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EDITOR INTRODUCTION

The 2013 Law Journal for Social Justice Symposium, "Just/Justice: Valuing Fairness and Efficiency in the Criminal Justice System" brought together a collection of interdisciplinary scholars, attorneys and community members to discuss theoretical and practical concerns in the United States' Criminal Justice system. Discussions ranged from the ethics of attorneys within the system, theoretical concerns of criminal justice, mental health, and community support. Panelists included scholars from Law, History, Justice Studies, Social Work, and Criminology, alongside practicing attorneys, judges and community organizers.

Drawing on voices from the Phoenix legal community, this issue echoes discussions from the symposium in a series of articles that analyze an array of ongoing issues of social justice in the criminal justice system. The first article, *Testing the Death Penalty*, comes from the "Just/Justice" keynote speaker, Paul Charlton, written with Quintin Cushner and William Knight, and sets the tone of this issue by proposing a capital bar exam for federal prosecutors to "reduce the risk of misapplication of the ultimate sanction." The second article by William Knight, *Hyde-ing From the Truth*, continues the focus on prosecutors by engaging concerns of prosecutorial ethics in light of national legislation and recent events in Arizona. Next, in *Provocation Excuse*, Erin Iungerich discusses the homo- and transphobic applications of the provocation defense, looking to international law for potential solutions. "*Lockdown for Liberty!"* by Jeremiah Chin looks to systemic problems of racism and labor in mass incarceration by focusing on the 2010 Georgia Prisoners Strike. Finally, Justin Hoffman concludes the issue by focusing on intimate partner violence in LGBTQ communities, with examples of support programs for victims across the United States and suggestions for Phoenix. Each article analyzes a sector of criminal law to raise important questions about fairness and efficiency for attorneys, offenders, victims and prisoners.

Special thanks to the entire staff of the Law Journal for Social Justice, past and present, who helped to create this edition, particularly Executive Articles Editor Erin Iungerich, Executive Managing Editor Natali Segovia, Notes and Comments Editor Timothy Brody, and Former Editors Janette Corral, Jose Carrillo, Laura Clymer, and Michael Malin.

Jeremiah Chin
2013-2014 Editor-in-Chief
The Law Journal for Social Justice

TESTING THE DEATH PENALTY

By Paul Charlton, Quintin Cushner, and William Knight*

Prosecutors possess the singular authority to seek the death penalty. Although recent history demonstrates such power can be abused, no universally recognized standard has been implemented to ensure prosecutors in death penalty cases are qualified to undertake this tremendous responsibility. The highly controversial nature of capital punishment, potential for legal error in such cases, and principles of judicial fairness and efficiency all favor a more rigorous means of vetting prosecutors before they are empowered to seek to take another person's life. This Article proposes that one way to address this issue would be to require prosecutors to become members of a "Capital Bar"—through successful completion of rigorous written and oral examinations, continuing education requirements, and meeting certain character and fitness standards—all to reduce the risk of misapplication of the ultimate sanction.

Introduction

The Great Seal of the United States is a powerful and omnipresent symbol whose use and likeness are protected by federal law.[1] Depicted on the Great Seal is the bald eagle, holding in its right talons the olive branch of peace, and in its left talons the arrows of war.[2] Notably, the head of the eagle faces the olive branch of peace.

An exception to this depiction can be viewed in the Washington D.C. headquarters of the United States Department of Justice, the Robert F. Kennedy Department of Justice Building. The unremarkable exterior of the Justice Building belies the beautiful interior, which is done in an art deco style and decorated throughout by murals painted as part of the New

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* Paul Charlton is a partner at the law firm of Steptoe & Johnson, L.L.P., and the former U.S. Attorney for the District of Arizona. Quintin Cushner is an Associate at Steptoe & Johnson, L.L.P. William H. Knight is a recent graduate of Sandra Day O'Connor College of Law, 2013, and an Associate at Aiken Schenk Hawkins & Ricciardi P.C. This article is dedicated to Thomas P. Sullivan, former U.S. Attorney for the Northern District of Illinois, who has spent his career pursuing justice.

[1] *See* 18 U.S.C. § 713.

[2] For the official history of the great seal of the United States, *see* http://www.state.gov/documents/organization/27807.pdf.

Deal-era Federal Art Project.[3] Above the entryway to the office of the United States Attorney General, the most powerful prosecutor in the United States, the mural depicts the Great Seal with the same bald eagle clasping the same arrows of war and olive branch of peace, but with a crucial difference: The eagle is facing the arrows of war.[4]

It is perhaps fitting that an artist working in the 1930s painted the eagle in this manner. During this earlier era, the dominant objective of criminal prosecutors was to convict the defendant.

However, a paradigm shift in this manner of thinking occurred in the late 1930s and early 1940s. That was when the leadership of the Department of Justice, very likely influenced by the United States Supreme Court, began to develop the ethic, now familiar, that prosecutors are in fact ministers of justice. As the Supreme Court stated in *United States v. Berger*:

> The United States Attorney is the representative not of an ordinary party to a controversy but, of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.[5]

Life for prosecutors today is as complicated as ever. Not only must prosecutors play the dual roles articulated in *Berger*, but they must work to continually improve both their practice and the justice system in which they operate. And perhaps no substantive prosecutorial practice area is more in need of improvement than the prosecution of death penalty cases.

An author of this Article, who served as United States Attorney for the District of Arizona from 2001 through 2007, has first-hand experience as a prosecutor charged with the difficult tasks of deciding what criminal acts warrant the ultimate punishment, and which prosecutors should seek that punishment in court. During his time as United States Attorney, the author was responsible for assigning death penalty prosecutors in the case of Lezmond Mitchell.[6] Mitchell was charged in the United States District

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[3] *See* Rafael Alberto Madan, *The Sign and Seal of Justice*, 7 AVE MARIA L. REV. 123, 173 n.141; Antonio Vasaio, Justice Mgmt. Div., U.S. Dep't of Justice, *The Fiftieth Anniversary of the United States Department of Justice Building: 1934-1984* at 98-99 (1984).

[4] *See id.*

[5] 295 U.S. 78, 88 (1935).

[6] For more information regarding the Mitchell case, see *United States v. Mitchell*, 502 F.3d 931 (9th Cir. 2007).

Court for the District of Arizona with double homicide, *inter alia*.[7] The evidence showed that Mitchell fatally stabbed Alyce Slim, 63, and then slashed the throat of Ms. Slim's nine-year-old granddaughter, before crushing the young girl's head with several large rocks.[8] The bodies were then dismembered and buried.[9]

After a long lapse in the use of the death penalty in federal cases, the Federal Death Penalty Act of 1994 had authorized its use.[10] The Attorney General and the U.S. Attorney's Office for the District of Arizona agreed that seeking the death penalty against Mitchell was appropriate. The next step was to choose prosecutors with the requisite experience and judgment to carry out the serious task of prosecuting this death penalty case.

No one in the U.S. Attorney's Office at that time had gone to trial on a federal capital matter, as this was the first such case in the District of Arizona in well over a decade. Further, no formal vetting or evaluation process was in place to assist in assigning this case. Therefore, an author of this Article, in consultation with others, relied upon what prosecutors have relied upon for generations in assigning such cases: the reputation and experience of the persons to be selected. Two Assistant U.S. Attorneys had prosecuted death penalty cases in Arizona state court, and based upon those credentials—and their strong reputations as ethical and capable attorneys—they were chosen to prosecute the case. Mitchell was convicted of first-degree murder and the jury imposed the death penalty. Mitchell remains on death row.[11]

In a second murder case, an author of this article was confronted with facts in which a methamphetamine dealer had allegedly killed his supplier in a case based primarily upon solid circumstantial evidence.[12] However, no forensic evidence in that case directly linked the defendant to the victim. Further, the victim's body was not recovered. Based upon these factors, the author recommended that the federal government not seek the death penalty.[13]

However, the Attorney General's Capital Case Review Committee recommended the death penalty, and subsequently Attorney General Alberto Gonzales instructed the U.S. Attorney's Office to seek death.[14]

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[7] *Id.* at 945.
[8] *Id.* at 942-43.
[9] *Id.* at 943.
[10] *See* 18 U.S.C. §§ 3591-98.
[11] *See Mitchell*, 502 F.3d 931.
[12] Officer of the Inspector General, U.S. Dep't of Justice, *An Investigation into the Removal of Nine U.S. Attorneys in 2006* at 227-28 (September 2008), *available at* http://www.justice.gov/oig/special/s0809a/final.pdf.
[13] *See id.* at 228-34.
[14] *See id.*

An author of this Article objected, and was later removed from his position as U.S. Attorney for the District of Arizona with this disagreement cited as the reason.[15] Attorney General Gonzales' successor, Michael Mukasey, subsequently concluded the death penalty was not appropriate in this case. The Defendant then pleaded guilty to murder, drug, and weapon violations and agreed to a life sentence.[16]

Thus, in the personal experience of one of this Article's authors, the manner in which prosecutors are currently chosen for death penalty cases is based not upon a rigorous vetting methodology, but rather on an anecdotal and word-of-mouth process. Critically, the individuals who comprise the Attorney General's Capital Case Review Committee are not required to be, and are often not "death penalty" prosecutors.[17] They too are selected through anecdotal evidence.

This system, in which a supervisor assigns a prosecutor who has proven his or herself capable on other cases to a death case, is perhaps an intuitive and efficient way to make this decision. However, given the grave responsibility prosecutors who seek the death penalty possess, a more rigorous system is needed to help ensure that only the best qualified people are selected for this extremely difficult job.

For this reason, the Article proposes a move away from the use of anecdotal evidence in favor of a more rigorous vetting process we call: a "Capital Bar Exam." This exam would provide a metric, an objective standard, which would give the public, the judiciary, and the defense bar an opportunity to see that the individuals who walk into court are capable and ethical enough, and have met a required standard before they were authorized to seek to impose the ultimate penalty.

The authors wish to make clear that the suggestion of a Capital Bar Exam is not intended to either promote or deter the death penalty. But the death penalty is a reality in the United States. It is imposed in the federal system and it is imposed in many states, including the State of Arizona. If it is going to be a reality, it is our obligation to ensure that it is imposed in the most just fashion—there can be no room for error. It is our belief that

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[15] *See id.*

[16] *See id.* at 234 n.151. Under the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976, federal defendants sentenced after November 1, 1987 serve determinate terms without the possibility of early parole. Accordingly, a life sentence issued by a federal court means that the defendant will actually spend the rest of his or her natural life imprisoned. *See generally* U.S. DEPARTMENT OF JUSTICE, HISTORY OF THE FEDERAL PAROLE SYSTEM (2003), *available at* http://www.justice.gov/uspc/history.pdf.

[17] *See* U.S. DEP'T OF JUSTICE, THE FEDERAL DEATH PENALTY SYSTEM: SUPPLEMENTARY DATA, ANALYSIS AND REVISED PROTOCOLS FOR CAPITAL CASE REVIEW, at Part I.B (June 6, 2001), *available at* http://www.justice.gov/dag/pubdoc/deathpenaltystudy.htm.

the imposition of a Capital Bar Exam requirement will improve the justice system.

A Capital Bar Exam will benefit the system in numerous ways. It would deter the risk of prosecutorial misconduct by testing and reinforcing the obligations prosecutors have to the Court, to opposing counsel, and, significantly, to the defendant. Further, a Capital Bar Exam would serve to give the public greater confidence that the people who are representing them in court and who are empowered to seek the ultimate penalty are qualified to do so. It would also give the bench greater confidence that the people before them representing the government possess qualifications and knowledge of the death penalty. Most importantly, the imposition of the Capital Bar would work to reduce wrongful convictions.

An exhaustive description of the exact nature of a Capital Bar Exam is beyond the scope of this Article. However, we believe that the U.S. Department of Justice should be empowered with the responsibility of setting the bar. That agency has the resources and reach to impose such standards. As a basic component, we recommend that the Capital Bar Exam contain a character and fitness requirement. Further, the exam should cover criminal procedure subjects spanning from issues that arise from the day a homicide takes place to the last post-conviction issues. Additionally, the Capital Bar Exam should thoroughly test the rules of ethics that apply to prosecutors.[18] And the Capital Bar Exam should test developments in the capital punishment arena so that only the most capable and knowledgeable prosecutors are able to seek to take another person's life.

Prosecutors and Problems with the Death Penalty

The authors of this article accept as true that the vast majority of prosecutors are well-intentioned people who seek to convict the guilty while ensuring that no one who is innocent is ever wrongfully prosecuted, much less convicted. Despite this, the system for capital punishment is deeply flawed and, tragically results in convictions of innocent people, often because of the actions of prosecutors.[19]

A three-year study conducted by the Department of Justice identified ten factors common to wrongful convictions—at least eight of which are

[18] Such issues include conduct before grand juries, obligations to turn over evidence to defense counsel, complications pertaining to witnesses, handling a confidential informant, and the role of surviving family members.

[19] Ineffective assistance of defense counsel is a common topic of death penalty appeals, and an important topic to consider when discussing problems with the capital punishment system. However, it is beyond the scope of this Article, which discusses ways to improve the prosecution of death penalty cases.

within the direct or indirect control of the prosecutor.[20] These included *Brady* violations, overly suggestive witness coaching, improper closing arguments, tunnel vision in which errors were disregarded and exculpatory evidence not considered, and perjured informant testimony.[21] Further, an often cited study led by Columbia Law School Professor James Liebman found a 68 percent error rate in death penalty cases, meaning "serious reversible error [was found] in nearly 7 of every 10 of the thousands of capital sentences that were fully reviewed" between 1973 and 1995.[22]

"In research on erroneous convictions, the most commonly established transgression is the prosecution's failure to turn over exculpatory evidence."[23] In a substantial number of cases, reversal of death penalty convictions occurred after an appellate court found "prosecutorial suppression of evidence of innocence."[24] Such *Brady* violations "can be caused by inexperienced prosecutors who may not recognize what information should be shared with the defense or by malicious misconduct."[25] This reported prosecutorial misconduct, whether or not it is a product of poor training or deficiencies in character and fitness manifested in bad intent, erodes trust in the justice system, and in law enforcement. This is true even when a death penalty conviction is not overturned.[26]

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[20] *See* JOHN B. GOULD, ET AL., PREDICTING ERRONEOUS CONVICTIONS: A SOCIAL SCIENCE APPROACH TO MISCARRIAGES OF JUSTICE (2013), *available at* http://www.american.edu/spa/djls/prevent/upload/Predicting-Erroneous-Convictions.pdf; David Stout, *The Wrongfully Accused: Who Among the Innocent are Cleared, and Who are Not?*, MAIN JUSTICE: POLITICS, POLICY AND THE LAW (March 14, 2013), *available at* http://www.mainjustice.com/2013/03/14/the-wrongfully-accused-who-among-the-innocent-are-cleared-and-who-are-not/; D.S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125-83.

[21] *See* GOULD, *supra* note 20.

[22] James S. Liebman, et al., *A Broken System: Error Rates in Capital Cases, 1973-1995*, COLUM. L. SCH., PUBLIC LAW RESEARCH PAPER, at 5 (2000), http://www2.law.columbia.edu/instructionalservices/liebman/liebman_final.pdf.

[23] *See* GOULD, *supra* note 20, at 19.

[24] Jason Liebman, et al., *A Broken System, Part II: Why There Is So Much Error in Capital Case, and What Can Be Done About It*, at 41 (2002), *available at* http://www2.law.columbia.edu/brokensystem2/report.pdf.

[25] *See* GOULD, *supra* note 20, at xiii.

[26] *See* Liebman, *supra* note 22, at 23; Ken Armstrong & Maurice Possley, *Break Rules, Be Promoted*, CHI. TRIB., Jan. 14, 1999, at N1 ("Between 1993 and 1997, there were 167 published opinions in which the Illinois Appellate Court or Illinois Supreme Court found that prosecutors committed some form of misconduct that could be considered harmless. In 122 of the cases—or nearly three out of four times—the reviewing court affirmed the conviction, holding that the misconduct was 'harmless'"); Spencer Hunt, *Clouded Cases. Prosecutors' Conduct Risks Reversals*, CINCINNATI ENQUIRER, Sept. 10, 2000, at A1 (reporting the Ohio Supreme Court "repeatedly has criticized prosecutors for making improper courtroom statements to win 14 death penalty

In addition to prosecutorial misconduct during the discovery and trial stages of litigation, aggressive charging by prosecutors was a cause of the startlingly high reported error rate.[27] Additionally, the decision to pursue the death penalty must often be made amid incomplete information and tremendous public outcry.[28] Liebman states that "over-charging of this sort in turn puts strong pressure on officials to cut corners and overstep bounds to avoid defeat, and to secure a capital conviction and sentence notwithstanding the weak evidence and aggravation or the strong mitigation."[29] The Department of Justice study also recommended "rigorous screening of cases by seasoned prosecutors" to ensure that the death penalty was judiciously utilized.[30] Even if the correlation between seeking death in marginally aggravated cases and mistakes at trial holds up, it is logical that seeking death in cases without a strong articulable reason for doing so diminishes the legitimacy of the death penalty.

Problems with the death penalty are certainly not foreign to Arizona. In Liebman's study, Arizona was one of ten States with an error rate of over 75%, and one of three States that was at the time pushing to increase the speed and number of executions.[31] Further, the doubling of death penalty recommendations that occurred in Maricopa County might make it more likely that expensive reversals, and the accompanying diminishment in public trust in the judgment of prosecutors, are on the horizon.[32]

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cases over the past 12 years," and "has written at least four lengthy opinions since 1988 telling prosecutors to stop the misconduct" even in cases where reversals did not occur); *Prosecutorial Restraint: Death Penalty Allows No Margin for Error*, COLUMBUS DISPATCH, July 15, 2000, at 6A (reporting Ohio Supreme Court "express[ed] frustration" and "'mounting alarm'" over prosecutorial misconduct in cases where death penalty nonetheless affirmed).

[27] Liebman, *supra* note 24, at 45.

[28] *See id.* ("[W]e report evidence that reversible error is related to pressures to impose death verdicts in marginal cases where the evidence of guilt or facts calling for a death sentence are weak. This tendency may be especially strong when prosecutors make snap charging decisions absent full investigation in response to outrage at a serious crime or doubts about the ability of existing law enforcement strategies to solve the crime and prevent its recurrence").

[29] *Id.*, at 409.

[30] *See* GOULD, *supra* note 20, at 86.

[31] *See* Liebman, *supra* note 22, at 8.

[32] Jennifer Steinhauer, *Policy Shift on Death Penalty Overwhelms Arizona Court*, N.Y. TIMES, March 5, 2007, *available at* http://www.nytimes.com/2007/03/05/us/05death.html; Terry Carter, *Pending Death Penalty Cases Weigh Against Maricopa County*, A.B.A. J., Apr. 1, 2010, *available at* http://www.abajournal.com/magazine/article/pending_death_penalty_cases_weigh_against_maricopa_county/.

Our Proposition: The Capital Bar Exam

The purpose of our proposition is to create a metric—an objective standard—that will give the public and the judiciary an opportunity to see that the individuals who walk into court are sufficiently capable and have arrived at an ethical standard that we can all agree ought to be required before someone may seek to impose the ultimate sanction. Although an exhaustive exposition of the contours that our proposed Capital Bar Exam might take is beyond the scope of this Article, a cursory overview of its basic elements will help demonstrate how implementing such an exam might improve our justice system. To that end, here follows a specific list of suggested exam criteria and an explanation of how these components might improve capital prosecution.

A. Individual Components of the Capital Bar Exam

As mentioned above, only the Department of Justice has the resources and influence to implement the first Capital Bar Exam.[33] But what, exactly, should the Department of Justice's capital bar examiners look for?

First and foremost, the Capital Bar Exam must contain a stringent character and fitness component. Most, if not all, state bar organizations already require their members to be of good moral character.[34] Although this character and fitness application and subsequent investigation is typically quite rigorous,[35] the moral fitness of admitted members, including prosecutors, is typically not revisited unless an admitted member has done something to warrant disciplinary attention. Most prosecutorial agencies also engage in independent background investigations—albeit of varying degrees of stringency—before hiring attorneys, but these, too, are typically done only once.[36]

Yet under both the anecdotal system currently in place and the proposed Capital Bar Exam, it is unlikely that a prosecutor will ever handle a death penalty case until many years have passed since his or her moral fitness was last examined. If death penalty prosecutors are entrusted with the great and singular authority to intentionally seek to take a life, then it is right and it is appropriate that somebody have another look

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[33] See Introduction, *supra*.

[34] *See*, *e.g.*, Rule 34(b)(1)(B), Ariz. R. S. Ct. (2013).

[35] *See, e.g.*, "Procedure before the Committee on Character and Fitness," Rule 36, Ariz. R. S. Ct. (2013),

[36] *See* Craig S. Denney, *How do You Become an Assistant U.S. Attorney?*, A.B.A. PUBL'NS, http://www.americanbar.org/publications/young_lawyer_home/young_lawyer_archive/how_do_you_become_an_assistant_us_attorney.html.

at their character and fitness. In fact, given the highly political and divisive nature of the death penalty,[37] this component of the Capital Bar Exam ought to be much more stringent than the standard moral fitness requirements of general bar membership. Further, the review should be ongoing. Capital Bar members should also be required to engage in continuing legal education above and beyond the mandated minimum to ensure members possess the most current legal knowledge. In this way, the examiners can demonstrate to the public that the people entrusted with discretion over life and death exhibit the very highest moral fortitude.

This leads to our second recommendation: In order to ensure objectivity and fairness in Capital Bar membership, the examiners themselves should be highly qualified and of diverse adversarial postures. Examination by a panel of distinguished prosecutors, members of the defense bar, and even members of the bench will further ensure that death penalty prosecutors are of exceptional character and fitness.[38] Attorneys who are not able to remove their personal ambitions, feelings, and beliefs about crime and punishment from the highly complex decision-making process in death penalty cases should be screened from admission.[39]

Third, bearing in mind certain inescapable realities of capital trial practice that often give rise to mistakes and appealable issues, we suggest applicants meet a minimum experiential requirement and that the exam contain an oral component. Death penalty prosecutors, like most criminal practitioners, are regularly required to think on their feet while in court and under fire. Unlike most criminal practitioners, however, the split-second decisions death penalty prosecutors make in court are regularly reviewed *ad infinitum* and from the pages of an ice-cold record.[40]

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[37] *See* Stephen F. Smith, *The Supreme Court and the Politics of Death*, 94 VA. L. REV. 283 (2008); James S. Liebman & Peter Clarke, *Minority Practice, Majority's Burden: The Death Penalty Today*, 9 OHIO ST. J. CRIM. L. 255 (2011).

[38] The authors discussed the possibility of including lay community members on the panel of examiners, like some police agencies do with "oral boards" when vetting police officers to use lethal force. Unfortunately, the vicissitudes of criminal law practice are too vast and technical for non-lawyers to analyze with the thoroughness required of a specialized bar examiner.

[39] *See* Peter Margulies, *True Believers at Law: National Security Agendas, The Regulation of Lawyers, and the Separation of Powers*, 68 MD. L. REV. 1 (2008) (discussing the phenomenon and impact of ideological "true believers" in criminal law practices); Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917, 949 (1999) (discussing ramifications of "true believers" working as prosecutors in the Southern District of New York).

[40] *See, e.g.*, *Ryan v. Gonzales*, 568 U.S. __ (2013) (slip opinion) (U.S. Supreme Court's unanimous reversal of 9th Circuit's unanimous vacating of Arizona death penalty case on habeas procedural competency grounds), *available at*

Accordingly, we suggest that the Capital Bar Exam mirror, to a degree, the "oral board" exams police officers undergo to qualify to carry a weapon and use lethal force.[41] An additional oral board component would mimic the high-stress environment of a death penalty trial, requiring exam takers to remain calm while drawing on their legal knowledge to answer technical questions.

Fourth, some minimum experiential requirement, such as four years of dedicated criminal trial practice, would guarantee that death penalty prosecutors are capable of avoiding common pitfalls while appearing on the record. It is our belief that these requirements might obviate certain appellate reversals, particularly those based on so-called "cumulative prosecutorial misconduct."[42]

Finally, the written exam itself should thoroughly test the applicants' knowledge of prosecutorial ethics and the substantive law of capital punishment. Prosecutorial misconduct, intentional or otherwise, underlies all of the most common reasons for appellate reversals.[43] Accordingly, the Capital Bar Exam should analyze exhaustively the particular and unique professional standards to which prosecutors must adhere.[44] For example, the exam should cover such areas as the rules of ethics (with an emphasis on Rule 3.8, addressing "Special Responsibilities of a Prosecutor"),[45] a prosecutor's disclosure obligations under *Brady*[46] and its progeny,[47] who—if anyone—the prosecutor's client is,[48] what factors influence a prosecutor's discretion,[49] how to deal with confidential informants,[50]

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http://www.supremecourt.gov/opinions/12pdf/10-930_7k47.pdf.

[41] *See* Amaury Murgado, *Oral Board Preparation*, POLICE MAG. (July 10, 2012), *available at* http://www.policemag.com/channel/careers-training/articles/2012/07/oral-board-preparation.aspx.

[42] *See State v. Roque*, 213 ARIZ. 193, 228, 141 P.3d 368, 403 (2006).

[43] Liebman, *supra* note 22; Liebman *supra* note 24..

[44] For an in depth analysis of prosecutorial ethics, see R. MICHAEL CASSIDY, PROSECUTORIAL ETHICS (2005).

[45] *Compare* Niki Kuckes, *The State of Rule 3.8: Prosecutorial Ethics Reform Since Ethics 2000*, 22 GEO. J. LEGAL ETHICS 427 (2009), *with* Frank O. Bowman, III, *A Bludgeon by Any Other Name: The Misuse of "Ethical Rules" Against Prosecutors to Control the Law of the State*, 9 GEO. J. LEGAL ETHICS 665, 670 (1996).

[46] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963).

