From the Editor. . .

Twenty years ago, a group of Loyola Law Students gathered to discuss ways to increase awareness of issues in public interest law and encourage open dialog. The work that followed from those discussions led to the founding of the Public Interest Law Reporter, a student-run publication. In November 1995, the Public Interest Law Reporter published its first issue. While much has changed in the legal profession, and the world at large, our mission remains the same as we publish this First Issue of Volume 20.

Our very first publication in 1995 aimed to convey the message that “the pursuit of justice is a struggle for many members of our society, the struggle must continue to be fought on many different levels.” The publication covered issues across the public interest spectrum from criminal justice for children, human rights in Bosnia, race relations in South Africa, Caring about Environmental issues and Racial Gerrymandering in the United States. Our mission to draw attention to important and timely issues for fellow law students and professionals has never faltered and remains our key focus to this day.

Although our mission remains much the same, progress requires change. To this end, the 2014-15 editorial board has made substantive and stylistic changes to the journal to provide our readers with an improved Reporter.

In this edition, we present insightful articles concerning key legal and policy issues of interest to the Public. Our contributing authors review recent court cases affecting teachers’ tenure classifications and discuss the effects of the Affordable Care Act on patients with HIV/AIDS, mental health issues, or substance abuse problems. From our Staff Writers you will read about cyberwarfare, life sentences for juvenile offenders, juror’s implicit bias in the case of Michael Brown in Ferguson, Missouri, and the use of microfinancing as an economic development tool. Staff writers selected to write Feature Articles extensively covered topics such as strict voter identification laws affect on transgender votes, the effects of pre-Great Recession predatory lending practices on minority populations, the use of child labor in American tobacco fields, and a constitutional right to counsel for immigrant children.

Since our inception, the Public Interest Law Reporter has focused on fostering discussion of issues of great concern and importance to the community. We thank you once again for joining us in this conversation and hope you find our articles informative and thought-provoking.

Conor Desmond
Editor-in-Chief
The Public Interest Law Reporter (PILR) is an innovative legal publication that focuses on current issues in public interest law and policy. Founded in 1995, PILR provides students, educators and practitioners with information about, and thoughtful analysis of, contemporary issues in the areas of human rights, economic equity, criminal justice, the environment, and both small and large-scale governance. The publication is produced, managed and edited by Loyola law students. Staff writers are selected through a write-on process and collaborate with editors to determine specific areas to research and write about. Feature articles provide more in-depth exploration of some particularly poignant or difficult issues. Additionally, selected articles from contributing authors are accepted for publication.

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How Strict Voter Registration Laws Will Affect Transgender Voters

Angela Sukurs

In order to cast a vote in Indiana, you must present a photo ID. The poll worker will check four criteria: is it your photo? Does it display your name and does that name conform to your voter registration record? Is the ID expired? Was the ID issued by the State of Indiana or the U.S. Government? While seemingly simple, these criteria can disenfranchise certain groups of voters who, for various reasons, face obstacles obtaining a government-issued photo ID. One such group of potentially disenfranchised citizens is transgender voters.

Transgender individuals who are transitioning or have already transitioned to a gender other than the one assigned at birth face certain complications in obtaining identification that reflects their current gender. These complications in obtaining IDs cause problems that range from attaining a loan or mortgage, dealing with anxiety concerning harassment, to voting in an upcoming election.

Voter ID laws vary from state to state. While 34 states have enacted laws requiring voters to provide an acceptable form of ID to poll workers, other states require that voters present a government-issued photo ID in order to vote. The states requiring government-issued IDs, also known as "strict voter identification laws," apply in 10 states.

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1 Indiana Secretary of State website, Photo ID Law, available at http://www.in.gov/sos/elections/2401.htm [hereinafter Photo ID Law].
2 Photo ID Law, supra note 1.
3 Id.
4 Id.
5 Id.
7 Herman, supra note 6.
8 Id.
9 Id.
ID states,” are predicted to hinder over 24,000 transgender voters from casting a vote in the November 2014 general election.12

HISTORY OF U.S. VOTER ID LAWS

Strict photo ID requirements are a recent phenomenon.13 Prior to 2006, no state required a government-issued photo ID in order to vote.14 Soon after, state legislatures began raising concerns of voter fraud, such as voter impersonation, and began drafting and passing bills to increase the public’s assurance in the soundness of the election process.15 In 2005, Indiana became the first state to enact a strict photo ID law, which the Supreme Court upheld the constitutionality of two years later.16

Some states opted to mandate registered voters show a government-issued photo ID, while in other states a utility bill or a bank statement is sufficient.17 If voters cannot show a valid photo ID in the strict photo ID states, they are entitled to a provisional ballot.18 In order for their vote to count, they must produce the required form of identification within a particular time frame.19 This time frame varies from state to state, with Georgia mandating a voter return within three days after the election while Indiana requires a voter return by noon the Monday after the election.20 The strict photo ID states currently include: Arkansas, Georgia, Indiana, Kansas, Mississippi, Tennessee, Texas, Virginia and Wisconsin.21 Additional states, such as Colorado and Oklahoma, have considered strengthening voter ID laws in the past year.22

Non-strict voter ID states, by contrast, allow certain voters without acceptable identification to cast a vote which may be counted without further action on their part, as long as it passes the election official’s review.23 On Election Day, these voters will complete an affidavit of identity and the poll workers

12 Herman, supra note 6.
14 Id., supra note 13.
15 Id.
16 Id.
18 Lee, supra note 13, at 3.
19 Id.
20 Id.
21 Herman, supra note 6, at 3.
23 Id.
can vouch for the voter. Election officials will inquire as to the voter’s registration status and eligibility and make a determination of whether to count the ballot or not. The voter does not need to take any further action as they do in the strict ID states.

Some exceptions exist within voter ID laws. In Indiana and Tennessee, for example, indigent groups are exempted from showing a photo ID. In other states, religious groups who have objections to being photographed are also exempted from showing an ID. Wisconsin’s law exempts victims of domestic abuse, sexual assault, or stalking who have a confidential listing. If an exception applies to a voter, the election officials will execute an affidavit stating that the voter is eligible to vote.

CHALLENGES TO VOTER ID LAWS

Although legislative histories state that voter ID laws were implemented to prevent voter fraud, actual evidence of voter fraud in the past decade is scant. Certainly, this is a partisan-issue with 36 percent of Republicans believing that voter fraud affects a few thousand or more votes versus 20 percent of independents and 7 percent of Democrats. Many conservatives believe that voter fraud is widespread, and that strict voter ID laws will address this perceived problem. The opposing side does not believe that voter fraud is an actual threat, and sees photo ID laws as too taxing on certain communities such as immigrants or transgender voters. Political scientist Lorraine Minnite observes that prosecutions for migratory bird law violations were far more common than election fraud in 2005. Even though voter fraud may be rare,
a poll shows that many voters believe it is widespread.37 This is likely due to campaigns led by conservative groups that seek to raise concerns about fraud in order to tighten up voter ID laws.38

Several lawsuits have surfaced challenging these laws, generally claiming that the laws violate their respective state constitutions.39 In October 2014, the U.S. Supreme Court struck down Wisconsin’s voter identification law for the November 2014 general election.40 The majority did not offer reasoning behind their decision, but rather published a one paragraph opinion simply granting the application to vacate the September 12, 2014 order of the Seventh Circuit.41 Justice Alito was joined by Justices Scalia and Thomas in his dissent, claiming the timing and the logistics of absentee ballots made the state’s request “difficult.”42

In 2011, the Georgia Supreme Court upheld the state’s law, holding that the requirement was a “minimal, reasonable, and nondiscriminatory restriction.”43 In contrast, the Missouri Supreme Court reasoned that there was “no compelling state interest to justify the burdens posed by the law.”44 The court noted that the state lacked any reports of voter impersonation fraud and also pointed to the fact that the law would not prevent any other type of voter fraud aside from impersonation.45 Missouri attempted again in 2011 to pass a photo ID law, but its democratic governor subsequently vetoed the bill.46 In 2014, a proposal to amend the state Constitution to include a photo ID requirement was rejected by a Missouri state judge.47

37 Id.
38 Id.
40 Liptak, supra note 37.
42 Id.
44 Lee, supra note 40.
45 Id.
46 Id.
47 Id.
HOW THESE LAWS WILL IMPEDE TRANSGENDER VOTERS

Identification documents are something a majority of Americans do not think twice about.\textsuperscript{48} For the majority of citizens, obtaining a government-issued ID is nothing more than a minor nuisance due to infamously long lines at the Department of Motor Vehicles (DMV).\textsuperscript{49} Transgender individuals, however, face obstacles in obtaining an ID.\textsuperscript{50} Harper Jean Tobin, policy counsel at the National Center for Transgender Equality, claims that for transgender individuals government-issued IDs can act as, “. . . something akin to a scarlet letter, with the ‘F’ or ‘M’ designation contradicting the holder’s appearance and social identity and outing him or her as transgender.”\textsuperscript{51} Government identification policies differ from state to state, causing a variety of issues for transgender individuals.\textsuperscript{52}

Gender transitioning is different for each individual, but usually involves psychological as well as medical treatments.\textsuperscript{53} Many states require proof of surgical treatment, such as gender reassignment or genital reconstructive surgeries, in order to update their ID documents.\textsuperscript{54} This outdated system makes it extremely difficult for most transgender people to have a current, accurate ID because many have not undergone surgical treatment.\textsuperscript{55} In fact, while a majority of transgender people go through hormone therapy, only a small minority actually undergo gender reassignment surgery.\textsuperscript{56} Specifically, fewer than one in five transgender women and less than one in twenty transgender men undergo genital reconstructive surgeries.\textsuperscript{57} The data reflects this problem of requiring proof of surgical treatment to update an ID, as the National Transgender Discrimination Survey shows that 27 percent of transitioned transgender people report to having no ID documents that reflect their current gender.\textsuperscript{58}

A study conducted by the Williams Institute at University of California Los Angeles School of Law found that within the strict photo ID states, an

\textsuperscript{49} Id.
\textsuperscript{50} Id.
\textsuperscript{51} Id.
\textsuperscript{52} Id.
\textsuperscript{53} Id.
\textsuperscript{54} Id.
\textsuperscript{55} Id.
\textsuperscript{56} Id.
\textsuperscript{57} Id.
\textsuperscript{58} Herman, \textit{supra} note 5, at 2.
estimated 84,000 transgender citizens will be eligible to vote in the November 2014 election.\textsuperscript{59} About 28 percent of these eligible voters may not have up-to-date IDs that reflect their current gender.\textsuperscript{60} While the provisional ballot is available to these citizens, it is speculated that a large number of these individuals will be prevented from returning to the site after Election Day to prove their identity due to issues such as low income jobs that may not allow them to take additional time off work.\textsuperscript{61} Requiring this additional step creates a substantial barrier for voters and, coupled with the potential for harassment or embarrassment for presenting an ID with a different gender, will likely deter a large number of transgender individuals from voting entirely.\textsuperscript{62}

**HOW ORGANIZATIONS ARE GETTING INVOLVED**

The National Center for Transgender Equality released a helpful “Voting While Trans Checklist” that is available on their website.\textsuperscript{63} The checklist includes tips for before and on Election Day.\textsuperscript{64} One checklist is available for transgender voters and another for poll workers and election officials.\textsuperscript{65} For transgender voters, the tips included: knowing whether a photo ID is required in your state, ensuring that the ID matches the name and address on voter registration, and encourages transgender voters not to worry, “...if your gender presentation doesn’t match your name, photo, or gender marker, as that is not required by the law.”\textsuperscript{66} It also gives information for using a provisional ballot on Election Day.\textsuperscript{67}

Tips to poll workers and election officials include the statistic that 80 percent of transgender people have only updated some of their ID’s to reflect their lived-in gender.\textsuperscript{68} It also informs officials that “different clothing and hairstyle on an ID is not a valid reason to deny a regular ballot.”\textsuperscript{69} By creating these checklists, the National Center for Transgender Equality seeks to educate elec-

\textsuperscript{59} Id.
\textsuperscript{60} Id.
\textsuperscript{61} Id.
\textsuperscript{62} Id. at 4.
\textsuperscript{64} Voting While Trans Checklist, supra note 59.
\textsuperscript{65} Id.
\textsuperscript{66} Id.
\textsuperscript{67} Id.
\textsuperscript{68} Id.
\textsuperscript{69} Id.
tion officials, poll workers and transgender individuals regarding transgender voting rights. Whether or not the poll workers and election officials will see this checklist, it is nonetheless a positive step towards raising awareness.

THE FUTURE FOR TRANSGENDER VOTERS IN AMERICA

Lesbian, gay, bisexual, transgender, and questioning (LGBTQ) activists see eliminating the barrier for transgender people to obtain ID documents as a major step towards eliminating the voter ID problem. Co-founder of Media Action Network Kristen Francis argues that, “Our country’s priorities are skewed when a small percentage of the public actually votes, yet we are making it harder for people to vote rather than focusing on why people aren’t voting.” Rather than focusing on the voter ID laws on a state-by-state basis, Francis would, “like to see a grand change on ID documents to include ‘other’ in addition to ‘male’ and ‘female,’ which would all start at the DMV.” Judge Nelva Gonzales Ramos from Texas raised a similar concern by ruling that voter ID law “creates an unconstitutional burden on the right to vote . . . and was imposed with an unconstitutional discriminatory purpose.”

In addition to eliminating the binary gender identification system on government IDs, local governments can also eliminate the requirement that transgender people show proof of a surgical procedure in order to change the gender on their ID. In 2006, the District of Columbia DMV enacted a policy where transgender individuals can fill out a form and have a medical or social service professional sign-off when they reach the point in their gender transition where a new ID is proper. The form does not require proof of a medical treatment, and places the power in the hands of the transgender person and his or her medical professional rather than a government worker who may not be fully informed of gender transitioning issues.

