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ARTICLES

NOTES

Articles

Future of Disability Rights Advocacy and "The Right to Live in the World"

Closing

Jacobus tenBroek Disability Law Symposium April 17, 2009

Eve Hill and Peter Blanck*

* Eve L. Hill, Esq., Senior Vice President, Burton Blatt Institute, Syracuse University. Peter Blanck, Ph.D., J.D., University Professor and Chairman, Burton Blatt Institute, Syracuse University. The program of research described herein is supported, in part, by grants from: (a) The National Institute on Disability and Rehabilitation Research (NIDRR), U.S. Department of Education, for (i) "The Asset Accumulation and Economic Self-Sufficiency Project," Grant No. H133A090014; (ii) "Demand Side Employment Placement Models," Grant No. H133A060033; (iii) "Southeast Disability & Business Technical Assistance Center," Grant No. H133A060094; and (iv) "Center on Effective Delivery of Rehabilitation Technology by Vocational Rehabilitation Agencies," Grant No. H133A090004; (b) The Rehabilitation Services Administration (RSA) for "Technical Assistance and Continuing Education (TACE) Center Region IV (Southeast TACE)," Grant No. H264A080021; and (c) the U.S. Department of Labor, Office of Disability Employment Policy (ODEP), for the "Disability Case Study Research Consortium on Employer Organizational Practices in Employing People with Disabilities," Grant/Contract No. E-9-4-6-0107.

I. INTRODUCTION

As we approach the twentieth anniversary of the Americans with Disabilities Act (ADA),[1] the disability community finds itself facing new challenges and opportunities. The ADA has been amended to strengthen its protections through the ADA Amendments Act (ADAAA);[2] the Obama Administration has expressed a renewed commitment to disability rights;[3] and disability civil rights have been recognized internationally through the UN Convention on the Rights of Persons with Disabilities.[4] However, barriers to enforcement of disability rights persist, negative public perceptions of disability rights linger, and many courts remain committed to the old charity and medical models of disability.[5]

The Second Jacobus tenBroek Disability Law Symposium, held on April 17, 2009 in Baltimore, Maryland, brought disability advocates together from around the world to discuss "New Perspectives on Disability Law: Advancing the Right to Live in the World."[6] The Symposium carries on the legacy of Jacobus tenBroek, a constitutional law scholar who introduced the concept that civil rights should extend to Americans with disabilities, and who founded the National Federation of the Blind.[7] The Symposium brings together leading legal scholars, policymakers, and practitioners in the field of disability rights to consider current barriers to full inclusion of people with disabilities and to identify legal and policy solutions.

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[1] 42 U.S.C. §§ 12101–12213 (2004).

[2] Pub. L. No. 110-325, 122 Stat. 3553 (2008).

[3] *See* The White House, Disability, http://www.whitehouse.gov/issues/disabilities/ (last visited Nov. 8, 2009).

[4] Convention on the Rights of Persons with Disabilities and Optional Protocol, Dec. 13, 2006, 46 I.L.M. 443, *available at* http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf.

[5] For a prior review, see Peter Blanck, *"The Right to Live in the World": Disability Yesterday, Today, and Tomorrow*, 13 TEX. J. C.L. & C.R. 367 (2008).

[6] *See* Jacobus tenBroek Disability Law Symposium, http://www.nfb.org/nfb/Law_Symposium.asp (last visited Nov. 8, 2009).

[7] *See* National Federation for the Blind, http://www.nfb.org (last visited Nov. 8, 2009).

Colleagues at the Burton Blatt Institute (BBI),[8] authors Hill and Blanck participated in the planning and presentation of the Symposium and offer this closing article. BBI, a university-wide institute at Syracuse University, is dedicated to advancing the civic, economic, and social participation of people with disabilities worldwide through a global network of research, education, community development, and advocacy. BBI's central areas of focus include employment, entrepreneurship, economic empowerment, civil rights, and community participation, each touching dimensions of the experience of people with disabilities.

BBI's multidisciplinary approach facilitates the inclusion into the disability rights movement of valuable perspectives: those of scholars, lawyers, policymakers, social science researchers, advocates, community members with and without disabilities, and providers of funding at the national and international levels. BBI impacts national and international civil rights through diverse efforts, including management of the Association of Disability Rights Counsel (ADRC); publications, including the casebook "Disability Civil Rights Law and Policy";[9] operating the Southeast Disability and Business Technical Assistance Center (DBTAC): ADA Center;[10] hosting the World Bank's Global Partnership on Disability and Development (GPDD);[11] and hosting the BBI Disability Policy Internship for Law Students in its Washington, D.C. office.[12]

This closing article reflects discussions and ideas of the Symposium, focusing on the roles of the federal government, private plaintiffs and their attorneys, the international community, and the disability community. We draw from and build on the remarks of the speakers at the Symposium.[13] We are very grateful to them for their thoughtful, intelligent, and forward-looking ideas.

Part II of this article, drawing from comments from Kareem Dale, Samuel Bagenstos, and Christine Griffin, discusses disability issues facing the Obama Administration and possible responses in a variety of areas, including community integration and health care, housing,

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[8] *See* Burton Blatt Institute, http://bbi.syr.edu (last visited Nov. 8, 2009).

[9] PETER BLANCK, ET AL., DISABILITY CIVIL RIGHTS LAW AND POLICY: CASES AND MATERIALS (2d ed. 2009).

[10] *See* DBTAC: ADA Center, http://www.sedbtac.org (last visited Nov. 8, 2009).

[11] *See* GPDD, http://www.gpdd-online.org (last visited Nov. 8, 2009).

[12] *See* Burton Blatt Institute: 2009 Disability Policy Leadership Program, http://bbi.syr.edu/scholarship/leadership2009.htm (last visited Nov. 8, 2009).

[13] The key speakers were, in order of appearance: Kareem Dale, Special Assistant to the President for Disability Policy; Maura Healey, Assistant Attorney General and Chief, Civil Rights Division, Office of the Attorney General, Commonwealth of Massachusetts; Tim Fox, Principal, Fox & Robertson, P.C.; Amy Robertson, Principal, Fox & Robertson, P.C.; Ari Ne'eman, Founding President, The Autistic Self-Advocacy Network; Gerard Quinn, Professor of Law, National University of Ireland, Galway; Katherine Guernsey, International Lawyer and Adjunct Professor, American University School of International Service; Samuel Bagenstos, Visiting Professor of Law, UCLA School of Law, and Professor of Law, University of Michigan Law School (Fall 2009); Christine Griffin, Commissioner, Equal Employment Opportunity Commission; Peter Blanck, University Professor and Chairman, Burton Blatt Institute, Syracuse University; Scott LaBarre, Principal, LaBarre Law Offices, P.C., and President, National Association of Blind Lawyers.

education, employment, and access to goods and services. Part III, inspired by the comments of Tim Fox, Amy Robertson, Samuel Bagenstos, Peter Blanck, and Scott LaBarre, discusses barriers and solutions to private enforcement of disability civil rights laws. Part IV, based on comments by Maura Healey, Tim Fox, and Amy Robertson, addresses state-level disability rights enforcement. Part V addresses judicial approaches to disability rights in response to changes in law, federal policy, and enforcement mechanisms. Finally, Part VI, drawing from comments by Gerard Quinn and Katherine Guernsey, addresses the international growth of disability rights.

II. FUTURE OF FEDERAL DISABILITY RIGHTS IMPLEMENTATION

The Obama Presidential Campaign expressed a commitment to the rights of people with disabilities and ensured that people with disabilities were actively included in a variety of campaign roles.[14] Now the Obama Administration must decide how that commitment is implemented. People with disabilities and disability advocates are shaping the Administration's approach to disability rights in a variety of contexts, from inside and outside the government. The Administration's commitment to disability rights may manifest in a variety of ways: development, interpretation, research, enforcement, implementation, and modeling of disability rights laws and concepts. The level of commitment also may be evident in substantive areas, such as community integration; health care; education; employment; equal access to goods, services, and technology; and involvement of people with disabilities in the federal government.[15]

A. Community Integration

The federal government plays a central role in the implementation of the "integration mandate" expressed by the U.S. Supreme Court in *Olmstead v. L.C. ex rel. Zimring*,[16] which was issued ten years ago. The Court in *Olmstead* held that the ADA requires states to provide services for people with disabilities in the most integrated setting appropriate for the individual. As a result, states cannot require people with disabilities to live in institutions—such as nursing homes, psychiatric hospitals, or residential schools—to receive disability-related services, such as health

[14] Fact Sheet, Obama for America, Barack Obama and Joe Biden's Plan to Empower Americans with Disabilities (2008), http://www.barackobama.com/pdf/DisabilityPlanFactSheet.pdf.

[15] For a review of these and related topics, see PETER BLANCK ET AL., *supra* note 9.

[16] 527 U.S. 581 (1999).

care. States must develop viable community-based options.

Because the federal government, through Medicaid[17] and Medicare,[18] provides much of the funding that states use for long-term care and health care services, as well as housing[19] for low-income, elderly, and disabled individuals, the federal government influences and encourages states to transition services from institutional to community-based settings. The federal government also enforces Title II of the ADA, including the integration mandate,[20] and therefore shapes the ways states move people with disabilities out of institutions. The Obama Administration has the opportunity to shape policy and enforcement to advance the integration of people with disabilities into their communities.

The Administration has committed to make community integration a priority, announcing on June 22, 2009, the "Year of Community Living," led by a Coordinating Counsel at the Department of Health and Human Services (HHS).[21] As part of this effort, HHS plans to fund Aging and Disability Resource Centers in every state to help individuals of all ages with disabilities understand, explore, and choose among the various services that help them live in their communities. HHS will fund efforts to strengthen partnerships between Aging and Disability Resource Centers and hospitals in certain states to help people being discharged receive assistance at home instead of in nursing homes. HHS will seek public input into other options to reduce the barriers to community living

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[17] Federal Medicaid funding matches state expenditures for health care services for low-income people. The minimum Federal Medical Assistance Percentage (FMAP) was 50% for 2004–2008. For 2009, because of increases through the American Recovery and Reinvestment Act (ARRA), the minimum FMAP is 56.2 %. CMS Information Related to the Economic Recovery Act of 2009, Medicaid (2009), http://www.cms.hhs.gov/Recovery/09_Medicaid.asp. The FMAP for each state varies from 56.2 % to nearly 76 %. *Id.*; *see also* Federal Matching Rate (FMAP) for Medicaid and Multiplier (2009), http://www.statehealthfacts.org/comparetable.jsp?ind=184&cat=4 (last visited Nov. 4, 2009). The Medicaid program serves approximately 60 million Americans annually. THE HENRY J. KAISER FAMILY FOUNDATION, EXPLAINING HEALTH CARE REFORM: WHAT IS MEDICAID? 1 (2009), *available at* http://www.kff.org/healthreform/upload/7920.pdf.

[18] Federal Medicare provides funding for health care services for individuals over age sixty-five and individuals with certain disabilities and health conditions. Medicare acts like health insurance for eligible individuals, providing payment to providers of health care services. Individuals may pay a monthly premium for coverage. *See* THE HENRY J. KAISER FAMILY FOUNDATION, MEDICARE: A PRIMER 1 (2009), http://www.kff.org/medicare/upload/7615-02.pdf. In 2009, the federal government expects to spend $477 billion on Medicare services. *Id.* at 13. The program serves over 37 million people. *Id.* at 14.

[19] The U.S. Department of Housing and Urban Development supports housing for low- and middle-income Americans by providing mortgage insurance, down payment assistance, rental assistance (i.e., Section 8 vouchers), public housing subsidies, and grants. *See* U.S. DEP'T OF HOUS. AND URBAN DEV., ANNUAL PERFORMANCE PLAN FISCAL YEAR 2009 3–4 (2009), *available at* http://www.hud.gov/offices/cfo/reports/pdfs/app2009.pdf. HUD has several programs focusing on people with disabilities and health conditions. *Id.*

[20] The ADA Title II regulations state the integration mandate on which the *Olmstead* Court relied: "A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d) (2009).

[21] News Release, U.S. Dep't of Health and Human Servs., HHS Announces Initiatives in Support of the "Year of Community Living" (June 22, 2009), *available at* http://www.hhs.gov/news/press/2009pres/06/20090622b.html.

for individuals with disabilities.[22]

Ten years after *Olmstead*, concerns remain about the states' capacities to provide community-living services to beneficiaries that need and want such support. Many states are working to reform their existing long-term-care delivery systems to build the community-based infrastructure needed to deliver these services. To appropriately allocate the resources essential to respond to needs, the federal government should facilitate a uniform functional assessment of need across the existing institutionalized populations in each state rather than simply relying on medical diagnoses.

Furthermore, it is essential that people with disabilities living in the community have access to competent assistance. The federal government should encourage states to invest in their community-based-services workforces and ensure access to competency-based training, living wages, and benefits. Federal and state governments should also invest in moving people from institutions to communities and in helping people to continue living in their communities. Deinstitutionalization is not as simple as opening doors and letting people out. Individuals need community services and supports to assist them before and after they leave an institution.

Federal and state governments can facilitate successful transition by developing a cadre of community-living coordinators knowledgeable in housing, personal assistance, transportation, employment, social, and other services and programs that help people remain in, or successfully transition to, their communities. These programs and services could be based on "community village" models currently in place in a variety of neighborhoods.[23] However, the need for additional infrastructure of needs assessment, workforce development, and care coordination cannot be used as an excuse to keep people in institutions. Many people inappropriately remain in institutions and have been waiting ten years for enforcement of the integration mandate from *Olmstead*.[24]

The federal and state governments also must adopt the flexibility necessary to make transitions possible. For example, global budgeting practices should be instituted to allow resources to move between and among previously allocated budget categories, permitting Medicaid funding to follow the beneficiaries as they move from institutions to the community.

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[22] Medicaid Program, Home and Community-Based Services (HCBS) Waivers, 74 Fed. Reg. 118 (proposed June 22, 2009) (to be codified at 42 C.F.R. pt. 441), *available at* http://edocket.access.gpo.gov/2009/pdf/E9-14559.pdf.

[23] For a list of villages nationwide, see Beacon Hill Village, Other Villages: Other At-Home Organizations (2008), http://beaconhillvillage.org/villages.html. New York provides government support for Naturally Occurring Retirement Communities (NORCs). *See* FREDDA VLADECK, UNITED HOSPITAL FUND, A GOOD PLACE TO GROW OLD: NEW YORK'S MODEL FOR NORC SUPPORTIVE SERVICE PROGRAMS (2004), *available at* http://www.uhfnyc.org/publications/203833.

[24] *See, e.g.*, Disability Advocates, Inc. v. Paterson, No. 03-CV-3209 (NGG), 2009 WL 2872833 (E.D.N.Y. Sept. 8, 2009).

B. Housing

The Administration recognizes the need to provide community housing options for individuals leaving institutions. The U.S. Department of Housing and Urban Development (HUD) will support community living by providing one thousand housing vouchers for individuals with disabilities transitioning from institutions to community-based living arrangements, and three thousand vouchers for non-elderly individuals with disabilities.[25] HHS and the Department of Justice will coordinate their efforts to ensure targeted, effective enforcement of the integration mandate under the ADA and Rehabilitation Act.[26] At the same time, the Administration included approximately $140 million in the American Recovery and Reinvestment Act to support independent living centers across the country.[27]

Efforts to update fair housing laws through regulatory and legislative measures will be crucial to preventing the conditions that force people into institutions. Currently, newly constructed or altered federally funded multi-unit housing is required to be accessible by Section 504 of the Rehabilitation Act.[28] Five percent of units are required to be physically accessible in accordance with the Uniform Federal Accessibility Standards.[29] This leaves new single-family homes, which constitute approximately 70% of the new homes being built,[30] inaccessible. The lack of accessible housing makes it difficult for many people to remain in their communities as they age or develop disabilities. It also substantially reduces the ability of individuals with disabilities to find housing. Research shows that demand for accessible housing exceeds the supply, and the gap between demand and supply is growing, especially as baby boomers age with or into disability.[31]

Incorporating reasonable "visitability" requirements into federally

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[25] News Release, U.S. Dep't of Hous. and Urban Dev., HUD to Offer Housing Assistance to 4,000 Americans with Disabilities (June 22, 2009), *available at* http://www.hud.gov/news/release.cfm?content=pr09-095.cfm.

[26] News Release, U.S. Dep't of Health and Human Servs., Statement by HHS Secretary Kathleen Sebelius on the 10th Anniversary of the U.S. Supreme Court Decision Olmstead v. L.C. (June 22, 2009), *available at* http://www.hhs.gov/news/press/2009pres/06/20090622a.html.

[27] U.S. DEP'T OF EDUC., AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009: INDEPENDENT LIVING RECOVERY FUNDS (Apr. 1, 2009), http://www.ed.gov/policy/gen/leg/recovery/factsheet/ils.html.

[28] 24 C.F.R. §§ 8.22–8.23 (2009). An additional 2% of units are required to be accessible for people with hearing and vision impairments.

[29] *Id.*

[30] *See* DAVID BERSON ET AL., HOMEOWNERSHIP ALLIANCE, AMERICA'S HOME FORECAST: THE NEXT DECADE FOR HOUSING AND MORTGAGE FINANCE 9, *available at* http://www.freddiemac.com/news/pdf/americas_home_forecast.pdf (last visited Nov. 8, 2009).

[31] *See* Nichole Earley & Jean Memken, *Accessible Housing Availability for the Growing U.S. Elderly Population*, 34 HOUSING AND SOCIETY 1 (2007); William N. Myhill & Peter Blanck, *Disability and Aging: Historical and Contemporary Challenges*, 10 MARQUETTE ELDER'S ADVISOR (forthcoming 2010); INFORMEDESIGN, ELDERLY POPULATION EXCEEDS ACCESSIBLE HOUSING STOCK (2007), http://www.informedesign.umn.edu/Rs_detail.aspx?rsId=3235.

funded multi-unit housing and into single-family and townhome housing would substantially improve the ability of people with disabilities to remain in the community. Generally, visitability requires a zero-step entrance, 32-inch doors and 36-inch hallways, and a bathroom on the main floor that is large enough to accommodate a wheelchair. [32] Several states and cities have put in place visitability requirements for government-funded or subsidized housing.[33] Financial incentives to support visitability have also been adopted in some states, including Georgia and Pennsylvania.[34] Preliminary case studies of visitability elements indicate that the costs of including visitability elements in new single-family home construction are minimal and the benefits are substantial.[35]

HUD should consider amending its Section 504 regulations to require reasonable visitability in new federally funded single-family homes. If additional information is needed to support such a change, the U.S. Architectural and Transportation Barriers Compliance Board (Access Board) may be charged with examining what constitutes minimal visitability requirements. Further research may assess the costs of incorporating visitability elements in new single-family housing, and the expected savings of subsequent modifications to incorporate the same elements into inaccessible homes.[36]

Privately and federally funded housing is covered by the Fair Housing Amendments Act (FHAA), which applies to multi-unit housing

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[32] *See* STEVEN TRUESDALE & EDWARD STEINFELD, REHABILITATION ENGINEERING RESEARCH CENTER ON UNIVERSAL DESIGN AT BUFFALO VISIT-ABILITY: AN APPROACH TO UNIVERSAL DESIGN IN HOUSING 2, *available at* http://www.ap.buffalo.edu/idea/Visitability/Booklet/ VisBk%20Ver3-7-03.pdf (last visited Nov. 8, 2009).

[33] *See, e.g.*, MINN. STAT. ANN. § 462A.34 (West 2001); IND. CODE ANN. § 22-13-4-7 (West 2003); *see also* OR. REV. STAT. ANN. § 456.510 (West 2003); TOLEDO, OHIO, MUNICIPAL CODE 1347.02 (2008); SAN ANTONIO, TEX. MUNICIPAL CODE ch. 6, art. XII, § 6-316 (2009).

[34] GA. CODE ANN. §48-7-29.1 (West 1998) (granting a credit to a taxpayer who incorporates the following accessible elements into his home: "(A) One no-step entrance allowing access into the residence; (B) Interior passage doors providing a 32 inch wide clear opening; (C) Reinforcements in bathroom walls allowing later installation of grab bars around the toilet, tub, and shower . . . ; and (D) Light switches and outlets placed in accessible locations."); 72 PA. CONS. STAT. ANN. §4751-104 (West 2006) (granting tax credit to taxpayers who comply with visitability design requirements); *see also* 310 ILL. COMP. STAT. ANN. 95/15 (West 1999) (requiring people applying for the accessibility demonstration grant to include "(1) . . . at least one no-step exterior entrance with a 36-inch-wide entrance door . . . ; (2) . . . interior passage doors [that] allow at least 32 inches of clearance in width; (3) . . . electrical outlet[s] in the home [that are no] lower than 15 inches from the finished floor and [light switches that are no] more than 48 inches from the finished floor[;] [a]ll environmental controls in the home shall [also] be in accessible locations; [and] (4) [i]n each bathroom . . . the walls adjacent to [fixtures such as a toilet, bathtub, shower stall, or shower seat must be] reinforced in a manner [to] allow the later installation of grab bars around those fixtures").

[35] TRUESDALE & STEINFELD, *supra* note 32, at 15–23 (estimating cost increases of $25–$1,500).

[36] BBI is working with the Global Universal Design Commission (GUDC) to develop universal design standards for buildings, products, and services. The GUDC involves builders, architects, disability advocates, and national and international leaders in the development and adoption of consensus universal design standards. To date, the GUDC has focused on commercial buildings, but universal design standards for housing may be pursued through this mechanism. *See* Global Universal Design Commission, Inc., http://www.globaluniversaldesign.org (last visited Nov. 8, 2009).

constructed since 1991.[37] Although FHAA applies to all units in a facility, the accessibility requirements of FHAA are minimal. FHAA requires all common areas to be accessible; doors to be thirty-two inches wide; at least one accessible route into and through the unit; light switches, outlets, and thermostats in accessible locations; reinforcements in bathroom walls to allow subsequent installation of grab bars; and kitchens and bathrooms large enough to allow an individual in a wheelchair to maneuver.[38]

These requirements alone often do not achieve an accessible unit where a person with a mobility disability could live. As a result, many individuals with disabilities must invest substantial resources in additional modifications, such as installing grab bars or an accessible shower, or lowering or removing kitchen cabinets. In addition, FHAA does not require accessibility in alterations to housing built before 1991, no matter how substantial the alterations.[39]

As mentioned above, demand for accessible housing is likely to continue to exceed the supply as the population ages. For people who cannot afford to make substantial modifications to their homes, the lack of fully accessible units increases their risk of losing their homes and being forced to move to institutions. The federal government needs to consider ways to sensibly spur the increased accessibility of multi-unit housing.

Private businesses are subject to accessibility requirements under Title III of the ADA for new construction (full access),[40] alterations (full access of the altered area, plus proportional access to the path of travel),[41] and existing buildings (ongoing "readily achievable" barrier removal).[42] Because integrated accessible housing is central to the quality of life of individuals with disabilities, elderly people, and our communities in general, similar attention to housing development as that paid by Title III to private businesses is justified.

FHAA could be amended to require accessibility in substantial alterations, and unit-by-unit accessibility in smaller alterations, much as the Rehabilitation Act does.[43] In an alteration, the additional costs of incorporating accessibility will likely be marginal. However, to offset any additional costs under either approach, tax incentives may be provided, modeled after the Disabled Access Credit available to small businesses for compliance with the ADA[44] and the tax deduction for

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[37] FHAA, 42 U.S.C. § 3604(f)(3)(C) (2004).

[38] *Id.*

[39] *Id.* (covers multifamily dwellings for first occupancy after the date that is thirty months after the date of enactment of the FHAA of 1988).

[40] 28 C.F.R. § 36.401 (2009).

[41] *See id.* §§ 36.402–36.403.

[42] *See id.* § 36.304.

[43] Substantial alterations under the Rehabilitation Act are those involving fifteen-unit or larger projects where the cost of the alteration is 75% or more of the replacement cost of the facility. 24 C.F.R. § 8.23 (2009).

[44] 26 U.S.C. § 44(c)(2) (2004).

removal of architectural and transportation barriers.[45]

In new, large, multi-unit private housing projects, FHAA could be amended to require a percentage of units to incorporate accessibility, perhaps modeling or improving on the Uniform Federal Accessibility Guidelines. Again, meaningful tax or financial incentives may offset additional costs and potentially create economic incentives for builders and owners.

Additional tax and other financial incentives may be provided to housing providers who go beyond FHAA requirements by providing greater accessibility in covered units, providing accessibility to units that are not covered, or incorporating accessibility in renovations. Such front-end incentives may save the government money by reducing the tax deductions (as medical expenses) given to individuals who have to modify their homes to accommodate their disabilities. Such retrofits typically are more expensive than the cost of incorporating accessibility during construction or renovations.[46]

Finally, the federal government should find ways to help people modify their pre-FHAA homes when necessary to accommodate a disability. The substantial retrofit costs associated with inaccessible housing, if placed solely on individuals with disabilities, will continue to force people to impoverish themselves and move into nursing homes and onto government benefits. By focusing on cost-effective accessibility at the front end of the construction process, and by assisting people to remain in their homes (where they can remain independent and self-sufficient, instead of seeking government support in institutions), the government serves not only its humanitarian and civil rights interests, but also its own financial interests as well as those of housing developers.

The federal government needs to play a central role in facilitating voluntary implementation of the housing accessibility requirements. Much confusion surrounds the application of fair housing laws, including: how FHAA applies to federally funded housing; how public housing authorities should implement their obligations to "affirmatively further fair housing";[47] for people with disabilities; and how accessibility requirements for alterations and for unaltered public housing facilities[48] should be interpreted and implemented. HUD's technical assistance does little to clarify these requirements.[49] The Administration has an opportunity to provide real guidance to builders, building owners, and people with disabilities on their rights and responsibilities.

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[45] *See id.* § 190.

[46] Myths and Facts about the Americans with Disabilities Act, http://www.ada.gov/pubs/mythfct.txt (last visited Nov. 8, 2009).

[47] 24 C.F.R. § 903.7(o)(1) (2008).

[48] *See id.* § 8.24 (program access in existing unaltered housing); *id.* § 8.23 (accessibility requirements for altered and substantially altered housing).

[49] *See* U.S. Dep't of Hous. & Urban Dev., Section 504 Frequently Asked Questions, http://www.hud.gov/offices/fheo/disabilities/sect504faq.cfm#anchor275219 ("Question: When and how should an individual request an accommodation?") (last visited Nov. 8, 2009).

The government also needs to take a lead role in enforcement of the fair housing laws. Some courts recently have held that there is no continuing violation rule for accessibility violations in housing.[50] Under this approach, a person with a disability must file suit within the statute of limitations period, which begins when the housing is constructed (e.g., one year after construction is completed). If a person with a disability does not try to rent a unit until after that period, the accessibility requirements will not be enforceable. The new administration has the opportunity to revise FHAA to address the continuous violation doctrine. Meanwhile, HUD should take a new proactive role in compliance and enforcement, particularly by instituting innovative programs for building plan reviews and site inspections of newly constructed housing, and by requiring violators to fund the development of accessible units.

C. Education

Education provides an experience of community integration for children and a foundation for integration for adults. Integrated or mainstream education supports the ability of individuals with disabilities to live in the community by allowing them to interact with people without disabilities at a formative age. It provides young people without disabilities a formative opportunity to engage with individuals with disabilities. Education, beyond the social aspect, is the foundation for community and economic life. A person's education largely determines their employment options, income level, and social status. Therefore, equal access to quality education for students with disabilities makes the difference between, on the one hand, poverty and reliance on government benefits, and on the other hand, employment, independence, and financial self-sufficiency.[51]

The Individuals with Disabilities Education Act (IDEA) provides federal financial support and legal requirements for the education of students with disabilities, including special education services.[52] IDEA calls for the federal government to provide 40% of the average cost of special education.[53] However, until 2009, Congress had never provided even 20%.[54] The Obama campaign promised to seek full funding for

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[50] *See* Garcia v. Brockway, 526 F.3d 456 (9th Cir. 2008). *But see* Fair Hous. Council, Inc. v. Vill. of Olde St. Andrews, Inc., 210 F. App'x 469 (6th Cir. 2006). For a recent analysis, see Eve Hill & Peter Blanck, *Future of Disability Rights: Part Three—Statutes of Limitations in Americans with Disabilities Act, "Design and Construct" Cases*, 60 SYRACUSE L. REV. (forthcoming 2009).

[51] ALEMAYEHU BISHAW & JESSICA SEMEGA, U.S. CENSUS BUREAU, INCOME, EARNINGS, AND POVERTY DATA FROM THE 2007 AMERICAN COMMUNITY SURVEY 16 (2008), *available at* http://www.census.gov/prod/2008pubs/acs-09.pdf (each level of educational attainment results in $10,000 or more increased median income).

[52] IDEA, 20 U.S.C. § 1400–1439 (2004).

[53] *Id.* § 1411.

[54] NEW AMERICA FOUNDATION, INDIVIDUALS WITH DISABILITIES EDUCATION ACT - FUNDING

special education services under IDEA.[55] Full funding of special education services will allow students with disabilities to be educated alongside their peers and learn on a level playing field. As a result, they will be able to pursue meaningful education and meaningful work and rely less on public benefits.

D. Employment

A part of deinstitutionalization that is rarely addressed is the segregated employment system in which many people with mental and intellectual disabilities are required to work. These segregated sub-minimum-wage programs, often referred to as sheltered workshops, pay people with disabilities below minimum wage, often for fully-productive work.[56] The nature of these segregated programs conflicts with the basic disability rights principles of integration and fairness.

In one of the largest national empirical studies of sheltered work settings, Peter Blanck and his colleagues found that these programs include a significant proportion of people with disabilities who are capable and desirous of working in integrated competitive work settings.[57] Moreover, as news coverage demonstrates, these programs are vulnerable to abuse.[58] The federal government should increase oversight of segregated employment programs to stop fraud and abuse. More importantly, the government should reconsider the role of segregated sub-minimum-wage programs and shift to appropriate programs supporting integrated employment and entrepreneurship.

Anti-discrimination in employment of people with disabilities is a major focus of the ADA. Still, the overall employment rate of people with disabilities remains unacceptably low.[59] The Administration is

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DISTRIBUTION (2009), http://febp.newamerica.net/background-analysis/individuals-disabilities-education-act-funding-distribution (American Recovery and Reinvestment Act provides an additional $12.2 billion for IDEA implementation by states over two years, temporarily raising the federal contribution to just over 30%).

[55] Fact Sheet, Obama '09, Barack Obama and Joe Biden's Plan to Empower Americans With Disabilities, http://www.barackobama.com/pdf/DisabilityPlanFactSheet.pdf (last visited Nov. 8, 2009).

[56] Fair Labor Standards Act, 29 U.S.C. § 214(c) (1989).

[57] Peter Blanck, Helen Schartz & Kevin Schartz, *Labor Force Participation and Income of Individuals with Disabilities in Sheltered and Competitive Employment: Cross-Sectional and Longitudinal Analyses of Seven States During the 1980s and 1990s*, 44 WM. & MARY L. REV. 1029, 1087 (2003).

[58] *See* Gregg Jones, *Texas farm that employed mentally disabled faces more scrutiny after Iowa facility's shutdown*, DALLAS MORNING NEWS, June 7, 2009, *available at* http://www.dallasnews.com/sharedcontent/dws/news/texassouthwest/stories/060709dnmetnewlostbo ys.44ea260.html; *Disabled "Fight Club" Trial Begins*, CBS NEWS, August 10, 2009, *available at* http://www.cbsnews.com/stories/2009/08/10/national/main5230499.shtml.

[59] *See* Peter Blanck, Meera Adya, William N. Myhill, Deepti Samant & Pei-Chun Chen, *Employment of People with Disabilities: Twenty-Five Years Back and Ahead*, 25 LAW & INEQ. 323 (2007). In July 2009, the unemployment rate of persons with a disability was 15.1 %, compared with 9.5 % for persons with no disability, not seasonally adjusted. Bureau of Labor Statistics, Labor Force

unlikely to pursue a legislative strategy to change the requirements of the disability rights laws because of the recent passage of the ADAAA. The Administration has numerous non-legislative opportunities to shape disability rights and other laws regarding employment.

The Administration may take a strong role in interpreting the law. For example, the Equal Employment Opportunity Commission (EEOC), Department of Justice, and Department of Transportation have authority to issue regulations interpreting the definition of disability under the ADAAA.[60]

The ADAAA was enacted in response to judicial narrowing of disability rights protections.[61] Following the Supreme Court's decision in *Sutton v. United Air Lines, Inc.*,[62] and its companion cases,[63] lower courts read the definition to exclude people who took medication or used equipment (i.e., "mitigating measures") to function, such as those with diabetes and people who use glasses.[64] Courts further limited the definition of disability to exclude people with episodic impairments, such as asthma and epilepsy, because these health conditions were substantially limiting only part of the time.[65] The courts also narrowed the definition to exclude people with learning disabilities who worked hard and succeeded despite their disabilities because they were compared to the average person, not the average person in their circumstances.[66]

The Supreme Court, in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*,[67] added a requirement that to be considered a major life activity, an activity must be of "central importance" to most people's daily lives.[68] This led to the exclusion form coverage of people with significant impairments, such as difficulty lifting, because courts held the activities affected by such impairments (for example, grocery shopping or child care) were not important enough to be covered by the law.[69]

These people were excluded because the courts decided their life activities were not "substantially limited" enough to deserve protection, even though their employers might have discriminated against them

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Statistics from the Current Population Survey, http://www.bls.gov/cps/cpsdisability.htm (last visited Oct. 30, 2009). For a study of disparities in employment between workers with and without disabilities, see Lisa Schur, Douglas Kruse, Joseph Blasi & Peter Blanck, *Is Disability Disabling in all Workplaces? Workplace Disparities and Corporate Culture*, 48 INDUS. REL. 381 (2009).

[60] ADA Amendments Act of 2008, Pub. L. No. 110-325, § 6(a)(2) (2008).

[61] *Id.* §§ 2(a)(4)–(7), 2(b)(2)–(5).

[62] 527 U.S. 471 (1999).

[63] Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999); Murphy v. United Parcel Serv., Inc., 527 U.S. 516 (1999).

[64] *See, e.g.*, Greenberg v. Bellsouth Telecomm., Inc., 498 F.3d 1258 (11th Cir. 2007); McPherson v. Fed. Express Corp., 241 Fed. App'x. 277 (6th Cir. 2006).

[65] *See, e.g.*, Equal Employment Opportunity Comm'n v. Sara Lee Corp., 237 F.3d 349 (4th Cir. 2001); Rhoads v. Fed. Deposit Ins. Corp., 257 F.3d 373 (4th Cir. 2001).

[66] Wong v. Regents of the Univ. of Cal., 410 F.3d 1052 (9th Cir. 2005).

[67] 534 U.S. 184 (2002).

[68] *Id.* at 198.

[69] *See, e.g.*, Mack v. Great Dane Trailers, 308 F.3d 776 (7th Cir. 2002).

because of their impairments.[70] In essence, the courts disregarded the civil rights model on which the ADA was based. This model is premised on the idea that barriers to access for people with disabilities are not the necessary result of their medical conditions, but often are the result of societal assumptions and decisions to exclude people with disabilities.[71] Instead, these courts relied on a medical or charity model in which coverage is determined by the severity of a person's disability. The courts treated ADA rights as special treatment, like charity, and believed people should only receive that special treatment if they were severely disabled and, therefore, deserving.

In light of the prior judicial narrowing of protection, forthcoming regulations need to be clear. These regulations must advance the law's civil rights approach, focusing on whether unfair and unnecessary discrimination has occurred, rather than on whether the employee is deserving of assistance or special treatment. In June 2009, the EEOC convened a meeting to discuss proposing regulations.[72] The EEOC published proposed regulations on September 23, 2009.[73]

The ADAAA provides that the phrase "substantially limits" in the definition of disability is less stringent than courts have interpreted it.[74] The Act provides that mitigating measures generally are not to be considered in determining whether an impairment is substantially limiting.[75] The ADAAA reverses Supreme Court decisions holding that a "regarded as" plaintiff must prove the defendant believed him to be substantially limited in a major life activity (a high standard).[76] The ADAAA provides that a plaintiff now need only show that the defendant believed she had an impairment that was not minor or transitory.[77] The ADAAA makes clear that a "regarded as" plaintiff is not entitled to reasonable accommodations or reasonable modifications.[78]

The ADAAA provides non-exclusive lists of life activities and bodily functions that constitute "major life activities."[79] The proposed ADAAA regulations would include the major life activities listed in the legislation itself, and also additional activities that have caused confusion

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[70] *Id.*

[71] *See* Harlan Hahn, *Equality and the Environment: The Interpretation of 'Reasonable Accommodations' in the Americans with Disabilities Act*, 17 J. REHAB. ADMIN. 101, 103 (1993).

[72] U.S. Equal Employment Opportunity Comm'n, Transcript of Notice of Proposed Rulemaking Implementing the ADA Amendments Act of 2008, June 17, 2009, http://www.eeoc.gov/abouteeoc/meetings/6-17-09/transcript.html#notice.

[73] Regulations To Implement the Equal Employment Provisions of the Americans With Disabilities Act, as Amended, 74 Fed. Reg. 48431 (proposed Sept. 23, 2009) (to be codified at 20 C.F.R. pt. 1630).

[74] ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2 (2008).

[75] *Id.*

[76] *See* Tice v. Ctr. Area Transp. Auth., 247 F.3d 506, 513 (3d Cir. 2001); Sullivan v. Neiman Marcus Group, Inc., 358 F.3d 110 (1st Cir. 2004). The ADA provides protection for individuals who do not have current/actual disabilities, but whose employers believe they have a disability and act on that basis. 42 U.S.C. § 12102(2)(C).

[77] Pub. L. No. 110-325, § 3 (2008).

[78] *Id.*

[79] 42 U.S.C. 12102 § 3(2) (2008).

in the past, such as reaching, sitting, and interacting with others.[80] The EEOC has previously issued guidance indicating that these are major life activities, but regulations will be given greater deference by courts than mere guidance.[81] The proposed regulations will include the "major bodily functions" listed in the ADAAA, and also add functions of the hemic, lymphatic, and musculoskeletal systems, which were previously included in the definition of "impairment."[82]

The proposed regulation would make clear that if a person's impairment restricts a major life activity, the activity need not be of central importance to most people's daily lives. The regulations would make clear the major life activity (for instance, lifting) is sufficient without adding a laundry list of practical implications of the disability.[83] Thus, the regulations would overturn the Supreme Court's decision in *Toyota v. Williams*.[84]

The proposed regulation would provide a list of impairments that will usually be found to be substantially limiting, including blindness, deafness, intellectual disabilities (formerly called mental retardation), partially or completely missing limbs, mobility impairments requiring the use of a wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV and AIDS, multiple sclerosis and muscular dystrophy, major depression, bipolar disorder, post-traumatic stress disorder, and schizophrenia.[85] The regulation would clarify the analysis of "working" as a major life activity.[86] The prior regulations provided that a person was substantially limited in working only if she were excluded from a class of jobs or a broad range of jobs.[87] The new regulation would instead focus on whether the person is unable to do the "type of work" at issue.[88]

The proposed regulations thus attempt to address the major areas of confusion around the definition of disability and require courts to focus on the issue of whether discrimination occurred, rather than on the preliminary issue of whether the plaintiff is disabled. However, to the extent the EEOC's proposed regulations, when finalized, go beyond what the ADAAA specifically requires, courts may challenge their validity and refuse to defer to them.

In *Sutton*, the Supreme Court rejected the three administrative agencies' position that mitigating measures were not to be considered in assessing the substantiality of a person's limitations because it found

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[80] Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, As Amended, 74 Fed. Reg. 48431, 48440 (proposed Sept. 23, 2009) (to be codified at 29 CFR pt. 1630).

[81] Matczak v. Frankford Candy & Chocolate Co., 136 F.3d 933, 937 (3d Cir. 1997).

[82] 74 Fed. Reg. 48431, 48440 .

[83] U.S. Equal Employment Opportunity Comm'n, *supra* note 72.

[84] 534 U.S. 184 (2002).

[85] 74 Fed. Reg. 48431, 48441.

[86] *Id.* at 48442.

[87] 29 C.F.R. § 1630.2(j)(3).

[88] 74 Fed. Reg. 48431, 48442.

those regulations "an impermissible interpretation of the ADA."[89] To the extent EEOC regulations create potential inconsistencies with the statutory language, they may be subject to similar treatment. For example, the proposed regulations provide a list of disabilities presumed to be protected.[90] However, such a list must not conflict with the legislative language requiring an assessment "with respect to an individual,"[91] which the Supreme Court has read to require an "individualized inquiry."[92]

Similarly, the proposed regulations address the Supreme Court's finding that major life activities are only those that are "of central importance to most people's daily lives."[93] The EEOC's proposed rejection of that requirement may be subject to challenge because that requirement was not explicitly addressed by the ADAAA's text. However, all of the EEOC's proposed regulations could be justified interpretations of the ADAAA's overarching mandate to interpret the meaning of "substantially limits" less stringently than the agency's and the courts' previous approaches.

The Administration has the opportunity to play a central role in enforcing disability rights laws in hiring. The Administration may employ new tools, such as employment testing strategies, to find, stop, and prevent disability discrimination. Disability-based hiring discrimination often cannot be uncovered by an individual applicant. Typically, no reason is given for a failure to hire. Moreover, the statistical size of the disability applicant pool is not large enough to form a basis for a discrimination finding on the basis of disparate impact.[94]

The Administration, through the EEOC, has the appropriate resources to investigate and uncover hiring discrimination and other denials of services through a testing program. Such a testing program could be implemented by submitting matched applications or resumes to employers of applicants with and without disabilities, but with similar qualifications.[95] The EEOC should consider pursuing class-wide enforcement actions when appropriate. Class actions have been used effectively in Title II and Title III cases, but are rarely used in Title I cases.[96] Such class actions may more effectively challenge discriminatory workplace norms; encourage employers to adopt broader policies regarding hiring, inclusion, and accommodation; and reach disparate impact discrimination in the workplace.[97]

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[89] Sutton v. United Air Lines, Inc., 527 U.S. 471, 472 (1999).
[90] 74 Fed. Reg. 48431, 48441.
[91] ADA, 42 U.S.C. § 12102(1).
[92] *Sutton*, 527 U.S. at 483.
[93] Toyota Motor Mfg. Co. v. Williams, 534 U.S. 184, 200 (2002).
[94] *See* Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, As Amended, 74 Fed. Reg. at 48437.
[95] Michael Waterstone, *A New Vision of Public Enforcement*, 92 MINN. L. REV. 434, 473–74 (2007).
[96] Michael A. Stein & Michael E. Waterstone, *Disability, Disparate Impact, and Class Actions*, 56 DUKE L.J. 861, 903–04 (2006).
[97] *Id.* at 914–17.

The Obama Administration may further improve enforcement of the ADA and other disability laws by increasing collaboration among its different program and enforcement agencies. For example, many people applying for Social Security benefits are prevented from working by discrimination, including employers' refusals to provide accommodations. As in the Supreme Court case *Cleveland v. Policy Management System Corp.*,[98] employment discrimination (e.g., failure to accommodate) often results in an individual being unable to work and qualify for government benefits. Yet people do not understand that they may pursue their discrimination claim. Collaboration between the Social Security Administration and the EEOC may empower people applying for government benefits to enforce their civil rights, regain employment, and end their reliance on government benefits.

E. Access to Goods, Services, and Technology

Because of limitations on private enforcement of Title III of the ADA discussed below, it is essential for the Department of Justice to play a lead role in Title III enforcement in public accommodations. The Department of Justice has previously taken a strong role in Title II enforcement against state and local governments, through complaint investigation, litigation, and Project Civic Access reviews.[99] The Department will need to dedicate more resources to investigating and litigating individual Title III claims, because those claims are difficult to enforce through private methods.

The Department of Justice also needs to take a leadership role in combating discrimination by standardized testing agencies. These standardized tests control how far people with disabilities are able to pursue their education and their careers. The perspective of standardized testing agencies, which focus on across-the-board implementation of exams without differentiation, often is in conflict with the individualized needs of people with disabilities. The Department of Justice has access to the technical, scientific, and enforcement resources needed to address this discrimination. In addition, the federal government should support rigorous study of whether reasonable modifications (such as extended time) for students with and without disabilities provide unfair advantage, and whether and to what degree standardized tests assess the relevant skills, abilities, and knowledge.

With the advent and explosion of electronic information, American

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[98] 526 U.S. 795 (1999).

[99] *See* ADA Home Page, www.ada.gov (last visited July 15, 2009). Project Civic Access is a wide-ranging effort by the Department of Justice to ensure that counties, cities, towns, and villages comply with the ADA by eliminating physical and communication barriers that prevent people with disabilities from participating fully in community life. The Department has conducted reviews in 50 states, as well as Puerto Rico and the District of Columbia.

society must be prepared to ensure that everyone has access to the mechanisms of electronic communication, information, and interaction.[100] The Administration has expressed a commitment to increasing access to digital information.[101] Through its responsibilities under Section 508 of the Rehabilitation Act,[102] the Administration has an opportunity to take the accessibility requirements for technology seriously.

As a major purchaser of information technology, the federal government has a leadership role to play in insisting that electronic, information, and communications technologies are accessible to people with disabilities, including electronic devices with menus and controls that do not require vision, and software with text-to-speech capability for content. Federal monitoring of agencies' compliance with Section 508 should be centralized, rather than left to each agency. Currently, the Department of Justice is supposed to review and report on agencies' implementation of Section 508 bi-annually. However, the Department has not issued such a report since 2001.[103] The report indicated that many agencies had accessibility barriers in their websites.[104] Recent investigations indicate that problems still remain.[105] The technical standards for Section 508 compliance must be kept up-to-date to reflect improving technological capabilities.[106] In addition, as the Administration develops its technology infrastructure, it will be important to include staff with experience and responsibility in enhancing accessibility for persons with disabilities.

However, not all technology is sold to the federal government and, therefore, some is not subject to Section 508. Currently, the courts are split on the issue of whether the internet and other mechanisms of electronic communication are covered by Title III of the ADA.[107] Title III covers "places of public accommodation," and some courts require a

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[100] Peter Blanck, *Flattening the (Inaccessible) Cyberworld for People with Disabilities*, 20 ASSISTIVE TECH. J. 175, 175–80 (2008).

[101] Fact Sheet, Obama '08, Barack Obama: Connecting and Empowering All Americans Through Technology and Innovation, http://lessig.org/blog/Fact%20Sheet%20Innovation%20and%20Technology%20Plan%20FINAL.pdf (last visited July 15, 2009).

[102] 29 U.S.C. § 794(d) (2004).

[103] *See* U.S. Dep't of Justice, Civil Rights Division, http://www.justice.gov/crt/508/report/content.php

[104] *Id.*

[105] *See* Suzanne Kubota, *GSA: accessibility compliance improves everyone's quality of life*, FEDERAL NEWS RADIO, October 27, 2009, http://www.federalnewsradio.com/?nid= 35&sid=1795669 (General Services Administration investigation reveals that over half of all procurements do not mention accessibility).

[106] The Web Content Accessibility Guidelines (WCAG) of the World Wide Web Consortium (W3C) were updated in December 2008 to version 2.0. W3C, Web Content Accessibility Guidelines (WCAG) 2.0, http://www.w3.org/TR/WCAG20/ (last visited Nov. 4, 2009). The U.S. Architectural and Transportation Barriers Compliance Board ("Access Board") plans to issue updated guidelines for Section 508 compliance later in 2009. *See* Chris Dorobek & Amy Morris, *New standards for Section 508 compliance are coming*, FEDERAL NEWS RADIO, October 6, 2009, http://www.federalnewsradio.com/?sid=1779637&nid=19.

[107] For a review, see Blanck, *supra* note 100.

"place" to be a physical location.[108] Therefore, some websites offered by physical businesses and websites offered by internet-only businesses are inaccessible to people with vision, hearing, and other sensory disabilities.[109] Similarly, the "place" requirement has been used to exempt insurance policies from nondiscrimination requirements.[110] The Administration needs to clarify, through regulations by the Department of Justice, that the "place" requirement does not limit nondiscrimination and accessibility requirements to physical locations, and that the internet and other electronic communication mechanisms are covered by Title III of the ADA.

