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REVIEW

*A journal of
legal theory
and practice
“to the end
that human
rights shall
be more
sacred than
property
interests.”*

—Preamble, NLG
Constitution



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editor's preface

This issue of *National Lawyers Guild Review* features articles on three subjects that could hardly be more topical: felon disenfranchisement, prosecutorial misconduct in capital cases, and the gay rights movement.

As the American population continues to grow poorer and less white, politicians of both parties and the powerful interests they're beholden to are altering our electoral processes to maintain the present system of political and economic stratification from which they benefit so enormously. One of their methods is making ever more punitive a criminal justice system whose laws and enforcement methods target people most likely to upset the current social hierarchy. It's no mystery which categories of people I'm referring to—those who are young, poor, non-white, groups who are suffering most and whose only recourse is either going to the ballot box or taking to the street. The state knows how to deal with these people. Nowadays taking to the street is apt to get you arrested and a criminal conviction, if it's serious enough, might get you permanently disenfranchised.

We're living in an era of unprecedented mass incarceration. It's an era in which a debased Wall Street plutocracy, as if playing with Monopoly money, has made more and more middle and low-income people poor while the state is simultaneously working toward making poverty itself a crime.

A new subgenre of criminal justice literature¹ has emerged trying to explain why the United States, which imprisoned only 300,000 of its citizens and residents as recently as 1980, now warehouses over two million today,² often under conditions that might have been a mad scientist's design for a human zoo. "Over all, there are now more people under 'correctional supervision' [prison, probation, parole, etc.] in America—more than six million—than were

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**Caitlin Shay &
Zachary Zarnow**

**FREE BUT NO LIBERTY:
HOW FLORIDA CONTRAVENES
THE VOTING RIGHTS ACT WITH
DISENFRANCHISEMENT OF FELONS**

Introduction

The United States has a long history of denying minorities their right to vote—of practicing racially-motivated disenfranchisement. In early 2011, Florida Governor Rick Scott continued this tradition by issuing an executive order permanently denying convicted felons their right to vote, unless they petition for executive clemency after a five-year waiting period following the completion of their sentences. These new procedures are a step backward for Florida to previous policies that disproportionately disenfranchised African-Americans. Actions like Governor Scott's demonstrate why the Voting Rights Act (VRA) of 1965,¹ most recently re-authorized in 2006, is still needed to prevent racially discriminatory voting practices.

This article argues that Florida's executive re-enfranchisement policies contravene the Voting Rights Act and should be nullified. A review of felon disenfranchisement in the United States and Florida, the VRA's basic mechanics, and Florida's recent challenge to the Act's constitutionality will help make this clear. The VRA continues to be a constitutional exercise of congressional power that requires Florida to seek pre-clearance for changes to felon disenfranchisement procedures under Section 5 of the Act, and would likely forbid the proposed changes under either a purposeful discrimination or disparate impact analysis under Section 2 of the Act. The article concludes that Florida must submit its proposed changes for pre-clearance, and that if it fails to do so, the U.S. Justice Department should act to prevent the implementation of arguably the harshest felon disenfranchisement procedures in the nation.

I. On felon disenfranchisement and the Voting Rights Act

Felon disenfranchisement strips certain civil rights, including the right to vote, from people convicted of certain crimes, sometimes for life. Globally, the

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United States is one of the few outlier countries with severe disenfranchisement laws that reach such a broad range and high number of people.² In the United States, felon disenfranchisement is regulated by the states, in accordance with Article 1, Section 4 of the U.S. Constitution, which gives states control over the time, place, and manner of federal voting, subject to congressional regulation.³ As of 2011, approximately 5.3 million people in the United States are ineligible to vote due to state felon disenfranchisement laws.⁴

Individual states have taken different approaches to felon disenfranchisement. Only two states, Maine and Vermont, allow all people with criminal convictions to vote, even those who are incarcerated.⁵ The remaining 48 states impose disenfranchisement at some stage of the post-conviction process.⁶ While some argue that felon disenfranchisement is an appropriate punishment for those convicted of crimes, others worry that felon disenfranchisement inhibits rehabilitation, thus preventing convicted persons from fully reintegrating into society.⁷ These concerns have prompted many states to automatically restore civil rights to convicted people after the completion of their sentences or after a waiting period. Florida, Iowa, Virginia, and Kentucky are the only four states that disenfranchise convicted felons for their entire lives.⁸ The only method by which felons in these states can restore their civil rights is through clemency from the governor.⁹

Racial discrimination was the impetus for many of the felon disenfranchisement laws enacted after the ratification of the Fifteenth Amendment.¹⁰ To this day, African Americans continue to be disproportionately impacted by disenfranchisement laws and stringent re-enfranchisement requirements. African American men, in particular, are disenfranchised at seven times the national average. Estimates indicate that if current incarceration levels stay the same, 30 percent of African American men are expected to be disenfranchised during their lives.¹¹ Therefore, felon disenfranchisement (and corresponding re-enfranchisement procedures) must be considered in the context of prophylactic laws aimed at preventing racial discrimination in voting, such as the Voting Rights Act of 1965.

A. Florida's re-enfranchisement policies and recent developments

Since Florida's original constitution was approved in 1868 it has mandated that, "No person convicted of a felony . . . shall be qualified to vote or hold office until restoration of civil rights."¹² The civil rights restoration procedures have varied by the political administration in power. Following public outcry after the 2000 presidential election, Governor Jeb Bush began a process, which was expanded by his successor, Governor Charlie Crist, to

automatically restore civil rights for felons convicted of non-violent crimes in certain circumstances.¹³

In the 2004 presidential election, 600,000 to 960,000 citizens in Florida were unable to participate in the electoral process because they had been convicted of a felony.¹⁴ Up to 25 percent of those excluded were African-American men.¹⁵ Some argue that the impact of the state's felon disenfranchisement law was a deciding factor in the election of President George W. Bush in 2000, who won by a mere 537-vote margin in Florida.¹⁶

In response to the ensuing controversy, Governor Jeb Bush made minor changes to the disenfranchisement laws. Previously, all convicted felons who had completed their sentences could apply for re-enfranchisement, but had to do so at a hearing before the executive clemency board.¹⁷ The executive clemency board could only hear the individual appeals of about 200 people per year.¹⁸ Governor Jeb Bush's changes established that people who had not committed a violent offense and had not committed another crime within five years could apply to have their civil rights automatically restored without an individual hearing.¹⁹ Additionally, any person who had been arrest-free for 15 years, regardless of the nature of her or his conviction, could also have her or his civil rights restored without a hearing.²⁰

In January 2007, Republican Charlie Crist took office as the newly elected governor of Florida. On April 5, 2007, the Florida Executive Clemency Board, which consisted of Governor Crist and three executive branch members,²¹ voted to automatically restore civil rights to felons convicted of non-violent crimes after their sentences were completed.²² The Florida Advisory Committee to the U.S. Civil Rights Commission, in a 2008 report praising the new policy, noted that Governor Crist's actions restored the rights of an estimated 154,000 people,²³ among the estimated one million Florida citizens stripped of their rights by the state's permanent disenfranchisement law.²⁴ By taking these steps Florida came into alignment with the majority of states that grant automatic restoration for citizens who have completed their sentences.²⁵

Rick Scott was elected Governor of Florida in 2010.²⁶ In 2011, promptly after his election, Governor Scott issued an executive order that permanently disenfranchised people convicted of felonies and imposed at least a five year waiting period to apply for rights restoration (seven years for "violent" offenders). Governor Scott's executive order not only reversed Governor Crist's historic reforms, but it also bucked the national trend toward automatic restoration by including further steps to prevent citizens convicted of felonies from restoring their rights.²⁷ The addition of the waiting period was significant because if a person were arrested at any point during the five-year waiting period, the clock would start over, even if no charges were ever filed against

the person.²⁸ Under these regulations, Florida now has the most burdensome felon re-enfranchisement procedures in the United States, which we argue violates the VRA.²⁹

B. Overview of the Voting Rights Act of 1965

The Voting Rights Act of 1965 (VRA) is considered the most important voting rights law because it broadly protects citizens against racial discrimination in exercising their franchise.³⁰ Congress passed the VRA in 1965 to enforce the protections guaranteed by the Fifteenth Amendment³¹ on a wave of momentum coming off the passage of the Civil Rights Act in 1964, and with the encouragement of President Johnson. The VRA prohibits voting discrimination based on race or minority language group, and authorizes federal government oversight of new election measures enacted by jurisdictions with discriminatory histories under certain criteria.³² There are two particularly relevant sections of the VRA: sections 2 and 5.

The general prohibition against racial discrimination appears in section 2, which provides a right of action against any state or political subdivision that applies a standard, practice, or procedure that “results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color,” and following reauthorization in 1975, because of membership in a “language minority group.”³³ These prohibitions forbid the use of “tests or devices,” such as poll taxes or literacy exams, as a means of preventing members of protected groups under the Act from exercising their right to vote.³⁴

In 1980, the Supreme Court held that section 2, as originally passed, was essentially a restatement of Fifteenth Amendment protections.³⁵ Under this analysis, a plaintiff had to show that there was an invidious purpose or discriminatory intent behind the voting standard, practice, or procedure.³⁶ In 1982, Congress amended section 2 to explicitly reject what became known as the “intent test,” instead allowing a cause of action when, given the totality of the circumstances, the effect of a standard, practice, or procedure denied a protected group an equal opportunity to vote.³⁷ The so-called “effects test” was subsequently endorsed by the Supreme Court in a section 2 case involving voter dilution, though it has come under scrutiny by Circuit Courts in felon disenfranchisement cases over the last twenty years.³⁸

Section 5 of the VRA requires federal pre-clearance before any changes to voting laws may take effect in a “covered jurisdiction” as defined by section 4.³⁹ “A state or political subdivision is covered by the VRA if it satisfies two elements under section 4. First, on November 1, 1964, the state or political subdivision must have maintained a test or device that restricted the

opportunity to vote or register to vote.⁴⁰ Second, the Director of the Census must determine that in that same state or political subdivision fewer than 50 percent of voting age persons were registered to vote on November 1, 1964, or that fewer than 50 percent of voting age persons had voted in the presidential election of November 1964.⁴¹ As part of an application for pre-clearance approval, the covered jurisdiction has the burden of showing that any proposed changes would not worsen or prove “retrogressive” toward the opportunity for racial minorities to vote.⁴³

In 1970, Congress renewed these provisions, setting November 1968 as the relevant date for both elements of the formula.⁴³ In 1975, two revisions were made: the provisions were extended to cover both race and language minority groups and the trigger date was changed to November 1972.⁴⁴ The coverage formula was extended again in 1982 and 2006.⁴⁵ Section 4, along with sections 5 and 8, which depend on it, will expire in 2031.⁴⁶ Under the 1972 based coverage formula, there are currently five Florida counties that are covered jurisdictions under the section four formula⁴⁷—Collier County, Hardee County, Hendry County, Hillsborough County, and Monroe County.⁴⁸

The concept of a “covered jurisdiction,” as determined by the section 4 formula, is the foundation for the federal government’s broad and important powers under section 5. The Supreme Court, in a seminal test case decided shortly after the VRA’s passage, *Allen v. State Board of Elections*, interpreted section 5 to be a broad grant of authority to review all proposed changes affecting voting.⁴⁹ The Court interpreted section 5 as requiring review of the “subtle, as well as the obvious, state regulations” because Congress intended that “all changes, no matter how small, be subject to section 5 scrutiny.”⁵⁰ As a result, section 5 has proven to be a vital mechanism for enforcing voting rights since its enactment.

There are two ways that a covered jurisdiction may comply with section 5.⁵¹ The first and by far most common is for the covered jurisdiction to seek administrative review of proposed changes by submitting them to the Civil Rights Division of the Department of Justice, which has been delegated review power by the Attorney General of the United States.⁵² If the Attorney General does not object to the change within sixty days, the covered jurisdiction may enforce its proposed change⁵³ and that decision may not later be challenged in court.⁵⁴ This prohibition, however, does not prevent a legal challenge under section 2 or other applicable law.⁵⁵

The second, and less common method of complying with section 5, is through filing an action for declaratory judgment before the United States District Court for the District of Columbia.⁵⁶ Under this method, the covered jurisdiction has the burden of proving that the proposed voting change(s)

“neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color or [membership in a language minority group].”⁵⁷ These actions are brought against the United States or the Attorney General and may be appealed directly to the Supreme Court.⁵⁸ If a jurisdiction brings a declaratory judgment action after the Attorney General has entered an objection during administrative review, the declaratory judgment action is heard *de novo*, as it is not considered an appeal of the Attorney General’s decision. Finally, if a covered jurisdiction fails to comply with the pre-clearance requirements of section 5, the Attorney General may file suit to enjoin the enforcement of the changes and any person or organization with standing may also sue seeking injunctive relief.⁵⁹

Covered jurisdictions may also apply to terminate coverage under the VRA’s section 5 “bailout” provisions.⁶⁰ To obtain a bailout, the covered jurisdiction must apply for a declaratory judgment to demonstrate that continued supervision is unnecessary. Specifically, it must prove that no discriminatory tests or devices have been used in the past five years and that all voting changes in the jurisdiction have been cleared under section 5.⁶¹ An increasing number of jurisdictions have successfully taken advantage of the bailout provision since the important *Northwest Austin Municipal Utility District No. 1 v. Holder* (“*NAMUDNO*”) decision of 2009.⁶² Eleven jurisdictions have bailed out in the three years since the decision, compared to seven in the previous three years, and only seventeen in the decade preceding the decision.⁶³

Despite repeated attacks, the Supreme Court has ruled that the VRA is constitutional. The Supreme Court held in *South Carolina v. Katzenbach* that the promulgation of the VRA fell within the full remedial powers to prevent racial discrimination granted Congress by the Fifteenth Amendment.⁶⁴ Accordingly, the VRA section 5 pre-clearance requirements were ruled constitutional in 1966.⁶⁵ In *NAMUDNO*, the Supreme Court declined to decide whether the 2006 extension of the VRA was constitutional, but instead found that any covered political sub-division could apply to bail out.⁶⁶ Despite many Supreme Court observers’ fears that the conservative Roberts Court would strike down the landmark law, the Court made a strategic choice to reach a “compromise” decision, which dodged the question of the VRA’s constitutionality (though hinting at certain bases for a future challenge) and explicitly encouraged localities to take advantage of the bailout provisions.

Since *NAMUDNO*, however, there have been two notable developments related to the VRA’s constitutionality. First, in September 2011, in *Shelby County v. Holder*, the D.C. District Court issued a very significant ruling which held that ample evidence supported the continued constitutionality of

section 5 of the 2006 VRA extension.⁶⁷ *Shelby County* addressed the very questions of the VRA's constitutionality that the Supreme Court skirted in *NAMUDNO*.⁶⁸ This decision was appealed to the U.S. Court of Appeals for the District of Columbia with oral arguments heard January 19, 2012. Many predict, and some fear, that this case is likely to reach the Supreme Court, where the conservative-leaning court will more heavily scrutinize constitutionality of section 5.⁶⁹

Moreover, in October 2011, Florida filed a complaint before the District Court of the District of Columbia, seeking either pre-clearance for several proposed voting regulation changes or a finding that section 4 and section 5 are unconstitutional.⁷⁰ The complaint argues that "subjecting Florida counties . . . covered exclusively under the language minority provisions of the VRA to pre-clearance is not a rational, congruent, or proportional means of enforcing the Fourteenth and/or Fifteenth Amendments and violates the Tenth Amendment and Article IV of the U.S. Constitution."⁷¹ The Court has yet to rule on this issue, though it seems like a weaker challenge in light of the *Shelby County* ruling.

II. Defending the VRA's constitutionality and expanding its reach to re-enfranchisement clemency schemes

The VRA remains a valid constitutional exercise of congressional power because it serves as a remedial statutory arm of the Fourteenth and Fifteenth Amendments against a backdrop of continued racial voting discrimination. The VRA's reach should extend to discriminatory executive clemency rules, such as those in Florida, because although the Supreme Court has yet to rule on this specific issue, the VRA applies broadly to cover all voting changes, even those made by executive order. The Justice Department should review Florida's procedures under section 5 as statewide changes to voting procedures must still be pre-cleared even if only five jurisdictions are covered. We argue that the Department should to refuse to pre-clear Florida's disenfranchisement-related changes because the procedures have the purpose or effect of denying racial minorities' ability to exercise their franchise. Further, we argue that Florida's procedures also violate VRA section 2 and the Equal Protection Clause because African-American Florida citizens are disenfranchised at a far higher rate than non-racial minorities.

A. The VRA remains an appropriate and constitutional exercise of Congressional power

The Supreme Court has held that the VRA is constitutional.⁷² Not surprisingly, the first failed challenge to the VRA came in 1964, before the Act became law. In *South Carolina v. Katzenbach*, South Carolina, along with Alabama, Georgia, Louisiana, Mississippi, and Virginia, petitioned the Court

asking for an injunction against the enforcement of the VRA.⁷³ In *Katzenbach*, as with Florida's current challenge, South Carolina did not challenge the constitutionality of the VRA in its entirety, but rather specific sections of the Act, including section 4 and section 5 on Article III, Fifth and Fifteenth Amendment grounds.⁷⁴ The Court, in upholding the VRA's constitutionality, applied a rational basis test.⁷⁵ It reasoned that South Carolina's argument that Congress' enactment of the VRA was beyond the scope of its power failed because section 2 of the Fifteenth Amendment gives Congress the power to enforce the Amendment by appropriate legislation.⁷⁶ Thus, the VRA was found to be a valid exercise of congressional power because it was rationally intended to further the aim of the Fifteenth Amendment, which expressly allowed for Congress to act in such a fashion.⁷⁷

The VRA essentially went unchallenged for years following *Katzenbach*. Some of the factors that contributed to this were the initial congressional findings justifying the law, the Act's continued enforcement over time, and the strength of the *Katzenbach* decision. Then, in 2009, the issue of VRA's constitutionality was raised once again in *NAMUDNO*, but the Supreme Court declined to expressly rule on the 2006 extension's constitutionality. Instead, it re-opened the door to future constitutional challenges by questioning the Act's "federalism costs" and continued necessity.⁷⁸

NAMUDNO's challenge hinged on the continued constitutionality of section 5, which had long been considered controversial. In *NAMUDNO*, a Texas utility district sought to bail out of the pre-clearance requirements.⁷⁹ The Court found that because the VRA considered the district a political sub-division subject to pre-clearance coverage, the district was entitled to the corresponding right to bail out.⁸⁰

More importantly, however, the Court called into question the continued necessity of the Act because of recent improvements in minority voter registration and turnout.⁸¹ In the Court's estimation, these perceived improvements, while likely the result of the VRA itself, also weighed against the Act's continued validity because it "imposes current burdens and must be justified by current needs."⁸² This determination led the Court to endorse the argument put forth in *Boerne v. Flores* that the VRA should be assessed for "congruence and proportionality" between the injury the Act seeks to prevent or remedy and the means adopted to that end, instead of merely assessing whether the VRA passes a rational basis examination.⁸³

Nonetheless, in *Shelby County v. Holder*, the U.S. District Court for the District of Columbia found that even under a congruence and proportionality test, the 2006 extension was an appropriate and constitutional exercise of congressional power.⁸⁴ In a 151-page opinion, the Court examined the his-

tory of the Fifteenth Amendment, past Supreme Court cases upholding the constitutionality of the VRA, and the 15,000 page legislative record outlining continued patterns of voting discrimination.⁸⁵ The Court held that the VRA was constitutional because it enforced the Fifteenth Amendment, remedied past discrimination, preserved gains against discriminatory practices, and was still necessary to protect the fundamental right to vote of racial and language minorities.⁸⁶

Thus far, VRA section 5 critics have made only modest steps toward reforming the law. The new application of the congruence and proportionality test to VRA section 5 does little to attack the provision's constitutionality because ample evidence still unfortunately exists to support its continued necessity. Since the 2006 extension, the Department of Justice has denied clearance to many proposed changes in the voting regulations of covered jurisdictions⁸⁷ including, most recently, restrictive voter identification laws.⁸⁸

Arguments that the VRA is obsolete because minority voter registration has increased are flawed because such claims rely on misinterpreted data.⁸⁹ For example, in his dissent in *NAMUDNO*, Justice Thomas argued that African American and white voter registration rates are nearly the same.⁹⁰ However, Latino registration rates are considerably lower than white registration rates, yet Latino voters, as non-African Americans, were factored into white registration rates, since many Latinos (an ethnicity category) are racially classified as white.⁹¹ Such misrepresentations affect the overall non-African American registration rate, making it appear to be near the same level as African American registration rates.⁹² In reality, non-Hispanic white data clearly show that registration rates for whites are much higher than African Americans rates.⁹³ Florida's constitutional challenge of the VRA should fail, given long precedent upholding the law and revived concerns about minority voter suppression.⁹⁴ The voluminous legislative history supporting the VRA's extension, repeated endorsement of the Act by the lower courts, and the indisputable evidence of continued discrimination in voting procedures all weigh heavily against Florida.

