

*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

In the 2013 case of *Fisher v. University of Texas* the current Supreme Court surprised many when it chose not to eliminate or radically narrow its 2003 ruling that allowed race to be a factor in higher education admissions. But there was hardly any relief among racial justice activists. Just a few weeks before the ruling in *Fisher*, the Court agreed to hear *Schuette v. Coalition to Defend Affirmative Action*, whose opinion we now await. In “Diversity, Democracy and White Racial Identity: *Schuette v. Coalition to Defend Affirmative Action*,” renowned scholar Osamudia R. James analyzes *Schuette* while providing a much-needed critique of “diversity” as a justification for affirmative action.\*

Tyler Somes’s “The Legal Services NYC Strike: Neoliberalism, Austerity and Resistance” is a history of the movement toward public legal assistance for the indigent, an argument that workers providing these services should be energized and politicized, and an inspiring story of workers who thoughtfully and courageously (and successfully) protected their interests by going on strike.

Eric Allen Engle’s “The International Criminal Court and *Lubanga*: The Feminist Critique and *Jus Cogens*” explores the reactions and consequences of the ICC’s punishment of Thomas Lubanga, the first person to be convicted by that court, for “conscripting and enlisting” child soldiers into his militia during a protracted spasm of inter-ethnic slaughter that ravaged northeastern parts of the Democratic Republic of the Congo about 10-15 years ago. Special attention is given to feminist concerns about the case.

Margaret Shikibu’s “Work like a Dog: Expanding Animal Cruelty Statutes to Gain Human Rights for Migrant Farmworkers in the U.S.” reads at first like Swiftian satire. But as one proceeds through the legal analysis to the startling realization that the rights of non-human animals can compare favorably against those of the workers who toil to bring the food we buy to market, any impulse toward amusement is displaced by an urge to resist.

—Nathan Goetting, *editor-in-chief*

\*On April 22, 2014, the day this issue was submitted for publication, the Supreme Court decided to uphold Michigan’s ban on affirmative action. The vote was 6–2. —NG

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**Osamudia R. James**

**DIVERSITY, DEMOCRACY AND  
WHITE RACIAL IDENTITY:  
*SCHUETTE V. COALITION TO  
DEFEND AFFIRMATIVE ACTION***

Spring of 2014 will bring an opinion in *Schuette v. Coalition to Defend Affirmative Action*, the Supreme Court's latest case implicating affirmative action in higher education. When issued, it will follow the Court's last pronouncement on affirmative action, made in June 2013 in *Fisher v. University of Texas*. In that opinion, the Supreme Court affirmed that an institution of higher education's consideration of race in the admissions process is subject to strict scrutiny when under constitutional review.<sup>1</sup> In doing so, the Court also implicitly reaffirmed the diversity rationale, as articulated in *Grutter v. Bollinger*, which allows institutions of higher education to consider race in the admissions process when necessary to admit a diverse entering class. For diversity advocates the *Fisher* holding was a relief, if not a decisive victory, regarding affirmative action, as Justices Scalia and Thomas made clear that the only reason they refrained from striking down the diversity rationale was because they had not been explicitly asked to do so.<sup>2</sup> *Schuette* now presents yet another opportunity for the Court to revisit the diversity rationale, and as such, the continuing viability of affirmative action in higher education is again in question.

The issues to be resolved in *Schuette* also present an opportunity to examine perceptions of race and racial inequality in our democracy, and to consider how the diversity rationale shapes those perceptions. Following the Supreme Court's decision in *Grutter* to affirm the diversity rationale, anti-affirmative action activists mobilized in opposition. In Michigan, activists successfully placed Proposal 2 onto Michigan's 2006 statewide ballot, an initiative to amend the Michigan Constitution to "prohibit all sex- and race-based preferences in public education, public employment, and public contracting."<sup>3</sup> After a balloting process in which activists resorted to deceptive tactics,<sup>4</sup> it ultimately received enough votes to pass by a margin of 58 percent to 42 percent.<sup>5</sup> Now enshrined in the state's constitution as Article 1, Section 26, Proposal 2 ensures that race, sex, color, ethnicity, or national origin cannot be considered in admissions decisions within the State of Michigan, despite the fact that consideration of the same is specifically permitted by *Grutter*.

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Osamudia James is a professor at the University of Miami School of Law. She writes and teaches in the areas of education law, race and the law, administrative law, and torts. Her recent work includes "White Like Me: The Diversity Rationale's Negative Impact on White Identity Formation," in the *New York University Law Review*, and "Opt-Out Education: School Choice as Racial Subordination," published in the *Iowa Law Review*.

Proposal 2 was eventually challenged by the Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by Any Means Necessary (BAMN), in conjunction with a group of concerned faculty members and prospective and current students at the University of Michigan (the Cantrell Plaintiffs). Writing for the Sixth Circuit, Judge Cole struck down Proposal 2, explaining that it unconstitutionally “‘targets a program that inures primarily to the benefit of the minority’ and reorders the political process in Michigan in a way that places special burdens on racial minorities.”<sup>6</sup> Advocates for other types of admissions criterion, he continued, including athletic ability, geographic diversity, or family alumni status, have several options for having the state adopt an admissions policy that considers that factor, including “lobbying the admissions committee, petitioning university leadership, influencing the school’s governing board, or initiating a statewide campaign to alter the state constitution.”<sup>7</sup> “In contrast,” he further explained, “minority students seeking to adopt a constitutionally permissible race-conscious admission policy can only do one thing: amend the Michigan constitution, a process that is described as ‘lengthy, expensive, and arduous. . .’”<sup>8</sup> Judge Cole ultimately concluded that because Proposal 2 forces minorities to “surmount procedural hurdles in reaching their objectives over which other groups do not have to leap,” it thus presents an equal protection violation.<sup>9</sup>

Now on *certiorari* to the Supreme Court, the final decision in *Schuette* may significantly impact the fate of race-conscious admissions policies in higher education. Current arguments in support of Proposal 2, however, also reflect problematic understandings of the nature of race and racism in the United States—understandings that are formed, in part, by current deployments of the diversity rationale itself.

The diversity rationale has a *negative* impact on white understanding of race and racial inequality. Although deployed in support of a more racially inclusive higher education sector, the rationale does not actually contribute to progressive thinking about race and identity. Rather, it perpetuates an old story about using black and brown bodies for white purposes, as institutions of higher education often do when they admit students of color to capitalize on the social and cultural capital that amasses to “diverse” institutions in the United States. The University of Wisconsin, for example, photoshopped a student of color into an admissions brochure to portray a more racially diverse campus than it actually had. As scholars have thoughtfully noted, using students of color in this way commodifies racial identity, distancing individuals from an integral aspect of their personhood.<sup>10</sup> When diversity is pursued for primarily aesthetic reasons, it is also often unaccompanied by initiatives to genuinely improve the racial climate on campuses and surrounding communities. These weak commitments to diversity easily buckle under the pressure of hard times; indeed, diversity initiatives are often the first to be jettisoned in times of financial hardship.<sup>11</sup>

The diversity rationale also reinforces the transparency of white racial identity, while emphasizing innocent white identity, because it is untethered to notions of social and racial justice, the nature of both individual and structural discrimination, or consideration of the impact of white privilege in both the admissions process and society more generally. Unaware of the privileges that inure to being white, students cannot understand the racialized disadvantages that often attach to being non-white. Whites begin, then, to perceive diversity initiatives and affirmative action programs as a sort of “reverse discrimination,” where Whites are the innocent victims of programs and policies that benefit undeserving non-Whites who didn’t “work as hard” as victimized Whites. One need look no further than Abigail Fisher, the lead plaintiff in *Fisher v. University of Texas*. Asked why she was challenging the University of Texas’s use of race in its admission policies, she explained that the *only* difference between her application and that of her minority peers that were awarded admission was “the color of [their] skin,”<sup>12</sup> and that in challenging the policy, she “hop[ed] that [the Supreme Court would] take race out of the issue in terms of admissions and that everyone will be able to get into any school that they want no matter what race they are but solely based on their merit and if they work hard for it.”<sup>13</sup>

Superficial deployments of the diversity rationale in higher education also leave college students unprepared for democracy. As explained by Danielle Allen, citizenship consists of “long-enduring habits of interaction [that] give form to public space and so to our political life.”<sup>14</sup> In a pluralistic society with no shortage of racial inequalities, full citizenship cannot be realized unless everyone is given an opportunity to form those social and political habits of interaction. A commitment to equal citizenship, then, necessarily requires a commitment to bringing everyone into the franchise, even as it requires recognition that privilege cannot be maintained for particular groups. For Whites, this commitment can only develop when accompanied by an honest assessment of white privilege, an understanding of how that privilege perpetuates racism and differential societal status, and a willingness to release that privilege.

Current deployment of the diversity rationale, however, fails to encourage those developments, resulting instead in white racial-identity performance that is unaware that collective democratic action involves communal decisions that will “inevitably benefit some citizens at the expense of others, even when the whole community generally benefits.”<sup>15</sup> Affirmative action might be considered one such decision, particularly because the “benefit” is actually a correction for racial exclusion. Whites, however, are often unprepared to incur any cost if the ultimate benefit inures to people of color—even if that benefit is actually part of a just redistribution. This zero-sum view of dominance and power underlies the problematic distribution of power, privilege, and political representation by race and makes impossible the sort of inclusive democracy for which we should strive.<sup>16</sup>

Which brings us back, then, to *Schuette*. The very Michigan constitutional amendment that prompted the case is an example of the problems with the current deployment of the diversity rationale. Divorced from any conception of remediation or social justice, diversity is a palatable goal as long as it remains non-threatening. When, however, Whites are asked to relinquish some measure of privilege to bring others into the franchise, diversity is quickly jettisoned; unanchored from moorings that fully articulate the need for diversity, it becomes all too easy to assert that the pursuit of diversity is not just inconvenient, but also reverse racism. In the context of the *Schuette* case, Proposal 2, deceptively cloaked in language that purported to promote equality, ultimately passed. Passing a ballot initiative to amend a state constitution sounds like a legitimate democratic exercise, but was actually the use of a democratic process to further exclude minorities and other socially marginalized groups from access to representation, participation and power.

In his Sixth Circuit opinion, Judge Cole admirably highlighted the democratic defect that Proposal 2 and the ensuing amendment to Michigan's constitution reflect: Proposal 2 effectively makes it more difficult for minorities to petition their government officials to properly account for structural disadvantage based on race or ethnicity. Proposal 2 does not, as Michigan Attorney General Schuette argued in his Supreme Court brief, merely require equal treatment of the laws.<sup>17</sup> Rather, by endorsing a constitutional amendment that requires absolute "race-neutrality," structural disadvantage by race is ignored as long as it is not reflected in official policy. As a result, state admissions policies that do account for structural advantage by allowing admissions officers to consider race or ethnicity as one factor in decisions become the only "discriminatory" policies that need to be dismantled.

The irony, of course, is that it is precisely a superficial deployment of diversity that has helped advance this inversion of equal protection jurisprudence. Both ahistorical and acontextual, the diversity rationale ignores issues of racial or social justice, and is silent on the privilege typically afforded Whites in the public school system, from elementary school to higher education. Such a view of race and discrimination in the United States has informed the Supreme Court-sanctioned "colorblind" approach to equal protection, which finds a potential equal protection violation whenever the state differentiates between similarly situated groups.<sup>18</sup> In the context of race, this has led to the preservation of facially neutral laws that have a disparate impact on minority groups, such as Proposal 2. These laws are upheld so long as no intentional discriminatory purpose is found. At the same time, race-conscious government policies that are implemented with the specific intent to ameliorate racial inequality are prohibited.<sup>19</sup>

To be clear, the goal of diversity is not the problem, as I support and endorse efforts to diversify institutions of higher education. Indeed, institutions

that function as gatekeepers to valuable social and cultural capital are fundamentally illegitimate if that access is limited to the racially and economically privileged. Rather, it is the ways in which Whites react to those goals, as informed by the superficial deployment of the diversity rationale, that is the problem. Although the diversity narrative is one of inclusion, by magnifying the transparency phenomenon, the rationale encourages simplistic and unrealistic notions of merit, while discouraging recognition of white privilege. It also perpetuates white identities grounded in racial innocence, such that would-be plaintiffs are free to challenge even the diversity rationale, itself, as unfair to Whites.

Unless remedied, the impact of the diversity rationale on white racial identity and understanding of race has long-term negative consequences for racial justice. We are, for example, potentially on the precipice of a Supreme Court decision in *Schuette* that will provide a model for others opposed to affirmative action to eliminate it through “democratic” processes. To prevent this, institutional narratives about diversity and use of the diversity rationale as justification for race-conscious measures must shift away from narratives about the usefulness and benefits of diversity toward a narrative that also address the illegitimacy of all-white institutions. Diversity is not just about training students for a global marketplace, citizenship, or deepening intellectual exchange—it is also about broadening access to social and cultural capital for all, including poor people and people of color.

At colleges and universities, this means more than a blurb about diversity in the glossy pages of admissions materials. Instead, institutions should initiate broader campaigns committed to informing potential and current members of university communities that their mission necessarily includes broadened access for all. All schools may not necessarily adhere to such a mission, but institutions that advocate a commitment to the diversity rationale in admissions purportedly do and so can be expected to deepen their commitment to diversity in ways that positively impact white racial identity.

Relatedly, institutional commitments to individualized review must be better contextualized for students. Admissions is an inherently individualized, subjective, and idiosyncratic process. That reality, however, should not be used only to justify the consideration of race, but should also be used to help students understand the multitude of factors that are considered in the applications of each student. Individualized review may consider the athletic background of some students, the legacy status of others, and the unique social experiences of minority students—experiences that are informed by race, no matter what the student’s ultimate worldview. Individualized review may also consider the racial or ethnic background that privileges some students prior to college. Other factors like class or disability may (or may not) mitigate or compound marginalization or privilege on account of race and ethnicity, and



admissions officers will often have to make hard decisions about how these factors affect students, and whether the institution would be best served by that student's admission and enrollment. To this extent, individualized review does not attempt to *remedy* societal discrimination, but it does take into account the social impact of race on *all* applicants—white and non-white—and on the institutions themselves, and should be discussed as such. The goal is not necessarily to make every rejected (or admitted) applicant perfectly happy with an institution's admissions decisions, but to help the Abigail Fishers of the world accept those decisions by enabling them to understand the larger societal context in which those decisions are made.

In the post-admissions context, a more substantive commitment to diversity might look like mandatory classes for incoming students about the racialized nature of opportunity and inequality in the United States.<sup>20</sup> Given the aspects of white identity most negatively impacted by superficial deployments of diversity, such a course would explore white and non-white racial identity, racial privilege, or narratives of meritocracy in the United States. This approach signals not just a commitment to improved racial climate, but a step toward unpacking myths about merit while making white privilege more visible, such that anti-racist white identity can develop. Lest such a mandate seem unnecessary, consider the Minneapolis Community and Technical College, where a Professor of English and African Diaspora studies was formally reprimanded under the College's anti-discrimination policy for making white students feel uncomfortable in her classroom discussions of structural racism and white privilege.<sup>21</sup>

Ultimately changes like these can help mediate the flawed social and political climate that led to Proposal 2 in the first place. In the meantime, we must rely on the Supreme Court's forthcoming opinion in *Schuette* to uphold Judge Cole's attempts to right the political defect that our current diversity rationale has promoted. Given, however, the hints that several Justices dropped in *Fisher*, you'll forgive me if I am not holding my breath.

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#### NOTES

1. *Fisher v. Univ. of Tex. at Austin*, 570 U.S. \_\_ (2013) (“To be narrowly tailored, a race-conscious admissions program . . . must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant’s race or ethnicity the defining feature of his or her application.”).
2. *See Fisher v. Univ. of Tex. at Austin*, 570 U.S. \_\_ (2013)(Scalia, J., concurring)(“...[T]he Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception. The petitioner. . . did not ask us to overrule *Grutter*’s holding that a “‘compelling interest”’ in . . . diversity can justify racial preferences in university admissions. I therefore join the Court’s opinion in full.”); *Fisher*, 570 U.S. \_\_ (2013)(Thomas, J., concurring); (“I join the Court’s opinion. . . I write separately to explain that I would overrule *Grutter v. Bollinger*, and hold that a State’s use of race in higher education admissions decisions is categorically prohibited by the Equal Protection Clause) *Fisher v. Univ. of Texas*, 570 U.S. \_\_ (2013).
3. Anti-affirmative action activists had previously successfully championed a similar proposition in California. California Civil Rights Initiative (209).



4. See, Operation King's Deram v. Connerly, 501 F. 3d 584, 591 (2007) ("The record and district court's factual findings indicate that the solicitation and procurement of signatures in support of placing Proposal 2 on the general election ballot was rife with fraud and deception. Neither Defendant group has submitted anything to rebut this. By all accounts, Proposal 2 found its way on the ballot through methods that undermine the integrity and fairness of our democratic processes.")
5. Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by Any Means Necessary (BAMN) v. Regents of the University of Michigan, 701 F.3d 466 (2012).
6. *Id.*, at 477.
7. Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by Any Means Necessary (BAMN) v. Regents of the University of Michigan, 701 F.3d 466 (2012).
8. *Id.*
9. *Id.*
10. Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151 (2013).
11. *Id.*, at 2211 (explaining that institutional diversity initiatives are often eliminated or reduced when economic hardship necessitates spending cuts).
12. Mike Tolson, *Supreme Court to Take Up UT Admissions Case*, HOUS. CHRONICLE (Oct. 7, 2012).
13. Adam Liptak, *Race and College Admission, Facing a New Test by Justices*, N.Y. TIMES, Oct. 8, 2012, at A1.
14. DANIELLE S. ALLEN, TALKING TO STRANGERS: ANXIETIES OF CITIZENSHIP SINCE *BROWN V BOARD OF EDUCATION* 10 (2004).
15. *Id.*
16. See LANI GUINIER & GERALD TORRES, THE MINER'S CANARY 111(2002), for a description of a zero-sum conception of power in the United States in which one group's benefit necessarily comes at another's expense. Guinier and Torres, however, also conceptualize a more transformative understanding of power that allows groups to discover that the hierarchy of power itself—not one another—is their common antagonist. *Id.* at 130.
17. Reply Brief, *Schuette v. Coalition to Defend Affirmative Action* 5, No. 12-682.
18. See Darren Lenard Hutchinson, "Unexplainable on Grounds Other Than Race": *The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. ILL. L. REV. 615,637-55 (2003)(using the court's colorblindness jurisprudence, including *Univ. of CA v Bakke*, in the context of affirmative action to illustrate how this framework treats Whites with racial privilege as politically vulnerable, while treating socially subordinate persons of color as privileged).
19. See, e.g. *Gratz v. Bollinger*, 539 U.S. 244 (2003) (striking down an admissions policy that awarded a specific number of points to minority applicants because race was purported outcome determinative); *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007) (striking down controlled-choice plans that sought to integrate schools and broaden minority access to competitive schools because the racial identity of students was considered in school assignments).
20. Research has found, for example, that courses on multiculturalism and race relations positively impact racial attitudes. See Rachel Moran, *Diversity and Its Discontents: The End of Affirmative Action at Boalt Hall*, 88 CAL. L. REV. 2241, 2264 (2000)(exploring the change in the educational experiences of students at Boalt Hall after the elimination of affirmative action).
21. *Want to Teach Your Students About Structural Racism? Prepare for a Formal Reprimand*, SLATE, December 3, 2013, [http://www.slate.com/articles/life/counter\\_narrative/2013/12/minneapolis\\_professor\\_shannon\\_gibney\\_reprimanded\\_for\\_talking\\_about\\_racism.html](http://www.slate.com/articles/life/counter_narrative/2013/12/minneapolis_professor_shannon_gibney_reprimanded_for_talking_about_racism.html).



## **Tyler Kasperek Somes**

### **THE LEGAL SERVICES NYC STRIKE: NEOLIBERALISM, AUSTERITY AND RESISTANCE**

In the summer of 2013, the Legal Services Staff Association (LSSA) launched a six-week strike to conclude a protracted round of contract negotiations with their employer, Legal Services NYC (LSNYC). The strike effectively shut down LSNYC, the nation's largest provider of civil legal services to low-income individuals.

On May 1, 2013 the LSSA's bargaining team rose from their seats, walked across the glass and marble atrium, collected their belongings and descended thirty-one stories to the street in Times Square without a deal. They would be back soon enough, but not to negotiate.

In a town with three-quarters of a million union members, every single one of New York City's 153 municipal labor contracts stood expired as they left the building. Most union members had been without a raise since at least 2009, even as the cost of living increased every year.<sup>1</sup>

This is the story of a small movement, but one bursting with ambition. The 240 members of LSSA represent a mere drop in the bucket of the local labor union membership. Yet, they were able to build a campaign of rank and file mobilization that defeated concessionary demands and secured new workplace protections, even in the presence of anticipated budget deficits and wage freezes across the city.

In many ways, the progressive movement is approaching a crossroads. In the last several decades the country's economic elites have succeeded in consolidating their control over the political process and weakening working class institutions under a banner of neoliberalism. The first part of this article supports that assessment by examining the history of the federal Civil Legal Services program as neoliberalism was on the rise. The second part introduces a critique of modern non-profit legal services organizations for failing to even attempt to strengthen the political power of their clients and the communities they serve. Only by contributing to campaigns to build power relative to corporate actors will progressive groups be effective in advancing structural solutions to the problem of poverty. The LSSA's success demonstrates how this can be done.

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The strike at Legal Services NYC shows that the people working in these agencies are already capable of successful movement-building. It suggests an alternative approach to civil legal services, one where representation is only the beginning of a relationship that leads into issue-based community organizing and strategic campaigning for progressive reform.

### **Neoliberalism as a political project**

*“Hey Joe, Hey Joe! Your corporate greed has got to go!”* chanted hundreds of strikers and their allies as they established picket lines at the entrances of One JP Morgan Chase Plaza, a towering skyscraper in the heart of Manhattan’s financial district. Within minutes, security personnel closed and locked the front entrance, directing credentialed entrants to use a nondescript door in the back of the building.

