to speak—even if only to make factually accurate statements—are therefore presumptively unconstitutional, and are usually subject to strict scrutiny by a reviewing court, requiring that they be narrowly tailored to serve a compelling government interest.²² As many scholars have noted, in practice the strict scrutiny standard is almost always “fatal in fact,” meaning that

20. *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 641 (1994). The Court stated:

At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence. . . . Government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential [idea].

Id.

21. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). The Court based this decision on the idea that “[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of ‘individual freedom of mind.’” *Id.*; see also *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1942) (holding that local authorities who compelled students to pledge allegiance to the American flag acted outside their constitutional power).

22. See *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988) (stating that because “mandating speech that a speaker would not otherwise make necessarily alters the content of the speech,” government legislation compelling speech is considered “content-based regulation[s] of speech” and is therefore subject to strict scrutiny review); see also, *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992) (holding that “content-based regulations are presumptively invalid”).

the law or regulation being challenged will most likely be struck down as unconstitutional.²³

The theory behind this general prohibition of government-dictated speech is drawn from what the Court deems “the point of all speech protection”: to prevent the government from compelling “affirmance of a belief with which the speaker disagrees.”²⁴ Justice Jackson famously elucidated the purpose behind this First Amendment doctrine by stating that “[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein.”²⁵ In acknowledging the importance of this First Amendment value, Jackson affirmed the role of the Court in protecting “the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.”²⁶ Because of this concern, the Court has held

23. See, e.g., Gerald Gunther, *The Supreme Court, 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 8 (1972); Lillian R. BeVier, *The First Amendment on the Tracks: Should Justice Breyer Be At the Switch?*, 89 Minn. L. Rev. 1280, 1293 (2005). BeVier writes:

Although the decision of which standard to apply is not supposed to be a decision on the merits, the decision is of pivotal importance in First Amendment cases because it is almost always outcome-determinative. Strict scrutiny is almost always “fatal in fact,” while intermediate scrutiny has become the practical equivalent of lenient, rational basis review.

Id. It should be noted that, in this case, the Second Circuit upheld New York’s ‘Status Disclosure’ (requiring CPCs to disclose whether or not they retain licensed medical providers on staff) under strict scrutiny. The Circuit found that the City had a compelling interest in passing the Local Law 17 to ensure that pregnant women as consumers are informed about the services they will receive from CPCs in order to “prevent delays in access to reproductive health services” and then analyzed each disclosure provision independently to determine whether it was sufficiently narrowly tailored to promote this interest by using the least restrictive means. In doing so, the Circuit maintained that strict scrutiny is not always “fatal in fact” but that narrowly tailored regulations have survived strict scrutiny in the First Amendment context. However, while there may be a few cases in which certain courts apply strict scrutiny in a manner that saves a challenged regulation, many scholars have noted that in the majority of cases, it is very difficult to survive strict scrutiny.

24. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573–74 (1995).

25. *Barnette*, 319 U.S. at 642.

26. *Id.*

unconstitutional a variety of state laws requiring individuals to profess an ideological message supported by the government that they may not personally agree with.²⁷

However, when the compelled speech does not force an individual or entity to espouse a particular ideological message or belief sponsored by the state, but merely requires the disclosure of factual information for the purpose of protecting the interests of the listener as the recipient of services, courts have often upheld government requirements in the face of First Amendment challenges.²⁸ Thus, exceptions to the general proscription against government-mandated speech exist, allowing for increased government regulation in certain contexts in light of other First

27. See, e.g., *Barnette*, 319 U.S. at 631, 637, 642 (holding unconstitutional a state law which required children to recite the Pledge of Allegiance and salute the American flag at school); *Wooley*, 430 U.S. at 717 (holding unconstitutional a New Hampshire statute that required all vehicle owners to include on their license plates the state motto “Live Free or Die”). *But see* Justice Rehnquist’s dissent in *Wooley*, where he argues that, by forcing motorists to have license tags with the state motto,

[t]he State has not forced appellees to “say” anything; and it has not forced them to communicate ideas with nonverbal actions reasonably likened to “speech,” such as wearing a lapel button promoting a political candidate or waving a flag as a symbolic gesture . . . [a]ppellees have not been forced to affirm or reject that motto

430 U.S. at 720.

28. See, e.g., *Scope Pictures of Mo., Inc. v. City of Kan. City*, 140 F.3d 1201 (8th Cir. 1998) (upholding a city ordinance requiring adult bookstores with video viewing booths to post information on sexually transmitted diseases because the provision of this type of information did not force the bookstores to adopt a particular political or ideological message); *Jerry Beeman & Pharmacy Servs., Inc. v. Anthem Prescription Mgmt., LLC*, 652 F.3d 1085 (9th Cir. 2011) (upholding a statutory requirement that compelled pharmacy benefit managers to conduct studies and disclose the objective factual data from these studies to third parties because the statute did not force the speaker to assert any particular viewpoint, and left them free to “encourage action or inaction on the basis of the statistics . . . [or] say that the report is worthless, sent only under government mandate). The *Beeman* court further stated that precedent

makes clear that not all fact-based disclosure requirements are subject to First Amendment scrutiny Instead, such requirements implicate the First Amendment *only* if they affect the content of the message or speech by forcing the speaker to endorse a particular viewpoint or by chilling or burdening a message that the speaker would otherwise choose to make.

Id. (emphasis added).

Amendment principles and public policy considerations. Two such exceptions recognized by the Court include the areas of commercial speech and professional speech.

2. Commercial Speech

Commercial speech was not truly recognized as being protected by the First Amendment until 1976. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, the Supreme Court extended a limited amount of First Amendment protection to commercial speech in order to protect a “consumer’s interest in the free flow of commercial information” in keeping with the First Amendment’s aim of promoting “enlighten[ed] public decision-making in a democracy.”²⁹ The Court defined commercial speech as that “which does no more than propose a commercial transaction,”³⁰ holding that a pharmacist’s drug advertisement was protected under the First Amendment, and that a state ban on these type of advertisements was unconstitutional.³¹ However, the Court qualified this protection,³² conceding that states may often “require that a commercial message . . . include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive.”³³

In *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York* the Court further examined the protection for commercial speech, stating that the level of protection available for commercial speech “turns on the nature both of the expression and of the governmental interests served by its regulation.”³⁴ It went on to expand the definition of commercial speech slightly from the *Virginia State Board* description to include speech that, while perhaps not *proposing* a commercial transaction, is

29. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 763, 765 (1976).

30. *Id.* at 762 (quoting *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 385 (1973)).

31. *Id.*

32. *Id.* at 771 n. 24. “In concluding that commercial speech enjoys First Amendment protection, we have not held that it is wholly undifferentiable from other forms [of speech].”

33. *Id.*

34. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 563 (1980).

“related solely to the economic interests of the speaker and its audience.”³⁵

The *Central Hudson* Court then established a four-part intermediate scrutiny test for determining whether regulations of commercial speech pass constitutional muster. First, to be protected by the First Amendment at all, commercial speech must concern lawful activity and not be misleading.³⁶ Second, if the regulated speech is protected, a court must determine whether the governmental interest served by that regulation is substantial.³⁷ If the speech is protected and the governmental interest is substantial, a reviewing court must find that the regulation directly advances the government interest and is “narrowly drawn” to serve that interest, in order for it to withstand judicial scrutiny.³⁸

While the *Central Hudson* test has been adopted by many lower courts and is often the controlling precedent in the commercial context, it can be argued that the Supreme Court set forth a more nuanced framework to guide a commercial speech analysis just three years later in *Bolger v. Youngs Drug Products Corp.* In *Bolger*, the Court implied that, in deciding whether speech is “commercial” in nature, a reviewing court should inquire whether (1) the speech is an advertisement, (2) the speech refers to a specific product or service, and (3) whether the speakers have an economic motivation.³⁹ The *Bolger* Court also maintained that the presence or absence of any of these factors is not dispositive, indicating that these are just a few of many possible guiding factors that may be useful in differentiating between noncommercial and commercial speech.⁴⁰

35. *Id.* at 561.

36. *Id.* at 566.

37. *Id.*

38. *Id.* at 564–66.

39. *See* *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66–68 (1983). The *Bolger* Court maintained that the while, in isolation, the fact that the pamphlets at issue were advertisements, referred to a specific product, and were mailed due to economic motivations could not “turn the materials into commercial speech . . . [t]he combination of *all* these characteristics” provided strong support for such a categorization. *Id.* The *Bolger* court also maintained that these materials could be defined as commercial speech despite the fact that they discussed issues relating to current public debate. *Id.*

40. *Id.* at 68 n.14 (“Nor do we mean to suggest that each of the characteristics present in this case must necessarily be present in order for speech to be commercial. For example, we express no opinion as to whether reference to any particular product or service is a necessary element of commercial speech.”).

Virginia State Board, *Central Hudson* and *Bolger* all concerned the constitutionality of an outright ban or prohibition on certain exercises of commercial speech.⁴¹ Government compelled disclosures in the commercial realm were not explicitly addressed by the Court until 1985 in *Zauderer v. Office of Disciplinary Council of the Supreme Court of Ohio*.⁴² This case concerned the application of the Disciplinary Rules of the Code of Professional Responsibility to attorney advertisements. The Appellee Office of Disciplinary Counsel of the Supreme Court of Ohio had filed a complaint against a practicing attorney, claiming that his advertisements were deceptive by failing to “inform clients that they would be liable for costs (as opposed to legal fees) even if their claims were unsuccessful.”⁴³ The Supreme Court sustained the Ohio Supreme Court’s decision to reprimand the attorney in question on commercial speech grounds.⁴⁴

First, the *Zauderer* Court noted that while the exact bounds of the definition of “commercial speech” may be subject to doubt, the commercial speech doctrine is based on “the ‘common sense’ distinction between speech proposing a commercial transaction . . . and other varieties of speech.”⁴⁵ Because the speech at issue in the case was an advertisement proposing a commercial transaction, the Court determined that it was undoubtedly “commercial speech” under even the most restrictive definition.⁴⁶ The Court then moved to discuss the protection required under the First Amendment for commercial speech, distinguishing blanket prohibitions on speech from mandated disclosures.⁴⁷ While, as noted

41. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (concerning a ban on pharmacist advertising); *Central Hudson*, 447 U.S. at 559 (concerning a ban on public utility electricity advertisements).

42. *Zauderer v. Office of Disciplinary Council of the Sup. Ct. of Ohio*, 471 U.S. 626, 626–27 (1985) (where the Supreme Court considered the constitutionality of a state law mandating that attorney advertisements include information about fees).

43. *Id.* at 626.

44. *Id.* at 655.

45. *Id.* at 638 (quoting *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 455–56 (1978)).

46. *Id.* at 638. (finding the speech, as an advertisement, could be deemed commercial simply as “speech which does no more than propose a commercial transaction”).

47. *See id.* at 650. The Court stated that

In requiring attorneys who advertise their willingness to represent clients on a contingent-fee basis to state that the client may have to bear certain expenses even if he loses, Ohio

above, the Court had previously maintained that compelled speech and outright bans on speech could pose equivalent danger to First Amendment rights, the Court distinguished the government-mandated disclosures in this context, as the state was not attempting to force attorneys to subscribe to a particular ideology, belief, or opinion but was instead compelling the dissemination of “purely factual and uncontroversial information” that was “reasonably related to the State’s interest in preventing deception of consumers.”⁴⁸ The Court justified this less stringent standard of judicial review based on the fact that “disclosure requirements trench much more narrowly on advertiser’s interests than do flat prohibitions on speech . . . [and therefore] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception.”⁴⁹

These cases outline the bounds of the current definition of “commercial speech” and elucidate the justifications for a lighter standard of First Amendment scrutiny in the commercial context. First, regarding the definition of “commercial speech,” *Bolger* implies that there may be room for expanding what is “commercial” slightly beyond the scope of the *Virginia Pharmacy* and *Central Hudson* tests to adopt a more context-based inquiry.⁵⁰ However, taken together, these cases indicate that for speech to be designated commercial in nature it must still have, at a minimum, some sort of economic component, be it an interest in obtaining a profit or a desire to enter into or engage in an economic relationship with an audience.

Second, the Court has accorded states and the federal government more freedom to regulate speech in the commercial context based on the purpose of the First Amendment and the salient public policy issues involved.⁵¹ The Court’s rationale for protecting

has not attempted to prevent attorneys from conveying information to the public; it has only required them to provide somewhat more information than they might otherwise be inclined to present.

Id.

48. *Id.* at 651.

49. *Id.*

50. See *Bolger, v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66–68 (1983).

51. See *Zauderer*, 471 U.S. at 638 (“Our general approach to restrictions on commercial speech is also by now well settled. The States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading, or that proposes an illegal transaction . . .”).

commercial speech from government regulation in the first place was to promote consumer interests in receiving information required to exercise freedom of choice, by allowing the open flow of information into the marketplace of ideas in line with the purpose of the First Amendment.⁵² Since the protection of commercial speech is premised upon the importance of consumer interests, it logically follows that this type of speech should *not* be protected when it runs counter to the interests of the consumer and jeopardizes the free-flow of information into the marketplace of ideas.⁵³ Thus, the First Amendment justification behind the exception explains judicial allowance for government regulations that seek to protect consumers from fraud or deception, as the purpose of protecting commercial speech is to ensure consumers have adequate information to make informed decisions in the marketplace—something they cannot do if they are being deceived or misled.⁵⁴

52. See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 763–65 (1976).

As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate

Generalizing, society also may have a strong interest in the free flow of commercial information. Even an individual advertisement, though entirely "commercial" may be of general public interest

It is a matter of public interest that [private economic decisions], in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.

Id.

53. *Id.* at 771–72.

Untruthful speech, commercial or otherwise, has never been protected for its own sake. Obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a State's dealing effectively with this problem. The First Amendment, as we construe it today does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely.

Id. (citation omitted).

54. See *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 496–98 (1995) (Stevens, J., concurring) (“[T]he consequences of false commercial speech can be particularly severe: Investors may lose their savings, and consumers may purchase products that are more dangerous than they believe or that do not work as advertised.”).

The reasoning also explains judicial tolerance of regulations compelling speech rather than limiting or prohibiting it—such as those in *Zauderer*. Compelled factual disclosures in the commercial context are unlikely to endanger speaker rights by suppressing ideological speech with which the government disagrees.⁵⁵ Instead, they seem to support the Court’s underlying goal of ensuring that consumers have access to as much information as possible, enabling them to make fully-informed decisions in a democratic society.⁵⁶

3. Professional Speech

In addition to its exception for commercial speech, courts have held incidental effects on the otherwise protected speech of certain professionals—including doctors,⁵⁷ lawyers,⁵⁸ mental health professionals,⁵⁹ accountants,⁶⁰ and interior designers⁶¹—to a less exacting level of scrutiny, in order to account for the legitimate government interest in regulating the profession.⁶² State licensing

55. *Id.* at 496 (“Not only does regulation of inaccurate commercial speech exclude little truthful speech from the market, but false or misleading speech in the commercial realm also lacks the value that sometimes inheres in false or misleading political speech.”).

56. *See* 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996) (“When a State regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review.”)

57. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 883 (1992).

58. *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 618–19 (1995).

59. *Nat’l Ass’n for Advancement of Psychoanalysis v. Cal. Bd. of Psychology*, 228 F.3d 1043, 1053–55 (9th Cir. 2000).

60. *Accountant’s Soc’y of Va. v. Bowman*, 860 F.2d 602, 603–05 (4th Cir. 1988).

61. *Locke v. Shore*, 682 F. Supp. 2d 1283, 1290–92 (N.D. Fla. 2010).

62. *See Dent v. West Virginia*, 129 U.S. 114, 121–22 (1889)

It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose . . . [T]here is no arbitrary deprivation of such right where its exercise is not permitted because of a failure to comply with conditions imposed . . . for the protection of society.

Id.; *see also* *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949) (“[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.”).

requirements and statutes governing the practice of a professional occupation are not subject to heightened scrutiny under the First Amendment just because practice of a particular profession involves speech, so long as “any inhibition of that right is merely the incidental effect of observing an otherwise legitimate regulation.”⁶³ Courts have maintained, however, that they will not take the government’s word that a particular statute is a professional regulation but will independently determine “the point where regulation of a profession leaves off and prohibitions on speech begin.”⁶⁴

The Supreme Court has not established a clear definition for what constitutes legitimate regulation of a profession. Many lower courts have adopted Justice White’s guidelines from his concurrence in *Lowe v. S.E.C.*⁶⁵ in making this difficult determination. Justice White explained that legitimate government regulation of an occupational practice with only incidental impact on speech is not subject to strict scrutiny under the First Amendment when that practice can be defined as professional.⁶⁶ He identified a professional occupation as one in which a “personal nexus [exists] between professional and client,” and characterized a professional as an individual who “purports to exercise judgment on behalf of the client in light of the client’s individual needs and circumstances.”⁶⁷ In this regard, if an individual is exercising judgment by providing advice or consultation on a personalized basis for a particular client—as opposed to broadcasting information to the general public—that individual’s speech may be curtailed by the state as incident to the regulation of the profession in general.⁶⁸

63. *Underhill Assoc. v. Bradshaw*, 674 F.2d 293, 296 (4th Cir. 1982).

64. *Lowe v. S.E.C.*, 472 U.S. 181, 232 (1985) (White, J., concurring).

65. *See id.* The *Lowe* court held that the Securities and Exchange Commission could not enjoin the publication of non-personalized investment advice by non-registered investment advisers. *Id.* at 211 (majority opinion). Justice White concurred on First Amendment grounds, finding the application of the Investment Advisers Act to prevent unregistered persons from disseminating advice to the general public to be a restraint on freedom of speech, subject to strict scrutiny under the First Amendment. *Id.* at 236 (White, J., concurring).

66. *Id.* at 232 (White, J., concurring).

67. *Id.*

68. *Id.* at 233. Thus, while the Investment Advisers Act as applied to unregistered unlicensed individuals broadcasting untailored advice to the general public would be subject to strict scrutiny, the Act’s application to “limit entry into the profession by providing investment advice tailored to the individual needs of

Lowe, like *Virginia State Board* and *Central Hudson* in the commercial context, dealt with a direct prohibition on speech, rather than a governmentally compelled factual disclosure. However, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Supreme Court sustained compelled disclosure requirements as applied to professional speakers.⁶⁹ The Court determined that the mandated disclosures of truthful, non-misleading information were not subject to strict scrutiny under a First Amendment challenge, but could be upheld as constitutional as long as they did not prevent a physician from “exercising his or her medical judgment” and did not place an “undue burden” on a woman’s right to make the final choice regarding the termination of her pregnancy.⁷⁰ As a result, the Court permitted the state to compel doctors to disclose details about the abortion procedure and its effects which might deter women from getting abortions. This lower standard of scrutiny was justified by the Court because the provision implicated the “physician’s First Amendment rights not to speak . . . only as part of the practice of medicine, which is licensed and regulated by the state.”⁷¹

B. The CPC Ordinances and Challenges

As mentioned above, in response to congressional, non-profit, and city council reports of misleading CPC tactics, Baltimore, Montgomery County, and New York City have enacted ordinances that compel CPCs to disclose certain factual information in order to protect vulnerable women.⁷² All of the mandatory disclosure

each client” would not be, as it could be justified as “a legitimate exercise of the power to license those who would practice a profession, and it is no more subject to constitutional attack than state-imposed limits on those who may practice the professions of law and medicine.” *Id.*

69. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 883 (1992) (upholding an informed consent provision of state legislation compelling doctors to disclose state-mandated information to women considering an abortion).

70. *Id.* at 883–84.

71. *Id.* at 884.

72. The New York City Council, for example, after determining that the deceptive tactics employed by CPCs work to “impede and/or delay consumers’ access to reproductive health services . . . [and] wrongly lead [consumers] to believe that they have received reproductive health care and counseling from a licensed medical provider,” enacted their ordinance, Local Law 17. The City Council was concerned that “delayed access to abortion and emergency contraception . . . [could] increase health risks and financial burdens and may eliminate a wom[a]n’s ability to obtain these services altogether, severely limiting

requirements in the ordinances have been challenged by the CPCs as unconstitutional infringements on their First Amendment free speech rights.⁷³ The parties' dispute over the appropriate level of scrutiny has revolved around whether the CPC speech being regulated can appropriately be defined as commercial or professional.⁷⁴ The cities maintain that the CPC speech being targeted is non-ideological commercial speech of CPCs engaged in commercial service provision in the medical industry—or, in the alternative, akin to professional speech—and that consequently, in accordance with Supreme Court precedent, regulation of the speech for the purpose of preventing deception and protecting the interests of the pregnant woman—as either a consumer or patient—should be subject to a less stringent standard of judicial review.⁷⁵ This would place upon the cities a

her reproductive health options.” The Council determined immediate action was necessary as the legal remedies available did not “adequately protect consumers from the deceptive practices . . . and anti-fraud statutes have proven ineffective in prosecuting deceptive centers” due to reluctance on the part of pregnant women to report abuses due to their concerns with protecting their privacy and anonymity. N.Y.C., N.Y., Admin. Code § 20-815 (2011).

73. See, e.g., CPC Response Brief, *supra* note 14 (arguing that a Baltimore ordinance that required centers providing pregnancy-related healthcare but not abortions to provide signage indicating as much was unconstitutional).

74. Judges on both the Fourth Circuit and the Second Circuit have noted the distinction between compelled commercial and non-commercial speech. In his 2012 analysis of the CPC case, Judge Niemeyer undertook an examination of existing First Amendment doctrine in the compelled speech realm. *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Baltimore*, 683 F.3d 539, 550 (4th Cir. 2012), *aff'd in part, vacated in part en banc*, 721 F.3d 264 (4th Cir. 2013). His analysis was aligned with the Supreme Court's justification that because laws compelling individuals to speak particular government messages “pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion,” regulations compelling non-commercial speech have historically been subject to strict scrutiny. *Turner Broad. Sys. Inc. v. F.C.C.*, 512 U.S. 622, 641–42 (1994) (“Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content.”). As the Court in *Turner* noted, “laws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny.” *Id.* at 643. Under this strict standard of review, the cities would bear the burden of proving that the ordinances compelling a disclosure are narrowly tailored to serve a compelling government interest. See *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 798 (1988) (holding that a statute regulating the solicitation of charitable contributions is subject to strict scrutiny).