If voter ID laws are here to stay, each state should revise their ID registration policies to include “other,” as well as eliminating burdensome obstacles

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70 Id.
71 Id. at 2.
72 Interview with Kristen Francis, Co-Founder, Media Action Network (October 25, 2014) [hereinafter Francis interview].
73 Francis interview, supra note 68.
74 Id.
75 Liptak, supra note 37.
76 Tobin, supra note 42, at 5.
77 Id.
78 Id.
for people to change the gender on their ID. This would allow transgender individuals to live in a place where their ID’s accurately reflected their gender and where they can easily present an ID to vote for their political leadership. This is a world in which the majority of Americans already live, and a world that should be fully available to all citizens.
A Closer Look at a Child Offender:  
Illinois to Review All Juvenile Life Without Parole Sentences

Michelle Corda

Addolfo Davis was only 8-years-old when he committed his first crime. Davis’ participation in criminal activity continued throughout his youth, and at age 14, he participated in a double murder “that the courts viewed as so heinous that [as a child] he was sentenced to life [in prison] without the chance of parole.”

Davis’ childhood in Chicago was not an easy one. His mother was addicted to drugs, so his overwhelmed and overworked grandmother did the best she could to fill that role. However, Davis desired attention and a sense of family that he was unable to find at home. It was these needs that led him to join the street gang that would ultimately lead to his involvement in the double homicide.

The double homicide occurred in Chicago in 1990, a time when the gang wars over the drug trade was at an all-time high. In addition to the gangs fighting each other, the government waged the “war on drugs,” and the “fear of young ‘super predators’ [fueled] calls for harsh punishment for violent young offenders.” It was this mentality during sentencing that dictated that 14-year-old Davis had no rehabilitative potential and should be sentenced to die in prison.

Today, Davis is 37 and has spent the vast majority of his life in prison. Davis, along with 2,500 other individuals across the country including roughly 80 in Illinois, are currently serving life without parole sentences for crimes they

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2 Id.
4 Id.
5 Lee, supra note 1.
6 Id.
7 Id.
committed as minors.9 Jill Stevens, Davis’ therapist, believes that “most people would feel like you [would] need to be a pretty heinous, remorseless person to be locked up for your entire life without a chance to go before a parole board . . .”10 Stevens insists this is not the case with Davis.11

**JUVENILE LIFE WITHOUT PAROLE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT**

On June 25, 2012, the United States Supreme Court ruled in *Miller v. Alabama* that for offenders under the age of 18 at the time of the crime, mandatory life without parole sentences violates the Eighth Amendment’s prohibition on cruel and unusual punishments.12 The court reasoned that by removing age from the sentencing factors to consider and thus, subjecting a juvenile to the same life without parole sentence applicable to an adult offender, these mandatory laws “prohibit a sentencing authority from assessing whether the law’s harshest term of imprisonment proportionately punishes a juvenile offender.”13

After the *Miller v. Alabama* decision, states and lower courts had to navigate the appropriate way to comply with the ruling.14 Since then, only a few decided to apply the ruling retroactively.15

**ILLINOIS TO REVIEW JUVENILE LIFE WITHOUT PAROLE SENTENCES RETROACTIVELY**

The Illinois Supreme Court ruled in March 2014 that Davis will be offered the opportunity to go before a review board in order to assess whether he should eligible for a new sentence.16 The court’s opinion applies retroactively to cases of inmates sentenced as minors to life with the possibility of parole,

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11 Id.
13 *Miller*, 132 S. Ct. at 2466.
14 Lee, supra note 1.
15 Id.
16 *People v. Davis*, 6 N.E.3d 709, 714 (Ill. 2014).
even in homicide cases. The decision opens the door for other inmates sentenced to juvenile life without parole to potentially live outside of prison.

In December 2014, the United States Supreme Court declined the Cook County State’s Attorney’s Office request to review the Illinois Supreme Court retroactive application decision. With nowhere else to appeal the decision, the Illinois ruling stands.

It is estimated that the Illinois Supreme Court decision will affect approximately 80 individuals in Illinois serving mandatory juvenile life without parole sentences. Courts will be able to open up these individuals’ cases and “provide individual consideration in cases where judges had little, if any, say in sentencing.”

WHY ARE CHILDREN TREATED DIFFERENTLY?

Children do not possess the same reasoning abilities as adults. The United States Supreme Court Miller decision cited the 2010 case Graham v. Florida where it ruled that juvenile life without parole sentences for individuals who committed a crime less severe than homicide was unconstitutional. The Court found that juveniles are categorically “less culpable” than adult criminals. The ruling noted that juveniles lack the “well-formed” identities of adults, are susceptible to “immature and irresponsible behavior,” and are vulnerable to “negative influences and outside pressures.”

In addition to lacking the reasoning abilities of adults, “young people [also] have an immense capacity to change and become rehabilitated,” according to Shobha Mahadev, a lawyer for the Illinois Coalition for the Fair Sentencing of Children. Elizabeth Clarke, President and Founder of the Juvenile Justice Initiative, echoes this sentiment, “any kind of cookie-cutter mandatory

17 Davis, 6 N.E.3d at 720.
18 Id.
19 Karlinsky, supra note 9.
20 Id.
21 Id.
22 Id.
23 Miller, 132 S. Ct. at 2467.
24 Id. at 2465.
25 Id. at 2475.
sentencing scheme that does not take into account individual characteristics and an individual’s potential for rehabilitation is just unfair.”

WHAT THIS MEANS FOR SOCIETY AND THE FAMILIES OF VICTIMS

Many believe that allowing reviews of juvenile life without parole sentences will benefit both society and the families of victims. One of the main goals of the prison system is to develop citizenship so you can have offenders reenter society. The Davis decision allows for individuals who entered prison as children the opportunity to show that they are profoundly changed and can contribute to society.

Jeanne Bishop, Public Defender and family member of three victims killed by a juvenile murderer, believes the ruling is beneficial to victims’ families because it allows them to have “input into what the offender’s sentence should be.” Families will have an opportunity to witness any rehabilitation in the offender from the time of the crime to the resentencing hearing, this will hopefully allow for additional closure.

However, not all families of victims agree. Dora Larson, the mother of a young girl who was brutally raped and murdered and now an advocate for the National Organization of Victims of Juvenile Murderers, fears for the public’s safety. Larson believes that “some of these killers, they are wired wrong. [Some may, if released,] do it again, and that’s what scares me so badly.”

Marsha Norskog, whose daughter was murdered by a juvenile, is offended by

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27 Interview with Elizabeth Clarke, President and Founder, JUVENILE JUSTICE INITIATIVE (October 28, 2014).
28 Id.
30 Id.
31 Id.
33 Id.
the decision. Norskog feels the ruling is “an insult to our judicial system to say that they deserve to be heard again . . . I think it’s a slap in the face.”

CONCLUSION

Allowing juvenile life without parole sentences to be reviewed will mitigate the Eighth Amendment issue. The retroactive application in Illinois will allow the review boards an opportunity to adequately assess the offender and his rehabilitative progress, and to make an appropriate decision as to whether any changes in the length of the sentence are necessary.

35 Id.
36 Davis, 6 N.E.3d at 715.
Every year, thousands of unaccompanied youth undertake the long and dangerous journey to the United States border. Just between October and September of 2014 alone, Border Patrol apprehended more than 68,500 children without parents or guardians at the U.S.-Mexico border—a 176 percent increase from 2013. Many of these children make the arduous journey in an effort to flee persecution, escape rampant gang violence, exploitation and economic devastation, or to unite with family members after years of separation. The reasons are endless, but the goal is the same: to obtain a stable and secure life in the United States.

The challenges and uncertainties facing these children do not simply end at the border. Every year, the United States initiates thousands of removal hearings against immigrant children. Yet, unlike juvenile defendants in domestic court proceedings, children facing deportation are not legally entitled to representation. As a result, nearly half of all unaccompanied youth—many of whom have limited education and English skills—are forced to advocate on their own behalf against government attorneys in extraordinarily complex immigration proceedings.

Recent statistics indicate that legal representation among unaccompanied youth in deportation hearings significantly impacts the outcome of a case: children with attorneys are more than four times likely to win their case than children who go before a judge alone. Nearly half of all children with attorneys are able to win their case, while only a mere 1 in 10 children without

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2 Id.
5 Center for Gender and Refugee Studies & Kids in Need of Defense, *supra* note 3, at 3.
7 Id.
counsel achieve success in court.\(^8\) Currently, nearly 64,000 juvenile deportation cases are pending and will presumably be heard despite the child’s inability to secure counsel.\(^9\) In light of the particular vulnerability of these children, immigration advocates have urged the federal government to step in and ensure unaccompanied youth are afforded proper due process.\(^10\)

### CHALLENGES AND RESPONSES TO PROVIDING LEGAL COUNSEL TO IMMIGRANT CHILDREN AT THE GOVERNMENT’S EXPENSE

Proponents of mandatory counsel for immigrant children have confronted numerous obstacles in their fight for legal representation of youth in removal hearings. The success of these efforts depends not only on overcoming fiscal and ideological barriers, but also on pushing the very boundaries of the United States Constitution. While the due process clause of the Fifth Amendment traditionally affords undocumented immigrants a full and fair opportunity to be heard in removal hearings, this constitutional protection notably stops short of providing effective counsel to undocumented defendants.\(^11\) The limited rights of undocumented immigrants in deportation hearings were further reiterated and codified in the Immigration and Nationality Act (“INA”).\(^12\) The INA explicitly dictates that though undocumented immigrants shall have a reasonable opportunity to present evidence, cross-examine witnesses and seek legal representation, such legal representation shall be “at no expense to the Government.”\(^13\)

Opponents to a federally funded public defender system for immigrants argue that such a system would not only be expensive, but it would also result in only adding to the already high number of immigrants in the United

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\(^8\) Id.


\(^13\) Id.
States. Moreover, though *Gideon v. Wainwright* held that defendants in criminal cases have a constitutional right to legal counsel, the Supreme Court has yet to extend a similar right to defendants in civil cases. Jon Feere, legal policy analyst for the Center for Immigration Studies, argues that given removal hearings are categorized as fundamentally civil rather than criminal in nature, undocumented immigrants who are assured counsel in civil removal hearings would effectively be guaranteed greater legal protections than citizens.

However, advocates and academics are quick to point out that while removal may be classified as a civil matter, the implications of removal proceedings can be severe and inherently criminal in nature. Deportation “can be a harsh penalty because in many cases removal from the United States has a more dramatic and detrimental effect on a foreign national than going to jail,” says Mr. Landau, an associate professor at Fordham University who specializes in immigration cases. Immigrants subject to removal orders are often deported back to countries where they face persecution or even death. Immigrants who violate a civil removal order and attempt to reenter the United States are also subject to criminal prosecution. Jonathan Ryan, executive director of the Refugee and Immigrant Center for Education and Legal Services, states his position on the matter more directly: “If we have to give lawyers to murderers, then perhaps we should give them to refugee orphans.”

Regardless of the civil or criminal nature of removal proceedings, advocates contend that when forced to go before a judge without counsel, unaccompa-
nied youth are unable to fairly represent their interests as pro se defendants.\textsuperscript{22} Not only do these children confront troubling cultural and linguistic barriers that impede their ability to properly advocate on their behalf, but also the complexity of court proceedings and immigration law itself make it nearly impossible for children to adequately represent their interests.\textsuperscript{23} Substantive and procedural immigration law is notoriously complicated and has been regarded as only “second to the Internal Revenue Code in complexity.”\textsuperscript{24} “How does a child begin to understand what kinds of evidence they have to put together or begin to understand what the definition of a refugee means?,” asks Lisa Frydman, managing director of the Center for Gender and Refugee Studies at the University of California Hastings College of Law.\textsuperscript{25} In the absence of counsel, children are forced to navigate a motley of intricate procedures and policies, respond to claims against them, assemble evidence and present legal arguments.\textsuperscript{26} Furthermore, many of these children have valid defenses against removal.\textsuperscript{27} Nevertheless, without a knowledgeable attorney, they are unable to meet their burden in demonstrating eligibility for asylum and other forms of relief including Special Immigrant Juvenile Status, U-Visas (for victims of violent crimes) and T-Visas (for victims of severe human trafficking).\textsuperscript{28}

GOVERNMENT’S RESPONSE TO INFLUX OF UNREPRESENTED YOUTH IN DEPORTATION HEARINGS

While the government has publicly recognized and responded to the need for legal representation among unaccompanied youth in deportation hearings, advocates insist it is not enough.\textsuperscript{29} In July 2014, President Obama mandated expedited deportation hearings for immigrant minors in a substantive effort to gain control of this humanitarian crisis.\textsuperscript{30} However, these so-called “rocket


\textsuperscript{23} Complaint of Petitioner-Plaintiff, \textit{supra} note 20, at 8-9.

\textsuperscript{24} \textit{Baltazar-Alcazar v. I.N.S}, 386 F.3d 940, 948 (9th Cir. 2004).


\textsuperscript{26} Complaint of Petitioner-Plaintiff \textit{supra} note 18, at 3-4.

\textsuperscript{27} Hlass, \textit{supra} note 22.

\textsuperscript{28} Complaint of Petitioner-Plaintiff, \textit{supra} note 20, at 9-10.

\textsuperscript{29} Semple, \textit{supra} note 10.

\textsuperscript{30} Gay, \textit{supra} note 18.
“Children are placed with a sponsor and less than a week later they are asked to appear in court,” says Lynne Davis, an immigration attorney at Pisgah Legal Services in North Carolina. In some instances, these children in North Carolina are required to travel as far as Texas to attend their hearing and do not have the money, nor the transportation to get there. “If they don’t show up to court the judge will issue an in absentia order, instructing them to be removed in their absence,” states Lynne Davis.

In response to the number of unrepresented immigrant minors overwhelming court dockets, the Department of Justice announced on September 12, 2014 that it was administering $1.8 million in grants to provide effective counsel for undocumented children facing deportation. The grants were distributed through the justice AmeriCorps and given to eight separate agencies that would work to represent children under the age of 16 in immigration proceedings in 16 cities across the country. The Department estimated that these grants would fund positions for some 100 legal fellows. In addition to funding, the Department announced it would also provide a workshop where new justice AmeriCorps members would be trained on issues relating to cultural sensitivity and ethics, as well as applicable immigration law, proceedings and practice.