As the former world headquarters of JP Morgan Chase, this address has seen its share of protests. When the housing market collapsed in 2008, Chase emerged as the kingmaker in the economic crisis, absorbing Bear Stearns and Washington Mutual to become the nation’s largest bank by assets. The six and seven figure salaries common in the financial industry stand in stark contrast to the paychecks of middle America, where millions of homeowners face foreclosure on the same mortgages that were issued by predatory lenders, pooled together by the big banks, stamped “AAA” by the rating agencies and resold at enormous profits.<sup>2</sup>

Chase Plaza is also home to Milbank, Tweed, Hadley and McCloy, a corporate law firm where the chairman of the Legal Services board of directors, Joseph Genova, is one of the equity partners. Milbank frequently represents the financial houses, including JP Morgan Chase, where Mr. Genova’s spouse is employed in the general counsel’s office. With this background, Mr. Genova might seem an unlikely figure to lead the nation’s largest provider of civil legal services to low-income individuals, but such is the state of today’s non-profit legal services sector.

In the half century since the foundation of the federally funded Civil Legal Services, the United States Congress has imposed a series of reforms that fundamentally reshaped the program. But in the period before the reforms CLS advocates helped build the welfare rights movement, posing a credible challenge to the mainstream political establishment and winning significant victories. This provides us an opportunity to question the nature of neoliberal power and establish a conceptual framework for developing strategies to counter neoliberal hegemony.

According to Professor David Harvey of City University of New York, neoliberalism may be understood as either “a *utopian* project to realize a theoretical design for the reorganization of international capitalism or as a *political* project to re-establish the conditions for capital accumulation and to

restore the power of economic elites.”<sup>3</sup> The terms of this reorganization involve limiting the state’s role in the economy by reducing taxes, cutting government spending and privatizing public services. In *A Brief History of Neoliberalism*, Harvey argues persuasively that the political project is the objective of neoliberal policymakers, while the economic rationale serves as “justification and legitimation for whatever needed to be done to achieve this goal.”<sup>4</sup>

Why did economic elites need to “restore” their power, according to Harvey’s thesis? In the post-war era, social democracy expanded in the United States. The working class gained a measure of political influence through the institutionalization of labor unions, federal protection of voting rights, the expansion of the welfare state, and wider access to legal representation. This facilitated a compromise between elites and the working class: from 1945 to 1965, the percentage of national wealth controlled by the richest one percent of Americans remained relatively constant.<sup>5</sup>

In that period, the American economy experienced two decades of regular growth encouraged by Keynesian demand-management, an economic policy whereby the government maintains high levels of spending to stimulate the private sector.<sup>6</sup> In the mid-1960s, however, this regime began to collapse as inflation spiked from a rate of 1 percent per annum in the early 1960s to 11 percent by the mid-1970s.<sup>7</sup> Assets held in dollars (real estate, capital stock, etc.) declined in value relative to other currencies, a development that disproportionately affected wealthy Americans. At the same time, rates of profits tumbled precipitously, meaning that investments and business ventures yielded comparatively smaller returns to their shareholders.<sup>8</sup> The wealthiest 1 percent of Americans experienced a sharp decline in their share of the national wealth, a drop estimated at between 5 and 15 percent in a single decade.<sup>9</sup> This triggered a political reaction from elites designed to prevent further redistribution of their wealth: the neoliberal movement.

The story of what happened to the CLS program as neoliberalism took hold broadly supports Harvey’s perspective. During its early years, the CLS program contributed meaningfully to the political empowerment of poor and working class people, but its very success made it a target of neoliberal policymakers intent on neutralizing its effectiveness.

### **Civil Legal Services and the welfare rights movement**

In the well-known case of *Gideon v. Wainwright*, the Supreme Court ruled in 1963 that every United States citizen charged with a felony has a constitutional right to counsel under the Fourteenth Amendment.<sup>10</sup> Subsequent decisions extended this right to misdemeanor and juvenile offenses.<sup>11</sup> These decisions compelled every county in the United States to establish a system of representation for people otherwise unable to afford counsel, dramatically expanding access to legal representation and creating a new corps of public defense attorneys.

Legal representation in civil matters never received such a broad judicial mandate. There is no right to counsel for tenants facing eviction, homeowners facing foreclosure, immigrants facing deportation, or spouses facing abusive partners. However, Congress appropriated funding for a nationwide CLS program in the Economic Opportunity Act Amendments of 1966 as a part of the War on Poverty. In a one-year period, over 300 agencies received \$42 million in funding, leading to the creation of over 800 community law offices and over 2,000 lawyers for the poor. By the early 1970s, this system was comparable in size to the United States Department of Justice and all of the U.S. Attorney offices.<sup>12</sup>

The War on Poverty has come under criticism in radical-left discourses as a strategy to preserve capitalism in the wake of the sustained social upheavals of the 1960s.<sup>13</sup> Indeed, Office of Economic Opportunity (OEO) Director Sargent Shriver often framed the effort as a riot-prevention program, despite an intentional omission of this rhetoric from the OEO mission statement.<sup>14</sup> It is true that “relief” (transfer payments, economic stimulus, etc.) comprised one part of the New Deal coalition’s strategy for managing potentially insurrectionary social movements, but “relief” has given way to “discipline” under the neoliberal regime. Although this acknowledgment may seem to stand in uneasy equilibrium with attempts to rediscover the transformational potential of some War on Poverty programs, the two perspectives are not necessarily mutually exclusive.<sup>15</sup>

In 1967, the OEO’s Office of Legal Services announced that CLS providers pursuing “law reform” (broad legal challenges to specific practices or systems) would receive priority funding over those emphasizing individual casework.<sup>16</sup> CLS attorneys were markedly successful in this endeavor: they brought 164 cases before the Supreme Court in eight years, of which they won seventy four.<sup>17</sup> This was a dramatic increase from the previous ninety years, in which not one legal aid staff attorney had taken a case before the Supreme Court.<sup>18</sup>

In addition to courtroom victories, CLS attorneys made strategic and operational contributions to campaigns of mass mobilization. Among the best examples is Mobilization for Youth’s (MFY) alliance with the welfare rights movement in New York City. This is also interesting because the employees of its successor, MFY Legal Services, are today also members of the Legal Services Staff Association.<sup>19</sup>

Funded by initial grants from the Kennedy Administration and various foundations, MFY was a precursor to the storefront Community Action Agencies (CAAs) that were established by the hundreds during the War on Poverty.<sup>20</sup> MFY operated offices in several Manhattan neighborhoods where residents could receive direct services like legal assistance and registration for welfare. In addition, MFY conducted aggressive community organizing campaigns that included rent strikes against negligent slum owners, education

boycotts against school segregation and demonstrations at construction sites demanding jobs for people of color.<sup>21</sup>

While working as researchers at MFY, in 1966 Frances Fox Piven and Richard Cloward co-wrote an essay entitled *The Weight of the Poor: A Strategy to End Poverty*, in which they proposed an anti-poverty campaign “based on the fact that a vast discrepancy exists between the [welfare] benefits to which people are entitled and the sums which they actually receive.” By organizing people onto the welfare rolls *en masse*, they expected to create a “bureaucratic disruption in welfare agencies and fiscal disruption in local and state governments,” which would be resolved with reforms favorable to the poor, such as a guaranteed minimum income.<sup>22</sup>

Mobilization for Youth tested this “crisis theory” with a campaign to flood the Department of Social Services with applications for winter clothing grants, an item provided for under the welfare code but rarely requested by welfare recipients.<sup>23</sup> They hired a community organizer to recruit clients and establish the Lower East Side’s Committee of Welfare Families, one of many local welfare rights groups emerging around the city. When grant applications were denied by the city, MFY’s Legal Unit would request fair hearings with the Department, the mere request of which was usually sufficient to obtain the clothing allowance. In the end, two-thirds of the committee members received grants, which the organizers considered a resounding success.<sup>24</sup>

In 1966, welfare rights activists founded the Citywide Coordinating Committee of Welfare Groups (Citywide), which escalated along the trajectory outlined by Piven and Cloward. This umbrella organization consolidated dozens of local groups into a cohesive political movement, reaching a peak of political power in the late 1960s. The number of families on welfare rose dramatically, with over a million people on the city’s rolls and a billion dollars spent on cash assistance annually by the end of the decade, making it the single largest line item in the city’s budget.<sup>25</sup> Moreover, the percentage of eligible families on the rolls increased from 53 percent in February 1966 to nearly 62 percent in September 1966, an almost 10 percent spike in seven months. An exhaustive study by the Rand Corporation attributed this increase primarily to the effects of welfare activism in recruiting enrollees and de-stigmatizing welfare recipients in the eyes of their community.<sup>26</sup>

Strategists for the movement expected a breakthrough. Responding to acute financial pressure, Governor Nelson Rockefeller proposed a “flat grant” that would replace the system of “special needs” grants that formed the basis of Citywide’s organizing tactics. In most cases, the flat grant would have resulted in a lower overall payment to welfare recipients, so Citywide came out against the measure. They launched a series of increasingly militant actions seeking to defeat the flat grant, including a demonstration at the United Nations, ap-

pealing to the world on behalf of America's poor, and an occupation of the Commissioner of Social Service's office.

On an early morning in June 1968, Citywide learned about a meeting between the State Board of Social Welfare and federal officials convened to discuss the implementation of Rockefeller's proposal, which was yet to be approved by the legislature. Forty activists descended on the meeting and demanded to participate, pushing their way into the building while the officials locked themselves in a conference room. The welfare activists responded by occupying the building and banging on the door to the conference room with their shoes, producing banner headlines in newspapers across the state.<sup>27</sup>

Through a combination of lobbying and aggressive demonstrations, Citywide defeated Rockefeller's proposal in the state legislature. As exemplified by this success, the welfare rights movement achieved a moment of political and economic power in the late 1960s with material benefits for many thousands of poor people. The record levels of transfer payments in New York City during this period represent a highpoint in economic redistribution through public policy in the United States. By 1969, the National Welfare Rights Organization had over 25,000 dues-paying members and independently supported a national network of field organizers.

The welfare rights movement in New York City also benefited from legal analysis and legal tactics developed by Mobilization for Youth, an early example of federally funded civil legal services. MFY's contributions included the "crisis theory," the tactical use of hearings, the success of strategic litigation and a discourse around the rights of welfare recipients. At the Supreme Court, groundbreaking decisions such as *King v. Smith*, *Shapiro v. Thompson*, and *Goldberg v. Kelly* removed discriminatory barriers to welfare enrollment, making tens of thousands more people eligible for the Aid for Families with Dependent Children (AFDC) program and bringing it closer to a true entitlement for the nation's poor.

### **The rise of neoliberalism: The case of Legal Services**

President Richard Nixon's appointment of Donald Rumsfeld as Director of the OEO in 1969 could symbolically mark the beginning of the neoliberal era, during which White House administrations of both parties supported reducing the government's role in the economy. During this period, which continues today by all appearances, neoliberal policymakers have moved to sharply curtail the political agency of poor and working people and substituted "discipline" for "relief" as the public policy mechanism functioning to regulate social discontent.

Following its peak in the late sixties, the welfare rights movement suffered a series of setbacks as conservative politicians invoked the racialized discourse of "welfare queens" to increase their percentage of the white vote and win



elections, both nationally and in New York City.<sup>28</sup> Once in office, these policymakers introduced “welfare-to-work” reforms, transforming redistributive subsidies for people in poverty into a disciplinary mechanism that pushed them onto the lowest rung of the labor market.

In New York, Mayor Edward Koch created the Public Works Program in 1971, compelling individuals on Home Relief to work for municipal agencies as a condition of receiving benefits. When AFSCME District Council 37 attempted to unionize these positions, lawyers for the Koch Administration successfully argued that “the program was not really a job, and the participants were not really workers, and were thus not entitled to union representation,” a position that sheds light on the disciplinary function of the “welfare-to-work” reforms. Under Mayor Rudolph Giuliani’s signature expansion of the Work Experience Program, the work requirement was added to the eligibility criteria for AFDC, as well.<sup>29</sup>

After their participation in the welfare rights movement and other causes, MFY staffers came under an intense investigation by the New York Police Department and New York City Council. City Council President Paul Screevane withheld MFY’s funding pending the outcome of his inquiry and issued a report that criticized the MFY for fomenting racial discord by, among other things, organizing for the March on Washington.<sup>30</sup> In 1968, MFY’s legal department formed a new organization, MFY Legal Services, Inc., which focused exclusively on strategic litigation and individual casework. Today, this is the only branch of the historical MFY remaining. MFY’s community organizing efforts ground to a halt when foundations withdrew their funding and Congress eliminated the OEO’s Community Action Program.

The local response to MFY’s campaigns in New York presaged the neoliberal reaction to the CLS program nationwide. In 1974, the Ford Administration moved the program into the Legal Services Corporation (LSC), a new executive agency governed by a board of directors drawn from the partnership ranks of major law firms. As the governor of California, Ronald Reagan attempted to withhold all funding to California Rural Legal Assistance and carried this antipathy into the White House with an attempt to abolish the LSC in 1981. When speaking to the media, White House aides referred to its appropriation as “funding of the left.”<sup>31</sup>

Since the creation of the LSC, a series of regulatory restrictions has curtailed the most effective tactics used by these programs to advance economic justice. Prohibited activities now include legislative lobbying,<sup>32</sup> community organizing,<sup>33</sup> participating in public demonstrations,<sup>34</sup> participating in class action lawsuits<sup>35</sup> and conducting trainings that disseminate information about any prohibited activity.<sup>36</sup> These restrictions were introduced in legislation pushed by the Nixon Administration, the Reagan Administration and the Gingrich Congress, all standard bearers of neoliberalism.

Neoliberal policymakers have transformed the character and purpose of the American CLS program. At one time, the OEO assigned priority funding to projects advancing structural “law reform” in the interests of the vast majority of Americans. Today, the Legal Services Corporation polices the activities of its own funding recipients to enforce conformity with regulations designed to inhibit them from achieving that same large-scale reform.<sup>37</sup> As a test case of Harvey’s thesis that neoliberal policymakers undertook a deliberate project to dilute the political power of the poor and working people, the experience of the CLS program provides compelling affirmative testimony.

### **Austerity and authority**

After several decades of political dominance, the neoliberal movement has largely succeeded at transforming the American political system to protect and advance the interests of wealthy individuals and corporations. This project has paid off: the wealthiest 1 percent of Americans now controls about 34 percent of the nation’s wealth, up from a low of about 20 percent in the late 1970s.<sup>38</sup>

The consequences of this transformation are not limited to economic and political indicators. According to political scientist Wendy Brown, a neoliberal rationality now permeates mainstream discourses on every facet of American society, from education to familial relations to the justice system. Building on Foucault’s concept of “governmentality,” Brown argues that these discourses mold neoliberal subjects who apply entrepreneurial values as a determinative factor even in spaces traditionally separate from the logic of capitalism.<sup>39</sup>

In the 2013 contract negotiations at Legal Services NYC, management presented dramatic deficit projections as the rationale for demanding concessions from union negotiators on wages, retirement contributions and healthcare coverage.<sup>40</sup> Among other cutbacks, these changes would have interrupted physical therapy and mental health treatments midstream for a number of union members. They would have removed fertility procedures as an affordable treatment option; imposing a heteronormative condition on gay, lesbian, transgender and gender non-conforming couples which had not existed previously.

As in all unionized workplaces, the employer faced an obligation to bargain for these demands, rather than impose them unilaterally. The workers had time to investigate management’s financial projections and fight back against concessions. Over the course of bargaining, union negotiators neutralized the economic rationale for management’s preferred form of concessions, exposing the authoritarian impulse that constitutes a critical, if sublimated, part of neoliberal rationality.

Management’s demands were predicated on a “fiscal crisis” resulting from the reallocation of LSC appropriations away from New York City. Although poverty is increasing throughout the United States, it is increasing fastest in

the Southwest, which will receive a larger proportion of LSC funding in the coming years. As a result, LSNYC management projected revenue losses of \$5 million over two years, out of a \$46 million annual budget. This was exacerbated by the “sequester” cuts, which took an additional 5 percent from the annual LSC appropriation.<sup>41</sup>

The union’s negotiating team immediately contested these projections. They pointed out that even using management’s estimates, LSNYC could expect a working capital surplus of nearly \$7 million at the end of 2014.<sup>42</sup> Based on this, they pivoted to a two-year contract, which would expire in June 2014 (one year would be retroactive), when management anticipated \$10.75 million in working capital reserves.<sup>43</sup> This would provide an opportunity to delay cost-cutting measures to see whether the budget forecast would improve, as the union argued that it would.

In the final hours before the strike vote, the two main issues separating the union and management concerned questions of authority rather than finances. On healthcare, the union agreed to approximately the same financial savings as management’s proposal, but proposed to structure the cost burden in a way that would protect people undergoing expensive procedures. On job security, the union demanded that the ratio of managers to bargaining unit staff would not increase in the event of significant layoffs. On neither issue was the board of directors willing to concede to avoid a strike, despite the largely non-economic nature of the two principle disagreements.

With the economic rationale for concessions deconstructed the authoritarian impulse behind management’s demands became clearly visible. True to the dictates of the neoliberal project, austerity programs are built around this kernel of authoritarianism lurking beneath the economic rhetoric employed to justify concessions. In this case, however, the employer’s obligation to negotiate opened an opportunity to counter that rhetoric and the Legal Services Staff Association found a vehicle for resistance.

### **The Legal Services NYC strike**

During the contract negotiations, the LSSA bargaining team met with LSNYC management in the Times Square office of Seyfarth Shaw, an infamous union-busting law firm retained by LSNYC to advise them on the bargaining process. Marshall Babson, a partner at the firm, provided this advice, drawing on his experience as a Reagan appointee to the National Labor Relations Board and a board member of the U.S. Chamber of Commerce’s public policy law firm. By contracting with Mr. Babson, the Board of Directors signaled its readiness to use aggressive anti-union tactics typically employed only by for-profit corporations.

Fortunately for the union membership, rank and file activists initiated a campaign of education, mobilization and escalation several months before the strike. Early in the bargaining process, members designed eye-catching posters

that enumerated the extent of management's demands for givebacks, explained the funding situation, and illustrated the class divide between the Board and the employees. On citywide days of action, all union members displayed these posters in their offices, an early test of their ability to conduct collective action.

Over the winter, activists from different neighborhood offices convened the Activism Committee. The Committee charted a course of escalating actions that would peak in the spring ahead of a possible strike vote. In response to "bargaining updates" disseminated by management, the Activism Committee improvised an "e-mail action" whereby members sent a short message to executive leadership at the exact same time, effectively flooding their inboxes. Small actions such as this helped build a culture of resistance, in which people felt increasingly comfortable in their ability to confront authority and to express their perspective on the negotiations.

Street demonstrations were also a crucial part of the pre-strike mobilization. The union organized a traditional rally outside a Board meeting, a *cacerolazo* inside a Board meeting, a day of lunchtime pickets and even a one-day strike. Each protest built on the previous one by escalating the level of subversion of the normal workplaces roles and routines required to participate. They also benefited from the participation of community allies, such as workers at MFY Legal Services and the Rude Mechanical Orchestra. In the end, every single union member participated in the one-day strike, the product of targeted one-on-one conversations between co-workers.

By capturing each of these actions on camera, the union was able to produce an impressive amount of independent media. The union was able to build an audience and solidarity network in advance of the strike by promoting these actions on Facebook and Twitter. This created a feedback loop, where members could share the actions with each other, friends, family members and community allies. LSSA also registered a new domain name and built the website [www.savelegalservices.com](http://www.savelegalservices.com), a visually appealing landing page for all strike-related materials.

All of this occurred largely outside the official infrastructure of the parent union, the United Auto Workers, and the local union, the National Organization of Legal Service Workers Local 2320. While union staff was accommodating and encouraging, they did not assign any full-time organizers or communicators to the contract campaign. As the strike deadline approached, however, the union lent increasing support in bargaining and political outreach. This may be a helpful refrain for rank-and-file activists looking for support from their union staff in the future: build the campaign and they will come.

On May 1, as May Day demonstrations continued throughout Manhattan, the two bargaining teams met in the glass-walled office space of Seyfarth Shaw. The membership assigned this date as the bargaining deadline in an intentional acknowledgment of the history of working class struggle in which they

shared. Management's lead negotiator obliquely referred to it as "Law Day." Two weeks later, the union voted to strike by an overwhelming 88 percent.

The decision to shift citywide protests to the Milbank office reflected an understanding of the power dynamics at play within Legal Services NYC's management. Full-time middle managers had much in common with the union members (although disproportionately white and attorneys) and held little formal influence over the bargaining process. Some members of the executive leadership sat on management's bargaining team, but similarly held little formal authority vis-à-vis the board of directors.

By observing board meetings, the union learned that the vast majority of board members were disengaged from their responsibilities and likely to defer to a small group of decision-makers. Thus, the union developed a "corporate campaign" that attempted to engage absent board members and disincentivize the decision makers from prolonging the strike. By identifying areas of personal liability for the board members behind management's position and gradually escalating along those lines, the union was able to significantly increase the pressure for a settlement, much more so than they would have been able to with simple picketing outside the neighborhood offices.

On May 30, the *New York Law Journal* ran a front-page article covering the protests outside of Milbank Tweed, doubtlessly embarrassing the firm.<sup>44</sup> While marching outside the Milbank offices, union members talked to as many of Mr. Genova's co-workers as possible, knowing that word would filter up. The Research Committee pulled the e-mail addresses of Milbank's New York partners and sent them updates on the strike, prompting Mr. Genova to write an office-wide defense of his conduct, which subsequently leaked out of the firm.

Finally, the union identified the recurring corporate clients of Milbank Tweed. The Research Committee collected the contact information of attorneys in their General Counsel's office and sent letters asking them to question Milbank about the strike. The Milbank partners in charge of those relationships were copied in on these communications, creating additional pressure within the firm on Mr. Genova.

At the height of the strike, the board of directors retaliated against the union by terminating the strikers' healthcare without sending individual notices to the employees. Decades-long employees were denied regular medications at pharmacies, sending at least one member across the picket line in a desperate attempt to regain coverage. In one instance, a member's spouse was denied a chemotherapy treatment in the middle of a hospital visit. In comprehensive research following the strike, the union was unable to identify any recent labor dispute in which management adopted this tactic; even Verizon mailed individual notices to employees providing two weeks notice of warning when it terminated healthcare benefits during the 2011 Communication Workers of America strike.<sup>45</sup>

Although the board of directors held formal decision-making authority with respect to negotiations, the various organizations that provide funding to Legal Services NYC could offer significant leverage by threatening to withhold that money. The City Council budget approval process provided the most immediate opportunity to do this, so the union members began regular lobbying on the steps of City Hall. These efforts culminated in a rally at City Hall entitled “Community Voices: Save Legal Services,” which featured testimony from clients, partner organizations and politicians about the importance of high quality civil legal services in their neighborhoods. Over half a dozen City Council members attended the rally as management watched from the lawn.