B. Florida's executive clemency scheme is subject to VRA section 5 even though Florida is only partially covered

Florida's new procedures ban people convicted of felonies for life, unless they petition to the governor for restoration at least five years after the completion of their sentences. These procedures, established by executive order, should be subject to the pre-clearance under section 5. As such, they may not be implemented in the five Florida counties covered under section 5 until they are approved by the Justice Department or United States District Court for the District of Columbia. The Justice Department should review

Florida's re-enfranchisement scheme because statewide voting changes in partially covered states must be pre-cleared under VRA section 5.

There are seven states that are only partially covered by the VRA.⁹⁵ In those states, statewide voting changes must be submitted to the Justice Department or the D.C. District Court for review if they directly affect voting in the covered jurisdictions.⁹⁶ In 2002, the Justice Department objected to a Florida statewide redistricting plan that would have eliminated the only majority-Hispanic district in the state, which was located in a covered jurisdiction.⁹⁷ Of the five pre-clearance denials that the Justice Department has made to Florida voting procedures since 1984, four of them have been for state-wide voting changes.⁹⁸ The fifth denial was to a change in voting procedures taking effect specifically in a covered county, and was later withdrawn.⁹⁹

Past objections to Florida's voting procedures align with the Supreme Court's decision in *Lopez v. Monterey County*, which held that statewide voting changes that affect covered counties must be pre-cleared by the Justice Department.¹⁰⁰ In *Lopez*, the Court determined that even though only some counties in California were covered under section 5 of the VRA, measures enacted by the state were subject to pre-clearance to the extent that such measures would affect the covered county.¹⁰¹ Therefore, the covered county was not allowed to administer the changes until after it had received pre-clearance by the Justice Department.¹⁰²

The *Lopez* decision strongly suggests that covered jurisdictions in Florida, like California, must submit changes to felon disenfranchisement procedures for pre-clearance.¹⁰³ In *Lopez*, Monterey County, not the state of California, had to submit the changes for pre-clearance.¹⁰⁴ Similarly, the covered counties in Florida must submit the felon disenfranchisement procedures to the Justice Department. Until pre-cleared, the covered counties are not allowed to administer the changes that the stricter Florida disenfranchisement procedures require.

If the Department of Justice denied preclearance to the executive order, it could lead to an odd situation in which some Florida counties would be allowed to ban felon civil rights, while the covered counties could not. The administrative details of how this would work are complex, but it is possible that ex-felons who live in covered jurisdictions would be automatically allowed to vote after completing their sentences, as they could before Governor Scott's executive order, while in the rest of the state, ex-felons would be subject to Governor Scott's executive order.

State rules about election uniformity further complicate this process. In 1998, the Secretary of State Sandra Mortham issued an opinion that Florida

election laws must be consistent throughout the state.¹⁰⁵ The continued validity of this opinion is unclear, as a challenge by the American Civil Liberties Union (ACLU) to the implementation of a statewide voting change in the non-covered counties prior to pre-clearance was dismissed in June 2011 on procedural grounds.¹⁰⁶ Yet, because of the complexity, confusion, and possible violation of state law that would result if the felon voting procedures were different in different counties, it is imperative that the covered counties in Florida submit the felon disenfranchisement procedure to the Department of Justice. Since Florida's changes are likely to face an objection, Governor Scott may have to issue a new executive order that would comply with the VRA without leading to the complexity and confusion of having different rules in different counties.

1. The re-enfranchisement scheme must be pre-cleared because executive orders are voting changes that are subject to section 5.

VRA section 5 does not distinguish among the source of election law changes.¹⁰⁷ The Supreme Court, in *Foreman v. Dallas County*, held that even changes to the selection process of election judges who monitor voting in precincts was subject to pre-clearance requirements.¹⁰⁸ Further, Florida itself has consistently acknowledged the breadth of the pre-clearance requirement, as it has previously submitted House bills, redistricting plans, and home rule charters for Justice Department approval.¹⁰⁹ All of these submissions are consistent with section 5's broad mandate that all "standard[s], practice[s], and procedure[s]" must be submitted to the DOJ to be pre-cleared if they affect the voting process.¹¹⁰

The Northern District of Alabama is currently considering whether Governor Riley's executive order that changes voting procedures is subject to VRA pre-clearance, but the challenge there is less clear than in the Florida case.¹¹¹ In Alabama, an amendment to the state constitution was approved by referendum and then pre-cleared by the Department of Justice in accordance with section 5.¹¹² The pre-cleared amendment allowed a Local Constitutional Amendment Commission to decide whether a proposed local constitutional amendment affects more than one county or more than one subdivision in one or more counties.¹¹³ As a condition of pre-clearance, the Justice Department required Alabama to remove a provision allowing the Governor to veto any decisions.¹¹⁴

In the years preceding this amendment, several Alabama counties approved local constitutional amendments that authorized bingo operations within their jurisdictions.¹¹⁵ Governor Riley has since sought to stop the bingo operations in Greene County through executive orders and police actions.¹¹⁶

African American voters in the county alleged that Governor Riley's use of executive orders to reverse the local counties' decision was a *de-facto* veto of their vote and an unapproved change to voting standards and practices.¹¹⁷ This case is distinguishable from Florida's case because Governor Scott's executive order, which changed procedures for reinstating felons' right to vote, was never submitted for section 5 pre-clearance at all. Unlike in the Alabama case, where it is unclear whether bans on bingo operations can be considered a voting change, the executive order in the Florida case is clearly a voting change affecting the rights of hundreds of thousands of Florida citizens.

In addition, Governor Scott's executive order addresses a voting change—it is not simply a change to sentencing procedures, as he claims. The order affects the way that a disenfranchised felon may regain her or his civil rights, including voting rights. The procedures have no bearing on sentencing because they impact felons long after sentencing decisions have already been made, after individuals have fully completed their sentences. Therefore, because section 5 provides a very broad grant of out-of-jurisdiction review authority, executive orders are subject to section 5's pre-clearance requirements, and since Governor Scott's executive order deals with a voting change, it must be submitted to the Justice Department or D.C. District Court before the five covered jurisdictions may implement any changes.

2. If Florida's re-enfranchisement scheme is considered under section 5, Florida will not be able to show the change does not have a discriminatory purpose or effect

The Justice Department or the D.C. District Court should reject Florida's felon re-enfranchisement scheme after review because Florida will be unable to meet its burden showing that the proposed changes have neither a discriminatory purpose nor effect.¹¹⁸ In its review, the Justice Department or D.C. District Court will examine whether the voting changes will have a "retrogressive effect" on the ability of minorities to vote.¹¹⁹ Although, historically, there has not been an objection issued by the Justice Department regarding a re-enfranchisement scheme, there are analogous cases to suggest a likely denial. For example, the Justice Department issued a 2008 objection to Georgia's voter verification scheme because African American and Hispanic voters were disproportionately and incorrectly flagged by the so-called verification system in comparison to white voters.¹²⁰ Flagged voters had to take additional steps, which sometimes included going to the courthouse during business weekday hours on three days' notice, in order to prove their eligibility to vote.¹²¹ The Justice Department found that the voter verification system had a retrogressive impact on voting rights for minorities because the disproportionate impact on minorities who were incorrectly

flagged was statistically significant, and thus found that the law did not meet section 5 requirements.¹²²

Similarly, Florida's re-enfranchisement scheme has a disproportionate impact on minority voters, which has a retrogressive impact on their right to vote. The evidence is clear. Although about 15 percent of Florida's total population is African American, African Americans account for 25 percent of those who are disenfranchised.¹²³ In 2010, 34 percent of all people arrested and 41 percent of all people arrested for drug violations were African American.¹²⁴ In the 2000 election, about 4.4 percent of whites were disenfranchised due to a past felony, compared with 10.5 percent of African Americans.¹²⁵ In 2008, while 15.3 percent of Floridians were African American, they made up 49.8 percent of the Florida prison population.¹²⁶ And in Florida today, African Americans are disenfranchised at twice the rate of whites.¹²⁷

The 2011 re-enfranchisement scheme subjects all persons convicted of felonies to at least a five-year waiting period before they can even apply to regain the right to vote.¹²⁸ If a person is arrested at any time during the waiting period, even if there is no prosecution or conviction, the waiting period re-starts.¹²⁹ As African-Americans are overly represented in both arrests and incarcerations, the new Florida scheme will almost certainly have a harsher impact on minorities. As such, the scheme will have a retrogressive impact on the right of minorities to vote and should be pre-cleared.

C. Florida's scheme violates VRA section 2 and the Equal Protection Clause

Sections 2 and 5 operate independently of one another. Covered jurisdictions, under section 5, have a burden of proving that voting changes are not racially discriminatory.¹³⁰ Under section 2, an individual in any state or jurisdiction can sue if they are harmed by a voting practice that has a racially discriminatory purpose or effect.¹³¹ Unlike section 5, non-covered jurisdictions may also face section 2 challenges.¹³² In Florida, this means that a section 2 challenge would affect the felon re-enfranchisement scheme for the entire state, not just the five covered counties. The Supreme Court has not ruled on whether felon disenfranchisement can violate section 2 of the VRA, and if so, whether the disenfranchisement must be the result of intentionally discriminatory practices. There is currently a circuit split concerning whether felon disenfranchisement is subject to section 2.

In *Farrakhan v. Gregoire* ("Farrakhan I"), the Ninth Circuit found that the Washington State criminal justice system was infected with racial bias, and as such, felon disenfranchisement laws operated improperly based on race in violation of section 2.¹³³ In reaching this result, the Court did not require the

ex-felons to show any history of official discrimination.¹³⁴ Instead, the court found that a VRA section 2 analysis requires a “totality of the circumstances” review to determine how “a challenged voting practice interacts with external factors such as ‘social and historical conditions’ to result in denial of the right to vote on account of race or color.”¹³⁵ Therefore, statistical findings and sociological studies about racial discrimination in the criminal justice system were appropriate evidence to bolster a section 2 claim.¹³⁶ The Court concluded that even though Washington did not pass its felon disenfranchisement law with a racially discriminatory purpose, the law interacted with a racially discriminatory criminal justice system, which produced a constitutionally impermissible effect on minorities under the VRA.¹³⁷ Evidence the court found persuasive showed that prosecution of crack cocaine and street drug trafficking was not proportional to its harm on the community or share of the drug trade; that the proportion of African Americans and Latinos arrested for drug possession had no correlation to the proportion of users among those races; that police searches of African Americans and Latinos occurred at higher rates than whites, but led to fewer seizures; and that minority defendants were detained in disproportionate numbers when other factors were controlled.¹³⁸ This kind of evidentiary record was novel for such a challenge.

Ten months after *Farrakhan I*, the Ninth Circuit reheard this case *en banc* and vacated the prior ruling.¹³⁹ In *Farrakhan v. Gregoire* (“*Farrakhan III*”), it decided that to succeed in a section 2 challenge based on criminal justice system racial discrimination, a plaintiff must show that the system is infected with intentional discrimination.¹⁴⁰ The Ninth Circuit ultimately held that plaintiffs did not meet their burden in establishing a VRA section 2 claim because the plaintiffs had presented statistical data only proving discriminatory effect.¹⁴¹ While other circuits that have considered this issue have generally followed the *Farrakhan III* reasoning,¹⁴² the Supreme Court has yet to definitively say whether there is a cognizable VRA claim against felon disenfranchisement laws and if so, whether an intentional showing of racial discrimination is required.¹⁴³

1. Florida’s re-enfranchisement scheme is a relic of its discriminatory 1868 constitution and violates the Equal Protection Clause and VRA section 2 under an intentional discrimination analysis.

Farrakhan III, which takes the position adopted by all of the circuits, held that proof of intentional discrimination in the criminal justice system was sufficient for section 2 claims.¹⁴⁴ Unfortunately, the Court did not provide clear guidance on which standard to apply in determining whether a felon disenfranchisement or re-enfranchisement scheme is intentionally discriminatory under section 2.¹⁴⁵ Therefore, the most applicable standard is to consider the felon disenfranchisement scheme through a Fourteenth Amendment Equal

Protection analysis.¹⁴⁶ Any finding that Florida's felon re-enfranchisement scheme is intentionally discriminatory under section 2 would also meet Equal Protection scrutiny standards.

In *Richardson v. Ramirez*, the Supreme Court held that felon disenfranchisement was not subject to strict scrutiny under section 2 of the Fourteenth Amendment.¹⁴⁷ Although the right to vote is a fundamental right, the second clause of the Fourteenth Amendment states that the right to vote may be limited "for participation in rebellion, or other crime."¹⁴⁸ In *Richardson*, the dissent noted that this clause was passed as a political compromise that had little to do with the purpose of the Fourteenth Amendment.¹⁴⁹ In addition, it argued that even if a voting penalty was authorized in section 2, the practice might still violate section 1 if it was discriminatory.¹⁵⁰ While the dissent would have subjected felon disenfranchisement to strict scrutiny and found it unconstitutional, the majority decision upholding the laws' constitutionality continues to stand as the prevailing law today.¹⁵¹

In the 1985 case *Hunter v. Underwood*, however, the Supreme Court revisited the question of the felon disenfranchisement law's constitutionality and struck down a provision in the Alabama Constitution that disqualified voters who had committed a crime of moral turpitude.¹⁵² In its decision, the Court found that when the 1901 disenfranchisement amendment was written into the Alabama Constitution, legislators passed it with the intent to keep African Americans from voting and absent such intent that the measure would have never been enacted.¹⁵³ The Court held that because the original enactment was motivated by racial discrimination and that because it continued to have a discriminatory effect on African Americans, the law was unconstitutional.¹⁵⁴ Based on this evidence, the Court invalidated the Alabama Constitution's felon disenfranchisement clause on Equal Protection grounds.¹⁵⁵ This decision suggests that the constitutionality of felon disenfranchisement is not completely settled from the Supreme Court's perspective.¹⁵⁶

In 1992, the Supreme Court ruled in *United States v. Fordice* that future re-enactments of a law may be constitutional even if the law was originally promulgated for a racially discriminatory purpose.¹⁵⁷ *Fordice* explains that if a legislature subsequently re-enacts a discriminatory law, it must do so for independent and legitimate reasons, so as to break the discriminatory link from the original law.¹⁵⁸ However, the burden is on the State to prove that the legislature offered independent and legitimate reasons that supported a racially-neutral justification for the law's renewal.¹⁵⁹ Since *Hunter* and *Fordice*, some circuits have incorrectly allowed states to prove that re-enactments of racist laws were passed for a non-discriminatory purpose with very little evidence that the original taint had been removed.¹⁶⁰

Florida's disenfranchisement laws have been debated by courts on these grounds. In 2002, the Federal District Court for Southern Florida found that Florida passed the felon disenfranchisement provision in its 1868 constitution with the express intention to limit the ability of African Americans to vote.¹⁶¹ In 2005, the Eleventh Circuit in *Johnson v. Governor of the State of Florida* concluded that a subsequent 1968 re-enactment had removed the racially discriminatory taint because there was sufficient deliberation; therefore, the law did not violate the Equal Protection Clause, regardless of a disparate impact on African Americans.¹⁶²

The Eleventh Circuit's analysis in *Johnson* was incomplete because the Court did not thoroughly apply the *Fordice* test, opting instead to simply note that the 1968 re-enactment was "deliberate." More specifically, the dissent in *Johnson* found that the majority used flawed reasoning, since Florida did not meet its burden to prove that the legislature offered independent and legitimate reasons for reenacting its felon disenfranchisement law.¹⁶³ Without this evidence, the re-enactment is still tainted by the original intentionally discriminatory law. Thus, the majority should not have concluded that the State met its burden under the *Fordice* test.¹⁶⁴

While the felon disenfranchisement procedures in Florida have evolved since *Johnson*, and the most recent procedure is the result of an executive order, Florida arguably has never properly broken the link to its original 1868 felon disenfranchisement law because neither the legislature nor the executive have offered independent and legitimate reasons to remove the taint of the 1868 intentionally discriminatory law.¹⁶⁵ As such, if the Supreme Court were to consider these current procedures and properly apply the tests given in *Hunter* and *Fordice*, it would likely find that Florida's current felon re-enfranchisement procedures violate the Equal Protection Clause. If the Supreme Court also found that felon disenfranchisement and re-enfranchisement procedures can violate Equal Protection due to historical discriminatory taint, Florida's re-enfranchisement scheme would also violate VRA section 2 because it is intentionally racially discriminatory.

2. Florida's re-enfranchisement scheme violates VRA section 2 under a disparate impact analysis.

Even if the Court does not accept that Florida's felon disenfranchisement procedures are intentionally discriminatory, disenfranchised voters could still prevail on a VRA section 2 claim under the *Farrakhan I* disparate impact test.¹⁶⁶ Although the Ninth Circuit vacated *Farrakhan I* in an *en banc* decision and it is no longer good law, the Supreme Court has never definitively ruled on whether a felon disenfranchisement scheme in a jurisdiction where there is a disparate racial impact in the criminal justice system violates section 2.¹⁶⁷

If the Supreme Court were to adopt a disparate impact test similar to the one adopted in *Farrakhan I*, then a finding that the criminal justice system is statistically infected with racial bias would be sufficient to strike down many states' disenfranchisement laws.¹⁶⁸

Florida's current felon re-enfranchisement procedure almost certainly would violate section 2 because it has a direct disparate impact on African Americans as Florida's criminal justice system is infested with racial bias.¹⁶⁹ African Americans in Florida, as previously mentioned, are disproportionately arrested, incarcerated, and accordingly disenfranchised.¹⁷⁰ Florida's 2011 harsh re-enfranchisement scheme punishes those who are arrested, by restarting waiting periods, even if there is no prosecution. Statistics that show that African Americans in Florida are disproportionately arrested, convicted of felonies, and disenfranchised, and thus the 2011 re-enfranchisement scheme falls more heavily on African Americans. A statistical showing that African Americans are disproportionately affected by the Florida justice system, under a *Farrakhan* disparate impact test, is sufficient to find that within the "totality of the circumstances" the clemency scheme violates section 2.¹⁷¹ Florida's re-enfranchisement should be struck down using a disparate impact analysis based on ample evidence of the discriminatory nature of Florida's criminal justice system and the disproportionate effect these laws have on African Americans' ability to vote because it impermissibly denies people their right to vote because of their race.¹⁷²

While it is unlikely that the current Supreme Court would accept this disparate impact test if it were presented, it is impossible to predict what test the current Court would find most appropriate or future changes to the Court's composition that would influence a decision. Regardless, a strong evidentiary showing of Florida's discriminatory criminal justice system is still important because it would make it difficult for the Court to deny the continued need for the VRA or to ignore the ways in which African-Americans continue to suffer from unfair voting practices.

Conclusion

The Voting Rights Act continues to stand for an ideological commitment that racial discrimination in voting should not be tolerated. In contrast, Governor Scott's 2011 executive order creates the most restrictive felon disenfranchisement procedures in the United States, which has a disparate impact on African Americans. It follows that the VRA should reach and reverse the Governor's executive order.

The five counties in Florida covered under the VRA section 5 are required to submit the proposed felon disenfranchisement procedures to the Justice

Department or D.C. District Court before they can implement any changes. The counties must submit the changes because even executive orders must be pre-cleared if they impact voting practices and procedures; moreover, individual jurisdictions in partially covered states are required to submit statewide changes for pre-clearance to the extent it affects them. The Justice Department should refuse to pre-clear the executive order on two grounds: because it is rooted in the intentionally racially discriminatory felon disenfranchisement provision in the original Florida constitution and because it has a disparate impact on African Americans, who statistically have much higher rates of criminal arrests and convictions. Therefore, Florida has not met its burden of showing that the proposed changes will not harm the ability of African Americans to vote.

The Florida ACLU has requested that the Department of Justice require Florida to submit the 2011 executive order for review but has not received so much as a reply.¹⁸¹ The DOJ's failure to act could be a dangerous signal to other states that the Justice Department is not planning to regulate these types of voting changes. Action must be taken quickly to ensure equal access to the ballot for all to prevent widespread disenfranchisement of African Americans in the 2012 elections.