[47] *See generally* George E. West II, *A Prosecutor's Duty to Disclose: Beyond* Brady, 73 TEX. B.J. 546 (2010); Theresa A. Newman and James E. Coleman, Jr., *The Prosecutor's Duty of Disclosure Under ABA Model Rule 3.8(D)*, 34-MAR CHAMPION 20 (Mar. 2010); CASSIDY, *supra*, note 44, at ch. 5.

[48] *See* CASSIDY, *supra*, note 44, at ch. 1.

[49] *See id.* at chs. 3–4, 7–8; U.S. Attorney's Manual § 9-2.000, *et seq.*; NAT'L DIST. ATTORNEYS ASS'N., NATIONAL PROSECUTION STANDARDS (3d ed.), *available at* http://www.ndaa.org/pdf/NDAA%20NPS%203rd%20Ed.%20w%20Revised%20Commentary.pdf.

conducting witness interviews,[51] preserving evidence both for trial and the inevitably lengthy appeal,[52] what—if any—role the surviving family should play in the prosecutor's internal process,[53] and more. In addition to prosecutorial ethics, the exam should test the applicants' knowledge of criminal procedure from the time a case is charged through carrying out the sentence. Among other things, applicants should demonstrate a thorough understanding of the history and current state of the death penalty, including areas that are in flux[54] and common defense strategies.[55]

B. Improving the Justice System

Together, these five generalized features of our proposed Capital Bar Exam will improve our system of justice. Stringent and ongoing character and fitness requirements will improve confidence in capital prosecutors, while simultaneously weeding out people without solid moral convictions. A diverse panel of bar examiners will keep ideologically divisive temperaments away from the Capital Bar. Experiential standards and oral boards will ensure that admitted members are sufficiently learned and capable in the courtroom. And a thorough examination of ethical and substantive legal knowledge will guarantee that only the best and brightest prosecutors handle these most difficult of all cases.

Conclusion

In a death penalty case, a prosecutor is allowed to methodically and intentionally seek to take another person's life. Therefore, it is right to

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[50] *See* R. Michael Cassidy, *"Soft Words of Hope:"* Giglio*, Accomplice Witnesses, and the Problem of Implied Inducements*, 98 NW. U. L. REV. 1129 (2004); Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. CIN. L. REV. 645 (2004).

[51] *See* CASSIDY, *supra*, note 44, at ch. 4.

[52] *State v. Grell*, __ Ariz. __ (2013) (*Grell III*) (vacating death penalty after finding defendant mentally retarded based upon sparse and decades-old childhood school records, under "independent review" of the trial record nearly fifteen years later still), *available at* http://www.azcourts.gov/Portals/0/OpinionFiles/Supreme/2013/CR-09-0199-AP.pdf.

[53] *See* Jonathan DeMay, *A District Attorney's Decision Whether to Seek the Death Penalty: Toward an Improved Process*, 26 FORDHAM URB. L.J. 767, 785–86 (1999).

[54] One example is the relatively recent *Atkins* doctrine that prevailed in *Grell*, *supra*, note 52. *See generally* John H. Blume et. al., *An Empirical Look at* Atkins v. Virginia *and Its Application in Capital Cases*, 76 TENN. L. REV. 625 (2009).

[55] Ineffective assistance of counsel claims are inevitable in capital prosecution, and responding to them can be particularly difficult when defense attorneys concede inefficacy. *See, e.g.*, 82 AM. JUR. TRIALS 1, *Defending Against Claim of Ineffective Assistance of Counsel* (Originally published in 2002).

rigorously evaluate death penalty prosecutors through stringent and ongoing character and fitness requirements; experiential standards; and thorough oral and written examination of ethical and substantive legal knowledge by diverse examiners. It is our belief that by doing so, it will reduce the risk of wrongful convictions. For a minister of justice, there is no worthier goal.

HYDE-ING FROM THE TRUTH: DOES THE HYDE AMENDMENT PROVIDE AN ADEQUATE REMEDY FOR KNOWN PROSECUTORIAL MISCONDUCT?

By William H. Knight*

Introduction

If the ability to choose our defendants is "the most dangerous power of the prosecutor,"[1] as Justice Robert Jackson famously wrote, then it follows that the abuse of this power can have the most devastating effect on society. When Justice Jackson's oft-quoted passage was written, the esteemed Justice was concerned with prosecutors searching law books "filled with a great assortment of crimes,"[2] in order to engage in targeted prosecutions against persons the prosecutor dislikes.[3] With roughly 4,000 statutorily defined federal crimes on the books today,[4] this principle rings true now more than ever before. This increasing criminalization dangerously tempts prosecutors to choose defendants first and their crimes second; accordingly, prosecutorial misconduct before a grand jury, where the state attorney's power is largely unrestrained,[5] must be regulated.

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[1] *See* Robert H. Jackson, *The Federal Prosecutor*, 24 J. AM. JUDICATURE SOC'Y 18, 19 (1940) ("If the prosecutor is obliged to choose his cases, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people he thinks he should get, rather than pick cases that need to be prosecuted.").

[2] *Id.*

[3] *Id.*

[4] Susan A. Ehrlich, *The Increasing Federalization of Crime*, 32 ARIZ. ST. L.J. 825, 826 (2000).

[5] For a thorough discussion of the ethical, judicial, and statutory limitations on prosecutorial conduct before a grand jury, see Peter J. Henning, *Prosecutorial Misconduct in Grand Jury Investigations*, 51 S.C. L. REV. 1 (1999). Even still, a prosecutor's influence in grand jury proceedings is great. For instance, prosecutors can, and often do, present hearsay evidence to a grand jury that would be inadmissible at trial for the purposes of procuring an indictment. Costello v. United States, 350 U.S. 359, 362–63 (1956). Although "it is improper for a prosecutor to present hearsay testimony to the grand jury in the guise of direct evidence, where the effect of the presentation is to mislead the grand jury about the nature or source of evidence they are hearing," federal prosecutors can still accomplish this by asking witnesses to recount what *was* observed, rather than what the witness *himself* observed. This technique avoids the need to disclose the attenuated source of the observation. R. MICHAEL CASSIDY, PROSECUTORIAL ETHICS

Consider the recent disciplinary hearings of former Maricopa County Attorney Andrew Thomas and his deputies, Lisa Aubuchon and Rachel Alexander.[6] Thomas was accused of, and ultimately disbarred for,[7] numerous ethical violations, including:

> [H]olding press conferences to denounce the Maricopa County Board of Supervisors, which was his client, and threatening county officials with litigation; falsely claiming a judge had filed Bar complaints against [him], in order to have the judge removed from the case; and seeking indictments against county officials to burden or embarrass them. In one case . . . Thomas and Aubuchon brought criminal charges against a county supervisor even though they knew that the statute of limitations had already expired on the offenses. The most serious allegations involve filing criminal charges against a sitting Maricopa County Superior Court judge without probable cause in order to stop a court hearing.[8]

Unsurprisingly, the ethics panel wrote, "This is the story of County Attorneys who did not 'let justice be done,'[9] but rather birthed injustice after injustice. This is the story of the public trust dishonored, desecrated, and defiled."[10] Though this case received national attention[11] as an

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29–30 (2005). Only one circuit court that has evaluated the legitimacy of such tactics has dismissed the perfidiously acquired indictment, holding that the independence of the grand jury was impermissibly compromised by the prosecutor's deliberate attempt to obfuscate the source of the evidence. United States v. Estepa, 471 F.2d 1132, 1137 (2d Cir. 1972) (citing United States v. Payton, 363 F.2d 996, 1000 (2d Cir. 1966)).

[6] *See In re* Andrew P. Thomas, PDJ-2011-9002, Opinion and Order Imposing Sanctions, *available at* http://www.azbar.org/media/398414/final_thomas_aubuchon_alexander_opinion.pdf (disbarring Thomas for abuse of prosecutorial power).

[7] *Id.* at 232.

[8] Michael Kiefer & Yvonne Wingett Sanchez, *Verdict in Andrew Thomas Ethics Case Due Today*, ARIZ. REPUBLIC (Apr. 10, 2012), http://www.azcentral.com/news/politics/articles/2012/04/09/20120409verdict-andrew-thomas-ethics-case-due-today.html.

[9] Ironically, "let justice be done" was the motto of the Maricopa County Attorney's Office under Andrew Thomas. *See In re Andrew P. Thomas*, *supra* note 6, at 244.

[10] *Id.* at 245.

[11] *See, e.g.*, John Rudolf, *Andrew Thomas, Phoenix Prosecutor, Disbarred for 'Defiled' Public Trust*, THE HUFFINGTON POST (Apr. 11, 2012), http://www.huffingtonpost.com/2012/04/11/andrew-thomas-disbarred-phoenix-prosecutor_n_1415815.html; The Associated Press, *Former Prosecutor in Arizona is Disbarred*, N.Y. TIMES (Apr. 10,2012),http://www.nytimes.com/2012/04/11/us/arizona-ethics-board-disbars-ex-maricopa-county-prosecutor.html.

egregious example of the dangers of unrestrained prosecutorial aggression, it is, fortunately, an aberration. In fact, "[m]ost prosecutors are hard-working men and women of good faith who sought out a job as [a] prosecutor because they hope to further the cause of justice."[12] However, this does not change the damage done to victims like Judge Gary Donahoe, who was confronted with personal and professional embarrassment, significant legal defense fees, and life-altering public ridicule.[13]

Cases like this exemplify the impetus behind the famous Hyde Amendment,[14] which provides for awards of attorney's fees in federal cases where victims of prosecutorial misconduct can show that the government's decision to levy charges was "vexatious, frivolous, or in bad faith."[15] Such cases permit victims of prosecutorial misconduct to recover, at a minimum, the reasonable fees incurred in defending against baseless criminal allegations. However, the standard of proof is high, and though a grand jury finding of probable cause does not preclude

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[12] Paul Charlton, *Most Prosecutors Act in Good Faith, Deserve Praise*, ARIZ. REPUBLIC (Apr. 11, 2012), http://www.azcentral.com/arizonarepublic/opinions/articles/2012/04/10/20120410charlton0411-most-prosecutors-act-good-faith-deserve-praise.html.

[13] *See In re Andrew P. Thomas*, *supra* note 6, at 148–74 (Thomas had a criminal complaint against Judge Donahoe "walked through," despite the reluctance of and lack of personal knowledge of those signing the affidavit, and did so entirely without probable cause).

[14] Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998, Pub. L. No. 105–119, § 617, 111 Stat. 2440, 2519 (1998) (codified as amended at 18 U.S.C. § 3006A (2000)). The Hyde Amendment states, in pertinent part:

> During fiscal year 1998 and in any fiscal year thereafter, the court, in any criminal case (other than a case in which the defendant is represented by assigned counsel paid for by the public) pending on or after the date of the enactment of this Act, may award to a prevailing party, other than the United States, a reasonable attorney's fee and other litigation expenses, where the court finds that the position of the United States was vexatious, frivolous, or in bad faith, unless the court finds that special circumstances make such an award unjust. Such awards shall be granted pursuant to the procedures and limitations (but not the burden of proof) provided for an award under section 2412 of title 28, United States Code . . . . Fees and other expenses awarded under this provision to a party shall be paid by the agency over which the party prevails from any funds made available to the agency by appropriation. No new appropriations shall be made as a result of this provision.

Id. (emphasis added).

[15] *Id.*

recovery,[16] an acquittal does not guarantee it.[17] Considering the difficulty of succeeding on a Hyde Amendment claim, and the fact that recovery is limited to "a reasonable attorney's fee and other litigation expenses,"[18] does the Hyde Amendment really redress the myriad of collateral consequences of frivolous prosecution[19] or its life-altering injuries?[20]

In this article, I will attempt to answer this question first by analyzing the history and purpose of the Hyde Amendment. Next, I will discuss the Hyde Amendment as juxtaposed against the increasing criminalization of federal white-collar offenses and possible supplemental remedies, such as criminalizing known prosecutorial misconduct. Finally, I will conclude by discussing the practicality of the proffered solutions and offer an alternative that may, for some, be simpler and more practicable than further regulation.

I. The History of the Hyde Amendment

A. The Inadequacy of Previous Remedies.

The Fifth Amendment guarantees that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ."[21] In *Costello v. United States*, however, the Supreme Court held that "neither the Fifth Amendment nor any other constitutional provision prescribes the kind of evidence upon which grand juries *must* act."[22] Accordingly:

> The Fifth Amendment right requires that a grand jury actually indict the defendant, but does not prescribe what types of evidence the grand jury may consider in determining whether there is probable cause to indict. Therefore, "[a]n indictment returned by a legally constituted and unbiased grand jury . . . if valid on its face, is enough to call for trial of the charge on the merits."[23]

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[16] Henning, *supra* note 5, at 50.

[17] *Id.* at 52–54.

[18] Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998, § 617.

[19] For an argument in support of interpreting the Hyde Amendment to provide for broader recovery for victims of prosecutorial misconduct, see Lynn R. Singband, *The Hyde Amendment and Prosecutorial Investigation: The Promise of Protection for Criminal Defendants*, 28 FORDHAM URB. L.J. 1967 (2001).

[20] *Id.*

[21] U.S. CONST. amend. V.

[22] Costello v. United States, 350 U.S. 359, 359 (1956) (emphasis added).

[23] Henning, *supra* note 5, at 10 (quoting *Costello*, 350 U.S. at 363).

"*Costello* involved a typical white collar crime, tax evasion, that usually involves a prosecutor leading a grand jury investigation by subpoenaing records,"[24] and the prosecuting attorney relied heavily on inadmissible evidence in seeking the underlying indictment.[25] As a result, prosecutors may now rely on otherwise inadmissible evidence, such as inadmissible hearsay, in procuring an indictment.[26] But can a defendant "challenge a prosecutor's conduct in the grand jury without challenging the sufficiency of [the] evidence presented to secure the indictment?"[27] What protections, if any, were left after the Supreme Court decided *Costello*?

Under the supervisory power doctrine the court retains a modicum of control over grand jury proceedings.[28] This was necessary because "[t]he lack of explicit constitutional constraints on the federal prosecutor's conduct during a grand jury investigation made the supervisory power doctrine the only means available for a court to curb tactics perceived as abuses of the government's power."[29] The independence of grand jury proceedings is the foremost concern.[30] However, the supervisory power doctrine is limited,[31] and under *Costello*, "a facially valid indictment precludes judicial review of the quality of the evidence on which the grand jury relied to decide probable cause."[32] Even if an indictment is dismissed

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[24] *Id.* at 11.

[25] *Id.*

[26] *Costello*, 350 U.S. at 363–64; *see also* CASSIDY, *supra* note 5, at 29 ("Even in the vast majority of jurisdictions where hearsay is admissible, there is a [sic] emerging body of authority that suggests that it is improper for a prosecutor to present hearsay testimony to the grand jury in the guise of direct evidence, where the effects of the presentation is to mislead the grand jury about the nature or source of the evidence they are hearing.").

[27] Henning, *supra* note 5, at 11.

[28] *See generally* McNabb v. United States, 318 U.S. 332 (1943).

[29] Henning, *supra* note 5, at 15 (citing Hon. John Gleeson, *Supervising Criminal Investigations: The Proper Scope of the Supervisory Power of Federal Judges*, 5 J.L. & POL'Y 423, 427 (1997)).

[30] *See* United States v. Williams, 504 U.S. 36, 46 (1992) (the threshold question is whether the alleged misconduct "amounts to a violation of one of those 'few, clear rules which were carefully drafted by this Court and by Congress to ensure the integrity of the grand jury's functions.'") (quoting United States v. Mechanik, 475 U.S. 66, 74 (1986) (O'Connor, J., concurring)); *see also* Henning, *supra* note 5, at 43 ("[T]he prosecutor's actions must have undermined the independence of the grand jury to such a degree that its probable cause determination was not the result of a detached review of the evidence, but instead only a forfeiture of its authority to the government") (citing United States v. Sears, Roebuck & Co., 719 F.2d 1386, 1391 (9th Cir. 1983); United States v. Red Elk, 955 F. Supp. 1170, 1182–83 n.12 (D. S.D. 1997)).

[31] "If sufficiency of the evidence cannot be examined, then the determination of independence must involve a review of the prosecutor's conduct in the actual grand jury proceeding." Henning, *supra* note 5, at 44.

[32] *Id.*

under the supervisory power doctrine, it is typically dismissed without prejudice, and a properly issued subsequent indictment can act as a "cure all" for any misconduct in the previous grand jury proceeding.[33] In fact, courts will more often than not hold that prosecutorial influence over a grand jury's probable cause determination is harmless unless it raises "grave doubt" about the jury's independence.[34] Even deliberate failures to present exculpatory evidence to the grand jury cannot be held to frustrate the jury's independence.[35] Thus, although the Supreme Court has suggested that particularly egregious or recurring misconduct before a grand jury can "empower the judiciary to put a halt to prosecutorial misconduct,"[36] the Court's reluctance to review conduct outside the direct purview of the federal judiciary[37] has rendered the supervisory power doctrine largely toothless, at least when it comes to alleged prosecutorial misconduct before a grand jury.[38]

B. The Introduction of the Hyde Amendment.

Criminal indictment can prove devastating for a defendant, even if he is ultimately acquitted.[39] Moreover, defendants historically enjoyed

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[33] *See, e.g.*, United States v. Breslin (Breslin II), No. 95-cr-202, 1997 WL 50422, at *1 (E.D. Pa. Feb. 7, 1997).

[34] *Id.* at *8–10 (pressuring a grand jury to respond quickly may constitute undue influence, but currying favor by bringing the jury a box of donuts does not); *see also Mechanik*, 475 U.S. at 78 (O'Connor, J., concurring) (reviewing courts should ask if "the violation substantially influenced the grand jury's decision to indict, or if there is *grave doubt* as to whether it had such effect" (emphasis added)).

[35] *Breslin II*, 1997 WL 50422, at *10 (citing *Williams*, 504 U.S. at 52).

[36] Henning, *supra* note 5, at 45.

[37] Courts tend to avoid the exercise of a "'chancellors foot' veto over the government because of its attorney's motives or tactics, absent a separate constitutional violation." *Id*.; *see also* United States v. Russell, 411 U.S. 423, 435 (1973) (available remedies for certain kinds of government misconduct "[were] not intended to give the federal judiciary a 'chancellor's foot veto' over law enforcement practices of which it did not approve").

[38] The supervisory power doctrine still exists, and if a case arises wherein prosecutorial misconduct truly "shocks the conscience," the Supreme Court might employ the supervisory power doctrine to hold that such misconduct represents an unconstitutional violation of due process. *Cf.* Rochin v. California, 342 U.S. 165 (1952) (pumping a protesting suspect's stomach to produce evidence of contraband that was believed to have been consumed so shocked the conscience that it constituted a Fifth Amendment violation). For better or worse, that case has yet to occur.

[39] Merely initiating criminal charges can have a devastating and life-long effect on one's reputation, both personal and professional. In some cases, a grand jury's indictment, even one leading to an acquittal, can cost a professional his license to practice. This is why the Department of Justice requires that its prosecutors go beyond Model Rule 3.8's bare-minimum requirement of "probable cause" before seeking an indictment. *See* U.S. Attorney's Manual, § 9-27.220 (2012), *available at*

limited remedies for improperly or maliciously procured indictments. [40] Given these problems, Congressman Henry Hyde sought to protect aggrieved defendants by creating a statutory remedy.[41] Thus, in 1997, Hyde proposed what is now known as the Hyde Amendment because he believed that erroneously indicted defendants deserved more meaningful recompense for their injuries.[42]

The Hyde Amendment awards a prevailing party who can show that the "position of the United States was vexatious, frivolous, or in bad faith" with "a reasonable attorney's fee and other litigation expenses."[43] Although "Congress enacted the Amendment hastily in a highly politicized context,"[44] and the language is arguably quite ambiguous,[45]

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http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm#9-27.220 ("The attorney for the government should commence or recommend Federal prosecution if he/she believes that the person's conduct constitutes a Federal offense and that the admissible evidence *will probably be sufficient to obtain and sustain a conviction*" (emphasis added)).

[40] The supervisory power doctrine fails to provide any meaningful redress. *See* Section II.A, *supra*. Additionally, common law tort actions for malicious prosecution are equally toothless due to the concept of sovereign immunity. *See* Henning, *supra* note 5, at 45–46 ("While an aggrieved defendant can pursue the common law tort of malicious prosecution against a complaining witness or police officer that fabricated evidence, prosecutors are absolutely immune from civil liability for initiating and pursuing the case.") (citing RESTATEMENT (SECOND) OF TORTS § 656 (1977)).

[41] Hyde was motivated by the same "dissatisfaction with the prosecution of Representative Joseph McDade" that led to the famous McDade Act, subjecting attorneys working for the federal government to the local ethical rules of the jurisdiction in which they are practicing. *Id*. at 48. For a discussion of Hyde's motives in proffering the Hyde Amendment, see Lawrence Judson Welle, *Power, Policy, and the Hyde Amendment: Ensuring Sound Judicial Interpretation of the Criminal Attorneys' Fees Law*, 41 WM. & MARY L. REV. 333, 336–42 (1999).

[42] See Singband, supra note 19, at 1968–69; see generally Irvin B. Nathan & John C. Massaro, *Shekels & Hyde: Little Money but Many Lessons from the Early Years of the Hyde Amendment*, 6 NO. 1 BUS. CRIMES BULL.: COMPLIANCE & LITIG. 1, 2 (1999).

[43] Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998, Pub. L. No. 105–119, § 617, 111 Stat. 2440, 2519 (1998) (codified as amended at 18 U.S.C. § 3006A (2000)).

[44] Welle, *supra* note 41, at 333–34. Welle goes on to state that the amendment passed with "virtually nonexistent opposition." *Id.* at 334. However, the Hyde Amendment did not pass *entirely* without opposition. At least one representative, Congressman Skaggs, quite vocally challenged the wisdom of passing it so hastily, and as a rider to an appropriations bill:

> Let us not do this fast, maybe wrong, and with ill consideration in the context of an appropriations bill. [Representative Hyde] has indicated that if we defeat his amendment, . . . this will be a matter taken up, as it should be, by the committee with jurisdiction over this kind of legislation, not a quick and possibly wrong resolution of the matter on an appropriations bill. Mr. Chairman, I urge my colleagues to vote no

there can be no doubt that the Amendment's promise of redress for victims of prosecutorial misconduct endeavored to satisfy a legal injury that had previously gone unrequited.[46] Congressman Hyde believed by awarding victims of prosecutorial misconduct the cost of their legal defense, his amendment would remedy, at least in part, a great evil.[47] Responding to his opponents, Hyde put it like this:

> The Constitution protects you, but it will not pay your bills. That Constitution you carry in your pocket, the property owner will not take that and your lawyer will not take that. They want to get paid with cash. When the Government sues you and, by the way, you seem to have sympathy for everybody in this picture but the victim, who has been sued and the Government cannot substantially justify the lawsuit. I really wish you had some imagination and could imagine yourself getting arrested, getting indicted, what happens to your name, to your family, and the Government has a case it cannot substantially justify. They do not need to defend against malice or hardness of heart or anything like that, just substantial justification. They do not have to win. The fact that I picked this time and we have not had hearings, that is just a dodge. This is about as simple a concept as there is. We have had it and we have been

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on this amendment.

143 CONG. REC. H7786-04, H7794 (daily ed. Sept. 24, 1997) (statement of Rep. Skaggs).

[45] Welle, *supra* note 41, at 334.

[46] During the congressional floor debates, Representative Hyde outlined the need for the amendment as follows:

> What if Uncle Sam sues you, charges you with a criminal violation, even gets an indictment and proceeds, but they are wrong. They are not just wrong, they are willfully wrong, they are frivolously wrong. They keep information from you that the law says they must disclose. They hide information. They do not disclose exculpatory information to which you are entitled. They suborn perjury. They can do anything. But they lose the litigation, the criminal suit, and they cannot prove substantial justification. In that circumstance. . . you should be entitled to your attorney's fees reimbursed and the costs of litigation. . . . That, my friends, is justice.

Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998, 143 CONG. REC. H7786-04, H7794 (daily ed. Sept. 24, 1997) (statement of Rep. Hyde)

[47] *See generally* Dick Deguerin & Neal Davis, *If They Holler, Make 'Em Pay . . . The Hyde Amendment*, THE CHAMPION, Sept.-Oct. 1999, at 30.

> satisfied with it in civil litigation. I am simply applying the same situation to criminal litigation.[48]

The Hyde Amendment sought to accomplish this goal by mirroring the standards of the Equal Access to Justice Act (EAJA),[49] which permits private parties to recover attorney's fees in civil litigation in which they prevail over the federal government, "unless the court finds that the position of the United States was *substantially justified*."[50] "However, due to fierce opposition from the Justice Department, the Hyde Amendment was altered to replace the 'substantially justified' standard with the higher standard of 'vexatious, frivolous, or in bad faith,' which was taken from the Firearms Owners' Protection Act of 1986."[51] Hence, despite similar legal standards, prevailing on a Hyde Amendment claim is significantly more challenging than making a successful claim under the EAJA.[52]

The Hyde Amendment provides that "awards shall be granted pursuant to the procedures and limitations (but not the burden of proof) for an award under [the EAJA]."[53] First, a Hyde Amendment claimant must meet the standing requirements of the EAJA, limiting eligibility based on the claimant's net worth.[54] Second, the claimant must file a Hyde Amendment action within 30 days of the final judgment of the underlying case.[55] This case must have been criminal in nature,[56] where the defendant was a "prevailing party"[57] represented by retained, rather than appointed, counsel.[58]

The court then determines whether an ex parte or in camera hearing is required to determine the evidentiary value of the evidence relied on by the government in procuring the initial indictment, while preserving, if possible, the secrecy of certain kinds of evidence, such as the identities of

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[48] Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998, 143 CONG. REC. H7786-04, H7794, 1997 WL 588683, 19 (statement of Rep. Hyde).

[49] 28 U.S.C. § 2412(d)(1)(A) (2006).