With a standing threat to transfer City Council funding to another provider, daily rallies outside key board members’ offices and residences, an expanding list of Milbank clients receiving information about the strike and a barrage of independent and traditional media coverage, management finally relented. From their pre-strike position, management dropped demands for reduced retirement contributions, increases to healthcare deductibles, increases to healthcare coinsurance and cutbacks across a variety of specific provisions of the healthcare plan. The union secured zero layoffs through the term of the contract and strict ratios in layoffs between management and bargaining unit positions in the event of significant layoffs.

### **Conclusion: Beyond services**

Civil legal services providers are potentially very well positioned to build power with progressive social movements, as the community members who approach them for representation could also receive political education and integration into campaigns of collective action. Who would be better positioned to organize homeowners against foreclosure practices, for example, than the legal services attorneys and housing counselors to whom they turn for assistance by the thousands?

Most CLS providers have abandoned the goal of organizing for power and are instead focused on resolving as many individual cases as possible, perhaps with an occasional attempt at “impact litigation.” This approach has come under sustained criticism for providing only survival-level services to a fraction of the populations in need, enabling the long-term diminution of social services, reproducing oppressive social relationships, siphoning potentially radical challenges into reformist initiatives and failing to challenge the structural systems that perpetuate poverty.<sup>46</sup> For Ruth Gilmore Wilson and others, these service providers comprise a “non-profit industrial complex” that addresses expectations of professional progressives more than the needs of their clients.<sup>47</sup>

For providers accepting Legal Services Corporation funding, the restrictions placed on their activities present statutory roadblocks to a “services +



movement” model. Ultimately, only repealing the prohibitions on community organizing and other activities will enable them to fully join the progressive movement. They can begin building a movement culture by taking small steps, such as referring clients with closed cases to strategic organizing campaigns in relevant practice areas. In the short term, the prospect of moving beyond services is much clearer for CLS providers who do not accept LSC funding, such as the majority of providers in New York City and in many metro areas.

The boards of directors of these non-profit agencies are an obvious starting point for building better anti-poverty programs. Proactively recruiting board members who share a critical analysis of capitalism and come from diverse professional backgrounds would be a positive first step. Genuinely incorporating former clients into decision-making roles in ways that move beyond tokenism would increase accountability to the communities these organizations serve. While corporate lawyers are often favored for their presumed ability to bring in donations, individuals with experience in grassroots fundraising may also be effective in building a long-term donor base which builds ties to communities, rather than to corporations.

In order for any organization to participate in an emancipatory movement for social justice, it is requisite for that organization to question and address internal systems of oppression. Prior to the strike, Legal Services NYC hosted four sessions of two-day anti-racism trainings, which were mandatory for all employees. The sessions opened a dialogue about racism within the organization and the organization’s role in supporting structural racism in society at-large. By supporting anti-racist (and, more broadly, anti-oppression) education on an ongoing basis and beginning to incorporate these practices into their operations, legal services providers can begin confronting the dilemmas mentioned above.

Finally, legal services providers should embrace the roles of unions within their organizations, as the goals of the two types of institutions are broadly overlapping. As just one example, the success of organized labor’s efforts to elect progressive candidates is in the direct self-interest of legal services groups, since only progressive politicians will be willing to increase their funding in an era of austerity. There is considerable potential between these groups for strategic partnerships in campaigns to build political, economic and legal power to advance the interests of poor and working people.

At other times, unions will come into conflict with program management, an inevitable result of workplace democracy, but one that the leadership of legal services agencies should embrace as a valuable second opinion and check on their authority. In the case of Legal Services NYC, the union showed that the leadership was dramatically out of step with the majority of employees. Indeed, the funding shortfall proved nowhere as calamitous as predicted and the



organization will likely be able to avoid many of the concessions demanded by management before the strike. As a result, Legal Services NYC will preserve a comprehensive benefits package that will allow talented staff members to build career-level expertise advocating for low-income New Yorkers.

Moving beyond services will take time, but there are plenty of encouraging signals even in the narrow history recounted here. Campaigning and movement-building are solidly rooted in the experiences of MFY Legal Services and many other agencies, showing that the potential for political empowerment shared between clients and advocates is not an unrealistic proposition. Moreover, the people employed by these agencies already have the skills to build campaigns that challenge corporate behavior and change public policy, as the strike unmistakably demonstrated.

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NOTES

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5. EMMANUEL SAEZ & WOJCIECH KOPCZUK, *TOP WEALTH SHARES IN THE UNITED STATES, 1916–2000: EVIDENCE FROM ESTATE TAX RETURNS* 64, 73 (2004). Saez and Kopczuk’s work is the most recent to estimate historical distributions of wealth in America. According to their methodology, the wealthiest one percent of American’s held about 24.65 percent of the nation’s wealth in 1945 and 24.70 percent of the wealth in 1965. Previous efforts assign different values to these percentages, but they generally show a trend of stability during this period, followed by a relatively sharp narrowing of the gap and decline in the percentage controlled by the wealthy in the following decade.
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25. KORNBLUH, *supra* note 23, at 94.
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41. *LSC Funding Assumptions*, Appendix B, available at [https://drive.google.com/file/d/0B7hVZyUm\\_wTeNXVvZ05KY3hYUUZuRTUyNHJaY09PdVhyU0x3/edit?usp=sharing](https://drive.google.com/file/d/0B7hVZyUm_wTeNXVvZ05KY3hYUUZuRTUyNHJaY09PdVhyU0x3/edit?usp=sharing).
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- 46. INCITE! WOMEN OF COLOR AGAINST VIOLENCE, *THE REVOLUTION WILL NOT BE FUNDED: BEYOND THE NON-PROFIT INDUSTRIAL COMPLEX* (2009).
- 47. RUTH WILSON GILMORE, *IN THE SHADOW OF THE SHADOW STATE* (2009).



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**Eric Allen Engle**

## **THE INTERNATIONAL CRIMINAL COURT AND *LUBANGA*: THE FEMINIST CRITIQUE AND *JUS COGENS***

The *Lubanga* decision, despite procedural missteps, further anchors the prohibition of child soldiers and child auxiliaries under international law. Feminist criticisms of *Lubanga* misapprehend the potential of *Lubanga* to attain the types of legal victories feminists strive for. While one can criticize *Lubanga* as a matter of procedure, *Lubanga* methodically strengthens the prohibition of child soldiery. The prohibition of child soldiers, like the prohibition of wartime rape, forced prostitution, and child sex-tourism are becoming *jus cogens* norms. *Lubanga* contributes to this coherence of *jus cogens* and sets the stage for extension of its logic into other wrongs committed against children.

### **Introduction**

Charles Lubanga was tried before the International Criminal Court (ICC) and found guilty of the war crime of recruiting and using child soldiers. Despite arguments made by representatives of victims, the ICC pretermitted a decision as to whether subjecting young females to rape or forced marriage (essentially rape) constituted a violation of the statute prohibiting enlistment and recruitment of children into armed conflicts because the prosecution did not adduce evidence of sexual violence and did not rely on proof of such in making its case, while arguing that such crimes are prosecutable under the statute. The court held:

Regardless of whether sexual violence may properly be included within the scope of ‘using [children under the age of 15] to participate actively in hostilities’ as a matter of law, because facts relating to sexual violence were not included in the Decision on the confirmation of Charges, it would be impermissible for the Chamber to base its Decision pursuant to Article 74(2) on the evidence introduced during the trial that is relevant to this issue.”<sup>1</sup>

The decision did not, however, limit possible prosecution to direct participation in combat activities, saying “the decisive factor . . . is whether the support provided by the child to the combatants exposed him or her to real danger as a potential target.”<sup>2</sup>

The decision of the (ICC), though marked and possibly marred by procedural problems, strengthens the global norm against child soldiers and extends the prohibition of child soldiery to cover child auxiliaries. Thus, despite procedural missteps, the *Lubanga* decision is a step in the right direction. Well-

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intended feminist criticisms of *Lubanga* as ignoring sex and gender aspects of the case do not recognize that *Lubanga* expands the norm prohibiting child soldiers to cover child auxiliaries, whether in national or international armed conflicts. Because of this “build out” *Lubanga* can serve as a stepping stone toward prohibition of war time rape and forced prostitution, whether such crimes are a means of genocide or a motivation to soldiery. The *Lubanga* decision implies that girl soldiers, child prostitutes and compelled “child brides” are, like human shields and “entertainers,” prohibited under international law as military auxiliaries because they are subject to being targeted during national and international armed conflicts. *Lubanga* is, moreover, another step toward a *jus cogens* prohibition of child soldiers, child auxiliaries, and child sex workers.<sup>3</sup> The emerging global norm prohibits the use of child soldiers because children cannot give fully informed consent due to their lack of experience and maturity. So, despite well intended feminist and anti-imperialist criticism,<sup>4</sup> the *Lubanga* decision has garnered praise for preventing the use of child soldiers throughout the world,<sup>5</sup> for example in Nepal.<sup>6</sup> Even critics of deterrence theory<sup>7</sup> in criminal law appear compelled to recognize that the *Lubanga* decision has contributed positively to ending child soldiery<sup>8</sup> by raising awareness of the problem of child soldiers and the impact that being a war child has on one’s life.<sup>9</sup>

Although the rule of international law prohibiting child soldiery is cogent, it is relatively recent and still emerging. The prohibition of child soldiery, like most norms involving children under international law, is not yet part of *jus cogens*, i.e., a non-derogable rule of international law.<sup>10</sup> However, the law is developing toward inclusion in *jus cogens* and change is surely coming. Others have also argued that the prohibition of child soldiery is becoming a *jus cogens* norm.<sup>11</sup> The *Lubanga* decision is a crystallization of the global norm prohibiting the use of children as soldiers and is another step in the direction of a *jus cogens* prohibition of child soldiery.

This article first examines the procedural problems in *Lubanga* (I). Then it exposes and contextualizes the feminist critique of the *Lubanga* decision (II). It then examines the substantive law of child soldiers under international law (III). It concludes with an argument that prohibitions on child soldiery, like the crime of systematic rape in war, are becoming *jus cogens* rules of international law (IV).

### **I. Procedural Problems in *Lubanga***

The ICC seeks to end impunity for grave breaches of the most serious rules of international criminal law.<sup>12</sup> The ICC is a hybrid of common law and civil law.<sup>13</sup> This hybridization and the novel nature of the court explain why the first trial<sup>14</sup> concluded at the ICC was characterized by procedural problems.<sup>15</sup> Despite the obstacles, the *Lubanga* decision demonstrates the capacity of the ICC to adjudicate international crimes.<sup>16</sup> The procedural problems at *Lubanga*

can be organized legally around the idea of the rights of the accused and practically in terms of the order in which they arose. The various procedural problems are all interrelated. They are discussed here in order of appearance.

### **A. Prosecutorial discretion**

In any criminal justice system, the prosecutor is vested with at least some degree of discretion as to which crimes s/he wishes to prosecute. At the ICC the “prosecutor ... has the ability to determine which charges s/he wishes to prosecute with the limited supervision of the Pre-Trial Chamber of the ICC.”<sup>17</sup> In *Lubanga*, the prosecutor decided not to bring charges for rape and forced sexual servitude. That decision has been criticized by some feminists but was within the prosecutor’s discretion. Similarly, the prosecutor had discretion to choose to charge the defendant for a violation of the law of international armed conflict or national armed conflict or both.

### **B. Discovery and disclosure**

The most evident procedural problem in *Lubanga* involved the right to discovery of confidential “lead” evidence<sup>18</sup> and the prosecution’s duty to disclose potentially exculpatory evidence.<sup>19</sup> That is, a conflict between prosecutorial power and the rights of the accused. “None of the statutes or rules of ICC tribunals provide clear guidance on how this conflict is to be resolved or articulate remedies when it cannot be.”<sup>20</sup>

A related problem is the question whether and to what extent the prosecution before the ICC may “outsource” evidence gathering to third-parties.<sup>21</sup> Third party investigators are at higher risk of reprisals than state or international officials because they are not directly backed by state-power, though they have the advantage of being “locals” and non-uniformed and thus are better able to ferret out the facts. However, the existence of such dangers and even the threat of reprisal are not unique to the ICC, nor are these insurmountable problems.<sup>22</sup> *Lubanga* determined that while the prosecution has a right to seek information and a duty to protect witnesses it also has a duty to the accused to disclose evidence which would tend to exonerate the accused.

### **C. Witness participation**

Another problematic point in *Lubanga* was the participation of victims, whether as witnesses or observers.<sup>23</sup> Essentially, the multiplicity of participants resulted in a “layered judiciary” which complicated the proceedings.<sup>24</sup> The problem was not merely due to the failings of the prosecutor. It was also due to the participation of so many persons whether as witnesses, observers, or active participants in the prosecution:<sup>25</sup> “too many cooks spoil the broth,” so to speak. The trial became encumbered by too many participants with little relevance to the actual charged crime.

Victim participation is seen as a part of therapeutic jurisprudence. Therapeutic jurisprudence is the idea that the victim has a legitimate interest in a court pro-

ceeding which allows them to process their pain and move on from it, and that courts should take this fact into account alongside prevention and punishment as legitimate concerns of criminal law. Although the great number of participants bogged the trial down, some feminists criticized what they perceived as a lack of adequate witness participation<sup>26</sup> to serve the therapeutic function.

#### **D. Witness protection**

Witness participation also raised the problem of witness protection, which was related to the problems of confidentiality (of witnesses) and disclosure of exculpatory evidence by the prosecution.<sup>27</sup> The right to confront one's accusers is recognized in common law under the rubric of "the right to confrontation" of one's accuser and in French law as one of the "*droits de la défense*." The right to confrontation is a basic criminal procedural right of self defense—how, after all, can one defend him or herself properly without knowing the accuser? Yet how are accusers and witnesses to be protected against reprisals? This of course requires a "balancing" i.e., a comparison, of the right of the accused to know his or her accuser and the rights of accusers and witnesses not to face (illegal, out of court) reprisals—that is, not to be victims of extra-judicial vengeance.<sup>28</sup>

#### **E. Prosecutorial abuse: non-disclosure & temporary stay of proceedings**

The existence of prosecutorial discretion creates the possibility of the abuse of that discretion. In the *Lubanga* trial the key procedural problem was an abuse of prosecutorial power: namely, the non-disclosure of exculpatory evidence. Whether at common law or civil law the prosecutor must disclose evidence to the court and/or defense which exculpates the defendant. Otherwise, wrongful convictions might result. However, the prosecution in *Lubanga* wished to keep information such as the identities of accusers and informants secret, tainting the trial. This taint led to the unusual step of a stay in proceedings<sup>29</sup> and the (ultimately temporary<sup>30</sup>) release of *Lubanga* during the court's suspension of proceedings.<sup>31</sup> The desire to protect witnesses is understandable, but must be balanced against the right of the defendant to confront their accusers and certainly does not justify the non-disclosure to the court of exculpatory evidence. As a result of this clear abuse the ICC took the extremely unusual step of staying the proceedings. Ultimately, however, the trial resumed after the procedural problem was resolved to the satisfaction of the court. This was the most serious procedural misstep, but it ultimately did not stop the just adjudication of the case.

## **II. The feminist critique of the *Lubanga* decision**

Given the procedural missteps, criticism of *Lubanga* is understandable, although in my opinion misplaced. The most strident criticism of *Lubanga* comes from feminist quarters. That criticism is understandable, because the prosecutor in *Lubanga* did not charge gender or sex-related crimes<sup>32</sup> and was



cautious, perhaps overly cautious, in that regard.<sup>33</sup> Thus, the *Lubanga* court tended to gloss over the sex and gender aspects of the systematic abuse of children in the Democratic Republic of the Congo (DRC). Here is a fairly typical example of the feminist critique::

Unfortunately, in the *Lubanga* trial the Court chose not to develop gender-based crimes, including the gendered aspects of child soldiering, further. It may be argued that the prosecutor's decision to charge *Lubanga* with the war crime of recruitment and use of child soldiers was guided by the wish to develop this particular norm. However, the Court should consistently prioritize particular crimes that have so far been undervalued, such as crimes of sexual violence. With regard to the Court establishing and advancing global norms, victim participation could complement and assist the Court in establishing the truth.<sup>34</sup>

### **A. Therapeutic jurisprudence**

Part of the logic of hearing claims about wartime rape and sex slavery is therapeutic. "By bringing about appropriate charges, the victims are more apt to deal with the physical violation."<sup>35</sup> Thus, "legal representatives of female child soldiers spoke at length during their opening statements not only about the fact that girl soldiers had been subjected to various forms of sexual and gender-based violence, but also about the broader context and the long-term effects of such violence."<sup>36</sup> From a therapeutic perspective, too few victims were allowed to testify, but from a procedural perspective too many were allowed to testify about facts which were legally irrelevant to the crimes charged. Again, this is a balancing of competing interests, but this one likely cannot be perfectly resolved.

### **B. Correct legal method**

Given the activist criticisms of *Lubanga*, before addressing the substantive *lex lata* and *lex ferenda* in the field of child soldiers I wish to suggest the correct legal method so that future activism will be effective at attaining concrete results.

International law is often rightly criticized for being ambiguous (contradictory general principles)<sup>37</sup> and uncertain (customs rise and fall) and for lacking a central enforcement mechanism.<sup>38</sup> Domestically, the state may seem all-powerful, but internationally it is otherwise. States in the international system are like fragile lifeboats, to which we take refuge, in hopes of surviving the maelstrom, the winds of war, disaster, and disease.<sup>39</sup> We cling to life like we cling to justice, and we have no choice but to repair to the state for refuge. The state offers us not only the means of our survival but also the means to the end of the good life in society<sup>40</sup> But international society is anarchical<sup>41</sup> and prone to crises. Given the shaky state of international law, ever changing and uncertain, I argue that the best activist strategy is to work within existing recognized international legal categories, to narrow, broaden, or extend them as appropriate—to expose and extirpate ambiguity and contradiction to attain

the rule of law and substantive justice rather than to try to generate exotic novel claims on the basis of wild theories, which are likely to fail. There are pragmatic reasons I recommend an incremental approach such as we see in *Lubanga*. First, why reinvent the wheel? Progress in science occurs by testing and refining hypotheses, not by throwing them out at any time to generate new (untested) hypotheses. Second, courts are skeptical. Third, doubtful claims fail in the face of the burden of proof. A novel theory might seem exciting but will it lead anywhere? In contrast, building out from irrefutable rules to better and more refined rules, as the *Lubanga* decision does, seems to be a more certain way to achieve justice and the rule of law than by gambling on radical grand theories which generally fail to be taken up in practice, despite (or because) of their novelty. Attractive norms persuade more often than they compel, and people are more easily persuaded to adapt to what they know rather than adopt what they do not know. It's a question of effective advocacy, of what actually works in the real world, not the ivory tower or the barracks.

### III. Substance: Child soldiers in international law

*Lubanga* is procedurally a negative example: *ad astra per aspera*. A success despite itself. However, substantively, *Lubanga* is a positive example. The decision did not appear to go as far as some feminists would have liked. However, in fact, *Lubanga* represents a strengthening of the norm against child soldiers and sets the stage for the types of legal victories feminists rightly strive for.

The international norm prohibiting child soldiers may seem a self-evident legal proposition. However, the prohibition of child soldiers as a rule of international law dates only from the 1977<sup>42</sup> Additional Protocol to the Geneva Conventions.<sup>43</sup> Yet the norm, though recent, has taken the world by storm. It quickly found resonance and replication in other international instruments. Thus, the African Charter on the Rights and Welfare of the Child (1990) requires State parties to “take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child.”<sup>44</sup> The Rome Statute<sup>45</sup> of the ICC (1998) likewise criminalizes child soldiery. Echoing the two prohibitions of the Geneva Additional Protocols, the Rome Statute prohibits child soldiery both in internal armed conflicts and in international armed conflicts. The rule outlawing child soldiery was echoed again in an Additional Protocol to the U.N. Convention on the Rights of the Child (CRC) in 2000.<sup>46</sup> Child soldiery is also prohibited in the domestic laws of many countries,<sup>47</sup> often with extraterritorial effect.<sup>48</sup> The legal prohibition of child soldiery has become nearly universal. Because of the nearly universal adherence of states to these treaties and because of the number of these treaties a customary international norm prohibiting the recruitment or use of child soldiers in armed conflicts, whether national or international, has formed.<sup>49</sup> Moreover, because child soldiering is an obvious violation of basic human dignity, the right to life, and the right to development, its prohibition should be seen as an emergent *jus cogens* norm,<sup>50</sup> along with the prohibition of child

sex-tourism.<sup>51</sup> Child soldiers are associated with child prostitutes, wartime rape, mercenaries and terrorists and all of these are of concern to the international system as a system, not merely to individual States severally, which also justifies seeing these as violations of *jus cogens*.

### **A. Structuring public international law: The law of war, international human rights law, and international criminal law**

We can divide public international law into at least these branches: the law of war (also known as international humanitarian law, consisting of *jus ad bello* and *jus in bello*), international human rights law, and international criminal law.