Though immigrant advocates commend this new initiative, they also insist that these efforts would only create a mere dent in the total number of unrepresented children. Furthermore, advocates stress that unaccompanied youth between the ages of 17 and 18 are wholly excluded from legal representation under the federal grants and that these funds fail to reach many areas in critical need, including Los Angeles. Advocates also note that effective representation for immigrant children requires highly-specialized skills and a steady handling

31 Telephone Interview with Lynn Davis, Immigration Attorney, Pisgah Legal Services (Oct. 17, 2014).
32 Id.
33 Id.
34 Id.
36 Id.
37 Id.
38 Id.
39 Semple, supra note 10.
40 Complaint of Petitioner-Plaintiff, supra note 20, at 13.
of complex immigration law that can only be gained through years of experience.41 Unless participating attorneys are already experienced in this area of law, it is unlikely that the program’s workshops will provide fellows with the necessary skills.42 “They may be well meaning, but they can’t do it with an hour’s training,” stated Lenni Benson, a professor at New York Law School and director of the Safe Passage Project.43

On September 30, 2014 the Obama administration announced that the Department of Health and Human Services would be allocating two additional grants as part of a larger nine million dollar award to agencies to provide legal assistance to immigrant children.44 In 2014, four million dollars of this fund was distributed to the United States Conference of Catholic Bishops and to the U.S. Committee for Refugees and Immigrants, with the remaining amount set for distribution at a later date.45 Once again, immigrant advocates urged that the additional funds would only allow attorneys to represent an estimated 1,222 unaccompanied children—a figure that falls far below the number of unrepresented youth.46 Kathleen Maloney, an attorney with the Immigration Law Unit of the Legal Aid Society in New York City, states that despite this extra funding, there are simply not enough trained attorneys to meet the increasing and complex needs of immigrant children.47

Later in November 2014, the Obama administration announced a major executive action on immigration that would grant as many as four million illegal immigrants deportation relief.48 The new executive plan, however, does not spare the thousands of immigrant children who have crossed the border

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41 Semple, supra note 10.
42 Id.
43 Id.
45 Id.
within the last five years from removal.\textsuperscript{49} As a result, an estimated 350,000 unauthorized minors remain ineligible for relief.\textsuperscript{50}

\textbf{TAKING THE ISSUE TO COURT}

On July 9, 2014, the Northwest Immigrant Rights Project ("NIRP") filed suit against the federal government on behalf of eight immigrant children between the ages of ten and 17 in a Seattle federal court.\textsuperscript{51} Several of these children, like so many other minors traveling across the border, were fleeing from violence in their home countries.\textsuperscript{52} These children-plaintiffs have deportation cases currently pending against them and no legal representation.\textsuperscript{53} The NIRP seeks class action certification and argues that the Government’s failure to provide legal representation to these children violates both the INA and the Due Process Clause of the Fifth Amendment.\textsuperscript{54} In their brief, the NIRP emphasizes that due to the adversarial nature of immigration proceedings, as well as the age and unique vulnerability of this class of persons, immigrant children are unable to effectively advocate for their own interests.\textsuperscript{55} In response to the suit, Deputy Attorney General Leon Fresco argued that mandating counsel for children “would create a magnet effect,” and that Congress would not be able to fund legal representation for these children.\textsuperscript{56}

On September 30, 2014, U.S. District Court Judge Zilly denied the NIRP’s request for a preliminary injunction seeking one-year continuances for child immigrants in deportation hearings.\textsuperscript{57} But “the core issue of whether plaintiffs are entitled, under the Fifth Amendment, to counsel at government expense” Judge Zilly writes, “must wait another day.”\textsuperscript{58} In response, Matt Adams, an attorney with the NIRP says, “We are heartened by the fact that he recognized there are serious constitutional issues at play.”\textsuperscript{59} Ahilan Arulanandan, an attorney with the American Civil Liberties Union who also ap-

\textsuperscript{49} Id.
\textsuperscript{50} Id.
\textsuperscript{51} Complaint of Petitioner-Plaintiff, \textit{supra} note 20, at 2.
\textsuperscript{52} Id. at 15-21.
\textsuperscript{53} Id. at 2.
\textsuperscript{54} Id. at 23, 25.
\textsuperscript{55} Id. at 8, 10
\textsuperscript{56} Rogers, \textit{supra} note 46.
\textsuperscript{57} Id.
\textsuperscript{58} Id.
\textsuperscript{59} Id.
peared before the Judge later stated, “You can read tea leaves one way or the other but the opinion just leaves for another day all of the central questions.”

CONCLUSION

While the debate over whether unaccompanied youth are entitled to legal representation at the government’s expense rages on, immigrant children continue to be pushed through the court system without counsel. “These are refugees, they are fleeing violence. But they are also children,” said Jojo Annobil, attorney-in-charge with the Immigration Law Unit at the Legal Aid Society. “They cannot represent themselves.”

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60 Id.
61 Gay, supra note 18.
The Cold War of Cyber Espionage

Elizabeth Hanford

During the Cold War, governments raced against each other to create the strongest and most effective nuclear weapons in the world.¹ Today, governments race against each other to obtain sensitive information through cyber espionage.² However, in cyber espionage “there is no MAD in the Cold War sense... You can’t be ‘assured’ of attribution.”³

Criminals are difficult to find in cyberspace, because “there is no equivalent of a DNA sample or fingerprint to identify the perpetrator of a specific cyber crime.”⁴ Perpetrators use proxy servers, virtual private networks, or peer-to-peer software to hide their identities within the vast world of cyberspace.⁵ Although attribution proves difficult, researchers can analyze data such as the “time zone, location of the physical servers used in the attack, nation-specific tools and techniques, and language indicators.”⁶

One example of this problem is Turla malware. The cyber espionage operation closely monitors diplomatic embassies in the former Eastern Bloc.⁷ Researchers suggest state sponsorship, as there is “a steep cost to conduct such surveillance, yet no apparent economic motive.”⁸ However, the exact source of the operation remains unclear.⁹ Another example includes Dragonfly, a cyber espionage operation capable of shutting down entire power grids in multiple

³ Id.
⁶ Supra note 4.
⁸ Supra note 4.
⁹ Supra note 7.
countries. The large scale of the operation and “high degree of technical capability” suggests the operation is also state sponsored.

Fortunately, Turla malware and Dragonfly abstain from harming civilians or causing physical damage at this point in time. However, every security breach is a serious threat that impairs national security and defense operations. When states become victim to cyber espionage, scholars turn to existing laws of armed conflict to determine permissible remedies.

SELF DEFENSE

According to the laws of armed conflict, the victim state may resort to self-defense in the wake of an armed attack. The principles of necessity and proportionality govern whether an attack rises to the level of an armed attack. In the context of cyber operations, scholars analyze a cyber attack in two steps. If the activity satisfies both steps, the activity is referred to as “cyber warfare.”

First, the cyber activity must constitute a “cyber attack.” One definition of a cyber attack is an attack that can “disrupt, deny, degrade, or destroy information resident in computers and computer networks, or the computer [network] itself.” Other scholars define a cyber attack as “any action taken to undermine the functions of a computer network for a political or national security purpose.” In order to constitute a cyber attack, the cyber operation must do more than steal information or “passively observe a computer network.”

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11 Id.


14 Supra note 12 at 849.

15 Id. at 836-37.

16 Id. at 837.

17 Id. at 836.


19 Supra note 12 at 826.

20 Id. at 830.
Second, the cyber attack’s “effects must be equivalent to an ‘armed attack,’ or [the] activity must occur in the context of armed conflict.” 21 Professor John C. Dehn explains, “the operation’s attacks must be directed toward a military objective, which creates a direct military advantage.” 22 In Nicaragua v. U.S., the International Court of Justice analyzed the United States’ operation’s “scale and effects” in Nicaragua to determine whether the acts of an operation rose to the level of an armed attack. 23 The larger the “scale and effects” of the operation, the more likely a court will find the threshold has been met. 24

Scholars argue that cyber espionage fails to constitute a cyber attack, because the operation fails to disrupt or destroy a computer network. 25 Additionally, states fail to claim that cyber espionage constitutes a prohibited use of force. 26 Therefore, states should not launch a military offensive attack to deter or retaliate against cyber espionage. One way for states to deter cyber espionage may be to prosecute offenders under domestic law.

DOMESTIC PROSECUTION

On May 19, 2014, the United States brought the first ever charges against a state actor for cyber espionage. 27 The indictment alleged five Officers of the Chinese People’s Liberation Army gained access to six United States utility companies and stole trade secrets from 2006-2014. 28 According to U.S. officials, the purpose of the indictment is to expose China’s spying and reduce the targeting of American companies. 29

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21 Id. at 833.
22 Interview with John C. Dehn, Assistant Professor, Loyola University Chicago School of Law (Oct. 24, 2014).
24 Id.
25 Supra note 12.
28 Id.
China points to Edward Snowden’s WikiLeaks, which revealed United States involvement in the hacking of Chinese companies, and accuses the United States of hypocrisy.30 In response, the head of the United States’ Justice Department’s National Security Division John Carlin argues, “[United States] spying on foreign companies is qualitatively different than what the Chinese are doing, because the United States doesn’t share the fruits of its espionage directly with companies, the way China does.”31

Even with the indictment of the Chinese Officers, it is unlikely governments will stop stealing sensitive information. Government espionage is already exposed. This exposure fails to reduce the amount of espionage.32 Additionally, the United States admits incarceration of the Chinese Officers is unlikely.33 The offenders’ diplomatic status raises the protection of diplomatic immunity.34 Furthermore, attribution is difficult to obtain in the cyber world.35 Cyberspace creates a criminal playground where the risks are low and the gains are high.36 To win the cold war of cyber espionage, states should “protect data at its core” and focus on creating the most effective cyber defense arsenals in the world.37

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31 Supra note 29.


33 Supra note 29.

34 Supra note 26.

35 Supra note 4.

36 Supra note 32.

Contributing Author

No Longer Uninsured: Residents of Illinois with a Preexisting Condition of AIDS, HIV, Mental Health, or Substance Use Are Now Covered Under the Affordable Care Act

Sonia A. Antolec and Alexis D. Figueroa, contributing†

The comprehensive health care reform law was enacted in two parts in March 2010. The Patient Protection and Affordable Care Act was signed into law on March 23, 2010 and was amended by the Health Care and Education Reconciliation Act on March 30, 2010. For purposes of this discussion, “ACA” is used to refer to “the Affordable Care Act” as the final version of the law. “ACA adults” refers to individuals between the ages of 19 and 64 who do not meet Medicaid eligibility criteria but who are now eligible under Medicaid Expansion for medical insurance coverage.

The Supreme Court of the United States in National Federation of Independent Business v. Sebelius made it optional for states to choose whether to expand their Medicaid coverage under the Affordable Care Act to service low-income people between the ages of 19 and 64 whose income is up to 138 percent of the Federal Poverty Level (FPL). In addition to extending Medicaid coverage, the ACA provides subsidies for lower- and middle-income people who are uninsured between 139 percent and 399 percent of the FPL to buy health insurance. Those individuals who receive subsidies and those who are not eligible for subsidies are able to purchase private coverage through state

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2 Id.
health insurance exchanges. These exchanges are commonly referred to as “online marketplaces” that provide access to information for potential consumers on a range of health insurance programs and health plans. These state online marketplaces are targeted to those who are not enrolled in Medicaid, Medicare, or affordable employer-based plans. In Illinois, the online marketplace can be found at GetCoveredIllinois.gov.

Illinois is one of the 26 states that chose to provide more affordable health-care coverage to all, regardless of preexisting conditions, under the optional Medicaid Expansion. Illinois also chose to expand certain Essential Health Benefits (EHB) with the goals of creating a culture of coverage and improving the health and wellbeing of the People of the State of Illinois. The ACA defined ten EHBs that must be included in all Qualified Health Plans sold inside and outside the Health Benefits Exchange starting in 2014. The ten categories of benefits are: ambulatory patient services; emergency services; hospitalization; maternity and newborn care; mental health and substance use disorder services, including behavioral health treatment; prescription drugs; rehabilitative and habilitative services and devices; laboratory services; preventive and wellness services and chronic disease management; and pediatric services, including oral and vision care.

People were able to apply for insurance on October 1, 2013 and the open enrollment period was extended to May 1, 2013. Within the first twelve months, more than 622,000 Illinois residents enrolled and had access to affordable healthcare under the ACA and Illinois’ expanded Medicaid program. As of September 30, 2014, 476,501 newly eligible ACA adults have enrolled in the first calendar year in Illinois.

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5 Id.
6 Id.
12 Covered: Year One Annual Report, supra note 9.
13 Id.
14 Id.
ILLINOIS EXPANDED MEDICAID UNDER THE ACA TO INCLUDE COVERAGE FOR PEOPLE LIVING WITH HIV AND AIDS

Illinois is one of 11 states that chose to expand its coverage of HIV medical services as an EHB.15 The CDC recommends that HIV screening be a part of routine medical care for all patients between the ages of 13 and 64.16 While all state Medicaid programs must cover medically necessary HIV testing, and the ACA offers states financial incentives to cover certain preventive services at no cost to consumers, state coverage of routine HIV screening varies because it is an optional benefit under Medicaid.17 Currently, there are no national estimates of People Living with HIV and AIDS (PLWHA) likely to gain medical coverage under the ACA, but there are some distinct similarities in the statistics for Illinois residents.