The Administration also needs to bolster enforcement action against places of public accommodation, as well as libraries, universities, and government agencies, that provide inaccessible websites or use other inaccessible electronic technology. To date, the government has left open the possibility that these entities could comply with the effective communication requirements of the ADA by providing the same information through other means (for example, staffed telephone lines or alternative formats).[111]

Apparently relying on this possibility, many covered entities have not made their websites and other technologies accessible, choosing instead, to believe no one with a disability will access the technology. Thus, for example, six colleges and universities recently adopted the Kindle DX electronic book reader for their students, even though the reader is not accessible for individuals who are blind.[112] Numerous public libraries have begun offering online electronic books through Adobe Digital Editions, though the software does not provide text-to-speech and is incompatible with screen reading software used by blind people.[113]

The U.S. Departments of Justice and Education, among others, need to make clear this loophole does not exist. In fact, the 24-hour, immediate, at-home access to information online is not equivalent to alternative "special" programs for accessibility. Such special requests for alternative formats generally involve long delays and inferior

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[108] Access Now, Inc. v. Southwest Airlines Co., 227 F. Supp. 2d 1312, 1318 (S.D. Fla. 2002).

[109] Blanck, *supra* note 100.

[110] Parker v. Metro. Life Ins. Co., 121 F.3d 1006, 1010–14 (6th Cir. 1997).

[111] U.S. DEP'T OF JUSTICE, ACCESSIBILITY OF STATE AND LOCAL GOVERNMENT WEBSITES TO PEOPLE WITH DISABILITIES 1 (2003), http://www.ada.gov/websites2_prnt.pdf.

[112] *See* Press Release, National Federation of the Blind, National Federation of the Blind and American Council of the Blind File Discrimination Suit Against Arizona State University (June 26, 2009), http://www.readingrights.org/458; *see also* Peter Blanck, *The Future of Electronic Learning–Opportunities for Inclusion or Exclusion?*, THE CHRONICLE OF HIGHER EDUCATION (forthcoming 2009).

[113] *See* District of Columbia Public Library, http://overdrive.dclibrary.org/A0A6C13C-C6F1-455C-AE03-E09EF8CD03D4/10/323/en/Help-QuickStartGuide.htm (last visited Nov. 4, 2009); Salt Lake County Library, http://slco.lib.overdrive.com/C04E0376-1D2B-4504-806E-58CF616EC948/10/328/en/default.htm (last visited Nov. 4, 2009); Michigan Library Consortium, http://ebooks.mlcnet.org/7196478A-27C0-4924-B338-A2BC09FA2012/10/246/en/default.htm (last visited Nov. 4, 2009); Brooklyn Public Library, http://digitalbooks.brooklynpubliclibrary.org/4E5B23B3-EE1E-42F0-9FE2-98A32A1BEEF0/10/340/en/default.htm (last visited Nov. 4, 2009).

products. Because there exists technology that can make electronic information accessible, covered entities should not be allowed to provide ineffective and unequal communication methods to individuals with disabilities.

F. Participation of Individuals with Disabilities

The Administration has a key role to play in shaping the federal government so that it respects and upholds the individual rights of people with disabilities. After years of judicial appointments reflecting activist states' rights or anti-government agendas, many in the judiciary are resistant to recognition of individual rights. Disability rights have arguably been narrowed more than most under the scrutiny of federal judges.

The Obama Administration's judicial nominations should reflect the importance of individual rights and fairness. The President has done so with the nomination of then-Judge Sonia Sotomayor to the Supreme Court. Justice Sotomayor herself has a disability: insulin-dependent diabetes.[114] In addition, her decisions have demonstrated an understanding of the civil rights model of disability and a commitment to individual rights.[115]

Equally important, the Administration has an opportunity to involve people with disabilities in issues that are not limited to disability interests by appointing them to positions in a variety of areas. This approach recognizes that disability issues arise in a variety of areas and that people with disabilities have broad expertise. Treating disability as a central element of the diversity that the Administration seeks to incorporate across all areas is an opportunity for the Administration and the disability community.

The Obama Administration has the additional opportunity to be a model employer by treating disability as part of diversity in its hiring, promotion, and accommodation policies and practices. Setting goals, tracking disability in the federal work force, and holding itself accountable for inclusion are important mechanisms to make disability inclusion a reality.

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[114] President Barack Obama, Announcement of Judge Sonia Sotomayor as Nominee for the U.S. Supreme Court (May 26, 2009) (transcript *available at* http://www.cnn.com/2009/POLITICS/05/26/obama.sotomayor.transcript/index.html#cnnSTCText); Tom Watkins, *Sotomayor's diabetes: 'She overcomes it every day,'* May 27, 2009, CNN.COM, http://www.cnn.com/2009/HEALTH/05/27/sotomayor.diabetes/index.html#cnnSTCText.

[115] *See, e.g.*, Bartlett v. N.Y. State Bd. of Law Exam'rs, 2001 WL 930792 (S.D.N.Y. 2001)(holding plaintiff entitled to reasonable accommodations for the New York bar examination).

III. FUTURE OF PRIVATE DISABILITY RIGHTS ENFORCEMENT

Individual and organizational lawsuits by private plaintiffs, represented by private attorneys, in nonprofit organizations and in private practice, are an important part of the enforcement of the disability rights laws. However, barriers inhibit the private enforcement of disability rights law. For example, the ADA does not provide for economic damages against Title III private entities that discriminate against their customers.[116] Therefore, individuals with disabilities who experience discrimination often are not compensated for their injuries.[117] Without the possibility of compensation, individuals with disabilities may be hesitant to go through the difficulties, delay, and expense of pursuing litigation. Judicial decisions under the ADA, IDEA, Section 504 of the Rehabilitation Act, and the Fair Housing Act, have made it difficult to enforce those laws privately.[118]

Because damages are unavailable under Title III, contingency fee arrangements are not a viable mechanism for disability rights plaintiffs to pay for attorneys. Therefore, it is essential that attorneys' fees and costs be recoverable from defendants through fee-shifting when the plaintiff prevails.[119] Fee-shifting provides support for private plaintiffs and their attorneys to act as "private attorneys general" to enforce the public interest in stopping discrimination. Without fee-shifting, individuals with disabilities are forced to pay for attorneys to enforce their rights, with no ability to recover their expenses or to recover for their injuries. Essentially, enforcement without fee-shifting punishes the victim, rather than the lawbreaker.[120]

One of the significant barriers to private enforcement is the Supreme Court's 2001 decision in *Buckhannon Board & Care Home, Inc. v. West Virginia Dep't of Health & Human Resources*,[121] which was a housing disability case. The Court held if a defendant, in response to a lawsuit, voluntarily stops violating the law, the plaintiff may not recover her attorneys' fees for bringing the suit.[122] Previously, the courts applied a "catalyst" theory, which held that if the plaintiff's legal action was a

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[116] *See* Samuel Bagenstos, *The Perversity of Limited Civil Rights Remedies: The Case of "Abusive" ADA Litigation*, 54 UCLA L. REV. 1 (2006).

[117] *Id.*

[118] *Id.*; Garcia v. Brockway, 526 F.3d 456 (9th Cir. 2008) (no continuing violation doctrine for statute of limitations in housing construction cases); Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res, 532 U.S. 598 (2001) (no catalyst theory for recovery of attorneys fees by plaintiffs in disability and housing cases); Ferguson v. City of Phoenix, 157 F.3d 668 (9th Cir. 1998) (no damages under Title II unless intentional discrimination); Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291 (2006) (parents may not recover expert's costs in special education cases).

[119] *See* 42 U.S.C. § 12205 (2004) (allowing for reasonable attorney's fees for the prevailing party at the court's discretion).

[120] Bagenstos, *supra* note 116, at 10–11.

[121] 532 U.S. 598, 609 (2001).

[122] *Id.*

catalyst to the defendant's change in behavior, the plaintiff could recover her fees through the fee-shifting provision.[123]

After *Buckhannon*, the defendant's change in behavior must be mandated for the plaintiff to be considered a "prevailing party" for purposes of fee-shifting. This is particularly problematic in Title III cases, where the defendant's change in behavior (e.g., making a physical accessibility modification) may moot the case because only injunctive relief is available, not damages. The defendant may thus prevent recovery of fees for the plaintiff's successful efforts to stop the discrimination.

The Obama Administration and Congress should change the legal definition of "prevailing party" in disability rights and other laws to specify that a party whose legal action is a catalyst to the defendant's change in behavior is entitled to prevailing party status for purposes of fee-shifting. In addition, because private enforcement is limited, particularly in Title III cases, the federal government should focus its enforcement efforts in that area.[124] Without such strong federal enforcement, the ADA's goal of increasing access to public accommodations will not be achieved.

In the meantime, private attorneys may avoid the ramifications of *Buckhannon* in a few ways.[125] After the *Buckhannon* decision, most Title III cases are brought in states that have comparable state laws that provide damage remedies, such as California, New York, Minnesota, and the District of Columbia.[126] The availability of a damage remedy prevents the defendant's change in behavior from automatically making the case moot, because the damages issue will remain. Therefore, it is important to advocate for state laws to be updated to include damages remedies. Another option is to pursue claims in states that have rejected the *Buckhannon* approach to fee-shifting. Where a state law, even if it only provides injunctive relief, recognizes the catalyst theory, a plaintiff will be considered a prevailing party if her suit resulted in the defendant's change of behavior, even if that change is not the result of judicial action. Unfortunately, some states have explicitly adopted the *Buckhannon* approach into state law.[127] Few states have, to date, rejected the *Buckhannon* approach.[128]

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[123] *See, e.g.*, Kelm v. Arlington Heights Park Dist., No. 98 C 4786, 2000 WL 1508240, at *4 (N.D. Ill. 2000).

[124] Waterstone, *supra* note 96, at 475–76.

[125] *See* Mark Weber, *Litigation Under the Individuals with Disabilities Education Act After* Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources, 65 OHIO ST. L.J. 357, 361 (2004).

[126] Unruh Civil Rights Act, CAL. CIV. CODE §§ 51, 52; CAL. CIV. CODE §§ 54, 54.1, 54.3 (West 2009); N.Y. CIV. RIGHTS LAW § 41 (McKinney 2009); MINN. STAT. § 363A.29 (2008); D.C. Human Rights Act of 1977, D.C. CODE § 2-1403.16 (2009).

[127] *See* Wittlinger v. Wing, 735 N.Y.S.2d 382 (N.Y. App. Div. 2001); Auguste v. Hammons, 727 N.Y.S.2d 880 (N.Y. App. Div. 2001).

[128] *See* Barrios v. Cal. Interscholastic Fed'n, 277 F.3d 1128, 1137 (9th Cir. 2002) (allowing award of attorneys fees under California law).

Even if a plaintiff may not avoid *Buckhannon*, the defendant should face a high evidentiary burden to demonstrate it has stopped the illegal behavior. The defendant must demonstrate that it has essentially locked itself into the changed behavior. For example, in a challenge to the inaccessibility of a website, a defendant who made the current website's pages accessible would not be able to demonstrate that it had made the accessibility permanent, if pages are added periodically to the website and the policy could change at any time. Therefore, the defendant would not have bound itself to the changed behavior. Similarly, a modification in policy is changeable and difficult for a defendant to prove the change is permanent, unless it is the subject of a legal agreement.

Partnering with state attorneys general or state human rights agencies is another way to enforce the ADA's public accommodation requirements. A state agency investigation may reduce the amount of resources the private plaintiff must invest in pursuing a violation. The state agency may be able to reach a negotiated, mediated, or conciliated agreement, whereas a private business may refuse to negotiate with a private plaintiff alone.

Another approach is to challenge physical access or other barriers at many facilities at the same time (e.g., via a class action or representing a membership organization). This approach to discrimination by business chains makes it difficult for the defendant to moot the case because they need to make the necessary changes at all facilities. In addition to these benefits, the potential scope of relief is much broader than with individual actions. Thus, the future of private disability rights enforcement is likely to involve more class actions and organizational plaintiff actions. However, class and organizational actions add delay and expense to the pursuit of disability rights enforcement.

In addition to the legal barriers to private enforcement, allegedly frivolous or serial disability rights lawsuits have generated a great deal of negative press, which influences the public's and the judiciary's opinions of disability rights.[129] To minimize these negative perceptions, it is important to notify prospective defendants of the violations in writing and give them an opportunity to correct the issues in advance of the suit. It is important to ensure that the complaint goes beyond the minimal pleading requirements. As the first entry in the "story" of the lawsuit, the complaint should tell a compelling story, including the negative impact of the challenged discrimination. It is also important for the plaintiffs and the disability community to publicly tell the story of the discrimination, through press releases, press conferences, and other media.

As these barriers are making it difficult to privately enforce the disability rights laws, it is important that private plaintiffs and their attorneys be strategic and thoughtful in choosing and pursuing their

[129] *See* Bagenstos, *supra* note 116.

cases. Disability rights attorneys have opportunities to shape the practice and the substance of disability rights law. They, of course, owe it to themselves and the community to bring strong cases and pursue them vigorously.

Disability rights attorneys must also support each other, share knowledge, and expand the advocacy community. To effectuate that supportive function, leading disability rights attorneys nationwide have gathered together to create the Association of Disability Rights Counsel (ADRC).

The ADRC, hosted by BBI, provides an online venue to share strategies, arguments, and documents through a listserv and a brief bank. The ADRC provides opportunities for groups of attorneys to work together on legal issues, such as educational testing and electronic information technology. It provides a venue to help attorneys identify effective experts and resources on various disability issues. The ADRC may assist with public outreach and education campaigns supporting individual litigation efforts. For example, when a disability rights suit is filed, local chambers of commerce and business groups often publish Op-Eds and articles to shape public opinion in the area. The ADRC may similarly educate the press and the local community about the disability community and the effects of discrimination.

Finally, and perhaps most importantly, the ADRC provides opportunities for new disability rights lawyers, law students interested in disability rights law, and lawyers taking their first disability rights cases to be mentored by experienced disability rights lawyers. For most people with disabilities who experience discrimination, there is no disability rights lawyer nearby. Therefore, they go to a generalist or an employment lawyer, who may not have any disability rights experience. Without access to guidance from an experienced disability rights attorney, the lawyer may be unfamiliar with the most effective arguments, may waste time reinventing the wheel, and may make bad law, both for the individual client and for the community. By providing mentoring, experienced disability rights lawyers shape the implementation and interpretation of disability rights law beyond their own cases.

IV. Future of State Disability Rights Enforcement

State governments have a significant role to play in enforcement of disability rights. Most states have their own disability rights laws, sometimes with greater protection than the federal law. For example, many state laws provide for damages for victims of discrimination, which are not available under the ADA.[130] Some state laws, such as

[130] *See, e.g.*, ARIZ. REV. STAT. ANN. § 41-1492.09(B)(2) (2009); ARK. CODE ANN. § 16-123-107

those of New York and California, provide protection to a broader range of people than federal law.[131] Other state laws, such as those of California and Minnesota, cover more entities.[132]

State attorneys general and offices of human rights, therefore, provide important mechanisms for disability rights enforcement. These offices may enforce the laws themselves through investigations and findings, settlement negotiations, or lawsuits, either on their own, or as interveners or amici in private suits. State agencies may have greater access to information, including subpoena power, than is available to private advocates. For example, in cooperation with the National Federation of the Blind, the Massachusetts Attorney General was able to reach an agreement through litigation with one of the largest ATM providers in the world to make its ATMs accessible.[133] Similarly, the Massachusetts Attorney General was able to negotiate, without litigation, the increased accessibility of Apple devices.[134]

Involvement of a state Attorney General or Office of Human Rights also brings attention to disability rights issues, thus providing a greater ripple effect from a single case. State agencies have their own networks and may gather greater national support for disability rights, including generating amici or opinions from other states. In a recent matter, twenty-three state attorneys general signed on to an objection to a proposed class action settlement agreement that would ban Segways from Disney resorts nationwide.[135] Because of the national impact of the proposed settlement, the attorneys general supported their citizens with disabilities by opposing court approval of the settlement.[136]

State agencies may help prevent or curb discrimination by

(West 2009); CAL. CIV. CODE § 54.3 (West 2009); D.C. CODE § 2-1403.13(a)(1)(C)–(E) (2009); MINN. STAT. § 363A.29 (2008); N.Y. CIV. RIGHTS LAW § 41 (McKinney 2009).

[131] N.Y. EXEC. LAW § 292 (McKinney 2009) (defining disability as "a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a *normal* bodily function or is *demonstrable by medically accepted clinical or laboratory diagnostic techniques*"; not requiring substantial limitation of major life activity as compared with national law) (emphasis added); *see also* Gaffney v. Dep't of Info. & Telecomm., 536 F. Supp. 2d 445, 473 (S.D.N.Y. 2008) (stating, "Unlike the under the ADA, plaintiffs [claiming a disability per N.Y. Exec. Law § 292(21)] need not establish that their condition affects a major life activity").

[132] *See* CAL. CIV. CODE § 51.10 (West 2009) (applies to "business establishments"), CAL. CIV. CODE §54.1 (West 2009) (applies to "places to which the general public is invited"); *see also* Minnesota Dep't of Human Rights, THE RIGHTS STUFF NEWSLETTER, *The ADA vs. the Minnesota Human Rights Act* (Nov. 2006) (saying that the Minnesota Human Rights Act covers employers with as few as one employee), *available at* http://www.humanrights.state.mn.us/education/articles/rs06_4ada_mhra.html.

[133] National Federation for the Blind, Cardtronics Settlement Agreement Jun. 22, 2007, http://www.nfb.org/nfb/Cardtronics_Settlement_Agreement.asp?SnID=533570205.

[134] National Federation for the Blind, Agreement, Sept. 29, 2008, http://www.nfb.org/nfb/News Bot.asp?MODE=VIEW&ID=367.

[135] Brief of the Attorneys General in Opposition to the Proposed Class Action Settlement as Amicus Curiae Post-Hearing Brief, Ault v. Walt Disney World Co., 254 F.R.D. 680 (M.D. Fla. 2009) (No. 6:07-CV-1785-GAP_KRS), WL 2175359; *see also* Jason Garcia, Disney's Segway Ban Faces New Challenge, ORLANDO SENTINEL, June 3, 2009, http://blogs.orlandosentinel.com/business_tourism_aviation/2009/06/disneys-segway-ban-faces-new-challenge.html.

[136] Brief of the Attorneys General, *supra* note 134.

providing opinion letters, statements, or advisories letting covered entities know that particular actions would violate the law. These offices may work informally behind the scenes to advise their governments on the disability rights implications of proposed actions. State attorneys general may convene hearings, and draft or support legislation bringing attention to important disability issues. For these reasons, the future of disability rights enforcement involves greater collaboration and stronger relationships among private advocates and state and local government enforcement agencies.

State and local governments also often have commissions or councils representing the disability community.[137] These commissions may express the disability community's perspective to local government officials, and they may express a local government's perspective on disability issues to the public. The commissions, therefore, may support disability rights in a variety of ways: by raising awareness of disability perspectives, and raising issues within the state or local government and in the larger community.

V. FUTURE OF JUDICIAL APPROACHES TO DISABILITY RIGHTS

The courts will continue to play a major role in the development, interpretation, and implementation of disability rights laws. It remains to be seen how the courts will adapt to the expanded definition of disability in the ADA Amendments Act. Will they continue to force a narrow charity-based approach onto the law, allowing protection only to those who are "most disabled" and, therefore, perceived as "most deserving"? Will they, as discussed above, reject some of the EEOC's regulations as not supported by the ADAAA's language? Or, will they shift focus to the question of whether unfair discrimination occurred and whether needed accommodations are reasonable?

If the courts shift focus to the issue of discrimination and away from the issue of defining "disability," they will need to address legal issues that have received short shrift to date, such as qualification, direct threat, reasonable accommodation, and undue burden. For example, courts are split on whether an employee who is on disability leave because she cannot perform the essential functions of the job is "qualified" for purposes of various employment benefits or job

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[137] *See, e.g.*, Hawaii Disability and Communication Access Board, http://www.state.hi.us/health/dcab/aboutus/ (last visited Nov. 14, 2009); D.C. Commission on Persons with Disabilities, http://odr.dc.gov/odr/cwp/view,a,1386,q,575704.asp (last visited Nov. 4, 2009); Washington Governor's Committee on Disability Issues and Employment, http://www.esd.wa.gov/newsandinformation/legresources/gcde/index.php (last visited Nov. 4, 2009); Texas Governor's Committee on People with Disabilities, http://governor.state.tx.us /disabilities/ http://governor.state.tx.us/disabilities/; Wisconsin Governor's Committee for People with Disabilities, http://dhs.wisconsin.gov/disabilities/physical/gcpd.htm (last visited Nov. 4, 2009).

retention.[138] In addition, the interaction between "qualified" and "direct threat" will have to be explored. Some cases raise the question of whether functions that exist for the safety of the employee (e.g., ability to evacuate and job rotation to avoid repetitive motion injury) should be addressed as essential functions in the qualification determination or as indications of risk in the direct threat analysis.[139] This distinction is important because it affects the allocation of the burden of proof.

The need for, and proper impact of, expert testimony in the direct threat analysis will be an important issue for courts. For example, courts considering a direct threat defense may permit employers to rely on their internal experts for assessment of risk, require that such experts meet objective standards of expertise, require some level of consultation with independent experts, or require employers to achieve the "correct" answer.[140]

In addition, the question of whether an accommodation is reasonable will arise more often. Questions to be addressed include how the determination of "reasonableness" differs from that of "undue burden," and how different burdens and standards of proof will be applied. All the circuits require that the plaintiff bear the burden of production by identifying a possible accommodation.[141] In some circuits, the defendant must then prove the proposed accommodation is unreasonable or poses an undue burden.[142] In other circuits, the burden of identifying and proving reasonableness is on the plaintiff.[143] In determining reasonableness and undue burden, courts will have to address the relevance of net cost, as well as whether, and how, cost-benefit analysis should be applied. Recent research indicates that both direct and indirect costs, as well as direct and indirect benefits, should be considered in assessing reasonableness and undue burden.[144]

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[138] *Compare* Johnson v. K-Mart Corp., 273 F.3d 1035 (11th Cir. 2001) (former employee may be qualified), *with* Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104 (9th Cir. 2000) (former employee is not qualified).

[139] *See* Turner v. Hershey Chocolate USA, 440 F.3d. 604, 613–14 (3d Cir. 2006) (jury question whether participation in job rotation program to reduce repetitive motion injuries is essential function); U.S. Equal Employment Opportunities Comm'n. v. E.I. DuPont de Nemours & Co., 406 F.Supp.2d 645, 657 (E.D. La. 2005), *aff'd* in part and *rev'd* in part, 480 F.3d 724, 730 (5th Cir. 2007) (ability to walk in case of emergency evacuation not an essential function).

[140] *See* Echazabal v. Chevron USA, Inc., 336 F.3d 1023 (9th Cir. 2003); *see also* discussion in BLANCK ET AL., *supra* note 9, at 286(5).

[141] *See, e.g.*, Reed v. LePage Bakeries, Inc., 244 F.3d 254, 258 (1st Cir. 2001).

[142] *Id.* This approach is adopted by the First, Second, Third, Eighth, and Tenth Circuits. *See, e.g.*, Borkowski v. Valley Central Sch. Dist., 63 F.3d 131, 138 (2d Cir.1995) Walton v. Mental Health Assoc., 168 F.3d 661, 670 (3d Cir.1999); Fjellestad v. Pizza Hut, 188 F.3d 944, 950 (8th Cir.1999); Benson v. Northwest Airlines, Inc., 62 F.3d 1108, 1112 (8th Cir.1995); White v. York Int'l Corp., 45 F.3d 357, 361 (10th Cir.1995).

[143] *See, e.g.*, Hoskins v. Oakland County Sheriff's Dep't., 227 F.3d 719, 728 (6th Cir. 2000). This approach is used by the D.C., Fifth, Sixth, and Seventh Circuits. *See, e.g.*, Barth v. Gelb, 2 F.3d 1180 (D.C.Cir.1993); Riel v. Elec. Data Sys. Corp., 99 F.3d 678, 682–83 (5th Cir.1996); *see* Hoskins v. Oakland County Sheriff's Dep't, 227 F.3d 719, 728 (6th Cir. 2000); Monette v. Elec, Data Sys. Corp., 90 F.3d 1173, 1183 n.10, 1186 n.12 (6th Cir. 1996); Vande Zande v. Wisc. Dep't of Admin., 44 F.3d 538, 542-43 (7th Cir. 1995); Willis v. Conopco, Inc., 108 F.3d 282, 285–86 (11th Cir. 1997).

[144] Helen A. Schartz, D.J. Hendricks & Peter Blanck, *Workplace accommodations: Evidence based outcomes*, 27 WORK 345, 345–46 (2006), *available at* http://bbi.syr.edu/publications/

Research regarding the first decade of ADA enforcement indicates defendants prevailed at trial in 93% of ADA cases.[145] When these pro-defendant decisions were appealed, the defendants prevailed on appeal in 84% of cases. Plaintiffs prevailed at trial in only 7.3% of cases and on appeal of pro-plaintiff cases, plaintiffs prevailed only 52% of the time.[146]

In 2008, the American Bar Association conducted a survey indicating that defendants prevailed in nearly 98% of cases (i.e., before the effective date of the ADA Amendments Act).[147] During the same period, plaintiffs prevailed in 24% of EEOC complaints.[148] Many of these cases were based on narrow interpretations of the definition of "disability."[149] Therefore, results may change after the ADAAA. However, many were decided on narrow readings of the questions raised above—whether individuals are qualified, job functions are essential, accommodations are reasonable, risks are significant, or hardship is undue.[150]

According to Professor Ruth Colker, courts frequently "substitut[e] their own normative judgments [on these issues] for that of the jury . . . , [which] is significant because it can affect overall outcomes," as civil rights and employment discrimination plaintiffs fare better before juries than before judges.[151] In addition, according to Colker, courts applied unduly high summary judgment standards on the above issues and did not defer to agency guidance in interpreting the ADA.[152] These issues are not addressed by the ADAAA, and the future of judicial responses to disability rights remains to be seen.

VI. FUTURE OF DISABILITY ADVOCACY IN THE WORLD

The United Nations General Assembly adopted the Convention on the Rights of Persons with Disabilities in 2006.[153] It was opened for signature in 2007, and effective in 2008.[154] As of October 2009, 143

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blanck_docs/2006/Work27_2006.pdf.

[145] Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 109 (1999).

[146] *Id.*

[147] AM. BAR ASS'N COMM'N ON MENTAL & PHYSICAL DISABILITY LAW, 2008 EMPLOYMENT DECISIONS UNDER THE ADA TITLE I – SURVEY UPDATE (2008), https://www.abanet.org/disability/docs/2009TitleISurvey.pdf.

[148] *Id.*

[149] Colker, *supra* note 145, at 101.

[150] *Id.*

[151] *Id.* at 101–02

[152] *Id.* at 102.

[153] UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES, G.A. Res. 61/106, U.N. Doc. A/RES/61/06 (Dec 13, 2006), *available at* http://www.un.org/disabilities/default.asp?id=61.

[154] UNITED NATIONS, ENTRY INTO FORCE, http://www.un.org/disabilities/default.asp?id=210 (last visited Oct. 5, 2009).

countries have signed the Convention, and 87 have signed the Optional Protocol.[155] Seventy-one entities have ratified the Convention and forty-five have ratified the Optional Protocol.[156] The European Union, independently of its member states, has signed the Convention.[157] On July 24, 2009, the Obama Administration announced its intent to sign the Convention.[158] U.S. law may now continue to be a model of compliance for other countries to follow, and the United States may be a strong voice in shaping disability law in the world.

The Convention will also challenge the United States to improve its domestic disability laws and policies.[159] U.S. disability laws, including the ADA, focus primarily on negative rights—rights to be free from future interference or discrimination.[160] Arguably, the adoption of the UN Convention will require the inclusion of positive rights to overcome the existing unequal position of people with disabilities resulting from past discrimination.[161] Such positive rights may include job training programs, hiring preferences, programs to combat social stereotypes, and programs that affirmatively overcome the increased gateway costs and barriers people with disabilities face, including health care, housing, education, transportation, and personal care.[162] The Convention will also challenge the United States to reconsider the defenses (e.g., fundamental alteration) in its disability rights laws, and to better address issues of immigration, legal capacity, international development, and education.[163]

However, the importance of the Convention lies not only in the technical legal changes it requires. Its lasting impact is in its ability to create a new type of disability politics worldwide. As articulated by Professor Gerard Quinn, the Convention introduces a new "dynamic of change."[164] The future of disability rights in the world depends in large part on what countries and communities do in response to the Convention.

The implementation of the Convention will succeed or fail

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[155] UNITED NATIONS, CONVENTION & OPTIONAL PROTOCOL SIGNATURES & RATIFICATIONS, http://www.un.org/disabilities/countries.asp?id=166 (last visited Oct. 5, 2009).

[156] *Id.*

[157] *Id.*

[158] CBSNews.com, *US to Sign UN Disabilities Rights Pact*, July 24, 2009, http://www.cbsnews.com/stories/2009/07/24/politics/main5187796.shtml.

[159] *See* Michael Ashley Stein & Janet Lord, *Ratify the U.N. Disability Treaty*, FOREIGN POLICY IN FOCUS (July 9, 2009), http://www.fpif.org/fpiftxt/6247.

[160] Michael Ashley Stein & Penelope J.S. Stein, *Symposium: Beyond Disability Civil Rights*, 58 HASTINGS L. J. 1203, 1209 (2007).

[161] *Id.* at 1240.

[162] *Id.* at 1211–12 and 1223–25.

[163] NAT'L COUNCIL ON DISABILITY, FINDING THE GAPS: A COMPARATIVE ANALYSIS OF DISABILITY LAWS IN THE UNITED STATES TO THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (2008), http://www.ncd.gov/newsroom/publications/2008/CRPD.html.

[164] Gerard Quinn, *Resisting the 'Temptation of Elegance': Can the Convention on the Rights of Persons with Disabilities Socialise States to Right Behaviour?*, *in* THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: EUROPEAN AND SCANDINAVIAN PERSPECTIVES 215 (Arnardottir & Quinn eds., 2009).

depending on whether it is implemented as merely a technical standard, or recognized as a roadmap for transformation. The Convention reaffirms our international societal core values of respect for dignity, autonomy, independence, nondiscrimination, participation and inclusion, respect for difference and diversity, equality of opportunity, accessibility, and equality. For the first time, it commits the international community to apply those core values to the disability community. The Convention forces the international community to recognize that our treatment of people with disabilities contradicts our core values. Substantively, the Convention adopts and adapts general human rights norms to the disability context. It elaborates a theory of equality and justice, and amplifies and clarifies the rights to ensure they are equally effectively available to people with disabilities.[165]

International disability rights will be achieved progressively, not necessarily immediately. Achieving these rights will require a dynamic of change and a pace of change that is both meaningful and measurable. To that end, procedurally, the Convention establishes a new treaty body—the Committee on the Rights of Persons with Disabilities—to assess state performance and process individual or group complaints.[166]

The Convention also creates a Conference of States Parties to exchange policy perspectives on subjects relevant to the Convention.[167] This may become the clearinghouse in the world on disability law and policy. Equally important, the processes called for by the Convention will transform the current processes that have led to ineffective and discriminatory laws on disability issues. For example, because of Article 4 of the Convention, which requires active engagement of government with people with disabilities, people with disabilities must now be included in the law-making process.[168] Similarly, Article 33 requires a focal point for disability responsibility, authority, and internal monitoring by an independent body in active consultation with people with disabilities.[169]

The growing international partnerships among the United States, the European Union and European countries, South American countries, Israel, Australia, Japan, and national and international organizations, such as BBI and the World Bank's Global Partnership on Disability and Development (GPDD), will help to implement the procedural and

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[165] GERARD QUINN & THERESIA DEGENER, U.N. HIGH COMM'N. ON HUMAN RIGHTS, *Human Rights and Disability: The Current use and future potential of United Nations human rights instruments in the context of disability* 13–29 (Feb. 2002), http://www.nhri.net/pdf/disability.pdf.

[166] UN Enable: Rights and Dignity of Persons with Disability, UN Convention on the Rights of Persons with Disabilities, Article 34, http://www.un.org/disabilities/default.asp?id=294 (last visited Nov. 4, 2009).

[167] UN Enable: Rights and Dignity of Persons with Disability, UN Convention on the Rights of Persons with Disabilities, Article 40, http://www.un.org/disabilities/default.asp?id=300 (last visited Nov. 4, 2009).

[168] *See* Michael Ashley Stein & Janet E. Lord, *Jacobus tenBroek, Participatory Justice and the UN Convention on the Rights of Persons with Disabilities*, 13 TEX. J. C.L. & C.R. 167, 177–78 (2008).

[169] *Id.*

substantive transformation of disability rights law and policy across the globe.

Espousing the concept of freedom is a primary interest of the United States. The United States has been a leader in the development of the civil rights perspective of disability issues, but it has room to improve its disability rights perspective. By joining the Convention, the United States may internalize the best international disability-related values and externalize its own disability-related values. By joining and participating actively in the Conference of States Parties and the Commission on the Rights of Persons with Disabilities, the United States may ensure the Convention is used effectively to create a new space for discussion and development of disability rights, both at home and internationally.

VII. CONCLUSION

Many stakeholders, such as federal agencies and legislators, state legislators and government leaders, disability organizations, private attorneys, international governments and organizations, and individuals with disabilities, have important roles to play in the future of disability advocacy. What that future will be depends on stakeholders working together toward a shared vision of inclusion, equal opportunity in society, and a renewed commitment to "The Right to Live in the World."

The United Nations Convention on the Rights of Persons with Disabilities: Toward a New International Politics of Disability

Jacobus tenBroek Disability Law Symposium April 17, 2009

Gerard Quinn*

I. INTRODUCTION

The United Nations Convention on the Rights of Persons with Disabilities ("the Convention")[1] was formally adopted by the United

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[1] *See generally* THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: EUROPEAN AND SCANDANAVIAN PERSPECTIVES (Oddny Mjoll Arnardottir & Gerard Quinn eds., Martinus Nijhoff Publishers 2009).

Nations General Assembly in December 2006 and opened for signature and ratification in March 2007.[2] It is the first global human rights convention of the 21st Century.[3] It has already attracted some eighty-five ratifications and is currently in force.[4] The speed with which it entered into force and the number of ratifications received thus far is something of a record in the United Nations.

The Convention is accompanied by an Optional Protocol, which is purely optional for states, as its title suggests,.[5] If states ratify the Optional Protocol then they agree to accept a complaints mechanism that will enable a new United Nations Committee on the Rights of Persons with Disabilities to entertain both group and individual complaints.[6] Surprisingly for treaties such as this, there have been forty-eight ratifications of this Protocol, which is effective only in those states that have opted in.[7]

The Convention provides both a moral compass for change as well as legal benchmarks against which to measure that change. Regrettably, the United States did not take an active part in the negotiations during the drafting of the convention. President Obama, nevertheless, signed the Convention in July 2009.[8] This lifted hearts all around the world and signaled the United States' re-engagement with disability law reform throughout the world. The Convention has since been sent by the Administration to the Senate to enable the ratification process to begin. The ratification process itself could take up to a year. Because the Convention is, in essence, a non-discrimination instrument, it is quite closely aligned with the Americans with Disabilities Act of 1990 and is indeed consonant with broader currents in United States disability law. That aspect should allow for a relatively smooth ratification process.

Upon ratification, the United States will be empowered to play a full part in the new Conference of States Parties set up under the Convention, which enables states to exchange best practices. It will also enable the United States to put forward candidates for election to the new United Nations Committee on the Rights of Persons with Disabilities, which performs the traditional roles assigned to a treaty-monitoring body

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[2] *See generally* Symposium, *The United Nations Convention on the Rights of Persons with Disabilities*, 34 SYRACUSE J. OF INT'L LAW AND COM. 287 (2007).

[3] See INTERNATIONAL PROTECTION OF HUMAN RIGHTS: A TEXTBOOK (Catarina Krause & Martin Scheinin, eds., Abo Akademi University Institute for Human Rights 2009).

[4] Currently there are 143 signatories to the Convention and 87 to the Optional Protocol. There are also 75 ratifications to the Convention and 48 to the Optional Protocol. United Nations, Rights and Dignity of Persons with Disabilities, http://www.un.org/disabilities/ (last visited Oct. 12, 2009).

[5] Convention on the Rights of Persons with Disabilities, Optional Protocol, G.A. Res. 61/106, Annex II, U.N. Doc. A/RES/61/106 (Jan. 24, 2007) (hereinafter also "the Convention").

[6] *Id.*, Annex II, art. 1.

[7] UN Enable, *Convention and Optional Protocol Signatures and Ratifications*, http://www.un.org/disabilities/countries.asp?id=166 (last visited Nov. 29, 2009).

[8] Press Release, U.S. International Council on Disabilities ("USICD"), Statement from USICD President Marca Bristo on the United States signing the UN Convention on the Rights of Persons with Disabilities (July 30, 2009), *available at* http://www.usicd.org/detail/news.cfm?news_id=25+id=92.

(interpretation, the formation of "conclusions," and recommendations based on periodic state reports, etc.). All in all, ratification will allow for a repositioning of the United States at the international level on disability rights. Additionally, ratification will enable the United States to contribute more directly to the process of disability law reform around the world, and learn from innovative practices that might assist it in overcoming common impasses.

Some perspective on the disability challenges throughout the world is necessary to assess the potential of the Convention. It is estimated that at least ten percent of any given population has a disability, which means that nearly 650 million people worldwide have disabilities.[9] According to the United Nations Development Program (UNDP), most of them, more than 500 million, live in developing countries.[10] It is further estimated by the United Nations that twenty percent of the poorest people in the world have disabilities. Persons with disabilities have been described by the United Nations as the world's "largest minority."[11]

The causes of disability vary, but they include social and economic deprivation, malnutrition, violence, and warfare.[12] That is, human rights violations can lead to disability, and having a disability exposes one to a high risk of further human rights violations. The impacts of disability are enormous and include chronic under-education, higher rates of physical violence and rape, multiple forms of discrimination (especially in the case of gender), higher rates of mortality, and severe unemployment.[13] The United Nations Educational, Scientific, and Cultural Organization (UNESCO) has noted the near invisibility of children with disabilities in educational statistics. It surmised that "about 35% of all out-of-school children have disabilities . . . and that fewer than 2% of children with a disability are enrolled in school. In Africa, more than 90% of all disabled children have never gone to school."[14] The heightened physical vulnerability of persons with disabilities is especially true of persons with intellectual disabilities who suffer great stigma in many parts of the world.[15] The International Labour Organization estimates that the unemployment rate of persons with

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[9] UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES, SOME FACTS ABOUT PERSONS WITH DISABILITIES (2006), *available at* http://www.un.org/disabilities/convention/pdfs/factsheet.pdf.

[10] *Id.*

[11] *Id.*

[12] UK DEPARTMENT FOR INTERNATIONAL DEVELOPMENT, EDUCATION'S MISSING MILLIONS INCLUDING DISABLED CHILDREN IN EDUCATION THROUGH EFA FTI PROCESSES AND NATIONAL SECTOR PLANS: MAIN REPORT OF STUDY FINDINGS 11 (2007).

[13] SOME FACTS, *supra* note 9.

[14] UNESCO, EDUCATION FOR ALL GLOBAL MONITORING REPORT 179 (2006), http://www.unesco.org/education/GMR2006/full/chapt7_eng.pdf (citations omitted). *See also* UK DEPARTMENT FOR INTERNATIONAL DEVELOPMENT, EDUCATION'S MISSING MILLIONS INCLUDING DISABLED CHILDREN IN EDUCATION THROUGH EFA FTI PROCESSES AND NATIONAL SECTOR PLANS: MAIN REPORT OF STUDY FINDINGS (2007).

[15] *See generally* THE HUMAN RIGHTS OF PERSONS WITH INTELLECTUAL DISABILITIES: DIFFERENT BUT EQUAL (Stanley Herr, Lawrence Gostin & Harold Hongju Koh eds., Oxford University Press 2003).

disabilities is as high as eighty percent in some countries.[16] One commentator suggests that up to $2.23 trillion in global gross domestic product (GDP) is lost annually through the absence of persons with disabilities from the workforce.[17] This occurrence represents a great amount of forgone economic activity as well as state revenue.

Poverty is a vicious cycle for most persons with disabilities.[18] And the loss is not all personal. Family members are also impacted by disability—especially mothers who stay at home to care for children with disabilities or for the elderly with disabilities.[19] Their opportunity costs can be quite high. Thus, disability tends to have a negative ripple effect on others, especially on families and careers.[20] This adds considerably to the numbers of persons *affected* by disability.

Importantly, the rising tide of economic development does not tend to elevate the status of persons with disabilities. Transitioning to a market economy tends to leave persons with disabilities behind. One recent World Bank study notes the extreme difficulty for poor persons with disabilities (and their families) to emerge from poverty in transitioning countries.[21] Persons with disabilities tend to fall behind in good times as well as in bad. Something more is needed besides an exclusive reliance on economic growth to elevate the status of persons with disabilities.

All in all, these statistics are very bleak. They add to the urgency of the general fight against poverty, because poverty is such a potent cause of disability. The statistics also reveal the human misery experienced by disabled people in poverty. Disability should not automatically lead to poverty. The link—though strong—is not inevitable and can be broken. It is the absence of appropriate policy responses to disability that lead to poverty and not the disability in itself. The move to the human rights framework of analysis in the disability context is significant as it can help plot a path out of poverty.

The next question is whether and how this new Convention can be used to reverse the above situation. In this short essay I want to reflect

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[16] *See* INTERNATIONAL LABOUR ORGANIZATION, FACTS ON DISABILITY IN THE WORLD OF WORK (2007), http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_087707.pdf.

[17] Roseangela Berman Beiler, Inter-American Institute on Disability & Inclusive Development, Remarks at World Congress on Communication for Development, Rome (October 25, 2006), *available at* http://siteresources.worldbank.org/DISABILITY/Resources/News---Events/463933-1163109717105/RBB_WCCD.pdf.

[18] Mainstreaming Disability in the Development Agenda: Note by the Secretariat, Commission for Social Development, E/CN.5/2008/6, 23, at 2 (November 23, 2007), *available at* http://www.un.org/disabilities/default.asp?id=708.

[19] *See* MILTON SELIGMAN & ROSALYN BENJAMIN DARLING, ORDINARY FAMILIES - —SPECIAL CHILDREN: A SYSTEMS APPROACH TO CHILDHOOD DISABILITY 29 (Guilford Press 2007), 3rd ed., Guildford Press, 2007.

[20] *Id.*

[21] *See* ECONOMIC IMPLICATIONS OF CHRONIC ILLNESS AND DISABILITY IN EASTERN EUROPE AND THE FORMER SOVIET UNION, pp. xiv-xv (Cem Mede ed., World Bank 2008).

on this question. I believe part of the answer lies in an understanding of why the Convention was deemed necessary in the first place. One might respond by insisting that the existing United Nations human rights treaties did not adequately address disability and that something drastic was required. This is true. But I will suggest that a deeper reason has to do with the systemic failure of "normal" politics to address disability. Persons with disabilities are largely "invisible citizens," especially in developing countries. They tend not to engage in the political process. That means that stereotypes often go unchallenged and the cycle of exclusion is simply reinforced. It is suggested that, to a large extent, the success of the Convention will depend on how it can help trigger a new form of disability politics of engagement as well as responsiveness to the vices of persons with disabilities. As will be seen, the Convention actually creates new political openings. The Convention effectively requires a new "focal point" on disability to exist within governments to combat the almost universal tendency to place disability in disconnected silos of policy. It also requires states to set up or task existing national human rights institutions (e.g., the Human Rights Commission) to conduct independent monitoring and to actively protect persons with disabilities. Such authoritative and independent institutions are necessary to prevent slipping back into policies that rely more on charity or pity rather than rights of justice. Crucially, the Convention requires government and independent human rights agencies to work closely with persons with disabilities. It is this new triangulation between government, independent national human rights mechanisms, and civil society that offers the best hope for a sustainable process of disability law reform throughout the world.

II. WHY A CONVENTION ON DISABILITY?

With due deference to John Adams, Thomas Jefferson espoused a particular theory of republican government—a theory that both justified the Revolution and continued to inform his view as to the future development of the United States.[22] He may have been wrong—certainly Adams viewed him as wrong—but he was steadfast in his vision. Yet even Jefferson did not, or could not, face the contradiction between declaring that "all men were equal" in the Declaration of Independence on the one hand, and continuing the institution of slavery on the other.[21] Famously, he did not face the contradiction. That came much later with the Civil War Amendments. While his values were admirable, his application of them was flawed.

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[22] *See generally* JOSEPH ELLIS, AMERICAN SPHINX: THE CHARACTER OF THOMAS JEFFERSON (Vintage 1998).

[21] *See* JOSEPH ELLIS, FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION 81-119 (Vintage 2002).

Likewise, let me suggest that the issue in disability law and policy across the world has nothing to do with the integrity of our legacy values such as dignity, autonomy, or equality. Instead, it has to do with the way in which these values are deflected, misapplied, or not applied at all in the context of disability.

After all, we had an entire edifice of human values enshrined in the two headline United Nations human rights treaties: the International Covenant on Civil & Political Rights[22] and the International Covenant on Economic, Social & Cultural Rights.[23] They were further particularized in the various United Nations thematic treaties focused on women (Convention on the Elimination of All Forms of Discrimination Against Women),[24] on children (Convention on the Rights of the Child),[25] and on racial minorities (International Convention on the Elimination of All Forms of Racial Discrimination).[26] It is a very fair question to ask why these treaties—which purported to be *universal*—did not in fact yield benefit for persons with disabilities?[27]

Some will explain the lack of efficacy by saying that there were "demand-side" problems— that persons with disabilities themselves did not look to these treaties for validation of their claims and for just satisfaction. Some will say that there were "supply-side" problems—that the people appointed to the various treaty monitoring bodies were just not attuned to disability as an issue of equality and rights. Both explanations are correct.

Yet I think there is a deeper reason. The cultural discounting of persons with disabilities was in fact reflected in the intellectual structure of these treaties, especially in the way they were interpreted. At one level there was no need for a new convention since the existing normative instruments were certainly capable of being applied in the context of disability. On the other hand, there was little prospect of this application unless the prodding of a wholly new legal instrument was

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[22] International Covenant on Civil and Political Rights, Dec.16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 360, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (Mar. 23, 1976), *available at* http://www2.ohchr.org/english/bodies/hrc/index.htmlaw/ccpr.htm.

[23] International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (Jan. 3, 1976), Dec. 16, 1966, 993 U.N.T.S. 3, 6 I.L.M. 360, *available at* http://www2.ohchr.org/english/bodieslaw/cescr.htm/index.htm.

[24] Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, 19 I.L.M. 33, G.A. Res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46 (Sept. 3, 1981), *available at* http://www.un.org/womenwatch/daw/cedaw/cedaw.htm.

[25] Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1456, G.A. Res. 44/25, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (Sept. 2, 1990), *available at* http://www2.ohchr.org/english/bodies/crc/index.htm.

[26] International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195, 5 I.L.M. 350G.A. Res. 2106 (XX), 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (Jan. 4, 1969), *available at* http://www2.ohchr.org/english/bodies/cerd/index.htm.

[27] *See generally* Theresia Degener & Gerard Quinn, HUMAN RIGHTS AND & DISABILITY: THE CURRENT USE & FUTURE POTENTIAL OF UNITED NATIONS HUMAN RIGHTS INSTRUMENTS IN THE CONTEXT OF DISABILITY, Office of the United Nations Commissioner on Human Rights (United Nations Publications 2002).

added to the equation.

So the main value of the Convention—like the Fourteenth Amendment—is that it forces us to face the contradiction between the "myth system" and "operation system" of our laws.[28] It is said that John Brown made it impossible for people to sit on the fence on slavery. After Harper's Ferry, you had to take a side.[29] The Convention is our Harper's Ferry moment on the world stage with respect to disability. Holding the mirror of the Convention up to society is important. It seems that the default setting of nearly every culture in the world is to discount persons with disabilities without experiencing any sense of contradiction. Henceforth, it is no longer possible to explain away the exclusion of persons with disabilities on grounds of paternalism or a sense of misplaced welfare.