Child soldiery is an example of an area where the laws of war (international humanitarian law—IHL) international human rights law (IRHL) and international criminal law (ICL) overlap and in my opinion are complementary, not conflicting. However, Adil Ahmad Haque argues that IHL and ICL are structurally inadequate. Haque states:

There is a gap between the international humanitarian law of Geneva and the international criminal law of Rome, a gap between the law we have and the law we need if we are to ensure respect for and protection of the civilian population caught in the midst of armed conflict. The Rome Statute of the ICC fails to fully enforce four core principles of humanitarian law designed to protect civilians: distinction, discrimination, necessity, and proportionality. As a result, it is possible for a combatant with a culpable mental state, without justification or excuse, and in violation of humanitarian law, to kill civilians yet escape criminal liability under the Rome Statute. The Rome Statute also ignores or misapplies three fundamental criminal law distinctions: between conduct offenses and result offenses, between material elements and mental elements, as well as between offenses and defenses.<sup>52</sup>

I don't regard Haque's claim as entirely well founded, because ICL is intended only to inculcate the gravest and most serious offenses: systematic intentional crimes committed by "leaders" (demagogues, really)—the "big fish." The "small fish" are meant to be held liable in national law. This is because wars involve literally millions of people. No international court could hope to litigate each and every case. But what the ICC can and tries to do is to catch "the big fish" to set an example provide guidance for national courts to emulate. Haque correctly recognizes the different perspectives of IHL and ICL (*ex ante* and *ex post*, respectively).<sup>53</sup> However, that difference in perspective is not a contradiction or a gap in legal regulation. The difference in perspective between IHL and ICL is because IHL is primarily about coordinating a State's actions with its interactions (*ex ante*), whereas ICL is primarily about inculcating individuals who commit serious breaches of international law in a grave and systematic manner (*ex post*). What Haque describes as "a gap" is actually an overlap. IHL and ICL have different objects and purposes, but sometimes overlap due to the transformation of international law in the post-Westphalian era from "states, only, with absolute rights" to "states and non-

state actors, with relativized rights.” If there were a “gap” here, IHRL would be the bridge between duties of individuals and rights of states.

With this teleological understanding of the norm and an understanding of the structure of international law (IHL, IHRL, ICL) we can now try to address the four refinements of the norm against child soldiers.

**B. Structuring international humanitarian law:  
The domestic/international and public/private splits**

Just as we structure public international law into at least the three branches of IHL, IHRL, and ICL, we also structure international law generally using the domestic/international and public/private splits.

As can be seen from the treaties cited, the prohibition of child soldiery is a “bifurcated” norm. Child soldiery is prohibited in all four quadrants, (public/private; state/non-state actor). Child soldiery is absolutely prohibited under international law, whether the soldiers are recruited or conscripted, whether by public or private actors and whether in domestic or international conflicts. The fact that all actors in all conflicts are forbidden to recruit or conscript or use child soldiers is evidence that the international law against child soldiery has emerged as a universal and non-derogable rule of international law (*jus cogens*). The use or recruitment of child soldiers (a) in domestic armed conflicts and (b) in international armed conflicts by (i) State Parties and (ii) Non-State Actors is prohibited under international law.

The “public/private” and “national/international” splits structure law and hopefully enable legal certainty and enable justice to be attained. However, they also create a risk of fragmentation. The norm, which seems so straightforward and self-evident at first glance, becomes more complex as we consider it in finer detail. However, we have to understand each of these four strands of the norm are expressions of one common core concept which seeks to attain the substantive goal of the law. These are four refined emanations of one common idea.

To understand the contours of the norm against child soldiers we must understand these splits. Historically, *jus in bello* and *jus ad bello* were largely if not exclusively *coordinating rules* directed to *state actors* and their agents. The main conflicts of the 19th Century and even most conflicts of the 20th Century were international armed conflicts between States. That is no longer the case. In recent decades conflicts increasingly involve non-state actors and are often purely internal domestic insurrections. Even inter-state conflicts often involve non-state actor combatants, whether as revolutionaries (targeting the state, seeking state power) or terrorists (targeting civilians and not necessarily seeking to seize state power) or proxies. The rise of non-state actors and national armed conflicts explains why four refinements on one idea are necessary in order to subdue and minimize violent human conflicts.

Non-state actors such as insurgents and terrorists with belligerent rights and legal duties under international law are a post-Westphalian legal phenomenon. However, the question facing the post-Westphalian law of war is the same as faced the Westphalian system (1684-1945/1989): how to prevent and limit violence. The answer is also nearly the same: war is to be prevented and concluded primarily through state power and state responsibility. However, international law has become more than merely a coordinating mechanism between states. As well as coordinating state interactions, international law now also guarantees certain limited individual human rights to non-state actors. Such rights include the right not to be made a sex slave or a child soldier. International human rights law (IHRL) is the primary international guarantor of basic human rights, although secondarily there are human rights aspects of the law of war (IHL).

### 1. Armed conflicts: National, international, or mixed

We just saw that we can divide public international law into at least IHL, IHRL, and ICL. We now examine the division within IHL between domestic armed conflict (internal armed conflicts) and conflicts between States (international armed conflicts). This structural split between two branches of IHL is reflected in both the Additional Protocols to the Geneva Conventions and the Rome Statute, which distinguish *international* from *national* armed conflicts, prohibiting the recruitment (i.e. conscripting or enlisting)<sup>54</sup> or active use of child soldiers in armed conflicts, at least by state parties.<sup>55</sup> How did this bifurcation play out in *Lubanga*?

In the *Lubanga* trial the prosecution only charged a violation of the law of non-international armed conflict. However, this was then unilaterally recharacterized by the court under Article 61(7)(c)(ii) of the Rome Statute to charge a violation of the law of international armed conflict. The pre-trial chamber (PTC) then found that “for the most part the armed conflict in question (between July 2002 and 2 June 2003) was one of an international character, due to the presence of the Ugandan army as an occupying power in parts of Ituri”<sup>56</sup> and thus governed by Article 8(2)(b) of the Rome Statute.<sup>57</sup> The question facing the court was whether the conflict in the Democratic Republic of the Congo (DRC) was domestic, international, or mixed. The pre-trial chamber “opted for a sequenced international/non-international solution, arguing that the conflict was international as long as the Ituri region was occupied by the Ugandan army (until 2 June 2003) but then changed to a non-international one (until end of December 2003).”<sup>58</sup> At the PTC national armed forces were determined to be not limited to the military forces of the state and thus could include proxy soldiers or state sponsored terrorists.<sup>59</sup>

The Trial Chamber in contrast “relied on a relational concept of armed conflict by focusing on the status of the two parties to the conflict”<sup>60</sup> and started from the assumption, “that parallel conflicts of a different (legal) nature may

take place at the same time in a single territory.”<sup>61</sup> The Trial Chamber then characterized the armed conflict as non-international, invoking Regulation 55 of the Regulations of the Court.<sup>62</sup> The armed groups contending in the DRC were found not to be proxies for conflicts between Uganda, Rwanda, or the DRC because State actors did not in fact exercise “overall control” over non-state actor combatants.<sup>63</sup> Since the conflict was found to be internal, not international, the relevant rule to apply was Article 8(2)(e)<sup>64</sup> of the Rome Statute (other serious violations of the laws and customs of war not of an international character) and not 8(2)(b).<sup>65</sup>

## **2. The public (state actor) and private (non-state actor) split: non-state actors and international humanitarian law**

The problem of non-state actors involving themselves directly as agents of political violence, whether independently or with state sponsorship (proxy wars and state sponsored terrorists) is an important contemporary issue. Non-state actors do use child soldiers. In fact: “Much illegal recruitment of children is undertaken by non-State actors such as armed opposition groups.”<sup>66</sup> According to the *Lubanga* decision, an armed conflict involving non-state actors can also be an international armed conflict where the non-state actor acts as a proxy for one state on the territory of another. The non-state actor must be subject to the “overall control” of the sponsoring state to be considered a proxy.<sup>67</sup> Whether “overall control” exists is a question of fact, though I would argue a proof of state funding or supplying weapons or ammunition to a controlled group would suffice to meet the standard, and should put the burden of proof on the party pleading that no overall control existed. Where the non-state actor is not acting as a proxy for a state actor and operates only on the territory of one state there is no international armed conflict. *Lubanga* also held that international armed conflict includes military occupation.<sup>68</sup>

### **C. Child auxiliaries in *Lubanga***

The international rule prohibiting child soldiers specifically prohibits the “active participation” of children. This raises the question of what is “active” or “direct” participation. “The plausible interpretations of the ‘active participation’ requirement range from a very restrictive reading limiting the participation to exclusively combat-related activities to a broader reading, including any supporting activity or role.”<sup>69</sup> The better interpretation is the interpretation which the *Lubanga* decision took up. The international norm prohibiting child soldiers also prohibits child auxiliaries. Auxiliaries do not primarily engage in direct combat activities but are active participants by supplying, servicing, and supporting soldiers.<sup>70</sup>

Auxiliaries are not combatants. They are combat support personnel. The ghastly examples are human shields and human landmine removers. The seemingly benign versions are camp cooks, transport drivers, and “entertainers” —where “entertainer” is often a euphemism for “camp prostitute” or “forced



war bride.” According to *Lubanga*, and I think rightly, the prohibition of the use of child soldiers also applies to child auxiliaries where the child auxiliary is likely to be targeted by enemy combatants. The prohibition of child auxiliaries is logical because auxiliaries are often targeted and may be forced by the circumstances of war to take up arms in self-defense. Interpreting the norm to prohibit child auxiliaries is also justified by the fact that such an interpretation of “active participation” is consistent with the CRC’s “best interests of the child” standard. Finally, prohibiting child auxiliaries is justified because the combatant/non-combatant distinction is another victim of modern warfare, as any “ethnic cleansing” or mass bombardment shows. Contemporary conflicts usually sweep up civilians into the bloodshed, regardless of the civilian’s own wishes. Finally, prohibiting child auxiliaries also prevents illusory claims that child soldiers were really only auxiliaries and makes clear that the prohibition on child soldiery is absolute, universal, and becoming a part of *jus cogens*, the non-derogable rules of customary international law.<sup>71</sup> Albeit, some child-soldiers may themselves be war-criminals,<sup>72</sup> which is less likely to be the case among auxiliaries.

#### **IV. The prohibition of child soldiery as *jus cogens***

The prohibition of child soldiery, like the prohibition of wartime rape and child-sex tourism, is becoming a non-derogable *jus cogens* rule of international law. *Jus cogens* norms are formed by near universal adhesion, and agreement not only that the norm is binding but also that the norm is non-derogable and of mutual, not merely several, concern and thus subject to universal jurisdiction. Ordinary customary international laws may be avoided by states that affirmatively and persistently object to the formation of the custom *ab initio*.<sup>73</sup> However, *jus cogens* is non-derogable. So, for example, South Africa could not argue that its apartheid regime was a persistent objector<sup>74</sup> to the *jus cogens* prohibition of state-sponsored segregation (apartheid).<sup>75</sup> *Jus cogens* norms are rules of conduct which are not only of concern to all states individually but also are of concern to the international system as a whole. That is, a violation of a *jus cogens* norm is an injury to every state. This explains why each *jus cogens* norm admits of universal jurisdiction.<sup>76</sup> No state may violate *jus cogens* rules and any state may enforce *jus cogens*.<sup>77</sup>

The theoretical basis of *jus cogens* is a late modern recurrence of natural law.<sup>78</sup> *Jus cogens* literally means compelling right, i.e., the right of good conscience (*cogens* is etymologically related to cogent, for the cogent thought is compelled to coherence). Certain legal rules are inevitable because they are in themselves good and fair and thus attract adhesion and replication and tend to become universal in space and time.

The naturalistic fallacy is to confuse that which occurs in nature for that which ought to occur in nature. People who criticize all natural law reasoning as flawed by this fallacy generally have a simplistic view of natural law,



one that regards natural law as an emanation of religious law. A more refined critique invoking the fallacy would attack natural law as self-contradictory epistemic dualism that ignores scientific materialism. However, there are several schools of natural law. Not all schools of natural law argue for the law of nature as “God’s own law.” Some advocates of natural law theory present pre-scientific or outright unscientific ideas that confuse that which appears in nature for that which ought to be done by man. However, when we recognize natural law as the law of reason and nature as teleology these valid criticisms of religious natural law fall away.

Aristotelian teleology regards nature not as a static unchanging incomprehensible force. To Aristotle, nature is a dynamic process of self-development. Aristotle’s teleology is naturalist in the sense that it describes what happens when everything goes rightly. The nature of the acorn, its teleology, is to become a tree. In the best of circumstances a mighty oak springs forth from an acorn. Not all acorns become trees. Likewise, the nature of a boy, that is the boy’s teleology, is to become a strong, intelligent, wise and just man. Obviously not all boys become that, nor do all boys even survive childhood. Aristotle’s naturalist teleology does not suffer from the naturalist fallacy. Moreover, Aristotle’s naturalism does not suffer from epistemic dualism, unlike Plato. Aristotle is monist and materialist. That is the correct theoretical basis of *jus cogens* as “natural law.”<sup>79</sup>

The prohibition of war crimes such as the use of child soldiers or of rape and prostitution as a means to wage genocide and war is so fundamental to the international system that it should be seen by all states as a prohibited practice to any state. These war crimes are in fact dangerous to the international system as a system and so are of mutual and not merely several concern. Such a violation anywhere is in fact an injury to every state because the conduct creates unpredictable instability (private and/or terrorist violence). The conduct moreover is utterly reprehensible and universally condemned both in national and international law and is already subject to extraterritorial enforcement under national law. To put it starkly: child soldiers may grow up to become international terrorists. Thus, they are of global concern.

### **A. Child soldiers as slaves**

Others have also argued that child prostitutes<sup>80</sup> (“prostitots”) and child soldiers are forms of slave labor and therefore prohibited by international law as *jus cogens*.<sup>81</sup> The argument seems somewhat forced yet also has some merit. The essence of slavery is a complete lack of autonomy. Forced prostitution is fairly obviously a form of slavery. However, not all child soldiers are in fact conscripts, some are volunteers. Yet, children have limited capacity for autonomy and thus even the “voluntary” child soldier can be seen like the slave as having no real autonomy and is a victim of labor extraction. Although an interesting theory, the argument that child soldiery is a form of slave labor

and thus a *jus cogens* violation does not appear to have been pursued in the *Lubanga* decision. It is however a possible path to the determination that recruiting, enlistment or use of child soldiers is a violation of *jus cogens*.

## Conclusion

In conclusion, *Lubanga* only appears to ignore gender. In fact, by building a more solid and broader foundation for the prohibition of child soldiers to include auxiliaries, *Lubanga* sets the stage for an extension of *jus cogens* to prohibit child soldiery, forced prostitution, and wartime rape. Feminist critiques of *Lubanga*, while understandable, well intended, and directed to desirable goals are somewhat misplaced for failing to see *Lubanga* as a systematic construction and strengthening of the international rule of law. Rather than a denial of justice for women, *Lubanga* sets the stage for future feminist legal victories.

## NOTES

1. Prosecutor v. Thomas Lubanga Dyilo, Case. No. ICC-01/04-01/06, at 288 (14 Mar. 2012).
2. *Id.* at 286.
3. The *jus cogens* norm, like the norm *erga omnes*, concerns interests of the international legal system qua system. *Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain)*, Judgment, 1964 I.C.J. Rep. 1964 (July 24), available at [http://www.worldcourts.com/icj/eng/decisions/1964.07.24\\_barcelona\\_traction.htm](http://www.worldcourts.com/icj/eng/decisions/1964.07.24_barcelona_traction.htm). All states severally share not only an interest in enforcement, but are moreover mutually injured in case of any violation of the *jus cogens* norm. The prohibition of child prostitution and sex tourism are not yet *jus cogens* norms, although universally condemned and sanctioned by national and international law, because the injury is still (wrongly) seen as to the individual, not to the international system as a whole. See, e.g., Eric Thomas Berkman, *Responses To The International Child Sex Tourism Trade*, 19 B.C. INT'L & COMP. L. REV. 397, 421 (1996).
4. The anti-imperialist critique argues that the ICC embodies neo-colonialism. Frederic Megret thinks that seeing the ICC as neo-colonialist is somewhat misplaced. Frederic Megret, *Cour Penale Internationale Et Colonialisme: Au-Dela Des Evidences* [The International Criminal Court and Colonialism: Beyond the Obvious], SOC. SCI. RES. NETWORK at 1 (Feb. 20, 2013) (Fr.), available at SSRN: <http://ssrn.com/abstract=2221424>.
5. "In its 2010 Report to the United Nations General Assembly, the ICC stated that there has been a noticeable decrease in the use of child soldiers since the ICC brought charges against Thomas Lubanga Dyilo in 2006." Robert Zuber & Saul Mendlovitz, *The Prospects Of Abolishing War: A Proposal For The 21st Century*, 21 TRANSNAT'L L. & CONTEMP. PROBS. 705, 713 (2013). (citing: International Criminal Court Assembly of States Parties [ICC-ASP], Report of the Bureau on the Impact of the Rome Statute System on Victims and Affected Communities, P 35, ICC-ASP/9/25 (Nov. 22, 2010)).
6. "Moreover, the case has had a positive impact on the prevention of the use of child soldiers, and has raised awareness of the impact of such crimes on children. For example, it contributed to the demobilization of thousands of child soldiers in Nepal." Karen L. Corrie, *International Criminal Law*, 46 INT'L LAW. 145, 148 (2012).
7. Practitioners and advocates of international criminal law frequently justify this body of law and its institutions on the basis of the deterrent effect that it has on those who might commit mass atrocities. Nevertheless, detailed studies by external critics in the past 20 years of globalised justice have strongly called into question this deterrence rationale as it lacks support in the historical record. Padraig McAuliffe, *Suspended Disbelief? The Curious Endurance of the Deterrence Rationale in International Criminal Law*, 10 N.Z. J. PUB. & INT'L L. 227 (2012).

8. *Id.* at 258:  
 At the *Lubanga* trial in 2010, the United Nations Special Envoy on Child Soldiers Radhika Coomaraswamy testified as an amicus curiae that the willingness of the ICC to prosecute cases of child soldier recruitment led armed groups to negotiate 14 action plans for the release of children who might otherwise have been pressed into military action, including 3000 in Nepal. Perhaps more tenuously, it has been suggested that the indictment of members of the Lord's Resistance Army 'cannot be discounted as one of the possible factors' motivating its willingness to negotiate with the Ugandan government from July 2006.
9. Karen L. Corrie, *International Criminal Law*, 46 INT'L LAW. 145, 148 (2012).
10. *Jus cogens* is "[a] mandatory norm of general international law from which no two or more nations may exempt themselves or release one another." BLACK'S LAW DICTIONARY 864 (7th ed. 1999). *See also*, Melina Milazzo, *Military Commissions Act of 2006: A Regressive Step Back from the International Legal Standards of Rape and Sexual Violence*, 35 FLA. ST. U. L. REV. 527, 536 (2007-2008) (citing BOLESŁAW A. BOCZEK, INTERNATIONAL LAW: A DICTIONARY, at xx (2005)); ANTONIO CASSESE, INTERNATIONAL LAW, 143 (2005).
11. Benjamin Pomerance, *Not Just Child's Play: Why Recognizing Fundamental Principles of the UN Convention on the Rights of the Child as Jus Cogens Would Give Needed Power to an Important International Document*, 16 GONZ. J. INT'L L. 1 (2013).
12. K'Shaani O. Smith, *Prosecutor v. Lubanga: How the International Criminal Court Failed the Women and Girls of the Congo*, 54 HOW. L.J. 467, 476 (2011).
13. "[C]ivil and common law judicial traditions merge in the ICC's hybrid system of criminal procedure." Corrie, *supra* note 9, at 147 (2012).
14. Alicia Mazurek, *Prosecutor v. Thomas Lubanga Dyilo: The International Criminal Court as it Brings its First Case to Trial*, 86 U. DET. MERCY L. REV. 535 (2009).
15. The case was not without difficulties. For example, Trial Chamber I stayed the proceedings for approximately five months after it concluded in June 2008 that the Prosecution had not disclosed to the Defense over 200 documents which contained potentially exculpatory information or which were material to the Defense's preparation, based on an incorrect use of article 54(3)(e) of the Rome Statute. In another example, the Prosecution's first trial witness initially retracted his claim that he had served as a child soldier in the FPLC and said that an unnamed NGO told him what to say." Corrie, *supra* note 9, at 147-148.
16. *Id.* at 148.
17. Smith, *supra* note 12, at 475.
18. Rome Statute of the International Criminal Court art. 54(3)(e).
19. Rome Statute of the International Criminal Court art. 67(2).
20. Alex Whiting, *Lead Evidence and Discovery Before the International Criminal Court: The Lubanga Case*, 14 UCLA J. INT'L L. & FOREIGN AFF. 207 (2009).
21. Dr. Caroline Buisman, *Delegating Investigations: Lessons To Be Learned From The Lubanga Judgment*, 11 NW. U. J. INT'L HUM. RTS. 30 (2013).
22. The security concerns outlined above [regarding investigation and intimidation] are not new to the ICC. Investigators from other international criminal tribunals have had to carry out investigations in difficult and volatile circumstances. This particularly holds true for the ICTY investigators, who had to operate while the war was still ongoing in parts of the former Yugoslavia. The ICTY was also successful in that all its suspects from all warring parties have eventually been surrendered to it. The ICTR was similarly successful in managing to try most indictees (although on many other fronts, the ICTR is not exemplary).  
*Id.* at 147.
23. *Id.*
24. "The tendency of this layered judiciary to complicate proceedings." Diane Marie Amann, *Prosecutor v. Lubanga. Case No. Icc-01/04-01/06. Judgment, Decision On Sentence, Decision On Reparations*, 106 AM. J. INT'L L. 809, 816 (2012).

