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*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

Right-wing pushback against the gains of the civil rights movement has always been powerful, but with the ascension of Donald Trump to the presidency, it has become unprecedentedly aggressive and malicious. White supremacists have been emboldened by this president. Near the top of his administration's target list of civil rights reversals is race-based affirmative action in higher education. In "From Dog-Whistle to Megaphone: The Trump Regime's Cynical Assault on Affirmative Action" Mark Brodin attacks the motives and methods of the latest, most brazen attempt to keep minority applicants disadvantaged in the higher education application process.

Justice Blackmun couldn't have fully appreciated the damage to the right to privacy he would cause in 1979 when he wrote the opinion for the Supreme Court in *Smith v. Maryland*.¹ However, we shouldn't be too easy on him or his colleagues. Modest grants of power to law enforcement in Fourth Amendment cases are nearly always expanded into the broadest possible license to reach into the personal lives of citizens.

In *Smith* Justice Blackmun reasoned that when we disclose who we call to a third-party (the phone company whose services we're using) we have forfeited any Fourth Amendment privacy interest we might have had in that information. *Smith* opened the door for police to partner with communications providers to capture, collect, and store what we now call "metadata"—records of who we call and are called by, when the calls take place, and for how long—without probable cause of criminal wrongdoing.

Smith was wrongly decided for many reasons.² Technology has advanced so rapidly and dramatically since *Smith* that the ancient device at issue in that case (a "pen register") is as obsolete as Blackmun's opinion authorizing its use. *Smith* has become the core legal basis for a massive surveillance state apparatus. Now police use "stingrays"—portable phone trackers that divert signals from cellphones and soak up the information they contain. As an investigative tool, stingrays are infinitely more handy, powerful, and intrusive than

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Mark S. Brodin

**FROM DOG-WHISTLE TO
MEGAPHONE: THE TRUMP
REGIME'S CYNICAL ASSAULT
ON AFFIRMATIVE ACTION**

The Civil Rights Movement of the 1960s transformed our society, most certainly for the better. It opened the door to minorities and women who had long been unjustly excluded from educational and employment opportunities, relegated to an inferior social and political status as a consequence of our ugly history of racism and sexism. Pressure from the bottom up, from the streets of Birmingham and Selma, as well as the emergence of inspirational leaders like Dr. Martin Luther King, Malcolm X, and John Lewis, finally moved previously hostile, or at least indifferent, political leaders to embrace The Cause. President John F. Kennedy finally recognized, six months before his assassination, that

[w]e are confronted primarily with a moral issue. It is as old as the scriptures and as clear as the American Constitution. The heart of the question is whether all Americans are to be afforded equal rights and equal opportunities, whether we are going to treat our fellow Americans as we want to be treated.¹

When his successor Lyndon B. Johnson introduced the Voting Rights Act, he spoke movingly to Congress and the American people:

I speak tonight for the dignity of man and the destiny of Democracy. I urge every member of both parties, Americans of all religions and of all colors, from every section of this country, to join me in that cause.

At times, history and fate meet at a single time in a single place to shape a turning point in man's unending search for freedom. So it was at Lexington and Concord. So it was a century ago at Appomattox. So it was last week in Selma, Alabama. There, long suffering men and women peacefully protested the denial of their rights as Americans. Many of them were brutally assaulted. One good man—a man of God—was killed. . . .

[To] deny a man his hopes because of his color or race or his religion or the place of his birth is not only to do injustice, it is to deny Americans and to dishonor the dead who gave their lives for American freedom. Our fathers believed that if this noble view of the rights of man was to flourish it must be

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rooted in democracy. This most basic right of all was the right to choose your own leaders. The history of this country in large measure is the history of expansion of the right to all of our people. . . .

But even if we pass this bill the battle will not be over. What happened in Selma is part of a far larger movement which reaches into every section and state of America. It is the effort of American Negroes to secure for themselves the full blessings of American life. Their cause must be our cause too. Because it's not just Negroes, but really it's all of us, who must overcome the crippling legacy of bigotry and injustice.

And we shall overcome.²

The bravery of the protestors and the eloquence of such words inspired public support for bold initiatives to undo the hundreds of years of oppression, to at long last confront the nation's Original Sin. The Civil Rights Act of 1964, the Voting Rights Act, and the Fair Housing Act ended *de jure* Jim Crow, but it was recognized that more was needed to reverse the tragic consequences of that era. And so the notion of "affirmative action" was born³—to "wipe away the scars of centuries of egregious mistreatment,"⁴ as President Johnson put it. And so began the *very slow* progress of minorities and women in the labor market, universities, and other areas of opportunity.

But as Sir Isaac Newton taught us, every action will generate an equal and opposite reaction, in this case beginning with the so-called Reagan Revolution. Ronald Reagan launched his 1980 presidential campaign in Philadelphia, Mississippi, the site of the infamous murder of three civil rights workers by sheriffs' deputies and Ku Klux Klan terrorists, promising to restore "states' rights."⁵ Once in office, his Justice Department was staffed with conservative operatives dedicated to undoing the modest gains of the prior two decades. The Civil Rights Division of Justice warned local governments engaging in affirmative action efforts that they would be subject to federal lawsuits alleging "reverse discrimination."⁶ The federal government for the first time joined white reverse discrimination plaintiffs in their efforts to prove *they* were the real victims of race discrimination.⁷

President Donald Trump's Justice Department is now renewing the assault on race-based remedies.⁸ Attorney General Jeff Sessions—the former senator from Alabama whose nomination to the federal bench was tripped up when his racist statements and actions became the subject of his confirmation hearings—has directed his lawyers to investigate "race-based discrimination" in college admissions.⁹ No doubt this is the prelude to a broader assault.

Since *Univ. of Cal. v. Bakke*¹⁰ in 1978, in which Justice Lewis Powell wrote an influential swing opinion supporting the use of race as one factor in school admissions programs, there has been a slow but steady erosion of support

for race preference. This culminated in *Fisher v. Univ. of Texas*¹¹ in 2013. Applicant Abigail Fisher was a white woman whose mediocre record (82nd in her high school graduating class, 80th percentile on her SATs) would not have spelled success in any event. However, she persuaded a Supreme Court majority, consisting of Reagan appointees and former Justice Department officials, that she had a viable constitutional claim against the very modest weighing of race in the holistic admissions process at Texas' most elite public university (the Federal District Judge hearing the case described the role of race in UT's admissions process as "a factor of a factor of a factor of a factor").¹² Fisher had been recruited by wealthy anti-affirmative action activist Edward Blum, the hidden face behind many such cases.¹³

Most chilling about the Court's ruling to overturn two lower court decisions in favor of the University was its equation of efforts to *rectify* discrimination with actions to *pursue* and *prolong* it:

It is therefore irrelevant that a system of racial preferences in admissions may seem benign. Any racial classification must meet strict scrutiny, for when government decisions touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest.¹⁴

Such is the illogic behind the "colorblind Constitution" fiction.¹⁵ Justice Clarence Thomas (himself a beneficiary of affirmative action at Holy Cross, Yale Law School, and the Supreme Court), doubled down on the equation by contending that the claims made in support of the University's program were no different than the defenses historically raised in support of slavery and Jim Crow, that the efforts to achieve diversity were no different than the most heinous forms of racial oppression.¹⁶ Ignored completely was the obvious stark contrast between using race *against* an applicant as a form of subordination and humiliation in the interest of a caste system, and weighing race or color to achieve a good-faith goal of diversity. Only on the most cynical level can race-conscious remedy be equated with racially-based hostility. The historical stigma of inferiority that follows from the latter is of course conspicuously absent in the former.

Critics of affirmative action support their claim to a colorblind Constitution with disingenuous references to Dr. Martin Luther King, Jr.,¹⁷ who famously dreamed of a time when people would be "judged not by the color of their skin but the content of their character."¹⁸ But King was denouncing a brutal regime of forced segregation, humiliation, and lynching of black citizens. There is little doubt he would find modest race preference an acceptable, indeed necessary, curative.

Fisher's "strict scrutiny" standard requires the institution seeking to justify race-preference to prove both that there is a compelling interest supporting the preference (such as a history of discrimination or exclusion), and that the preference is the only practicable means to achieve diversity. The latter will often be the most challenging, given the difficulty of proving a negative—negating all other possible avenues to diversity.

But surprisingly, when the lower courts in *Fisher* again ruled on remand in favor of the University and the case returned to the Supreme Court in 2016, a slim four-to-three majority (Justice Kagan took no part, and the Republican theft of Antonin Scalia's seat was not yet complete) acceded to the conclusion that UT's race-preference passed (although barely) constitutional muster.²⁰

But oh what a difference a year makes! Now Neal Gorsuch (who is already occupying whatever space there is to the right of Scalia, as well as Thomas and Alito) sits on the Court. And Donald Trump, carried into the White House by white rage he skillfully manipulated, plays out his role as "angriest white man"²¹—xenophobic, chauvinistic, misogynist, racist. He has become the darling of the white supremacists, as the Nazi and Klan violence in Charlottesville, Virginia so chillingly demonstrated.²²

The case against affirmative action is a construct of fictions, the "colorblind Constitution" and equation of remedial race preference with malicious race discrimination prime among them. But there is also the pernicious myth of merit—that affirmative action violates the sacred concept of choosing "the best applicant." "Merit" is at best an elusive concept, but not to the critics of affirmative action. For them it is measured simply in those dubious selection devices—primarily standardized tests—that have worked so well to maintain white male dominance in universities and the workplace.²³ The evidence is legion that such tests have little predictive value of academic success or performance on the job, but inertia and their inexpensive sorting capacity keep such tests in place.²⁴

Media have perpetuated the falsehood by portraying reverse discrimination plaintiffs as champions of merit. The lawyer for the white plaintiffs who challenged the New Haven Fire Department's scuttling of the multiple-choice test that excluded all minority candidates for promotion described the case as a "symbol for millions of Americans who are tired of seeing individual achievement and merit take a back seat to race and ethnicity."²⁵ Rarely is the idea questioned that merit equals success on such tests, notwithstanding the obvious fact that memorizing fire and police manuals and then spitting back the text on the exam has little to do with selecting "the best candidate" for promotion.

And then there is the false presumption of causation—that whenever a white man loses out to a person of color or a woman it *must* have been because of affirmative action. In reality, admissions decisions and workplace selections are rarely attributable to one factor, but are usually a complex calculus. Abigail Fisher was, as noted above, almost certainly rejected by UT because of her singularly unimpressive application. In fact, 168 minority applicants with higher index numbers than Fisher were also denied admission.²⁶

The stark economic inequality between white and black citizens of this nation remains one of its most permanent fixtures. Median household wealth for whites stood in 2011 at about \$112,000 and for African-American families at \$7,000.²⁷ Unemployment for blacks can always be determined by multiplying the white unemployment rate by two, and persists no matter the level of educational attainment.²⁸ Yet the Justice Department Civil Rights Division will be now working on behalf of the haves to keep the have-nots from accumulating wealth.

The relentless right-wing propaganda efforts have paid off. Polls show widespread agreement among whites that they, not minorities and women, are the new victims of discrimination.²⁹

We have always had “affirmative action” for certain privileged groups, like legacies (children of alumni) and “development admits” (children of big donors), as well as for athletes, musicians (e.g., oboe players when needed for the orchestra). It is only when white privilege and status are challenged in favor of minority opportunity that the outcry follows.

Reagan’s dog-whistle to disaffected whites has become a megaphone. W.E.B. DuBois’s famous prophecy that the problem of his century would be the persistence of the color line has carried tragically into the next. As long as the Republicans continue to play the white anger card and stir resentment, and as long as the Democrats remain the proverbial deer-in-the-headlights, race preference and affirmative action, now endangered species, will experience extinction.

NOTES

1. Theodore C. Sorensen, *Televised Address* (June 11, 1963), in “LET THE WORD GO FORTH”: THE SPEECHES, STATEMENTS, AND WRITINGS OF JOHN F. KENNEDY, at 194 (1988).
2. President Lyndon B. Johnson, Voting Rights Act Address before Congress (Mar. 15, 1965), *available at* <http://www.historyplace.com/speeches/johnson.htm>.
3. *See, e.g.*, Exec. Order No. 11246, 30 Fed. Reg. 12,319 (Sept. 28, 1965).
4. President Lyndon B. Johnson, Commencement Address at Howard University (June 4, 1965), *available at* <http://teachingamericanhistory.org/library/document/commencement-address-at-howard-university-to-fulfill-these-rights/>.

5. See Jack White, *Lott, Reagan, and Republican Racism*, TIME (Dec. 14, 2002), <http://content.time.com/time/nation/article/0,8599,399921,00.html>.
6. RAYMOND WOLTERS, RIGHT TURN: WILLIAM BRADFORD REYNOLDS, THE REAGAN ADMINISTRATION, AAND BLACK CIVIL RIGHTS 23 & n.113 (1996), at 23 & n.113.
7. See, e.g., *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984) (holding that the district court erred in granting an injunction requiring white employees to be laid off before minorities); *Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501 (1986) (rejecting a challenge to race-conscious consent decree for promotions in fire department).
8. Charlie Savage, "*Justice Dept. to Take on Affirmative Action in College Admissions*," THE N.Y. TIMES (New York Times, August 1, 2017), <https://www.nytimes.com/2017/08/01/us/politics/trump-affirmative-action-universities.html>.
9. *Id.*
10. 438 U.S. 265 (1978).
11. 133 S. Ct. 2411 (U.S. 2013) [hereinafter *Fisher I*].
12. *Fisher v. Univ. of Tex.*, 645 F. Supp. 2d 587, 608 (W.D. Tex. 2009).
13. See Morgan Smith, *One Man Standing Against Race-Based Laws*, N.Y. TIMES, Feb. 24, 2012, at A21. Blum was also behind the successful challenge to Section 5 of the Voting Rights Act in *Shelby County v. Holder*, 133 S. Ct. 2612 (U.S. 2013). See Ari Berman, *Conservatives Take Aim at Voting Rights*, THE NATION, Feb. 25, 2013, at 11, 12.
14. *Fisher I*, 133 S. Ct. at 2417.
15. No language in the Constitution uses this phrase.
16. See *Fisher I*, 133 S. Ct. at 2426–27, 2429–30. Justice Thomas believed that race preference creates a harmful dependency in its beneficiaries, represents an offensive paternalism on the part of do-gooder whites, and puts minorities in positions they are not qualified for and will inevitably fail in. See CLARENCE THOMAS, MY GRANDFATHER'S SON: A MEMOIR 56–57, 74–75, 148–49 (2007) ("I'd graduated from one of America's top law schools, but racial preference had robbed my achievement of its true value."). Justice Sotomayor had quite the opposite personal experience with affirmative action at Princeton, where she was grateful for the chance to prove herself, as she certainly did, graduating summa cum laude. See SONIA SOTOMAYOR, MY BELOVED WORLD 191 (2013): "I had no need to apologize that the look-wider, search-more affirmative action that Princeton and Yale practiced had opened doors for me. That was its purpose: to create the conditions whereby students from disadvantaged backgrounds could be brought to the starting line of a race many were unaware was even being run."
17. Associated Press, "*MLK's 'Content of Character' Quote Inspires Debate*," CBS NEWS REPORT (Jan. 20, 2013, 5:34 PM), <https://www.cbsnews.com/news/mlks-content-of-character-quote-inspires-debate>.
18. Rev. Martin Luther King, Jr., Speech at the March on Washington (Aug. 28, 1963), available at <https://www.archives.gov/files/press/exhibits/dream-speech.pdf>.
19. See *id.*
20. *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198 (U.S. June 23, 2016) [hereinafter *Fisher II*].
21. See MICHAEL KIMMEL, ANGRY WHITE MEN: AMERICAN MASCULINITY AT THE END OF AN ERA (2015).
22. Hawes Spencer & Sheryl Gay Stolberg, "*White Nationalists March on University of Virginia*," THE N.Y. TIMES (Aug. 11, 2017), <https://www.nytimes.com/2017/08/11/us/white-nationalists-rally-charlottesville-virginia.html>.