In 2010, Illinois reported 513 HIV-related deaths.18 In 2010, Illinois reported 31,884 people living with HIV.19 In 2011, Illinois reported 2,142 diagnoses of HIV.20 Prior to the expansion of Illinois Medicaid, those diagnosed PLWHA may not have been eligible for Medicaid coverage because HIV and AIDS were considered “preexisting conditions” under exclusionary provisions for health insurance.21 PLWHA may have only qualified for coverage once they were sick enough to be considered a “disabled person” under the program’s non-income based eligibility provisions.22

22 Id.
In 2010, of the national population of PLWHA, 65 percent were racial minorities.\textsuperscript{23} Currently in Illinois, 63 percent of PLWHA are racial minorities.\textsuperscript{24} This percentage of racial minorities diagnosed with HIV or AIDS in Illinois is almost equivalent to the percentage of racial minorities who were uninsured in Illinois.\textsuperscript{25} As of 2012, 49 percent of Illinois’ uninsured population was minorities.\textsuperscript{26} The causes of this HIV health disparity are complex. HIV-infection prevalence is higher and more broadly represented in the minority community compared to the white population.\textsuperscript{27} Additionally, minority communities experience high rates of other sexually transmitted infections, and some of these infections can significantly increase the risk of contracting HIV.\textsuperscript{28} Minorities also tend to be diagnosed at later stages in the disease and therefore begin therapy later, increasing the length of time of their infectivity.\textsuperscript{29} Once engaged in treatment, minorities are more likely to discontinue therapy prematurely, risking resurgence of HIV infectivity and further health complications.\textsuperscript{30} Of the newly enrolled ACA population in Illinois, 60 percent are racial minorities.\textsuperscript{31}

The PLWHA population comprises much of the same population of people who were uninsured because they did not have access to affordable medical insurance coverage. One of the most important sources of care and coverage for people with HIV/AIDS in the U.S. is Medicaid, Illinois’ and the nation’s


\textsuperscript{26} Id.

\textsuperscript{27} Id.

\textsuperscript{28} Id.

\textsuperscript{29} Id.

\textsuperscript{30} Nancy Aldrich & William F. Benson, CDC Focuses on Need for Older Adults To Receive Clinical Preventive Services, CENTERS. Center for Disease Control and Preventive Services, CTRS. FOR DISEASE CONTROL & PREVENTION (2012), http://www.cdc.gov/aging/pdf/cps-clinical-preventive-services.pdf.

principal safety net health insurance program for low-income Americans.\textsuperscript{32} Medicaid is estimated to provide insurance coverage to almost half of all those with HIV who are in regular care.\textsuperscript{33} In addition, a significant share of those newly diagnosed with HIV has been found to already be covered by Medicaid.\textsuperscript{34} Thus, by expanding its Medicaid program, Illinois provides an important potential entry point for assessing implementation of routine HIV screening in health care settings for individuals who previously did not have access to routine health plans.

Illinois only offered “medically necessary” screening and treatment for PLWHA prior to expanding its Medicaid program.\textsuperscript{35} Enrolled adults will now have access to routine and preventive clinical services, including screening, counseling, and preventive medications.\textsuperscript{36} These visits are defined by the Centers for Medicare and Medicaid Services (CMS) as 20–30 minute sessions delivered by a primary care provider in a primary care setting.\textsuperscript{37} The visit includes a personal risk assessment and a unique patient health plan to set up screening and preventive services over a period of five to ten years.\textsuperscript{38} Part of the patient’s health plan should also include an assessment that covers the patient’s history and risk factors for contracting HIV or developing AIDS. Part of the risk factors and assessment are the patient’s substance use and mental health history.

\textsuperscript{35} See supra note 31 and accompanying text.
\textsuperscript{37} See supra note 32 and accompanying text.
ILLINOIS EXPANDED COVERAGE UNDER THE ACA TO COVER PEOPLE WITH MENTAL HEALTH AND SUBSTANCE USE DISORDERS

The ACA also includes services for mental health and substance use disorder, including behavioral health treatment as an EHB that must be covered by ACA health plans. The National Survey on Drug Use and Health (NSDUH) Report states that from 2011 and 2012, approximately 18.2 percent or 42.5 million adults aged 18 or older experienced a mental, behavioral, or emotional disorder (known together as “any mental illness”) as defined in the fourth edition of the Diagnostic and Statistical Manual of Mental Disorders. This same study also found that in Illinois, 15.86 percent of Illinois residents 18 or older suffered from a mental illness. The inclusion of this EHB means that those covered under the ACA will have access to prevention treatment, early intervention, and treatment for their mental and/or substance use disorders. Specifically, the ACA requirements state that health plans must cover preventive services like depression screening for adults and behavioral assessments for children at no cost. The new ACA compliant health plans will also, at a minimum, meet health and substance use parity as set forth in the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA). The ACA’s parity with the MHPAEA means coverage of mental health and substance use services generally cannot be more restrictive than those for medical and surgical services.

The addition of mental and substance use disorders as an EHB means many previously uninsured Illinois residents who suffer from mental and/or substance use disorders will have an opportunity for treatment that otherwise would not have been available to them. It is estimated that nearly 672,156 previously uninsured Illinois residents aged 18 to 64 will become eligible for

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41 Id.
43 Id.
44 Id.
45 Id.
coverage under Medicaid Expansion.\textsuperscript{46} Likewise, it is estimated that 724,820 previously uninsured Illinois residents aged 18 to 64 will become eligible for coverage under an ACA health plan.\textsuperscript{47} The implementation of the ACA has therefore increased eligibility coverage of uninsured Illinois residents aged 18 to 64 by approximately 1.4 million, increasing the total of insurance-eligible people to nearly 2.2 million Illinois residents.\textsuperscript{48} Of these 2.2 million Illinois residents, nearly 770,000 are estimated to be suffering from a behavioral health condition (people with a serious mental illness, in serious psychological distress, or with a substance use disorder).\textsuperscript{49}

The National Association of State Mental Health Program Directors estimates that in 2011, nearly 211,000 uninsured adults in Illinois suffered from a mental health condition (persons with either a serious mental illness or in serious psychological distress).\textsuperscript{50} An additional 121,000 uninsured adults in Illinois with a mental health condition have become eligible for health insurance coverage under the new Medicaid Expansion program, and another nearly 156,000 have become eligible for coverage under the online marketplace ACA adults.\textsuperscript{51} In total, the implementation of the new Medicaid Expansion program and State Exchange Program has increased Illinois’ coverage of residents with a mental health condition by 277,000.\textsuperscript{52}

The National Association of State Mental Health Program Directors also estimated that in 2011, nearly 74,000 uninsured adults in Illinois suffered from a substance use disorder.\textsuperscript{53} Due to the expansion of Medicaid coverage brought on by the ACA, nearly 91,500 adults with substance use disorders who were previously uninsured in Illinois are now eligible for health insurance coverage under the new Medicaid Expansion program, and 118,000 under the online marketplace as ACA adults.\textsuperscript{54} In total, the implementation of the ACA

\textsuperscript{46} MILLER & MAUDUDI, supra note 4, at 20.  
\textsuperscript{47} Id.  
\textsuperscript{48} Newly eligible population for coverage under the Medicaid Expansion (672,156), plus the newly eligible population for coverage under the online marketplace (724,820), plus previously eligible population of Medicaid in 2011 (769,762), equals 2,173,738 total residents estimated to be eligible for coverage.  
\textsuperscript{49} See supra note 46 and accompanying text.  
\textsuperscript{50} Id.  
\textsuperscript{51} Id.  
\textsuperscript{52} Id.  
\textsuperscript{53} Id.  
\textsuperscript{54} Id.
has allowed Illinois to increase the availability of health insurance to those suffering from substance use disorders to 282,000 more Illinois residents.\footnote{Id.}

**ILLINOIS’ EXPANSION OF MEDICAID UNDER THE ACA IMPROVES HEALTH SERVICES FOR A PREVIOUSLY UNINSURED POPULATION**

Historically, stigmatized conditions such as HIV, Aids, mental health, and substance use were categorized as “pre-existing” conditions and anyone with any of these diagnoses was categorically denied medical insurance. The inclusion of coverage to these populations, among others, reflects a change of perception and awareness of the conditions that affect the residents of Illinois.\footnote{Id.} Illinois’ initiative to expand Medicaid and implementation of the ACA is a demonstration of its goal of creating a culture of inclusive medical coverage and improving the health and wellbeing of all Illinois residents, regardless of any condition.\footnote{Id.}

\footnote{Id.}{\textit{STATE OF ILL., ILLINOIS HEALTH INSURANCE MARKETPLACE OUTREACH AND CONSUMER EDUCATION PLAN 4} (Mar. 29, 2013), https://www2.illinois.gov/hfs/SiteCollectionDocuments/IHIMOEP.pdf.}

\footnote{Id.}{Id.}
Feature Article
Tobacco’s Other Downside: Child Labor in American Tobacco Fields
Katherine Colburn

Ten-year-old Marta W. works on a tobacco farm in Tennessee where she harvests tobacco plants with her father and brother. She’s experienced nausea and headaches while in the tobacco fields and barns. Her 9-year-old brother, Patrick, reported coughing and vomiting while cutting tobacco plants and has had to leave the fields because of it. Their father is paid based on how many tobacco plants he harvests and hangs to dry, so having his children working with him increases his earnings, but hurts his children’s quality of life. This delicate balance between providing for their family but subjecting their children to the dangers of the tobacco field is one juggled by many rural families.

Children who witness their parents’ hardships go to work in the tobacco fields—some times because they want to, but most times because they need to. In the agriculture industry, children as young as 12 can legally work for unlimited hours outside of school on a tobacco farm of any size with parental permission and children under the age of 12 can work on small farms owned and operated by family members. While there is no comprehensive number of child tobacco workers, the National Institute for Occupational Safety and Health (NIOSH) estimates that hundreds of thousands of children under age 18 work in US agriculture each year. The lack of a comprehensive number is because those who are hired by contractors or work in multiple crops are not specifically counted. In May 2014, Human Rights Watch (HRW) published a report—“Tobacco’s Hidden Children”—detailing the children who work in tobacco and highlighting their reasons for working and the health and safety risks. The report exposed a largely overlooked portion of the population, and

2 Wurth, supra note 1.
3 Id.
4 Id.
5 29 C.F.R. § 570.2(b) (2010).
6 Wurth, supra, note 1.
7 Id.
showed the hardships encountered by working in tobacco, especially the dangerous and unhealthy effects it has on young children.

POVERTY AND THE CHILD TOBACCO WORKER

Eighteen-year-old Natalie G. was twelve when she started working in tobacco.\(^8\) She had witnessed the physical and financial hardships her single mother had experienced, and wanted to help her out, while providing for her younger siblings as well.\(^9\) Natalie’s 12-year-old sister, Elena, also works in the fields.\(^10\) While most children Elena’s age are using their allowance on toys, Elena’s earnings go toward the family’s bills, food, and items for her younger brother.\(^11\) Most children build memories by spending summer days playing with friends or enjoying school activities. Instead, their memories of childhood will include long days harvesting and hanging tobacco, and long nights nursing the illnesses that result.

According to the HRW report, most child tobacco workers reported their reason for working in the fields was to help support their household.\(^12\) In 2009, the average individual farmworker income ranged from $12,500 to $14,999 and the total family income ranged from $17,500 to $19,999.\(^13\) These statistics place twenty-three percent of farmworker families below the poverty line.\(^14\) A 2008 U.S. Department of Agriculture study found poverty among farmworkers is more than double that of all wage and salary employees in the United States.\(^15\) With this level of poverty, it is easy to see how another stream of income—even that of a child—could help buy necessary food and clothing for the family, or go toward the rent to allow the family to remain in their home. For the children that contribute to the family income, it’s not about the dangers of tobacco, but helping to provide their family with the necessities of life.

In addition to helping support their families, many children work in the tobacco fields because of a lack of alternate employment opportunities.\(^16\)

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\(^8\) Id.
\(^9\) Id.
\(^10\) Id.
\(^11\) Id.
\(^12\) Id.
\(^14\) Id.
\(^15\) Wurth, supra. note 1.
\(^16\) Id.
Often living in rural and poor communities, children have fewer options for employment because of age or location. While other jobs in construction or maintenance may be more appealing because of safer work environments and more workers’ rights laws, children choose to work in tobacco because of the lower age requirements. Other children find that working in tobacco is their only choice because of legal status. Those children whose immigration status keeps them from seeking work elsewhere are able to find work in the tobacco fields because of the relaxed regulations. Many undocumented children believe working in the tobacco fields and subjecting themselves to the dangers of tobacco farming is the only job available to them.

“JUST KEEP CUTTING”

Danielle S., 16, was hired to work on a tobacco farm outside of Lexington, Kentucky and got sick while harvesting tobacco: “It happens when you’re out in the sun. You want to throw up. And you drink water because you’re so thirsty, but the water makes you feel worse. You throw up right there when you’re cutting, but you just keep cutting.” Stories of illness and poor working conditions in the tobacco fields are common. Children often report vomiting, loss of appetite, headaches, skin rashes, sleeplessness, and irritation to their eyes and mouths while working. While many of these illnesses result from the extreme temperatures and rigorous activity required, exposure to pesticides is another culprit.