25. The trial chamber laid the blame for the shortcomings of *Lubanga* at the foot of the man to whom it pointedly referred as ‘the former Prosecutor.’ That is too easy an evaluation, for the case revealed other sources of strain, among them the ICC’s novel, many-sided litigation model. Most national criminal justice systems invite active participation by the prosecution, defense, and trial bench. Some also permit a measure of victim participation; in contrast, the Rome Statute has been interpreted to afford an active role to multiple teams of victims’ lawyers who, in *Lubanga*, disagreed at times on litigation strategy. Adding more sides to the model were the pretrial judges, who ordered the presentation of evidence of an international armed conflict that prosecutors had argued could not be proved, and an appeals chamber called upon to decide an interlocutory matter.  
*Id.*
26. Susana SáCouto, *Victim Participation At The International Criminal Court And The Extraordinary Chambers In The Courts Of Cambodia: A Feminist Project?*, 18 MICH. J. GENDER & L. 297 (2012).
27. Kai Ambos, *Confidential Investigations (Article 54 (3)(E) ICC Statute) vs. Disclosure Obligations—The Lubanga Case and National Law*, 12 NEW CRIM. L. REV. (Fall 2009), available at SSRN: <http://ssrn.com/abstract=1540623>.
28. Kai Ambos, *The First Judgment of the International Criminal Court (Prosecutor v. Lubanga): A Comprehensive Analysis of the Legal Issues (2012)*, 12 INT’L CRIM. L. REV. 115 (2012), available at SSRN: <http://ssrn.com/abstract=2030751> or <http://dx.doi.org/10.2139/ssrn.2030751>.
29. A recurring question in international criminal procedure is how to ensure that prosecutors are held accountable for their errors and misconduct. When International Criminal Court (ICC) judges encountered the first serious error by the prosecution in *Prosecutor v. Lubanga*, they opted for an absolutist approach to remedies: the judges stayed the proceedings and ordered the release of the defendant. Although termination of the case was avoided through the intervention of the Appeals Chamber.  
Jenia Iontcheva Turner, *Policing International Prosecutors*, 45 N.Y.U. J. INT’L L. & POL. 175, 175 (2012).
30. Victor Tsilonis, *Thomas Lubanga Dyilo: The Chronicle of a Trial Foretold?* 5 INTELLECTUM 27-42 (2008), available at SSRN: <http://ssrn.com/abstract=1936658>.
31. Bruce Zagaris, *Tribunal Orders Release Of Lubanga After Suspending Trial For Prosecutorial Misconduct*, 24 No. 9 INT’L ENFORCEMENT L. REP. 372 (2008).
32. [A]lthough *Lubanga* was not charged with sexual or gender-based crimes, four legal representatives of victims specifically referred to sexual and gender-based violence suffered by girl soldiers during their opening statements. . . . *Lubanga* was charged with war crimes relating to the enlistment, conscription, and use of children under the age of fifteen in armed conflict. Despite strong advocacy by women’s rights groups and others, the prosecutor did not specifically charge the accused with any sexual or gender-based crimes. Nevertheless, legal representatives of female child soldiers spoke at length during their opening statements not only about the fact that girl soldiers had been subjected to various forms of sexual and gender-based violence, but also about the broader context and the long-term effects of such violence.  
SáCouto, *supra* note 26, at 333-334.
33. “[T]hese crimes are seen as a ‘detour, a deviation, or the acts of renegade soldiers . . . pegged to private wrongs and . . . [thus] not really the subject of international humanitarian law.’ Therefore, despite the enumerated list of sexually-based crimes in the Rome Statute, the prosecutor likely adopted the historical view of the crimes and refused to include them in an indictment.” Smith, *supra* note 12, at 479.
34. Solange Mouthaan, *Victim Participation at the ICC for Victims of Gender-Based Crimes: A Conflict of Interest?*, 21 CARDOZO J. INT’L & COMP. L. 619, 649 (2013).
35. Smith, *supra* note 12, at 486.
36. SáCouto, *supra* note 26 at 333-334.
37. Eric Allen Engle, *Humanitarian Intervention and Syria*, 18 BARRY L. REV. 1 (2012), available at <http://amor.cms.hu-berlin.de/~engleeri/international/18BarryLRev1.htm>.

38. Eric Engle, *U.N. Packing the State's Reputation? A Response to Professor Brewster's 'Unpacking the State's Reputation'*, 114 PENN STATIM 34 (2010), available at <http://lexnet.co.cc/international/114 PennStatim34.htm>.
39. "A COMMONWEALTH, or STATE which is but an artificial man, though of greater stature and strength than the natural, *for whose protection and defence it was intended.*" THOMAS HOBBS, *LEVIATHAN*, "Introduction," 1 (1651). "[T]hat mortal god to which we owe, under the immortal God, *our peace and defence.*" *Id.* at ch. XVII. "A state should be so constituted as to live for ever. For a commonwealth, there is no natural dissolution, as there is for a man, to whom death not only becomes necessary, but often desirable. And when a state once decays and falls, it is so utterly revolutionized, that if we may compare great things with small, it resembles the final wreck of the universe." MARCUS TULLIUS CICERO, *TREATISE ON THE COMMONWEALTH*, (54 B.C.) (trans. Frances Barham, Esq., 1841-42).
40. "When several villages are united in a single complete community, large enough to be nearly or quite self-sufficing, the state comes into existence, originating in the bare needs of life, and continuing in existence for the sake of a good life," ARISTOTLE, *POLITICS*, BOOK ONE, Part II (c. 350 B.C.E.) (trans. Benjamin Jowett, 2000).
41. HEDLEY BULL, *THE ANARCHICAL SOCIETY, A STUDY OF ORDER IN WORLD POLITICS*, (3d ed. 2002).
42. While the use of children in armed conflict is not necessarily a new concept, it is only relatively recently that international law has been specifically directed towards addressing it. Since 1977, a number of international legal instruments have attempted to set standards to prevent the recruitment and use of children in this way.  
Steven Freeland, *Mere Children or Weapons of War - Child Soldiers and International Law*, LAVERNE L. REV. 19, 29 (2008), available at SSRN: <http://ssrn.com/abstract=1306169> or <http://dx.doi.org/10.2139/ssrn.1306169>.
43. "Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces." Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts, art. 4(2)(c), 1125 UNTS 609 (AP II) (1977).
44. "State Parties to the present Charter shall take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child." African Charter on the Rights and Welfare of the Child art. 22 (1990), available at <http://www.achpr.org/instruments/child/#a22>.
45. Rome Statute of the International Criminal Court, U.N. Doc. A/CONF. 183/9\*, 2187 U.N.T.S. 90 (1998).
46. "[S]hall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities" and "shall refrain from recruiting any person who as not attained the age of fifteen years into their armed forces." Optional Protocol to the Convention on the Rights of the Child art. 38, May 25, 2000 (on the involvement of children in armed conflict), available at <http://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=24CAD49E85523D5941256937002F7220&action=openDocument>.  
Resolution adopted by the General Assembly (without reference to a Main Committee (A/54/L.84)) 54/263; Optional Protocols to the Convention on the Rights of the Child, G.A. Res. 24 54/263, May 25, 2000 (on the involvement of children in armed conflict and on the sale of children, child prostitution and child pornography), available at <http://www.un-documents.net/a54r263.htm>.
47. For example, Child Soldiers Prevention Act, 22 U.S.C. §§2370(c)-(c)(2)(2008); Child Soldiers Accountability Act, 18 U.S.C. § 2442 (2008); 18 U.S.C. § 2442 (2008); and the War Crimes Act, 18 U.S.C. § 2441 (2006)(criminalizing war crimes committed by or against a member of the U.S. armed forces or a U.S. national).
48. Tracey B. C. Begley, *The Extraterritorial Obligation to Prevent the Use of Child Soldiers*, 27 AM. U. INT'L L. REV. 613 (2012).

49. Christopher Greenwood, *Customary Status of the 1977 Geneva Protocols*, in HUMANITARIAN LAW OF ARMED CONFLICT: CHALLENGES AHEAD: 101-2 (Astrid J.M. Delissen & Gerald J. Tanja, eds., 1991).
50. Others also argue that the rights of children should be seen as *jus cogens*. See, e.g., Ladan Askari, *Girls' Rights Under International Law: An Argument for Establishing Gender Equality as a Jus Cogens*, 8 S. CAL. REV. L. & WOMEN'S STUD. 3 (1998).
51. "Child sex tourism is widely recognized as a universal crime." Joanna Doerfel, *Regulating Unsettled Issues In Latin America Under The Treaty Powers And The Foreign Commerce Clause*, 39 U. MIAMI INTER-AM. L. REV. 331, 339 (2008). Thus, e.g., child sex tourism is illegal under U.S. law. 18 U.S.C. A. § 2423(c). However, sex tourism though *universally* condemned by national and international law does not yet appear to be recognized as a *jus cogens* norm. Others have suggested that child sex tourism should be seen as a *jus cogens* violation because child prostitution is a form of slavery. Kyle Cutts, *A Modicum Of Recovery: How Child Sex Tourism Constitutes Slavery Under the Alien Tort Claims Act*, 58 CASE W. RES. L. REV. 277 (2007). Unfortunately the Alien Tort Statute's extraterritorial effect has been significantly constrained. It is now subject to a presumption against extraterritoriality such that cases now must "touch and concern the territory of the United States with sufficient force to displace the presumption against extraterritorial application." (*Kiobel v. Royal Dutch Shell*, 569 U.S. \_\_\_); 113 S.Ct. 1659, 1665, 1666 (2013). While broad based *Filartiga* type claims are now precluded, see, *Filartiga v. Pena-Irala*, 630 F.2d 876 (1980), it remains to be seen how human rights actions under international law will be treated in U.S. courts. See, e.g., Gregory H. Fox & Yunjoo Goze, *International Human Rights Litigation After Kiobel*, 92 MICH. B.J. 44 (Nov. 2013).
52. Adil Ahmad Haque, *Protecting And Respecting Civilians: Correcting The Substantive And Structural Defects Of The Rome Statute*, 14 NEW CRIM. L. REV. 519 (2011).
53. Civilians are protected during armed conflict by two bodies of law that differ from one another both in their institutional function and in their conceptual structure. International humanitarian law, particularly as embodied in Additional Protocol I to the 1949 Geneva Conventions, is designed to guide the prospective conduct of military commanders and soldiers on the battlefield. Armed forces are first to distinguish between civilians and enemy combatants; then to direct attacks only at enemy combatants and not at civilians; then to plan and carry out attacks in a manner that avoids or at least minimizes harm to civilians; and finally to refrain from attacks that would cause disproportionate harm to civilians in relation to the military advantage the attacks would achieve. By contrast, international criminal law, particularly as embodied in the Rome Statute of the International Criminal Court, is designed to guide the retrospective evaluation of past offenses by courts. Courts are first to establish the commission of a criminal offense by the defendant; then to consider any justifications, excuses, or other defenses the defendant may assert with respect to that offense; then to acquit or convict the defendant; and finally to impose an appropriate punishment.
- Haque, *supra* note 52 at 520.
54. For example, in the *Lubanga* decision,
- Although it ruled that conscription typically carries an element of compulsion while enlistment is voluntary, it reasoned that children under fifteen were not entitled to choose to fight, so that enrollment of a child under fifteen in an armed force was illegal 'with or without compulsion,' (*id.*, para. 618). As for use, a majority of the chamber construed the phrase 'to participate actively in hostilities' to include a child's support to combatants, if it 'exposed him or her to real danger as a potential target,' (*id.*, para. 628). The construction expanded the proscription to use beyond 'the immediate scene of the hostilities', (*id.*), yet appeared to exclude children victimized not by the enemy but, rather, by the militia that had recruited them.
- Amann, *supra* note 24 at 810-812 (2012).
55. Rome Statute of the International Criminal Court, art. 8(2)(b) ("Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:"), available at <http://untreaty.un.org/cod/icc/statute/rome.htm>.



56. Thomas Liefänder, *The Lubanga Judgment of the ICC: More than Just the First Step?*, 1 CAMBRIDGE J. INT'L & COMP. L. 191, 193 (2012), available at SSRN: <http://ssrn.com/abstract=2183881>.
57. ICC Statute of Rome, Article 8(2)(b) provides:  
 Other serious violations of the laws and customs applicable in *international armed conflict*, within the established framework of international law, namely, any of the following acts: (xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.  
 Rome Statute of the International Criminal Court, art. 8(2)(b) (*emphasis added*).
58. Ambos, *The First Judgment of the International Criminal Court*, *supra* note 28 at 129.
59. Liefänder, *supra* note 56 at 199.
60. *Id.*
61. Ambos, *The First Judgment of the International Criminal Court*, *supra* note 28 at 129.
62. ICC, REGULATIONS OF THE COURT, adopted 26 May 2004, as amended 14 June and 14 November 2007, (amendments entering into force 18 December 2007) ("the Chamber may change the legal characterisation of facts to accord with the crimes under articles 6, 7 or 8, or to accord with the form of participation of the accused under articles 25 and 28, without exceeding the facts and circumstances described in the charges and any amendments to the charges."), available at <http://www.icc-cpi.int/NR/rdonlyres/DF5E9E76-F99C-410A-85F4-01C4A2CE300C/0/ICCBD010207ENG.pdf>.
63. Ambos, *The First Judgment of the International Criminal Court*, *supra* note 28. The *Lubanga* decision applies the more relaxed "overall control test" first enunciated in *Prosecutor v. Tadic*, ICTY, IT-94-1-A., *Lubanga* at 561. However, whether the overall control test or the more rigid effective control test (requiring closer day to day control over proxy forces) should apply remains controversial. See footnote 65, *infra*.
64. Rome Statute of the International Criminal Court provides:  
 (e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:  
 (vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;  
 Rome Statute of the International Criminal Court art. 8(2)(e)(vii).
65. [A]s a consequence of the Chamber's move to a non-international armed conflict, the war crime of Article 8(2)(b)(xxvi) is no longer applicable and thus the tricky issue whether paramilitary-like armed groups like the UPC can be equated to 'national armed forces', unconvincingly affirmed by the PTC,<sup>124</sup> is no longer relevant.<sup>125</sup> Indeed, the applicable war crime for the non-international armed conflict, Article 8(2)(e)(vii), more broadly covers the recruitment ('conscripting or enlisting') of children under fifteen 'into armed forces or groups', i.e., it clearly extends to any armed group within the meaning of international humanitarian law.  
 Ambos, *The First Judgment of the International Criminal Court*, *supra* note 28 at 132-133.
66. Matthew Happold, *Child Recruitment as a Crime under the Rome Statute of the International Criminal Court* (February 5, 2010), in THE LEGAL REGIME OF THE INTERNATIONAL CRIMINAL COURT: ESSAYS IN MEMORY OF IGOR BLISCHENKO 2 (José Doria, et al, eds., 2010), available at SSRN: <http://ssrn.com/abstract=979916>.
67. While *Lubanga*, following the *Tadic* decision out of the ICTY applied the overall control test for determining liability for human rights violations perpetrated by proxies, see note 61 *supra*, there remains a doctrinal question on this point. The International Court of Justice following its earlier decision in *The United States v. Nicaragua*, ruled in *Bosnia and Herzegovina v. Serbia and Montenegro*, 46, no 2 I.L.M. 185 (Feb. 26, 2007) that the proper test was the "effective control" test not the more malleable "overall control" test of *Prosecutor v. Tadic*, Judgment, Case No. IT-94-1-A., 38 ILM 1518 (1999). At least as to state control for purposes of attributing direct responsibility for genocide the test then is "effective control" requiring



direct and continuous control over the otherwise separate, or perhaps non-organic, military units involved in the violation of the laws of war or genocide or crimes against humanity. The ICJ court distinguished *Tadic*, which applied an “overall control” test for determining when a war was international for purposes of applying the Geneva Conventions. The overall control test allowed for liability for use of proxy forces committing violations of IHL even where the sponsor nation lacked effective control over the situation. Logically there could be a different test in this different situation where state responsibility is not directly concerned. However, some of the commentators do not see it that way. *See, e.g.*, Marco Sassoli, & Laura M. Olson, 94 A.J.I.L. 571 (2000); *International Decision: Prosecutor v. Tadic (Judgment)* ICTY Case No. IT-94-1-A., 38 ILM 1518 (1999). They argue that the overall control test has been effectively superseded. International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, July 15, 1999.

In any event the ICJ reverted to the *Nicaragua* test and applying that test found that it had not been proved that the authorities of the FRY had issued instructions to the army of the Republica Srpska to commit the massacres and that it was not an organ of the FRY. The FRY did not exercise the required effective control and this case ends the doctrinal debate on the test of attribution under Article 8 of the ILC Articles on State Responsibility. Nonetheless, *Lubanga* provides strong support for application of the overall control test outside of the state responsibility area and this writer argues that at least in the *Tadic* war crimes area the ICC was correct to adopt the overall control test. This more relaxed test will encourage adherence to IHL and ICL and will make proxy war violations of IHRL more difficult.

68. Liefländer, *supra* note 56 at 194.
69. Ambos, *The First Judgment of the International Criminal Court*, *supra* note 28 at 137.
70. [T]he Chamber distinguished the notion of active participation in hostilities from the more common international humanitarian law notion of direct participation, a move that has already given rise to criticism. The Chamber stated that: Those who participate actively in hostilities include a wide range of individuals, from those on the front line (who participate directly) through to the boys or girls who are involved in a myriad of roles that support the combatants. All of these activities, which cover either direct or indirect participation, have an underlying common feature: the child concerned is, at the very least, a potential target. The decisive factor, therefore, in deciding if an ‘indirect’ role is to be treated as active participation in hostilities is whether the support provided by the child to the combatants exposed him or her to real danger as a potential target. In the judgment of the Chamber these combined factors—the child’s support and this level of consequential risk—mean that although absent from the immediate scene of the hostilities, the individual was nonetheless actively involved in them. Liefländer, *supra* note 56 at 201.
71. “[T]here exist in the general positive international law of today certain fundamental rules of international public order contrary to which States may not validly contract.” Rep. of the Int’l Comm’n, ¶ 18, U.N. Doc. A/5601, 15th Sess. (Nov. 6, 1963); UN GAOR, 18th Sess. (1963).
72. Megan Nobert, *Children At War: The Criminal Responsibility of Child Soldiers*, 3 No. 1 PACE INT’L L. REV. ONLINE COMPANION 1 (2011).
73. *See, e.g.*, Kane v. Winn, 319 F. Supp. 2d 162, 202 n.62 (D.Mass. 2004) (citing Ted L. Stein, *The Approach of a Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT’L L.J. 457 (1985)). Fisheries Case (U.K. v. Nor.), 1951 I.C.J. 116, 131 (Dec. 18).
74. On persistent objectors generally, *see, e.g.*, Lynn Loschin, *The Persistent Objector and Customary Human Rights Law: A Proposed Analytical Framework* 2 U.C. DAVIS J. INT’L L. & POL’Y 148 (1996).
75. LOUIS HENKIN, 216 RECUEIL DES COURS, 1989-IV, 60 (Académie de droit international de La Haye, 1989) (Fr.).
76. Criminal violations of *jus cogens* principles (genocide, grave violations of the Geneva Conventions, and Crimes against Humanity) are subject to permissive universal jurisdiction.

Under one construal of this principle a willing nation may not only prosecute such violations of international criminal it can expect that a second nation, holding an alleged violator, must either prosecute or extradite to the nation willing to undertake such prosecution. *See, e.g.,* RONALD C. SLYE & BETH VAN SCHAACK, *ESSENTIALS OF INTERNATIONAL CRIMINAL LAW* 54-55, 72-78 (2009). There is, however, contrary authority that would acknowledge the permissive jurisdiction to prosecute but denies that a nation holding an alleged criminal violator of *ius cogens* principles must necessarily, in the event that it refused to prosecute, extradite to a nation willing to so prosecute. Under this view a nation may prosecute the genocide, war criminal or perpetrator of crimes against humanity, but it is under no obligation to do so and may refuse to extradite to a nation willing to prosecute. For example, Spain sought to extradite Pinochet Ugarte from the UK for prosecution under the principles of universal jurisdiction. Spain thus accepted the notion that it could seek Pinochet's extradition for prosecution in Spain for the violation of *ius cogens* human rights norms. The first round before the House of Lords accepted that proposition and would have extradited Pinochet for a host of violations of the Convention Against Torture. *R. v. Bow Street Metropolitan Station* [House of Lords] 1AC 61, 25 Nov. 1998. The second Pinochet appeal before the House of Lords, *id. Stipendiary Mag., ex parte Pinochet Ugarte* (No. 3) [1999] 1 A.C. 147, refused to accept the prior holding by the earlier panel and ruled that the *ius cogens* norm against torture could only be enforced for extradition purposes not from the undoubted emergence of the norm but only from the date of ratification by the UK. Specifically that court held:

Since torture outside the United Kingdom was not a crime under UK law until [the date of ratification of CAT] the principle of double criminality which requires an Act to be a crime under both the law of Spain and of the United Kingdom cannot be satisfied in relation to conduct before date [because] the principle of double criminality requires the conduct to be criminal under United Kingdom law at the date it was committed.

*Id.* Thus, the House of Lords rejected extradition under the principal of universal jurisdiction based solely upon the principle of *ius cogens*. The UK required rather that extradition could occur only after both the UK and Chile had ratified CAT thus satisfying the principle of double criminality by making torture a crime under UK law wherever in the world that it occurred. This narrow interpretation of universal jurisdiction notwithstanding, it appears that permissive universal jurisdiction for violation of *ius cogens* principles is increasingly coming to require that a nation prosecute such criminals or extradite them to a willing nation.

77. On the definition of *ius cogens* and its relation to *erga omnes* norms *see, e.g.,* M. Cherif Bassiouni, *International Crimes: "Jus Cogens" and "Obligatio Erga Omnes,"* 59 *LAW & CONTEMPORARY PROBLEMS* 63 (1996), *available at* <http://www.jstor.org/stable/1192190>.
78. Mary Ellen O'Connell, *Jus Cogens: International Law's Higher Ethical Norms,* in *THE ROLE OF ETHICS IN INTERNATIONAL LAW*, (Donald Earl Childress, III, ed., 2012); Notre Dame Legal Studies Paper No. 11-19 (April 19, 2011), *available at* <http://ssrn.com/abstract=1815155>.
79. On Aristotle's theory of law and justice *see, e.g.,* Eric Allen Engle, *Aristotle, Law, and Justice: The Tragic Hero*, 35 *N. KY. L. REV.* 1 (2008).
80. Eric Thomas Berkman, *Responses To The International Child Sex Tourism Trade*, 19 *B.C. INT'L & COMP. L. REV.* 397, 421 (1996) ("Sexual exploitation of children is not classified among these crimes of a 'universal concern,' but perhaps it might be considered a form of slave trade, which is covered by the universality principle.")
81. Susan Tiefenbrun, *Child Soldiers, Slavery and the Trafficking of Children*, 31 *FORDHAM INT'L L. J.* 415, 457-458 (2008).