75. See *Evergreen Ass'n, Inc. v. City of New York*, 801 F. Supp. 2d 197, 204 (S.D.N.Y. 2011), *aff'd in part, vacated in part*, 740 F.3d 233 (2d Cir. 2014)

lighter burden of proof reserved for the compelled commercial speech context, requiring only that the disclosure requirements be *reasonably* designed to promote the government's interest in preventing the deception of women.⁷⁶

The CPCs, on the other hand, argue that because they are non-profits with no economic motive for service provision, and because they do not employ medical professionals traditionally subject to licensing and regulation by the state, their speech is neither commercial nor professional in nature. They contend that “by insisting that the disclaimer be posted conspicuously in the waiting room, the City intertwines its message with every word uttered by . . . the Center and alters the Center’s speech.”⁷⁷ The CPCs maintain that this violates their First Amendment right to engage in personal, political speech, as “a charitable pregnancy center speaking about its services and other services it does *not* provide and the moral and health objections to such services certainly is not commercial.”⁷⁸ As a result, they maintain that strict scrutiny must apply to the ordinances, and no exception to imposing this rigorous standard of review is applicable.⁷⁹

The Maryland District Court granted the CPC’s motion for summary judgment and conducted a facial review of the ordinance, enjoining it as unconstitutional under the strict scrutiny standard of review.⁸⁰ In rejecting the City’s argument that a lesser degree of scrutiny should apply, the court maintained that the speech was not “commercial” in nature, as the Center’s overall purpose “is not to propose a commercial transaction, nor is it related to . . . economic interest.”⁸¹ The City appealed this decision to the Fourth Circuit,

(addressing an argument by the city that the CPCs’ speech is commercial because they advertise goods and services and receive something of value, an opportunity to advocate for their cause, in return).

76. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 585 (1980) (Rehnquist, J., dissenting) (arguing that the test adopted by the court will “unduly impair a state legislature’s ability to adopt legislation reasonably designed to promote interests” of great importance to the state).

77. CPC Response Brief, *supra* note 14, at *24.

78. *Id.*

79. *Id.* at *30.

80. *O’Brien v. Mayor of Baltimore*, 768 F. Supp. 2d 804, (D. Md. 2011), *aff’d sub nom.* *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Baltimore*, 683 F.3d 539. (4th Cir. 2012), *aff’d in part, vacated in part en banc*, 721 F.3d 264 (4th Cir. 2013).

81. *Id.* at 813.

which issued a decision in 2012 applying strict scrutiny to both the Baltimore and Montgomery County ordinances. That standard of review required the City to prove that its regulations were narrowly tailored to promote a compelling government interest and constituted the least restrictive means to achieve that interest in order to withstand a First Amendment challenge.⁸² The Fourth Circuit panel did not find the cities' interests in countering deceptive business practices and in protecting the health of the pregnant women to be sufficiently compelling, nor did it find the ordinance to be sufficiently narrowly tailored to overcome strict scrutiny.⁸³ This decision was further appealed to the Fourth Circuit en banc. In July of 2013, Judge King—who had vigorously dissented to the 2012 panel affirmation of the district court—wrote for a majority of the Circuit, vacating the district court judgment against the city on procedural grounds and remanding to allow for full discovery and a rehearing. While the Fourth Circuit stressed the procedural nature of its ruling,⁸⁴ the sharp divide between Judge King's majority opinion and panel dissent and Judge Niemeyer's panel judgment and en banc dissent indicate a division in the Circuit as to the ultimate merits of the matter.

The Southern District of New York also preliminarily enjoined New York City's ordinance, finding that the plaintiffs had shown a likelihood that the disclosure requirements were unconstitutional.⁸⁵ The court acknowledged the two definitions of commercial speech outlined by the Supreme Court: *Virginia State Board's* "[speech that] does no more than propose a commercial transaction" and *Central Hudson's* "expression related solely to the economic interests of the speaker and its audience."⁸⁶ Based on these definitions, the court found that the CPCs were not engaged in commercial speech because they were neither motivated by an economic interest nor proposing a commercial transaction. The court

82. *Greater Balt. Ctr.*, 683 F.3d at 556. Because "content-based regulations are presumptively invalid," courts apply the harsh strict scrutiny standard of review in evaluating their constitutionality. *R.A.V., v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992).

83. *Greater Balt. Ctr.*, 683 F.3d at 556–57.

84. *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Baltimore*, 721 F.3d 264, 271 (4th Cir. 2013).

85. *Evergreen Ass'n, Inc. v. City of New York*, 801 F. Supp. 2d 197, 211 (S.D.N.Y. 2011), *aff'd in part, vacated in part*, 740 F.3d 233 (2d Cir. 2014).

86. *Id.* at 204 (internal quotation marks omitted).

determined that the CPCs were offering free pregnancy services in pursuit of social or religious concerns rather than with an economic motivation, and that the mere provision of a commercially valuable service was not enough to place the accompanying speech in the commercial speech realm.⁸⁷ The court therefore applied strict scrutiny, finding the ordinance to be over-expansive and unduly burdensome, as the city could employ less speech-restrictive means to address the problem by erecting signs on public property or launching a public awareness campaign.⁸⁸

On appeal, the Second Circuit reversed the district court to uphold the provision requiring CPCs to disclose whether or not they retained licensed medical providers on staff (“Status Disclosure”). Under strict scrutiny, it found the “neutral” Status Disclosure to be narrowly tailored to serve the compelling government interest of informing consumers and protecting against fraud.⁸⁹ However, the Circuit affirmed the district court’s decision to enjoin the provision requiring CPCs to disclose whether or not they provide abortion services or referrals (“Services Disclosure”) as unconstitutional.⁹⁰ The Circuit maintained that the Services Disclosure “alters the centers’ political speech by mandating the manner in which the discussion of [controversial political topics like abortion, emergency contraception, or prenatal care] begins.”⁹¹ The panel stated that this provision was appropriately enjoined as unconstitutional regardless of whether it applied strict scrutiny or intermediate scrutiny.⁹² It also stated that even if the CPC speech were deemed commercial, *Zauderer* would not

87. *Id.* at 205 (“[A]n organization does not propose a ‘commercial transaction’ simply by offering a good or service that has economic value. Rather, a commercial transaction is an exchange undertaken for some commercial purpose”) (citations omitted). Additionally, the court noted that “Plaintiffs [do not] offer pregnancy-related services in furtherance of their economic interests. Plaintiffs’ missions—and by extension their charitable work—are grounded in their opposition to abortion and emergency contraception.” *Id.*

88. *Id.* at 208–09.

89. *Evergreen Ass’n, Inc. v. City of New York*, 740 F.3d 233, 247–48 (2d Cir. 2014).

90. *Id.* at 249–50. The Circuit determined that under strict scrutiny, the district court had rightly enjoined the provisions requiring the CPCs to disclose whether or not they provide abortion services or referrals (“Services Disclosure”) and to state that the New York City Department of Health encourages pregnant women to consult with a licensed provider (“Government Message”) as unconstitutional. *Id.*

91. *Id.* at 249.

92. *Id.* at 250.

save the Services Disclosure because the provision “requires centers to mention controversial services that some pregnancy services centers . . . oppose,” rather than merely mandating the disclosure of “purely factual and uncontroversial” information.⁹³

Although the Circuit asserted that strict scrutiny and intermediate scrutiny would converge in the case of the Services Provision, intermediate scrutiny was only addressed in a superficial, cursory paragraph placed at the end of a detailed strict scrutiny analysis.⁹⁴ The Circuit failed to present a convincing argument as to why or how these standards necessarily converge as applied here—an unsupported attestation that they simply do is unsatisfactory. Additionally, the Circuit failed to fully explain why, if the CPC speech were to be characterized as commercial, it would discount *Zauderer’s* application in this context. The panel takes for granted that any mandated disclosure related to abortion pertains to “controversial” information that would preclude the application of *Zauderer’s* rational basis review. It is true that a provision compelling a CPC to make particular moral or political statement about abortion could not be characterized as “purely factual and uncontroversial” under *Zauderer*. However, the disclosure of the fact that a center does not provide abortions or abortion referrals is not “controversial” merely because the word “abortion,” which is associated with a sensitive and divisive subject, is included in it. The actual substance of the disclosure—a factual statement lacking any underlying normative message or political or moral undertones—is itself not controversial, but merely a statement of fact.

III. THE CUBBYHOLE CONUNDRUM: FIRST AMENDMENT DOCTRINE IN THE CPC CONTEXT

As the district courts have noted, and as Section A of this Part will proceed to explain, the CPC speech targeted by the ordinances cannot be appropriately fit into either a commercial or professional cubbyhole without drastically distorting these existing doctrinal exceptions. As a result, the intermediate standard of scrutiny

93. *Id.* at 245 n.6.

94. *Id.* at 250 (“Finally, we consider whether a different answer would obtain under intermediate scrutiny While it is a closer question, we conclude that it would not, considering both the political nature of the speech and the fact that the Status Disclosure provides a more limited alternative regulation.”).

permitted in the commercial and professional realms cannot be invoked to save the ordinances from a First Amendment challenge. However, as Section B will detail, the misleading CPC speech at issue and the nature of the communicative relationship between the pregnant women and the CPCs raises many of the same concerns that justify the application of a lesser degree of scrutiny in the commercial and professional contexts. Additionally, as Section C will argue, the application of strict scrutiny to strike down ordinance provisions in these cases runs afoul of the purpose of First Amendment doctrine, as it is difficult to justify according the deceptive CPC speech full First Amendment protection based on traditional First Amendment principles and values.

Together, the similarities between the CPC speech and speech falling within the existing commercial and professional exceptions on the one hand, and the inability to justify fully protecting the CPC speech based on the traditional function of the First Amendment on the other, point towards subjecting the city ordinances in the CPC cases to a lesser degree of scrutiny. As a result, as Section D will highlight, the application of strict scrutiny in this case fails to serve its doctrinal purpose of distinguishing improper regulatory motives from permissible regulations in the First Amendment context.

A. The CPC Case and the Commercial and Professional Cubbyholes

1. The CPC Speech Is Not Commercial

As several judges in the CPC litigation have rightly maintained,⁹⁵ the speech in the CPC cases does not fall under either

95. *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Baltimore*, 721 F.3d 264, 290 (4th Cir. 2013) (Wilkinson, J., dissenting). Judge Wilkinson argues that in vacating and remanding to allow the City opportunity for discovery, the majority

has licensed a fishing expedition into the Center's motivations and operations on the off chance that it might turn up some vaguely "commercial" activity . . . [even though] the majority appears to recognize that the Center's speech clearly lies far from "the core notion of commercial speech," since none of its advertisements proposes a commercial transaction.

Id. at 303.

Judge Niemeyer argues, as he did in the prior panel decision, that because the ordinance "imposes a disclosure requirement on *all speakers*,

the *Virginia State Board* or the *Central Hudson* definitions of commercial speech. The CPCs are not selling any goods or services. Their speech is neither “proposing a commercial transaction” nor related “solely to the economic interests” of the CPCs or their female clients. The CPCs are providing free information about pregnancy and, if the speech is related to any interest, it is a politically- or religiously-motivated interest in dissuading women from getting an abortion, not achieving economic gain. While the CPCs may be providing a commercially valuable service in a medical market place, this activity in and of itself does not constitute the proposal of a “commercial transaction” required to place the speech in a commercial context.

It could be argued that the definitions of “commercial” espoused in *Central Hudson* and *Virginia State Board* are too rigid and formulaic and that a different definition should be adopted.⁹⁶ Citing *Bolger*,⁹⁷ Judge King in the Fourth Circuit en banc decision maintains that “the potential commercial nature of speech does not hinge solely on whether the Center has an economic motive.”⁹⁸ In his dissent from the prior panel opinion, King argued that the CPCs’ speech satisfies the first two *Bolger* factors as advertisements referring to a service. He asserted that the third factor—the speaker’s

regardless of economic motivation . . . wholly indifferently as to whether the speaker ‘propos[es] a commercial transaction,’” it unconstitutionally compels noncommercial speech based on its content. *Id.* at 303. The Second Circuit panel did not directly address this issue, maintaining that it would reach the same conclusions regarding the disclosures under both strict and intermediate scrutiny. See *Evergreen Ass’n*, 740 F.3d at 250. However, as noted above, the court failed to fully justify or explain its blank assertion that the standards converge.

96. See Katherine E. Gilbert, *Commercial Speech in Crisis: Crisis Pregnancy Center Regulations and Definitions of Commercial Speech*, 111 Mich. L. Rev. 591, 597–98 (2013) (arguing that courts should adopt the *Bolger* factor-based approach to defining commercial speech in the CPC context and beyond, and that under this approach some CPC speech is likely commercial and ordinances targeting it should be deemed constitutional).

97. The *Bolger* Court cited several factors in support of its decision that a condom manufacturer’s informational pamphlet about condom use was commercial speech. It found that, *when combined all together*, the fact that the pamphlet was labeled an ‘advertisement’, its reference to a specific product, and its publication and distribution by a condom manufacturer with an economic motive, provided “strong support for the District Court’s conclusion that the informational pamphlets are properly characterized as commercial speech.” *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66–67 (1983).

98. *Greater Balt. Ctr.*, 721 F.3d at 287.

economic motive, or lack thereof—should not be determinative in deciding whether the speech can be defined as commercial.⁹⁹ King maintained that, because the ordinances compel a disclaimer, the court must look at the “nature of the speech” regulated “taken as a whole and the effect of the compelled [disclaimer] thereon” in order to determine whether the speech is commercial or non-commercial in nature.¹⁰⁰

While context may matter, and a more comprehensive definition of “commercial” similar to the *Bolger* test should perhaps be employed for determining whether or not speech is commercial in nature,¹⁰¹ the *Bolger* factors cannot be used to push the CPC cases under the commercial speech heading without further distorting the already confused commercial speech doctrine.

First, it is difficult to argue that all of the speech being directly regulated by the ordinances is “an advertisement” under the first *Bolger* factor. While misleading advertisements circulated by the CPCs in the Yellow Pages, online or in newspapers may be closer to commercial in nature, the ordinances’ requirement that disclaimer signs be posted in CPC waiting rooms cannot be analogized to regulation of an informational pamphlet in *Bolger*.¹⁰² There is no

99. Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Baltimore, 683 F.3d 539, 568–69 (4th Cir. 2012), *vacated en banc*, 721 F.3d 264 (4th Cir. 2013).

100. *Id.* (quoting *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988)). King also draws attention to the Supreme Court of North Dakota’s decision in *Fargo Women’s Health Org., Inc. v. Larson*, in which it determined that the Help Clinic—a similarly situated non-profit CPC utilizing false and deceptive advertising techniques—was engaging in commercial speech despite the provision of free services. The court justified this determination based on the fact that the Help Clinic ads were “placed in a commercial context and . . . directed at the providing of services rather than towards an exchange of ideas.” *Fargo Women’s Health Org., Inc. v. Larson*, 381 N.W.2d 176, 181 (N.D. 1986).

101. For this argument, see Gilbert, *supra* note 96, at 604–05.

102. See *id.* at 613–14. Gilbert applies the *Bolger* factor test to the ordinances and maintains that “[w]here the CPCs engage in advertising (the first factor) of particular goods and services (the second factor), such as free pregnancy tests or pregnancy options counseling, the *Bolger* factors militate heavily in favor of considering the speech ‘commercial’ for the purposes of analyzing the regulation.” *Id.* However, she concedes that “[w]here the CPC is required to pose a sign in its office indicating whether it provides or refers for abortion services . . . the regulation is more likely to . . . fall outside the scope of commercial speech.” *Id.* Additionally, not all of the ordinances address CPC

indication that the CPCs are advertising within their waiting rooms—such proposals would be redundant, as the women there have already entered the centers seeking their services—and therefore the government sign posted on the wall cannot be justified as remedying deceptive advertising practice.

With regards to the second *Bolger* factor, it may be conceded that the speech targeted does pertain to a particular product or service. However, the target in many cases is not the CPCs' reference to their provision of pregnancy services. Rather, it is the *absence* of a reference to a product or service that they *do not* provide—namely, abortions.¹⁰³ Additionally, even for cases where deceptive tactics may be more transparent, and CPCs refer directly to abortion services that they do not in fact provide or advertise in the abortion section of the Yellow Pages,¹⁰⁴ the Court has stated that a mere “reference to a specific product” does not render speech commercial on its own.¹⁰⁵

Finally, there is no indication in the records of the CPC cases that the non-profit CPCs have an economic motive under the third *Bolger* factor. Even if the service provision could be designated as “commercial” based on their advertisements and their provision of a commercially valuable product or service, such speech does not remain commercial in nature “when it is inextricably intertwined with otherwise fully protected speech.”¹⁰⁶ It is clear from their categorical opposition to abortion that the motivation behind CPCs' advertising and offering services is ideological or religious in nature. Even if the CPCs harbor the tangential economic motive of increasing availability of funds by attracting clients to support their underlying ideological purpose, this is not their “sole” motivation for

advertisements. While the New York ordinance also mandates that disclosures be made “in any advertisement promoting the services of [the] pregnancy services center,” the Baltimore ordinance solely mandates that signs be posted at the CPC. See N.Y.C., N.Y., Admin. Code § 20-815 (2011) (setting out requirements for disclaimers); Balt., Md., Health Code § 3-501 (2013) (same).

103. Cf. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 62 n.4 (1983) (where the issue was Youngs Drug Products Corporation's referral to the condoms they were selling in their informational pamphlets).

104. The Waxman Report, *supra* note 1, at 3.

105. *Bolger*, 463 U.S. at 66.

106. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988).

advertisement and the Supreme Court has not found charitable solicitation to be a “variety of purely commercial speech.”¹⁰⁷

Even if it is conceded that the absence of a “sole economic motive” should not be outcome determinative, an expansion of the definition of commercial speech to include all that which offers services that have commercial value in the market place would threaten to subsume expression rightly protected under the First Amendment within the commercial exception.¹⁰⁸ Such an expansion could result in diminished constitutional protection for the valued ideological and political speech of religious, non-profit, or charitable organizations.¹⁰⁹

2. The CPC Speech is Not Professional

The cities have also argued in the alternative, contending that even if the CPCs speech cannot be designated as commercial, the disclosure requirements are analogous to those in the abortion provision context, which were upheld by the Supreme Court in *Casey*.¹¹⁰ In sustaining state regulations compelling doctors to make certain disclosures to pregnant women seeking abortions, the *Casey* Court indicated that a government may compel an individual who would rather remain silent to speak if “the communication takes place in the context of a professional relationship with a client.”¹¹¹

107. *Vill. Of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980); *see also Riley*, 487 U.S. at 795–96.

108. *See Evergreen Ass'n, Inc. v. City of New York*, 801 F. Supp. 2d 197, 205 (“Adoption of Defendant’s argument would represent a breathtaking expansion of the commercial speech doctrine.”).

109. *See O'Brien v. Mayor of Baltimore*, 768 F. Supp. 2d 804, 814 (D. Md. 2011) (maintaining that adoption of the city’s definition would mean that “any house of worship offering their congregants sacramental wine, communion wafers, prayer beads, or other objects with commercial value, would find their accompanying speech subject to diminished constitutional protection”); *see also Evergreen Ass'n*, 801 F. Supp. 2d at 205–06 (“Likewise, a domestic violence organization advertising shelter to an abuse victim would find its First Amendment rights curtailed, since the provision of housing confers an economic benefit on the recipient.”).

110. *See Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233, 245 (2d Cir. 2014); *see also Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992) (where the plurality applied a lesser degree of scrutiny to a Pennsylvania abortion law’s disclosure requirements).

111. Halberstam, *supra* note 18, at 774 (discussing *Casey*’s implications regarding professional speech).

However, the CPC speech cannot be categorized as professional and therefore subject to regulation under state licensing power.

The mandatory disclosures upheld in *Casey* were only permitted because they were “imposed incidental to the broader governmental regulation of a [licensed medical] profession.”¹¹² The CPCs, in contrast, are not licensed medical facilities with licensed medical professionals on staff.¹¹³ Additionally, as the Southern District of New York found—a finding left in place by the Second Circuit—despite the fact the CPCs met with pregnant women individually, they did not necessarily “employ any specialized expertise or professional judgment in service of their clients’ individual needs and circumstances.”¹¹⁴

The record in the CPC cases does not indicate that the CPCs retain conventional learned professionals on staff, licensed by the state and subscribing “to a body of knowledge that is shared among their peers.”¹¹⁵ The cities could have chosen to license ultrasound technicians, thus positioning the activities of the CPCs more closely under professional speech.¹¹⁶ However, unlike the case of doctors, lawyers, psychologists or accountants,¹¹⁷ neither the cities nor the

112. See *Greater Balt. Ctr.*, 683 F.3d at 554. The initial panel of the Circuit Court distinguished the CPC case from *Casey*, maintaining that in *Casey* the government regulations were only upheld because “even though they implicated a physician’s right not to speak,” they did so “only as part of the practice of medicine, subject to reasonable licensing and regulation by the State.” *Casey*, 505 U.S. at 884.

113. See *Greater Balt. Ctr.*, 683 F.3d at 554–55 (stating that, in contrast to *Casey*, the CPCs subject to Baltimore’s ordinance “do not practice medicine, are not staffed by licensed professionals, and need not satisfy the informed consent requirement”).

114. *Evergreen Ass’n.*, 801 F. Supp. 2d at 207 (noting that professional speech is generally confined to that which is “given in the context of a quasi-fiduciary—or actual fiduciary—relationship, wherein the speech is tailored to the listener and made on a person-to person basis”).