But facing the contradiction is only the beginning. One reason the contradiction was never faced in the past was the relative absence or invisibility of persons with disabilities from the political process. The Convention forces an acknowledgement of the contradiction between our universal values and our practice on disability throughout the world. Just as importantly, the Convention removes the invisibility of persons with disabilities and partners them with government in moving the reform process forward. So the Convention provides a tool to force acknowledgement of a contradiction. But in creating new political openings for persons with disabilities to interact with government, it also enables change to happen.

III. THE LIMITS AND POSSIBILITIES OF INTERNATIONAL LAW AS AN ENGINE OF CHANGE

Before detailing how the Convention creates space for a new dynamic of disability politics and reform, let me first address a threshold issue—the value of international law, which often nags at the back of all our minds.

Some will make exaggerated claims for international law: that it can force recalcitrant states to conform, that it contains hard and fast norms that, if interpreted properly, lead to one right answer on every question. I do not believe this, and very few public international lawyers claim this. It is true that international courts such as the European Court of Human Rights can have a dramatic impact. But that court has spent decades building up its institutional legitimacy. In any event, there is no court attached to the Convention, merely a standard "treaty monitoring

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[28] *See generally* Craig Haney, *The Fourteenth Amendment and Symbolic Legality: Let Them Eat Due Process*, 15(2) LAW & HUM. BEHAV. 183 (1991).

[29] *See generally* EVAN CARTON, PATRIOTIC TREASON: JOHN BROWNE AND THE SOUL OF AMERICA (Free Press, 2006).

body." As befits a convention that in its essence pivots on the equality idea, there will be many occasions when the language of the text restates rather than resolves hard cases.

There are others who will claim that international law does not exist in the sense that it can significantly drive state behavior.[30] Rather, states comply when they want to and when it suits their interests to do so. This may be descriptively true in many instances, but that does not mean that international law is robbed of all autonomy. In any event, even if one were to subscribe to this view, it would certainly be true to say that it is in the interests of the United States to engage in the convention process because espousing and spreading the concept of freedom is not just in the interests of the United States—it is the primary interest.

There is a third way that international law can bring about a transformed domestic policy environment. It is said that socialization and acculturation can also nudge meaningful change.[31] In other words, states—or at least actors within states such as senior policymakers and especially those conscious of their country's international reputation—could become socialized to align policy with the cosmopolitan norms and thus bring about meaningful change.

If a critical mass of key policymakers can be brought, either through "persuasion" or "socialization," to tackle a core impediment (especially one that might have huge symbolic value such as outdated conceptions of legal capacity), then change can happen. Of course, the really interesting thing about such policy breakthroughs is that even when there is significant domestic pushback this resistance tends to fade through time and the momentous change of today becomes simply part of the (new) orthodoxy of tomorrow, thus making further change easier.

But how can we ensure "persuasion" and "socialization" occur? One should not rely on the fact that many state delegates were "persuaded" or "socialized" during the negotiations. Such delegates must also become "policy entrepreneurs" within their own administrations upon their return home or inspire others to initiate that change. Because diplomats do not normally rotate home a new set of institutional champions, who are strongly motivated to reshape domestic law and policy in line with the Convention, will have to emerge. This can only happen when the Convention is used to open a new space for a different kind of disability politics.

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[30] *See* JACK E. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (Oxford Press 2005).

[31] *See generally* Ryan Goodman & Derek Jinks, *Measuring the Effects of Human Rights Treaties*, 14 EUR. J. INT'L LAW 171 (2003); Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621 (2004).

IV. THE CONVENTION—SUBSTANTIVE RIGHTS AND PROCEDURAL INNOVATION

Let me briefly highlight some features of the roadmap for reform in the Convention—both in terms of substance and, most importantly, process.

A. Substantive Rights

Benjamin Franklin once said that he developed a lifelong aversion to drafting a text only to see it edited by a committee.[32] Yet it has to be said that the text of the Convention produced by the Ad Hoc Committee in the United Nations seems to have survived reasonably intact with a clear focus.

What kinds of obligations for change do states undertake in the Convention? Mechanically speaking, Article 4 contains general obligations of the States Parties above and beyond the more specific obligations contained in the individual Articles.[33] It requires that legislation should be adopted where needed, inconsistent legislation should be repealed, disability should be mainstreamed into policy formulation, and active consultation should take place with persons with disabilities and their representative organizations on all relevant matters. In short, Article 4 converts the Convention into a trigger for worldwide disability law reform.

I spoke earlier of the Convention as providing a moral compass for change. The values in this compass are contained in Article 3.[34] These are important. They demonstrate the paradigm shift. Just as important, where there are ambiguities in the text, they are to be resolved in light of the values.[35] In that Article, the values or principles that animate the convention are said to be: dignity, individual autonomy, non-discrimination, full and active participation and inclusion, respect for difference, equality of opportunity, accessibility, equality between men

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[32] Gerard Quinn, Member, Irish Human Rights Commission, Presentation to New Zealand Parliament (Feb. 19, 2009).

[33] The Convention, *supra* note 5, art. 4.

[34] Id., art. 3.

[35] Vienna Convention on the Law of Treaties, Art. 31(1), May 22, 1969, U.N. Doc. A/Conf.39/27, 1155 UNTS 331, 8 ILM 679 (1969), 63 AJIL 875 (1969), *available at* http://untreaty.un.org/ilc/texts/instruments/english/conventions/ 1_1_1969.pdf.

and women, and respect for the evolving capacities of children with disabilities.[36]

These values are hardly revolutionary in themselves, but the point is they are revolutionary in the disability field, and perhaps even more so in the intellectual disability field. These values inform the various rights, many of which are connected. These rights either protect persons with disabilities against the abuse of power, especially in vulnerable situations; nurture the capacities of persons with disabilities so that they can take their place alongside their fellow citizens as equal participants in society; or empower persons with disabilities to use the new opportunities arising from an equality strategy.

As to the kind of convention that the Convention could have become, the drafters were presented with a number of choices at the outset. First, the Convention could have become a substantive convention containing stand-alone substantive rights like the Convention on the Rights of the Child.[37] This would have been quite robust, but it was not the preferred option. Secondly, it could have been just a simple non-discrimination convention containing a bald proscription against unfair treatment. Two or three articles would have done. Indeed, there were one or two proposals to this effect on the table at the beginning of the process. That would not have been of much use, because it would simply have focused on the need to ensure equal treatment in the abstract without reference to any particular policy area, and without reference to the need to go the extra mile to provide material support to enable persons with disabilities to exercise their rights in reality and not merely on paper. It certainly would not have been nuanced enough to capture and respect differences, especially with respect to intellectual disability.

Finally, it could have been a hybrid of a non-discrimination convention and one that attached a broad swath of rights such as life, liberty, education, etc. This was in fact the approach adopted. So the Convention is not merely a non-discrimination convention, it also provides a web of substantive rights. The Convention blends together a mix between classic rights such as liberty and more substantive rights like the right to education. It then animates both sets from the perspective of securing the equal effective enjoyment of these rights using the non-discrimination tool.

Put another way, the goal, in the language of Ambassador McKay, was not to create new rights, but to ensure, through the use of non-discrimination principles, that all existing rights were made equally effective for persons with disabilities.[38] It follows that the technical challenge facing the drafters was to tailor the existing continuum of rights to the specific context of disability. This is stated explicitly in

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[36] The Convention, *supra* note 5, art. 3.

[37] Convention on the Rights of the Child, *supra* note 25.

[38] UN Enable, Statements Made on the Adoption of the Convention on the Rights of Persons with Disabilities (2007), *available at* http://www.un.org/esa/socdev/enable/convstatementgov.htm.

Article 1.[39] So, the purpose is to secure the equal effective enjoyment of rights.

But what does equality mean in the context of disability? It goes beyond merely respecting difference to positively accommodating difference. While on the subject of non-discrimination, it has to be recalled that comparative law throughout the world adds an obligation of "reasonable accommodation" in the context of disability.[40] Failure to achieve such accommodation is automatically deemed to be discrimination under most comparative law.[41]

The equality or egalitarian ideal goes beyond formal rights and even beyond "reasonable accommodation." It animates a large category of economic, social, and cultural rights (such as the right to education). Including these rights was entirely appropriate if only for the simple reason that it is obviously not enough to remove formal obstacles to persons with disabilities—it is also necessary to equip them with the means needed to make new opportunities a reality.

Equally as important, such socioeconomic rights are regarded as more programmatic, in the sense they can only be achieved through time, and the obligations they give rise to are referred to as "obligations of conduct."[42] That is, the obligation is not so much to achieve a particular result immediately but to lay down a positive dynamic of change that will lead to results within a reasonable time frame. In the language of international law, the obligation is to "progressively achieve" the realization of such rights.[43] This contrasts with the so-called "obligations of results" which accompany classic civil rights, such as liberty, which are immediately achievable.[44]

This seemingly academic distinction between "obligations of

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[39] The Convention, *supra* note 5, art. 1.

[40] *See, e.g.*, United Nations Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons With Disabilities, United Nations General Assembly, *The Concept of Reasonable Accommodation in Selected National Disability Legislation,* U.N. Doc. A/AC.265/2006/CRP.1 (Dec. 7, 2005) (discussing the "reasonable accommodation" obligation as applied in Australia, Canada, the European Union, Ireland, Israel, New Zealand, the Philippines, South Africa, Spain, Sweden, the United Kingdom, the United States, and Zimbabwe).

[41] *See, e.g.,* United Nations Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, United Nations General Assembly, *Intervention—Article 2* (Jan. 31, 2006), *available at* http://www.un.org/esa/socdev/enable/rights/ahc7nhri.htm ("The US courts and indeed many other courts throughout the world have built up an elaborate body of jurisprudence on 'reasonable accommodation' over several decades and especially since the enactment of the rightly famous Americans with Disabilities Act (1990). This comparative jurisprudence is almost unanimous in explicitly pegging 'reasonable accommodation' to the non-discrimination norm.")

[42] See The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, 20 HUMAN RIGHTS QUARTERLY 691, 694 (1998) ("The obligation of conduct requires action reasonably calculated to realize the enjoyment of a particular right.").

[43] Juan Mendez, Remarks, Human Rights and the Future: Advancing Human Rights in a Dangerous World, International Center for Transnational Justice (Sept. 17, 2008), *available at* http://www.ictj.org/en/news/features/1982.html.

[44] *See generally* Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, *available at* http://www1.umn.edu/humanrts/instree/y3gctpw.htm.

conduct" and "obligations of result" is actually quite crucial in the context of the Convention. Undoing the legacy of the past takes time and resources. Choices will have to be made and priorities set.

The site for considering this issue under the Convention is Article 4.2, which implies that with respect to economic, social, and cultural rights, the main obligation of a state is to "progressively achieve" the realization of the same. [45] In short, the Convention creates "obligations of conduct" with respect to programmatic rights, and "obligations of immediate result" with respect to civil and political rights. Of course, the Convention does not tell you which is which—that requires an analysis of each particular right in question.

The presence or absence of the dynamic of change is the most important aspect. Resources will have to be re-deployed to bring about better outcomes. This will take time as well as the re-engineering of social services, and persons with disabilities have waited decades or longer for positive change. Given these considerations, one may question whether the notion of progressive achievement undermines the Convention.

The notion of progressive achievement genuflects to an inescapable reality that resources are finite and some change takes time. Yet this nod toward reality in the Convention does not rob the concept of some core meaning. There must be some positive dynamic in place—it must be measurable, and it should lead to positive results within a reasonable time frame. This much is already evident from the General Comments of the Committee on Economic, Social, and Cultural Rights.[46]

The sister organization of the European Union, the Council of Europe's Committee on Social Rights, had occasion about four years ago to visit the issue in the context of the slow rates of integrating children with autism into the education system. While acknowledging arguments about resource scarcity, the Committee said:

> When the achievement of one of the rights in question is exceptionally complex and particularly expensive to resolve, a State Party must take measures that allow[] it to achieve the objectives of the Charter within a reasonable time, with measurable progress and to an extent consistent with the maximum use of available resources. States Parties must be particularly mindful of the impact that their choices will have for groups with heightened vulnerabilities as well as for others [*sic*] persons affected including, especially, their families on whom falls the heaviest burden in the event of institutional

[45] The Convention, *supra* note 5, art. 4.2.

[46] United Nations Economic & Social Council, Committee on Economic, Social, & Cultural Rights, Implementation of the International Covenant on Economic, Social, and Cultural Rights, General Comment No. 3, U.N. Doc. E/1991/23 (Dec. 14, 1990), *available at* http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/94bdbaf59b43a424c12563ed0052b664?Opendocument.

shortcomings.[47]

This supplies an illustration of the more general point, which is that the notion of progressive achievement is in fact positive and that bodies such as the new United Nations Committee on the Rights of Persons with Disabilities should be able, from a legal point of view, to determine whether sufficient progress has in fact been made.

And the concept works in reverse. Assuming a period of economic retrenchment, which is exactly where we are right now throughout the world, the notion of progressivity should allow for moments of regression provided that: (1) there is a conscious process to mitigate the worst effects on the worst off, and (2) some floor provision is in place. The first prong guards against the temptation to cut back first against the weakest. The second prong insists on some minimum level of provision to maintain human dignity and autonomy. It is not good enough from either a moral or a legal point of view to say that progress has to be postponed. In any event, the prospect of eventual economic recovery does not assure progress, as a rising tide certainly does not raise all boats, for example, when it comes to disability generally or intellectual disability in particular.

Why is this important? Many (not all) of the changes required in the intellectual disability field will be resource-intensive. Therefore, they will be subject to the looser obligation of "progressively achievement." It remains to be seen what attitude the new United Nations Committee on the Rights of Persons with Disabilities will take toward this crucial issue. This concern has become even more important in the context of the worldwide recession.

One more aspect of the shift to equality bears emphasis, especially in the context of intellectual disability. We have in the past—nearly everywhere in the world—adopted a very narrow view of difference. The processes of constructing difference and labeling differences not only marked one apart but also kept one apart. Access to life opportunities were limited to those who conformed to dominant ideals. If a person differed, he or she had to be made to fit the system—the system did not have to adjust to take him or her into account. This paradigm played itself out in the debate between inclusion (adjusting systems to persons) and assimilation. Well, that war of ideas is over. The convention decisively opts for an inclusive philosophy. This decision is nowhere more evident than in Article 24, which deals with the right to education.[48]

So, in sum, the Convention seeks to give equal effectiveness to all human rights to persons with disabilities. It rejects assimilation and requires positive respect for difference. It mandates a rolling program of

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[47] Autism- Europe v. France, No. 13/2002, European Committee of Social Rights, Decision on the Merits ¶ 53 (Nov. 4, 2003), *available at* http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/CC13Merits_en.pdf.

[48] The Convention, *supra* note 5, art. 24.

reform—one that actively takes into account the views of persons with disabilities themselves. In addition to the usual international bodies of interpretation, the Convention takes the logical extra step of requiring a domestic process of change to be put into place, encompassing a governmental "focal point" as well as independent bodies to monitor and protect these rights. There are other vital provisions in the Convention dealing with international cooperation. Suffice it to say, the Convention should dramatically affect how development aid is conceived and implemented.

B. Procedural Innovation

At the international level a new treaty body has been established—the United Nations Committee on the Rights of Persons—which will assess state performance by reviewing periodic state reports.[49] It will have the competence to entertain individual or group complaints, provided the relevant government opts in to an Optional Protocol to that effect. [50] It will clarify the norms of the Convention.[51] Civil society groups in fact advocated for something different during the negotiations, but the states reverted to this very traditional model of monitoring.[52] The Committee can be looked to for authoritative interpretations of the Convention in the years ahead. Such interpretations will be developed in line with the established jurisprudence of the other treaty-monitoring bodies, including those that are attached to conventions that the U.S. has already ratified.[53]

A Conference of States Parties has also been established at the international level with an extremely wide discretion to exchange policy perspectives. This has the potential to channel the collective effort of states. It could become the main clearinghouse in the world on disability law and policy—provided it has the right leadership. This is another reason why active engagement by persons with disabilities is needed.

The procedural innovations at the domestic level are the most remarkable of all. Oliver Wendell Holmes once wrote that to truly assess a new idea, a value, or a legal instrument, "cynical acid" must first be poured over it, and then one must see if anything remains.[54] The pulse of the Convention resides in this shift from viewing persons with

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[49] *Id.*, art. 34-35.

[50] *Id.*, Optional Protocol, Annex II, Art. I.

[51] *Id.*

[52] UNITED NATIONS DEPT. OF ECONOMIC AND SOCIAL AFFAIRS, RECOMMENDATIONS FROM THE EXPERT GROUP TO CIVIL SOCIETY 5 (2007), *available at* http://www.un.org/disabilities/default.asp?id=359.

[53] See Convention on the Rights of the Child, supra note 25; see also Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46 (June 26, 1987), available at http://www2.ohchr.org/english/bodies/cat/index.htm.

[54] Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 463 (1897).

disabilities as objects to viewing them as subjects. But it is much more than that.

There are a lot of bad laws, policies, and programs around the world on disability. The rights and obligations contained in the convention will enable one to challenge these laws. That, at any rate, is a lawyer's way of looking at the Convention. A broader view of the Convention and its potential to help frame change is needed. I believe you miss the point if you confine the Convention to the traditional role of challenging bad laws and policies. The most important potential of the Convention is its potential to transform the process that leads to those laws in the first place.

One reason why bad laws were enacted in the past was the relative invisibility of disability and of persons with disabilities in the political process. For one thing, the opportunity costs of political participation were formidably high for persons and their families simply struggling to survive. In addition, the policy process tended to work from a very narrow policy narrative—one that simply equated disability with cost and foreclosed serious analysis of reform. This absence of the most important voices from the table meant that these deficiencies could not be readily undone.

The framers of the Convention were cognizant of the fact that unless processes are changed, there will be few effective outcomes. The democratic system can right itself, but it can only do so when the full panoply of voices comes to the table. That is why the mantra "nothing about us without us" is now enshrined in Article 4 of the Convention.[55] This requires ongoing and active consultation between government and persons with disabilities.

To govern is to choose. This does not mean that persons with disabilities have a trump card. But it redresses a fundamental flaw and measurably enhances the prospects of greater equity and better outcomes.

There is another design flaw of which the framers were aware. International law exists "out there"—in the ether. In general, there is no transmission belt to ensure that the fresh air of international law can reach into and revive the domestic reform process. One may score the odd victory in Geneva, but there the victory remains. The trick is to find some way of ensuring that the norms of the Convention gain traction where they count most—in Peoria, in Dublin, in Lusaka. They have to become somehow "owned" by administrations everywhere. Policymakers need to become motivated to see the symmetry between the Convention and their domestic reform agenda. Most importantly, policymakers should see themselves as giving back to the international arena. This is a two-way street.

The framers of the Convention actually took the next logical step by going beyond a simple listing of rights with a monitoring system

[55] The Convention, *supra* note 5, art. 4, para. 3.

hovering in the pure ether of international law. They enshrined a domestic institutional architecture for change in Article 33.[56] This article lies at the very heart of the Convention, for it attempts to put in place an architecture of change at home—in Washington, D.C., or Dublin—that can transform processes that if left undisturbed simply lead to even more bad laws and policies.

Article 33.1 demands the existence of a "focal point" as well as a coordination mechanism within government.[57] This gets at and seeks to unravel the "silo phenomenon," whereby most governments in the world disperse responsibility for disability across many departments and even within departments. The predictable result is similar to the "tragedy of the commons," whereby no entity takes lead responsibility and the chaos that ensues creates massive cracks into which ordinary people fall.[58] Article 33 is truly innovative,[59] particularly in light of the Convention's requirement of this government mechanism to consult actively with persons with disabilities.[60]

Yet something else is needed to ratchet a dynamic of reform into place. Good governance is about accountability, and accountability is not just an end in itself; it helps keep the reform process moving in the right direction. It underpins, rather than undermines, effectiveness. That is why the framers took another logical step by requiring states to designate an independent body or set of bodies to "promote, protect and monitor" progress in implementing the Convention.[61] The language is somewhat open-ended—an example of constructive ambiguity to bring along those governments (not including the United States government) that do not see accountability in quite the same positive light. But the intent to harness an independent body in the process of ensuring the norms are real and not rhetorical is clear.

Human rights commissions, civil rights commissions, and national disability bodies such as the National Council on Disability will have to be at the forefront of such implementing bodies. A first step in a rational process of "designating" this independent entity or entities under Article 33.2 could well be to map out which entities already do some "promotion, protection and monitoring" and meld them together appropriately.[62]

The triangulation at the domestic level is complete when one realizes that Article 33.3 also requires that the monitoring by the relevant independent body be done in active consultation with persons with

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[56] *Id.*, art. 33.

[57] *Id.*, art. 33.1.

[58] Garrett Hardin, *The Tragedy of the Commons*, SCIENCE, Dec. 13, 1968, at 1243, *available at* http://www.sciencemag.org/cgi/reprint/162/3859/1243.pdf.

[59] The Convention, *supra* note 5, art. 33.

[60] *Id.*

[61] *Id.*, art. 33.2.

[62] *Id.*

disabilities.[63] This is both unique and remarkable and has no precedent. This consultation requirement will perhaps prompt some thinking by commissions on the larger issue of the relationship between independent commissions and civil society. At the end of the day, such bodies still have their functions to perform, but the performance of these functions will be very considerably enriched by interaction with civil society. There are embryonic models out there, but it is early yet.

Article 32 on International Cooperation is going to be key in helping to embed this dynamic of change, especially in those countries where disability has been neglected.[64] It does not specifically require development aid to be increased or even earmarked, but it does require that development is inclusive of and accessible to persons with disabilities.[65] This requirement entails the proofing of development aid programs from a disability perspective. Just as important, it requires facilitating and supporting "capacity-building," which includes the sharing of information, experience, training programs, and best practice.[66] This "capacity-building" will be where the experience of the United States will be most telling. Logically, this should lead the United States government to find and support ways of transferring both knowledge and skills from its civil society to the nascent disability community abroad. The Article requires cooperation with respect to research as well as technical assistance.[67] The United States certainly has this research prowess, and it would be good to see it harnessed to help others ratchet up their own research capacity on disability.

These process-based innovations are the key to the success of the convention. Unless the "normal" process of change can be enriched with disability perspectives, that process is likely to continue ignoring the just claims of persons with disabilities.

V. THE FUTURE OF INTERNATIONAL DISABILITY LAW & POLICY

The Convention's significance is underplayed if it is viewed merely as supplying a set of norms against which to measure bad laws and policies. Instead it should be seen as an instrument that can transform the process that makes these laws in the first place. The Convention does not simply impose obligations—it seeks to improve the democratic process by opening it up to voices that were previously excluded or discounted.

States, commissions, and civil society can only bring these voices

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[63] *Id.*, art. 33.3.
[64] Convention, *supra* note 5, art. 32.
[65] *Id.*, art. 32(1)(a).
[66] *Id.*, art. 32(b).
[67] *Id.*, art. 32(c).

to the table—and trust the process to reach the right outcomes—by actively listening to and discussing with persons with disabilities themselves. The process of drafting the Convention showed how useful and constructive this engagement can be. The key to the success of the Convention will be in how well states can embed the domestic institutional architecture for change envisaged by Article 33.

The United States has been a global leader in disability law reform for at least the last 20 years. The United States' civil rights tradition continually forces people to confront the contradiction between myth and reality. And the focus on using law to underpin freedom and choice—and not to undermine it—is inspiring. The United States' model is one model and it is not perfect. But the United States has spent at least two decades building it and confronting many of the challenges and puzzles others now face. The United States needs to share this, partly to help others and partly to gain new perspectives that may help the United States navigate some of its own internal issues.

Europe is in the middle of transforming its social model to accommodate a civil rights perspective. The EU has signed the Convention and is due to affirm it by the end of 2009. This could have a dramatic impact on the kinds of legislative proposals that the European Commission presents to the Council of Ministers and the European Parliament. It should also dramatically impact the EU development aid budget, which is now the single largest aid budget in the world.[68] The EU ratification only affects EU law inasmuch as the EU has legal competence. In fact, most legal competence with respect to disability is retained by the EU Member States. The EU Presidency (of the Council of Ministers) has now agreed to share perspectives with the Member States for both ratification and implementation. The Member States understand the need for common legislative and policy approaches even where the matter in question is not squarely a matter for EU law. A number of EU Member States are either adopting national disability strategies for the first time because of the Convention or amending existing strategies.

The Convention, if and when ratified by the United States, should help reinforce law-reform trends in the United States. It does not fatally undermine sovereign responsibilities—it helps align them with challenges faced elsewhere. Ratification would allow the domestic courts to take the Convention into account in the interpretation of domestic legislation. The Convention would not supplant domestic legislation and the primacy of the legislature. Yet it is certainly desirable within all common law countries to interpret domestic law in a manner consistent with international legal obligations. As Justice Stephen Breyer would say, this would enable the United States to have a

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[68] *See* European Commission—Development, *Financing for Development*, http://ec.europa.eu/development/how/monterrey_en.cfm.

meaningful conversation with the world on common challenges.[69]

Furthermore, there is sufficient "margin of appreciation" to allow discretion at the domestic level. And the aforementioned concept of "progressive achievement" affords sufficient latitude for the United States and other states to begin laying the groundwork for social supports to underpin freedom. Australia has publicly pledged to adopt a national disability strategy based explicitly on the Convention.[70]

Additionally, the new Conference of States Parties would provide a unique platform to initiate a serious sharing of ideas, experience, and expertise to trigger the law-reform process worldwide.[71] This can also be done bilaterally, but the impact would be magnified many times over through active participation in the Conference of States Parties.

The United States also has invaluable experience with respect to its institutional architecture for change. Without this institutional architecture, no sustainable process of change is possible. Very few countries have this, and many are eager to learn. Article 32 on International Cooperation provides a way to channel support for this process of change.[72] This is not just about knowledge of laws and policies; it has more to do with transferring skills and know-how.

When Jefferson was based in Paris he reputedly had a small part to play in the drafting of the French Declaration of the Rights of Man.[73] He was a true internationalist and understood that the pursuit of liberty knows no borders. He could not face the contradictions between the myth of equality and the reality. But we can. Let me be so bold as to suggest that as the United States faces the process of ratification and then implementation, the spirit of freedom represented by Jefferson be your guide.

The Convention is actually much more important than its application to disability. It articulates a theory of justice that every citizen can subscribe to and in which every citizen has a stake. It is not a case of special rights for a particular group; it is about equal rights for all. And it is about making the democratic process open to all voices so that blockages can be dissolved and solutions found to deal with the legacy of the past and build a more inclusive society for all. So the American disability rights revolution now belongs to all, and the world again looks to the United States for leadership.

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[69] Meg Charendoff & Asher Hawkins, *Breyer: 'Never Heard a Voice Raised in Anger' on High Court*, THE LEGAL INTELLIGENCER, Jan. 23, 2006 ("[T]here is no reason not to analyze how the judiciaries in other democracies have tackled common challenges.")

[70] AUSTRALIAN DEPARTMENT OF FAMILIES, HOUSING, COMMUNITY SERVICES AND INDIGENOUS AFFAIRS, NATIONAL DISABILITY STRATEGY, *available at* http://www.fahcsia.gov.au/sa/disability/progserv/govtint/Pages/nds.aspx.

[71] United Nations Convention on the Rights of Persons with Disabilities, Strategies for Implementing Disability Convention, *available at* http://www.disabled-world.com/news/implementing-disability-convention.php.

[72] The Convention, *supra* note 5, art. 32.

[73] DECLARATION OF THE RIGHTS OF MAN (France 1789), *available at* http://avalon.law.yale.edu/18th_century/rightsof.asp.

It is said that law is too important to be left to lawyers.[74] Fred Rodell, a famous legal realist at Yale, once wrote that the practice of law should be made a criminal offense![75] Naturally, I disagree. I disagree not simply because the sentiment emanates from overstretched and overworked stereotypes, but mainly because, on occasion, law intersects with ethics. As Holmes once said, "law is the witness and external deposit of our moral life."[76] To live in that intersection—where law intersects with ethics to produce justice—is inspiring. More importantly, it can lead to practical change that affects the lives of many.

To see a theory of justice embodied in a single instrument gives one confidence in the possibility of seeking justice through law. The Americans with Disabilities Act encapsulated and gave expression to a new sense of justice for persons with disabilities. It led to many innovative laws throughout the world. And so it is with the new United Nations Convention on the Rights of Persons with Disabilities (UNCRPD). I once wrote that while disability rights is an American invention, it is now truly a global challenge.[77] The UNCRPD is a beacon for an international consensus on justice and disability.

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[74] ELIZABETH FROST KNAPPMANN & DAVID SCHRAGER, THE QUOTABLE LAWYER 217 (1998).

[75] FRED RODELL, WOE UNTO YOU LAWYERS 271-72 (Fred B. Rothman and Co., 2d ed. 1987) (1939) ("Well, why not make the practice of law for money...a crime?").

[76] Holmes, *supra* note 49, at 459.

[77] Gerard Quinn, Valerie Gordon Memorial Lecture, Next Steps: Towards a United Nations Treaty on the Rights of Persons with Disabilities, at the Northeastern University School of Law (April 1, 2004) (on file with author).

Notes

Keeping Stalkers at Bay in Texas

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* J.D. Candidate, 2010, The University of Texas School of Law. I would like to express my gratitude to Professor Sarah Buel and the editors and staff of the Texas Journal on Civil Liberties & Civil Rights for their insight and support in producing this Note, my family, Cindy Ou, and friends at Austin Chinese Campus Christian Fellowship for their continuing encouragement, and Jesus Christ, whose love compels and strengthens me. This Note is dedicated to all stalking victims in Texas.

> [The stalking makes me] mad, hurt, hate—I feel hate, I feel rage, I feel disgust. I feel like screaming. I just get aggravated. I don't feel like a real person, I feel like a robot. I feel like I have to speak, and I have to look, and I have to dress, and I have to walk the way he wants me to. Not the way I want to.[1]

I. INTRODUCTION

Although stalking has sometimes been portrayed on the cinema

[1] Tara, former stalking victim, quoted in TK LOGAN ET AL., PARTNER STALKING: HOW WOMEN RESPOND, COPE, AND SURVIVE 135 (Springer Publishing 2006) [hereinafter TK LOGAN, PARTNER STALKING].

screen as romantic and appealing, in reality it is a "crime of terror."[2] As Neal Miller describes, "it is one part threat and one part waiting for the threat to be carried out."[3] The development of stalking laws in the United States and Texas has been remarkably short, yet encouragingly fast. Texas, however, remains one of a trio of states that does not address stalking in its protective order legislation. While the devastating impact of stalking on victims and society as a whole is well known, Texas has fallen behind the national trend of states assisting stalking victims within their borders. Despite having progressed more slowly than other states, Texas still has the opportunity to draft a focused and comprehensive statute creating stalking protective orders.

This paper argues that the Texas Legislature should enact a bill authorizing stalking protective orders. Part I provides an overview of stalking in the United States, the relation of stalking to domestic violence, and the use of protective orders as a legal response to both crimes. Part II surveys current stalking protective orders in the United States and features an in-depth case study of Oregon, which demonstrates how one state passed and subsequently interpreted its stalking protective order law. Part III focuses on stalking and protective orders as they exist in Texas, and reveals the urgency and feasibility of legislating stalking protective orders. Finally, Part IV is comprised of eleven recommendations divided into three categories: (1) strategies to make stalking protective orders in Texas a reality; (2) enhancements to the protective order process; and (3) improvements to the enforcement and effectiveness of protective orders. These recommendations are the heart of this paper, and are deliberately forward-looking in that they assume stalking protective order legislation will be enacted in the near future.

II. STALKING IN THE UNITED STATES: A GRIM PICTURE

According to the U.S. Department of Justice, an estimated 3.4 million people are stalked annually in the United States.[4] At least one in

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[2] NEAL MILLER, U.S. DEP'T JUST., INST. FOR LAW AND JUST., STALKING LAWS AND IMPLEMENTATION PRACTICES: A NATIONAL REVIEW FOR POLICYMAKERS AND PRACTITIONERS 1 (2001).

[3] *Id.*

[4] KATRINA BAUM ET. AL, U.S. DEP'T OF JUST., BUREAU OF JUST., STALKING VICTIMIZATION IN THE UNITED STATES 1 (2009) (Special Report). This is a staggering jump (143%) from 1.4 million recorded only eleven years ago. PATRICIA TJADEN & NANCY THOENNES, NAT'L INST. OF JUST., CTRS. FOR DISEASE CONTROL AND PREVENTION, STALKING IN AMERICA: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY, RESEARCH IN BRIEF 1, 2 (April 1998) [hereinafter TJADEN & THOENNES, NVAW SURVEY FINDINGS]. Approximately 503,000 women and 185,000 men are stalked by an intimate partner annually. PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T JUST., NAT'L INST. JUST., EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE iii (2000).

twelve American women and one in forty-five American men will be stalked at some point in their lives.[5] These "domestic terrorists" use violence and threats of violence to subjugate and torment their victims in their quest for power and control.[6] Almost half of the victims (45.5%) were stalked at least once a week.[7] Although stalking can affect both women and men, most (78%) of stalking victims are women, and 74% of these women are between the ages of eighteen and thirty-nine.[8] This high percentage shows that stalking of young women is especially severe.

The sexual victimization of college students is also quite prevalent.[9] The combination of many young adults working, living, and interacting in a relatively cloistered and confined physical space such as a college campus with potentially immature views of relationships can produce unhealthy relationships and modes of communication. Extrapolating from previous studies on college students, Patricia Tjaden estimates that between 21% and 26% of women attending postsecondary institutions are stalked each year, a figure which is twenty-five times greater than that found in the national study she conducted in 1998.[10] Stalking on campus is not limited to student-student interactions, but also includes student-instructor relationships.[11]

With the proliferation of cheap technology that allows instantaneous tracking and monitoring of victims, the frequency of cyberstalking has risen dramatically. In response, Linda Farstein, Chief

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[5] TJADEN & THOENNES, NVAW SURVEY FINDINGS, *supra* note 4, at 3.

[6] JUSTICE SOLUTIONS, 2005 NATIONAL STALKING AWARENESS MONTH RESOURCE GUIDE 2 (2004).

[7] BAUM, STALKING VICTIMIZATION, *supra* note 4, at 12.

[8] TJADEN & THOENNES, NVAW SURVEY FINDINGS, *supra* note 4, at 2.

[9] Patricia Tjaden, *Stalking in America: Laws, Research, and Recommendations*, *in* VICTIMS OF CRIME 75, 81 (2007) [hereinafter Tjaden, *Stalking in America*].
Stalking among college women is a thoroughly researched field. For further research, *see* BONNIE S. FISHER, FRANCIS T. CULLEN & MICHAEL G. TURNER, BUREAU OF JUST. STATISTICS, NAT'L INST. OF JUST., THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN (2000) (conducting a study of 4,446 female students and reporting 13.1% had been stalked in school and surprisingly, only 3.9% sought a restraining order); Bonnie S. Fisher, Francis T. Cullen & Michael G. Turner, *Being Pursued: Stalking Victimization in a National Study of College Women*, 1 CRIMINOLOGY & PUB. POL'Y 257, 289-90 (2002) (summarizing various studies on stalking among undergraduate women students and stating "among college women, stalking appears to be a common form of victimization"); Victoria Ravensburg & Catherine Miller, *Stalking Among Young Adults: A Review of the Preliminary Research*, 8 AGGRESSION & VIOLENT BEHAVIOR, 455-469 (2003) (describing how social immaturity, structure of college campuses, and unchecked independence are some reasons why the stalking rate is markedly higher among young adults); Andrew Brownstein, *In the Campus Shadow, Women Are Stalkers As Well As the Stalked*, CHRON. HIGHER EDUC. Dec. 8, 2000, at A40 (discussing a study showing that men constitute 42% of stalking victims at the University of Pennsylvania and Rutgers University, and that female stalkers were three times as likely to be found at the two college campuses than in the population at large).

[10] Tjaden, *Stalking in America*, *supra* note 9, at 81.

[11] *See* Karen Osterholm et al., *College Professors as Potential Victims of Stalking: Awareness and Prevention: National Implications*, 1 FOCUS on C., U., & Sch., no. 1, 1, 2 (2007), *available at* http://www.mincava.umn.edu/categories/1001?type=8 (last accessed January 14, 2010) (follow link to article) (discussing how cases involving students who stalk educators are less likely to be reported to college administration, law enforcement entities, or the media than when the roles are reversed, and how a faculty member may mistakenly perceive an obsessive fixation on the part of the student as merely a harmless crush).

of the Sex Crimes Prosecution Unit in the Manhattan District Attorney's Office, has proclaimed that "cyberstalking has replaced traditional methods of stalking and harassment."[12] One-quarter of all stalking victims reported suffering some form of cyberstalking, often via e-mail or instant messaging.[13] A stalker no longer needs to be in close proximity to his victim to monitor or follow her. He can use a global positioning system (GPS) to track her in her car as she travels to virtually any location, or install a small hidden camera (often called a "spycam") in his victim's home and peek in on the most private moments of her life.[14]

Technological stalking can be done from a distance—something that was not anticipated by early stalking laws that were drafted to prohibit *physically* following and pursuing another person.[15] Stalkers'

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[12] Quoted in U.S. DEP'T OF JUST., STALKING AND DOMESTIC VIOLENCE: REPORT TO CONGRESS 5 (2001) [hereinafter 2001 STALKING AND DOMESTIC VIOLENCE REPORT]. Cyberstalking is truly "the hidden horror of the Internet" that nobody talks about. Tom Zeller Jr., *A Sinister Web Entraps Victims of Cyberstalking*, N.Y. TIMES, April 17, 2006, *available at* http://www.nytimes.com/2006/04/17/technology/17stalk.html (last accessed December 31, 2009) (quoting Parry Aftab, executive director of WiredSafety.org, a network of 9,000 volunteers who patrol the Web and assist victims of cyberstalking, child pornography and other online ills). For as little as $5.99 per month, a person can turn a cell phone into a surveillance device, which will track where the victim travels. GLEN KERCHER & MATTHEW JOHNSON, CRIME VICTIMS' INST., SAM HOUSTON ST. U. STALKING IN TEXAS, 5 (2006). This has led to some terrifying tactics, such as the cyberstalker's hooking a phone to the battery of a victim's car and programming it to pick up silently whenever he called, so that he could monitor the precise location of her vehicle via the Internet. *See e.g.*, Marie Tessier, *Hi-Tech Stalking Devices Extend Abusers' Reach*, WOMEN'S ENEWS, Oct. 2, 2006, *available at* http://www.womensenews.org/article.cfm/dyn/aid/2905 (last accessed December 31, 2009). Like stalking among young adults, cyberstalking has spawned a growing body of scholarly studies. For further research and information, *see* 2001 STALKING AND DOMESTIC VIOLENCE REPORT (discussing the nature and extent of cyberstalking in America, and the major differences between offline and online stalking); Cindy Southworth et al., Violence Against Women Online Resources, *A High-Tech Twist on Abuse: Technology, Intimate Partner Stalking, and Advocacy* (2005), *available at* http://www.mincava.umn.edu (last accessed December 31, 2009) (click on "Stalking," and then "Research") (surveying the various technologies with which cyberstalkers utilize, such as cell phones, location and surveillance systems, instant messaging, spyware, and blogs); Naomi H. Goodno, *Cyberstalking, A New Crime: Evaluating the Effectiveness of Current State and Federal Laws*, 72 MO. L. REV. 125 (2007) (discussing the differences between cyberstalking and offline stalking, criminal elements that should be in included in state statutes, and potential issues in criminalizing cyberstalking); Cindy Southworth & Sarah Tucker, *Technology, Stalking and Domestic Violence Victims*, 76 MISS. L.J. 667 (2007) (providing a brief overview of all the different technologies cyberstalkers can use in their goal to maintain control over their victims).

[13] BAUM, STALKING VICTIMIZATION, *supra* note 4, at 5.

[14] NAT'L CTR. FOR VICTIMS OF CRIME, THE MODEL STALKING CODE REVISITED: RESPONDING TO THE NEW REALITIES OF STALKING 15 (2007) [*hereinafter* MODEL STALKING CODE REVISITED]. The stalker can also put a spyware program on the victim's computer for as little as $30.00 and intercept all of her e-mails and Internet searches. *Id.* Global positioning system (GPS) technology comprised about a tenth of the electronic monitoring of stalking victims. BAUM, STALKING VICTIMIZATION, *supra* note 4, at 5.

[15] The sheer terror of being cyberstalked can be seen "in the first successful prosecution under California's cyberstalking law, [where] prosecutors in the Los Angeles District Attorney's Office obtained a guilty plea from a 50-year-old former security guard, who used the Internet to solicit the rape of a woman who rejected his romantic advances. The defendant terrorized his 28-year-old victim by impersonating her in various Internet chat rooms and online bulletin boards, where he posted, along with her telephone number and address, messages that she fantasized of being raped. On at least six occasions, sometimes in the middle of the night, men knocked on the woman's door saying they wanted to rape her. The former security guard pleaded guilty in April 1999 to one count of stalking and three counts of solicitation of sexual assault. 2001 STALKING AND DOMESTIC

use of e-mail and other technology to contact victims has prompted many jurisdictions to pass so-called "cyberstalking" laws. While it is heartening to see state legislatures responding to this new form of stalking, as the National Center for Victims of Crime explains, "passing separate laws for stalking and cyberstalking often creates unintended consequences such that prosecutors have trouble choosing the statute under which to prosecute a case."[16] The obvious solution is to phrase the text of the stalking statute in a way that covers all conceivable forms of stalking, whether with the use of currently known technologies or yet undeveloped ones. A broadly-written statute is something the Texas Legislature should consider since the current stalking statute does not explicitly cover cyberstalking.[17]

Further data paint a grim picture of stalking and its relationship to femicide. Overall, 87% of stalkers are men; furthermore, 94% of women and 60% of men are stalked by men.[18] Seventy-seven percent of female stalking victims and 64% of male victims are stalked by someone they know.[19] Fifty-nine percent of female stalking victims and 30% of male victims are stalked by a current or former intimate partner.[20] The Intimate Partner Stalking and Femicide Study, which studied female murder victims who had been killed by intimate partners, found that 76% of femicide victims and 85% of attempted femicide victims had been stalked by their intimate partners in the year prior to their murders.[21] These sobering statistics reveal that as much as stalkers may claim they act out of love for their victims, "it is not the power of love that drives them, but the love of power."[22] One would think that given the danger stalkers pose both to their victims and society, legislators would have long since fully addressed stalking in all of its forms. However, although there have always been stalkers in society, the history of stalking laws is surprisingly short.

VIOLENCE REPORT, *supra* note 12, at 4.

[16] MODEL STALKING CODE REVISITED, *supra* note 14, at 15.

[17] *See* TEX. PEN. CODE ANN. § 42.072 (Vernon 2008); *see also* Part IVB (discussing ways to modernize protective orders in Texas).

[18] Tjaden & Thoennes, NVAW SURVEY FINDINGS, *supra* note 4, at 5. However, the most recent statistics have shown two-thirds (66.9%) of female victims report being stalked by men, one-fourth (23.5%) by females, and one-tenth (9.6%) by an individual whose sex they are unsure of. BAUM, STALKING VICTIMIZATION, *supra* note 4, at 4.

[19] NAVW SURVEY FINDINGS, *supra* note 4, at 2. Overall in 2006, approximately three-fourths of all stalking victims interviewed reported knowing their perpetrator in some capacity. BAUM, STALKING VICTIMIZATION, *supra* note 4, at 4

[20] NAVW SURVEY FINDINGS, *supra* note 4, at 2. In 2006, 30.3% of all stalking victims were stalked by such people. BAUM, STALKING VICTIMIZATION, *supra* note 4, at 4. Nancy K. D. Lemon, DOMESTIC VIOLENCE & STALKING: A COMMENT ON THE MODEL ANTI-STALKING CODE PROPOSED BY THE NATIONAL INSTITUTE OF JUSTICE, BATTERED WOMEN'S JUST. PROJECT 1 (1994) ("[I]t is estimated that seventy to 80% of stalking cases occur in a domestic context, while only 10% to 20% involve strangers").

[21] Judith M. McFarlane et al., *Stalking and Intimate Partner Femicide*, 3 HOMICIDE STUDIES 300, 308 (1999).

[22] JUSTICE SOLUTIONS, *supra* note 6, at 2.

A. A Brief Overview of Stalking Legislation in the United States

Stalking has only recently been recognized as a significant and widespread problem.[23] Stalking laws emerged, in part, because of the failure of civil injunctions to protect adequately victims from threatening behavior and bodily harm.[24] Before 1990, not only might a court have held that a person who was the target of stalking behavior failed to meet the "irreparable injury" requirement for an injunction,[25] but the process of obtaining this civil remedy was often arduous, time-consuming, and—should the victim need an attorney—expensive.[26]

In 1990, California enacted the first state stalking law after the young and popular actress, Rebecca Schaeffer, was murdered at her Los Angeles apartment by an obsessed fan who had stalked her for two years.[27] In 1992, twenty-nine states passed similar legislation, and by 1993, all states and the District of Columbia had addressed stalking in their penal codes.[28] Three years later, Congress codified interstate

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[23] Before 1990, "stalking consist[ed] of behavior which was often committed but which was not named as a crime." Carol E. Jordan et al., *Stalking: Cultural, Clinical and Legal Considerations*, 38 BRANDEIS L.J. 513, 550 (2000). Even the 1990 edition of Black's Legal Dictionary did not have an entry for "stalking" among its definitions. *See* Black's Law Dictionary (6th ed. 1990).

[24] Kathleen G. McAnaney et al., Note, *From Imprudence to Crime: Anti-Stalking Law*, 68 NOTRE DAME L. REV. 819, 875 (1993); Jennifer L. Bradfield, Note, *Anti-Stalking Laws: Do They Adequately Protect Stalking Victims?*, 21 HARV. WOMEN'S L.J. 229, 240-247 (1998).

[25] *E.g.*, Alberti v. Cruise, 383 F.2d 268, 271 (4th Cir. 1967).

[26] McAnaney, *supra* note 24, at 877.

[27] Bradfield, *supra* note 24, at 244. There were a number of events prior to 1990 that helped pave the road to this legislation. In 1982 there was the stalking and attempted murder of actress Theresa Saldana. Email from Jodi Rafkin, Program Attorney for the Stalking Resource Center at the National Center for Victims of Crime, to author (Nov. 10, 2009, 17:14 CST) (on file with author). Schaffer's stalker learned about hiring a private investigator to obtain the victim's home address from the subsequent media coverage. *Id.* He later hired his own investigator to find Schaeffer's home address through the California motor vehicle database. *Hearing on Securing Electronic Personal Data: Striking a Balance Between Privacy and Commercial and Governmental Use, Before the United State Senate Committee on the Judiciary* 100th Cong. (2005). In 1988 in Sunnyvale, California, Richard Farley shot and killed 7 people and wounded 4 others, including the woman he had been stalking. Email from Jodi Rafkin, Program Attorney for the Stalking Resource Center at the National Center for Victims of Crime, to author (Nov. 10, 2009, 17:14 CST) (on file with author). The following year, in Orange Country, there were 5 more stalking murders. *Id.* All these events taken together prompted passage of California's stalking law. Intense pressure from the film industry and wider community also compelled California State Senator Edward Royce and Judge John Watson to draft the stalking law. Tjaden, *Stalking in America, supra* note 9, at 75.