Pesticides are commonly used in tobacco farming, and the children who work on the farms are often exposed to them. Pesticide exposure is associated with nausea, dizziness, vomiting, abdominal pain and other skin and eye problems. It can cause long-term health effects including problems with childbirth, loss of consciousness, coma, and death. Respiratory problems, cancer, depression and neurological issues are also problems associated with

17 Id.
18 Id.
19 Id.
20 Id.
21 Id.
22 Id.
23 Id.
24 Id.
25 Id.
26 Id.
27 Id.
28 Id.
prolonged exposure to pesticides. 29 Sixteen-year-old Theo D. was given a wearable device that sprayed pesticides. 30 This heavy exposure caused him to become dizzy and vomit. 31 Several employers also do not provide any health training so children are not aware of the dangers they are exposed to, and just work through their illnesses unaware of what it is doing to their bodies in the long-term. 32

In addition to a lack of health training and heavy exposure to the elements, employers give very few children protective equipment and most have to make their own. 33 This is no usual art project for these children, as some found their homemade raincoats didn’t protect them completely and they overheated in the sun, so many children have taken to wearing garbage bags. 34 Some children don’t wear garbage bags and instead work in their wet clothes causing rashes and irritation. 35 There is also a lack of gloves and protective footwear provided to the children. 36 For many, their hands are too small for generic plastic gloves so they go without which leads to skin rashes, cuts, sores, and blisters. 37 In addition to bare hands, many children are also working with bare feet as most do not have boots that are able to withstand the thick mud of the field. 38

PROTECTIONS OF THE LAW

Children who are employed in the United States are regulated and assisted under The Fair Labor Standards Act. In an attempt to protect small family-owned farms, agricultural employers are exempt from many of the provisions of the law, leaving adult and child farmworkers without the same protections provided to workers in other industries. 39 These exemptions provide child farmworkers less protection than all other working children by establishing that there is no minimum age at which employers may hire children to work unlimited hours outside of school, and allowing children, fourteen years or

29 Id.
30 Id.
31 Id.
32 Id.
33 Id.
34 Id.
35 Id.
36 Id.
37 Id.
38 Id.
39 Id.
older, to work unlimited hours on a farm of any size without parental consent.\textsuperscript{40} The Department of Labor also regulates workplace activities in relation to the age of the laborer, and they currently remain very relaxed. Regulations have not been updated since 1970 for agricultural activities (they were updated for all non-agricultural activities in 2010).\textsuperscript{41} In 2011, a proposal for new restrictions on child labor was introduced by the Department of Labor to prohibit all children under age 16 from working in various tobacco harvesting and drying situations, but the proposal was withdrawn because of opposition from several agricultural groups.\textsuperscript{42} While it is important to protect the existence of family farms, there must also be deference in the law for the true protection of child workers. Rod Kuegel, President of the Council for Burley Tobacco, understands this need for the protection of family farms and children as a fourth generation farmer himself, and stated, “The Council for Burley Tobacco supports the family farm, but they do not support the practice of having children work in dangerous jobs on the farm.”\textsuperscript{43}

International law also provides protections for children who are employed. The International Labor Organization’s Convention No. 182 Concerning the Prohibition and Immediate Elimination of the Worst Forms of Child Labor, which was ratified by the United States, prohibits several forms of child exploitation and “work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety, or morals of children.”\textsuperscript{44} As a signatory since 1999, the United States is obligated to take immediate steps to determine if child labor in tobacco farming violates this convention and eliminate them. To this date, however, no investigation has been initiated by the United States. Another avenue for challenging child labor issues is the United Nations Convention on the Rights of the Child. This convention provides that children have a “right to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the

\textsuperscript{40} 29 C.F.R. § 570.2(b) (2010).
\textsuperscript{42} Id.
\textsuperscript{43} Telephone Interview with Rod Kuegel, President, Council for Burley Tobacco (December 2, 2014)
child’s education, or to be harmful to the child’s health or physical, mental, spiritual, moral, or social development.”

Children are often a marginalized population. Even though they are often afforded special protections because of their age and inability to meet their own needs, they cannot always represent themselves and rely greatly on adults to provide for them and ensure that their needs, including legal protections, are met. Regulations must be changed to afford children working in tobacco greater protections, and to lessen the need for children to be exposed to hazardous chemicals and situations. Tobacco companies and farms are opposed to these regulations because of the economic impact it could have on their companies, but certain things, like ensuring that children remain safe, healthy, and protected should take precedence. In this regard, the role of children in the tobacco industry must be revised and their wellbeing must be a top priority.

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Microfinance: An Engine for Global Economic Growth

Tyler Gurss

Innovation is critical for preventing economic stagnation. Sustained macroeconomic growth depends upon the efficient use and investment in human capital. However, billions of potential innovators worldwide do not have the opportunity to reach their potential due to a lack of funds, education, or even access to basic necessities. In Burma, the banking sector has found it commercially challenging to extend financial access to the poor, resulting in fewer than 20 percent of people having access to formal financial services. This is why the U.S. Government has recently begun supporting efforts to set a high standard for responsible business conduct in Burma and encouraging responsible investment in the country as part of an overall strategy to support development and improve the quality of life of the Burmese people. U.S. companies have responded, and since July 2012 have invested millions of dollars through microfinance in Burma for rural citizens, developing women entrepreneurs, training engineers and managers, and offering apprenticeship opportunities to youth. Further investment would encourage yet more growth in the most efficient manner possible.

HOW MFI LOANS WORK

Microfinance is a source of financial services for entrepreneurs and small businesses lacking access to banking and related services. Microfinancing Institutions (MFIs) provide low interest loans to entrepreneurs who lack credit. According to Professor Ramirez of Loyola Law, “The number one problem the economy is facing is a lack of capitalization of the ingenuity and innovation of the impoverished.”

5 Id.
6 About Microfinance, supra note 2.
7 Id.
8 Ramirez, supra note 1
Gegham Grigoryan is a 48-year-old man who lives in Yerevan Armenia with his wife and two children. He operates a sewing workshop there where he produces medical uniforms. Gegham initially lacked the funds to expand his business. However, he acquired a loan through microfinancing and bought the raw materials necessary to stabilize his business and allow it to grow. There are thousands of would-be entrepreneurs seeking funds for similar needs. Due to the proliferation of computers and the internet over the past decade, a person can use an MFI to help someone like Gegham start a business on the opposite side of the world from them just as easily as they could help a next door neighbor. Although investors may not be able to meet face-to-face with recipients, most MFI websites now allow for members to view the business plans of entrepreneurs and loan according to their level of trust for both the recipient and the loan officer in charge of the loan in question. This accessibility to information allows for investors to make intelligent decisions about which loans they would like to fund. The result is an extremely low default rate and millions of people finally achieving a semblance of stability.

RESULTS OF MFI LOANS

The expansion of microfinance as a tool for developmental aid would help create long-term macroeconomic growth. It is axiomatic that those with the least resources offer the greatest potential for economic growth. Using microfinance, developmental dollars are allocated almost exclusively toward improving the recipients’ ability to subsist and thrive, driving the economic growth of the community. MFIs give potential entrepreneurs the opportunity to prove their businesses can be sustainable sources of income for their

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10 Id.
11 Id.
12 Id.
13 About Microfinance, supra note 2.
14 Id.
17 Id.
community, making them the perfect vehicle for the distribution of developmental funds.

The value of the stability MFIs provide for those on the edge of subsistence cannot be overstated. Simply reaching the level of subsistence has been proven to increase the educational attainment of the children in families affiliated with an MFI. When children are forced out of school early, their opportunities in life immediately become more restricted. According to Professor Ramirez, “Stripping an individual of the ability to reach his or her economic potential retards the extent of the market available to support maximum innovation and specialized knowledge for everyone.” The entire world suffers “as any brilliance or innovation [they] could have achieved is likely to go to waste,” which “leads to grossly underdeveloped markets.”

A study published in World Development titled “Impact of Microfinance on Schooling: Evidence from Poor Rural Households in Bolivia” found that the children of a family involved with a microfinance institution have an increased likelihood of staying in school. The effect even held true within families with both older children who left school prior to the family becoming affiliated and younger children who gained the additional benefit of being affiliated with an MFI stayed in school longer. “[A]ccess to credit and the attending benefits from its profitable usage increases entitlement of program household on education through increasing capability to spend more on education of children.” If a family’s home life is stable they are less likely to take their child out of school, helping the child to raise their economic potential.

THE EXPANSION OF MICROFINANCE THROUGH LEGAL STRUCTURE

Use of MFIs for loan disbursement promotes educated decisions regarding investment, leading to sustained economic growth at the lowest levels of soci-

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19 Id.
20 Ramirez, supra note 1, at 131.
21 Ramirez, supra note 1, at 125.
22 Ramirez, supra note 1, at 131.
23 Maldonado, supra note 18.
24 Id.
26 Id.
ety where it is most sorely needed. Investment in human capital leads to innovation, which then leads to new enterprises, increased income and yet more investment in human capital.

Current foreign aid models, even when fully funded, are frequently ineffective when it comes to combating the root causes of poverty at the local level. Bogged down by corrupt governments on the recipients’ end and politics on the donors’ end, traditional foreign aid has failed to make a significant impact in many areas. As Professor Ramirez states, “The structure of globalization is designed to maximize profits by multinational corporations.” To combat this, he suggests changing the legal framework to “productively recycle currency reserves into microfinance capital for the impoverished around the world.” The potential for growth through widespread use of MFIs capable of reaching those areas is massive, especially considering the small amount of capital necessary to completely change the economic trajectory of an entire community. This is why the U.S. government is encouraging further investment in microfinance and companies like Coca Cola and Chevron are engaging in and embracing this foreign aid model. When the disempowered like Gegham are given the capital necessary to provide stability for themselves and higher educational attainment for their children, macroeconomic development is the result.
Feature Article
Predatory Lending: What’s Race Got To Do With It

Zainab A. Mehkeri

The year is 2003 and you are an African American living on the Southside of Chicago. After years of saving and building your credit, you are finally able to buy your own home. And as you sit at your kitchen table with your mortgage broker, you sign off on the closing documents to seal the deal. You think you’re ensuring your slice of the American dream, but little do you know that your mortgage broker preyed on you. Little do you know that you were just a means to an end. Little do you know that your mortgage was carefully designed to default.

Scenarios like this occurred across the United States during the housing bubble of the early 2000s. Financial institutions purposefully issued mortgages that were made to default in order to ensure profitability for their collateralized debt obligations (CDOs). By using this fraudulent tactic, financial institutions were able to obtain big, short-term gain at the expense of American homeowners. This was an exploitation of the most disempowered communities of the United States by the most powerful companies in American finance. Despite the financial collapse of 2008, minority communities can still feel the expense of such exploitation today.

MORTGAGE-BACKED SECURITIES, SUBPRIME MORTGAGES, AND PREDATORY LENDING

A mortgage-backed security (MBS) is an asset-backed security whose value derives from a pool of mortgages. Traditionally, a government-sponsored entity (GSE) or a “private label” company will purchase a pool of loans and sell

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1 Interview with Douglas M. Matton, Attorney, Matton Law Offices (Oct. 16, 2014).
the bundle to investors. When mortgage payments are made on time by homeowners, investors in a pool of mortgages receive a cut. In this way, MBSs proved to be very profitable.

In order to expand homeownership in the United States, the Clinton and Bush administrations encouraged the investment of MBSs backed by subprime mortgages. Subprime lending compensated high credit risk with higher interest rates and required less of a down payment than a traditional prime loan. Thus, subprime mortgages benefited communities that were historically alienated from the benefits of homeownership. The initial profitability of this market encouraged private investment banks to compete with government-sponsored entities. And as a result, subprime lending increased fivefold between 2001 and 2005. By 2006, 40 percent of all MBSs included at least some subprime loans.

Competition for profitability was an unfortunate consequence, however, since it magnified a common industry practice in subprime lending. The Federal Crisis Inquiry Commission (FCIC) found that hedge funds not only sponsored pools of subprime loans, but also simultaneously engaged in non-transparent transactions (such as credit default swaps). Thus, they were guar-
anteed bigger profits when loans defaulted than when loans were paid on time.\footnote{Id at 191-194}

In addition, the same hedge funds that sponsored pools of subprime loans were usually in charge of selecting the loans that entered it.\footnote{Id. at 189,192-193; The Financial Crisis Inquiry Commission, supra note 12 at 68.} In order to maximize profits, financial institutions utilized predatory lending techniques to ensure a supply of loans defaults.\footnote{Ramirez, supra note 2; Supra note 4.} They targeted vulnerable communities and purposely pursued loans that had a greater chance of defaulting (i.e. risky and unpayable loans).\footnote{Supra note 4.} By 2006, this practice was evidenced in 50 percent of all collateralized debt obligations issued.\footnote{The Financial Crisis Inquiry Commission, supra note 15 at 192, 194; Ramirez, supra note 2.}

BUT WHAT’S RACE GOT TO DO WITH IT?

A common predatory technique used by financial institutions was steering, i.e. issuing subprime loans to homeowners who qualified for conventional, prime loans.\footnote{Amaad Rivera et al., Foreclosed: State of the Dream, 2008, at 8, 11. Available at: http://www.faireconomy.org/files/pdf/StateOfDream_01_16_08_Web.pdf. This explains how loans can be predatory if there is steering, i.e. “Mortgage brokers and other financial institutions deliberately targeted asset poor communities whose members were eager to acquire homes. This practice was coupled with giving subprime loans to middle and lower income families and households (typically people of color) that qualified for conventional (market rate) loans but were given higher cost loans instead.”} According to a Wall Street Journal study, 61 percent of borrowers who were issued subprime loans actually qualified for prime loans.\footnote{Rick Brooks and Ruth Simon, Subprime Debacle Traps Even Very Credit-Worthy, The Wall Street Journal (Dec. 3, 2007). Available at: http://www.online.wsj.com/articles/SB119662974358911035.} Borrowers who were steered into subprime loans had interest rates that were on average 3.5 percent higher than what they would have been with prime loans.\footnote{Ramirez, supra note 9 at 148.} And with higher than necessary interest rates, these borrowers were saddled with thousands of dollars in unnecessary payments.\footnote{Brooks and Simon, supra note 22.} This exacerbated the economic plight that many families faced, causing some families to eventu-
ally lose their homes to foreclosure. In fact, when compared to prime loan
defaults, subprime loans defaulted eight times more.

Although financial institutions preyed on low income, elderly, and minority communities, their efforts were particularly concentrated in communities of color. Studies show that minorities were subjected to predatory loans more so than whites. Lenders issued high cost loans to 58 percent of low-income blacks and to 37 percent of low-income Latinos, as compared to only 28 percent of low-income whites. When level of income is taken into account, 54 percent of high-income blacks and 49 percent of high-income Latinos were issued high cost loans, compared to only 16 percent of high-income whites. Thus, even high-income blacks and Latinos were issued more high cost loans than low-income whites. Even when credit risk is controlled, Blacks were 3.9 times more likely than whites to receive subprime loans, while Latinos were 2.6 times more likely. In fact, when regulatory authority, credit risk, and other variables (which lenders use to determine issuance) are controlled, race is still found to play a major role.

In addition, the subprime industry blossomed in areas of the United States where marginalized and vulnerable minority communities lived. Even after controlling for credit risks, subprime lending was plentiful in the region where the U.S. borders Mexico, in the urban areas of the Midwest, and within the Black Belt of the old Confederacy.