115. Halberstam, *supra* note 18, at 772. Halberstam maintains that “although members of any given learned profession may differ in their individual judgments about particular issues, their role as professionals traditionally implies their subscription to a body of knowledge that is shared among their peers.” *Id.*

116. See *Evergreen Ass’n, Inc. v. City of New York*, 740 F.3d 233, 247 n.7 (2d Cir. 2014) (“As the district court noted, New York State does not impose licensing requirements on ultrasound technicians. The district court suggested that the City could impose licensing requirements or lobby the state to do so.”).

117. See *supra* notes 57–60 (citing the cases in which these occupations have been deemed “professional” by the courts).

states involved in the CPC cases have chosen to require licenses for the provision of pregnancy counseling, ultrasound operation, or any other services offered by the CPCs; therefore, the ordinances cannot be evaluated “through the lens of lowered scrutiny accorded to professional speech.”¹¹⁸

As Judge Niemeyer aptly noted, the Supreme Court has never held that the speech of those engaged in unlicensed occupations is entitled to less First Amendment protection.¹¹⁹ A court determination that the CPCs are engaging in professional speech despite the fact that the CPCs’ activities and services do not require licensing by the state would therefore constitute an unprecedented expansion of the professional speech doctrine. Rather than allowing minimal state regulation of speech as incident to a broader regulatory or licensing scheme,¹²⁰ such a ruling would open the door for direct state regulation of any speech uttered during the course of the performance of all occupations, compromising a great deal of First Amendment protection.

B. Occupying the Void: The Bounded Nature of Commercial, Professional and CPC Speech

While CPC speech falls under neither the commercial speech nor the professional speech exceptions, that does not mean that CPC speech warrants full First Amendment protection. That is because CPC speech shares doctrinal DNA with speech in the commercial and professional contexts—most notably, the bounded nature of its communicative process.

In order to appropriately situate the CPC case, it is first necessary to examine the reasoning behind the exceptions created for professional and commercial speech. Speech in both the commercial

118. *Evergreen Ass’n*, 801 F. Supp. at 207.

119. *Greater Balt. Ctr. for Pregnancy Concerns v. Mayor of Baltimore*, 683 F.3d 539, 555 n.3 (4th Cir. 2012) (noting that, while the Supreme Court has recognized that the government “may regulate the professions and, as necessary to serve the state’s interest in such regulation, so regulate the professionals’ speech,” the Court has never “recognized the notion that ‘professional speech,’ unconnected to state regulation or licensing, is entitled to less protection under the First Amendment” and the city “does not claim that the Pregnancy Center’s employees and volunteers are state-regulated professionals.”).

120. *See Underhill Assoc. Inc. v. Bradshaw*, 674 F.2d 293, 296 (4th Cir. 1982) (holding that a registration scheme does not violate the right to free speech).

and professional realms can be said to share a common characteristic that may help explain greater judicial leeway for government regulation in these contexts—what Daniel Halberstam terms “the constitutional status of bounded speech practices.”¹²¹ Halberstam argues that “speech within certain relationships, such as those between buyer and seller, or between physician and patient, lies beyond the traditional conception of unbounded public discourse, because it takes place as part of a predefined communicative project.”¹²² Unlike unstructured, unbounded instances of communication or public debate, where the First Amendment rights of the speaker are generally emphasized,¹²³ in both the commercial and professional speech contexts the focus is placed on a bounded, “substantive vision of the communicative project with the result that cognizable interests of the speaker and listener are harmonized.”¹²⁴

In these cases, the Court has focused not only on the speaker’s interest in speaking, but also on the listener’s interest in receiving particular information, examining the communicative relationship contextually and taking account of the expectations and interests of both parties.¹²⁵ This “listener-based rhetoric” can be found in many commercial and professional speech decisions.¹²⁶ Because the boundaries of discourse in these cases can be judicially ascertained in

121. See Halberstam, *supra* note 18, at 828. Halberstam maintains that communicative interactions in these areas are bounded because they “are not seen as abstract exchanges of views and ideas between persons about whom nothing is known, but instead, as context dependent interactions with purposes that can be judicially ascertained with a reasonable degree of confidence.” *Id.*

122. *Id.* at 832.

123. *Id.* at 829. For example, when a soapbox orator or pamphleteer disseminates “their views about matters of public concern to whomever chooses to stop and listen.” *Id.*

124. *Id.* at 831.

125. *Id.* at 831. Halberstam notes that in commercial and professional contexts, “the importance of the speaker is eclipsed by an emphasis on the listener’s interest in receiving certain ‘information’ . . . [and] the Court finds itself able to stand in the shoes of the speaker and listener and definitively assess the communicative enterprise in narrow, functional terms.” *Id.*

126. See, e.g., 44 *Liquormart Inc. v. Rhode Island*, 517 U.S. 484, 496 (1996) (plurality) (discussing the development of free speech law’s relationship with advertising); *Glickman v. Wileman Bros. & Elliot, Inc.*, 521 U.S. 457, 480 (1997) (stating that speech in advertising is important to public discourse); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 882–83 (1992) (addressing requirements that prospective abortion patients be given specific information about risks); *Rust v. Sullivan* 500 U.S. 173, 200 (1991) (addressing discussions about abortions).

advance based on the expectations of both the listener and speaker regarding the nature of the communicative project, the Court “welcomes government regulation [in these contexts] . . . as assuring that communications that are dependent on predefined communicative goals remain within the boundaries of that discourse.”¹²⁷

In the commercial context, it is the listener’s—or the public consumer’s—interest in receiving accurate commercial information that “supports the regulation of potentially misleading advertising . . . [and] constitutional protection for the dissemination of accurate and nonmisleading commercial messages.”¹²⁸ An exception allowing for increased government regulation is justified in order to correct for information asymmetries so that both the speaker and the listener share “the common understanding about the content and purpose of the communication” required for a commercial transaction based on expected background norms to exist.¹²⁹ Judge King makes note of this in his majority en banc opinion, maintaining that “context matters . . . [and] from a First Amendment free speech perspective, that context includes the viewpoint of the listener, for ‘[c]ommercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information.’”¹³⁰

Similarly, a professional and client share a predefined relationship that runs far deeper than the relationship between pedestrians and soapbox orators who share the same physical

127. Halberstam, *supra* note 18, at 831.

128. *44 Liquormart, Inc.*, 517 U.S. at 496 (Stevens, J., concurring). Halberstam maintains that because,

[b]y entering into a commercial transaction, buyer and seller are deemed to share the background norms and community values that make the exchange possible[,] . . . government regulation, although content-based, may [be allowed in this context to] facilitate the speech practice by helping to ensure that communication within these relationships satisfies the high degree of intersubjectivity that is necessary to make the social interaction possible at all.

Halberstam, *supra* note 18, at 833.

129. Halberstam, *supra* note 18, at 833.

130. *Greater Balt. Ctr. For Pregnancy Concerns, Inc. v. Mayor of Baltimore*, 721 F.3d 264, 286 (4th Cir. 2013) (quoting *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 561–62 (1980)).

space.¹³¹ A professional fulfills a more defined social role by offering specific knowledge and expertise to an audience that deliberately seeks to access information and the professional's judgment about a particular issue.¹³² A client requesting professional advice comes to the table with a predefined understanding of the nature of the communicative interaction that will ensue.¹³³ That client's presumption and trust that the professional is "acting under a commitment to the ethical and intellectual principles governing the profession" is necessary for a meaningful dialogue between client and professional to exist at all.¹³⁴ Speech compelled in the professional context serving only to enable the lay-person's receipt of "the expert information necessary to make an autonomous, intelligent and accurate selection of what medical treatment to receive"¹³⁵ may therefore be upheld as "constitutive of the communicative interaction."¹³⁶

Thus, in both the commercial and professional contexts, exceptions allowing for government regulations are required in order to maintain the integrity of the bounded communicative process that has come to be expected in these relationships by both listener and speaker.¹³⁷ While the CPC cases may not fall into either of the predefined existing exceptions, the nature of the speech involved in the CPC context and the communicative relationship between the pregnant woman as listener and the CPC as speaker suggest that these cases may have more in common with the bounded areas of

131. Halberstam, *supra* note 18, at 772.

132. *Id.*

133. *Id.* at 834.

134. *Id.*

135. Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. Ill. L. Rev. 939, 972.

136. Halberstam, *supra* note 18, at 828; *see also id.* at 773 (maintaining that State regulations "ensure professionals' faithfulness to the public aspects of their calling . . . [by playing] a complementary role in maintaining the profession").

137. *Id.* at 834

[W]hether the relationships are ones of trust, such as those between lawyer and client or doctor and patient, or are merely common material enterprises, such as those between buyers and sellers, their presence triggers a contextual First Amendment review that is specifically centered around the social relation, as opposed to an abstract review such as that traditionally applied to the street-corner speaker.

Id.

commercial and professional speech than with the unbounded arena of traditional public debate.

Like both commercial and professional speech, the relationship between the pregnant woman and a CPC can be seen as a pre-defined communicative project. Unlike the unbounded case of the soapbox orator—where the orator expresses his or her beliefs or opinions to a public without a reliance interest or a pre-existing expectation that the orator’s words are truthful—the women as listeners in the CPC context listen to CPC speech with pre-existing expectations. These women *deliberately* seek out the advice and counsel of the CPC under the assumption that the CPC will fulfill its presumed social role and that they will be fully apprised of all their options regarding their pregnancy.¹³⁸

The relationship between a pregnant woman and a pregnancy service provider is thus bounded by a pre-existing expectation of trustworthiness and the receipt of comprehensive information on the part of the woman as listener, much like in the professional context.¹³⁹ The woman enters this relationship trusting that the CPC will provide abortion referrals or access to an abortion if requested, as the CPC has positioned itself as a comprehensive provider of such services. Unfortunately, however, in these cases, the women are situated much like commercial consumers faced with potentially misleading advertising.¹⁴⁰ They are at an informational disadvantage

138. In Halberstam’s words, the CPC’s female clients visit with an established “interest in receiving certain information.” *Id.* at 831 (internal quotation marks omitted); see also Kristen Gallacher, *Protecting Women From Deception: The Constitutionality of Disclosure Requirements in Pregnancy Centers*, 33 *Women’s Rts. L. Rep.* 113, 143 (2011) (“[M]any women visit [CPCs] specifically to discuss [the topics of pregnancy, abortion, and birth control] based on previously held assumptions that these centers provide or refer for abortion.”).

139. In this sense, the relationship between a pregnant woman and a CPC provider is similar to the relationship between patient a physician, with regards to which the Court has determined that “professionals’ interests may be subordinated to those of their clients” in contexts such as *Casey*, where the relationship was deemed to be “derivative of the woman’s position.” See Halberstam, *supra* note 18, at 844 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 883, 884 (1992)).

140. See *id.* at 788–89 (quoting 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996) (Stevens, J., concurring) (“When a State regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for

due to the CPCs' purposeful engagement of deceptive tactics, and their interest in receiving accurate information as consumers of pregnancy related services is consequently compromised.

Because of the pre-existing expectations and bounded nature of the communicative process between a pregnant woman and a CPC, it is necessary to view speech in the CPC context as part of a substantive, pre-defined communicative project, requiring the harmonization of both speaker and listener interests. While the CPCs argue that their First Amendment rights as speakers are being infringed upon by the compelled disclosures, this alone cannot defeat legitimate government regulation in a bounded speech context. Even though the CPC speech may not fit neatly into either a professional or commercial cubbyhole, the deceptive tactics used to mislead women into thinking that the CPCs are licensed medical facilities offering comprehensive services justify compelled disclosures in order to remedy the informational imbalance and correct for the lack of "common understanding about the content and purpose of the communication."¹⁴¹

C. Occupying the Void: First Amendment Functions vs. CPC Speech

An examination of the values underlying the First Amendment's protection of free speech alongside the nature of the CPC speech makes apparent that the CPC speech cannot be characterized as the type of "core speech" that the First Amendment was designed to protect. Consequently, according full legal protection to the speech at issue in the CPC cases would seriously undermine basic First Amendment principles.

Zechariah Chafee, a preeminent twentieth century First Amendment scholar, wrote that in order to ascertain "[t]he legal meaning of freedom of speech . . . a knowledge of the political and philosophical basis of such freedom" is necessary.¹⁴² Throughout

according constitutional protection to commercial speech and therefore justifies less than strict review.").

141. *Id.* at 833.

142. Zechariah Chafee, Jr., *Freedom of Speech* 337 (1920); *see also* O. Lee Reed, *Is Commercial Speech Really Less Valuable Than Political Speech?*, 34 *Am. Bus. L.J.* 1, 3 (1996) ("To interpret properly the meaning of constitutional free speech, courts and scholars must appreciate the values, or desirable ends (or purposes or functions), that speech promotes.").

history, various scholars and courts have sought to define the values or principles underlying the First Amendment's protection of free speech in order to determine the manner and strength of its application in emerging contexts. While a full survey of the First Amendment's purpose is beyond the scope of this Note, various scholars have identified a number of First Amendment principles that may serve as useful frameworks around which to construct an analysis of the CPC speech.

Drawing on the overarching First Amendment goal of promoting a vibrant and thriving marketplace of ideas, First Amendment scholars have identified some key values underlying the constitutional protection of the freedom of speech. These include, among others: (1) individual self-fulfillment; (2) the attainment of truth; and (3) societal participation in social and political decision-making.¹⁴³ This Note will analyze the CPC speech in the context of these First Amendment values, arguing that the misleading CPC speech is incompatible with the type of speech that the First Amendment is designed to protect, and that the compelled disclosure requirements only serve to bolster the purpose of the First Amendment.

First, individual self-fulfillment has been identified as a value protected by the First Amendment. In this regard, First Amendment scholar Thomas Emerson claims that man's right to form and express his beliefs and opinions is essential to both developing his individual character and fulfilling his role as a member of the community.¹⁴⁴ Consequently, one purpose behind the First Amendment is to protect the capacity of the individual to achieve self-fulfillment through the expression of ideas and beliefs relevant to his personality and

143. See Thomas I. Emerson, *Toward A General Theory of the First Amendment*, 72 Yale L.J. 877, 878 (1963); see also, Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* 82–89 (1948); Kent Greenawalt, *Free Speech Justifications*, 89 Colum. L. Rev. 119 (1989); C. Edwin Baker, *Scope of First Amendment Freedom of Speech*, 25 UCLA L. Rev. 964 (1978); Harry H. Wellington, *On Freedom of Expression*, 88 Yale. L.J. 1105, 1129–31 (1979).

144. Emerson, *supra* note 143, at 879.

The right to freedom of expression is justified first of all as the right of an individual purely in his capacity as an individual. . . . From this it follows that every man—in the development of his own personality—has the right to form his own beliefs and opinions . . . [and] the right to express these beliefs and opinions. Otherwise, they are of little account.

Id.

through engagement with others in his community.¹⁴⁵ Emerson asserts that these concepts endow the individual with a right “to participate in formulating the aims and achievements of his society and his state.”¹⁴⁶

Certainly, this value is implicated in the CPC case. The purpose behind CPC engagement in the provision of pregnancy services is to “communicate [their] . . . preferences and judgments”¹⁴⁷ by expressing their belief in the immorality of abortion. The CPCs thus claim that their freedom of expression and ability to participate in formulating “the aims and achievements”¹⁴⁸ of society is severely curtailed by the ordinances’ disclosure requirement.

Whether and to what extent the compelled disclosures actually curb or restrain the CPCs expression is disputed, as the ordinances do not prohibit the CPCs from expressing opposition to abortion.¹⁴⁹ The CPCs may continue to express distaste for abortion, to counsel women who visit their facilities against obtaining an abortion, and to speak against the mandated signs in the waiting room.

However, even if it is conceded that the CPCs’ autonomy as speakers is compromised to some degree by the disclosure requirements, their freedom of expression is not the only relevant consideration under this overarching value. Within the value of individual self-fulfillment, Emerson includes not only the right of the

145. *Id.* at 880 (“The right to freedom of expression derives, secondly, from basic Western notions of the role of the individual in his capacity as a member of society.”). Emerson claims that man’s right to express his beliefs and opinions in his role as a member of the community is drawn from societal notions of individual welfare and equality. *See, e.g.,* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Bos., 515 U.S. 557, 573 (1995) (holding that the use of the State’s power to require a private parade organizer to allow groups espousing a message opposed by the organizer to participate in the parade “violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message”).

146. *Id.*

147. *Id.* at 880.

148. *Id.*

149. *See* Gallacher, *supra* note 138, at 142 (arguing that, even under the ordinances, “pregnancy centers will still be free to advocate their position that women choose life over abortion [as] . . . the disclosure requirements do not mandate that the pregnancy centers promote or explain comprehensive reproductive services[,] [nor do they] prohibit the centers from engaging in any speech with its clients.”).

individual to communicate, but also “the right of the individual to access . . . knowledge.”¹⁵⁰ This points to considering not only the First Amendment rights of the speaker in a particular context, but also the rights of the listener to access information in order to shape his/her own individual views and achieve self-fulfillment.¹⁵¹

Various scholars have argued along these lines, maintaining that the autonomy of the listener should also play a role in a First Amendment analysis.¹⁵² Listener autonomy rights are premised on the idea that “affording people an opportunity to hear and digest competing positions and to explore options in conversation with others . . . [promotes] independent judgment and considerate decision.”¹⁵³ The “marketplace of ideas” concept central to the First Amendment also points to a focus on listener perspective, championing the principle that “more speech is better” so as to allow individuals access to a multitude of ideas and opinions that may serve to inform their decisions.¹⁵⁴

In the CPC context, it appears that the autonomy rights of the CPCs as speakers run counter to the autonomy rights of the

150. Emerson, *supra* note 143, at 880.

151. *Id.*

152. See, e.g., T. M. Scanlon, Jr., *A Theory of Freedom of Expression*, 1 Phil. & Pub. Aff. 204 (1972); see also Cass R. Sunstein, *Democracy and the Problem of Free Speech* 53–77 (Free Press 1993); Kent Greenawalt, *Speech, Crime and the Uses of Language* 27–28 (1989) (arguing that First Amendment justifications for the protection of free speech are also based on listener interests and maintaining that “the most straightforward claim is that the government should always treat people as rational and autonomous by allowing them to have all the information and all the urging to action that might be helpful to a rational, autonomous person making a choice”); Laurent Sacharoff, *Listener Interests in Compelled Speech Cases*, 44 Cal. W. L. Rev. 329, 335–36, 374 (2008) (arguing that “focusing on listener interests will help to guide the proper application of compelled speech doctrine in future cases”). Sacharoff maintains that “traditional free speech justifications focus primarily on the practical interests of listeners in discovering truth or deciding how to vote . . . [and] also focus upon listeners’ autonomy in choosing how to live, to develop their characters, faculties, and especially their minds . . .” *Id.*

153. See Greenawalt, *supra* note 143, at 26.

154. See Sacharoff, *supra* note 152, at 404 (citing *Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio*, 471 U.S. 626, 651, 653 (1985)) (noting that the Court decided that, based on listener interests, “more information was better”); see also *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 373–75 (1969) (upholding a federal requirement that radio stations provide airtime for opposition as constitutional in part due to the interests of listeners).

women as listeners.¹⁵⁵ The CPCs should undoubtedly have the freedom to express their opposition to abortion and emergency contraception. However, the way in which they are exercising this right—by withholding information and misleading women into believing that they offer abortion referrals or services—jeopardizes a woman’s right to self-fulfillment by restricting her access to the information required in order to make an informed decision. The ordinances seek to remedy this asymmetry by forcing the CPCs to make the factual disclosure to clients that they do not offer abortion services and are not licensed medical facilities.¹⁵⁶ Thus, even if the ordinances do constrain CPC speaker autonomy to some extent, they do so only to support the autonomy of the women as listeners.¹⁵⁷

The importance of accounting for the autonomy of the listener also relates deeply to our second and third First Amendment values: the attainment of truth, and societal participation.¹⁵⁸ Freedom of speech has been justified based on its ability to promote the attainment of truth.¹⁵⁹ In this respect, an individual must be able to

155. As Judge King notes, the speech and the regulations must be analyzed in a context that “includes the viewpoint of the listener, for ‘[c]ommercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information.’” *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Baltimore*, 721 F.3d 264, 286 (4th Cir. 2013) (quoting *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 561–62 (1980)). Judge King also cites *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976) (“Freedom of speech presupposes a willing speaker. But where a speaker exists . . . the protection afforded is to the communication, to its source and to its recipients both.”).

156. See *supra* notes 9–12 (the local ordinances).

157. See Helen Norton, *Secrets, Lies and Disclosure*, 27 J.L. & Pol. 641, 652–54 (2012) (arguing that courts should examine the reason for speaker resistance to truthful disclosure requirements when evaluating First Amendment claims to ensure the protection of listener autonomy).

158. See Emerson, *supra* note 143, at 881–82. (“[F]reedom of expression is not only an individual but a social good . . . [as it is both] the best process for advancing knowledge and discovering truth . . . [and] provide[s] for participation in decision-making through a process of open discussion which is available to all members of the community.”)

159. One of the primary purposes behind the First Amendment’s protection of speech has been identified by the Supreme Court as the preservation of “an uninhibited marketplace of ideas in which truth will ultimately prevail.” *Red Lion Broad. Co.*, 395 U.S. at 390; see also Greenawalt, *supra* note 143, at 130 (tracing this First Amendment value to John Stuart Mill’s *On Liberty*). As Greenawalt notes, a number of Supreme Court justices have cited this value in explaining

“hear all sides of the question . . . consider all alternatives, test his judgment by exposing it to opposition, [and] make full use of different minds to sift the true from the false”¹⁶⁰ in order to make both individual and social judgments. The proliferation of information required in order to attain truth also serves to bolster and support individual participation in the decision-making processes in society, seen as essential to a functioning democracy.¹⁶¹

David Strauss has argued that we should adopt the perspective of the listener “in trying to decide how far the government can go in restricting private speech on the ground that it is manipulative.”¹⁶² In this regard, when examining a government regulation targeting manipulative advertising, one should ask a series of questions, including whether:

[T]he information currently available . . . deviate[s] substantially from what [a] hypothetical individual would desire? If so, could that individual, operating under normal conditions of scarcity, compensate for the deficiency herself? If not, does the proposed

First Amendment doctrine. *Id.*; see also *Abrams v. United States*, 250 U.S. 616, 623, 630 (1919) (Holmes, J., dissenting) (stating that “the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market”); *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (stating that “to expose through discussion the falsehood and fallacies . . . the remedy to be applied is more speech, not enforced silence”).