NOTES

1. 42 U.S.C. §§ 1971–1973 (2000), as amended in 1970, Pub. L. 91-285, 84 Stat. 314 (1970), in 1982, Pub. L. 97-205, 96 Stat. 131 (1982) and in 2006, Pub. L. 109-246 (2006).
2. See Katherine Shaw, *Comment Invoking the Penalty: How Florida's Disenfranchisement Law Violates the Requirement of Population Equality in Congressional Representation, and What To Do about It*, 100 NW. U. L. REV. 1439, 1468 (2006) (finding that 29 of the 37 in 1868 did not allow felons to vote, affirming the U.S.'s long history of denying this right to felons). *But see* Hirst v. United Kingdom, ECHR (2006) (holding that disenfranchisement is permissible only if there is a clear, direct connection to the crime for which the prisoner was convicted, such as electoral fraud or abuse of office, and should be left to judicial discretion as an aspect of sentencing; August v. Electoral Commission, (CCT8/99) SA 1 (1999) (reviewing South Africa's elections law that only restricts prisoners' right to vote due to (1) mental capacity; (2) current drug dependency; or (3) murder, robbery with aggravating circumstances, or rape).
3. See U.S. Const., art. 1, § 4, para. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."); see also Oregon v. Mitchell, 400 U.S. 112 (1970) (noting that while Congress can set limits for voting in federal elections, it may not set such limits for state and local elections).
4. Marc Mauer, "Letter to U.S. Senators Richard Durbin and Lindsay Graham," THE SENTENCING PROJECT 1, (September 8, 2011), http://sentencingproject.org/doc/publications/Subcommittee_hearing_letter_9-8-11.pdf Subcommittee Hearing Letter.
5. See ME. CONST. art. II, § 1 ("Every citizen of the United States of the age of 18 years and upwards, excepting persons under guardianship for reasons of mental illness, hav-

- ing his or her residence established in this State, shall be an elector . . .”); *see also* VT. STAT. ANN. tit. 28, § 807(a) (2000) (“Notwithstanding any other provision of law, a person who is convicted of a crime shall retain the right to vote by early voter absentee ballot in a primary or general election at the person’s last voluntary residence during the term of the person’s commitment under a sentence of confinement provided the person otherwise fulfills all voting requirements.”).
6. *See, e.g.*, MD. CODE ANN., Elections § 3-102(b) (2011) (restricting voting for felons only while serving a court-ordered sentence, including term of parole or probation). *See* Mauer, *supra* note 4, at 1 (relating that 35 states disenfranchise both prisoners and people who are in the community on parole or probation, four states permanently disenfranchise all people convicted of felonies, while the remaining states only restrict voting while actually in prison).
 7. Dara Kam, *Gov. Scott Willing to Reconsider Felon Rights Policy*, PALM BEACH POST, Nov. 1, 2011, <http://www.palmbeachpost.com/news/state/gov-scott-willing-to-reconsider-felon-rights-policy-1945750.html> (noting that Governor Scott himself has heard evidence and made statements about how important it is for ex-felons to regain their stake in society, and discussing studies that show recidivism rates are lower for felons who are restored voting rights).
 8. *See* FLA. CONST. art. VI, § 4(a) (2011) (“No person convicted of a felony . . . shall be qualified to vote, or hold office until restoration of civil rights.”); *see also* IOWA CODE § 48A.30 (2011); KY. REV. STATE. ANN. § 116.025(1) (2011); VA. CONST. art. 2, § 1; *see also* *Felony Disenfranchisement Laws in the United States*, THE SENTENCING PROJECT, 3 (Mar. 2011) (charting the laws of the fifty states to demonstrate that only Florida, Iowa, Kentucky, and Virginia disenfranchise convicted felons for their entire lives, unless they are given a pardon by the governor).
 9. *See* Abby Goodnough, *Disenfranchised Florida Felons Struggle to Regain their Rights*, N.Y. TIMES, Mar. 28, 2004, at <http://www.nytimes.com/2004/03/28/us/disenfranchised-florida-felons-struggle-to-regain-their-rights.html?pagewanted=all&src=pm> (revealing that in Florida before 2005, restoration of voting rights was automatic upon application to the governor for some people, but those convicted of more serious offenses were required to undergo an investigation and attend a hearing at the state capital in Tallahassee). Because of serious back-logs, some applicants had to wait years for a decision regarding whether their voting rights would be restored. *Id.*
 10. *See* JEFF MANZA & CHRISTOPHER UGGEN, *LOCKED OUT: FELON DISENFRANCHISEMENT & AMERICAN DEMOCRACY* 41-69 (2006) (arguing though there was a first wave of disenfranchisement laws that appeared in the 1840s targeted at white men without property, a distinct second wave of disenfranchisement laws appeared post-1870s during the Reconstruction era, particularly in the South, to explicitly create voting barriers for African-Americans and other racial minorities).
 11. *See* Mauer, *supra* note 4, at 2 (arguing that discrimination in the criminal justice system has the cyclical effect of leading to high prison rates for African American men, which leads to disenfranchisement, which may then lead to further criminal activity by those who feel alienated from the political process).
 12. FLA. CONST. art. VI, § 4(a) (2011).
 13. *See* Mark Christopher, *Florida’s Ex-Felons Right for Civil Rights Restoration Under Gov. Scott*, SUNSHINE SLATE (November 11, 2011), <http://www.sunshineslate.com/2011/11/17/civil-rights-restoration-under-gov-scott-in-focus/> (tracing one woman’s struggle to restore her voting rights, and the difficulties she is facing under Governor Scott’s administration, as compared to the procedures under prior administrations).

14. See Goodnough, *supra* note 9 (revealing the intense scrutiny Florida faced following this election for its voting regulations because the election was so close and a disenfranchisement law that more closely aligned with those of the majority of the states could have changed the outcome of the election); see also Shaw, *supra* note 2, at 1470 (relating that approximately two-thirds of disenfranchised felons in Florida have already completed their sentence but remain unable to vote).
15. See Goodnough, *supra* note 9 (citing a 2001 report from a University of Minnesota sociologist).
16. See *Political Punishment: The Consequences of Felon Disenfranchisement for Rhode Island Communities*, Rhode Island Family Life Center (2004), available at <http://opendoorsri.org/sites/default/files/PoliticalPunishment.pdf>; *The Vanishing Black Electorate: Felony Disenfranchisement in Atlanta, Georgia, King & Mauer*, THE SENTENCING PROJECT (2004), available at http://www.sentencingproject.org/doc/publications/fd_vanishingblackelectorate.pdf.
17. See *Ex-Felon Voting Rights in Florida: Revised Rules of Executive Clemency that Automatically Restore Civil Rights to Level 1 Offenders is the Right Policy* 15 (Florida Advisory Committee to the United States Commission on Civil Rights) (Aug. 2008), <http://www.usccr.gov/pubs/EX-FelonVRFL.pdf> [hereinafter *Ex-Felon Voting Rights in Florida*] (explaining the changes made by Governor Bush).
18. *Id.*
19. Ryan S. King, *Expanding the Vote: State Felony Disenfranchisement Reform, 1997-2008* 8, THE SENTENCING PROJECT (2008), at http://www.sentencingproject.org/doc/publications/fd_statedisenfranchisement.pdf.
20. *Ex-Felon Voting Rights in Florida*, *supra* note 17, at 15.
21. In 2007, the Commission consisted of Alex Smith, Chief Financial Officer, Charles Bronson, Commissioner of Agriculture, Charlie Crist, Governor, and Bill McCollum, Attorney General. The Commission always consists of the holders of those offices. See generally Florida Parole Commission Annual Report 2007-2008, available at <https://fpc.state.fl.us/PDFs/FPCAnnualreport200708.pdf>.
22. See *Ex-Felon Voting Rights in Florida*, *supra* note 17, at 17 (explaining that felons are categorized on a three tier system, and those on the lowest tier, Level 1, automatically have their voting rights restored at the completion of their sentence).
23. *Disenfranchisement News*, THE SENTENCING PROJECT, Sept. 13, 2011, http://www.sentencingproject.org/detail/news.cfm?news_id=1189.
24. *Id.* at 21.
25. See Mauer, *supra* note 4, at 1 (reporting that since 1997, state reforms have restored 800,000 people to voter registration polls).
26. See Amy Green, *Rick Scott Elected Florida Governor as Alex Sink Concedes Tight Race*, POLITICS DAILY, Nov. 6, 2010, <http://www.politicsdaily.com/2010/11/03/floridas-gubernatorial-race-too-close-to-call/> (representing the narrow margin of victory with forty-nine percent for Scott and forty-eight percent of the vote for his closest competitor).
27. *Governor Scott and Florida Cabinet Discuss Amended Rules of Executive Clemency*, PRESS RELEASE, March 9, 2011 https://fpc.state.fl.us/PDFs/clemency_press_release.pdf.
28. *Id.*
29. See Shaw, *supra* note 2, at 1441 (commenting that Florida's law applies to any felony committed in any state, which has led Florida to have the largest number of disenfranchised felons in the country).

30. This statement is a widely-held belief in the civil rights community. *See, e.g.*, U.S. Dep't of Justice, Voting Section, <http://www.justice.gov/crt/about/vot/> (last visited March 5, 2012) (“The Voting Rights Act, adopted initially in 1965 and extended in 1970, 1975, 1982, and 2006 is generally considered the most successful piece of civil rights legislation ever adopted by the United States Congress”).
31. *See generally* WILLIAM GILLETE, *THE RIGHT TO VOTE: POLITICS AND THE PASSAGE OF THE FIFTEENTH AMENDMENT* (1969) (tracing the origins and implementation of the Fifteenth Amendment through the passage of the Voting Rights Act).
32. *See* 42 U.S.C. §1973.
33. 42 U.S.C. §§ 1973(a), 1973b(f)(2); *see* 42 U.S.C. § 1973(l)(c)(3) (defining “language minorities” or “language minority group” as persons who are American Indian, Asian American, Alaskan Natives, or of Spanish heritage).
34. 42 U.S.C. § 1973b.
35. *See* *Mobile v. Bolden*, 446 U.S. 55, 60-61 (1980) (noting that during Senate hearings on the VRA, the view was expressed without contradiction that Section Two simply restated the prohibitions of the Fifteenth Amendment).
36. *See id.* at 66-75 (finding that the Equal Protection Clause required intent, not just effect); *see also* *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264-68 (1977) (requiring that when discriminatory intent is alleged, plaintiffs must prove that the challenged practice was adopted, at least in part, because it would harm minority voting strength, and not merely with an expectation that it would do so).
37. Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347, 1355-57 (1983); *see* S. Rep. No. 97-417, 97th Cong., 2d Sess., at 28-29 (1982) (listing several factors to consider when determining if the operation of an electoral device has a discriminatory effect).
38. *See* *Thornburg v. Gingles*, 478 U.S. 30, 43 (1986) (holding that Congress explicitly stated that a voting practice that has a discriminatory effect on minorities violates section two of the VRA).
39. *See* 42 U.S.C. § 1973c (describing the pre-clearance procedure).
40. *Id.*
41. *Id.*
42. *See* 42 U.S.C. § 1973.
43. *Id.* (reflecting the change from 1964 to 1970).
44. *Id.*; 42 U.S.C. §§ 1973(a), 1973b(f)(2).
45. *See* 42 U.S.C. § 1973b(b).
46. *Id.*
47. *See* *Section 5 Covered Jurisdictions*, United States Department of Justice, http://www.justice.gov/crt/about/vot/sec_5/covered.php (last visited November 5, 2011) (listing all covered jurisdictions under the VRA).
48. 40 FR 34329, 43746.
49. 393 U.S. 544, 565 (1969); *see also* 42 U.S.C. 1973c(a) (“Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color . . . to elect their preferred candidates of choice denies or abridges the right to vote.”).
50. 393 U.S. at 565, 568.

51. 42 U.S.C. § 1973c.
52. *See Section 5 Changes by Type and Year*, United States Department of Justice, http://www.justice.gov/crt/about/vot/sec_5/changes.php (last visited November 6, 2011) (tabulating the total number of changes submitted for approval between 1965 and 2010 as of March 31, 2011 at 531,142).
53. *See* 42 U.S.C. § 1973c (noting that a covered jurisdiction may also request an expedited review if necessary).
54. *See* *Morris v. Gressette*, 432 U.S. 491, 501-03 (1977) (holding that it was not the intent of Congress to have the Attorney General's decision subject to judicial review).
55. *See* 42 U.S.C. § 1973b (prohibiting standards, practices, or policies which intend or have the effect of denying the right to vote to a protected racial or language minority group).
56. 42 U.S.C. § 1973c. For a list of declaratory judgment actions, see *Section 5 Declaratory Judgment Actions*, United States Department of Justice, http://www.justice.gov/crt/about/vot/sec_5/caselist_ddc.pdf (last visited November 6, 2011).
57. *Id.*
58. *Id.*
59. *See* *Allen v. State Board of Elections*, 393 U.S. 544, 555 (1969) (reasoning that while no explicit private right of action is listed, the language providing that “no person shall be denied the right to vote for failure to comply with [a new state enactment covered by, but not approved under, § 5]” allows plaintiffs to seek a declaratory judgment that a new state enactment is governed by section five). If a plaintiff can prove that a change was not properly submitted for approval, he or she has standing to seek an injunction preventing the state from enforcing the change until it has sought approval under Section 5. *Id.* *See also* *Lopez v. Monterey County*, 519 U.S. 9, 23 (1996) (describing the Attorney General's inquiry during a section five enforcement action).
60. 42 U.S.C. § 1973b(a)(1)(A)-(F); *see* *NAMUDNO v. Holder*, 129 S. Ct. 2504 (2009) (holding that if a political subdivision is subject to pre-clearance under the VRA it may also apply for a bailout).
61. *See* 42 U.S.C. § 1973b(a)(1)(A)-(F). For a list of jurisdictions that have successfully bailed out, *see Section 4 of the Voting Rights Act*, United States Department of Justice, http://www.justice.gov/crt/about/vot/misc/sec_4.php#bailout (last visited February 10, 2012).
62. *See id.*
63. *Id.*
64. *See* 383 U.S. 301 (1966) (exercising original jurisdiction to rule that the Fifteenth Amendment provides Congress with the authority to enact legislation to prevent racially discriminatory voting practices).
65. *Id.* at 308.
66. 129 S. Ct. 2504 (2009).
67. 811 F.Supp.2d 424 (2011); *see* Mike Scarcella, *D.C. Circuit to Hear Voting Rights Act Case in January*, THE BLT: THE BLOG OF LEGAL TIMES (November 2, 2011, 1:31 PM), <http://legaltimes.typepad.com/blt/2011/11/dc-circuit-to-hear-voting-rights-act-case-in-january-.html> (citing the support the Department of Justice has received from the NAACP, ACLU, and the Lawyers' Committee for Civil Rights as friends of court).
68. *See* 811 F.Supp.2d 424 (2011), 427-28 (affirming the constitutionality of the VRA under a congruent and proportional standard of review after accepting the evidence in the Congressional record regarding the continued need for the VRA).

69. See Mary Orndorff, *Shelby County's appeal in voting rights case gets fast track*, AL.COM (October 7, 2011, 7:00 AM), http://blog.al.com/sweethome/2011/10/shelby_countys_appeal_in_votin.html (expressing concern that if this does reach the Supreme Court, it may find the pre-clearance requirements in the VRA outdated).
70. See First Amended Complaint for Declaratory Judgment for the Plaintiff, Florida v. U.S., Civ. No. 1:11-cv-01428-CKK-MG-ESH (D.C.D.C. 2011), (seeking pre-clearance of changes that would restrict third-party voter registration drives, shorten the 'shelf-life' of signatures collected for ballot initiatives, limit a voter's ability to change their registered address on election day, and reduce the number of early voting days).
71. *Id.* at 1, 27, 28.
72. See *Georgia v. United States*, 411 U.S. 526 (1973); *City of Rome v. United States*, 446 U.S. 156 (1980); *Lopez v. Monterey County*, 525 U.S. 266 (1999).
73. See 383 U.S. 301, 305, 308 fn. 2 (1966) (holding that passing the VRA was within Congress' power under section two of the Fifteenth Amendment).
74. See *id.* at 316-17 (categorizing constitutional attacks on other sections of the VRA as premature and noting that only some portions of the Act were being challenged).
75. See *id.* at 324 (citing *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 258-59, 261-62 (1964) and *Katzenbach v. McClung*, 379 U.S. 294, 303-04 (1964) to support the proposition that when Congress acts under the Fifteenth Amendment to prohibit racial discrimination in voting that action is judged under a rational basis standard).
76. See *id.* at 325-26 (holding that the Fifteenth Amendment allows Congress to preempt state laws to protect the voting rights of racial minority groups).
77. See *id.* at 327 (endorsing Congress' actions as constitutional).
78. See *Northwest Austin Municipal Utility District No. 1 v. Holder*, 129 S. Ct. 2504 (2009).
79. See *id.*; see also 42 U.S.C. § 1973b(a)(1)(A)-(F) (describing the VRA's bailout procedures).
80. *NAMUDNO*, 129 S. Ct at 2516 (widening the definition of political subdivisions eligible to file a bailout suit beyond those described in the VRA).
81. See *id.* at 2511 (recounting perceived improvements in combating discrimination in voting since the passage of the VRA, such as higher African American voter registration and turnout rates).
82. *Id.* at 2511-12.
83. See *id.* at 2512 (reasoning that the VRA is likely in trouble under either a congruence and proportionality test or a rational means test); see also *Boerne v. Flores*, 521 U.S. 507, 520 (1997).
84. See 811 F.Supp.2d 424, 427-28 (affirming the constitutionality of the VRA under a congruent and proportional standard of review).
85. *Id.*; see H.R. Rep. 109-478, **11 2nd sess. 2006 (finding that the testimony and reports considered in re-authorizing the Act supports the conclusion that "gains made under the VRA are the direct result of the VRA's temporary provisions, and that reauthorization of these provisions is both justified and necessary").
86. *Id.*
87. See *Section 5 Objection Determinations*, U.S. Department of Justice, http://www.justice.gov/crt/about/vot/sec_5/obj_activ.php (last visited Dec. 18, 2011) (listing two objections in Alabama, three in Georgia, two in Louisiana, one in Michigan, two in Mississippi, two in North Carolina, one in South Carolina, one in South Dakota, and six in Texas, as well as many others in 2000 and 2001); 811 F.Supp.2d 424 (2011),

- 465 (noting that “the Justice Department determined that discriminatory purpose was a motivating factor in no less than 186 of the redistricting plans proposed by covered jurisdictions during the 1990s”).
88. See, e.g., Charlie Savage, *Justice Dept. Blocks Texas on Photo ID for Voting*, N.Y. TIMES, Mar. 3, 2012, available at <http://www.nytimes.com/2012/03/13/us/justice-dept-blocks-texas-photo-id-law.html> (reporting that Texas, South Carolina among other states’ voting identification laws that require voters to show IDs much narrower than the prevailing federal standard have failed pre-clearance due to evidence that such laws will significantly affect minority voters’ ability to vote).
 89. See *Northwest Austin Municipal Utility District No. 1 v. Mukasey*, 573 F.Supp.2d 221, 248 (describing how the House and Senate reports erroneously found higher levels of electoral participation by minorities because of a failure to separate Hispanic rates from white rates and to control for citizenship when assessing Hispanic registration rates).
 90. *Northwest Austin Municipal Utility District No. 1 v. Holder*, 129 S. Ct. 2504, 2525 (2009) (Thomas, J., concurring and dissenting) (citing statistics from the Southeastern Legal Foundation amicus curiae brief).
 91. 811 F.Supp.2d 424, 467; *Northwest Austin Municipal Utility District No. 1 v. Mukasey*, 573 F.Supp.2d at 221, 248.
 92. *Id.*
 93. *Id.*
 94. See *supra* note 97.
 95. See *Section 5 Covered Jurisdictions*, *supra* note 52 (listing California, Florida, North Carolina, Michigan, New Hampshire, New York, and South Dakota as the states where only some counties or townships are covered jurisdictions under section 5 of the VRA).
 96. See Letter from Ralph F. Boyd, Jr, Assistant Att’y Gen., Civil Rights Div., to John M. McKay, President of the Florida Senate and Tom Feeney, Speaker of the Florida House of Representatives, 2 (Jul. 1, 2002), available at http://www.justice.gov/crt/about/vot/sec_5/pdfs/1_070102.pdf.
 97. See *id.* (noting that a portion of the majority-Hispanic district was located in Collier County, which is covered by the VRA).
 98. See JoNel Newman, *Voting Rights in Florida, 1982-2006*, RenewtheVRA.org, 8-9 (Mar. 2006), available at http://www.acluf.org/issues/voting_rights/FloridaVRA2.pdf (revealing that the DOJ objected to both of Florida’s voting plans following their decennial redistricting based on new Census data).
 99. See *id.* at 8 (noting that an objection to a Home Rule Charter in Hillsborough County was later withdrawn).
 100. See 525 U.S. 266, 278 (1999) (agreeing with the County that it, not the State, must seek pre-clearance for state-wide voting changes).
 101. *Id.*
 102. See *id.* at 278-79 (concluding that a textual reading of the statute reveals that a covered county in a non-covered state must not administer state-wide voting changes until after that county submits the change to the Justice Department and received pre-clearance).
 103. *Id.*
 104. *Id.*
 105. See Dara Kam, *ACLU, Voting Rights Group Sue to Stop Implementation of New Florida Elections Law*, PALM BEACH POST, (June 3, 2011), <http://www.palmbeachpost.com/news/state/aclu-voting-rights-group-sue-to-stop-implementation-1517536.html?printArticle=y> (noting the ACLU’s reliance on the Mortham opinion, but also