[28] Tjaden, *Stalking in America, supra* note 9, at 76; *see also* Jordan, *supra* note 23, at 554-63 (comparing stalking statutes across the country). "In 1993, Congress directed the National Institute of Justice (NIJ) at the U.S. Department of Justice to develop a model anti-stalking code to encourage states to adopt anti-stalking measures and to provide them with direction in drafting such laws." MODEL STALKING CODE REVISITED, *supra* note 14, at 11. NIJ entered into a cooperative agreement with the National Criminal Justice Association (NCJA) to research existing stalking laws and develop model legislative language." *Id.* "NCJA sought additional expertise and input from the National Conference of State Legislatures, the American Bar Association, the National Governors' Association, the Police Executive Research Forum, the National Center for Victims of Crime, and other national organizations." *Id.* Since the 1993 model anti-stalking code was developed, much more information regarding the behavior of stalkers and the effectiveness of state stalking laws was

stalking as a federal offense, and later amended the statute to include stalking via electronic communications.[29] An amendment adopted in 2006 expanded the federal stalking statute to include conduct that causes the victim substantial emotional distress.[30] The new law also added language that would cover surveillance of a victim by a GPS device.[31]

B. Nature and Relation of Stalking to Domestic Violence

Three of the strongest justifications to be made for the passage of stalking protective order legislation in Texas are: (1) the devastating impact stalking has on its victims; (2) the clear correlation between stalking, physical violence, and femicide; and (3) the special danger stalkers pose as criminals. Stalking can be paralyzing for the victim and cause physical, financial, social, psychological, and emotional misery. In describing the nature of stalking, Professor Paul Mullen writes that "stalking is distinguished [from other criminal offenses] by its repetition and persistence. The stalking victim is usually exposed to multiple forms of harassment, often involving threatening and traumatic incidents, the consequence of which may be chronic fear and apprehension."[32] Put another way, stalking is a crime that is defined largely by its effect on the victim and the fear it induces.

i. The Impact of Stalking on Victims

Since the goal of stalking is to induce fear and exercise control over someone else's life, victims inevitably suffer many mental health problems.[33] Four-fifths of women in one study reported suffering direct negative physical and mental health consequences as a result of being

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made known, including the stalker's rising use of tracking and monitoring technology, quantifiable national data that documented the prevalence and severity of stalking. This created a need for revisiting and updating the original code, which was completed last year. *See generally id.*

[29] 18 U.S.C. § 2261A (2007), *see also, supra* note 12 on cyberstalking.

[30] 18 U.S.C. § 2261A(2)(B) (2007).

[31] 18 U.S.C. § 2261A(2)(A) (2007).

[32] PAUL E. MULLEN, MICHELE PATHÉ & ROSEMARY PURCELL, STALKERS AND THEIR VICTIMS 58 (2000). The fact that stalking, by definition, is a form of repeat victimization, which requires behavior constituting a series of incidents rather than a single criminal act, makes it especially dangerous, as one Pennsylvania court noted: "The repetitiveness of stalking acts is indicative of the defendant's unrelenting obsession with the victim and often reveals an escalation of violence." Cmmw. v. Leach, 729 A.2d 608, 613 (Pa. Super. Ct. 1999).

[33] In one study, almost all victims (99%) reported diminished quality of their lives as a result of the stalking. Eighty percent reported a high level of fear, 94% were constantly wary, and 64% reported changes in activity patterns. MARY P. BREWSTER, U.S. DEP'T OF JUST., NAT'L INST. OF JUST., EXPLORATION OF THE EXPERIENCES AND NEEDS OF FORMER INTIMATE STALKING VICTIMS 10 (1999); *see also* 2001 STALKING AND DOMESTIC VIOLENCE REPORT, *supra* note 12 (outlining emotional and psychological symptoms exhibited by stalking victims).

stalked.[34] The symptoms they reported include: (1) acute physical injury including open wounds, fractures, head injuries, sprains and strains, and burns; (2) chronic physical injuries or exacerbations of other health problems; (3) stress-related health problems; (4) difficulty with sleep; (5) decreased perception of safety at home or neighborhood; (6) anxiety disorders; and (7) feelings of losing self, negative perceptions of self, and self-blame.[35]

Stalking also imposes significant financial and social distress on its victims. In one study, Professor Mary Brewster found that 80% of stalking victims incurred financial expenses, ranging from nominal costs to those exceeding $100,000, as a direct result of being stalked.[36] Twenty-seven percent of the women incurred moving expenses as a result of trying to evade their stalkers, and 29% reported losing salary or tuition as a result of the stalking.[37] Interference with job performance, harassment at work, and disruption of occupational duties also aggravate victims' monetary woes and keep them from achieving financial independence.[38] In their efforts not to be followed, victims' normal routines and social lives are disrupted. Many avoid going out on their own, and give up personal activities.[39] Some may even move to another state or attempt to change their identity, which can involve uprooting children, leaving behind close relatives and friends, and abandoning careers.[40]

Stalking creates a "psychological prison" that systematically "deprives its victims of basic liberty of movement and security in their homes."[41] One victim described her ordeal in the following words:

> I wake up every morning, wondering if this is the day I will die at the hands of my stalker. I spend the day looking over my shoulder for him. I jump every time the phone rings. I can't sleep at night from worrying, and when I do sleep, I have nightmares of him. I can't escape him, not even for a minute. I never have a moment's peace, awake or asleep.[42]

Psychological responses to stalking may include not just anxiety, fear, and paranoia, but also feelings of guilt, self-blame, shame, isolation, low self-esteem, anger, rage, and depression.[43] Almost always, there is a

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[34] TK LOGAN, PARTNER STALKING, *supra* note 1, at 107-47.

[35] *Id.*

[36] BREWSTER, *supra* note 33, at 10. Victims bore a median cost of $1000. *Id.*

[37] *Id.* at 7. In 2006, over half of the victims lost less than $1,000 of pay, and 8% of victims lost $5,000 in pay or more. BAUM, STALKING VICTIMIZATION, *supra* note 4, at 7.

[38] LOGAN, *supra* note 1, at 149–81.

[39] OFFICE OF COMMUNITY ORIENTED POLICING SERVS., U.S. DEP'T OF JUST., CREATING AN EFFECTIVE STALKING PROTOCOL 11 (2002).

[40] *Id.*

[41] 2001 STALKING AND DOMESTIC VIOLENCE REPORT, *supra* note 12, at vii.

[42] CREATING AN EFFECTIVE STALKING PROTOCOL, *supra* note 39, at 11.

[43] *Id.* The destructive impact of stalking can be exacerbated in certain cultural contexts, for instance,

"pervasive sense of loss of personal safety, a constant feeling of stress, and hypervigilance."[44] In more serious episodes, stalking victims may show symptoms of Post-Traumatic Stress Disorder (PTSD): (1) repeatedly re-experiencing frightening stalking incidents, (2) avoiding reminders of the problem (for example, through social withdrawal or avoidance of any situations that might trigger memories of stalking incidents), and (3) having exaggerated "startled responses."[45] Victims often complain about feeling exhausted, being unable to concentrate, and for some, suffering short-term memory problems, which negatively affect work productivity or academic performance.[46] Each new stalking incident can exacerbate victims' reactions, which may be further compounded by concerns regarding the harmful effects stalking may have on their children and other "secondary victims."[47] These concerns bolster the argument that additional forms of protection for victims, including stalking protective orders, are essential.

ii. Correlation of Stalking to Physical Violence, Protective Order Violations, and Femicide

Stalking and domestic violence intersect and are enmeshed on many levels.[48] According to Professor TK Logan, who has conducted

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in Asian families. In 2002, the National Asian Women's Health Organization conducted a study of violence among 336 young Asian American women. NAT'L ASIAN WOMEN'S HEALTH ORG., SILENT EPIDEMIC: A SURVEY OF VIOLENCE AMONG YOUNG ASIAN AMERICAN WOMEN 1 (2002) (Special Report). The study found that a large number of these women were victims of sexual violence, emotional abuse, and stalking, but barely utilized support services. *Id.* at 2. One reason for this phenomenon was the cultural barriers and stigmas within Asian American families that often suppressed the violence as a private "family matter," which in turn perpetuated the violence. *Id.* Young Asian American women victims were also often blamed for "bringing shame to the family," erecting yet another barrier for them in seeking support. *Id.* Indeed, there is a common Chinese saying, *jiachou buke waiyang*, which translates to "Don't wash dirty linens in public." In other words, any affair that might bring shame upon the family cannot be made known to the outside world; it is to be strictly kept within the confines of the home.

[44] CREATING AN EFFECTIVE STALKING PROTOCOL, *supra* note 39, at 11.

[45] McAnaney, *supra* note 24, at 851 & n. 146.

[46] CREATING AN EFFECTIVE STALKING PROTOCOL, *supra* note 39, at 11. Overall, in measuring the emotional impact of and response to their stalking, women reported that they "very much" felt: (1) frustrated (82%); (2) overwhelmed (77%); (3) angry (73%); (4) lonely (71%); (5) resentful (69%); (6) anxious or worried (68%); (7) tense or on the edge (68%); (8) confused (65%); (9) less trustful of others (63%); (10) like I don't get what I deserve (63%); (11) withdrawn from others (61%); (12) tearful and/or sad (60%); and (13) vulnerable (57%). TK LOGAN, PARTNER STALKING, *supra* note 1, at 134.

[47] *Id.* at 12. Stalking also results in children's psychological distress and negatively impacts the relationships between family and friends. TK LOGAN, PARTNER STALKING, *supra* note 1, at 155.

[48] *See* TK Logan et al., *Stalker Profiles With and Without Protective Orders: Reoffending or Criminal Justice Processing?*, 17 VIOLENCE AND VICTIMS 541 (2002) (a study based on 346 males who had been charged with stalking, of which two-thirds had a protective order against them at some point over the study period, suggesting stalking was associated with intimate partner violence); *cf.* Jennifer Cole et al., *Intimate Sexual Victimization Among Women with Protective Orders: Types and Associations of Physical and Mental Health Problems*, 20 VIOLENCE AND VICTIMS 695, 697 (2005) ("Some research findings have shown that men who physically and sexually assault their partners are more violent when compared to men who physically assault but do not sexually assault their

numerous scholarly studies on domestic violence, stalking is the number one predictor of whether a perpetrator will commit subsequent acts of domestic violence.[49] Stalking can manifest itself in the form of directed aggression, damaged or stolen property, harm towards a third party or pet, and most seriously, physical assault.[50] In roughly one-fifth of reported incidents, stalkers wielded weapons: knives, firearms, and even cars.[51] A vast majority (81%) of female stalking victims who were stalked by a current or former husband or cohabiting partner were also physically assaulted by that partner, and almost a third were sexually assaulted.[52] In an in-depth study of sixty-two stalking victims, Professor Logan and other researchers found that 92% of the women feared their stalking partners would physically harm them or someone close to them, and that 71% believed the stalking worsened in frequency and severity over time.[53]

Where there is stalking, domestic violence is also likely to be found.[54] The majority of stalking victims complain of serious physical assault, threats to kill or harm, or attempts or threats to take children.[55]

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partners. . .").

[49] Telephone Interview with TK Logan, Professor in Department of Behavioral Science, University of Kentucky (Nov. 24, 2008). In the introduction to her book, PARTNER STALKING, Professor Logan comes to these eight conclusions about the severity of stalking: (1) stalking is not a rare event; (2) current or ex-intimate partners make up a large, if not the largest, category of stalking perpetrators among women reporting stalking victimization; (3) partner stalking often occurs during relationships as well as separation or divorce from abusive relationships; (4) partner stalking is dangerous because it is associated with violence, including potential deadly violence; (5) stalking is associated with extensive victim distress (86% of women indicated they had experienced long-term changes to their personalities because of being stalked, and 75% had symptom levels indicating a presence of at least one psychiatric disorder); (6) women use a variety of strategies to cope with stalking; (7) partner stalking is often not perceived as serious (dismissal was the most common disposition of stalking criminal cases); and (8) little is known about men who stalk their partners. TK LOGAN, PARTNER STALKING, *supra* note 1, at 3-12.

[50] Kris Mohandie et al., *The RECON Typology of Stalking: Reliability and Validity Based upon a Large Sample of North American Stalkers*, 51 J. FORENSIC SCI. 147, 150 (2006). In this study of over one thousand stalkers, the results of previous studies are confirmed: stalkers predominantly target female victims (81%), the duration of the average stalking episode is sixteen months, and threats are commonly used (60%, with an average number of five threats per stalking case). *Id.* at 149-50. Most disturbingly, the study found that violence occurred in 46% of cases, with 73% of all cases reporting criminal justice involvement greater than a police report. *Id.* at 150.

[51] *Id.* at 150.

[52] TJADEN & THOENNES, NVAW SURVEY FINDINGS, *supra* note 4, at 2.

[53] TK LOGAN, PARTNER STALKING, *supra* note 1, at 22. More specifically, 57% of the women were afraid their stalker was going to kill them, 44% were afraid of physical harm, 5% were concerned that the stalker would harm their children or take them away, 5% feared the stalker would harm others close to them, and 7% thought the stalker might harm himself. *Id.* at 22. Chapter two of the book provides comprehensive statistics on the relationship of stalking to domestic violence.

[54] CREATING AN EFFECTIVE STALKING PROTOCOL, *supra* note 39, at 9; *see also* Kevin S. Douglas & Donald G. Dutton, *Assessing the Link Between Stalking and Domestic Violence*, 6 AGGRESSION & VIOLENT BEHAVIOR 519, 533 (2001) (citing a study in which 30% of 120 convicted batterers attending a treatment program admitted to stalking their partners).

[55] BREWSTER, *supra* note 33, at 7. In one study, 73% of the women reported threats of violence made by their stalkers against them, and 37% mentioned threats of violence towards family, friends, coworkers, or other affiliates. Forty-six percent of the victims reported that their stalkers had committed violence against them during the stalking. Those who received explicit threats were also more likely than those who received implicit threats or no threats, to have experienced violence at the hands of their stalkers (65.7% versus 23.9%, respectively).

Physical injuries from these assaults range from small scrapes and bruises to gunshot wounds.[56] Studies suggest that the relationship of former partners in between 30% and 65% of stalking cases was violent.[57] Overall, it is estimated that stalkers commit acts of violence against their victims in 25% to 35% of all stalking cases.[58] In light of this data, most domestic violence could be seen as a sub-category of stalking.

Not only does stalking play a critical role in the domestic abuse that causes victims to seek protective orders, it is also a primary source of protective order violations. Professor TK Logan reported in her study of 698 women that 30% continued to be stalked by their partner *after* the protective order was issued.[59] Even more disturbing is that after the issuance of a protective order, the chances of this subset of women experiencing psychological abuse almost doubled, and the chances of suffering physical abuse quadrupled.[60] They were also 4.7 times more likely to be injured, 4.8 times more likely to experience severe physical violence, and an astonishing 9.3 times more likely to experience sexual assault than were women who were not stalked after the issuance of a protective order.[61] Furthermore, women in the first category reported more verbal abuse, physical violence, degradation, jealousy and control, symbolic violence or threat tactics, and sexual coercion than women in the second.[62] It is not surprising, then, that post-protective order stalking causes women to report continued fear and to perceive the order as ineffective.[63]

Since relationship violence significantly correlates with femicide, and stalking is tightly linked to relationship violence, there is good reason to treat every domestic violence case as a potential stalking case, and in many instances, as a potentially lethal one.[64] In a high proportion

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[56] *Id.* at 10. In Brewster's study, 46% of the women experienced violence at the hands of their stalkers, with 81% of these women suffered physical injuries. The most prevalent injuries were bruises (27.3% of the total sample), small scrapes and cuts (18.2%), and black eyes (12.3%). Additionally, 22% of the women suffered property damage of some kind. *Id.*

[57] *Id.*

[58] JR Meloy, THE PSYCHOLOGY OF STALKING: CLINICAL AND FORENSIC PERSPECTIVES 5 (1998).

[59] *See* TK Logan & Robert Walker, *Civil Protective Order Outcomes Violations and Perceptions of Effectiveness*, 24 JOURNAL OF INTERPERSONAL VIOLENCE 675, 682 (2009) (*also available at* J. Interpersonal Violence OnlineFirst, doi:10.1177/0886260508317186, 10) (summarizing the various studies that give rise to this wide spectrum of figures). In a separate study, Professors Logan and Cole found that the stalking lasted, on average, eight months after the order was issued. TK Logan & Jennifer Cole, *The Impact of Partner Stalking on Mental Health and Protective Order Outcomes Over Time*, 22 VIOLENCE & VICTIMS 546, 558 (2007).

[60] Logan & Walker, *supra* note 59, at 680.

[61] *Id.*

[62] Logan & Cole, *supra* note 59, at 553.

[63] *See* Logan & Walker, *supra* note 59, at 683. Heightening the victims' lower perception of personal safety and effectiveness of protective orders, Professors Logan and Cole reported that if there was no stalking after the protective order, 85.4% of the women felt fairly to extremely safe from their partners, and 86% stated the protective order itself was fairly to extremely effective. However, if there was stalking, these numbers plunge to 55.2% and 59%, respectively. Logan & Cole, *supra* note 59, at 554.

[64] CALLIE MARIE RENNISON & SARAH WELCHANS, BUREAU OF JUST. STATISTICS, U.S. DEP'T OF JUST., INTIMATE PARTNER VIOLENCE 1 (2000) (Special Report).

of cases involving the murder (76%) or attempted murder of women (85%), the perpetrator was shown to have stalked the victim beforehand.[65] Another study found that femicide victims who were physically abused prior to the murder were also far more likely to have been stalked than women who were not physically abused.[66] Although femicide in stalking cases is admittedly rare—only 0.5% of known stalking cases culminate in the death of the female victim— that rate is still fifty times that of the U.S. population at large (<0.01%).[67] Femicide is also the leading cause of death in the U.S. among young African-American women aged fifteen to forty-five years, and the seventh leading cause of premature death among women overall.[68]

iii. Stalkers Are an Especially Dangerous Breed of Criminals

Many stalkers have a host of life problems that are occasionally compounded by histories of violence and serious mental illness.[69] Stalkers tend to be young males with some prior criminal record and history of substance abuse.[70] If their attempts to contact or win over their victims' hearts prove unsuccessful, it is possible that they will target the victims aggressively with violent acts such as breaking into their

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[65] McFarlane, *Intimate Partner*, *supra* note 21, at 300. In North Carolina, one research study found that 23.4% of the women who had been murdered by a current or former partner had been stalked prior to the fatal crime. Kathryn Moracco et al., *Femicide in North Carolina, 1991-1993: A Statewide Study of Patterns and Precursors*, HOMICIDE STUDIES 422, 435 (1998). The large differences between both studies can be explained by the use of proxy informants who knew the victim and perpetrator, in McFarlane's study, and the exclusive use of police knowledge in Moracco's study.

[66] Jordan, *supra* note 23, at 536.

[67] Mohandie, *supra* note 50, at 152.

[68] Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 AM. J. PUB. HEALTH 1089, 1089 (2003). Intimate partner homicide accounts for approximately 40% to 50% of U.S. femicides. *Id.*

[69] Mohandie, *supra* note 50, at 152; *see also* Carol E. Jordan et al., *Stalking: An Examination of the Criminal Justice Response*, 18 J. INTERPERSONAL VIOLENCE 148, 148 (2003) (reinforcing previous studies stating there are high rates of criminal offending among stalkers and a high rate of protective orders associated with stalking cases).

[70] *See* BREWSTER, *supra* note 33, at 6. This study, consisting of 187 women who were recent stalking victims in various counties in southeastern Pennsylvania, also profiled the stalkers who terrorized the women. *Id.* at 3. It found stalkers were, on average, slightly younger than the victims in the sample, with a median age of 30 years old. Seventy-seven percent had completed at least high school, and 45% had completed at least some college. Sixty-nine percent of the stalkers were employed; 62% in blue-collar positions and 37% holding white-collar positions. About sixty-two percent of the stalkers had some type of prior criminal record; 31% for violent offenses. The abuse of either drugs or alcohol by 72% of stalkers may have aggravated their violence. Indeed, 66% of the women identified drug and/or alcohol use as a trigger of violence during their prior relationship with the stalker. *Id.* at 6. Many studies have been conducted on typologies of stalkers and characteristics of stalking. *See e.g.*, Mohandie, *supra* note 50, at 152-54; BREWSTER, *supra* note 33, at 6.

homes with the intent to commit harm.[71] Indeed, rejections may humiliate the stalker and intensify their anger. As Professor Mullen and other researchers note, "In our experience, the majority of these stalkers possess an overwhelming sense of entitlement to their partner and family. Rejection is experienced by these individuals as personally humiliating and a powerful justification for their continued pursuit of the perpetrator of their narcissistic wound."[72]

In other words, as Douglas and Dutton note, the stalker's inability to handle shame, humiliation, and loss, means they may respond to rejection with rage, fantasies of power, and possibly retaliation, which can lead to even more aggressive stalking and further rejection.[73] This self-aggravating cycle is one reason why "[s]talkers are by nature the most relentless of criminals."[74] The ruthlessness of stalkers can be seen in how they focus their entire lives on one individual, without fearing the prospect of going to jail; the threat of handcuffs and prison time is simply not a deterrent for them.[75] As one journalist remarks, "If a stalker . . . is determined to kill, there is little short of death, permanent jail time or round-the-clock bodyguards that will keep him from his mission. Not court orders, not threats – not even moving away."[76]

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[71] Alana M. Nicastro, Amber V. Cousins & Brian H. Spitzberg, *The Tactical Face of Stalking*, 28 J. CRIM. JUST. 69, 71 (2000).

[72] Mullen, *supra* note 32, at 233 ("The abandonment rage leads to pursuit and the attempt to devalue the other person in real life, which reinforces the 'narcissistic linking fantasy to the idealized object.' Narcissistic wounding occurs for the stalker every time his approaches or contacts are rebuked").

[73] Douglas & Dutton, *supra* note 54, at 536.

[74] Michael Drexler, *Psychologist Says Stalkers Have Need to Exert Control*, THE PLAIN DEALER, Oct. 31, 1993, at 4B; Douglas & Dutton, *supra* note 54, at 542 ("After continuing rejections by the object of their pursuit, the tension could culminate in an attempt to be physically assaultive. After this, a stalker may enter the contrition phase and display qualitatively different stalking behavior, such as unwanted gifts, non-menacing phone calls, and the like. The cycle may perpetuate itself . . . ").

[75] One commentator further noted: "[M]ost anti-stalking laws have one major shortcoming -- they do not adequately recognize that many stalkers, perhaps most, are emotionally disturbed or mentally ill. The proper penal goal of anti-stalking laws, therefore, should be incapacitation of the stalker. Deterrence is not an appropriate goal because stalkers, will not cease their harmful behavior because of criminal penalties. . . . [P]ersons intent on stalking will break protection orders, and other laws, to contact their victim. Protection of the victim will be best served by basing sentencing provisions on the primary goal of incapacitation." Heather M. Stearns, Comment, *Stalking Stuffers: A Revolutionary Law to Keep Predators Behind Bars*, 35 SANTA CLARA L. REV. 1027, 1061 and n. 240 (1995). However, one should be careful not to explain away stalking behavior as merely the result of mental illness, since it diminishes the fact that stalkers choose to engage in their criminal conduct. Email from Jodi Rafkin, *supra* note 27. Contrast Stearns' conclusion with Mohandie's data, "Forty-six percent of all the subjects in the sample had a clear or probable DSM-IVTR diagnosis at the time of the stalking, while no disorder was apparent from the available data for 30% of the subjects. Psychotic symptoms were present at the time of the offense for 14% of the subjects, but were not present for 64%." Mohandie, *supra* note 50, at 149.

[76] Kevin Fagan, *New Focus on Deadly Stalkers*, S.F. CHRON., Jan. 11, 1993, at A1.

iv. Conclusion: Stalking Requires the Use of Protective Orders

Given that stalking is a "correlate of lethal and near lethal violence against women and . . . is significantly associated with murder and attempted murder," Texas legislators must enact laws that keep stalkers away from their victims.[77] If "one major way to decrease intimate partner homicide is to intervene with battered women who are at risk,"[78] then part of this intervention must address stalking, since it is intimately linked to domestic violence that is further tied to the majority of intimate partner femicides.[79] It has been proven that the single biggest predictor of protective order violations via stalking occurs before the order is issued.[80] This is yet another reason why there should be a stalking protective order law.[81]

Unless there are protective orders available against stalking, a majority of orders already in place may lose their effectiveness because offenders are not told they cannot stalk their victims. While a mere quarter of female stalking victims and about a tenth of male stalking victims do obtain protective orders against their stalkers, even this very low number may be inflated due to the fear created physical and sexual violence that can accompany stalking.[82] Why should a stalking victim have to wait until she is physically injured to obtain a protective order?[83] A survivor should have the remedy of a stalking protective order to ensure the stalking does not worsen into physical violence, and possibly femicide.

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[77] McFarlane, *Intimate Partner*, *supra* note 21, at 300. Femicide victims who were physically abused prior to being murdered were also far more likely to also be stalked. *Id.* at 309. Furthermore, 91% of attempted femicide victims who reported abuse within the year prior to the incident also reported stalking. *Id.* Of course, the stalking protective order law must be gender neutral, since men are also stalking victims.

[78] Campbell, *supra* note 8, at 1089.

[79] *See id.* (reporting 67% to 80% of intimate partner homicides "involve physical abuse of the female by the male before the murder, no matter which partner is killed").

[80] Logan & Cole, *supra* note 59, at 558.

[81] *See* TK Logan et al., *Factors Associated With Separation and Ongoing Violence Among Women With Civil Protective Orders*, 23 J. FAM. VIOLENCE 377, 383 (2008) [hereinafter TK Logan, *Factors*].

[82] TJADEN & THOENNES, NVAW SURVEY FINDINGS, *supra* note 4, at 2.

[83] "Stalking victims who are not eligible for protection orders are frequently told that nothing can be done until they are physically harmed or a suspect has committed a criminal act. By that time, a serious assault or homicide may have occurred." Lowell T. Woods, Jr., Note, *Anti-Stalker Legislation: A Legislative Attempt to Surmount the Inadequacies of Protective Orders*, 27 IND. L. REV. 449, 458 (1993); *see generally* RAOUL FELDER & BARBARA VICTOR, GETTING AWAY WITH MURDER: WEAPONS FOR THE WAR AGAINST DOMESTIC VIOLENCE (1997) (discussing how criminal justice fails to protect battered women, and how battered woman are victimized by police).

C. Protective Orders as a Legal Response

As domestic violence began to be recognized as a crime, there was a concurrent recognition that protective orders were a potential civil remedy for victims to seek relief.[84] As early as 1976, battered women's advocates identified domestic violence as a "pattern of coercive control that one person exercises over another," and worked to both liberate victims from their batterers' grip and restore the victims' autonomy.[85] Called the "grandmother of domestic violence law,"[86] protective orders first came into existence in 1970 when the District of Columbia passed its Intrafamily Offenses Act.[87] Pennsylvania became the first state to authorize orders when it passed its Protection from Abuse Act in 1976.[88] Within four short years, forty-five states implemented similar legislation.[89] Today, all jurisdictions in the United States provide civil protection orders for victims of intimate or family violence.[90] They are a prospective remedy designed to prevent future violence rather than punish past conduct, though today almost every state makes the violation of a protective order a crime.[91] Most importantly, they remain "the single most commonly used legal remedy for domestic violence today."[92]

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[84] The recognition of domestic violence as a crime did not come easy. For instance, in Illinois, prior to the enactment of its protective order statute, most judges, police, and prosecutors did not think that the justice system should intervene in domestic matters, so they took a hands-off approach towards battered women, unless she had "severe injuries." Nina W. Tarr, *Civil Orders for Protection: Freedom or Entrapment?*, 11 WASH. U. J.L. & POL'Y 157, 164 (2003).

[85] Tamara L. Kuennen, *"No-Drop" Civil Protection Orders: Exploring the Bounds of Judicial Intervention in the Lives of Domestic Violence Victims*, 16 UCLA WOMEN'S L.J. 39, 47 (2007) (quoting Susan Schechter, a pioneer of the Battered Women's Movement, her book GUIDELINES FOR MENTAL HEALTH PRACTITIONERS IN DOMESTIC VIOLENCE CASES 4 (1987)).

[86] Barbara Hart, *The Legal Road to Freedom, in* BATTERING AND FAMILY THERAPY: A FEMINIST PERSPECTIVE 1, 13 (Marsali Hansen and Michele Harway, eds., 1993)

[87] Kuennen, *supra* note 85, at 48 (2007). D.C.'s Act was formally adopted by Congress on July 29, 1970. D.C. CODE ANN. § 16-1001, et seq. (2008).

[88] Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2, 13 (2006).

[89] *See* CLARE DALTON & ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND THE LAW 498 (2001).

[90] A.B.A. COMM. DOMESTIC VIOLENCE, DOMESTIC VIOLENCE CIVIL PROTECTION ORDERS (CPOS) BY STATE (July 2008) (giving an overview of domestic violence orders in all fifty states). To ensure there was nationwide enforcement of civil and criminal protective orders, even when victims crossed state lines to escape abuse, VAWA created the Full Faith and Credit Act, which required every temporary or final injunction, protective order, or restraining order properly issued by a state court be given full faith and credit by courts in every other state. 18 U.S.C. §§ 2265, 2266 (2007). A fair number of states have passed their own full faith and credit law, requiring that a new state's remedies and sanctions apply, even if they differ from those of the issuing state; *See, e.g.*, ALA. CODE § 30-5-4 (2009); FLA. STAT. § 741.315 (2009); IOWA CODE § 236.19 (2009); MD. FAM. LAW CODE ANN. § 4-508.1 (2009); N.H. REV. STAT. ANN. § 173-B:13 (2009); TENN. CODE ANN. § 36-3-622 (2009); W. VA. CODE § 48-28-3 (2009). Even though Texas currently does not authorize stalking protective orders, it must uphold such orders issued by neighboring states such as Oklahoma, Louisiana, and New Mexico that do authorize them. TEX. FAM. CODE § 88.003 (Vernon 2008).

[91] Suk, *supra* note 88, at 16 (citing NEAL MILLER, DOMESTIC VIOLENCE: A REVIEW OF STATE LEGISLATION DEFINING POLICE AND PROSECUTION DUTIES AND POWERS, INST. LAW & JUST. 24 & n.67 (June 2004)).

[92] Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?*, 29 CARDOZO L. REV. 1487, 1489 (2008).

At its core, protective orders afford victims both control and independence by recognizing a privacy interest on behalf of the victim.[93] By ordering the offender from the home and prohibiting contact with the victim, protective orders erect a zone of privacy in which the offender cannot legally intrude.[94] Victims seek them not only to stop the physical assault and break free from the psychological chains shackled upon them, but also to have the law act as a "loudspeaker" proclaiming that society condemns the abuse.[95] Victims may also want to use a protective order to create a public record documenting the abuse, making prosecution for later acts of abuse more likely, and ensuring the batterer will not simply "get away with it."[96] Another advantage of a protective order is that as a civil proceeding, it has a lower burden of proof than in criminal litigation.[97] Even if the available evidence cannot sustain a criminal conviction, the victim may still be able to acquire relief through a protective order. This is especially important when the victim and the assailant are the only witnesses to the crime and there is little, if any, extrinsic evidence.[98]

Despite the advantages of protective orders, victims of domestic violence, sexual assault, and stalking seldom seek them, in part because they are concerned about having to face the perpetrator in court, and worried that the court will not believe them.[99] They also fear losing their privacy and that the abuse will continue even after the protection order is obtained.[100] Some realize that attempts to escape their abuser may result in murder.[101] This inexcusable fact means that protective orders can and will be ineffective without sound enforcement and skilled,

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[93] As Barbara Hart so eloquently wrote, "A new remedy was needed . . . One that would not displace the abused woman from her home but could compel relocation of the abuser. One that could constrain the abusing husband from interfering with and disrupting the life of the abused woman and children . . . One that would give the mother authority to act as primary caretaker of her children . . . One that would sharply limit the power of the battering husband or partner to coerce reconciliation. One that would advance the autonomy and independence of the battered woman from the abuser. Civil protection orders were this new remedy." Barbara J. Hart, *State Codes on Domestic Violence: Analysis, Commentary and Recommendations*, 43 JUV. & FAM. CT. J. 3, 23 (1992).

[94] Jordan, *supra* note 23, at 543; Jeannie Suk also writes, "From the beginning of the battered women's movement, women's advocates understood that victims faced a particular practical obstacle to avoiding continued violence: sharing a home with their abusers. . . . [A]dvocates concluded that short-term housing in shelters was inadequate. The civil protection order would exclude the abuser instead of displacing the victim from the home. It would there by limit disruption to her life, provide stability and safety in her own space, enhance her autonomy from her abuser, and reduce the costs of ending a marriage." Suk, *supra* note 88, at 14.

[95] *See* Karla Fischer & Mary Rose, *When "Enough is Enough": Battered Women's Decision Making Around Court Orders of Protection*, 41 CRIME & DELINQ. 414, 423 (1995).

[96] *Id.*

[97] Elizabeth Topliffe, *Why Civil Protection Orders Are Effective Remedies for Domestic Violence But Mutual Protective Orders Are Not*, 67 IND. L.J. 1039, 1048 (1992).

[98] Woods, *supra* note 83, at 457.

[99] A.B.A. COMM'N ON DOMESTIC VIOLENCE, A.B.A. STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING VICTIMS OF DOMESTIC VIOLENCE, SEXUAL ASSAULT, AND STALKING IN CIVIL PROTECTION ORDER CASES vi (2007).

[100] *Id.*

[101] *Id.* at vi-vii.

holistic advocacy.

i. Enforcement and Violations: Great Challenges to Effectiveness

Without enforcement, protective orders are like dollar bills that are not legal tender; they are merely pieces of paper.[102] As the "Achilles heel of the civil protection order process," enforcement is imperative because otherwise a protective order "at best offers scant protection and at worst increases the victim's danger by creating a false sense of security."[103] Protective orders are effective when the stalker is rational and can control his behavior to avoid legal consequences, but they are ineffective when the stalker has little regard for the consequences of stalking behavior and is obsessed with harming or harassing the victim.[104] Some stalkers are simply not afraid of the consequences of a protective order violation. As Diana, a former stalking victim, laments: "[the protective order] pisses them off. It's like taking a fly swatter and hitting an elephant with it. It just makes them mad."[105] One study revealed that overall, "58% of women were classified as having experienced a [protective order] violation."[106] This figure falls in the middle of a range of 23% to 70% ascertained in other reports.[107] Unfortunately, most women expect such violations.[108] Another study demonstrated that victims who obtained protective orders experienced 2.5 times as many total suspect tactics and significantly higher number of stalking tactics than victims who had not obtained protective orders.[109]

Even assuming that offenders stay at the required minimum distance prescribed in their orders, they can still terrorize a victim

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[102] A Texas detective concurred with this statement by saying that the piece of paper is not what saves a victim's life, it is the batterer's ultimate obeying the law that does. However, he added that protective orders have reduced crime in Austin, and have given police officers a tool for warrantless arrests, even if it is only a family disturbance. Telephone Interview with Detective [name withheld], Austin Police Dept. (Nov. 21, 2008).

[103] PETER FINN AND SARAH COLSON, U.S. DEP'T OF JUST., CIVIL PROTECTION ORDERS: LEGISLATION, CURRENT COURT PRACTICE, AND ENFORCEMENT (1990).

[104] Harvey Wallace & Kathleen Kelty, *Stalking and Restraining Orders: A Legal and Psychological Perspective*, 18 J. OF CRIME & JUST. 2, 99, 107 (1995).

[105] Quoted in TK LOGAN, PARTNER STALKING, *supra* note 1, at 259.

[106] TK Logan, *Factors*, *supra* note 81, at 382.

[107] *See* Logan & Walker, *supra* note 59, at 3 (summarizing the various studies that give rise to this wide spectrum of figures).

[108] Fischer and Rose found that 86% of the victims they interviewed thought the batterer would violate the order, but 98% reported feeling more in control of their lives, and 89% felt more in control of their relationships after obtaining the order. Fischer & Rose, *supra* note 95, at 417. Adele Harrell and Barbara Smith also came to similar conclusions. They found that less than half of the women they interviewed believed the batterer would obey the order, yet 79% said it was helpful in sending her partner a message that his actions were wrong. Adele Harrell & Barbara E. Smith, *Effects of Restraining Orders on Domestic Violence Victims*, *in* DO ARRESTS AND RESTRAINING ORDERS WORK? 214, 218 (Eve S. Buzawa & Carl G. Buzawa eds., 1996).

[109] Nicastro et al, *supra* note 71, at 76.

through stalking tactics. Recidivism, defined as contact between the stalker and victim after criminal justice intervention, occurs in 60% of cases, as reported by a study involving one thousand stalkers, the largest nonrandom sample of stalkers ever studied.[110] That study also reported the time frame between intervention and recidivism averages two months, with a range of one day to six years.[111] Another analysis of women who had domestic violence protective orders indicated that a violent partner had stalked approximately half of them during their relationship.[112] These stalking victims experienced more PTSD and anxiety symptoms, as well as protective order violations, than women who were not stalked by their partners.[113]

ii. Beneficial Influences: Reduction of Violence and Victim Empowerment

In spite of the unsettling frequency of protective order violations, protective orders still produce substantial beneficial effects. They give victims a real hope of reducing the chances of being harmed, and they also shift the dynamics of the relationship away from the batterer in favor of the victim. First, they lower the possibility of of victims being harmed. For example, victims in Texas who applied for protective orders reported significantly lower violence, and decreased levels of threats of abuse at three months, six months, and one or two years after initial contact with the justice system.[114] Similarly, 149 women who participated in another study on the effectiveness of protective orders also reported considerably lower levels of intimate partner violence up to eighteen months after applying for an order.[115] These findings were confirmed in another report, which concluded,

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[110] Mohandie, *supra* note 50, at 150.

[111] *Id.*

[112] TK Logan, Lisa Shannon & Jennifer Cole, *Stalking Victimization in the Context of Intimate Partner Violence*, 22 VIOLENCE AND VICTIMS 669, 671 (2007) (finding 53% of the women had been stalked by a violent partner, and 47% reported experiencing stalking behavior from this partner in the past year). Other researchers add "stalking is more likely to occur in the context of a terminated relationship than is rape or physical assault." TJADEN & THOENNES, EXTENT, NATURE, AND CONSEQUENCES, *supra* note 4, at 38.

[113] *Id.* at 677, 678.

[114] Julia H. Gist et al., *Protection Orders and Assault Charges: Do Justice Interventions Reduce Violence Against Women*, 15 AM. J. FAM. L. 59, 67, 70 (2001); Victoria Holt et al., *Civil Protection Orders and Risk of Subsequent Police-Reported Violence*, 288 J. AM. MED. ASS'N 589, 593 (2002) (reporting a significant 80% decrease in police-reported violence against women who had permanent protective orders).

[115] Judith McFarlane et al., *Protection Orders and Intimate Partner Violence: An 18-Month Study of 150 Black, Hispanic, and White Women*, 94 AM. J. PUB. HEALTH 613, 616 (2004) [hereinafter McFarlane, *Protection Orders*].

> Women who applied for a protection order, irrespective of whether the order was received, were 70% less likely to experience reassault. Stated another way . . . women who did not apply for a protection order were 3.3 times more likely to be reassaulted when compared with women who sought help.[116]

The message from all these experts is that despite the regularity with which orders are violated, they are nonetheless still an effective legal remedy against domestic violence.[117]

The second way a protective order is beneficial to a victim of intimate partner violence is how it empowers her by placing her at the center of the decision-making process. It gives her a "taste of freedom," and her restorative process begins in earnest as she leaves the oppressive relationship.[118] Through a protective order, women are able to convey to the batterer that his behavior is illegal and unacceptable, and shift the blame from themselves to the abuser.[119] Many abusers retreat after being served a protective order, since a violation may result in criminal sanctions, including jailtime or "even time in an abuse-prevention course."[120] As two researchers concluded, "The specter of facing a judge after violating his order may act as a deterrent for some stalkers."[121] To victims, a protective order is their day in court and an affirmation by an authority figure who says, "I agree that something terrible has happened to you and you deserve protection."[122] By placing the strength of the law on the victim's side, protective orders provide her with a "bargaining chip" which she may use to extract concessions from the abuser, resulting in an improvement of her personal safety.[123]

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[116] Judith McFarlane et al., *Intimate Partner Sexual Assault Against Women: Frequency, Health Consequences, and Treatment Outcomes*, 105 OBSTETRICS & GYNECOLOGY 1, 99, 102 (2005).

[117] Goldfarb, *supra* note 92, at 1503-04; *see also* JEFFREY FAGAN, THE CRIMINALIZATION OF DOMESTIC VIOLENCE: PROMISES AND LIMITS 24 (1996) (describing civil protect orders as "the primary source of legal sanction and protection for battered women")

[118] Ruth Sheehan, *Orders Can Help Victims,* NEWS & OBSERVER (Raleigh, N.C), June 26, 2006, at 1, http://www.ncdsv.org/publications_protectorders.html (last accessed January 14, 2010) (follow link to article).

[119] Goldfarb, *supra* note 92, at 1535.

[120] Sheehan, *supra* note 118, at 1; *cf.* Stearns, *supra* note 75.

[121] Wallace & Kelty, *supra* note 104, at 108.

[122] As one victim stated, "After so long of just taking it and taking it[,] I needed to be able to show myself as much as show him that I was tired of being a victim. . . . [T]hat feeling, of fighting back and speaking out, will never leave me." Quoted in Fischer & Rose, *supra* note 95, at 424.

[123] LEE H. BOWKER, ENDING THE VIOLENCE 98 (1986); JAMES PTACEK, BATTERED WOMEN IN THE COURTROOM 164–66, 171 (1999); *see also* David A. Ford & Mary Jean Regoli, *The Criminal Prosecution of Wife Assaulters: Process, Problems, and Effects, in* LEGAL RESPONSES TO WIFE ASSAULT 127, 142, 156–57 (N. Zoe Hilton ed. 1993) (finding that women who have the choice of whether to drop criminal charges against the abuser, but do not do so, are least likely to be revictimized, in part because their control over the prosecution gives them bargaining leverage over the abuser); FAGAN, CRIMINALIZATION OF DOMESTIC VIOLENCE, *supra* note 117, at 17–18 (describing the "Sword of Damacles" effect created by giving the victim the power to hold the threat of legal sanctions over the abuser's head). Even though only an estimated one-fifth of the approximately two million victims of domestic violence in the United States each year seek protective orders, these victims generally report increased emotional well-being, sense of security, and control over their lives. Carolyn N. Ko, *Civil Restraining Orders for Domestic Violence: The*

Protective orders are also empowering because they help change the dynamics of the batterer-victim relationship. No longer is the victim merely a pawn in the batterer's hands. She can take control of the relationship and also convey to the batterer that she will seek help from the legal system when she needs it, and that the system will respond. Even the simple act of filing for an order can be one of the most helpful and empowering strategies available; it affirms that the victim has a choice in how she lives.[124] This choice also brings her into contact with the legal system, which can lead her to other community resources like social services agencies and battered women's support groups.[125] Protective orders can thus further empower victims by expanding their support network and allowing third parties to intervene on their behalf.

Overall, empirical studies have consistently shown a high level of satisfaction among women who have obtained protective orders. For example, a study conducted by the National Center for State Courts found that six months after obtaining a protective order over 85% of women felt their lives had improved since the order, over 92% felt better, and over 80% felt safer.[126] Ninety-five percent of the participants stated they would seek a protective order again.[127] Similarly, in a Wisconsin study, 94% of the women felt their decision to obtain a protective order was a good one, and 86% were satisfied, with half of them reporting they were very satisfied.[128] In a four-state study of clients in family violence agencies, 72% of the women who obtained protective orders rated them as "somewhat effective" or "very effective" in preventing further abuse and violence.[129] Lastly, in a Colorado study, 84% of women felt somewhat safe or very safe from physical harm and 72% felt somewhat safe or very safe from harassment one year after receiving their protective order.[130] The relationship of stalking to domestic violence and the success of protective orders in combating domestic violence combine to form a powerful tool that stalking victims can acquire to keep their

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Unresolved Question of "Efficacy," 11 S. CAL. INTERDISC L.J. 361, 369–70 (2002).

[124] Jane C. Murphy, *Engaging with the State: The Growing Reliance on Lawyers and Judges to Protect Battered Women*, 11 AM. U. J. GENDER SOC. POL'Y & L. 499, 513–16 (2003); *see* Fischer & Rose, *supra* note 95, at 423–35; *see also* Goldfarb, *supra* note 92, at 1544 ("The fact that an order is violated does not necessarily mean that it is worthless or that obtaining it was a mistake. The process of obtaining a protection order can be a valuable experience and prepare the woman to take additional actions on her own behalf.")

[125] Goldfarb, *supra* note 92, at 1509.

[126] Susan L. Keilitz et al., CIVIL PROTECTION ORDERS: THE BENEFITS AND LIMITATIONS FOR VICTIMS OF DOMESTIC VIOLENCE, NAT'L CTR. STATE CTS. 35 (1997).

[127] *Id.* at ix.

[128] Anne L. Horton et al., *Legal Remedies for Spousal Abuse: Victim Characteristics, Expectations, and Satisfaction*, 2 J. FAM. VIOLENCE 265, 274 (1987); *see also* Murphy, *supra* note 124 at, 511, 517 (reporting the results of a Baltimore study in which 68% of battered women who filed for a protective order remarked that doing so was helpful, quite helpful, or extremely helpful).

[129] Janice Grau et al., *Restraining Orders for Battered Women: Issues of Access and Efficacy, in* CRIMINAL JUSTICE POLITICS AND WOMEN: THE AFTERMATH OF LEGALLY MANDATED CHANGE 13, 22 (Claudine Schweber & Clarice Feinman eds., 1985).

[130] ADELE HARRELL ET AL., THE URBAN INST., COURT PROCESSING AND THE EFFECTS OF RESTRAINING ORDERS FOR DOMESTIC VIOLENCE VICTIMS 32–33, 60 (1993).

stalkers at bay.

III. STALKING PROTECTIVE ORDERS IN THE UNITED STATES

Stalking protective orders should be the first line of defense against the relentless stalker. The U.S. Department of Justice has cited lack of confidence in the ability of the criminal justice system to protect victims from future harassment as an important reason why it is so hard for victims to recover from the effects of stalking.[131] One way to remedy this lack of confidence in the ability of the system to protect stalking victims is the creation of a protective order specifically tailored for stalking. As Carol Jordan and other domestic violence researchers recommend, "[State] statutes should afford stalking victims, like domestic violence victims, access to protective orders. This is particularly important for those victims who would not fall under the state's existing statutory definition for eligibility for a domestic violence protective order."[132]

Forty-eight jurisdictions (forty-seven states and the District of Columbia) have permanent protective order measures against either stalking or harassment.[133] While not every state has a specific stalking-

[131] CREATING AN EFFECTIVE STALKING PROTOCOL, *supra* note 39, at 12.

[132] Jordan, *supra* note 23, at 579.