160. See Emerson, *supra* note 143, at 881.

161. See *id.* at 882 (Emerson notes that, “in order for the process to operate at its best, every relevant fact must be brought out, every opinion and every insight must be available for consideration.”). This First Amendment focus on ensuring an informed citizenry for democratic self-government has been expounded by Professor Alexander Meikeljohn. As Meikeljohn has argued, legislation aimed at restricting freedom of speech should be forbidden, “but not legislation to enlarge and enrich it”; because the individual “freedom of mind” essential in a democracy “can be increased and established by learning, by teaching, [and] by the unhindered flow of accurate information,” legislatures should be given leeway to act if they are expanding the available information in the proverbial “market place of ideas.” Alexander Meikeljohn, *Free Speech* 16 (1948); see also *Roth v. United States*, 354 U.S. 476, 484 (1957) (“The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”).

162. David A. Strauss, *Persuasion, Autonomy and Freedom of Expression*, 91 *Colum. L. Rev.* 334, 367 (1991). Strauss defines the listener as an individual “who has no interests or desires other than to reach the best decision about the subject under discussion.” *Id.* at 369.

government restriction make it more likely, from the point of view of that individual, that she will be able to reach the correct decision, or does it simply substitute the government's manipulation for that of the private parties?¹⁶³

When these questions are asked in the CPC context, it becomes apparent that the government regulation in this case should be upheld as protecting the First Amendment autonomy of the woman as listener. In answer to Strauss' first question, the misleading information that CPCs provide aimed at deceiving women "deviates" from what a hypothetical woman seeking pregnancy care services would want to know.¹⁶⁴ In this context, the answer to Strauss' second question also points to the importance of the ordinances. As noted above, women frequenting CPCs are often some of society's most vulnerable, such as the poor or recent immigrants with limited English language capabilities.¹⁶⁵ While some women in these cases may be able to "compensate for the deficiency" of information themselves through online research, a referral service or discussion with friends or neighbors, many may not have the luxury of time or access to the resources necessary to combat CPC deception on their own.

Taken together, the values embodied in First Amendment principles point towards allowing for government regulation in the CPC context. The compelled factual disclosures in this case enhance the autonomy and self-fulfillment of the women as listeners, support the attainment of truth and enable the women to participate in the decision making process of whether to engage their constitutional right to an abortion.¹⁶⁶ By expanding, rather than contracting, the amount of information available to the women, the ordinances in the

163. *Id.* at 369–70.

164. *See* Keighley, *supra* note 12, at 610 ("The evidence suggests that women visiting the centers often believe that they are visiting a medical clinic, and are unaware that the pregnancy service centers have ideological motivations for providing women with pregnancy-related services.").

165. *See, e.g.*, NARAL MD Report, *supra* note 6, at 2 (describing how CPCs target the most vulnerable populations, such as young, poor, and minority women).

166. *See* Keighley, *supra* note 12, at 602 ("By solely focusing on the underlying religious and ideological motivations of the pregnancy service centers, the courts have failed to appreciate, or even consider, the perspective of the audience for their speech: women who are or may be pregnant.").

CPC cases compelling speech serve to advance First Amendment values.¹⁶⁷

Finally, the proposed government restriction in these cases—the disclosure sign located in the CPC waiting room—rather than substituting any purported government belief regarding abortion for that of the CPCs, provides information that makes it more likely that the pregnant woman will be able to reach an informed decision on her own.¹⁶⁸ The waiting room sign is a truthful disclosure, relaying the fact that the CPC is not a licensed medical facility and does not offer abortion services. A woman may seek out the CPC *because* of its ideological or religious bent, or choose to obtain its services even after being made aware of the fact that it does not provide abortion referrals. The signs do not attempt to change the minds of these women or manipulate them into leaving the CPCs. They merely seek to reach women who have been deceived into thinking that the CPCs will provide them with access to an abortion, enabling these women to make fully informed decisions regarding where to access pregnancy related services and thereby enhancing their autonomy and right to self-fulfillment as listeners, all in accordance with the First Amendment.

D. Doctrinal Purpose & A Categorical Conundrum

The CPC speech has characteristics that simultaneously situate it close to speech excepted from full protection in the commercial and professional categories and far from core First Amendment political or ideological speech. This places the CPC speech outside of the bounds of existing exceptions allowing for increased government regulation, yet not within the core area of speech that the First Amendment is designed to protect. Nevertheless, courts have erred on the side of applying strict scrutiny

167. See *id.* at 552–53 (Compelled factual disclosures are “particularly necessary when there is a market failure in the provision of information [about risk and harm] . . . necessitating some type of government intervention to require its disclosure if the public is to be adequately informed.”).”) While Keighley’s analysis of compelled disclosures is confined primarily to the compelled commercial speech context, First Amendment values at issue in this context still point towards allowing government regulation even if the CPC cases do not fit comfortably within the existing commercial speech doctrine. *Id.*

168. See Strauss, *supra* note 162, at 369–70 (arguing that in certain cases government restrictions can make it more likely that an individual can reach the correct decision from her point of view).

as a default.¹⁶⁹ However, the default application of strict scrutiny in this case is problematic and inappropriate considering the function of strict scrutiny as a judicial tool. This is apparent from an examination of the purpose of the tiers of scrutiny in First Amendment doctrine.

While the First Amendment protects speech rights, the Court has stated many times that freedom of expression is not absolute or completely immune from government regulation, and that state imposed restrictions on speech may sometimes be permissible.¹⁷⁰ As a result, much of First Amendment doctrinal analysis and case law revolves around discerning whether government regulation of speech in a particular instance is constitutionally acceptable or not.¹⁷¹ As

169. As noted above, the Second Circuit upheld the Status Provision, strict scrutiny notwithstanding, and maintained that the Services Provision and Government Message enjoined as unconstitutional would meet the same fate under both strict and intermediate scrutiny. It therefore determined that it did not need to decide how to characterize the CPC speech, as its decision would be the same regardless of the level of scrutiny applied. However, the Circuit's conclusory statement that the standards converge here is unsatisfactory. The Circuit analyzed the provisions through the lens of strict scrutiny, only addressing the application of intermediate scrutiny with two sentences. While it noted that review under intermediate scrutiny presented "a closer question," it did not explain how it would analyze the Services Provision under this standard but merely concluded that the result would be the same "considering both the political nature of the speech and the fact that the Status Disclosure provides a more limited alternative regulation." *Evergreen Ass'n Inc. v. City of New York*, 740 F.3d 233, 250 (2d Cir. 2014). Perhaps, had the court engaged in a full-fledged, detailed intermediate scrutiny analysis, rather than applying strict as a default and then cursorily addressing intermediate scrutiny after the fact, the result may have been different.

170. *See, e.g., Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002) ("As a general matter, 'the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content'. . . . However, this principle, like other First Amendment principles, is not absolute."); *see also Dennis v. United States*, 341 U.S. 494, 503 (1951) (stating that free speech "is not an unlimited, unqualified right, but that the societal value of speech must, on occasion, be subordinated to other values and considerations"); *American Commc'ns Ass'n, C.I.O. v. Douds*, 339 U.S. 382, 394 (1950) (recognizing that "[f]reedom of speech thus does not comprehend the right to speak on any subject at any time").

171. The Supreme Court has acknowledged the importance and centrality of government motive in a First Amendment analysis, indicating that First Amendment doctrine is built upon a purposivist approach already. *See, e.g., Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819, 829 (1995) (stating that the government may not restrict speech where "the specific motivating ideology or the

Elena Kagan has argued, judicial application of First Amendment law is “best understood and most readily explained as a kind of motive-hunting.”¹⁷² The Court can be seen as having developed a series of judicial tools—the varying standards of scrutiny—as proxies for direct inquiry into government motive, intended to assist it in the process of ferreting out illicit or impermissible government motives.¹⁷³

Kagan has identified a number of impermissible motives for speech restrictions that judicial review of government regulation attempts to expose. A government may not restrict speech due to its own or a majority of the public’s disagreement or disapproval with the speaker’s ideas, or to protect the tenure of incumbent officials.¹⁷⁴ It also may not privilege ideas that it itself favors or those favored by a majority of the public.¹⁷⁵ These motivations for regulation are

opinion or perspective of the speaker is the rationale for the restriction”); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (asserting that the “principal inquiry . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys”).

172. Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive In First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 414 (1996). Kagan claims that “[t]he most important components of First Amendment doctrine—indeed, the very structure of that doctrine—serve precisely this function.” *Id.* She cites a number of case examples in support of this thesis, including *R.A.V. v. City of St. Paul, Minn.*, concerning the constitutionality of an ordinance criminalizing the placement of a symbol on property knowing it to arouse anger in others based on race, color, creed, religion, or gender as applied to the burning of a cross on an African-American family’s property. Kagan contends that the Court determined the ordinance to be unconstitutional because St. Paul’s motive in enacting it was to restrict the expression of specific ideas due to disagreement with them or hostility towards them; she points to the Court’s identification of St. Paul’s statement in its brief that the purpose of the ordinance was to highlight that the speech prohibited “is not condoned by the majority.” *See id.* at 392–93.

173. *Id.* (claiming that the Court has constructed “objective tests to serve as proxies for a direct inquiry into motive . . . like certain burden-shifting mechanisms or presumptions, to counter the difficulties involved in determining motive and to enable the judiciary to make, if only indirectly, that determination”).

174. *See Kagan, supra* note 172, at 428 (citing *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (inquiring whether a law “was designed to suppress certain ideas that the City finds distasteful”); *Consolidated Edison Co. v. Pub. Serv. Comm’n*, 477 U.S. 530, 536 (1980) (quoting *Niemotko v. Maryland*, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring) (inquiring whether speech was prohibited “merely because public officials disapprove of the speaker’s views”))).

175. *Id.* at 429; *see also R.A.V.*, 505 U.S. at 382, 386 (stating that the First Amendment “prevents government from proscribing speech . . . because of

constitutionally prohibited based upon the purpose of the First Amendment. Others, however, which relate “not to the message as message, but to the consequence of its expression . . . stem[ming] not from ideological hostility, but from a perception of material harm,” would be supported by First Amendment values.¹⁷⁶

As the First Amendment prohibits restrictions on speech that are motivated by “hostility, sympathy, or self-interest” and the task of uncovering these illicit motives is exceedingly difficult due to “the government’s ability to invoke pretextual reasons” for regulation, the Court has developed “a set of rules able to flush out bad motives without directly asking about them.”¹⁷⁷ The tiers of scrutiny as applied in the First Amendment context are meant to assist the courts with the difficult task of discerning the motive behind a government regulation. As Kagan explains, “at one end of the spectrum, the regulation of speech about political issues poses the greatest risk of stemming from improper purpose . . . [so] courts view the regulation of political speech with special disfavor . . . requiring the government to make an extraordinary showing to dissipate the suspicion of improper motive.”¹⁷⁸ At the other end of Kagan’s spectrum lie the “low-value categories” of speech that raise “fewer concerns than usual about improper purpose,” allowing the Court to reject the application of strict scrutiny in favor of an intermediate standard of judicial review.¹⁷⁹

These rules or categories and their corresponding levels of scrutiny “devised to flush out illicit purpose” can be seen to be “the foundation stones of First Amendment doctrine.”¹⁸⁰ However, a problem arises when the judicially created doctrinal proxies for direct inquiry into government motive fail to properly distinguish between legitimate regulatory goals and illicit motives in the face of novel,

disapproval of the ideas expressed” and again that “[t]he government may not regulate based on hostility—or favoritism—towards the underlying message expressed”).

176. Kagan, *supra* note 172, at 431–32. (“[W]hen the government has restricted ideas only as and when they bear harmful consequences . . . the government’s purposes support sustaining the action.” The critical inquiry therefore tests “whether the government regulated . . . on the basis of ideas as ideas, rather than on the basis of material harms.”).

177. *Id.* at 443.

178. *Id.* at 478–79.

179. *Id.* at 479–80.

180. *Id.* at 443.

complex realities. This is the problem presented in the CPC context, where, despite the regulatory effect on the CPCs as speakers, the application of strict scrutiny to enjoin the city ordinances as unconstitutional seems incongruous with both the rationale behind existing exceptions and the purpose of the First Amendment.¹⁸¹

The governmental motive in the CPC cases is not to suppress or stifle the CPCs' speech regarding their opposition to abortion because of ideological disagreement, but to prevent harm from occurring to women due to CPC deception.¹⁸² The regulations do not prohibit the CPCs from expressing their viewpoint, and the CPCs remain free to counsel their clients against receiving an abortion, to speak against abortion in general, and even to express disagreement with the government regulations.¹⁸³

It has been argued that even though the cities may be motivated in part by a desire to prevent harm from occurring to pregnant women, they are also impermissibly motivated by hostility

181. See *supra* Part II.

182. See Appellants/Cross-Appellees' Brief for the En Banc Court at 7, 28, Greater Balt. Ctr. for Pregnancy Concerns v. Mayor of Baltimore, 683 F.3d 539 (4th Cir. 2012) (Nos. 11-1111, 11-1185), 2012 WL 3812702, at *7, *28. "[T]he City enacted the Ordinance in response to evidence presented to the City Council documenting a pattern of deceptive practices by Pregnancy Centers both in Baltimore and nationwide." *Id.* at *7. This decision was unrelated to the viewpoint of the speaker . . . [as] any entity whose primary purpose is to provide pregnancy-related services but who does not provide or make referrals for both abortion and comprehensive birth-control services must post a sign stating that those services are unavailable, regardless of the reason that the entity does not provide or make referrals for those services.

Id. at *28.

183. *Id.* at *41 ("The Ordinance does no more than impose a modest disclosure requirement on Pregnancy Centers It does not prevent such centers from speaking, nor does it limit their speech."); see also *supra* notes 9–12 (the local ordinances). For a further discussion of how the ability to disassociate oneself from the government message impacts the constitutionality of the compelled speech, see *Wooley v. Maynard*, 430 U.S. 705, 722 (1977) (Rehnquist, J., dissenting). Rehnquist maintained that because there was nothing in the state law compelling motorists to use a license plate with the state motto "Live Free or Die," which would preclude "appellees from displaying their disagreement with the state motto . . . [and therefore] any implication that they affirm the motto can be so easily displaced," he could not agree with the majority that the state statute "may be invalidated under the fiction that appellees are unconstitutionally forced to affirm, or profess belief in, the state motto." *Id.*

towards expression opposing abortion.¹⁸⁴ But the cities are not attempting to promote abortion in any way, nor are they trying to convince pregnant women to receive abortions or to dissuade them from accessing CPC services.¹⁸⁵ In fact, even after the enactment of the ordinances, cities have continued to refer pregnant women to CPCs,¹⁸⁶ implying that they recognize the independent value of their provision of pregnancy related services, regardless of their religious ideology or stance on abortion.

Instead, the cities are motivated by a desire to remedy what they perceive to be a “material harm”—the harm to the health of a pregnant woman that may result when she is seeking an abortion and her access to abortion services is delayed or impeded due to the deceptive practices of the CPCs.¹⁸⁷ In order to satisfy the permissible

184. See CPC Response Brief, *supra* note 14, at 8 (arguing that the CPCs are subjected to “disfavored treatment by the City expressly because they refuse to provide or refer for services they believe are morally repugnant”).

185. See *Greater Balt. Ctr.*, 683 F.3d at 570 (King, J., dissenting).

The disclaimer does not . . . convey a message that abortion and birth control are “morally acceptable alternative[s].” The disclaimer simply does not speak to what is or may be morally acceptable. It merely discloses that a particular pregnancy center does not provide or refer for abortions or non-directive and comprehensive birth-control services. That is, the disclaimer relates to the services offered, not to the religious or ideological beliefs of a pregnancy center.

Id. (citations omitted).

186. See *id.* at 557 (“The City also conceded that it has referred and continues to refer women to the Pregnancy Center . . .”). In King’s dissent, he maintained that “[i]f the City disfavors the Center’s viewpoint, or possesses an improper animus against the Center, its continual referrals of women to the Center constitutes an unexplained oddity.” *Id.* at 573 (King, J., dissenting). Additionally, he notes that “the record validates the City’s uncontradicted contention that the Ordinance was enacted to curtail deceptive advertising, not because the City disagreed with or wanted to suppress the Center’s speech.” *Id.* King discusses this further in a footnote, arguing that the record “fatally undermines any assertion of improper animus against the Center or other limited-service pregnancy centers . . . [and] shows conclusively that the animus assertion has been created from whole cloth.” *Id.* at n.12.

187. See *supra* note 182 and accompanying text; see also Kagan, *supra* note 172, at 483–85 (discussing how the secondary effects doctrine is supported by a motive-based approach). The secondary effects mandate that “facially content-based regulations of speech that ‘are justified without reference to the content of the regulated speech’ should be treated as if they made no facial distinctions on the basis of content.” *Id.* at 483 (citing *City of Renton v. Playtime Theaters*, 475 U.S. 41, 48 (1996)). In *City of Renton v. Playtime Theaters*, 475 U.S. 41, 48 (1996),

motive of protecting the health of pregnant women seeking abortion services, the cities have sought to improve the communicative process within a bounded discourse by compelling factual disclosures that simply notify the women that CPCs are not licensed medical facilities and will not provide them with an abortion, if this is what they wish to obtain.¹⁸⁸

It has been argued that even if the ordinances serve valuable First Amendment goals and were enacted based on permissible government motives, the use of strict scrutiny to invalidate the ordinances is still warranted, and the ordinances rightly fail the test because the government interests can be served by other means that do not encroach on CPC speech.¹⁸⁹ However, these alternative options are unlikely to effectively address the harm posed by the CPCs' deceptive practices.¹⁹⁰ As in the commercial case, much of the deceptive speech or misleading expressive conduct may occur just prior to a woman's retention of services. This is therefore the most

the Court decided that zoning ordinance that applied only to theaters showing sexually explicit movies would not be subjected to strict scrutiny based on the fact that the ordinance's purpose was not to "suppress the expression of unpopular views" or "restrict[] the message purveyed by adult theaters" but to achieve the secondary effects of preventing crime, maintaining property values, and generally protecting and preserving the quality of the city's neighborhoods). *Id.* at 48 (quoting *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 82 n.4 (1976)). While Kagan notes that the secondary-effects doctrine has thus far only been used regarding sexually explicit expression, she maintains that the Court has "not made the presence of arguably low-value speech a definite condition of the doctrine's application and once has suggested to the contrary." Kagan, *supra* note 172, at 483–84 n.190 (citing *Boos v. Barry*, 475 U.S. 312, 320–21 (1988)). This reasoning, drawn from a motive-based doctrine, may translate over to the CPC context, as the cities' purpose for enacting ordinances applying only to centers that do not provide abortions were not enacted to suppress the expression of the CPCs but to achieve "the secondary effects" of preventing the deception of women. *Id.* at 484.

188. See *supra* notes 9–12 (the local ordinances).

189. See *Greater Balt. Ctr.*, 683 F.3d at 558. Where the majority identified "several alternatives that would address the problems targeted by the ordinance while imposing a lesser burden on speech . . . [including] public education campaigns . . . promoting consultations with physicians for pregnant women[,] . . . produc[ing] a document or website listing local pregnancy centers[,] and noting what services are available at each." *Id.*

190. See *Greater Balt. Ctr.*, 683 F.3d at 576 (King, J., dissenting) (noting that inadequate or unenforceable deceptive advertising statutes, problems of proof, and scarcity of resources can make prosecuting limited-service pregnancy centers difficult).

effective time at which to counter the CPCs' deception through factually accurate compelled disclosures.¹⁹¹ If the cities harbored impermissible motives, such as to promote abortion or to prohibit CPC speech against abortion due to disagreement, then perhaps the availability of alternative outlets for the government's ideological message would serve to bolster the already present presumption of unconstitutionality. In this case, however, because the cities' motivation behind the compulsion of speech is permissible, the availability of less-effective alternative remedies should not be outcome determinative.¹⁹²

The problem presented by the CPC context, as highlighted above, is that we are faced with a First Amendment challenge to government regulation of a novel type of speech that does not fit neatly into any of the categories—it is neither political speech nor purely commercial or purely professional. While strict scrutiny should ordinarily apply to regulations of speech lying outside of these well-defined categories, the CPC case is one such example of how a default application of strict scrutiny fails to appropriately differentiate between permissible and impermissible government regulations under the First Amendment. In this sense, strict scrutiny is too harsh a default. It presumes that, just because the CPC speech does not fit comfortably into a current doctrinal category and falls between the cracks of the cubbyholes, it is therefore most akin to the core political speech that the Court has steadfastly protected as particularly vulnerable to impermissible government regulation.¹⁹³

191. See *Rubin v. Coors*, 514 U.S. 476, 496 (Stevens, J., concurring) (“Finally, because commercial speech often occurs in the place of sale, consumers may respond to the falsehood before there is time for more speech and considered reflection to minimize the risks of being misled.”).

192. See *Greater Balt. Ctr.*, 683 F.3d at 576 (King, J., dissenting). Judge King reiterates that any less restrictive alternatives suggested must be “*as effective* in achieving the [Ordinance’s] legitimate purpose.” *Id.* (emphasis in original) (quoting *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 846 (1997)).

193. See, e.g., *Roth v. United States*, 354 U.S. 476, 484 (1956) (“The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”); *Mills v. Alabama*, 384 U.S. 214, 218 (1966) (“[T]here is practically universal agreement that a major purpose of [the First Amendment] was to protect the free discussion of governmental affairs.”); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 347 (1995) (“When a law burdens core political speech, we apply ‘exacting scrutiny,’ and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest.”).