[50] Henning, *supra* note 5, at 48 (quoting the EAJA, 28 U.S.C. § 2412(d)(1)(A)) (emphasis added).

[51] Deguerin & Davis, *supra* note 47, at 31 (citing 18 U.S.C. § 924 (1999)); *see also* Elkan Abramowitz & Peter Scher, *The Hyde Amendment: Congress Creates a Toehold for Curbing Wrongful Prosecution*, THE CHAMPION, Sept.-Oct. 1998, at 22 n.20.

[52] Deguerin & Davis, *supra* note 47, at 32–33.

[53] Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998, Pub. L. No. 105–119, § 617, 111 Stat. 2440, 2519 (1998).

[54] Deguerin & Davis, *supra* note 47, at 33.

[55] The Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A) (1994).

[56] *Id.*

[57] *Id.*

[58] *Id.* For a comprehensive checklist of the requirements of a successful Hyde Amendment claim, see Deguerin & Davis, *supra* note 47, at 33.

confidential informants.[59] The claimant must then provide the court with a signed affidavit from his criminal defense counsel, itemizing all of the attorney's fees and expenses.[60] Assuming the court determines the litigation costs were reasonable,[61] the damages will be set, and the hearing will proceed against all liable government agencies.[62] Should the claimant prevail, the prosecuting agencies will be required to pay damages from their individual budget appropriations.[63]

The inquiry will then fall on whether the government's actions were "vexatious, frivolous, or in bad faith,"[64] and if so, whether there exist any "special circumstances" that would make granting an award "unjust."[65] The mechanics of the process are fairly straightforward. However, the vagueness of the Hyde Amendment's operable language, in both the "vexatious, frivolous, or in bad faith" burden and the "special circumstances" that might make an award unjust, has led to some difficulties.[66] Thus, in practice, the Hyde Amendment might not have provided as meaningful a remedy as Representative Hyde intended.[67]

C. Interpreting the Hyde Amendment.

Although judicial review has resulted in a wide range of differing interpretations, even the earliest Hyde Amendment cases agree that mere prosecutorial negligence does not satisfy the legal standard.[68] Rather, the

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[59] *See* Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998, Pub. L. No. 105–119, § 617, 111 Stat. 2440, 2519 (1998).

[60] The Equal Access to Justice Act § 2412(d)(1)(A).

[61] *Id.*

[62] § 617, 111 Stat. at 2519.

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *See* Singband, *supra* note 19, at 1983–86 (criticism of the Hyde Amendment's departure from the "American Rule" with such a vague and unworkable burden); Welle, *supra* note 41, at 364–70 (detailed explanation of the "judicial perpetuation of the folly" of the Hyde Amendment's legal standards).

[67] In addition to the linguistic difficulties, the Hyde Amendment's impact is continually and significantly curtailed by boilerplate language in plea agreements that waive a defendant's ability to file a claim, pre-determining that he is decidedly *not* a "prevailing party." JULIE R. O'SULLIVAN, FEDERAL WHITE COLLAR CRIME: CASES AND MATERIALS 1079 n.7 (4th ed. 2009).

[68] Singband, *supra* note 19, at 1991–92 (citing *In re* 1997 Grand Jury, 215 F.3d 430, 437 (4th Cir. 2000)) ("even though the federal prosecutor would have realized the evidence in his possession did not support the charges had he reviewed it more carefully, the defendant still failed to meet the requisite standard of proof to collect attorney's fees.").

Hyde Amendment standard is very high, and with good reason. If the standard were lower, every acquittal would undoubtedly lead to a Hyde Amendment claim, overburdening a saturated judicial system. Federal prosecutors already criticize the Hyde Amendment for being "unduly burdensome and an unlawful interference with their discretion."[69] Accordingly, most courts have interpreted the "vexatious, frivolous, or in bad faith" standard to be quite high. But exactly how much misconduct must an aggrieved defendant suffer before he is entitled to recovery? At the very least, a grand jury finding of probable cause does not preclude a defendant from making a claim.[70] Precisely what constitutes impermissibly vexatious misconduct, however, evades interpretation.[71]

In *United States v. Gardner*, an Oklahoma district court heard a Hyde Amendment claim springing from federal prosecution for numerous white-collar tax preparation offenses.[72] The prosecution culminated in a dismissal of all eighteen criminal allegations, some with and some without prejudice.[73] The court, looking to both the plain meaning of the statute as well as its "sparse legislative history,"[74] held that "the [Hyde Amendment] seeks to apply the EAJA to the *fullest extent possible* to the criminal context."[75] The court went on to hold that Gardner was, in fact, a "prevailing party" within the meaning of the Hyde Amendment, and the

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[69] Deguerin & Davis, *supra* note 47, at 31. Prior to the adoption of the Hyde Amendment, it was the Department of Justice's position that "[d]efending against [a criminal prosecution] has always been deemed to be one of the costs of American citizenship." *Id.* (quoting Abramowitz & Scher, *supra* note 51, at 23).

[70] Henning, *supra* note 5, at 50 ("The Conference Report accompanying the resolution that included the Hyde Amendment asserts that the conferees understand that a grand jury finding of probable cause to support an indictment does not preclude a judge from finding that the government's position was vexatious, frivolous or in bad faith." (internal quotations omitted)).

[71] *Compare In re* Grand Jury Subpoena Duces Tecum, 31 F. Supp. 2d 542, 543–44 (N.D. W. Va. 1998) (textual analysis of the Hyde Amendment only for its plain meaning), *with* United States v. Ranger Elec. Commc'ns, Inc., 22 F. Supp. 2d 667, 673–75 (W.D. Mich. 1998) (looking to the admittedly sparse legislative history of the amendment to determine where the legal standard lies), *and* United States v. Gardner, 23 F. Supp. 2d 1283, 1295 n. 22 (N.D. Okla. 1998) (looking to both the plain meaning of the amendment and its legislative history).

[72] 23 F. Supp. 2d at 1285–86.

[73] *Id*.

[74] *Id.* at 1287.

[75] *Id.* at 1297 (emphasis added). Lawrence J. Welle argues that "the [*Gardner*] court fell prey to the lure of legislative history as a substitute for independent judicial analysis," which led to an erroneous departure from well-established judicial precedents and legal doctrines. Welle, *supra* note 41, at 364. This approach served only to perpetuate the attendant congressional errors of hasty legislation that failed to adequately consider its own costly collateral implications. *Id.* at 367.

dismissed charges, including the ones dismissed without prejudice, were "final judgments" from which he could seek relief.[76] Although the Supreme Court has held that a dismissal without prejudice does not constitute a final judgment,[77] the *Gardner* court distinguished Hyde Amendment claims,[78] reasoning that, "to rule in favor of the government would be 'inconsistent with both logic and the purpose behind the statute, which is to deter vexatious governmental conduct.'"[79] Unsurprisingly, Mr. Gardner recovered his reasonable attorney's fees.[80] Alternatively, in *In re Grand Jury Subpoena Duces Tecum*,[81] the Fourth Circuit held that a dismissal without prejudice did not render the defendant a "prevailing party" within the meaning of the Hyde Amendment, precluding him from recovering as a matter of law.[82]

Judicial inconsistency does not end with interpretations of what constitutes a "prevailing party" or a "final judgment."[83] Courts have also reached different conclusions regarding what constitutes a "criminal case," a "reasonable fee," actionable "litigation expenses" beyond reasonable fees, a "substantial justification," and "special circumstances" capable of rendering an award unjust.[84] Most importantly, courts have disagreed on the meaning of the "vexatious, frivolous, or in bad faith standard."[85] "Vexatious" has been interpreted both as "[w]ithout reasonable or probable cause or excuse,"[86] and as "lacking justification and intended to harass."[87] "Frivolous" prosecution has been interpreted as levying charges

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[76] *Gardner*, 23 F. Supp. 2d at 1298.

[77] Parr v. United States, 351 U.S. 513, 518 (1956).

[78] *Gardner*, 23 F. Supp. 2d at 1292.

[79] Welle, *supra* note 41, at 366 (quoting *Gardner*, 23 F. Supp. 2d at 1292). Welle submits that the *Gardner* court actually broadened the scope of the Hyde Amendment with its liberal statutory interpretation, "fl[ying] in the face of the *Alyeska Pipeline* holding that federal courts are not permitted to extend departures from the American rule and sovereign immunity doctrine without *specific* statutory guidance." Welle, *supra* note 41, at 366 (citing Alyeska Pipeline Svc. Co. v. Wilderness Soc'y, 421 U.S. 240, 269 (1975) (emphasis in original)).

[80] *Gardner*, 23 F. Supp. 2d at 1298.

[81] 31 F. Supp. 2d 542 (N.D. W. Va. 1998).

[82] *See id.* at 544–45 (successfully quashing a subpoena and obtaining a dismissal of criminal charges without prejudice did not render defendant a "prevailing party").

[83] For a detailed examination of the differing statutory constructions of the various components of a Hyde Amendment claim, see Deguerin & Davis, *supra* note 41, at 32–33.

[84] *See id.*

[85] *Id.* at 33.

[86] United States v. Reyes, 16 F. Supp. 2d 759, 761 (S.D. Tex. 1998) (citing BLACK'S LAW DICTIONARY 668, 1595 (6th ed. 1990)); *see also* United States v. Gardner, 23 F. Supp. 2d 1283, 1293 (N.D. Okla. 1998).

[87] United States v. Holland, 34 F. Supp. 2d 346, 359–60 (E.D. Va. 1998) (quoting

"of little weight or importance,"[88] or as "having no basis in law or fact . . . light, slight, sham, irrelevant, superficial."[89] Attempts to define "bad faith" as a legal term of art have garnered voluminous case law and academic scholarship, but in the Hyde Amendment context, courts have held "bad faith" to mean either "reckless disregard for the truth,"[90] or "conscious doing of a wrong because of dishonest purpose or moral obliquity."[91] The vague language of the Hyde Amendment has resulted in both confusion and radically different standards between jurisdictions. However:

> The Hyde Amendment is not limited to situations that would meet the requirements of the tort of malicious prosecution, such as requiring proof of a lack of probable cause to indict or of actual malice, although evidence along those lines would go a long way toward demonstrating the government's position was vexatious, frivolous, or in bad faith.[92]

Accordingly, "[w]hile the standard is flexible, the scope of the Hyde Amendment should be determined carefully by the courts, which must be mindful not to interfere in grand jury investigations."[93]

Despite the varying perspectives on what constitutes actionable prosecutorial misconduct, the resolution of most Hyde Amendment claims is often mercifully predictable: Regardless of how different courts interpret the legal threshold, most claims of misconduct fail to rise to a level commensurate with the Hyde Amendment's lofty standard.[94] No

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MERRIAM-WEBSTER'S NEW INTERNATIONAL DICTIONARY (1993)).

[88] *Reyes*, 16 F. Supp. 2d at 761 (quoting BLACK'S LAW DICTIONARY 668, 139 (6th ed. 1990)).

[89] *Holland*, 34 F. Supp. 2d at 359–60 n.22 (quoting MERRIAM-WEBSTER'S NEW INTERNATIONAL DICTIONARY (1993)).

[90] United States v. Troisi, 13 F. Supp. 2d 595, 596 (N.D. W. Va. 1998) (quoting Franks v. Delaware, 438 U.S. 154, 171 (1978)); United States v. Ranger Elec. Comm'cns., Inc., 22 F. Supp. 2d 667, 676 (W.D. Mich. 1998).

[91] *Reyes*, 16 F. Supp. 2d at 761 (quoting BLACK'S LAW DICTIONARY 139 (6th ed. 1990)).

[92] Henning, *supra* note 5, at 52.

[93] *Id*.

[94] *Compare* United States v. Lain, 640 F.3d 1134, 1139–40 (10th Cir. 2011) (failed prosecution for delivering a firearm without a federal license did not warrant Hyde Amendment recovery), *and* United States v. Monson, 636 F.3d 435, 442 (8th Cir. 2011) (legitimate finding of probable cause in drug and firearm case precluded Hyde Amendment recovery), *and* United States v. Isaiah, 434 F.3d 513, 519–20 (6th Cir. 2006) (prosecution not vexatious when circumstances surrounding alleged charges were highly suspicious, even if ultimately innocent), *and* United States v. Schneider, 395 F.3d 78, 88-89 (2d Cir. 2005) (Hyde claim denied despite existence of internal U.S. Attorney

matter where a court draws the line, it is sure to be high. Although there are some examples of clear Hyde Amendment violations, such as *United States v. Aisenberg*—where the government engaged in a prolonged campaign of unwarranted surveillance, harassment, falsifying evidence, and suborning perjury[95]—such examples are few and far between. Thus, succeeding on a Hyde Amendment claim is both difficult and rare. This is the case for two reasons: First, proving the various elements of a Hyde Amendment claim requires a great deal of evidence that a criminal

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memorandum recommending against pursuing prosecution), *and* United States v. Manchester Farming P'ship, 315 F.3d 1176, 1186 (9th Cir.), *opinion amended on denial of reh'g*, 326 F.3d 1028 (9th Cir. 2003) (initiation of charges based on information from a "vengeful tipster" was "less than laudable," not vexatious as a matter of law), *and* United States v. True, 250 F.3d 410, 425–26 (6th Cir. 2001) (antitrust prosecution not sufficiently vexatious where underlying offense supported by ample probable cause), *and* United States v. Gilbert, 198 F.3d 1293, 1304-05 (11th Cir. 1999) (reversal of conviction for expiration of statute of limitations insufficient to warrant recovery), *and* United States v. Schneider, 289 F. Supp. 2d 328, 334-35 (E.D.N.Y. 2003), *aff'd*, 395 F.3d 78 (2d Cir. 2005) (Hyde claim properly denied after acquittal where prosecutors had adequate evidence to establish each element of the crimes charged), *and* United States v. Morris, 248 F. Supp. 2d 1200, 1206-07 (M.D. Ga. 2003) (existence of some evidence of defendant's guilt precluded recovery of fees), *and* Catano v. United States, 248 F. Supp. 2d 1158, 1161-62 (S.D. Fla. 2003) (suspicious circumstances surrounding defendant's receipt of money in conspiracy sufficient to overcome claim of vexatious prosecution), *and* United States v. Holstrom, 246 F. Supp. 2d 1101, 1110 (E.D. Wash. 2003) (decision to initiate federal arson charges following decision by state prosecutor to decline prosecution in the same matter did not necessarily constitute vexatious prosecution), *with* United States v. Aisenberg, 247 F. Supp. 2d 1272, 1323-24 (M.D. Fla. 2003), *rev'd in part, vacated in part*, 358 F.3d 1327 (11th Cir. 2004) (parents of missing child subjected to charges based on government's unfounded and borderline obsessive certitude in defendants' guilt, prolonged tape recording based on warrant issued pursuant to affidavits containing knowingly false allegations, failure to continue seeking other leads despite complete lack of inculpatory evidence, offering knowingly perjured testimony, and fabricating incriminating evidence allegedly obtained from completely unintelligible tape recordings, constituting egregious prosecutorial misconduct such that defendants prevailed on Hyde Amendment claim with damages far in excess of EAJA fee maximums (on appeal, the 11th Circuit affirmed the award, but greatly reduced it in order to comply with EAJA standards)), *and* United States v. Knott, 106 F. Supp. 2d 174, 179-80 (D. Mass. 2000) *aff'd in part, rev'd in part*, 256 F.3d 20 (1st Cir. 2001) (Clean Water Act prosecution was vexatious where government lacked credible evidence, failed to make *Brady* disclosure until specifically requested to do so, and agents harassed corporate employees during search), *and* United States v. Chan, 22 F. Supp. 2d 1123, 1127-28 (D. Haw. 1998) (government's refusal to pay defendant's court ordered restitution to crime victim out of the funds defendant forfeited to the government constituted vexatious misconduct), *and* United States v. Gardner, 23 F. Supp. 2d 1283, 1292 (N.D. Okla. 1998) (dismissal of charges, both with and without prejudice, sufficient to support award of fees, in keeping with statutory purpose "to deter vexatious government conduct").

[95] *See Aisenberg*, 247 F. Supp. 2d 1272.

defendant may have difficulty procuring.[96] Second, and more importantly, prosecutorial misconduct rising to this level is exceedingly rare, and cases like *Aisenberg*, *Gardner*, and *In re Andrew Thomas, et al.* are aberrations, representing the exception, not the rule. Most prosecutors are true ministers of justice, and adhere to the principles espoused in *Berger v. United States*:[97] They regularly strike hard blows, but never foul ones.[98]

II. Prosecutorial Misconduct: Civil Injury or White-Collar Crime?

A. The Increasing Federalization of White-Collar Crime.

In recent years, Congress has promulgated numerous criminal statutes governing so-called "white-collar crimes,"[99] or "those classes of non-violent illegal activities which principally involve traditional notions of deceit, deception, concealment, manipulation, breach of trust, subterfuge, or illegal circumvention."[100] Essentially, white-collar is any non-violent offense involving dishonesty, motivated by a desire for personal gain.[101] Many of these crimes, such as bank fraud,[102] can be incredibly devastating to numerous victims and certainly warrant criminal sanctions. However, "[a] great many white-collar cases involve attempts to deceive the government about a range of matters, including compliance with regulatory requirements, entitlement to government jobs, privileges, or

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[96] *See* Nathan & Massaro, *supra* note 42, at 5.

[97] 295 U.S. 78 (1935).

[98] Charlton, *supra* note 12, at 2 (referencing *Berger*, 295 U.S. at 88 ("The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but *that justice shall be done*. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, *while he may strike hard blows*, *he is not at liberty to strike foul ones*. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.") (emphasis added)).

[99] *See generally* Ehrlich, *supra* note 4.

[100] Tony G. Poveda, *White-Collar Crime and the Justice Department: The Institutionalization of a Concept*, 17 CRIME, L. & SOC. CHANGE 235, 241 (1992) (quoting U.S. DEP'T OF JUSTICE, NATIONAL PRIORITIES FOR WHITE-COLLAR CRIMES 5 (1977)).

[101] Since the term was coined over sixty years ago, the definition of white-collar crime has changed many times. For the purposes of this article, I will limit my definition to non-violent crimes involving dishonesty, typically motivated by personal gain or profit. For a comprehensive analysis of the evolution of the term "white-collar crime," see Stuart P. Green, *The Concept of White-Collar Crime in Law and Legal Theory*, 8 BUFF. CRIM. L. REV. 1 (2002).

[102] 18 U.S.C. § 1344 (2007).

program benefits, and monies owed to or by the government."[103] Regardless, the United States Code is now filled with thousands of malum prohibitum white-collar crimes, many more than gave Justice Jackson pause in 1940, and meaningful reform is, at best, a distant prospect.[104]

B. Prosecutorial Misconduct as a White-Collar Crime

Although "the Hyde Amendment provides courts with an opportunity to use judicial review to guide prosecutorial discretion objectively,"[105] its vague standards,[106] limited effectiveness,[107] subjective applicability,[108] and nominal financial remedies[109] have rendered it undesirable, unworkable, and largely inoperative. Although vexatious prosecution is admittedly uncommon, when it does occur, the result is undeniably catastrophic. With the Hyde Amendment largely innocuous, its deterrent effect against prosecutorial misconduct is de minimis at best. So what, if anything, can be done to prevent and/or redress egregious prosecutorial misconduct, such as that perpetrated by Andrew Thomas and his deputies?

With the supervisory power doctrine virtually toothless, sovereign immunity preventing most tort actions, and disciplinary action doing little to make an aggrieved defendant whole, supplemental proceedings seem to be the most viable solution.[110] "One recommendation is to give the grand jurors independent legal counsel and thereby eliminate the jury's reliance on the prosecutor's legal advice—advice possibly tied to the prosecutor's stake in the outcome of the proceeding."[111] However, this suggestion ignores the fact that independent counsel would have little more power to prevent or remedy most vexatious tactics, such as suborning perjury, than the grand jury itself, not to mention that the addition of an extra layer of

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[103] O'SULLIVAN, *supra* note 67, at 7. Susan Ehrlich suggests that many of these crimes are enacted in order "to bring votes to politicians at election time." Ehrlich, *supra* note 4, at 826; *see also* MICHAEL TONRY, THINKING ABOUT CRIME: SENSE AND SENSIBILITY IN AMERICAN PENAL CULTURE vii–x (2004) (arguing that our society's crime control model has grown out of control due to moral panic incited by "pusillanimous politicians").

[104] *See generally* Robert Joost, *Federal Criminal Code Reform: Is it Possible?*, 1 BUFF. CRIM. L. REV. 195 (1997).

[105] Singband, *supra* note 19, at 2003.

[106] *Id.* at 1997–99.

[107] *Id.* at 1994–96.

[108] *Id.* at 1999–2002.

[109] *Id.* at 1996–97.

[110] Henning, *supra* note 5, at 45–47.

[111] *Id.* at 46 (citing Renée B. Lettow, Note, *Reviving Federal Grand Jury Presentments*, 103 YALE L.J. 1333, 1361 (1994).

procedure would likely slow the entire process.[112] "[R]eforms that focus on refining the grand jury's accusatory role . . . ignore the core issue of making prosecutors accountable for their misconduct."[113]

So if accountability is the key to preventing and redressing misconduct, then the Hyde Amendment, though ineffective, seems to be on the right track. If the courts could develop a more workable construction of Hyde Amendment standards, perhaps it would be more influential. However, two problems come to mind. First, in the early years of Hyde Amendment actions, Dick Deguerin and Neal Davis predicted that as the litigation grew beyond its infancy, we would develop a better understanding of its underlying legal principles and the law's "impact on frivolous and malicious prosecutions."[114] Unfortunately, more than a decade later, "it remains to be seen whether 'the breath of accusation' will continue resulting in 'lame acquittal.'"[115] Second, if we are looking for personal accountability in cases of prosecutorial misconduct, then any supplemental proceeding that redresses individual misconduct from the coffers of the wrongdoer's employer, rather than from the wrongdoer himself, misses the mark entirely.

This leads me to my suggestion. Prosecutorial misconduct constitutes a non-violent offense motivated by a desire for personal gain, such as public recognition, adversarial competitiveness, or professional advancement. Its victims, like Judge Gary Donahoe, suffer devastating intangible injuries. So if known vexatious prosecution, like that perpetrated by Andrew Thomas, bears such uncanny similarities to other non-violent offenses motivated by personal gain, then does not it seem like a proper white-collar crime? Why, then, should such criminal conduct not be punishable like so many other white-collar offenses, by fines and/or jail time proportionate to the injuries inflicted? Perhaps this would generate the desired personal accountability—or even a mild deterrent effect discouraging vexatious tactics in advance.

Such an approach would predictably foster as much, if not more, opposition than the Hyde Amendment itself did. The most significant challenge to a criminalization of prosecutorial misconduct would likely be "its potential 'chilling effect' on federal prosecutors, especially in regard to crimes where the government has to rely on witnesses who often are reluctant to testify, such as child abuse and pornography."[116] However, if

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[112] *Id.* at 46–47.

[113] *Id.* at 47.

[114] Deguerin & Davis, *supra* note 47, at 33.

[115] *Id.* (quoting PERCY BYSSHE SHELLEY, THE CENCI (1819)).

[116] United States v. Gilbert, 198 F.3d 1293, 1300–01 (11th Cir. 1999) (citing 143 CONG. REC. H7786–04, H7793 (daily ed. Sept. 24, 1997) (statement of Rep. Rivers)

the history of the Hyde Amendment is any indication, vexatious prosecutions will continue to "generally involve[] white collar criminal charges, including bank fraud, import violations, government program bribery, and tax evasion."[117] Moreover, the burden of proof in a criminal charge of prosecutorial misconduct, like other criminal proceedings, would have to be "beyond a reasonable doubt," even higher than the Hyde Amendment's already lofty standard. Furthermore, attentive legislative drafting would ensure that the standard is workable, uniform, and easy to apply. The requisite mens rea for the offense would most likely have to be *knowing* prosecutorial misconduct, which would alleviate prosecutors' fears that accidental errors arising from reluctant witnesses could lead to a criminal sanction. In fact, the Hyde Amendment already addresses this concern by precluding recovery in cases of negligent misconduct. Thus, there will be no legitimate chilling effect on federal prosecutions in response to the criminalization of known prosecutorial misconduct.

Another criticism might be that criminal sanctions, like disciplinary actions, constitute mere retributive justice and would not actually redress the serious harms inflicted by frivolous prosecution. However, potential criminal penalties should have some deterrent value, effectively preventing misconduct before it becomes a problem. Additionally, criminal penalties could include orders to make restitution, which, unlike Hyde claims that are limited to an award of reasonable attorney's fees and other litigation expenses, could redress some of the other consequences of vexatious prosecution, such as financial injuries resulting from a collateral loss of reputation, good will, or professional licenses.

Finally, people may question the severity of threatening prosecutors with jail time for misconduct. However, the potential sentence does not have to be very high to accomplish goals of personal accountability and deterrence. Even a misdemeanor sentence could be enough to make a prosecutor considering a bad faith strategy to think twice, especially considering the collateral impact it would have on one's employment and professional reputation before the bar. Moreover, by requiring a knowing mens rea for the offense, the charge will likely never be raised against any but the most infamous offenders. Considering the deplorable consequences of an unwarranted criminal prosecution,[118] the comparatively minor penalties faced by violating a misdemeanor criminal offense,[119] the need for meaningful redress of these rare but shocking

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(Congressman Rivers challenged the Hyde Amendment under this same theory)).

[117] Henning, *supra* note 5, at 54–55.

[118] *See* Section I, *supra*.

[119] Federal misdemeanor crimes typically carry a maximum potential sentence of roughly six months. *See* POSTCONVICTION REMEDIES § 40:2 (Westlaw 2011).

offenses, and the fact that such a criminal charge would fit perfectly into our modern conceptions of appropriate white-collar criminal prosecution,[120] I urge the legislature to consider enacting a law criminalizing known prosecutorial misconduct, at least before the grand jury.