- referring to a current elections supervisor arguing that the Mortham opinion does not apply because current circumstances are much different).
106. See Howard Simon, *New State Voting Laws II: Protecting the Right to Vote in the Sunshine State*, ACLU (Jan. 27, 2012) 8, n. 19, http://www.aclu.org/files/assets/aclu_fl_statement_for_senate_judiciary_subcomm_field_hearing_on_voter_suppression_2_2_12.pdf (reviewing the ACLU position that implementing a voting change in the sixty-two non-covered counties has negative consequences on voters in the remaining five counties).
 107. See 42 U.S.C. § 1973 (“No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied . . . in contravention of the guarantees set forth in [the VRA]”); *Allen v. State Board of Elections*, 393 U.S. 544, 565 (1969) (construing section five of the VRA to be a broad grant of authority to review “subtle, as well as obvious, state regulations” and indeed, to assess “all changes, no matter how small”).
 108. See 521 U.S. 979 (1997) (holding that the changes required pre-clearance under precedent demanding that even “an administrative effort to comply with a statute that had already received clearance may require separate pre-clearance, because section five reaches informal as well as formal changes” (internal quotation marks removed)).
 109. See *Florida Changes Submitted for Pre-Clearance*, United States Department of Justice, http://www.justice.gov/crt/about/vot/sec_5/fl_obj2.php (last visited Nov. 30, 2011) (listing Florida voting regulation changes submitted for approval to the DOJ).
 110. See 42 U.S.C. § 1973; *Allen v. State Board of Elections*, 393 U.S. 544, 565 (1969).
 111. See *Johnson v. Riley*, Complaint, 2010 WL 3423779 (N.D.Ala.) (alleging that Governor Riley’s executive order effectively nullifies the votes of electoral majorities in several counties and is in violation of the VRA because the order was not pre-cleared).
 112. *Id.* ¶¶ 39-40.
 113. *Id.*
 114. *Id.* ¶ 40.
 115. *Id.* ¶ 38.
 116. *Id.* ¶¶ 62-70.
 117. See *Johnson v. Riley*, Complaint, 2010 WL 3423779 (N.D.Ala.) ¶¶ 62-70; 71-75 (explaining that the counties affected by the Governor’s actions are majority African American, a racial group explicitly protected under the VRA).
 118. See *Procedures for the Administration of Section 5 of the Voting Rights Act*, 28 C.F.R. 51.52 (c).
 119. *Georgia v. United States*, 411 U.S. 526 (1973); 28 C.F.R. § 51.52; see also *Objection to Georgia Voting Change*, Department of Justice, May 29, 2009, http://www.justice.gov/crt/about/vot/sec_5/ltr/l_052909.php.
 120. See *Objection to Georgia Voting Change*, *supra* note 127 (explaining that the system flagged minority voters as “non-citizens” far more often than it did white voters, meaning that the flagged minority voters had extra obstacles to prove that they were eligible to register to vote).
 121. *Id.*
 122. *Id.*
 123. See Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, STANFORD PUBLIC LAW AND LEGAL THEORY WORKING PAPER SERIES 13, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=484543 (revealing that the percentage of African Americans unable to vote was close to two and a half times that of Caucasian people).

124. *See* Part I and II Arrests for Florida by Age, Sex and Race, 1998-2010, 14 FLORIDA DEPARTMENT OF LAW ENFORCEMENT, available at http://www.fdle.state.fl.us/Content/getdoc/2c4b035b-369b-406f-a729-dc898ae08996/arr_age_race.aspx.
125. *Id.*
126. *Incarceration Trends in Florida, 1988-2008*, THE SENTENCING PROJECT 2 (Dec. 2009), http://www.sentencingproject.org/doc/publications/inc_FLTrends.pdf.
127. Laughlin McDonald, et al., *Letter to Governor Scott and Members of the Executive Clemency Board*, ACLU, (Mar. 4, 2011), <http://www.brennancenter.org/page/-/Democracy/Letter%20to%20Florida%20Clemency%20Board%20March%204%202011.pdf>.
128. *Governor Scott and Florida Cabinet Discuss Amended Rules of Executive Clemency*, *supra* note 32.
129. *Id.*
130. 42 U.S.C. § 1973c.
131. 42 U.S.C. § 1973b.
132. *Id.*
133. *See* 590 F.3d at 1016 (noting that although the Senate lists several factors to consider when determining if a voting procedure violates the VRA and that racial bias in the criminal justice system is not specifically listed, the Senate did not intend for their list to be exhaustive, and this type of bias is relevant to the totality of the circumstances).
134. *Id.* at 1008 (arguing that although affirmatively proving official history of discrimination would be strong evidence to support a VRA violation, lack of such evidence does not automatically negate a VRA violation claim).
135. *Id.* at 994.
136. *Id.* at 1006.
137. *Id.* at 1008.
138. *Id.* at 1012.
139. *See* *Farrakhan v. Gregoire*, 623 F.3d 990, 993 (9th Cir. 2010) (*en banc*) (granting that while intentional discrimination in the criminal justice system would be sufficient to find a violation of section two, the plaintiffs did not meet their burden of showing such intentionality).
140. *Id.* at 993.
141. *Id.* at 994.
142. *Johnson v. Governor of Fla.*, 405 F.3d 1214 (11th Cir. 2005) (*en banc*); *Hayden v. Pataki*, 449 F.3d 305, 323 (2d Cir. 2006); *Simmons v. Galvin*, 575 F.3d 24, 41 (1st Cir. 2009).
143. *See* *Johnson v. Bush*, 126 S. Ct. 650 (2005) (denying certiorari to the Eleventh Circuit's decision regarding a felon disenfranchisement section two VRA challenge).
144. *See* U.S. CONST., amend. 14, § 1 ("No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."); *see also* *Farrakhan v. Gregoire*, 623 F.3d 990, 993 (9th Cir. 2010) (*en banc*) (holding that only intentional discrimination in enacting a felon disenfranchisement scheme is sufficient to find a section two violation).
145. *Farrakhan*, 623 F.3d at 993.
146. U.S. CONST., amend. 14, § 2.
147. *See* *Richardson v. Ramirez*, 418 U.S. 24, 54 (1974) (relying on the argument that since section two of the Equal Protection Clause mentions felon disenfranchisement, the practice does not violate the Equal Protection Clause).

148. See U.S. CONST, amend. 14, § 2(4)(a).
149. See *Richardson* 418 U.S. at 72-73 (Marshall, J., dissenting) (recounting that section two was passed because the Republican-controlled House wanted to ensure its continued dominance by insuring that southern African Americans, who supported them, would be able to vote, but realized that unlimited suffrage rights to all African Americans would be politically infeasible).
150. See *id.* at 74 (reasoning that Congress did not intend to authorize discriminatory practices that fell into special categories named in section two, and that Congress likely did not appreciate the literal significance of impingement upon democratic values that the Court has allowed section two to impose).
151. See *id.* at 86 (concluding that judged under modern standards, felon disenfranchisement could not stand). But see *Richardson*, 418, U.S. at 54 (majority) (holding that the California Supreme Court erred in determining that felon disenfranchisement ran afoul of the Fourteenth Amendment).
152. See *Hunter v. Underwood*, 471 U.S. 222, 233 (1980) (holding that the obvious invidious motivation for passing the felon disenfranchisement clause in the Alabama Constitution in 1908 renders it unconstitutional, despite valid reasons under which it could be passed today).
153. See *Hunter*, 471 U.S. at 227-28 (describing that after establishing that racial bias was a substantial factor in passing the legislation, the State has the burden to prove the law would have been passed even absent this impermissible motivation).
154. See *id.* at 233 (expounding that it is irrelevant whether the same law could be passed for a facially neutral reason today if the actual original passage had a discriminatory intent).
155. *Id.*
156. See Matthew E. Feinberg, *Suffering without Suffrage: Why Felon Disenfranchisement Constitutes Vote Denial Under Section Two of the Voting Rights Act*, 8 HASTINGS RACE & POVERTY L.J. 61, 69 (2011) (admitting that this case is to date the only time the Supreme Court has struck down a felon disenfranchisement law, but suggesting that future challenges are possible).
157. See *United States v. Fordice*, 505 U.S. 717, 739 (1992) (finding that the burden is on the State to offer legitimate reasons to prove that a law is no longer rooted in its original discriminatory purpose); see also *Knight v. Alabama*, 14 F.3d 1534, 1550 (1994) (applying *Fordice* and requiring the State to provide independent and legitimate justifications to break the causal link between a reenacted law and its discriminatory predecessor).
158. 505 U.S. 717, 739 (1992).
159. *Fordice*, 505 at 739; *Knight*, 14 at 1550.
160. See *Johnson v. Governor of Fla.*, 405 F.3d 1214 (11th Cir. 2005) (*en banc*) (finding that although it was clear that Florida originally passed its felon disenfranchisement law for a discriminatory purpose, later reenactments removed the taint of that law because they were passed for facially neutral reasons). But see *id.* at 1245 (Barkett, J., dissenting) (discrediting the majority's finding that Florida's reenactment of its felon disenfranchisement law was valid because it had been passed through a "deliberative process," and reiterating that deliberation is not sufficient if such deliberation does not result in articulable, legitimate policy justifications for the law).
161. See *Johnson v. Bush*, F.Supp.2d 1333 (S.D. Fla. 2002) (holding for the defendants, but conceding that plaintiffs did present ample evidence of a racially discriminatory motive for passing the 1868 law).

162. *See* Johnson v. Governor of the State of Florida, 405 F.3d 1214 (2005) (finding that the 1968 reenactment narrowed the class of the disenfranchised to those who had committed felonies, was considered by the Suffrage and Elections Committee, was approved by the legislature, and was then voted on by the populace).
163. *See id.* at 1244 (Barkett, J., dissenting) (noting that a deliberative process is not the same as a process in which independent, racially-neutral reasons are offered and accepted before a law is passed).
164. *Id.*; *see also* Johnson v. Bush, 126 S. Ct. 650 (2005) (denying certiorari to reconsider the decision).
165. *See id.* at 1247 (noting the Florida's subsequent reenactments were textual changes that were even less substantive than the changes made to the law that was struck down in Hunter (citation omitted)); *see also* Erika Wood, *Turning Back the Clock in Florida*, BRENNAN CENTER FOR JUSTICE, (March 2011) (arguing that Governor Scott's changes made via executive order are far more restrictive than the procedures that had been in place prior to 1999).
166. Farrakhan v. Gregoire, 590 F.3d 989 (9th Cir. 2010).
167. Farrakhan, 623 F.3d at 993.
168. *Id.* at 1008.
169. *Id.*
170. Farrakhan v. Gregoire, 590 F.3d 989, 1012 (9th Cir. 2010).
171. 42 U.S.C. 1973(a).
172. Letter from Laughlin McDonald, Director American Civil Liberties Union Voting Rights Project to Chris Herren, Chief, Voting Section, Civil Rights Division (April 25, 2011) *available at* <http://www.acluf.org/pdfs/2011-04-ACLU DOJ Clemency Letter.pdf>.



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Hannah Autry

CONNICK V THOMPSON: THE COSTS OF VALUING IMMUNITY OVER INNOCENCE

Introduction

What is the price tag attached to every year spent wrongfully convicted on Louisiana's death row? Placing a price on life is a complicated, nearly impossible task. When faced with this issue, a jury in Louisiana rationalized, and the Court of Appeals for the Fifth Circuit agreed, that \$1 million for each year was justified. The U.S. Supreme Court, however, placed a price on John Thompson's life in *Connick v. Thompson*,¹ and the number was a big fat zero.

In a 5-4 decision authored by Justice Clarence Thomas that has been deemed "one of the meanest Supreme Court decisions ever,"² the Court found that the New Orleans Parish District Attorney's Office could not be held liable under U.S.C. § 1983³ for failure to train its prosecutors based on a single *Brady*⁴ violation.⁵ Thompson spent fourteen years on Louisiana's death row for a murder conviction that was later overturned in a second trial; the district attorney's office's failure to turn over exculpatory *Brady* material led to his conviction.⁶ The Court largely based its decision on a narrow reading of an already narrow exception carved out in *City of Canton v. Harris*,⁷ finding that district attorney's offices could not be civilly liable for failure to train because attorneys have already passed the requisite examinations and have the resources and knowledge to interpret legal principles on their own.⁸ While *Connick*'s theory of liability centers around § 1983, the decision raises many more puzzling issues and draws attention to the societal costs of valuing immunity over innocence.

Part I: The Case

In early 1985, John Thompson was charged with the murder of Raymond T. Liuzza.⁹ Shortly thereafter, Thompson was charged with an unrelated armed robbery when one of the victims identified him as the attacker after seeing him on television due to publicity received from the murder.¹⁰ As part of the robbery investigation, a crime scene technician obtained blood evidence belonging to the perpetrator from one of the victim's pant legs.¹¹

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After testing, the results conclusively established that the perpetrator had blood type B.¹² This evidence, however, was not given to the defense despite requests to access all materials and information favorable to the defendant and all results or reports of scientific tests or experiments.¹³ Not only was the evidence not disclosed to the defense, but prosecutors actively blocked the defense's inspection of the pant leg swatch stained by the robber's blood.¹⁴ Prosecutors responded to defense counsel's request to inspect all materials, but checked out the swatch from the property room and did not return it until the day before trial.¹⁵ The prosecutors did not produce the swatch at trial, and the swatch has never been found.¹⁶ One of the prosecutors said that he did not consider the blood evidence *Brady* material that would require disclosure because he "didn't know what the blood type of Mr. Thompson was."¹⁷ Thompson, as it turns out, has blood type O.¹⁸

Prosecutors made a strategic decision to try Thompson for armed robbery first.¹⁹ Doing so would preclude Thompson from testifying in his own defense at his murder trial because the prior conviction could be used to impeach his credibility.²⁰ Furthermore, the armed robbery conviction could be used in the penalty phase of the murder trial to persuade the jury to choose death over life imprisonment.²¹

Their strategy proved successful. Thompson was first convicted of armed robbery based only on the eyewitness testimony of the victims, and he elected not to testify in his murder trial in May 1985.²² Not only did prosecutors fail to turn over the blood evidence, but they also withheld other *Brady* material that could have been used to impeach the prosecution's key witnesses.²³ Most importantly, prosecutors withheld the initial police reports of the eyewitnesses' identification.²⁴ These police reports contained information that the eyewitnesses' originally described the assailant's hair as "close cut."²⁵ Thompson, in contrast, had "afro" style hair at the time of the murder.²⁶ The police reports would have suggested that Kevin Freeman, another suspect who had "close cut" hair, and more closely matched the victims' initial description of the Lizzza murder assailant, was the perpetrator.²⁷ Without this information to show inconsistencies in the prosecution's case, the testimony of the witnesses against Thompson was powerful, and he was convicted and sentenced to death.²⁸

The nondisclosure of the results of blood testing was known and intentional. On his death bed in 1994, one of the prosecutors in Thompson's armed robbery trial confessed to a fellow prosecutor in the Orleans Parish office that he had suppressed the blood evidence.²⁹ In April 1999, less than a month before Thompson's scheduled execution, his private investigator discovered the crime lab report from the armed robbery investigation in the files of the New Orleans Police Crime Laboratory.³⁰ As a result, Thompson's execution

was stayed and his armed robbery conviction was vacated.³¹ Consequently, the Louisiana Court of Appeals reversed the murder conviction, finding that the armed robbery conviction unconstitutionally deprived Thompson of his right to testify in his own defense at the murder trial.³² During the retrial in 2003, the jury acquitted Thompson of Liuzza’s murder.³³

Thompson brought a § 1983 action against Connick³⁴ in his official capacity as Orleans Parish District Attorney, the district attorney’s office, and others in district court, alleging that the district attorney’s office had violated *Brady* by failing to disclose the crime lab report in his armed robbery trial.³⁵ Connick admitted that there was a *Brady* violation prior to trial.³⁶ The district court instructed the jury that the “only issue” was whether the nondisclosure was caused by either a policy, practice or custom of the district attorney’s office or a deliberately indifferent failure to train the office’s prosecutors.³⁷ The jury found that the district attorney’s office was liable for failure to train the prosecutors and awarded Thompson \$14 million in damages.³⁸

Connick renewed the same objection that he raised in summary judgment—that he could not have been deliberately indifferent to an obvious need for more or different *Brady* training because there was no evidence that he was aware of a pattern of similar *Brady* violations.³⁹ The district court rejected this argument, finding that “the DA’s office knew to a moral certainty that assistan[t] district attorneys would acquire *Brady* material, that without training it is not always obvious what *Brady* requires, and that withholding *Brady* material will virtually always lead to a substantial violation of constitutional rights.”⁴⁰

A panel of the Court of Appeals for the Fifth Circuit affirmed,⁴¹ and an *en banc* court also affirmed, but disputed whether Thompson could establish municipal liability for failure to train the prosecutors based on the single *Brady* violation without proving a pattern of similar violations, and, if so, what evidence would make that showing.⁴² The Supreme Court granted a petition for a writ of *certiorari* and reversed the decision, leaving Thompson with no relief for spending eighteen years in prison, fourteen of them on death row, for a crime he did not commit.⁴³

Part II: Background

The Court’s opinion in *Connick* limited the already narrow decision in *City of Canton v. Harris*. Section 1983 actions are vast, and they range from violations concerning abuse of authority⁴⁴ to zoning.⁴⁵ The violation in *Connick* falls in between and focuses on single-incident liability for a prosecutor’s failure to train that resulted in a *Brady* violation. A handful of cases have addressed prosecutorial immunity and municipal liability,⁴⁶ and those cases led to the Court’s decision in *Connick*.

In *Imbler v. Pachtman*, the Court found absolute immunity for prosecutors “in initiating a prosecution and in presenting the State’s case.”⁴⁷ As a core prosecutorial function, *Brady* disclosures fall under such a category. In a concurring opinion, however, Justice White reasoned that extending absolute immunity to *Brady* violations “would threaten to injure the judicial process and to interfere with Congress’ purpose in enacting 42 U.S.C. § 1983.”⁴⁸ The point of § 1983 actions were to hold public officials accountable for constitutional violations,⁴⁹ and the majority’s holding in *Imbler* counters § 1983’s purpose and dismantles *Brady*’s protections. “Immunity from a suit based upon a claim that the prosecutor suppressed or withheld evidence would discourage precisely the disclosure of evidence sought by the rule.”⁵⁰ As Justice White points out, “the only effect on the process of permitting such suits will be a beneficial one—more information will be disclosed to the court.”⁵¹

*Van de Kamp v. Goldstein*⁵² gave rise to the “failure to train” theory that exists in *Connick*. In *Van de Kamp*, the Court barred a § 1983 action for a wrongful conviction due to a district attorney’s office’s failure to adequately train or supervise deputy prosecutors on disclosure of impeachment information relevant to witnesses for the prosecution.⁵³ The Court found that “prosecutors involved in such supervision or training or information-system management enjoy absolute immunity.”⁵⁴ Therefore, while *Imbler* found absolute immunity for prosecutors in their official capacity, *Van de Kamp* extended that liability to prosecutors’ superiors under theories such as “failure to train” as well.

Municipalities are treated differently in consideration of an employer’s liability for his employee’s wrongful actions.⁵⁵ Under traditional principles of vicarious liability, employers are liable for the torts of their employees.⁵⁶ By contrast, municipalities are generally only liable where the employee’s error results from the employer’s policy or custom.⁵⁷ This stems from the decision *Monell v. Dept. of Social Services of the City of New York*.⁵⁸ In *Monell*, a civil suit was filed under § 1983 when the New York City government compelled pregnant female employees to take unpaid leaves of absence before such leaves were required.⁵⁹ The Court in *Monell* held that municipalities were “persons” that could be held civilly liable for constitutional violations,⁶⁰ but limited liability to actions taken by public employees pursuant to the employer’s “policy or custom.”⁶¹ The Court explicitly stated that municipalities could not be held liable under § 1983 on a respondeat superior theory.⁶²

This “policy or custom” rule has been followed and detailed in municipal liability actions, such as *Connick*, and the Court has expanded municipal liability to encompass some single-instance violations.⁶³ *Canton* is a leading case on single-instance violations and became the focus for the majority’s discussion of § 1983 municipal liability in *Connick*.