IV. RECONSTRUCTING THE DOCTRINAL LANDSCAPE: THE CREATION OF A NEW COMPREHENSIVE CUBBYHOLE

The foregoing analysis suggests that courts, faced with CPC speech cases, ought to reassess the doctrinal landscape to ensure that it continues to serve the First Amendment purpose of smothering out improper regulatory motives while protecting permissible regulations that bolster the communicative enterprise and prevent public harm. One could argue for a new categorical exception to strict scrutiny for non-profit pregnancy service providers. But such a narrow cubbyhole would perpetuate the problem currently posed by rigid categorization: the inability to appropriately situate emerging or novel types of speech within the confines of the existing doctrinal framework. Instead, this Note proposes that courts draw upon the similarities between types of speech located in the current categorical exceptions to strict scrutiny in order to create a larger, holistic category of speech subject to intermediate review. This category would be broad enough to account for novel or “hybrid” types of speech as society evolves, but precise enough to ensure that core First Amendment political speech remains fully protected. What this would entail is a merging of existing cubbyholes, incorporating some of the existing, disparate, and narrowly defined categories under a comprehensive heading.

While there are a number of ways one could classify a new category, this Note argues that courts should define it as “false or misleading public accommodation speech.” Such an overarching heading would include all false, deceptive speech issued in the course of the provision of either for-profit or non-profit goods and services where members of the general public are the consumers or recipients in the transactional process. This would enable a seamless synthesis of existing categories, including commercial speech and professional speech, and would be flexible enough to incorporate speech with similar characteristics—like that of the CPCs—as it presents itself.

Courts should be more willing to allow for governmental regulation of misleading speech in the broader context of public accommodation for two reasons. First, speech in this area is of lower value than that which the First Amendment is designated to strenuously protect. It is with regard to political speech that the First Amendment realizes its “fullest and most urgent application.”¹⁹⁴ The

194. Kagan, *supra* note 172, at 473–74.

Court has thus distinguished fully protected political speech from lower-value, non-political speech.¹⁹⁵

It is true that if considered in isolation, the speaker or service provider's self-realization interest in choosing "among expressive activities" might counsel against government regulation.¹⁹⁶ However, when false public accommodation speech is considered in the context of other First Amendment values, the justification for government regulation becomes apparent. In this sense, "[i]f the goal of a free speech system is [also] to provide individuals (especially in their roles as citizens) with the range of opinion and information that will enable them to arrive at the truth and make wise decisions," we should be less concerned with government regulation of speech that "does not enrich ([and] may even impoverish) the sphere of public discourse."¹⁹⁷

Deceptive speech pertaining to a transaction, exchange or conveyance of goods and services to the public—whether for profit or in the not-for-profit context—is not likely to involve the expression of political beliefs or "enrich" public debate to the extent that political or ideological speech would.¹⁹⁸ Speech that is "false and misleading . . . [or] operates through deception" will not assist consumers of public or private goods in making rational, well-informed decisions.¹⁹⁹ As Kagan notes, it seems odd, considering the First Amendment's purpose, that "near absolute protection [is] given to false but nondefamatory statements of fact outside the commercial realm . . . [as] even a concern with chilling true speech would not explain such sweeping protection of speech that disserves understanding."²⁰⁰ The creation of a broader categorical exception to strict scrutiny that would allow more room for government regulation of false, deceptive speech outside of a strictly for-profit or commercial realm would remedy this oddity, bringing First Amendment doctrine more directly in line with its purpose.²⁰¹

195. *Id.* at 472–73.

196. *Id.* at 476.

197. *Id.*

198. *See* *Rubin v. Coors*, 514 U.S. 476, 496 (Stevens, J., concurring) ("Transaction-driven speech usually does not touch on a subject of public debate, and thus misleading statements in that context are unlikely to engender the beneficial public discourse that flows from political controversy.").

199. Kagan, *supra* note 172, at 477.

200. *Id.* at 477.

201. Some members of the Court have already indicated a desire to apply intermediate scrutiny to false and misleading speech outside of the commercial

Second, government regulation of false public accommodation speech is less likely to be impermissibly motivated, and any infringement on speaker rights is likely to be a secondary effect of a good faith effort to promote legitimate government interests. The exceptions to strict scrutiny already created for commercial and professional speech could be thought of as reflecting judicial recognition that in these contexts the government motive for

realm. In *United States v. Alvarez*, Justice Breyer, in a concurring opinion joined by Justice Kagan, maintained that it was necessary to apply intermediate scrutiny, rather than strict scrutiny, to statutes regulating false or deceptive non-commercial speech in order to “offer proper protection in the many instances in which a statute adversely affects constitutionally protected interests, but warrants neither near-automatic condemnation (as ‘strict scrutiny’ implies) nor near-automatic approval (as is implicit in ‘rational basis’ review).” 132 S. Ct. 2537, 2552 (2012) (Breyer, J., concurring). As Kagan and Breyer maintained, because the “dangers of suppressing valuable ideas are lower where . . . the regulations concern false statements about easily verifiable facts . . . [and] such false factual statements are less likely than are true factual statements to make a valuable contribution to the marketplace of ideas . . . the government often has good reasons to prohibit such false speech.” *Id.*

Justice Kennedy, writing for a plurality in the case, maintained that “the Court has never endorsed the categorical rule . . . that false statements generally should constitute a new category of unprotected speech . . .” *Id.* at 2545 (plurality opinion). However, the CPC case is distinguishable from the Stolen Valor Act matter. Justice Kennedy was particularly concerned with the wide applicability of the Stolen Valor Act. Unlike the Stolen Valor Act, the city ordinances are not so sweeping as to apply “to a false statement made at any time, in any place, to any person . . . [including] personal, whispered conversations within a home,” but merely compel a limited, factual disclaimer in the waiting room of the CPC facilities, leaving the CPCs free to engage in any speech they otherwise desire in the waiting room, the facility, or the outside world. *Id.* at 2547.

Additionally, the plurality expressed uncertainty over the link between the Stolen Valor Act’s “restriction on the false claims of liars” and “the Government’s interest in protecting the integrity of the military honors system.” *Id.* at 2549.

In the CPC cases, the link is not so tenuous, as the truthful disclaimer signs will operate to correct misconceptions that pregnant women seeking abortions may harbor about CPC service provision. It should also be noted that the CPC case, unlike *Alvarez*, pertains to an important public health matter and is related to the provision of medical services generally regulated by the state, perhaps increasing the importance of the government interest at hand. Thus, while the Court may not wish to create a new, completely “unprotected” category of “false statements” and while the government regulation in *Alvarez* may have been overly broad and unnecessary, this does not mean that an intermediate scrutiny exception for false speech is unwarranted. Intermediate scrutiny—presenting a middle-ground alternative to strict scrutiny vs. complete lack of protection—may enable the Court to strike down regulations like that in *Alvarez* while at the same time upholding the ordinances in the CPC cases.

regulating is more often permissible than not.²⁰² In this respect, they reflect an acknowledgment that government purpose in these cases is generally to mitigate the harm that could result if the expectations of either a consumer or patient are not met in the bounded communicative project with the speaker, not to privilege one particular ideology or belief over another.²⁰³ With regard to the “common interests of the speaker and listener,” the government “is not, and need not be, agnostic.”²⁰⁴ Consequently, courts could be seen to have granted governments more leeway to compel speech in these areas, so long as the governmental purpose for involving itself in the communicative project is to correct for the “material harm” that could result from informational imbalance in a bounded discourse realm.²⁰⁵

Speech in the general arena of goods and services provision, just as in the commercial and professional categories contained within it, is bounded in nature because the parties are coming to the table with pre-existing expectations regarding how the communicative enterprise will unfold. Government regulations compelling factual disclosures in order to prevent deception serve to promote First Amendment values by leveling the playing field and allowing for audience expectations to be met in a bounded provider/consumer relationship.²⁰⁶ The purpose of government regulation in this area is usually not to suppress any ideological expression but to ensure that recipients of goods or services are fully informed and their expectations for the exchange are met.²⁰⁷

The creation of a “false public accommodation speech” exception to strict scrutiny is a logical next step in the evolution of

202. Kagan, *supra* note 172, at 478.

203. See *supra* Part II (noting that the government motive for regulating commercial or professional speech is often to correct for information asymmetries).

204. Halberstam, *supra* note 18, at 832.

205. See, e.g., *Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio*, 471 U.S. 626, 651 (1985) (suggesting that a governmental purpose of protecting consumers from harm is what justifies allowing disclosures in the commercial context).

206. See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976) (finding that the free flow of information is indispensable to forming opinions on how a free enterprise system ought to be regulated and “even if the First Amendment were thought to be primarily an instrument to enlighten public decision making in a democracy, we could not say that the free flow of information does not serve that goal”).

207. See *supra* Part II.A.

First Amendment doctrine, as it easily encapsulates the type of speech that the Court has determined the government may regulate more freely due to the lower likelihood of illicit regulatory motives.²⁰⁸ In this broader sphere of goods and services provision, as in the narrower commercial and professional contexts, it can be safely presumed that “the government less often acts for self-interested or ideological reasons,” and therefore the danger that “illicit motive has tainted a law” is lower.²⁰⁹ Because the regulation of this kind of lower value speech “carries a reduced suspicion of taint, the Court should adopt a standard of review that places a reduced burden of justification on the government[,] . . . lower[ing] the usual strong presumption against regulation or even switch[ing] the presumption in the opposite direction.”²¹⁰ In other words, in the context of false or misleading public accommodation speech, the Court may “discard its usual ‘sledgehammer’ standard for a daintier constitutional instrument,”²¹¹ such as intermediate scrutiny.

It may be argued that a broader “public accommodation” categorical exception is too sweeping and runs the risk of inadvertently permitting illicit government regulation of core political or ideological speech.²¹² While it must be conceded that this is a valid concern, it is important to remember the difficulties inherent in constructing doctrinal rules and the unfortunate reality that they will likely always be imperfect in form. Of course, this Note does not advocate that the government should be given unfettered discretion to regulate in this area. It merely argues that, because we should be less suspicious of government regulation of this type of speech than of core political speech, the application of the harsh strict scrutiny

208. The Court has already indicated, on numerous occasions, that false statements enjoy minimal First Amendment protection. *See, e.g.*, *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 531 (2002) (“[F]alse statements may be unprotected for their own sake”); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (“[T]he erroneous statement of fact is not worthy of constitutional protection”).

209. *Kagan, supra* note 172, at 479–80.

210. *Id.* at 478.

211. *Id.* at 488.

212. *See, e.g.*, *United States v. Alvarez*, 132 S. Ct. 2537, 2552 (2012) (Breyer, J., concurring) (“[T]here are broad areas in which any attempt by the state to penalize purportedly false speech would present a grave and unacceptable danger of suppressing truthful speech,” such as “[l]aws restricting false statements about philosophy, religion, history, the social sciences, [or] the arts”).

standard, which presumes from the start that the regulation is impermissible and forces the government to carry the heavy burden of proving otherwise, is inappropriate in this context.²¹³

An intermediate scrutiny test, however, would be much more fitting.²¹⁴ While the Court has a number of options for fashioning such a test, this Note suggests borrowing from existing doctrine rather than starting from scratch. The four-part test developed by the Court in *United States v. O'Brien* may present a useful intermediate option—one that cuts straight to the judicial purpose of ferreting out illicitly motivated government regulations.²¹⁵ *O'Brien* was an expressive conduct case concerning a First Amendment challenge to a statutory prohibition on the destruction of selective service registration certificates or draft cards.²¹⁶ The defendant in the case had burned his draft card as an expression of his ideological opposition to the Selective Service and was convicted under a statute that prohibited the knowing destruction of the certificates.²¹⁷

In upholding the government prohibition as constitutional, the Court applied a four-part intermediate scrutiny test.²¹⁸ The Court maintained that government regulation of expressive conduct is

213. *Id.* (explaining why the regulation of false factual statements should be subject to intermediate scrutiny rather than strict scrutiny). Statutes in this area do not warrant “near-automatic condemnation (as ‘strict scrutiny’ implies)” because the false factual statements they regulate “are less likely than are true factual statements to make a valuable contribution to the marketplace of ideas . . . [a]nd the government often has good reasons to prohibit such false speech.” *Id.* However, they also do not warrant “near-automatic approval (as is implicit in ‘rational basis’ review)” because regulation “can nonetheless threaten speech-related harms.” *Id.*

214. *See id.* (maintaining that intermediate scrutiny is the appropriate standard under which to examine the constitutionality of government regulations of false speech).

215. *United States v. O'Brien*, 391 U.S. 367, 383 (1968) (maintaining that the Court would not conduct an inquiry into government motive as “the purpose of Congress . . . is not a basis for declaring . . . legislation unconstitutional.”). *But see* Jed Rubenfeld, *The First Amendment's Purpose*, 53 *Stan. L. Rev.* 767, 785–87 (2001) (maintaining that, despite Court assertions to the contrary, the *O'Brien* test has actually “played its proper, purposive function in First Amendment law . . . [as it] is applied with bite only when there exists a significant, plausible suspicion of an improper speech-suppressing purpose—and thus only when failure to satisfy *O'Brien* plausibly implies the existence of an impermissible purpose”).

216. *O'Brien*, 391 U.S. at 370.

217. *Id.*

218. *Id.* at 377.

justified under the First Amendment if: (1) it is within the constitutional power of the Government; (2) it furthers an important or substantial governmental interest; (3) the governmental interest is unrelated to the suppression of free expression; and (4) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.²¹⁹ This test has also been used to assess the validity of “time, place and manner” restrictions on speech, or those that limit when, where, and how an individual may engage his or her First Amendment rights due to competing government interests in the public welfare.²²⁰

The *O'Brien* test is an effective tool for differentiating between permissible and impermissible government regulations in contexts in which the speech is presumed to be of lower value and the government motive is likely to be legitimate.²²¹ It conforms to the underlying purpose of the First Amendment’s doctrinal schema—it is both flexible *and* well defined so as to allow for good-faith government regulation in the name of public interest while protecting against unconstitutional restrictions on highly valued speech.

Were a reviewing court to subject the ordinances in the CPC cases to the *O'Brien* test, they would likely withstand judicial scrutiny. The factual disclosure signs are within the states’ constitutional power to mandate. They further the important or substantial governmental interest in protecting the reproductive health and freedom of choice of the pregnant woman.²²² This interest—protecting the health and freedom of pregnant women as consumers of services—is unrelated to the suppression of the CPCs’ freedom to express opposition to abortion, as the cities do not have an interest in influencing a woman’s decision either way, but only in enabling her to make fully informed choices for herself. Finally, any incidental restriction on the First Amendment right of the CPCs to express their ideological opposition to abortion is “no greater than is essential to the furtherance of that interest,” as the CPCs are still able to distance themselves from the government message, voice

219. *Id.*

220. *See Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 298 (1984) (stating that the four-factor *O'Brien* test is “little, if any, different from the standard applied to time, place, or manner restrictions”).

221. *See Rubinfeld*, *supra* note 215, at 786–87 (characterizing the *O'Brien* test as a smoking-out device to examine how well a law furthers a purposive function).

222. *See supra* notes 182–183 and accompanying text.

disagreement, and counsel women who choose to obtain their services against receiving an abortion.²²³

If the existing doctrinal cubbyholes in which intermediate scrutiny applies were combined under the general heading of “false public accommodation speech,” and regulations governing this type of speech were subject to the *O’Brien* test, the First Amendment goal of smoking out illicit government motives and protecting legitimate government regulation from unduly harsh scrutiny would be better served. The reconstruction of the existing First Amendment framework in this regard would solve the problem posed by the CPC context, relaxing rigidity and narrowing the doctrinal void by sensibly combining comparable cubbyholes into a comprehensive and accommodating category.

V. CONCLUSION

The complicated current construction of the First Amendment doctrinal landscape—replete with strictly defined, discrete categorical exceptions to a background rule of strict scrutiny for government restrictions on speech—presents the risk that courts may lose sight of the First Amendment forest for the trees.²²⁴ When this happens, we must step out of the weeds of a “doctrinal wonderland” and critically examine “how these rules function and what they accomplish[,] . . . for only when we know why the doctrine has emerged and what purposes it serves will we know whether and how to modify it.”²²⁵

This Note has attempted such an analysis in the limited context of the CPC cases. Upon examining both the commercial and professional speech doctrinal exceptions, it becomes apparent that the CPCs’ speech cannot fit into either a commercial or professional cubbyhole. Unfortunately, this determination does not solve the CPC problem. Instead, such a holding produces the unacceptable result of affording undeserving speech full protection by subjecting permissible government regulation to strict scrutiny.

223. *Id.*

224. Kagan, *supra* note 172, at 515–16 (noting that various scholars have criticized First Amendment doctrine for devolving “into conceptualism and technicality” and exhibiting “an almost medieval earnestness about classification and categorization”).

225. *Id.* at 516.

Thus, the CPC cases show that while First Amendment doctrine may have evolved into a “complex scheme for ascertaining the governmental purposes underlying regulations of speech,”²²⁶ certain novel circumstances exist in which these judicially constructed rules and categories fail to serve their purpose as a substitute or “proxy” for direct inquiry. Because these rules “operate at a step removed, they are both over-inclusive and under-inclusive.”²²⁷ In the CPC context, the application of strict scrutiny to the city ordinances is over-inclusive, as it prohibits government regulations that are based upon permissible motives and align with First Amendment values.

This Note does not advocate abandoning the intricate scheme of First Amendment doctrine that the courts have evolved for a system of direct inquiry.²²⁸ However, in cases like that of the CPCs, where the application of doctrinal tools yields an incongruous result, courts must not lose sight of the First Amendment’s purpose. Instead, when formalism and complex constructs fail to serve their functions in an evolving modern landscape, courts must bravely take up their constitutional role by amending and reshaping existing doctrinal categories and rules to ensure that they continue to serve their purpose of flushing out illicitly motivated government regulation and shielding valuable and permissible policies from undue First Amendment scrutiny.

226. *Id.*

227. *Id.*

228. *Id.* (noting that the doctrinal tools are valuable because, in most instances, “the government could offer a permissible reason for its action, and the Court could not tell whether this reason was real or pre-textual” through direct inquiry).

LEGAL AID AND INTERNATIONAL OBLIGATION: ENSURING ACCESS TO JUSTICE IN THE LIBERIAN CONTEXT

By Sherie Gertler*

Access-to-justice programs in Liberia present an important step in the trajectory towards the country's development. However, as currently designed, these initiatives focus too much on the litigation process and the formal court system. As this Note will show, Liberia's turbulent history calls for a modified approach. I will argue that legal aid initiatives should include pre-litigation counseling and access to lawyers in stages preceding formal court proceedings.

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I. INTRODUCTION

On May 30, 2012, the Special Court for Sierra Leone sentenced Charles Taylor, former President of Liberia, to fifty years in prison following his conviction for aiding and abetting war crimes and crimes against humanity in Sierra Leone.¹ Taylor's conviction and sentencing was considered worldwide to be a significant moment for war crimes accountability and international human rights law because he was the first former head of state to be convicted by an international tribunal since the Nuremberg Trials following World War II.²

Despite the conviction, and other efforts to rebuild and reconcile, Liberia today faces considerable economic, political, and social obstacles as it seeks to recover from a devastating civil war and decades of violence. Though the nation has taken marginal steps, Liberia still faces significant problems of high crime rates, a weak judiciary, a large percentage of the population living below the poverty line, high incidence of rape of women and girls, and considerable corruption.³

Liberia's corruption and culture of governmental impunity dates back to the nineteenth century. In 1822, the American Colonization Society, a private organization, arranged the return of freed slaves from the United States to Liberia.⁴ Following their arrival, these Americo-Liberians established a "ruling aristocracy" in which their party—the True Whig Party—dominated the political system.⁵ Americo-Liberians retained this political control for over a

1. *Sierra Leone: 50-Year Sentence for Charles Taylor*, Human Rights Watch (May 30, 2012), <http://www.hrw.org/news/2012/05/30/sierra-leone-50-year-sentence-charles-taylor>.

2. Marlise Simons & J. David Goodman, *Ex-Liberian Leader Gets 50 Years for War Crimes*, N.Y. Times, May 30, 2012, at A1, available at <http://www.nytimes.com/2012/05/31/world/africa/charles-taylor-sentenced-to-50-years-for-war-crimes.html?pagewanted=all>.

3. See *World Report 2011: Liberia*, Human Rights Watch (2011), <http://www.hrw.org/en/world-report-2011/liberia>; *World Fact Book: Liberia*, Cent. Intelligence Agency, <https://www.cia.gov/library/publications/the-world-factbook/geos/li.html> (last visited Mar. 6, 2014); *Liberia Data*, World Bank, <http://data.worldbank.org/country/liberia> (last visited Mar. 6, 2014).

4. M. B. Akpan, *Black Imperialism: Americo-Liberian Rule over the African Peoples of Liberia, 1841–1964*, 7 *Can. J. Afr. Stud.* 217, 218 (1973); Peter Dennis, *Int'l Ctr. for Transitional Justice, A Brief History of Liberia 2* (2006), available at <http://ictj.org/sites/default/files/ICTJ-Liberia-Brief-History-2006-English.pdf>.

5. Martin Meredith, *The Fate of Africa: A History of Fifty Years of Independence* 545 (2005).

century.⁶ By designing a system that subordinated the indigenous population of Liberia, Americo-Liberians created a colonialist scheme reminiscent of other exploitative systems existing throughout the African continent.⁷ In 1971, William R. Tolbert was elected President of Liberia, pledging to heed the interests of the native population and to address the privileges of the elite.⁸

Tolbert ultimately was not successful, however, in making space for the views and influence of indigenous Liberians within the government.⁹ In 1980, Samuel Doe, a 28-year-old master sergeant, broke into the President's Executive Mansion with a group of dissident soldiers and captured and killed President Tolbert. Doe brought neither political ambitions nor a guiding philosophy to the nation; instead, he suspended all political activities and spent his time siphoning money from Liberian corporations to add to his own personal affluence.¹⁰ In 1989, a coup took Samuel Doe's life and established Charles Taylor, a Liberian exile, as President. However, Taylor offered no reprieve from Doe's repressive rule, and his forces were widely associated with human rights atrocities committed against civilians, the conscription and use of child soldiers, torture, and mutilation.¹¹ In March 2006, Charles Taylor was turned over to the Special Court for Sierra Leone and indicted for war crimes, crimes against humanity, and other considerable violations of international humanitarian law stemming from his role in the rebellion.¹²

6. *Id.*

7. *Id.* at 546.