[133] ALA. CODE. § 30-5-1 (2008) (providing for protection orders to prevent domestic abuse); ALASKA STAT. § 18.65.850 (West 2008) (providing protection orders for stalking and sexual assault); ARIZ. REV. STAT. § 12-1809 (2008) (protective orders for stalking and sexual assault); ARK. CODE ANN. § 11-5-115 (West 2008) (workplace violence order); CAL. CIV. PROC. CODE § 527.6 (West 2008) (providing for a temporary restraining order and an injunction prohibiting harassment); COLO. REV. STAT. ANN. § 13-14-102 (West 2008) (providing two processes for obtaining protection orders); DEL. CODE ANN. tit. 10, § 1045 (West 2008) (permitting the court to provide relief under a protective order); D.C. CODE § 16-1003 (2008) (petition for civil protection); FLA. STAT. ANN. § 784.046 (West 2008) (creating a cause of action for an injunction for protection in cases of repeat violence); GA. CODE ANN. § 16-5-94 (West 2008) (restraining orders, protective orders, and approval of consent orders to prevent recurrence of stalking); HAW. REV. STAT. ANN. § 604-10.5 (West 2008) (granting the district courts power to enjoin or prohibit or temporarily restrain harassment); IDAHO CODE ANN. § 18-7905 (West 2008) (by implication); 750 ILL. COMP. STAT. ANN. 60/214 (West 2008) (order of protection); IND. CODE ANN. § 34-26-5-2 (West 2008) (providing process for a victim of violence or stalking to apply for an order for protection); IOWA CODE ANN. §§ 664A.3, 708.11 (West 2008) (no-contact order); KAN. STAT. ANN § 60-31a06 (West 2008) (permitting the court to issue a protection from stalking order); KY. REV. STAT. ANN. § 508.155 (West 2008) (restraining order authorized after stalking conviction); LA. REV. STAT. ANN. § 46:2136 (2008) (protective order issued after petitioner demonstrates abuse and shows relationship to the stalker); ME. REV. STAT. ANN. tit. 5, § 4655 (2008) (protective order issued after finding of harassment); MD. CODE ANN., CTS. & JUD. PROC. § 3-1501 (West 2008) (order approved after stalking conviction); MICH. COMP. LAWS § 600.2950A (2008) (personal protective order issued after petitioner demonstrates facts that constitute stalking); MINN. STAT. ANN. § 609.748 (2008) (retraining order authorized if petitioner shows specific facts and circumstances); MISS. CODE ANN. § 93-21-7 (West 2008); MO. ANN. STAT. § 455.020 (West 2008) (civil protective order granted after the petitioner presents a verified petition alleging stalking by respondent); MONT. CODE ANN. § 40-15-116 (2008) (petitioner need only show reasonable apprehension of bodily injury); NEB. REV. STAT § 28-311.09 (2008) (civil harassment protective order authorized after petitioner provides the events and dates of acts constituting harassment); NEV. REV. STAT. ANN. § 200.591 (West 2008) (order issued if petitioner shows specific facts and circumstances); N.H. REV. STAT. ANN. § 173-B:5 (2008) (civil protective order approved if defendant represents a credible threat to the safety of the plaintiff); N.J. STAT. ANN. §

protective-order statute, forty-two of the forty-eight jurisdictions have language that specifically points to or mentions stalking.[134] As would be expected, there is great variation between these states' statutes in terms of the actions that are covered, qualification requirements for and duration of orders, standard of proof, and penalties for knowing violations.[135] But they at least address stalking in one form or another in their permanent protective order laws. Texas is only one of a trio of states, the other two being Massachusetts and Connecticut, that does not provide a permanent protective order against stalking or harassment.[136]

2C:12-10.1 (West 2008) (authorized restraining order after stalking conviction); N.M. STAT. ANN. § 40-13-3 (West 2008) (civil protective order authorized if petitioner is in immediate danger following an incident of abuse by the respondent); N.Y. FAM. CT. ACT § 821 (McKinney 2008) (protective order issued after stalking conviction); N.C. GEN. STAT. ANN. § 50C-1 (West 2008) (order granted if respondent is convicted of stalking); N.D. CENT. CODE § 12.1-31.2-01 (West 2008) (disorderly conduct order); OHIO REV. CODE ANN. §§ 2903.211, .214(C)(1) (2009) (defining and prohibiting stalking, authorizing protective order for stalking violations); OKLA. STAT. tit. 22, § 60.2(A) (2009) (allowing victim of stalking to seek protective order); OR. REV. STAT. § 30.866 (2007) (authorizing protective order based on stalking); 23 PA. CONS. STAT. § 6108(a)(9) (2009) (authorizing protective order based on stalking or harassment); R.I. GEN. LAWS §§ 15-15-1(2)(iv), 15-5-3 (2009) (defining domestic abuse to include stalking, authorizing victim of domestic abuse to seek protective order); S.C. CODE ANN. § 16-3-1750 (2008) (authorizing restraining order based on stalking or harassment); S.D. CODIFIED LAWS § 22-19A-1, -19A-8 (2009) (defining and prohibiting stalking, authorizing protective order for stalking violations); TENN. CODE ANN. § 36-3-602 (2009) (authorizing protective order based on stalking); UTAH CODE ANN. § 77-3A-101 (2009) (authorizing civil stalking injunction); VT. STAT. ANN. tit. 12, § 5133 (2009) (authorizing protective order against stalking); VA. CODE ANN. §§ 18.2-60.3, 19.2-152.10 (2009) (criminalizing stalking, authorizing protective order based on stalking violation); WASH. REV. CODE §§ 10.14.020, .040 (2009) (defining "unlawful harassment," authorizing protective order based on "unlawful harassment"); W. VA. CODE § 61-2-9a(i) (2009) (restraining order authorized after stalking or harassment conviction); WIS. STAT. § 813.125 (2009) (defining harassment to include stalking and authorizing restraining order against harassment); WYO. STAT. ANN. § 7-3-507 (2009) (authorizing victim of stalking to seek protective order). Two charts that provided a good start for the compilation of this list are: (1) COMM'N ON DOMESTIC VIOLENCE, AMERICAN BAR ASS'N, STALKING/HARASSMENT CIVIL PROTECTION ORDERS (CPOS) BY STATE (June 2007), http://www.ncvc.org/src/main.aspx?dbID=DB_StalkingProtectionOrdersbyState198 (last accessed January 14, 2010) (follow link to chart); (2) CATHERINE A. CARROLL, WASH. COALITION OF SEXUAL ASSAULT PROGRAMS, STALKING PROTECTION ORDERS BY STATE (February 2007), http://www.ncvc.org/src/main.aspx?dbID=DB_StalkingProtectionOrdersbyState198 (last accessed January 14, 2010) (follow link to chart).

[134] Alabama, Alaska, Arkansas, Colorado, Delaware, D.C., Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming mention stalking, *supra* note 133. The states that include harassment, but do not mention stalking are: Arizona, California, Hawaii, Maine, Minnesota, and North Dakota, *supra* note 133.

[135] *E.g.*, Florida explicitly covers cyberstalking (FLA. STAT. ANN. § 784.048(1)(D) (West 2008)), whereas New Hampshire does not (N.H. REV. STAT. ANN. § 633-a (2008));. Delaware allows any person to qualify for an order (DEL. CODE ANN. TIT. 10, § 1041(3) (2008)), whereas South Dakota states only a victim of stalking is qualified (S.D. CODIFIED LAWS § 22-19A-8 (2008)). Ohio has a five-year limit (OHIO REV. CODE § 2903.214(E)(2)(a) (Baldwin 2008)), whereas Tennessee only has one year (TENN. CODE ANN. § 36-3-605(b) (West 2008)). Maryland requires clear and convincing proof (MD. CODE ANN. CTS. & JUD. PROC. § 3-1505(c)(1)(ii) (West 2008)), whereas South Carolina requires good cause (S.C. CODE ANN. § 16-3-1760(A) (2008)). Finally, in Nevada, a violation is a felony (NEV. REV. STAT. ANN. § 200.591(5)(b) (West 2008)), whereas in North Carolina it is just contempt (N.C. GEN. STAT. ANN. § 50C-10 (West 2008)).

[136] Thankfully, Texas does provide civil protection orders for victims of non-intimate partner sexual assault, under TEX. CODE CRIM. PROC. ANN. ART. 7A.01 (Vernon 2008).

Texas should join the overwhelming majority of states that have stalking protective orders by either amending its protective order legislation or adding a new section specifically enacting stalking protective orders.

A. Oregon Case Study

An in-depth study of how one state has passed and interprets its stalking protective order law can be a useful reference for the Texas Legislature, should it decide to enact its own. Oregon, with its strong stalking laws, detailed legislative history, and rich case law, is well suited for this comparison. Oregon's stalking protective order statute was enacted in 1993.[137] At that time, the nation was caught up in the rush to provide legislative remedies for stalking victims.[138] Under this limelight, the Oregon Legislature received numerous specific reports and stories of stalking victims in Oregon,[139] which prompted it to pass the stalking protective order statute.[140] Professor Caroline Forell at The University of Oregon School of Law noted, "Substantial evidence shows that the legislature enacted the stalking statutes because it recognized the harm female stalking victims were suffering . . . [T]he primary purpose

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[137] OR. REV. STAT. ANN. § 30.866 (West 2008). Subsection 1 of that statute reads: A person may bring a civil action in a circuit court for a court's stalking protective order or for damages, or both, against a person if:

(a) The person intentionally, knowingly or recklessly engages in repeated and unwanted contact with the other person or a member of that person's immediate family or household thereby alarming or coercing the other person;

(b) It is objectively reasonable for a person in the victim's situation to have been alarmed or coerced by the contact; and

(c) The repeated and unwanted contact causes the victim reasonable apprehension regarding the personal safety of the victim or a member of the victim's immediate family or household.

[138] Caroline Forell, *Making the Argument that Stalking is Gendered*, 8 J.L. & SOC. CHALLENGES, 52, 87–88 (2006). *See also* James R. Hargreaves, *Many Questions, Few Answers: Oregon's New Anti-Stalking Law Will Be a Challenge to Implement*, 54-DEC OR. ST. B. BULL. 15, n. a (1993) ("Even though SB 833 is an imperfect bill, the final version represented a reluctant compromise among the interest groups involved, including the American Civil Liberties Union, Oregon District Attorneys Association, Oregon Criminal Defense Lawyers' Association and various women's groups. The challenge was to craft legislation that balanced First Amendment free-speech rights with the need to protect victims of stalking crimes").

[139] Bob Bonaparte was a lawyer who did a pro bono stalking case in Multnomah County that gained publicity through its bizarre facts and helped bring the severity of stalking to the urgent attention of the Oregon Legislature. He represented a female college student at Portland State University who was stalked by a male student, who left her bloody jeans and notes. The student obtained a civil injunction for invasion of her privacy, which was the predecessor remedy to a stalking protective order. The odd aspects of the case caught the attention of national media, like *USA Today* and *Inside Edition*, though the female student refused to be interviewed to protect her own privacy. Telephone Interview with Bob Bonaparte, Partner, Shenker & Bonaparte, LLP (Dec. 9, 2008).

[140] Representative Kevin Mannix, a leading proponent of the stalking legislation, explained the motive behind the SPO statute to Senator Shoemaker: "[T]he essence of the whole stalking legislative package is to understand and relate to the concerns of the victim and the fears of the victim rather than so much the intention of the stalker. . . [O]f all the stories I had presented to me, and it's reached a total of over forty . . . from Oregon alone, every single one of them involved a situation where the person did, by the time they wanted to start complaining about the situation, did begin to feel real fear . . . for usually her safety . . . ." *Id.* at 85-86 (citing Tape Recording: S. Judiciary Comm., S.B. 833, 67th Cong., (May 5, 1993), Tape 142, Side A).

of the Oregon Legislature was to protect women who are the bulk of stalking victims."[141] The Legislature later added electronic communications to the types of conduct applicable to Section 30.866 in 2001. Those who do obtain orders receive intense enforcement from police officers, since the officers view a violation of a stalking protective order as a higher offense than the violation of a restraining order.[142] As in Texas, meeting the grounds for stalking in Oregon is quite hard.[143] Hopefully, with more awareness and education, more Oregonians will utilize stalking protective orders. Despite limited use today, it is still commendable that Oregon enacted stalking protective orders fifteen years ago.

In evaluating the constitutionality of the stalking protective order statute, the Oregon Supreme Court in 2002 held the statute is neither facially vague nor violative of a respondent's due process right to travel.[144] Prior to 2002, constitutional challenges to the stalking protective order had a mixed record in the appellate courts.[145] Nevertheless, the Oregon Supreme Court, upon its analysis of the legislative purpose behind Section 30.866, concluded that the means aimed at achieving the purpose behind the protective order statute were sufficiently narrowly drawn so as to satisfy the Due Process Clause.[146]

Two Oregon cases demonstrate the flexibility that Oregon judges have exercised in issuing stalking protective orders. First, in *Pinkham v. Brubaker*,[147] the respondent became intimate with the petitioner after being unable to find housing and staying at petitioner's home.[148] Though their relationship was rocky, and the respondent never explicitly threatened the petitioner or her daughters, the petitioner later became

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[141] Forell, *supra* note 138, at 83.

[142] Telephone Interview with Gabby Santos, Program Coordinator for Undeserved Communities, Oregon Coalition Against Domestic and Sexual Violence (Nov. 21, 2008). Ms. Santos said the police view the abuse of a person with whom the abuser does not live as more serious than the abuse of someone with whom the abuser does live.

[143] *Id.*

[144] Delgado v. Souders, 46 P.3d 729, 749 (Or. 2002).

[145] Cases where the statute was upheld include: State v. Maxwell, 998 P.2d 680 (Or. App. 2000) (vagueness challenge to terms of protection order rejected [phrase "visual or physical presence" has plain and ordinary meaning]); Shook v. Ackert, 952 P.2d 1044 (Or. App. 1998) (overbreadth claim rejected, [stalking protective order statute is not facially overbroad in its specification of what the order contents may be, since the court will determine on case-by-case basis what communication is constitutionally permitted]). Cases where the statute was held void for vagueness include: State v. Norris-Romine, 894 P.2d 1221 (Or. App. 1995) (phrase "without legitimate purpose" is not self-explanatory and lacks sufficient warning of what is barred); State v. Orton, 904 P.2d 179 (Or. App. 1995) (phrase "without legitimate purpose" for judging post-issuance behavior is vague); Starr v. Eccles, 900 P.2d 1068 (Or. App. 1995) (citing Norris-Romine for ruling that "legitimate purpose" phrase is vague).

[146] *See* Delgado v. Souders, 46 P.3d at 751. It found the legislative purpose to "prevent[] the commission of certain crimes against particular persons and their immediate families or household members. To prevent the commission of such crimes. . . the legislature created a mechanism in ORS 30.866 whereby a potential criminal defendant could be prevented from 'contact[ing]' a potential crime victim." *Id.* at 750.

[147] 37 P.3d 186 (Or. App. 2001).

[148] *Id.* at 188.

fearful because of the respondent's stalking behavior.[149] The Oregon Court of Appeals affirmed the trial court's issuance of a stalking protective order based on expressive incidents that occurred before the respondent moved from the petitioner's home: the respondent's attack on the ten-year-old daughter's friend; his comment that the younger daughter's artwork looked like the "boobs" of her, her sister, and her mother; and his shredding of the petitioner's dresses to express his anger after an argument with her.[150] The court stated that at least the latter two incidents "qualified . . . [as] unwanted contact [involving expression] under the statute."[151] The court then concluded that two nonexpressive contacts the respondent made—his twice taking the younger daughter on an extended car trip without the petitioner's permission or knowledge—"satisf[ied] the statutory requirement of repeated, unwanted contacts," and thus declined to analyze the incidents under the "more stringent standard required under *Randal* [for nonexpressive conduct.]"[152]

The second case, *Boyd v. Essin*,[153] involved a respondent who had been served with a protective order for domestic abuse.[154] After separation from the petitioner, he began spying on her from a distance outside of the restraining order's prohibited range of 1,000 feet.[155] The court believed such actions fell within the scope of the stalking protective order statute:

> Even though watching petitioner's home with binoculars may not fall within the specific acts listed in ORS 163.730(3), it is similar in both kind and effect to the acts that the legislature has said are encompassed within the term "contact." It shows an unwanted relationship or association between petitioner and respondent, and it is precisely the kind of contact that the statute was intended to prevent.[156]

Despite the seeming liberality with which Oregon courts interpret Section 30.866, they still emphasize the need for an explicit threat to be made before an issuance of a stalking protective order.[157] They will also consider the context and totality of the circumstances in assessing the nature of the threat.[158]

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[149] *Id.* at 188-191.
[150] *Id.* at 188-90, 192.
[151] *Id.*
[152] *Id.* at 192 [citation omitted].
[153] 12 P.3d 1003 (Or. App. 2000)
[154] *Id.* at 1004.
[155] *Id.* at 1005.
[156] *Id.* at 1007. *See also* Smith v. Di Marco, 142 P.3d 539, 541 (Or. App. 2006) ("The final series of contacts do qualify under [Section 30.866]. Respondent repeatedly followed petitioner, peered at him through binoculars at a distance, and followed closely in a car as petitioner biked down the street. That conduct, petitioner testified, caused him to take special precautions to ensure that respondent was not able to kidnap his children").
[157] *See e.g.*, Hanzo v. deParrie, 953 P.2d 1130, 1142 (Or. App. 1998) (reversing the grant of a stalking protective order for an anti-abortion protester).
[158] In one case, respondent alleged his e-mail and telephone contacts were nonthreatening contacts.

IV. STALKING AND PROTECTIVE ORDERS IN TEXAS

The conclusions of the Oregon Supreme Court and the passage of Oregon's stalking protective order law are important because they give the Texas Legislature a template for framing the language of an effective stalking protective order statute. It is not necessarily a violation of due process if a state government limits the movement of a person it deems is a danger to others in society; as the U.S. Supreme Court has stated, "The fact that a liberty cannot be inhibited without due process of law does not mean that it can under no circumstances be inhibited."[159] Indeed, Texas already inhibits the liberty of two classes of unincarcerated people—family violence and sexual assault offenders—by application of its corresponding protective orders.[160]

A. Currently Available Protective Orders in Texas

In Texas, victims of family violence and sexual assault can obtain permanent civil protective orders,[161] while stalking victims can receive only emergency protective orders.[162] Temporary ex parte orders are also available if the court finds "clear and present danger of family violence," but they are issued as immediate protection until a court hearing can be set.[163] It was not until 1997 that a partner in a cohabitating relationship

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The court, in its analysis, ultimately rejected his allegation by interpreting his nonthreatening contacts in light of his previous behavior: "[M]any of respondent's contacts with petitioner . . . in combination with his in-person encounters with petitioner at the gym during that time—would alarm a reasonable person. For example, respondent repeatedly alluded to his fantasies—some of them coercive in nature—of resuming a sexual relationship with petitioner. More significantly here, however, respondent's expressive contacts provide context for his nonexpressive contacts. . . . Specifically . . . respondent continued to engage in such conduct despite petitioner's repeated requests that he leave her alone; when petitioner asked him to find another workout facility, he purported to treat her request as a joke. Respondent's conduct was particularly disturbing in light of his admission to petitioner that he had been violent toward a former spouse."
Castro v. Heinzman, 92 P.3d 758, 762 (Or. App. 2004) (citations omitted).

[159] Zemel v. Rusk, 381 U.S. 1, 14 (1965).

[160] *See* TEX. FAM. CODE ANN. § 82.001 (Vernon 2009), TEX. FAM. CODE ANN. § 85.001 (Vernon 2009).

[161] TEX. FAM. CODE ANN. § 82.004 (Vernon 2009) governs family violence protective orders, whereas TEX. CODE CRIM. PROC. ANN. arts. 7A.01-7A.06 (Vernon 2005) authorize sexual assault protective orders. Under § 85.001 of the Family Code, a protective order will be ordered if family violence has occurred and family violence is likely to occur in the future. TEX. FAM. CODE ANN. § 85.001 (Vernon 2009). "Family violence" includes: "an act by a member of a family or household against another member of the family or household . . . that is a threat that reasonably places the member in fear of imminent physical harm, bodily injury, assault or sexual assault." TEX. FAM. CODE ANN. § 71.004(1) (Vernon 2009). No time specifications are mentioned in section 71.004, which makes it arguably possible to obtain a protective order, no matter when the violence occurred, as long as it is like to occur again in the future.

[162] TEX. CODE CRIM. PROC. ANN. art. 17.292(a) (Vernon 2005).

[163] TEX. FAM. CODE ANN. § 83.001(a) (Vernon 2009).

became eligible for a protective order in Texas.[164] In 1999, the Legislature lengthened the maximum duration of a protective order from one year to two years,[165] and two years later expanded the definition of family violence to include victims of dating violence.[166] To assist the processing of intra- and interstate protective orders, Texas law mandates that every protective order issued is entered immediately into a statewide law enforcement database, which is maintained by the Department of Public Safety and is also linked to the Federal Bureau of Investigation's National Crime Information Center.[167]

In 2007, the Texas Legislature passed two bills that expanded the coverage of sexual assault protective orders within the state. Previously, access to protective orders in Texas was limited through statutory requirements of a relationship between the victim and the assailant, as it was in many other jurisdictions.[168] In 2007, however, the Texas Legislature made two significant amendments that eliminated this limitation. The first change, enacted through House Bill 1988, authorized a victim of any sexual assault offense to obtain a lifetime protective order against the offender "without regard to the relationship between the applicant and the alleged offender."[169]

The second amendment, enacted via Senate Bill 584, authorized a magistrate to issue an emergency protective order for victims of sexual assault.[170] Like the bills that authorized the stalking and family violence emergency protective orders, the fiscal note attached to Senate Bill 584 read, "It is assumed that the bill would not significantly affect the operations of state or local government."[171] The House Research Organization's bill analysis on House Bill 1907, the companion bill to Senate Bill 584, noted supporters' position that "[v]ictims should not have to wait until a defendant who has already been arrested for sexual assault or aggravated sexual assault stalks them before an emergency protective order can be issued."[172] This line of reasoning worked for stalking victims in an emergency protective order context and should also hold true in a civil protective one. The severity of stalking in Texas demands that a more aggressive and accessible protective order option be made available for stalking victims.

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[164] *See id.* at § 71.005 (Vernon 2009).
[165] *See id.* at § 85.025(a)(1) (Vernon 2009).
[166] *Id.* § 82.002(b).
[167] *Id.* § 86.0011.
[168] Grau, *supra* note 129, at 706-07.
[169] TEX. CODE. CRIM. PROC. ANN. art. 7A.01(a) (Vernon 2008).
[170] *Id.* art. 17.292(a).
[171] FISCAL NOTE, TEX. S.B. 584, 80th Sess. (2007).
[172] HOUSE RESEARCH ORG., BILL ANALYSIS, TEX. H.B. 1907, 80th Sess. (2007).

B. Stalking: A Texas-Sized Problem

Under Texas law, there are three primary means of a stalking offense: (1) the offender must know, or reasonably believe, the victim will perceive the behavior as threatening; (2) the behavior must cause the victim or a member of the victim's family to fear injury or damage to property; (3) the behavior would cause a reasonable person to have these fears.[173] Making a terroristic threat is similar to stalking, except it does not have to occur on more than one occasion.[174] Unless fear is intended and present, behavior that might be construed as stalking fails to reach the legal threshold for stalking. Such behavior, however, may fall under Texas's harassment laws, which are limited to actions that an offender may not reasonably believe cause fear for the victim's safety.[175] If the offender's intention is to "harass, annoy, alarm, abuse, torment, or embarrass" the victim, then it falls under the harassment statute.[176] Though Texas should also extend protective orders to harassment cases, it should first address stalking, because stalking is more severe in its requirement for the presence of fear and likelihood of leading to violence.

C. Texas Stalking Statistics

Stalking is a serious social problem in Texas because of its frequency, its association with physical violence, and the emotional toll that it takes on its victims.[177] First, in the only study of its kind conducted in Texas, Professor Glen Kercher and doctoral student Matthew Johnson queried 700 residents about their experiences with

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[173] TEX. PENAL CODE ANN. § 42.072 (Vernon 2008).

[174] *Id.* § 22.07.

[175] *Cf.* Segura v. State, 100 S.W.3d 652, 656 (Tex. App. Dallas 2003), no pet. history ("We conclude stalking and harassment are not *in pari materia* because they are not similar in purpose or object"). In April 2008, the Fort Worth Court of Appeals in *Karenev v. State* found the harassment statute unconstitutionally vague with respect to subsection (a)(7), which states a person commits harassment if he "sends repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another." Karenev v. State, 258 S.W.3d 210, 216–17 (Tex. App.—Ft. Worth 2008) *judgment reversed by* Karenev v. State, 281 S.W.3d 428 (Tex. Crim. App. 2009, no pet. h.)), *discussing* TEX. CODE CRIM P. ANN. art. 42.07(a)(7) (Vernon 2008). The court observed that subsection "employs, in the disjunctive, a series of vague terms that are themselves susceptible to uncertainties of meaning. . . [Since the statute] "still does not establish a clear standard for whose sensibilities must be offended, it is unconstitutionally vague in that the standard of conduct it specifies is dependent on each complainant's sensitivity." *Id.*

[176] TEX. CODE CRIM. P. ANN. art. 42.07 (Vernon 2008). However, if the harassment is without an active threat, then it will not be grounds for a family violence protective order. *See* Thompson v. Thompson-O'Rear, No. 06-03099129, 2004 WL 1243080, at *4 (Tex. App.—Texarkana 2004), *no pet. history* (refusing to uphold a protective order because there was no active threat of violence).

[177] *See* Part I(B)(1).

stalking.[178] Roughly one-fifth of them responded affirmatively to being stalked in the past twenty-four months, reporting a total of 453 stalking incidents, or approximately 3.5 incidents per victim.[179] The two most frequently reported stalking acts were phone call harassment and stolen property.[180] Surprisingly, men and women were about equally likely to be stalked, and close to three-fifths of the victims were acquainted with their offenders.[181]

Second, as mentioned above, stalking is closely correlated with physical violence, and in Texas it is no different. Of those who previously knew the offender, 61.6% reported prior violence by the offender.[182] Although this is lower than the 81% of victims reporting prior violence in previous research, it is still alarmingly high.[183] The most common acts of violence were threats of harm (46.6%), followed by pushing or shoving (27.4%).[184]

Lastly, there was a heavy emotional toll and only modest outreach for help resulting from these acts of physical violence. Three-quarters (75.6%) of the victims reported at least one adverse emotional effect, with the most common reaction being anger (58.6%), followed by loss of sleep (29.7%), lack of concentration (26.7%), fear of being alone (25%), and feelings of helplessness (24.2%).[185] It is particularly noteworthy that although men and women reported similar rates of being stalked, more

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[178] Kercher & Johnson, *supra* note 12, at 3.

[179] *Id.* 128 reported being stalked, for a yield of 18.26%. Kercher and Johnson had a broad definition of stalking, which included the following behaviors:

Repeatedly sending angry and threatening emails, notes, or letters; repeatedly sending unwanted emails, notes, or letters that were apologetic and/or expressed love for the person; repeatedly sending unwanted angry or threatening phone calls; repeatedly calling the victim and behaving apologetically or expressing love for the person; repeatedly calling the victim and then either hanging up when the phone is answered or saying nothing; watching the victim when he/she is at home; following the victim when he/she is out in public; repeatedly showing up unexpectedly at the victim's home, work, or at a public place; coming to the home or workplace of the victim and creating a disturbance; threatening to kill the victim; threatening to hurt or kill members of the victim's family; tampering with a victim's vehicle; threatening the victim while he or she is driving; breaking into the victim's house, car, or business; stealing things from the victim's house, car, or business; destroying some of the victim's possessions; threatening to report the victim to the police for something he or she did not do; threatening to commit suicide if the victim does not do as the stalker asks; threatening to report the victim to child protective services, immigration, or other authorities if he or she does not do something the stalker wants them to do. *Id.* at 4-5.

[180] *Id.* About a quarter (24.2%) were spied on at home, one-fifth (20.3%) were bothered at work or at home, one-fifth (21.1%) had their house, car, or business broken into, and one-sixth (16.4%) were threatened with being reported to the police for something they did not do. *Id.* at 8.

[181] *Id.*

[182] *Id.* The total number of Texas family violence incidents in 2008 was 193,505. TEX. DEP'T PUB. SAFETY, THE TEXAS CRIME REPORT FOR 2008, 47 (2008), *available at* http://www.txdps.state.tx.us/administration/crime_records/pages/crimestatistics.htm (last accessed January 14, 2010). This represented a 2.1% increase when compared to 2007. *Id.* These incidents involved 208,073 victims (up 3.2% from 2007) and 203,682 offenders (up 3.2% from 2007). *Id.* In Travis County alone, there were 9,451 incidents of family violence (up 3.0% from 2007). *Id.* at 57. Gail Rice, coordinator of the Family Violence Protection Team in Austin, said in 2007 there were 4,523 family violence arrests. Email from Gail Rice, Coordinator, Family Violence Protection Team, to author (Dec. 18, 2008) (on file with author).

[183] TJADEN & THOENNES, NVAW SURVEY FINDINGS, *supra* note 4, at 2.

[184] Kercher & Johnson, *supra* note 12, at 12.

[185] *Id.* at 10.

than a quarter of the female victims reported experiencing at least six or more emotional symptoms, whereas less than one-twentieth of the males were similarly affected.[186] Kercher and Johnson concluded, "[I]t appears that females are more adversely affected by stalking than are males. This may reflect a heightened sense of vulnerability on the part of females when the stalker is a male."[187]

In terms of reaching out for help, only 43% of victims reported the incidents to the police.[188] Unfortunately, the study did not mention how many participants obtained protective orders.[189] Despite the gravity of the problem of stalking in Texas, legal intervention remedies are few and far between. The Texas Legislature ought to address this problem by enhancing its protective order legislation through the inclusion of stalking protective orders.

D. Conclusion: The Lack of Stalking Protective Orders is an Oversight in Texas's Protective Order Legislation

Texas needs to address the gap in its stalking and protective order legislation by enacting a bill that merges the two together.[190] Victims should not only have a right to privacy on which the stalker cannot intrude; they should also have the right to avoid contact with a stalker, regardless of whether or not the two had a prior relationship. As one Connecticut court stated,

> Providing protection from stalking conduct is at the heart of the state's social contract with its citizens, who should be able to go about their daily business free of the concern that the [sic] may be the targets of systematic surveillance by predators who wish them ill. The freedom to go about one's daily business is hollow, indeed, if one's peace of mind is

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[186] *Id.* at 11.

[187] *Id.*

[188] *Id.* at 14. Interestingly, almost a quarter of the respondents stated that their stalker had been arrested prior to the stalking incident for other offenses (though the number is likely higher, since 41% of the victims did not know if the person who stalked them had been previously arrested or not). *Id.* Almost one-third of the victims called the police four or more times, and in only one-fifth of the cases where the victim called the police did an arrest of the stalker take place. *Id.*

[189] In 2007, the Protective Order Division of Travis County Attorney's Office issued 505 two-year orders out of 636 applications (79.4%). Email from Gail Rice, *supra* note 182. Through January to September of this year, it issued 368 two-year orders out of 452 applications (81.4%). *Id.* These are encouragingly high numbers. However, there were 442 protective order violations in 2007, as reported to the Family Violence Protection Team in Austin. *Id.* Of these 442 violations, 392 were filed as misdemeanor violations (88.7%), and 50 were filed as felony violations (11.3%). *Id.* Although it is unclear how many of these violations were associated with the same protective order, even assuming there were two violations per order, this yields a violation rate of 43.8%.

[190] Alaska passed its stalking protective order statute to close a loophole in its stalking laws. Associated Press, *House OKs Protective Orders*, ANCHORAGE DAILY NEWS, April 17, 2003, at B3.

> being destroyed, and safety endangered, by the threatening presence of an unwanted pursuer.[191]

Texas's stalking protective order statute should cover *any* person who stalks, just as its sexual assault protective order statute applies to any person who sexually assaults another.[192] As Caroline Forell writes, "Jurisdictions which specifically provide stalking protective orders for all victims of stalking assure that all women benefit from substantive equality."[193]

There are currently emergency protective orders and civil protective orders for both sexual assault and family violence in Texas. Recent changes in the law now allow *lifetime* protective orders for sexual assault victims, and it would not be surprising if a similar bill passed for family violence protective orders within the upcoming legislative sessions. Yet, the only protective order available for stalking victims is a magistrate's emergency order. The legislature needs to balance out the disparity between the protective orders of these three crimes by enacting stalking protective orders.

V. RECOMMENDATIONS

The Texas Legislature has three options in authorizing stalking protective orders: (1) simply add the word "stalking" to its existing family violence protective order language; (2) broaden the scope of victims who can apply by stating that any victim of domestic abuse is eligible to apply; or (3) enact its own specific stalking protective order. Regardless of which option it chooses, some strategies on how a stalking protective order bill could be passed are presented below. Further recommendations for improving the protective order application process and the enforcement and effectiveness of protective orders are also discussed, because they would be applicable to newly enacted stalking protective orders.

A. Strategies on Implementing Stalking Protective Order Legislation

The most important recommendation deals with the actual implementation of a stalking protective order bill in Texas. Without a focused strategy and broad support, such a bill proposal to the legislature

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[191] State v. Culmo, 642 A.2d 90, 102 (Conn. Super. Ct. 1993).

[192] TEX. CODE CRIM P. ANN. art. 7A.01–07 (Vernon 2008).

[193] Caroline Forell, *The Meaning of Equality: Sexual Harassment, Stalking, and Provocation in Canada, Australia, and the United States*, 28 T. JEFFERSON L. REV. 151, 160 (2005).

is likely to fail. Proponents should present evidence of the severity of stalking, both in the United States and specifically in Texas, as well as the effectiveness of protective orders as a legal remedy for stalking victims, and adopt the following three-step approach to maximize the chances the bill will pass: (1) generate support and unity among existing domestic violence advocates; (2) create a stalking advocacy group that is wholly dedicated to fighting stalking; and (3) anticipate and address concerns that the legislature might have concerning the bill.

i. Generate Consensus Among Existing Domestic Organizations

The most important strategy in advancing stalking protective order legislation is to generate consensus among existing domestic violence organizations so that they can together underscore the importance of such a bill to the Texas Legislature. Building consensus was a key strategy in the successful passage of Oregon's stalking protective order law. As Judge Hargreaves noted, "[T]he final version represented a reluctant compromise among the interest groups involved, including the American Civil Liberties Union, Oregon District Attorneys Association, Oregon Criminal Defense Lawyers Association and various women's groups."[194] These women's groups included advocates from the Oregon Coalition Against Domestic and Sexual Violence, Salem Mid-Valley Women's Crisis Center, Oregon Commission for Women, and Women's Rights Coalition.[195] They helped spur legislative activity by providing valuable testimony on the devastating impact of stalking on Oregon women.[196] As a result of their leadership, the Oregon Legislature acknowledged the similarities between victims of family violence and stalking, and "create[d] a stalking statute similar in purpose and practice to the Family Abuse Prevention Act."[197]

Thankfully, there seems to be consensus in Texas. The Texas Association Against Sexual Assault (TAASA) believes stalking protective orders would give prosecutors another tool to pursue their cases and would offer victims more opportunities to see a judge, thereby increasing access to the courts.[198] Additionally, many attorneys at

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[194] Hargreaves, *supra* note 138, at n. a.

[195] Cassandra C. Skinner Lopata, *From "The Victim's Situation": A Hypothetical Opinion by a "Reasonable Woman,"* 8 J. L. & SOC. CHALLENGES 111, 125 (2006).

[196] *Id.*

[197] *Id.* at 127 (citing Tape Recording, S. Judiciary Comm., S.B. 833, 67th Cong., (May 4, 1993), Tape 140, Side A [remarks of Fred Avera, Oregon District Attorney's Association, Senator Dick Springer, Chair, Lauren Moughon, Women's Rights Coalition]; Tape Recording, S. Judiciary Comm., S.B. 833, 67th Cong., (May 5, 1993), Tape 142, Side A [remarks of Representative Mannix]).

[198] Telephone Interview with Victoria "Torie" Camp, Director, Texas Association Against Sexual

various influential domestic violence groups, such as Texas Lawyers Care, Travis County Attorney's Office (TCA), TAASA, and Texas Advocacy Project, have all expressed strong support and interest in passing a stalking protective order bill.[199] For instance, TCA Attorney Erin Martinson underscored how "most people don't understand how dangerous stalking is since it often does not consist of specific threats or violence" and believed enacting a stalking protective order statute would be "an easy fix."[200] Even police departments, such as in Austin, have no objections to having stalking protective order legislation passed.[201]

Of course, the consensus does not have to be confined to members of the legal community. In addition to attorneys and other groups focused on stalking victims, members of social justice groups, religious congregations, community leaders, and any other concerned citizens should all come together in the effort to curb stalking incidents and promote the safety of stalking victims through the passage of a stalking protective order bill. Stalking, like domestic violence, is a crime that transcends all divisions of society, whether socio-economic, racial, religious, sexual, or cultural, and is something all members of society ought to confront together.[202] Mary Lowry, Public Policy Analyst at the Texas Council for Family Violence (TCFV), observes, "There may be a hole in [Texas] stalking legislation because there is no stalking coalition."[203] To fill in this gap, attorneys, judges, and law professors can help review and critique drafts of the proposed stalking protective order bill, and members of this coalition outside the legal community can unite as one voice, so that by the time the next legislative session begins, not only will there be a well-written bill in hand, there will also be a list of advocates ready to testify on behalf of the bill.[204]

ii. Create a Stalking Advocacy Organization

In addition to generating consensus among existing domestic violence groups, the creation of a separate stalking advocacy organization, in the same vein as the TCFV and TAASA, would give more weight to a stalking protective order proposal and raise awareness

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Assault (Nov. 21, 2008).

[199] Compiled from numerous telephone interviews.

[200] Email from Erin Martinson, Assistant County Attorney, Travis County Attorney's Office, to author (Dec. 11, 2008) (on file with author).

[201] Telephone Interview, Detective, *supra* note 102.

[202] Sarah M. Buel, Lectures in Domestic Violence and the Law at the University Texas School of Law (Fall 2008).

[203] Telephone Interview with Mary Lowry, Public Policy Analyst, Texas Council on Family Violence (Dec. 12, 2008).

[204] Jayne Kita, Director of the Arkansas Domestic Violence Coalition, mentioned one judge who looked at a draft of a protective order law in Arkansas and wrote a critique. Such feedback is invaluable and is something that Texas advocates and judge should emulate. Telephone Interview with Jayne Kita, Director, Arkansas Domestic Violence Coalition (Nov. 18, 2008).

of stalking within Texas. It may even be created as a subcommittee under either organization. Admittedly, strong leadership from existing domestic violence groups may be difficult because they already have full-time legislative agendas. TCFV and TAASA have been able to push successfully for policies because they are focused on just one issue. An organization devoted exclusively to combating stalking would have the power, time, and resources to lobby effectively for stalking issues.

Once a stalking organization has been established, it can lobby a Texas Senator or Representative, perhaps one who has served on the Criminal Justice Committee, to sponsor a stalking protective order bill. Professor TK Logan believes the main role a stalking organization could play is to build crucial connections with the legislature so that there is a realistic chance of drafting a bill and getting it passed.[205] Torie Camp added that the most successful way to advocate would probably be to find a stalking victim who suffered as a result of not being able to obtain a stalking protective order.[206] While finding victims who are willing to come forth and spark legislative action through their personal stories would certainly be helpful, the passage of a stalking protective order bill in Texas should not have to wait until a sensational, and most likely tragic, story appears. The severity of stalking and the importance of protective orders in Texas have already been thoroughly demonstrated, so there is enough timber to kindle legislative action.

iii. Anticipate and Address Concerns of the Texas Legislature

The third and final prong in the comprehensive strategy to implement a stalking protective order bill is the anticipation and resolution of concerns that might keep the Texas Legislature from proceeding forward. Jodi Rafkin, Program Attorney for the Stalking Resource Center at the National Center for Victims of Crime, has heard from advocates around the country that budgetary concerns can be an obstacle for stalking protective order legislation.[207] In general, one reason why the legislature may hesitate to fund a new protective order procedure is that "entities funding the cost of the programs will not directly reap many of the benefits of the programs because the benefits are diffused among different entities."[208] Additionally, police departments that already suffer a shortage of officers may not be able to cover an additional category of protective order victims.

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[205] Telephone Interview, TK Logan, *supra* note 49.

[206] Telephone Interview, Victoria "Torie" Camp, *supra* note 198.

[207] Telephone Interview with Jodi Rafkin, Program Attorney, Stalking Resource Center, National Center for Victims of Crime (Nov. 14, 2008).

[208] Karen Tracy, *Building a Model Protective Order Process*, 24 AM. J. CRIM. L. 475, 482 (1997).

Torie Camp understands the budgetary concern argument but believes stalking protective order legislation would not carry a fiscal note, because any costs would be borne by local municipalities, not the state.[209] Substantial savings would be generated through reduced medical costs from the decrease of domestic violence incidents, and payroll savings would result from the decrease in police time needed to handle those incidents.[210] Furthermore, addressing stalking early can save exorbitant costs of litigation and other services.[211] While full implementation of stalking protective orders will not come free, the staggering societal costs of domestic violence and stalking in Texas, and the inextricable link between the two, merit action instead of passivity. Budgetary concerns should not be an impediment preventing the legislature from going forward with this stalking protective order law.

Another concern that the legislature might have is a reluctance to amend the protective order statute. Mary Lowry says that whenever it amends the statute, other interest groups might want to tinker with the language, which is already clear as it stands now.[212] Thus, in her opinion, a stalking protective order bill "would be a hurdle in the Legislature."[213] Dani Lindner, VAWA Grant Coordinator at St. Cloud State University in Minnesota, is in agreement with Lowry and says the biggest argument against the enactment of a stalking protective order statute would be, "What we have now works, so why mess with it? Why spend more time?"[214]

The legislature's concern about amending the protective order statute can be allayed by realizing that what is currently in place does not work as it pertains to stalking victims. Implementing stalking protective order legislation is in the state's best interest since it would likely reduce family violence, given the close correlation between stalking and domestic violence.[215] Moreover, the legislature amended its sexual assault protective order legislation last year, to much applause from domestic violence advocates.[216] Taking similar steps with stalking legislation should not be any more difficult and would likely be just as welcomed by concerned Texas citizens.

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[209] *Id.* at 480 ("Funding a protective order policy is typically a matter for local government"); Telephone Interview, Victoria Camp, *supra* note 198.

[210] Tracy, *supra* note 208, at 482-83.

[211] See, *e.g.*, CASEY GWINN & GAEL STRACK, HOPE FOR HURTING FAMILIES: CREATING FAMILY JUSTICE CENTERS ACROSS AMERICA 81-82 (2006) (noting that in San Diego, it takes an average of $2.5 million to complete a domestic violence homicide trial.)

[212] Telephone Interview, Mary Lowry, *supra* note 203.

[213] *Id.*

[214] Telephone Interview with Dani Lindner, VAWA Grant Coordinator, St. Cloud State University (Nov. 21, 2008).

[215] Telephone Interview with Tracy Grinstead-Everly, Policy Manager, Texas Council on Family Violence (Nov. 21, 2008).

[216] Article 17.292(a) of the Texas Code of Criminal Procedure was amended by the legislature to allow the issuance of emergency protective orders against perpetrators of sexual assault. Act of May 11, 2007, 80th Leg. R.S., ch. 66, §1, 2007 Tex. Sess. Law Serv. 66 (Vernon)).

B. Improving the Protective Order Process

Along with strategies for enacting a stalking protective order bill, improvements on the overall protective order process in Texas are also needed. Many women who qualify for protective orders do not receive them, and those who do are often overwhelmed by the sheer amount of paperwork and intimidated by the required application process.[217] In a Harris County study, researchers "found that of 2,932 applicants, . . . only 1,980 (68%) qualified for a protective order, and of those who qualified, only 962 (49%) actually received the order."[218] The fact that less than half of qualified applicants actually received a protective order is simply appalling.

Among the reasons most cited for not receiving the order are processing delays at the agency; it takes several weeks and multiple trips to the court to complete all the required paperwork.[219] The following four recommendations are directed at making the protective order process more efficient and applicant-friendly: (1) standardize and shorten protective order forms across Texas; (2) improve overall access to forms and increase cultural sensitivity; (3) raise awareness in the courts of disrespectful attitudes that can cause re-victimization; and (4) expedite database entry and distribution by increasing communication across relevant agencies and personnel.

i. Standardize and Shorten Protective Order Forms

In many states, application forms for protective orders are nearly impossible for a layperson to comprehend, which obviously presents serious problems for victims seeking help.[220] Thankfully, Texas has taken a step in the right direction with the creation of its Protective Order Kit, which facilitates the application process for *pro se* petitioners.[221]

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[217] Glen Kercher & Katrina Rufino, PROTECTIVE ORDERS IN TEXAS, CRIME VICTIMS' INST., SAM HOUSTON ST. U. 8 (2008) (citing Ann Malecha et al., *Applying for and Dropping a Protection Order: A Study With 150 Women*, 14 CRIM. JUST. POL'Y REV. 4, 486–504 (2003)).

[218] *Id.* at 8.

[219] *Id.* (citing Gist, *supra* note 114, at 59-71).

[220] Tarr, *supra* note 84, at 165.

[221] *See* Letter from Stewart W. Gagnon, Chair, Supreme Court of Texas Protective Order Taskforce, Letter to Andrew Weber, Clerk of the Court (Jan. 5, 2005), *available at* http://jwclientservices.jw.com/sites/scac (last accessed January 5, 2010, click on SCAC Library tab, then click on "More items..." at the bottom of the screen, and then browse to the corresponding report [dated February 22, 2005]). A series of simple question and answers help guide the applicant through the protective order process. For example, the question, "Can I get a protective order?" is followed by the answer: "You can get a protective order if: Someone has hurt you, or threatened to hurt you, and you have a close relationship with that person (you were or are married, dating or living together, have a child together or are close relatives), and you are afraid that person may hurt you again." TEX. SUP. CT. PROTECTIVE ORDER KIT 1 (2005), *available at* http://www.women-

However, there are still different forms for the assortment of protective orders, and overall, they are still quite complex, long, and understandably daunting to the average victim. One solution to this basic issue is to simplify, shorten, and standardize the application forms for all protective orders in Texas.[222] Standardization should be cost-efficient, since it would decrease processing time and minimize filing mistakes.

A few states have already taken steps towards a standardized protective order form. For example, Colorado has consolidated its civil protection order process by combining the procedures for obtaining domestic violence, elder abuse, and stalking protective orders and by using standardized petition and order forms.[223] By adopting a uniform format, Colorado has simplified the process and attempted to improve the enforcement rates of all protective orders.[224] Similarly, Louisiana has adopted a "Uniform Abuse Prevention Order," which encompasses all civil injunctions and orders "as long as such order is issued for the purpose of preventing violent or threatening acts or harassment against, contact or communication with, or physical proximity to, another person."[225] Finally, in Kentucky, any order that requires entry into its Law Information Network, including those from another jurisdiction, that are entitled to full faith and credit, must be entered on a specified standardized form.[226]

These states demonstrate how it is possible to standardize forms. There are current efforts in Texas to follow suit, such as the adoption of Project Passport, a nationwide campaign to create a uniform first page for all protective orders in every state, thereby allowing any police officer in the nation to view information necessary to enforce orders from other jurisdictions.[227] This effort is commendable, but before there

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law.org/documents.php (last accessed January 14, 2010) (click on "Pro Se Protective Order Packet (English)" link). The kit was administered in 2005, and needs to be updated. For example, the kit fails to mention how due to the legislative changes of 2007, a sexual assault victim can now obtain a protective order regardless of any prior relationship or not with the perpetrator.

[222] *Cf.* MODEL DOMESTIC AND FAM. VIOLENCE CODE, § 302 (Nat'l Council of Juv. and Fam. Ct. Judges 1994) ("Uniform form required for petitions and orders; required statements in petitions and orders; duty of clerk to provide petitions and clerical assistance").

[223] COLO. REV. STAT. § 13-1-136 (West 2008).

[224] The Colorado Legislature stated its purpose in enacting this statute: "The general assembly hereby finds that the statutes provide for the issuance of several types of civil protection orders to protect the public, but that many of these protection orders have many elements in common. The general assembly also finds that consolidating the various forms for issuing and verifying service of civil protection orders and creating, to the extent possible, a standardized set of forms that will be applicable to the issuance and service of civil protection orders will simplify the procedures for issuing these protection orders and enhance the efficient use of the courts' and citizens' time and resources." *Id.*

[225] LA. REV. STAT. § 46:2136.2 (West 2008).

[226] KY. REV. STAT. § 403.737 (Baldwin 2008).