Conclusion

Unfortunately, considering the significant opposition the Hyde Amendment faced,[121] and that it was only an amendment providing for limited legal fees to victims of frivolous prosecutions, attempting to redress prosecutorial misconduct with criminal sanctions will undoubtedly generate even greater criticism. Lawyers, and prosecutors especially, tend to be very conservative inasmuch as they do not appreciate change.[122] Opening the door to criminal liability for known prosecutorial misconduct may be a good idea, but it will probably generate so much knee-jerk disapproval that it would take a truly herculean effort to see it through.

In the interim, consider both sides of the equation. On the one hand, you have the occasional prosecutor like Andrew Thomas, who "dishonored, desecrated, and defiled"[123] the trust the public placed in him, whose outrageously unethical conduct had a ruinous impact on the lives of many innocent public servants. On the other hand, prosecutors like that are extremely rare. Most prosecutors are quite selfless public servants who spend their careers living by the motto of Thomas's former office, "let justice be done."[124] I still believe that criminalizing known prosecutorial misconduct is the next step in combating vexatious, frivolous, or bad faith prosecutorial misconduct. However, considering both the massive effort involved in passing such a law and the rarity of these offenses, a cost/benefit analysis indicates the relative inefficacy of working meaningfully toward this goal.

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[120] If the people are subjected to an ever increasing number of white-collar criminal offenses, some of which going so far as to attach criminal liability to negligent behavior, then it only makes sense to redress known prosecutorial misconduct, a near perfect archetype of white-collar crime, by criminalizing this atrocious behavior and providing for restitution to victims. *Cf.* Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 716 (2005); Stuart P. Green, *Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533 (1997).

[121] *See generally* 143 CONG. REC. H7786–04 (daily ed. Sept. 24, 1997).

[122] Paul K. Charlton (Former U.S. Attorney for the District of Arizona), Final Lecture Before Arizona State University Law's Spring 2012 Prosecutorial Decision Making Class (Apr. 11, 2012).

[123] *In re Andrew P. Thomas*, *supra* note 6, at 245.

[124] *See id.*

Alternatively, I would encourage my fellow prosecutors to always remember their roles as ministers of justice. Injuries caused by prosecutorial misconduct are easy to avoid if we just remember to listen to the dictates of our conscience.[125] Moreover, "good leadership reminds even the veteran prosecutors that their goal is not to seek a conviction, but do what is right."[126] Accordingly, one prosecutor's example might just have a comparable preventative effect on another's misconduct.

[125] *See generally* R. Michael Cassidy, *Character and Context: What Virtue Theory Can Teach Us About a Prosecutor's Ethical Duty to "Seek Justice"*, 82 NOTRE DAME L. REV. 635 (2006) (Aristotelian ethics argument for resolving the most difficult questions in prosecutorial ethics by relying on individual conscience and personal morality).

[126] Charlton, *supra* note 12.

PROVOCATION EXCUSE: USING INTERNATIONAL LAWS AND NORMS TO GIVE PERSPECTIVE IN THE DOMESTIC SPHERE

By Erin Iungerich*

Introduction

"It effectively provides a defence for lashing out in anger, not just any anger, but violent, homicidal rage. It rewards lack of self-control by enabling an intentional killing to be categorised as something other than murder."[1] Those were the words of New Zealand's Justice Minister Simon Power on why he introduced a bill to abolish the provocation excuse in his country. The bill passed in New Zealand's Parliament by a vote of 116 to five.[2] When it was announced the five opposing members would vote against the bill, members supporting the bill shouted "shame" at those opposing.[3]

The visceral reaction of politicians came against the backdrop of a University employee claiming he was provoked into stabbing his ex-girlfriend 216 times.[4] The experience of New Zealand is not unique, however. The case of *People v. Merel* [5]provides a reason to dislike the use of the provocation partial excuse in general, and homo- and transphobic applications of the excuse in particular.

Jose Antonio Merel and Michael William Magidson were charged in the death of Gwen Araujo, a transgender woman. Both Merel and Magidson had sexual relations with Araujo. There were discussions about Araujo's gender between the defendants and their friends. The court notes

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[1] Crimes (Provocation Repeal) Amendment Bill, [2009] 656 NZPD 5646 (N.Z.) [hereinafter *Provocation Repeal*] (Statement of Hon. Simon Power) *available at* http://www.parliament.nz/en-nz/pb/debates/debates/49HansD_20090818_00001219/crimes-provocation-repeal-amendment-bill-—-first-reading.

[2] *Provocation Defence Abolished*, THE NEW ZEALAND HERALD (NOV. 27, 2009), http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10611973.

[3] *Id.*

[4] *Id.*

[5] *People v. Merel*, A113056, 2009 WL 1314822 (Cal. Ct. App. May 12, 2009).

that in one discussion, the defendants talked about "men who dressed as woman [sic] and 'l[ed] men into sex.'"[6] At one point, Magidson attempted to feel Araujo's genitals and breasts, and Araujo pushed his hand away[7] (one might wonder if at that point Araujo would have been justifiably enraged at the unwanted sexual advance of Magidson to meet the provocation excuse standard, but this article will not discuss that point). Finally, after a night of drinking, Merel, Magidson, and their friends decided to confront Araujo.[8] At one point, Merel was alleged to say, "I swear if it's a man, I'm going to fucking kill him."[9] The fact Araujo was referred to as "it" indicates something about the mindset of her attackers. After forcing Araujo to submit to an invasive inspection, and discovering Araujo was a transgender female with genetic male genitalia, Merel purportedly began crying and said, "I can't be fuckin' gay."[10] The defendants went on to beat Araujo with a can, a frying pan, a fist, a knee, tied her up with rope, wrapped her in a blanket, beat her with a shovel, and then buried her in a hole.[11] The defendants were allowed to make an argument of provocation to the jury.[12]

I relate the story of Gwen Araujo to give the discussion of provocation defense some perspective. As Joshua Dressler notes in his well-thought out article, "[i]n the ordinary provocation case, for example, when the provoker spits in another's face, uses insulting racial epithets, wrongs the individual by assaulting him, or commits some harm to a loved one, the provoker sends a disparaging message . . . or commits a seeming injustice."[13] While we may understand a defendant becoming enraged at a perceived insult, seeming injustice, or unwanted advance, we must keep in mind the kinds of brutal acts perpetrated by defendants who wish to use the provocation defense. In return for Gwen Araujo's perceived wrong, which was apparently not disclosing her genital status to the defendants, she was brutally beaten, then dumped in a hole.

The question is not whether such situations as the Araujo case can enrage; the provocation excuse exists because they can. Rather, this article will not explore whether such situations should enrage; that is a social question beyond my scope. What question this article will explore

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[6] *Id.* at *2.
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.* at *3.
[11] *Id.* at *3-*5
[12] *Id.* at *9.
[13] Joshua Dressler, *Why Keep the Provocation Defense?: Some Reflections on A Difficult Subject*, 86 Minn. L. Rev. 959, 972 (2002).

and attempt to answer is whether a jury should be able to mitigate a crime through the provocation excuse.

Part I will give a very brief overview of the current state of provocation law in the United States. Part II will examine international norms and treaties, along with solutions in other common law countries, to the provocation excuse problem. Part III will look at proposed solutions in the domestic legal system. Part IV will put forward using international norms and treaties to formulate a role for juries in provocation mitigation. I will discuss the provocation excuse as a whole, with reference to specific problems of homosexual and trans panic, and violence against women as ways to understand the flaws in provocation theory. My proposal is that the United States' legal system take into account international human rights ideas which could be used to help juries frame their deliberation on whether to mitigate a murder charge based on provocation. I suggest juries be instructed they may consider provocation in a murder trial, but if, and only if, the jury finds doing so would not violate the victim's human dignity or right to security of person, and respects the victim's right to private life.

I. Description of the Current Provocation Defense

A. American Common Law

A typical common law statute regarding the distinction between murder and manslaughter can be found in 18 U.S.C. § 1112: "(a) Manslaughter is the unlawful killing of a human being without malice. It is of two kinds: voluntary – Upon a sudden quarrel or heat of passion."[14] The presence of heat of passion is viewed as removing the malice requirement for murder.[15] Common law provocation uses a "reasonable man" standard to determine whether a sudden quarrel or heat of passion caused sufficient provocation to eliminate the malice consideration for murder.[16] The common law has further narrowed provocation defense beyond the reasonable man standard. Typically, courts will limit sufficient provocation to certain scenarios, including unjustified physical attack, mutual combat, certain extreme threats, adultery, or assault of a close relative.[17] Further, there must have been no time between the provocation and the killing for a reasonable person to have "cooled off."[18]

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[14] 18 U.S.C. § 1112 (2013).
[15] PAUL H. ROBINSON, CRIMINAL LAW DEFENSES §102 (2012).
[16] *Id*.
[17] *Id*.
[18] *Id*

B. Model Penal Code

The Model Penal Code lays out a provocation rule which represents a departure from traditional common law rules of sudden quarrel or heat of passion.[19] Instead, the MPC uses a standard of "extreme mental or emotional disturbance for which there is reasonable explanation or excuse."[20] The MPC further modifies the common law rule by stating, "The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be."[21] There are four important effects of the MPC's broader language: 1) the victim does not have to be the source of the disturbance; 2) the common law tradition of limited circumstances is removed; 3) the jury does not use a reasonable person standard to determine whether there is adequate provocation, instead examining the facts from the point of view of someone in the defendant's situation; and 4) "the adequacy of the provoking conditions is to be determined not according to the circumstances as they are, but as the defendant believes them to be."[22] In the explanatory note to the MPC manslaughter rule, the authors state, "The traditional requirement of a sudden heat of passion based on adequate provocation is broadened by the Model Code, though the new version still retains both objective and subjective components."[23]

C. Example of Statutory Exception in the United States

The state of Maryland retains much of the common law qualifications for murder and manslaughter, with absence of "malice aforethought" reducing murder to manslaughter.[24] Also, Maryland uses a "heat of passion" standard for reducing murder to manslaughter, with the additional common law reasonable man standard and no cooling off period.[25]

However, Maryland makes one important statutory exception to their general provocation defense. In 1997, Maryland passed a change to their manslaughter statute, eliminating adultery as adequate provocation. As the statute currently reads, "The discovery of one's spouse engaged in sexual intercourse with another does not constitute legally adequate

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[19] *See generally* MODEL PENAL CODE § 210.3 (2013)
[20] *Id.*
[21] *Id*.
[22] ROBINSON, *supra* note 15.
[23] MODEL PENAL CODE, Pt. II, Art. 210 editor's note (2013).
[24] Parker v. State, 7 Md. App. 167, 199, 254 A.2d 381, 398 (1969).
[25] McKay v. State, 90 Md. App. 204, 212, 600 A.2d 904, 908 (1992).

provocation for the purpose of mitigating a killing from the crime of murder to voluntary manslaughter even though the killing was provoked by that discovery."[26]

D. Salient Provocation Cases in the United States

One of the most-discussed cases involving the provocation excuse is *People v. Casassa*, a New York case involving a defendant who claimed romantic rejection by the victim provoked the defendant into killing her.[27] The defendant had broken into the victim's apartment building to listen to her conversations at home.[28] Eventually, the defendant broke into the victim's apartment with gifts, which were subsequently rejected by the victim.[29] The defendant then "stabbed [the victim] several times in the throat, dragged her body into the bathroom and submerged it in a bathtub full of water to 'make sure she was dead.'"[30] After being detained at the victim's apartment, the defendant confessed to the crime, giving police details about the murder.[31] At trial, the defendant raised the provocation excuse under New York's criminal statutes, which followed the Model Penal Code ("MPC") "extreme emotional disturbance" standard, requiring a "reasonable explanation or excuse."[32]

In its analysis of the case, the Court of Appeals of New York explored the provocation excuse as put forth in the MPC, and New York law. Finding the only substantial difference between the New York statute and the MPC was that New York placed the burden of proof on the defendant the court went on to examine the objective and subjective components of the excuse. The court found the first branch of the excuse, acting under the influence of extreme emotional disturbance, was a subjective test; the determination is merely whether the defendant was, in fact, extremely emotionally disturbed.[33] The second branch of the excuse was described as an objective test: whether there was a "reasonable explanation or excuse."[34] However, according to the court, the test is in fact an entirely subjective one.[35] The court uses a test which examines the internal view of the situation that the defendant had at the time of the

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[26] MD. CODE ANN., CRIM. LAW § 2-207 (West 2013).
[27] *People v. Casassa*, 404 N.E.2d 1310, 1312 (1980).
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.* at 1314.
[33] *Id.* at 1316.
[34] *Id*.
[35] *Id.*

killing, regardless of whether that view reflected reality.[36] The court sums up its view on the provocation excuse in the MPC and New York law: "what the Legislature intended in enacting the statute was to allow the finder of fact the discretionary power to mitigate the penalty when presented with a situation which, under the circumstances, appears to them to have caused an understandable weakness in one of their fellows."[37]

The best-known case involving homosexual panic as a defense is probably the Matthew Shepard case which took place in Laramie, Wyoming.[38] Matthew Shepard was a 21 year-old student who left a bar in Laramie with two other young men, and was subsequently beaten with a .357 magnum handgun, tied to a fence, and left for dead.[39] One of the men accused of the crime was Aaron J. McKinney.[40] McKinney's attorney told jurors the reason McKinney killed Shepard was that he entered an "emotional rage" after Shepard made sexual advances toward McKinney.[41] Less than a week later, the trial judge disallowed the use of a "gay panic" excuse, stating the excuse amounted to attempt to show temporary insanity or diminished capacity.[42] The judge was quoted as saying "[e]ven if relevant . . . the evidence will mislead and confuse the jury."[43] Interestingly, Wyoming has a fairly typical common law manslaughter statute, which states "A person is guilty of manslaughter if he unlawfully kills any human being without malice, expressed or implied, . . . (i) Voluntarily, upon a sudden heat of passion."[44] The Wyoming Supreme Court has also found "A homicide is manslaughter if the defendant at the time of the killing was incapable of cool reflection as a result of provocation sufficient to produce such a state of mind in a person of ordinary temper."[45]

The facts of *People v. Merel* have already been related in the introduction to this article.[46] The defendant in *Merel*, unlike the defendant tried for Matthew Shepard's murder, was allowed to use provocation as an

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[36] *Id.*

[37] *Id.* at 1317.

[38] Michael Janofsky, *A Defense to Avoid Execution*, NEW YORK TIMES (Oct. 26, 1999), *available at* http://www.nytimes.com/1999/10/26/us/a-defense-to-avoid-execution.html.

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] Michael Janofsky, *Judge Rejects 'Gay Panic' As Defense in Murder Case*, NEW YORK TIMES (NOV. 2, 1999), http://www.nytimes.com/1999/11/02/us/judge-rejects-gay-panic-as-defense-in-murder-case.html?ref=aaronjamesmckinney.

[43] *Id.*

[44] Wyo. Stat. Ann. § 6-2-105 (West, Westlaw through 2013 General Session).

[45] *Searles v. State*, 589 P.2d 386, 389 (Wyo. 1979).

[46] *See Merel*, *supra* note 5.

argument for the jury.[47] Similarly to Wyoming, California's definition of manslaughter includes mitigation of homicide through lack of malice and "upon a sudden quarrel or heat of passion."[48] As in the New York statute, the burden of proving mitigating factors falls on the defendant.[49] In instructions to the jury, the trial judge advise the jury a "reasonable man" standard should be applied to the provocation defense: "no defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, unless further the jury believe that the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable man."[50] The instructions also included the requirement that "the exciting cause must be such as would naturally tend to arouse the passion of the ordinarily reasonable man."[51]

II. Foreign and Transnational Solutions

A. New Zealand

As mentioned in the introduction, New Zealand abolished its provocation partial excuse laws in 2009.[52] Before taking up debate on the Bill, the New Zealand Law Commission published an in-depth report on the status of the excuse, and its recommendations based on flaws of and reasons to retain the excuse.[53] I include the Commission's findings because of its influence over the parliamentary debate.

The report contains a brief discussion of the history of the excuse as a "retaliatory justification" for four specific affronts, "a gross insult; seeing a friend attacked; seeing an Englishman unlawfully deprived of liberty; and catching someone in the act of adultery with the defendant's wife."[54]

After its historical analysis particular to New Zealand, the Commission set out its argument for abolition of the partial excuse. The report points to four fundamental flaws in the provocation concept:

1. The excuse does not fulfill its stated purpose of recognizing human frailty, because it does not take into account diminished capacity

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[47] *Id.*

[48] Cal. Penal Code § 192 (West, Westlaw through Ch. 3 of 2013 Reg.Sess.).

[49] Cal. Penal Code § 189.5 (West, Westlaw through Ch. 3 of 2013 Reg.Sess.).

[50] *Merel*, *supra* note 5.

[51] *Id.*

[52] *Provocation Repeal, supra* note 1.

[53] *See generally*, NEW ZEALAND LAW COMMISSION, REPORT 98: THE PARTIAL DEFENCE OF PROVOCATION (2007).

[54] *Id.* at 19.

2. It "bifurcate[es]" what the jury must consider by at once taking into account the defendant's perceptions of the gravity of a provocation, but an objective standard for self-control
3. "[I]t assumes that there is in fact such a phenomenon as a loss of self-control"
4. It assumes an ordinary person would react to a grave provocation with uncontrolled homicidal violence[55]

The first flaw set out by the Commission is perhaps its weakest argument in favor of abolishing the partial excuse. Legislation must not cure all possible ills in order to be valid. A partial excuse for provocation does not necessarily need to solve the related, but separate, issue of diminished capacity for decision-making in order to be an effective legal tool.

The Commission put forward an intriguing argument when it examined loss of self-control in real-world settings. It states in its report "[i]t is not at all clear that there is in fact such a phenomenon as a loss of self-control."[56] The Commission argues even if loss of self-control does exist, "it is an abomination that a judge, defence counsel, or members of a jury can seriously contend that an ordinary person . . . might lose control and kill . . .. Only the most extraordinary person could kill in such circumstances."[57] This argument makes at least intuitive sense. After all, billions of people around the world are insulted every day; millions perhaps are grievously offended. And yet, how many of these grievously offended people are actually driven into such a rage that they assault the other person, to say nothing of kill the other person in a homicidal rage?

The report goes on to note, as others have (two of whom will be discussed later)[58], that the excuse favors the interests of heterosexual men.[59] The report makes note of the disparate impact on women and homosexual men, as well as the male-centric theory behind the excuse that it can be used "in situations where [men] deem their masculinity to be fundamentally threatened."[60] The Commission does point out, however, there is an argument to be made that the law should recognize "a degree of culpability short of murder,"[61] and that a majority of common law

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[55] *Id.* at 42.
[56] *Id.* at 45.
[57] *Id.* at 46.
[58] *See infra* Part III.B.
[59] *Id.* at 48-49.
[60] *Id.* at 49.
[61] *Id.* at 51.

countries still have a provocation defense.[62] Two of those common law countries will be discussed below.

In its discussion of whether the judge or jury should decide the question of provocation, the Commission includes two compelling arguments: First, that if 12 members of the community decide the defendant is guilty of a charge not as severe as murder, the community as a whole is more likely to accept a reduced sentence.[63] Second, that if faced with the prospect of only being able to decide between guilt for murder and an acquittal, jurors who believe there is a partial excuse will choose to acquit rather than find the defendant guilty.[64] The second argument more compelling than the first. It is not apparent that the community as a whole will accept a jury's verdict; in fact, several examples of a community's puzzlement with jury verdicts spring to mind (one of the most apparent might be the public reaction after the Rodney King trial). However, jury nullification is a particular thorny issue. It may make some sense to give a jury more options than guilt or acquittal, because in the case of provocation, acquittal seems especially perverse to the demands of justice.

In its parliamentary debate on the topic, the Minister of Justice, Simon Power, specifically referred to the Commission's report, emphasizing its importance in the legislative process.[65] Mr. Power made several important policy arguments in his speech to Parliament. Practically speaking, jurors may find it difficult to understand the instructions given to them which should frame their deliberation. In relating to Parliament input from a judge, the judge advised Mr. Power "'most have seen the glazed look in the jurors' eyes' following instructions from the bench in this regard."[66] This is as important a point to remember as jury nullification. If a jury does not understand what it is to deliberate, a just outcome is more a matter of luck than of careful examination of the facts.

On the broader message of the provocation excuse to the public, Mr. Power emphasized two key points: First, the message of ordered society should be that people should not resort to violence as an outlet for anger; second, victims and their families should be as important a consideration as the reasonableness of the defendant. He proposes that "it is inappropriate and undesirable that anger be singled out as an overriding mitigating factor that could be seen to justify conviction for manslaughter

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[62] *Id.*
[63] *Id.* at 52.
[64] *Id.*
[65] *Provocation Repeal, supra* note 1.
[66] *Id*.

rather than murder."[67] While it may be inaccurate to say that only anger is grounds for reduction from murder to manslaughter, his point is certainly well taken that it has been used as a defense in particularly egregious cases. Also, it is apparent from the amount of public research and debate on the topic in multiple countries, the legal community and occasionally the public at large sees the use of anger as an excuse to be, at least in some circumstances, problematic at best.[68]

As I stated in the introduction, I believe it critically important to keep in mind the level of violence done to victims, and the underlying justifications for that violence when assessing the provocation excuse. As Mr. Powell stated to Parliament: "This partial defence enables the accused to besmirch the character of his or her victim. Needless to say, the victim cannot defend his or her legacy. Repeal of the partial defence would make factors such as the alleged sexual behaviour of the victim less relevant at the trial."[69] While there are certainly reasons besides provocation to introduce such evidence about the victim, the provocation excuse makes the victim an easy target. The characteristics of the victim are likely to become an essential part of the defense, because the defendant has a motive to make the victim's behavior as shocking as possible to meet the requirement that a reasonable person in the defendant's situation would have become enraged. Therefore, large amounts of court time and publicity can be devoted to attacks on someone who has been violently killed.

While Mr. Powell focused on policy reasons why the excuse should be abolished, his colleagues Lianne Dalziel and Charles Chauvel discussed two other reasons why juries should not be faced with the prospect of evaluating the provocation defense. Mr. Chauvel and Ms. Dalziel both discussed the fact that the victim is not able to testify at trial; that the jury invariably hears only one side of the victim's actions leading up to his or her death. As Mr. Chauvel compellingly stated, "All that the jury ever hears is the killer's account of the victim's last moments, and inevitably the account is coloured; it is designed to paint the victim as somehow morally inappropriate, and deserving, even, of what eventually happened to him or her."[70] It is important to remember any jury can be swayed by receiving only one side of the story. In New Zealand, Parliament decided

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[67] *Id*.

[68] *See, e.g.*, NEW ZEALAND LAW COMMISSION, REPORT 98: THE PARTIAL DEFENCE OF PROVOCATION 18 (2007); LENNY ROTH & LYNDSEY BLAYDEN, N.S.W. PARLIAMENTARY RESEARCH SERVICE, PROVOCATION AND SELF-DEFENCE IN INTIMATE PARTNER AND SEXUAL ADVANCE HOMICIDES: BRIEFING PAPER NO. 5/2012 ii (2012).

[69] *Provocation Repeal, supra* note 1.

[70] *Id*. (Statement of Hon. Charles Chauvel).

to repeal the provocation excuse at least in part because it was impossible for the jury to understand the victim as a whole person. Ms. Dalziel gave another, broader, reason for juries to be removed from decisions about provocation: "it is an invitation to jurors to dress up their prejudices as law."[71] The allegation is especially disturbing because, if true, a jury should not be trusted to make decisions about provocation excuses, because they have a predisposition to denounce the victim by excusing the killer. This may be the reason underlying New Zealand's decision to repeal the provocation defense. In light of their experience with highly public trials, the government of New Zealand decided that, along with solid public policy arguments, jurors simply could not be trusted to make just decisions because of deeply imbedded prejudices.

B. United Kingdom

Unlike New Zealand, the United Kingdom repealed their common law provocation defense, but replaced it with a statutory regime leaving in place the loss of control concept.[72] Under the U.K.'s Act, a defendant cannot be convicted of murder if he (or, rarely, she) suffered from a loss of self-control that had a "qualifying trigger," and that a reasonable person "in the circumstances" of the defendant *might* have acted in a similar way.[73] Additionally, the loss of self-control does not have to be sudden.[74] A qualifying trigger includes something "done or said (or both)" which "caused [defendant] to have a justifiable sense of being seriously wronged."[75] The legislation also stipulatedwhen examining whether a qualifying trigger is present, "the fact that a thing done or said constituted sexual infidelity is to be disregarded."[76]

But then the courts severely limited the statutory exclusion for sexual infidelity as a qualifying trigger. The Court of Appeal for England and Wales considered the exception, and found that it was not as simple as it appears on its face. The court's reasoning walked through the common law notion that "sexual infidelity has the potential to create a highly emotional situation" and that it can "produce a completely unpredictable, and sometimes violent response."[77] The court asked whether intentional

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[71] *Id*. (Statement of Hon. Lianne Dalziel).
[72] Coroners and Justice Act, 2009, c. 25, Part 2, Chapter 1 (Eng., Wales, N. Ir.).
[73] *Id*. at § 54.
[74] *Id*.
[75] *Id*. at § 55.
[76] *Id*. at § 55.
[77] R v. Clinton and R v. Parker and R v. Evans, (2012), Court of App of Eng. and Wales (U.K.).

taunts from an unfaithful partner should be ignored,[78] and then went on to examine legislative history. The history was used to help answer the court's question, but also presents an underlying assumption of the theory of provocation: "for a man to be able to say that he killed his wife as a result of sexual infidelity . . . if other factors come into play, the court will of course have an opportunity to consider them."[79] For the court, the statement showed that it may examine sexual infidelity unless infidelity were presented as the exclusive qualifying trigger.[80] It also shows the legislature's assumption that men will use the excuse when they have killed women.