In *Canton*, the plaintiff, Geraldine Harris, fell down several times and was incoherent following her arrest by officers of the City of Canton police department.⁶⁴ The officers did not seek any medical attention for her, and after her release, she was diagnosed as suffering from several emotional ailments requiring hospitalization and subsequent outpatient treatment.⁶⁵ She brought suit against the City's police department under § 1983 alleging that she was denied her right under the Due Process Clause of the Fourteenth Amendment to receive necessary medical attention while in police custody.⁶⁶ Specifically, Mrs. Harris alleged that the city's police department was liable for failing to train police officers in determining that she needed medical treatment.⁶⁷

When the case eventually reached the Supreme Court, it held that, "Only where a municipality's failure to train its employees in a relevant respect evidences a 'deliberate indifference' to the rights of inhabitants can such a shortcoming be properly thought of as a city 'policy or custom' that is actionable under § 1983."⁶⁸ Ordinarily to prove this "deliberate indifference," one would need to show evidence of a pattern of similar constitutional violations by untrained employees.⁶⁹ Without this pattern, the "obviousness" of the need for training in single-incident violations, like those in *Canton* and *Connick*, can substitute for the pattern usually needed to establish municipal fault.⁷⁰ The Court in *Canton* did not find merit to Mrs. Harris' claim, questioning what level of medical training police should reasonably be required to have, and denied that "deliberate indifference" had become a "policy or custom" of the police department.⁷¹

In the Court's treatment of prosecutorial and municipal liability it has continually erred on the side of the State and limited liability with each decision. In *Imbler*, the Court gave prosecutors absolute immunity when performing one of their core functions.⁷² In *Van de Kamp*, the Court extended that liability to a prosecutor's superiors.⁷³ In *Monell*, the Court rejected respondeat superior liability for municipalities and instead narrowed liability to actions of an employee's failures under an employer's "policy or custom."⁷⁴ In *Canton*, the Court held that such a policy or custom must be based on a "deliberate indifference" resulting in a failure to train in single-incident liability cases, and provided a narrow range of circumstances where such indifference would exist.⁷⁵ Finally, in *Connick*, the Court further narrowed the *Canton* hypothetical, finding that known and purposeful *Brady* violations that resulted in a wrongful death sentence was not "deliberate" enough.⁷⁶

Part III: Analysis

In its *Connick* decision, the Court rationalized that in order to prove liability, Thompson first needed to show that Connick was on actual or constructive notice of a problem that would result in a constitutional violation. Next, he had

to prove that Connick made a deliberate choice not to fix the problem. Finally, he needed to demonstrate that a pattern of similar constitutional violations by untrained employees existed, since patterns are “ordinarily necessary” to demonstrate deliberate indifference for purposes of failure to train.⁷⁷ Alternatively, deliberate indifference to constitutional rights could have been proven by a single incident where it was obvious that such an incident would occur. Since a pattern had not been established, the Court relied on single-incident liability as established in *Canton*, which required a showing of “obvious need” for training. The Court then rejected liability under this theory.

The Court’s decision in *Connick* provides prosecutors with a green light to continue to disregard *Brady* violations and leaves innocent men and women like Thompson without civil remedies when “ministers of justice”⁷⁸ perpetrate flagrantly unconstitutional acts that lead to years wrongfully spent behind bars. Some have suggested that the *Connick* decision is bad law because it is based on flawed precedent that allows for absolute prosecutorial immunity and a stringent standard for municipal liability when such protections should not exist.⁷⁹ However, the *Connick* decision also ignored basic notions of due process embedded in the U.S. Constitution. A look at the Court’s heavy and misguided reliance on the *Canton* hypothetical, the compelling facts behind Thompson’s conviction, and the evidence that *Brady* material is not as easily distinguishable as Justice Thomas purported, show why this is so. The Court in *Connick* committed a grave injustice to Thompson and society as a whole.

Connick was on notice of a problem

The majority opinion relied on the ability of law professionals to “find, interpret, and apply legal principles”⁸⁰ in its conclusion that Connick was not put on notice of a *Brady* disclosure problem, and therefore was not deliberately indifferent to Thompson’s rights in his failure to train his employees. The majority assumed that the young and inexperienced prosecutor had the ability to discern *Brady*’s anomalies without error. Such a conclusion is naïve, and the cost of that conclusion is years spent wrongfully behind bars.

Since *Brady v. Maryland* was decided in 1963, a handful of subsequent cases further fleshed out *Brady*’s requirements. In 1972, *Giglio v. United States*⁸¹ expanded *Brady* to include any materials that could show impeachment of a government witness. In 1976, the Supreme Court decided that certain types of evidence must be disclosed by a prosecutor without a specific request.⁸² The example cited by the Court was the District Court judge’s hypothetical of “fingerprint evidence demonstrating that the defendant could not have fired the fatal shot.”⁸³ Blood evidence showing that the defendant could not have been the assailant in an armed robbery, as in Thompson’s case, would likely fall in the same category. *Brady* was expanded further in 1989 to show that

“[d]ue process requires exculpatory evidence to be revealed whenever it is ‘possessed by the prosecutor or anyone over whom the prosecutor has authority.’”⁸⁴ In 1995, *Kyles v. Whitley* held that that the individual prosecutor has an affirmative duty to learn about favorable evidence known to others acting on the government’s behalf, including police.⁸⁵ However, District Attorney Connick would not have been aware of these legal developments surrounding *Brady* because he “stopped reading law books . . . and looking at opinions” when he was elected District Attorney in 1974.⁸⁶

These opinions, which are not exhaustive, demonstrate that *Brady* is not as cut and dried as the majority in *Connick* hopes. One law professor highlighted *Brady*’s inconsistencies when he wrote:

Given that the *Brady* obligation is broad, ongoing, and not limited by a good faith exception, a certain number of violations are inevitable. the prospect of error is enhanced by the vagueness of the duty’s doctrinal formulation. How does a prosecutor figure out prior to trial whether evidence is favorable to the accused and material to guilt or punishment? Determining whether evidence is favorable to the accused does not pose especially vexing problems in many cases. A much thornier issue, though, concerns whether evidence is material to guilt or punishment.⁸⁷

Brady’s ins and outs provide confusion even for the most experienced district attorneys,⁸⁸ and such confusion should put an experienced district attorney on notice that he should train his younger prosecutors on *Brady* material that they regularly encounter on the job. Short of that, we have “the blind leading the blind.”⁸⁹

The Court highlighted the reversals of four other convictions prosecuted by the New Orleans Parish office due to *Brady* in Louisiana courts but refused to recognize these four recorded and known incidents of *Brady* violations as a “pattern” that would put Connick on notice because, “None of those cases involved failure to disclose blood evidence, a crime lab report, or physical or scientific evidence of any kind.”⁹⁰ Here the Court is mistaken. Instead, it should have ruled that the type of evidence withheld is irrelevant. The prosecutor’s office knew that its employees either did not understand or purposely disregarded the holdings of *Brady* and its progeny.

Connick made a deliberate choice not to fix the problem

Connick was aware of the power that his inexperienced attorneys had. “Connick acknowledged, many of his prosecutors ‘were coming fresh out of law school,’ and the office’s ‘[h]uge turnover’ allowed attorneys with little experience to advance quickly to supervisory positions.”⁹¹ Two of the attorneys who worked on Thompson’s capital case were two of the highest ranking attorneys in the office despite the fact that neither had even five years of experience as a prosecutor.⁹²

Furthermore, Connick himself had experienced problems with *Brady* violations in the past. He confessed that he was indicted by the U.S. Attorney's Office when he withheld a crime lab report as a prosecutor.⁹³ When Thompson's § 1983 suit proceeded to a jury trial, the jury found that the *Brady* violation in Thompson's case was "substantially caused by [Connick's] failure, through deliberate indifference, to establish policies and procedures to protect one accused of a crime from these constitutional violations."⁹⁴

Single-incident liability showing a deliberate indifference

The Court was misguided when it found that Thompson's case did not fit squarely within the *Canton* single-incident liability hypothetical. In *Canton*, the Court offered a hypothetical situation where single-incident liability for a deprivation of rights may be present:

For example, city policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officers with firearms, in part to allow them to accomplish this task. Thus, the need to train officers in the constitutional limitations on the use of deadly force can be said to be "so obvious," that failure to do so could properly be characterized as "deliberate indifference to constitutional rights. It could also be that the police, in exercising their discretion, so often violate the constitutional rights that the need for further training must have been plainly obvious to the city policymakers, who, nevertheless, are "deliberately indifferent" to the need."⁹⁵

This hypothetical was the crux of the majority opinion's rationale in denying Thompson relief in *Connick*. The Court found that the obvious need for specific legal training, in contrast to the hypothetical above, did not exist in Thompson's case. "Armed police must sometimes make split-second decisions with life-or-death consequences. There is no reason to assume that police academy applicants are familiar with the constitutional constraints of deadly force.... In stark contrast, legal training is what differentiates attorneys from average public employees."⁹⁶

The hypothetical above alludes to the case *Tennessee v. Garner*,⁹⁷ where a police officer fatally shot a fleeing burglar that the officer was "reasonably sure" was unarmed. The Court found this to be an unreasonable seizure under the Fourth Amendment.⁹⁸ In referencing this case in the hypothetical, the Court suggested that only police officers trained specifically on the Fourth Amendment's safeguards would know that there was something wrong with shooting an unarmed television burglar scaling a fence and fleeing the scene of the crime.

One would think that the opposite would be true. The prohibition against unreasonable seizures is clearly stated in the Constitution and is a well-known protection. However, there is no constitutional right to discovery, and *Brady*

disclosure is a prophylactic rule created by the Supreme Court, which has been expanded and explained by subsequent decisions. Despite these cases, confusion about and inconsistencies in its application still exist.⁹⁹ The facts surrounding *Connick* suggest that it is precisely the type of scenario that would require training under the *Canton* hypothetical, especially if a failure to disclose could lead to taking someone's life, as it nearly did in this case. The *Canton* hypothetical only provided an example, not a limit, to single-incident failure to train liability under § 1983.

The majority pointed out small details to show why the *Canton* hypothetical is inapplicable when it could have just as easily found the opposite. Compare the *Canton* to a size 9 shoe and Thompson's case to a size 8 and a half. The Court reasoned that because Thompson's case is not a perfect fit to the *Canton*, the shoe cannot be worn. Even if the case is not a perfect fit, there is still wiggle room, and the Court should err on the side of the wrongfully convicted individual instead of the prosecutor's office with a history of constitutional violations. If the shoe fits, wear it.

In its finding that Connick was not liable for failure to train, the Court reasoned that "attorneys are trained in the law and equipped with the tools to interpret and apply legal principles, understand constitutional limits, and exercise legal judgment."¹⁰⁰ Recent media suggests that the Court's premise is wrong. An article entitled "What they Don't Teach Law Students: Lawyering," demonstrates how young attorneys who have spent hundreds of thousands of dollars on a law degree are graduating with little to no practical experience.¹⁰¹ "What they did not get, for all that time and money, was much practical training. Law schools have long emphasized the theoretical over the useful."¹⁰²

If attorneys were already trained in the law and prepared to face legal interpretations and challenges on their own, top paying law firms would think twice about immediately placing its fresh-out-of-law-school associates in training sessions instead of assigning them billable work. However, that is precisely what Drinker Biddle & Reath¹⁰³ does before letting its first-year associates loose, citing hiring studies that show the median amount of practical experience at top-tier law firms was one year.¹⁰⁴ Although firms have traditionally allowed their first-year associates to perform billable work, many clients are aware of the realities that incoming attorneys at big firms are inexperienced and refuse to pay for work done by first- or second-year associates.¹⁰⁵

The reality is that many law students do not receive the practical training necessary to make such complex decisions before leaving law school. "What they taught us at law school is how to graduate from law school," said Dennis P. O'Reilly, a graduate of George Washington University School of Law and first-year associate at Drinker Biddle & Reath who completed the extensive

first-year training program.¹⁰⁶ “What they taught us at this firm is how to be a lawyer.”¹⁰⁷ In her dissenting opinion in *Connick*, Justice Ginsburg focused on the very minimal coverage of *Brady* in law schools, the Louisiana bar, and Connick’s office. One of the prosecutors’ alma maters, like other law schools, does not make criminal procedure a required course; from 1980 to the time of the decision, *Brady* questions did not account for even 10 percent of the total points in the criminal law and procedure section of any administration of the Louisiana Bar Examination; and the manual in Connick’s office at the time contained only four sentences on *Brady*.¹⁰⁸

District attorneys at overworked, understaffed, and underfunded offices do not have the luxury of hiring top-notch law students and placing them in limbo pending their performance in an extensive training program. So, like the prosecutors in Connick’s office, young prosecutors are left to learn by example, and in Thompson’s case, learn from a prosecutor who acknowledged that he misunderstood *Brady*.¹⁰⁹ As shown in Thompson’s case and others, such an approach has proved drastically ineffective.

Part IV: Solution: Open File Disclosure

Some states have recognized the difficulties with *Brady* and the effect that those difficulties have had on the criminal justice system. In response to several exonerations where individuals were wrongfully capitally convicted due to withheld evidence,¹¹⁰ states like North Carolina¹¹¹ have implemented “open file discovery” where prosecutors must turn over all evidence to the defense.¹¹² “The most obvious benefit of open file discovery—reducing the rate of wrongful convictions—would help restore faith in our criminal justice system.”¹¹³ If Louisiana had such a policy, the misinformed prosecutor in Thompson’s case would not have mistakenly assumed that the crime lab report was not required *Brady* material and perhaps John Thompson would never have been convicted.

In response to the disturbing evidence¹¹⁴ that prosecutors across the country continue to violate their obligations under *Brady*, Sen. Lisa Murkowski (R-Alaska) introduced the Fairness in Disclosure of Evidence Act.¹¹⁵ “This bipartisan legislation will clarify what evidence must be disclosed and when it must be disclosed as well as address remedies for *Brady* violations.”¹¹⁶ The bill provides that, “In a criminal prosecution brought by the United States, the attorney for the Government shall provide to the defendant any covered information: (1) that is within the possession, custody, or control of the prosecution team; (2) the existence of which is known, or by the exercise of due diligence would become known, to the attorney for the Government.”¹¹⁷

“Covered” information is evidence “that may reasonably appear to be favorable to the defendant in a criminal prosecution brought by the United States with respect to (A) the determination of guilt; (B) any preliminary matter before the court before which the criminal prosecution is pending; or (C) the sentence to be imposed.”¹¹⁸ The “prosecution team” includes “the Executive agency,” and any “entity or individual” that acts “on behalf of” or “under the control of” the United States “with respect to the criminal prosecution” or “participates, jointly with the Executive agency . . . in any investigation with respect to the criminal prosecution.”¹¹⁹

One of the most significant changes is the bill’s take on the issue of “materiality” of the information. Under *Brady*, evidence is material if there is “reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.”¹²⁰ However, under the proposed legislation “the reviewing court may not find an error arising from conduct not in compliance with this section to be harmless unless the United States demonstrates beyond a reasonable doubt that the error did not contribute to the verdict obtained.”¹²¹

The bill would set a nationwide standard and provide guidance to prosecutors and courts about discovery obligations for cases involving the criminally-accused. “The Fairness in Disclosure of Evidence Act will help ensure that the principle of the *Brady* Rule is upheld and that all people maintain their constitutionally guaranteed rights.”¹²²

Conclusion

Based on precedent and the theories of liability raised, the Court had the opportunity to uphold the damages awarded to Thompson. It just chose not to do so.¹²³ Instead, the majority assumed that training on *Brady* was not “obviously necessary” and put too much faith in the ability of lawyers to navigate complex discovery requirements without training, despite evidence suggesting the need for such training.

The effect of the Court’s decision is that it has narrowed single-incident §1983 liability so much that deserving parties who bring suit under the statute’s protections will find themselves without relief. By denying Thompson relief under § 1983’s protections, the Court sends a troubling message to those who have been deprived their most basic rights due to preventable prosecutorial error and misconduct.

Thompson himself said it best when he predicted the dire effects of the Court’s decision: “Because of that, prosecutors are free to do the same thing to someone else today.”¹²⁴ The disturbing question is: how many John Thomps-
ons have already been executed before a private investigator was able to

recover hidden *Brady* evidence? *Brady* violations often go undetected,¹²⁵ and Thompson was lucky to have the support and resources that many innocent, indigent defendants lack.

The decision has societal costs as well. While officials in Louisiana have not yet been able to place a per-case cost on capital cases, studies in other states suggest that the cost of capital cases compared to the number of executions is highly disproportionate.¹²⁶ That means that taxpayers in Louisiana contributed more than 18 years worth of money to Thompson's trials, appeals, and housing on death row when those costs could have been avoided had Connick adequately trained his prosecutors on *Brady*'s requirements. If that money cannot be paid back to Louisiana tax payers, should compensation not be given to the man himself?

Perhaps the largest cost, which cannot be described in numbers, is the doubt that cases like Thompson's place in the criminal justice system. Thompson's case completely undermines basic notions of justice and fairness and reaffirms the public's fear that in many cases defendants are in fact "guilty until proven innocent." Retired Louisiana Supreme Court Justice Pascal F. Calogero hit the nail on the head when he wrote: "Our justice system makes two promises to its citizens: a fundamentally fair trial and an accurate result. As Justice Cochran of Texas' highest criminal court observed, 'If either of those two promises are not met, the criminal justice system itself falls into disrepute and may eventually be disregarded.'"¹²⁷ Without confidence in the criminal justice system, citizens are less likely to report crime, cooperate as witnesses, and participate as jurors.¹²⁸ Our justice system and its actors must promote policies and practices that favor the criminally-accused and innocent rather than rogue prosecutors so that everyone will participate fully and faithfully.

NOTES

1. 131 S. Ct. 1350 (2011).
2. Dahlia Lithwick, *Cruel but Not Unusual*, SLATE (Apr. 1, 2011, 7:43 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2011/04/cruel_but_not_unusual.2.html.
3. 42 U.S.C. § 1983 (2006) (Provides, in relevant part, that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...").
4. *Brady v. Maryland*, 373 6.
5. *Id.* U.S. 83 (1963) (imposing a constitutional obligation on prosecutors to share exculpatory and material evidence with the defense).
6. *Connick*, 131 S. Ct. at 135

7. 489 U.S. 378 (1989) (holding that failure to train liability under § 1983 may only be imposed where the failure amounts to a deliberate indifference to the rights of persons).
8. *Connick*, 131 S. Ct. at 1361-62.
9. *Id.* at 1356. The murder occurred on December 6, 1984.
10. *Id.*
11. *Id.*
12. *Id.* at 1371 (Ginsburg, J., dissenting).
13. *Id.* at 1372.
14. *Id.*
15. *Id.*
16. *Id.* at 1373.
17. *Id.* at 1379.
18. *Id.* at 1371.
19. *Id.* at 1372.
20. *Id.*
21. *Id.*
22. *Id.* at 1373.
23. *Id.* at 1374.
24. *Id.*
25. *Id.*
26. *Id.* at 1371.
27. *Id.* at 1372-74 (Freeman was actually the government's key witness at the first murder trial. Thompson stated that a few weeks before the murder charge, Freeman had sold Thompson the gun that turned out to be the murder weapon and a ring which belonged to the victim. See John Thompson, Op-Ed, *The Prosecution Rests, But I Can't*, N.Y. TIMES, April 9, 2011, <http://www.nytimes.com/2011/04/10/opinion/10thompson.html?pagewanted=all>).
28. *Connick*, 131 S. Ct. at 1356 (majority opinion).
29. *Id.* at 1374.
30. *Id.* at 1356 (majority opinion).
31. *Id.* at 1356 (majority opinion).
32. *Id.* at 1357.
33. *Id.* The jury took only 35 minutes to acquit Thompson. See Thompson, *supra* note 27.
34. Harry F. Connick was elected as District Attorney in 1974 and resigned in 2003 in protest against a grand jury proceeding against the prosecutors who had withheld the lab report because the grand jury "w[ould] make [his] job more difficult." *Connick*, 131 S. Ct. at 1375 (Ginsburg, J., dissenting).
35. *Id.* at 1357 (majority opinion).
36. *Id.* at 1355.
37. *Id.* at 1357.
38. *Id.*
39. *Id.*
40. *Id.* at 1358.
41. *Id.* ("The panel acknowledged that Thompson did not present evidence of a pattern of similar *Brady*, but held that Thompson did not need to prove a pattern. According to

the panel, Thompson demonstrated that Connick was on notice of an obvious need for *Brady* training by presenting evidence ‘that attorneys, often fresh out of law school, would undoubtedly be required to confront *Brady* while at the DA’s Office, that erroneous decisions regarding *Brady* would result in serious constitutional violations, that resolution of *Brady* issues was often unclear, and that training in *Brady* would have been helpful.’” (citations omitted)).

42 *Id.*

43 *Id.* at 1350.

44 *See* *Brown v. Miller*, 631 F.2d 408 (5th Cir. 1980).

45 *See* *Moreland Properties, L.L.C v. City of Thornton*, 559 F.Supp.2d 1133 (D. Colo. 2008).

46 *See* *Imbler v. Pachtman*, 424 U.S. 409 (1976); *Monell v. New York City Dep’t of Social Services*, 436 U.S. 658 (1978); *Van de Kamp v. Goldstein*, 129 S. Ct. 855 (2009); *Canton*, 489 U.S. 378 (1989).

47 *Imbler*, 424 U.S. at 431; *see* *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (under the qualified immunity standard, officials remain immune “insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”).