THE AFTERMATH

According to Douglas Matton, a Chicago based attorney who works on foreclosure cases, foreclosures have had a “disruptive and traumatic effect” on

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26 Supra note 4.
28 Ramirez, supra note 9 at 8.
29 Rivera, supra note 22 at 14.
30 Id.
31 Id.
33 Debbie Gruenstein Bocian et al., Race, Ethnicity and Subprime Home Loan Pricing, 60 J. Econ. Bus. 110, 121-123 (2008).
35 Ramirez, supra note 9 at 150.
families and communities. Unfortunately, this traumatic effect does not end once the bank seizes the house. Not only does an ex-homeowner have to pack up and move his family elsewhere, the location of “elsewhere” becomes a hurdle as well. With a foreclosure on record, an ex-homeowner is rendered vulnerable in terms of immediate housing, and it becomes increasingly hard to find an apartment with poor credit.

Furthermore, banks can continue to go after an individual even after a house is foreclosed on. Mr. Matton notes that if a bank cannot sell the property for the same value before foreclosure, it will try to obtain the remaining balance from an already struggling individual. This can be done by taking the ex-homeowner to court, garnishing his wages, and forcing him to sell off assets. For a struggling and vulnerable minority family in the United States, this creates financial trauma that can only be solved by filing for bankruptcy.

When the housing bubble popped and the market experienced huge losses, minorities were affected most by the downturn. Black borrowers suffered $72 billion to $93 billion in loss, while Latinos suffered losses between $76 billion and $98 billion. Mike Calhoun of the Center for Responsible Lending stated that the crisis “stands to likely be the largest loss of African-American wealth that [the United States] has seen, wiping out a generation of home wealth building.”

“Foreclosures can hurt an entire family and this hurt extends to the community with the consequence of deteriorating neighborhoods,” states Sumi Cho, a professor of Economic Justice at DePaul University School of Law. A city can experience a loss of tax revenue when banks and local governments shirk away from the responsibility of maintaining vacant properties (either purposefully or, in the case of some local governments, because they cannot afford

36 Supra note 1.
37 Id.
38 Id.
39 Id.
40 Id.
41 Id.
42 Id.
43 Id.
44 Ira Goldstein, Subprime Lending, Mortgage Foreclosures and Race: How far have we come and how far have we to go?, 1, 14 (2008). Available at: http://www.prrac.org/projects/fair_housing_commission/atlanta/SubprimeMortgageForeclosure_and_Race_1014.pdf.
45 Rivera, supra note 22 at 17.
46 Id. at 18.
47 Supra note 4.
to). And entire communities can witness a decline in investment and in jobs. "A recent study by the Association of Community Organizations for Reform Now (ACORN) concluded that foreclosures increase violent crime in neighborhoods, decrease property values, and ‘reduce city tax revenue, making it harder to provide good schools, police protection, code enforcement, and other services.’" This leaves many, including Ms. Cho, to conclude that urban blight has “devastating, long-term communal and intergenerational effects.”

GOVERNMENT RESPONSE

After the collapse, federal and state governments scrambled to hold financial institutions accountable for their actions. Illinois Attorney General Lisa Madigan led a multi-state action against Countrywide, the largest mortgage lender in the United States. As a result, Countrywide paid a total of $8.7 billion for claims of predatory lending in 400,000 loans nationwide. In August of 2014, Bank of America reached a $17 billion dollar settlement, the largest of its kind, with the Department of Justice (DOJ). The settlement was offered after the DOJ charged Bank of America for the “faulty sale in mortgage securities” which enabled predatory lending to thrive. The two-pronged settlement included $9.65 billion to serve as a cash penalty, and $7 billion to serve as a form of relief for, “homeowners struggling with unrealistic mortgages and demolishing ‘urban blight.’”

Local governments have also filed suits against major financial institutions. Pending lawsuits from the City of Memphis and the City of Baltimore have utilized statements from former employees explaining how they were en-

48 Id.
49 Id.
50 Rivera, supra note 22 at 21.
51 Supra note 4.
52 Ramirez, supra note 2.
53 Id.
55 Id.
56 Pathe, supra note 4.
couraged to target black neighborhoods for high cost loans. 57 Los Angeles has filed four suits against banks for “flooding minority neighborhoods with sub-prime mortgages even when residents qualified for better terms.” 58 The City has also “explored legal means to hold banks accountable for urban blight,” which has racked the city since the collapse of 2008. 59 Similarly, Cook County has filed suit against HSBC Holdings Plc for “targeting Chicago-area minority borrowers for high cost home loans.” 60 The County also plans to hold HSBC liable for Chicago’s urban blight. 61

NOW WHAT?

In order to prevent predatory lending, Ms. Cho believes that legal assistance programs should continue to aid prospective homebuyers in their pursuit of homeownership. 62 Financial education can benefit individuals with a lack of homeownership history as well as those who are experienced in the process. 63 However, Ms. Cho is quick to note that any assistance or educational program will only serve as a “band aid” on a bad wound. 64 After all, the problem will never be solved if the source of the problem still exists. 65

Legislation must be created to prevent financial institutions from engaging in fraudulent tactics, and those that violate the law should be held accountable. Unfortunately, there’s a long way to go. As Mr. Matton pointed out, Illinois does not have an anti-predatory statute on its books and the government does not pursue criminal prosecution of those engaged in fraudulent financial practices. 66

61 Id.
62 Supra note 4.
63 Id.
64 Id.
65 Id.; supra note 1.
66 Supra note 1.
Despite how bleak the future may look, Mr. Matron offers one golden rule of advice for those seeking to purchase a home: “Never enter into a transaction of such magnitude without first obtaining a lawyer. A lawyer is there to help read through the 30 plus pages of mortgage paperwork and to help you understand the ramifications of your signature.”67 Had individuals utilized lawyers when purchasing a home, perhaps there would not have been so many predatory loans signed.68 And, perhaps, there would not still be 60,000 foreclosures pending in Cook County alone.69

67 Id.
68 Books and Simon, supra note 22. “A study done in 2004 and 2005 by the Federal Trade Commission found that many borrowers were confused by current mortgage cost disclosures and ‘did not understand important costs and terms of their own recently obtained mortgages. Many had loans that were significantly more costly than they believed, or contained significant restrictions, such as prepayment penalties, of which they were unaware.’”
69 Supra note 1.

Nickolas Kaplan

America has continued to witness countless police and vigilante killings of young, unarmed black men in the last decade.1 Each killing, acquittal, and non-indictment renews scrutiny over America’s violent racial oppression in the “postracial” 21st century.2,3 Even when community activism yields prosecutorial action, implicit biases and representation concerns in juries further hamper the deliverance of justice to victims’ families.

On August 20, 2014, St. Louis County prosecutor Bob McCulloch convened a grand jury to decide whether charges should be brought against Officer Wilson for the fatal shooting of Michael Brown.4 The 12-person grand jury, impaneled three months earlier, had three black jurors (one man, two women) and nine white jurors (six men, three women),5 reflecting the county’s racial demographics (24 percent black, 68 percent white),6 but far removed from that of Ferguson (67 percent black, 29 percent white).7 The grand jury’s composition thus raised concerns in light of structural representation issues in

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6 Id.
municipalities like Ferguson and the county’s stark divide on whether “race had nothing to do with the shooting.”

This article examines juror bias and jury selection considerations vis-à-vis the St. Louis County grand jury that refused to indict Officer Darren Wilson for the fatal shooting of Michael Brown.

**IMPLICIT BIAS IN THE JURY SYSTEM**

Jurors’ implicit bias often corresponds with whether a case is “race[-]-sali-ent,” where “everyone on the jury is on the alert that their decisions about race are being observed.” The most bias emerges where the defendant (or, the victim) “happens to be” a person of color. When a case is not apparently related to race, jurors are “unaware of the fact that their racial biases need to be checked”. Consequently, implicit biases in race often fill in evidentiary gaps. Yet the presence of even one juror of color in such cases can underscore the importance of being fair” to other white jurors, alerting individual jurors to consciously check their implicit biases.

A majority-white jury composition has significant bearing on jurors’ interpretive capacity in cases involving interactions between white police and persons of color in racially and socioeconomically stratified counties. According to Illinois federal defender Geoffrey Meyer, “For [jurors] from more affluent communities, their interactions could be when the police visit their children’s school or they get a traffic ticket—minor encounters. Whereas in other communities, there can be a much more antagonistic relationship.” Meyer identifies that challenge as one of “communicat[ing] what life might be like for

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10 Id.

11 Id.


13 Id.


someone who is not of their race, because this can color the way actions taken by the police or the defendant are interpreted.”

THE “TWO FERGUSONS”

Power structures in suburbs that transitioned to majority-black populations remain overwhelmingly white. Ferguson, for instance, has a white mayor, a 6-white-1-Hispanic school board that recently suspended a black superintendent, one black City Council member, and a six percent black police force. This is compounded by a municipal revenue scheme over-reliant on traffic citations by mostly white officers against black drivers: 86 percent of stops, 92 percent of searches, and 93 percent arrests in 2013 were of black drivers. The grand jury thus replicates Ferguson’s demographic power imbalance.

More striking, though, is the diametric racial divide between the 604 St. Louis County residents polled on the Michael Brown case by the local Remington Research Group. While 64 percent of blacks agreed that Brown was “targeted because of his color,” 77 percent of whites disagreed. And while 71 percent of blacks believed that Wilson should be arrested and charged with a crime, 72 percent of whites believed he should not be. Protest perceptions also foster this divide. Political science research suggests that blacks “are much less likely to blame the black protesters for what transpires [while] whites are less likely to blame the white police,” even “where police were calm and protesters, orderly.”

GRAND JURY SELECTION & PROCEDURE

Moreover, jury selection was not conducted in light of the case’s specific procedural and bias concerns, but rather, via ordinary summons that, according to federal defender Meyer, is prone to selection bias. “Not everyone regis-
ters to vote and not everyone has a driver’s license or state ID,” Meyer observes.\(^{25}\) “There’s a parallel [as it relates to] voter ID laws in this country. People of lower-economic means may not have the same access or necessity for state ID’s or identification cards. . .[impeding on the] possibility at the jury selection stage to get a fair representation.”\(^{26}\) Insofar as this summons procedure was consistent with that of Missouri state courts\(^ {27}\), the grand jury selection was not preliminarily safeguarded against racial compositions under-representative of the community where the alleged criminal conduct occurred.

The grand jury required nine out of twelve jurors to find that the weight of the evidence showed “probable cause,” or reasonable grounds that the officer could have committed manslaughter or second-degree murder.\(^ {28}\) Yet McCulloch’s “avalanche”-like disclosure of conflicting evidence and witness testimony,\(^ {29}\) which rendered the grand jurors trial-level fact finders, was delivered in the absence of an adversarial process that could advocate for Brown.\(^ {30}\) “Probable,” then, proved fitting for an outcome so systemically entrenched.\(^ {31}\) The living histories of redlining, police repression, and disinvestment endemic to St. Louis County are inseparable from the fate of Michael Brown and the officer-shooter.\(^ {32}\)

\(^{25}\) Id.

\(^{26}\) Id.


CONCLUSION

Ferguson revived a national dialogue on systemic racism in policing, the justice system, media discourse, and social institutions. A justice system where “reasonable fear and suspicion” are squarely vested in “the eyes of the beholder” continues to be prone to the derivative biases of the shooters. Grand jury proceedings must elicit inquiry into racial representation and implicit bias in jury selection and integrate the experiences of Americans of color into courtroom deliberations. The perpetuation of more Michael Browns requires nothing less.

34 Potts, supra note xxi.
Contribution Author

Vergara v. State of California: Judicial Abolition of Teacher Tenure?

Perry A. Zirkel, Lehigh University

On August 27, 2014, a trial court in California issued a decision that invalidated three statutory employment protections for public school teachers as violations of the state constitution. National media reported that this decision abolished tenure. The school reform organization that sponsored the suit characterized the decision in *Vergara v. State of California* as "a historic victory." In an editorial, the *New York Times* inveighed: "The ruling opens a new chapter in the equal education struggle. It also underscores a shameful problem that has cast a long shadow over the lives of children, not just in California but in the rest of the country as well."

This impartial examination summarizes and analyzes the decision in terms of its effect in California and elsewhere. More specifically, the succeeding sec-

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1. *Vergara v. State of California*, No. BC484642 (Cal. Super. Ct. Aug. 27, 2014). The court first issued its decision as a tentative ruling on June 10, 2014; the content did not change in any significant way in the interim. For the tentative decision, see, e.g., http://www.documentcloud.org/documents/1193670-tenative-vergara-decision.html. The suit was filed on May 14, 2012. The state’s two largest teacher unions, the California Teachers Association and the California both of Teachers, intervened on May 2, 2013. The trial began on January 27, 2014. For the full case timeline, see http://studentsmatter.org/our-case/vergara-v-california-case-status/timeline/


3. The founder the sponsoring organization, Students Matter, is Silicon Valley entrepreneur, David Welch. *Id.* Critics also take issue with "the group’s connections to other deep-pocketed donors, such as philanthropist Eli Broad, who has a history of butting heads with the teachers' unions.” Stephen Sawchuk, *Teacher Protections Violated Student Rights, Calif. Judge Finds*, *Educ. Wk.* (June 11, 2014), http://www.edweek.org/ew/articles/2014/06/11/36vergara.h33.html?tkn=STMFXN6fFSzkHdricexYRSXkB7cyp241cm&intc=ES. See also *http://studentsmatter.org/victory/.*


5. For the need for an objective analysis, see, e.g., Stephen Sawchuk, *Teacher Case Raises Stakes in Equity Fight*, *Educ. Wk.*., July 9, 2014, at 1, 22: To a degree, the cacophony of responses greeting the decision has obfuscated the fact that many of the implications of the lawsuit remain unclear, both in the Golden State and nationwide. Among the lingering questions: Will the ruling, at a slim 16 pages,
tions of this brief overview provide 1) a summary of the decision, 2) analysis of its legal status and effect in California, 3) projection of its legal effect in other states, and 4) its overall impact in terms of school reform on behalf of students in high-poverty and high-minority schools.

THE TRIAL COURT DECISION

After hearing the arguments and evidence, including the testimony of various experts, the trial court judge ruled that each of these three statutory requirements violated the California constitution: 1) the two-year probationary period of the teacher tenure statute, 2) the super due process of three related teacher dismissal statutes, and 3) the last-in-first-out (LIFO) provision of the teacher reduction-in-force statute. The suit was filed on behalf of high-poverty and high-minority schools in California.