C. United Nations

One of the fundamental flaws with how the provocation defense has been used in some cases is the defendantattempts to strip part of the humanity from the victim; by attempting to get the jury to go along with the defendant's outrage at the cheating spouse, the gay man approaching another man in a bar, the transgender woman who takes off her clothes without first issuing a warning about her genitals, the defendant attempts to paint the victim as something "other," a person more worthy of disgust, or at least disapproval, rather than sympathy and respect. International law is uniquely positioned to give a jury a broad perspective on the importance of viewing everyone as fully human and fully worthy of a respected place in society. International law does not speak directly to the validity of the provocation excuse. It does, however, speak directly to the value of the victims the provocation defense has been used to condemn, and therefore to the need to change how the excuse is used in courts.

The basis for international law within the United Nations system, and a basic starting point for perspective on examining a domestic legal doctrine, is the "recognition of the inherent dignity . . . of all members of the human family."[81] The international human rights system also has provisions that "everyone has the right . . . to security of person."[82] While these sweeping ideals may not speak directly to the validity of a provocation defense, they can give a jury a framework for deliberation. Juries should be reminded in criminal cases where the victim's actions are being impeached that along with defendants' rights, the victim also has basic human rights which can only be violated in the most extreme

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[78] *Id*.

[79] *Id*. (Quoting Hon. Claire Ward, MP).

[80] *Id*.

[81] Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES.217(III), at preamble (Dec., 10, 1948) [hereinafter *UDHR*].

[82] *Id*. at Art. 3.

situations. While not established as law in the United States, this framework of thinking about all people as an equally valuable part of the "human family" helps ensure a jury views the victim as a fully worthy human being. The victim should be viewed as a person with rights, regardless of his or her consensual sexual activity, sexual orientation, or gender identity.

An additional United Nations document which can be used to frame judicial examination or jury debate in provocation situations is the Convention Against Torture (CAT).[83] In some cases where the defense has put forward the provocation excuse, there has been a series of violent acts before the victim died.[84] Under the CAT, "'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as . . . punishing him for an act he . . . has committed or is suspected of having committed."[85] As a California court pointed out, the CAT definition of torture only applies to acts which can be attributed to officials, and is only binding in the United States on those acting under color of law.[86] However, the CAT definition does give additional depth to statutes in the United States. California's statute, for example, defines torture as inflicting great bodily injury "with the intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose."[87] The international norm exemplified by the CAT makes clear torture can be mental as well as physical. A judge or jury should keep in mind that the victim may have suffered tremendous psychological distress prior to death, and that fact should have bearing on the viability of a provocation defense. It should be an incredibly difficult burden to convince a judge or jury that a defendant was provoked into torturing a victim.

D. Europe

The European Convention on Human Rights (ECHR) has language which is more concise than the U.N. Convention Against Torture. The ECHR simply states "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."[88] The European Court of Human Rights firmly established the norm against torture, saying "[a]rticle 3 of

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[83] Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, 1465 U.N.T.S. 85 [herinafter *CAT*.

[84] *See Merel, supra note* 5.

[85] *CAT*, *supra* note 83, at .Art. 1.

[86] *People v. Martinez*, 125 Cal. App. 4th 1035, 1046, 23 Cal. Rptr. 3d 508, 516 (2005).

[87] Cal. Penal Code § 206 (West, Westlaw current through Ch. 3 of 2013 Reg.Sess.).

[88] European Convention on Human Rights art. 3, Sept. 3, 1953 (Council of Europe).

the Convention enshrines one of the most fundamental values of a democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's behavior."[89] Here is an international court recognizing the importance of protecting all victims, regardless of who they are or what they have done, from inhuman or degrading treatment. The Court goes on to give a definition of "degrading" as "arous[ing] in the victim feelings of fear, anguish, and inferiority capable of humiliating and debasing them."[90]

Along with torture, the European Convention on Human Rights contains the idea of respect for private life.[91] It may at first seem difficult to relate respect for private life to a provocation defense situation like that in *Shepard* or *Merel*. However, the European Court of Human Rights has made the following statement about what private life entails: "the concept of private life includes a person's physical and psychological integrity . . . [States] are to maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals."[92] In the European human rights system, states are mandated to protect victims against physical and psychological assault by defendants, including private citizens. The respect for private life along with strong provisions against torturous conduct provides citizens with a bulwark against treatment like that received by Matthew Shepard and Gwen Araujo before their deaths.

III. The Current Debate in the United States

> [W]hen courts permit a jury instruction for voluntary manslaughter in these instances, the defendants' response receives legitimization regardless of whether they ultimately receive a reduced sentence. The mere provision of the jury instructions indicates that the judge believes that the defendant's sentence could be mitigated under the law in light of the unwanted advance.[93]

A. Creating Exceptions within the Doctrine

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[89] Application no. 12694/04, Lacatus and Others v. Romania, 2012 E.C.H.R.

[90] *Id*.

[91] European Convention on Human Rights art. 8, Sept. 3, 1953 (Council of Europe).

[92] Application no. 29525/10, Remetin v. Croatia, 2012 E.C.H.R.

[93] Kavita B. Ramakrishnan, *Inconsistent Legal Treatment of Unwanted Sexual Advances: A Study of the Homosexual Advance Defense, Street Harassment, and Sexual Harassment in the Workplace*, 26 Berkeley J. Gender L. & Just. 291, 316-17 (2011).

Maryland statute, § 2-207, explicitly states spousal adultery is not a mitigating factor in a murder case.[94] The statutory exception is almost exactly like the solution developed in the United Kingdom.[95] In Britain, the statutory exclusion was then strictly limited through court interpretation. [96] The Supreme Court has said on many occasions that a penal statute will be construed strictly.[97] Additionally, there is a tradition of construing statutes which overturn the common law narrowly.[98]

It is entirely possible a Maryland court would make the same exception the Court of Appeals did in Britain. Somewhat mitigating the possibility of a British-style interpretation is the fact that Maryland courts have required no cooling off period, unlike the statute in Britain.[99] Also, a Maryland court recognized that "there are many slings and arrows of outrageous fortune that people either must tolerate or find an alternative way, other than homicide, to redress."[100] While it is possible in Maryland that the statute would not be so strictly construed as to make its provisions as limited as in Britain, the statute does not make provision for cases like *Shepard* or *Merel*, nor does it provide a guarantee that the intent of the legislature will be followed in every case.

In his article *Homophobia in Manslaughter: the Homosexual Advance as Insufficient Provocation*, Robert Mison makes the argument judges as a matter of law should prohibit the use of the provocation defense in "gay panic" cases.[101] For Mison, the provocation defense in such cases focuses on the victim's behavior, rather than the actions of the defendant.[102] Allowing the provocation defense against homosexual victims acts to create a group of citizens denied full protection of the law because of homophobia.[103] Because of such entrenched homophobia on the part of both judge and jury, and to avoid cases of blaming the victim,[104] the problem of misuse of gay panic provocation defense is best solved by eliminating the possibility of the defense being used in such cases.

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[94] MD. CODE ANN., CRIM. LAW § 2-207 (West 2013).

[95] *See* Ramakrishnan, *supra* note 93, at 303-12.

[96] *See id.* at 313-18.

[97] *See, e.g.*, *United States v. Lanier*, 520 U.S. 259, 266, 117 S. Ct. 1219, 1225 (1997); *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 90 (1820).

[98] *See, e.g.*, Staples v. United States, 511 U.S. 600, 605 (1994); *Brown v. Barry*, 3 U.S. (3 Dall.) 365, 367 (1797).

[99] *Bartram v. State*, 364 A.2d 1119 (Md. Ct. Spec. App. 1976).

[100] *Dennis v. State*, 661 A.2d 175 (Md. Ct. Spec. App. 1995).

[101] Robert B. Mison, *Homophobia in Manslaughter: The Homosexual Advance As Insufficient Provocation*, 80 CAL. L. REV. 133, 176-77 (1992).

[102] *Id*. at 147.

[103] *See id.* at 156, 163.

[104] *Id*. at 170-71.

Mison has been criticized for focusing on only the homosexual advance issue to carve out a special exception for only one group.[105] Presumably such an argument would extend to Maryland's statutory exception as well. While I agree that an idea solution would cover the entire provocation excuse realm, I disagree that a proposed solution necessarily has to cover all provocation ground. Focusing on single issues, whether it be homosexual advance or spousal infidelity, can both focus attention and develop solutions tailored to those particular circumstances, without throwing out an entire legal theory. However, there may be an issue with passing such exceptions as part of a legislative regime, given that very few states have a statute like Maryland's.[106]

B. Modification of the Existing Excuse Doctrine

Christina Pei-Lin Chen and Joshua Dressler have both argued for a modification of the provocation defense rather than an exception-based approach. In her well-researched and well-thought-out note, Chen states feminist critique has shown through impact analysis that the provocation defense in non-violent advance cases is extremely gender- and heterosexual-biased, being used almost exclusively by heterosexual men who kill.[107] Women use the defense rarely, since they rarely kill, and when they do, they typically claim to have acted in self-defense.[108] Also, since male heterosexuals do not make advances toward homosexual men, Chen states "male heterosexuals become an insulated class accruing all the benefits attached with no burdens."[109] Transgender victims are left out of Chen's analysis, since she states a critical factor in the use of the defense is the defendant's perception of the victim's gender at the time of the advance.[110]

In contrast to Mison, Chen's proposal is to expand the provocation defense to include killing out of fear, and should only be used in cases where the victim could have invoked the same defense.[111] By using a two-pronged approach, Chen seeks to eliminate the disparate impact on female

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[105] Joshua Dressler, *Why Keep the Provocation Defense?: Some Reflections on A Difficult Subject*, 86 MINN. L. REV. 959, 961 (2002).

[106] Kimberly Wilmot-Weidman, *After A 3-year Fight, Murder Is Finally Murder in Maryland*, CHI. TRIB. (Nov. 23, 1997), http://articles.chicagotribune.com/1997-11-23/features/9711230114_1_spousal-maryland-law-deadly-rage.

[107] Christina Pei-Lin Chen, Note, *Provocation's Privileged Desire: The Provocation Doctrine, "Homosexual Panic," and the Non-Violent Unwanted Sexual Advance Defense*, 10 CORNELL J.L. & PUB. POL'Y 195, 224 (2000).

[108] *Id*. at 225-26.

[109] *Id*. at 224.

[110] *Id*. at 235.

[111] *Id*. at 233.

and homosexual victims of heterosexual male rage.[112] The solution is creative, and would preserve what some see as a valid excuse for killing. The one drawback of the proposal is that it focuses on an expanded use of a problematic excuse, rather than focusing on the rights and value of the victim in a particular instance.

Finally, Joshua Dressler addresses the question of how the excuse can be modified to produce better results. For Dressler, the provocation excuse is a legal recognition that sometimes ordinary people can become so provoked as to kill another.[113] For Dressler, it is important to remember that the provocation must be so severe that "an ordinary person in the actor's circumstances, even an ordinarily law-abiding person of reasonable temperament, might become sufficiently upset by the provocation to experience substantial impairment of his capacity for self-control and, as a consequence, to act violently."[114] Dressler further states that the provocation excuse itself is not biased in favor of one group; rather "[t]he provocation defense is about human imperfection and, more specifically, impaired capacity for self-control."[115]

There are problems with Dressler's argument addressed by the New Zealand law commission, and by Chen's note. First, there is not conclusive evidence that there is such thing as loss of self-control, and second, if there is, it only occurs in the most extraordinary circumstances.[116] In everyday life, ordinary people frequently become angry, and possibly even enraged, but do not enter into a homicidal fit. Second, as Chen's article notes, while the language of the excuse may not in itself be biased toward one group, its effect certainly is.[117] Finally, if the excuse is about recognizing human imperfection, then the imperfection of the victim should be recognized as well. Is a woman who engages in a sexual relationship with a man who is not her husband more imperfect than the husband who kills her? The provocation excuse, if it is about human imperfection, allows the jury to treat imperfect actions by the victim differently than certainly imperfect actions by the defendant.

Dressler argues that the role of the jury is important enough to be retained in provocation cases. Twelve citizens, as members of a community, should be allowed to make the decision on whether a situation reasonably drove a defendant to kill.[118] Dressler would limit removing a

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[112] *Id*. at 231
[113] Dressler, *supra* note 100, at 972-73.
[114] *Id*. at 974.
[115] *Id*. at 978-79.
[116] *See supra* Part I.A.
[117] Chen, *supra* note 102, at 217, 224.
[118] Dressler, *supra* note 21, at 980-81.

jury from the decision making process only in cases such as "assassins, terrorists, and violence-justifying racists."[119] This solution ignores the vast majority of cases where the disparate impact of the excuse is felt. Certainly, it ignores the vast majority of cases in total. Dressler's exception seems to be not really an exception at all. The jury system as it stands, which would be substantially left intact by Dressler's solution, leads to unacceptable results. It is by changing how the jury system operates vis-à-vis the provocation excuse that we can achieve more just results.

IV. Framing the Jury Debate Using Transnational Norms

A. Why Transnational Norms Should Matter

Almost none of the international norms described in Part II are binding on the U.S., and those that do are not applied to private, rather than state action. Even in countries like the United Kingdom, which comes under the European human rights system, the provocation defense is still alive and well.[120] So why should those norms impact the debate regarding the provocation excuse in the United States? International norms help frame the debate for both judge and jury, and emphasize human rights based on the idea of the human family. International human rights law contains standards which are non-derogable.[121] They both embrace and go beyond equal treatment to the central idea of dignity. They hold the state and individuals to human rights standards, giving citizens positive rights and the ability to demand protections from the justice system, not just freedom from state interference.[122] International norms do not replace local law, they augment and work in conjunction with local laws to ensure a just result. Additionally, transnational court decisions can give context and elaboration on judicial or jury review of fundamental rights.

B. Why a Jury Should Hear the Provocation Excuse

To give an idea of what a jury is faced with when beginning to deliberate on provocation defense, here is the partially incomplete quote of the instruction read to the jury in *Merel* from the appellate court decision:

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[119] *Id*. at 997.

[120] *See* supra, Part II.D.

[121] *See CAT, supra* note 83; *UDHR*, *supra* note 81.

[122] *Compare CAT, supra* note 83 *and UDHR*, *supra* note 81 *with* Cal. Penal Code § 206.

> To reduce unlawful killing from murder to manslaughter upon the grounds of sudden quarrel or heat of passion, the provocation must be of the character and degree as naturally would excite and arouse the passion, and the assailant must act under the influence of that sudden quarrel or heat of passion. The heat of passion which will reduce ... a homicide to manslaughter must be such a passion as naturally would be aroused in the mind of an ordinarily reasonable person in [the] same circumstances. A Defendant is not permitted to set up his own standard of conduct to justify or excuse himself because his passions were aroused, unless the circumstances in which the Defendant was placed and [the] facts that confronted him were such as would have aroused the passion of the ordinarily reasonable person faced with the same situation. Legally adequate provocation may occur in a short, or over a considerable period of time.
>
> The question to be answered is whether or not at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause an ordinarily reasonable person of average disposition to [act] rashly, and without deliberation and reflection, and from passion rather than from judgment.
>
> If there was a provocation, whether of short or long duration, but of a nature not normally sufficient to arouse passion, or if a sufficient time elapsed between the provocation and the fatal blow for passion to subside and reason to return, and if an unlawful killing of a human being followed the provocation and had all the elements of murder as I defined it, the mere fact of a slight or remote provocation will not reduce the offense to manslaughter.[123]

This partially incomplete jury instruction is 292 words long. A typical juror would have guilty making sense of the entire quote, not to mention evaluating every part of it based on the facts of the case. Jury instructions must change for practical purposes alone.

The long tradition of the provocation defense is not enough to cling to it when strong public policy of non-violence, non-discrimination, and justice for victims and families is at stake. There is a real danger as

[123] *Merel*, *supra* note 5, at.*9. *See also* CALJIC No. 8.42.

Robert Mison[124] and the New Zealand legislature[125] point out of judges and jurors bringing their prejudices to bear against a victim, especially if those prejudices are an ingrained part of social norms. If we are to keep our reliance on juries playing such a critical role in administering justice, some method must be found to mitigate their prejudice. Transnational norms can assist with the jury process, and work along with local laws to ensure a just result. An example of cooperation between international and state norms was given in the discussion of torture.[126] The court can rely on its state statute for technical definitions, while allowing international norms a place in framing the jury debate, and judicial deliberation.

C. Proposed Jury Instruction Using Transnational Norms

I propose a simple jury instruction incorporating local and transnational ideas. Instructions would be given to the jury that they may find a defendant not guilty of murder, but guilty of the lesser charge of manslaughter if, and only if, such a finding would not violate the victim's dignity, and sufficiently respects the victim's right to security of person and respect for private life as part of the human family. Courts should at their discretion give a brief background on dignity, security of person, and respect for private life as those terms are understood within the state, and within the international human rights framework. This would allow the community to be part of the justice process. Also, it would give juries additional guidance which may help make them aware of subconscious prejudice. Through the action of all twelve jurors, such an instruction could also frame deliberation in the jury room, potentially dealing with the issue of jury nullification of murder charges. Finally, such an instruction would take into account the rights of victims and their families.

To avoid wholly unjust verdicts, I would propose the following change to the current provocation defense: a judge should make a determination whether—under local law, in conjunction with globally recognized standards—the victim was tortured before death, including being subjected to inhuman or degrading treatment or punishment. Such a judgment would be regardless of the victim's behavior. This would move the determination of torture from jury to judge, and from part of sentencing to a factor in determination of guilt. A defendant who tortured a victim would be completely barred from using the provocation defense. Such a rule would eliminate the danger of a jury's complete disregard for a victim's rights based on prejudice.

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[124] *See* Mison, *supra* note 101, at 170-71.
[125] *See supra*, Part II.A.
[126] *See supra*, Part II.C.

Conclusion

Integrating international norms with state standards is certainly not without problems. First, it does not guarantee a just result in a provocation defense case. Determined juries would still be able to excuse behavior which would seem unjust in some cases. Also, such a close integration of international and state norms may require a substantially different political climate that is currently prevalent in the United States. Often, there is a misperception that international law is used to undermine national authority. Such a view would need to be fundamentally changed before the political will to implement international standards could be realized. Finally, the solution is only a partial one. Ultimately, I would prefer to see a New Zealand-style solution of complete elimination of the provocation defense, with recognition that there is no such thing as a reasonable fit of homicidal rage. However, I agree that as social norms currently stand, such a solution may not be practically feasible. Until such time as killing a person because of their sexual expression, sexual preference, or gender identity becomes universally condemned, I believe an instruction admonishing the jury to keep in mind standards of the human family is our best option.

"LOCKDOWN FOR LIBERTY!" BLACK MASCULINITIES, MASS INCARCERATION AND LABOR IN THE GEORGIA PRISONERS STRIKE

By Jeremiah Chin*

I'm expressin' with my full capabilities
And now I'm livin' in correctional facilities
Cause some don't agree with how I do this
I get straight, meditate like a Buddhist[1]

Introduction

In February 2011, proposed budget cuts in benefits for public workers drew 70,000 demonstrators to protest the removal of bargaining rights from unions. Wisconsin became the "main stage" for the discussion of labor rights in the United States as national attention focused on the Midwest.[2] Reports appeared in the front pages of the *New York Times*[3] while public figures like Michael Moore and Sarah Palin made speeches in Madison, Wisconsin to show support. Months before Wisconsin took the main stage, however, thousands of prisoners in at least four state prisons[4] across Georgia non-violently refused to leave their cells or work until demands for better working conditions and recognition of constitutional rights were met.[5] Although the self-imposed lockdown of inmates lasted only six days in December, the strike demonstrated a mass collective

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[1] N.W.A., *Express Yourself*, *on* STRAIGHT OUTTA COMPTON (Ruthless Records 1988).

[2] Richard A. Oppel Jr. & Timothy Williams, *Rallies for Labor, in Wisconsin and Beyond*, N.Y. TIMES, February 27, 2011, at A4.

[3] The article cited, Oppel and Williams, *Rallies for Labor in Wisconsin and Beyond*, appeared on page A4 of the print edition of the New York Times on February 27, 2011.

[4] Baldwin, Hancock, Hays, Macon, Rogers, Smith and Telfair State Prisons were reportedly involved in the strike, while the Georgia Department of corrections would only confirm Hays, Macon, Telfair, and Smith were in lockdown. *Compare* Sarah Wheaton, *Prisoners Strike in Georgia*, N.Y. TIMES, December 12, 2010, http://www.nytimes.com/2010/12/12/us/12prison.html *with* Bruce A. Dixon, *GA Prison Inmates Stage 1-Day Peaceful Strike Today*, BLACK AGENDA REPORT, December 09,2010, http://blackagendareport.com/content/ga-prison-inmates-stage-1-day-peaceful-strike-today

[5] Wheaton *supra* note 4.

action within the U.S. prison system and became the "largest prison protest in the history of the United States."[6] However, the Georgia prisoners' strike never took the main stage. Beginning on December 9, 2010, news of the strike spread throughout the internet via independent, alternative publications like the *Black Agenda Report*. The strike took five days before spreading to national media coverage in the *New York Times* on December 12 and local media coverage in the *Atlanta Journal-Constitution* on December 13. The prisoners' strike failed to make the front pages like the demonstrators in February. The *New York Times* was the only national paper to pick up the strike, though deeper in the "A" section of the paper.[7] When the strike ended on December 15, prisoners' demands for fair labor wages, increased educational opportunities, better living conditions, healthier prison nutrition, and greater access to families had not been met.[8]

These events raise the following questions: considering the events in Wisconsin and Georgia were both organized to contest unfair or inequitable labor issues, why were demonstrators in Wisconsin given the main stage while prisoners in Georgia were relegated to the back stage? Why didn't public figures such as Michael Moore show up at the Hays, Macon, Telfair or Smith State Prison to stir up support for the thousands of incarcerated laborers on strike? The short answer is simple demographics: Georgia prisoners are predominantly black,[9] labeled as criminals and live in the south, while images of Wisconsin are predominantly white, blue collar workers who live in the north. This article argues that the lack of national response and attention to the Georgia Prisoners' strike is a reflection of the system of mass incarceration, the racially stratified nature of US polity and the criminalization of black men in the United States.

Although "mass incarceration has been the most thoroughly implemented government social program of our time,"[10] "there is

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[6] Dixon *supra* note 4.

[7] The two subsequent articles in the NEW YORK TIMES appeared on pages A13 and A27 of their respective print editions. *See* Sarah Wheaton, *Inmates in Georgia Prisons Use Contraband Phones to Coordinate Protest*, N.Y. TIMES, December 12, 2010, at A13; Sarah Wheaton, *Some Georgia Inmates Return to Work*, N.Y. TIMES, December 16, 2010, at A27.

[8] Rhonda Cook, *Prisoners' protest over.Protest Over. For now.Now.,* ATLANTA JOURNAL-CONSTITUTION, December 15, 2010, http://www.ajc.com/news/news/local/prisoners-protest-over-for-now/nQnxt/.

[9] African-Americans make up 30 percent of the population of Georgia, yet account for 63 percent of the states' prison population. *See* Nicole D. Porter, *Incarceration Trends in Georgia*, THE SENTENCING PROJECT, 2010, 2.

[10] Elliott Currie quoted in ANGELA DAVIS, ARE PRISONS OBSOLETE? 11 (2003).

reluctance to face the realities hidden within them, a fear of what happens inside them…We take prisons for granted but are often afraid to face the realities they produce."[11] Keeping prisons out of the public gaze allows the public to ignore the systemic labeling of crime, prisons historical link to race, particularly blackness, and the present system of mass incarceration as a racial caste system.[12] On a national scale, media coverage of the Georgia prisoners strike was relatively meager but the strike was still important in speaking out against mass incarceration from within the prison system. The demands of Georgia prisoners raised issues of exploited convict labor, inequitable health and educational opportunities through a self-imposed lockdown. In calling their strike a "Lockdown for Liberty"[13] the prisoners turned one of the central models of control for prisons into a means of resistance that organized inmates across gang affiliations and across prisons around the state. Prisoners united through the common cause of justice and equitable, humane treatment. Prisoners understood that, as summarized by one anonymous participant, "we committed the crime, we're here for a reason. But at the same time we're men. We can't be treated like animals."[14]

This article examines the Georgia prisoners' protest and uses the prisoners' list of demands to examine the relationship between historical and present notions of race, labor, rights and incarceration. Particular focus will be placed on how mass incarceration is racialized in the disproportionate imprisonment of men of color, specifically black men, and how this contributes to the invisibility of this population in the public eye.[15] The next section offers a theoretical framework to understand how prisons and prisoner issues are removed from public discourse, the general assumptions undergirding public perceptions of prisons and how common sense assumptions of prisons can be countered. Section three examines how criminality has been conflated with black masculinity to establish mass incarceration as a racial caste system in the United States, intensifying the stigma and invisibility of prisons/prisoners. The fourth section outlines a brief history of United States prisons from slavery to the present in relation to black men, convict labor and white supremacy. The final section examines the Georgia prisoners strike as a specific site of resistance to the history of racialized mass incarceration, assertions of

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[11] DAVIS, *supra* note 10, at 15.

[12] MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 6-7 (2010).

[13] Dixon, *supra* note 4.

[14] Wheaton, *supra* note 4.

[15] *See generally* DAVIS, *supra* note 10; ALEXANDER, *supra* note 12; KATHERYN K. RUSSELL, THE COLOR OF CRIME: RACIAL HOAXES, WHITE FEAR, BLACK PROTECTIONISM, POLICE HARASSMENT, AND OTHER MICROAGGRESSIONS (1998).

constitutional rights by a disenfranchised prison population and the role of media in generating public discourse during the strike. Though the lack of ongoing media coverage makes the Georgia prisoners strike appear as a non-event, the "Lockdown for Liberty" presents a crucial act of resistance to mass incarceration.