23. See, e.g., Mark S. Brodin, Ricci v. DeStefano: *The New Haven Firefighters Case & the Triumph of White Privilege*, 20 S. CAL. REV. L. & SOC. JUST. 161, 222–25 (2011).
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25. Melissa Bailey, “If You Work Hard, You Can Succeed in America,” NEW HAVEN INDEPENDENT (June 29, 2009, 3:57 PM), http://www.newhavenindependent.org/index.php/archives/entry/if_you_work_hard_you_can_succeed_in_america/.
26. See Nikole Hannah-Jones, *Race Didn’t Cost Abigail Fisher Her Spot at the University of Texas*, THE WIRE (Mar. 18, 2013), <http://www.thewire.com/national/2013/03/abigail-fisher-university-texas/63247/> (Fisher graduated eighty-second in a high school class of 674 and had undistinguished SAT scores. 168 minority applicants with higher index numbers than Fisher were also rejected, and white applicants with lower numbers were admitted). See generally Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Sselective Admissions*, 100 MICH. L. REV. 1045 (2002).
27. Laura Shin, “The Racial Wealth Gap: Why A Typical White Household Has 16 Times the Wealth of a Black One,” FORBES (Mar. 26, 2015, 8:00 AM), <https://www.forbes.com/sites/laurashin/2015/03/26/the-racial-wealth-gap-why-a-typical-white-household-has-16-times-the-wealth-of-a-black-one/>.<https://www.forbes.com/sites/laurashin/2015/03/26/the-racial-wealth-gap-why-a-typical-white-household-has-16-times-the-wealth-of-a-black-one/#4a1e8251f45e>
28. John Amis, *Unemployment in Black and White*, N.Y. TIMES, Aug. 28, 2017, at A16. .
29. Jeffrey Rosen, *Affirmative Action and Public Opinion*, N.Y. TIMES (Sept. 6, 2011, 3:22 PM), <https://www.nytimes.com/roomfordebate/2011/05/22/is-anti-white-bias-a-problem/affirmative-action-and-public-opinion.> .



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Introduction

On May 11, 2015, Washington state's governor, Jay Inslee, signed a bill into law that required state and local law enforcement to get a warrant before deploying cell site simulators. Cell site simulators, sometimes collectively referred to as "Stingrays," are based on a popular model of simulator. They aid officers by "mimic[ing] a cellphone tower, getting a phone to connect to it and measuring signals from the phone."¹ This law received unanimous support in both the Washington State House and Senate and, by requiring a warrant, offers very strong procedural protections. In addition to requiring police officers to secure a warrant for a Stingray, it also requires them to discard cellphone data from people who are not the specific target of an investigation. The purpose is simple: to prevent law enforcement, under the auspices of investigating one person, from deploying a Stingray device that intercepts thousands of peoples' private information. Federal law does not offer the same protections.

Since the Supreme Court's decision in *Smith v. Maryland*, the judiciary has held that devices labelled as "pen registers" do not constitute a "search" under the Fourth Amendment; therefore, a probable cause warrant is not required.² Over time the development of more sophisticated technologies, coupled with a "tough on crime" mentality that gave more power and resources to prosecutors and law enforcement, led to a practice where the definition of a "pen register" grew to include Stingray devices. This has allowed federal law enforcement to collect troves of information from parties they do not have cause to investigate, allowing them to effectively skirt the Fourth Amendment which requires a probable cause warrant for the collection and monitoring of other types of electronic information such as wiretaps.³ This is a continuation of the troubling trend we have seen from the judiciary; where courts, in the name of deference and security, abdicate their judicial role to "say what the law is."⁴ Analyzing the current landscape of federal and state law in this area, the federal government should follow the lead of those states, such as Washington, which provide stronger protections for individual privacy under the Fourth Amendment.

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Fourth Amendment rights

The language of the Fourth Amendment prohibiting unreasonable searches and seizures is open-textured and indefinite; moreover, it could not anticipate the impact of every development of new technology in more than two hundred years since it was written:

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.⁵

In *Olmstead v. United States*, the Supreme Court first defined a “search” as a physical intrusion onto an individual’s private property—known as the physical trespass doctrine.⁶ By limiting the application of the Fourth Amendment only to physical trespass, *Olmstead* permitted other kinds of surveillance.⁷ This approach changed in response to emerging technologies. Eventually, in *Katz v. United States*, the Supreme Court overturned *Olmstead* and set out a new constitutional standard that expanded Fourth Amendment protections to include individual privacy interests.⁸ *Katz* held that a “search” occurs when the government violates an individual’s “reasonable expectation of privacy.”⁹ The *Katz* Court then established the following two-prong test for determining whether a “search” occurred, such that a probable cause warrant is required: (1) Whether an individual exhibited an actual expectation of privacy, and (2) whether society is prepared to recognize this expectation as reasonable.¹⁰

To conduct a “search,” the government must get a warrant issued upon probable cause.¹¹ Probable cause is summarized as a reason, supported by sufficient objective evidence, to believe that a search will turn up evidence of criminal activity or contraband.¹² *Carroll v. United States* explained that probable cause is a common-sense standard¹³ and, under *Dumbra v. United States*, probable cause requires only a “practical, non-technical”¹⁴ probability that incriminating evidence was involved.

The exclusionary rule,¹⁵ first described in *Weeks v. United States*,¹⁶ is a prophylactic rule that prohibits the introduction of unconstitutionally gathered evidence for purposes of prosecuting an individual in a criminal trial.¹⁷ In *Elkins v. United States*, the Supreme Court held that the exclusionary rule’s purpose is to compel respect for the Fourth Amendment by removing law enforcement’s incentive to disregard it.¹⁸ Although the exclusionary rule has been subject to many limitations and exceptions over time,¹⁹ it is still the primary enforcement mechanism for ensuring that law enforcement officers follow the requirements of the Fourth Amendment.

Smith V. Maryland: From pen registers to Stingrays

In *Smith v. Maryland*, the Supreme Court held that a law enforcement officer's use of a pen register—an electronic device that records all numbers called from a particular phone line—to collect information about an individual's outgoing phone calls is not a “search” because the phone-user had “voluntarily conveyed numerical information to the telephone company.”²⁰ The Court held that, because the phone-user disclosed his numerical information to the phone company so that they could connect his call, he did not have a reasonable expectation of privacy in the numbers he dialed under *Katz*.²¹ In setting forth this reasoning, *Smith* created what is known as the “third party” rule.²²

Notably, *Smith* made no distinction between connections made by a human telephone operator versus automated equipment, nor did it focus on the relationship between the caller and the third party to whom the information was disclosed.²³ This case placed pen registers completely outside Fourth Amendment protections, meaning that if there were to be any privacy protections against law enforcement's use of pen registers, those protections would have to be created by statute. *Smith*'s holding is problematic for two reasons: (1) the Supreme Court incorrectly applied *Katz*'s “reasonable expectation of privacy” test and (2) the decision has allowed law enforcement and the intelligence community to bypass the Constitution.

Smith was wrongly decided and should be overturned

Smith was wrongly decided because the Court incorrectly applied *Katz*'s “reasonable expectation of privacy” test. Under the first part of *Katz*, the court considers whether an individual has exhibited an actual expectation of privacy. This is the subjective part of the test. In *Smith*, the answer was clearly “yes.” When the phone-user in *Smith* called another person, he did not expect other people to be collecting and distributing all of the numbers he called. Indeed, the phone-user claimed that he thought his outgoing calls were private and protected by the Fourth Amendment, in part because he made them from the privacy of his own home.²⁴

Nevertheless, the *Smith* Court, while not directly refuting this claim, asserted that, “Although petitioner's conduct may have been calculated to keep the contents of his conversation private, his conduct was not and could not have been calculated to preserve the privacy of the number he dialed.”²⁵ The Court stated that the location of where the phone-user made his calls were irrelevant because the numerical information transmitted to the phone company to connect a call would be conveyed in the exact same manner regardless of location.²⁶ However, an acceptance of *Smith*'s reasoning means

that an individual who uses a phone to make a call is never able to fulfill the subjective part of the *Katz* test. In other words, any person who dials a number to make a call has evidently performed conduct that is inconsistent with an expectation of privacy in *calling* that number.

Turning to the second prong of the *Katz* test, which considers whether an individual's expectation of privacy was reasonable, the *Smith* majority incorrectly concluded that, even if the phone-user had a subjective expectation of privacy, it was not "reasonable."²⁷ However, the correct answer is again, "yes." People do not regard their outgoing call logs to be public information.²⁸ The fact that telephone companies have made a habit of turning over their customers' phone records to the police does not negate that expectation of privacy. As Justice Stewart stated in his dissent in *Smith*, "It is simply not enough to say, after *Katz*, that there is no legitimate expectation of privacy in the numbers dialed because the caller assumes the risk that the telephone company will disclose them to the police."²⁹

Finally, the majority in *Smith* did not distinguish the fact that the "third party" privy to the phone-user's data was the phone company, more specifically, a machine that uses the information to simply route and connect calls. To imply, as the majority did, that a routing machine is a person, hunched over a desk and eagerly scribbling down the numbers the phone-user calls in anticipation of handing that information over to police, is ludicrous. As noted by Justice Marshall in his dissent, "Since I remain convinced that constitutional protections are not abrogated whenever a person apprises another of facts valuable in criminal investigations, I respectfully dissent."³⁰ He further stated:

The use of pen registers ... constitutes an extensive intrusion. To hold otherwise ignores the vital role telephonic communication plays in our personal and professional relationships, as well as the First and Fourth Amendment interests implicated by unfettered official surveillance.... Many individuals, including members of unpopular political organizations or journalists with confidential sources, may legitimately wish to avoid disclosure of their personal contacts. Permitting governmental access to telephone records on less than probable cause may thus impede certain forms of political affiliation and journalistic endeavor that are the hallmark of a truly free society. Particularly given the Government's previous reliance on warrantless telephonic surveillance to trace reporters' sources and monitor protected political activity, I am unwilling to insulate use of pen registers from independent judicial review.³¹

Justice Marshall's opinion is as true today, if not more so, as it was in 1979. Today, in an age of omnipresent digital communication and interconnectedness, this role is even more apparent. We disclose information to many "third parties"—banks, phone companies, social media companies,

to name a few—yet we expect each of those parties to protect that information.³² And society is ready to recognize this expectation of privacy as reasonable. Indeed, we long have.³³ *Smith v. Maryland* should be overturned and pen registers should be classified as a “search” requiring a probable cause warrant.

Expanding the definition of a pen register to include Stingrays

Under *Smith*, absent statutory protections, law enforcement’s use of pen registers is not bound by any constitutional protections. As a result, law enforcement and the intelligence community figured out a simple, yet clever, method to evade the Constitution: expand the scope of what constitutes a pen register to include cell site simulators.

In contrast to a pen register, which collects the basic numerical information of phone calls, once connected a Stingray can be used to access electronic serial numbers (ESNs) and a phone’s internal storage.³⁴ Stingrays also have the capability to track a phone, intercept communications (including text, voice, and data), deny service, and extract encryption technology, among other functions.³⁵

When it comes to similar privacy concerns, the Supreme Court has attempted to limit technological invasions. The Supreme Court has held that searches involving thermal imaging of a house,³⁶ tracking a car via a GPS locator,³⁷ and searching digital information on an individual’s cell phone during arrest are all subject to the Fourth Amendment and thus require a probable cause warrant.³⁸ In contrast, under the Patriot Act and similar legislation, a Stingray is treated as a type of “pen register,”³⁹ which means that individuals have no constitutional protection from such devices.

The refusal to differentiate Stingrays from pen registers and give them distinct legal consideration, along with the expansion of the definition of “pen register,” means that all a federal law enforcement officer needs to do in order to use a Stingray is get a pen register request approved by a judge.⁴⁰ This process has been defined as “ministerial” rather than providing meaningful judicial oversight,⁴¹ and simply requires law enforcement officers to meet the low burden of asserting that the information sought is “likely” to be “relevant” to a criminal investigation.⁴² The judge will then approve the request without even being made aware that a Stingray is the device that will be utilized.⁴³ Thus, the powerful Stingray, a device never explicitly authorized by Congress⁴⁴ or addressed by Supreme Court jurisprudence, is used aggressively and continues to evade the probable cause warrant requirement under the Fourth Amendment for what is certainly an invasive search.