8. Markus Zimmer, *The Challenge of Judicial Reform in Post-Conflict States*, 37 Ohio N.U. L. Rev. 645, 672–73 (2011).

9. Gwendolyn Heaner, *Religion, Law and Human Rights in Post-Conflict Liberia*, 8 Afr. Hum. Rts. L.J. 458, 460 (2008).

10. Meredith, *supra* note 5, at 550.

11. See Sara Kuipers Cummings, *Liberia's "New War": Post-Conflict Strategies for Confronting Rape and Sexual Violence*, 43 Ariz. St. L.J. 223, 230 (2011); Human Rights Watch, "Even a 'Big Man' Must Face Justice": Lessons from the Trial of Charles Taylor 13–14 (2012), available at <http://www.hrw.org/sites/default/files/reports/sierraLeone0712ForUpload.pdf>; Dennis, *supra* note 4, at 5–6; see also Vera Achvarina & Simon F. Reich, *No Place to Hide: Refugees, Displaced Persons, and the Recruitment of Child Soldiers*, 31 Int'l Security 127, 155 (2006) (stating that "[c]hildren were left vulnerable to the war's ravages and, seemingly, none were spared from its horror").

12. Human Rights Watch, *Trying Charles Taylor in The Hague: Making Justice Accessible to Those Most Affected* 1 (2006), available at <http://www.hrw.org/legacy/backgrounder/ij/ij0606/ij0606.pdf>.

The parallel development of Liberia's legal system has also played a role in perpetuating Liberia's inequalities and elite interests. Liberia's dual system of statutory law and customary law preserves a distinction in the ways that different populations access justice; though Liberia developed absent the colonial influence of many other African nations, it exhibited "many of the hallmarks of discriminatory segregation."¹³ Liberia's statutory law applies to all Liberians today, but some claim that the state created the dual system at the nation's founding "to ensure that statutory law would govern 'civilised' people—Americo-Liberians and missionaries—while customary law would regulate 'natives.'"¹⁴

Against this backdrop of unaccountability, violent struggles for power, and legal dualism, the international community has responded to Liberia's history with a push for rule of law reforms and legal aid. This can be contextualized as part of a larger international movement emphasizing the importance of a strong legal framework and access to justice in ensuring human rights and stability. Legal support for a human right to legal aid can be found in several international human rights treaties, UN resolutions, and domestic constitutions (including Liberia's national constitution). In 2012, the Liberian National Bar Association (LNBA) began researching and developing a national legal aid pilot program in partnership with several NGOs working in Liberia. The program was officially launched in September 2012.¹⁵ While the program's objective to increase access to justice for marginalized populations in the country is laudable, the program faces significant obstacles in implementation and durability. Though aiming to strengthen the rule of law and human rights protections for Liberians, a Liberian national legal aid program dependent on a functioning judiciary will inevitably encounter the debilitating roadblocks of an unstable infrastructure, scarce resources, and judicial corruption. Though the program may be able to reach marginalized populations, access to justice can only be achieved if the legal system itself is able to deliver fair legal services.

13. Justin Sandefur & Bilal Siddiqi, *Delivering Justice to the Poor: Theory and Experimental Evidence from Liberia*, Center for Global Development Conference (2013), https://editorialexpress.com/cgi-bin/conference/download.cgi?db_name=CSAE2013&paper_id=1014.

14. *Id.* at 5 (citing Int'l Crisis Grp., *Liberia: Resurrecting the Justice System* 7 (2006)).

15. Welemongai Ciapha II, *LNBA Launches Legal Aid Program*, Heritage Newspaper, Sept. 3, 2012, available at <http://www.news.heritageliberia.net/index.php/inside-heritage/legal-matters/525-lnba-launches-legal-aid-program>.

This Note argues that while increasing access to legal services has been hailed as a critical objective to be met by State governments, promoting access to the judiciary and formal court system in the context of post-conflict Liberia's impeded development may create gaps in the nation's progression. While rule of law principles carry clear value in post-conflict efforts, the question also arises of how effectively these programs can work in certain environments. Moving forward, the LNBA and partner organizations could address these gaps by facilitating access to pro bono legal counseling and advising as an important stepping stone toward equality and empowerment of the poor. An emphasis on dialogue and mediation would resonate in the Liberian cultural predilection for informal and local justice mechanisms over more formalized rituals. Access to legal services and professional lawyers could help to introduce lawful principles and rule of law into Liberia's civil society at a more local level before a conflict progresses to a lawsuit.

Part II of this Note contains a summary of literature on the legal aid movement and impetus to increase access to legal services, particularly as it pertains to pressure exerted by the international community on transitional countries. Part II also outlines the right to legal aid as found in international law sources and Liberia's recent efforts to establish a national legal aid program.

Part III describes the inherent problems Liberia faces in attempting to establish a national legal aid program in light of its history, state of development, and alternate priorities. Many Liberians have historically utilized more traditional judicial mechanisms,¹⁶ and this preference creates an additional barrier to a typical legal aid system. In addition, Part III addresses common criticisms of the rule of law approach, as applied to the Liberia context.

Finally, Part IV advocates for an adjusted approach to a national legal aid program, accounting for a middle step that allows time for Liberia to strengthen its infrastructure while still providing isolated populations access to justice. Part IV emphasizes the need to develop rule of law ideas within Liberia's civil society, and focuses on the role of Liberian lawyers in this rebuilding and restructuring

16. See Deborah H. Isser et al., *Peaceworks, Looking for Justice: Liberian Experiences with and Perceptions of Local Justice Options* 39 (2009); Pewee Flomoku & Counsellor Lemuel Reeves, *Formal and Informal Justice in Liberia*, 23 *Accord* 44, 44 (2012) ("Rural Liberians pursue justice almost entirely through traditional means.").

process. In this section, I argue that promoting access to lawyers and legal knowledge, as opposed to promoting access to a formal judicial system that is not yet fully functioning, will harness the power of counseling and advising and prove to be a more efficient model in the current Liberian context.

II. ACCESS TO JUSTICE: ACCOUNTABILITY AND OBLIGATIONS IN LIBERIA

A. Rule of Law Assistance and Legal Aid Development

Rule of law is often put forth as a development strategy for post-conflict nations, although its definition varies across actors and its implementation is complex and rarely straightforward.¹⁷ The appeal of a rule of law approach may be explained as a way to address some of the common problems experienced by states following a conflict: dealing with past crimes committed, reestablishing the infrastructure of a stable government, and addressing divisions and discriminatory practices within a society.¹⁸ Yet, rule of law cannot be transplanted into states lacking a foundation of accountability and civil society.¹⁹ Nor can it be used in isolation: the right to access justice in a state with stable and meaningful laws is “not only a

17. The United Nations defines “rule of law” as a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.

U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Rep. of the Secretary-General*, ¶ 6, U.N. Doc. S/2004/616 (Aug. 23, 2004).

18. David Tolbert & Andrew Solomon, *United Nations Reform and Supporting the Rule of Law in Post-Conflict Societies*, 19 Harv. Hum. Rts. J. 29, 29–30 (2006).

19. Thomas Carothers, *The Rule of Law Revival*, 77 Foreign Aff. 95, 95–96 (1998) (arguing that “[r]espect for the law will not easily take root in systems rife with corruption and cynicism, since entrenched elites cede their traditional impunity and vested interests only under great pressure.”).

fundamental right in itself, but it is an essential prerequisite for the protection and promotion of all other civil, cultural, economic, political and social rights.”²⁰ The creation of legal aid programs as a type of rule of law promotion ensures that marginalized populations can attain legal assistance when needed, thereby protecting their human rights and preserving the integrity of the legal system.²¹

1. Rule of Law Aid

In 2003, the United Nations Security Council adopted Resolution 1509, establishing the United Nations Mission in Liberia (UNMIL) as a “stabilization force” following a tumultuous and violent civil war.²² The Resolution also urged the Liberian government to prioritize the “establishment of a state based on the rule of law” and “an independent judiciary” as critical steps to rebuilding the nation.²³ For the United Nations, rule of law relates to promulgating laws in line with international principles and holding actors accountable to those laws.²⁴ This definition also includes “equality before the law” and fairness in its application.²⁵

Beyond the United Nations, the “rule of law” concept has existed for centuries, emphasizing principles of legality and stability, though fixed definitions and requirements are still contested by political theorists even today.²⁶ While some advocate a rule of law definition that focuses more on the formalized restrictions on State governments and agents when dealing with citizens, other theorists emphasize a “thicker” definition that encompasses wider versions of justice, including the protection of human rights and other individual

20. Special Rapporteur on Extreme Poverty and Human Rights, *Obstacles to Access to Justice for Persons Living in Poverty*, ¶ 91, U.N. Doc. A/67/278 (Aug. 9, 2012) (by Magdalena Sepulveda Carmona) [hereinafter Report of the Special Rapporteur].

21. *Id.*

22. S.C. Res. 1509, para. 1, U.N. Doc. S/RES/1509 (Sept. 19, 2003).

23. *Id.*

24. U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Rep. of the Secretary-General*, ¶ 6, U.N. Doc. S/2004/616 (Aug. 23, 2004).

25. *Id.*

26. See Simon Chesterman, *An International Rule of Law?*, 56 Am. J. Comp. L. 331, 333, 340 (2008); Timothy Endicott, *The Impossibility of the Rule of Law*, 19 Oxford J. of Legal Stud. 1, 1–2 (1999); Paul Craig, *Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework*, Pub. Law 467, 467–68 (1999).

freedoms.²⁷ Within the context of globalization and the influence of the Western humanitarian and UN communities, Simon Chesterman advocates for a third category in considering rule of law by “examining its international context . . . to look at the function that the rule of law is intended to serve in a society.”²⁸ This categorization of rule of law is defined by the promotion of human rights, peaceful dispute resolution, and liberal economic development.²⁹

Indeed, within the globalization context, rule of law is frequently touted as a critical step in a nation’s development and democratization.³⁰ The rule of law movement has been applied often to post-conflict and transitional countries, used as an objective and tool recommended by donor states in which post-conflict nations may begin to rebuild their political and economic systems.³¹ Indiscriminate use of violence, as in a civil war, indicates a breakdown of a society’s laws and standards that may typically be entrusted to ensure security. In turn, rule of law is seen as a beneficial objective in the wake of conflict because it is associated with more stable national institutions that support principles of accountability, justice, and the protection of human rights.³² The ability to access these institutions is also an important component of post-conflict reconstruction because accountability and equality may only be secured if all segments of the population are accorded the opportunity to participate.

Since the 1990s, there has been a significant push toward the rule of law ideal. Bilateral and multilateral donors, along with U.S. agencies, have helped to support the movement with rule of law aid and donor assistance.³³ Pressure on States to endorse and support

27. Chesterman, *supra* note 26, at 341.

28. *Id.* (stating that “in addition to promoting human rights and providing a stable foundation for economic development, [rule of law assistance] has also been used to establish non-violent mechanisms for resolving political disputes”).

29. *Id.*

30. See Boutros Boutros-Ghali, *The United Nations and Democratization*, 3 Afr. Y.B. Int’l L. 11, 14 (1995); Samuel J. M. Donnelly, *Reflecting on the Rule of Law: Its Reciprocal Relation with Rights, Legitimacy, and Other Concepts and Institutions*, 603 Annals Am. Acad. Pol. & Soc. Sci. 37, 38 (2006).

31. See Thomas Carothers, *Rule of Law Temptations*, 33 Fletcher F. World Aff. 49 (2009); David Dyzenhaus, *Transitional Justice*, 1 Int’l J. Const. L. 163 (2003).

32. *What is the Rule of Law?*, United Nations Rule of Law, http://www.unrol.org/article.aspx?article_id=3 (last visited Feb. 17, 2014).

33. Thomas Carothers, *The Rule of Law Revival*, 77 Foreign Aff. 95, 103 (1998).

rule of law finds support in a variety of bases, including legal, moral, economic, and politically motivating ideas.³⁴ However, beyond a general message supporting the establishment of rule of law, specific steps and programs to achieve this objective are unclear. Due to differing accounts of what rule of law should constitute, State recipients of rule of law aid may receive mixed messages, in an international system where “transitional countries are bombarded with fervent but contradictory advice on judicial and legal reform.”³⁵ For example, as some scholars have said, academics and practitioners form different conceptions of the rule of law because academics base their understandings in legal philosophy and constitutionalism while practitioners concentrate on the objective of creating rule of law in other societies, often using models of best practices.³⁶ In this vein, the term “rule of law” itself is arguably problematic, having gained such widespread approval yet “afflicted by an extraordinary divergence of understandings.”³⁷

Within this plurality of meanings, rule of law assistance is delivered by a number of organizations in a series of forms.³⁸ In a state such as Liberia, which has garnered a considerable amount of international assistance in the wake of its most recent civil war, many organizations have attempted to provide what they believe to be rule of law aid. For example, UNMIL’s Rule of Law Pillar provides: (1) a Legal and Judicial Systems Support Division, to consolidate governmental institutions; (2) a Corrections Advisory Unit, to strengthen Liberia’s prison system; (3) a Human Rights and

34. Eileen Skinnider, Int’l Ctr. for Criminal Law Reform and Criminal Justice Policy, *The Responsibility of States to Provide Legal Aid* 4–5 (1999) (stating that, in the 1960s, the movement “focused on strategies to improve the conditions of the poor rather than on individualised services” but later, “the coverage of legal aid schemes evolved to include civil law matters, including family, housing, debt, social security and other like matters”); see also Carothers, *supra* note 33, at 95 (“The rule of law promises to move countries past the first relatively easy phase of political and economic liberalization to a deeper level of reform . . . [yet] that promise is proving difficult to fulfill.”).

35. Carothers, *supra* note 31, at 104.

36. Amichai Magen, *The Rule of Law and Its Promotion Abroad: Three Problems of Scope*, 45 *Stan. J. Int’l L.* 51, 57–58 (2009).

37. *Id.* (arguing that “the term ‘rule of law’ is vulnerable to overreaching and abuse”); see also Rachel Kleinfeld, *Competing Definitions of the Rule of Law*, in *Promoting the Rule of Law Abroad: In Search of Knowledge* 31–74 (Thomas Carothers ed., 2006) (considering the different definitions of the rule of law by various organizations and societies).

38. See Robert Stein, *Rule of Law Symposium: Teaching the Rule of Law*, 18 *Minn. J. Int’l L.* 403, 403 (2009).

Protection Section; and (4) UN Police.³⁹ Separately, the American Bar Association's Rule of Law Initiative also provided assistance in Liberia following the end of the civil war, by training Liberian judges and magistrates, distributing benchbooks on Liberian laws to be used as teaching resources, and partnering with Liberia's only law school to support legal education.⁴⁰ These two programs, though both administered under the umbrella of rule of law promotion, address different facets of Liberian society, with UNMIL's program focusing largely on governmental institutions and the ABA's program emphasizing education and legal professionals.

2. Legal Aid Programs as Rule of Law Assistance

A distinct form of rule of law assistance supports the development of legal aid programs,⁴¹ which emphasize the right to counsel and access to legal services and often advocate for legal representation for those unable to afford it. Legal aid programs typically seek to strengthen channels of access to the law and legal services for marginalized populations, suggesting that rule of law is less meaningful for those unable to utilize or rely on legal institutions. Ensuring the right to access legal services is a critical objective within rule of law programs. First, the right to legal services is a human right afforded under international human rights treaties and law.⁴² Second, access to legal services promotes stability and political liberalization, allowing all segments of the population the opportunity to resolve conflict and seek remedy equally under the law.⁴³

The movement to establish legal aid systems, by providing for these systems under domestic legal frameworks and then ensuring access and representation to all citizens who need it, has been viewed as a particularly significant objective in post-conflict and transitional

39 . Rule of Law, U.N. Mission in Liberia, <http://unmil.unmissions.org/Default.aspx?tabid=3955&language=en-US> (last visited Mar. 6, 2014).

40. Rule of Law Initiative: Liberia Programs, Am. Bar Ass'n, http://www.americanbar.org/advocacy/rule_of_law/where_we_work/africa/liberia/programs.html (last visited Mar. 6, 2014).

41. Skinnider, *supra* note 34, at 13 (citing David Dyzenhaus, *Normative Justifications for the Provision of Legal Aid*, 2 Rep. of the Ontario Legal Aid Rev. 475 (1997)).

42. *Id.* at 12–13.

43. *Id.* at 14–15.

states. The *Handbook on Improving Access to Legal Aid in Africa* asserts:

Post-conflict settings are doubly impacted due to the fragility of the State and the need to accord priority to stabilization and the establishment of legitimacy. The demand for legal aid is highest in such settings, to protect the rights of groups affected by the conflict and to bring to justice perpetrators of violations.⁴⁴

The U.N. Security Council and General Assembly have repeatedly reiterated legal aid and access to justice as key strategies for state rebuilding following conflict.⁴⁵ Although this strategy is often tempered with disclaimers that U.N. officials and humanitarians must consider local contexts in the process of setting legal aid priorities, many remain concerned that legal aid advocates' liberalist leanings color their priorities.⁴⁶ Indeed, concerns persist that Western priorities and values define humanitarian aid efforts within the context of developing states, without enough consideration for those states' autonomy and values—an apprehension that pervades rule of law efforts.⁴⁷

44. U.N. Office on Drugs and Crime, *Handbook on Improving Access to Legal Aid in Africa* 2 (2011), available at http://www.unodc.org/pdf/criminal_justice/Handbook_on_improving_access_to_legal_aid_in_Africa.pdf [hereinafter U.N. Handbook].

45. See U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 36, U.N. Doc. S/2004/616 (Aug. 23, 2004) (stating that “legal aid and public representation program[s] are essential” in supporting access to justice in post-conflict nations by developing national justice systems); see also Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Aug. 27–Sept. 7, 1990, *Report Prepared by the Secretariat*, U.N. Doc. A/CONF.144/28 Rev.1 (strengthening international cooperation in the area of criminal justice); ESCOR Res. 2007/24, U.N. Doc. E/RES/2007/24 (July 26, 2007) (requesting the U.N. Office on Drugs and crime increase their efforts in strengthening access to legal aid in the criminal justice system); ESCOR Res. 2004/25, U.N. Doc. E/RES/2004/25 (July 21, 2004) (urging increased efforts in the promotion of the rule of law); Report of the Special Rapporteur, *supra* note 20 (analyzing the obstacles to access to justice for persons living in poverty).

46. Dyzenhaus, *supra* note 31, at 165. In his book review essay on transitional justice, Dyzenhaus expresses his belief that there is “a real concern about letting the idea of liberalization both frame and answer the question of transitional justice” though “there is something close to agreement that the question of what means are appropriate is largely dependent on context.” *Id.*

47. See Dyzenhaus, *supra* note 31, at 165; see, e.g., Carothers, *supra* note 32, at 104 (arguing that “[m]any Western advisers involved in rule-of-law assistance are new to the foreign aid world and have not learned that aid must

In the past few years, the movement to expand the right to legal aid and access to justice has experienced another resurgence. In 2009, Thomas Carothers wrote, in a follow-up to his *Foreign Affairs* magazine article published ten years earlier, “international attention to rule-of-law development has not only continued to increase, but also political leaders worldwide have asserted a commitment to building the rule of law.”⁴⁸ Recently, in September 2012, United States Attorney General, Eric H. Holder, Jr., remarked at a high-level United Nations event on the rule of law, “the United States will continue to support UN-led efforts to expand access to legal aid [. . .] to build on UN initiatives in the rule of law sector that are focused on conflict and post-conflict situations.”⁴⁹ The United States recently established an Access to Justice Initiative, designed to mirror access to justice advocacy worldwide by addressing domestic legal service issues within the United States.⁵⁰ And in November 2012, the Special Rapporteur for Extreme Poverty and Human Rights, Magdalena Sepúlveda Carmona, presented her report on Access to Justice to the United Nations General Assembly.⁵¹ The report states that “[p]ersons living in poverty have a right to access justice without discrimination of any kind, and a right to due process, understood as the right to be treated fairly, efficiently and effectively throughout the justice chain.”⁵²

B. Right to Legal Aid in International Law

Pressure on states to provide their citizens with access to legal services is encouraged not only as a means to promote stability and rule of law, but also as one way that a state must fulfill its obligations under certain international human rights treaties, such

support domestically rooted processes of change, not attempt to artificially reproduce pre-selected results”).

48. Carothers, *supra* note 31, at 50.

49. U.S. Attorney Gen. Eric H. Holder, Jr., Remarks for Attorney General Eric H. Holder, Jr., United Nations General Assembly—High-Level Event on the Rule of Law (Sept. 24, 2012), *available at* <http://www.unrol.org/files/Statement%20by%20the%20United%20States.docx.pdf>.

50. *About the Initiative*, United States Dep’t of Justice, <http://www.justice.gov/atj/about-atj.html> (last updated Aug. 2012). The website defines ATJI’s mission: “to help the justice system efficiently deliver outcomes that are fair and accessible to all, irrespective of wealth and status.” *Id.*

51. *Access to Justice by People Living in Poverty (2012)*, U.N. Office of the High Comm’r for Human Rights, <http://www.ohchr.org/EN/Issues/Poverty/Pages/Accessstojustice.aspx> (last accessed Mar. 6, 2014).