I. Hegemony, the "Back Stage," and Critical Race Theory

Relegating the prisoners strike to the back stage in public discourse is a reflection of the larger invisibility of mass incarceration to mainstream society. "Prisoners are kept behind bars, typically more than a hundred miles from home. Even prisons—the actual buildings—are a rare sight for many Americans, as they are often located far from population centers…Prisoners are thus hidden from public view—out of sight, out of mind."[16] Despite the fact "the United States imprisons a larger percentage of its black population than South Africa did at the height of apartheid;"[17] these racial disparities are obscured by rhetoric of "law and order"[18] and being "tough on crime."[19] Angela Davis argues "prison is one of the most important features of our image environment. This has caused us to take the existence of prisons for granted. The prison has become a key ingredient of our common sense…We do not question whether it should exist."[20]

As Davis points out, prisons as institutions and prisoners as people are completely obscured by the commonsense acceptance of "the prison" as an idea. This dichotomy between systems of power concerning prisons and prisoners and general acceptance of the social institutions is underscored by Antonio Gramsci's notion of hegemony. [21] Gramsci asserts that power relationships are obscured by a culture of "common sense" that asserts the worldview of the status quo as normal, natural and inevitable.[22] While hegemony looks at common sense in a broad cultural context, Erving Goffman focuses on the acceptance and visibility of institutions. Goffman notes that social institutions present a public face or "front region" with formal documented practices that appear to be just or

[16] ALEXANDER, *supra* note 12, at 190.
[17] *Id.* at 6.
[18] *Id.* at 42.
[19] *Id.* at 55.
[20] DAVIS, *supra* note 10, at 18.
[21] ANTONIO GRAMSCI, THE MODERN PRINCE & OTHER WRITINGS 60 (Louis Marks trans., 1970).
[22] *Id.*

unbiased, while informal practices are hidden in the back stage through, what Goffman terms, "impression management."[23]

Extending Goffman's argument, Katheryn K. Russell contends that this binary presentation of front region and back stage are "inextricably linked," since "what appears in the front region is presumed to be a statement of reality…Thus, racially-motivated decisions made in the back stage are easily presented as racially-neutral ones in the front region."[24] In this article, by explaining how the issues and conditions raised in the strike remain absent from social discourse and media accounts, the notions of hegemony and the backstage become key theoretical points of conversation for discussing the role of prisons and the prisoners strike

This article uses Critical Race Theory (CRT) to understand how the prisoners strike forms a story counter to the commonsense acceptance of prisons and forefront the historical context of race, labor and incarceration. CRT argues the law historically and directly contributes to the process of maintaining racial stratification and preserving the interests and needs of whites. The theory is founded on the notion that, in the context of the United States, "racism is normal, not aberrant…it looks ordinary and natural to persons in the culture." [25] Therefore, formal legal remedies can only address extreme instances of injustice, ignoring "the business-as-usual forms of racism that people of color confront every day and that account for much misery, alienation and despair."[26] Consequently, racism functions as a social construct which encompasses the more visible, structural demonstrations of racism, such as segregation or slavery, as well as the larger collection of cultural attitudes towards race that form the dominant narrative of white supremacy and "racial subordination [which] maintains and perpetuates the American social order."[27] CRT scholars argue that counterstories are key to undermining racist systems of oppression. These are stories of oppressed groups that challenge socially constructed notions of race and destroy the hegemonic dominant mindset, or "the bundle of presuppositions, received wisdoms, and shared understandings against a background of which legal and political discourse takes place."[28] As Derrick Bell explains, the voices of

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[23] Katheryn K. Russell, *Toward Developing a Theoretical Paradigm and Typology for Petit Apartheid*, *in* PETIT APARTHEID IN THE U.S. CRIMINAL JUSTICE SYSTEM: THE DARK FIGURE OF RACISM 3, 6 (Dragan Milovanovic & Katheryn K. Russell eds., 2001).

[24] *Id.*

[25] RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: THE CUTTING EDGE xvi (2000).

[26] *Id.*

[27] Derrick Bell, *Who's Afraid of Critical Race Theory?*, *in* THE DERRICK BELL READER 78, 80 (Richard Delgado & Jean Stefancic eds., 2005).

[28] Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*,

oppressed groups "expose[], tell[] and retell[], signal[] resistance and caring, and reiterate[] the most fearsome power – the power of commitment to change."[29]

However, the presence and use of stories by oppressed groups do not instantly change the existing racial hierarchy that places white, upper-class males at the top. Rather, the existing social structures and institutions allow for change only through what Derrick Bell has termed "interest convergence." For Bell, black social movements and a national "change of heart" do not lead to racial justice, but rather "the interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites." [30] To better understand how interest convergence occurs in issues of social justice, CRT emphasizes a call to context that requires a deeper examination of legal and social issues by urging "attention to the details of minorities' lives as a foundation for our national civil rights strategy."[31] CRT presents an important framework for analyzing the Georgia prisoners' strike.

II. Criminalizing Black Masculinity

Prisons and the criminal justice system both sit at an intersection between cultural attitudes towards racialized groups and the institutional manifestation of racism in the United States. Although whites represent 69.5 percent of the arrests in the United States, blacks constitute 46 percent of the prison population.[32] Blackness has been used in racial profiling to arrest black people involved in almost any every day act, ranging from driving, to standing or even breathing while black.[33] Criminologist Katheryn K. Russell notes that crime and blackness have become interchangeable in public perception, making blackness an indicator for criminality and crime a code word for blackness. [34] Thus the "criminalblackman" comes to exist in the mindset of society.[35] Black men are therefore caught in a perpetual cycle of criminalization as "policies which allow law enforcement officers to use Blackness as an indicator of

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in CRITICAL RACE THEORY: THE CUTTING EDGE 60, 61 (Richard Delgado and Jean Stefancic eds., 2000).

[29] Bell, *supra* note 27, at 80.

[30] Derrick Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

[31] DELGADO & STEFANCIC, *supra* note 25, at xviii.

[32] KATHERYN RUSSELL-BROWN, UNDERGROUND CODES: RACE, CRIME AND RELATED FIRES 108-11 (2004).

[33] *See Id.* (For a longer, but still incomplete, list),

[34] RUSSELL, *supra* note 15, at 71.

[35] *Id.*

criminality (in the absence of empirical support), have the effect of *creating* black criminality."[36] The criminalblackman becomes more than just a rhetorical image; it underscores drastic disparities in the criminal justice system. The range of influence for racial determinations in the criminal justice system, from arrest to parole, represents a "petit-apartheid" since the process is not explicitly sanctioned, but rather permitted and enabled by the process of the criminal justice system.[37] The criminalblackman image is a central feature of the dominant narrative of criminality in the United States, fronting the idea of "black crime" while valorizing whiteness, maintaining white supremacy and keeping white crime in the back stage.

Focusing on the role of prisons and imprisonment in the criminal justice system reveals what legal scholar Michelle Alexander has termed the "New Jim Crow." Alexander argues that mass incarceration represents more than a system of racial disparity, but rather a racial caste system that facilitates discrimination since "it is perfectly legal to discriminate against criminals in nearly all the ways that it was once legal to discriminate against African Americans… Once you're a felon, the old forms of discrimination…are suddenly legal."[38] Under the guise of colorblindness, the criminal justice system acts as

> a *gateway* into a much larger system of racial stigmatization and permanent marginalization. This larger system, referred to here as mass incarceration, is a system that locks people not only behind actual bars in actual prisons, but also behind virtual bars and virtual walls—walls that are invisible to the naked eye but function nearly as effectively as Jim Crow laws once did at locking people of color into a permanent second-class citizenship.[39]

Felon disenfranchisement laws have "decimated the potential black electorate," as nationally, one in seven black men have had their voting rights removed.[40] Blacks labeled as felons are therefore unable to choose their representation on any level of government; from school boards that can determine their children's education, to legislators who make laws that determine sentencing or decide how taxes are spent. Incarcerating large numbers of black men in rural prisons not only obscures the prisons from public view, forming the back stage, it also shifts political boundaries to

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[36] RUSSELL, *supra* note 23, at 11.
[37] *Id.* at 3.
[38] ALEXANDER, *supra* note 12, at 2.
[39] *Id.* at 12 (emphasis in original).
[40] *Id.* at 188.

favor predominantly white rural areas by; increasing their voice in the political process, silencing the voices, needs and experiences of blacks in prison, removing voting power from predominantly black urban communities and shifting federal aid from urban centers to rural towns.[41]

Despite the wide sweeping marginalizing and oppressive effects of mass incarceration, the dominant narrative persists in the front stage: prisons are necessary to keep the general public safe and increases in the prison population are due to an explosion of crime. What lurks backstage is that, over the past twenty-five years, the prison population has "leapt from approximately 350,000 to 2.3 million", while violent crime is at historically low levels and murder rates similarly have had little impact on the explosion of the prison population. [42] What keeps the prison population rising is how federal funding for drug arrests has made it incredibly profitable for law enforcement agencies to pursue drugs as their primary agenda. "Financial incentives were offered to local law enforcement to pump up their drug arrests," regardless of levels of drug activity within the agency's jurisdiction.[43]

Mass incarceration is therefore a self-perpetuating caste system with financial benefits for those who operate and regulate it. A criminalblackman stereotype facilitates racial profiling while law enforcement agencies are paid to increase arrest rates, which leads to a disproportionate incarceration rate for black men. This generates a large, predominantly black prison population that legitimizes the stereotype in social discourse, starting the cycle of oppression all over again. Law enforcement agencies and even entire towns have become dependent on the funding and revenue generated by mass incarceration, masked by a commonsense understanding that "it is simply the way things are done."[44]

III. Race, Labor, and Incarceration in the United States

Historically, race, labor, and incarceration have been intertwined, especially in the South. Though slaves were not punished with incarceration, slave codes regulated the behaviors of blacks through corporal and capital punishment against slaves or anyone deemed to have African ancestry. Crimes committed by blacks received the harshest punishments, while any crime committed by whites against blacks was either not enforced or treated as a punishment for violating a white slave

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[41] JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISMENT AND AMERICAN DEMOCRACY 202 (2006).

[42] ALEXANDER, *supra* note 12, at 92.

[43] *Id.* 76.

[44] ALEXANDER, *supra* note 12, at 83.

owner's property rights.[45] Under slavery, the value of black people was reduced solely to their ability to work as white-owned laborers; law and crime enforcement followed suit.

After emancipation, Southern whites feared blacks that had been given rights and full status as people, even if only on paper, and faced an economic crisis as the primary source of free labor, through chattel slavery, had been eliminated. In 1865, "Black Codes" developed as a new system of control that made it a crime for blacks to be unemployed, "have a gun, be out after a certain hour, or utter 'offensive language' in the presence of white women."[46]

> Nine southern states adopted vagrancy laws—which essentially made it a criminal offense not to work and were applied selectively to blacks—and eight of those states enacted convict laws allowing for the hiring-out of county prisoners to plantation owners and private companies. Prisoners were forced to work for little or no pay.[47]

Crime served as an easy way to maintain racial caste hierarchy in the south. It continued an exploitative system of labor while ensuring the disenfranchisement of black men by turning lesser offenses into felonies, disproportionately criminalizing black men.[48] The combination of black codes and convict lease systems in the South during Jim Crow, in essence, replaced black slave labor with black convict labor as white supremacy in the South ensured common, arbitrary arrests based on blackness.[49] Even after the end of the black codes, a convict lease system persisted, linking "race and criminality in a new and powerful way. It generated peonage by forcing convicted individuals to escape prison by allowing a local white landowner to pay their fine and thus control their labor."[50]

Georgia followed the post-emancipation trend of creating prisoner labor, and built a convict lease system tasked to work on quarries, mines, and railroads. The division of labor had different implications for convicts based on race; whites were given craft labor and industrial training leaving

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[45] RUSSELL, *supra* note 15, at 16.

[46] MARY ELLEN CURTIN, BLACK PRISONERS AND THEIR WORLD, ALABAMA, 1865-1900 6 (Reginald Butler ed., 2000).

[47] ALEXANDER, *supra* note 12, at 28.

[48] "These lesser crimes included theft, vagrancy, wifebeating [sic], adultery, larceny, bribery, burglary, arson, obtaining money or goods under false pretenses, perjury, forgery, embezzlement, and bigamy." Keesha M. Middlemass, *Racial Politics and Voter Suppression in Georgia*, in AFRICAN AMERICANS IN GEORGIA: A REFLECTION OF POLITICS AND POLICY IN THE NEW SOUTH 13 (Pearl K. Ford ed., 2010).

[49] *Id*.

[50] Curtin, *supra* note 46, at 10.

"punitive manual labor for blacks."[51] Much like present systems of mass incarceration, the convict lease system provided a perfectly legal outlet for racialized labor in Georgia because "the language of the Thirteenth Amendment still allowed the southern states to use the criminal law to sell blacks into bondage."[52] These early roots of the criminalblackman merged an economic need for the continuance of black labor exploitation with maintaining a social hierarchy wound through the legal codes that legitimized white supremacy.

Convict labor became a key financial source for rebuilding following the devastation of the Civil War, as well as maintaining social and economic control over emancipated blacks. Historian Alex Lichtenstein explains that "New South capitalists in Georgia and elsewhere were able to use the state to recruit and discipline a convict labor force, and thus were able to develop their states' resources without creating a wage labor force, and without undermining planters' control of black labor."[53] By 1908 the convict lease system was outlawed. Georgia claimed it was to end the brutal form of punishment, but in reality it was due to competition with free labor. Convict leasing was replaced with the similarly racialized, exploitative chain gangs that would continue through the mid-twentieth century. Like the present day system of mass incarceration, chain gangs and convict lease programs depended on impression management to legitimize the racialized system of convict labor that constructed the roadways of twentieth century Georgia. Lichtenstein concludes that "the Progressive ideals of southern modernization, penal reform, and racial moderation" obfuscated "the role of the state in coercing black labor for economic development."[54]

In the same way that black codes and convict labor emerged to reinforce racial and economic hierarchy following emancipation, the use of "law and order" rhetoric "was first mobilized in the late 1950s . . . to generate and mobilize white opposition to the Civil Rights Movement."[55] Race became inscribed into criminality as conservatives presented blackness and poverty as a "tangle of pathology,"[56] evolving into the declaration of a War on Drugs and corresponding laws and enforcement in the 1970s and 1980s. During the presidency of Ronald Regan, the War on Drugs went into full force, entrenching crime and welfare in negative

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[51] ALEX LICHTENSTEIN, TWICE THE WORK OF FREE LABOR: THE POLITICAL ECONOMY OF CONVICT LABOR IN THE NEW SOUTH 33 (1996).

[52] *Id*. at 36.

[53] *Id*. at 13.

[54] *Id.* at 16.

[55] ALEXANDER, *supra* note 12, at 40.

[56] *Id.* at 45.

racial tropes like the "welfare queen"[57] that blamed black unemployment, poverty, crime, and drug use on black people rather than systemic failures.

Georgia followed with the rest of the nation in pursuing a hardline law and order approach to the War on Drugs. It enacted the "Two Strikes" law in the 1980s that provided life imprisonment after the second conviction for sale or possession with intent to distribute a controlled substance.[58] Legal challenges to two strikes laws cited the uneven application along racial lines. Black defendants were sixteen times more likely to have "Two Strikes" invoked in their case and black convicts made up 98.4% of those serving life imprisonments under the two strikes law.[59] Yet the Georgia Supreme Court ruled that there was no violation of constitutional rights or discrimination in sentencing.[60] The Sentence Reform Act of 1994 imposed "the strictest mandatory minimum laws of any other state and required that the sentence be served in its entirety."[61] In 1995, Georgia passed the Truth in Sentencing Law that effectively abolished parole and required inmates to serve 90% of their sentence in prison. Together, these laws effectively ensure a large and long-term prison population that— thanks to racial profiling and application of sentencing laws—is disproportionately black. These laws also make Georgia more viable for federal incentives programs, such as the Violent Offender Incarceration and Truth-in-Sentencing Incentive Grants (VOITIS) created in 1994, which gives funds to states to expand, construct, and operate prisons. Georgia received more than $82 million in federal VOITIS grants between 1996 and 2001; "only eight states received more money."[62] Thus Georgia not only incarcerates disproportionately more black men for longer periods of time, but the federal government pays the state to continue to do so.

While the state of Georgia is receiving millions of dollars to support prisons, it is also saving millions of dollars by utilizing convict labor. Inmate labor in Georgia is no longer outsourced to private mines or used

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[57] *Id.* at 48.

[58] Artemesia Stanberry & David R. Montague, *Serving Five to Life: Racial Disparities in the Enforcement of Georgia Drug Sentencing Laws*, in AFRICAN AMERICANS IN GEORGIA: A REFLECTION OF POLITICS AND POLICY IN THE NEW SOUTH 247 (Pearl K. Ford ed., 2010).

[59] *Id.* at 248.

[60] *Compare Stephens v. State*, 456 S.E.2d 560, 561 (Ga. 1995) (citing McCleskey v. Kemp, 481 U.S. 279, 292 (1987) that absent showing of purposeful discrimination and discriminatory effect on an individual defendant, there was no constitutional issue) *with Id.* at 567 (Benham, dissenting) (noting that all persons sentenced to life in Hall County under the two strikes law for certain narcotics chargers are Black, despite the fact that Blacks are only 10 percent of the county's population).

[61] Stanberry & Montague.*supra* note 58, at 249.

[62] *Id.*

to build railroads, now inmate work crews maintain prison facilities, clean state and county buildings, paint over graffiti, and maintain parks.[63] Counties in Georgia save more than $2 million dollars per year by using inmate labor instead of hiring people to do the same work since inmates in Georgia are not paid for their labor and do not require medical benefits. While inmates go unpaid, the counties and state collect twenty dollars per prisoner per day from inmate work crews. [64] Though inmate labor is cheap to utilize and brings income to prisons, mass incarceration remains an expensive system to maintain, partially drawing money from inmates themselves. Jail booking-fees, jail per diems, court costs, child support drug testing, and "various expenses related to their incarceration" create a system of debt that perpetuates incarceration because of prisoners' inability to pay the fees and fines, incurring more time in custody.[65]

Mass incarceration also strictly limits post-conviction employment through the stigma of criminality compounded by race. Sociologist Devah Pager created an experimental study to test the stigma of criminality when seeking employment by having white and black men with and without criminal records and equal qualifications apply for the same jobs. Pager's results reveal that criminality acts as a negative credential while seeking work, reducing the chances of employment by fifty percent for whites and sixty percent for black applicants.[66] Looking at the effects of race and crime as intersecting exposes that "the powerful effects of race rival even the strong stigma conveyed by a criminal record. In this study, a white applicant *with a criminal record* was just as likely to receive a callback as a black applicant *without* any criminal history."[67] The criminalblackman image makes race a potential proxy for criminality in the hiring process, dramatically decreasing any opportunities for black employment since "employers may (consciously or unconsciously) treat all black men as though they have a criminal record."[68]

From slave codes to black codes, convict lease and mass incarceration, the prison system has been intertwined with prisoner labor that is largely exploited for the maintenance and growdth of the prison

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[63] David Wickert, Gwinett Reviving Inmate Work Crews, but Prison Fate Remains Uncertain, *Atlanta Journal-Constitution*, Aug.9, 2010, *available at* http://www.ajc.com/news/news/local/gwinnett-reviving-inmate-work-crews-but-prison-fat/nQjFk/

[64] Gwinett County saved $2.6 million and Clayton County saved $2.3 million in 2009. *Id.*

[65] Alexander, *supra* note 12, at 151-152.

[66] Devah Pager, *Marked: Race, Crime and Finding Work in an Era of Mass Incarceration,* (Chicago: University of Chicago Press, 2007), 67-9.

[67] *Id.* at 90-1.

[68] Alexander, *supra* note 12, at 149. *See also* Pager, *supra* note 66, at 160.

system. With the financial incentives provided to law enforcement agencies and states, the dominant narrative of law and order provides a profitable solution to the criminalblackman image. In exchange for easing white racial fears of the criminalblackman, prisons are financially supported through predominantly black, exploited labor that is disenfranchised from voting against policies that would increase the duration of stay or the way their labor is used. The system of incarceration remains deeply entrenched in Georgia's political economy as pressing budget crises have not lead to a decrease in state spending on prisons. Instead Georgia has experienced an increasing prison population because of harsh sentencing laws, fueling a billion dollar prison industry with a prison population that is 63% black when African Americans account for only 30% of the state's population.[69]

IV. The Georgia Prisoners Strike

So what happens when those oppressed start to fight back? Riots at Attica or Lucasville prisons raised public attention but do not undermine mass incarceration practically or ideologically. The story of a riot conjures images of violence and—considering the disproportionate percentage of black men in prison—feeds back into the narrative of the criminalblackman that stokes white racial fears. Georgia presents a prisoners *strike*, a non-violent resistance to mass incarceration by those most directly affected. The means of organizing and the implications of the strike present a counterstory to systems of oppression by indicting the criminalblackman narrative from the perspective of those incarcerated through nonviolent resistance. However this same context also keeps the strike on the back stage, away from national discourse on mass incarceration and perpetuating a hegemonic acceptance of prisons as necessary to public safety.

A. Cells and Cellphones

Most accounts and analysis of prison riots have pointed to similar histories of abuses, labor exploitation, and general tensions in prisons before a riot occurs. Prison uprisings in Attica, New York in 1974 and Lucasville, Ohio in 1993 appear to have started spontaneously and localized to a single prison.[70] However, The Georgia prisoners strike was

[69] Porter, *supra* note 9, at 2.

[70] *See* : Staughton Lynd, *Lucasville: The Untold Story of a Prison Uprising*, 29 (Philadelphia: Temple University Press, 2004); New York State Special Commission on Attica, *Attica: The Official Report of the New York State Special Commission on Attica*, 111 (New York: Praeger Publishers, 1972).

a coordinated, non-violent work stoppage in prison facilities across the state. After a statewide ban on cigarettes was implemented in September 2010, prisoners saw an opportunity to overlook differences and began to organize across racial distinctions, religious differences, and gang affiliations, preparing for a strike in the winter months.[71] The coordinated time frame was intended to exploit the cooler weather of the winter months in an effort to lower the chance of individuals losing their temper against guards while giving inmates time to gather food supplies. It also afforded prison gangs time to discuss the strike with individual members and spread the word to other institutions through cell phones.[72]

Cell phones are contraband within prison facilities as the prisons cannot monitor calls or text messages and have prompted governmental concern. The United States Senate passed a resolution in 2010 to investigate the use of cell phones within prisons. The initial Senate investigation examined the connection of cell phones to crime and fear for the public safety, emphasizing the role of phones on increasing inmate crime and lowering the safety of prison officers.[73] However guards and those distributing cell phones to prisoners at exorbitant rates went without penalty in the Cell Phone Contraband Act of 2010 that made possession of a cell phone while incarcerated in a federal prison a felony; compounding the sentences of those found with cell phones, continuing a spiral of criminalization and disenfranchisement. The Cell Phone Contraband Act was signed into law by President Obama on August 12 of 2010, less than four months before prisoners would use contraband phones to organize the largest prison strike in United States history.

B. Inmates assert their rights

With voting rights of inmates disenfranchised, they turned to an alternative that allows their demands to be heard and presents their issues before the system and the public. Work stoppages are not a new phenomenon in strikes against unfair labor conditions. However, with the Georgia prisoners strike, the self-imposed lockdown not only stops work but it appropriates a system of power that is traditionally used as

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[71] Rhonda Cook, "Inmates Discuss Planning, Details of Ongoing Prison Protest," *Atlanta Journal-Constitution*, December 14, 2010, final edition; Amy Goodman, "Prisoner Advocate Elaine Brown on Georgia Prison Strike: 'Repression Breeds Resistance,'" *Democracy Now*, interview, December 14, 2010.

[72] *Id.*

[73] *Contraband Cell Phones in Correctional Facilities: Public Safety Impact and the Potential Implications of Jamming Technologies: Hearing Before the S. Comm. on Commerce, Sci., and Transp.*, 111th Cong. (2009); Cell Phone Contraband Act of 2010, PL 111-225, August 10, 2010, 124 Stat 2387.

punishment.[74] Inmates were aware of strikebreaking methods used by prison authorities, planning early to avoid measures that would create disunity by disconnecting television sets in common areas and placing them by doors to be taken away.[75] Using connections outside of prisons, the inmates issued a press release with their list of demands to the public, first picked up in black owned and operated news sources like the *Black Agenda Report*.[76] Between the coordinated planning and the list of demands, the strike began a counterstory to the dominant narrative of mass incarceration that touches on the historical exploitation of prisoners' labor and current inequalities in the prison system, attempting to bring the backstage of mass incarceration to the forefront. The list of nine demands reflects the constitutional rights denied to prisoners, as well as general social values on education, families, and living conditions designed to appeal to public sensibilities.

The first and foremost demand of prisoners was for a living wage for work: "In violation of the 13th Amendment to the Constitution prohibiting slavery and involuntary servitude, the DOC demands prisoners work for free."[77] While the convict lease programs and chain gangs exploited the loophole in the language of the constitution that permits slavery and involuntary servitude "except as punishment for crime whereof the party shall have been duly convicted,"[78] the present system of mass incarceration makes prison labor a condition of incarceration. As discussed earlier, the exploitation of prisoner labor occurs while prisoners are being punished through incarceration; therefore the labor itself is not a form of punishment but rather an activity required during an inmates' stay. Later in the press release the inmates explicitly refer to prison labor as slavery,[79] calling on historical feelings toward slavery as unjust in order to bring support and emphasizing their status as oppressed, predominantly black, laborers.