48 *Imbler*, 424 U.S. at 432 (White, J., concurring).

49 *Id.* (White, J., concurring).

50 *Id.* at 443.

51 *Id.* at 446 n.9.

52 129 S. Ct. 855 (2009).

53 *Id.* at 859 (The Court also barred the § 1983 action for the district attorney’s office’s failure to institute an information-sharing system between deputy district attorneys).

54 *Id.* at 861-62.

55 *See* David Rittgers, *Connick v. Thompson: An Immunity that Admits of (Almost) No Liabilities*, 2011 CATO SUP. CT. REV.203, 219 (2011).

56 *Id.*

57 *Id.*

58 436 U.S. 658 (1978).

59 *Id.* at 660-61.

60 *Id.* at 686-87.

61 *Id.* at 694.

62 *Id.* at 693.

63 *See* *Oklahoma City v. Tuttle*, U.S. 808 (1985); *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986).

64 *Canton*, 489 U.S. at 378.

65 *Id.*

66 *Id.*

67 *Id.*

68 *Id.* at 389.

69 *Bryan County v. Brown*, 520 U.S. 397, 409 (1997).

70 *Connick*, 131 S. Ct. at 1361 (majority opinion).

71 *Canton*, 489 U.S. at 391-93.

72 Rittgers, *supra* note 55, at 213.

- 73 *Id.* at 218.
- 74 *Id.* at 222.
- 75 *Id.* at 226.
- 76 *Id.* at 235.
- 77 *Connick*, 131 S. Ct. at 1360 (majority opinion).
- 78 See Jane Campbell Moriarty, *Misconvictions, Science, and the Minister of Justice*, 86 NEB. L. REV.1, 21-22 n.117 (2008) (noting that American prosecutors' obligation to seek justice is traceable as far back as George Sharwood's 1854 "An Essay on Professional Ethics").
- 79 See Margaret Z. Johns, *Unsupportable and Unjustified: A Critique of Absolute Prosecutorial Immunity*, 80 FORDHAM L. REV.509 (2011); Rittgers, *supra* note 55.
- 80 *Connick*, 131 S. Ct. at 1364 (majority opinion).
- 81 405 U.S. 150, 151 (1972).
- 82 *United States v. Agurs*, 427 U.S. 97, 110-11 (1976).
- 83 *Id.* at 122, n.18.
- 84 *United States v. Meros*, 866 F.2d 1304, 1309 (11th Cir. 1989)
- 85 514 U.S. 419, 437-38 (1995).
- 86 *Connick*, 131 S. Ct. at 1380 (Ginsburg, J., dissenting).
- 87 Daniel S. Medwed, *Brady's Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533, 1540 (2010) (emphasis included).
- 88 *Connick* conceded that he was confused by *Brady*.
- 89 *Connick*, 131 S. Ct. at 1380 (Ginsburg, J., dissenting).
- 90 *Id.* at 1379.
- 91 *Id.* at 1379.
- 92 *Id.*
- 93 *Id.* at 1378.
- 94 *Id.* at 1377.
- 95 *Id.* at 400, n. 10 (citations omitted).
- 96 *Connick*, 131 S. Ct. at 1361 (majority opinion) (citations omitted).
- 97 471 U.S. 1 (1985).
- 98 *Id.* at 3.
- 99 See *infra* Part III A.
- 100 *Connick*, 131 S. Ct. at 1361 (majority opinion).
- 101 David Segal, *What They Don't Teach Law Students: Lawyering*, N.Y. TIMES, Nov. 19, 2011, http://www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html?pagewanted=1&_r=2.
- 102 *Id.*
- 103 *Drinker Biddle & Reath* has a salary of \$130,000 to \$145,000 firm wide, and pays its associates in the first-year associate training program a reduced salary of \$105,000. See *Careers at Drinker Biddle*, <http://www.drinkerbiddle.com/careers/compensation/> (last visited Jan. 13, 2012).
- 104 Segal, *supra* note 101 ("So at *Drinker Biddle*, first-year associates spend four months getting a primer on corporate law. During this time, they work at a reduced salary and they are neither expected nor allowed to bill a client. It's good marketing for the firm and a novel experience for the trainees").

- 105 *Id.* (“Last year, a survey by *American Lawyer* found that 47 percent of law firms had a client say, in effect, ‘We don’t want to see the names of first- or second-year associates on our bills.’ Other clients are demanding that law firms charge flat fees.”)
- 106 *Id.*
- 107 *Id.*
- 108 *Connick*, 131 S. Ct. at 1381-85 (Ginsburg, J., dissenting).
- 109 *Id.* at 1378.
- 110 Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CAL. L. REV. 1585, 1644 n. 137 (2005).
- 111 See N.C. GEN. STAT. § 15A-902 (2004).
- 112 Medwed, *supra* note 87, at 1557.
- 113 *Id.* at 1559.
- 114 *Justice in the Balance*, USA TODAY, Sept. 22, 2010, <http://projects.usatoday.com/news/2010/justice/cases/?t=failure-to-disclose-evidence> (The study investigated 86 cases where prosecutors failed to disclose evidence).
- 115 Fairness in Disclosure of Evidence Act, S. 2197, 112th Cong. (2012).
- 116 Jesselyn McCurdy & Dan Zeidman, *Brady Reform: New Legislation is a Win for Justice*, ACLU BLOG OF RIGHTS (March 15, 2012, 3:47 PM), [://www.aclu.org/blog/capital-punishment-criminal-law-reform/brady-reform-new-legislation-win-justice](http://www.aclu.org/blog/capital-punishment-criminal-law-reform/brady-reform-new-legislation-win-justice).
- 117 S. 2197 § 3014(b) (emphasis added).
- 118 S. 2197 § 3014(a)(1).
- 119 S. 2197 § 3014(a)(2).
- 120 *United States v. Bagley*, 473 U.S. 667 (1985).
- 121 S. 2197 § 3014(i).
- 122 See McCurdy, *supra* 116.
- 123 See Lithwick, *supra* note 2 (“It’s not just that a jury, a judge, and the 5th Circuit Court of Appeals found that Connick knew his staff was undertrained and he failed to fix it. It’s that it’s almost impossible, on reviewing all of the evidence, to conclude anything else”).
- 124 See Thompson, *supra* note 27.
- 125 See Medwed, *supra* note 87 at 1541-42. (“When a prosecutor chooses not to disclose evidence, that decision is seldom revealed to outsiders unless he later has a change of heart or it somehow finds its way into defense hands.”)
- 126 Michelle Millhollon, *Economics of Executions*, ADVOCATE CAPITAL NEWS, March 8, 2009, <http://cftj.org/economics-of-executions> (For example, “[s]ome experts [in Maryland] say that the state spends about \$37 million to execute an inmate”).
- 127 Pascal F. Calogero Jr. (Ed.), *We Need Reforms to Increase Confidence in the Justice System*, TIMES-PICAYUNE, Feb. 29, 2012, http://www.nola.com/opinions/index.ssf/2012/02/we_need_reforms_to_increase_co.html.
- 128 *Id.*



Nathan H. Madson

THE LEGACY OF ACT UP'S POLICIES AND ACTIONS FROM 1987-1994

I am someone with AIDS and I want to live by any means necessary. I am not dying: I am being murdered. Just as surely as if my body was being tossed into a gas chamber, I am being sold down the river by people within this community who claim to be helping people with AIDS. Hang your heads in shame while I point my finger at you.¹

We condemn attempts to label us as “victims,” a term which implies defeat, and we are only occasional “patients,” a term which implies passivity, helplessness, and dependence upon the care of others. We are “People with AIDS.”²

On June 5, 1981, the Centers for Disease Control and Prevention (CDC) announced an odd cluster of *Pneumocystis pneumonia* (PCP) in five gay men from Los Angeles, marking the start of the global AIDS epidemic.³ The earliest reports of Acquired Immune Deficiency Syndrome (AIDS) referred to the disease as “gay cancer”⁴ or “Gay-Related Immune Deficiency.”⁵ One physician with the CDC even made an early claim that AIDS posed no threat to heterosexuals.⁶ By September 15, 1982, when the CDC defined AIDS as a disease that destroyed a person’s immune system and left him⁷ vulnerable to PCP, Kaposi’s sarcoma (KS), and/or other opportunistic infections (OOI), there were 593 reported diagnoses of AIDS and 243 of those diagnosed had already died.⁸ The disease had spread to 27 states and the District of Columbia; there were also 41 cases of AIDS reported in ten countries in addition to the United States.⁹

Within those first 15 months of the epidemic, this previously “gay only” disease had been reported in hemophiliacs, intravenous drug users (IDUs), Haitians, and children born of mothers with AIDS.¹⁰ A fear that the heterosexual majority was now at risk swept the nation and the world; that panic was amplified by the fact that doctors still knew very little about the disease.¹¹ Doctors soon learned that AIDS was spread through sexual intercourse¹² and tainted blood,¹³ but it was not until May 1983 and April 1984 that French and American doctors, respectively, discovered Human Immunodeficiency Virus (HIV), the virus that causes AIDS.¹⁴ Despite the knowledge that anyone could become infected with AIDS, many Americans still considered AIDS to be a gay disease, in effect creating a medicalized form of homophobia.¹⁵

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The Founding of ACT UP

According to Larry Kramer, one of the founding members of ACT-UP, the sheer numbers of HIV/AIDS diagnoses was causing a panic among the gay men of New York City in the late 1980s.¹⁶ By December 1987, researchers and physicians had diagnosed AIDS in 128 and territories and there were an estimated 71,751 cases internationally.¹⁷ The early figures were shocking; physicians in the United States diagnosed over 47,000 people with AIDS,¹⁸ and eight other countries reported over 1,000 diagnoses.¹⁹ Furthermore, the World Health Organization (WHO) recorded that five to ten million people were living with HIV worldwide; it predicted 150,000 diagnoses of AIDS by 1988, and close to 3 million cases of AIDS by 1992.²⁰ In a speech in March 1987, Kramer implored gay men to pay attention to the massive AIDS casualties and express their rage through organized queer²¹ politics. It was this initial rage and an overall lack of public awareness that pushed Kramer to form ACT UP soon after. He wanted to address the growing need for systematized political action, reform how people with AIDS (PWAs) were treated and change the way AIDS was being dealt with in the United States.²²

ACT UP partially arose from queer PWAs' frustrations with AIDS groups such as the Gay Men's Health Crisis (GMHC) that refused to take an active political stance against HIV/AIDS.²³ The GMHC sought government funding and private donations and feared a politicized response to HIV/AIDS would prevent the organization from receiving the funds necessary to survive, especially if it was taken against the politicians and political bureaucracies that PWAs felt were denying them service and care.²⁴ Additionally, many of the AIDS organizations in existence seemed to spring forth with pre-existing boards, goals and a hierarchy; they merely sought supporters and individuals to carry out actions, but did not want input from those supporters.²⁵ Early ACT UP activists like Maxine Wolfe noted that these apolitical AIDS organizations worked closely with the police and left little decision-making up to those demonstrating:

GLAAD [Gay and Lesbian Alliance Against Defamation] soon formed and immediately became a bone of contention because it started doing these very orchestrated demonstrations. By "orchestrated," I mean they negotiated with the cops, they basically told you when to show up, when to go home, and there was absolutely no input from anybody into what was going to be done. The board of directors made the decisions.²⁶

It was this anger, both at AIDS and at the queer AIDS organizations that failed to work with individual PWAs, that sparked Kramer's March 1987 speech and the birth of ACT UP.²⁷

A few months later, in June 1987, ACT UP made its bold debut at the Gay Pride March, sparking a surge in membership. ACT UP marched as a moving

concentration camp, complete with wire barrier, men in masks and military gear, and ACT UP's soon-to-be famous logo—SILENCE=DEATH.²⁸ ACT UP utilized the apolitical and oft commercialized New York City Gay Pride March as the canvas for their deliberate insertion of a highly political and controversial message.²⁹ ACT UP sought to turn the pain, fear and grief many queers felt since the start of the epidemic into rage and action.³⁰ According to Maxine Wolfe, ACT UP “was a whole group of people...ready to do something. They were looking for a kick in the ass and needed an event to be at together, that would lead to that, and that was it.”³¹ The language of the *ACT UP Working Document* captured that rage by describing the organization as “a diverse, nonpartisan group of individuals united in anger and committed to direct action to end the AIDS crisis. We protest and demonstrate; we meet with government and public health officials; we research and distribute the latest medical information; we are not silent.”³² Finally, following the theme of Kramer's formative speech, ACT UP was meant to “organiz[e] the unorganized” and to get “people [to] do stuff for themselves.”³³

Since many of ACT UP's members were disaffected by AIDS organizations that failed to consider their input, ACT UP's methodology developed organically from its weekly meetings.³⁴ ACT UP's main decision-making body is its general membership body; all proposed policies and actions must be approved by the general body before being adopted by ACT UP.³⁵ The Coordinating Committee serves as an administrative advisor to the general body, primarily authorizing expenses, reviewing literature and publications by the group, coordinating sub-committees and planning agendas for general meetings.³⁶ The Coordinating Committee, however, is subject to the interests of the sub-committees they represent and the general body itself—the members of the Coordinating Committee will only remain on the Committee for as long as the sub-committees they represent believe they are effective.³⁷

Yet, it was not just the grassroots style of involvement that drew people to ACT UP. ACT UP's members were also tired of the slow, normative methods of activism in use at the start of the AIDS epidemic.³⁸ They were also frustrated with politicians' failure to represent their interests.³⁹ ACT UP's members were angry and ACT UP capitalized on this anger by directing it into many different forms of action, including zaps, politicized art, emotionally charged protests, and lobbying for a Manhattan Project for AIDS. Most of these forms of activism were not new, but they soon became closely associated with ACT UP, AIDS and queer street activism in the 1980s and 1990s.⁴⁰

Zaps

Zaps had been used by queer rights organizations for many years before being appropriated by ACT UP.⁴¹ Arthur Bell, one of the founding members of Gay Activists Alliance, wrote on zaps:

Gays who have as yet no sense of gay pride see a zap on television or read about it in the press. First they are vaguely disturbed at the demonstrators for “rocking the boat”; eventually, when they see how the straight establishment responds, they feel anger. This anger gradually focuses on the heterosexual oppressors, and the gays develop a sense of class-consciousness. And the no-longer-closeted gays realize that assimilation into the heterosexual mainstream is no answer: gays must unite among themselves, organize their common resources for collective action, and resist.⁴²

The zaps used by ACT UP were premised on the same principle—uncover heterosexual bigotry toward PWAs in an effort to unite queer PWAs in the combat against AIDS. Zaps forced people who supported policies detrimental to PWAs to explain themselves, to change their policies and to sabotage their public image.⁴³

One of the ways in which ACT UP was able to zap political leaders and public figures was through the art of “Republican Drag.”⁴⁴ Wolfe described Republican Drag as “pretend[ing] to be almost anything...to get in somewhere.”⁴⁵ ACT UP used costume and theatrics to gain entry into semi-public places and events before revealing themselves and zapping public officials.⁴⁶ The rationale was that standing outside of a building and handing out leaflets or protesting required passersby to be receptive to ACT UP’s message, but by invading spaces in which ACT UP (and AIDS) was not supposed to be, they disrupted these AIDS-free spaces and commanded the attention of the people inside them.⁴⁷ Possessing these places, and using Republican Drag to do so, caused public officials to lose their composure and ACT UP capitalized on those moments to solidify queer support in the fight against AIDS.⁴⁸

On the other hand, not all of ACT UP’s zaps were intended to increase the ire of the heterosexual majority and strengthen queer solidarity; zaps directed at science and health professionals were used as analytical brainstorming sessions for the future of AIDS research.⁴⁹ Some in the scientific community believed ACT UP’s zaps were initially “hypercritical and negative, [and] not very constructive,” but the zaps eventually shifted into informative sessions in which ACT UP members identified new research and brought possible drug trials to the attention of scientists.⁵⁰ In fact, ACT UP’s Treatment and Data Committee insisted that the first thing any individual member must do is to “know [their] shit” before attending a zap with a scientist or health care professional.⁵¹ Specifically, ACT UP recommended that anyone participating in a zap should have detailed files about each drug, including both its positive and negative effects; members were also to acknowledge when there was very little information available.⁵² Steven Epstein noted ACT UP members’ transformation into scientific “experts” lent credibility to their zaps and allowed ACT UP to get in the doors of the institutions of biomedicine. Once they

could converse comfortably about viral assays and reverse transcription and cytokine regulation and epitome mapping, activists increasingly discovered that researchers felt compelled, by their own norms of discourse and behavior, to consider activist arguments on their merits.⁵³

The use of scientific credibility in zaps had an early success when ACT UP convinced major health insurance providers to cover aerosolized pentamidine isethionate, a preventative treatment for PCP. Pentamidine had been used in an injected form to treat PCP, but after evidence started to show that an aerosolized treatment could prevent PWAs from contracting PCP in the first place, ACT UP pushed for health insurance providers to cover the aerosolized form.⁵⁴ It also partnered with physicians and AIDS researchers in its presentation of scientific evidence to insurers, eventually convincing many Boston and New England insurers to cover the treatment.⁵⁵

Political Theater and Politicized Art

ACT UP did not, however, only single out influential individuals to change policies or make treatments more accessible. ACT UP also targeted wider audiences and sought to change public perceptions about HIV/AIDS and sex in general. Large spectacles and political theater were meant to affect how individuals talked about issues at home.⁵⁶

Using political theater to encourage sex education

Wolfe was one of the early members of the ACT UP Women's Committee who tried to spread HIV/AIDS awareness to women. In 1988, AIDS was the number one killer of women ages 25–34 in New York City, but there had yet to be an important push to make women and the public aware of the dangers of unsafe heterosexual intercourse and intravenous drug use for women. On the rare occasions there was publically-consumable information directed at women, it placed the onus on them to ensure men wore condoms during sexual intercourse, rather than making it an issue for both genders. According to Wolfe, heterosexual men were not responsible for their own safety or condom usage; it was the women they were sleeping with who needed to insist on safer sex methods. Public information campaigns reminding women never to leave home without condoms drove home this message. In an effort to educate heterosexual men and women about HIV/AIDS transmission and to make men more responsible for their own health, ACT UP sought to engage them with a piece of political theater in a traditionally heterosexual (male) environment.⁵⁷

In the spring of 1988, ACT UP's Women's Committee brought ACT UP's message of safe heterosexual sex to the people watching a baseball game at Shea Stadium. Individual activists purchased tickets to a Mets' game in three different blocks in three different parts of the U-shaped stadium.⁵⁸ In a call-and-response type fashion, the activists unfurled large signs with white letter-

ing on a black background,⁵⁹ reading: “Don’t balk at safe sex,” “AIDS kills women,” “Men! Use Condoms,” “Strike out AIDS,” “No glove, no love,” and the ACT UP logo, “SILENCE=DEATH” under an up-turned pink triangle.⁶⁰ The messages and the very public theatrics of the event were meant to convince sports fans of the need for comprehensive sex education. With just the warning that ACT UP would be at the game, Shea Stadium’s head of public relations met with ACT UP leaders to put ACT UP’s flyers in each press packet and allowed ACT UP members to hand out flyers with information on how HIV/AIDS affected women to each spectator attending the game. ACT UP’s Shea Stadium political theater not only captured the attention of the 20,000 people at the game, but also the thousands more who watched on C-Span.⁶¹

Although ACT UP believed comprehensive sex education could slow the spread of HIV, there was a large pushback from many Americans to ACT UP’s message.⁶² Some were concerned that increased sex education would lead to promiscuity and increased and earlier sexual activity among children and teens.⁶³ Many scientific studies, however, show no correlation between a safer-sex curriculum and an earlier sexual debut or a more promiscuous lifestyle.⁶⁴ Furthermore, the claim that abstinence-only education reduces teen sexuality is unsupported by scientific evidence.⁶⁵ Even if comprehensive sex education led to increased sexual activity among teens and children, condemnation of such activity makes implied normative judgments about what the “appropriate” age is for teens to engage in consensual intercourse, what the “appropriate” frequency of intercourse is for teens, and what the “appropriate” number of sexual partners is.