[227] Telephone Interview with Elma Garcia, Director, Texas Lawyers Care (Nov. 21 2008). For basic information on Project Passport, see Ethan Butterfield, *Integrators Woo Criminal Justice Work*, 21 WASH. TECH. 4, Feb. 24, 2006, *available at* http://www.washingtontechnology.com/print/21_04/28089-1.html?topic=statelocal (last accessed January 14, 2010) ("Without integrated IT justice systems, an officer may be unable to establish a protective order's validity and may have no choice but to leave the scene without enforcing it. . . . If county court systems were linked to state databases of protective orders and other criminal justice information, not only would it be easier to

is national uniformity of protective order forms, there should be intrastate uniformity.

ii. Increase Access and Cultural Sensitivity

Access to protective orders and a culturally sensitive application process are essential in ensuring that victims of domestic violence, sexual assault, and stalking receive necessary and appropriate legal assistance. Texas should consider providing onsite counselors who would guide the victim through the application process and provide emotional support. The availability of these counselors would increase the likelihood that the applicant would continue with the process.[228] Personnel who understand and are responsive to different cultural needs would also encourage applicants to remain in the legal system. For example, Asian-American women often face cultural misunderstandings from service providers and facilities, which ultimately deter them from seeking assistance.[229] A study of Chinese women found that the utilization of legal services, including shelters and social service agencies, was very low due largely in part to cultural and language barriers.[230] Traditional roles, values, and social constraints severely compromise Asian-American women's ability to leave a battered relationship, especially when it involves sexual violence.[231] Given such cultural differences, when assessing either threats in a protective order violation or hearing, or the requisite element of fear in a stalking case, judges and police officers in Texas should be aware that words or acts that are not particularly threatening in one cultural frame of reference could very well be terrorizing in another. If they were aware of the basic differences across major cultures, they would be able to gauge a domestic violence victim's situation with greater fairness and accuracy.

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establish an order's validity, it could help save lives . . . Project Passport advocates uniformity in appearance and sharing of protective orders to improve safety for domestic violence victims.").

[228] Thankfully, this is already happening in Texas. When the author attended a protective order hearing in Travis County Courthouse in October 2008, he noticed the flurry of Safeplace (a domestic violence shelter in Austin) volunteers that were on hand ready to assist applicants and provide emotional support. However, other jurisdictions may not have as many resources as Austin. Nevertheless, actively seeking to provide onsite counselors whenever possible is a step that all relevant domestic violence personnel should readily implement.

[229] SILENT EPIDEMIC, *supra* note 43, at 4.

[230] Mo-Yee Lee, *Understanding Chinese Battered Women in North America: A Review of the Literature and Practice Implications*, 8 J. MULTICULTURAL SOC. WORK, 215-41 (2000).

[231] SILENT EPIDEMIC, *supra* note 43, at 4. *See also* comments on these values and customs on in *supra* note 43.

iii. Raise Awareness in the Courts Regarding Possible Re-victimization

Court personnel must appreciate the victim's sense of vulnerability in protective order proceedings to minimize the risk of further re-victimizing or terrorizing her.[232] Unfortunately, the way the current Texas stalking statute is phrased, a victim must testify to her fear and emotional distress before she will be able to secure a stalking conviction or protective order.[233] Regrettably, she is only able to begin to gain control over her life by first testifying to her helplessness in front of her abuser. Any negative or minimizing attitude that is imparted from the court can quickly drive victims away. Darlene, a former stalking victim, tied her lack of trust in the justice system to the belittling manner in which she was addressed by court staff:

> I think the people that I dealt with about getting it [protective order], they question you and (sighs). And I felt intimidated because they're like, "Are you sure this is what you want to do?", "Do you understand all this?" I just felt like it was an intimidating process. I think they made me feel like they didn't believe me.[234]

Courts are the vanguard of the protective order process. As Janet Carter eloquently asserts,

> How effectively the judiciary handles domestic violence cases ultimately determines how effectively the justice system is able to break the cycle of violence. It is a judge who sets the tone in the courtroom, and it is the judge who makes the most critical decisions affecting the lives of the victim, the perpetrator, and children.[235]

Judges need to be well-versed in protective order legislation so they can use it effectively in their courts. Similarly, they need to be familiar with the needs of the traumatized protective order applicant in front of their benches and demonstrate full respect for them. Otherwise, victims will not avail themselves of the courts, thus effectively nullifying protective order legislation.[236]

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[232] Topliffe, *supra* note 97, at 1050–51 (citing studies in Minnesota and Florida that revealed the gender bias of judges that result in profound victimization of women).

[233] *See* §§ TEX. PENAL CODE 42.072(a)(2) & (3), TEX. FAM. CODE 71.004 (Vernon 2008)

[234] Quoted in TK LOGAN, PARTNER STALKING, *supra* note 1, at 277.

[235] JANET CARTER ET AL., DOMESTIC VIOLENCE IN CIVIL COURT CASES: A NATIONAL MODEL FOR JUDICIAL EDUCATION xvii (Jacqueline Agtuca et al. eds., 1992).

[236] Topliffe, *supra* note 97, at 1050.

iv. Speed Up Distribution of Protective Orders by Enhancing Communication Between Relevant Agencies and Personnel

Texas should streamline and expedite the protective order process so that victims should only have to file once and be assured that the right personnel, through the appropriate channels, are handling their information. The application process should not require multiple trips to provide information that has already been submitted. As Renee, a former stalking victim, said in conveying her frustration at the difficulty of trying to obtain a protective order,

> Well, if you go to get one you have to stay down there all day, hours and hours. . . . They drag you in and out of court. They ask you a billion questions and they try to act like you are lying when you tell them what's really going on. You have to run to all kinds of different places and they'll just look at you like you're stupid.[237]

Reasons why qualified women do not receive protective orders are almost always procedural delays at the agency.[238] Communication between the police and the court is crucial to avoid delays, especially in situations involving emergency protective orders, since they require an arrest before issuance.[239] Procedural delays are also due to the accumulating backlog of applications. Currently, women in Texas can only apply for a protective order during business hours on weekdays.[240] As Kercher and Rufino suggest, increasing staff so that some can work on a nightly rotating basis or part-time on Saturday, could help alleviate

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[237] TK LOGAN, PARTNER STALKING, *supra* note 1, at 269 (note, this victim was not a Texas resident, but similar experiences have been reported in Texas.).

[238] Gist, *supra* note 114, at 69. Judith McFarlane and other researchers describe the inordinately long time victims must wait until they receive an order: "To obtain a protection order, applicants must be willing to arrive at the district attorney's office with proper photo identification and complete paperwork, and they are required to complete an interview with a caseworker, be photographed, and sign an affidavit. This process requires about 2 to 3 hours. Applicants must wait approximately 6 weeks for a court date and then appear in court in front of a judge, at which time the abuser may contest the protection order. In addition, many women need to return to the district attorney's office at a later date with additional required paperwork/witnesses to the abuse. For some women, these trips to the district attorney's office mean work absences and loss of income. . . . [A]t the 3-month interview, many women reported dropping the order within the first 2 weeks after application." McFarlane et al, *Protection Orders, supra* note 115, at 615.

[239] These two entities are also responsible for the effectiveness of protective orders, since enforcement often depends upon their unwritten and informal policies. Topliffe, *supra* note 97, at 1046-47.

[240] Kercher & Rufino, *supra* note 217, at 9.

the filing backlog and enable more women to receive their orders.[241]

Another step in speeding up the distribution of protective orders comes in the form of electronic applications, which have been successfully implemented in New York. The family court in White Plains has initiated the electronic transmission of protective orders to the police department, utilizing technology developed by the Westchester County Information Technology Department.[242] White Plains County Executive Andrew Spano stated, "Electronic orders are quicker and easier to serve. That means that these women can get the protection they need sooner."[243] Supervising Judge of the Family Court Joan Cooney also commented that the new e-orders program is "an example of how agencies can work together to protect victims of domestic violence."[244] In a similar fashion, Texas can set up its own e-orders program, which would make application processing much more efficient. The state has already digitized its protective order forms[245] but should go one step further by allowing electronic filing.

C. Improving Protective Order Enforcement and Effectiveness

Should stalking protective orders be enacted in Texas, courts and law enforcement must deal with problems of enforcement and effectiveness. As discussed above, these are two critical yardsticks by which to measure the actual power and legitimacy of protective orders. Stalking protective orders would probably face the same challenge that family violence and sexual assault orders have in terms of effective enforcement. Four recommendations are presented in hopes of meeting and overcoming this challenge: (1) enhance stalking training and response protocols in police departments and the community as a whole; (2) engage respondents in protective order proceedings; (3) advance the economic rights of applicants; and (4) modernize safety planning.

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[241] *Id.*

[242] *New E-Orders Pilot Program Helps Protect Domestic Violence Victims*, MID-HUDSON NEWS (Newburgh, N.Y), July 24, 2005, http://www.ncdsv.org/images/NewE-OrdersPilotProgramHelps ProtectDVVictims.pdf (last accessed January 5, 2010).

[243] *Id.*

[244] *Id.* Judge Cooney remarked, "This is a very exciting way to use technology . . . It helps victims of domestic violence. . . . It is fair to the persons being served. It is a better system for everyone." *Id.*

[245] Attorney General of Texas-Greg Abbott, *Protective Orders*, http://www.oag.state.tx.us/ victims/protective.shtm (last accessed January 5, 2010).

i. Enhance Stalking Training and Response Protocols in Police Departments and the Community

In Texas, as in other states, there is a general lack of specialization and training among law enforcement and prosecution agencies with respect to enforcing stalking statutes. There are currently no stalking units in any police departments in Texas.[246] Most departments assign stalking cases to non-stalking specialist units, such as those responsible for family violence or sex crimes.[247] Surveys have shown that nationwide, only 13% of police agencies provide specialized stalking training independent of domestic violence training, and about one-fifth of prosecutor offices have no stalking training at all.[248] It is not surprising, then, that police officers in Texas do not have sophisticated knowledge or understanding in identifying and handling stalking cases.[249] Short of creating individual stalking units within their agencies, which may be costly, police departments can solve this problem by equipping their officers with enhanced training and response protocols that cover stalking.

Texas should consider emulating the system of the Dover Police Department in Dover, New Hampshire. Having adopted a system of "vertical prosecution" in which a single prosecutor handles all stalking cases, Dover detectives and prosecutors work in conjunction with stalking victims to enhance police responses to stalking cases.[250] This integration promotes open communication in the investigation of stalking cases.[251] The stalking prosecutor serves as the point person on stalking cases and can also help train officers to handle stalking cases more effectively.[252]

Alternatively, Texas police departments can adopt the Model

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[246] Tjaden, *Stalking in America, supra* note 9, at 83. Texas is hardly in the minority here. Only one police agency out of 169 examined in one national study reported having a specialized stalking unit. *Id.*

[247] *E.g.*, the Austin Police Department sends all stalking cases to its Family Violence Unit. Telephone Interview, Detective, *supra* note 102.

[248] Tjaden, *Stalking in America, supra* note 9, at 83.

[249] Telephone Interview with Jodi Rafkin, *supra* note 207. For instance, police officers may be hesitant if most of the cases where they do arrest the stalker do not lead to formal prosecution. Jodi Rafkin points out, "Victims are facing a lot of challenging decisions, and sometime it is frustrating when a victim goes back and forth." It would be especially frustrating if police officers do not understand the victim's state of mind. Yet in one study, researchers showed how rarely police officers actually proceed with an arrest of a stalker. They reviewed 1,785 domestic violence complaints generated by the Colorado Spring Police Department from April to September 1998. Of these complaints, 1,731 (97%) had either victim or police narrative, and of these reports, 285 (16.5%) had evidence that the suspect stalked the victim. Only 1 out of the 285 reports resulted in the police officer formally charging the suspect with stalking! Patricia Tjaden & Nancy Theonnes, *The Role of Stalking in Domestic Violence Crime Reports Generated by the Colorado Springs Police Department*, 15 VIOLENCE & VICTIMS 4, 427–41 (2000).

[250] CREATING AN EFFECTIVE STALKING PROTOCOL, *supra* note 39, at 19.

[251] *Id.*

[252] *Id.*

Stalking Code, published by the National Center for Victims of Crime.[253] This detailed and structured set of guidelines starts off by recommending police departments "assess which community agencies, organizations, or programs are currently responding to the needs of stalking victims, and which additional community stakeholders have a part to play in a more community oriented approach."[254] These stakeholders should be involved in the earliest stages of response planning and should become members of any and all of the bodies charged with developing and executing the new stalking policy, especially since they can promote "understanding of the new policy among the wider community through public education initiatives."[255] The Model Protocol can serve as the basis for the development of Texas's own comprehensive protocol that would address stalking more effectively. But in the end, Texas should keep in mind that implementation of any stalking protocol can only be effective "if it reaches beyond the confines of the police department to all criminal justice agencies, victim service programs, and beyond."[256]

To ensure stalking victims in Texas receive the greatest and broadest protection, the Texas civil and criminal justice system need to work together to enhance the quality of enforcement and the effectiveness of all protective orders. This coordinated effort can speed up responses, increase efficiency, and encourage victims who see the seriousness, care, and focus with which the justice system handles their cases. The inclusion of community involvement can also ensure victims who seek help actually receive proper assistance.

One idea is to use "community partners," who are resources within the community that have the abilities to provide services for victims, such as representatives from the court system, law enforcement, and victim advocates, who can meet together to discuss collaborative efforts to provide coordinated services for victims.[257] Community-based and institutional efforts (i.e., the formal justice system) to address domestic violence can be harmonized because they both share the common goal of reducing, and eventually eradicating, abuse in the lives of victims. Michelle Waul highlights the benefits of community-based advocacy by contrasting it with criminal justice action. She sees community-based services as empowering the victim and providing the resources and information necessary to help them make informed decisions.[258] Contrarily, criminal justice initiatives aim at deterring batterers from continuing their abusive behavior by focusing on punishment and

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[253] MODEL STALKING CODE REVISITED, *supra* note 14.

[254] *Id.* at 99.

[255] *Id.*

[256] *Id.* at 100.

[257] *See* EMILY SACK, CREATING A DOMESTIC VIOLENCE COURT 10 (Lindsey Anderson et al. eds., 2002). *See also* Part IV(A)(1), *infra*, on generating consensus among various advocates and organizations to bolster the case for stalking protective order legislation.

[258] Michelle R. Waul, *Civil Protection Orders: An Opportunity for Intervention With Domestic Violence Victims*, 6 GEO. PUB. POL'Y REV. 51, 53 (2000).

fines.[259]

These two crucial tactics should support one another. They are complementary and can be mutually reinforcing. As Jodi Rafkin of the Stalking Resource Center in Washington, D.C. urges,

> We encourage prosecutors, police, victim advocates, probation officers, and public health officials a whole variety of people who are affected, to form some sort of coordinated community response group. When you get a group of people working together, they can be powerful in terms of coming together as a coalition that represents a variety of interests.[260]

This reinforcing, coordinated coalition is what may enable the domestic violence victim to "break free from a batterer's power and control."[261]

ii. Engage Respondents in Protective Order Proceedings

Texas should engage respondents, who can become agitated during a protective order hearing because they view it as an intrusion into a private matter. Engagement is recommended because it helps reduce order violations, thereby increasing the safety of applicants. Respondents are often as unclear as the petitioners are about courtroom procedures and the protective order process as a whole.[262] Combined with the fact that they often harbor anger towards their partner for invoking the legal process, and may be most volatile and unpredictable immediately after an unsuccessful challenge of a protective order, personal engagement can help pacify tense situations and increase compliance with orders.[263]

Texas could follow the lead of Massachusetts, whose court system engages the respondent to ensure the safety of the petitioner as she leaves the courtroom and the understanding of the respondent as he receives the order. The Judicial Oversight Demonstration (JOD) Initiative in the Dorchester District of Boston designed and implemented the Dorchester Community Outreach Worker Program, which assists civil restraining

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[259] *Id.*

[260] Telephone Interview with Jodi Rafkin, *supra* note 207.

[261] Sean D. Thueson, *Civil Domestic Violence Protection Orders in Wyoming: Do They Protect Victims of Domestic Violence?*, 4 WYO. L. REV. 271, 278 (2004). *See generally* GWINN & STRACK, HOPE FOR HURTING FAMILIES, *supra* note 211 (discussing how San Diego was able to set up a family justice center providing all the services a victim would need in one convenient location).

[262] VERA INST. JUST., DEP'T OF JUSTICE, ENGAGING RESPONDENTS IN CIVIL RESTRAINING ORDER CASES: A NEW APPROACH TO VICTIM SAFETY 1 (2006), *available at* http://www.ovw.usdoj.gov/dorchester_jodi2.pdf (last accessed January 14, 2010). "[T]his is especially true for recent immigrants with a poor grasp of English, [but] complex legal language can present difficulties for anyone not familiar with the court system." *Id.*

[263] *Id.*

order respondents by pairing them one-on-one with outreach workers as they enter and leave the courtroom.[264] As with the protective order process, the JOD subcommittee recommended hiring a culturally competent outreach worker, preferably bilingual or multilingual, from the local community.[265] This program enhances petitioner safety because it ensures "respondents receive clear and accurate information about restraining orders and appropriate social service referrals" in accessible language, which "reduce[s] the likelihood of unintentional violations of court orders."[266]

If Texas communities want to set up their own outreach worker program, they should begin by taking stock of their own particular circumstances and needs. As Carmen Del Rosario, a longtime victim advocate and Director of the Domestic Violence Program at the Boston Public Health Commission explains, "Before people start an outreach worker program they should get a number of key players at the table to talk about why they are doing it, how they are going to do it, why it's important in the community, and what it would look like in their particular community."[267] After assessing their needs, Texas communities can use the guidelines outlined by the JOD as a template for the development of their tailored programs, which can also be circulated for use in rural areas.[268]

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[264] *Id.*

[265] *Id.* at 6.

[266] *Id.* at 1. Explanation of the terms of the restraining order in clear, accessible language can help the respondent cool down. Outreach worker Alexandre also "makes sure that respondents understand that violating a civil restraining order is a serious criminal offense." *Id* at 4. Defense Attorney Cathleen Bennett adds, "Some respondents are intimidated by the court system, and they don't necessarily understand what the judge has said. In these emotional circumstances and even in regular circumstances they may not understand what the judge is trying to convey. So having someone there who can actually walk out with them afterwards and translate and make sure the respondent understands everything is a very good thing." *Id.* Judge Sydney Hanlon further comments on how addressing the respondent's immediate needs contributes: "To the degree that respondents feel they have been treated respectfully and compassionately, and offered help to change the behavior that brought them to court, they will be more likely to respect [the terms of the restraining order and the rights of the victim]." *Id.* If some victims vacillate on filing a restraining order due to a concern for how it will affect the respondent, the availability of an outreach worker can help reduce the victim's hesitation. *Id.*

[267] VERA INST. JUST., *supra* note 262 at 6. "Key players might include the clerk's office, the judge or magistrate who is charged with issuing restraining orders, victim advocacy organizations (especially those that provide court support to victims seeking civil restraining orders), batterer intervention program providers, bailiffs or other court security personnel, the local defense bar, prosecutors, and other relevant players who can help provide guidance, information, and resources." *Id.* at 6, n.8.

[268] The guidelines are a rough protocol only, and "the Boston Public Health Commission, with the assistance of the JOD Advisory Board, is currently developing a formal protocol." *Id.* at 8. However, the guidelines for outreach worker duties include:

"Making contact with the respondent at the courthouse before and after the civil restraining order hearing. In some instances, the outreach worker (OW) makes follow-up calls to the respondent after the hearing. Because speaking with the OW is voluntary, the OW is required to obtain consent before working with the respondent. Explaining in clear, nontechnical language the civil restraining order process, what to expect from the court hearing, and the meaning of terms in relevant legal forms and documents. The OW is not permitted to strategize with respondents; advise respondents on how to get what they want from the court or judge; compose affidavits or legal forms on the respondent's behalf; or give legal advice. Referring respondents to shelters, job placement centers, job training programs, substance abuse treatment facilities, and educational programs. Emphasizing to the respondent that the OW is not an advocate, that the OW does not stand beside the respondent

iii. Advance the Economic Rights of Applicants

Texas should ensure the adequate promotion of the economic security and restitution for applicants as another measure to improve the overall effectiveness of protective orders. Sadly, many women are unable to leave abusive relationships and often return to their batterers because of financial challenges and economic concerns.[269] But thankfully, most courts have statutory authority to grant financial support to domestic violence victims; maintain housing, child care and health insurance for victims and their children; and award other forms of monetary relief in a protective order proceeding.[270] Therefore, Texas courts should advance economic compensation for applicants, which should include at least the some or all of the following: (1) housing (orders to vacate, future rent or mortgage payments, suitable alternative housing for the survivor and her children); (2) personal property rights; (3) household expenses; (4) medical costs; (5) reimbursement for property damage; (6) temporary use of vehicle; and (7) future payment of financial obligations or other out-of-pocket expenses related to abuse.[271] Advancing the economic rights of protective order petitioners throughout the application process will give them a realistic chance of getting back on their feet, as well as improving the likelihood that they will continue with the order.

iv. Modernize Safety Planning

Although protective orders are not the end-all solution to stalking or

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in court, and that the OW cannot speak on behalf of the respondent in court. Avoiding at all costs collusion with respondents. The OW should remain a neutral provider of information. Avoiding discussion of the details of the respondent's case. The OW should emphasize that communication between the respondent and OW is not confidential and that anything the respondent says can be used against the respondent in court. Immediately informing a supervisor about any threats against victims, children, or others, or whenever the OW has significant concerns about the safety of the victim or others. (Supervisors are bound to follow court protocols after receiving information about a credible threat). Requesting the services of an interpreter when the respondent does not speak English and the outreach worker cannot communicate in the respondent's native language. Meeting at least once a week with a supervisor." *Id.*

[269] CHRISTINE THOMAS, BATTERED WOMEN'S JUST. PROJECT ADVANCING THE ECONOMIC RIGHTS OF DOMESTIC VIOLENCE SURVIVORS IN PROTECTION ORDER PROCEEDINGS, 1 (May 2003); *see also* Sarah Buel, *Fifty Obstacles to Leaving a.k.a. Why Abuse Victims Stay*, 28 COLO. BAR J. 19, 20 (1999) (listing reason no. 15 as "Financial Despair": "Financial despair quickly takes hold when the victim realizes that she cannot provide for her children without the batterer's assistance."); Topliffe, *supra* note 97, at 1048 (stating many women do not leave the batterer or want him jailed "because he may be the only source of support for the victim or her family").

[270] *See* Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 993 (1993) (listing thirty-eight state statutes that contain "catch-all" provisions and twenty jurisdictions that authorize specific forms of monetary relief).

[271] *See generally id.*

domestic violence, with proper safety planning, they can be powerful tools that reduce and even halt the violence. Victims should never rely solely on protective orders, but they are still a "useful adjunct to other legal proceedings initiated early in the course of stalking."[272] Safety planning is not technically a "legal proceeding," but it must always be the first step in any zealous advocacy. Regarding stalking, safety planning should be modernized to combat the latest forms of cyberstalking, since it is a growing threat in Texas and America.[273] It should also include appropriate discussions on lifestyle alterations, such as not going to a certain gym late at night, if the stalking is particularly severe. An up-to-date safety plan combined with an effective protective order affords Texas battered men and women the protection the law purports to give.[274]

VI. CONCLUSION

Texas should not let stalking victims be re-victimized by its failure to respond effectively to their danger. Stalking is a clarion call for the Texas legislative and judicial system to revise the protective order process with greater emphasis on the role of stalking as an indicator of risk for ongoing violence. Should the Texas Legislature continue to remain silent as stalking incidents increase, it will not be fulfilling its mandate to protect crime victims.[275] Protective orders have proven their effectiveness in reducing domestic violence. Millions of victims in the United States, and thousands in Texas, have attributed their sense of empowerment and control through the issuance of protective orders. In many ways, they have been a light at the end of a long dangerous tunnel for victims. As such, stalking protective orders can help Texas courts and law enforcement personnel confront stalking, the darkest of crimes. It is time for the legislature to take action and enact stalking protective orders so that Texas stalkers will be kept at bay.

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[272] Mullen, *supra* note 32, at 234.

[273] *See supra* note 12. The National Network to End Domestic Violence (NNEDV) has released a CD that "teaches victims how their abusers may be employing technology to trace their every move." Texas shelters can consider distributing the CD, which also instructs users how to use technology more safely to their advantage. *National Network to End Domestic Violence Fund Introduces New Tool to Outsmart Abusers and Stalkers in Today's High-Tech World*, PR NEWSWIRE ASS'N, *available at* http://www.ncdsv.org/publications_stalking.html (last accessed January 14, 2010) (follow link to article).

[274] *See* www.abanet.org/domviol/pubs.htm (last accessed January 5, 2010).

[275] *See* TEX. CONST. art. 1, § 30.

Learning on Razor's Edge: Re-Examining the Constitutionality of School District Policies Restricting Educationally Disruptive Student Speech

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I. INTRODUCTION

In *Davis v. Monroe County Board of Education*, the Supreme Court dramatically altered the landscape of public education by granting students a private right of action against their school for student-on-student sexual harassment under Title IX.[1] Pursuant to *Davis*, a student may bring a "hostile environment" harassment claim under Title IX if the "sexual harassment . . . is so severe, pervasive, and objectively offensive" so as to "detract[] from the victims' educational experience."[2] Although *Davis* does not mandate that a school district adopt and enforce an anti-harassment policy to avoid liability, the specter of *Davis* liability led many school districts to adopt and implement vigorous and restrictive anti-harassment policies.[3] In the decade following *Davis*, federal courts have addressed multiple facial challenges to anti-harassment policies drafted in the shadow of *Davis*.[4]

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[1] 526 U.S. 629, 645 (1999) (construing Title IX as providing students with a private right of action against a public school that "exercises substantial control over both the harasser and the context in which the known harassment occurs"). *Cf.* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998) (construing Title IX as providing students with a private right of action against a public school for teacher-on-student harassment); Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60 (1992) (same).

[2] *Davis*, 526 U.S. at 651.

[3] The *Davis* Court gave school boards powerful incentives to draft and enforce vigorous anti-harassment policies. By explicitly holding that "recipients of federal funding may be liable for 'subjecting' their students to discrimination where the recipient is deliberately indifferent to known acts of student-on-student sexual harassment and the harasser is under the school's disciplinary authority" and "in [the classroom] setting the [School] Board exercises significant control over the harasser." *Id.* at 646–47. Although *Davis* dealt exclusively with sexual harassment under Title IX, the various circuit courts have recognized a similar cause of action under Title VI for "hostile racial environment" harassment. *See, e.g.*, Monteiro v. Tempe Union High Sch. Dist., 158 F.3d 1022, 1035 (9th Cir. 1998); Bryant v. Indep. Sch. Dist. No. I-38, 334 F.3d 928, 930 (10th Cir. 2003); *see also* Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 206 n.5 (3d Cir. 2001) ("Although both *Franklin* and *Davis* dealt with sexual harassment under Title IX, we believe that their reasoning applies equally to harassment on the basis of the personal characteristics enumerated in Title VI [race, color, or national origin] and other relevant federal anti-discrimination statutes [disability or age]."). Accordingly, a plausible argument exists that *Davis*'s Title IX analysis applies to racial harassment under Title VI and harassment on the basis of disability under the Rehabilitation Act of 1973. *See* 42 U.S.C. § 2000d (2004); 29 U.S.C. § 794 (2004).

[4] *See, e.g.*, Nuxoll v. Indian Prairie Sch. Dist. No. 204, 523 F.3d 668, 670 (7th Cir. 2008) (analyzing

Responding to this national controversy, courts have developed competing approaches to "the very real tension between anti-harassment laws and the Constitution's guarantee of freedom of speech."[5] Applying conventional First Amendment jurisprudence, some courts have struck down such anti-harassment policies as "unconstitutionally overbroad."[6] Conversely, other courts have determined substantively identical policies[7] to be constitutional under controlling First Amendment precedent.[8] In operation, this harsh climate of legal uncertainty places school authorities on a "razor's edge" when drafting student conduct policies in conformity with student speech jurisprudence.[9] Where a school adopts and enforces an anti-harassment policy prohibiting psychologically harmful student speech, the school is subject to a possible First Amendment challenge. However, where a school fails to adopt and enforce a policy prohibiting "disparaging comment[s] directed at an individual's sex, race, or some other personal characteristic,"[10] the school lays the foundation for a potential student-on-student harassment claim under Title IX.[11] Due to *Davis's* "severe, pervasive, and objectively offensive" requirement, isolated instances of psychologically harmful student speech often fail to constitute a hostile environment.[12] Because "[t]here is no categorical 'harassment exception' to the First

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the constitutionality of a school policy forbidding "'derogatory comments,' oral or written, 'that refer to race, ethnicity, religion, gender, sexual orientation, or disability'"); *Saxe*, 240 F.3d at 202–03 (analyzing the constitutionality of a school board policy providing, "Harassment means verbal or physical conduct based on one's actual or perceived race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics, and which has the purpose or effect of substantially interfering with a student's educational performance or creating an intimidating, hostile or offensive environment" and "[a]ny harassment of a student by a member of the school community is a violation of this policy").

[5] *Saxe*, 240 F.3d at 209.

[6] *E.g.*, *id.* at 217 (voiding anti-harassment school board policy as "unconstitutionally overbroad"). *Cf.* Nixon v. N. Local Sch. Dist. Bd. of Educ., 383 F. Supp. 2d 965, 975 (S.D. Ohio 2005) (finding school policy unconstitutional as applied to student-plaintiff).

[7] *Compare Saxe*, 240 F.3d at 202 (finding school board policy prohibiting "verbal or physical conduct based on one's actual or perceived race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics" to be unconstitutionally overbroad), *with Nuxoll*, 523 F.3d at 670 (finding school policy prohibiting "'derogatory comments,' oral or written, 'that refer to race, ethnicity, religion, gender, sexual orientation, or disability'" to be facially constitutional).

[8] *See, e.g.*, *Nuxoll*, 523 F.3d at 674–75 (upholding school policy as constitutional under *Tinker v. Des Moines Independent Community Schools*' 393 U.S. 503 (1969 "substantial disruption" standard); Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1183 (9th Cir. 2006) (upholding school's restriction of psychologically harmful student speech as constitutional under *Tinker*'s purported "rights of other students" standard), *vacated as moot*, 549 U.S. 1266.

[9] *See Nuxoll*, 523 F.3d at 675 (expressing concern that "if the rule is invalidated the school will be placed on a *razor's edge*, where if it bans offensive comments it is sued for violating free speech and if it fails to protect students from offensive comments by other students it is sued for violating laws against harassment") (emphasis added).

[10] *Saxe*, 240 F.3d at 206.

[11] *See* Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 641–45 (1999) (construing Title IX as providing students with a private right of action against a public school that "exercises substantial control over both the harasser and the context in which the known harassment occurs"). *Cf.* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998) (construing Title IX as providing students with a private right of action against a public school for teacher-on-student harassment); Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60 (1992) (same).

[12] *Davis*, 526 U.S. at 650.

Amendment's free speech clause,"[13] such isolated instances of psychologically harmful student speech must be restricted in accordance with established student-speech jurisprudence. Accordingly, public school officials must tread carefully when confronting psychologically harmful student speech.

This Note posits a standard supporting a school's ability to limit psychologically harmful student speech within the framework of existing First Amendment jurisprudence. Although the Supreme Court has yet to address the constitutionality of restricting psychologically harmful student speech in public schools, *Tinker v. Des Moines Independent Community Schools*[14] is generally accepted as the default standard for student free speech rights.[15] Under *Tinker*, a school may restrict student speech only where that speech "substantially interfere[s] with the work of the school or impinge[s] upon the rights of other students."[16] Evaluating the effects of psychologically harmful student speech on students and administrators, this Note ultimately argues for a broad construction of *Tinker's* "substantial disruption" standard, permitting schools to implement viewpoint-neutral regulations on psychologically harmful student speech.[17]

Part II examines and discusses the effects of psychologically harmful student speech on students, administrators, and school districts. Part III examines the Supreme Court's First Amendment jurisprudence in the context of public education. Part IV analyzes the various approaches employed by lower courts regarding psychologically harmful student speech. Specifically, Part IV discusses the impact of *Morse v. Frederick*[18] on extensions of *Tinker* and its progeny at the circuit level. Part V examines *Nuxoll v. Indian Prairie School District No. 204*,[19] specifically discussing Judge Posner's post-*Morse* approach to restricting psychologically harmful student speech. Finally, Part VI posits a model student conduct policy and examines relevant jurisdictional considerations.

II. THE NEED TO COMBAT PSYCHOLOGICALLY HARMFUL STUDENT SPEECH IN PUBLIC SCHOOLS

Across the nation, local school boards possess powerful incentives

[13] Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 204 (3d Cir. 2001).
[14] 393 U.S. 503 (1969).
[15] *See generally* Brannon P. Denning & Molly C. Taylor, *Morse v. Frederick and the Regulation of Student Cyberspeech*, 35 HASTINGS CONST. L.Q. 835, 838 (2008).
[16] *Tinker*, 393 U.S. at 509.
[17] The *Tinker* Court described "substantial disruption" as student speech that: (i) "would substantially interfere with the work of the school," *id.* at 509, (ii) "materially disrupts classwork," *id.* at 513, and (iii) "involves substantial disorder." *Id.*
[18] 551 U.S. 393 (2007).
[19] 523 F.3d 668 (7th Cir. 2008).

to enact and enforce vigorous anti-harassment student speech policies. From a pedagogical perspective, a student speech policy prohibiting educationally disruptive speech preserves a classroom environment conducive to learning. From a legal perspective, a student speech policy prohibiting such speech may preemptively minimize a school district's exposure to *Davis* liability. This part seeks to examine the effects of psychologically harmful student speech on students and school districts.

A. Emerging Research Shows a Correlation Between Psychologically Harmful Student Speech and Educational Harm

Over the past decade, a developing body of research shows a correlation between psychologically harmful student speech and negative educational outcomes. Although the evidence is not yet conclusive, an emerging consensus links subjectively harassing student speech with declining grades, increased truancy, and other educationally harmful consequences.[20]

For example, a 2001 study, *Hostile Hallways: Bullying, Teasing, and Sexual Harassment in School*,[21] extensively analyzes the behavioral impact of sexual harassment on high school students.[22] According to the study commissioned by the American Association of University Women ("AAUW"), 27% of high school students experience some form of sexual harassment "often."[23] Alarmingly, of those students experiencing sexual harassment: 22% report to "[n]ot want to go to school," 20% "[f]ind it hard to pay attention in school," 16% "[f]ind it hard to study," 16% "[s]tay home from school or cut a class," 13% report "[m]ak[ing] a lower grade on a test or paper than [they] think [they] otherwise would have," 4% "change schools," and 3% "drop out of a course."[24]

Contrasted with earlier research commissioned by the same organization in 1993,[25] "[t]he biggest change in the type of harassment experienced from 1993 to [2001] is the incidence of students being called gay or lesbian: a jump from 17 percent in 1993 to 36 percent [in 2001]."[26] Ultimately, the AAUW study reaches three "major findings" regarding sexually harassing student speech. First, the study notes a significant rise in the number of students experiencing sexual harassment

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[20] JODI LIPSON, AM. ASS'N OF UNIV. WOMEN EDUC. FOUND., HOSTILE HALLWAYS: BULLYING, TEASING, AND SEXUAL HARASSMENT IN SCHOOL 1 (2001), *available at* http://www.aauw.org/research/upload/hostilehallways.pdf.

[21] *Id.*

[22] *See id.* at 36–38.

[23] *Id.* at 4.

[24] *Id.* at 37.

[25] AM. ASS'N OF EDU. FOUND., HOSTILE HALLWAYS: THE AAUW SURVEY ON SEXUAL HARASSMENT IN AMERICA'S SCHOOLS (1993).

[26] *See* LIPSON, *supra* note 20, at 21.

when compared to the 1993 study.[27] Second, an increasing amount of statistical evidence supports the notion that "[s]chool sexual harassment has a negative impact on students' emotional and educational lives."[28] Finally, the study notes that students in 2001 were more likely to "know what sexual harassment is" and "to say their schools have a policy or distribute literature on sexual harassment."[29]

Similarly, a 2004 study observes, "gay, lesbian, or bisexual adolescents (defined by sexual behavior, sexual attraction, or self-labeling) are more likely than other adolescents to report being involved in fights or to be the targets of harassment."[30] Although the study sample included individuals years removed from high school, "[t]hirty-seven percent of the participants reported that they had experienced verbal harassment during the preceding 6 months because of their sexual orientation," and "[t]hese types of mistreatment were associated with lower self-esteem and a [two]-fold increase in the odds of reporting suicidal ideation."[31] In light of "the potentially life-threatening nature of these acts and their psychological correlates," the study recommends that "policymakers should attend to the effects of harassment, discrimination, and violence on young gay men if they hope to improve the lives of this vulnerable population."[32] Because "[m]en younger than 21 years of age may be at higher risk for a number of reasons,"[33] the study concludes, "the surest means of preventing anti-gay harassment, discrimination, and physical violence is to implement and enforce policies that prohibit and punish these acts."[34]

Additional studies show a similar correlation between subjectively harassing speech on the basis of race[35] or gender[36] and negative

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[27] *Id.* at 4.

[28] *Id.*

[29] *Id.* ("*Students [in 2001] are much more likely than those in 1993 to say their schools have a policy or distribute literature on sexual harassment:* Seven in 10 students (69 percent), compared to just 26 percent in 1993, say their schools have a policy on sexual harassment to deal with sexual harassment issues and complaints.") (emphasis in original).

[30] David M. Huebner et al., *Experiences of Harassment, Discrimination, and Physical Violence Among Young Gay and Bisexual Men*, 94 AM J. OF PUB. HEALTH 1200, 1200 (2004).

[31] *Id.*

[32] *Id.*

[33] *Id.* at 1202 ("Men younger than 21 years of age may be at higher risk for a number of reasons; for example, relative to older men, they may have less independence and control over their lives, making it difficult for them to access safe venues where gay and bisexual men gather. In addition, individuals who self-identify as gay at younger ages may be more gender nonconforming, increasing perpetrators' ability to identify them as targets for anti-gay bias. Finally, studies suggest that perpetrators of anti-gay violence tend to be younger themselves, and thus young men may be targeted more frequently because their peers are more likely to be perpetrators.") (citating Heidi M. Levitt & Sharon G. Horne, *Explorations of Lesbian-Queer Genders: Butch, Femme, Androgynous or "Other"*, 6 J. LESBIAN STUDIES, 25–39 (2002); GARY D. COMSTOCK, VIOLENCE AGAINST LESBIANS AND GAY MEN 116–17 (Columbia University Press 1991)).

[34] *Id.*

[35] *See, e.g.*, Hope Landrine & Elizabeth A. Klonoff, *The Schedule of Racist Events: A Measure of Racial Discrimination and a Study of its Negative Physical and Mental Health Consequences*, 22 J. BLACK PSYCHOL. 144–68 (1996).

[36] *See, e.g.*, Hope Landrine, et al., *Physical and Psychiatric Correlates of Gender Discrimination: An Application of the Schedule of Sexist Events*, 19 PSYCHOL. OF WOMEN Q. 473–92 (1995).

psychological effects. Although dissenters exist within the scientific community,[37] an emerging consensus "link[s] minority-specific stress to negative physical and mental health outcomes."[38] Beyond the academic literature, federal harassment laws provide school districts with powerful incentives to adopt and enforce restrictive student speech policies.

B. Potential School District Liability

Three federal anti-harassment statutes are of primary importance for educators, administrators, and local school boards. First, Title IX of the Education Amendments of 1972 provides, "No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance . . . ."[39] Second, Title VI of the Civil Rights Act of 1964 provides, "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or subjected to discrimination

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[37] *See, e.g.*, Huebner, *supra* note 30, at 1201–02 ("The associations observed between experiences of mistreatment and markers of psychological distress are subject to a number of interpretations. . . . For instance, men with preexisting low self-esteem or suicidal ideation may be more vulnerable to and more likely to be targeted by perpetrators of mistreatment. Alternately, men with greater psychological distress may simply be more likely to report mistreatment or to interpret ambiguous negative events as anti-gay discrimination or harassment.").

[38] *Id.* at 1200 ("Recent research involving gay and lesbian individuals has documented associations between psychological distress and both perceptions of discrimination and experiences of victimization. *These findings are consistent with research examining the consequences of mistreatment among other marginalized groups and with theories linking minority-specific stress to negative physical and mental health outcomes.*") (emphasis added) (citing Diaz et al., *The impact of homophobia, poverty, and racism on the mental health of gay and bisexual Latino men: findings from 3 US cities*, 91 AM. J. PUB. HEALTH 927 (2001)); V.M. Mays & S.D. Cochran, *Mental health correlates of perceived discrimination among lesbian, gay, and bisexual adults in the United States*, 91 AM. J. PUB. HEALTH 1869 (2001); S.L. Hershberger & A.R. D'Augelli, *The impact of victimization on the mental health and suicidality of lesbian, gay, and bisexual youths*, 31 DEV PSYCHOL. 65 (1995); Herek et al., *Psychological sequelae of hate-crime victimization among lesbian, gay, and bisexual adults*, 67 J. CONSULTING CLINICAL PSYCHOL. 945 (1999); Waldo et al., *Antecedents and consequences of victimization of lesbian, gay, and bisexual young people: a structural model comparing rural university and urban samples*, 26 AM. J. COMMUNITY PSYCHOL. 307 (1998); A.R. Fischer & C.M. Shaw, *African Americans' mental health and perceptions of racist discrimination: the moderating effects of racial socialization experiences and self-esteem.* 46 J. COUNSELING PSYCHOL. 395 (1999); Kessler et al., *The prevalence, distribution, and mental health correlates of perceived discrimination in the United States*, 40 J. HEALTH SOC. BEHAV. 208 (1999); H. Landrine & E.A. Klonoff, *The Schedule of Racist Events: a measure of racial discrimination and a study of its negative physical and mental health consequences*, 22 J. BLACK PSYCHOL.168 (1996); Landrine et al. *Physical and psychiatric correlates of gender discrimination: an application of the Schedule of Sexist Events*, 19 PSYCHOL. WOMEN Q. 473 (1995); K.W. Allison, *Stress and oppressed social category membership*, *in* PREJUDICE:THE TARGET'S PERSPECTIVE 145–70 (J.K. Swim & C. Strangor, eds., Academic Press Inc. 1998); J.K. Swim et al., *Experiencing everyday prejudice and discrimination*, *in* PREJUDICE:THE TARGET'S PERSPECTIVE 37–60 (J.K. Swim & C. Strangor, eds., Academic Press Inc. 1998); M.F. Peters & G. Massey, Mundane extreme environmental stress in family stress theories: the case of black families in white America, 6 MARRIAGE FAM. REV. 193 (1983); H.F. Meyers, *Stress, ethnicity, and social class: a model for research with black populations*, *in* MINORITY MENTAL HEALTH 118-48 (E.E. Jones & S.J. Korchin eds., Praeger 1982)).

[39] 20 U.S.C. § 1681(a) (1972).

under any program or activity receiving federal funding."[40] Finally, the Rehabilitation Act of 1973 makes it unlawful for an "otherwise qualified individual with a disability . . . [to] be excluded from the participation in, denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ."[41]

In 1999, the *Davis* Court radically altered public education by construing Title IX's "discrimination" provision[42] to provide a private right of action for student-on-student harassment.[43] Although the Supreme Court has yet to recognize a student's private right of action beyond Title IX's sexual harassment protections, a strong argument exists that a similar private right of action arises under the "discrimination" provisions of Title VI and the Rehabilitation Act.[44] The circuit courts have displayed a willingness to read a private right of action into Title VI for student-on-student racial harassment.[45]

Pursuant to *Davis*, a student-plaintiff must establish three elements to articulate a student-on-student "hostile environment harassment" claim under Title IX.[46] First, the sexual harassment must be "so severe, pervasive, and objectively offensive [that it] so undermines and detracts from the victims' educational experience."[47] Second, the school district must act with "deliberate indifference" to sexual harassment "tak[ing] place in a context subject to the school district's control."[48] Third, a school district employee must have actual knowledge of the sexual harassment.[49] The *Davis* Court specifically stressed the importance of evidence indicating education harm, noting that a "drop-off in [the victim's] grades provides necessary evidence of a potential link between [the victim's] education and [the harasser's] misconduct."[50]

In light of the "deliberate indifference" requirement, the Court noted the inherent difficultly of proving "official indifference [from] a

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[40] 42 U.S.C. § 2000d (1964).

[41] 29 U.S.C. § 794(d) (1973); *see also* Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 204 (3d Cir. 2001).

[42] Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 650 (1999) (holding "'sexual harassment' is 'discrimination' in the school context under Title IX," (citing Bennett v. Ky. Dep't of Educ., 470 U.S. 656, 665–66 (1985)).

[43] *See id.* at 650.

[44] *Saxe*, 240 F.3d at 206 n.5 ("Although [the Supreme Court has only] dealt with sexual harassment under Title IX, we believe that their reasoning applies equally to harassment on the basis of the personal characteristics enumerated in Title VI and other relevant federal anti-discrimination statutes.").

[45] *E.g.*, Monteiro v. Tempe Union High Sch. Dist., 158 F.3d 1022, 1032–33 (9th Cir. 1998); Bryant v. Indep. Sch. Dist. No. I-38, 334 F.3d 928, 930 (10th Cir. 2003).

[46] *Davis*, 526 U.S. at 650 ("We thus conclude that funding recipients are properly held liable in damages only where they are [1] deliberately indifferent to sexual harassment, [2] of which they have actual knowledge, [3] that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.").

[47] *Id.* at 651.

[48] *Id.* at 644.

[49] *Id.* at 648.

[50] *Id.* at 652.

single instance of one-on-one peer harassment."[51] Although "a single instance of one-on-one peer harassment" in isolation does not constitute a "hostile environment,"[52] such student speech may contribute to such a claim. Because isolated "instance[s] of one-on-one peer harassment" have the potential of aggregating into an actionable Title IX claim in the face of official inaction, school districts have powerful incentives to preemptively suppress such student speech to minimize liability exposure. Where a school district adopts and enforces a restrictive anti-harassment policy, proving the requisite "deliberate indifference" becomes a virtually insurmountable burden.[53] Thus, a school district enforcing such a policy simply cannot be acting with the "deliberate indifference" to sexual harassment necessary to implicate *Davis*.

In light of this reality, school districts across the country have implemented restrictive anti-harassment student speech policies to protect every student's access to a school's educational resources.[54] From the inception of such policies, critics questioned whether otherwise protected student speech could be suppressed under the guise of harassment prevention.[55] When confronted with a constitutional challenge to a student speech restriction, lower courts often struggle to apply binding Supreme Court precedent.

III. THE FREE SPEECH RIGHTS OF PUBLIC SCHOOL STUDENTS

The seminal case of student speech jurisprudence, *Tinker v. Des Moines Independent Community School District*, arose in a climate of

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[51] *Davis*, 526 at 652–53 ("Although, in theory, a single instance of sufficiently severe one-on-one peer harassment could be said to have such an effect, we think it unlikely that Congress would have thought such behavior sufficient to rise to this level in light of the inevitability of student misconduct and the amount of litigation that would be invited by entertaining claims of official indifference to a single instance of one-on-one peer harassment.").

[52] *Id.*

[53] The underlying facts of *Davis* illustrate this point. In *Davis*, the student-plaintiff articulated a recognizable claim with four pieces of evidence. First, the student-plaintiff alleged multiple acts of misconduct, including inappropriate touching and vulgar statements. *Id.* at 633. Second, although the student-plaintiff allegedly reported "each of these incidents to her mother and to her classroom teacher . . . no disciplinary action was taken" and the "conduct allegedly continued for many months." *Id.* at 633–34. Third, the student-plaintiff claimed that "the [school board] had not instructed its personnel on how to respond to peer sexual harassment and had not established a policy on the issue." *Id.* at 635. Finally, the student-plaintiff claimed that "her previously high grades allegedly dropped as she became unable to concentrate on her studies." *Id.* at 634. Had the school district adopted and enforced a restrictive anti-harassment policy, the student-plaintiff could not have presented the requisite evidence of "deliberate indifference." Thus, a school district may preemptively foreclose *any and all* exposure to *Davis* liability by adopting and enforcing a vigorous and restrictive anti-harassment policy.

[54] *See* LIPSON, *supra* note 20, at 15 (noting a significant increase in the number of students reporting "awareness of their schools' policies and materials to address sexual harassment," rising from 26% in 1993 to 69% in 2001).