First, the court set forth the following legal framework for analyzing the factual findings:

- precedents in California, including but not limited to the school finance decision in Serrano v. Priest II, clearly establish that education is a fundamental right under the state constitution

hold up on appeal? Will California’s notoriously polarized legislature, fearful of additional litigation and bad press, consider changing the statutes at issue on its own? And finally, will similar lawsuits elsewhere—one is already primed for introduction in New York—be as initially successful?

Thus, there were six challenged statutes in total, but—due to the cluster of three dismissal statutes for the middle category, the treatment here is organized in terms of three challenged requirements.

According a critic of the decision, the nine named student plaintiffs were not entirely minority or poor students. Alan Singer, The Case Against Teacher Tenure (Sept. 11, 2014), http://www.huffingtonpost.com/alan-singer/the-case-against-teacher-_b_5527306.html.

135 Cal. Rptr. 345 (Cal. 1976) (holding that revised school finance system that continued to result in substantial disparities in per pupil expenditures among districts violates the state constitution by not passing the strict scrutiny/compelling justification test based on the interaction of its education and equal protection clauses). This decision is part of a line of cases ranging from Serrano I, 96 Cal. Rptr. 601 (Cal. 1971) (holding, prior to the superseding Supreme Court ruling in San Antonio School District v. Rodriguez, 411 U.S. 1 (1973) with respect to the U.S. Constitution, that the former system violated both the federal and state constitutions) to Serrano III, 226 Cal. Rptr. 584 (Ct. App. 1986), remanded on limited other issue, 253 Cal. Rptr. 1 (1989). The other cited precedent was Butt v. State of California, 15 Cal. Rptr. 480 (1992) (extending Serrano’s principal of basic educational equality to proposed closure of a district’s schools six weeks early).
• the equally well-settled precedent in California establish the concept of “equal educational opportunity,” requiring strict scrutiny, i.e., compelling justification, for substantial, appreciable disparities

Second, as the factual fabric within this legal framework, the court arrived at the following overall set of findings:
• competent teachers are a critical, if not the most important, factor to student success
• conversely, grossly ineffective teachers substantially undermine the ability of the child to succeed in school
• an estimated 1–3% of the teachers in California are grossly ineffective (amounting to 2,750–8,250 teachers)
• high-poverty, low-performing schools have a disproportionate number of both minority students and grossly ineffective teachers

The court’s next set of factual findings was specific to the three statutory requirements that the court found to be contributing factors to this disproportionate effect:
• the statutorily mandated two-year probationary period, which effectively is more like 1.6 years due to the notice requirement, is not long enough for an informed decision for the critical question of tenure
• the dismissal statutes’ procedures are so unwieldy in terms of time and cost that districts rarely resort to termination of incompetent teachers
• the LIFO statute, which treats seniority as the sole criterion, for reductions-in-force (RIF) is distinctly different than the vast majority of state laws, which either treat seniority as one consideration or leave the matter to district discretion

Finally, applying the foregoing legal framework to the factual findings for the three challenged statutory requirements, the court not only concluded that they did not pass muster under the state constitution but also indirectly indicated a template for revising them to survive the requisite strict scrutiny analysis:

9 This strict scrutiny analysis is parallel to Fourteenth Amendment equal protection adjudication for fundamental rights or suspect classifications.
10 The court posited the issue in terms of both “all California students in general and . . . minority and/or low income students in particular.”
11 The court characterized the dismissal statutes are providing “uber due process.”
12 Acknowledging the separation of powers among the branches of government, the court intoned:
All this Court may do is apply constitutional principles of law to the Challenged Statutes as it has done here, and trust the legislature to fulfill its mandated duty to enact legislation on the issues herein discussed that passes constitutional muster, thus providing each child in this state with a basically equal opportunity to achieve a quality education.
sis. More specifically, here is the implicit prescription for each of the three fatal flaws:

- the acceptable minimum, per the court’s comparison to other jurisdictions with 3–5 year probationary periods, appears to be three or, allowing for due notice, perhaps 3.5 years
- the constitutionally satisfactory level, per the court’s comparison to the statutory due process accorded to California’s permanent classified employees, is a more streamlined system in terms of time and cost, though its specific contours are not entirely clear

13 See supra note 9 and accompanying text.

14 The trial court ascribed the specific procedural rights to *Skelly v. State Personnel Board*, 124 Cal. Rptr. 14 (1975):

As a minimum, these preremoval safeguards must include notice of the proposed action, the reasons therefor, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline.

*Id.* at 215 (emphasis supplied). However, this federal constitutional minimum concerns pre-termination safeguards, which the Supreme Court subsequently addressed in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). Such a so-called *Loudermill* hearing is only “an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action.” *Id.* at 545–46. The *Loudermill* Court also made clear that the rather minimal due process requirements of such a pre-termination hearing are premised on the availability of a more formal termination, or “post-termination,” hearing. *Id.* at 546. In California, school district permanent classified employees are statutorily entitled to:

- written notice of the specific charges against him or her, a statement of the employee’s right to a hearing on those charges, and the time within which the hearing may be requested which shall be not less than five days after service of the notice to the employee . . . . The burden of proof shall remain with the governing board . . . .

*Cal. Educ. Code* § 45113. The constitutional requirement for an impartial adjudicator in this context is relatively relaxed, with the board having the authority to be the final decision maker. See, e.g., *Thornbrough v. W. Placer Unified Sch. Dist.*, 167 Cal. Rptr. 3d 24 (Ct. App. 2013). The present complicated system includes, for example, a tripartite panel. *Cal. Educ. Code* § 44944. Such a panel is typical elsewhere only for interest arbitration, where the stakes are the livelihood of the entire collective bargaining unit rather than the individual employee, far exceeds not only the constitutional minimum but also the prevailing statutory standard in other states. In most states, the school board or a single hearing officer implements this process. See, e.g., Education Commission of the States, Teacher Tenure: Notification of Nonrenewal and Hearing [http://ecs.force.com/mbdata/mbquestRTL?rep=TT02]. A legislative compromise that would likely fit within the boundaries that the trial court outlined would be a single California administrative law judge with a firm, fixed time limit and/or cost limit. For example, California amended its dismissal legislation in June 2014 solely for teachers engaged in “egregious misconduct,” such as criminal sex offenses, to add limitations to the extensive hearing process, including an administrative law judge rather than a tripartite panel and a seven-month period without exceptions. *Cal. Educ. Code* §§ 44934.1 and 44944. Similarly, Connecticut recently eliminated the three-member adjudicator, while reducing the length of the proceedings,
• the minimum, again based on the court’s discussion of contrasting treatments of seniority in RIF statutes, appears to be a waiver procedure or, more safely, reducing its level to being a factor, rather than the factor.\(^{15}\)

**NEXT STAGE IN CALIFORNIA**

Beating the two California teacher unions, which were intervenors in the trial court deliberations, to the door of the appeals court, the Governor filed an appeal on August 29, 2014.\(^{16}\) In the meanwhile, the trial court’s decision is in abeyance.\(^{17}\)

The appeal in California’s congested courts is more likely to take years than months, especially if the state’s highest court agrees to hear this significant issue. For example, the appeals process for another recent school case, which concerned whether the state’s nurse practices act prohibited school personnel from administering injections to students with diabetes, took 4.7 years from the filing of appeal at the intermediate level to the state supreme court’s decision.\(^{18}\) Although the final judicial outcome is unpredictable, an affirmance is more likely than a reversal. Although skeletal, the trial court judge’s factual findings, which typically receive deference on appeal, were largely undisputed. More vulnerable is the activist bent of his legal conclusions. Seeing the slippery slope of establishing a precedent for various other substantial and appreciable disparities in educational opportunity\(^{19}\) between the low income and

including a six-hour limit for each side’s presentation at the hearing, with extensions for good cause. CONN. GEN. STAT. § 10-151(d) [http://www.cga.ct.gov/2012/ACT/PA/2012PA-00116-R00SB-00458-PA.htm]. Providing perhaps the strongest example, New Jersey’s 2012 amendments that, *inter alia*, changed the adjudicator from an administrative law judge to an arbitrator from a panel administered by the commissioner of education; required the hearing to start within 45 days of assignment the decision issued within the next 45 days with no extensions except those that the commissioner approves; and capped the arbitrator’s compensation at $7500. N.J. STAT. ANN. § 18A:6-17.1

\(^{15}\) More specifically, in light of its central position in this case, competence—sometimes referred to in this context as “merit”—would have to be another and major factor.


\(^{19}\) For example, the ACLU reportedly filed suit in May 2014 challenging the alleged disparity in instructional time between schools serving low-income and minority and other schools. Sawchuk, supra note 5.
minority students and other students, the appellate judiciary might follow the more conservative, post-Serrano interpretation of equal protection analysis, which requires direct or indirect evidence of discriminatory intent. Yet, as recently as 1992, California’s highest court concluded that “both federal and California decisions make clear that heightened scrutiny applies to State-maintained discrimination whenever the disfavored class is suspect or the disparate treatment has a real and appreciable impact on a fundamental right or interest.” The trial court’s equal protection analysis may also be sustained on appeal based on alternate grounds. Thus, although uncertain, it would not be surprising if the ultimate appellate outcome were an affirmance of the trial court’s ruling.

In the meanwhile, California’s legislature has a clear opportunity to resolve the matter by revising the challenged statutes within the trial court’s implicitly countenanced boundaries. Yet, the state’s complicated politics, including the strong influence of the unions, would suggest that such a seemingly rational resolution is unlikely. Successive examples of the teacher unions’ power in favor of resisting such changes include 1) their success in helping to defeat then Governor Schwarzenegger’s 2005 referendum to extend the teachers’ proba-

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20 One of the conceptual problems that the trial court glossed over with broad strokes is whether the disparity is in terms of students or schools and, either way, whether it limited to the overlapping low income and minority categories. See supra note 10 and accompanying text.


23 For example, Welner has identified another possible basis for a less activist approach on appeal based on language in the post-Serrano precedent—requiring an effect clearly below a threshold minimum level of basic educational equality. Valerie Strauss, A Silver Lining in the Vergara Decision, http://www.washingtonpost.com/blogs/answer-sheet/wp/2014/06/11/a-silver-lining-in-the-vergara-decision/. For the specific language, see Butt v. State of California, 15 Cal. Rptr. 2d at 492 (“Unless the actual quality of the district’s program, viewed as a whole, falls fundamentally below prevailing statewide standards, no constitutional violation occurs”). The factual findings in Vergara would seem to show a real and appreciable effect on this prerequisite basic level; by its norm-like definition a grossly ineffective teacher is well below the state standard and having such a teacher for a year would seem to be at least equivalent to Butts’ qualifying loss of six weeks at the end of the school year.

24 Just as the reformers’ theories of productivity and competition are in significant part attributable to a commercial model, the unions are rooted in a collective employee interest tied to the industrial model. The plea from a former staff member of the California Teachers Association to change the position of both unions from an industrial to an innovative model is likely to go unheeded. Leslie C. Francis, The Teachers’ Unions Must Embrace the Future, EDUC. WK., Aug. 6, 2014, p. 32.
tionary period from two to five years; 2) the California Teachers’ Association refusal to support the attempt of its local affiliate in San Jose to extend some teacher’ probationary period for another year; 3) the April 2014 settlement of an earlier suit challenging the LIFO system in the Los Angeles school district made other relatively limited changes but did not alter the fundamental seniority standard that the suit targeted; and 4) both teachers unions’ multi-million-dollar support for the election of the incumbent chief state school officer, narrowly defeating the former leader of a charter school network who tried to use Vergara as a wedge issue.

OTHER STATES

Vergara is likely to have a ripple effect in terms of litigation in other states, but its leverage is markedly limited. First, it is only a trial court decision, thus carrying negligible legal weight. Second, even if upheld on appeal, its importability to other states is restricted to the relatively few states with a similarly solid state constitutional foundation, as primarily reflected in the school finance litigation that corresponded to Serrano.

26 Sawchuk, supra note 5, at 22.
27 Stephen Sawchuk, Los Angeles Settlement on Teacher Layoffs Ducks the Seniority Issue, EDUC. WK. blog, Apr.9, 2014, http://blogs.edweek.org/edweek/teacherbeat/2014/04/la_settlement_ducks_the_senior.html?qs=sawchuk. For the intervening decision that negated the prior consent decree based on the teacher union’s due process right, see Reed v. United Teachers Los Angeles, 145 Cal. Rptr. 3d 454 (Ct. App. 2012).
28 Andrew Ujifusa, California Chief’s Win a Bright Spot for Teachers’ Unions, EDUC. WK., Nov. 12, 2014, at 16.
In the primary tangible example to date, an educational reform organization in New York filed suit on July 28, 2014 challenged a similar set of statutes based on the education article of the New York state constitution. The resulting problem is also similar. However, the differences in this case may amount to a distinction. For example, although the named plaintiffs are students in New York City and another urban school system and the complaint uses New York City as its primary example, the theory of the case does not seem to focus on the disparity in educational opportunity for low-income and minority students. Perhaps more significantly, the precedents in New York are less robust than in California with respect to the state constitution; in comparison to California’s Serrano and subsequent case law foundation of “equal educational opportunity,” New York’s precedents lack the leverage of requiring a compelling justification for the challenged statutes. Finally, al-


32 Wright v. State of New York, http://nylawyer.nylj.com/adgif/decisions14/072914 summons.pdf. Interestingly, despite the obvious impetus, the complaint does not specifically cited the Vergara decision. Id.

33 See, e.g., KATHARINE B. STEVENS, TENURED TEACHER DISMISSAL IN NEW YORK (2014), http://www.aei.org/papers/education/k-12/tenured-teacher-dismissal-in-new-york/ (reporting that .0008% of New York City’s teachers were dismissed for poor performance during the decade 1997–2007).

34 Two of the seven named plaintiffs are in the Rochester City School District. Id.

35 See supra note 8 and accompanying text.

though New York’s dismissal and LIFO statutes are approximately parallel to their counterparts in California, the probationary period is three, not two years.  