While there should be an emphasis on teenagers waiting to have sex until they are emotionally mature enough to do so, bringing morality into teenage sexuality may cause a considerable number of problems. One of the most apparent problems is that determining for teens when they are ready to engage in consensual intercourse is a paternalistic approach to sex. Provided they have sufficient education about the risks and dangers associated with sex, teenagers should be able to exhibit sufficient responsibility and forethought to make appropriate decisions regarding intercourse. Teens are trusted to care for younger children, to drive, and to work in a variety of industries. It is not so great a leap to trust teens to be responsible enough to make wise decisions about their own sexual health if they are well-educated and have a system of support. In fact, statistics show that teens and children without sexual education (abstinence-only education), are more likely to be unprepared for sexual intercourse when it does happen, increasing the risk of HIV/AIDS.⁶⁶

Additionally, passing normative judgments about teen sexual intercourse can lead to stigmatizing sexually active teenage women while sexually active

teenage men escape social disfavor. Although anyone who is sexually active is at risk for contracting HIV or other sexually transmitted infections (STIs), only women can become pregnant. Due to modern medical advances in HIV/AIDS and other STI health care, there are rarely physical signs that a teen has lost his or her virginity other than pregnancy.⁶⁷ Presuming a strong societal norm against sexually active teens, men will be able to pass as sexually inactive and, as such, can reap the privilege of being “moral.” Women, on the other hand, run a much higher risk that they will be stigmatized for their choice to engage in sexual activity. Furthermore, even if a teenage man admits to his sexual experience, there will be no physical reminder constantly displaying his violation of societal norms. Finally, women who do not become pregnant are still marked by their sexual experiences with a broken hymen.

Politicized art

Beyond Shea Stadium and the push for sex education, ACT UP capitalized on the privilege and artistic background of AIDS' first major group of victims—gay men. It utilized their talent to create politicized art and used it to convey other ACT UP needs, such as a radical shift in the public perception of AIDS: “But AIDS made its debut among a very cultured group of people. Many were artists who, devastated and enraged, turned their professional skills to protest...But even those gay men who were not culture mavens by trade were knowledgeable amateurs.”⁶⁸ These artistic gay men, many of whom were members of ACT UP, used their art and street theater to gain attention and bring their demands to the non-queer masses.⁶⁹

The art was meant to convey specific messages and to instigate action against the institutional constraints that arguably worsened the AIDS epidemic.⁷⁰ For example, ACT UP chained themselves to drug company's headquarters; stenciled bloody hands everywhere, as if to highlight the “governmental guilt in promoting a blood-borne disease;” and covered Jesse Helm's house in a giant condom in order to show “prejudice [was] as insidious a danger to society as H.I.V. [sic].”⁷¹ Jesse Green of the *New York Times* argues that this art was successful, in that those outside the populations hardest hit by AIDS could attach a “human face” attached to AIDS.⁷² Although the art humanized AIDS, the rendition was often made into a more palatable (and at times an untruthful) face.⁷³ Even with this sanitization of the “face” of AIDS, the artistic representations made queers more acceptable members of society and simultaneously transformed the purpose of the original confrontational art of ACT UP into a movement for queer inclusion: “At the beginning of AIDS, artists humanized the disease and engaged people's instincts for self-preservation by appropriating comfortable, popular forms of expression... Within about a decade, that appropriation neutralized the artists' ability to make

further change; the message itself... became comfortable and popular.⁷⁴ As a result, AIDS is still a global epidemic, but the luster of AIDS has dimmed. It is possible that art's loss of potency in AIDS activism has shifted concern from HIV/AIDS onto other causes.

Emotionally-Charged Protests: mobilizing underlying anger

ACT UP was also extremely adept at transforming PWAs' sorrow and other emotions into rage and directing that rage into action. The intense anger that fueled these zaps, protests, and politicized art was due, in part, to the government's seeming avoidance of the AIDS epidemic.⁷⁵ Ronald Reagan was the president during the first eight years of AIDS, but it was not until April 2, 1987, that he first publically spoke the word "AIDS."⁷⁶ ACT UP sought to engage these frustrated and angry queers and mobilize that anger as action;⁷⁷ yet, ACT UP was often met with stiff resistance:

Anger takes on an especially negative cast when expressed by people marked as "other" by mainstream society, particularly when large numbers of such people are purposefully taking to the streets and breaking the law in order to disrupt "business as usual." ACT UP also confronted an American ideology of democracy that locates legitimate political activity in the voting booth and the halls of legislatures and maligns street activism as unnecessary and extreme, a threat to social order. As well, ACT UP existed in a moment when other progressive oppositional movements had disappeared or were in quick decline. Given this context, ACT UP had to make angry street activism a normative and legitimate route for lesbians and gay men.⁷⁸

It was not just heterosexuals or people without HIV/AIDS that opposed public rage; earlier queer activists also feared that anger could threaten what social standing and acceptance queers had achieved up to that point.⁷⁹ Eventually, however, ACT UP became known for channeling these intense emotions into protest.

Successful use of anger at the Names Project Quilt, storming of the FDA and the parallel track trials

Some of the foundational policy goals of ACT UP revolved around drugs, and medication was one place where ACT UP saw a successful use of PWA anger to effect policy change. The medication goals included improved access to previously approved drugs through lowered prices, increased access to drug trials and research, and speedier approval of drugs by the FDA. The importance of medication and drugs was easily understandable—PWAs were dying without access to medication and many more would die before the slow FDA approval process could be completed for new drugs. Despite the sometimes bleak prospects, ACT UP saw some of its greatest successes in the medication field. ACT UP shamed many pharmaceutical companies into

lowering prices, established parallel track studies for AIDS medication, and convinced the FDA to speed up its approval for medication.

It was at the Names Project Quilt display at the national Mall in 1988 that ACT UP capitalized on peoples' emotions to fight for better access to drugs.⁸⁰ The quilt was a memorial for those who had died of AIDS and it served as a site of grief.⁸¹ ACT UP handed out leaflets to those who came to see the quilt in an effort to get the mourners' enraged.⁸² ACT UP's flyers asserted that it was the government and its inaction that had murdered the PWAs; it was not their disease, but the government's negligence and slow movement that killed their loved ones.⁸³ ACT sought to engage the PWAs' and mourners' anger by bringing a protest to the FDA and the regulatory system that had prevented PWAs from accessing the medications necessary to forestall their deaths.⁸⁴

ACT UP encouraged the people it met at the Names Project Quilt to storm the FDA in an effort "to dramatize what they called the criminally slow pace of the federal bureaucracy to approve new drug treatments for AIDS."⁸⁵ Over 1,200 PWAs protested for nine hours, blocking exits and preventing anyone from entering or leaving the building.⁸⁶ Throughout the protest, over 175 enraged participants were arrested.⁸⁷ ACT UP's protest was a way to force the FDA to increase access to medications through experimental trials and to speed the process of drug approval.⁸⁸ At the time, only azidothymidine (AZT) was approved to treat the symptoms of AIDS, but the drug was extremely toxic and had dangerous side effects.⁸⁹ There were, however, more than 80 other AIDS treatments being tested in experimental trials throughout the United States, but the FDA refused to use the fast-track system to release drugs after Phase II studies were completed, as AZT had been.⁹⁰

Despite the seemingly rude or offensive techniques, ACT UP managed to convince the FDA to change how it approved drugs and drug trials.⁹¹ The FDA and researchers had feared that if experimental drugs were made available before studies were completed, it could cause a drop in the number of drug study participants because anyone could get the drugs from their doctors.⁹² Despite this fear, Jason DeParle of the New York Times reported that ACT UP's "fits" significantly sped up the approval of two new drugs and lowered the price of AZT.⁹³ Even Anthony Fauci, the director of the National Institute of Allergy and Infectious Diseases (NIAID) since 1984 who had once been called "an incompetent idiot" and a "monster" by Kramer, credited ACT UP with changing how many people could access drug trials.⁹⁴ Specifically, Fauci admitted ACT UP played a large role in shrinking the timeline of a drug's approval from eight years down to three.⁹⁵

ACT UP also managed to get access to parallel track programs as a way for PWAs and HIV-positive people who were unable to enroll in controlled clinical

trials to gain access to experimental drugs and treatments.⁹⁶ The parallel track programs allowed researchers to continue to collect data from controlled drug trials while still providing PWAs who did not qualify to participate in controlled trials with access to experimental drugs.⁹⁷ ACT UP envisaged parallel track to be available to Phase II drugs that were determined to be “tolerably safe” and marginally effective.⁹⁸ The drugs would be available by consultation with a physician and organizations would collect reaction and efficacy data. Parallel track was approved by the FDA in 1989, and while there is no definitive proof that ACT UP was the agent of change, the approval was close on the heels of ACT UP’s protests at the FDA.⁹⁹ The FDA Anti-Infective Drugs Advisory Committee also formed the Ad Hoc Parallel Track Working Group and allowed ACT UP to be represented in the group.¹⁰⁰ Further, ACT UP also participated with NIAD and sat on its AIDS Research Advisory Committee to “define and implement the Parallel Track [sic] program.”¹⁰¹

Informed consent and ethical questions of increased access to drugs and drug trials

One of the potential downfalls of ACT UP’s goal of getting more PWAs involved in clinical trials was whether the PWA-participant had given informed consent. George Annas, a legal-medical philosopher, opines that PWAs can never truly give informed consent because the desperation they feel because of their chronic illness prevents them from making an informed decision.¹⁰² Annas also argues that any PWA that believes he is receiving treatment and not participating in an experimental or risky clinical trial has failed to give informed consent.¹⁰³ These arguments, however, are in direct opposition to ACT UP’s rallying cry “A Drug Trial is Health Care Too!”¹⁰⁴ For Annas, ACT UP’s belief that clinical trials can and should be used as a form of treatment opens PWAs up to being taken advantage of by earnest researchers.¹⁰⁵ Annas’ concerns, however, are based off of a researcher-participant model in which the participant is largely left in the dark about the inner workings and risks of the trials. With legal regulations in place that force researchers to reveal their intentions, the known risks, and the suspected benefits, it would strip PWAs of their agency if they were not allowed to give consent to testing merely because of their illness.

Eugene Volokh illustrated this argument by claiming people combating terminal illnesses have a right to medical self-defense, or in the case of PWAs, to participate in clinical trials.¹⁰⁶ Volokh notes that the Supreme Court held in *Roe. V. Wade*¹⁰⁷ and *Planned Parenthood of Southeastern Pennsylvania v. Casey*¹⁰⁸ that a woman had the option to exercise medical self-defense because there must always be an exception for the life and health of the mother.¹⁰⁹ Even though an abortion performed in medical self-defense may pose a risk

to the health or safety of the woman undergoing the procedure, there must be a tangible risk to the woman before a restriction can be enacted.¹¹⁰¹ Extending this argument to PWAs, the government should be required to show a substantial or tangible risk to a PWA before restricting his or her access to a drug trial. Annas' concern that physicians and researchers will take advantage of PWAs,¹¹¹ however, is based on the presumption that ACT UP's push for wider involvement in drug trials failed to consider the safety and health of PWAs. In line with abortions' protections for the health and life of an expectant mother, ACT UP sought access to drugs through parallel track "as soon as a tolerably safe dose range ha[d] been defined and preliminary evidence of efficacy ha[d] been obtained."¹¹² ACT UP and the PWAs advocating for parallel track drug trials wanted to seek out new treatments in order to improve the quality of their lives or forestall their death.

Additionally, Annas argues that it is when a patient is suffering from a terminal illness that he or she cannot give informed consent to participate in an experimental drug trial.¹¹³ He opines that the researchers use extreme coercion and the PWA is blinded by self-deception, preventing the PWA from making a rational decision with his or her health or life in mind.¹¹⁴ ACT UP, however, lobbied and protested the FDA to open up parallel track, meaning there was no coercion on the part of researchers to enroll PWAs into the program. Furthermore, any data collected from PWAs enrolled in a parallel track study is not sufficiently scientifically reliable to be used in a final report because patients with access to parallel track drugs previously failed to meet the criteria needed to perform a valid drug trial.¹¹⁵ Finally, the FDA is able to modify the parallel track programs to ensure the drugs available meet certain levels of safety, as first suggested by ACT UP.¹¹⁶

The concern that PWA participation in clinical trials risks exposure to potentially dangerous medications is a risk that anyone using medication undertakes. Anyone, whether he or she has AIDS, HIV or neither, faces risks on a daily basis—from crossing the street to eating in a restaurant to consuming medication—there is no way to live a completely risk-free life. While clinical trials are used to gather information on how people react to new or unknown medications, these experiments were in place long before ACT UP won access to clinical trials via parallel track. Even with FDA-approved medicines, a doctor cannot guarantee that a patient will not have an adverse and potentially life-threatening reaction to the medication. Prohibiting PWAs from participating in clinical trials because of a fear of exposure to potentially dangerous medicine fails to take into consideration the normal process for FDA approval, which includes human subject participation in clinical trials. Further, as long as PWAs give their informed consent, PWAs have been made aware of the risks of participation in the trial.

A Manhattan Project for AIDS

One of the final policies ACT UP pushed for was the creation of a Manhattan Project for AIDS, or a Manhattan Project II: a government-coordinated, -funded, and -run research program dedicated to discovering medical advances in HIV/AIDS. The official name was the McClintock Project, but it was often called the Manhattan Project II in reference to the highly centralized government-sponsored research and development project to create the first atomic weapon during World War II.¹¹⁷ ACT UP sought government involvement because it feared that independent researchers were wasting time performing duplicative work without any regulation or information-sharing.¹¹⁸

ACT UP also wanted increased government funding for HIV/AIDS research and sought fund distribution through a Manhattan Project mechanism.¹¹⁹ When HIV was initially discovered in 1983 and 1984, the Secretary of Health and Human Services made the bold claim that there would be a cure for AIDS within two years.¹²⁰ Many in ACT UP saw the government's failure to find that cure as a direct result of its lack of funding and centralization of AIDS research.¹²¹ They believed that if the government had actually committed sufficient funds and coordinated the research into HIV/AIDS, there would have been substantial progress.¹²²

ACT UP's goal for a Manhattan Project II to streamline HIV/AIDS research was never successful.¹²³ Despite numerous promises by President Bill Clinton throughout his first presidential campaign, he was still calling for a future coordinated effort to create an AIDS vaccine in 1997.¹²⁴ ACT UP was successful, however, in bringing a Manhattan Project for AIDS to the national stage and helped elect Clinton because of his support for PWA rights.¹²⁵ The 1992 presidential election, the first in which exit polls asked voters if they identified as homosexual or bisexual, had an estimated four to five percent queer turnout and 72 percent of those queer voters voted for Clinton.¹²⁶

After Clinton won the presidency, the AIDS battleground changed.¹²⁷ Clinton spent 20 percent more on AIDS research than his predecessors, nearly \$1.3 billion.¹²⁸ Clinton also established an outpatient fund named after a teenager who was infected by AIDS after a blood transfusion, Ryan White.¹²⁹ In the words of Kramer, "You don't know where to yell or who to yell at. Clinton says all the right things, then doesn't do anything."¹³⁰ Indeed, Clinton talked a lot about the need for early AIDS action during his campaign in order to get elected, but it took five months before he named Kristine M. Gebbie as the AIDS Czar, and only after the National Commission on AIDS was prepared to attack Clinton for his failure to follow through on campaign promises.¹³¹

Gebbie was a former nurse and chief health officer of Oregon and Washington, but she was not the leader ACT UP had hoped for.¹³² Her only experi-

ences with AIDS came from her roles on the CDC's advisory panel on HIV prevention and on the National Commission on AIDS.¹³³ Gebbie did not see herself as a leader; she saw her job as a short-term coordinator of different federal agencies without any responsibility for engaging in research herself.¹³⁴

The push for a Manhattan Project for AIDS was a result of the "sluggish progress of AIDS research" in the initial years of the epidemic.¹³⁵ ACT UP activists believed that directed research would speed up the development of a cure or eliminate redundancies in research, but a Manhattan Project might actually have limited the positive aspects of competition in AIDS research.¹³⁶ Any kind of scientific research needs to be examined, reformatted and refocused in a variety of different scientific approaches. If there had been a Manhattan Project for AIDS however, it is possible that scientists would not have made the breakthroughs or discoveries ACT UP hoped for because of a limited scope of research.¹³⁷ Had the scientists been directed to complete a narrowly defined task, they would not have been allowed to jump start dead-end research by consulting research in closely related and potentially helpful areas. Steven Salbu, a legal ethicist, argues that

the vaccination or cure for AIDS will come from the vision of someone who sees the problem somewhat differently from the masses of investigators. The end of AIDS will likely accompany a demonstration that the scientists who came before missed something essential, or modeled the disease inaccurately, due to some largely accepted but false paradigm.¹³⁸

Competition is also a driving force in scientific discovery and a Manhattan Project for AIDS would have stripped much of the competition to develop AIDS research.¹³⁹ Putting aside their competitive drive, researchers might have lowered their incentive to strive for scientific discovery. The scientific pluralism required for scientific discovery could have been hampered by a government-run program, especially if the government's assigned tasks were too narrow or constricting.

A more appropriate solution than the Manhattan Project II would be for the national government to create significant funding streams for HIV/AIDS research without earmarking too much for specific types of research or expected outcomes.¹⁴⁰ If the research grants had more open objectives, the competitive and adversarial aspects of AIDS research would remain, but the desire for increased funding similar to the Manhattan Project for AIDS would also be present. Furthermore, with the advent of social networking technology, the possibility of shared data and cooperation for the sake of a competitive advantage could increase. As long as participation in data-sharing is voluntary, researchers can incorporate diverse scientific approaches into their experiments and studies only when it will help with scientific discovery.

Conclusion

Although ACT UP was in its prime from 1987 to 1994, ACT UP is still actively involved in HIV/AIDS policy and care in many cities across the U.S. and worldwide. HIV/AIDS is still a global epidemic, although the Joint United Nations Programme on HIV/AIDS (UNAIDS) reports reductions in HIV transmissions and no increases in AIDS-related deaths since 2001.¹⁴¹ In 2009, UNAIDS recorded 33.3 million diagnoses of HIV, 2.6 million new cases of HIV, and 1.8 million AIDS-related deaths. Further, the CDC believes over one million people in the United States have HIV and 21 percent of them do not yet know their status. The CDC estimates that 18,000 people will still die from AIDS each year in the United States, and over 576,000 Americans have died since the epidemic began.¹⁴²

ACT UP emerged at a time when people were still petrified of HIV/AIDS, gay people, and dirty blood. This organization's struggle has been tied inextricably to other causes and campaigns, including queer rights and patient advocacy, but its greatest impact has still been in the HIV/AIDS community. The way in which ACT UP operated was not new, but it allowed marginalized groups of people to force change outside of the more normative legislative or judicial process. At a time when there were few politicians catering to the PWA vote, ACT UP used methods that made its message heard.

ACT UP has certainly not ended AIDS, but it has had a considerable effect on the HIV/AIDS battleground. ACT UP radically changed how the FDA conducts drug trials and has expanded PWAs' access through the parallel track programs. ACT UP was also instrumental in speeding up the drug approval process and getting more drugs available to more people. Most importantly, ACT UP has brought greater public awareness to AIDS and made the disease much more human.

While ACT UP's methods were not perfect, its methodology can be and has been imitated by other marginalized or patients' advocacy groups seeking change outside the traditional legislative process. ACT UP laid the framework for not only making the public more aware of a disease or injustice by using loud, eye-catching protest and political theater, but it also has pushed groups to work hard to protect their rights. Increasing the visibility of an illness or marginalizing status and using aggressive "expert"-type zaps and emotionally-charged protests can make people in power address concerns that they might not otherwise have considered. The most translatable and effective techniques ACT UP used was as simple as reclaiming agency and shrugging off the negative connotation of suffering or the passive connotation of a patient; ACT UP was an organization of active, loud, People With AIDS.