[55] *See, e.g.*, David E. Bernstein, *Defending the First Amendment From Anti-Discrimination Laws*, 82 N.C. L. REV. 223 (2003).

civil unrest surrounding the Vietnam War.[56] In *Tinker*, local school officials banned black armbands in order to subvert a planned student protest.[57] Defying the ban, five students refused to remove their armbands and received suspensions.[58] In response, the *Tinker* plaintiffs filed a First Amendment suit seeking injunctive relief against the enforcement of the school board's ban.[59] Finding the ban "reasonable because it was based upon [the school's] fear of a disturbance,"[60] the district court dismissed the complaint and the Eighth Circuit affirmed.[61] Reversing both lower courts in a 7-2 decision, the *Tinker* majority articulated the default standard for student speech restrictions.[62]

Pursuant to *Tinker*, while public school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"[63] the First Amendment must be "applied in light of the special characteristics of the school environment."[64] Recognizing the need for school officials "to prescribe and control conduct in the schools,"[65] the *Tinker* Court announced two circumstances where a school may restrict otherwise protected student speech: where "States and school authorities ha[ve] reason to anticipate that the [student speech] would substantially interfere with the work of the school or impinge upon the rights of other students."[66] Perhaps anticipating the pre-textual use of "interfere[nce] with the work of the school"[67] as a basis for sustaining expansive student speech restrictions, the *Tinker* majority carefully noted that "apprehension of disturbance is not enough to overcome the right to freedom of expression."[68] In the face of a First Amendment challenge, *Tinker* requires that a defendant produce "any facts which might reasonably have led school authorities to forecast

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[56] 393 U.S. 503, 504 (1969) (describing the plaintiffs' "objections to the hostilities in Vietnam and . . . support for a truce by wearing black armbands").

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Id.* at 508. Significantly, the district court did not require a specific evidentiary showing to support the school's fear of "disturbance."

[61] *Tinker*, 393 at 504–05.

[62] *Id.*

[63] *Id.* at 506.

[64] *Id.*

[65] *Id.* at 507.

[66] Tinker, 393 at 509 (emphasis added). Although the majority opinion's vague and inconsistent language appears to posit two grounds for restricting student speech, very few courts have recognized Tinker's "rights of other students" standard as an independent justification for student speech restrictions. But cf. Barr v. LaFon, 538 F.3d 554, 568 (6th Cir. 2008) (recognizing in dicta "[u]nlike in Tinker, [the students'] free speech rights 'coll[ide] with the rights of others students to be secure and to be [let] alone'"); Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1183 (9th Cir. 2006) (upholding school's restriction of psychologically harmful student speech as constitutional under Tinker's purported "rights of other students" standard), vacated as moot, 549 U.S. 1266; Trachtman v. Anker, 563 F.2d 512 (2d Cir. 1977) (upholding school's restriction of psychologically harmful student speech as constitutional, at least in part, under Tinker's purported "rights of other students" standard). Conversely, Tinker's "substantial disruption" standard is universally recognized as a constitutional basis for restricting student speech.

[67] *Tinker*, 393 U.S. at 509.

[68] *Id.* at 508 (emphasis added).

substantial disruption of or material interference with school activities."[69] Evaluating the weight of the evidence, the Court made two significant observations. First, the Court found the school district's ex post disruption justification to be pre-textual.[70] Significantly, the official school memorandum regarding the suspension of the *Tinker* plaintiffs "made no reference to the anticipation of such disruption."[71] Second, the school's ban constituted a viewpoint-based student speech restriction that did not "prohibit the wearing of all symbols of political or controversial significance."[72] Because the school failed to carry its burden of "demonstrat[ing] facts which might reasonably have led school authorities to forecast substantial disruption," the Court found the ban unconstitutional.[73]

Lower courts have struggled to consistently apply *Tinker's* holding.[74] This uncertainty belies two important distinctions created by Justice Fortas. First, the First Amendment does not protect "actually or potentially disruptive conduct"[75] or "interference, actual or nascent, with the schools' work."[76] Although the "apprehension of disturbance is not enough to overcome the right to freedom of expression,"[77] *Tinker* does not require schools to wait until a disruption ensues before restricting student speech.[78] Second, where a student challenges a school policy on First Amendment grounds, *Tinker's* burden of proof requires that the school "demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption."[79] Although some courts construe *Tinker's* "reasonable forecast"[80] requirement as mandating the occurrence of a similar disruption before restricting certain types of speech,[81] a plain reading of *Tinker* provides for the restriction of student

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[69] *Id.* at 514.

[70] *Id.* at 509.

[71] *Id.*

[72] *Tinker*, 393 U.S. at 510. *Cf.* R.A.V. v. St. Paul, 505 U.S. 377, 391 (1992) (striking down a municipal "hate-speech" ordinance on viewpoint discrimination grounds).

[73] *Id.* at 514.

[74] *Compare* Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 212 (3d Cir. 2001) ("[I]f a school can point to a well-founded expectation of disruption—especially one based on past incidents arising out of similar speech—the restriction may pass constitutional muster."), *with* West v. Derby Unified Sch. Dist., 206 F.3d 1358, 1366 (10th Cir. 2000) (holding "where school authorities reasonably believe that a student's uncontrolled exercise of expression might 'substantially interfere with the work of the school or impinge upon the rights of other students,' they may forbid such expression" in the absence of a prior disruption, (quoting *Tinker*, 393 U.S. at 509).

[75] *Tinker*, 393 U.S. at 505–06 (emphasis added).

[76] *Id.* at 508 (emphasis added).

[77] *Id.* (emphasis added).

[78] *Id.* at 514.

[79] *Id.* at 514 (emphasis added).

[80] *Compare* Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 212 (3d Cir. 2001) *with Tinker*, 393 U.S. at 514, *and id.* at 505 (implying the First Amendment does not protect "actually *or potentially* disruptive conduct") (emphasis added).

[81] *See, e.g.*, Newsom v. Albemarle County Sch. Bd., 354 F.3d 249, 259 n.7 (4th Cir. 2003) ("In the absence of past incidents, courts have concluded that school authorities have failed to establish a sufficient likelihood of disruption to support the ban on speech."); Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243, 254 (3d Cir. 2002) (same); *Saxe*, 240 F.3d at 212; Castorina *ex rel.* Rewt v. Madison County Sch. Bd., 246 F.3d 536, 543 (6th Cir. 2001) (construing *Tinker* to require "actual

speech, irrespective of prior events, where school officials reasonably forecast a nascent or potential disruption.[82]

The Court next addressed the issue of student speech in 1986, and this ruling, *Bethel School District No. 403 v. Fraser*, articulated a far more deferential standard for the suppression of student speech.[83] In *Fraser*, the plaintiff delivered a sexually charged nomination speech to a high school assembly.[84] The school severely punished Fraser[85] in accordance with an established disruptive conduct policy,[86] and Fraser responded with a First Amendment claim seeking injunctive and monetary relief under 14 U.S.C. § 1983.[87] The district court found for *Fraser*: voiding the school's "disruptive conduct" policy as unconstitutional, providing injunctive relief, and awarding nominal damages.[88] The Ninth Circuit affirmed, finding the case "indistinguishable from the protest armband in *Tinker*."[89]

The Supreme Court reversed with a five-justice majority, noting the "marked distinction" between Fraser's sexually charged speech and the political message of the *Tinker* students.[90] In a striking break with *Tinker's* substantial disruption analysis, the *Fraser* Court first analyzed the "basic educational mission" of public education: "inculcati[ng] fundamental values necessary to the maintenance of a democratic political system."[91] Significantly, the Court recognized "these 'fundamental values' must also take into account consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students" [92] and "[t]he inculcation of these values is truly the

racially motivated violence" for a school's ban on racially divisive symbols to pass constitutional muster); *Nixon*, 383 F. Supp. 2d at 973 (construing *Tinker* to require "evidence of any history of violence or disorder in the school or any other circumstances that would justify a reasonable likelihood of disruption"); Bragg v. Swanson, 371 F. Supp. 2d 814, 826 (W.D. W. Va. 2005) (holding "[t]he starting point in the analysis is the school's history of any instances where the [student speech] disrupted the learning environment or interfered with the rights of others").

[82] *See Tinker*, 393 U.S. at 514 (requiring only a "demonstrat[ion of] any facts which *might reasonably* have led school authorities to *forecast* substantial disruption of or material interference with school activities" for a restriction to pass constitutional muster (emphasis added)).

[83] 478 U.S. 675, 685 (1986).

[84] *Id.* at 677 ("Matthew N. Fraser, a [high school student], delivered a speech nominating a fellow student for student elective office. Approximately 600 students, many of whom were 14-year-olds attended the assembly. . . . Fraser referred to his candidate in terms of an elaborate, graphic, and explicit sexual metaphor.").

[85] *Id.* at 678 (As punishment for his speech, Fraser received a three-day suspension and was "removed from the list of candidates for graduation speaker at the school's commencement exercises.").

[86] *See id.* The relevant portion of the school policy provides "[c]onduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures."

[87] *Id.* at 679.

[88] *Fraser*, 478 U.S. at 679.

[89] *Id.*

[90] *Id.* at 680.

[91] *Id.* at 680–81 (citing Ambach v. Norwick 441 U.S. 68, 76–77 (1979)). Because "[t]he determination of what manner of speech in the classroom or in school assembly . . . rests with the school board," a school may proscribe student speech inconsistent with its educational mission. *Id.* at 683.

[92] *Id.*

'work of the schools.'"[93]

Drawing upon this framework, the Court announced a categorical exception to the *Tinker* standard for "lewd, indecent, or [plainly] offensive speech and conduct."[94] Because the First Amendment does not protect student speech that "would undermine the school's basic educational mission,"[95] Chief Justice Burger proclaimed that a school may "disassociate itself" from speech "wholly inconsistent with the 'fundamental values' of public school education."[96] Balancing Fraser's free speech rights against the school's "basic educational mission,"[97] the Court found lewd, indecent, and offensive speech outside the scope of the First Amendment's protection.[98] Accordingly, the Court found the school's actions constitutional.[99]

Much uncertainty surrounds the scope of *Fraser's* holding. Although a majority of courts and commentators read *Fraser* as a narrow, categorical exception to *Tinker's* substantial disruption baseline,[100] a plausible argument exists that *Fraser* constitutes an alternative basis for restricting all student speech "inconsistent with [a school's] basic educational mission."[101] Significantly, *Fraser* provides that "[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board."[102] Accordingly, at least three circuit courts have applied *Fraser's* more deferential standard to the issue of psychologically harmful student speech.[103]

In 1988, the Supreme Court extended *Fraser's* basic educational mission analysis in *Hazelwood School District v. Kuhlmeier*, distinguishing conventional student speech from school-sponsored speech.[104] In *Hazelwood*, a school principal censored two controversial student-written articles[105] from the student newspaper pursuant to a

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[93] *Fraser*, 478 U.S. at 683 (quoting *Tinker*, 393 U.S. at 508).

[94] *Id.*

[95] *Id.* at 685.

[96] *Id.* at 685–86.

[97] *Id.* at 681.

[98] *Fraser*, 478 U.S. at 683.

[99] *Id.* at 685.

[100] *C.f.* Brandt v. Bd. of Educ. of Chicago, 480 F.3d 460, 467 (7th Cir. 2007) (finding a school's restriction of student speech constitutional in light of "the Supreme Court's admonition that 'a school need not tolerate student speech that is inconsistent with its basic educational mission'") (citations omitted); Scott v. Sch. Bd. of Alachua County, 324 F.3d 1246, 1248 (11th Cir. 2003) (accepting order from district court, which concluded that "school officials can appropriately censure students' speech" pursuant to (i) *Tinker's* "substantial disruption" analysis, or (ii) *Fraser*'s "basic educational mission" analysis); Boroff v. Van Wert City Bd. of Educ., 220 F.3d 465, 470 (6th Cir. 2000) (holding that school officials can censor student speech promoting values "patently contrary to the school's educational mission").

[101] *Brandt*, 480 F.3d at 467.

[102] *Fraser*, 478 U.S. at 683.

[103] *See Brandt*, 480 F.3d at 467; *Scott*, 324 F.3d at 1248; *Boroff*, 220 F.3d at 470.

[104] (*Hazelwood*), 484 U.S. 260, 273 (1988).

[105] *Id.* at 263 ("One of the stories described three [of the high school's] students' experiences with pregnancy; the other discussed the impact of divorce on students at the school.").

school board policy.[106] Responding to this censorship, the *Hazelwood* plaintiffs brought a First Amendment challenge.[107] Although the district court found for the school,[108] the Eighth Circuit reversed pursuant to *Tinker's* substantial disruption analysis.[109] The *Hazelwood* Court reversed, articulating a second categorical exception to *Tinker* for "school-sponsored" student speech.[110]

Distinguishing *Tinker's* requirement of substantial disruption,[111] the *Hazelwood* Court affirmed *Fraser's* sweeping language and deferential balancing standard.[112] The Court employed a two-step analysis,[113] which recognized that a school may restrict student speech "inconsistent with its 'basic educational mission' even though the government could not censor similar speech outside the school."[114] First, the Court asked whether the school newspaper "may appropriately be characterized as a forum for public expression."[115] Finding the school newspaper to be a non-public forum,[116] the Court held "school officials may impose reasonable restrictions on the speech of students" when it "bears the imprimatur of the school."[117] Second, the Court asked "whether the First Amendment requires a school affirmatively to promote particular student speech."[118] Distinguishing *Tinker*,[119] the Court held that a school may regulate "student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical

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[106] *Id.* at 268–69. The relevant policy gave school officials editorial discretion over student articles not "within the rules of responsible journalism . . . ." *Id.* at 269.

[107] Kuhlmeier v. Hazelwood Sch. Dist., 607 F. Supp. 1450 (E.D. Mo. 1985), *rev'd*, 795 F.2d 1368 (8th Cir. 1986), *rev'd*, 484 U.S. 260 (1988).

[108] *Id.* at 1467.

[109] Kuhlmeier v. Hazelwood Sch. Dist., 795 F.2d 1368, 1370 (8th Cir. 1986), *rev'd*, 484 U.S. 260 (1988).

[110] *See Hazelwood*, 484 U.S. at 273 (holding that a school may restrict "student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns").

[111] *Id.* at 266 (recognizing that student speech may be restricted where "school authorities have reason to believe that such expression will 'substantially interfere with the work of the school or impinge upon the rights of other students'") (quoting *Tinker*, 393 U.S. at 509).

[112] See id. at 266–67. The Hazelwood Court recognized that (i) a school may restrict student speech "inconsistent with its 'basic educational mission,' even though the government could not censor similar speech outside the school," (ii) a school may "disassociate itself" from student speech "wholly inconsistent with the 'fundamental values' of public school education," and (iii) "'the determination of what manner of speech in the classroom . . . is inappropriate properly rests with the school board,' rather than with the federal courts." Id. (citations omitted).

[113] *Id.* at 267–73.

[114] *Hazelwood*, 484 U.S. at 266 (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986)).

[115] *Id.* at 267.

[116] *Id.* at 269–70. Because (i) school facilities constitute "public forums only if school authorities have 'by policy or by practice' opened those facilities 'for indiscriminate use by the general public,'" and (ii) a school board policy vested editorial discretion over the newspaper in the principal, the Court concluded that "no public forum has been created, and school officials may impose reasonable restrictions on the speech of students. . . ." *Id.* at 267–71.

[117] *Id.* at 267, 271.

[118] *Id.* at 270–71.

[119] *Hazelwood*, 484 U.S. at 270–71 ("The question whether the First Amendment requires a school to tolerate particular student speech . . . is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech.").

concerns."[120] Applying this standard to the facts, the Court found the school's actions consistent with "legitimate pedagogical concerns" and, therefore, constitutional.[121] Due to the Court's imprecise language and two-step analysis, courts and commentators have debated the scope of *Hazelwood's* holding for two decades.[122]

In 2007, a divided Court returned to the issue of student speech in *Morse v. Frederick*,[123] which created yet another categorical exception to *Tinker's* substantial disruption analysis. In *Morse*, a high school student unfurled a banner reading "BONG HiTS 4 JESUS"[124] at "a school-sanctioned and school-supervised event."[125] Pursuant to a school board policy prohibiting "expression that . . . advocates the use of substances that are illegal to minors,"[126] the school's principal "demanded that the banner be taken down."[127] When Frederick refused, the principal "confiscated the banner" and suspended Frederick for ten days.[128] Frederick filed a First Amendment challenge, and the district court granted summary judgment in favor of the school.[129] The Ninth Circuit reversed, finding the principal's actions inconsistent with *Tinker's* substantial disruption analysis and rejecting her qualified immunity defense.[130]

After determining that *Morse* was a school speech case"[131] the Court generally affirmed *Tinker* and *Fraser*[132] as controlling precedent.[133] However, the *Morse* Court abandoned the "basic educational mission" rationale employed in both *Fraser* and *Hazelwood*.[134] Instead, the *Morse* Court "distilled" two narrow

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[120] *Id.* at 273.

[121] *Id.*

[122] *See infra* note 148, *see also* Brannon P. Denning & Molly C. Taylor, *Morse v. Frederick and the Regulation of Student Cyberspeech*, 35 HASTINGS CONST. L.Q. 835, 838 (2008).

[123] 551 U.S. 393 (2007).

[124] *Id.* at 397.

[125] *Id.* at 396. Despite Frederick's argument that the *Tinker*, *Fraser*, and *Hazelwood* analyses were inapplicable to off-campus student speech, the Court abruptly concluded "we reject Frederick's argument that this is not a school speech case . . . ." *Id.* at 400.

[126] *See id.* at 398.

[127] *Id.*

[128] *Morse*, 551 U.S. at 398.

[129] *Id.* at 399.

[130] Frederick v. Morse, 439 F.3d 1114,1121–23, 1125 (9th Cir. 2006), *rev'd*, 551 U.S. 393 (2007).

[131] *Morse*, 551 U.S. at 400 (rejecting Frederick's assertion that student speech jurisprudence does not control off-campus student speech).

[132] It should be noted that the *Morse* majority declined to extend *Fraser*'s "plainly 'offensive'" language to "encompass any speech that could fit under some definition of 'offensive.'" *Id.* at 409.

[133] See id. at 403–05. Despite labeling the case as "instructive," the Morse Court explicitly held "[Hazelwood] does not control this case because no one would reasonably believe that Frederick's banner bore the school's imprimatur." Id. at 405.

[134] *Compare id.* at 404–05 (refusing to endorse *Fraser*'s "educational mission" analysis, instead distilling two limited principals necessary for resolution), *with Hazelwood*, 484 U.S. at 266–67 (recognizing that (i) a school may restrict student speech "inconsistent with its 'basic educational mission,' even though the government could not censor similar speech outside the school," (ii) a school may "disassociate itself" from student speech "wholly inconsistent with the 'fundamental values' of public school education," and "'the determination of what manner of speech in the classroom . . . is inappropriate properly rests with the school board,' rather than with the federal

principles from *Fraser*.[135] First, it held that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults"[136] and should be applied "in light of the special characteristics of the school environment."[137] Second, it held that "the mode of analysis set forth in *Tinker* is not absolute."[138] Building on this framework, the Court noted the compelling[139] "governmental interest in stopping student drug abuse"[140] and cited the harmful "physical, psychological, and addictive effects of drugs."[141] Accordingly, the majority announced a third categorical exception to *Tinker*: "The 'special characteristics of the school environment,' and the governmental interest in stopping student drug abuse . . . allow schools to restrict student expression that they reasonably regard as promoting illegal drug use."[142] Concluding that Frederick's message could be reasonably construed as promoting drug use,[143] the Court found the school's actions constitutional.[144]

Although Justice Alito joined the *Morse* majority, he provided a strongly-worded concurring opinion of debatable importance.[145] Attempting to narrow the scope of the majority's holding, Justice Alito wrote, "I join the opinion of the Court on the understanding that the opinion does not hold that the special characteristics of the public schools necessarily justify any other speech restrictions."[146] Although the *Morse* majority merely rejected reading *Fraser* "to encompass any speech that could fit under some definition of 'offensive,'"[147] Justice

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courts") (quoting Bethel Sch. Dist. No. 403 v. Fraser , 478 U.S. 675, 683, 685–686 (1986)).

[135] *See Morse*, 551 U.S. at 404–05 ("We need not resolve [the basic educational mission] debate to decide this case. For present purposes, it is enough to distill from *Fraser* two basic principles.")

[136] *Id.* at 404 (quoting *Fraser*, 478 U.S. at 682).

[137] *Id.* at 405 (quoting *Tinker*, 393 U.S. at 506).

[138] *Id.* ("Whatever approach *Fraser* employed, it certainly did not conduct the 'substantial disruption' analysis prescribed by *Tinker*.") (citing *Tinker*, 393 U.S. at 514).

[139] *Id.* at 407 (taking notice of prior Supreme Court jurisprudence and recognizing "that deterring drug use by schoolchildren is an 'important—indeed, perhaps compelling' interest") (quotingVernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 661 (1995)).

[140] *Morse*, 551 U.S. at 408.

[141] *Id.* at 407 As justification for the compelling governmental interest, the *Morse* Court observed (i) "Congress has declared that part of a school's job is educating students about the dangers of illegal drug use" and (ii) "[t]housands of school boards . . . have adopted policies aimed at effectuating this message." *Id.* at 408.

[142] *Id.* at 408.

[143] *Id.* at 410 (finding "Principal Morse thought the banner would be interpreted by those viewing it as promoting illegal drug use, and that interpretation is plainly a reasonable one").

[144] *Id.*

[145] *Compare* Ponce v. Socorro Indep. Sch. Dist., 508 F.3d 765, 768 (5th Cir. 2007) (construing Justice Alito's concurrence to be the "controlling" opinion of *Morse* because Justice Alito articulated the narrowest holding of a member of the five Justice majority), *with* Nuxoll v. Indian Prairie Sch. Dist. No. 204, 523 F.3d 668, 672–73 (7th Cir. 2008) (construing Justice Roberts majority opinion to be the controlling opinion of *Morse* because five justices "joined the majority opinion, not just the decision").

[146] *Morse*, 551 U.S. at 423 (Alito, J., concurring).

[147] *Id.* at 409. ("Petitioners urge us to adopt the broader rule that [student] speech is proscribable because it is plainly 'offensive' as that term is used in *Fraser*. We think this stretches *Fraser* too far; that case should not be read to encompass any speech that could fit under some definition of 'offensive.'") (citations omitted).

Alito discarded outright the notion that "public school officials [may] censor any student speech that interferes with a school's 'educational mission.'"[148] Because a school's "educational mission" is determined by the political motivations of an elected school board, Justice Alito feared such a rule "would give public school authorities a license to suppress speech on political and social issues . . . strik[ing] at the very heart of the First Amendment."[149]

Beyond affirming *Tinker's* substantial disruption analysis as the baseline standard for evaluating student speech restrictions, the ultimate ramifications of *Morse* are difficult to predict with certainty. Perhaps inadvertently, the *Morse* Court's analysis established a logical framework for future expansion.[150] Reasoning by analogy, a plausible argument exists that the underlying rationale behind *Morse*, protecting the physical and psychological well-being of students while they are at school, justifies the creation of additional categorical exceptions where it can be proven that certain speech poses as much of a threat as drug-related speech. Following this rationale, the Fifth Circuit established a novel categorical exception for "speech that gravely and uniquely threatens violence. . . ."[151]

In *Ponce v. Socorro Independent School District*, the Fifth Circuit expanded the scope of *Morse* by analogizing the harm presented by illegal drug use with that of imminent physical violence.[152] According to the *Ponce* court, *Morse* stands for the proposition that when particular student speech implicates a "compelling interest,"[153] it "is per se unprotected [from First Amendment protection] because of the scope of the harm it potentially foments."[154] Because the court found the prevention of imminent physical violence to be a compelling governmental interest, speech implicating that activity "may be prohibited by school administrators with little further inquiry."[155] Upon this analytical foundation, the *Ponce* court announced a categorical exception for student "speech that gravely and uniquely threatens violence, including massive deaths, to the school population as a

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[148] *Id. But cf.* Brandt v. Bd. of Educ. of Chicago, 480 F.3d 460, 467 (7th Cir. 2007) (upholding the constitutionality of school district's restriction of student speech that was "inconsistent with its 'basic educational mission.'" (citing *Hazelwood*, 484 U.S. at 266)); Scott v. Sch. Bd. of Alachua County, 324 F.3d 1246, 1248–49 (11th Cir. 2003) (construing *Fraser* to allow for the restriction of non-disruptive student speech inconsistent with a school district's basic educational mission); Boroff v. Van Wert City Bd. of Educ., 220 F.3d 465, 470 (6th Cir. 2000) (holding where particular student speech is "so patently contrary to the school's educational mission, the [s]chool has the authority" to prohibit that student speech).

[149] *Morse*, 551 U.S. at 423 (Alito, J., concurring).

[150] *See infra* notes 151–70.

[151] Ponce v. Socorro Indep. Sch. Dist., 508 F.3d 765, 772 (5th Cir. 2007).

[152] *Id.* at 771–72 (citing *Morse*, 551 U.S. at 425).

[153] *Id.* at 769; *see also Morse*, 551 U.S. at 407 (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 661 (1995)).

[154] *Ponce*, 508 F.3d at 769.

[155] *Id.*

whole."[156]

The *Ponce* court's reasoning may be applied with equal resonance to the issue of harassing student speech. In *Morse*, the majority apparently declined to apply *Tinker's* substantial disruption analysis in light of a school's "important—indeed, perhaps compelling" interest in deterring drug use by schoolchildren.[157] The *Morse* Court cited three pieces of evidence in declaring the deterrence of student drug use to be a compelling governmental interest.

First, the *Morse* Court cited precedent indicating that "[s]chool years are the time when the physical, psychological, and addictive effects of drugs are most severe."[158] Similarly, peer-reviewed medical research indicates that homosexual "[m]en younger than 21 years of age may be at higher risk [of anti-gay harassment, discrimination, and physical violence] for a number of reasons" including a lack of "independence and control over their lives" and the fact "that perpetrators of anti-gay violence tend to be younger themselves, and thus young men may be targeted more frequently because their peers are more likely to be perpetrators."[159] Accordingly, both drug use and peer harassment pose a substantial threat to educational development. Second, the *Morse* Court observed, "Congress has declared that part of a school's job is educating students about the dangers of illegal drug use."[160] Similarly, through Title VI and Title IX, Congress has prohibited "discrimination" in public schools receiving "federal financial assistance"[161] and the Supreme Court has "determined that 'sexual harassment' is 'discrimination' in the school context under Title IX."[162] Thus, both drug use and peer harassment implicate a national regulatory program. Third, the *Morse* Court noted with approval that "[t]housands of school boards throughout the country . . . have adopted policies aimed at effectuating this message [of educating students about the dangers of illegal drug use]."[163] Again, empirical evidence shows a dramatic rise in the number of school districts "hav[ing] adopted policies aimed at effectuating"[164] the message of harassment prevention.[165]

Because harassing student speech arguably poses as much of a threat as drug-related student speech, a plausible argument exists for excluding harassing student speech from First Amendment protection.

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[156] *Id.* at 771–72.

[157] *Morse*, 551 U.S. at 407.

[158] *Id.*

[159] *See* Huebner, *supra* note 30 at 1202.

[160] *Morse*, 551 U.S. at 408.

[161] *See supra* notes 39–41.

[162] Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 650 (1999) ("Having previously determined that 'sexual harassment' is 'discrimination' in the school context under Title IX, we are constrained to conclude that student-on-student harassment, if sufficiently severe, can likewise rise to the level of discrimination actionable under the statute.").

[163] *Morse*, 551 U.S. at 408.

[164] *Id.*

[165] *See* LIPSON, *supra* note 20, at 4.

The *Morse* Court's underlying logic appears to implicate harassing student speech: "The 'special characteristics of the school environment,' and the governmental interest in stopping student drug abuse (student-on-student harassment)—reflected in the policies of Congress and myriad school boards . . . —allow schools to restrict student expression that they reasonably regard as promoting illegal drug use [constituting peer harassment]."[166] The Supreme Court has previously recognized: (i)"the State's compelling interest in eliminating discrimination against women,"[167] (ii) that "'sexual harassment' is 'discrimination' in the school context under Title IX,"[168] and (iii) that the presence of a compelling governmental interest renders specific student speech beyond the scope of First Amendment protection.[169] Thus existing precedent may plausibly be synthesized to establish an additional categorical exception for sexually harassing student speech.[170] However, until the

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[166] *Morse*, 551 U.S. at 408 (emphasis added) (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)).

[167] See, e.g., Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 549 (1987) ("Even if the [challenged statute] does work some slight infringement on [plaintiffs'] right of expressive association, that infringement is justified because it serves the State's compelling interest in eliminating discrimination against women.") (emphasis added) (citations omitted); Roberts v. U.S. Jaycees, 468 U.S. 609, 623–24 (1984) ("We are persuaded that Minnesota's compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to the Jaycees may have on the male members' associational freedoms. . . . That goal, which is unrelated to the suppression of expression, plainly serves compelling state interests of the highest order.") (emphasis added). It should be noted that the "compelling interest in eradicating discrimination" recognized in the aforementioned cases arose in the context of state law anti-discrimination statutes, not Title IX. Additionally, the compelling interest is limited to the context of gender-based discrimination. However, even Justice Alito concedes that "preventing discrimination in the workplace—and in the schools—is not only a legitimate, but a compelling, government interest." Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 209 (3d Cir. 2001) (emphasis added) (citations omitted).

[168] Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 650 (1999) ("Having previously determined that 'sexual harassment' is 'discrimination' in the school context under Title IX, we are constrained to conclude that student-on-student sexual harassment, if sufficiently severe, can likewise rise to the level of discrimination actionable under the statute.").

[169] *See Morse*, 551 U.S. at 407–08 (declining to apply *Tinker*'s substantial disruption analysis because "deterring drug use by schoolchildren is an 'important—indeed, perhaps compelling' interest") (quoting Vernonia Sch. Dist. 475 v. Acton, 515 U.S. 646, 661 (1995)); *see also* Ponce v. Socorro Indep. Sch. Dist., 508 F.3d 765, 769 (5th Cir. 2007) ("To the extent that preventing a harmful activity may be classified as an 'important—indeed, perhaps compelling interest,' speech advocating that activity may be prohibited by school administrators with little further inquiry.") (quoting *Vernonia*, 515 U.S. at 661).

[170] A plausible argument exists that the combined holdings of *Roberts*, *Davis*, and *Morse* synthesize to produce a categorical exception for sexually harassing student speech. *See supra*, notes 175–77. In *Roberts*, the Court recognized a State's "compelling interest in eradicating discrimination against its female citizens." *Roberts*, 468 U.S. at 623. In *Davis*, the Court held that "sexual harassment is discrimination in the school context under Title IX." 526 U.S. at 649–50. Thus, an argument exists that *Roberts* and *Davis* recognize a school's compelling interest in eradicating sexual harassment. In *Morse*, the Court declined to apply *Tinker*'s substantial disruption analysis because "deterring drug use by schoolchildren is an 'important—indeed, perhaps compelling' interest." *Morse*, 551 U.S. at 407 (quoting *Vernonia*, 515 U.S. at 661). At least one circuit court has construed *Morse* to require that where "preventing a harmful activity may be classified as an 'important—indeed, perhaps compelling interest,' speech advocating that activity may be prohibited by school administrators with little further inquiry." Ponce v. Socorro Indep. Sch. Dist., 508 F.3d 765, 769 (quoting *Vernonia*, 515 U.S. 646). Thus, if *Morse* renders particularly harmful student speech unprotected in the presence of a compelling governmental interest; and *Roberts* and *Davis* recognize a school's compelling interest in eliminating sexual harassment against women; then a plausible argument

Supreme Court expands the scope of *Morse* to provide additional categorical exceptions, *Tinker's* substantial disruption analysis will determine the constitutionality of a given student speech policy.

Although the legal principles established by the Supreme Court in *Tinker*, *Fraser*, *Hazelwood*, and *Morse* govern psychologically harmful student speech, lower courts have struggled to coalesce these principles into a cohesive framework. While *Morse* did resolve some disputes at the circuit level, significant questions remain unanswered. First, does *Tinker* require a prior disruption before the restriction of student speech?[171] Second, how many students must be affected for student speech to constitute a substantial disruption? Third, does *Tinker* allow for student speech restrictions based upon "the rights of other students?"[172] Finally, may *Morse's* reasoning be extended by analogy to create additional categorical exceptions?[173] The circuit courts have provided conflicting answers to each of these questions.

IV. PSYCHOLOGICALLY HARMFUL STUDENT SPEECH POLICIES: THE DEBATE IN THE COURTS

Although lower courts universally recognize *Tinker* and its progeny as the controlling student speech precedent, lower courts have adopted divergent interpretations of each holding's scope, which has resulted in contradictory rulings on substantively identical school board policies.[174] The vast majority of lower courts apply a tripartite construction of student speech jurisprudence, under which all student speech falling outside the narrow exceptions articulated in *Fraser*, *Hazelwood*, and

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exists that sexually harassing student speech directed at women is excluded from First Amendment protection.

[171] *Compare Saxe*, 240 F.3d at 212 ("[I]f a school can point to a well-founded expectation of disruption—especially one based on past incidents arising out of similar speech—the restriction may pass constitutional muster."), *with* West v. Derby Unified Sch. Dist., 206 F.3d 1358, 1366 (10th Cir. 2000) (holding "where school authorities reasonably believe that a student's uncontrolled exercise of expression might 'substantially interfere with the work of the school or impinge upon the rights of other students,' they may forbid such expression" in the absence of a prior disruption) (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969)).

[172] *Compare* Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1178 (9th Cir. 2006) ("As *Tinker* clearly states, students have the right to 'be secure and to be let alone.' Being secure involves not only freedom from physical assaults but from psychological attacks that cause young people to question their self-worth and their rightful place in society." (quoting *Tinker*, 393 U.S. at 508)), *vacated as moot*, 549 U.S. 1266 (2007), *with* Kuhlmeier v. Hazelwood Sch. Dist., 795 F.2d 1368, 1376 (8th Cir. 1986), *rev'd on other grounds*, 484 U.S. 260 (1988) ("[S]chool officials are justified in limiting student speech, under [*Tinker*'s 'rights of other students'] standard, only when [that student] speech could result in tort liability for the school.")

[173] *Ponce*, 508 F.3d at 769 ("To the extent that preventing a harmful activity may be classified as an 'important—indeed, perhaps compelling interest,' speech advocating that activity may be prohibited by administrators with little further inquiry.") (quoting *Vernonia*, 515 U.S. at 661); *see also Morse*, 551 U.S. at 407–08 (declining to apply *Tinker*'s substantial disruption analysis because "deterring drug use by schoolchildren is an 'important—indeed, perhaps compelling' interest") (quoting *Vernonia*, 515 U.S. at 661).

[174] *See* discussion *infra* Part IV.

Morse is governed by *Tinker's* substantial disruption analysis.[175] Under this approach, a school district policy regulating psychologically harmful student speech must satisfy *Tinker's* substantial disruption requirement to pass constitutional muster.[176] However, a circuit split exists regarding the scope of *Tinker's* "reasonable forecast of substantial disruption" burden of proof.[177] On the fringe of the debate, the Ninth Circuit has applied an unorthodox construction of *Tinker* to the issue of psychologically harmful student speech, providing for the restriction of student speech that "invades the rights of other students."[178]

A. Policy Must Satisfy *Tinker's* "Substantial Disruption" Analysis

Despite broad recognition of *Tinker's* substantial disruption analysis as the default standard governing student speech codes, a circuit split exists regarding what quantum of evidence satisfies *Tinker's* required burden of proof.[179] On one hand, the Third,[180] Fourth,[181] and Eleventh[182] Circuits require "a well-founded expectation of disruption . .

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[175] *See, e.g.*, Chandler v. McMinnville Sch. Dist., 978 F.2d 524, 529 (9th Cir. 1992) ("We have discerned three distinct areas of student speech from the Supreme Court's school precedents: (1) vulgar, lewd, obscene, and plainly offensive speech [governed by *Fraser*], (2) school-sponsored speech [governed by *Hazelwood*], and (3) speech that falls into neither of these categories [governed by *Tinker*]."); *see also* Denning & Taylor, *supra* note 15, at 838-42.

[176] *See Saxe*, 240 F.3d at 216 (Holding that because "the Policy, even narrowly read, prohibits a substantial amount of non-vulgar, non-sponsored student speech. . . . [The school] must therefore satisfy the *Tinker* test . . . .").

[177] *Compare id.* at 212 ("[I]f a school can point to a well-founded expectation of disruption—especially one based on past incidents arising out of similar speech—the restriction may pass constitutional muster."), *with* West v. Derby Unified Sch. Dist., 206 F.3d 1358, 1366 (10th Cir. 2000) (holding "where school authorities reasonably believe that a student's uncontrolled exercise of expression might 'substantially interfere with the work of the school or impinge upon the rights of other students,' they may forbid such expression" even in the absence of a prior disruption) (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969)).

[178] *See* Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1178 (9th Cir. 2006) ("As *Tinker* clearly states, students have the right to 'be secure and to be let alone.' Being secure involves not only freedom from physical assaults but from psychological attacks that cause young people to question their self-worth and their rightful place in society.") (quoting *Tinker*, 393 U.S. at 508), *vacated as moot*, 549 U.S. 1266 (2007).

[179] *See Tinker*, 393 U.S. at 514 (suggesting that a school district's burden of proof requires "demonstrat[ing] any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities").

[180] *See Saxe*, 240 F.3d at 212 ("[I]f a school can point to a well-founded expectation of disruption—especially one based on past incidents arising out of similar speech—the restriction may pass constitutional muster"); *see also* Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243, 254–55 (3d Cir. 2002) (same).

[181] *See* Newsom v. Albemarle County Sch. Bd., 354 F.3d 249, 255 (4th Cir. 2003) (holding "if a school can point to a well-founded expectation of disruption—especially one based on past incidents arising out of similar speech—the restriction may pass constitutional muster") (quoting *Saxe*, 240 F.3d at 212).

[182] *See* Heinkel v. Sch. Bd. of Lee County, Fla., 194 Fed. App'x 604, 608 (2006) (striking down "content restriction unsupported by a reasonable belief of the School Board that all such expression would create substantial disruption") (unpublished opinion); *see also* Holloman v. Harland, 370 F.3d 1252, 1273 (11th Cir. 2004) (construing *Tinker* to require "a real or substantial threat of actual

. based on past incidents arising out of similar speech" for a speech restriction to survive a facial challenge.[183] Conversely, the Seventh[184] and Tenth[185] Circuits require a mere "reasonabl[e] belie[f] that a student's uncontrolled exercise of expression might 'substantially interfere with the work of the school'" for a speech restriction to pass constitutional muster.[186] In determining the validity of a given school board policy, a court's construction of *Tinker's* "reasonable forecast" is often dispositive.

B. "Reasonable Forecast" Requires a Prior Disruption Involving Similar Speech

In 2001, the Third Circuit questioned the constitutionality of preemptive student speech restrictions in *Saxe*, reversing the lower court and striking down a school district's anti-harassment policy as "facially unconstitutional under the First Amendment's free speech clause."[187] The policy at issue prohibited "verbal or physical conduct . . . which has the purpose or effect of . . . creating an intimidating, hostile or offensive environment"[188] and applied to "harassment of a student by a member of the school community."[189] Re-characterizing *Tinker's* burden of proof variously as "a well-founded expectation of disruption—especially one based on past incidents arising out of similar speech"[190] and "a specific and significant fear of disruption,"[191] the court took issue with the policy's language "creating an intimidating, hostile, or offensive environment."[192] The court found the policy unconstitutionally overbroad[193] for three reasons. First, the court found that the school district failed to "provide any particularized reason as to why it anticipates substantial disruption from the broad swath of student

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disorder, as opposed to the mere possibility of one").

[183] *See Saxe*, 240 F.3d at 212–15.

[184] *See* Nuxoll v. Indian Prairie Sch. Dist. No. 204, 523 F.3d 668, 673 (7th Cir. 2008) (rejecting overbreadth challenge where school district presented "facts which might reasonably lead school officials to forecast substantial disruption" in the absence of a prior disruption).

[185] *See* West v. Derby Unified Sch. Dist., 206 F.3d 1358, 1366 (10th Cir. 2000) (holding "where school authorities reasonably believe that a student's uncontrolled exercise of expression might 'substantially interfere with the work of the school or impinge upon the rights of other students,' they may forbid such expression" even in the absence of a prior disruption) (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969)).

[186] *See id.* (emphasis added).

[187] 240 F.3d 200 at 202–03 (3d Cir. 2001).

[188] *Id.* at 202.

[189] *Id.* at 203.

[190] *Id.* at 212.

[191] *Saxe*, 240 F.3d at 211.

[192] *Id.* at 216.

[193] *See id.* at 217 (concluding the anti-harassment policy covers "substantially more speech than could be prohibited under *Tinker*'s substantial disruption test. Accordingly, we hold that the Policy is unconstitutionally overbroad.").

speech."[194] Further, it found that the policy "ignores *Tinker's* requirement that a school must reasonably believe that speech will cause actual, material disruption before prohibiting it."[195] Finally, then-Judge Alito noted that the policy is not "susceptible to a reasonable limiting construction."[196]

In 2002, a different panel of the Third Circuit affirmed *Saxe's* heightened "reasonable forecast" requirement in *Sypniewski v. Warren Hills Regional Board of Education*,[197] striking down in part a school district's racial harassment policy[198] where there was "substantial evidence of prior disruption."[199] Affirming *Saxe*, the court construed *Tinker's* burden of proof to require "a particular and concrete basis for concluding that the association is strong enough to give rise to well-founded fear of genuine disruption in the form of substantially interfering with school operations . . . ."[200] Applying *Saxe's* heightened "reasonable forecast" standard, the court held that "[t]he history of racial difficulties in [the school district] provides a substantial basis for legitimately fearing disruption from the kind of speech prohibited by the policy."[201] However, "[i]n the absence of such a history, the fear of disruption is likely to be no more than 'undifferentiated fear or apprehension of disturbance.'"[202] Despite this history, the *Sypniewski* court took issue with the policy's prohibition of student speech "that creates ill will,"[203] striking the provision down as "facially overbroad."[204] Subsequent Third

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[194] *Id.* Although the school district argued that "it has an interest in avoiding liability for harassment under *Franklin* and *Davis*," then-Judge Alito rejected this notion "because the Policy prohibits substantially more conduct than would give rise to liability under these cases, this justification is unavailing." *Id.*

[195] *Id.* at 217. *But cf.* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505 (1969) (allowing for the restriction of "actually *or potentially* disruptive conduct") (emphasis added).

[196] *Saxe*, 240 F.3d at 215 (noting "the elementary rule that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality," the court ultimately found the policy incapable of such a narrowing construction). *Id.* at 215–17 (quoting Stretton v. Disciplinary Bd. of the Sup. Ct. of Pa., 944 F.2d 137, 144 (3d Cir. 1991).

[197] 307 F.3d 243 (3d Cir. 2002).

[198] The racial harassment policy provided in pertinent part: "District employees and students shall not at school . . . wear or have in their possession any written material, either printed or in their own handwriting, that is racially divisive *or creates ill will* or hatred." *Id.* at 264 (emphasis added).

[199] *Id.* at 254. "[T]he history of racial hostility demonstrates the policy was intended to address a particular and concrete set of problems involving genuine disruption." *Id.* at 262.

[200] *Id.* at 257.

[201] *Id.* at 262 (distinguishing *Sypniewski* from *Saxe* on the basis of prior racial hostilities).

[202] *Sypniewski*, 307 F.3d at 262. (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969)). The Third Circuit was careful to point out "the background of turmoil at a particular place and a particular time means that the policy would likely be unconstitutional in another school district . . . ." *Id.* at 265.

[203] *See id.* at 264–65. Although upholding the facial validity of the school district's racial harassment policy, the *Sypniewski* court singled out the racial harassment policy's subjective "ill will" provision, concluding that "protecting expression that gives rise to ill will—and nothing more—is at the core of the First Amendment." *Id.* at 265. Accordingly, the court held, "That part of the policy directed at material that 'creates ill will' is unconstitutional." *Id.*

[204] *Id.* at 258 (holding that "one provision [causing 'ill will'] creates an overbreadth problem of sufficient magnitude that it must be stricken from the policy"). Unlike other portions of the policy, the Third Circuit found this provision of the district's policy incapable of a limiting construction, and therefore facially overbroad. *Id.* at 265–66.

Circuit precedent affirms the notion that some 'harassing' speech might warrant First Amendment protection."[205]

Persuaded by then-Judge Alito's analysis, at least two other circuit courts have followed the Third Circuit's lead in striking down student conduct policies on overbreadth grounds.[206] In 2002, the Fourth Circuit adopted *Saxe's* heightened "reasonable forecast" burden of proof in *Newsom v. Albemarle* and enjoined the enforcement of a school district's dress code policy prohibiting "messages on clothing, jewelry, and personal belongings that relate to . . . weapons."[207] Adopting *Saxe's* "well-founded expectation of disruption" standard,[208] the Fourth Circuit found that "there simply is no evidence suggesting that clothing containing messages related to weapons . . . ever substantially disrupted school operations."[209] Accordingly, the court held that "[the plaintiff] has demonstrated a strong likelihood of success on the merits on his overbreadth claim."[210]

Similarly, in 2006, the Eleventh Circuit employed the overbreadth doctrine in *Heinkel v. School Board of Lee County*,[211] striking down a school district's policy prohibiting the distribution of religious materials on school premises.[212] According to the Eleventh Circuit, the absence of a prior disruption involving similar speech renders a speech restriction facially unconstitutional because it is "unsupported by a reasonable belief of the School Board that all such expression would create substantial disruption."[213] District courts within the Third, Fourth, and Eleventh Circuits have displayed a willingness to strike down school

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[205] *E.g.*, DeJohn v. Temple Univ., 537 F.3d 301, 317 (3d Cir. 2008) (finding a university's anti-harassment policy, with substantively identical language to the policy at issue in *Saxe*, facially overbroad).

[206] *E.g.*, Newsom v. Albemarle County Sch. Bd., 354 F.3d 249, 260 (4th Cir. 2003) (granting preliminary injunction against enforcement of school district policy where plaintiff "demonstrated a strong likelihood of success on the merits on his overbreadth claim"); Heinkel v. Sch. Bd. of Lee County, Fla., 194 Fed. App'x 604, 608–09 (11th Cir. 2006) (striking down a school district policy prohibiting "all religious and political symbols" as facially unconstitutional).

[207] 354 F.3d 249, 252 (4th Cir. 2003).

[208] *Id.*

[209] *Id.* at 259 n.7.

[210] *Id.* at 260.

[211] 194 Fed. App'x 604 (11th Cir. 2006). Although *Heinkel* lacks precedential value as an unpublished opinion, the Eleventh Circuit employs a legal standard similar to *Saxe*'s "well-founded expectation of disruption" requirement. Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 212 (3d Cir. 2001). Ruling on an as-applied challenge in *Holloman v. Harland*, the Eleventh Circuit articulated an extremely narrow construction of *Tinker*'s substantial disruption standard, holding that school officials may not preemptively restrict student speech causing a "*de minimis*, insubstantial impact on classroom decorum." 370 F.3d 1252, 1271–73 (11th Cir. 2004). In light of *Holloman*'s de minimis disruption analysis, coupled with *Heinkel*'s persuasive value, school districts within the Eleventh Circuit face the threat of a potential overbreadth challenge.

[212] *Heinkel*, 194 Fed. App'x at 609 (sustaining a facial challenge to the policy as a prior restraint on free speech and because of the significant risk of arbitrary censorship).

[213] *Id.* at 608–09 (finding the school district's ban on religious and political symbols "a prior restraint on speech that is unconstitutional"). Although the *Heinkel* court applied *Tinker*'s substantial disruption analysis to the school-sponsored speech at issue, a strong argument exists that the facts of *Heinkel* mandate the application of *Hazelwood*'s more deferential "legitimate pedagogical concerns" public-forum analysis.

board policies on First Amendment grounds.[214]

Thus, the Third, Fourth, and Eleventh Circuits employ a heightened "reasonable forecast" analysis in determining the facial validity of a school district's anti-harassment policy. Where a school district fails to present facts showing a "well-founded expectation of disruption" based on prior disruptions involving the prohibited speech, a anti-harassment policy faces the very real threat of a successful overbreadth challenge.