52. Report of the Special Rapporteur, *supra* note 20, at 4.

as the International Covenant on Civil and Political Rights (ICCPR). Broadly speaking, the right to access legal services can be found in international treaties, domestic constitutions, and customary international law. The right to legal aid is not a recent development, but traces back to the origins of the United Nations—the Universal Declaration of Human Rights (UDHR). According to Article 8 of the UDHR, “[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”⁵³ In other words, if an individual finds himself before a national tribunal but is unable to attain an effective remedy, the state must ensure that his rights under both domestic and international law are protected.

The right of access to legal services is also located within the ICCPR,⁵⁴ the Convention on the Elimination of All Forms of Racial Discrimination,⁵⁵ and the Convention against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment.⁵⁶ Liberia has either ratified or acceded⁵⁷ to all of the above international human rights treaties.⁵⁸ In doing so, a state commits to “respect, protect, and fulfill” the rights contained in these treaties, including the right to an

53. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 8, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

54. International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI) A, art. 14, § 3(d), U.N. Doc. A/RES/2200(XXI) (Dec. 16, 1966) (obliging states to provide legal assistance to an individual “in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.”).

55. International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, art. 6, S. Exec. Doc. C, 95-2 (1978), 660 U.N.T.S. 195 (entered into force Jan. 4, 1969)

(declaring that “State Parties shall assure to everyone within their jurisdiction effective protection and remedies”).

56. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, art. 13–14, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 (entered into force June 26, 1987) (ensuring that victims of torture have a right to have their cases “promptly and impartially examined” and a right to “obtain redress”).

57. *Glossary*, United Nations Treaty Collection, http://treaties.un.org/Pages/Overview.aspx?path=overview/glossary/page1_en.xml#accession (last visited Mar. 6, 2014). According to the Glossary, “accession” indicates that a state has become a party to a treaty that was previously negotiated and decided upon by other states, typically after the treaty has come into force. Legally, accession has the same legal effect as ratification. *Id.*

58. *Ratification of International Human Rights Treaties – Liberia*, Univ. of Minn. Hum. Rights Libr., <http://www1.umn.edu/humanrts/research/ratification-liberia.html> (last visited Mar. 6, 2014).

effective remedy.⁵⁹ Confirming these international standards, the U.N. Office on Drugs and Crime's *Handbook on Improving Access to Legal Aid in Africa* posits that "[t]hese conventions establish the right to legal aid and are binding on those States that have ratified them."⁶⁰

Within Africa, the African Commission on Human and Peoples' Rights, which has jurisdiction over Liberia, has also established the right to legal aid through a number of declarations and principles.⁶¹ Other formal bodies and declarations that have endorsed this right include the African Charter on the Rights and Welfare of the Child, the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice.⁶² Not only do these documents reinforce the obligation that State signatories and members have to ensure the delivery of legal services to their citizens, but these documents also support the existence of the fundamental right to legal services, which states have an obligation to protect and enforce.

59. Report of the Special Rapporteur, *supra* note 20, ¶ 6.

60. U.N. Handbook, *supra* note 44, at 18. The Handbook was published in response to ECOSOC Resolution 2007/24, which dealt with access to legal aid. *Id.* at 1; see also ESCOR Res. 2007/24, *supra* note 44, pmb., art. 5 (stating that "all persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings" and calling on the U.N. Office on Drugs and Crime "to assist African States . . . in applying the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa").

61. See U.N. Handbook, *supra* note 44, at 18; International Seminar on Prison Conditions in Africa, Sept. 19–21, 1996, *Kampala Declaration on Prison Conditions in Africa and Plan of Action* (Sept. 21, 1996) (exploring how adequate prison conditions requires access to legal resources); International Conference on Community Service Orders in Africa, Nov. 24–28, 1997, *Kadoma Declaration of the Participants on Community Service Orders and Plan of Action* (Nov. 28, 1997) (explaining how community service should be a viable alternative to incarceration); African Commission on Human and Peoples' Rights, Sept. 18–20, 2002, *The Dakar Declaration on the Right to Fair Trial in Africa* (Sept. 1999) (discussing how legal aid for defendants is a prerequisite to a fair trial); Pan-African Conference on Prison and Penal Reform in Africa, *Ouagadougou Declaration on Accelerating Prison and Penal Reform in Africa and Plan of Action* (Sept. 20, 2002) (calling for additional legal aid in order to reduce the number of unsentenced prisoners); Conference on Legal Aid in Criminal Justice: the Role of lawyers, Non-Lawyers and other Service Providers in Africa, Nov. 22–24, 2004, *Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa and Plan of Action* (Nov. 24, 2004) (laying out a multistep plan for governments to increase legal aid for its citizens).

62. U.N. Handbook, *supra* note 44, at 18.

In addition, the Liberian Constitution also stipulates the right to legal aid in Article 21(i):

The right to counsel and the rights of counsel shall be inviolable. There shall be no interference with the lawyer-client relationship. In all trials, hearings, interrogatories and other proceedings where a person is accused of a criminal offense, the accused shall have the right to counsel of his choice; and where the accused is unable to secure such representation, the Republic *shall make available legal aid services* to ensure the protection of his rights.⁶³

The Liberian Constitution was written in 1986 and replaced the 1847 Constitution, which had been suspended by Samuel Doe after his successful coup d'état overthrowing then-leader H.E. William R. Tolbert, Jr.

In conjunction, these sources of law establish that Liberian citizens must be accorded their human right to legal aid services. While the precise content of the right to legal aid and access to justice has not been definitively established, and is still in fact heavily debated,⁶⁴ it can be assumed that Liberians are entitled to some measure of the right to counsel, as ensured in the Liberian Constitution, and legal aid services as the national budget may support.

C. The Liberian National Bar Association's Legal Aid Program

In the context of this international movement to spread rule of law and increase access to legal services, the Liberian National Bar Association (LNBA) decided to launch a national legal aid program in 2012. The program is spearheaded by the Legal Aid Committee of the Liberian National Bar Association, directed by Counselor Tiawan Gongloe, who has had a long, fraught relationship with his native Liberia as one of the nation's first human rights lawyers.⁶⁵ Although Gongloe was at one point Solicitor General in Liberia's current administration led by President Ellen Johnson-Sirleaf, he later

63. Constitution of the Republic of Liberia, Jan. 6, 1986, art. 21 § i, available at <http://www.unhcr.org/refworld/country,LEGAL,,LEGISLATION,LBR,456d621e2,3ae6b6030,0.html> (emphasis added).

64. See Richard Moorhead & Pascoe Pleasence, *Access to Justice after Universalism: Introduction*, 30 J.L Soc'y 1, 2 (2003).

65. Q&A with Liberia's Solicitor General Taiwan S. Gongloe, Carter Ctr. (Feb. 11, 2008), http://www.cartercenter.org/news/publications/peace/conflict_resolution_publications/qa_liberia_taiwan_gongloe.html.

resigned from government service and now works as a private lawyer in Monrovia.⁶⁶

The initiative directed by the LNBA's Legal Aid Committee, with support from The Carter Center and other NGOs, calls for Liberian lawyers to volunteer their pro bono time to represent indigent clients who have been sued in criminal or civil court and are unable to hire their own representation. The program accepts applications from all, but emphasizes that clients should possess all or most of the following characteristics: (1) be economically, politically, or socially disadvantaged, (2) be unable to afford legal representation on his/her own, (3) has exhausted other potential remedies available to him/her, and (4) has not previously received legal assistance from the program. The program works in partnership with NGOs like The Carter Center, which runs an Access to Justice Program in which Community Mediators trained in Liberian law help to resolve local disputes, and could potentially refer larger conflicts to the LNBA's pro bono attorneys as part of the Legal Aid Program.⁶⁷

66. In the 1970s, Gongloe was imprisoned for speaking out as a student activist against then-president William Tolbert. During Charles Taylor's rule, Gongloe provided legal defense for those wrongly accused by Taylor and his allies and kept many out of prison. In 2002, Gongloe gave a speech criticizing the administration's use of violence, and was severely beaten as a result, ending up in the hospital and later fleeing Liberia with the help of Amnesty International. When Ellen Johnson-Sirleaf was elected to President in 2006, she asked Gongloe to return home to Liberia to serve as Solicitor General. Gongloe accepted the position though ultimately expressed criticism of Johnson-Sirleaf's administration, and resigned from government service when President Johnson-Sirleaf responded by demoting the human rights advocate. However, even now working as a private lawyer, Gongloe continues to be an outspoken critic of corruption in Liberia's government, calling for the resignation of President Johnson-Sirleaf in 2012. *Id.*; Binaifer Nawrojee, *Human Rights Watch Defender Video: Tiawan Gongloe* (Tiawan Gongloe's Speech at the 2003 Human Rights Watch Defenders Benefit Event), <http://www.youtube.com/watch?v=yeweEMfBeuY> (last visited Mar. 6, 2014). Gongloe lived briefly in exile in the United States, spending time at Harvard University and Columbia University, but ultimately returned to Liberia. Jim Dube, *Resurrecting the Rule of Law in Liberia*, 60 Me. L. Rev. 575, 582 (2008); Chronicle of Liberian Trendsetters, *Tiawan S. Gongloe, Former Solicitor General of Liberia and Human Rights Advocate* (July 11, 2012), <http://liberianmaletrendsetters.wordpress.com/2012/07/11/tiawan-s-gongloe-former-solicitor-general-of-liberia-and-human-rights-advocate/>; *Gongloe Calls for Ellen's Resignation*, Heritage Newspaper, Nov. 26, 2012, available at <http://www.news.heritageliberia.net/index.php/inside-heritage/general-news/78-slides/953-gongloe-calls-for-ellen-s-resignation> (last visited Mar. 6, 2014).

67. *Access to Justice in Liberia*, Carter Ctr., http://cartercenter.org/peace/conflict_resolution/liberia-homepage.html (last visited Mar. 6, 2014).

Prior to this initiative, legal aid programs in Liberia were limited to private attorneys working independently to represent clients as they saw fit and civil society organizations working piecemeal to supply representation when resources allowed.

Given Liberia's history and past struggles with accountability, this legal aid program is an important initiative for the nation's development. The application criteria are designed to determine an applicant's level of need: if an applicant qualifies for legal representation provided by the program, it is assumed that the applicant would otherwise be unable to afford the services provided. In that way, this locally-led initiative is a significant step forward in providing access to legal services for marginalized segments of the population. The Liberian Constitution states that, "where the accused is unable to secure such representation, the Republic shall make available legal aid services to ensure the protection of his rights."⁶⁸ In essence, this program focuses on those individuals unable to secure representation, working to respond to the Government's obligation to safeguard certain human rights.

In some ways, this legal aid pilot program is a progressive advance. First, the program does not restrict legal aid to criminal cases. Applications based both on civil and criminal matters are accepted for consideration. This is not a given in the world of legal aid and access to legal services; rather, it is a deliberate and laudable decision to consider the fundamental human rights at stake in civil matters, in addition to those at risk in criminal charges. More developed countries continue to struggle with the provision of similar services for civil cases.⁶⁹ Second, the program does not shy away from applications on controversial political or human rights issues. To the contrary, members of the Legal Aid Committee expressed willingness to accept cases involving "politically motivated crimes" and "trafficking," for example.⁷⁰

Yet, due to resource constraints and the program's start as a limited pilot, its focus is narrowed to include only legal representation. The program does not currently provide legal

68. Constitution of the Republic of Liberia, Jan. 6, 1986, *supra* note 63, art. 21 §1.

69. Edwin Rekosh et al., *An Overview of Civil Legal Services Delivery Models*, 24 *Fordham Int'l L.J.* S225 (2000), available at <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1787&context=ilj>.

70. Liberian National Bar Association, *Legal Aid Program: Case Selection Criteria* (on file with author).

counseling, education, or pre-litigation advising services. While the program as framed may be an adequate response to Liberia's obligations under international human rights treaties, at the very least as an indication of Liberia's willingness to address access to justice issues, its focus may be too narrow to work holistically toward establishing rule of law and human rights protections. Parts III and IV will address the inherent obstacles in implementing this national legal aid program in a nation still rebuilding its judiciary and infrastructure of governance, as well as potential solutions that may exist.

III. BARRIERS TO IMPLEMENTATION

While a national legal aid program is difficult to implement in any state and may often be riddled with inherent obstacles, Liberia's current state presents certain unique impediments, suggesting that some elements of the program could be altered to increase the program's likelihood of success. Obstacles to the program's implementation include the effects of Liberia's civil war on the nation's judiciary, a culture of impunity cultivated by past governments, a common predilection toward customary justice mechanisms, and a general unfamiliarity with formal judicial institutions for some segments of the population.

Liberia's experience promoting rule of law, with the encouragement of the international aid community, presents an interesting case study, given the nation's unique history, first as a refuge for freed slaves from the United States, then as a nation ruled as an oligarchy by the elite, and later as the site of violent coups and decades of rulers unaccountable to the Liberian population.⁷¹ As I have argued, rule of law programs and the creation of legal aid institutions raise questions of their own concerning the implications of promoting this work. Liberia's current state of development and history present an interesting opportunity to examine inaugural

71. Dennis, *supra* note 4, at 2; *see generally* Akpan, *supra* note 4; Meredith, *supra* note 5. In the summer of 2012, I was given the opportunity to work with the Liberian National Bar Association in translating their intentions and ideas for the initiative into founding policies, formally adopted in July/August 2012 by the Legal Aid Committee. This opportunity allowed me to witness first hand the many different factors at play in designing such a program, including the need to account for the varied interests of the Liberian government, Liberian lawyers, the international aid community, and the individual members of the Legal Aid Committee.

efforts to provide legal assistance in a particularly inhospitable environment. Part III of this Note outlines the foreseeable barriers to implementation and the Liberia-specific obstacles that may require a renegotiation of the terms of the program.

A. Infrastructure and Development Obstacles in Liberia

The push to establish a legal aid program within a post-conflict country reflects the belief that isolated and marginalized populations need to be given access to a nation's judicial system from the beginning and as it develops in order to lay the groundwork for a just and equal society.⁷² Within the human rights framework, it is argued that, "no meaningful development can ensue without the simultaneous availability of access to legal services that can be utilized to enforce all generations of rights and thus ensure the empowerment of all persons in society."⁷³ From a governance standpoint, the argument may also be put forth that establishing rule of law in transitional countries is necessary before democratization may occur, because "until a country is a well-functioning state that enjoys a reasonable level of economic development and the rule of law, it is not ready for democracy."⁷⁴

Although significant international efforts have been made to assist Liberia as it rebuilds its judicial infrastructure, the nation's judiciary still suffers from considerable inadequacies. As of 2006, only three of the nation's 130 magistrates were lawyers, and more than half of about 300 justices of peace were illiterate.⁷⁵ Human Rights Watch reports that, in 2010, "[p]ersistent deficiencies in Liberia's judiciary led to widespread abuses of the right to due process and

72. See U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, *supra* note 45, ¶ 36; see also Patricia Lundy & Mark McGovern, *Whose Justice? Rethinking Transitional Justice from the Bottom Up*, 35 *J. of L. and Soc'y* 265, 268–69 (2008) (stating that "the international community . . . has increasingly embraced and employed transitional justice discourses and mechanisms in its interventions in 'post-conflict' situations").

73. U.N. Handbook, *supra* note 44, at 10.

74. Carothers, *supra* note 31, at 55. Carothers proceeds to dispute this concept of "sequencing" by arguing that this reasoning is reductionist, because "seeing rule-of-law development and democratization as distinct processes rests on a narrow, proceduralist conception of the rule of law." *Id.*

75. Richard Sannerholm, *Legal, Judicial and Administrative Reforms in Post-Conflict Societies: Beyond the Rule of Law Template*, 12 *J. Conflict & Sec. L.* 65 (2007) (citing Int'l Crisis Grp., *Liberia: Resurrecting the Justice System* 1 (2006)).

undermined efforts to address impunity for the perpetrators of crimes.”⁷⁶ The organization cites a long list of considerable weaknesses contributing to the inefficiency of the nation’s judiciary including, “insufficient judicial personnel,” “logistical constraints,” “archaic rules of procedure,” and “poor case management.”⁷⁷ The U.S. State Department echoes these sentiments, describing those in the Liberian judicial system as insufficiently trained and compensated, and explaining that there is a popular perception that exists that “judgments can be purchased.”⁷⁸

Given these observations, I argue that in the context of Liberia’s history and current fragility, the country does not stand to benefit from a traditional legal aid system right now and could even be harmed by it. Advocating for access to a formal judiciary that is currently neither stable nor transparent could engender cynicism or antipathy toward rule of law ideals that could then harm the development of civil society in Liberia’s transitional state. By installing a national legal aid program that emphasizes legal representation only after the initiation of a lawsuit, the program makes the judiciary the focal point of access-to-justice initiatives.⁷⁹ However, if the formal system is considered by the population to be corrupt, the question then becomes: how valuable is this right of access to justice?

In Monrovia, Liberian lawyers relay a popular anecdote about how lawyers win jury cases in Monrovia courts. As the story goes, each lawyer presents the jury with a briefcase of money, and the lawyer with the bigger briefcase wins. In June 2012, when a lawyer was indicted for bribing jurors, Liberia’s current Solicitor General, Counselor Michael Wilkins Wrights, used the opportunity to turn the spotlight on corruption.⁸⁰ Wright publicly stated, “We the lawyers are responsible for contaminating the jurors, so we must stop offering them bribes. When we offer, that’s bribery; when they solicit, that’s

76. *World Report 2011: Liberia*, *supra* note 3.

77. *Id.*

78. *2013 Investment Climate Statement – Liberia*, U.S. Dep’t of State, Bureau of Econ. & Bus. Affairs (Apr. 2013), <http://www.state.gov/e/eb/rls/othr/ics/2013/204678.htm>.

79. The national legal aid program as it currently stands requires that an individual applying for legal aid be the defendant in a lawsuit. The program was designed this way in order to ensure that the most dire cases—individuals in danger of being legally taken advantage of and facing a fine or imprisonment—are able to access legal representation for the trial.

80. Winston W. Parley, *Liberia: Lawyers Indicted for Bribery*, AllAfrica, June 19, 2012, <http://allafrica.com/stories/201206190885.html>.

bribery; when we give, that's bribery; when they receive, that's bribery.”⁸¹ Proper protocol suggests that judges set aside jury verdicts won by illegal means, but Counselor Theophilus C. Gould, President of the Liberian National Bar Association, has stated that he believes judges are too “afraid” to do so.⁸²

To conceptualize this story, it is important to discuss the apparent shortcomings of the Liberian judiciary. Civil war affects all nations differently and, in Liberia, it is clear that the judiciary has taken a hit and has not yet recovered. While efforts have been made to train new judges and lawyers, and re-establish local courts that had stopped functioning during the war, progress is slow. In Liberia, Doe and Taylor both cultivated an ideology of impunity, which survives today and can still be seen in illegal land occupations,⁸³ a severe lack of prosecution for rape and sexual violence cases,⁸⁴ and government corruption⁸⁵. The extent to which both the judiciary and public perceptions of law have suffered presents Liberia-specific obstacles that must be addressed by any legal aid program that endeavors to be successful and gain public support. In addition to potential corruption and insufficient infrastructure, Liberia's justice system maintains a complex structure. The formal common-law system of courts overlaps jurisdictionally with a network of “native” courts, established before certain areas of Liberia had been integrated into the nation's system of counties, and reinforced by the Revised Rules and Regulations for Governing the Hinterlands of Liberia in 2000.⁸⁶

81. *Id.*

82. *Id.*

83. Int'l Crisis Grp., *Liberia: Resurrecting the Justice System 2* (2006) (citing the “challenge [of] the culture of impunity that continues to reign on Guthrie rubber plantation in Bomi and Grand Cape Mount Counties [. . .] symptomatic of a court system unable to prosecute ex-combatants who continue to commit crimes.”).

84. Rukmini Callimachi, *Liberian Courts Battle Rape Scourge*, Wash. Post, Aug. 6, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/08/06/AR2007080601045_pf.html (reporting that despite 658 rape victims having been treated since the end of the war at Monrovia's main rape clinic alone, “only five convicted rapists are serving sentences in Monrovia's central prison” as of 2007).

85. See *World Report 2011: Liberia*, *supra* note 3, at 3 (noting that “[w]hile authorities made progress in conducting regular audits and putting programs in place to improve public finance management, these efforts made little headway in curbing official malfeasance”).

86. Markus Zimmer, *The Challenge of Judicial Reform in Post-Conflict States*, 37 Ohio N.U. L. Rev. 645, 681 (2011) (arguing that, “[t]he jurisdiction of these native courts includes and overlaps with the jurisdiction of common law

Furthermore, there are general rule-of-law obstacles to promoting a traditional national legal aid program in the context of Liberia's current state. In part, specific obstacles currently faced in Liberia mirror traditional criticisms of the rule of law development strategy. First, the proliferation of rule of law programming in post-conflict societies has often been criticized for being myopically focused.⁸⁷ While a rule of law approach typically attempts to address the problems of national insecurity by addressing violations of political and civil rights, this focus may ignore other factors equally significant to a nation's insecurity, such as governance, economic circumstances, and the strength of national institutions.⁸⁸

Similarly, the legal aid program designed by the LNBA may also fall prey to this narrow focus, emphasizing legal representation in a *court case* as the priority of the program, potentially at the expense of other notable issues. For example, a number of factors contribute to a situation in which an indigent individual is sued and must appear in court, thereby triggering eligibility for legal aid. In such a court case, the conflict between the parties may also implicate issues of unequal bargaining power due to discriminatory practices, insufficient knowledge of the law or judicial process, or the presence of certain economic factors preventing the parties from settling conflicts of debt or civil damages.

Another traditional criticism of access to justice programs is the limitation on legal aid services to provide representation only to the poorest candidates—sometimes called “targeting.”⁸⁹ Individuals who do not fall strictly within the poorest segment of a community,

courts and, to that extent, create potential jurisdictional conflict issues.”); see Sandefur & Siddiqi, *supra* note 13, at 7 (explaining that, through the Hinterland Regulations, “statutory law explicitly recognizes the dual nature of the legal system in the form of a parallel, idiosyncratic customary system administered by local chiefs.”).