## Margaret Shikibu

# WORK LIKE A DOG: EXPANDING ANIMAL CRUELTY STATUTES TO GAIN HUMAN RIGHTS FOR MIGRANT FARMWORKERS IN THE U.S.

### Introduction

“It does not take long either to boil an egg or to cook neurons.”<sup>1</sup> This explains why a body literally cooks itself from the inside out under certain conditions. The loss of water from the body triggers the onset of rapidly escalating symptoms of heat illness: increased thirst, dry mouth, cessation of sweating and tear production, muscle cramps, nausea and vomiting, heart palpitations, and lightheadedness.<sup>2</sup> Left unchecked, dehydration will then cause confusion and weakness, as the brain and other bodily organs receive less blood. Finally, coma and massive organ failure will follow.<sup>3</sup> But two surprisingly simple ingredients can prevent any of this from occurring: water and shade.<sup>4</sup>

Heat illness was certainly not prevented in the case of two workers, “A” and “B.” Worker A died in the company car on June 20, 1998 in San Diego County, California.<sup>5</sup> Temperatures had topped 100° F that day, and a necropsy performed on Worker A confirmed that he died from the effects of heatstroke.<sup>6</sup> Further upstate near Stockton, Worker B died on May 16, 2008, two days after collapsing on the job from 95° heat.<sup>7</sup> At the time of her arrival at a hospital, her internal body temperature topped 108°F.<sup>8</sup>

Two workers in the same state, both dead from heatstroke—but there the similarities end. Worker A (“Forrest”), was a 5-year old Belgian Malinois assigned to the K-9 unit of a police department that had been left in his squad car with the windows rolled up.<sup>9</sup> His handler ultimately pleaded no contest to a misdemeanor charge of animal neglect, and was ordered to: (1) pay a \$411 fine; (2) pay \$4,941 in restitution for the dog; (3) perform 100 hours of community service; and (4) serve three years of probation.<sup>10</sup> Moreover, in an effort to prevent similar tragedies, the Police Department announced plans to buy heat-alert systems for its fleet of 53 canine patrol cars that would automatically lower the car’s windows, switch on the air conditioning, and sound an alarm when the interior of the car reached a predetermined temperature.<sup>11</sup>

Worker B (“Maria Isavel Vasquez Jimenez”), on the other hand, was a pregnant 17-year old human.<sup>12</sup> She had been denied water and shade as she

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pruned grapes for nine sweltering hours in a vineyard.<sup>13</sup> Two farm supervisors were ultimately held accountable for her death under the terms of a plea bargain. One supervisor pleaded guilty to a misdemeanor count of failing to provide shade and was sentenced to 40 hours of community service, three years of probation, and a \$370 fine. A second supervisor pleaded guilty to a felony count of failing to follow safety regulations resulting in death and was sentenced to 480 hours of community service, five years of probation, and a \$1,000 fine.<sup>14</sup>

The difference in accountability for their deaths is profound. Apart from the paucity of public outrage, the lack of legal accountability for the conditions that led to Worker B's death is shocking. First, if Worker B had been an animal like Worker A, the parties responsible for her death would have had to make restitution for her market value.<sup>15</sup> Second, it is very likely that serious efforts would have been undertaken to implement comprehensive strategies for the prevention of similar tragedies in the future,<sup>16</sup> as it was in the case of Worker A.

But most importantly, had Worker B been an animal instead of a migrant farmworker, those responsible for her death would have been legally accountable for their negligence even before there was a death to show for it. The two supervisors responsible for Worker B's death were only found criminally<sup>17</sup> liable *by reason of* her death. In contrast, Worker A's handler potentially could have been held criminally liable under three separate state criminal statutes governing the neglect, endangerment, or failure to care for animals<sup>18</sup> even if Worker A hadn't died, and would have faced a maximum sentence of six months of jail time and a fine of \$1,000 for each violation.<sup>19</sup>

Sadly, Worker B's death is not all that unusual in the U.S. Farm work is our second most dangerous occupation.<sup>20</sup> Workers employed in the crop production (and support activities for crop production) sectors accounted for 67 percent of the 423 laborer deaths from environmental exposure that were reported between 1992 and 2006.<sup>21</sup> And yet farmworkers remain routinely excluded from federal employment protections, whether explicitly through statutory language or implicitly through inadequate government enforcement. Further, they continue to be subjected to the horrible work conditions and abusive employment practices<sup>22</sup> that earn them the dubious distinction of being among the lowest paid and most exploited workers in our economy.<sup>23</sup> The grim situation for farmworkers,<sup>24</sup> most of whom are undocumented,<sup>25</sup> is only exacerbated by the deep-rooted societal animus towards them that stems from the widespread public disapproval of illegal immigration.<sup>26</sup>

What can we do? This article considers a possible solution: expanding existing animal cruelty statutes to provide core human rights to migrant farmworkers working in the U.S.<sup>27</sup> Moreover, I propose to do so without enacting completely new legislation,<sup>28</sup> through the legislative or judicial expansion of the definition of "animal" to include human beings.

This proposal for expanding existing animal cruelty statutes to provide human rights to migrant farmworkers faces a number of obstacles, especially the fact that many animal cruelty statutes specifically exclude human beings from their coverage. This is typically achieved through the inclusion of terms such as “dumb animals” in their definition. But the ultimate goal in making these comparisons is not so much to win cases, as it is to change the terms of the discussion. We are in an era in which migrant farmworkers, particularly those who are unauthorized workers, have become a new form of “*homo sacer*,” a person who has no rights that employers are bound to respect.<sup>29</sup> If meaningful reform is to be achieved, we must start with the very basic task of reaffirming our shared humanity with these workers—which we can do by contrasting their treatment with the way we treat animals. If letting a worker such as Worker B die for lack of shade and water is not enough to provoke a meaningful change in the law, or more than a token punishment for those responsible, then the point must be driven home by other means—even if the comparison between dogs and human beings may seem outlandish.<sup>30</sup>

There is another reason to pursue this connection between the welfare of workers and of animals: in addition to extending the hard-won protections that currently exist for animals to equally vulnerable workers, we can also “humanize” the dialogue about animal rights, to support the growing awareness that “human oppression of other animals. . . is profoundly and permanently entwined with human oppression of other humans.”<sup>31</sup> This is, of course, a moral, rather than narrowly legal, proposition. In the words of the late activist, César Chávez: “Kindness and compassion towards all living things is a mark of a civilized society.”<sup>32</sup> Establishing the value of all living beings and our inter-dependence is a step toward recovering our own humanity, as well as reaffirming that of farmworkers, which is the heart of this case study comparison.

## **II. Migrant farmworkers are denied international standards of protection, as farmworkers and as migrants**

Proponents of the status quo claim that U.S. labor laws already function well. Indeed, the official line is that the annual number of worker deaths is declining as a result of the initiatives and programs implemented by the government<sup>33</sup> and that the annual number of workplace illnesses and injuries is likewise on a steady decline.<sup>34</sup> But when domestic labor is viewed through the lens of international standards, which link labor rights with human rights, it becomes apparent that “the self-image of the United States as a beacon for human rights flickers darkly when it comes to workers’ rights.”<sup>35</sup>

U.S. labor laws have helped create a huge marginal underclass, disproportionately made up of domestic and migrant<sup>36</sup> workers, who are systemically denied any protection or benefit from those laws.<sup>37</sup> The perception that migrant farmworkers in particular are “disposable workers”<sup>38</sup> has relegated them to being members of “*homo sacer*”—a class of human beings who are consigned

to “zones of exemption” from labor laws.<sup>39</sup> They continue to be excluded from legal protections and reduced to the margins on two separate grounds: (1) their status as farmworkers denies them the basic right to organize and (2) their status as migrants subjects them to officially sanctioned discrimination. Those shortcomings directly conflict with the internationally established recognition, based on the Universal Declaration of Human Rights (UDHR) unanimously adopted by members of the United Nations on December 10, 1948, that human rights are universal and indivisible,<sup>40</sup> and that all workers are guaranteed core rights regardless of their employment or immigration status.

### **A. Farmworkers in the U.S. are legally denied the basic right to organize**

While “[f]reedom of association is the bedrock workers’ right under international law on which all other labor rights rest,”<sup>41</sup> that right is not extended to every worker in the U.S. On the contrary, even though the U.S. ratified the International Covenant on Civil and Political Rights (ICCPR, 1966) in 1992, most farmworkers in the U.S. are expressly denied the right to unionize by exclusion from coverage under the National Labor Relations Act.<sup>42</sup> U.S. law, both state and federal, not only falls short of, but contradicts, the more inclusive international standards<sup>43</sup> set out in such human rights instruments as the Universal Declaration of Human Rights,<sup>44</sup> the International Covenant on Civil and Political Rights,<sup>45</sup> the International Covenant on Economic, Social, and Cultural Rights (ICESCR, 1966),<sup>46</sup> and the International Labor Organization (ILO) Convention No. 87,<sup>47</sup> which all recognize that “everyone,” or every “worker,” has the right to form and join trade unions for the preservation of their interests.

Many of the challenges farmworkers face today are tied to the fact that the eligibility for protection under domestic labor laws, including the right to form and join trade unions, depends on “employee” status.<sup>48</sup> Based on “the fiction... that [they were] not really employees in the industrial sense,”<sup>49</sup> farmworkers have been expressly excluded from the National Labor Relations Act from its inception.<sup>50</sup> Farmworkers continue to be excluded from NLRA protections<sup>51</sup> even though large-scale corporate farming has mostly edged out the “hired hand” model of farm labor prevalent in the 1930s at the dawn of the NLRA.<sup>52</sup> Consequently, approximately 75 percent of the agricultural workers in the U.S. today remain without collective bargaining rights,<sup>53</sup> even with while nine individual states recognize some form of collective bargaining rights for them.<sup>54</sup>

It is important to keep in mind that “the right to organize does not exist in a vacuum,”<sup>55</sup> rather “[workers] organize for a purpose.”<sup>56</sup> According to the results of a 2006 government survey, the number one reason why workers elect to form a union and collectively bargain is for occupational safety and health, and not for wages or benefits.<sup>57</sup> That is precisely why denial of the right to organize is a critical issue for farmworkers. The inability to organize leaves them virtually powerless to raise health and safety concerns, even



those conferred by the Occupational Safety and Health Act and its state law counterparts because they have no effective protection against retaliation for asserting those rights.<sup>58</sup>

Laws such as the Occupational Safety and Health Act theoretically protect the occupational health and safety of migrant farmworkers without regard to their immigration status.<sup>59</sup> OSHA provides that farms employing eleven or more workers engaged in agricultural activities or operations performed by hand or with hand tools are required to provide drinking water, hand-washing facilities, and toilets at no cost to the farmworker.<sup>60</sup> Employers are further required to allow their employees reasonable opportunities to avail themselves of those facilities and water.<sup>61</sup> However, deplorable work conditions persist due to inadequate enforcement of such regulations.<sup>62</sup>

The fact that OSHA and its state law counterparts are alarmingly underfunded<sup>63</sup> and understaffed by international standards is underscored when the actual number of OSHA inspectors is compared to the target number of inspectors for industrialized economies established by the ILO.<sup>64</sup> The ILO template calls for one inspector for every 10,000 workers, but there is by one count only one OSHA inspector for every 63,913 workers in the U.S.<sup>65</sup> To put those numbers into perspective, an inspection of each workplace will occur once every 24 years in Oregon, and once every 228 years in Florida, at the current OSHA rate of inspection.<sup>66</sup> According to the AFL-CIO, OSHA has never had more than 2,000 inspectors for six million sites, and would only be able to inspect each American workplace that falls within its jurisdiction once each century.<sup>67</sup>

Getting an OSHA inspector on site would, moreover, only be half the battle. On the rare occasions when OSHA inspectors do inspect work sites and assess fines for violations of health and safety infractions, an elaborate appeals process almost guarantees that fines will be lowered and citations consolidated.<sup>68</sup> As a matter of fact, it has been calculated that the top twenty-five OSHA fines of all time have been discounted by an average of 57 percent as a result of the appeals process.<sup>69</sup> This general tendency to reduce civil liability once assessed effectively renders OSHA toothless, and only serves to encourage noncompliance with its regulations by employers.

Since farmworkers do not have the federal right to engage in “concerted activities” for “mutual aid or protection” without NLRA coverage, they are powerless to challenge their workplace conditions. As a result, migrant farmworkers remain the lowest paid and most heavily exploited workers in our economy.

## **B. Officially sanctioned immigration-based discrimination in the U.S.**

The U.S. consistently falls short of international standards when it comes to discrimination against migrant farmworkers based on their immigration



status. International migrants comprise a substantial portion of the world's population today: nearly 200 million people permanently or temporarily live outside their country of origin, and the United States is home to approximately 20 percent of that total number.<sup>70</sup> And while a report by the U.S. Department of Agriculture estimates that 52 percent of all farmworkers in the U.S. are undocumented,<sup>71</sup> information provided by farmworker advocates indicates that the actual percentage is closer to somewhere between 70 and 90 percent.<sup>72</sup> In order to address this substantial segment of the world's population, the ILO has twice issued conventions, first in 1949, and a second time in 1975,<sup>73</sup> calling for the promotion of equal opportunity and treatment for migrant workers. Yet, the U.S. has failed to ratify any conventions pertaining to migrant workers. Rather, in defiance of those international calls for equality, unauthorized<sup>74</sup> immigrant workers in the U.S. are routinely discriminated against, and face both remedies exclusions<sup>75</sup> and possible criminal prosecution, specifically because of their immigration status.<sup>76</sup>

Anti-union discrimination against unauthorized workers was rampant before the seminal case of *Hoffman Plastic Compounds, Inc. v. NLRB*,<sup>77</sup> but the Supreme Court's 2002 decision officially sanctioned the practice by denying any meaningful remedy to the victims of anti-union retaliation.<sup>78</sup> Since the *Hoffman* decision, unauthorized workers are no longer entitled (as their authorized co-workers are) to the vital remedy of back pay, even if they are terminated in retaliation for having engaged in protected practices.<sup>79</sup> In essence, the decision issued employers a de facto "invitation to ignore the law."<sup>80</sup>

To make matters worse, the fallout from *Hoffman* has not been confined to situations involving the NLRA, but has contributed to the erosion of other rights of unauthorized workers.<sup>81</sup> Both the Inter-American Court of Human Rights (IACHR)<sup>82</sup> and the ILO Committee on Freedom of Association<sup>83</sup> have independently condemned the *Hoffman* doctrine for violating workers' rights based on their migrant status.<sup>84</sup>

Moreover, the government's "enforcement only" approach,<sup>85</sup> which prosecutes and often criminalizes the migrant employee instead of the employer, further discriminates against migrants. While it is illegal for an employer to "knowingly" hire foreigners who lack proper documentation,<sup>86</sup> "few employers have been prosecuted, much less sanctioned, for doing so."<sup>87</sup> An infamous May 2008 Immigration and Customs Enforcement (ICE) raid in Postville, Iowa that resulted in the arrest of 600 workers, illustrates this dynamic: 306 of those workers subsequently faced criminal charges for working with false papers, including Social Security fraud and identity theft.<sup>88</sup> In contrast, while charges were subsequently brought against the senior managers and owners for labor violations, no charges for immigration violations were ever brought against them.<sup>89</sup> Ironically enough, ICE cited numerous health and safety and wage-and-hour violations (uncovered through investigations by at least three state

and federal labor agencies) in their warrant application for the raid as evidence of the strong possibility that unauthorized workers would be found on-site.<sup>90</sup>

### **III. Non-human animals currently have greater legal protection than migrant farmworkers**

With neither “meaningful bargaining leverage nor the right to refuse unsafe work when hazards present themselves,”<sup>91</sup> migrant farmworkers are, as stated above, *homo sacer*, “beings of an inferior order . . . who ha[ve] no rights which [society] [i]s bound to respect,”<sup>92</sup> and are consigned to zones of exemption from the law. They are worse off than animals because animals currently have the benefit of greater legal protection. In stark contrast to the dearth of legal remedies available to migrant farmworkers, every single state in the U.S. has enacted anti-cruelty statutes for animals.<sup>93</sup> Acts of cruelty may be deemed an infraction, misdemeanor, or a felony, depending on the individual facts of the case.<sup>94</sup> It goes without saying that animals should be protected by the law from abuse and cruelty. However, drawing attention to the disparity between the law’s solicitude for animals and its disregard for the lives and health of migrant farmworkers may help bring about a “transformation of our thinking about the nature of industrial accidents and deaths” in which workplace deaths are seen as preventable and predictable events, rather than unpredictable accidents.<sup>95</sup>

#### **A. Comprehensive legal protection for non-human animals**

Though there are significant differences among the states, there are also many similarities.<sup>96</sup> The various state statutes generally provide basic prohibitions against abuse, cruelty, neglect and sexual assault.<sup>97</sup> They also typically contain provisions mandating community service, counseling, cross-reporting of known or suspected child abuse, forfeiture of rights in the animal victims, penalties, restitution, seizure, and veterinarian reporting of suspected or known animal cruelty.<sup>98</sup>

The Animal Legal Defense Fund (ALDF) periodically conducts empirical research and compiles their findings into rankings<sup>99</sup> that rate the overall strength and comprehensiveness of the various states’ animal anti-cruelty legislation. According to their results in 2010, the five states with the best animal protection statutes are: (1) Illinois (2) Maine (3) Michigan (4) Oregon and (5) California. Conversely, the worst five states are: (1) Iowa (2) Mississippi (3) Idaho (4) North Dakota and (5) Kentucky.

The animal anti-cruelty provisions that are especially relevant for migrant farmworkers are the provisions (1) mandating a minimum duty of care and (2) establishing law enforcement policies. First, state anti-cruelty statutes have established criminal penalties<sup>100</sup> for “intentionally” or “knowingly” failing to provide minimum care to an animal, such as water, food, shelter and veterinary care.<sup>101</sup> Second, some states have also granted varying powers of investigation, arrest, or use of reasonable force necessary to appointed agents to help enforce their animal anti-cruelty statutes. These animal anti-cruelty provisions,

especially those concerning law enforcement provisions, would be a substantial improvement over the existing but largely unenforced standards that have allowed the deplorable conditions faced by migrant farmworkers to persist.

## **B. But what exactly is an animal?**

Each state commonly provides a definition of “animal” for the purposes of its anti-cruelty statutes, which differs vastly from state to state.<sup>102</sup> Unfortunately, the definitions leave much room for interpretation. Some statutes have no express definition. In other instances, even when terms are defined, the same species of animal may be defined in different terms in different statutes within the same state.<sup>103</sup>

In Arizona, animal “means a mammal, bird, reptile or amphibian.”<sup>104</sup> In Delaware, the definition only specifies that it “shall not include fish, crustacea or molluska.”<sup>105</sup> New Jersey gives no definition, but the text of the state’s anti-cruelty statute refers to “a living animal or creature.”<sup>106</sup> South Carolina likewise gives no definition, but its statutory section concerning the mistreatment of animals specifies that it does not apply to “fowl.”<sup>107</sup> In Michigan, animal means “any vertebrate other than a human being.”<sup>108</sup> In California, animal “includes every dumb creature.”<sup>109</sup> The various states make further distinctions between “domestic” and “companion” animals versus “livestock,”<sup>110</sup> and those definitions can be similarly nebulous.

Consulting a dictionary is of little help in resolving any ambiguities, and may add to the confusion, as the definitions given for the word “animal” contradict each other:

- 1) *any of a kingdom (Animalia) of living things* including many-celled organisms and often many of the single-celled ones (as protozoans) that typically differ from plants in having cells without cellulose walls, in lacking chlorophyll and the capacity for photosynthesis, in requiring more complex food materials (as proteins), in being organized to a greater degree of complexity, and in having the capacity for spontaneous movement and rapid motor responses to stimulation;
- 2) one of the *lower animals as distinguished from human beings*; mammal; broadly: vertebrate;
- 3) *a human being* considered chiefly as physical or nonrational; *also*, this nature;
- 4) *a person* with a particular interest or aptitude; or (5) *matter, thing*; *also*: creature.<sup>111</sup>

## **C. Are migrant farmworkers “animals”?**

The definition of the term “animal” is often up for debate, and that the question of whether a particular animal falls within the purview of a given statute has frequently been subject to judicial interpretation.<sup>112</sup> Could the courts interpret the word “animal” as used in anti-cruelty statutes to include human beings—and thereby extend their protections for migrant farmworkers, particularly since traditional labor protections have been stubbornly denied to a vulnerable yet inherently deserving class of people?

Migrant farmworkers, like all humans, qualify as animals under the most general meaning of the word: they belong to the kingdom *Animalia*. And a case

could be made that since they are denied an independent collective voice that is in compliance with international standards,<sup>113</sup> they are effectively rendered “dumb” by the law only. Thus, migrant farmworkers should be permitted access to the same statutory protections available to animals under existing anti-cruelty statutes that they are denied as human beings.<sup>114</sup>

This proposed statutory construction treating farmworkers as animals for the purposes of extending otherwise denied protections is not as far-fetched as it may seem. In fact, historical precedent for such an intersection between animal and human activism was first established in 1874, when the principles of animal activism were used as a model to obtain protection for a nine-year old girl who had been repeatedly beaten, cut, and burned by her foster mother for a period of more than seven years.<sup>115</sup> The American Society for the Prevention of Cruelty to Children (ASPCA) was founded shortly thereafter.<sup>116</sup>

The intersection between animal and child anti-cruelty statutes has been reaffirmed more recently as well. Courts have analogized terms such as “cruelty” and “neglect” as they are used in the animal law context with their meaning in contemporary child abuse statutes.<sup>117</sup> And when animal rights activists were campaigning for Proposition 2,<sup>118</sup> the Prevention of Farm Animal Cruelty Act, in 2008, United Farm Workers supported their efforts.<sup>119</sup> The two issues are more deeply related than they might first appear. All living beings deserve protection from cruelty and abuse.