OVERALL IMPACT

Even if the appeal in Vergara ultimately affirms the trial court decision and the California legislature revises the challenged statutes ample accordance with its constitutional template, it is not likely to come close to resolving the appreciable and substantial disparity faced by low-income and minority students for several overlapping reasons. First, the state constitutional minimum is far from the educational optimum. For example, if California revised its probationary period to three or four years, adopted the dismissal procedures of its permanent classified employees or for its teachers accused of “egregious misconduct,” and in one way or another reduced seniority and introduced merit into the RIF criteria, there may well not be a resulting significant reduction in the number of grossly ineffective teachers, because the time and cost are likely to remain considerable. In the various other states that have a com-

provide a sound basic education to New York City’s school children in violation of the education article in the state constitution). In a case that rejected extending CFE II to educational quality issues more generally, see K.M. v. Hyde Park Central School District, 381 F. Supp. 2d 343, 363 n.16 (S.D.N.Y. 2005). At best, CFE II recognized that teaching is “the first and most important input” for the requisite minimally sound education and that, in measuring this input, “principals’ reviews tend to conceal teacher inadequacy because principals find it difficult to fire bad teachers and to hire better ones.” 769 N.Y.S.2d at 113. However, the court also found various other inputs, such as facilities and instructional equipment, as essential elements of this equation and that for the teaching factors, the key determinant was the New York City system’s “inability to attract and retain qualified teachers.” Id. at 114. In a subsequent decision, New York’s highest court rejected the plaintiffs’ claim that the legislature’s appropriations and capital improvement plan for New York City did not satisfy the remedial order in CFE II. Campaign for Fiscal Equity, Inc. v. State of New York, 828 N.Y.S.2d 235 (2006) (“CFE III”).

37 N.Y. EDUC. LAW § 3012(1)(a). In other developments reflecting controversy concerning New York’s teacher tenure policies, governor Cuomo (1) vetoed legislation that would have temporarily shielded teachers from the effects of student testing on teacher evaluation, and (2) urged the state board of regents to make it easier to remove “poor performing” teachers. N.Y. Governor Aims to Flex Muscles on Education Policy, EDUC. WK., Jan. 14, 2015, at 15.

38 See supra text accompanying notes 13–15.

39 Thus, this sobering prognosis calls into question the Vergara judge’s assumption about or meaning of “a basically equal opportunity to achieve a quality education.” See supra note 12. However, it is consistent with the boundaries that the primary part of his statement establishes.

40 See supra note 14 and accompanying text.

41 See supra note 15 and accompanying text.
parable combination of less stringent procedural requirements, the length and expense of the proceedings tends to be high. 42

The second and interrelated reason is the school culture, specifically the perceptions of school officials. 43 The trial court’s Vergara decision depended on not only the actual but also the perceived difficulties of this triad of California statutes. 44 The evidence is considerable that in the rest of the country, which largely has a range of less onerous procedures extending to the other extreme of “right-to-work” states, administrators do not resort to teacher termination based on incompetence. 45 For example, the U.S. Department of Education’s National Center on Educational Statistics found that in 2010–11 the average number of tenured teachers per school districts terminated for poor performance was less than .1%. 46 Yet, contrary to the lore among the administrators, 47 the law from the courts is strongly skewed in favor of school districts,


43 In this school culture, where student grade inflation is another manifestation, less than 1% of the teachers typically receive unsatisfactory summative evaluation ratings. See, e.g., DANIEL WEISBERG, SUSAN SEXTON, JENNIFER MULHERN, & DAVID KEELING, THE WIDGET EFFECT: OUR NATIONAL FAILURE TO ACKNOWLEDGE AND ACT ON DIFFERENCES IN TEACHER EFFECTIVENESS (2009), http://tnftp.org/publications/view/the-widget-effect-failure-to-act-on-differences-in-teacher-effectiveness; see also Donald Langlois & Mary Rita Colarusso, Don’t Let Teacher Evaluation Become an Empty Ritual, 10 EXEC. EDUC. 32 (May 1988); Pamela Tucker, Lake Wobegon: Where All Teachers Are Competent, 11 J. PERSONNEL EVALUATION EDUC. 103 (1997).

44 Based on the testimony of a defense expert and substantial supporting evidence, the Vergara opinion found that “dismissals are ‘extremely rare’ in California because administrators believe it to be ‘impossible’ to dismiss a tenured teacher under the current system” (emphasis added).

45 See, e.g., Brian A. Jacob, Do Principals Fire the Worst Teachers?, 33 EDUC. EVALUATION & POL’Y ANALYSIS 403 (2011) (finding that a notable proportion of Chicago principals, including those in the lowest performing schools, failed to resort to the more flexible dismissal procedures under the collective bargaining agreement).

46 U.S. Department of Education, National Center on Educational Statistics, Schools and Staffing Survey (n.d.), http://nces.ed.gov/surveys/sass/tables/sas1112__2013311_d1s_.009.asp. The corresponding figure for nonrenewal of nontenured teachers based on poor performance is .5%. Id. For much earlier and similar data in various states, see EDWIN M. BRIDGES & BARRY GROVES, MANAGING THE INCOMPETENT TEACHER 16 (1990), available from the Education Resources Information Center, Access No. ED320195.

47 See, e.g., Edwin M. Bridges, It’s Time to Get Tough with the Turkeys, 64 PRINCIPAL 20 (Jan. 1985) (identifying various common “excuses,” or “rationalizations,” among principals, including the following: “It’s too costly,” “It’s too time-consuming,” and “You can never win.”). Other contributing factors appear to include avoidance of conflict and lack of support. Don L.
thus posing a steep uphill slope against the teachers in the final judicial outcomes of termination proceeding based on performance. 48

Third, various other strategies are the relatively hidden or at least unofficial responses to grossly incompetent teachers, such as the gamesmanship of “pass the turkey” (i.e., inflated ratings), 49 “dance of the lemons” (i.e., transfers), 50 and “passing the trash” (i.e., resignation/recommendation deals). 51 For example, in a survey at a large urban school district the teacher-respondents identified the use of several strategies with incompetent teachers more frequently


49 See, e.g., Langlois & Colarusso, supra note 43, at 32.


than dismissal proceedings, including—whether truly voluntary or not—transfer, retirement, and resignation.

Fourth, even if the administrators fully utilized the streamlined statutory procedures to eliminate grossly ineffective teachers, the substantial overall disparities between low-income and high-minority schools or students and their mainstream counterparts will remain largely the same due to several other systemic factors, including 1) the remaining segment of teachers who are moderately or marginally ineffective, 2) other significant issues of teacher quality.

52 There is reason to suspect that at least some of the grossly ineffective teachers would leave based on frustration in being so unsuccessful. See, e.g., Richard M. Ingersoll, Why Do High-Poverty Schools Have Difficulty Staffing Their Classrooms with High Quality Teachers?, http://www.shankerinstitute.org/images/ASI-Talk-Oct-2014-Ingersoll.pdf (reporting that high-poverty schools have particularly high rates of attrition and that job dissatisfaction is the leading reason).

53 The data tend to be anecdotal and informal based on the coyness of this strategy, but I have on more than one occasion heard principals boasting about their success in effectuating resignations of teachers they perceived to be ineffective by making their working conditions intolerable.

54 Menuey, supra note 47, at 315. These strategies also included those that did not involve exiting, such as successful remediation or voluntary switching to a different teaching assignment in the school. Id.; see also Tucker, supra note 43 (finding that the typical principal in Virginia with a staff of 100 teacher annually identifies 1.53 incompetent teachers and for them remediates .68, encourages retirement or resignation for .37, reassigns .29, and recommends dismissal for .10).

55 See, e.g., Bridges & Groves, supra note 46, at 11 (estimating that 11% of teachers were unsatisfactory based on statewide survey of principals in 1985); Richard Ehrgott, Joan C. Henderson-Sparks, & Richard K. Sparks, Marginal Teachers in California, available from the Education Resources Information Center, Access No. ED356556 (Jan. 1993) (estimating that 10.8% of teachers in California were marginal based on survey of school administrators in the early 1990s); Carolyn Lavely, Neal Berger, & John Follman, Actual Incidence of Incompetent Teachers, 15 EDUC. RES. Q. 11 (1992) (estimated that 10% of public school teachers in the U.S. are incompetent based on a mix of early, state-based sources); Menuey, supra note 47, at 310 (estimated that 5% of teachers are incompetent or marginal based on various earlier studies and “gross disparity” from the dismissal rate). Part of the problem in arriving at accurate estimates is the imprecise definitions of such relative terms. An overlapping part is their unclear or lack of uniform reference frame—is it criterion-based or norm-referenced?

56 The identification of contributing factors depends in part on the specific definition of teacher quality and similar terms, such as effectiveness or competency. For example, in advocating for output-oriented policies, Hanushek provide this definition of teacher quality: “good teachers are ones that get large gains in student achievement for their classes; bad teachers are just the opposite.” Eric A. Hanushek, Teacher Quality, in TEACHER QUALITY 1 (Lance T. Izumi & M. Evers eds., 2002). The recent development of value-added evaluation grapples with the measurement issues in implementing such a seemingly simple definition. See, e.g., Michael Croft & Richard Buddin, Applying Value-Added Methods to Teachers in Untested Grades and Subjects, 44 J.L. & EDUC. 1 (2015); Preston C. Green Bruce D. Baker & Joseph Oluwole, The Legal
including recruitment and retention,\(^57\)

3) various other, non-teacher factors,

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\(^57\) Tara Beteille, Demetra Kalogrides, & Susanna Loeb, Effective Schools: Managing the Recruitment, Development, and Retention of High Quality Teachers (2009), http://www.urban.org/UploadedPDF/1001428-effective-schools.pdf; The Irreplaceables: Understanding the Real Retention Crisis in America’s Urban Schools (2012), http://tntp.org/assets/documents/TNTP_Irreplaceables_2012.pdf; cf. Sarah Almy & Melissa Tooley, Building and Sustaining Talent: Creating Conditions in High-Poverty Schools that Support Effective Teaching and Learning (June 2012), http://www.edtrust.org/dc/publication/building-and-sustaining-talent-creating-conditions-in-high-poverty-schools-that-suppo (concluding that “despite widespread assumptions that students are the primary cause of teacher dissatisfaction and attrition, research shows that the work environment in schools — particularly the quality of school leadership and staff cohesion — actually matters more, especially among teachers working in high-poverty schools”); National Council on Teacher Quality, 2013 State Teacher Policy Yearbook: National Summary (Jan. 2014), http://www.nctq.org/dmsStage/2013_State_Teacher_Policy_Yearbook_National_Summary_NCTQ_Report (identifying exiting ineffective teachers as only one of five critical factors in state teacher policies, with the others being delivering well-prepared teachers, expanding the pool of teachers, identifying effective teachers, and retaining effective teachers); Nicole S. Simon & Susan Moore Johnson, Teacher Turnover in High-Poverty Schools: What We Know and Can Do (2013), http://isites.harvard.edu/fs/docs/icb.topic1231814.files/Teacher%20Turnover%20in%20High-Poverty%20Schools.pdf (concluding that teachers leave high-poverty schools for positions in the suburbs due to poor working conditions in terms of school leadership and collegial culture); cf. Steven Sawchuk, Steep Drop Seen in Teacher-Prep Enrollment Numbers, Educ. Wk., Oct. 22, 2014, at 1 (attributing 10% national decline in teacher education enrollments not only to the economic/employment situation but also the policy changes perceived as diminishing the status of teachers). For other significant teacher quality factors, see, e.g., David N. Figlio & Lawrence W. Kenney, Individual Teacher Incentives and Student Performance, 91 J. PUB. ECON. 901 (2007) (finding that student test scores are higher in schools that offer merit pay, particularly those with low parental oversight); Linda Darling Hammond, Teacher Quality and Student Achievement: A Review of State Policy Evidence, 8 EDUC. POL’Y ANALYSIS ARCHIVES 1 (Jan. 2000) (concluding that teacher preparation and certification are by far the strongest correlates with student achievement before and after controlling for student poverty); Eric A. Hanushek, Teacher Quality, in Teacher Quality 1 (Lance T. Izumi & M. Evers eds., 2002) (advocating experimentation focused on incentive measures for student-gain rather than input policies); Charles Taylor Kerchner, Even in Winning, Vergara Is Still a Loser, Educ. Wk. blog, http://blogs.edweek.org/edweek/on_california/2014/06/even_in_winning_vergara_is_still_a_loser.html?qs=vergara (pointing out proposed California legislation focus on professional development of teachers).
such as effective leadership,\textsuperscript{58} equitable resources,\textsuperscript{59} and social injustice,\textsuperscript{60} and 4) the overlay of procedural and other security protection in teacher contracts in collective bargaining jurisdictions.\textsuperscript{61}

In conclusion, the \textit{Vergara} decision is more significant symbolically than legally. Analyzed carefully and objectively, the real meaning of this decision is not to abolish tenure. Rather, the trial court’s decision serves as not only a stimulus for "rebalancing"\textsuperscript{62} tenure to its original meaning of reasonable and fair procedural due process but also a reminder of the overriding need for more comprehensive and systematic reform.\textsuperscript{63} The fulcrum for such policymaking ultimately is in the legislative, not the judicial branch, requiring powerful and collaborative educational leadership and broad-based political will.\textsuperscript{64}

\textsuperscript{58} See, e.g., \textsc{Robert J. Marzano, Timothy Waters, \& Brian McNulty}, \textit{School Leadership That Works: From Research to Results} (2005), available from the Education Resources Information Center, Access No. ED509055.


\textsuperscript{61} See, e.g., Levin, Mulherin, \& Schunk, \textit{supra} note 50.


\textsuperscript{63} For the need for more comprehensive and systematic policymaking in related areas, see, e.g., \textsc{Erik A. Hanushek \& Alfred A. Lindseth}, \textit{Performance-Based Funding}, \textit{Educ. Wk.}, June 10, 2008, at 20.

\textsuperscript{64} In her report on New York’s teacher dismissal legislation, Stevens, \textit{supra} note 33, at 52, argued that "while removing chronically ineffective teachers alone will not fix the problem, that’s no reason not to do it. . . . The aim is to protect children." However, the interest of protecting children and providing them with competent teachers dictates corresponding revision of the interrelated causes of this problem; there’s every reason to do it.