NOTES

1. Kiki Mason, *By Any Means Necessary*, ACT UP/New York DIVA TV Netcast (1994), <http://www.actupny.org/divatv/netcasts/index.html> (last visited Apr. 14, 2011).
2. *Denver Principles*, ACT UP/NEW YORK (1983), <http://www.actupny.org/documents/documents.html> (last visited Apr. 14, 2011).
3. Centers for Disease Control and Prevention (CDC), *Pneumocystis Pneumonia—Los Angeles, Morbidity and Mortality Weekly Report* (MMWR) (June 5, 1981), http://www.cdc.gov/mmwr/preview/mmwrhtml/june_5.htm (last visited Apr. 14, 2011).
4. Sheryl Gay Stolberg, *New Challenge to Idea That 'AIDS is Special'*, N.Y. Times, Nov. 12, 1997.
5. Lawrence K. Altman, *New Homosexual Disorder Worries Health Officials*, N.Y. TIMES, May 11, 1982.
6. Lawrence K. Altman, *Rare Cancer Seen in 41 Homosexuals*, N.Y. TIMES, July 3, 1981.
7. While AIDS affects men and women, the earliest reports of the disease were in men, as such I will use the gendered pronouns he, him, and his in reference to early individuals diagnosed with AIDS.
8. See CDC, *Current Trends Update on Acquired Immune Deficiency Syndrome (AIDS) —United States* (MMWR) (Nov. 30, 1984), www.cdc.gov/mmwr/preview/mmwrhtml/00000442.htm.
9. *Id.*
10. CDC, *Epidemiologic Notes and Reports Pneumocystis carinii Pneumonia among Persons with Hemophilia A* (July 16, 1982), <http://www.cdc.gov/mmwr/preview/mmwrhtml/00001126.htm> (last visited May 01, 2011) (hemophiliacs); CDC, *Current Trends Prevention of Acquired Immune Deficiency Syndrome (AIDS): Report of Inter-Agency Recommendations* (March 04, 1983), <http://www.cdc.gov/mmwr/preview/mmwrhtml/00001257.htm> (last visited May 01, 2011) (IDUs); CDC, *Opportunistic Infections and Kaposi's Sarcoma among Haitians in the United States* (July 09, 1982), <http://www.cdc.gov/mmwr/preview/mmwrhtml/00001123.htm> (last visited May 01, 2011) (Haitians); CDC, *Unexplained Immunodeficiency and Opportunistic Infections in Infants—New York, New Jersey, California* (Dec. 17, 1982), <http://www.cdc.gov/mmwr/preview/mmwrhtml/00001208.htm> (last visited May 01, 2011) (children).
11. See Robin Herman, *A Disease's Spread Provokes Anxiety*, N.Y. TIMES, Aug. 8, 1982.
12. CDC, *Epidemiologic Notes and Reports Immunodeficiency among Female Sexual Partners of Males with Acquired Immune Deficiency Syndrome (AIDS)—New York* (Jan. 07, 1983), <http://www.cdc.gov/mmwr/preview/mmwrhtml/00001221.htm> (last visited May 01, 2011).
13. *Current Trends Prevention of Acquired Immune Deficiency Syndrome (AIDS)*, *supra* note 10.
14. Lawrence K. Altman, *Federal Official Says He Believes Cause of AIDS Has Been Found*, N.Y. TIMES, Apr. 22, 1984.
15. Kaye Wellings, *Perceptions of risk, media treatment of AIDS*, in SOCIAL ASPECTS OF AIDS 83, 87 (Peter Aggleton and Hilary Homans, eds., 1988). Although AIDS was represented in many different populations, Wellings reported that hemophiliacs became the “innocent victims” of the AIDS epidemic, whereas many believed gay men deserved the disease as a result of a hedonistic lifestyle.
16. See LARRY KRAMER, REPORTS FROM THE HOLOCAUST: THE STORY OF AN AIDS ACTIVIST 127-136 (1994).
17. World Health Organization (WHO), *Weekly Epidemiological Record*, No. 49 Dec. 4, 1987, at 369, 372.

18. *Id.* WHO reported 47,022 cases of AIDS in the United States by December 1987.
19. *Id.* Brazil (2,102), Canada (1,334), France (2,674), West Germany (1,486), Italy (1,104), Uganda (2,369), the United Kingdom (1,123), and Tanzania (1,608).
20. *Id.*
21. I use “queer” to refer to lesbian, gay, bisexual, transgendered peoples and other sexual and gender minorities as a whole. The use of more specific identifiers, such as “gay” or “lesbian” is intentional.
22. KRAMER, *supra* note 18 at 135.
23. Interview by Laraine Sommella with Maxine Wolfe, in QUEERS IN SPACE: COMMUNITIES, PUBLIC PLACES, SITES OF RESISTANCE (Gordon Brent Ingram *et al.* eds., 1997), *available at* <http://www.actupny.org/documents/earlytactics.html> (last visited Apr. 14, 2011).
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.* The symbol originally created by six artists in a collective called Gran Fury was the phrase “SILENCE=DEATH” in white letters on a black background. The lettering sat underneath the pink triangle used by the Nazis to label homosexuals (although Gran Fury turned it so the triangle pointed up). “Here, ACT UP takes a symbol used to mark people for death and reclaims it. They reclaim, in fact, control over defining a cause of death; the banner connects gay action to gay survival, on the one hand, and homophobia to death from AIDS, on the other. ACT UP’s common death spectacles repeat the inversion.” Josh Gamson, *Silence, Death, and the Invisible Enemy: AIDS Activism and Social Movement “Newness”*, 36 SOC. PROBS. 351, 361. *See also* Jesse Green, *When Political Art Mattered*, N.Y. TIMES, Dec. 7, 2003 at 6 for commentary on why inverting the Nazi’s pink triangle was important.
29. Sommella, *supra* note 23.
30. *Id.*
31. *Id.*
32. *Original Working Document*, ACT UP/New York (2003), <http://www.actupny.org/documents/workdoc.html> (last visited Apr. 14, 2011). (Emphasis added.) Although the Working Document was authored in 2003, it was based on the Original Working Document and oral tradition.
33. Sommella, *supra* note 23.
34. Jason DeParle, *Rude, Rash, Effective, Act-Up Shifts AIDS Policy*, N.Y. TIMES, Jan. 3, 1990 at B.
35. *Original Working Document*, *supra* note 37; *The ACT UP Working Document*, ACT UP/New York (May 4, 1987) <http://www.actupny.org/documents/workdoc.html> (last visited Apr. 14, 2011).
36. *Original Working Document*, *supra* note 32.
37. *Id.*
38. *See* Gamson, *supra* note 28 at 354-355, 359-361.
39. *Id.*
40. *See generally id.*
41. *Id.* at 351.
42. LARRY GROSS, UP FROM INVISIBILITY: LESBIANS, GAY MEN, AND THE MEDIA IN AMERICA 46 (2002).

43. See Sommella, *supra* note 23.
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. See *id.*
49. See generally Steven Epstein, *The Construction of Lay Expertise: AIDS Activism and the Forging of Credibility in the Reform of Clinical Trials*, 20 SCI., TECH. & HUM. VALUES 408 (1995). See also Thomas Morgan, *Mainstream Strategy for AIDS Group*, N.Y. TIMES, July 22, 1988 at B.
50. Morgan, *supra* note 49.
51. *T&D Teach-In*, ACT UP/NY (1989), <http://www.actupny.org/documents/T%26DTI.html> (last visited Apr. 14, 2011).
52. *Id.*
53. Epstein, *supra* note 49. (Emphasis in the original.)
54. Richard A. Knox, *AIDS Militants Turn Up the Heat; Insurers Facing New Pressures to Pay for Preventative Care*, BOS. GLOBE, Nov. 1, 1988 at 31.
55. *Id.* See also Richard A. Knox, *AIDS Drug Protest Targets Hancock*, BOS. GLOBE, Oct. 25, 1988 at 60.
56. See generally Sommella, *supra* note 28.
57. *Id.*
58. *Id.*
59. The signs appeared as if the letters were floating on their own because the black background blended in to the darkness while the lights reflected off the lettering.
60. Sommella, *supra* note 23.
61. *Id.*
62. *Sex Education in America: An NPR/Kaiser/Kennedy School Poll*, NATIONAL PUBLIC RADIO (NPR), Feb. 24, 2004, available at <http://www.npr.org/templates/story/story.php?storyId=1622610> (last visited on May 03, 2011).
63. *Id.*
64. See Diana Jean Schemo, *Surgeon General's Report Calls for Sex Education Beyond Abstinence*, N.Y. TIMES, June 29, 2001; Jane E. Brody, *Personal Health; Abstinence-Only: Does It Work?*, N.Y. TIMES, Jun. 1, 2004; Laura Beil, *Abstinence Education Faces an Uncertain Future*, N.Y. TIMES, Jul. 18, 2007; Laura Sessions Stepp, *Study Casts Doubt on Abstinence-Only Programs*, WASH. POST, Apr. 14, 2007.
65. See Schermo; Brody; Beil; Sessions Stepp, *supra* note 64. See also *Sex Education in America*, *supra* note 62.
66. Interview with Cathy Strobel, Assoc. Dir. of Health Education, Minn. AIDS Project, in Minneapolis, Minn. (Apr. 1, 2011).
67. For an analysis of HIV and pregnant women, see Michele Oberman, *Test Wars: Mandatory HIV Testing, Women, and Their Children*, 3 U. CHI. L. SCH. ROUNDTABLE 615 (1996). Oberman's work touches upon the implications of mandatory HIV testing of pregnant women as part of the state's police power, especially in light of data that pregnant women with HIV who take azidothymidine (AZT) reduce the risk of transmitting HIV to their fetuses.
68. Green, *supra* note 28.
69. *Id.*

70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.* Green notes that many of the more mainstream artistic representations of AIDS, especially those that put a “human face” to AIDS, were contextually dishonest. The made-for-television movie *An Early Frost*’s protagonist was a gay lawyer who tells his conservative family that he both has AIDS and is gay. The protagonist was an innocent and sympathetic character, as he was infected by his partner’s infidelity and, despite initial close-mindedness by his father, is accepted by his family. Further, the protagonist was “so sanitized as to make his disease and especially his gayness...almost nonexistent. Which is exactly why it worked.” *The Ryan White Story* also provided American masses the ability to see AIDS playing out on a non-homosexual 13-year-old Midwestern boy. Ryan White was another innocent victim of the AIDS crisis after contracting the disease from a blood transfusion due to his hemophilia. One of the last major humanizing AIDS films was *Philadelphia*, in which a gay lawyer with AIDS is wrongfully terminated and represented by a homophobic attorney. The inclusion of the homophobic attorney was to provide audience members with a relatable character and reinforce the stereotype that the AIDS epidemic was characterized by heterosexuals coming to the aid of infected gay men.
74. *Id.*
75. Deborah B. Gould, *Life During Wartime: Emotions and the Development of ACT UP*, 5-6 http://www.actupny.org/indexfolder/gould_s02.pdf (last visited Apr. 14, 2011).
76. *Reagan’s AIDSGATE*, ACT UP/New York, <http://www.actupny.org/reports/reagan.html> (last visited May 10, 2011).
77. See Gould, *supra* note 75 at 9-14.
78. *Id.* at 3.
79. See DeParle, *supra* note 34.
80. Gould, *supra* note 75 at 6-7.
81. *Id.*
82. *Id.*
83. “ACT UP passed out a leaflet at the Quilt showing. One side blared: “SHOW YOUR ANGER TO THE PEOPLE WHO HELPED MAKE THE QUILT POSSIBLE: OUR GOVERNMENT.” Text on the reverse read: The Quilt helps us remember our lovers, relatives, and friends who have died during the past eight years. These people have died from a virus. But they have been killed by our government’s neglect and inaction... More than 40,000 people have died from AIDS... Before this Quilt grows any larger, turn your grief into anger. Turn anger into action. TURN THE POWER OF THE QUILT INTO ACTION.” *Id.* at 7.
84. “ACT UP’s logic both acknowledged, and offered a resolution to, lesbian and gay ambivalence about self and society: given our grief and under these dire circumstances where we and our loved ones are being murdered by our government, anger and confrontational activism targeting state and society are legitimate, justifiable, rational, righteous, and necessary. ACT UP offered an emotional and political sensibility that simultaneously acknowledged, evoked, endorsed, and bolstered lesbians’ and gay men’s anger.” *Id.*
85. Renee Loth, *AIDS Protestors Close FDA Headquarters*, BOS. GLOBE, Oct. 12, 1988 at 1.
86. Warren Leary and David Binder, *Making Amends*, N.Y. TIMES, Nov. 3, 1988 at B20.
87. Loth, *supra* note 85.

88. Susan Okie, *AIDS Coalition Targets FDA for Demonstration; Activists Protest Restrictions on Releasing Experimental Drugs to Severely Ill*, WASH. POST, Oct. 11, 1988 at A17.
89. Loth, *supra* note 85.
90. Okie, *supra* note 88.
91. DeParle, *supra* note 34.
92. *Id.*
93. *Id.*
94. Frank Bruni, *Act Up Doesn't Much, Anymore; A Decade-Old Activism of Unmitigated Gall Is Fading*, N.Y. TIMES, Mar. 21, 1997 at B.
95. *Id.*
96. *Guidelines for the Parallel Track Program For AIDS and HIV-Related Treatments*, ACT UP/NY, <http://www.actupny.org/treatment/access-philos.html> (last visited Apr. 14, 2011). Interestingly, Marlene Cimons of the *Los Angeles Times* reported that it was Anthony Fauci who proposed the Parallel Track program. *Too Much Too Fast?: Drug Rules: AIDS Spurs New Climate*, Sept. 7 1989 at 1.
97. *Id.*
98. *Id.*
99. *Treatment Access—Activists' Philosophies*, ACT UP/New York, <http://www.actupny.org/treatment/access-philos.html> (last visited May 03, 2011).
100. *Id.*
101. *Id.*
102. See George J. Annas, *Questing for Grails: Duplicity, Betrayal, and Self-Deception in Postmodern Medical Research*, 12 J. CONTEMP. HEALTH L. & POL'Y 297, 313-314.
103. *Id.* at 311.
104. *Id.* at 312.
105. *Id.* at 310-313.
106. See generally Eugene Volokh, *Medical Self Defense, Prohibited Experimental Therapies, and Payment for Organs*, 120 HARV. L. REV. 1813.
107. 410 U.S. 113 (1973).
108. 505 U.S. 833 (1992).
109. Volokh, *supra* note 106 at 1824.
110. *Id.* at 1825.
111. Annas, *supra* note 102 at 312.
112. *Treatment Access*, *supra* note 99.
113. Annas, *supra* note 102 at 310
114. *Id.*
115. *Treatment Access*, *supra* note 99.
116. See *id.* ACT UP did not advocate an uninhibited access to any experimental drug trial or medical procedure, but rather suggested that there be minimum safety guidelines for the PWAs participating in the Parallel Track.
117. Steven R. Salbu, *Should AIDS Research be Regulated? A Manhattan Project for AIDS and Other Policy Proposals*, 69 IND. L.J. 425, 432-433.
118. *Id.*
119. *Id.*

120. Office of Technology Assessment, *Review of the Public Health Service's Response to AIDS* (Feb. 1985) 29, http://www.blackvault.com/documents/ota/Ota_4/DATA/1985/8523.PDF.
121. Salbu, *supra* note 117 at 426.
122. *Id.*
123. See Alison Mitchell, *Clinton Calls for AIDS Vaccine as Goal*, N.Y. TIMES, May, 19, 1997 at B8.
124. *Id.*
125. See Robert Pear, *The 1992 Campaign; As Bush Defends AIDS Policy, Its Critics See Flaws*, N.Y. TIMES, Oct. 18, 1992; Jeffrey Schmalz, *The 1992 Elections: The States—The Gay Issues; Gay Areas Are Jubilant Over Clinton*, Nov 5, 1992; *A Renewed Urgency on AIDS*, N.Y. TIMES, Dec. 3, 1993; Andi Rierden, *In New Haven, Taking Action Against AIDS*, N.Y. TIMES, Jan. 30, 1994; Philip J. Hiltz, *Clinton's Director of Policy on AIDS Resigns Under Fire*, N.Y. TIMES, July 9, 1994. See also Mitchell, *supra* note 134.
126. Schmalz, *supra* note 125.
127. Jeffrey Schmalz, *Whatever Happened to AIDS?*, N.Y. TIMES, Nov. 28, 1993 at 6.
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.* AIDS activists, rather, sought someone such as Jimmy Carter, C. Everett Koop or H. Norman Schwazkopf to lead the government's response to AIDS.
133. *Id.*
134. *Id.*
135. Salbu, *supra* note 117 at 425.
136. *Id.* at 432-433.
137. *Id.* at 441.
138. *Id.* at 442.
139. See *id.* at 445-446.
140. As of May 1997, Clinton was spending \$1.5 billion on AIDS research and only 10 percent was specifically directed toward creating an AIDS vaccine. Mitchell, *supra* note 123. Clinton also claimed to have tripled AIDS funding while he was president and provided 25 percent of global AIDS funding. Peter Baker, *It's Not About Bill*, N.Y. TIMES, May 31, 2009. President George W. Bush, however, set aside \$2.5 billion for AIDS research in 2001. Dave E. Sanger, *Bush Says U.S. Will Give \$200 Million to World AIDS Fund*, N.Y. TIMES, May 12, 2001. Finally, President Barack Obama sought to spend \$4.9 billion on HIV/AIDS research. Robert Pear and Gardiner Harris, *Obama Proposes Health Agency Cut, a First, but Spares Doctors' Medicare Fees*, N.Y. TIMES, Feb. 15, 2011 at A19.
141. UNAIDS, *Global Report: UNAIDS Report on the Global AIDS Epidemic 2010*, 22 (2010).
142. CDC, *HIV in the United States*, at <http://www.cdc.gov/hiv/resources/factsheets/us.htm> (last visited May 01, 2010).



in the Gulag Archipelago under Stalin at its height,"³ wrote Adam Gopnick not long ago in an alarm bell of an article in *The New Yorker*. Let that fact sink in.

As a rule, the wealthy don't go to prison. Locating a rich person in prison is like finding a four-leaf clover during a walk in the park. Their presence serves to reinforce the rule rather than disprove it. This issue's first article, "Free but No Liberty: How Florida Contravenes the Voting Rights Act by Preventing Persons Previously Convicted of Felonies from Voting" by Caitlin Shay and Zach Zarnow, exposes the process by which convicted felons are denied the franchise in the state that is most aggressive in its efforts to remove them from its roles. This is a state, one can't help but notice, that has the fourth most electoral votes, can at any time swing either way between Democrats and Republicans, and whose governor, leading the effort at disenfranchisement, belongs to the party standing to gain most by it. This article makes the case that the great triumph of the civil rights era, the Voting Rights Act, which requires certain southern states to "pre-clear" changes to their voting laws with the justice department, should serve as a block to Florida's latest efforts.

In our second article, "*Connick v Thompson*: The Costs of Valuing Immunity over Innocence," Hannah Autry, a student working in both North Carolina Central University School of Law's Death Penalty Project and Innocence Project, explores the Kafkaesque history of one of the great outrages in recent Supreme Court history. The case involves John Thompson, who was falsely convicted and sent to death row and for 14 years stared death in the face because the district attorney's office knowingly withheld exculpatory evidence. Mr. Thompson was retried and summarily acquitted. He then won a \$14 million dollar civil rights judgment, which, citing prosecutorial immunity, the Supreme Court chose to negate, leaving him with nothing. Ms. Autry's article is a short biography of one man's nightmare and a step-by-step diagram of the Supreme Court's shame. Mr. Thompson served as the keynote speaker during the Guild's 2010 convention in New Orleans.

Gay rights have been at the forefront of our national consciousness in recent months. Progress toward equality has been made on many fronts. However, as with any great civil rights struggle, there have been setbacks among the victories. In between the Justice Department's decision not to enforce the blatantly homophobic "Defense of Marriage ACT (DOMA), which denies federal recognition of same-sex marriages, and Obama's qualified personal endorsement of same-sex marriage,⁴ North Carolina citizens voted to join 27 other states by amending their constitution to prohibit gays and lesbians from marrying each other.⁵ Our third article, "The Legacy of ACT UP's Policies and Actions from 1987-1994" by Nathan H. Madson, takes us back to an earlier period in the struggle for gay rights—a time when, for many, activism, often in the form of direct action, was the only antidote to a deadly disease.

Continued on the back cover

This article explores the motives, tactics, and accomplishments of an activist group that, fighting equally against a devastating plague and the homophobia that made politicians and the general public slow to respond to it, turned protest not just into a liberation tool but a life-saving one. This article reminds one of both the distance we've travelled and long road that lay ahead.

—Nathan Goetting, *Editor in chief*

NOTES

1. For high-end examples of this subgenre, see MICHELLE ALEXANDER, *THE NEW JIM CROW* (2010) and WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011).
2. Michelle Alexander, *The New Jim Crow: How the War on Drugs Gave Birth to a Permanent American Undercaste*, HUFFINGTON POST, Mar. 8, 2010, http://www.huffingtonpost.com/michelle-alexander/the-new-jim-crow-how-the_b_490386.html.
3. Adam Gopnik, *Mass Incarceration and Criminal Justice in America*, NEW YORKER, Jan. 30, 2012, http://www.newyorker.com/arts/critics/atlarge/2012/01/30/120130crat_atlarge_gopnik.
4. Obama has stated that the issue of same-sex marriage should be determined at the state level. See generally David Jackson, *Obama: Same-Sex Marriage Should Be Legal*, USA TODAY, May 5, 2012, <http://content.usatoday.com/communities/theoval/post/2012/05/obama-likely-to-discuss-gay-marriage-today/1#.T-Dev1Ks31U> (discussing Obama's evolving view of same-sex marriage and states' rights to set their own marriage laws). By contrast, opposite-sex marriage is a fundamental constitutional right which, barring a compelling reason, no state can take away. Compare *Loving v. Virginia*, 388 U.S. 1, 13 (1967) ("Under our Constitution, the freedom to marry or not marry . . . resides with the individual, and cannot be infringed by the State"). Obama might personally endorse same-sex marriage but, he does not endorse its equal standing with opposite sex-marriage. Far from it. The distance between Obama's position, and true equality is the distance between believing southern schools should desegregate during the civil rights era and sending in the 101st Airborne Division. The former respects the states' power to discriminate. The latter ends it.
5. Kim Severson, *North Carolina Voters to Decide on Same-Sex Marriage*, N.Y. TIMES, Sept. 13, 2011, <https://www.nytimes.com/2011/09/14/us/north-carolina-voters-to-decide-on-same-sex-marriage.html>.

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