#### **IV. Illustrative examples of how animal anti-cruelty statutes should be expanded to include human workers**

Because it is not possible to cover all 50 states within the constraints of this article, this article focuses on the three states of California, Florida, and North Carolina to illustrate how various existing animal anti-cruelty statutes might be modified to provide human rights for migrant farmworkers in light of existing labor law shortcomings. These three particular states were selected because a disproportionate number of deaths from environmental exposure occurred among crop workers in them between 1992–2006.<sup>120</sup> Out of 21 states reporting 68 heat-related deaths during that time, these three states accounted for 57 percent of the total, with North Carolina having the highest annualized rate.<sup>121</sup>

##### **A. California**

Agriculture is a huge industry in California. California was the number one state in the U.S. for cash farm receipts in 2011, and accounted for 15 percent of the national total.<sup>122</sup> The state’s cornucopia consists of more than 400 different commodities that constitute nearly half of all the fruits, nuts, and vegetables that are grown in the country.<sup>123</sup>

Unfortunately, migrant farmworkers do not partake of that bounty. For example, even after California adopted its Heat Illness Prevention Regulation<sup>124</sup> for humans in 2005, at least 28 farm workers have died of potentially

heat-related causes.<sup>125</sup> The inadequacy of Cal/OSHA enforcement efforts was confirmed by a press release issued by the agency itself, which revealed estimates that one out of four employers fail to comply with heat illness prevention regulation.<sup>126</sup> That would mean that more than 156,000 farmworkers on at least 8,400 farms are at risk.<sup>128</sup>

Yet, California has one of the most comprehensive animal anti-cruelty statutes in the country, and is ranked in the top tier (coming in at 5 out of 50 in the 2010 ALDF State Animal Protection Laws Rankings). This is startling when compared to the inadequate protections offered to the migrant farmworkers within its borders. California animal anti-cruelty statutes provide general prohibitions against (1) poisoning animals (2) maliciously and intentionally injuring or killing a non-threatened or non-endangered animal (3) general cruelty and neglect (4) maliciously and intentionally injuring or killing a threatened or endangered animal (5) cruelty to animals being transported (6) abandonment or neglect of animals (7) abandonment of domestic animals (8) animal confinement (9) failure to care for animals and (10) animal endangerment.<sup>129</sup> Most violations of these statutes are classified as misdemeanors, but depending on the circumstances of the case, a violation of (2), (3), or (4) above could be ruled as either a misdemeanor or felony. If it qualifies as a felony, the maximum penalty would be three years in prison and/or a \$20,000 fine.<sup>130</sup> If it qualifies as a misdemeanor, the maximum penalty would be one year in jail and/or a \$20,000 fine.<sup>131</sup> All other violations would count as a misdemeanor, with a maximum penalty of six months in jail and/or a \$1,000 fine.<sup>132</sup>

The specific statutes governing general cruelty and neglect or abandonment of animals, failure to care for animals, and animal endangerment are the most pertinent for the migrant farmworkers in the state, as the failure to provide workers with water and shade would be treated as a crime.<sup>133</sup> The prospect of facing a criminal record, even if it is an only a misdemeanor, is certainly more of a deterrent than barely enforced regulation backed only by fines.

In addition, the state gives “authorized humane agents” the power to “make arrests, serve search warrants, carry firearms, and use reasonable force necessary to prevent the perpetration of cruelty to animals.”<sup>134</sup> Authorized humane agents could give a much-needed boost to the ineffectual Cal/OSHA enforcement efforts currently in place.

The definition of an “animal” for the purposes of these statutes is: “every dumb creature,”<sup>135</sup> including “[e]ndangered or threatened species, protected birds, mammals, reptiles, amphibians, fish.”<sup>136</sup> The definition does not expressly exclude human beings.

Expanding that definition to cover migrant farmworkers, who are doubly disenfranchised because of their alienage and immigration status, would be difficult. California courts frequently start and stop their analysis with the plain meaning of the statute, which almost certainly forecloses this expansion of

the definition to humans.<sup>137</sup> A court will need to look past precedent to read the statute expansively enough to cover farmworkers.

## **B. Florida**

Agriculture is also big business in Florida. Its industry is second only to that of California.<sup>138</sup> Florida produces three-fourths of the annual citrus crop of the U.S. It leads the world grapefruit production. The top ten vegetable growers in the southeastern United States in 2000 were based in the state.<sup>139</sup> “Yet behind the sunny image of Florida’s No. 2 industry, abuse abounds, and it is not limited to one rough boss, or one patch of hard-luck laborers.”<sup>140</sup> Work and housing conditions and wages are so inhumane that it has been noted “that the only people who are going to do farm work are undocumented aliens or crack addicts.”<sup>141</sup> Moreover, the agricultural labor market is increasingly built on layers of contracting and subcontracting systems, therefore, growers escape liability by using the services of labor contractors (commonly referred to as crew leaders) that supply workers and then claim that they are not the true employers.<sup>142</sup> Such contractors traffic in farm labor, and typically disappear when legal proceedings are brought against them.<sup>143</sup> Florida is home to more labor contractors than any other state in the nation.<sup>144</sup>

Florida’s anti-animal cruelty statutes are not as comprehensive as those of California, but they are still ranked in the middle tier in the 2010 State Animal Protection Laws Rankings.<sup>145</sup> Florida’s animal-related criminal statutes provide (1) general prohibitions against leaving poison on the property belonging to another, which is classified as a first-degree misdemeanor with a maximum penalty of one year imprisonment and/or a \$5,000 fine (2) cruelty to animals, which is normally classified as a first-degree misdemeanor and if the cruelty results in death or excessive suffering, it can be classified as a third degree felony, which would result in five years imprisonment and/or a \$10,000 fine and (3) the confinement/abandonment of animals, which is classified as a first degree misdemeanor with a maximum penalty of one year imprisonment and/or a \$5,000 fine.<sup>146</sup>

The most relevant provision that would be applicable to farmworkers is the prohibition against cruelty to animals.<sup>147</sup> In addition, there are two pertinent provisions concerning law enforcement policies that may be helpful for migrant farmworkers. First, appointed agents are allowed to investigate violations.<sup>148</sup> Second, a sheriff or peace officer is permitted to make an arrest without a warrant and detain someone committing cruelty to animals, until the proper warrant is obtained.<sup>149</sup> These law enforcement provisions would enable both the detention of farm contractors and subsequent investigations of the abuses experienced by the farmworkers.

Unfortunately, Florida precedent weighs against application of these statutes, which define animals covered under the statutes as “every living dumb creature,”<sup>150</sup> to undocumented workers. Expanding the definition of “dumb



creature” will require either reversal of the interpretation repeated by the Florida courts<sup>151</sup> or an amendment of the statute.

### **C. North Carolina**

“North Carolina’s leading industry is agriculture, yet farmworkers are among the most underserved residents in the state.”<sup>152</sup> To take one example: typically they are paid 40 cents per bucket (5/8 bushel) for harvesting sweet potatoes. Therefore farmworkers must pick and haul two tons of sweet potatoes to earn \$50.<sup>153</sup> At least one in four farmworkers reports having been injured on the job in his or her lifetime, and the fatality rate for farmworkers in North Carolina is higher than the national average.<sup>154</sup>

Fortunately for the animals in North Carolina, they are entitled to more protections, although the state is also ranked in the middle tier in the 2010 State Animal Protection Laws Rankings.<sup>155</sup> State criminal animal anti-cruelty statutes prohibit cruelty to animals,<sup>156</sup> a Class 1 misdemeanor with a maximum penalty of 45 days imprisonment and/or fine at the court’s discretion;<sup>157</sup> intentional deprivation of necessary sustenance,<sup>158</sup> a Class H felony with a maximum penalty of six months imprisonment and/or fine at the discretion of the court,<sup>159</sup> maliciously torturing, mutilating, cruelly injuring, or killing<sup>160</sup> an animal, a Class H felony with a maximum penalty of six months imprisonment and/or fine at the discretion of the court,<sup>161</sup> instigation or promoting cruelty to animals,<sup>162</sup> a Class 1 misdemeanor with a maximum penalty of 45 days imprisonment and/or fine at the court’s discretion,<sup>163</sup> abandonment of animals,<sup>164</sup> a Class 2 misdemeanor with a maximum penalty of 30 days imprisonment and/or \$1,000 fine,<sup>165</sup> and conveying animals in a cruel manner,<sup>166</sup> a Class 1 misdemeanor with a maximum penalty of 45 days imprisonment and/or fine at the court’s discretion.<sup>167</sup>

Several of these North Carolina statutes could be used for the benefit of migrant farmworkers: those concerning cruelty to animals,<sup>168</sup> intentional deprivation of necessary sustenance,<sup>169</sup> and instigation or promoting cruelty to animals.<sup>170</sup> The state’s comprehensive law enforcement policies would also provide further benefits for migrant farmworkers.

The first two are self-explanatory, and could be used to prosecute employers who fail to provide the minimum workplace health and safety requirements, such as water, shade, and sanitary facilities. The third provision, instigation or promoting cruelty to animals, would be particularly beneficial in the migrant farmworker context, because it could be used to prosecute violations of workers’ rights arising from the labor contracting system.

The growers themselves typically escape any liability for any farmworker injury because the use of a labor contractor relieves them of employer status.<sup>171</sup> The statute criminalizing the instigation or promotion of cruelty to animals could be used to “pierce the veil” and hold the growers themselves accountable because they are the ones that have arguably instigated—or set

off—the entire chain of events that results in cruelty toward the farmworkers by soliciting the contractors, even if they do not technically directly “employ” the migrant farmworkers.<sup>172</sup>

In addition, the comprehensive law enforcement policies enacted by North Carolina to help enforce the anti-cruelty statutes would provide additional protection for migrant farmworkers. Specific provisions provide for the appointment of animal cruelty investigators<sup>173</sup> and the requisite training required for the position.<sup>174</sup> State animal cruelty investigators are also permitted to request the assistance of a law enforcement or animal control officer to seize cruelly treated animals,<sup>175</sup> and similarly, interference with an animal cruelty investigator is classified as a Class I misdemeanor.<sup>176</sup> By extending animal anti-cruelty statutes to protect migrant farmworkers, investigators would be able to intervene and enforce the anti-cruelty statutes to ensure that the farmworkers are not intentionally deprived of necessary sustenance, such as potable drinking water, and shade.

But this cannot happen under North Carolina’s current statutes, which define “animal” to include “every living vertebrate in the classes Amphibia, Reptilia, Aves and Mammalia *except human beings*.”<sup>177</sup> The immediate prospects for amending the law are not favorable, as the current legislature has shown no disposition to advance rights in general (as shown by the recent rollback in voting and teachers’ rights), let alone farmworkers’ rights. As with the California and Florida examples, statute expansion would be a difficult effort but worth considering in terms of imaginative approaches around existing labor law frameworks.

## V. Conclusion

This proposal to extend existing animal cruelty statutes to provide human rights to migrant farmworkers may ultimately prove to be impractical, but we must start somewhere. In those states where it may be possible to obtain statutory protections, this comparison of human and animal rights can be used to achieve several aims: it can shock the conscience of those who treat the senseless and preventable deaths of Worker B and many others like her, as just part of doing business, and it also advances a broader vision of justice that contends that all living beings deserve protection from abuse. In those states where legislative responses are less likely, prosecutors, courts and the media must be made to acknowledge the absence of farmworker protections, then move to strengthen the laws that cover both animals and vulnerable workers.

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## NOTES

1. Thomas A. Walters, *Heat Illness: Tips for Recognition and Treatment*, in 68 CLEVELAND CLINIC JNL. OF MEDICINE 687 (Aug. 2001) (citing D. Hamilton, *The Immediate Treatment of Heatstroke* in ANAESTHESIA 1976, 31, 270–2, available at <https://www.ccm.org/content/68/8/685.full.pdf>) (noting that the central nervous system is particularly vulnerable to heat).

2. Walters, *Heat Illness: Tips for Recognition and Treatment*, *supra* note 1 at 687.
3. *Id.*
4. See generally A Guide to Heat Stress in Agriculture, EPA-750-B-92-001 (May 1993), available at <http://www.epa.gov/oecaagct/awor.html>.
5. Pet-Abuse.com Animal Cruelty Database, Case ID: 13927, <http://www.pet-abuse.com/cases/13927/CA/US/> (Last visited Oct. 26, 2012).
6. *Id.*
7. Sasha Khokha, *Teen Farmworker's Heat Death Sparks Outcry*, NPR, Jun. 6, 2008, <http://www.npr.org/templates/story/story.php?storyId=91240378> (Last visited Oct. 26, 2012).
8. *Id.*
9. Pet-Abuse.com Animal Cruelty Database, *supra* note 6.
10. *Id.*
11. *Id.*
12. Gosia Wozniacka, *Farmworker Death in Vineyard Results in Community Service Hours for Employers*, HUFF. POST (March 9, 2011), [http://www.huffingtonpost.com/2011/03/09/farmworker-death-in-vineyard\\_n\\_833772.html](http://www.huffingtonpost.com/2011/03/09/farmworker-death-in-vineyard_n_833772.html) (Last visited Oct. 26, 2012).
13. *Id.*
14. *Id.*
15. In a recent landmark California decision, pet owners were allowed to recover damages that exceeded the traditional remedy of the market value of their pet. See *Martinez v. Robledo*, 210 Cal.App.4th 384 (2012) (Pet owners were allowed to recover the reasonable and necessary costs related to the treatment of a wrongfully injured animal. “Given the Legislature’s historical solicitude for the proper care and treatment of animals, and the array of criminal penalties for the mistreatment of animals, as well as the reality that animals are living creatures, the usual standard of recovery for damaged personal property—market value—is inadequate when applied to injured pets.”) By contrast, in that same year Governor Brown vetoed a bill that would have, among other things, created a private right of action so that farmworkers could recover damages and civil penalties for heat illness violations. (Assembly Bill 2346).
16. Over five years have passed since her death, and little has changed for migrant farmworkers in California. In addition to vetoing AB 2346 in 2012, Governor Brown also vetoed Assembly Bill 2676, which would have provided criminal penalties for directors or supervisors that fail to provide sufficient amounts of shade and cool, potable water to farmworkers. In 2013 he signed Senate Bill 435, which requires California employers to pay workers an additional hour of wages at straight time rates for every day in which they do not provide the “recovery periods” required by California Industry Safety Order 3395, 8 C.C.R. 3395.
17. While other possible legal avenues, such as tort or contract claims, may also be viable, this article is limited to the hypothetical use of existing criminal statutes involving non-human animals.
18. Cal. Pen. Code §§ 596f; 597.1; 597.7.
19. Cal. Pen. Code §§19 and 597.7(b).
20. U.S. Dep’t of Labor Bureau of Statistics, *Agricultural Safety*, CENSUS OF FATAL OCCUPATIONAL INJURIES 1995, <http://www.cdc.gov/niosh/topics/aginjury/> (Last visited Oct. 26, 2012); Farmworker Legal Services of Michigan Internship Description, <http://www.farmworkerlaw.org/internshipshiring/fls-summer-internship-description> (Last visited Oct. 26, 2012); See generally BRENT ASHBRANNER, DARK HARVEST: MIGRANT FARMWORKERS IN AMERICA (1985) ].
21. CDC, <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5724a1.htm> (Last visited Oct.26, 2012).
22. Marsha Chien, *When Two Laws are Better than One: Protecting the Rights of Migrant Workers*, 28 BERKELEY J. INT’L L. 15, 22 (2010)
23. *Bautista v. State of California* 2011 WL 2184074 (Cal. App. 2 Dist.)(Appellate Brief) p.1 (citing Agricultural Worker Health Project, *Protecting Farm Worker Health and Safety*, available at <http://www.agworkerhealth.org/index.cfm?pagename=homepage>).

24. See generally ASHABRANNER, *supra* note 20; Rebecca Smith, *Prosecute, Prevent, Protect: Migrant Labor, Forced Labor, and Human Rights*, in HUMAN RIGHTS IN LABOR AND EMPLOYMENT RELATIONS: INTERNATIONAL AND DOMESTIC PERSPECTIVES 155, 155-180 (James A. Gross & Lance Compa, eds., 2009) [hereinafter Smith, *Prosecute, Prevent, Protect*].
25. See Juliana Barbassa, *Farmers Fear Illegal Crackdown*, ASSOCIATED PRESS (Aug. 16, 2007), available at <http://abcnews.com/Business/wirestory?id=3486284> (Farmworker advocates consider the Department of Labor estimate of the number of unauthorized farmworkers at 52 percent to be significantly lower than the actual number; for example, government officials in Pennsylvania estimated that 90 percent of Mexican farmworkers in Pennsylvania may be unauthorized).
26. Beth Lyon, *Changing Tactics: Globalization and the U.S. Immigrant Workers Rights Movement*, 13 UCLA J. INT'L L. & FOREIGN AFF. 161, 190 (Spring 2008) (citing DOUGLAS S. MASSEY, CATEGORICALLY UNEQUAL: THE AMERICAN STRATIFICATION SYSTEM 149-151 (2007), a study that explored stereotypes among American college students found that the "most despised" group was undocumented migrants, who were ranked with or below criminals and drug dealers in terms of "warmth" of feeling and "competence"; RUBEN J. GARCIA, MARGINAL WORKERS: HOW LEGAL FAULT LINES DIVIDE WORKERS AND LEAVE THEM WITHOUT PROTECTION 27 (2012) ("The venom reserved for immigrant workers is also readily visible in contemporary society").
27. Although this article specifically addresses migrant farmworkers, the same proposed framework can be applicable to exploited workers in other fields as well (*i.e.*, food processing/plant workers or H2B agricultural workers).
28. In letters accompanying his vetoes of California Assembly Bills 2346 and 2676 (which sought human rights equal to that of animals for farmworkers) on September 30, 2012, Governor Brown stressed that the idea of creating new legislation to improve inhumane farmworker conditions was flawed; rather, he felt that a regulatory approach was preferable.
29. *Dred Scott v. Sandford*, 60 U.S. 393 (1857).
30. This article is not, on the other hand, attempting to imitate Swift's *A Modest Proposal For Preventing The Children of Poor People in Ireland From Being A Burden to Their Parents or Country, and For Making Them Beneficial to The Public*; that would call for a combination of literary skill and savage indignation that the author does not claim to possess. We do not, moreover, need that sort of satire in this case, since the deaths of Worker B and the many like her are factual, not fictional.
31. DAVID NIBERT, ANIMAL RIGHTS/HUMAN RIGHTS: ENTANGLEMENTS OF OPPRESSION AND LIBERATION 3 (2002).
32. Dec. 26, 1990 letter from César Chávez to Eric Mills, coordinator of Action for Animals, based in Oakland, California.
33. Jeff Hilgert, *A New Frontier for Industrial Relations: Workplace Health and Safety as a Human Right*, in HUMAN RIGHTS IN LABOR AND EMPLOYMENT RELATIONS: INTERNATIONAL AND DOMESTIC PERSPECTIVES 43, 44 (James A. Gross & Lance Compa, eds., 2009) (citing U.S. Bureau of Labor Statistics (BLS) figures indicating a nationwide decline of 6 percent between 2006 to 2007, the lowest number since the Census of Fatal Occupational Injuries (CFOI) began recording worker deaths; Secretary of Labor Elaine Chao attributed the decline to the government's new regulatory enforcement efforts).
34. *Id.* at 45 (citing L.S. Friedman and L. Forst, *The Impact of OSHA Recordkeeping Regulation Changes on Occupational Injury and Illness Trends in the US: A Time-Series Analysis*, 64 BRITISH MEDICAL JOURNAL 454-60 (2007)) (There was a 35.8 percent overall decline of occupational illnesses and injuries from 1992 to 2003 in the U.S.).
35. LANCE COMPA, UNFAIR ADVANTAGE: WORKERS' FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS xii (2004). (hereinafter COMPA, UNFAIR ADVANTAGE).
36. 29 U.S.C.A. § 1802 defines "migrant agricultural worker" as: "an individual who is employed in agricultural employment of a seasonal or other temporary nature, and who is required to

be absent overnight from his permanent place of residence.” For the purposes of this article, however, “migrant” refers to those who have engaged in cross-border migration (as used in ILO conventions), and “migrant farmworker” refers to those individuals who have engaged in cross-border migration and are employed as farmworkers.

37. GARCIA, *supra* note 26, at 3. The author defines “marginal workers” as “those who are technically protected by labor and employment laws, but because of competing policy concerns or bodies of law...lose full protection.” He notes that “it is especially true of more legally vulnerable workers, such as noncitizens, people of color and women.”
38. GARCIA, *supra* note 26, at 103.
39. Beth Lyon, *Tipping the Balance: Why Courts Should Look to International and Foreign Law on Unauthorized Immigrant Worker Rights*, 29 U. PA. J. INT’L L. 169, 194 (2007) [hereinafter Lyon, *Tipping the Balance*] (Italian political theorist Giorgio Agamben coined the term from Roman law, defining a “*homo sacer*” as a human being who is consigned to “zones of exemption” from law; literal meaning: “the bare or depoliticized life that is distinguished from politicized forms of life, most clearly manifest in the citizen;” citing GIORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE*, 71-74 (1998); Prem Kumar Rajaram & Carl Grundy-Warr, *The Irregular Migrant as Homo Sacer: Migration and Detention in Australia, Malaysia, and Thailand*, 42 INT’L. MIGRATION 33, 34 (2004)).
40. Edward E. Potter & Marika McCuley Sine, *Human Rights and Sustainability: A Corporate Perspective*, in HUMAN RIGHTS IN LABOR AND EMPLOYMENT RELATIONS: INTERNATIONAL AND DOMESTIC PERSPECTIVES 181, 181-183 (James A. Gross & Lance Compa, eds., 2009).
41. COMPA, UNFAIR ADVANTAGE, *supra* note 35, at 13.
42. National Labor Relations Act § 2(2), 29 U.S.C. § 152(2); Lance Compa, *Workers’ Freedom of Association in the United States: The Gap Between Ideals and Practice*, in WORKERS’ RIGHTS AS HUMAN RIGHTS 23, 24-25 (James A. Gross, ed., 2003) [hereinafter Compa, *Workers’ Freedom of Association*].
43. Compa, *Workers’ Freedom of Association*, *supra* note 42, at 23-24.
44. Article 23 of the Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc. A/810 (Dec. 10, 1948), states that: (1) *Everyone* has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment; (2) *Everyone, without any discrimination*, has the right to equal pay for equal work; (3) *Everyone* who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection; and (4) *Everyone* has the right to form and to join trade unions for the protection of his interests. [Emphasis added].
45. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (art. 22).
46. International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (art. 8).
47. ILO Convention No.87 on Freedom of Association and Protection of the Right to Organise (1948) (Art. 2).
48. See Christopher David Ruiz Cameron, *The Borders of Collective Representation: Comparing the Rights of Undocumented Workers to Organize Under United States and International Labor Standards*, 44 U.S.F. L. REV. 431(2009); GARCIA, *supra* note 26, at 12-13.
49. COMPA, UNFAIR ADVANTAGE, *supra* note 35, at 174.
50. 29 U.S.C. § 152(3).
51. Chien, *supra* note 22, at 23 (citing CLETUS E. DANIEL, BITTER HARVEST: A HISTORY OF CALIFORNIA FARMWORKERS 1870-1941, p. 282 (1981)).
52. COMPA, UNFAIR ADVANTAGE, *supra* note 35, at 174.
53. American Rights at Work, *The Haves and the Have-Nots: How American Labor Law Denies a Quarter of the Workforce Collective Bargaining Right* 7, available at [http://www.american-rightsatwork.org/dmdocuments/ARAWReports/havesandhavenots\\_nlracoverage.pdf](http://www.american-rightsatwork.org/dmdocuments/ARAWReports/havesandhavenots_nlracoverage.pdf) (Last visited Nov. 11, 2012) (In February 2005, there were a total of 676,469 agricultural workers

in the U.S. Of these, 168,772 (or about 25 percent) resided in one of the nine states where agricultural workers have collective bargaining rights. Thus, 507,697 agricultural workers, or 75 percent, were without rights.)