87. See Sannerholm, *supra* note 75. Sannerholm argues that rule of law programming in transitional countries has traditionally been directed toward the reform of the criminal justice sector, but should also focus on public sector reform, as has been seen recently in Liberia. Although Sannerholm criticizes the focus on human rights and rule of law, to the detriment of the development of the public sector, the essence of his argument—that a development strategy that ignores floundering institutions in order to promote other ideals—is similar to mine. Sannerholm emphasizes that, “there is a need to pay greater attention to rule of law in relation to issues such as governance and economic management, and that failure to do so may severely undermine the sustainability of other statebuilding reforms.” *Id.* at 67.

88. *Id.* at 68.

89. Moorhead & Pleasance, *supra* note 64, at 2.

but nevertheless have little disposable income, can be left without representation. Built to promote universal equality, this legal aid program could have the counterproductive effect of creating a new sort of disparity.⁹⁰ Though there are obvious reasons—such as efficiency and “cost containment”—that explain this choice,⁹¹ the Legal Aid Committee must be mindful that prioritizing efficiency over equality may make it difficult to simultaneously endorse notions like equality before the law.⁹²

B. Use of Customary Justice Mechanisms in Liberia

Even if the current state of Liberia could support an increased use in the formal court system, the national legal aid program as proposed would encounter difficulties in persuading the more rural populations to utilize and trust the formal court system. Most Liberians’ experiences with institutions of justice and dispute resolution to date have been limited to local and traditional justice mechanisms in which conflicts are mediated within the communities. Therefore, engaging in legal aid services in the context of a complete shift to formal mechanisms would be jarring and confusing to Liberians who have had no prior experience with the formal court system, especially without accompanying educational instruction on the rules and regulations.

In Liberia, the use of customary justice mechanisms is more common than the use of the formal court system, especially in rural areas.⁹³ In a given conflict, a non-binding decision is made by a chief or elder family member, and “justice” is achieved when the perpetrator is penalized and the victim is rewarded.⁹⁴ The customary justice system is predicated on a hierarchy beginning with senior members of a family, and then moving out of the family toward quarter chiefs, town chiefs, clan chiefs, and paramount chiefs.⁹⁵ While the customary justice system is still used despite the concurrent existence of a formal justice system, research indicates that a chief’s

90. *Id.* (“The old models have been appropriated but the ideology has not: the focus is on efficiency and effectiveness rather than equality and ideals.”).

91. *Id.* at 3.

92. *See id.* (arguing that efficiency should be the balance of cost and value).

93. *See* Sandefur & Siddiqi, *supra* note 13 (using survey data of rural Liberians as evidence that traditionally underrepresented communities prefer customary legal institutions to formal ones).

94. Ezekiel Pajibo, *Traditional Justice Mechanisms: The Liberian Case*, Institute for Democracy and Electoral Assistance 16 (2008).

95. Isser, *supra* note 16, at 23.

decision may not be viewed as an ultimate conclusion, but rather that cases may transition back and forth between the customary and formal systems.⁹⁶ However, customary systems are arguably more accessible and prevalent, since they exist at the local level.⁹⁷ Some suggest that military rule and civil war increased societal reliance on local mechanisms, as there were greater impediments to accessing the formal system during times of conflict, rendering the formal justice system an expensive, limited commodity.⁹⁸ A recent study also suggests that individuals may, on average, be more satisfied with the justice they receive in the customary system than that received in the formal system, strengthening the existing preference for customary justice mechanisms.⁹⁹

The customary justice system in Liberia differs from the formal system, in that it utilizes proceedings that resemble “nonbinding arbitration with elements of mediation,” permitting parties to “appeal” their cases to the next level in the hierarchy or even transition the case to the formal justice system if they are displeased with the result.¹⁰⁰ The goal of the arbitration is generally considered to be social reconciliation, rather than punishment, and adversarialism is typically viewed as something to avoid, rather than embrace.¹⁰¹

This Liberian justice tradition presents several problems for the adoption of a legal aid program. Liberians, especially those living in rural communities, overwhelmingly prefer to use traditional justice mechanisms, and are accordingly skeptical of formal courts.¹⁰² A survey conducted by Oxford University in 2008 indicated that “rural citizens took only four per cent of criminal cases and three per cent of civil cases to the formal courts.”¹⁰³ Knowledge of legal rights and the formal court system is rare; in an interview conducted by the Crisis

96. *Id.*

97. *Id.*

98. Pajibo, *supra* note 94, at 16. As Pajibo explains, certain traditional mechanisms include the *palava* hut process (a mediation ritual performed by community elders), the sharing of the kola nut (a resolution process in which the wrongdoer provides the victim with a kola nut, or another form of atonement, and the wrongdoer is forgiven), and ‘sassywood’ – now an illegal practice by Liberian law (the wrongdoer is forced to drink a certain mixture or is burned with metal, and guilt is determined by the body’s response). *Id.* at 16–22.

99. Sandefur & Siddiqi, *supra* note 13, at 25.

100. Isser, *supra* note 16, at 26.

101. *Id.* at 48.

102. Isser, *supra* note 16.

103. Flomoku, *supra* note 16, at 1.

Group in 2006, a judicial monitor logged, “people often say that the constitution is not their constitution—that the constitution does not apply to them because they are tribal people.”¹⁰⁴ In some cases, traditional justice mechanisms apply rules that run counter to national laws, so citizens hold conflicting ideas about what the correct laws even are and what individual rights they possess.¹⁰⁵ In this way, the two systems are in tension with one another.

Because of this tradition of customary justice in Liberia, a legal aid program that emphasizes a shift to a formal justice system is problematic in that it requires Liberians to abandon the prior practice. Not only does the program require this shift, in asking individuals to come forth to apply for legal representation in the formal justice system, but it also requires a change in underlying doctrine: a lawsuit engenders a firm decision and formalized procedures whereas the customary system is more of a process of reconciliation and informal conversation. Because the foundation of the legal aid program is built on legal representation in the formal court system, the program faces cultural and institutional obstacles in providing “access to justice” in an unfamiliar context. Considered in sum, these obstacles of a struggling judiciary and a population with no prior formal justice experience are challenging, if not unworkable.

104. Int'l Crisis Grp., *supra* note 83, at 11. “Rights based knowledge is almost non-existent. If civil society and international organizations do not create and fund access to justice programs, and the government does not insist on their vital importance to justice reform, Liberians will remain unaware of both their fundamental rights and how to realise them.” *Id.*

105. This tension can be seen in the continued practice of ‘sassywood,’ despite now being illegal under Liberian law. Pajibo, *supra* note 94, at 17. Pajibo describes sassywood as “trial by ordeal.” Pajibo explains several methods of *sassywood*: in one, “[t]he alleged perpetrator is made to imbibe a mixture or brew made from indigenous plants. If he or she regurgitates the brew, this constitutes a not guilty verdict. Failure to do so demonstrates guilt and the person will be banished from the village (in the case of murder), scorned, shamed and (in the case of theft of property) made to make restitution.” In another method, the alleged perpetrator is burned with a red-hot metal and is considered guilty if he or she pulls away from the heat. *Id.*; see also Sandefur & Siddiqi, *supra* note 13, at 7 (stating that “the boundary between [the customary system and the formal system] is complex and contentious”).

IV. A ROLE FOR LIBERIAN LAWYERS: PROVIDING COUNSELING AND LEGAL EDUCATION AS A MIDDLE ROAD

For decades there has been worldwide consensus on the importance of rule of law as a component of international development efforts. The creation of national legal aid programs is an important part of this strategy, despite being resource-intensive, because it helps to ensure that all segments of the population have access to the developing judicial mechanisms and their benefits. There is a danger, however, in encouraging access by the population to a formal judiciary that is not yet capable of supporting the weight of its people. This risk exists in Liberia, and a traditional national legal aid program, with a reliance on legal representation as its central pillar, may not be the most effective answer.

A legal aid program is certainly critical, given the problems Liberia faces. Rule of law cannot take hold in a society until its people have a genuine understanding of the potential protection offered by civil and political rights and can trust their government to fulfill this promise. Yet, in the context of Liberia, there seems to be a step missing. A program that forces the routine of legal representation in a lawsuit does not necessarily instill judicial ethos in its people; after all, running through the motions does not produce a purposeful civil society invested in the rule of law. And an individual's experience with the justice system does not begin when he or she is sued nor does it end when the lawsuit has finished. Rather, the process is longer and more complex, and individuals must feel supported for the duration of that experience. Furthermore, in order to instill the rule of law and judicial ideals into all facets of civil society, a legal aid program must also permeate democratic institutions; it cannot be limited to merely providing legal representation in a court of law.

A. Access to Alternate Legal Services

For these reasons, the Liberian National Bar Association should adjust its pilot legal aid program to promote access to justice but not necessarily provide litigation within the confines of a court case. While a right to legal representation is crucial, rule of law programs also must consider the need for efficiency in resource-scarce post-conflict environments when making the determination of

whether or not legal representation is the most urgent need.¹⁰⁶ Instead, a legal aid program could take a different shape. At the *Conference on the Protection and Promotion of Human Rights through Provision of Legal Services* in 2007, Simon Rice put forth the suggestion that, “a right to legal aid could mean much more than a limited right to representation in court.”¹⁰⁷ As he explained, we can, instead, think of legal aid as providing “public access to law, to law that is preventive and protective, that brings change and hope, that relieves poverty and promotes prosperity. We can think of legal aid as providing public access to legal information, to legal advice and to legal education and knowledge.”¹⁰⁸ This expansion encompasses a more holistic view of what a legal aid program can accomplish in a post-conflict environment.

Because Liberia’s judicial system is still recovering from decades of conflict and impunity following horrifying war crimes,¹⁰⁹ and is already overloaded bureaucratically with backlogged cases,¹¹⁰ the system as it exists has little to offer those who are unfamiliar with its mechanisms. However, information on the legal system, including information on Liberian laws, and instruction on individual civil, political, economic, and social rights, could still benefit those facing personal threats to their liberties. Programs exist in rural areas in Liberia, run by non-governmental organizations, that teach community members Liberian laws and train them in dispute

106. Moorhead & Pleasance, *supra* note 13, at 3 (noting that “[e]fficiency is, of course, often a euphemism for cost containment; but in reality it should and can involve the balancing of both cost and value”).

107. Simon Rice, *A Human Right to Legal Aid: Keynote Address, in Redress*, Kyiv Conference 39, 43 (2007), available at <http://www.redress.org/downloads/publications/Kiyv%20Conference.pdf>.

108. *Id.*

109. See Liberia: Resurrecting the Justice System, *supra* note 83, at 1 (stating that “[t]he culture of impunity marked by the lack of impartial institutions was a primary catalyst for the wars in Liberia. . . . There is a crisis of confidence in the Liberian justice system because powerful individuals have used it as a political tool through which to exercise and legitimise their power.”).

110. Liberia: Broken Judicial System with Backlog of Cases – Ellen Years for Modernization, *The Informer* (Monrovia), June 24, 2010, available at <http://allafrica.com/stories/201006241011.html> (stating that President Sirleaf is “expressing concern that the court system remains slow in processing and dispensing justice despite higher levels of compensation and overall better working conditions for judges, county attorneys, defense counsels and magistrates.”).

resolution so that they can help mediate conflicts that arise.¹¹¹ For example, The Carter Center, an American NGO started by former President of the United States, Jimmy Carter, trains Liberians to work as “Community Justice Advisors,” mediating local conflicts and referring certain cases to the police force.¹¹² However, these Community Justice Advisors are not trained lawyers, and so the help they can provide is limited. A legal aid program could supplement this educational training with the help of Liberian legal professionals.

B. The Role of Liberian Lawyers in Rebuilding

The legal aid program may also benefit by shifting its focus to concentrate on access to advice from lawyers and legal counseling, as opposed to legal representation. In doing so, the program could help to reinforce rule of law ideals without overburdening the courts of the Liberian judiciary. Providing access to lawyers who are willing to contribute time to advise individuals on a variety of issues, before conflicts escalate to a lawsuit, could work in tandem with programs like The Carter Center’s Access to Justice Initiative, and could serve many of the same goals as the national legal aid program is designed to address.¹¹³ Using legal counseling to avoid lawsuits could also benefit the nation’s judiciary, by saving resources and lessening the caseload.

Moreover, it has been seen in the common law system that lawyers can play an influential role and help to fill the void of a strong state judicial presence in the process of rebuilding.¹¹⁴ Lawyers

111. See, e.g., Carter Ctr., Annual Report 13 (2009–10), available at http://www.cartercenter.org/resources/pdfs/news/annual_reports/annual-report-10.pdf.

112. *Id.* at 13. The Carter Center Annual Report refers to these individuals as “Community Legal Advisors” as they were formerly called; in Summer 2012, however, The Carter Center staff in Liberia began referring to them as “Community Justice Advisors” in response to informal complaints by the Liberian National Bar Association that the “Community Legal Advisor” title was misleading, as these individuals did not possess legal degrees.

113. The Carter Center did consult with the Legal Aid Committee in the design of the national legal aid program, and it was left as an open question whether Community Justice Advisors could refer cases to pro bono lawyers. Along these lines, Community Justice Advisors could—with redesign of the program—have access to certain lawyers they could call in to consult, before a case reached litigation stages, to advise individuals in need on legal matters.

114. Sandra Fullerton Joireman, *Inherited Legal Systems and Effective Rule of Law: Africa and the Colonial Legacy*, 39 J. Mod. Afr. Stud. 571, 575 (2001) (“Lawyers and strong law associations can provide an important alternative locus

can contribute to the stability and rule of law of a society both by formally resolving conflicts and endorsing rule of law, and by informally promoting principles that encourage peace and stability.¹¹⁵ Specifically, lawyers can “facilitate the public’s confidence in the fairness and efficacy of the legal system” and “ensure due process and protect fundamental rights by pursuing the necessary remedies when these rights have been infringed upon.”¹¹⁶ In Ghana, for example, as the nation was transitioning to independence towards the end of British rule, lawyers organized among themselves in an effort to collectively exert political pressure on Britain.¹¹⁷ The force of a pro-bono legal movement by Liberian lawyers could not only help a national legal aid program to succeed, but could also help launch Liberia’s judicial sector past this phase of struggle and into a more stable and efficient place.¹¹⁸

In designing the national legal aid program, the Legal Aid Committee of the LNBA was optimistic that experienced lawyers would be eager to give back to their country. To increase the capacity of a volunteer task force, the Committee also contemplated making pro bono hours a requirement for new Liberian lawyers before being admitted to the bar. One potential arrangement involves the assignment of pro bono cases to pairs consisting of one newly-trained lawyer and one more experienced lawyer.¹¹⁹ This arrangement would encourage the newer lawyer to engage with the pro bono case because he or she could learn from the more experienced lawyer, and the more experienced lawyer could be spared the more menial tasks and paperwork involved in legal representation. Instituting this arrangement, and ensuring that the program maintains enough volunteer support by making pro bono projects a requirement of

of power to the state, thereby increasing the chances for democratic development and a thriving civil society.”).

115. David Tolbert & Andrew Solomon, *United Nations Reform and Supporting the Rule of Law in Post-Conflict Societies*, 19 Harv. Hum. Rts. J. 29, 48 (2006).

116. *Id.*

117. Joireman, *supra* note 114, at 575. However, in a footnote, Joireman explains that lawyers may also be detrimentally influential: “Lawyers and bar associations may not always play such a positive role. In Pakistan, for example, the bar has been strongly criticized for corruption and its role in funneling money to judges in order to influence their decisions.” *Id.* at 575 n.7.

118. See Dube, *supra* note 66, at 576 (seeking to “prove that existing legal architecture and institutions in a post-conflict state matter less to the rule of law than does the character of the people who run the legal system”).

119. This proposal was informally discussed in an early planning meeting for the legal aid program in July 2012.

newly trained lawyers, could afford a national legal aid program with enough capacity to provide legal services beyond only representation in a lawsuit. In South Africa, a legal aid model employing students to do legal aid work as an internship program following graduation has been successful in creating opportunities for young graduates and providing legal aid support for a relatively low cost.¹²⁰

To date, Liberian lawyers have largely shown themselves to be productive and well-meaning contributors to peacebuilding efforts. Though there have been allegations of corruption and bribery within the lawyer population, mostly in Monrovia, from what I observed in my fieldwork, many Liberian lawyers do not engage in corrupt practices and work hard to support themselves and their families.¹²¹ This hypothesis is exemplified by the philanthropic efforts Liberian lawyers have made in seeking to facilitate national recovery. The Association of Female Lawyers of Liberia (“AFELL”) describes itself as a “non-profit, non-governmental organization,” accredited by the Liberian Ministry of Planning.¹²² Established in 1994, AFELL’s mission is “to advocate for the promotion, protection and advancement of the rights of women and children,” working towards a Liberia in which women will understand the rights afforded to them by the Liberian Constitution.¹²³ Liberian lawyers have also organized to form a coalition called Green Advocates Liberia, an association of environmental lawyers and Liberia’s first public interest environmental law organization, founded in 2001.¹²⁴ Their main program areas include Protecting the Environment, Human Rights Advocacy and Protection, and Natural Resources and Tribal Peoples’ Rights.¹²⁵ In addition, the placement of Tiawan Gongloe, a former human rights advocate and vocal critic of the Sirleaf Administration, as head of the prominent Legal Aid Committee of the Liberian National Bar Association, indicates that Liberia’s lawyers are serious

120. Rekosh, *supra* note 69, at S235–36.

121. Anecdotally, many Liberian lawyers openly discuss the well-known obligation to support one’s immediate and extended family members when making the type of salary private Liberian lawyers make.

122. Association of Female Lawyers of Liberia (AFELL), <http://www.afell.org> (last visited Mar. 6, 2014).

123. *Mission Statement & Vision*, AFELL, http://afell.org/index.php?option=com_content&view=article&id=47 (last visited Mar. 6, 2014).

124. *About Us*, Green Advocates Liberia, <http://www.greenadvocates.org/about-us> (last visited Mar. 6, 2014).

125. *Programs*, Green Advocates Liberia, <http://www.greenadvocates.org/programs> (last visited Mar. 6, 2014).

about their nation's reconstruction and are seeking advice from one of the most reputable human rights advocates amongst them.

Moreover, a national legal aid program that focuses on counseling and informal advising, as opposed to more formalized and adversarial mechanisms, is better suited to the Liberian culture of traditional justice systems. To be fair, there are considerable dangers present in relying on, and even strengthening, traditional justice mechanisms, including an inability to handle criminal cases, a lack of protection for witnesses and victims, and a lack of due process rights.¹²⁶ However, I am not advocating a reliance on these mechanisms, nor am I suggesting a reversion to them. Rather, I am proposing that instead of forcing a complete abandonment of these mechanisms immediately, the national legal aid program should play more of a transitional role, gradually incorporating lawyers and legal institutions within a more familiar and comfortable context. In this way, the program would not reinforce reliance on traditional justice mechanisms, but could help to bridge the transition from traditional mechanisms to a legal system based on the Liberian Constitution and other laws. Similarly, others have suggested that instead of reinforcing reliance on traditional justice mechanisms, the use of customary forums may help to promote the development of rule of law during periods of transition.¹²⁷

This proposal rests in large part on the shoulders of Liberian lawyers—on their ability and willingness to provide pro bono hours, their patience in instructing populations on legal rights within the formal system while remaining respectful of traditional mechanisms, and their integrity in aiding the nation's most marginalized and at-need populations while policing those who may take advantage of people in need. In essence, it is risky, yet necessary. A nation at a crossroads must persevere on the will of its people, or not at all. The Liberian National Bar Association in particular has shown itself to be an innovative and passionate organization, working hard to institute initiatives that can help Liberia rebuild. There is a strong

126. Rena L. Scott, *Moving from Impunity to Accountability in Post-War Liberia: Possibilities, Cautions, and Challenges*, 33 Int'l J. Legal Info. 345, 395–96 (2005). However, Scott also qualifies these dangers by suggesting that “traditional practices ought not to be rejected outright, [but] we must avoid supporting practices simply because they have historical or traditional roots.” *Id.* at 395–96.

127. *Id.* (citing Jennifer Widner, *Court and Democracy In Postconflict Transitions: A Social Scientist's Perspective On the African Case*, 95 Am. J. Int'l L. 64, 75 (2001)).

humanitarian presence in Monrovia, and these lawyers are potentially supported by the wide network of U.N. personnel, NGOs, and domestic civil society groups that work tirelessly to deliver services and human rights protections to the Liberian population.

V. CONCLUSION

It is always easier to criticize an existing initiative than to create one from scratch. It is only by first convening a committee, designating an inventive leader, and constructing founding policies that one can then determine whether a program is best suited for the population it is addressing, or whether structural adjustments are necessary. The Legal Aid Committee of the Liberian National Bar Association has achieved an incredible objective a mere decade after emerging from two dictatorships and a violent civil war; it has attempted to address the nation's international obligations under human rights treaties and respond to international pressures encouraging the promotion of rule of law by beginning to ensure the deliverance of legal services to Liberia's most isolated populations. And, it has done this in a capital city where bombed-out structures still stand and white UN vehicles still parole the streets.

The Legal Aid Committee faces formidable challenges, some specific to Liberia, in implementing a legal aid program. Liberia's conflict was particularly brutal, and characterized by impunity and a lack of accountability. In many rural areas, Liberians are just now starting to learn about formal Liberian laws and rights, after relying for decades on local mechanisms, some at odds with their formal counterparts. Liberia's courts are not yet ready to support an increase in cases; the judiciary cannot fully operate under its existing load.

And yet, Liberian lawyers have persevered. They have proven to be motivated and hard-working individuals, organizing into philanthropic associations and offering pro bono services where possible. In light of this, I am advocating for a redirection of the national legal aid program, requesting that these lawyers provide counseling and education instead of only providing representation in court. In this way, the nation can rebuild person-to-person, instead of inside government buildings, where those who are unfamiliar with the legal process should not have their first encounter with the "rule of law."