C. "Reasonable Forecast" Does Not Require a Prior Disruption Involving Similar Speech

In 2000, the Tenth Circuit articulated a different rationale in *West v. Derby Unified School District No. 260*, upholding a school district's racial harassment policy in the face of an overbreadth challenge.[215] Responding to a history of racial altercations that were generally unrelated to the Confederate flag,[216] the school district adopted a policy prohibiting student speech and clothing "that is racially divisive or creates ill will or hatred," including the Confederate flag.[217] Rejecting "any notion that the Constitution requires a finding of an intent to harass or intimidate" before a school may preemptively suppress student speech,[218] the court found *Tinker's* substantial disruption standard controlling.[219] Faithfully applying *Tinker's* burden of proof to permit student speech restrictions "where school authorities reasonably believe that a student's uncontrolled exercise of expression might [cause substantial interference],"[220] the court found the absence of a prior disruption involving the flag irrelevant.[221] Because *Tinker* endowed "[t]he district [with] the power to act to prevent problems before they occurred[,] it was not limited to prohibiting and punishing conduct only

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[214] *E.g.*, Miller v. Penn Manor Sch. Dist., 588 F. Supp. 2d 606, 625–28 (E.D. Pa. 2008) (striking down provision of school district policy prohibiting "anything that is a distraction to the education environment" as "substantially overbroad"); Gillman v. Sch. Bd. for Holmes County, Fla., 567 F. Supp. 2d 1359, 1373–79 (N.D. Fla. 2008) (permanently enjoining school district's ban on "illegal organizations" and "secret societies" on vagueness grounds); Bragg v. Swanson, 371 F. Supp. 2d 814, 825–29 (W.D. W. Va. 2005) (permanently enjoining school district's ban on Confederate flag as facially overbroad).

[215] 206 F.3d 1358, 1368 (10th Cir. 2000) (holding "the harassment and intimidation policy does not threaten protected speech and is not unconstitutionally overbroad").

[216] *Id.* at 1362 (noting (i) "verbal confrontations occur[ing] between black and white students," (ii) "[m]embers of the Aryan Nation and Ku Klux Klan became active off campus circulating materials to students encouraging racism," (iii) the presence of racist graffiti including "KKK" and "Die Nigger" on school grounds).

[217] *Id.* at 1361.

[218] *Id.* at 1363.

[219] *Id.* at 1365–66 (finding the display of the Confederate flag "a form of political speech" within the meaning of the First Amendment, and thus governed by *Tinker*'s substantial disruption analysis).

[220] *See id.* at 1366 (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969)).

[221] *Id.* (holding "[t]he fact that a full-fledged brawl has not yet broken out over the Confederate flag does not mean that the district was required to sit and wait for one").

after it caused a disturbance."[222] Noting the significance of the school district's limiting discretionary language within the policy,[223] the court held that "the harassment . . . policy does not threaten protected speech and is not unconstitutionally overbroad."[224]

From 2001 to 2008, the Tenth Circuit's objective "reasonable belief" construction of *Tinker* remained a minority view regarding anti-harassment policies and the overbreadth doctrine. Although outside the context of an overbreadth challenge to a student speech policy, the Second, Sixth, Eighth, and Ninth Circuits faithfully apply *Tinker's* preemptive "reasonable belief" burden of proof.[225]

In 2008, the Seventh Circuit faithfully applied *Tinker's* "reasonable belief" burden of proof in *Nuxoll ex rel. Nuxoll v. Indian Prairie School District No. 204*[226] and upheld a school district's anti-harassment policy as "strik[ing] a reasonable balance between the competing interests [of] free speech and ordered learning."[227] In *Nuxoll*, a high school student was prohibited from wearing a tee shirt with the phrase "Be Happy, Not Gay" pursuant to a school rule banning "derogatory comments . . . that refer to race, ethnicity, religion, gender, sexual orientation, or disability."[228] Noting that "[a] judicial policy of hands off (within reason) school regulation of student speech has much to recommend it,"[229] Judge Posner construed *Tinker* to require only "facts which might reasonably lead school officials to forecast substantial disruption."[230] Applying Tinker's substantial disruption analysis in light of *Fraser* and

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[222] *Id.* at 1366–67 (citations omitted).

[223] *Id.* at 1367–68. Because "the policy permits the administrator to consider whether the student's conduct was willful, whether the student displayed the symbol in some manner, and whether the conduct had the effect of creating ill will," *id.* at 1362, the Tenth Circuit found "it likely that the policy will only apply in circumstances where it is constitutional to do so . . . ." *Id.* at 1368.

[224] *Id.*

[225] *E.g.*, B.W.A. v. Farmington R-7 Sch. Dist., 554 F.3d 734, 739 (8th Cir. 2009) ("*Tinker* and its progeny allow a school to 'forecast' a disruption and take necessary precautions before racial tensions escalate out of hand"); Barr v. LaFon, 538 F.3d 554, 565–68 (6th Cir. 2008) (holding "*Tinker* does not require disruption to have actually occurred" and "*Tinker* does not require school officials to wait until the horse has left the barn before closing the door"); Doninger v. Niehoff, 527 F.3d 41, 51 (2d Cir. 2008) (holding "[s]chool officials have an affirmative duty to not only ameliorate the harmful effects of disruptions, but to prevent them from happening in the first place" (quoting Lowery v. Euverard, 497 F.3d 584, 596 (6th Cir. 2007)), and "[t]he question is not whether there has been actual disruption, but whether school officials 'might reasonable portend disruption' from the student expression at issue" (quoting LaVine v. Blaine Sch. Dist., 257 F.3d 981, 989 (9th Cir. 2001)); *LaVine*, 257 F.3d at 989 (holding "*Tinker* does not require school officials to wait until disruption actually occurs before they may act" and "[f]orecasting disruption is unmistakably difficult to do[;] *Tinker* does not require certainty that disruption will occur, 'but rather the existence of facts which might reasonably lead school officials to forecast substantial disruption'") (quoting Karp v. Becken, 477 F.2d 171, 175 (9th Cir. 1973)).

[226] 523 F.3d 668 (7th Cir. 2008).

[227] *Id.* at 672.

[228] *Id.* at 670.

[229] *Id.* at 671.

[230] *Id.* at 673 (emphasis added) (quoting Boucher v. Sch. Bd. of Sch. Dist. of Greenfield, 134 F.3d 821, 827–28 (7th Cir. 1998), Walker-Serrano ex rel. Walker v. Leonard, 325 F.3d 412, 416 (3d Cir. 2003), LaVine v. Blaine Sch. Dist., 257 F.3d 981, 989 (9th Cir. 2001)) ("Taking the case law as a whole we don't think a school is required to prove that unless the speech at issue is forbidden serious consequences will *in fact* ensue.") (emphasis added). *Id.*

Morse, the court held, "if there is reason to think that a particular type of student speech will lead to a decline in students' test scores, an upsurge in truancy, or other symptoms of a sick school—symptoms therefore of substantial disruption—the school can forbid the speech."[231] Relying on "suggestive" medical literature showing a correlation between psychologically harmful student speech and negative educational outcomes,[232] as opposed to prior disruptions based on similar student speech,[233] Judge Posner concluded, "The rule challenged by the plaintiff appears to satisfy" *Tinker's* substantial disruption analysis.[234] Accordingly, the Seventh Circuit upheld the facial validity of the school's anti-harassment policy.[235]

Thus, the Seventh and Tenth Circuits employ a more deferential "reasonable forecast" burden of proof analysis in determining the facial validity of an anti-harassment policy. Under this analysis, school officials are empowered to implement preventive anti-harassment policies in order to "take necessary precautions before . . . tensions escalate out of hand."[236] Although the Second, Sixth, Eighth, and Ninth Circuits acknowledge that "*Tinker* does not require actual disruption" to have occurred,[237] they have yet to apply this standard to a facial challenge.

D. Policy May Satisfy Tinker's "Rights of Other Students" Analysis

Controversially, a small number of lower courts recognize *Tinker's* purported "rights of other students" prong as an additional basis for

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[231] *Id.* at 674 (emphasis added).

[232] *See, e.g.*, *supra* note 30, at 1200–01.

[233] *Nuxoll*, 523 F.3d at 671. *But cf.* Newsom v. Albermarle County Sch. Bd., 354 F.3d 249, 259 n.7 ("In the absence of past incidents, courts have concluded that school officials have failed to establish a sufficient likelihood of disruption to support the ban on speech.").

[234] *Nuxoll*, 523 F.3d at 674.

[235] *See id.* at 675.

[236] B.W.A v. Farmington R-7 Sch. Dist., 554 F.3d 734, 739 (8th Cir. 2009).

[237] *Id.* at 740 (holding "*Tinker* and its progeny allow a school to "forecast a disruption and take necessary precautions before racial tensions escalate out of hand"); Barr v. LaFon, 538 F.3d 554, 565–68 (6th Cir. 2008) (holding "*Tinker* does not require disruption to have actually occurred" and "*Tinker* does not require school officials to wait until the horse has left the barn before closing the door") (quoting Lowery v. Euverand, 497 F.3d 584 (Tenn. 2007)); Doninger v. Niehoff, 527 F.3d 41, 51 (2d Cir. 2008) (holding "[s]chool officials have an affirmative duty to not only ameliorate the harmful effects of disruptions, but to prevent them from happening in the first place" and "[t]he question is not whether there has been actual disruption, but whether school officials 'might reasonably portend disruption' from the student expression at issue") (citing LaVine v. Blaine Sch. Dist., 257 F.3d 981, 989 (9th Cir. 2001)); *LaVine*, 257 F.3d at 989 (holding "*Tinker* does not require school officials to wait until disruption actually occurs before they may act" and "Forecasting disruption is unmistakably difficult to do. *Tinker* does not require certainty that disruption will occur, 'but rather the existence of facts which might reasonably lead school officials to forecast substantial disruption.") (quoting Karp v. Becken, 477 F.2d 171, 175 (9th Cir. 1973)).

student speech restrictions.[238] Under this view, *Tinker* provides for the suppression of student speech that collides "with the rights of other students to be secure and to be let alone."[239] Although *Tinker's* holding is clearly written in the disjunctive,[240] the Court failed to articulate the source and scope of the "rights" enjoyed by public school students.[241] Because of uncertainty surrounding its scope, *Tinker's* "rights of other students" remains a disfavored ground for suppressing student speech.[242] Indeed, at least one circuit judge has gone so far as to describe *Tinker's* "rights of other students" prong as mere dicta.[243]

In *Harper v. Poway Unified School District*, the Ninth Circuit ignited national controversy by recognizing *Tinker's* purported "rights of other students" prong as an independent basis for restricting student speech.[244] Although *Harper* no longer constitutes binding precedent within the Ninth Circuit, the case remains instructive for its persuasive value.[245] In *Harper*, the plaintiff attempted to wear a tee shirt proclaiming, "BE ASHAMED, OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMNED" and "HOMOSEXUALITY IS SHAMEFUL 'Romans 1:27'" to school.[246] Citing multiple anti-harassment policies[247]

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[238] *See, e.g.*, *Barr*, 538 F.3d at 567–68 (relying in part on *Tinker*'s "rights of other students" prong to uphold student speech restriction); Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1178 (9th Cir. 2006) (relying exclusively on *Tinker*'s "rights of other students" prong to uphold student speech restriction), *vacated as moot*, 549 U.S. 1266 (2007); Trachtman v. Anker, 563 F.2d 512, 521 (2d Cir. 1977) (relying in part on *Tinker*'s "rights of other students" prong to uphold student speech restriction) (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969)).

[239] *See Tinker*, 393 U.S. at 508.

[240] *Id.* ("There is here no evidence whatever of petitioners' interference, actual or nascent, with the schools' work *or* of collision with the rights of other students to be secure and to be let alone.") (emphasis added).

[241] *Id.* Despite articulating two distinct grounds for suppressing student speech, the *Tinker* Court's application of the rule focused exclusively on "substantial disruption." *Id.* at 509–12.

[242] The vast majority of lower courts recognizing *Tinker*'s "rights of other students" prong limit its scope to student expression which violates state criminal or tort law. *See, e.g.*, Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 217 (3d Cir. 2001) ("The precise scope of *Tinker*'s 'interference with the rights of others' language is unclear; at least one court has opined that it covers only independently tortious speech . . . . In any case, it is certainly not enough that the speech is merely offensive to some listener."). *Id.*; *Kuhlmeier v. Hazelwood Sch. Dist.*, 795 F.2d 1368, 1376 (8th Cir. 1986), *rev'd on other grounds*, 484 U.S. 260 (1988) ("[S]chool officials are justified in limiting student speech, under [*Tinker*'s 'rights of other students'] standard, only when . . . [that student] speech could result in tort liability for the school."); *Nixon*, 383 F. Supp. 2d at 974 (same); Slotterback v. Interboro Sch. Dist., 766 F. Supp. 280, 289 n.8 (E.D. Pa. 1991) (same).

[243] *See Trachtman*, 563 F.2d at 520–21 (Mansfield, J., dissenting) ("[T]he majority, relying upon dicta in [*Tinker*], to the effect that school authorities may prohibit speech 'that intrudes upon . . . the rights of other students,' or 'involves . . . an invasion of the rights of others' would include in these amorphous terms the dissemination to others of non-disruptive, non-defamatory and non-obscene material because it might cause some kind of 'psychological' harm to an undefined number of students. With this I disagree.").

[244] 445 F.3d 1166, 1178 (9th Cir. 2006) *vacated as moot*, 549 U.S. 1266 (2007) ("As *Tinker* clearly states, students have the right to 'be secure and to be let alone.' Being secure involves not only freedom from physical assaults but from psychological attacks that cause young people to question their self-worth and their rightful place in society.") (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969)).

[245] *See* Harper v. Poway Unified Sch. Dist., 549 U.S. 1266 (2007) (vacating the judgment of the Ninth Circuit as moot).

[246] *Harper*, 445 F.3d at 1170–71.

[247] *Id.* at 1202 (citing two separate policies prohibiting (a) "negative comments or behavior based on

and a prior disruption involving anti-homosexual speech, school officials isolated Harper from the general student body for the school day.[248] Responding to this punishment, Harper filed multiple First Amendment claims, including a facial challenge to the school's various anti-harassment policies.[249] Although the district court denied Harper's motion for a preliminary injunction, finding that his tee shirt constituted a substantial disruption, the district court failed to address Harper's facial challenge.[250] Accepting Harper's interlocutory appeal, a divided Ninth Circuit employed a heavily criticized *Tinker* analysis.[251]

Breaking with prior student speech jurisprudence, the Ninth Circuit construed *Tinker* as providing two alternative grounds for restricting student speech: speech causing "substantial disruption," or speech that "impinge[s] upon the rights of other students."[252] Relying on *Tinker's* alleged second ground, the Ninth Circuit concluded, "Harper's wearing of his tee shirt 'collides with the rights of other students' in the most fundamental way."[253] Finding such psychologically harmful student speech detrimental to the "educational development" of homosexual students,[254] the court held the First Amendment inapplicable to "instances of derogatory and injurious remarks directed at students' minority status such as race, religion, and sexual orientation."[255] Despite articulating a novel extension of existing student speech jurisprudence, the *Harper* majority refused to address Harper's overbreadth challenge to the school district's anti-harassment policies; thus avoiding "an examination that would cause us to discuss prematurely a number of controversial constitutional issues."[256]

In a vigorous dissent, Judge Kozinski confronted the facial validity of the school district's anti-harassment policies head on.[257] After describing the majority's holding as "entirely a judicial creation, hatched to deal with the situation before us, but likely to cause innumerable problems in the future,"[258] Judge Kozinski found Harper's overbreadth challenge to be the dispositive issue of the case.[259] Insisting on the

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race, ethnicity, sexual orientation, religion, or gender;" and (b) "negative comments, slurs, or behaviors based on race, ethnicity, sexual orientation, religion, or gender").

[248] *Id.* at 1172.

[249] *Id.* at 1173.

[250] *Id.* at 1175 n.11 ("The district judge apparently concluded that the validity of the School's anti-harassment policies was not before him, or that it was not necessary to decide that question, and we cannot say that his determination was unreasonable.").

[251] *See, e.g.*, Abby Marie Mollen, Comment, *In Defense of the "Hazardous Freedom" of Controversial Student Speech*, 102 NW. U. L. REV. 1501, 1504–07 (2008).

[252] *Harper*, 445 F.3d at 1177.

[253] *Id.* at 1178.

[254] *Id.* at 1179 ("Those who administer our public educational institutions need not tolerate verbal assaults that may destroy the self-esteem of our most vulnerable teenagers *and interfere with their educational development.*") (emphasis added).

[255] *Id.* at 1183.

[256] *Id.* at 1175 n.11.

[257] *Harper*, 445 F.3d at 1201 (Kozinski, J., dissenting).

[258] *Id.*

[259] *Id.* at 1202 n.12.

applicability of *Saxe's* heightened "well-founded expectation" analysis,[260] Judge Kozinski found the school's harassment policy "substantially overbroad, largely for the [same] reasons articulated by the Third Circuit in *Saxe v. State College Area School District*, 240 F.3d 200 (3d Cir. 2001)."[261]

A degree of uncertainty surrounds *Tinker's* "rights of other students" prong in light of *Morse*. Unlike *Fraser* and *Hazelwood*, the *Morse* majority conspicuously declined to recognize the "rights of other students" prong in affirming *Tinker*.[262] Similarly, Justice Alito's concurrence construes *Tinker* to solely permit "the regulation of student speech that threatens a concrete and 'substantial disruption.'"[263] Even Justice Breyer's concurrence fails to recognize *Tinker's* "rights of other students" as an independent justification for student speech restrictions.[264] This break with *Fraser* and *Hazelwood's* construction of *Tinker* lends some credence to the view that the "rights of other students" prong is mere dicta. In light of *Morse's* narrow construction of *Tinker*, coupled with *Harper's* lack of precedential value, a strong argument exists that non-disruptive student speech may not be restricted pursuant to the "rights of other students."

In the post-*Morse* student speech landscape, *Tinker's* "substantial disruption" analysis appears to be the preferred rationale for determining the constitutionality of student speech restrictions. Although *Morse* did not explicitly foreclose *Tinker's* "rights of other students" prong as providing an alternative basis for student speech restrictions, *Tinker's* "substantial disruption" analysis remains universally recognized as the soundest constitutional basis for restricting student speech.

V. IN DEFENSE OF *NUXOLL*

In the post-*Morse* environment, student speech jurisprudence presents two competing views of *Tinker's* required burden of proof for determining the facial validity of a school district's anti-harassment policy. On one hand, the Third and Fourth Circuits' heightened "well-

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[260] *Id.* at 1205.

[261] *Id.*

[262] *Compare* Morse v. Frederick, 551 U.S. 393, 403 (2007) ("*Tinker* held that student expression may not be suppressed unless school officials reasonably conclude that it will 'materially and substantially disrupt the work and discipline of the school.'") (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969)), *with* Hazelwood Sch. Dist. v. Kuhlmeier (*Hazelwood*), 484 U.S. 260, 266 (1988) (construing *Tinker* to provide for the restriction of student speech where "school authorities have reason to believe that such expression will 'substantially interfere with the work of the school or impinge upon the rights of other students'") (quoting *Tinker*, 393 U.S. at 509), *and* Bethel Sch. Dist. No. 403 v. Fraser , 478 U.S. 675, 680 (1986) (construing *Tinker* to provide for the restriction of student speech "that intrudes upon the work of the schools or the rights of other students").

[263] *Morse*, 551 U.S. at 422 (Alito, J., concurring).

[264] *Id.* at 429.

founded expectation" burden of proof results in a policy of judicial intervention, where the federal judiciary closely scrutinizes the judgment of elected school officials pursuant to the overbreadth doctrine.[265] On the other hand, the Seventh and Tenth Circuits' loyal application of *Tinker's* "reasonable forecast of substantial disruption" standard results in a policy of judicial restraint, where the federal judiciary defers judgment on the propriety of student speech restrictions to elected school officials.[266] Beyond disagreement as to *Tinker's* burden of proof, much uncertainty surrounds the issue of what facts rise to the level of *Tinker's* "substantial disruption." In the context of a facial challenge, Judge Posner's *Nuxoll* analysis provides a comprehensive framework for resolving the underlying constitutionality of a given student speech restriction. This Part examines the propriety of invoking the overbreadth doctrine to strike down student speech restrictions, Judge Posner's *Nuxoll* analysis, and the scope of *Tinker's* "substantial disruption."

A. The Overbreadth Doctrine and Student Anti-Harassment Policies

In the years following *Saxe's* controversial holding, then-Judge Alito's application of the overbreadth doctrine has faced sharp criticism from courts and commentators.[267] A harassment policy may be unconstitutionally overbroad if "there is 'a likelihood that the statute's very existence will inhibit free expression' by 'inhibiting the speech of third parties who are not before the Court'" to a substantial degree.[268] Arguably, four distinct structural flaws underlie the Third and Fourth Circuits' liberal application of the overbreadth doctrine in the realm of student anti-harassment policies.

First, on a formalist level, *Saxe* and its progeny unilaterally heighten *Tinker's* burden of proof by requiring far more than a "reasonable forecast" of disruption. In the words of Justice Fortas, a

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[265] Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 212 (3d Cir. 2001) ("[I]f a school can point to a well-founded expectation of disruption—especially one based on past incidents arising out of similar speech—the restriction may pass constitutional muster."); Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243, 254–55 (3d Cir. 2002) (same).

[266] *See, e.g.*, West v. Derby Unified Sch. Dist., 206 F.3d 1358, 1366 (10th Cir. 2000) ("[W]here school authorities reasonably believe that a student's uncontrolled exercise of expression might 'substantially interfere with the work of the school or impinge upon the rights of other students,' they may forbid such expression") (quoting *Tinker*, 393 U.S. at 509).

[267] *See, e.g.*, Nuxoll v. Indian Prairie Sch. Dist. No. 204, 523 F.3d 668, 671 (7th Cir. 2008) ("A judicial policy of hands off (within reason) school regulation of student speech has much to recommend it. . . . [J]udges are incompetent to tell school authorities how to run schools in a way that will preserve an atmosphere conducive to learning . . . ."); *see also* Thomas R. Baker, *Tinkering with Tinker: The Third Circuit's Overbreadth Test For School Anti-Harassment Codes*, 164 EDUC. L. REP. 527 (West 2002).

[268] *Saxe*, 240 F.3d at 214 (quoting Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 799 (1984)).

school may prohibit "actually or potentially disruptive conduct"[269] where there exist "any facts which might reasonably have led school authorities to forecast substantial disruption."[270] In contrast, *Saxe* purports to require "a well-founded expectation of disruption—especially one based on past incidents arising out of similar speech" for the suppression of student speech.[271] Accordingly, an honest reading of *Tinker* cannot stand for the proposition that student speech restrictions must be based on prior, similar disruptive speech. As six circuit courts of appeals observe, "*Tinker* does not require certainty that disruption will occur."[272]

Second, on a functionalist level, *Saxe's* prior disruption analysis would require school officials to allow disruption to occur before restricting obviously disruptive student speech.[273] Such a standard poses difficult problems relating to school discipline; "school officials would be between the proverbial rock and hard place: either they allow disruption to occur, or they are guilty of a constitutional violation."[274] As the Sixth Circuit astutely observed, "Such a rule is not required by *Tinker*, and would be disastrous public policy: requiring school officials to wait until disruption actually occurred before investigating would cripple the officials' ability to maintain order."[275] In light of *Tinker's* permissive attitude toward restrictions on student speech interfering "with the requirements of appropriate discipline in the operation of the school,"[276] a strong argument exists that the Third and Fourth Circuits'

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[269] *Tinker*, 393 U.S. at 505 (emphasis added).

[270] *Id.* at 514.

[271] *Saxe*, 240 F.3d at 212.

[272] LaVine v. Blaine Sch. Dist., 257 F.3d 981, 989 (9th Cir. 2001) (holding "*Tinker* does not require school officials to wait until disruption actually occurs before they may act" and "[f]orecasting disruption is unmistakably difficult to do. *Tinker* does not require certainty that disruption will occur, 'but rather the existence of facts which might reasonably lead school officials to forecast substantial disruption.") (quoting Karp v. Becken, 477 F.2d 171, 175 (9th Cir. 1973); *see, e.g.*, B.W.A. v. Farmington R-7 Sch. Dist., 554 F.3d 734, 739 (8th Cir. 2009) (holding "*Tinker* and its progeny allow a school to 'forecast' a disruption and take necessary precautions before racial tensions escalate out of hand"); Nuxoll v. Indian Prairie Sch. Dist. No. 204, 523 F.3d 668, 673 (7th Cir. 2008) (emphasis added) ("Taking the case law as a whole we don't think a school is required to prove that unless the speech at issue is forbidden serious consequences will *in fact* ensue. . . . It is enough for the school to present 'facts which might reasonably lead school officials to forecast substantial disruption.'") (quoting Boucher v. Sch. Bd. of Sch. Dist. of Greenfield, 134 F.3d 821, 827–28 (7th Cir.1998)); Barr v. LaFon, 538 F.3d 554, 565–66 (6th Cir. 2008) (holding "*Tinker* does not require disruption to have actually occurred" and "*Tinker* does not require school officials to wait until the horse has left the barn before closing the door") (quoting Lowrey v. Euverard, 497 F.3d 584, 591–92 (6th Cir. 2007)); Doninger v. Niehoff, 527 F.3d 41, 51 (2d Cir. 2008) (holding "[s]chool officials have an affirmative duty to not only ameliorate the harmful effects of disruptions, but to prevent them from happening in the first place"); *id.* (also holding "[t]he question is not whether there has been actual disruption, but whether school officials 'might reasonably portend disruption' from the student expression at issue") (internal citations omitted); West v. Derby Unified Sch. Dist., 206 F.3d 1358, 1366–67 (10th Cir. 2000) (holding "[t]he fact that [a student's] conduct may not have resulted in an actual disruption of the classroom . . . does not mean that the school had no authority to act. The district had the power to act to prevent problems before they occurred; it was not limited to prohibiting and punishing conduct only after it caused a disturbance.") (quoting West v. Derby Unified Sch. Dist. 23 F. Supp. 2d 1223 (D. Kan. 1998).

[273] *Lowery*, 497 F.3d at 596.

[274] *Id.*

[275] *Id.*

[276] *Id.* at 588 (citing *Tinker*, 393 U.S. at 513).

application of the overbreadth doctrine conflicts with *Tinker's* holding.

Third, on a more abstract level, the Supreme Court has yet to define the precise contours of *Tinker's* holding in relation to an overbreadth challenge of a given student speech policy. In *Tinker*, the Court merely addressed an as-applied challenge to a school district policy, "express[ing] no opinion as to the form of relief which should be granted."[277] Subsequent to *Tinker*, the *Fraser* Court reversed the Ninth Circuit's overbreadth analysis,[278] upholding the constitutionality of a school district's "obscene language" policy.[279] As the Third Circuit itself recognizes, "the Supreme Court's resolution of student free speech cases has been, to this point in time, without reference to the overbreadth doctrine."[280] Thus, a plausible argument exists that *Saxe's* extension of the overbreadth doctrine into the realm of student speech conflicts with *Tinker's* core holding.

Finally, a strong argument exists that then-Judge Alito's *Saxe* analysis misapplies an "elementary rule"[281] of the overbreadth doctrine. Before striking down a speech restriction as unconstitutionally overbroad, a court must determine whether the policy "is susceptible to a reasonable limiting construction . . . [and] 'every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'"[282] The Third Circuit correctly applied this principal in *Sypniewski*, striking down problematic language within a policy to "save [the policy as a whole] from unconstitutionality."[283] However, then-Judge Alito refused to apply this "elementary rule" to the policy at issue in *Saxe*.[284] Despite noting "that the Policy's first prong . .

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[277] *Tinker*, 393 U.S. at 514.

[278] Bethel Sch. Dist. No. 403 v. Fraser, 755 F.2d 1356, (9th Cir. 1985), *rev'd*, 478 U.S. 675 (1986).

[279] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685–86 (1986) ("[P]etitioner School District acted entirely within its permissible authority in imposing sanctions [on] offensively lewd and indecent [student] speech" and "[g]iven the school's need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct . . . the school disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions.").

[280] DeJohn v. Temple Univ., 537 F.3d 301, 313 (3d Cir. 2008) (emphasis added).

[281] Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 215 (3d Cir. 2001).

[282] *Id.* (quoting Stretton v. Disciplinary Bd. of the Sup. Ct. of Pa., 944 F.2d 137, 144 (3d Cir. 1991).

[283] Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243, 259 (3d Cir. 2002) (striking down a policy's "ill-will provision" as overbroad, while upholding the remainder of the policy pursuant to "reasonable limiting construction" analysis).

[284] The policy at issue in *Saxe* restricted "(1) verbal or physical conduct (2) that is based on one's actual or perceived personal characteristics and (3) has the purpose or effect of either (3a) substantially interfering with a student's educational performance or (3b) creating an intimidating, hostile, or offensive environment." *Saxe*, 240 F.3d at 216. Then-Judge Alito took issue with two aspects of the policy. First, he took issue with the policy's "purpose" component, noting "the Policy punishes not only speech that actually causes disruption, but also speech that merely intends to do so: by its terms, it covers speech 'which has the *purpose* . . . of' interfering with educational performance." *Id.* at 216 (emphasis added). Second, he took issue with the "Policy's second criterion [that] prohibits speech that 'creates an intimidating, hostile, or offensive environment.'" *Id.* at 217. Had then-Judge Alito loyally applied Supreme Court precedent mandating "that every reasonable construction must be resorted to," the Policy could be narrowly construed to restrict only (1) verbal or physical conduct (2) that is based on one's personal characteristics and (3) has the effect of substantially interfering with a student's educational performance. *Id.* at 215. Paradoxically, then-Judge Alito himself noted "[w]e agree that the Policy's first prong, which prohibits speech that would 'substantially interfere with a student's educational performance,' may

. may satisfy the *Tinker* standard,"[285] then-Judge Alito struck down the policy in its entirety.[286] Thus, a strong argument exists that then-Judge Alito's *Saxe* analysis contains fatal analytical defects.

Judge Posner's *Nuxoll* analysis avoids the pitfalls described above by loyally applying *Tinker* and its progeny in the context of a facial challenge. In the absence of guidance from the Supreme Court, the *Nuxoll* court's two-tiered analysis creates a viable framework for resolving the facial validity of a given anti-harassment policy.

B. Examining Judge Posner's Functionalist Analysis

In *Nuxoll*, Judge Posner articulated a deferential conceptualization of *Tinker's* holding: a two-tiered substantial disruption analysis. First, Judge Posner addressed what quantum of evidence satisfies *Tinker's* required burden of proof, adopting *West's* faithful application of *Tinker's* "reasonable forecast" standard.[287] Second, Judge Posner addressed what facts rise to the level of "substantial disruption."[288]

As to *Tinker's* "reasonable forecast" burden of proof, Judge Posner described the determinative issue as whether "a school is required to prove that unless the speech at issue is forbidden serious consequences will in fact ensue."[289] Acknowledging the inherent difficulty of carrying such a heightened burden in the absence of a prior disruption, Judge Posner rejected *Saxe's* misconstruction of *Tinker's* holding.[290] Loyally applying *Tinker's* proscribed burden of proof, Judge Posner found *Tinker* satisfied where "the school [presents] 'facts which might reasonably lead school officials to forecast substantial disruption.'"[291] Having determined the scope of *Tinker's* "reasonable forecast," Judge Posner proceeded to address the more difficult questions: "[W]hat is 'substantial disruption'? Must it amount to 'disorder or disturbance'? Must classwork be disrupted and if so how severely?'"[292]

To resolve the scope of *Tinker's* "substantial disruption," Judge Posner distilled three basic principles from *Fraser* and *Morse*. First, *Morse's* holding demonstrates that "avoiding violence, if that is what 'disorder or disturbance' connotes, is not a school's only substantial concern."[293] Accordingly, a school district's authority to restrict student

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satisfy the *Tinker* standard.'" *Id.* at 217.

[285] *Saxe*, 240 F.3d at 217.

[286] *Id.*

[287] Nuxoll v. Indian Prairie Sch. Dist. No. 204, 523 F.3d 668, 673 (7th Cir. 2008).

[288] *Id.* at 674.

[289] *Id.* at 673.

[290] *Id.*

[291] *Id.*

[292] *Nuxoll*, 523 F.3d at 674.

[293] *Id.* at 674.

speech is not limited to speech provoking physical violence.[294] Second, *Morse's* holding recognizes the compelling governmental interest in preventing psychological damage from drugs[295] and that "[d]rug abuse can cause severe and permanent damage to the health and well-being of young people . . . ."[296] Just as Congress has recognized a school's interest in "educating students about the dangers of illegal drug use,"[297] the Supreme Court has recognized the State's compelling interest in "eliminating discrimination."[298] Because "'sexual harassment' is 'discrimination' in the school context under Title IX,"[299] even the Third Circuit acknowledges a school district's "compelling interest in preventing harassment."[300] Third, *Morse's* holding displays the Supreme Court's willingness to permit the suppression of particularly harmful student speech[301] "without the school's having to prove a causal relation" between the banned speech and physical or psychological harm.[302] Although the evidence is "suggestive rather than conclusive,"[303] an increasing amount of medical research links psychologically harmful student speech (based primarily on race, gender, and sexual orientation) to disruption of the educational process.[304]

Relying on the three principles cited above, the Seventh Circuit held "if there is reason to think that a particular type of student speech will lead to a decline in students' test scores, an upsurge in truancy, or other symptoms of a sick school—symptoms therefore of substantial disruption—the school can forbid the speech."[305] Applying this rule to the school district's ban on "derogatory comments that refer to race, ethnicity, religion, gender, sexual orientation, or disability,"[306] Judge Posner found the policy a constitutional attempt "to maintain a civilized school environment conducive to learning"[307] in an even-handed

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[294] *See id. But cf.* Bragg v. Swanson, 371 F. Supp. 2d 814, 826–28 (W.D. W. Va. 2005) (implying *Tinker*'s substantial disruption test requires a prior, violent disruption for the restriction of otherwise protected student speech).

[295] *Nuxoll*, 523 F.3d at 674.

[296] Morse v. Frederick, 551 U.S. 393, 407 (2007) ("School years are the time when the physical, *psychological*, and addictive effects of drugs are most severe.") (emphasis added) (citing Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 661 (1995)).

[297] *Id.*

[298] Bd. of Dir. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 549 (1987).

[299] Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 650 (1999).

[300] DeJohn v. Temple Univ., 537 F.3d 301, 319–20 (3d Cir. 2008); *see also* Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 209 ("Certainly, preventing discrimination in the workplace—and in the schools—is not only a legitimate, but a compelling, government interest.") (citations omitted).

[301] *See Morse*, 551 U.S. at 403–09 (allowing for the restriction of student speech "reasonably viewed as promoting illegal drug use" without proof of a causal link between the student speech in question and illegal drug use).

[302] *See Nuxoll*, 523 F.3d at 674 ("We know from *Morse* that the Supreme Court will let a school ban speech—even speech outside the school premises—that encourages the use of illegal drugs, without the school's having to prove a *causal relation* between the speech and drug use.") (emphasis added).

[303] *Id.* at 671.

[304] *See supra* notes 20–38 and accompanying text.

[305] *Nuxoll*, 523 F.3d at 674 (emphasis added).

[306] *Id.*

[307] *Id.*

manner.[308] Although acknowledging that "[t]his particular restriction . . . would not wash if it were being imposed on adults,"[309] the Court distinguished the public school environment, noting that "high-school students are not adults . . . and school authorities have a protective relationship and responsibility to all the students."[310] In light of a school district's exposure to harassment liability[311] arising out of this "protective relationship and responsibility to all the students,"[312] the Court reasoned that if such an anti-harassment policy is invalidated, "the school will be placed on a razor's edge, where if it bans offensive comments it is sued for violating free speech and if it fails to protect students from offensive comments by other students it is sued for violating laws against harassment."[313]

C. Anti-Harassment Student Speech Policies: Can Educational Harm Constitute Substantial Disruption?

In light of "the very real tension between anti-harassment laws and the Constitution's guarantee of freedom of speech,"[314] Judge Posner's two-tiered *Nuxoll* analysis provides vital guidance for policy drafters seeking to comply with the contradictory pulls of free speech and harassment jurisprudence. For an anti-harassment policy to pass constitutional muster, the school district must carry its burden of proof by demonstrating a "reasonable forecast" of "substantial disruption."[315] Unfortunately, *Tinker* does not explicitly address whether disruption need encompass all or a significant portion of the student body, or whether disruption can occur from isolated student-to-student speech. However, such a determination is unnecessary for resolving the facial validity of a given anti-harassment student speech policy. Pursuant to

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[308] *See id.* (noting the "even-handed" operation of the challenged school policy prohibiting all derogatory comments, regardless of the speaker's viewpoint). Additionally, a strong argument exists that the policy (prohibiting "derogatory comments . . . that refer to race, ethnicity, religion, gender, sexual orientation, or disability") fits squarely within *R.A.V.*'s "secondary effects" exception for content-discriminatory speech restrictions. *See* R.A.V. v. St. Paul, 505 U.S. 377, 389 (1992). Pursuant to *R.A.V.*, a content-discriminatory speech restriction is permissible where the classification "happens to be associated with particular secondary effects of the speech, so that the regulation is *justified* without reference to the content of the . . . speech." *Id.* (quoting Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986)).

[309] *Nuxoll*, 523 F.3d at 674.

[310] *Id.* at 674–75.

[311] *See id.* at 675.

[312] *Id.*

[313] *Id.* Due to *Davis*'s extremely high burden of proof (which requires a showing of severity, pervasiveness, and objective offensiveness), Judge Posner exaggerates a school district's exposure to harassment liability. *See* Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 650 (1999).

[314] Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 209 (3d Cir. 2001).

[315] *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969).

Tinker, student speech "materially disrupt[ing] classwork"[316] or "interfer[ing] with work" constitutes a "substantial disruption."[317] Where a school district can "reasonably forecast" that particular student speech will objectively inhibit the educational performance of an identifiable class of students, a strong argument exists that such speech may be constitutionally suppressed as a disruption of classwork.[318]

Addressing what quantum of evidence rises to the level of *Tinker's* "reasonable forecast" of "substantial disruption," the *Nuxoll* court found *Tinker* satisfied where a school district presents evidence of "a decline in students' test scores, an upsurge in truancy, or other symptoms of a sick school."[319] Accordingly, a plausible argument exists that a school district may carry its burden of proof by presenting one of two types of evidence. First, even within the Third or Fourth Circuit, a district may point to prior instances of student speech causing an objective decline in the educational performance of other students.[320] Second, outside of the Third or Fourth Circuit, a district may plausibly rely on peer-reviewed medical research showing a direct correlation between the prohibited student speech and negative educational performance.[321] Where a school district bases a student speech policy on peer-reviewed medical literature, such evidence should ideally conform to the standard of *Daubert v. Merrell Dow Pharmaceuticals Inc.*[322] to justify the preemptive suppression of specific student speech.[323] A school district could hardly satisfy *Tinker's* "reasonable forecast" with inadmissible

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[316] *See id.* at 513 ("*But conduct by the student*, in class or out of it, *which for any reason*—whether it stems from time, place, or type of behavior—*materially disrupts classwork* or involves substantial disorder or invasion of the rights of others *is, of course, not immunized by the constitutional guarantee of freedom of speech.*") (emphasis added).

[317] *Id.* at 514.

[318] *See, e.g.*, *Tinker*, 393 U.S. at 513 ("[C]onduct by the student . . . which for any reason . . . materially disrupts classwork . . . is, of course, not immunized by the constitutional guarantee of freedom of speech"); Barr v. LaFon, 538 F.3d 554, 566 (6th Cir. 2008) (holding "fear of racial violence caused an increase in absenteeism among African-American students [is] *the epitome of disruption in the educational process.*") (emphasis added); *Nuxoll*, 523 F.3d at 674 ("[I]f there is reason to think that a particular type of student speech will lead to a decline in students' test scores [or] an upsurge in truancy . . . the school can forbid the speech.").

[319] *Nuxoll*, 523 F.3d at 674.

[320] *See, e.g.*, Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243, 262 (3d Cir. 2002) ("Here, the history of racial hostility demonstrates the policy was intended to address a particular and concrete set of problems involving genuine disruption—not merely lack of mutual respect.").

[321] *See, e.g.*, *Nuxoll*, 523 F.3d at 671 (upholding a school district's "reasonable forecast" of disruption on the basis of peer-reviewed medical research showing "adolescent students subjected to derogatory comments about [race, ethnicity, religion, gender, sexual orientation, or disability] may find it even harder than usual to concentrate on their studies and perform up to the school's expectations."); Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1178–79 (9th Cir. 2006) ("The demeaning of young gay and lesbian students in a school environment is detrimental not only to their psychological health and well-being, but also to their educational development. Indeed, studies demonstrate that 'academic underachievement, truancy, and dropout rates are prevalent among homosexual youth and are the probable consequences of violence and verbal and physical abuse at school.'") (quoting Susanne M. Stronski Huwiler and Gary Remafedi, *Adolescent Homosexuality*, 33 REV. JUR. U.P.R. 151, 164 (1999)), *vacated as moot*, 549 U.S. 1262 (2007); Gillman v. Sch. Bd. for Holmes County, Fla., 567 F. Supp. 2d 1359, 1370–71 (N.D. Fla. 2008) (same).

[322] 509 U.S. 579, 592–94 (1993).

[323] *See Harper*, 445 F.3d at 1199 (Kozinski, J., dissenting) (implying that peer-reviewed medical research, meeting the *Daubert* standard, may serve as the basis for student speech restrictions).

evidence.

Thus, in the case of a student speech restriction protecting an identifiable class of students from educationally harmful speech, an administrator could conceivably construe the banned speech to be a "substantial disruption." Where a school district's anti-harassment policy is limited to suppressing student speech that "materially disrupts classwork," a strong argument exists that the policy is facially constitutional under *Tinker's* "substantial disruption" analysis.[324] In jurisdictions loyally applying *Tinker's* "reasonable forecast" standard, a well-drafted anti-harassment policy allowing for the restriction of educationally harmful student speech is not per se overbroad.

VI. DRAFTING CONSTITUTIONAL STUDENT SPEECH POLICIES

When drafting anti-harassment student speech policies, school districts face First Amendment concerns beyond mere compliance with existing student speech jurisprudence. As previously discussed, a broad and encompassing speech restriction may be struck down on overbreadth or vagueness grounds.[325] Conversely, a narrow and specific speech restriction may be struck down on viewpoint discrimination grounds.[326] The difficulty of successfully balancing these competing considerations cannot be underestimated.

In jurisdictions that faithfully apply *Tinker's* "reasonable forecast" of "substantial disruption" standard, the following policy achieves the desired goal of minimizing a school district's harassment liability exposure while conforming to student speech jurisprudence:

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[324] *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969) ("*But conduct by the student*, in class or out of it, *which for any reason*—whether it stems from time, place, or type of behavior—*materially disrupts classwork* or involves substantial disorder or invasion of the rights of others *is, of course, not immunized by the constitutional guarantee of freedom of speech.*") (emphasis added).

[325] *See, e.g.*, Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 214–15 (3d Cir. 2001).

[326] *See, e.g.*, R.A.V. v. St. Paul, 505 U.S. 377, 391 (1992). However, a strong argument exists that a student-speech policy prohibiting "derogatory comments . . . that refer to race, ethnicity, religion, gender, sexual orientation, or disability" fits squarely within *R.A.V.*'s "secondary effects" exception for content-discriminatory speech restrictions. *R.A.V.*, 505 U.S. at 389. Pursuant to *R.A.V.*, a content-discriminatory speech restriction is permissible where the classification "happens to be associated with particular 'secondary effects' of the speech, so that the regulation is '*justified* without reference to the content of the . . . speech.'" *Id.* at 389 (quoting Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986)). However, the Supreme Court has explicitly held that "[t]he emotive impact of speech on its audience is not a 'secondary effect.'" Boos v. Barry, 485 U.S. 312, 321 (1988). Although the "emotive impact" of psychologically harmful student speech does not implicate the "secondary effects" exception to *R.A.V.*'s holding, a strong argument exists that the *educational impact* of such speech squarely implicates *R.A.V.*'s "secondary effects" rationale. *See R.A.V.*, 505 U.S. at 389. Despite the existence of a strong legal argument, no court has recognized "educational impact" as within *R.A.V.*'s "secondary effects" analysis. Unless and until the Supreme Court recognizes "educational impact" as a "secondary effect" justifying content-based speech restrictions, the impact of *R.A.V.*'s holding on student speech policies remains unresolved.

Prohibited Conduct:

1. Verbal, written, or physical conduct based on a student's:

Race,
Color,
National Origin,
Religion,[327]
Gender,
Sexual Orientation, or
Disability;

2. That has the effect of substantially interfering with a student's educational performance by:

Materially disrupting classwork,
Disrupting the requirements of appropriate discipline in the operation of the school,
Causing a decline in grades or attendance, or
Otherwise disrupting the work of the school.

Although a majority of lower courts look favorably on such student speech restrictions,[328] Third and Fourth Circuit jurisprudence closely scrutinizes the facial validity of all student speech restrictions.[329] Accordingly, a school district within the Third or Fourth Circuit may be better served by abstaining from implementing a vigorous and protective student speech policy. In light of cases such as *Saxe*, *Sypniewski*, and *Newsom*, a school district could reasonably determine that the costs of litigating the facial validity of such a policy outweigh the benefits of "provid[ing] a useful guide for students, parents, and others involved in the school community."[330]

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[327] Despite the absence of a federal statute proscribing religious harassment, a plausible argument exists that a school district could restrict such student speech under *Tinker*'s substantial disruption analysis.

[328] The Ninth Circuit has gone so far as to hold that a school may only punish a student for exercising free speech rights pursuant to an existing statute or school rule. *See, e.g.*, Karp v. Becken, 477 F.2d 171, 176 (9th Cir. 1973) ("However, for discipline resulting from the use of pure speech to pass muster under the First Amendment, the school officials have the burden to show justification for their action. . . . Absent justification, such as a violation of a statute or school rule, [a school] cannot discipline a student for exercising [free speech] rights.").

[329] *See, e.g.*, Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243, 259–60 (3d Cir. 2002) ("It is apparent, therefore, that most racially hostile conduct could be regulated and punished even without a racial harassment speech code, so long as it is disruptive. . . . Speech codes are disfavored under the First Amendment because of their tendency to silence or interfere with protected speech.") (citing *Saxe*, 240 F.3d at 207); Newsom v. Albemarle County Sch. Bd., 354 F.3d 249, 258 (4th Cir. 2003) (holding "speech codes in general are looked at with disfavor under the First Amendment because of their tendency to silence or interfere with protected speech").

[330] *See* Martha McCarthy, *Anti-Harassment Provisions Revisited: No Bright-Line Rule*, 2008 BYU EDUC. & L.J. 225, 245 (2008) (conducting a cost-benefit analysis of adopting and enforcing anti-

VII. CONCLUSION

By granting students a private right of action against their school for student-on-student sexual harassment in *Davis*, the Supreme Court created powerful incentives for school districts to minimize their exposure to harassment liability by adopting restrictive student speech policies. However, in the absence of guidance from the Supreme Court regarding the permissible contours of student speech policies, lower courts have provided inconsistent and contradictory rulings on the facial validity of such policies. Although the threat of a tyrannical administrator running roughshod over students' free speech rights is a substantial concern, expansion of the overbreadth doctrine into the realm of student speech jurisprudence fails to address the threat of administrative tyranny. Whereas it is a district's democratically elected school board that adopts a given anti-harassment policy, school administrators are charged with enforcing the terms of such a policy. When an administrator abuses his or her discretion in enforcing a student speech policy, the preferred means of protecting students' free speech rights is through an as-applied challenge. Because an honest reading of *Tinker's* "reasonable forecast" standard permits a district to adopt and enforce a viewpoint-neutral anti-harassment policy, invocation of the overbreadth doctrine to strike down student speech restrictions lacks a textual anchor in student speech jurisprudence.

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harassment student speech policies).