The second demand for increased educational opportunities and the seventh demand for vocational training have implications for post-release employment and prisoners' desire for learning: "For the great majority of prisoners, the DOC denies all opportunities for education beyond the GED, despite the benefits to both prisoners and society."[80] The lack of education may drastically reduce employment opportunities following

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[74] Davis, *supra* note 10, at 49.
[75] Cook, *supra* note 71.
[76] Dixon, *supra* note 4.
[77] *Id.*
[78] U.S. CONST. amend. XII, § 1.
[79] Dixon, *supra* note 4.
[80] *Id.*

release. Georgia only provides scant GED programs and a program that trains inmates to become Baptist ministers. Demanding educational rights goes beyond advocating for enhanced economic opportunity, but places emphasis on the value of education by noting "the benefit to both prisoners and society." By stating that mass incarceration has denied inmates education, the strike undermines the criminalblackman stereotype that would pathologize incarcerated individuals as disdainful of social values. The demand for vocational and self-improvement opportunities[81] similarly targets post-release employment by trying to remove some of the barriers that limit post-release employment—though the stigma of race and criminality can still undermine any program. [82]

In demands three through six, the prisoners indict the system of mass incarceration for cruel and unusual treatment under the Eighth Amendment citing inadequate medical care with high fees, [83] prison brutality,[84] poor living conditions[85] and malnutrition.[86] Reports from Georgia's Department of Corrections and Health Services indicate that the system is incredibly understaffed as the prison population continues to increase and budget cuts have restricted corresponding increases in staff—often cutting staff to create budget savings.[87] These Eighth Amendment claims were brought against the Georgia penal system decades earlier in *Guthrie v. Evans*.[88]. The *Guthrie* court held the substandard conditions of the Georgia State Prison in Reidsville, Georgia required medical, mental, nutritional and recreational needs of inmates be met by the system[89]—yet Reidsville was a one of the many prisons involved in the strike.

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[81] "The DOC has stripped its facilities of all opportunities for skills training, self-improvement and proper exercise." Dixon, *supra* note 4.

[82] Pager, *supra* note 66, 145.

[83] "In violation of the 8th Amendment prohibition against cruel and unusual punishments, the DOC denies adequate medical care to prisoners, charges excessive fees for the most minimal care and is responsible for extraordinary pain and suffering." Dixon, *supra* note 4.

[84] "In further violation of the 8th Amendment, the DOC is responsible for cruel prisoner punishments for minor infractions of rules." *Id.*

[85] "Georgia prisoners are confined in over-crowded, substandard conditions, with little heat in winter and oppressive heat in summer." *Id.*

[86] "Vegetables and fruit are in short supply in DOC facilities while starches and fatty foods are plentiful." *Id.*

[87] Public Works, LLC, *Understanding Georgia's Correctional Standards: What Policymakers and Stakeholders Need to Know: A Report to the Georgia Department of Corrections,5, (*2009).

[88] *Guthrie v. Evans*, 93 F.R.D. 390 (1981)

[89] Bradley Stewart Chilton, *Prisons under the Gavel: The Federal Court Takeover of Georgia Prisons,* 108(Columbus, OH: Ohio State University Press, 1991).

The final demands for access to families[90] and just parole decisions[91] further indict the systemic problems of mass incarceration that pose financial barriers to inmates and affect the criminalblackman image. Private telephone companies charge prisoners "exorbitant rates to communicate with their loved ones," furthering a cycle of debt extending from prisoners to their families not incarcerated. [92] Yet by demanding access to families, inmates are challenging stereotypical associations of black masculinity that create the image of the bad black father, presenting a counterstory from the perspective of those incarcerated: lack of communication with children, spouses and partners stems from financial barriers and burdens as well. Demanding just parole decisions not only attacks a systemic effect of mass incarceration that has been severely limited in Georgia due to the Two Strikes law passed in the 1990s but also potentially points to the role of racism in the parole process. Considering the racial population of the Georgia penal system is over sixty three percent black,[93] this demand raises questions concerning the role of the criminalblackman stereotype in receiving parole eligibility as overt or covert expressions of racism that can manifest in the uneven application of on-face neutral laws.

C. The Media Cycle

As the strike continued, the list of demands began to circulate throughout news media and social media like Facebook and Twitter. By December 12th, reports appeared in the *New York Times* and *Atlanta Journal-Constitution*, including cell phone interviews with inmates on lockdown.[94] Prisoners spoke on condition of anonymity due to fears of guard retaliation[95] and the fact that having a cell phone in prison is a felony. In the interviews with print media, the prisoners on strike revealed their communication network through contraband cell phones that were used to forwarding text messages warning fellow striking inmates about prison guard activity, giving support, alerting inmates on future actions and creating solidarity under threat of exclusion.[96] Reports in the *Atlanta*

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[90] "The DOC has disconnected thousands of prisoners from their families by imposing excessive telephone charges and innumerable barriers to visitation." Dixon, *supra* note 4.

[91] "The Parole Board capriciously and regularly denies parole to the majority of prisoners despite evidence of eligibility." *Id.*

[92] Alexander, *supra* note 12, at 219.

[93] Porter, "*Incarceration Trends*," *supra* note 9 at 2.

[94] Cook, *supra* note 71; Wheaton *supra* note 4.

[95] Cook, *supra* note 71; Wheaton, *supra* note 4.

[96] Cook, *supra* note 71.

Journal-Constitution and *New York Times* indicated a more decentralized network of inmate organization leading up to the strike that decreased the potential for leaders to be rounded up and dealt with by prison authorities.[97] The only identifiable public face of the strike was given to former Black Panther Elaine Brown, who was interviewed in each news story and on internet news program *Democracy Now*. Though the *New York Times* would be the only national newspaper to pick up on the story, the accounts of the prisoners revealed tactics by prison authorities to try and break the strike. Prison guards went into individual cells and "removed doors to each inmate's locker where they store personal items and their purchases from the prison commissary" to entice "inmates to steal from each other."[98] Public statements from the Department of Corrections declined to comment on the strike specifically, but did cite a commitment to "maintaining safe and secure facilities" and claiming the lockdown was imposed by the prison.[99]

What emerges from the rhetoric of the prisoners interviewed over cell phones and the statements of the press are two opposing narratives: a lockdown to create public safety and a lockdown for liberty self-imposed by prisoners to strike for rights. Like narratives of law and order that helped to define the system of mass incarceration through the War on Drugs, the safety narrative invokes a violent criminality present in the criminalblackman stereotype to garner public support. The counterstory of the strike presents an oppositional narrative that undermines the criminalblackman racial fears by invoking constitutional rights and citing claims to manhood rights. In a *New York Times* interview, an anonymous prisoner's statement that "we're men"[100] evokes what historian Steve Estes describes as "masculinist rhetoric" to lay claim to traditional understandings of manhood to equivocate the rights of oppressor and oppressed within a patriarchal society.[101] Demands for access to families strike a similar note in asserting the desire of inmates to fill traditional roles of sons, fathers and husbands within their family, countering the pathological demonization of black masculinity by asserting patriarchal manhood.

After seven days of remaining on self-imposed lockdown, inmates reached an agreement with prison officials to lift their strike to further negotiations on the list of demands issued and gain access to law libraries

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[97] Cook, *supra* note 71; Wheaton *supra* note 4.

[98] *Id.*

[99] *Id*.

[100] Wheaton, *supra* note 4.

[101] Steve Estes, I AM A MAN!: RACE, MANHOOD, AND THE CIVIL RIGHTS MOVEMENT, 8 (2005).

to file suit against the prison system. On December 16, stories appeared in the *New York Times*, *Atlanta Journal-Constitution* and on *National Public Radio* raising the issue of prison labor one last time before the mainstream news cycle moved on. Some inmates continued to boycott their jobs, others remained on strike, and a final anonymous report from "Mike" in the *New York Times* and *Atlanta Journal-Constitution* warned that demands would need to be met by prison officials or "the next way, it's not going to be nonviolent."[102] "Mike" told the *Journal-Constitution* that if demands were not met, desperation may push some prisoners to violent backlash: "They feel like if they go past the guards and to the warden they will be taken more seriously. . . . These guys have nothing to lose. They're going to spend their lives in prison."[103]

By January of 2011, accounts of backlash from the prison system had not ended. Accounts emerged of prison guards beating inmates involved with the strike. Georgia DOC officials declined to issue a public statement, but in a comment to the *New York Times* a spokesperson asserted "[w]e are a law enforcement agency and do everything possible to uphold, not break, laws."[104] An investigation was launched by the Georgia branch of the National Association for the Advancement of Colored People (NAACP) over allegations of prisoner beatings at Macon State Prison in late December after the strike had ended, but the results have yet to result in a lawsuit. Further stories emerged in March, 2011, in black publications of the *Black Agenda Report* and *San Francisco Bay View* about healthcare being withheld from inmates suspected of organizing the prisoners strike.

Conclusion

In 2007, six black male youth in Jena, Louisiana were tried on trumped up charges for fighting with white youth over the hanging of nooses from a tree in the schoolyard. Civil rights advocates and news media descended on Jena, Louisiana to defend the wrongfully accused Jena six against unjust incarceration over the emblem of lynching and old fashioned racism; briefly bringing racism in to the national discussion.[105] "Nooses, racial slurs, and overt bigotry are widely condemned by people

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[102] Wheaton, *supra* note 7, "*Some Georgia Inmates Return to Work*."

[103] Cook, *supra* note 71.

[104] Robbie Brown, "*Georgia N.A.A.C.P. Says Guards Beat Prisoners*," N.Y. Times, January 3, 2011.

[105] *See generally* Gabriel J. Chin, *The Jena Six and the History of Racially Compromised Justice in Louisiana*, 44 HARV. C.R.-C.L: L. REV. 361 (2009) (summarizing the prosecution of the "Jena Six" and noting historical and ongoing racial discrepancies in punishment for Black and White offenders).

across the political spectrum; they are understood to be remnants of the past, no longer reflective of the prevailing public consensus about race."[106] Little was said in national media about mass incarceration and the prosecution of Black youth.[107] The shootings of Black youth, Oscar Grant in 2009 and Trayvon Martin in 2012, again raised national discussions of race, particularly the racialized suspicion of Black men, mass incarceration, and systemic racism in the criminal justice system[108]—however these conversations rarely appeared in national news media.[109]

Media accounts of the Georgia prisoners' strike did not note a singular instance or symbol of racism that could spark public consciousness. The strike was the result of a historical process of mass incarceration—a racial caste system—that has a deep historical legacy that is not packaged in sound-bites for quick public consumption. Interrogating the very factors of criminality, historical labeling of blackness as criminal, the growing War on Drugs filling Georgia prisons and Georgia's own history of exploiting convict labor are part of a complex discussion that does not easily translate into headlines. What nearly turned the "Lockdown for Liberty" into a non-event are the very factors which caused the strike to occur in the first place: the view of crime as a racialized trait, the system of mass incarceration and the appearance of legal neutrality.

As politically, economically and socially stigmatized members of society, the inmates involved in the Georgia prisoners' strike are not a part of the key constituency of media attention or politicians. Lacking the ability to vote in elections at any level, politicians nationally and in Georgia do not have to concern themselves with the rights of those in prisons in order to secure reelection. Even those released feel a stigma that keeps them and their families from using the ballot to effect change.[110] The same disenfranchisement that inspired the strike also

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[106] Alexander, *supra* note 12 at 211.

[107] *See* Chin, *supra* note 105.

[108] *See* Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555 (2013) (analyzing the racialized implications of "reasonableness" defenses when invoked against young Black men); Theodorea Regina Berry & David O. Stovall, *Trayvon Martin and the Curriculum of Tragedy: Critical Race Lessons for Education*, 16 Race, Ethnicity and Educ. 587 (2013) (presenting a counterstory and "curriculum of tragedy" for education); Donald F. Tibbs, *Who Killed Oscar Grant?: A Legal-Eulogy of the Cultural Logic of Black Hyper-Policing in the post-Civil Rights Era*, 1 J. RACE, GENDER AND POVERTY 1 (2010) (analyzing the intersection of race, policing, and the law in entrenching socio-economic disparities in the United States).

[109] Stories have appeared outside news media, particularly in the film FRUITVALE STATION (Significant Productions 2013), depicting the final day of Oscar Grant's life.

[110] *Id.* at 156.

promotes the silence surrounding the racial and economic disparities in mass incarceration. Common sense rhetoric and law and order narratives make it so that public safety can only be achieved through one logical outcome: mass incarceration. Politicians must appear "tough on crime" and any sentencing leniency or support for federally funded assistance programs is sidelined in order to maintain mainstream political viability. Mass incarceration, as a racial caste system, makes it so that large portions of the black electorate are disenfranchised through policies and law enforcement grounded in racial stereotypes and fears of the criminalblackman.[111] "Despite the jaw-dropping impact of the 'get tough' movement on the African American community, neither the Democrats nor the Republicans revealed any inclination to slow the pace of incarceration."[112]

Even though the demands of prisoners and masculinist rhetoric tap into United States' social values present in the Constitution, legal scholar Derrick Bell's concept of interest convergence reminds us that social justice in legislation only occurs when those in power benefit.[113] Because the system of mass incarceration, in Georgia particularly, generates large economic benefits through the warehousing of men of color, there is little financial or political incentive for a predominantly white political system to acknowledge or end the exploitation of predominantly black prisoner labor. Stereotypes of the "criminalblackman" [114] persist at all levels of the criminal justice system despite facially neutral legislation, promoting a racial caste system that feeds on racial stereotypes. National media coverage during and following the prisoners' strike was sparse. None of the newspaper accounts—outside of the black press—acknowledged the racial disparities in prison. These reports noted race only to mark the interracial coalition that formed between prisoners. The interracial, interfaith coalition that drew prisoners together may have formed quickly in Georgia prisons after cigarettes were taken away, but the persistence of racism and racial fears of the criminalblackman make coalition building to indict the racial caste system of mass incarceration incredibly difficult outside prison walls. A nationwide cigarette ban is not going to spark an uprising against mass incarceration.

Countering the criminalblackman image presents more difficulties in the present post-racial narrative that dominates conversations on race and racism. As Michelle Alexander notes,

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[111] Russell, *supra* note 15, at 71.
[112] *Id.* at 55.
[113] Bell, *supra* note 30 at 524.
[114] Russell, *supra* note 15, at 71.

> The carefully engineered appearance of great racial progress strengthens the 'colorblind' public consensus that personal and cultural traits, not structural arrangements, are largely responsible for the fact that the majority of young black men in urban areas across the United States are currently under the control of the criminal justice system or branded as felons for life. . . . Mass incarceration depends for its legitimacy on the widespread belief that all those who appear trapped at the bottom actually chose their fate.[115]

Returning to Ervin Goffman's notion of impression management; black exceptionalism and Katheryn K. Russell's concept of the "criminalblackman"[116] operate as two sides of the same coin. In the front stage, black exceptionalism touts the successes of black individuals as the end of racism. With racism supposedly defeated, the criminalblackman is made to appear as fact; disabling claims for racial justice with neutrally worded laws that lack overt racist language. Black exceptionalism similarly reduces encounters with racial profiling as individual instances rather than systemic inequalities, promoting a false sense of racial healing by looking at individual abuses of power rather than systemic white supremacy. The fact that discourse on the prisoners' strike in major news accounts went silent until the NAACP investigated prison guard abuses is no accident, but rather stems from the black exceptionalism narrative that only identifies racism as an individual act of meanness that mirrors Jim Crow era manifestations of overt racism.

With the ongoing legal investigation into guard abuses after the prisoners' strike and the inmates preparing a lawsuit over their list of demands, the inmates' counter story still has potential to effect change. Legal victories to mass incarceration are elusive since the evidence of racial disparities in arrests, sentencing and parole have been consistently disregarded; litigation alone will not correct the systemic problems that caused the strike. In order to fully address the prisoners' demands, the counter story presented by the prisoners strike must be retold and reaffirmed through continued social action. Organizations such as The Sentencing Project and grassroots movements like All of Us or None can utilize the strike as a starting point for broadening civil rights discourse. The Georgia prisoners' strike represents collective resistance within the system of mass incarceration that must be met with a growing social movement in and outside of prisons if the system is to be dismantled.

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[115] Alexander, *supra* note 12 at 236.
[116] Russell, *supra* note 15, at 71.

LGBTQ INTIMATE PARTNER VIOLENCE IN PHOENIX

By Justin Hoffman*

Lesbian, Gay, Bisexual, Transgender, and Questioning (LGBTQ) intimate partner violence is a pervasive issue throughout the United States. A recent Center for Disease Control and Prevention survey found that individuals in LGBTQ relationships are more likely to face intimate partner violence. Currently, the city of Phoenix and surrounding areas have an inadequate system for specifically dealing with LGBTQ domestic violence. To fix the issues affecting Phoenix, a full audit of the LGBTQ domestic violence resources needs to be conducted, along with a streamlining of resources to achieve a system where survivors do not have to go from agency to agency to find resources and can locate all of the information they need in one area. Additional improvements and suggestions like a Family Resource Center for domestic violence survivors and specific LGBTQ safety plans also offer additional safeguards to allow for the maximum level of help that an LGBTQ domestic violence survivor could utilize.

Introduction

In order to solve the LGBTQ intimate partner violence problem in Phoenix, the city needs to conduct an audit of all the services currently offered, and streamline those into one accessible place that any LGBTQ intimate partner victim can access. Additionally, the city of Phoenix needs to look to other cities and community agencies to learn from organizations who are addressing the LGBTQ intimate partner violence in a more encompassing, complete manner.

According to the US National Census in 2010, Phoenix has approximately 1.5 million people in the city alone.[1] This does not account for the many other towns and cities that surround Phoenix to make up the metropolitan area known as the "Valley of the Sun", which encompasses a

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[1] *State and County Quick Facts*, United States Census (Apr. 28, 2013, 9:15PM), http://quickfacts.census.gov/qfd/states/04/0455000.html.

little over 4 million people.[2] Despite Phoenix's growth, resources for LGBTQ[3] intimate partner victims have not kept up with that growth. After conducting research to determine what resources are available to LGBTQ domestic violence victims it appears that there are limited resources in the city, and the resources that are available are not streamlined. In order to identify LGBTQ domestic violence resources, a domestic violence victim has to contact multiple agencies and conduct hours of research online. While my original project was to focus on youth LGBTQ domestic violence in the city of Phoenix, I realized that my scope was much too small.[4] Instead, I decided to focus on the Phoenix Metropolitan Area and identify resources that were available to all LGBTQ domestic violence victims regardless of age and qualifiers. Given the increased risk of intimate partner violence in LGBTQ relationships and the large number of LGBTQ couples living in Arizona and Phoenix in particular, a comprehensive list of LGBTQ domestic violence resources and safety plans should be compiled to ensure that all residents have adequate access to services when they need them.[5]

I. LGBTQ Intimate Partner Violence Occurs at an Equal or Higher Rate as Heterosexual Intimate Partner Violence

The National Intimate Partner and Sexual Violence Survey, released in January 2013, was the first comprehensive survey about LGBTQ Intimate Partner Violence available from a national perspective.[6] The survey was conducted over a ten-month period, and included over 18,000 interviews (9,970 women and 8,079 men).[7] The results of the survey indicated that overall, individuals that identified gay, lesbian, or bisexual reported levels of intimate partner violence equal to or higher than those of heterosexuals.[8] The lifetime prevalence of rape, physical violence, and/or stalking by an intimate partner for women was: Lesbian – 43.8%, Bisexual – 61.1%, and Heterosexual – 35.0%.[9] For men, the lifetime

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[2] *State and County Quick Facts*, United States Census (Apr. 28, 2013, 9:20PM), http://quickfacts.census.gov/qfd/states/04/04013.html.

[3] LGBTQ refers to the Lesbian, Gay, Bisexual, Transgender and Queer population.

[4] No agencies were able to identify resources specifically for LGTBQ youth domestic violence victims.

[5] Center for Disease Control and Prevention: The National Intimate Partner and Sexual Violence Survey (2013).

[6] *Id*. at 1.

[7] *Id*.

[8] *Id*.

[9] *Id*.

prevalence of rape, physical violence, and/or stalking by an intimate partner was: Gay – 26%, Bisexual – 37.3%, and Heterosexual – 29.0%.[10]

Data from seven states and six cities that participated in Centers for Disease Control and Prevention's Youth Risk Behavior Surveillance System from 2001-2009 indicated a higher prevalence of dating violence and unwanted forced sexual intercourse among lesbian, gay, and bisexual youth than heterosexual youth.[11] Additionally, only one in five LGBTQ victims of intimate partner violence or sexual assault solicit and receive help from service providers.[12] These statistics show that LGBTQ intimate partner violence is occurring on a regular basis and that most LGBTQ community members who face such issues do not come forward to get the help and resources they need.

II. LGBTQ Relationships and Legal Protections in Arizona

Last month, the Phoenix City Council approved an LGBTQ anti-discrimination law which "expand[s] the city's anti-discrimination law to include protections for gays, lesbians, bisexuals and transgender people in city contracts, housing, places of employment, and public accommodations such as restaurants."[13] While this law may be marginally beneficial for LGBTQ domestic violence victims, many victims need services far beyond the basic laws that are provided in 166 other United States cities and counties.[14] Additionally, with so many reported same-sex couples in the Phoenix Metropolitan Area, along with the many couples which are probably not captured by the US Census statistics, it is clear that Phoenix needs resources for these couples when domestic violence situations arise between them. One recent Gallup poll from February 15, 2013 found that 3.9% of Arizona resident respondents identified as lesbian, gay, bisexual or transgendered.[15] Based on this percentage and the 2012 US Census Bureau estimate of Arizona's population at 6,553,255, I

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[10] *Id*.

[11] *Id*.

[12] NATIONAL CENTER FOR VICTIMS OF CRIME AND NATIONAL COALITION OF ANTI-VIOLENCE PROGRAMS: WHY IT MATTERS: RETHINKING VICTIM ASSISTANCE FOR LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUEER VICTIMS OF HATE VIOLENCE AND INTIMATE PARTNER VIOLENCE (2010).

[13] *Phoenix approves LGBT-inclusive anti-discrimination law*, LGBTQ NATION (Mar. 30, 2013, 9:30 AM), http://www.lgbtqnation.com/2013/02/breaking-phoenix-approves-lgbt-inclusive-anti-discrimination-law/.

[14] *Id*.

[15] Gary J. Gates and Frank Newport, *LGBT Percentage Highest in D.C., Lowest in North Dakota*, GALLUP (Apr. 1, 2013, 5:05PM), http://www.gallup.com/poll/lgbt-percentage-highest-lowest-north-dakota.aspx.

estimate that over 250,000 people in the state of Arizona identify as lesbian, gay, bisexual or transgender.[16]

According to the 2010 United States Census, there are currently 15,817 same-sex couples living in the state of Arizona. Out of those 15,817 same-sex couples, 8,296 (52%) of the couples were female same-sex couples, and 7,521 (48%) of the couples were same-sex male couples.[17] Out of the total number of same-sex couples, 2,608 (16%) of the couples were raising their own children.[18] Additionally, in Maricopa County there are 10,147 same-sex couples or 7.19 same-sex couples per 1,000 households; this makes Maricopa County the 113th highest county for same-sex couples in the nation who have more than fifty same-sex couples in their county.[19] Additionally, Arizona has the thirteenth highest proportion of same-sex couples per 1,000 households out of all fifty states and the District of Columbia, and Phoenix ranks twentieth in the nation for the number of same-sex households per 1,000 households right behind more LGBTQ friendly cities like St. Paul, Minnesota and Chicago, Illinois.[20]

III. The Costs to Society of LGBTQ Intimate Partner Violence

Being proactive about domestic violence in general can save the state many resources in the long run. The cost of prosecuting a homicide and incarcerating a domestic violence offender is approximately $2,550,000.[21] This figure represents the costs of four police responses, two temporary restraining orders, a 180-day jail term, two years' probation, one emergency room visit, two weeks in a domestic violence shelter, one week at a center for three children, one year of foster care for three children, two coroners' autopsies, a homicide investigation, a prosecution and a state prison sentence.[22] Not surprisingly, the two most expensive items in domestic violence homicides are the homicide investigation and prosecution at $1,500,000, and the state prison sentence at $1,000,000.[23] Additionally, The National Institute of Justice estimates the average cost of a domestic violence homicide at $2,400,000.[24]

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[16] Based on taking the average 3.9% of LGBTQ residents, multiplied by the overall population rate.

[17] *Id*. at 2.

[18] *Id*. at 3.

[19] *Id.* at 4.

[20] The Williams Institute: United States Census Snapshot: 2010 (2010).

[21] CASEY GWINN & GAEL STRACK, DREAM BIG 101-102 (Wheatmark 2010).

[22] *Id*.

[23] *Id*.

[24] *Id*.

Casey Gwinn in San Diego has cut the cost of adjudicating domestic violence crimes in San Diego by creating "family justice centers" in the city.[25] Family justice centers consolidate resources for domestic violence victims in to one accessible location, avoiding the need for victims to visit upwards of thirty separate locations for services.[26] The obvious benefit of the program is the one-stop location of services as well as collaboration between the various agencies in order to promote innovative solutions to domestic violence issues.[27] The other benefit is the amount of money the county of San Diego is saving!

Other cities have experienced similar results as San Diego by instituting family justice centers. The Mayor of New York City, Michael Bloomberg has lead the city to institute family justice centers throughout the community.[28] New York City has built three family justice centers since 2005, and has worked with over 200 community organizations to create these new centers.[29] Violence in the city has decreased due to these efforts with family violence related crimes declining by twenty-one percent and intimate partner homicides declining by fifty-one percent citywide.[30]

The introduction of family justice center(s) to Alameda County, California, caused similar positive effects. Domestic violence homicides declined from thirty in 2001 to seven in 2007.[31] When the family justice center first opened, fifty-five percent of misdemeanors were not prosecuted because the victim refused to participate.[32] After three years, the victim-refusal rate decreased to nineteen percent.[33] Felony domestic violence cases followed the same pattern within the community. In 2006, thirty-one percent of felony domestic violence cases were not charged because the victim refused to participate; within three years that number decreased to approximately nineteen percent.[34]

While the family justice center statistics relate specifically to heterosexual intimate partner violence, it does have credence for LGBTQ intimate partner violence. For example, in Washington, DC, 75-80% of cases handled by the Gay and Lesbian Liaison Unit of the District of

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[25] *Id*.
[26] *Id*. at 66-68.
[27] *Id*. at 67-68.
[28] *Id*. at 138.
[29] *Id.* at 138.
[30] *Id.* at 138.
[31] *Id*. at 139.
[32] *Id.* at 139.
[33] *Id.* at 139.
[34] *Id.* at 139.