Case study: Tacoma, Washington

On March 3, 2017, Pierce County Superior Court Judge Frank Cuthbertson fined the City of Tacoma over \$50,000, plus legal fees, for violating Washington State's Public Records Act.⁴⁵ The case arose when, pursuant to the Public Records Act, the Center for Public Policy, a good-governance group, requested the Tacoma Police Department's (TPD) nondisclosure agreement ("NDA") with the FBI concerning the TPD's Stingray device.⁴⁶ The TPD withheld most of the NDA through redactions, in violation of the Act, in part because of agreements it had made with the FBI to keep information related to the Stingray secret as a condition of receiving one.⁴⁷

Judge Frank Cuthbertson ruled against the City of Tacoma, imposing the maximum penalty available under state law.⁴⁸ After the victory, the Center for Public Policy's attorney, David Whedbee stated, "Judge Cuthbertson said that this was a paradigm case in which the City favored its interests in maintaining good relations with the FBI at the expense of the public's right to open government under the Public Records Act."⁴⁹ This is simply the latest development in the story of Tacoma's adventure with Stingrays, which began in 2008 and eventually led to Washington State passing House Bill 1440 on May 11, 2015, which requires state law enforcement officers to get a warrant before utilizing Stingray technology.⁵⁰

Around the same time, in August 2014, *The News Tribune*, a local Tacoma newspaper, published a story revealing that the TPD acquired and utilized a Stingray device in 2008.⁵¹ Following the flurry of follow-up stories about the extent of a Stingray's capabilities (and a rather predictable public outcry), it was revealed that among those surprised by the revelation of Stingray use were the City Council members who approved software update purchases for the Stingray as well as the county judges who authorized law enforcement's use of the device.⁵² When asked by *Tribune* reporters to comment on the City Council's purchase, City Councilmember David Boe responded, "I've got to find out what I voted on before I comment."⁵³

At first blush, Boe's response implies some level of incompetence, especially considering that elected officials are supposed to provide an oversight and budgetary role for the City; however, it turned out that no Councilmember could recall being told the full capabilities of the equipment, much less that it would be used in to search, track, and collect information from phones.⁵⁴ When the TPD briefed the Council, convincing them to purchase the equipment, the Stingray was described as a "boon to Tacoma's bomb squad."⁵⁵ A detective writing a memo to the Council stated, "This new equipment offers enhanced technological capabilities for the Tacoma Police Department Ex-

plosives Ordinance Detail [“EOD”] with IED [improvised explosive device] prevention, protection, response and recovery measures.”⁵⁶ Shortly after the briefing, the City Council approved the quarter of a million-dollar purchase unanimously, apparently thinking that the device would be used to detect bombs rather than surveilling random phones.⁵⁷ Perhaps more worrying than law enforcement misleading the Council, however, was law enforcement’s willingness to be even less transparent to those in the judicial branch.

From 2009 to 2015, the county’s Superior Court judges unwittingly signed more than 170 orders that Tacoma police and other local law enforcement agencies say authorized them to use a device that not only allows investigators to track a suspect’s cellphone but also sweeps cellphone data from innocent people nearby.⁵⁸

After news broke about the TPD’s Stingray use, Assistant Police Chief Kathy McApline said that the police only used cell site simulators with a court’s permission.⁵⁹ However, Presiding Judge Ronald Culpepper’s response was: “People have never heard of it.”⁶⁰ He went on, “If they use it wisely and within limits, that’s one thing, I would certainly personally have some concerns about just sweeping up information from non-involved and innocent parties—and to do it with a whole neighborhood? That’s concerning.”⁶¹ When orders authorizing TPD’s use of pen registers were unsealed as part of the Tribune’s investigation, the orders revealed that neither the pen registers nor the affidavits filed by law enforcement mentioned that the Department had a Stingray and intended to use it.⁶² “Instead, detectives used language commonly associated with requesting an order that would force a cellphone company to turn over records for a particular phone, and, where possible, the real-time location of the phone.”⁶³ With requests like these, it is not difficult to understand why the judges were surprised to discover that they had signed over 170 orders that, unbeknownst to them, were used to authorize the use of a Stingray device capable of sweeping up the intimate digital data of thousands of non-suspects.

When the TPD was asked whether all Stingray requests failed to inform judges of cell simulator use, police spokeswoman Loretta Cool stated that the TPD did not believe it was necessary to inform judges of the existence or contemplated use of the device.⁶⁴ Cool asserted that TPD officers were required to disclose only what crime they were investigating and what information they sought.⁶⁵ The Superior Court of Pierce County disagreed, and within two months, in November 2014, the Court required language in the TPD’s pen register applications that clearly articulated the device’s intended use.⁶⁶ The Court further issued a limiting order instructing law enforcement officers to discard the information of non-suspects.⁶⁷ This was not done so

much out of fear that the TPD was engaging in egregious violations of law, but as a simple matter of oversight by providing judicial checks and balances over a zealous law enforcement department with new technologies that move at a faster pace than court proceedings.

At the time of the TPD Stingray revelation, no other state or local law enforcement agency in Washington acknowledged possession of such a device. This is still the case today.⁶⁸ It is extraordinary then that, twenty-one months after the use of a single Stingray was revealed in Tacoma, Washington formulated new statutory privacy protections to address cell site simulators use.⁶⁹ Further, despite a politically divided legislature, Washington unanimously passed legislation that required officers to get a warrant before using a cell site simulator, such as a Stingray, and to discard cellphone data of people who are not a specific target of a police investigation.⁷⁰

The unusual bipartisan nature and speed at which this bill was made law has its roots in a simple belief that citizens' privacy interests should be protected. The bill was motivated by the following factors: (1) there was no federal law extending regulation to Stingrays, (2) the State's privacy laws did not cover the devices, and (3) judges could not provide meaningful oversight and "authorize" law enforcement activity if law enforcement agencies entered into agreements wherein they promised to keep secret the activities judges are supposed to be authorizing. The state of Washington, starting with its judiciary and ending with its legislature, saw a gap in the law and filled it within twenty-one months. By comparison, the federal government has had roughly twenty-two years and thus far has failed to establish effective oversight of the federal government's use of Stingrays.⁷¹

Applying lessons learned from the states to the federal government

Like Washington, other states—such as Indiana, Maine, Montana, Illinois, and Minnesota—have either passed legislation requiring law enforcement to get a probable cause search warrant before using a cell site simulator or are considering enacting such legislation.⁷² Based on these states' approaches, the following proposals present possible remedies for the federal government to pursue in order to help rectify, or at least mitigate, the damage done to the Fourth Amendment via pen registers and Stingrays:

- (1) The Supreme Court should overturn *Smith v. Maryland* and establish that the use of pen registers and similar devices (such as cell site simulators, including Stingrays) constitute a "search" for purposes of the Fourth Amendment, which thus require a probable cause warrant. As such, pen register use would be treated analogously to other law enforcement searches such as thermal imaging,⁷³ cell phone searches

incident to arrest,⁷⁴ and GPS tracking.⁷⁵ The Court should also extend the exclusionary rule to cover evidence obtained via pen registers and require law enforcement officers to discard information collected from non-suspects.

- (2) Through future case holdings, the federal judiciary should differentiate between pen registers and more technologically superior tools, such as Stingrays and cell site simulators, classifying the latter as a “search” for purposes of the Fourth Amendment, thus requiring a probable cause warrant. This would also include extending the exclusionary rule to evidence obtained through Stingrays without a warrant and require law enforcement to discard the information collected on non-suspects. This way, even if the courts were unwilling to extend Fourth Amendment protections to all pen registers, there would still be protection against the use of more invasive tools, such as Stingrays.
- (3) Through legislation, Congress should provide that pen registers and, using broad language, similar technologies including Stingrays, should be utilized only after receiving a probable cause warrant from a federal judge. This legislation should also require law enforcement to destroy the information collected from non-suspects in order to protect individual privacy.
- (4) Akin to proposal three, Congress should provide that Stingrays and cell site simulators should be utilized only after receiving a probable cause warrant from a federal judge. This legislation would be narrower since it would not target pen registers, thus leaving the holding of *Smith* intact. However, it would differentiate pen registers from the technologically superior Stingray devices and include provisions that order law enforcement to destroy the information collected from non-suspects to protect privacy.
- (5) Finally, federal judges should order that law enforcement officers must detail their intended use of pen register authorizations (under which Stingrays would presumably, and unfortunately, still be included). This would provide more oversight, or “checks,” on law enforcement activity and make authorizations less of a ministerial process, or rubber stamping, as they have become. Federal judges should also order that law enforcement must destroy information collected from non-suspects. This solution resembles the aforementioned efforts of Pierce County Superior Court to provide more oversight of the TPD.

These proposals are listed in order from most to least preferable, and most protective to least protective. Judicial remedies are prioritized over legislative remedies because this issue is in the unique purview of the judiciary to

“say what the law is” under the Constitution.⁷⁶ Even though Congress has the ability to legislate on Constitutional issues, Congress is unable, absent a Constitutional Amendment, to legislate a Constitutional protection into existence. The Courts, in interpreting the Constitution, set the floor for what constitutes a “search” and proper process under the Fourth Amendment. Moreover, if the remedy were legislative, it could be altered or simply erased by another statute because there are no stabilizing judicial principles such as *stare decisis* or judicial restraint. Judicial remedies are also preferred because the exclusionary rule is a judicially created prophylactic rule that the courts could (and should) apply to the use of pen registers and Stingrays.

Even if Congress attempted to limit the admissibility of evidence obtained from Stingrays that enters the courtroom, the Fourth Amendment and rules of evidence are not its area of expertise. This is evidenced by the fact that the Federal Rules of Evidence are first crafted by advisory committees consisting of legal practitioners, law professors, and judges before they are passed, following minor edits, by Congress.⁷⁷ As such, judicial remedies would streamline the process and be consistent with the application of prophylactic rules.

Finally, judicial resolution is the best route here because the Supreme Court recently granted certiorari review over *Carpenter v. United States*, which again gives the Court the opportunity to examine the issue of whether law enforcement’s use of cellular information, such as the numbers dialed and where a call originated and terminated, is protected by the Fourth Amendment and requires a probable cause search warrant.⁷⁸

In *Carpenter*, the defendant, Timothy Carpenter, was charged with conspiring and participating in a string of armed robberies. He was arrested after one of the other suspects was captured, confessed, and turned over his phone to the FBI so they could review his call logs.⁷⁹ Once it was determined that Carpenter’s phone was called during the time of the robberies and always within a two-mile radius, he became a suspect and was later charged and convicted for aiding and abetting.⁸⁰ While the Sixth Circuit’s decision affirmed Carpenter’s conviction under the reasoning of *Smith*, the dissent stated the decision was out of line with Fourth Amendment tracking jurisprudence, as law enforcement used Carpenter’s cell phone to physically track his movements despite a previous Supreme Court decision stating that GPS tracking of a suspect without a warrant violated the Fourth Amendment.⁸¹

In light of recent Supreme Court decisions on technology and the Fourth Amendment, and the fact that the attorneys for Carpenter are likely to echo Justice Marshall’s dissent in *Smith* by arguing that cell phones have become

inextricably intertwined with individuals' personal affairs, *Carpenter* gives the Supreme Court the opportunity to essentially reconsider *Smith v. Maryland*. This decision has the ability to rewrite Fourth Amendment jurisprudence in the area of pen registers in a matter of a few months.

Conclusion

It is not the judiciary's job to make law enforcement's job easier. It is, however, the job of the judiciary to jealously guard the rights enshrined in the Constitution for the citizens of the United States. The decision of *Smith v. Maryland*, that a pen register does not constitute a "search," is flawed. This holding was ignorant as to the evolving standards of technological capabilities and it incorrectly applied *Katz v. United States*. Even if *Smith* were allowed to stand, using Stingray technology as a "pen register" not only constitutes an illegal "search," but encourages a culture of secrecy surrounding law enforcement methods that, in turn, results in the public's decreased trust in law enforcement. Furthermore, this secrecy creates a scenario where those who are supposed to be checking the power of law enforcement, judges and legislators, are being deceived as to what their authorizations are being used for.

The United States can survive violent criminals or another terror attack. What the United States cannot survive is a judiciary that, in the name of "order" and "security," sacrifices its role as a check on the political branches of government; its role as the defender of the United States Constitution.

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William S. Geimer

WILL KOREANS COUNT THIS TIME?

A number of important matters are being ignored in the latest furor over North Korea. One of the most consequential is the fact that the U.S. created North Korea and South Korea, and then rejected the only democratic option for unification. This, as we will see, was accomplished in flagrant disregard for the wishes of the Korean people, at the cost of an unnecessary war, and at the sacrifice of just over a million lives.¹ To date, it has been clear that Korea is no more than a playing field for foreign interests, with the U.S. playing a dominant and deadly role. Koreans themselves don't count. One wonders if they will be considered this time around.

The lives of Koreans today depend upon adoption of a relatively simple solution to the current standoff: negotiation. The principal parties should begin talks, without preconditions. All parties, that is *all* parties, should assess what they are willing to give, and then proceed from there. Anyone seen a list yet of what the U.S. might be willing to give up? More importantly, while there are others with legitimate interests in the confrontation, primacy should be accorded to the wishes of Koreans—all Koreans. The logistical problems with determining the wishes of the North Koreans is beyond the scope of this short article, but given good faith on all sides, this problem should not be insurmountable.²

Listening to Koreans involves heeding both the government and the people. Giving the lead to Korea is the best negotiation model. At the government level, that is the only approach with any history of progress. Newly elected President Moon Jae-in buckled to the U.S. a bit in announcing that South Korea may have to revamp its military, but he has thought through the issue of negotiation far more than has his bellicose U.S. counterpart. And as his spokesman recently observed, resumption of dialogue with North Korea may need to be pursued with close cooperation and consultation with the United States, but South Korea does not need to be allowed by the U.S. to do so.³

As for the Korean people, every indication for years is that they not only support negotiating with their brothers and sisters in the north, they also clearly do not suffer from the rampant paranoia that periodically strikes the West. Many suggest that what North Korea most resembles is Texans

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strutting around with their guns.

The problem is difficult but not insoluble and the issues suggest that the approach outlined by Moon's representative is probably the better one. It apparently breaks down like this: South Korea is willing to talk. The U.S. says it is willing but imposes preconditions it knows North Korea will never accept.⁴ There is intelligent opinion to the effect that North Korea is currently averse to continuing talks with South Korea because its primary goal is an end to joint U.S./South Korean military exercises and ultimately an end to the 67-year-old war on terms that would include withdrawal of U.S. troops.⁵ If that is true, it raises a point that is being almost universally ignored at the present moment. If negotiations led by Koreans should result in concessions by both regimes, is it not open to South Korea to agree to end the military exercises and set a timetable for U.S. troops to leave? If not, why not?

A compelling reason for leaving this matter primarily to Koreans is the sorry history of U.S. involvement in Korea. Few in the West remember much about post-WWII Korea, aside from Cold War propaganda. A brief review of that record should highlight the importance of taking another path today.