54. American Rights at Work, *supra* note 53, at 6. There are nine states in which agricultural workers have some collective bargaining rights. In some cases (Arizona, California, Maine and Oregon), they have been granted under a state agricultural labor relations act. Others states (Hawaii, Massachusetts, New Jersey and Wisconsin) have passed legislation providing collective bargaining protections to private employees, including agricultural workers. Kansas has given agricultural workers both.
55. COMPA, UNFAIR ADVANTAGE, *supra* note 35, at 13.
56. *Id.*
57. Hilgert, *supra* note 33, at 49 (citing *Workplace Safety is Key Issue in Union Organizing, Poll Finds*, DAILY LABOR REPORT, Washington, D.C.: Bureau of National Affairs, 174, A-30 (2006)).
58. GARCIA, *supra* note 26, at 12.
59. 29 U.S.C § 651(b) indicates that the legislative intent of OSHA is to “assure so far as possible every working man and woman in the Nation safe and healthful working conditions.” [Emphasis added.]
60. 29 C.F.R. § 1928.110.
61. 29 C.F.R. § 1928.110(c)(4).
62. Farmworker Legal Services of Michigan, FLS Summer Internship Description, <http://www.farmworkerlaw.org/internshipshiring/fls-summer-internship-description> (Last visited Nov. 12, 2012) (Migrant farmworkers in the U.S. typically continue to face inadequate workplace sanitation, deplorable housing conditions, often receive less than the minimum wage, and labor for ten or more hours a day while being exposed to harmful pesticides and the harsh elements (without shade), because of the inadequate enforcement of regulations).
63. Emily A. Spieler, *Risks and Rights: The Case for Occupational Safety and Health as a Core Worker Right*, in WORKERS’ RIGHTS AS HUMAN RIGHTS 78, 113 (James A. Gross, ed., 2003) [hereinafter Spieler, *Risks and Rights*].
64. Hilgert, *supra* note 33, at 49.
65. *Id.*
66. *Id.* at 50.
67. Spieler, *Risks and Rights*, *supra* note 63, at 113, citing *Work is Changing But Observers Wonder if OSHA is Changing With It*, OCCUPATIONAL SAFETY AND HEALTH REPORTER (BNA) (May 19, 1999): 1513, 1537.
68. Hilgert, *New Frontier*, *supra* note 33, at 50.
69. Hilgert, *supra* note 33, at 49 (citing J.P. Leigh *et al*, *An Estimate of the U.S. Government’s Undercount of Nonfatal Occupational Injuries*, 46 JNL. OCCUPATIONAL HEALTH ENVIRONMENTAL MEDICINE, 10-18 (2004)).
70. Smith, *supra* note 24, at 155.
71. Lyon, *Tipping the Balance*, *supra* note 39, at 186-7 (citing KALA MEHTA ET AL., FINDINGS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY (NAWS) 1997-1998: A DEMOGRAPHIC AND EMPLOYMENT PROFILE OF UNITED STATES FARMWORKERS viii (2000), available at [http://www.dol.gov/asp/programs/agworker/report\\_8.pdf](http://www.dol.gov/asp/programs/agworker/report_8.pdf)) (estimating that 52 percent of employed farmworkers in 1997-1998 were unauthorized).
72. Lyon, *Tipping the Balance*, *supra* note 39, at 187 (citing Anthony DePalma, *A Tyrannical Situation: Farmers Caught in Conflict Over Illegal Migrant Workers*, N.Y. TIMES, Oct. 3, 2000, at C1; also Juliana Barbassa, *Farmers Fear Illegal Crackdown*, ASSOCIATED PRESS, Aug. 16, 2007, available at <http://abcnews.com/Business/wirestory?id=3486284>) (Farmworker advocates consider the Department of Labor estimate of the number of unauthorized farmworkers at 52 percent to be significantly lower than the actual number; for example, government officials in Pennsylvania estimated that 90 percent of Mexican farmworkers in



Pennsylvania may be unauthorized).

73. Beth Lyon, *The Unsigned United Nations Migrant Worker Rights Convention: An Overlooked Opportunity to Change the "Brown Collar" Migration Paradigm*, 42 N.Y.U. J. INT'L L. & POL. 389, 395 (2010); Convention Concerning Migration for Employment, July 1, 1949, I.L.O. No. 97, 1616 U.N.T.S. 120; Convention Concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers, June 24, 1975, I.L.O. No.143, 17426 U.N.T.S. 1120.
74. Smith, *Prosecute, Prevent, Protect*, *supra* note 24, at 175, n. 1 ("'Unauthorized' worker refers to immigrant workers who do not possess authorization to be employed pursuant to U.S. law, including workers who are legally present in the U.S. (i.e., students, asylum seekers), but who are unauthorized to work... '[u]ndocumented' immigrants are a subset of unauthorized workers, and refers to immigrants who do not have legal authorization to be present in the country").
75. Lyon, *Tipping the Balance*, *supra* note 39, at 188-192 (citing Rebecca Smith, *Human Rights at Home: Human Rights as an Organizing and Legal Tool in Low-Wage Worker Communities*, 3 STAN. J. C.R. & C.L. 285 (2007)).
76. Lyon, *Tipping the Balance*, *supra* note 43, at 189-191.
77. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) (Court held that back pay, a crucial remedy provided by the NLRA, should not be awarded to workers who were not legally eligible to work in the first place, based on the argument that doing so would undermine national immigration policy).
78. Smith, *Prosecute, Prevent, Protect*, *supra* note 24, at 157.
79. *Id.*
80. Christopher David Ruiz Cameron, *Borderline Decisions: Hoffman Plastic Compounds, the New Bracero Program, and the Supreme Court's Role in Making Federal Labor Policy*, 51 UCLA L. REV. 1, 34 (2003) [hereinafter Cameron, *Borderline Decisions*].
81. Lyon, *Tipping the Balance*, *supra* note 39, at 189 (citing the U.S. Equal Opportunity Employment Commission Directives Transmittal 915.002, Rescission of Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws (June 27, 2002), available at <http://www.eeoc.gov/policy/docs/undoc-rescind.html>) (discussing the implication of the *Hoffman* decision on the EEOC's position regarding remedies for undocumented workers, such as the decision to deny unauthorized immigrant workers lost wages in employment discrimination cases).
82. *Id.*; see also Inter-American Court of Human Rights, Legal Condition and Rights of Undocumented Migrant Workers, Consultative Opinión OC-18/03 (Sep. 17, 2003).
83. COMPA, UNFAIR ADVANTAGE, *supra* note 35, at xxiii-iv; see also ILO Committee on Freedom of Association, Complaints against the Government of the United States Presented by the American Federation of Labor and the Congress of Industrial Organizations (AFL-CIO) and the Confederation of Mexican Workers (CTM), Case no. 2227: Report in which the committee requests to be kept informed of developments (Nov. 20, 2003).
84. COMPA, UNFAIR ADVANTAGE, *supra* note 35, at xxiii-iv.
85. Smith, *Prosecute, Prevent, Protect*, *supra* note 24, at 158.
86. Lyon, *Tipping the Balance*, *supra* note 39, at 185; Immigration and Nationality Act, 8 U.S.C. § 1324(a)(1)(A) (2006); Cameron, *Borderline Decisions*, *supra* note 80, at 33.
87. Cameron, *Borderline Decisions*, *supra* note 80, at 33.
88. Smith, *Prosecute, Prevent, Protect*, *supra* note 24, at 158 (citing David Wolfe Leopold, *On Behalf of the American Immigration Lawyers Association Before the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law Committee on the Judiciary United States House of Representatives Hearing on the Arrest, Prosecution, and Conviction of Undocumented Workers in Postville, Iowa, from May 12 to 22*, Jul. 24 (2008)).
89. Julia Preston, *Meatpacker is Fined Nearly \$10 Million*, N.Y. TIMES, Oct. 29, 2008, available at <http://www.nytimes.com/2008/10/30/us/30fine.html?fta=y> (Last accessed Nov. 30, 2012).

90. Smith, *Prosecute, Prevent, Protect*, *supra* note 24 at 158 (citing David M. Hoagland, *Enforcement Affidavit and Application for a Search Warrant in the Matter of Agriprocessors, Inc. and/or Neval Properties*. Case No. 08-MJ-110 (N.D. Iowa, May 8, 2008)).
91. Hilgert, *supra* note 33, at 49.
92. Dred Scott v. Sandford, 60 U.S. 393 (1857).
93. See STEPHAN K. OTTO, ALDF, ANIMAL PROTECTION LAWS OF THE USA & CANADA (6th Edition, 2011).
94. *Id.*
95. Spieler, *Risks and Rights*, *supra* note 63, at 102 (quoting Rosner, *When Does A Worker's Death Become Murder?* AM. JNL. PUBLIC HEALTH 90 535, 536 (2000)).
96. BRUCE WAGMAN ET AL., ANIMAL LAW: CASES AND MATERIALS 83 (2010).
97. *Id.* at 91.
98. *Id.* at 91-92.
99. Stephan K. Otto, ALDF, *2010 State Animal Protection Laws Rankings: The Best & Worst Places to Be an Animal Abuser* (Dec. 2010). The best states were ranked accordingly because of factors that include: a full range of statutory protections, adequate definitions of standards of basic care, humane officers having broad law enforcement authority, police officers having an affirmative duty to enforce animal protection laws, broad measures to mitigate and recover costs of care for abused pets seized by animal welfare agencies, and mandatory reporting of suspected cruelty by veterinarians or select non-animal-related agencies or professionals. The statutes in the worst states did not have such provisions.
100. Violations of state animal neglect laws are almost always misdemeanor violations, but Washington and California have also established felony counts for cases of extreme animal neglect. ALDF, *Animal Neglect Facts*, <http://aldf.org/article.php?id=1299> (Last visited November 12, 2012).
101. *Martinez v. The State of Texas* 48 S.W.3d 273 (Ct. of App. 4th Dist. 2001) (Court found Appellant guilty of intentionally and knowingly failing to provide necessary food, care, or shelter for a dog in her custody that had to be euthanized as a result of her failure to provide reasonable medical care. Appellant argued that there was no evidence of culpable intent or knowledge, but the court found that a jury could easily infer intent or knowledge from the dog's obvious need for medical treatment.); *see also* WAGMAN ET AL., *supra* note 96, at 132, note 1.
102. *See generally* WAGMAN ET AL., *supra* note 96, at 3-49.
103. *Id.*
104. Ariz. Rev. Stat. Ann. § 13-2910.
105. Del. Code Ann. Title 11, § 1325.
106. N.J. Stat. Ann. § 4:22-17.
107. S.C. Code Ann. § 47-1-40.
108. Mich. Comp. Laws Ann. Ch. 272, § 750.50.
109. Cal. Pen. Code § 599b.
110. *See, e.g.*, United States v. Park, 536 F.3d 1058 (9th Cir. 2008); *McKinney v. Robbins*, 892 S.W.2d 502 (Ark. 1995).
111. *Animal Definition*, MERRIAM WEBSTER ONLINE, <http://www.merriam-webster.com/dictionary/animal> (Last visited November 10, 2012).
112. *See, e.g.*, Lock v. Falkenstine, 380 P.2d 278 (Oklahoma Ct. Crim. App. 1963); Knox v. Society for Prevention of Cruelty to Animals, 425 N.E.2d 393 (Mass. App. Ct. 1981); *People v. Baniqued*, 101 Cal. Rptr. 2d 835 (Cal. Ct. App. 2000); *State v. Cleve*, 980 P.2d 23 (New Mexico 1999).
113. *See* Roy Adams, *Voice for All: Why the Right to Refrain from Collective Bargaining Is No Right at All*, in WORKERS' RIGHTS AS HUMAN RIGHTS 142 (James A. Gross, ed., 2003) (Adams presents two theoretical standards which can be used to evaluate whether a collective

bargaining policy is in compliance with international standards, a “choice theory” and a “voice theory.” He contends that the U.S. policy denies a collective voice to a majority of the American work force by muddling together the freedom of association and the right to bargain collectively, instead of treating them as two distinct and equal rights).

114. This article does not, on the other hand, address any possible equal protection challenges to this disparity in the law’s treatment of dogs and migrant farmworkers. *See, e.g., Graham v. Richardson*, 403 U.S. 365 (1971) (alienage); and *see* Marc Linder, *Farm Workers and the Fair Labor Standards Act; Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335 (1987).
115. *See generally, Mr. Bergh Enlarging His Sphere of Usefulness*, N.Y. TIMES, April 10, 1874; ERIC A. SHELMAN & STEPHEN LAZORITZ, M.D., *OUT OF THE DARKNESS: THE STORY OF MARY ELLEN WILSON* (2000); ROBERT L. GEISER, *THE ILLUSION OF CARING: CHILDREN IN FOSTER CARE* (1973) (In 1874, social worker Etta Wheeler unsuccessfully appealed to the police, the church and the courts, but was unable to rescue a nine-year girl who had been repeatedly beaten, cut and burned by her foster mother for more than seven years. She finally turned to Henry Bergh, the founder of the American Society for the Prevention of Cruelty to Animals. Based on strategies developed to obtain relief for animals, ASPCA counsel Gerry used an obscure section of *habeas corpus* to secure standing to bring suit, and Mary Ellen Wilson was finally freed from her torture. The Society for the Prevention of Cruelty to Children was founded a year later, and Bergh became its Vice President). *See also The New York Society for the Prevention of Cruelty to Children 125th Anniversary Commemorative Booklet, available at* <http://www.nyspcc.org/nyspcc/history/> (Last visited Nov. 12, 2012).
116. *The New York Society for the Prevention of Cruelty to Children 125th Anniversary Commemorative Booklet*, *supra* note 115.
117. *See People v. Allen* 657 P.2d 447 (1983) .
118. *California Voters Pass Proposition 2 with 63 % of the Vote*, POULTRY PRESS, Winter 2008-2009, <http://www.upc-online.org/winter2008/california-voters.html> (Last visited Nov. 12, 2012) (Proposition 2 was a proposal to prohibit the confinement of certain farm animals in a manner that does not allow them to turn around freely, lie down, stand up, and fully extend their limbs. The proposition passed with 63 percent of the vote in the general election held on November 4, 2008, and the substantive portion of the statute will become operative on January 1, 2015).
119. UFW President Arturo Rodriguez stated at the time: “The founding principles of Prop. 2 are the same as that of the Farm Worker Movement, built on the vision of Cesar Chavez. During his lifetime, he championed ‘kindness and compassion toward all living things.’ He said: ‘We need, in a special way, to work twice as hard to help people understand that animals are fellow creatures, that we must protect them and love them as we love ourselves.’”
120. CDC, *Heat-Related Deaths Among Crop Workers—United States, 1992–2006*, <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5724a1.htm> (Last visited Nov. 11, 2012).
121. *Id.*; CDC, *Table: Number, Percentage, and Estimated Annualized Rate of Occupational Heat-Related Deaths Among Crop Workers, By Selected Characteristics—United States, 1992–2006, available at* <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5724a1.htm> (Last visited Nov. 11, 2012) (California had 20 deaths (29 percent); Florida had 6 deaths (9 percent); and North Carolina had 13 (19 percent); however, North Carolina had the highest number of annualized rates).
122. California Department of Food and Agriculture, *2012-2013 California Agricultural Statistics Review, available at* <http://www.cdffa.ca.gov/statistics/> (Last visited Aug. 27, 2013).
123. *Id.*
124. 8 C.C.R. § 3395.
125. UFW: The Official Web Page of the United Farm Workers of America, *Lawsuit Says Failed Enforcement Means California’s Farm Workers Face Daily Threat of Heat Illness and Death*, Oct. 18, 2012, [http://www.ufw.org/board.php?mode=view&b\\_code=news\\_press&b\\_no=12798&page=1&field=&key=&n=877](http://www.ufw.org/board.php?mode=view&b_code=news_press&b_no=12798&page=1&field=&key=&n=877) (Last visited November 12, 2012).

126. *Id.*
127. *Id.*
128. ALDF, *2010 State Animal Protection Laws Rankings*. (The Animal Legal Defense Fund (ALDF) conducted empirical research and compiled rankings of the overall strength and comprehensiveness of the states' animal anti-cruelty legislation. According to the results, the five states providing the best legal protection for animals were: (1) Illinois (2) Maine (3) Michigan (4) Oregon and (5) California. In contrast, the worst five states were determined to be: (1) Iowa (2) Mississippi (3) Idaho (4) North Dakota and (5) Kentucky).
129. Cal. Pen. Code § 596-597 *et seq.*
130. Cal. Pen. Code § 597(a),(b),(c).
131. Cal. Pen. Code §§ 17, 18 and §§ 597(a),(b),(c).
133. See Cal. Pen. Code § 597(b); Cal. Pen. Code § 596f.; Cal. Pen. Code § 597.1; Cal. Pen. Code § 597.7.
134. Cal. Corp. Code § 14502 (A humane society or society for the prevention of cruelty to animals is eligible to petition for confirmation of an appointment of any individuals as a humane officer; their duty is to enforce laws for the prevention of cruelty to animals. Subject to training and approval, humane officers may be entitled to exercise the powers of a peace officer at all places within the state in order to prevent the perpetration of any act of cruelty upon any animal, may use reasonable force necessary to prevent the perpetration of any act of cruelty upon any animal, and may be authorized to carry a firearm).
135. Cal. Pen. Code § 599b.
136. Cal. Pen. Code § 597(d).
137. *People v. Baniqued*, 85 Cal.App.4th 13, xx (2000) (“Thus, in its broadest sense, the phrase “dumb creatures” describes all animals except human beings.”)
138. Ronnie Greene, *Fields of Despair*, MIAMI HERALD (August 31, 2003), available at <http://www.miamiherald.com/2003/08/31/56963/fields-of-despair.html#storylink=misearch> (Last visited Aug. 18, 2013).
139. *Id.*
140. *Id.*
141. *Id.* (Quoting Gregory S. Schell, attorney with the Migrant Farmworker Justice Project of Florida Legal Services).
142. COMPA, UNFAIR ADVANTAGE, *supra* note 39, at 37.
143. *Id.*
144. Ronnie Greene, *supra* note 154. (Florida is home to one in three, or 3,027 out of the 8,832 crew-chief contractors in the nation, and also leads the nation in the number of them, 43 percent, who have been stripped of their licenses to work because of labor violations).
145. According to the *2010 State Animal Protection Laws Rankings* produced by the ALDF, Florida ranks 22nd out of the 50 states.
146. Fla. Stat. Ann. § 828 *et seq.*
147. Fla. Stat. Ann. § 828.12.
148. Fla. Stat. Ann. § 828.03.
149. Fla. Stat. Ann. § 828.17 (A sheriff, peace officer, or any police officer of any city or town of the state, can make a warrantless arrest of any person found violating any of the provisions of §§ 828.08, 828.12, and 828.13-16; the officer making the arrest shall hold the offender until a warrant can be procured, and he or she shall use proper diligence to procure such warrant).
150. Fla. Stat. Ann. § 828.02.
151. As the Supreme Court of Florida stated, as dictum, in *Wilkerson v. State*, 401 So.2d 1110, 1112 (Fla.1981), the definition of “animal” as “every living dumb creature’... excludes human beings from the commonly understood definition of animals.” The Court did not rely on any legislative history or offer evidence of the practical application of the law to support

this; instead it simply stated that, “People of common intelligence are able to discern what are and are not animals.” *Id.*

152. Student Action with Farmworkers, *North Carolina Farmworker Health Facts*, available at <http://saf-unite.org/content/north-carolina-farmworker-health-facts> (Last visited Mar. 4, 2014).
153. Student Action with Farmworkers, *Facts About North Carolina Farmworkers*, available at <http://saf-unite.org/content/facts-about-north-carolina-farmworkers> (Last visited Mar. 4, 2014).
154. Student Action with Farmworkers, *North Carolina Farmworker Health Facts*, available at <http://saf-unite.org/content/north-carolina-farmworker-health-facts> (Last visited March 4, 2014).
155. ALDF ranks North Carolina at 31st out of the 50 states in its *2010 State Animal Protection Laws Rankings*.
156. N.C. Gen. Stat. § 14-360(a).
157. N.C. Gen. Stat. § 15A-1340.23.
158. N.C. Gen. Stat. § 14-360 (a1)
159. N.C. Gen. Stat. § 15A-1340.17.
160. N.C. Gen. Stat. § 14-360(b).
161. N.C. Gen. Stat. § 15A-1340.17.
162. N.C. Gen. Stat. § 14-361.
163. N.C. Gen. Stat. § 15A-1340.23.
164. N.C. Gen. Stat. § 14-361.1.
165. *Id.*
166. N.C. Gen. Stat. § 14-363.
167. N.C. Gen. Stat. § 15A-1340.23.
168. N.C. Gen. Stat. § 14-360(a).
169. N.C. Gen. Stat. § 14-360 (a1)
170. N.C. Gen. Stat. § 14-361.
171. COMPA, UNFAIR ADVANTAGE, *supra* note 39, at 37.
172. It may be possible, of course, to pursue growers under the same approach that was used to pursue garment manufacturers who were contracting out for production of goods by slave labor in El Monte, California. See Julie Su & Chanchanit Martorell, *Exploitation and Abuse in the Garment Industry: The Case of Thai Slave-Labor Compound in El Monte*, in *ASIAN AND LATINO IMMIGRANTS IN A RESTRUCTURING ECONOMY: THE METAMORPHOSIS OF SOUTHERN CALIFORNIA* (Lopez-Garza, Marta & David R. Diaz, eds., 2001).
173. N.C. Gen. Stat. §§ 19A-45.
174. N.C. Gen. Stat. §§ 19A-49.
175. N.C. Gen. Stat. §§ 19A-46(b).
176. N.C. Gen. Stat. §§ 19A-48.
177. N.C. Gen. Stat. §§ 14-360, 19A-1. (Emphasis added.)



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