Columbia Metropolitan Police Department are domestic violence related.[35] If some of the violence could be preempted this could make the Phoenix area a much safer place for LGBTQ people to live, as well as save Maricopa County a significant amount of money each year.

IV. How are LGBTQ Intimate Partner Concerns different from heterosexual intimate partner concerns?

LGBTQ victims of intimate partner violence can have additional concerns that some heterosexual LGBTQ intimate partner victims may not have. For example, LGBTQ youth may have to come out[36] to their parents in order to receive support for finding help in their domestic violence relationships. Coming out to parents can include detrimental effects. One study found that LGBTQ youth ages fourteen to twenty-one who came out to their parents disclosed more verbal and physical abuse by family members and experienced more suicidality, than their peers who chose to not disclose their sexual orientation to their family.[37] Additionally, some parents may not support their children financially or choose to provide clothing, food, or housing when they find out their children are LGBTQ.[38] Most of these issues relate to younger LGBTQ domestic violence victims. However, many LGBTQ members are still not accepted and loved by their families regardless of their age. In essence, regardless of their age, LGBTQ domestic violence victims may not receive any sort of encouragement or support from family members. Another concern for LGBTQ domestic violence members can be 'coming out' to the community and/or nonprofit organizations in order to receive support for their abusive intimate partner relationships.

Within the community at large, there is still a stigma that is associated with being part of the LGBTQ community. Individuals may have pre-conceived notions, make rude comments, or even resort to violence.[39] These concerns are ever-present as members of the LGBTQ community

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[35] *Get The Facts,* SHOW ME LOVE, INC. (Mar. 25, 2013 6:30PM), http://showmelovedc.org/lang/en-us/get-the-facts/.

[36] To recognize one's sexual orientation, gender identity, or sex identity, and to be open about it with oneself and with others. *Definition of Terms*, UNIVERSITY OF CALIFORNIA-BERKELEY GENDER EQUITY RESOURCE CENTER (Apr. 1, 2013 5:35PM), http://geneq.berkeley.edu/lgbt_resources_definiton_of_terms#coming_out.

[37] Anthony R. D'Augelli, Scott L. Hershberger & Neil W. Pilkington, *Lesbian, Gay, and Bisexual Youth and Their Families: Disclosure of Sexual Orientation and Its Consequences*.68 AM. J. ORTHOPSYCHIATRY 361 (1998).

[38] Gill Valentine, Tracey Skelton & Ruth Butler, *Coming out and outcomes: negotiating lesbian and gay identities with, and in, the family*, 21 ENV & PLAN. D: SOC. & SPACE 479 (2003).

[39] *Id*.

ask for help in intimate partner violence situations. In order to actually ask for help, LGBTQ domestic violence victims must often disclose their sexual orientation, which can be a fear-inducing process. This is just one more added stress-factor when LGBTQ domestic violence victims are considering looking for help.

Another concern for LGBTQ intimate partner victims is where to go when they decide to leave their intimate partner. Many shelters are for females and children only, and have policies that forbid men from accessing the Domestic Violence Shelter in order to keep them as safe as possible. Accordingly, while lesbians may have an easier time trying to find shelter, gay males can have a difficult time finding a shelter in their area. A majority of the domestic violence victims are women[40], however, there are foreseeable situations where a male LGBTQ victim may need shelter.[41]

V. Personal Experience Finding LGBTQ Intimate Partner Violence Resources

In order to get a sense of what an LGBTQ victim of domestic violence faces when seeking out assistance, I decided to start from the ground zero and research what resources were available in Phoenix. I started my search for resources with the Domestic Violence Hotline, by calling 1-800-799-SAFE.[42] I explained to the telephone bank volunteer what I was trying to accomplish and asked for the LGBTQ domestic violence resources in Phoenix. Much to my dismay, in a thirty-five mile radius of Phoenix the only resource available was Eve's Place,[43] which was located outside of Phoenix in Peoria, AZ on the Northwest side of the city. Along with this one resource, the Domestic Violence Hotline was able to give me some online or national resources including the GLBT

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[40] Shannan M. Catalano, Bureau of Justice Statistics, Office of Justice Programs, U.S. Dep't of Justice, NCJ 239203, Intimate Partner Violence 1993 – 2010, 2 (Nov. 27, 2012) at http://www.bjs.gov/index.cfm?ty=pbdeatil&iid=4536 ("About 4 in 5 victims of intimate partner violence were female from 1994 to 2010").

[41] Currently in AZ, male victims are supposed to be placed in a hotel if they are victims of domestic violence if they call the Arizona Domestic Violence Coalition.

[42] The Domestic Violence hotline is accessible by dialing 1-800-799-SAFE (7233) or by using their computer to go to thehotline.org. The website additionally has a warning for users: "Computer use can be monitored and is impossible to completely clear. If you are afraid your internet and/or computer usage might be monitored, please use a safer computer, and/or call the National Domestic Violence Hotline at 1−800−799−SAFE(7233) or TTY 1−800−787−3224." THE NATIONAL DOMESTIC VIOLENCE HOTLINE (Mar. 25, 2013 6:30PM), http://www.thehotline.org.

[43] Eve's Place: A Place of Safety in the Northwest Valley. 8101 N 35th Ave # D10, Phoenix, AZ 85051. (602) 995-7450

Help Center,[44] the National Center for Lesbian Rights,[45] PFLAG,[46] and an organization called Show Me Love[47] located in Washington, DC. I also asked the phone bank volunteer about LGBT services offered in the San Francisco[48] area, and she told me there were five domestic violence resources. Due to the high concentration of LGBTQ citizens and the progressive nature of the area, I assumed the Domestic Violence Hotline would have more resources for the city.[49] Additionally, she explained that safety plans[50] were a collaborative process that the caller phoning in and the phone bank operators would do together based on the specific needs of the person.

Again and again I received similar responses from the community agencies that I contacted. Specifically, the community agencies did not have any resources available from their office, but had a list of resources to redirect people to. While these national resources may be great, they are not located in Phoenix and make an assumption that the individuals have access to the internet, without fear of an intimate partner reviewing their internet activity or taking retribution against them for seeking domestic violence resources.

All of the phone calls, emails, and checking websites was an exhausting process that encompassed many hours.[51] Fortunately, I was not in any danger and did not need services at that time. However, an LGBTQ domestic violence victim may not have the luxury of time or transportation on their side.[52] A victim may only have time to locate these resources for thirty minutes to an hour per day, under cover at work, at the community library or any number of possible roadblocks to open and free

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[44] GLBT Help Center. 1-888-843-4564. http://www.glbtnationalhelpcenter.org

[45] National Center for Lesbian Rights. http://www.nclrights.org.

[46] Parents, Families and Friends of Lesbians and Gays. http://www.pflag.org.

[47] Show Me Love DC! http://showmelovedc.org/

[48] Specifically San Francisco and the entire Bay Area including Oakland and surrounding communities

[49] San Francisco has the highest same-sex couples per 1000 households percentage wise out of large cities with 250,000 or more people. The Williams Institute: United States Census Snapshot (2010).

[50] A safety plan is an action oriented plan in order to help the victim stay alive in the event of threatening attacks from a batterer. A sample safety plan is available from the American Bar Association's Torts and Insurance Practice Section "Domestic Violence, Safety Tips For You and Your Family" at www.abanet.org/tips/publicservice/dvsafety.html. The Youth Safety Plan is available from the American Bar Association's Commission on Domestic Violence website at: www.abanet.org/domviol.

[51] This time includes calling different agencies, a lot of times speaking to one representative and then being transferred to a supervisor or some sort of manager.

[52] Sarah M. Buel, *Fifty Obstacles to Leaving a.k.a., Why Abuse Victims Stay*, 28 COLO. LAW. 10, 19-28 (1999).

information of resources.[53] Once a victim finds resources in the Phoenix Metropolitan Area, they may have trouble accessing these resources. The city of Phoenix was 516 square miles according to the 2010 US Census, while Maricopa County was 9,200 square miles.[54] This does not include the many other cities and surrounding towns, which make up the metropolitan area. Accessing a bus, finding a friend to drive the victim, or even driving one's own car can be a resource-intensive process.

In one particular conversation that I had with the Director of Victim Services of the Phoenix City Attorney's Office, she had to stop and ask me what LGBT stands for.[55] While I hope this was because she misheard me, or some other excuse, it does show the need for additional training in the legal field in the Phoenix area. LGBTQ may not be known as standing for Lesbian, Gay, Bisexual, Transgender and Queer throughout the entire country, but one would hope that members of the legal field would be able to recognize the acronym to save further uncomfortable feelings of the caller about identifying themselves as LGBTQ. Even though my friends, family and colleagues know that I am gay, it was awkward and uncomfortable to have to continually 'come out' to a variety of different phone bank volunteers when seeking their resources. This could be an additional reason why some victims of LGBTQ domestic violence do not seek additional help or services when they are in intimate partner violence situations.

Overall, I found that many resources throughout the Phoenix Metropolitan Area were disjointed and not well organized. The Phoenix Police Department gave me a couple of resources which did not match the National Domestic Hotline, match what the Victim Services Advocate gave me from the city attorney's office. It was clear to me based on trying to find LGBTQ domestic violence resources in Phoenix, that a streamlined list needs to be made of resources and that this list needs to be distributed to all of the agencies that effected respond to LGBTQ domestic violence in order to create a cohesive community response that will be able to provide adequate resources to LGBTQ domestic violence victims and continuing support to the survivors after their intimate partner violence situation has terminated.

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[53] *Id*.

[54] *State and County Quick Facts*, United States Census (Apr. 28, 2013, 9:20PM), http://quickfacts.census.gov/qfd/states/04/04013.html.

[55] Telephone Interview with Head of the Victim Advocate for the City of Phoenix Attorney's Office. (March 2013).

VI. Model Programs

A. Northwest Network

The Northwest Network is a nonprofit organization in Seattle, WA that offers services to LGBT Intimate Partner victims by offering a variety of services. The mission statement listed on the website shows the full scope of the resources and services provided by the organization.[56]

When someone goes to the website for the Northwest Network, they are immediately asked why they are visiting the website.[57] The options listed on the website include: "I am checking out resources for myself," "I am looking for information for a friend," "I want to learn about queer issues," "I want to have better relationships," "I am a young person looking for support," and "I work in the field, and am looking for resources."[58] After a domestic violence victim chooses an appropriate option for themselves, he or she is redirected to a new webpage which lists the various resources of the Northwest Network including relationship skills classes, safety planning, academic articles relating to Intimate Partner Violence, peer counseling and resources referrals.[59] In effect, the Northwest Network is combining all of the resources that a Family Justice Center would have and making them available to LGBTQ Domestic Violence victims. The Northwest Network also has other resources that are applicable to the LGBTQ community in Seattle including smoking resources, HIV/AIDS resources, General Wellness Support, Support for Parents and Families, as well as recreational and sports resources for the LGBTQ community.[60] By expanding the list of resources, the Northwest Network is allowing people to take a proactive, healthy approach to relationships, which may in fact be preventative by decreasing the likelihood of someone potentially being in an LGBTQ Intimate Partner Violence situation. Additionally, by having up-to-date online resources for LGBTQ Intimate Partner Violence victims, the Northwest Network is

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[56] Mission Statement:

> The NW Network increases our communities' ability to support the self-determination and safety of bisexual, transgendered, lesbian and gay survivors of abuse through education, organizing and advocacy. We work within a broad liberation movement dedicated to social and economic justice, equality and respect for all people and the creation of loving, inclusive and accountable communities.

THE NORTHWEST NETWORK, (December 10, 2013) http://nwnetwork.org/who-we-are/.

[57] THE NORTHWEST NETWORK, (December 10, 2013), http://nwnetwork.org/.

[58] *Id.*

[59] *Id.*

[60] *Id.*

allowing those individuals affected to be more discrete in seeking help. The website is available both on computers and by smart phone.[61] One final feature worth noting is the section on Safer Surfing. If a user clicks on the Safer Surfing button, it redirects the user to a webpage dedicated to safe browsing and step-by-step instructions on how to delete internet history from a computer's web browser, which can be extremely important if someone's abuser is monitoring their web use.[62]

B. Show Me Love

Show Me Love is a program similar to the Northwest Network that is run out of Washington, DC. Show Me Love! is a campaign that seeks to provide information to all people affected by intimate partner violence in LGBTQ communities.[63] The program was created by a grant from the Office of Victims of Crime and the Office of Justice Programs, under the U.S. Department of Justice.[64]

Show Me Love is similar to The Northwest Network in that it combines many resources in one platform that is easy for members of the public and specifically residents of the Washington, DC area to use; however, it also focuses on legal services that are available to assist LGBTQ domestic violence victims. On its webpage "Know Your Rights," Show Me Love has five categories of rights with additional information for visitors to read about. These sections include: Protection From Abuse in Civil Court, Criminal Charges, Housing and Employment Rights, Rights Regarding Children, and Immigration Rights.[65] Most ley people do not fully understand the extent of the protections available, so this is a great way to educate them about the many options that may exist.

Another great tool that Show Me Love has is a 'Get Help' section. Within the 'Get Help' section, resources are organized into two options, Washington, DC or national.[66] Within each category there are nine broad categories of services. These areas include: Advocacy, Counseling, Emergency, Housing, Legal, LGBTQ-Specific, Medical, Spanish-Speaking, and Teen Specific.[67] Within each category there is a variety of more specific resources, depending on what the user is looking for.

Show Me Love, has other great information on the website including general information about LGBTQ domestic violence, a test to see if you

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[61] *Id.*
[62] *Id.*
[63] SHOW ME LOVE, (December 10, 2013) http://showmelovedc.org/.
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id.*

should be worried about your specific relationship, a postcard project which uses postcards to represent what a healthy relationship means to each artist, and general information about the campaign as well as contact information.[68] One final feature that is worth noting is the "quick escape" feature that is located at the top right of every page. If a user hits the "Leave this site quickly" button, it redirects the internet browser to Google.[69]

VII. LGBTQ Safety Plans

Some communities and organizations have created LGBTQ domestic violence safety plans. These safety plans not only include the usual information from safety planning, like how to obtain safety and shelter and who to call in an emergency, but also contains additional information relating to LGBTQ concerns. The Lesbian, Gay & Bisexual Youth Plan from the Norfolk County District Attorney's Office separated resources for young people into three separate sections: at school, at home, and on the street.[70] The brochure also contained information relating to the Massachusetts statute regarding discrimination against lesbian, gay, and bisexual people, which shows the legal standard that Massachusetts citizens can expect in their own state.[71] In addition, the pamphlet also contained many phone numbers, besides 911, for (at-risk) youth to call.[72] Some of the resources were LGBTQ specific, and other resources were general community resources that could provide help to LGBTQ intimate partner victims.[73]

The Texas Association Against Sexual Assault also has a specific safety plan for LGBTQ Survivors of Sexual Assault.[74] The pamphlet contains some national resources, and then contains general information about "What to Do if You are Sexually Assaulted," "What is sexual assault," and a section about "Lesbian, Gay, Bisexual Transgender, Queer and Intersex Survivors of Sexual Assault."[75] While the pamphlet does not have as many local or state resources, it does a great job summarizing generally what sexual assault is and some of the concerns that are directly

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[68] *Id.*

[69] *Id.*

[70] NORFOLK COUNTY DISTRICT ATTORNEY'S OFFICE, LEAFLET, LESBIAN, GAY & BISEXUAL YOUTH SAFETY PLAN (1991).

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] TEXAS ASSOCIATION AGAINST SEXUAL ASSAULT, LEAFLET, LGBTQI SURVIVORS OF SEXUAL ASSAULT.

[75] *Id.*

applicable to the LGBTQ community. For example, the pamphlet talks about homophobia, transphobia, and specifically what it is like to be a transgender survivor.[76] By including this specific information, the pamphlet is accessible and relatable to the entire LGBTQ community. Ideally, a mixture of information, such as the content available in the Suffolk County District Attorney's Office pamphlet and the narratives about LGBTQ survivor issues in the Texas Association's Against Sexual Assault would be an ideal combination to reach the greatest amount of victims and survivors, while providing the best resources available.

VIII. How Technology Can Improve LGBTQ Safety Plans

Technology and innovative ideas can help create more covert and hidden LGBTQ Domestic Violence Safety Plans that are safer for LGBTQ Domestic Violence victims to use. For example, when an LGBTQ Domestic Violence victim carries around papers, flyers, and other resources relating to domestic violence, the abuser may recognize that he or she may lose their partner. Additionally, the most dangerous time for a domestic abuse victim is right after they choose to leave their abusive partner.[77] At this point, the abuser may be so enraged he or she will do anything to make sure that the victim does not leave him or her.

With the development of mobile technologies the providers of domestic violence services have a unique opportunity to give resources to victims. Instead of carrying around paper safety plans, pamphlets, and other things that can easily be found, the victim has the opportunity to have all of the information available electronically. However, this presents an obstacle for a victim whose abuser is technologically savvy. If the abuser is technologically savvy, they may be able to track what sites the victim visits, which poses a higher risk for the victim. When using online resources, it is imperative that the victim knows how to clear his or her history in order to keep him or herself safer to ensure a higher level of safety.

With that being said, it was extremely difficult to find all of the resources for LGBTQ domestic violence resources. An 'application' for a phone or a website that does not show the history on the phone or computer would be a win-win solution to this issue. These types of services combine the resources victims need, along with keeping the resources discrete enough to keep the victim safe. Currently, this type of

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[76] *Id.*

[77] Dr. John Schufeldt, M.D., St. Joseph's Hospital and Medical Center, Address at Domestic Violence & the Law, at the Sandra Day O'Connor College of Law, Arizona State University (Spring 2013).

resource is not available for LGBTQ Intimate Partner violence victims in Phoenix.

Another innovative idea to combat domestic violence was offered by Dr. Schufeldt, an emergency room physician, during a class presentation at the Sandra Day O'Connor College of Law. Dr. Schufeldt cited one hospital that was currently creating domestic violence information packets that could be inserted into a victim's sock while the abuser was not around at the hospital in order to keep the information discrete.[78] Innovative ideas that combine technology that is not able to be tracked are crucial for domestic violence victims in the future.

IX. Solutions for Phoenix

In order to help solve the LGBTQ Intimate Partner Violence problem in Phoenix, more streamlined services are needed. After all of the calling to various agencies and nonprofit organizations, no particular organization could offer an exhaustive list of resources for LGBTQ Domestic Violence victims. In order to solve this problem one group, whether it's (a) public agency or nonprofit organization needs to take the lead on performing a complete community audit of all the resources available and streamlining that list into one single document that can be distributed throughout the city of Phoenix. Without one exhaustive list of LGBTQ resources, domestic violence victims will not have the time or where-with-all to travel to all of the various agencies to get the help they deserve and desperately need. Because Phoenix does not have an LGBTQ Family Resource Center that covers domestic violence issues at this point, it is absolutely imperative that these resources are available online. While not everyone has access to the web, domestic violence victims most likely would have an easier time tracking down resources that are online, rather than traveling to each and every location of the individualized services. If the resources could also be organized into a phone application, it would be even better.

The Domestic Violence hotline needs a larger, more encompassing database for LGBTQ Domestic Violence victims. According to the Domestic Violence hotline there is one LGBTQ Domestic Violence resource in all of the Phoenix area. However, this not represent the full extent of the resources available. There are many nonprofit organizations in the Phoenix area that provide a number of resources to LGBTQ people. These nonprofit organizations and government agencies may not specifically provide resources to "Domestic Violence Victims/Survivors", but some provide food while others provide housing, clothes, etc. By

[78] *Id.*

taking a full audit of the resources in Phoenix and streamlining this information, it may be easier to separate the services by what specifically the LGBTQ Domestic Violence victim is searching for. Re-organizing the database and resources specifically by what the survivor is looking for would cast a wider net of possible resources and begin to piece together a cohesive list of resources that meets all the needs of LGBTQ domestic violence victims.

Of course, the best option for the city of Phoenix would be a family resource center. This would create a centralized location of resources that LGTBQ Domestic Violence victims could utilize. This venture could be privately and publicly funded since all parties have an economic interest in lowering and preventing the cost of domestic violence.[79] Given the large geographic area the city of Phoenix and surrounding communities encompass, one location would be a huge time saver for those parties who are interested in receiving help. Additionally, the center could offer proactive resources like the Northwest Network does, including classes and peer counseling to try and prevent the issues before they even occur.

In Phoenix we must not also forget about LGBTQ intimate partner violence batterers. LGBTQ Intimate Partner violence is based on a pattern of coercive control.[80] Batterer Intervention Programs have been designed to stop the coercive control and mediate the offender back to a healthy way of living.[81] Batterer Intervention Programs have been proven successful to lower the rate of violence with offenders in long-term studies that were conducted six months after the treatment has ceased.[82] There are programs around the country that have specific Batterer Intervention Programs designed to address concerns and needs that domestic violence batterers have as well as issues specific to the LGBTQ community.

In Massachusetts, the Department of Public Health created specific guidelines, which require batterer intervention programs to meet a number of criteria.[83] The program has educational components that required each batterer intervention program to educate their participants about general guidelines provided by the Massachusetts Guidelines and Standards for the Certification of Batterer Intervention Programs as well as specialized

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[79] GWINN & STRACK, *supra* note 21, at 53-57.

[80] THE COMMONWEALTH OF MASSACHUSETTS, EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES, DEPARTMENT OF PUBLIC HEALTH, LEAFLET, PILOT PROGRAM SPECIFICATIONS FOR INTERVENTION WITH GAY, LESBIAN, BISEXUAL AND TRANSGENDER PERPETRATORS OF INTIMATE PARTNER VIOLENCE (1999).

[81] *Id.*

[82] Edward W. Gondolf, *Batterer Programs: What We Know and Need to Know*, 12 J. INTERPERSONAL VIOLENCE 1, 83-98 (1997).

[83] *See id*.

components.[84] The specific educational components that related to the LGBTQ community were: homophobia and internalized homophobia, HIV and sexual health, negative self-talk, relationship history, goal-setting, and role plays.[85] By addressing specific issues relating to the LGBTQ community, the batterer intervention program has a better chance of contributing to the success of the participants who enter the program.[86]

Overall, in order to solve the LGBTQ intimate partner issue in Phoenix, the interested parties have to begin considering resources on a wider scale, since the area currently does not have many resources for that victim population.

X. Funding LGBTQ Intimate Partner Violence Resources in Phoenix

When considering starting a community resource or any type of program to help solve social issues in the community, inevitably the problem of funding comes up. Funding not only affects the quality of services given but whether or not specific services can be offered to the community. LGBTQ Domestic Violence Resource Centers are a great investment for the city of Phoenix and can be funded in a variety of ways. Due to the amount of money the city would be saving in the long-run by creating preventive programs that directly address these issues, all of the community agencies that have a stake in domestic violence should be interested in investing money upfront for services, instead of being reactionary and paying for trials and jail time in response to intimate partner violence.

The two model programs, The Northwest Network and Show Me Love, are funded in two separate ways. The Northwest Network is a 501(c)(3) nonprofit organization that accepts donations from the community as well as local businesses in the Seattle, Washington area.[87] Show Me Love is primarily funded by a grant that was received through the Department of Justice but is also funded through other grants and local businesses.[88] These models of funding show the importance of community based responsibility and funding of programs that affect multiple sectors of the community and a variety of agencies. By having multiple funding sources, the Family Justice Center or a similar program is not reliant on only one form of funding and is better able to meet the needs of the community by diversified funding.

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[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Supra* note 57.
[88] *Supra* note 63.

Casey Gwinn in San Diego has mastered the process of having community partners by involving city agencies from the city of San Diego, along with private foundations and local nonprofit organizations.[89] The impressive list of partnering organizations from the San Diego Family Justice Center includes thirty-three organizations, ranging from a local law school to the local military base, a hospital, and specific agencies within the city of San Diego.[90] By including a variety of organizations, family justice centers and new initiatives will make themselves more sustainable by ensuring that their funding is coming from a variety of services.

Conclusion

Overall, the community of Phoenix and surrounding communities need to think of new ways to cut the number of incidents concerning LGBTQ Domestic Violence. By working together and thinking of all the collaborative resources, nonprofit organizations,[91] and government agencies can work together to create a list of comprehensive resources that are available for LGBTQ Domestic Violence victims. Additionally, with an exhaustive list of the resources available in the community, the areas of opportunity would be clearer and individual agencies could begin to fill those gaps.

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[89] *See* GWINN & STRACK, *supra* note 21.

[90] *Id*. The list of partnering agencies include: Action Network-Human Trafficking Coalition, Adult Protective Services, Cal Western Law School-Legal Internship Program, Camp HOPE, Center for Community Solutions-HOPE Team (Elder Abuse), Children's Hospital-Chadwick Center Family Violence Project, Dress for Success, FJC Legal Network, Military (Navy & Marine Corps), San Diego City Attorney's Office-Child Abuse & Domestic Violence Unit, San Diego Deaf Mental Health Services, San Diego District Attorney's Office-Family Protection Division, Victim Assistance Program, San Diego Domestic Violence Council, San Diego County-Child Welfare Services, San Diego Family Justice Center Foundation, Family Justice Center Volunteer Program, San Diego FJC Chaplain's Program, San Diego Police Department-Domestic Violence Unit, San Diego Probation Department, San Diego Volunteer Lawyer Program-Family Law and Immigration Legal Services, San Diego State University (Stalking Assessment Project), The Crime Victims Fund, Sharp Grossmont Hospital, Soul Care Project, Speak for Success-Women's Leadership Institute, UCSD-Forensic Medical Unit, Teen Court Juvenile Diversion Program, The Rainforest Art Project, Travelers Aid, Union Pan Asian Communities (UPAC), Woman Infants and Children (WIC), YWCA of San Diego County.

[91] Thank you to all of the various agencies who took time to list all of their resources. Everyone I worked with was extremely professional, helpful, and more than willing to give their time to help.