The Korean shooting war was long ago, but its story is much the same as that of later U.S. interventions in Iraq and Afghanistan—make a mess that includes tens of thousands of civilian deaths, and then claim the need for further intervention to clean it up.

At the close of WWII, Korea became a pawn in the Cold War struggle between the U.S. and the Soviets over the spoils of war. Except that, notwithstanding U.S. propaganda, it turned out that the Soviets had little interest in Korea.

On August 8, 1945, almost as the war was ending, the Russians entered the war against Japan and began to drive the Japanese out of Manchuria and Korea. This triggered action by the Americans, who had also previously been uninterested. Two American officers, one of whom was Dean Rusk (who would later cause further damage to the people of Vietnam⁶) drew an arbitrary line at the 38th parallel, designating the best agricultural land, industry, and more than half the population for occupation by their forces. The advancing Soviets, of course, did not have to accept this division, but they voluntarily halted at the arbitrary line. At the end of 1945, they accepted a U.S. proposal that all of Korea be governed for five years by a four-power commission and then become a unified independent state. The U.S. reneged on this agreement in 1947. The Russians then proposed that occupying forces simultaneously withdraw and leave the fate of Korea to Koreans. That did not happen, but Russian troops went home anyway, leaving the U.S. to continue

clinging to Korea as part of the confrontation with a non-existent “world wide communist conspiracy.”⁷

In their area in the south, the Americans, working to set up a client government “in harmony with U.S. policies,” excluded Korean nationalists, leftists and communists, who, as a group, had been prominent members of the guerrilla forces fighting the occupying Japanese. This faction was largely free of corruption. Apparently, their major sin was opposing the American occupation. Instead, the U.S. opted for “stability” and administrative efficiency and employed Japanese, including war criminals, to be in charge of law and order. Eventually, most of the Japanese were sent home but not before warning the new occupiers of the danger of communist influence in the newly forming Korean political parties. The Americans took their advice.⁸

The U.S. rejected the idea of an election. Leaving Koreans to decide about Korea was unthinkable because they knew those excluded nationalists would probably prevail, bringing a democratically elected, communist-leaning government to power over the entire Korea peninsula. Instead, manipulating the fledgling UN, as they would later do to provide cover for their war, the U.S. got approval for a UN-supervised election. All countries allied with the Soviets made it clear that they would reject the idea. In those circumstances, going ahead with an election only in the South meant the end of prospects for a united Korea, chosen by Koreans.

Instead, what the Korean people got were two dictators. Before leaving, the Russians set up Kim Il Sung and his family. Hereditary succession brought us today’s despot Kim Jung Un, whose governing skills and rhetorical flourishes are roughly equivalent to those of his current U.S. counterpart. Below the 38th, having rejected legitimate nationalists who supported reassembling the nation, the U.S. chose instead an egotistical Harvard-educated dilettante, Syngman Rhee. He had not fought the Japanese and in fact had been absent from Korea for decades, but he talked a great anti-communist game. He met the only two requirements for dictators allied with the U.S., opposition to communism and a willingness to do business with the Americans.

Aided by the U.S., Rhee’s faction saw to it that the election was conducted in an atmosphere of violent repression. His goon squads terrorized anyone who opposed him, detaining 10,000 people in the run-up to the election and killing hundreds more. An American diplomat pronounced the predictable election result a magnificent demonstration of the capacity of the Korean people to establish a representative and responsible government.⁹ Ordinary Koreans doubtless had little interest in which of the two imposed dictators was worse. They would soon learn that things could get much worse.

Over in Japan, there was another major player, the egomaniacal Pacific Commander in Chief, General Douglas MacArthur. He was in many respects like the current U.S. Commander in Chief. The difference is that MacArthur's Commander in Chief eventually got rid of him. The U.S. Commander in Chief today is firing a lot of people but many of his generals see him as the problem with respect to resolving the current crisis in the two Koreas.

Rhee, Sung and MacArthur had in common the absence of any intent to accept Rusk's 38th parallel as an international border. Incursions by both sides continued into 1949. Sung went to Russia and China seeking support for his plan to unify by force. The Soviets eventually acquiesced in principle, but with important caveats; their forces would not participate in hostilities and they would not bail the North Koreans out if they failed. Sung also needed approval from China. The Chinese were surprised, but acquiesced. This war belonged to Pyongyang, not Moscow or Beijing. Similar to the danger we face today, there were numerous miscalculations on both sides. Sung, like the misguided Americans later in Iraq, assumed his forces would be greeted as liberators. China and Russia were unaware that the U.S. was spoiling for a fight anywhere, including intervening in a civil war in a place where none of the major powers had expressed much interest.¹⁰

North Korea invaded on June 25, 1950 and soon controlled the entire peninsula save the port of Pusan (now Busan). With Russia boycotting the Security Council over its refusal to recognize the real government of China, the U.S. managed to get a United Nations fig leaf authorization for its war in Korea. Importantly, however, the authorizing resolution permitted member states to render such assistance to the Republic of Korea as may be necessary to repel the armed attack and restore international peace and security to the area.¹¹

As a military leader, MacArthur was sometimes a genius, sometimes a fool. His WWII record in the Philippines was less than stellar. In Korea, he was slow to realize that the attack from the north was more than an incursion, and even slower to recognize that South Korean forces could not repel it. Once he got his bearings however, he overcame staff objections and ordered a daring landing at Inchon on September 15th. It was a complete success. The North Korean forces quickly retreated north of the 38th parallel. The UN mandate had been fulfilled. If repel means drive back, and restore means put back, the Korean War was over.

But another MacArthur characteristic later shared by Donald Trump was the belief that rules made for others did not apply to him. MacArthur decided that this was the time for a decisive battle to rid the world of the evils of

communism, and he would be the great leader who brought that about.¹² The most dangerous aspect of the rogue general's delusion about this apocalyptic struggle, was that his plan included using nuclear weapons. In the U.S., Americans were fine with using nukes. Truman would later fire MacArthur for his insolence and hubris in dragging the U.S. into a wider and bloodier war, but not for the insane war plan itself.

Before that happened, however, MacArthur got a lot of people killed and came close to having his nuclear war. For months, he ignored China's warnings that it would stand neither for an American-led army on her border nor a unified Korea under the West's preferred dictator rather than hers. MacArthur invaded the north and pushed all the way to the Chinese border. The Chinese intervened and absolutely routed the U.S. 8th Army, driving it in a headlong retreat back down the peninsula to the Hahn river, south of Seoul. MacArthur was now ready to use nuclear weapons.

Faced with a retreating and dispirited 8th Army, and the death of its general, Lieutenant General Walton Walker, MacArthur appointed Matthew Ridgway to command. This coincidental change of command on the battlefield may have kept nuclear weapons out of the war. Forces under General Ridgway managed to halt the retreat.¹³ Of this, an American historian who still supported the war wrote: "The men who reversed the fortunes of the UN on the battlefield in Korea in the first week of 1951 may also have saved the world from the nightmare of a new Hiroshima in Asia."¹⁴ There is no guarantee that such a serendipitous event will avert disaster in 2017.

The war evolved into a stalemate, but the sides were too stupid to stop fighting. Armistice talks continued until 1953. The death toll during this period exceeded that of the period of active fighting. Rhee billed the UN \$90 million for rent of land used by the forces that saved his beleaguered regime. South Korea suffered autocratic rule for 35 years. North Korea got even more repressive.¹⁵ That is where we sit today. The 38th parallel bristles with weaponry. There are some 30,000 U.S. troops in South Korea. The insecure rulers of North Korea and the U.S. scream childish threats at one another.

The point of this historical review is twofold. First, the U.S. made a mess of the Korean peninsula and bears a special responsibility to rectify past errors. Second, the original sin revolved around failure to listen to and respect the will of the Korean people. Where do the Korean people fit into all this? So far, their job has largely been to be victimized and ignored. During the war, millions of civilians were killed. The U.S. contribution included bombings that left no building in the north higher than two stories, as well as bombing and strafing of refugees fleeing the conflict. It also included a massive display

of cultural ignorance and racism. To the U.S., the “gooks” didn’t matter.¹⁶

So how does the world today find its way out of a mess that history shows to be so reminiscent of the earlier fiasco? If you ask me, a good starting point would be to begin negotiating a non-aggression pact among all parties in the area. But that’s the point—don’t ask me. Ask the Koreans this time.

NOTES

1. Bethany Lacina & Nils Petter Gleditsch, *Monitoring Trends in Global Combat: A New Dataset of Battle Deaths*, 21 EUR. J. POP., 145, 154 (2005).
2. One can imagine, for example, this being carried out by a special rapporteur of the United Nations selected by consent of all parties.
3. “South Korea Does Not Need U.S. Permission to Engage in Policy Dialogue With North Korea. ROK Presidential Office” YOHAH NEWS AGENCY, 21 Jun. 2017.
4. <https://www.cbsnews.com/news/rex-tillerson-expands-on-preconditions-for-u-s-north-korea-talks/>.
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6. JOHN PRICE, *ORIENTING CANADA: RACE, EMPIRE AND THE TRANSPACIFIC* (Vancouver: University of British Columbia Press 2014), 123.
8. MAX HASTINGS, *THE KOREAN WAR* (London: Michael Joseph Ltd. 1987) (hereinafter HASTINGS, KOREA) It should be noted that Hastings, who laid out the U.S. motives and South Korean corruption in great detail, remained a supporter of the war—a testament to the power of Cold War propaganda.
9. HASTINGS, KOREA, *supra* note 8 at 13-16; MAX HASTINGS, *INFERNO: THE WORLD AT WAR* (New York: Alfred A. Knopf 2011), 648 (hereafter HASTINGS, INFERNO).
10. HASTINGS, KOREA, *supra* note 8 at 33.
11. HASTINGS, KOREA, 33-36; PIERRE BERTON, *MARCHING AS TO WAR: CANADA’S TURBULENT YEARS 1899-1953* (Toronto: Random House 2001) 539 (hereafter BERTON, MARCHING); Price, 211-213.
12. HASTINGS, KOREA, *supra* note 8 at 56.
13. HASTINGS, KOREA, *supra* note 8 at 60-63; BERTON, MARCHING, 532-539.
14. BERTON, MARCHING, *supra* note 11 at 548.
15. HASTINGS, KOREA, *supra* note 8 at 226.
16. HASTINGS, KOREA, *supra* note 8 at 272-275; 352-356.
17. HASTINGS, KOREA, *supra* note 8 at 279-285; 290; PRICE, *supra* note 6 at 261-262; BERTON, MARCHING, 552, 556-557, 575-576; PIERRE BERTON, *MY TIMES, LIVING WITH HISTORY* 69, 75, 79, 83 (Toronto: Doubleday Canada Ltd. 1995). Berton was a war correspondent in Korea.



Blanche Cook

**AN ALGORITHM FOR CAPTURING
WHITE HETEROPATRIARCHY:
THE PARABLE OF THE WOMAN
CAUGHT IN ADULTERY**

Dmitri Mendeleev and I share the same birthday. We also both build algorithms. He built an algorithm that captured all matter and reduced it down to its basic elements, and then he categorized and organized those elements in a way that made them perceptible, understandable, knowable, and useful to us. I build algorithms to capture white heteropatriarchal power; I build algorithms to capture power as it is raced, classed, sexed, and gendered. I build algorithms to capture racism, sexism, classism, and all the ways in which those things are intertwined, enmeshed, and intersectional.

When I say power, I'm talking about the way in which white heteropatriarchal power takes its desires, fantasies, and agendas, and materializes those things out in the real world using the vehicles of racism, sexism, and classism. You may say, "Why, why do you want to build an algorithm to capture power?" As a former federal prosecutor and now as a law school professor and legal scholar, I believe you can capture, try, and correct power. You can capture it. You can arrest it. You can reduce it down to its basic elements, maneuvers, moves, and functions. And then you can subject all of those things to rigorous scrutiny, interrogation, investigation, and an actual trial, all in an effort to redistribute power and get us much closer to our ideals involving equality, full human flourishing, and justice.

You may ask, "How do you plan to go about building this algorithm to capture power?" The answer to the question "how?" is actually a story or a parable. Specifically, the parable of the Woman Caught in Adultery.¹ This particular story encapsulates the basic ways in which racism, sexism, and classism operate, but the story also gives us some possibilities for liberation.

The story begins with Jesus Christ, the Rabbi, the teacher, out in the world teaching. And as the Rabbi is teaching, a group of Sadducees and Pharisees

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come up to him and say, “Hey, Rabbi, we caught this woman in the middle of adultery and under Mosaic Law, we must stone her to death.”²

Let’s unpack a little bit of that: the Sadducees and the Pharisees are the leaders of law and religion. They embody law and religion. They are metaphors for law and religion. Hold on to that because that’s going to become terribly important in just a moment. It’s also important that the body they bring to the Rabbi, to impose the death penalty, judgment and sentencing, is a vulnerable body—they bring a woman’s body. It’s equally important that they caught this woman in the middle of adultery. Not the beginning of adultery, or an introduction to adultery, or adultery-prep, or the after-glow of adultery, the results of adultery.

Now, you may say, “Why is that important?” No matter how hard you try, no matter how hard you strive, no matter how much you work at it, and put your backbone into it, you just can’t commit adultery all by yourself. You cannot commit adultery alone; it inherently requires at least one other person. We know that they caught her in the middle of adultery, so there was another person there. And yet, the Sadducees and Pharisees only saw fit to bring the vulnerable body to the Rabbi for sentencing and judgment.

Let’s go back to the story. So we’ve got the Rabbi out in the world teaching. The Sadducees and Pharisees come up and say, “Hey, time to impose the death penalty, woman caught in adultery, time to throw some rocks, all under Mosaic Law.” The Rabbi turns to the Sadducees and Pharisees and says, “Let those of you without sin cast the first stone.”³ In other words, you can participate in the death penalty, sentencing, and judgment, but you have to have clean hands. The Sadducees and the Pharisees give this some thought, and then they begin to leave, starting with the oldest.⁴ The Rabbi turns to the woman and says, “Well, where are your accusers? Hasn’t anyone condemned you?” And she says, “No.” And he says, “Well neither do I. Go forth and sin no more.”⁵

This particular parable contains the basic ways in which racism, sexism, and classism operate. But it also gives us some keys to liberation. I want to focus in on three basic moves of power as they’re contained in this parable. There are actually a lot more moves, but the TED people only gave me eighteen minutes, so you’ll have to invite me back in order to unpack the rest of this parable. But for now, the top three hits of power: (1) obfuscation—deliberately confusing things; (2) performance; and (3) the gaze.

Obfuscation

So, Michael Foucault says, “Power is tolerable only on condition that it masks a substantial part of itself. Its success is proportional to an ability to

hide its own mechanisms.”⁶ In other words, in order for racism, sexism, and classism to be effective, they have to render themselves invisible, imperceptible, natural, legitimate, just the way things are, inevitable, and, furthermore, righteous and good. Not only is power’s success predicated on its ability to hide, it’s also proportionate to its ability to hide. So if power can hide really well, it can do a whole lot. If it can’t hide so well, its effectiveness is greatly diminished. Now, one of the ways in which power renders itself invisible and legitimate at the same time, is it hijacks the function of law and religion in order to do its dirty work, in order to exact its agenda. When power colludes with law and religion, the effect becomes totalizing. It becomes omnipresent, ubiquitous, everywhere. So, let’s bring in an example to prove the point.

This is the classic case of *Dred Scott*,⁷ decided in 1857. It’s the slavery case. In this case, a majority held that anyone of African descent was not a citizen. The majority occupied, dominated, and controlled the field of citizenry, and then relegated any body of African descent outside the boundaries of citizenship, including the protections, the rights, and entitlement of citizenship. It didn’t matter if you were free, it didn’t matter if you were enslaved—male or female—you were outside the boundaries of citizenship.

And, if you’re here and you don’t enjoy the protections of citizenship, you’re vulnerable. You’re vulnerable to sexual exploitation as well as physical exploitation. So, if you were someone of African descent and someone violated you sexually or physically, or exploited your labor, you couldn’t go to the police for help, and you couldn’t go to the courts to vindicate your rights because you didn’t have any access to the courts and you didn’t have any rights. Then, religion kicks in and says, “Well, God says you ought to be a slave, and God says that slavery is good for you. And, God says that slavery is good for you because slavery will save you from your criminal, evil, treacherous self.” There again, when power colludes with law and religion, the effect becomes totalizing. It becomes ubiquitous, omnipresent, everywhere. It becomes part of history, psychology, and philosophy. Other examples: undocumented workers. If you’re an undocumented person and you’re here and someone violates you physically or sexually, you can’t go to the police or the courts without calling into question your own status. And, as a result, you’re vulnerable.

Another move of obfuscation in the confederacy of power—and this I call the functional equivalent of dangling a shiny ball in front of your face and stealing your wallet—and that’s where power says one thing and does another. When you measure what power says against what it does, you get this huge discrepancy. So, the Sadducees and Pharisees come up and say, “We’re here to enforce Mosaic Law. We’re here to enforce morals and

ethics. A sexual perversity, a sexual transgression has occurred and we're here to fix that." The question becomes is that really what the Sadducees and Pharisees are there to do? Well, the answer to that question is no. And, how do we know that? Because, remember when we went through that little exercise and established that you can't commit adultery alone? That it inherently requires at least one other person? And, we know that this woman was caught in the middle of adultery, so there was at least one other person there? And, yet they only saw fit to bring the vulnerable body of a woman to the Rabbi for the purposes of sentencing and judgment? Because what they're really interested in doing is playing and performing on that vulnerable body; controlling, dominating and subjugating that body.

Now, you religious and biblical scholars will say, "You know what? This is the problem with legal scholars interpreting the Bible. See, little Miss Law School Professor, you ought to know that in the days of Biblical antiquity, only women could commit adultery. Only women could be charged with adultery. Only women could be charged with adultery and be guilty of adultery because it's a woman-only crime. Which is why the Sadducees and the Pharisees only brought the woman." But you see, that would be my exact point—you see how power highjacks the function of law and religion in order to do its dirty work? In order to exact its agenda, which is really playing and performing on a vulnerable body? And, under the auspices of law and religion, it renders itself legitimate and invisible at the same time? My exact point.

Other examples of power: saying one thing and doing another. In this country, we've had a war on drugs. We've reached a societal consensus that we're going to declare a war on drugs. And yet, when you look at the demographics of people who've been incarcerated as a result of the war on drugs, they're disproportionately people of color, leaving a lot of people to argue that in fact we didn't have a war on drug. We had a war on vulnerable bodies of color. Some will argue as well, that we use the criminal justice system to define crimes in ways that turn those vulnerable bodies into property again.

Another example of power saying one thing and doing another is in our houses of worship. Sometimes you may hear a scathing criticism leveled against "homosexuals"; that homosexuals are going to cause the end of the earth, the great apocalypse, the end of days. How homosexuals are directly responsible for all natural disasters—hurricanes, tornadoes, earthquakes. How homosexuality is the greatest sexual perversion and travesty in history. Now, the question becomes, is that scathing criticism really interested in sexual perversity and sexual violence? Perhaps not. Because if they were really interested in sexual violence, they would turn all of that energy and

ire and anger toward all of that sexual violence that occurs under the roofs of our homes and in our intimate spaces, which is where a lot of sexual violence occurs. And, that, in fact, that kind of scathing criticism is really interested in playing and performing on a vulnerable (gay) body. Which gets us to our next move, performance.

Performance

Anthony Farley, a law school professor, suggests that racism is a compulsion that performs as pleasure; that racism, sexism, and classism are all compulsions that perform as pleasure; that we do ourselves a tremendous disservice when we oversimplify racism, sexism, and classism. And, one of the ways in which we oversimplify power is when we reduce it down to hatred or animus only; in fact, these things are far more complex than that. In fact, these things embed themselves inside our minds. They saturate every part of our brain, even that layer of fantasy because what the Sadducees and Pharisees really want the Rabbi to do is to join with them in a fraternity and to engage in a figurative gang rape of this woman that serves the same function as a lynching. The stoning, gang rapes, and lynchings are all performances. And, what they perform is who's powerful and who's vulnerable. Who's deserving of pain and who's deserving of pleasure. Who's good and who's evil. Who's deserving of life and who's deserving of death. Who's deserving of being judged and who gets to do the judging. Which brings us to our third move of power, the gaze.

The gaze

Implicit bias research teaches us that the moment we see a black or brown body, we immediately associate that body with dangerousness, suspiciousness, and the need to be controlled. We do it instantaneously, automatically. We do it so quickly because we're convinced about it. It does not require some sort of deliberate, conscious cogitation. And, then when we see a white body, we immediately associate that body with goodness, innocence, and righteousness. And, again, it happens instantaneously. It happens so quickly that these associations actually become lodged and entrenched inside our minds. They become architectural structures anchored inside our brain. They become a frame through which we see the world. They become a filter through which we see evidence. They become the judgment that we cast before we've seen the body of proof.

These things, these associations are so fixated in our minds, that they affect the way we see things, such that when we see a black or brown body engaged in actually innocent conduct, we create narratives of dangerousness, suspiciousness, pathology, criminality, and treachery. Then, when we see

white bodies actually engaged in mischief, mayhem, and criminality, we create narratives of innocence. Because, you see, when *that* body [pointing to a photo of Trayvon Martin] goes to the store to get some candy—and how much more childlike can it be then for a child to go to the store and get some candy?—but when *that* body goes to the store to get some candy, the narrative that gets created is one of dangerousness, suspiciousness, the need to be controlled and the need to be put down. Because, you see, this body [pointing to a photo of Trayvon Martin] is never entitled to innocence and never entitled to childhood. Yet, when this body [pointing to a photo of Donald Trump] freely admits that it's engaged in sexually predatory behavior and sexual violence, we create narratives of innocence. It's just locker-room talk; boys will be boys; men will be men. This is natural and, furthermore, it's kind of good because it's so manly.

So, some other examples of the gaze of pathology and the gaze of overvalorization—battered women. Battered women come forward and they say, “I’ve been battered.” And, immediately we start asking, “Well, did you fight back?” “Why did you stay?” “Why didn’t you go?” Because we keep that gaze of pathology fixated on that vulnerable body. We engage in all of that victim-blaming. We know from Foucault that power operates at the level of distraction, because when we stay fixated on that vulnerable body, we never get around to asking the accused, “Why do you hit women?”

Rape victims. Rape victims come forward and they say, “I’ve been violated.” And, immediately we start asking questions like, “Isn’t that shirt too tight?” “And isn’t that skirt, uh, too short?” And, “Why were you out there?” “Why were you out there so late?” “Why were you drinking?” “Why did you pass out drunk?” “Why did you wait so long to bring these accusations?” Because, there again, we keep problematizing and pathologizing that vulnerable body, and we never get around to the accused.

But, part of the beauty of the Woman Caught in Adultery, is that the Rabbi takes that pathological gaze off the vulnerable woman’s body and shines it on the sources of power—the Sadducees and the Pharisees. Because when the Rabbi asks, “Let those of you without sin cast the first stone,” the Rabbi initiates the very first phase of the cycle of liberation.

Cycle of liberation

This is a calling for all of us, where we critically reflect on our thoughts, where we interrogate our minds candidly, and we ask where racism, sexism, and classism have embedded themselves inside our minds. Make no mistake about it, if you’re talking about implicit bias, whether it’s race, class, sex,

or gender—it doesn't matter—we're not just talking about thoughts. These thoughts lead to actions where we play and perform on vulnerable bodies from microaggressions to macroaggressions. So, we must be as skeptical about our actions as we are about our thoughts.

Within the parable, everybody has agency. The "oppressors," the Sadducees and the Pharisees, have the agency to critically reflect on their thoughts and actions. If those things are tainted, if they don't measure up against full human flourishing, they have the agency to refrain from imposing the death penalty. To refrain from imposing any kind of adverse action that's tainted by power.

Also within the parable, there's a redistribution of power. There's a redistribution of agency that creates a much more democratized space that gets us much closer to our ideals of full human flourishing. And, then full human flourishing becomes the standard by which we measure our thoughts, our actions, our ability to find agency, and our efforts to redistribute power.

There's absolutely nothing new about state violence and police power playing and performing on vulnerable bodies. There is absolutely nothing new about state violence and police power playing on vulnerable bodies of color because state power—state violence—and the police power have played on vulnerable bodies of color in this country since the beginning of this country. State violence and police power have been playing and performing on vulnerable bodies since the days of biblical antiquity. And, we don't need to look any further than the Woman Caught in Adultery to make that point.

But, what is new is all of the agency that technology gives you. Technology gives you the agency of your cell phones, where you can record and document and bear witness to these killings (pointing to a photo spread of black people killed by law enforcement). But, then technology gives you more—you can upload these images on your social media spaces, Facebook, your blogospheres. And, when you do, you can begin to draw similarities and symmetries between these cases. Then, you begin to realize that we're not just dealing with aberrant conduct in the South, or the North, or the East, or the West. That, in fact, what we're dealing with is something that is systemic, something that is an epidemic if not a pandemic. But technology gives us more because on our blogospheres, we can engage in a national discourse, a new narrative, a political activism where we take that pathological gaze off the lives of these people and we shine it on the sources of power like, for example, law enforcement and the law. We can begin to ask questions and problematize. For example, we can ask how the grand jury process was so manipulated as to sanitize and legitimize the deaths

of Tamir Rice, Michael Brown, and Eric Gardner, just to name a few. But then we go further because technology also gives us the ability to engage in that national discourse, that new narrative where we can recognize the humanity of these people.

So, in closing, I'm going to end pretty much where we began. Because you see this picture [pointing to a series of photos of victims of police shootings] kind of looks like a periodic table. You see, we can take power and we can distill it down to its basic elements, moves, maneuvers, and functions. And we can subject those things to scrutiny, interrogation, investigation, all in an effort to redistribute power in a way that gets us much closer to our ideals involving full human flourishing. Much like the woman caught in adultery.

Thank you.

NOTES

1. See John 7:53-8:11.
2. See John 8:3-5.
3. See John 8:7.
4. See John 8:9.
5. See John 8:10-11.
6. MICHAEL FOUCAULT, *THE HISTORY OF SEXUALITY, VOLUME 1: AN INTRODUCTION* 86 (Robert Hurley trans., Vintage Books 1990) (1976).
7. 60 U.S. 393 (1857).



Sarah Dávila-Ruhaak

**THE SPROUTING OF HUMAN
RIGHTS INITIATIVES IN
THE MIDST OF A STORM OF
RESISTANCE TO REFUGEES**

In response to the atrocities of World War II, the international community promised “Never Again!” Yet the world has turned its back on the humanitarian refugee crisis fomented by massive human rights violations. Millions continue to suffer even as the U.S. and Europe turn these refugees away.¹

But the principle that human rights belong to everybody has animated a community of advocates to effectuate change. This energized spirit of activism amidst a profound humanitarian crisis in Syria and a hostile anti-refugee sentiment in the United States creates a paradox: from human rights violations come human rights initiatives; from xenophobia and anti-refugee sentiment comes human rights and action-oriented initiatives, which seek to protect people by ensuring that they are able to exercise their human rights. These efforts are based on the idea that communities, organizations, and individuals can be agents of change on local, national, and international levels. The focus of this article is on one such project, the Human Rights for Syrians Initiative (HRSI) of the International Human Rights Clinic, a law clinic of which I am the director that seeks to protect the human rights of Syrian refugees in the United States.

Struggles of a Syrian refugee

A writer described the situation he saw in northern Greece, where fifteen improvised camps hold an estimated 55,000 refugees, most of them Syrian families:

I spent the last few days talking to refugees all intending on continuing their journey towards the unknown. Men, women, and children with aches, blistered feet, and injured knees would not be denied their right to continue to search for a safer, more stable home for their families, for jobs, for a warm welcome. Their options are either a trip to the Greek border to Macedonia, either to be successfully smuggled for 800–1000 euros, which they would pay once they had reached Belgrade, Serbia, or to be caught or turned back at the border to walk hours back to the refugee camps.

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In that purgatory, in the camps, they would seek out medical aid, replenish their food and water, and continue by foot to attempt the crossing once more. Many were open about having a smuggler, while others continued as though they had no clue that the borders were shut, that the German Dream that other Syrian refugees had attained was out of sight, at least for a while. Such was the case with the woman who was 5 months pregnant who turned up at our tent after walking 7 hours after being evacuated from Idomeni with her husband. She had not felt the baby move in a day. After a tense hour of examinations, with her husband broken down in tears, paranoid about other men being near our private tent for female patients, but carrying the world on his shoulders, we found the baby to be safe. We told them to return tomorrow for a follow-up. But the baby was not dead. So again they were on the move.²

Emerging initiatives to protect human rights

The Syrian conflict has created one of the worst humanitarian crises of our time, producing horrific human suffering on a wide scale. Millions have been summarily executed, tortured, imprisoned, raped, starved, or bombed with chemical or conventional weapons. However, there are people coming together in humanitarian, grassroots, and other advocacy-oriented initiatives attempting to provide mitigation of the suffering and redress for the wrongs.

Europe has recently been plagued with disturbing scenes of anti-refugee backlash where skinheads have marched, gangs have beaten immigrants and refugees, arsonists have set fire to refugee shelters, and refugees have been forcibly evicted and live in inhumane and degrading conditions.³ Some European politicians have openly talked about how “swarms of migrants” are coming to Europe and have advocated against feeding these refugees.⁴ Racist and anti-immigration policies have resulted in the denial of entry to many refugees, in part due to the European-Turkey deal that returns them to Turkey even after landing on European shores. Many Europeans justify the maltreatment of refugees by arguing for greater security and a blind acceptance of state control of immigration.⁵

On the other hand, many individuals, communities, and organizations have taken this highly charged backlash head-on and sought to combat the racist and anti-refugee movements in order to curb the spread of their influence. These movements have sprouted all over Europe, especially in locations where violence against refugees has taken place. “Because in [recent] years there were a few incidents, attacks.... For us, it’s very important to show that not only Nazis are living here.”⁶

As in Europe, anti-refugee messages have proliferated in speeches, political debates, and rallies in the United States. Several Republican presidential candidates reaped political support in response to their xenophobia, deliver-

ing thinly veiled racist and bigoted speeches exploiting fears of Islamic extremism. Furthermore, governors from both political parties have attempted to refuse Syrian refugees (as well as refugees from other Islamic countries) entry into their respective states. While the governors' positions are not lawful, they complicate the process of resettlement and effectively place roadblocks to the integration of Syrian refugees to their new communities. More recently, the Trump administration has taken a strong anti-refugee position, entering executive orders seeking to suspend the refugee program and preventing the entrance from seven predominantly Muslim countries, including Syria.⁷ Other countries in the same part of the world as Syria, including Kuwait, Oman, Qatar, Bahrain, Saudi Arabia, and the United Arab Emirates, have refused Syrian refugees altogether.

We must first contextualize existing tensions between the international legal framework and the reality of the present crisis caused by the international community's inaction. Only then can we fully appreciate the import of the broader grass-roots movement to mitigate the suffering.

State abdication of responsibility in the face of refugees from other abusive states shifts the burden of alleviating refugee suffering from governments to private actors. States have the responsibility under international law for ensuring the protection of persons in their territory. Grassroots communities, individuals, and NGOs must push states toward responsible and lawful action in this regard.

The refugee crisis has spawned private initiatives seeking to provide justice to those abused by the Syrian government, but these initiatives are largely ignored. Even so, human rights organizations (HROs)⁸ and their advocates have transformed the human rights landscape by publicizing atrocities and shaming and pressuring governments into complying with their human rights obligations.⁹ HROs shape the way in which States engage in the protection of human rights, by mobilizing private individuals and working with local groups.¹⁰ HROs also provide key resources and services that offer refugees access to legal aid and basic human services. HROs as well as social movement organizations (SMOs) attempt to transform public opinion and change policy-makers' positions by providing greater attention to human rights crises. In order for HROs and SMOs to foster human rights initiatives and encourage action, they must mobilize constituents, garner broad public support, and counterbalance and neutralize legal and political antagonists.¹¹

HROs have called upon their home countries to increase refugee resettlement numbers and provide refugees, including those fleeing violence and starvation in Syria, with access to legal and social services. The Human

Rights for Syrians Initiative (HRSI) was created out of the need to mobilize lawyers, law students, and members of the Chicago community to fill a gap of access to legal and social services for Syrian refugees in the United States. Conversations with Syrians in the Chicago area reveal a sense of despair due to the roadblocks they face when navigating the justice system. Moreover, the persistent lack of social services to address their needs to obtain housing, employment, education, health services, and emotional healing adds to their distress. In this regard, HRSI was designed to be an agent of change, mobilizing resources to address the legal and structural deficiencies in the justice system as they relate to Syrian refugees and to ensure the protection of their human rights. HRSI provides representation and advocacy in asylum cases, and provides a robust referral system for a variety of social and legal services. These services are anchored in the holistic, client-centered advocacy model, which seeks to address varied human needs.

Background on the Syrian humanitarian crisis

March 2017 marked the sixth year of the bloody conflict that has scarred Syrians' lives with trauma, suffering, loss, and misery.¹² In March 2011, responding to decades of repression, specifically the arrest and torture of children who painted revolutionary slogans on a school's wall in Daraa, Syrian pro-democracy protests surged.¹³ Syrian President Bashar al-Assad intensified the repression of his authoritarian regime by using torture, arbitrary arrests, and killings to crack down on the opposition. By the end of the summer, his regime had been responsible for the deaths of more than a thousand people who sought democratic reform. Assad attempted to justify these killings as combating "terrorist groups."¹⁴ But anyone opposed to the regime, including those promoting human rights and democracy, were deemed "terrorists."

The detention of journalists and online activists became common practice.¹⁵ Individuals posting comments on social media about the uprising or uploading videos were targeted and punished. By June 2011 Human Rights Watch had reported the systematic practice of extrajudicial killings, arbitrary detentions, torture, preventing medical assistance to the ill and injured, and the military siege of several towns resulting in the deprivation of basic resources to civilian populations.¹⁶ Homs, Damascus, Latakia, Daraa, Idlib, and, of course, Aleppo felt the brunt of Assad's wrath.¹⁷ A man who had been detained and tortured in the Idlib governorate described the horrors that he had endured.

They forced me to undress. Then they started squeezing my fingers with pliers. They put staples in my fingers, chest, and ears. I was only allowed to take

them out if I spoke. The nails in the ears were the most painful. They used two wires hooked up to a car battery to give me electric shocks. They used electric stun-guns on my genitals twice. I thought I would never see my family again. They tortured me like this three times over three days.¹⁸

By 2012, extrajudicial killings, including mass executions, were a common practice by Syrian security forces and pro-government Shabiha (“Shabeeha”) militia. State forces would often lie in wait and murder people as they entered their homes or mosques.¹⁹ In 2013, the Assad regime used chemical weapons on the civilian population; sarin gas, chlorine, and other toxic substances were dropped by aircraft in neighborhoods near Aleppo and Damascus.²⁰

During the course of the ensuing six-year conflict, approximately 1,500 people died from chemical weapon attacks.²¹ Chemical weapons have been used strategically by the Assad regime to quash opposition and displace the civilian population.²² Mohammed Tennari, a doctor in the rebel-held province of Idlib, said “[T]he world knows that chemical weapons will be used against us again and again.” He added, “What we need most is not antidotes—what we need is protection, and to prevent another family from slowly suffocating together after being gassed in their home.”²³

Asaad has also used mass starvation to weaken opposition and control the civilian population.²⁴ Military sieges that have impeded access to food, water, and medical treatment have worsened the issue. For example, a siege in Madaya resulted in the starvation of 20,000 civilians, including children and the elderly.²⁵

[N]ow that the siege has tightened, the doctors we support have empty pharmacy shelves and increasing lines of starving and sick patients to treat. Medics are even resorting to feeding severely malnourished children with medical syrups, as they are the only source of sugar and energy, thereby accelerating consumption of the few remaining medical supplies.²⁶

Starvation has been deployed as a military tactic and has resulted in death and the deterioration in the condition of patients undergoing medical treatment.²⁷ According to the United Nations, by January 2016 there were at least fifteen towns across Syria where 400,000 or more people had been living under siege, the first step toward forced starvation.²⁸ Indeed, sieges followed by starvation have been used throughout Syria as part of a larger military strategy.

The Syrian conflict has morphed into a proxy war with a complex combination of internal and external political alliances.²⁹ The involvement of Russia, United States, Saudi Arabia, Turkey, and Iran—all with opposing interests—has intensified and lengthened the conflict, exacerbated societal divides, and

created power vacuums where non-state actors have taken advantage of the breakdown of the social order. For example, the shortage of Syrian armed forces has resulted in the utilization of foreign militia groups, complicating the interaction between domestic and international actors involved in the conflict.³⁰ This proxy warfare includes the invasion of neighborhoods and localities, bombardment, starvation, extrajudicial execution, targeted killing, arbitrary detention, torture, forced disappearances, the use of chemical weapons, systematic rape, human trafficking, and forced marriages.³¹

There has also been a variety of spillover effects, including border insecurity and a massive outflow of refugees, resulting in the internationalization of the conflict.³² The overall death toll has reached 470,000.³³ Seven million persons have been displaced and there has been an exodus of approximately 4.8 million refugees to neighboring countries.³⁴

Humanitarian disaster

The result has been a full-fledged international humanitarian crisis. For Syrians living in nearly destroyed homes or in displacement shelters, access to medical care, food, water, and sanitation has been difficult to obtain. For instance, the intensified attacks around Aleppo have not only caused high numbers of civilian casualties, they have damaged the entire health care infrastructure,³⁵ creating a widespread systematic medical emergency. More than half of Syria's pre-war population has been killed or forced to flee their homes.³⁶ "This life is worse than death," cries Ahmad al Ahmad, a 79-year old Syrian man who has seen his life upended.³⁷

Many Syrian towns are under the control of Asaad's putative foe, ISIS, and are cut off from humanitarian aid. Many of these families, struggling to survive, have left their hometowns to relocate to marginally safer villages. They have also been separated from one another at checkpoints due to ongoing armed clashes.³⁸ Out of a population of 18.5 million, approximately 6.6 million have been displaced within the country.³⁹

Making a safe journey out of the war-torn regions is nothing less than miraculous. It requires crossing dozens of active battle lines and navigating hundreds of checkpoints, set up by both sides of the conflict, before reaching neighboring countries.⁴⁰ Many rely on smugglers to help them leave Syria in the hope of receiving asylum or protection as refugees. The path to Europe, though highly desirable, is especially difficult. Refugees who have made it there face discriminatory practices, hate crimes, and difficult integration policies, and lack legal protections. Difficulties notwithstanding, approximately one million asylum applications flooded Europe between April 2011 and March 2016.⁴¹

Even when individuals are lucky enough to afford housing in urban centers, many refugees live in filthy, overcrowded quarters. Others are forced to live in refugee camps such as the ones in Idomeni, Greece, where they are interminably in legal limbo. When Dimitris Avramopoulos, the Commissioner for Migration, Home Affairs and Citizenship at the EU Commission visited the Idomeni camp, he acknowledged the abysmal living conditions. “The situation here is tragic. . . . It doesn’t honour Europe.”⁴² Refugees who have made their way to France in the hope of crossing to the UK have experienced similarly degrading conditions at the refugee camps in Calais and Dunkirk. There, many young refugees face sexual exploitation by traffickers. Interviews from these camps reflect the deep trauma that children suffer.⁴³

With the new Europe–Turkey deal,⁴⁴ many Syrian refugees have been deported to Turkey or are stuck in refugee camps. The deal was forged for the alleged purpose of addressing the overwhelming flow of smuggled refugees who pass through the dangerous waters of the Aegean Sea trying to reach safety in Greece. It permits “all new irregular migrants” who arrived on March 20, 2016 or later to be returned to Turkey. In return, EU countries will increase the resettlement of Syrian refugees living in Turkey, accelerate the visa liberalization for Turkish nationals traveling to the Schengen Area (a 26-nation passport-free zone) in Europe, provide additional financial support for the refugee population in Turkey, and re-establish the progression of Turkey’s bid to join the European Union.⁴⁵ This deal provides Turkey greater financial and political growth with respect to its European Union relations, but at the expense of refugees’ lives and safety. In practice, the agreement represents a violation of European Union law, refugee law, and international laws that protect against refugees being returned (“*refouler*”) to a country that they have fled due to fear of persecution.⁴⁶ Amnesty International has documented the surge of illegal mass deportations of Syrian refugees from Turkey back to Syria. The report sheds light on Turkey’s new practice of rounding up and expelling groups of around a hundred refugees, including women and children, and returning them to Syria on a nearly daily basis.⁴⁷

To date, the United States has accepted approximately 12,587 Syrian refugees.⁴⁸ However, recent executive orders by the Trump Administration have sought to temporarily suspend the United States Refugee Admissions Program (refugee resettlement program)⁴⁹ with the pretextual justification of protecting the nation against “foreign terrorists.” The most recent of the administration’s refugee orders provides that, until there is further assessment of the screening and vetting in the resettlement program, it will be suspended because of “the risk of erroneously permitting entry of a national of one of these countries who intends to commit terrorist acts or otherwise

harm the national security of the United States.”⁵⁰ In addition, the Executive Order ostensibly claims that refugees from Syria are not permitted to enter through the program because Syria has been designated as a state sponsor of terrorism. The order reads:

Syria has been designated as a state sponsor of terrorism since 1979. The Syrian government is engaged in an ongoing military conflict against ISIS and others for control of portions of the country. At the same time, Syria continues to support other terrorist groups. It has allowed or encouraged extremists to pass through its territory to enter Iraq. ISIS continues to attract foreign fighters to Syria and to use its base in Syria to plot or encourage attacks around the globe, including in the United States. The United States Embassy in Syria suspended its operations in 2012. Syria does not cooperate with the United States’ counterterrorism efforts.⁵¹

Countries designated as sponsoring terrorism have been classified in the Global Terrorism Database (GTD), which was created by the National Consortium for the Study of Terrorism and Responses to Terrorism (START).⁵² The GTD compiled information from open-source reports and documented acts, including violent acts carried out by non-state actors.⁵³ Furthermore, the GDT used a set criteria to document and classify the “terrorist” activities. These include

(1) The violent act was aimed at attaining a political, economic, religious, or social goal; (2) The violent act included evidence of an intention to coerce, intimidate, or convey some other message to a larger audience (or audiences) other than the immediate victims; and (3) The violent act was outside the precepts of International Humanitarian Law insofar as it targeted non-combatants.⁵⁴

Many advocates view the Executive Order as Islamophobic and discriminatory. “The proposal treated as presumptively suspect a religion practiced by about 1.6 billion people worldwide, nearly a quarter of the globe’s population.”⁵⁵ Moreover, the third prong of the GTD identifies the victims of the violence by non-state actors as non-combatants—that is, the targets of violent acts are civilians, humanitarian workers, and others that are not “engaged in hostilities.” This highlights the very problem that the Executive Order creates: non-combatant refugees are especially vulnerable to violence, but are prevented from reaching safety under the order. The current Executive Order punishes Syrian refugees for their identity and ultimately ignores their vulnerability. As one refugee describes it:

[The Executive Order will] [h]urt a lot of people, innocent people who need immediate help. These people, the majority women and kids. I still remember the hard time and how much we suffered to reach America. I am praying for those who are still looking forward and dreaming of a safe life for their kids.

If we want to make America safe we must recognize that ... refugees are not threatening America, but they help building it and make it even safer place.⁵⁶

The international legal framework protecting Syrian refugees

The Syrian government has plainly failed to protect its people. It has engaged in policies of systematic and widespread use of torture, extrajudicial killings, arbitrary detention, starvation, sexual violence, and chemical weapons against its population, including civilians. In addition, the Islamic State (also known as ISIL or Daesh) has targeted and engaged in violence to eliminate identifiable minority groups, such as Christians, Shia Muslims, and Yezidis.⁵⁷ These systemic human rights violations cannot be measured solely by the loss of life or physical destruction of the country,⁵⁸ one must also consider how the international community is failing its obligations under international law.

Protections during armed conflict

Armed conflict is defined under international humanitarian law as “armed violence between governmental authorities and organized armed groups or between such groups within the State.”⁵⁹ This level of violence can be triggered by issues relating to identity, ethnicity, religion, political influence, and access to resources.⁶⁰ The 1949 Geneva Conventions and later protocols have extensively codified minimum protections for those caught in armed conflict. The extent of its protections, however, are triggered by the nature of the conflict as either international or non-international. International conflicts, which provide the greatest level of legal protection, exist when the violence is between two or more states.⁶¹ Non-international conflicts or internal armed conflicts exist when the conflict is between governmental forces and non-governmental armed groups, or when the violence is exclusively between non-governmental armed groups.⁶² The latter triggers lesser, but nonetheless important, protections of Common Article 3 of the Geneva Conventions.

Syria’s intense fighting between the Assad regime (along with pro-government forces), rebel forces, and the Islamic State constitutes a non-international armed conflict, to which Common Article 3 of the Geneva Convention applies.⁶³ Common Article 3 provides for minimum protections towards persons not actively taking part in the hostilities, such as members of armed forces who are not in combat because they have laid down arms, are wounded, or detained.⁶⁴ They are protected from “cruel treatment,” “torture,” being taken hostage, “humiliating and degrading treatment,” and extrajudicial executions. The wounded and the sick also have the right to be “collected and cared for.”⁶⁵

In addition to protections during times of conflict, human rights law provides an additional layer of inalienable protections in times of conflict or emergency. The right to life is the most fundamental right and cannot be taken away, waived, surrendered, or renounced.⁶⁶ In addition, the rights to be free from torture, slavery, and forced labor are also non-derogable, which means that at no point should a government engage in such practices or allow for non-state actors to violate such rights with impunity.⁶⁷

Internally displaced persons

States have a duty to protect civilians within their territory and to ensure that their rights are protected.⁶⁸ Syrians who have been internally displaced as a result of conflict⁶⁹ have the right to be protected against arbitrary displacement, that is, displacement carried out in a manner that violates their rights to life, dignity, liberty, and security. They are to be protected against direct or indiscriminate attacks, starvation as a method of combat, and, for civilians, their use as military shields.⁷⁰

Moreover, when the national authority is unable or unwilling to protect its people and provide humanitarian assistance, the international community—through international humanitarian organizations and other actors—has the obligation to provide that assistance.⁷¹ Specifically, the international community must “use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the UN Charter, to help to protect populations from genocide, war crimes, ethnic cleaning and crimes against humanity.”⁷² The international community has recognized that if peaceful means—including diplomatic, humanitarian, and other approaches—are inadequate, the United Nations Security Council must come up with a solution on a case-by-case basis and in cooperation with regional organizations.⁷³ The implementation of the responsibility to protect is threefold:

- (1) The State carries the primary responsibility for protecting populations from genocide, war crimes, crimes against humanity and ethnic cleansing, and their incitement;
- (2) The international community has a responsibility to encourage and assist States in fulfilling this responsibility;
- (3) The international community has a responsibility to use appropriate diplomatic, humanitarian and other means to protect populations from these crimes. If a State is manifestly failing to protect its populations, the international community must be prepared to take collective action to protect populations, in accordance with the UN Charter.⁷⁴

Accordingly, the United Nations has demanded a halt to violence and targeting of civilians, noting that it is the government's primary responsibility to protect its people.⁷⁵ This call to stop the violence must be framed within the duty to protect.

Protection of refugees

Syrians fleeing their country in search of safety are considered refugees. As indicated, refugees are persons who are unable to return to their country due to a well-founded fear of "being persecuted because of race, religion, nationality, membership of a particular social group or political opinion."⁷⁶ They are protected from being returned to the country they have fled under the principle of non-refoulement. "No contracting state shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened."⁷⁷

The right of non-refoulement has been widely recognized under international law⁷⁸ and has been expanded to include the "right to seek and be granted asylum."⁷⁹ It is, however, up to nation states to determine whether an individual qualifies as a refugee or how asylum protections exist within the domestic legal system. While asylees are granted protection from refoulement, "the duty of non-refoulement applies whether or not refugee status has been formally recognized."⁸⁰ The obligation of non-refoulement is a cardinal protection enshrined in the Geneva Conventions as well as the Universal Declaration of Human Rights, which reflects its status as a rule of customary international law,⁸¹ in addition to treaty law.

The threshold of "persecution" for purposes of the Refugee Convention is flexible and permits an inference of persecution if there is a "threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group."⁸² It is ultimately left to each state to determine who has demonstrated that they will likely be persecuted.

In the United States, a refugee seeking asylum must show that he or she has a well-founded fear of persecution. A "well-founded fear" of persecution can be proved "so long as an objective situation is established by evidence."⁸³ It is sufficient that the persecution is a "reasonable possibility."⁸⁴ Further protections are anchored in the 1951 Refugee Convention and international human rights law, which provides for the right to work, education, liberty and security of person, freedom of movement and religion, non-discrimination, and equal access to justice.⁸⁵

Refugee law and international human rights law coexist and, more importantly, international human rights law can supplement refugee law by

offering broader protections that are universally recognized. The preamble to the International Covenant on Civil and Political Rights states, “[Whereas] recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”⁸⁶ These rights are not always protected by states, leaving a vacuum where human rights are violated. Non-governmental organizations, communities, and advocates have sought to narrow this gap of access to justice and human rights through their work.

The role of civil society in bridging the gap of access to justice and the promotion of human rights

NGOs worldwide have worked tirelessly to provide Syrian refugees access to legal aid in addition to providing safety, supplies, shelter, medical help, food, hygiene, water, sanitation, pre-natal and post-natal care for infants, counseling, and temporary schools.⁸⁷ They have also served a critical role in the resettlement process, enhancing access to social services, and assisting in the integration of refugees in local communities.⁸⁸ In addition to these services, NGOs have pledged more than \$400 million for humanitarian relief.⁸⁹ Dozens of NGOs have called upon the European Union and the United Nations to increase resettlement and legal channels for refugees.⁹⁰ Jasper Kuipers, the deputy director of the Dutch Council for Refugees and NGO co-chair of the Annual Tripartite Consultations on Resettlement (ATCR) said, “There is no doubt about it: resettlement saves lives. It prevents deaths at sea and it makes it harder for smugglers to exploit refugees for profits.”⁹¹ Similarly, NGOs have created reception centers in countries to assist asylum seekers.⁹²

Public concern over safety and national security have been a major factor in the reluctance of politicians and communities to support resettlement and integration of Syrian refugees.⁹³ Syrian refugees are often stigmatized and labeled as potential terrorists. Indeed, Islamophobia and xenophobia confront Syrian refugees at every step of their journey to safety and rebuilding their lives.

American NGOs have provided essential services to affected communities, especially Syrian refugees, by delivering lifesaving emergency assistance, food and emergency supplies, transportation of personnel and humanitarian aid, psychosocial support, medical equipment, emergency cash assistance, winterization and cold weather supplies such as heaters, fuel vouchers, floor mats, food, water, sanitation and hygiene, lifesaving vaccinations, child and youth educational opportunities, and shelter.⁹⁴ The majority of these services have been geared to the resettlement process, including cultural orientation

and integration, housing and rent assistance, job training and placement, clothing, food, medical attention, and English language classes.⁹⁵

Yet barriers to justice remain. Unrepresented litigants are at a severe disadvantage. In Jordan, for example, many refugees have not been registered as refugees or are currently awaiting the renewal of their status.⁹⁶ Other barriers include a scarcity of information, knowledge of their rights, medical and mental health assistance, and effective referral systems.⁹⁷ These deficiencies create situations of insecurity, anger, and anxiety, while refugees are unable to access basic services and legal representation. They have difficulty finding safety and coping with the trauma they have suffered. Many do not recognize what aid is available and how to gain access to the UNCHR or domestic system to pursue asylum claims.⁹⁸ According to Sherif Elsayed-Ali, head of Refugee and Migrants' Rights at Amnesty International,

The vast majority of Syrian refugees in Jordan live outside camps in urban areas, and in poverty. Lengthy bureaucratic procedures and additional health care fees pose huge obstacles to those of them requiring medical treatment. The user fees imposed by Jordan may not appear to be high but are unaffordable for most refugees who are struggling to feed their families, and leave many unable to access the critical care they need.⁹⁹

In Lebanon the International Rescue Committee found that refugees were being targeted for abuse and exploitation relating to work. It also discovered that men, in particular, were suffering due to the lack of information, unavailability of services due to standardized vulnerability criteria, and an enduring belief it was impossible for them to get aid.¹⁰⁰

Once in Europe, refugees face shortages of funding and resources, xenophobic sentiments, political oppression, resentment of asylum-seekers, and the general insecurity of the preexisting population.¹⁰¹ Although European governments and institutions are able to support integration programs for refugees, anti-immigrant groups exert significant political pressures and are able to considerably influence policy-makers to keep refugees in their countries of origin.¹⁰² The European Union has expanded operations under Frontex (Frontières extérieures, "external borders")¹⁰³ and Eurosur,¹⁰⁴ the new European Union border control system, to prevent entry into Europe. Michael Juritsch, Eurosur's project coordinator, stated that "Eurosur's main component consists in making a network available with the goal of curbing organized crime and rescuing people who are in distress at sea."¹⁰⁵ While Eurosur has identified rescuing refugees at sea as a main priority for its new project, human rights groups have been critical of Frontex and Eurosur because, they argue, the initiatives do not rescue refugees, but rather deter them from entering Europe¹⁰⁶ while strengthening the idea of a "fortress"

Europe where refugees are unwelcome.

Similarly, refugees in the U.S. face barriers to entry and, once admitted, resettlement. Moreover, “[r]efugees are subject to the highest level of security checks of any category of traveler to the United States.”¹⁰⁷ This process includes a recommendation by United Nations High Commissioner on Refugees and internal domestic screenings with biodata and biometrics that involve the National Counterterrorism Center/Intelligence Community, Federal Bureau of Investigation (FBI), Department of Homeland Security (DHS), and State Department.¹⁰⁸ Syrians, in particular, face even greater barriers to entry. DHS conducts an additional review of Syrian cases during which they may be referred to the USCIS Fraud Detection and National Security Directorate.¹⁰⁹ Consequently, Syrian refugees waiting to be resettled in the United States wait longer and are subjected to a stricter scrutiny than other groups.

Asylum-seekers also face obstacles in accessing essential services. Most social services agencies that serve refugees limit themselves to those who have arrived in the country through an official resettlement program. These organizations are geared towards assisting refugees who qualify with rent assistance, food pantries, public benefits, job training, and cultural sensitivity training. Social services agencies geared towards helping the general population often require proof of public benefits, work history, legal status, and a driving record. The presentation of such records is often impossible for an asylum-seeker who has not arrived through an official resettlement program

Moreover, the asylum process in the United States is fiendishly difficult, requiring the applicant to be physically present in the United States, which however has an incredibly long backlog of applications.¹¹⁰ What is more, asylum-seekers are not permitted to work for 150 days, and may wait up to three years for their applications to be reviewed. “As a result, surviving especially during those first six months (and for however long it takes a person after that to find a job) is a serious material challenge,” says Anwen Hughes, Deputy Legal Director of Human Rights First. Hughes adds that it is “also psychologically draining for applicants who really want to be working, helping their families, and keeping their minds off the problems that drove them here.”¹¹¹ Meanwhile, asylum-seekers are ineligible to receive many government services while awaiting the outcome of their cases.

In addition, the American legal system does not ensure that an advocate or attorney will assist asylum-seekers in the daunting application process. “[T]he alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien’s choosing who is authorized to

practice in such proceedings. . . .”¹¹² But finding and hiring such an attorney is beyond the means of most asylum-seekers. Since immigration proceedings are civil in nature, indigent asylum-seekers do not benefit from an appointed attorney. The consequences are enormous. *Pro se* asylum-seekers are almost five times less likely to be successful in immigration court than asylum-seekers who have the benefit of legal representation.¹¹³

The absence of a skilled advocate or attorney can prevent the correct completion of the asylum application, including the omission of key facts or failure to invoke protections under the Convention Against Torture. Attending the asylum interview without the assistance of an attorney can be especially intimidating. Asylum-seekers are faced with reliving past traumas while trying to prove their credibility to the asylum officer. During this interview, asylum officers are less concerned about the heart-wrenching stories and instead focus on whether the asylum-seeker is able to prove that he or she has a well-founded fear of persecution. Although there is no requirement that asylum-seekers must prove that they were harmed in the past, they must prove that there is a reasonable possibility that threats to their lives will be carried out.¹¹⁴ That asylum-seekers can manage, on their own, to understand how to conduct themselves, prove their credibility, and deliver their testimony in a way that proves that they have a well-founded fear is nothing short of astonishing. In addition, their traumatic experiences require special guidance and, in some cases, they need mental health professionals to assist them to produce a testimony that is clear, coherent, and hits all the right points to establish a well-founded fear.¹¹⁵ The consequences of failing to prove an asylum case can be disastrous. Asylum-seekers whose cases are denied face detention, torture, forced labor, sexual violence, and possibly death upon their return to their country of origin.

How can we bridge these gaps to ensure that all refugees, specifically asylum-seekers who fail to qualify under official resettlement programs, are protected? Initiatives providing a multi-disciplinary or holistic approach are best able to address a person’s multiple needs. Asylum-seekers may face barriers to justice due to a lack of language proficiency, past trauma, knowledge of the legal system, evidentiary proof to support their claims, and limited access to social services.¹¹⁶ Holistic advocacy can help address these needs.¹¹⁷

The sprouting of initiatives in the midst of suffering and hate: the Human Rights for Syrians Initiative

Humanitarian initiatives are generally rooted in the desire to alleviate suffering. In refugee emergencies, humanitarianism mobilizes the best of us to protect the vulnerable. These initiatives are grounded on the principle

that individuals have rights and are entitled to protection. It is within this framework that HROs engage in work to expose injustice, push for change, provide services to ensure the protection of human rights and push forward for more protections. As the former U.N. High Commissioner Refugees, Sadako Ogata, once put it:

[H]uman rights violations are a major factor in causing the flight of refugees as well as an obstacle to their safe and voluntary return home. Safeguarding human rights in countries of origin is therefore critical both for the preservation and for the solution of refugee problems. Respect for human rights is also essential for the protection of refugees in countries of asylum.¹¹⁸

The Human Rights for Syrians Initiative was created at the Human Rights Clinic, of which I am the director, with the primary objective of protecting the rights of Syrian refugees in the United States. The HRSI advocates directly on behalf of Syrian refugees through international human rights principles. Beyond the principle of non-refoulement, refugees are entitled to a broad spectrum of protections under the 1951 Refugee Convention and other major international human rights instruments. Among other things, HRSI seeks to ensure refugees' rights to be free from cruel, inhuman or degrading treatment, access to justice, employment, non-discrimination, and dignity.¹¹⁹

The HRSI conducts outreach efforts to establish connections with the Syrian, Muslim, and Arab American communities in Chicago in order to promote dialogue between these communities and help them integrate into the broader community. HRSI also seeks to reduce the barriers refugees encounter in obtaining appointments with governmental agencies and navigate their complicated bureaucracies.

In addition, HRSI does not turn any Syrian refugees away. In those instances where the HRSI cannot accept a case, it provides a robust referral system. And, in cases of extreme vulnerability, HRSI engages in direct advocacy to ensure that an attorney will take the case on a pro bono basis. It investigates which legal services are available in the particular state in which the Syrian refugee is located or hopes to be relocated in. Our clients receive a thorough, multi-faceted assessment of their needs. If HRSI determines that a client has needs beyond legal representation—such as housing, medical help, job training or placement—it refers him or her to those that provide the required service. It is a holistic approach. We look beyond the legal case to address the basic human needs of our clients. Part of connecting with them includes trying to understand their struggle to survive the conflict back home, their journey to the United States, and the suffering they endured throughout their ordeal.

HRSI's members feel a legal and moral obligation to provide clients with the tools to be proactive within the judicial system and to ensure that their position of vulnerability after surviving a conflict does not render them defenseless or susceptible to abuse. This provides our clients with a sense of empowerment and an understanding that the protection of human rights belong to the people themselves no matter who they are or where they come from.¹²⁰ Although the duty to protect the rights of refugees belongs to states,¹²¹ HROs and the general public should not remain inert. We all have a role to play.

Many HRSI members have been transformed through their experiences working with refugees. They have begun to understand the impact and profundity of refugee work—that it is significant in protecting human rights, and that they are individual agents of change and human rights defenders. “Working with refugees on an everyday basis has opened my eyes to a world that I really never knew. . . . The war and civil unrest in Syria is not just a news story anymore. Every time I hear about the Syrian crisis I see the faces of the people I have been trying so hard to help.”¹²² Their work has helped them understand the humanitarian crisis, conduct outreach to shape communities’ perception of Syrian refugees in the United States, and emphasize the need to ensure that Syrian refugees are not sent back to the very danger that they have escaped. HRSI members ultimately seek to humanize Syrian refugees and ensure that they are treated as right-holders who are active in their integration. This transformation is key. Promoting the message that refugees are not faceless and nameless victims, but flesh-and-blood human beings vindicating their rights under law, positively affects how our clients view themselves and how they are perceived by the new community into which they are assimilating.

Concluding thoughts

The HRSI has sprouted to life amidst the controversies of the Syrian humanitarian crisis and anti-refugee sentiments in the United States. It has effectively become an agent of change, moving attorneys, advocates, students, and community members into action, to work in synergy to protect the human rights of Syrian refugees. Syrian refugees have been provided, and continue to receive, services for asylum representation and case management to access other social services. Through this work, HRSI is able to represent individuals who have been denied services, who have been neglected, or who would be unable to navigate the judicial system without the legal representation of HRSI members. Syrians have accessed HRSI services from Syria, Turkey, and across the United States. HRSI has been able to deliver a message of

action and urgency regarding the need to prioritize the protection of human rights for Syrian refugees in the United States.

As one HRSI member recently said

I have always tended to believe that we, as members of the human race at large, are all entitled to certain, basic liberties (or rights), notwithstanding our age, religion, race, nationality, political ideology, sexual orientation, etc. In my mind, to fight and advocate for basic, human rights is to fight and advocate for humanity itself.¹²³

It is this core understanding that human rights belong to everybody that animates us as a community of advocates to push and pull states to effectuate change. This energized spirit of activism amidst a profound humanitarian crisis in Syria and a hostile anti-refugee sentiment in the United States indicates a deep paradox—from human rights violations come human rights initiatives.

NOTES

1. This article will use the term “refugee” as it is defined in the 1951 Refugee Convention, where any person who “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion... is unable or, owing to such fear, is unwilling to avail himself of the protection of that country...or unwilling to return.” Although the practice in the United States is to differentiate between the term refugee and asylum-seeker, I will follow the international definition of refugee, therefore including asylum-seekers in the definition of “refugee.”
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6. Patrick Strickland, *The Rise of Germany’s Anti-Refugee Right: Opponents Accuse the Alternative for Germany Party of Inciting Violence Against Asylum Seekers*, ALJAZEERA (Apr. 7, 2016), <http://www.aljazeera.com/indepth/features/2016/03/rise-germany-anti-refugee-160331123616349.html>.
7. Exec. Order No. 13780, 82 Fed. Reg. 13209 (Mar. 6, 2017).
8. HROs engage in many different types of activities (such as service provision, community outreach and education, or lobbying state governments), and may not engage at all in the kind of micromobilization campaigns we describe. However, even HROs such as Human Rights Watch that have not traditionally focused their efforts on persuading grassroots activists have increasingly engaged in more “broad-based” strategies. Kyla Jo McEntire, Michele Leiby, & Matthew Krain, *Human Rights Organizations as Agents of Change: An Experimental Examination of Framing and Micromobilization*, 109 AM. POL. SCI. REV. 407 (2015), available at <http://discover.wooster.edu/mkrain/files/2012/12/>

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9. McEntire et al., *supra* note 8.
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 13. *Syria: Origins of the Uprising*, BBC (June 8, 2012), <http://www.bbc.com/news/world-asia-17344858>.
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Climate change. Global warming.
A big chunk of Antarctica just fell off.
The seas are rising. Palau is sinking.
Can the ICJ fix it?

Great case study for my students.
Ever heard of Palau? Did you know it was a U.S. colony?
But I digress.

While we weren't looking the clowns came in. The scary kind.
Go to sleep one night, joking about them.
Wake up the next day and they're in charge.
All oil pipelines are hereby approved
The EPA is run by a guy who wants to disappear it.
The Park Service can't tweet.
The USDA can't tell us what's in our food.
And ExxonMobil's CEO is in charge of world peace.

Climate change is a hoax, the clowns tell us.
The Chinese invented it to steal our jobs. Or maybe our
hair spray.

Do people really believe this? Maybe so.
Apparently one in four Americans doesn't know the earth
revolves around the sun.
What *have* they been teaching our kids?
But that's another story.

What is to be done?
March for Science. March for Truth. March, march, march.
Those marchers are mad.

Natsu Taylor Saito is a renowned human rights attorney, scholar, and professor. But, she tells us, "this definitely does not reflect the views of my employer. I was supposed to write a nice academic essay. But only a rant came out."

They want to know why so many people deny the facts.
Don't those deniers know that science brought us progress?
Made us rich?
That we need it to fix everything we screwed up?

Wait. Is this that science that brought us nuclear power?
Drones? Roundup?
Told us to drink the water in Flint?
Put beads in skulls to figure out who's smartest?
Sterilized us for our own good?
Put our ancestors' bones in their museums?
This is getting a little messy.

Maybe they're talking about the science that's so proud of
itself for figuring out
That there really were ages of fire and ice.
That animals do talk to each other.
That without bees, nothing is going to grow.
One day science might even tell us we're all related.

But in the meantime, what about those people who believe all
those *other* stories?
That we can keep digging up dead stuff and burn it and
still breathe the air.
That we can keep bombing other people's countries and
not have enemies.
That locking up babies makes life safer.
That Black and Brown and Red and Yellow people
are scary. And stealing their jobs, their schools,
their country.
Who taught them this?

Maybe we do have to get back to that what-did-you-learn-in-
school-today story.
Let me guess.
Christopher Columbus discovered America. And it was
a good thing.
Pretty sure everyone's taught that.

They say origin stories tell us who we are.

Where we come from. Where we are going.

So, who was this guy, anyway?

Cristóbal Colon, they called him. Crystal Ball the Colonizer.

Italian? Spanish? Portuguese? A *converso*?

No one really seems to know.

But that's ok. Definitely a White guy.

(Heard a Black guy had to show him the way, but why mess up a good story?)

And there's America, just waiting to be discovered.

It was already America, the most powerful country on the planet.

Ripe for the picking.

It wasn't Turtle Island, home to hundreds of nations. Nope.

No one was here. Well, almost no one.

We have the Pilgrims and John Wayne to take care of that.

And those diseases no one is responsible for.

Those Indians, they just disappeared.

But don't worry, we honor them every day.

The Redskins. The Braves. Squaw Peak.

In any case, if you discover something, you get to keep it, right?

In law school we teach it this way:

On the discovery of this immense continent . . . blah, blah . . . the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy.¹

Blah, blah, and to keep the Europeans from killing each other, they decided *that discovery gave title . . . which title might be consummated by possession.²*

That John Marshall had a way with words.
But it's the same story.

Columbus discovered America.

The land of the free. Or was it the brave?
Those colonizers worked hard.
Their science and industry brought riches, power,
Progress.
Stolen lands and enslaved labor? Those were just
passing phases.
Unfortunate, no doubt. Sort of like collateral damage.
But worth it.

You who are now so outraged about the denial of truth:

Did you contest this origin story? Do you?
It surrounds us, smothers us, every day.
“But don't you think things are getting better?”
Here comes that Progress again.
No, actually, I don't.

“You can't replace us,” those blond boys proclaim from their
torchlit parade.

“Blood and Soil!” Heard that somewhere before.
Clearly these guys have drunk the Koolaid.
But who's been making it and passing it out, all these
years?
Why wouldn't they think that Columbus discovered
America, for *them*?
Their blood. *Their* soil.

When the Tainos don't matter, or the Pequots, or Sand
Creek, or Wounded Knee, or Standing Rock, or Puerto
Rico, why would anyone care about Palau, just another
little colony sinking below the waves?

If we can pretend that we're not on illegally occupied lands,
benefitting daily from slave labor of one kind or another,

locking up or killing those who are inconvenient, why
can't we pretend the oceans aren't rising?

Which truths are ok to deny, and which ones are we supposed
to be mad about?

It's hard for me to see the outline.

Except maybe that it's *your* kids now.

My father told me to never trust a liberal.

But then he had a chip on his shoulder.

Something about being a kid in an internment camp.

And the resounding silence of the liberals.

But that's another story.

NOTES

1. Excerpted from *Johnson v. M'Intosh*, 21 U.S. 543, 572-73 (1823).
2. *Id.*



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anything imagined in the 1970s. Along with metadata, they can provide police with the location of the cell phone and the content of its communications, such as conversations and text messages, though a warrant is still required before capturing communicative content. In “Stingrays” Joshua Dansby explains how *Smith* has been misconstrued so as to permit the widespread use of this new intrusive technology. Dansby proposes a number of methods for preserving our privacy. His article could hardly be timelier. This year, the Court will be considering *Carpenter v. U.S.*,³ which will finally force a reconsideration of an increasingly dangerous holding in *Smith*.

In “Will Koreans Count This Time?” William S. Geimer examines the alarming bellicosity between the Trump administration and North Korea within the much-needed context of the U.S.’s historical role as an imperial power during and after the Korean War. Though too dangerous for consideration, it seems, in corporate media and elite academic periodicals, his modest proposal is this: Why not let Koreans, north and south, take the lead in determining their own fate?

“An Algorithm for Capturing White HeteroPatriarchy: The Parable of the Woman Caught in Adultery” by Blanche Cook thoughtfully deploys a biblical tale to expose and explain how certain forms of hegemonic power function in the U.S. One needn’t be a believer to recognize the truths. Originally delivered as a TEDx talk, Professor Cook’s interpretation of the New Testament tale is as fascinating as it is liberating.

Sarah Davila-Ruhaak is doing extraordinary humanitarian legal work on behalf of some of the most vulnerable and oppressed people on earth. She is the Director of the International Human Rights Clinic at The John Marshall Law School in Chicago where she leads the Human Rights for Syrians Initiative (HRSI). In “The Sprouting of Human Rights Initiatives in the Midst of a Storm of Resistance to Refugees” she assesses the legal, political, and social plight of the luckless civilians fleeing for their lives from one of the world’s most perilous warzones. It also details the extraordinary work HRSI is doing to help Syrians who have escaped to the U.S. adjust to life in their new country.

NLGR asked renowned human rights attorney and law professor Natsu Taylor Saito, an expert on harmful effects of colonization, if she’d contribute an essay on the threats connected with the contempt for science and nature shown by various Trump appointees leading executive branch regulatory agencies. She responded with a poem titled “Denial,” which we’re proud to print.

—Nathan Goetting, editor in chief

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1. 442 U.S. 735 (1979).
 2. Rebutting the Court’s wrongheaded reasoning—which suggests that the mere act of using a telephone (a prerequisite for inclusion in modern society) implies the forfeiture of privacy rights to significant amounts of personal information—is beyond the scope of this preface. However, I recommend the reader consider the persuasive dissents in this case written by Justices Stewart and Marshall.

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